

Jersey Trusts and Divorce – Submission and Exclusion

Insights – 05/05/2015

Jersey Trusts and Divorce – Submission and Exclusion

Two linked judgments of the Royal Court of Jersey have provided a further insight into the exercise of the Court's supervisory jurisdiction over Jersey trusts in the context of a trustee faced with overseas divorce proceedings concerning members of the beneficial class.

Both judgments relate to decisions made by the trustee of a Jersey trust in connection with divorce proceedings in Hong Kong. In the initial court application, the Trustee sought directions as to whether it should submit to jurisdiction of the Hong Kong Court and take part in the divorce proceedings. In the second, the trustee sought a blessing of its decisions to: distribute funds from the trust to enable the husband (the settlor and a beneficiary) to pay the sum ordered on the divorce; and thereupon to exclude the by then former wife as a beneficiary of the Trust.

Submission to the jurisdiction (Otto Poon [2011] JRC 167)

Having been joined to the Hong Kong divorce proceedings, the trustee sought directions from the Jersey Court as to whether it should take part in them. The trustee was in favour of submission for various reasons. First, the Hong Kong Court could enforce its decision against trust assets in Hong Kong even if the trustee did not submit. Second, the trust was administered in Hong Kong and key individuals could be subpoenaed to give evidence. Third, the trustee was minded to appear in order to put forward relevant arguments to seek to safeguard the interests of the other beneficiaries – in that context the trustee considered that the ability to make submissions would outweigh merely providing information by way of its disclosure obligations. Finally, the trustee considered that there was little risk of it being put in a position of conflict between the duty to obey the Hong Kong Court and the duty to adhere to the trust instrument.

The Jersey Court concluded that the trustee's decision to submit to the jurisdiction of the Hong Kong Court was reasonable and blessed it.

The divorce proceedings and impact on the Trust (Otto Poon [2014] JRC 254A)

The divorce proceedings were appealed up to the Hong Kong Court of Final Appeal where the wife was awarded 50% of the combined matrimonial assets of the parties, which were treated as including the assets of the trust. Following this judgment, the Trustee decided to make distributions out of the Trust in order to enable the husband to comply with the Hong Kong judgment but also decided to thereafter exclude the wife. On the basis that the decisions were "momentous", the Trustee brought an application to the Jersey Court to approve them. The Royal Court approved the decisions.

The Role of the Court in Approval Applications

The legal test to be applied by the Court in deciding whether to bless a "momentous" decision derives from the decision of English case of *Public Trustee v Cooper* [2001] WTLR 901 (as applied in Jersey in *Re S Settlement* [2001] JRC 154) and falls within the second limb of the categorisation approved in that case. The Court will at least need to be satisfied that, based on the facts, the following can be established:

1. the trustee has formed its opinion in good faith and the steps envisaged by the decision are desirable and proper in the circumstances;
2. the decision is one which reasonable trustees, properly instructed, could have arrived at; and
3. the decision has not been vitiated by any actual or potential conflict of interest on the part of the trustee.

In the trustee's application in *Otto Poon*, it was not contended that the Trustee had acted in bad faith or that its decision had been vitiated by conflict. The Court accordingly confined its determination to whether or not the second question could be answered affirmatively.

It is important to note that, when deciding whether or not to bless a "momentous" decision, the court is not exercising its own discretion unless the trustee has (for valid reasons) surrendered its discretion. Instead, it is making a declaration that the trustee's proposed exercise of the power is lawful and reasonable. The consideration is therefore whether the decision falls within the range of decisions a trustee, properly exercising its power, is entitled to make (even if the Court would balance the factors differently and might have reached a different decision).

Decision

Notwithstanding various submissions made on behalf of the wife (who was convened to and appeared at the hearing) the Court considered the decision of the trustee to make the distribution and to exclude the wife as beneficiary to be reasonable and accordingly blessed it. The Court accepted that a power to exclude a beneficiary was an unusual power and one which was to be exercised carefully. However, on the facts of this particular case the Court concluded that it was appropriate to exclude the wife as a beneficiary, and in so doing stated as follows:

“The wife has, in effect, received half the trust fund. She is aged 75 and will now have HK\$770.5m plus certain other assets giving her a total of HK\$832.5m in her own right. She therefore has ample financial resources to last her for the rest of her life and there is no need for her to remain as a beneficiary of the Trust on financial grounds. Furthermore, the money has been paid to her as part of a divorce order intended to achieve a clean break. It is entirely reasonable in those circumstances that the trustee should conclude that the remaining assets of the Trust should be held exclusively for the remaining beneficiaries of the Trust.”

Commentary

There are two somewhat unusual elements to this case, namely the blessing of the decision of the trustee to submit to the jurisdiction of an overseas divorce court, and of the decision to exclude the wife as a beneficiary. It is important to note that the Royal Court’s jurisdiction in granting those directions was in the exercise of its supervisory jurisdiction to ensure the beneficiaries’ interests are protected and is not seeking to determine who should prevail between the convened parties on a purely adversarial basis.

The circumstances that need to be borne in mind when seeking to take lessons from the first decision were that trust assets were within the jurisdiction of the Hong Kong Court and that the provision of information beyond mere disclosure could assist in circumstances where the husband and wife and their one daughter comprised the beneficial class. As regards the decision to exclude a beneficiary, the Court noted that it was by no means a common situation but again it was the consideration of the factual circumstances of the case and particularly those of the wife that swayed the Court.

Whilst on this occasion the Court did not find in favour of the views of the wife as a beneficiary, the decision demonstrates that the Royal Court continues to provide a forum where the position of the beneficial class as a whole will be considered and balanced and a decision reached in light of but notwithstanding the hostile litigation being pursued between beneficiaries in the onshore divorce Court. The supervisory jurisdiction of the Royal Court continues to demonstrate its ability to adapt to the many varied legal and factual scenarios brought before by trustees and beneficiaries alike.

Ogier is a professional services firm with the knowledge and expertise to handle the most demanding and complex transactions and provide expert, efficient and cost-effective services to all our clients. We regularly win awards for the quality of our client service, our work and our people.

Disclaimer

This client briefing has been prepared for clients and professional associates of Ogier. The information and expressions of opinion which it contains are not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific advice concerning individual situations.

Regulatory information can be found under [Legal Notice](#)

Meet the Author



Edward Mackereth

Global Managing Partner

Jersey

E: edward.mackereth@ogier.com

T: [+44 1534 514320](tel:+441534514320)

Key Contacts



Nick Williams

Partner

Jersey

E: nick.williams@ogier.com

T: [+44 1534 514318](tel:+441534514318)

Related Services

[Dispute Resolution](#)

[Private Wealth](#)

Related Sectors

[Trusts Advisory Group](#)