

A Representation of Maurant & Company Trustees Ltd as The Trustees of The Wellman Trust and And The Trusts (Jersey) Law 1984

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	23 April 2001
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Text

[2001] JRC 087A

ROYAL COURT

(Samedi Division)

Before:

M.C. St. J. Birt, Deputy Bailiff, and Jurats de Veulle, and Allo.

In The Matter of A Representation of Maurant & Co Trustees Limited As The Trustees of
The Wellman Trust
And In The Matter of The Trusts (Jersey) Law 1984

Advocate J.P. Speck for the Representor

Advocate C.G. P Lakeman on behalf of Her Majesty's Attorney General, and as Representative of the minor, unborn, or unascertained beneficiaries.

Authorities

Re Masters [\(1911\) 1 Ch.321](#) .

Application for directions as to the proper interpretation of a settlement

Bailiff

THE DEPUTY

- 1 The Court has before it an amended representation by Mourant & Co Trustees Limited ("the Trustee") seeking directions as to the proper interpretation of a settlement ("the Settlement") dated 7th May 1997 and made between Ronald Cohen ("the Settlor") as settlor and the Trustee as trustee. The Settlement was originally known as the Portland Trust but, since February 1998, has been known as the Wellman Trust.

Relevant Provisions of the Settlement

- 2 The Settlement is expressed to be governed by Jersey law. The beneficiaries are set out in Clause C2 of the Trust Deed as follows:–

"C2 The beneficiaries

C2.01 The Settlor.

C2.02 Any person who shall for the time being be a spouse of the Settlor.

C2.03 The issue of the Settlor (now living or hereafter born during the Trust Period).

C2.04 Other issue of the Settlor's parents (now living or hereafter born during the Trust Period).

C2.05 Any person who shall for the time being or at any time be or have been a spouse of any of the persons who are described in Clauses C2.03 or C2.04.

C2.06 The Settlor's parents.

C2.07 Any trust association body or other organisation in any part of the world the objects of which are charitable.

C2.08 Any person who is the subject of any addition under Clause A3.02.”

- 3 The present living beneficiaries comprise the Settlor, his wife, his two minor children, his brother and his mother. They have all been convened to the hearing, as has the Attorney General on behalf of the charitable institutions included at Clause C2.07. Advocate Lakeman has been appointed pursuant to Rule 4/5(i) of the Royal Court Rules to represent the minor, unborn and unascertained beneficiaries. No person has been added as a beneficiary. The four adult beneficiaries were not represented before the Court but all wrote letters to the Trustee expressing their views, which were before the Court.
- 4 The key provisions of the Settlement are Clauses A6 and A7 and it is necessary to set them out in full:—

“A6. Principal trusts

A6.01 The Trustees shall during the Trust Period subject as hereinafter provided hold the Trust Fund upon trust:

A6.01.01 during the lifetime of the Settlor to pay the income thereof to the Settlor;

A6.01.02 subject thereto to accumulate the income thereof by way of compound interest investing it and the resultant income thereof in the acquisition of any investments or other property authorised hereunder and all accumulations of income so made shall be held as additions to the Trust Fund for all purposes but with power at any time to treat the accumulations already then so made (or any part thereof) as current income;

it being provided that the Settlor shall have power to appoint by instrument delivered to the Trustees revocable during the Trust Period or irrevocable or by will or codicil to take effect during the Trust Period that all or any part of the Trust Fund to the income of which the Settlor is entitled pursuant to the provisions of Clause A6.01.01 shall after the termination of such entitlement for whatsoever reason and in priority to the trusts declared by Clause A6.01.02 be held upon trust to pay the income thereof to the person (if any) who is at the time of such termination the Settlor's spouse during the remainder of her lifetime or for any less period.

A7. Overriding powers of payment application and appointment

A7.01 Notwithstanding and in derogation of anything hereinbefore contained including without limiting the foregoing any appointment made by the Settlor under the proviso to Clause A6.01 the Trustees shall have power during the Trust Period:

A7.01.01 to pay or apply the Trust Fund and the income thereof or any part thereof to or for the benefit of all or such one or more exclusive of the others of

the Beneficiaries and in such shares if more than one and in such manner generally as the Trustees may at any time in their discretion think fit.

A7.01.02 to revocably or irrevocably appoint the Trust Fund and the income thereof or any part thereof upon such trusts for the benefit of all or any one or more exclusive of the others of the Beneficiaries at such ages or times with such powers of appointment maintenance advancement and otherwise in favour of all or any one or more of them and with such administrative powers and subject to such provisions (whether or not such powers and provisions are similar to those contained in this trust) and generally in such manner in all respects as the Trustees may at any time in their discretion think fit and so that:

(a) any trust so appointed may be either mandatory or discretionary and may create any interests whatsoever in either capital or income or both whether absolute or limited and whether vested or contingent and whether in possession or in reversion and whether revocable or irrevocable and may divide the Trust Fund or the income thereof or any part thereof respectively into any shares and any discretionary trusts or powers may by any such appointment be conferred upon any persons (not necessarily being or including the Trustees) and any such trusts or powers so conferred may authorise the delegation of any discretion and it shall not be an objection to any appointment that the same makes provision of an administrative nature only and does not alter or vary any beneficial interest in the Trust Fund or income thereof;

(b) in any appointment the Trustees shall have power to appoint separate trustees of the property of which trusts are declared thereunder and to provide for the appointment of new or additional trustees thereof so that all or any such trustees or new or additional trustees may be persons resident within or without the jurisdiction of the proper law;

(c) no such appointment shall affect any payment or application of all or any part of the Trust Fund or the income thereof previously made under any other provision contained in this trust or power conferred by law;

(d) any revocable appointment if not revoked before the date of expiration of the Trust Period shall become irrevocable on that date”.

The issue before the Court

- 5 A difficulty has arisen over the interrelationship of Clause A6.01.01 and Clause A7. Is the combined effect of these provisions to require the Trustee to pay the whole of the income of the trust fund as it arises to the Settlor or do the provisions confer a discretion on the Trustee to pay the income to other beneficiaries under any of their powers in Clause A7, so that the Settlor is not entitled to the income as of right when it arises?

- 6 The Court has had the benefit of affidavits sworn by the Settlor, advocate Nicola Davies, the director of the Trustee who was responsible for the drafting of the trust deed on behalf of the Trustee, and Mr Michael Trask, a partner of S.J. Berwin & Co., English Solicitors, who were responsible for advising the Settlor at the time of the creation of the Settlement and for approving the terms of the trust deed.
- 7 From these affidavits, it is clear that the parties intended the Settlor to have a defeasible life interest and that the life interest should constitute an “interest in possession” as defined for the purposes of United Kingdom Inheritance Tax. However these matters are not relevant for the Court. The Court's sole function is to interpret the trust deed and give a ruling on the meaning of the relevant provisions under the law of Jersey. Whether the trust deed, as interpreted by the Court, does or does not confer an interest in possession (as defined in English Law) on the Settlor is not a matter for this Court, nor is it a relevant consideration for the Court when considering the true meaning of the provisions of the trust deed.
- 8 The Court was referred to the case of *Re Masters* [\(1911\) 1 Ch.321](#). That case concerned a marriage settlement which settled the capital upon trust for the wife for life, and after her death, upon trust for the husband for life or until he should become bankrupt. Subject to these interests the trustees were to hold the trust fund and the income upon trust for the issue of the marriage as the spouses should by deed jointly, or as the survivor by deed or will, direct and appoint, and in default of appointment for all the children who, being sons, should attain twenty-one or, being daughters, should attain that age or marry, in equal shares. At the date of the proceedings, the wife had died and the husband had been adjudicated bankrupt. Accordingly both life interests had ended. There were three children of the marriage all of whom had attained twenty-one. No appointment had been made under either of the powers contained in the Settlement although it was clearly still open to the husband to do so at a future date. The trustees sought directions as to how they should deal with the income of the trust fund. The adult children of the marriage argued that they were entitled to the intermediate income pending any appointment. The grandchildren argued that the income should be accumulated.
- 9 Eve J. held that the children had defeasible interests in the funds and he found in their favour saying at pp 325–6:–

“... the arguments on behalf of the children ought to prevail: their interests in the settled fund are vested interests subject to being divested by the exercise of the power: *Doe v. Martin* ; *Lambert v. Thwaites*; and although the existence of the power necessarily precludes the immediate division of the capital, I cannot see any principle on which the same result should follow in the case of the current income. Until the right to receive this is intercepted by the donee of the power I think the trustees are bound to pay it to those in whom the capital by which it is produced is for the time being vested”.

He then referred to earlier authorities and continued:–

“... if I am right in holding that the children of the marriage are indefeasibly

entitled to the accruing income until an appointment is made, I do not see how difficulty arises out of the hotchpotch clause. The subject-matter for appointment is the corpus and the income accruing from the date of the appointment”.

- 10 Mr Speck argued that the case suggests that where a person is entitled to capital or income in default of the exercise of a power to appoint the capital or income of the trust fund, an appointment will not carry the income accruing prior to the appointment in the absence of clear words showing a contrary intention.
- 11 The wording used in Clause A7 is not as clear as it might be. Nevertheless we have come to the firm conclusion that, pursuant to Clause A6.01.01, the Settlor is entitled to the income which accrues prior to any exercise of the Trustee's powers under Clause A7 and that the Trustee has no alternative but to pay such income to him. The powers under Clause A7 are only exercisable in relation to income arising after the date of the exercise of the relevant power. Our reasons can be summarised as follows.
- 12 Clause A6.01.01 is the first effective trust provision set out in the trust deed and appears under the heading “Principal trusts”. Omitting the irrelevant (for these purposes) words, it provides:–

“The Trustees shall ... hold the Trust Fund upon trust during the lifetime of the Settlor to pay the income thereof to the Settlor ...”. (emphasis added)

On the face of it the provision is mandatory and provides that the Settlor is entitled to the income as it arises.

- 13 That impression is confirmed by the proviso which follows Clause A6.01.02 and confers a power on the Settlor to appoint a further life interest to his spouse with effect from the termination of his own life interest. The proviso refers to

“... all or any part of the Trust Fund to the income of which the Settlor is entitled pursuant to the provisions of Clause A6.01.01 shall after the termination of such entitlement ...” (emphasis added).

- 14 It is true that Clause A6 is expressed to be “subject as hereinafter provided” and it is therefore clearly subject to the provisions of Clause A7, which is in turn described in its heading as being an overriding power. It is said that the wording of Clause A7.01.01 and A7.01.02 is wide enough to encompass income which has already arisen as well as income arising after the exercise of the relevant power. If this is right, it would mean that the Trustee should retain accrued income in its hands for a reasonable period pending a decision as to whether to pay such income to a beneficiary other than the Settlor. Only once such period had expired with no such payment being made, would it then be paid to the Settlor under the provisions of Clause 6.01.01.

- 15 In our judgment such a position does not sit comfortably with the strong language of Clause 6.01 with its mandatory terms and its talk of “entitlement”. If, under Clause A7, the Trustee had power to divert accrued income away from the Settlor, it would not be natural to refer to his “entitlement” to that income under Clause A6.01.01.
- 16 In our judgment, to interpret Clause A7 so as to apply to income which has already arisen requires a departure from the natural construction of Clause A6.01. Conversely, to interpret Clause A7 as applying only to income arising after the exercise of the relevant power is wholly consistent with Clause A6.01 and does not involve any departure from the natural construction of Clause A7. On the contrary, whilst the wording in Clause A7 could in theory be wide enough to include income arising before as well as after the exercise of the relevant power, the provision makes perfect sense if construed so as to be restricted to the latter. When construing a trust deed, one must attempt to do so in such a way as to make sense of all the provisions of the deed in relation to each other. In our judgment, to construe Clause A7 so as to apply to income which has already arisen would be inconsistent with Clause A6.01 whereas to construe Clause A7 as applying only to future income would not only be a reasonable and natural construction of Clause A7 itself, but it would also then read naturally and consistently with the terms of Clause A6.01.
- 17 We have derived some assistance from the case of *Masters* because our interpretation of the trust deed appears to us to be consistent with the approach adopted in *Masters*. In that case, the income in question arose under a default provision whereas here, it arises under a specific life interest. But in our view this makes no difference. Clear wording is required to interpret an overriding power such as that contained in Clause A7 so as to enable income arising prior to the exercise of the power to be diverted from a person entitled to that income pending the appointment. There is no such clear wording in this case. On the contrary, as we have said, the natural interpretation points in the opposite direction.
- 18 Accordingly we hold that, on its true construction, the trust deed provides that, where income has accrued to the Trustee, the Settlor is entitled to that income and it must be paid to him pursuant to Clause A6.01.01. There is no discretion on the part of the Trustee to pay that income to any other beneficiary. The powers conferred by Clause A7 may of course be exercised so as to have the effect of bringing the Settlor's life interest wholly or partially to an end but these powers only apply to capital and future income i.e. income which arises after the date upon which the Trustee exercises the relevant power.