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# STEP GUERNSEY LECTURE SERIES EXITING PROBLEM CLIENT RELATIONSHIPS ISSUES AND HOW TO DEAL WITH THEM

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## Companies

**Scenario:** Guernsey Trust Company (GTC) administers Company A. GTC is registered office. It provides Directors to Company A and Nominee shareholders. GTC as nominee shareholder holds shares on bare trust for underlying client on standard DoT – GTC cannot transfer, deal with or dispose of shares save as underlying client may from time to time direct. Company A is insolvent on cash flow basis - has little to no funding and liabilities. Annual validation fee and other expenses coming up. Company A has assets. Underlying client cannot be contacted. GTC owed fees. GTC have had enough and want to exit this client relationship.

- So what to do?

## Companies

- Remind yourself of duties – Directors have duty to act in best interests of shareholders / creditors where insolvent
- Company is insolvent – insolvency process?
- Need to be alert to insolvent trading if trading company
- Can't seek directions of Court

## Companies

- Look at GTC terms of business with client
- Simply resign as Directors, terminate client engagement and walk away?
- Company is rudderless (Company may be struck off) and assets could be lost – practical and legal consequences??
- Better option – Attempt to communicate with UBO to seek funding and instructions

## Trusts - General

- Issues – Want to exit that structure for operational reasons or because problematic trust – fallout between Trustee and Beneficiaries / Settlor
- Exiting can be more problematic - Cannot simply resign if sole Trustee – Section 20(1) Trusts Law
- Trustee will need to consider how and whether appropriate to appoint new Trustees – who has ability to appoint new trustees under trust instrument? does Trustee need Protector / other consent?

## Trusts - General

- What about where one of a class of beneficiaries requests Trustee to resign or threatens removal?
- What if there is a question mark about the Current Trustees ability to appoint a new trustee under terms of trust– such as where holding assets on bare trust where trust property potentially represents proceeds of crime?
- If need be, can seek directions from Court

## Trusts – Inherent Jurisdiction of Courts

- Inherent jurisdiction of Court – see *Schmidt v Rosewood Trust Limited*,[\[5\]](#) whereby the UK Privy Council confirmed the court's inherent jurisdiction to intervene in trusts' administration to secure the trust's competent administration.
- Position confirmed in *Re C (2019) Bermuda* - Dealt with invalidly appointed Trustees but judgment notable for comments on inherent jurisdiction of the Court

## Trusts – Inherent Jurisdiction of Courts

- *In Re C*, Hargun CJ accepted that:  
*'... the Court has an inherent jurisdiction to intervene in the administration of a trust and to approve certain acts on the part of the trustees and/or authorise trustees to do certain things which are an effective departure from the terms of the trust where it is not possible to obtain the consent of all the beneficiaries because they are not all sui juris.'*

## Trusts – Momentous Blessing Application

- Momentous Blessing Application
  - Does the trustee have the power to make this “momentous” decision?
  - Is the Court satisfied that the trustee formed the opinion in good faith and that it was desirable and proper for them to [make the decision]?
  - Is the Court satisfied that the opinion formed by the trustee is one which a reasonable trustee in its position properly instructed could have arrived at?
  - Is the Court satisfied that the opinion arrived at by the trustee has not been vitiated by any actual or potential conflict of interests which either had or might have affected its decision?”

## Trusts – Liang v RBC Trustees (Guernsey) Limited

- Liang v RBC Trustees (Guernsey) Limited
- First private law action dealing with effect of Guernsey's AML legislative regime
- Specifically the Court examined whether a Trustee could enter into a transaction where law enforcement had given "no consent" to a proposed transaction
- No Consent from FIS = Informal Freeze. Described by the Court of Appeal in Garnet decision (Judgment 19/2011) as the "chilling effect" of the legislative regime

## Trusts – Liang v RBC Trustees (Guernsey) Limited

- Ms Liang made a request to terminate the Trust in April 2013
- Trustee sought consent from the FIS to terminate the Trust, which was refused
- Ms Liang sought to explain source of wealth / funds however consent still refused
- Ms Liang forced to bring private law claim
- Trustee took a neutral position

## Trusts – Liang v RBC Trustees (Guernsey) Limited

- **Two Step Test:**

- The Trustee must establish it had the requisite suspicion; and

- If suspicion established, for the beneficiary to prove the funds are not proceeds of crime

- **Burden of proof** shifts from Trustee to Beneficiary

- **Initial suspicion must be kept under review by Trustee** – time at which suspicion must be held is the time of trial

## Trusts – Liang v RBC Trustees (Guernsey) Limited

- At [20] the Deputy Bailiff gave the test for suspicion:

*"In relation to the issue of suspicion, I have, therefore, reminded myself that the Defendant bears the burden, on the balance of probabilities, of satisfying me that there are still relevant facts on which to base the suspicion about the source of the funds in the Trust, where there is more than a fanciful possibility that those funds are the proceeds of criminal conduct. Further, for a valid suspicion to be held, it must go beyond mere general mistrust. If the Defendant fails to establish that suspicion exists, it follows that the Plaintiff is entitled to succeed. However, if suspicion is established, the Court moves on to consider the provenance of the funds."*

## Trusts – Liang v RBC Trustees (Guernsey) Limited

- If suspicion proved by Trustee on balance, burden moves to beneficiary to prove provenance of funds. At [26] the Deputy Bailiff describe the shift in burden between suspicion and provenance:

*"A plaintiff will establish a prima facie case to have the instruction or request made to the institution complied with. A defendant will raise an impediment to being in a position to comply, which will be the combination of the suspicion held and the absence of law enforcement consent. In order to overcome that impediment, the plaintiff will have to prove that the position is that the suspicion is unfounded because the source of the funds is not tainted in the manner believed or suspected."*



## ANTHONY WILLIAMS

Advocate and Head of Dispute Resolution | Guernsey

+44 (0)1481 755 622

[awilliams@applebyglobal.com](mailto:awilliams@applebyglobal.com)

## LOCATIONS






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