

Jersey quarterly trust update

June 2017

Collas Crill's Jersey fiduciary team takes a look at judgments handed down recently by the Royal Court of Jersey.

Court sets aside mistaken transfer of UK situs property into trust

In the Matter of the Representation of Mr and Mrs A and the A Family Trust [2017] JRC014, the Court set aside a mistaken transfer of UK situs property into a Jersey trust.

Background

Mr and Mrs A obtained tax advice from a firm of London lawyers which was to the effect that whilst they remained non-UK domiciled, any of their "non-UK assets" which were transferred into a trust would remain free from Inheritance Tax (IHT), even if Mr and Mrs A acquired a UK domiciled status on returning to live in England. Furthermore, UK assets could be sheltered from IHT if the trust held those assets via a non-UK company; the non-UK company effectively blocking the UK situs of the underlying assets.

Having considered the advice provided, Mr and Mrs A decided to transfer into trust an investment account that they owned and that was held by a foreign (non-UK) bank. The transfer constituted the trust.

It is important to note that the term "non-UK assets" was not explained or defined to Mr and Mrs A at any point and no enquiries were made as to the investments held in the foreign account.

Mr and Mrs A appointed a local trust company to act as trustee and settled their trust with the investment portfolio held by the foreign bank. It subsequently came to light that 38% of that investment portfolio was situated in the UK, which gave rise to an immediate IHT entry charge equivalent to 20% of the value of the UK assets added, with ongoing tax consequences for the trust.

Mr and Mrs A did not have sufficient liquidity to meet those tax liabilities and would have had to sell their home in order to do so, seriously impacting upon the quality of their lives thereafter.

Collas Crill acted for Mr and Mrs A and brought the application before the Royal Court.

Decision

The Court was satisfied that this was a clear case of mistake on the part of Mr and Mrs A, who had assumed that their investment account was a non-UK asset. Further, the transfer would not have been made but for the mistake and that the mistake was of so serious character (in terms of the amounts involved and the impact upon their lives) to render it unjust on the part of the trustee to retain the UK situs investments.

KEY TAKEAWAY: this case demonstrates the need to be absolutely certain of the nature and situs of any assets (including underlying investments) being transferred into trust. Don't make assumptions as to what constitutes a UK situs asset. If in doubt, seek advice as to

what constitutes a UK asset and make it your business to establish the situs of all underlying investments with any investment manager.

Court blesses trustee's decision to give effect to an order of a foreign court

In the matter of the D Settlement [2017] JRC061 a trustee sought the Jersey Court's blessing of its decision to give effect to a decision of the Family Division of the English High Court in order to bring an end to acrimonious divorce proceedings.

The facts

There was a Jersey trust with Jersey based trustees. The trust was illiquid, but held a business worth a substantial amount of money. The settlor (also the husband) was a beneficiary of the trust. The settlor's wife was not a beneficiary of a trust. The settlor and his wife were going through a bitter divorce.

The divorce proceedings

One of the key issues in the proceedings before the judge in the High Court had been whether (as the wife contended) the wife should receive a substantial lump sum or other liquid payment from the husband or whether (as the husband submitted) there should be an order that certain of the assets of the trust be divided in specie (due to the damage which would be done to the business held within the trust if assets had to be realised speedily in order to fund a lump sum payment).

The High Court judgment provided that the wife should receive certain lump sum payments and other assets (including the matrimonial home) but in relation to the business held within the trust, acceded to the husband's submission that the wife should be awarded a shareholding in the relevant company. A shareholders' agreement was ordered in order to protect the minority position of the wife and with a view to preventing disruption to the company's business by the wife as a minority shareholder.

The trustees were consulted by the English High Court and gave their views on the options and confirmed their preference that the wife receive the minority shareholding so as to avoid any forced sale of the business assets, which would be detrimental to the beneficiaries of the trust.

Tax advice was obtained in relation to the restructuring and in order to avoid having to pay a substantial tax bill, the restructuring had to be completed prior to 6th April. Given the urgency the trustees decided to appoint the minority shareholding to the settlor knowing that he would then transfer those shareholdings to his wife in satisfaction of the Order of the English High Court. The transfer took place prior to 6th April and the trustees were heard by the Jersey Court on 10th April.

Decision

The Jersey Court had to satisfy itself that the trustees' decision had been formed in good faith, was a decision that a reasonable trustee could have reached and that the decision had not been vitiated by any actual or potential conflict of interest. It was also required to consider whether the appointment of the shares would amount to a fraud on a power, given that the exercise of that power would benefit a non-beneficiary (the settlor's wife not being a beneficiary of the trust).

The Jersey Court held that it was appropriate for the trustee to give effect to the order of the High Court on the basis that it would bring an end to the bitter divorce proceedings and therefore be of benefit to the husband and the other beneficiaries. The Court was satisfied that as the decision was being taken in order to benefit the husband the exercise of the power did not constitute a fraud on a power.

KEY TAKEAWAY: if the purpose in exercising a trustee power is for the benefit of a beneficiary then the fact that a non-beneficiary will indirectly benefit also will not in itself constitute a fraud on a power.

Threatened litigation hampering the administration of a trust? Apply for a 'put up or shut up' order and get protection from the Court

In the Matter of the Representation of BNP Paribas Jersey Trust Corporation Limited [2017] JRC008 the Court blessed the decision of a trustee to distribute the entirety of the trust fund to the settlor, thereby putting an end to a long-running family dispute concerning a Jersey law trust.

Background

The quarrel between the settlor and her eldest son came about following the death of the settlor's husband and pertained to the proper distribution of the deceased's estate. The settlor's husband's will had provided for a percentage split of his wealth in favour of his wife and children, but the son's assertion was that the estate had never gone to probate and the settlor, his mother, had inappropriately transferred funds comprising the estate into trust.

When this matter first appeared before the Court in 2010, the trustee sought the Court's guidance on the best course of action for a trustee threatened with litigation (in this case for a period of 5 years), but where proceedings had not been formally instigated and there was a further 5 years to run before any such claim was time barred. The threatened litigation was hampering the trustee's ability to administer the trust and hence the application to Court.

The Court was of the view that it was unacceptable that a trustee be frustrated in its duties by a complaint that had not been acted upon for 5 years and therefore ordered that the son bring his claim within six months otherwise the trustee would become entitled to administer the trust free of any purported claims – in effect an order that the son 'put up or shut up!' In the absence of any such order, the trustee knew that it could be held personally liable if, first, the trust fund was dealt with in disregard of the notice of such claim and secondly, the claim was subsequently proven to be well-founded.

The Court also ordered the trustee to make distributions to the son in order that he may fund any such claim. A cap was imposed by the Court (which could be increased at the discretion of the Court) and the Court made it clear that such fees would only be reimbursed by the trustee if in receipt of a lawyer's certificate confirming that the services of the lawyer were employed in relation to the abovementioned challenge.

Decision

In the latest judgment concerning this trust, the Jersey Court approved the trustee's decision to distribute the entire trust fund to the settlor. The Court acknowledged that:

- The trustee had taken all reasonable advice and had considered carefully the view of the beneficiaries before reaching its decision
- All of the beneficiaries, except the son in question, agreed with the proposal to distribute the entire trust fund to the settlor
- The son had caused significant financial and emotional harm to the family and that his continued protestations were meritless

KEY TAKEAWAY: this is a case which will ring true with many trustees. The following points can be taken away from the various judgments concerning this matter:

1. If a trustee has been threatened with litigation, but no formal proceedings have been instigated then:
 - It would be prudent to seek legal advice prior to continuing to administer the trust (especially if a distribution is being contemplated) otherwise a trustee risks being held personally liable if a claim is subsequently proven to be well-founded
 - It might be appropriate to apply to the Court for orders that the potential claimant 'put up or shut up' within a specified period of time
2. If a beneficiary is requesting a distribution in order to fund litigation against a trustee then again it would be prudent to seek the Court's blessing to ensure that the trustee has adequate protection from any future breaches of trust claims brought by any of the other beneficiaries.