The DDD Settlements

Jurisdiction:	Jersey
Judge:	The Deputy Bailiff
Judgment Date:	28 December 2011
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Text

[2011] JRC 243

ROYAL COURT

(Samedi)

Before:

W. J. Bailhache, Esq., Deputy Bailiff, **and** Jurats Le Breton **and** Nicolle.

In the Matter of the Representation of A and B
And in the Matter of the DDD 1976 Settlement, the DDD 1979 Settlement and the DDD 2005 Settlement
And in the Matter of Articles 47, 51 and 53 of the Trust (Jersey) Law 1984 ("The Law")

Advocate N. Pearmain **for A and B**.

Advocate J. P. Speck **for RBC Trustees (CI) Limited, the Trustee ("the Trustee")**

Advocate D. Le Maistre **for the unborn and unascertained beneficiaries of the Settlements**.

Authorities

Trust (Jersey) Law 1984.

In the matter of the T Settlement [2002] JLR 204.

Re Clore's Settlement Trusts [1966] 1 WLR 958.

In the Settlement of Douglas [2000] JLR 73.

re N and N [1999] JLR 86.

Re Weston's Settlements [1969] 1 Ch 223.

re Whitehead's Will Trusts [1971] 1WLR 833.

Trust — application to remove the settlor from the list of excluded persons.

The Deputy Bailiff
Background

1 A and B are beneficiaries of the DDD 1976 Settlement and the DDD 1979 Settlement. B is a beneficiary of the DDD 2005 Settlement. They bring representations before the Court as adult beneficiaries of those settlements (the "Settlements") seeking an order for the variation of the trusts affecting the Settlements as set out below.

2 The DDD 1976 Settlement was established between C ("the Settlor") and the original trustees, being persons resident in Jersey. There have been various changes of trustees, and the Trustee is the present sole trustee of this and indeed the other two Settlements. The DDD 1976 Settlement is an irrevocable discretionary trust governed by Jersey Law.

3 On 19th June 1979, C was also the settlor of the DDD 1979 Settlement, made between the same parties as with the DDD 1976 Settlement. Once again, the Trustee is the present sole trustee of the DDD 1979 Settlement.

4 The former trustees executed two separate Deeds of Exclusion on 29th June 1984 whereby the Settlor was excluded from benefit in relation to both the DDD 1976 Settlement and the DDD 1979 Settlement.

5 On 23rd March 2005 the Settlor made the DDD 2005 Settlement with the Trustee and one

other Trustee who has since retired, leaving the Trustee as the present sole Trustee of this trust. Like the other two trusts, the DDD 2005 Settlement is an irrevocable discretionary trust governed by Jersey law. The persons within the class of beneficiaries are B and her spouse or widower, children and remoter issue. By the Fourth Schedule to the DDD 2005 Settlement, the Settlor and the Trustees are classed as excluded persons, such that they cannot benefit in any way from the terms of the trust.

6 The Settlor was at the date of the Settlements and remains resident and domiciled in Singapore. We are advised that the Deeds of Exclusion were executed by the Trustees in 1984 because at that time Singapore had an estate tax that was levied on the value of all dutiable estates, and that the assets of both the DDD 1976 and the DDD 1979 Settlements would have been aggregated with the value of other assets which the Settlor had for the purposes of estate tax, and there would have been a very substantial estate tax liability as a result. For similar reasons, the Settlor was classed as an excluded beneficiary from the outset in relation to the DDD 2005 Settlement.

7 A is resident in Singapore, as is his wife. His only child is married, and although she and her husband are temporarily resident in Singapore, they are otherwise resident in the United Kingdom. At present they have no children.

8 By contrast, B and her husband and three children are all resident in the United Kingdom. The three children currently have no children, although one of them is married.

9 All the ascertained beneficiaries are of age. However, each of the three Settlements provides that the children and remoter issue of A and B are also beneficiaries. The unborn and unascertained beneficiaries in this instance in relation to each settlement are represented by Advocate Le Maistre.

The Application

10 The application is for an order revoking the two Deeds of Exclusion made on 29th June 1984 by which the Settlor was excluded irrevocably by the Trustees from benefit under the DDD 1976 and DDD 1979 Settlements, and for an order removing the Settlor as a member of the excluded class of beneficiaries under the DDD 2005 Settlement. The basis of the application centres upon the assertion that until February 2008, Singapore had an estate tax which would have resulted in significant liabilities on the death of the Settlor as a result of these Settlements had the various exclusion provisions not been made, but that estate tax was then abolished. Accordingly, although it was necessary to ensure that the Settlor was an excluded person when those steps were taken, it was no longer so necessary after February 2008. All the adult beneficiaries of the three Settlements have therefore agreed that the Settlor should no longer be an excluded person. The Court is asked to sanction that arrangement pursuant to Article 47 of the Trust Law.

Jurisdiction

11 Article 47 is in these terms:-

> ***"(1) Subject to paragraph (2), the court may, if it thinks fit, by order approve on behalf of –***
>
> ***(a) …;***
>
> ***(b) …;***
>
> ***(c) any person unborn; or***
>
> ***(d) …***
>
> ***any arrangement, by whomsoever proposed and whether or not there is any other person beneficially interested who is capable of assenting thereto, varying or revoking all or any of the terms of the trust or enlarging the powers of the trustee of managing or administering any of the trust property*** .
>
> ***(2) The court shall not approve an arrangement on behalf of any person coming within paragraph (1)(a), (b) or (c) unless the carrying out thereof appears to be for the benefit of that person*** .
>
> ***…"***

12 Advocate Speck was at pains to emphasise that the Court was not being asked to do any more than to remove the impediment to adding the Settlor as a beneficiary to each of these settlements. The Trustee had not yet resolved that it would add the Settlor in this way. An amendment of the Trusts was sought to enable her to be so added if the Trustee thought fit. He contended that the other way of looking at the issue was that the Court was being asked to enlarge the powers of the Trustee so as to remove the impediment.

13 Article 47 of the Trust Law is cast in wide terms. It is possible to vary or revoke all or any of the terms of a Trust. We do not think the second power conferred on the Court, namely that of enlarging the powers of the Trustee, apply to what is proposed here because the power to enlarge the powers of the Trustee is limited to what is necessary for the purposes of managing or administering the Trust property. We do not think that enlarging the powers of the Trustee to add beneficiaries can be seen as a power of managing or administering trust property. It seems to us that a power to add beneficiaries is closer to a dispositive power and is a substantive provision as opposed to a power of management or administration.

14 The language of Article 47(1) does however appear to extend to a judicial power to revoke all or any of the terms of the Trust, including those which have arisen from the irrevocable exercise of power by the Trustee. In substance that is not very different from a power to

revoke the terms of a Trust which have been accepted by the Trustee in the Settlement Deed itself, again perhaps expressed in irrevocable terms. A Trustee who comes to Court seeking the exercise of the Court's power to revoke a trust provision which arises as a result of an irrevocable exercise of power by the Trustee in the first place can expect to have the motivation for such a request very closely examined by the Court. Nonetheless, we accept that we have jurisdiction pursuant to Article 47 of the Trust Law to make the orders which we are asked to make.

Benefit

15 It is clear from Article 47(2) that the Court is not to approve any arrangement made pursuant to paragraph (1) unless the carrying out of the arrangement appears to be for the benefit of the person on whose behalf the arrangement is approved – in this case the unborn beneficiaries, as all the other beneficiaries are of age and have consented to the proposed arrangements. The issue for us therefore is what benefit accrues to the advantage of the unborn beneficiaries.

16 Advocate Pearmain put it to us that there were three benefits, namely these:-

(i) There was no good reason why the Settlor should be treated differently from the other members of the family.

(ii) There was a moral obligation which the adult beneficiaries owed to her to enable her to be brought back into the class of potential beneficiaries.

(iii) There were tax benefits which might be available for the family at large if she were to be allowed to become a beneficiary again.

17 The Trustee and Advocate Le Maistre supported the proposal that the Court should give approval to the arrangement largely on the grounds of the potential tax benefits which are considered in more detail below.

Treating the Settlor the Same

18 In his affidavit, A says this:-

"My mother was the primary benefactor and the only person responsible for ensuring the preservation of her wealth for the benefit of her children and their descendants. I appreciate that she is in her autumn years and not without means but I would strongly prefer that she again be in a position where she may be a potential object of the Trustee's discretionary powers. She may never need any assistance from the 1976 Trust, however it would only be fair and just for all that she has done throughout her life and kindness she has shown to have the

> impediment of being an Excluded Person removed particularly where there is no longer any need for such restriction on the exercise of the Trustee's discretionary powers…"

19 It appears to us that to say that there is no good reason why the Settlor should be treated differently from other members of the family ignores the fact that she chose to make the Settlements which she did, and there seems therefore little doubt that the Deeds of Exclusion were made with her acquiescence for the purposes of saving Singapore estate tax. It is relevant to note that the argument was cast in terms of fairness to her – it was said there was no good reason why she should be treated differently. That argument has only to be put in those terms for it to be seen immediately that it does not fit within Article 47(2) which requires us to identify the benefit for the unborn beneficiary before our discretion is exercised in favour of approving the arrangements. An assessment that it would be to the benefit of the Settlor does not meet the necessary criteria and we therefore reject the argument that we should approve the arrangements on this ground.

Moral Obligation

20 It is said to us that all the adult beneficiaries accept there is a moral obligation to remove the impediment which prevents the Settlor becoming eligible to be added as a beneficiary. For our part, we do not see where the alleged moral obligation comes from at all. The Settlor is in her 90s, and is financially independent. She is in good health and remains active. She chose to make the arrangements she did, primarily for the benefit of her children and remoter issue. We cannot see that there is any moral obligation lying on the children and the remoter issue to procure that she is eligible to receive back the benefit of the assets which she voluntarily gave away. The position would certainly be different if she were in need. If that were the position, then she would fall fairly and squarely within the scope of the Royal Court's comments *In the matter of the T Settlement* [2002] JLR 204. There, the Settlor was excluded from benefit from a settlement, and faced the possibility of very substantial capital gains tax liabilities being assessed upon her, leaving her bankrupt. The adult beneficiaries in that case considered that they had a moral obligation to save her from such bankruptcy, and the Court found, applying in *Re Clore's Settlement Trusts* [1966] 1 WLR at page 958 that the improvement of the material situation of the beneficiary was not confined to direct financial advantage but included the discharge of moral or social obligations of the beneficiary towards his or her dependants. One can well see therefore in those circumstances how it could be said that a moral obligation arose for the beneficiaries to ensure that the settlor was no longer excluded from benefit and did not have to face capital gains tax liabilities in relation to assets to which she could have no claim.

21 By contrast here, there is no suggestion that any tax will be assessed on the Settlor, and there is no suggestion of any bankruptcy. To the contrary, the Settlor is financially independent and lives a comfortable life in Singapore where she lives alone, although assisted by her personal driver and two domestic maids.

22 *In the matter of the T Settlement*, the Court considered that the views of the adult beneficiaries were also in effect to be imputed to the unborn children. At paragraph 19 the Court said this:—

> ***"If 17 or so adults of the same family are unanimous in their moral obligation to Mrs T and do not wish her to be jeopardised or put in fear of jeopardy as a result of her generosity then we agree with Advocate Le Cocq that the ethos is morally right no matter to what generation the ethos applies."***

23 As we have said, this seems to imply that the Court is bound by the views of the adult beneficiaries as to what their moral obligation is. If that is the proper construction of the Court's judgment in that case, we do not associate ourselves with that reasoning. In our judgment, an objective test has to be applied by the Court to the question as to whether a moral obligation arises in the circumstances of the decision the Court is asked to reach. The fact that the adult beneficiaries may consider a moral obligation has arisen may well be useful to the Court in its objective assessment as to whether the unborn beneficiaries should be considered to be subject to the same moral obligation – but it nonetheles remains for the objective assessment of the Court.

24 In the circumstances, for the reasons given, we do not consider that there is any benefit to the unborn beneficiaries in approving this arrangement on the grounds of any moral obligation owed to the Settlor.

The Tax Position

25 Advocate Pearmain submitted that if the Court were to give approval to the proposed arrangements, it might be possible for the Trustee to give consideration to mechanisms by which savings might be made in capital gains tax which would otherwise be due by the UK resident beneficiaries. In essence, as we understand it, as a result of the changes introduced in the 1998 Finance Act of the United Kingdom, UK resident beneficiaries are liable to be assessed for capital gains tax on the uplift in capital value in the underlying settlement assets between the date of the Settlement and the date of any appointment to them. In the case of these trusts, particularly of course the DDD 1976 Settlement and the DDD 1979 Settlement, such liability might be very significant and indeed account for a major proportion of the Trust assets ever appointed to them. It appears that this particular tax regime disregards the fact that the beneficiaries were not the owners of the assets during which time the gains were made, had no control over what gains were made or how the assets were invested or whether income or capital was appointed or retained. It is not as if the underlying settlement assets were UK beneficially owned assets either or naturally fell within the UK tax net during the period of the Settlements. The tax, as the Court understands it, is calculated by reference to the time during which the beneficiaries were only discretionary objects of the Trust, artificially treating them as if they had a control which neither legally or actually they had. It appears to us that there might well be examples of lawful but overt tax avoidance which would make the Court hesitate to exercise its

discretion, but this is not one of them. If it is right as we think it is, as a matter of law, to accept the proposition that tax planning is a benefit which the Court can take into account in exercising its discretion on an application of this kind, this is the clearest possible case where the artificial and unduly harsh nature of the basis of taxation would indeed prompt the exercise of discretion.

26 In this respect the Law of Jersey is clear. *In the Settlement of Douglas* [2000] JLR 73, the Royal Court had to consider an application to vary the terms of a settlement under what was then Article 43 of the Trust Law where the purpose of the variation was to avoid a liability for UK capital gains tax following the change in the UK tax regime in 1998 in relation to offshore trusts. The Court was satisfied that the arrangement was for the benefit of the unborn beneficiaries in two respects. First of all, the arrangement offered the prospect of preventing a depletion of the trust assets by avoiding the charge to capital gains tax arising on the settlor. Secondly, by increasing the class of beneficiaries, it gave great opportunity for effective tax planning. The Court noted that in approving the variation, it was acting in similar fashion to the Court in *re N and N* [1999] JLR 86 where similarly a variation was approved to avoid a charge to capital gains tax. The Court also noted that the approach of the English Court was similar. In *Re Weston's Settlements* [1969] 1 Ch 223, Lord Denning M R said, at page 245:-

> ***"Two propositions are clear*:**
>
> ***(i) In exercising its discretion, the function of the court is to protect those who cannot protect themselves.*** It must do what is truly for their benefit .
>
> ***(ii) It can give its consent to a scheme to avoid death duties or other taxes.*** Nearly every variation that has come before the Court has tax avoidance for its principle object; and no-one has ever suggested that this is undesirable or contrary to public policy" .

27 The Court in *Re Douglas* also referred to the judgment of Pennycuick, V.-C. In *re Whitehead's Will Trusts* [1971] 1WLR 833, where he said at page 839:-

> ***"I should, perhaps, add that one of the purposes of this appointment is unquestionably to escape the burden of certain United Kingdom fiscal liabilities.*** It has, however, long been established that there is no reason why the Court should not lend its assistance in connection with a particular transaction" .

28 Accordingly, Birt, Deputy Bailiff said in *Re Douglas* at page 77:-

> ***"The Court sees no reason to adopt a different approach in Jersey to that of the English Court in relation to the equivalent legislation in the United Kingdom.*** Accordingly, despite any implied reservation in Osias Settlements, the Court is quite satisfied that the avoidance, minimisation or deferral of

taxation is capable of being a benefit and that, as in the English Courts, the fact that such avoidance, minimisation or deferral is the principle object of the variation is not a reason for the Court to refuse to give its consent if satisfied that the arrangement is for the benefit of the persons concerned" .

29 We remind ourselves that this application is to remove the provisions which exclude the Settlor from benefit in relation to the three Trusts. Of itself, no physical charge to tax arises in any jurisdiction as we understand it, as a result of such a change. The result of that change however is, as Advocate Speck helpfully put it for the Trustee, that while the Court cannot assume that the only way of benefiting the beneficiary as a result of the change in arrangements is that there would be an appointment of all or a proportion of the assets to the Settlor, the definable benefit is that the structure is more user friendly and that there will be a better opportunity to plan proper tax mitigation than if the status quo were to be preserved. Against this potential benefit, what is the potential downside? It is that if in fact the Trustee did determine – and nothing has been decided yet – to make an appointment in favour of the Settlor of some or all of the Trust assets, the Settlor might leave the assets by will to the equivalent of the cats' home, or place the assets on a bet on a horse in the Grand National at Aintree and lose it all. Conversely, the Settlor might either make a resettlement or leave the property by will to the same beneficiaries whom she has regularly shown an inclination to benefit, in which case the tax advantages would be significant.

30 None of this really arises on an application merely to remove the impediment to making an appointment in favour of the Settlor. Clearly if the impediment is removed, the Trustee would have to consider carefully the question of any appointment of assets to the Settlor, just as the Trustee would have to consider carefully the appointment of assets to any beneficiary.

31 Advocate Le Maistre, appointed to represent the interests of the unborn and unascertained beneficiaries, submitted that the only benefit which he could identify was the potential fiscal benefits. Those whom he represented would stand to make a substantial loss if their parents or grandparents were the subject of a significant tax liability. He accepted that there was no moral obligation owed by the unborn beneficiaries to the Settlor. He made his submission solely on the advantage of the tax flexibility which making this variation in the terms of the Trust would achieve.

32 The Court has noted that there are beneficiaries currently resident in the United Kingdom and also some who are currently resident in Singapore. By definition, one does not know where the unborn beneficiaries will be resident, but we have to assume that there is at least a good chance they will be resident in the United Kingdom, or will be children of persons who are resident in the United Kingdom. In the circumstances we have no doubt at all that this arrangement is in their best interests and we approve the proposed arrangement. Accordingly, we revoke the exclusion of the Settlor from benefit under the DDD 1976 and DDD 1979 Settlements, as achieved by the Deeds of Exclusion dated 29th June 1984, and we vary the terms of the DDD 2005 Settlement so as to remove the Settlor from the list of excluded persons contained in the Fourth Schedule to that Settlement. We are satisfied that

it is in the best interests of the Trust estate that we should do so and we so order it accordingly.