

## Protection for Trustees Facing Foreign Tax Liabilities - Representation of WW and XX (Trust)...

Insights - 30/05/2013

### Protection for Trustees Facing Foreign Tax Liabilities - Representation of WW and XX (Trust) [2013] JRC 013

A recent judgment of the Royal Court is noteworthy and should provide some comfort to Jersey trustees facing potential tax liabilities for two reasons:

1. It re-enforces the position that a trustee is under a duty to assist the Court in an application for directions brought either by itself as trustee or by another person, and provided that it is acting in accordance with such duty will normally be awarded its costs incurred in doing so;
2. It confirms that a trustee is entitled to take reasonable steps to ensure that it does not face, personally, a tax liability which in fairness ought not to have been imposed upon it, and it should not be penalised in costs for requesting an indemnity on handover of trust assets based on a potential tax liability.

In this case, the Court found that the trustee concerned was entitled to have regard to a potential tax liability when seeking an appropriate indemnity on handover of trust assets. It was thus not penalised in costs for its approach. The Court in fact went further and said that, even in circumstances where a trustee may not be entitled to request an indemnity to protect itself against a potential tax liability, it would not be willing to order costs against the trustee which sought such an indemnity (at least on the basis of professional advice) because to do so would place a Jersey trustee at the mercy of draconian foreign taxes.

### Background

The E family, going back some years, included the late E and his two children (a son C and a daughter B). A took on the trusteeship of the E Family and Charitable Foundation in 2007 and,

having taken some tax advice it became apparent to A that a significant tax liability potentially existed.

The trust fund of the C Foundation comprised four parts, each with a different protector and different trustees. The Protector of the First Part was E; of the third part it was C. In August 1985, the Trustee of the First Part purported to wind up the First Part and to resign as trustee. To achieve this a procedure was designed requiring the execution of a number of documents as follows:

- a deed of appointment of new protector of the First Part;
- a declaration of additional beneficiary of the First Part;
- a revocable appointment appointing out the whole of the First Part of the trust fund to an individual outside the family, M, contingent upon her survival on a particular date;
- a sale contract whereby a company, G Services Inc, bought from M the whole of her contingent reversionary interest in the First Part (subject to the power of revocation);
- a release of the power of revocation making the appointment to M irrevocable.

The intention, it would seem, was for the whole of the First Part of the trust fund of the C Foundation to vest in G Services Inc absolutely. The documents were executed. E was a director and treasurer of G Services Inc. On 14 June 1985 G Services Inc made a declaration of trust (the G Trust), and transferred the shares in G Services Inc into the G Trust (later to become known as the E Family and Charitable Foundation).

However, some decades later, an allegation was made that certain of the above documents were backdated with the ultimate result being that the First Part of the trust fund was still in existence but without trustees. C brought a Representation by way of separate proceedings alleging the backdating of documents and seeking the appointment of new trustees of the First Part. The Court ordered the appointment of two individuals WW and XX as joint trustees of the First Part.

## Representation of WW and XX

WW & XX then brought a Representation under Article 51 of the Trusts (Jersey) Law 1984 seeking declarations that the deeds and revocable appointments described above be declared invalid, and that the sale contract and subsequent release of power of revocation be declared invalid. The Representors alleged a knowing falsification of the relevant documents by the then trustee of the C Foundation and/or by two other Respondents and E - the former protector. A was convened to the hearing of that Representation on the basis that it was allegedly a trustee *de son tort*.

## Trustee's position

A filed an answer to the Representation. A did not contend that the declarations of invalidity ought not to be granted: it had no evidence to counter the specific allegations made. Rather, A took the view that, as trustee of the E Family and Charitable Foundation and as a convened party, it owed the Court a duty to bring to its attention all relevant information in its possession to give context to the relief being sought. In complying with this duty, A raised two primary issues, the most noteworthy being that before sanctioning any distributions, the Court should look at the potential tax liabilities which A had been advised may be found to exist which needed to be tackled as a priority before any trust funds could be released from the E Family and Charitable Foundation to the C Foundation.

## HMRC

The Court gave various orders and directions concerning the filing of pleadings and evidence, and also adjourned the proceedings of its own motion to allow time to resolve the issues using mediation. During this time, further advice was taken from A's tax advisors. C also took up the question of potential tax liabilities with HMRC. Ultimately the position was reached whereby HMRC confirmed that so far as they were concerned, the matter was closed. The tax advisors concluded that although the risk previously identified still existed, the chances that HMRC would be pursuing it were minimal.

## Costs

The matter therefore turned to costs, and the terms of an indemnity to be given to A. The Court had already dealt with the question of the second respondent's (B's) costs in a separate hearing, in which the Court was required to consider whether the second respondent was reasonable to have supported A in raising the tax issues. The Court at that hearing held that it was not unreasonable for A to have raised the issues, and therefore an issue estoppel arose which prevented the Court from finding differently in the hearing regarding A's costs. However the judge did state that if there had been no issue estoppel, the principles to be adopted in similar cases were that (i) a trustee is normally entitled to a full indemnity out of the trust for reasonable legal costs if incurred in a neutral position in litigation; and (ii) if a trustee has acted unreasonably, it could be denied its indemnity.

It was made clear that in line with the Court's judgment in the Esteem matter, in an application for directions regarding a trust, the Court is entitled to expect the fullest assistance from the trustee, who should ensure that all relevant law is before the Court and that all arguments for and against the possible causes of action are rehearsed. The trustee should usually assist the Court by recommending a particular course of action and explaining the reasons for its recommendation. It would not be in the public interest for trustees to be penalised in costs simply because the Court did not agree with their recommendations, and therefore trustees will only be deprived of their costs out of the trust fund if they are found to have acted unreasonably.

The Court then went on to state that (a) WW and XX had not discharged the burden of showing that A had acted unreasonably, and (b) if the burden was on A, it had more than satisfied the task of establishing that it had acted reasonably in the proceedings. A took tax advice over a prolonged period in relation to the possibility of tax being due. A also took advice on the possibility of criminal liability on the part of the trustees.

The Court said that the question was whether A acted reasonably in approaching the question as to whether any tax liabilities might arise, and if so, against whom they might be enforced. A, as a trustee, was entitled to take reasonable steps to ensure that it did not face personally a liability for taxes which in fairness ought not to have been imposed upon it. A was entitled to have regard to any such potential liability for the purposes of framing its request for an appropriate indemnity on passing over the assets to the C Foundation.

Importantly, the judge said that even if that last finding was not so, "*I would not be willing to exercise a discretion over costs against a trustee which acted in that way because to do so would place a Jersey trustee at the mercy of draconian liability provisions which might be contained in foreign taxation statutes.*"

The Court did not hear evidence on the facts as to whether there was or was not any IHT liability. However the Court was convinced that on the basis of the documents that it had seen, there was a risk of such a liability. It was therefore not unreasonable for A to put matters before the Court which raised this issue.

## Comment

The comfort provided to trustees in this judgment should be welcomed by the Jersey trust industry. Trustees who find themselves convened to a Court application are clearly under a duty to assist the Court to the best of their ability and can comply with that duty safe in the knowledge that provided they do not act unreasonably they will be entitled to recover their costs. In addition, Trustees who are concerned about foreign taxes in any of their structures should be reassured by this judgment which confirms that they will not be penalised in costs if they incur costs in investigating potential foreign tax liabilities and acting cautiously on handover of assets due to the risk of such liabilities crystallising. Ogier acted for A.

### About Ogier

Ogier is a professional services firm with the knowledge and expertise to handle the most demanding and complex transactions and provide expert, efficient and cost-effective services to all our clients. We regularly win awards for the quality of our client service, our work and our

people.

## Disclaimer

This client briefing has been prepared for clients and professional associates of Ogier. The information and expressions of opinion which it contains are not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific advice concerning individual situations.

Regulatory information can be found under [Legal Notice](#)

## Meet the Author



[Edward Mackereth](#)

Global Managing Partner

[Jersey](#)

E: [edward.mackereth@ogier.com](mailto:edward.mackereth@ogier.com)

T: [+44 1534 514320](tel:+441534514320)

## Key Contacts



[Nick Williams](#)

Partner

[Jersey](#)

E: [nick.williams@ogier.com](mailto:nick.williams@ogier.com)

T: [+44 1534 514318](tel:+441534514318)

# Related Services

Dispute Resolution