

In the matter of the *C Trust Company Limited* [2016] JRC 144: Jersey Royal Court blesses momentous decisions of council member of five Jersey foundations

UPDATE

Update prepared by Jonathan Speck (Managing Partner, Jersey), Edward Devenport (Partner, Jersey), Luke Olivier (Senior Associate, Jersey)

On 25 August 2016, the Royal Court of Jersey handed down a judgment in the matter of the Representation of the *C Trust Company Limited* [2016] JRC 144 in which it confirmed, *inter alia*, the scope of the powers of a council member to amend, vary and/or delete certain terms of the regulations of five Jersey foundations.

Introduction

As set out in greater detail below, the judgment and the declarations made by the Royal Court will lead to the council member in this matter (the **Council Member**) implementing a plan whereby:

1. the way in which these foundations are to be administered will be profoundly changed;
2. it will:
 - 2.1. pay a foreign tax liability owed by certain of the beneficiaries of some of these foundations from the assets of those foundations; and
 - 2.2. restructure, wind up and dissolve the foundation structure as a whole.

Mourant Ozannes acted for the Council Member and the Guardian of these Jersey foundations, the latter fully supporting the application throughout. It is of interest because this is only the second case where the Royal Court has heard an application brought pursuant to the Foundations (Jersey) Law 2009 (the **Foundations Law**).

Background

The Council Member is the sole council member of the five Jersey foundations which were created in 2011. They consist of four non-charitable foundations (the **Non-Charitable Foundations**) which were established for the benefit of certain members of a family, and one charitable foundation (the **Charitable Foundation**) (collectively the **Foundations**).

The Foundations' assets (estimated to be valued at £77m) are ultimately derived from the personal fortune of a deceased overseas resident. The deceased's wealth passed to his wife (**W**) and his two daughters (**D1** and **D2**) upon his death in the 1970s. Over the years, W, D1 and D2's shares of this fortune have been settled into various trust structures. As noted above, in 2011 the Foundations were created and thereafter the assets (which were in Jersey trusts at the time) were settled into the Foundations and those Jersey trusts were terminated. While W has always been a beneficiary of the Non-Charitable Foundations along with the eight (adult) children of D1 and D2 (the **Family Member Beneficiaries**), prior to the application being brought D1 and D2 did not form part of the Non-Charitable Foundations' beneficial class.

On the basis of tax advice taken in 2011, the Foundations were formed on the understanding that no tax filing or payment obligations would arise as a result of their formation in the foreign country of residence of W, D1, D2 and/or the majority of the other Family Member Beneficiaries (the **Foreign Jurisdiction**). However, it came to the family's attention in early 2015 that the tax advice previously taken may be flawed. In light of these developments, W, D1 and D2 sought fresh tax advice as to their obligations and were

advised that they would be (i) required to disclose the existence of the Foundations to the Overseas Tax Authority in the Foreign Jurisdiction (the **OTA**), and (ii) be liable for the payment of substantial retrospective tax liabilities (the **Tax Liability**), with the possibility of interest and other penalties being applied to that Tax Liability for their failure to make the necessary declarations timeously.

In late-2015, the Council Member was approached by W, D1 and D2 who confirmed to it that they (with the support of the rest of the Family Member Beneficiaries) wished to regularise their personal tax positions by making a declaration of the existence of the Foundations to the OTA (the **Declarations**) and paying the Tax Liability (which was eventually calculated at approximately €32m).

W, D1 and D2 were not in a position to settle the entirety of the Tax Liability out of their own personal wealth. The Council Member was, therefore, asked by the family to, amongst other things, (i) supply D1 and D2 with information in relation to the Foundations (the **Foundations' Information**) so that they could make the Declarations, (ii) facilitate that payment of part of the Tax Liability be made from the Foundations' assets, and restructure and dissolve the Foundations (collectively the **Requests**).

As a result of the Requests, the Family Member Beneficiaries were further consulted by the Council Member and given the opportunity to seek separate and independent advice in relation to their respective positions. Following this period of consultation, it was agreed amongst all of the parties that, notwithstanding the fact that D1 and D2 were not beneficiaries of the Non-Charitable Foundations, the Council Member would (i) supply the Foundations' Information to D1 and D2, (ii) enable a process whereby D1 and D2 would be made beneficiaries of the Non-Charitable Foundations so that a payment of their portion of the Tax Liability could be made out of the Non-Charitable Foundations' funds, and (iii) facilitate the restructuring and dissolution of the Foundations.

The Non-Charitable Foundations

As noted above, the object of the Non-Charitable Foundations was to benefit the Family Member Beneficiaries.

At the same time, prior to the application, their regulations expressly excluded from benefit any Family Member Beneficiary for the time being resident in the Foreign Jurisdiction. Of the nine named beneficiaries at that point, only one was resident outside of that jurisdiction, meaning that only that person was capable of benefiting.

Charitable Foundation

The purpose of the Charitable Foundation was to benefit such charities and charitable purposes as may be specified from time to time or in accordance with the regulations of the foundation. As part of the application, the Council Member pledged to make significant donations to charity to satisfy the Charitable Foundation's purpose to enable it to be terminated on the grounds that its object had been fulfilled.

Application to Court

Blessing sought

In order to give effect to the Requests, the Council Member sought the Royal Court's blessing to, *inter alia*:

1. amend or vary the definition of 'excluded person' in the regulations of the Non-Charitable Foundations in a way so that the Family Member Beneficiaries residing in the Foreign Jurisdiction could benefit;
2. amend the regulations of the Foundations to enable the Council Member to disclose the Foundation Information to D1 and D2 and allow the relevant parties to comply with any reporting obligations to the OTA;
3. add D1 and D2 as beneficiaries of the Non-Charitable Foundations and approve its decision to make the payment of the Tax Liability on their and W's behalf to the OTA; and
4. approve the restructuring and dissolution of the Foundations along with the payment away of the Foundations' assets to D1, D2 and the making of the significant donations to charity.

Evidence

The evidence of the parties in support of the application showed that:

1. all of the members of family were close and supportive of what was being proposed;
2. the OTA would very likely look through the Foundations and treat the assets thereof as belonging to W, D1 and D2; and
3. notwithstanding the point made at 2 above, the family members confirmed that there was an expectation that the assets of the Foundations would be distributed to the family in due course given that the assets were ultimately derived from family wealth.

Relevant powers of the Council Member, Guardian and/or the Royal Court

In bringing the application and seeking the Royal Court's blessing, the Council Member's primary contention was that it was within the scope of its powers under the terms of the regulations of the Foundations to amend, vary or delete any provision of the Foundations' regulations, to pay taxes, interest or penalties payable by the Foundations, and to dissolve each of the Foundations during the foundation period.

As regards the Guardian, the Council Member submitted that pursuant to Article 14 of the Foundations Law (the wording of which was echoed in the Foundations' regulations), if a guardian acting in good faith considered that it was appropriate, in the best interests of the Foundations and not prohibited under the regulations themselves, it could sanction or authorise any action to be taken by the Council Member that would not otherwise be permitted by the charter or Foundations' regulations.

The Council Member further submitted that even if the Royal Court found that the Council Member would be acting outside of the scope of its powers, then it is within the powers of the Royal Court, pursuant to Articles 45 and 46 of the Foundations Law, to make the necessary orders, in that:

1. Article 45 of the Foundations Law allows the Royal Court to amend regulations of a foundation if satisfied that the change will assist the foundation to administer its assets or attain (or nearly attain) its objects;
2. Article 46 of the Foundations Law confers a broad power on the Royal Court to give directions to assist a foundation to administer its assets or carry out its objects or if it is otherwise desirable for the Royal Court to do so.

Decision

The Royal Court, taking into account all of the relevant factors including that all of the members of the family were 'close and mutually supportive' of what was being proposed and that the Guardian was supporting the application, held that the actions that the Council Member intended to take were within its powers (with or without the sanction of the Guardian) and that this matter was an appropriate one in which the Royal Court could give its blessing.

In giving its blessing and approval in the context of foundations, the Royal Court applied the principles as set out in *Re the S Settlement* [2001] JLR Note 37 when it comes to matters to be considered by it if it is asked to approve a course of action proposed by a trustee. In applying these principles, the Royal Court confirmed that the Council Member's opinion had been formed in good faith and its decision was one that a reasonable council member could make. It also made the point that the Council Member's opinion had not been vitiated in any way by an actual or potential conflict of interest.

On the application and extent of the Royal Court's jurisdiction under Article 46 of the Foundations Law, the Royal Court approved the comments of the same court in *A Ltd v B, C Limited, D and E* [2013] 1 JLR 305 by stating that it should have regard to the similar jurisdiction to be found within the law relating to trusts.

The Royal Court also noted that Article 43 of the Foundations Law provides that a person with standing (which includes a council member) in respect of a foundation may apply to the Royal Court for the Court to take certain actions in respect of a foundation.

Finally, it also took the view that, even if the Foundations' regulations did not expressly permit the Council Member to make the changes that it wished to make, the Royal Court would have exercised its powers under Article 45 of the Foundations Law in any event on the basis that it would enable the Foundations to obtain their objects.

Conclusion

The Royal Court's pragmatic approach to the application once again shows its willingness to consider blessing momentous decisions of council members of foundations in a similar way and applying the well-established principles as it would when considering momentous decisions of trustees when it comes to trusts.

It is also a case that serves as a prime example of a foundation council member working collaboratively with that foundation's beneficiaries to come up with a solution, which will not only turn out to be in the best interests of the beneficial class of the foundations, but also the family as a whole.

Contacts

Johnathan Speck
Managing Partner, Jersey
+44 1534 676 371
johnathan.speck@mourant.com

Edward Devenport
Partner, Jersey
+44 1534 676 366
edward.devenport@mourant.com

Luke Olivier
Senior Associate, Jersey
+44 1534 676 069
luke.olivier@mourant.com

This update is only intended to give a summary and general overview of the subject matter. It is not intended to be comprehensive and does not constitute, and should not be taken to be, legal advice. If you would like legal advice or further information on any issue raised by this update, please get in touch with one of your usual contacts. © 2018 MOURANT OZANNES ALL RIGHTS RESERVED

[Document Reference]