

## Variations to trusts: what does the Court need to know before it will give its approval?

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This case considers the circumstances in which the Royal Court of Jersey (the **Court**) will approve the variation of the terms of a Jersey trust pursuant to of Article 47 of the Trusts (Jersey) Law 1984 (the **Trusts Law**), where that variation forms part of a planned wider restructuring of the trust in question.

### | Background and basis of application

Three trusts (the **Trusts**) were established in 2013 by the settlor, "B" (the **Settlor**) pursuant to identical trust instruments entered into between the Settlor and Paicolex Trust Management AG and Paicolex Trust Co. (BVI) Ltd as trustees (the **Trustee**).

The primary beneficiaries of the Trusts were the Settlor's wife, their three minor children (the **Children**) and their respective descendants (the **Remoter Issue**). The Settlor was listed as an Excluded Person from the outset.

At the time the Trusts were established the Settlor's wife had been diagnosed with a serious illness and subsequently died in 2014. The Settlor and his had established the Trusts so that she would have comfort that the Children would be well provided for during their lifetimes. At the time the Trusts were established little thought was given to the tax structuring on account of the emotional distress occasioned by the Settlor's wife's illness.

Following the death of his wife, the Settlor gave further consideration to his wider estate-planning objectives. The Settlor was of the view that his status as an Excluded Person meant that the Trustees had limited flexibility in terms of how distributions could be made, which in turn meant that distributions might not be capable of being made in the most tax efficient manner particularly given that the Children were domiciled in the UK.

In that context, he wished:

- to have his status as an Excluded Person in relation to the Trusts revoked; and
- to be added as a beneficiary of the Trusts (albeit he gave evidence to the Royal Court that he anticipated that he would never require distributions on account of his personal wealth). was then decided that the Trustees should be provided with more flexibility in respect of the Trusts to respond to future events and to ensure tax efficiency.

The Settlor and the Representors therefore sought approval from the Court on behalf of the Children and the Remoter Issue to amend the terms of the Trusts to allow for the Settlor to be removed as an Excluded Person of the Trusts and subsequently added back as a beneficiary (the **Proposed Changes**).

## Article 47 of the Trusts Law

Under article 47 of the Trusts Law, the Court may, if it thinks fit to do so, approve "*any arrangement, by whomsoever proposed and whether or not there is any other person beneficially interested who is capable of assenting thereto, varying or revoking all or any of the terms of the trust or enlarging the powers of the trustee of managing or administering any of the trust property.*"

The Trusts Law provides further that such order can be made on behalf of certain categories of individuals, including (without limitation) the following:

- minors or interdicts having either directly or indirectly and whether vested or contingent, an interest in the trust;
- any person that cannot be found despite reasonable efforts to find such person; or
- any person unborn.

Such order can only be ordered to the extent that the Court is satisfied that it would be for the benefit of the persons listed above.

## Issues before the Court and its decision

The questions at hand for the Court were twofold:

- whether the Court had jurisdiction under article 47 of the Law to approve the Proposed Changes; and
- whether it would be for the benefit of the Children and the Remoter Issue to approve the Proposed Changes.

In respect of the first question, the Court held that it did possess jurisdiction to approve the

Proposed Changes relying on the authoritative case of *In the Matter of Representation of A and B [2011] JRC 243*.

In respect of the second question, the Court held that approving the variation of the Trusts to remove the Settlor as an Excluded Person was premature given the lack of information presented to the Court by the Representors. The Court therefore adjourned further consideration of that question to a later date.

## Rational

The Court held that it was not able to make the relevant order on the basis that it was not provided with sufficient information to be satisfied that the Proposed Changes would benefit the Children and the Remoter Issue. More particularly, the Court held that:

- the Children, being at most at the start of secondary school, were still too young at this stage to ascertain whether they would remain domiciled in the UK for the purposes of tax residency, which was one of the main reasons of the application (i.e. that the Children would be subject to significant tax liabilities in respect of the Trusts' assets if they remained UK domiciled for tax purposes);
- the Settlor and his wife had intended that the purpose of the Trusts was to ensure that the Children had a comfortable life with the caveat that they would only benefit from the Trusts once they were mature enough and had achieved professional success. The Court held however that given the age of the Children it was not clear that there was any urgency to the Settlor's tax planning objectives;
- the Trustees had failed to provide sufficient information in respect of the Trusts' assets and how these were being invested, an element the Court felt it needed to understand before making any orders under Article 47 of the Trusts Law;
- the Trustees had put it to the Court that the intention behind the Proposed Changes was to allow the Settlor to be distributed a certain part of the assets held in the Trusts to then be distributed onto the Children and his new wife in equal shares after his death. The Court considered that it did not hold sufficient information to understand what was contemplated by the Settlor and the Trustees in respect of such assets for the foreseeable future given the Settlor's age; and
- on the same lines as the above, the Trustees had also argued that the Court's approval would be sought for any future decisions to be made by the Trustees with regards to distributions to the Settlor. The Court however considered that it needed to be provided with further information as regard to the proposed restructuring so as to be able to make an informed decision.

# Lessons for trustees

The approach of the Court in **Paicolex** makes it clear that where an Article 47 application is made in the context of a wider restructuring/tax planning exercise, it will be necessary for a trustee to provide the Court with as much information as possible in respect of the broader restructuring objectives and intentions.

Practically speaking, this is likely to mean that where an Article 47 application is just one step in such an exercise, trustees may wish to put the subsequent planned stages of the exercise before the Court for approval as a momentous decision under Article 51 of the Trusts Law. Whilst this will increase the amount of preparatory work which trustees will need to undertake, it will have a number of benefits including:

- enabling the Court to assess the merits of the Article 47 application in the context of the wider intentions of the trustee; and
- avoiding the need for (and therefore the time and cost associated with) multiple applications to Court.

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