TRUSTS LAW UPDATE

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PRESENTED BY
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Mistake/Hastings Bass - Re Z Trust (2016)

- Jersey Trust administered by a Jersey Trustee, which held shares in a foreign company (with Jersey resident directors) which held UK property
- Settlor removed the Trustee and appointed UK Trustees. The shares in the company were transferred to the UK Trustees. The directors resigned and (at the new trustees’ request) appointed a UK Director
- Adverse UK Corporation Tax and Income Tax consequences
- Successful application to set aside appointment of UK Trustee:
  - under Article 47G of the Trusts Law- the settlor was mistaken when she exercised the power to appoint UK trustees, the settlor would not have exercised the power ‘but for’ the mistake and the mistake was sufficiently serious for relief to be granted.
  - alternatively, under Article 47H of the Trusts Law - she failed to take into account “relevant” tax matters
- Both the appointment of the UK director and the transfer of the company’s shares were set aside as “related transactions”
The Court relieved the retired (Jersey) trustees and the purported (UK) trustees from personal liability

Could the Court ratify acts carried out by the UK trustees during their purported trusteeship? Possibilities:

- Ratification of administrative actions by the Court
- Confirmation by re-exercise of the power by the trustee
- Confirmation by non-intervention by the trustee

Confirmation by (i) non-intervention and (ii) re-exercise of power preferred in this case

Directed new trustee not to intervene in unauthorised acts of purported trustee

Directed new trustee to confirm distribution purportedly made to beneficiary
Mistake - In the matter of The S Trust and T Trust (2015)

- Extent of relief available under the doctrine of mistake in circumstances where mistake has led to adverse tax consequences
- S and T Trusts settled on the basis of advice from English financial advisor to mitigate UK IHT in respect of English properties
- Advice was flawed and scheme led to significant IHT charges
- Application under Article 47E - mistake in the transfer of property to a trust
- Court granted relief but voiced its discomfort at having to rescue overseas tax payers seeking to avoid tax
Foundations - C Trust Company (2016)

- C Trust Company was sole council member of five Jersey foundations, one charitable and four non-charitable, established on basis of tax advice
- Any family members presently resident in jurisdiction X were excluded from benefit
- Tax advice was flawed - large tax liabilities incurred in jurisdiction X
- Council proposed that definition of excluded persons in the non-charitable foundations be amended so that beneficiaries resident in jurisdiction X would not be excluded and distributions could be made to them
- Provision dealing with excluded persons:
  - “no excluded person shall be capable of being entitled to or of taking any benefit of any kind by virtue or in consequence of this Foundation and in particular ...:-
  - no power or discretion hereby or by any appointment made hereunder or by law conferred upon the council or any member of the council should be capable of being exercised in such manner that any excluded person would become entitled either directly or indirectly to any benefit in any manner or in any circumstances whatsoever”
Did the Council have the power to make this amendment, and would the Court bless its decision to do so under Article 46 of the Foundations (Jersey) Law 2009?

Findings:

- Council did have power to make amendments proposed
- Guardian had the power to sanction/authorise an action to be taken not otherwise permitted by the Charter or Regulations (compare Article 14 of the Foundations Law), which power was not limited by the excluded persons provisions
- Court blessed the proposed actions of the Foundation Council
- Court would have been willing, if necessary, to vary the Regulations under Article 45 of the Foundations Law

- Letter of request from a Missouri Court sought disclosure of Trust documentation for matrimonial proceedings between the non-beneficiary wife and the beneficiary husband.
- A balancing exercise between confidentiality of trust information v judicial comity.
- Trustee argued:
  - Confidentiality is essential to the trust relationship.
  - Wife would not have been able to obtain disclosure by application under Article 51 of the Trusts (Jersey) Law 1984.
  - Referred to previous letter of request case - Re the C Trust (2010) - Court refused to order disclosure of affidavits from proceedings heard in private.
  - Analogy to firewall provisions.
Letter of request – J v K (2016) (cont.)

- Judicial Comity prevailed:
  - Jersey Courts to require disclosure of information which might be relevant to proceedings in a foreign matrimonial Court
  - Even where such information is highly confidential - e.g. letters of wishes and correspondence with beneficiaries
Trusts (Jersey) Law 1984 - Consultation

Some of the key issues being considered:-

- **Beneficiaries’ rights to seek information:**
  - Should there be full exposition in the law of the principles which govern requests for disclosure?
  - Should a settlor be allowed to vest the rights to seek disclosure in a third party to the exclusion of the beneficiaries?

- **Reservation of powers by a Settlor:**
  - Reserved powers held on a personal rather than fiduciary basis?

- **Power of the Court to vary a trust:**
  - Should the Court’s powers be extended?
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