

UPDATE

Protector's decision to onshore trusts to pay more taxes blessed by Guernsey Royal Court

Update prepared by Christopher Edwards and Marco Nel (Guernsey).

The Guernsey Royal Court recently in an *in camera* matter blessed the decision of the Protector of Guernsey law governed trusts to replace Guernsey-based trustees with UK-based trustees so that the trusts would be liable to UK taxation. A decision that was made following a request by the adult beneficiaries who considered that they had a moral duty to pay their fair share of taxes in England where they reside. This note sets out a brief background to the proceedings and the key take-aways from the Guernsey Royal Court's judgment.

Background to the decision to onshore

Mourant was convened to act on behalf of the minor and unborn beneficiaries of three discretionary family trusts established by a deceased settlor who wished for as many of his descendants to benefit from the structure. The structure has a modest distribution policy as the late settlor wanted his descendants to make their own way in life and not be dependent on the trust funds.

The adult beneficiaries were finding it increasingly difficult in the present social, political, and economic climate to maintain personal and/or business relationships or enjoy the family wealth with a sense of pride while this was held offshore. Together, they each hold a strong moral conviction that their wealth should rather be held onshore and be subject to UK taxation. As a family, they considered it their duty to pay their fair share of taxes in the UK where they are resident so that their wealth could contribute to the UK fiscus.

After the Protector had considered its powers under the trusts, actuarial calculations, advice from leading counsel, and Mourant's input concerning the impact of the proposed onshoring on the interests of the minor and unborn beneficiaries, it made the in-principle decision to onshore the structure before applying to the Guernsey Royal Court for a *Public Trustee v Cooper* category two blessing decision.

Key take-aways from the judgment

As the Protector had fiduciary powers under the trusts, it was possible for it to apply to Court in the same manner as a trustee would for a *Public Trustee v Cooper* category two blessing decision.

The Protector had to convince the Court that the decision it has made was a 'momentous decision' of real importance for the trusts. The Court noted that large trust fund of the trusts coupled with a modest distribution policy would ensure that the trusts are able to benefit the beneficiaries for a long time while it remained offshore. The effect of the Protector's decision to onshore, as gathered from the actuarial reports, would however mean that the trusts would be completely depleted by 2134 due to the additional tax burden. Comparatively, if the trusts were to remain offshore, they would continue to grow significantly in value. The decision was therefore considered by the Court to be clearly momentous.

The Court considered the benefit onshoring posed for the beneficiaries of the trusts. It was not a financial benefit since the net effect of the onshoring would be a complete depletion of the trust funds of the trusts in the next 110 years. Instead, the benefit was of a moral and social nature. The adult beneficiaries wanted the trusts onshored because they perceived that they had a moral duty to pay their fair share of taxes in the UK where they resided. The onshoring would also relieve them of the social stigma associated with a

connection to an offshore structure and help them maintain better personal and business relationships. Onshoring would effectively mean the adult beneficiaries are able to enjoy and take pride in the family wealth while contributing to the society in which they live.

The Court reviewed the authorities and held that moral and social benefits were recognised benefits. It was not only financial benefits that were capable of recognition and protection by the Court. While it was clear that onshoring the trusts would hold such benefit for the adult beneficiaries of the trusts, it was not possible to maintain with any certainty that it would equally be considered a benefit by the minor and unborn beneficiaries once they come of age. However, the Court took the view that the adult beneficiaries held strong moral convictions and since the adult beneficiaries would raise their children to hold the same or similar views, it is likely that their children would also view onshoring as a benefit to them. It was accepted that it would become harder to make this assumption with the later generations of the family as it is simply not possible to predict what their views would be.

Ultimately, the Court accepted that:

- the Protector has the power to onshore the trusts
- the Protector made the decision to onshore the trusts in good faith and for the benefit of the beneficiaries of the trusts
- the decision of the Protector is one which a reasonable protector properly instructed could have arrived at in the circumstances, and
- the decision of the Protector was not vitiated by a conflict of interest. While the board of the Protector comprised adult beneficiaries, it also comprised independent directors. Any conflict of interest was mitigated by the fact that the adult beneficiaries' interests were noted at the time the in-principle decision was made and input on the possible conflict of interest was obtained in advance from leading counsel and Mourant acting for the minors and unborn beneficiaries. The Court was made aware of the possible conflict and accepted that it could bless the Protector's decision notwithstanding a theoretical conflict of interest in the circumstances.

The Court was accordingly satisfied that the requirements were met and blessed the Protector's decision to onshore the trusts.

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