Judgment 38/2012

Dervan et al v Concept Fiduciaries Limited et al
Royal Court
Civil Action File No 1652
30th November 2012

Application to determine the applicable law to be applied when considering the relief sought by the applicants.

Approved Text
30.11.2012

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

(ORDINARY DIVISION)

Between:	**MIRIAM DERVAN**	**First Applicant**
	MD EVENTS LIMITED	**Second Applicant**
	-and-	
	CONCEPT FIDUCIARIES LIMITED **(As the trustee of the MD Events, Limited Remuneration Trust and the MD Events Limited Remuneration Trust First Sub-Trust**	**First Respondent**
	SILENE LIMITED	**Second Respondent**
	PRET LIMITED	**Third Respondent**

Hearing date: **30th October 2012**

Judgment handed down: **30th November 2012**

Before: **Richard James McMahon, Esq., Deputy Bailiff**

Counsel for Applicants: **Advocate J T Le Tissier**

Counsel for Respondents: **Advocate St J A Robilliard**

Cases, Texts & legislation referred to:

The Trusts (Guernsey) Law, 2007
1984 Hague Convention on the Law applicable to Trusts and on their Recognition
The Trusts (Guernsey) Law, 1989

Stuart-Hutcheson v Spread Trustee Company Limited (unreported, 15 July 2002)
Recognition of Trusts Act 1987
Harris, *The Hague Trusts Convention: Scope, Application and Preliminary Issues* (Hart Publishing, 2002)
Harris, *The International Trust* (3rd ed., Jordans, 2011)
Dicey, Morris and Collins, The Conflict of Laws
Arun Estate Agencies Limited v Kleinwort Benson (Guernsey) Trustees Limited [2009-10] GLR 437
In the matter of the S Trust [2011] JRC 117
CC Limited v Apex Trust Limited [2012] JRC 071
Tait and Tait v Apex Trustees Limited [2012] JRC 148
In the matter of the DSL Remuneration Trust [2007] JRC 251
GL v Nautilus Trustees Limited [2009] JRC 164A
In the matter of Mr and Mrs P Capital Asset Protection Plan Trust [2008] JRC 159
In the matter of the A Trust [2011] WTLR 745

Background

1. This judgment deals only with the question of the applicable law to be applied when considering the relief sought by the Applicants. It has been dealt with as a preliminary issue (following an earlier preliminary issue of whether any other parties needed to be convened) as being the most efficient and cost-effective way of resolving the application, which in due course will be determined by a Court constituted with Jurats.

2. By an application dated 8 March 2012 (hereafter referred to as "the Application"), the Applicants, Miriam Dervan and MD Events Limited (hereafter referred to as "the company"), which Ms Dervan had established, and in which she held 100% of the Ordinary shares prior to her transferring them to the First Respondent, seek the setting aside on the grounds of mistake of two dispositions. In Ms Dervan's case, this relates to the transfer of 100,000 Ordinary shares in the company to the First Respondent by Deed of Assignment dated 18 May 2010. In the company's case, it seeks to set aside the payment by it of £500,000 to the First Respondent on or about 18 May 2010. In both cases, the First Respondent received the property as trustee of the MD Events Limited Remuneration Trust Scheme.

3. The Application is supported by an Affidavit of Ms Dervan sworn on 8 March 2012. The details of the transactions will be a matter for the Jurats to consider at the final hearing of the Application, but what I hope is an uncontroversial summary of the basis of the Application insofar as it is applicable to the determination of the applicable law question follows.

4. The company is registered under the laws of England and Wales. The Respondents are registered under the laws of Guernsey and so received the property from the two transactions in Guernsey. Although Ms Dervan is originally from the Republic of Ireland, she lives and works in England. Ms Dervan took advice on how to minimise her exposure to taxation, including in respect of payments made to her by the company and also in the event of her selling her beneficial interest in the company. This resulted in the setting up on 18 May 2010 of the MD Events Limited Remuneration Trust. £100 was settled by the company in accordance with a Trust Deed expressed to be "*established under the laws of England and Wales*". Clause 6.2 of the Deed of Assignment in respect of Ms Dervan's shareholding provides that:

> "*This Deed shall be governed by and interpreted in accordance with English law and shall be subject to the non-exclusive jurisdiction of the English courts.*"

An identically worded provision appears as clause 5.2 in the Deed of Contribution in respect of the payment from the company's reserves of £500,000.

The issue

5. Against that background, one of the questions for the presiding judge when directing the Jurats will be the law applicable to the allegations of mistake. Is it the law of England and Wales, being the proper law chosen in respect of the MD Events Limited Remuneration Trust, the Deeds relating to the two dispositions and any other factors pointing to that outcome, or is it the law of Guernsey, because Guernsey is the country where the enrichment has occurred and, so it is argued, the proper law of the restitutionary obligation? Neither Counsel has suggested that the applicable law might be the law of another jurisdiction.

6. In his Skeleton Argument dated 27 April 2012 and at the oral hearings, Advocate Jeremy Le Tissier submitted that the preferable approach is to apply the law of Guernsey. He suggests that such a conclusion would be consistent with the approach of the Royal Court of Jersey. He submits it is the conclusion reached by applying established conflicts of laws principles derived from English law. On the other hand, in his Skeleton Argument dated 18 May 2012, in which he adopts the role of being duty-bound to offer helpful guidance to the Court from the trustee's neutral perspective, Advocate Robilliard explains a previous decision of this Court, to which I shall turn in due course, and suggests that a full review of all the authorities points more towards the applicable law being English law. At the first oral hearing, he developed these arguments by reference first and foremost to relevant provisions in the Trusts (Guernsey) Law, 2007, submitting that the Court is bound to rule in favour of the proper law, namely English law.

7. Because this was a new development, not aired in quite that way in Advocate Robilliard's Skeleton Argument, at the conclusion of the first oral hearing I gave directions for those arguments to be set out in writing by him, thereby enabling Advocate Le Tissier to address them by way of a written reply. Advocate Robilliard's note of his verbal address is dated 4 October 2012 and Advocate Le Tissier's written Reply is dated 12 October 2012.

8. During the course of preparing a written judgment, I became concerned that neither Counsel had explicitly addressed Article 4 of the *1984 Hague Convention on the Law applicable to Trusts and on their Recognition*. I therefore caused the hearing to be resumed on 30 October 2012 to enable Counsel to address me on that provision and, as necessary, to develop their previous submissions to the extent that they were affected by these further submissions. I am grateful to both Advocates for their helpful written and oral submissions.

9. At the conclusion of the resumed hearing, I indicated that I would direct the Jurats that the proper law to be applied is the law of England and Wales. I did so to enable the final preparation for the hearing before Jurats to be completed. Although I briefly outlined the thought processes through which I reached that conclusion, I reserved my full reasons, which now follow.

The Hague Convention and the domestic law

10. Given that Advocate Robilliard has, in my view quite properly, invited me to take as the starting point the statutory provisions, I have reminded myself about the origins of Guernsey's statutory framework for trusts. The Policy Letter resulting in the Trusts (Guernsey) Law, 1989 (Billet d'État No. IX of 1988, p. 244) covers just two pages. The most relevant extracts are:

> "*The roots of Guernsey law lie in Norman customary law which is in many respects similar to English common law. The courts of Normandy and the common law courts of England did not recognize trusts and, in England, trust law evolved by decisions of the courts of equity which have never formed part of our customary law. Whilst the Royal Court has developed a limited equitable jurisdiction and has recognised trusts*

> *there is considerable uncertainty as to what the law of Guernsey is in many areas relating to trusts.*
>
> *With the increasing establishment of Guernsey trusts by persons both resident and non-resident in the Island, and the general acceptance of the Jersey Trusts Law of 1984, the Committee's conclusion was that there was a need to dispel the present uncertainty concerning trusts in Guernsey.*
> *… The Law would follow the general pattern of the Jersey Law (although it would not invalidate trusts of realty) and would seek to set out a basic infrastructure of legal principles on the authority of which trustees, beneficiaries and settlors could operate with certainty and confidence. It would incorporate many of the principles of English trust law, but not all such principles, and not necessarily without modification.*
>
> *… The Law would seek in particular to confer very wide supervisory powers on the Court to ensure that these classes of people are properly protected.*
>
> *Enactment of a formal Trusts Law will also enable an extension to Guernsey of the 1984 Hague Convention on the Law applicable to Trusts and on their Recognition. This will result in the recognition, in other contracting states, of Guernsey trusts.*"

Although the Policy Letter is silent on the point, given the nature of a multilateral Convention such as the 1984 Hague Convention, it necessarily means that Guernsey would similarly recognise foreign law trusts. Amongst the matters recommended for coverage in the proposed Law was "*(k) the law which is to govern any particular trust (its "proper law")*".

11. The 1989 Law has since been repealed and replaced by the Trusts (Guernsey) Law, 2007. Both Laws distinguish between a Guernsey trust and a foreign trust. By section 3(2) of the 2007 Law "*A trust the proper law of which is the law of Guernsey is referred to in this Law as a "**Guernsey trust**"*" (see previously the definition in section 73(1) of the 1989 Law). Section 80(1) of the 2007 Law (in like terms to section 73(1) of the 1989 Law) provides that "*"**foreign trust**" means a trust the proper law of which is not the law of Guernsey*". Further, by virtue of section 65(1) of the 2007 Law (which is in the same terms as section 59(1) of the 1989 Law), "*Subject to subsection (2), a foreign trust is governed by, and shall be interpreted in accordance with, its proper law.*" Section 65(2) deals with when a foreign trust is unenforceable in Guernsey and is inapplicable in the present case.

12. The distinction is of some importance because Part II of each Law contains provisions applicable only to a Guernsey trust whereas Part III contains provisions applicable only to a foreign trust (albeit that these provisions are only those contained in section 65 of the 2007 Law). Part IV of each Law then contains provisions of general application, with Parts I and V being preliminary and supplemental respectively.

13. Advocate Robilliard's submissions commence by focusing on what is a trust. Section 1 of the 2007 Law provides that:

> "*A trust exists if a person (a "**trustee**") holds or has vested in him, or is deemed to hold or have vested in him, property which does not form or which has ceased to form part of his own estate –*
>
> *(a) for the benefit of another person (a "**beneficiary**"), whether or not yet ascertained or in existence, and / or*
>
> *(b) for any other purpose, other than a purpose for the benefit only of the trustee.*"

By reference to the definitions in section 80(1), "*"**trust property**" means property held on trust*" and "*"**trust**" includes (a) the trust property, and (b) the functions, interests and relationships under a trust*". Accordingly, by looking at the property in question and seeing whether the conditions for there being a trust of that property exist, one is concentrating on the legal relationship in respect of the property. Unlike, for example, a company, a trust is not a legal entity.

14. As indicated in the Policy Letter preceding the enactment of the 1989 Law, the intention was that this legislation would enable the 1984 Hague Convention to be extended to Guernsey. The notification made by the United Kingdom on behalf of Guernsey in that regard was registered on the Records of the Island on 29 June 1993 (see Ordres en Conseil Vol. XXXIV, p. 438). Advocate Robilliard also drew attention to the use made of the Convention by the Court of Appeal in *Stuart-Hutcheson v Spread Trustee Company Limited* (unreported, 15 July 2002, at para. 20) to demonstrate that its provisions provide assistance to the construction to be given to domestic legislation.

15. The 1984 Hague Convention was given effect in the United Kingdom by the Recognition of Trusts Act 1987. The text of the Convention is set out in the Schedule to that Act. Article 2 of the Convention provides:

> "*For the purposes of this Convention, the term "trust" refers to the legal relationship created—inter vivos or on death—by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.*
>
> *A trust has the following characteristics—*
>
> *(a) the assets constitute a separate fund and are not a part of the trustee's own estate;*
> *(b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;*
> *(c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.*
>
> *The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.*"

Section 1 of the 2007 Law is consistent with this Article.

16. As regards the applicable law, Article 6 of the Convention provides that:

> "*A trust shall be governed by the law chosen by the settlor. The choice must be express or be implied in the terms of the instrument creating or the writing evidencing the trust, interpreted, if necessary, in the light of the circumstances of the case.*"

Article 7 then provides that:

> "*Where no applicable law has been chosen, a trust shall be governed by the law with which it is most closely connected.*
>
> *In ascertaining the law with which a trust is most closely connected reference shall be made in particular to—*

> *(a) the place of administration of the trust designated by the settlor;*
> *(b) the situs of the assets of the trust;*
> *(c) the place of residence or business of the trustee;*
> *(d) the objects of the trust and the places where they are to be fulfilled.*"

Those articles are given effect by section 3 of the 2007 Law. Indeed, the four matters listed are reproduced almost verbatim in subsection (1)(b).

17. By virtue of Article 8 of the Hague Convention, the applicable law found through Article 6 or 7:

> "*... shall govern the validity of the trust, its construction, its effects and the administration of the trust.*
>
> *In particular that law shall govern—*
>
> *(a) the appointment, resignation and removal of trustees, the capacity to act as a trustee, and the devolution of the office of trustee;*
> *(b) the rights and duties of trustees among themselves;*
> *(c) the right of trustees to delegate in whole or in part the discharge of their duties or the exercise of their powers;*
> *(d) the power of trustees to administer or to dispose of trust assets, to create security interests in the trust assets, or to acquire new assets;*
> *(e) the powers of investment of trustees;*
> *(f) restrictions upon the duration of the trust, and upon the power to accumulate the income of the trust;*
> *(g) the relationships between the trustees and the beneficiaries including the personal liability of the trustees to the beneficiaries;*
> *(h) the variation or termination of the trust;*
> *(i) the distribution of the trust assets;*
> *(j) the duty of trustees to account for their administration.*

18. Advocate Robilliard submitted that this Article "*enjoins the parties to apply the proper law of the trust to the trust property*". This Article explicitly deals with validity (see, also, Article 15(d) relating to "*the transfer of title to property*") and he further submitted that one cannot distinguish between the original establishment of the trust by one piece of paper and subsequent assets transferred in. Advocate Le Tissier had acknowledged that the proper law of the MD Events Limited Remuneration Trust is English law and the legal consequence of that acknowledgement was that dispositions of additional property to be held by the trustees in accordance with that Trust would similarly be governed by its proper law, namely English law.

19. In his written Reply, Advocate Le Tissier does not dispute that the Court is bound to apply section 65 of the 2007 Law in a case where it is engaged, but suggests that that is not the case in relation to his clients' Application. In particular, he emphasises that section 65 refers to governance and interpretation. Similarly, by reference to Article 8 of the Hague Convention, he submits that the Application does not require a determination on the validity, construction, effects or administration of the trust. In short, if the Application does not "activate" section 65 or Article 8, the Court is not obliged to apply the proper law of the MD Events Limited Remuneration Trust.

20. In making those submissions, Advocate Le Tissier has drawn attention to section 14(1) of the 2007 Law:

> "*Subject to the terms of the trust, all questions arising in relation to a Guernsey trust or any disposition of property to or upon such a trust, including (without limitation) questions as to –*
>
> *(a) the capacity of the settlor,*
> *(b) the validity, interpretation or effect of the trust or disposition or any variation or termination thereof,*
> *(c) the administration of the trust, whether it is conducted in Guernsey or elsewhere, including (without limitation) questions as to the functions, appointment and removal of trustees and enforcers,*
> *(d) the existence and extent of any functions in respect of the trust, including (without limitation) powers of variation, revocation and appointment, and the validity of the exercise of any such function,*
> *(e) the distribution of the trust property,*
>
> *are to be determined according to the law of Guernsey without reference to the law of any other jurisdiction.*"

He points out that there is nothing equivalent in relation to a foreign trust and relies on the absence of any wording about "*any disposition of property to or upon such a trust*" in section 65 to indicate that the proper law of a foreign trust does not apply in the same way as for a Guernsey trust. However, that submission overlooks that section 65 is effectively directing attention away from Guernsey law to the proper law of the foreign trust and one would then need to look at the proper law to see how it deals with these matters. In the case of England and Wales, the incorporation of the provisions of the Hague Convention into domestic law by way of the 1987 Act, which is the equivalent of the relevant provisions in Guernsey's 2007 Law, is, therefore, potentially sufficient for Advocate Robilliard's submission to stand scrutiny.

21. The structure of Guernsey's law of trusts operates as a simple binary system. A trust is either a Guernsey trust or a foreign trust. If it is a Guernsey trust, Part II of the 2007 Law governs the position and, in particular, section 14 requires the Court to use Guernsey law, and no other law, to resolve the types of question identified therein. If, however, it is a foreign trust, section 65(1) requires the Court to have regard to the proper law of the trust and then to see what, if anything, that foreign law dictates in respect of those questions.

Distinguishing the rocket and the rocket-launcher

22. In relation to this sort of issue, Article 4 of the Hague Convention provides that "*The Convention does not apply to preliminary issues relating to the validity of wills or of other acts by virtue of which assets are transferred to the trustee.*" At the resumed oral hearing, Advocate Le Tissier sought to draw a distinction between steps preliminary to receipt of an asset by a trustee, which will always be covered by this Article and the subsequent administration of the trust and the trust property. In particular, the fact that the MD Events Limited Remuneration Trust already existed at the time of the Deed of Assignment and the Deed of Contribution was, in his submission, irrelevant, because these were both preliminary aspects of receipt by the trustee of additional trust property. Therefore, because the Deed of Assignment and the Deed of Contribution have both now been brought into question by the transferors of the relevant assets, these become preliminary issues relating to acts by virtue of which assets were transferred to the trustee rather than being part and parcel of matters relating to an existing trust. In turn, Advocate Robilliard pointed to the different approach taken by asserting common law mistake or equitable mistake. Because the Application relies on advancing equitable mistake, he suggested that it is less clearly what Article 4 is directed at addressing.

23. Prior to the resumed oral hearing, Counsel had provided copies of some helpful material written by Professor Jonathan Harris. The earliest in time is *The Hague Trusts Convention: Scope, Application and Preliminary Issues* (Hart Publishing, 2002). In relation to Article 4 of the Hague Convention, Professor von Overbeck's Explanatory Report (at para. 53) had offered an analogy with a rocket-launcher and its rocket:

> "*The image employed was that of a launcher and the rocket; it will always be necessary to have a 'launcher', for example a will, a gift or another act with legal effects, which then launches the 'rocket' the trust. The preliminary act with legal effects, the 'launcher', does not fall under the Convention's coverage.*"

Professor Harris then comments (at page 151) that these rocket launching issues "*are of crucial importance and, in some cases, themselves give rise to very complex and unsettled choice of law problems*" and continues that "*Where the transfer of property is ineffective by its governing law, the fact that it was valid by the law putatively applicable to the trust is irrelevant.*"

24. In this regard, Advocate Le Tissier drew attention to para. 54 of the von Overbeck Report:

> "*A transfer of assets to the trustee is a sine qua non condition for the creation of the trust. But the law designated by the Convention applies only to the establishment of the trust itself, and not to the validity of the act by which the transfer of assets is carried out. This act is entirely governed by the law to which the conflicts rules of the forum submit it. It may be moreover that different laws will be applicable for the substance and for the form of this act, or yet for the capacity of the person who has effected it. If it turns out that under the applicable law the transfer is not valid, one may consider at the start that the trust has not come into existence since an essential element is lacking.*"

25. Applying these principles to the two dispositions in this case, I am satisfied that Article 4 of the Hague Convention does not assist me in determining the law that will need to be applied. Neither Counsel has argued that the proper law of the trust is Guernsey law meaning that Part II of the 2007 Law applies. Advocate Le Tissier's submissions that Guernsey law should be applied, to which I will turn in more detail shortly, are based on the proper law of the restitutionary obligation rather than the proper law of the trust. He acknowledged that the proper law of the trust is English law. Accordingly, the mutual exclusivity of the distinction between Guernsey and foreign trusts in the 2007 Law leads to the conclusion that this is not a Guernsey trust for the purposes of that Law.

26. As such, being an English law trust, and insofar as this remains relevant, the way in which the Hague Convention has been given effect in English law through the 1987 Act means that its provisions have been incorporated into domestic law without further ado. This means that Article 4 of the Hague Convention would exclude from consideration in accordance with English law questions relating to preliminary issues, ie, the rocket-launcher matters. Therefore, the proper law relating to those issues has to be identified in another way.

27. Further guidance is offered in *The International Trust* (3rd ed., Jordans, 2011) and, in particular, by Chapter 2 entitled "Launching the Rocket – Capacity and the Creation of Inter Vivos Transnational Trusts", authored by Professor Harris, on which Advocate Robilliard based his further submissions at the resumed oral hearing. Focusing on intangible movables, the starting point (at para. 2.39) is expressed to be:

> "*Given that the situs of an intangible is actually likely to be more enduring than that of a tangible movable, and that the lex situs can sensibly be applied to capacity to*

> *transfer the latter, it is difficult to see in principle why the lex situs ought not also to be applied to the transfer of intangibles.*"

This analysis then leads him to suggest (at para. 2.49) that the conclusion to be drawn is as follows:

> "*(a) The capacity of any settlor to dispose of any interest in his property inter vivos is governed by the lex situs at the time of the purported transfer.*
> *(b) The capacity of any settlor to create a trust of any property of which he may, according to rule (a), dispose, is governed by the proper law of the trust.*"

28. As regards the issue of the passing of property to the trustee, ie, its vesting, Professor Harris moves on to consider whether there should be two questions here relating to the transfer of the legal title to the trustee and the transfer of equitable title or equitable rights to the beneficiary. In this regard, he notes that "*once legal title has validly been transferred to B, the rocket-launching process is at an end and the law applicable to the trust takes over*". This is the distinction that Advocate Robilliard submitted was of great significance. The Application is not founded on arguing that legal title in the shares and the money has not been legally vested in the First Respondent as trustee, but rather that the Court should exercise its discretion, on equitable principles, to set aside or, as he put it, "unscramble" the two dispositions on the basis of mistake.

29. At paragraph 2.69 of his 2011 work, Professor Harris offers the following choice of law rules for the transfer of property on trust:

> "*(1) Whether any proprietary interest has been transferred inter vivos from a would-be settlor to a would-be trustee is determined by the lex situs at the time of transfer. However, in the case of debts, the assignability of the debt will be determined by the law under which the debt arose; and the question whether the debt has been assigned to the trustee will be determined by the law governing the assignment itself.*
>
> *(2) Whether the transfer is effective to transfer an equitable interest to the would-be beneficiary, and thus to form a completely constituted trust, is determined by the proper law of the trust.*"

30. In relation to the Deed of Assignment of the shares, therefore, the *lex situs* route leads one clearly to applying the law of England and Wales. This was explained in the following way at para. 2.60:

> "*The law still purports to ascribe a situs to intangible property. Shares have their situs in the country where they may be dealt with between shareholder and company. So, if shares are only transferable by entry on the register, they are situated in the country where the register is kept.*"

The company is registered in England and Wales. The Deed of Assignment transferred the legal ownership of the 100,000 ordinary shares from Ms Dervan to the First Respondent. The *lex situs*, therefore, is the law of England and Wales and, in my judgment, that is the applicable law in respect of the questions arising in relation to that disposition under the Application. The fact that the applicable law identified in this way corresponds with the choice of law on the face of the Deed of Assignment lends support to that conclusion.

31. The position in relation to the Deed of Contribution is not as clear-cut. The transfer of £500,000 by the company to the First Respondent took place before the end of the company's tax year, some weeks in advance of the creation of the MD Events Limited Remuneration Trust. The Board Minute to which Ms Dervan refers at para. 29 of her Affidavit describes

that as a payment "*to hold upon constructive trust in [Concept's] clients' account, on behalf of the proposed Company's Remuneration Trust …*". There is an argument, therefore, that the money was already held in Guernsey at the time of the formal Deed of Contribution and, if applying the *lex situs* in the same way as for the shares, it would be the law of Guernsey and not the law of England and Wales. Further, if treated as a debt, its assignment will depend on the law under which it was created and whether it has been assigned would be a matter of the *lex situs* (see para. 2.68).

32. I do not, however, consider that that is the right approach in relation to the disposition of the money by way of the Deed of Contribution. When it was passed to the First Respondent it was clearly envisaged to be held by it as trust property. It did not form part of the First Respondent's estate or assets then, or subsequently, and so was trust property for the purposes of the 2007 Law. Applying section 3 of that Law, although some of the factors point towards the proper law of that trust being the law of Guernsey, it is not conclusively so. The intended use of the money paid to the First Respondent by the company was to go into the Remuneration Trust the company had in mind, and duly settled with an express choice of law. As such, the closest connection can, in my view, be regarded as England and Wales because of the ongoing connection to the company and its objective in establishing a Remuneration Trust for the benefit of its employees, both existing and previous. Accordingly, I have reached the conclusion that the applicable law in respect of the questions arising in relation to that disposition under the Application is also the law of England and Wales. Once again, I consider that the fact that the applicable law identified in this way corresponds with the choice of law on the face of the Deed of Contribution lends support to that conclusion.

The Jersey cases

33. In reaching these conclusions I am aware that I am rejecting Advocate Le Tissier's submission relying on how the law has been developing in Jersey and relying on rule 230 in *Dicey, Morris and Collins, The Conflict of Laws*. In the circumstances, in order to address those submissions briefly, I make the following comments on them.

34. Both Counsel drew attention to a previous decision of this Court, *Arun Estate Agencies Limited v Kleinwort Benson (Guernsey) Trustees Limited* [2009-10] GLR 437 in which Deputy Bailiff Collas (as he then was) pointed to the fact that the trust deed in that case provided that the proper law was that of England and Wales and Counsel were agreed that the law the Court should apply was English law. Advocate Robilliard, who had the benefit of having appeared in the *Arun* case, suggested that Advocate Le Tissier was inviting the Court not to follow this decision. He also subjected the Jersey cases on which Advocate Le Tissier relied in support of his submission that the Court should rule in favour of applying Guernsey law to detailed scrutiny. The route I have taken to reaching the conclusion that English law should be applied in the present case is different from the route taken in the *Arun* case, even though the outcome is the same. Because I was not faced with the same situation as that facing my predecessor in the *Arun* case, this decision is neither the application of or any departure from that case.

35. Advocate Le Tissier placed particular reliance on the approach of the Royal Court of Jersey in *In the matter of the S Trust* [2011] JRC 117. In order to determine the question of the applicable law, as between the two competing possibilities, namely English law and Jersey law, the Court had regard to rule 230 as set out in *Dicey, Morris and Collins* (and to which I will turn shortly) and concluded (at para. [15]):

> "*This is not a case where the alleged obligation arises in connection with a contract or in connection with immovable properly. Nor it is a case where a beneficiary is seeking to enforce a claim arising under a trust which would ordinarily be governed by the choice of law rules for trusts. This is a case falling within the 'other*

circumstances' mentioned in Rule 230. The proper law of the obligation is accordingly the law of the country where the enrichment occurs."

36. In that case, the factual situation was slightly different from the present case. There, the Applicant, or representor, had transferred shares in a French company to a company registered in Jersey. That Jersey company subsequently declared a trust in respect of those shares and that trust was expressed to be governed by English law. There is no reference in the Court's judgment to the Hague Convention, the learning thereon of Professor Harris or the equivalent in the Trusts (Jersey) Law 1984 of section 65 of our 2007 Law, namely Article 49.

37. Advocate Le Tissier also commented on *CC Limited v Apex Trust Limited* [2012] JRC 071, which related to a similar application to set aside on the ground of mistake a transfer of assets to a trust, which had been effected by way of a Deed of Assignment expressed to be governed by English law. Although the Court recognised (at para. [37]) that "*it can be argued that mistake goes to the issue of whether the Deed of Assignment is valid at all and, if it is not valid, the choice of English law in the Deed was not valid either and should not determine the issue*", it decided the question by reference to the law governing the trust, which was expressed to be Jersey law, through applying Article 9 of the 1984 Law, which is in comparable terms to section 14 of Guernsey's 2007 Law. In other words, because the Jersey legislature had enacted a provision requiring the application of Jersey law to the exclusion of any rule of foreign law to resolve such questions, that was conclusive.

38. A similar outcome was reached in the most recent decision to which I was referred, *Tait and Tait v Apex Trustees Limited* [2012] JRC 148. Because both of these cases were decided through applying Article 9 of Jersey's 1984 Law, neither of them assist me in the approach to take in the present case. This is because no one has suggested that the MD Events Limited Remuneration Trust is governed by any law other than English law. I am not dealing with a Guernsey trust, unlike the position mutatis mutandis in the two Jersey cases.

39. Before returning to rule 230 in *Dicey, Morris and Collins*, I might conveniently just mention in passing the earlier Jersey cases to which I was referred. In two of the cases (*In the matter of the DSL Remuneration Trust* [2007] JRC 251 and *GL v Nautilus Trustees Limited* [2009] JRC 164A), English law was applied in each to an English law trust without further consideration. In the other two cases (*In the matter of Mr and Mrs P Capital Asset Protection Plan Trust* [2008] JRC 159 and *In the matter of the A Trust* [2011] WTLR 745), both involved Jersey law trusts, with the consequence that Jersey law was applied. None of these cases takes the issue of how to determine the applicable law in a case such as the present case further. This is because section 14 of the 2007 Law does not apply and the approach now likely to be taken by the Royal Court of Jersey in a non-Jersey law situation is that adopted in *In the matter of the S Trust* [2011] JRC 117.

Proper law of the restitutionary obligation

40. Rule 230 in *Dicey, Morris and Collins* appears in Chapter 34 on Restitution and is in these terms:

> "*(1) The obligation to restore the benefit of an enrichment obtained at another person's expense is governed by the proper law of the obligation.*
>
> *(2) The proper law of the obligation is (semble) determined as follows:*
>
> *(a) If the obligation arises in connection with a contract, its proper law is the law applicable to the contract;*
> *(b) If it arises in connection with a transaction concerning an immovable (land), its proper law is the law of the country where the immovable is situated (lex situs);*

> *(c) If it arises in any other circumstances, its proper law is the law of the country where the enrichment occurs.*"

No one has suggested that clause (2)(b) is engaged because the case does not involve land. The choice, therefore, is between applying the contracts approach or, as was found in ***In the matter of the S Trust***, the "other circumstances" approach.

41. The general explanation for clause (2)(a) of the Rule is contained in paragraphs 34-020 and 34-021:

> "*Although the obligation to restore an unjust benefit does not arise from a contract, it may, and very frequently does, arise in connection with a contract. This is the case where a party seeks to recover money paid pursuant to an ineffective contract, e.g. by reason of a failure of consideration or as a repayment of money paid under an illegal contract or where he claims a quantum meruit for work done or services rendered under a contract which turned out to be void. In all these and similar cases, it is submitted that the existence and the scope of the obligation to restore the benefit are in principle governed by the law which governs the contract, or by what would have been the governing law of the contract, if it had been validly concluded.*
>
> *Thus stated, the choice of law for dealing with the consequences of a contract being void, or being avoided, or being discharged for frustration, will be the law which governed the real or supposed contract and pursuant to which the avoidance or discharge was brought about.*"

42. The commentary continues (at paragraphs 34-023 and 34-024):

> "*If the parties have expressly chosen the law to govern the contract, it is realistic to suppose that, had they given the matter any thought, they will have expected this law also to deal with the remedial consequences if the contract is ineffective or has failed.*
>
> *… if the contract is void on account of a common and fundamental mistake as to the subject matter of the contract, there may be no objection to giving effect to an express choice of law: the parties may have been clear in their intention that Ruritainan law should govern the contract and any consequences of its invalidity, even though they were mistaken as to the existence of the subject matter of the contract. The nature of the invalidity does not appear to impugn the express choice of law …*"

Further, the comment offered by Zweigert and Müller-Gindullis in their chapter on ***Quasi-Contract*** in Lipstein's ***International Encyclopedia of Comparative Law*** is quoted, seemingly with endorsement, at para. 34-025:

> "*… the application of the law which governs the contract 'does not imply that the legally distinct claim for unjustifiable enrichment is to be treated as if it were a contractual claim. It means only that the claim for unjust enrichment is determined by the same law as that which governs the underlying transaction in order to apply as far as possible one legal system only to all aspects of a unitary situation'."*

43. In the light of this guidance, I take the view that, because both of the dispositions referred to in the Application were undertaken by virtue of Deeds expressed to be governed by English law, there is a strong argument in favour of concluding that the proper law of each is connected with the respective contracts. I am once again conscious of the need to distinguish between common law mistake, which is not being relied on, and the invocation of the equitable mistake jurisdiction of the Court. However, the general tenor of the commentary is that, if the parties to a contract have addressed their minds to the law they have chosen to govern the contract, then it is likely that they would, if they had also addressed their minds to

it, have indicated that they expected that law to apply to dealing with the consequences that that contract fails. Whilst I accept Advocate Le Tissier's submission that "*clause (2)(a) … does not state an inflexible rule which must be applied without exception to every case connected to a contract*" (see Dicey, Morris and Collins, para. 34-028), I do not regard my approach as slavish adherence to the principle but rather its application to the particular facts of this case. Accordingly, with both Deeds having English law choice of law provisions, which are consistent with the overall flavour of what was happening, I would treat these matters as indicative that rule 230(2)(a) can be used to reach the conclusion that the applicable law for any restitutionary obligation in respect of each disposition is English law.

44. In respect of rule 230(2)(c), Dicey, Morris and Collins explains (at para. 34-030) that:

> "*The rationale for the traditional formulation of clause (2)(c) is that in the absence of a prior relationship between the parties to which reference may be made, or which may contribute to the identification of the proper law of the obligation to make restitution, the law of the place where the enrichment occurred may be expected to be that which has the best claim to be applied to any obligation to restore.*

The main comment to make here is that the establishment of the MD Events Limited Remuneration Trust was in the minds of the settlor company and Ms Dervan as a means of achieving what Ms Dervan wished to achieve at that time and prior to these two dispositions. Accordingly, there was some form of relationship with the First Respondent rather than some benefit being conferred on the First Respondent with whom no prior contract or supposed contract existed.

45. Again, one might be tempted to draw a distinction between the Deed of Assignment of the shares and the Deed of Contribution of the money. A prior contract clearly existed in respect of the shares, supporting the view that it is appropriate to look towards a principle other than rule 230(2)(c) in respect of that disposition. As regards the payment of £500,000 from the company, the position is more confused. It was already paid by the company to the First Respondent to hold on trust to its order. If this was the first contact between the company and the First Respondent, there may be an argument in favour of saying that rule 230(2)(c) should be applied. However, the disposition that is the subject of the Application is not the initial payment to the First Respondent but the payment "on or about 18 May 2010", ie, the transfer of the money by way of the Deed of Contribution. By that time, there was already a relationship between the company and the First Respondent for the First Respondent to provide its professional services to the company and then to act as trustee of the MD Events Limited Remuneration Trust. I regard this factor as a reason why rule 230(2)(c) is inapplicable and further support for the conclusion that rule 230(2)(a) applies instead.

46. Although application of rule 230(2)(c) would potentially result in the conclusion that the place of enrichment is Guernsey, I do note that in para. 34-052 of Dicey, Morris and Collins this is described as "*a starting point*" when faced with a case not falling within either of the other sub-clauses and "*it is not to be applied whenever the centre of gravity of the factors relevant to the obligation indicates that the proper law is different*". Looking at just the money, one approach is to consider that the proper law can be inferred from what happened throughout the transaction resulting in it being held in the MD Events Limited Remuneration Trust. Such an analysis, based on claims in the laws of obligations, would involve looking for the closest and most real connection. The conclusion might be that, with the money being held in Guernsey by a Guernsey-based trustee, Guernsey law is the proper law. However, there is also an argument that the continuing links to the company and all the other surrounding circumstances about the establishment of the MD Events Limited Remuneration Trust point to the proper law being English law. Because I have already decided the question on a different basis, it is unnecessary for me to reach any firm conclusion on this issue. I have mentioned the thought processes, however, to show that, even if rule 230(2)(c) were to be applied, there may well be no automatic and conclusive outcome.

Conclusion

47. For the reasons given, I have concluded that the applicable law in relation to both of the dispositions addressed in the Application is the law of England and Wales. Those conclusions will form the basis of the directions to the Jurats at the final hearing. Accordingly, appropriate evidence of the way in which these matters would be dealt with under English law will be needed prior to the hearing with Jurats and, at the conclusion of the resumed oral hearing, I was comforted that Counsel indicated that this was already well-advanced.