

Third party applications invoking the Court's general powers over trusts and beneficiary anonymity.

UPDATE

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In the recent decision of *X Trustees Limited and Y Trust Company Limited & Beneficiary E*¹, the Royal Court of Guernsey considered for the first time the question of who, other than the Attorney General, a trustee, settlor, or beneficiary, may apply to the Court to invoke the Court's general powers over trusts. It also considered beneficiary anonymity and the cost consequences of misconduct by departing trustees.

Judgment in the snappily titled case of *X Trustees Ltd v Y Trust Company Ltd & Beneficiary E* was handed down on 5th June 2019 by the Royal Court of Guernsey (Deputy and recently announced future Bailiff Richard McMahon). The facts were unusual but the principles set out are of helpful general application.

Background facts

The Guernsey based and regulated Applicant trust company was the original trustee of two trusts settled by brothers, the beneficiaries all being members of their families. No protector was appointed. The Applicant had retired in 2015 the light of certain tax advice. The First Respondent Swiss trust company replaced the Applicant as trustee. The odd twist in the tale is that principal individual behind the First Respondent company had been arrested. All of the directors resigned. No liquidator had been appointed. The company was, as a matter of Swiss law, incapacitated. In those circumstances there was no mechanism under the terms of the trust to appoint a replacement trustee. A little ironically, given the issue which arose concerning locus, one of the beneficiaries was appointed by the Court as a Second Respondent given the failure of the First Respondent to appear or respond.

Leave to apply

The first issue was whether the Applicant as a former trustee could make the application at all. It had no automatic standing and relied upon the power of the Court to grant leave to any other person (ie other than the usual suspects, including a trustee, settlor or beneficiary) to apply and invoke the general powers of the court under s.69 of the Trusts (Guernsey) Law 2007 (see s.69(2)(g) for the power to grant leave to 'any other person'). The Royal Court granted leave, borrowing from Jersey case law that the guiding principle was the welfare of the beneficiaries and the competent administration of the trust in their favour. While any of the beneficiaries could have applied as of right, the Deputy Bailiff speculated that it seemed to him they wished to avoid being identified. He said he understood '... why a beneficiary of a trust might be reticent about being so identified' and pointed to the power to anonymise judgments. The desire not to be identified was, though, a good enough reason not to refuse leave to the Applicant on the grounds that a beneficiary could apply as of right. What persuaded the Deputy Bailiff to grant leave was that 'someone like' the Applicant had a sufficient 'nexus' to one of the categories of persons with automatic standing to be granted leave. Leave was therefore granted.

¹ [2019] GRC 017.

Removal of Trustee

Matters were relatively plain sailing after that. The First Respondent was incapable of acting. The Deputy Bailiff drew on principles previously established in the similar context of removal of a protector citing *In the matter of the K Trust*². The administration of the trusts was paralysed. The First Respondent's failure to appoint a replacement trustee was an omission which endangered the trust property. The First Respondent was unfit and incapable of acting, qualities which could extend as much to legal entities as to natural persons. The First Respondent had shown itself unfit to continue in office and the order to remove was made, the Applicant appointed and ancillary orders made for delivery up of the property of each trust to the Applicant.

Indemnity costs

Costs on an indemnity basis were ordered against the First Respondent. The failure of the First Respondent to deal with its retirement as trustee properly amounted to misconduct deserving of sanction. The prospect of costs being paid seemed remote though.

Summary

The case is interesting because it is the first Guernsey case to explore the scope of the Court's willingness to give leave to a third party to apply under s.69 and seems to require a 'nexus' between such a person and the list of those with a right to apply. It sheds further light on when the court will remove a trustee, appoint a trustee and the cost consequences for departing trustees who fail to manage their exit properly.

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² [2015] GLR 433.

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