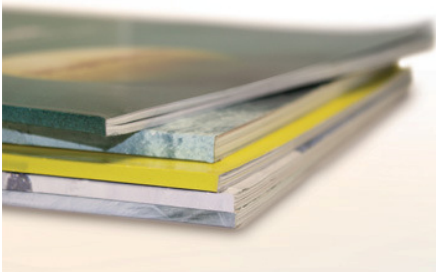


Article 51 - A Flexible Tool

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The role of trustee, particularly a corporate professional trustee, is becoming ever more burdensome. The onerous fiduciary duties to which trust companies are subject can render them a target to be sued for breach of trust. In these circumstances trustees should be aware of the assistance potentially provided by an application made pursuant to Article 51 of the Trusts (Jersey) Law 1984, under which trustees may apply for directions as to how they should act in connection with any matter concerning the trust.

In **Re S Settlement** [2001] JLRN[37], the then Deputy Bailiff Birt (now Bailiff) identified four distinct situations in which a court is required to adjudicate on a course of action proposed or actually taken by the trustee:

- (1) Where the court is asked to consider whether the proposed conduct is within the trustee's powers. Such applications may involve the interpretation of trust documents or deciding whether certain documents should properly be disclosed to certain beneficiaries.
- (2) Where the court considers whether the proposed course of action is a proper exercise of the trustee's powers. In such circumstances, there is no doubt at all as to the extent of the trustee's powers, nor is there any doubt as to what the trustees want to do, but they think it prudent to request the

court's blessing on a momentous decision (for example, the sale of significant trust assets or complying with an order of a foreign court).

- (3) Consideration of a surrender of discretion by the trustee to the court. The court will only accept a surrender of discretion for a good reason, for example where the trustees are deadlocked or because the trustees are disabled from acting as a result of a conflict of interest.
- (4) Where the trustees have actually taken action and that action is being attacked as being either outside, or an improper exercise of their powers. These are cases of hostile litigation and as such should be heard and decided in open court.

Further points to note for trustees in relation to such applications include:

- A trustee must disclose all relevant material. The court will not grant orders without seeing all relevant documents, and if it considers disclosure is incomplete the trustee may be refused its costs from the trust fund.
- A trustee on making an application for directions should put forward recommendations and present the arguments both for and against. A trustee will not be penalised in costs simply because the court

does not agree with the trustee's recommendations. It will only be deprived of its costs where it acts unreasonably.

- In making an application under Article 51 as to the position it should take in relation to litigation (i.e. a Beddoe application), a trustee has an absolute right to make an application at the expense of the trust fund.

The following are recent examples of Article 51 applications to the Royal Court:

MM v. SG Hambros [2010] JRC037, concerned an application by the beneficiary for the court to overturn a decision by the trustee to sell a significant property in central London which was the sole asset of the trust. The court endorsed the trustee's decision describing it as "*eminently reasonable*" and the trustee was duly awarded its costs in relation to the application. In reaching its decision, the court drew on previous Jersey case law emphasising that the central role of the court in situations such as these was to exercise its supervisory jurisdiction to ensure the decisions taken by trustees are reasonable and lawful.

Reasonable and Lawful

Cunningham v. Cunningham [2010] JRC074, was an application by the plaintiff for an order that the legal adviser of the trustee provide certain information. The trustee itself could not as it was no longer in business, its licence having been revoked in Gibraltar. The court said it could not order the disclosure as it was only the trustee which would waive the privilege. However, the plaintiff could alternatively apply for directions under Article 51, and ask the court to direct the trustee to waive its privilege in connection with the legal adviser so the relevant evidence would be given.

Open Court

In the matter of **C Trust Company Limited** [2010] JCA017, the Court of Appeal restated the general rule that proceedings should be conducted in open court unless the parties can demonstrate that it will be necessary for confidential information to be disclosed during the hearing. In such circumstances, the court will depart from the general principle and conduct the hearing in private if necessary to meet the interests of justice. There is no general exception for proceedings concerning private trusts. In this case, the court was of the view that confidential information would not need to be disclosed, however it did reserve to any party the right to renew an application to be heard in private if at any stage it appeared to have become necessary in the interests of the justice.

Finally, in **Re the AE Settlement** [2010] JRC85, it was held that pursuant to Article 51 the court can order the directors of companies ultimately owned by a trust to disclose information regarding those companies to the trustees. The court did stress, however, that Article 51 should not be used to obtain pre-action disclosure by a stranger to the trust with a view to attacking the trust.

Useful Tool

It is clear from the above that Article 51 provides a useful tool for the trustee to meet complex and difficult issues which arise in relation to trusts and take steps to protect itself from potential actions in the future, primarily by disgruntled beneficiaries.

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