Titris SA v A

Jurisdiction:	Jersey
Judge:	Matthew John Thompson
Judgment Date:	16 March 2018
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Text

[2018] JRC 59

Royal Court

(Samedi)

Before:

Advocate Matthew John Thompson, Master of the Royal Court

Between
Titris SA
First Representor
Nerina Cucchiaro
Second Representor
and
A
First Respondent
B
Second Respondent
C

Third Respondent
D
Fourth Respondent
Alessandro Jelmoni
Fifth Respondent
Giulio Sgaria
Sixth Respondent

Advocate M. P. Renouf **for the Representors**.

Advocate E. L. Jordan **for the First Respondent**.

Advocate W. Grace **for the Second and Third Respondents**.

Advocate N. M. Sanders **for the Fourth Respondent**.

The Fifth and Sixth Respondents did not appear and were not represented.

Authorities

Trusts (Jersey) Law 1984, as amended.

Trusts Amendment No.5 (Jersey) Law 2012.

The Parish of St Helier v The Minister for Infrastructure [2017] JCA 027 .

Trust — reasons relating to a dispute concerning the G Trust.

CONTENTS OF THE JUDGMENT

THE MASTER:

Introduction

1 This judgment represents my written reasons in respect of certain directions I gave at a hearing on 26 th February, 2018, and my decision in respect of other directions. All the directions relate to a dispute concerning a trust which I shall refer to as the "The G Trust".

Background

2 The background to the present dispute is set out in a judgment of Commissioner Clyde-Smith dated 13 th November, 2017.

3 Paragraph 4 to 7 of the judgment stated as follows:-

> " ***4. The very brief background is that the (G) Trust was created, in Italian, on 17th July 2002, and is governed by Jersey law, with the courts of Jersey having exclusive jurisdiction over any disputes. Subject to that, the (G) Trust has no connection with Jersey. Titris was appointed trustee on 23rd March 2005***.
>
> ***5. Working from a translation of the trust deed, it would seem that the (G) Trust came to an end on 30th September 2014, and should then have been distributed by Titris to the beneficiaries defined, following an amendment approved by the Court on 18th May 2009, as "the legitimate heirs (or legitimate heirs of the aforesaid) of (AG)"*** .
>
> ***6. The representation was originally brought before the Court by Titris on 17th October 2014, shortly after the (G) Trust terminated, seeking directions in relation to the distribution. Orders were made for the convening of the respondents. However, the matter was not progressed and it stood adjourned*** .
>
> ***7. (X) died on 16th October 2015, and is survived by his widow, the first respondent, and his three children, the second, third and fourth respondents. The fourth respondent, represented by Advocate Sanders*** , ***claims to be the sole legitimate heir of his father, and entitled therefore to the entirety of the trust fund***."

4 At paragraph 15 Commissioner Clyde-Smith identified that there were three disputes before the court as follows:-

> " ***(i) The determination of who is entitled to the trust fund of the (G) Trust;***
>
> ***(ii) The provision of information by the new trustee; and***
>
> ***(iii) The validity of the appointment of the new trustee, and/or the***

appointment of a Jersey based professional trustee in her place ."

5 I refer to these issues as the "entitlement issue", the "information issue" and the "removal issue".

6 In respect of the information issue Commissioner Clyde-Smith at paragraph 18 required the second representor to file a much more detailed affidavit containing the following:-

> " ***(i) Of the assets and liabilities of the (G) Trust, whether held or owed directly or indirectly at the date she was appointed trustee and at the current time;***
>
> ***(ii) Of her dealings with those assets and liabilities from the time of her appointment to the present date;***
>
> ***(iii) Of her dealings with the first to fourth respondents from the time of her appointment to the present date;***
>
> ***(iv) Of the reasons for the commissioning of the report by THE-A and its current involvement in the affairs of the (G) Trust;***
>
> ***(v) Of the current status and anticipated outcome of any proceedings which directly or indirectly affect the (G) Trust; and***
>
> ***(vi) Of the current legal status and business of Titris and the identity of its directors and ultimate owners, if known*** ."

7 Finally, the Commissioner delegated case management of the entitlement issue, the removal issue and the information issue to me. Paragraph 1 of the Commissioner's act of court dated 13 th November, 2017, therefore directed that:-

> " *1. the following matters shall be delegated to the Master of the Royal Court for case management in advance of any trial before the Inferior Number*:
>
> *(a) determination as to who shall be entitled to the trust fund of the [G] Trust;*
>
> *(b) the validity of the appointment of the new trustee and/or whether a replacement professional trustee shall be appointed; and*
>
> *(c) the provision of information by the new trustee*."

8 The issue of the extent of my power was raised in relation to the information issue by Advocate Sanders which is therefore addressed in more detail later in this judgment.

9 On 23 rd November, 2017, I gave the first representor permission to amend its representation to add the second representor and to clarify whether or not the first

representor had been removed on 27 th October, 2015, or whether it had resigned. The current position of the representors is set out in its re-amended representation filed on 15 th December, 2017, which states that the first representor was removed when the second representor was purportedly appointed as trustee.

10 On 29 th November, 2017, I approved directions agreed by the parties in relation to the removal issue and gave directions for the filing of pleadings in relation to the entitlement issue.

11 On 5 th December, 2017, an urgent application was made by the representors before the Royal Court for a blessing of the decision of the trustee to enter into what was described as a debt for equity swap in connection with companies that formed a major part of the underlying assets of the G Trust. The concern was that if the swap was not approved a bank would reduce or end its credit to the main underlying company, which company might then face bankruptcy.

12 However, while the court accepted it had power to approve the proposal, it refused to do so for a number of reasons set out in a brief judgment of the Deputy Bailiff.

13 On 18 th January, 2018, I approved a variation to the timetable in relation to the removal issue.

14 The representors then applied initially to me to stay the (agreed) directions in respect of the removal issue as payment of its legal costs out of a bank account in Luxemburg had been blocked by the fourth respondent, who had refused to consent to such fees being paid. I directed that this application had to be heard by the Royal Court because only the Royal Court could order the legal costs of the representors to be paid and override the refusal of the fourth respondent to consent to such payment. This was because the power to make such an order arises pursuant to the Trusts (Jersey) Law 1984, as amended, in particular Article 51 which is power vested in the Royal Court only.

15 The representors' summons in respect of its costs was therefore fixed for determination before the Royal Court on 7 th March, 2018, which was the first available date.

16 In the meantime by an act of court dated 8 th February, 2018, I stayed the obligation on the representors to file affidavit evidence for the removal issue pending the determination of its summons before the Royal Court on 7 th March, 2018.

17 The hearing fixed before me was to give directions in relation to the entitlement issue as had been agreed by the parties as part of the directions dated 29 th November, 2017. In addition, Advocate Sanders for the fourth respondent sought various categories of

documentation because he argued that the representors had not complied with the order of Commissioner Clyde-Smith to provide information as set out at paragraph 6 above.

18 However, on 22 nd February, 2018, there was a further development in respect of the removal issue because the representors indicated that the second representor would step down as trustee because she was no longer wanted as trustee by the family. It was the position of the representors that the first representor had already been removed as trustee. This position was subject to the following:-

(i) The second representor could not resign until a replacement trustee was identified;

(ii) A replacement trustee had to be agreed and had to be suitable but because all the candidates were Jersey based under the regulated trust companies this was not seen as causing a particular issue;

(iii) A deed of retirement and appointment had to be agreed, including by the replacement trustee;

(iv) The question of the representor's fees needed to be resolved; and

(v) A handover of trust assets with appropriate retentions had to be made to the new trustee.

19 Advocate Renouf also suggested a vacation of the dates fixed for the removal application on 25 th and 26 th April, 2018.

20 In respect of the hearing, the following records my decisions in respect of each of the issues. In respect of the removal issue and the information issue, I explained my preliminary thinking to the parties, which was accepted by them and accordingly a new timetable was set. In relation to the entitlement issue full argument was heard and this judgment therefore contains my decision on the necessary directions to enable the entitlement issue to be determined.

The removal issue

21 I should at the outset say that while I have described this part of the dispute as the removal issue, it is right to record that the primary position of Advocate Sanders was that the second respondent had never been validly appointed as trustee. In the alternative his summons sought her removal.

22 In relation to the removal application, in light of the clearly stated intent of the second representor to resign, the following issues remain:-

(i) Who is to be appointed as a new trustee;

(ii) There could be disputes about terms of retirement and appointment and associated issues including any retention by either of the representors for fees or other potential liabilities;

(iii) A handover to the new trustee had to be agreed;

(iv) The question of whether the representors should recover their costs needed to be determined;

(v) The question of costs also overlapped with the decision of the Deputy Bailiff in December, 2017 where the question of costs had not been resolved.

23 In view of these outstanding issues I left the dates of 25 th and 26 th April, 2018, in place together with the following directions:-

(i) The fourth respondent was to file and serve his skeleton argument and any affidavit evidence he wished to rely on in respect of any of the above issues which remained outstanding by 23 rd March, 2018;

(ii) The representors and any other party were to file their skeleton arguments and any further affidavit evidence they wished to rely on by 6 th April, 2018;

(iii) The fourth respondent could file a skeleton argument and affidavit in reply by 13 th April, 2018, if advised to do so.

24 In making these directions I encouraged the parties to enter into discussions to reach agreement on the issues set out in paragraph 22 above. The timetable I set allowed the parties some 4 weeks to discuss who should be the new trustee and the terms of their appointment and the terms of retirement of the representors.

25 I directed that the fourth respondent should file his skeleton argument first because by reference to the correspondence filed with me for the hearing, it was clearly apparent that the fourth respondent was resisting payment of costs to the representors. I was also of the view that argument on the question of costs appeared to be necessary even if the other issues identified in relation to replacing the second representor as trustee could be resolved by agreement.

The information issue

26 In relation to this issue, I indicated to the parties that any issue with non-compliance with paragraph 18 of Commissioner Clyde-Smith's judgment and the consequent order was a matter for the Royal Court. This was because only the Royal Court had jurisdiction to order

trustees to provide information to beneficiaries. Although the fourth respondent was seeking documents, effectively his application was that the representors had failed to comply with Commissioner Clyde-Smith's order. Furthermore, while Advocate Sanders suggested that paragraph 19 of Commissioner Clyde-Smith's judgment meant that I could order the representors to provide further information, paragraphs 16 and 21 of the judgment made it clear that the authority delegated to me was to deal with case management issues only and not the trial of any allegation that information had not been provided. An allegation of a failure to provide information ordered by the Royal Court ultimately is a substantive issue rather than a case management issue.

27 Notwithstanding, the above observations, I did indicate I was sympathetic to the categories of information being sought being provided although there were areas of the requests that needed to be amended so they were not unduly burdensome or wide-ranging which view I expressed to the parties. To the extent that the real issue was who should pay for the provision of the information sought, I also reminded the parties that generally where a beneficiary of a trust required information about the trust and its assets above and beyond that supplied to beneficiaries in the ordinary course by a trustee which request would lead to significant costs being incurred, then an individual beneficiary seeking more detailed information ordinarily would have to meet the trustees costs of providing that information. Against the general position, I also accepted that the position in this case was more complicated because the information sought related to steps that the fourth respondent argued that the representors had no power to take and should not have taken.

28 I also observed that the representors had no presence in Jersey and while they have sought the assistance of the Royal Court and still might need to do so, they were in control of the information the fourth respondent was seeking. I therefore encouraged the parties to see whether accommodation could be made to deal with payment of the costs of the representors in providing the more detailed information sought on a cash flow basis with the fourth respondent reserving his position more generally to argue that the representors were not entitled to some or all of their costs, including costs of providing information.

29 In terms of resolution of the information issue, if it could not be resolved by agreement or there remained a dispute about costs, I directed that any alleged breach of the information ordered to be provided or cost argument should also be heard on 25 th and 26 th April, 2018. I therefore made the following orders:-

(i) the fourth respondent is to issue a summons and file any affidavit evidence it wished to rely on in the support of its application for more detailed information by 9 th March, 2018;

(ii) the representors and any other party is to file any affidavit evidence in response by 23 rd March, 2018;

(iii) the fourth respondent may file evidence in reply by 6 th April, 2018; and

(iv) skeleton arguments would then be exchanged on this issue on 18 th April, 2018.

The entitlement issue

30 Of the three issues identified by Commissioner Clyde-Smith, this is the most significant because it concerns ultimately who is entitled to assets held in the G Trust. This is a dispute between the fourth respondent who claims to be the sole heir of his father on the one hand and the first respondent, his mother, and the second and third respondents, the siblings of the fourth respondent who all dispute the fourth respondent's claim. The other respondents and including the representors are neutral and have no interest in the entitlement issue.

31 Pursuant to the directions dated 29 th November, 2017, pleadings have been filed by the first respondent, the second and third respondents (who have joint representation) and the fourth respondent in relation to the entitlement issue. To understand the positions taken by the fourth respondent on the one hand and the first to third respondents on the other it is appropriate to briefly refer to the trust deed dated 17 th July, 2002, and the amendments to the trust deed approved by the Royal Court on 18 th May, 2009.

32 By reference to a translation of the trust deed it was common ground that the trust deed was executed on 17 th July, 2002, by the third respondent and the original trustee, ING Trust Luxemburg SA ("the 2002 deed"). The third respondent as the named settlor transferred to the trustee the sum of €5,000 according to recital A of the 2002 deed. Recital B recorded *"it is the settlor's wish that, upon executing this deed, (X), (Y) and (Z) transfer in favour of the trustee for the same purposes for which the trust has been established further sums financial instruments, securities, not limited to the ones specified hereunder"*.

33 (X), (Y) and (Z) were brothers. (X) was the husband of the first respondent and the father of the second to fourth respondents.

34 Recital F of the 2002 deed stated that "the settlor and anybody contributing to the trust shall be entitled to properly explain their own purposes by virtue of a memorandum of understanding delivered to the …". This appears to be a reference to a document similar to a letter of wishes.

35 Recital G states the settlor intends to enable other members of the family and specifically (X), (Y) and (Z) to transfer assets to of the G trust for the purposes of fulfilling its objectives.

36 The beneficiaries are described in clause 6–1 of the 2002 deed as the legitimate heirs (or the legitimate heirs of the latter) of (X), (Y) and (Z) on the basis of their respective contributions to the trust.

37 The (G) Trust is governed by Jersey law.

38 The above quotations are translations. The original deed was executed in Italian and in respect of the beneficial class used the phrase *"eredi legittimi"*. It is the meaning of this phrase that is at the heart of this dispute between the fourth respondent on the one hand and first to third respondents on the other.

39 It was not in dispute that what led to the amendment in 2009 was a dispute between (X) and his two brothers. The purpose of the application to the Royal Court was to approve an amendment to exclude the *"eredi legittimi"* of (Y) and (Z).

40 The act of court of 18 th May, 2009, approving the variation on behalf of various children and unborn beneficiaries recorded that the beneficiaries of the G Trust at paragraph 9 to be the *"legitimate heirs (or legitimate heirs of the aforesaid")* of (X).

41 The proceedings in 2009 were brought by the first to fourth respondents who as adults all consented to the variation as did their adult issue. The court further convened all adult issue of (Y) and (Z) and appointed a Guardian ad Litem. I note in particular that paragraph 5 of the representation brought by the first to fourth respondents including the fourth respondent stated "under Italian law, which is the relevant law in this case as all the individuals mentioned are resident and domiciled in Italy, if a deceased individual leaves a surviving spouse and children, then they all his legitimate heirs". Paragraph 6a described the first to fourth respondents as *"(X's) beneficiaries"*.

42 The same position was taken in respect of the wife and children of (Y) and (Z) who were described as Y and Z's beneficiaries respectively.

43 I also note that in 2009, no discussion is recorded in the act of court as to the composition of beneficial class should any of (X), (Y) and (Z) leave a will. The only change between 2002 and 2009 is therefore the exclusion of the surviving spouse and children of (Y) and (Z) but still using the same phrase in the original Italian resolution passed by the trustee of *"eredi legittimi"*. This issue was raised in the competing arguments before me.

44 It is also appropriate to refer to the provisions of Article 9 of the Trusts (Jersey) Law 1984, as amended. Article 9 currently provides as follows:-

> " ***9 Extent of application of law of Jersey to creation, etc. of a trust***
>
> ***(1) Subject to paragraph (3), any question concerning –***
>
> ***(a) the validity or interpretation of a trust;***
>
> ***(b) the validity or effect of any transfer or other disposition of property to a***

trust;

(c) the capacity of a settlor;

(d) the administration of the trust, whether the administration be conducted in Jersey or elsewhere, including questions as to the powers, obligations, liabilities and rights of trustees and their appointment or removal;

(e) the existence and extent of powers, conferred or retained, including powers of variation or revocation of the trust and powers of appointment and the validity of any exercise of such powers;

(f) the exercise or purported exercise by a foreign court of any statutory or non-statutory power to vary the terms of a trust; or

(g) the nature and extent of any beneficial rights or interests in the property ,

shall be determined in accordance with the law of Jersey and no rule of foreign law shall affect such question .

(2) Without prejudice to the generality of paragraph (1), any question mentioned in that paragraph shall be determined without consideration of whether or not –

(a) any foreign law prohibits or does not recognise the concept of a trust; or

(b) the trust or disposition avoids or defeats rights, claims, or interests conferred by any foreign law upon any person by reason of a personal relationship or by way of heirship rights, or contravenes any rule of foreign law or any foreign judicial or administrative order or action intended to recognize, protect, enforce or give effect to any such rights, claims or interests .

(2A) Subject to paragraph (2), paragraph (1) –

(a) does not validate any disposition of property which is neither owned by the settlor nor the subject of a power of disposition vested in the settlor;

(b) does not affect the recognition of the law of any other jurisdiction in determining whether the settlor is the owner of any property or the holder of any such power;

(c) is subject to any express provision to the contrary in the terms of the trust or disposition;

(d) does not, in determining the capacity of a corporation, affect the recognition of the law of its place of incorporation;

(e) does not affect the recognition of the law of any other jurisdiction prescribing the formalities for the disposition of property;

(f) does not validate any trust or disposition of immovable property situate in a jurisdiction other than Jersey which is invalid under the law of that jurisdiction; and

(g) does not validate any testamentary disposition which is invalid under the law of the testator's domicile at the time of his death.]

(3) The law of Jersey relating to légitime shall not apply to the determination of any question mentioned in paragraph (1) unless the settlor is domiciled in Jersey.]

(3A) The law of Jersey relating to conflict of laws (other than this Article) shall not apply to the determination of any question mentioned in paragraph (1) .

(4) No –

(a) judgment of a foreign court; or

(b) decision of any other foreign tribunal (whether in an arbitration or otherwise) ,

with respect to a trust shall be enforceable, or given effect, to the extent that it is inconsistent with this Article, irrespective of any applicable law relating to conflict of laws .

(5) The rule donner et retenir ne vaut shall not apply to any question concerning the validity, effect or administration of a trust, or a transfer or other disposition of property to a trust .

(6) In this Article –

"foreign" refers to any jurisdiction other than Jersey;

"heirship rights" means rights, claims or interests in, against or to property of a person arising or accruing in consequence of his or her death, other than rights, claims or interests created by will or other voluntary disposition by such person or resulting from an express limitation in the disposition of his or her property;

"légitime" and "donner et retenir ne vaut" have the meanings assigned to them by Jersey customary law;

"personal relationship" includes the situation where there exists, or has in the past existed, any of the following relationships –

(a) any relationship between a person and the settlor or a beneficiary, by blood, marriage, civil partnership or adoption (whether or not the marriage, civil partnership or adoption is recognised by law);

(b) any arrangement between a person and the settlor or a beneficiary such as to give rise in any jurisdiction to any rights, obligations or responsibilities analogous to those of parent and child, husband and wife or civil partners; or

(c) any relationship between –

(i) a person who has a relationship mentioned in either of paragraphs (a) and (b) with the settlor or a beneficiary, and

(ii) a third person who does not have a relationship mentioned in either of paragraphs (a) and (b) with the settlor or a beneficiary .

(7) Despite Article 59, this Article applies to trusts whenever constituted or created ."

45 The relevance of Article 9 is that generally, any question of interpretation of a trust including any question concerning any beneficial rights is a matter for the law of Jersey only and no rule of foreign law applies to such a question.

46 Paragraph 3 of Article 9 excludes the law of Jersey relating to *legitime* to any question falling within paragraph 1. Paragraph 3A also states that the law of Jersey relating to conflict of laws (other than Article 9 itself) does not apply to the determination of any question set out in paragraph 1.

47 For the sake of completeness I observe that in 2009 an earlier version of Article 9 was in force. Article 9 was subsequently modified by the Trusts Amendment No.5 (Jersey) Law 2012. The change of significance was to introduce an express reference in Article 9(1) to apply it to any question concerning the nature of any beneficial right or interest. Otherwise there is no material difference between the current version of Article 9 and the version in force in 2009 beyond stylistic changes.

48 Article 9 is relevant because it formed a material part of the pleadings of the parties and the submissions put before me.

49 In relation to the fourth respondent, Advocate Sanders argued by reference to Article 9 that the construction of the expression *"eredi legittimi"* had to be determined by reference to Jersey's domestic law i.e. ignoring the laws of any other country. This would generally make Italian law irrelevant by reference to the provisions of Article 9 referred to above. However, the fourth respondent's answer argues that Italian law is relevant and at paragraph 6.3 to 6.5 pleads as follows:-

> " *6.3 It is averred that an heir is the person who is entitled by law to succeed another upon the death of that other person and who therefore is entitled to receive property of the deceased.* The expression "legitimate heir" is not a defined term as a matter of Jersey law. It is averred that to the extent that (X) intended the expression "legitimate heir" to be interpreted as a matter of Italian law, (being the law of domicile of (X) and Italian being the original language of the Trust Instrument) the meaning of that expression will require to be determined with the benefit of expert Italian law evidence. As pleaded below, it is the fourth respondent's case that he is the sole legitimate heir of (X) upon a proper interpretation of clause 6 of the Trust Instrument.
>
> *6.4 As a matter of Jersey law, the Trust Instrument must be construed in a manner that reflects the assumed intentions of the maker of the document.* Notwithstanding that the third respondent was the named settlor of the Trust she provided merely EUR5,000 of the Trust assets out of a total approximate value of settled assets of in excess of EUR100m. (X) was the economic settlor of the Trust assets. (X) was a party to the proceedings in 2008 when the Trust Instrument was varied to limit the beneficial class to (X) and his family upon (X's) brothers and their families being provided for from other assets made available at the behest of Alberto. Accordingly, it is averred that to interpret the Trust Instrument it is the presumed intentions of (X) that are to be ascertained. In the absence of an express definition within the Trust Instrument, the ordinary and natural meaning of the expression 'legitimate heir' in clause 6 of the Trust Instrument will apply.
>
> *6.5 It is averred that the intention of (X) was that the beneficiaries of the Trust were such person or persons who would be his legitimate heir or heirs as determined by reference to Italian law.* As pleaded above, it will be a matter of expert evidence as to whom could be and were in the case of (X) his legitimate heirs."

50 A handwritten will of (X) said to have been made in 2012 appointed the fourth respondent as his sole heir. The fourth respondent therefore argues that he is the sole legitimate heir of (X) and therefore the sole beneficiary of the trust.

51 The position of the first, second and third respondents is that identification of who is *a "eredi legittimi"* is a matter of Italian law because under Italian law *"eredi legittimi"* is a term of art used to describe those persons entitled under section 565 of the Italian Civil Code successors of a deceased natural person if that person had left no will.

52 The primary position of the first to third respondents was therefore the existence of a will was irrelevant and the beneficial class on expiry of the G Trust was the first to fourth respondents as they were the *eredi legittimi*.

53 In the alternative if the terms of the will of (X) are relevant, the fourth respondent is not the sole heir as (X) lacked capacity to make a will in 2012, or his will was made on the basis of undue influence or because the fourth respondent acted dishonestly in inducing the will to be made. Proceedings have been brought by the first respondent in Italy in respect of the arguments set out in this paragraph to which the second, third and fourth respondents are parties.

54 The first to fourth respondents all accepted that there was an overlap between the summons issued by the fourth respondent in Jersey as to the meaning of the phrase legitimate heirs or *"eredi legittimi"* and the Italian proceedings if the will of (X) was relevant to the question of determining the beneficial class as a matter of Jersey law.

55 This led Advocate Jordan supported by Advocate Grace to suggest that the court should first determine whether the construction of the beneficial class was dependant on the validity and terms of the will of (X) and then asking the court, if the answer to that issue was in the negative, to determine the composition of the beneficial class.

56 It was further contended therefore that all that was needed before the Royal Court was expert evidence on Italian law as to the meaning of the phrase *"eredi legittimi"*.

57 To the extent that I was not in favour of ordering the issues suggested by Advocates Jordan and Grace, in the alternative they raised two further points. Firstly, they expressed concern as to the scale of any discovery exercise. Any discovery ordered should only be directly relevant to the question of intent and should not be a general discovery exercise, the entire operation of the trust or indeed its operation between 2002 when the deed was originally executed and 2009 when the Royal Court approved the amendment. Secondly, if some directions on discovery and witness statements and expert evidence were issued, that would allow the family members an opportunity to see if they could resolve their differences through mediation. Advocate Jordan on behalf of the first respondent indicated her client was very concerned about the dispute and was in communication with all her children to enable a resolution to the dispute to be found. I was therefore encouraged to order a stay for mediation.

58 Advocate Sanders's analysis started from a different perspective. His contention was that Italian law was relevant to determine the intention of (X). The matter could not be determined under Jersey law because the phrase *"eredi legittimi"* was ambiguous; furthermore both the original trust deed and the amendment in 2009 approved by the trustees used the Italian expression *"eredi legittimi"* which was a term of art. The intention of (X) was relevant because it was clear that in 2002 deed that he was going to be an economic settlor and from 2009 onwards that he was sole economic settlor given that given the agreement reached in relation to his brothers, (Y) and (Z). What was therefore required was evidence by way of discovery and witness statements to show what was the intent of (X). Once the evidence had been produced, expert evidence on an Italian law could then be exchanged.

Decision

59 In my judgment, the starting point to decide what directions to give is Article 9 of the Trust (Jersey) Law 1984. Under that law questions of interpretation of the trust deed executed in 2002 or the amendment in 2009 is a matter of Jersey law only. Ordinarily, expert evidence of any foreign law would not therefore be permitted. However, the fourth respondent has raised an argument that the expression *"eredi legittimi"* is not clear as a matter of Jersey law and has to be interpreted by reference to Italian law because this is what is intended by those who established the trust in 2002 and by those who brought the representation to the Royal Court in 2009.

60 Advocate Sanders specifically referred me to the decision of the Court of Appeal in *The Parish of St Helier v The Minister for Infrastructure* [2017] JCA 027 where the Court of Appeal summarised the principles of a construction of documents at paragraph 12 as follows:-

> " ***Principles of construction***
>
> ***12. The Royal Court set out extensively the principles applicable to the construction of documents, primarily by reference to the decisions of this Court in*** *Trilogy Management v YT Charitable Foundation (International) Ltd* [2012] JCA 152 ***and*** *La Petite Croatie Ltd v Ledo* [2009] JCA 221 . ***Those principles, which are well-known, may be stated as follows***:
>
> ***(1) the aim is to establish the presumed intention of the makers of the document from the words used;***
>
> ***(2) the words must be construed against the background of the surrounding circumstances or matrix of facts existing at the time of execution of the document;***
>
> ***(3) the circumstances relevant and admissible for this purpose are those that must be taken to have been known to the makers of all parties to the document at the time, and include anything which would have affected the way in which the language of the document would have been understood by a reasonable man;***
>
> ***(4) evidence of subjective intention, drafts, negotiations and other matters extrinsic to the document in question is inadmissible as an aid to construction, but may be admitted to resolve a latent ambiguity (that is to say, an ambiguity that only becomes apparent when otherwise clear words are related to the surrounding circumstances);***
>
> ***(5) evidence of events subsequent to the making of the document is inadmissible as an aid to construing the original meaning of the document;***

(6) words must be read in the context of the document as a whole;

(7) words should so far as possible be given their ordinary meaning; and if the language is unambiguous the Court must apply it unless the result is commercially absurd;

(8) if the words used are ambiguous, in the sense of being capable of more than one construction, the court should adopt the construction that appears most likely to give effect to the commercial purpose of the agreement and to be consistent with business common sense; but there is a correlation between the degree of ambiguity and the persuasiveness of a common sense construction, so that the greater the ambiguity the more likely it is that the court will adopt a construction based on business common sense, and vice versa ."

61 In this case what is relevant was the intention of the makers of the deed in 2002 including the background of the surrounding circumstances and the intent of those who agreed to the amendment to the trust deed in 2009.

62 While the approach of Advocate Jordan is attractive, it does not start from the correct position namely that the issue before the Royal Court is to establish intention. The question of any will made by (X) can only be relevant, if it can be established that either at the time the G Trust was created in 2002 or when the amendment was approved in 2009 that the relevant persons involved intended the *"eredi legittimi"* to be determined by a subsequent will. If such intention cannot be established then any will under the Italian proceedings becomes irrelevant. On the other hand if the evidence does establish such an intention then the Italian proceedings would be relevant. As Advocate Jordan fairly accepted, this meant that if the beneficial class was to be determined by the making of a subsequent will then the final determination of the issues raised by the fourth respondent would have to await the determination of the Italian proceedings.

63 Putting it another way, the first issue identified by Advocate Jordan namely whether the construction was dependant on the wills could only be answered by the court satisfying itself as to what the intent of the relevant parties was in 2002 and in 2009. Furthermore, the issues identified for determination by her did not deal with the position where the answer to the first question was in the affirmative, namely the proper construction of the term *"eredi legittimi"* was dependant on the validity of the terms of the will. The issue suggested did not address what would then happen, albeit there was a recognition in the oral hearing before me that the Royal Court could only reach an ultimate determination following a decision of the Italian court. It was further recognised by all that the Italian proceedings could take a number of years including any appeals.

64 The view I reached was that I should make orders for discovery, for the exchange of witness statements and the exchange of the Italian law experts. This is because this

evidence is relevant to establish intent. Following exchange of this evidence, I then stayed the dispute for mediation. If the matter did not resolve at mediation I would then be in a position to decide what further orders to make having had the benefit of witness statements and expert evidence having been exchanged. At this stage given the potential overlap between the entitlement issue and the Italian proceedings, I did not consider I was in a position to issue directions to enable the Royal Court to hold a trial of the issues raised by the fourth respondent without sight of witness statements and expert evidence and possibly key documents. I also accepted that it was appropriate to give the family members an opportunity to try to resolve their differences even if that might be challenging given their current positions. In particular, I recorded that Advocate Grace emphasised that a dispute of this kind was exactly the sort of case where when sent to mediation is appropriate rather than expensive and protracted dispute across two jurisdictions.

65 The difficult issue concerns the scope of the discovery order to be made. What Advocate Sanders asked for was a general discovery order which in my judgment goes too far. The issue here is the intention of the makers of the trust deed and the amendment. In relation to the trust deed this is clearly the third respondent and the original trustee. However, given that the trust deed on its face also contemplated (X) and his brothers, settling assets what they considered was meant by legitimate heirs prior to the deed being executed is also relevant. Any letters of wishes he or they could provide are also pertinent because they are referred to in the deed even if produced subsequently and so relate back to what was intended at the time the deed was entered into.

66 The discovery ordered is however limited to those documents that either expressly refer to the phrase *"eredi legittimi"* or legitimate heirs, or which contain any evidence indicating who was intended to benefit under the trust deed prior execution in 2002, or who was intended to benefit by virtue of the amendment being approved by the Royal Court in 2009. Generally evidence about who is intended to benefit under the trust deed subsequent to its execution, other than letters of wishes of (X), (Y) and (Z) as set out above is irrelevant as is the general operation of the trust. Similarly in relation to the application to amend the G Trust, it is only documents containing who was intended to benefit as a result of the amendment being sought, prior to the amendment being approved that are relevant. I am limiting discovery in this manner so that the discovery focuses on the relatively discrete issue between the parties namely the meaning of the phrase *"eredi legittimi"* applying the principles of construction set out by the Court of Appeal. I have also had regard to the principles of the overriding objective in ensuring efficient case management in limiting discovery in the manner set out in this judgment.

67 In relation to the amendment, the intention of the representors at the time the matter came before the Royal Court in 2009 is also relevant. Any documents recording their understanding of the phrase *"eredi legittimi"* which predate the amendment being approved in 2009 should therefore be disclosed.

68 In relation to surrounding circumstances, documents shown the rationale for establishing the trust and for the amendment insofar as they explored who was intended to benefit

should also be disclosed because these documents will contain the surrounding circumstances leading to the 2002 deed being executed and the amendment being approved.

69 In relation to witness statements, these should primarily set out the evidence of any relevant party as to who is intended to benefit. To the extent that a party now adopts a different position from that in 2002 or 2009 they are expected to address any difference in their witness statement. This applies to all parties. At this stage I simply note that the representation presented to the court in 2009 by all parties including the fourth respondent contained the statements I have set out at paragraph 41 above as to who was intended to benefit.

70 In respect of expert evidence, I permitted Italian law expert evidence to explain the phrase *"eredi legittimi"* because this is the phrase used in the 2002 deed and the amendment. This evidence is relevant to explain any documents or witness statements recording the intention of the makers of the deed or the parties to the amendment, including an economic settlor where the phrase *"eredi legittimi"* was used and where the parties intended to give effect to the Italian law meaning of this phrase. This evidence is permitted because the meaning of legitimate heirs both as a matter of Jersey law is ambiguous. The Court has to therefore ascertain the intent of the parties. If they intended a phrase used in the 2002 deed to be defined by reference to another system of law, and because what that phrase means is now disputed, expert evidence of the meaning of such a phrase has to be permitted. This decision is not therefore applying a foreign law to determine the meaning of a Jersey law trust deed, which is prohibited by Article 9. Rather, evidence of the foreign law is permitted because it is at least arguable that the meaning of the phrase legitimate heirs or *"eredi legittimi"* cannot otherwise be understood. If the expression used had not been ambiguous and the makers had not arguably intended to refer to Italian law then Italian law would otherwise have been irrelevant.

71 Finally, as indicated at the hearing, the timetable for provision of discovery, witness statements and the stay for mediation will only take effect after the resolution of the removal issue and the information issue to enable the parties to focus on those issues first and then to address steps to be taken in respect of the entitlement issue.