COMPASS TRUSTEES LIMITED (as trustee of the Eiger Trust) v. McBARNETT and 17 OTHERS
ROYAL COURT (Le Cras, Commr.): May 15th, 2002
Trusts—variation—enforcement of foreign financial provision—court may vary discretionary Jersey trust under Trusts (Jersey) Law 1984, s.47 to make capital provision ordered for wife in English divorce—comity requires Jersey court to give effect to properly considered judgment of foreign court

The trustees of a discretionary Jersey settlement applied for directions under art. 47 of the Trusts (Jersey) Law 1984.

The sole asset of the trust, which was set up in 1996, was the matrimonial home in England of the settlor and his wife. She obtained a decree nisi of divorce in England, and an injunction in Jersey preventing the settlor from disposing of the house. The trust deed specifically excluded any former wives of the settlor from the discretionary class of beneficiaries. The English High Court held that the trust was a post-nuptial settlement, created for the benefit of the settlor, his wife and their children, which was capable of variation under the Matrimonial Causes Act 1973, and that it was in the interests of justice to vary the settlement to allow a capital distribution to be made to the wife by way of financial provision. The trustees advised the English High Court that they would not give effect to any order it made until authorized by the Royal Court. After the High Court judgment was delivered, the wife obtained a decree absolute.

On the application by the trustees for directions in Jersey, the wife submitted that (a) the court should give effect to the English judgment by exercising its power to vary the settlement under art. 47 of the Trusts (Jersey) Law 1984, giving weight to the principle of the comity of courts; (b) alternatively, the trust deed authorized the court to alter its terms if, in the opinion of the trustee, that was for the benefit of the beneficiaries; (c) it was irrelevant that she had obtained a decree absolute as the relevant date for determining her status under the settlement was the date of the English judgment and, at that time, she was still a beneficiary; and (d) if she were not a beneficiary, under the terms of the settlement she could be added.

The minor beneficiaries submitted that (a) the wife was no longer a beneficiary because, as a result of obtaining a decree absolute, she was excluded as a former wife of the settlor; and (b) as she was not a beneficiary, the court, standing in the position of trustee, could not make a payment to her.

Held, varying the settlement:

(1) This was an appropriate case in which to follow the doctrine of comity of courts and give effect to the declaration of the English High Court. The English court had properly explored the background of the case and had concluded that the necessity to provide capital to the wife outweighed any disadvantage caused to the other beneficiaries. The court would therefore exercise its discretion under art. 47 of the Trusts (Jersey) Law 1984 to vary the settlement to allow a capital payment to be made to the wife (para. 7; para. 13).

(2) Moreover, as the court was considering whether to give effect to the decision of the English High Court, it was irrelevant that the wife had subsequently excluded herself from the settlement by obtaining a decree absolute. The court should consider the facts as they stood at the date of the English judgment and, at that time, the wife was still a beneficiary (para. 20).

(3) Although it was not necessary to decide the matter, it would have been inappropriate for the court, acting as trustee, to vary the provisions of the trust deed by adding the wife as a beneficiary when, as a former wife, she had been explicitly excluded by the terms of the settlement (para. 15).

Cases cited:

(1) *F* v. *H*, 2001 JLR 492, referred to.
(2) *Lane* v. *Lane*, 1985–86 JLR 48, followed.
(3) *Solvalub Ltd.* v. *Match Invs. Ltd.*, 1996 JLR 361, referred to.
(4) *SP* v. *AJP*, 2002 JLR *N* [15], followed.
(5) *T* v. *T*, [1996] 2 FLR 366, referred to.

Additional cases cited by counsel:

E v. *E (Financial Provision)*, [1990] 2 FLR 233.
I, In re, Royal Ct., November 12th, 2001, unreported.
Maister v. *Rind*, Royal Ct., November 25th, 1997, unreported.
Osias, In re, 1987–88 JLR 389.
Rabaiotti (1989) Settlement, In re, 2000 JLR 173.

Legislation construed:

Trusts (Jersey) Law 1984, art. 8A(2):

> "(2) If a person domiciled outside Jersey transfers or disposes of property during his lifetime to a trust—
>
> ...
>
> (b) no rule relating to inheritance or succession (including, but without prejudice to the generality of the foregoing, forced heirship, "légitime" or similar rights) of the law of his domicile or any other system of law shall affect any such transfer or disposition or otherwise affect the validity of such trust."

art. 47: The relevant terms of this article are set out at para. 12.

Miss D. Gilbert for the representor;
N. Pearmain for the 1st, 2nd and 3rd respondents;
M. Renouf for the 6th, 7th, 8th, 10th, 11th, 12th, 16th, 17th and 18th respondents.
The remaining respondents did not appear and were not represented.

1 **LE CRAS, COMMR.:** This is a representation by Compass Trustees Ltd., the trustee of the Eiger Trust, which was established by declaration of trust on July 31st, 1996. The proper law of the trust is Jersey law.

2 The settlor of the trust was Mr. Guus Alink (Mr. Alink) and the only asset of the trust, held through the medium of shares in Beagle Holdings Ltd., is a house in England, "Cherry Tree House," which was the matrimonial home of Mr. Alink and his then wife Mrs. Olga Cachita McBarnett.

3 The beneficiaries of the trust were (a) Guus Alink; (b) Peter Alink; (c) Marion Gortzen (*née* Alink); (d) all and any children and remoter issue of Guus Alink or Peter Alink or Marion Gortzen "whether now living or born hereafter"; (e) all and any of the wives, husbands, widows or widowers of the beneficiaries described in (a) to (d) excluding for the

avoidance of doubt the former wives or husbands of such beneficiaries whether remarried or not; (f) Foster Parents Plan; and (g) Save The Children Fund.

4 Unhappy differences took place between Mr. Alink and Mrs. McBarnett, which led to the latter commencing matrimonial proceedings in England on November 16th, 1998. On February 9th, 1999, a decree nisi was pronounced. On June 2nd, 1999, the petition was transferred to the High Court, and on June 8th, 1999, injunctive proceedings were commenced in Jersey preventing, *inter alia*, Mr. Alink from disposing of "Cherry Tree House." The trustees are still bound by this injunction.

5 The trustees were invited to appear in the English proceedings but declined to do so in order to minimize costs. They did, however, advise the High Court that, in their view, any order made in that court might not be binding in Jersey and that, in effect, only the Royal Court could authorize the trustees to comply with an order made in the High Court. The trustees further advised Mrs. McBarnett's lawyers that the trustees would take no action until the High Court had finalized its order at which time an application would be made to the Royal Court.

6 On May 3rd, 2001, the applications came before the district judge. He heard sworn evidence from Mr. Alink and Mrs. McBarnett, and had the benefit of a statement from Mr. Peter Alink, the protector of the trust. It is clear that the learned judge went carefully into the affairs of the parties. *Inter alia*, he made the following findings:

> "This case revolves around the former matrimonial home which is not an asset of either party. It was valued at £500,000 some eight months ago. The former matrimonial home is owned by Beagle Holdings Ltd. The shares of Beagle Holdings Ltd. are held by Compass Trustees Ltd. who are a subsidiary of Cater Allen Ltd., a Channel Islands organisation, now a subsidiary of Abbey National PLC. The shares are held upon trusts of a Jersey settlement called the Eiger Trust. This was formed in July 1996 as the vehicle by which the parties were to purchase the matrimonial home. There had been a previous home purchased at 318 Hithercroft Road on November 14th, 1995, by Peter Alink as a bare trustee for the husband. This property was sold and the proceeds reinvested in 'Cherry Tree House' at a purchase price of £360,000 plus expenses plus a figure (which is not well recorded, as £25,000 at one point and £40,000 at another) for improvements to 'Cherry Tree House' by the husband.
>
> This is not in dispute. These moneys were the husband's life savings and effectively included his half-share of a property in the Netherlands after his first divorce. That property had been sold and the proceeds divided equally with his first wife, to allow her to purchase a property for herself and the two adopted children of that marriage. His half-share was ultimately placed in the trust. The husband explained that he did this to shield the sum from any liability he might be placed under as a director or in any other way. He sought to safeguard the position of his wife and children, and the two children of his former marriage, to protect the fund and to provide overall security. The trust was set up initially with £2,000 sterling. The beneficiaries are within a discretionary class [The learned district judge then listed the beneficiaries].

I have heard the husband's evidence on setting up the trust, and have had due regard to Peter Alink's statement and the wife's evidence. I consider the trust was set up for genuine reasons and was not set up to frustrate any claim by the wife or to defeat her legitimate claims."

7 The learned judge continued:

"The husband says that the wife should have a home at £180,000 but that the home should be left in trust. He offers £300 per month for both the children in total and £500 per month for two years plus £250 for the third year for the wife with no capitalization.

Peter Alink's case is that he has been joined as the protector of the trust to consider the other beneficiaries' interests. He says that the purpose of the trust is to provide for the four children despite its strict wording and it cannot be right that this is treated as a case where, as submitted by the wife, the trust does not exist. He says that the welfare of the children is safeguarded by the trust, that this was the purpose of the trust and that my first consideration is the children's welfare. However, there should be no disadvantage to the wife. Can it really be that the wife can have a copper-bottomed security against the trust and that the husband is relieved of his responsibility to pay maintenance for his family? In any event, the protector submits that the distribution should not exceed 50% of the trust assets.

The first question then is whether this is a post-nuptial settlement capable of variation, bearing in mind that this is a discretionary trust. Under s.24(1)(c) of the Matrimonial Causes Act, the court may make an order varying for the benefit of the parties and children any ante- or post-nuptial settlement made on the parties to the settlement. Robin Spons Smith helpfully advised that this is considered in the well-known case of *Brooks* v. *Brooks* ([1995] 2 FLR 13). In the course of his leading judgment Nicholls, L.J. referred to the context of the settlement, namely that this 'must be one which provides continuing support for the parties with or without the children ...'

It seems that the interests which were created for the wife, the husband, Peter Alink and the children are concurrent and discretionary. Following the clear guidance given by Nicholls, L.J., this is manifestly a post-nuptial settlement which is capable of variation. It specifically includes husband and wife, and excludes ex-husband and ex-wife. The nuptial element is as clear as it can be."

8 Finally, the learned judge comes to the following conclusion:

"If the settlement is not varied, the wife will have none of the matrimonial assets. It is true that I could create a petition of the trust with the wife as a life tenant but this would give the wife no capital interest and, upon ceasing to be the settlor's wife, she would no longer be a beneficiary under the existing trust. I toyed with the idea of dealing with it in this way.

However, in the light of the circumstances of this case, the disadvantage caused to the remaining beneficiaries by varying the trust does not outweigh the injustice caused to the wife by leaving her without a capital interest. It is therefore necessary for the settlement to be varied to do justice to the wife's case. Of course,

> only the Royal Court in Jersey will vary it, and the Jersey advocate has led me to believe that they will."

9 In reading this, the court takes the view that where the learned judge says that "only the Royal Court in Jersey will vary it," he meant "will" in the sense of "capable of" or "is able to," rather than in the sense of "must." On this interpretation, no possible offence can be taken.

10 The decree absolute was granted in either June or July 2001, so that Mrs. McBarnett was no longer a beneficiary of the trust, and this was followed on August 23rd, 2001 by the representation which is now before the court. No explanation has been provided as to why the decree absolute was obtained. The representation came before the court on December 10th, 2001, and was then adjourned, there being insufficient information for any decision properly to have then been made. It comes before the court again today. The trustees, quite properly, placed themselves in the hands of the court, having sought to place all relevant information before the court.

11 Advocate Pearmain for Mrs. McBarnett submitted that the judgment of the High Court should be recognized, or effect given to the order in Jersey. He relied on two grounds. First, he submitted that the court had power to grant the order under art. 47 of the Trusts (Jersey) Law 1984 or, alternatively, or in conjunction with and in recognition of the doctrine of comity of courts. Article 47 reads as follows:

> "(1) A trustee may apply to the court for direction concerning the manner in which he may or should act in connexion with any matter concerning the trust and the court may make such order, if any, as it thinks fit.
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> (2) The court may, if it thinks fit—
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> (a) make an order concerning—
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> ...
>
> (iii) a beneficiary or any person having a connexion with the trust;
>
> (b) make a declaration as to the validity or the enforceability of a trust; ..."

12 He accepted, on the authority of *T* v. *T* (5), that the learned judge would not expect automatic enforcement of the order in Jersey. On the other hand, it was clear from art. 8A of the Trusts (Jersey) Law 1984 (as amended) that this was the only specific legislation requiring the court to disregard foreign law.

13 What was necessary here, he submitted, was to give proper consideration to the finding and its reasons and, specifically, whether the

order went further than was necessary. The court in England went into the facts and background in some detail. It was clear that it had not exercised any excessive or unfair discretion in deciding that the necessity to provide capital to Mrs. McBarnett outweighed any disadvantage to the other beneficiaries. The court should therefore exercise its discretion and follow the finding of the English court.

14 He canvassed the possibility of the application proceeding under art. 43 of the Trusts (Jersey) Law 1984 but ultimately and, in the view of the court, correctly, conceded that this was not an avenue open to the court in this case.

15 Alternatively, he suggested that the court, exercising its discretion as a trustee, might vary the provisions of the trust deed under art. 21(1) of the trust deed, in a way which the trustee considers to be of benefit to the beneficiaries. Although Mrs. McBarnett is not presently a beneficiary it might, he submitted, be possible under art. 6(1) of the trust deed to write Mrs. McBarnett in as a beneficiary, with or without the assent of the protector. The difficulty here is that, although Mrs. McBarnett is not an "excluded person" as defined in the schedule, she will be an "excluded person" under the terms of the settlement as a former wife (see art. 1(6)). The court is not attracted by this argument, and in the present circumstances does not consider this an appropriate route to follow.

16 In continuance of his earlier submission, Advocate Pearmain submitted that, in deciding how to exercise its discretion, the court should give weight to the doctrine of comity of courts which has recently been considered in Jersey, and that this was an appropriate case in which to do so. In particular, he relied on *Lane* v. *Lane* (2), the headnote of which reads (1985–86 JLR at 49–50):

> "**Held**, granting relief to the plaintiff:
>
> (1) Where on the matter before the Royal Court, there was a declaration of a competent English court, properly made, submitted to by the same parties and not appealed, the doctrine of comity required that the declaration of the English court be given effect to, provided that it was clear that the defendant had had every opportunity to raise all relevant defences at that hearing. That being the situation here, the claim that the deceased was at fault due to his delay could not now be made and the agreement to transfer and the order of the English court were conclusive between the parties ...
>
> (2) Since the property was jointly owned by the defendant and her husband, then during their joint lives each had the right to enjoy the whole of the property; that right was an *immeuble* which could only be altered by a *contrat*, and the original agreement between the defendant and her husband that the defendant would transfer her

> interest in 'Cramond' to him did not therefore operate to vest that interest in her husband. However, on his death the right of survivorship did operate to vest in the defendant the whole interest in the property ...
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> (3) Even so, the original agreement which formed a part of the financial provisions on divorce was to be treated as a contract for the conveyance of property of which the defendant was in breach, and although the right of the original transferee was of an *in personam* character, it was transmissible and on his death it had passed to the plaintiff as his heir and was enforceable by her ...
>
> (4) Therefore, although the whole title to 'Cramond' had now vested in the defendant and strong arguments would be needed to remove it from her, the court's general power to remedy a wrong done—the general French 'equité' rather than the more formalised English 'equity'—required it to enforce the agreement and order the conveyance of the property to the plaintiff in line with the declaration of the English court ..."

17 Lastly, he referred to *SP* v. *AJP* (4), a case in which a wife had an order which was neither registerable under the Judgments (Reciprocal Enforcement) (Jersey) Law 1960 nor under the Separation and Maintenance Orders (Jersey) Law 1953. In that case, the court made reference to the remarks in *Lane* v. *Lane* (2): "So far as the doctrine of comity is concerned, the Royal Court recognizes that if it can, it will follow that doctrine." The court also referred to the remarks of Sir Godfrey Le Quesne in *Solvalub Ltd.* v. *Match Invs. Ltd.* (3), a case concerning *Mareva* injunctions, as well as to the attitude of the court in *F* v. *H* (1), a case where, in the circumstances, the court had had no hesitation in making a mirror order in respect of children. He therefore submitted that taking these decisions into account, as well as the wide provisions of art. 47, the court should make an order confirming the terms of the finding of the High Court.

18 Advocate Renouf, appearing for various minor children, raised an interesting and potentially fatal objection to the application. In an application under art. 47, the court is standing in the shoes of the trustees. Therefore, although the trustees could make a payment to a beneficiary, Mrs. McBarnett is not a beneficiary and is excluded, being a former wife as a result of obtaining the decree absolute. Had she been a beneficiary, there was little doubt but that the court would have made the order sought. The problem now is that neither the trustees nor the court have the power to make such an order. In other words, the court cannot do what the trustees cannot do. The court could make an order in favour of the McBarnett children but this, of course, was not what the court in England had ordered; and indeed it was questionable whether such an order would be proper given the information before the court.

19 He further submitted that, so far as *Lane* (2) was concerned, it did not apply here as it was an agreement between the deceased and the applicant and from the moment of the agreement there was a constructive trust. Here, there was only a court judgment against Mr. Alink in respect of property which belonged to others and in which he only had an interest. Thus, although it might be hard on Mrs. McBarnett, the children were entitled to benefit from an action, whether taken deliberately or otherwise, by which she had excluded herself from the trust and no longer fell within the confines of art. 47(2)(a)(iii).

20 There is force in this argument. The court, however, takes the view that it should consider the position as it stood on May 3rd, 2001, when Mrs. McBarnett was clearly a beneficiary. Had the application come before the court then, the court, given the authorities put before it, and the circumstances of the case, would have had no hesitation in making the order sought. Both art. 47(1) and the doctrine of the comity of courts would, in this case, where careful consideration had been given to the circumstances, have led the court to make the order sought by Mrs. McBarnett. In *Lane*, the delay in enforcing the order was forgiven—if that is the right word—by the court and, in the view of the court, the position, despite the assets being trust assets, is no different here.

21 In the view of the court, the mere obtaining of the decree absolute after the finding of May 3rd, 2001 (when Mrs. McBarnett was still a beneficiary) is not sufficient to disqualify her, and the terms of art. 47(1) are not so confined by art. 47(2) as to prohibit the court from making the order sought. The court therefore has no hesitation in ordering that (a) the trustees pay the sum of £200,000 to Mrs. McBarnett; (b) the injunctions set out in the Order of Justice as amended be lifted; (c) the trustee be granted its indemnity costs and expenses incurred of and incidental to this representation and in the English proceedings, payable out of the trust; (d) the 1st, 2nd and 3rd respondents be granted their indemnity

costs incurred in and incidental to this representation, payable out of the trust; and (e) the 6th, 7th, 8th, 10th, 11th, 12th, 16th, 17th and 18th respondents be granted their indemnity costs incurred in and incidental to this representation, payable out of the trust.
Order accordingly.