

Disclosure, decisions and non-binding guidance in trust law

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Mathew Newman, Sandie Lyne and Fay Warrilow from Ogier's Trust Advisory Group chatted about recent Guernsey and Jersey trust law cases with an audience of local practitioners last week.

Topics ranged from disclosure requests to momentous decisions, as partners Mathew and Sandie and senior associate Fay discussed the limits of the court's supervisory jurisdiction and how that might differ between the Jersey and Guernsey courts.

While the fireside was CGI, the subjects themselves generated some heated debate – particularly the concept of 'non-binding guidance' recently explored in the Jersey courts, and the disclosure requests made by non-beneficiaries in Guernsey this year.

What kinds of disclosure applications might a trustee experience and what rights do those parties have?

Disclosure requests can come to a trustee by various routes. The most common will be beneficiaries seeking information about a trust they have an interest in, but there are other possible sources including non-beneficiaries or even regulatory authorities.

Beneficiaries have some defined statutory rights such as a right to information about the state and amount of trust assets – see for example section 26 of the *Trusts (Guernsey) Law 2007*. They also have common law rights which were reviewed and restated in 2003 by the Privy Council (on appeal from the Isle of Man's appellate court) in the highly influential *Schmidt v Rosewood Trust Ltd*.

That case has been repeatedly considered and cited with approval in Guernsey and Jersey and can be distilled down to the principles that:

1. A beneficiary has a right to approach the court to seek disclosure of trust documents under the court's supervisory jurisdiction
2. There are three areas where a court may need to form a discretionary judgment:
 - i. whether a discretionary object should be granted any relief at all
 - ii. what classes of documents should be disclosed and whether they should be redacted
 - iii. what safeguards should be imposed.

Non-beneficiaries might ask for information because they think they may have a right to be added to the class of beneficiaries, or because they need trust information for other reasons such as a personal tax liability. Whether they have a right to that information may also be a matter for the court to decide, but it will not grant non-beneficiaries wider rights than beneficiaries have (see *BX v T*, discussed later).

Beneficiaries and non-beneficiaries might also make a direct subject access request (or **DSAR**) under the relevant data protection law, but again they will not obtain anything under data protection law which they cannot obtain under trust law (see for example section 16B of the Data Protection (Bailiwick of Guernsey) Law, 2017 which cross refers to section 38 of the Trusts (Guernsey) Law 2007).

What should a trustee do when asked for disclosure and what happens if the person asking doesn't like the answer?

Firstly, a trustee will look at the decision to be made and see if it can simply make the decision. If the decision is momentous enough it may apply to the court to have its decision blessed, or even, under certain circumstances, surrender its discretion to court. Recent case law has tested the extent and purpose of the Jersey and Guernsey courts' trusts supervisory jurisdiction as set out in section 69 of the Trusts (Guernsey) Law, 2007 ("section 69") and section 51 of the Trusts (Jersey) Law, 1984 ("section 51").

BX v T – non intervention and powers of addition

This case related to applications by B and a 'US family' for disclosure under section 69 from the W Trust on the basis that the court could entertain their claims because of their respective prospects of benefitting under the trust.

Ultimately, the Guernsey Royal Court dismissed their applications on the basis that (i) their prospects had to be 'overwhelmingly strong', and were not, and (ii) in any event, the purpose of the disclosure was not sufficiently connected with the administration of the W Trust.

In her judgment, Lieutenant Bailiff Hazel Marshall reviewed *Schmidt v Rosewood* and the scope of the court's inherent jurisdiction to order disclosure. In her view, non-beneficiaries could not benefit from wider rights than beneficiaries, and would have to have an exceptionally strong case. She also considered the proper purpose rule in light of *Grand View PTC v Wong*.

Representation of SG Kleinwort Hambros Trust (CI) Limited and others

This 2023 Jersey Court of Appeal case also looked at the scope of the court's supervisory jurisdiction over trusts, the non-intervention principle, and the notion of 'non-binding guidance'.

The settlor of a suite of family trusts died unexpectedly in 2019 and a restructuring of the various trusts was proposed to resolve issues that had arisen between beneficiaries including the settlor's widow, their children, and the settlor's children from his first marriage.

The trustee had formed its own view, but it was agreed by all parties in a case management hearing before the Jersey Royal Court that the court would provide "such non-binding guidance, observations and views as it may see fit" in relation to the restructuring proposals in an iterative process leading up to the final blessing application.

The case management decision was essentially appealed by one of the parties which had agreed to it. If that seems surprising, it was equally surprising to the Jersey Court of Appeal, which dismissed the matter on the basis that it would not interfere with an interlocutory decision of this kind, and certainly not one which everyone had agreed to.

In dismissing the decision, the Court of Appeal offered some comment on the scope of the Jersey court's intervention powers in trust administration matters: "Whilst the Royal Court will always need to case manage trustee applications such as this, and the Court of Appeal will always respect the case-management decisions of the court below, nothing we have said in this judgment should be interpreted as an encouragement to first instance judges either to depart from the non-intervention principle or to express provisional views as to the substantive content of any possible restructuring in the generality of cases.

"Self-evidently, judicial decision-making must be, and must be seen to be, based on the best available evidence, which is a situation that is only reached at the end of a substantive trial. As a result, provisional views which have been formed at an earlier stage will not be fully informed and may accordingly be wrong.

"Equally importantly, any expression of such provisional views will risk giving the impression that the court's mind is already made up before the evidence is complete. And, irrespective of how disciplined the judicial mind may be, human nature being as fallible as it is, there is always a risk that, having expressed a provisional view, the court will subconsciously be inclined to adhere to

it even as further evidence and argument unfold. For these reasons, we would generally discourage the expression by the court of provisional views as to the content of any proposed restructuring."

'Non-binding guidance' – a help or a hindrance?

The jury is out! Despite the Jersey Court of Appeal's comments, some of the seminar audience could see the use of an iterative process where versions of, say, a restructuring have the benefit of court guidance before they are finally tested. That could avoid a situation where a scheme is years in the making only to be rejected at the last moment when it comes before the court.

On the other hand, some thought that non-binding guidance could be the worst of all worlds for trustees, who would be left to make their own decisions without the protection of a definitive ruling but with the weight of a court indication which might be used against them by disgruntled parties.

Another fireside, or barbecue-side, chat may be needed to see how the case law unfolds.

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