

## Representation of Schroder Cayman Bank and Trust Company Limited [2015] JRC125

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This was an application to the Royal Court of Jersey (the **Jersey Court**) in respect of the validity of appointments (i.e. transfers of trust property) (the **Appointments**) by the trustees of an employee benefit trust, governed by the law of the Cayman Islands (the **Cayman Trust**), to themselves as trustees of three new employer financed retirement benefit schemes, governed by the law of Jersey (the **Jersey Trusts**). The Jersey Court was required to consider the applicable law and the effect of a decision by the Grand Court of Cayman (the **Cayman Court**).

#### Background

The Jersey Trusts were established, and the Appointments made, following on from advice that proposed UK legislation would have adverse consequences for the Cayman Trust, which could be mitigated by making the Appointments. The Cayman Trust permitted the transfer of assets to a 'Qualifying Settlement', i.e. only to a trust of which all the beneficiaries were also beneficiaries of the Cayman Trust.

It subsequently became clear that HMRC considered the Appointments gave rise to an IHT charge. It also then came to light that:

- (i) the beneficial class of the Jersey Trusts was wider than that of the Cayman Trust and therefore, the Appointments purported to confer a benefit on a class wider than that permissible under the Cayman Trust; and
- (ii) the Appointments were executed in the mistaken belief that the beneficial classes of the Cayman Trust and the Jersey Trusts were identical and that no charge to IHT would arise.

## Decision of the Cayman Court

The trustees of the Cayman Trust applied to the Cayman Court for a decision that the Appointments were void and of no effect or, alternatively, an order setting aside the Appointments on grounds of mistake.

The Cayman Court held that the Appointments were each void on the grounds of excessive execution – in summary, because the Jersey Trusts did not meet the criteria for a ‘Qualifying Settlement’, as defined in the Cayman Trust, the trustees purported to do something which was outside the scope of their powers. The Cayman Court said it would have been prepared to set aside the Appointments on the grounds of mistake, including because it accepted that the trustees of the Cayman Trust mistakenly believed there would be no adverse tax consequences of making the Appointments.

As the assets were now held by the trustees of the Jersey Trusts, those trustees wanted to be certain they could act on the decision of the Cayman Court and return the assets accordingly to themselves as trustees of the Cayman Trust, on the basis the Appointments were void.

## Decision of the Jersey Court

The trustees of the Jersey Trusts sought a declaration from the Jersey Court for (i) a ruling either that the Appointments were void for excessive execution or that they be set aside on grounds of mistake and (ii) that the proper forum for deciding upon the validity of the Appointments was the Cayman Court, i.e. such that the Jersey Court should give effect to the order of the Cayman Court. With regard to the latter point, the Jersey Court considered Article 9(2A) of the Trusts (Jersey) Law 1984 in relation to a transfer or other disposition to a Jersey trust, which provides that subject to any express provision to the contrary in the transfer or disposition, then Jersey law would apply in determining any question concerning the validity of the transfer or disposition. In this case, there were express provisions in the Appointments that they would be governed by and construed in accordance with Cayman law and as such, the Jersey Court held that the validity of the disposition to the Jersey Trusts was to be determined in accordance with Cayman law.

In considering the application to ‘give effect’ to the Cayman Court’s decision, the Jersey Court considered the concepts of ‘enforcement’ and ‘recognition’ of foreign judgments and noted that enforcement generally applies in respect of judgments for a sum of money<sup>1</sup>, though there was case law to the effect that non-money judgments could be enforced in Jersey on a discretionary basis<sup>2</sup>. The Jersey Court said that it would have been prepared to enforce the Cayman Court’s judgment on the latter basis, but viewed this being more properly categorised as a case of recognition<sup>3</sup> (in respect of which there is no restriction on the type of judgment which can be recognised).

The Jersey Court said that in the circumstances, it was a matter of *res judicata* (i.e. the matter

had already been adjudicated by a competent court and did not need to be decided again) and the trustees of the Jersey Trusts could rely on the judgment of the Cayman Court in any proceedings brought in Jersey. Therefore, the trustees of the Jersey Trusts could return the assets to themselves as trustees of the Cayman Trust, on the basis that (i) the validity of the Appointments was governed by Cayman law; (ii) the Appointments were void and (iii) there was a judgment which could properly be recognised in Jersey. The Jersey Court added that if it had been necessary to apply Jersey law to the issues, then the Jersey Court would have reached the same decision as the Cayman Court for essentially the same reasons.

### **Comment from the Cayman perspective**

Taken in isolation, the Cayman aspects of this case are unremarkable. Where a trustee purports to transfer assets to another trust or trusts and in so doing acts outside the scope of its powers, one would expect that transfer to be void for excessive execution.

In this case, the Jersey Court accepted that Cayman law governed the purported Appointments because of an express choice of law clause in the instruments by which the Appointments were effected. However, the Jersey Court also made it clear that it would have reached the same conclusion even if Jersey law applied to the Appointments. The interaction of different legal systems is a complicated area of law, particularly where trusts are concerned. Many jurisdictions (including Cayman and Jersey) have in place special rules referred to as the “firewall legislation” which set out when the law of that jurisdiction applies in respect of a trust. The firewall legislation has potential to cause significant conflicts in a case where assets pass from a trust in one jurisdiction with firewall legislation to a trust in another jurisdiction with firewall legislation (as was the case here). This decision is encouraging as an example of how those rules can work together to achieve an outcome which is sensible in the circumstances.

### **Comment from the Jersey perspective**

Whilst this case will be pertinent generally to trustees in relation to transfers from a non-Jersey trust to a Jersey trust, it is interesting to note that had the Jersey Court been required to consider the validity of the Appointments prior to the Trusts (Amendment No.5) (Jersey) Law 2012, which amended inter alia Article 9 of the Trusts (Jersey) Law 1984 (the **Law**), it would have been necessary for the Jersey Court to apply Jersey law in considering the validity of the Appointments, because the unqualified effect of Article 9(1) of the Law was such that any question concerning the validity of a transfer or other disposition to a Jersey trust was to be determined in accordance with Jersey law, without reference to Jersey’s conflicts of laws principles. However, by that amending law, Article 9(1) was made subject to any express provision to the contrary in the trust or disposition and, in this case, there was an express provision in the Appointments that they were to be governed by Cayman law - therefore, the validity of the Appointments was to be determined in accordance with that law.

<sup>1</sup> *Rule 42(1), Dicey, Morris and Collins, Conflicts of Laws 15th Edition*

<sup>2</sup> *Brunei Investment Agency v Fidelis Nominees [2008] JRC 152*

<sup>3</sup> *Rule 42(2), Dicey*

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