

anti-wager rationale for insurable interest, namely that an insurable interest “is to preclude the possibility of gambling by the assured”.⁵⁴ He did not mention any other rationales or justifications for the requirement of insurable interest and his exclusive reliance on the anti-wagering rationale is perhaps referable to the insurer’s counsel’s contention that Western Trading’s insurance contract was “no more than a disinterested wager on whether or not the Boak would burn down”.⁵⁵ Given the correlation between the presence of an insurable interest and the suitability of an insurance product for a specific policyholder discussed above, the requirement of insurable interest may have a role to play that goes beyond that of a dividing line between insurance and wagering.

Conclusion

Western Trading serves as an example that it can be difficult to determine an insurable interest on the facts, even if the parties agree on the law on the nature and extent of an insurable interest. Judge Mackie QC’s decision reconfirms that the courts do not look favourably upon insurers pleading a lack of insurable interest as a defence to their liability for a claim. His criticism that the insurer showed no interest in the insurable interest position until a claim was made is a pointer to insurers to consider a proposer’s interest in the insured subject matter at placement stage. His comments on the rationale for the requirement of insurable interest also serve as a reminder that the traditional justifications for the principle of insurable interest have been challenged⁵⁶ and that, in connection with the law reform proposals, the place and purpose of the requirement for insurable interest in modern English insurance law merit further examination.

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JURISDICTION CLAUSES IN TRUST INSTRUMENTS

Crociani v Crociani

Jurisdiction clauses are a common feature in trust instruments today. However, the unique nature of trusts raises difficulties that usually do not arise in contractual situations. For one, the drafting of such clauses is often idiosyncratic, providing for the trusts’ “forum for administration”. In addition, the provisions are typically drawn unilaterally by the

54. [2015] EWHC 103 (QB) [58]

55. *Ibid.*, [11]. HHJ Mackie QC did not pass comment on the “it is not insurance, it must be a wager” analysis by insurer’s counsel. In *Feasey v Sun Life Assurance Co of Canada* [2003] EWCA Civ 885; [2003] Lloyd’s Rep IR 637, [58], Waller LJ rejected the idea that a policy is either a wager or a contract of insurance with insurable interest, allowing for a middle ground of a contract of insurance lacking insurable interest.

56. Harnett and Thornton (1948) 48 Col LR 1162; *Constitution Insurance Co of Canada v Kosmopoulos* [1987] 1 SCR 2; J Lowry and P Rawlings, “Rethinking Insurable Interest”, in S Worthington (ed.), *Commercial Law and Commercial Practice* (Hart, Oxford, 2003).

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settlor—to what extent, then, do they bind the beneficiaries? In *Crociani v Crociani*,¹ an appeal from Jersey, the Privy Council found that a forum for administration provision which the trustees argued was an exclusive jurisdiction clause had in fact nothing to do with jurisdiction at all; and that, even if it was indeed an exclusive jurisdiction clause, it would not be accorded the same weight as one found in a contract. This is the first Privy Council decision to have dealt squarely with the interpretation and applicability of a jurisdiction clause in a trust instrument.

The material facts may be simply stated. In 1987 Mme Crociani settled substantial assets into the Grand Trust in favour of her two daughters, Cristiana and Camilla. Under cl.15 of the Grand Trust, the governing law of the trust was at the outset the law of the Bahamas. However, cl.12 allowed the incumbent trustees to appoint new trustees and to change the proper law of the trust, after which the trust funds would be held:

subject to and governed by the law of the country of residence or incorporation of such new Trustee or Trustees and thereafter the rights of all persons and the construction and effect of each and every provision hereof shall be subject to the exclusive jurisdiction of and construed only according to the law of the said country which shall become the forum for the administration of the trusts hereunder...

In 2012, the outgoing trustees, comprising Mme Crociani, Mr Foortse and a Jersey trust company, resigned and appointed a Mauritian trust company as sole trustee of the Grand Trust. In 2013, Cristiana commenced proceedings in Jersey against the outgoing trustees to seek equitable compensation for alleged breaches of trust. Cristiana also sought to set aside their purported resignation and change of the proper law and forum for administration. In response, the trustees (including the new trustee) applied to stay the Jersey proceedings on the basis of *forum non conveniens*, arguing that cl.12 conferred exclusive jurisdiction on the Mauritian courts. The trustees' stay application was unsuccessful in both the Jersey Royal Court and Court of Appeal, and they appealed to the Privy Council.

Is a “forum for administration” clause a jurisdiction clause?

Whether cl.12 conferred exclusive jurisdiction on the Mauritian courts turned on two key phrases, namely the provisions for “the exclusive jurisdiction of ... the law of the said country” and “the forum for the administration for the trusts”. The Board held that the former did not assist the trustees as it was merely a choice of *law* provision, the purpose of which was to avoid *dépeçage* (ie, different issues being governed by different laws).

The Board's analysis in respect of the forum for administration provision deserves closer attention. Surprisingly, although the provision has long been used in trust deeds,² its precise import is still a matter of controversy. In particular, prior to *Crociani*, it was understood that “forum for administration” was a reference to a *court*, but lawyers disagreed as to its purpose. The source of the debate may be traced to *Koonmen v Bender*,³ where the Jersey Court of Appeal had to interpret a clause stating that “[the trust] is established

1. [2014] UKPC 40.

2. See eg *IRC v Countess of Kenmare* [1956] Ch 220; *Chellaram v Chellaram* [1985] 1 Ch 409; R Johns and R Greenfield, *Dymond's Death Duties*, 15th edn (Oyez Publishing, London, 1973), 1286, 1299.

3. *Koonmen v Bender* [2002] JCA 218; 6 ITEL 568.

under the laws of Anguilla and ... the Proper Law shall be the law of Anguilla which said Island shall be the forum for the administration thereof".⁴ The court held that this conferred exclusive jurisdiction on the Anguillan courts. This decision was later criticised in an oft-cited commentary, which argued that the expression "forum for administration" is concerned only with "aspects of the administration of the trust which, for one reason or another, require the assistance of the court".⁵ On this view, the clause ostensibly captures only friendly proceedings known as administration actions commenced by trustees. This would include matters such as the clarification of trustees' investment powers, directions relating to the distribution of trust assets, and applications to remove or appoint trustees, but *not* contentious breach of trust claims.⁶ In recent years, this narrow interpretation appears to have gained traction,⁷ and was, indeed, adopted by the Jersey Court of Appeal in the present case.⁸

Crociani marks a significant development, because, without expressing any view on the merits of the narrow interpretation, the Board adopted an unprecedented, *even stricter* reading of "forum for administration" in reaching the conclusion that cl.12 was not an exclusive jurisdiction clause. According to the Board, the words "forum for administration" in the Grand Trust were not even a reference to any court, but merely pointed to "the place where the trust is administered in the sense of its affairs being organised".⁹ In other words, cl.12 was not concerned with jurisdiction at all. The Board held that such a reading was supported by the fact that cl.12 referred only to the *country* of the new trustee, as opposed to the *courts* of that country; and furthermore such a reading was not precluded, as the expression "forum of administration" did not carry any sufficiently well-established technical significance.¹⁰ Accordingly, post-*Crociani*, it will be very hard indeed to argue that a forum for administration provision is a jurisdiction clause. The provision must refer specifically to the courts of a country; but, even if this is so, the prevailing view (which *Crociani* leaves intact) remains that it has no application to contentious breach of trust claims.

On the facts of the case, the end result in *Crociani* must be correct,¹¹ but it is nonetheless necessary to consider whether the Board's analysis as regards the forum for administration

4. "Proper Law" was defined in the trust as "the law to the exclusive jurisdiction of which the rights of all parties and the construction and effect of each and every provision of this Settlement shall from time to time be subject and by which such rights construction and effect shall be construed and regulated".

5. P Matthews, "What is a Jurisdiction Clause?" (2003) 7 Jersey LR 21, [21].

6. *Ibid*, [21–22].

7. See *Helmsman Ltd v Bank of New York Trust Co (Cayman) Ltd* [2009] CILR 490; 13 ITEL 177 (Cayman Islands), [10]; *Re the Representation of AA* [2010] JRC 164; 13 ITEL 690 (Jersey), [26–28]; J Harris, "Jurisdiction and the Enforcement of Foreign Judgments in Transnational Trusts Litigation" in D Hayton (ed.), *The International Trust*, 3rd edn (Jordan, 2011) ("Harris"), [1.298–1.302]; D Hayton, P Matthews and C Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees*, 18th edn (LexisNexis, London, 2010), [100.227]. *Cf Green v Jernigan* [2003] BCSC 1097; 6 ITEL 330 (British Columbia), [40]; *NABB Brothers Ltd v Lloyds Bank International (Guernsey) Ltd* [2005] EWHC 405 (Ch), [59]; *Re A Trust* [2012] SC (Bda) 72 Civ, [69]; N Le Poidevin QC and K Robinson, "Jurisdictional Conundrums" (2013) 19 T & T 848, 852–853; L Tucker, N Le Poidevin QC and J Brightwell, *Lewin on Trusts*, 19th edn (Sweet & Maxwell, London, 2014) ("*Lewin on Trusts*"), [11.055].

8. *Crociani v Crociani* [2014] JCA 089, [73–74], [83–85].

9. At [17].

10. At [17–20].

11. Most of the impugned transactions occurred during the outgoing trustees' term of office, so Jersey would be the exclusive jurisdiction even if cl.12 were an exclusive jurisdiction clause.

provision is sensible. First, if it is true that it only identifies the geographical location for the running of the trust, then it is in fact otiose—trustees are generally free to carry on such internal management wherever they think fit.¹² Second, the Board considered that “forum” may simply mean “a place for any purpose”,¹³ but predominantly the word has always referred to a place where jurisdiction is exercised.¹⁴ More importantly, “administration” in the context of trust law in fact *has* a well-established technical significance, ie, the judicial execution of a trust.¹⁵

Indeed, it would have been opportune for the Board to examine the view that administration in this context does not admit of contentious breach of trust claims between trustees and beneficiaries. Properly understood, there is no reason why a forum for administration provision in a trust instrument cannot be a jurisdiction clause governing such hostile litigation. Under the courts’ administrative jurisdiction, *both* trustees and beneficiaries were entitled to commence administration actions, which, simply put, refers to any claim where the relief sought is the execution of a trust under the direction of the court.¹⁶ This jurisdiction did not only deal with friendly proceedings commenced by trustees—in fact, administration actions were once the only means by which any dispute between trustees and beneficiaries could be resolved.¹⁷ In the UK, with the introduction of Ord.55, r.3 of RSC 1883, trustees and beneficiaries were finally able to bypass a full administration when all they needed were specific reliefs or directions from the court, but this did not change the fact that the courts’ administrative jurisdiction still contemplated hostile litigation between trustees and beneficiaries. Thus, under Ord.85 of RSC 1965 (titled “Administration and Similar Actions” and which succeeded Ord.55, r.3 of RSC 1883¹⁸), r.4 specifically stated that in an administration action the court could grant “any relief to which the plaintiff may be entitled by reason of *any breach of trust, wilful default or other misconduct of the defendant*”.

This historical backdrop is consistent with case authorities showing that beneficiaries could make breach of trust claims in administration actions.¹⁹ It also coheres with the fundamental principles which underlie breach of trust claims. Where a rendered account in an administration action showed that a trustee had misapplied the trust property (eg, by an unauthorised disposition or investment) and the beneficiary refused to adopt the unauthorised transaction, the beneficiary could falsify that transaction in the account so that the trustee would be personally liable to reconstitute the trust property. On the other

12. J Kessler QC, *Drafting Trusts and Will Trusts: A Modern Approach*, 12th edn (Sweet & Maxwell, London, 2014), [28.6]; *Lewin on Trusts*, [11.050].

13. At [18].

14. See eg AS Oppe, *Wharton’s Law Lexicon*, 14th edn (Stevens and Sons, London, 1938), 432; JB Saunders, *Mozley & Whiteley’s Law Dictionary*, 9th edn (Butterworths, London, 1977), 142; LB Curzon, *A Dictionary of Law* (Macdonald and Evans, Plymouth, 1979), 140; SH Gifis, *Law Dictionary*, 3rd edn (Barron’s, 1991), 197.

15. See eg G Spence, *The Equitable Jurisdiction of the Court of Chancery: Vol.1* (Stevens and Norton, 1846), 578; TH Haddan, *The Administrative Jurisdiction of the Court of Chancery* (William Maxwell, 1862).

16. *Atkin’s Encyclopaedia of Court Forms in Civil Proceedings: Vol.41*, 2nd edn (Butterworths, 2000) (“*Atkin’s*”), [8].

17. *Atkin’s*, [8]. See also S Elliott, “Compensation Claims Against Trustees” (DPhil thesis, University of Oxford, 2002), 77–88 for a detailed account of the history of the courts’ administrative jurisdiction.

18. Order 85 of the RSC 1965 has in turn been replaced by Pt 64 of the CPR 1998.

19. See eg *Knott v Cottee* (1852) 16 Beav 77; *Re Wrightson* [1908] 1 Ch 789. See further *Lewin on Trusts*, [11.055], [27.021].

hand, where the account showed that the trustee maladministered the trust by failing to obtain certain property, the beneficiary could surcharge the account so that the trustee would be personally liable to put right the deficit at his own expense.²⁰

The effect of an exclusive jurisdiction clause in a trust instrument

Although the Board concluded that cl.12 of the Grand Trust was not a jurisdiction clause, it nevertheless went on to consider *obiter* how cl.12 would have been applied in the event that it was an exclusive jurisdiction clause. In this regard the position in a contractual scenario is relatively settled: in general, the party suing in the non-contractual forum bears the burden of showing strong reasons for departing from the exclusive jurisdiction clause.²¹ The question in *Crociani* was whether the same test applies *vis-à-vis* a trust deed. The Board held that, although a trustee is *prima facie* entitled to enforce an exclusive jurisdiction clause in a trust deed, it would be easier for a beneficiary to resist the enforcement of the clause than a party in a contractual scenario.²² Applied to the case at hand, there were numerous reasons why the Jersey proceedings should not be stayed, including the facts that most of the issues would be governed by Jersey law, most of the evidence and witnesses were in Jersey, and the trustees had conceded in pre-proceedings correspondence that they were content to explain themselves to the Jersey Royal Court. For present purposes, however, what is noteworthy is the Board's reasoning that:²³

"In the case of a clause in a trust, the court is not faced with the argument that it should hold a contracting party to her contractual bargain. It is, of course, true that a beneficiary, who wishes to take advantage of a trust can be expected to accept that she is bound by the terms of the trust, but it is not a commitment of the same order as a contracting party being bound by the terms of a commercial contract."

Thus far, the English courts have yet to have the occasion to consider properly whether a dispute resolution clause in a trust instrument is binding on a beneficiary.²⁴ Apart from situations involving *forum non conveniens*,²⁵ the question most often arises in the discussion of the arbitration of trust disputes, where there is a divergence of academic opinions as to whether a beneficiary may be compelled to submit his disputes with a trustee to arbitration. On one hand, under the "deemed acquiescence" (sometimes also referred to as "benefits and burden") theory, it is said that the bounty which the beneficiary enjoys must come together with the onerous terms of the trust drawn by the settlor, or at

20. See PJ Millett, "Equity's Place in the Law of Commerce" (1998) 114 LQR 214, 225–227; SB Elliott and C Mitchell, "Remedies for Dishonest Assistance" (2004) 67 MLR 16, 23–31. Most recently Lord Millett laid down an authoritative restatement of the accounting procedure and its relationship with breach of trust claims in *Libertarian Investments Ltd v Thomas Hall* [2013] HKCFA 93, [168–170].

21. *Donohue v Armco Inc* [2001] UKHL 64; [2002] 1 Lloyd's Rep 425, [24].

22. At [35], [37].

23. At [36].

24. Although the courts have had to consider whether clauses providing that the decision of a trustee (or a third party) as regards a beneficiary's rights would be conclusive and binding, is an attempt to oust the court's jurisdiction and hence void and of no effect: see *In re Raven* [1915] 1 Ch 673; *In re Wynn* [1952] Ch 271; *Dundee General Hospitals v Walker* [1952] 1 All ER 896; *In re Tuck's Settlement Trusts* [1978] 1 Ch 49.

25. As in the present case and in *EMM Capricorn Trustees Ltd v Compass Trustees Ltd* [2001] JRC 87; 4 ITEL 34 (Jersey Royal Court).

least that the beneficiary must be taken to have agreed to be bound by them.²⁶ This position is generally thought to be sound, although an opposing view says that beneficiaries' rights and interests are bestowed not by the settlor but by principles of equity.²⁷ The latter proposition cannot be seriously contested, but on closer analysis does not explain why equity would not require the beneficiary to abide by the terms of the trust.

Advocates of trust arbitration would welcome *Crociani* in so far as it accepts in principle the deemed acquiescence theory (albeit without a detailed analysis), especially since most arbitration legislation mandate a stay of court proceedings so long as a valid arbitration agreement is in place.²⁸ Nevertheless, *Crociani* raises a more fundamental question: is it appropriate or necessary even to compare the binding effect of trust clauses on beneficiaries as against contractual clauses on contracting parties? If the type of mutual bargain or consent found in the contractual paradigm is necessary to enforce an exclusive jurisdiction clause in a trust instrument to its fullest extent, then the inquiry is surely a non-starter to begin with. Yet, mutual bargain or consent is usually a non-issue when trustees seek to enforce other types of terms in a trust, such as exemption clauses or scope of duty provisions. Trusts are not contracts. It is perhaps ironic that the Board considered this a reason why an exclusive jurisdiction clause in a trust deed should attract less weight.²⁹

Conclusion

Issues such as arose in *Crociani* are very practical problems for trusts practitioners, and the courts—mostly in the offshore jurisdictions—have only just started to grapple with these questions. Regrettably some uncertainty persists after *Crociani*, and it is hoped that it will not be long before the highest appellate court may get the opportunity to visit these issues again.

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26. See L Cohen QC and M Staff, "The Arbitration of Trust Disputes" (1999) 7(4) JTCP 203, 221; L Cohen QC and J Poole, "Trust Arbitration—Is It Desirable and Does It Work?" (2012) 18(4) T & T 324, 328; Le Poidevin and Robinson (2013) 19 T & T 848, 853; Harris (*supra*, fn.7), [1.297]. But see D Hayton, "Problems in Attaining Binding Determination of Trust Issues by Alternative Dispute Resolution" (Papers of the International Academy of Estate and Trust Law, 2001) (suggesting that whether an arbitration agreement can subsist would depend on the precise terms of the instrument). See also SI Strong, "Arbitration of Trust Disputes: Two Bodies of Law Collide" (2012) 45 Vanderbilt J Transnatl L 1157, 1211–1212 (describing a similar "conditional transfer" theory in the United States).

27. Executive Committee of the Trust Law Committee, "Arbitration of Trust Disputes" (April 2012), available at www.step.org/arbitration-trust-disputes, [28]; T Molloy QC and T Graham, "Arbitration of Trust and Estate Disputes" (2012) 18(4) T & T 279, 284.

28. This is of course subject to other sticking points, such as whether a beneficiary is a person "claiming through or under" a party (ie, the settlor) to the arbitration agreement and whether trusts disputes are arbitrable.

29. At [36]. In fact it was held in *Gomez v Gomez-Monche Vives* [2008] EWCA Civ 1065; [2009] Ch 245 that a choice of law clause in a trust would be given *more* primacy than that in a contract: "The connection between a trust and its proper law is in every sense real and close. A trust is not like a commercial contract, where it is only necessary to consider the content of the applicable law in exceptional circumstances. Trustees in particular have to be intimately aware of their responsibilities under the general law applicable to the trust. They may have to know whether they can lawfully accumulate income. Resort to the law governing the trust is central to their responsibilities." (at [64])

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