John Le Cras Bisson and Colin Taylor v B and Appleby Trust (Jersey) Ltd, Colin Taylor and John Le Cras Bisson (in their capacity as Trustees of the C Family Settlement) and Appleby Trust (Jersey) Ltd, Colin Taylor and John Le Cras Bisson (in their capacity as Trustees of the D Settlement) and E

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	29 July 2013
Neutral Citation:	[2013] JRC 148
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Court:	Royal Court
Date:	29 July 2013

Text

[2013] JRC 148

ROYAL COURT

(Samedi)

Before:

Sir Michael Birt, Kt., Bailiff, **and**Jurats Kerley**and**Milner.

IN THE MATTER OF A (PROBATE)

AND IN THE MATTER OF ARTICLE 25 OF THE PROBATE (JERSEY) LAW 1998

Between
John Le Cras Bisson and Colin Taylor
Representors
and
B
First Respondent

and

Appleby Trust (Jersey) Limited, Colin Taylor and John Le Cras Bisson (in their capacity as Trustees of the C Family Settlement)
Second Respondents

and

Appleby Trust (Jersey) Limited, Colin Taylor and John Le Cras Bisson (in their capacity as Trustees of the D Settlement)
Third Respondents

and

E
Fourth Respondent

Advocate M. I. Guillaume **for the Representors and the First and Second Respondents**.

Authorities

Probate (Jersey) Law 1998.

Re O'Sullivan [2011] JRC 208 .

Probate — application by the representors for an order to vary the Will.

Bailiff

THE

1 This is an application by the representors (“the Executors”), in their capacity as executors of a Will dated 25th February, 2009, and a codicil thereto dated 31st March, 2009, (the Will and codicil together being referred to as “the Will”) made by A (“the Testator”) for an order under Article 25 of the Probate (Jersey) Law 1998 varying the Will. The Court granted the

application at the conclusion of the hearing and now gives its reasons.

Background

2 The Testator was at the date of his death — and had been for over 40 years — resident and domiciled in Jersey. He had two children, B and E; B is ordinarily resident in the United Kingdom and had three minor children. E currently has no children and is ordinarily resident in Jersey.

3 During his life, the Testator created two discretionary settlements. In the events which have happened, the position in relation to each settlement is as follows. The first was dated 27th November, 2000, and is known as the C Family Settlement. We shall refer to it as “B's' Trust”. The class of beneficiaries comprises B and his children and remoter issue. The trustees are the second respondents. The second settlement is dated 25th February, 2009, and has the same trustees, who have been convened in that capacity as third respondents. The settlement is known as the D Settlement but we shall refer to it as “E's Trust”. The class of beneficiaries comprises E and his children and remoter issue.

4 The Testator died on 16th October, 2011, and the Executors were granted probate from this Court on 17th November, 2011. Under the Will, he left various specific and pecuniary legacies which are not affected by the proposed variation and we do not propose to refer to them. By clause 15, he bequeathed all his shares in a Jersey company called F (“F”) to the trustees of B's Trust to hold upon the terms of that trust. By clause 16, he bequeathed all his shares in a Jersey company called G (“G”) to the trustees of E's Trust to hold upon the terms of that trust. By his codicil, he bequeathed his shares in a Guernsey company called H to B absolutely.

The issue

5 A significant portion of the Testator's wealth consisted of Jersey and Guernsey real property. These assets were held in a number of companies. These property holding companies were in turn owned (except for H) either by F or by G as a holding company.

6 For our purposes, F is the relevant holding company as it was bequeathed to B's Trust. It has four Jersey subsidiaries. These companies have made gains over the years because, *inter alia*, of the increase in value of the properties which they own. Following the Testator's death, the Executors sought advice as to any UK tax liability which might arise in respect of distributions out of B's Trust to B or his issue as residents of the UK.

7 That advice, which has been produced in evidence before us, discloses an issue in relation to UK capital gains tax. It is accepted that any gains arising after the Testator's death will, under UK tax legislation, be chargeable to capital gains tax as and when distributions are

made to UK residents out of B's Trust. However, it appears that in certain circumstances, capital gains tax may also be chargeable by reference to gains made before the Testator's death. Thus if F were to be liquidated, there would be an additional charge to capital gains tax by reference to any gain in value of each subsidiary company between the date of its acquisition by F and the date of the Testator's death. Similarly, if any of the subsidiaries were to sell the real property which they own, capital gains tax would be chargeable by reference to the gain since the original acquisition of that particular property by the subsidiary in question.

8 As stated, the effect is that capital gains tax will be payable by reference to gains made at a time when the assets were owned ultimately by the deceased (who was resident and domiciled in Jersey), when B and his issue had no interest in the assets, and when the structures as a whole had no connection with the UK.

9 The Executors have been advised that the Testator, whilst still leaving the assets in trust for B and his issue, could easily have structured the Will so as to avoid these additional charges to capital gains tax. They believe that, if he had been so advised, the Testator would not have wished to expose his son and grandchildren to unnecessary UK tax liabilities in respect of gains made when he was the ultimate beneficial owner.

The proposed variation

10 It is proposed that the relevant parties enter into a deed of variation which varies the Will ("the Revised Will"). We would summarise the changes as follows:–

(i) Clause 5(e) of the Will (being the clause inserted by the codicil pursuant to which the Testator's shares in H were left to B) is to be deleted. Given that H is exposed to the same tax issues as the other companies, it is said to be more appropriate for H to be dealt with in the same way as them rather than pass directly into B's ownership.

(ii) Clause 15 of the Will is amended so that it now only bequeaths to the trustees of B's Trust the benefit of any loan account due by F, as opposed to both the benefit of such loan account and the shares of F.

(iii) Clause 16 of the Revised Will directs the Executors to establish a new trust ("the New Trust") to be known as the J Trust, the terms of which are set out in the first schedule to the Revised Will. This is a discretionary trust whose beneficiaries will be B and his children and remoter issue. It is intended that the New Trust will be used as a vehicle to hold and keep isolated the capitalised gains of the companies prior to the date of death.

(iv) Clause 17 of the Revised Will instructs the Executors to carry out a restructuring exercise in relation to the companies with a view to transferring their capitalised gains as at the date of death to the trustees of the New Trust (thus separating them from the

on-going operation and profitability of the companies). The steps which the Executors are directed to take by the Revised Will in order to achieve this are:–

(a) to summarily dissolve F;

(b) to raise the sum of £1 million from the net assets of F and pay the same to B; this is intended to be an equalising payment for the proposal that the ordinary shares in H will now be transferred to the trustees of B's Trust rather than to B directly;

(c) to re-structure the capital of each of the four subsidiaries so as to (i) re-classify the existing shares in issue as a class of ordinary £1 shares and (ii) create a second class of redeemable non-participating preference shares of par value £1 each ("RNPP shares") the terms of which are set out in the second schedule to the Revised Will and, in effect, provide that they are redeemable at par;

(d) to procure the issue of such number of RNPP shares in each of the four subsidiaries to the trustees of the New Trust such that, in each case, the aggregate par values of such RNPP shares shall be equal to the capital gains of each company; and

(e) to transfer all of the ordinary shares in issue in the capital of each of the four subsidiaries to the trustees of B's Trust.

(v) Clause 18 of the Revised Will instructs the Executors to carry out the same restructuring exercise in respect of the capital of H.

(vi) There is no variation of the bequests to E, to E's Trust or of any other bequest contained in the Will.

11 The effect of the restructuring will be that all of the gains in each of the companies accumulated during the life of the Testator (i.e. before B and the other beneficiaries of B's Trust had any possible interest in them) will be represented by their respective RNPP shares and thus held entirely in the New Trust. The trustees of the New Trust will be able to access such profits (in the form of capital in their hands) by redeeming the RNPP shares as and when they so require. This process will ensure that these profits are kept separate from profits or gains made by the companies following the death of the Testator.

The role of the Court

12 Article 25 of the Probate Law provides as follows:–

"Variation of dispositions etc by consent

(1) Subject to paragraph (2), the Court may by order made with the consent of all parties who in its opinion should be consulted and

having regard only to the interests of the beneficiaries or heirs interested in so much of the estate as is affected by the order –

> ***(a) vary any disposition (whether effected by will, under the law of intestacy or otherwise) of the movable estate of the deceased person;***
>
> ***(b) provide that any variation made under sub-paragraph (a) shall have effect as if it were a disposition effected by the will of the deceased person or under the law of intestacy, as the case may be; and***
>
> ***(c) direct to whom and in what manner the movable estate of the deceased person shall be distributed.***

(2) An order for a variation under paragraph (1)(a) may only be made within 2 years after the death of the deceased person."

13 The first issue to consider therefore is the parties whose consent is required. Advocate Guillaume submits that this is simply B and the trustees of B's Trust as the proposed variations do not affect the other bequests contained in the Will and the trustees are the legatees who represent the interests of the beneficiaries under B's Trust. In this latter connection he referred the Court to the observations in *Re O'Sullivan* [2011] JRC 208. In that case, a variation was sought in respect of bequests in a will to three trusts. The adult beneficiaries of the trusts (there were no minor beneficiaries) were in fact convened but the Court said this at paragraph 14 of the judgment:–

> ***"In the circumstances we are satisfied that the consent of all parties who should be consulted has been obtained namely, the trustee of each of the three trusts and all the beneficiaries of the trusts.*** We should add that we are not stating that in a future case, all beneficiaries need to give their consent. The actual legatee is of course the trustee; but nevertheless in this case, the Court notes that all living beneficiaries of the trusts have consented."

14 In our judgment, where there is a bequest in a will to a trust and it is sought to vary the bequest, it is the trustee of the trust who is the party that must consent in order to comply with Article 25(1). There is no need formally to convene the beneficiaries of any such trust. Naturally, the trustee itself may well wish to consult the beneficiaries of the trust before deciding whether to consent to the proposed variation and it may sometimes be helpful for the Court to be informed of the result of any such consultation. However, the decision as to whether to consent to the variation rests with the trustee.

15 Accordingly we agree that there is no need in this case to appoint a representative of the minor beneficiaries of B's' Trust. It is for the trustees of B's Trust to decide whether to consent to the variation. B himself has been convened, but not in his capacity as a beneficiary of B's Trust. He has been convened as a legatee of the bequest of H pursuant

to the codicil, which bequest is being varied under the proposal.

16 We note that, by its Act dated 28th June, the Court ordered that the trustees of E's Trust and E should also be convened; hence the reference to them in the heading as the third and fourth respondents. However, we do not think this was necessary. As described at paragraph 10(vi) above, there is no variation to the bequests to E and E's Trust. It follows that, in accordance with Article 25(1), the Court is to have no regard to their interests and there is no need for their consent to the proposed variation.

17 We turn then to the issue of whether this variation is in the interests of B and B's Trust. For the reasons given above, we are quite satisfied that it is. It will enable payments to be made to the UK resident beneficiaries in a more tax efficient manner. Although value in the original bequest of F to B's Trust has been removed, it has been replaced by the value in the New Trust, where the beneficiaries are identical. It is therefore perfectly proper for the trustees of B's Trust to form the view that overall, the variation is in the interests of their beneficiaries and that they should therefore consent to the variation.

18 In all the circumstances, we conclude that the requirements of Article 25 are complied with and we therefore vary the Will with effect from the date of death and make the order as requested in the prayer.