COLLAS CRILL

Pragmatic solutions for sensitive trusts: Benjamin Orders and publication of judgments

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The matter of the Banayou Trust [2019] JRC 078

The Royal Court has taken a pragmatic approach in blessing a trustee's decision to distribute the assets of a trust, in circumstances where third parties may have proprietary rights to the assets distributed. The Court granted the trustee an indemnity, protecting it from any potential breach of trust claim initiated by any such third party, by way of a Benjamin Order.

Factual background

The context is unusual. In brief, the Banayou Trust was settled by the National Bank of Yugoslavia ("NBY") in 1988; NBY was sole beneficiary and the trust fund was to be applied according to NBY's instructions. Following the subsequent destabilisation of the region, the ultimate dissolution of the Socialist Republic of Yugoslavia in 1992 and the ensuing Bosnian war, the five Successor States covering the geographical area of the Former SFRY entered in to a Succession Agreement in 2001 to regulate the division of assets *inter se* and manage external debt. This was overseen by a Distributions Committee, which was made up of representatives from each of the five Successor States.

The Jersey Court was satisfied that the assets of the Banayou Trust were within the scope of the Succession Agreement. Not without difficulty, the Successor States and the trustee agreed an apportionment of the trust assets, and the Court was asked to approve a draft deed of appointment and indemnity before the distributions were made.

Further regional changes since the 2001 Succession Agreement separating Montenegro from the State Union with Serbia (2006) and Kosovo's declaration of independence in 2008 (which is only partially recognised) meant that Montenegro and Kosovo would not receive distributions from the Banayou Trust in terms of the draft before the Court.

It was uncontroversial that this was a momentous decision in terms of the categories identified in *Re S Settlement* [2001] JRC 154. Whilst the trustee had wide powers, given the long history of uncertainty relating to the beneficial class and that the proposal was to appoint out all Banayou Trust assets in the sum of £9.9 million, it was appropriate for the trustee to obtain the Court's blessing before proceeding.

The legal issues

The judgment provides important clarification on the following issues:-

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- the grant of a Benjamin Order in the context of a Jersey trust;
- the *functus officio* principle; and
- the Court's handling of competing interests in deciding whether to publish a judgment.

The Benjamin Order

Perhaps surprisingly, rather than order the trustee to obtain legal opinion on the international private law position of Montenegro and Kosovo *vis à vis* the Trust assets, the Court took a pragmatic approach and approved the order sought, which would see the assets distributed to the Successor States alone.

In its reasoning, the Court explained that the trust had been administered under the supervision of the Court for some 20 years; and that it was now time for it to be wound up. The trustee had been dealing in good faith with the Distributions Committee; no claims had been intimated by either Montenegro or Kosovo; and the proposal before the Court had been agreed with the Distributions Committee with some difficulty. The court concluded that to send the trustee away in this way would be disproportionate and inappropriate.

It also granted the trustee the protection of a Benjamin Order, named after the case of *Neville v Benjamin* [1902] 1 Ch 723. The Order provides the trustee with protection from any potential claims for breach of trust in respect of distributions it makes that have been authorised by the Court.

Lewin on Trusts, 19th edition at paragraph 27 provides a helpful summary:-

"A Benjamin order does not vary or destroy beneficial interests but merely enables trust property to be distributed according to the practical probabilities. Its effect is therefore that the trustees are protected, in that they cannot afterwards be accused of a breach of trust as they have acted under the authority of the order of the court, but it preserves the right of any person actually entitled to follow the trust property if he later appears."

The Court therefore held that to the extent Montenegro or Kosovo have claims to the assets, they can follow the property in to the hands of the States that have received them. However, in reality it is difficult to see how this could be more than a theoretical proposition.

Publishing the judgment

Functus officio

The trustee initially argued that the judgment could not be published. Its reasoning was that the existing privacy orders in place preventing material filed with the Court being publically available, coupled with an earlier order of the convening court that *"no judgment in relation to this Representation shall be published"*, meant that the Court was prevented from publishing the judgment. These arguments were based on the principle of *functus officio*, which means that once proceedings are finally concluded and the final judgment or order perfected, the Court cannot review or alter its decision (*Jersey Evening Post Limited v Al Thani* [2002] JLR 542 at paragraph 9).

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The trustee ultimately conceded that the Court could not be *functus officio* as no final judgment had been handed down. Also instructive was the case of *RBC Trustees (CI) Limited v Appleby* [2007] JRC 211 which clarified that *"the principle does not apply to a decision which, by its nature, is interim or requires continuing monitoring."*

Drawing on this dicta, the Commissioner held that the "no publication" order was by its nature an interim or provisional one, subject to review by the Court hearing the substantive application. It was not a final order binding on the Court.

The decision to publish

The Court convened a further hearing to determine whether to publish the judgment, including hearing argument from the Attorney General on the issue of public interest. As the parties are easily identifiable from the facts, anonymising the judgment would have no effect and the Court must therefore publish in full, or not at all.

In deciding to publish, the Court made the following observations:-

- The starting point is the principle of open justice. A key factor weighing against publication is privacy, as enshrined in Article 8 ECHR (see *HSBC Trustee (CI) Limited v Siu Hing Kwong and others* [2018] JRC 051A). The Court pointed out that article 8 has no application to a State. The NBY was both settlor and beneficiary - itself an asset of a State which no longer exists. While the Banayou Trust had the form of a private trust, the Court was dealing in substance with public money.
- "The Court has inherent jurisdiction to re-hear, *inter partes*, any application which it has dealt with *ex parte* (i.e in the presence of only the party making the application). This is the only basis on which a power to decide matters *ex parte* can be reconciled with the rules of natural justice" (*Desastre of Blue Horizon Holidays Limited* [1997] JLR 124 at page 135. The Court confirmed that this principle applies to the Banayou Trust – the "no publication" order had been dealt with at a hearing involving the trustee alone. This bolstered the Court's view that it was not *functus officio*, and could re-visit the previous order.
- The trustee failed to persuade the court that the Successor States had a reasonable expectation of privacy in light of the privacy orders (see *M and Other Trusts* [2012] JRC 127). The privacy orders remained in place. There was nothing in the judgment that revealed sensitive information that had been provided on the basis that it would be treated confidentially, or any political sensitivities raised. The Banayou Trust has been reported on in the Sarajevo Times. Publication would therefore not cause any unfair prejudice to any of the convened parties.
- The Attorney General felt it was wholly undesirable that Montenegro and Kosovo should learn about the judgment by way of a private communication from one of the parties; and emphasised that it would be unhelpful to the reputation of the Island to deal with this kind of case in secret. It would be unattractive for the judgment to enter the public domain other than by way of being published by the Jersey Court.

It is helpful to look at the English position following last month's Court of Appeal decision of *MN v OP* [2019] EWCA Civ 679, on anonymising judgments in the context of applications to vary trusts.

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The Court of Appeal endorsed the principle that whether to anonymise a judgment is not just a balancing exercise but a question of whether it is necessary for the court, in light of specific circumstances of the case, to grant a derogation from open justice - open justice being the default position. In doing so, it upheld and applied the approach of *Morgan J in V v T* [2014] EWHC 3452.

In Jersey, the court's stated policy is that directions hearings and similar trust applications are heard in private with a reasoned judgment published, but anonymised in order to strike the balance between privacy and open justice. If impossible to protect privacy by anonymization, the Court will look at the specific facts to decide whether to publish or not. In *HSBC Trustee (CI) Limited v Kwong* [2018] JRC 051A, Sir Michael Birt, Cmr reviewed the case of *V v T* and the first instance decision in *MN v OP* and found these decisions not to be of assistance, noting the specific context of variation applications traditionally being held in public in England and Wales. This is not the case in Jersey: see for example the anonymised judgment in In *re Y Trust* [2017] (1) JLR 266.

Take-away points

Benjamin Orders are traditionally used in circumstances where beneficiaries are unascertainable, and ***The matter of the Banayou Trust*** offers a helpful illustration of its application by the Jersey Courts. When a trustee feels it is at an impasse, the court can intervene in its supervisory capacity to order that trust property is distributed according to the practical probabilities of who is entitled to the trust assets, and offer the trustee protection from any breach of trust claim if it gets it wrong.

This provides an example of the Jersey Court's willingness to take a pragmatic view to un-lock stalemate in complex trust scenarios.

The case also contains useful discussion on the sensitive issue of publishing judgments in full in the context of non-contentious trust representations, and how the court balances competing interests to uphold the principle of open justice on the one hand, and respect parties' legitimate expectations of privacy on the other.

The hearing of non-contentious trust applications in private is a cornerstone of the Jersey system, and the retention of the privacy orders in this case confirmed that privacy remained, to a limited extent, protected. However, this case is a reminder that judgment anonymity is not in any way an automatic right. Further, a "no publication" order made during the course of proceedings can be re-visited by the Court. The principle of open justice means that the Court will consider whether publishing a judgment will in fact infringe parties' privacy rights including under Article 8 ECHR, and in some circumstances may decide that a particular infringement is justified in the wider public interest.

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