The case of Representation of White Willow (Trustees) Limited [2022] JRC120 provides helpful clarification as to the trustee's right to reasonable security in the form of an indemnity when making an interim distribution to beneficiaries.

This case was another instalment in long running litigation concerning the Foundation, but, in summary, White Willow (Trustees) Limited (the "Trustee"), as the trustee of a charitable trust, known as the Foundation, proposed to make an interim distribution of US$20m equally amongst the eight charitable sub-trusts which are the beneficiaries of the Foundation.

The Trustee required standard indemnities to be put in place in connection with the interim distributions, as there were a number of contingent liabilities that it had identified, including: (i) potential tax liabilities; (ii) possible fines in relation to potential infringement of the laws where some of the trust assets had historically been located; and (iii) unknown liabilities (for example in connection with historic litigation) which the trustee may be unaware of.

On the other hand, the trustee of a number of the sub trusts argued that in the circumstances there was no need for an indemnity and that the risks of the contingent
liabilities identified by the Trustee were fanciful.

The issue that the Royal Court was therefore required to consider was whether the Trustee was entitled to require execution of a deed of indemnity on behalf of each of the sub-trusts prior to making the distribution.

The Law

The Trusts (Jersey) Law 1984 (the "Law") helpfully provides that a Trustee is entitled to be provided with reasonable security for liabilities before surrendering the trust property and states as follows:

43A Security

(1) A trustee –

(a) who–

(i) resigns, retires, is removed or otherwise ceases to be a trustee, or

(ii) distributes trust property; or

(b) of a trust that is terminated or wholly or partly revoked, may, before distributing or surrendering trust property, as the case may be, require to be provided with reasonable security for liabilities whether existing, future, contingent or otherwise.

(2) Where security required to be provided under paragraph (1) is in the form of an indemnity, the

indemnity may be provided in respect of –

(a) the trustee or a person engaged in the management or administration of the trust on behalf of the trustee;

(b) any or all of the present, future or former officers and employees of the trustee or person engaged in the management or administration of the trust on behalf of the trustee; and

(c) the respective successors, heirs, personal representatives or estates of the persons mentioned in sub-paragraphs (a) and (b), and any person in respect of whom the indemnity is provided under this paragraph may enforce the terms of the indemnity in their own right (whether or not they are party to the contract or other arrangement providing the indemnity).

(3) If an indemnity to which paragraph (2) refers is extended or renewed by a contract or other arrangement and that contract or other arrangement provides an indemnity in respect of any of the persons referred to in paragraph (2), any such person may enforce the terms of the indemnity in their own right (whether or not they are party to that contract or other arrangement)."

Article 26 (2) of the Law, further states that:

"A trustee may reimburse himself or herself out of the trust for or pay out of the trust all expenses and liabilities reasonably incurred in connection with the trust."

The Court's Decision

Right to reimbursement means full repayment

In relation to Article 26 (2) of the Law, the Court helpfully reiterated that this Article reflects the general principle of trust law that a trustee is entitled to reimbursement out of the trust fund for all expenses and liabilities properly incurred and that the right to reimbursement means full repayment.

With regards to Article 43A of the Law, the Court held that it was clear from Article 43A that an indemnity is regarded as a form of security and that what is regarded as reasonable security in any given case will depend both on the nature of the liabilities in question and the nature of the security required. In other words, the greater the remaining and ongoing risks of a liability materialising after a distribution, the greater the nature and extent of security that could be sought.

In the case in question, the Court noted the limited nature of the security being sought and that this was not a request to retain assets by way of security, with the only request being for the provision of a standard indemnity for liabilities which had been properly incurred.

Contingent Liabilities

Importantly, the Court held that even in circumstances where the likelihood of the contingent liabilities materialising was very small, the limited nature of the security sought meant that it was wholly reasonable for the Trustee to seek such security. Indeed, all the provision of the indemnity meant was that, should the liabilities materialise, they are borne by the correct parties, namely the beneficiaries, rather than the Trustee. In addition, the Court held that it did not matter that there were assets remaining in the Foundation after the interim distribution had been made.

Unknown Liabilities

Regarding unknown liabilities, the Court further held that it is common practice in the offshore trust world for indemnities against unknown liabilities to be required of beneficiaries on termination of a trust or on making distributions when the assets retained in the Trust are comparatively small and that in this case it was therefore entirely reasonable for the Trustee to require an indemnity in the proposed form simply to cover any unknown liabilities even in the absence of possible contingent liabilities.

The Court went on to note that as in the case of the specific liabilities, if no such liability ever materialises, the indemnity will have cost the sub-trusts nothing and they will be able to carry on their charitable activities exactly as they wish. If, on the other hand, any such liability appears out of the woodwork, it is entirely reasonable that any such liability should be borne by the sub-trusts which have received the assets from the Foundation rather than by the Trustee itself.

Conclusion

The Court’s decision provides welcome comfort to the Jersey trust industry and confirms that in seeking an unsecured indemnity in a standard form, it is unnecessary for a trustee to have to demonstrate the existence of known contingent liabilities and that it is perfectly acceptable for such indemnities to also cover unknown liabilities.