

## A round up of a few interesting cases coming out of the Jersey Royal Court

Service area / [Trusts and Private Wealth, Dispute Resolution and Litigation](#)

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### Exclusion of beneficiaries – Representation of GB Trustees Limited [2021] JRC048 22 February 2021

The Court in this case was asked to bless a decision of the Trustees to exclude against her wishes one of the beneficiaries of two Jersey family trusts of which they were trustee. This case is noteworthy because of the extraordinary facts that lead to the exclusion but also because it discusses the distinction commonly made between various types of exclusion.

The beneficiary was beneficiary of each trust along with her brother and their respective issue and other family members. Relations between the beneficiary and her father and brother had almost irretrievably broken down. As a result of this the beneficiary had engaged in “*unremitting hostility*” towards the Trusts despite the fact she had previously benefitted substantially from them.

Her conduct included launching or procuring the launch of proceedings in multiple jurisdictions, launching proceedings to remove the Trustees only to withdraw them on the basis that her case for removal was weak, changing her evidence on oath during the course of proceedings, failing to pay indemnity costs orders for which she was held in contempt of the Royal Court and debarred from participating further in proceedings in Jersey, being indebted significantly to the Trustees and her own lawyers in relation to unpaid costs, refusing to undertake to keep confidential information received by her about the Trusts from the Trustees, using the media to denigrate her father, the Trustees, the trust industry in Jersey and the judicial authorities in Jersey.

In his letters of wishes in 2018 and 2019 the settlor expressed the wish that the beneficiary be excluded due to her conduct

and the effect it was having on the Trusts. The Court noted that a settlor’s wishes about a member of the family with whom there had been a complete breakdown in their relationship had to be considered with caution especially as they were also engaged in litigation in the US involving allegations of fraud and wrongdoing.

The other beneficiaries however also supported the exclusion. They genuinely feared that what was left in the Trusts would be eaten up in legal fees generated by the beneficiary’s continuing abusive and unreasonable conduct both towards them and the Trusts. They wanted an end to the litigation and for the remaining assets to be preserved and applied to benefit future generations.

The Trustees felt that the conduct of the beneficiary had had an enormous impact on the Trusts and feared it would continue potentially to the point where all the value in the funds will be exhausted in the costs of litigation. The Court was asked to bless its decision to exclude the beneficiary.

In deciding whether the decision reached was rational and honest the Court examined the various powers of exclusion available to the Trustees under the Trusts. They were in terms commonly seen. The Trustees had the power to make revocable or irrevocable declarations that a person who would or might but for the provision become a beneficiary either:

- i. be wholly or partially excluded from future benefit under the Trust. The Court noted that the effect of such a declaration would exclude a beneficiary wholly or partially from future benefit, but he or she would retain the status of a beneficiary.

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- ii. cease to be a beneficiary. The Court noted that even if such form of exclusion is irrevocable, the Trustee would still be able to reinstate a person as a beneficiary using its power of addition under the Trusts. This power allowed the Trustees to add any person, not being an Excluded Person, to the class of beneficiaries. Equally it noted, if the exclusion under this provision was revocable, the Trustee would be able to achieve the same result by simply revoking the declaration.
- iii. be an Excluded Person. The Court noted that if the beneficiary were declared irrevocably to be an Excluded Person under this option she could not be reinstated as a beneficiary under the powers of addition. Exclusion under this option is most total and final.

Whilst the Trustees wished to exclude the beneficiary permanently it did recognise that there might be unusual events in the future which might change their view. Therefore, they concluded that the right course would be to make an irrevocable declaration that she cease to be a beneficiary – namely option (ii) above. She could be reinstated subsequently by being added as a beneficiary under the powers of addition if there were a substantial change in circumstances.

In blessing the decision of the Trustees, the Court accepted that the circumstances went beyond a beneficiary *“just being a difficult beneficiary to one whose actions are hostile and damaging to the trust estate”*. It recognised its decision was detrimental to the interests of the beneficiary, but that there was *“a genuine need to protect what is left of the trust assets from further depletion by a beneficiary who has a significant history of conducting litigation against the trustees that is without merit and who has benefited substantially in the past”*.

## Duties of directors – Financial Technology Ventures II LP and others v ETFS Capital Limited and Graham Tuckwell [2021] JRC025 26 January 2021

In another colourful case on the facts, the Royal Court in January handed down its judgment in the affairs of EFTS Capital Limited, a Jersey company dealing in commodity exchange traded funds.

This case concerned an action brought by FTV, a private equity firm which owned a minority 35% interest in EFTS. FTV wanted its shares to be purchased by EFTS at fair value with no discount applied; alternatively it sought an order that EFTS be wound up on the just and equitable basis and any surplus distributed pro rata amongst the shareholders.

FTV made various allegations against the founder and chairman of EFTS, Graham Tuckwell, who directly or indirectly held a 58% interest in EFTS. It alleged unfairly prejudicial conduct by Mr Tuckwell and a breach of the fiduciary and other duties owed by him to EFTS.

The unfair conduct alleged by FTV was that Mr Tuckwell had (i) treated EFTS as his own (ii) breached the shareholder agreement by making an unauthorised transfer of shares (iii) purported to make awards to himself under a long term incentive plan (iv) forced the resignation of the ETFS independent directors who had favoured a fair distribution of

the EFTS shares (v) unilaterally changed the business of EFTS without reference to its board (vi) unilaterally adopted a new investment policy (vii) refused to distribute the proceeds of sale pro rata amongst the shareholders (viii) pressurised FTV to sell him their shares at an unjustified discount and (ix) moved to Australia in breach of his service agreement with EFTS and without first checking the tax implications of this for EFTS.

Mr Tuckwell said that he had in fact acted for the benefit of the shareholders as a whole, that a liquidity event under the shareholders agreement applied only to preference shareholders (FTV had converted its shares from that status), that FTV were sophisticated investors and knew the risks of purchasing a minority shareholding in a private company and that he had offered fair value for the minority shares.

It was clear from the judgment that there had been a breakdown in relations between the directors of FTV and Mr Tuckwell. It was said that Mr Tuckwell had never recovered from *“liquidity envy”* and *“a burning resentment”* of FTV which, following the conversion of its preference shares to ordinary shares, had ended up owning in excess of a quarter of a company ultimately worth hundreds of millions of dollars leading Mr Tuckwell to refer to it often as a *“vampire squid”*.

In considering the various allegations against Mr Tuckwell, the Court noted the duties owed by a director under Article 74 the Companies (Jersey) Law 1991 and judged his conduct against his duties:

- a. to act bona fide in the best interest of ETFS as a whole which the Court noted meant for the benefit of its members as a whole;
- b. to exercise his powers as director for proper purposes and not for improper purposes; and
- c. not to put his own interests above those of ETFS (that is, the shareholders as a whole) when acting as a director. It noted that as a fiduciary, a director is required to ensure that his duty to the company and his personal interests do not conflict.

The Court made the following findings:

- i. A justifiable loss of confidence in a board (as opposed to between shareholders) could result in an order for a just and equitable winding up;
- ii. A director's breach of duty or breach of shareholder's agreement would be sufficient to amount to a loss of confidence;
- iii. Mr Tuckwell had pursued a scheme designed to drive FTV out of EFTS at the lowest possible price;
- iv. Mr Tuckwell had secured the removal of the independent directors, who had said they wanted to ensure that all shareholders were treated fairly;
- v. Mr Tuckwell had adopted a new investment policy and in doing so preferred his interest to those of the other shareholders which lead the Court to note that *“the market for their shares has simply gone”*;
- vi. Mr Tuckwell had made an offer to FTV to buy their shares, pursuant to a process that was flawed, and in any event

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different from the one that he promised FTV he would pursue, which led to a discount against pro-rata value of FTV's shares that was far too low;

- vii. Mr Tuckwell was "*reckless in moving to Australia without fully establishing the tax consequences that may have arisen for the Company*" beforehand.

The Court declined to make an order to wind up the Company because it was a going concern with funds and staff but ordered a purchase of the FTV shares by 30 April 2021 and designated a specified formula for calculating the fair purchase price.

Of the various ETFS board meetings conducted during the period in question it was noted that these were casually and poorly run, not disciplined, with important issues left to the end and just kicked around with a '*murkiness*' surrounding decisions. Discussions about the long term incentive plan were described as "*very loosey-goosey*".

The case serves as a useful reminder as to the duties of directors generally towards the company they manage. It shows the importance of good governance and of pursuing an orderly approach to company business and meetings, particularly where there are multiple issues in train, conflicting interests and strained relationships.

A good process for effective decision making could include the following:

- What is the decision the board is asked to take?
- Does the board have sufficient information to make the decision?
- Does the board need professional advice?
- Are there tax consequences arising from the action proposed?
- Does the board have the power and authority to make the decision or are other consents required?
- Have all conflicts been disclosed?
- How is the decision to be documented? Is there any inaction to be documented?

### Blessing of momentous decisions in Jersey

The Royal Court is used to considering applications by trustees for the blessing of momentous decisions. Two decisions in this area with slightly unusual twists have been handed down by the Court in recent months.

**In re H Trust [2020] JRC250A** the Trustee asked the Court to bless its decision to compromise proceedings which had been brought against it in Sweden. These concerned a claim by the sole biological child of the deceased settlor (R) who was entitled to 50% of her estate. R was also entitled under Swedish law to claw back into the estate any assets transferred by the settlor prior to her death to the extent that such transfers were undertaken with the aim of depriving R of his statutory share.

The Trustee did not submit to the jurisdiction of the Swedish

courts but the Royal Court did note that the trust was potentially vulnerable to any judgment in satisfaction of R's claim because many of the underlying assets of the trust comprised immovable property situated in Sweden.

The Trustee therefore reached a compromise with R and the administrator of the settlor's estate. It had received advice that the settlement agreement was to be preferred over the prospect of lengthy litigation. It was also supported by the protector.

It seems axiomatic to say that a trustee should know who its beneficiaries are and this point is instructive here. Initially, the application was presented on the basis that R was not a beneficiary of the trust. Whilst R was not a named beneficiary, the class of beneficiaries included the issue of any named beneficiary. R was the issue of the settlor and therefore was a beneficiary on this basis.

One of the reasons this is important is to help the Court decide who should be convened to an application to ensure those with an interest are given a fair hearing. The Court might decide either a) to convene a beneficiary to be heard and order that he be served with all papers, b) to convene the beneficiary to be heard but order that he be supplied only with limited papers or c) not to convene him at all.

In this case, R had agreed the settlement agreement on his own behalf. The Court said it might not in fact have convened him at all or might have convened him but provided him with only limited material so as not to compromise the position of the Trust had the litigation continued. Therefore the Court concluded that no unfairness had arisen to R from him not being convened.

In January in **Re the A Trust and the B Trust [2021] JRC2019** the Court published a short judgment on the jurisdiction of the Court to bless a decision as unusually it concerned an application by the representative of minor and unborn beneficiaries to bless a decision taken by him (typically the decisions the Court is asked to bless are decisions of trustees). This scenario only arises rarely because generally the role of the representative of minor and unborn beneficiaries is to make submissions in relation to a trustee's course of action which is then either blessed or not by the Court.

The position here was different in that the representative had been asked to defend the interests of the trusts against attacks by the beneficiaries on certain transfers into the trusts which it was alleged had been made when the settlor was under incapacity. The trustee's position remained neutral on the basis that the assets had been properly settled.

The representative had taken the lead in defending the trusts against the claim and the lead in negotiating the terms of the settlement agreement. It was his decision to compromise the claims and the reasonableness of that decision which was in issue.

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The court observed:

- i. Under Article 51 of the Trusts (Jersey) Law its jurisdiction to intervene in the administration of a trust was a wide one and extended not only to trustees but to other persons;
- ii. The duly appointed representative owed fiduciary duties to the beneficiaries of the trust and it was reasonable that a person appointed to undertake fiduciary duties should be able to seek the blessing of the Court in the same way a trustee was able to do so; and
- iii. Analogies were also drawn with the settlement by a guardian on behalf of a minor in a civil action who would be able to seek the Court's approval to such settlement and the jurisdiction of the Court to bless a momentous decision by a delegate to settle litigation brought on behalf of a person lacking mental capacity.

It concluded that the decision of the representative to enter into the settlement agreement was properly characterised as a momentous decision and that under its inherent jurisdiction it was able to give its blessing to it.



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