

FURBS and firewalls (In the matter of the A Limited FURBS and the B EBT)

Insights - 10/07/2017

What is the background to this case?

The case relates to a funded unapproved retirement benefits scheme (or FURBS) which is a Guernsey trust and holds assets of significant value, for the benefit of the sole member of the FURBS but also, if he dies, his wife. The husband and wife are going through a divorce in England and the wife sought to join the trustee into the family proceedings for the purposes of disclosure – i.e. she wanted to know what assets were vested in the trust.

What legal issues does it involve?

This is the first time that a Guernsey trustee has sought assistance from the Royal Court of Guernsey for directions as to whether or not it should submit to the jurisdiction of a foreign court. This is because, in common with other offshore jurisdictions, Guernsey trust law has a firewall which confers exclusive jurisdiction on the Royal Court over matters concerning Guernsey trusts, and so asking the Royal Court to approve the submission to a foreign jurisdiction (even for specific purposes such as those involved in this case) is a significant step to take for any Guernsey trustee.

What was the decision of the Royal Court?

The Court directed the trustee to submit to the jurisdiction of the Family Division of the High Court of England & Wales for the purposes of taking part in the ongoing matrimonial proceedings in order to provide disclosure and assistance within those proceedings.

Please comment on the Court's observation in paragraph 46 that "the nature of the FURBS was such that T Limited was placed in a different position to the trustee of a discretionary trust". What is the significance for other types of commercial trusts?

By its very nature, a FURBS is, in effect, a workplace pension scheme and thus there is very little discretion on the trustee as to when to make distributions from the trust under the scheme rules (in

common with many other types of pension scheme). This is a significant difference with a private family discretionary trust, which confers unfettered discretion on the trustee to make distributions and take other decisions which could affect the beneficiaries. In making this statement, the Deputy Bailiff was narrowing the ratio of the case and limiting it to these types of trusts only. In Jersey, the courts there have, fairly reluctantly it has to be said, taken the line that, where appropriate, trustees of discretionary trusts should submit on a limited basis to the jurisdiction of a foreign (normally matrimonial) court and whilst the Guernsey court did not go that far on this occasion, I expect that the same course will be taken if a similar case comes before the Court in the future.

To what extent is the judgment helpful in clarifying the law in this area?

The judgment is helpful because it clarifies that the Court will do what it can to assist trustees of Guernsey trusts in the carrying out of their functions. In this case, the trustees were put in a near impossible position by the English court which had, without any reference to the Guernsey court at all, simply joined the trustees in to the English proceedings as a party. Without any comment about whether that is right or wrong, it is appropriate for Guernsey trustees to seek direction from their home court in that situation as to whether to submit to the foreign jurisdiction or not and, importantly, how far they should go in submitting. In this case, it is arguably only for the purposes of disclosure and nothing more but the decision shows that, in the right case, the Guernsey Court will look at the issues sensibly and commercially.

What are the practical lessons for advisers?

I think there is one practical lesson for the two different types of lawyer involved in situations like this. For matrimonial legal advisors, where a foreign trust is involved, you need to seek advice from trust lawyers in that jurisdiction. Many jurisdictions do have firewall legislation and the matrimonial advisors will need to consider whether they need the trustee to participate in the proceedings or not and if so then have regard to comity and allow the trustee to seek assistance from its home court first. For trusts lawyers, this case serves to demonstrate that the courts do routinely exercise their trusts jurisdiction, and are rightly protective of it. It will be interesting to see how protective the Royal Court will be when a trustee of a discretionary trust comes before it with a similar issue in the future.

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