XXIV BARRISTERS' CHAMBERS

DECISIONS, DECISIONS, DECISIONS – INTERNATIONAL CASE UPDATE

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ADAM CLOHERTY KC

The last year has certainly seen no let-up in the pace of litigation on a full range of issues across the family of trust jurisdictions. And, perhaps more than ever, courts across the trusts law world are engaged in a healthy – and occasionally 'robust' – dialogue on issues of common interest.

With those two points in mind, this short paper briefly summarises selected judgments handed down in various trust jurisdictions other than The Bahamas in the last 12 months. This is avowedly not a comprehensive list of every (or even every important) case in the jurisdictions referred to. Rather, these are decisions which appear, to me at least, to address a point of general principle and either 'move' the dialogue on, or offer helpful reminders or learning points for trust practitioners.

BERMUDA

In the matter of the X Trusts

[2023] CA Bda 4 Civ (Bermuda Court of Appeal)

"*The Trustees shall not exercise their power to [appoint / distribute / transfer / sell etc etc]… without obtaining the prior written consent of the Protector[ate]*". As is well known, the role that a fiduciary protector should play when asked for and giving such consent is a matter of some debate across trust jurisdictions. The debate to date has essentially proceeded in binary terms: (i) should the protector make his / her own decision i.e. exercise independent discretion taking account of relevant, and disregarding irrelevant, factors (the so-called "wide review role"); or (ii) is their role confined to simply satisfying themselves that the proposed exercise of the power is one which a reasonable body of properly informed trustees is entitled to take (the so-called "narrow review role")?

In *Re Piedmont and Riviera Trusts* [2021] JRC 249, the Jersey Royal Court had famously endorsed the 'wide review' role.

However, in the *X Trusts* case a strong Bermuda Court of Appeal, upholding the conclusion of Kawaley J below, preferred the 'narrow review' role. In broad terms the Court's reasons (which differed in some respects from the first instance judge's) included the following. First, and perhaps most significantly, the trustees generally had the "*paramount substantive role*" of administering the trusts, whereas the protector's role was (necessarily) a subsidiary "*watchdog or enforcer*" role and its powers should be construed with that "*constitutional*" distinction in mind. Second, previous authorities from around the trust law world that "*refer to or reflect upon*" the position of protectors, while not determinative, demonstrated that a protector's role is not to "*usurp*" the trustee's functions – and the decision in *Piedmont* was simply wrong. Third, the practical implications support the narrow role and tell against the wide review role - in particular because of the time and expense that would be involved in the protector carrying out essentially the same deliberation as the trustee and also because of the possibility of "deadlock" between the trustee and protector.

It might be thought that the first and second group of reasons tend to beg the question – or at least do not *ipso facto* shed light on what should, on analysis, be an exercise of interpreting the wording of the particular trust instrument in its context. Similarly, while the practical implications of one or other interpretation might inform the answer, such an approach risks pre-judging the question. Be that as it may, last month the *X Trusts* appellants obtained leave to appeal to the JCPC. The debate will accordingly continue, and we can expect further (and higher) guidance on this issue in due course.

<u>In the matter of the P Trusts</u>

[2023] SC (Bda) 31 Civ 20 (Bermuda Supreme Court)

A family comprising three branches (headed by children of the wealth creator and settlor) benefited under three trusts. Subsequent disputes arose between them as to how the trusts' assets should be allocated and distributed among the family. The significant disharmony was (or was intended to be) compromised under a formal settlement agreement, executed by all of the principal adult beneficiaries, which provided for a scheme rearranging the trusts and intending to achieve a broadly three-way split of value. In the events that subsequently occurred, it transpired that the agreed division turned out to benefit one branch more than and at the 'expense of the other two.

When the trustee subsequently made a ‘category 2’ Public Trustee v Cooper application to ‘bless’ its implementation of the settlement agreement as a ‘momentous decision’, the two lesser benefiting branches opposed that relief on the basis that the trustee’s decision was unfair.

The court held that the proper course for any party seeking to rescind the settlement agreement was for them to do so by separate writ action, and adjourned the application to afford them that opportunity. No such action having been commenced, however, the matter came before the court again. The court blessed the restructure, holding that it was “*implausible*” and “*impossible*” to suggest that the trustee’s decision was irrational or one which no reasonable trustee could make. Although, because of the unusual way the procedure and hearings had evolved, the court declined to hold that the Settlement Agreement prevented the two branches from making submissions opposing the approval application, it nonetheless held that in the “*ordinary*” case there would be a “*compelling*” argument that they would be contractually obliged – and held to their promise – not to oppose implementation of the agreement.

CAYMAN ISLANDS

Re Settlements made by DOTs dated 9 May 2013

FSD 228 of 2023 (Grand Court, Kawaley J, 28.09.23)

This appears to be the first *published* decision on the Caymanian statutory ‘Hastings-Bass’ provision – s. 64A of the Trusts Act (“jurisdiction of court to set aside mistaken exercise of fiduciary power”) – which was introduced in June 2019 (and which has many parallels in s. 91C of the Bahamian Trustee Act). The Grand Court set aside transfers into three trusts which had been made without taking appropriate tax advice and which, contrary to the settlors’ intention, had the effect of brining the assets within an onshore tax regime rather than out of it. (It is not entirely clear from the judgment why the relevant rule was s. 64A – which is concerned with the exercise of a fiduciary power – rather than the doctrine of equitable mistake, which applies to a settlor’s flawed disposition of assets that s/he owns absolutely. The answer may derive from the fact that the ‘economic’ settlors appear first to have transferred the assets to the ‘formal’ – fiduciary – settlors before the assets ended up in the trusts.)

Kawaley J held that, while the court's starting point was the statutory wording, the court could and should have regard to the "*evolution*" of the "*broadly analogous*" judge-made *Hastings-Bass* rule when interpreting the new rule – in particular by having regard to the legislative intent to "*override the constraining effect [on that judge made rule] of Pitt v Holt*". His Lordship considered that the statutory jurisdiction will be a "*more liberally available one*" precisely because its purpose "*was clearly to sidestep a perceived narrowing on the previously more flexible jurisdiction*": the statute can "*confidently be construed as intending to facilitate a flexible approach*".

Perhaps the key feature of this provision, as in other statutory offshore codifications of the rule, is s.64A(4), which provides that – contrary to the position established in *Pitt v Holt* – a claimant invoking the rule need not prove that the exercise of the relevant power was in breach of trust / fiduciary duty. Nonetheless, and despite the statutory regime being intended to "*cut through the conceptual thickets*" introduced by the breach of duty requirement, Kawaley held that the court is still required to find facts that would have amounted to the improper exercise of fiduciary power. In other words, "*in many (if not most) cases*" this will be "*indistinguishable… from having to establish a breach of the fiduciary duty of due deliberation*" in "*conceptual terms*". In other words, his Lordship suggested, the change may be mere "*legal labelling*".

Finally, his Lordship made two other interesting observations:

- First, a comparison. The statutory (and indeed previously judge-made) rule, Kawaley J opined, "*is closely connected to the proper purpose rule*" (i.e. the "*wider equitable principle that fiduciary duties can only validly be exercised for their proper or intended purpose*"). This perhaps fits with the fact that, as the Court explained, a flawed decision under s. 64A is "*explicitly void*" – contrary to the obiter suggestion in *Pitt v Holt* that a decision vitiated under the provision would be voidable (and unlike the Bahamian provision, which allows the court to declare the exercise void <u>or</u> voidable).

- Second, a gloss on the statutory language. "*it seems logical*", said Kawaley J, that *"an implicit requirement*" for obtaining relief under s. 64A is that the applicant acted in *"good faith or comes to the Court with 'clean hands'*": "*the starting assumption ought to be that, by necessary implication, section 64A relief can only be obtained when the applicant has acted in good faith in relation to the impugned transaction*". This means that the applicant "*has not deliberately pursued a course of conduct designed to gain some undisclosed and impermissible onshore tax advantage, nor indeed designed to procure any other improper benefit*". This seems rather like importing the third limb of *Pitt v Holt* – and Lord Walker's deprecation in that context of the "*social evil*" of "*artificial* *tax avoidance*" – into the Caymanian statutory test. And this explicit reference to the tax policy of other 'onshore' jurisdictions is arguably difficult to square with the Grand Court's approach, in the analogous context of rectification claims, not to require any "*deference to the imperative of domestic fiscal policy as articulated by HMRC*" (see *Re G Trusts*, below).

<u>In the matter of the G Trusts</u>

FSD 270 of 2023 (Kawaley J, 01.02.24 and 11.12.23)

This case concerned a Cayman STAR trust which was the subject of ongoing proceedings in Hong Kong concerning the validity of asset transfers by a Hong Kong trust to the STAR trust in which competing beneficiary factions (the 'A beneficiaries' and the 'B beneficiaries' respectively) took opposing positions, but in which the STAR trustee was neutral.

The STAR trustee subsequently sought *Beddoe* relief to bring proceedings in Cayman (at the expense of the STAR trust) to rectify a deed of addition of beneficiaries which, it was said, had mistakenly caused "*discrepancies*" between the Cayman (STAR) trust and the Hong Kong trust which were not intended when the deed was executed. The enforcer and the 'A' beneficiaries supported the STAR trustee's application. The 'B' beneficiaries opposed it – essentially, it seems, on the basis that (i) the ownership of the STAR trust's assets was in dispute in the Hong Kong proceedings and (ii) the rectification issue, if it arose at all, could or should be dealt with in those HK proceedings.

Kawaley J granted the STAR trustee permission to bring the rectification claim in Cayman, essentially on the basis that Cayman was the more appropriate forum in which to litigate rectification of the Cayman instrument. The Cayman 'firewall' provisions weighed heavily in the analysis: they made it "*desirable*" for the Cayman court (rather than then foreign, HK court) "*to adjudicate apparently novel questions of Cayman Islands law relating to the exclusion of foreign law*". "*The public policy weighing in favour of [the Cayman Islands] will generally be stronger*" where the dispute involves "*distinctive*" questions concerning "*bespoke*" Caymanian vehicle like STAR trusts or where the 'firewall' mandates "*uniquely Cayman trust law*". Moreover, the Cayman Court should entertain the rectification claim now precisely because of the "*increase[d]… likelihood that the foreign [HK] court would become the more appropriate forum if the issue were to be postponed to a future date*". In other words, the Cayman claim should 'torpedo' any litigation of the rectification issue in the foreign court. His Lordship also considered that the rectification claim could and should proceed with the benefit of a pre-emptive costs order notwithstanding the doubt about ownership of the trust assets.

An issue then arose as to whether any "adversarial" argument was required on the rectification claim and, if so, who should present it. The 'B' beneficiaries contended that they should oppose the rectification claim with the benefit of a similar pre-emptive costs order. The Court ultimately disagreed: Kawaley J, overturning his previous "*provisional*" view to the contrary, holding that (i) adversarial argument is not always required (the need for adversarial argument largely arising out of what Smeelie CJ had previously described as "*imperatives of [onshore] fiscal policy*" that "*do not arise in this jurisdiction*"); and (ii) the rectification judge should decide whether any further argument was required and who should present it (and at what cost). Although his Lordship's comments tended to suggest that the appropriate person to present opposing arguments might well be the Enforcer and not the B beneficiaries because "*… The voice of a beneficiary in relation to a STAR trust is far more muted compared with the standard position in relation to an ordinary trust*".

<u>Perry v Lopag Trust Reg</u>

[2023] 1 WLR 3494 (JCPC)

This case is not a decision as such, but more a decision *not* to decide a case – reached by a panel of some 7 Justices of the Supreme Court. *Perry* concerned a case of transfer into trust which, it was claimed, was made (i) in breach of matrimonial 'community' property rights and (ii) by reason of a mistake in failing to understand the effect of the trust. The mistake claim raised the question whether a transferor's "causative ignorance" (as opposed to his/her mistaken belief or tacit assumption) could ground relief for equitable mistake. That in turn called into question the correctness of the decision in *Pitt v Holt:* hence why an unusually large panel of Justices was convened.

The Privy Council's practice of refusing to disturb concurrent findings of fact in the courts below, save in exceptional cases, is well-known – and has arguably become more trenchant in its application in recent times. In broad terms, the Board will only interfere if the appellant identifies findings of fact that are unsupported by the evidence, or which are tainted by some serious procedural irregularity, and which (in either case) would have been critical to the outcome of the case.

But in *Perry*, the question arose how this practice should apply, if at all, to findings of foreign law – which, although treated as "facts" in common law courts, are facts of facts "*of a peculiar kind*". In that case, the underlying transactions fell to be analysed under Israeli law (for the purposes of the matrimonial claim) and Liechtenstein law (for the mistake claim).

The PC's answer is that there is a spectrum and it all depends on the type of foreign law in issue. At one end of the spectrum are cases where the judge can use his or her skill and experience of domestic law to ascertain and apply the foreign law – for example, an English judge considering a foreign common law system which applies the same or analogous principles and means of analysis as English law. In those cases, the Board would be unlikely to invoke the concurrent fact principle and would bring its own experience to bear in analysing the foreign law. At the other end, however, are cases where the judge's skills and experience in their own law has a minimal role to play in ascertaining the foreign law – for example, a foreign civil law system where the relevant area of law has no obvious counterpart in the domestic law. The Board concluded that Israeli matrimonial law and Liechtenstein trust law lay at this latter end of the spectrum: they are not "readily accessible" to judges trained in Cayman or English law Accordingly, given that the foreign law findings were essential to the ultimate resolution of the case, the Board declined to hear the appeal at all.

Thus, the Board did not in the event consider the significant point of principle for which the 7-member panel was convened. Whether the doctrine of mistake should extend to cases of causative ignorance – not knowing about something which would make you behave differently – will therefore have to await a future case.

<u>ENGLAND AND WALES</u>

<u>Denaxe Ltd v Cooper</u>

[2024] 2 WLR 142 (Court of Appeal)

A trustee or other office holder's momentous decision – for example to sell a substantial asset – is approved by the court. Is the trustee thereby immunised from future breach of trust claims – for example a claim of negligence – in respect of that transaction? There is a surprising dearth of English appellate authority on that question. But in *Denaxe* the Court of Appeal (overturning the first instance judge) concluded that the office-holder is *not* immune as such from any and all claims.

Although *Denaxe* concerned a sanction application brought by receivers by way of equitable execution (for approval of their decision to sell assets owned by the debtor), the CA confirmed that such applications involve the same principles (and consequences) as trustees' applications for directions. The receivers served their sanction application on the debtor / owner (the 'beneficiary' if you like) and the owner filed evidence simply purporting to reserve his rights as to the wisdom of the sale. Marcus Smith J held that the transaction was a "momentous decision" and sanctioned the receivers' decision to sell, on the usual basis that the transaction was (i) within the receivers' powers; (ii) they genuinely held the view that the sale was for the benefit of the company and its creditors and (iii) they were acting rationally and without any conflict of interest.

The owner subsequently sued the receivers claiming that they had negligently sold the assets at an undervalue. At first instance, Fancourt J struck out the claim, holding that (i) the court's approval of the transaction 'immunised' the receivers from any subsequent equitable or common law claims for breach of trust and (ii) the claim was barred by an issue estoppel res judicata; and (iii) the claim was an abuse of process. As to the immunity point, Fancourt J's decision echoed the prevailing view, as expressed in *Lewin on Trusts*, that "*the result of giving approval is that the beneficiaries will be unable thereafter to complain that the exercise is a breach of trust or even to set it aside as flawed*".

However, the CA disagreed – Snowden LJ holding that none of the authorities directly addressed the precise extent of the immunity conferred by an approval decision. In his view, the three (first instance) decisions that appeared to support the proposition espoused in *Lewin* were all obiter, and that there is in fact no such thing as "immunity" *per se* ([117]). At most, the concept of "immunity" is a judicial shorthand the doctrine issue estoppel (and, relatedly, *Henderson v Henderson* abuse of process or abuse by way of impermissible collateral attack on an earlier decision); and, approving *Re Sova Capital* (below), the scope of any such "immunity" must "*be sensitive to the particular facts*". Whether there is an issue estoppel will therefore depend on what issues are put before the court. For example, in an ordinary 'category 2' approval application, the court would not look into, still less rule on, the detailed merits of a particular transaction – and, in such a case, no estoppel would arise as to such matters.

Fortunately for the receivers, and although the CA declined to decide whether an issue estoppel was made out, the Court did uphold the outcome in the lower court on the basis that the debtor / owner's claim was a *Henderson v Henderson* abuse: he had been given "*the clearest possible opportunity*" to litigate the suitability of the sale at the sanction application and it would be abusive for him now to raise that issue (his "calculated decision" to keep his powder dry was not open to him).

Of interest too are the CA's remarks – perhaps made with a view to discouraging the widening of approval applications – about the general inappropriateness of a trustee seeking to surrender its discretion, or of the trustee framing the issues on an approval application so as to address wider questions, such as the suitability of the underlying transaction. As to the first, Snowden LJ opined that: "*In the absence of some deadlock or disabling conflict of interest, it is relatively rare for the court to accept a surrender of discretion from trustees. It is all the more difficult to imagine circumstances in which the court would think it appropriate to accept a surrender of discretion in relation to a proposed sale of assets by professional office-holders who had been appointed for their expertise in taking commercial decisions in relation to the realisation of assets, and who were being remunerated to do that job*" [74]. And as to the second, his Lordship echoed the Court's dicta in the Cotton case: "*Vos LJ did not think that trustees should ordinarily ask, or that the court would ordinarily be prepared to undertake in advance, the type of detailed fact-finding exercise involving oral and/or expert evidence which would be required to determine whether a proposed sale price was the best price reasonably obtainable for the property in question.*"

<u>Bhaur v Equity First Trustees (Nevis) Ltd</u>

[2023] EWCA Civ 534 (Court of Appeal)

Claims to set aside mistaken dispositions into trust under the principles clarified in *Pitt v Holt* continue unabated. In *Bhaur*, Mr and Mrs B were "oversold" and aggressive tax avoidance scheme (called the "Asset Liberation Solution"). In reliance on very expensive but fatally flawed estate planning advice, they transferred various beneficially owned assets to an employee benefit trust (EBT) in the apparent but erroneous belief that that the transfer would attract favourable inheritance tax treatment. It did not – the scheme was hopeless and, when it was challenged HMRC, Mr and Mrs B sought to set the relevant transfers aside on the grounds of equitable mistake, engaging the now familiar three-stage test: (1) a mistake which is (2) of the relevant type and (3) is sufficiently serous as to render it unjust or unconscionable for the transaction to stand.

Overall, the CA upheld the first instance judge's decision to refuse relief, on the basis of the third strand of the test: "*it would not be unjust or unconscionable to refuse equitable relief and to leave the consequences of the Appellants' mistaken belief uncorrected*". Although the consequences of the transaction for the B family were likely very serious indeed (the tax, interest and penalties would potentially exceed the value of the remaining assets), they fell foul of the proviso introduced by Lord Walker in Pitt v Holt that "if the circumstances are such as to show that [the transferor] deliberately ran the risk, or must be taken to have run the risk, of being wrong" then relief would probably be refused.

In *Bhaur*, Snowden LJ rationalised that proviso as "*probably fit[ting] best into the third limb of… [the] analytical framework*". On that basis, taking a *"broad view of the justice of the case*" and notwithstanding that the transfer may well have been the result of bad or misleading advice, there was no injustice. Mr and Mrs B "*deliberately chose to implement what they knew to be a tax avoidance scheme which, to their knowledge, carried a risk of failure and possible adverse consequences*". Moreover, it seemed to the CA "*to be of considerable weight that the Scheme was, on any objective view of the facts, an entirely artificial tax avoidance scheme"*, Snowden LJ stating "*I fully accept that tax avoidance is not unlawful, but I agree with Lord Walker's observations in Pitt v Holt at [135] that <u>artificial</u> tax avoidance is a social evil that puts an unfair burden on the shoulders of those who do not adopt such measures. In my view this is a very weighty factor against the grant of any relief*".

Interestingly, the CA left open the question – which the judge decided against them – whether Mr and Mrs B had made a "mistake" of the relevant type. On the judge's approach, Mr and Mrs B had not made a mistake about a past or present state of affairs, but, rather, a "misprediction" as to the consequences of the (future) scheme going wrong – which, on the present authorities, would not suffice. However, the CA thought this an "interesting point" – in particular seeing the scope for the argument that the futurity of the scheme (and the misprediction analysis) was a red-herring in *Bhaur*, because <u>at the time of the transfer</u> the scheme "*either did, or did not, have the desired effect of avoiding inheritance tax*". We therefore probably haven't seen the last of the mistake versus misprediction debate – an analysis which, in the words of Goff & Jones, can lead to "*some uncomfortably fine distinctions*".

<u>**Byers v Saudi National Bank**</u>

[2024] 2 WLR 237 (Supreme Court)

Mr Al-Sanea held valuable shares in five Saudi Arabian banks on trust for SICL, a Cayman company. In 2009 he transferred those shares to Samba, a Saudi bank later merged with

Saudi National Bank, in discharge of his own indebtedness to Samba – and, therefore, in gross breach of trust.

SICL and its liquidators made a claim against Samba/SNB in knowing receipt. The claim was governed by Cayman law (which is materially identical to English law in this regard). Samba having been debarred from defending the claim by reason of its refusal to give disclosure, it was taken as read that Samba knew about SICL's rights under the trust, and Mr Al-Sanea's breach of trust, when it received the shares, and that its receipt was therefore unconscionable. But Samba/SNB contended, and the first instance judge accepted, that, under the Saudi Arabian law applicable to the share transfer, it obtained good title, clear of any other interest (notwithstanding its knowledge of SICL's interest). On that basis, the first instance judge dismissed the claim, and such dismissal was upheld by the Court of Appeal – the claim failed for lack of a sufficient "proprietary base".

The Supreme Court agreed. It held that, while there was no authority directly on point and it should consider matters from first principle, a personal claim in knowing receipt depends upon the claimant having a continuing equitable proprietary interest in the transferred property *that survives the transfer*; where under the law applicable to the transfer the recipient obtains a 'clean' title, both proprietary and personal rights would be 'wiped', whether or not the recipient is 'equity's darling' under the English / Cayman law governing the claim; and that the effect of the Saudi law governing the transfer was to extinguish the claimants' proprietary rights and, necessarily therefore, any personal Cayman/English claim in knowing receipt. (The same would not apply to personal claim in dishonest assistance, which is different species of liability.) In other words, a beneficiary's proprietary claims and personal claims are completely co-terminus – and so, just at the point when the personal claim might be thought to be most needed (because a proprietary claim no longer lies) it, too, will have disappeared.

JERSEY

Representation of SG Kleinwort Hambros Trust (CI) Ltd

[2023] JCA 088 (Jersey Court of Appeal)

Applications for directions in which the trustee asks the court to give so-called "non-binding" guidance – usually guidance 'along the way' during evolving deliberations as the trustee and others (e.g. beneficiaries) formulate a final plan to undertake some "momentous" action, such as restructure the trust or divest it of a significant asset – are a recent and increasing phenomenon, particularly in the Channel Islands jurisdictions.

However, some have suggested that they are fraught with danger and indeed that the concept of "non-binding guidance" is inimical to the judicial function – which is of course to give directions or make decisions (not guidance) which are very much binding. The *Kleinwort Hambros* case will provide some grist to the doubter's mill.

It involved a long-running dispute between two branches of a family interested under various trusts and proceedings for the removal of the protector and appointment of trustees, resulting in a lengthy (but inconclusive) judgment, in which the (first instance) Royal Court and the parties concluded that there should be a "holistic restructuring" of the trust. Various abortive attempts at restructuring followed without success; and, eventually, the trustee applied to court for approval of the trustee's further restructuring proposals as "*formulated in due course*". All parties having hitherto operated on the basis that the court would give its non-binding guidance to facilitate the restructuring along the way, one branch subsequently recanted and urged the court not to get involved. Nonetheless, the court set down a three-day "outline proposals hearing" for the purpose of considering what guidance to give.

The recanting branch then appealed, contending that the court did not have jurisdiction under Jersey's statutory-based jurisdictional rules for trusts (especially Article 51 of the Trusts Law) to give non-binding guidance; alternatively, that do so would breach the non-intervention principle, i.e. that a court will not in general intervene in the management of the trust and direct fiduciaries how to exercise their discretionary powers (see below). The Jersey CA essentially dismissed the appeal on the basis that it was premature – before seeing whether the court in fact gave any non-binding guidance at the hearing, and if so what guidance – to conclude that the guidance would go beyond the court's jurisdiction or fall foul of the non-intervention principle. The Jersey CA could not say that <u>any</u> guidance the lower might give in due course would <u>necessarily</u> infringe the rules – any appellate review would have to be based on what, if any, guidance the lower court actually gave.

However, it is fair to say that the Jersey CA gave a resounding endorsement of the centrality of the non-intervention principle and its applications in all types of proceedings – including applications for directions, whether for non-binding guidance or otherwise: "*the non-*

intervention principle has rightly formed a key part of the court's practice in the exercise of its jurisdiction under Article 51 for many years, thereby greatly contributing to certainty in the law"

It is also fair to say that the Jersey CA expressed some scepticism about the utility or wisdom of a court ever giving non-binding guidance save in exceptional cases: "*nothing we have said in this judgment should be interpreted as an encouragement to first instance judges either to depart from the non-intervention principle or to express provisional views as to the substantive content of any possible restructuring in the generality of cases. Self-evidently, judicial decision-making must be, and must be seen to be, based on the best available evidence, which is a situation that is only reached at the end of a substantive trial. As a result, provisional views which have been formed at an earlier stage will not be fully informed and may accordingly be wrong. Equally importantly, any expression of such provisional views will risk giving the impression that the court's mind is already made up before the evidence is complete. And, irrespective of how disciplined the judicial mind may be, human nature being as fallible as it is, there is always a risk that, having expressed a provisional view, the court will subconsciously be inclined to adhere to it even as further evidence and argument unfold. For these reasons, we would generally discourage the expression by the court of provisional views as to the content of any proposed restructuring.*"

<u>Alpha, Beta and Delta Trusts</u>

[2023] JRC 138 (Jersey Royal Court)

The 'non-intervention' principle is that a court will not generally interfere with a decision taken by a trustee simply because it would have reached a different decision: the decision is one for the trustee to take and, absent some factor vitiating (eg breach of fiduciary duty), a court will only overturn a trustee's decision if it is one that no reasonable trustee could have taken in the circumstances.

In *Alpha, Beta and Delta Trusts* the Court held that the principle is as applicable to decisions about how best to preserve and protect trust assets as it is to decisions about how to invest or the appointment of assets to beneficiaries.

In that case, trustees were on notice of potential wrongdoing in a company in which the trust held a minority stake, the other shares being held by (inter alia) two brothers who were beneficiaries of the trust. It was accepted that the trustee needed to address matters, but the brothers vehemently disagreed about how best to address the situation: one brother, the representor (applicant), taking the view that the trustee should procure the appointment of directors suggested by him; while the other brother urged the appointment of directors he suggested.

The trustee – having failed to find a respected local professional to be its appointee – then decided to take a third way of appointing in the first instance an 'observer' to attend and monitor board meetings and receive information, so as to establish an independent information flow with a view to further investigating the wrongdoing. The representor took the view that this was insufficient and sought an order directing the trustee to join in the appointment of additional directors. However, the Court refused the application: the trustee had taken a decision about how to address the situation; and, while not very trustee would have acted as it did, its decision was not one which no reasonable trustee could have reached. "*In effect, the Representor considers that there is a better way of proceeding and is asking the Court to direct the Delta Trustee to proceed in this better way. But that is not the function of the Court unless the course proposed by the Delta Trustee would amount to a course which no reasonable trustee would pursue.*"

ADAM CLOHERTY KC

XXIV Old Buildings, Lincoln's Inn, London

adam.cloherty@xxiv.co.uk

+44 (0) 20 7691 2424