T Limited
Royal Court
24th April 2017

JUDGMENT
21/2017

In the matter of the A Limited Funded Unapproved Retirement Benefits Scheme and the B Employee Benefit Trust

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

IN THE MATTER OF THE A LIMITED FUNDED UNAPPROVED RETIREMENT BENEFITS SCHEME AND THE B EMPLOYEE BENEFIT TRUST

T LIMITED (AS TRUSTEE) **Applicant**

Date of hearing: 25th July 2016

Judgment delivered: 25th July 2016

Reasons handed down: 24th April 2017

Before: Richard James McMahon, Esq., Deputy Bailiff

Counsel for the Applicant: **Advocate M C Newman**

Cases, Texts & Legislation referred to:

The Trusts (Guernsey) Law, 2007
AD v The C Trust [2010] JRC 001
A, B and C v Rozel Trustees (Channel Islands) Limited [2012] JRC 127
The Royal Court Civil Rules, 2007
In the matter of the A and B Trusts 2007 JLR 444
The Trusts (Jersey) Law 1984
In the matter of the H Trust [2006] JRC 057
In the matter of the R Trust [2015] JRC 267A

Introduction

1. On 25 July 2016, I heard an Application dated 20 July 2016 brought by a professional corporate trustee for various orders. The Application was made pursuant to sections 68, 69 and 71 of the Trusts (Guernsey) Law, 2007 and/or pursuant to the inherent supervisory jurisdiction of the Court over trustees of Guernsey trusts. At the conclusion of the hearing I granted certain orders and briefly outlined my reasons for doing so. I indicated that I would, when time permitted, set out my reasons more fully in writing. It has taken me far longer than I imagined would be the case to do that and so apologise for that delay. This judgment contains those reasons.

2. I have prepared these reasons in an anonymised form on the basis that there were some novel points of law raised by Advocate Newman on behalf of the Applicant, which I consider deserve wider dissemination than a judgment given only in private. In doing so, I have chosen to call the Applicant "T Limited". The Applicant made its Application solely in the capacity it has as trustee of two trusts. The first is a Funded Unapproved Retirement Benefits Scheme in respect of a company I will simply refer to as "A Limited". I will refer to this trust as "the A Limited FURBS" or simply as "the FURBS". The second trust is an Employee Benefit Trust ("EBT") and so I will refer to it as "the B EBT". The hearing very much concentrated on the FURBS, but the position in respect of the EBT is also covered by the relief I granted.

3. The Application was made by T Limited as a result of it being joined as a party to matrimonial proceedings taking place in the High Court of Justice of England and Wales. The parties to those proceedings, which deal with financial remedies on divorce, are a couple, to whom I will refer as "Mr D" and "Mrs D" or as "the Ds" when referring to them collectively.

Procedural matters

4. The first questions I had to resolve at the hearing on 25 July 2016 related to privacy and there being no person convened to respond to the Application.

5. Although this Court generally adopts the principle of justice being carried out in open court, that principle is subject to a number of well-established exceptions. One of those exceptions relates to the hearing of applications for ancillary relief in a matrimonial context. Another exception is where the proceedings invoke the supervisory jurisdiction of the Court in trusts cases. In the circumstances of this case, if matters had arisen in a purely domestic context, the proceedings would have been held in private under either of these heads. The fact that the proceedings are the result of steps taken and orders made in England and Wales did not, in my view, affect that outcome. This approach is consistent with the way that the Royal Court of Jersey has dealt with applications in broadly similar circumstances (eg, *AD v The C Trust* [2010] JRC 001 and *A, B and C v Rozel Trustees (Channel Islands) Limited* [2012] JRC 127).

6. In the first of those two cases, the Royal Court of Jersey noted (at para. 6(d)):

> "*... that it is absolutely necessary that a trustee should be able to come to Court under Article 51 to make a candid appraisal of its position and the problems which are to be addressed. If trustees thought that such Affidavits and applications might be provided to those with hostile eyes upon the trust or the trust fund, they would be less likely to be candid and the whole purpose underlying the Article 51 procedure would be liable to be frustrated.*"

In the second of those cases, a differently constituted Royal Court of Jersey stated (at para. 21):

> "*… the Court considers that it is in the interests of justice that trustees should be able to come before this Court in private, confident in the knowledge that they may speak frankly to the Court and that what is said or produced to the Court and to the other parties to the private proceedings will not be released to third parties or used for purposes other than the private proceedings.*"

The hope that the Family Division would, in the interests of comity, take note of the concerns expressed was added in the following paragraph. The approach in Jersey can, in my view, be applied equally well in Guernsey to this type of application made pursuant to section 68 or 69 of the 2007 Law. Accordingly, I proceeded to hear the Application in private and directed that the Court file should be sealed.

7. The second preliminary issue I needed to address was the decision taken by the Applicant not to convene any other party to the hearing. I was shown a letter dated 15 July 2016, written on behalf of Mrs D, in which her Advocates requested that she be joined to any application by T Limited for directions. That letter referred to the level of protection afforded to Mrs D already by way of various orders made against Mr D and T Limited, and it was notable that the majority of the letter related to proceedings that had been instituted by Mrs D before this Court to obtain injunctive relief against T Limited so as to preserve the assets of the trusts for whatever might be done in relation to them in the financial remedy proceedings underway in England and Wales.

8. Rule 35(1) of the Royal Court Civil Rules, 2007 permits an action to be brought by a trustee without adding as parties any persons who have a beneficial interest in the trust. Although there is an argument that an application for directions by a trustee should not be treated as an action, which by rule 10 requires the tabling of a cause, there appeared to me to be a choice between proceeding with just the trustee present or convening all those who could be said to have an interest in the outcome, which would include not only Mrs D, but also Mr D and any other adult beneficiaries and even potentially someone to represent the interests of other beneficiaries, especially whose position might not be aligned to that of either Mr or Mrs D.

9. I noted that the majority of the cases of this broad type heard before the Royal Court of Jersey had had respondents convened. However, in *In the matter of the A and B Trusts* 2007 JLR 444, there was no respondent and the application for directions was made by the trustee ex parte.

10. I took the view that the position of the Ds, apparent from the evidence placed before me, was such that directing T Limited to give them notice of the Application and then waiting to see what stance, if any, they, and indeed others, wished to adopt, was not necessary. The orders sought by the Applicant, as I will explain in more detail in due course, related to whether or not to submit to the joinder of it in the English High Court proceedings, which was an issue that had already been aired between the Ds in those proceedings and did not necessarily need repetition, and orders about the steps to be taken by the Applicant in response to orders made in those proceedings. In those circumstances, it struck me that the Applicant, as trustee, was seeking guidance in respect of the very orders that had been made following the participation of the Ds in the English proceedings, which were still ongoing, and the Applicant needed to be able to give the Court full and frank disclosure of the materials concerned and to explore the issues raised by them without the parties affected by the Applicant's role in the English proceedings being privy to those materials. In effect, if the Ds were given the material in the context of these proceedings the Applicant would have indirectly complied with certain aspects of the disclosure orders made anyway. In those circumstances, whilst recognising that it was an unusual course to adopt, I was satisfied that I should hear the Application without anyone on behalf of the beneficiaries having been notified.

Facts

11. The evidence in support of the Application was contained in an Affidavit sworn by a senior trust manager of T Limited, to which a raft of documentation was exhibited. That Affidavit was made with authority of two further companies, one of which, M Limited, is a wholly owned subsidiary of T Limited and is the corporate director of a company registered in the British Virgin Islands, C Limited. I will summarise the position as briefly as I can.

12. Before doing so, I feel the need to make a general comment about the form of the affidavit evidence. No effort had been made to avoid what can only be described as unnecessary replication of the documents across the substantial exhibit. There were multiple copies of some of the documents and, however important they might have been, there was no justification for an approach that failed to edit down the exhibits in such a way that there was only one copy of each document included. If necessary, inserting a page to show where the document appears in another place in substitution for what would be a duplicate of that document would be a practical approach. In my view, it is desirable for those preparing affidavits to remember that the deponent is endeavouring to assist the Court. Simply copying indiscriminately all documents referred to in their original form without thinking more carefully about how it would be easier to digest that person's evidence if those documents were marshalled differently is not as helpful as it could be. In future, some attempt really ought to be made to present affidavit evidence in a readily manageable way.

13. The B EBT was created by an instrument dated 21 December 1996 made between A Limited and Original Trustees who did not include T Limited. The copy of the instrument I have seen appears to have been signed on behalf of A Limited by both Mr and Mrs D. The Beneficiaries are stated to be the directors, other employees and former employees from time to time of A Limited and the wives, husbands and widows, widowers, children, step-children, adopted children and the spouses and former spouses (whether or not remarried) of such children and "*remoter issue of all such*". The deed is to be construed in accordance with the law of England. A Sub-Trust was created on 1 July 2002. In the Sub-Trust, the Beneficiaries of the B EBT are referred to as the Members and two Principal Beneficiaries are identified, being Mr D and one other person, but the definition extends *inter alia* to a Principal Beneficiary's wife, widow, children and remoter issue.

14. The A Limited FURBS was created by an instrument of settlement dated 5 July 2001, between the Original Trustees, again being an entity different from T Limited, and A Limited, in which A Limited is referred to as "*the Principal Employer*". By an Instrument of Retirement and Appointment of Trustee dated 15 April 2010, the entity that was the Original Trustees was replaced and by a Deed of Appointment, Retirement and Indemnity dated 29 July 2015, T Limited replaced that entity as the trustee of the FURBS. The recitals to that later Deed record *inter alia* that the Protector of the FURBS had been removed in June 2012 and that A Limited, ie, the Principal Employer, had been struck off the Register of Companies House and dissolved on 19 May 2009. The corporate trustee at that time had passed a resolution on 20 June 2012 accepting a letter received from Mr D requesting that the protector be removed.

15. The assets held by the FURBS are substantial, including a number of properties used by the Ds, many, although not all, of which are held by or through C Limited. C Limited was incorporated in the British Virgin Islands in July 2002. The one issued share in C Limited is held by T Limited within the FURBS. T Limited, as trustee of the FURBS, owns other shares as well, through which specific properties are owned. I have not differentiated between those various companies because it is only C Limited that has been made subject to an order by the High Court.

16. In 2005, A Limited transferred all of its assets to E Limited. T Limited, as trustee of the FURBS, owns the entirety of the Class C shares in E Limited. On 20 September 2005, A Limited resolved that it would transfer to E Limited "*all obligations, responsibilities and duties of the sponsoring employer for the [A Limited] FURBS*". By a resolution of the same date, E Limited agreed to take these over. Both Ds are recorded as being present at each meeting, with Mr D signing as Chairman. Mrs D has stated that she was not present at either meeting. On 30 September 2005, an adviser to Mr D sent an e-mail explaining that A Limited was ceasing trading and its business and assets were being "*hived up to the holding company*".

17. The matrimonial proceedings between the Ds were commenced in September 2015. There was much subsequent correspondence between the solicitors and Advocates acting for the Ds and T Limited and I will be quite selective in respect of what I will mention. During this period, T Limited also took advice from English Counsel.

18. By a letter dated 11 May 2016, the solicitors acting for Mr D provided to the solicitors acting for Mrs D copies of three documents recently executed that related to the FURBS. The first was a Deed of Amendment dated 10 May 2016. This Deed noted that the corporate entity that had been the first protector of the FURBS had been removed by the Member (ie, Mr D) in June 2013 (although it appears that is an error and it should have referred to 2012 instead), so that amendments could be made without protector consent pursuant to Clauses 11.2 and 13.1. The amendments made were to insert Clauses 17.1(e) and 13.3. The second was an Instrument of Determination dated 10 May 2016, by which T Limited exercised the power contained in Clause 14.2 to clarify the meaning of some words in Clause 13.1 and confirmed that there was no Principal Employer at the time the Original Trustees left office and also when T Limited assumed the trusteeship, and finally it confirmed that payments had been received from E Limited and held on the terms of the FURBS. The third was a Deed of Appointment of Principal Employer and Confirmation of Payments dated 11 May 2016. Using the newly inserted power in Clause 17.1(e), T Limited declared that E Limited was the new Principal Employer and E Limited accepted that appointment and agreed that the payments made by it had been based on the mistaken belief that it was already the Principal Employer. All three instruments state they are governed by and to be construed in accordance with the laws of Guernsey.

19. On 27 May 2016, Mrs D applied ex parte *in camera* in this Court for an injunction against T Limited restraining it from taking certain action in respect of the FURBS and the EBT. This application sought to mirror relief already obtained from the High Court on 13 May 2016. The part of the application seeking ancillary disclosure orders was adjourned to 3 June 2016, but the restraining interim order was made by the Bailiff. That order was served on T Limited later the same day. Mrs D's affidavit in support of her application was exhibited in full to the Affidavit in support of the Application of T Limited. Some of its contents have been used to fill in gaps in what is relevant to this Application but I do not consider it necessary to describe every exchange of correspondence in the matrimonial proceedings. A Consent Order dated 3 June 2016 was then made by which T Limited was ordered to serve copies of the documents to which it considered Mrs D was entitled and would also "*make available the original Trust Deed dated 5 July 2001 for inspection by the single joint handwriting expert*". The deadline for compliance was 10 am on 20 June 2016.

20. An order made by a judge in the High Court dated 23 June 2016 was served on T Limited on 7 July 2016. Pursuant to that order, T Limited and C Limited have been joined as respondents to the matrimonial proceedings involving the Ds. Having been joined, T Limited has retained a firm of solicitors to represent it. It was as a result of being joined to those proceedings that the Applicant sought directions from this Court.

21. The Advocates of T Limited received a letter dated 4 July 2016 from Mrs D's solicitors, which enclosed her Amended Form A. Among the orders sought by Mrs D is a variation of both trusts and/or a pension sharing order in respect of the FURBS. On the same date, an unsealed copy of the judge's order of 23 June 2016 was provided to the solicitors acting for T Limited. The joinder order is at para. 13 and para. 15 affords both T Limited and C Limited liberty to apply, if so advised, for the setting aside of the Order and their removal as parties to the proceedings. The time for T Limited doing so was stated to be 14 days from the date of service of the Order, with an additional 10 days for C Limited. By para. 18, it was ordered that T Limited and/or C Limited must serve replies to a number of specified questions in the questionnaire of Mrs D by 4 pm on 22 July 2016, albeit with some relaxation of the terms of the order to avoid duplication if Mr D provided full answers to certain of those questions. Again, both T Limited and C Limited were given liberty to apply. Paragraph 22 ordered that T Limited "*shall send forthwith by secure post the Original FURBS Trust Deed dated 5th July 2001*" to a named handwriting expert, so that the report already directed by an earlier order could be prepared, and para. 23 extended the time for preparation and service of that report to 4 pm on 22 July 2016. In para. 9, the recitals include reference to the Consent Order made on 3 June 2016, and also that Mrs D had suggested that T Limited may wish to take a notarised copy of the original deed while the original is in the possession of the expert and that the expert had offered to give undertakings to secure and protect the trust deed whilst it is in his care and control.

22. On 5 July 2016, the solicitors of T Limited informed Mrs D's solicitors that the firm would accept service on behalf of T Limited and C Limited. The same day, the solicitors acting for Mr D provided to the Advocates of T Limited a copy of the Order, which included the questions to be answered by T Limited and/or C Limited, adding that it would be helpful if they might also consider a couple of extra questions.

23. On 7 July 2016, Mrs D's solicitors were enquiring whether T Limited did wish to take a notarised copy of the FURBS trust deed before it was despatched to the expert and indicated that the undertakings offered by the expert were available. The solicitors of T Limited were given copies of more documents by Mrs D's solicitors by way of a letter dated 8 July 2016. Those documents included the Skeleton Argument on behalf of Mrs D relating *inter alia* to the issue of joinder. By a letter dated 12 July 2016, the solicitors acting for Mr H provided a copy of Leading Counsel's Note in which, *inter alia* he addressed the issue of joinder.

24. Following various further exchanges of correspondence between the respective solicitors, which do not appear material, the solicitors acting for T Limited wrote to the other firms on 18 and 20 July 2016 respectively indicating that T Limited was not then minded to apply to set aside the joinder but that it could not submit to the jurisdiction of the English court without seeking the sanction of this Court. Accordingly, a request was made for an extension of time to be agreed by which an application to set aside could be made on behalf of T Limited. By the time of swearing the Affidavit, no responses had been received to these letters.

Provisions of the FURBS

25. The deed in respect of the FURBS sets out how arrangements for how this trust operates. I understand that there were certain tax advantages associated with a FURBS, but that these have now largely disappeared. As Counsel's advice commented, the FURBS was intended as a form of pension plan for Mr D, and for any other employee of the Principal Employee who might be admitted to Membership of it. The distinctive nature is shown by Clause 4.1:

> "*The Trustees shall hold each Member's Interest notionally separate from the balance of the Fund and upon trust in each case for or in respect of the Member subject to the provisions of this Deed.*"

Mr D was identified in the schedule to the Rules as the initial Member and I understand that no other Member had been appointed. In effect, the whole of the Trust Fund was held under the terms of the FURBS for Mr D as the sole Member. Clause 20 provides that "*a Member shall not be empowered to influence or determine the exercise of any of the powers that are vested in the Trustees*". Clause 21.2 provides that "*the benefits to be provided under the Scheme shall be exclusively Relevant Benefits*". That term is one of those defined in the Rules of the Scheme, and Clause 2.1 provides that the definitions in the Rules apply. Accordingly, "*Relevant Benefits*" are "*relevant benefits defined in Section 612(1) of the Taxes Act*". This is the interpretation provision of Chapter I of Part XIV of the Income and Corporation Taxes Act 1988, and it defines "*relevant benefits*" as "*any pension, lump sum, gratuity or other like benefit given on retirement or on death, or in anticipation of retirement, or, in connection with past service, after retirement or death, or to be given on or in anticipation of or in connection with any change in the nature of the service of the employee in question, except that it does not include any benefit which is to be afforded solely by reason of the disablement by accident of a person occurring during his service or of his death by accident so occurring and for no other reason*". The necessary nexus to Mr D's employment is quite clear as a result of these definitions.

26. Clause 17 deals with a change in the Principal Employer. There were originally four situations covered in Clause 17.1. The first relates to the Principal Employer going into liquidation. The second relates to the Principal Employer's undertaking being acquired by, or vested in, any other body corporate. The third relates to the Principal Employer being dissolved by virtue of, or pursuant to, any statutory provision or any order of the court. The fourth relates to circumstances other than these three if another body corporate enters into an agreement with the Trustees and the Principal Employer (or its liquidator). A Limited entered into a sale and purchase agreement with E Limited in September 2005. A Limited was not dissolved until June 2009. However, its undertaking had been acquired by E Limited in 2005, so the steps relating to liquidation and dissolution were not the operative steps affecting the change in Principal Employer. There was no written agreement at the time for E Limited to perform the obligations under the FURBS of Principal Employer. This led to a doubt as to whether clause 17.1(b) had been satisfied:

> "*the Principal Employer's undertaking being acquired by (or vested in) any other body corporate and such other body corporate either entering into an agreement with the Trustees and the Principal Employer (or its liquidator), or being bound by virtue of (or pursuant to) any statutory provision or any order of the court made under it (or otherwise), to perform the said obligations*".

Indeed, when the Original Trustees retired in 2010, recital (F) recorded that "*the Principal Employer was struck off the Register of Companies House and was dissolved on 19 June 2009 and accordingly cannot give its consent or participate in the resignation or removal of the Retiring Trustee and the appointment of the New Trustee*", from which it is apparent that the Original Trustees did not acknowledge that E Limited had replaced A Limited as the Principal Employer.

27. As a result, the Deed of Amendment dated 10 May 2016 made by T Limited inserts as Clause 17.1(e) a fifth situation: "*the Trustee declaring by an instrument in writing that a new body corporate shall be appointed as Principal Employer*". Exercising that power, on 11 May 2016, T Limited declared that E Limited "*shall be the Principal Employer from the date hereof*". The Instrument of Determination dated 10 May 2016 states that T Limited was exercising the power contained in Clause 14.2 to:

"*(a) Clarify that the words 'after consultation with the Member' in Rule 13.1 mean 'or a date later than the Normal Retirement Date, as agreed between the Trustee and the Member';*

(b) Confirm that there was no Principal Employer at the time of the First DORA and the Second DORA were executed, and that the First DORA and the Second DORA were therefore valid; and

(c) Confirm that the Payments have been held since they were paid on the terms of the FURBS and for the benefit of the Scheme Member".

This Instrument also states:

"*The Current Trustee and the Scheme Member confirm that their current intention is for the Scheme Member's rights under the FURBS to continue to accrue and that his pension will be provided at the Pension Date (such date to be decided at some time after the date hereof after consultation between the Scheme Member and the Current Trustee or its successor.)*"

28. Clause 14 of the trust instrument of the FURBS provides:

"*14.1 The provisions of Clause 14.2 shall have effect subject to the powers expressed to be exercisable by the Protector, Principal Employer or the other Employers under this Deed and save insofar as set aside or varied by any court of competent jurisdiction.*

14.2 The Trustees shall have full power conclusively to determine whether or not any person is entitled to any of the benefits from time to time payable under the Scheme and the amount of any such benefit, and also conclusively to determine all questions and matters of doubt arising under or in connection with the Scheme and the Fund and whether relating to the construction thereof or otherwise any such determination shall be binding on all interested parties."

I did not have to decide whether T Limited could properly exercise the power under Clause 14.2 in the way it had. Whether or not there were any "*questions and matters of doubt*" is something for another day, but it appears to have been common ground that there was no Principal Employer in 2010 and 2015. The validity of the two instruments resulting in T Limited becoming the trustee of the FURBS is really for judicial determination rather than something on which T Limited alone can rule. Similarly, the meaning of the words in Rule 13.1 can be adjudicated upon differently if a court reaches the conclusion that it cannot properly be construed in the way T Limited says it will be.

29. Rule 13.1 provides:

"*If a Member ceases to be in Service (otherwise than by death) before Normal Retirement Date then (unless he takes an immediate pension pursuant to the provisions of Rule 11) his Member's Interest shall be applied at Normal Retirement Date (after consultation with the Member) to provide a pension commencing at that date, secured in the manner set out in Rule 17.6 and subject to the provisions of Section E of the Rules.*"

The clarification in the Instrument of Determination could be regarded as amounting to a re-writing of Rule 13.1 so that what would already be a deferred pension, payable from Normal Retirement Date, can be further deferred to a later date agreed between the Trustee of the FURBS and the Member. In any event, one way of reading the clarification is that there must be a date fixed by agreement at or before Normal Retirement Date at which the pension will subsequently become payable, rather than it being capable of being left open.

30. The words "*after consultation with the Member*" appear in a number of places in Section D of the Rules. It seemed slightly odd to me that T Limited would seek to clarify the meaning of these words solely in Rule 13.1 when it is a phrase used in other contexts as well. For example, Rule 10 contains the "standard" position:

> "*On retirement from Service at Normal Retirement Date, the Member's Interest shall be used by the Trustees (after consultation with the Member) to provide the Member with a pension payable in accordance with the provisions of the Letter of Announcement, secured in the manner set out in Rule 17.6 and subject to the provisions of Section E of the Rules.*"

The process of consultation still leaves the actual decision with the trustee. The clarification to Rule 13.1 implies that a further deferral of a pension that would otherwise be payable at Normal Retirement Date following the Member leaving Service before that date requires both the trustee and the Member to agree what the new date for payment of the pension will be. In the absence of any agreement, it seems that the pension must become payable at Normal Retirement Date. Consultation is a different concept from agreement and it did appear strange that consultation in Clause 13.1 could be read in the way now determined by T Limited.

31. The position of a Member who continues in Service is already dealt with by Rule 12, which provides:

> "*If a Member remains in Service after Normal Retirement Date, he shall arrange with the Trustees to postpone drawing his pension under the Scheme until the date of his actual retirement from Service whereupon the Member's Interest shall be used by the Trustees (after consultation with the Member) to provide the Member with a pension, secured in the manner set out in Rule 17 and subject to the provisions of Section E of the Rules.*"

It is possible that Mr D will argue that he has remained in Service for the purposes of the FURBS throughout and that his intention now is to continue in Service indefinitely, in which case this Rule 12 would operate to defer any pension entitlement he has.

32. Rule 3 contains various definitions of terms used in these Rules. "*Service*" means "*continuous service with the Employers as an Employee in the United Kingdom or such other territory or territories as the Principal Employer may determine. For the purposes of the Rules a transfer from one or another of the Employers shall not be construed as termination or interruption of Service.*" The word "*Employers*" is defined as "*the Principal Employer and every Associated Employer or such one or more of them as the context shall determine or the circumstances require and 'Employer' in relation to any person means whichever it is of the Employers in which employment that person is or was at the relevant time or those Employers (if more than one) in whose employment he has been during the relevant period.*" This involves looking further at the definition of "*Associated Employer*", which means "*any company or undertaking which is directly or indirectly controlled by or associated in business from time to time with the Principal Employer or its holding company and which has covenanted in the terms set out in Clause 12 of this Deed and 'associated' means the relationship between employers when one is controlled by the other or both are controlled by*

a third party and 'control' has the meaning attributed to it in Section 840 of the Taxes Act of the United Kingdom or in the case of a close company Section 416 of the Taxes Act."

33. From the sequence of events I have described, A Limited was the Principal Employer and Mr D worked for that company. E Limited appears to have been its holding company, but there was no suggestion that E Limited had covenanted as required by Clause 12. The May 2016 documents expressly acknowledge that there was no Principal Employer until 11 May 2016 at the earliest when T Limited exercised the newly inserted power in Clause 17.1(e) to declare E Limited as Principal Employer. There was, therefore, a long gap when there was no Principal Employer and so a time when Mr D may well not have been in continuous service with an Employer, as so defined. If that argument were to succeed, Mr D would be unable to rely on Rule 12.

34. Rule 25 makes provision for the winding up and distribution of the Fund in a number of circumstances, one of which relates to there being no such agreement as is referred to in Clause 17.1(b). Given the documentation created in May 2016, the inference is that this circumstance had already arisen, but the power contained in Rule 25 was not exercised, although, according to Rule 25.2, it may still exist. If it does exist, it is something that could potentially be of use in resolving the matrimonial proceedings. It is unclear, however, how this power sits with the construction being given to Rule 13.1 by T Limited. Similarly, Rule 14 provides that "*a Member who ceases to be in Service (otherwise than by death) may elect to receive all or part of the Member's Interest as a lump sum*", which may similarly be of assistance in the matrimonial proceedings.

35. Rule 16 deals with death benefit lump sums: "*On the death of a Member prior to the application of the Member's Interest in the purchase of a pension there shall become payable the Member's Interest in lump sum form. Such lump sum shall be held by the Trustees upon the trusts specified in Rule 18.*" Rule 18 provides:

> "*18.1 A benefit which is expressed to be held upon the trusts of this Rule 18 shall be held by the Trustees upon trust with power to pay or apply the same within two years from the date of the relevant Member's death to or for the benefit of or by way of settlement or otherwise to trustees for the benefit of any one or more of the Member's Beneficiaries in such shares and proportions (if more than one) and upon such trusts and in such manner generally as the Trustees shall in their discretion appoint.*
>
> *18.2 In the event that there are no Beneficiaries in existence at the death of the Member, the Trustees shall hold the benefit upon trust for such Charities as the Trustees shall for this purpose by deed or deeds before the Ultimate Dissolution Date appoint.*"

In Rule 3, the definition of "*Beneficiary*" is *inter alia* "*the spouse of the Member or any … descendant (however remote) of the Member*" and spouse includes wife and any former wife. Accordingly, the interest of someone like Mrs D in the Fund (or that part of it that represents the Interest of Mr D) is not the same as Mr D's interest as the Member, but arises if he died before the application of that Interest in the purchase of a pension, at which time Mr D's Interest is held as a lump sum upon the trusts described in Rule 18. By this stage, the position would be more akin to that within a discretionary family trust.

36. The definition of "*Member's Interest*", in relation to a Member such as Mr D, "*means that part of the Fund which is attributable to a Member (as reasonably and properly determined by the Trustees having taken suitable advice including, if appropriate, that of an Actuary) having regard to the contributions paid in respect of him by his Employer and the investment*

of those contributions and the accumulations of income held as an accretion to capital". Rule 3 also provides that "*'Normal Retirement Date' in relation to a Member means the date of attainment of the age of 55 or any other date which may have been agreed between the Employer and the Member but which date shall not be earlier than the Member's attainment of the age of 50*". Mr D reached the age of 55 before the May 2016 documents were executed. As such, there is an argument that T Limited was bound to give effect to the terms of the trust deed as they stood at that time and Rule 13.1 may fall to be construed historically.

37. As I have already pointed out, my task at the hearing in July 2016 was not to rule on anything to do with how T Limited is to act under the FURBS trust deed and I have only set out the provisions as fully as I have because of the way I found that they impact on the relief actually sought. I have raised some of the points of construction that might become issues in the matrimonial proceedings, but have not attempted to do so exhaustively. The mere fact that these arguments exist are, in my view, sufficient to show that the FURBS is not the same as the more commonly encountered discretionary trust. I will not comment separately on the terms of the EBT because the general principle is the same and my approach to the FURBS covers the situation in which T Limited finds itself. Although the cases to which I was referred, and to which I will turn shortly, deal with discretionary trusts, the terms of the FURBS are such that the role of T Limited as trustee is quite clearly of a different type to that of a trustee of a standard discretionary trust. I regarded it as being important to have that difference at the forefront of my mind.

Discussion

38. At the beginning of the hearing, Advocate Newman sought, and was given, leave to withdraw some of the relief sought by the Application. By confining the extent of the Application to the questions relating to whether T Limited should submit to the jurisdiction of the High Court of Justice and what steps should properly be taken in relation to providing access for the handwriting expert to original examples of Mrs D's purported signatures, it made the decision about not convening any other party simpler.

39. The principal question for my determination was whether or not to sanction T Limited submitting to the jurisdiction of the English High Court. The position adopted by T Limited was that it was prepared to do so, if so sanctioned, and wished largely to remain neutral, being prepared to offer such assistance to that court, consistent with its duties under the FURBS and the B EBT.

40. Section 14(4) of the 2007 Law provides that:

> "*Notwithstanding any legislation or other rule of law for the time being in force in relation to the recognition or enforcement of judgments, no judgment or order of a court of a jurisdiction outside Guernsey shall be recognised or enforced or give rise to any right, obligation or liability or raise any estoppel if and to the extent that –*
>
> *(a) it is inconsistent with this Law, or*
>
> *(b) the Royal Court, for the purposes of protecting the interests of the beneficiaries or in the interests of the proper administration of the trust, so orders.*"

This subsection has not apparently been the subject of judicial analysis by this Court previously. Advocate Newman did not draw any authorities on it to my attention.

41. Article 9(4) of the Trusts (Jersey) Law 1984, as amended, makes similar provision:

> "*No –*
>
> *(a) judgment of a foreign court; or*
>
> *(b) decision of any other foreign tribunal (whether in an arbitration or otherwise),*
>
> *with respect to a trust shall be enforceable, or given effect, to the extent that it is inconsistent with this Article, irrespective of any applicable law relating to conflict of laws.*"

This provision has been the subject of comment in the Royal Court of Jersey. Further, the question of submission to the jurisdiction of the English court has been addressed in some detail by that Court in *In the matter of the H Trust* [2006] JRC 057.

42. That case involved a discretionary trust. A couple divorcing in England were among the beneficiaries. The wife obtained an order joining the trustee to the English proceedings. The trustee then issued a representation seeking directions from the Royal Court of Jersey, one of which related to its decision not to submit to the jurisdiction. The Court's judgment on this question was as follows:

> "*12. Significant consequences may flow from a decision by a trustee of a Jersey trust to submit to the jurisdiction of the Family Division of the High Court ("the Family Division") or indeed any other court considering the matrimonial affairs of beneficiaries of a trust. Any order subsequently made by the Family Division would be made in proceedings to which the trustee had voluntarily submitted and in which therefore it had full opportunity to put forward submissions on the order which the court should make. It follows that the trustee would be in some difficulty in arguing subsequently before this Court against the proposition that any order of the Family Division relating to the Trust should be enforced without re-consideration of the merits of such order.*
>
> *13. Conversely, if the trustee has not submitted to the jurisdiction of the Family Division, any order of that court will not be enforceable in Jersey under the rules of private international law. On any subsequent application to this Court to vary the trust so as to achieve the effect of any variation or other order made by the Family Division, this Court would have complete discretion as to the course it should take.*
>
> *14. In this respect it is important to note that the roles of the two courts are very different. The Family Division is concerned to do justice between the two spouses before it. It is sitting in a matrimonial context and its objective is to achieve a fair allocation of assets between those spouses. It has no mandate to consider the interests of the other beneficiaries of any trust involved. Conversely, this Court is sitting in its supervisory role in respect of trusts, as is regularly done in the Chancery Division of the English High Court. This Court's primary consideration is to make or approve decisions in the interests of the beneficiaries. It has therefore a very different focus from the Family Division.*

> *15. It follows that, in most circumstances, it is unlikely to be in the interests of a Jersey trust for the trustee to submit to the jurisdiction of an overseas court which is hearing divorce proceedings between a husband and wife, one or both of whom may be beneficiaries under the trust. To do so would be to confer an enforceable power upon the overseas court to act to the detriment of the beneficiaries of a trust when the primary focus of that court is the interests of the two spouses before it. It is more likely to be in the interests of a Jersey trust and the beneficiaries thereunder to preserve the freedom of action of both the trustee and this Court to act as appropriate following and taking full account of the decision of the overseas court. We have said that this is likely to be the case in most circumstances. In some cases – e.g. where all the trust assets are in England – it may well be in the interests of a trustee to appear before the English court in order to put forward its point of view because the English court will be able to enforce its order without regard to the trustee or this Court by reason of the location of the assets.*
>
> *16. The observations which we have made do not lead to the conclusion that this Court will ignore a decision of the Family Division or other overseas court. Far from it. That court will have investigated the matter very fully and will have made a decision intended to achieve a fair allocation as between the spouses. In such cases the interests of comity as well as the interests of the beneficiaries will often point strongly in favour of this Court making an order which achieves the result contemplated by the order of the Family Division. Indeed this Court has made such orders in the past and will no doubt do so again in the future. But the significant factor from the point of view of whether the trustee should submit to the jurisdiction of the overseas court is that it will remain a matter of discretion for this Court as to the course it should take in the light of the overseas order if the trustee has not submitted, whereas if the trustee has submitted, the overseas order is likely to be enforced without reconsideration of the merits.*"

43. In *In the matter of the A and B Trusts* (*supra*), the trustee applied to intervene in proceedings in the Family Division of the English High Court without first seeking directions from the Royal Court of Jersey. When the question of seeking approval from the Court for the trustee's ongoing participation in the matrimonial proceedings arose, the Court declined to make the order sought, quoting from the passages in the previous decision to which I have just referred. As noted in that case, the consequences of having submitted to the jurisdiction meant that there was scope for full disclosure in respect of the trusts concerned to be ordered in those proceedings.

44. Although it is of less relevance in a case where the High Court of Justice has joined a trustee to the matrimonial proceedings, an alternative way of proceeding would have been to issue a letter of request seeking assistance from this Court. This occurred in *AD v The C Trust and PW* (*supra*), where normally assistance would be granted but, for the reasons given in the judgment, it was declined in that case. In this manner, the answers to the questions to be answered by T Limited pursuant to the order of the High Court could have been put through this process.

45. More recently, Article 9(4) of the 1984 Law was explained in the context of a representation made in *In the matter of the R Trust* [2015] JRC 267A as being the reason why the representation sought not to enforce the order made in matrimonial proceedings in England, but rather seeking approval of the decision reached as a result of the analysis leading to that order. Put another way, the trustee concerned had been presented with the order made dividing up the assets of the couple and had formed the view that it was in the interests of the

beneficiaries as a whole to take certain steps in relation to the trust fund, about which it sought the blessing of the court. As explained in the ***H Trust*** case, this avenue was left open because the trustee had not been involved in the matrimonial proceedings, and it respected the constraints imposed by Article 9(4) of the 1984 Law.

46. Although these Jersey cases point away from a trustee submitting to the jurisdiction of an overseas court, I was not persuaded that I should simply rule in favour of that outcome. I was also not attracted to an argument presented by Advocate Newman that T Limited could opt for submission only to a limited extent of responding to Mrs D's questionnaire. I took the view that the nature of the FURBS was such that T Limited was placed in a different position to the trustee of a discretionary trust. Had the trust in question been a "standard" family discretionary trust with a class of beneficiaries extending beyond the divorcing couple, I would probably have followed the reasoning in the ***H Trust*** case and concluded that it was best for the trustee not to submit to the jurisdiction, ie, for it to apply to set aside the joinder order and so cease to be a party. This is a situation where not all of the trust assets are in England and Wales, although those of the most interest to Mrs D may well be those properties held through C Limited, so that particular factor was not determinative.

47. The real reason, though, for the order I made was that I felt that T Limited could potentially assist in explaining to the High Court the terms on which the various assets within the FURBS (and the EBT, to the extent that it entered into consideration) were being held. The joinder of T Limited appears to have flowed from an uncritical analysis of the position that some assets are held on trust. The precise terms of the way in which they are so held did not appear to have been undertaken, but almost certainly needed to be before the next stage of the proceedings, which was a FDR hearing. As I have already commented, there are various ways at looking at what has happened and quite what Mr D was entitled to do as the Member was not entirely clear. I considered that it would be unfortunate if the English proceedings were going to head off in a direction that could not then be unscrambled in the event that an order were to be made (or some agreement reached beforehand) that could not lawfully be put into effect. Unlike in the discretionary trust cases, on one reading of the FURBS trust instrument, T Limited has no discretion to exercise. All it is required to do is to make arrangements to pay a pension or, if Mr D so elects, to provide him with a lump sum. In doing so, T Limited is not unduly concerned about anyone else because its focus is on the Member and how to manage the deferred remuneration represented by the trust fund. Its role seemed to me to be far more mechanistic than that of the trustee of a discretionary trust. Accordingly, there was a real distinction in the merit of leaving open further consideration of the best interests of the beneficiaries of the trust in this Court. Instead, it seemed probable that any order of the High Court could be directing Mr D to act in certain ways and T Limited would be obliged to follow those wishes. In such a situation, the arguments in favour of assisting, and being seen to assist, in the Ds' matrimonial proceedings tipped the balance in favour of it submitting to the jurisdiction. The impact of section 14(4) of the 2007 Law will have to be considered in the event that enforcement of any order made is sought, but I did not regard it as amounting to a bar to T Limited participating in the proceedings to which it had been joined.

48. I did consider whether T Limited's position could be resolved better by C Limited taking responsibility for responding to Mrs D's questionnaire and so extracting T Limited from the matrimonial proceedings. However, looking at the questions carefully showed that some of them are questions that only T Limited can answer. In those circumstances, it made sense for T Limited to be in a position to render the best assistance it could because that would be beneficial to the Ds. In terms of the way that T Limited should reply to the questions and provide information or documents, I was content to make it clear that T Limited was only able to do this by reference to the information and documentation in its power, possession or control. In much the same way as if there had been a letter of request, this Court would only

have been able to require answers or documents to the extent that they were available. Accordingly, I agreed that an express limitation on the extent to which T Limited was able to participate in the matrimonial proceedings was appropriate, if only to assist T Limited in the event that the High Court considered that the role of T Limited should be broader. Had that situation arisen, T Limited would have needed to return to this Court for further directions.

49. The Application also sought a further direction in the context of submitting to the jurisdiction of the foreign court that legal advice received by T Limited is privileged and so should not be disclosed to either of the Ds. I was not prepared to make that declaration. It struck me that this could potentially hamper T Limited in its role of assisting the English High Court through whatever level of participation it was destined to have having been joined as a respondent. It was preferable for T Limited to be in a position within those proceedings of arguing that it benefited from privilege if there was something it was not prepared to disclose if being ordered to do so. Equally, however, something in which T Limited has privilege might sensibly be disclosed as a means of assisting all those engaged in those proceedings and it would have been counter-productive, in my view, to have tied the hands of T Limited. In any event, if an issue arose, T Limited was at liberty to seek further directions from this Court.

50. The final issue was about the way in which the original deed for the FURBS was to be transported to the handwriting expert. It was common ground that the expert needed to opine through seeing the original and putting it through the various processes which could only be performed with the equipment installed at his premises in England. The terms of the Consent Order made by this Court were to make the deed available. The narrow terms of the order made in the High Court were for the deed to be posted. Understandably, T Limited was not keen on complying with that order and preferred to hand-deliver the document to the expert's premises and wait until it had been finished with. This was also broadly consistent with its duty to preserve the trust property, of which the deed was a part, by keeping it more firmly under its control than would be the case if it were posted.

51. I was satisfied that the relief sought was designed to enable T Limited to seek the other parties' agreement to a variation of the terms of the order made in the High Court, which was perhaps unduly prescriptive. There was no prejudice to anyone in adopting this suggestion for how the deed should be delivered to the expert and kept thereafter in the safe-keeping of the trustee. Although I did not believe it was strictly necessary for T Limited to obtain any order of that nature from this Court, to the extent that it provided some comfort and a foundation from which to seek the agreement of the other parties, I was prepared to make that order. In doing so, I made clear that I had no power to vary the order made by the High Court of Justice to which T Limited was subject, but that I was lending my support to T Limited seeking a variation of the terms of the order already made.

Conclusion

52. For these reasons, which I have now provided in some detail, I granted some of the relief sought in the Application. I regarded the situation in which T Limited found itself as one of those exceptional cases where submission to the jurisdiction of a foreign court was permissible and appropriate. In doing so, I confirmed that any responses to questions raised within those proceedings and any information and documents to be provided necessarily had to be limited to what T Limited had available to it, ie, being under its power, possession or control. I also made a pragmatic order permitting the trust deed (and any other examples of Mrs D's signature that might usefully be provided) to be delivered to the expert for analysis rather than being posted.

53. Finally, I was satisfied that T Limited had been entitled to seek directions from the Court as a result of the steps taken against it in the matrimonial proceedings and so saw no reason not to

grant T Limited an order that its costs of the Application and its ongoing participation in the matrimonial proceedings be taken from the assets of the FURBS.