The C A Settlement v and the Representation of AA

Jurisdiction:	Jersey
Judge:	Deputy Bailiff
Judgment Date:	02 May 2002
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ROYAL COURT

(Samedi Division)

Before:

M.C. St. J. Birt, **Esq**., Deputy Bailiff, **and** Jurats Potter **&** Georgelin

In the Matter of the C A Settlement
and
And in the Matter of the Representation of AA

Advocate K. Lawrence **for the Representor**.

Advocate F. B. Robertson **for the Trustee**.

Advocate J.D. Kelleher **for the Executors**.

Advocate G R Boxall **for the adult beneficiaries**.

Authorities.

Trusts (Jersey) Law 1984: Articles 25,47(2)(3).

Law Reform (Disclosure and Conduct before Action) (Jersey) Law 1999.

Re Lemos Trust Settlement (1992–3) CILR 26.

Re Murphy's Settlements (1998) 3 All ER 1.

Application by the Representor for disclosure of certain documents by the Trustee of a settlement, of which she is not a beneficiary.

Deputy Bailiff

THE

1 The representation before us concerns an application by the representor for disclosure of certain documents by the trustee of a settlement, of which she is not a beneficiary. On 27 th March we refused her application. We now give our reasons.

Factual background

2 The affidavit of the representor outlines the following factual background. The representor is the sole daughter of C A (“the settlor”). She has one brother T A (“the son”). The settlor was a Swiss national. In 1981 he was, at his own request, placed under “quasi guardianship” under Swiss law because of the state of his mental health. In 1985 the son married. The representor alleges that her relationship with her father gradually deteriorated thereafter as the son's wife sought to undermine the representor's relationship with her father.

3 Matters culminated in 1989 when the representor opposed an application by the son, on behalf of the settlor, for the quasi-guardianship order to be revoked. The representor states that she so acted because of her concern that the settlor still needed the protection of the quasi-guardianship and because of the risk that the son and his wife might, because of their influence over the settlor, divert assets from the settlor before he died. Eventually, in May 1991 the Supreme Court of Switzerland revoked the order of quasi-guardianship. Contact between the settlor and the representor effectively ceased from that time.

4 In December 1991 the settlor moved to Jersey. He died domiciled in Jersey on 15 th

January 2000. By his Will he left everything to his son. That Will has, on the application of the representor, been reduced ‘ad legitimum modum’ but it transpires that the settlor's estate is of only nominal value. On enquiry, the representor has established that, on 13th September 1991, the settlor created a settlement of which Onyx Trustee Company Limited is the trustee.

5 The settlor had been a wealthy man. The records of the guardianship authority in Switzerland show that, as at 31st December 1987, the settlor's assets totalled £27million. The representor assumes that virtually all of the settlor's assets were transferred to the settlement. It has been asserted on oath on behalf of the trustee that all the assets in the settlement were settled at the time of its creation or, at the latest, before December 1991 when the settlor moved to Jersey and acquired a Jersey domicile. At present the representor has no further information concerning the settlement other than that she is not a beneficiary.

These proceedings

6 The representor wishes to establish whether there are grounds for attacking the settlement. In particular, she wishes to ascertain whether the manner in which the settlement has been administered is testamentary in nature, in which events she contends that it may be liable to be set aside and the assets deemed to form part of the estate of the settlor. She would then have a right to a share of those assets pursuant to her rights of legitime under Jersey law.

7 Accordingly she has asked the trustee to disclose certain documents and information concerning the settlement. The trustee has declined to accede to that request. Because she is not a beneficiary under the settlement, the representor has therefore sought and obtained leave from the Court under Article 47(3) of the Trusts (Jersey) Law 1984 (“the 1984 Law”) to bring proceedings under Article 47(2) seeking an order that the trustee should disclose the information and documents requested.

8 The representor has closely confined the documents which she seeks. At the hearing she sought an order for disclosure of the following:-

The trustee has asserted on affidavit that there is no letter of wishes and that any evidence as to how the settlor wished the trustee to exercise its discretion as regards distributions is contained in minutes of the meetings of the trustee. Accordingly the request at (iii) fell away and the representor seeks the relevant trustee minutes falling within (iv).

(i) The trust deed and any amendments thereto;

(ii) A schedule of all distributions made since the creation of the settlement, the amount of the distribution, the date of such distribution and the identity of the recipient;

(iii) The letter of wishes, should one exist, or alternatively;

(iv) Correspondence, file notes, memoranda or other documents as may exist sufficient to evidence how the settlor wished the trustee to exercise its discretion as regards distributions, such documents to be redacted to the extent they contain information other than the above.

Jurisdiction

9 The representor contends that, notwithstanding that she is a stranger to the settlement, the Court has jurisdiction to make an order that the documents in question be disclosed to her because of the provisions of Article 25 of the 1984 Law. Article 25 provides as follows:-

> ***"Subject to the terms of the trust and subject to any order of the court, a trustee shall not be required to disclose to any person, any document which:-***
>
> ***discloses his deliberations as to the manner in which he has exercised a power or discretion or performed a duty conferred or imposed upon him; or***
>
> ***discloses the reason for any particular exercise of such power or discretion or performance of duty or the material upon which such reason shall or might have been based; or***
>
> ***relates to the exercise or proposed exercise of such power or discretion or the performance or proposed performance of such duty; or***
>
> ***relates to or forms part of the accounts of the trust*** ,
>
> ***unless, in a case to which sub-paragraph (d) applies, that person is a beneficiary under the trust not being a charity, or a charity which is referred to by name in the terms of the trust as a beneficiary under the trust……"*** .

10 We are satisfied that there is jurisdiction to make an order in the terms requested. The introduction to Article 25 refers to "any person". That expression is to be distinguished from the concluding passage of the article which makes specific provision where "……. that person is a beneficiary ……". The expression therefore extends to non-beneficiaries. The article is not as easy to construe as it might be because of the use of the double negative; but in essence it provides that, subject to any order of the Court, the trustee is not required to disclose to any person, documents falling within sub paragraphs (a) – (c) but is required to disclose documents falling within (d), (i.e. documents relating to or forming part of the trust accounts), to a person who is a beneficiary. The fact that a trustee is not required to disclose any of the categories of documents to a non-beneficiary "subject to any order of the court" must mean, in our judgement, that there is jurisdiction for the Court to order disclosure to a non-beneficiary in appropriate cases.

Exercise of the discretion in this case – the parties' contentions

11 Miss Lawrence submitted that the Court should order disclosure of the documents on the following grounds:-

(i) These are documents which, in the event of the representor launching a conventional action to set aside or otherwise attack the settlement, would be discoverable. She will therefore be entitled to see the documents in any event in due course. The confidentiality which normally attaches to such documents is therefore not being breached because the representor will inevitably see the documents in due course.

(ii) She accepts that the application is a form of pre-action discovery but argues that this is in the interests of justice because it may lead to a considerable saving of costs. If the documents do not support the representor's claim, proceedings will not be instituted and litigation will therefore be avoided altogether. This would result in a considerable saving of costs to the representor and to the trustee. Conversely, if a conventional action were brought and then discontinued after discovery, the representor would have incurred substantial costs. The trustee would also have incurred substantial costs and although many of these would be recoverable from the representor, some would not. Accordingly all parties would save costs if the documents turned out not to support the representor's proposed action.

(iii) She accepted that, save for one or two exceptions (e.g. personal injury claims and Norwich Pharmacal relief) there was no provision for pre-action discovery in litigation in Jersey. However, Article 47 existed and, if leave were granted to a non-beneficiary to apply under the article, it gave the Court jurisdiction to order pre-action discovery. The Court should take advantage of that jurisdiction and, in appropriate cases, exercise the jurisdiction so as to save costs and enable all parties to know where they stood.

(iv) Furthermore, granting the application might well lead to a narrower circulation of private documents of the settlement than if a conventional action were brought. The documents sought in this application were very limited. If the representor decided, having seen them, not to bring an action, they would be the only documents to have been disclosed. If, on the other hand, she brought a conventional action and only discontinued it after discovery, she would by then have received virtually all of the documents of the settlement. There would therefore have been much greater disclosure of trust documents with a greater invasion of the private nature of the settlement.

12 In response, Mr Robertson argued that the Court should not permit Article 47 to be used so as to allow a person who wished to attack a settlement to obtain pre-action discovery and find out whether he had a claim or not. Pre-action discovery was not generally available and Article 47 should not be used to provide a back door method of such discovery in trust litigation. By analogy, he referred to *Re Lemos Trust Settlement* (1992–93) CILR 26. In that

case, certain beneficiaries of a Cayman Island trust brought an action in the Greek courts to set aside the trust. They then sought an order from the Cayman Island court for disclosure of various trust documents by the trustees. The trustees were not party to the Greek action. The Cayman Island court upheld the decision of the trustees not to supply the documents to the beneficiaries on the ground that the documents were being sought in order to attack the trust. Disclosure would not therefore be in the interests of the trust or the beneficiaries as a whole. Mr Robertson argued that, if that was the case when those attacking the trust were beneficiaries, how much more so should it be the case where the potential plaintiff was not a beneficiary.

13 He further argued that Miss Lawrence was mistaken in saying that the representor would inevitably obtain discovery of these documents in the event of the institution of an action to attack the settlement. The case might be struck out before the discovery stage on two grounds:-

Both of these points might well be taken as preliminary issues prior to discovery.

(i) The prescription period for setting aside inter vivos gifts of movable property was a year and a day from the date of death. On that basis any action was prescribed. Even accepting that time did not run during any period that the plaintiff was prevented from pursuing her legal rights by practical impossibility (e.g. that she did not know of the existence of the gift(s)) there were grounds for arguing on the facts that her state of knowledge was such that the action was still prescribed.

(ii) Article 8A of the 1984 Law provided that, where a person domiciled outside Jersey transferred property to a trust during his lifetime, no rule relating to inheritance or succession (including legitime) of the law of his domicile or any other system of law should affect any such transfer. The settlor was domiciled outside Jersey at the time of the transfer of assets to the settlement and therefore no rule of Jersey law relating to legitime could invalidate those transfers.

Decision

14 The general principle of litigation in Jersey is similar to that applicable in England and most other common law jurisdictions, namely that a potential plaintiff is not entitled to an order requiring a potential defendant to give discovery of documents so that the potential plaintiff may establish whether or not he has a cause of action. The position is, of course, very different in the United States. Statute has intervened to make an exception in the case of personal injury litigation (see Law Reform (Disclosure and Conduct before Action) (Jersey) Law 1999) and Norwich Pharmacal relief is available where appropriate; but otherwise the principle remains generally applicable.

15 We do not think that Article 47 of the 1984 Law was intended to be used to enable a stranger to a trust to obtain pre-action discovery in order to see if he has grounds to launch a hostile action attacking the trust. Nor do we see any reason of principle why a potential

plaintiff in a hostile trust action should be placed in a different and more advantageous position than a potential plaintiff in any other type of action. There would appear to be no public policy grounds for distinguishing a hostile trust action from any other action. We accept, that, if a potential plaintiff who is a stranger to a trust is given leave under Article 47(3), the Court has a theoretical jurisdiction under Article 47(2) to order disclosure of documents to the potential plaintiff; but we do not, for the reasons given above, think that the Court should generally order such disclosure. The existence of Article 47, which was clearly intended to give a general power to the Court to give directions in administrative proceedings, should not be used as a back door method of allowing pre-action discovery to a non-beneficiary who wishes to attack a trust.

16 We do not intend to say that this is an absolute rule. There may be exceptional circumstances in which it would be right to give some form of pre-action discovery to a stranger to the trust, although we find it hard to envisage such circumstances. Nor do we mean to exclude the somewhat different power of the Court to order that the identity of trustees of a trust be made known to a potential plaintiff where appropriate (see *re Murphy's Settlements* [1998] 3 All ER1).

17 Is this one of those very exceptional cases where we should grant the relief sought? We think that it comes nowhere near being such a case. All the points relied upon by Miss Lawrence would apply in most such applications. Thus the documents would normally become subject to discovery in the event of a hostile action being commenced; early production would lead to a saving of costs if the potential plaintiff decided not to proceed as a result; and pre-action disclosure would probably be more limited than the full discovery which would take place in the event of hostile litigation commencing. These factors cannot overcome the general rule that a potential plaintiff, even in the case of a hostile trust action, is not entitled to pre-action discovery in order to see if he has a claim.

18 In reaching our decision, we have assumed that Miss Lawrence is right in saying that the documents will inevitably be seen in due course by the representor upon discovery if she institutes an action against the settlement. Accordingly it has not been necessary to place any weight on the potential preliminary defences mentioned by Mr Robertson. Nevertheless, if either of those preliminary points were to be successful (as to which of course we express no view, having heard no argument) the action would fail before the discovery stage so that the representor would not, in that event, see the documents in question.

19 It follows from what we have said in this judgment that, save in very exceptional circumstances, there would be no serious issue to be tried in the event of a stranger to a trust seeking similar relief in future. We would therefore not expect leave under Article 47(3) to be given to such a person to bring a similar application.

20 For the reasons contained in this judgment, we refused the representor's application.