

Judgment 14/2011

**Trustee ‘T’ and Respondents
- Royal Court
- 4th July 2011**

The Trust (Guernsey) Law, 2007 – application for a variation of a trust – section 57 – application granted.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 4th day of July 2011 before Richard John Collas, Esquire, Deputy Bailiff; present: Stephen Edward Francis Le Poidevin, Esquire, Constance Helyar-Wilkinson and Margaret Ann Spaargaren, Jurats

ON THE APPLICATION of TRUSTEE ‘T’ in connection with a trust (“the Trust”) constituted by its declaration of trust made on the 19th day of December 2000.

BETWEEN:

TRUSTEE ‘T’ (Applicant)

And

Five Respondents

WHEREAS The Court having heard Advocates St John A Robilliard on behalf of the Applicant, Russell Clark on behalf of the First to Fourth Respondents respectively and Ian Swan on behalf of the minor, unborn and unascertained Beneficiaries

ORDERED:

1. On 23rd May 2011 Advocate Ian Swan to represent the minor, unborn and unascertained Beneficiaries.
2. That no other person need be convened in this matter.
3. That as of today the Deed of Exclusion and Addition of Beneficiary made by the Applicant on the 18th February 2004 (“the Deed”) be varied as follows:
Recital E, clause 4 and the Second Schedule of the Deed are revoked and accordingly set aside.
4. That the Applicant and all of the Respondents be entitled to their fees and costs from the Trust Fund on an indemnity basis.
5. The reasons for the said Orders be reserved for delivery upon a later day.

A J NICOLLE
Her Majesty’s Deputy Greffier

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY
ORDINARY DIVISION

Between:

TRUSTEE ‘T’

Applicant

-and-

Five Respondents

Hearing date: 4th July 2011

Judgment handed down: 25th July 2011

Before: Richard John Collas Esq., Deputy Bailiff and

Jurats: S E F Le Poidevin, C Helyar-Wilkinson & M A Spaargaren

Advocate for the Applicant:

St J A Robilliard

Advocate for the first to fourth Respondents:

R Clark

Advocate for the Minor,

Unborn and unascertained Beneficiaries:

I C Swan

Cases & legislation referred to:

Storm Residential & Commercial Management Ltd v Sarnia Developments Ltd (13th April 2010)

The Trust (Guernsey) Law, 2007

Mubarik v Mubarak, The Craven Trust Company Limited (2008 JLR 430)

Re Isaiah Settlement [1987-88] JLR 389

Goulding v James [1997] 2 All ER 239

Introduction

1. This application for variation of a trust included references to minor children. The hearing was in camera and this judgment is written in anonymised form so that it may be reported and circulated. The Court announced its decision at the conclusion of the hearing and reserved its reasons to be delivered in a written judgment.
2. At an earlier directions hearing the Deputy Bailiff directed that he would sit with Jurats to hear and determine the application as it appeared to involve an exercise of discretion based upon evidence rather than a pure point of law or procedure (see the guidance of the Court of Appeal in Storm Residential & Commercial Management Ltd v Sarnia Developments Ltd (13th April 2010)). The Deputy Bailiff chose not to sit alone even though he would have been entitled to do so under Section 27 of The Trust (Guernsey) Law, 2007.

Factual Background

3. The settlement with which we are concerned was created by a Declaration of Trust dated the 19th December 2000, made by the Applicant which was the original trustee and remains the trustee and to whom we will refer to as “T”. Monies were settled into the trust by the settlor (“S”), a South African resident. S was never married and had no descendants. The members

of the class of discretionary beneficiaries were S, his sister (to whom we will refer as “Mrs B”) and her children and remoter issue in all degrees. There was also power for the trustee to add additional beneficiaries.

4. S, Mrs B and all the other members of the class of beneficiaries were resident in the Republic of South Africa. At the request of S, T executed a deed of addition and exclusion of beneficiary dated 18th February 2004 whereby any beneficiary was irrevocably declared to be an excluded person i.e. excluded from benefitting, “whilst ordinarily resident in South Africa”. That provision would have left no members of the class of beneficiaries and so a charity was added (“the First Charity”), on the basis that such addition could be partially or wholly revoked at a later date. The reason for the exclusion arose from a tax amnesty that had been declared in South Africa. In order to avoid any obligation on any member of the class of beneficiaries to declare the existence of the trust to the South African tax authorities, S was advised that all South African residents should be excluded.
5. The next relevant event was on 12th January 2007 when, by a deed of addition of beneficiary, T added a second charity (“the Second Charity”) as a beneficiary.
6. Shortly thereafter, on the 29th January 2007, S died.
7. By deed of exclusion of beneficiary dated 29th September 2010, T excluded the First Charity from benefitting. It never received any benefit from the trust. The Second Charity remained a beneficiary.
8. As at today’s date, the only beneficiary who could presently benefit is the Second Charity and we are advised that payments have been made to the Second Charity.
9. The only other members of the beneficial class are S’s sister, Mrs B, and her descendants, but they are not entitled to benefit so long as they remain resident in South Africa, where they all currently reside and intend to reside for the foreseeable future.
10. Mrs B has a grandchild aged 3 years, the daughter of her only son, who presently resides in Belarus.
11. In his initial skeleton argument, Advocate Swan, acting for the minor, unborn and unascertained beneficiaries, drew attention to the situation of this grand-daughter whose interests may be different from Mrs B’s other four minor grand children (by her two daughters) all of whom were resident in South Africa. However, it later came to the attention of Advocate Swan that the grand-daughter in Belarus is illegitimate. Counsel are all agreed that the interpretation of the trust is governed by Guernsey Law and that, at the date of its execution, the definition of the class of beneficiaries would not have included illegitimate issue. The grandchild in Belarus is therefore not presently a member of the class of beneficiaries.
12. Further evidence disclosed to Advocate Swan and to the Court, indicates that Mrs B’s son intends to marry the mother of his illegitimate daughter. As a matter of Guernsey Law, the child will then become legitimated and hence will join the class of beneficiaries. However, her mother and father intend to live for the foreseeable future in South Africa with their child. Her position will then be the same as the other grandchildren, all of whom are excluded from benefitting while they remain residents of South Africa.
13. After the marriage, the members of the class of beneficiaries apart from the Second Charity will be Mrs B, her son, her two daughters and her five grandchildren, all of whom are or will be residents of South Africa. There may be further grandchildren and remoter descendants, but it is likely that they will also be South African residents.

The Proposed Variation

14. The Application before the Court is to vary the deed of addition and exclusion of beneficiaries made on 18th February 2004 by revoking the exclusion applicable to persons resident in South Africa. Mrs B, her three children, five grandchildren and unborn remoter descendants will all then become entitled to benefit from the trust.
15. The Court was advised by letter by a firm of Guernsey Advocates that the Second Charity consents to the relief sought in the Application having taken Guernsey legal advice. Such consent is significant because the Second Charity is the only beneficiary which does not stand to benefit from the variation.
16. Advocate Clark appeared for Mrs B and her three children. On their behalf, he confirmed that they all agreed to the proposed variation.
17. The issue for the Court was to decide whether to give consent, pursuant to Section 57 of The Trust (Guernsey) Law, 2007 on behalf of the minor, unborn and unascertained beneficiaries.
18. Following a recent decision of the Deputy Bailiff, handed down on 28th June 2011 (which may be reported under an anonymous name), there are two questions for the Court:
 - (1) Is this an “arrangement” which varies or revokes the terms of the trust; and
 - (2) Is it an arrangement which appears to be for the benefit of the persons on whose behalf the court is consenting?
19. Counsel addressed the question of whether the Court had the power to consider the Application when it does not relate to a variation of the founding trust instrument, but to a subsequent deed which was expressed to be irrevocable. In support of their submissions that the Court had power to consider the Application, counsel put forward two arguments.
20. The first relied upon the Jersey Court of Appeal decision in Mubarik v Mubarak, The Craven Trust Company Limited (2008 JLR 430), a case concerning a variation of a revocable exclusion of a beneficiary. In paragraphs 85 and 86 of the judgment of the court delivered by McNeill JA, he held that the Jersey court has the power under a statutory provision equivalent to Section 57 of our Law to revoke an exclusion of a beneficiary, whether made revocably or irrevocably.
21. The second argument put forward relies upon the definition of “terms of the trust” being the relevant phrase in Section 57 of the 2007 Law which is defined as meaning “*the written or oral terms of the trust and any other terms applicable under its proper law*”. Adopting that definition, the provisions of the deed of addition and exclusion of beneficiary are applicable terms of the trust under Guernsey Law.
22. The Deputy Bailiff directed the Jurats to accept both submissions and to accept that they have the power to consider the Application.
23. The question of benefit to the minor, unborn and unascertained beneficiaries is easily resolved on the facts of the present Application. There are no tax considerations to consider. There will be financial benefit either directly to such persons if they receive any benefit, or indirectly as a result of their parent being entitled to benefit. If the Application is not granted any one or more of the beneficiaries would have to become resident outside of South Africa in order to receive benefit and that is not the present intention of any of their parents.

Conclusion

24. Following the decision of Mrs B’s son to marry the mother of his daughter, the factual issues in this application have become more straightforward than initially appeared. At first sight, it appeared there might be a conflict between the position of that child and her cousins, but that conflict is now resolved.
25. In accordance with a trustees' duty to give full and frank disclosure in applications of this nature, set out in a decision of the Jersey Royal Court Re Isaiah Settlement [1987-88] JLR 389, approved by the Jersey Court of Appeal in Mubarak at para 70 and 71, Advocate Robilliard drew one matter to the attention of the Court. Evidence in one of the affidavits adduced in support of the application suggested that in S’s latter years he had fallen out with Mrs B and her family and would not wish them to benefit from the trust, even if they became resident out of South Africa. That evidence was contested and indeed it is to be noted that if that had been S’s wish, he could have requested T to execute a further deed to that effect, but he did not.
26. The Deputy Bailiff directed the Jurats that it was not necessary for the Court to hear evidence to resolve this potential conflict following the English Court of Appeal’s decision in Goulding v James [1997] 2 All ER 239. The Court’s concern is to look to the benefit of those for whom it gives its consent. The wishes of S had little, if any, relevance or weight to the issue of benefit (per Mummery LJ at page 251(f) to 252(a)).
27. The Jurats are therefore satisfied it is for the benefit of the persons for whom they are giving consent to revoke the exclusion that prevents the beneficiary resident in South Africa from receiving benefit from the trust.
28. The Application is therefore granted.