Judgment 28/2007 **In re the H Trust – Royal Court (Civil Action File 960) – 29 August 2007.**

Trusts (Guernsey) Law, 1989 (s.52) – application for variation – presiding Judge and Jurats retired together to consider the principal application – adult beneficiary suffering from Asperger's syndrome – held to be under a legal disability under s.52(a) of the Law – Advocate appointed special guardian so that instructions could be given on behalf of this beneficiary – principles to be applied in variation of trust cases – Jersey and English authorities considered

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 960

The 29th day of August 2007 before Patrick John Talbot QC Esquire, Lieutenant Bailiff; present Alan Cecil Bisson; Michael John Tanguy and Susan Mowbray, Jurats.

Re: THE H TRUST

Whereas on 5th July 2007 the Court considered two applications seeking its approval for the proposed variation of a trust and heard thereon Advocate Paul Richardson for the Trustee, Advocate Catherine Fooks on behalf of the Son of the Settlor, Advocate John Loveridge on behalf of the Minor Daughter of the Settlor and Advocate Mark Ferbrache on behalf of any unborn or unascertained beneficiaries and whereas on the 5th of July the Court approved the variation of the said trust as sought and reserved its reasons the Court this day in anonymised form, handed down the reasons for its decision in the terms attached hereto.

S M D ROSS
H M Deputy Greffier

THURSDAY 5th JULY 2007

IN THE ROYAL COURT

Before

Patrick John Talbot, Esquire, QC,
Lieutenant Bailiff, and Jurats Bisson, Tanguy and Mowbray

Advocate Paul Richardson appeared for the trustee

Advocate Catherine Fooks appeared on behalf of the son of the Settlor

Advocate John Loveridge appeared on behalf of the minor daughter of the Settlor

Advocate Mark Ferbrache represented the interests of any unborn or unascertained beneficiaries

Re: THE H TRUST

Judgment delivered by the Lieutenant Bailiff (in anonymised form prepared for public release)

Introduction

1. On 5th July 2007 there were two applications before the Court, the principal application being made under Section 52 of the Trusts (Guernsey) Law, 1989, ("the Trusts Law"), seeking the approval of the Royal Court of a proposed variation of a Guernsey trust.

2. This Judgment is now released to the public in an anonymised form so as to preserve the anonymity of the parties, which, in our view, is in the best interests of the parties, and of the H Trust to which the applications relate, ("the Trust").

3. The applications were heard in chambers on Thursday 5 July 2007. We gave a summary of our conclusions on the principal application on that day and said that we would give our reasons later. On the principal

application we declared that the arrangement for the variation of the Trust, to which the principal application related, was approved.

4. Except where an issue is a pure matter of law, (which it is solely the responsibility of the Lieutenant Bailiff as the presiding judge to decide,) this is the Judgment of the Royal Court, including the Jurats.

5. Adopting the procedure outlined by Deputy Bailiff Carey, (as he then was,) in the application of ***Kleinwort Benson (Trustees) (Guernsey) Limited, In re Mr and Mrs W's 1966 Settlement*** (1998) 25 GLJ 24, under which the presiding Judge and the Jurats retire together to reach, if they can, a common mind as to how the Court's discretion in particular cases involving the supervision of, or intervention in, Guernsey trusts should be exercised, we retired together to consider the principal application. The Lieutenant Bailiff decided that this procedure was suitable for an application to the Royal Court, like the principal application, for the approval of an arrangement to vary a Guernsey trust under the express statutory power given to the Court in Section 52 of the Trusts Law.

6. By Section 52 of the Trusts Law, (which essentially mirrors section 1 of the English Variation of Trusts Act, 1958,):

> (*1) The Court, on the application of any person mentioned in section 63(2), on behalf of:-*
>
> *(a) a minor or person under a legal disability having, directly or indirectly, an interest...under a trust;*
>
> *…..*
>
> *may, subject to sub-section (2), approve an 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 consenting to the arrangement.*
>
> *(2) The Court shall not approve an arrangement made on behalf of a person mentioned in sub-section 1(a)... unless the arrangement appears to be for his benefit.*

7. The applications in this case were made by the present sole trustee of the Trust, a Guernsey trust company, ("the trustee"), being a legal person in a category named in Section 63(2) of the Trusts Law. Advocate Paul Richardson represented the trustee, which became the sole trustee of the Trust early in 2005.

8. The Trust was formed by a Deed of Settlement dated 30th November 1990, made by a male settlor, ("the Settlor"), ("the Trust Deed"), primarily

to provide for his two children by his marriage, the elder of whom is a son, who was born on 3rd September 1987, ("the son") and the younger, a daughter, who was born on 16th August 1989, ("the daughter"). Where necessary, we shall refer to the son and the daughter together as the "Principal Beneficiaries". The Settlor is still living, but his wife died in October 2006.

9. The principal application was made as a result of the health of the son, who suffers from Asperger's syndrome, which is an autistic spectrum disorder. The son is now 19 years old, and has, therefore, attained his legal majority.

10. A preliminary question arose whether the son was under a legal disability within the meaning of Section 52(1)(a) of the Trusts Law because of his medical condition. The Jurats determined this question of fact at the commencement of the hearing on 5th July 2007, on the basis of the affidavit evidence then before the Court, including evidence from (i) the Settlor, (ii) Mr. Richardson, (iii) an educational psychologist, and (iv) a psychiatrist. The evidence established that the son had educational, behavioural and other learning difficulties, that he had no real concept of the value of money and that he would not be able to give instructions to an Advocate about the proposed variation of the Trust or to understand, in an informed way, the basis of the principal application.

11. After the Lieutenant Bailiff had summed up the facts established by the affidavits, to which we have referred, and the law relating to mental capacity and legal disability in the context of a party to the principal application, the Jurats found as a fact that the son was under a legal disability within the meaning of section 52(1)(a) of the Trusts Law. It followed, therefore, that he was unable to give instructions relating to, or to consent to the relief claimed in, the principal application, and that he would have to be separately represented by an Advocate instructed by a specially-appointed guardian.

12. Immediately after the finding had been made that the son was under a legal disability, Advocate Nick Barnes was appointed by the Court as special guardian of the son so that instructions could be given on behalf of the son for the purposes of the principal application. This appointment of a limited scope was both cost-saving and procedurally simple and avoided the need for an application for the appointment of a guardian of the son under the Curatelle Rules.

13. Since the son was under a legal disability, in order for Section 52 of the Trusts Law to be duly satisfied, the arrangement to vary the trusts of the Trust had to be approved, if the Court so decided, on his behalf, as well as on behalf of others, including the daughter.

14. The daughter was 17 years old at the time of the hearing and was, therefore, still a minor, upon whose behalf the Court was asked to approve the arrangement to vary the trusts of the Trust under Section 52.

15. The son, acting by Mr. Barnes as his guardian, was represented before us by Advocate Catherine Fooks. The daughter was represented before us by Advocate John Loveridge. We also heard submissions from Advocate Mark Ferbrache representing the interests of any unborn or unascertained beneficiaries under the Trust, upon whose behalf we were also required to approve the arrangement.

16. As set out in the Executive Summary prepared for the Court by Mr. Richardson, on the present terms upon which the assets of the Trust are held, the son will become beneficially entitled to half the capital of the Trust on 3rd September 2012 and will also become entitled to a share of income on the expiration of the accumulation period on 30th November 2011. We were told by Mr. Richardson, Counsel for the trustee, that the whole trust fund was valued at approximately £1.2 million.

The question for determination by the Court

17. The main question in this case for decision by the Court was whether or not the arrangement before the Court, under which it was proposed that the trusts of the Trust would be varied, appeared to be for the benefit of the son, the daughter and any future beneficiaries, whether unborn or unascertained, and, if so, whether it should be approved by us on their behalf under the terms of Section 52 of the Trusts Law.

A short summary of the material terms of the Trust

18. The Trust Deed established an accumulation and maintenance settlement in a form sometimes seen in this Court.

19. In summary, the assets of the Trust are held upon trusts which operate, during the lifetime of the Trust, so as to allow income to be accumulated and invested as an accretion to the capital to the trust, *i.e.* what we recognise as a typical Guernsey accumulation and maintenance settlement. The trustee has the power to apply all or part of the accumulated income of the trust for the maintenance, education or benefit of one or both of the Principal Beneficiaries.

20. Under the original terms of the Trust, each of the Principal Beneficiaries under the Trust would become absolutely entitled to one half share of the capital and accumulated income upon attaining the age of 25 (namely, as we have mentioned above, 3rd September 2012 for the son and 16th August 2014 for the daughter,) and prior to that date, a share of income on the expiration of the accumulation period on 30th November 2011.

21. The ultimate default beneficiaries, named in the Trust Deed, are the Settlor's brother and one of the Settlor's brothers-in-law. They were both joined as Defendants. Both of them have supplied letters to the trustee, which confirm that they agree to the proposed variation to the Trust. We read these letters as part of the affidavit evidence and, in these circumstances, we did not find it necessary for the ultimate beneficiaries to be separately represented before us.

The law

22. In ***Goulding v James*** [1997] 2 All ER 239 in the Court of Appeal in England, Lord Justice Mummery said that the court has a discretion whether or not to approve a proposed variation, such discretion only being fettered by the express restriction preventing the court from approving a variation which is not for the benefit of the classes referred to in sub-sections (a), (b) or (c) of section 1 of the Variation of Trusts Act, 1958, (which provisions, we noted, mirror the material terms of section 52 of the Trusts Law). It is the exercise of this discretion which, in Guernsey, brings the principal application into the hands of the Royal Court, (comprising a presiding Judge and the Jurats,) to decide whether or not the proposed arrangement to vary the trusts of the Trust appears to be for the benefit of the son, the daughter and any unborn or unascertained beneficiaries, and whether it should, or should not, be approved.

Benefit

23. It was contended by all Counsel that the proposed variation would provide financial benefit for both the son and the daughter, and it was also submitted that the Court could also take other benefits into account, including benefit to the family as a whole of a "social" nature, namely, that it would be for the benefit of the family as a whole that the son's care should be properly set up for the future.

24. The main thrust of the argument was that there would be financial benefit for both the son and the daughter in that, should the trustee be able to retain the Trust funds after the son's 25th birthday on trust, the "gross" trust fund would be available in order to generate further investment growth and income for the Principal Beneficiaries. Further, it was argued on the basis of advice from the Trust's accountants, (which was exhibited in evidence and further explained to us in oral submissions from Counsel, and which has been further confirmed in an affidavit lodged after the hearing confirming what Counsel had submitted to us on instructions,) that the variation would make the Trust more tax- and investment-efficient.

25. In order to preserve the anonymity of these Reasons it is not, we think, appropriate for us to rehearse here in any more detail than the brief summary in the previous paragraph the details of the proposed variation. We record here, as we said in Court on 5th July 2007, that it appeared to us, and, indeed, we were satisfied, that the variation would be for the financial benefit of both the son and the daughter.

26. We also concluded that, since a small fund was being set aside and preserved, as it were, for the benefit of the unborn and unascertained "beneficiaries", represented by Mr. Mark Ferbrache, the proposed variation also, in all the circumstances, appeared to us to be for their benefit as well. In this regard, we took into account, in particular, that the evidence established that it was, at the outset of the Trust, and it still remained, the intention of the Settlor to treat each of the Principal Beneficiaries equally, thus making it unlikely that anyone other than the Principal Beneficiaries would benefit from the Trust; and we also reminded ourselves that it was only necessary for it to appear to us that the proposed variation would provide *some* tangible benefit for the unborn and unascertained beneficiaries in order to satisfy the terms of section 52 of the Trusts Law. On the basis of all the affidavit evidence, we decided that it did so appear.

27. By way of final summary, we approved the proposed variation of the Trust under section 52 of the Trusts Law on behalf of the son, the daughter and any unborn or unascertained beneficiaries of the Trust, and, as we have said above, we announced our decision at the end of the oral hearing on 5th July 2007.

A Legal Footnote

28. As a legal footnote to our Reasons, and in the hope that it might be of use both to Guernsey advocates and to those employed in the administration of Guernsey trusts, a few general points about the law applicable in variation of trust cases in Guernsey now follow.

29. There are, it seems, no reported decisions in Guernsey on the proper application of Section 52 of the Trusts Law. After a careful reading of the English and Jersey cases cited to the Court, the Lieutenant Bailiff concluded that they were persuasive and that, where appropriate, they should be followed in Guernsey. Accordingly, the Royal Court will, (as is the case with the Royal Court of Jersey,) pay a close regard to the English common law authorities, since the relevant laws of the jurisdictions on variation of trusts are very similar – see ***In the Matter of the Leah and Harry Osias 1980 Settlements*** [1987-1988] JLR 389. Two aspects of the authorities seem to merit special mention.

30. First, whilst in cases of this sort the "benefit" which has to be "appear" to the Court is usually benefit of a financial nature, the Court can, if the

circumstances so demand, take other benefits into account, and will, if necessary, give the word "benefit" a wide construction. Specific reference may be made to three cases. First, in ***In re Weston's Settlements*** [1969] 1 Ch. 223, the Master of the Rolls, Lord Denning, sitting in the Court of Appeal in England, said:

> *"The court should not consider merely the financial benefit to the infants ... but also their educational and social benefit. There are many things in life more worthwhile than money."*

Secondly, in ***In re T's Settlement Trusts*** [1964] Ch 158, a case which is of some comparative weight with regard to the principal application before us, Mr Justice Wilberforce, (as he then was,) held in the Chancery Division of the High Court in England, (at p. 162), that the advantage of postponing the age at which a minor who was irresponsible and immature would become entitled to an interest under the trust was:

> *"...the kind of benefit...which seems to be within the spirit of the Act."*

And thirdly, in the Jersey case of ***In the Matter of The Neil Ashley (1990) Settlement*** [2003] JLR N9 the Royal Court of Jersey decided that a settlement containing an overriding power of appointment which was not exercisable until a principal beneficiary was 25 years old and attained an interest in possession should be varied by the court so as to allow the trustees to appoint some or all of the settlement assets to a new trust, whether governed by the law of Jersey or another jurisdiction, if that was for the benefit of the beneficiaries for tax-planning purposes.

31. Secondly, as has been mentioned above, in ***Goulding v James*** [1997] 2 All ER 239, Lord Justice Mummery, sitting in the Court of Appeal in England, held that the court has a discretion whether or not to approve a proposed variation, such discretion only being fettered by the express restriction preventing the court from approving a variation which is not for the benefit of the classes referred to in sub-sections (a), (b) or (c) of the Variation of Trusts Act, 1958, (which mirror those in section 52 of the Trusts Law). In ***the Osias case***, (above), the Royal Court of Jersey adopted a similar approach, holding that the only limitation on discretion under the similar Jersey law provision was that the variation must, as article 43 of the Jersey Law expressly required, benefit minor and potential beneficiaries. Further, in ***the Osias case***, the Court gave some interesting guidance on the circumstances when it would decline to exercise its discretion to vary a trust, such circumstances, (which the Lieutenant Bailiff thinks may only occur rarely,) being:

    (i) where there is a pointless application, such as where approval is sought on behalf of a beneficiary who will never come into existence;

(ii) where the application followed the purported exercise of a power of appointment which turned out to have been exercised purely for the purpose of facilitating the application itself; and

(iii) where a settlor created protective or spendthrift trusts in order to protect the beneficiary against his own profligacy.

32. We express our thanks to all Counsel for their assistance in this matter.

