



BREAKING UP IS HARD TO DO...ESPECIALLY FOR AN OFFSHORE TRUSTEE

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Highlighting the challenges faced by an offshore trustee when drawn into foreign divorce proceedings of a beneficiary.

In the context of a divorcing beneficiary, trustees in Jersey and Guernsey are regularly faced with requests for trust information and demands from the beneficiary, and potentially even from the foreign court with jurisdiction over the divorce. The demands may require the trustee to 'submit to the jurisdiction' of that court, most commonly the Family Division of the High Court of Justice of England and Wales.

The demands can create a tension between the Jersey Royal Court (which has supervisory jurisdiction over the given trustee and trust) and the foreign court; the foreign court is concerned to achieve fairness between the husband and the wife in terms of financial provision, whereas the Royal Court is concerned with the interests of the beneficial class and the administration of the trust as a whole. The Royal Court has, as a matter of generality, taken the approach that it is appropriate for a trustee to provide information to a beneficiary about that beneficiary's interest under the trust, and the trust assets generally, so that the foreign court is in the best possible position to enable it to make an informed decision about the trust and its assets and whether, for example, the assets are a resource available to the divorcing spouse.

The provision of information is one thing, but whether the trustee should become a party to the foreign divorce proceedings – by 'submitting to the jurisdiction' – is quite another. The starting point for most trustees is to decline to submit because, generally speaking, the Royal Court is better placed to make any final determination in relation to whether trust assets ought to be used to facilitate the settlement of ancillaries in a divorce case. The trustee therefore provides information to assist the foreign court but leaves questions of enforcement to its home jurisdiction.

The question of whether or not to submit to the jurisdiction of a foreign court took centre stage in a recent case that came before the Guernsey Royal Court: *In the Matter of the A Limited FURBS and the B EBT*.

T Limited was the trustee of a Funded Unapproved Retirement Benefits Scheme or 'FURBS' which is a type of trust used for pension arrangements, and which had been established for the benefit of D. As part of matrimonial proceedings in England, D's wife sought to join T Limited to the proceedings for the purposes of gathering information about the assets of the FURBS and the trust generally. As stated above, the starting point for trustees is, in most cases, to decline to submit to the jurisdiction. However, T Limited sought guidance from the Guernsey Court in respect of its submission to the jurisdiction of the English Court. T Limited's application was, in part, driven by the fact that Guernsey, like Jersey, has what are termed 'firewall' provisions in its trust law. The firewall provisions confer

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exclusive jurisdiction to the Guernsey Court in relation to Guernsey trusts, of which the FURBS was one. This was the first time the Guernsey Court had been asked to consider firewall provisions and so the judge took the opportunity to review the relevant case law, which review included the various Jersey decisions which considered a trustee's submission to the jurisdiction of a foreign court.

The various decisions considered by the judge highlighted the importance of a trustee consulting its 'home' court when considering whether or not to submit to the jurisdiction of a foreign court. The Jersey cases indicated that a failure to do so before submitting could mean the trustee loses the benefit of the firewall provisions and is exposed to onerous disclosure obligations. Whilst the Jersey authorities indicated that, as a rule of thumb, a trustee should *not* submit to the jurisdiction of a foreign court, in this instance the Guernsey judge departed from the Jersey authorities and decided that it was appropriate for the trustee to submit to the jurisdiction of the English Court. This was because:

1. unlike a standard discretionary trust, T Limited had no discretion to exercise. D was the only member of the FURBS and the trustee's role was purely "mechanistic" i.e. to make arrangements to pay D a pension or (at his election) a lump sum.
2. the judge felt that the interpretation of the FURBS, and how it operated, was confusing and therefore the trustee could assist the English Court in clarifying the terms on which the assets of the FURBS were held.

Incidentally, the judge did say that he would have followed the Jersey authorities if T Limited had been trustee of a standard family discretionary trust with a beneficial class extending beyond the husband and the wife.

It will be interesting to see whether the Royal Court in Jersey adopts the same approach in a similar situation i.e. that the rule of thumb should not apply when the trustee has a limited discretion in respect of the trust.

So what does this mean? When confronted by divorce proceedings in a foreign jurisdiction, what should trustees of a Jersey-law trust have in mind?

- It is usually appropriate for a trustee to provide information to a beneficiary about that beneficiary's interest under the trust. But, depending on the circumstances, it may nevertheless be advisable to seek directions from the Royal Court.
- An analysis of the Jersey authorities shows that, as a rule of thumb, a trustee should *not* submit to the jurisdiction of a foreign court without first seeking the permission of the Royal Court; it would be a very brave trustee indeed to decide to submit without the blessing of the court from its home jurisdiction.

In light of the recent Guernsey FURBS case, the rule of thumb as to the Royal Court's refusal to direct submission may not apply if the trust is one in respect of which the trustee has a limited discretion. There is a good chance that the correct decision will be to submit and the trustee will, probably, be permitted to do so by the Royal Court – but in such circumstances it is even more important for the trustee to apply to the Royal Court before taking any steps.

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