PRIVATE CLIENT

GLOBAL ELITE

THE MONTH

SUMMER 2023

OFFSHORE

CONTENTS

EDITOR NOTE

FRANCESCA FFISKE

GLOBAL DIRECTOR, PRIVATE CLIENT

Welcome to our summer edition of The Month, which shines a lens on a few different offshore jurisdictions from practitioners both there, and in the USA and UK.

In this edition you will find two In The Spotlight interviews with **Vanessa Schrum, Partner, Appleby (Bermuda)** and **Paul Hodgson, Deputy Managing Director, Butterfield (Guernsey).**

We also hear from the incomparable **Shân Warnock-Smith KC** and **Andrew De La Rosa,** who confront a recent Cayman decision in 'Lost in the Caribbean, somewhere between Cayman and Barbados'.

Moving over to the United States, **K. Eli Akhavan, Steptoe & Johnson** writes about the 'Corporate Transparency Act and Disclosure Requirements for Non-US Persons'.

Next, our friends **Anthony Partridge, Ogier (Cayman),** and **Helen Ratcliffe, BDB Pitmans (UK)** write up their excellent session they ran at our Private Client Global Elite Exchange in Bermuda in July.

Finally, **Katie Hooper, Mourant (Jersey)** writes about what trustees can do to manage the risk of conflicting judgments from different courts.

Thank you so much to all of our contributors!

2023 - 2024

Minds of the Future Exchange
Terre Blanche, 14-16 September 2023

Trust & Estates Litigation Forum
La Mamounia, Marrakesh, 20-22 September 2023

Private Client Exchange France
Chateau Saint-Martin, 12-13 October 2023

International Private Client Forum
Villa d'Este, 15-18 November 2023

Private Client Exchange UK
Cliveden House UK, 30 November - 1 December 2023

Private Client Exchange Cayman
The Ritz, 16 -17 January 2024

Private Client Global Elite Celebratory Dinner
Spencer House, London, 1 February 2024

Private Client Forum Americas
Banyan Tree Mexico, 28 February - 1 March 2024

International Women's Day Leadership Brunch
London, Thursday 7 March 2024

Private Client Exchange Switzerland
Guarda Val, Switzerland, 14-15 March 2024

Rising Leaders Leadership Brunch
London, 18 April 2024

Private Client Exchange Italy
Puglia, Italy, 21-22 April 2024

Private Client Exchange Asia
The Capella, Singapore, 16-17 May 2024

Private Client Exchange Portugal
TBC, 20-21 June 2024

Private Client Global Elite Summer Party

Trust & Estates Litigation Forum
La Mamounia, Marrakesh, 18-20 September 2024

Minds of the Future Exchange
TBC, 26-27 September June 2024

Private Client Exchange France
Chateau Saint-Martin, 3-4 October 2024

Private Client Exchange United States
TBS, 30 October - 1 November 2024

International Private Client Forum
Villa d'Este, 14-16 November 2024

Private Client Exchange UK
Cliveden House, 14-16 November 2024

IN THE SPOTLIGHT: VANESSA SCHRUM

Appleby, Bermuda

Francesca Ffiske of Private Client Global Elite sat down with Vanessa Schrum from Appleby in Bermuda.

FF: Why did you become a lawyer?

VS: I was on the accounting route (studied economics for 4 years and then worked at PWC) but changed tack at the last minute to study law which I thought would be far more sexy. I fell in love with private wealth work after 6 months articling with a strong private client team in London and in particular the variety of work the discipline offered. From will drafting, estate planning and administration for private clients, to advising corporate trustees on complex trust structures - no two days are ever the same.

FF: What do you think will be the most significant trend in your firm's practice areas over the next 12 months?

VS: Greater regulation, compliance and transparency issues are here to stay so we will need to accommodate them. On the private wealth side I suspect we will continue to see consolidation of structures, diversification of underlying assets, jurisdiction and service provider shopping, perhaps an increase in non-contentious trust restructuring applications.

As a firm, ESG and environmental sustainability will also play a key role in how we do business. We are thrilled to announce that Appleby has recently received a Planet Mark Business Certification demonstrating our commitment to measuring and reducing our groupwide carbon emissions by at least 2.5% each year. In addition to paper free and streamlined services, several of our offices have moved to open plan flexible working. I see this trend continuing.

FF: What are some of the recent happenings in Bermuda?

VS: Bermuda remains a popular jurisdiction for private trust companies due in part to their ease of formation, operation and the absence of licensing which removes the regulatory burden seen in some other jurisdictions. Consequently we are seeing an increase in family office work and the formation of perpetual trusts. Bermuda is also a flexible jurisdiction for trust restructuring and section 47 of our Trustee Act 1975 has been applied in several recent trust cases providing the Court with power to authorize transactions relating to trust property where it is expedient to do so. The Bermuda Court is willing to grant confidentiality orders and annonymise private trust cases. In addition King's Counsel readily appear in Bermuda Courts, all of which is of comfort to our HNW clients.

FF: What are your proudest professional moments?

VS: Being promoted to partner and thereafter Head of the Bermuda Private Client & Trusts practice group at Appleby demonstrated that the Firm had faith in me. Other proud moments include winning a Gold Citywealth Powerwomen award - twice, receiving Band 1

Chambers recognition, Global Elite status and various accolades for our global PC&T team including 3 STEP award wins during my tenure. Our team has just been shortlisted for a STEP private client award 2023/24: "International legal team of the year – midsize firm" which we are super chuffed about.

FF: What was your worst day at work?

VS: The day our managing partner announced that we would be moving to an open plan work environment. I had to clear out my office with 25 years of 'stuff' and part with beloved texts and accumulated 'things'. Fortunately I've warmed up to it and now actually quite like the new work environment. It's fresh and new. Our carbon footprint is reduced. I can certainly see the efficiencies and the benefit of open plan collaboration.

FF: Did you have a mentor who supported you in your early career? What was the most valuable thing they taught you?

VS: I have had some very strong female mentors over the years including Lesley Lintott (head of Private Client when I articled at Penningtons, London) and Monica Jones (head of Private Client & Trusts when I joined Appleby, Bermuda). I learned a lot from these mentors including to always listen, have compassion, document everything and enter your time!

FF: What advice would you give a junior just starting out?

VS: Similar advice as above. Plus, get involved in industry focus groups and network, network, network. Never 'burn bridges'. Use your contacts and connections. Read.

FF: What is the most unusual or shocking request you've ever had from a client?

VS: Perhaps we can just 'back-date' that? Surprisingly I hear this quite frequently. Of course, we can't do that.

FF: What is your top box-set?

VS: Succession. It's a hoot and I can definitely see some similarities with a few of our UHNW clients.

FF: What do you do when you're not working?

VS: This is scholarship season and I have the immense pleasure of interviewing and handing out money to deserving young adults heading off to universities around the globe. We have some fabulous, talented youth – the future is bright!

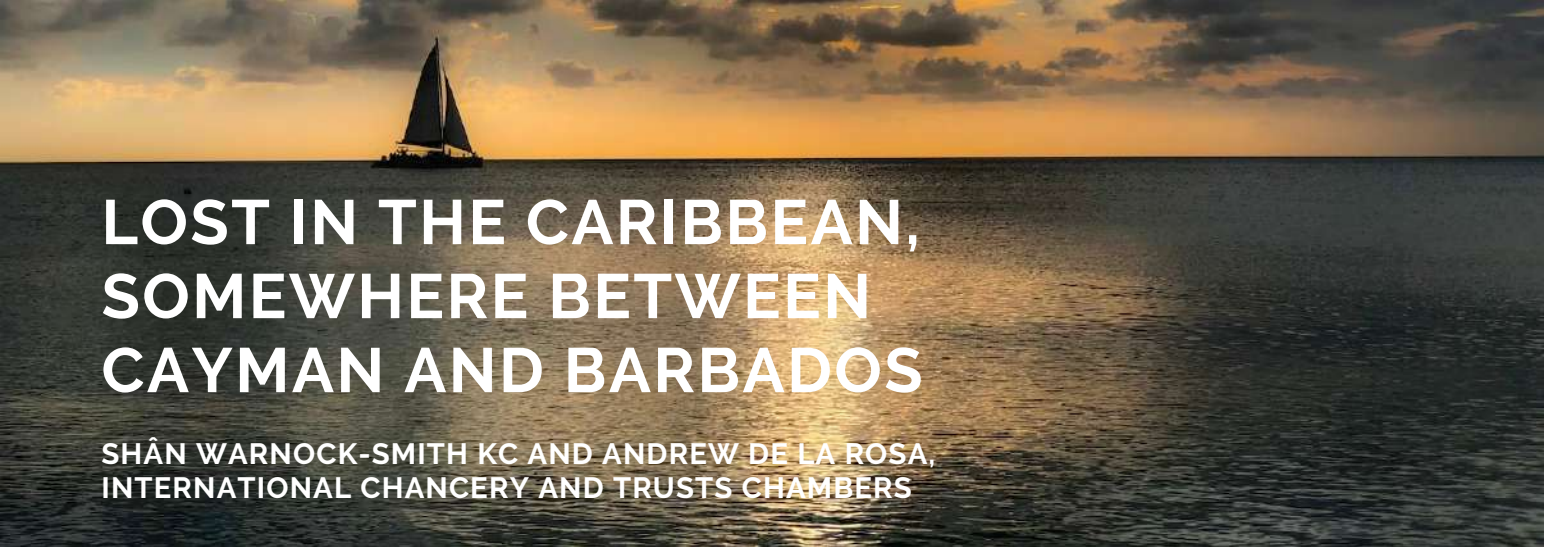
Otherwise it's pretty much the usual: Family life (3 kids), social activities, travel, pickleball.

FF: What would you do if you weren't a lawyer?

VS: Own a guest house in Bermuda. Play pickleball.

FF: Where can you see yourself in fifteen years?

VS: Owning a guest house in Bermuda. Playing pickleball ■



LOST IN THE CARIBBEAN, SOMEWHERE BETWEEN CAYMAN AND BARBADOS

SHÂN WARNOCK-SMITH KC AND ANDREW DE LA ROSA, INTERNATIONAL CHANCERY AND TRUSTS CHAMBERS

The issue

Among the many and varied challenges faced by executors it is not, fortunately, an everyday occurrence to discover that an apparently straightforward sale of a valuable estate asset (to which sale the testator had contractually bound himself before his death and was uncontroversial) can be thwarted by the unwelcome discovery that the company holding the asset had become homeless as the result of a failed attempt at redomiciling the company. Such was the problem that faced the Cayman court recently and it raised a novel question: what, if any, remedy is there when a company simply drops off the map into the deep turquoise waters of the Caribbean lying between the Cayman Islands and Barbados?

The intended move to Barbados having ceased to be desirable for other reasons, the obvious answer seemed to be to apply to the court for restoration of the company to the Cayman companies register. Straightforward one might have thought and not likely to give rise to any particular difficulty – it's done every day or almost, and the conditions for restoration in Cayman and indeed other Caribbean English common law-based jurisdictions are broadly permissive.

But wait. The company had not been struck off or wound up. On the contrary, the relevant sections of the Cayman Companies Act, sections 206 and 207, that deal with redomiciliations, make it clear that when a company is removed from the register in order to complete its move to another jurisdiction it retains its integrity as a company albeit that it is no longer registered in the outgoing jurisdiction. That is fine as far as it goes but unless it is registered somewhere else it becomes jurisdiction-less and not in good standing anywhere. In this case there was no chance of curing the defect by proceeding with the Barbados registration (notwithstanding that it was no longer desired anyway) because no certificate of good standing could be provided from Cayman attorneys as would have been required. This is a requirement that is common in the English company law-based Caribbean jurisdictions, primarily to ensure that the company is not in default of any regulatory obligations. Subject to that, redomiciliation of an ordinary company from one Caribbean jurisdiction to another is in most cases primarily an administrative matter. The basic idea is to permit a commercial/trading company to migrate between jurisdictions without a liquidation and termination of existing rights and obligations - if the laws of the outbound and inbound jurisdictions permit it and the governing documents of the company don't prohibit it.

The options

The reasons the attempt to move the company failed need not trouble us here. Suffice it to say that mistakes were made – and certainly not by the executors or their advisors. Ah, mistake, you say, brightening as any good trust professional would. If there is no statutory solution to the problem in the Companies Act or elsewhere, which there is not or at least not clearly so, perhaps the answer lies in a mistake claim or maybe a Hastings-Bass application? Section 64A of the Cayman Trusts Act contains a handy statutory Hastings-Bass provision that applies to fiduciaries generally. The testator had been the sole shareholder and director of the company during his lifetime and it had been he, in his capacity as director (a fiduciary), who had signed

off on the necessary declarations to the Companies Registrar including the statement that the requirements of Barbados had or "will be" complied with. In doing so he had no idea that they would not and could not be completed because of the mistakes of others. Section 64A does not require a breach of duty on the part of the fiduciary to be established and it seemed to the executors' advisers that the necessary elements of a claim to set aside the de-registration could be established.

An alternative approach, and the one that ultimately appealed to the Chief Justice, was to suggest that the operative mistake, an innocent one of course, lay with the Companies Registrar herself in that she had been misled by the documentation submitted to her by and on behalf of the testator. As a matter of statutory construction the scheme of section 206 required full compliance with its conditions and the failure to meet its requirement that the laws of Barbados would be complied with was a "fatal non-compliance with a mandatory statutory provision" that justified the court utilising its general powers under the Grand Court Act to make binding declarations of right. Accordingly her Ladyship set aside the deregistration of the company with the effect that the company never left home to cast its fate upon the seas in the first place.

Her Ladyship is expected to give detailed written reasons shortly in order to provide a guide to the appropriate course of action in other such cases. Those will no doubt be rare but absent a statutory addition to the Companies Act this approach will provide a lifebelt for an otherwise homeless company. ■

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CORPORATE TRANSPARENCY ACT AND DISCLOSURE REQUIREMENTS FOR NON-US PERSONS

K. ELI AKHAVAN, STEPTOE & JOHNSON

Attorneys, advisors and clients in the United States are preparing for a sea of change in beneficial ownership transparency laws that will be implemented in the beginning of 2024. On January 1, 2024, the Corporate Transparency Act ("CTA") will become effective in the US, and will herald a landmark change in the country's approach to beneficial ownership information (BOI) disclosure. While advisors outside the US have become accustomed to BOI disclosure through the Common Reporting Standards (CRS), the CTA represents a significant change for US-based beneficial owners.

Background

The Organization for Economic Cooperation and Development (OECD) is a multinational group of democratic governments with free-market economies who collaborate to advance policies that they view are beneficial for economic, social and political purposes. As part of its activities, the OECD established the Foreign Action Task Force (FATF) to evaluate countries on whether they have adequate disclosure of beneficial ownership information for entities operating in their jurisdictions. The OECD's and FATF's position is that in order to effectively combat money laundering, terrorist financing and other illicit activities, transparency concerning the beneficial owners of entity structures is required.

The US ranked quite low on FATF's transparency ratings due to not having robust disclosure rules such as those promulgated under the CRS. In response, the legislative process in the US culminated in the CTA which was enacted by the US Congress in January 2021 as part of the National Defense Authorization Act. As part of the CTA, certain entities have BOI disclosure requirements that must be filed with the US Treasury's Financial Enforcement Network (FinCEN).

CTA

The CTA has three important elements:

1. Reporting company
2. Beneficial owner; and
3. Company applicant

Reporting Company

A "reporting company" has to file reports that identify a company's beneficial owners, as well as information about the "company applicants". A reporting company is generally a domestic entity that is created through a US state filing (e.g., corporation, limited liability company, limited partnership and certain business trusts), or a foreign entity that is registered to do business in the US. There are 23 entities that are exempt from the general definition of a reporting company including public companies, tax-exempt charities, public accounting firms, large operating companies, and pooled investment vehicles.

Notably, for private client practitioners, non-business trusts are not considered reporting companies and therefore are not subject to the CTA. However, if reporting company is owned by a trust, then there may be reporting requirements for the trust or trustee as the beneficial owner.

Beneficial Owner

If it is determined that the entity is a reporting company then the beneficial owners must be identified. Beneficial owner is defined as:

1. individuals with substantial control; and
2. individuals with direct or indirect ownership interests that equal to at least 25% of the company's equity interests.

As indicated, "beneficial owner" does not only mean someone who has an actual ownership interest in

the company. Even an individual who exercises substantial control over the company is deemed to be a "beneficial owner" for purposes of the CTA. Individuals who exercise substantial control over a reporting company include senior officers of a reporting company, as well as individuals who have authority over the appointment or removal of any senior officer or a majority of the board of directors of a reporting company.

Determining whether someone has substantial control is also subject to a facts and circumstances test based on: (a) whether the person has the power to merge or dissolve the company; or (ii) whether the person controls major expenditures, selection of business lines, compensation schemes, or entry into contracts or other decisions of a similar nature.

In the private client context with respect to non-business trusts, if there is a distribution adviser, investment adviser, or trust protector that has the authority to direct the trustee to appoint or remove a majority of the managers or directors of a reporting company such adviser or protector would have to be identified as a "beneficial owner". Additionally, a trustee or other individual who has the authority to dispose of trust assets, a beneficiary who is the sole permissible recipient of income and principal or who has the right to demand a distribution of substantially all the assets, and a trust settlor who has the right to revoke the trust or otherwise withdraw the trust assets, all qualify as beneficial owners.

With respect to the 25% threshold, parties who are direct or indirect owners of at least a 25% equity interest in the reporting company are beneficial owners.

Company Applicant
In addition to the beneficial ownership information, the CTA requires the company applicant to also disclose information. The company applicant is the individual who directly files the document creating the domestic reporting company or who first registers as foreign reporting company, as well as the individual who is primarily responsible for directing the filing. In the private client context, tthis will include the attorneys who direct the filing and formation of entities for their clients.

Foreign Government Access to CTA Reports
The BOI disclosure under the CTA will not be part of a public register. Rather, the information will be stored by FinCEN on their secure Beneficial Ownership Secure System ("BOSS").

FinCEN has the authority to release the BOI to a restricted set of parties that include: (1) federal agencies involved in national security, intelligence, and law enforcement, (2) state-level law enforcement agencies possessing a court order, (3) US Treasury Department, (4) financial institutions, provided they have obtained consent from the company, (5) regulators overseeing financial institutions, and (6) specific foreign authorities who seek information via a U.S. agency. Additionally, the BOI information is accessible for disclosure or inspection to officers and employees of the US Department of the Treasury whose official duties require such inspection or disclosure and Treasury Department may also access the BOI information for purposes of tax administration.

For non-US entities, the category of foreign government entities as potential recipients of BOI reporting is quite relevant. Non-US parties who establish entities in the US or who have foreign entities that are registered to do business in the US may value their anonymity and privacy. The fact that FinCEN may disclose BOI information to foreign government in certain circumstances may be of concern especially in jurisdictions that do not have transparent and robust legal systems.

Information to be Disclosed
A reporting company must disclose the following information:

- Legal name including any d/b/a (doing business as)
- Business address
- Jurisdiction of formation
- Unique identification number from an acceptable identification document

Beneficial owners and company applicants must report:

- Legal name
- Date of birth

- Residential address for beneficial owners
- Business address for professional company applicant and residential address for non-professional company applicant
- Unique identification number from an acceptable identification document (e.g., driver's license or FinCEN identifier
- Image of the document with the identification number

A FinCEN identifier is a unique identifying number that FinCEN will issue upon request. The FinCEN identifier allow, among other things, submitting a beneficial owner's or company applicant's identifier instead of the individual's identifying information.

Timelines and Penalties

As noted earlier, the effective date of the CTA is January 1, 2024. Any reporting company that was formed prior to January 1, 2024 has until January 1, 2025 to file its initial report. A domestic reporting company created on or after January 1, 2024 or a foreign reporting company that was registered to do business in the US on or after January 1, 2024, must file the report within 30 days of the company formation or registration. Updates and corrections to the BOI must also be submitted within 30 days of such changes.
If a reporting company willfully provides or attempts to provide fraudulent BOI or willfully fails to update the BOI, there is a penalty of $500 per day, up to a maximum of $10,000, and possible incarceration of up to two years.

Conclusion

The CTA is a significant change in the disclosure rules that currently govern entities operating in the United States. While the law will make it more difficult for bad actors to use shell companies to conceal their activities there is a great deal of concern about breach of privacy for legitimate actors and entities. It is imperative for US and non-US attorneys to advise their clients about their potential reporting requirements and to start assembling the required information. ■

IN THE SPOTLIGHT: PAUL HODGSON

Butterfield, Guernsey

Francesca Ffiske of Private Client Global Elite sat down with Paul Hodgson, Deputy Group Head of Trust of Butterfield in Guernsey.

FF: Why did you become a trustee?

PH: This is my second career. In my first, I was a chartered accountant and insolvency expert. I qualified with KPMG in Australia before moving to London and then to Hong Kong where I met my wife who is from Guernsey, which is where we decided to settle when we were married in early 1998.
I was put forward for a couple of odd jobs by a recruiter who confessed that he did not have a clue what to do with me - which obviously inspired a lot of confidence! One of the jobs he put me forward for was working as a relationship manager for a single family within a trust business. In May 1998 I met that particular family, and got along very well with the two brothers who interviewed me; that was the determining factor. What appealed to me then and still drives me is that trustees are constantly applying their knowledge and understanding of the law and the world of finance to benefit the families that we work with.

FF: What do you think will be the most significant trend in your firm's practice areas over the next 12 months?

PH: It is hard to make generalisations with regard to a diverse business such as Butterfield but I think economic and political uncertainty are things that have traditionally benefited the work of trustees, in the sense that by giving people reassurance about the assets that we hold for them, we help them to sleep better at night. I would therefore expect our main focus to be continued face-to-face interaction with our most important clients. We get a disproportionate amount of value out of those face-to-face interactions, and while I am not naive to the benefits of post-Covid video conferencing model I do think that some of the conversations that are necessary for a trustee to have really only come about in the course of in-person discussions.

FF: Who had the biggest influence on your career?

PH: 'Biggest' is a subjective term, but do I think the fact that I spent about twenty years of my life working with Bob Moore, who was the previous group head of trust here at Butterfield, would make him the best candidate. That is partially a function of the time spent working together, but also the example he set for me and for all of those who worked with him. Bob was great person to work with and I thoroughly enjoyed the long part of my career that was spent with him.

FF: What are your proudest professional moments?

PH: They are in two different categories. The first is whenever I see milestones in the careers of people that I have worked with for a long time, and knowing that being a part of a high-performing team is, in part, what has enabled

them to make progress in their careers; awards, for example, for some of the junior members of the team here in Guernsey who started as school leavers and who have gone on to win top 30 under 30 awards. Those moments are great. The second is working with families where the work that we have been doing together has delivered really positive outcomes for people, and they are able to express their appreciation for the role that the trustee has been able to play in helping them to resolve their issues.

FF: Did you have a mentor who supported you in your early career? What was the most valuable thing they taught you?

PH: Yes - a guy called Geoff Grady, who was my manager when I transferred into the insolvency world at KPMG in Brisbane. He was dual qualified as lawyer and accountant. The most valuable thing he taught me was the need to pay attention to detail - particularly in correspondence. Being precise about your use of language in all forms of written communication. How are you expressing yourself? Who are you speaking to? I can remember giving him a draft letters on something fairly simple which came back heavily marked up and then discussing how to improve and avoid the same mistakes.

FF: What advice would you give a junior just starting out?

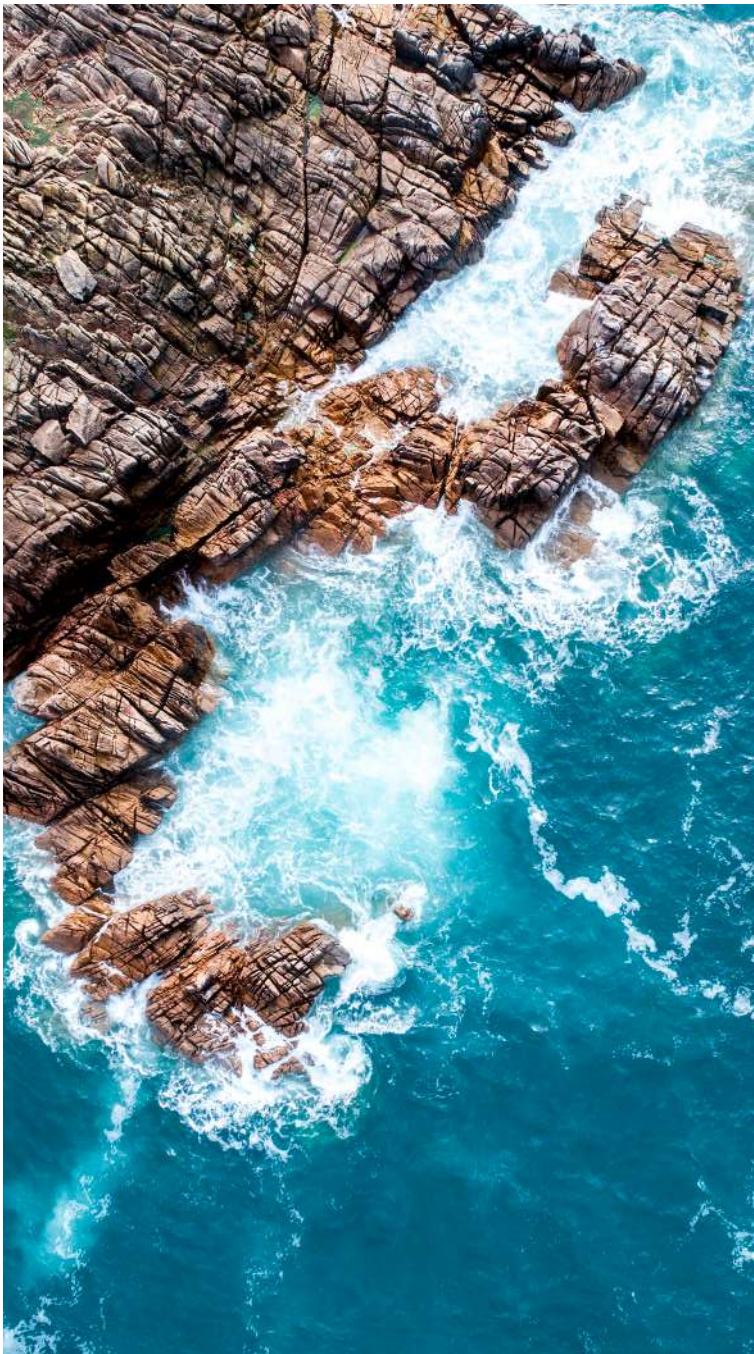
PH: In a sense the same advice that I repeat to my own kids at the moment - you need to be flexible. The work environment is continually changing. When I started work, most of us expected to pursue one career for the rest of my life, but that has not been the case. Most people these days will do multiple different jobs, and it is important to try to treat that as a strength, not a weakness. You do not need to doggedly pursue the same path just because it is where you started. If that is your mindset, any alteration from the path you have set for yourself can be seen as a failure rather than a change of tack.

FF: What do you do when you're not working?

PH: I am an open water swimmer and swim in the sea all year round! It's been great for my physical and mental health and has lead me to invest in a sauna, a hot tub and an ice bath, which I like to use before I go to bed.

FF: Where can you see yourself in fifteen years?

PH: In an ideal world, I am still working in some way shape or form with the people I currently work with - both families and professional advisors. I really enjoy this area of work and the people I get to work with. I am incredibly lucky in terms of colleagues, advisors and clients which is why I love your events - I get to meet some wonderful people, have a memorable time, and get paid to do it! ■



PLANNING WITH TRUSTS - AND INVOLVING YOUR CONTENTIOUS TRUSTS COLLEAGUES

ANTHONY PARTRIDGE OF OGIER CAYMAN AND HELEN RATCLIFFE OF BDB PITMANS LONDON

At the Private Client Exchange in Bermuda we facilitated a session more provocatively entitled 'Are planners a litigator's best friend?' In a room with 10 planners and 35 contentious trust litigators this looked destined to be something of a one-sided debate but it produced an interesting discussion which we explore further in this article.

Trust drafting has become both more sophisticated and less wide ranging in recent years. More sophisticated because the deficiencies of older trusts will have been rectified, less wide ranging because of the changing trends in trust drafting brought about by a more international client base, range of assets and tax changes. It is most likely that advisers will be preparing discretionary trusts with maximum flexibility and a wide range of powers, and in an offshore context, with detailed provisions about trustees and protectors. Certainly in the UK the range of trusts which used to be possible has been severely curtailed by tax changes and the more international client using one of the IFC jurisdictions is likely to have some kind of overriding discretionary trust even if it also contains extensive default provision with more fixed interests.

In principle therefore this may mean that some of the drafting issues with older trusts, for example, a lack of a charging clause, insufficiency of powers, lack of flexibility in operative provisions, ambiguous drafting, might be a thing of the past. But many of these older trusts, with their outdated definitions designed for a society from decades ago and with limited administrative powers for a much less varied range of assets than trustees now hold, will still be in existence. They are likely to have undergone various permutations in response to changes in tax legislation, often with a scramble to meet deadlines. A lack of facility with drafting and lack of knowledge why it was done in a particular way may lead to problems when further changes are made. Lack of drafting experience may also lead to issues when powers are exercised in more recently drafted trusts.

If planning has to take account of tax, this adds another difficult dimension. Trustees will often have beneficiaries from a mix of low tax and high tax jurisdictions and require drafting which is effective for more than one tax jurisdiction. Tax or succession may have dictated the original form of the settlement and subsequent deeds. This knowledge may not always be accessible to the later draftsman and poor records and archives are always a risk. Sometimes a mistake will have been made in a crucial part of an analysis (for example, about the domicile of the settlor) leading to a succession of problems.

Have the expectations of clients, coupled with the availability of wide discretionary powers, led to a less rigorous approach when exercising powers? The temptation to regard discretionary powers as capable of being used in the most flexible way has received a recent warning in the Privy Council case of Grand View Private Trust Co Ltd and another v Wong and others (Bermuda) [2022] UKPC47and the implications of this case are still being assimilated. It was inevitable that a good deal of the discussion should focus on this.

The principles about the exercise of powers are well known. The scope of the power should not be exceeded, adequate deliberation on relevant matters is needed when making a decision within the scope of the power, and no action should be taken which would ostensibly be within the power

but done for an improper purpose (or fraud on a power as it used to be known but which is language the Privy Council consider should be discarded as historical and inappropriate because of its suggestion about the intentions of the trustees).

In Grand View the powers being exercised were the powers to add and exclude beneficiaries and the power of appointment in favour of a discretionary object. For whatever reason the trustees did not decide to apply to court for approval of their decisions or for guidance. Proceedings were brought on the basis that there was a breach of trust on four grounds – (i) the trustee took irrelevant considerations into account and did not act for the benefit of the beneficiaries, (ii) it acted in excess of its powers, (iii) it failed to exercise its powers for the purposes for which they were conferred and (iv) it acted in breach of the rule against remoteness of vesting in transferring trust assets to a purpose trust. In other words, looking at the challenges in (i) to (iii) it did not comply with the principles about the exercise of powers.

In the Privy Council the adequate deliberation point was not at issue, but the scope of the power and the proper purpose of the power were and it was reaffirmed that these need to be understood sequentially. Nothing new was said about the scope of a power which is a question of construing the text. But it was made clear that the proper purpose(s) of a power have to be determined at the date of the instrument conferring the power and the intention of the settlor has to be objectively determined. In determining the objective of the settlor, substantially contemporaneous documents such as a letter of wishes are admissible.

So what happens if a settlor later changes his wishes? The Privy Council noted that 'It was common ground that, while trustees could legitimately have regard to wishes later expressed by the settlor…as to how the trustees should exercise their powers, such wishes were not admissible in determining the purpose of those powers' (paragraph 63).

Grand View is therefore saying that the purpose must be determined at the outset and then

Given the unlimited length of time that offshore trusts can last, settlors will therefore need to be very aware of the scenarios which might unravel and be very careful in how the purpose of the trust is expressed. Much was made of the fact that in Grand View the terms of the trust deed emphasised the family character ' to a degree which may be unusual in the world of discretionary trusts.' What was unusual was the very strong link between setting up the trust and providing a means of incentivising the children in the success of the business. But once that purpose was set, the powers to add and exclude beneficiaries had to be considered in that context. The purpose of the powers to add and exclude beneficiaries was to further the interests of the existing beneficiaries. An exercise of the powers to exclude all the family beneficiaries and add a purpose trust as a beneficiary could not be said to be in the interests of the existing beneficiaries. With the benefit of hindsight, the purposes were set too narrowly and with wider purposes a more flexible position could have been achieved for the trustees and the settlors.

In terms of existing trusts, it will be worth trustees re-assessing the purpose(s) for which trusts are set up so that powers are exercised appropriately. Where circumstances have changed and the settlor's views have changed, this may or may not be at variance with the original purpose and action will have to be tailored appropriately. It may not be possible to achieve what is wanted even with consent from all the current beneficiaries.

For settlors the ability of trusts to adapt to changing circumstances has always been one of their chief attractions. They may have an open mind as to how the trust evolves. The trust documentation will be prepared between their local advisers and the advisers in their jurisdiction of choice and there may have been little recorded by way of contemporaneous evidence.

Here the ability to involve contentious trust colleagues, to discuss the purposes and the proposed exercise of the power(s) and to consider the court routes available will be very helpful - the litigator will turn into the planner's best friend.

What about for new trusts? It is doubtful that including the purpose of the settlor in the recitals or elsewhere in the trust deed is going to be the right approach as it may only introduce ambiguities or unforeseen restrictions. But the letter of wishes is likely to be a much more bespoke document looking at possible scenarios and keeping matters as fluid as possible, including situations where a restructuring on radical lines might be appropriate. Powers to add and exclude are likely to be given much more thought.

It was suggested that when new trusts are set up contentious trust lawyers should be involved to 'stress test' the paperwork ie what the context is behind the trust, and what language is being used in the trust deed and the letter of wishes. Sensitivities about fees might limit that, but all could see the merits of more plain drafting. To quote from how we ended the session - 'So we could all explore the merits of more plain drafting – let's call a spade a spade – and draft clauses in language which indicates what it actually is intended to do – but that would take away a lot of the litigator's work!' ■

WHEN A BLESSING CAN BECOME A CURSE

WHAT TRUSTEES CAN DO TO MANAGE THE RISK OF CONFLICTING JUDGMENTS FROM DIFFERENT COURTS

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In specialist trust law jurisdictions, such as Jersey and Guernsey, a trustee may apply to the relevant court to sanction or 'bless' a decision it wishes to take (which forms part of the so-called Public Trustee v Cooper jurisdiction). Such applications have become a very familiar feature of the legal landscape in Jersey and Guernsey, where the adjudications of the courts have helped ensure the continued, smooth operation of Channel Island-based trusts, notably when trustees are faced with 'momentous' decisions, such as the sale of a significant asset or substantial restructure of a trust settlement.

In Representation of SG Kleinwort Hambros Trust Company (CI) Limited [2023] JRC 054, the Royal Court of Jersey (Commissioner Bailhache presiding) had cause to consider the challenging question of how to avoid a risk of different decisions being made by courts in different jurisdictions, where both are asked (in the course of separate sets of proceedings) to 'bless' trustee decisions relating to trusts in the same structure. The case is proceeding in parallel with proceedings before the Royal Court of Guernsey (the Bailiff of Guernsey presiding). While the SG Kleinwort litigation raises several interesting points, the focus of this brief article is the issue of how trustees can manage the risk of two different courts delivering conflicting judgments on similar issues within the same structure.

Background

In the SG Kleinwort litigation, the Royal Court of Jersey is concerned with a potential application to bless the complex restructuring of certain trusts (though no final blessing application had, as at April 2023, been made). The family wealth was spread between several trusts, some established under Jersey law, and others under Guernsey law (with different trustees in each jurisdiction). In ultimate prospect, therefore, was a joint proposal to be developed and made by the trustees - SG Trustees (the applicant in Jersey) and Mirafield (the applicant in Guernsey) – in relation to the same scheme, ultimately to be considered in separate blessing applications before the Royal Courts of Jersey and Guernsey.

A shared headache for the Royal Courts of Jersey and Guernsey

Despite certain similarities of approach, including on matters of trusts law, Jersey and Guernsey are distinct legal systems with separate bodies of case law. A decision made by a court in Jersey thus does not bind a court in Guernsey, and vice versa, though the final court of appeal in both jurisdictions is the Judicial Committee of the Privy Council.

In the SG Kleinwort litigation, the Royal Courts of Jersey and Guernsey each faced the prospect of being asked to grant relief in the form of a blessing in relation to the same structure. While there was significant focus on the challenge presented by this in the SG Kleinwort judgment, it is unlikely to be an isolated instance, given the prevalence of pan-Channel Island trust structures, and it is certainly not unusual to come across complex structures comprising trusts in different (sometimes multiple) jurisdictions, in the offshore world. The decision is, therefore, of practical interest to trusts practitioners.

While one supposes that the two Royal Courts would likely adopt a similar approach and reach similar decisions on blessing applications in relation to the same scheme, this is far from a given. Each court has discretion to reach its own conclusion, weighing similar factors and drawing from similar legal principles, but in a potentially different way, such that there is at least the risk of inconsistent conclusions. As Commissioner Bailhache noted: "the nature of our respective jurisdictions is that we will follow our approach in Jersey and the Court in Guernsey will follow its approach there."

The very real nature of these concerns is brought into focus by the potentially negative impact of conflicting decisions on the welfare of the beneficiaries, including the interests of future unborn children, with the final decisions of each court likely to have a significant impact on the family members connected to the relevant trusts in the years to come. This point was underscored by the Bailiff of Guernsey, who in the Guernsey proceedings noted that he "want[ed] to emphasise…the fact that there are real people behind what is happening in this Court room…and that [it] is important for everyone to have the best interests of the beneficiaries as a group in mind" (this statement was quoted and endorsed by Commissioner Bailhache in the Jersey proceedings).

So, how could the risk of conflicting decisions be avoided, a scenario colourfully described by one advocate in the Jersey proceedings as "a train wreck"?

Options

One option (favoured by the Jersey Court) was for all of the trustees to submit to the jurisdiction of one or the other court, thereby allowing a single judgment to be issued on one blessing application. However, neither set of trustees were willing to submit to the other jurisdiction unless all the beneficiaries of their trusts agreed and no such agreement was forthcoming. All parties therefore proceeded on the basis that there would ultimately need to be separate blessing applications in the Royal Court of Guernsey and in the Royal Court of Jersey, albeit the intention was that the blessing applications would be in respect of the same scheme, jointly developed by the two sets of trustees.

Against this backdrop, a combination of the parties involved proactively explored a number of alternative options with a view to ensuring the best outcome for the beneficiaries of the trusts.

An initial (seemingly unprecedented) proposal made by one of the advocates in the Jersey proceedings was that both the Royal Courts of Jersey and Guernsey could sit together as one unified forum, to hear the applications. Commissioner Bailhache considered that, while it might be possible for the two courts to sit together, this was a novel concept which raised a number of practical issues including: who would have the right to address the Court, which laws would apply to which application and also how would the law of perjury apply and which court would have jurisdiction over it.

A further alternative proposal was considered which envisaged close cooperation between the two courts (short of the courts sitting together). This would have entailed closely aligned (but sequential) hearing dates, such hearings to take place in private (save that each court and counsel in each jurisdiction would be able to watch and listen to the hearing in the other jurisdiction remotely), exchange of affidavits and skeleton arguments between the courts and counsel in each jurisdiction, followed by reserved judgments and consultation between the judges thereafter before handing down judgments.

It appears that this concept was considered by the Bailiff of Guernsey who ultimately considered that it was premature to determine at this stage of the proceedings how and if it would be appropriate to seek judicial cooperation with the Royal Court of Jersey. Accordingly, the degree of consultation necessary between the judges was better left to a later stage. Though some consideration was given to the necessity for formal letters of request in this process, the Bailiff of Guernsey considered that it was not necessary for letters of request to be issued at this stage, a view with which the Jersey Court agreed.

However, the Jersey Court decided that, in the circumstances, there was no reason not to have consultations between the judges, both in advance of, and if necessary after, the hearing, and that, on the contrary, there was every reason to do so, subject to there being transparency in the sense of the parties being able to address any questions which trouble the judges arising in those consultations.

SG Kleinwort provides a fascinating insight into the Jersey Court's view as to how two independent, offshore legal systems may pragmatically cooperate with one another to protect the integrity of the blessing application

procedure of each jurisdiction. Whether the judges ultimately consult with one another, and the extent of any such consultation, is a matter for another day.

Another way forward?
As noted, interesting and novel options were mooted in the SG Kleinwort litigation.

One further, potential option in cases such as this (which are not unique in view of the prevalence of complex structures in the offshore world) is the possibility of the first court determining the application but directing that the relief be conditional upon a similar form of relief being made by the court of the other jurisdiction when it determines the application before it. In this way, if the second court seized of the blessing application proceeds to grant similar form relief, the relief granted by the court first seized is triggered and becomes effective. On the other hand, if the second court seized does not proceed to grant similar form relief, the relief granted by the court first seized is not triggered and does not become effective. Though it depends on the court first seized being prepared to make such an order on conditional terms, it potentially offers a way of effectively managing the risk of conflicting decisions.

In these times of high global mobility, it is all the more important for trusts lawyers to be agile and innovative in engendering cross-border solutions for clients. ■

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