Representation of VV

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Esq, Jurats Morgan, Nicolle
Judgment Date:	26 October 2011
Neutral Citation:	[2011] JRC 209
Reported In:	[2011] JRC 209
Court:	Royal Court
Date:	26 October 2011

Text

[2011] JRC 209

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, Esq., **Commissioner, and** Jurats Morgan **and** Nicolle.

IN THE MATTER OF THE REPRESENTATION OF V V

AND IN THE MATTER OF TWO TRUSTS

Between
V V
Representor
and
A
First Respondent

B
Second Respondent
C
Third Respondent

and

D
Fourth Respondent

Advocate E. C. P. MacKereth **for the Representor**.

Advocate D. S. Steenson **for the Third and Fourth Respondents (in part)**.

Authorities

Re Moritz (1959) 3 All ER.

Alsop Wilkinson -v- Neary (1996) WLR 1220.

Re Bank of America (Jersey Unreported, 10 January 1995).

Re Evans (1986) 1 WLR 101.

THE COMMISSIONER:

1 On 12 th September, 2011, the Court gave directions in private to the Representor ("V V") in its capacity as trustee of two trusts, which we will refer to as "the E Trust" (established on the 23 rd April, 1999) and "the F Trust" (established on the 14 th June, 2002) respectively, as to the ongoing role it should play in a claim brought by G in the High Court of the Republic of Singapore ("the Singapore proceedings"). G is the former wife of the late settlor of the trusts (who died in 2004). We have given leave for this judgment to be shown not only to the respondents but also to the Singapore High Court so that it can be taken into account by the Singapore High Court to the extent it might find it helpful to do so, in particular on any issues as to costs.

2 The named beneficiaries of the E Trust are the first respondent A (the settlor's daughter by an earlier marriage) and his two children by his marriage to G, namely the third respondent, C and the fourth respondent, D. The named beneficiaries of the F Trust are A and the trustees from time to time of the E Trust.

3 In broad terms, it was the settlor's wish that C and D and their respective issues should benefit from the E Trust failing which A should benefit. In relation to the F Trust, and again in broad terms, it was the settlor's wish that A and her issue should benefit failing which C

and D should benefit.

4 Both trusts are discretionary in form, the E Trust being subject to BVI law and the F Trust to Jersey law. The Court accepted jurisdiction in relation to the E Trust on the basis that V V is resident in this jurisdiction from which the trust is administered. The second respondent is protector to both trusts. He is A's stepfather.

5 G claims that she was the victim of fraudulent misrepresentation and deceit on the part of the settlor in relation to their divorce proceedings, the marriage being dissolved on 6 th October, 2000. The claim is brought against A as executrix of the settlor's estate. Initially G sought to impute the settlor's allegedly fraudulent behaviour to V V, but following an amendment to her pleading, she now seeks to impose a remedial constructive trust on and/or restitution from the trusts and a claim for costs to be paid personally by V V from the date that the pleading was amended, on the basis that, notwithstanding the earlier directions of this Court, V V should have played a neutral role in the Singapore proceedings from that date.

6 C is 20 and D is 22; both are therefore of age. They have instructed Malaysian lawyers Ee & Lim, whose letters on their instructions have been copied to their mother, G. Anticipating that C and D would be likely to pass any information received from V V in relation to this application to their mother, V V have not disclosed to Mr Steenson confidential information as to the advice it has received and the prospects of successfully defending the Singapore proceedings insofar as the trusts are concerned. Pursuant to the principles in *Re Moritz* (1959) 3 All ER Mr Steenson was requested to withdraw from the hearing following his own submissions so that the Court could be addressed by Mr Mackereth on that confidential information.

The Singapore proceedings

7 A is defending the Singapore proceedings in her capacity as executrix of the settlor's estate and on 23 rd March, 2010, this Court directed V V to submit to the jurisdiction of the High Court of Singapore and to defend the proceedings as against itself and the trusts up to discovery. Since then the Singapore proceedings have been very active, pleadings have been filed and discovery made. The matter is now listed for trial during 21 st November to 2 nd December, 2011.

The H Trusts

8 It transpires from the discovery process that the settlor settled assets into other trusts of which H was or is trustee, which formed part of the body of assets to which G maintains a claim, but she has not commenced proceedings against those trusts. V V have ascertained that the beneficiaries of at least one of those trusts consist of her children C and D and her

child from her first marriage.

The role of V V

9 Of the three kinds of dispute described in the well known case of *Alsop Wilkinson -v- Neary* (1996) WLR 1220, it is clear that the Singapore proceedings, insofar as they concern the trusts, constitute "a trust dispute", namely hostile litigation in which G claims that V V holds the whole or part of the assets of the trusts for her and not for the beneficiaries of the trusts. At page 1225, Lightman J considers the position of a trustee in a hostile trust dispute:-

> ***"In*** *Ideal Bedding Co. Ltd -v- Holland* [1907] 2 Ch. 157, ***the plaintiffs, who were judgment creditors, obtained against the trustees of a settlement an order declaring the settlement void as against the plaintiffs and other creditors under the statute 13 Eliz.*** C. 5 on the ground that it "delayed, hindered and defrauded" the plaintiffs and other creditors. The question arose whether one of the trustees who had defended the action ought to have his costs out of the trust estate. Kekewich J. held that the trustee had had a duty to defend the trust as he did and that in his discretion he should have his costs.
>
> ***I do not think that the view expressed by Kekewich J. in the*** *Ideal Bedding* ***case that in case of a trust dispute (as was the dispute in that case) a trustee has a duty to defend the trust is correct or in accordance with modern authority.*** In a case where the dispute is between rival claimants to a beneficial interest in the subject matter of the trust, rather the duty of a trustee is to remain neutral and (in the absence of any court direction to the contrary and substantially as happened in *Merry's* case [1898] 1 Ch. 306) ***to offer to submit to the court's directions leaving it to the rivals to fight their battles.*** If this stance is adopted, in respect of the costs necessarily and properly incurred e.g. in serving a defence agreeing to submit to the courts direction and in making discovery, the trustees will be entitled to an indemnity and lien. If the trustees do actively defend the trust and succeed, e.g. in challenging a claim by the settlor to set aside for undue influence, they may be entitled to their costs out of the trust, for they have preserved the interests of the beneficiaries under the trust: consider In *re Holden, Ex parte Official Receiver* (1887) 20 Q.B.D. 43. ***But if they fail, then in particular in the case of hostile litigation although in an exceptional case the court may consider that the trustees should have their costs (see*** *Bullock -v- Lloyds Bank Ltd* [1955] 1 Ch. 317) ***ordinarily the trustees will not be entitled to any indemnity, for they have incurred expenditure and liabilities in an unsuccessful effort to prefer one class of beneficiaries e.g. the express beneficiaries specified in the trust instrument, over another e.g. the trustees in bankruptcy or creditors, and so have acted unreasonably and otherwise than for the benefit of the trust estate: consider R.S.C. Ord. 62, r.6; and see*** *National Anti-Vivisection Society -v- Duddington*, The Times 23 November 1989 ***and Snell's Equity, 29th ed.*** (1990) p. 258".

10 This case establishes a principle of neutrality where there are rival claims to the beneficial interests in the trust property, subject, of course, to any alternative directions that the Court may give. Inherent to the concept of rival claims is that there are parties able and willing to prosecute and defend the same, thus leaving the trustee in a neutral role. In (*Re Bank of America* Jersey Unreported, 10 January 1995) the Court considered whether the principle of neutrality in respect of a trust dispute (in the *Alsop Wilkinson* classification) still held true where there "was no rival on the field to fight the battle against the plaintiff". In that case the court declined to order the trustee to take an active role in the proceedings, in circumstances where one party to the dispute had already been determined to be a fraudster. However, the Court was ***"troubled"*** by the prospect of one-sided litigation if the trustee had remained neutral and there was no one else to ***"take up the cudgels"***.

11 In *Re Evans* (1986) 1 WLR 101, a case in which the administrator of an estate sought leave to defend proceedings against the estate and an indemnity from the estate for so doing, Nourse LJ expressed the following view:-

> ***"In my view, in a case where the beneficiaries are all adult and sui juris and can make up their own minds as to whether the claim should be resisted or not, there must be countervailing considerations of some weight before it is right for the action to be pursued or defended at the cost of the estate.*** I would not wish to curtail the discretion of the court in any future case but, as already indicated, those considerations might include the merits of the action. I emphasise that these remarks are directed only to cases where all the beneficiaries are adult and sui juris. The position might be entirely different if, for example, one of the beneficiaries was under age."

12 The important question in this case is whether there is an appropriate person to contest G's claim against the assets of the trusts.

13 C and D's position is that they wish the trustee to take a neutral role. Bearing in mind their age, it is not clear to V V that they are acting independently of their mother's wishes and they are certainly taking a position which is adverse to their strict financial interests as beneficiaries.

14 As Mr Steenson pointed out, the interests of the beneficiaries can extend beyond purely financial considerations and can include moral obligations, for example, that C and D may feel towards their mother. There is a conflict between their interests as beneficiaries of the E Trust (it being the settlor's wish that they should benefit from it) and the interests of A in the F Trust (it being the settlor's wish that she should benefit from it), which made it difficult to support Mr Steenson's initial submission that V V should, at the instance of C and D, be neutral in respect of both trusts. In the end he submitted that V V should be directed to be neutral in respect of the E Trust and that any costs incurred in the litigation should be visited upon the F Trust. In the context of the claim as pleaded, it is difficult to see how V V could be expected to defend one trust but not the other.

15 A is a party to the Singapore proceedings as executrix and not as a beneficiary of the trusts. Given the very compressed timetable between now and the hearing it is very late in the day to expect a new party to be joined and present an effective defence of the assets of the trusts. It is also apparent that A's position as a beneficiary of the F Trust and C and D's position as beneficiaries of the E Trust are in conflict, in that it is in A's interest to argue that the whole burden of any remedial constructive trust should fall on the E Trust and not on the F Trust. There is also a tension between A's role as executrix (in which she is to be expected to argue that if there is a liability, it should not be attributed to the estate) and as beneficiary of the trusts. A's position therefore is that V V should defend the trusts.

16 Mr Mackereth addressed the Court in confidence in relation to the advice it had received as to the merits of any defence to the claims against the assets of the trusts, which for obvious reasons it would be inappropriate to go into in this judgment. Suffice it to say that we were satisfied that it was in the interests of the two trust estates that they be defended against these claims (but not the claim in fraudulent misrepresentation made against the settlor and his estate) and also in order to secure as advantageous an outcome as was reasonably possible.

17 None of the beneficiaries were prepared or were in a position to “take up the cudgels” on behalf of the trusts and in the light of this advice it would not be appropriate to allow these claims to go by default. Whilst ordinarily, we would expect V V to take a neutral stance, in these special circumstances we concluded that it was the only person in a position to defend the trusts and it was directed to do so. We also gave V V its costs for doing so out of the trust funds.