

## Distribution of trust assets - the Court's blessing in times of unrest

Insights - 21/07/2016

### Distribution of trust assets - the court's blessing in times of unrest

The Royal Court of Guernsey has the power to approve the distribution of trust assets, which can be particularly important for trustees where there are warring beneficiaries since approval will prevent complaining beneficiaries from alleging breach of trust and seeking compensation.

Simon Davies, a partner in Guernsey's dispute resolution team examines the recent decision of the Royal Court of Guernsey in *A (As Trustee of the Trust) -v- R1, R2, R3, R4 and R5* and the way in which the court approaches such applications by trustees.

#### The Application

The trustee ("A") applied to the Royal Court for a distribution of the Trust's assets in accordance with the Trust Deed and in the proportions provided for by the Settlers in their Letter of Wishes, the relevant part of which read:

*"After the demise of the last one of us, we would like the Trustee to immediately distribute the remaining Trust Fund in the following percentages:*

- *To our daughter, (R2).....23.5%*
- *To our son, (R1).....4.5%*
- *To our grandson, (R3).....22%*
- *To our granddaughter, (R4).....25%*
- *To our grandson, (R5).....25%"*

## The Dispute

The last surviving Settlor died in July 2015 and there was an unfortunate family dispute between R1 and the other beneficiaries. This was considered by the Directors of A at a Board Meeting in October 2015 and minuted. R1's concerns were listed, but A decided to proceed in accordance with the Letter of Wishes. This was opposed by R1 hence the application.

Pursuant to section 69 of the Trusts (Guernsey) Law, 2007, as amended, the court has power to make orders in respect of the execution, administration and enforcement of a trust.

## Applicable Legal Principles

The governing law of the Trust was that of the Bahamas. In that regard, it was noted that foreign law must be pleaded and proved by expert evidence, the burden of proving it lying on the party who bases his claim or defence on it. If no evidence or insufficient evidence is adduced, the court in England would apply English law<sup>[1]</sup>. The Court held there was no reason why the very well established principles should not be followed in Guernsey by substituting "Guernsey" for "English".

The Court noted this was a case where A sought the sanction of the Court for a so-called "momentous decision" as per Public Trustee & Another -v- Cooper & Ors [2001] and, as such, was not a surrender of the trustee's discretion to the Court, rather, the Court would consider whether the trustees' proposals "*were ones which they could properly be given general liberty to carry into effect*".

In doing so, the Court must act cautiously, there must be full disclosure on the part of the trustees and it is not simply a rubber stamp exercise. The Court referred to Tamlin -v- Edgar [2011] and said that trustees must satisfy the court they properly considered their proposals to be for the benefit of the advancees or appointees. This required full and frank disclosure of all relevant facts and documents.

It was noted that these principles were approved in the more recent case of Cotton & Another -v- Brudenell-Bruce & Others [2014] and where it was further held that the court would not approve a trustee's decision without a proper evidential basis for doing so, but equally should not deprive a trustee of approval without good reason. Further, the court should not place insurmountable hurdles in the way of trustees.

The decision also defined the procedural approach to applications of this type which are supposed to be "quick and accessible" and matters of fact should not be tried with oral evidence. The court are not being asked to find facts, rather they are being asked to decide whether the trustees have presented sufficient evidence to show that they have fulfilled their duties to the beneficiaries and have formed a view which reasonable trustees could properly have formed.

There was previous Guernsey authority consistent and in accord with the English decisions. In the

Guernsey Court of Appeal case of Re F [2013], it was pointed out that in exercising this supervisory jurisdiction, the court was effectively making declarations:

1. that the trustees' proposed exercise of the power was lawful (i.e. that the proposed exercise was within the proper ambit of the power);
2. that the trustees were acting honestly;
3. that in reaching their decision, the trustees had taken into account all relevant matters and had not taken into account irrelevant matters and had not reached a decision that no reasonable body of trustees could have reached

the effect of which would be to protect the trustees from any challenge to their decision by persons interested in the trust, and to make clear that the trustees were entitled to indemnity from the trust assets in respect of the costs or financial consequences of their decision.

Reference was also made to two Jersey judgments which were consistent with the English and Guernsey decisions. In the Jersey Court of Appeal case of Kay -v-HSBC International Trustee Ltd & Ors [2015] it was held that the court needed to be satisfied as to the rationality of the decision and that the length to which the court must go in examining the process by which the trustee arrived at the decision would depend on the particular decision.

The second Jersey case was helpful when considering the status of a letter of wishes. In In the matter of the Rabaiotti 1980 Settlement [2000] it was said that if trustees were to slavishly follow a letter of wishes, their decision could be quashed on the grounds it is not their decision since the trustees must make up their own minds as to how they should exercise their discretion in the best interests of the beneficiaries.

This was supported by legal text<sup>[2]</sup> where it was said that the trustees must be careful to provide documentation revealing that they consciously exercised an independent discretion when making decisions.

### **Test to be applied**

The court referred to the Jersey Kay case and said the essential test was that the court must satisfy itself:

1. that the trustee's decision has been properly formed in good faith;
2. that the decision is one which a reasonable trustee properly instructed could have reached;  
and
3. that the decision has not been vitiated by any actual or potential conflict of interest.

Further, the court must not act as a rubber stamp and must be satisfied as to the rationality of the

decision. The court is not putting itself in the shoes of a trustee and exercising a discretion, but deciding if the decision is one which the trustee could properly be given general liberty to carry into effect. It was noted in particular, that the court should not deprive a trustee of approval without good reason and that it should not place insurmountable hurdles in the way of trustees.

### Parties' submissions

The Respondents argued that the trustees had adduced insufficient evidence for the application to be granted and further, there was an almost complete focus on the validity of the Letter of Wishes to the exclusion of other considerations. Further, there was no real discernible evidence to set out the basis of A's decision, nor was there any evidence of the decision-making process. They submitted that A was not aware of the individual circumstances of the beneficiaries or of there had been any changes to those.

In response, A argued that the decision was explained by the Letter of Wishes and that there was a minute by the independent directors setting matters out. It was rare for a trustee to be criticised for following a letter of wishes. Further, R1 had given no information to A as to why the proposed distributions were not in his interests, R1 was simply dissatisfied with his share.

### Findings

The court held that a review of the documentation showed that A had considered the relevant points and had done its best to address them. An affidavit filed by A showed a rational decision-making process and an explanation for the decision made. R1 had chosen not to engage with A. A would have been on unsafe ground if the Letter of Wishes had been blindly followed but R1 had not put up anything of substance to counteract it.

### Conclusion

A trustee needs to show that that their decision has been properly formed in good faith. Is one which a reasonable trustee properly instructed could have reached and that the decision has not been vitiated by any actual or potential conflict of interest. A trustee who blindly follows a letter of wishes may have difficulty in justifying a decision but if a proper decision-making process has been followed which produces a rational result, the court will not refuse to bless a decision simply because it may have reached a different conclusion.

---

[1] The Conflict of Laws, Dicey, Morris & Collins (15<sup>th</sup> Ed)

[2] Law relating to Trusts and Trustees, Underhill and Hayton (18<sup>th</sup> ed)

### 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](#)

## Key Contacts



Simon Davies

Partner

Guernsey

E: [simon.davies@ogier.com](mailto:simon.davies@ogier.com)

T: [+44 1481 737175](tel:+441481737175)



Mathew Newman

Partner

Guernsey

E: [mathew.newman@ogier.com](mailto:mathew.newman@ogier.com)

T: [+44 1481 752253](tel:+441481752253)

## Related Services

[Dispute Resolution](#)

## Related Sectors

[Trusts Advisory Group](#)