

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

Between:

**M LIMITED
AS TRUSTEE OF THE B TRUST**

Applicant

-and-

W

Respondent

Judgment handed down: 9 October 2019

Before: Richard James McMahon, Esq., Deputy Bailiff

Counsel for the Applicant: Advocate P Richardson
The Respondent did not participate in the determination of the Application

Cases, texts & legislation referred to:

The Trusts (Guernsey) Law, 2007

The Royal Court Civil Rules, 2007

Rothschild Trust Guernsey Limited v Pateras and Katigko-Kalliopi (unreported, 3 May 2011)

T Limited [2017] GLR Note 7, (unreported, 24 April 2017)

Introduction

1. By an Application dated 22 January 2019, a company to which I will refer as M Limited, as Trustee of a Settlement to which I will refer as the B Trust, principally seeks declaratory relief in respect of that Settlement pursuant to section 69 of the Trusts (Guernsey) Law, 2007 (“the Trusts Law”). The Application was first before the Court on 25 January 2019, when I granted the Applicant leave to serve notice of the Application on the Respondent, to whom I will refer as W on the basis that I was satisfied that she is outside the jurisdiction. The Applicant was also required to notify the other adult beneficiary of the Settlement, to whom I will refer as H, of the proceedings, which resulted in him providing a letter dated 13 February 2019 confirming that he had no wish to be heard, but that he supported the Application.
2. At the return date on 22 February 2019, Advocate Field appeared on behalf of the Respondent and provided an *élection de domicile*. He indicated that there might be a challenge to the jurisdiction of the Court. I directed that, if such an application were to be made, it should be

made by 15 March 2019. In the event, no such application was made, but a letter dated 20 June 2019 was sent on behalf of the Respondent by Advocate Field indicating that, as a result of an order in a Family Court in Israel, the Respondent was restrained from any further participation in these proceedings. He suggested that the Applicant was similarly subject to that restraint. I will turn to that issue in due course.

3. As a result of the non-participation of the Respondent, at a hearing on 21 June 2019, I heard only from Advocate Paul Richardson on behalf of the Applicant. I was persuaded by him that the matter could proceed even though the Respondent was no longer engaging. I directed that any further materials on which the Applicant wished to rely in support of the relief sought at para. 9 of the Application be filed and served no later than 5 July 2019, after which I would, if I was satisfied it was appropriate to do so, determine the Application on the papers, as the Court is permitted to pursuant to rule 50(2)(1) of the Royal Court Civil Rules, 2007, rather than by convening a further hearing. This is what I have done.
4. The materials in support of the Application comprise an Affidavit sworn by a director of the Applicant on 23 January 2019, the original written Submissions prepared by Advocate Richardson dated 21 January 2019 and his written Supplemental Submissions dated 3 July 2019. Before turning to the substance of the Application, there are several matters to which I need to refer.
5. I have prepared this version of the judgment in an anonymised form so that it can be handed down in public and published on the legal resources website.

Jurisdiction

6. There are two aspects to the question as to whether the Court should accept jurisdiction to entertain the substance of the Application. The first is a general issue and the second arises from the order of the Israeli court.
7. Section 4(1)(a) of the Trusts Law confers jurisdiction on this Court in respect of a Guernsey trust. By section 80(1), a Guernsey trust “*means a trust the proper law of which is the law of Guernsey*”. Section 3(1)(a) provides that the proper law of a trust is “*the law chosen by the settlor to be the proper law, the choice being expressed or implied in the terms of the trust*”. The trust instrument is exhibited to the director’s Affidavit. By Article TENTH, the proper law of the Settlement is expressed to be the laws of Guernsey. I am satisfied from the evidence that the proper law of the Settlement has not changed. The Settlement is, therefore, a Guernsey trust and so section 4 confers jurisdiction on this Court to determine questions in respect of it.
8. Section 69(1)(b) of the Trusts Law empowers this Court to “*make a declaration as to the validity or enforceability of a trust*”. Section 69(1)(a) confers wide powers on the Court to make orders in respect *inter alia* of the execution, administration or enforcement of a trust, a trustee, a beneficiary and any trust property. These powers arise on an application of a person mentioned in subsection (2), which includes a trustee. The director’s Affidavit exhibits an Instrument of Appointment and Retirement of Trustees executed on 8 November 2018 by which the Applicant was appointed as Trustee of the Settlement by its predecessor. In Schedule One to that Instrument, the sequence of changes of office holders in respect of the Settlement is set out, going back to the Settlement itself, dated 31 January 2002 between H, as Settlor, and the original Guernsey-based trustee. I am, therefore, satisfied that the Applicant can properly seek the substantive relief in the Application.
9. The decision of the Israeli court (both in Hebrew and in a certified English translation) was enclosed with Advocate Field’s letter dated 20 June 2019. As the Applicant’s director also

explains, the background to seeking relief in this jurisdiction is that there are divorce proceedings between H and W before the Israeli court in which the former matrimonial home in Israel, referred to in the Israeli court as “the House”, is in issue. The registered owner of that property is a company incorporated in the British Virgin Islands to which I will refer as H Limited. The Applicant’s director deposes to the fact that she is the sole director of H Limited and that the Applicant, as Trustee of the Settlement, owns the entirety of the issued share capital in H Limited. H Limited has been joined as party in the Israeli proceedings. The judge in those proceedings made an order on 13 March 2019 “*forbidding all or any of the Respondents from initiating and/or taking steps and/or acting in any legal proceedings on the matter of the House other than in the State of Israel*” (para. 6 of the decision). The judge was aware that proceedings had been commenced before this Court (para. 3), referring to there having been unsuccessful attempts to thwart the hearing of the claim in Israel and the proceedings before this Court being “*a transparent attempt to by-pass the decisions of the court in Israel and to create an additional forum for litigation on the exact same matter, i.e. the House.*”

10. Against that background, Advocate Field’s letter informed the Court that the Respondent could not prejudice her position before the Israeli court and so would not be participating further in these proceedings. However, the Respondent maintained her opposition to the Court accepting jurisdiction over the Application.
11. At the hearing on 21 June 2019, Advocate Richardson pointed out that the terms of the order of the Israeli court could not extend to the Applicant, which is a distinct legal entity from H Limited, against which it was acknowledged that the Israeli court’s order operated. Appended to the Applicant’s Supplemental Submissions is a letter dated 21 June 2019 from an Israeli Advocate. This arose because I wished to be provided with some comfort that, at least as a matter of Israeli law, the evidence given by the Applicant’s director in support of this Application, although sworn before the order made in March 2019, would not lead to the director having difficulties before the Israeli court. The letter states materially:
 - “2. *I am aware that on March 13, 2019 ... the Family Court in ... Israel issued a decision (“**Decision**”).*
 3. *[The Applicant], whether as trustee of the [B Trust] or otherwise ..., is not a Respondent to the Decision.*
 4. *[The Applicant] is not bound by the Decision and any proceedings issued in another jurisdiction by [the Applicant] would be regarded by the Israeli Court as proper and legitimate.*
 5. *The Proceedings in Guernsey, including [the Applicant’s] application dated 22 January 2019, do not infringe the Decision. Neither progressing the Guernsey proceedings nor considering or granting the relief sought would breach the Decision.*
 6. *In causing [the Applicant] to progress the application, [its director] does not breach the Decision.*
 7. *I am aware that [the director] remains content for [the Applicant] to progress the application.”*
12. As a result of the content of this letter, I am satisfied that there is no bar to this Court continuing to a determination of the Application with which it is seized. As I suspected on reviewing the order of the Israeli court, the Applicant before this Court is not a party. The

evidence given by the director in the Affidavit in support is given as a director of the Applicant. Where it explains further about H Limited, the director is, in my view, doing so on behalf of the Trustee of the Settlement. It would, in my opinion, be a strange set of circumstances in which a trustee of a Guernsey law trust could not seek relief from this Court where this Court is arguably best placed to rule on questions of Guernsey law as they impact on a Guernsey law trust. Accordingly, I am satisfied that it is appropriate to consider the substantive relief sought by the Application.

Privacy

13. By para. 6 of the Application, the Applicant seeks an order that the proceedings be heard in private and the Court file sealed. It does so on the usual basis that the Application involves the supervising jurisdiction of this Court in respect of matters where it is generally recognised as one of the well-established exceptions to the rule relating to open justice that those proceedings can be ordered to take place in private. When Advocate Field briefly appeared in these proceedings on behalf of the Respondent, he did not oppose this aspect of the Application.
14. I am satisfied that it is appropriate to grant this part of the Application. Not only are these the type of trust proceedings where a privacy order is regularly made, the underlying dispute is a matrimonial action. Although I do not know whether the proceedings in Israel take place in private or in public, if there were an application relating to the former matrimonial home in this jurisdiction it would normally be heard in private and, if any judgment were published, it would be suitably anonymised.
15. Given the nature of the underlying proceedings, para. 8 of the Application seeks leave to the parties “to cause materials filed in relation to this application and including a copy of this application to be put before the divorce court in Israel in proceedings number ... and to provide information derived from the proceedings to their legal advisers and representatives in Israel, and to [H].” I consider it appropriate to grant that paragraph of the Application and to go further and explicitly give the parties leave to disclose this judgment to those involved in those divorce proceedings.

Declarations

16. Having dealt with those matters, I can turn to the relief actually sought by the Applicant in para. 9 of the Application, which relates to declarations:

“That the trust created by an instrument in writing dated 31 January 2002 and known as the [B Trust] is valid and enforceable in that and/or and that:

- a. It exists;*
- b. It has as its proper law the laws of the Island of Guernsey and that this can only be changed by the method set out in clause 10.2 of the settlement deed, alternatively by the method set out in clause 10.2 or order of the court;*
- c. It is a trust over which the Royal Court (as defined in section 4 of the Trusts Law) has jurisdiction;*
- d. It is a trust all questions in relation to which are to be determined according to the law of Guernsey without reference to the law of any other jurisdiction;*

- e. *It is a trust that is not void, voidable, liable to be set aside or invalid by reason that the trust potentially avoids or defeats any right, claim obligation or liability that may be imposed by the law on [H] by reason of him having been married to the Respondent;*
- f. *The property held on trust:*
 - i. *Does not form part of [H's] own estate;*
 - ii. *Does not form part of the Respondent's own estate;*
 - iii. *Includes the entirety of issued shares in H Limited;*
- g. *That the Respondent:*
 - i. *Has no entitlement to any distribution from the B Trust;*
 - ii. *Cannot compel or instruct the Applicant to deal with the property of the Trust in a certain way."*

I have already touched on the issues raised by sub-para. c. and, at least in part, sub-para. b. because I have already accepted that section 4 of the Trusts Law operates to confer on this Court jurisdiction and I am satisfied that the proper law of the Settlement is, as expressed in the trust instrument, the laws of Guernsey. I have also already outlined the evidence in the Applicant's director's Affidavit relating to the establishment of the Settlement in 2002 and the explanation about the trust assets held through H Limited. Each of these sub-paragraphs relates to the overriding issue raised by the Application relating to whether the Settlement is valid and enforceable.

17. In his written Submissions, Advocate Richardson draws attention to a previous decision of this Court on what are broadly similar issues in *Rothschild Trust Guernsey Limited v Pateras and Katigko-Kalliopi* (unreported, 3 May 2011). This judgment broadly follows the pattern of that earlier decision.

18. Section 14 of the Trusts Law provides:

“(1) Subject to the terms of the trust, all questions arising in relation to a Guernsey trust or any disposition of property to or upon such a trust, including (without limitation) questions as to –

- (a) the capacity of the settlor,*
- (b) the validity, interpretation or effect of the trust or disposition or any variation or termination thereof,*
- (c) the administration of the trust, whether it is conducted in Guernsey or elsewhere, including (without limitation) questions as to the functions, appointment and removal of trustees and enforcers,*
- (d) the existence and extent of any functions in respect of the trust, including (without limitation) powers of variation, revocation and appointment, and the validity of the exercise of any such function,*
- (e) the distribution of the trust property,*

are to be determined according to the law of Guernsey without reference to the law of any other jurisdiction.

For these purposes “**the law of Guernsey**” does not include the Guernsey rules of private international law, except those set out in this section.

- (2) Subsection (1) –
- (a) does not validate any disposition of property which is neither owned by the settlor nor the subject of a power of disposition vested in the settlor,
 - (b) does not affect the recognition of the law of any other jurisdiction in determining whether the settlor is the owner of any property or the holder of any such power,
 - (c) is subject to any express provision to the contrary in the terms of the trust or disposition,
 - (d) does not, in determining the capacity of a corporation, affect the recognition of the law of its place of incorporation,
 - (e) does not affect the recognition of the law of any other jurisdiction prescribing the formalities for the disposition of property,
 - (f) subsection to subsection (3), does not validate any trust or disposition of real property situate in a jurisdiction other than Guernsey which is invalid under the law of that jurisdiction, and
 - (g) subject to subsection (3), does not validate any testamentary disposition which is invalid under the law of the testator’s domicile at the time of his death.
- (3) No Guernsey trust, and no disposition of property to or upon such a trust, is void, voidable, liable to be set aside, invalid or subject to any implied condition, nor is the capacity of any settlor, trustee, enforcer, trust official or beneficiary to be questioned, nor is any settlor, trustee, enforcer, trust official, beneficiary or third party to be subjected to any obligation or liability or deprived of any right, claim or interest, by reason that –
- (a) the laws of any other jurisdiction prohibit or do not recognise the concept of a trust, or
 - (b) the trust or disposition –
 - (i) avoids or defeats or potentially avoids or defeats rights, claims, interests, obligations or liabilities conferred or imposed by the law of any other jurisdiction on any person –
 - (A) by reason of a personal relationship to a settlor or any beneficiary, or
 - (B) by way of foreign heirship rights, or
 - (ii) contravenes or potentially contravenes any rule of law, judgment, order or action of any other jurisdiction intended to recognise, protect, enforce or give effect to any such rights, claims, interests, obligations or liabilities.”

I have set out these three subsections in full to show the breadth of the section and how it widely affects the approach to be taken to questions of validity and enforceability of a

Guernsey trust such as the Settlement. Advocate Richardson relies in particular on aspects of subsections (1) and (3). I have borne these principles in mind when considering the declarations sought by the Applicant.

19. Section 1 of the Trusts Law provides that:

“A trust exists if a person (a “trustee”) holds or has vested in him, or is deemed to hold or have vested in him, property which does not form or which has ceased to form part of his own estate –

(a) for the benefit of another person (a “beneficiary”), whether or not yet ascertained or in existence, and/or

(b) for any purpose, other than a purpose for the benefit only of the trustee.”

In accordance with section 6(1)(b), a trust may be created by an instrument in writing. I am satisfied from the Applicant’s director’s evidence, that the Settlement was so created in 2002. Although section 6(5) provides that no technical expressions are needed for the creation of a trust, the instrument used appears to me to be a form of trust that the original trustee had available for use by clients (as shown, for example, by the omission of an element, numbered 1.2 in Article FIRST), and so does contain various clauses that are, in my view, entirely consistent with the creation of a trust. The first recital sets out the explanation that:

“The Settlor desires to create a trust for the purpose of conserving and managing certain of his assets, providing for his personal financial security, and for the other purposes set forth in this Settlement.”

The initial trust fund was US\$100, provided to the original trustee by the Settlor.

20. The terms of Article FIRST provide in relation to the trust estate that:

“The Trustees shall hold the trust estate, IN TRUST, for the uses and purposes set forth in this Settlement, and hold, manage, invest and reinvest the same, collect the income therefrom and dispose of the net income and principal thereof, as follows:

1.1 At any time before the Perpetuity Date, during the Settlor’s lifetime, the Trustees may pay or apply any part or all of the net income of the trust estate and any part or all of the principal of the trust estate to, or for the use and benefit of, (i) the Settlor, (ii) the Settlor’s spouse, or (iii) subject to clause 14.6, one or more Charitable Organizations, at such times and in such amounts as the Trustees in their discretion determine. ...”

It is a requirement of a trust that it has a beneficiary or beneficiaries and that they are identifiable by name or ascertainable by reference to a class or a relationship to another person (section 8 of the Trusts Law). The Settlor is identified in the instrument as H and, as a result, the Settlor’s spouse is readily identifiable through relationship to him. I am satisfied, therefore, that the Settlement does not fail for want of identifiable beneficiaries.

21. Section 11 deals with the validity and enforceability of a Guernsey trust. Subsection (2) provides:

“A trust is invalid and unenforceable to the extent that –

(a) it purports to do anything contrary to the law of Guernsey,

(b) it confers or imposes any right or function the exercise or discharge of which would be contrary to the law of Guernsey,

- (c) *it has no beneficiary identifiable or ascertainable under section 8(1), unless –*
 - (i) *it is for a charitable purpose, and/or*
 - (ii) *it is for a non-charitable purpose in relation to which it is valid and enforceable by virtue of section 12(1), or*
- (d) *the court declares that –*
 - (i) *it was established by duress, fraud, mistake, undue influence or misrepresentation,*
 - (ii) *it is immoral or contrary to public policy,*
 - (iii) *its terms are so uncertain that its performance is rendered impossible, or*
 - (iv) *the settlor was, at the time of its creation, incapable of creating such a trust.”*

From the material placed before the Court, I am satisfied that none of these matters applies to make the Settlement invalid or unenforceable. As a result, I do not need to consider whether the approach to partial validity covered in subsection (3) operates.

22. For these reasons, I am satisfied that in 2002 the Settlement was created and that it has continued to exist since. Although it is not a separate part of the declaratory relief sought by the Applicant, on its face, the Instrument of Appointment and Retirement of Trustees, which is expressed to be governed by Guernsey law and which was executed on 8 November 2018, validly appoints the Applicant as the replacement Trustee of the Settlement. This approach, which appears to have been followed previously through a chain of trustees, is consistent with the terms of Article THIRD.
23. Once a trust exists, it follows that the trust estate does not form part of the trustee’s own assets, as is clear from section 1 of the 2007 Law. The terms of the Settlement are such that the trust estate is distinct from any assets owned personally by the Applicant. Although there has been no document showing that the shares in H Limited were settled into the trust estate (or acquired using other trust assets), Article FOURTH of the trust instrument permits the Settlor or any other person to “*have the right to add to the principal of any trust hereunder by transferring or assigning additional property of whatsoever kind or nature acceptable to the Trustees to be held by the Trustees under the terms of this Settlement as part of the trust estate.*” The Applicant’s director deposes to the entirety of the shares in H Limited being held within the Settlement. I am satisfied from her evidence that this means that the trust estate, including for these purposes the shares in H Limited does not form part of the personal estate of H or the Respondent. As Trustee of the Settlement, the Applicant holds the shares in H Limited on the terms of the Settlement for the benefit of the beneficiaries. It is up to the Applicant as Trustee to decide whether, and if so how, to make distributions from the trust estate and no beneficiary, extending to the Respondent, can assert any entitlement to receive a distribution from the trust estate or to be able to compel the Trustee to deal with any of the trust estate in any particular way. Of course, a request can be made and the Applicant would then have to decide whether it is permissible and appropriate to make a distribution in accordance with that request (see, eg, the broad analysis contained in *T Limited* [2017] GLR Note 7, (unreported, 24 April 2017)), but this is not a form of trust where what Advocate Richardson refers to the rule in *Saunders v Vautier*, but which more accurately means relying on section 53(3) of the Trusts Law, can be invoked, save for in a case such as those which have been dealt with in other judgments on that subsection delivered by this Court.

24. So far as the declaration sought by the Applicant in para. 9(e) of the Application is concerned, I do not know enough about the circumstances in which the shares in H Limited came to form part of the trust estate to know whether that transaction is at risk of being set aside on any of the bases referred to in section 14(3) of the Trusts Law. Viewed from a Guernsey law perspective, it appears that the transaction was a regular one. It is certainly not unusual, at least in my experience, that the assets within a Guernsey law trust are structured through using corporate entities. In particular, it is fairly commonplace for the structure to include a BVI corporate entity, as is the case with H Limited. I assume that it is not contrary to Israeli law for a BVI entity to own Israeli real property. The translation of entry in the Israeli land registry, which according to the Applicant's director is known as the tabu, appears to show that the interest of H Limited is recognised. What I can say from the evidence of the director is that the shares of H Limited are held within the Settlement by the Applicant. I expect that there ought to be further written material available from the BVI that will show this. As a result, in accordance with section 14 of the Trusts Law, in principle the circumstances in which that company (and so the property in Israel) came within the Settlement appears to be regular and so not liable to be set aside, etc. As a matter of Guernsey law, the transfer into a Guernsey trust of a parcel of real property, under whatever terms that property was previously held, would not in itself be liable to be set aside at the suit of the spouse of the transferor. That said, this Court acknowledges that rules about what can and cannot be done with a parcel of land may have to be resolved by reference to the *les situs*. There may also be some impact if a foreign corporation is used, where the law applicable to that entity may also come into play. In the absence of any such issues arising, the validity and enforceability of the Settlement will be determined in accordance with section 14.

Relief

25. I have carefully considered whether I ought to exercise the Court's discretion to make the declaration (or declarations) sought. I am conscious that the approach of the Israeli court, dealing with the issues arising on H and W's divorce, might not have regard to the existence of the Settlement and its consequences. The terms of this judgment set out, so far as I can, the basis on which I am satisfied that the Settlement is a valid one. I have noted that section 69(1)(b) explicitly confers on the Court the power to "*make a declaration as to the validity and enforceability of a trust*". In those circumstances, I am persuaded that I should make a simple declaration that the Settlement is a valid trust and enforceable as such.
26. Insofar as the Applicant seeks discrete declarations as set out in the sub-paragraphs of para. 9 of the Application, it follows from what I have already set out that I am satisfied that the Settlement does exist. Its terms are such that it is expressed to have as its proper law the law of Guernsey and I have seen nothing to suggest that the original proper law has been changed by any of the means potentially available to achieve that end. I remain satisfied that the proper law of the Settlement is Guernsey law and so the Settlement is a Guernsey trust over which this Court has jurisdiction by virtue of section 4 of the Trusts Law. The trust assets, or trust estate, includes the entirety of the shares in the BVI company H Limited. A consequence of that finding is that those shares (and so any asset of that corporate entity) do not form part of the personal estate of either of H and W. As a further consequence, the terms of the Settlement mean that neither of H and W can assert any entitlement as such to receive any of the trust estate or compel the Applicant to distribute it. However, a request can be made to the Applicant and will then have to be determined in the usual way, possibly by seeking directions from this Court, particularly if it is a means of giving effect to the terms of an order arising on divorce.

27. In relation to sub-paragraphs d. and e. of para. 9, in general, the effect of section 14 of the Trusts Law is that questions in relation to the Settlement will be determined by reference to the law of Guernsey, but there are some circumstances, as set out in particular in subsection (3) where that is subject to the position in the law of another place. Because I do not know whether this position actually arises, I am not minded to give the broad declaration that the Applicant seeks in sub-para. d. Similarly, I have sought to explain how I understand the question of whether or not what has previously happened in supplementing the trust estate can be set aside, which in my view goes as far as I sensibly can on the material that has been placed before me, which I do not think amounts to full disclosure of everything that could have been put into evidence, and those comments will, therefore, have to suffice. I am not minded to give the declaration that is sought by the Applicant in sub-para. e. The fact that I am, though, prepared to make the overarching declaration that the Settlement is valid and enforceable should, in my view, suffice.
28. In summary, I broadly grant para. 9 of the Application for all the reasons given, but subject to those minor qualifications when it comes to certain of the sub-paragraphs.

Costs

29. By para. 10 of the Application the Applicant seeks an order that the Respondent pay the costs of the Application personally. Alternatively, by para. 11, it seeks that its costs come from the assets of the Settlement. I have no difficulty with making an order under para. 11 and will make that order if Advocate Richardson confirms to the Greffe that the Applicant is content with that outcome. However, if the Applicant is still pursuing para. 10, given that the Respondent has not engaged in the substantive application, some persuasion is likely to be required to persuade me that these have been hostile trusts proceedings, and so I will formally reserve the costs if that is what the Applicant still wishes to argue.