**IN THE GRAND COURT OF THE CAYMAN ISLANDS**
**FINANCIAL SERVICES DIVISION**

**CAUSE NO: FSD 277 OF 2022 (IKJ)**

**IN THE MATTER OF SECTION 48 OF THE TRUSTS ACT (2021 REVISION) AND ORDER OF THE GRAND COURT RULES**

**AND IN THE MATTER OF A TRUST KNOWN AS THE K TRUST**

**IN COURT**

**Appearances:**

Ms. Rachael Reynolds KC and Deborah Barker Roye of Ogier (Cayman) LLP for the Trustee

**Before:** The Hon. Justice Kawaley

**Heard:** 17 January 2023

**Judgment Delivered:** 17 January 2023

**HEADNOTE**

*Ex parte Originating Summons-application for trustee for a confidentiality order-whether substantive hearing should be on notice to beneficiaries-governing principles-Trusts Act (2021 Revision), section 48*

**The Application**

1. The Trustee by an Ex Parte Summons dated 29 November 2022 seeks a Confidentiality Order, which essentially requires that any judgment or order pursuant to the Summons to appear in anonymized form and that all information relating to the Summons, including the anonymized Summons, Affidavits, Exhibits and Submissions should be kept confidential, and that the Court file be sealed. In addition, the Trustee seeks Orders that the Summons be heard in private and that directions be given as to who should be served with the Summons and who should appear.

2. The substantive relief that is sought involves making distributions to beneficiaries that modify to some extent the most recent letter of wishes and also seeks approval of the decision to treat the exclusion of a beneficiary as lawful, effective and conclusive. Ms. Reynolds made it clear that the Court was not actually being asked to decide that the exclusion is actually lawful, effective and conclusive. Finally, the substantive relief includes approval for the Trustee's decision about the status of a particular beneficiary.

**The legal basis of the application**

3. The confidentiality and service directions are actually sought today and the application is in fact being made, as such applications frequently are, under section 48 of the Trusts Act (2021 Revision)[1]. That section clearly provides a very broad jurisdiction to give advice and directions to

[1] Section 48 provides:

"***Application to the Court for advice and directions***
*48. Any trustee or personal representative shall be at liberty, without the institution of suit, to apply to the Court for an opinion, advice or direction on any question respecting the management or administration of the trust money or the assets of any testator or intestate, such application to be served upon, or the hearing thereof to be attended by, all persons interested in such application, or such of them as the Court shall think expedient; and the trustee or personal representative acting upon the opinion, advice or direction given by the Court shall be deemed, so far as regards that*

trustees, to which I accept entirely is far broader than the equitable *Public Trustee-v-Cooper*[2] jurisdiction in relation to, in particular, 'the blessing of momentous decisions'. And so in large part the rationale for the most controversial aspects of the application, as I consider them to be, namely not giving notice of this application to the beneficiaries, is that the decisions that are proposed to be made at this point are not final decisions adversely affecting the rights of anybody in such a way that would give rise to them having reasonable expectation of being heard. If the trustees are instead seeking to take preliminary steps by way of laying the groundwork for making more substantive decisions about the administration of the Trust later, then it would be at that later stage, which is not expected to be in the distant future, that it is accepted that the beneficiaries would have to be heard.

4. One of the decisions involves the controversial question of whether certain investigations into the conduct of one of the beneficiaries should be continued or discontinued. The Trustee, in its evidence, has very rationally in my judgment expressed concern about the potential for family discord. It therefore is very persuasive to me that the Trustees should be permitted to take preliminary steps and putting off the need to notify the beneficiaries of their final decisions until those decisions have actually been reached. They have not, to date, been reached.

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*person's own responsibility, to have discharged that person's duty as such trustee or personal representative in the subject matter of the said application:*
*Provided, that this shall not indemnify any trustee or personal representative in respect of any act done in accordance with such opinion, advice or direction as aforesaid, if such trustee or personal representative shall have been found to have committed any fraud, wilful concealment or misrepresentation in obtaining such opinion, advice or direction, and the costs of such application as aforesaid shall be in the discretion of the Court.*"

[2] [2001] W.T.L.R. 901.

**Circumstances in which trustees can seek directions from the Court without giving notice to or joining beneficiaries**

5. The law in relation to Confidentiality Orders is well settled in this jurisdiction and the only points which are somewhat unusual are those relating to when notice should be given to beneficiaries of applications for directions by trustees. As regards the issue of confidentiality, *Re Londonderry Settlement*[3] decided, as long ago as 1964, that beneficiaries did not have the right to see all information relating to the administration of a trust, but only such information that was relevant to their interest. In particular, as is clear from the judgments in that case of Harman LJ[4] and Danckwerts LJ[5], that where the trustees are seeking to protect the family from discord by concealing the reasoning behind their actions, that type of information is not information to which beneficiaries are automatically entitled.

6. As regards to the question of when beneficiaries should be joined, various Jersey cases were referred to in the Trustee's Skeleton Argument and they include *In the Matter of the B, D & C Settlements* [2011, JLR 236] and also *In the Matter of the E,R, O & L Trusts*[2008 JLR Note 17]. And *In the Matter of a Settlement* [1994 JLR 139], Deputy Bailiff Bailhache (as he then was) said this (at pages 144-145):

> "*The court agrees that it has a discretion to permit the joinder of one or more beneficiaries as party to applications for directions made by trustees under art. 47 of the Law and proposes to exercise its discretion in favour of the beneficiaries in this case. The court is not, however, prepared to go so far as to decree that as a matter of practice the beneficiaries should always be joined as parties to such applications. Much will depend*

[3] [1965] Ch 918.
[4] At page 931D.
[5] At page 935F-G.

*upon the circumstances surrounding the proposed application. It is true that the beneficiaries will usually be interested in the outcome of an application for directions; and the court would be surprised if trustees did not generally take it upon themselves to consult with, or at least to apprise, the principal beneficiaries of an intended application to the court under art. 47 of the Law. If trustees were aware of any dissenting views amongst the beneficiaries they would, of course, have a duty to draw such views to the attention of the court. If the court is to exercise the discretion surrendered by a trustee by virtue of its application for directions, it must be put in possession of all the relevant material with which it requires to exercise that discretion. Such material would undoubtedly include any dissenting views expressed by a beneficiary. In such circumstances, it is inconceivable that the court would not wish to give such a beneficiary the opportunity of being heard in relation to the trustee's application. It would seem desirable, therefore, that the trustee should take steps to join any beneficiary who had expressed dissenting views or indeed who might be adversely affected by the proposed order*…"

7. That passage illustrates the sort of considerations that a court must have in mind when considering whether or not to join beneficiaries to an application under section 48. I am satisfied that the narrow ambit of the present application is such as to justify not in fact joining the beneficiaries, or indeed directing that they should be served. Because the Court is not being asked, when it comes to consider the substantive relief on the Originating Ex Parte Summons, to make a momentous decision, nor indeed to make any decision that is likely to adversely affect any beneficiary to any material extent.

8. The highly strategic, administrative and preliminary nature of the relief that is sought makes it counter-productive to involve the beneficiaries at this stage. It seems to me that the Court should be astute to respect the judgment of professional trustees who are seeking to limit the possibility of

contentious litigation to the maximum extent possible by taking preliminary steps which will lead them to making and formulating more substantive decisions; decisions which, while carrying the risk of controversy, might also perhaps carry the hope that they might be accepted without controversy.

**Conclusion**

9. So, for those reasons, I grant the relief sought, substantially in terms of the draft Order which has been placed before the Court.

**THE HONOURABLE MR JUSTICE IAN RC KAWALEY**
**JUDGE OF THE GRAND COURT**