Judgment 25/2011

In re a Settlement
- Royal Court
- 28th June 2011

Trusts (Guernsey) Law 2007 – Section 57 – application to vary a trust - £80,000,000 – to benefit as many future generations as possible – application granted.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

28th day of June 2011, before Richard John Collas Esquire, Deputy Bailiff alone,

IN RE A SETTLEMENT

Whereas on 16th June 2011 the Deputy Bailiff ordered That Pursuant to Section 57 of the Trusts (Guernsey) Law 2007 the Settlement be varied in the terms attached hereto the Deputy Bailiff this day handed down reasons for the said order also in the terms attached hereto.

S M D ROSS
H M Deputy Greffier

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

ORDINARY DIVISION

IN RE A SETTLEMENT

Hearing date: 16th June 2011

Judgment handed down: 28th June 2011

Before: Richard John Collas Esq., Deputy Bailiff

Advocate for the Trustee: St J A Robilliard
Advocate for the Minor and Unborn Beneficiaries: R Clark

Cases, texts and legislation referred to:

The Trusts (Guernsey) Law, 2007, S.27
The English Variation of Trusts Act 1958
Goulding v James [1997] 2 All ER239 at page 249
Re T's Settlement Trust [1964] 1 Ch.158
Lewin on Trusts, 18th Edition at paragraph 45-62
Re Irving (1975) 66 DLR (3d) 387
In the matter of the Representations of N and N [1999] JLR 86
Re Elizabeth K Gates Estate Trust 3 ITELR 113
Re NAZ Trust Corp Limited & The Brian Munroe Settlement (28th July 1995, unreported Jersey Royal Court)
Re Holt's Settlement [1969] 1Ch.100

Introduction

1. The court is asked to give its consent on behalf of minor and unborn beneficiaries to a variation of trust. As the matter concerns minors, it was heard in private and for that reason I am delivering the judgment in anonymised form so that it may be published.

2. The trust concerned was established by a Settlement created twenty years ago by two Settlors. The Applicant is the current trustee. The Settlement was created for the initial benefit of grandchildren of the Settlors by one of their sons, who are referred to as the Primary Beneficiaries of whom there are two currently living and, by virtue of the terms of settlement, there can be no more. For the sake of anonymity, I will refer in this judgment to 'the Settlement', 'the Settlors', 'the Trustee' (which shall mean the trustee for the time being save where the context requires otherwise), the First Primary Beneficiary, the Second Primary Beneficiary and, together, the 'Primary Beneficiaries'.

3. By virtue of Clause 5 of the Settlement, the interest of a Primary Beneficiary vests on attaining the age of twenty-five years, subject to the terms of the Settlement. The First Primary Beneficiary has attained the said age; the Second Primary Beneficiary is not yet twenty-five years old. The First Primary Beneficiary has one child now living aged two years and a second child is expected. The Second Primary Beneficiary has no children at present.

4. The provisions of the settlement relevant to the Application at present are as follows:

    4.1 By virtue of Clause 5(a) a Primary Beneficiary who has attained twenty-five years of age is entitled to the income of his or her share of the trust fund.

    4.2 Clause 5(b) provides that after the death of a Primary Beneficiary, whether or not he or she had attained the age of twenty-five years, his or her share shall be held upon trust as to capital and income for his or her children who attain the age of 25 years in such shares as the Trustees may determine with the consent in writing of the Primary Beneficiary during his or her lifetime.

    4.3 Paragraph 5(c) empowers the Trustee to advance or lend capital to a Primary Beneficiary.

    4.4 Paragraph 5(d) enables the Trustee with the prior written consent of the Primary Beneficiary during his or her lifetime and after he or she has attained twenty-five years of age, to appoint a successive interest in the income of the trust fund to the Primary Beneficiary's surviving spouse. Such power has not yet been exercised.

    4.5 Paragraph 5(e) provides that upon failure or determination of a share of the trust fund, it is to accrue to the remaining shares of the trust fund for the surviving Primary Beneficiaries or if there are none, as an accretion to other maintenance and accumulation settlements established by the Settlors.

5. On the failure of the trusts, Clause 5(f) provides that the trust fund shall be held for a well known international charity. A revocable Deed of Appointment dated last year declares that upon any failure of the trust, the capital and income shall be held for the First Primary Beneficiaries' minor child, to the exclusion of the international charity. Advocate Clark rightly described it as a curious document as the Settlement would not fail if the minor child was still alive.

6. The Settlement was established with a duration period of 100 years, but in any event it cannot continue beyond the lifetime of children of the Principal Beneficiaries.

7. I was informed by an affidavit sworn on behalf of the Applicant that the Settlement was created to hold shares in a well known public company for the benefit of grandchildren of the Settlors at a time when it was not envisaged that the shares would be assets of such worth as would provide for multiple generations. However, over the years, considerable value has been obtained and the value of the fund, held in a wholly owned subsidiary of the Settlement, is in excess of £80,000,000 (eighty million pounds).

8. Three years ago, the Settlors and other family members executed a letter of wishes stating they would like as many generations as possible to benefit and requesting the Trustee to ensure that the Settlement, together with certain related settlements, would continue in existence for as long as possible.

9. The Application to vary is in four parts.

10. The first part proposes to delete paragraph 5(b) and substitute for it a paragraph giving the Trustee discretionary powers in respect of the children and remoter issue of a Primary Beneficiary after the death of such Primary Beneficiary. It would therefore give the Trustee discretion to extend the life of the interest of a child of a Primary Beneficiary beyond the age of twenty-five and create discretionary powers in favour of remoter issue. It also provides that upon the expiration of the period of duration of the trust, the trust fund should be held for the benefit of the children or remoter issue of the Primary Beneficiary in such shares as the Trustee shall determine.

11. The second part of the Application proposes that the Trustee shall have the power to apply capital *"to or for the benefit of*" a Primary Beneficiary. At present the Trustee's only power is to advance capital to the Primary Beneficiary.

12. The third part of the Application proposes revocation of the revocable Deed of Appointment executed last year referred to above.

13. The fourth part of the Application proposes the deletion of Clause 5(e) as originally drafted and the substitution of a new clause reflecting the proposed changes, preserving the benefit for related maintenance and accumulation settlements in the event of the trusts failing and subject to the same, directs that the trust fund shall be held for the international charity mentioned above.

14. Affidavits were filed in support of the Application by the two Principal Beneficiaries, confirming that they consent to the proposed variations.

15. Advocate Clark was appointed by the Court to represent the minor and unborn Beneficiaries. I directed at an earlier hearing, after hearing from Advocates Robilliard and Clark, that there was no need for any other parties to be convened. Such other possible parties could have included the spouse of the first Primary Beneficiary, the trustees of the related accumulation of maintenance settlements and the international charity. The provisions of the Settlement relating to such parties are not being varied, hence I considered there was no need for them to be considered.

16. The motivation for the variations proposed in the Application, in addition to the ability to make provision for future generations of the family, is to give the Trustee greater flexibility as to how and when it pays capital and income to beneficiaries. There is also a tax benefit, although Advocate Robilliard was at pains to emphasise that this is not an attempt at aggressive tax planning and tax is not the primary motivator.

17. The Settlors were UK domiciled at the time of creation of the Settlement. The tax treatment of the Settlement and of the Primary Beneficiaries is not straightforward. It is not necessary for me to describe the situation in detail. I believe it is sufficient to say that the advantage of the proposed variations is that the additional flexibility they will confer on the trustees will enable assets to remain within the Settlement if the Trustee so decides. That will give rise to a deferral of Income Tax and Capital Gains Tax liabilities, thereby enabling assets to be accumulated within the Settlement. There is no way of predicting how the tax regime may change but, almost certainly, it will change and in all likelihood the tax environment will become less and less favourable to trust settlements. It is not expected that the proposed variations will adversely affect the tax situation of the Settlement or beneficiaries. The likelihood is that it will be beneficial, but, as was emphasised, that is not the main reason for seeking to vary the terms of the Settlement.

18. The court's power to vary the Settlement is in Section 57 of The Trusts (Guernsey) Law, 2007 ("Section 57"):

> *"<u>Variation of trusts on behalf of minors, etc.</u>*
>
> *57. (1) The Royal Court, on the application of any person mentioned in section 69(2), on behalf of –*
>
> *(a) a minor or a person under legal disability having, directly or indirectly, an interest, vested or contingent, under a trust,*
>
> *(b) any person unborn,*

> *(c) any person, ascertained or not, who may become entitled, directly or indirectly, to an interest under a 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,*
>
> *(d) any person, in respect of an interest that may accrue to him by virtue of the exercise of a discretionary power on the failure or determination of an existing interest, or*
>
> *(e) with leave of the Royal Court, any other person,*
>
> *may, subject to subsection (2), approve any arrangement which varies or revokes the terms of a trust or enlarges or modifies the powers of management or administration of any trustees, whether or not there is another person with a beneficial interest who is capable of assenting to the arrangement.*
>
> *(2) The Royal Court shall not approve an arrangement on behalf of a person mentioned in subsection (1)(a), (b) or (c) unless the arrangement appears to be for his benefit."*

19. Section 57 is a simplified version of the English Variation of Trusts Act 1958. It is not identical to the English Act and the differences in drafting need to be borne in mind when considering relevant decisions of the English court.

20. Advocate Robilliard's explanation of the origins of Section 57 are that the Variation of Trusts Act was copied in a number of jurisdictions, including Canada. Canadian Law was, apparently, a model used by Jersey when drafting its Trust Law and, as is well known, Guernsey's statutory Trust Law was based upon the Jersey Law and bears great similarities to the Law of our sister island.

21. The common law position is that an adult beneficiary with legal capacity may consent to a variation of trust. Section 57 enables the court to give consent on behalf of persons who are not able to do so for themselves. The role of the court was considered by the Court of Appeal in Goulding v James [1997] 2 All ER239 at page 249. Mummery LJ (at page 249h) said that the court is almost in the position of a 'statutory attorney' on behalf of those for whom it consented.

22. In the present Application the Court is asked to give its consent on behalf of persons mentioned in sub sections (1)(a) and (b) of Section 57, namely a minor with a contingent interest in the Settlement and persons unborn. As I said above, there is presently one minor aged two, a person living but not yet born and possible other unborn persons.

23. There are two considerations for the Court under Section 57. First of all, whether the proposed arrangement "*varies or revokes the terms of the trust or enlarges or modifies the powers of management or administration*" of the Trustee. The second consideration is whether the proposed variations will be for the "*benefit"* of the persons for whom the Court is consenting.

24. In Re T's Settlement Trust [1964] 1 Ch.158, Wilberforce J (as he then was) refused to give approval for a proposed arrangement which he considered was not a variation of a trust but a resettlement which the court had no jurisdiction to approve. The facts of the present Application are very different from those in that case. I was satisfied that the present Application is clearly within the powers of the Court to approve if I am so minded.

25. The real issue before me is whether the proposed arrangement is for the "*benefit"* of the minor and unborn persons.

26. The question of what can amount to "benefit" is one that has exercised the courts in a number of jurisdictions. It is apparent from the wording of Section 57 that even if the Court is satisfied that there is benefit, it retains a discretion as to whether to give its consent to a proposed arrangement. The general considerations are explained in *Lewin on Trusts,* 18th Edition at paragraph 45-62:

> *"The court will not confine itself to looking at the alleged benefit to those persons for whom it has jurisdiction to approve but will examine the arrangement as a whole, in the light of the purpose of the trust as disclosed by the trust instrument and any other available evidence. It will undertake a practical and businesslike consideration of the arrangement, including the total amounts of the advantages which the various parties obtained, and their bargaining strength…… The arrangement may be acceptable although in certain events no benefit or even a loss may result. The court will take the same sort of risk as a reasonable adult would be prepared to take".*

27. The concept of a reasonable adult is a theme which has been further developed by the Canadian courts and adopted by the Jersey Royal Court. A Canadian decision, Re Irving (1975) 66 DLR (3d) 387 was followed by the Jersey Royal Court in, In the Matter of the Representation of N and N [1999] JLR 86, saying that in that court's opinion, the Canadian case posed the question the Court had to answer "*is the benefit to be obtained on behalf of those for whom the Court is acting such that a prudent adult motivated by intelligent self interest after sustained consideration of the expectancies and risks and the proposal made, would be likely to accept?".*

28. Such line of thinking appears to have influenced the Jersey Royal Court's approach to ascertaining whether a benefit exists. In Re Elizabeth K Gates Estate Trust 3 ITELR 113, the Court cited its dictum in Re NAZ Trust Corp Limited & The Brian Munro Settlement (28th July 1995 unreported) where the court stated:

> "*It is not in our judgment generally in the interests of young persons to come into possession of large sums of money which might discourage them from achieving qualifications and from leading settled and industrious lives to the benefit of themselves and of the community".*

29. In doing so, they echoed the views of Megarry J (as he then was) in Re Holt's Settlement [1969] 1Ch.100 (at page 19 of 22 of the extract of the case produced in the court bundle) where he said:

> "*I fully concur in the view taken by Mrs Wilson that, speaking in general terms, it is most important that young children "should be reasonably advanced in a career and settled in life before they are in receipt of an income sufficient to make them independent to the need to work". The word "benefit" in the proviso to Section 1(1) is, I think, plainly not confined to financial benefit, but may extend to moral or social benefit, as is shown by In Re T Settlement Trust*".

30. Advocate Clark concurred with Advocate Robilliard's analysis of the legal position and of the powers of the court.

31. With those principles in mind, I have to consider whether the proposed arrangements in the Application before me are for the benefit of the minor and unborn beneficiaries. Advocate Clark's careful and detailed submissions in this behalf have been of great assistance to me. I agree with him that the fiscal benefits do not by themselves justify giving consent. As matters stand at present, there is likely to be a tax benefit if beneficiaries have a discretionary rather than a vested interest but, as Advocate Clark pointed out, it will be many years before the

interests of the minor and unborn beneficiaries vest and the tax regime then in force is likely to be different and, in all likelihood, less favourable than at present.

32. The Settlement has benefited from the huge success of the public company whose shares are ultimately owned by the Settlement. The extent of that success was not anticipated by the Settlors twenty years ago. They did not envisage that the Settlement would have the potential to benefit future generations of their family beyond their own grandchildren. The subsequent letter of wishes executed by them, and other beneficiaries, indicates it is now their wish that the Trustee should take steps to benefit future generations. If the proposed arrangement is not approved, those who will benefit will receive a substantial financial sum, likely to be far beyond their reasonable needs.

33. The proposed arrangements will give the Trustee greater flexibility in determining who will benefit, when they will benefit and how they are to benefit.

34. After careful consideration, I agree with Advocate Clark that, on balance, it is appropriate that the court should approve those arrangements as they will "*benefit"*, in the wide sense in which "*benefit"* is to be interpreted, the minor and unborn beneficiaries by preserving assets in the Settlement for the future generations. Furthermore, the additional flexibility the Trustee will enjoy in the exercise of its powers will be an extra benefit.

35. I did question with counsel whether there would be any advantage in postponing any proposed variation until a later date when the circumstances of the beneficiaries and the consequences of the variation, including any tax benefits, might be more apparent. However, I accept their submissions that, on balance, any potential advantage are outweighed by the risks, which include for example, the possibility of one or both of the Primary Beneficiaries suffering an untimely and early demise, together with the consequences of any tax changes that might occur in the meantime and which are more likely to be detrimental than advantageous.

36. In conclusion therefore, I accept that the increased flexibility that the proposed arrangements will give the Trustee, including the ability to determine when and how future generations are to benefit from the Settlement are sufficient "*benefit"* for the purposes of Section 57. I am satisfied in all the circumstances that I should grant the Application.