

HSBC International Trustee Ltd v Poon Lok to Otto; Madam Kan Lai Kwan Kay; Poon Wing Yun Karen; Advocate Michael Christopher Goulborn (as representative of unborn and unascertained beneficiaries)

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	19 December 2014
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Text

[2014] JRC 254A

ROYAL COURT

(Samedi)

Before:

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

Between
HSBC International Trustee Limited
Representor
and
Poon Lok To Otto

First Respondent
Madam Kan Lai Kwan Kay

Second Respondent
Poon Wing Yun Karen

Third Respondent
Advocate Michael Christopher Goulborn (as representative of unborn and unascertained
beneficiaries)
Fourth Respondent

Advocate R. J. MacRae for the Representor.

Advocate A. D. Robinson for the Second Respondent.

Advocate M. C Goulborn appeared in person.

The First and Third Respondents did not appear and were not represented.

Authorities

Rep of Otto Poon Trust [\[2011\] JRC 167](#).

Re S Settlement [2001] JLR N 37.

Re Y Trust [\[2011\] JLR 464](#).

Lewin on Trusts 18th edition.

Re Rabaiotti 1989 Settlement [\[2000\] JLR 173](#).

Re the C Trust [\[2012\] JRC 086B](#).

Trust — Reasons for approval for distribution to first respondent.

Bailiff

THE

1 On 22nd October the Court sat to hear an application by the Representor (“the trustee”) for approval of its decision to make a substantial distribution out of the Otto Poon Family Trust (“the Trust”) to the first respondent (“the husband”) in order that he might meet a lump sum order in favour of the second respondent (“the wife”) made against him in divorce proceedings in Hong Kong and thereafter to exclude the wife as a beneficiary of the Trust.

2 At the conclusion of the hearing, the Court gave its approval. We now give our reasons.

Factual background

- 3 The husband and the wife were married in 1968. They are now aged 74 and 75 respectively. They had three children but tragically two of them died leaving no issue. The third respondent ("Karen") is the remaining child and she is 43. She has no issue at present.
- 4 The husband has built up a successful business operated through a large group of companies. The holding company of the group is a company incorporated in Bermuda ("the Company"). The Trust was established by deed dated 25th July, 1995, between the husband as settlor and the trustee. Its main asset is a holding of 84.63% of the shares in the Company. The Trust is a conventional discretionary trust governed by the law of Jersey. The husband is the protector and has the power to appoint and remove trustees. The beneficiaries are defined in the trust deed as the husband, the wife, their three children and any other person born thereafter who is a lineal descendant of the husband. The Trust contains a power to add beneficiaries and this was exercised on 26th January, 1996, when the Hong Kong Polytechnic University was added as a beneficiary. It follows that the current beneficiaries comprise the three living members of the family, namely the husband, the wife and Karen together with the University.
- 5 Clause 3(a) of the trust deed contains a power to remove a person as a beneficiary in the following terms:–

"The Trustee may with the consent in writing of the Protector by instrument in writing revocable or irrevocable before the Vesting Date declare that any person within the definition of Beneficiaries in clause 1 hereof shall cease to be a Beneficiary and as from the date upon which such instrument is expressed to take effect, such person shall cease to be a Beneficiary for all purposes of this Deed."
- 6 Sadly the marriage between the husband and the wife broke down and in 2009 divorce proceedings were begun in Hong Kong with decree absolute being granted on 1st September, 2010. There were contested proceedings for ancillary relief with the wife seeking a substantial order by reference to the assets in the Trust. The High Court of Hong Kong ("the High Court") made an order joining the trustee to those proceedings.
- 7 Following the making of that order, the trustee sought directions from this Court as to whether it should submit to the jurisdiction of the High Court and participate in the divorce proceedings. There was an associated issue as to disclosure. That application came before this Court on 25th August, 2011, and in a judgment of that date this Court approved the decision of the trustee to submit to the jurisdiction of the High Court and to participate in the divorce proceedings. It also approved the general principle of making disclosure to the

wife but no specific order was required. Those proceedings were of course heard in private and the judgment has not hitherto been published. However, given that the judgments in the Hong Kong divorce proceedings are in the public domain, the August 2011 judgment will be published at the same time as this judgment.

The Hong Kong divorce proceedings

- 8 Judgment at first instance in the High Court was given on 10th February, 2012. The Court decided that the assets of the Trust were not a 'resource' of the husband but nevertheless decided that two-thirds of the underlying assets of the Trust should be ascribed in equal shares to the husband and the wife as forming part of their matrimonial assets available for distribution. It further ordered that there should be a departure from the principle of equal sharing in favour of the husband.
- 9 The wife appealed to the Hong Kong Court of Appeal on the basis that the entirety of the value of the Trust's assets should be regarded as available for distribution and that there should be no departure from the equality principle. Judgment was given by the Court of Appeal on 25th March, 2013. The Court of Appeal upheld the High Court's decision that only two-thirds of the assets of the Trust should be regarded as a matrimonial asset available for distribution but held that there was no basis for departing from the principle of equality.
- 10 Both parties appealed from that decision to the Hong Kong Court of Final Appeal. The judgment of the Court of Final Appeal was handed down on 17th July, 2014. In summary it held that:—
 - (i) the entire trust fund (not just two-thirds) should be regarded as a financial resource available to the husband;
 - (ii) there was no basis for departing from the yardstick of equality; and
 - (iii) the wife was entitled to 50% of the combined matrimonial assets of the parties, including the assets of the Trust.
- 11 By the time of the hearing before the Court of Final Appeal, the husband had already paid a total of HK\$380 million to the wife pursuant to the ancillary relief orders made by the lower courts. These had been funded by way of loans made by the trustee to the husband and these loans were in turn funded by way of dividends paid by the Company to the Trust. The trustee had also loaned the sum of HK\$5m in respect of legal costs.
- 12 At the date of the hearing before this Court, the exact amount ordered to be paid by way of lump sum by the Court of Final Appeal had not been ascertained but the parties were agreed that the husband was likely to be ordered to pay a further HK\$390.5 million. The

total award was therefore expected to be approximately HK\$770.5 million together with legal costs.

This application

- 13 It is against that background that the trustee brings the present application before the Court. The husband, who is the chairman of the board of directors of the Company, has procured that the Company declare a dividend in an amount sufficient to pay the remaining amount of HK\$390.5 million together with any costs which the husband is ordered to pay the wife in connection with the divorce proceedings. He has requested the trustee to make a distribution to him of a sum sufficient to enable him to meet the balance of the award made by the Court of Final Appeal and then to exercise its power under clause 3(a) of the trust deed to exclude the wife as a beneficiary of the Trust.
- 14 The trustee has decided to accede to those two requests and, in addition, to treat the loans referred to in paragraph 11 as distributions. It therefore now seeks the approval of the Court to the following decisions:—
- (i) The making of a distribution out of the Trust to the husband for the purpose of enabling him to satisfy the order made by the Hong Court of Final Appeal (including any costs orders against him).
 - (ii) To treat the loans made to the husband so far in the total sum of HK\$385 million as distributions to the husband, with the net effect that the whole of the ancillary relief award made by the Court of Final Appeal in favour of the wife and the payment in respect of legal costs will have been funded by way of distributions out of the Trust.
 - (iii) To exercise its power under clause 3(a) of the trust deed to declare that the wife shall cease to be a beneficiary, such decision only to take effect after the distribution has been made and the husband has complied with the lump sum award in favour of the wife.

The position of the parties

- 15 Although he has not appeared in the proceedings, it is clear from the evidence before us that the husband supports all three aspects of the trustee's application.
- 16 Although she has been convened, Karen has not appeared nor has she made any written submission. The Court does not find this entirely surprising. It may well be the case that she does not wish to take sides between the husband and the wife. Advocate Goulborn, on behalf of the unborn and unascertained beneficiaries supports all three aspects of the trustee's application.

- 17 The wife has filed an affidavit and has appeared through Advocate Robinson. She supports the decision to make a distribution to enable the husband to meet the order of the Court of Final Appeal and she does not oppose the suggestion that existing loans should be treated as a distribution. She does, however, oppose the proposal that she should be excluded as a beneficiary of the Trust.

The approach of the Court

- 18 This is not a case where the trustee is surrendering its discretion to the Court. The trustee has reached its decision but seeks the Court's approval on the basis that it is a 'momentous' decision. In those circumstances the Court's role is well established as set out in *Re S Settlement* [2001] JLR N 37. The Court must satisfy itself that the trustee's decision has been formed in good faith, that the decision is one at which a reasonable trustee properly instructed could have arrived, and that the decision has not been vitiated by any actual or potential conflict of interest.
- 19 No issue arises in relation to the first or third of these matters and accordingly we confine ourselves to whether the decision of the trustee is one at which a reasonable trustee could properly have arrived.
- 20 We can deal briefly with the decision to make the distribution of approximately HK\$390.5 million together with costs and to treat the sum of HK\$385 million already loaned as a distribution.
- 21 In our judgment this is an entirely reasonable decision. As a result of the ruling of the Court of Final Appeal, the husband owes this sum to the wife. It is not suggested that there are other assets from which this sum could be paid and payment is needed in order to bring to an end this long running litigation between the husband and the wife, thereby enabling each of them to move on with their lives. It is of course a substantial sum and amounts to half the trust fund as valued by the Hong Kong courts. Nevertheless, we conclude that the payment is in the interests of all the beneficiaries. It is in the interests of the husband in order to enable him to pay his debt; it is in the interests of the wife in order to enable her to receive the amount which the Court of Final Appeal has ordered; and it is also in the interests of Karen in that it will bring the litigation between her parents to an end. Furthermore, the trustee considers it likely that Karen will ultimately benefit from her mother's estate. Although the total payment of some HK\$770.5 million together with legal costs is very substantial, the remaining assets of the Trust will be equally substantial.

The decision to exclude the wife as a beneficiary

- 22 In her affirmation in support of the trustee's application, Susan Chung, Vice-President in relationship management — Private Wealth Solutions of HSBC Trustee (Hong Kong) Limited (which company administers the Trust on behalf of the trustee) summarises the

events which we have described above and the decisions which the trustee has reached. In connection with the decision to exclude the wife, she says simply at paragraph 29 of her affirmation that, in the light of the substantial sums which have been or will ultimately be paid to the wife out of the Trust, the trustee would regard it as being in the interests of the beneficiaries of the Trust as a whole for the wife to cease being a beneficiary and to be excluded from further benefitting from the Trust.

- 23 Advocate Robinson was very critical of the paucity of this reasoning. He submitted that the Court could only go on the reasons given by the trustee for its decision and that what was contained in the affidavit did not give the Court enough material to justify such an exceptional decision.
- 24 Advocate Robinson drew our attention in particular to the case of *Re Y Trust* [2011] JLR 464, where at para 40, the Court cited with approval from *Lewin on Trusts* 18th edition at para 29–299 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.”

- 25 In addition to complaining about the lack of evidence from the trustee, he put forward the following grounds for opposing the exclusion of the wife, drawing on the wife's affidavit:–

(i) The reasoning in Miss Chung's affidavit referred to above discloses an error in the trustee's thinking. The payments out of the Trust are not to be made to the wife. The

trustee is making a distribution to the husband for his 'benefit' so as to enable him to pay his creditor under the judgment of the Court of Final Appeal. It is not a payment out of the Trust to the wife or for the wife's benefit.

(ii) The wife has been denied the information which is necessary for her to consider and make appropriate submissions on the trustee's decision to exclude her. The figures used by the Hong Kong courts were historical figures. They had not been updated in the light of business developments since then. The wife had asked the trustee for an up to date financial statement of the trust assets. She was still a beneficiary and accordingly she was entitled to see information about the financial affairs of the Trust unless there was good reason to the contrary (see *Re Rabaiotti (1989) Settlement* [2000] JLR 173). She believes that the business of the group has gone from strength to strength since the valuation used for the Hong Kong proceedings and if there has been an increase, the accrued value would not have been reflected in the capital provision which was made for her in the divorce proceedings.

(iii) She believes that she has an important role to play in the future in holding the trustee to account even if she does not expect to receive any benefit herself. In particular, she would like to be able to supervise the trustee in connection with its conduct towards Karen, given that the trustee pays great attention to the views of the husband. A continued presence as a beneficiary would not prejudice the other beneficiaries as the Trust is fully discretionary and she has no entitlement to any particular share of the Trust assets. She thought that Karen needed protection because the trustee had adopted an '*incorrect and unduly partisan approach*' in the divorce proceedings because it had effectively aligned itself with the husband's position.

Decision

- 26 We agree that the affidavit on behalf of the trustee could have been fuller as to the reasons for the trustee's decision to exclude the wife as a beneficiary. Where a trustee seeks the Court's approval, it is incumbent upon the trustee to disclose the reasons for its decision. However, Advocate MacRae has expanded upon the reasons in his written skeleton argument when commenting on the points raised by the wife in her affidavit and he has confirmed, as an officer of the Court, that the terms of the skeleton argument were specifically approved by the trustee and reflect the trustee's views.
- 27 At one stage we considered whether to adjourn the matter in order to receive a further affidavit from the trustee. But on reflection, we decided that the litigation in relation to this family has been going on for long enough and that an adjournment was highly unlikely to produce any new information for us. Any supplementary affidavit would almost certainly simply rehearse what is contained in Advocate MacRae's skeleton and would therefore merely lead to delay and extra expense. In all the circumstances we concluded that we had sufficient information to enable us properly to reach a decision.

- 28 Turning to the points raised by the wife, we take them in the order referred to above. As to the first point, she is of course technically correct in saying that the distribution of HK\$770.5m is made to the husband and is made for his benefit. But one cannot ignore the background to that distribution and the fact that it is made to the husband in order that he can pay the money over to the wife so as to comply with the order of the Court of Final Appeal. The decision of that court was that the wife should in effect receive half the value of the trust fund. Thus, although paid to the husband, it will end up in the wife's pocket; the husband will retain nothing. His only 'benefit' from the distribution is that he will have been able to pay his debt to the wife. She, on the other hand, will be better off to the extent of HK\$770.5m and the Trust will be worse off to that extent. In those circumstances, it is impossible to criticise the view of the trustee in paragraph 29 of Miss Chung's affidavit that it is taking into account the fact that substantial sums have been or will ultimately be paid to the wife out of the Trust.
- 29 As to the second point, we do not have any application before us seeking an order for disclosure of documents or information. The point which Advocate Robinson makes on the wife's behalf is that she is a beneficiary who is entitled to have information about the financial affairs of the Trust and that she should have up to date information so as to enable her to make properly informed submissions on the decision to exclude her.
- 30 We do not think that this is a reason to withhold approval of the decision to exclude her. The wife's request for information must be considered in the context of the particular facts of this case. It is clear that the orders of the Hong Kong courts were intended to effect a clean break between these spouses. The Court of Final Appeal has assessed a fair figure for this clean break at HK\$770.5m, which was half the value of the trust fund on the basis of the figures before the Court. The intention of the trustee is to exclude the wife. In those circumstances we see no justification for the wife seeking up to date information with a view — in the event of it transpiring that the assets have increased — to seeking a further payment or to arguing that she should not be excluded because she might receive a further payment. She has received what the Court of Final Appeal considered fair in circumstances where that court has found that the whole of the trust fund is to be treated as a resource of the husband. In those circumstances, we do not think that the trustee can be criticised for refusing to provide the wife with up to date information; nor do we think that such refusal is any reason to withhold approval of the trustee's decision to exclude her.
- 31 The third ground which the wife relies upon relates to her wish to remain as a beneficiary so as to hold the trustee to account, particularly in relation to protecting Karen's interests. She contends that the trustee adopted an incorrect and unduly partisan approach in the divorce proceedings. She further suggests that the trustee misled the High Court and Court of Appeal into thinking that the trustee could not give effect to the equal division of all the trust assets as the wife was seeking.
- 32 As to this latter point, we can dispose of it promptly. The wife relied upon a comment by the judge in the High Court (repeated in the Court of Appeal) to the effect that:—

“... the Trustee in exercising its duty of safeguarding the interests of all the beneficiaries fairly as between themselves would not I suspect countenance any disposition which results in Karen's interest being diluted to below something in the order of one third ...”

She submits that that was the trustee allowing the Court to gain the mistaken impression that the trustee could not lawfully give effect to an equal division of assets. We have to say that we do not read the judgment in that way. What the judge was saying was that he thought the trustee would not in practice make an appointment which resulted in Karen's interest being diluted below one third. That is very different from saying that the trustee was submitting that it could not lawfully do what the wife was suggesting.

- 33 As to the wife's wider point that the trustee had adopted an incorrect and unduly partisan approach, Advocate Robinson referred to paragraph 143 of the judgment of Mr Justice Ribeiro PJ in the Court of Final Appeal where he said:—

“... as to the trustee's costs ... I note that the trustee was joined on W's application presumably because this was thought necessary in the light of the alternative claim for a variation of the trust. However, the trustee participated by making submissions not just in relation to variation, but also regarding the discretionary trust as a possible financial resource in the ancillary relief proceedings, as it had done in the Court of Appeal. In doing so, it aligned itself with H, arguing for only two-thirds of the trust fund to be treated as an available asset on a basis which I have rejected ...”

- 34 The wife submitted that the trustee ought to have adopted a position of neutrality given that both the husband and she were beneficiaries of the Trust.
- 35 We do not agree that the above extract suggests that the trustee adopted an incorrect or unduly partisan approach in the divorce proceedings or that the Court of Final Appeal thought that to be the case. It was merely pointing out the approach which the trustee had in fact adopted. Indeed the Court of Appeal stated specifically (at para 23 of its judgment) that the position taken by the trustee at trial and on appeal was a neutral one and it made this statement in the knowledge that the trustee was resisting the wife's contention that the whole of the Trust should be seen as a matrimonial asset available for distribution or that the Court should attribute all the trust assets to the husband as a resource.
- 36 This Court specifically gave permission to the trustee to participate in the divorce proceeding in order that it could put forward all arguments which could be put in favour of the beneficiaries of the Trust (other than the husband and the wife) in order to safeguard the interests of those beneficiaries — see paras 10 and 13 of the August 2011 judgment.
- 37 It is entirely consistent with that duty that the trustee should be putting forward arguments which emphasised the interests of Karen as the other beneficiary and which therefore

suggested that not all of the trust assets should be regarded as a resource available to the husband. Speaking more generally, we expect that in many cases where a trustee intervenes in divorce proceedings in order to protect the interests of beneficiaries other than a husband and a wife, the trustee's arguments will end up being in practice more supportive of whichever spouse is seeking to argue that the trust assets are not a resource available to one or other of the parties. Such an approach does not suggest that a trustee is behaving in an incorrect or unduly partisan approach; on the contrary it suggests that a trustee is doing what it should do, namely highlighting the interests of the beneficiaries other than the spouses.

- 38 As to the point concerning the protection of Karen, the trustee is a professional trustee and we see no reason to think that it will not act properly and impartially as a trustee. Karen is a successful businesswoman who holds a senior position in the Company and whom the husband intends to name as protector of the Trust following his death. We see no grounds for thinking that the presence of the wife as a beneficiary is necessary to protect the interests of Karen.
- 39 We do not therefore agree with any of the three points relied upon by the wife. Nevertheless, we must consider whether the decision of the trustee to exclude the wife is one which a trustee could reasonably reach.
- 40 The power to exclude a person as a beneficiary is an unusual power. Normally, powers are exercisable in the interests of the object or objects of the power. A power to exclude is different. Save in the case where there may be tax advantages in a person being excluded as a beneficiary, the exercise of the power is likely not to be for the benefit of the person to be excluded, but instead be for the benefit of the remaining beneficiaries. Where a trustee proposes to exercise such a power, it is incumbent upon it to consider the position very carefully, to take into account the position of the person to be excluded and whether therefore it is a reasonable decision in the interests of the other beneficiaries. An example of where it was concluded that there was not a reasonable exercise of discretion was in *Re the C Trust* [2012] JRC 086B, where the Court struck down a decision to exclude grandchildren from benefit without taking proper account of the financial position of the grandchildren, their likely need for distributions from the trust and other related matters.
- 41 However, we have to say that the circumstances of the present case are perhaps a classic example of where it may well be appropriate to exclude a beneficiary. Indeed it is to be noted that it was the view of the judge of the High Court in the Hong Kong divorce proceedings that this would be a proper outcome when he said at para 134:—

“As between the husband and the wife, this court has ordered a lump sum payment and I will leave it to the trustees to decide how best to address the wife's discretionary beneficial interest in the Trust given the terms of the judgment, the trustee may well be completely justified in extinguishing her interest upon payment to her of the final instalment of lump sum. I will leave it to the trustee to resolve this which may well require the sanction of the

Jersey Courts.”

Our attention was not drawn to any observation of the Court of Appeal or the Court of Final Appeal which disapproved of this observation.

- 42 The wife has, in effect, received half the trust fund. She is aged 75 and will now have HK\$770.5m plus certain other assets giving her a total of HK\$832.5m in her own right. She therefore has ample financial resources to last her for the rest of her life and there is no need for her to remain as a beneficiary of the Trust on financial grounds. Furthermore, the money has been paid to her as part of a divorce order intended to achieve a clean break. It is entirely reasonable in those circumstances that the trustee should conclude that the remaining assets of the Trust should be held exclusively for the remaining beneficiaries of the Trust. The trustee is also, in our judgment, entitled to take into account that, following a divorce, relations between a former husband and a former wife may be difficult and the continued presence as a beneficiary of a spouse who has received a capital sum as a clean break is likely to make it more difficult for everyone to put the divorce proceedings behind them and to move forward with their lives.
- 43 Putting all these matters together, we have no hesitation in approving the decision of the trustee to exclude the wife as a beneficiary as being an entirely reasonable decision. We note and approve that the exclusion will only take effect upon the trustee being assured that the wife has received the sum awarded to her by the Court of Final Appeal.
- 44 For these reasons, we granted the trustee the approval which it sought in its application.