

Trustee directions applications: what is the function of the Court?

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| Jersey: Y Trust [2014] JRC 027

The Royal Court of Jersey recently faced a trustee's application seeking the Court's blessing of its refusal to disclose trust information to a former beneficiary.

On the facts, the case was straightforward: documents were not being sought in order for the former beneficiary to hold the trustee to account, but to support proceedings which might have involved an attack on the Trust assets, and the Court agreed that it was not in the interests of the beneficiaries as a whole that the disclosure be given.

However, the question arose as to the function of the Court in such an application; was it for the Court to exercise its own discretion? Or was the Court's role limited to reviewing the proposed exercise of the trustee's discretion? (the **Function Issue**).

The answer to the Function Issue is important: it sets the test that the Court will apply in directions applications concerning disclosure, and therefore how the trustee should approach the Court. Surprisingly, the authorities are not consistent on this fundamental issue.

The trustee sought the Court's blessing for its decision applying the well known principles in the case of Re S[1], which in essence provide that the Court should bless a reasonable decision properly made. However, a different strand of authorities suggests that in matters concerning disclosure of trust documents, the Court will wish to reserve to itself the exercise of its own discretion and not limit itself to a review of the trustee's decision.

The Royal Court considered that it did not need to decide between the two approaches, because the trustee would satisfy both tests, and it should not decide definitively one way or the other because the point had not been the subject of detailed argument. It therefore expressly left the Function Issue open for determination on another occasion. However, Commissioner Clyde-Smith

took the opportunity to set out some noteworthy observations. In doing so, the Commissioner's judgment reviews both English and Jersey authorities, and provides interesting analysis which may very well be drawn upon by whichever Court finally decides the issue.

Is the Court to exercise its own discretion?

The Court began its analysis of the Function Issue with Re Rabaiotti[2]. Behind the question of what trust documents should be disclosed to beneficiaries lies one of the core elements of being a trustee, namely a trustee's duty to account to their beneficiaries. A beneficiary has a right to have the Court enforce this fundamental duty to account. However, does this mean that a beneficiary has a right to see trust documents? This was one of the questions considered in Rabaiotti, although it was considered from the context of whether the Court rather than the trustee has a discretion to refuse disclosure. In Rabaiotti the Court contemplated that whilst trustees were able to refuse to make disclosure, such a decision by a trustee should be combined with an application to the Court for directions, which could be brought either by the disappointed beneficiary or trustee. The judgment goes further and suggests that irrespective of who brings such an application, the function of the Court is not to review the decision of the trustees but to exercise its own discretion (although, confusingly, in doing so it appears to rely on a passage in the Australian case of Rouse[3] which is actually referring to trustee discretion).

The Court also considered that the Privy Council, in Schmidt v Rosewood[4] appeared to contemplate that the Court would exercise its own discretion, rather than review the decision of the trustees on such an issue.

Article 29 of the Trusts (Jersey) Law 1984 has been interpreted by the Jersey Court to mean that it confers a positive right on a beneficiary to see documents which relate to the accounts of the trust. The Court in Rabaiotti stated that the position under Article 29 is that the beneficiary's right to information is subject to any order of the Court, and the Court may in appropriate cases exercise a discretion to refuse to order disclosure. This adds further weight to the argument that the Court's function is to exercise its own discretion.

In the case of U v B [5], the Court was concerned with an application by a trustee for directions as to the disclosure of information to a settlor. The trustee did not seek the Court's blessing, but rather asked the Court to exercise its own discretion.

Or is the Court's function simply to bless the decision of the trustee?

Since U v B, it has been suggested in a leading trust law text book[6] that in fact, when concerned with issues of disclosure of information to beneficiaries, the Court would not exercise its own discretion, unless the trustee had surrendered its discretion (eg for reasons of conflict of interest)

or there is a successful challenge to the trustee's decision. The English case of Breakspear v Ackland[7], which concerned disclosure of a letter of wishes, supports this line of argument, envisaging that if the trustee does not surrender its discretion, or if the beneficiary cannot demonstrate that an occasion has arisen justifying the interference of the Court, then the Court will treat the application as a blessing application.

Further Jersey support for the Breakspear line of argument can be found in S and L and E v Bedell Cristin Trustees[8] where Birt, then Deputy Bailiff, said "The Court's role is a supervisory one and it is simply to ensure that decisions taken by trustees are reasonable and lawful. The Court does not simply substitute its own discretion for that of the trustee unless the trustee surrenders its discretion to the Court and the Court agrees to accept such surrender (which it is not obliged to do)."

In short, the Breakspear line of argument suggests that unless something has clearly gone wrong or the trustee has surrendered its discretion, the discretion remains with the trustee and the Court will not interpose its own decision for that of the trustee.

Observations from the Court

Commissioner Clyde-Smith acknowledged that it would be unworkable to hold that in every case where trustees decline to disclose documents they must seek the directions of the Court (as might be implied by interpreting Article 29 to mean that a beneficiary's right to information is subject to the Court's discretion, as held in Rabaiotti).

However, the Commissioner drew the potential distinction between applications brought in respect of the discharge of a trustee's obligations, and those brought in respect of the exercise of powers vested in the trustees under the trust deed or by law, with the Court being more astute to ensure that trustees discharge their obligations and not to distance itself from that task.

Ultimately, until full argument could be heard on the Function Issue, the Commissioner held that the Court is likely to reserve to itself the exercise of its own discretion in any application concerning disclosure, in order to ensure the proper protection of beneficiaries. However, the issue is not closed, and the final answer to the Function Issue remains to be seen.

Guernsey

Almost in parallel with the Jersey Royal Court, the Court of Appeal in Guernsey has been considering the Court's function in two different "Re S" application scenarios. In particular, the Court of Appeal considered applications brought by trustees for the blessing of a momentous decision, and applications brought by trustees where they are unable to decide how to exercise a power, perhaps because of conflict of interest.

The Court of Appeal, in its judgment in the case of In re F^[9] stated that momentous decision cases do not enable the Court to exercise a discretion. In fact Martin JA stated that any attempt by a Court to exercise a discretion in a momentous decision case where trustees had not surrendered their discretion would infringe the general principle that a Court will not enforce the exercise of a power against the wish of the trustees. When a trustee surrenders its discretion, however, the Court must then step in and exercise its own discretion, and the Court must act as a reasonable trustee would do in all the circumstances.

Conclusion

Directions applications brought by trustees or beneficiaries are relatively commonplace in both Jersey and Guernsey, and it is therefore surprising to note the difference in approaches taken in past authorities in respect of the important Function Issue. It should however be of some comfort to the trust industry in both jurisdictions to note that the Courts are alive to the issue of what test, and what function should be applied in respect of the different types of directions applications. We may be on the brink of a judgment that confirms that the Function Issue depends on whether one is considering the exercise of a power of a trustee, or the discharge of an obligation of a trustee - which will enable trustees to have confidence that they are approaching the Court on the right basis. In the meantime, it may be best to bring such applications on an either/or basis.

Ogier represented the trustee in Y Trust and the 2nd Respondent in Re: F.

[1] 2001/154

[2] In re Rabaiotti 1989 Settlement [2000] JLR 173

[3] Rouse -v- 100F Australia Trustees Ltd [1999] 73 SASR 484

[4] [2003] 2 AC 709

[5] [2011] JLR 452

[6] Lewin on Trusts, supplement to 18th Edition, para 23-20

[7] [2008] EWHC 220

[8] [2005] JRC 109

[9] Judgment 32/2013

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