



A STUDY IN OFFSHORE TRUSTS; OFFICEHOLDER CLAIMS TO RECOVER ASSETS DISPOSED OF OFFSHORE

1. Our presentation on offshore trusts is built around a case study. The facts of the case study will emerge from the slides which we have prepared.
2. In summary, the case study involves a UK entity, Slade Finance Ltd, which in due course finds itself in liquidation. One of Slade's directors, Fletcher, has set up an offshore trust, the Marionette Trust, prior to liquidation. Various assets have found their way into the trust, in some cases, via a Swiss bank account.
3. The case study is designed to prompt a discussion between us as to the options which Fletcher's trustee and Slade's liquidator have in order to recover the assets. We shall address both the practical and legal aspects of seeking to recover offshore trust assets, including:
 - Soft options / notification obligations of the trustees;
 - Issues of jurisdiction / law as to where the officeholders can initiate proceedings, if the same proves necessary;
 - Recognition process in Jersey;
 - Whether an officeholder can exercise any rights that Fletcher has under the trust documentation?
 - How to attempt to bust the trust;
 - Attacking individual transactions with the trust.
 - Personal liability of the trustees of the trust.
4. At various points in the presentation, we shall make reference to parts of the statutory law of Jersey and of England and Wales. For completeness, we have enclosed extracts of the following:
 - Article 49 of the Bankruptcy (Désastre) (Jersey) Law 1990
 - ss.9 & 9A of the Trusts (Jersey) Law 1984
 - s. 32 of the Trusts (Jersey) Law 1984
 - s.423 of the Insolvency Act 1986



Bankruptcy (Désastre) (Jersey) Law 1990

49 Assistance for other courts in insolvency matters

- (1) The court may, to the extent it thinks fit, assist the courts of a relevant country or territory in all matters relating to the insolvency of a person, and when doing so may have regard to the extent it considers appropriate to the provisions for the time being of any model law on cross border insolvency prepared by the United Nations Commission on International Trade Law.
- (2) For the purposes of paragraph (1), a request from a court of a relevant country or territory for assistance shall be sufficient authority for the court to exercise, in relation to the matters to which the request relates, any jurisdiction which it or the requesting court could exercise in relation to these matters if they otherwise fell within its jurisdiction.
- (3) In exercising its discretion for the purposes of this Article the court shall have regard in particular to the rules of private international law.
- (4) In this Article “relevant country or territory” means a country or territory prescribed by the Minister.



Trusts (Jersey) Law 1984

9 Extent of application of law of Jersey to creation, etc. of a trust

- (1) Subject to paragraph (3), any question concerning –
 - (a) the validity or interpretation of a trust;
 - (b) the validity or effect of any transfer or other disposition of property to a trust;
 - (c) the capacity of a settlor;
 - (d) the administration of the trust, whether the administration be conducted in Jersey or elsewhere, including questions as to the powers, obligations, liabilities and rights of trustees and their appointment or removal;
 - (e) the existence and extent of powers, conferred or retained, including powers of variation or revocation of the trust and powers of appointment and the validity of any exercise of such powers;
 - (f) the exercise or purported exercise by a foreign court of any statutory or non-statutory power to vary the terms of a trust; or
 - (g) the nature and extent of any beneficial rights or interests in the property,shall be determined in accordance with the law of Jersey and no rule of foreign law shall affect such question.
- (2) Without prejudice to the generality of paragraph (1), any question mentioned in that paragraph shall be determined without consideration of whether or not –
 - (a) any foreign law prohibits or does not recognise the concept of a trust; or
 - (b) the trust or disposition avoids or defeats rights, claims, or interests conferred by any foreign law upon any person by reason of a personal relationship or by way of heirship rights, or contravenes any rule of foreign law or any foreign judicial or administrative order or action intended to recognize, protect, enforce or give effect to any such rights, claims or interests.
- (2A) Subject to paragraph (2), paragraph (1) –
 - (a) does not validate any disposition of property which is neither owned by the settlor nor the subject of a power of disposition vested in the settlor;
 - (b) does not affect the recognition of the law of any other jurisdiction in determining whether the settlor is the owner of any property or the holder of any such power;
 - (c) is subject to any express provision to the contrary in the terms of the trust or disposition;
 - (d) does not, in determining the capacity of a corporation, affect the recognition of the law of its place of incorporation;
 - (e) does not affect the recognition of the law of any other jurisdiction prescribing the formalities for the disposition of property;
 - (f) does not validate any trust or disposition of immovable property situate in a jurisdiction other than Jersey which is invalid under the law of that jurisdiction; and
 - (g) does not validate any testamentary disposition which is invalid under the law of the testator's domicile at the time of his death.
- (3) The law of Jersey relating to *légitime* shall not apply to the determination of any question mentioned in paragraph (1) unless the settlor is domiciled in Jersey.
- (3A) The law of Jersey relating to conflict of laws (other than this Article) shall not apply to the determination of any question mentioned in paragraph (1).
- (4) No –
 - (a) judgment of a foreign court; or



- (b) decision of any other foreign tribunal (whether in an arbitration or otherwise), with respect to a trust shall be enforceable, or given effect, to the extent that it is inconsistent with this Article, irrespective of any applicable law relating to conflict of laws.
- (5) The rule *donner et retenir ne vaut* shall not apply to any question concerning the validity, effect or administration of a trust, or a transfer or other disposition of property to a trust.
- (6) In this Article –
- “foreign” refers to any jurisdiction other than Jersey;
- “heirship rights” means rights, claims or interests in, against or to property of a person arising or accruing in consequence of his or her death, other than rights, claims or interests created by will or other voluntary disposition by such person or resulting from an express limitation in the disposition of his or her property;
- “*légitime*” and “*donner et retenir ne vaut*” have the meanings assigned to them by Jersey customary law;
- “personal relationship” includes the situation where there exists, or has in the past existed, any of the following relationships –
- (a) any relationship between a person and the settlor or a beneficiary, by blood, marriage, civil partnership or adoption (whether or not the marriage, civil partnership or adoption is recognised by law);
- (b) any arrangement between a person and the settlor or a beneficiary such as to give rise in any jurisdiction to any rights, obligations or responsibilities analogous to those of parent and child, husband and wife or civil partners; or
- (c) any relationship between –
- (i) a person who has a relationship mentioned in either of paragraphs (a) and (b) with the settlor or a beneficiary, and
- (ii) a third person who does not have a relationship mentioned in either of paragraphs (a) and (b) with the settlor or a beneficiary.
- (7) Despite Article 59, this Article applies to trusts whenever constituted or created.



Trusts (Jersey) Law 1984

9A Powers reserved by settlor

- (1) The reservation or grant by a settlor of a trust of –
 - (a) any beneficial interest in the trust property; or
 - (b) any of the powers mentioned in paragraph (2),shall not affect the validity of the trust nor delay the trust taking effect.
- (2) The powers are –
 - (a) to revoke, vary or amend the terms of a trust or any trusts or powers arising wholly or partly under it;
 - (b) to advance, appoint, pay or apply income or capital of the trust property or to give directions for the making of such advancement, appointment, payment or application;
 - (c) to act as, or give binding directions as to the appointment or removal of, a director or officer of any corporation wholly or partly owned by the trust;
 - (d) to give binding directions to the trustee in connection with the purchase, retention, sale, management, lending, pledging or charging of the trust property or the exercise of any powers or rights arising from such property;
 - (e) to appoint or remove any trustee, enforcer or beneficiary, or any other person who holds a power, discretion or right in connection with the trust or in relation to trust property;
 - (f) to appoint or remove an investment manager or investment adviser;
 - (g) to change the proper law of the trust;
 - (h) to restrict the exercise of any powers or discretions of a trustee by requiring that they shall only be exercisable with the consent of the settlor or any other person specified in the terms of the trust.
- (3) Where a power mentioned in paragraph (2) has been reserved or granted by the settlor, a trustee who acts in accordance with the exercise of the power is not acting in breach of trust.
- (4) The States may make Regulations amending paragraph (2).



Trusts (Jersey) Law 1984

32 Trustee's liability to third parties

- (1) Where a trustee is a party to any transaction or matter affecting the trust –
 - (a) if the other party knows that the trustee is acting as trustee, any claim by the other party shall be against the trustee as trustee and shall extend only to the trust property;
 - (b) if the other party does not know that the trustee is acting as trustee, any claim by the other party may be made against the trustee personally (though, without prejudice to his or her personal liability, the trustee shall have a right of recourse to the trust property by way of indemnity).
- (2) Paragraph (1) shall not affect any liability the trustee may have for breach of trust.



Insolvency Act 1986

s.423 – Transactions Defrauding Creditors

(1) This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if—

(a) he makes a gift to the other person or he otherwise enters into a transaction with the other on terms that provide for him to receive no consideration;

(b) he enters into a transaction with the other in consideration of marriage or the formation of a civil partnership; or

(c) he enters into a transaction with the other for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by himself.

(2) Where a person has entered into such a transaction, the court may, if satisfied under the next subsection, make such order as it thinks fit for—

(a) restoring the position to what it would have been if the transaction had not been entered into, and

(b) protecting the interests of persons who are victims of the transaction.

(3) In the case of a person entering into such a transaction, an order shall only be made if the court is satisfied that it was entered into by him for the purpose—

(a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or

(b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make.

(4) In this section “the court” means the High Court or—



(a) if the person entering into the transaction is an individual, any other court which would have jurisdiction in relation to a bankruptcy petition relating to him;

(b) if that person is a body capable of being wound up under Part IV or V of this Act, any other court having jurisdiction to wind it up.

(5) In relation to a transaction at an undervalue, references here and below to a victim of the transaction are to a person who is, or is capable of being, prejudiced by it; and in the following two sections the person entering into the transaction is referred to as “the debtor”.

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