E v A, as Appointer and Guardian of the Trust and B and The Children of B and C and Advocate Swart as Guardian ad litem for the Grandchildren of B and C and D and The Children of D

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Kerley, Olsen
Judgment Date:	17 August 2015
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Text

[2015] JRC 59

ROYAL COURT

(Samedi)

Before:

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

IN THE MATTER OF THE REPRESENTATION OF E TRUST COMPANY LIMITED AS TRUSTEE OF THE Y TRUST

AND IN THE MATTER OF ARTICLE 51 OF THE TRUSTS (JERSEY) LAW 1984

Between
E
Representor
and
A, as Appointer and Guardian of the Trust
First Respondent

and

B
Second Respondent

and

The Children of B and C
Third Respondents

and

Advocate Swart as Guardian ad litem for the Grandchildren of B and C
Fourth Respondents

and

D
Fifth Respondent

and

The Children of D
Sixth Respondents

Advocate J. P. Speck **for the Representor**.

Advocate C. P. Le Quesne **for the First Respondent**.

Advocate C. J Swart **represented himself**.

Advocate M. C. Goulborn **for the Second and Third Respondents**.

Authorities

Trusts (Jersey) Law 1984.

Re S Settlement 2001/154.

Lewin on Trusts 18 th edition.

In re B Settlement [2010] JLR 653.

In re X Trust [2002] JLR 377.

In the matter of the Esteem Settlement and the No. 52 Trust [2001] JLR 7.

Rep of Otto Poon Trust [2014] JRC 254A.

Trust — surrender of discretion of the representor as trustee of the Y Trust.

THE COMMISSIONER:

1 On 10 th February, 2015, the Court, in what was an unusual application, accepted the surrender of the discretion of the representor ("E") as trustee of the Y Trust ("the Trust") in order to bring to an end several years of very lengthy, expensive and bitter litigation concerning the affairs of the Trust and in particular, to give effect to the settlement of equally lengthy, costly and hostile divorce proceedings between the second respondent ("the mother") and her husband ("the father").

2 Since the Trust was established, the father has been responsible for driving the commercial success of the businesses ultimately owned by the Trust and his activities have resulted in significant financial success for the benefit of the Trust as well as himself and the mother and their three children who are the third respondents ("the children").

3 Historically, E did not interfere in the day to day management of the operating businesses owned by the Trust on the basis that they were being successfully run to the satisfaction of the father and the mother, but when it became clear to E that the marriage of the mother and the father was in difficulty, it took steps to ensure as far as it could that it had proper control of the assets which it owned as trustee of the Trust; steps that were resisted by the father.

4 E had always understood that it was intended by the father (and his own father, who was the original economic settlor of the Trust) that the father and the mother and the children would benefit from the Trust. It is a discretionary trust, subject to the proper law of Jersey, but the deed itself is complex and somewhat unorthodox. It is not necessary for the purposes of this judgement to go into those complexities. Suffice it to say that the *"Specified Beneficiaries"* were named as the father's sister who is the fifth respondent ("the sister") and her two adult children who are the sixth respondents. It is E's understanding that they were only intended to benefit in default of the mother and father and the children. Subsequently, the mother was added to the class of *"Specified Beneficiaries"*, which appointment by the terms of the trust deed brought with it the children and the grandchildren of the mother and father. The sister's children were added by instrument to the "Excluded Class", but doubts exist as to whether this was effective. Subject to that, the position at the time of the application was that the beneficiaries comprised the mother, the children, the grandchildren of the mother and father, the sister and her grandchildren (of which there are none currently).

5 The trust deed provides for an Appointor (whose powers relate to the appointment and removal of trustees) and a Guardian, who has no powers as such, but to whom notice of the exercise of certain powers (referred to as *"the Reserved Powers")* has to be given. The deed goes on to provide (at Schedule S.2) that the *"Excluded Class"* shall include any person who becomes Appointor or Guardian *"whilst they are Appointors or Guardians and after they have ceased to be Appointors or Guardians".* The father was Appointor and Guardian from 6 th July, 2003, until 11 th January, 2012, and it would seem that an inadvertent consequence of this is that he is and remains an *"Excluded Person"* and therefore unable to benefit directly or indirectly in any manner from the exercise of any of the powers vested in E.

6 Divorce proceedings were commenced between the mother and father in New York in 2012. The mother has since brought three representations to this Court, predicated on her belief that the father has been exerting an inappropriate level of control over the various companies underlying the Trust and was converting trust property for his use to the prejudice of the beneficiaries. In compliance with directions given, E has taken steps against much resistance to obtain greater information about and greater control over the trust assets, including action/proceedings in New York, Delaware, Mauritius, the Bahamas and India.

7 In response, the father has alleged that E has caused him "serious and irreparable damage to his reputation in both a personal and professional capacity" and that statements made by E were *"defamatory and libellous"* and made "maliciously … with the intention of causing serious and irreparable damage to [the father's] reputation and business affairs". He has threatened to commence civil action for defamation and was considering criminal proceedings against E. In December 2013, the sister brought proceedings before this Court seeking the removal of E as trustee (later withdrawn) and voicing criticisms very similar to those expressed by the father; E noting that both the father and the sister were represented by the same firm of lawyers.

8 Advocate Swart submitted that E had seemingly done everything reasonable to discharge its duty " *to get in"* and determine the true extent of the trust estate, but absent the proper cooperation of the parties concerned, that would remain a seemingly unattainable task. He noted that even the New York court, in its judgment of 17 th April, 2014, found that neither the father nor the mother had been entirely frank with that court about their financial circumstances and that court found it impossible to determine from the papers the true financial circumstances of the parties or who the moneyed spouse is. The judgment noted that tactical games had been the order of the day in those matrimonial proceedings and the mother had apparently used five sets of U.S. lawyers.

9 Against this complex factual matrix, hostile proceedings, cost, uncertainty and bitterness, the mother and father have now agreed to settle the divorce proceedings. We were told that this was at least the third attempt to settle the divorce proceedings and it has taken very

considerable time and difficulty to conclude that agreement. The trial of the divorce proceedings was due to commence on 18 th February, 2015, hence the urgency of the application. E is not a party to that agreement ("the Agreement") but a " *Schedule of trust property"* has been developed and agreed between E, the mother and the father and Advocate Speck informed us that this now represents a complete, comprehensive and accurate account of all property held subject to the Trust, the approximate net asset value of which is likely to be at least US$ 31M.

10 The central terms of the Agreement, in so far as they relate to the Trust, provide for:–

(i) US$3.7M to be distributed to the children (including the forgiveness or cancellation of a loan made to one of the children).

(ii) US$12.l7M to be distributed in almost equal sums to the mother and the father.

(iii) No money or other property to be payable to the sister.

(iv) Certain ongoing future contingent payments, royalties and/or refunds to be distributed equally to the mother and the father.

(v) The share capital of three companies to be transferred to the father, and a particular shareholding sold and the proceeds distributed equally between the mother and the father.

11 It is accepted by the mother, the children and the sister (to whom we shall refer as "the adult beneficiaries") that in facilitating a settlement of the divorce proceedings in the manner set out in the Agreement, E will be acting in the best interests of all the beneficiaries of the Trust, but they acknowledge that in giving effect to the Agreement, E will be making distributions of trust property in the knowledge that, the father, as an Excluded Person, would benefit and that this could carry some residual exposure.

12 The adult beneficiaries have therefore proposed that the class of beneficiaries of the Trust should be closed and limited to themselves, so that pursuant to Article 43(3) of the Trusts (Jersey) Law 1984 as amended they can terminate the Trust and direct E to distribute the trust property in accordance with the Agreement. The specific powers that would need to be exercised by E in order to achieve this would be:–

(i) Pursuant to Clause R.3, to release its power under clause Q.1 to add to the class of "Specified Beneficiaries".

(ii) Under Clause L.1(1), to vary the terms of the trust deed by deleting the reference to the sister's children (thus putting beyond doubt their exclusion).

(iii) Under Clause Q.3, to declare that only the adult beneficiaries are not included in the "Excluded Class" (leaving the adult beneficiaries as the only beneficiaries and

thus able to terminate the Trust).

13 These proposals have been put forward by the adult beneficiaries in order to remove any risk to E, a self-interest that could be said to put E in a position of conflict between its personal interests and its duties as trustee. For that reason, E sought to surrender its discretion in relation to the exercise of these three powers.

14 A number of issues arose in relation to these proposals on which there was no dispute as to the applicable law.

Surrender of discretion

15 The leading authority in Jersey on applications to the Court by trustees where the court is requested to "adjudicate on a course of action proposed … by trustees" is *In re S Settlement* [2001] JRC 154. This case falls into the third category, namely a surrender of discretion. The test is as follows:–

> ***"There the court will only accept a surrender of discretion for a good reason, the most obvious good reasons being either that the trustees are deadlocked (but honestly deadlocked, so the question cannot be resolved by removing one trustee rather than another), or because the trustees are disabled as a result of a conflict of interest."***

16 The classic formulation of the approach which it is submitted the Court will adopt if it accepts a surrender of discretion is found in Lewin on Trusts (18 th edition, paragraph 29–301):–

> ***"Where the trustees surrender their discretion to the court, it acts in their place by giving directions.*** In doing so, the court will act as a reasonable trustee could be expected to act having regard to all the material circumstances and is not bound by the wishes of any beneficiary. The court has, however, no greater powers than the trustees have either under the trust instrument or under general law. Trustees who surrender their discretion must ***put the court into possession of all the material necessary to enable the discretion to be exercised, including, for example, any requisite expert advice."***

17 The Court of Appeal in *In re B Settlement* [2010] JLR 653 at paragraph 27, made the point that a trustee who had accepted office in the terms of the trust instrument was not entitled to hand over performance of the trusteeship to the court and that a surrender of discretion should be regarded as a last resort that would normally only be accepted by the Court in relation to a specific exercise of discretion where no sensible alternative exists.

Fraud on a power

18 The issue arises as to whether the closing of the class by the exercise of these three powers constitutes a fraud on the power, i.e. whether they are being made for the impermissible purpose of benefiting a non-beneficiary.

19 *In re X Trust* [2002] JLR 377 involved not dissimilar facts. In that case, the beneficiaries comprised the only son of the settlor and his three children by his wife, who was not a beneficiary. The Family Division had ordered the son to procure the transfer of the matrimonial home by the trustee (which did not surrender its discretion) to the wife. The Court found that this transfer directly to the wife, who was not a beneficiary, did not constitute a fraud on the power. The primary purpose in making the transfer was for the benefit of the son and the children in that a refusal to approve such a transfer would re-open the matrimonial proceedings before the Family Division. It was in the interests of the son and the children that this hostile and bitterly contested litigation should be brought to an end. It could also be said that there was a strong moral obligation on the son that his wife and children could continue to live in the former matrimonial home with all the stability which that brings. It was made clear in *In the matter of the Esteem Settlement and the No 52 Trust* [2001] JLR 7 at paragraph 42 that it was proper for trustees to consider that an appointment made to comply with a moral obligation on a beneficiary, with the consent of that beneficiary, is for his benefit.

20 *Lewin on Trusts* states at paragraph 29–26:–

> ***"It is open to an appointee, moreover, to apply the property appointed as he wishes and in particular to apply it in favour of persons who are not objects of the power.*** An exercise of the power is not vitiated merely because the donee [of a power] is aware that the proposed appointee intends to do so, nor even if there is an arrangement that the appointee should do so, as long as the donee's purpose in making the appointment is the benefit of the appointee ***and not the benefit of those who are not objects.*** A father who appoints a fund in favour of his daughter to enable her to settle it on the trusts of her marriage settlement, with the purpose of benefiting the daughter and with no other purpose, does not commit a fraud on the power even though the daughter's husband and children will obtain a benefit. Hence the appointment itself may be made in favour, or partly in favour, of persons who are not objects, if that is done with the consent of the object to be benefited and the consent is not produced by the exercise of pressure on the appointee. To upset the exercise of the power, it must be shown that the arrangement was the reason for the appointment or if the arrangement had not existed the appointment would not have been made." [emphasis added]

Excluding beneficiaries

21 In the very recent case of *Rep of Otto Poon Trust* [2014] JRC 254A, the Court heard an

application by a trustee (which did not surrender its discretion) for approval to make a distribution to the husband to enable him to comply with a lump sum order of the Hong Kong court on his divorce from his wife and thereafter to exclude the wife as a beneficiary. The Court found the decision to make a distribution to the husband entirely reasonable and in the interests of the husband in order to enable him to discharge his obligations to his wife. It was in her interests to receive the amount which the Court of Final Appeal had ordered in her favour and it was in the interests of the child that the litigation between her parents be brought to an end. The wife would have received, through the distribution to the husband, half the value of this very substantial trust fund, but notwithstanding this, she resisted her subsequent exclusion as a beneficiary. Sir Michael Birt, then Bailiff, said this at paragraph 40 in relation to the power to exclude:–

> ***"A power to exclude a person as a beneficiary is an unusual one.*** Normally, powers are exercisable in the interests of the object or objects of the power. A power to exclude is different. Save in the case where there may be tax advantages in a person being excluded as a beneficiary, the exercise of the power is likely not to be for the benefit of the person to be excluded, but instead be for the benefit of the remaining beneficiaries. Where a trustee proposes to exercise such a power, it is incumbent upon it to consider the position very carefully, to take into account the position of the person to be excluded and whether therefore it is a reasonable decision in the interests of the other beneficiaries. An example of where it was concluded that there was not a reasonable exercise of discretion was in *Re the C Trust* [2012] JRC 086B, ***where the Court struck down a decision to exclude grandchildren from benefit without taking proper account of the financial position of the grandchildren, their likely need for distributions from the trust and other related matters."***

In that case, the decision to exclude the wife was approved by the Court as being a classic example of where it would be appropriate to exclude a beneficiary.

Position of the convened parties

22 The current Guardian expressed no view on the application as it fell outside the ambit of the roles she played within the Trust, but she pointed out that fourteen days' notice was required before the relevant powers could be exercised (which she had no power to prevent). The sister (who is independently wealthy) and her children agreed with the relief sought by E. The sister would remain one of the adult beneficiaries and would therefore be a necessary party to the directions bringing the Trust to an end. Advocate Swart, as guardian *ad litem* for the minor grandchildren of the mother and father and the unborn beneficiaries of the Trust, which could include any future grandchildren of the mother and the father and any future grandchildren of the sister, did not oppose the relief sought. This is a case, he said, where there are strong family bonds and the future of the grandchildren of the mother and father will be secure. It is not a case where the arrangement proposed was intended to defeat the interests of those who cannot speak for themselves. There was an overwhelming desire by all concerned to bring the very damaging feuding and litigation

skirmishing to an end, which of itself will be of benefit to the whole family. He said this at paragraph 16 of his skeleton argument:–

> *"16 There may be more elegant ways of achieving the same result but I cannot realistically argue with the overriding objective as predicated by the Representation.* Firstly, the Trustee has clearly given careful thought to this application with the benefit of advice and against the background of all that has gone before. Secondly, the proposals are being driven by the main, intended beneficiaries of the Trust and there is no lopsided division of assets between B and C or between their three adult children in the proposal. Thirdly, the confusing terms of the Trust will mean that there will in any event need to be further variation or rectification proceedings in due course, at further expense (and there is no certainty of parties' cooperation) if the proposal is not pursued. Fourthly, the effective implementation of [the Agreement] will contribute to the resolution of the dispute between C and B and end the ongoing expenditure on legal proceedings (including the Trustee). Fifthly, the expense of maintaining what is on the face of it now an unnecessary device (the Trust) will be removed."

23 Advocate Goulborn for the mother and the children obviously consented to the proposals that they had put forward along with the sister.

Decision

24 We accepted that these proposals were unquestionably for the benefit of the mother. We were given to understand that she had been constrained to borrow money in order to fund her huge costs in the various proceedings to which her estrangement from the father had given rise. Since late 2012, the trust fund has effectively been frozen and with limited exceptions, unable to be used to benefit the beneficiaries in the ordinary course, which had caused her real difficulty. If the arrangements contemplated were put into place, she would be able to effect a clean break from the father and focus no more on hostile litigation, but instead as she would wish on her children and grandchildren. E was also aware that the various proceedings had placed considerable strain on her already fragile health.

25 E was aware that there was a strong bond amongst the mother and her children and grandchildren and she would be not only able but ready and willing to re-organize her financial affairs in cooperation with her advisers so as to ensure that the future of all of them is financially secure. This is not a case, therefore, as Advocate Swart pointed out, where the arrangements are intended to defeat the interests of those who cannot yet speak for themselves; on the contrary, we were satisfied that the arrangements were deliberately framed so as to ensure that new arrangements could be made for their protection into the future.

26 What was proposed was also unquestionably for the benefit of the children. We therefore found that the primary purpose of the proposed arrangements were to benefit the mother

and the children, who are beneficiaries, albeit that the father would also indirectly benefit. That benefit was not just in terms of the direct distributions they were to receive, but in the extraordinary haemorrhaging of the trust fund in litigation in various jurisdictions being brought to an end. We were satisfied therefore that these arrangements being put in place would not amount to a fraud on the relevant powers.

27 It is true that E could have distributed the entirety of the trust fund to the mother on the basis that she would discharge her obligation under the agreement to the father, but we could understand why, in the light of the bitter relations between them, this might not have been acceptable to the father. His interests under the Agreement are in effect safeguarded by the involvement of his sister as one of the remaining adult beneficiaries who will be a necessary party to the Trust being terminated.

28 The potentially more difficult decision for the Court was as to whether it should accept a surrender from E rather than requiring E itself to make the relevant decisions and then seeking the Court's blessing.

29 We accepted that E had a conflict of interest in that the proposals had been designed by the adult beneficiaries with the express intention of removing any risk to E and that may have presented a problem to the Court if E had simply sought the Court's blessing to a momentous decision under the second category in *Re S*. One of the three matters the Court has to consider under that category is whether it is satisfied that the decision of the trustee had not been vitiated by any actual or potential conflict of interest which has or might have affected its decision (paragraph 11 of *Re S*).

30 The Agreement, no doubt as a consequence of carefully considered expert advice, was expressly premised upon E applying to the Court to surrender its discretion. Although the agreement provided for arbitration in the event that the Court refused the application, the arbitrator would have had no power over E and the assets within the Trust. Advocate Speck described the alternative to these arrangements as *"unthinkable"*.

31 On the facts of this case the Court, which was very much minded to do everything it properly could to facilitate the settlement that the mother and father had been able to reach, was prepared to accept that no sensible alternative existed to a surrender of E's discretion in relation to these specific powers. We therefore accepted the surrender and directed the exercise of these powers accordingly, to take effect after the notice given to the Guardian had expired.