

UPDATE

The importance of promptly seeking the court's help

Update prepared by Julia-Anne Dix (Associate, Jersey)

In the recent case of *In the matter of Number 1 C Trust* [2018] JRC 021, the Royal Court of Jersey reiterated that trustees of Jersey law trusts should seek its judicial assistance and guidance at the earliest opportunity when they encounter difficulties.

Background

The settlor created a discretionary trust governed by Jersey law in February 1997 known as the C Trust (the **First C Trust**). In doing so, the settlor provided the trustee, a Jersey company (the **First Trustee**), with a very detailed and prescriptive letter of wishes, in which he set out his intention that on his death the trust should receive the proceeds of an insurance policy, which would be distributed in accordance with his wishes to his wife, children and step-children. The First Trustee informed the settlor that it could not treat the letter of wishes as a legally binding document. The settlor was not happy with this and therefore decided to establish a second trust, a Guernsey discretionary trust (the **Second C Trust**), in October 1997. A US company was incorporated to act as trustee (the **US Trustee**) of the Second C Trust.

The settlor died in 2005 and the US Trustee received approximately US\$9m from the settlor's insurance policy, which was intended to be held on the terms of the Second C Trust.

A Guernsey company (the **Representor**) replaced the First Trustee as trustee of the First C Trust, with the intention that it would also become trustee of the Second C Trust. This, however, did not happen. The US Trustee nevertheless transferred the proceeds of the insurance policy to the Representor, as its proposed successor as trustee of the Second C Trust, though at a time when the Representor's only relevant capacity was as trustee of the First C Trust.

This transfer gave rise to issues because there was no power in the terms of the Second C Trust to distribute trust assets to other trusts, and no element of discretion. Since receiving the funds from the US Trustee (in its sole capacity as trustee of the First C Trust) the Representor has therefore been acting as *trustee de son tort*.

In 2009, the Representor became concerned as to which terms applied to the trust assets it was holding. The Representor took legal advice and was advised to create a new Guernsey law trust (the **Third C Trust**). The terms of the Third C Trust were to mirror the Second C Trust. However, this did not solve the problem as the original transfer from the US Trustee to the Representor was invalid.

Period as trustee de son tort

The Representor was acting as a *trustee de son tort* from 2005, when it received the trust funds, until January 2017 when all the beneficiaries signed an instrument expressly confirming it as trustee. Throughout this period, the Representor had been making distributions in accordance with the terms of the Second C Trust and also paying its own fees. The Representor accordingly brought representation proceedings before the Royal Court to request ratification of all the trustees' actions between 2005 and 2017. The Representor also sought the early termination of the Second C Trust, at the request of all the beneficiaries, due to high administration costs. The Representor proposed that a new US trust would be

set up for the minor and unborn beneficiaries if the Second C Trust was terminated. The Royal Court granted the application as it acknowledged that the Representor had discharged its duties as it saw them honestly and competently, and for the benefit of the beneficiaries.

Lessons to be learnt

The Royal Court agreed with the Representor's submission that the application had been brought to draw a line under what had become a 'bit of a mess'. The court stated that the issues arising from the complexity of the arrangements, which had been exacerbated by trying to resolve matters by creating the Third C Trust, could have been avoided if an application had been made to the Royal Court at an earlier stage.

This case is a reminder to trustees to seek the guidance of the court at an early stage, particularly when there is ambiguity regarding what terms apply to the assets they hold. The court has confirmed that it would be willing to assist a trustee to 'sort out a mess' where the trustee has acted honestly and competently, and for the benefit of the beneficiaries.

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[Document Reference]