

## A trustee's fiduciary duty to act en bon père de famille: the Guernsey Royal Court finds a dishonest breach of trust

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On the 23 December 2022, the Royal Court of Guernsey handed down judgment in the matter of *Nina Naustdal vs TKC Corporate Services NV and two others* in which the Court found that the First Defendant, a professional trustee had acted in dishonest breach of trust.

The principal asset of the Trust had been transferred out of trust to benefit a stranger to the trust constituting a fraud on a power. The Court declared, amongst the various other relief that it granted, that the purported transfer of trust property by the trustee was void and further ordered that the trustee be deprived of its indemnity for any legal fees and disbursements in connection with the proceedings and to repay any sums that had been taken from the trust.

### Relevant facts

The Plaintiff, Ms Naustdal is a successful fashion designer and mother who lives in London with her partner and three children. Ms Naustdal is also a beneficiary of a Guernsey law trust (the **Trust**), which owns a valuable London property (through a holding company), where she and her family reside.

In or around August 2019, the former trustee of the Trust, TKC Corporate Services NV (the **Trustee**) purported to transfer the share in the holding company to a third party - the second named defendant in the proceedings (**Mr Rijckaert**) - for a consideration of £1. The basis for transferring the shares was an agreement that Mr Rijckaert had ostensibly concluded with Ms Naustdal and her partner earlier in the year. Notwithstanding the fact that Mr Rijckaert had not performed any of obligations under this purported agreement (something which the Trustee failed to investigate), the Trustee transferred the shares to Mr Rijckaert without consulting Ms Naustdal or any of the other beneficiaries. Shortly after the transfer, Ms Naustdal received a notice to vacate the property which had been sent at the behest of Mr Rijckaert.

Under the threat of being evicted from her family home, Ms Naustdal attempted to replace the Trustee only to discover that the Trust had purportedly been terminated and the share transferred. She therefore approached the Royal Court of Guernsey for various relief including an order to set aside the transfer. The claim brought by Ms Naustdal included allegations of dishonest breach of trust, knowing receipt, dishonest assistance, and conspiracy against the defendants.

## Court's analysis and findings

The Court was thorough in its analysis of the evidence before it and noted instances where the defendants' failure to meet their disclosure obligations meant that the evidence was ultimately lacking or absent. Most noticeably, the Trustee failed to disclose any documents regarding its decision to transfer the share save for one document, a chronological timeline, which appeared to have been prepared substantially after the event and from the perspective of Mr Rijckaert. As a professional trustee, one would have expected the Trustee to have minutes for its decision recording what information and supporting documents the Trustee considered in reaching its decision and also an accompanying resolution. Despite the Court making further orders for the Trustee to specifically disclose all such documents relating to its decision to transfer the share (or to provide an affidavit stating the reasons why such documents could not be disclosed), the Trustee was unable or unwilling to do so.

In examining the chronological timeline which the Trustee relied upon to support its decision, the Court noted that the document did not reference the beneficiaries or consider what was in their best interests. Remarking on this document, the Court noted that:

"there does not appear to have been at the time or indeed at all, any consultation with [Ms Naustdal] nor any consideration by the [Trustee] to the interests of the Minor Beneficiaries who live in the Property and for whom along with [Ms Naustdal] the Trust had been settled, the purpose of which being 'to provide accommodation for the beneficiaries at all times during the Trust period'. The [Trustee] does not appear to have given any consideration to the fact that neither [Ms Naustdal's partner] nor [Ms Naustdal] were able to sign away the Minor Beneficiaries' rights in the Trust, or their rights to any distribution from the Trust, on their behalf."

The Court further noted that the evidence showed that Mr Rijckaert - who the Court further noted was a stranger to the Trust - had agreed to pay the Trustee's professional fees for carrying out trust services including the purported transfer of the primary trust asset to him. It also showed that Mr Rijckaert had given an undertaking to indemnify the Trustee for any costs or liabilities to third parties associated with the trusteeship, including any liabilities incurred as a result of transferring the asset to himself.

Having considered the above-mentioned evidence, the Court then looked at the terms of the trust instrument and noted clause 10 which provides:

“the Trustee shall exercise (or refrain from exercising) the trust powers and discretions vested in it as the Trustee shall think fit for the benefit of all or any one or more of the Beneficiaries....”.

The Court noted that this has been referred to in case law as the principle of “single-minded loyalty” of the fiduciary and that the test of whether an exercise is for the benefit of the beneficiaries is an objective test.

The Court reiterated in its judgment that the Trustee was obliged to exercise its functions with utmost good faith and to act en bon père de famille as required by Section 22 of The Trusts (Guernsey) Law, 2007. As a trustee with fiduciary duties, the Trustee was under an obligation to exercise its power for a proper purpose. If a trustee exercises its power for a purpose or with an intention beyond the scope of or not justified by the instrument creating a power, this is a fraud on a power and such an exercise is void.

The Court then examined the requirements for showing dishonesty in the case of a professional trustee which are set out in the English case of *Fattal & Others v Walbrook Trustees (Jersey) Limited & Others* [2010] EWHC 2767 (Ch). These include:

- i. a deliberate breach of trust
- ii. committed by a professional trustee
  - a. who knows that the deliberate breach is contrary to the interests of the beneficiaries; or
  - b. who is recklessly indifferent whether the deliberate breach is contrary to their interests or not; or
  - c. whose belief that the deliberate breach is not contrary to the interests of the beneficiaries is so unreasonable that, by any objective standard, no reasonable professional trustee could have thought that what he did or agreed to do was for the benefit of the beneficiaries

In applying the test from *Fattal v Walbrook*, the Court found that the exercise of the transfer of the shares to Mr Rijckaert could not be properly regarded as being for the benefit of the beneficiaries. The Court found that the Trustee had not independently turned its mind at all to the exercise of its powers but had merely acted on the prompting of others (in this instance, Mr Rijckaert). In this regard, the Court noted:

- that there were no trustee resolutions or minutes or contemporaneous file notes made prior to the exercise of the Trustee's discretion recording that it deliberated the matter of the transfer at all
- the Trustee did not inform let alone consult the beneficiaries of its intention to transfer the asset out of the Trust
- there was no evidence to show that the Trustee attempted to verify or check that the ostensible agreement between Mr Rijckaert and Ms Naustdal and her partner had been

performed

- the Trustee failed to consider the position of the minor beneficiaries who were not capable of expressing their wishes or authorising a conflict of interest
- Mr Rijckaert is not a bona fide purchaser for value without notice and that he assisted in the breach of Trust committed by the Trustee
- the Original Trustee refused to transfer the share to Mr Rijckaert on the basis that it was not in the best interests of the beneficiaries. The Trustee and Mr Rijckaert were both on notice that the Original Trustee had refused to undertake the transfer
- the Trustee admitted to being funded by Mr Rijckaert for carrying out its services including the purported transfer of the share with no identifiable benefit for the beneficiaries and that Mr Rijckaert undertook to indemnify it against liabilities to third parties any liabilities incurred as a result of transferring the Trust's primary asset to himself

In concluding, the Court found that the transfer was a deliberate breach of trust and made contrary to the interests of the beneficiaries and that the Trustee acted at the very least with reckless indifference to their interests.

Given that the Court found that there was a dishonest breach of trust to benefit Mr Rijckaert constituting a fraud on a power, it did not find it necessary to make findings of dishonesty against Mr Rijckaert (although the Court remarked that there was sufficient evidence to conclude that he was the knowing recipient of property transferred or paid out in breach of trust and that he engineered the circumstances which resulted in the Trustee taking the actions that it did).

The Court therefore declared that the transfer of the shares to Mr Rijckaert was made in breach of trust and that such transfer was void and should be set aside.

The case is also notable because the Court was prepared to make findings of dishonest breach of trust and grant declaratory relief to set aside the transfer on a default judgment basis and in the absence of a full trial. The fact that the defendants were at certain times litigants in person did not excuse them from engaging with the proceedings and complying with court orders.

## Conclusion

This case serves as a reminder of the importance for trustees to remain independent and to not allow themselves to be influenced by third parties and strangers to the trusts which they administer. Trustees have a fiduciary duty of single-minded loyalty to act in the best interest of the beneficiaries. The test for this is an objective standard and the Royal Court has shown itself willing to make findings of dishonest breach of trust when the evidence demands it with severe consequences for a professional trustee.

This case is also an important reminder for beneficiaries to be vigilant and take action if they suspect any misconduct on the part of the trustee.

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