O dear, O dear: Royal Court of Jersey issued a significant judgment in Re The O Trust and The J Trust

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The Royal Court of Jersey has issued a significant judgment in *Re The O Trust and The J Trust* [2019] JRC 220A where it considered the validity of the appointment of a protector and trustees, and the consequences for the administration of the trust. In doing so, the Court reviewed the proper approach to applications for rectification and ratification.

Background

The O Trust had been established as a Jersey law discretionary trust with substantial assets. The trust and its adult beneficiaries had been under investigation by foreign revenue authorities for a number of years but by December 2016 a settlement agreement had been reached in principle between the foreign revenue authorities and the adult beneficiaries, who otherwise faced the possibility of criminal sanctions. The settlement required the trust to meet liabilities for back taxes and penalties, as well as to pay tax in future.

The incumbent trustee considered that the tax settlement was not in the best interests of the minor and unborn beneficiaries and demanded protection against the prospect of future claims for breach of trust, including suggesting an application to court for a blessing. At that time, the O Trust had a so-called "nominee protector" (the **Nominee**) which had been appointed by the incumbent trustee by an instrument in 2013 (the **2013 Deed**). The adult beneficiaries persuaded the Nominee to appoint two new trustees of the O Trust and to remove the incumbent trustee in February 2017. The replacement trustees immediately entered into the settlement agreement with the revenue authorities and changed the proper law of the trust from Jersey law to that of a foreign jurisdiction.

The applications to court

The incumbent trustee subsequently brought a representation in the Royal Court of Jersey in November 2017 seeking relief on the question of the validity of the changes made in 2017. The proceedings were protracted and hostile, with live evidence heard in late 2018 and early 2019.

The key issue proved to be the status of the Nominee and the validity of the 2013 Deed, with the incumbent trustee contending that the Nominee was not the formal protector of the trust, who was still in office, and as such the Nominee had lacked the power to make the appointments in February 2017. The adult beneficiaries and the replacement trustees sought to argue against this, further suggesting that the 2013 Deed should be rectified to remove any deficiencies around the terminology used, which were said to be contrary to the true intention of making the Nominee the formal protector of the trust.

As an alternative application, the adult beneficiaries and the replacement trustees also sought orders "ratifying", or confirming, the actions which the latter had taken following their purported appointment.

Decision

The Court took into account the live and other evidence presented to it and concluded that the Nominee was never intended to act as a protector and that the confusing and inapt terminology was a deliberate fudge to appease the adult beneficiaries. It was also clear that the 2013 Deed was not a proper exercise of the power under the trust instrument to appoint a new protector. In ordinary circumstances, only the incumbent protector could appoint a successor, and only where it wished to resign. On the facts, this was not the case and there was a "real" protector in office as well as the Nominee, the latter in fact having no formal status at all pursuant to the terms of the trust.

It followed that the Nominee lacked the power to appoint new trustees or to remove the incumbent trustee, who continued in office. The replacement trustees were trustees *de son tort* and also lacked any power to take steps in relation to the trust, including to change the proper law. All of these appointments and changes were held to be invalid.

Given that there was no intention to appoint the Nominee as the "real" protector in 2013, it was impossible to satisfy the requirement for rectification of the 2013 Deed that there had been a genuine mistake such that its terms did not carry out the true intention of the parties to it. It was also impossible to rectify the identity of the appointing party to change this from the incumbent trustee to the "real" protector who had the power to make the appointment. The application was therefore refused.

The Court carefully analysed the principles applying to the controversial remedy of ratification, reviewing the limited jurisprudence which has developed in this area. The Court confirmed that this remedy, which remains novel in the context of trusts, will be applied with considerable caution, with each case turning on its own facts.

The Court rejected the submission that it merely had to be satisfied that the trustees *de son tort* had acted in good faith and that retrospective ratification would ensure the competent administration of the trust and avoid any legal or practical difficulties resulting from the trustee's lack of proper authority. Instead, the right approach would be for the Court to scrutinise the merits of the decisions that had been taken, requiring the Court to be satisfied on the evidence, which should be the subject of full and frank disclosure on the part of the applicant, that any such decision was in the best interests of the beneficiaries as a whole.

In this case, there was insufficient evidence presented to demonstrate that the tax settlement and change of proper law were in the interests of the beneficiaries and it seemed likely that they were not in the interests of the minor and unborn beneficiaries. The Court noted the speed with which the replacement trustees had acted, entering into the settlement agreement and changing the proper law of the trust on the day following their appointment and without the benefit of any advice or directions from the Court, making it difficult to see how they could reasonably have concluded that these steps were beneficial.

The Court therefore rejected the application for ratification and, perhaps unsurprisingly, declined to appoint the replacement trustees as trustee of the O Trust or the Nominee as its protector. The Court preferred to appoint an independent, experienced co-trustee to act with the incumbent, tasked with obtaining expert advice and seeking further directions.

Takeaway points

The case provides useful clarification around the remedy of ratification, both in terms of the procedure, which requires full and frank disclosure so that the Court can make its assessment of the relevant decisions, and also the substantive test which will guide the Court in the exercise of its discretion. Applicants for ratification should appreciate that they are under a burden to satisfy the Court as to the propriety and benefit of the decisions which they wish to have ratified. The precise threshold for meeting that test remains to be seen and it may be that there ought to be an automatic presumption against the applicant in order to protect the interests of the beneficiaries.

A further lesson to be drawn from the decision is that prospective office-holders of trusts should seek independent legal advice in connection with their appointment, and should ensure that they are familiar with and understand their obligations, duties and powers. At

the risk of stating the obvious, incoming trustees should take proper advice and consult all relevant parties before rushing to take momentous decisions in the life of a trust, and would be well-advised to seek the Court's prior approval.

The judgment also demonstrates that applications for "creative remedies" are likely to be viewed with disfavour by the courts where they are intended to whitewash actions taken that are unlikely to have been in the best interests of the beneficiaries as a whole. Parties bringing such applications are unlikely to be deemed deserving of an award of costs from the trust fund and may even be penalised with an order to pay the costs of the other parties personally.

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