Ocorian Ltd and Ocorian (UK) Ltd v B

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith O.B.E., Jurats Blampied, Hughes
Judgment Date:	10 August 2021
Neutral Citation:	[2021] JRC 208
Court:	Royal Court

Text

[2021] JRC 208

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith O.B.E., **Commissioner, and** Jurats Blampied **and** Hughes

In the Matter of the Representation of Ocorian Limited as Trustee of V Trust, The W Trust and The X Trust

And in the Matter of the Representation of Ocorian Trustee (UK) Limited as Trustee of the Y Trust

And in the Matter of the Trusts (Jersey) Law 1984 (As Amended)

Between
Ocorian Limited and Ocorian (UK) Limited
Representors
and
B

First Respondent

and

C
Second Respondent

and

D
Third Respondent

and

E
Fourth Respondent

and

Advocate Damian James for the unborn beneficiaries
Fifth Respondent

Advocate J. M. Dann **for the Representors**.

Advocate S. A. Hurry **for Fifth Respondent**.

Authorities

Representation of Otto Poon Trust [2015] JCA 109.

Otto Poon [2014] JRC 254A.

Lewin on Trusts (18th edition).

Re Y Trust [2011] JLR 464.

In the matter of the H Trust [2006] JLR 280.

Trust — momentous decisions — reasons

THE COMMISSIONER:

1 The Representors seek the blessing of the Court in respect of a number of momentous decisions made in respect of four Jersey proper law trusts, which the Court is only prepared to accommodate in part.

2 The four trusts were settled … and are known as the Y, V, W and X Trusts (together "the Trusts"). They are discretionary trusts in near identical terms with the currently ascertained beneficiaries comprising B (the first Respondent), his wife C (the second Respondent), their son D (the third Respondent), and their daughter, E (the fourth Respondent). [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED] This section of the judgment explains the history of litigation involving wider members of the family (not spouses) [REDACTED].

7 [REDACTED] … that Ocorian Trustee (U.K.) Limited became trustee of the Y Trust on 31st March 2020 in the place of Ocorian Limited. We will refer to them together as "the Trustees".

8 [REDACTED]

9 In 2020 the Trustees turned their minds to a more comprehensive amendment of the terms of the Trusts, to ensure that they met the needs of the current and future beneficiaries and limited the risks of further litigation. This process, which involved consultation with the currently ascertained beneficiaries, and the obtaining of advice from leading tax, trust and matrimonial counsel, led to three decisions, all supported by the currently ascertained beneficiaries, namely:

(i) [REDACTED]

(ii) [REDACTED]

(iii) To exclude irrevocably the spouses, widows and widowers of B and C's children and remoter issue from the beneficial class of the Trusts and the creation of a new settlement with assets of £7.5 million in which spouses, widows and widowers would be included in the beneficial class along with B, his spouse or widow and his children and remoter issue.

10 In the convening act of 19th February 2021, Advocate James was appointed as guardian *ad litem* for the unborn and unascertained beneficiaries of the Trusts, which would, of course, include the unborn spouses, widows or widowers of the unborn children and remoter issue. …, the future spouses, widows or widowers of D and E, who are aged [in their twenties], will in all probability be alive today, although unascertained. [REDACTED]

The Law

11 The jurisdiction of the Court to bless a decision of a momentous character by a trustee is well established. The test is summarised in the Court of Appeal's decision in *Representation of Otto Poon Trust* [2015] JCA 109 at paragraph 14 of the judgment:

> ***"Where a trustee has made a momentous decision, that is as decision of real importance for the trust, and seeks the court's approval for the decision, the legal test to be applied by the court is well established in this jurisdiction.*** As explained in *Re S Settlement* [2001] JLR N 37, ***the court must satisfy itself (i) first, the trustee's decision has been formed in good faith, (ii) second, that the decision is one which a reasonable trustee properly instructed could have reached, and (iii) third, that the decision has not been vitiated by any actual or potential conflict of interest.*** A similar approach is taken in England:—see *Public Trustee v Cooper* [2001] WTLR 901."

12 The Court in *Otto Poon* (at paragraph 15 of the judgment) considered but rejected a submission that there now exists a fourth requirement, that the trustee must also prove in detail that it has given proper consideration to the matter under scrutiny, setting out in detail the steps which it has taken and the matters which it has considered. Accordingly, the test to be applied remains as set out above.

13 At first instance in *Otto Poon* [2014] JRC 254A, the Court noted that the wording of paragraphs 29–299 of Lewin on Trusts (18 th edition) had previously been cited with approval by the Court in *Re Y Trust* [2011] JLR 464, as follows:

> ***"The court's function where there is no surrender of discretion is a limited one.*** It is concerned to see that the proposed exercise of the ***trustees' powers is lawful and within the power and that it does not infringe the trustees' duty to act as ordinary, reasonable and prudent trustees might act, ignoring irrelevant, improper or irrational factors; but it requires only to be satisfied that the trustees can properly form the view that the proposed transaction is for the benefit of beneficiaries or the trust estate and that they have in fact formed that view.*** In other words, once it appears that the proposed exercise is within the terms of the power, the court is concerned with limits of rationality and honesty; it does not withhold approval merely because it would not itself have exercised the power in the way proposed. The court, however, acts with caution, because the result of giving approval is that the beneficiaries will be unable thereafter to complain that the exercise is a breach of trust or even to set it aside as flawed; they are unlikely to have the same advantages of cross-examination or disclosure of the trustees' deliberations as they would have in such proceedings. If the court is left in doubt on the evidence as to the propriety of the trustees' proposal it will withhold its approval (though doing so will not be the same thing as prohibiting the exercise proposed).

> Hence it seems that, as is true when they surrender their discretion, they must put before the court all relevant considerations supported by evidence. In our view that will include a disclosure of their reasons, though otherwise they are not obliged to make such a disclosure, since the reasons will necessarily be material to the court's assessment of the proposed exercise."

14 On the issue of exclusion of a beneficiary, the Court of Appeal (again in *Otto Poon*) said:

> ***"The exercise of a power to exclude a beneficiary is unusual.*** Other than in exceptional circumstances it is unlikely to operate for the benefit of the person excluded, and its justification is accordingly likely to rest on the benefit to be gained by the other beneficiaries or by the harmonious administration of the trust estate as a whole. Where the interests of those excluded have not been properly taken into account, a decision to exclude can be struck down; see for example *Re the C Trust* [2012] JRC 086B."

[REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

[REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

The exclusion of the spouses, widows and widowers and the settlement of the new trust

25 This proposal to narrow the beneficial class follows [REDACTED] litigation and is motivated by a desire on the part of the currently ascertained beneficiaries and the Trustees to avoid the risk of future litigation, the most obvious risk perceived by them as being claims brought by future spouses on divorce. This narrowing of the beneficial class is in the context of trust deeds in which there is power to exclude beneficiaries but no power to add beneficiaries.

26 In November 2020, the Trustees instructed Mr Richard Todd QC to advise on the steps proposed to protect the family wealth in the event of divorce, namely by the narrowing of the beneficial class by the exclusion of spouses. The instructions of 18 th November 2020 note that the removal of spouses "…. *has raised the eyes of all [PROFESSIONALS] concerned"*.

27 In his opinion of the 3 rd February 2021, Mr Todd sought to allay that concern by explaining why in his opinion the spouses should be irrevocably excluded. He noted that a family constitution was being drafted which will provide that D and E would be expected to enter into pre-nuptial agreements with their intended spouse in due course, failing which they will be removed from benefit under the Trusts. The regulation of their financial relationships by pre-nuptial agreements was to be welcomed, he said, as a way of providing protection to the Trusts, and this is one of those cases where it would make sense for a tripartite nuptial agreement involving the parties celebrating their nuptials and any relevant trust.

28 Mr Todd explained the general approach of the English courts to ancillary relief claims in matrimonial proceedings and the risk, he said the greatest risk, of the English court deeming a trust to be a nuptial settlement and consequently, infinitely variable by the English court. He explained in detail what is meant by a nuptial settlement, the powers of the English court and the steps that might be taken to protect against those powers being exercised or enforced. Mr Todd strongly advised against flexibility being retained so as to enable spouses to be added in the future. That, he said, would become a Trojan horse and would expose the Trusts.

29 Mr Todd advised that exclusion from the Trusts of the spouses should be expressly stated in any pre-nuptial agreement and the existence of a pre-nuptial agreement should be a condition of benefit under a trust. The beneficiary and his or her spouse should be required to recognise that the trust is not a nuptial settlement, as a condition precedent to the advance of funds, although it would be imperative that the non-object spouse had good quality independent legal advice.

30 Mr Todd recommended that the Trusts should irrevocably exclude spouses but that a new fifth Jersey trust be created, which does not irrevocably exclude spouses. This fifth trust

would be “carved out” and would have assets that could satisfy a pre-agreed pre-nuptial agreement, (i.e. funding as provided in the future nuptial agreement.) That way, he said, there is an entity in Jersey which can rely on its third-party rights without drawing in the Trusts. The “optics” of this he said were excellent, as it showed a willingness to meet a needs claim by a spouse without descending to a more generous sharing claim as opposed to the “optics” of the Jersey Trusts (the Y trust being onshore) simply saying that they will “defiantly” not submit to the English courts. As such, it should be a condition of any future advances/benefit that the recipient and his/her spouse (i) enter into a pre-nuptial agreement, and (ii) recognise and accept that the Trusts are both non nuptial and should not be pursued as part of a claim for a financial remedy upon divorce.

31 The Court asked to see the terms of the proposed new trust. It is on terms broadly similar to the Trusts, with differences highlighted in Advocate Hurry's letter of the 21 st May 2021, the main difference being that, unlike the Trusts, it contains a power to add beneficiaries. The beneficiaries will be B, his spouse or widow, his children and remoter issue and the spouses, widows and widowers of his children and remoter issue.

32 Of those represented by Advocate James, he submitted that the interests of the unborn children and remoter issue of B and C would be aligned with their parents. The interests of the unborn and unascertained spouses, widows or widowers would clearly not be served by the proposed deeds of exclusion. They stand to be irrevocably excluded from trusts with a collective value of approximately £100 million and in replacement they will be given a discretionary interest in a single trust worth significantly less (£7.5 million). Their interests would be further diluted by the inclusion of the other family members and the power to add beneficiaries. They would expect him to robustly resist the implementation of such exclusion.

33 Advocate James pointed out that the Trusts were settled by a husband and wife in which they appointed each other as beneficiaries and in which the beneficial class encompassed spouses, widows and widowers. It seemed to him that these were dynastic trusts, specifically intended to benefit spouses. The retention of C's interest in the new trust was consistent with this proposition yet inconsistent with the rationale of the proposed exclusion by which unborn and unascertained spouses, widows or widowers would have their interests irrevocably eradicated. He said this in his letter of 11 th March 2021:

> *“An eternal optimist might rule out any potential for discord in a marriage.* I do not take that position but suggest that the starting point should be that that D and E's respective marriages, should they occur (and any that follow) will be happy and endure the test of time. The Deeds of Exclusion are, on one analysis, predicated on the opposite view, that these marriages are bound to fail and not only that, but that litigation will ensue.
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> *The aversion to the risk of litigation is understandable – the future is uncertain.* However, the Trustees' outlook is, when it comes to the Deeds of Exclusion, a bleak one.”

34 As Advocate James said, the matrimonial courts are concerned with achieving a fair settlement between spouses, whereas this Court, exercising its supervisory jurisdiction over Jersey trusts, will be concerned with protecting the interests of the beneficiaries as a whole—see *In the matter of the H Trust* [2006] JLR 280 at paragraph 14. There are a number of checks and balances in place to ensure that the beneficiaries' interests are protected, and in his view, the proposal placed too much weight on reducing the litigation risks at the expense of the unborn and unascertained spouses, widows and widowers. In any event, the proposals were not water-tight, as they would not prevent a claim being made for full disclosure about the affairs of the Trusts and for a lump sum in the expectation that it would be met by the Jersey trustee. The Jersey Courts will regard it as important to ensure that a husband and wife engaged in matrimonial proceedings in the UK should have the fullest information concerning the financial affairs of the Trusts which the Court is likely to direct the trustees to provide—see paragraph 17 of the *H Trust*.

35 [REDACTED]… we are given to understand that all of the Trusts are likely to make substantial investments into businesses in the UK and it might be desirable therefore for the trustees of those of the Trusts that are offshore to appear in any English matrimonial proceedings involving a beneficiary—see paragraphs 12 to 16 of the *H Trust*.

36 Furthermore, as the Court said in the *H Trust* at paragraph 16 the English courts in matrimonial proceedings will have fully investigated the matter and made an order intended to achieve a fair allocation between the spouses and the interests of comity and of all of the beneficiaries will often point strongly to this Court making an order which achieves the result contemplated by the English court.

37 It might be thought that the most effective way of protecting the Trusts against claims by spouses is through pre-nuptial agreements, as advised by Mr Todd, that are recognised by the English matrimonial courts and effective in reducing the claims that can be made.

38 Advocate Dann submitted that this decision fell squarely within the range which a reasonable trustee properly instructed could have reached for the following reasons:

> (i) The Trusts and the currently ascertained beneficiaries have been [INVOLVED IN LITIGATION] and both the Trustees and the currently ascertained beneficiaries were united in their desire to avoid at all costs the risk of future litigation in relation to the Trusts. The most obvious risk of future litigation lay in English matrimonial proceedings in the unfortunate event that B's children or grandchildren were to be divorced from their future spouse.
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> (ii) The Trustees had taken detailed advice from Mr Todd as to steps which could properly be taken to protect the Trusts from the risks of matrimonial litigation.
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> (iii) D and E have not yet met their future spouses, if indeed either or both decide to

marry. Accordingly, their future spouses have no expectation of benefit from the Trusts. If and when they do meet their future spouses, that spouse will be expected to enter into pre-nuptial agreements. This is not a situation whereby a potential benefit is being removed from a beneficiary who would otherwise benefit by accident of birth – any future spouse will be coming into the situation as an adult and entirely by choice.

(iv) Further, any future spouse of D and E will continue to benefit from the Trusts during their marriage, even though the spouse is not within the beneficial class. The Trusts will no doubt provide a marital home and support for all the family living expenses and medical expenses and the like and support for the education and upbringing of any children.

(v) In the unfortunate event of a divorce or of a spouse being widowed, where there are no children of the marriage, the spouse in question is still a beneficiary of a Jersey trust which holds £7.5 million in cash, or the equivalent in another currency, or in gilts or in qualifying corporate bonds, which trust is being established to ensure that they are not left without some means of support.

(vi) As D and E are presently unmarried young adults, the point at which any children they may have are in turn likely to reach maturity and to marry, is realistically 30 – 40 years away from now, and therefore too remote to warrant much consideration.

(vii) The letters of wishes signed in 1993 made it plain that the settlors intended B and C to be the primary beneficiaries of the Trusts, and thereafter their children. There is no mention whatsoever of future spouses.

39 We acknowledge that the letters of wishes make no reference to spouses, but they were written some 28 years ago, before D and E were born, and we attach no significance to that omission.

40 The proposal raises a number of questions in the minds of the Court, which were not resolved at the hearing, in particular how in practice the proposed new trust, which will be in very similar terms to the Trusts save for the power to add, would work.

41 The principal underlying purpose of the new trust, as we understand it, would be to meet claims by spouses under the proposed prenuptial agreements to which it is contemplated the trustee will be a party. The spouses will be listed in the beneficial class along with B, his spouse or widow and their children and remoter issue. Was it intended that the trust fund would be retained to meet those claims, or is it anticipated that distributions will be made from time to time to other members of the beneficial class?

42 Assuming that D and E marry in due course, and those marriages are happy, does that mean that the trust fund should be retained until the marriages of their own children not only take place, but break down, which could be in 30 – 40 if not more years?

43 The suggestion that the trust fund of the new trust should be kept in cash or cash equivalent rather implies that the possibility of early marriage breakdowns is contemplated, but it is clear that it will be many years before D and E marry, and their marriages possibly fail. Is such an investment policy consistent with the duties of a trustee?

44 Are B, his wife and children going to be content with the trust fund of £7.5 million being held back indefinitely by the trustee to meet what may be perceived as the remote possibility of claims by a spouse on divorce? Will not the trustee come under pressure either to make distributions to them or to utilise the funds in some way to benefit them, bearing in mind that the wealth here has been generated by the [REDACTED] family?

45 If one of the future marriages of D or E does break down, how much of the trust fund of the new trust will be available to meet the claims of that spouse, bearing in mind that a principal purpose of the new trust is to meet claims of all future spouses, widows and widowers?

46 The focus of the currently ascertained beneficiaries and the Trustees is the need to guard against claims by future spouses on divorce, but what is the position of the widow or widower of happy marriages to D and E, in particular marriages that have produced children? What threat of litigation do they pose and why should they be excluded from the Trusts? To what extent could they benefit from the new trust when its principal purpose is to meet claims by spouses under prenuptial agreements?

47 The new trust has a power to add beneficiaries (in contrast to the Trusts) which could be used to dilute the interests of the spouses, widows and widowers. Advocate Dann was unable to indicate the category of persons the trustees might have in mind as being the objects of this power, bearing in mind that the wider members of F and G's family have been excluded from the Trusts and, as we understand it, could not therefore be added to the class of beneficiaries of the new trust.

48 The beneficial class of the Trusts has already been narrowed and there is no power to add beneficiaries. The exclusion of the spouses, widows and widowers from the Trusts narrows the beneficial class even further, reducing the flexibility of the Trusts. Furthermore, we note that the beneficial class could be reduced even further if either D or E decline to sign a prenuptial agreement, as the result of which we are told they will be excluded. Assuming that B and C will not have any more children and if D and E do not have any children, on the death of the last of them (potentially leaving widows or widowers surviving) the entirety of the assets of the Trusts will go to charity, an outcome Advocate Dann said was in accordance with the family's wishes.

49 The proposal to create a new trust in which the spouses, widows and widowers will be included in the beneficial class implies a recognition on the part of the Trustees and their advisers that an outright exclusion from the Trusts would not be reasonable, but in the light of the issues canvassed above we question how realistic the proposal to compensate them

by creating this new trust is and how the trustees of the new trust will be expected to exercise their powers. We question why the proposed exclusion extends to widows and widowers when the concern relates to spouses on divorce. We question the further narrowing of the beneficial class and the loss of flexibility that entails. We question whether this proposed exclusion may be an overreaction to [REDACTED] litigation that did not involve spouses.

50 We also bear in mind the unusual nature of a power to exclude. The facts here are quite different to the facts in the case of *Otto Poon*, when the court approved the exclusion of a spouse after she had received a substantial lump sump payment (HK$770 million) ordered in divorce proceedings. Here the Trustees are proposing to exclude all future spouses, widows and widowers on the somewhat artificial basis, we think, of their being included as beneficiaries with others in the proposed new trust, which as Advocate James said is very significantly smaller. The exclusion is clearly not in the interest of the spouses, widows and widowers and it is justified as being in the interests of the currently ascertained beneficiaries. It is only in their interests to the extent that it really does provide protection against what may in practice be the remote, if not very remote, possibility of claims by spouses. The exclusion is not something that in our view the settlors would have contemplated, and it sweeps away the interests of widows and widowers who may well have become valued members of the family and who would pose no such equivalent threat.

51 We are satisfied that the first and third part of the test are met in that the Trustees are acting in good faith and their decision has not been vitiated by any actual or potential conflict of interest. As to the second part of the test, there is much force in Advocate Dann's submission that this decision comes within the limits of rationality in that it reflects the views of the currently ascertained beneficiaries and is supported by legal advice. It is a decision, he submits, which a reasonable trustee properly instructed could make.

52 At the same time, there is much in what Advocate James has said. Taking into account the unresolved issues canvassed above, the Court is left sufficiently uncomfortable with what is proposed to be in doubt as to its propriety. After careful consideration we decline to bless the decision. As made clear in the passage cited from *Otto Poon* above, that is not the same thing as a prohibition on the Trustees from implementing their decision.

53 In conclusion, we decline to bless the decision to exclude the spouses, widows and widowers and the creation of the new Jersey law discretionary trust.