The Evolution of the Trust Law in Guernsey

Proposals for Law Reform

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Where is Guernsey?
An Overview of the Jurisdiction

- Situated in Europe 120km south of the UK and 50km from France
- 62 square kilometres, population 60,000+
- Geographically within Europe but not a member of the European Union (EU)
- Frequent air links to UK and Europe
- English speaking
- A British Crown Dependency
- Currency is British Pound Sterling (GBP)
- Same time zone as the UK
- Highest standards of regulation
Guernsey as a centre for Trusts and Private Wealth

- Mature and well established > 50 years experience as leading fiduciary centre
- 150 licensed trust companies
- 43 personal fiduciary license holders
- 700 STEP members
- 23 regulated banks
- £300 billion assets administered by trustees
History of Trusts in Guernsey

• 20 March 1860 Advocate Peter Jeremie;
  “We have introduced trusts of late; they have come into use, and of course they will require some regulation by and by, but our law does not enter into that.”

• Trusts (Guernsey) Law, 1989
• Trusts (Guernsey) (Amendment) Law, 1990
• Trusts (Guernsey) Law, 2007
• Foundations (Guernsey) Law, 2011
Guernsey Bar Proposals for Reform

- A statutory return to the old Hastings Bass test pre *Pitt v Holt*
- The introduction of a presumption that a protector is a fiduciary
- Expanding the use of ADR
- A statutory presumption that administrative matters will be heard in private
- Abolition of the rule against self-dealing
- The automatic vesting of trust property upon a change of trustees
- The ability of the Royal Court to give consent to variations on behalf of adults
- Simplification of the provisions regarding powers of attorney
Hastings v Bass - The English Position

The Original Approach

“Where trustees act under a discretion given to them by the terms of the trust, in circumstances in which they are free to decide whether or not to exercise that discretion, but the effect of the exercise is different to that which they intended, the court will interfere with their action if it is clear that they would not have acted as they did had they not failed to take into account considerations which they ought to have taken into account, or taken into account considerations which they ought not to have taken into account.” Sieff v Fox [2005] 1 WLR 3811
The English Position

The Revised Approach

**Pitt v Holt, Futter v Futter [2013] UKSC 26:**

- “the trustees’ act ... will be voidable if, and only if, it can be shown to have been done in breach of fiduciary duty on the part of the trustees.”

- “the trustees’ duty to take relevant matters into account is a fiduciary duty…”

- “Fiscal considerations will often be among the relevant matters which ought to be taken into account.”

- “If trustees seek advice from apparently competent advisers...and follow the advice...they are not in breach of their fiduciary duty ...because it turns out that the advice given to them was materially wrong.”
Reactions from other jurisdictions

To follow or not to follow?

• Jersey: not followed: amendment to Trusts (Jersey) Law 1984
• Bermuda: not followed: amendment to the Trustee Act 1975
• Bahamas: not followed: the Trustee (Amendment) Act 2016
• Isle of Man: not yet decided: may not be followed – AB v CD (2016)
• Cayman Islands: not yet decided: under consultation by Law Reform Commission
• BVI: followed: Gany Holdings (PTC) SA v Khan & Ors [2018] UKPC 21
**M v St Anne’s Trustees Limited**

The Court of Appeal decision

1. Proceeds on the “assumption” that Guernsey law is to “like effect” as the revised approach in Pitt v Holt **BUT** does not decide the point

2. Proceeds on the “basis” that the duty of adequate deliberation is a fiduciary duty **BUT** does not decide the point

3. Causal nexus between the breach and the loss is **NOT** a pre-condition

4. Once a breach of duty is found, the Court has jurisdiction under the Rule.
M v St Anne’s Trustees Limited

Breach of duty?

• “We have no hesitation in concluding that the inadequate deliberation by the Trustee in the present case was of sufficient gravity to constitute a breach of fiduciary duty.”
  • duty to consider tax consequences – a material factor
  • purpose of the Scheme to provide UK-tax free pension benefits to M
  • professional, experienced trustee
  • GAPP guidance note 2011
  • No tax advice taken or M’s advice seen – “it completely ignored the tax consequences for the plan’s beneficiary.”
M v St Anne’s Trustees Limited

Exercise of discretion

“It is clear from Pitt v Holt that, once a breach of duty has been found, the decision in question is voidable and it is a matter of discretion as to whether or not the court grants relief by avoiding the transaction resulting from the decision.”

• Test of “unconscionability” is wrong

• No overriding test for exercise of Court’s discretion – will be fact specific.
Proposal – Subject to Consultation

Conditions

Powerholder failed to take into account one or more considerations (whether of fact or of law, or a combination of fact and law) that were relevant to the exercise of the power, or took into account one or more considerations that were irrelevant to the exercise of the power; and

but for this failure

would not have exercised the power or would have exercised it differently or at different time

No need for any breach of duty
Trust Officials (aka Protectors)

Reversing the presumption

• Section 15(2) of the TGL v Section 32(3) of the TGL
• *Re K* (2005)
• Where the power is reserved to the Settlor – presumption will be that the powers are not fiduciary
• Where the power is granted to another – presumption will be that the powers will be fiduciary
• The ability of the Royal Court to give consent to variations on behalf of adults
Expanding the use of ADR

• Currently limited to breach of trust claims and requires a “settlement” that is signed by all parties

• Expand the types of ADR available to cover evaluation, adjudication, expert determination or arbitration

• Expand the nature of disputes covered to include any claims involving a trust to which the trustee is a party
Administrative Proceedings to be in Camera

Enshrining current practice

- Presumption of open justice
- Different nature of administrative proceedings
- Provides clients with greater certainty
- Court will remain able to publish anonymised judgments
- Court will be able to override the presumption if public interests so demand
Abolition of Two Party Rule

For the avoidance of doubt...

- Contracts require two parties to be enforceable
- Recognition that trustees have many hats and may need to contract with themselves for a variety of reasons
- “Notwithstanding any rule of law to the contrary, except where the terms of a trust expressly provide to the contrary, a trustee may in his capacity as trustee of one trust or in his personal capacity enter into a transaction with himself in his capacity as trustee of another trust”
Automatic Vesting of Trust Property

On a Change of Trustee

“...where a new trustee is appointed by written instrument the instrument shall, subject to any express provisions to the contrary therein, affect the vesting of all trust property in the new trustee and the instrument shall operate without the need for any conveyance or assignment to vest the trust property in the new trustee and if more than one jointly for the purposes of the trust.”

- Separate arrangements for Guernsey land
- Not a universal panacea but it will help
Other Proposed Revisions

- Ability of Court to consent on behalf of adults where the Court is satisfied that the giving of consent on behalf of that person is not contrary to any wishes they may have expressed and is not contrary to their best interests.
- Power to extend the duration of pre-2008 trusts
- Abolition of minimum trustee rule
- Abolition of restriction on the duration of PoAs
- Enabling professional trustees to be remunerated where trust is silent
Any Questions?
Thanks for listening