



## Trusts and Fiduciary Group

# Disclosure of information by beneficiaries and the Court's jurisdiction to give directions

Representation re the E Settlement [2010] JRC 85, 4 May 2010

Commissioner Clyde-Smith, Jurats Clapham and Liddiard

June 2010



*In this case the Court gave directions under Article 51 of the Trusts (Jersey) Law 1984 (the equivalent provision in Guernsey is section 69 of the Trusts (Guernsey) Law 2007) that a beneficiary disclose information to a trustee. This note looks at the circumstances in which the Court came to give such directions, and identifies an alternative basis on which the Court could have made the same orders.*

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## The Facts

The AE, IE and CE settlements (the "E Settlements") were three trusts administered by the same Jersey trustee (the "Trustee"). The trusts were settled by three brothers (now deceased) and the family of each brother were the principal beneficiaries of each settlement. The assets of each settlement were held through a jointly owned Jersey company ("S") which was also administered by the Trustees. S held interests in a number of Irish companies. Members of one of the three families (the "CE directors") controlled and managed these companies for the benefit of all three settlements.

Between 2001 and 2002 the beneficiaries of the AE and IE settlements raised concerns with the Trustee about the management of the Irish companies by the CE directors. The concerns related to excessive directors' remuneration paid to the CE directors and excessive secretarial and administrative expenses paid by the Irish companies to entities controlled by the CE directors. A consequence of these excessive payments was a potential significant tax liability due by the Irish companies together with interest and penalties thereon.

The Trustee had attempted to resolve the matter with the CE directors through negotiations. All the parties (including the beneficiaries of the AE and IE settlements and the remaining beneficiaries of the CE settlement) were in agreement that the interests of the settlements should be separated. In order to determine the value of the assets and

any benefit which the CE directors might have received from the trust assets, the Trustee sought, from the CE directors, information relating to the Irish companies. The CE directors were however reluctant to comply with these requests which made it difficult for the parties to negotiate an agreement.

The Trustee had previously obtained directions from the Royal Court under Article 51 of the Trusts (Jersey) Law 1984 (the "Trusts Law") and it brought the matter back before the Court when it became clear that the parties were not able to reach an agreement.

## The Decision

The Trustee, which recognised that it was conflicted as it owed duties to the beneficiaries of the AE and IE settlements as well as to the CE directors (as beneficiaries of the CE settlement), surrendered its discretion to the Court. The Court accordingly assumed the Trustee's powers and had to consider the separation of the interests of the settlements and whether there was sufficient information available about the trust assets for the terms of such a separation to be determined.

The Trustee submitted that the most prudent and efficient solution in this matter would be the separation of the interests of the families. The alternative, liquidation of the Irish companies, would be very costly, would be unlikely to realise any value for the beneficiaries, and was not supported by any of the parties. However, in order to avoid this, and deal with the separation of the interests of the settlements, the Trustee required disclosure of information by the CE directors.

The beneficiaries of the AE and IE settlements contended that there had been insufficient disclosure by the CE directors to allow the Trustee to complete its investigation of the affairs and value of the Irish companies, and that it was not possible to separate the interests of the three settlements without knowing the extent to which the CE directors may have already benefited from the management of the Irish companies.

The CE directors (who had submitted to the jurisdiction of the Royal Court by participating in the proceedings) maintained that there was no further information to be given by them. They denied all allegations of impropriety against them and argued that if the beneficiaries of the AE and IE settlements wanted to pursue these allegations they should do so by way of an action for breach of duty rather than in the context of an application for directions.

The Court agreed with the submissions of the Trustee and the beneficiaries of the AE and IE settlements that there were serious issues in relation to the Irish companies which needed to be investigated and characterised the refusal by the CE directors to disclose the information in relation to the Irish companies as "intolerable". The Court accordingly had to consider whether it was appropriate to use its powers under Article 51 of the Trusts Law to order disclosure by the CE directors.

The Court confirmed the conventional starting point namely that any causes of action against the directors of the Irish companies would be pursued in the usual way, i.e. S should use its controlling interest in the Irish companies to procure that they take action against the directors in the Irish courts (which would be the natural forum).

The Court considered two questions:

1. Could beneficiaries be required, on an application for directions under Article 51 of the Trusts Law, to provide the Trustee with information which the beneficiaries hold as directors of companies in which the settlement had an indirect interest?
2. Would this disclosure amount to pre-trial discovery (which is not permitted) and would it be an appropriate use of the Court's power to order disclosure where the Trustee has surrendered its discretion?

In considering its powers under Article 51 of the Trusts Law the Court held that the Article conferred wide powers on the Court relating to the execution and administration of trusts, including the power under Article 51(2)(a)(iii) to "... *make an order concerning ... a beneficiary or any person having a connection with the trust.*" The Court held that this power was wide enough to give the Court jurisdiction to make an order requiring a beneficiary or any person having a connection with a trust to disclose information for the purposes of the execution and administration of the trust, notwithstanding the fact that the Trustee did not itself directly have powers to compel such disclosure. The Court held that the directors of the Irish companies were "persons having a connection with the trust".

In considering whether it was appropriate to exercise this wide jurisdiction under Article 51, the Court said that it should not be used to bypass the limitation on shareholders' entitlement to information relating to a company. It would also be inappropriate for the Court to use Article 51 as a means to circumvent the general principle of litigation that a potential plaintiff was not entitled to pre-action discovery of documents to enable him to establish whether he had a cause of action.

In this case, the Articles of Association of the Irish companies allowed S to require the Irish companies to provide information relating to the companies directly to the Trustee and the Irish companies, by their directors, would be bound to comply with such a request. The Court held that the Trustee was therefore not asking the Court to order disclosure of documents which it could otherwise only have had access to under the disclosure rules in hostile litigation - the application was merely a way to short circuit the legal proceedings which the Trustee would otherwise have had to go through (via S) to obtain the information, thereby saving unnecessary legal costs. The Court therefore considered that it had power to give directions for the disclosure of information under Article 51 and that it was appropriate to do so as disclosure of the information was inevitable.

## Comment

The Royal Court has taken a wide interpretation of the powers in Article 51 of the Trusts Law in order to achieve a just separation of the interests of the trusts without unnecessary proliferation of legal proceedings in several jurisdictions. The decision illustrates the flexibility and strength of the jurisdiction under Jersey law to give directions to a trustee for the purpose of resolving difficult questions which arise in the execution of trusts. It remains to be seen whether the Guernsey Royal Court would follow the same approach in a similar case. If a similar approach is to be followed in future cases, it could be difficult to identify the limits of the Court's powers. Indeed, given that the CE directors had submitted to the jurisdiction of the Jersey Court and were participating actively in the proceedings, the Court would have had jurisdiction under Jersey's rules of civil procedure (the Royal Court Rules 2004) to order the CE directors to give discovery on issues relevant to those proceedings rather than having to rely on Article 51(2)(a)(iii) of the Trusts Law, and aspects of the Court's reasoning accord more readily with such an analysis.

Please contact Robert MacRae, Andreas Kistler or Judy Marais if you would like further information about this case



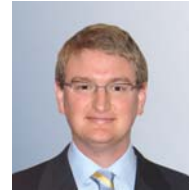
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Please note that this briefing is only intended to provide a very general overview of the matters to which it relates. It is not intended as legal advice and should not be relied on as such.

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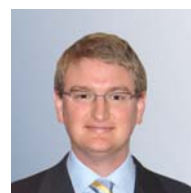
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