

Offshore Trust Case Round-up

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serle court



Some themes...

Protectors

Privilege

Substratum



Protectors

- ❑ Increased popularity of flexible discretionary trusts has led to greater use of protectors and wider scope of powers

- ❑ This creates a number of issues, for example:
 - ❑ Are the protector's powers fiduciary?
 - ❑ What is the scope of a power to consent?

- ❑ Until recently, there has been little engagement on the second issue



Protectors (1)

- ❑ *PTNZ v AS* [2020] WTLR 1423 (England):
 - ❑ T's application to approve exercise of power of appointment
 - ❑ Protector appointed
 - ❑ Questions over:
 - ❑ Whether appointment was valid (issue of construction of the trust)
 - ❑ Whether requirement for protector consent was limited to deciding whether T's decision was a proper one, or whether it involved independent exercise of discretion by P
- ❑ Court held that requirement for P's consent means that P's role is substantive, and not merely a review of the trustee's decision. P was therefore entitled to withhold consent even if T's decision



Protectors (2)

- ❑ *In the Matter of the X Trusts* [2021] (Bermuda)
 - ❑ Proposal to restructure and confer additional powers on P
 - ❑ Difference in view between groups of beneficiaries
 - ❑ What was the ordinary scope of P's power to consent?
 - ❑ Court held:
 - ❑ Answer will be one of construction
 - ❑ Ordinarily, 'narrower view' of P's power will be correct
 - ❑ P's power will therefore be one of review for rationality etc



Protectors (3)

- ❑ *Re The Piedmont and Riviera Trusts (Jersey):*
 - ❑ 'Hot off the press'
 - ❑ T's decision to distribute. P withheld consent. T considered it was not obliged to give reasons for its decision to P.
 - ❑ T then made second decision, taking into account P's concerns
 - ❑ Group of Beneficiaries objected to second decision
 - ❑ Court held that P does not have a narrow review function
 - ❑ But – P's discretion in context of a power to consent '*lies within a narrower compass than that of a trustee*'
 - ❑ Discussion is encouraged (and P is entitled to information)



Protectors (4)

- Position is now, perhaps, *less* clear than before these cases were decided
- Three different approaches
- Need for clarity from appellate courts
- Ultimately it may be a question of drafting
- More thought needs to be given to protectors and the role they are to play



Privilege

- ❑ Important question for trustees: *is legal advice received protected from disclosure to beneficiaries?*
- ❑ Question of Joint Privilege between T and Bs is important in this context



Privilege (1)

- ❑ *Dawson-Damer v Taylor Wessing* (England):
 - ❑ B under Bahamian Trust sought disclosure of information
 - ❑ Bahamian law restricts access to information
 - ❑ B made SAR under Data Protection laws against sols in England
 - ❑ Privilege exception under DPA
 - ❑ Did Bahamian rule mean that privilege could be asserted?
 - ❑ Distinction between litigation and advice privilege
 - ❑ Question of privilege governed by law of the forum
 - ❑ Joint privilege between T and B in respect of advice re: administration
 - ❑ Implications for T?



Privilege (2)

- ❑ *Wang v Grand View* (Bermuda, CA, April 2021):
 - ❑ Assets to be settled onto new trust using power of attorney
 - ❑ Trustees of 4 existing trusts sought advice and drafts from Taiwanese lawyers in respect of PoA
 - ❑ In proceedings to challenge validity of PoA, S's administrator sought disclosure of the lawyers' file
 - ❑ Ts asserted privilege
 - ❑ CA held there was joint privilege in the file and ordered disclosure under the litigation disclosure rules
 - ❑ No need for an established category of relationship



Privilege (3)

- Courts are favouring disclosure (for the moment!)
- How safe is your advice? (consider impact of foreign proceedings)
- How early in the process will joint privilege arise?
- Does paying for the advice help prevent disclosure?
- Remember: advice subject to *litigation* privilege will be protected.



Substratum

- ❑ Basic question: if trusts confer wide discretionary power on trustees, are there limits on how those powers can be used?
- ❑ If so, what are those limits?
- ❑ In particular, is there a *substratum* of the trust that cannot be undermined when using powers of amendment.



Substratum (1)

- ❑ *Wong v Grand View* (Bermuda, CA, April 2020):
 - ❑ T of discretionary trust for family of S
 - ❑ T had wide powers of amendment (inc addition and exclusion of beneficiaries)
 - ❑ T decided to:
 - ❑ Add trustees of purpose trust to class of beneficiaries
 - ❑ Exclude existing beneficiaries
 - ❑ Appoint entirety of trust fund to new beneficiary
 - ❑ Was this permissible?



Substratum (2)

First instance:

- When exercising powers of amendment, those powers are limited in that they cannot be used to undermine the essential *substratum* of the trust
- The *substratum* of the trust in this case was that it was an irrevocable trust for the benefit of family members
- Using powers to amend the trust to replace the family with the trustee of a purpose trust destroyed the *substratum* and was therefore impermissible



Substratum (3)

- ❑ Court of Appeal:
 - ❑ No *substratum* rule applies
 - ❑ The scope of powers has to be assessed by reference to the proper construction of their terms
 - ❑ The powers in this case were wide in scope and therefore should not be read down by reference to any *substratum*
 - ❑ 'Proper purpose' principle applies – but that will ordinarily be ascertained from the terms of the trust



Substratum (4)

- ❑ *Wong*: Privy Council appeal in March 2022
- ❑ *Representation of Rysaffe Fiduciaries Sarl* (Jersey, 2021):
 - ❑ Proposed addition of S's widow to the class of beneficiaries under the trust
 - ❑ Question arose as to whether this was permissible
 - ❑ Court followed *Wong* and rejected notion of any trust *substratum*



Next year....

- Wong v Grand View:*
 - Privy Council Appeal
 - Main action: judgment:
 - Mistake
 - Mixed charitable and non-charitable purpose trusts
 - Uncertainty
 - Statute of frauds
 - Capacity