

The Treasurer of the States v HM Attorney General

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith O.B.E., Jurats Crill, Nicolle
Judgment Date:	06 December 2021
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Text

[2021] JRC 303

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith O.B.E., **Commissioner, and** Jurats Crill **and** Nicolle

Between
The Treasurer of the States
Representor
and
Her Majesty's Attorney General
Respondent

Advocate J. P. Rondel for the Representor.

M. Temple **Q. C., Her Majesty's Solicitor General for the Respondent.**

Authorities

Trusts (Jersey) Law 1984.

In the matter of the Representation of the Attorney General (on behalf of the administrators of the Greville Bathe Fund) [\[1973\] JJ 2513](#).

Charities (Jersey) Law 2004.

Gelber and another v Sunderland Foundation and others [\[2018\] EWHC 2344 \(Ch\)](#).

Lewin on Trusts 20th Edition

Trust — reasons for varying the provision of the trust

THE COMMISSIONER:

- 1 On 18th October 2021, the Court varied the provisions of the Greville Bathe Fund (“the Fund”), pursuant to Article 47A(3) of the Trusts (Jersey) Law 1984 (“the Trusts Law”) and we now set out our reasons.
- 2 The Fund was established under the will of the late Greville Inverness Bathe, who died on 14th March 1964 (“the Testator”). The relevant provision of the will is as follows:

“I give and bequeath TWO-THIRDS of my holdings of and in the share capital of the limited liability Company registered and established in the Island of Jersey under the name and style of ANN STREET BREWERY COMPANY LIMITED (the business of which undertaking was founded by my father, Inverness John Bathe) hereinafter called ‘the Company’ to the Treasurer of the States of the Island of Jersey, for himself and his successors in the said office, IN TRUST for and on behalf of the States of the Island of Jersey, for the creation of a fund to be known as THE GREVILLE BATHE FUND, and I declare that the income of the said Fund will be disposed of and expended by grants of pecuniary relief or pensions in any form, in the following proportions:- one half of the annual income of the said Trust for relief and pensions to needy persons of either sex whose legal domicile is in the Island of Jersey, who have rendered service to the Island of Jersey either in an honorary or remunerated administrative or clerical capacity, or whose ancestors were employed or engaged in such service to the Island, but excluding persons who are actually in receipt of grants or benefits under the Fund known as ‘the Alice Raynor Fund’ already administered by the States of Jersey, and one half of the said income for relief to sick and aged persons of the Island of Jersey, in addition of or otherwise to any pension or relief which such sick or aged person may already be in receipt of and to include grants or pensions in support of any institution other than owned and administered by public funds which has for its object the relief of sick and

aged.

I declare that the said income of the said Fund will be administered at the absolute discretion of four persons resident and domiciled in the Island of Jersey who are not elected members of the States Assembly, to be named by the Assembly of the States. I would prefer and desire that those selected by the States of Jersey for this administration and sanctioning of grants from the income of this Trust Fund hereby created should be four of the Jurats of the Royal Court of Jersey, my reason for this being that the Jurats are entirely non political and have been elected by an Electoral College established under the law of the Island. I also wish and desire that the aforesaid holding of shares in the aforesaid Company hereby bequeathed, should continue and be maintained as an investment of the said Trust, as in my view this is in the best interests of the said Company and to safeguard and maintain it as a local concern and undertaking."

- 3 The Representor has maintained two separate accounts, namely the "A" account, for relief and pensions to those designated in the first half, and the "B" account, for relief to sick and aged persons, as designated in the second half.
- 4 An issue arose in 1973, in that the income from the "A" account exceeded the payments made from it to persons entitled to claim. An application to the Court resulted in the judgment *In the matter of the Representation of the Attorney General (on behalf of the administrators of the Greville Bathe Fund)* [\[1973\] JJ 2513](#), in which the Court authorised the income administrators:
 - (i) to include payments to former rectors within the "A" account and to the widows and widowers of any person who has performed the requisite service required to qualify for payment under the "A" account;
 - (ii) to maintain as at 31st December in each year a balance of not less than three times the current year's payments in the "A" account; and
 - (iii) to transfer any monies remaining, after setting aside the said sum under (ii) above, into the "B" account.
- 5 The shares in Ann Street Brewery Limited were acquired by the Liberation Group in 2008 and the Fund now comprises a portfolio of investments.
- 6 The income of the Fund has been administered from the outset by the Jurats of the Royal Court in accordance with the Testator's wishes, but with the very considerable changes in the regulatory environment and the other burdens upon the office of Jurat, it was felt that it was no longer appropriate for them to continue in that role, and on 12th November 2020, the Bailiff wrote to the Representor in the following terms:

"It is the unanimous conclusion of the Jurats that it was no longer appropriate for the Jurats to fill the role of income administrators. I do not at this point need to go into great detail but in summary, it is no longer felt to be appropriate for the Jurats to fulfil that role as the environment under which their original involvement has changed with the advent of many new laws regulating the administration of Trusts and Charities and the nature of the Trust Fund has itself changed over the years.

I write, therefore, to request on behalf of the Jurats that consideration is given to the early nomination of other individuals, other than elected members of the States Assembly, to take over responsibility for the administration of income in place of the Jurats currently serving in this role."

- 7 The withdrawal of the Jurats as income administrators does not of itself require a change to the terms of the will. Their involvement was only expressed as a wish, and it would still be possible for the Assembly of the States to find four other persons, who were not elected members, to take on this role, but in consultation with the Jurats, the Charitable Funds Oversight Board and the Jersey Charity Commissioner, the Representor proposed that it should have the power to appoint income administrators and in particular a corporate income administrator and to have the power to remove as well as to appoint the same.
- 8 The Representor sought the additional option of the appointment of a single corporate body as income administrator in recognition of the fact that the administrative environment and "**best practice**" standards have evolved over the years, placing increasingly unsustainable demands on individual income administrators. The Representor considered that a corporate administrator may be a more suitable option because of its better access to professional resources and infrastructure.
- 9 The Representor considered that:
 - (i) with a corporate administrator, there will be more durable appointments which will result in more consistent decision making to be made over the longer term,
 - (ii) a corporate income administrator operating in the charity sector would be better placed to distribute awards and monitor outcomes, and to the degree it becomes a single point of contact for other similar funds it will increase the visibility of the Fund to those it seeks to reach, and
 - (iii) a corporate appointment would bring structural improvements in governance.
- 10 The Representor proposed to set out the mutual expectations and responsibilities of trustee and income administrators in a written agreement. The expectations and responsibilities would be clearly defined and the functions of the two shown as separate. At present the Jurats rely on Treasury support and any registered charity or other regulated

body that is appointed will have further external oversight.

- 11 The Representor further considered that it would strengthen the governance of the Fund if he were to be granted the power to terminate appointments. Whilst the income administrators act independently and will continue to act independently of the trustee in respect of the decisions made about the income of the Fund, the trustee remains ultimately responsible for the Fund and the trust administration. The current structure involves a degree of fiduciary overlap between the trustee and the income administrators. This could have unfortunate consequences in the event of a dispute. By giving the trustee a power to make and terminate appointments it would enable the trustee to take remedial action in the event of any misdoing on the part of the income administrator or if the income administrator becomes unsuitable. At present there is no provision for termination or resignation in the will.
- 12 The Representor proposed therefore that the relevant part of the will should be varied, so as to read as follows (as amended in discussion at the hearing):

"I declare that the said income of the said Fund shall be administered at the absolute discretion of four persons resident and domiciled in the Island of Jersey who are not elected members of the States Assembly, or alternatively shall be administered at the absolute discretion of a single incorporated body, appointed from time to time at the absolute discretion of the Treasurer of the States, or his successor in office as Trustee (in either case the "Income Administrators"). In the case of a single incorporated body the quorum for decision making shall not be fewer than four directors (or equivalent executive officers), and whose decisions in relation to the administration and sanctioning of grants from the income of the Trust Fund hereby created shall not be taken by fewer than four directors (or equivalent executive officers), appointed from time to time. The Treasurer of the States shall have, at all times, the power to terminate any such appointment of Income Administrators by notice in writing."

The law

- 13 The application was made under Article 47(A) of the Trusts Law which deals with trusts for charitable or non-charitable purposes, specifically under Article 47(A)(3), which is in the following terms:

"(3) Where trust property is held for a charitable or non-charitable purpose the court may, on the application of a trustee or the Attorney General, approve any arrangement that varies or revokes the purposes of the trust or enlarges or modifies the powers of management or administration of the trustees, if it is satisfied that the arrangement –

(a) is suitable and expedient; and

(b) is consistent with the original intention of the settlor and the spirit of the gift.”

14 Accordingly, for the Court to have jurisdiction under Article 47A(3), the following requirements must be met:

- (i) the trust property must be held for a charitable or non-charitable purpose;
- (ii) the application must be made by a trustee or the Attorney General; and
- (iii) the application must seek to enlarge or modify the powers of the trustee.

Decision

15 Dealing with the jurisdiction of the Court and the first requirement, the Representor had obtained a helpful opinion from Mr Nicholas Le Poidevin of English counsel dated 25th August 2021, which ranged over a number of matters which were not before the Court, but in relation to this requirement, as he said in his opinion, each account is plainly held for a purpose. The query might be raised as to whether the “A” account is now held for charitable purposes since the Charities (Jersey) Law 2004 (“the Charities Law”) came into force, because of the restriction to persons who have given service to Jersey, but the point is immaterial for the purpose of a jurisdiction under Article 47A(3), because the provision applies where property is held for a charitable or non-charitable purpose. Until the Charities Law came into force, the account was certainly a valid trust for charitable purposes, as the Court so held in 1973, but even if the “A” account suddenly lost its charitable status when the Charities Law came into force, it has since been a valid trust for non-charitable purposes. It does not fall within the category of non-charitable trusts which require an enforcer to be valid, because that is so only where there is no beneficiary (Article 11(2)(a)(iv) and Article 12 of the Trusts Law). Here there is a class of beneficiaries, namely needy persons who have rendered relevant service (including former rectors) together with their needy descendants and widows or widowers.

16 The second requirement is met as the application is made by the current trustee, namely the Representor, and as to the third requirement, it is obvious that conferring the power sought would be an enlargement of the powers of management or administration of the trustee. A new power for him to appoint income administrators, including a corporate administrator, and the power to remove income administrators, would necessarily be an enlargement of the trustee's powers of management.

17 The Court, however, must be satisfied of two further matters, namely that the arrangement is suitable and expedient, and is consistent with the original intention of the Testator and the spirit of the gift.

Suitable and expedient

- 18 Up until now, the practice has been that the nomination of the income administrators is made by the Court putting forward the names of four Jurats to fulfil that role, and that is then lodged by way of a proposition for approval by the States Assembly. The burden upon the States Assembly was minimal. With the Jurats no longer fulfilling that role, the task of appointing administrators would fall in earnest upon the States Assembly which would have to find and approve candidates every time an administrator was to be appointed.
- 19 The Representor, on the other hand, is well resourced and capable of making the necessary decisions as to who should be appointed income administrators. The Representor is a public figure who is necessarily held to account for his actions. Furthermore, the Representor is the trustee of the Fund and is therefore subject to a number of fiduciary obligations in respect of the Fund. Without providing the Representor with power to appoint and to terminate the appointment of income administrators, the Representor would continue to have overlapping responsibilities with the income administrators of the Fund, but no ability to appoint or to terminate the income administrators.
- 20 As the English High Court said in *Gelber and another v Sunderland Foundation and others* [2018] EWHC 2344 (Ch) at paragraph 11, in the context of [Section 57 of the Trustee Act 1925](#) (the equivalent of Article 47(3) of the Trusts Law) the notion of expediency is obvious but slightly elusive. It clearly includes something that is “**advantageous**” or “**beneficial**”. The term is discussed in Lewin on Trusts 20th Edition at 52–019 in the context of [Section 57](#):

“Expediency

The proposed transaction must be expedient for the trust as a whole. This means the same as expedient in the interests of the beneficiaries under the trust. But, as has been decided in New Zealand and in England and Wales, this does not mean that the court needs to be satisfied that the transaction or power in question is expedient or advantageous in the interest of each and every beneficiary considered separately, but rather that, taking into consideration the interests of all the beneficiaries, the transaction or power in question can fairly be said to be expedient in the interests of the trust as a whole. And in Australia it has been held that a transaction or power, otherwise expedient in the management or administration of the trust and interests of the trusts and beneficiaries as a whole, may be authorised or conferred even if its impact may be relatively positive for some beneficiaries and relatively negative for other beneficiaries. In England and Wales too, the conferral of a power has satisfied the test of expediency where it is in the interests of the trust as a whole in that it facilitates better administration against a background of beneficiaries in different jurisdictions, though it is of particular benefit to one group of beneficiaries who are adversely affected by the absence of the power in a way the others are not.

The approach to expediency under section 57 of the Trustee Act 1957 is

therefore different from the approach to benefit under the Variation of Trusts Act 1958. Under [section 57](#), a broad approach is adopted so that an assessment can be made of the advantage to the beneficiaries as a whole. ***Under the 1958 Act, each beneficiary or group of beneficiaries is considered separately, and appropriate compensating adjustments will need to be made where some beneficiaries, considered separately, do not benefit or, normally, where other beneficiaries benefit disproportionately.*** But there must be an advantage under [section 57](#) to the beneficiaries as a whole, not merely to the trustees. And so there is no justification under the [section 57](#) jurisdiction for the conferral of a general power on trustees to pay tax liabilities when such liabilities are not enforceable against the trustees”

- 21 In the Court's view, for the reasons put forward by the Representor, this variation was both suitable and expedient for the Fund as a whole and all of its beneficiaries and not merely for the Representor. It does not benefit some beneficiaries at the expense of others. The Fund will have the benefit of an accountable and workable process for the appointment of income administrators.
- 22 As to consistency with the original intention of the Testator and the spirit of the gift, it is obviously not requisite that no change whatever should be made, since otherwise the statutory jurisdiction would be stultified. The core of the gift is that the Fund should reach the intended recipients and that distribution should be decided upon by several non-political persons. The grant of the power to appoint income administrators would make no difference to the recipients and the Representor can no doubt be relied upon to select suitable appointees.
- 23 The variation requires that in the case of the appointment of a corporate income administrator, there would be a requirement for a quorum of at least four persons in its decision making to be consistent with the wishes of the Testator, but as Mr Le Poidevin pointed out in his opinion, if a corporation is appointed:
 - (i) There is no mechanism by which the Representor can ensure that decisions are taken by the directors, rather than be delegated within the corporation.
 - (ii) The Representor will lose any control of the identity of the individuals within the corporation actually taking the decisions.
 - (iii) Though there may be four directors when the appointment is made, their number may drop thereafter.
 - (iv) The directors may take decisions when one or more of them is absent and do so by a majority. There is no mechanism for the Representor to insist on a quorum.
- 24 The Court took these considerations into account but noted that the Representor would be in a position to monitor the performance of the corporate income administrator, and, if

necessary, to exercise its power of removal. The intention is to appoint the Jersey Community Foundation, a registered charity, to be the income administrator and the Representor has committed to the Jersey Charity Commissioner that the appointment will be for a maximum of 18 months, so that an assessment can take place which will inform decisions regarding long term appointments.

25 For these and all of the reasons put forward by the Representor, the Court was satisfied that the proposed variation was both suitable and expedient and consistent with the original intentions of the Testator and the spirit of the gift, so that all of the requirements of Article 47A(3) were met. The Solicitor General, representing the public interest, supported the variation.

26 The Court therefore approved the variation to the Fund.