

Submission by a Guernsey trustee to the jurisdiction of a foreign court

Insights - 10/05/2017

In the matter of the A Limited Funded Unapproved Retirement Benefits Scheme and the B Employee Benefit Trust

A recent decision of the Royal Court has considered for the first time whether a Guernsey trustee should submit to the jurisdiction of a foreign court.

The application took place *in camera*, however the Deputy Bailiff handed down his reasons to the application on 24 April 2017 due to the novel points of law raised by Advocate Mathew Newman, head of Guernsey's Dispute Resolution team, which he felt deserved wider dissemination.

The Application

The facts of the case can be summarised as follows:

- T Limited acts as trustee of two trusts, in particular, a Funded Unapproved Retirement Benefits Scheme (the **FURBS**) of which Mr D is the sole member;
- the FURBS was intended as a form of pension plan for Mr D;
- Mr and Mrs D are currently party to English matrimonial proceedings in relation to financial remedies on divorce;
- an order made by a judge in the English High Court joined T Limited as respondents to the matrimonial proceedings; and
- as a result, pursuant to sections 68, 69 and 71 of the Trusts (Guernsey) Law, 2007 (the **2007 Law**) and/or the inherent supervisory jurisdiction of the Royal Court over trustees of Guernsey trusts, T Limited sought directions from the Royal Court as to whether to it should submit to the jurisdiction of the English High Court.

Guernsey authority

Section 14(4) of the 2007 law provides that:

'Notwithstanding any legislation or other rule of law ... in force in relation to the recognition or enforcement of judgments, no judgment or order of a court of a jurisdiction outside Guernsey shall be recognised or enforced or give rise to any right, obligation or liability or raise any estoppel if and to the extent that ... b) the Royal Court, for the purposes of protecting the interests of the beneficiaries or in the interests of the proper administration of the trust, so orders'.

This subsection had not been the subject of judicial analysis by the Court previously, however article 9(4) of the Trusts (Jersey) Law 1984 makes similar provisions and has been the subject of comment in the Royal Court of Jersey.

Jersey authority

The question of submission to the jurisdiction of the English court has been addressed in detail by the Royal Court of Jersey in *In the matter of the H Trust* [2006] JRC 057 ('H Trust'), with a factual scenario very similar to T Limited's application, save that it involved a discretionary trust.

The Jersey court approved the trustees refusal to submit to the jurisdiction of the English court and concluded that, in most circumstances, it is unlikely to be in the interests of a Jersey trust for the trustee to submit to the jurisdiction of an overseas court which is hearing divorce proceedings where one or both of the parties are beneficiaries. It is more likely to be in the interests of both the trust and the beneficiaries to preserve the freedom of action of both the trustees and the Jersey Court to act as appropriate when the decision of the overseas court is known. The Jersey court highlighted how the roles of the two courts are very different and, in its decision, preserved the Jersey court's discretion to review the merits of the English court's decision in its supervisory role in respect of trusts.

Findings

The Deputy Bailiff stated that had the trust in question been a 'standard' family discretionary trust with a class of beneficiaries extending beyond the divorcing couple, he probably would have followed the Jersey court's reasoning in H Trust and concluded that it was best for the trustee not to submit to the jurisdiction.

However, in his interpretation of the FURBS Trust Instrument, the Deputy Bailiff found that the FURBS cannot be considered a discretionary trust. All T Limited is required to do is to make arrangements to pay a pension to Mr D. In doing so, T Limited is not unduly concerned about anyone else because its focus is on Mr D, as its sole Member. As such the Deputy Bailiff distinguished T Limited's application from H Trust, and other Jersey cases which pointed away

from a trustee submitting to the jurisdiction of an overseas court, and found that T Limited's situation was an exceptional case where a trustee's submission to the jurisdiction of a foreign court was both permissible and appropriate.

The Deputy Bailiff believed that T Limited could assist in explaining to the English High Court the terms on which the various assets within the FURBS were being held and in these circumstances, i.e. where it is beneficial for the beneficiary, it makes sense for T Limited to be in the position to render the best assistance it can.

The Deputy Bailiff therefore held that section 14(4) did not amount to a bar to T Limited participating in the proceedings to which it had been joined - though the impact of section 14(4) will remain to be considered in the event that enforcement of any English court order made is sought in Guernsey.

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