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The Court of Appeal in Guernsey has recently handed down an important judgment in non-contentious trust proceedings commenced by way of application made by the trustees, which sought disclosure from beneficiaries of a number of family trusts under the supervisory jurisdiction of the Royal Court in anticipation of then seeking the Court's blessing of a proposed 'momentous' decision.

The judgment will have significant weight in Jersey as well as Guernsey, as it was decided by Jersey's Bailiff (sitting as a Guernsey Court of Appeal judge) and the relevant statutory provisions are not materially different between the jurisdictions.

### Facts

The trustees of the relevant family trusts wished to separate the interests of one beneficiary (the daughter). To do so they needed to value the assets of the trusts, which broadly consisted of i) an investment portfolio, ii) two property portfolios and iii) business interests in Africa.

The assets were held through a number of companies in different jurisdictions and the trustees therefore commissioned a valuation which highlighted significant gaps in the trustees' knowledge such that they could not satisfy themselves as to the overall value of the trusts (estimates varied between \$159m and \$373m).

The trustees believed that certain other beneficiaries of the trusts (the brothers) had the information required to complete the valuation of the trusts.

## Application

The trustees made an application for disclosure by the brothers pursuant to sections 68 and 69 of The Trusts (Guernsey) Law, 2007 (Trusts Law), which the Court recognised were materially the same as the equivalent articles of The Trusts (Jersey) Law 1984.

The daughter subsequently made an application for disclosure herself which went beyond the material sought by the trustees.

The lower court refused both the trustees' and the daughter's applications for disclosure. The daughter sought leave to appeal the decision of D.B. McMahon, but the trustees did not, citing *Re Londonderry Settlement* as authority that in such proceedings, having received the directions of the court it is not the place of a trustee to appeal.

## Trustees' decision to not appeal

As a preliminary point, the Court questioned whether the trustees were right to rely on the observations of Harman LJ in *Re Londonderry Settlement*, noting that Salmon LJ in that case had taken a different approach, stating that "the trustees were fully justified in bringing this appeal. Indeed it was their duty to bring it since they believe rightly that an appeal is essential for the protection of the general body of beneficiaries."

The Court of Appeal preferred the view of Salmon LJ, and Birt JA was of the view that as the trustees in the present case clearly still believed that the information they sought was important for them to reach a fair conclusion as to the division of the assets of the trusts, they should have taken on the responsibility for appealing. He noted that it was very unlikely that a court would conclude that such a stance on their part was so unreasonable that they should be denied their indemnity out of the trust fund.

## Orders for disclosure

In opposing the daughter's appeal, the brothers submitted that the Court should adopt the principles laid down by the Jersey Court of Appeal in *Re B, C and D Settlements v E (BCD)* in finding that the orders for disclosure sought fell outside the scope of section 69 of the Trusts Law.

The following points arose for decision in R and RA:

(i) Should BCD be followed in Guernsey?

In BCD the trustee sought disclosure against certain beneficiaries who were directors of underlying companies. The information sought related to potentially excessive remuneration paid to the directors and was sought in anticipation of a decision to achieve a proper division of trust assets between family members. The Royal Court granted the orders sought but that decision was overturned by the Jersey Court of Appeal on the ground that the making of such an order fell outside the scope of the equivalent Jersey disclosure provision because the directors owed no duty of disclosure to the trustee or other beneficiaries which arose directly out of the trust relationship.

Birt JA stated that if the Court in BCD meant that there was simply no jurisdiction to make the order sought, that he respectfully disagreed. He pointed out that the terms of the statute were very wide, and that as long as the matter was connected to the court's supervision of a trust and the relief sought fell within the terms of the statute, the court should recognise that it at least has the jurisdiction (i.e. the power) to make the order. Beloff JA, in his supporting judgment, agreed that the Guernsey and Jersey provisions each represented the statutory embodiment of the Court's inherent supervisory jurisdiction, and was not inclined to narrow this broad and flexible power as the Court in BCD had done.

Beloff JA stated (para 7) that: "In my view, the Court should, on a case by case basis consider whether the order sought by someone entitled to seek it promotes the purpose of the provision, and, if the Court considers that it does, whether there are any factors which should incline the Court nonetheless to refuse to make such an order."

(ii) Does section 69 permit the Court to order a beneficiary to provide information to a trustee in relation to a trust?

Although Birt JA accepted that a beneficiary does not owe a fiduciary or other duty towards a trustee, so the circumstances in which an order for disclosure will be made against a beneficiary are likely to be "exceedingly rare", he stated that the inherent and statutory jurisdictions of the Court are both wide enough to encompass such an order. Therefore, if the Court concludes that the provision of information by a beneficiary is required in order to protect the interests of the beneficiaries as a whole, it can and should make such an order

(iii) Assuming the Court has jurisdiction to make the order requested, should it do so on the facts of this case?

On the facts of the case, the Court of Appeal concluded that: (i) the information sought was needed by the trustees in order to reach a decision which would be fair to all beneficiaries, (ii) there were good reasons to believe that the brothers had the information, and (iii) there was a sufficiently close connection between the brothers' positions as beneficiaries of the trusts and the information sought. Therefore, certain disclosure was ordered.

However, the Court refused to grant the additional information requested by the daughter, which

the trustees themselves stated that they did not require, as it was for the trustees to decide what information was necessary.

(iv) If the Court does not have jurisdiction under section 69, may it order disclosure under ordinary litigation rules?

The Court concluded that there was abundant authority for the proposition that the Court's ability to order disclosure pursuant to its supervisory jurisdiction in relation to trusts is quite distinct from its power to order disclosure in ordinary litigation (*Schmidt v Rosewood*; *Bathurst v Kleinwort Benson (CI) Trustees Limited*; *Re HHH Employee Trust*), and so the matter fell to be considered solely under the supervisory trust jurisdiction.

## Comment

In light of the decision in *R and RA*, we now know that in Guernsey disclosure can be ordered against a beneficiary on the application of a trustee or another beneficiary of the trust, albeit only in "exceedingly rare" circumstances. The principles governing disclosure under the Court's supervisory jurisdiction as formulated in *Schmidt v Rosewood* therefore continue to evolve.

As noted by Beloff JA, the Court was qualifying the judgment of the Court of Appeal in Jersey in *BCD* "in terms of its applicability to Guernsey", and so of course the decision in *BCD* is still binding on the Royal Court in Jersey, although an applicant who is denied disclosure at first instance in Jersey may be inclined to take the matter to the appeal court .

Perhaps as significantly, the perceived wisdom that if a trustee has the benefit of a direction from the court that is the end of the matter seems to have had its day. A trustee who disagrees with the decision of the Royal Court (and presumably has the advice to back it up) should not be criticised for appealing the decision (and could be criticised for not appealing in certain circumstances)

The law concerning administration of trust proceedings is a fast-developing area of law, which has evolved significantly since the seminal decision in *Public Trustee v Cooper* in 2001. The decision of the Guernsey Court of Appeal in *R and RA* itself gives important clarification to trustees and beneficiaries alike as to the powers of the courts in the Channel Islands in the exercise of their supervisory jurisdiction of trusts.

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