Judgment 40/2010

Rothschild Trust Guernsey Limited v Ojjeh and Ojjeh (In re the NAO Settlement) – (Civil Action File 965) – Royal Court – 29th November 2010

Trusts (Guernsey) Law, 2007 – co-trustee's application for approval to enter into a Settlement Agreement – proceedings before the French courts – application of the principles in Public Trustee v Cooper – 2007 Law gave discretion to the Bailiff to sit alone or with Jurats – held that it is appropriate to sit with Jurats when exercising discretion in trust cases – application granted.

IN THE ROYAL COURT IN THE ISLAND OF GUERNSEY

The 29th day of November 2010 Before Richard John Collas Esquire, Deputy Bailiff, and Jurats Stephen Edward Francis Le Poidevin, Stephen Murray Jones and David Percy Langley Hodgetts LVO, Esquires

ROTHSCHILD TRUST GUERNSEY LIMITED

The Applicant

and

MADAM NAHED OJJEH

First Proposed Respondent

and

AKRAM OJJEH

Second Proposed Respondent

Re: A Settlement made on the 5th day of July 1999 known as the NAO TRUST("the settlement")

The Court having considered an application approve and ratify the Applicant's decision as a co-trustee of the NAO Settlement to enter into a Settlement Agreement in respect of proceedings that are before the French courts and are currently waiting to be heard in the Paris Court of Appeals and to approve and ratify the Applicant's decision to perform all its obligations under the terms of the Settlement Agreement and having heard Advocate St John Robilliard thereon DECLARED that it was minded to ratify and approve the Applicant's decision to enter into the Settlement Agreement and to perform its obligations thereunder, as requested in the said Application all in accordance with the terms of the judgment attached hereto.

S M D ROSS
H M Deputy Greffier

IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION

Between:

ROTHSCHILD TRUST GUERNSEY LIMITED
The Applicant

and

MADAM NAHED OJJEH
First Proposed Respondent

and

AKRAM OJJEH
Second Proposed Respondent

Re: A Settlement made on the 5th day of July 1999 known as the NAO TRUST("the Settlement")

Date of hearing: 29th November 2010

Approved note of Judgment handed down: 29th November 2010

Before: Richard John COLLAS Esq., Deputy Bailiff and
Jurats: S E F Le Poidevin, S M Jones & D P L Hodgetts

Advocate for Applicant: St J A Robilliard

Cases, texts, legislation and other material referred to:

The Public Trustee v Cooper [2001] WTLR 901
Lewin on Trusts, 18th edition, paragraph 29-299
In the Matter of The Mischca Trust (18th March 2010, Royal Court)
The Trusts (Guernsey) Law, 2007, Section 79
The Royal Court (Reform) (Guernsey) Law, 2008
Storm Residential & Commercial Management Ltd v Sarnia Developments Ltd (13 April 2010, Guernsey Court of Appeal)

Background

1. The Court is being asked to approve and ratify the Applicant's decision as a co-trustee of the NAO Settlement to enter into a Settlement Agreement in respect of proceedings that are before the French courts and are currently waiting to be heard in the Paris Court of Appeals. We are also asked to approve and ratify the Applicant's decision to perform all its obligations under the terms of the Settlement Agreement.

2. The Trust Deed of the NAO Settlement confers on the Applicant the necessary power to settle the proceedings and it has decided that to do so is in the best interests of the trust and the beneficiaries, notably Madame Ojjeh (who is the Applicant's co-trustee) and her adult son Akram Ojjeh who agrees with and supports the decision, having received independent advice as to the effect and consequences of the proposed settlement.

The Law

3. The legal basis for seeking the Court's approval is to be found in the judgment of Hart J in *The Public Trustee v Cooper* [2001] WTLR 901, a case that has been applied in Guernsey on a number of occasions such that, as Advocate Robilliard submitted, the jurisdiction is well established in this Court.

4. We are concerned with the second of the categories cited by Hart J from a judgment of Robert Walker J (as he then was) given in chambers in 1995:

> *"The second category is where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers. Obvious examples of that, which are very familiar in the Chancery Division, are a decision by trustees to sell a family estate or to sell a controlling holding in a family company. In such circumstances there is no doubt at all as to the extent of the trustees' powers nor is there any doubt as to what the trustees want to do but they think it prudent, and the court will give them their costs for doing so, to obtain the court's blessing on a momentous decision. In a case like that, there is no question of surrender of discretion and indeed it is most unlikely that the court will be persuaded in the absence of special circumstances to accept the surrender of discretion on a question of that sort, where the trustees are prima facie in a much better position than the court to know what is in the best interests of the beneficiaries."*

5. The Court's function is explained clearly and succinctly in paragraph 29-299 of Lewin on Trusts, 18th edition:

> *"The court's function where there is no surrender of discretion is a limited one. It is concerned to see 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, ignoring irrelevant, improper or irrational factors; 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 and that they have in fact formed that view. In other words, once it appears that the proposed exercise is within the terms of the power, the court is concerned with limits of rationality and honesty; it does not withhold approval merely because it would not itself have exercised the power in the way proposed. The court, however, acts with caution, because the result of giving approval is that the beneficiaries will be unable thereafter to complain that the exercise is a breach of trust or even to set it aside as flawed; they are unlikely to have the same advantages of cross-examination or disclosure of the trustees' deliberations as they would have in such proceedings. If the court is left in doubt on the evidence as to the propriety of the trustees' proposal it will withhold its approval (though doing so will not be the same thing as prohibiting the exercise proposed). Hence it seems that, as is true when they surrender their discretion, they must put before the court all relevant considerations supported by evidence. In our view that will include a disclosure of their reasons, though otherwise they are not obliged to make such disclosure, since the reasons will necessarily be material to the court's assessment of the proposed exercise."*

The Factual Background

6. Advocate Robilliard has explained to the Court the background to the French proceedings, the allegations in the claim and counter-claim at first instance, the judgment of the Tribunal de Grande Instance and the issues raised in the appeals from that judgment.

7. We have the benefit of a French legal opinion as to the merits of the appeals.

8. We have a copy of the concluded Settlement Agreement which has been agreed and signed by all parties and is subject only to approval from this Court as a condition precedent.

9. The terms of the Settlement Agreement are confidential and we do not propose to refer to them in this judgement, in case the judgment is circulated to third parties.

10. The factors to which the Applicant had regard in deciding to enter into the Settlement Agreement are set out in the Affidavit of Trevor James Kelham, the Managing Director of the Applicant.

The Court's Decision

11. The Court has had regard to the questions set out in paragraph 36 of the judgment of the Royal Court in the matter of *The Mischca Trust* handed down on 18th March this year and in relation to which the Court has concluded that:

    (i) The Applicant trustee has the power to make the momentous decision to settle the French proceedings by virtue of both clause (9) of the Second Schedule of the Trust Deed and section 31(2) of the Trusts (Guernsey) Law 2007.

    (ii) In the absence of any evidence to the contrary, the Court is satisfied that the Applicant has acted in good faith in deciding it was desirable and proper to enter into the Settlement Agreement.

    (iii) Having read the explanations given by Mr Kelham and the advice given to the Applicant especially by its French lawyer, the Court accepts that a reasonable trustee properly instructed could have arrived at the same decision.

    (iv) The decision is not vitiated by any conflicts of interest on the part of the Applicant, either actual or potential.

12. The Court has also had regard to the words of caution expressed in the passage from Lewin on Trusts cited above and to which Advocate Robilliard quite properly drew our attention.

13. In conclusion, the Court is minded to ratify and approve the Applicant's decision to enter into the Settlement Agreement and to perform its obligations thereunder, as requested in the Application before the Court.

Participation of the Jurats

14. The remainder of this judgment concerns a procedural issue and is written by the Deputy-Bailiff alone.

15. I wish to explain the decision I made on Friday 19 November to sit with Jurats at the substantive hearing of the Application.

16. Section 79 of The Trusts (Guernsey) Law, 2007 enables the Royal Court to be constituted by a Bailiff sitting unaccompanied by Jurats for the purposes of the 2007 Law. The Court therefore has an unfettered discretion to decide to sit with a Bailiff alone and the 2007 Law gives no guidance as to how that discretion is to be exercised.

17. It is to be noted that the 2007 Law pre-dated the enactment of the Royal Court (Reform) (Guernsey) Law, 2008 and the reforms introduced therein, including provisions enabling a Bailiff to sit alone when deciding issues of fact in certain instances and provisions enabling the Bailiff (when not sitting alone) to retire with the Jurats rather than direct them on matters of law in open court.

18. The provisions of the 2008 Law were considered by the Guernsey Court of Appeal earlier this year in *Storm Residential & Commercial Management Ltd v Sarnia Developments Ltd* (13 April 2010), a case concerning the exercise by the Royal Court of its powers to order a stay of eviction from commercial premises. It was therefore not concerned with trust matters and section 79 of the 2007 Trusts Law was not mentioned.

19. However, I considered the Court of Appeal's judgment to be instructive and informative even if not strictly binding on me. I had regard to paragraph 15 of the Court's judgment delivered by Sir de Vic Carey, JA:

> *"15. We are in no doubt that, save where an issue of discretion relates to a question of procedure or costs (which is a matter for the Bailiff pursuant to Section 6(2)(a) of the 1950 Law), an issue which falls to be decided as a matter of discretion is a decision for the Jurats. To refer back to the definition referred to above, issues of what is just, fair, right, equitable and reasonable, are just the sort of issues for which the Royal Court has always had Jurats. They are elected to decide such matters."*

20. The learned judge went on to refer to a number of (non-trust) cases where a Bailiff had sat without Jurats when (he said) perhaps the Bailiff should not have done. Without expressing any view as to the correctness of such decisions, Sir de Vic said at paragraphs 28 and 29:

> *"28. Applications of this kind can however involve the Court engaging in difficult balancing exercises weighing up conflicting interests and principles. Separating those out from factual findings in the days when the Bailiff did not retire with the Jurats may have led to a mild reluctance to involve the Jurats particularly where the facts were not really in issue. The then procedure could have given rise to difficulty in the presiding Judge having to give full directions on the issues which should weigh with the Jurats in the exercise of their discretion and the Jurats then returning announcing their decision when it was not their practice to give any reasons.*
>
> *29. These problems are to a large extent overcome by the provisions of Sections 14 and 16 of the Royal Court Reform (Guernsey) Law 2008, which enable the Bailiff to now retire with the Jurats and assist in preparation of the court's judgment. This brings the procedure in Guernsey closer to that of the Samedi division of the Royal Court of Jersey where the Jurats routinely sit with the Bailiff on these kinds of application."*

21. The position in trust cases was always different, even before the 2007 Trusts Law as the Bailiff did retire with the Jurats when the Court was exercising its supervisory jurisdiction. Nevertheless, it seems to me that the Court of Appeal's remarks may have been equally applicable to some trust cases in that judges may have preferred to sit alone rather than attempt to direct Jurats on complex issues in open court.

22. The specific statutory provisions in section 79 of the 2007 Trusts Law mean that the circumstances in which a Bailiff may sit alone and the factors to be considered by him when deciding whether to do so are different, as a matter of law, in trust cases from all other civil cases. However, as a matter of practice and until there is further guidance from this Court or the Court of Appeal, I intend to have regard to the decision in *Storm* when deciding whether to

sit unaccompanied by Jurats in trust matters. I will treat it as being persuasive, even if not binding on me, and I will expect to sit accompanied by Jurats more often than not. I note that will bring this Court closer to the practice in the Royal Court of Jersey where it appears from the reported cases that Jurats normally sit with a Bailiff on applications of this nature.