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Royal Court of Jersey exercises power under Trustee Act 1925 (UK) to grant trustees a general power to self-deal

Service areas / Dispute Resolution and Litigation, Trusts and Private Wealth

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[Re the E Settlement and Re the F Settlement], Royal Court of Jersey (MacRae, Deputy Bailiff, and Jurats Olsen and Christensen), 25 June 2020.

Summary

In two significant new decisions, the Royal Court has exercised the jurisdiction arising under s. 57 of the Trustee Act 1925 (UK) ("**Trustee Act**") to vary three trusts governed by English law so as to confer general powers to self-deal. In doing so, the Court relied on Article 8 of the Hague Convention on the Law Applicable to Trusts and on their Recognition, despite the Convention not having direct effect in Jersey law.

The Royal Court also considered its ability to approve a trustee's decision under Article 51 of the Trusts (Jersey) Law 1986 ("**Trusts Law**"), and the relationship between the second (approval of momentous decision) and third (surrender of discretion) categories set out in *Public Trustee v Cooper*.

The trustees were advised by Andreas Kistler, Alexa Saunders and Dean Robson of Carey Olsen Jersey LLP and Nicholas Le Poidevin QC advised on the English law aspects.

Background

The trusts were declared in England by the settlors while they were resident there and they originally had English trustees. Although the trusts contained no explicit choice of law clause, it was clear that the proper law of the trusts was English law, not least given numerous references in the trust instruments to English statute.

By the time the application was made, all of the trusts had Jersey trustees, the trust assets were situated in Jersey and the trusts were administered in Jersey. Accordingly, the Royal Court had jurisdiction over the trusts pursuant to Article 5 of the Trusts Law.

The decision in [Re E settlement] concerned a single trust (the "[E Trust]") and the decision in [Re F Settlements] concerns two trusts (the "[F Trusts]"). Each of the trusts had a different set of trustees. The trustees and the investment companies of which the shares were held by the trustees in the trust funds, and the trust of which they were trustee, had some directors in common. None of the trusts contained provisions authorising self-dealing, as would be common in modern instruments.

On a number of occasions the trustees had transacted in a manner which they later learned had offended the English law rule against self-dealing. These included transactions between underlying companies held by the trusts involving sales and loans. Although such transactions were not carried out directly by the trustees, Mr Le Poidevin explained that they were nevertheless caught by the rule given the overlap between the boards of the underlying companies and the trustees.

The trustees of each of the trusts made applications to the Royal Court seeking:

- variation of the trusts to include a power to self-deal under s. 57 of the Trustee Act; and
- approval of re-organisations of the trusts (which themselves would involve self-dealing) under Article 51 of the Trusts Law. This relief was sought primarily to provide for the possibility that the Court might not grant the general power to self-deal.

In addition, the trustees of the [F Trusts] sought approval of a remediation exercise to address loans made on an interest free basis between underlying companies held by each of the [F Trusts].

What is self-dealing?

The Royal Court relied on the exposition of the rule against self-dealing under English law in the opinions provided by Mr Le Poidevin. It made no finding as to the extent to which the English law rule against self-dealing applies in Jersey. It noted that the English law rule against self-dealing is concerned with a conflict between a trustee's interest and its duty. The starting point is that a transaction affected by the rule will automatically be set aside. The burden is then on the trustee to show not only that the price, if any, was a fair one but that the transaction was one which could have been made at arms' length.

Save for the loan remediation exercise between the [F Trusts], the trustees decided not to seek to unravel historic transactions but instead to seek a power to self-deal for future transactions.

Variation of the trusts to include powers to self-deal

The Court noted that it can vary Jersey law trusts to provide powers expedient in the management and administration of a trust pursuant to Article 47(3) of the Trusts Law. However, the proper law of the trusts was English law so that Article 47(3) was inapplicable.

The equivalent provision in English law is s. 57 of the trustee Act. The English Courts could vary the trusts under this provision but the question was whether the Royal Court could apply English law (i.e. s. 57) to do so. Section 67 of the Trustee Act provides that the "court" contemplated by s. 57 means the High Court of England and Wales or the County Court.

The Royal Court decided that it could apply s. 57. Its reasoning was as follows:

- Article 49(1) of the Trusts Law provides that "*... a foreign trust shall be regarded as being governed by, and shall be interpreted in accordance with its proper law.*" In this case, English law.
- The proper law for this purpose meant the whole of English law, including s. 57. If the Royal Court could not exercise the power conferred by s. 57 then it would not be applying the whole of English law to the trusts. This was the logic adopted in the English case of *C v C* [2015] EWHC 2699 (Ch) where the High Court was asked to vary a Kenyan law trust. The reasoning in that judgment indicated (albeit not unambiguously) that the High Court would apply Kenyan law to vary that trust, in particular given the reference to Article 8 of the Hague Trusts Convention which has been incorporated into English law.
- Unlike in England, the Hague Trusts Convention (which was extended to Jersey by Order in Council in 1991) does not have direct effect in Jersey law. However, the Deputy Bailiff explained that "it is quite proper for the courts of Jersey to have regard to the terms of the Convention so long as it is not inconsistent with Jersey legislation".
- The recital to the Trusts (Amendment No. 2) (Jersey) Law 1991 and Explanatory Note which accompanied the draft of that Amendment Law made it clear that the legislature intended to the Trusts Law (as amended) to be consistent with the Convention so that the Convention could be extended to Jersey.
- Article 4 of the Trusts Law was amended at that time to incorporate the entirety of Article 7 of the Convention – being the provision which sets out how the Court is to determine the proper law of the trust where none is expressly chosen. By contrast, Article 8 of the Convention – being the article which sets out the matters concerning a trust that the proper law shall govern, expressly including the variation or termination of the trust – was not replicated in the Trusts Law. However, the Deputy Bailiff explained that *"although the Convention is not directly effective as a matter of Jersey law, it is appropriate for the Court to have regard to the contents of Article 8 of the Convention when considering the meaning and effect of Article 49(1) of the Law as set out above. Accordingly, we had no doubt that this Court does have the power to make an order under Section 57 of the Trustee Act 1925".*

The next question which the Royal Court had to consider was whether s. 57 permitted the trusts to be varied to include a general power to self-deal (i.e. rather than for the purpose of a specific transaction). The Royal Court found, with the benefit of Counsel's opinion, that the s.57 jurisdiction did extend to the grant of general powers. The Court's judgment preceded that in *Cotterell v Allendale* (2020) EWHC 2234 (Ch) in which the High Court made the equivalent finding.

The Royal Court referred to the three stage test from *Alexander v Alexander* [2011] EWHC 2721 (Ch) as applied in *Re Portman Estate* [2015] EWHC 536 (Ch). The first stage – that there was no power to carry out the transaction under the trust instrument – was clearly met. As to the second stage – that it was expedient for the trustees to be able to enter into the relevant transaction – the Royal Court noted that powers to self-deal are common and would allow the trustees to carry out transactions in the interests of the beneficiaries. The Royal Court also noted that the proposed power had been carefully drafted and incorporated various safeguards to protect the beneficiaries (e.g. a requirement for professional advice) and that the granting of the power would save the need for future applications. The third stage – that the Royal Court should exercise its discretion – was therefore satisfied.

The Royal Court noted that the three stage test applicable under English law had been applied in the Jersey authority of *In the matter of the Greville Bathe Fund* [2013] (2) JLR 402 which concerned the variation of a Jersey trust to include a new power (not a power to self-deal) under Article 47(3) of the Trusts Law.

The Royal Court took comfort from Mr Le Poidevin's opinion that an order made by it would be recognised by the English

Court given that the adult beneficiaries had submitted to the

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jurisdiction of the Royal Court.

Approval of the remediation exercise

The trustees of the [F Trusts] sought approval for a remediation exercise to address an imbalance in investment returns as a result of interest free loans having been made between sub-funds of the [F Trusts].

There is a well-trodden path for the blessing of decisions pursuant to Article 51 of the Trusts Law. The principles are set out in *Re S Settlement* [2001] JLR Note 37 which adopted the approach taken in the English case of *Public Trustee v Cooper* [2001] WTLR 901. Broadly speaking, there are four situations where a court will adjudicate on a course of action proposed or actually taken by trustees. It was the second (approval of a momentous decision) and third (surrender of discretion) categories that were of relevance in this case. As Hart J had anticipated in *Public Trustee*, these categories can be blurred as proved the case here.

A momentous decision was described in *Kan v HSBC International Trustee Limited and others* [2015] (1) JLR Note 31 as a matter of "*real importance to the Trust*".

The Royal Court accepted that the decision to undertake the remediation exercise was momentous and that the trustees and their directors were subject to a conflict of interest owing to the fact that they sought to remediate the consequences of a previous transaction affected by self-dealing and the remediation itself would also involve self-dealing.

Following the approach of Hart J in *Public Trustee*, the Court had to consider whether the conflict was so significant that the trustees had to surrender their discretion to the court, or whether the trustee could make the decision notwithstanding the conflict. The difference in the role of the Court is significant, as in the case of a surrender of discretion the Court must be put in a position to make the decision on the basis of all considerations and evidence necessary to do so, rather than reviewing a decision that the trustees have made.

On the facts, the Court was satisfied that the trustees were able to make a decision in the best interests of the beneficiaries and that the extent of the conflict was not to vitiate such a decision so that they would have to surrender their discretion to the Court. The Royal Court noted that although the loans were instances of self-dealing and that the trustees and their directors were subject to conflict, they should not be required to surrender their discretion to the Royal Court. They had not gained personally from the loans and did not stand to gain from the remediation exercise, save to the extent that they were heading off a theoretical exposure to litigation where the situation to remain unresolved. The Royal Court also gave weight to the fact that future litigation on the issue would not be in the interests of the beneficiaries and that the principal beneficiaries had agreed to the remediation exercise. As the Court was satisfied that that the trustees had formed their opinion in good faith and that the trustees' decision was reasonable, the Court approved the trustee's decision.

No approval of decision to re-organise necessary

The Royal Court declined to make orders approving the trustees' decisions to re-organise the trusts, as the powers to self-deal that the Court had conferred would enable those transactions to proceed and the decisions were not otherwise momentous.

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