

**ADVISORY**
Industry Information

Should I stay or should I go: removal of trustees

Sept 2018

In the recently reported case of the *Representation of Rawlinson & Hunter Trustees SA and Others* [2018] JRC 131 Commissioner Clyde-Smith considered applications by former and current trustees in respect of the validity and effectiveness of the removal of a former trustee. It provides a useful reminder of the wide discretion that is available to the Court when asked to determine issues relating to the retirement of trustees.

Background

Rawlinson & Hunter Trustees SA (“R & H”) was the trustee of eleven Jersey law discretionary trusts associated with D and his family (together the “Trusts”). The relationship between R & H and D broke down in 2017. Difficulties arose subsequently over the terms on which R & H should retire as the trustee of all the trusts in favour of Fort Trustees Limited (“Fort”) and Balchan Management Limited (“Balchan”), both Guernsey based trust companies.

The retirement of R & H was complicated by potential personal liability faced by it in proceedings to which it is a party as trustee in Guernsey and the United Kingdom. The proceedings involved claims for many millions of pounds and significant costs exposure. The Royal Court noted that R & H’s considerable concern about the possible impact of the potential personal adverse costs orders was understandable.

In September 2017 Fort and Balchan were appointed as additional trustees of the G Trust and the D Discretionary Trust (“DDT”) by the protector. The validity of that appointment was confirmed by the Royal Court in October 2017. R & H also appointed Fort and Balchan as co-trustees of the D Discretionary “A” Trust (“DDAT”).

On 3 October 2017 the protector exercised his power to remove R & H as trustee of the DDT Trust which was the trust involved in the court proceedings in Guernsey. R & H brought a representation on 5 October 2017 seeking the Royal Court’s blessing of its decision to retire as trustee of all of the Trusts. R & H stated the reason for its decision was that it had been placed in an impossible position. R & H said their position was impossible due to a number of difficulties including funding of its fees, its personal exposure to litigation when it didn’t have access to sufficient funds to cover its indemnity, its exposure to decisions which could be imposed on it by the other two co-trustees, the conduct of the litigation which continued without R & H’s instruction or authority, its reasonable requests for information in respect of administration and litigation were being ignored and unsubstantiated allegations had been made about R & H and its staff by D.

On 8 November 2017 the Royal Court considered the terms on which R & H should retire and during the course of the hearing the parties reached a compromise. The Royal Court ordered by consent (the “November Order”) that the deed of retirement and indemnity (“DORA”) for all of the trusts should be “on the basis of the STEP Standard Provisions”.

Issues arising following the making of the November Order

Draft Dora’s were sent by the advocate acting for R & H to Fort and Balchan’s advocate showing the changes made against previously circulated drafts. No response was received.

In the interim disclosure orders were made in the English proceedings requiring R & H to carry out an extensive electronic disclosure exercise. The Royal Court, following an application by D, Fort and Balchan, ordered R & H to carry out the disclosure exercise.



Between 11 January and 29 January 2018 Fort sent their own PDF DORA's directly to R & H which were based on the drafts prepared by R & H's advocate but deleting the chain indemnity that had been included and therefore reducing significantly the protection that would be received by R & H if the DORAs had remained drafted in line with the STEP Standard Provisions.

On 5 February 2018 Fort and Balchan's advocate sent copy resolutions and deeds to R & H's advocate. These documents made certain changes in respect of the G Trust, giving the protector the power to remove trustees which he exercised on 5 February 2018 in relation to R & H. In relation to DDAT the documents gave the majority of trustees the power to remove a trustee which Fort and Balchan also exercised on 5 February 2018.

On 7 February R & H responded to Fort noting that the DORAs they had been provided had been considered by their Jersey advocates. R & H also stated that the DORAs had been altered so as not to reflect the STEP Standard Provisions without discussion or the approval of the Royal Court. The advocate for R & H also wrote to Fort and Balchan's advocate and noted it was his view that attempting to by-pass the order of the Royal Court was a contempt and therefore ineffective.

In early March the advocate for R & H received documents from Fort and Balchan's advocate in relation to the F Trust appointing a new protector who appointed Fort and Balchan as additional trustees. Fort and Balchan then, as majority trustees, varied the terms of the trust to provide the protector with the power to remove trustees which the protector then exercised removing R & H.

Matters to be determined by the Court

Following these steps the Royal Court was asked by Fort and Balchan to declare that the removals of R & H as trustee from the DDAT, F Trust and G Trust were valid and effective. R & H in contrast sought an order that Fort and Balchan execute the DORA's in respect of all of the trusts other than DDT in the form provided to the Royal Court which complied with STEP Standard Provisions, on pain of contempt.

The parties accepted that the power to remove a trustee was a fiduciary one and the Royal Court referred to the helpful summary of the duties of a holder of a fiduciary power in *Re Jasmine Trust* [2015] JRC 196 as follows:

"Without purporting to assert an exhaustive statement of the duties, for the purposes of this case we would hold that, when exercising the power to appoint a new trustee, the protector was under a duty:

- i. *To act in good faith and in the interests of the beneficiaries as a whole;*
- ii. *To reach a decision open to a reasonable appointor;*
- iii. *To take into account relevant matters and only those matters; and*
- iv. *Not to act for an ulterior purpose."*

Fort and Balchan sought to justify their conduct on the grounds that:

- i. R & H had not responded to their correspondence sent between 11 and 29 January 2018 making it clear to Fort and Balchan that they couldn't work with R & H.
- ii. STEP does not produce a standard template DORA.
- iii. Any issue regarding the DDT indemnity should be brought before the Guernsey court as it was seized of the litigation there.
- iv. R & H was refusing to retire and had begun a campaign of mischief making in the various legal proceedings, requiring its removal as quickly as possible.
- v. Article 43A of the Trusts (Jersey) Law 1984 (the "Law") would, when it came into force, offer R & H additional protection which would deal with its concerns.

The Royal Court rejected all of the reasons given by Fort and Balchan. Dealing with each justification in turn, with regards to the first point raised in justification the Royal Court noted that R & H had been heavily engaged in January 2018 dealing with the "extensive disclosure exercise" ordered by the Royal Court and stated that in any event the correspondence sent by Fort should have been between the advocates acting for the parties.

The second reason given by Fort and Balchan, that STEP did not have a standard DORA for use in Jersey, was also rejected by the Royal Court. The advocate for R & H provided templates to the Royal Court in this regard and the Royal Court was satisfied that the drafts provided by R & H's advocate complied with the STEP DORA requirements.



In respect of the third reason given by Fort and Balchan, the Royal Court held that this point was irrelevant as R & H had been removed as trustee of DDT before the order of 8 November 2017 had been made and the Royal Court had not been requested to determine, in respect of that trust, what if any indemnities should be given.

In relation to the fourth reason given by Fort and Balchan as justification, that R & H was reluctant to retire, the Royal Court noted this was not correct. The Royal Court said that it was clear that R & H was keen to retire as trustee of all of the trusts, it simply wanted to do so on reasonable terms. The Royal Court also dismissed the suggestion that R & H has displayed a lack of co-operation and cited correspondence from a director of R & H which illustrated that R & H had in fact been co-operative. The Royal Court held that R & H had not been involved in a campaign of mischief-making concluding that R & H had understandable concerns about the ongoing litigation that was still being conducted in its name with decisions being taken without its knowledge.

The fifth reason given by Fort and Balchan, relating to the effects of Article 43A of the Law, was also given short shrift by the Royal Court. The Royal Court noted that this article would just enable indemnities to be provided to persons involved in the management or administration of trusts along with current, future or past officers and employees of the trustee and their successors. It would not help R & H as it would have either retired or been removed as trustee without a chain indemnity.

Further Criticism of Fort and Balchan

The Royal Court was also critical of the apparent lack of steps taken by Fort and Balchan to comply with the provision of the November Order requiring them to use their "*best endeavours*" to secure their substitution for R & H as parties to any existing litigation. The burden imposed on parties to use "*best endeavours*" was described by the Royal Court as a heavy one, obliging Fort and Balchan to pursue all reasonable courses of action until they are exhausted. The Royal Court observed that it was unclear on the evidence provided what, if anything, Fort and Balchan had actually done in respect of their obligations to secure their substitution for R & H in the existing litigation.

In a critical assessment of Fort and Balchan's approach to the form of indemnity the Royal Court noted that its supervisory jurisdiction over Jersey trusts had been invoked by R & H and accepted by Fort and Balchan. The issue that had been determined by the Court related to R & H's decision to retire and the terms of that retirement. The Royal Court in ordering that R & H should retire on the terms of the STEP Standard Provisions determined, amongst other things, the form of the indemnity R & H should receive noting that this form included a chain indemnity. The DORA sent by Fort to R & H excluded the chain indemnity and did not comply with the order made.

The Royal Court also observed that the parties had been given, in the November Order, liberty to apply. If Fort and Balchan had actually been concerned about the need to move quickly with the retirement of R & H they could have referred the matter back to Court. At no point between 18 November 2017 and 5 February 2018 did Fort and Balchan give notice to R & H of any concerns about delay.

Failing to engage with the advocate for R & H who had circulated revised draft DORAs was held to be inappropriate by the Royal Court, as was the redrafting of the DORA's in a manner contrary to the STEP Standard Provisions, the sending of those non-compliant DORAs to R & H directly by Fort rather than through R & H's advocate and the subsequent variation of the trusts and removal of R & H without notice.

The Royal Court concluded that R & H had been removed as trustee of three of the trusts so that Fort and Balchan could avoid their obligations under the consent order to provide chain indemnities and consequently they were held not to be acting in good faith. The Royal Court therefore declared that the removal of R & H had not been effective or valid and directed that DORAs be executed in the terms put forward by R & H within seven days of receipt of an execution version on pain of contempt.

Conclusions

This case provides reassurance for trustees that the Royal Court will consider sympathetically reasonable requests for indemnities from retiring trustees. It also reiterates the wide discretion available to the Royal Court where its supervisory jurisdiction over Jersey law trusts has been invoked to assist trustees in challenging situations.

The Royal Court has made it clear that any failures by another party to comply with an order of the Royal Court as to the form of the indemnities will not be tolerated and may lead to that party being found to be in contempt with the serious reputational and legal consequences that go with such a finding.



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