

## Transcontinental Trusts Bermuda Forum: April 2015

***Latest developments in the offshore world: 1. Recent cases on the confidentiality of trust proceedings; 2. A case calling for the apparent resolution of conflict between Cayman and Jersey “firewall” provisions; 3. Application of the Pitt and Futter v HMRC restatement of the mistake principles in the exercise of the court’s remedial jurisdiction in the Cayman Islands.***

**The Hon. Chief Justice Anthony Smellie, Chief Justice of the Cayman Islands.**

### **1. Confidentiality of trust proceedings in court: should they be open or private proceedings?**

Ever since it was settled by the House of Lords in *Scott v Scott* in 1913<sup>1</sup>, it has been a well established principle of common law that the proceedings of courts of justice are open to the public. Indeed, as Lord Halsbury observed in his judgment delivered in that case, “I believe this has been the rule, at all events for centuries, but it has been the unquestioned rule since 1857”.

Viscount Haldane VC emphasized in his judgment that<sup>2</sup> : “A mere desire to consider feelings of delicacy or to exclude from publicity, details which it would be desirable not to publish is not, I repeat, enough as the law stands. I think that to justify an order for hearing in camera it must be shown that the paramount object of securing that justice is done would really be rendered doubtful if the order (for a private hearing) were not made. Whether this state of the law is satisfactory is a question not for a court but for the Legislature.”

In that case, their Lordships went on to declare as unlawful, the order which had been made by the lower courts for marital nullity proceedings to be heard in

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<sup>1</sup> [1913] AC 417.

<sup>2</sup> At p. 439

private, notwithstanding that the proceedings would involve an obviously sensitive enquiry and possible embarrassment for the husband.

But equally discernible from their Lordships' judgments in *Scott v Scott* were the qualifications upon the general rule.

Per Viscount Haldane L.C.: *"The general rule as to publicity must yield to the paramount duty of the court to secure that justice is done; and it is open to a party in a matrimonial suit, upon proof that justice cannot be done otherwise, to apply for a hearing in camera, and even for the prohibition of subsequent publication of the proceedings, in exceptional cases."*

And per Earl Loreburn: *"In cases where it is shown that the administration of justice would be rendered impracticable by the presence of the public, as for example where a party would be reasonably deterred by publicity from seeking relief at the hands of the Court, an order for hearing a matrimonial suit in camera may be lawfully made. Subject to the above limitations, rules may be made under the Matrimonial Causes Act, 1857, to regulate the hearing of causes in camera."*<sup>3</sup>

Such rules have long since been made for the regulation of the hearing of matrimonial cases and those relating especially to the welfare of children, to be taken in camera.

It is perhaps surprising therefore, that until the introduction in 1999 of the Civil Procedure Rules ("CPR") Rule 39.2(3), no rules existed in England and Wales specifically to regulate the hearing of trust administration proceedings in private, and this is notwithstanding that the courts' jurisdiction to grant relief to trustees was established by statute as long ago as in the Trustee Act 1850<sup>4</sup> and power to vary even beneficial entitlements under trusts, in the Variation of Trusts Act 1958. The position is the same in the Cayman Islands where equivalent legislation for the grant of relief to trustees must be applied BUT following rules which are non-

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<sup>3</sup> The principles from *Scott v Scott* have time and again been reaffirmed and applied by superior courts: see for instance *Hodgson v Imperial Tobacco Ltd* [1998] 2 All. E.R.673 and *R (Mohamed) v Foreign & Commonwealth Affairs Sec.* [2010] EWCA Civ 65.

<sup>4</sup> The early precursor to the Trustee Act 1925 and the Variation of Trusts Act 1958 in which broad jurisdiction was given including to allow the court to make orders vesting trust property in the trustees of a settlement. See *Underhill & Hayton* 18<sup>th</sup> Ed, para 73.15

specific in this regard and based upon the inherent jurisdiction and the Rules of the Supreme Court which preceded the CPR (“RSC”)<sup>5</sup>.

The modern case law has not departed fundamentally from the established principles as declared by the House of Lords in *Scott v Scott* (above) but, in deference to Article 10 in particular of the European Convention on Human Rights (“ECHR”) which recognizes the public interest in the freedom of expression and the need for public information to inform the exercise of that right; the emphasis upon the public right to open justice has become heightened in the recent cases.

The result is that RECENT case law coming out of Jersey<sup>6</sup>, Bermuda<sup>7</sup>, the Cayman Islands<sup>8</sup>, England and Wales<sup>9</sup> and the Isle of Man<sup>10</sup> consistently declares that there is no general exception to be carved out for trust administration proceedings and the appropriateness of an order directing that trust proceedings be taken in camera, must be established on the case by case basis.

The comprehensive Isle of Man judgment of Deemster David Doyle was delivered in February 2014 in *Re Delphi Trust*. It provides a broad survey of important case law from England and Wales and the Overseas Territories and gives helpful guidance on the approach to be taken depending on the nature of the trustee’s application (following the four broad categories of applications by trustees identified in *Public Trustee v Cooper*<sup>11</sup>) to be taken under section 61 of the Manx Trustee Act 1961.<sup>12</sup>

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<sup>5</sup> In the Trusts Law (2011 Revision). This lack of rules is of course, with the exception of Beddoe applications, where it is well established at common law –following *Re Beddoe*, *Downes v Cottam* [1893] 1 Ch 547- and so in the Grand Court Rules based on the RSC, that the purpose of the application is to inform the court of the strength and weaknesses of the trustee’s case in the main action, and of the views of trustees and beneficiaries regarding the prospects of success and the course to be taken, for example in respect of a possible compromise. It is therefore inappropriate for these issues to be revealed to the court which has to try the main action or to the other parties to the action: *Alsop Wilkinson v Neary* [1995] 1 All E R 431; and for that reason, Beddoe applications are taken in camera. See also RSC 199 Ed. O 85 and the notes at 85/2/2 pp1561 – 1562.

<sup>6</sup> *Jersey Evening Post v Al Thani et al* (below)

<sup>7</sup> *Guardian Limited v Bermuda Trust Company Limited* (below)

<sup>8</sup> *Barclays Private Bank and Trust (Cayman) ;Limited v Francois and Others* (below)

<sup>9</sup> *See V and T&A* (below)

<sup>10</sup> *Re Delphi Trust Limited*, High Court, Isle of Man, CHP 13/0120, 4<sup>TH</sup> February 2014.

<sup>11</sup> below

<sup>12</sup> That which, similar in terms to section 48 of the Cayman Islands Trusts Law (2011 Revision); vests the court with jurisdiction to decide upon applications by trustees,(without institution of suit) for an opinion, advice or direction

Taking into consideration such applications as including trustee *Beddoe* applications<sup>13</sup>, Deemster David Doyle concluded: *“Normally, the court would sit in private to hear a Beddoe application whereby a trustee is seeking directions from the court in respect of existing legal proceedings or proposed proceedings and in particular what action or stance the trustee should adopt in respect of such proposed or existing proceedings. The disclosure to the public or other parties of full and frank information in respect of such proceedings by a trustee including any weaknesses in the case, may adversely impact on the best interests of the beneficiaries. Applications by trustees for rectification would normally be dealt with in open court. Hostile applications to remove trustees or protectors would normally be dealt with in open court. Hostile applications for disclosure orders against trustees in respect of substantive proceedings for the replacement of trustees would normally be dealt with in open court. The court should normally only sit in private where it is strictly necessary in order to secure the proper administration of justice and where privacy considerations legitimately override the important principle of open justice.”*<sup>14</sup>

This dictum, by its conditional use of the word *“normally”*, neatly captures the further sentiment in the judgment, expressed in agreement with earlier dictum from the Royal Court of Jersey<sup>15</sup> that *“it is unwise to be too dogmatic as to when the court should sit in public and when it should sit in private to hear applications by trustees for directions”*.

The guiding principle thus recently emerging from the Isle of Man, Jersey and Guernsey<sup>16</sup> courts, is that the court should adopt a principled, pragmatic and flexible approach, one that allows the court to recognize the public interest in the open administration of justice even while, in the appropriate case, preserving the

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on any question respecting the management or administration of the trust. Trustee applications are also not infrequently made pursuant to section 72 of the Cayman Islands Law which allows the court to vary trusts.

<sup>13</sup> See FN 11 above (at paras 147 – 150).

<sup>14</sup> Taken from the case summary as more fully set out in paras 147-149 of the judgment.

<sup>15</sup> Per Bailiff Sir Phillip Bailhache in *Jersey Evening Post Limited v Al Thani and Four Others* 2002 JLR 542

<sup>16</sup> As appears from *H Trust* 2007-08 GLR 118, where although the hearing of the application for the variation of the trust was taken in chambers, the judgment was released to the public in anonymised form so as to preserve the anonymity of the parties, regarded as being in the best interests of the beneficiaries and of the trust itself.

ability of the court to respect the confidentiality of private trusts and the privacy concerns of settlors and beneficiaries.

This measured approach has not infrequently, resulted in orders being made to preserve the confidentiality of the identities of parties and of trust assets, even in cases where the actual proceedings were taken in open court.

This, I think it is correct to say, also reflects the approach taken on this issue both in Bermuda and the Cayman Islands, notwithstanding that in both of those jurisdictions, there are constitutional provisions which enshrine the right to a public hearing in the determination of persons' legal rights and obligations and the right to freedom of expression; including the right of the public to information which would enable the public to exercise the freedom of expression<sup>17</sup>.

In Bermuda (in terms nearly identical to the Cayman Islands provisions<sup>18</sup>), section 6(10) of the Constitution provides (among other things) that nothing in section 6(9) requiring that court proceedings be held in public, shall prevent the court from excluding from proceedings persons other than the parties thereto and their legal representatives, to such extent as the court considers that publicity would prejudice the interests of justice... or the protection of the private lives of persons concerned in the proceedings.

In *Guardian Limited v Bermuda Trust Company Limited*, (judgment 1<sup>st</sup> December 2009) Kawaley J. (as he then was), struck the balance between the competing objectives of the constitutional provisions, in directing that although the judgment should be published, it should be published as written in a form that did not reveal the identity of the subject trust itself or of its beneficiaries, giving practical effect to the judge's further views expressed at [23] that: "*It ought to be*

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<sup>17</sup> Section 6(9) of the Bermuda Constitution Order 1968 provides: "All proceedings instituted in any court for the determination of the existence or extent of any civil right or obligation, including the announcement of the decision of the court, shall be held in public. "

Similar provisions are in section 7(9) of the Cayman Constitution. And in section 11, the public right to receive and impart ideas and information without interference is enshrined, and which finds its counter-part in section 9 of the Bermuda Constitution and in both of which provisions, the right may be restricted on exceptional grounds including "to the extent that may be reasonably required... for the purpose of protecting rights, reputations and freedom of other persons or the private lives of persons concerned in legal proceedings".

<sup>18</sup> In section 7(10) of the Cayman Islands Constitutional Order 2009

*possible for the court to both be responsive to the interests of public justice and the privacy needs of persons involved in civil litigation, trust cases included, as well”.*

Chief Justice Kawaley, in a more recent case dealing with a beneficiary’s application for disclosure of trust confidential information<sup>19</sup>, provided another practical illustration of the principle at work. The public judgment was delivered in an anonymised form and dealt with matters of principle and legal analysis. However, the detailed factual findings, including private matters of sensitivity for the trust and beneficiaries, were provided only to the parties in the form of a confidential appendix.

Cases have been decided in the Cayman Islands<sup>20</sup> with similar practical outcomes and a helpful and accurate summary of the Cayman practice is to be found also in Deemster Doyle’s judgment<sup>21</sup>: *“... applications by trustees for directions are heard in private with anonymised judgments being delivered if appropriate. However, applications which fall within category 4 of the Public Trustee v Cooper classification which are essentially hostile litigation are heard and decided in open court. This distinction appears from (a number of decided cases)”<sup>22</sup>.*

A more recent Cayman case<sup>23</sup> provides another example of the challenges facing the court in seeking to balance the precepts of open justice with compelling requirements of the trust for the preservation of confidentiality. There the trustee applied for the “blessing” of the court for a very large disposition from the family discretionary trust fund, for the benefit of charity. The magnitude of the disposition, if publicised, would have revealed the extent of the family’s wealth

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<sup>19</sup> Re an application for information about a trust [2012] SC (Bda) 16 Civ 85

<sup>20</sup> As also in the British Virgin Islands where, in KCTS Holdings Ltd (21 January 2011, OECS (BVI) Com. Div), Bannister J. observed, among other things, that section 7 of the Trustee Relief Act 1877 allows a judge to decide a trustee’s application “on the papers” and thus in private.

<sup>21</sup> In R e Delphi Trust (above) at para 124

<sup>22</sup> Citing Barclays Private Bank and Trust (Cayman) Limited v Francois and others 2004-05 CILR Note 42; Re Q Trusts 2001 CILR 481 and Re B Trust 2010(2) CILR 348

<sup>23</sup> Barclays Private Bank and Trust (Cayman) Limited v C, K and Attorney General 2014 (1) CILR 144

and given rise to several of the well - known concerns about the security and developmental stability of family members, especially the minor beneficiaries<sup>24</sup>.

To allay such concerns, directions were given for the filing of two versions of the trustee's application, one anonymised to substitute random alphabetical references for actual family names and to be available on the public records of the court and another set with actual names, to be kept sealed on the court file and not to be unsealed without an order of the court to be made only upon prior notice to the trustee.

A written judgment that discussed and decided upon the applicable principles of law is published in the Cayman Islands Law Reports [as cited below], using the anonymised references.

Even more recently in October 2014, in the Chancery Division, the English High Court was called upon to decide whether a trustee's application should be heard in private.

The question required the interpretation and application of the Civil Procedure Rules CPR 39, which reads as follows:

- (1) The general rule is that a hearing is to be in public.*
- (2) The requirement for a hearing to be in public does not require the court to make special arrangements for accommodating members of the public.*
- (3) A hearing, or any part of it, may be in private if-*
  - (a) publicity would defeat the object of the hearing;*
  - (b) it involves matters of national security;*
  - (c) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality;*
  - (d) a private hearing is necessary to protect the interests of any child or patient;*

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<sup>24</sup> Concerns of the kind more fully identified for instance, in V and (1)T & (2)A by Justice Paul Morgan (below).

*(e) it is a hearing of an application made without notice and it would be unjust to any respondent for there to be a public hearing;*

*(f) it involves uncontentious matters arising in the administration of trusts or in the administration of a deceased person's estate; or*

*(g) the court considers this to be necessary, in the interest of justice*

*(4) The court may order that the identity of any party or witness must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness."*

The parties relied in particular on sub-rules (c), (d) and (f) of rule 39(2). They cited the kinds of concerns that often arise to propel trustees to seek a private hearing:

*"(1) the evidence would reveal that the value of the assets of the trusts were very high and much higher than was typical in a case under the 1958 Act;*

*(2) the evidence would disclose information about the dividends policy of a company the shares of which were owned directly or indirectly by the trusts;*

*(3) the evidence as to dividends policy would indicate the levels of profit made by the company;*

*(4) the company was a private company and its customers and its competitors were generally not aware of the levels of profit made by the company;*

*(5) if the company's customers became aware of the levels of profit made by the company, those customers (some of whom were powerful enterprises) could squeeze the profit margins of the company;*

*(6) apart from the adverse commercial consequences for the company and consequentially for the trusts, public knowledge of the value of the trust assets would create a risk as to the personal security of both the adult and the minor beneficiaries;*



*(7) the case involved uncontentious matters in the administration of trusts.”*

By way of his own elaboration on these concerns, the judge specifically also required the parties to address the special position of minor beneficiaries. He raised another question which trustees of offshore trusts often pose to the courts which is whether *“it would be appropriate to impose some restrictions to safeguard the children from the adverse consequences of them becoming aware at too early an age of the extent of their likely wealth and to protect them from friendships and relationships with others who were inappropriately influenced by knowing about the likely wealth of the children”*. He enquired whether a reason of that kind would be accepted in the Family Division as a sufficient reason for a hearing in private.

In his carefully considered judgment, Justice Paul Morgan reviewed the legal principles from the case law and concluded:

*“The general rule is that a court hearing is to be in public. That general rule applies to trustee applications under the 1958 Act. When considering whether to depart from the general rule, the court must apply the general principles as to open justice. As stated in the Practice Guidance (Interim Non-Disclosure Orders) [2012] 1WLR 1003: “... open justice is a fundamental principle so that derogations from it can only be justified in exceptional circumstances when they are strictly necessary to secure the proper administration of justice. There is no general exception to the principles of open justice where privacy or confidentiality is in issue. The burden of establishing a derogation from the general principle lies on the person seeking it and it must be established by clear and cogent evidence. These principles are principles of the common law. They do not depend on the case coming within Article 6 of the (ECHR).”<sup>25</sup>*

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<sup>25</sup> Article 6(1), (in terms similar to section 7(1) and (10) of the Cayman Constitution and section 6 of the Bermuda Constitution reads: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and the public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”

This distinction drawn by Justice Morgan between the common law and ECHR principles, can be important in the present context. This is because while Article 6 of the ECHR addresses the rights of the individual to a fair and public trial in the determination of his or her rights and obligations, the typical trustee's administrative application for directions may engage the court only in determining what ought to be done in the best interests of the trust as a whole and not in the determination of the rights of adversarial parties. Thus Article 6 may sometimes not be engaged and what remains to be considered nonetheless, is whether the public's right to open justice under the Article 10 "Freedom of Expression" principles, ought to be curtailed.

This is an issue that was clearly recognized and understood by both Deemster Doyle and Chief Justice Kawaley in their respective judgments in *Re Delphi Trusts* and *Guardian Limited v Bermuda Trusts* (both already cited above)<sup>26</sup>.

And the distinction is recognized in the English CPR at rule 39(3)(f) itself, where it singles out uncontentious trust administration proceedings<sup>27</sup> as among those for which the court has a discretion not to sit in public.

Returning to Justice Morgan's judgment decided under the English CPR, it will be seen that he was not persuaded that a number of the factors cited by the parties, - especially those seeking to protect the confidentiality of the economic interests of the trust assets themselves – were sufficient to justify curtailing the public's right of access to open justice. He was persuaded however, from the evidence presented, that the court should be prepared to take appropriate steps to protect the children from the adverse effect on their upbringing and personal

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There are cases which say that when hearing the typical trustee's application for directions or relief in the administration of a trust, the court is not determining anyone's rights or obligations but is essentially engaged solely in determining what ought to be done in the best interests of the trust estate as a whole and not determining the rights of adversarial parties. See *Re Trusts of X Charity v A.G.* [2003] EWHC 1462(Ch) and *Marley v Mutual Security Merchant Bank Ltd Trust Co Ltd* [1991] 3 All ER 198 and per Deemster Doyle at para 91 of *In Re Delphi Trust* (above)

<sup>26</sup> Respectively at paras 21 and 90-91.

<sup>27</sup> Recognising that they may typically not involve the determination of partisan rights and obligations.

development which might well result from an open court hearing generating publicity as to their potential wealth.<sup>28</sup>

Adhering to the view that any derogation from the principles of open justice should be no more than the minimum strictly necessary to ensure that justice is done, he decided that it would suffice in the case before him to impose reporting restrictions in relation to the proceedings, allowing them to proceed in open court and to issue the written judgment in anonymised form. Also, to bolster those orders, he directed that a non-party would not be entitled to obtain a copy of the transcript or a statement of the case or of any judgment or order without permission of the court and any application for permission must be notified to the parties<sup>29</sup>.

And so we see from a review of the recent cases that the courts have accepted the obligation, even in non-contentious trustee applications, to observe and apply the principle of open justice. Equally however, the courts will make appropriate and practical orders for the protection of privacy in such proceedings, recognizing that the paramount obligation is to ensure that justice is administered properly in all cases.

We see also that the current thinking appears to be that contentious trust proceedings – those in which persons’ rights or obligations are to be affected or imposed against their wishes – should be taken in open court, in the glare of public scrutiny and the mere desire of the parties to such proceedings that they

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<sup>28</sup> At [21] - [24] of the judgment.

<sup>29</sup> The judge gave these further directions and observation [30]s: "Finally, I wish to comment on the future listing of applications under the 1958 Act,. If the parties intend to apply at the hearing of the substantive application for an order that the application be heard in private, or that there be reporting restrictions or that any judgment should be anonymised, and they wish the substantive hearing to be listed without the names of the parties but with random initials only, then it is to be expected that the Chancery Listing will accede to that request. In such a case, in addition to random initials, the listing should refer to (the 1958 Act) but will state that the hearing is in private. This procedure should not be abused. A request to Chancery Listing to list the case in this way should only be made where a party genuinely intends to argue at the substantive hearing that the court should sit in private or impose reporting restrictions or give an anonymised judgment. If the parties are in doubt as to whether it is appropriate to make a request, they may apply to the court in writing in advance for a direction that the substantive hearing might be listed in the way described above. I have the authority of the Chancellor of the High Court to make the comments in this paragraph"

be taken in private, will by itself, seldom suffice to justify curtailing the public right of access<sup>30</sup>.

But even in such proceedings, the right of the public to witness the administration of justice is not absolute and the over-riding objective must still be to ensure that justice is indeed administered properly. And so, even where the right of public access is enshrined in the Constitutions (as in the Cayman Islands), that right is not offended where measures imposed are “*reasonably necessary*” for the purpose of protecting (among other things) “*the rights, reputations and freedoms of other persons or the private lives of persons concerned in legal proceedings*”.

The same, as I understand it, is the position under the Constitution of Bermuda as it would be in other offshore jurisdictions which apply the ECHR.

It must follow then, that in the context not only of uncontentious but also of contentious trust proceedings, the courts may be called upon and will have an obligation to decide whether such measures for the exclusion of the public as are minimally necessary to ensure the proper administration of justice, should be put in place.

## **2. A case of apparent conflict between the “firewall” provisions in Cayman and Jersey Trusts Laws.**

Recently, in *Schroder Bank and Trust v Schroder Trust AG* (Grand Court FSD Cause No 122 of 2014, judgment 9<sup>th</sup> March 2015), trustees sought declaratory relief to set aside certain appointments of capital out from a Cayman trust to a number of sub-trusts to be settled under Jersey law. After the execution of the deeds of appointment, the Cayman trustee was advised that the appointments in favour of the Jersey sub-trusts had been made in the excessive and impermissibly wide use of the dispositive powers in that they purported to benefit a class of beneficiaries not within the Cayman trust, beneficiaries who, therefore, could not be entitled

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<sup>30</sup> Eg: *Jersey Public Post Limited v Al Thani* (above); *Public Trustee v Cooper* [2001] W.T.L.R 901 (Hart J’s categories (a) and (d). ;

to benefit under the Jersey sub-trusts on the basis of dispositions from the Cayman trust.

In considering whether the appointments should be declared void, a difficulty confronting the Cayman court was the requirement in each of the Cayman and Jersey laws, that challenges to the validity of trusts respectively established under them are to be determined exclusively in keeping with their respective provisions<sup>31</sup>.

The question therefore became whether the law of the Cayman Islands (as the proper forum of the Cayman Trust) or the law of Jersey (as the proper law of the sub-trusts) applied. And so that while the Cayman Trust could properly be the subject of declaratory relief from the Cayman court, orders affecting the Jersey sub-trusts could be made only by the Jersey court.

As neither the Cayman nor the Jersey law provided an obvious answer to this conundrum, the Trustee of the Cayman Trust in bringing the application felt obliged to choose one forum over the other and so applied to the Cayman court for the declaratory relief.

In deciding that the appointments from the Cayman Trust were void for being an excessive and impermissibly wide use of the dispositive power, the court accepted that there were two ways of approaching the conflict of laws conundrum.

The first was to have recourse to the settled ordinary principles of private international law and which required the court to identify the system of law most closely connected with the transactions under challenge. As the dispositive transactions involved the exercise of discretionary powers by a Cayman resident trustee of a trust governed by Cayman law, the transactions clearly had their closest connection with the laws of the Cayman Islands.<sup>32</sup>

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<sup>31</sup> Sections 89 and 90 of the Cayman Trusts Law and Article 9 of the Trusts (Jersey) Law 1984.

<sup>32</sup> The assets purportedly appointed out of the Cayman Trust comprised, moreover, choses in action or "movables" and so deemed situated in the country where they are properly recoverable or can be enforced; viz: the Cayman Islands, citing *Kwok Chi Leung v Karl v Comm. Of Estate Duty* [1988] 1 W.L.R. 1035 (P.C) and Rule 112(1), *Dicey, Morris and Collins: The Conflict of Laws*, 15<sup>th</sup> Ed.

The second involved a practical assessment of the effect of any order the Cayman Court would make setting aside the appointments. As such an order would render the appointments void ab initio, the practical effect would be that no assets made their way to the Jersey sub-trusts from the Cayman Trust and so , on that view of the situation, the Cayman court was really not being called upon to determine a challenge to the validity of the Jersey sub-trusts.

On those bases, Cayman was found to be the proper forum for determination of the challenge to the appointments out of the Cayman Trust<sup>33</sup>.

### 3. Mistake.

Also in the Schroder case<sup>34</sup>, the court considered whether the decision of the Cayman trustee was liable to be set aside on the alternative basis of mistake as the doctrine has been restated by the Supreme Court in Pitt and Futter v HMRC<sup>35</sup>.

The Court was not called upon to consider the matter by application of this, Hastings-Bass rule which remains a part of Cayman law, the Supreme Court decision notwithstanding.

The court was satisfied, both as a matter of Jersey and Cayman law<sup>36</sup> that the reliance by the Trustees on the erroneous advice and erroneous drafting of their lawyers, as to the effect of the Appointments, (in terms of the issues of their validity, their tax consequences and the further issue of their irrevocability)<sup>37</sup> caused severe consequences to the Trusts which were never intended and that the Appointments would never have been made but for those mistakes. The Appointments were therefore also liable to be set aside on the basis of the

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<sup>33</sup> On the basis that there could nonetheless be the need to seek an order of the Jersey court confirming the order of the Cayman court (to satisfy UK Inland Revenue rules carrying potential tax consequences depending on whether the appointments were valid and effective); the Cayman court also considered expert evidence of Jersey law and concluded that it would have arrived at the same decision on the invalidity of the appointments and dispositions out to the Jersey sub-trusts, by application of Jersey law.

<sup>34</sup> FSD 122 of 2014, above

<sup>35</sup> [2013] UKSC 26

<sup>36</sup> And on the basis that the principles would be applied in the same way on the instant facts in both jurisdictions.

<sup>37</sup> A further unintended consequence which left the Trustees with no option but to apply to the court for relief.

restated doctrine of mistake, even in the absence of an allegation of breach of trust by the Trustee. It would have been unconscionable to refuse relief.