Trust Litigation in Guernsey

Litigation in the trust sector has seen a number of high profile cases in Guernsey and Bedell's Rupert Morris examines the impact two of these cases could have on trust work on the island

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2015 has been an eventful year for the Guernsey courts with a large number of important judgments having been delivered. The scope of such cases has covered many topics ranging from the application to English law trusts of the revised "Hastings - Bass" jurisdiction through to determining the nature of the law of contempt in private trusts proceedings. These decisions reflect the Bailiwick's continued importance as an offshore trusts jurisdiction and its contribution to international trust jurisprudence as a whole. It would be extremely difficult to do justice to each and every decision in a summary fashion. However, two cases are of particular global interest in the developing jurisprudence covering the topics of mistake and the duties of protectors.

Mistake

In *Nourse v Heritage Corporate Trustees Limited and Concept Fiduciaries Limited* (Royal Court 01/2015) the applicant sought to set aside the settlement of the majority of his shareholding in a company into an employee benefit trust and sub-trust on grounds of mistake resulting from incorrect UK CGT advice provided in 2009. As now appears to be standard practice, HMRC were notified of the application however, in this instance, chose not to make any submissions or take part.

The Royal Court confirmed that it would apply English Law principles on the law of mistake, as now settled by the UK Supreme Court decision in *Pitt v Holt* [2013] UKSC 26. The test for setting aside a transaction in Guernsey now mirrors that in England & Wales – namely that there must be a causative mistake of sufficient gravity (and not merely ignorance or inadvertence) as to some matter of fact or law which it would be unconscionable to leave uncorrected.

The Judgment is of particular note given the consideration by the Jurats (the arbiters of fact in the Royal Court) of the possibility raised by the UK Supreme Court in Pitt as to whether relief should be refused on public policy grounds were the transaction to have involved a tax avoidance scheme that had gone wrong.

In *Nourse* the Jurats held that they did not regard the fact that the applicant was participating in a scheme to avoid the payment of taxes in the UK as any reason to refuse to grant the relief sought in Guernsey and, in the absence of any suggestion that the transaction was tainted with any illegality, found that it appeared to be a perfectly legitimate arrangement and accordingly set it aside.

Protectors

In *In the matter of the K Trust* (Royal Court 31/2015) the Court was asked to remove a protector at the instance of a trust's beneficiaries. The protector, a close friend of the late settlor, had taken a hands on approach to her duties following his death, leading to a breakdown in her relationship with the beneficiaries to such an extent that the current trustee considered that the trust had become unworkable. Additionally the protector was reluctant to resign until a suitable replacement of her choosing was appointed and she received a suitable indemnity against future liabilities (a matter upon which the trust deed was silent).

In the absence of Guernsey authority, the Royal Court rejected the Manx position of *Re Papadimitriou* [2004] WTLR 1141 which suggested that a court would only remove a protector "when that was essential to prevent a trust failing". Instead, whilst acknowledging that this was not a jurisdiction to be exercised lightly, it took guidance from, respectively, the Jersey and English cases of *In the matter of the A Trust* [2012] JRC 169A and *Letterstedt v Broers* (1883) LR9 App Cas 371, finding that the guiding principles for removal of a protector are akin to those for removal of a trustee. In granting the beneficiaries' application the Royal Court held that a protector might be removed where it appears clear that his/her continuance would be "*detrimental to the execution of a trust*" or otherwise damaging to the welfare or interests of the beneficiaries.

Of particular note is the Court's consideration of the nature of a protector's powers, relevant to the question of whether he/she would be entitled to be indemnified out of the trust fund. Generally, where a protector provides a degree of oversight of a trust, these powers have been assumed to be fiduciary rather than personal. However, in Guernsey at least, there is some debate due to s.15(2) of the Trusts (Guernsey) Law 2007 which suggests that the opposite might be true in the case of certain reserved powers.

The Guernsey Court held that, a protector's duties, and indeed to whom such duties might be owed, will need to be assessed on a case-by-case basis (as in Jersey in *In the matter of the Bird Trust* [2003] JRC013) by reference to the construction of the trust instrument itself. Here, it formed an "*overall impression*" from the trust's terms that the protector's office had been endowed with fiduciary rather than personal powers. However, relevant to the Court's decision was the fact that the trust had been settled prior to the 2007 Law coming into force, when no provision similar to s.15(2) was enacted. This suggests that the position might be different for trusts settled or powers exercised by protectors after that date, remaining, a potential area of concern for protectors in Guernsey, particularly as any implied right of indemnity is entirely dependent upon their powers being fiduciary in nature.

facts

£84 billion in bank deposits

source: Guernsey Finance