

The Sanne Trust Company Ltd

Jurisdiction:	Jersey
Judge:	The Bailiff
Judgment Date:	16 February 2009
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Text

[2009] JRC 25B

ROYAL COURT

(Samedi Division)

Before:

Sir Philip Bailhache, **Kt.**, Bailiff, **and** Jurats Tibbo **and** Bullen.

In the Matter of the Representation of Sanne Trust Company Limited

Advocate R. J. MacRae **for the Representor.**

Advocate M. C. Goulborn, **guardian ad litem of the minor child.**

Authorities

Re the Representation of Saffery Champness Trust Corporation [\[2005\] JRC 052](#).

Jersey Evening Post Limited -v- Al Thani [\[2002\] JLR 542](#).

Trusts (Jersey) Law 1984.

The Bailiff

- 1 On 25th September, 2008, the court considered an application by Sanne Trust Company Limited (“the Trustee”) seeking the rectification of a settlement (“the C family settlement”) created by Declaration of Trust made on 5th July, 1999. At the conclusion of the hearing we granted the prayer of the representation and indicated that we would give our reasons at a later date. This we now proceed to do. The C family settlement is in the fairly standard form of a discretionary Jersey trust. The submission of the trustee was that the establishment of the settlement in this form was a mistake, and that it should have been established as an interest in possession settlement (“an IIP Trust”) in accordance with tax advice received at that time.
- 2 Before turning to the merits of the application Mr MacRae for the Trustee asked us to deal with a preliminary matter dealing with the identification of the beneficiaries and *de facto* settlor of the settlement. Counsel drew attention to an unreported decision of this court in *Re the Representation of Saffery Champness Trust Corporation* [\[2005\] JRC 052](#). In that case the court had declined to sit in private but had agreed that the identities of the beneficiaries of the trust in question could be withheld by a redaction of the judgement to that end. The principles in question are important, and the court's policy in this area bears re-statement.
- 3 The first principle is that justice must be done in public. The principle is conveniently encapsulated in the second paragraph of the headnote to the report of *Jersey Evening Post Limited -v- Al Thani* [\[2002\] JLR 542](#) at 544 in the following terms:-

“ The principle of open justice had not yet found statutory expression in Jersey but formed part of the law and an order for proceedings to be heard in camera was only to be granted when it was necessary to do justice in the exceptional circumstances of the case e.g. to protect specific individuals or prevent the destruction of the subject matter in issue. Public proceedings ordinarily deterred inappropriate behaviour on the part of the court, maintained public confidence in the impartial administration of justice, made uninformed and inaccurate comment on the proceedings less likely, and could result in additional evidence becoming available. The burden lay with the party seeking an order for hearing in camera to prove that it was the only way in which justice could be done; convenience, potential embarrassment and the parties' preference were in themselves insufficient justifications ”

- 4 The second principle, which might be thought to conflict with the first, is that in this

jurisdiction, considerable importance is attached to the confidentiality of private trusts. It is for that reason that administrative applications under Article 51 of the Trusts (Jersey) Law 1984 are customarily heard in private.

- 5 An application for the rectification of a settlement or other trust document is not however an administrative matter of that kind. Applications for rectification involve the commission of a mistake by someone, and the exercise of a judicial discretion as to whether that mistake can be put right. There is no public interest in sparing the blushes of professional advisers who have made mistakes in or about the drafting of trust deeds or related documents. On the contrary, there might be said to be a public interest in ensuring that such errors are put into the public domain so that clients can be made aware of them. Furthermore, the exercise of the court's discretion may affect others, particularly tax authorities; as a matter of generality there is no justification for sitting in private to hear an application for the rectification of a trust document, and the application to sit in private at an earlier stage of these proceedings should not have been made.
- 6 The reconciliation of the requirement for public justice and the need to respect the confidentiality of private trusts is achieved by sitting in public but by redacting the Court's judgment so as to excise any reference to the name of a beneficiary and/or a settlor or protector. But for the error of a professional adviser, there would be no application to the court. The nature of confidential family arrangements embodied in a private trust would not ordinarily see the light of day. There seems to us no compelling reason why the mistakes of professional advisers should involve the public exposure of family arrangements which would otherwise have remained entirely private.
- 7 We have therefore sat in public, but this judgment will be redacted to protect the privacy of the family members involved.
- 8 We turn now to the application itself. The history of the matter is that between July 1997 and October 1998 Mr C sought advice from his English solicitors Lawrence Graham as to the mitigation of his tax liabilities. He received advice from Mr Robert Field of that firm that a life interest trust from which he and, after his death, his widow would be entitled to income should be established. This advice from Mr Field was embodied in a letter dated 6th October, 1997, to Mr C, and stated:-

“ If you can show that you are not domiciled in the UK, and have retained your Irish domicile of origin, then it would be possible to place the shares received into the hands of a non-UK Trust. Any gains subsequently realised by the Trustees would be tax free, even if the proceeds of sale are transferred to you in the UK. ...since I would envisage setting up a life interest trust for you, from which you are entitled to the income, the same gains tax considerations would apply in the event of your death, when your widow would be able to receive any gains realised by the trustees tax free.”

- 9 The task of drafting the settlement was entrusted to Miss Kelly Noel-Smith, an assistant solicitor in the firm. Her affidavit shows that on 19th August, 1998, she wrote to Mr C's Irish solicitor, Mr Eoin Kennedy, stating:-

“ If the offshore trusts to be created by Mr C while he is UK domiciled are to have his daughters as life tenants, the transfer by Mr C of any assets, whether situated in the UK or not, will constitute a potentially exempt transfer made by him”.

At the end of that letter she attached a tax planning memorandum prepared by Mr Field which referred to the tax consequences for inheritance tax purposes as being a “PET” (a potentially exempt transfer). This would have been the consequence of creating an IIP Trust.

- 10 There was then a delay of some months while discussions took place, *inter alia*, over the identity of the trustees. In or about April 1999, the file returned to Miss Noel-Smith, who for reasons which are unclear, drafted a discretionary settlement instead of the IIP Trust envisaged by Mr Field. On 15th April, 1999, the draft deed was sent to Mr C who approved it. Miss Noel-Smith stated expressly in her letter to Mr C that “ *the trust is a discretionary one which is necessary for tax planning purposes, and this means, as you know, your trustees have absolute discretion as to the payment of income and capital from your trust fund to particular beneficiaries*”. Mr C made no comment upon the draft. Miss Noel-Smith has deposed that it was clearly inappropriate to draft a discretionary trust, and she has no idea why she did so.
- 11 The draft deed was engrossed and executed by the trustee on 5th July, 1999. In 2006 the trustee was undertaking a periodic review of the trusts under its administration, and the matter came to light. Subsequently, it was decided to make an application to this court for rectification by substituting for the discretionary trust executed in 1999 an IIP trust conferring benefits on Mr and Mrs C as described above. Counsel laid before us a revised trust deed showing the modifications which were sought.

- 12 The law to be applied is clear. The court must be satisfied of three matters:-

We consider each of these matters in turn.

(i) It must be satisfied by sufficient evidence that a genuine mistake has been made so that the document does not carry out the true intention of the parties.

(ii) There must be full and frank disclosure.

(iii) There should be no other practical remedy. The remedy of rectification remains a discretionary remedy.

- 13 It seems clear to us that an error was made in the drafting of the trust deed. There was a

significant fiscal disadvantage in creating a discretionary trust and the intentions of Mr Field that an IIP Trust should be created is well documented. So far as Mr C was concerned, we are satisfied that he relied entirely upon his different advisers to create a tax-efficient trust for his benefit during the lifetime and thereafter for the benefit of his wife. We were satisfied that a genuine mistake has been made by the solicitors acting for Mr C. Secondly, we were equally satisfied that there has been full and frank disclosure. Thirdly, we were satisfied that there was no other practical remedy available.

- 14 Finally, Mr Goulborn, who was appointed as guardian ad litem of the minor child and unascertained beneficiaries of the C Family Settlement by the Act of Court of 28th August, 2008, told us that he had considered carefully the skeleton argument and other papers filed on behalf of the Trustee. He was satisfied that a genuine mistake had been made and that it was in the interests of those whom he represented that the relief sought by the Trustee should be granted. None of the adult beneficiaries opposed the application. The Court was informed of correspondence between Messrs Lawrence Graham and HMRC Capital Taxes Office which was content to rest on the decision of this Court following the application of the Trustees.
- 15 It was for all these reasons that we granted the application of the Trustee and ordered the rectification of the C family settlement so as to create an IIP Trust, such rectification to have retrospective effect from 5th July, 1999.