

Jersey & Guernsey Law Review – February 2013**Conference Proceedings****INSIGHTS INTO TRUST LAW: THE CHANNEL ISLANDS AND BEYOND****Scott Atkins****Overview**

1 This Institute of Law conference in October 2012 provided an excellent opportunity to reflect upon the rapid development of trusts law in the Channel Islands. The remarkable success of the Trusts (Jersey) Law 1984 (“the 1984 Law”) is evidenced by its export and use in numbers of other jurisdictions. It was adopted shortly after 1984 by Guernsey and both Islands have kept their Laws under almost constant review to ensure that they keep pace with market requirements.

2 Professor Andrew Le Sueur, Director of Studies at the Institute of Law, opened the Conference by providing a brief history of the development of the Institute and thanking speakers and delegates for attending.

A judicial perspective on the Trusts Law

3 The provision of information by trustees was the focus of the paper presented by Sir Michael Birt, the Bailiff of Jersey. He explained that there were three areas to consider: (i) a trustee supplying information to a beneficiary; (ii) an outgoing trustee supplying information to an incoming trustee; and (iii) the provision of information from a trustee to a third party.

4 It was arguably the third area that had generated the most recent case-law and which showed a distinction between the development of the law in Jersey and Guernsey. By definition, the question of whether a trustee should give information to a third party involved consideration of whether the trustee owes a general duty of confidentiality to the beneficiary. In *In re Internine Trust*¹ the Jersey

¹ *In re Internine Trust* 2006 JLR 195.

Court of Appeal had said that it was inclined to the view that there was no presumption that all trust documents were confidential.

5 The Bailiff noted that in July 2012 the Guernsey Court of Appeal had held (in *B v T*²) that there is a general duty of confidentiality between the trustee and the trust. This was an interesting development, particularly given that the Jersey Bailiff was a member of the court in that case! Exceptions to this general duty could exist but would depend on the context of the case. The trustee could disclose documentation to the extent it was reasonably necessary to protect a trustee's interests. The court would examine the trustee's and beneficiary's competing interests.

6 The Bailiff also addressed the question of confidentiality in relation to art 51 hearings, which were normally held in private, and the recent tendency of the Family Division of the High Court in England to require sight of documentation. In *Re M Trust*,³ the Royal Court hoped that, whilst it recognized that the English High Court needed full access to information, the High Court would similarly recognize the usefulness of art 51 hearings in Jersey.

7 The Bailiff closed his address by thanking the Channel Islands' and English Bars and solicitors for their professionalism as the courts' judgments could only ever be as good as the arguments put before them.

Amendments to the Trusts (Jersey) Law 1984

8 James Mews, Director of Financial Services in the Economic Development Department, explained that the latest amendment to the 1984 Law (Amendment No 5) had been passed by the Privy Council and would shortly be registered in the Royal Court.⁴

9 He explained that Amendment No 5 dealt with three major issues: (i) the clarification of the proper law to be applied to Jersey trusts; (ii) that holding assets may be a valid purpose for a trust; and (iii) that in the absence of specific terms in a trust, professional trustees are entitled to a reasonable remuneration.

10 Mr Mews explained that work has already commenced on Amendment No 6. Two issues for this Amendment were discussed: (i) the introduction of arbitration and mediation provisions in trusts; and

² *B v T* Guernsey C.A., 31 July 2012.

³ *Re M Trust* [2012]JRC127.

⁴ The Trusts (Amendment No 5) (Jersey) Law 2012 was in fact registered on 26 October 2012 and came into force on 2 November.

(ii) varying trusts. The main focus of this discussion was on the former provision.

11 Arbitration hearings are currently permitted under the Arbitration (Jersey) Law 1998 but all parties must agree to such a hearing. This can prove impossible in a trust dispute where there are more than a few beneficiaries and/or those beneficiaries are minors.

12 If arbitration/mediation is the way forward, consideration needs to be given to the powers of the arbitrator/mediator. For instance, should administrative matters be dealt with just by the courts, as occurs in Malta? Or should the arbitrator/mediator have extensive powers?

13 A slightly shorter discussion concerned the variation of trusts. At present, the court may consent to a variation on behalf of certain individuals (*e.g.* minors) if it is for the management or administration of a trust. The main issue is whether the ability to vary a trust should be extended—perhaps to substantive variations to the beneficial interest, even if the beneficiaries refuse consent. The Supreme Court of Bermuda has recently confirmed that this latter, wider position is available in its jurisdiction (*GHIJ v KL*⁵). Such a flexible position may benefit Jersey's trusts industry.

14 Mr Mews stressed that the States of Jersey is interested in hearing all views on these matters.

Non-identical twins? The trusts laws of Jersey and Guernsey compared

15 The similarities and differences between the trusts models of the two largest Channel Islands was the subject for Professor Paul Matthews, Visiting Professor at King's College, London.

16 He outlined the history of the development of the trust in the Channel Islands. The great strength of the Jersey law was the introduction of the 1984 statute. Such an initiative gave lawyers of other jurisdictions confidence that the trust not only existed but was well regulated. This statute was not a piecemeal reform of existing trusts law, as had occurred over time in England, but was almost a codification of Jersey trusts law dealing, as it did, with substantive as well as administrative trusts law.

17 Professor Matthews explained how Jersey was keen not to be left behind in trusts law. Amendments followed apace to the original 1984 Law. The amendments since the original Law have improved the

⁵ *GHIJ v KL* [2011] SC (Bda) 23 (2 December 2010).

Jersey model by, for instance, permitting non-charitable purpose trusts and extending *cy-près* to non-charitable trusts.

18 In Professor Matthews' view, recent developments to the Guernsey model have overshadowed Jersey. Guernsey has created a number of unique selling points: for instance, their disclosure provisions are now more cohesive and positive; the forced heirship and divorce provisions are better; and there is clear provision for trusts of immovable property. This has been achieved by having powers to amend primary legislation without the need to resort to the Privy Council.

19 There are wider issues than simply comparing trusts law of the two Islands. Professor Matthews spoke of the issue of the potential Federation of the Channel Islands and the extent to which that would affect the different trusts regimes. He questioned whether one trusts law may bring benefits or whether perhaps the other Islands have the desire to develop their own trusts law.

20 Overall, Professor Matthews felt that both Jersey and Guernsey trusts regimes were in a rude state of health.

The view from England

21 Robert Ham, QC stressed that he was keen to present 'a' view from England as opposed to 'the' definitive view concerning the Channel Islands' trusts regimes.

22 Mr Ham explained that in the 1968 decision of the Court of Appeal in *Re Weston's Settlements*⁶ the Court of Appeal was reluctant to permit the variation of an English trust to be subject to Jersey's jurisdiction. The Court of Appeal had noted that trusts' law in the Island had not been developed. Since that decision, matters had moved on considerably. There had been such an extent of trusts' litigation that Jersey's courts were now more experienced in dealing with it than their English counterparts. All of the Jersey decisions are now readily accessible thanks to the Internet and freely cited in English courts.

23 Mr Ham thought that a number of parts of Jersey trusts law were worthy of praise: for example, art 32 of the Trusts (Jersey) Law 1984 and the more robust way that the Jersey courts have dealt with trustee exemption clauses than has occurred in England where such clauses are managed by professional practice rules as opposed to the courts.

24 The relationship between art 9 of the 1984 Law and the Family Division of the High Court in England has caused some interest lately.

⁶ *Re Weston's Settlements* [1969] 1 Ch 223.

There remains a danger that Family Division judges may be pre-disposed to consider off-shore trusts as shams.

25 Finally, Mr Ham commented on the different conclusions reached in England and Jersey on two cases concerning the issue of mistake: respectively, *Pitt v Holt*⁷ and *Re the S Trust*.⁸ Mr Ham thought that the approach of the Jersey court was to be welcomed as it was more straightforward to settlors.

A Swiss view of Channel Island trusts

26 Professor Luc Thévenoz from the University of Geneva gave a presentation concerning how Jersey trusts were being used in Switzerland. He explained that Swiss law will not permit a trust to be created but will instead recognize a foreign trust under the Hague Convention on the Law Applicable to Trusts and on their Recognition.⁹

27 The Jersey trust has been generally well received in Switzerland. The 1984 Law is a 'readable' statute for lawyers versed in the civilian system. The lack of explicit recourse to equitable principles supported the ease of recognition of the Jersey trust. The Swiss courts have shown a good understanding of the trusts laws of both Channel Islands albeit there have been far fewer cases than in the Islands' courts.

28 Specifically, Professor Thévenoz believed that Switzerland was attracted to the proposal to introduce arbitration provisions into trusts. The ability to resolve disputes by arbitration would help satisfy people's concerns that an expert would decide the case as opposed to the alternatives of submitting to a non-expert Swiss judge or travelling to the Islands for the case to be resolved in court.

29 Professor Thévenoz highlighted some areas of concern about Jersey trusts. These included settlor-reserved powers, trusts with no perpetuity period and non-charitable purpose trusts. These concerns increased the risk that Swiss courts would be inclined to pierce the veil of the trust or declare it to be a sham.

An Italian construction of the Trusts (Jersey) Law

30 Professor Paolo Panico, Private Trustees SA, Luxembourg gave an Italian perspective on the Jersey law of trusts.

⁷ *Pitt v Holt* [2011] 3 WLR 19.

⁸ *Re S Trust* [2011]JRC117.

⁹ Hague Convention on the Law Applicable to Trusts and on their Recognition, 1 July 1985.

31 No Italian law of trusts exists as such but Italy does permit its nationals to settle property on trust governed by a foreign law. The jurisdiction of Jersey has been the most successful of foreign jurisdictions, probably due to its trusts' model and the volume of case-law. Italy had, however, developed its own wealth of case-law on Jersey trusts, with around 100 judgments in existence including those from the Supreme Court.

32 Professor Panico then explained some of the most significant cases to come before the Italian courts concerning the Jersey law. The cases had developed from fundamental questions involving recognizing a Jersey trust in the mid-1990s to much more sophisticated jurisprudence concerning specific articles of the Jersey law in recent years.

33 The conclusion was that there was now an established practice of Italian domestic trusts. The Jersey trust model fitted well with Italian taxation provisions and the Italian judiciary were perhaps more sympathetic to Jersey trusts than their Swiss counterparts.

Le best of onshore and offshore trusts

34 The 'best' parts of trusts law were discussed by Michael McAuley, of Counsel, Carey Olsen, Guernsey. He emphasized that the traditional trust can be seen as a 'deal', where the centre of gravity lies between the settlor and the trustee.

35 Mr McAuley showed that both academics and other jurisdictions had been nervous of a trust being impliedly too biased in favour of the original settlor such as by, for example, reserving the settlor powers. He felt this settlor bias should be dealt with openly and categorically. A way forward could lie in removing settlor-reserved powers from trusts law and placing them into discrete legislation, so enabling the trust to be more beneficially centred and move the centre of gravity towards the beneficiaries. The way he recommended, however, was to follow the Cayman Islands' STAR trusts and draft a special series of provisions and then blending them with the general law of trusts. Some American states had gone further by introducing revocable trusts—which did not shy away from emphasizing the control the settlor could have over the trust whilst still alive.

The word from the Isle of Man

36 John Rimmer, from Appleby in the Isle of Man, gave a presentation on the latest decisions from the Isle of Man, an exclusively common law jurisdiction. He pointed out that the Isle of Man was a far smaller trusts jurisdiction than Jersey with correspondingly less case-law.

37 Looking into future developments in the Isle of Man, Mr Rimmer explained that the Island was keen to escape English public policy

rules in its development of the law of trusts. In a sense, this would involve the Isle of Man catching up with Jersey by, for example, abolishing the need for two trustees and the requirement for a perpetuity period (already existing in the 1984 Law). There may be some desire in the Isle of Man to take part in the creation of a Supreme Court of the Crown Dependencies, which would hear final appeals in place of the Privy Council. This would avoid the possibility of the Privy Council being swayed by British public policy considerations.

Trusts elsewhere in the world

38 Advocate Steven Meiklejohn from Ogier, Jersey, considered the Cayman Islands' asset protection trust and, in particular, the recent decision in *TMSF v Merrill Lynch Bank & Trust Co. (Cayman) Ltd.*¹⁰

39 He explained that the decision of the Privy Council in that case had equated a wide power of revocation enjoyed by the settlor with ownership of the trust's assets. This meant that the power was delegable to the settlor's receivers who could exercise it in favour of his creditors.

40 Advocate Meiklejohn suggested the decision in the case had wider implications and meant that settlors with such a wide power of revocation should consider surrendering the power or, at least, should be advised that the benefit of the power carried with it the risk identified by the decision in the case.

Conference papers

41 The papers presented by the speakers at the Conference will be available in a publication to be published in 2013.

Conclusion

42 In the High Court decision in *Re Weston's Settlements* in 1968, Stamp, J remarked that—

“there are certain difficulties in connection with the law of Jersey in relation to trusts which leave me in some doubt whether the courts of that island are so well adapted as the courts in this country to administer such trusts as are found in English settlements.”¹¹

¹⁰ *TMSF v Merrill Lynch Bank & Trust Co. (Cayman) Ltd.* [2011] UKPC 17.

¹¹ *Re Weston's Settlements* [1969] 1 Ch 223 at 233. The case was later heard in the Court of Appeal where Harman, LJ made similar remarks.

43 The speakers at the conference all demonstrated that, in a little over 40 years, the sophisticated development of the law of trusts in the Channel Islands has been so marked, and the amount of litigation so voluminous, that it is perhaps no exaggeration to suggest that the Islands' courts are now better equipped than the English courts to adjudicate on trusts matters.

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