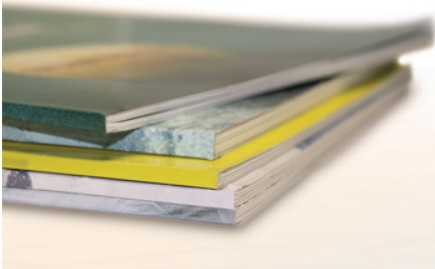


## Trust Law Round-Up

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BY NAOMI RIVE

Last year was an extremely significant year for the trust industry in Jersey with a number of trust cases coming before the courts in Jersey. This has resulted in a number of important judicial decisions which have not only clarified many of the issues facing Jersey trustees but are of interest to the offshore world generally. 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 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**, given that a Suspicious Activity Report had been filed by the previous trustees.

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.

### Enforcement of English Matrimonial Decisions

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 had 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 an award 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 in 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.

These 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.

### **Trust Law Amendments**

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.

### **Purpose Trusts**

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.

### **Charity**

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. As highlighted in previous editions, 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.

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