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Jersey court decision in Beddoe application may have implications for statutory firewall

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Private Client analysis: The Royal Court of Jersey has issued a judgment on a Beddoe application in which it blessed the decision of a trustee to submit to the jurisdiction of the English High Court and to adopt a neutral stance in proceedings where the claimants asserted proprietary claims to the trust assets. In doing so, it ceded control of the determination of whether the trust was validly established and the ownership of the assets to a foreign court. It is not immediately clear why the facts were thought to be so exceptional as to justify the decision. The court was also prepared to direct the trustee to waive privilege in its legal advice, despite the benefit of doing so being both marginal and speculative. Written by Sam Williams, group partner at Collas Crill LLP, Jersey.

In the matter of the Arpettaz Settlement [2020] JRC 161 (registration required)

What are the practical implications of this case?

The case is significant as an example of the Jersey court approving a trustee's decision to submit to the jurisdiction of a foreign court and to provide full cooperation in overseas proceedings such that the validity of a Jersey trust and beneficial ownership of its assets should be determined by the foreign court. While the Royal Court has previously stated that a trustee should only submit in 'exceptional' circumstances, on this occasion the court seems to have been guided by sheer pragmatism despite fairly vanilla facts. The consequence may be that the presumption against submitting to a foreign court is being eroded and the statutory firewall provisions, which are designed to guard against the impact of challenges to Jersey law trusts in foreign courts, undermined.

The decision is also remarkable in relation to the issue of waiver of privilege in legal advice obtained by trustees. The court was prepared to direct that privilege in the trustee's advice be waived in the foreign proceedings, taking the bullish view that it was probably a decision for the court itself and that in any event the consent of all the beneficiaries was probably not required. Again, this appears to have been motivated by pragmatism rather than supported by sound authority.

What was the background?

The trustee brought an application seeking a direction from the Royal Court of Jersey approving its decision to submit to the jurisdiction of the English High Court and adopt a neutral stance in proceedings there between its principal beneficiary, the settlor of the trust and claimants who asserted a proprietary interest in the trust assets on the basis that these represented the traceable proceeds of the settlor's breaches of fiduciary duty. This would enable the High Court to determine the ownership of the trust assets.

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The trustee also sought specific approval for the disclosure in the English proceedings of three pieces of privileged advice obtained by its predecessors in office relating to the manner in which the trust was established, the propriety of receipt of funds by way of settlement, and its subsequent dealings with the trust assets.

The principal beneficiary asked to see the advice taken by the trustee from leading counsel as to the proper role it should play in the English proceedings. The trustee argued that the advice was privileged as against the beneficiaries but that, if not, it should also be disclosed to the English claimants given their equal standing as potential beneficial owners of the trust assets.

The trustee sought its costs of and incidental to the application from the trust assets, which was opposed by the English claimants in light of their proprietary claim. The claimants also requested confirmation of whether the trustee had received an indemnity in respect of participation in the English proceedings from the principal beneficiary or another person.

What did the court decide?

Applying *Re The F Charitable Trust* [2017] 2 JLR 26 (not reported by LexisNexis® UK), the court reaffirmed that the approach to consideration of *Beddoe* applications (from *Re Beddoe* [1893] 1 Ch 547) is broadly the same as when considering a blessing application in respect of a momentous decision, but 'slightly more nuanced' in that the court should have regard to the nature of the decision which the trustee seeks to have blessed: the court is as well if not better placed than the trustee to judge whether to enter into litigation.

The court observed that the starting point is that questions of validity of a Jersey trust should be determined by the Jersey court and that only exceptional circumstances would warrant a direction that the trustee should submit to a foreign court's jurisdiction where that may result in third-party recovery of the trust fund. As both the principal beneficiary and the main trust asset, being a debt situated in England, were within the High Court's jurisdiction, this made it an appropriate case in which to submit and participate in the English proceedings. As the principal beneficiary intended to defend the claims to the trust assets, it was also appropriate for the trustee to adopt a neutral stance.

The court expressed provisional views that it was probably unnecessary to obtain the consent of all the beneficiaries to waive privilege in legal advice obtained on behalf of a trust and that, on an application to court, it would exercise its own discretion rather than approve the trustee's decision. The trustee was authorised to waive privilege in the three pieces of legal advice, which the court said may assist the principal beneficiary's defence, as well as to disclose the existence and terms of any indemnity it had received in relation to the English proceedings.

The advice of leading counsel was held to be subject to joint interest privilege, applying *Lewis v Tamplin* [2018] EWHC 777 (Ch), having been sought for the benefit of the trust as a whole, and should be disclosed to the principal beneficiary. However, the trustee was not obliged to disclose the advice to the English claimants. The court expressed the hope that the English court would not subsequently order the principal beneficiary to disclose the advice in the English proceedings.

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Pursuant to the court's broad discretion to award costs in trust proceedings under Article 53 of the Trusts (Jersey) Law 1984, the trustee was granted its costs of the application out of the disputed trust assets.

Case details

Court: Royal Court of Jersey

Judge: RJ MacRae Esq (deputy bailiff), and Jurats Christensen and Hughes

Date of judgment: 10 August 2020

Case analysis first published on LexisPSL on 24 September.

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