In the matter of the N Settlement
Royal Court
25th July 2016

JUDGMENT
29/2016

Application pursuant to sections 68 and 69 of the Trust (Guernsey) Law 2007 for relief

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

IN THE MATTER OF THE N SETTLEMENT

Date of hearing: 22nd June 2016

Reasons handed down: 25th July 2016

Before: Richard James McMahon, Esq., Deputy Bailiff

Counsel for the Applicant: Advocate A M Ozanne

Cases, Texts & Legislation referred to:

The Trusts (Guernsey) Law, 2007
Public Trustee v Cooper [2001] WTLR 901
A Trust Company v F, M and Cs (unreported, 5 February 2014)
In the matter of the F Trust [2012] JRC 210

Introduction

1. On 22 June 2016 I heard an Application dated 21 June 2016, supported by an Affidavit that was at the time unsworn, but which was then sworn on 22 June 2016 by an Associate Director of the Trustee Applicant. The Application was made pursuant to sections 68 and 69 of the Trusts (Guernsey) Law, 2007 and/or the Court's supervisory jurisdiction in respect of trusts. The principal relief sought was the blessing of a compromise agreement that the Trustee had decided to execute as a means of reaching full and final settlement of an action before the Court to which it was a party.

2. Advocate Alison Ozanne appeared on behalf of the Applicant. Subject to receiving a sworn version of the Affidavit in support of the Application and such further information as Advocate Ozanne wished to lodge in respect of the positions of the beneficiaries of the Settlement, I indicated that I was minded to grant the Application. That further evidence was contained in an Affidavit of Michael Rogers sworn on 28 June 2016. As a result, I confirmed the decision I had provisionally reached. I had indicated that I would reserve giving full reasons for my decision and this judgment now contains those reasons.

Preliminary orders

3. The Application sought the Court's direction that the hearing proceed in private. Because the jurisdiction being invoked by the Applicant is the familiar one derived from the second category of cases described in *Public Trustee v Cooper* [2001] WTLR 901, where this type of case is usually heard in private, I readily acceded to that part of the Application. Further, the terms of the compromise agreement include undertakings of confidentiality and the Settlement in question already has minor beneficiaries and potential beneficiaries who are yet to be born. In many respects, the position is similar to *A Trust Company v F, M and Cs* (unreported, 5 February 2014), in which the hearing took place in private and the judgment was anonymised to preserve the confidentiality of those involved.

4. The second direction sought was that I would sit unaccompanied by Jurats. Section 79 of the 2007 Law permits the Court to be constituted in this manner. Given the nature of what had taken place leading to the Application being made and the desirability of reaching an outcome as soon as possible, even though the jurisdiction involves the exercise of discretion, where the Jurats' involvement is often desirable, in order to deal with the matter as quickly as possible and in a cost-effective manner, I took the decision to grant this element of the Application as well.

5. No party was convened to the hearing by the Applicant. Advocate Ozanne explained that this course of action had been adopted because the Settlement is a family trust where the adult beneficiaries had all been involved in agreeing the terms of the compromise agreement and, where there were minors and unborns involved, each adult was able to recognise that this was a settlement of the action to be regarded as in the best interests of those children. In those circumstances, there was nothing to be gained by convening anyone as a respondent to the Application. Having seen the correspondence exhibited to Mr Rogers' Affidavit, I am satisfied that this is the case. Accordingly, although unusual, I agreed that the Application could be heard without any nominal respondent.

Background

6. The N Settlement was established in 1991 as a Jersey law trust. It has had various trustees. The current trustee is the Applicant. The other parties to the action that the Applicant had agreed to compromise were previous trustees. As a result of changes to class of beneficiaries, the Settlor, the Settlor's spouse, the Settlor's two children and the children of the Settlor's children are the main beneficiaries.

7. The Plaintiff in the action made a claim some years ago. That claim was defended and a counterclaim pleaded. That counterclaim was defended. It was a substantial counterclaim. For a variety of reasons, the case did not proceed quickly to trial. However, fairly significant legal costs have been incurred by the various parties. The current trustee instructed new Advocates. A number of issues were identified and a mediation was proposed and has proved successful. The terms on which the action is to be settled do not come close to securing payment of the amounts sought by the counterclaim. That is why the Applicant regards entering into the compromise agreement as a momentous decision and sought the blessing of the Court. Although the monetary value of the settlement agreed following the mediation is a fraction of the overall claim made, it is regarded by the trustee and the beneficiaries as the best that can be achieved in the circumstances in which the trustee finds itself.

8. The concerns which the Applicant's Advocates have expressed about the litigation to which the Applicant is a party are set out in an opinion given by one of Advocate Ozanne's colleagues, Paul Buckle. I have read that opinion carefully and I understand why it says what it does and the consequences that flow from it. I do not consider it appropriate to set out the content in any detail because to do so would risk the proceedings being more readily identifiable. It does, however, concentrate on the likely outcome given the Court's findings in *Jefocate v Spread Trustee Company Ltd* (unreported, 31 October 2014). Having sight of this

opinion and weighing up the options are what I suspect has led to the Applicant and the beneficiaries of the N Settlement adopting the pragmatic stance they have at the mediation.

9. Following the mediation, the parties to the action reached an agreement in principle for the full and final settlement of the action. The compromise agreement is to be governed by Guernsey law. Most of its terms are commonplace. The indemnities are slightly unusual, but the evidence in support of the Application explains why these were required in this form and that they became non-negotiable. Accordingly, there was either a settlement on terms that included them or no settlement was possible. The compromise agreement states that the Applicant will seek approval of its terms.

Discussion

10. The Court has jurisdiction to entertain the Application pursuant to section 4 of the 2007 Law. Adopting Advocate Ozanne's submission, when the Court is asked to bless a momentous decision, after a scrupulous consideration of the evidence, it needs to be satisfied of three matters:

    (a) that the trustee has in fact formed the opinion that it should act in a particular way;
    (b) that the opinion of the trustee to do so is one which a reasonable body of trustees properly instructed could properly have arrived at; and
    (c) that the opinion is not vitiated by any conflict of interest under which the trustee has been labouring.

11. I am satisfied from the evidence in support of the Application that the Applicant Trustee has reached a decision to settle the action on the terms set out in the compromise agreement. It has done so after careful consideration of the options available to it, having regard to the opinion given by Mr Buckle. It has consulted with the adult beneficiaries. It has had the benefit of legal advice and representation at the mediation. Accordingly, I am satisfied that the decision taken has also been taken in a manner that shows it is one which any trustee addressing its mind to the situation could properly reach.

12. The cases on how to approach a conflict of interest to which Advocate Ozanne has referred tend to relate to cases in which it is the trustee that is being sued for breach of trust and agrees to settle the proceedings commercially by making payment to the trust fund. In doing so, it has a clear conflict of interest because it is acting to preserve its own position as well as having an eye to what is best for the trust itself. In such a case, and a good example is ***In the matter of the F Trust*** [2012] JRC 210, the trustee has to surrender its discretion to the court (see also the way this was set out more fully in the ***F, M and Cs*** case (*supra*)). The position in the present case is not quite the same. It is true that, if looking solely at the Plaintiff's claim, the Applicant seeks to settle that on terms, but those terms do not include making any payment by it into the trust fund. The more significant element of the settlement is the acceptance by the current trustee of the N Settlement of an amount much lower than that claimed in the counterclaim. Accordingly, the compromise agreed is more about foregoing the prospect of securing a larger amount of damages through litigating in return for a guaranteed amount. The compromise also avoids risks associated with the possible costs position. It represents a commercially acceptable outcome.

13. In those circumstances, I consider that the levels of any conflict of interest are properly to be regarded as not existing in the same way as in the more usual case. The Applicant Trustee's consideration of the choices is very much what any litigant would have to consider when faced with the possibility of settling a claim. The litigation risk involved has to be carefully weighed up, with the benefit of legal advice. A trustee acting en bon père de famille will be prepared to take the sort of risk that an adult with capacity to decide for himself would be prepared to take. From the evidence given, I am satisfied that this is the exercise that the Applicant has undertaken. It could have pushed ahead and seen what, if anything, the Court would award on the counterclaim. The opinion of Mr Buckle has highlighted why the prospect of succeeding in the pleaded claim was assessed to be low. In those circumstances, a

sensible litigant will decide whether the amount being offered in settlement, taking into account the possibility of there being an adverse costs order if some or all of the claim is rejected, is as generous as it can reasonably expect and so decide whether the offer made is realistic. I am satisfied that, in considering the pros and cons, the Applicant's properly taken decision has not been vitiated by any conflict of interest.

14. Having reached those conclusions, the remaining question is whether to approve the exercise of discretion by the trustee. I emphasise that this is not one of those cases where the Court is being invited to exercise its own discretion. In cases of surrender, it is sometimes said that not approving a compromise would entail the parties being driven back to the litigation from which they wish to escape. This is particularly pertinent in cases where family members have disagreed but finally come to terms as to the way forward. Once again, the present case is happily not one of those. The family members support the settlement terms. They may have wished for a more positive outcome, but the Applicant still potentially has avenues to explore to obtain further redress. Accordingly, the adult beneficiaries have all confirmed their positions in writing. In doing so, they have written about the next generation's position as well. I consider that I can properly infer from their support for the terms agreed that the adult beneficiaries also firmly believe that the compromise agreement is in the best interests of the minor beneficiaries and any beneficiaries yet to be born within the family. I was, therefore, satisfied that this was an appropriate case in which to give the Court's blessing to the Applicant's momentous decision.

Conclusion

15. Pursuing a claim to final resolution by the Court is a last resort. The capacity of parties and their Advocates to reach negotiated settlements, sometimes facilitated through a mediation, appears to be growing as each year passes. The Court recognises the desirability of parties exploring alternative dispute mechanisms and frequently encourages parties to take those steps early in the life of an action. These general comments apply with equal force to trusts litigation. Indeed, because a trustee may well be expending trust funds in the litigation process, it could be argued that the onus on them to seek to resolve matters through discussion and negotiation is even greater. Accordingly, when a claim can be settled on acceptable terms, the Court's approval will generally be forthcoming once it has carefully considered how the trustee has reached its decision.

16. This was one of those cases where the trustee had acted properly and adopted a pragmatic approach. The support of the beneficiaries has been given and that has weighed heavily in the balance. In those circumstances, I am persuaded that it is right to approve the Applicant executing the compromise agreement and putting its terms into effect. This will mean that the action to which it is a party will be stayed. I accept that the alternative to approving the compromise agreement would be continuing expensive and risky litigation which could pose a threat to the value of the N Settlement. That risk is avoidable through the Applicant's decision to enter the compromise agreement.

17. The Applicant has also sought an order that its costs of this Application be taken from the assets of the Settlement on the usual indemnity basis. I agree that such an order should be granted.