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When should Guernsey trustees submit to foreign divorce proceedings?

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When a beneficiary of a trust becomes involved in foreign matrimonial proceedings, the offshore trustee can be faced with a dilemma if they are asked to take part and so submit to that foreign jurisdiction.

The Guernsey court's judgment in the matter of the *A Limited FURBS [2017] 21/2017* (Re: A Ltd) has provided some helpful commentary on the likely approach of the Guernsey court.

The facts of this case itself are a little more unusual and specific but the Deputy Bailiff helpfully took the opportunity to make comments of a more general nature as to how a trustee should react to such a situation.

The first point to note is that a trustee asked to submit to the foreign jurisdiction will generally want to seek directions from its "home" court before deciding what to do. That will ensure that it has the benefit of protection against any issues arising out of the decision taken.

As to the decision itself, it will usually not be advisable or appropriate for the trustee of a discretionary trust to submit to the jurisdiction of the overseas court.

Submitting to the jurisdiction confers an enforceable power on the overseas court to make orders in respect of the beneficial class, where it is highly unlikely that that court will be taking its decision while considering the interests of that class as a whole.

Take, for example, divorce proceedings where the matrimonial assets may be argued to include a trust. The court will be concerned to do justice between the two spouses before it, but it is not in a position to take into account the interests of all of those others who may be interested under the trust.

As a party to proceedings, the trustees will also be subject to disclosure obligations, and so may find themselves needing to offer up information about the trust that the parties would otherwise not have been entitled to receive.

The Guernsey court's judgment in Re: A Ltd has now cited with approval the following line of Jersey case law. The analysis is of matrimonial proceedings in the Family Division of the High Court in England & Wales, but many of the potential issues will be relevant to any requests for a trustee to join foreign proceedings.

In the matter of the H Trust [2006] JRC 057 the Royal Court of Jersey considered a representation seeking directions as to whether to submit to an order joining the trustee to divorce proceedings in the English courts. The court's view was that:

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"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 proceedings between a husband and wife" in order 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"*.

The judgment in *H Trust* indicated that the trust would lose the protection of the "firewall" provisions of the Trusts (Jersey) Law, 1984 (particularly article 9(4)) if it were to submit. Because the trustee had submitted voluntarily and had full opportunity to put forward submissions on the order which the overseas court had made the trustee would then face difficulties in arguing to the court in Jersey that the decision should not be enforced.

In comparison, *In the matter of the R Trust [2015] JRC 267A* the trustee had not been involved in the proceedings in the English courts and so, when presented with an English order, the trustee could still apply to the Jersey court for directions concerning how to react and the full range of responses was still available including the protection of the firewall provisions.

The danger of intervening without first seeking the directions of the local court were further demonstrated *In the matter of the A and B Trusts [2007] JLR 444*. In that case, a trustee intervened in proceedings of the English court and later sought approval from the Jersey court regarding their continuing participation (relating to their disclosure obligations). The Jersey court refused to make the order sought, and so denied the trustee the protection it sought in what had become a difficult situation.

In *AD v The C Trust and PW [2010] JRC 001* another route was highlighted when the English High Court issued a letter of request seeking assistance from the trustee's home court. If this assistance is granted by the local court then the overseas court can obtain information without the trust submitting and being subject to the concerns regarding disclosure obligations as highlighted above.

In the judgment of the Deputy Bailiff in *Re: A Ltd* the Deputy Bailiff identified that, if the trust in question had been a "standard" family discretionary trust with a class of beneficiaries extending beyond the divorcing couple, he *"probably would have followed the reasoning in the H Trust case and concluded that it was best for the trustee not to submit to the jurisdiction."*

Guernsey has been lacking authority in this area, so this is a helpful indication that the position in Jersey is likely to be followed.

However, in *Re: A Ltd* the Guernsey court did depart from that general rule on a number of grounds. The case concerned a funded unapproved retirement benefits scheme (FURBS) with only one member. The Deputy Bailiff described the trustee's role as *"mechanistic"* and pointed to its lack of discretion: the trustee's responsibility was to make arrangements to pay a pension or (at the election of the member) pay a lump sum.

The Deputy Bailiff also pointed to some confusion around interpreting what had happened in the FURBS to the extent that there was some risk that the English proceedings could *"head off in a direction that could not then*

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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".

For these reasons the Royal Court of Guernsey considered this to be *"one of those exceptional cases where submission to the jurisdiction of a foreign court was permissible and appropriate",* and directed the trustee to submit and join the proceedings in the English Family Division. The trustee had been right to seek directions from the court and permitted it to recover its costs from the FURBS. Responding to or submitting to the jurisdiction of a foreign court will always be a matter on which trustees should seek advice, and on which directions from the Royal Court will often be advisable.

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