

The Tchenguiz Discretionary Trust: Judgment 3/2018

APRIL 2018

In February, the Royal Court of Guernsey provided its latest written judgment in the ongoing litigation surrounding the Tchenguiz Discretionary Trust (the **TDT litigation**).

The case concerned an application for leave to *use* documents disclosed in the predominantly private administrative "Guernsey 2" proceedings in open English proceedings which had been commenced against the applicant and other parties.

The "Guernsey 2" Proceedings

For those unfamiliar with the TDT litigation, the "Guernsey 2" proceedings relate to a series of administrative hearings initiated by both the former trustee and the current trustee of the TDT (together **trustees**) and which since July 2010 have been heard by the Royal Court of Guernsey in private as is often the case in Guernsey for administrative trust matters.

The Application

The liquidators of four BVI companies (which were assets of the TDT) were parties to the Guernsey 2 proceedings (the **liquidators**), and received disclosure of documents in the course of those proceedings.

The Trustees in the Guernsey 2 proceedings gave full and frank disclosure of information in a confidential setting, and so it was in that context that the Liquidators came to be in possession of the documents.

Rule 79(1)(b) of the Royal Court Civil Rules, 2007 provides that:

"A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where...the Court gives leave".

Proceedings had been commenced against the liquidators and other parties in the English Courts (**English Defendants**), as a result of which they were obligated to provide standard disclosure of any relevant documents.

It wasn't practical for the liquidators at that stage to identify which confidentially disclosed documents were relevant to the English proceedings. The liquidators therefore wanted to use the confidentially disclosed documents to:

(a) share with the English Defendants; and

(b) subject to the English Defendants entering into an undertaking of confidentiality, permit them to review the confidentially disclosed documents for relevance to the English proceedings. Once the documents had been reviewed the liquidators'

intention was to apply to the Royal Court to seek permission to disclose the documents identified as relevant to the English proceedings.

During the course of the hearing the parties agreed that the review of the confidentially disclosed documents would be limited to agreed search terms. This was done to remove from the pool of documents those documents that should remain confidential to the Guernsey 2 proceedings.

Discussion

It is understood from the judgment that this was the first time an application of this type had come before the Guernsey courts. Previous applications have concerned requests to use specifically identified documents, however in this case it wasn't practical for the relevant documents to be identified without an extensive review process.

In light of this, the Royal Court relied heavily on an English High Court decision of Mr Justice Knowles who heard a similar application under the equivalent provision of the Civil Procedure Rules. That case coincidentally was also linked to the TDT and concerned an application for permission to use documents disclosed in other English proceedings in a similar manner.

In the High Court case Mr Justice Knowles was prepared to grant permission for a review to be carried out as he was satisfied that no document would be disclosed in the other proceedings without further permission from the court and that the documents were not going to enter the public domain.

Following the decision of Mr Justice Knowles in the English case, Lieutenant Bailiff Talbot granted the application and in handing down his judgment he commented on the need for privacy to be maintained in relation to the documents disclosed in the "Guernsey 2" proceedings. At paragraph 32 he commented:

"In my judgment, it is essential that the most stringent controls practicable are put in place, as so as to ensure that sealed files in Guernsey 2 remained sealed files, so far as is practicable, and that secondly, information and documents received by [the applicant]...under the embargo of privacy which applies in the protected trustee administration proceedings which are Guernsey 2 remain so protected. In my judgment, the proposals now largely agreed between the parties should ensure that, so far as is practicable, this happens".

Comment

This case is an important reminder of the rule that documents which are disclosed to parties in the course of court proceedings do not become the property of those parties to do what they want with them. The objective of this rule is to ensure that parties feel able to provide full and frank disclosure to the court so that justice can be done. This is of particular importance in the context of administrative trust proceedings where such documents are usually disclosed in a confidential setting where there is a higher expectation of privacy.

This judgment demonstrates that where an application to use documents is made in respect of documents disclosed in private proceedings the Royal Court will take every step to ensure the privacy of those documents is not undermined.

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