H

Jurisdiction:	Jersey
Judge:	The Bailiff
Judgment Date:	30 March 2011
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Text

[2011] JRC 70

ROYAL COURT

(Samedi Division)

Before:

M. C. St. J. Birt, Esq., Bailiff, **sitting as a Single Judge**.

IN THE MATTER OF H

Between
A
Representor
and
1. B Management Limited
First Respondent
2. C Charitable Foundation (International) Limited
Second Respondent

and

3. HM Attorney General
Third Respondent

Advocate N. F. Journeaux **for the Representor**.

Advocate S. M. Baker **for the First Respondent**.

Advocate J. P. Speck **for the Second Respondent**.

The Third Respondent did not appear and was not represented.

Authorities

Re the E R O and L Trusts [2008] JLR N17 .

Re the E R O and L Trusts [2008] JRC 053 .

Re JW Laing Trust [1984] Ch 143 .

Attorney General v Dedham School (1857) 23 Beav 350 .

Charities Act 1960.

Bradshaw v University College of Wales [1988] 1 WLR 190 .

Re Hampton Fuel Allotment Charity [1989] 1 Ch 484 .

The Bailiff

1 This is an application by A ("the widow") to participate in proceedings ("the main proceedings") brought by the first respondent ("the Sub-trustee") seeking certain relief in connection with a charitable trust known as the C Charitable Foundation ("the Trust"). The second respondent ("the Trustee") is the trustee of the Trust. The widow seeks an order that she:-

Alternatively, she seeks an order that she be made a party to the main proceedings.

(i) is served with copies of all the documents served or filed in the main proceedings;

(ii) be permitted to be heard by her advocate at any hearing in the main proceedings; and

(iii) be permitted to file submissions and evidence in the main proceedings.

2 Her application is supported by the Trustee but opposed by the Sub-trustee.

The factual background

3 It is not necessary to go into great detail about the main proceedings but it is necessary to describe them sufficiently for the context of the widow's application to be understood.

4 The Trust was established by a trust instrument dated 28th May 1987 made between the settlor and the Trustee. The main asset of the Trust consists of all the issued B shares in a substantial investment company incorporated in Jersey to which we shall refer as “the investment company”. The B shares carry the whole economic interest in the investment company and were transferred to the Trustee during the life of the settlor. The A shares carry the right to appoint and remove directors of the company and were owned by the settlor at the date of his death. The settlor also owned the entire share capital of the Trustee.

5 The settlor died in 2001. He was survived by the widow and their eight children. He named four of his children as executors of his will together with a partner of a leading firm of solicitors in London. By his will he left the shares in the Trustee and the A shares in the investment company to his executors as trustees upon certain trusts described in clause 6 of the will. As to the residue of his estate, he left this as to 1% to the widow and 99% to BNP Paribas Jersey Trust Corporation Limited (“BNP”) as trustee of a discretionary trust.

6 Certain difficulties arose in connection with the administration of the will and two of the executors instituted proceedings before this Court seeking directions, including on whether clause 6 was valid. The parties convened to the representation of the two executors were the remaining executors, the Trustee and BNP. The widow and the other four children were not formally convened but they were permitted by the Court to address it through counsel at the hearing to which we now turn.

7 The matter came before this Court and was ultimately compromised by an agreement which was reflected in an order of the Court dated 11th June 2004 (“the compromise”). In outline, the relevant terms of the compromise were as follows:-

> (i) The settlor's A shares in the investment company (conferring the right to appoint directors to that company) were to be transferred as to 99% to the Trustee and as to 1% to the widow.
>
> (ii) The settlor's shares in the Trustee were transferred as to 1% to the widow, 3% to BNP as trustee of the discretionary trust and the balance of 96% to Mourant and Co Trustees Limited (“Mourant Trustees”) as trustee to hold on the trusts of a new purpose trust, with the four children who were executors designated as Enforcers of the purpose trust.

(iii) Agreed amendments were to be made to the Articles of Association of the investment company in connection with the distribution of profits of that company.

(iv) An instrument of appointment declaring new trusts in respect of the Trust's shares in the investment company was to be executed. The object of this was that the Trustee should hold the Trust's 'B' shares in the investment company on trust to pay the income and any capital distribution there from in equal shares for the trustees of eight sub-trusts to be established for charitable purposes ("the charitable sub-trusts"). These were subsequently established with a different child of the settlor as the guardian of each charitable settlement. The Sub-trustee is the trustee of three of the charitable sub-trusts of which three of the children who are not executors are guardians.

8 The new Article 96 of the Articles of Association of the investment company provides that not less than 75% of the profits available for dividend should be distributed to the Trust subject to certain exceptions.

9 Under the terms of the purpose trust, the four children who are executors are the directors of the Trustee and of the investment company as well as being the Enforcers of the purpose trust. Advocate Alan Binnington is an independent director of the Trustee and the investment company.

10 Differences have arisen between three of the children and the remaining five in relation to how the compromise has been put into effect. This has resulted in the Sub-trustee (as trustee of three of the charitable sub-trusts) instituting the main proceedings by way of representation dated 3rd November 2010. In brief, it is alleged in the main proceedings that the investment company has not distributed 75% of its profits as required under the Articles of Association adopted pursuant to the compromise and the Trustee has failed to ensure that proper distributions are made, as well as committing certain other alleged defaults. In effect, says the Sub-trustee, the three charitable sub-trusts of which it is trustee have not received the funds to which they are entitled under the compromise. We should add that the accounts of the investment company show that the sums involved are very considerable.

11 The representation in the main proceedings seeks a number of matters by way of relief:-

The parties convened to the main proceedings at present comprise the Trustee, the Attorney General and the trustees of the five other charitable sub-trusts.

(i) Adjudication upon what sums are properly available for distribution by way of a dividend in the investment company under Article 96 as adopted following the compromise;

(ii) An order that the Trustee procure immediate payment by way of dividend of whatever sums are found to be available for distribution from the investment

company;

(iii) An order that the Trustee transfer 3/8ths of the assets of the investment company to W as trustee of the three charitable sub-trusts;

(iv) Alternatively, an order that the Trustee distribute the trust fund equally between the eight charitable sub-trusts;

(v) Alternatively an order removing the Trustee as trustee of the Trust.

12 It is in these circumstances that the widow seeks to be convened or to participate in the more limited capacity described at para 1 above.

The applicable principles

13 There appears to be no Jersey case where consideration has had to be given to the test for convening parties to an application concerning a charitable trust. However all counsel agreed that, although it related to private trusts rather than charitable trusts, the observations of the court in *Re the E R O and L Trusts* [2008] JLR N17; [2008] JRC 053 at paras 21 – 25 provide a useful starting point:-

> ***"21. When the Court sits in its supervisory capacity to consider directions or rulings it should give in relation to a trust, it has to consider in each case who should be convened to the hearing. The starting point is that the trust property is held beneficially for the beneficiaries and accordingly it is normally appropriate that they should be convened (see*** *Re a Settlement* 1994 JLR 139 at 144 ***per Bailhache, Bailiff). However, as that case made clear, it is not invariably the case that all the beneficiaries need to be heard. Many of them may have an identical interest; alternatively their interest may be extremely remote. It is ultimately a matter for the discretion of the Court as to which beneficiaries should be convened having regard to the nature of the particular application and the particular circumstances*** .
>
> ***22. …***
>
> ***23. As well as beneficiaries, the Court may think it appropriate to hear from others who have a close connection with the trust even if they are not beneficiaries. For example there may be a protector whose views would be material; and sometimes the nature of the issue before the Court may mean that is appropriate to hear from the settlor even if he is not a beneficiary. But again, whether this is appropriate will depend upon the circumstances*** .
>
> ***24. Occasionally, but rarely, the Court may think it appropriate to hear from persons who are neither beneficiaries nor have the sort of connection just referred to. An example of this is the case of*** *Re Abacus* ***referred to by Advocate***

Journeaux. In that case Grupo Torros was a creditor of the settlor and had brought proceedings seeking to challenge the gifts into the trust. It also had a proprietary claim against some of the trust assets. The trustee sought directions as to whether it should distribute all the trust assets to the settlor (who was also a beneficiary) with a view to reducing his debt to Grupo Torros as his creditor. In its discretion the Court decided that it would be appropriate to convene Grupo Torros to the trustee's application on the basis that the company was not a mere creditor but asserted a proprietary interest in some of the monies and the Court felt that it would benefit from the detailed knowledge of the history of the matter which Grupo Torros possessed .

25. As Bailhache, Bailiff made clear at 168 in *Re Abacus* , ***the question is whether it is necessary that a party be convened in order properly to determine the trustee's application (or in this case that of the beneficiaries). If that test is satisfied, the Court has a discretion to convene the relevant party. It seems to us that the underlying rationale for convening a beneficiary is essentially two-fold:-***

> ***(i) It is likely that a beneficiary will have something material which the Court ought to be aware of before deciding what directions to give.*** Thus the view of a beneficiary on whether it would be right to take a particular course of action is clearly something relevant for the Court to know .
>
> ***(ii) It may also be thought unfair for the Court to make a decision which would affect the trust (and therefore the interests of a beneficiary) without giving that beneficiary an opportunity of putting his observations to the Court*** .
>
> ***Neither of these considerations is likely to have such strength in the case of a person who is not a beneficiary.*** It is for this reason that it is only rarely appropriate to convene a stranger to the trust to an application for directions."

14 Advocate Journeaux sought to derive assistance from certain English cases dealing with charitable trusts. He referred to *Re JW Laing Trust* [1984] Ch 143 and *Attorney General v Dedham School* (1857) 23 Beav 350 where, in each case, the Court emphasised, in relation to a charitable trust, the importance of having careful regard to the intentions and wishes of the settlor.

15 He also submitted that some guidance could be obtained, by way of analogy, from Section 28 of the Charities Act 1960 which provides that proceedings in relation to charities may be taken by ***"any person interested in the charity…"***. In *Bradshaw v University College of Wales* [1988] 1 WLR 190, Hoffmann J struck out proceedings by the executors of the settlor of a charitable trust on the basis that they were not 'persons interested' in the charity. In passing he said at 194:-

> ***"Even assuming, which, as I have said, I do not accept, that the settlor could have been a 'person interested' on the ground that she would wish***

to see the trusts of the charity enforced, I do not see how an interest of this kind could have been transmitted to the plaintiffs. Executors succeed to the property of the deceased; not to her spirit and disembodied wishes."

16 Whilst agreeing with Hoffmann J insofar as executors are concerned, his observations were not accepted in relation to the position of the settlor herself by the English Court of Appeal in *Re Hampton Fuel Allotment Charity* [1989] 1 Ch 484. Nicholls LJ said this at 493:-

> ***"In particular we are unable to accept what was submitted to be the test to be extracted from the decisions of Hoffmann J in Bradshaw v University College of Wales and Knox J in the present case, viz., that to be interested a person needs either (a) to be capable of benefiting from the charity or taking some interest under the trusts affecting the property of a charity or (b) to be entitled to participate in the management of the charity.*** In our view that is unsatisfactory as a test because in some respects it may be too wide and in other respects it is too narrow. …
>
> ***In Bradshaw v University College of Wales [1988] 1 WLR 190 it was not the settlor but her executors who brought proceedings.*** We agree with Hoffmann J that they were not persons interested. As the judge said in that case, at p194: "Executors succeed to the property of the deceased; not to her spirit and disembodied wishes."
>
> ***But if it had been the settlor herself who was plaintiff, we would not wish to rule that she was not a person interested.*** Certainly we would have no doubt that a person does not qualify as a person interested in a charity simply because he has a sentimental or altruistic interest in it or provides modest financial support for it, whether by making payments under covenant or buying a flag on its flag day or contributing to an appeal. But, at the other edge of the spectrum, we think it would be surprising if a person who founds and finances a charity can never thereby qualify as a person interested in that charity."

Nicholls LJ went on to elaborate what was meant by a 'person interested' at 494:-

> ***"… this suggests, therefore, that to qualify as a plaintiff in his own right a person generally needs to have an interest materially greater than or different from that possessed by ordinary members of the public such as we have described*** .
>
> ***In our view that may be as near as one can get to identifying what is the nature of the interest which a person needs to possess to qualify under this heading as a competent plaintiff.*** It is not a definition. But charitable trusts vary so widely that to seek a definition here is, we believe, to search for a will-o'-the-wisp. If a person has an interest in securing the due administration of a trust materially greater than or different from, that possessed by ordinary members of

the public as described above, that interest may, depending on the circumstances, qualify him as a 'person interested'. It may do so because that may give him, to echo the words of Sir Robert Megarry V-C in *Hazelmere Estates Limited v Baker* [1982] 1WLR 1109, 1122C : ***'Some good reason for seeking to enforce the trusts of a charity or secure its due administration…' We appreciate that this is imprecise, even vague, but we can see no occasion or justification for the court attempting to delimit with precision a boundary which Parliament has left undefined."***

17 The position in England is to be distinguished from that in Scotland. According to the Encyclopaedia of the Laws of Scotland at paragraph 500:-

> ***"The heir-at-law or the executor of the founder of a charity has an interest which entitles him to see that the trust is properly administered."***

18 In my judgment, although his words were used in the context of an English statutory provision, the observations of Nicholls LJ are of assistance as to the approach to be taken in Jersey. If a person is 'interested' for the purposes of the English statute, it seems to me that he is likely to be a person whom it would be right to convene so that he may be heard, if he wishes, in relation to a Jersey charitable trust. A person who just has a general interest in a charity should not be given leave to intervene in proceedings concerning that charity. But the court may convene as a party a person who has an interest in the trust which is materially greater than, or different from, that possessed by ordinary members of the public. For my part, given the importance attached to the wishes and intentions of the settlor in relation to a charitable trust, I would expect the settlor of a charitable trust normally to be a person who does have such an interest and who may therefore be convened in proceedings concerning such a trust.

19 With that introduction I turn to consider the submissions by the parties in relation to the particular facts of this case.

Submissions on behalf of the widow

20 I would summarise Advocate Journeaux's contentions as follows:-

> (i) The wishes and intentions of the settlor will be an important factor in the Court's decision. The widow was married to the settlor for over 50 years. She is fully aware of his wishes. She would be the person best placed to assist the Court in this respect. The settlor would not have wished to see the Trust broken up into eight separate parts as suggested by the Sub-trustee in the main proceedings. He wished it to remain as a single perpetual charitable foundation administered by such of his children as he specified in his will. The widow cannot fulfil this important role simply by giving evidence; she needs to be in a position to respond to points raised by other parties

and to make submissions through her advocate.

(ii) Although the widow is not the settlor, the Court should follow the Scottish approach rather than the English approach and hold that the heir-at-law or executor of a settlor of a charitable trust has sufficient interest to be convened.

(iii) In response to the suggestion that, even if it might ultimately become appropriate for the widow to participate in the proceedings, it was premature at this stage because the first issue was a technical issue relating to the interpretation of Article 96 of the Articles of Association of the investment company, Advocate Journeaux submitted that the settlor's intentions may be relevant even in that connection; and in any event, the proceedings should be taken as a whole given the nature of the relief sought by the Sub-trustee. It might be that the widow would play a lesser role in connection with this first issue than in relation to subsequent issues.

(iv) The widow has an interest materially greater than or different from an ordinary member of the public by reason of her role in the administration of the Trust. Thus:-

(a) As a holder of 1% of the A shares in the investment company, she has the right to attend and vote at general meetings at which the shareholders consider the accounts and balance sheet. The way in which the accounts are now being presented is relevant to the issue concerning Article 96.

(b) Under the Articles of Association of the investment company, she is entitled to have her shares counted and therefore her views known in determining the effectiveness of any notice from the majority of the holders of A shares as to the removal or appointment of directors.

(c) Under Article 96 of the Articles of Association of the investment company, she has the right to vote on any ratification and approval of dividends recommended by the board. It is of course the question of dividends which is at the heart of the complaint brought by the Sub-trustee.

(d) As a 1% shareholder in the Trustee, she has the right to attend general meetings to receive the accounts etc and also to vote on the appointment and removal of directors of the Trustee.

(e) Whilst it was accepted that her shareholding was small and could not carry the day, the fact remained that she was entitled to be consulted on these matters and therefore had a voice. It would be strange in those circumstances if she were to have no voice once the matter came before the Court.

(v) The proceedings brought by the Sub-trustee related to how the compromise had been put into effect. Although she had not been a party to the proceedings which gave rise to the compromise, she had been permitted to address the Court through her advocate at the hearing leading up to the compromise. It would be strange if she were permitted to address the Court on that occasion but not on the present occasion.

(vi) There was no good reason for excluding her. All of her children (through their individual charitable sub-trusts) would be involved in the proceedings and the interests of the family were extremely important. She could no doubt be informed by the Trustee as to what was happening, but this would be no substitute for having direct knowledge through her advocate rather than having to rely on second hand information as to what was being contended before the Court.

(vii) Her application had the support of the Trustee and of five out of the eight children i.e. the guardians of five of the eight charitable sub-trusts.

(viii) It was accepted that her position was not the same as the other parties convened and accordingly she would be content to have the lesser involvement summarised in paragraph 1 above. Although in many ways this would mean she could play the same part as if she were convened, the key difference would be that, if she was not a party, she would not have any right to appeal any decision of the Court.

21 I would summarise Advocate Baker's arguments in response as follows:-

(i) Even if it was appropriate for a settlor to be joined in relation to proceedings about a charitable trust, she was not the settlor; she was not even one of the executors. She had no standing to be joined as some form of representative of the settlor.

(ii) If it was thought relevant to ascertain the settlor's wishes and intentions, this could be done in the ordinary way by her giving evidence at the request of the Trustee or one of the other charitable sub-trusts. There was no need for her to be a party or to participate in the proceedings merely to inform the Court of the settlor's wishes and intentions.

(iii) Even if that was wrong, the application was premature. The Court had made it clear that the issue which it proposed to consider first was whether the Trustee and the investment company had complied with Article 96 of the Articles of Association concerning the distribution of dividends. That was a matter of construction on which the settlor's wishes could not be relevant. The application should therefore be deferred until after resolution of that first issue.

(iv) The widow's interest in the Trustee and the investment company did not justify her being convened or participating in the proceedings. As to the investment company, she held only 1% with 96% being held by the Trustee as trustee of the Trust. She could not therefore influence matters in her capacity as shareholder. Similarly, in relation to her shareholding in the Trustee, the other 99% was held by the Mourant Trustees as trustee of the purpose trust. The provisions of that purpose trust were mandatory and meant in effect that she would have no influence at all in any matters for which a shareholders' vote was needed in relation to the Trustee.

(v) He did not accept that no harm would be done by allowing the widow to

participate. It would be prejudicial to the interests of the three charitable sub-trusts. The widow was 82 and lived with one of the other children. In China, respect for one's parents is taken very seriously. The three sisters involved in the three charitable sub-trusts of which the Sub-trustee is trustee had already had to steel themselves to bring these proceedings in the face of opposition from the other five children. If the widow were to participate and exercise her influence as a parent, there was a real risk that the three daughters would not be able to withstand the pressure and see the proceedings through for the benefit of the charitable interests which they were representing.

(vi) For that reason, the Sub-trustee also opposed any lesser involvement by the widow or even a simple release by the Court so that the Trustee could keep the widow informed of proceedings which would be held in private. This would still have the same potentially prejudicial effect in that pressure could be brought to bear on the three sisters.

Conclusion

22 I have not found this an easy matter and I consider the arguments to be fairly finely balanced. It is ultimately a discretionary decision as to how best to ensure that the Court receives all relevant assistance in relation to the decisions which it has to take concerning the Trust.

23 Having considered the arguments carefully, I have come to the conclusion that the widow should be allowed to participate in the proceedings, essentially for the reasons put forward by Advocate Journeaux. I would summarise them as follows:-

(i) I have already indicated at paragraph 18 that a settlor is a person who may be convened to proceedings concerning a charitable trust so that he may have the opportunity of making submissions if he so wishes. There is clearly a difference between English law and Scottish law as to whether this approach applies also to heirs (in which I would include those taking under a will) and executors. I prefer the Scottish approach. Whilst in many cases executors or heirs will not be able to assist as to the settlor's wishes and intentions, there may be cases where they can. If so, it seems to me wrong for the Court to exclude the possibility of deriving assistance from them.

(ii) I appreciate that the widow is not an executor and that her interest as legatee is small. Nevertheless she was married to the settlor for over 50 years and is in a good position to assist as to his wishes and intentions. Furthermore, it is not clear at present that the Trustee and the other charitable sub-trusts will necessarily put forward arguments concerning the settlor's wishes. They may of course do so but if they do not, then, in the absence of the widow, there would be no-one putting them forward.

(iii) I do not agree that an ability to give evidence is as good as participating in the

proceedings, as submitted by Advocate Baker. Giving evidence is essentially passive and depends upon being called as a witness by one of the other parties. An ability to receive and comment on all the submissions made by other parties in the context of the settlor's wishes would be much more effective and of more assistance to the Court.

(iv) Apart from her position as a legatee and as widow of the settlor, she has an interest which is materially greater than, or different from, that possessed by ordinary members of the public because of her position as a shareholder of the investment company and the Trustee. I accept that in each case her shareholding is very small and that she can be out-voted by the Trustee (in the case of the investment company) and by the trustees of the purpose trust (in the case of the Trustee). However, taking the investment company, as an example, she has a forum at shareholders' meetings in which she can express her views and seek to persuade the majority on matters such as dividends payable by the investment company – and that lies at the heart of this dispute. Given that she has an ability to seek to dissuade those in control in that forum, it seems wrong to exclude her from putting forward any submissions to this Court when it considers the various actions which have been taken in relation to the investment company and the Trust.

(v) She was allowed to participate in the proceedings giving rise to the compromise. Whilst that is in no sense decisive, it would seem slightly strange to exclude her from making any submissions in proceedings which concern how the compromise has or has not been put into effect. Indeed, Advocate Baker went further and submitted that she should not even be allowed to be told by the Trustee what was taking place in the main proceedings. For the mother of eight children who are involved in a dispute to be excluded altogether in that way – particularly in the case of a Chinese family where family matters are important – does not seem to me to be the right approach.

(vi) I do not consider that it is premature to allow her to participate at this stage. I accept that it may be – although I do not know for certain – that the issue of whether the correct dividends have been paid will be largely a matter of construction of the Articles of Association and will involve technical accountancy matters. But the fact remains that the representation of the Sub-trustee seeks as one of its prayers the dismantling of the current structure by dividing the assets of the investment company equally between the eight charitable sub-trusts. I think it reasonable that the widow should be permitted to participate immediately albeit that, as Advocate Journeaux conceded, her participation may well turn out to be minimal in relation to purely technical issues.

(vii) I do not accept Advocate Baker's argument on prejudice. Whenever there is a family dispute, there is the possibility of emotional pressures and concerns playing a part. I can accept that the three daughters who are guardians of the three sub-trusts may find it difficult if their mother opposes what they are proposing. But that is already the position. They know from her affidavit that she does not agree with their actions. Furthermore, I do not see any real distinction between her giving evidence and participating in the proceedings. If she were to give evidence to the effect that what the daughters were proposing went against the wishes of their father, they would face

exactly the same pressures as where she asserts this through her advocate; indeed, in the case of her giving evidence, they would have to decide the extent to which their advocate should cross examine her, which would be even more difficult. Even if they do feel pressure as a result of her involvement, this is an occupational hazard of litigation concerning families and I do not consider that this factor outweighs the arguments in favour of her being allowed to participate.

24 As to whether the widow should participate in the three respects summarised at paragraph 1 of this judgment or whether she should simply be convened as a party in the ordinary way, little argument was addressed to this issue during the hearing. I have to say that participating in those three respects seems remarkably similar to participating as a party and it is not clear to me whether there is any material difference. Be that as it may, when this judgment is formally delivered, I propose to invite the parties to address me briefly on the exact form of order which I should make.

25 In summary, subject to clarification of the exact form of order, I rule that the widow should be allowed to participate in the main proceedings.

Note: Following submissions after formal delivery of the judgment, the Court ordered that the widow be convened as a party.