Creditor v beneficiary: enforcement actions against interests under Jersey trusts

The Royal Court of Jersey recently handed down its judgment in *Kea Investments Ltd v Watson and others* [2021] JRC 009. The gist of the judgment was to deny that the Plaintiff, Kea, was entitled to distrain against the beneficial interests of a judgment debtor, Eric Watson, in three Jersey discretionary trusts in satisfaction of English judgment debts registered in Jersey (though it succeeded in its uncontroversial claim to distrain on various loans owed to Watson by his trustees and a trust-owned company). The court thereby confirmed the conventional wisdom that interests under discretionary trusts are beyond the reach of creditors.

The right to distrain against a debtor's movable property is known in Jersey as an *arrêt*. It is a local discretionary remedy of enforcement granted over movables; it is a judicially granted proprietary security interest. The customary law contains no obvious limitations on the precise subject-matter which can be targeted, though traditionally of course it was chattels which were realised by the Viscount.

Article 1(1) of the Trusts (Jersey) Law 1984 defines 'beneficiary' as 'a person entitled to benefit under a trust or in whose favour a discretion to distribute property held on trust may be exercised', and accordingly includes discretionary beneficiaries. Article 10(10) provides 'the

interest of a beneficiary [itself defined as the beneficiary's interest under a trust] shall constitute movable property'. Further, Article 10(11) provides that "subject to the terms of the trust, a beneficiary may sell, pledge, charge, transfer or otherwise deal with his or her interest in any manner".

The provision in Article 10(10) has no internal relevance to the 1984 Law; its purpose is to allocate trust interests a place in the taxonomy of the general law of Jersey and for that reason, *prima facie* facilitates the remedy of *arrêt* applying. The provision in Article 10(11) means that beneficial interests (as defined) under Jersey trusts are transmissible property interests, unless the trust says otherwise (which these did not): the relevance being that they can be acquired and enjoyed by third parties as against the trustee. There are in fact likely to be wealth-holding structures that make explicit use of this characteristic.

On this basis, coupled with a strong factual case (being pursued with some success in England) of a conspiracy by Watson to defeat his creditors, the contention looked attractive. But the court held nonetheless that the discretionary interests of Watson could not be distrained upon, essentially because the terms of the Watson trusts neither expressed the interests to be assignable (turning Article 10(11) on its head) nor provided a mechanism whereby any proposed transferee could be properly added to the beneficial class. Without such a mechanism, it was said, the transferee's rights would have no utility, because the trustee would essentially be being asked to commit a fraud on whichever power or powers it happened to be exercising in the transferee's favour.

Kea had necessarily accepted that it would not by *arrêt* acquire any better interests than Watson himself had in the trusts, which (though he had vested proprietary interests in the trusts, albeit defeasible future ones, as a default beneficiary), in the immediate present were the rights to due consideration, proper administration and

to give good discharge. As the court recognised, the argument was akin to asking for Kea to be subrogated to all of Mr Watson's rights.

Kea had of course considered the fraud on a power issue, but submitted that it was asking, by way of subrogation, for the *arrêt* to be recognised as conferring effective judicial approval for a red-pencil exercise in which the trustee could consider Kea's claims on the trust as if it were a beneficiary, with all its own characteristics (having a large unsatisfied debt) being relevant to the trustee's determination. The court declined, notwithstanding the close parallel in Article 43(2)(c)(iii) of the Security Interests (Jersey) Law 2012, which Article governs the enforcement of contractually granted securities: by that provision the creditor is empowered to ask third parties who have obligations in relation to the collateral to carry out those obligations for it, instead of for the debtor. The court did not address Kea's point that if the States legislated in those terms for consensually granted securities, then judicially articulating that court-granted ones had the same feature would not be at all unreasonable.

Regrettably it is therefore the case that, notwithstanding the promising ammunition in the Trusts (Jersey) Law 1984, an unscrupulous judgment debtor who squirrels his assets into a Jersey discretionary trust will always be able to oblige the judgment creditor to pursue a full second set of proceedings to bust the trust, these being (unless you are lucky) fact-intensive, expensive and relatively slow, before obtaining recourse.

Elizabeth Jones QC and Kathryn Purkis are instructed by Farrer & Co and Collas Crill (Jersey) on behalf of Kea. Kathryn Purkis appeared as an Advocate in the Royal Court on the application.

An extended article will be published in the forthcoming 27th edition of Serlespeak on Private Client Trusts and Probate.

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