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David O'Hanlon & Cerisse Fisher
Collas Crill

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INTRODUCTION

The Bailiwick of Guernsey comprises three separate jurisdictions: the islands of Guernsey, Alderney and Sark. In relation to civil matters, each island has its own court of first instance (the Royal Court of Guernsey, the Court of Alderney, and the Court of the Seneschal, respectively). Those courts (of first instance) have unlimited jurisdiction over civil matters arising in their respective islands.

For the purposes of this guide, the following relates to the island of Guernsey only.

The historic roots of Guernsey's laws are derived from Norman customary law, although in certain other circumstances the Royal Court will look to English law precedent, for instance, in relation to the application of Guernsey's company laws. (In the case of *Flightlease Holdings (Guernsey) Limited v. Flightlease (Ireland) Limited* [2009-10 GLR 38], the Royal Court considered that: "Since the concept of the limited liability company had been introduced into Guernsey from England in the late 19th century, it was appropriate to look to English law for help in the solution of company law problems which were not covered by Guernsey statues or customary law".) Whilst case law precedence in Guernsey is constantly increasing, there is, nevertheless, often a need to go back to first principles to assist in the interpretation of Guernsey law.

However, it should also be noted that Guernsey law should not be regarded as fixed in aspic. In *Morton v. Paint* (1996) 9 GLJ 61 (Appeal No.219 1996), it was noted that:

> "The *coutume* and common law of Guernsey has always been developed by judicial decision and supplemented by statutes passed by the States of Guernsey and approved by the Privy Council. But there are fundamental parts of Guernsey common law which have been recognised as not being capable of alteration by judicial decision."

When considering what might be a development of the existing law, the court's likely frame of reference will be:

- Fundamental legal doctrines should be given due respect and not lightly set aside.
- Where the States of Guernsey have rejected the opportunity to clear up a known difficultly or have legislated whilst leaving the difficulty untouched, the court should be cautious to intervene.
- Legal matters (as opposed to social matters) may be more suitable for judicial intervention.
- The judge should be wary of imposing their own remedy where the solution is doubtful.
- Judges should not intervene unless finality and certainty can be achieved.

The Court of Appeal in *Morton v. Paint* cited Lord Lowry in *C v. DPP* [1996] 1 AC 1 (HL). Since *Morton v. Paint*, the legislature has brought into force substantive statutes addressing both trust and family law matters.

In Guernsey, the trust law is set out in the Trusts (Guernsey) Law, 2007 (the "Trusts Law"). This statute sets out the governing framework for Guernsey law trusts including the duties of trustees, the regulation of trust administration and the rights of beneficiaries.

Family law in Guernsey has recently been updated with the Matrimonial Causes (Bailiwick of Guernsey) Law, 2022 (the "Matrimonial Causes Law"), which came into force on 19 July 2024. Repealing the Matrimonial Causes (Guernsey) Law, 1939, it brought Guernsey's matrimonial laws into line with international standards, including through the introduction of "no fault" divorces, removing the ability to contest divorces, simplifying the annulment process, and clarifying the issues to which the court is to have regard when considering financial provisions.

Whilst significant consultation was undertaken by the States of Guernsey on civil partnerships, there remains no current legislation enabling parties to enter into a civil partnership in Guernsey.

The Matrimonial Causes Division of the Royal Court of Guernsey has jurisdiction in respect of all matrimonial causes and matters in the Bailiwick, including proceedings for:

- divorce and judicial separation;
- nullity of marriage; and
- presumption of death and dissolution of marriage.

In order for the court to exercise its jurisdiction in matrimonial matters, it is a requirement that at least one of the parties:

- is domiciled in the Bailiwick on the date when the application for a divorce or judicial separation order, or for a pronouncement of judicial separation is made; or
- was habitually resident in the Bailiwick throughout the period of one year ending with that date.

In relation to a marriage of a same-sex couple, it is necessary that, as well as one of the above conditions being met, the following conditions are also satisfied:

- the parties to the marriage married each other under the law of the Bailiwick; and
- it appears to the court to be in the interests of justice to assume jurisdiction in the case.

The Matrimonial Causes Law provides for financial remedies to be applied for within divorce proceedings. Claims can be made for:

- interim financial provisions;
- interim occupation orders (including both the occupation of and exclusion from property);
- periodical payments for the benefit of the spouse or a child of the marriage;
- lump sum payments for the benefit of the spouse or child of the marriage;
- vesting or division of property;
- creation of trusts for the benefit of a spouse or child of the marriage;
- the variation or modification of any trust containing relevant property (relevant property is defined under the Matrimonial Causes Law at section 39(1) as meaning "real and personal property in which each or either of the parties to a marriage has an interest, present, prospective or conditional");
- sale of property and payment of proceeds; and
- cancellation, modification or variation of any marriage contract, or antenuptial or postnuptial settlements.

Unlike in the UK, there is currently no ability for the court to make a pension-sharing order in matrimonial proceedings but as the court, in considering any financial remedy, must take into account the income, earning capacity, property and other financial resources which each of the parties has or is likely to have in the foreseeable future, based on section 28(2) of the Matrimonial Causes Law, then it is likely this will be compensated for in the overall financial provision directed by the court.

1. DIVORCE AND TRUSTS

Guernsey is an internationally recognised and well regarded jurisdiction for trusts and private wealth structuring in general. The UK ratification of the Hague Convention on the Law Applicable to Trusts and on their Recognition was extended to Guernsey and, accordingly, Guernsey trust law recognises both Guernsey and foreign law trusts

As such, Guernsey's courts are well versed in matters such as the administration of trusts and trust disputes.

The main issues that a trustee may be required to consider often arise from one of three common circumstances in divorce contexts:

- where a party to the proceedings attempts to obtain financial disclosure from the trustee of the trust, information relating to a particular beneficiary's interest, or information relating to a particular party's powers in relation to the trust;
- where the trust is capable of being varied as part of matrimonial proceedings; and
- where the trust (or particular settlements in it) is being attacked, for instance, by allegations that the trust is a sham or that the party to the matrimonial proceedings has effective control over the assets such that they fall equivalent to ownership.

In general, the usual circumstances in those proceedings are that the matrimonial proceedings are being conducted in a foreign jurisdiction and the trustee is therefore obliged to consider the provisions of section 14 of the Trusts Law, which are colloquially referred to as the "firewall provisions".

Under the firewall provisions, all questions arising in relation to a Guernsey trust, or any disposition of property to or upon such a trust, are to be determined in accordance with the law of Guernsey, without reference to the law of any other jurisdiction, including questions as to:

- the capacity of the settlor;
- the validity, interpretation or effect of the trust or disposition or any variation or termination thereof;
- the administration of the trust;
- the existence and extent of any functions in respect of the trust, including (without limitation) powers of variation, revocation and appointment, and the validity of the exercise of any such function; and
- the distribution of the trust property.

Section 14(4) of the law goes on to state:

> "Notwithstanding any legislation or other rule of law for the time being in force in relation to the recognition or enforcement of judgments, no

judgment or order of a court of a jurisdiction outside Guernsey shall be recognised or enforced or give rise to any right, obligation or liability or raise any estoppel if and to the extent that –
(a) it is inconsistent with this Law, or
(b) the Royal Court, for the purposes of protecting the interests of the beneficiaries or in the interests of the proper administration of the trust, so orders."

There has been no published judgment by the Royal Court analysing the application of section 14 but it would certainly appear, for the purposes of enforcement (at least by a party in Guernsey), a foreign court would be required to apply Guernsey law to any matter arising in relation to a Guernsey law trust.

1.1 Financial disclosure

Divorce proceedings often entail complex negotiations over assets and it is common practice for assets held in trusts established in international jurisdictions to present significant challenges in divorce proceedings. Trustees are often required to balance the confidential nature of trusts with duties to disclose, duties to protect the interests of other beneficiaries, and a party's rights to information.

Despite greater regulatory transparency and reporting, the inherently confidential nature of trusts and their assets presents a challenge for family practitioners. Without full disclosure from both parties, one of the primary difficulties is establishing the nature and extent of the assets held within a trust.

There is very little publicly available information, trust documents — including the trust instrument itself and financial statements and details of the key parties (such as settlor and beneficiaries) — are private and it will be at the discretion of the trustee to decide who gets to see or know what.

Very little information needs to be filed and any information that is, as things currently stand, is not publicly available.

Applications by parties under the Trusts Law

Whether a party to divorce proceedings can obtain information about trust assets depends upon their standing and connection to the trust. The Trusts Law provides that a trustee shall, at all reasonable times, at the written request of:

- any enforcer; or
- subject to the terms of the trust:
  - any beneficiary (including any charity named in the trust);
  - the settlor; or
  - any trust official (which could include a protector)

provide full and accurate information as to the state and amount of the trust property.

Under section 26 of the Trusts Law this statutory right of a beneficiary, settlor or trust official to request information can be disapplied by the terms of the trust and it is common practice for Guernsey law trust instruments to expressly exclude this duty to give information.

There is potential for a person not listed above to apply for an order of the Royal Court to obtain information, but the circumstances in which this is possible are fairly limited. In the case of *BX v. T Limited* [2024] GRC036, the Royal Court

held it did have jurisdiction to order information be provided to non-beneficiaries but the applicant must show that the provision information is for the proper administration of the trust. Non-beneficiaries who were potentially liable for U.S. tax due to trust held companies and who could have been added as beneficiaries of the trust were not held to have passed the threshold whereby the trustee should be directed to provide the information.

Whilst the Trusts Law refers to "full and accurate information as to the state and amount of the trust property", it does not prescribe any further what this may mean. Generally, it is considered that the following would be disclosable:

- trust instrument and supplemental instruments;
- accounts/financial statements of the trust; and
- potentially, documents relating to underlying companies.

The following documents would not normally be disclosable:

- documents detailing trustee deliberations (such as minutes/resolutions);
- letter of wishes; and
- internal trust correspondence.

The Royal Court would be expected to apply the principles set out in *Schmidt v. Rosewood* [2003] UKPC 26 (as was the case in *BX v. T Limited*).

Applications to make trustees a party to matrimonial proceedings

An alternative mechanism by which spouses have attempted to obtain trust information is by making the trustee a party to the matrimonial proceedings. In *BX v. T Limited*, the Royal Court was asked to consider the submission by a trustee to the jurisdiction of the High Court of England and Wales following an order of the High Court joining it as a respondent. The Royal Court held that:

- the trustee was correct to seek directions and sanction from the Royal Court prior to taking a step in the High Court matrimonial proceedings;
- had the trust in question been a "standard" family discretionary trust with a class of beneficiaries extending beyond the divorcing couple, it most likely would have concluded that it was best for the trustee not to submit to the jurisdiction and to apply to set aside the joinder order and so cease to be a party; but
- due to its more "mechanistic" role as trustee of a retirement benefit scheme (as opposed to a trustee of a discretionary trust), the circumstances were such that the arguments in favour of assisting, and being seen to assist, in the matrimonial proceedings tipped the balance in favour of it submitting to the jurisdiction.

Notably, whilst the Royal Court accepted that, by voluntarily submitting to the jurisdiction, the trustee would be bound by such disclosure directions as the court seized of the matrimonial proceedings may make, but left open the potential impact of section 14(4) of the Trusts Law on the enforcement of any order.

***Commission rogatoire* or letters of request**

The Royal Court noted in *BX v. T Limited* that an alternative method of proceeding would have been for the High Court to issue a letter of request to the Royal Court.

A *commission rogatoire*, or letter of request, is the mechanism by which a foreign court may apply to the Royal Court for assistance. It is by that mechanism that evidence can be taken in Guernsey for use in foreign proceedings.

The Royal Court will need to be satisfied that the request is made pursuant to a request issued by a foreign court, that it is not too widely drawn, and that it does not offend local law. Letters of request usually relate to evidence being obtained in Guernsey, either by the production of documents or the taking of evidence in the Royal Court for onward transmission to the foreign court, however, the Royal Court does have broad discretion to deal with requests as it deems appropriate. Foreign lawyers may be admitted (for instance, for the purposes of examining witnesses) but restrictions may be imposed (including the requirement to have Guernsey-qualified advocates overseeing the case).

Whilst documentary evidence may be sought, the Royal Court will not enforce requests that amount to "fishing expeditions", such as requiring a witness to state what evidence they may have. Witnesses are entitled to rely on privilege (where applicable as a matter of Guernsey and the foreign law). Guernsey procedure is applied to the letter of request process and it is then considered a matter for the foreign court as to admissibility.

However, it does not appear that a letter of request would give a requesting party *carte blanche* to obtain any documents they may wish for from trustees. In *BX v. T Limited* the Royal Court indicated it would have had regard to the reasoning set out in *AD v. C Trust* [2010] JRC 001 in which the Royal Court of Jersey refused a request from the Family Division of the High Court for the production of affidavits submitted by a trustee during in-camera proceedings under which the trustee was permitted to seek directions from the court. The court refused on the basis that it considered it "absolutely necessary that a trustee should be able to come to Court … to make a candid appraisal of its position and the problems to be addressed". It therefore held this principle would be frustrated if trustees considered affidavits, and applications may be provided subsequently to parties hostile to the trust. Therefore, when considering letters of request to the Royal Court, practitioners would still need to consider any issues relating to the principles of trust confidentiality.

1.2 Financial orders

See Section 1.3, below.

1.3 Enforcement

Those seeking to enforce orders made in matrimonial proceedings in foreign jurisdictions against a Guernsey trustee are likely to come up against the firewall provisions.

A party seeking to enforce any potential order will want to consider following:

- direct enforcement against assets (such as property) in the jurisdiction of the foreign court;
- the exceptions to section 14 of the Trusts Law;
- whether the trust can be established as a sham or it can be otherwise shown that the settlor has control of the assets;
- whether the settlor and/or beneficiary has effective control of the assets of the trust (for instance, by the reservation of powers within the trust); and
- the use of any indirect "encouragement" orders against the settlor or beneficiary.

Any party seeking a financial provision order in foreign matrimonial proceedings that relates to a Guernsey trust would be well advised to consider in advance the above issues in order to maximise the likelihood of it being recognised, enforceable or otherwise effective. There have been a number of circumstances in which the foreign family court's order has been rendered nugatory, for instance, by directing a purported transfer of beneficial ownership (which could not be enforced) as opposed to the creation of a debt (which could).

Direct enforcement against foreign-held assets

In practice, the firewall provisions and their effectiveness depends on the location of the trust asset and the trustee. Where the trustee and the trust assets are based in Guernsey, section 14 can be relied upon to provide a robust defence of foreign family court orders that are contrary to Guernsey law trust principles.

However, where the assets (particularly immovable property) are located in the jurisdiction of the foreign family court, the enforcement of that foreign court's order against trust assets is likely to be followed. This is often a key consideration where a Guernsey trustee seeks directions from the Royal Court as to whether it should submit to the foreign family court's jurisdiction. If the main or major asset of the trust (such as a substantial residential property) is located within the jurisdiction of the foreign family court, it is often considered in the best interests of the wider class of beneficiaries that the foreign family court be advised of all circumstances and the trustee have the opportunity to make representations relating to the trust and the expectations of the wider beneficial class.

Exceptions to section 14

Under section 14(2) there are a series of areas which are expressly carved out from the remit of section 14. These tend to focus in particular on the ability of the settlor to settle the trust property and include that section 14 will 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;
- 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;
- affect the recognition of the law of its place of incorporation in determining the capacity of a corporation; and
- affect the recognition of the law of any other jurisdiction prescribing the formalities for the disposition of property.

Section 14(2) also enables the trust instrument to limit or exclude the provisions of section 14, although this is not common practice. However, the terms of the disposition may also apply foreign law (for instance, by incorporation of a specific governing law clause). This is likely to be a more frequent occurrence than a specific disapplication. Therefore, where the terms of the disposition are determined to be governed by a foreign law, consideration to the potential mechanisms for enforcement under that governing law should also be given.

Sham trusts and other attacks

A party in family proceedings will seek to challenge the validity of a trust settled by their spouse, the reasoning being that if the trust is declared invalid the assets are held by the spouse and therefore become potentially relevant property for the purposes of any financial claim.

Asserting that a trust is a sham is one such way of attacking the validity of a trust. In order to succeed in showing that a trust is a sham trust, the applicant must demonstrate to the Royal Court that there is a common intention on the part of the trustees and settlor that, whilst the trust terms show the trustee having possession of trust property, the settlor remains the *de facto* legal owner. If that can be established, the trust is declared a sham and is void.

The requirement to show common intention is a high bar and often an applicant party finds itself unable to evidence this to meet the threshold.

In light of this threshold, when seeking to attack the validity of trusts, parties have also sought to argue that the settlor (or beneficiary) has *de facto* ownership of the trust assets.

The High Court of England and Wales has previously considered whether a settlor has divested themselves of the assets purportedly in trust. In the case of *JSC Mezhdunarodniy Promyshlenniy Bank v. Pugachev and others* [2016] EWHC 192 (Ch), Birss J relied upon the rights that had been reserved by Mr Pugachev when he settled the trust to determine that the trust deeds were not effective at divesting him of his beneficial interests (and so the assets were held in bare trust for Mr Pugachev).

The reasoning in *Pugachev* has not been tested before a Guernsey court, however, at section 15 of the Trusts Law it expressly states:

> "A trust is not invalidated by the reservation or grant by the settlor (whether to the settlor or to any other person) of all or any of the following powers or interests…"

The Trusts Law goes on to identify a range of powers that fall within this, including: powers to revoke, vary or amend the terms of the trust; powers to advance, appoint, pay or apply the income or capital of the trust; investment manager-type powers; power to remove; power to give directions; power to change the law of the trust; and power to restrict the function of a trustee by requiring it only be exercised with permission.

It is therefore unlikely that a Guernsey court would find that, solely on the basis that powers have been reserved to the settlor, a trust is a sham or illusory without any further factual enquiry as to the effect. Indeed, commentary around the *Pugachev* application offshore suggests its reasoning would find little traction.

However, the more recent Privy Council case of *Webb v. Webb* [2020] UKPC 22 on appeal from the Cook Islands Court of Appeal considered the reservation of rights in a claim brought in the context of matrimonial proceedings

In deciding whether the trust was valid, the Privy Council considered that the question of validity could be approached in two ways, either:

- that the powers reserved to Mr Webb were so extensive that Mr Webb can be said never to have disposed of any of the property purportedly settled on or acquired by the trust, and in connection with that, the question of whether the trusts lacked the irreducible core of obligations owed by trustees to the beneficiaries and enforceable by them, which is fundamental to the concept of a trust; or

- that the powers reserved were so extensive that he can be regarded as having rights which were tantamount to ownership.

The Privy Council found that it made no difference to the outcome which of those analytical paths was taken. It considered that, taken in the round, "the bundle of rights which [Mr Webb] retained is indistinguishable from ownership" and that the Court of Appeal was "plainly entitled to find as it did that the trust deeds failed to record an effective alienation by Mr Webb of any of the trust property".

The alienation of property is a fundamental tenet of trust law, without which a trust cannot be created. The cases relied on by the Privy Council to reach its determination are well known and regularly cited and relied on by the Royal Court, such as such as *Armitage v. Nurse* (re: irreducible core of trust obligations); *Schmidt v. Rosewood* (court's supervisory powers over a trust); and *McPhail v. Doulton* (certainty of objects). The Privy Council's decision in *Webb v. Webb* would indicate that, whilst the ability to reserve powers does not, of itself, automatically invalidate a trust, where the settlor has reserved so much they cannot truly be said to have parted with the property, the trust would be invalid from the outset and available to be considered as part of the relevant property for financial provision.

Indirect "encouragement" orders

Much of this chapter has inevitably focused on the issue of a trustee or the Royal Court "protecting" trust assets. However, it remains open for the foreign family court to make orders against beneficiaries of a trust knowing that they are unlikely to be able to satisfy it without recourse to the trust. At that point, the trustee will have to consider any request from a beneficiary for their interests and that of any wider beneficial class.

Where a trustee resolves to make a distribution to a beneficiary (such that the distribution becomes part of the beneficiary's matrimonial estate), it would be very likely to seek a blessing of its decision from the Royal Court, which has shown itself to be sympathetic in those circumstances.

2. PRENUPTIAL AND POSTNUPTIAL AGREEMENTS (PNAs)

PNAs are not, as a matter of course, legally binding or directly enforceable in Guernsey. However, it is generally considered that the Royal Court can take a PNA into account when considering financial provisions.

2.1 Procedural requirements

The Royal Court can give a PNA weight, in particular where:

- the PNA has been fairly negotiated between two parties who are both represented or have had the benefit of legal advice; and
- full disclosure of the parties' financial position has been given by them (for instance, in a schedule annexed to the PNA).

Other factors that may assist the Royal Court in whether to give weight (or indeed what weight to give) to a PNA would include the parties' circumstances at the time of entering into the PNA (for instance, age, maturity and emotional state).

The Royal Court is likely to give less weight to a PNA where there may have been some change in circumstances, for instance:

- the parties having children;
- a significant change in the respective finances; and/ or
- a significant length of time elapsing since the PNA was entered into.

2.2 Spouse's financial claims

See Section 2.1, above.

2.3 Children's financial claims

See Section 2.1, above.

3. THE MEDIA AND DIVORCE/FAMILY LAW PROCEEDINGS

Whilst it is not necessarily a requirement, the court will normally sit in private to determine ancillary relief cases. Any published judgments are anonymised to prevent the identification of the parties.

3.1 Reporting restrictions

See Section 3, above.

AUTHOR BIOGRAPHIES

David O'Hanlon

David is admitted to practice in Guernsey, England and Wales, and the British Virgin Islands and regularly acts for trustees, investment banks and beneficiaries in contentious or semi-contentious matters, including in relation to claims for breach of trust, variations of trust, interpretation of trustee powers, removal of fiduciaries and advising trustees and beneficiaries on their obligations and rights in respect of the trusts, and appearing in trust blessing applications. David is recognised by Chambers & Partners and regularly speaks at conferences on trust issues, both in Guernsey and internationally.

Cerisse Fisher

Cerisse specialises in all aspects of Guernsey trust and private client law and regularly advises trustees, family offices, high-net-worth individuals and intermediaries on non-contentious and semi-contentious matters, in particular, the creation, restructuring and winding up of trusts and a wide scope of cross-jurisdictional fiduciary transactions. In addition to being co-chair of Collas Crill's highly successful Circle of Trusts seminar series, Cerisse is recognised on Citywealth Leaders list and by Chambers & Partners and has been involved in industry activities such as speaking at London thought leadership summit conferences addressing high-net-worth divorce.