

History repeating: a trustee de son tort in Jersey

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Becoming a trustee, or ceasing to act in that capacity, is one which will be familiar to all professionals in the offshore trust industry. It is vital that the process is carried out in a manner which is consistent with the interests of the beneficiaries, and complies with the relevant mechanism for the retirement and appointment of trustees. Those mechanics can be found either in the trust instrument itself, or if the trust instrument is silent and governed by Jersey law, in Article 17 of the Trusts (Jersey) Law 1984 (the **Trusts Law**). The dangers of getting the procedure wrong are exacerbated when the appointment of a new trustee is carried out in-house, so that there is no third party to review the procedure. If a trustee acts without being properly appointed for a long period of time, it may well mean a "lot" and not just a "little" bit of history repeating to remedy the position.

Trustee de son tort duties and obligations

Where a person intermeddles with the affairs of a duly constituted trust, taking upon itself to act as if it were a trustee, it may be liable as if it were a trustee.^[1] A person in these circumstances has no title to the trust property, but is often called a **trustee de son tort**,^[2] a de facto trustee, or even a constructive trustee (though only in the sense of giving rise to personal liability).^[3] Broadly a trustee de son tort is someone who assumes to act in the administration of trusts without having been properly appointed as a trustee and, in certain circumstances, can be placed in a similar position to a trustee who has been duly appointed. Indeed, it is accepted under Jersey law that a trustee de son tort closely resembles an express trustee.^[4]

Therefore, one would expect a trustee de son tort to be subject to the duties set out in Article 21 of the Trusts Law. These are to act:

- with due diligence;
- as would a prudent person;

- to the best of the trustee's ability and skill; and
- subject to the terms of the trust to preserve and enhance the value of the Trust Fund.

A trustee de son tort, therefore has duties to **act with due diligence, as would a prudent person and to the best of its ability and skill** in everything that it does with regard to the trust. These statutory duties apply at all times and cannot be contracted out of by the terms of the trust or otherwise.

There is also an overriding duty to act in the interests of the beneficiaries.

There is no actual statutory duty to diversify investments but, subject to the terms of the trust, a trustee of a Jersey trust is required to both preserve and enhance the value of the trust property so far as is reasonable. On the assumption that the best means of reasonably preserving and enhancing the value of investments is to include some diversification of investments (as was accepted by the English Court of Appeal in *Nestle v. National Westminster Bank* (1993) 1 WLR 1260) it is generally accepted that some diversification of trust investments would ordinarily be expected of a trustee of a Jersey law trust (subject to the terms of the trust). Notably Article 21, refers to a trustee acting "to the best of his ability and skill". It would seem that these words were intended to import into Jersey law the English law principle which recognises that a higher level of skill will be expected from a person who holds itself out as a professional trustee.

It has further been held by the Royal Court of Jersey that a trustee de son tort is liable for breach of trust as if properly appointed.^[5] By ignoring the trust instrument in the manner of becoming a trustee, it will not be able to rely on it for its own benefit. The trustee de son tort is therefore potentially in the worst possible position, being responsible for its actions but without the benefit of any indemnity which might otherwise be available in the trust instrument, and without the ability to charge fees and expenses as if a professional trustee.

There is Jersey case law which indicates a professional entity administering a trust in good faith but on the mistaken assumption that it has been properly appointed, following a defective transfer of trusteeship, is entitled to an indemnity out of the trust fund for the costs of representation to court to ratify appointments and purported actions.^[6] However, there is no automatic right to such an indemnity and any trustee de son tort wishing to avail itself of an indemnity on this basis would require an order of the Royal Court to this effect.

Remedying the position

To remedy the position, the trustee de son tort will need to be validly appointed as trustee of the trust and the retiring trustee will need to validly retire as trustee of the trust. There is limited authority on the validity or otherwise of the exercise of powers and discretions by a trustee de son tort.^[7] That said, in a non-contentious scenario, it would be usual practice for the retiring trustee (as the trustee of the trust for the time being) to also ratify and agree all actions taken

by the trustee de son tort, capable of being ratified, prior to their retirement. Of course the retiring trustee would need to be agreeable to doing so. The actions undertaken by the trustee de son tort are sometimes scheduled to the deed of retirement and appointment of trustee or if there are no concerns on the part of the retiring trustee then the retiring trustee simply ratifies all actions undertaken by the trustee de son tort in a generic clause.

Administrative vs dispositive powers

As a general rule, administrative powers can be ratified; dispositive powers cannot be ratified. Administrative decisions are essentially contractual in nature or actions that a trustee could undertake in its own right and can be ratified. Actions performed by the trustee de son tort such as the appointment of directors, dealings in respect of bank accounts, contracts with third parties and interest bearing loans are likely to be administrative in nature. Dispositive powers are those powers exercised under the terms of the trust and in relation to the trust itself. The trustee de son tort was never validly appointed as trustee of the trust and consequently any exercise of a dispositive power pursuant to the trust would likely be void and of no effect. To this end any purported exercises of dispositive powers by the trustee de son tort would need to be re-exercised once the trustee is validly appointed as trustee. This would include any purported exercise of the power of addition to add beneficiaries or any exercise of powers of exclusion to exclude beneficiaries. It would also capture any exercise of powers of appointment in the trust whereby distributions of income and capital have been made to beneficiaries. It is generally not possible for dispositive powers exercised by a trustee de son tort to be ratified after the event once the trustee de son tort has been validly appointed (other than by a ratification of the Court). The power has to be re-exercised.

Conclusion

This is a scenario we encounter on a fairly regular basis in practice usually in non-contentious circumstances. To remedy the position, the trustee de son tort will need to be validly appointed as trustee of the trust and the purported retired trustee will need to validly retire as trustee of the trust. This could be dealt with by a deed of retirement and appointment of trustees if all parties were agreeable to enter into the same with a subsequent re-exercise of relevant dispositive powers by the properly appointed trustee.

In contentious or more complex scenarios, Article 51(1) of the Trusts Law provides a trustee may apply to the court for direction concerning the manner in which the trustee may or should act in connection with any matter concerning the trust and the court may make such order, if any, as it thinks fit. There is therefore a wide ambit for the trustee to seek directions from the Royal Court of Jersey and there are various examples of orders which the Court at its discretion, having regard to the interests of beneficiaries and the proper administration of the trust, can make and which we have assisted with. The effect of such orders include ratifying and confirming the past acts of the trustee de son tort who has acted in good faith, allowing it to

keep remuneration charged and relieving it from liability which arises merely because it had not been properly appointed as trustee.[8]

[1] *Cunningham v Cunningham* 2009 JLR 227, paras 21-26

[2] *Re Representation BB, re D Trust* [2011] JRC 148

[3] *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366, paras 135-40

[4] *Cunningham v Cunningham* 2009 JLR 227 at para. 22

[5] *Crociani v Crociani* (Royal Ct.) 2017 (2) JLR 303

[6] For example, *In re BB* (Royal Ct.), 2001 JLR 672

[7] See Lewin on Trusts 20th Ed. 42-106

[8] For example, see *Z Trust* [2016] (1) JLR 132; *Representation of A Trust Limited* [2018] JRC021

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