Judgment 4/2008 **In re The V Settlement – Royal Court (Civil Action File 845) – 28 January 2008**

Trusts (Guernsey) Law, 1989 (s.62) – application by the trustee for authority to make a loan to the son of the Settlor – presiding judge retired with the Jurats to consider the application – Court satisfied that the trustee's opinion that he should exercise his discretion to make the proposed loan was one which an ordinary, reasonable and prudent trustee properly instructed could have properly formed – costs of all the parties to be met out of the trust fund on the indemnity basis

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 845

The 28th day of January 2008 before Patrick John Talbot Q.C., Lieutenant Bailiff, present Alan Cecil Bisson, Susan Mowbray and David Osmond le Conte, Jurats.

In re the V Settlement (loan issue)

Whereas on the 17th and 18th January 2008 the Court considered an application under Section 62 of the Trusts (Guernsey) Law, 1989, seeking the approval and authorisation of the Court of a loan by the applicant, ("the trustee"), the sole trustee of the above-mentioned Settlement ("the V Settlement") and heard thereon Advocate Mark Ferbrache for the current trustee under the above-named Settlement; Advocate Karen le Cras for the son of the Settlor under the above-named Settlement; Advocate Jeremy Wessels for the widow of the Settlor, the mother of the son of the Settlor and Advocate Ian Swan for the interests of the infant daughter of the son of the Settlor, and of any unborn or unascertained beneficiaries, under the above-named Settlement and whereas the Court on the 18th January granted the said application the Court this day handed down its reasons for the said decision and ORDERED that the costs of this application of all parties should be paid out of the trust fund on the indemnity basis.

S M D ROSS

Her Majesty's Deputy Greffier

Approved Text
28 January 2008

THURSDAY 17th and FRIDAY 18th January 2008

IN THE ROYAL COURT

In re. the V Settlement (loan issue)

before

Patrick John Talbot, Esquire, QC,
Lieutenant-Bailiff, and Jurats Bisson, Mowbray and Le Conte

Advocate Mark Ferbrache appeared on behalf of the current trustee under the above-named Settlement

Advocate Karen le Cras appeared on behalf of the son of the Settlor under the above-named Settlement

Advocate Jeremy Wessels appeared on behalf of the widow of the Settlor, the mother of the son of the Settlor

Advocate Ian Swan represented the interests of the infant daughter of the son of the Settlor, and of any unborn or unascertained beneficiaries, under the above-named Settlement

Re: "THE V TRUST"

J U D G M E N T

(IN ANONYMISED FORM PREPARED FOR PUBLIC RELEASE) DELIVERED BY THE LIEUTENANT-BAILIFF ON BEHALF OF THE COURT

Introduction

1. On 17th and 18th January 2008 an application came before the Royal Court under Section 62 of the Trusts (Guernsey) Law, 1989, ("the Trusts Law"), seeking the approval and authorisation of the Court of a loan by the applicant, ("the trustee"), the sole trustee of the above-mentioned Settlement ("the V Settlement"). The V Settlement, which was made by the late Settlor, ("the Settlor"), is a Guernsey trust.

2. This Judgment, (which contains our reasons for the direction referred to below,) 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 V Settlement.

3. The trustee was appointed the sole trustee of the V Settlement on 20th August 2002.

4. The loan, to which this application relates, is proposed to be made by the trustee to the son of the Settlor under an express power contained in clause 12(o) of the V Settlement. Clause 12(o) authorises the trustee to

> "*lend the whole or any part of the Trust Fund to any Beneficiary upon such terms as to repayment and interest (or interest free)*

and otherwise as the Trustees shall in their discretion think fit provided that no loan shall be made on terms that repayment shall be postponed beyond the end of the Trust Period."

5. The loan to the Settlor's son would be of a maximum total sum from time to time of £260,000 and would be made for a term of no more than four years on an interest free basis. It is clear from the affidavit evidence of a director of the trustee under the V Settlement, ("the director"), filed on behalf of the trustee on this application, that the loan is urgently required to meet outstanding Guernsey and English legal costs incurred by the Settlor's son over the course of these proceedings, which commenced in 2004 and which raise relatively complex questions of construction and validity relating to Deeds of Appointment made under the V Settlement in 2002 and 2003. Details of the issues in these proceedings are helpfully summarised in paragraph 8 of the skeleton argument lodged on behalf of the trustee.

6. The director's evidence, and that of the Settlor's son himself, establish to our satisfaction that, unless the loan is made in the very near future, the Settlor's son's English Solicitors and Guernsey Advocates will both cease to act for him and sue him for the large sums amounting in total to just over £260,000 outstanding in their books as costs due to them from the Settlor's son. The affidavit evidence was amplified by invoices produced to us by the Settlor's son's Counsel, Advocate Karen le Cras, which disclosed full details of her firm's costs, but very substantially fewer details of the larger costs incurred on his behalf by the Settlor's son's English solicitors. No issue arose on this application about the liability of the Settlor's son to his lawyers to meet their costs or about the size of their bills.

7. The application was self-evidently an urgent one, and, during a telephone directions hearing held by the Lieutenant-Bailiff on 9th January 2008, arrangements were made for an early hearing date.

8. This Judgment contains our reasons, in summary form, for deciding, as we announced in Court on Friday 18th January 2008, that we approved and authorised the making of the loan by the trustee to the Settlor's son on the terms of a draft loan agreement, to which reference is made below, and that we would direct the trustee accordingly pursuant to Section 62 of the Trusts Law.

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

Procedure on this application

10. In *In re. the H Trust* (2007) the Lieutenant-Bailiff said:

> "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 ... application. The Lieutenant-Bailiff decided that this procedure was suitable for an application to the Royal Court ... 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."

11. On 18th January 2008 the Lieutenant-Bailiff announced that he had decided to use the procedure mentioned in his judgment in *In re the H Trust* (above) on this application by the trustee for directions

under Section 62 of the Trusts Law and that he would retire with the Jurats to consider the application at the end of Counsel's argument. Counsel agreed that this application was suitable to be dealt with by the Court on this basis and so the Court retired together to consider, and decide, this application.

Jurisdiction

12. On this application the direction of the Court approving and authorising the proposed loan to the Settlor's son was sought by the trustee under Sections 62 and 63 of the Trusts Law, which, in so far as is material to this application, read as follows:

> *Applications for Directions*
>
> *62. A trustee may apply to the court for directions as to how he should or might act in any of the affairs of the trust, and the court may make such order as it thinks fit.*
>
> *General Powers of Court*
>
> *63 (1) On the application of any person mentioned in sub-section (2), the Court may:-*
>
> *(a) make an order in respect of:-*
>
> *(i) the execution, administration or enforcement of a trust;*
>
> *(ii) a trustee, including an order as to the exercise of his functions, …..*
>
> *(iii) a beneficiary, or any person connected with a trust;*
>
> *(iv) any trust property, including any order as to the vesting, preservation, application, surrender or recovery thereof ….*
>
> *(2) An application under sub-section (1) may be made by …a trustee …* .

13. The application before us on 17th and 18th January 2008 was, as we have said above, made by the trustee, a legal person in one of the categories named in Section 63(2) of the Trusts Law. Advocate Mark Ferbrache represented the trustee and made helpful written and oral submissions to us.

The V Settlement

14. The V Settlement was formed by a Deed of Settlement dated 22 August 1989 and made between (1) the Settlor and (2) the original trustee.

15. The Settlor's son, who was born on 19th July 1978, is the sole member of the class of 'the Beneficiaries' defined in clause 1 (g) of the V Settlement. The class closed on the death of the Settlor on 6th October 1994.

16. In summary, the Settlor's son is presently entitled to the whole of the net income of the V Settlement and the capital is held upon trust for the Settlor's son's children and remoter issue on accumulation and maintenance trusts of a form which is often encountered by the Court. The V Settlement includes other important trusts and powers, which it is not necessary for us to mention on this application, but which are central to the principal applications in these proceedings. These terms of the V Settlement, which might be material to the main part of these proceedings, are helpfully set out in the trustee's Counsel's skeleton argument.

17. The principal application, which is still standing as a "live" application in the lists of the Royal Court, was made in 2004 in relation to the Deeds of Appointment made in 2002 and 2003, which we have mentioned briefly in paragraph 5 above. Issues remain unresolved as

to the validity of those deeds and over a long period of time the parties have been involved in attempts, through their Guernsey and English lawyers, to resolve these issues without a full hearing in court. If such attempts, however, fail, the application is likely to be listed for hearing within the next few months.

18. The director's 3rd affidavit, and the trust accounts to 5th April 2007 exhibited thereto, established that the funds and other assets, including land, subject to the V Settlement were valued as at 5th April 2007 at about £14,000,000 – the fixed assets being valued at cost - and that the distributable income, to which the Settlor's son is presently entitled, amounted in the year to that date to approximately £270,000.

19. At the present time the Settlor's son, (on whose behalf we were addressed by Advocate le Cras in commendably brief and well-directed written and oral submissions,) is married and has only one child, a daughter, who was born in 2006.

20. The Settlor's son's daughter was represented on this application by Advocate Ian Swan, who made helpful written and oral submissions to us on her behalf, and also on behalf of any future or unascertained beneficiaries of the V Settlement. Advocate Swan's oral submissions ensured that any arguable points adverse to the trustee's application were rehearsed before the Court, but the thrust of his submissions was that he supported the application.

21. The Settlor's son's mother is one of the ultimate default beneficiaries of the V Settlement, and she was represented before us by Advocate Jeremy Wessels. He, understandably, had very little to add to the submissions of other Counsel, but he told us that his client also supported the trustee's application.

The question for determination by the Court

22. The large outstanding amount of costs claimed by the Settlor's son's lawyers both here and in England has apparently built up both during the principal proceedings in this Court, and, primarily perhaps, during the course of the negotiations towards resolving the outstanding issues between the parties. These negotiations, it seems, stalled when the Settlor's son became unable to continue funding his lawyers to conduct them on his behalf, and the lawyers decided not to act without further funding from their client.

23. On the basis of the director's 2nd, 3rd and 4th affidavits, we found that it was clearly established that the trustee had decided by about 18th January 2008, the date of the director's 4th affidavit and the second day of the hearing, that it wished, in the exercise of its express power under clause 12 (o) of the V Settlement, to make the proposed loan to the Settlor's son on the security of his freehold property in England, and on the other terms set out in the draft Loan Agreement attached to the application dated 17th January 2008, (subject to one minor drafting amendment made during the oral hearing on 18th January 2008).

24. It was for us to decide whether or not we were satisfied that it was right to approve and authorise the making of the proposed loan.

25. In some of the English cases in this area of trusts law, this is referred to as the Court "blessing" an exercise by a trustee of its powers in the way in which it has decided it would wish to exercise them.

The law in Guernsey

26. In this application the trustee has not in any sense surrendered its discretion to the Court, but has decided that it wishes to exercise its

express power of making a loan to the only member of the class of the Beneficiaries, namely, to the Settlor's son, and seeks the authorisation, or the "blessing", of the Court for the action which it has decided it should take – see, esp., Article 87 in *Underhill and Hayton's Law to Trusts and Trustees,* 17th edition (2006).

27. In delivering the judgment of this Court in *Rysaffe Trustee Company (CI) Limited v Hexagon Trust Company (CI) Limited*, 2nd November 2004, Carey B. said, at paragraph 11:

> *..diverting to the law we have had the benefit of having quoted to us a decision of Mr Justice Hart in the case of The Public Trustee v Cooper [now reported in [2001] 1 WTLR 901]. In that judgment the learned judge quotes from a Chambers judgment of Robert Walker J., as he then was, given in 1995, in which he identifies the various categories of application that will be made to the court by trustees. We accept … that this is a case where it is appropriate for an application to be made to this Court in the situation that trustees have already decided how to exercise their powers, but where they wish to obtain the blessing of the Court for the action which they have resolved to take. As the judgment outlines, sometimes these applications will be made because of the momentous nature of the decision, such as selling a family estate. There can be other situations, as there are here, where the Court, without accepting a surrender of the discretion of the trustees, can reasonably be asked to say to the trustees that in the light of potential conflict of interests, it approves the way in which the trustees propose to deal with a matter. Accordingly we are being asked to give the Court's blessing to the compromise proposed. …*

28. In addition to the help which we get from that case, we have also found considerable help in some recent English cases on the proper formulation of the approach to be taken to the trustee's application, and

we have followed the approach taken both here in Guernsey and in England. We found that approach persuasive, and readily followed it.

29. It is clear from *Richard v McKay* (1987) 11 Tru LI 23, per Millett J. at page 24, *RSPCA v Attorney General* [2002] 1 WLR 448, per Lightman J. at paragraph 31, and *X v A* [2006] 1 WLR 741, per Hart J. at paragraphs 27-30, that, (as the learned editors of *Underhill and Hayton* put it, at paragraph 87.9,)

> *the task of the Court here is not to say how it would itself exercise the discretion, but merely to ensure (via the inquisitorial process) that the proposed exercise is lawful in the sense that the trustees can properly form the view which they have. The consequences of the court being so satisfied is that the beneficiaries will be deprived of the opportunity to allege that it constitutes a breach of trust, and thus the court will act with caution.*

30. It is also important to remind ourselves, as Millett J, said in *Richard v McKay*, that the task of the Court is

> *to ensure that the proposed exercise of the trustees' powers is lawful and within the power and that it does not infringe the trustees' duty to act as ordinary, reasonable and prudent trustees might act, but it requires only to be satisfied that the trustees can properly form the view that the proposed transaction is for the benefit of beneficiaries or the trust estate.*

Dealing with this application

31. There is no doubt that the trustee has an express power granted by clause 12 (o) of the V Settlement to make an interest free loan to the Settlor's son, the only member of the class of 'the Beneficiaries'. The

making by the trustee of the proposed loan, on the security of the freehold English property of the Settlor's son, (which has been professionally valued at £540,000 subject to the rights of its present occupant, the Settlor's son's grandmother,) would, therefore, be a *lawful* exercise of the express power to lend part of the funds of the V Settlement, in the sense that the express power clearly envisages the making of such a loan.

32. We, therefore, turn to consider whether or not the proposed loan would infringe the trustee's duty to act as an ordinary, reasonable and prudent trustee, and whether or not it would be for the benefit of beneficiaries or the trust estate. In doing so, we remind ourselves that this application is made under section 62 of the Trusts Law, and, in particular, that it is *not* an application under section 52 of the Trusts Law for the approval on behalf of the infant daughter of the Settlor's son and unborn or unascertained beneficiaries for approval of a variation of the V Settlement, (in which type of application we would have had to have been satisfied that the proposed loan was *for the benefit of* such beneficiaries).

33. The approach which we have taken on this application is, therefore, in accordance with the guidance of *Rysaffe Trustee Company (CI) Limited v Hexagon Trust Company (CI) Limited* (above) and of the English cases to which we have referred above, and we note as well that the Royal Court of Jersey has taken the same approach, relying especially upon *Public Trustee v Cooper*, in *In the Matter of the S Settlement* , 24 July 2001, per Birt DB.

34. We were satisfied that the opinion which the trustee formed, *i.e.* that it should exercise its discretion under clause 12 (o) of the V Settlement to make the proposed loan to the Settlor's son, was one which an ordinary, reasonable and prudent trustee properly instructed could have properly formed and we, therefore, granted the direction requested to the effect that the loan was approved and authorised by

the Court. In the light of the dispute primarily between The Settlor's son and his mother which underlies these proceedings, we understood why the trustee had not made the proposed loan without the direction of the Court and why it had come to the Court for its blessing. We accepted, as was said in paragraph 19 c. of the trustee's Counsel's skeleton argument, that the trustee regards the making of the proposed loan as "particularly momentous", and we were satisfied without difficulty that the trustee could, in all the circumstances, have properly come to the view that the proposed loan to the Settlor's son was for the benefit of him, as the sole member of the class of 'Beneficiaries' under the V Settlement, and of the trust estate.

35. Our reasoning was as follows.

36. It was established to our satisfaction that the Settlor's son had large debts, including (i) a very large debt owed, in due course, to the trustee, (and which may or may not be secured on property occupied by him in a country in North Africa,) and (ii) the large debts of just over £260,000 owed to his Guernsey and English lawyers. We accepted that, whilst he enjoyed the full net income resulting from the investment of the trust funds, he could not meet his debts without receiving the loan and, that, if he were to be sued by his lawyers for their fees, judgment would be granted against him for the total sum and that there would be a very genuine risk that he would be declared bankrupt, probably in England. We also accepted the submission that in such circumstances it would be likely to be difficult, if not impossible, for the Settlor's son to obtain the services of replacement English and Guernsey lawyers to assist both him and the Court in these proceedings.

37. We also considered that, although the Settlor's son's bankruptcy might, subject to the arguments about validity of the Deeds of Appointment, produce the result that 90% of the net income of the V Settlement would be withheld from him for the benefit of those entitled

under those Deeds, and under the V Settlement, including the Settlor's son's own young daughter, there would be a real chance of both his English and his North African properties being used to pay his creditors, thereby risking the family homes, which, of course, are also the homes of the Settlor's son's daughter, and the future homes of any other children who may, in the future, be born to the Settlor's son and his wife. We thought, therefore, that the Settlor's son's immediate family would be likely to be adversely affected by his bankruptcy.

38. We add that we were also persuaded, (although we repeat that we did not, as a matter of law, *need* to be so persuaded,) that the proposed loan would be in the ultimate best interests of the Settlor's son's daughter, and of others represented by Mr Swan. We readily agreed with the submission in paragraph 12 of his skeleton argument, which we regarded as being made particularly well, that

> "*the principal benefit to the minor and unborn beneficiaries in the loan being made is that it is hoped that this will enable [the Settlor's son]… to engage actively in resolving the present dispute between the adult beneficiaries. The dispute not only promotes disharmony within the family, but is also likely to run up yet further costs, a part of which at least will come out of the trust assets thus diminishing the assets available for distribution. If an acceptable compromise of the dispute, which is in the interests of the minor and unborn beneficiaries, can be found then this can only be a good thing. [The Settlor's son's] inability to meet his legal bills is at present preventing further exploration of issues crucial to the resolution of that question.*"

39. We also took into account as factors which a trustee in the position of the trustee could properly consider as a reason to make the loan that the English property of the Settlor's son appeared to amount to strong security for it, that the Settlor's son himself agreed to the

using of that property as such security and that the capital sum to be loaned to the Settlor's son was not particularly large in the context of a trust fund valued at about £14,000,000. Advocate le Cras, in our view, also correctly summarised the position that the proposed loan would be in the Settlor's son's best interests as a beneficiary in this way in paragraph 7 of her skeleton argument:

> "*it is clearly in the best interests of [the Settlor's son] as a beneficiary that the loan be made to permit him to pay his outstanding legal fees, with the result that (a) any prospect of bankruptcy is avoided (b) the dispute as to the construction of the Deeds of Appointment can be resolved (c) the significant amount of fees incurred in resolving the dispute [is] not wasted and (d) family harmony is restored.*"

40. We also accepted that it was more likely than not that, if the main proceedings were to be resolved between the parties, subject to approval of terms of settlement on behalf of those represented by Mr Swan, the costs incurred on behalf of the Settlor's son would be ordered to be paid out of the trust fund on the indemnity basis.

41. All other Counsel, therefore, supported the trustee's application. We readily came to the conclusion that it should be granted. Equally readily, the Lieutenant-Bailiff ordered, in accordance with usual practice in proceedings relating to the validity of trust documents, that the costs of this application of all parties should be paid out of the trust fund on the indemnity basis.

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

