The role of the Royal Court in supervising the administration of trusts is fundamental to the trust concept, with article 51 (1) of the Trusts (Jersey) Law 1984 (the "Law") permitting a trustee to apply to the Royal Court for directions concerning the manner in which the trustee may or should act in connection with any matter concerning the trust. In relation to such applications, the Royal Court has the power to make such order, if any, as it thinks fit.

The ability of a trustee to apply to the Royal Court for the court's blessing under Article 51 of the Law, is particularly helpful in situations where the trustees find themselves in a situation where they have reached in principle a decision, but where there are contentious issues or a dispute as to the propriety of the trustee's decision, as in the event that the application is successful the court's blessing will afford protection to the trustee.

Momentous circumstances where a trustee may consider making such an application, may include, by way of example, situations where the trustee is considering removing a beneficiary, disclosure of trust documents, the sale or gift of a significant trust asset or a substantial restructuring of the trust and / or its assets.

The 4 cases set out in Public Trustee v Cooper

In circumstances where a trustee is considering making an Article 51 application, it is well established that there are 4 types of cases in which the Royal Court may become involved, which were first identified in an unnamed decision of Robert Walker J in an English High Court in 1995 and then applied in the well-known English case of The Public Trustee v Cooper [1999] 12 WLUK 603 and arise where:

1. there is an issue whether, on its proper interpretation, the trust instrument permits a proposed course of action;

2. the trustee asks the court to bless a decision which it considers to be a momentous one for the trust, where the nature of the trustee's power is not in doubt;

3. the trustees surrender their discretion to the court as they are disabled from acting, for example, because they are deadlocked or there is a conflict of interest; and

4. there is a challenge to an exercise of a trust power on the grounds that it is ultra vires or has otherwise been exercised for an improper purpose.

The Momentous Decision Category

The second of the aforementioned categories is the "momentous decision" category, which arises in cases where there is unlikely to be any doubt as to the nature of the power, and the trustees will have decided how they wish to exercise it, but the decision is of such a momentous nature that they wish to seek the court's blessing.

This approach to the categorisation of cases was adopted and applied by the Royal Court in Re S Settlement [2001] JLR N 37 and has subsequently been applied by the Royal Court on many occasions.

In Re S Settlement [2001], the Royal Court's involvement arose because of a case falling within the second category and the Royal Court famously held that the Royal Court was required to consider whether the trustee's decision was:

1. formed in good faith;

2. was one, which a reasonable trustee properly instructed could have arrived; and

3. has not been vitiated by any actual or potential conflict of interest which has or might have affected its decision

In the recent case of Representation of G.B. Trustees [2021] JRC 048, in analysing its function in relation to such applications, the Royal Court referred to an often quoted extract from Lewin on Trusts (20 th edition) which held that:

"The court's function where there is no surrender of discretion is a limited one. It is concerned to see that the proposed exercise of the trustees' powers is lawful and within the power and that it does not infringe the trustees' duty to act as ordinary, reasonable and prudent trustees might act, ignoring irrelevant, improper or irrational factors; but it requires only to be satisfied that the trustees can properly form the view that the proposed transaction is for the benefit of beneficiaries or the trust estate and that they have in fact formed that view.

In other words, once it appears that the proposed exercise is within the terms of the power, the court is concerned with limits of rationality and honesty; it does not withhold approval merely because it would not itself have exercised the power in the way proposed.

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; they are unlikely to have the same advantages of cross-examination or disclosure of the trustees' deliberations as they would have in such proceedings. If the court is left in doubt on the evidence as to the propriety of the trustees' proposal it will withhold its approval (though doing so will not be the same thing as prohibiting the exercise proposed)."

Issues to consider when making such an application

In making such an application for the Royal Court's blessing, the trustee will need to be aware, amongst other things, that:

1. in considering such applications, the general standpoint of the Royal Court is that it will not substitute its own discretion for that of the trustee, it will merely ask the question: "is the decision one which a reasonable trustee, properly instructed, could have made, taking relevant considerations into account and

ignoring irrelevant considerations;"

2. the trustee has a duty of full and frank disclosure to the Royal Court, as the Royal Court cannot be viewed as a rubber stamp and parties and their advisers must be astute not to appear to treat them as such;

3. the application must summarise the arguments for and against the proposed course of conduct, especially given that fact that such applications for administrative directions are invariably held in private and once approved, the beneficiaries will be unable to complain that a breach of trust has occurred or attempt to set it aside as flawed;

4. the decision of the trustee must be a "proper one" and the Royal Court must be satisfied as to the rationality of the decision. However, the decision need not be final, in that implementation of the decision may be conditional upon the Royal Court's approval;

5. the Royal Court needs to be satisfied that the decision was within the range of possible decisions which could reasonably be made, but also that the actual decision was arrived at by the trustee in such a way that from the range of possible decisions it was likely to be a good decision;

6. when determining whether to sanction a decision, the Royal Court should act with caution but it should not withhold approval merely because it would not itself have exercised the power in the same way;

7. the Royal Court is unlikely to entertain an application to approve a transaction already completed by the trustee where no challenge to the validity of that transaction has been initiated by the beneficiaries (Re H Trust 2006);

8. in order for the court to be able to bless a decision, there needs to be a decision to bless. In the Case of re AAA Children's Trust, the Court found that it was impossible to pinpoint a meeting of the Trustee at which the momentous decision the Court was being asked to bless had actually been taken. As a result in this case, the Court declined to bless the transaction, highlighting the importance of trustee meetings being clearly recorded, which consider all relevant factors relating to the momentous decision;

9. the interests of minor and unborn beneficiaries must always be taken in account. In the case of Re the V, W, X and Y Trusts [2021] JRC 208 it was held that whilst the interests of the unborn children and remoter issue would be aligned with their parents, the interests of the unborn and unascertained spouses, widows or widowers would clearly not be served by the proposed exclusion of the aforementioned classes and on that basis, the court declined to bless the trustee's decision in this case;

10. although the court will often give weight to the views of the majority of the beneficiaries, if the court is satisfied that the course of action supported by the minority best serves the interests of the trust, then the court has demonstrated its willingness for the views of the minority to prevail;

11. the trustee will need to provide the Royal Court with sufficient information, which would normally include relevant trustee minutes, any relevant expert evidence, relevant counsel advice and affidavit evidence from the trustees, as may be required;

12. the Royal Court will also generally want assurances that the trustee has taken account of the views of the beneficiaries as part of its consideration as to whether the trustee has discharged its fiduciary duties and reached a reasonable decision in the circumstances;

13. in the event that the Court blesses a transaction, the trustee is not obliged to then proceed with the action in question, if it then transpires a more favourable option is available (for example, due to changing market conditions a trust asset can be sold to another party on more favourable terms). Conversely, in the event the Court declines to bless a transaction, the trustee is not prevented from proceeding, however, as ever in such a situation, it would take a bold trustee to do so in the face of the declination of a court blessing; and

14. such applications can also be made by a beneficiary or the Attorney General

Applications involving litigation

In relation to applications involving litigation, it is important to be aware of the case of F Trust [2017] JRC 142, where the Royal Court held that it will adopt a more inquisitorial role than it would ordinary do for an application for the blessing of a momentous decision.

In this case, the Royal Court acknowledged that frequently the Royal Court would not normally claim to have any more expertise than the trustee, and indeed very possibly less in relation to the matter in question as the trustee, with its greater knowledge of the family or of acting as a trustee may have more intimate knowledge of the issues in question. In such cases, it is therefore unsurprising that the Royal Court exercises only a supervisory power in blessing a momentous decision, restricting itself to a review, as has been held in previous cases, based on honesty, lack of conflict and rationality.

However on the other hand, the Royal Court in this case held that where the substratum of the decision is the question of litigation, then this would be an issue that the Royal Court is familiar with, probably in most cases more familiar than the trustee. Where the trustee therefore seeks to have a decision to litigate blessed by the Royal Court, it should expect the Royal Court to exercise a more direct, inquisitorial role, and be ready to form its own judgement as to whether it is sensible for the trust estate to be put at risk by the litigation in question.

Conclusion

The jurisdiction that enables the Royal Court to bless momentous decisions is a useful one.

From the point of view of the trustees by seeking the court’s blessing before taking a momentous decision, it protects itself from complaints from the beneficiaries whether now or in the future and from the point of view of the beneficiaries it may help overcome the inertia that can sometimes arise when a trustee is faced with a difficult decision.

Although it is relatively rare for a Royal Court to decline to bless a trustee's decision, such cases have arisen, notably the case Re the V, W, X and Y Trusts [2021] JRC 208 and it is therefore crucial for the trustee to be meticulous in preparing for such an application and ensure there are no unresolved questions at the date of the hearing.

The costs of making such applications should also be considered, as they can be significant and it is always important to seek to avoid a situation where the costs of obtaining a blessing application are disproportionate to the gravity of the decision. Although seeking the court's blessing before taking a momentous decision provides the best level of protection, in certain cases, obtaining robust waivers or indemnities from all the adult beneficiaries may be more appropriate, provided that such waivers or indemnities are provided freely and the beneficiaries have full knowledge of all material facts relating to the trustee's decision.

However, the importance of obtaining court blessings for momentous decisions in appropriate situations cannot be overstated as the costs are a lot less than fully developed hostile litigation. The case of Grand View Private Trust Co Ltd and another v Wong and others [2022] UKPC 47, indeed provides a salient warning, as in this case the trustees of the trust in question opted not to seek the blessing of the court, when taking the momentous decision to exercise its powers of addition and exclusion of beneficiaries. This left the door open for certain beneficiaries to challenge and indeed overturn the trustee decision some 13 years after it was taken.

For further information or specific advice, please contact Daniel Walker.

This note is intended to provide a brief rather than a comprehensive guide to the subject under consideration. It does not purport to give legal or financial advice that may be acted or relied upon. Specific professional advice should always be taken in respect of any individual matter.