Representation of Y

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Le Breton, Nicolle
Judgment Date:	24 August 2010
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Date:	24 August 2010

Text

[2010] JRC 154

ROYAL COURT

(Samedi Division)

Before:

J. A. Clyde-Smith, **Commissioner, and** Jurats Le Breton **and** Nicolle.

In the Matter of the Representation of Y

And in the Matter of A Settlement

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

Between
Y
Representor
and

B
C
D
E
F
G
H
First Respondents (The L Beneficiaries)

and

I
J
K
Second Respondents (The M Beneficiaries)

Advocate E. L. Jordan **for the Representor.**

Advocate B. J. Lincoln **for the L Beneficiaries.**

Advocate P. D. James **for the M Beneficiaries.**

Authorities

Companies (Jersey) Law 1991.

In re a Settlement [1994] JLR 144.

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

In re Internine Trust [2006] JLR 195.

Trusts (Jersey) Law 1884 (as amended).

THE COMMISSIONER:

1 On 3 rd August, 2010, the Court sanctioned and approved the decision of the Representor ("Y") as liquidator of Centurion Trust Company Limited ("Centurion") to appoint Herald Trust Company Limited ("Herald") as new trustee of the Q Trust ("the trust").

2 The trust is governed by Jersey law. Its assets were settled by the late N and the beneficiaries comprised the children and grandchildren from his first marriage to O ("the L beneficiaries") and the children from his second marriage to P ("the M beneficiaries"). The relationship between the two sets of beneficiaries is hostile.

3 Through a Jersey holding company, the trust owns a majority interest (99.55%) in a Spanish company which in turn owns valuable farm land in Spain, and minority interests in two Spanish companies which own land and a marina in Spain respectively.

4 Centurion, the last remaining trustee of the trust, was ordered to be wound up by the Court pursuant to Article 155(1)(a) of the Companies (Jersey) Law 1991 and Y was appointed liquidator. Under the provisions of the trust, the office of trustee was *ipso facto* determined and vacated on that date and the liquidator given the power to appoint a new trustee.

5 Apart from the self-evident need for a new trustee to be appointed, there were practical reasons why a new trustee was required as a matter of urgency. The process of transferring the client base of Centurion to new service providers was nearing its end and at the end of July Y would be exiting the premises currently occupied by Centurion and releasing the majority of the staff resource which had been employed by him in achieving the winding up. Accordingly, there will be very limited staff resources available to him to undertake any further work. Furthermore, he did not have additional financial resources which would enable him to provide anything other than a very limited service beyond the end of July.

6 Y had made extensive efforts to find a new trustee, hampered by a lack of liquidity within the trust. That process had been carried out in consultation with the legal representatives of the L and M beneficiaries. Without going into the history of the steps so taken, two trust companies were ultimately prepared to act as trustee notwithstanding the liquidity issues and without requiring funds on account. Y had concerns about the resources available to one of those companies and the fact that the person who would be dealing with the matter knew certain of the M beneficiaries socially. Accordingly, he elected to appoint the other company, namely Herald.

7 The application was not contentious as it was manifestly in the interests of all the beneficiaries that Herald should be appointed. Mr James, for the M beneficiaries, was more than content for that appointment to be made. Mr Lincoln, for the L beneficiaries, felt unable to agree to the appointment because the Court had declined to disclose to him certain correspondence between Y and the M beneficiaries (as to which see below), but subject to that, he did not oppose the application. Importantly, he was not aware of any reason which would militate against the appointment of Herald.

8 Two issues arose which we take in turn.

Representation of issue

9 The trust instrument includes within the class of beneficiaries the issue of the four named L grandchildren of the Settlor whether then living or thereafter born. In his representation, Y proposed that Mr Lincoln should be appointed to represent the issue. Mr Lincoln was not prepared to accept such appointment, principally because he had not been instructed by

the L beneficiaries whom he represented to do so. Although he accepted for the purposes of this application that there was no possible conflict between the issue and their parents, such a conflict might arise in the future and he did not wish to be debarred from acting for his clients because he had taken on this role.

10 In the view of the Court, there was no need for the issue to be represented. There was no rule of practice that all beneficiaries should be convened to such an application (see *In re a Settlement* [1994] JLR 144). It was inconceivable that a lawyer appointed to represent the issue would dissent from the appointment of a new trustee and it was not arguable that the interests of the issue were adversely affected by such an appointment – on the contrary, it was very much in their interests as it was in the interests of all the beneficiaries for a new trustee to be appointed.

Disclosure of information

11 The second exhibit to Y's affidavit contained correspondence between him and the M beneficiaries either directly or through their respective legal advisers. The M beneficiaries had specifically requested that this correspondence be kept confidential from the L beneficiaries and it was therefore disclosed to the Court but not to the L beneficiaries.

12 Mr Lincoln applied for this correspondence either to be withdrawn by Y or disclosed to the L beneficiaries. It was inappropriate and wrong in principle, he submitted, for that information not to be shared, if it was before the Court. Mr Lincoln did not cite any authority in support of his application.

13 The correspondence was concerned in the main with the potential appointment of another trust company which had since withdrawn. It was therefore historical information. There was an e-mail from one M beneficiary to Y, the contents of which Y had summarised in his affidavit, but it was concerned with the financing of the trust structure. A final e-mail from the same beneficiary in which he indicated on his own behalf and that of his brother that they would respect the decision of Y to appoint Herald had been disclosed to the L beneficiaries.

14 The Court expressed the view to Mr Lincoln that, having reviewed the correspondence, none of it was relevant to the issue before the Court, namely the appointment of Herald, with the exception of the one e-mail which had been disclosed to them but notwithstanding Mr Lincoln maintained his application which the Court rejected. It did so without the benefit of authority applying its understanding of the principles to be applied which we set out below. An application for leave to appeal was also refused.

15 No point was taken that Y should not be equated to a trustee; able to invoke the jurisdiction of the Court under Article 51 of the Trusts (Jersey) Law 1884 (as amended) notwithstanding that the office of trustee had been vacated.

16 It is well established that a trustee undertakes a confidential role as made clear in the case of *In re a Settlement* where Bailhache, Deputy Bailiff said this at page 146:-

> ***"In the context of a discretionary trust, it seems to us eminently sensible and reasonable that trustees should be able to weigh conflicting considerations as between different beneficiaries and to judge the merits and demerits of particular courses of action without being exposed to minute examination as to their motives and processes of reasoning at the instance of disaffected beneficiaries.*** Trustees of such a trust have been entrusted with a confidential role and should, in general, be permitted to exercise their functions away from the glare of publicity."

17 In *Re Rabaiotti (1989) Settlement* [2000] JLR 173 it was held that beneficiaries do not have an absolute right to see trust documents; the Court has a discretion to refuse to order disclosure. Quoting from the judgment of Birt, Deputy Bailiff:-

> ***"But the need for an individual beneficiary to obtain trust documents has to be weighed against the interests of the beneficiaries as a whole.*** The trustee has a duty to the beneficiaries as a class. If, as in some of the cases referred to above, the trustee forms a view in good faith that disclosure of documents to which a beneficiary would normally be entitled would be prejudicial to the interests of the beneficiaries as a whole, it may refuse to make that disclosure and seek the directions of the Court."

18 In our judgment, it is important that beneficiaries are able to communicate in confidence with their trustee and it is in the interests of all the beneficiaries that they should be able to do so. As made clear by the Court of Appeal in *In re Internine Trust* [2006] JLR 195 at page 209 and this in the context of discovery proceedings, trustees would be expected to be vigilant in raising issues of confidentiality when making disclosure.

19 Y has therefore acted appropriately in protecting the confidentiality of the correspondence with the M beneficiaries by not disclosing the same to the L beneficiaries.

20 The Court has the power to order disclosure of this confidential correspondence if the interests of justice so dictate (see *Internine* at paragraphs 29 to 37) and if they do so dictate it is for the Court to decide whether there are protective mechanisms which can and should, be put in place to preserve confidentiality except in so far as it must be breached for the purposes of the application.

21 In this case, there was nothing in the correspondence which in our judgment justified breaching the confidential nature of the correspondence.

22 We also rejected the assertion that this correspondence should be withdrawn by Y. The Court has in the past castigated trustees for failing to make full disclosure when applying for directions. Full disclosure to the Court was to be encouraged but the trustee must give consideration to issues of confidentiality and to the extent to which information provided to the Court should be disclosed to the convened parties.