

STEP JOURNAL



Clause and effect

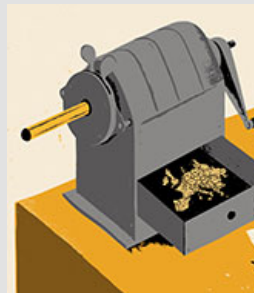
Edward Cumming, July 2015

Edward Cumming is a barrister at XXIV Old Buildings and appeared for the appellants before the Privy Council

Edward Cumming considers the landmark decision in *Crociani v Crociani* on jurisdiction clauses in trusts.

Key points

- **What is the issue?** The Privy Council's landmark decision on jurisdiction clauses in trusts.
- **What does it mean for me?** Its decision on the scope and effect of jurisdiction clauses in trust instruments, and the construction of clauses that stipulate the 'forum for the administration' of the trust, is likely to be significant.
- **What can I take away?** Among other considerations, reflect on clauses stipulating the 'forum for the administration' of a trust.



The Privy Council handed down its much-awaited judgment in *Crociani and Others v Crociani and Others* in November 2014.¹ Its decision on the scope and effect of jurisdiction clauses in trust instruments, and the construction of clause that stipulate the 'forum for the administration' of the trust – the first time that these issues have received consideration from the Privy Council despite various decisions at first instance and at local appellate level in jurisdictions including the Channel Islands, the Cayman Islands, Bermuda and Canada since 2000 – is likely to have wide-ranging significance for trust lawyers and professionals around the world.

Facts of the case

In *Crociani*, the defendants (present and former trustees of 'the Grand Trust', against whom the plaintiffs sought to pursue various claims, including for breach of trust) sought an order staying proceedings in Jersey on the basis it was not the proper forum to determine the claims. Underpinning the application for a stay was a clause in the instrument that settled the Grand Trust which the defendants contended was an exclusive jurisdiction clause in favour of Mauritius.

The key parts of the clause in question, which contained a power for the trustees to appoint a replacement trustee in new jurisdiction, were as follows: ‘... and upon such appointment being made the then Trustee or Trustees shall immediately stand possessed of the Trust Fund upon trust for the new Trustee or Trustees as soon as possible so that the Trust Fund shall continue to be held upon the trusts hereof but 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* (but so that nonetheless the then Trustee or Trustees or the new Trustee or Trustees may by deed declare that the trusts hereof shall continue to be read and take effect according to the laws of the said Commonwealth of The Bahamas as provided by Clause 15 hereof) and Clause 15 hereof shall take effect and be subject to the provisions hereinbefore declared by this clause.’

The present and former trustees contended that, nearly a year before the proceedings had been commenced, this power had been exercised to appoint the present trustee (a Mauritian trust company), to change the proper law of the trust to that of Mauritius, and to make Mauritius the exclusive jurisdiction for claims, such as that brought by the plaintiffs in Jersey, that were commenced thereafter.

The Privy Council, in considering the defendants’ appeal from the Court of Appeal, was faced with two principal questions. Was the clause, on its proper construction, an exclusive jurisdiction clause (in that it sought to preclude the plaintiffs from bringing their claims other than in the courts of Mauritius)? If so, what should its effect be? In other words, might the plaintiffs still be entitled to pursue their claims in Jersey in breach of the clause?

The judgment

On the question of the construction of the clause, Lord Neuberger, delivering the board’s opinion, found that the clause was not a jurisdiction clause at all. A clause in a trust instrument that stipulates a particular jurisdiction as the ‘forum for the administration of the trust’ may confer jurisdiction to hear claims concerned with the trust, but it does not necessarily have this meaning. It may instead refer to the place where the trust is to be ‘administered’ in the sense of being ‘managed’ (although no guidance was given as to what, in the circumstances, that meant or as to the consequences of such a requirement). The meaning of the phrase in any particular clause will depend on the context in which it appears. In *Crociani*, it was significant that the clause referred to a place being the ‘forum for the administration of the trust’, rather than the courts of a place.



Lord Neuberger found that the clause was not a jurisdiction clause at all

Lord Neuberger went further than this, however, and (without deciding the point) questioned whether, even if such a clause did stipulate that the courts of a place shall be the ‘forum for the administration of the trust’, it would confer exclusive, rather than simply non-exclusive, jurisdiction on those courts to hear claims concerned with the trust. He questioned, contrary to the earlier decision of the Jersey Court of Appeal in *Koonmen v Bender*,² whether the use of the definite article in the stipulation was strong enough on its own to confer exclusive jurisdiction.

What of the fact that the clause also stipulated that, after the power had been exercised, ‘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’?

This was found to be a reference not to ‘the exclusive jurisdiction... of the said country’, but rather to ‘the exclusive jurisdiction of... the law of the said country’. As such, it was intended to avoid the risk of *dépeçage*, and to ensure that absolutely all issues concerning the Grand Trust would be governed by the new proper law of the trust.

While that would have been sufficient to dispose of the appeal, the Privy Council nevertheless went on to consider the

question of whether, if the clause had been an exclusive jurisdiction clause, it would have been necessary to stay the proceedings in Jersey in favour of proceedings in Mauritius, albeit that its decision on this point was *obiter dictum*.

The appellants had argued that the test applicable to jurisdiction clauses in contracts – which requires ‘strong reasons to depart from the clause’³ – ought to be applied in trust cases; such that, unless there were exceptional circumstances, effect should be given to the clause. Such an approach would accord with the idea that a beneficiary who chooses to take a settlor’s bounty accepts it with both the benefits and burdens stipulated in the trust instrument. This argument had found favour with the Jersey Court of Appeal in *Crociani*.

Lord Neuberger, however, concluded that, while a trustee is prima facie entitled to insist on and enforce an exclusive jurisdiction clause in a trust instrument, the weight to be given to the existence of the clause is less (or the strength of the arguments needed to outweigh the effect of the clause is less) than where a contracting party is seeking to enforce a contractual jurisdiction clause against another contracting party.

Thus, contrary to the decision of the Jersey Court of Appeal, it should be less difficult for a beneficiary to resist the enforcement of an exclusive jurisdiction clause in a trust instrument than for a contracting party to resist the enforcement of an exclusive jurisdiction clause in a contract. Indeed, ‘one would normally expect the trustees to come up with a good reason for adhering to the clause, albeit their failure to do so would not prevent them from invoking the presumption that the clause should be enforced’.

Unresolved questions

It remains to be seen what this approach will mean in practice. Although a party seeking to litigate in breach of an exclusive jurisdiction clause in a trust instrument need not show ‘strong reasons’ why the clause ought not to be enforced, what test should a first instance court apply? Further, what might a trustee advance as a ‘good reason’ for adhering to an exclusive jurisdiction clause? If the only ‘good reason’ that would justify invocation of the clause is that the courts of the country stipulated are the most appropriate forum for the litigation absent an exclusive jurisdiction clause, then does this decision strip an exclusive jurisdiction clause of any meaningful effect?

The decision will require trust lawyers and trust professionals around the world to reflect carefully on the use and effect of clauses stipulating the ‘forum for the administration’ of a trust, the consequences if such an expression directs the ‘administration’ of a trust to be undertaken in a particular place, and the use and effect of other jurisdiction clauses in trust instruments. These issues may require further appellate consideration before the common-law position is completely settled. In the meantime, there is force in Martin JA’s observation, in his judgment in the Jersey Court of Appeal in *Crociani*, that it would be ‘better if the expression “forum for administration” were abandoned altogether’.

Postscript

Interestingly, very shortly after *Crociani*, the position within the EU arguably became clearer. Under article 25(3) of the Recast Brussels I Regulation (*Regulation (EU) No.1215/2012*), which replaces the Brussels I Regulation (*Council Regulation (EC) No.44/2001*), and applies in respect of proceedings commenced on or after 10 January 2015, where a trust instrument confers jurisdiction on the courts of an EU member state in proceedings against a settlor, trustee or beneficiary, that jurisdiction is deemed to be exclusive and the courts have no discretion to decline to enforce the clause.

1. [2014] UKPC 40, (2015) 17 ITEL 624
2. [2002] JCA 218, 6 ITEL 568
3. *Donohue v Armco Inc* [2001] UKHL 64

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