

# Fiduciary update: Reflecting on 2016

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**Kellyann Ozouf, partner in the fiduciary team in Jersey, reflects on 2016.**

The Panama Papers dominated the headlines for some time last year. The scandal prompted heightened scrutiny from the UK Government to deter not only tax evasion but also tax avoidance, prompting the Jersey regulator to flex its muscles. In addition, the Royal Court of Jersey continued to develop our local case law and, in doing so, provided guidance for professionals in the fiduciary field.

## **Keeping it in-house...a cost or a saving?**

Supplemental trust instruments are mistakenly viewed by some as simple, cheap and "off the shelf" documents. However, their importance and the need to get the drafting correct should not be overlooked. This was highlighted in a case last year where the validity of the DORA was brought into question as the corporate trustee had purported to transfer the trusteeship and change the proper law of the trust, but those actions were invalid due to the legal requirements of the jurisdiction to which the trust was being transferred not having been complied with.

Something also to bear in mind is that the Court held last year that, whilst it has power to ratify the purported exercise of administrative powers, it has no power to ratify the purported exercise of dispositive powers. If, therefore, a trustee invalidly exercises a power to remove a beneficiary, that power will need to be exercised again, but the valid removal will not be capable of having retrospective effect and could therefore (depending upon the reason for the beneficiary's removal in the first instance) result in adverse tax consequences.

## **Mistaken transfers into trust**

Applications are increasingly being made to the Court by settlors of trusts seeking for them to be set aside. In a case last year we successfully persuaded the Court to set aside a transfer of property into trust following the discovery that the investment portfolio originally transferred into trust contained (in error) UK sited funds. In considering such applications, the Court will take into account any potential tax liability that may arise from such transfer, however, it is important to note that previously the Court has commented that it would be "wary of coming to the rescue of foreign tax payers who, anxious to avail paying the contribution towards the outgoings of their own jurisdiction's government, and then meet their own obligations as citizens of that jurisdiction, make [tax avoidance] schemes of this nature."

## **Will your foundation get the Court's blessing?**

Applying a well-established trust principle, the Court held that to bless any decisions of a Jersey foundation it will need to be satisfied that:

- The acts proposed to be taken are made in good faith

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- The trust company is acting as a reasonable council member would
- The acts concerned have not been vitiated by any actual or potential conflict
- The trust company is not seeking to surrender its discretion to the Court

If you have any questions in relation to the above please feel free to call [Kellyann](#) or a member of her [team](#).

For more information please contact:



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