

CASE UPDATE

Momentous trustee decisions: the role of the Jersey courts

The Royal Court of Jersey recently published its judgment in the case of Representation of G.B. Trustees [2021] JRC 048, which relates to an application by a trustee for the court's blessing of its decisions to (a) exclude a beneficiary and (b) not to litigate to recover losses arising out of alleged fraud and breaches of trust.

Background of the case

The case, as with many family disputes, has a lengthy and complex history. In overview, the case related to two Jersey proper law trusts, the Manor House Trust and the Russian Trust, which respectively owned St. John's Manor in Jersey and (via Lilianfeld Holdings Limited) a flat in St. Petersburg. The economic settlor of the trusts, which were respectively established in 1980 and 1974, was John William Dick I (the "**Settlor**"), the father of John William Dick II ("**John**") and Tanya Stock ("**Tanya**"). The trust instrument of each trust gave its trustee(s) powers to add and exclude beneficiaries. This latest judgment related *inter alia* to the decision of G.B. Trustees Limited (the "**Trustee**") to exclude Tanya as a beneficiary of both trusts, following her "*hostile conduct*" which, the Trustee said, "*had an enormous impact on the trusts*" and which the Trustee feared "*will continue potentially to the point where all of the now much reduced value of the funds will be exhausted in the costs of litigation*". Tanya's conduct included: -

- her issuing of proceedings (including in contravention of an injunction imposed on her by the Royal Court of Jersey (the "**Royal Court**")) in Cyprus, the U.S., and Russia relating to the trust property and involving the Trustee and other family members, in a manner which was said to "*damage the interests of the trusts*";
- her contempt of orders of the Royal Court;
- her refusal to pay (a) amounts owed under costs orders made by the Royal Court exceeding £934,000 and (b) her own lawyers over £1.05m;
- her husband's "*frivolous and vexatious*" debt claims totalling £1.4 million relating to the Manor House Trust; and
- her and her husband's arranging the publication of denigrating articles about the Settlor, former trustees of the trusts, the Trustee, the trust industry in Jersey, the Jersey authorities and Jersey's judiciary.

CASE UPDATE

Exercising exclusionary powers

The power to exclude a beneficiary is an unusual power. Usually, powers are exercised in the interests of an object or objects of a trust power. Powers to exclude beneficiaries are different. Save in cases where there may be tax advantages associated with excluding a person as a beneficiary, the exercise of an exclusionary power is likely not to be of benefit to the person being excluded but instead to be of benefit to the persons who are to remain as beneficiaries. As made clear by the Royal Court in 2014¹, it is incumbent upon any trustee who is considering whether to exercise a power to exclude a beneficiary to consider the position very carefully, including by taking into account the position of the beneficiary whose exclusion is proposed and whether the decision is a reasonable one in the interests of the other members of the beneficial class. In this case the Trustee, after *inter alia* considering the wishes of the Settlor (which were that his daughter, Tanya, be excluded as a beneficiary of both trusts), exercised its powers to do just that but sought the Royal Court's approval.

The role of the Royal Court of Jersey

In general terms, where a trustee is either considering or has exercised an exclusionary power there are four categories or types of cases in which the Royal Court may become involved. The four categories of case were identified in the well known English case of *The Public Trustee v Cooper* [1999] 12 WLUK 603 and arise where: -

- (1) there is an issue whether, on its proper interpretation, the trust instrument permits a proposed course of action;
- (2) the trustee asks the court to bless a decision which it considers to be a momentous one for the trust, where the nature of the trustee's power is not in doubt;
- (3) the trustees surrender their discretion to the court as they are disabled from acting, for example, because they are deadlocked or there is a conflict of interest; and
- (4) there is a challenge to an exercise of a trust power on the grounds that it is *ultra vires* or has otherwise been exercised for an improper purpose.

This approach to the categorisation of cases was adopted and applied by the Royal Court in *Re S Settlement* [2001] JLR Note 37 and has subsequently been applied by the Royal Court on many occasions.

Where, as in this case, the Royal Court's involvement arises because the case falls into category (2), the Court considers whether the trustee's decision: -

- (1) was formed in good faith;
- (2) was a reasonable opinion which a properly instructed trustee would have arrived at;
- (3) was vitiated by any actual or potential conflict of interest.

¹ See *HSBC International Trustee Limited v O. Poon, Kan, K. Poon and Goulborn* [2014] JRC 254A.

CASE UPDATE

At paragraph 55 of its judgment the Court referred to the explanation of its function in the following extract from the 20th edition of *Lewin on Trusts*: -

“39-095 The court’s function where there is no surrender of discretion is a limited one. It is concerned to see that the proposed exercise of the trustees’ powers is lawful and within the power and that it does not infringe the trustees’ duty to act as ordinary, reasonable and prudent trustees might act, ignoring irrelevant, improper or irrational factors; but it requires only to be satisfied that the trustees can properly form the view that the proposed transaction is for the benefit of beneficiaries or the trust estate and that they have in fact formed that view. In other words, once it appears that the proposed exercise is within the terms of the power, the court is concerned with limits of rationality and honesty; it does not withhold approval merely because it would not itself have exercised the power in the way proposed....

39-096 The court, however, acts with caution, because the result of giving approval is that the beneficiaries will be unable thereafter to complain that the exercise is a breach of trust or even to set it aside as flawed; they are unlikely to have the same advantages of cross-examination or disclosure of the trustees’ deliberations as they would have in such proceedings. If the court is left in doubt on the evidence as to the propriety of the trustees’ proposal it will withhold its approval (though doing so will not be the same thing as prohibiting the exercise proposed)..

39.097 Hence it seems that, as is true when they surrender their discretion, they must put before the court all relevant considerations supported by evidence. In our view that will include a disclosure of their reasons, though otherwise they are not obliged to make such a disclosure, since the reasons will necessarily be material to the court’s assessment of the proposed exercise.”

The first decision: whether to approve the decision to exclude Tanya

In the Royal Court’s judgment, Commissioner Clyde-Smith evaluated the factors considered by the Trustee in reaching its decisions, including: -

- (1) Wishes of the Settlor: The Royal Court considered the Settlor’s wishes “*to always be a relevant consideration*” but that they should be treated with an element of caution given the complete breakdown in relations between the Settlor and Tanya.
- (2) Position of John: The position of John (which the Court considered to be “*the key factor*”) was (a) that he wanted an end to the litigation, (b) that he wanted the remaining assets to be preserved and applied to benefit future generations of the Dick family (including his children), (c) that Tanya had “*caused irreparable financial damage to the trusts and to him personally by reason of her conduct, which was continuing, causing further administrative and legal costs to be incurred*” and (d) that, if there was to be anything left for him and his children, exclusion was the only proper course.
- (3) Impact on the trusts if Tanya remained a beneficiary: The Court considered that the tone of Tanya’s correspondence supported the view that any future decisions of the Trustee which

CASE UPDATE

conferred benefit on other beneficiaries (but not her) was *“likely to be challenged by her at the further cost of the trust funds.”*

- (4) The extent of Tanya’s prior benefit: The Royal Court reached the view by reference to the available evidence that Tanya *“had benefited substantially”* while John had received *“little or no direct benefit”*.

The Royal Court concluded that there was *“a genuine need to protect what is left of the trust assets from further depletion by a beneficiary who has a significant history of conducting litigation against the trustees that is without merit and who has benefited substantially in the past.”*

Applying the foregoing 3-part test, the Royal Court found the decision (a) to be in good faith and in the interests of the trust estates, (b) to be a reasonable decision for a properly instructed trustee to arrive at, and (c) despite unconvincing allegations by Tanya to the contrary, not to have been vitiated by a conflict of interest. The Royal Court accordingly blessed the decision of the Trustee to irrevocably exclude Tanya as a beneficiary of the trusts.

The second decision: no further litigation

The second decision, which the Royal Court blessed, concerned a view that the Trustee had reached (which was contrary to the wishes of Tanya) not to issue proceedings against the Settlor and former trustees in relation to alleged breaches of trust, fraud and other unspecified causes of action going back decades. The principal considerations relied upon by the Trustee in reaching such a view were: -

- (1) John was *“consistently and firmly against the use of trust funds in such litigation”*.
- (2) Tanya was unwilling to fund any such litigation.
- (3) A settlement agreement and mutual release signed by the Settlor, John, Tanya, Tanya’s husband, and the former trustees in 2016 likely precluded the pursuit of any such claims.
- (4) The expense of such litigation, with discovery alone being expected to cost £1.9m–£4m, was high and put the remaining assets of the Trusts (estimated to be worth £3.5m–£4m) at risk.
- (5) Litigation funding was unlikely to be available.
- (6) There was uncertainty whether, if any claims were successful, any recovery might be made.

The Royal Court, unsurprisingly, accepted these arguments and took account of the following: -

- (1) After Tanya’s exclusion, John and his children were the remaining members of the primary beneficial class.
- (2) Pursuing a claim through litigation has to be considered by trustees as an investment of the trust fund made for the sole purpose of achieving a financial return for the trust estate.
- (3) Trustees are required under Article 21 of the Trusts (Jersey) Law 1984 to act *“as would a prudent person”* and considered it *“eminently prudent not to invest any part of these trust funds in investigating and then pursuing what would be complex litigation in a number of jurisdictions.”*

CASE UPDATE

Concluding remarks

This case provides a useful illustration of the approach taken by the Royal Court in relation to the approval of trustees' momentous decisions, including in relation to a rare decision to exclude a beneficiary.

James Dickinson provided strategic advice to the Settlor in this matter.

Dickinson Gleeson is well placed to advise trustees who have taken, or are about to take, a momentous decision likely to be opposed by a beneficiary.

Contacts



James Dickinson
Partner
+ 44 1534 737757
james.dickinson@dgadvocates.com



William Grassick
Associate
+ 44 1534 737757
william.grassick@dgadvocates.com

This update is only intended to give general overview of the subject matter. It is not intended to be comprehensive and does not constitute, and should not be taken to be, legal advice. If you would like legal advice or further information on any issue raised by this update, please get in touch with one of your usual contacts.