



## The Royal Court of Jersey clarifies its powers to ratify actions of invalidly appointed trustees

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

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In the recent decision of *In the Matter of the Z Trust [2016] JRC 048*, the Royal Court of Jersey considered an application to set aside the appointment of trustees under recently enacted provisions in the Trusts (Jersey) Law 1984 (the "Trusts Law"). Having concluded that their appointment was to be set aside, the Court also clarified the extent of its power to ratify actions taken by the purported trustees prior to their appointment being quashed.

### Setting-aside application

The Court granted an application brought by a beneficiary of a Jersey law trust to set aside:

- the appointment by the late settlor of UK-resident trustees of a Jersey law trust, the principal asset of which was all of the issued shared capital in a foreign (i.e. non Jersey) company (the "Company");
- the appointment by the retiring directors of the Company of a UK incorporated director (being a company controlled by the purported new trustees); and
- the transfer of shares in the Company to a UK incorporated nominee for the purported new trustees.

The appointment had been made by the Settlor without her having taken detailed tax advice on the consequences of moving the trust to the UK, despite it having been recommended to her that she do so. She was therefore unaware of the full impact that tax would have on the beneficiaries of the trust. The Settlor had also had regard to her (unfounded) fear that the trust assets were vulnerable to attack by her wider family if they remained offshore. In fact, moving the trust onshore by appointing UK-resident trustees did nothing whatsoever to protect the trust assets from attack.

The Court accepted that the Settlor's power to appoint new trustees was a fiduciary power. Under Article 47H of the Trusts Law, the Court can declare the exercise of a fiduciary power to appoint new trustees to be invalid where the fiduciary has failed to take any relevant factors into account or took into account irrelevant considerations in exercising its power of appointment, and the fiduciary would not have exercised the power in the same way with proper consideration. Importantly, Article 47H specifically provides that it is not relevant whether or not the fiduciary was in any way at fault in exercising the power (thereby negating, for the purposes of Jersey law, that aspect of the decision of the Supreme Court of the United Kingdom in *Pitt v Holt [2013] 2 A.C. 108*).

In determining for this purpose whether the late Settlor would still have exercised the power of appointment in the same way had she taken into account "relevant considerations", the Court observed that an objective test must be applied based "on the reasonable person acting in accordance with his or her duties". On this basis, the Court concluded that the appointment should be set aside.

The application was also made, in the alternative, in reliance on Article 47G of the Trusts Law. This provision applies where the person exercising a power in relation to a trust would not have acted as they did had it not been for a mistake of so serious a character as to make it just for the Court to set the exercise of the power aside. Again, this test was satisfied on the facts.

Finally, the Court found that the Settlor's exercise of the power of appointment, while well-intentioned, was irrational (in the sense that no reasonable trustee would have made it). The Court therefore could also set it aside under its inherent jurisdiction to supervise and administer trusts.

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Article 47I(3) of the Trusts Law allows the Court to make orders consequential upon an order under 47G or 47H. In the instant case, the Court relied on this provision to set aside the transfer of shares in the Company and the appointment of the UK director. Importantly, the Court found that these transactions were undertaken for the sole purpose of giving effect to the exercise of the power of appointment and, accordingly, were treated as one related transaction. The Court was satisfied that making this order would not affect the position of a third party purchaser of real property from the Company who had not had notice of the grounds upon which the UK director's appointment might be avoided.

Although the effect of the orders was to reinstate the retired trustee as trustee and to deem it to have continued as trustee throughout, the Court accepted that the retired trustee would not choose to resume trusteeship in the circumstances and gave directions blessing the retired trustee's decision to appoint a new trustee chosen by the beneficiary. The Court made further orders under Article 45 of the Trusts Law releasing both (i) the retired trustee from any liability for not having discharged its duty to administer the trust during the period when it thought it had retired and been replaced by the purported trustees and (ii) the purported trustees from liability for inter-meddling with the trust property as trustees de son tort.

## Ratification

In light of the setting-aside of the appointment of the purported trustees, the beneficiary sought ratification of the actions taken during the course of their purported trusteeship.

In the earlier case in *Re BB, A and D 2011 JLR 672* the Court ratified certain actions of a trustee de son tort (the trustee in that case not having been appointed by the correct power holder – so that was a case of a void appointment rather than a voidable one), which it did in the exercise of its inherent jurisdiction to “supervise and where necessary or appropriate [to] intervene in the administration of the trust”. The Court considered that this jurisdiction arose from the need to avoid the havoc that would be caused from having to unscramble all of the actions of the purported trustees over several years and the trustees seeking to recover trust property from beneficiaries who had received it. However, the principle relied on in that case had not been the subject of any further judicial scrutiny and had attracted adverse commentary. Accordingly, the Court took the opportunity to clarify the scope of its jurisdiction to ratify or confirm actions taken by purported trustees.

The Court referred to three forms of ratification, which it said may have the same practical result but are conceptually different:

- Confirmation by perfection of an imperfect act or transaction – for example, confirmation by a principal of a contract entered into by an agent without authority.
- Confirmation by replacement of a doubtful transaction by a valid one with similar effect – i.e. where a state of affairs that was intended to have been effected by a doubtful transaction is brought into effect by a second, fully effective, transaction. It is crucial for this form of confirmation that the power remains exercisable.

- Confirmation by non-intervention in acts or omissions which may not have been authorised but which were acted upon, with the effect that the trusts are administered on the same basis as if those acts or omissions had been authorised. The justification for non-intervention would be that the havoc and distress caused to the beneficiaries would outweigh the benefit in the trustee seeking to restore to the trust fund the value lost through the invalid acts. This form of confirmation will not be available if nothing has been done to give effect to the purported exercise of the power – for instance, if trust property purportedly appointed to a beneficiary absolutely has not in fact been transferred and remains in the trustee's hands.

The Court drew a distinction between validation of invalid exercises of (i) administrative powers and (ii) dispositive powers, which involve a change in the trusts on which the property is held and potentially the transfer of the property to a beneficiary. In relation to dispositive powers, the first form of confirmation (i.e. the Court perfecting or validating a hitherto invalid exercise of the power) would be for the Court to vary the trust, which the Court noted that it has no power to do save (i) in accordance with the Court's statutory jurisdiction under Article 47(1) of the Trusts Law to consent on behalf of minor, unborn and unascertained beneficiaries to vary a trust in a case where all adult beneficiaries consent or (ii) in the context of a compromise of a dispute concerning a trust. Accordingly, while the Court could ratify the purported exercise of administrative powers (even in cases where the trustees themselves would not have had power to do what the Court would authorise), the Court had no power to ratify the purported exercise of dispositive powers.

Whilst having much the same effect as ratification, the Court considered that orders based on the second and third forms of confirmation would be preferable in the circumstances of the case. In particular:

- The present case was different from *Re BB* where the goal was to preserve the validity of acts undertaken by the purported trustees, whereas the present case involved the destruction of the validity of the appointment of the trustees – the exact opposite of ratification. However, there was no difficulty in confirming the desired acts (and not confirming those which were not desired to be preserved) by the trustee re-exercising the power to the same effect or continuing to administer the trusts as if the chosen acts were valid.
- Certain of the acts sought to be confirmed were acts of the Company, as to which there was doubt that the Court had power to ratify. However, there was no difficulty in the Court directing the trustee to procure that the Company continued to be administered as if the transactions had been procured or permitted by duly authorised trustees.
- The consequence of the Court ratifying the administrative actions of the purported trustees, including allowing the sale of property by the Company, might have been to deem the affairs of the Company to have been administered in the UK for tax purposes.

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The Court considered that the administrative powers conferred on the retired trustee or the new trustee under the trust deed (which expressly included the powers of an absolute beneficial owner of the trust property) were wide enough for the trustees to decide to leave the acts or omissions of the purported trustees undisturbed so that the trust would be administered on the basis that the acts or omissions had been validly done by or with the authority of duly appointed trustees. It was considered that the Court could direct the trustee not to intervene in the unauthorised administrative acts and the unauthorised dispositive act of allowing the Settlor's husband to live in the trust property on a gratuitous basis.

In relation to the further dispositive act of the purported trustees by which a substantial distribution was made to a beneficiary, the Court considered that the retired trustee or the new trustee had the power to confirm the distribution by way of a fresh exercise of the power to appoint in his favour (i.e. confirmation by replacement), and that this would be preferable to directing the trustee merely not to seek to recover the property purportedly appointed to him.

However, rather than leave it to the retired trustee or the new trustee to consider what should be done about the invalid acts and omissions, the Court considered that there was a "sound basis" for an order directing them to take the appropriate steps (i.e. to leave the invalid acts and omission undisturbed; and to formalise the historic distribution by re-exercise of the power of appointment).

### Comment

In addition to illustrating the application of Jersey's newly enacted statutory provisions which allow the exercise of powers in relation to a Jersey trust to be set aside, this judgment provides welcome clarification of the legal basis and extent of the powers of trustees and the Court to confirm actions taken by invalidly appointed trustees. The pragmatic approach adopted illustrates the Court's concern to secure the efficient and effective administration of Jersey trusts in the best interests of beneficiaries.

However, the judgment sets clear limits on how far the Court can go by way of ratification. In particular, ratification may not provide a remedy where the original timing of a transaction is important for its tax consequences, its appropriateness (for example, because the power holder would not now consider it appropriate to exercise its power in the same way) or its effectiveness (for example, because the power ceased to exist upon the intervening death of the power holder). Each case will now turn on its particular circumstances and specific advice should be sought.

Andreas Kistler acted for the retired trustee in this case, with assistance from Victoria Connolly and Louise Woolrich.



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