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Jersey court criticises trustee

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Private Client analysis: The Royal Court of Jersey has criticised the approach of a trustee to its application for approval of two momentous decisions involving settlement of English court proceedings and a proposed distribution and termination of the trust. The court said that fresh proceedings should have been brought and that all the relevant beneficiaries with an interest in the outcome should have been convened. While the court was prepared to approve the settlement, the trustee was forced to withdraw the remainder of the application. Written by Sam Williams, group partner at Collas Crill LLP (Jersey).

In the matter of the Arpettaz Settlement [2020] JRC 183

For analysis of an earlier decision in these proceedings, see News Analysis: Jersey court decision in Beddoe application may have implications for statutory firewall (In the matter of the Arpettaz Settlement).

What are the practical implications of this case?

The case serves as a poignant reminder to trustees and legal advisers to ensure that the correct court procedure has been followed, and that all those with a potentially relevant interest in a trust have at the very least been contacted and informed of, if not actually convened to, a trustee's application for the blessing of a momentous decision. It is highly unusual for a trustee to be compelled to withdraw its application because parties have not been convened, as occurred here.

The fact that the court identified a potential conflict of interest as between the principal and other beneficiaries at the second stage of proceedings in August 2020 also raises the question of whether it might have reached a different conclusion at the previous stage in June 2020 when approving the trustee's decision to submit to the jurisdiction of the High Court in proceedings where the ownership of the trust assets was at stake. The principal beneficiary was a party to the June 2020 application, but apparently the court was not informed that his settlement negotiations with the English claimants were already at an advanced stage. The court proceeded on the assumption that the principal beneficiary intended to defend the English proceedings and uphold the validity of the trust.

The remaining beneficiaries were not convened in June 2020 and, as a result, lost any opportunity to influence the trustee's serial decisions to submit, settle and surrender the substantial liquid assets of the trust to the English claimants. The individual decisions of the trustee were considered reasonable, but if the court had been presented with the prospective decisions as a single package, then perhaps the outcome might have been different.

What was the background?

On 28 June 2020, the Royal Court of Jersey approved the decision of a trustee to submit to the jurisdiction of the English High Court and adopt a neutral stance in proceedings there between the principal beneficiary, the settlor and claimants asserting a proprietary interest in the trust assets on the basis that these represented the traceable proceeds of the settlor's breaches of fiduciary duty (*In the matter of the Arpettaz Settlement* [2020] JRC 161).

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It was deemed appropriate to participate in English proceedings, and to provide disclosure, as both the principal beneficiary and the main trust asset, being a debt situated in England (in fact, funds loaned to the principal beneficiary and invested in a property in southern Europe) were within the High Court's jurisdiction. 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 trustee subsequently acknowledged service in the English proceedings and disclosed details of the trust assets to the claimants. Aside from the loans to the principal beneficiary, these included an investment portfolio worth in excess of $US 4.5m.

By the end of July 2020, the trustee had executed a settlement agreement with the claimants and principal beneficiary. This provided a release for the trustee in exchange for the payment of the value of the investment portfolio to the claimants with a guaranteed minimum of $US 4m. The trustee would retain sums to discharge a consequential tax liability and its own fees.

The trustee applied to court for approval of the settlement within the existing Jersey proceedings pursuant to a liberty to apply provision. The trustee also sought the blessing of its momentous decision to write off the loans to the principal beneficiary and to terminate the trust.

What did the court decide?

The court approved the decision of the trustee to enter into and perform the settlement agreement. It considered the confidential advice of leading counsel and agreed that this was a beneficial settlement from the perspective of the trust, particularly in light of the real advantage of saving on the legal and administrative costs of participating in the English proceedings. Applying the criteria for blessing a momentous decision as established in Jersey law in *Re S Settlement* [2001] JLR N37 (not reported by LexisNexis® UK), the court found that the decision of the trustee was formed in good faith, not vitiated by any conflict of interest, and a reasonable one for a properly instructed trustee to take.

However, the court criticised the trustee's decision to apply for approval within the existing Jersey proceedings, to which only the principal beneficiary was convened, rather than bring fresh proceedings. The court considered the circumstances in which beneficiaries should be convened as an exercise of its discretion with reference to the dicta in *Re E, R, O and L Trusts* [2008] JRC 051 (not reported by LexisNexis® UK) and confirmed that the primary considerations are necessity and fairness, with reference to whether a particular beneficiary, whose interest is not extremely remote, may have a material and distinct view of the application.

While there was a common interest as between the principal and other beneficiaries in defending the trust assets in the English proceedings, the same was not true regarding the waiver of the loans to the principal beneficiary and termination of the trust, which was not necessarily in the interests of the others. As a result, the trustee withdrew its application in relation to the waiver and termination decision.

Case details

- Court: Royal Court of Jersey
- Judge: R J MacRae (deputy bailiff), and Jurats Thomas and Christensen
- Date of judgment: 14 September 2020

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