

Changes of trustees and protectors in contentious circumstances in Jersey

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Introduction

Most modern trust instruments will contain provisions which grant to certain individuals the power to effect a change of trustee or protector. It is well established in Jersey law that such a power is a fiduciary one. The legal principles as a matter of Jersey law that will apply to the exercise of these fiduciary powers of appointment of new trustees and protectors have been the subject of a number of Royal Court decisions. However, a case of particular note in recent times, in terms of the issues to be addressed when appointments are challenged, and the costs of those proceedings, was the Royal Court's decisions in: *Representation of Jasmine Trustees Limited* and *In the Matter of the Piedmont Trust and In the Matter of the Riviera Trust*. The first decision provided useful guidance with regard to the test and approach that the Court will apply when judging whether the exercise of a power of appointment was lawful. The second decision provided an analysis of the principles and considerations that are applied to the costs of any proceedings challenging such appointments.

Background

The case concerned two Jersey law family trusts, the Piedmont Trust and the Riviera Trust (together the **Trusts**). Each of the Trusts had the same original protector (the **Protector**) and both Trusts granted to the Protector the power to remove and appoint trustees. The principal beneficiaries of the Trusts were the Protector together with his three adult children (two sons and a daughter (together the **Principal Beneficiaries**)) (each of whom had their own children of varying ages who fell within the beneficial class).

The broader background to the matters before the Royal Court were long-running family disputes. Those disputes had led to ongoing US proceedings (not directly relating to the Trusts), between the Protector and the two sons and on one hand, and the daughter on the other. The Protector decided to effect a change of trustee for both Trusts in late 2013. In early 2014, he executed and served deeds of removal and appointment by which a successor trustee was purportedly appointed to the Trusts. Being concerned as to the suitability of the proposed appointee, the Trustees sought the

views of the Principal Beneficiaries (other than the Protector) as to whether they supported the appointments. In the absence of consensus on the part of the Principal Beneficiaries the respective Jersey Trustees of the Trusts commenced proceedings in Jersey to seek directions from the Royal Court as to whether or not to vest the assets in the new trustee, being an apparently small trust company in New Zealand (the **New Trustee**).

Shortly after the Jersey proceedings were commenced, the Protector retired. The sons were appointed as the new protectors of the Trusts under their respective terms: by the Protector for the Riviera Trust; and by the majority of adult beneficiaries for the Piedmont Trust. At that point, the daughter filed a further application within the Trustees' Jersey proceedings seeking a declaration that the appointments of her brothers as protectors were invalid given the on-going dispute and particularly given the extant US proceedings. Accordingly, the validity of all of the appointments of the officers for the Trusts was thrown into question and became subject to review by the Royal Court.

Appointment of a new trustee

It was accepted by the parties that the power to appoint new trustees was a fiduciary one. Having reviewed relevant authorities, the Royal Court held that a person exercising a power of appointment was subject to a duty to:

On the facts of the case and in light of those duties, the Court determined that the decision of the Protector to replace the current with new Trustees was invalid. It was held that material matters did not appear to have been considered by the Protector prior to making the appointments which therefore rendered the decisions irrational. Such material matters included:

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The Court held that the appointment of the New Trustee and removal of the Trustees were such closely linked decisions and exercises of the powers of appointment, that they stood and fell together. Therefore, having determined the appointment of the New Trustee to have been irrational, the Court held that the linked removal of the Trustees was also invalid and accordingly they remained as trustees of both Trusts.

Appointment of new protectors

The Court's consideration of the validity of the appointment by the Protector of his sons as protectors of the Trusts involved a much more detailed review of evidence advanced by each of the parties. There was no dispute with regard to the formal validity of the appointments of the sons as protectors - the issue was whether they were substantively valid. The daughter contended that the nature of the family dispute and the litigation that was pending between her and her brothers meant that it would be impossible for her brothers to act as protectors in a manner that was in her best interests as a member of the beneficial class for the Trusts. In effect, she contended that her brothers were conflicted and should not be appointed as Protectors (particularly where the Protector's powers in the Trusts were relatively wide, including its consent being required for distributions to be made from the Trusts).

The Royal Court reminded itself that in finding the exercise of a power to be invalid, it is not sufficient that the Court considers the decision to be mistaken (in so far as it would not be a decision that the Court would have reached). Instead the Court must conclude that:

“the decision is outside the band within which a reasonable disagreement is possible and is accordingly a decision to which no reasonable appointor could come (i.e. irrational), that the Court may intervene and hold the decision to be invalid”

The Court was satisfied that the same duties identified in relation to the trustees' appointment, applied to both the Riviera Trust as well as the Piedmont Trust notwithstanding that the appointors in the Piedmont Trust were the adult beneficiaries - the power was fiduciary in nature. The Court concluded that in light of the on-going litigation between the Principal Beneficiaries and the breakdown in family relationships, the appointment of the sons as protectors of the Trusts was irrational and therefore invalid. The Court identified a number of factors, including:

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Costs

The issue the costs of the proceedings was also the subject of a contentious hearing following which the Royal Court delivered a further judgment, in which it reviewed and applied the key principles concerning the recoverability of costs by fiduciaries and beneficiaries in cases of this kind.

Issues

The focus for the Court on the issue of costs was to consider the position of the parties in their capacities as fiduciaries and beneficiaries. The key issues were:

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Costs bases

As part of its broader analysis, the Royal Court considered the bases upon which a party to trust related administrative proceedings (even those that become contentious) might be awarded costs. The Court clarified the difference between two typical awards and confirmed that:

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A fiduciary's costs

The Royal Court noted the general position confirmed by the Jersey Court of Appeal in *Re The JP Morgan 1998 Employee Trust*, that different principles apply depending upon whether a party is acting as a trustee/fiduciary or a beneficiary. In that judgment, the Court of Appeal had approved the observation in *Re HHH Trust* (the first instance decision in the same proceedings) that a person “*exercising fiduciary powers in the interest of beneficiaries cannot, absent a finding of misconduct, be expected to meet the costs reasonably incurred by him or her in the exercise of those powers out of his or her personal assets*”. Therefore, the starting point for cases of this nature in Jersey is that a fiduciary will be entitled to a *trustee basis* indemnity in respect of its costs when acting in that capacity. However in this case where, in particular, there had been findings that the exercises of fiduciary powers of appointment by the erstwhile protector and beneficiaries had been irrational or “*outside the band of reasonable decisions*”, the Court needed to consider whether those acting in that fiduciary capacity had lost that right of indemnity.

The Court considered that the Trustees in the case were wholly justified in bringing the proceedings (which as noted above were to seek directions as to the validity of the appointment of the New Trustees in circumstances where the Trustees had reservations and when seeking the views of the adult beneficiaries, no consensus had emerged) and given that it was not suggested that they had acted unreasonably in doing so, they were awarded their costs on the trustee basis.

As regards the Protector (ie the father), the Court adopted an approach that was mindful of the need to avoid excessively penalising persons that exercise fiduciary powers in good faith, but ultimately in an invalid manner. Notably it was held that: “*the mere fact that an appointment by a fiduciary has been found to be invalid should not lead inexorably to the conclusion that he should be deprived of his indemnity*”; and that “*an unremunerated family trustee will not lightly be ordered to pay the costs of litigation if he has made an innocent mistake or acted in a manner which has ex post facto been shown to be misguided or even careless*”. The Court specifically observed that, whilst the test for finding a power to have been invalidly exercised (as noted above) and the grounds to deprive a fiduciary of its indemnity are similar, “*it is a mistake to consider the tests as being the same*”.

The Court confirmed, following the principles set out by the Jersey Court of Appeal in *MacKinnon v MacKinnon* that whether or not to deprive a fiduciary of its indemnity will be a question of fact and degree. That will require consideration of whether the nature or gravity of the fiduciary’s conduct had reached a level where it was appropriate to deprive the fiduciary of its right to an indemnity. Examples of where that might be the case include: acting in bad faith; acting for any improper purpose; or acting with reckless disregard for one’s fiduciary duties.

A beneficiary’s costs

As a starting position in determining the recoverability of a beneficiary’s costs of trust related proceedings, the Royal Court, following the guidance in *Re The JP Morgan 1998 Employee Trust* which itself had looked at the often cited categorisation of proceedings established in *Re Buckton*

and which are referred to as the “*Buckton categories*”, namely:

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Category 1 and Category 2 proceedings typically afford beneficiaries the right to seek costs on the indemnity basis, whilst Category 3 will follow usual cost principles applicable in hostile litigation (the starting point being that costs follow the event, ie the loser pays). The Royal Court confirmed that in a Category 1 or 2 case “*to the extent that any party is convened in his or her capacity as a beneficiary, that party is entitled to his or her costs out of the trusts on the indemnity basis save to the extent that such party has behaved unreasonably*”.

It was of particular note that, in this case, it had been held that the substantive hearing was in effect hostile litigation for the purposes of whether or not the matter be heard in private or public. It was argued by the daughter, therefore, that the case fell squarely into Category 3 on the basis that it was essentially a beneficiary dispute between her on the one side (challenging the exercise of powers of appointment of the new trustees and protectors) and her father and brothers on the other (as the parties exercising the powers).

However, the Royal Court (again noting the Court of Appeal in *Re The JP Morgan 1998 Employee Trust*) confirmed that matters need to be looked at in the round and the categorisations of cases not considered as if they were statutory provisions. The Court therefore looked more broadly at the substance of the matters before it and, whilst accepting that it had previously considered the issues raised by the daughter to constitute hostile litigation for the purposes of sitting in private, held that having heard the matter, the true nature of the proceedings related to the administration of the trusts, and the challenges raised by the daughter could just as easily have been raised by the Trustee on behalf of all of the beneficiaries. In those circumstances, the Court considered the matter to fall within Category 2, with the costs consequences following as set out above.

Decision

The Court held that the actions of the parties were not of a nature to cause them to lose any right to indemnity and accordingly awarded all of the parties their costs albeit on different bases. The Court had been required to determine the validity of both the trustee and protector appointments, which were made in different circumstances and with the same parties acting in different capacities. Therefore the Court had to engage in a careful breakdown of the various actions taken by the parties and consider in what capacity they were involved in the proceedings in order to

identify which costs were to be granted on which basis. The father, therefore, was awarded his costs on a trustee basis as were the sons with regard to their role as appointing beneficiaries with regard to the protector of the Piedmont Trust. The daughter only acted as a beneficiary and was awarded her costs on the indemnity basis, as were the sons with regard to the invalid trustee appointments and the Riviera Trust protector for the same reason. The Court did note that, ultimately, there would likely be little difference in practice between what a party would recover on the indemnity basis as compared to the trustee basis.

Comment

The substantive decision in this case underlines the importance for trustees to undertake robust due diligence when being requested to transfer a trusteeship to a new trustee and how, if the trustee harbours concerns over the proposed successor, it should consult with the adult beneficiaries and if there is no consensus among them the right approach is to seek directions from the Court. The decision further provides a clear statement of the fiduciary nature of powers of removal and appointment and the relevant duties that arise. It also confirms that, in the exercise of its supervisory jurisdiction, the Court will cast a very careful eye over what are important decisions made by fiduciaries to change trustees and/or protectors and will be careful to assess whether the applicable duties have been discharged by those exercising fiduciary powers. If they have not, the Court demonstrated in this case its preparedness to declare such appointments or removals to be irrational and invalid.

The general tenor of the costs judgment shows a willingness by the Court to look at the substance of matters when assessing the costs consequences that follow and to not slavishly seek to apply categorisations or hard rules. The decision in particular provides further comfort to trustees and other fiduciaries exercising powers in a trust, that just because an exercise is held to have been invalid, it will not automatically lead to the fiduciary being deprived of its indemnity with regard to costs. The Court will, rather, adopt an approach of closely looking at the motivations behind a fiduciary's actions and reaching a view on the gravity of his or her conduct.

The Royal Court of Jersey is extremely active in the area of trust law and regularly is required to determine matters that are not only complex but which address principles of general application for those that work in the trust industry, not only in Jersey but in other jurisdictions (particularly England and Wales and other countries whose trust law is derived from English law).

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