

Jersey & Guernsey Law Review – October 2011**A GUERNSEY LOOK AT *SPREAD TRUSTEE* IN
THE PRIVY COUNCIL¹****St John A Robilliard**

The Privy Council's decision underlines Guernsey trust law's dependence on English law. At the same time its treatment of the concept of acting en bon père de famille might have been more definitive had a fuller exploration of the use of that term in the customary law been made.

Background

1 The road to the Privy Council decision began in 2001² when Alan Stuart Hutcheson, the uncle of the present applicant, commenced first an action against Spread for the production of information about a trust and its underlying company and then a substantive action for breach of trust on the ground that investment in the shares of a particular company had led to considerable loss. This action for information went to the Guernsey Court of Appeal.³

2 That Court had to consider what the Guernsey law on beneficiaries' rights to trust information was prior to the coming into force of the Trusts (Guernsey) Law 1989 ("the 1989 Trust Law"). In order to determine the question, examples of the use of trusts in Guernsey in the 19th and early 20th centuries were placed before the court, which commented—

“Trusts do not form part of Norman Law from which Guernsey customary law is, in part, derived. The trust is, in origin, an English Law concept, developed by English judges and subsequently by the courts of those countries whose law is, or is derived from, English Law. But, well prior to 1989, the concept

¹ *Spread Trustee Co Ltd v Hutcheson* [2011] UKPC 13, 15 June 2011.

² *Stuart-Hutcheson v Spread Trustee Co Ltd. Re the Peter Acatos No. Settlement* (2001) 3 ITEL 683 (Guernsey Royal Court).

³ *Hutcheson v Spread Trustee Co Ltd* (2002) 5 ITEL 140 (Guernsey Court of Appeal), at paras 19 and 20.

of a trust and the concomitant duties of a trustee and rights of a beneficiary had been recognised in Guernsey ...

That, prior to the 1989 Law, trusts had become part of Guernsey Law is not in dispute; what is in issue is the extent to which the general law of trusts in England had become part of the law of Guernsey. To that question the answer is, in my judgment, to be found by a consideration of the process by which trusts came to be part of Guernsey Law. They did so because settlors established trusts, whether *inter vivos* or by will, the validity of which was recognised and when necessary, enforced, by the Royal Court. In addition, the Legislature in a number of Laws recognised and enforced the notion of trusteeship. In thus importing, as it were, the English concept of a trust and trustees, those concerned must be regarded as having intended to introduce the trust concept with its usual incidents, unless they were inconsistent with some provision of some Guernsey customary or statute law or otherwise inapposite or inapplicable”.

The case

3 Sarah Hutcheson, the niece of the applicant in the first action, brought her own action on behalf of her family and herself on not dissimilar grounds to that of her uncle, namely that the holding of shares in a particular company had led to losses to the trust fund and also that the current trustee had failed to take action against a previous trustee.

4 The relevant trusts were created in the 1970s, many years before the 1989 Trust Law came into force on 22 April 1989. They each contained the following exoneration clause—

“In the execution of the trusts and powers hereof no trustee shall be liable for any loss to the Trust Fund arising in consequence of the failure, depreciation or loss of any investments made in good faith or by reason of any mistake or omission made in good faith or any other matter or thing except wilful and individual fraud and wrongdoing on the part of the trustee who is sought to be made liable”.

5 Section 34(7) of the 1989 Trust Law as originally enacted stated—

“Nothing in the terms of a trust shall relieve a trustee of liability for a breach of trust arising from his own fraud or wilful misconduct”.

By virtue of an amendment made by the Trusts (Guernsey) Amendment Law 1990 (“the 1990 Trust Law”) which came into force

on 19 February 1991, the words “or gross negligence” were added to wilful and individual fraud and wrongdoing.

6 This history gave rise to these questions—

- (1) Prior to the 1989 Trust Law coming into force was it possible for a trust instrument to exclude liability for acts of gross negligence?
- (2) In the period between the coming into force of the 1989 Trust Law and the coming into force of the 1990 Trust Law was it possible to exclude liability for acts of gross negligence?
- (3) Was the prohibition on excluding liability for acts of gross negligence in the 1990 Trust Law retrospective?⁴

7 At first instance, Sir de Vic Carey, Lieut Bailiff, noted⁵ that at the time of the creation of the trusts in 1977, trusts were frequently being created but in view of the requirement to act *en bon père de famille*⁶ it was not possible for a trustee to rely on an exculpation clause covering acts of gross negligence carried out prior to the coming into force of the 1990 Trust Law.

8 In the Guernsey Court of Appeal⁷ the appellant trustee argued⁸ that the pronouncement in *Stuart Hutcheson* that English law “had filled the gaps of Guernsey trust law” and that, therefore, Guernsey law prior to the enactment of the legislation on such clauses was English law meant acts of gross negligence could be excluded.

9 However, the Court of Appeal disagreed referring to the Guernsey Royal Court decision of *Lloyd v Lloyd*⁹ in 1956 when Sir Ambrose Sherwill, Bailiff had directed the Jurats *not* to impose a trust on the particular facts of the case and remarked—

“You have heard today from Mr Ogier that the right arises out of the equitable jurisdiction of the Courts in England. Now we have been forced, to a certain extent, to accept some sort of equivalent jurisdiction in regard to trusts. We have no law on the subject (except that we have to act ‘*en bon père de famille*’) ...”

⁴ Footnote 1, paras 19–20.

⁵ *Hutcheson v Spread Trustee Co Ltd* 2009–10 GLR 197.

⁶ First referred to by Sir Ambrose Sherwill, Bailiff in summing up to the Jurats in *Lloyd v Lloyd*, Guernsey Royal Ct, 20 October 1956.

⁷ *Spread Trustee Co Ltd v Hutcheson* 2009–10 GLR 403.

⁸ Footnote (7) at para 14.

⁹ Royal Court, 20 October 1956.

10 The Court of Appeal¹⁰ noted that acting *en bon père de famille* was a standard derived from French law also occurring in the context of *tutelle* and *curatelle* and because of this an exoneration clause covering gross negligence was inconsistent with the pre-1989 position.¹¹ The Court of Appeal¹² also decided that the 1989 Trust Law was not intended to effect a radical change in the law and the subsequent addition of the words “or gross negligence” by the 1990 Trust Law was declaratory of the existing position rather than a change. Accordingly, in reply to the various questions, a trustee could not exclude its liability for acts of gross negligence before the 1990 Trust Law came into force.

Exclusion for acts of ‘mere’ negligence: *En bon père de famille* in Guernsey law

11 A common ground between the parties was that it was possible to limit some liability that the standard gave rise to but the question was how much of that standard could be excluded?

12 In fact, a general examination of the use of the standard in Guernsey law shows this is not the case. In a *saisie*, where the arresting creditor takes the real property of the debtor pursuant to an interim vesting order, at which point the debtor loses his interest in it, the arresting creditor takes the property as a trustee for all of the claimants¹³ and is required to act *en bon père de famille*¹⁴ and there is no possibility of excluding that liability as it is imposed by law. The same standard and reason as to why it cannot be limited applies to the other principal area from land law, where one owes duties to another; namely the duty of the usufruct to *jouir en bon père de famille*.¹⁵ The customary law duty of a tutor or curator is to act *toujours en bon père de famille*.¹⁶

13 Under customary law a father had a usufruct over the property of his minor children in return for providing them with their maintenance; he was obliged to “*garder et entretenir leurs héritages en estat*

¹⁰ Footnote 7 at para 39.

¹¹ Footnote 7 at para 43.

¹² Footnote 7 at para 44.

¹³ Saisie Procedure (Simplification) (Bailiwick) Order 1952, cl 2(3).

¹⁴ Jeremie, “*Traité sur la Saisie Mobilière*” (1815) p 33.

¹⁵ *Rapport sur le Droit coutumier a l’égard de l’usufruit établi sur les Immeubles, III Recueil D’ordonnances de la Cour Royale de L’Isle de Guernesey* (1854) p 308, cl 24.

¹⁶ *Count Lothair Blucher von Wahlcatt, Plaid de Meubles* Vol XVIII pp 421–422.

convenable, à peine d'estre privé du bénéfice et office d'administrateur si il en abuse ou le néglige". Thus the starting point for the standard is that of the actual father.¹⁷ In *Lloyd v Lloyd* the type of trust that was being advanced was a constructive one as opposed to an express one. It follows that in all cases where the duty to act *en bon père de famille* is imposed by law there is no limitation of the liability.

14 In a 1982 Guernsey Royal Court decision¹⁸ recognising a constructive trust, Sir Charles Frossard, Bailiff referred to Pothier's *Traité des Substitutions* as an example of the French pre-revolutionary law recognising the *fideicommissum*—a concept that Guernsey lawyers had regarded as a trust in the 19th century.¹⁹ Pothier's work deals with the use of *fideicommissum* in a substitution; that is where property is given to X on condition that where a condition is met he gives it or devises it to Y who becomes owner at that point. Pothier makes it clear that if property subject to the *fideicommissum* is destroyed without the fault or neglect of A²⁰ then it is at an end with the implication that if A has been at fault or neglectful and that has led to damage to or the loss of the property subject to the *fideicommissum* B could bring an action against him.

15 Against this background, it was common ground in the courts below that it was possible for there to be a clause excusing trustee liability for "mere" negligence.²¹ Certainly a review of the normal usage of the duty of acting *en bon père de famille* does not show that any form of exclusion was permitted. Contrary to that, it may be argued that a trust is created by a consensual act and while it is logical to see it as an imposed standard as in the case of a constructive trust that fits in with the normal employment of the standard as one imposed by law and not chosen or modified by the parties. Where there is a consensual act the position is of course different. In the Guernsey law of contract for example, there is no reason why parties should not

¹⁷ Le Marchant *Remarques et Animadversions, sur L'Approbation des lois et Coustumier de Normandie usitées es jurisdiction de Guerneze* (1826) Tome 1 pp 40–42.

¹⁸ *CK Consultants (Plastic) Ltd v Vines* Guernsey Royal Ct, 10 February 1982. Equating constructive trusts with express trusts has given rise to various problems with language. See *Paragon Finance Plc v Thacker* [1991] 1 All ER 400 followed in *Bagus Invs Ltd v Kastening* 2010 JLR 355.

¹⁹ See art 29 of the *Loi sur les Successions* (1840); Jeremie: "An Essay on the Laws of Real Property in Guernsey" (1841) Appendix D p 55; *Loi sur les Successions en l'île d'Auregny* (1841) s 26.

²⁰ Pothier *Traité des Substitutions* Dupin ed (1827) Tome 7, p 460.

²¹ Lord Hope, footnote 1 at paras 10, 12 and 22.

agree to exclude liability for negligence, including gross negligence. There is some indication in Guernsey that local lawyers did some decades ago regard trusts as arising as a matter of contract.²² Contrary to the idea that you can reduce the standard by agreement are the extracts dealing with usufructs and *fideicommissa* which may be created by an agreement and on which there was no evidence that there could be such an exclusion.

The majority decision

16 The majority of the Board held²³ that as s 34(7) of the 1989 Trust Law, as originally enacted, prohibited exclusions for fraud or wilful misconduct, the implication was that it was possible to exclude liability for all forms of negligence. They also disagreed with the idea that “fraud or wilful misconduct” encompassed gross negligence. The enactment of the section was important as it indicated what the pre-enactment law was believed to be.²⁴ When the section was amended by the 1990 Trust Law to extend to “gross negligence” this was not a minor change but rather to bring various parts of the Guernsey law into line with recent amendments to the then Jersey law.²⁵ Another factor in deciding that there was no prohibition on excluding liability for gross negligence was the wording of the exclusion clauses themselves.²⁶ In fact, further examples of how trusts were drafted at the time were not put before the courts,²⁷ but in the author’s experience such clauses were commonplace at the time that the relevant trusts were created. Equally common were clauses dealing with the duration of trusts which inevitably assumed that the English Law on perpetuities was applicable in spite of a Guernsey Royal Court decision that it was not part of Guernsey law.²⁸ How well the average draftsman of Guernsey law trusts at the time was aware of either this decision or *Lloyd v Lloyd* given that Guernsey Court cases were not reported is a moot point.

²² Thus see the *H Sossen 1969 Settlement* Guernsey Royal Ct., 28 May 2004. A trust was created on 18 September 1969 and provided that only the original trustee could be paid for its services but not any successor to it. This may have been a mistake or may have reflected a view that there had to be a contractual right to charge. The author has come across several trusts from around that period drafted in this way.

²³ Footnote 1 at para 23.

²⁴ Footnote 1 at paras 25–27.

²⁵ Footnote 1 at paras 29–33.

²⁶ Footnote 1 at para 36.

²⁷ In contrast to the examples of the early use of trusts put before the Guernsey Court of Appeal in *Hutcheson v Spread Trustee Co Ltd* footnote 3.

²⁸ *Re Tardiff (Deceased)* Guernsey Royal Ct, 9 May 1953.

Thus an examination of contemporary documents, whilst important, is not necessarily decisive.

17 One remarkable feature of the case in the Court of Appeal was the reliance on the Scots law of trusts in aid of a rule, that a trustee exoneration clause could not cover acts of gross negligence.²⁹ Whether or not that is or was the position is not really to the point, as it could be said that that system of law was invoked to justify the result it pointed to, rather than a consideration of the historic development of the concept of *en bon père de famille*. That might give some justification to the view that no exclusion was justifiable, or alternatively that the English law had been received as had been the case of much criminal law³⁰ and civil law. The earlier Court of Appeal decision in *Stuart Hutcheson*³¹ had recognised that English law in general terms had been imported into Guernsey trust law, thus³²—

“The Board entirely accepts that English law would not be imported wholesale and that it would have to yield to a provision of Guernsey customary or statute law. However, the problem here is that there is no specific Guernsey customary law which has focused on the extent of permissible exclusions, so that the general principle identified in *Stuart Hutcheson* would be likely to have been applied. In addition, there is no evidence that Guernsey at any stage looked at the law of Scotland. In these circumstances it appears to the Board to be more likely than not that it would have looked to the law of England. The question that arises is what it discovered, or would have discovered.”

The reply, based on the reasoning in *Armitage v Nurse*,³³ was “yes”,³⁴ a view further reinforced by the finding of the Jersey Court of Appeal in *Midland Bank Trustee (Jersey) Ltd v Federated Pension Servs Ltd*.³⁵

18 The other contention made by the respondent beneficiaries was that s 34(7) of the 1989 Trust Law as originally enacted had retrospective effect. The Board did not agree³⁶ and whilst the wording

²⁹ Footnote 1 at para 38.

³⁰ Gahan: “Criminal Law in Guernsey” [1963] *Solicitors Quarterly* pp 148–160.

³¹ Footnote 3.

³² Footnote 1 at para 45.

³³ [1998] Ch 241, pp 253E–254E.

³⁴ At paras 46 and 57.

³⁵ 1995 JLR 352, 378–379 and 381 at para 58.

³⁶ Footnote 1 at paras 68–69.

of s 34(7) affects the wording of all exculpation clauses whenever drafted so that from the time the section was in force, the clauses in their original forms could not be relied upon by the trustee, this was not true of acts committed before it was in force.

19 Section 34(7) of the 1989 Trust Law, as amended, was repealed by s 39(7)(a) of the Trusts (Guernsey) Law 2007 (“the 2007 Trust Law”) and the current statutory wording did not produce a retrospective effect for acts committed prior to the coming into force of this new Law.³⁷

20 In his concurring judgment, Lord Manse reminded the Board of the words of Lord Wilberforce in *Vaudin v Hamon*³⁸—

“If an argument based on analogy is to have any force, it must first be shown that the system of law to which an appeal is made in general, and moreover the particular relevant portion of it, is similar to that which is being considered, and then that the former has been interpreted in a manner which would call for a similar interpretation in the latter.”

21 He then went into an examination of the Scots cases in order to ascertain whether the exclusion of acts of gross negligence came about as a matter of interpretation of the relevant clauses of the trust deed, or as a rule of law and then turned to the English authorities. Whilst he was not inclined to the view that the Scots law had an inflexible rule for precluding trustees from exempting themselves from liability for acts of “gross negligence” or “*culpa lata*”³⁹ he did not have to decide the point as⁴⁰—

“There is no reason to treat Guernsey law as following the Scottish view on this point, if it differs, in preference to the view taken under English law with which the Guernsey law of trusts is more closely associated, as well as in preference to that taken in the Jersey Court of Appeal in the *Midland Bank* case.”

22 Sir Robin Auld was also in the majority. He made the point⁴¹ that the difference between “negligence” and “gross negligence” was a matter of degree only and the fact that it is “gross” does not equate it to fraud or wilful misconduct. The standard of acting *en bon père de*

³⁷ Footnote 1 at paras 78–79.

³⁸ [1974] AC 569, pp 581–582.

³⁹ Footnote 1 at para 108.

⁴⁰ Footnote 1 at para 109.

⁴¹ Footnote 1 at para 117.

famille was not defined in Guernsey law.⁴² It was not higher than a duty to⁴³—

“act with reasonable care and skill in all the circumstances to protect and advance the beneficiary’s interests in the matters entrusted in his care.”

If liability could not be excluded it included all negligent acts, not just those that were grossly negligent.⁴⁴ Finally, what was required⁴⁵ to be considered was what—

“a pre-1991 Guernsey court should have decided as a matter of Guernsey law as a logical and otherwise legally correct process of reasoning ...”

The dissenting views

23 The first of the two dissenting judgments was from Lady Hale. Her reasoning was that one could not with certainty say what the English law on the subject was in 1988,⁴⁶ especially as Scots law would appear to forbid clauses that covered gross negligence. In addition, the standard of acting *en bon père de famille* was inconsistent with being excused liability for acts of gross negligence.⁴⁷

24 The other dissenting judgment came from Lord Kerr who again considered that the English law in 1989 on the subject was not clear,⁴⁸ although there was sufficient to say that English law would probably have allowed exoneration from a trustee’s acts of gross negligence.⁴⁹ However, the English law was controversial and there was no reason why it should be adopted⁵⁰ in Guernsey especially—

“because the principle that a trustee was required to act as a bon père de famille was so deeply imbedded in Guernsey customary law”.

⁴² Footnote 1 at para 122.

⁴³ Footnote 1 at para 123.

⁴⁴ Footnote 1 at para 124.

⁴⁵ Footnote 1 at para 127.

⁴⁶ Footnote 1 at paras 130–137.

⁴⁷ Footnote 1 at para 139.

⁴⁸ Footnote 1 at paras 151–162.

⁴⁹ Footnote 1 at para 163.

⁵⁰ Footnote at para 168. It may be noted that in the context of occupier’s liability the Guernsey Court of Appeal has ruled that outdated English common law should not be followed in Guernsey: *Morton v Paint* (1996) 21 GLJ 61.

As to the public policy arguments on the subject these were clearer in Scotland than England in 1988.⁵¹ Ultimately the determinate issue was the duty to act *en bon père de famille*⁵² which was incompatible with the exclusion of acts of gross negligence.

Some conclusions

25 The actual result in *Spread* given that the matter has been covered by statute since the 1990 Trust Law is of interest to the parties alone. However, it has considerable ramifications for trust law in Guernsey—

(a) In applying the *en bon père de famille* standard, at least as far as trusteeship goes, the English prudent man test will apply. In other contexts it would appear that it is a standard of acting without fault but of not being liable for acts outside the individual's control, a definition that can be deduced from the customary law authorities.

(b) The case will be of particular importance in construing a number of sections of the 2007 Trusts Law. Perhaps the most important of these is s 15(2)(b) which states in effect that the grant of a power in connection with the trust to a non-trustee does not “subject to the terms of the trust, impose any fiduciary duty on the holder”. To put it another way, under the 2007 Trust Law there is a presumption that the grant of powers to a protector is non-fiduciary, which of course reverses the usual English law presumption that such powers are likely to be fiduciary.⁵³ In the light of the views on retrospective legislation, this should not apply to such clauses that were drafted prior to when the 2007 Trust Law came into force on 17 March 2008. There are many trusts where this is likely to be a live issue as it is a reversal of such a fundamental principle of “ordinary” trust law.

(c) Legal principles that are generally applicable to trusts in England are now far more likely to apply in Guernsey. For example, on the issue of setting aside trusts on the ground of mistake Guernsey has only one decision⁵⁴ where the court applied English law as the proper law was Guernsey law. The court left open the question of whether English law would necessarily apply if the proper law of the trust had been Guernsey law, with the Deputy Bailiff remarking—

⁵¹ Footnote 1 at paras 167–174.

⁵² Footnote 1 at paras 177–179.

⁵³ *Vestey's (Lord) Executors v Inland Revenue Commrs* [1949] 1 All ER 1108

⁵⁴ *Arun Estate Agencies Ltd v Kleinwort Benson (Guernsey) Trustees Ltd* 2009–10 GLR 437.

“Any analysis of Guernsey law will, no doubt, start with a consideration of the Norman customary law, as applied in Guernsey, with regard to Donations and may or may not reach a conclusion that is similar to English law.”

Jersey has of course, moved further down the path declining both to have recourse to general customary law principles⁵⁵ and the English Court of Appeal’s decision to restrict the principle in *Pitt v Holt*.⁵⁶ Obviously the Channel Island courts are free to do so where a rule of law is not “established” which perhaps takes us back full circle to *Spread*, illustrating that whilst the rule is now binding on Guernsey, albeit of academic interest given the statutory prohibition on excluding liability for gross negligence since 1991, it has not yet been determined in English law, being based on a Court of Appeal decision which itself could in theory be overturned by the Supreme Court. The case is likely to be considered in many jurisdictions as the near definitive authority on what trustee liability may, without statutory intervention, be excluded, especially those that still retain the Privy Council as their final court of appeal.

St John A Robilliard is a Guernsey Advocate and was Counsel for the applicant in the earlier proceedings, see footnotes 2 and 3.

⁵⁵ *JP v Atlas* [2008] JRC 154.

⁵⁶ [2011] EWCA Civ 197, now on appeal to the United Kingdom Supreme Court; *In re the Representation of R* [2011] JRC 117.