

Representation by the Trustees of the H Settlement

Jurisdiction:	Jersey
Judge:	The Bailiff
Judgment Date:	06 June 2005
Neutral Citation:	[2005] JRC 77
Reported In:	[2005] JRC 77
Court:	Royal Court
Date:	06 June 2005

vLex Document Id: VLEX-792960785

Link: <https://justis.vlex.com/vid/representation-by-the-trustees-792960785>

Text

[2005] JRC 77

ROYAL COURT

(Samedi Division)

Before:

Sir Philip Bailhache, Bailiff.

The Matter of a Representation by the Trustees of the H Settlement

Advocate J. A. Clyde-Smith for the Trustees/Representor.

Advocate P.D. James for the unascertained beneficiaries.

Authorities

In Re the George Richard Pinto Voluntary Settlement [\[2004\] JRC 047](#).

Lewin on Trusts 17th Ed'n Chapters 6–01 to 6–13.

The Bailiff

- 1 This is an application by the Trustees of a Jersey family settlement which I shall refer to as the “H Settlement”. The Court sat in private to hear the submissions of Counsel but this judgment is being delivered in public.
- 2 The application raises a narrow point of construction relating to an Acte of this Court of the 24th May, 1991 which approved a settlement of earlier litigation between members of the extended family.
- 3 It is unnecessary for the purposes of this judgment to describe the earlier litigation, nor the process whereby the Trustees of the H Settlement became vested with the Trust Fund which they now hold. Suffice it to say that they wish to appoint out part of the Trust Fund into a new discretionary settlement.
- 4 I am not asked to consider the merits of the proposed appointment in any way. The trustees are not surrendering their discretion to the Court. I am asked merely to rule, as a matter of law, whether the Trustees have the power to do that which they wish to do.
- 5 The relevant provision is contained in paragraph 7 (a) of the Schedule to the Acte of the Court of the 24th May, 1991 and is in the following terms:

*“In relation to the contingent share of [P], the trustees (other than [P] himself whilst he remains a Trustee) shall have power (“**the power of appointment**”) exercisable from time to time during the trust period by writing under their hands to appoint the whole or any part or parts of the capital and income of the share on such trusts and with and subject to such powers and provisions (including if thought fit discretionary trusts and powers exercisable at the discretion of the trustees or of any other person or persons) as they think fit in favour of [P] and any wife or widow of his and his children or remoter issue and their wives husbands widows and widowers”.*

- 6 The trustees wish to limit the class of beneficiaries in the new discretionary settlement to [P] and his issue. The issue will be defined to include:

“The children and remoter issue of such person through all degrees and any adopted or legitimated person shall be treated as the child of his adoptive or legitimated parents as the case may be and of no other person.”

The class of beneficiaries will not, however, include wives, widows, husbands, and

widowers of P or his issue.

- 7 The issue for me is whether the provision in paragraph 7 (a) of The Schedule to which I have just referred empowers the trustees to limit the class of beneficiaries in that way. In essence the question reduces to a construction of the word “and” where it appears in the last two lines of the paragraph. Is the word “and” to be read conjunctively so that the appointment on trust must be made for the benefit of any spouse as well as of P and his issue; or disjunctively so that a trust for the benefit of P and his issue is permissible?
- 8 Mr Clyde-Smith for the Trustees invited me to reach the latter conclusion. The Trustees had obtained an opinion from Mr Victor Joffe Q.C., and counsel relied upon his analysis. Mr James who appeared on behalf of Advocate Costa, who was in turn appointed to represent the interests of any future wife or widow of P and any future wife, husband widow or widower of the children and remoter issue of P agreed with counsel for the Trustees. The wife of P has written to Court saying that she does not oppose the application of the Trustees.
- 9 I also agree that the construction urged by Counsel for the Trustees is the correct one. The words must be interpreted objectively having regard to all the surrounding circumstances. Those circumstances in this case include the original trust document, the dispute between the members of P's family which was compromised in 1991, the whole Acte of the Court embodying and approving that compromise and the family situation at that time. A number of factors point towards the disjunctive construction as being the correct one. The most important factors seem to me to be as follows.
- 10 First, the 1991 Acte of the Court recited the representation made at that time. Paragraph 10 (d) of the representation provided:
- “It is proposed that the trusts of [P's] share shall be made subject to an overriding power of appointment exercisable by the trustees (other than [P]) in favour of [P] and his issue and their respective spouses: this power will enable benefits to be conferred, during [P's] life as well as after his death, on other members of his immediate family.”*
- 11 The 1991 Acte must be construed as a whole, and it is proper therefore to look at para 10 (d). The subparagraph implies that the power may be exercised during P's lifetime or after his death. Clearly if the power were to be exercised after his death the word “and” preceding “any wife or widow” must be read as “and/or”, and there seems to be no logical reason for reading “and” where it subsequently appears in any other way.
- 12 Secondly, in relation to the power to appoint “the whole or any part or parts of the capital and income” contained in paragraph 7 (a), there can be no justification or sense in imposing a requirement that the trust should compulsorily embrace both capital and income. The context requires an interpretation of “and” as meaning “and/or”.

- 13 Thirdly, if one postulates the establishment of fixed rather than discretionary trusts, the difficulties of reconciling the interests of existing and unidentified beneficiaries become apparent. Would the trustees be obliged to set aside sums for those mentioned in paragraph 7 (a), for example, wives and husbands of P's children who were unidentified at the date of appointment and might indeed never come into existence? Such difficulties do not arise if "and" in paragraph 7 (a) is construed disjunctively.
- 14 Fourthly, the whole thrust of paragraph 7 (a) and indeed of the other parts of the Act, indicates to me the granting to the trustees of a wide discretionary power to establish other trusts in the interests of one or more of the beneficiaries.
- 15 I therefore conclude that the word "and" where it appears in the last two lines of paragraph 7 (a) is to be construed disjunctively, and that the trustees have the power to create the discretionary trust in favour of P and his issue which they are minded to do. An act will issue in the terms drafted by Counsel for the trustees and approved by the Court.
- 16 Finally, I order that the costs of all the parties occasioned by this representation shall be paid out of the trust fund on an indemnity basis.