

## Representation of WW and XX (Trust) 11-Apr-2013

<b>Jurisdiction:</b>	Jersey
<b>Judge:</b>	Bailiff
<b>Judgment Date:</b>	11 April 2013
<b>Neutral Citation:</b>	[2013] JRC 70
<b>Reported In:</b>	[2013] JRC 70
<b>Court:</b>	Royal Court
<b>Date:</b>	11 April 2013

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### Text

[2013] JRC 70

ROYAL COURT

(Samedi)

Before:

W. J. Bailhache, **Q.C.**, **Deputy**Bailiff, **and**Jurats Le Cornu**and**Milner.

IN THE MATTER OF THE REPRESENTATION OF WW AND XX AND

IN THE MATTER OF THE C FOUNDATION

Between  
WW  
XX  
Representors  
and  
A

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First Respondent

and

B

Second Respondent

and

K

Third Respondent

and

L

Fourth Respondent

and

M

Fifth Respondent

and

N

Sixth Respondent

**Advocate A. J. Clarke for the Representors.**

### **Authorities**

Royal Court Rules 2004.

Service of Process Rules 1994.

Trusts (Jersey) Law 1984 as amended.

Trust — application by the representors to remove restriction imposed on the trustee by an order dated 22nd November 2011.

Bailiff

### **THE DEPUTY**

<sup>1</sup> On 25<sup>th</sup> February, 2011, on the application of C the Court appointed the Representors as joint trustees of the first part of the trust fund of the C Foundation, a settlement made on 10

- <sup>th</sup> July, 1981, between C as Settlor and D as the original trustees ("The C Foundation"). The application of C had been ordered to be served upon the Second, Third and Fifth Respondents in the current proceedings. None of them appeared on 25<sup>th</sup> February, 2011. The Second Respondent in the current proceedings was not in fact served as the Court was informed her address was unknown, and it may well be that the Fifth Respondent in the current proceedings did not receive effective notice of the application albeit that she was served at her last known address out of the jurisdiction in accordance with the Royal Court Rules 2004 and the Service of Process Rules 1994.
- 2 On 8<sup>th</sup> April, 2011, the Representors brought the present proceedings. These have been served on all the Respondents in these proceedings, albeit that it is again unclear whether the Fifth Respondent has received effective notice of the process. We are advised by Advocate Clarke that the document was properly served outside the jurisdiction at her last known address but it has been returned unopened. We were also advised that the Fourth Respondent was properly served, but he has never entered an appearance, and has died since the issue of proceedings.
  - 3 The substance of the proceedings is an application under Article 51 of the Trusts (Jersey) Law 1984 as amended ("The Law") for declarations that certain documents and transactions referred to in the representation and set out in more detail below are invalid.
  - 4 The effect of the documents and transactions which are now currently the subject of criticism was to transfer assets from the C Foundation to the E Family and Charitable Foundation. As is clear from the answer filed by the First Respondent, those trustees attempted to take a neutral position in the proceedings, neither in support of nor against the relief sought in the representation, but seeking to assist the Court with the background to the E Family and Charitable Foundation which was asserted to be particularly complex. The First Respondent also raised a number of issues relating to potential tax liabilities in the United Kingdom and the consequences for the First Respondent and other parties if those should turn out to be actual as opposed to potential liabilities.
  - 5 The Second Respondent who was both a beneficiary under the C Foundation and also both beneficiary and protector under the E Family and Charitable Foundation adopted the concerns of the First Respondent with regard to potential UK tax liabilities but in addition contended that the appointment of the Representors as Trustees of the C Foundation should be declared void on the ground of non-disclosure by C and the absence of the First Respondent from those initial proceedings.
  - 6 Various cash flow costs orders were made to enable the Representors, First and Second Respondents to receive payment of their costs from the trust fund, and on 22<sup>nd</sup> November, 2011, when adjourning the further hearing of the representation, the Court ordered that the Representors' powers under the C Foundation Trust Deed which required protector consent should not be exercised without the permission of the Court, C then being the

protector.

- 7 By 18<sup>th</sup> June, 2012, matters had advanced. It was clear that by that point, the tax issues had evaporated, and it was made plain by Advocate Goulborn on behalf of the Second Respondent that she was not pursuing her application for the relief claimed in her answer. Accordingly the cash flow order made in her favour was withdrawn forthwith. As far as the First Respondent was concerned, it was agreed that the only matters which were then in issue were the possibility of the First Respondent obtaining indemnities in relation to the assets which would have to be handed back to the Representors, and the question of costs in relation to the proceedings. Since 18<sup>th</sup> June those issues too have evaporated, or been dealt with.
- 8 The Court therefore was left on 27<sup>th</sup> February, 2013, solely with the outstanding claim for relief under paragraphs (g) and (h) of the prayer in the representation by which the Representors sought declarations of invalidity in relation to the documents about which complaint was made. On 27<sup>th</sup> February, the Court heard argument from Advocate Clarke only in relation to this matter, no other party having appeared.
- 9 It appears that the First Respondent, as trustee of the E Family and Charitable Foundation received assets from the first part of the trust fund of the C Foundation as a result of arrangements made in 1985. The arrangements were summarised in a letter dated 26<sup>th</sup> July, 1985, from the Fourth Respondent to E as protector of the first part of The C Foundation trust fund. It appears from the letter of 26<sup>th</sup> July, 1985, that there was enclosed with that letter copies of documentation which was expressed to be required to wind up the trust fund, as follows:—

*“(1) Appointment of new protector of First Part of the Trust Fund of 15th August 1984, whereby you retire as Protector of the First Part of the Trust Fund and appoint K as Protector, in your place. This document should be signed by you, your signature witnessed (preferably by an overseas resident) and then returned, for placing with the trust documentation, in safe custody, in Jersey.*

*(2) Declaration of additional beneficiary of 15th August 1984, sealed by the trustee and signed by the Protector, appointing a Filipino Lady resident in Hong Kong (M) as an additional discretionary beneficiary of the First Part of the C Foundation.*

*(3) Revocable Appointment of 16th August 1984, sealed by the Trustee and signed by the Protector, revocably appointing the whole of the First Part of the Trust Fund to M, contingent on her surviving to 31st May 1985.*

*(4) Sale contract of 30th September 1984, where G. Services purchases from M, for the sum of Hong Kong \$500 (approximately £50) the whole of her contingent reversionary interest to the First Part of the Trust Fund, subject to the power of revocation. The sum of Hong Kong \$500 has been paid to M and N, who is*

returning to Hong Kong on 29th July, will send to me the completed sale contract, signed by M.

*(5) Receipt dated 30th September 1984 by M of the sum of HK \$500 in respect of the purchase price.*

*(6) Release of the Power of Revocation, dated 31st May 1985, to make the Appointment in favour of M irrevocable, with the result that the whole of the First Part of the Trust Fund of the C Charitable Foundation vested in G. Services Inc. as that date, as the purchaser of M Contingent reversionary interest, vesting absolutely on that date.*

*That completes the winding up of the first part, and from the ashes of the First Part, like phoenix, rises G. Charitable Foundation."*

- 10 We were advised by Advocate Clarke that M, the Fifth Respondent, was the cleaner for N and K, the Sixth and Third Respondents respectively, and the Sixth Respondent in addition is the son of the Fourth Respondent, upon whose advice these various arrangements were apparently made. There was no connection between the Fifth Respondent and the J Family such as would apparently justify her appointment as an additional beneficiary.
- 11 On 5<sup>th</sup> August, 1985, the Fourth Respondent wrote to Mr Malcolm Le Boutillier of Messrs. Le Gallais and Luce to enclose the appointment of new protector dated 15<sup>th</sup> August, 1984, the declaration of additional beneficiary of 15<sup>th</sup> August, 1984, the revocable appointment of 16<sup>th</sup> August, 1984, and the release of the power of revocation of 31<sup>st</sup> May, 1985. It was suggested that the original documents should be retained with the original trust deed of the C Foundation. On 13<sup>th</sup> August, 1985, Mr Le Boutillier acknowledged receipt of the original documents. Unfortunately, the papers appear now to have been mislaid and the original documents have not been found. Of those which are listed at paragraphs (i) to (vi) in the Fourth Respondent's letter of 26<sup>th</sup> July, 1985, only the sale contract and receipt remain available and we have had to proceed upon the basis that the letter of 26<sup>th</sup> July, 1985, appropriately described the content of the documents that had been executed. Were it not for Mr Le Boutillier's acknowledgment of the original documents, there would of course be no evidence that the documents ever existed, but we are satisfied from Mr Le Boutillier's evidence on affidavit and from his contemporaneous letter of 13<sup>th</sup> August, 1985, that the documents were executed and once existed.
- 12 The basis upon which the Representors contend that they are entitled to a declaration that the appointment of K as a new protector of the first part of the trust fund of the C Foundation was invalid is that it is apparent that it could not have been executed on 15<sup>th</sup> August, 1984, the date upon which it is said it was executed. This is because the original document was sent to E on 26<sup>th</sup> July, 1985, almost a year later, with the request that he should sign it and have his signature witnessed. It is said that it follows that the declaration adding the Fifth Respondent as an additional discretionary beneficiary of the first part of the C Foundation

cannot stand because it is apparently a document executed on 15<sup>th</sup> August, 1984, sealed by the trustee and effective only if it had the consent of the protector, purportedly the Third Respondent, although clearly she was not validly appointed as a protector at that time and therefore unable to approve the exercise of the trustee's power to add the Fifth Respondent as a beneficiary. Similarly, the revocable appointment by the trustee on the 16th August, 1984, in favour of the Fifth Respondent, also apparently approved by the Third Respondent as protector, could not be said to be valid because the Third Respondent had not been validly appointed as a protector, nor had the Fifth Respondent been validly added as a beneficiary.

- 13 As to the sale contract dated 30<sup>th</sup> September, 1984, this could not be valid because if the Fifth Respondent never received the benefit from the trustee of the contingent reversionary interest in the first part of the trust fund, because she had not been validly appointed as a beneficiary in the first place, then it followed she could not sell that interest to G Services or anyone else. The receipt which she gave for the purchase price was therefore of no consequence, and the release of the power of revocation apparently executed on 31<sup>st</sup> May, 1985, equally could have no validity because the appointment in favour of the Fifth Respondent had never been valid in the first place and therefore the power of revocation could not be validly released.
- 14 The question thus arises as to whether it would be unjust to the Representors to deny the declaration, particularly in circumstances where they need to know, as Trustees of the First Part of the Trust Fund of the C Foundation, whether the arrangements which were made in 1985 were effective in dealing with trust interests and assets.
- 15 In our view, there is no doubt that the justice lies in making a declaration which settles these particular matters for the Representors. They do need to have a firm answer to the questions raised as to the validity of these particular documents and it would be unjust to hold back from a declaration simply because not everyone who might have an interest had resolved to appear in the proceedings, or in the case of the Fifth Respondent, perhaps even knew of their existence, notwithstanding valid service upon her in accordance with the relevant rules.
- 16 If the alleged deed of appointment of new protector dated 15<sup>th</sup> August, 1984, had been produced, it is possible that the document would have made a claim that although it was executed at a later date, it was intended to have had effect from 15<sup>th</sup> August, 1984, and argument might then conceivably have taken place as to the validity of such an arrangement. That, however, is not the position. The original documents have not been produced, and the only evidence before us is the evidence of the correspondence we have seen which suggests that at least one of the documents in question must have been backdated. The language of the Fourth Respondent's letter of 26<sup>th</sup> July, 1985, suggests in fact that they were all backdated — the original documents were described and the words then added "*to be dated...*", which suggests that they had not been executed as at 26<sup>th</sup>

July, 1985.

- 17 The dating of a document is important. As is clear from this case, the date of the document may have relevance for the capacity of the person who makes it. Thus, for example, the appointment of an additional beneficiary which required the consent of E as protector, if he were protector at the relevant time, could not be valid if that document were executed by someone else as protector, unless that person had herself been validly appointed.
- 18 In this case, the bearer shares of G Services Inc., which company had acquired the relevant assets from the Fifth Respondent pursuant to the sale contract, were settled into the G Charitable Foundation (subsequently the E Family and Charitable Foundation) on 14<sup>th</sup> June, 1985. The trust instrument by which that settlement took place was signed by the Sixth Respondent as a director of G Services Inc., and witnessed by the Third Respondent, who was in turn appointed the first protector under that trust. This transaction could not have taken place if G Services Inc were not entitled to those shares. Their entitlement to the shares derives from the sale contract of 30<sup>th</sup> September, 1984, where the seller was a person who herself only had a valid capacity to sell the assets in question if she had been validly added to the class of beneficiaries of the first part of the trust fund of the C Foundation.
- 19 The Court is in no doubt that on the evidence which has been shown to us, the deed of appointment of new protector of the First Part of the Trust Fund of the C Foundation, purporting to be dated 15<sup>th</sup> August, 1984, did not exist at that time, but the document came into existence at a later stage and could not have been executed prior to 26<sup>th</sup> July, 1985. Accordingly the declaration of additional beneficiary of purportedly dated 15<sup>th</sup> August, 1984, sealed by the trustee and signed by the Third Respondent as protector could not be valid, and accordingly the Fifth Respondent was not properly added as a beneficiary.
- 20 It equally follows that the revocable deed of appointment dated 16<sup>th</sup> August, 1984, in relation to all the assets of this Part of the C Foundation, by which the trustee, with the approval of the Third Respondent as purported protector, purportedly appointed the assets contingently to the Fifth Respondent, equally could not be valid.
- 21 From this it follows that the sale contract made by the Fifth Respondent in respect of shares which came her way as a result of an invalid appointment of those shares to her cannot be valid because she could not have capacity to sell something which did not belong to her.
- 22 Accordingly we make the declarations requested that the deed of appointment of new protector of the First Part of the Trust Fund of the C Foundation purportedly dated 15<sup>th</sup> August, 1984, whereby E retired as a protector and appointed the Third Respondent in his stead is invalid. We also declare that the declaration of additional beneficiary the Part of the C Foundation purportedly dated 15<sup>th</sup> August, 1984, by which the Fifth Respondent was



purportedly appointed a beneficiary of the C Foundation was invalid. By the same reasoning we declare the revocable deed of appointment dated 16<sup>th</sup> August, 1984, by which the trustee revocably appointed all of the assets in this Part of the C Foundation to the Fifth Respondent to be invalid. Accordingly the purported sale of those assets by the sale contract dated 30<sup>th</sup> September, 1984, also failed and was invalid by reason of the Fifth Respondent's lack of true ownership of the assets she purported to sell. Similarly it follows that the release of the power of revocation dated 31<sup>st</sup> May, 1985, in respect of a revocable deed of appointment which has been found to be invalid, must itself also be found invalid and we make that declaration accordingly.

- 23 We have been asked by Advocate Clarke to remove the restriction imposed on the trustee by the order of 22<sup>nd</sup> November, 2011, namely that the trustees' powers under the trust deed that require protector consent should not be exercised without the permission of the Court. It was said that now that the disputes which had been before the Court had been resolved and were no longer pending, it would be wrong for the Court effectively to freeze the on-going administration of the First Part of the Trust Fund of the C Foundation. We consider that is an appropriate point for Advocate Clarke to raise, and given the absence of on-going dispute in relation to this trust, we revoke the order in question and confirm that the Representors, as trustees of the First Part of the Trust Fund of the C Foundation, should execute the trust in accordance with its terms subject to the approval of the protector in those cases where that approval is necessary.