A Settlement

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Clapham, Liddiard
Judgment Date:	04 May 2010
Neutral Citation:	[2010] JRC 85
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Court:	Royal Court
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Text

[2010] JRC 85

ROYAL COURT

(Samedi Division)

Before:

J. A. Clyde-Smith, **Commissioner and** Jurats Clapham **and** Liddiard.

In the Matter of the B Settlement

And in the Matter of the D Settlement

And in the Matter of the C Settlement

And in the Matter of Article 51 of the Trusts (Jersey) Law 1984

Between
RBC Trust Company (Jersey) Limited

Representor
and
E
First Respondents
F
G
H
I
J
K

and

Advocate Claire Davies, appointed to represent the grandchildren and remoter issue of D
Second Respondent

and

L
J
N
M
O (both on their own behalves and representing their own children and remoter issue)
Third Respondents

and

J
P
Q (both on their own behalves and representing their own children and remoter issue)
Fourth Respondents

Advocate D. M. Cadin **for the Representor.**

Advocate A. D. Hoy **for the First Respondents.**

Advocate S. J. Young **for the Third and Fourth Respondents.**

Authorities

Trusts (Jersey) Law 1984.

S v Bedell Cristin Trustees Ltd [2005] JRC 109.

In the matter of the CA Settlement [2002] JLR 312.

In the matter of the Internine and Azali Trusts [2006] JLR 195.

In the matter of the Yaheeb Trust, the Havana Trust and the Yaheeb No. 2 Trust [2003] JLR 92.

THE COMMISSIONER:

1 In its judgment of 25 th November, 2009, the Court adjourned RBC's application for three months to enable the parties to resolve the issues by without prejudice discussions and/or mediation. If the parties were not able to resolve the issues in a manner acceptable to the Court then the Court expressed the wish to be addressed further on the orders it can and should make in order to resolve these issues. Counsel were invited to fix a further hearing date (estimated half a day) so that the Court could review the matter and that review took place on 9 th April, 2009. The background to the application and the issues before the Court are set out in the judgment of 25 th November, 2009, and we will not repeat them here. We adopt the same definitions.

2 A mediation agreement was entered into by the beneficiaries of the three settlements with Mark Lomas QC as mediator. The mediation took place on 22 nd February, 2010, and was attended by the following beneficiaries (and their respective advisors):-

(i) in relation to the D settlement G, H, I and K. They had authority from F to conclude any agreement reached;

(ii) in relation to the B settlement R and S (representing his wife, U). P was in Latin America at the time but was available on video-link via skype;

(iii) in relation to the C Settlement L, who lives in Canada, was available on the telephone, as was her accountant T. None of her four children participated in the mediation but as we understand it were effectively represented by her.

3 A mediation agreement was concluded after midnight on 23 rd February, 2010, and signed by H for Y, Z, AA and B, Mr Hoy, for the beneficiaries of the D settlement and Mr Young for U and R. The agreement was conditional upon a number of matters but materially for these purposes upon the approval of L and P. That approval has not been forthcoming because, Mr Young submitted, they did not have sufficient information from the D directors to enable them to ascribe a monetary value to the Irish companies. They were, in his words, *"mediating in the dark"*.

4 Thus, the position remains as set out in the Court's judgment of 25 th November, 2009. For the reasons set out in that judgment, RBC remains conflicted and thus surrenders its discretion to the Court, a surrender accepted by the Court.

5 The central issues before the Court are:-

(i) The actions of the D directors and the tax affairs of the Irish companies.

(ii) The separation of the interests of the settlements or some other resolution or programme for resolution.

6 The overriding aim of the three families is to obtain a separation of their interests. Mr Hoy, for the first respondents, (the D beneficiaries), maintained that there was no further information to be given by the D directors. The allegation of impropriety on the part of the D directors was firmly denied and if pursued should be pursued by way of hostile litigation brought by the third and fourth respondents or some or all of them, at risk as to costs on the usual basis. The D beneficiaries recommended that time should be allowed for the mediation agreement to be perfected or for mediation to be completed, failing which they could provide within six weeks a plan for the orderly realisation of the trust assets.

7 Mr Young, for the third and fourth respondents (the B and C beneficiaries), rejected the suggestion that they should be characterised as or put into the position of plaintiffs in hostile proceedings, certainly at this stage. The trustee had commenced an investigation into the affairs of the Irish companies which had not been completed as a result of the refusal of the D directors to provide the necessary information. The trustee should complete that exercise and the Court should assist it in that process. It was impossible to reach agreement on a separation of the interests of the three families without knowing the extent to which the D directors may have already benefited from the trust assets. There was an imbalance of information and there could be no fairness or equality until there had been full disclosure.

8 Mr Cadin for RBC submitted that of all the options summarised in the fourth affidavit of V (at paragraph 22) the front runners, so to speak, were the liquidation of the Irish companies or for a re-allocation of the assets at trust level. Liquidation would ultimately resolve all of the issues but was not supported by any of the parties as an option in that it was unlikely to realise any value for any of the beneficiaries (see paragraph 30 of the judgment of 25 th November, 2009).

9 A robust trustee, Mr Cadin submitted, could avoid the ruinous costs of liquidation by addressing the imbalances, if such were found to exist, between the beneficiaries at trust level but to do this it would have to:-

(i) order disclosure from the D directors;

(ii) permit DD to complete its report;

(iii) on completion of that report, take a view as to the amount, if any, by which the D beneficiaries had improperly benefited from the trust assets.

Decision

10 We do not accept Mr Hoy's assertion that there is nothing further for the D directors to disclose. The matter is canvassed at paragraphs 19–26 of the Court's judgment of 25th November, 2009, but the advice of DD in its letter of 7th October, 2009, is clear and we accept it. Serious issues have been raised as to the propriety of the remuneration paid to the D directors and the administration fees paid on their instruction by the Irish companies to companies associated with the D beneficiaries. If fairness is to be achieved between the beneficiaries of all the three settlements, then these issues need to be fully investigated. We regard it as intolerable that the D beneficiaries should stand before us seeking a separation of these trust assets but declining to disclose to us and to the other respondents information in relation to those assets which they alone hold. Is it appropriate therefore for the Court to use its powers under Article 51 of the Trusts (Jersey) Law 1984 to order disclosure from the D directors?

11 RBC had helpfully obtained the advice of Elspeth Talbot Rice QC. She points out that Article 51 gives the Court very wide powers relating to the execution and administration of trusts including in Article 51(2)(a)(iii) the power to "make an order concerning … a beneficiary or any person having a connection with the trust". *Prima facie* it is a very wide power which gives the Court jurisdiction to make an order requiring a beneficiary or any person having a connection with a trust to disclose information for the purposes of the execution and administration of the trust, notwithstanding the fact that the trustee does not have such a power. In that sense, Article 51 could be regarded as an extension of the powers of trustees in relation to their trusts.

12 In her view, the Court technically has jurisdiction to order directors of companies which are ultimately owned by a trust (as persons having a connection with the trust, not least by virtue of the information they will hold relating to the trust assets) to disclose information relating to those companies to the trustees. The question for the Court is whether it is appropriate to exercise that jurisdiction in the circumstances of any given case.

13 As was said by the Royal Court in *S v Bedell Cristin Trustees Ltd* [2005] JRC 109:-

> ***"…Although the wording of article 51(2) is indeed wide and the Court may have a theoretical jurisdiction to make an order … the jurisdiction of the Court must be exercised on a sensible and principled basis … the Court's role is a supervisory one and it is simply to ensure that decisions taken by trustees are reasonable and lawful."***

14 She could well see that if the trustee did not have an entitlement to the information it sought from a company, the Court might well be reluctant to use its Article 51 power to order disclosure of such information to the trustee. The Court would no doubt be concerned in such a case that Article 51 was being used to bypass the limitation on shareholders' entitlement to information imposed by customary law.

15 A potential objection to the making of an order pursuant to Article 51 requiring documents to be produced might be if the effect of making such an order amounted to pre-action discovery. In *In the matter of the CA Settlement* [2002] JLR 312, the Royal Court held that although the wording of Article 51's predecessor (Article 47) was sufficiently wide to allow the Court to order pre-action discovery to a potential plaintiff in a hostile trust action, it was clearly intended to enable the Court to give directions in administrative proceedings and it was therefore inappropriate for the Court to use Article 47 as a means of circumventing the general principle of litigation that a potential plaintiff was not entitled to the pre-action discovery of documents to enable him to establish whether he had a cause of action. Birt, Deputy Bailiff, said this at paragraphs 16 and 17:-

> ***"16. We do not think that art. 47 of the 1984 Law was intended to be used to enable a stranger to a trust to obtain pre-action discovery in order to see if he has grounds to launch a hostile action attacking the trust. Nor do we see any reason of principle why a potential plaintiff in a hostile trust action should be placed in a different and more advantageous position than a potential plaintiff in any other type of action. There would appear to be no public policy grounds for distinguishing a hostile trust action from any other action. We accept that, if a potential plaintiff who is a stranger to a trust is given leave under art. 47(3), the Court has a theoretical jurisdiction under art. 47(2) to order disclosure of documents to the potential plaintiff; but we do not, for the reasons given above, think that the Court should generally order such disclosure. The existence of art. 47, which was clearly intended to give a general power to the Court to give directions in administrative proceedings, should not be used as a back-door method of allowing pre-action discovery to a non-beneficiary who wishes to attack a trust.***
>
> ***17. We do not intend to say that this is an absolute rule. There may be exceptional circumstances in which it would be right to give some form of pre-action discovery to a stranger to the trust, although we find it hard to envisage such circumstances…"***

16 Similarly, the Court of Appeal in *In the matter of the Internine and Azali Trusts* [2006] JLR 195 held that it would be inappropriate for an application for directions under Article 51 to be used as a means of circumventing the general principle that a potential plaintiff was not entitled to pre-action discovery of documents simply because the person in possession of documents or other evidence is a trustee.

17 Counsel distinguishes the position of the two wholly owned companies, Z and CC. Their articles have been amended to include the following:-

> *"Upon receipt of a written request from a Shareholder Majority, the Company shall furnish to the members (or their nominated consultants, valuers or other advisers) to such an extent and in such form and detail as the Shareholder Majority may from time to time require particulars of any matter concerning with*

and arising out of the present or past activity of the Company, including without prejudice to the generality of the foregoing, a breakdown of the administrative expenses of the Company for the past and current years."

Thus RBC through EE can direct Z and CC to provide directly to RBC particulars of any past or present activity of those companies and those companies by their directors would be bound to comply with such a request. RBC is not therefore asking the Court to order the disclosure of documents which it could otherwise not get at all unless it had procured the relevant companies to commence hostile proceedings against the directors. It is asking the Jersey Court to order disclosure of documents which it would otherwise have to procure EE to obtain from the directors of CC and Z. The question for the Jersey Court in these circumstances seemed to counsel to be this:- Is it an appropriate use of the wide jurisdiction under Article 51 to short circuit the legal proceedings which the trustees would otherwise have to procure through the corporate entities, to order the directors of Z and CC to deliver up documents and information the disclosure of which RBC is, through the corporate structures, entitled to demand?

18 Put in that way, it seemed to counsel that the Jersey Court might well think it is an appropriate use of its wide Article 51 jurisdiction to order the disclosure. The short point is that disclosure of the information is inevitable. Should the Jersey Court require a proliferation of legal proceedings and costs by requiring RBC to procure the relevant companies to make the relevant requests and sue the relevant companies rather than simply use its Article 51 jurisdiction to order the disclosure? Counsel imagined that the Jersey Court would shrink from requiring the parties to expend unnecessary legal costs in further litigation.

19 There is no question of any breach of duty or confidentiality in this case, because the directors are bound (by virtue of Z and CC's articles) to deliver up the information required to EE and EE would, in turn, deliver it up to RBC.

20 There also can be no realistic complaint on jurisdictional grounds (e.g. that the proceedings ought to take place in Ireland not in Jersey) either, because the directors in question have submitted to the jurisdiction of the Jersey Court in the proceedings before the Court. It is noted that in this regard, the first affidavit of H is sworn by him specifically in his capacity as a director of the Irish companies and on behalf of his co-directors (see paragraph 3).

21 In counsel's view, disclosure of documents belonging to AA, BB and Y stands in a different position because the A Settlements do not have a controlling stake in any of these companies and RBC and EE cannot require them to disclose their company information (other than information to which any company's shareholder is generally entitled). Counsel apprehended that in those circumstances the Court would not think it an appropriate exercise of its powers under Article 51 to order the directors of those companies to disclose documents to which EE, and through EE RBC, is not otherwise entitled.

22 As Mr Cadin has pointed out, however, counsel was not asked to opine upon the information balance amongst the beneficiaries of the three settlements and the impediment that imposes upon the Court in its supervisory capacity to give directions for the separation of the interests of the three families held through their respective settlements. We are faced with a stark choice between directing a liquidation, which we are advised would in all probability destroy any value for the beneficiaries, or dealing with a division at trust level.

23 We accept and adopt counsel's reasoning in relation to the ordering of disclosure in relation to Z and CC. We have also concluded that disclosure should be ordered in relation to AA, BB and Y for reasons which were not canvassed before counsel and which are as follows:-

(i) In substance, these companies can be considered as family companies. BB and Y were established and operated and continue to be operated by descendants of the D family with H, G and F taken together having a majority shareholding in each (see paragraph 33 of V's first affidavit). Of the remaining shares in AA, 25% are held by FF, a D family company, and 25% by X who RBC believes is connected with the D family.

(ii) The D directors have submitted to the jurisdiction of the Court and by H's first affidavit have submitted extensive evidence designed to justify what they have done (and to complain about what RBC has done). We take the view that it is only right that this evidence is properly tested:-

(a) By the directors being required to disclose the information needed properly to test what they are saying and

(b) By orders for cross-examination being made (as to which see *In the matter of the Yaheeb Trust, the Havana Trust and the Yaheeb No. 2 Trust* [2003] JLR 92).

(iii) We are not concerned here with a stranger to the settlements or potential plaintiff in proceedings against the settlements seeking pre-action discovery. RBC and all of the beneficiaries seek the assistance of the Court in its supervisory capacity in giving directions for the separation of the interests of the three families in the underlying assets of the three settlements. That cannot, in our view, be achieved in a just manner without investigating the extent to which the D directors may have already benefited improperly from those assets. Those directors on the one hand seek (as beneficiaries) the assistance of the Court in separating out the interests of the D family in the trust assets and on the other hand decline to give the Court the information it requires to do that. In our view, no real issue of confidentiality arises and the interests of justice require that the information be provided.

24 The disclosure to be given by the D directors is to be as set out in paragraph 26 of the Court's judgment of 25 th November, 2009, but with the period of disclosure to be extended to 2009. We require Mr Cadin to prepare a draft order for consideration by the Court and the observations of the parties when this judgment is handed down.

25 Subject to hearing further from Mr Hoy, we would propose that this information should be provided by the D directors within 28 days of the order being made and leave it to RBC to bring the matter back before the Court for the purpose of further directions being given. All other matters are to be adjourned to that further hearing with liberty to apply.