

CASELAW UPDATE: NOVEMBER 2008

JERSEY FINANCIAL SERVICES BUSINESSES



TRUSTEE'S REMOVAL AND CONFLICT OF INTERESTS

In re the E, L, O and R Trusts (11 September 2008) confirmed that the failure to recognise and manage a clear conflict of interests by the trustee will be sufficient to warrant the removal of the trustee by the Court. This brings Jersey in line with the most recent decisions in this area in England and New Zealand.

In this particular case, the clear conflict of interests was that the trustee would potentially become involved in litigation between the two primary beneficiaries of the trusts, meaning that the trustee would be a claimant and a possible defendant to the litigation.

The trustee wrongly failed to retire at an early stage, despite the clear conflict. It was also wrongly influenced by the effect of its retirement on persons who were not beneficiaries. The trustee was ordered to pay the other parties' costs.

Comment: Trustees will not always recover their legal costs if they seek the Court's directions. They may be penalised in costs if the right course of action is obvious, as here, ie retirement.

TRUSTS: SETTING ASIDE ON THE GROUND OF MISTAKE

JP v Atlas Trust Company (22 September 2008) is the first occasion where an application to set aside a trust on the grounds of mistake has been considered in Jersey. The Representor and his wife established a non-charitable trust following advice that it would protect their assets from inheritance tax and provide a source of income for the duration of their lives.

A change of trustee and subsequent advice revealed possible flaws in the ability of the trust to fulfil those intended functions and the Representor sought to set aside the trust in accordance with Article 11(2) of the *Trusts (Jersey) Law 1984* and general equitable principles. The Court found that the Representor and his wife were mistaken as to the effect of the scheme which they had been advised to enter into and that they would never have contributed their funds to the trust had they known its true effect. The key mistake was that the Representor and his wife would not have ready access to their funds. The trust was set aside insofar as it related to the funds provided by the Representor and his wife.

Comment: It is likely that the current market conditions will lead to an increased number of people trying to set aside arrangements made when times were good. In addition, while tax avoidance was notably a lesser feature of this decision, it will not be surprising if HMRC takes an increased interest in offshore tax avoidance schemes in the future.

ENFORCING JUDGMENTS: TRUSTS AND INFORMATION

In Africa Edge S.a.r.l. v Incat Equipment Rental Limited and John Haden (10 October 2008) the Plaintiff, in order to assist its enforcement of a Belgian judgment against a Jersey company and a Jersey resident, applied for a freezing order and a disclosure order.

The Court was wary of freezing the assets of a Guernsey trust in respect of which the Jersey resident Defendant was merely a discretionary beneficiary, but did so here, in part because of the evidence that he regarded himself as an important beneficiary and spoke of himself as the beneficial owner of an underlying company.



Significantly, the Court said that “a creditor should normally have all the information he needs to execute the judgment or award anywhere in the world. The disclosure of the information will then enable the plaintiff, if so advised, to institute proceedings where there are other assets”.

Comment: This clarification of the wide powers of the Jersey Court to order a judgment debtor to disclose information about its assets should be of great assistance to those seeking to enforce debts in the future, particularly against Jersey residents because the Court clearly has jurisdiction over them.

ENFORCING JUDGMENTS: NON-MONETARY AWARDS

In *Brunei and Bandone v Fidelis and Others* (16 September 2008) the Court ordered that a judgment of the Brunei High Court for a non-monetary order should be enforced directly in Jersey, without any need to re-open the merits.

The background to the case was an action brought against a Prince Jefri in Brunei by the Brunei Investment Agency (BIA) for misappropriation of Brunei funds. A settlement agreement was reached whereby Prince Jefri was to return assets acquired with the funds, including shares in Jersey companies. He failed to do so. The Brunei High Court then ordered him to transfer the shares to the BIA. The BIA made an application to the Jersey Court to enforce the judgment.

The Jersey Court, following the lead taken by the Canadian and Cayman Courts, effectively updated its previous position on the enforcement of non-monetary judgments. It decided that it had a discretion whether or not to enforce such foreign judgments.

Comment: The Court's decision to enforce foreign judgments in respect of awards other than for money represents a significant departure from its previous practice. It is, however, more in keeping with its obligation to enforce foreign arbitration awards. It also indicates that, in the absence of recent Jersey authority and compelling reasons for not doing so, the Court may readily adopt the rules of other jurisdictions in relation to the enforcement of parties' rights, where they are appropriate to a modern commercial environment.

BANKRUPTCY: COSTS CONSEQUENCES FOR CREDITORS

In re Buchanan Smith Limited (6 October 2008) was an application brought by certain creditors of the company to declare its property en désastre.

Désastre, being the most common form of bankruptcy in Jersey for individuals, is a discretionary remedy. Désastres are administered by the Viscount, an officer of the Jersey Court. The Viscount will usually seek and obtain an indemnity for his costs from the petitioning creditors before the Royal Court orders any désastre.

In this case, due to its complexity, the Royal Court ordered that the applicants indemnify the Viscount against the costs of the désastre in full and that “if the Viscount requires more money on escrow, he will ask for it, and it will be paid”.

Comment: Petitioning creditors therefore need to be reasonably satisfied that the proposed bankrupt, whether a company or an individual, has realisable assets before seeking a désastre, otherwise they could find themselves without any recovery of money and with a bill to pay in respect of the Viscount's costs.

WINDING UP: THE JUST AND EQUITABLE OPTION

Two cases have recently come before the Court on the subject of the winding up of Jersey companies.

In the first, *In re Belgravia* (23 September 2008), the Court decided in the circumstances to order a just and equitable winding up under Article 155 of the Companies (Jersey) Law 1991 of three Belgravia group companies.

The three Belgravia companies were the applicants and in those circumstances the Court had jurisdiction to order either a just and equitable winding up, or a creditors' winding up, or a *désastre*.

The Court ordered the first of these options. It felt that a just and equitable winding up allowed for the Belgravia companies' affairs to be investigated more easily, for increased flexibility and for reduced costs.

In the subsequent case of *Bisson v Bish* (11 November 2008), the relevant company, whose businesses were the Luggage Shop and Horseplay, was ordered to be wound up on just and equitable grounds. The underlying reasons for the order in this case were the fact that the company in question was to an extent a quasi-partnership and that there was deadlock in the businesses which could not be resolved.

Comment: The two cases emphasise that, as economic circumstances harden, the Court will be readily prepared to look beyond the more common forms of bankruptcy and winding up, and towards the array of bankruptcy options available to it, in order to select the most appropriate means of winding up the entity.

EMPLOYMENT TRIBUNAL: A FINE POWER?

In *CI Fire Security Limited v Browning* (25 September 2008) the Royal Court considered an appeal brought by the company against a decision of the Employment Tribunal.

The Tribunal had found that Mr Browning, the company's employee, had been unfairly dismissed but the appeal related to a fine imposed by the Tribunal, apparently for failing to provide a written statement of the employee's terms of employment containing particulars of any disciplinary and grievance procedures, or for not informing him of the subsequent alteration to those terms which did include certain procedures.

The Court agreed with the company that, absent a specific power in the legislation, the Tribunal had no power to fine.

Even if it had, the Court found it difficult to see how there was any breach of the legislation in circumstances where there is no obligation to maintain disciplinary and grievance procedures, and when they were introduced, the employee was informed.

Comment: The fine was for only £250 and so the appeal was not made on economic grounds. However, in circumstances where the Tribunal had been handing out fines since 2005, it demonstrates the fact that a wrong court decision will be perpetuated unless somebody takes it upon themselves to appeal against the principle, and the fact that the relatively swift justice of the Employment Tribunal can be far from infallible.



For details of the above cases and to discuss how these issues might affect your business please contact one of the following or your usual BakerPlatt contact:

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