

UPDATE

Royal Court hears rare contested *Public Trustee v Cooper* type application

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The Royal Court confirmed that in considering whether to approve a trustee's 'momentous decision', it will not displace the Trustee's discretion with its own views. Rather, it will decide whether the trustee's decision was one which a reasonable trustee, properly instructed, could arrive.

The Royal Court of Guernsey recently determined a *Public Trustee v Cooper*¹ type application in which the trustee sought approval for the distribution of the entirety of the trust in accordance with a letter of wishes. The application was unusual in that it was contested by one of the beneficiaries (**Beneficiary A**). Mourant Ozannes represented the successful group of beneficiaries who supported the trustee's decision to distribute the assets in accordance with the letter of wishes. The hearing, which was held in camera, resulted in the Court approving the distribution.

The judgment is of interest in that it confirmed a number of important principles as a matter of Guernsey law:

- Beneficiary A's main argument centred on criticisms of the actions of the trustee and, in particular, there being no substantive evidence as to the basis of the trustee's decision or its decision-making process. This argument was rejected by the Court. The question for the Court to determine was set out by Deputy Bailiff Collas in the Matter of Mischca Trust² in the following terms, 'Is the decision ... one which a reasonable trustee properly instructed could have arrived at?'

Importantly, the Court then went on to confirm that answering this question did not require second guessing of the actions of the trustee or a line by line microanalysis of the trustee's actions, nor 'is the court able to substitute its own decision in a so-called momentous case, which this plainly is'.

The Court concluded that not only was the trustee's application meritorious, but a responsible trustee could not properly have acted otherwise on the facts available to it.

- Beneficiary A argued that the Court could not hear the application without having knowledge of Bahamian law, which was the governing law of the trust. However, Beneficiary A neglected to serve any expert evidence on Bahamian law or assert that it would produce any different result than applying Guernsey law. As a result, the Court reverted to what it called the 'normal principle' as summarised in Dicey and Morris³ that 'where foreign law is not proved, the court applies English law'. The Court held that there was no reason why this 'very well established principle' should not be followed in this instance and hence in the above quotation 'Guernsey law' should be substituted for 'English law'.
- Prior to the hearing, Beneficiary A had also made various allegations, including an allegation that the settlors' signatures on the letter of wishes were forgeries. Most of the allegations were dealt with in

¹ [2001] WTLR 90. Invoking the Court's jurisdiction to grant its blessing for momentous decisions by trustees.

² Royal Court, 18 March 2010.

³ Dicey, Morris and Collins, the Conflict of Laws (Fifteenth Edition) at paragraph 9-025.

correspondence and subsequently dropped by Beneficiary A. The fact that Beneficiary A was making serious allegations without being able to substantiate them did not go down well with the Court:

'The original serious allegations did not have any persuasive detail to back them up and have fallen away, the forgery allegation rests on what seems to be an inadequate report by a person with questionable qualifications, unlike those of the two experts produced to contradict it. That can be fairly discerned on the papers. What it boils down to is a wistful hope from [Beneficiary A] that something more can be somehow conjured-up than the 4.5 per cent he is going to get ... What further investigations are merited are wholly unclear. It all amounts to assertions without substance.'⁴

In conclusion, the Court confirmed that in considering whether to approve a trustee's 'momentous decision', it will not displace the Trustee's discretion with its own views. Rather, it will decide whether the trustee's decision was one which a reasonable trustee, properly instructed, could arrive at. Here the Court's clear answer to this question was in the affirmative even if, unusually, the path to that result was more contentious than usual.

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⁴ Judgment paragraph 19.

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