Trust.

[2024]JRC210

ROYAL COURT
(Samedi)

11 October 2024

Before : Sir William Bailhache, and Jurats Averty and Berry

Between	**IQ EQ (Jersey) Limited**	**Representor**

IN THE MATTER OF THE REPRESENTATION OF IQ EQ (JERSEY) LIMITED

AND IN THE MATTER OF THE B TRUST

AND IN THE MATTER OF ARTICLES 47 AND 51 OF THE TRUSTS (JERSEY) LAW 1984

Advocate J. W. Angus for the Representor

Advocate M. L. Preston for Minor and Unborn Beneficiaries

JUDGMENT

IN PRIVATE

COMMISSIONER BAILHACHE:

1. The Representation of the Representor (the "Trustee") came before the Royal Court on 9 August 2024 when the Court ordered that, until further order, all hearings should be in private and documentation in relation to the Representation should be kept confidential to the Court and to the parties. Convening orders were made so that the Protector, who is also the Settlor, his wife and their three adult children should be convened, together with Advocate Preston as Guardian *Ad Litem* for the minor and unborn beneficiaries. The Court ordered that the Attorney General be given notice of the Representation and that further consideration of it should be adjourned until 10:00 am on 5 September.

2. Unfortunately, by reason of an administrative error, the Court was not able to sit on 5 September and instead a revised date was set for 10 September. On that day, before we heard any

significant argument, we raised the question with Advocate Angus as to why notice of the Representation had not been given to His Majesty's Revenue and Customs. Having heard his submissions in that respect, we considered that we should not proceed until such notice had been given, and the application was adjourned until 10am on 1 October.

3. Before setting out our reasons for that decision, it is right to refer to the Representation in more detail.

4. On 21 February 2012, ("C") or the ("Settlor") established a Trust by Deed of Settlement, Investec Trust (Switzerland) SA being the original trustee. The Representor was appointed Trustee in place of the original trustee on 22 July 2019. The Trust is governed by the proper law of Jersey. Full discretionary powers are given to the Trustee in relation to both capital and income, subject to obtaining the consent of the Protector in accordance with the terms of the deed. The Trustee also has power, again with the consent of the Protector, to exclude revocably or irrevocably any person or class of persons from being or becoming a beneficiary of the Trust; and similarly has powers to add any persons or class of persons to the class of beneficiaries.

5. Under the terms of the Trust as originally constituted, C, his spouse or widow, and his children and remoter issue, together with any charity added to the class of beneficiaries, were all eligible for benefit. The initial property settled was £100, but subsequent assets have been settled such that the current assets of the Trust are valued in excess of £70 million. The Trust was made because the Settlor had taken tax and wealth planning advice before moving from Africa, where he then lived, to the United Kingdom. Although he and his wife were originally to be regarded as the primary beneficiaries, the intention behind the structure was to create a vehicle for the preservation of the family wealth for at least one if not more generations.

6. The Trust did not contain all of the Settlor's assets and both he and his wife, using those assets and the income which they generated from various non-executive and advisory positions, were able to provide for their day-to-day living expenses without calling on the Trust for making any distributions. They do not indeed intend to rely upon the Trust assets in the future, as they continue to enjoy that independent income. At the time it was made, the Settlor did not anticipate that his adult children would go on to become UK resident and domiciled; and it is said that this, now highly relevant, tax planning factor was not in his mind at the time of settling the Trust.

7. Subsequently on 31 March 2017, the Settlor was irrevocably excluded from being a beneficiary. His wife was also irrevocably excluded by a subsequent Deed of Exclusion on 5 April 2017. Both these deeds were executed on tax advice.

8. The present application before the Court is for the Court to endorse on behalf of the minor and unborn beneficiaries a variation of the Trust under Article 47 of the Trusts (Jersey) Law 1984 ("TJL") so as to reverse one of the Deeds of Exclusion, and reinstate the Settlor as a beneficiary; and then to bless the decision of the Trustee, contingent upon the Deed of Exclusion being so reversed, to appoint the entirety of the Trust fund to the Settlor, who, as a result of the anticipated abolition of the UK tax benefits associated with "*resident but non-domiciled"* status (proposed by the new UK Government), has relocated to ("Country 1").

9. Advocate Angus accepted that in cases of mistake and Hastings Bass applications, it was not at all infrequent that HMRC be given notice of the proceedings in order that they could apply to be joined if so advised and make submissions. However, he contended that in variation cases there was no need for that notice to be given and in particular he emphasised that there was no actual tax liability currently in existence, and thus the order of the Court would not affect HMRC. They had no interest therefore in the outcome. He also submitted that it was not apparent from the judgments in the cases which were before the Court and on which reliance would be placed that HMRC had been notified – he referred to In the Matter of the DDD Settlement [2011] JRC 243, In the Matter of the Paicolex Trust Management AG Representation [2023] JRC 127 and In the Matter of the Representation of Accuro Trust (Switzerland) SA [2023] JRC 215 – these were all cases involving variation applications, in which no notification to HMRC had been given.

10. On this latter point, we have looked at the convening orders in the two more recent of these cases and on this limited study, it would appear that practice has not been uniform. In Accuro the Court did in fact direct that HMRC be given notice of the application. In Paicolex it did not. In DDD, the settlement was originally made to avoid potential tax liabilities in Singapore, but subsequently it became clear there was a potential HMRC interest in it albeit that they were not notified of the application.

11. We considered that HMRC should be given notice in the instant case so that they could consider whether they wished to make an application to join the proceedings and/or make submissions. It seemed to us to be clear that even though there was no ascertainable quantification of the liability, there was no doubt that at some point in 2032 such liability would crystallise and by granting the variation the liability would be removed. Accordingly, we directed that notification to HMRC be given and the application was adjourned until 1 October.

12. On that date, we were shown by Advocate Angus a copy of the letter which his firm had had delivered by courier to HMRC on 13 September, giving details of the present application and the reasons for it, and informing them that the Court would hear the case on 1 October and would receive any representations from them if they wished to make them. Of course, having received

that information from Ogier, it would also have been open to HMRC to apply to join the proceedings as a party. In the event, they have chosen not to follow either course and, accordingly, there is nothing further in that respect which we need to consider, other than to note that one of the main objectives of the present application is to avoid UK tax consequences which, if they were to come to pass, would cause significant loss to the Trust Fund.

13. The decision the Trustee has reached is to add the Settlor back as a beneficiary, subject to the Court's consent on behalf of minor and unborn beneficiaries and appoint the entirety of the Trust Fund to him. This has been said to us to have the consent of the Protector, but we do not feel that we can pay much regard to that. The Settlor is the Protector and has a very direct conflict of interest. The Protector's consent is therefore a necessary but not influential factor in our decision.

14. The assets of the Trust have a value of approximately £70 million. They comprise a valuable London property and 100% ownership of ("Company A"), a company registered in Jersey, with approximately £51 million of assets. The Settlor was until April 2024 tax resident but not domiciled in the United Kingdom. As things currently stand, there are a number of UK taxes which will be applicable, including a ten yearly charge on the trust assets under the Inheritance Tax legislation, as well as income tax, capital gains tax on distributions from the Trust and further inheritance tax on subsequent distributions from the Trust. The next 10 yearly charge is not due until 2032.

15. On the other hand, if the Trustee's proposal were to be implemented, and if the Settlor acts as he has said he will, the UK taxes can all be avoided. The Settlor will be able to make gifts free of tax to his children and grandchildren during his lifetime, and the inheritance taxes on his death, if indeed he does not make other arrangements in the intervening period, will be less than would be the case under the present arrangements.

16. The other advantage of the Trustee's proposal from the beneficiaries' perspective is that trustee fees will be avoided.

The Law

17. The present application involves two different legal principles. One concerns the variation of a trust; the other the endorsement by the Court of a momentous decision taken by the trustees. It is relevant to note that in the former case there is no power to vary a trust deed save as is contained in the trust or as provided by law. In the present case, the Trust Deed contains no power to vary.

18. Article 47 of the Trusts (Jersey) Law 1984 as amended (TJL") provides as follows:

"47 Variation of terms of a Jersey trust by the court and approval of particular transactions

(1) Subject to paragraph (2), the court may, if it thinks fit, by order approve on behalf of –

(a) a minor or interdict having, directly or indirectly, an interest, whether vested or contingent, under the trust;

(b) any person, whether ascertained or not, who may become entitled, directly or indirectly, to an interest under the trust as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons;

(ba) any person, if the court is satisfied that despite reasonable effort to find such person, the person cannot be found;

(bb) any person, if the court is satisfied that the person falls within a class of beneficiary and that because of the number of persons falling within that class it is unreasonable for the person to be contacted;

(c) any person unborn; or

(d) any person in respect of any interest of his or hers that may arise by reason of any discretionary power given to anyone on the failure or determination of any existing interest that has not failed or determined,

any arrangement, by whomsoever proposed and whether or not there is any other person beneficially interested who is capable of assenting thereto, varying or revoking all or any of the terms of the trust or enlarging the powers of the trustee of managing or administering any of the trust property.[73]

> ***(2)*** ***The court shall not approve an arrangement on behalf of any person coming within paragraph (1)(a), (b), (ba), (bb) or (c) unless the carrying out thereof appears to be for the benefit of that person.“***

19. This language has been construed by the Royal Court and the Court of Appeal on a number of occasions. I will refer first to the decision of Tomes DB In re Osias [1987-88] JLR 389 where the Court considered whether there was any rule in Jersey which prevented the court giving sanction in relation to what was then an application under Article 43 (now Article 47) of TJL, although the essential provisions are the same, to an arrangement which destroyed the substratum of the trust when, after considering a number of English authorities, he said this:

> ***“ This court proposes, subject to one important reservation, to adopt the principles enunciated in In re Seale’s Marriage Settlement (8), in In re Holt’s Settlement (5) and in In re Ball’s Settlement Trusts (1). The jurisdiction of art. 43 of the Law is as beneficial as the Act of 1958 and, in the court’s judgment, should be construed widely. The one reservation that the court has relates to the substratum doctrine. It seems to us that there are two problems with this doctrine. The first is the practical difficulty of deciding when the substratum has been changed. Different judges may come to different conclusions on the same facts. Indeed, the same judge may change his mind in different case. See, for example, the difficulties that Megarry, J. had in In re Holt and In re Ball. The second problem is one of principle. If, as we said earlier, the court under art. 43, is merely supplying the consent on behalf of beneficiaries which they are not in a position themselves to give, and if all beneficiaries being sui juris can put an end to the trust and re-settle the trust property as they please, whether the substratum of the new trust be the same as the old or not, we can see no justification for implying any limit on the scope of the arrangement to which the court can give approval beyond the words of the article itself. The article says nothing about substrata and indeed refers to “varying or revoking the terms of the trust.” The only limitation on the court’s power to give consent is that contained in art. 43(2), i.e. that the carrying out of the arrangement appears to be for the benefit of the person on whose behalf the court’s approval is being given. The court has power to convert a Jersey trust into a trust governed by some other system of law and, therefore, in the instant case, into a trust governed by the law of Florida. The court has power to approve an arrangement which effectively revokes and then sets up new trusts.”***

20. This decision, with one qualification, was approved by the Court of Appeal in Mubarik v Mubarak and others [2008] JLR 430 where McNeill JA said this:

"81 Whilst, depending upon the revenue regime in force at a particular time, there may be tax implications for transferring funds from one trust to another or for resettling a trust, it would seem strange that, having a power to approve a revocation and having a power to approve a variation (the magnitude of which is not restricted), the court would not have a power to approve a far-reaching arrangement whereby a trust structure remained, where the trust assets remained dedicated to trust purposes and where the issue as to benefit was favourable to the application.

82 In my opinion, therefore, art. 47 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 benefiting were within the ambit of the settlor's expressed bounty. Under the 1958 and the 1961 Acts and the 1984 Law, trusts have been substantially altered, brought to an end and distributed. So long as the arrangement is to some extent to the benefit of those entitled to the court's protection (or, in Scotland, not prejudicial to their interests), the court may grant approval. My qualification arises from the learned Deputy Bailiff's rejection of the "substratum" argument. In the first place, for my own part, whilst, as I have said, there can be a cessation as well as a revocation, it seems to me that, if the trust is not to come to an end, the assets must remain dedicated to some form of trust purposes. I would not see it as within the power of the court to allow trust assets to be held in some way that the beneficiaries could not call on a court for protection. I would not immediately be inclined to allow assets to be transferred to the private patrimony of an individual against whom the beneficiaries stood only as creditors. In the second place, I note that in In re Osias (17), the Royal Court was prepared to allow the trust assets to be transferred to be held in another trust jurisdiction. I would think it a matter for careful consideration in individual cases where approval of an expatriation was sought as to whether that transferee allowed broadly similar protections to that of this Island. "

21. The next case to which we were referred is that of Re DDD 1976 Settlement and others [2011] JRC 243. That case involved an application for a variation of three settlements by reinstating, in two cases, a beneficiary (the Settlor) who had been removed by a Deed of Exclusion and in the third case, who was an excluded person under the trust deed. The exclusions had all been effected to avoid the possibility of estate tax in Singapore. The Court agreed to endorse the variation on behalf of the minor and unborn beneficiaries. It held that the width of Article 47 of TJL was sufficient to extend to reinstating a beneficiary who had been excluded by the irrevocable exercise by the trustees of a power of exclusion conferred on them by the deed, albeit the Court would make a very close examination of the facts before exercising its discretion to do so. It emphasised that the Court's function was to identify, and then consider, what benefit there

was for the minor and unborn beneficiaries in approving the arrangement proposed. On the facts of that case, the Court approved the variation as being in the interests of the beneficiaries, and therefore in the interests of the minor and unborn beneficiaries. It did so for this reason, as set out at paragraph 29 of the judgment:

> ***"We remind ourselves that this application is to remove the provisions which exclude the Settlor from benefit in relation to the three Trusts. Of itself, no physical charge to tax arises in any jurisdiction as we understand it, as a result of such a change. The result of that change however is, as Advocate Speck helpfully put it for the Trustee, that while the Court cannot assume that the only way of benefiting the beneficiary as a result of the change in arrangements is that there would be an appointment of all or a proportion of the assets to the Settlor, the definable benefit is that the structure is more user friendly and that there will be a better opportunity to plan proper tax mitigation than if the status quo were to be preserved. Against this potential benefit, what is the potential downside? It is that if in fact the Trustee did determine – and nothing has been decided yet – to make an appointment in favour of the Settlor of some or all of the Trust assets, the Settlor might leave the assets by will to the equivalent of the cats' home, or place the assets on a bet on a horse in the Grand National at Aintree and lose it all. Conversely, the Settlor might either make a resettlement or leave the property by will to the same beneficiaries whom she has regularly shown an inclination to benefit, in which case the tax advantages would be significant. "***

22. It seems to be apparent from that extract that the Court was aware that the settlor might receive an appointment from the trustees which would be intended to create a more flexible structure for tax purposes, albeit the exact structure was not identified. Nonetheless, the underlying assumption must presumably have been that if there had been a significant appointment to the settlor, then the probability was that it would be a momentous decision for which the trustees would have sought the Court's blessing.

23. In re Paicolex Trust Management AG [2023] JRC 127 the representors again sought the variation of the trust deeds, which had provided from their inception that the settlor be excluded as a beneficiary, and also the blessing of the proposal to join the settlor as a beneficiary of each of the three trusts. The prospective benefit to the beneficiaries was to provide flexibility in future arrangements and provide for benefits to be made available to them in a tax efficient manner. The settlor was adamant that he would not need any financial support from the three trusts even if added as a beneficiary. At the first hearing, the Court adjourned the matter for further consideration indicating the fresh information which would be required as to what would actually occur in the future to give effect to the settlor's expressed intentions if added back as a

beneficiary and conferred some benefit from the trusts. At the second hearing, substantially applying the approach of the DDD Settlements decision, the Court approved the variations and blessed the applications to add the settlor as a beneficiary.

24. We mention lastly Re the Collings Trust and the Palmyra Trust [2023] JRC 215. The facts of that case were not very dissimilar to those of the DDD Settlements and Re Paicolex in that the Court was requested to undo an irrevocable deed of exclusion and an exclusion contained in the trust deed, and add the settlor to the class of beneficiaries albeit that unlike the latter case, the trustee had not resolved on the action that would be taken thereafter. The Court (MacRae DB presiding) accepted that it had jurisdiction under Article 47 TJL and exercised its discretion to make the variations on the basis that the potential flexibility for tax purposes which would result from its orders would be for the benefit of the minor and unborn beneficiaries.

Discussion

25. The review of these authorities makes it clear that the arrangement which may be approved by the Court is potentially constrained by the need to avoid any wholesale rewriting of the trusts which might in fact destroy the entire substratum of them (Mubarik), but the possibility of such a subsequent appointment which brought the trusts to an end and did not leave them "dedicated to some form of trust purposes" did not mean that the Court's discretion could not be exercised to endorse the variation on behalf of the minor and unborn issue. This reflects that there is a potential difference between bringing the trusts to an end by advancing the assets to one or more beneficiaries and in effect revoking the trusts altogether and returning the assets to the Settlor. Nonetheless, the key test for the Court is the assessment of whether it is for the benefit of the beneficiaries that this is done.

26. That comes into sharp focus in this case. At present, the beneficiaries have a discretionary interest in a very valuable trust which has some stockpiled gains which would be liable to tax in the hands of UK residents upon subsequent distributions and which faces periodic inheritance tax charges. The consequence of these charges to tax would be that the beneficiaries would still have a discretionary interest in the Trust, but the Trust would be worth less. On the other hand, the fact is that in this case, if the Court grants the relief under Article 47 and makes the order blessing the distribution of the entire Trust Fund to the Settlor and the Trustee proceeds as envisaged, the beneficiaries will have no interest in anything. It might be thought hard to justify the Trustee's decision as being in the interests of the existing beneficiaries who currently have a vested discretionary interest in the Trust and, if the Trustee's intentions come to fruition, will have no vested interest in anything because the Trust will have come to an end.

27. In our judgment, the Court has jurisdiction to approve a variation of trusts under Article 47 if it is satisfied on the balance of probabilities that it is for the benefit of the beneficiaries. If not so satisfied, there is no jurisdiction to do so. If it has jurisdiction, it does not follow that the proposed variation will be approved. The Court still retains a discretion which it may or may not exercise. The assessment of benefit is a different test from that applied to the blessing application. In the former, we have to be satisfied that the variation is for the benefit of the beneficiaries but also that it is right that we exercise our discretion to approve the proposed variation. In the latter case, we are looking to apply the principles of Re S Settlement [2001] JRC 154, namely:

(i) Was the decision which is sought to be blessed by the Court one which the trustees have made in good faith and were empowered to make?

(ii) Did the decision fall within the band of reasonable trustee decisions?

(iii) Was the decision vitiated by any conflict of interest on the part of the trustees?

28. Thus the tests for variation and blessing have to be applied separately to the different applications, but it is clear, as Advocate Angus submitted to us in a well prepared address, that there is a close link between the two. If the decision to make the appointment of the entire Trust Fund to the Settlor were not for the benefit of the beneficiaries, it is hard to see how it could be justified as falling within the band of reasonable trustee decisions.

29. In this case, the variation and the proposed appointment are said to be in their interests because the tax consequences will be significant and the Settlor can be expected to make provision for his children and remoter issue differently, albeit more tax efficiently. One of his reasons, after all, for making the Trust in the first place was to provide a tax efficient vehicle for delivering his and his wife's wealth to the next generations of his family; so why should he not be expected to do the same thing second time around if the assets are appointed back to him? The Court is asked to take into account that the three children of the Settlor have all expressed their agreement with the proposed actions of the Trustee and if they consider that to be in their best interests, it must be their view (which is not binding on us) that it is also in the best interests of their children and remoter issue. We note that the children are all now resident and domiciled in the United Kingdom, and we take the view that the right assumption to make is that their children and remoter issue will also be UK domiciled and resident.

30. In our judgment, while there may be some risk that the Settlor will squander the trust assets appointed to him, or apply them to some other purposes or fall out with one or more members of

his family, such that the existing beneficiaries do not get some or any benefit from the Trust Fund in the future, that risk, on the evidence before us, is minimal. It is not simply that the purpose of the Trust in the first place was to benefit the dynastic family, and nothing seems to have changed there. It is also that the Settlor has shown the wish to benefit his children by making sizable gifts directly to them already and his current Will, made in 2017, is to the same effect, with gifts to his wife but if she predeceases him or does not survive him by more than 28 days, then to his children with gifts over to their issue if they predecease him. His very full letter to the Trustee setting out his intentions if the variation and appointment are made and reasons for them, demonstrates convincingly his intentions. His affidavit in this application is to the same effect; and we take into account that those who know him best – his family and the Trustee – support what he has proposed.

31. If we reverse the debate and ask ourselves what we would say to the minor and unborn issue if we did not approve the variation and bless the Trustee's decision, with the result that the Trust suffers a loss of perhaps half its value to the detriment of the dynastic family, we suspect that, if they could, the beneficiaries would be challenging us to justify the decision. In our view, the balance of risk lies firmly with the Trustee's proposal. It is clear from the minute of their decisions that the Trustee has given very careful thought to what is suggested.

32. Accordingly, we find that it is for the benefit of the beneficiaries that the variation is made, and we go on to the exercise of discretion.

33. We have considered whether the Court is being drawn too far into agreeing arrangements to vary trusts or bless proposed trustee actions for tax benefits for the beneficiaries in other jurisdictions. That might be thought to arise particularly in cases where what is done by the parties to a trust deed or by trustees is said to be done irrevocably to gain a tax benefit, and when that benefit is not available is sought to be revoked. However, the argument is in our judgment for another day, if it is to arise at all. HMRC have not appeared to argue against what is proposed and both counsel support it. The state of the law in this island – and in the UK as well as far as one can tell – is that it is not inappropriate for Courts to take tax benefits into account in considering their decisions, as long as what is proposed is lawful and reasonable.

34. Furthermore, in this case, we have no difficulty at all with the proposal. The Settlor is not and never has been a UK domiciliary. He is not resident in the UK. No UK tax has been avoided as a result of the irrevocable exclusion of the Settlor from the Trust, which it is now sought to undo. It is not a case where the relevant party has gained a benefit over a period from an irrevocable deed of exclusion, and when that benefit is no longer available or no longer suits, seeks to have

revoked what was done irrevocably or for a different purpose. This might be a factor in the exercise of the Court's discretion in another case but does not arise here.

35. We have gone on to consider the Re S tests (see paragraph 28 above) and we are satisfied that, once the Trust has been varied to enable the Settlor to be added as a beneficiary, the decision of the Trustee to appoint the entire fund to him is one which has been made in good faith and is one the Trustee is empowered to make. We note that there may be cases where an appointment to one beneficiary with a condition attached that the appointee uses the assets appointed in a particular fashion is capable in principle of being a fraud on a power, but that does not arise here. No such condition has been proposed. In any event, the persons expected to benefit will be the existing beneficiaries.

36. As to the second Re S test, we think the decision falls within the band of reasonable trustee decisions for the reasons already given; and furthermore that the decision is not vitiated by any conflict of interest on the part of the Trustee. We note that the Protector has approved the decision, which is fine as far as it goes, but as the Protector is operating under a serious conflict of interest, the appointment being made to him, we would exercise his consent on his behalf if that were necessary.

37. Accordingly, we order:

(i) that the variation of the terms of the Trust so as to render the exclusion of C revocable be approved by the Court pursuant to Article 47 of the Law on behalf of the minor and unborn beneficiaries of the Trust;

(ii) that the in-principle decision of the Trustee to take all necessary steps to re-admit C as a beneficiary of the Trust (to the extent required in consequence of the order made at (i) above) is blessed by the Court pursuant to Article 51 of TJL;

(iii) that the in-principle decision of the Trustee to distribute the entirety of the assets of the Trust to C is blessed by the Court pursuant to Article 51 TJL;

(iv) that the Trustee's costs of and incidental to the Representation be paid out of the assets of the Trust on the trustee indemnity basis;

(v) if and to the extent that the parties convened to the Representation have incurred legal costs of and incidental to these proceedings those costs and the costs of Advocate Preston shall be payable from the assets of the Trust on the indemnity basis, such costs to be taxed if not agreed.

(vi) there is liberty to apply.

Authorities

Trusts (Jersey) Law 1984.

Re DDD 1976 Settlement and Others [2011] JRC 243.

Representation of Paicolex Trust Management AG [2023] JRC 127.

Representation of Accuro Trust (Switzerland) SA re The Colling and Palmyra Trust [2023] JRC 215.

Mubarik v Mubarak and others [2008] JLR 430.

In re Osias [1987-88 JLR 389].

Re S Settlement [2001] JRC 154.