

BUT I ACTED ON LEGAL ADVICE.....



Authored by: Paul Buckle - Ocorian

It may come as a surprise to some that where a trustee takes and follows legal advice, that does not necessarily mean it has behaved reasonably so that in some cases it may still be denied its costs when acting on that advice. That was the contention being made in the recent Guernsey case of *In re J and K Trusts*,¹ where counsel for a beneficiary argued a trustee legally advised to pursue a directions application before the court, should be denied the costs of that application where it was faced with a plain and obvious conflict of interest, even if the advice was that there was no such conflict.

To give some context, the case involved two trusts established by the same settlor (since deceased) and with the same trustee appointed by the settlor. The principal beneficiary of the first trust was A, who was the late settlor's wife, and of the second B, who was the survivor of the settlor's two daughters. In 2020, at a Guernsey Court of Appeal

hearing, it was determined that a part of the second trust was to be transferred to the first, but counsel for A later argued the trustee was conflicted and should resign rather than pursue the transfer. The trustee was legally advised it had no conflict, or alternatively, that if there was a conflict it had been placed in that position by the terms of the trusts which thereby authorised it to proceed. However, in the face of A's contentions the advice was that it should seek court directions to confirm the absence of conflict, which it duly did. A lodged a counter application for the trustee's removal as trustee of both trusts. In the event the trustee did resign on terms making the two applications otiose. The one remaining question, on which the parties could not agree, was how to deal with their costs.

Collas LB thought the law was not in dispute, but that its application to the facts was more controversial. Drawing on Jersey authority, which he thought

also represented the law in Guernsey, he said a trustee could be denied its costs if it was (not simply alleged to be) guilty of misconduct, which was a high threshold to surmount.² In arguing for misconduct on the trustee's part, counsel for A relied heavily on the Jersey case of *BA v Verite Trust Co Ltd re the E, L, O and R Trusts*,³ where a trustee which failed to resign in the face of a plain and obvious conflict was denied its fees and costs even though it had taken advice. In response, the trustee argued it had acted reasonably in following the legal advice it had obtained.

Although he found for the trustee, Collas LB said "The act of taking legal advice does not provide a cast iron defence".⁴

1 [2022] GRC013

2 [2002] GRC013, [7] citing *des Pallières v JP Morgan Chase & Co* [2013] JCA146 and *Re H Trust* [2019] JRC072

3 [2008] JRC150

4 [2022] GRC013, [17]

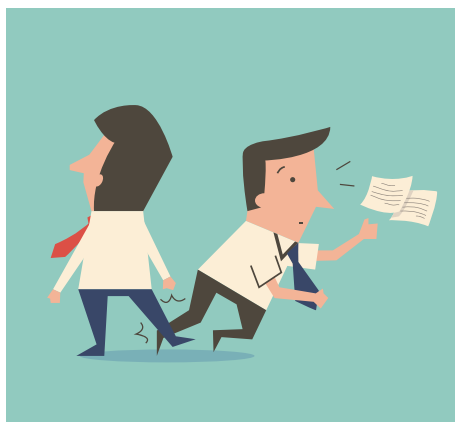


When faced with an allegation of conflict, a trustee should seek legal advice; to that extent, there was no distinction to be made between E, L, R and O Trusts and the instant case.⁵ The difference lay in the trustee's assessment of the advice received. In E, L, R and O, by virtue of its trusteeships, the trustee found itself in a situation where in short, it would be on both sides of a contested hearing. That was a situation where, whatever the legal advice, the trustee should have acknowledged the patent conflict and resigned not sought court directions. In the instant case, the question was whether it was unreasonable for the trustee to have followed its counsel's advice or that the advice was so plainly wrong that no reasonable trustee would have accepted it. It was not for Collas LB to decide the correctness of the trustee's advice but having analysed it he concluded it was not unreasonable for the trustee to have accepted and acted on it.⁶ The trustee was therefore entitled to its costs and was not obliged, as A had argued, to pay A's costs personally.

The court went on to decide on supplementary matters, such as the allocation of costs between the two trusts and so on. However, it is the question of legal advice that is the most interesting aspect of the case. There is no doubt that, not being expert in all matters,⁷ trustees should take legal advice where they need it, and very often are expressly authorised to do so

by the terms of the trust or by the trust's governing law.⁸ Moreover, because a trustee cannot delegate the exercise of its discretion, it has to assess the advice it receives not blindly follow it;⁹ and costs aside, a decision to act on flawed advice may result in the decision being set aside as the trustee will not have considered all relevant matters or considered irrelevant ones. These principles are seen at work in the familiar forum of a Beddoes application where trustees adduce their legal advice to the court, and the court and beneficiaries critically assess that advice before the court decides whether to allow the trustee to proceed in reliance on it.

Similar principles apply where a trustee is sued for breach. That the trustee took legal advice is no defence in itself, although it may become relevant if the court is asked to exercise its discretion to excuse a trustee that has acted



honestly and reasonably.¹⁰ Also, a trust deed could expressly exonerate a trustee which acted on legal advice. But in general, acting on poor legal advice gives the trustee a claim against the advisers not a defence against the beneficiaries, and even acting on good advice does not mean there is no breach of trust.

All this means that trustees need to assess their legal advice carefully, not as experts themselves (as they will not usually be such) but as prudent professionals faced with a decision to take.

This is not to say they have to scrutinise advice and double check every last word, but certainly, if the advice is based upon false assumptions or has failed to take account of something the trustee reasonably considers relevant, an enquiry should be raised. Equally, however, trustees that go shopping for a favourable opinion may behave unreasonably if the original advice was not obviously suspect or whilst advantageous for the trust placed the trustee in a personally disadvantageous position. In extreme cases, trustees may have to go against their advice. In E, L, R and O Trusts, even though it acted in good faith, and genuinely thought the interests of the trust were served by remaining in office, the trustee should have appreciated that when the facts confirmed the existence of a patent conflict, its lawyers' enquiries for additional information and advice that no criticism of its trusteeship was being made missed the point; the conflict spoke for itself and the trustee should have resigned.¹¹

The other point is that any advice is only as good as the instructions to the adviser. It is therefore as much a trustee's responsibility to ensure it provides instructions which contain all the relevant facts and documents, and ask the relevant questions, as it is to assess the end product.

5 [2022] GRC013, [16] quoting [2008] JRC150, [38].

6 [2022] GRC013, [24].

7 Pitt v Holt [2013] UKSC 26, 10.

8 See s.32 of the Trusts (Guernsey) Law, 2007 (as amended).

9 Scott v National Trust for Places of Historic Interest or Natural Beauty [1998] 2 All ER 705, 717.

10 See eg Re Alsop [1914] 1 Ch 1; Marsden v Reagan [1954] 1 WLR 423.

11 See especially [2008] JRC150 [33] - [34].