

The Representation of Equiom Trust (CI) Ltd (“The Trustee”)

Jurisdiction:	Jersey
Judge:	Deputy Bailiff
Judgment Date:	21 September 2021
Neutral Citation:	[2021] JRC 235
Court:	Royal Court

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Text

[2021] JRC 235

ROYAL COURT

(Samedi)

Before:

R. J. MacRae Esq., Deputy Bailiff, **and** Jurats Crill **and** Austin-Vautier

In the Matter of the Representation of Equiom Trust (CI) Limited (“The Trustee”)
And in the Matter of the Hugo Trust (“The Trust”)
And in the Matter of Articles 47 and 53 of the Trusts (Jersey) Law 1984 (As Amended)

Advocate F. B. Robertson for the Representor.

Authorities

Trust (Jersey) Law (as Amended) 1984.

Representation of Y Trust and Z Trust [\[2017\] \(1\) JLR 266](#).

Representation of Rysaffe Fiduciaires Sarl re G 2000 Trust and G 2008 Settlement [\[2021\] JRC 230](#).

Trust — application to vary the trust

Deputy Bailiff

THE

- 1 On 9th September 2021, we granted the Trustee's application to approve the variation of the Trust on behalf of the minor and unborn beneficiaries. We now give reasons for our decision to do so.
- 2 By a Will and two codicils made in Jersey by the Settlor on 9th September 1970, probate being taken out in the Royal Court on 24 January 1972, the Trust was established. The Trust itself is in short form and is contained within the Will of the Settlor, which was witnessed by Advocate Ralph Vibert on execution.
- 3 Although there is no statement in the Trust that it is governed by Jersey law, by implication it is and, in any event, it has always been administered in Jersey.
- 4 The Representor ("the Trustee") has been Trustee of the Trust since 2016.
- 5 The life tenant, pursuant to the Trust, is the first cousin twice removed of the Settlor, namely B.
- 6 After reciting the life interest of B, the Trust provides as follows:

"13G. On the death of the said [B] [sic] to divide the capital and income of my Trust Fund between such of his children as may survive him if more than one in equal shares BUT should he die without leaving issue, to pay the income thereof to the said [C] for her life on condition that should she then have ceased to be known by the surname of [REDACTED] because of her marriage or otherwise she adopts the said surname by Deed Poll within six months of the death of the said [B] [sic] or of this Will being proved whichever shall be later AND on the death of the said [C] or should she fail to adopt the surname [REDACTED] as aforesaid to divide the capital and income between such of her children as are living at the death of the said [B] [sic] or after her death whichever shall be the later if more than one in equal shares PROVIDED THAT should any of the children of either [B] [sic] or [C] have predecease[sic] the said

[B] [sic] or the said [C] as the case may be leaving issue surviving the same such issue shall take if more than one in equal shares "per stirpes" the share which his her or their parent would have taken had he or she survived the said [B] [sic] or the said [C] as the case may be."

- 7 Accordingly, it can be seen that on the death of B, the Trust, as currently drawn, terminates and the assets of the Trust are to be divided between his children or, if he were to die without leaving issue, to his sister C.
- 8 In fact, B has three adult children and they each have two children of their own, aged between five and eighteen. Save for the eighteen year old, all are minors.
- 9 The Trust, importantly, makes no provision for B's wife, D, who is slightly younger than B and may, of course, survive him. The assets of the Trust are the family home in which B and D have lived since 1978, and a portfolio of shares and similar assets with a total value approaching £1 million.
- 10 The proposal to vary the Trust was supported by all the other beneficiaries, by the parents on behalf of their children and any unborn heirs, and by counsel appointed to represent the minor and unborn heirs of B and D's three children, who filed written submissions with the Court to that effect.
- 11 B's sister is over the age of fifty-five and, pursuant to Rule 2 under Article 36 of the Trust (Jersey) Law (as Amended) 1984 ("the Law"), a woman who is over the age of fifty-five shall be deemed to be no longer capable of bearing a child. Nonetheless, even though she declares that she has no wish to do the same, B's sister might adopt a child in future and, accordingly, she was appointed guardian on behalf of any unborn beneficiaries attributable to her.
- 12 There have been various discussions and meetings between family members over the last eighteen months or so. The upshot of those discussions is that all the adult beneficiaries agree that the Trust should be varied. In summary the draft Trust as varied provides that after the death of B his wife should be entitled to a successive life interest in the income of the Trust and be permitted to continue to reside in the family home. The adult children of B and D do not wish the Trust to terminate on the death of their father, and believe it is in the interest of the family as a whole to allow their mother, and the grandmother of their children, to continue to reside in the family home.
- 13 The draft Trust also provides that, with the consent of the life tenant (B), or the successor life tenant (D), the Trustee may also, during their lifetimes, exercise an overriding power of appointment in favour of other beneficiaries, in particular in benefitting their grandchildren. B said to us that he wished to assist his eldest grandchild who is about to start a degree at university. This, of course, is not possible under the Trust as currently drawn. B's son told

the Court that, speaking for himself and his sisters, they wanted to ensure that their mother could continue to live at home; and that they were grateful to the Settlor for his generosity in giving the family the opportunity to allow them and their children to benefit from the Trust.

- 14 The varied Trust will provide that, following the death of the successive life tenant (if she survives the life tenant), the beneficial class should include the three children of B and D, and the grandchildren and remoter issue of B.
- 15 All family members take the view that it is self-evidently in the interests of the minor grandchildren and unborns for the Trust to continue. This may assist with school and university fees in due course.
- 16 It will also avoid a significant liability to UK tax on termination of the Trust, which would arise if the Trust were to terminate on the death of B. This is the subject of tax advice taken by the Trustee that was exhibited in the Trustee's affidavit.
- 17 It is not necessary to set out the terms of that advice, as the tax consequence of the variation is only one of the reasons for variation in this case. The principal reasons for the proposed variation are to benefit D, B's grandchildren and their issue. As the tax adviser notes, the effect of the variation is that D will no longer be left in a precarious position in relation to both her residence of the family home and her financial affairs, and the whole family will be able to 'benefit on a dynastic basis', rather than subjecting them to a 'large tax bill'. It is proper to observe that the intention of the Settlor was that the Trust should terminate on the death of B. However, as was made clear by the Royal Court in *Representation of Y Trust and Z Trust* [\[2017\] 1 JLR 266](#) when considering approving a variation to a trust on behalf of the minor and unborn beneficiaries, the wishes of the settlor are not, in fact, relevant when evaluating the benefit to the persons whose interests must be considered and safeguarded by the Court. As the Court had said at paragraph 35 in that case:

“35. The consistent theme of the English decisions is that the court, in considering whether to exercise its discretion, will have some regard to but will not necessarily follow the wishes of the settlor, but only where those wishes are relevant to the question of whether the proposed arrangement is beneficial to those for whom the court is concerned. The other way of putting that test is that where the court is satisfied that a proposed arrangement is beneficial to those on whose behalf it is asked to sanction the variation, the fact that the variation might be contrary to the wishes of the settlor or testator is not material.”

- 18 As the Court said in that decision, in accordance with previous and subsequent Jersey authorities, 'benefit' for the purpose of Article 47 of the Law should be construed widely. In *Y Trust and Z Trust*, the Court said at paragraph 22:

“22. Accordingly, the court has jurisdiction to approve an arrangement on behalf of minors and those who might become entitled to an interest under the trust, including any person unborn, which varies or revokes the terms of the trust or enlarges the powers of the trustee. Paragraph (2) makes it plain that the court should not approve the arrangement unless it concludes that the variation is for the benefit of the minor, unborn and unascertained beneficiaries, and of course it must be satisfied that the case is a fit and proper one in which to exercise its discretion to make the order .

23. There has been a limited number of applications to the Royal Court for approval to variations. Indeed, only six such cases have been cited to us. The seminal case is *In Re Osias Settlements* [[1987 – 1988] JLR 389]. That was an application under what was then art. 43 of the Trusts Law, seeking the court's approval of an arrangement varying the trusts of two settlements governed by Jersey law such that the trusts would be constituted under Florida Law and the funds in Jersey transferred to trustees resident in the United States. The reason for the application was that the holding of the trust assets in companies incorporated in Jersey turned out to be disadvantageous to the primary beneficiaries and potentially to the unborn and unascertained beneficiaries since they would be liable to pay US income tax, and that the holding of the trust assets for the issue on irrevocable trusts governed by Florida law would be for the benefit of all beneficiaries.”

- 19 The meaning of the word ‘benefit’ has been recently considered in a number of Jersey authorities and was summarised as follows in the *Representation of Rysaffe Fiduciaires Sarl re G 2000 Trust and G 2008 Settlement* [\[2021\] JRC 230](#):

“53. The Court was concerned about the position of the minor and unborn beneficiaries, particularly of the 2008 Settlement as they were, by reason of the proposal to be excluded from benefit thereunder in large part .

54. In respect of the unborn children of the “remote beneficiaries” Advocate Evans submitted that as it was accepted that the interests of their parents and grandparent were remote, the same applied to their potential interest. He observed that the Trustee's proposals were consistent with the wishes of the Settlor's and the Court was reminded of its observations in relation to “benefit” in the *Wigwam Trust* [\[2020\] JRC 228](#) and the decision in the *May Trust* [\[2021\] JRC 137](#). This is not an application to vary a trust under Article 47 of the Law but in such cases, and indeed this case, on the authority of the cases referred to above and the cases referred to within them, we adopt a wide definition of benefit which is not restricted to financial benefit. In the latter case, the position was summarised by Commissioner Sir William Bailhache as follows:

“61. In summary, the decision of a trustee that a particular appointment is for the benefit of a beneficiary in the case of a

discretionary trust must of course be one to which the trustee could reasonably arrive having regard to the terms of the deed. In making that journey, the trustee will have regard to the law which is to the effect that “benefit” is to be widely construed. Thus, unless the deed otherwise provides, “benefit” as a matter of principle:

(i) goes wider than financial benefit and includes donations to charity (Re Wigwam), the payment of debts to HM Revenue (Re Bolan) and avoiding the detriment of parents of beneficiaries facing large tax claims arising from the transfers into the trust which they have made (Re N).

(ii) may include the application of trust monies to provide social or educational benefits for the beneficiary in question .

(iii) may include the application of trust monies in discharge of a moral obligation which the beneficiary, in receipt of the appointment which the trustees have resolved to make in his favour, accepts is one that should be discharged from that appointment.”

55. In this case the proposal will achieve a global settlement in respect of all issues relating to the trusts and the Estate; it ensures that there will be no litigation between the beneficiaries, in particular it does away the need for any future litigation before the English courts; it provides for a clean break and a separation out of the interests of different branches of the family by way of the separation of the interests of the widow and stepchild under one trust and the other principal beneficiaries by way of sub funds under the 2008 Settlement and provides properly for a reasonable and appropriate provision for the Settlor's widow and for a reasonable standard of living for her in the future .

56. All these arrangements are to the ultimate benefit of all beneficiaries including those as yet unborn.”

20 The Court considered carefully the terms of the varied Trust, which contains all the provisions that one would anticipate in a modern Trust instrument. Accordingly, it contains provisions that are entirely absent from the Trust currently drafted, including provisions in relation to change of proper law; overriding powers of appointment; addition and removal of beneficiaries, and a variety of trustee powers.

21 We were in no doubt that it was appropriate for the Court to supply, on behalf of the minors and unborn, its consent to this variation of the Trust so that the adult beneficiaries can execute, as they must, the instrument of variation so that it has effect in the terms that they have all agreed.

22 The Court, pursuant to Article 47(2) shall not approve an arrangement on behalf of such

persons unless the carrying out thereof appears to be for their benefit. In the circumstances, we had no doubt that the proposed variation benefitted those persons that the Court is required to protect and we therefore approved the variation.