UPDATE

NOVEMBER 2021

mourant

Obtaining a blessing from the Court: the difficulty in judging reasonability- Re the V, W, X and Y Trusts [2021] JRC 208

Update prepared by Stephen Alexander, Katie Hooper and Lillian Garnier (Jersey)

The narrow scope of the court's jurisdiction when being asked to bless momentous decisions of trustees means that the occasions where the courts refuse such blessings are usually quite limited. The recent judgment of the Royal Court of Jersey in *Re the V, W, X and Y Trusts* [2021] JRC 208 provides an important example of such a refusal of a blessing application. The case is of particular interest because, the Royal Court declined to bless a trustee decision which seems, on the face of the Court's judgment, to have been carefully considered and supported by the currently ascertained beneficiaries of the trusts in question and by legal advice, on the basis that the Court was left sufficiently uncomfortable with the decision to be in doubt as to its propriety. This judgment raises interesting questions as to how to walk the reasonability line as a trustee and demonstrates the exacting, sometimes inquisitorial, process adopted by the supervisory court in Jersey to ensure that trustees do strike the appropriate balance.

Background

The judgment of the Royal Court in *Re the V, W, X and Y Trusts* is heavily redacted, meaning that it is not possible to have full context and background to the Royal Court's decision. However, some of the key available background is as follows.

The V, W, X and Y Trusts (the **Trusts**) were discretionary trusts in near identical terms, governed by Jersey law. Ocorian Limited was the Trustee of the V, W and X Trusts and Ocorian Trustee (UK) Limited became the trustee of the Y Trust on 31 March 2020, replacing Ocorian Limited. The trustee of the V, W and X Trusts and the trustee of the Y Trust will be referred to together herein as the **Trustees**.

The currently ascertained beneficiaries of the Trusts were convened to the proceedings: B, his wife (C), their son (D) and their daughter (E).

In 2020, the Trustees proceeded to consider a comprehensive amendment of the terms of the Trusts, in consultation with the currently ascertained beneficiaries and with the benefit of advice from leading tax, trust and matrimonial counsel. This led to three decisions by the trustee, all supported by the currently ascertained beneficiaries. Two of these are redacted from the published judgment but the third decision, which is the focus of the published elements of the judgment, was a decision to irrevocably exclude the spouses, widows and widowers of B and C's children (i.e. D and E) and remoter issue from the beneficial class of the Trusts and to create a new trust with assets of £7.5million in which spouses, widows and widowers would be included in the beneficial class (along with B, his spouse or widow and his children and remoter issue) (the **Trustees' Decision**).

The Trustees sought the blessing of the Royal Court in respect of these momentous decisions made in respect of the Trusts, including the Trustees' Decision.

As there were unborn and unascertained beneficiaries of the Trusts, including unborn spouses, widows or widowers of the unborn children and remoter issue (whose irrevocable exclusion was proposed by the Trustees' Decision), a guardian *ad litem* was appointed to represent their interests.

The rationales for the Trustees' consideration of a comprehensive overhaul of the Trusts in 2020 were to ensure that the Trusts met the needs of the current and future beneficiaries and to limit the risks of further litigation. In this latter context, the judgment notes that there had been a history of litigation involving wider members of the family, although not involving spouses (i.e. not involving the category of beneficiary whose position would be impacted by the Trustees' Decision). As far as the Trustees and the currently ascertained beneficiaries were concerned, they perceived the greatest risk of future litigation to be claims brought by future spouses on divorce.

The Trustees had received counsel's opinion that spouses should be irrevocably excluded but that a new fifth trust be created, which does not irrevocably exclude spouses. The Trustees were advised that it should be a condition of any future advances/benefit that the recipient and his/her spouse (i) enter into a pre-nuptial agreement, and (ii) recognise and accept that the Trusts are both non nuptial and should not be pursued as a part of a claim for a financial remedy on divorce. A particular concern outlined in the advice taken by the Trustees seems to have been the approach of the English courts to ancillary relief claims and the risk of the English court deeming a trust to be a nuptial settlement and, therefore, it being able to be varied by the English court.

The terms of the proposed new trust were broadly similar to the Trusts with the main difference being that, unlike the Trusts (which had power to exclude but no power to add beneficiaries), it contained a power to add beneficiaries. The beneficiaries were to be B, his spouse or widow, his children and remoter issue and the spouses, widows and widowers of his children and remoter issue.

The Legal Test

The Court's inherent jurisdiction to bless a momentous decision is well-known and well-entrenched in Jersey. The oft-cited case of *Re S Settlement* [2001] JLR N 37 (which confirmed that the *Public Trustee v Cooper* categorisation and accompanying analysis *"is to be taken as reflecting the position under Jersey Law just as much as under English law"*) provides that, in addition to the decision being of a momentous nature, the court must be satisfied that:

(i) The decision has been formed in good faith;
(ii) The decision is one which a reasonable trustee properly instructed could have reached; and
(iii) The decision has not been vitiated by any actual or potential conflict of interest.

The Court in the *Re the V, W, X and Y Trusts* case quoted the summary of the test set out in *Otto Poon Trust* [2015] JRC 062 (*Otto Poon*), which in turn had applied *Re S Settlement*. The court in *Otto Poon* considered but ultimately rejected a submission that there now exists a fourth requirement to bless a decision of a momentous nature by a trustee, namely that it has given proper consideration to the matter under scrutiny, setting out in detail the steps which it has taken and the matters which it has considered.

The Royal Court in *Re the V, W, X and Y Trusts* also acknowledged the important principle of non-intervention, i.e. the principle that, once it appears that the proposed exercise of a trustee power is within the terms of the power, the court is concerned with the limits of rationality and honesty and it does not withhold approval merely because it would not itself have exercised the power in the way proposed. In citing a passage from Lewin on Trusts (18th edition, paragraph 29-299), as cited in *Otto Poon*, the Royal Court noted that *"The Court, however, acts with caution, because the result of giving approval is that the beneficiaries will be unable thereafter to complain that the exercise is a breach of trust or even to set it aside as flawed"*.

As to the issue of excluding a beneficiary, the Court of Appeal in *Otto Poon* stressed that the exercise of a power to exclude a beneficiary is *'unusual'*, noting that, *"other than in exceptional circumstances it is unlikely to operate for the benefit of the person excluded"*. Accordingly, where the interests of those excluded have not been properly taken into account, a decision to exclude can be struck down.

The Decision

The Royal Court confirmed that the first and third limbs of the legal test were met in that the Trustees were acting in good faith and their decision had not been vitiated by any actual or potential conflict of interest.

In relation to the second limb of the test, i.e. whether or not the decision is one which a reasonable trustee properly instructed could have reached, the Court acknowledged that there was much force in the argument that the Trustees' Decision fell within the limits of rationality, particularly in view of the facts that

(a) it reflected the views of the currently ascertained beneficiaries, and (b) it was supported by legal advice. In support of this, the Trustees had also cited (*inter alia*): (i) the fact that any future spouses of D and E had no expectation of benefit from the Trust as they had not yet met their future spouses. When they did meet them, the spouses would be expected to enter into pre-nuptial agreements and, therefore, would have their eyes wide open to the situation; (ii) the fact that any future spouse of D and E will continue to benefit from the Trusts during their marriage in any event, even though they are not within the beneficial class, by virtue of D and E being beneficiaries; and (iii) the letters of wishes, which did not mention future spouses at all.

However, the Court noted that there was much to commend the guardian *ad litem*'s submissions. In particular, the guardian had submitted that, whilst the interests of the unborn children and remoter issue of B and C would be aligned with their parents, the interests of the unborn and unascertained spouses, widows and widowers would clearly not be served by the Trustees' Decision. That is because (i) they stand to be irrevocably excluded from the Trusts which have a collective value of approximately £100 million and in replacement given a discretionary interest in a single trust worth significantly less (£7.5 million), and (ii) their interests were further diluted by (a) the inclusion of the other family members within the beneficial class of that new trust and (b) the power to add beneficiaries. Moreover, the guardian's view was that the proposals (which, in any event, were not watertight as they would not prevent a claim being made for full disclosure about the affairs of the Trusts and for a lump sum in expectation that it would be met by the Jersey trustee, in any ancillary relief proceedings in due course) placed too much weight on reducing litigation risks at the expense of those to be excluded under the Trustees' Decision.

The Court cited certain unresolved questions in the mind of the Court, particularly as to how in practice the proposed new trust would work (posing these questions at paragraphs 41 – 46 of the judgment), as summarised in (*inter alia*) paragraph 49 of the Court's judgment:

> "*The proposal to create a new trust in which the spouses, widows and widowers will be included in the beneficial class implies a recognition on the part of the Trustees and their advisers that an outright exclusion from the Trusts would not be reasonable, but in the light of the issues canvassed above we question how realistic the proposal to compensate them by creating this new trust is and how the trustees of the new trust will be expected to exercise their powers. We question why the proposed exclusion extends to widows and widowers when the concern relates to spouses on divorce. We question the further narrowing of the beneficial class and the loss of flexibility that entails. We question whether this proposed exclusion may be an overreaction to* [REDACTED] *litigation that did not involve spouses*"

The Court also emphasised the unusual nature of the power to exclude, distinguishing the facts of the present case to the facts of *Otto Poon* (in which an exclusion was approved), emphasising that the proposed exclusion in the present case had a "*somewhat artificial basis*", noting that "*the exclusion is not something that in our view the settlors would have contemplated, and it sweeps away the interests of widows and widowers who may well have become valued members of the family and who would pose no such equivalent* [i.e. equivalent to spouses on divorce] *threat*".

Ultimately, "*the Court* [was] *left sufficiently uncomfortable with what is proposed to be in doubt as to its propriety*" and it, therefore, declined to bless the Trustees' Decision.

Conclusion

Whilst it is impossible to discern the full background from the heavily-redacted judgment, it is clear that the Trustees were at pains to take comprehensive legal advice and carefully consult with the currently ascertained beneficiaries, in advance of making the Trustees' Decision. This would not appear to be a decision hastily-reached or ill-conceived. Yet, the Court declined to bless it because it did not sit well with the Court. Whilst, on a superficial reading of the judgment, it might seem as though the Court's mere discomfort with the Trustee's Decision prevented it from blessing the Trustees' Decision, when properly analysed, the Court effectively found that, as things stood (i.e. with some key questions unresolved), it was a decision which no reasonable trustee properly instructed could have reached. The mild language used in the judgment does not mask that harsh conclusion.

It is relatively rare for the Court to decline to bless a trustee's decision, even rarer when there are as many factors militating in favour of the reasonability of the decision as there are in *Re the V, W, X and Y Trusts*. It does beg the question as to how a trustee can judge the likely prospects of a blessing application, when it has seemingly done all it can to line matters up favourably in advance.

The reality is that the supervisory jurisdiction of the Royal Court in respect of trusts is so flexible and nuanced that it can be very difficult for a trustee or indeed their advisers to predict with certainty the Court's decision. Where such an application is made, the best approach is to be meticulous in the preparation, making sure that there are no unresolved questions at the date of the hearing (as there were in the present case), and ensure that any points likely to concern the Court are dealt with frankly, thoroughly and early.

The consequence of the court ultimately blessing a decision is that the beneficiaries of the trust will be deprived of the opportunity to allege that it constitutes a breach of trust. Therefore, the ability of a trustee to apply to the supervisory court for a pre-emptive blessing is a privilege but it must be remembered that it carries with it the corresponding burden, not only of carefully reaching the decision in the first place, but of potentially having to deal with best laid plans coming to naught if the Court declines to provide the approval the trustee seeks. Of course, in declining to bless the Trustees' Decision in the present case, the Court emphasised that this does not prohibit the Trustees from pressing ahead and implementing their decision. However, as ever in this situation, it would take a bold trustee to do so in the face of the declination of a blessing by the Court.

While the decision of the Court may seem disheartening at first blush, it does serve to reinforce (as have other recent decisions in Jersey in which blessings have been declined, e.g. *Representation of Hawksford (Jersey) Limited* [2018] JRC 171) the importance and integrity of the supervisory court's role in seeking to consider all possible permutations and ramifications of a trustee decision, even when that decision is supported by careful advice, deliberation and engagement by the trustee. The court does not act as a rubber-stamp and will seek to ensure, via an inquisitorial process where appropriate, that the decision of the trustee strictly satisfies the tests justifying a blessing.

Contacts

Stephen Alexander
Partner | Advocate
Mourant Ozannes (Jersey) LLP
+44 1534 676 172
stephen.alexander@mourant.com

Katie Hooper
Counsel | Advocate
Mourant Ozannes (Jersey) LLP
+44 1534 676 101
katie.hooper@mourant.com