

Guernsey: All potentially interested parties to be considered by the court when blessing a decision of trustees

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In a decision which provides useful guidance for both trust and insolvency practitioners, the Guernsey Court of Appeal has upheld a decision of the Royal Court blessing a trustees' decision to pay for the costs of refinancing a trust asset from the assets of a family trust. One of the key grounds of appeal concerned the solvency of the trust and more particularly, that because it was insolvent, the Court lacked the jurisdiction to bless a decision proposed by the trustees. But the Court of Appeal unanimously held that the potential insolvency of the trust was not a bar to the court's supervisory jurisdiction and that the interests of all those who may be interested in the assets of the trust had to be considered.

Background

The appellants were the joint liquidators of four companies of a family trust. They claimed to be entitled to repayment out of the trust assets of loans of approximately £180 million entered into by the Former Trustees, who were two of the respondents to the appeal. The Former Trustees had been replaced by a third respondent, who is the Current Trustee.

The status of the loans was the subject of separate proceedings in Guernsey and at the date of the Court of Appeal's judgment, judgment in relation to the loans remained outstanding.

The proceedings in the Royal Court which lead to the appeal were commenced by the Former Trustees for the purpose of seeking directions from the Court about how to deal with the trust assets. The Former Trustees had commenced those proceedings whilst they remained as trustees, and upon their removal had exercised a lien and retained the trust assets, pending the outcome of the proceedings concerning the loans.

The appeal

The genesis of the appeal was an application by the Former Trustees for directions about the refinancing of a loan secured against a substantial property in London, which is a trust asset. That building was occupied by one of the respondents and his family. Directions from the Royal Court were sought in relation to the refinancing of the loans secured against that building, because the existing lender had indicated that it would not renew the loan beyond a certain date. An alternative lender had been found, but the costs of refinancing that loan could only be met from other assets within the Trust, because the company which owned the building on behalf of the Trust was unable to meet those costs.

The Royal Court made an order authorising the Former Trustees to pay the refinancing costs from the Trust and the joint liquidators appealed. Mr John Martin QC, sitting with the Hon. Michael Beloff QC and Sir John Nutting QC, handed down the Court of Appeal's judgment, dismissing the appeal.

The Court of Appeal noted that the Royal Court had the power to make such a decision in the exercise of what is frequently referred to as the Court's supervisory jurisdiction. The Royal Court's blessing had been sought under what is commonly referred to as a category 2 application under *Public Trustee v Cooper* [2001] WTLR 901: an application for the court's sanctioning of what is considered a "momentous" decision.

Solvency of the trust

Two of the grounds of appeal concerned the Lieutenant Bailiff's purported failure to have proper regard to the fact that the trust was "hopelessly insolvent." Because of its alleged insolvency, the appellants submitted (i) the

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trustees ceased to have power to deal with the trust property, and (ii) the Royal Court lacked jurisdiction to make any order under the supervisory jurisdiction to sanction any action on the part of the trustees which prejudiced trust creditors.

The Court of Appeal held that the appellants' submissions about trust solvency were wrong, finding:

"the fact (if it be such) that a trust is insolvent does not have the consequence either that the trustees cease to have any powers to deal with the trust property or that the court has no jurisdiction to supervise the exercise of those powers."

And further: *"This is by no means to say that the interests of the creditors are irrelevant: in many cases their interests are likely to be the predominant factor. But in every case the court's task is to consider the matter with regard to the interests of all those who have or may have an interest in the trust property."*

The Court of Appeal observed that the effect of the refinancing was to preserve a trust asset for the benefit of anyone who was ultimately entitled to it. As long as the Royal Court was satisfied that all potential parties' interests had been reasonably considered by the trustee, it was entitled to take the view that blessing the refinancing was a proper exercise of its

power. This requirement had been satisfied by the appellants having been a party to the application in the Royal Court, where they had the opportunity to express their views about the merits of the proposal.

The judgment confirms that in the case of a potentially insolvent trust the Court will take into account the interests of all the parties who may be interested in the trust fund, including the interests of potential creditors. However, on the facts of this case, where the insolvency had not yet been established, the case confirms that the fact of the potential insolvency does not deprive trustees of the ability to go to Court and seek protection as to how to deal with the trust assets where there are genuine difficulties as to the management of the trust assets.

Re F (Anonymised judgment of the Court of Appeal – 10 September 2013)

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