

BERMUDA SUPREME COURT

IN THE MATTER OF THE E TRUST

REASONS FOR RULING

[2018] SC (Bda) 38 Civ (23 April 2018)

This matter came before the Court on an *Ex Parte* Originating Summons filed on 5 April 2018 for an Order, *inter alia*, pursuant to Section 47 of the *Trustee Act 1975* empowering the Trustees of the E Trust (“the Trust”) to add a charitable foundation (“the Foundation”) as a beneficial member of the Discretionary Class.

The Plaintiffs sought for this application to be heard privately in Chambers and for the Court file to be sealed. Additionally, Counsel applied for an Order that all Rulings and any Judgment in these proceedings be anonymized for reporting purposes.

The facts on the evidence

The Trust was settled by deed made in 2003 and it currently holds assets in excess of \$20 million. There are five Trustees, one of whom is also both the Settlor and primary beneficiary.

The *affidavit* evidence was sworn by another one of the Trustees (the “Deponent Trustee”) with whom all the other Trustees are agreed.

The beneficiaries of the Trust are described in the Deed as the Discretionary Class, consisting of the Settlor/primary beneficiary, her now deceased husband and the RL.

The Deponent Trustee produced the Settlor’s Letters of Wishes dated 2 April 2003, which stated that it was her wish that the Trustees exercise their discretion “in so far as the RL is concerned as a beneficiary by making them a modest and anonymous distribution from time to time.... As you are aware, on the death of the survivor of my husband or I, you are obligated to appoint the Fund to the Trustees of the Foundation...”

The Deponent Trustee’s affidavit states: “The intention, by adding the Foundation to the Discretionary Class, is to allow the

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Trust to make charitable donations via the Foundation during the Settlor’s lifetime, which is the strong wish of the Settlor.”

While the RL is a current beneficiary of the Trust, the Foundation will in any event be the ultimate beneficiary.

The Order empowering the Trustees to add the Foundation as a beneficial member of the Discretionary Class was granted, with the condition that RL be served with the proceedings within seven days of the date of the written reasons. The Court’s reason for the stay of enforcement was “to allow the RL an opportunity to pursue any wish it might have to be heard on this application”, while expressing a provisional view that “such a pursuit from the RL would likely be futile”. The RL is neither the primary nor ultimate beneficiary of the Trust and the contributions it receives are not significant enough to give rise for concern that the assets of the Trust are inadequate to add and feed another beneficiary.

The Application for Anonymity

The Plaintiffs submitted that the application should be heard privately because of the personal administrative nature of the trust application and because it did not involve any factual matters of public interest.

In support of the application, the Plaintiffs referred to *Re BCD Trust (Confidentiality Orders) [2015] Bda LR 108* before Kawaley CJ, who said in his ruling: “*It seems to me that in this type of case it is inherently consistent with the public interest and the administration of justice generally that applications such as these should be anonymised and dealt with as private applications, where there is no obvious public interest in knowing about an internal trust administration matter.*”

The Plaintiffs also relied upon *Re G Trusts [2017] SC (Bda) 98 Civ (15 November 2017)*. In his ruling on that case, Kawaley CJ stated: “*The Confidentiality Order made in the present case was,*

on reflection, not just informed by the privacy rights alluded to in section 6(10) of the Bermuda Constitution, but was also indirectly informed by related fundamental rights. Section 5 of the Constitution (“Protection of home and privacy of other property”) restricts the ability of public authorities (including representatives from all three branches of Government) from interfering with private premises and property, save to a proportionate extent in service of a qualifying countervailing public interest. Section 13 of the Constitution prohibits the confiscation of private property without due compensation, subject to an even more narrowly defined exception. This Court is also entitled to construe domestic law rules, whether procedural or substantive, so far as possible so as to conform to Her Majesty’s international obligations in respect of Bermuda. In this regard, the following provisions of the First Protocol to the European Convention on Human Rights articulates a broad principle which is also relevant to confidentiality orders in trust cases:

‘ARTICLE 1 Protection of Property - Every natural or legal person is entitled to the peaceful enjoyment of his possessions...’

Another observation made by the learned Chief Justice in *Re G Trusts* was that rearrangements on the basis on which trust assets are administered are considered to be transactional. They would typically fall in the category of services offered by an attorney under legal professional privilege, but for the fact that Court approval is required under Section 47 of the *Trustee Act 1975*.

The Court was persuaded to grant the Confidentiality Order. The ruling stated: *The assistance sought is purely transactional and akin to the restructuring of a will, which would ordinarily be done privately by issuing privileged instructions to an attorney. There is no legitimate interest that the public would have in knowing about the wealth and the vesting affairs of the Settlor and her now deceased husband.*

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.