Exclusive and Inherent Jurisdictions: to boldly go where no Court has gone before?

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Introduction

On 26 November 2014, the Privy Council delivered judgment in the long-running case of Crociani & Others v. Crociani & Others [2014] UKPC 40. The case is of interest to trustees because it provides conclusive and binding guidance on the treatment of exclusive jurisdiction clauses in trust deeds. However, it also raises questions as to the fundamental nature of the inherent supervisory jurisdiction of the Royal Court in connection with trust matters, and whether it is in fact broader than previously thought.

This case is, therefore, important both at a specific and general level.

The Facts

The Grand Trust was established in 1987. According to Clause 15 of the Trust Deed, the Grand Trust was to be governed by Bahamian Law. The Bahamas were also the forum for administration.

Clause 12 of the Trust Deed provided that the original Bahamian trustees were able to resign in favour of trustees outside the jurisdiction, and to declare that the Grand Trust should be subject to and governed by the law of the country of residence or incorporation of the new trustee.

From this point on, Clause 12 said that:

"...the rights of all persons and the construction and effect of each and every provision hereof

shall be subject to the exclusive jurisdiction of and construed only according to the law of the said country which shall become the forum for the administration of the trusts hereunder". [underlining added for emphasis]

From October 2007, there were Jersey trustees so that, pursuant to Clause 12, Jersey law was the governing law of the Grand Trust. In February 2012, Mauritian trustees were appointed so that, again pursuant to Clause 12, Mauritian law was the governing law of the Grand Trust.

In early 2013, proceedings were brought in the Royal Court of Jersey seeking to impugn certain payments made, and actions taken, whilst the trust was administered by the Jersey trustees (i.e. between October 2007 and February 2012). In response to these proceedings, one of the parties sought a stay of the proceedings on the basis that the effect of Clause 12 was to confer exclusive jurisdiction on the courts of Mauritius to deal with trust disputes arising out of the Grand Trust.

Does Clause 12 confer exclusive jurisdiction on the courts of Mauritius?

The Privy Council held that Clause 12 did not confer exclusive jurisdiction on the courts of Mauritius to deal with trust disputes arising out of the Grand Trust.

The Privy Council acknowledged that there was some force in the argument that, by stating that a trust should be subject to the exclusive jurisdiction of a particular country, it was implicit that it was intended to confer exclusive jurisdiction on the courts of that country as well. The Privy Council also accepted that *"forum for administration"* could refer to the courts that were intended to enforce a trust. However, it could equally also refer to *"the place where the trust is administered in the sense of its affairs being organised".*

The Privy Council held, therefore, that the meaning of the phrase *"forum for administration"* came down to context. In this context, it was clear that it was intended to refer to the place of administration alone, and not to include the manner in which trust disputes should be dealt with.

In terms of its reasoning, the Privy Council noted that the draftsman of the Trust Deed has specifically referred to *"courts"* elsewhere in the Trust Deed. If the draftsman had intended Clause 12 to relate to the exclusive jurisdiction of the court, he or she would have said so expressly. Thus, by way of analogy, in one of the case authorities referred to, the *"forum for administration"* was said to be *"the English courts"* not *"England"*.

In addition, it was *"perfectly feasible"* to think that the draftsman's aim was to stipulate simply where the Grand Trust's affairs were to be conducted. For example, it may potentially have been relevant to the tax treatment of the trustees to be able to show that they had no connection with a particular country (especially those countries who might see the forum of administration

of the trust as relevant). The court cited UK capital gains tax provisions as an example, where both section 52(1) of the Capital Gains Tax Act 1979 and section 69(1) of the Taxation of Chargeable Gains Act 1992 make reference to the place where *"the administration of the trusts is ordinarily carried on"*.

The Privy Council then turned to the meaning of *"exclusive jurisdiction"*. The Appellants had argued that this was clearly intended to include the exclusive jurisdiction of the courts of the particular country. However, the Respondents had argued that the purpose of the *"exclusive jurisdiction"* was avoid *"dépeçage"* i.e. that different aspects of the Grand Trust might be subject to different governing laws. The purpose of the provision was to ensure consistent universal application of the same law in the administration of the trust.

Again, the Privy Council favoured the Respondents' point of view. As well as repeating the point about there being no specific reference to the courts of the country in question (only to the country itself), the Privy Council also saw an inconsistency between Clauses 12 and 15 on the Appellants' own arguments. The Privy Council considered that it could not have been intended for the exclusive jurisdiction of the courts of a particular country only to have come into play on the appointment of new trustees pursuant to Clause 12 but not to have been operative in the context of Clause 15 (whilst the Grand Trust remained originally governed by Bahamian law). There was no sense in such a position.

The Privy Council added that if a provision in a document was to provide a particular court with exclusive jurisdiction then *"one would expect it to be clear in its effect"*.

Inherent Jurisdiction

Although it was not strictly necessary, the Privy Council did consider the question of whether the proceedings in Jersey could continue even if there had been an exclusive jurisdiction clause in favour of the courts of Mauritius. The Privy Council provided some crucial guidance on inherent jurisdiction in relation to the administration of trusts.

First, and most importantly, it held that there is a fundamental difference between an exclusive jurisdiction clause in a contract, and an exclusive jurisdiction clause in a trust deed. In a contract, significant emphasis is placed on the principle of *"contractual bargain"*. The parties have agreed to the provisions, and they should be applied unless there are strong grounds for departing from them. In Jersey, this principle is enshrined in the maxim: *"la convention fait la loi des parties"*.

The test is not the same in relation to a trust deed. The Privy Council held that it should be less difficult for a beneficiary to resist the enforcement of an exclusive jurisdiction clause in a trust deed. Whilst there is an assumption that a beneficiary who wishes to benefit from a trust should be taken to accept that he or she is bound by its terms, this is less of a burden than between

parties to a contract.

In addition, the Privy Council reiterated that the court has an inherent jurisdiction to supervise the administration of a trust (Schmidt v. Rosewood Trust Limited [2003] UKPC 26). The court has no such inherent jurisdiction in relation to a contract. This could be used to depart from the words of the Trust Deed. The Privy Council concluded with the following summary: *"[T]his is not to suggest that a court has some freewheeling unfettered discretion to do whatever seems fair when it comes to trusts. However, what is clear is that the court does have a power to supervise the administration of trusts, primarily to protect the interests of beneficiaries, which represents a clear and, for present purposes, significant distinction between trusts and contracts".*

The Privy Council confirmed that the correct approach was to start with the exclusive jurisdiction clause and assess whether there was good reason to depart from its *"in principle"* applicability. In this case, the Privy Council indicated that, had they been required to consider the issue, they would have departed from the exclusivity of jurisdiction. In this case, they found the following to be pertinent:

1. that most of the salient issues in dispute were Jersey law issues;

2. that much of the relevant documentation, and many of the witnesses, would be in Jersey;

3. that the Appellants had indicated that they were *"willing and able to explain themselves to the Royal Court"*. Although this did not give rise to estoppel arguments, it did indicate an acceptance that claims might be brought in Jersey;

4. the absence of any credible argument as to why Mauritius was a more amenable jurisdiction (the fact that it was the holiday destination of choice for one of the parties was described as *"unimpressive"* by the Privy Council).

Comment

This judgment underlines just how careful trustees must be in drafting trust deeds. If it is intended that disputes be subject to the exclusive jurisdiction of the courts of a particular country, then this must be stated expressly and clearly. It should say clearly that exclusive jurisdiction is to relate to the courts of a country in relation to disputes, rather than simply and generally to the country.

In terms of interpreting a trust deed, any clause will be read in context. This accords with, and emphasises the existing Jersey position. The interpretation of trust deeds under Jersey law has recently been confirmed (in September) in Consolidated Resources Armenia v. Global Gold [2014] JRC 169. Applying the principles set out in the earlier case of Trilogy Management Limited v. YT Charitable Foundation (International) Limited [2012] JCA 152, the Royal Court confirmed that:

1. the aim is to establish the presumed intention of the parties from the words used;

2. the words must be construed against the background of surrounding circumstances;

3. the words must be read in the context of the document as a whole;

4. the words must be given their ordinary meaning;

5. where parties have used unambiguous language, that meaning must be applied;

6. if there are two meanings, then the meaning that accords with business common sense should prevail.

However, one might ask what value there is left in in exclusive jurisdiction clauses in trust deeds. It is true that they have *prima facie* applicability. However, no further assurances can be given to trustees. Ultimately, what will be relevant is the nature of the dispute. If the courts of another jurisdiction are deemed more appropriate and convenient, then the exclusive jurisdiction clause will be potentially worthless.

The Privy Council has also clarified that exclusive jurisdiction clauses in a contract carry greater weight than in a trust deed. The underlying reasoning of the Privy Council, however, may have unexpected consequences.

As mentioned above, the Privy Council arrived at its distinction between trusts and contracts in relation to exclusive jurisdiction clauses on the basis that: (i) in a contract there exists the concept of a contractual bargain; and (ii) the court has an inherent jurisdiction to supervise trust administration.

The second limb of this reasoning raises an issue. Whilst the Privy Council has helpfully confirmed that inherent supervisory jurisdiction does not give a court *"some freewheeling unfettered discretion to do whatever seems fair"*, it seemingly enabled the Privy Council to justify a departure from the clear words of a trust deed.

No consideration was given to the interplay with, or effect on, the limitations on inherent jurisdiction set out in the decision of the Royal Court in IMK Family Trust 2008 JLR 250 (the **"IMK Judgment**"). In this regard, the IMK Judgment noted that the general nature of the inherent jurisdiction of the court had been encapsulated in Article 51 of the Trusts (Jersey) Law 1984 (as amended) which allows the Royal Court to make orders regarding the broad administration of a trust. However, at paragraph 65, it confirmed that the Royal Court had no power to *"alter"* the terms of a trust either under Article 51 or its general supervisory jurisdiction. In this sense, *"alter"* meant authorising the doing of something by the trustees which is outside the powers conferred on them by the trust deed (as opposed to *"vary"* which is changing the trusts in a manner which the trustees would have been empowered to do of their own volition).

The essential underlying reasoning behind the stance of the Royal Court is stated, at paragraph 65(iv) of the IMK Judgment, as follows: *"A settlor determines the provisions of a trust when he establishes it. He is entitled to insert such provisions as he thinks fit, provided they are lawful. It is his decision as to how and in what manner he chooses to benefit the beneficiaries and what powers he chooses to give the trustees in relation to the beneficiaries. Why should the court assume a power to override the expressed intentions of the settlor when it is the settlor who is contributing his assets to the trust for the benefit of the beneficiaries? It seems to us that the position is not far removed from the situation under the law of contract. A court has no power to rewrite a contract entered into by the contracting parties simply because it thinks it would be beneficial to do so; parties are entitled to expect that the court will uphold and enforce the very bargain which they have entered into. Similarly, a settlor is entitled to expect that the court will uphold and enforce the provisions of the trust which he has established".*

This is, on one reading, inconsistent with the conclusions of the Privy Council. Arguably, the Privy Council seeks to rely on inherent jurisdiction in a manner which was not contemplated in the IMK Judgment. In light of the overriding and binding nature of Privy Council decisions, one is left wondering whether the reliability of the IMK Judgment, which is of pivotal importance in the context of Jersey's approach to the enforcement of orders of foreign matrimonial court orders affecting Jersey trusts, has in any way been undermined. Does it open the door, however slightly, to the possibility of inherent jurisdiction justifying alterations to dispositive provisions in trust deeds? Does this judgment affect (and, indeed, enlarge) the very essence of the general supervisory jurisdiction of the Royal Court that underpins and supports the day-to-day operation of the trust industry? Or is it to be read as only coming into play in relation to a departure from exclusive jurisdiction clauses, where the door is already ajar as a matter of first principles? These are questions that may need to be considered in due course.

Conclusion

In many respects, confirmation of the overarching ability of the Royal Court to ensure that the interests of beneficiaries are protected is to be welcomed. Whilst any enlargement of the ability of the court to supervise trusts might be helpful to trustees, it may also be seen as a vehicle for those who are unhappy at the words the Settlor has used. Whether it leads to an increase in the level of trust applications or, worse, litigation, remains to be seen. It will depend ultimately on how future courts interpret this Privy Council decision.

For the time being trustees should be very clear in their drafting, and accept that exclusive jurisdiction clauses may end up having no actual effect.

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