INTERNATIONAL TRUSTS CONFERENCE
ISLE OF MAN
15 September 2015

The Judge's Perspective
[seeing trust issues through the eyes of the Deemster]

Introduction

I am the second speaker of the day and you still have another 5 speakers after me before lunch. I am in fact just the warm up act for the real experts with recent practical experience at the sharp end of the trust industry.

With so much information and opinion to be absorbed I have decided to save the long, patronising, pompous and condescending 'standard' judicial material for another day and keep my insights and messages short and focused on the fundamentals.

If I am going to be able to give you an insight into the judge's perspective and how to see trust issues through the eyes of the Deemster it would be helpful if we shared a common understanding of what judges are supposed to do.

The role of the judge

We can all agree that judges are supposed to apply the law to the cases before them, oversee and actively manage the legal process and in doing so resolve the legal disputes and issues arising.

And all that seems perfectly straight forward, reasonable and non-controversial.

But to do all of this fairly and efficiently for all concerned we need the help of everyone who crosses the threshold of the court.

In practical terms this means making sure applications to the court are appropriate, well thought out and well presented, and supported by the relevant facts, documents and legal authorities.

Without these vital elements the job of a judge becomes very frustrating. That is why we doggedly pursue this support and because of this you may well regard me and the rest of the judiciary as part of your problem rather than as part of your solution; as your enemy rather than as your friend.

Poacher turned gamekeeper?

But I must reassure you that I do understand more about your situation than you think. After all I may be regarded by some as a poacher turned game keeper. There was once a time, many years ago now, when with a bold and optimistic heart I practised as an advocate at the sharp end of the trust industry.

This involved mixing with long gone firms such as Coopers & Lybrand before the merger with Price Waterhouse and long standing firms such as Abacus alongside the likes of leading

counsel Lennie Hoffmann and Alan Steinfeld in contentious and non-contentious chancery matters.

You will be sad (or perhaps relieved) to hear that I must omit extensive detail, due to confidentiality concerns.

However, during this time I travelled the world to distant countries with a partner from Coopers & Lybrand sitting in the front of the bus enjoying privately funded first class luxury. Those were the days my friends. Those were the days when I saw the world through the specialist perspective of an advocate adviser.

At the time of these 'promotional' trips I was in my late 20s and APTs (asset protection trusts; is there really any other type of trust?) were all the rage.

Lawyers spent their time poring over the Fraudulent Assignments Act 1736, Clerk of the Rolls Thomas Kneen's judgment in *Corrin's Bankruptcy* (1912) and Deemster Cain's judgment in *Heginbotham* in 1999 (1999-01 MLR 53). Riveting stuff!

For me life is now somewhat different. When I'm fortunate enough in my judicial capacity to be invited to present papers at international chief justices' conferences, I now travel at the back of the bus in economy where I belong. Just another perk of public service!

Solid Manx stock

But I am always glad to travel and gain experience of other jurisdictions. As much as I love the Isle of Man, and I am of solid Cain and Quayle Manx stock, it is healthy, refreshing and dare I say essential to get off the Island from time to time.

A judge's perspective and judgment are enhanced if he or she has a broader international viewpoint.

Delphi Trust Ltd and section 61

In the 2014 *Delphi Trust* case, although I travelled on paper to a number of different jurisdictions with Robert Ham QC as my pilot, I stayed physically on the Isle of Man. Indeed, for many days while writing drafts of the judgment I was almost handcuffed stationary to my blue leather chair in chambers, now there is an image for the Mail on Sunday.

That judgment considered the law in detail (probably too much detail) as to when it was appropriate for a court to sit in private when dealing with an application by a trustee for assistance, under the court's inherent jurisdiction and/or section 61 of the Trustee Act 1961.

Free access to that judgment, along with very many other Manx judgments, is available at www.judgments.im. Well you are the perfect audience for a website plug.

The four broad categories

In *Delphi* 2014 MLR 51 I referred to the four broad categories of application by trustees for guidance from the court (originally formulated by Walker J as he then was). I am sure you will all be aware of the well-established four broad categories - if not I would respectfully invite you to read the judgment.

I am going to focus on the second and in my experience most common category. In such cases the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them. But, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court. These applications are normally heard in private.

The three factors in a category 2 case

In this second category where the trustees wish to obtain the blessing of the court for a momentous decision, the court must usually be satisfied of the following three things, and I summarise so as not to lose too much of your attention in the detail:

Number 1 - the decision of the trustee has been formed in good faith;

Number 2 - the decision is one that a reasonable trustee properly informed could have reached; and

Number 3 - the decision has not been vitiated by any actual or potential conflict of interest.

These are the three headlines that should attract your attention when approaching the court in a category 2 case. However, the court's attention is not limited to these 3 headlines. Broadly the court is looking to ensure that any decision of the trustees has been honestly and competently reached and is untainted by any improper considerations.

Who should be parties to a section 61 application?

There are a number of other issues to consider, including who should be parties to such an application. Section 61 answers that question by saying:

> "… all persons interested in such application, or such of them as the court shall think expedient …"

Normally beneficiaries would be given an opportunity to participate but it is not invariably the case that all beneficiaries need to be heard. Many of them may have an identical interest. Alternatively this interest may be extremely remote. Sometimes it may be appropriate to ask the protector and the settlor to join the party. In rare cases even a creditor may be permitted to gate crash. See my judgment in the *Islamic Investment Company* case (6 January 2012 paragraph 48).

The court needs to consider if it would be unfair to proceed in the absence of giving certain persons an opportunity to be heard. The question is whether it is necessary and expedient for a person to be a party to the application for directions.

Disclosure of material matters

It is important that the trustee discloses material matters to the court because section 61 provides that:

> "… this Act shall not extend to indemnify any trustee in respect of any act done in accordance with such opinion, advice, or direction … if such trustee shall have been

> guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice, or direction …"

It is therefore important for the trustee to put the court in possession of all the relevant facts and documents.

So be aware the court will not approve a trustee's decision without a proper evidential base for doing so. But on the other hand the court should equally not deprive a trustee of assistance without good reason.

Vos L J in the 2014 case *Cotton and Moore v Earl of Cardigan and others* [2014] EWCA Civ 1312 paragraph 86 stated:

> "The decision that these trustees have reached is indeed a momentous one. The court is not a rubber stamp and must be cautious to ensure that it is satisfied that the trustees are indeed justified in proceeding in accordance with their decision. But the court should not place insurmountable hurdles in the way of trustees in the position of those before this court. The court has a supervisory jurisdiction that needs to be exercised in appropriate circumstances. Caution cuts both ways."

In *The Otto Poon Trust* [2015] JCA 109 I had the privilege in May of this year of sitting as a Judge of Appeal in Jersey. We referred to the test for approving momentous decisions of trustees and at paragraph 18 of our judgment stated that the lengths to which the court must go in examining the process by which the trustees arrived at the decision must depend upon the particular decision. At paragraph 19 we added that the trustees should put before the court all relevant considerations (supported by evidence) and should explain their reasons for reaching the decision.

Applications to the court are not always appropriate

In a judgment I delivered in March of this year in the *Beverly Hills Holdings Limited* case (published on www.judgments.im with the consent of the parties, you heard it here first) I tried to make it very clear that it is not appropriate for trustees to come running to the court whenever they have some discretion to exercise. It is in general their responsibility to exercise their discretion themselves.

I stressed that an application under section 61 should not be used as a substitute for taking decisions which should be the trustees' own responsibility.

In particular professional trustees must be ready, willing and able to make their own decisions in respect of the management and administration of the trust property.

Moreover, I suggested it was not helpful to the court to metaphorically dump the problem in the court's lap saying "there you are, you sort it out, we don't know what to do".

The court is entitled to expect the fullest assistance from a professional trustee who should ensure that all the relevant law is before the court and that all the arguments for and against the various possible courses of action are well rehearsed.

The court will usually be assisted by the trustee recommending a particular course of action and explaining the reasons for its recommendation.

In the *Beverly Hills* case I praised the trustee, who had been ably assisted by Nicholas Le Poidevin QC who I had assisted in some SIB civil litigation on the Island in the 1980s. We acted for the auditors and from memory were faced with an unwelcome and unnecessary application for interrogatories.

I remember that case for a number of reasons.

Firstly, Nicholas was a very impressive advocate and I immediately realised if I was to progress in the law I needed to work a little harder, sacrifice a few more weekends and try to find an intellect.

Secondly, Nicholas asked me to dig out a local case on interrogatories to put before the local Deemster, Deemster Luft.

We hoped that would impress the local Deemster and show how sensitive Nicholas, a foreign barrister specially licensed for this case, was to local concerns. But unfortunately it backfired due to a simple mispronunciation by English counsel of the Manx name Bridson (pronounced Bride-son not Brid-son). A valuable lesson learned - detailed local knowledge is important.

Unimpressive applicants

In my judgment in *Beverly Hills* (sadly not the Californian city) I recorded that I had been greatly assisted by the trustee and its professional advisers.

In other cases courts have been less than impressed by applicants apparently attempting to dodge their responsibilities and applying unnecessarily for assistance from the court.

The Appeal Division in a judgment delivered in August 2013 (paragraph 93) in the *Islamic Investment Company* 2013 MLR N16 appeal noted perhaps somewhat harshly (brace yourselves):

> "[section 61] is all too easily used by lawyers and trustees seeking to avoid making difficult decisions as to their responsibilities and seeking to require the court to make them instead."

However, nowadays trustees and their legal advisers appear more informed and I have not recently seen any glaringly inappropriate section 61 applications. Long may this continue.

Courts serve the community

I do not want to give you the impression that the courts are not keen to help. We are.

But I must emphasise that from a judge's perspective, if you are thinking of coming to the court for help, make sure you are on solid ground. Do your preparation thoroughly.

And make sure you can provide the court with sufficient assistance and information for the court to determine whether it may provide the help you are seeking.

Provide the court with a draft order and precise and concise reasons as to why such relief should be granted.

The courts are here as a service to facilitate rather than to obstruct lawful activities and business while also providing assistance by way of judicial intervention where necessary and appropriate. We are here to serve the local and international community.

In short:

> "We are here to help, not hinder."

Closing comments

So from the judge's point of view, especially in relation to applications by trustees for directions, all we want is for the applicant to provide us with the necessary information and assistance to enable the court to do justice.

Under the Rules of Court the parties are required to help the court in furthering the overriding objective of dealing with cases justly (Rule 1.2(4) of the 2009 Rules).

Under the Advocates Practice Rules (Rule 19(1) of the 2001 Rules) advocates also have an overriding duty to ensure, in the public interest, that the proper and efficient administration of justice is achieved and they must assist the court in achieving justice.

Judicial support for trustees was for me captured in a judgment of the Gibraltar Court of Appeal which involved indemnity costs of trustees – I thought that would get your attention!

Page 223 of the report regarding *STG Valmet Trustees Ltd v Brennan* 1999-00 Gib LR 211 identified the need for some judicial empathy that you might find reassuring:

> "… Trusteeship is often a burdensome status, and the Court of Chancery has traditionally encouraged trustees to seek the directions of the court in cases of doubt, embarrassment or difficulty. It is a door open to all trustees, of whatever kind and calibre …"

So the judiciary have an open door policy but the door must swing both ways. As much as the court will endeavour to support trustees, the trustees must, along with all other associated parties, support the process of the court.

This is the Judge's perspective.

Whoever you are, whether a settlor, a trustee, a protector, a beneficiary, a creditor, administrator or an adviser, if you are going to court you will inevitably consider the case through your eyes and the eyes of those who you represent.

But you must also seriously consider the matter through the eyes of the judge who will be dealing with the case.

If I had had that knowledge when I was a young advocate I would have been a much better advocate.

However, as we all know, to be old and wise you must first be young and stupid.

Nowadays as a father of three young men I am constantly reminded that unlike my children I am not young enough to know everything.

But I do know that going to court can be an expensive, stressful and time consuming option and does not always produce the result you wish for. So for the best results, look at things from the judge's point of view.

When going to court as an adviser your eyes may be firmly fixed on the best interests of those you are advising.

If you are a trustee you may be cross-eyed - you may have one eye on the settlor and the other eye on the beneficiary.

If however you are applying to a judge for judicial relief your eyes should be firmly focused on the judge and how to persuade him or her to give you the relief you seek.

I remember attending an excellent presentation by Richard Hay, who you will be hearing from shortly, at the Manx Museum in 2012 entitled: *The Isle of Man, an international finance centre : How to win friends and influence people*. Richard spoke, amongst other matters, of the Island having a "functioning judiciary" and the importance of the rule of law to the future of the Island.

Richard got me thinking about the importance of the rule of law to economic development and in July 2014 I gave a lecture at the Oxford Union on the subject *Rule of Law – the backbone of economic growth* which is also available, along with a number of other lectures, at www.courts.im [you would think I am on a commission for every website hit].

In the presentation I asserted my belief that the rule of law is, and will continue to be, the social and economic backbone of every society. A backbone that enables countries to fully evolve, and irrespective of size, stand shoulder to shoulder when it comes to the international collaboration needed to fuel economic growth.

So the rule of law is important for everyone whether in your case they are settlors, trustees, beneficiaries, protectors, creditors, administrators, advisers or whoever.

To ensure the legal process runs smoothly you must be well prepared with the relevant facts and documents as well as arguments for and against possible courses of action.

If in preparing for court you endeavour to see legal issues from the point of view of the judge it will significantly help you to persuade the judge to grant the relief you are seeking.

In essence, you should not treat the judge as an enemy but as a friend who you must influence and persuade.

I congratulate the organisers of this conference for the relevance of the topics and, leaving myself aside, the quality of the speakers. I hope you all have an enjoyable day.

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Isle of Man
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