



## Trust Essentials: July 2022

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As the requirements (and subsequent disputes) of HNW individuals and families continue to increase in complexity, courts across our jurisdictions are frequently seeing cases that are establishing new precedents.

The scope and application of established principles and approaches are also being put to the test, including, among others, the substratum principle, the right of a trustee to indemnification, and res judicata and issue estoppel in the context of complex cross-border succession proceedings – all of which our team write on below.

In other team news, we were extremely pleased to take home offshore firm of the year at this month's eprivateclient excellence awards, after a year of significant milestones for Ogier. Thank you to all our clients and intermediaries.

Enjoy Trust Essentials.

#### **Read our At A Glance Guides to blessing applications:**

- [Jersey](#)
- [Guernsey](#)

[Snapshot: obtaining indemnity costs against a litigant in Jersey](#)

In a recent further judgment in *Cohen & Crooks as Joint Administrators for the Estate of James Donald Hanson & Anor v Arbitrage Research and Trading S.A. & Ors*, the Royal Court of Jersey confirmed and developed the test for when indemnity costs will be awarded against an unsuccessful litigant. Ogier successfully appeared for BDO and Creditforce, and obtained an indemnity costs order against a trustee previously found to have misappropriated trust assets. [Continue reading.](#)

#### Jersey Royal Court reaffirms approach to indemnification of trustees

In the recent case of Representation of *White Willow (Trustees) Limited*, the Royal Court reaffirmed a trustee's broad right to an indemnity as reasonable security when making an interim distribution to beneficiaries. While this may be an uncontroversial principle, in this case the Royal Court helpfully confirmed that it was unnecessary for a trustee to have to demonstrate, as a precursor, the existence of known contingent liabilities.

Furthermore, the justification for an indemnity was not necessarily undermined if substantial assets remained in the trust fund after the payment of the interim distribution. [Continue reading.](#)

#### Cayman courts continue to provide essential guidance to trust practitioners navigating complex trust and estate challenges

It is not uncommon for trust practitioners to face significant challenges when administering trusts and estates. Changing circumstances and family dynamics can even involve practitioners in foreign and cross-jurisdictional disputes, which can result in trustees being caught up in a clash of laws and processes and potentially facing conflicting orders and obligations.

In a number of recent cases in which Ogier successfully acted, the Cayman courts have provided essential guidance to assist trust practitioners to navigate these difficulties and have demonstrated a willingness to assist trustees and beneficiaries when circumstances require it in order to ensure the proper, and cost-effective administration of trusts and estates. [Continue reading.](#)

#### Eastern Caribbean Court of Appeal enforces Qatari Royal Family oral will and holds that BVI shares are movable property

A judgment, regarding issues of res judicata and the enforcement of a foreign oral will over BVI shares, and of particular importance to contentious private wealth practitioners, was handed

down in the Eastern Caribbean Court of Appeal on Wednesday 23 March 2022. Justices of Appeal Michel, Webster and Baptiste found in favour of Ogier's Respondent-clients, who acted along with Maurice Turner Gardener and led by Bajul Shah of XXIV Old Buildings. The court dismissed the appeal and affirmed the decision of Justice Ellis in the BVI High Court below. [Continue reading.](#)

### Substratum – what is it and do I need to worry about it?

There has been debate between legal academics and trust practitioners about whether a power holder is prohibited from exercising powers of addition or exclusion of beneficiaries, or other analogous powers, when the proposed change is so significant that it has the effect of changing the basic purpose, or '*substratum*' of the trust. That is to say, the exercise of trust powers would result in an outcome closer to a fundamental change to the purpose of the trust itself than a simple variation, or addition or exclusion of beneficiaries.

This article considers recent authority on the so-called '*substratum*' principle, and in particular how those authorities might impact similar proceedings before the Grand Court of the Cayman Islands. [Continue reading.](#)

### Family office investments and Jersey Private Funds

We are increasingly asked to advise on the applicability of the Jersey Private Funds (JPF) regime to structures established by family members or family offices to hold a variety of investments. JPFs can take the form of companies (including cell companies), unit trusts or limited partnerships. A number of considerations arise in this regard. [Continue reading.](#)

### How is private wealth approaching impact?

Our people and planet face serious challenges from the developing climate crisis, natural disasters and rising inequality. No corner of earth is immune from the consequences. But we are far from powerless in the face of these global threats - this is a race we can win.

Fortunately, there is a growing global momentum towards sustainability, and we've seen this positive change supported at COP26 and by the UN Sustainable Development Goals (SDGs), which provide guidance for countries, companies, investors and philanthropists to align their activities towards sustainability and protecting the environment for the next generation. [Continue reading.](#)

## Changes to fiduciary regulation in Guernsey

Guernsey's fiduciary sector was one of the first in the world to be comprehensively regulated. Since April 2001, subject to a narrow range of exemptions, anyone offering trust and corporate services from Guernsey for a fee has had to be licensed by the Guernsey Financial Services Commission. The regulatory regime has been revised recently: The Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2020 came into effect on 1 November 2021, replacing the 2000 iteration of that law, and was accompanied by the Fiduciary Rules and Guidance, 2021 which set out the standards to be met by licensed fiduciaries.

Although the revised regime in the main standardises and consolidates laws and rules that already existed, a few significant changes have been introduced. Continue reading.

## Power struggles: challenges based on capacity and undue influence

A recent judgment issued by Kawaley J provides a detailed and helpful analysis on claims seeking to set aside an exercise of powers on the basis of a lack of capacity and undue influence in the Cayman Islands.

The judgment in *In the Matter of Poulton Trust* will be of assistance to individual power holders, and those assisting or advising such persons, in seeking to: (i) assess potential deficiencies prior to a purported exercise of powers; (ii) take steps to protect a purported exercise of powers from challenge; and (iii) minimise the risk of costly litigation associated with a challenge to a purported exercise of powers. Continue reading.

## Trustees trapped by troublesome trusts: take ten

On 18 May 2022, the Cayman Islands Grand Court delivered an ex tempore judgment sanctioning a momentous decision taken by Standard Chartered Trust (Singapore) Limited (**Trustee**) in its capacity as trustee of the Emerging Markets Diversified Fund Trust (**Fund**), a Cayman Islands-law governed trust.

In doing so, the Court delivered a helpful summary of the factors that it will consider when determining an application by a trustee for the Court's blessing of a momentous decision under section 48 of the Trusts Act (**2021 Revision**). The Court described the Trustee's application as a "textbook example of how to proceed properly in respect of such matters" and while setting no new law, the judgment is a good reminder of the existing principles relevant to such

applications. [Continue reading.](#)

## **Meet Ogier's Trust Advisory Group.**

### About Ogier

Ogier is a professional services firm with the knowledge and expertise to handle the most demanding and complex transactions and provide expert, efficient and cost-effective services to all our clients. We regularly win awards for the quality of our client service, our work and our people.

### Disclaimer

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## Related Services

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