

STEP Guernsey Conference 2021

Recent Trust Cases from Around the World

Presented by

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Jurisdictions covered

- Guernsey
- Jersey
- England
- Cayman Islands
- Bermuda

Areas covered

- Open justice and remote hearings
- Domicile
- Constructive trusts
- Arrêt of beneficiary's interest
- Rescission/Rectification on the grounds of mistake
- Removal of trustees/protectors
- Blessing applications
- Firewalls

Open Justice-Remote Hearings

WONG, WEN-YOUNG AND GRAND VIEW PRIVATE TRUST COMPANY LTD, Supreme Court of Bermuda 16 April 2021

- Remote hearing of trial proceedings
- Principle of open justice still applies
- Public in Bermuda vs Overseas media
- On application, not unrestricted live streaming

You be the judge

POLL:

Should open justice apply to trust disputes?

- Yes
- No
- Depends

Domicile

J B O'CONNOR in his capacity as executor of the estate of Neil Corner and T F Corner and James Corner

- Applicable legal principles
- Guernsey's rules of private international law looks to English law
- Domicile of origin in England
- Domicile of choice
- Effect of loss of capacity

Constructive Trusts

THE L TRUSTS [2021] JRC 068

- Profit, gain or advantage from breach of trust
- A33 TJL constructive trust of profit, gain or advantage
- Transfer of money interest free even if to be repaid is a “gain” or “advantage”
- A33 TJL not exclusive species of constructive trusteeship

Constructive Trusts

SFO, Mr J Milsom and Mr D Standish as joint enforcement receivers v Litigation Capital Ltd and others [2021] EWHC 1272 (Comm)

- Constructive trust of Jersey real property?
- Customary law of property vs TJL
- Recognition of equitable interest in movable property in *Esteem*
- It is not possible to have an constructive trust over Jersey real property-no proprietary equitable claim

Is the position the same in Guernsey?

Arrêt over the rights of a discretionary beneficiary

KEA INVESTMENTS LTD AND WILLIAM GERALD GIBSON AND OTHERS [2021] JRC009

- Short cut to a proprietary claim?
- Arrêt customary law remedy for the satisfaction of a debt
- May be effected against future property
- What are the rights/interests of a beneficiary that may be subject to arrêt?
- A10 TJL *movable* property but not assignable or in any way transmissible

Mistake-Setting aside and Variation

IN THE MATTER OF THE GC SETTLEMENT, Supreme Court of Bermuda, 25 January 2021

- Previous order in 2019 approving deed of variation under S47 Trustee Act, 1975
- “Serious error” and full implications were not appreciated
- S47A statutory “Hastings Bass” jurisdiction to set aside the flawed exercise of fiduciary power
- 2 conditions-no breach of fiduciary duty
- Further order granting Trustee power to vary the trust by deed of variation
- On condition that did not invalidate the exercise of any power under the original deed of variation

Mistake-Rectification

MR NICHOLAS JOHN WARE AND MRS CONSTNCE WILTSHIRE WARE [2021] EWHC 694 (Ch)

- Application for rectification of two deeds of appointment made by trustees of two will trusts created by a deed of variation
- Deeds of appointment mistakenly included provisions which terminated the claimant's existing interests in possession and appointed new ones in their place
- Significant adverse tax liabilities consequent upon the termination of pre 22 March 2006 interest in possession and the creation of new ones-immediate charge to IHT at 20%, 10 year charge and exit charges; still be IHT death charge and no capital gains tax free base cost uplift

Mistake-Rectification

MR NICHOLAS JOHN WARE AND MRS CONSTANCE WILTSHIRE WARE [2021] EWHC 694 (Ch)

Test

- Clear evidence/convincing proof of the true intention
- A flaw in the written document such that it does not give effect to the intention as opposed to the parties merely being mistaken as to the consequences of what they have agreed or intended
- Specific intention of what they did intend; not sufficient to show that they did not intend what was recorded
- Issue capable of being contested

Removal of Trustees/Protectors

IN THE MATTER OF THE FA TRUST AND FB TRUST, Supreme Court of Bermuda, 6 January 2021

- Application for removal of protector (and successor)-brought by the trustees
- Relevant test to be applied-GRC in *K Trust*
- Welfare of the beneficiaries and the competent administration of the trust
- No wrongdoing required on the part of the protector if detrimental to the execution of the trust

Removal of Trustees and Blessing of compromise

*PATRICK SCHUMACHER AND BRIAN CLARKE, RANA HADID AND R. H. PETER GARTH
BARON PALUMBO AND OTHERS [2020] EWHC 3381 (Ch)*

- Originally application for removal of trustees
- Category 2 Public Trustee application for approval of settlement agreement
- Court to be satisfied:
 - (1) trustees have, in fact, formed the opinion they should act in the way for which they seek approval;
 - (2) the opinion is one which a reasonable trustee could have properly come to;
 - (3) the opinion was not vitiated (impaired) by any conflict of interest.

Removal of Trustees and Blessing of compromise

*PATRICK SCHUMACHER AND BRIAN CLARKE, RANA HADID AND R. H. PETER GARTH
BARON PALUMBO AND OTHERS [2020] EWHC 3381 (Ch)*

- A matter of discretion; no entitlement
- Entitled to take into account the consequences of refusing to approve
- A failure to acknowledge a conflict of interest and to explain how it has been managed may be fatal
- A must unusual case-dispute between trustees
- Concerns about process and the manner in which conflicts of interest have been managed
- Real risk decisions are vitiated by conflicts of interest-decline approval

Offshore Firewalls-Cayman Islands

IN THE MATTER OF THE STINGRAY TRUST, Grand Court of Cayman, 21 December 2020

- Proceedings issued in Italy seeking an order that the Trust be terminated
- Issues to be determined:
 - *Whether Section 90 of the Trusts Law requires all matters to be determined by the Cayman court;*
 - *Whether the trust contains an exclusive jurisdiction clause;*
 - *Forum non conveniens*

Offshore Firewalls-Cayman Islands

IN THE MATTER OF THE STINGRAY TRUST, Grand Court of Cayman, 21 December 2020

- Statutory Governing law clause vs Exclusive Jurisdiction clause
 - S90 does not confer exclusive jurisdiction on the Cayman Court to determine all issues which are required to be under Cayman Islands law
- Forum for administration clause vs Exclusive Jurisdiction clause
 - Wording; nature or legal character of the dispute; beneficiary or stranger to the trust
- Even if exclusive jurisdiction clause that captures the claim
 - Discretion whether to enforce
 - Italy more convenient and appropriate forum

Upcoming releases

Before the Privy Council

ITG Ltd and Others v Fort Trustees and Anor (Guernsey)

Should the assets of an insolvent trust be distributed: on a pari passu basis between current and former trustees or between former and current trustees on the basis that their rights rank according to time?

Equity Trust (Jersey) Ltd v Halabi (in his capacity as Executor of the Estate of the Late Madam Intisar Nouri) (Jersey)

Whether the claim of a former trustee of a Jersey law trust takes priority over the claims of successor trustees on a first in time basis and trust creditors and what is the status of a trustee's right of indemnity and associated equitable lien in relation to a trust governed by Jersey law?

You be the judge

POLL:

What do you think the Privy Council will decide?

- First in time; or
- Pari passu?

 Speaker



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