

Trustee's application requesting to update the Court as to progress since the last application, to seek approval from the Court to make further distributions and set aside a fund for the remoter beneficiaries and to make provision for resolution of the Settlement.

[2020]GRC018

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

In the matter of an application by Credit Suisse Trust Limited ("the Trustee")
In respect of The Translux Financing Trust (the "Settlement" or "Trust")

BETWEEN:

CREDIT SUISSE TRUST LIMITED

Applicant

- and -

(1) SIMON E. HAGGIAG

(2) MICHAEL HAGGIAG

(3) JACOPO FRANZAN

(on his own behalf, and representing the interests of Mirella Petteni Haggiag)

(4) ALEXANDRA DEAN

(on her own behalf, and representing the minor and unborn potential beneficiaries of The Translux Financing Trust and adult persons who are direct descendants of the settlor)

(5) ADVOCATE PAUL RICHARDSON

(appointed by the Court to represent the interests of persons within the class of beneficiaries but who have a more remote or contingent interest)

Respondents

Before Sir Richard Collas, Bailiff

Judgment handed down: 22 April 2020

Advocate for the Applicant:

A. D. Laws

Advocate for the First to Fourth Respondents:

J. P. Greenfield

Advocate for the Remoter and Contingent Beneficiaries:

P. Richardson

Cases, texts & legislation referred to

The Public Trustee v Paul Cooper [2001] WTLR 901

In The Matter of the A, B, C and D Trusts and the W, X, Y and Z Trusts (Royal Court, unreported, Judgment 53/2016)

Re the AAA Children's Trust (unreported, 8 January 2014)

Butterfield Trust (Guernsey) Limited v Thommessen (unreported, 18 March 2010)

Background

1. There have been a number of previous applications in respect of the Settlement resulting in Orders made on 7 November 2011, 5 March 2012, 1 June 2012, 17 November 2014 and 3 November 2017. The purpose of the present application by the Trustee which is supported by the Board of Protectors is:
 - (1) To update the Court as to progress since the last application;
 - (2) To seek approval of the Court to make further distributions;
 - (3) To seek approval of the Court to set aside a fund for the remoter beneficiaries;
 - (4) To make provision for resolution of the Settlement.
2. I have before me the following:
 - (1) The application dated 17 October 2019 (the “Application”);
 - (2) The sixth affidavit of Geoffrey David Le Poidevin (“Mr Le Poidevin”) sworn on 17 October 2019 together with the exhibits thereto;
 - (3) The affidavit of Simon E Haggiag (the “First Respondent”) sworn on 21 November 2019 together with the exhibit thereto;
 - (4) The seventh affidavit of Mr Le Poidevin sworn on 31 January 2020 together with the exhibits thereto;
 - (5) Skeleton Submissions of the Trustee;
 - (6) Skeleton Argument of the First to Fourth Respondents; and
 - (7) Skeleton Argument on behalf of the Remoter and/or Contingent Beneficiaries.
3. The Application was due to be heard at an oral hearing on Wednesday 25 March 2020 but because of restrictions imposed during the current Coronavirus pandemic, I agreed with the parties that I would deal with the Application “on the papers”. I granted the Application by Act of Court dated 25 March 2020 with reasons reserved. The reasons are now set out in this judgment.

The Assets of the Settlement

4. Following the making of the Order of 3 November 2017, the Applicant has disposed of what was referred to as the “Fourth Trust” and has sold most of the “Italian Assets”. The latter (which comprise mainly of the company Dear SpA) were sold for €1.9 million (subject to adjustments for issues that have yet to be resolved) and the Trust has thereby been relieved of liability for employees of Dear SpA. The Applicant still owns a wind farm in Italy which is income producing and a small amount of cash. It has a potential significant liability as shareholder of the Italian Entertainment Group but the debt is being restructured and it is anticipated that the liability will be extinguished as part of the restructuring. In any event, there are sufficient funds to cover that liability.
5. A former Protector of the Settlement, Giuseppe Nemni, had been pursuing a claim against the Trustee in Italy which the Trustee described as spurious. He is the same Mr Nemni against whom the Trust obtained a judgment in November 2011 in respect of his misappropriation of funds from the Settlement. In Italy, he lost his claim at every stage and last year it was defeated

in the highest court, the Court of Cassation. There are now no cases pending against the Trust and the Applicant has been advised that it is virtually inconceivable that any fresh claim could be brought in respect of the period prior to the Settlor's death as the ten year limitation period has expired and the Applicant does not believe that any claims could be brought subsequent to his death.

6. The Settlement has a significant asset of €1 million held in a Luxembourg lawyer's client account related to claims brought by Mr Nemni in Luxembourg and Italy involving him, the Trust and the Settlor's heirs. Mr Nemni died on 22 January 2020. It is not yet known whether any of the claims he was pursuing will now be withdrawn, but, at worst, they are expected to be resolved in the next few years following which there is a prospect that the funds held in the lawyer's account will be released to the Trustee
7. The net effect of the above is that the Trustee expects to have available cash in excess of US\$20 million after allowing for any prospective liabilities.

The Proposals

8. The Trustee's proposals that the Court is being asked to bless are to distribute all but US\$7 million of the US\$20 million to the principal beneficiaries. Of the remainder, US\$2 million will be retained as a fund for the remoter beneficiaries and the balance of US\$5 million will either be distributed to the principal beneficiaries thereby enabling the Trust to be wound up or it could be retained within the Trust albeit that the Applicant would wish to retire as trustee and appoint another in its place because the fund would then be smaller than the Applicant would wish to administer.
9. Future distributions to the principal beneficiaries will be in revised proportions, as agreed with the beneficiaries. The Settlor's wish which the Trustee has followed until now was that the First, Second and Third Respondents (the latter on behalf of himself and his mother who he represents) receive distributions in the proportions 60:25:15 respectively. The current proposal with which those Respondents are in agreement is that in future they will receive distributions in the proportions 51:30:19.

Legal Principles

10. The Application is brought under the second category identified by Hart J in The Public Trustee v Paul Cooper [2001] WTLR 901. The principles were considered by the Guernsey Court of Appeal in In Re F [2013 GLR 388] and explained by the Deputy Bailiff in In The Matter of the A, B, C and D Trusts and the W, X, Y and Z Trusts (Royal Court, unreported, Judgment 53/2016):

"In the second type of application, however, the court is not exercising a discretion. What it is doing is in effect making a declaration that the trustees' proposed exercise of the power is lawful; in other words, that the proposed exercise is within the proper ambit of the power, that the trustees are acting honestly, and that in reaching their decision the trustees have taken into account all relevant matters, have taken into account no irrelevant matters, and have not reached a decision that no reasonable body of trustees could have reached. The effect is to protect the trustees from any challenge to their decision by persons interested in the trust, and to make clear that the trustees are entitled to indemnity from the trust assets in respect of the costs or other financial consequences of their decision. It is immaterial that the court, had it been exercising a discretion of its own, would have exercised it in a different way from that proposed by the trustees. To the extent that the court has any discretion, it is in whether or not to admit the application: if, for example, the court considers that the trustees' decision

is of insufficient moment, it may refuse to entertain the application at all. Once it has decided to deal with the application, however, it has no more discretion than in the making of any other declaration, and will make it once satisfied of the propriety of the proposed exercise of the power. It may nevertheless be that the court will sometimes engage in a dialogue with the trustees as a result of which the trustees' decision is modified; but, properly analysed, that is not more than a process by which the court identifies the circumstances in which it will be satisfied that the proposed exercise of the power is within the proper range of such exercises. It is not indicative that the court is exercising a discretion, and any attempt by a court to do so in circumstances where the trustees had not surrendered their discretion would infringe the general principles that a court will not enforce the exercise of a power against the wish of the trustees."

In Re the AAA Children's Trust (unreported, 8 January 2014), the Bailiff referred (at para. 51 to the questions the Court should consider in a category 2 application as set out in Butterfield Trust (Guernsey) Limited v Thommessen (unreported, 18 March 2010):

- (i) Does the trustee have the power to make this "momentous" decision?*
- (ii) Is the Court satisfied that the trustee formed the opinion in good faith and that it was desirable and proper for it to make the decision?*
- (iii) Is the Court satisfied that the opinion formed by the trustee is one which a reasonable trustee in its position properly instructed could have arrived at?*
- (iv) Is the Court satisfied that the opinion arrived at by the trustee has not been vitiated by any actual or potential conflict of interests which wither had or might have affected its decision?"*

11. In the present matter, the first question is whether this is a 'momentous' decision requiring the blessing of the Court. I am satisfied that any decision which may lead to the winding-up of a trust is by its very nature momentous for the trust concerned but it is a decision that a trustee would normally be able to decide for itself without resorting to the Court to obtain its blessing. The Court would be swamped if every such decision had to come before it. However, in the context of this Settlement where there have been a number of applications to the Court and a significant amount of litigation relating to the Settlement, it is understandable that the Applicant has chosen to seek the blessing of the Court.
12. The Application involves a number of separate decisions as to how the funds in the Settlement are to be distributed. I am satisfied that each one of them is within the powers of the Applicant under the discretionary powers conferred on it by the Trust Instrument.
13. The principal beneficiaries have been consulted by the Applicant and are supportive of the proposals as is Advocate Richardson on behalf of those with a remote or contingent interest. The terms of his appointment by the Court prohibited him from contacting any of the beneficiaries but he has carefully considered the proposals from their point of view.
14. The beneficiaries and their Advocates have not cast any doubt on the motives of the Applicant and I am satisfied that there is no evidence before me to suggest that it is acting other than in good faith. The Applicant has defeated the claims brought against it and the Trust fund, principally by Mr Nemni, it has successfully rationalised the assets, having disposed of potentially loss making assets and liquidated others. It is desirable that the Applicant should now be looking to distribute assets to the principal beneficiaries, leaving a proportion of the Trust fund available for any further distributions in accordance with the terms of the Settlement.

15. The Applicant has an absolute discretion under the terms of the Settlement as to the payment of income and capital. It has had regard to the wishes of the Settlor which are not binding upon it and has had regard to the efforts of the Second and Third Respondents which it has reflected in an adjustment to the proportions they will receive. The changes reflect the wish of the Settlor that the First Respondent should receive the largest distribution. The proposed proportions have the support of all of the first three Respondents who are in fact the principal beneficiaries.
16. It is reasonable that the Applicant should be looking to make further distributions and to leave a smaller fund to meet any future distributions. There has been no suggestion of any actual or potential conflict that might have vitiated the decisions of the Applicant. In fact, the opposite could be said to be true because the Applicant is contemplating reducing the size of the fund to a level at which it would no longer be appropriate for it to continue to act as trustee and where another trustee would be appointed. The Applicant has dealt with a number of claims and there is no reason to believe there could be any more. Nevertheless, I have asked myself whether the Applicant might be seeking to protect itself from future claims and I am satisfied that there is no evidence it is doing so.
17. In conclusion, I am satisfied that the proposals represent a prudent course of action that meets the considerations I have set out above from my decision in Re the AAA Children's Trust. They are supported by all the Respondents and I am pleased to make the Orders sought.