

# A Matter of Trusts

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Last year was an extremely important year for the trust industry in Jersey with a number of trust cases coming before the Royal Court and Court of Appeal.

This has resulted in a number of significant judicial decisions which have not only clarified many of the issues facing Jersey trustees, but are of interest to the offshore world generally. As such they have further enhanced Jersey's reputation as the leading offshore centre in the development of trust law.

Space permits brief reference to only a couple of major issues which arose in 2008, namely fraud on the power, and the effect of foreign judgments on Jersey trusts.

## **FRAUD ON THE POWER**

In Re Bird Charitable Trust [2008] JLR 1, the court gave some useful guidance on the concept of 'fraud on the power', in the context of the anti money laundering legislation. In essence, a fraud on the power will occur where a trustee (or in certain circumstances, the court held, a protector)

exercises a power in an apparently valid way, but with the intention of achieving a result which would have been outside its powers.

Thus, in Re Bird the court had to consider whether an appointment of new non Jersey trustees by a new protector amounted to a fraud on the power in circumstances where that appointment had been made to facilitate the removal of trust assets from Jersey so as to avoid the restrictions of the **Proceeds of Crime (Jersey) Law 1999**, (the previous trustees having filed a Suspicious Activity Report).

Perhaps surprisingly, the court concluded that the appointment did not amount to fraud on the power as the ultimate intention to remove control of the trust from the Jersey trustees was found not to be an unlawful intention.

The position would have been different had the trust assets already been determined to be the proceeds of crime rather than the original trustees merely having suspicion that they might be the proceeds of crime.

## COURT ORDERS

2008 also saw the Royal Court defending the integrity of Jersey trusts in the face of foreign court orders, usually English matrimonial decisions, which purported to vary or affect the terms of a Jersey trust (Re IMK Family Trust [2008] JLC 136).

This case, relating to the notorious English matrimonial proceedings in Mubarak v Mubarak, has quite rightly received considerable press comment since the judgment in August last year.

It is sufficient, for the purposes of this article, to note that in recent years a pattern has developed of the Royal Court giving directions to Jersey trustees so as to give effect to English matrimonial judgments which took into account trust assets in determining awards to be made to a spouse, even where that spouse was not a beneficiary under the trust.

In summary the position, following IMK Trust, is now that the Royal Court cannot and will not enforce judgments of English courts which purport to vary or alter a Jersey trust.

Where, however, the purported variation does not amount to an ‘alteration’, in the sense that it does not require the trustees to act outside their powers under the trust, the Royal Court can give directions to Jersey trustees to achieve the objectives of the English court, as the giving of directions does not in a technical sense amount to enforcement.

Where, however, the purported variation ordered by the English court does amount to an ‘alteration’, the Royal Court has no jurisdiction to direct the trustees to act outside their powers.

Those findings and rulings are likely to be of enormous significance in helping to support the integrity of Jersey trusts generally and particularly in the face of foreign matrimonial decisions which purport to look behind the Jersey trust structures in considering the nature of family assets.

## LEGISLATION

From a legislative perspective, 2008 was also a busy year and saw the commencement of a further review into the **Trusts (Jersey) Law 1984** (the “Law”).

In a Consultation Paper issued in July 2008 a number of amendments were proposed to the Law, including the introduction of the long anticipated statutory non-possessory lien and limited third party contract rights which will, over time, help to reduce the need for chain indemnities.

Such indemnities currently make the transfer of trusteeship unnecessarily cumbersome, in a way that can only be viewed as detrimental to the growth of the local trust industry.

The introduction of the concept of a purpose trust into Jersey law proved to be a great success and purpose trusts have subsequently been utilised in a wide variety of structures. With increased demand being seen for the use of private trust companies, however, questions have been raised as to what constitutes a ‘valid’ purpose in this context and, in particular, whether it includes the simple exercise of owning and holding assets such as the shares in a company.

A positive response to this question would bring Jersey law into line with the position under Guernsey law and would secure the future of purpose trusts.

The extent to which a beneficiary is entitled to information relating to a Jersey law trust is once again up for debate.

On this occasion, the focus lies in considering whether the Law currently achieves the right balance between ensuring that trustees are accountable, whilst at the same time allowing settlors a say in the level of information disclosed to young or vulnerable beneficiaries.

It will come as a surprise to many that despite using the term ‘charity’ twice and ‘charitable’ ten

times, the Law offers no guidance as to the meaning of those words.

At a time when an increasing number of high net worth individuals wish to establish structures for philanthropic giving, such an omission could prove costly to the finance industry.

The proposal to introduce a modern definition of charity in line with that adopted under English and Scottish law therefore is likely to generate considerable support.

## **FOUNDATIONS**

As well as seeking to build upon the strength of Jersey's Trusts Law, 2009 is likely to see the introduction of the concept of private foundations into Jersey law. A Jersey law foundation will be a body corporate with its own separate legal personality which is registered with the Registrar of Companies in Jersey.

The foundation will not have shareholders or directors. Instead, once assets are placed into the foundation by the founder, a foundation council will govern the foundation in accordance with the terms of a charter and regulations.

The foundation's charter will be required to contain certain minimal information about the foundation and will be a publically available document whilst the regulations will remain private.

The foundation council will be responsible for fulfilling the aims of the foundation and must include at least one 'qualified' member, who will be regulated under the **Financial Services (Jersey) Law 1998**.

A foundation must also have a guardian, who will oversee the work of the council and to whom the council will be accountable.

The draft Foundations (Jersey) Law has been carefully drafted to ensure both simplicity and flexibility. It allows founders the maximum possible freedom of choice, while at the same time ensuring that the structure is not susceptible to abuse for money laundering or terrorist financing purposes.

A Jersey law foundation has many appealing characteristics which, when combined with Jersey's well established reputation for excellence and expertise in administering companies, trusts and limited partnerships, stands Jersey in good stead to develop into a leading jurisdiction for the incorporation and administration of foundations.

We look forward to the introduction of the Foundations Law later this year.

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