



# In The Supreme Court of Bermuda

CIVIL JURISDICTION

2018 No: 105

**IN THE MATTER THE E TRUST**

## **REASONS FOR RULING**

(In Chambers)

Dates of Hearing: Friday 20 April 2018  
Date of Ruling: Friday 20 April 2018  
Date of Reasons: Monday 23 April 2018

Counsel for the Plaintiff Trustees: Mr. Ben Adamson (Conyers Dill & Pearman Limited)

*Trust Law – Anonymization – Confidentiality – Private Applications  
Power of the Court to authorize transactions relating to trust property  
Section 47 of the Trustee Act 1975 - Order 85 of the Rules of the Supreme Court*

RULING of Shade Subair Williams A/J

### **Introduction**

1. This matter came before the Court on an Ex Parte Originating Summons filed on 5 April 2018 (“the Originating Summons”) 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.

2. Counsel for the Plaintiff Trustees, Mr. Ben Adamson, also sought for this application to be heard privately in Chambers and for the Court file to be sealed by Order of the Court. Additionally, Counsel applied for an Order that all Rulings and any Judgment in these proceedings be anonymized for reporting purposes.
3. I granted these applications at the 20 April 2018 hearing, subject to a term staying the execution of my Order made under section 47 until Friday 1 June 2018 coupled with the condition that one of the existing beneficiaries (“RL”) is served with these proceedings within 7 days of the date of these written reasons. Apart from the Settlor of the Trust, RL is the only current beneficiary.

### **The Facts on the Evidence**

4. The Trust was settled by deed made in 2003 and it currently holds assets in excess of \$20,000,000.00. There are five Trustees, one of whom is also both the Settlor and primary Beneficiary (“the Settlor T/PB”). (Notably, the Settlor T/PB was present during the hearing of the applications before this Court.)
5. The affidavit evidence before the Court filed in support of the Originating Summons (“the affidavit”) was sworn by another one of the Trustees with whom all the other Trustees are agreed. In this Ruling I shall refer to that particular Trustee as the Deponent Trustee.
6. The Deponent Trustee exhibited a Deed of Trust dated 25 March 2003 (“the Deed of Trust”) in addition to five other Deeds of Appointment and Retirement of Trustees spanning a 14 year period between 2003 and 2017.
7. The beneficiaries of the Trust are described in the Deed of Trust at clause 1.6 as “the Discretionary Class”. The Discretionary Class consists of the Settlor T/PB, her now deceased husband and the RL.
8. The Deponent Trustee also produced the Settlor T/PB’s Letters of Wishes dated 2 April 2003 which provides in material part:

*“Dear Trustees,*

*THE E...TRUST*

*I refer to the Declaration of Trust dated the 25<sup>th</sup> March, 2003 and known as the E...Trust.*

*As a Settlor it is my wish you exercise your discretion in so far as the (RL) is concerned as a beneficiary by making them a modest and anonymous distribution from time to time. At this time it is not envisaged that my Husband or I will require funds but this position may well alter.*

*As you are aware, on the death of the survivor of my Husband and I, you are obligated to appoint the Fund to the Trustees of the Foundation. ...”*

9. The obligation referred to by the Settlor T/PB to appoint the Fund to the Trustees of the Foundation arises out of the provision in clause 5.1 of the Deed of Trust which states:

*“On the death of the survivor of the Settlor and her husband, the Trustees shall appoint the Trust Fund and the income of the Trust Fund to the trustees for the time being of the...Foundation c/o ...as an addition to the corpus of that Foundation provided no exercise of this power shall be made so as to infringe the rule against perpetuities.”*

10. At paragraph 7 of the Deponent Trustee’s affidavit it states:

*“The intention, by adding the Foundation to the Discretionary Class, is to allow the Trust to make charitable donations via the Foundation during the Settlor’s lifetime which is the strong wish of the Settlor.”*

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

### **The Application for Anonymity**

12. Mr. Adamson submitted that his clients’ 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. Indeed, I took notice that the vast majority of private trust administration applications are treated with confidentiality by the Court’s administrative process.

13. As a measure of particular care, Counsel produced various previous decisions of this Court which showcased his expertise and frequent involvement with applications of this nature. Mr. Adamson referred to *Re BCD Trust (Confidentiality Orders) [2015] Bda LR 108* in which he previously appeared before the learned Hon. Chief Justice, Ian Kawaley, who delivered the following *ex tempore* Ruling:

*“I should just say briefly that the application [for a confidentiality order sealing the file and anonymising the proceedings] seems to me to be well-grounded.*

*I bear in mind that the history of what is essentially Chambers hearings is that they were traditionally private hearings. The notion of a more open approach to Chambers hearings has developed in the public interest within a constitutional framework which specifically blesses the idea of the Court departing from the public hearing principle in the interest of privacy and other countervailing public interests (Footnote on section 6(9)-(10) of the Bermuda Constitution).*

*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.”*

14. In *Re G Trusts [2017] SC (Bda) 98 Civ (15 November 2017)* the Plaintiff trustees sought declaratory orders that provisions of the Children Act 1998 and the perpetuity rule under section 4 of the Perpetuities and Accumulation Act 2009, did not affect the settlements established under a foreign governing law. Kawaley CJ in his learned consideration of the anonymization of the proceedings stated at paragraph 3 of his judgment:

*“Prior to the formal issuance of the present proceedings, which essentially concern the internal administration of a related group of trusts, I made what has become a standard ‘Confidentiality Order’ for such applications, entailing (a) anonymising the title to the proceedings and (b) sealing the file from the public inspection. In a short ex tempore judgement in a previous case, I explained briefly why such an Order was appropriate in *Re BCD Trust (Confidentiality Orders) [2015] Bda LR 108...*”*

15. In providing an insightful dissertation into the development of Confidential Orders, Kawaley CJ stated at para 7:

*“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... " "*

16. Another poignant observation was made by the learned Chief Justice in *Re G Trusts*. 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.

17. The Court further stated at para 11:

*"For the above reasons I had no reticence about tacitly confirming the Confidentiality Order I made at the beginning of the present case when the proceedings reached their conclusion. The present proceedings concern the internal administration of a private trust into which the general public have no right to pry. Persons administering, interested in or settling Bermuda trusts should rest assured that this Court's firmly established practice of making confidentiality orders in appropriate cases, which is merely designed to enable law-abiding citizens to peacefully enjoy their actual and contingent property rights, has a venerable legal basis. The existing practice will continue to be applied in appropriate cases such as the present."*

18. This too is an appropriate case for a Confidentiality Order. 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 T/PB and her now deceased husband.

19. The RL, however, is not a private citizen but a public international institution. Arguably, there is no need for the identity of the RL itself to be shielded with anonymity. The same point applies to the Foundation which is proposed to be added as a new beneficiary. However, I am mindful that there is likely to be a real risk that the names of these entities would assist in leading some members of the public to identifying the Settlor T/PB and her now deceased husband by association. For that reason, I decided not to identify these institutions by name.

20. This Court was guided by the approach recommended in *Re G Trusts*. To that extent, I addressed my mind as to whether the trust structure was genuine on its face and found no evidence of it being operated in an artificial eye-brow manner. Notwithstanding, I issue warning that if the trustees, beneficiaries or any other persons linked with the Trust become subject to foreign criminal, tax, or other public investigations, this Confidentiality Order will be liable to be set aside.

### **The Application under section 47 of the Trustee Act 1975**

21. Section 47 of the Trustee Act 1975 provides:

*“Power of court to authorize transactions relating to trust property*

*47 (1) Where any transaction affecting or concerning any property vested in trustees, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the instrument, if any, creating the trust, or by any provision of law, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorized to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.*

*(2) The court may, from time to time, rescind or vary any order made under this section or may make any new or further order.*

*(3) An application to the court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust.*

*(4) In this section, “transaction” includes any sale, exchange, assurance, grant, lease, partition, surrender, reconveyance, release, reservation, or other disposition, and any purchase or other acquisition, and any covenant, contract, or option, and any investment or application of capital, and any compromise or other dealing, or arrangement.”*

22. Mr. Adamson correctly submitted that the test is ‘expediency’. In this case, I satisfied myself that it was indeed expedient to grant the Order as prayed. The Foundation is lined up to be the ultimate beneficiary of the Trust. The assets held by the Trust are more than sufficient to continue with the modest contributions anonymously given to the RL as a beneficiary which since 2003 have totaled GBP 3,000 on the evidence of the Deponent Trustee.

23. Giving effect to the clear wishes of the Settlor T/PB, I saw no sound reason for the refusal of her request for an Order of this Court to permit the Trustees to add the Foundation to the membership of the Discretionary Class. For those reasons I granted the application.

*Whether the existing Beneficiaries have a right to disclosure and to be heard on s.47 application*

24. The Originating Summons was filed without notice to the RL. Thus in granting the Orders prayed, I also applied a short stay of enforcement, as a measure of particular caution, to allow the RL an opportunity to pursue any wish it might have to be heard on this application. However, I express a provisional view that such a pursuit from the RL would likely be futile in any event.
25. 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.
26. As a matter of law, it is not obvious to me that the RL has an unfettered right of disclosure from a transactional perspective, which in such circumstances would be distinct from the disclosure rights given to parties to litigation under civil procedure law. Generally, the RL would be entitled to know of the existence of the settlement and of its own interest under it. As its interest is not threatened by this Ruling in favour of the Foundation being added as a beneficiary, it is difficult to envisage any arguments open to the RL which would lead me to set aside the Orders made herein.

## **Conclusion**

27. The file in this matter is to be sealed such that the Court file shall not be opened, nor made available for inspection or copying, by the public.
28. These proceedings shall be entered into the Cause Book as “In the Matter of the E Trust”.
29. Commencing Friday 1 June 2018 the Trustees are hereby empowered to add the Foundation as a member of the Discretionary Class.

Dated this 23<sup>rd</sup> day of April 2018

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**SHADE SUBAIR WILLIAMS**  
**ACTING PUISNE JUDGE OF THE SUPREME COURT**