

Schroder Cayman Bank Trust Company Ltd; Schroder Trust AG v Advocate Jonathan Speck (as representative of the ascertained beneficiaries) and Advocate Damian Evans (as representative of the unascertained beneficiaries)

Jurisdiction:	Jersey
Judge:	Sir Michael Birt, Jurats Fisher, Liston
Judgment Date:	10 June 2015
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Text

[2015] JRC 125

ROYAL COURT

(Samedi)

Before:

Sir Michael Birt, **Commissioner**, and Jurats Fisher and Liston

Between
Schroder Cayman Bank Trust Company Limited
Schroder Trust AG
Representors
and

Advocate Jonathan Speck (as representative of the ascertained beneficiaries)
First Respondent

and

Advocate Damian Evans (as representative of the unascertained beneficiaries)
Second Respondent

Advocate J. P. Speck for the Representors.

Advocate D Evans in person.

Authorities

Harvey v Stacey ([1 Drewry, 73](#)) (1852) 5. C. 22, L.J. Ch 23.

Pitt v Holt [\[2013\] 2 AC 108](#).

Trust (Amendment No. 5) (Jersey) Law 2012.

CC Limited v Apex Trust Limited [\[2012\] \(1\) JLR 314](#).

Trusts Law (2011) Revision.(Cayman)

Dicey, Morris and Collins, Conflict of Laws 15th Edition.

Brunei Investment Agency v Fidelis Nominees [\[2008\] JRC 152](#).

Trust — application regarding appointments out of a trust governed by the law of the Cayman Islands.

THE COMMISSIONER:

- 1 This is an application concerning the validity of certain appointments out of a trust governed by a law of the Cayman Islands to three trusts governed by Jersey law. It requires the Court to consider the applicable law and the effect of a decision on the point at issue by the Grand Court of the Cayman Islands.

The Factual Background

- 2 By a trust deed dated 28th January, 2000, Boyer Allan Investment Management Limited (since renamed as Boyer Allan Investment Services Limited, and referred to hereafter as “Boyer Allan”) as settlor established an irrevocable employee benefit trust known as the Boyer Allan Investment Management Limited Employee Benefit Trust (“the Cayman Trust”).

The Representors have at all times been the trustees of that trust.

- 3 Clause 13 of the trust deed provided that the proper law of the Cayman Trust was that of the Cayman Islands and the courts of the Cayman Islands were the forum for the administration for the trust.
- 4 The Cayman Trust was a discretionary trust. The class of beneficiaries was defined in Clause 2 as meaning “the Employees and the wives, husbands, widows, widowers, and children or step-children and remoter issue, of the Employees”. “Employee” was defined as any person who had at any time after the date of the Cayman Trust been a *bona fide* employee of Boyer Allan.
- 5 Clauses 4.1 and 4.2 of the trust deed were in the following terms:–

“4.1 Power of Appointment

4.1.1 The Trustees may appoint that they hold the whole or any part or parts of the Trust Fund for the benefit of any of the Beneficiaries on such terms as the Trustees think fit.

4.1.2 An appointment may create any provisions and in particular;

4.1.2.1 discretionary trusts; or

4.1.2.2 dispositive or administrative powers,

exercisable by any Person.

4.1.3 An appointment shall be made by deed and may be revocable (including with the consent of any Person) or irrevocable.

4.2 Transfer of Trust Property to new settlement

4.2.1 The Trustees may by deed declare that they hold any Trust Property on trust to transfer it to trustees of a Qualifying Settlement, to hold on the terms of that settlement, freed and released from the terms of this Settlement.

4.2.2 ‘Qualifying Settlement’ in this clause means any settlement, wherever established, under which every Person who may benefit is, or would if living be, a Beneficiary of this Settlement.”

- 6 In 2011 the representors, as trustees of the Cayman Trust, were informed that proposed UK tax legislation would adversely affect the Cayman Trust. They were advised that these adverse consequences could be mitigated by appointing assets to an Employer Financed Retirement Benefit Scheme for the benefit of particular employees of Boyer Allan and their respective families. In accordance with that advice, the Representors established by

declaration of trust three such trusts on 5th April, 2011, namely the Nicholas Allan Employer Financed Retirement Benefit Plan, the Andrew Tay Employer Financed Retirement Benefit Plan, and the Jonathan Boyer Employer Financed Retirement Benefit Plan (“the Jersey Trusts”). These were discretionary trusts expressly governed by the law of Jersey. Each of the above named individuals was an Employee for the purposes of the Cayman Trust.

7 Clause 1.1.4 of the trust deed of each of the Jersey Trusts defined “*Beneficiary*” as:–

The Member was defined as the relevant Employee in each case, i.e. Nicholas Allan in respect of the Jersey Trust bearing his name, and likewise in respect of Andrew Tay and Jonathan Boyer. The representors were the trustees of each of the Jersey Trusts.

- (a) the Member;
- (b) the Member's widow or widower;
- (c) any child of a Member living at the date of the Member's death;
- (d) any other person who in the opinion of the Trustees (which opinion may be exercised with or without requiring proof) is dependant upon the Member for the ordinary necessities of life at the date of the Member's death.

8 By deeds dated 5th April, 2011, (“the Appointments”) the representors as trustees of the Cayman Trust made three appointments, one to each of the Jersey Trusts. The three deeds were in identical form and the relevant provisions were as follows:–

- (i) The representors as trustees of the Cayman Trust were defined as “the Transferor Trustees” and the representors as trustees of each of the Jersey Trusts were defined as “the Recipient Trustees”.
- (ii) Recitals J & L referred to the powers under Clauses 4.1.1 and 4.2.1 of the Cayman Trust respectively;
- (iii) Recital M referred to the definition of “*Qualifying Settlement*” under Clause 4.2.2 of the Cayman Trust.
- (iv) Recital N recorded that “the Transferor Trustees and the Recipient Trustees hereby note for the record that all Beneficiaries of the [Jersey Trust] are also Beneficiaries of the [Cayman Trust].……”
- (v) Recital O defined the powers under Clauses 4.1.1 and 4.2.1 of the Cayman Trust together as “*the Power of Appointment*”.
- (vi) By Clause 2.1, the representors as trustees of the Cayman Trust purported to exercise their powers in the following terms:–

“The Transferor Trustees, in exercise of their Power of Appointment and every other power enabling them, hereby revocably appoint and declare that with effect from the date of this Deed they hold the Transfer Fund to the Recipient Trustees to hold the same upon the trusts of and with and subject to the powers and provisions contained in the [Jersey Trust] as an addition to, and as one fund for all purposes with, any assets already held by them as Trustees of the [Jersey Trust] upon the trusts and with and subject to the powers and provisions contained in the [Jersey Trust] Deed; and that the Transfer Fund shall be transferred into the names of the Recipient Trustees, or under their control, subject always to the lien of the Trustees of the [Cayman Trust] for any tax or other liabilities and freed and released from the terms of the [Cayman Trust] [the Transfer].”

9 Subsequently, during the course of discussions with Her Majesty's Revenue and Customs (“HMRC”), it became clear that HMRC held the view that the transfer of assets from the Cayman Trust to the Jersey Trusts gave rise to a charge to UK inheritance tax. It also became clear during the course of these discussions that the Appointments were flawed in two important respects:–

(i) They purported to benefit a class wider than that permissible under the Cayman Trust (*“the Excessive Execution Issue”*).

(ii) They were executed in the mistaken belief that (a) the classes of Beneficiaries under the Jersey Trusts and the Cayman Trust were identical; and (b) that no charge to inheritance tax would arise (*“the Mistake Issue”*).

The decision of the Grand Court

10 It is an elementary principle of the common law conflict of law rules that the validity of an appointment by trustees falls to be determined by the proper law of the trust in question. The Appointments in this case were made pursuant to the powers conferred on the trustees of the Cayman Trust and accordingly, subject to any statutory provision to the contrary, their validity will be governed by the law of the Cayman Islands.

11 It is therefore not surprising that the Representors instituted proceedings before the Grand Court of the Cayman Islands. Their application sought a declaration that the Appointments were void and had no effect; alternatively an order setting the Appointments aside on the grounds of mistake.

12 Smellie CJ delivered the decision of the Grand Court on 9th March, 2015, and we have had the great advantage of being referred to his judgment.

13 He held that the Appointments were each void on the ground of excessive execution. We

would summarise (very inadequately) his reasons for so concluding as follows:–

- (i) Clause 4.2.1 of the Cayman Trust enabled the trustees to appoint assets to another trust provided it was a Qualifying Settlement.
- (ii) A Qualifying Settlement (as per Clause 4.2.2) was a settlement under which every person who may benefit is (or would if living be) a Beneficiary of the Cayman Trust.
- (iii) The Jersey Trusts were not Qualifying Settlements because the class of beneficiaries of those trusts included at Clause 1.1.4(d) (see paragraph 7 above) persons dependant on the relevant Employee for the ordinary necessities of life at the Employee's death, whereas such persons were not included as Beneficiaries under the Cayman Trust.
- (iv) It followed that the Appointments went beyond the terms permitted by the power conferred by Clause 4.2.1.
- (v) Although the Appointments were also stated to be made pursuant to Clause 4.1 of the Cayman Trust, such power could only be exercised for the benefit of any of the Beneficiaries of the Cayman Trust and this did not include the wider class of “dependants” included under Clause 1.1.4(d) of the Jersey Trusts.
- (vi) It was well-established law that there would be an excessive execution of a power of appointment if it was in favour of strangers. Smellie CJ referred in particular to *Harvey v Stacey* ([1 Drewry, 73](#)) (1852) 5. C. 22, L.J. Ch 23:–

“When an appointment is to a class, some of whom are within and others are not within the proper limits of the power, if the class of persons is ascertained, so that you can point to A, who is within the limits, and say, so much is to go to him, though the others are not within the limits, yet the appointment to A shall take effect; but if the appointment is to a class, some of whom may, and others may not, be objects of the power, and there is nothing to point out what portion is to go to those who are within the power, and what to those who are not, the whole fails.”

- (vii) It followed that, whether considered under Clause 4. 1 or 4.2.1, there had been excessive execution and the Appointments were void.

14 The Chief Justice went on to say that, as an alternative, he would also have been prepared to set aside the Appointments on the ground of mistake. He referred at paragraph 78 of his judgment to two mistakes in particular:–

- (i) The tax consequences of the Appointments. He accepted that the trustees of the Cayman Trust mistakenly believed that there would be no adverse tax consequences whereas a significant charge to inheritance tax had arisen as a result of the Appointments.

(ii) Irrevocability of the Appointments. On the face of the Appointments, the exercise of the relevant power was clearly intended to be revocable. However, Clause 4.2.1 did not permit the trustees to exercise it revocably and therefore, if the exercise took effect, it did so irrevocably. He accepted that the trustees wished to have revocable Appointments to allow for the possibility that assets would have to be returned to meet any tax payment by Boyer Allan to HMRC for which a liability was ultimately established.

- 15 Applying the principles laid down by the Supreme Court in *Pitt v Holt* [2013] 2 AC 108 he concluded that if, contrary to his decision that the Appointments were void, they were in fact valid, he would nevertheless set them aside on the ground of mistake.

The application to this court

- 16 By their representation dated 2nd April, 2015, the representors (as trustees of the Cayman Trust and the Jersey Trusts) seek similar relief to that which they have obtained in the Grand Court. The reason for this of course is that the assets are at present apparently held by the representors as trustees of the Jersey Trusts upon the trusts set out in the Jersey Trusts. They wish to be sure that they can properly act on the decision of the Grand Court and accordingly return the appointed assets to the Cayman Trust on the basis that the Appointments were void and are treated therefore as never having taken place. The representors seek the same relief as was obtained from the Grand Court, namely a ruling that the Appointments are void for excessive execution or alternatively an order that the Appointments be set aside on the ground of mistake. In addition, they seek a declaration from this Court that the proper forum for deciding upon the validity of the Appointments is the Grand Court, with the consequence that this Court should give effect to the order of the Grand Court. Logically, that last point is the first issue for consideration.
- 17 Had this issue arisen before the coming into force of the Trust (Amendment No. 5) (Jersey) Law 2012 ("the 2012 Amendment"), the Court could not have acceded to the representors' submission that the validity of the Appointments is to be determined by Cayman law. That is because Article 9 of the Jersey Trust Law provided (and still provides) as far as material:—

“(1) Subject to paragraph (3), any question concerning:—.....

(b) the validity or effect of any transfer or other disposition of property to a trust;....

shall be determined in accordance with the law of Jersey and no rule of foreign law shall affect such question.

The law of Jersey relating to:—....

(b) conflicts of law ,

shall not apply to the determination of any question mentioned in paragraph (1) unless the settlor is domiciled in Jersey.

(4) No foreign judgment with respect to a trust shall be enforceable to the extent that it is inconsistent with this Article irrespective of any applicable law relating to conflicts of law.”

18 It was held in *CC Limited v Apex Trust Limited* [2012] (1) JLR 314 that the effect of these provisions was that, whenever the validity of a transfer or other disposition to a trust governed by Jersey law was in question, the issue had to be determined in accordance with the domestic law of Jersey i.e. the law of Jersey without reference to its conflict of law principles. The Appointments in this case clearly amount to a ***‘transfer or other disposition of property to a Jersey trust’*** and accordingly this Court would have had to apply Jersey law in assessing their validity notwithstanding that the proper law of the Cayman Trust (and the Appointments) was that of the Cayman Islands.

19 The Cayman Islands has corresponding legislation namely the Trusts Law (2011) Revision, section 90(d) of which provides:–

“All questions arising in regard to a trust which is for the time being governed by the laws of the Islands..... including questions as to:–.... (d) the existence and extent of powers.... including..... powers of appointment, and the validity of any exercise thereof ,

are to be determined according to the laws of the Islands without reference to the laws of any other jurisdictions with which the trust or disposition may be connected.....”.

20 It follows that, in relation to a disposition by way of an appointment from a Cayman trust to a Jersey trust, its validity would be determined under Cayman law by the Cayman courts and under Jersey law by the Jersey courts. In order that the trustees of both trusts could be protected, there would therefore need to be applications to both courts. Although each court would be applying its own law, we would anticipate, given the similarity of trust law in both jurisdictions, that in most cases they would come to the same conclusion despite applying different law.

21 However, since the decision in *CC Limited v Apex Trust*, the States has amended Article 9 of the Jersey Trust Law by virtue of the 2012 Amendment. That Law inserted a new paragraph (2A) in Article 9, the relevant part of which reads as follows:–

“(2A) Subject to paragraph (2), paragraph (1):–.....

(c) is subject to any express provision to the contrary in the terms of the trust or disposition...”

The wording of paragraph (4) of Article 9 has also been amended very slightly but the effect remains the same as before in relation to a judgment of a foreign court.

- 22 The effect of paragraph (2A)(c) is that, if in the document which constitutes the disposition of property to a Jersey trust, there is to be found an express provision that such disposition is to be governed by the law of some jurisdiction other than Jersey, that is now effective and is not prohibited by paragraph (1).
- 23 While submitting that a simple express choice of proper law to govern the disposition was sufficient to engage paragraph (2A)(c), Advocate Speck alerted us to the possibility that it might be necessary for the disposition to go further and state expressly that its validity is also to be governed by the proper law of the disposition. We do not think that this is a correct interpretation of paragraph (2A)(c). It is well established that, under private international law, the proper law of a contract governs its material validity as well as its interpretation (see para 32–124 Dicey, Morris and Collins, Conflict of Laws 15th Edition). By analogy, in our judgment, the proper law of a disposition to a trust governs its material validity as well as its interpretation. It is sufficient therefore for the disposition simply to state expressly that it is governed by a law other than that of Jersey. We should add however that it is necessary for such provision to be express. If the disposition is silent as to its proper law then one is left to determine its proper law by virtue of the system of law with which it has the closest connection or by implication. That is insufficient to oust paragraph (1) of Article 9.
- 24 Turning to the facts of this case, Clause 7 of each of the Appointments provided:–

“This Deed shall be governed by and construed in accordance with the laws of the Cayman Islands as long as that shall remain the proper law of the [Cayman Trust]. All rights under this Deed and its construction shall be subject to the exclusive jurisdiction of the Courts of, and construed according to the laws of, the Cayman Islands.”

It follows that, pursuant to paragraph (2A)(c), Article 9 (1) is to be dis-applied and the validity (for the purposes of Jersey law) of the disposition of property to the Jersey Trusts by means of the Appointments is to be determined in accordance with the law of the Cayman Islands.

The effect of the Judgment of the Grand Court

- 25 The prayer of the representation asks the Court to ‘give effect’ to the decision of the Grand Court concerning the validity of the Appointments. At the hearing, the Court explored with Advocate Speck exactly what he meant by this. Was he inviting the Court to enforce the Cayman judgment or merely to recognise it? Following the hearing, Advocate Speck submitted further material for which the Court is grateful.

26 Enforcement and recognition of foreign judgments are different concepts and are dealt with in paragraphs (1) and (2) respectively of Rule 42 of *Dicey, Morris and Collins* which is set out at para 14 R — 020 as follows:—

“(1) Subject to the Exceptions hereinafter mentioned and to Rule 62 (international conventions), a foreign judgment in personam given by the court of a foreign country with jurisdiction to give that judgment in accordance with the principles set out in Rules 43 to 46, and which is not impeachable under any of Rules 49 to 54, may be enforced by a claim or counterclaim for the amount due under it if the judgment is:—

(a) for a debt, or definite sum of money (not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty); and

(b) final and conclusive ,

but not otherwise.....

(2) A foreign judgment given by the court of a foreign country with jurisdiction to give that judgment in accordance with the principles set out in Rules 43 to 46, which is not impeachable under any of Rules 49 to 54 and which is final and conclusive on the merits, is entitled to recognition at common law and may be relied on in proceedings in England.”

27 This is not a judgment for a sum of money and accordingly cannot be enforced under Rule 42 (1). However, there is recent authority that non-money judgments can also be enforced in this jurisdiction on a discretionary basis (see *Brunei Investment Agency v Fidelis Nominees* [\[2008\] JRC 152](#)). It would seem that the judgment of the Grand Court could be enforced in accordance with the principles described in the *Brunei Investment Agency* case and, were it necessary, we would be willing to do so.

28 However it seems to us that this is more properly categorised as a case of recognition. That is governed by Rule 42 (2) above and there is no restriction on the type of judgment which can be recognised. What the representors, as trustees of the Jersey Trusts, are looking for is comfort that, as a matter of Jersey law, they can treat the Appointments as void and therefore return the relevant assets to the Cayman Trust. They were parties to the proceedings in the Grand Court and indeed Clause 7 of the Appointments conferred exclusive jurisdiction in relation to the Appointments upon the Cayman courts. In the circumstances it seems to us that it is a matter of *res judicata* as between the trustees of the Cayman Trust and the trustees of the Jersey Trust. The trustees of the Jersey Trust are able to rely on the judgment of the Grand Court in any proceedings brought in Jersey.

29 It follows in our judgment that the representors, as trustees of the Jersey Trust, can safely return the appointed assets to themselves as trustees of the Cayman Trust on the basis that the validity of the Appointments is governed by the law of the Cayman Islands, that the

Grand Court has ruled as a matter of Cayman law that the Appointments were void and that that is a judgment which can properly be recognised in this jurisdiction.

- 30 We should add that, had it become necessary for us to determine the Excessive Execution issue and the Mistake Issue applying only domestic Jersey law, we would have reached the same decision as the Grand Court for essentially the same reasons.