



A Trust Company and (1) F, (2) M, (3), Cs
Royal Court
5th February, 2014

JUDGMENT 06/2014

Application for a Settlement Agreement.

Approved Text
05.02.2014

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

Between

A TRUST COMPANY

Applicant

-and-

(1) F

(2) M

(3) Cs (together with any other unborn issue)

Respondents

Date of hearing: 3rd January 2014

Reasons handed down: 5th February 2014

Before: Richard James McMahon, Esq., Deputy Bailiff

Counsel for the Applicant:

Advocate S L Brehaut

Counsel for the First and Second Respondents:

Advocate P Richardson

Counsel for the Third Respondents:

Advocate T J Malyn

Cases, Texts & Legislation referred to:

The Trusts (Guernsey) Law, 2007

Public Trustee v Cooper [2001] WTLR 901

In the matter of E [2012] JRC 141

In the matter of the F Trust [2012] JRC 210

Underhill & Hayton, *Law of Trusts and Trustees*, 18th ed.

The Variation of Trusts Act 1958

Re Drewe's Settlement [1966] 1 WLR 1518

Re Lister's Will Trusts [1962] 1 WLR 1441

Re Cohen's Will Trusts [1959] 1 WLR 865

Introduction

1. On 3 January 2014, I heard an Application dated November 2013, supported by an Affidavit sworn on 15 November 2013 by the Managing Director of the Applicant, seeking *inter alia* the blessing of the Court of a proposed Settlement Agreement. Having heard from Advocate Brehaut, on behalf of the Applicant, and from Advocate Malyn, who I agreed to appoint to represent the interests of the minor and unborn issue, I indicated that I would grant the Application, subject to one matter. That matter related to the Court receiving formal confirmation from Advocate Richardson, on behalf of the First and Second Respondents, that those Respondents had no wish to be heard and did, as I had inferred from their being parties to the terms of the proposed Settlement Agreement, approve the relief sought. Such confirmation was provided by way of a letter from Advocate Richardson dated 6 January 2014, at which point the orders took effect. I did, however, reserve the giving of reasons, which are now set out in this judgment.
2. Given the nature of the Application, I was content to sit unaccompanied by Jurats, as I am permitted to do in accordance with section 79 of the Trusts (Guernsey) Law, 2007. This way of proceeding followed the election of all parties, no doubt recognising that the terms of the Settlement Agreement had been finalised for some time and the sooner the matter was resolved the better for all concerned. Therefore, although the case involves exercising the Court's discretion, where sitting with Jurats is generally preferable, I took the decision for the sake of expediency and so as to minimise the costs associated with it to conclude the matter as swiftly as possible.
3. The hearing of this Application took place in private. I made that order, which is common in trusts applications of this type, because the terms of settlement reached following mediation included that the parties would keep it confidential and there are minor children involved. This is also a case falling with the third category set out in *Public Trustee v Cooper* [2001] WTLR 901, where it was said that this type of case is usually heard in chambers. I also granted a separate element of the Application that any judgment be fully anonymised to protect that confidentiality. I have, therefore, chosen to refer to the parties, including the Applicant only by letters rather than by name. This is a matter concerning a family and so the First Respondent, who is the father, is referred to as "F", the Second Respondent, who is the mother, as "M", and their children as "Cs". Such anonymity respects the confidentiality of the agreement and also means that these reasons can be handed down in public.
4. The Application also sought the appointment of Advocate Malyn as representative of the interests of Cs, the minor children, and any unborn issue who would become beneficiaries of the trusts in question. The Affidavit in support of the Application exhibits an Opinion dated 5 November 2013 from Advocate Malyn in which he addresses whether the Settlement Agreement is in the best interests of the minor and unascertained beneficiaries. Although Advocate Malyn is employed by the firm of which Advocate Richardson is a partner, I was satisfied that he had independently considered the issues as a officer of this Court and so could be appointed for this purpose.

Background

5. The mediation took place in the summer of 2013. The outcome was that the parties to proceedings commenced by the First Respondent against the Applicant and others reached agreement on how those proceedings could be settled and in respect of other matters of contention between them. A Settlement Term Sheet, made subject to the negotiation of an appropriate agreement to be submitted to the Court for its blessing, was signed on behalf of the parties represented at that mediation. That Settlement Agreement has now been drawn up

and everyone who is a party to it has confirmed their willingness to execute it, subject only to the decision of the Court.

6. The Settlement Agreement is governed by the laws of Guernsey. It constitutes the entire understanding and agreement between the parties to it in relation to its subject-matter. Its terms are confidential. It is expressly subject to obtaining the prior approval of the Royal Court before it is operational. It states that it is in full and final settlement of all actions, claims, etc arising out of or connected with the matters in dispute. As part of the settlement terms, the Applicant is to make a payment into one of the trusts, of which the Respondents are beneficiaries, that underlie the parties' dispute.
7. For the purposes of this judgment, I do not need to elaborate on the nature of the proceedings against the Applicant, save to note that they allege breach of trust and that, by consent, an aspect of interlocutory relief has previously been granted in them. Suffice it to say that it had the hallmarks of being a substantial piece of litigation, which would have incurred significant costs for all those involved, and that it constitutes hostile litigation against *inter alia* the trustee. The intention of the Settlement Agreement is, therefore, to bring an end to those proceedings and also to address other issues that have arisen in the relationship between the parties. This Court welcomes such developments, believing that it is always preferable for those involved in disputes to resolve them for themselves, sometimes with the assistance of other persons, rather than battle it out in court proceedings with the consequence that one of the parties, or perhaps more than one of them, may feel aggrieved at the outcome.

Legal principles

8. The Application seeks the Court's blessing of the Settlement Agreement. In doing so, the parties are relying on the jurisdiction previously accepted by the Court developed out of the judgment of Robert Walker J given in chambers in 1995 to which Hart J referred in *Public Trustee v Cooper* (*supra*). Four categories of case were identified. The second and third of them are:

“... 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 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 of 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.

The third category is that of surrender of discretion properly so called. There the court will only accept a surrender of discretion for a good reason, the most obvious good reasons being either that the trustees are deadlocked (but honestly deadlocked, so that the question cannot be resolved by removing one trustee rather than another) or because the trustees are disabled as a result of a conflict of interest. Cases within categories (2) and (3) are similar in that they are both domestic proceedings traditionally heard in Chambers in which adversarial argument is not essential although it sometimes occurs. It may be that ultimately all will agree on some

particular course of action or, at any rate, will not violently oppose some particular course of action. The difference between category (2) and category (3) is simply as to whether the court is (under category (2)) approving the exercise of discretion by trustees or (under category (3)) exercising its own discretion.”

9. The Applicant has acknowledged that the nature of the disputes between the parties and the terms of Settlement Agreement place it in a position of potential conflict. In doing so, it has referred to two recent judgments of the Royal Court of Jersey in which similar applications were dealt with. In the first, *In the matter of E* [2012] JRC 141, the Court stated (at para. 5):

“Of course it is arguable here that the representor has not made the settlement agreement as a trustee of the M Settlement, but as a defendant to proceedings, and therefore that any decision which it makes in that context is a commercial decision for the representor with which the Court is not concerned – indeed on this analysis, the Court’s supervisory jurisdiction over a trustee is not engaged, one way or another. Indeed that is, so it seems to us, the position insofar as the representor is concerned. However the Court’s sanction of the settlement agreement is necessary because if any claims against it are to be compromised, then all claims must be compromised. The Court’s approval of the settlement arrangements is therefore necessary on behalf of the minor and unborn beneficiaries, for whom there would be an obvious conflict of interest if the representor were to seek to represent them. In the circumstances it is entirely right that the discretion is surrendered to the Court and that we should accept it and exercise that discretion on their behalf. Adult beneficiaries can agree to compromise claims if they so choose. The Court’s engagement is to sanction or bless the settlement agreement on behalf of the minor and unborn beneficiaries of the Trust.”

I accept the principles set out in that paragraph, which I consider are of equal application to the present case. For that reason, I needed to look carefully at the submissions made by Advocate Malyn on behalf of those minors and unborn issue. Because of the Applicant’s conflict of interest, I am satisfied that this is an appropriate case in which there is good reason for the Court to accept the surrender of the discretion that the Applicant has as trustee.

10. The second case to which the Applicant referred is *In the matter of the F Trust* [2012] JRC 210, which covered very similar ground to this decision and which I have found helpful in constructing these reasons. At para. 12, for the reasons given, the Court concluded that *“the representor trustee has the clearest possible conflict ... evidenced by the fact that a very substantial sum of money is being paid into the trust fund by the trustee to compromise the claims being made against it for breach of trust or maladministration”*. That paragraph continued: *“The Court accepts that there has been considerable negotiation of the Compromise Agreement between the parties involved. In the course of that negotiation, the representor trustee was no doubt protecting its own position as far as it possibly could, and not taking the part of the neutral trustee”*. Again, I have concluded that this reasoning can be adopted in the context of the present Application as support for the conclusion that the Applicant has no choice but to surrender the discretion it has to the Court and that it is appropriate for the Court to accept such a surrender.
11. The approach that the Court should take in such a situation was then explained in para. 13:

“Given that the conflict which faces the trustee is such that it must surrender its discretion to the Court, the question for us then is whether that is a limited discretion or one which the court can exercise at large. On this point, we accept the representor trustee’s submission that the choice lies between either endorsing the Compromise Agreement or driving the parties back to litigation, and that the Court should not seek to exercise a trustee discretion in any other way. This is because the

Compromise Agreement is a settlement of hostile litigation which requires the exercise of a trustee discretion and one cannot take the latter in a vacuum as though the compromise would be unaffected. As a result we concluded that the Court should proceed on the alternative approach, namely to ascertain whether the Court thinks the Compromise Agreement was an appropriate compromise of the various claims. That of course has made our function very much easier. If the only result of not approving the compromise would be to remove the representor trustee's contribution to the trust fund and drive the parties back to litigating with each other their different claims, the Court would in fact be contributing to the dynamics of further family destruction. This is not to say that in appropriate cases the Court would not do so."

12. I agreed that this Court should adopt a similar approach to that set out by the Royal Court of Jersey. The facts are not the same because the proceedings being compromised involve F alone and no other member of the family, albeit that he is effectively acting on behalf of the beneficiaries. The prospect of family destruction through continuing the litigation is, therefore, absent. That said, a lengthy and expensive dispute will not be in the interests of any of the family beneficiaries unless the likelihood of complete success is so high that the agreed settlement terms appear to represent a bad bargain.

Discussion

13. In this regard, I paid particular attention to the Opinion given by Advocate Malyn on behalf of Cs and any unborn issue who will become beneficiaries. As he noted, section 63 of the Trusts (Guernsey) Law, 2007 establishes a mechanism under which breach of trust claims can be resolved in a binding fashion through alternative dispute resolution. There are two routes by which this can occur. The first is if the terms of the trust so direct or authorise. This was not the case in respect of any of the trusts involved. The second is if the Court so orders. No such order was sought. There are then procedural safeguards to ensure that the beneficiaries' interests are represented, or there was at least the opportunity for them to be represented, in the alternative dispute resolution proceedings. In relation to a beneficiary who is not yet ascertained or in existence, or a minor, which would have been the case here, there would need to be an independent Court-appointed individual who the person conducting the proceedings certifies represented the beneficiaries in question. Whilst it was acknowledged that these steps had not been taken prior to the mediation, Advocate Malyn suggested that they could have been and, if they had, the settlement agreed would be binding on all the beneficiaries, including those now represented by him. I accept that proposition, insofar as it explains that the Court might have been asked in advance and, with the benefit now of hindsight, may well have made an order if, as seems to be the case, the parties supported moving to a binding alternative dispute resolution outcome. It is a factor to be borne in mind when considering whether the Court should exercise the discretion that the trustee has surrendered to it, but cannot of itself be determinative.
14. Advocate Malyn has referred to guidance contained in Underhill & Hayton, *Law of Trusts and Trustees*, 18th ed., in relation to how the Court might approach consideration of the "benefit" of the Settlement Agreement to Cs and any unborn issue. He has done so by reference to the commentary on the powers conferred by the Variation of Trusts Act 1958 to give approval on behalf of persons who are unable to give approval for themselves. These principles would be useful guidance in respect of an application pursuant to section 57 of the Trusts (Guernsey) law, 2007 and appear to me to be equally relevant when considering how to exercise a discretion surrendered to the Court. It is necessary to consider the scheme as a whole (para. 43.63) and although "*'benefit' usually means financial benefit, it is not to be narrowly interpreted or restricted to matters of finance*" (para. 43.63a, citing *Re Drewe's Settlement* [1966] 1 WLR 1518). It is also apparent that the Court is permitted to take a broad view of the benefit, balancing aspects that might be more favourable against those which are not (see, eg, *Re Lister's Will Trusts* [1962] 1 WLR 1441, referred to at para. 43.69). The final principle

to which I can usefully refer is that “*the court will be prepared to take, on behalf of those for whom its approval is sought, the kind of risk which an adult beneficiary of full capacity would take on his own behalf*” (para. 43.71, citing *Re Cohen’s Will Trusts* [1959] 1 WLR 865).

15. Applying that guidance to the present case and having regard to the material in relation to the proceedings to be compromised by the Settlement Agreement, I am able to reach conclusions similar to those expressed at paragraphs 14 and 15 of the *F Trust* case (*supra*). The way those proceedings were pleaded meant that both sides felt they had cases to be fairly argued in the event of a trial. There is always an element of litigation risk to be borne in mind, however strong one party considers its case to be. Taking those factors into account, making use of the services of an experienced mediator to assist in negotiating a settlement acceptable to all sides made sense and I cannot objectively consider the outcome to be inappropriate. It is of particular importance that F and his family, who are the people affected by the terms of the Settlement Agreement, have been represented throughout by experienced Counsel and that they have clearly signalled their desire to bring an end to these proceedings on the terms that have been negotiated. I think I can properly infer that F and M, as parents, have chosen to bring the proceedings to an end on these terms in the best interest of their children, including on behalf any future issue. That stance has been confirmed by Advocate Malyn’s Opinion and the submissions he made. For the sake of the entire family, bringing the proceedings to an end on the terms agreed, as well as securing other benefits that are regarded by the parents as important, is regarded as a positive outcome. When balanced against the alternative of driving F back to litigation, I am clear that this is an appropriate case in which to exercise the discretion favourably for the sakes of Cs and any unborn issue.

Conclusion

16. For the reasons given, I was persuaded that I should grant the relief sought by the Applicant and bless, or more accurately approve, the Settlement Agreement so as to bind all the minor beneficiaries and any unborn issue who will become beneficiaries of the trusts in question. In doing so, the Court has approved the execution of the Settlement Agreement by Advocate Malyn on behalf of Cs and any issue of F and M as yet unborn. Under the Settlement Agreement, the parties to the proceedings brought by F have agreed that they should be withdrawn, including the discharge of the interlocutory relief previously granted, with there being no order as to costs. That may be achieved by way of a Consent Order or, if the parties prefer, by notifying the Greffe in writing that the Settlement Agreement has been executed, at which point the Court’s file will be closed. Further, because there was no application for costs in respect of this Application, there will be no order for costs in respect of it.