



**Practical problems in trust  
administration and possible  
legal remedies in Jersey**

**Presentation to FISA**

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## Overview

Henry advises professional trustees, intermediaries, family offices and high-net worth families in the Channel Islands and internationally on all aspects of Jersey trusts, foundations and estate planning and related corporate law issues.

Prior to joining Ogier in August 2019, Henry worked for over 8 years in the international private client group of another major law firm in Jersey. A graduate from the University of Edinburgh Henry has also worked in a top tier private client team in London.

Henry provides advice and assistance on the creation and ongoing operation of private and commercial trusts, including the drafting of trust instruments, supplemental documentation and the establishment and use of private trust companies. He has considerable experience in estate planning, advising on complex restructurings and the impact of international sanctions upon companies and trusts. Henry also advises in relation to corporate migrations, philanthropic structures, pension and employee reward scheme matters.

## Industry focus

- STEP member
- Former Chair of STEP Jersey Branch
- On a number of consultative bodies relating to Jersey's trust industry
- Lead editor of STEP Directory Jersey overview
- Co-editor of chapter on Jersey as a trust jurisdiction in Butterworths LexisNexis “Encyclopaedia of Forms and Precedents” 2019

## **Areas of expertise**

- Employee incentives and pensions
- Notary Public
- Private Wealth
- Probate and Estates
- Trusts Advisory Group

## **Admitted in:**

2014 - Jersey

2008 - England and Wales (non-practising)

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*“Don’t find fault, find a remedy...”*

## **Henry Ford**

**American Industrialist, the founder of the Ford Motor Company (1863 – 1947)**

# Introduction

- Trusts (Jersey) Law 1984 (the **Trusts Law**)
- Art 21 – to act:
  1. with due diligence;
  2. as would a prudent person;
  3. to the best of the trustee’s ability and skill; and
  4. subject to the terms of the trust to preserve and enhance the value of the trust fund.
- Cannot exclude core duties 1 to 3.
- Overriding duty to act in the best interests of the beneficiaries.



# Specific risks and pitfalls during lifecycle of trust

- Settling / taking on trust
- Trust documents –errors in wording
- Trustee decision making
- Change of trustee
- Tax



# Settling trust (1)

## Control

- Benefits of more control in the trust deed to be conferred upon the settlor or a third party:
  - the settlor's perspective may be at odds with trustees' duties;
  - the trustee may not have the relevant business skills;
  - their decision-making processes time lines may not fit with dynamic business; or
  - give rise to unacceptable large costs.

## Settling trust (2)

### Re Esteem Settlement [2003] JRC 092 (§54)

- **Facts:** Fraudulently acquired assets were transferred into a number of trusts, including two Jersey trusts. These proceedings sought to recover the remaining trust assets on the grounds that the *Esteem Settlement* had never been a validly constituted trust as the settlement was null and void on the basis that, *inter alia*, the trust was a sham.
- **Held:** There had been no sham as the trustee and the settlor intended that the trust assets transferred should be administered in accordance with the terms of the executed trust deed. A sham will only exist if there is a common intention of the settlor and trustee that the true position should be otherwise than as set out in the trust instrument which they both executed.





## Settling trust (3)

### Statutory solution: *settlor wanting control*

- Possible to reserve powers under Article 9A of the Trusts law, to include:
  1. revoke, vary or amend the terms of a trust or any trusts or powers;
  2. advance, appoint, pay or apply income or capital of the trust property or to give directions;
  3. binding directions as to the appointment or removal of, a director or officer;
  4. binding directions re purchase, retention, sale, management, lending, pledging or charging of the trust property or the exercise of any powers or rights arising from such property;
  5. appoint or remove any trustee, enforcer or beneficiary, or other power holder;
  6. appoint or remove an investment manager or investment adviser;
  7. to change the proper law of the trust;
  8. to restrict the exercise of any powers or discretions of a trustee by requiring that they shall only be exercisable with the consent of the settlor or any other person.

- All powers theoretically can be reserved but.....



## Settling trust (4)

### Issue: settlor wants too much control

- *Too many reservations may be considered a nominee arrangement.*
  - Why do trustees worry about this?
    - no right to the trust property;
    - no right to any indemnity leaving them personally exposed to liability; and
    - no right to remuneration and the return of trustee fees.
  - Problem: too much control conferred on parties other than the trustee, may enable a third party to undermine the trust by asserting that no true discretion was ever intended to be exercised by the trustees. (*TMSF (Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Company (Cayman) Limited and ors [2011] UKPC*)
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## Settling trust (5)

### Issue: Exoneration

- West v Lazard Bros and Company (Jersey) Ltd 1993 JLR 166 at 289.
  - **Facts:** The plaintiffs brought two actions against the defendants for alleged breaches of trust and fraudulent mismanagement in connection with various transactions in which they were interested.
  - **Held:** *inter alia*, the clause that the trustee “shall not be liable in respect of any purported exercise of any duties or powers under this trust” (except fraud) was invalid because it was contrary to the provisions of art. 26(9) of the Trusts (Jersey) Law 1984, as amended, whereby trustees could not be exonerated from liability for breach of trust caused by their own “fraud, wilful misconduct or gross negligence.”
- STEP members are obligated to highlight exoneration clauses to clients.

## Settling trust (6)

### Issue: Higher level of skill expected from professional trustees

- Bartlett -v- Barclays Bank Trust Corporation [1980] 1 Ch.D 515 at 534, where he said as follows;

*"I am of opinion that a higher duty of care is plainly due from someone like a trust corporation which carries on a specialised business of trust management... I think that a professional corporate trustee is liable for breach of trust if loss is caused to the trust fund because it neglects to exercise the special care and skill which it professes to have."*

- Brightman J.

## Settling trust (7)

### Issue: Higher level of skill expected from professional trustees

Midland Bank Trust Company (Jersey) Limited & Others v. Federated Pension Services 1995 JLR 352:

*"Mr. Clyde-Smith for the appellant-plaintiffs correctly submitted that the scope of duties imposed on trustees and the performance of those duties to be expected of trustees must vary according to the category of trustee concerned. What is to be expected of a junior employee made a trustee of his multinational company employers occupational pension scheme is necessarily different from what is to be expected of a paid professional trustee company acting as the sole trustee of an occupational pension scheme. This arises under art. 17(1) of the 1984 Law."*

- Sir Godfray Le Quesne QC (at page 381).



## Settling trust (8)

Issue: Higher level of skill expected from professional trustees – Investment

- Investments often involve a degree of speculation.
- Very high risk investments might be merely a gamble.
- Gambles are potentially unauthorised.



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## Settling trust (9)

### ESG clauses

- Reserved powers
- Express power to invest in sustainable investments
- The Trustees "shall endeavour" to invest in sustainable investments
- The Trustees shall have "regard" to directions/advice on sustainable investments
- The Trustees shall consult professionals
- The Trustees shall consult the Beneficiaries
- Must make a term of the investment adviser's appointment that sustainable investments considered first
- Restrict the powers to allow only sustainable investments
- Shall or may?
- Setting out the interaction between traditional "Anti-Bartlett Clauses" and underlying companies to be vehicles for ESG investment

# Taking on trust

## Awareness of History and Purpose of Trust



- Reason for a trusts creation:
  - sheltering of assets from tax or exchange control legislation;
  - preservation of assets for estate planning reasons;
  - avoidance of forced heirship rules; and/or
  - protection of family businesses to prevent a single member of the family from overriding the wishes of others or which prevents fragmentation of interests.
- Required beneficiary details:
  - identity of the beneficiaries;
  - ages;
  - places where they reside; and
  - personal circumstances.



# Trust documents

## Issue: Mistakes in documents

- Errors in wording of trust documents, or their execution, can give rise to issues of administration.
- Remedies:
  1. Construction / interpretation
  2. Imputed intention
  3. Equity aiding the defective execution of a power
  4. Ratification
  5. Variation
  6. Rectification



# Trust documents (1)

## Solution: Mistakes in documents - Construction / Interpretation

- Meaning?
- Interpreted objectively not subjective intention
- Can remedy drafting errors:
  - Clear mistake on the face of the document (says “X”)
  - Clear what correction must be made (should say “Y”)
- Court declares effective as if says “Y”
- Only obvious clerical blunders or grammatical mistakes



## Trust documents (2)

### Solution: Mistakes in documents – Imputed intention

- Usually need express intention. But if necessary for transaction to work, relevant intention can be imputed.
  
- Examples:
  1. Sign documents to sell property. Imputed intended to use power to sell.
  2. Universally thought X has power. Document says so. Document validly executed. Everyone wrong – but real power holder Y also executes (perhaps in another capacity). Correct person signing right document, wanting it to happen – can impute intention of Y to exercise.
  3. Later document recites earlier exercise of power as effective –intention imputed dated from later document.

## Trust documents (2) - example

### Solution: Mistakes in documents – Imputed intention (example)



#### ○ Re H1 Trust Company [2013] JRC 039:

- **Facts:** When entering into a DORA, a mistake was noticed in clause 1 stating that the 'Protector' was appointing the new trustee.
- **Held:** The Court was satisfied that there was a clerical mistake. Imputed intention offered assistance. All parties with power to appoint the new trustee had intended for the new trustee to be appointed, so no need to ratify previous actions of the new trustee or relieve the old trustee from inaction.

## Trust documents (3)

### Solution: Mistakes in documents – equity aiding the defective execution of a power

- Power holder intends and attempts to exercise power for proper purpose but error in execution formalities.
- Equity may assist the following by giving effect to the document: purchasers for value, creditors, charities and persons for whom the appointor is under a “natural or moral obligation to provide”.
- “Natural or moral obligation to provide” – question of fact in each case. Traditionally wife and child –but not husband, illegitimate children or remoter issue.



## Trusts documents (3) - example

### Solution: Mistakes in documents – equity aiding the defective execution of a power

- Re Shinorvic Trust [2012] (1) JLR 324:



- **Facts:** a defect in the deed was discovered, when a beneficiary was added but the execution had not been witnessed (as defined) and the power to appoint additional trustees vested in MF after his death, and there was no definition of 'new trustees' in the deed.
- **Held:** There was an obvious intention to exercise the power to add the beneficiary and to appoint the new trustee. Equity will aid the defective execution of a power.

## Trust documents (4)

### Solution: Mistakes in documents – ratification

- Particularly relevant to ineffective trustee appointment
- Remedy situation:
  - Person who thought they were trustees = trustee *de son tort*. Court can “ratify” what they have done as *de facto* trustees, and appoint them going forward
  - People who thought they were no longer trustees – court can relieve them from liability for breach of trust (Art 45 Trusts Law)



## Trust documents (4) -example

### Solution: Mistakes in documents – ratification

- Re BB (Royal Ct), 2011 JLR 672:

- **Facts:** Concerned how court should best deal with two invalid appointments of trustees as a result of one of the party's having actually been dissolved and accordingly the remaining trustees had consequently become trustees *de son tort*.
- **Held:** it should save the trust from the havoc that might ensue from any attempt to unscramble what had been purportedly done by the trustees *de son tort* by ratifying those actions it had taken.



## Trust documents (5)

### Issue: problem with trust deed

- May be possible to vary trust document if there is an issue with it:

1. Power to vary (historically just administrative provisions but modern trust instrument usually allows for dispositive provisions as well).
2. All beneficiaries agree and trustee consents.
3. Court consents on behalf of beneficiaries who are unable to provide it (e.g. minors, interdicts, unborns), if the variation is of benefit to them, and the case is a fit and proper one for the court to make the order (Article 47).



## Trust documents (5)

### Solution: Variation

- **Saunders v Vautier [1841] EWHC J82, 4 Beav:**

- **Facts:** A testator bequeathed stock for a his great nephew and his wife and heirs. According to the terms of the trust, it was to accumulate until the beneficiary reached the age of 25. when the beneficiary was 21 (the age of majority at the time), he presented a petition for the trustees to be ordered to transfer to him stock, or it be sold and the proceeds transferred to him.
- **Held:** if all of the beneficiaries in the trust are of adult age and under no disability, the beneficiaries may require the trustee to transfer the legal estate to them and thereby terminate the trust.

## Trust documents (6)

### Solution: Mistakes in documents – rectification

- If trust document terms do not reflect maker(s) subjective intention, it can be re-written
- Requirements:
  1. Sufficient evidence that a genuine mistake has been made, so that documents do not reflect the true intentions
  2. Full and frank disclosure
  3. No other practical remedy –cannot use the other remedies described above. Last resort

## Trust documents (6) - example

### Solution: Mistakes in documents – rectification

○ Re Exeter Settlement (Royal Ct.) [2010] JLR 169:

- **Facts:** Parties had intended trust to be executed with no named beneficiaries but with the Royal National Lifeboat Institution as the ultimate beneficiary. There was an error in not inserting the RNLI into the deed.
- **Held:** Trust deed was to be rectified by inserting charity by name. Court was satisfied that, *inter alia*, it was a result of genuine mistake and the trust deed did not carry out trust intentions of parties and settlor.



## Trustee decision making (1)

- Trusts Law, Art 24(2) = every power conferred on trustees is to be exercised only for the purposes of the trust, and in the interests of the beneficiaries.
- Trusts (Jersey) Law 1984, Art 21(1) = a trustee shall in the execution of his or her duties and in the exercise of his or her powers and discretions –
  - act–
    - (i) with due diligence,
    - (ii) as would a prudent person,
    - (iii) to the best of the trustee's ability and skill; and
    - (iv) observe the utmost good faith.

## Trustee decision making (2)

### Issue: trustee not exercising its discretion correctly

- Possible lines of attack:
  1. Decision not within scope of trustee's powers under trust;
  2. Fraud on a power;
  3. Trustee did not exercise its own discretion (see Turner v Turner [1984] Ch 100);
  4. Trustee failed to take into account relevant considerations / or took into account irrelevant considerations; or
  5. Trustee had a conflict of interest.
  
- Effect = trustee decision declared void.

## Trustee decision making (3)

### Solution: mitigating risk



- Mitigating trustee risk:
  - check the trust instrument, understand nature / scope of powers.
  - make appropriate enquiries and ensure you have the relevant facts.
  - a decision that is "reasonable" in all the circumstances - often more than one outcome.
  - act for the proper purpose— usually in the best interests of the beneficiaries and not an ulterior motive.
  - keep complete records of decisions and reasons.
  - take professional advice.
  - consider an application to the court.

## Trustee decision making (4)

### Solution: mitigating risk –court involvement

- Jersey court 4 types of cases where Court asked to adjudicate on course of action as originally set out in In Re S Settlement 2001 JLR N-37, [2001] JRC 154:
  1. Court construing powers in a trust;
  2. Court's blessing for a proposed momentous decision on the part of the trustee;
  3. Conflict of interest –surrender of discretion; or
  4. Set aside a decision.



## When a change of trustee is contemplated

**Issue: Essentiality of proper appointment and discharge**

- As seen earlier when discussing mistake, case of *Re BB, A and D* 2011 JLR 672: the Court ratified certain actions of a *trustee de son tort*.



## Taking Control of Trust Assets

### Issue: no automatic vesting of assets

- No automatic vesting of trust assets in the names of the new or continuing trustees.
- Article 17(4) = whatever procedures or actions are necessary for vesting the trust property in the trustees for the time being shall be done.

### Solution: make sure legal title to assets is transferred



# Tax

## Issue

- The creation of a trust, or the appointment of new trustees of a trust, will also potentially give rise to tax consequences.
- The place of residence of a beneficiary may also be relevant to the tax consequences.
- Onorati Settlement [2013] JRC 182 =
  - Facts: two of the beneficiaries sought to set aside a deed of appointment distributing the trust fund of the Trust to them without adequate consideration of the tax consequences of the appointment and without professional tax advice, rather than to their mother who was also a beneficiary of the Trust (as was originally envisaged).
  - Held: The trustee was in breach of its fiduciary duty by failing to have regard to the tax consequences of the appointment of the trust fund of the Trust to the beneficiaries.

[Picture]

# Tax Solution

- Applications to the Jersey court to unwind the transactions:
  1. by settlor in respect of transfers under the doctrine of mistake (Art 47E of Trusts Law);
  2. by trustee in respect of transfers under doctrine of Hastings Bass (Art 47H of Trusts Law); or
  3. by trustee in respect of distributions under doctrine of Hasting Bass (Art 47H of Trusts Law).

# Conclusion

- Anticipate control issues, skill expected of trustee.
- If mistakes in documents consider six potential remedies to fix:
  1. Construction / interpretation
  2. Imputed intention
  3. Equity aiding...
  4. Ratification / confirmation
  5. Variation
  6. Rectification
- Exercise discretion carefully.
- Be particularly mindful when changing trustees / potential tax implications.



**Any questions?**

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