COLLAS CRILL

A practical guide to trustee blessing applications for 'momentous' decisions

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This briefing note is intended for trustees who are interested in trustee blessing applications (often arising in contentious or high-stakes trustee decision-making).

What is a 'blessing application' and what use does it serve?

A blessing application is an application by a trustee to the Royal Court of Jersey (the **Court**) (under Article 51 of the Trusts (Jersey) Law 1984) for the Court's approval of a trustee's 'in principal' decision that is in some way 'momentous' in the life of the trust.

A blessing application is not a request for the Court to make the decision for the trustee — rather, it seeks judicial approval that the trustee's decision and proposed course of action is reasonable and the decision has been appropriately reached.

A blessing, if granted:

- provides the trustee with protection from subsequent challenge by beneficiaries in respect of that decision;
- effectively immunises the decision (so long as full and frank disclosure is made in the hearing) from any future claim that the trustee has committed a breach of trust.

A blessing of a trustee decision is not a directive to the trustee that it *must* take that decision. A blessing, if granted, is an endorsement by the Court that should the trustee take the decision it proposes, it will not be later criticised for doing so.

In the event that the Court declines to give its blessing to a trustee in respect of a momentous decision, the trustee is not prevented from continuing to act as they had intended. They may however leave themselves susceptible to future challenges and litigation risk that could have otherwise been avoided had the blessing been approved.

When will a trustee's decision be considered 'momentous'?

There is no exhaustive list of circumstances in which a trustee's decision will be treated as momentous. The Court has identified decisions that have significant consequences or are of 'high stakes' to the trust as being momentous. Typical examples of 'momentous decisions' include:

- the sale or distribution of a significant trust asset;
- the widening or narrowing (by removal or exclusion) of the beneficial class;

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- substantial restructuring of the trust or its assets;
- the provision of significant funds to satisfy a beneficiary's divorce award or settlement;
- submission to a foreign court's jurisdiction;
- the provision of sensitive documents or information to certain beneficiaries or 'outsiders' to the trust;
- terminating the trust;
- the commencement, discontinuance or settlement of significant litigation in which the trustee is involved (known as a Beddoe application);
- a decision that generates significant contention either between beneficiaries or between beneficiaries and the trustee.

The clear themes from the cases is that whether a particular decision is 'momentous' must have some grounding in objective reality (ie it is not simply a subjective assessment of the trustee choosing to designate a particular 'difficult' decision as 'momentous').

What legal test will the Court apply?

The first point to establish is whether the trustee is empowered to make the particular decision it intends to move. If the trustee lacks the power to do what it proposes, the Court cannot cure that deficiency with its blessing. In some circumstances it may be necessary to seek a variation to the terms of the trust to provide the trustee with the powers it needs, followed by a blessing of the proposed exercise of those powers.

When considering a blessing application the Court will assess whether the trustee's decision:

- was made in good faith;
- is one that a reasonable trustee properly instructed could have made; and
- is untainted by actual or potential conflicts of interest [1].

The Court, in deciding whether or not to 'bless' a momentous decision is guided by the principle of 'non-intervention'. This is the principle that the role of the Court is not to make the trustee's decision for it or to agree with the decision that the trustee has taken (ie to substitute it's own view of what the decision should be). The Court's role is simply to approve the decision that the trustee has itself reached.[2]

The test applied by the Court focuses on the rationality and reasonableness of the trustee's decision-making process. Procedurally, this means that before a blessing application is made, the trustee must have got its 'ducks in a row' in terms of the decision making procedure it has followed, what factors it has considered and what factors it has rejected as relevant to its decision. Rushing to a blessing application, without having undertaken a methodical approach to the decision that is sought to be blessed, can result in the Court refusing to bless or even refusing to hear the application.

In deciding whether to bless, the Court is not concerned whether it would have reached the same decision. In reality there is a fine line between the principle of non-intervention and the way the test for a blessing works in practice. The Court is not

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bound to bless a decision of the trustee and so if the Court is not satisfied with the decision making process the trustee has gone through to reach its decision, it can refuse to bless.

The Court has, on a number of occasions, given 'non-binding' judicial guidance to trustees in the way they go about their decision making process (which can effectively result in a change to the decision that is then sought to be blessed).

Momentous decisions about litigation

There is a specific type of blessing application that relates to decision making by trustees engaged (or proposing to be engaged) in litigation called a Beddoe application. Engaging or withdrawing from litigation in which the trust is involved is very likely to be a momentous decision. The Court will apply the same fundamental test, but will ordinarily subject such applications to heightened scrutiny due to its own familiarity with litigation risk and cost — whilst still affirming that its role is supervisory and not directive.

Procedural issues

Privacy

Blessing proceedings are normally conducted in private. This means that only the parties to the litigation may be in Court when the application is heard and the general public and the media are excluded. Hearing the application in private places restrictions on the ability of parties to refer to or use documents or evidence submitted in those proceedings outside the blessing application.

Supporting evidence

To ensure any blessing application stands the best chance of being approved notwithstanding challenges by beneficiaries, a degree of front-loading is required. The trustee must properly document its decision making process, as well as the decision it has reached. The documentation must show the trustee's rationale for its decision and its deliberation about the factors it has considered (and/or excluded from its consideration).

There is no definitive checklist of matters a trustee should consider (this will vary with the decision being taken) but the following are likely to be material to most applications and will need to be addressed in the trustee's evidence:

- What is the decision?
- Does the trustee have the power(s) to make the decision it is proposing to make?
- What is the rationale for the decision – why is it being made?
- What is the likely impact of the decision on the beneficiaries (collectively and individually)?
- Is the trustee's information concerning the beneficiaries' personal circumstances, up to date and accurate?
- What are the views of the beneficiaries regarding the proposed decision?
- If there is disagreement with some or all of the beneficiaries about the proposed decision, on what basis has the trustee discounted those views?

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- If the decision requires legal or tax advice, can the trustee evidence that it has understood and considered that advice and its impact upon the decision.
- What are the likely views of the settlor (whether expressed in a letter of wishes or directly).
- Is the trustee's decision subject to any kind of actual or potential conflict of interest or a conflict in its duties.
- Do any of the factors the trustee considers impact upon its consideration of any other factor (ie does the trustee need to go back and revisit earlier decision making in light of new material facts)?
- What is the cost/risk analysis of not making the decision?
- Having taken into account all matters, is there a better or different decision that the trustee could now reach?
- Is the decision (or the components of a decision) logically consistent – ie has the trustee left itself open to a challenge that its decision is irrational because it has reached inconsistent conclusions on similar factual issues?
- What is the cost benefit analysis of proceeding with a blessing application for the particular decision (ie is the trustee proposing to incur costs that vastly exceed the quantum of the risks associated with not proceeding with a blessing application)?

Convene interested parties

It is the trustee's responsibility to identify who should be given notice and convened (ie joined) to the application. Ultimately it is for the Court to determine who is convened to the application and the Court may widen or narrow the class of convened beneficiaries depending upon its assessment of where their interests or positions may materially differ.

If the trust has a protector whose consent is material to the proposed decision, they may also need to be convened to the application as an interested party.

Judgment

Judgments of blessing applications are typically anonymised to remove mention of the name of the trust, the beneficiaries or the particulars of any person or entity who may be affected by the application.

What role is there for beneficiaries?

The beneficiaries of a trust – unless their interest is extremely remote so as not to be materially affected by the application - are generally convened (ie joined) to the application and may file responsive evidence, submissions and attend and make representations to the Court as part of the application.

Minor and unborn beneficiaries will typically have their interests represented independently from their parents (if they are beneficiaries also) by a Court appointed guardian *ad litem*.

The Court will consider:

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- whether all relevant beneficiaries have been at least properly notified of the application (and the decision to which it relates);
- whether their interests are sufficiently distinct to warrant individual participation;
- whether a decision may adversely impact some beneficiaries more than others.

If a trustee fails to engage properly with beneficiaries in advance of the application (or fails to convene them where appropriate), the Court may refuse the application or require beneficiaries to be convened before it will proceed to hear the application.

The blessing jurisdiction is an indulgence to trustees and is part of the Court's supervisory jurisdiction to protect the interests of beneficiaries of trusts. In the everyday administration of a trust, a trustee is not formally required to engage in consultation with the beneficiaries or to explain its decision making process or to divulge the factors that have fed into it.

However, where the trustee seeks a blessing, the opposite approach needs to be taken. In exchange for the immunity that a blessing confers upon a trustee, the trustee must divulge, to the Court and to the convened parties, the entire basis for its decision making. This will include any legal advice the trustee has obtained relating to its decision.

This will lay both the decision and the process followed to reach it open to scrutiny by any of the beneficiaries who may be unhappy about the substance of the decision (or the process). If there is a serious defect in the decision making process that will leave the blessing application open to challenge.

It is for this reason that it is wise for trustees to seek professional advice both on the substance of their proposed decision, as well as how best to evidence their decision making process.

How are the costs of blessing applications determined?

Unless expressly ordered otherwise, the trust fund will normally bear the cost of the application. There is judicial authority to the effect that a temporary shortage of liquidity within a trust is not a good reason for the trustee not to seek a blessing or not to obtain the professional advice necessary to assist in the trustee's decision making.

Cost orders are ultimately at the Court’s discretion and may take into account conduct of the parties. If the application for a blessing is refused on the basis that the decision making process of the trustee is shown to have been, in some way, materially defective, there may be cost consequences for the trustee. Cost risk is one reason it is essential to obtain early advice from experienced local lawyers on how best to prepare the application.

For litigation-related applications (ie Beddoe applications), the Court has indicated that an indemnity for the trustee for its retrospective costs (if the application is brought late) should only be granted in exceptional circumstances and if it can be shown that, had the application been brought in advance of the decision, that the Court would have given its approval at that stage. The sort of circumstances in which a retrospective Beddoe application might be brought is where the trustee has been forced to take a step in litigation to preserve its position but has not had sufficient time in advance of that step to obtain the Court's blessing first eg to preserve a claim from limitation.

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Trustees should be aware that complex blessing applications (eg where there the decision involves significant restructuring affecting multiple beneficiaries) can (often dependant upon the attitudes of the convened parties) be protracted and can generate significant cost. This is something to bear in mind in discussions with the beneficiaries – the longer and more costly the blessing application, the greater the impact will be on the value of the trust assets.

If a decision is likely to become contentious, making early engagement with legal advisors is highly advisable.

Practical tips for trustees to achieve success

If the decision is one that is likely to be momentous or generate controversy among the beneficiaries that the trustee does not thinks it can manage by itself, it is important the trustee takes early advice.

Prepare meticulous documentation

Ensure the trustee board minutes record both the decision that is being taken and the decision-making process that has been followed. The minutes should be sufficiently detailed as to show what factors the trustee has considered and the legal advice it has obtained.

The Court's inquiry is into how the decision was made. This is sometimes easier said than done. A complex, multifactorial decision making exercise is a process that might have to be gone back over and looked at again in light of new information or documents.

If legal advice is obtained, ensure it is understood and is followed (unless there is a very clear reason for not doing so – which also needs to be set out in writing).

Early and constructive engagement

A sensible trustee thinking about a blessing application will consult with beneficiaries about their proposed decision, especially those with potentially divergent interests. It is necessary to show that the trustee has considered all relevant considerations in its decision making. Considering the views of beneficiaries is in partial discharge of that obligation.

The object of the exercise is not to seek to achieve the beneficiaries agreement to the trustee's decision (although that will make the application much easier, if not unnecessary) but to be able to show the Court (if agreement is not achieved) that the trustee has properly discharged its duties in how it has gone about its decision making process.

Consider alternatives

A blessing application can be helpful in narrowing issues between trustees and their beneficiaries and ultimately saving the costs and risk of litigation arising from a contentious decision. It does not necessarily follow that the costs of preparing for, and obtaining a blessing, will be low. Complex multi-stage blessing applications that are asked to consider complex restructuring can be costly.

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Consideration should be given to whether a blessing is proportionate in the circumstances. It may, for example, be the case that a trustee considers it more appropriate and cost-effective to pursue an alternative means of achieving substantially the same end point as a blessing i.e. agreeing releases from any claims as well as cross indemnities from the principal adult beneficiaries against the risk that future or minor beneficiaries might seek to challenge the trustee in future.

Seek early advice on litigation decisions and strategy

Given the heightened scrutiny the Court will give to momentous decisions about litigation, it is essential that trustees obtain early legal advice on risk, cost, and litigation strategy before and during the application process.

Don't forget to address conflicts

The trustee should actively (and be seen to in the minutes of its decision making) ensure that it addresses whether there is any actual or potential conflict in its decision making. A conflict includes any interest the trustee has that might reasonably be considered to impact upon its decision making. This includes any actual or potential conflict the trustee has between its own interests and those of the beneficiaries (eg it is proposing to sell a trust asset to generate cash with which it will pay itself outstanding fees) as well as any conflict between its duties (eg the trustee is proposing to agree or settle a loan owed between different trusts for which it is the trustee since it is effectively both creditor and debtor in the same transaction).

The fact of an actual or potential conflict may not preclude the Court giving its blessing but the non-disclosure of conflict or the trustee's failure to address the issue at all (even if there is no conflict) can undermine and potentially derail the application, leading to adverse cost consequences.

How can Collas Crill help?

- ***For more insights like this, explore our dedicated 'Modern families resource centre' which highlights our expertise working closely with ultra-high-net-worth (UHNW) and multi-generational families.***

The role of a modern trustee has never been more complex. Trustees must satisfy the needs and desires of their beneficiaries, manage complex assets and navigate an ever-changing legal and regulatory landscape.

We know that trustees can need assistance and advice on how best to satisfy their duties and to meet their legal and regulatory obligations. We understand and have a great deal of experience in working with trustees to get ahead of any potentially difficult situation and resolve it in a way that minimises risk and conflict.

Collas Crill's private client and trusts team has decades of experience advising trustees and beneficiaries. We frequently assist fiduciaries with the increasing complexity of decision-making and, where appropriate, will advise on how best to prepare that application and to navigate the Court process.

[1] Re S Settlement [2001] JLR N 37

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[2] There is another form of trustee application that does involve the trustee surrendering its discretion to the Court. In that kind of application, the Court's role (if it accepts the surrender) is to make the decision for the trustee. Such applications are rare and are not the subject of this briefing note.

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