



# Trust Sector and Continued Litigation

## How can Guernsey's trust legislation respond?

Bedell Cristin's Rupert Morris and Alasdair Davidson assess how trust law in Guernsey may adapt to respond to changes in the sector.



**Rupert Morris**

advocate  
Bedell Cristin



**Alasdair Davidson**

partner  
Bedell Cristin

Generally speaking beneficiaries and trustees alike would all agree that litigation involving a trust should be avoided if at all possible. However, whether we like it or not, hostile or administrative court proceedings are a fact of life. This article considers what changes we think might usefully be made to the Trusts (Guernsey) Law, 2007 (the "Trusts Law") not only in light of recent court decisions but also taking into account legislative innovation elsewhere.

### Protectors - Fiduciary or not?

An area considered recently by the Guernsey Courts concerns the fiduciary nature of Protectors' duties. The position



is not straightforward in Guernsey given that s.15(2) of the Trusts Law effectively reverses the usual presumption that powers granted under a trust are fiduciary in nature by declaring that a wide range can be reserved to an individual without imposing such fiduciary duty upon the holder. Conversely, s.32(3) declares the opposite in respect of so called “consent powers”, which will be fiduciary unless the trust specifies otherwise.

Ultimately, given these contradictory positions, in Guernsey the nature and scope of a Protector’s duties must be assessed by the Court on a case-by-case basis by reference to the Trust deed (In the matter of the K Trust [Royal Court 31/2015]). Clarity could be provided by limiting the scope of s.15(2) to settlors (with a concomitant amendment s.32(3) to exclude them) - this may even have been the intended outcome envisaged by the draftsman. This would bring Guernsey in line with other similar jurisdictions and provide certainty, thereby limiting the need defer to the Courts.

### Surely some mistake?

Following the decision of the English Supreme Court in *Pitt v Holt* [2013] UKSC 26 the nascent Hastings-Bass regime in Guernsey stumbled before it could really walk. This might not have been an issue given that, prior to *Gresh v RBC & HMRC* [Royal Court 25/2009], no one had ever sought to rely upon the principle in Guernsey, instead using the mistake jurisdiction under the Trusts Law to set aside transactions with unforeseen consequences.

However, the issue has become more topical since, as discovered in *In the matter of Abacus Global Approved Manged Pension Trust* [Royal Court 6/2016], mistake may not assist much if the mistake in question cannot be shown to be “sufficiently unconscionable” to justify the attempted setting aside. Faced with such a proposition, the attraction

of an old style Hastings-Bass regime, without the need to demonstrate breach of fiduciary duty by a trustee, is clear.

Other jurisdictions such as Jersey and Bermuda have responded to Pitt by incorporating the old principle into their respective trust laws and, in the writers’ view, it would be useful for the local legislature to do likewise. This would not only rectify a perceived disadvantage but would also provide certainty to trustees and beneficiaries that transactions based upon incorrect advice could be set aside without having to risk the pain, expense and uncertainty of suing the trustee’s advisers.


### ADR

Whilst becoming increasingly popular in other sectors, ADR for trust disputes remains a notably underused exception to this trend. This is surprising given that such disputes can engender a high degree of cost irrespective of whether or not a trust has sufficient assets to justify parties taking such action.

Guernsey was, in our immodest view, ahead of the curve in this area because s.63 of the Trusts Law permits ADR where the terms of a trust deed so provide. This is limited, though, to breach of trust claims against a trustee. Ironically a trustee may, therefore, be better advised not to invoke ADR where he/she has acted honestly and reasonably

since, in such circumstances, only the Court has the power (under s.55) to relieve him/her from personal liability if, ultimately, any such breach is proved. With that in mind would a trustee want to accept a trusteeship with an ADR clause?

The current legislation does not address the myriad of contentious trust claims which do not encompass a breach of trust action against a trustee - for example, beneficiary disputes as to division of assets. If the provisions were widened to permit ADR for all claims involving a trust to which a trustee is a party or, alternatively, arbitration of trust disputes generally (as with the Bahamas Trustee Amendment Act 2011) then, arguably, it is much more likely that ADR would be more widely used. A clear attraction for beneficiaries would be that such ADR proceedings would be in private whereas the same cannot be guaranteed for hearings before the Courts.

Whether or not introducing a wide ranging set of ADR provisions is either practical or commercially viable is another question. The Law Commission in England are considering the topic going as far as including questions of variation of trust through the means of ADR. In light of the paternalistic approach to the supervision of trusts by the Guernsey Courts, though, that might just be one legislative innovation too far. 



▶ In 2016, MONEYVAL reported Guernsey as being compliant or largely compliant with 48 out of 49 of the Financial Action Task Force (FAFT) recommendations – the highest standard of any jurisdiction so far assessed.

source: [www.weareguernsey.com](http://www.weareguernsey.com)

