X Trustees Ltd and W and A

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Nicolle, Olsen
Judgment Date:	23 June 2015
Neutral Citation:	[2015] JRC 136
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Court:	Royal Court
Date:	23 June 2015

Text

[2015] JRC 136

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, **Esq., Commissioner, and**Jurats Nicolle**and**Olsen

IN THE MATTER OF THE REPRESENTATION OF X TRUSTEES LIMITED

AND IN THE MATTER OF THE W 2001 SETTLEMENT

AND IN THE MATTER OF ARTICLE 47 OF THE TRUSTS (JERSEY) LAW 1984, (AS AMENDED).

Between
X Trustees Limited
Representor

and
W
First Respondent

and

A
Second Respondent

and

Advocate Fraser Bruce Robertson as Guardian ad litem to represent the interests of any minor, unborn and unascertained beneficiaries of the W 2001 Settlement
Third Respondent

Advocate L. J. Springate **for the Representor.**

Advocate F. B. Robertson **appeared in person.**

Authorities

Trusts (Jersey) Law 1984.

Pearson v Inland Revenue Commissioners [1981] AC 753 at 784.

In the matter of the DDD Settlements [2011] JRC 243 .

In the matter of the Leah and Harry Osias 1980 Settlements [1987–88] JLR 389 .

In the matter of the Representation of N and N [1999] JLR 86 .

Trust — Court's approval sought by the trustee to variations to terms of W Settlement.

THE COMMISSIONER:

1 On 29 th April, 2015, the Court approved variations to the terms of the W 2001 Settlement ("the Settlement") on behalf of the minor, unborn and unascertained beneficiaries pursuant to Article 47 of the Trusts (Jersey) Law 1984 ("the Trusts Law").

2 The Settlement was declared on 11 th June, 2001, in respect of assets advanced out of an earlier English proper law settlement made on 2 nd May, 1966, ("the 1966 Settlement") by a Settlor who died domiciled in BVI. As a consequence, the trust period specified in the Settlement mirrors the original perpetuity period specified in the 1966 Settlement and accordingly, the Settlement will terminate on 2 nd May, 2016. The first variation sought by the representor ("the Trustee") was an extension of the trust period of the Settlement by 125

years, which is the maximum perpetuity period allowed under English law.

3 The beneficiaries of the Settlement are now the first respondent and second respondent (as the first respondent's spouse), who are resident in the United Kingdom and domiciled in England for tax purposes, together with their two minor children and any future born issue of the first respondent and her two minor children and the respective spouses, widows and widowers of such issue. Advocate Robertson was appointed guardian *ad litem* to represent the two minor children and the unborn and unascertained beneficiaries. The evidence indicated that the family was amply provided for through assets held outside the Settlement.

4 Under the terms of the Settlement, the Trustee has very limited power to accumulate income, in effect limited to income accumulated pursuant to the provisions of Article 38(3) of the Trusts Law, under which income attributable to the interests of a minor can be accumulated pending attainment of the age of majority. The second variation sought by the Trustee was to give it an unfettered power to accumulate income arising from the trust fund.

5 There is a power contained within the Settlement enabling the Trustee to vary the administrative provisions of the Settlement, but that is insufficient to effect the variations proposed, which will alter the beneficial interests in the trust fund (see *Pearson v Inland Revenue Commissioners* [1981] AC 753 at 784).

6 Both variations were supported by the first and second respondents and, although his consent was not required, by the Protector; hence the application to the Court to approve the variations on behalf of the minor, unborn and unascertained beneficiaries pursuant to Article 47 of the Trusts Law, which is in the following terms:–

> ***"47 Variation of terms of a Jersey trust by the court and approval of particular transactions***
>
> > ***(1) Subject to paragraph (2), the court may, if it thinks fit, by order approve on behalf of –***
> >
> > > ***(a) a minor or interdict having, directly or indirectly, an interest, whether vested or contingent, under the trust;***
> > >
> > > ***(b) any person, whether ascertained or not, who may become entitled, directly or indirectly, to an interest under the trust as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons;***
> > >
> > > ***(c) any person unborn; or***
> > >
> > > ***(d) any person in respect of any interest of his or hers that may arise by reason of any discretionary power given to anyone on the failure or determination of any existing interest that has not***

failed or determined,

any arrangement, by whomsoever proposed and whether or not there is any other person beneficially interested who is capable of assenting thereto, varying or revoking all or any of the terms of the trust or enlarging the powers of the trustee of managing or administering any of the trust property.

(2) The court shall not approve an arrangement on behalf of any person coming within paragraph (1)(a), (b) or (c) unless the carrying out thereof appears to be for the benefit of that person."

7 In his affidavit of 19 th March, 2015, Mr B, a director of the Trustee, explains that because the Settlement, which is now resident in Jersey, was established with assets originating from a settlor who died domiciled in the British Virgin Islands, it is outside the scope of certain charges to UK tax. As a consequence, provided the Settlement does not invest directly in any UK located assets, the trust assets will not be liable to inheritance tax either on the death of the first respondent or any of her issue. There would therefore be a considerable tax saving if the lifetime of the Settlement could be extended beyond her lifetime. Similarly, UK Capital Gains Tax or Income Tax would only arise once distributions are made to, or benefits provided to, a UK resident beneficiary.

8 If the Settlement is allowed to come to an end on 2 nd May, 2016, the identity of the beneficiaries will crystallise, either in the first respondent (in default of appointment) or (upon appointment) in some combination of the respondents and their minor children, triggering an immediate UK capital gains tax charge and bringing all of the assets into the scope of UK inheritance tax. Any future children the first respondent may have would not benefit and so the trust assets would not pass on evenly amongst her children. It is, however, for the benefit of all of those whom Advocate Robertson represents for the Settlement to continue to grow outside the scope of UK tax.

9 As Bailhache, Deputy Bailiff, said in *In the matter of the DDD Settlements* [2011] JRC 243 in approving an arrangement proposed to the Court:–

"[We think it is right] as a matter of law, to accept the proposition that tax planning is a benefit which the Court can take into account in exercising its discretion on an application of this kind …

In this respect the Law of Jersey is clear. In [Douglas] the Royal Court had to consider an application to vary the terms of a settlement under what was then Article 43 of the Trust Law where the purpose of the variation was to avoid a liability for UK capital gains tax following the change in the UK tax regime in 1998 in relation to offshore trusts. The Court was satisfied that the arrangement was for the benefit of the unborn beneficiaries in two respects. First of all, the arrangement offered the prospect of preventing a depletion of the trust assets by avoiding the charge to capital gains tax arising on the settlor. Secondly, by

increasing the class of beneficiaries, it gave great opportunity for effecting tax planning."

10 The assets of the Settlement consist of shares in an underlying company so that income is effectively accumulated at company level. There is therefore currently no imperative for the accumulation of income. It might be said therefore that there is no apparent benefit to the minor, unborn and unascertained beneficiaries if the Settlement were to be varied to introduce a power to accumulate now. Advocate Robertson submitted that such a variation was still desirable for the reasons set out by Judith Bryant of Wilberforce Chambers in her opinion of 13 th April, 2015, where she said this:–

> *"5 However, an amendment of clause 6 of the Settlement to give the Trustees an immediate power to accumulate income of the Trust Fund would provide greater flexibility in managing the Trust Fund now, rather than relying on the existing structure of the underlying company and allowing for the possibility of an exercise of the power of appointment to create a power to accumulate income of the Trust Fund in the future in the event that the existing structure no longer serves its purpose.* Such flexibility would be beneficial to the minor and unborn beneficiaries as it would give the Trustees greater scope to manage the Trust Fund efficiently, to provide for future costs and liabilities associated with the Settlement, and also to control the flow of income to younger beneficiaries, even after attaining the age of 18 years, so that *they gradually get used to receiving significant amounts of income, or to control the flow of income if the beneficiaries between them have no need for the whole of the income to be distributed to them and would prefer it to be rolled up in the Trust Fund.* Such a power to accumulate income in clause 6 of the Settlement would mean that the Trustees would not have to rely on the continuing structure of an underlying company in which income is retained. If, therefore, the minor and unborn beneficiaries of the Settlement are likely to be amply provided for out of family wealth, so that they have, and are likely to have, no pressing need for the whole of the income of the Trust Fund to be distributed, it would in my opinion be beneficial to them for clause 6 of the Settlement to be amended to provide for an immediate power to accumulate income of the Trust fund so that the Trustees have greater flexibility now in managing the Trust Fund."

11 Under Article 47(2) of the Trusts Law, the variations have to appear to the Court to be for the benefit of those on behalf of whom approval is sought. ***"Benefit"*** for these purposes is to be widely construed (see *In the matter of the Leah and Harry Osias 1980 Settlements* [1987–88] JLR 389) and it is not restricted to financial interests (see *In the matter of the Representation of N and N* [1999] JLR 86). Advocate Robertson had concluded that these variations were for the benefit of the minors, unborns and unascertained beneficiaries and we agreed. It was manifestly beneficial for these assets, which originated from a settlor who died domiciled in the British Virgin Islands, to be maintained outside the scope of a UK tax and that could be achieved perfectly properly by extending the trust period. Furthermore, it was in their interests for the current inflexibility in relation to the accumulation of income to be removed so that the Trustee could control the flow of income in a planned way for their

benefit.

12 For all these reasons, the Court gave approval on behalf of the minor, unborn and unascertained beneficiaries to the variations sought by the Trustee with the consent of the first and second respondents.