

UPDATE

Retrospective relief for trustees

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This update considers decisions of the Royal Jersey Court and the Grand Court of the Cayman Islands where relief has been granted retrospectively in relation to decisions already taken by trustees.

While retrospective relief can be (and has been) granted in certain circumstances, a trustee should normally seek approval from the court as soon as possible to avoid the risks and exposure associated with the court subsequently declining to bless a momentous decision taken by a trustee, or refusing to grant retrospective *Beddoe* relief. However, provided there are good reasons for any delay, obtaining relief retrospectively is still possible.

Both the Royal Court of Jersey (the **Royal Court**) and the Grand Court of the Cayman Islands (the **Grand Court**) have considered the circumstances in which it is appropriate for the Court to grant relief retrospectively in relation to a decision already taken by a trustee.

Retrospective blessing of a trustee's momentous decision

Re X Trust Limited [2024] JRC 296 marked the conclusion of long-running proceedings brought by the trustee of the S Trust and the T Trust (the **Trustee** and the **Trusts**) to seek the Royal Court's blessing of a number of decisions the Trustee was called to make in relation to distributing the Trusts' assets to certain of the Trusts' beneficiaries, collapsing the Trusts' underlying corporate structures, and ultimately terminating the Trusts, in order to regularise the Trusts from a foreign tax perspective.

As a result of the nature of the decisions the Trustee had to take, the process of seeking the Royal Court's blessing proceeded iteratively. At a previous hearing in 2024, the Royal Court considered and blessed in-principle decisions taken by the Trustee regarding the proportional allocation of the Trusts' assets to the recipient beneficiaries (which decision was, in part, informed by the tax issues with which the Trustee was faced), the winding up and dissolution of the various entities underlying the Trusts, and the termination of the Trusts themselves. The Royal Court agreed that these were momentous decisions in the lifetime of the Trusts, and blessed the Trustee's in-principle decisions in relation to them.

At that earlier hearing, the Royal Court was not asked to, and therefore did not, bless the Trustee's decision as regards the implementation of its distribution decision; in other words, the manner in which the assets allocated to the beneficiaries in the proportions the Trustee had decided were to be distributed to the beneficiaries before the Trusts were terminated (the **Implementation Decision**). The Implementation Decision was instead held over until the decisions of principle had been made and blessed.

That being the case, the parameters of the Implementation Decision were heavily informed by the earlier decisions taken by the Trustee (and blessed by the Court) as regards allocation and termination. Essentially, the range of decisions available to the Trustee on implementation was narrowed significantly by the decisions made (and blessed) on matters of principle. In that way, and as the Royal Court noted in its judgment, the Implementation Decision was the final link in a chain of complex and inter-connected events and decisions. In making the Implementation Decision, the Trustee had sought to steer a course that was in the best interests of all the beneficiaries, in what were very difficult circumstances.

A peculiarity of the Implementation Decision was that certain elements of the implementation of the distributions to the beneficiaries had been (and had to have been) completed before the Royal Court sat to consider the blessing of the Implementation Decision itself. On the basis that (a) the Implementation Decision was, as above, a continuation of previous decisions the Royal Court had been asked to bless (during the course of which the Implementation Decision had been considered and discussed, if not formally put to the Royal Court), and (b) implementation of the Implementation Decision was only partly complete by the time of the hearing, the Trustee sought the Royal Court's retrospective blessing for those aspects of the Implementation Decision it had had to complete before the hearing.

In Jersey, where a trustee has made a momentous decision, the trustee may seek the court's approval of the decision. The legal test to be applied¹ requires that the court must satisfy itself that the trustee's decision:

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

As regards the retrospectivity of certain elements of the blessing it was being asked to give, the Royal Court referred to its earlier decision in *Re Y Trusts* [2011] JLR 464, in which it blessed a decision of a trustee to make a final division of trust assets more than a year after the decision had been taken and assets had actually been distributed to the beneficiaries by the trustee. Although the retrospectivity of the blessing did not appear to have been the subject of specific argument in *Re Y Trusts*, the Royal Court accepted the Trustee's submission that the trustee in *Re Y Trusts* had gone further than the Trustee had, insofar as it had actually distributed assets to the beneficiaries in advance of seeking the court's blessing.

The Royal Court saw no reason, as a matter of principle, why it could not give its blessing of a momentous decision retrospectively. However, in such cases it will be for the applicant trustee to carefully explain the reason for any delay in bringing the matter to the court, which may well be a factor in the Royal Court deciding whether or not a blessing is appropriate in all the circumstances. In cases where the trustee has already implemented the decision it is asking the court to (retrospectively) bless, the trustee will have to accept the risk that if the Royal Court declines to bless the decision, the reasons put forward by the Royal Court in doing so may have an adverse impact upon its ability to defend proceedings subsequently brought in relation to the part of the decision that had already been implemented.

In *Re X Trust Limited*, the Royal Court did not consider that there had been undue delay in the Trustee seeking the court's blessing. The Royal Court recognised that (a) the Trustee had previously sought the court's blessing for the earlier stages in the process of terminating the Trusts and collapsing the trust structure, and (b) that the Trustee had not yet fully completed the implementation of its decision. The Royal Court accordingly held that the partly retrospective nature of the relief it was being asked to give was not an impediment to the court giving its blessing.

The Royal Court ultimately blessed the Implementation Decision as it was satisfied that that the Trustee's decision had been formed in good faith, was one that a reasonable trustee properly instructed could have reached, and the decision had not been vitiated by any actual or potential conflict of interest.

Retrospective *Beddoe* relief

A similar approach was previously adopted by the Grand Court in the context of an application for *Beddoe* relief. *Beddoe* relief gives permission to a trustee to take or defend legal proceedings with the assurance that their legal costs of doing so will be indemnified from the trust fund in respect of costs incurred in the proceedings.

In *In the matter of the Stingray Trust* (unreported, 17 September 2018) the trustee of the Stingray Trust (the **Stingray Trustee**) applied to the Grand Court for retrospective *Beddoe* relief in relation to its participation in foreign proceedings. The Stingray Trustee had elected to defend proceedings, including injunction proceedings brought by a guardian appointed by the Milanese Courts over a beneficiary of the Trust (the **Guardian**), against the Stingray Trustee (and others) in Lugano, Switzerland (the **Swiss Proceedings**). The Swiss Proceedings sought to attack the validity of the Stingray Trust.

¹ See *Kan v HSBC International Trustee Limited: Representative of Otto Poon Trust* [2015] JCA 109, at [14].

Shortly after the dismissal of the Swiss Proceedings (at first instance and by the Appeal Court of the Canton of Ticino), the Stingray Trustee issued an application for *Beddoe* relief in relation to the Swiss Proceedings. However, before this *Beddoe* application could be determined, the Guardian issued fresh proceedings attacking the validity of the Stingray Trust before the Court of Milan (the **Milan Proceedings**). Unlike the position it faced regarding the Swiss Proceedings, the Stingray Trustee had sufficient time to seek *Beddoe* relief prior to taking any substantive step in the Milan Proceedings and accordingly filed a *Beddoe* application in relation to the Milan Proceedings.

The Grand Court, on a review of the evidence, found that the Stingray Trustee acted reasonably in deciding to defend the Swiss Proceedings and the Milan Proceedings, and as a result, it should be indemnified out of the trust fund. The Grand Court did not give an open-ended *Beddoe* relief in relation to the Milan Proceedings and limited its sanction to a challenge by the Trustee of the jurisdiction of the Milan Court, following which the Trustee would need to revert to the Court for further directions.

The Grand Court addressed the retrospective nature of the *Beddoe* relief being sought in relation to the Swiss Proceedings. While it was unusual for a trustee to only seek such relief after the conclusion of the litigation in question, the failure to apply for *Beddoe* relief at an earlier stage was understandable given the urgency of the case and in view of the injunctive relief obtained by the Guardian. The Grand Court considered that, had an application been made before the Trustee's participation in the Swiss Proceedings, the relief sought would have been granted. On that basis, it was prepared to make a retrospective *Beddoe* order sanctioning the Stingray Trustee's defence of the Swiss Proceedings.

Comment

In both decisions, the relevant trustee acted as any trustee would by seeking the court's blessing of a momentous decision or seeking *Beddoe* relief in relation to its decision to defend legal proceedings against the trust. However, the decisions are unusual as the courts had to grapple with the trustee seeking approval after the relevant actions had been taken (or partly taken) by the applicant trustee.

A trustee should normally seek approval from the court as soon as possible to avoid the risk that the court subsequently declines to grant relief retrospectively. The reasons put forward by the court when declining the application may have an adverse impact on the trustee's ability to defend proceedings subsequently brought in relation to decisions already made by the trustee.

However, if a trustee has exceptional reasons for not being able to apply for *Beddoe* relief or for the blessing of a momentous decision at an earlier stage, a trustee may still be able to have retrospective relief granted. A trustee would need to be able to explain the reasons for the delay, which may well be a factor in the court deciding whether or not granting retrospective relief is appropriate.

While retrospective relief is available in certain circumstances, it is always best practice for a trustee to seek directions from the court at the earliest opportunity.

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