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The Royal Court of Jersey exercises its discretion to help a trustee out of a “bit of a mess”.

February 2018

In the recent case of *In the matter of the Number 1 C Trust* [2018] JRC 021, the Royal Court of Jersey provided a helpful reminder to trustees of Jersey law trusts to seek its judicial assistance at the earliest opportunity where they encounter difficulties in relation to the due administration of a trust. In the present case, the Royal Court exercised its discretion to ratify the actions of a *trustee de son tort* and to vary the terms of a Jersey law discretionary trust in the interests of the beneficiaries.

Background

There were three trusts known as the C Trust. The First C Trust was a discretionary trust, governed by Jersey law. The original trustee was a Jersey incorporated trustee (the “*Jersey Trustee*”). It had a nominal trust fund and the Settlor intended that that trust would receive the proceeds of an insurance policy on his death (the “*Policy*”). He provided a detailed and prescriptive letter of wishes regarding intended distributions. The Jersey trustee informed the Settlor that it could not accept the letter of wishes as legally binding and could not act as trustee on that basis. Accordingly, the Settlor elected to establish a second, more prescriptive trust (the “*Second C Trust*”).

The Second C Trust was established in October 1997. A company was incorporated in the USA for the specific purpose of acting as original trustee (the “*USA Trustee*”). This trust was intended to receive the proceeds of the Policy. The Second C Trust provided that the anticipated proceeds of the Policy would be transferred to the USA Trustee as trustee and that it would then resign in favour of the Jersey Trustee. As set out below, that did not happen. There was no power within the terms of the Second C Trust to distribute trust assets to other trusts and no element of discretion afforded to the trustee. Its terms were detailed and prescriptive as to quarterly distributions to each of a number of the adult beneficiaries. It was to terminate no later than 11 March 2039. There was no relevant provision for earlier termination.

Following the death of the Settlor in 2005, the USA Trustee received approximately US\$9m pursuant to the Policy to be held on the terms of the Second C Trust.

As stated above, the trustee of the First C Trust (the Jersey Trustee) was unwilling to act. It was replaced as trustee of that trust by the Representor (a Guernsey incorporated company). It was intended that the Representor would also become trustee of the Second C Trust but that did not happen. Instead, the funds received pursuant to the Policy were purportedly transferred by the USA Trustee as trustee of the Second C Trust to the Representor as purported replacement trustee of the Second C Trust (but at a time when the Representor’s only relevant capacity was as trustee of the First C Trust). The Representor’s position as express trustee of the Second C Trust was not confirmed until an instrument dated 12 January 2017. Following the transfer of assets, the USA Trustee was dissolved.

In 2009, doubts arose as to the manner in which the assets were being held. The Representor considered that it must hold the proceeds pursuant to the terms of the discretionary First C Trust (it never having been appointed as trustee of the Second C Trust). However, it was clear that it was the Settlor’s intention that the funds should be held and administered pursuant to the prescriptive terms of the Second C Trust. The Representor took advice from Guernsey advocates who advised that, in order to clarify the position, the Representor should declare that it henceforth held the proceeds on a Guernsey law trust (the “*Third C Trust*”), whose terms would be the same as those of the prescriptive Second C Trust.



As the terms of the Second C Trust contained no provision permitting the transfer of the funds other than in compliance with its prescriptive distribution policy, the transfer of funds from the USA Trustee to the Representor (as purported trustee of the Second C Trust) was invalid until its appointment as express trustee of the Second C Trust in January 2017. Up until that time the Representor held the funds as *trustee de son tort*.

Of course, in the intervening period, the Representor had purported to deal with the funds by effecting distributions in accordance with the prescriptive provisions of the Second C Trust and by paying its own and other professional fees. It was in those circumstances that the Representor was seeking ratification for its actions during the period from its receipt of the funds in 2005 to its formal appointment in 2017 and approval of its charges both historic and until the termination of the Second C Trust.

The Representor also sought the Court's approval on behalf of the minor and unborn beneficiaries to a variation which would facilitate the early termination of the Second C Trust and the distribution to certain adult beneficiaries of the trust fund. If such a variation was not agreed the trust would need to remain in existence until 2039.

Ratification

There was no suggestion that the Representor had acted other than in good faith during the period that it thought it was the fully constituted trustee of the Second C Trust. It had managed the trust fund in accordance with the Settlor's distribution policy. The court had no hesitation in approving the Representor's historic costs on that basis.

Further, the Court found that it was not in the interests of the beneficiaries to say that the Representor's actions should not be treated as valid acts. To do so would only serve to create uncertainty with regard to prior distributions. Accordingly, the Court ratified the actions of the Representor and absolved it from liability during the time it had acted as *trustee de son tort* (subject to it remaining liable for any breaches of trust should any have occurred). As regards future costs, the Court concluded that it would be right to provide that the Representor may, until the final distribution, continue to charge its fees on its standard terms and conditions on that basis that this would provide for the proper administration of the trust going forward.

Variation

The Representor's application to vary the Second C Trust so that it could be terminated prior to 2039 was supported by each of the adult beneficiaries. The question for the Court was, therefore, whether pursuant to Article 47(1) of the Trusts (Jersey) Law 1984, as amended, the proposed variation would be of benefit to the minor and unborn beneficiaries. The Court has previously held that the term "*benefit*" is to be construed widely.

The practical effect of the arrangements proposed was that the Second C Trust would come to an end. The adult beneficiaries would receive a distribution. They would be in a financially better position and also in a better position to provide for their families including the minor and unborn beneficiaries. Refusing the application would mean that there would be a significant number of years of fees and costs reducing the amount of the income distributions to be made to the adult beneficiaries.

The variation application was also supported by the Advocate acting for and on behalf of the minor beneficiaries. Pursuant to the terms of the Second C Trust, the benefit that may come to the minors was contingent upon the death of their fathers and they would not, in any event, receive anything until they achieved a specific age. Some would therefore not benefit for decades. The Representor had proposed a separate fund be set aside of US\$150,000 for the benefit of the minor beneficiaries who would, therefore, share in something, albeit a small percentage of the current assets of the trust.

The Court accepted that the proposed variations would be for the benefit of the minor and unborn beneficiaries and accordingly ordered the variation of the Second C Trust.

Comments

This case provides a useful reminder of the importance of seeking the Court's assistance at an early stage. The Royal Court has frequently made clear that it is there to assist trustees in the proper administration of Jersey law trusts and in this case commented that it was unfortunate that "*complexity seems to have been added to error in an attempt to deal with the matter that could have been dealt with in a straightforward way by an application to the Court at an earlier stage.*"



Notwithstanding the delay, the Court recognised that the variations sought were for the benefit of all beneficiaries and that the Representor had sought to deal with its duties honestly and competently and to the benefit of the adult beneficiaries. As such, it was an appropriate case in which to ratify the previous actions of the Representor to get out of, what its own Advocate described as, a “*bit of a mess*”.

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