

The Representation of BBB Ltd

Jurisdiction:	Jersey
Judge:	The Deputy Bailiff
Judgment Date:	28 December 2011
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Text

[2011] JRC 240

ROYAL COURT

(Samedi)

Before:

W. J. Bailhache., Deputy Bailiff, **and** Jurats Fisher **and** Nicolle.

IN THE MATTER OF THE REPRESENTATION OF BBB LIMITED

AND IN THE MATTER OF THE K TRUST

Between
BBB
Representor
and

(1) A on his own behalf and on behalf of his spouse, dependents, issue (save B) and his
issue's spouses and former spouses

(2) B on his own behalf and on behalf of his spouse and dependents

(3) C

(4) D on his own behalf and on behalf of his spouse, dependents, issue and his issue's spouses and former spouses

(5) E on her own behalf and on behalf of her spouse, dependents, issue and his issue's spouses and former spouses

(6) F on her own behalf and on behalf of her spouse, dependents, issue and his issue's spouses and former spouses

(7) G on his own behalf and on behalf of his spouse, dependents, issue and his issue's spouses and former spouses

(8) H on her own behalf and on behalf of her spouse, dependents, issue and his issue's spouses and former spouses

(9) J on her own behalf and on behalf of her spouse, dependents, issue and his issue's spouses and former spouses

Respondents

Advocate R. MacRae for the Representor.

Advocate L. Springate for the Third, Fourth, Fifth, Sixth, Seventh, Eighth and Ninth Respondents.

Authorities

Internine and the Intertraders Trusts [\[2005\] JLR 236](#).

Income and Corporation Taxes Act 1988.

English Finance Act 2010.

Aspden -v- Hildesley [1981] 55 TC 609.

Trust — Representor seeking a declaration as to the meaning of the expressions Beneficiaries and Excluded Persons appearing in the Trust Deed.

The Deputy Bailiff

1 The Representor brings this Representation by way of construction summons in relation to the A Trust ("the Trust"). The First and Second Respondents have not appeared, but have written letters to the lawyers for the Representor indicating that they have no interest in the trust property or the annuity and that there was never any intention as far as they were aware that they should have any such interest. They asked that their letters be placed before the Court and we have had appropriate regard to them.

2 The Representor asked the Court to make a declaration as to the meaning of the

expression “*Beneficiaries*” and “*Excluded Persons*” appearing in Clause 1.1 and Schedule 2 of a Trust Instrument dated 8th March 2002 (the “Trust Deed”) made between L Limited (the “Founder”) and M Limited (the “Original Trustee”). The Court was asked in particular to make a declaration as to the identity of the persons falling within those definitions and as to whether any persons who have at any time been Excluded Persons are currently prohibited from benefiting under the Trust, and if so who.

- 3 At the hearing on 1st June 2011, the Court made the declaration sought, namely that the Third to Ninth Respondents are not currently prohibited from benefit under the Trust, and now gives detailed reasons in this judgment.
- 4 The Trust Deed is expressed to be governed by Jersey Law. The relevant provisions which give rise to the problem brought to the Court by the Representer as the Trustee are these. Clause 1.1 of the Trust Deed contains these definitions:—

“In this Trust Instrument (otherwise referred to hereunder as “this Deed”) unless the context otherwise requires the following expressions have the following meanings respectively:

...

“The Beneficiaries” means the present, past and future employees and directors from time to time of the Founder and the wives, husbands, widows, widowers, children, step-children and remoter issue and dependants of such employees or directors and the spouses and former spouses (whether or not remarried) of such children and remoter issue and “Beneficiary” has a corresponding meaning PROVIDED THAT no Excluded Person shall be a Beneficiary;

...

“Excluded Person” means all and any of the persons described in Schedule 2 hereto.”

- 5 Schedule 2 provides:—

“Excluded Persons”

- 1. The Founder*
- 2. Any person connected with the Founder*
- 3. Any Participator in the Founder*
- 4. Any person connected with any such Participator.*

For the purposes of this Deed, the words “Participator” and “connected with” shall have the meanings ascribed to them by the Income and Corporation Taxes

Act 1988 (of the English Parliament)".

- 6 The substantive provisions in relation to Excluded Persons are contained at paragraph 14 of the Trust Deed and are in these terms:-

"14.1 The Trustee shall not by any means whether directly or indirectly exercise any power, duty or obligation vested in the Trustee by this Deed (or any amendment or modification thereof) nor otherwise allow, arrange or procure that any Excluded Person obtains any factual benefit whatsoever (whether in money or otherwise) from the Trust Fund which is or has been or becomes at any time held by the Trustee upon the Purpose Trusts.

14.2 Without prejudice to the generality of Clause 14.1, no Excluded Person shall by any means be provided with any factual or legal advantage (including any property, interest, power or right) nor shall any Excluded Person enjoy the remission (in whole or part) of any factual or legal disadvantage or liability from the utilisation by any means of any part of the Trust Fund.

14.3 The Trustee shall not by any means whether directly or indirectly exercise any power, duty or obligation vested in the Trustees by this Deed (or any amendment or modification thereof) nor otherwise allow, arrange or procure that any Excluded Person obtains any factual benefit whatsoever (whether in money or otherwise) from the Trust Fund which is or has been or becomes at any time held by the Trustee upon the beneficiary trusts.

14.4 Without prejudice to the generality of Clause 14.3, no Excluded Person shall be or be capable of being an object of the beneficiary trusts.

..."

- 7 The principles for the construction of a trust instrument are helpfully set out by Commissioner Page in the Royal Court's judgment in the matter of the *Internine and the Intertraders Trusts* [\[2005\] JLR 236](#) at paragraphs 62 and 63 and we adopt and apply those principles.
- 8 The first principle is that one seeks to establish the presumed intention of the makers of the document from the words used. In some cases it is necessary to construe the words used against the background of the surrounding circumstances or matrix of facts existing at the time the document was executed. It is clear in this particular case that it is necessary to have some external evidence as to the background facts because without that evidence, it would be impossible to construe adequately Schedule 2 of the Trust Deed.
- 9 The Founder is defined in the Trust Deed as L Limited. For the purposes of identifying who is an Excluded Person, one has to establish who is a participator in the Founder, and who is connected with either the Founder or any such participator. We received evidence of

English Law as to the meaning of the words "*participator*" and "*connected with*" as the Trust Deed requires us to have regard to the meanings given to that language by the Income and Corporation Taxes Act 1988. In this case we have had the advantage of two opinions from leading counsel – one given to the Representor by Mr Nicholas Le Poidevin QC and dated 8th March 2011, and the other given to the Third to Ninth Respondents by Mr Eason Rajah QC and dated 19th May 2011. In his opinion, Mr Rajah indicates that he has had the benefit of considering Mr Le Poidevin's opinion and he agrees with both his reasoning and conclusions.

10 Mr Le Poidevin makes plain that although the definitions contained in the Income and Corporation Taxes Act 1988 in respect of the words "*participator*" and "*connected with*" were repealed by the English Finance Act 2010, the definitions were as follows at the date of the Trust Deed:-

(i) The category of participator in a company comprises anyone with an interest in the capital or income of the company, including anyone possessing share capital in the company.

(ii) A person is connected with an individual if he is (i) the individual's spouse or civil partner (ii) a relative of the individual or (iii) a spouse or civil partner of the relative. "Relative" in this context means a brother, sister, ancestor or lineal descendant.

(iii) In his opinion, as a matter of English Law on the application of the Income and Corporation Taxes Act 1988, the category of participators and the category of persons connected with participators were undoubtedly capable of change from time to time. He gave the example that a person might become or cease to be a participator by, for example, acquiring or disposing of shares. Similarly a person might become or cease to be connected with a participator by marriage or divorce. In his view, as a matter of English Law under the 1988 Act, the status of a connected person had a variety of miscellaneous significances, but it was clear that it was possible to acquire the status or to lose it. Reference was made to *Aspden -v- Hildesley* [1981] 55 TC 609, a decision on capital gains tax legislation where it was held that a divorcing wife remained a connected person until the decree absolute.

11 The evidence of background circumstances which the Court needed in order to reach any view on the matters put before us can be summarised in this way:-

(i) The only issued share in the Founder was transferred to N on 8th March 2002. According to the evidence of Mr Le Poidevin as to the meaning of the word "*participator*" it is therefore clear that N was a participator in the Founder.

(ii) The Founder was dissolved on 7th June 2005.

(iii) N died on 7th March 2006.

(iv) The Third Respondent is the widow of N. The Fourth, Fifth, Sixth, Seventh, Eighth and Ninth Respondents are the children, their spouses, issue and spouses of issue of N's first marriage and his marriage to the Third Respondent.

- 12 N and the first two Respondents were directors of the Founder. An earlier director was a company O Limited, but that company both was appointed and also resigned on 8th March 2002.
- 13 Although the initial trust fund was £100, the subsequent assets were all provided into the Trust by N by the execution of an estate annuity purchase deed on 8th March 2002. This property consisted of the private residence in which N lived in Buckinghamshire, and the proceeds of sale of his Portuguese property. The estate annuity purchase deed was executed by N in the presence of the First Respondent, his solicitor.
- 14 Subject to the question of "*Excluded Persons*" it is clear that the Beneficiaries potentially are N, who ceased to be an object of a power on his death, the Respondents to this representation and the company O Limited.
- 15 The Court is satisfied that it has the correct parties before it for the purposes of this construction summons. The First and Second Respondents are solicitors and do not express any interest in the Trust Fund. Although O Limited has not been convened, it is apparent that its participation in these arrangements extended merely to the incorporation of the Founder, and it was then immediately removed as a shareholder and director. It would not be reasonable to construe the Trust Deed as having been intended to benefit either that company or the First and Second Respondents.
- 16 There have been no other employees or directors of the Founder at any time.
- 17 We should add that we asked Advocate MacRae whether Her Majesty's Revenue and Customs in the United Kingdom had been given any notice of this application. We were advised that no such notice had been given, as it was not thought that any taxation liabilities would directly arise from the Court's decision on the subject matter of this Representation, whatever that decision might be. While it may be that fiscal considerations played a major part in the formulation of the Trust Deed, we have proceeded on the assurance given to us by Advocate MacRae as is set out.
- 18 Thus the problem which arises is whether the only beneficiaries of the Trust Deed are also Excluded Persons by virtue of the definitions which are contained in Clause 1.1 of the Trust Deed and set out in full above.
- 19 For all that there has been a lengthy exposition of the terms of the Trust Deed and the relevant facts as set out above, the issue in question is really a short point of construction.

Either the class of Excluded Persons is a class which is capable of change, or it is not. If it is incapable of change, then once a person qualifies as an Excluded Person, he or she is excluded for all time. The practical consequences of such a construction would be that N's family, the Third to Ninth Respondents to this application, could not benefit, and that the wealth which he transferred to the Trustee through the estate annuity purchase deed, which we understand to be the vast majority of his estate, could never accrue to any members of that family. This would be a surprising conclusion given the definition of the Beneficiaries as set out in Clause 1.1 of the Trust Deed.

- 20 In our view it is perfectly clear that the Trust Deed contemplates a change in class of Beneficiaries and Excluded Persons. The language used for the definition of the Beneficiaries extends to present, past and future employees from time to time. That language contemplates the addition of new beneficiaries, as indeed does the provision that remoter issue and spouses and former spouses of issue and remoter issue are also to be included.
- 21 Given that it is clear from the definition of the Beneficiaries that this extends to future employees and directors from time to time, it would be surprising if the definition of Excluded Persons could not also be subject to change. If that is right, it would follow that an approach to Schedule 2, which sets out the list of Excluded Persons, should envisage that that list be liable to change at some future date.
- 22 If that is the way in which Schedule 2 should prima facie be approached, then a detailed examination of that Schedule makes the matter even clearer. The Schedule is to be construed in accordance with the meanings ascribed to those words by the Income and Corporation Taxes Act 1988 which itself envisages that persons might be participators or connected with participators at one point, and not be participators or so connected at a later date. It seems to us to be clear that the nature of Schedule 2 and the definitions which are to be found there show that the class of Excluded Persons is a potentially changing class from time to time.
- 23 If a person can fit within the definition of an Excluded Person at one point in time, and subsequently not be an Excluded Person at a later date, there is no basis in our judgment for finding that the Excluded Person would in fact still be excluded from benefit even if not by definition at that later stage an Excluded Person. That makes no sense to us. We have noted that Clause 14.4 of the Trust Deed provides that “no Excluded Person shall be or be capable of being an object of the beneficiary trusts.” (emphasis added) The underlined section of that Clause could lead to a construction that Excluded Persons were excluded for all time; but we reject that conclusion because it would require us to find that an excluded person was excluded even if he or she did not fit within the class of Excluded Persons. We are fortified in that conclusion because it would be wholly artificial to take the grounds for exclusion as those linked for fiscal purposes to the Income and Corporation Taxes Act 1988, and hold that those grounds of exclusion continued even when the fiscal consequences ceased – and we find that to be so, without making any assessment as to whether there were or were not fiscal consequences by reason of the use of this language.

24 The Representor also makes the point that if members of N's family were incapable of ever ceasing to be Excluded Persons and thus become incapable of receiving benefit under the Trust, the creation of the Trust could be barely explicable on ordinary motives. As the Representor contends, the result would be highly unreasonable. The Court finds that this is a further reason why it would be wrong to construe the Trust Deed as excluding from benefit the very persons whom it is clear that N, as the provider of the assets in to the Trust, intended to benefit.

25 For all these reasons, we find that the Third to Ninth Respondents are Beneficiaries and although they may once have been Excluded Persons, they have ceased to be Excluded Persons because N is no longer a participator in the Founder. It is hard to see how N could be treated as a participator in the Founder once it had been dissolved, but even if there were to be any doubt on that matter, he could certainly not be treated as a participator after his death as well. That too is the evidence, as a matter of English Law, provided by Mr Le Poidevin, with whom Mr Rajah agreed. We therefore declare that the Third to Ninth Respondents are Beneficiaries of the Trust Deed.