

Ogier cross-border webinar - Top Fiduciary Questions 2020

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Top fiduciary questions 2020

A Jersey perspective

Katherine Neal

ESG – Fad or Fiduciary Duty



Trustees' Duties

- Duties of trustees
 - Fiduciary duties
 - Preserve and enhance – has this been excluded
 - Prudent Person
- Legal v “Moral” Obligations
- Time horizons

Are these duties compatible with sustainable investing?

- Is it all about the money?
- Do you need specific authority in the Trust Deed?

Clause in the Trust Deed?

- All the powers of a beneficial owner
- Specific 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?

Wishes of Settlor and Beneficiaries?

- Can refer to these in the trust deed
- Can you rely on letter of wishes?
- Indemnities and releases

Insolvency



Can a Trust be insolvent?

- No separate legal personality
- Preparation of accounts
- Who owns the assets?
- Who has liability to creditors?

Statutory protection

Article 32 Trusts (Jersey) law 1984 as amended

- (1) *Where a trustee is a party to any transaction or matter affecting the trust –*
- (a) *if the other party knows that the trustee is acting as trustee, any claim by the other party shall be against the trustee as trustee and shall extend only to the trust property;*
 - (b) *if the other party does not know that the trustee is acting as trustee, any claim by the other party may be made against the trustee personally (though, without prejudice to his or her personal liability, the trustee shall have a right of recourse to the trust property by way of indemnity)*

Is the trust insolvent?

Which test to apply?

- Two standard test for insolvency:
 1. Cash flow insolvency
Cannot meet liabilities as they fall due
 2. Balance sheet insolvency
Debts exceed assets
- Re Z – Trustees must have the cash flow test in mind when administering trust assets

The Trust failed the test

What next?

- Look to Re Z
 - Move away from Article 24
 - Creditor interests
- How do you administer an insolvent trust
 - Court appointed insolvency practitioner
 - Trustee appointed insolvency practitioner
 - Trustee continues to act itself
- Formal or Informal approach
- Ultimate aim

That was good news

More practical tips

- Be aware in the current situation about the possibility of cash flow insolvency – no matter how wealthy the trust appears on paper, can you pay all the debt if it were called in
- If you have any concerns, talk to the creditors, if you can work with them amicably then you may be able to avoid stressful and costly proceedings
- Creditors at present more inclined to give more time
- Resolve the position re fees as early as possible
- The court is there to assist

Letters of Wishes

How important?



Duties of a Trustee

Article 21 Trusts (Jersey) Law, 1984:

"(1) A trustee shall in the execution of his or her duties and in the exercise of his or her powers and discretions:

- (a) act:
 - (i) with due diligence;
 - (ii) as would a prudent person;
 - (iii) to the best of the trustee's ability and skill; and
- (b) observe the utmost good faith."

Article 24 Trusts (Jersey) Law, 1984:

"A trustee shall exercise the trustee's powers only in the interests of the beneficiaries and in accordance with the terms of the trust."

How does the Settlor Fit In?

- The Settlor is given no role by the Trusts (Jersey) Law, 1984 in relation to trusts for Beneficiaries.
- The Trust Deed may give the Settlor powers e.g. rights to direct investments.
- Letters of wishes not mentioned in the Trusts (Jersey) Law.

Should the Trustee Consider a Letter of Wishes

- Accepted position is that the Trustee should take the Letter of Wishes into account.
- Often said that Trustee should follow unless a good reason not to do so.
- Beware – do not just follow without considering fiduciary duties.

Do Fiduciary Duties Override the Letter of Wishes?

- **In the Matter of the E, L, O and R Trusts, 2008**

The 1994 letter of wishes, which instructed the trustee to consult J in respect of the H trusts, was also irrelevant as it could not override the trustee's fiduciary duty to have regard solely to the interests of H's family in respect of the H trusts.

- **In the Matter of the A and B Trusts, 2012**

It can be no part of the function of a protector with limited powers of the kind conferred on S by the trust instruments to *ensure* that a settlor's wishes *are carried out* any more than it is open to a settlor himself to insist on them being carried out. **A trustee's duty as regards a letter of wishes is no more than to have due regard to such matters without any obligation to follow them.**

Do Fiduciary Duties Override the Letter of Wishes?

- **In the Matter of the Y Trust and the Z Trust, 2017**

"in considering whether to exercise its discretion, will have some regard to but will not necessarily follow the wishes of the settlor, but only where those wishes are relevant to the question of whether the proposed arrangement is beneficial to those for whom the court is concerned. The other way of putting that test is that where the court is satisfied that a proposed arrangement is beneficial to those on whose behalf it is asked to sanction the variation, the fact that the variation might be contrary to the wishes of the settlor or testator is not material."

What Should a Trustee Do?

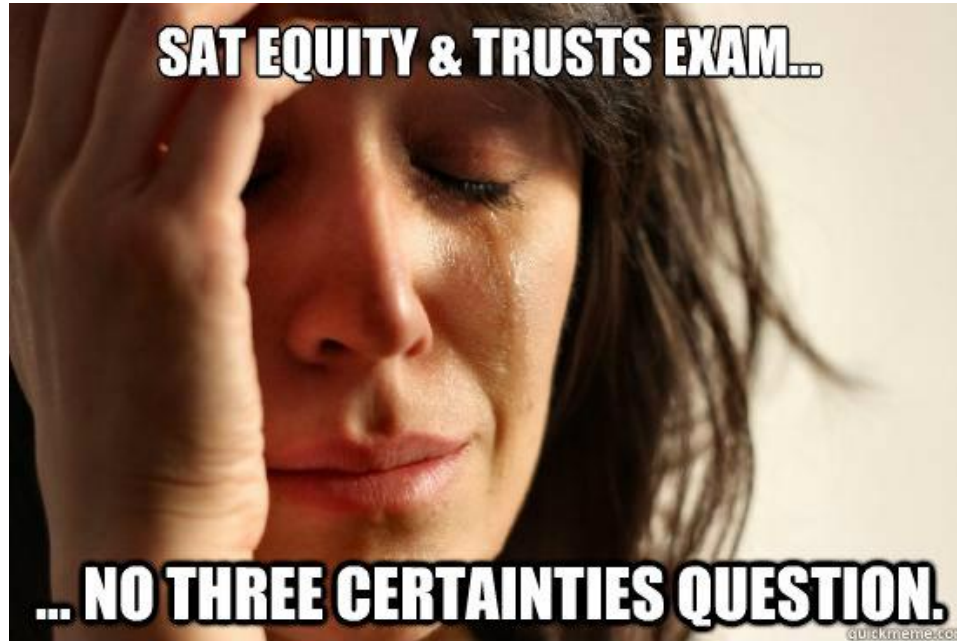
- Read the letter of wishes.
- Make sure that you can understand them and they are achievable.
- Talk to the Settlor to understand the motivations.
- Take it into account – use it as a guide but you are not bound by it.



Top fiduciary questions 2020
A Guernsey perspective

Chris Hards

Is my trust properly constituted?



Certainty of Objects

- Common law position:
 - Knight v Knight: a valid trust cannot exist where there is no certainty of objects
 - IRC v Broadway Cottages: a complete list test
 - McPhail v Doulton: the in or out test
- Trusts (Guernsey) Law, 2007:
 - S.1 – a trust exists if a person holds property which does not form part of his own estate for the benefit of another (a **beneficiary**) *whether or not yet ascertained or in existence*
 - S.8 – a beneficiary shall be (a) identifiable by name or (b) ascertainable by reference to a class or a relationship to another person whether or not living at the time the trust is created

The ability to enforce a trust

- Enforcement of proprietary rights:
 - *IRC v Broadway* - Fixed interest trusts – the beneficiaries must be able to enforce the distribution of trust property
- Enforcement of due administration:
 - *McPhail v Doulton* – the beneficiaries do not need to be able to enforce proprietary rights but can enforce the due administration (the right to be considered for benefit out of trust property)
- Trusts (Guernsey) Law, 2007:
 - S.11(2) – a trust is invalid and unenforceable to the extent that it has no beneficiary identifiable or ascertainable under section 8(1) unless it is charitable or a purpose trust with an enforcer.

Blind Trusts/Red Cross Trusts/Black-hole Trusts

- Fully discretionary trust
- No named beneficiaries
- Power to add beneficiaries vested in the trustees
- A default charitable beneficiary (e.g. Guide Dogs for the Blind / The International Red Cross)
- Application of *McPhail v Doulton*
- Application in Guernsey law

Re Exeter Settlement (2010)

- Jersey law case
- Applicability to Guernsey not confirmed although the statutory basis is similar -
 - A question of lack of certainty of objects (pursuant to *McPhail v Doulton*); or
 - A lack of enforceability of the trust pursuant to Jersey statute?
- A default beneficiary would arguably have saved the trust but consider *Steele v Le Paz* 1995 Isle of Man case

Guernsey – where are we on blind trusts?

- *Re Exeter* likely applies given the similarity in the statutory provisions; however:
 - Consider the drafting of the trust and what happens if the primary trusts fail in favour of a default beneficiary
 - A matter of a technical construction of the trust deed
 - Does the trust become wholly charitable? Was that intentional and if not is the trust void or voidable by reason of mistake?
 - Is the charity itself capable of enforcing the trust? Does the whole trust fail?
- Arguments as to the extent of the application of the test in *McPhail v Doulton* remain unresolved in Guernsey

How do I respond to a request to terminate a trust?



The rule in *Saunders v Vautier*

- 1841 ruling applicable to fixed interest trusts:
 - If all of the beneficiaries are:
 - ascertained
 - of sound mind
 - not minors
 - The beneficiaries may together require the trustee to terminate the trust and distribute the property among them

- *Re Smith* in 1928 extends the ruling to incorporate discretionary trusts whereby “ascertained” requires a closed class of beneficiaries. But note later developments in respect of any identifiable “share” in the trust fund

Saunders v Vautier in Guernsey

- The trust *Saunders v Vautier* rule (as developed under English law and elsewhere) remains untested in Guernsey although some form of the rule is generally assumed to be applicable
- *Re Torino* confirmed the existence of the rule in Jersey and extended the applicability such that it deals not just with trust terminations but also with variations on the rationale that combined ownership by the beneficiaries permits them to direct how the trust fund is dealt with
- Is section 53(3) of the Trusts (Guernsey) Law the Guernsey equivalent of the rule in *Saunders v Vautier*?

Section 53(3) of The Trusts (Guernsey) Law, 2007

- *Without prejudice to the general powers of the Royal Court under subsection (4) and notwithstanding the terms of the trust, where all the beneficiaries are in existence and have been ascertained, and none is a minor or a person under legal disability, they may require the trustees to terminate the trust and distribute the trust property among them*

Distinction between *Saunders v Vautier* and s.53(3)

- Requirement for beneficiaries to be ascertainable **and** ascertained
- Is that the same as the requirement for a closed class of beneficiaries?
- Consider *McPhail v Doulton* and *Re Trafford's Settlement* (1985) – what does a power to add beneficiaries bestow on the trustee in respect of the beneficial class?
- What is the effect of section 53(4)?

Rusnano – the facts

- Rusnano (in liquidation) was the sole beneficiary under a discretionary trust
- The trustee has the power to add beneficiaries (and, in fact, the trustee does contemplate so adding beneficiaries in the future)
- Rusnano invokes the provision under s53(3) as the sole ascertained beneficiary to direct the termination of the trust and the distribution of the trust fund

Rusnano – the arguments

- Rusnano's position was that s53(3) is clear on its own terms that it has the right to direct the trustee to terminate the trust on the basis that at the time of that direction it was the sole ascertained beneficiary
- The trustee invoked the *Saunders v Vautier* rule that because the class of beneficiaries may be added to by the trustee, not all of the beneficiaries has in fact been ascertained and therefore s53(3) was inapplicable
- The Court found that an object of the power to add beneficiaries was not a beneficiary at all (until the power is exercised) and therefore could not be an unascertained beneficiary. Rusnano was therefore the sole beneficiary and was entitled to exercise section 53(3)
- The Court declined to consider the *Saunders v Vautier* arguments on the basis that the extent to which the rule has developed in Guernsey is immaterial to the exercise of a Guernsey statutory power which must be exercisable on its own terms

Rusnano – the appeal

- The trustee appealed on the following grounds:
 - Incorrect construction of s53(3) on the basis that the rules does not directly reflect the *Saunders v Vautier* position
 - Floodgate concerns in respect of “blind trusts”
 - The discretion under section 53(4) was not considered
- The first points were rejected:
 - If the legislation was supposed to be a reflection of the *Saunders v Vautier* rule that is a legislative matter and not a judicial matter and the Court could not construe it differently
 - The floodgate risk is easily resolved because unascertained beneficiaries (e.g. issue and remoter issue) can be introduced to diversify the class and preclude the operation of s.53(3)
- The appeal however succeeded on the final point – the failure to consider section 53(4)

Section 53(4) of The Trusts (Guernsey) Law, 2007

- *The Royal Court, on the application of any person mentioned in section 69(2) [trustee, settlor, beneficiary etc.] may (a) direct the trustees to distribute, or not to distribute, the trust property or (b) make such other order in respect of the termination of the trust and the distribution of the trust property as it thinks fit*

Rusnano – the appeal (cont.)

- The case was referred back to the lower court to:

“to consider the position under subsection (4), which would require the hearing of evidence as to the intention of the parties at the time of the establishment of the Trust”

Guernsey – where are we following *Rusnano*?

- As previously established, Guernsey statute takes priority over common law trusts principles derived from English trust law
- But it remains uncertain whether s.53(3) is a codification (and modification) of the rule in *Saunders v Vautier* or whether it is a Guernsey law statutory tool that operates in addition to any application of the rule in *Saunders v Vautier* in Guernsey law (e.g. could a *Saunders v Vautier* direction be used to vary a trust, as it can in Jersey?)
- The s53(3) provision is less favourable for a trustee than a *Saunders v Vautier* direction because the trustee is not relieved of its discretion
- The clarification of the meaning of unascertained beneficiaries in Guernsey has far-reaching consequences for the administration of blind trusts and indeed whether such trusts can be considered to be valid at all for lack of either beneficiaries or enforceability or both

Can my protector resign?



Can my protector resign?

- Intention of the settlor
- Fiduciary v non-fiduciary position
- Consideration of effects and suitability of replacement/vacancy
- Application to court



Top fiduciary questions 2020
A Cayman perspective

Christopher Levers

How far does the Cayman firewall go?



Effect of firewall provisions

- Sections 90 to 93 of the Trusts Act (2020 Revision)
- Cayman trusts can only be varied in accordance with Cayman law
- Any foreign order which doesn't apply Cayman law would not be enforceable against the trustee, the beneficiaries or the trust fund
- As a means of further protection, does it grant the offshore courts exclusive jurisdiction in respect of any questions relating to the validity of the trust?

Section 90 of the Trusts Act

[a]ll questions arising in regard to a trust which is...governed by the laws of the [Cayman] Islands or in regard to any disposition of property upon the trusts thereof including questions as to... any aspect of the validity of the trust, ...whether the administration be conducted in the Islands or elsewhere... are to be determined according to the laws of the islands, without reference to the laws of any other jurisdiction with which the trust or disposition may be connected."

Effect of Firewall Provisions

- Not clear from section if Cayman Court would have exclusive jurisdiction
- Number of authorities have indicated this may be the result:
 - *Re B Trust*: “A trust in the Cayman Islands can only be varied in accordance with the law of the Cayman Islands and only by a court of the Cayman Islands”.
 - *Re A Trust*: “From *In Re B Trust*, a number of principles may be seen...an order of the English High Court is unenforceable in the Cayman Islands whether or not the trustee submits to the jurisdiction because of the terms of the firewall legislation.
 - *HSBC International Trustee Limited v Tan Poh Lee & Ors*, the Cayman Court made a declaration that, although the point not fully argued in the previous authorities, “An order of a foreign court...where such order does result from the application of Cayman Islands law, may not be enforced, recognized or give rise to any estoppel”.

Stingray Trust

- Section 90 is intended to be a governing law clause
- Nothing in the text of the law or any legislative material which purported to bestow exclusive jurisdiction on the Cayman Courts:

“Section 90, applying a purposive construction which is entirely consistent with the natural and ordinary meaning of the section in its wider statutory context, does not require all matters which must be determined by Cayman Islands law to be determined exclusively by [the Cayman] Court.” – Kawaley J

Trustee Takeaways

- Although robust, the Cayman firewall provisions only go so far.
- Absent a binding exclusive jurisdiction clause, normal *forum non conveniens* principles will apply
- If a trustee is facing proceedings abroad, and wishes to have jurisdictional issues determined by the Cayman Court, it should do so as soon as possible

Remote Witnessing and Notarisation – a Virtual Reality



Remote Witnessing

- Governed by Property (Miscellaneous Provisions) (Amendment) Act 2020 (“**PMP Amendment Act**”)
- Came into force on 7 January 2021 – in effect until 16 April 2022
- For a signature which needs to be witnessed to be valid, it must be signed either:
 - By the individual in the presence of a witness who attests to the individual’s signature
 - At the individual’s direction and in his or her presence and the presence of 2 witnesses each of whom need to attest to the signature of person signing and that they did so on the individual’s direction.

Remote Witnessing cont'd

- PMP Amendment Act addresses the limitations experienced in 2020
- Provides that “presence” includes “virtual presence” and means where, using communication technology (such as Facetime, Zoom or Skype), both persons are able to contemporaneously see, hear and speak to each other
- Where a deed or instrument under seal is to be signed virtually in the presence of a witness:
 - the witness must be able to contemporaneously view the signing of the deed or instrument remotely; and
 - If the individual is not known to the witness, she must present a valid photo ID to the witness contemporaneously

Remote Notarisation

- Governed by Notarial Public (Virtual Conduct of Notarial Acts) Regulations 2020 (the “**Notarial Regulations**”)
- Came into force on 17 April 2020
- Allows for notarial acts, such as administering oaths or making a notarial copy of a document, to be done using communication technology
- In effect until 16 April 2022

Remote Notarisation cont'd

- The Notarial Regulations allow notarial acts using communication technology where:
 - the remotely located individual (ie the person not in the physical presence of the notary) must demonstrate he or she is physically in the Cayman Islands
 - the remotely located individual shall transmit via fax, email or other electronic means, a legible copy of the document to be notarised
 - the notary may, after observing the signature or requisite act of the remotely located individual, notarise the transmitted copy of the document and return it via fax, email or other electronic means

Remote Notarisation cont'd

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 - the notary may, after observing the signature or requisite act of the remotely located individual, notarise the transmitted copy of the document and return it via fax, email or other electronic means
 - the notary shall record the details of notarial act in his or her Notarial Acts book
 - If the remotely located individual is not known personally known to the notary public, the individual shall present a valid photo ID during the real time interaction

Remote Notarisation cont'd

- Notary may repeat the notarisation of the document where the notary receives the “wet-ink” signature within 30 days of the date of execution
- Can be done even where the individual is not present before the notary, virtually or physically
- If a notary becomes aware that a notarial act was not performed in compliance with the Notarial Regulations, he or she must, within 3 days of becoming aware, notify the Clerk of Court in writing and provide the Clerk with the details of the non-compliance

Regulatory Update



Recent legislative amendments

- There have been a number of recent legislative amendments:
 - Bank and Trust Companies Act
 - Private Trust Companies Regulations
 - CIMA Regulatory procedure
 - Companies Act
 - Proceeds of Crime/AML Regulations
 - Tax Information Authority (International Tax Compliance) (CRS) (Amendment) Regulations
 - Tax Information Authority (International Tax Compliance) (US) (Amendment) Regulations
 - Tax Information Authority Act
 - International Tax Co-operation (Economic Substance) Act
 - Monetary Authority (Administrative Fines) Regulations

Trusts Act

- Several amendments to the Trusts Act, including Trusts (Amendment) (No 2) Act, 2019 (the “**Trusts Amendment Act**”)
- The Trust Amendment Act places, amongst others, the following obligations on trustees:
 - maintain and keep up-to-date an accurate record of the identity and particulars of the settlor, contributor to the trust, beneficiaries, protectors, enforcers, service providers (including any investment adviser or manager) as well as the person exercising ultimate effective control of the trust
 - maintain and keep up-to-date accounting records relating to the trust.
- Various authorities have power to request information – subject to fine

Trusts (Transparency) Regulations, 2019

- Regulations to be read alongside Trusts Amendment Act
- Requires:
 - A trustee to keep and maintain current copies of trust deed or other document recording the terms of the trust, the names and addresses of the trustee, settlor, beneficiaries, contributors, protectors and enforcers
 - A trustee to take reasonable steps to ensure that an accurate and adequate record of this information is maintained in English, is easily accessible and legible, and is updated promptly. It must be retained by the trustee for a period of at least 5 years after the trustee ceases
 - A written request from a competent authority must be complied with within 48 hours
 - Failure to comply with the Regulations is an offence punishable with a fine of up to CI\$5,000

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