Briefing Note March 2018
The Court as "Super Trustee"
A timely reminder of the Court's role in non-contentious proceedings

This note is for information purposes only and is not intended to be legal advice.

Litigation does not always have to be hostile, especially when it comes to proceedings involving trustees. The Royal Court has, in recent times, seen an increase in the number of applications made by professional trustees seeking the Court's guidance to sanction trustee actions, in advance, as a pre-emptive measure.

Making use of the Royal Court's supervisory jurisdiction in relation to Guernsey trusts is one of the most powerful risk-management tools available to local fiduciary businesses. Such applications also give beneficiaries the comfort of knowing that the trusts in which they have an interest, are being properly administered under the watchful eye of the Royal Court.

This briefing note provides a reminder to trustees of the circumstances in which a trustee may wish to seek guidance from the Court, and how the Court might respond to such an application.

Court's Jurisdiction

The Royal Court's power to assist a trustee is considerable. The statutory provisions under which applications for such relief are made are contained in section 68 of the *Trusts (Guernsey) Law, 2007* (the "**Trusts Law**") which states that:

> "*A trustee may apply to the Royal Court for directions as to how he should or might act in any of the affairs of the trust, and the Court may make such order as it thinks fit*."

Section 69 sets out general powers of the Court which includes the general power to make an order in respect of the execution, administration or enforcement of a trust; and

Section 71 makes provision for the Court to make an order for the costs and expenses of an application to the Court to be paid from the trust property or by such persons as it thinks fit.

The seminal decision concerning the Court's jurisdiction in this area is the English case of *Public Trustee v Cooper* [2001] WTLR 901 in which the High Court identified three heads of jurisdiction which cover these sorts of applications by a trustee:

(i) the jurisdiction to decide questions of construction (of the trust instrument / statute or both) as to the ambit of trustee's powers;

(ii) the jurisdiction to "bless" a particular transaction proposed by a trustee in relation to which it is not surrendering its discretion to the Court. The circumstances in which a Court is likely to be prepared to give its blessing to an exercise of discretion by a trustee are where the trustee is embarking on what has been called a "momentous decision" such as one which would fundamentally affect the rights of the beneficiaries; and

(iii) the jurisdiction to accept a complete surrender of the exercise of discretion on the part of the trustee. In practice, this may occur when a trustee is faced with, for example, a conflict of interest which disables it from acting.

Examples of "friendly" applications to the Court, which fall within the above categories or which are governed by other express provisions of the Trusts Law, include: the determination of questions of law as to the scope of trusts or powers; assistance with the correct interpretation of a settlement or its terms; the variation of the terms of a settlement; guidance on requests for information from a beneficiary or third party; the removal or appointment of a trustee in "friendly" circumstances; guidance on the administration or execution of a trust; guidance on whether the trustees should submit to the jurisdiction of a foreign Court and / or whether the trustee should bring or defend legal proceedings.

There are many circumstances where an application for the Court's direction is appropriate and, as such, the list set out above is by no means exhaustive. However, there are some circumstances that we see giving rise to applications more frequently than others, as follows:

Beddoe Applications

The Beddoe application (named after a 19th century English case) is perhaps the best known type of

friendly application to the Court. It is made when a trustee is considering suing or defending proceedings, typically involving a third party. The trustee is under a duty to preserve the trust assets and that duty may involve suing to recover them or defending a claim against them. The power to bring and defend proceedings will generally be contained within the trust deed and is enshrined in section 31 of the Trusts Law.

It is one thing to have the power to sue or defend. It is another to recover the costs of doing so out of the trust fund. A trustee is usually able to recover his costs out of the fund, even if he loses the case, provided that he can show that he acted reasonably. However the burden is on him to establish reasonableness after the event. This leaves a trustee conducting what may prove long and very expensive litigation, for what he perceives to be the benefit of the trust, at his own risk as to costs. For a professional trustee this makes little economic sense. However, if he fails to pursue or defend the claim he may lay himself open to an action for breach of trust for failing to preserve the trust assets. The way out from between this rock and hard place is the Beddoe application.

A trustee's right to a full indemnity from the trust fund pursuant to a Beddoe order is accepted practice. However, this presumes that there is enough in the fund to cover any potential claim exposure. This begs the question as to what happens in the event that a trustee faces a claim by a third party where, if successful, the third party claim would exhaust the trust assets?

That situation was recently considered by the Grand Court of the Cayman Islands in *X (as a Trustee of the A Trust) v Y (as Beneficiary of the A Trust)* (unreported) 15 March 2017. In that case, the trustee was granted Beddoe relief and was allowed an indemnity from the trust assets even though the trust fund would have been exhausted if the third party plaintiff's claim were successful. Whilst the position in Guernsey is somewhat uncertain, this case demonstrates the Caymanian Court's willingness to assist professional trustees and reinforces the importance of a trustee protecting their position by seeking Beddoe relief as a pre-emptive measure.

As to who is entitled to take part in a trustee's Beddoe application, in *STG Valmet v Brennan* [1999-2000] Gib LR 211, the Gibraltar Court of Appeal held that *"a claimant to the trust should be given the maximum opportunity to be heard"* on any such application. Thus, even where a trustee is applying for a Beddoe order relating to a claim against a beneficiary (or against a vehicle that is controlled by that beneficiary), the same beneficiary would be entitled to take part in the Beddoe application. Unsurprisingly, the Gibraltar Court of Appeal also confirmed that any such party is not permitted to be present in Court when the merits of the claim are being discussed. That approach has since been adopted by courts in common law jurisdictions across the world, including in Guernsey.

Foreign Proceedings

Trustees can often be faced with the difficult position where a beneficiary is embroiled in, or is subject to, an order made in foreign proceedings. Perhaps the most common example would be a matrimonial dispute, but the underlying principles remain the same for any dispute in a foreign jurisdiction which affects the trust. The beneficiary's apparent "entitlement / expectation" under a trust might have been "put in the pot" for the purpose of matrimonial proceedings where an order for financial relief is being sought, or there may even be a battle between competing spouses who are both beneficiaries.

The trustee faces two basic problems. The first is what position to adopt between the competing interests of the spouses. The second is what to do to protect the interests of other beneficiaries, for example, the children or unborn issue in a private family settlement. It is therefore tempting to say, "let the Court decide". But the Court is a foreign Court. It has no jurisdiction over the trust.

The trustee who wants to "let the Court – i.e. the foreign Court – decide" may be tempted to co-operate with that Court. Commonly the foreign Court will make orders for disclosure of documents, frequently purporting to make them directly against the trustees. It may order that the trustees be joined to the proceedings. Ultimately it may order that the terms of the settlement be varied.

The trustee faces difficult decisions. If it refuses to co-operate then the interests of beneficiaries, or some of them, may be adversely affected. For example, the husband may be assumed to have a greater interest under the trust than in fact he does have. If the trustee does co-operate, perhaps even to the extent of submitting to the jurisdiction of the foreign Court, giving evidence and making submissions, then it significantly increases the chances that the Guernsey Court will give effect to the orders of the foreign Court, which may be detrimental to the interests of beneficiaries, particularly those (such as children) who

were not parties to the matrimonial dispute. Those beneficiaries may then have a claim against the trustee.

The safest course is therefore to seek directions (which may need to be sought urgently) from the Royal Court as to the stance which the trustee should adopt in relation to the foreign proceedings.

Provision of Information

Mention has been made of requests for information as to the trust in the context of foreign proceedings. Those might be direct from the foreign Court, or indirect, in that a beneficiary has been ordered to provide the information and now asks the trustees for it. The latter case also frequently arises in the context of tax investigations.

The statutory right of beneficiaries (and prescribed others) to information is enshrined in section 26 of the Trusts Law which sets out that beneficiaries are entitled to *"information as to the state and amount of the trust property"* as a right, following a written request. At present, a trustee faced with a request for information from a beneficiary can probably safely divulge that information if it is of a standard nature, such as trust accounts – even when the relevant settlement instrument provides that the trustee is under no obligation to do so. However, in the event of any difficulty or uncertainty, the Court's directions should be sought. It may be, for example, that the release of information about the activities of an underlying company is commercially sensitive.

In addition to statutory rights to information, a general entitlement to information arises under principles of general trusts law. In *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709, the Privy Council held that a party, who was no more than a potential beneficiary under discretionary trusts set up in the Isle of Man was entitled to disclosure of certain trust information and in *Countess Bathurst v Kleinwort Benson* [2003-04] GLR N32 the Royal Court ordered documents to be provided to an *excluded* beneficiary of the trusts in question. Ultimately, irrespective of whether the applicant is a beneficiary, or even an excluded beneficiary, the question for the Court to decide (and therefore for trustees to have at the forefront of their minds) is whether the provision of trust information would be in the interests of the beneficiaries. That consideration is paramount. Its primacy was recently emphasised by the Guernsey Court of Appeal in *Re: the R and RA Trusts* (Judgment 25/2014), where the Court held that disclosure of documents and information may even be ordered against beneficiaries if the provision of the documents and information would be in the best interests of the trust's beneficiaries *"as a whole"*.

Preventing Breach

There may also be circumstances where a trustee makes an application to the Court where he fears that a breach may occur. This sounds rather odd (since one might have thought that it is the trustee that could be in breach). However, this may occur when a trustee is in a minority and his co-trustees propose to act by a majority. Another example is when the trust instrument gives a protector the power to remove / appoint additional trustees. The protector may also be a beneficiary and may use such powers to manipulate, for example, voting provisions to his own benefit. In such circumstances, provided there are good reasons for challenging a proposed appointment / removal, the Court's guidance may be sought.

When to make an application?

Whilst such trustee applications to the Court are ordinarily made prior to any actions being taken, in the recent case of *In the matter of the number 1 C Trust* [2018] JRC 021, the Royal Court of Jersey exercised its discretion to ratify actions of a trustee after the event. However, it is important to note that in that instance the Court acknowledged that the circumstances were "*a bit of a mess*" and indicated that the matter could have been dealt with "*in a straightforward application to the Court at an earlier stage*". Whilst in this specific (and unusual) circumstance the Court was willing to provide relief retrospectively, the guidance is that trustees should act at the earliest opportunity in seeking the Court's assistance.

Nick Robison
Tel: +44 1481 746176
n.robison@babbelegal.com

Helena Lavin
Tel: +44 1481 746164
h.lavin@babbelegal.com