

## Testing Jersey's firewall

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### Testing Jersey's firewall: In the matter of the R Trust [2015] JRC267A

#### Introduction

This case concerned orders made by the English Family Court in relation to a Jersey discretionary trust, and therefore the operation of the so-called "firewall" provisions contained in Article 9 of the Trusts (Jersey) Law 1984 (**Trusts Law**) regarding the enforcement or recognition of foreign judgments against Jersey trusts.

The case confirms that trustees are not prevented from taking steps which are in the best interest of their beneficiaries simply because doing so might also be seen as giving effect to a decision of a foreign Court which had applied foreign law to a question regarding a Jersey trust.

#### Facts

Mr B and his former wife (Mrs B) had been involved in divorce proceedings in England, as a result of which there had been a division of the matrimonial assets ordered by the English Family Court.

The trust in question had been settled by the Mr B, and the only beneficiaries were the children of the marriage who were both minors. The trust instrument permitted, among other things, the addition of beneficiaries.

The English Court made orders that that the disposition of the trust assets by Mr B to the trust be set aside, and ordered the trustee to treat that disposition accordingly and remit the trust fund to Mr B for onward payment by him to Mrs B.

It was clear from the judgment in the divorce proceedings that the assets of the family overall were not sufficient for Mrs B to maintain the property in England in which she and the two

children resided. It was in part for that purpose that the judge in England determined that access was required to the trust assets to enable Mrs B to keep the property.

The trustee had carefully considered the English judge's analysis and concluded, on the basis of his factual findings, that it was in the best interest of the beneficiaries of the trust (the children) that Mrs B have access to the trust funds so that she could maintain the home over the children's heads.

The trustee therefore decided to add Mr B as a beneficiary of the trust and to distribute the whole of the trust assets to him to enable their onward distribution to Mrs B, and applied to the Royal Court for approval of that decision on the basis that it was momentous.

## Decision

That Court had no difficulty in confirming that the tests for approval of a momentous decision (as set out in the well-known case of Re S Settlement [2001] JLR N37) were satisfied, that is to say:

1. The trustee's decision was formed in good faith;
2. The decision was one which a reasonable trustee properly instructed could have reached;
3. The decision was not vitiated by any actual or potential conflict of interest.

An interesting question arose, however, as to whether the proposed steps fell foul of Article 9(4) of the Trusts Law which provides that:

*"(4) No –*

*(a) judgment of a foreign court;*

*...*

*with respect to a trust shall be enforceable, or given effect, to the extent that it is inconsistent with this Article, irrespective of any applicable law relating to conflict of laws"*

Article 9 requires questions regarding a Jersey trust to be determined in accordance with Jersey law, which was not the case in relation to the orders made by the English Court. As a result, Article 9(4) would have prohibited the English order being enforced or "given effect".

The Court noted that the English judgment was not being enforced, and importantly the Court was not concerned that trustee was "giving effect" to the English decision (which would be prohibited by Article 9(4)). Rather, the Court was satisfied that the trustee was taking the proposed steps because the trustee considered them to be in the best interests of the beneficiaries.

## Comment

The main aim of Article 9 of the Trusts Law is to ensure that questions concerning a Jersey trust are governed by Jersey law, and as such it has been largely welcomed by trustees since its introduction in 2006.

However, it would be an absurd consequence were a trustee prevented from taking steps which are clearly in the best interests of the beneficiaries simply because there is an English Court order requiring similar steps. In this regard, the decision provides some welcome clarity that this is not how Article 9(4) (which was introduced in 2012) is to be interpreted.

We note in passing that the most recent Consultation Paper on amendments to the Trusts Law published last week records that there have been a number of suggestions as to how Article 9 may be improved, but that there are no amendments immediately in prospect. Given this decision, it may be considered that the correct interpretation of Article 9(4) is sufficiently clear.

Ogier acted for the trustee.

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