

A Settlement

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Le Breton, Newcombe
Judgment Date:	26 June 2009
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Text

[2009] JRC 125

ROYAL COURT

(Samedi Division)

Before:

J. A. Clyde-Smith, **Esq., Commissioner and** Jurats Le Breton **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 Articles 51 of the Trusts (Jersey) Law 1984

Advocate D. M. Cadin for the Representor.

Authorities

Re S 2001/154.

In re E, R, O and L Trusts [2008] JLR N 17.

THE COMMISSIONER:

- 1 On 1st May, 2009, the Court gave certain interim directions to the Representor ("RBC") without convening the beneficiaries of the three settlements concerned. The matter was adjourned for ten weeks when further Directions will be given. We said we would set out our reasons for proceeding without convening the beneficiaries in a written judgment which we now do. The judgment is limited to that issue and does not therefore go into the detailed history of the matter.
- 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. Whilst the family of each brother might be thought to be the principal beneficiaries of each settlement, there is, as Mr Cadin puts it, cross fertilisation in that to a greater or lesser extent, each family has a beneficial interest in the settlements of the other.
- 3 In essence, the assets of each of the trusts are held through a Jersey registered company called EE administered and controlled by RBC. EE has interests in a number of Irish companies which are managed by the family of D on behalf of the three trusts and any dividends received are passed on by EE to the three trusts 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 family. RBC sought information from the directors of the Irish companies but 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 and reporting to it. The Court ratified that decision on the 7th June, 2007, and directed RBC, *inter alia*, to proceed.
- 5 Those directions were implemented in respect of those companies in which SIL held a controlling interest, but not in respect of one company AA in which EE only held a 50% interest. The steps taken by RBC to seek the appointment of a majority of directors to AA are fully set out in the affidavit of V, the person responsible for the trusts within RBC, dated 29th April, 2009, but it is not necessary to go into that for the purposes of this judgment.

Draft Report

- 6 RBC has received a draft report from W following what was clearly a lengthy and complex assignment which concludes *inter alia* that:-

(i) There have been potentially excessive secretarial and administration expenses and group charges levied against the Irish companies by entities controlled by the D family.

(ii) There are potentially unpaid taxes due by the Irish companies together with interest and penalties.

7 The potential tax liabilities are significant. RBC has been advised that were the Irish Revenue itself to demand an investigation, it could as part of that investigation recover unpaid liabilities going back as far as 1974/75 and that such an 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 an 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 directors (members of the D family) in respect of any penalties and interest accruing before 2003.

8 Given the possible tax issues and the potential liability of the directors of the Irish companies, W and his colleagues had been advised by independent Irish lawyers to ensure that they resigned contemporaneously with the signing of the report, which they agreed to delay until the matter came before the Court on 1st May, 2009. Apart from those resignations undermining the previous directions given to RBC by the Court relating to majority control, RBC is presented with a number of conflicts:-

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

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

9 These conflicts were heightened given the absence of the beneficiaries from the Court on 1st May, 2009, and the suggestion that steps be taken in the interim without convening them. RBC was concerned that, viewed objectively, if it took any steps it could or would be criticised on the grounds that it has or may have or would appear to have a conflict and thus

it sought to surrender its discretion to the Court. Mr Cadin referred us to principles set out in *Re S 2001/154*. We agreed with RBC that it had good reason to surrender its discretion and we accepted that surrender.

- 10 RBC was of the view that ultimately, an approach to the Irish Revenue could not be avoided but it recommended that the directors of the Irish companies (other than referring to its contents in general terms in discussions with members of the D family) be given an opportunity to explore other options such as, for example, a sale of those companies to those directors. In the meantime, RBC was concerned to keep control of the position by not disclosing the draft report of W to the beneficiaries, (other than the members of the D family, who are directors) who might, given its contents, seize the initiative and report the companies to the Irish Revenue. Once the report is disclosed, it may be difficult to contain. Were this to happen, RBC would lose control of the process and may thereafter simply be responding to the Irish Revenue rather than engaging with it. Accordingly, RBC recommended that the beneficiaries should not be convened at this stage, but that RBC be given a limited period of time (ten weeks) in order to liaise with the directors of the Irish companies to explore the issues raised in the draft report and whether there might be any alternative routes available.
- 11 *In re E, R, O and L Trusts* [2008] JLR N 17, Birt, Deputy Bailiff, explained the underlying rationale for convening beneficiaries as being essentially twofold:-
- “(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 the 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 the beneficiary) without giving that beneficiary an opportunity of putting his observations to the Court.”***
- 12 Ordinarily, the Court would be concerned to ensure that the beneficiaries of the three trusts were convened so that their views could be heard, but we agreed with RBC that in the light of the limited directions being suggested the Court should make at this stage, the sensitivity of the issues and the clear interests of all the beneficiaries of the three trusts that the process should be properly controlled, it was appropriate to proceed without them. The matter will be reviewed at the expiration of ten weeks.