

JERSEY / JUDGMENT

Re S Settlement v [2001]

JRC 154 (24 July 2001)

[2001] JRC 154

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[2001] JRC 154 [New search] [Help] 2001/154 ROYAL COURT (Samedi Division) 24th July, 2001
Before: M. C. St. J. Birt, Deputy Bailiff, and Jurats Le Breton and Quérée IN THE MATTER
OF the S Settlement Matters to be considered by Court when asked to approve Trustees'
proposed course of action: (1) is it within Trustees' power; (2) if so, is it a proper exercise
of that power; (3) surrender of discretion; (4) where Trustees have already taken action.
Matters to be considered under (2) [proper exercise of Trustees' power]:

- (a) has Trustees' opinion been formed in good faith; (b) is opinion one of a reasonable Trustee;
(c) is opinion vitiated by actual/potential conflict of interest. Advocate J. A. Clyde-Smith for
the Trustee. Advocates J. P. Speck, C. G. P. Lakeman, A. J. D. Winchester and S. J. Young for
the various convened parties. EXTRACT FROM A JUDGMENT DELIVERED IN CAMERA
AUTHORISED FOR RELEASE BY THE DEPUTY BAILIFF THE DEPUTY BAILIFF: 10. We turn
next to consider the role of the Court in this application. The Trustee has asked the Court to
authorise it to enter into the various deeds which have been produced to us and which are
intended to achieve the objectives which we have described. We wish first to consider
exactly what the Court is being asked to decide. Mr. Clyde-Smith has cited to us an extract
from the English case of *The Public Trustee -v- Cooper* , an unreported decision of Hart J
dated 20 th December, 1999. That judgment in turn cites from a judgment of Robert Walker J
in an unnamed case which took place in chambers in 1995. We think that the extract is
extremely useful and is to be taken as reflecting the position under Jersey Law just as much
as under English Law, and we would therefore like to take the opportunity of setting it out.
Robert Walker J said this: "At the risk of covering a lot of familiar ground and stating the
obvious it seems to me that when the court has to adjudicate on a course of action proposed
or actually taken by trustees there are at least four distinct situations and there are no doubt
numerous variations of those as well. (1) The first category is where the issue is whether
some proposed action is within the trustees' powers. That is ultimately a question of
construction of the trust instrument or a statute or both. The practice of the Chancery

Division is that a question of that sort must be decided in open court and only after hearing argument from both sides. It is not always easy to distinguish that situation from the second situation that I am coming to. (2) The second category is where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers. Obvious examples of that which are very familiar in the Chancery Division are a decision by the trustees to sell a family estate or to sell a controlling holding in a family company. In such circumstances there is no doubt at all as to the extent of the trustees' powers nor is there any doubt as to what the trustees want to do, but they think it prudent and the court will give them their costs of doing so, to obtain the court's blessing on a momentous decision. In a case like that there is no question of surrender of discretion and indeed it is most unlikely that the court will be persuaded in the absence of special circumstances to accept the surrender of discretion on a question of that sort, where the trustees are *prima facie* in a much better position than the court to know what is in the best interests of the beneficiaries. (3) The third category is that of surrender of discretion properly so called. There the court will only accept a surrender of discretion for a good reason, the most obvious good reasons being either that the trustees are deadlocked (but honestly deadlocked, so the question cannot be resolved by removing one trustee rather than another), or because the trustees are disabled as a result of a conflict of interest. The cases within categories (2) and (3) are similar in that they are both domestic proceedings traditionally heard in chambers in which adversarial argument is not essential, although it sometimes occurs. It may be that ultimately all will agree on some particular course of action, or at any rate will not violently oppose some particular course of action. The difference between category (2) and category (3) is simply as to whether the court is (under Category (2)), approving the exercise of discretion by trustees or (under category (3)), exercising its own discretion. (4) The fourth category is where trustees have actually taken action, and that action is attacked as being either outside their powers or an improper exercise of their powers. Cases of that sort are hostile litigation to be heard and decided in open court." Hart J in the Cooper case went on to comment:- "Secondly, I would draw attention to the paradigm nature of the classification suggested by Walker J. There may be variations within each category and a particular application may straddle more than one category. Moreover, some caution needs to be exercised before assuming that there is always a bright-line distinction between the case where trustees surrender their discretion and the case where they do not. In a case like the present, for example, it might theoretically be possible for the trustees to have been unanimous in reaching a conclusion that special circumstances existed such that would justify them in selling, but divided as to whether in fact it was desirable for them to do so. If the court's assistance was then invoked to resolve the deadlock, the court would not necessarily have to revisit with a clean slate the question of the existence of special circumstances. Even where the trustees are surrendering their discretion, the question will arise as to what discretion is being surrendered". 11. This is not

a case where the Trustee is surrendering its discretion to the Court, nor indeed would it be a suitable case for that to occur. It is therefore a case of the second category. The Trustee has decided what it wishes to do; there is no question as to its legal power to do so, but, because it can be categorised as a momentous decision, it wishes to seek the blessing of the Court to the course of action which it proposes to take. We think that in this case, that was a perfectly reasonable stance for the Trustee to take. Drawing further on a subsequent part of Robert Walker J's judgment, we think that we need to consider three issues when fulfilling our role under the second category. 1. Are we satisfied that the Trustee has in fact formed the opinion in good faith that the circumstances of the case render it desirable and proper for it to carry out each of the steps we have described earlier in this judgment? 2. Are we satisfied that the opinion which the Trustee has formed is one at which a reasonable Trustee properly instructed could have arrived? 3. Are we satisfied that the opinion at which the Trustee has arrived has not been vitiated by any actual or potential conflict of interest which has or might have affected its decision? Authorities The Public Trustee-v-Cooper (20 th December, 1999) Unreported Judgment of the High Court of England. Page Last Updated: 02 Nov 2015 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: https://www.bailii.org/je/cases/UR/2001/2001_154.html

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Prepared on 26 October 2026 · Esheria