A Settlement

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Clapham, Newcombe
Judgment Date:	25 November 2009
Neutral Citation:	[2009] JRC 223
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Date:	25 November 2009

Text

[2009] JRC 223

ROYAL COURT

(Samedi Division)

Before:

J. A. Clyde-Smith, **Esq., Commissioner and** Jurats Clapham **and** Newcombe

In the Matter of the B Settlement

And in the Matter of The D Settlement

And in the Matter of The C Settlement

And in the Matter of Article 51 of The Trusts (Jersey) Law 1984

RBC Trust Company (Jersey) Limited
Representor

and

E

F

G

H

I

K

First Respondents

Advocate Claire Davies, appointed to represent the grandchildren and remoter issue of D

Second Respondent

L

J

N

M

O (both on their own behalves and representing their own children and remoter issue)

Third Respondents

J

P

Q (both on their own behalves and representing their own children and remoter issue)

Fourth Respondent

Advocate D. M. Cadin **for the Representor**.

Advocate A. D. Hoy **for the First Respondents**.

Advocate S. J. Young **for the Third and Fourth Respondents**.

Advocate C. R. G. Davies **was released from the hearing**.

Authorities

Re S 2001/154.

In re Drexel Burnham Lambert Pension Plan (1995) WLR 32.

Trusts (Jersey) Law 1984.

Lewin on Trusts (18th edition).

IMK [2008] JRC 136.

THE COMMISSIONER:

1 This is an application for further directions in a matter upon which the Representor ("RBC") has been seeking the guidance of the Court since June 2007. This is however the first occasion upon which all of the beneficiaries have been convened. We summarise first the

background.

Background

2 RBC is trustee of three settlements settled by three brothers (now deceased); the settlements taking their names, viz. the B Settlement, the C Settlement and the D Settlement. The family of each brother are the principal beneficiaries of each settlement but there is, as Mr Cadin put it, cross-fertilisation in that to a greater or lesser extent, each family has a beneficial interest in the settlements of the other.

3 The assets of each of the settlements are held in the main through a jointly owned Jersey registered holding company called EE administered and controlled by RBC. EE has interests in a number of Irish companies which are managed and controlled by members of the D family, namely one or more of F, G and H ("the D Directors"). Any dividends received by EE from those Irish companies are passed on up to the settlements in equal shares.

4 Between 2001 and 2002, the beneficiaries of the B Settlement and the C Settlement raised concerns with RBC as to the management of the Irish companies by the D Directors. RBC sought information from the D directors but on the evidence of RBC, they were reluctant to cooperate. Consequently, it resolved to procure, through EE, the appointment of a majority of directors to the Irish companies, such majority to include W of DD, chartered accountants, for the purpose of W investigating the Irish companies and reporting to it. The Court ratified that decision on 7 th June, 2007, and directed RBC, *inter alia*, to proceed. Those directions were implemented in respect of those companies which were wholly owned by EE, but not in respect of one company, AA in which EE only held a 50% interest. RBC's attempts to appoint a majority of directors to AA were successfully resisted by the D directors and the other shareholders of AA.

5 On 1 st May, 2009, RBC sought further directions following receipt of a draft report from W into the Irish companies, following what was clearly a lengthy and complex assignment, which concluded on the basis of the information that had been made available, that:-

Because of these potential tax issues W and his associates resigned as directors of the Irish companies to which they had been appointed leaving the D directors in control.

(i) Much higher directors' remuneration than would normally be expected had been paid by the Irish companies to the D directors, some of which had not been accounted for in a transparent way, but which W considered, on balance, to be justified.

(ii) There had been potentially excessive secretarial and administration expenses and group charges levied against the Irish companies by entities controlled by the D directors.

(iii) There were consequently potentially unpaid taxes due by the Irish companies

together with interest and penalties.

6 The potential tax liabilities were significant. RBC had been advised that were the Irish Revenue itself to demand an investigation, it could as part of that investigation recover any unpaid liabilities going back as far as 1974/75 and that such investigation would be unlikely to stop with the underlying companies, but would probably eventually involve the settlements and/or beneficiaries. The costs occasioned by such investigation would be significant. Moreover, notwithstanding that the Irish Revenue might impose penalties and interest going back to 1974/75, there is a prescription period for actions against directors which might preclude the shareholders from recovering damages from the D directors in respect of any penalties and interest claimed for the period before 2003. RBC sought an adjournment of 10 weeks to enable it to liaise with the D directors to explore options for resolving the issues that had arisen and to inform the beneficiaries of the development, but in summary terms only. The Court approved its proceeding in that matter and made a number of other directions including, *inter alia*, a direction that RBC was not to make any distributions or appointments out of the D Settlement to the immediate family of D so as to preserve its freedom of action should it transpire that members of the D family had benefited improperly.

7 RBC's attempts to progress these matters with the D directors have come to nothing and accordingly on 2 nd July, 2009, the Court convened the beneficiaries of all three settlements to a hearing which took place on 14 th October, 2009.

Assets of the trusts

8 Leaving aside cash within each settlement, EE currently has cash of €500,000. Its interests in the Irish companies are as follows:-

All three companies have potential claims against the D directors (or other entities controlled by them) for allegedly excessive directors remuneration and secretarial and administration expenses with consequential potential tax liabilities. The B and C Settlements also own one sixth each of two other Irish companies BB and Y which are again controlled by the D directors.

(i) Through an intermediate holding company it wholly owns CC which is a dormant Irish company with cash of €12,769. CC is managed and controlled by the D directors.

(ii) It wholly owns Z, an Irish company managed and controlled by the D directors. This has assets valued at €2.9 million comprising cash, a two-bedroomed apartment currently valued at €495,000, and a commercial property in Dublin. This property had been valued by Knight Frank at €2,150,000 but it cannot be sold until 2010 in order to avoid a claw-back in taxation. The current market, as in most places, is affected by the credit crunch and is not favourable.

(iii) It owns 50% of AA which currently has assets of some €2.8 million, comprising cash and two residential flats in Dublin.

Potential claims against CE directors

9 For the purpose of these directions, it is helpful to illustrate the concerns reported by W by taking Z as an example as follows:-

(i) From 1990 to 1999 inclusive the total directors' remuneration was €212,415, an average of €21,241 per annum. In the period from 2000 to 2007 inclusive, the total directors' remuneration including termination payments was €304,738, an average of €38,092 per annum. In addition, during this period, the directors received a further €95,425 netted off from the disposal of properties (and thus not transparent).

(ii) In the period 1990 to 1999 inclusive the total administration expenses were €181,146, an average of €18,115 per annum. In the period 2000 to 2007, the total administration expenses were €634,672, an average of €79,334 per annum. These latter charges represented 58% of the rental income.

10 The D directors say the directors' remuneration was justified because it took account of and compensated them for payments in earlier years which were not commensurate with the work undertaken and to reflect additional work actually undertaken by them in later years. They say the administration charges consist of a contribution towards group overhead costs (by group we mean other companies controlled by the D directors) which have been paid by Y and BB and which should be properly allocated to Z because they are costs which have been incurred by Z in connection with its business activities and the work performed by its directors.

11 W on balance thought the directors' remuneration was justified. The third and fourth Respondents have advice that the overall level of management compensation for CC and Z was excessive.

12 Mr Cadin drew our attention to an e-mail sent to H by GG, an Irish tax adviser, on 6 th September, 2006, commenting upon the directors' commission on the sale of the premises as follows:-

"Where the directors' commission on the sale of the premises is concerned — The expense that is liable is the incidental expense of making disposal —I would expect auctioneers', solicitors', accountants' fees would fall in here. I do not think the directors' commission was necessary to sell the properties – I think Revenue would argue that it is really an appropriation of gains or profits. However, I think the fact that the articles of association provided for this commission probably gives you a legal right to the commission and as such it is a legal burden arising out of the sale and should be provided against the gains

arising – once the property was sold the commission became payable."

13 Irrespective of the position under the articles it might be expected that the D directors would seek shareholder approval for their direct and indirect compensation in relation to all the Irish companies bearing in mind their conflict in awarding the same to themselves. They would not appear to have ever done so.

Surrender of discretion

14 At the directions hearing on 1 st May, 2009, the Court accepted the surrender of RBC's discretion as trustee as a result of a number of conflicts which arose:-

Viewed objectively, RBC was concerned that any steps it would or could take could be criticised on the grounds that it had or may have had or may have appeared to have a conflict. Applying the principles set out in *Re S 2001/154*, we agreed with RBC that it had good reason to surrender its discretion.

(i) W's advice was and RBC's inclination as a regulated financial services business would be to liaise with the Irish Revenue over the tax issues. However, RBC recognised that unfettered by other considerations a trustee might choose a wholly different path which might protect the settlements and the beneficiaries to a great extent, albeit exposing them with the passage of time to delay and the potential consequences thereof.

(ii) RBC would not wish and still does not wish to appoint any of its own employees to the position of director of any of the Irish companies for a number of reasons including the tax issues.

(iii) RBC was of the view that losses may have been caused to the settlements and/or inappropriate benefits may have been taken by the D family from the Irish companies and accordingly there should be a prohibition on any further distributions to the D family pending further order of the Court. Such a move would potentially engender conflict between the three families and thus the three settlements and the trustee.

15 At the hearing on 14 th October, 2009, RBC sought to surrender its discretion again on the basis of the same conflicts but now enhanced as a result of the D family making allegations (to which we come below) of the charging by RBC of excessive fees for a disreputable purpose, i.e. a personal attack upon RBC. In seeking to surrender its discretion RBC had not abandoned the problems to the Court but had provided very full documentation, has set out for consideration the various options open to the Court and prepared a draft order which has served as a useful agenda for discussion.

16 Mr Young for the third and fourth Respondents queried whether it was necessary for RBC to surrender its discretion and both he and Mr Cadin referred us to *In re Drexel Burnham*

Lambert Pension Plan (1995) WLR 32, a case in which the trustees of a pension scheme sought the directions of the English Court as to the exercise in a particular way of the discretion vested in them in relation to the winding up of the scheme amongst the several categories of beneficiaries, of which some of the trustees were themselves members. It was held that notwithstanding the general rule of equity preventing a person from placing himself in a position where his fiduciary duty and his personal interest conflicted, the court had jurisdiction to give directions notwithstanding that the proposals for winding up the scheme had been instituted by trustees in a position of conflict. In that case a number of "escape routes" were not open to the trustees. Quoting from the judgment of Lindsay J at page 39G:-

> ***"Before I return to the 'general rule' in more detail, I must first mention why two particular escape routes (if I might so describe them) from it are here, if not barred, then at least highly inconvenient.*** The first is the route by which trustees placed in the position of conflict surrender their discretion to the court. The way in which the trustees propose here to exercise their discretion is very far from being the only reasonable way in which the discretion could be exercised. If the court were now or later to turn from asking whether the trustees' proposals were ones which they could properly be given general liberty to carry into effect to the different question of how should the court, having the trustees' discretion surrendered to it, exercise that power, not only the trustees but equally the four classes of beneficiaries would, I am told, wish to file further evidence and, on the strength of it, each class of beneficiaries would then press for the adoption of proposals more favourable to each respectively than is the present proposal. There would be considerable delay and further expense. Indeed Mr Thomas for 'male deferreds,' a class which sees itself as little advantaged by the present proposals, is confident on the mathematics that so great would be the further costs that would be involved that the money seen as otherwise likely to be applicable to the advantage of his class by the present proposals would be eaten up in costs and that it would then be difficult to formulate fresh proposals which he would commend to his class. Another difficulty, were there to be a surrender of the kind I described (although I confess to seeing it as rather shadowy), is that Holdings, which has bound itself by compromise 'not to oppose the application of the whole … of the funds … in providing and or maintaining the benefits under the scheme' might, if the present proposals are not implemented and if instead a tabula rasa were presented to the court, feel itself able to appear afresh and ask for provision for itself and even ask, perhaps, for the compromise to be set aside. Were that to occur there would be very adverse implications and yet further costs, delays and difficulties in the formulation of an attractive scheme.
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> ***A second escape route would have been the resignation of these four present trustees and their replacement by new trustees – likely to be professionals – who would be free of any possible conflict and who could start afresh with the formulation of proposals.*** In practical terms the objections are much the same as to a surrender of the discretion to the court. There would be further, and probably even greater, delay and expense such

that the ultimate formulation of proposals which would commend themselves to all would be seriously jeopardised. What it comes to is that the court is pressed not to inflict these alternatives on the parties unless it really has to."

17 The possibility of RBC resigning from the D Settlement has been canvassed but it is not something sought by any of the three sets of beneficiaries. The true conflict is not between the beneficiaries of the three settlements but between the D directors, who may have improperly benefited, and the remaining beneficiaries of the D Settlement and the C and B Settlements. Furthermore, resignation would simply move the conflict down to the level of EE and leave the D Settlement in the position of a minority shareholder, exposed to the will of the C and B Settlements. Unlike the position in the *Drexel* case, surrender is here an escape route from RBC's conflict. The beneficiaries have been convened and are represented and accepting surrender will not therefore cause any further delay or expense. There is however no alternative to RBC continuing in office as trustee of all three settlements, notwithstanding its conflict, until the issues between the settlements are settled.

Issues before the Court

18 The following live issues were before the Court:-

We take the first two issues together.

(i) The actions of the D directors and the tax affairs of the Irish companies.

(ii) The separation of the interests of the settlements or some other resolution or programme for resolution.

(iii) The steps taken by RBC on the direction of the Court in relation to:-

(a) The distributions to the family of D.

(b) Protecting the assets of Z.

(iv) The first Respondents' representation in relation to RBC's fees.

The actions of the directors and separation of interests

19 The first Respondents filed two affidavits by H setting out the background to the matter from their perspective, two affidavits from HH, an independent accountant from the firm II in Dublin, and an affidavit from S of JJ. who act as auditors for Z and CC and have prepared the tax returns for those companies.

20 The first Respondents believe that the evidence filed by RBC in this matter has given the Court an inaccurate and one-sided view of the relevant background. They repudiate the

assertion that the D directors have failed to cooperate with RBC and regard the whole approach of RBC as disproportionate and unwarranted. Very substantial costs (they estimate in excess of £2 million) have been incurred by RBC to the detriment of the beneficiaries of all three settlements. The steps which have been taken and the costs which have been incurred as a result have been wholly disproportionate, they say, to any genuine issues which ever existed in this matter.

21 In her report, HH concludes that all assessments for Z and CC for the years 2000 to 2003 are final and conclusive. In the absence of negligence on the part of the directors in respect of returns filed, the Revenue Commissioners cannot amend them. In her opinion there is no evidence of negligence having occurred in respect of any of the matters referred to in her report. The Irish Revenue Commissioners would be permitted until the end of 2009 to audit the tax returns for Z and CC for 2004. However, this does not create any obligation on the directors to bring any matters to the attention of the Revenue Commissioners in the absence of negligence in respect of any matters contained in any return. In her opinion, neither CC nor Z have any obligations to contact the Irish Revenue Commissioners regarding the tax returns submitted for the period 2000 to 2004.

22 In his affidavit, S confirms that he prepared the tax returns for Z and CC for the years 2000 to 2004 and that they were submitted to the Revenue Commissioners on time and were a true and correct reflection of the tax affairs of both companies for each of those years. Furthermore, he confirmed that the level of fees incurred by the directors in respect of the management of properties owned by the companies were reasonable, having regard for work undertaken by them and that the administrative expenses and inter-company charges were incurred wholly and exclusively in connection with the activities of the companies and were properly accounted for in the books of the companies and in the financial statements. They were reasonable, having regard to the activities undertaken by the companies and there was no profit element in them.

23 In relation to W's report HH concluded that it does not set out any basis for finding that there are outstanding tax liabilities in respect of the Irish companies and further that the content of the report does not establish any grounds on which to make contact with the Irish Revenue in relation to these matters.

24 DD have considered the affidavits from HH and S and in their letter of 7 th October, 2009, state that they do not alleviate their concerns in relation to the taxation issues. They say the very unequivocal statement of S is not supported in any way by relevant documentation and their review of the documentation provided to them and used in the preparation of the report still lead them to have doubts at this stage about the accuracy of S's statement. They say they sought on a number of occasions to meet with S to discuss their concerns and to review his files supporting the tax returns submitted by the companies, but were prohibited from doing so by H and G. In relation to HH, she does not refer when stating her opinions, to any examinations of the underlying records and advices and they believe it is necessary to examine the same to arrive at a definitive conclusion. They consider, based on the

information available to them at present, that their concerns have considerable justification. To progress matters to a conclusion for the companies, they set out in their letter the information they need to see.

25 It is clear that from an early stage there was a divergence between the beneficiaries of the C and B Settlements and those of the D Settlement. The former took the view that the property activities of the group should be wound down, the investment properties sold and the net proceeds returned to the shareholders. For the D directors, the plan for the property companies had always been that they would operate for the long term earning rental income from the tenants of the properties, maximising upward only rent reviews on the commercial properties and with an orderly disposal of particular properties as and when it made commercial sense to do so. Over time the different and opposing objectives of the families led to a serious deterioration in their relationships. According to the D family, RBC became a participant in the conflict and from 2004/2005, embarked on a heavy-handed and litigious approach, placing ever increasing demands on the D directors to provide more and more information with no regard to the time, effort and resources that were required in order to deal with these matters and the cost implications.

26 The Court is not in a position and it would be inappropriate in these proceedings for directions to make findings in respect of these matters. The current position is that RBC is in possession of preliminary advice in relation to the tax issues and further information is required for that advice to be completed. RBC and the parties would then have a clearer idea as to whether the D directors have acted improperly, the prospects of any claim against them and the tax issues. The information sought is set out in a schedule couched in broad terms as follows:-

> *"Schedule of Disclosure*
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> *1. In relation to CC and Z:*
>
> *(1) Full supporting documentation in relation to pension payments (paragraph 44 of W's report).*
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> *(2) Full breakdown of individual items comprising the secretarial and administration expenses (paragraph 48 of W's report);*
>
> *(3) Copies of all tax advice relied upon by the directors (paragraph 72 of W's report);*
>
> *(4) The Audit, Tax and correspondence files of S for the years 2000 to 2008 including all correspondence in relation to tax and/or tax treatment received or given by S concerning the tax affairs of the companies between 2000 and 2008.*
>
> *2. In relation to AA:*
>
> *(1) A complete analysis of the Administrative Expenses included in the financial statements for the periods 2000 to 2007 (paragraph 129 of W's report);*

(2) Analysis of turnover for each of the years 2000 to 2007, detailed profit and loss accounts for each of the years 2000 to 2007 and schedules detailing the makeup of profits on disposals of fixed assets for 2003, 2006 and 2007 (paragraph 130 of W's report);

(3) The Audit, Tax and correspondence files of S for the years 2000 to 2008 including all correspondence in relation to tax and/or tax treatment received or given by S concerning the tax affairs of the companies between 2000 and 2008.

3. In relation to Y and BB:

(1) The Audit, Tax and correspondence files of S for the years 2000 to 2008 including all correspondence in relation to tax and/or tax treatment received or given by S concerning the tax affairs of the companies between 2000 and 2008.

4. Insofar as not provided in respect of the above paragraphs:-

(1) Copies of all correspondence in relation to tax and/or tax treatment received or given by Directors concerning the tax affairs of the companies between 2000 and 2008.

(2) All documentation and working schedules supporting the calculations of Directors Remuneration, Termination Payments, Secretarial and Administration Expenses and Group Charges for the years 2000 to 2008 for CC, Z, Y, BB and AA.

(3) Any documents relied upon by HH not exhibited to her affidavits.

5. Further, in relation to CC, Z, AA, Y and BB:

(1) Copies of the bank statements going back to 2000.

(2) Copies of the company books, board minutes and resolutions, AGM/EGM resolutions and details of directors' remuneration going back to 2000.

(KK's letter of 21st September, 2009).”

27 RBC put forward as an option for consideration the making of a direct order by the Court against the D directors for the provision of this information so that DD can conclude their advice. The third and fourth respondents support the making of such an order.

28 Mr Cadin referred us to Article 51(2) of the Trusts (Jersey) Law 1984, which is in the following terms:-

“The Court may, if it thinks fit –

(a) make an order concerning-

(iii) a beneficiary or any person having a connection with the trust."

The D directors are beneficiaries and therefore Mr Cadin submitted the Court has the power to make a direct order for disclosure against them.

29 Before making such an order we would wish to be addressed further on the following concerns:-

(i) These three trusts have invested through EE and the starting point would ordinarily be that any causes of action within the corporate structure would be pursued by the companies themselves in the usual way. Thus, EE would use its controlling interest in Z to procure that Z took action against the directors in the Irish courts, the natural forum.

(ii) When a trustee surrenders its discretion to the court, the court has no greater powers than the trustee has either under the trust deed or the general law (see Lewin, 18 th edition paragraph 29–301 and *Mubarak* [2008] JRC 136). Does the trustee have the right enforceable in law to require the D directors to provide it with information in relation to the Irish companies of which they are directors because they are beneficiaries? Put another way are beneficiaries under an obligation in law to provide the trustee with information they hold as directors of companies in which the trust has an interest?

(iii) If the D directors are potential defendants to proceedings at the instance of the Irish companies, is it an appropriate use of the Court's power on a surrender of discretion by a trustee shareholder to order what would in effect be pre-trial discovery directly to the shareholder?

(iv) Can the D directors properly be required by this Court as beneficiaries of the settlements to use their powers as directors to obtain from the Irish companies information that is confidential to those companies (and not ordinarily available to shareholders) and pass it on to the trustee? In particular is it appropriate in the context of AA, in which the settlements do not have a controlling interest?

30 Consideration has been given by RBC as to whether it might be directed to use its powers through S to liquidate the Irish companies using an independent insolvency practitioner. V of RBC addresses this in paragraphs 44 to 49 of his affidavit of 20 th August, 2009. For the reasons which he rehearses, he concludes that looked at in the round, liquidation of the companies might turn out to be long, complex and costly with the result that the trusts do not realise any value from the companies at all, or realise less value than through a re-allocation of assets. Mr Young's view, on behalf of the third and fourth respondents, was that liquidation would bring no return. As Mr Cadin said, it is ultimately a matter for the B and C families to decide if they wish to pursue and fund these claims.

31 Are we then left with the perhaps unattractive position from the point of view of the B and C

families that the allegedly improper actions of the D directors will be left unaddressed?

32 RBC has prepared on a limited budget a memorandum of possible ways of reallocating assets between the settlements, which if it is to be pursued will require further work and advice. Within that reallocation is a suggestion that RBC introduce a cash adjustment to compensate the B Settlement and the C Settlement for the possible loss to the trust funds which may have been caused by the D directors and the costs incurred in dealing with the Irish companies. It is not of course the D Settlement as a whole that has benefited but allegedly the D directors personally. The loss, if there is one, has been suffered by the remaining beneficiaries of the D Settlement and the beneficiaries of the B and C Settlements. It was further suggested that the quantum of those losses could be determined by the Court in Jersey now that the D directors have appeared in these proceedings. We have considerable reservations about the feasibility of such a process and upon which we would again need to receive further submissions.

33 A further option for the Court upon which it would wish to be addressed would be the possibility of inviting the D directors to provide the information sought, failing production of which it would draw the adverse inference that they had improperly benefited in an amount the court would have to assess. RBC would then be directed to take that into consideration in the future exercise of its powers and discretions. In essence, the D directors would each receive less in terms of future distributions and the remaining beneficiaries of the D Settlement and the beneficiaries of the C Settlement and B Settlement more.

34 At this stage we are going to leave all of these options open and instead give all of the parties an opportunity to attempt to resolve these issues through “without prejudice” discussions and/or mediation, thus avoiding the inevitable further and substantial fees that will be incurred if any of these options are pursued. All three families wish to separate out their interests as far as is commercially feasible. If assets have to remain in joint ownership then a programme of disposal on terms can be agreed. Appointing new trustees is no solution in that it leaves the parties locked together through the shareholding in EE with the D Settlement potentially in a minority. The personal attack now brought by the first Respondents against RBC in relation to fees places the latter in a position where it cannot safely exercise any of its dispositive powers as trustee of the D Settlement without the sanction of the Court (itself an expensive process), at least until those proceedings are determined. It is therefore very much in the interests of the D family to have these matters resolved as quickly as possible. For such discussions and/or mediation to have any prospects of success, sufficient information must be provided by the D directors to enable the parties to place fair values on the assets to be reallocated.

Embargo on distribution to the family of D

35 On 30 th March, 2009, E, who is the widow of the late E, wrote to RBC asking it to consider making an appointment to her for the first time, due to her current financial circumstances. She asked for an initial appointment of £120,000 to discharge her bank overdraft and other

liabilities and a further £75,000 annually. RBC responded on 14 th May, 2009, drawing her attention to the embargo imposed upon it from making distributions pending further order, but in anticipation of the Court lifting the embargo, asked her for further information in order to enable RBC to consider her request. It asked her to set out her current financial situation in more detail, providing a breakdown of her current assets and liabilities and supporting documentation, such as copy bank statements. In relation to the annual appointment, to help it consider this on a more informed basis, it asked for a breakdown of her living expenses over the last twelve months and to give the details of her income and what has changed in her financial circumstances which has led to her making this request. She did not reply to that letter, but her solicitors LL did on 15 th June, 2009, saying she found RBC's letter deeply upsetting, not to mention offensive. They referred RBC to the settlor's letter of wishes to the effect that the income and capital of the settlement should be used for her benefit during her lifetime. They could see no necessity for her to provide any of the information requested.

36 On 19 th August, 2009, D's daughter, K née A wrote to RBC, seeking appointments to meet her basic living needs of £3,750 per month, together with an immediate payment of £5,000 to allow her to discharge immediate and pressing debts. She had separated from her husband three years ago and had three dependent children living with her at a time of great financial hardship, when they were finding it difficult to survive. RBC responded on 25 th August drawing her attention to the embargo placed upon distributions and saying it had little option but to await the outcome of the application on 14 th October.

37 In our view, there is no longer any need for an embargo on distributions out of the D Settlement. The personal attacks upon RBC by the first Respondents have placed it in a position in which it cannot properly exercise its dispositive powers without seeking the sanction of the Court in any event. We do not have enough information in relation to either the requests from E or K to give directions at this stage. Before these applications for distributions are returned to us, RBC must collate all the information that we would need in order to exercise the trustee's powers properly in this regard. In our view the information sought by RBC in its letter of 14 th May, 2009, was perfectly proper and reasonable and the response of LL of 15 th June, 2009, unreasonable. Further information will be required from K and E.

Protecting the assets of Z

38 Pursuant to directions given by this Court, the bank account and assets of Z have been ring-fenced by the imposition of a co-signatory. On 1 st September, 2009, the company had a credit balance in its bank account of €17,202. The D directors have sought payment of the following:-

(i) €36,000 by way of directors' remuneration to H and G.

(ii) Legal fees to LL of €60,029.

(iii) Accounting fees to II for €12,150.

39 The directors are accordingly seeking payment of some €108,179 against liquid assets of €17,202. A number of issues arise. Judging from the e-mail of H of 1 st September, 2009, he is seeking remuneration at the annual rate of €42,000 and G remuneration at the annual rate of €30,000. We are not aware of any disclosure as to the contractual arrangements between the directors and the company for the payment of directors' fees. Why are fees being paid to them and on what basis? In view of their conflict in resolving to pay fees in their favour and bearing in mind this is a company wholly owned by EE, it might be thought that they would seek shareholder approval for the payment of any remuneration to themselves.

40 The fee note submitted by LL dated 12 th August, 2009, is addressed to both Z and Y, not to Z alone, and the narrative refers to advice given in relation to the actions taken by RBC in the Jersey Courts including a review of the pleadings. We have considerable doubts as to whether Z has any legitimate interest in seeking advice on the Jersey proceedings. It is the personal position of the D directors which is at issue here and there must be some doubt as to whether this advice was in substance given for the benefit of Z. The same point applies to the accounting advice. RBC suggests that these invoices remain unpaid pending the next hearing and we agree.

First Respondents' representation in relation to trustee's fees

41 The first Respondents have brought a representation in relation to the costs incurred by RBC. They assert a *prima facie* case that RBC has failed to act in the best interests of the beneficiaries of the settlements and that expenses and liabilities have not been reasonably incurred within the meaning of Article 26(2) of the Trusts (Jersey) Law 1984, or alternatively that there is a *prima facie* case that RBC is effectively in breach of trust within the meaning of Article 30 of the Trusts Law. They seek a direction that RBC provides a detailed breakdown of its fees and expenses, that they have an opportunity to file objections to those fees and expenses and that there be a further hearing for determination by the Court of whether the fees and expenses have been reasonably incurred.

42 RBC has provided details of the fees it has charged and will continue to do so. What it has not yet done is to provide a breakdown of the professional fees it has incurred with lawyers and accountants, i.e. the billing narrative identifying exactly what work was done. Until the issues above are resolved, the D directors are potential defendants to proceedings brought either directly by RBC or by the Irish companies. The material sought by the first Respondents is detailed and specific and absent resolution of these issues might provide a potentially hostile party with privileged material detrimental to the interests of the beneficiaries as a whole. We agree therefore with RBC that the first respondents' representation must be adjourned pending resolution of these issues but on condition that

the trustee continues to provide details of its own fees charged every three months.

Representation of the grandchildren and remoter issue of D

43 On 2 nd July, 2009, the Court appointed Mrs Davies to represent the grandchildren and remoter issue of D because there was a perceived conflict between the interests of the adult members of the D family (some or all of whom may have benefited inappropriately through the operation of the Irish companies) and the interests of the grandchildren. Pursuant to her appointment, Mrs Davies has ascertained the identity of the grandchildren, who would all appear still to be minors. She has made what enquiries she can of the parents and from Voisins, acting for the first Respondents, but has received no response. She thus knows nothing of the background of the grandchildren in terms of their social, educational or financial needs.

44 The parents, included within the first respondents, have instructed Voisins and as with the other families, wish to represent the interests of their children with whom they say there is no conflict. Mrs Davies had made written submissions based on the information available to her but in the interests of saving costs was released from the hearing. Until the issues referred to above are resolved, we are not prepared at this stage to discharge Mrs Davies.

45 All of the parties are agreed that her costs incurred to date should be paid but the first Respondents submit that they should be paid by RBC personally. They say that the appointment of Mrs Davies was made at a hearing to which they had not been convened and on the basis of facts presented by RBC which they dispute. In essence they say that these are hostile proceedings and that the costs should follow the event. It is wrong in principle they say for RBC to act with impunity as to costs and be indemnified from the trust assets. In our view, these submissions are misconceived. The appointment of Mrs Davies was made by the Court, not by RBC. For the Court to order RBC to pay Mrs Davies' costs personally it would have to have determined that RBC had acted in breach of its duties as trustee or in breach of its duties to the Court in some defined manner. Whilst the first Respondents may well challenge RBC's account of the history of this matter, there has been no such finding against RBC. There is therefore no basis upon which the Court could properly visit Mrs Davies' costs upon RBC personally. Her costs on an indemnity basis will therefore be paid out of the trust fund of the D Settlement.

46 Thus in summary:-

(i) The Court is going to adjourn RBC's application for three months to enable the parties to resolve the issues by without prejudice discussions and/or mediation. Counsel are invited to attend upon the Bailiff's Judicial Secretary to fix a further hearing date (estimated $^{1}/_{2}$ day) in three months' time so that the Court can review the matter.

(ii) If the parties are not able to resolve the issues in a manner acceptable to the Court, then the Court will wish to be addressed further on the orders it can and should make in order to resolve these issues.

(iii) The embargo against further distributions from the D Settlement is discharged. We have insufficient information to give directions in relation to the applications by E and K for distribution. If those applications are maintained, then RBC must collate sufficient information before referring the matter back to the Court.

(iv) The application by the D directors for the payment out of Z of their own directors' fees and the fees of LL and II is to be left over until the next hearing.

(v) The first Respondent's representation in respect of RBC's costs is to be adjourned until the next hearing.

(vi) Mrs Davies is released from further work in relation to this matter pending further order and her costs to date are to be paid from the trust fund of the D Settlement on an indemnity basis.

47 We invite Mr Cadin to prepare a draft order reflecting the above to be circulated and if possible agreed by the parties when this judgment is handed down.