

In the Matter of the E Trust

Service area / [Trusts and Private Wealth](#)

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The Supreme Court of Bermuda continues to produce a significant number of interesting decisions which serve to develop Bermuda's trust law. A recent example is *In the Matter of the E Trust [2017] SC (Bda) 103 Civ* in which the Chief Justice grappled with a potential clash between the jurisdiction of the Bermuda and Jersey Court over a Bermuda law trust. The trust was administered in Jersey and the only connecting factor with Bermuda was the governing law. The Bermuda Court struck out the Bermuda proceedings brought by the settlor and a beneficiary against the Jersey based trustee, allowing proceedings to continue in Jersey. In doing so, the Chief Justice agreed with the Royal Court that Jersey was "*clearly the most convenient forum*" for the proceedings.

The facts

In June 2017, the Jersey based corporate trustee of the E Trust ("Trustee" and "the E Trust") commenced proceedings in the Royal Court of Jersey ("Jersey Proceedings" and "Jersey Court", respectively) seeking directions that (a) the Trustee was not required to retire; (b) any purported removal of the Trustee under section 26(1) of the Bermuda Trustee Act 1975 ("1975 Act") was invalid; and (c) approving the Trustee's decision to sell certain real estate held in the E Trust ("Property"). Section 26(1) of the 1975 Act provides a statutory power of appointment of new trustees that can be exercised in a range of situations, including where a trustee refuses to act, is unfit or incapable of acting.

On 10 July 2017, at an *inter partes* hearing of a jurisdictional challenge brought in the Jersey Proceedings by the settlor and one beneficiary ("Bermuda Plaintiffs"), the Jersey Court ruled that: (a) Jersey was clearly the most appropriate forum; (b) approved the Trustee's decision not to retire; (c) ordered that

the Trustee was to remain in office until further order; and (d) approved the decision of the Trustees to market the Property (see *Representation of G Trustees Limited [2017] JRC 162A*).

The Bermuda Plaintiffs issued the Bermuda proceedings 2 days later on 12 July 2007 by which they sought (a) an order under section 31 of the 1975 Act removing and replacing the Trustee (this section sets out the Court's power of appointment of trustees under Bermuda law); and (b) setting aside the purported decision of the Trustee to sell the Property and alternatively declaring that the decision of the Trustee in this respect was invalid ("Bermuda Proceedings"). The Bermuda Plaintiffs then sought and obtained *ex parte* leave from the Bermuda Court to serve the Bermuda Proceedings on the Trustee out of the jurisdiction arguing that despite the potential for conflicting decisions in Jersey and Bermuda, only the Bermuda Court had competence to deal with the question of the removal of the Trustee.

As would be expected, the Trustee promptly applied to set aside leave to serve the Bermuda Proceedings out of the jurisdiction and stay the Bermuda Proceedings on the basis of *forum non-conveniens*. In his decision in favour of the Trustee, the Bermuda Chief Justice went further and struck out the entire Bermuda Proceedings.

Reasoning

The Bermuda Plaintiffs conceded that as a result of the decision of the Jersey Court and their unsuccessful attempt to appeal in Jersey, the Bermuda Proceedings were liable to be struck out, in part only, in so far as they related to directions as to the sale of the Property. However, they argued that the relief sought under section 31 of the 1975 Act (removal of the Trustee)

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ought to remain on the basis that only the Bermuda Court was jurisdictionally competent to remove a trustee of a Bermuda law trust, notwithstanding the Jersey Court's personal jurisdiction over the Jersey Trustee in this instance.

In rejecting this submission, the Chief Justice placed considerable emphasis on:

- the Jersey Court's personal jurisdiction over the Trustee (considering it to extend to jurisdiction over the question of the Trustee's continuation in office);
- the Bermuda Plaintiffs' voluntary submission to the jurisdiction of the Jersey Court in the Jersey Proceedings; and
- the Jersey Court's competence to administer a Bermuda law trust (or any foreign law trust).

It is this latter point that is particularly interesting from a Bermuda perspective. While the Chief Justice made no mention of the expansive nature of the jurisdiction of the Bermuda Court over trusts which are governed by a foreign law, such jurisdiction is clear from section 11 of the Trusts (Special Provisions) Act 1989. This provides that the Bermuda Court has jurisdiction where (a) a trustee is resident in Bermuda; (b) where any trust property is situated in Bermuda (but only in respect of such property); (c) where the administration of any trust is carried on in Bermuda; or (d) where the Court thinks it appropriate.

In his decision in *In the Matter of the E Trust* the Chief Justice pointed to several provisions of Jersey law referred to in the decision of the Jersey Court (in particular, Article 5 of the Trusts (Jersey) Law 1984) which indicated that the Jersey Court had similarly wide jurisdiction in respect of a Jersey resident trustee (even when the governing law of the trust in question was a foreign law). The Chief Justice pointed to the lack of any exclusive jurisdiction clause in the E Trust and compelling public policy grounds saying that

"it would... be inconsistent with comity for [the Bermuda] Court to permit its processes to be used to undermine the exercise by the Jersey Court of its lawful supervisory personal jurisdiction over trustees resident within its jurisdiction".

He also quoted with approval from the decision of the Jersey Court that

"... we would expect the courts of Bermuda, for reasons of comity, to afford respect to the directions we have given to a Jersey resident trustee of a Bermud[i]an trust, in the same way we would afford the same respect to directions given by the courts of Bermuda to trustees of Jersey trusts resident in its jurisdiction".

Comity

In explaining why the Bermuda Court was prepared to go so far as to strike out the Bermuda Proceedings in their entirety (rather than granting a stay of the removal claim), the Chief Justice noted that keeping the Bermuda Proceedings alive

would potentially undermine the efficacy of the Jersey Court's orders in relation to the Property by creating unfounded legal doubts as to the Trustee's authority to sell the Property under the governing law of the E Trust. He held that the further prosecution of the Bermuda Proceedings would amount to an abuse of process of the Bermuda Court. In a theme that is to be found in many of the Chief Justice's rulings, he concluded with a rallying cry for comity by saying

"were the roles to be reversed and this Court were to be exercising its supervisory jurisdiction over Bermudian trustees in relation to a trust governed by Jersey law, this Court would expect the Jersey Court to support rather than undermine our jurisdiction. In the highly internationalised offshore world, the role of comity and cross-border judicial cooperation, whether active or passive, carry greater public policy significance for the efficacy of Bermuda's courts".

While only referred to briefly by the Chief Justice, the Jersey Court had on 31 October 2017 granted its blessing of the decision of the Trustee to proceed with the sale of the Property. This was on the basis that it was a momentous decision (see *Representation of G Trustees Limited [2017] JRC 189*). The Jersey Court applied the well known principles in such applications laid down in *Public Trustee v. Cooper [2001] WTLR 903*, which principles are common to both Jersey law and Bermuda law.

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