

Application to vary the terms of a Trust.

[2019]GRC013

**IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)
IN CAMERA**

**IN THE MATTER OF THE PQ EMPLOYER FINANCED RETIREMENT BENEFIT PLAN
("THE TRUST")**

AND

IN THE MATTER OF AN APPLICATION UNDER THE TRUSTS (GUERNSEY) LAW, 2007

Between:

(1) A **First Applicant**
(By his Mother B As Tuteur)

(2) C **Second Applicant**
(By her Mother D as Tuteur)

-AND-

(1) PQ **(First Respondent)**

(2) RS **(Second Respondent)**

(3) T Trustees Limited **(Third Respondent)**

Hearing and decision given on: 30th January, 2019

Judgment giving reasons handed down on: 27th February, 2019

Before: John Russell Finch, Esq., O.B.E., Judge of the Royal Court

Counsel for A: Advocate K Le Cras

Counsel for C: Advocate G K Bell

Counsel for T Trustees Limited: Advocate N Robison

(The other parties did not appear at any of the hearings and were not represented)

Cases and Materials referred to in Judgment:

The Trusts (Guernsey) Law, 2007, Section 57.

In the Matter of the Representation of A Trust Limited [2018] JRC 021;

Goulding v James [1997] 2 All ER 239;
In re the H Trust (Royal Court, 28/2007);
Mubarak v Mubarak, the Craven Trust Company Limited, S Mubarak, N Mubarak and Renouf [2008] JLR 250 and [2008] JLR 430;
In the matter of the Representation of N and N [1999] JLR 86;
In re a Settlement (Royal Court 25/2011);
Trustee 'T' (Royal Court 14/2011);
Wright v Gater [2012] 1 WLR 802.

Introduction

1. On the 30th January, 2019 a final hearing was held dealing with the application under the Trusts (Guernsey) Law 2007 (“The Law”). Comprehensive documentation had been provided during the earlier stages of the matter, which was updated for the hearing. When the hearing took place, Advocate Le Cras gave a full outline of the facts and detailed submissions on the legal position. Advocate Bell associated himself with her submissions and Advocate Robison made some observations on behalf of T Trustees Limited (“the Trustees”). At the end of this hearing, it seemed appropriate to give a decision so that the Applicants and the Trustees knew what the position was, without further delay. This was done and the application was granted, with reasons to follow. This was not an adversarial hearing, the applicants were of one mind and the Trustees understandably wanted their position understood, and, helpfully were represented to do so. In view of this, the decision is set out concisely as there were, in effect, no competing oral submissions.
2. References are to the three very full volumes of documents, authorities and correspondence produced for the hearing. It will only be necessary to make detailed reference to Bundle A (applications, skeletons, witness statements and affidavits) and Bundle B (authorities). The divider numbers used in these bundles will be cited, where necessary. It is helpful that many of the key cases are from Guernsey, and Jersey courts, and the trusts legislation in each Bailiwick is very similar.

The basis of the Application

3. The First Respondent is a famous and very high-level professional footballer, who has had a glittering career throughout the world where football is played. The Second Respondent is his wife. The Third Respondent is the Trustees, who were alone represented of the Respondents. The Applicants, A and C are the natural children of PQ, the First Respondent. His wife, RS is the mother of two children of the marriage and a step-child. The application concerns the maintenance of the natural children in England, born to two different mothers, in respect of which it is claimed that inadequate support and maintenance has been provided by PQ, in breach of orders of the High Court of Justice, Family Division, on 5th December, 2014 (“the 2014 Orders”). Although slightly different in amount, the substantive terms of these Orders were the same in respect of the two natural children A and C. The terms of the 2014 Orders are conveniently set out in A’s skeleton argument at A, Divider 21, paragraphs 17-24. The 2014 Orders were made by consent and included irrevocable undertakings by PQ, RS and the children’s mothers B and D to ensure the creation of two equal (50%) sub-funds of half the value of the PQ Trust for the benefit of the children A and C. There were also lump sum payments and orders for periodical payments and school fees. The parties agreed to cooperate to ensure these matters could be effected. There was also an irrevocable undertaking to consent to the Royal Court of Guernsey’s order in respect of putting these arrangements into effect. PQ has not complied, and an outline of the situation is given below. The assets are in the PQ Employer, etc. Retirement Plan and it is necessary to set out the relevant details.

The Trust

4. This is PQ's retirement fund, settled on 7th December, 2010. It is estimated that the value of the assets is (as of 5th April, 2017) £3,606,199 (paragraph 16 of A's first skeleton at A, Tab 21). The governing law is that of Guernsey. The recital provides that its purpose is to provide retirement benefits to PQ and any other beneficiaries as the Trustee may in its discretion decide. The instrument is copied at A, Divider 11, pages 72-102. As a professional footballer, PQ's retirement age is 35. He is now 36. The only person entitled to benefit from the Trust is PQ during his lifetime. He can receive all of the benefits by way of annuities or lump sum. The class of beneficiaries in clause 1.1.4 of the Trust instrument comprises PQ, his widow, any child of his living at his death and any other person, who in the opinion of the Trustees is dependent on PQ for the ordinary necessities of life upon his death. Natural children are to be treated as if legitimate (sub-clause 1.3.5). The Applicants A and C were born on 29th September, 2007 and 21st November, 2012. There are also potential unborn and unascertained beneficiaries.

Breach of the 2014 Order

5. The affidavits of B and D, the mothers of the two children who are seeking relief spell out the problems that have persisted since the 2014 Orders (see B11 – 15A). In breach of the 2014 Orders, PQ has failed to purchase a property for A's occupation and has also failed to make payments due. He has also failed, despite an undertaking, to request the Trustee to create a sub-fund for A. The second and younger Applicant, C associates herself with the submissions and position put forward on behalf of A. It is apparent that PQ has "consistently breached" the 2014 Orders and once funds presently available are exhausted there are no other known assets beyond the Trust, with C's entitlement being over £2,000,000 in the next 17½ years. As of February 2018 the arrears of Child Maintenance were £3,444.78. Arrears of nursery/school fees at that date were £2,649.53. PQ has also not paid the legal costs he was ordered to meet. PQ's applications to vary the relevant terms of the 2014 Orders were dismissed with full indemnity costs in November, 2015. These have not been paid (paragraph 9 of D's first affidavit, at A, Divider 15). D's total estimate for monies due from December, 2017 is £2,092,209.40 (paragraph 40 of the first affidavit). A similar calculation is made by B in her first affidavit at A, folio 11, paragraph 86. The total as of 28th November, 2017 of payments due from PQ from December, 2017 is £1,315,150.00. (It should also be noted that C has special educational needs arising from ASD, or Autism Spectrum Disorder, vividly set-out in paragraph 9 of her mother C's first affidavit at A, Folio 14).
6. The affidavits provided by the Applicants' mothers, are clear and detailed. Unfortunately the same cannot be said for PQ's affidavits, at B, Folios 16 and 16a (the latter was received, although not sworn. As indicated, neither PQ nor his wife attended the hearings). I described them in the course of Advocate Le Cras' submissions as being strong on rhetoric, but short on fact. There is an element of indignation that PQ is being put before the court and a most unfortunate set of observations about the merits of the Application – at paragraphs 22-24 of his second affidavit at A, Folio 16A - highlighted in block print. The most valid point raised, and to an extent echoed by Advocate Robison in his submissions on behalf of the Trustees, is that relying on newspaper reports that estimate wealth and assets is inherently dangerous. But be that as it may, there is a considerable lack of detail in PQ's contributions to the case. Where the documents produced by one side to a matter are clear and contain circumstantial figures, exhibit court documents and produce dates and events, and the other is vague and lacking in such detail then generally the former will prevail (other things being equal). However, for the purposes of this decision media reports of PQ's wealth and his spouse's alleged ownership of certain other assets are discounted. It is useful when considering PQ's financial situation to look at Lucy Stone QC's observations (pages 191-210 of the exhibits to Tab 11) adduced in the 2014 proceedings, which led to the 2014 Orders. This is helpfully summarized in the Applicants' last submissions at A, Folio 26, paragraphs 24-28.

7. At B, Folio 23 there is a Position Statement on behalf of PQ, dated 12th January, 2018. This has been noted and there has been ample opportunity to engage in the proceedings over the long period of time they have been conducted. PQ's two affidavits were produced after this date, on 20th April, 2018 and 13th December, 2018 respectively. They have been taken fully into account, but in view of their lack of detail and absence of supporting documentation do not (as stated in paragraph 6 above) add much to the case. Throughout various concerns have been raised by the Trustees via Advocate Robison, but at the final hearing these were essentially met and there was no opposition to the Application. The main worry was the tax aspect, which has now been settled shortly before the hearing. Both HMRC and Guernsey Income Tax have indicated that there will be, in effect, no adverse consequences should the Applications be granted. The relevant correspondence is found at pages 155 onwards in Volume C.

Legal Authorities

8. The Application seeks the Court's approval under Section 57 of the Law on behalf not only of A and C, but PQ's unborn children and unascertained persons who may be entitled to benefit. However, the gist of these proceedings is to order proper maintenance and financial provision for the benefit of the natural children A and C. It was forcefully submitted on behalf of the Applicants that because of the undertakings and agreements set out in the English 2014 Orders, PQ and his wife RS have given their consent to the proposed variation, which seeks to give effect to the 2014 Order. The case cited in support of this is the Jersey Court of Appeal decision in Mubarak v Mubarak, the Craven Trust Company Limited, S Mubarak, N Mubarak and Renouf [2008] JLR 430, Volume B, Folio 45. On considering the terms of Section 57, there are two questions to consider:
 - (i) is this an "arrangement" which "varies", etc. the terms of the Trust? and
 - (ii) is it an arrangement which benefits those on whose behalf the court is asked to consent?
9. Volume B contains the authorities and is a hefty item. Although not all of them were referred to by Counsel (principally Advocate Le Cras' oral submissions) quite a number were. It is only proposed to refer to those which appear most significant in resolving the Application. An appropriate starting point is In re the H Trust (Royal Court 28/2007) at B136, where Talbot LB stated at paragraph 29, that close regard will be paid to English and Jersey authorities, in view of the paucity of Guernsey decisions at that time; the relevant laws of the jurisdictions being similar. He added (paragraph 30) that the word "benefit" is to be given a wide construction, not only financial, but educational and social. The Court has, it is clear, a wide discretion, subject only to the express restriction preventing the approval of a variation which is not for the benefit of the persons on whose behalf the consent is sought, see at B/47 Goulding v James [1997] 2 All E.R. 239 at 249, b-f, per Mummery LJ (B/47).
10. In Jersey the Mubarak case (supra) is very helpful in various ways. At paragraph 82 of a detailed judgment McNeill JA said:

"In my opinion therefore, art. 47 [i.e. the Jersey position] empowers approval of an arrangement even though the arrangement might be so extensive as to leave little of the existing trust provisions extant; but so long as those benefitting were within the ambit of the settlor's expressed bounty."

In the present matter the "substratum" of the Trust remains. The variation is designed to give effect to the agreed terms of the 2014 Orders. The question is whether what is proposed benefits the class of beneficiaries for whom consent is sought.

11. “Benefit” is given a wider meaning than simply pecuniary. Where it is financial the Court is concerned in a “practical and business-like consideration of the arrangement” (Wright v Gater [2012] 1 WLR 802 at 807-b, per Norris J, B/68). Two helpful Guernsey authorities make the point that it is not essential that the benefit should inevitably result, provided it is overwhelmingly likely to do so. (In re A Settlement (Royal Court 25/2011) and Trustee ‘T’ (Royal Court 14/2011, at B/35 and B/37). In the first case Collas DB at paragraph 27 followed a Canadian decision, approved by the Royal Court of Jersey in the case of In the Matter of the Representation of N and N [1999] JLR 86 saying that the question to be answered:

“... is the benefit to be obtained on behalf of those for whom the Court is acting such that a prudent adult motivated by intelligent self-interest after sustained consideration of the expectancies and risks and the proposal made would be likely to accept.”

12. Returning to the Jersey case of Mubarak (supra), there is a notable similarity on the facts to the present matter. The Court of Appeal upheld the decision of the Royal Court [2008] JLR 250, B/41 and it was held that in acrimonious family law financial proceedings where the husband had corresponded with the trustee saying he was bound by an English order and wished the trustee to give effect to it, he could not renege on it for the Jersey proceedings and was bound by it, see especially Birt DB’s observations at paragraph 88 of the judgment. This was approved by the Court of Appeal, see especially paragraph 123 of McNeill JA’s judgment. In the present matter, one of the foundations of A’s submissions is that PQ and RS agreed to the 2014 Orders and gave undertakings to enable its execution. They are, it is suggested, therefore debarred from opposing this Application; the Court has to look only at the interests of the minor and unborn beneficiaries. It has already been mentioned that there was irrevocable agreement and undertakings which have not been complied with (see paragraph 5 above).

13. It is not just A’s and C’s interests, of course, that need to be considered. A sub-fund will be carved out for the other minor and unborn beneficiaries, by virtue of the new clause 3.2.A approved (in the new Schedule A to the Application attached to A/1). Furthermore, properties occupied by A’s and C’s mothers, B and D will revert to the Trust once their entitlements to occupy cease, i.e., on the respective “Determining Dates”, as set out in Schedule A. There is no evidence that there is any prejudice to PQ’s other children, apart from bare assertions in PQ’s affidavits. Another Jersey case is helpful. In the Matter of the Representation of A Trust Limited [2018] JRC021 (B/44) an application was made to vary a trust to allow its early termination and a distribution to the adult beneficiaries. It was due to terminate in 2039 with a distribution for beneficiaries and, on their death, their issue. Hence an early termination would deprive the minor and unborn beneficiaries of a prospective benefit in the event of the death of the adult beneficiaries. Accordingly, it was proposed that a separate fund of US\$150,000 should be set aside for their benefit, with the adult beneficiaries as trustees. In the words of Le Cocq DB, summarising one of the main submissions:

“The current proposals give a pot to the minors who have therefore, the prospect of a share in something, albeit a small percentage of the current assets of the trust, against the possibility of nothing.”

Counsel for the unborn beneficiaries supported this approach and the variation was approved. Here the proposed sub-fund is 10% of the assets (new Clause 3.2.A). It was not in the 2014 Orders. A and C would have enjoyed 50% each, rather than the 45% proposed. The variation sought in the present Application seems consistent with that approved by the Jersey Royal Court.

Conclusion

14. The Trustees are no longer in the somewhat apprehensive position they were, since the tax position appears to have been clarified, and Advocate Robison's submissions chimed in with those of Advocates Le Cras and Bell. At the end of the final hearing it was quite evident that the proposed variation did not achieve an undesirable result and was in accordance with the authorities produced in writing and orally. There is very good reason for PQ (and RS) to be held to what they solemnly accepted in 2014; and what they have put forward does nothing to displace the weight of evidence in support of the Application. As indicated, the present case is analogous to the situation in Mubarak (supra). Accordingly, in view of what PQ (and RS) promised and agreed to in 2014 – see especially A, pages 189-197, 227-229 and 242-244, they should be held to their position.
15. It is for these reasons (which would have been expressed at greater length and in more detail if the Application had been opposed) that it was considered correct to approve what was sought, at the conclusion of the oral hearing on 30th January, 2019. I am grateful to all three Advocates for their assistance throughout the proceedings and willingness to discuss matters with each other, so that the issues were narrowed without tedious procedural wrangles. I am particularly obliged to Advocate Le Cras for her detailed and typically lucid oral submissions. It was right for the present Trustees to appear in court and make submissions and no criticism is made of them.

J R Finch, O.B.E.
Judge of the Royal Court