Matrimonial.

[2023]JRC029

ROYAL COURT
(Family)

17 February 2023

Before : Sir William Bailhache, Commissioner, and Jurats Averty and Le Cornu

Between	**B**	**Petitioner**
And	**D**	**Respondent**
	Erinvale PTC Limited	**Third Party**
	E	
	F	
	T	**Intervenors**
	(personally and as appointed representative of his minor and unborn issue)	
	W	
	(personally and as appointed representative of her minor and unborn issue)	
	J	
	(personally and as appointed representative of his minor and unborn issue)	

Advocate D James for the Petitioner

Advocate S. M. J. Chiddicks for the Respondent

Advocate K. L. Hooper for the Third Party

Advocate S. A. Franckel for the Intervenors

JUDGMENT

THE COMMISSIONER:

Introduction

1. The Petitioner and the Respondent were married in [Redacted] in 1997 and they have one child, ("J"), one of the Intervenors in these proceedings. The Petitioner had previously been married and there were two children from that marriage – ("E") and ("F"), also Intervenors in these proceedings. In 2012, while living in Country 1, the Petitioner established a Jersey law discretionary settlement (the "Trust") on which he settled the bulk of his wealth for the benefit of himself, his spouse, his children and his remoter issue. The trustee of the Trust (the "Trustee") is joined to these proceedings as the Third Party.

2. The Petitioner and the Respondent separated in 2017, and the Petitioner subsequently petitioned for divorce in the Family Division of the Royal Court, the Respondent claiming ancillary relief. A *decree nisi* was pronounced in 2017, and a *decree absolute* in 2020.

3. Between the date of the *decree nisi* and the date of the *decree absolute*, the Petitioner lost capacity and ("C"), a long-standing business associate and friend of the Petitioner was appointed as his delegate.

4. The ancillary relief proceedings have been fiercely contested. There has been argument about the extent to which the assets in the Trust are to be treated as pre-marital property and not taken into account for the purposes of calculating ancillary relief; there has been other argument as to the extent to which E (the first named Intervenor) is entitled to claim that some of the assets within the Trust are directly held for him. There have been arguments over disclosure including the existence of other trusts, and indeed all these various arguments have been compounded by potentially difficult issues surrounding the possibility of a UK inheritance tax liability. The cost of all these arguments has so far been paid out of the Trust.

5. The litigation has been extremely expensive and has reduced the available assets by some 12.5% of the value of the Trust.

6. In July 2022, an application was made unsuccessfully by the Respondent to have the then Intervenors, E and F, removed from the proceedings. For the reasons set out in the judgment B v D and Ors (Matrimonial) [2022] JRC 173, not only was the application unsuccessful but the Court also ordered that J, ("T") and ("W"), all being of age, should be joined as parties to the proceedings as Intervenors, with their consent, on the basis that each of them would also represent their minor and unborn issue. The result of this approach was that, in the proceedings

between husband and wife, the parties included not only the Trustee but also the beneficiaries of the Trust which held the majority of the wealth. To the extent that there are assets outside the Trust, the parties to the proceedings include all the immediate heirs of the Petitioner and the Respondent, should there be an intestacy.

7. Sensibly, the parties agreed to mediate their various difficulties, and that took place in a without prejudice financial dispute resolution hearing in October 2022. The reasoned assessment of the Respondent's ancillary relief claim was accepted by the parties and a draft consent order was prepared and signed by each party. It is clear that the acceptance by ("C") as delegate for the Petitioner was conditional on his having approval from the Royal Court, and the Trustee was anxious to ensure that any agreement which it entered would be blessed by the Court as well.

8. Given that all parties agreed, it would normally be unnecessary for any detailed judgment to be issued, but there are three reasons why we think it might be appropriate to do so.

The position of the delegate

9. The delegate was appointed by Act of the Royal Court on 14th December 2018. The relevant part of that Act is as follows:

> ***"The Court appointed [C] delegate of the said [B] to make such decisions as are necessary, in accordance with the said Law, relating to the matters set out below, ….. conducting legal proceedings on behalf of the person to whom this application relates…standing in place of P as discretionary beneficiary / settlor of a Jersey proper law trust."***

10. On behalf of the delegate, Advocate James filed a Skeleton Argument which, in its conclusions, requested the Court to approve and give effect to the settlement of the litigation upon the basis that the agreement had been formed by the delegate in good faith and without conflict of interests; and that the decision is one which the delegate believed to be in the best interests of the Petitioner and that belief was a reasonable one. The Skeleton Argument asserts that the decision taken by the delegate, in respect of which he seeks a blessing, falls within the terms of his appointment; and it also asserts that on an application of this kind, the delegate not having surrendered his discretion, the Court should give its blessing if the delegate, having complied with Article 6(1) to 6(5) of the Capacity and Self Determination (Jersey) Law 2016 ("the Law"), reasonably believed that the decision was in the best interests of the Petitioner. It was submitted that that approach is consistent with the limited role of the Court in a blessing application and the

test to be applied by the Court when determining it, and in that context reliance was placed on the decision in Representation of A as Delegate for B [2018] JRC 225.

11. For reasons which we will set out later in this judgment, the Court agrees that the settlement of the litigation is in the best interests of the Petitioner. However, the points raised in the Skeleton Argument for the delegate are not purely of academic interest and in our judgment ought to be addressed.

12. The first point is whether or not the delegate is able to make the agreement settling the proceedings without the consent of the Court. This point is probably not as important as it might otherwise be because the current approach of the Royal Court in appointing delegates is generally not to give a *carte blanche* for the conduct of legal proceedings on behalf of the person to whom the application relates. The cost of conducting proceedings is capable of being so significant that the Court now generally requires that before those proceedings are commenced the delegate comes to Court with a reasoned application in relation to the proceedings; there will usually, if not always, be a costs budget and the Court will generally grant its consent to the delegate to commence or defend proceedings up to a certain point on condition that a further report is provided later on as those proceedings have progressed. It could be argued that the power to conduct legal proceedings in this case includes power to compromise them, on the basis that a compromise is always part of the overall conduct of the proceedings. In case this language should reappear at some future date, we indicate that we do not think that would be the appropriate construction of the Act of Court. In our view, it is one thing to manage the Court proceedings on behalf of P, but it is quite a different thing to settle the substantive claims and defences with a monetary or other agreement which results in the estate of P being enhanced or reduced as the case may be. Advocate James advised the Court that at the time that the delegate was appointed, the Royal Court had indicated that it expected the delegate to return to Court with a settlement proposal, if that stage were reached. Although that does not appear in the Act of Court, we are not surprised that that was what was intended and indeed it would be more likely to meet current practice.

13. The second point of interest in relation to the delegate's application arises in connection with the test which the Court should apply. In The Matter of the Representation of A as Delegate for B [2018] JRC 225, the Court was dealing with an application by the representor, as delegate, for directions as to whether she should accept the terms of an offer made in settlement of a personal injuries claim. B had been involved in a road traffic accident in 2011 while cycling in France as a result of which he suffered life changing physical and psychological disabilities, rendering him incapable of managing his property and affairs. The other driver concerned was insured in France, where there is operated a *'no fault'* based system in respect of all road traffic accidents. The liability to compensate B was indisputable but the level of compensation was not precise and

a matter for argument if there were no agreement. In that case, an open offer to settle the claim was made, and the delegate obtained advice from the Paris office of a firm of London lawyers. The advice was that the offer should be accepted. Originally, the delegate, having been appointed a curator under the Mental Health (Jersey) Law 1969, had intended to apply to Court for approval of her intention to accept the offer. However, her appointment changed with the Capacity and Self Determination (Supervision of Delegates etc) (Jersey) Regulations 2018 such that she became the delegate of B as if appointed under the Law, having all the powers of a delegate. It was thought therefore that she had the power to accept the offer not least because Article 35 of the Law provides that, subject to any restriction or condition imposed by the Court on the appointment of a delegate, the delegate may do anything which appears to the delegate to be necessary or expedient to be done in P's best interests.

14. Commissioner Clyde-Smith held that the delegate had not purported to surrender to the Court the powers delegated to her and that the decision therefore remained hers. He further determined that where the delegate retained the power to make the decision on P's behalf but sought the protection of the Court by way of a direction or authority to do so, the role of the Court in such an application was a limited one, and analogous to the role of the Court when a trustee seeks the blessing of the Court to a particular exercise of power without surrendering its discretion, generally following the approach of In Re S Settlement [2001] JLR Note 37. The Court applied this test and sanctioned the delegate's decision to accept the offer.

15. We respectfully agree with the comment of the learned Commissioner that the Court acts with caution in these cases because, if it approves the decision in question after full and frank disclosure of everything relevant to that decision, no interested party will thereafter be able to complain that the decision was not in P's best interests. However, with the greatest respect to that Court, we are not convinced that the right outcome is the application of the In Re S Settlement line of cases. The decision which the delegate has to make is a best interests decision and in our judgment it cannot be right for the Court to endorse a decision it does not believe to be right simply because the delegate, acting properly and in good faith and without conflict of interest, believes it to be right. In that context, it is of interest that the rationale for the In Re S Settlement line of cases is in part that the settlor chose the trustee and not the Court to act as trustee of the settlement; but that is not the case here, because the delegate is in fact chosen by the Court and is always subject to the overall supervision of the Court.

16. In many trust cases, the decision which is sought to be blessed is a discretionary decision taken by the trustee. The difference between those cases and cases under the Law is that the decisions under the legislation must be best interests decisions as defined in the statute. In our judgment, the effect of applying In Re S Settlement to the delegate cases could, in some cases, be to overrule the terms of the statute, to the extent that the Court would be giving its sanction to

a decision taken on behalf of P whether it believed that the decision was in P's best interests or not as long as it was a decision which fell within the band of reasonable decisions which a delegate might make. Given that P and his estate are entitled to require the delegate to reach a best interests decision, it does not appear to us that that approach is necessarily right.

17. We recognise that this issue may not arise frequently given the changed Court policy to the way in which delegates are appointed and the restrictions which are imposed but we have thought it right to ensure that there is at least some material upon which the Royal Court may be addressed in a future case, should it arise.

18. In this case, the issue does not arise. The Court agrees with the delegate that the settlement of the litigation is very much in the best interests of the Petitioner. In that context it has had regard to the very substantial costs which have been incurred to date and the saving of costs, perhaps very considerable costs, for the future; to the wishes of the Petitioner that there should be a proper settlement for the Respondent, albeit not a settlement which is more generous than it needs to be; to the fact that there may well be an impact on the Petitioner's health from the continuation of the proceedings, even though his capacity is such that he does not fully understand or follow what is now being done; and to the fact that the settlement protects his children's best interests on his death. We also have been addressed by the delegate as to whether there will be sufficient funds within the settlement to pay for his ongoing care and we have been persuaded that that is not an issue even if an inheritance tax liability, which is considered to be unlikely, fructifies.

The Blessing application

19. It has been understood by all the parties to the proceedings that no award in favour of the Respondent will be met unless the Trustee makes an appointment to the Petitioner enabling him to discharge the obligation in favour of the Respondent. That is at least one reason why the Trustee is present in the proceedings. The Court has had no difficulty in blessing the decisions of the Trustee as set out in the minute of its meeting on 11th January 2023. All those who might be interested in the decisions being taken have agreed that the Trustee should have its application approved and indeed have asked the Court to do so. As those party to the present proceedings include all those interested under the Trust, that is a very material factor for the Court to take into account.

20. The Trustee has previously indicated that it would surrender its discretion to the Court in this respect, but that was at a time when it was thought the substantive proceedings would go to a full contested hearing. If that had happened it would have been a nonsense, as the Court has

previously indicated in directions hearings, for the Court to make an award to the Respondent in the matrimonial proceedings, and then bless a decision of the Trustee not to make the full amount available to the Petitioner in order that he might discharge the award simply because the Trustee had reached a different decision. However, circumstances have changed because this is not an order in matrimonial proceedings following a contested argument but following agreement between the parties. In those circumstances there was no need for the Trustee to surrender its discretion.

21. We agree with the Trustee that it is appropriate to regard its decision to agree to the settlement of the matrimonial proceedings as a momentous decision, given the long and convoluted history of those proceedings, the highly acrimonious nature of them from time to time, including the accusations of bias levelled at the Trustee and its directors, the quantum of the settlement, the fact that the beneficial class includes minor and unborn beneficiaries and the continuing risk of a potential inheritance tax liability.

22. It is contended for the Trustee that the test to be applied on a blessing application of this kind is summarised at paragraph 14 of Kan v HSBC International Trustee Limited [2015] JCA 109 where the Court said this:

> ***"14. Where a trustee has made a momentous decision, that is a decision of real importance for the trust, and seeks the Court's approval for the decision, the legal test to be applied by the Court is well established in this jurisdiction. As explained in Re S Settlement [2001] JLR N37 the Court must satisfy itself (i) first, that the trustee's decision has been formed in good faith, (ii) second, that the decision is one which a reasonable trustee properly instructed could have reached, and (iii) third, that the decision has not been vitiated by any actual or potential conflict of interest. A similar approach is taken in England: see Public Trustee v Cooper [2001] WTLR 901."***

23. The decision in that case was a decision by the trustee to make a substantial distribution out of the trust to the first respondent to enable him to meet a lump sum order in favour of the second respondent, made in divorce proceedings in Hong Kong, and secondly thereafter to exclude the second respondent as a beneficiary of the trust. As here, the trustee had submitted to the jurisdiction of the matrimonial court, on that occasion in Hong Kong, and had participated in the ancillary relief proceedings there. The argument in the Court of Appeal as to the test for approving momentous trustee decisions was not that any of the In Re S Settlement considerations were wrong but rather that there was an additional requirement, namely that the trustee must prove in detail that it had given proper consideration to the matter under scrutiny, setting out in detail the steps taken by the trustee and the considerations which informed the

trustee's decision. The Court of Appeal did not endorse that additional requirement but it did go on to say this:

> ***"When the Court is to give approval for a momentous decision the Court needs to be satisfied as to the rationality of the decision; the lengths to which the Court must go in examining the process by which the trustee arrived at the decision must depend upon the particular decision. In some cases the decision may be a difficult and doubtful one, requiring fine judgment in the face of competing considerations; in others the decision may be obvious. In the former cases the quality of the decision making process will be more important than the latter. For that reason, we do not consider that the additional requirement for which Madame Kan contends should be introduced to the law of this jurisdiction, even if it were to be adopted in England."***

24. As the Court of Appeal then said, each case must depend upon its own facts and upon the decision in question. In that context, it is right to reflect that part of the rationale for the In Re S Settlement line of cases is that the trustee is frequently in a better position than the Court to appreciate the significance of the decision which is being taken and the technical information which underlies it. A momentous decision, for example, to withdraw from a particular investment may be a matter on which the trustee would be expected to have much more background knowledge than the Court; but on the other hand, a decision about the conduct of litigation is a decision which is *prima facie* one where the Court rather than the trustee can be expected to have a greater awareness of how the litigation is likely to go. The present case is one where this slightly more nuanced approach to In Re S Settlement is appropriate.

25. Having said all that, there seems to us to be no doubt that the decision of the Trustee, reflected in the Trustee minute of 11th January 2023, is entirely appropriate and we sanction it accordingly.

Process

26. There is a process point which we think can conveniently be recorded here. It is obvious that there were three jurisdictions which the Court was being asked to exercise in this case. The first jurisdiction was as a matrimonial court to give its consent to the agreement which the parties have reached. That consent was indeed given. The second jurisdiction was that of the capacity court under the Law, where it was looking at the decision of the delegate to settle the proceedings. The Court has approved that decision as well. Thirdly, the Court has been asked to bless the arrangement proposed by the Trustee; and acting as a trust court has given that sanction.

27. The Court was constituted in the same way for each of those applications. It may be that there will be occasions when it is inappropriate for the same Court to sit on different applications of this kind; but in our judgment it can be a perfectly appropriate process – and it was in this case – not least to avoid the position whereby difficulties might arise from matters being agreed by one Court and contested in another. We note that in Netherton v Netherton 2 ITELR 241, a decision in 1999, the same judge sat in the Family Proceedings and also in the Chancery Proceedings. In the Family Proceedings, the Court decided what Mr Netherton should pay and transfer to his ex-wife. In doing so, the Court had regard to the whole picture, and indeed the judge indicated that the family court would review the matter if the trustees were to change their mind as to the proposed exercise of their discretion, that exercise being necessary to enable Mr Netherton to discharge his obligations without hardship to himself. The convenience of that approach is obvious, and it is one which the Court has adopted in the present proceedings. The Matrimonial Proceedings could not be settled by consent if the Trustee did not make the appointment from the Trust to the Petitioner. It follows that it was essential that the same Court deal with the blessing application of the Trustee as with the Matrimonial Proceedings. Similar arguments apply to the Capacity Court Proceedings. In our judgment, each case will procedurally be decided on its own merits, but we considered here that this was the most cost effective way to proceed. If there had been any difficulty with the Capacity Court or the Trust Court, that would inevitably have had an impact on whether the Family Court could make the consent order which it has.

Authorities

B v D and Ors (Matrimonial) [2022] JRC 173.

Capacity and Self Determination (Jersey) Law 2016.

Representation of A as Delegate for B [2018] JRC 225.

Mental Health (Jersey) Law 1969.

Capacity and Self Determination (Supervision of Delegates etc) (Jersey) Regulations 2018.

Re S Settlement [2001] JLR Note 37.

Kan v HSBC International Trustee Limited [2015] JCA 109.

Netherton v Netherton [1999] 2 ITELR 241.