

Jersey Royal Court demonstrates its ability to assist in the administration of foreign trusts

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In its recent decision in *In the matter of the 1964 Settlement* [2020] JRC 140B^[1], the Royal Court (the **Court**) has – for the first time – considered whether it can exercise a foreign statutory power on the application of a trustee of a foreign trust. The Court concluded that as a matter of principle it can do so, and went on to exercise an English statutory power so as to permit the trustees of a trust governed by English law to self-deal.

Background

The 1964 E Settlement (the **Trust**) was made in England by the Settlor when she was resident in England. While there was no express choice of law clause, the Trust contained references to various English statutes and the first trustees were also residents of England. By the time of the application those trustees had been replaced by two Jersey private trust companies (the **Trustees**), and the administration of the Trust was carried out by a dedicated family office that administered the offshore wealth of two branches of the same family.

By way of subsequent instruments, a number of sub-funds were established for the benefit of the Trust's principal beneficiaries. Each principal beneficiary's sub-fund held all of the issued shares in a separate holding company, which in turn held various assets that comprised the body of the Trust. Each of the holding companies were Jersey companies.

In order to create greater independence between different sides of the family, the Trustees proposed to reorganise the corporate structure underlying the Trust. English Counsel advised that:

- the Trust was governed by English law;
- as there was no provision in the Trust permitting self-dealing by its trustees, the Trustees were subject to the English law rule against self-dealing (the core of that rule being that a trustee is not allowed to purchase trust property^[2]), with a likelihood that any infringing

transaction would be set aside;

- various historic transactions carried out by the Trustees were instances of self-dealing, namely (i) certain sales of assets between the Trust and two other family trusts^[3] and (ii) certain sales and re-allocations of assets between the Trust's sub-funds; and
- aspects of the proposed re-structure would also infringe the rule against self-dealing.

The Trustees (having consulted with the principal beneficiaries) decided not to unravel the historic transactions, and did not seek relief in respect of them from the Court. However, the Trustees did apply to the Court for:

- approval under Article 51 of the *Trusts (Jersey) Law 1984* (the **Trusts Law**) in respect of a reorganisation of the corporate structure underlying the Trust; and
- an order under the provisions of Section 57 of the *Trustee Act 1925* (Section 57), legislation of the United Kingdom, granting the Trustees a power to self-deal.

The Court's decision

Governing law of the Trust

While there was no express choice of law clause, the Court concluded that the terms of the Trust "*unambiguously*" implied a choice of English law. (The Court emphasised that it was therefore making no finding as to the extent to which the English law rule against self-dealing might apply in Jersey.)

Application of a foreign law statutory power

The Court noted that, had the application permitting the Trustees to self-deal been brought in respect of a Jersey law governed trust, relief could have been granted under Article 47(3) of the Trusts Law^[4]. However, as the Trust was a 'foreign trust' that power was not available.

The Court noted that Section 57 contained an equivalent provision to Article 47(3), and that there was some sense in the application for an order under Section 57 being made to the Jersey court "*bearing in mind the location of the Trustee, the trust property and the administration of the companies of the Trust*" – provided the Court had the power to make such an order.

The Court found that it was able to exercise the Section 57 jurisdiction, notwithstanding that the 'court' for the purposes of Section 57 was defined as the High Court of England & Wales.

The Court noted that Article 49(1) of the Trusts Law provides that "*a foreign trust shall be regarded as being governed by, and shall be interpreted in accordance with its proper law*" (subject to certain exceptions), and so concluded that:

"Accordingly this Trust, as a matter of Jersey law, is governed by English law. The proper law of the trust necessarily means the whole of that law. If the Royal Court were to decide that it could not exercise the power conferred by section, it would not be applying the whole of English law to the Trust but only a truncated version of it."

The Court noted that the same reasoning had been adopted in the English case of *C-v- C* [2015] EWHC 2699 (Ch). In that case, the English court held that it could exercise a Kenyan foreign statutory power in relation to a Kenyan-law governed trust by virtue of Article 8 of the *Hague Convention on the Law Applicable to Trusts and on their Recognition* (the **Convention**), as scheduled to (and given force in England by) the *Recognition of Trusts Act 1987*. Article 8 provides that the applicable law of a trust is to govern its validity, its construction, its effects and its administration.

The Court held that, while the Convention does not have direct force in Jersey, it could nonetheless have regard to Article 8 of the Convention when considering the meaning and effect of Article 49(1) of the Trusts Law^[5]. The Court therefore had "*no doubt*" that it had the power to make an order under Section 57 and, on the facts, concluded it was appropriate to grant the order sought.

Blessing of the decision

The Court declined to grant an order approving the Trustees' decision to enter into the proposed re-organisation, as the relief granted under Section 57 already enabled the re-organisation to proceed. However, the Court did make some "*general remarks*", including that:

- on the facts, the conflicts were not such as to require the Trustees to surrender their discretion to the Court (as opposed to taking the decision themselves); and
- had the Court had to consider (for the purpose of granting its blessing) whether the Trustees' opinion had been vitiated by a conflict of interest, it would have concluded it had not. In reaching this view, it noted that the Trustees: would not stand to gain personally; had consulted with, and gained the written support of, the adult principal beneficiaries to the proposed re-organisation; and had sought the sanction of the Court in advance of the transaction.

Discussion

The judgment is a welcome one for trustees in two particular respects.

First, the Court's confirmation that it will apply the whole of the proper law of a foreign trust (including powers conferred by foreign statute) is both well-reasoned and pragmatic. This judgment illustrates to Jersey-based trustees of foreign trusts that the Jersey court is willing to assist in the administration of foreign trusts and, importantly, that it can apply the full range of

powers available under the trust's governing law. This gives trustees the option of seeking assistance from the Jersey court, thereby avoiding the potential difficulties that can follow from commencing proceedings in another jurisdiction.

Second, the judgment provides a helpful reminder of the type of factors that the Court will consider when asked to bless a decision that the trustee proposes to take in circumstances where they may be exposed to a conflict of interest.

[1] <https://www.jerseylaw.je/judgments/unreported/Pages/%5B2020%5DJRC140B.aspx>

*[2] The judgment describes the rule as applying (broadly speaking) where the trustee: acts in its own capacity or as trustee of another trust (a **Second Trust**); sells trust property to a company of which it is the sole shareholder; or transacts (either itself or through a company whose affairs it controls) with a company owned by a Second Trust (whose affairs it controls).*

[3] There being substantial overlap in the relevant corporate trustees' Boards, and the membership of the Boards of the relevant underlying companies being the same.

[4] Broadly speaking, this provision empowers the Court to vary the terms of a trust so as to empower a trustee to undertake certain transactions otherwise not permitted by the terms of the trust or by law.

[5] In reaching this view, the Court noted that the Trusts (Amendment No. 2) (Jersey) Law 1991 and the Explanatory Note to the Report laid before the States in 1990 proposing that law stated that (i) the purpose of that law was to give effect to Article 7 of the Convention and (ii) following the coming into force of that law the Trusts Law would be compliant with the Convention.

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