

UPDATE

# Zurich and Geneva Trusts and Private Wealth Seminars 2024 - Top takeaways

Update prepared by Fred Milner (Jersey)

Our annual Trusts and Private Wealth Seminars took place in Zurich and Geneva recently. The sell-out events featured sessions tailored for trustees and private client advisors which were led by members of the Mourant International Trusts and Private Client practice.

Topics on the agenda included the implications of significant recent cases, and practical guidance on drafting to avoid issues with the invalid exercise of powers.

Below, we've summarised the key information and top takeaways from the events.

## Invalid exercise of powers

When drafting or reviewing supplemental trust documents it is essential to ensure there is an appropriate power available to achieve the intended outcome, and the power is exercised in accordance with any requirements prescribed by the trust instrument or law. In particular, any applicable rule against perpetuities or the maximum duration of trusts should be considered, as should the rule against self-dealing. Care should also be taken to avoid any unintended consequences of the exercise of powers, including inadvertent changes to the beneficial class.

## Formalities when exercising powers

It's always important to consider who should be exercising the powers set out in a trust instrument, how they must be exercised, if there are any preconditions to meet, if there are any consents required (and if so by whom and how) and what steps must be followed to ensure that the exercise of the trust power is valid and can be relied upon. That might also mean understanding the specific meaning of words used, such as 'acknowledged' which is often undefined but can mean it must be executed before a duly authorised officer such as a notary public, where the notary verifies their identity.

## Overlapping powers

It's important to consider if there is more than one power you could rely upon in the trust instrument and if so, do the formalities differ between the two powers (eg: one requires consent and the other does not). If so, you may be wise to adhere to the higher standard required, even if you could achieve a similar or the same result with a power requiring fewer formalities.

## Read the whole document

Sometimes contrary provisions or powers can be hidden in a trust instrument. For example, a trust may specify that the current trustee has the power to appoint a new trustee but later state that, 'notwithstanding any other provisions of the trust instrument the Protector has the power to appoint new trustees'.

## Statutory provisions

Some terms such as 'trust corporation' can have specific meanings in some jurisdictions such as the Cayman Islands. Where there is a change of proper law or change of trustee, care must be exercised and lawyers in both jurisdictions should be involved. For example, 'trust corporation' as a matter of Cayman law means a company with a Cayman Islands trust licence so if a trustee in another jurisdiction is appointed

they are unlikely to fulfil this criteria. This has been modified by statute so it doesn't apply to trusts dated after 11 May 1998, if only one trustee was originally appointed or if there is a contrary intention stated in the trust instrument.

### **An apparently invalid exercise of a power may be capable of remediation**

Where the purported exercise of a power has not achieved the intended outcome, but another more appropriate power was available, it may be possible for the second power to have been impliedly exercised. Of course, the better approach is to have recited the correct power in the first place and the inclusion of words to the effect of '...and any other relevant powers...' is also potentially very helpful. If the necessary formalities have not been followed, this may also be capable of remedy, but only when the intention was to benefit certain limited categories of persons, such as dependents and charities.

### **Remediation of past acts of a trustee de son tort may also be possible**

Once the correct trustees are in situ, certain invalid acts may be capable either of ratification, or replacement by a subsequent valid act. This remediation will often not be retrospective. However, it may be possible to amend a trust instrument with retrospective effect so that an otherwise invalid change of trustees was effective, thereby validating their historic acts. There is limited case law on this and sometimes a court blessing will be appropriate.

### **Case law round-up and trends in 2024**

Channel Island Courts continue to demonstrate their ability to deal with the most complex of trust cases competently and with careful regard for the position of trustees, as evidenced by the Kazzaz judgments. At the same time, the non-interference principle has been re-stated forcefully in Guernsey. The Court will not interfere with a decision which a trustee acting reasonably could have made. It will only intervene in the case of 'perversity'.

Meanwhile, interesting issues are arising relating to Guernsey and Jersey law trusts. Specifically, there have been issues in relation to blessing and Beddoe applications and in situations where the Court was asked to consent on behalf of the minor and unborn beneficiaries to amendments to trusts. This has included where the settlor intended Sharia principles to apply but the beneficiaries did not want them to apply and there was potential for tension with ECHR principles governing the Courts. Likewise in respect of undisclosed payments made to fiduciaries.

If you have any questions in relation to the topics covered in this update, please contact a member of our International Trusts and Private Client team.

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