STEP Isle of Man
A Review of Recent Trust & Estate Cases
January 2012
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PREFACE

This Guide has been produced as an aid to those seeking general information with respect to private client services in the Isle of Man. It is recognised that this Guide will not completely answer detailed questions which clients and their advisers may have and has been designed to serve as a starting point for a more detailed and comprehensive discussion of the substantive legal issues involved. Before proceeding with any matter discussed herein, persons are advised to consult their professional advisers.

While we have made every effort to ensure the accuracy of the statements made herein, we accept no liability for any errors. In all cases expert legal advice from a qualified practitioner of Isle of Man law should be obtained.

Appleby (Isle of Man) LLC
Isle of Man
January 2013
1. MANX TRUST LAW UPDATE

1.1 Roger Harper (receiver of Kolemos Limited) v Simpson and others (2011) – CHP 2010/91 Isle of Man High Court – Deemster Doyle

In re Duomatic Limited [1969] 2 Ch 365: where all the shareholders who have a right to attend and vote at a general meeting of a company agree to a decision in a shareholders’ agreement which could be carried into effect at a general meeting of the company, that concurrence is as binding as a resolution at a general meeting. What mattered was that all the members, who ultimately exercised power over the affairs of the company through their right to attend and vote at a general meeting, had agreed on that matter. It was decided that, in the Duomatic case itself, as long as the members had previously reached an agreement, they were unable to purport that they were not bound by a particular matter simply because the formal procedure for approving it was not followed.

Background

There were two registered shareholders of an Isle of Man company, K Limited: TTI and TTI 1985. The shares were held beneficially for the first defendant, S.

Section 113(1) of the Companies Act 1931 provides:

“(1) The directors of a company, notwithstanding anything in its articles, shall, on the requisition of members of the company holding at the date of the deposit of the requisition not less than one-tenth of such of the paid-up capital of the company as at the date of the deposit carries the right of voting at general meetings of the company … forthwith proceed duly to convene an extraordinary general meeting of the company.”

S purported to convene a general meeting at which the second and third defendants (D and B, respectively) were named as new directors of K Limited, but no registered shareholder was present. D and B (purporting to act as directors) signed a power of attorney, appointing S to sell the apartments. Hence S effectively took control of the transaction himself, with the cooperation of D and B.

The Arguments

The “Duomatic Principle”

The receiver of K Limited argued that D’s and B’s actions were ineffective to bind the company since:

- section 102 of the Companies Act 1931 provided that trusts were effectively excluded from the company’s register
- section 103 of the Companies Act 1931 provided that the register of members was evidence of the membership of the company
- article 4 of the company’s articles provided that registration in the register of members was conclusive
- In In re Law Investments Limited [2003-5] MLR 494, it had been held that a beneficial owner (as opposed to registered owner) of shares had no standing to oppose an application for winding up
Jalmoon Pty Limited v Bow [1997] 15 ACCL 233: (a) “The doctrine of unanimous consent did not apply as it did not cover instances in which some or all of the persons who assented were not registered shareholders” and (b) there was “no reason to think that [a payment of money to a third party] could have been for the benefit of the company. The company was insolvent...”. The Australian court in that case also remarked that, in some older cases, beneficial (but not registered) shareholders were able to act as shareholders for some purposes but said that that was not now in accordance with orthodoxy.

S had therefore to rely on his section 142 argument.

The Section 142 Point

S claimed that, even if B and D had not been properly appointed, their acts as purported directors were valid under section 142 of the Companies Act 1931:--

“The acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification.”

Morris v Kanssen [1946] 1 All ER 586, per Lord Simonds:--

“There is, as it appears to me, a vital distinction between (a) an appointment in which there is a defect or, on [sic] other words, a defective appointment, and (b) no appointment at all. ...”

Hence, where no appointment had taken place, the acts could not be the acts of the company.

Conclusion

The Deemster concluded that the company did not appoint S as its agent and did not replace its directors as S had sought to achieve.

1.2 D v D, M and M Limited [2011] DIV 2008/67 (Family) Isle of Man High Court – Deemster Corlett

If a party can show that a trust is “nuptial” in relation to their marriage, it is open to the court to amend it extensively (Matrimonial Proceedings Act 2003 section 29).

The Deemster had ordered that M Limited (the trustee) be joined to the proceedings to determine whether the trusts concerned were or were not nuptial in nature.

The wealth arose through the father (X) of the husband: he had set up a complex trust structure for his children under which the wealth was allocated into various “cells” (of which there were nine).

In this case, cell number 5 was in issue, comprising a number of trusts and companies. One of these - the C Trust - could not be nuptial as it predated the marriage by too far.

Funds had flowed to the husband. A structure chart had been provided to the Deemster but is not shown in the judgment. Broadly they were said to originate in a company owned by the No.5 Settlement. Loans were made to the C Trust (generally at the instigation of a phone call from the husband, leading to a standard chain of events and documentation), which made loans to the 5th PJD Settlement, which, in turn, made loans to the husband. Some £1.6 million or so appeared to have been lent in all.
The Deemster concluded that these were “loans in name only” and did not think that they would ever be recalled (para 21), and were plainly “far from commercial, arm’s length, transactions” and that “The reality was that the First Respondent could do as he liked with the monies that were advanced to him…He always treated the money as his own and had free rein to spend his money how he wished…”.

Some similar loans were made to the claimant.

M Limited (as trustee) also referred to the husband as the “principal beneficiary”.

The applicant said that she had discussed the structure with Patrick Taylor and seen designations of certain amounts of wealth – she said that it was clearly designed to provide that the children never had to work for a living.

Clearly, in the court’s view, they were all (apart perhaps from the loan to the sister) for the husband’s benefit.

The Deemster reviewed the law (para 47 ff). He went through some of the cases over the period during which the power has existed in England.

He concluded on the law (at paras 69 to 74) that:

- “settlement” is given a very wide meaning in this context, covering a variety of structure, entities and transactions
- The entity or structure here comprised the three trusts and A Investments Limited
- He accepted that a non-nuptial settlement could not become a nuptial one, but a new “settlement” was created in 2003 when the C Trust became part of the “cell” – since when that settlement has been “nuptial”
- The “cell” was designed to benefit the selected child of the husband’s father and that child’s family
- He had to look at the real substance of the 5th cell – surprisingly for a local Deemster, he commented that “Mr Barclays’ evidence was to the effect that the trust deeds did not represent the true and complete picture and any Manx advocate or judge is very familiar with the bland and uncommunicative nature of the vast majority of offshore discretionary trusts. It is indeed extremely rare for such a trust to specify who are the true beneficiaries.” This, it is suggested, with respect, is an extraordinary suggestion.

And went on to find that the husband was the principal beneficiary of the 5th cell and that the various funds comprising it were earmarked for his benefit. He concluded that the structure taken as a whole was a nuptial settlement.

1.3 Pomfrett (2012) Court of General Gaol Delivery

P was convicted of the English common law offence of cheating the public revenue. A trust had been established in the Isle of Man, “the Pomfrett Trust”. The Manx court granted a restraint order over P’s assets, including the Pomfrett Trust, subject to withdrawals to meet costs and expenses. The trustee sought to withdraw funds from the trust to meet costs and expenses, with the consent of the Crown Prosecution Service in the UK.
P’s wife, an object of the trust, applied to be heard in the matter. Her application was objected to by the CPS and the trustee. She claimed:-

- to be a person affected by the order and therefore entitled to apply to vary or discharge the restraint order

- an order that the trustee not be allowed to withdraw funds to pay various costs and expenses

The law is dealt with by the Proceeds of Crime (External requests and Orders) Order 2009.

Mrs P sought to rely on In the Matter of Poyiadjis [2001-3] MLR Note 31, Schmidt v Rosewood Trust Limited [2001-3] MLR 511 in claiming to be “affected” by the restraint order. She also submitted that the beneficial objects effectively had no redress owing to the terms of the order (permitting costs and expenses to be paid).

“Person Affected”: the Deemster concluded that the meaning to be given was very wide.

The Deemster said:-

- there was no proof that P was incapable (so Mrs P’s power may not yet have arisen)
- Mrs P was, at best, a person who might in the future be “affected”

He said that the beneficiaries’ rights were not affected by the restraint order (except in having funds paid out) and nor were the existence of remedies against the trustee. While she had alleged mismanagement by the trustee and negligence by its advisers, this remained to be proved. Interestingly, the Deemster said that if Mrs P or any other beneficiary could show that they were being stopped from exercising their rights by the order then they could seek redress as a person affected.

See also The Bird Charitable Trust and the Bird Purpose Trust [2008] JRC 013.

1.4 US Securities and Exchange Commission v Wyly and others (2012)


Requested under the Convention from a US court (as given effect by the Evidence (Proceedings in Other Jurisdictions) Act 1975 as extended to the Isle of Man), the Isle of Man court not only ordered examination and the productions of evidence, it ordered that “the United States’ Federal Rules of Evidence and Federal Rules of Civil Procedures should apply”, although normally, it said, Manx rules would apply.

The court also ordered that US attorneys be authorised to conduct the examination, even though this was opposed by certain of the parties. At para 61, Deemster Doyle said:-

“It would be an affront to common sense and justice to prevent the US lawyers, who represent the Claimant and the Defendants in the US civil proceedings, from examining the witnesses during the examination procedure in the Isle of Man. If they were so prohibited the reality would be that they would attend the examination procedure and simply whisper the correct questions into the ears of a Manx advocate who would be reduced to the level of a performing parrot by simply repeating them.”

This matter concerned an alleged fraud against US SEC rules regarding shareholders who are also directors of listed companies.

This is a complex matter: there were 17 Manx trusts with over 30 companies beneath them.
Deemster Doyle gave a number of examples of cases in which he had emphasised how the Manx courts would not support attempts to use the island for wrongful evasion of legal responsibilities:


‘Here on the Isle of Man, we are all citizens of the Island but we are also citizens of the global community in which we live, work and contribute. We need to recognise our international as well as our local responsibilities. If the English High Court requires assistance then the Manx High Court, if it has jurisdiction and subject to any necessary safeguards, should not, in a proper case, be slow to provide such assistance.’

23. At paragraph 82 of my judgment in *Impex Services Worldwide Limited* I added:

‘82. Friendly and sophisticated jurisdictions, which respect the rule of law and human rights, need to be aware that if things go wrong in their jurisdiction, and persons in the Isle of Man have information that would assist them, then the Manx courts, in a proper case and, if necessary, subject to suitable safeguards, will offer judicial co-operation and assistance when that is reasonably requested by the judicial authority in that friendly jurisdiction. When the call for help comes, the Manx courts will, in proper cases, answer the call positively and provide the necessary co-operation and assistance.’

24. In *Seçilpar* 2003-05 MLR 352 I … stated:

‘Disclosure of the information in this case may provide considerable assistance to the victim of a potential wrongdoing and would enable the victim to further assert its legal rights in Portugal and would assist the administration of justice there.’

25. In *Tomlinson* (judgment delivered 26th July 2006) at paragraph 21 of the judgment I … stated:

‘It is well established that this court has wide powers to assist courts and insolvency officers from other jurisdictions.’

26. In *Hafner* (judgment 16th June 2006) the Appeal Division at paragraph 56 of the judgment referred to the fact that we lived in a time where:

‘responsible jurisdictions are taking a global approach and assisting other jurisdictions in relation to investigations in respect of potential wrongdoings or in relation to cross-border insolvencies.’

27. In *Wine* (judgment delivered 29th May 2007) I stated the following:

‘71. This court is not in a position to determine whether Mr Wine is attempting to hide assets from Mrs Wine. For the avoidance of any doubt however I should make this jurisdiction’s position crystal clear in respect of those who endeavour to use this Island to facilitate wrong doing.

72. It is not the policy of this jurisdiction to support a concept of blanket confidentiality to cloak irregular financial dealings (*Tucker* 1987-89 MLR 220 at 226-227). Those endeavouring to make use of the equivalent of Harry Potter’s invisibility cloak to prevent sight of information or documents regarding the proceeds of wrong doing will find, to their disappointment that it does not work in this jurisdiction.

73. This jurisdiction does not exist to assist those who seek to evade their responsibilities to their wives. This jurisdiction does not exist to assist wrongdoers to hide their assets or the proceeds of their wrongdoings. This jurisdiction does not exist to assist those who seek to evade their creditors or their taxes. This jurisdiction does not exist to assist wrongdoers to evade foreign courts, foreign insolvency officers or foreign regulatory authorities.

74. It is the policy of this jurisdiction to assist parties, foreign courts, foreign regulatory authorities and foreign insolvency officers, where appropriate and subject to any suitable safeguards, in the provision of full information and documentation to enable a proper, just and fair determination of any issue or dispute in the principal jurisdiction of such issue or dispute.’

28. In *Jones* (Common Law Division CLA 2009/053) I made an order on the 16th June 2009 for the production of evidence under the Evidence (Proceedings in Other Jurisdictions) Act 1975 (an Act of Parliament) as extended to the Isle of Man by the Evidence (Proceedings in Other Jurisdictions) (Isle of
Man) Order 1979 by way of assistance to the Family Division of the High Court of England and Wales. In that case certain parts of the request were ordered to be struck out in red.”

Apart from noting the fact that this can happen at all, the important point to take away from this is the court’s willingness to assist in cases of dishonesty or some kind of wrongful behaviour.

Deemster Doyle went on to summarise the position:

“(1) The High Court of Justice of the Isle of Man will ordinarily give effect to a letter of request from a foreign court for assistance in obtaining evidence for the purpose of proceedings in that foreign court so far as it is proper and practicable and to the extent that it is permissible under Manx law. ... 

(2) In dealing with a request for evidence from a foreign court the Manx court has first to decide whether it has jurisdiction to make an order to give effect to the request and secondly, if it has, whether as a matter of discretion it ought to make or refuse to make such an order.

(3) The Manx court should be prepared to accept the statement of the foreign court in its request that the evidence is required for the purposes of civil proceedings in that foreign court. … 

(4) … the Manx court should normally exercise its discretion to make the order asked for unless it is satisfied that the application would be regarded as falling within the description of frivolous, vexatious or an abuse of the process of the court.

(5) The Manx court has power to accept or reject the request from the foreign court in whole or in part, whether as to oral or documentary evidence; and it can and should delete from the request from the foreign court any parts that are excessive either as regards witnesses or as regards documents. … 

(6) A request should not be denied on the grounds of “fishing” if there is sufficient reason to believe that the witness could give relevant evidence as to issues in the foreign proceedings and the issue of relevance falls to be determined by the foreign court. …

(7) The foreign court should be afforded the fullest help it is possible to give. If its rules of evidence are known, effect should be given to them; if not, any questions should be admitted which may be expected to throw light on the matters in issue.”

Deemster Doyle

The allegation was that Cains breached a duty of care owed to the claimant in making an application under section 61 of the Trustee Act 1961, by failing to put it to the court that it ought to give notice of the application to the claimant of the application.

Cains held some money in their client account. As trustee they applied for directions as to what to do with it. An order was made directing Cains to make certain payments from the retained sums and Cains complied. The claimant, aggrieved at Cains’ not serving them with notice of the section 61 application, sued Cains, claiming compensation for the loss of the opportunity of recovering the funds held (plus interest).

There were claims:-
- in negligence
- for conspiracy to injure by unlawful means
- for unlawful interference with economic interests/causing loss by unlawful means

Cains sought either to strike out the claims as disclosing no grounds or summary judgment on the basis that there was no prospect of success.

The Deemster believed that the claimant was trying to over-complicate the matter (para 101) and he stripped it to its bare bones (para 102), adding that “Cains applied to the court pursuant to Section 671. Cains gave full disclosure. Cains was not guilty of any fraud, wilful concealment or misrepresentation in the Section 61
proceedings...No legal liability attaches to Cains in respect of these matters. The case really is as simple as that.”

He:-
- struck out the claim in negligence, which he said was “bound to fail” and “unwinnable”
- granted summary judgment for Cains in respect of the conspiracy claim
- struck out the claim for causing loss by unlawful means

He would hear no criticism of Cains or of Deemster Kerruish, who had made the order, commenting that:
“The Deemster plainly directed his mind to the issue of notice and service and made orders accordingly. The Deemster did not see fit to make any other orders for service at the subsequent hearing. It was a matter for the Deemster as to how he dealt with the Section 61 petitions and as to which entities, if any, should be served with such petitions and permitted to attend the hearings.”

At para 119, he said:
“Cains was required by the [Manx court’s section 61] order to make those payments. Cains then acted on the order. Cains did not act unlawfully in releasing the funds in its client account. It is plain on the face of the pleadings that the allegation that Cains acted by unlawful means is unsustainable.”

And at para 121 he went on to explain that Deemster Kerruish’s order was consistent with the authorities.

Further, he said that the claimant relied on two fallacious propositions:--
- that the English freezing injunction was binding against Cains in the Isle of Man: it was not
- that the claimant was a necessary party to the section 61 application, which they clearly were not in Deemster Kerruish’s view

Some key points arose from the judgment:--
- An English injunction is not effective in the IoM without a supporting Manx order
- Guidance on the approach to an application for directions could be taken from the Jersey case, JA v BA [2008] JRC 053
- In the ordinary course, a solicitor will owe no duties to his client’s opponents
- It is important to make full disclosure and comply with one’s duties
- Right to be concerned about possible implications for, e.g. English qualified staff

1.6 Intertire Limited v HSBC Securities Services (Isle of Man) Limited [2012] ORD 2011/32

This was an application to the Isle of Man High Court to strike out claims based on breach of duty, tort and breach of contract.

The claimant controlled the appointment of trustees of the trust and was the driver behind the scheme which was designed as a pension arrangement under which fees would be generated from large numbers of scheme members. It said that the defendant had claimed expertise and infrastructure enabling it to operate such a scheme. It claimed, however, based on these were not true, large numbers of investors left the scheme, leading to a loss of income (alleged at $76 million). It claimed compensation from the appointee as trustee for failing in complying with what the claimant said was the defendant’s duty to act as trustee with skill, care and diligence.

At the heart of the claim, the claimant said, was the duty to administer the trust properly.
This was a striking-out claim: not a final trial on merits. Hence, the Deemster said, what had to be shown was that the claim was “bound to fail”. The claim must, he said, “be effectively unarguable and have no chance of succeeding and as such it must be a plain and obvious case”. Alternatively, the court might give summary judgment where there is an arguable claim BUT there is no real prospect of success. Neither should involve a mini-trial in complex, disputed cases.

The Deemster said (at para 24) (in contrast to his findings in the Islamic Investment Company case) that “This is potentially a legally complex case. It is not appropriate to strike out the claims or to grant summary judgment in favour of the Defendant.” He made clear that this was not a victory for the defendant on the merits: the trial still had to be held. But he would not summarily dismiss the claims.

Much of the argument concerned the elements that needed to be pleaded for the three claims to succeed but they are beyond the scope of this talk in their detail. The Deemster did doubt the likelihood of success of the equitable claim but would not strike it down as bound to fail just because it was novel. The Deemster accepted that certain of the claimant’s pleadings required clarifying, enlarging or particularising and indicated a willingness to direct filing of a case summary within 28 days.

1.7 IFG International Trust Company Limited and others v French (2012) CHP 2012/0048

Michael French was protector or a member of the protector committee on each of nine trusts. He retired with effect from January 2001.

The Securities and Exchange Commission (“SEC”) in the USA had begun proceedings against the Wyly brothers, a Louis Schaufele III and Mr French. The SEC accused the Wyly brothers of engagement in a fraudulent scheme to deal in, and conceal the dealing in, US securities. It was alleged that the trusts were the means by which this was done and Mr French was accused of being an accessory to the dishonest arrangements.

Mr French sought an indemnity from the trust funds in respect of the ongoing foreign proceedings, both in respect of costs already incurred and in respect of future costs. The trustees sought directions following demands from Mr French’s lawyers and proceedings in Texas commenced by Mr French with the same end in mind.

There were express provisions in the trust deeds regarding indemnities. The first set (in “the 1992 deeds”) provided that:

“the trustee may grant an indemnity out of the Trust Fund to any Committee member or to such delegate upon such terms as the Trustee may think fit.”

The second set (in “the 1994/5 deeds”) provided that:

“Each person occupying the office of Protector shall be entitled to exoneration and indemnity out of the Trust Fund for any liability loss or expense incurred hereunder and for any judgment recovered against and paid by such person other than liability loss expense or judgment arising out of his own wilful and individual fraud or dishonesty.”

As regards the 1992 deeds, the trustees were not obliged to indemnify Mr French. So far they had declined.

Mr French submitted that:

- where, as in the case of the 1992 deeds, the trustees had a discretion as to whether or not to indemnify the protector, the court had jurisdiction to intervene in the decision-making process if it would be in the interests of the trust to do so; and
• in the case of the 1994/5 deeds, the mandatory indemnity extended to third-party disputes where that it was in the interests of the trust;

• had an implied right of indemnity anyway;

• the claim was essentially that the trusts were a sham (and that the claims in relation to establishment of the trust were a minor aspect), so it must be in their interest for him to withstand such a claim – indeed, he said that the SEC essentially criticised the trustees also and that a claim would be made against them; and

• the allegation of fraud was entirely unproven

Mr French relied on the authority of *Lloyds Bank International (Cayman) Limited v Byleven Corporation SA* [1994-5] CILR 519, where the court had authorised a protector to withstand a hostile attack on a trust and be indemnified from the trust property. However, the Deemster dismissed this: the family were, it appeared, already vigorously defending the trusts, so there was not need for a fully funded defence by the protector on this score. Furthermore, he had ceased to be a protector some 10 years earlier: he was under no duty to defend the trusts. And in the *Byleven* case, the context of the application was different: the trustee was seeking, and was given, leave to defend the trusts with the vital assistance of the impecunious protectors. The Deemster distinguished it on this basis (paragraph 83).

Mr French further argued that it would be wrong to disallow a trust officer from defending a trust merely because an allegation of fraud was made: the allegation did not, he said, create a *prima facie* case and the failure of his striking out application was one based on a point of law and not the merits. The Deemster rejected this, though: there was a “world of difference” between a simple verbal allegation and a claim following a number of years’ investigation by a friendly country.

The 1992 deeds: gave the trustees a discretion to indemnify the protector or not.

The 1994/5 deeds: the trustees would be bound to indemnify in some circumstances but were under duties when informing themselves about the facts.

Based on *Rawcliffe v Steele*, Corlett D thought that a protector’s duties went beyond the pure words of the settlement deed. Nonetheless, he thought that merely because the joint protector was not alleged to have been fraudulent was not determinative that this must be relating to matters outside his role as protector.

He thought (paragraph 64) that the trustees were entitled to form the view that the claims were not purely tied up with Mr French’s being protector. Further, it was not for the trustees or the court to decide whether there was a valid claim or not: the trustees were entitled to await the outcome of the New York courts’ decision. Only when those proceedings were complete would it be possible for the trustees to make an informed decision, he thought.

*Interpreting the 1994/5 deeds*

The requirement that liabilities covered by the indemnity were those “incurred hereunder” (i.e. under the trust deed) did not confine the sorts of claims to exercising the express powers of the protector alone. The Deemster agreed with Mr French, that it meant “properly incurred in connection with the office of protector”.

*Implied Indemnities*
The Deemster refused to hold that there were implied indemnities where the settlor had included express indemnities: “a recipe for confusion”.

**The Maximum Permissible Extent of Indemnity Clauses**

While he acknowledged that an indemnity was not identical to an exclusion of liability, the Deemster held that similar principles applied as regards being able to obtain an indemnity for liabilities incurred in good faith (and that it was not limited to gross negligence).

**2. MANX SUCCESSION CASE UPDATE**

**2.1 Games v AG and anor (2012) Isle of Man High Court**

The *cy-près* doctrine sometimes rescues an impossible gift where there is a paramount charitable intention, but what does this mean precisely? There the court had to consider the possible application of the *cy-près* doctrine to a gift that was too narrowly drawn. It helps to illustrate what is required to find a paramount charitable intention.

**Terms of the Will**

Clause 8:-

“ I GIVE and DEVISE my field … numbered 1358 on the Ordnance Survey Plan of the Isle of Man ...unto my Trustees UPON TRUST to erect a Heritage Hall and Museum on the said field and that all my personal property of historical significance with particular regard to Manx Heritage should be displayed in the Heritage Hall and Museum for the benefit of the people of the Isle of Man and Visitors to the Isle of Man.”

There was no dispute as to the charitable nature of the gift. The problem was that it was most unlikely that planning permission would be given to build and run a heritage centre in the place specified by the testator. This meant that it was impossible to fulfil the charitable objects in the gift. On the face of it, the gift therefore failed.

To the extent that it failed, and as regards any other undisposed-of property, there was then a gift of the residue of the estate in clause 9:-

“9. As to the rest residue and remainder of my Estate both real and personal I GIVE DEVISE and BEQUEATH the same to my Trustees UPON TRUST to call in administer and (so far as may be necessary in order to pay all my outstanding debts taxes and other liabilities and the costs incurred in administering and distributing my Estate) to sell the same and to transfer pay or apply my remaining property and the proceeds of sale of any such property as shall have been sold:-

(a) as to so much thereof as shall be necessary to meet all the costs of planning and building a Heritage Centre and Museum to be called “The Collister Heritage Centre and Museum” and

(b) as to the balance thereof TO HOLD the funds remaining UPON TRUST to apply the capital and income thereof for and towards

(i) the cost of maintenance and upkeep of [a property disposed of during the testator’s life but left, under the terms of the will, for charity in the Isle of Man] and
(ii) the cost of maintenance and upkeep of the Heritage Centre and Museum and its surrounding land aforesaid...”

This was intended to meet the costs of creation of the heritage centre and subsequently maintaining it. The provision assumed that the heritage centre would be built.

What would then happen in the event of failure of the gifts in clauses 8 and 9? Clause 15 provided:

“15. Should there be insufficient funds to construct and maintain the Collister Heritage Centre and Museum aforesaid after the rest residue and remainder of my Estate … have been called in sold or transferred then and in such case I LEAVE DEVISE and APPOINT my residuary estate unto my Trustees UPON TRUST to pay the capital and income thereof to the Trustees of the Manx Museum and National Trust1 absolutely subject to them paying thereout the cost of maintenance and upkeep of [the property that the deceased had disposed of during his life] absolutely.”

Would this gift take effect, or did the wording, “Should there be insufficient funds to construct and maintain the [centre]” mean that the gift only took effect if the gift failed because the funds were insufficient (rather than because planning permission would not be granted)?

The Application

The Manx Museum and National Trust thought that it should receive the estate under clause 15. The local authority supported a cy-près scheme (see below) to give effect to an amended version of the gift in clause 8. The administrator of the estate had also to consider whether he ought to seek planning permission as a prerequisite for the gift in clause 8 to fail, even though refusal was inevitable.

The administrator applied to the court under section 61 of the Trustee Act 1961 (which permits trustees to apply to the court for directions in the performance of their trusts) and under rule 13.35(1) of the Isle of Man’s rules of court (2009)(which provides for applications by personal representatives, as well as trustees, for directions in the administration of an estate2). The court indicated its willingness to give guidance in the administration of the estate and the fulfilment of the trusts in view of the problems that had arisen here.

Construction of the Will

The judge said that what was important was not trying to work out what the testator was trying to say but what were his “expressed intentions”.

The judge found that the charitable gift comprising the field under clause 8 was impossible from the outset as it was specifically for the construction of a building on the field for the specified charitable purposes. The judge confirmed that the administrator ought not to waste the estate in verifying the fact by making a hopeless application for planning permission.

He further found that the gift in clause 9 had to be read with the gift in clause 8 and, in view of his comments on clause 8, likewise failed on its terms.

Hence a gift to specified charitable objects failed from the outset (“initial failure”). In the case of such initial failure, the court may sometimes approve an amended gift, for closely related objects, under the doctrine of cy-près. Might the gifts here be rescued, then, by application of the cy-près doctrine to the primary gift in clause 8?

1 Better known as “Manx National Heritage”.
2 The applicant accepted in the proceedings that the better application would be one for directions rather than an administration order, which he had originally sought.
The Cy-Près Doctrine

Section 3 of the Wills Act 1962 says:

“3 Occasions for applying property cy-près

(1) Subject to subsection (2) below, the circumstance in which the original purposes of a charitable gift can be altered to allow the property given or part of it to be applied cy-près shall be as follows:—

(a) where the original purposes, in whole or in part,—… (ii) cannot be carried out, or not according to the directions given and to the spirit of the gift; …

(2) Subsection (1) above shall not affect the conditions which must be satisfied in order that property given for charitable purposes may be applied cy-près, except in so far as those conditions require a failure of the original purposes.

(3) References in the foregoing subsections to the original purposes of a gift shall be construed, where the application of the property given has been altered or regulated by a scheme or otherwise, as referring to the purposes for which the property is for the time being applicable.”

What though are the requirements for the cy-près power to apply? The key requirement the Deemster said was for it to be ascertainable that there is a “paramount charitable intention (see per Parker LJ in re Wilson [1913] 1 Ch 314 at 320-321); by contrast a charitable gift if the testator intended it only to take effect in a particular way that was impossible (see per Buckley LJ in In re Lysaght, Decd. [1966] Ch 191 at 202). It may not merely be the literal terms of the gift itself that determine the issue, though.

The judge referred to the judgment of Vinelott J in In re Woodhams Dec’d. [1981] 1 WLR 493. He had cautioned against merely looking at the wording of the testator - this would be, in his view, “in many cases to follow a will-o’-the-wisp”. He went on to remark that “the construction of the language in which the trust is expressed seldom contributes much towards a solution. More is to be gained by an examination of the nature of the charitable trust itself and what is involved in the author’s plan or project.”

The judge also considered whether it would be possible to identify a paramount charitable intention even where there was a general residuary gift over to charity. Applying the decision of the Privy Council in Mayor of Lyons v AG of Bengal (1875-6) LR 1 App Cas 91, in the judge’s view, the residuary gift to the Manx Museum and National Trust did negate the finding of a general charitable intention in then gifts in clauses 8 and 9. The initial gift was impossible: planning permission would not be obtained.

Hence, the judge was unable to find a paramount charitable intention: the gifts in clauses 8 and 9 were simply too specific. The gift could not therefore be applied cy-près.

Giving Effect to the Longstop Gift in Clause 15

The judge said that whether the gift in clause 15 took effect was a matter of construction. First, he found that the wording was intended only to put the gift in clause 15 into context (making it explanatory rather than restrictive).

Secondly, he said that the funds provided were insufficient anyway to maintain the centre beyond ten years even if it had been built. He thought that if the gift in clause 15 did require a failure of the funds to suffice to construct and maintain the heritage centre in order to be triggered, that requirement was satisfied here because the funds would not last more than about ten years.
Consequently, the gift to the Manx Museum and National Trust would take effect.

2.2 *Walshaw v Scott* (2012) Ord 10/0038 Isle of Man High Court

Deemster Corlett

This case concerned the codicil to a will of the late Frank Scott (“Mr Scott”) who died on the 6th June 2008. The Claimants (Mr Scott’s daughters) argued that a codicil executed by Mr Scott on the 31st May 2008, was invalid on the following grounds:

- it was not validly signed and witnessed in accordance with s.3 of the Wills Act 1985
- Mr Scott was not of testamentary capacity when he signed the codicil
- Mr Scott did not know and approve of the contents of the codicil
- it was signed as a result of undue influence by the First Defendant (Mr Scott’s widow, B)

Mr Scott made his original will on the 16th September 2005 (“the will”) after marrying B; his assets were to be equally divided between his two daughters, B and a long standing work colleague. The will appointed local advocates as executors. However, the codicil, prepared by B, left the residue of Mr Scott’s estate (approximately £1.6 million pounds) solely to her. The codicil also removed the local advocates as executors and replaced them with B. Of less significance was the removal of the provision for a wake and a change to funeral wishes.

The Court heard from B that Mr Scott had wished to amend his will to ensure that she and her son William would be better provided for. Further, Mr Scott’s two daughters were to be generously provided for upon his death through bank accounts that had been set up in their joint names. Additionally, she claimed that substantial funds were transferred to these joint accounts before his death.

The court then heard varying accounts from the two witnesses: one witness claimed he did not see Mr Scott or witness his signature in his presence. The other witness claimed that this was not the case and that both witnesses were in Mr Scott’s presence when he signed the codicil and they signed as witnesses.

Evidence was then adduced by Mr Scott’s longstanding friend, who had printed out the precedent of the codicil and handed it to B. Mr McGurgan understood that Mr Scott only wanted to change the executor of his will. Mr McGurgan suggested that while a change of executor might be dealt with using an internet generated precedent by Mr Scott, any major changes would perhaps have made Mr Scott exert more caution. The Claimants stated that they last saw their father on the 25th May 2008 when he advised them that he was going to change his will regarding the executor, the wake and the burial.

In handing down his judgment Deemster Corlett outlined that he found it difficult to see what had happened in Mr Scott’s personal and family life to induce Mr Scott to change his testamentary provisions so as to leave his most valuable asset solely to his widow. The Deemster accepted that overall Mr Scott was largely himself in the days leading up to the execution of the codicil, but, he agreed in accordance with the expert opinions that there may have been a minor degree of confusion.

It was held by Deemster Corlett that Mr Scott did have testamentary capacity. It was further held that the Claimants had failed to discharge the burden of proving undue influence by B. However, the codicil was held to be void on two grounds, firstly for failure to comply with section 3 of the *Wills Act 1985*. The lack of attestation clause meant that there was no presumption of execution (an attestation clause would have provided prima facie evidence that Mr Scott signed the codicil in the presence of the two witnesses). The burden to establish due attestation therefore fell on the First Defendant and it was concluded that this burden had not been discharged.
Secondly, it was held that the codicil was void as the First Defendant failed to prove that Mr Scott knew and approved of the content of the codicil.

As such the codicil of the 31st May 2008 was pronounced invalid and the earlier 2005 will would therefore govern the distribution of the estate alone.

3. OVERSEAS CASES WASHING UP HERE

3.1 Bermuda

*BQ v DQ* [2010] (Bda) 40 Civ

Ground CJ

Two Bermudan family trusts were set up by S for his children (“the sons’ trust”) and grandchildren (“the grandchildren’s trust”). The claim was made that, on their face or when considered in the factual context, they were testamentary and were revoked by a subsequent marriage.

In terms of the trust and surrounding circumstances, the settlor had reserved to himself significant powers and rights under the trusts.

The *amicus* relied on various US authorities, which lent towards recognising trusts as such, no matter how extensive were the powers reserved. The court preferred the version of the law as quoted from *Lewin on Trusts*.

> “Applying the law as set out above to the facts, my primary conclusion is that the concatenation of rights and powers in the Settlor, when coupled with the fact that he was the sole trustee at the time of the constitution of the Trusts, rendered this trust illusory during his lifetime.”

In other words, reading the document and looking at the circumstances showed that the settlor could not be called to account, so the trust lacked the “irreducible core” (per Millett J in *Armitage v Nurse*). He expected to retain dominion over the assets and lacked any intent to create a trust during his lifetime.

Consequently, it was a will, which was revoked on the settlor’s marriage.

And, if the testamentary trusts (those arising on death) were valid at their outset, they had been revoked.

3.2 Cayman


This was a claim for damages by the liquidators of the company (a fund) against its former directors, Hans Ekstrom and Stefan Peterson. It transpired that a number of assets on the balance sheet were simply fictitious (around $600 million – around 80% of the NAV). A Magnus Peterson, a close relative of the defendants, was the “principal investment adviser”.

The case concerned directors’ duties to exercise the reasonable care, skill and diligence that a person acting as an independent non-executive director of an open-ended investment company would exercise. They were not expected to supervise the investment manager’s trading activities but they were expected to satisfy themselves that it was complying with its investment restrictions.
As in England/IoM, it is a mixed objective and subjective test: you can take into account the skill, knowledge and experience that the individual concerned has. The directors here were held out as having particular skill, knowledge and experience.

There was a provision in the articles to the effect that directors were not liable except for wilful neglect or default.

There is extensive analysis of the actions of the directors, including particular transactions, and their failings.

The judge concluded:-

“In my judgment the evidence in this case leads, unequivocally, to the conclusion that both of these Directors are guilty of wilful neglect or default because they consciously chose not to perform their duties to the Macro Fund, or at least not in any meaningful way. Given their business backgrounds and experience, they must have known that the directors of an investment fund whose shares were listed on the Irish Stock Exchange, would be expected to act in a businesslike manner and that they could not discharge their duty by signing whatever documents were put in front of them (including standard form minutes of meetings) without reading them, or if they did read them, without applying their minds to the content. They claim to have appreciated that that they had a high level supervisory duty, yet they never once, in six years, asked any of those whom they were supposedly supervising to give them a written report or attend a board meeting to provide them with an oral report. Every board meeting took the form of a discussion with Mr. Magnus Peterson and no one else. There were no agendas and there is no record of the discussion. The board minutes were created by Mr. Magnus Peterson, but they are standard form documents intended to constitute a “note” for the file and create the impression that the Directors were reviewing the affairs of the company on a regular quarterly basis, whereas there is no evidence that any real business was ever in fact conducted at these meetings. It is clear that these Directors consistently signed financial statements, management representation letters, side letters and other documents without making any enquiry whatsoever. In 2007 they signed sham investment management and advisory agreements either without reading them or, if they did, knowing that the agreements would never be acted upon. This modus operandi was so firmly entrenched that not even the bankruptcy of Lehman Brothers and the ensuing financial crisis was sufficient to prompt them into convening board meeting or reading the Q3 2008 Quarterly Report which contained damning information about the identity of the IRS counterparty. This failure cannot be treated as an error of judgment or negligence, because Mr Ekstrom subsequently signed minutes which falsely asserted that a meeting did take place and that they did review the administrator’s report.”

Judgment was given against the directors, and each of them, in the sum of $111 million.

In the Matter of the Ta-Ming Wang Trust [2010] (1) CILR 541

Here the plaintiffs sought the setting aside of the declaration of a dividend and its payment into a trust. The trustee procured the payment of a dividend, which passed into the trust (the trustee being the shareholder), triggering an unexpected tax charge (or at least taxable at a higher rate). Had the trustee realised that, it would have liquidated the company, when the distribution would have been taxed at a lower rate. The plaintiffs sought to set the dividend aside under the rule in Hastings-Bass because:-

- The trustee’s decision was based on a mistake.

- The company’s decision was procured by the trustee and the company’s directors were the trustee’s directors (and so bound up in one transaction).
- Even if viewed independently, the company’s actions could be set aside

The court set aside the transactions, applying *Sieff v Fox* [2005] 1 WLR 3811:-

- The trustee’s decision to procure the payment arose from a failure to understand the effect of the transaction for tax purposes.

- The company’s actions could not, however, be regarded as one with those of the trustee, even though the directors were common to both (since they were obliged to act independently in the different roles).

- The *Hastings-Bass* principle could in theory apply to company directors (as fiduciaries – partly relying on *Pitt v Holt* at first instance, but this part of the judgment has not been overruled) but there was, in the event, no evidence that the directors had the trust and its tax position in mind when declaring the dividend (*i.e.* as to the element of mistake or misunderstanding). Even though they were virtual nominees of the trustee, the decision was a separate one to take.

*TMSF v Merrill Lynch Bank & Trust Company (Cayman) Limited* [2011] UKPC 17

In this case, a judgment debtor held a power of revocation of trusts governed by Cayman law. TMSF was established by the Turkish government to recover the assets of failed banks. A Mr Demirel was accused of appropriating (with his family) some $490 million from Egebank and $336 million from other banks. TMSF obtained a Turkish cash judgment for $30 million against Mr Demirel.

TMSF discovered that Mr Demirel had established two trusts (the “Mana Trust” and the “Dolphin trust”) in Cayman with $24 million, the beneficiaries being Mr Demirel and his wife and children. The trusts were subject to a power of revocation vested in Mr Demirel:

“This Trust may be revoked, amended, varied or altered in any manner whatsoever from time to time and at any time by the Settlor by deed and delivered to the Trustees provided always that no such revocation, amendment, variation or alteration shall take effect until actual receipt of such instrument by the Trustees or with the written consent of the Trustees thereto if such revocation, amendment, variation or alteration would increase or extend the obligations, liabilities or responsibilities of the Trustees”.

It was clear that there was power to appoint a receiver by way of equitable execution (*Senior Courts Act 1981, section 37(1)*). TMSF sought the appointment of a receiver to execute the power of revocation in order to recover the trust assets to meet the judgment debt. Mr Demirel pleaded poverty and was declared bankrupt in Turkey.

Mr Demirel resisted the appointment, arguing:-

- A receiver can only be appointed by way of equitable execution over “property”

- A power of revocation was not property but was like a general power of appointment, which was not property

- Such an order would only be effective if the revocation was authorised to be done on Mr Demirel’s behalf or he was ordered to revoke them and the court could not make such orders.
TMSF argued that an unrestricted power of revocation was tantamount to property itself. Mr Demirel argued that the power was personal to Mr Demirel and that the court had no right to order it delegated to a receiver to exercise on his behalf.

There was detailed discussion of the commonality and distinctions of property and powers. For example, in _Ex Parte Gilchrist; Re Armstrong_ (1886) 17 QBD 521, Fry LJ had said (at 531):

“No two ideas can well be more distinct the one from the other than those of ‘property’ and ‘power’ ... A ‘power’ is an individual personal capacity of the donee of the power to do something. That it may result in property becoming vested in him is immaterial; the general nature of the power does not make it property. The power of a person to appoint an estate to himself is, in my judgment, no more his “property” than the power to write a book or to sing a song. The exercise of any one of those three powers may result in property, but in no sense which the law recognises are they ‘property.’ In one sense no doubt they may be called the ‘property’ of the person in whom they are vested, because every special capacity of a person may be said to be his property; but they are not ‘property’ within the meaning of that word as used in law.”

Was the power delegable, so as to allow the appointment of a receiver to exercise it? The court quoted Powers by Sugden (8th edition, 1861), where the author said:-

“... wherever a power is given, whether over real or personal estate, and whether the execution of it will confer the legal or only the equitable right on the appointee, if the power reposes a personal trust and confidence in the donee of it, to exercise his own judgment and discretion, he cannot refer the power to the execution of another, for _delegatus non potest delegare_ ... Where the power is tantamount to an ownership, and does not involve any confidence or personal judgement, and no act personal to the donee is required to be performed, it may be executed by attorney in the same manner as a fee simple may be conveyed by attorney…”

Other authorities were quoted to the effect that, to be delegable, a power (1) had to be authorised to be delegated or (2) had to amount to ownership rather than a power given to someone to exercise personally.

In this case the court decided that the power of revocation did make it tantamount to ownership, that there is no invariable rule to the effect that a power is distinct from property and that, here, Mr Demirel could be treated as the owner of the trust assets. The power was subject to no fiduciary duties and he could exercise it as he wished.

The Privy Council thus ordered that a receiver could and should be appointed.

3.3 England

_Green v Montagu_ [2011] WTLR 1341 English High Court

Duke of Manchester (living in Australia) moved to California and went through a marriage ceremony on 7th May 1993 – son was born on 13th May 1993 and their daughter in 1999. In 2009 it came out that he was already married so the marriage was void. He was divorced three years after the wedding ceremony in California.

The trustees of two trusts had been making provision for the children until discovering the Duke’s bigamy. Traditionally illegitimate children would fall outside the class of “issue”.

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At the time of the trusts, the Legitimacy Act 1959 applied under English law with the effect that if at the time of the intercourse leading to the birth (or at the time of the ceremony if later) both or either of the parties reasonably believed the marriage to be valid, the child would be treated as the legitimate child of his parents.

This required, however, that the father be English domiciled at the time of the birth and that was far from clear. The court concluded that it did not matter, in the event. This was because, in both Australia and California, the children would have been regarded as legitimate and the court believed that legitimacy under those laws ought to be recognised under English law.

Interestingly, in view of the Gregg case, the argument had been raised whether the 1959 Act could be allowed to stand in view of the Human Rights Act 1998 in light of the perceived discrimination against illegitimate issue.

Gregg v Pigott [2012] EWHC 732 (Ch)
Mark Herbert QC

The trustees of a 1948 settlement sought guidance from the court on the interpretation of the phrase “statutory next of kin” where the longstop gift was “upon trust for the statutory next of kin of the beneficiary at the date of her death on the footing that she died a spinster.” She in fact died without any descendants, parents or siblings surviving her. Her late sister, however, left two adopted children. The question was whether they inherited or whether cousin inherited.

The Administration of Estates Act 1925 provided that gifts to statutory next of kin were determined by that Act and that references in a will or other instrument to “statutory next of kin” were to be construed, unless the context required otherwise, as referring to persons who would take beneficially on an intestacy under the Act.

The judge accepted the adopted children’s contention that the Convention on Human Rights could extend to a private settlement as long as it could be achieved without unfairness. Here he decided that it was right to apply the Convention so that it had the effect of preventing discrimination against adopted children.

This was not, he thought, a decision that the private settlor could not discriminate: it was purely based on the discriminatory effect of the outdated statutory provision.

Futter v Futter, Pitt v Holt [2011] EWCA Civ 197 Court of Appeal

The New Hastings-Bass Rule

Lloyd LJ reviewed the duties of trustees when exercising a power (paras 102 to 113). There appeared to be duties, to know:-

- The wishes of the settlor (e.g. see Abacus v Barr, above)
- The wishes, needs and circumstances of the beneficiaries so far as made known to the trustees
- Taxation consequences (which would require tax advice)

Trustees would need, as part of this, to take advice. But what if that advice was wrong? The court concluded that taking advice that proved to be wrong could not amount to a breach of the duty – at para 120:

“The trustees have discharged properly their duty to take advice, as a matter of skill and care.”

and at para 125:
“Accordingly, in my judgment, in a case where the trustees’ act is within their powers, but is said to be vitiated by a breach of trust so as to be voidable, if the breach of trust asserted is that the trustees failed to have regard to a relevant matter, and if the reason that they did not have regard to it is that they obtained and acted on advice from apparently competent advisers, which turned out to be incorrect, then the charge of breach of trust cannot be made out.”

The Mistake Claim

Lloyd LJ expressed the “correct” test as follows (at para 210):

“I would therefore hold that, for the equitable jurisdiction to set aside a voluntary disposition for mistake to be invoked, there must be a mistake on the part of the donor either as to the legal effect of the disposition or as to an existing fact which is basic to the transaction. (I leave aside cases where there is an additional vitiating factor such as some misrepresentation or concealment in relation to the transaction, among which I include Dutton v Armstrong.) Moreover the mistake must be of sufficient gravity as to satisfy the Ogilvie v Littleboy test, which provides protection to the recipient against too ready an ability of the donor to seek to recall his gift. The fact that the transaction gives rise to unforeseen fiscal liabilities is a consequence, not an effect, for this purpose, and is not sufficient to bring the jurisdiction into play.”

The Supreme Court appeal is listed for 12th March 2013.

Integral Memory plc v Haines Watts [2012] EWHC 342 English High Court

Haines Watts were accountants who advised the claimant on an NIC-saving scheme. It was agreed that the claimants had been advised that the scheme would work in the absence of a change in the law. In 2003, the law changed. The claimant only discovered this in 2009 when it took further advice. Consequently the claimant was charged interest and costs owing to non-compliance with the new rules.

There was an issue of limitation of action. If there was a continuing obligation to advise the claimant of the change in the law, some of the claim would not be time-barred. The judge found that if there was an obligation to advise on the change in the law, it was breached only once – when the law changed. Anything after that was merely a failure to remedy the earlier breach.

Shah v HSBC [2012] EWHC 1283 (QB)

A bank was entitled to comply with AML requirements and was not obliged to explain its dealings to its customer.

Vigeland v Ennismore Fund Management Limited [2012] EWHC 3099 (Ch)

A trustee was not liable to an employee, a beneficiary under an EBT, for its decision not to grant him a bonus payment.

3.4 Guernsey

Gresh v RBC Trust Company (Guernsey) Limited v HMRC

G’s tax advisers were notified by HMRC that his pension was not taxable. RBC, the trustee, decided to distribute G’s entire fund to him as a lump sum in the belief that he would only be taxed on the remittance
basis. This followed a misunderstanding of HMRC’s remarks and it was realised that such a distribution would be taxable after all.

The trustee attempted to revoke the distribution (the success of which has yet to be ascertained). It also sought to set aside the distribution under the rule in Hastings-Bass.

On the rules, for HMRC to be joined:

(i) there had to be a “question or issue” between G and HMRC;
(ii) the question or issue arose out of or related to, or was connected with, the relief or remedy claimed in the proceedings; and
(iii) it must be just and convenient to determine that issue or question as between them.

Yet the court would still retain a discretion, so making out the above would still not entitle HMRC automatically to be joined.

At first instance, HMRC’s application was rejected. HMRC appealed.

The Court of Appeal began by identifying the issues between G and RBC in the proceedings, including whether the distribution were void and the effect of the revocation. The court of first instance, they said, had thought that the taxation issue between HMRC and G would never arise if the proceedings determined that the distribution were of no effect. They thought that this was the wrong approach: the primary question, they thought, on which rested the issue of taxation, was the efficacy of the distribution: hence essentially the same issue as between G and RBC. HMRC, they thought, had made out a sufficient connection to enable them to be joined (at para 26):

“HMRC do not just have a commercial interest in the outcome. They have a direct interest in the subject matter of the action, namely the validity of the Distribution.”

The court considered whether it was an attempt to enforce a foreign revenue claim but decided it was not, following the approach in *re State of Norway’s Application (Nos 1 and 2)* [1990] 1 AC 723.

The court said that what had troubled it most was the final point: was it “just and convenient” to join HMRC in to the proceedings? It acknowledged “the indulgence that it may be thought the court would be granting by allowing HMRC to litigate this difficult point here.” It concluded that it would:

1. HMRC would not accept the judgment and, contrary to what the deputy bailiff had thought, would require further litigation.
2. HMRC had great experience of such claims, although partisan, and could assist in ensuring that factual evidence was closely examined.

They considered the circumstances to be “unusual”.

The court decided to exercise its discretion in favour of joinder:

(a) the situation (*Hastings-Bass* application) was “unusual”;
(b) it doubted that foreign revenue authorities would wish to join in “any normal proceedings between the parties to trusts or other disputes”;

The court of first instance, they said, had thought that the taxation issue between HMRC and G would never arise if the proceedings determined that the distribution were of no effect. They thought that this was the wrong approach: the primary question, they thought, on which rested the issue of taxation, was the efficacy of the distribution: hence essentially the same issue as between G and RBC. HMRC, they thought, had made out a sufficient connection to enable them to be joined (at para 26):

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(b) it doubted that foreign revenue authorities would wish to join in “any normal proceedings between the parties to trusts or other disputes”;
Guernsey “is a transparent, mature and respectable jurisdiction...well equipped properly to consider and evaluate the arguments that HMRC will put forward...”.

Spread v Hutcheson [2011] UKPC 13

Two 1977 Guernsey law settlements contained limitations on liability clauses protecting the trustee from anything but fraud or wilful misconduct. The 1989 Trusts Law in Guernsey (as amended in 1991) prevented exclusion of liability for gross negligence. The trustee failed to show that it could rely on the exclusion clause at first instance or on appeal and appealed to the Privy Council.

A majority of the Privy Council held that exclusion of liability for gross negligence had been lawful. It was clear that a trustee could not exclude liability for fraud or wilful misconduct under the 1989 Act – it was implicit therefore that it could exclude liability for other claims. The 1989 Act was, the court decided, intended to replace the existing customary law. It was intimated that the trust had come from England and that, therefore, English law would have been applied by the Guernsey court in the absence of Guernsey authority.

The case is mainly of interest in Guernsey, but was criticised locally for introducing English law where they are proud of the Norman origins of their law. This was recognised by Lady Hale, who had said at para 129:

“The problem is that, in order to disagree with the Courts in Guernsey, the Board has to reach two conclusions, both of which are questionable: (i) that it is reasonably clear that the law of England and Wales was in 1988; and (ii) that the Courts in Guernsey would have followed English law, rather than taken their own view in the light of the different views taken in other jurisdictions and of the distinctive character of Guernsey law.”

Re B (2012) unreported
Guernsey Court of Appeal

These proceedings concerned possibly a trustee’s worst nightmare.

The application was made to the Guernsey High Court – oral submissions concluded with only two days before the court hearing was due to take place

The Guernsey High Court made the following order:

“The Respondent and/or its employees, representatives, agents, officers or directors be at liberty to disclose any information of whatever nature, whether orally, or in written form, or any document, relating to the Trusts to the law enforcement authorities of the Republic of France, as the Respondent reasonably considers necessary or desirable to protect the interests of the beneficiaries of the Trust, to secure the preservation of the trust property or to protect the interests of the Respondent personally in the context of an on-going criminal investigation in that country apparently commenced pursuant to charges brought by a French Prosecutor [on specified dates] and including but not limited to a summons issued to the Respondent by [a named investigating magistrate] which requires the Respondent to appear

The appeal court was able to hear additional evidence, effectively hearing the application afresh.

The respondent (the claimant in the action) was a granddaughter of the settlor. She argued that the duty of confidentiality owed by the trustees to the beneficiaries overrode any right that the trustee might have to disclose information even to defend itself in criminal proceedings.
Following the death of the settlor, his widow commenced proceedings that led to investigation of his affairs and the trusts that he had created. When she died her civil claim died with her, but criminal proceedings that she had commenced continued. A judge had been appointed to investigate in the criminal claim. There were also tax investigations in France concerning the settlor’s affairs.

In July 2011, new disclosure rules were introduced by France. They came into effect in July 2012 and, in this case, had the effect at least that the trust’s interest in French property should be disclosed.

In January 2012 the respondent trustee received a summons from the French investigating judge, requiring its attendance as a witness. The witness threatened that the judge was considering placing the respondent under criminal investigation for possession of stolen goods, tax evasion and aggravated laundering. Serious punishment (including imprisonment) could be imposed.

Expert witnesses attested that there was no criminal liability attaching to the trustee. But the French judge was considering issuing an arrest warrant against the legal representative of the trustee. While none was known to have been issued, it was regarded as a serious possibility.

The 1959 European Convention on Mutual Assistance in Criminal Matters provides for mutual assistance between signatory countries. Guernsey is a party. The Guernsey Procureur invited him to use the co-operation procedure but no request was forthcoming.

The court reviewed the law of confidentiality owed by trustees:

- there were no directly relevant provisions in the trusts or Guernsey law concerning the disclosure of information.

- the parties agreed that trustees owe a duty of confidentiality regarding the affairs of the trust (referring to Underhill and Hayton at 60.31).

- it was possible that information would be confidential owing to the circumstances in which it was received (see Attorney General v Guardian Newspapers (no. 2) [1990] 1 AC 109).

The court accepted that trustees do owe a duty of confidentiality in respect of trust affairs. In any case, like the duty owed by a bank, it was qualified. Here, the court thought that disclosure was permitted where necessary to protect the trustee’s interest (paragraph 40).

There were no direct English or Guernsey authorities as to what use a trustee could make of confidential trust information or when a trustee could disclose. The court asked itself:-

1. Had the trustee shown that its interests required disclosure? Here the trustee had shown that there was a risk of the prosecution of the trustee and its officers and employees.

2. Had the claimant shown that there would be prejudice to her from disclosure? There was a risk that a mass of information would be released and that trust assets might be claimed in satisfaction of any tax liability (even if unenforceable).

3. Was there evidence upon which the court could refuse to order disclosure? The claimant’s case was that the judge was trying to extort information, deliberately evading the protection in the proper channels for disclosure (see above). It seemed to the court that it was open to the French judge to proceed on that basis and there was no evidence of bad faith on his part.
4. What was the outcome then of its carrying out a balancing act: in favour of or against disclosure? According to *re a New York Bank* [1983] ECC 342. Here, the potential risk to the trustee trumped the risks to any other parties. The trustee had “brusquely and at short notice, been summoned as a prospective criminal defendant on serious charges.” Here it was plain where the balance lay. The order made was as made at first instance, but with a small amendment (replacing the word “desirable” with “prudent”).

*Jefcoat v Spread trustee Company Limited and others* (2012) unreported

This was an interlocutory application for security for costs. In practice this can be used as an aggressive tactic designed to strangle a party of its funding for litigation.

The court staged the proceedings into three parts:

- Up to close of pleadings
- Interlocutory stages
- Preparation for and participation in the final hearing

It ordered the payment of funds by way of security accordingly.

**3.5 Jersey**

*In the Matter of the Representation of R* (2011) Royal Court of Jersey

R was the *de facto* settlor of the S trust. She sought a setting aside of the transfer by her of assets to the trust (and the subsequent transfers by her to new trusts in America) on the grounds of mistake. Judgment was given after the Court of Appeal decision in *Pitt v Holt*.

S sought setting aside (1) of the gift to the S Trust and (2) of the distributions from the S Trust to the US trusts.

*Which law governed the transfer and, therefore, the setting aside?*

The court asked which was the law with which the restitutionary obligation was most closely associated. The court identified this as the place where the enrichment occurred. The court was content that this was the law of Jersey.

*Should HMRC be given notice of the proceedings?*

In *Gresh*, the answer had been a round “yes” and the Jersey decision in *re Seaton* had been disapproved. However, the claimant did not intend to seek a recovery of any tax paid and it was not thought necessary to convene HMRC as a party. In any case, all it would do, the court said, would be to ask the court to apply *Pitt v Holt*.

*The law of mistake in Jersey*

In *re the A Trust* [2009] JLR 447, the court had upheld the approach in the Manx cases on mistake, applying *Ogilvie v Littleboy* and *Ogilvie v Allen*. That case had since been followed in Jersey, and in *In re the Lochmore Trust* [2010] JRC 068. The Jersey court refused to follow the “effects” versus “consequences” test arrived at by Millett J in *Gibbon v Mitchell*. But the law had now changed in England in *Pitt v Holt*. 
The court noted the policy issue, that a settlor should not find it “too easy to retrieve a gift when things do not turn out precisely as he had anticipated” (or, as Lawrence Collins J had put it, “are mistaken about the commercial effects of their transactions or have second thoughts about them”). But, at the same time, there was an issue of fairness: a party acting gratuitously ought not to be held to the transaction if he would not have entered it had he known the outcome.

He went on to say that the A Trust test was indeed more faithful to the original than was Pitt v Holt and that the criticism was “misconceived”.

In addition, the weight of interest given to the tax authority seemed excessive (at para 39).

In conclusion, the court preferred the approach in the Jersey courts and gave judgment for the claimant.

*Dalemont Limited v Senatorov, Helios Investments Foundation and others* (2012) Jersey Royal Court

The plaintiff claimed that it had received an assignment of rights from a Russian bank enabling it to sue the first defendant under a guarantee. The plaintiff successfully claimed £44 million in Russia. Most remained outstanding when the Jersey claim was made. It included a claim to pierce the corporate veil of the foundation (second defendant). It also sought to claim under a “Pauline action”, to look through a series of transactions designed to defraud the plaintiff, distancing the first defendant from the underlying assets (hence claims against the corporate entities as third and fourth defendants).

The second defendant was a Jersey foundation, with a Jersey-based council member (JTC Foundations Limited). The disclosure made in the proceedings was inadequate, but a Jersey individual had entered the evidence and, being within the jurisdiction, was summoned for cross-examination. It transpired that she had never met the other council members, that decisions were made solely by written resolution and that the foundation knew little of what went on in the structures below the fourth defendant.

It had tried to protect the position by including in the foundation’s regulations (rules) provision requiring JTC’s consent to certain decisions. The court noted that there seemed to be no control by the council at all. The court accordingly went on to criticise not only the foundation concerned but the legislation in allowing an arrangement under which no information was held in Jersey.

The court did not find the second defendant immune from criticism, and suggested it consider what steps it ought to be taking to supervise its subsidiary companies held through the fourth defendant.

It concluded by giving further orders for disclosure and threatening enforcement (including using its powers under the Foundations Law) for non-compliance.

In the matter of The A Trust (2012) JRC 066

The trustees of a trust can (helpfully) turn to the court for guidance in some circumstances.

A couple settled assets on themselves and their four children as the life tenants of the A Trust. The only other named beneficiaries were charities.

They also settled the B Trust for the benefit of the settlors’ brothers and sisters and remoter issue and their spouses.

There were no letters of wishes. This was in part owing to family strains which the settlors did not wish to record. The trustees understood the settlors’ intentions to be that the trust assets should benefit the wider family, cascading down generations.
The settlors died. They left certain assets to the trusts. Believing the intention to benefit the settlors’ siblings tax-efficiently, the trustee took tax advice. The plan was to add them as beneficiaries of the A trust, allowing the trustees to use their powers to disclaim the succession to the wife’s assets. This would allow them to pass to the siblings. The plan was then to add the remoter issue as additional beneficiaries of the A Trust.

The settlors’ siblings suddenly asked for the distribution of the very substantial trust assets to them. They threatened that if the trustees carried out their intention to add the remoter issue that they would challenge the trustee’s decision and seek its removal.

The trustee applied to the court for approval if its intended addition of the remoter issue as beneficiaries. The siblings opposed this and applied for the trustee’s removal.

The court was satisfied that the trustee’s understanding was in accordance with the settlors’ intentions. The court did think that the trustee was right to seek its approval in these circumstances, where a body of beneficiaries opposed the decision: there was no clearly recorded guidance; new trustees would have no direct knowledge of the settlors; the trustee was already implementing plans that involved including the remoter issue as beneficiaries.

_Bas Trust Corporation Limited and Jean Gabriel Goyet v MF and Others, the Shirnovic Trust [2012] JRC 81_

Here, the questions concerned whether JGG was a trustee or not and whether a certain individual had been validly added as a beneficiary of a trust.

This discretionary trust was created by an individual, VB, in 1988 under Jersey law. The trustee was Radcliffe’s Trustee Company SA.

The settlor had power by “instrument” or by will to add beneficiaries. In 1990 he tried to exercise this power to add Mrs B as a beneficiary by a written instrument. In 1998 he added his brother L to the beneficiaries. In 1999, he executed a further deed adding his brother H and his sons as beneficiaries. The court noted that, unlike the previous deeds, the court did not recite the earlier deeds.

Finally in 2002 he signed a further deed adding the children and remoter issue of H’s two sons. He also signed a new, and very detailed, letter of wishes. It included a request to take particular care of Mrs B.

VB died in 2005, and the power to add beneficiaries died with him.

The trustees made regular distributions to Mrs B totalling some £400,000. They distributed some £735,000, as well as making loans, to other beneficiaries.

In the course of taking tax advice, it was noticed that the 1990 deed had not been witnessed. “instrument” was defined in the deed as “any instrument in writing signed by the parties thereto and witnessed…” The question thus arose: had Mrs B ever been added as a beneficiary?

Mrs B was not married to VB but had been in relationships with him on and off for many years, living together for some of the time. (VB had other relationships at the same time, but treated Mrs B like his own wife and there was a degree of longevity about that relationship.) She was financially dependant on him from the 1980s onwards. VB was married to another woman, who died in 1999. After his death in 2005 Mrs B said that she was reassured by family members that she would continue to be financially supported by the family as before. She was maintained by the trust until payments to her were stopped following discovery of the problem.
The court was satisfied that Mrs B enjoyed a special relationship with VB and that he intended to look after her after he had died through the trust, in fulfilment of what he regarded as his moral duty.

**Was Mrs B a beneficiary?**

The instrument of addition was not witnessed, and therefore it did not satisfy the requirement of an instrument as defined by the deed (see above).

*Equity Assisting Defective Execution*

The English court has long asserted a power to aid defective execution in certain circumstances. The court reviewed various commentaries on the power. It concluded from the commentaries that it applied where there would have been a proper exercise of a power but that it had been formally defective. However, it required that the claimants must be persons for whom the appointor was (among others) under a moral obligation to provide.

The court held that the power extended to a power to add beneficiaries.

The only concern was, the court thought, whether the power could extend to someone such as Mrs B.

The court thought that the principle had a beneficial role, preventing formality from causing hardship for those to whom the power holder owes a moral or natural obligation. This is a refreshing view of the law which can, in England, be taken too far by looking back to the precise wording and principles elucidated in different times.

“We see every reason to develop the principle to take account of modern standards and mores. We hold therefore that, under Jersey law, the principle may operate in favour of any person for whom the donee of the power is under a natural or moral obligation to provide…”

The court thought that the application in each case would be a question of fact – here, VB had clearly acknowledged that he did indeed owe a moral obligation to provide for Mrs B. It upheld the application.

*The Imputed Intention Argument*

A separate argument had been raised in support of Mrs B’s inclusion as a beneficiary. In spite of the finding on the earlier point (above), the court decided to address this.

The argument was that by stating in a later document (which did qualify as an “instrument” for the purposes of the deed) that Mrs B had been added as a beneficiary, VB had indeed added her.

The court upheld the application of the principle: if a person recited the fact that they had previously exercised a power, the later document in which they made that recital could operate as the valid exercise of such a power.

Hence, the court decided that VB had added Mrs B as a beneficiary by the later deed if not the earlier one.

*Equity Trust (Bahamas) Limited v Basel Trust Corporation (Channel Islands) Limited [2012]*

The Bird Charitable Trust and the Bird Purpose Trust had been established with the involvement of Gary Kaplan, a director of an online betting company (BetonSports) who had been prosecuted for breaches of U.S. gaming legislation. Mr Kaplan was named as protector and, as regards the purpose trust, enforcer.
Equity Trust (Bahamas) Limited was trustee of the trusts. Basel Trust Corporation (Channel Islands) Limited was the former trustee. Equity Trust sought an order against Basel Trust for the disclosure of documents relating to the administration of the trusts. The claim was wide but, as regards this hearing, the claim was limited to legal advice obtained by Basel at the cost of the trust (some $1 million!).

Basel made an AML report following Mr Kaplan’s indictment in the U.S.A. – before that there had been a good relationship. Mr Kaplan decided to circumvent Basel and appointed Ghirlanda Anstalt as protector of both trusts. In 2007 Ghirlanda appointed additional trustees and Basel took proceedings to question the validity of their addition. These were resolved and Basel resigned in 2008.

The Jersey legislation required the trustee to deliver up trust property in its control (Trusts (Jersey) Law 1984, section 34(1)). Equity claimed that the legal advice was a trust asset and that it was entitled to it, and that the court had no discretion in the matter. It abandoned that argument and the court said it was right to do so: (at paragraph 21) legal advice was not distributable but was obtained to allow the trustee properly to administer the trust. The matter was referred to general trust principles, therefore.

The court said that, normally, an incoming trustee (being in the same position as an outgoing one) is entitled to be placed in the same position as an outgoing one, in order to allow it properly to administer the trust. However, the court said, it had a discretion as to what specific documents and information ought to be handed over in a particular situation.

The court thought that legal advice would normally be disclosable to beneficiaries and, even more so, to successor trustees (at paragraph 29):

“... an incoming trustee will normally be under a duty to hand over to an incoming trustee all documents and information which relate to the administration of the trust so as to enable the incoming trustee to fulfil his duties.”

Here, Basel said that the advice obtained was specific to the circumstances at the time and was irrelevant to future administration. The court accepted this argument.

Further, there was a fear that actually Mr Kaplan, for whom Equity’s advocates had acted, merely wanted the information himself and was likely to try to re-open matters that had been dealt with. Basel had failed however to show that there was a reason why the new trustee ought not to have the chance to look at the advice with a view to satisfying itself that the previous trust administration was not deficient in some way. It was ordered to disclose the advice.

Federal Republic of Brazil v Deutsche Bank International Limited [2012] JRC 211

$10.5 million had been paid into accounts in Jersey. It was alleged that they were bribes received by the former mayor of Sao Paolo and his son. There were three alternative claims: a knowing receipt claim, an unjust enrichment claim and a proprietary claim.

The court was faced with a divergence in decisions: the Privy Council, in Attorney General of Hong Kong v Reid had held that bribes obtained by a person in a fiduciary position were subject to constructive trust. The English Court of Appeal had however, in Sinclair Investments (UK) Limited v Versailles Trade Finance Limited [2011] EWCA Civ 347, declined to follow this approach. While inclined to follow the Privy Council’s approach, the court said that it did not need to decide the point.
The court decided that it was not going to follow English principles in this case: it decided not to be burdened by what it saw as unduly restrictive English rules regarding tracing. It would adopt its own approach to tracing, which would be equally applicable at law and in equity.

The court would therefore allow “backwards tracing” (not clearly available in England): what one had to show was a clear link between the debits and credits in an account, irrespective of the order: on the basis of both justice and practicality, the court would not apply the lowest intermediate balance test required in England.

The defendants were held liable to account on the basis of all three claims.

For more specific advice on Private Client and Trusts in the Isle of Man, we invite you to contact:

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