

## Being rational in the exercise of powers of appointment and removal in Jersey Trusts

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### Being rational in the exercise of powers of appointment and removal in Jersey Trusts - Royal Court guidance In the Matter of the P and R Trusts

In its decision in In the Matter of the P and R Trusts the Royal Court has provided useful guidance with regard to the exercise of fiduciaries' powers of appointment of new trustees and protectors.

The case concerned two family trusts, the P Trust and the R Trust (together the **Trusts**). Each of the Trusts had the same original protector (the **Protector**) and both Trusts gave the Protector the power to remove and appoint trustees. The principal beneficiaries of the Trusts were the Protector's three adult children (two sons and a daughter (together the **Principal Beneficiaries**)).

The broader background to the matters before the Royal Court were long-running disputes, including US proceedings (not directly relating to the Trusts), between the brothers and the Protector on one hand and the daughter on the other. Following receipt of deeds of removal and appointment of a successor trustee to the Trusts by the Protector, and in the absence of consensus on the part of the Principal Beneficiaries the respective Jersey Trustees of the Trusts sought directions from the Royal Court as to whether or not to vest the assets in the new trustee, being an apparently small trust company in New Zealand (the **New Trustee**). Shortly after the Jersey proceedings were commenced, the Protector retired. The sons were appointed as the new protectors of the Trusts under their respective terms: by the Protector for the R Trust and by the majority of adult beneficiaries for the P Trust. At that point, the daughter filed a further application within the Jersey proceedings seeking a declaration that the appointments of her brothers as protectors were invalid given the on-going dispute and proceedings. Accordingly, the validity of all of the appointments of officers for the Trusts was thrown into

question.

### **Appointment of a new trustee**

It was accepted that the power to appoint new trustees was a fiduciary one and in exercising the power the Court noted that the person exercising that power had a duty to: (i) act in good faith and in the interests of the beneficiaries as a whole; (ii) reach a decision open to a reasonable appointor; (iii) take into account relevant matters and only those matters; and (iv) not to act for an ulterior purpose. On the facts of the case and in light of those duties, the Court determined that the decision of the Protector to replace the current with new Trustees was invalid. It was held that material matters did not appear to have been considered by the Protector prior to making the appointments which therefore rendered the decisions irrational. Such material matters included:

- A considerable delay by the New Trustee in supplying standard due diligence information.
- A lack of information about the financial position of the New Trustee.
- The New Trustee appeared to be 100% owned by an individual director.
- No information was provided by the New Trustee as to its insurance cover.
- A lack of information regarding the trust experience of the directors of the New Trustee.
- The New Trustee did not appear to have any presence on the internet.
- The New Trustee was based in New Zealand whereas the beneficiaries were primarily in the US and this raised questions about the appropriateness of the appointments given the significant time difference.

The Court held that the appointment of the New Trustee and removal of the Trustees were so closely linked that they stood and fell together and accordingly the Court held that the Trustees remained in office.

### **Appointment of new protectors**

There was no dispute with regard to the formal validity of the appointments of the sons as protectors - the issue was whether they were essentially valid. The daughter contended that the nature of the family dispute and the litigation that was pending between her and her brothers meant that it would be impossible for her brothers to act as protectors in a manner that was in her best interests as part of the beneficial class.

The Royal Court reminded itself that in finding the exercise of a power to be invalid, it is not sufficient that the Court considers the decision to be mistaken (in so far as it would not be a decision that the Court would have reached). Instead the Court must conclude that:

*“the decision is outside the band within which a reasonable disagreement is possible and is accordingly a decision to which no reasonable appointor could come (i.e. irrational), that the Court may intervene and hold the decision to be invalid”*

The Court was satisfied that the same duties identified in relation to the trustees’ appointment, applied to both the R Trust as well as the P Trust notwithstanding that the appointors in the P Trust were the adult beneficiaries – the power was fiduciary in nature. The Court concluded that in light of the on-going litigation between the Principal Beneficiaries and the breakdown in family relationships, the appointment of the sons as protectors of the Trusts was irrational and therefore invalid. The Court identified a number of factors, including:

- The dispute in the US amounted to hostile litigation between the Principal Beneficiaries.
- The US litigation (which involved issues concerning other family companies) included allegations of fraudulent conduct and dishonesty against the sons.
- There was a significant conflict of interest between the sons and the daughter.
- The sons failed to show themselves to be independent of their father (the Protector) who, the Court accepted, had a severe breakdown in relationship with his daughter.
- In the context of the matters raised in the US litigation, it appeared that the sons paid little attention to their fiduciary duties.
- The daughter had legitimate concerns over how her brothers would perform their function as protectors and their appointment would have a serious detrimental effect on the administration of the Trusts with the result that the Court would likely become regularly involved in resolving challenges brought by the daughter in respect of the decisions her brothers might take in future as protectors.

## **Comment**

The decision underlines the importance for trustees to undertake robust due diligence when being requested to transfer a trusteeship and how, if there are concerns over the proposed successor, if there is no consensus among the adult beneficiaries the right approach is to seek directions from the Court. The decision further provides a clear statement of the fiduciary nature of powers of removal and appointment and the relevant duties that arise. It also confirms that, in the exercise of its supervisory jurisdiction, the Court will cast a very careful eye over these important decisions and will be careful to assess whether the applicable duties have been discharged by those exercising fiduciary powers. If they have not, the Court has demonstrated in this case its preparedness to declare such appointments or removals to be irrational and invalid.

Ogier represented the Trustees in this matter.

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