

# 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