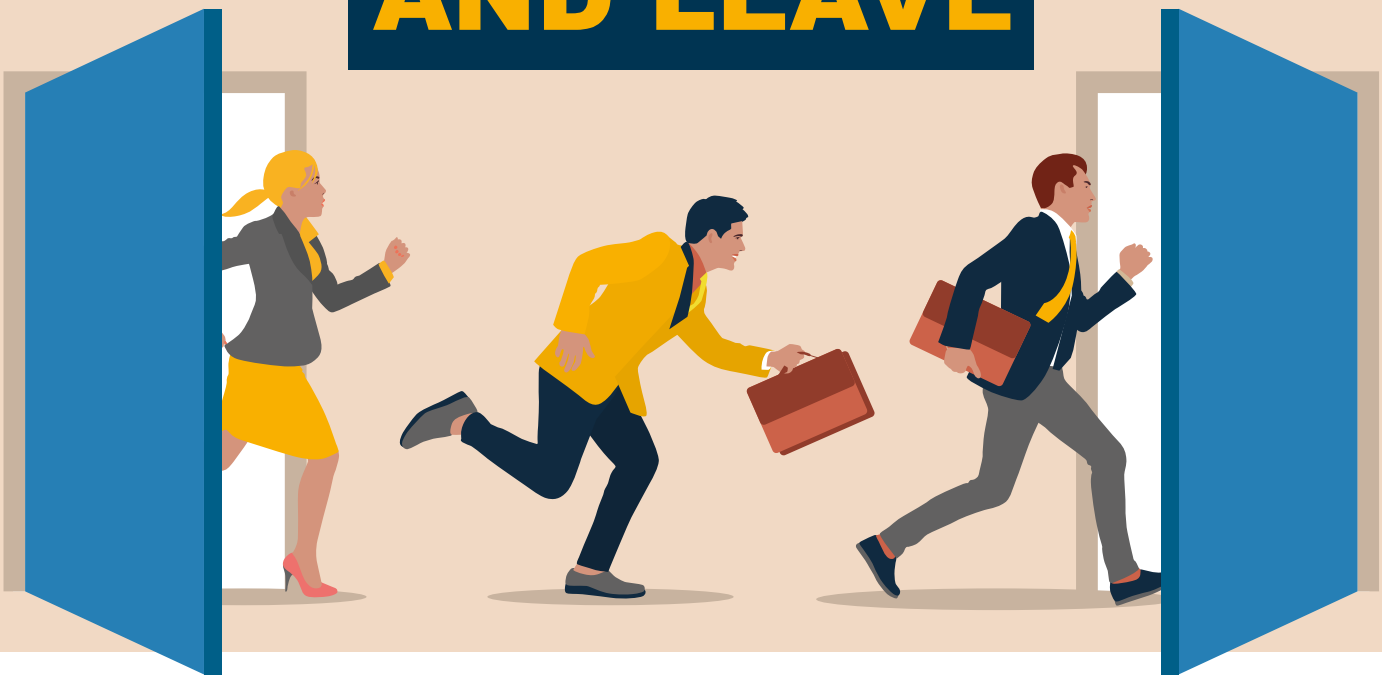
MAKE LIKE A TR(UST)EE AND LEAVE



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A trustee is about to get sued by a beneficiary. The trustee has the power to change the governing law and jurisdiction. Doing so will sever the immediate connection between the trust and the beneficiary's intended forum. Can the trustee exercise that power to change the law and jurisdiction to a more trustee-friendly destination and thus escape the litigation?

On its plain words, a power to change the law and jurisdiction has no limits on its legal scope. The underlying legal issue is the purpose of the power and whether it is proper to use it to gain an advantage in litigation. The practical issue is whether it will do the trustee any good.

We now know from Grand View Private Trust Co v. Wong [2022] UKPC 47 that the purpose for which a power is conferred is discerned from a full analysis of all the circumstances, aiming to find the settlor's objective intention. That is more easily done for some powers than others: a power of addition may well have been discussed with the settlor, who might have given some guidance about its purpose in a letter of wishes. But a power to change the law and jurisdiction might just be a bit of boilerplate that wasn't even drawn to the settlor's attention, let alone thought about in detail.

The courts have given a mixed reception to trustees changing the law and jurisdiction of their trusts.

In Bermuda, the court has welcomed previously foreign trusts that have become Bermuda trusts. The aim of changing to Bermuda, at least in some cases, was to exploit Bermuda's Perpetuities and Accumulations Act 2009. That Act provides a simple route for trustees to strip off limits on their powers imposed under the rule against perpetuities. For example, in G Trusts [2017] SC (Bda) 98 Civ, a trust had started life under Cayman Islands law. The trustees changed the law to that of Bermuda so that they could get rid of the perpetuity period and avail themselves of Bermuda's sympathetic attitude to restricting beneficiaries' access to information.

On the other side, cases in the Bahamas, and Jersey and Mauritius have found that a change in law and jurisdiction was made for an improper purpose.

In Patinage Trust (Bahamas, 2017), the plaintiff beneficiary had attempted to issue proceedings against the trustee, but named the wrong entity in her summons. She also, presciently, obtained an injunction which among other things forbade the trustee from changing the proper law. The summons and injunction were sent to the trustee electronically. The trustee pointed out the error, and the plaintiff sought to amend her summons. She was too late:

the trustee had changed the proper law to Irish law and the jurisdiction to Switzerland and had in fact done so before bringing the mistake to the plaintiff's attention.

Winder J took a dim view. He described the trustee's conduct as sharp practice, worthy of moral condemnation. The trustee claimed that it had chosen Switzerland as the forum because the underlying dispute with the beneficiary was about the obligation to pay French tax, and there might have been breaches of French revenue obligations. The explanation about Irish law was even less convincing, and rested on Irish law being based on common law and an assertion that Ireland would not exercise jurisdiction over the trustee in Switzerland. Winder J accepted the plaintiff's submission that the change was exercised for the improper purpose of divesting the Bahamian court of jurisdiction and conferring a litigation advantage on the trustee and that it was prompted by sight of the summons and injunction.

The Crociani saga gives us another example. The case centred on Mme Crociani's extraction of assets from the family trusts and later attempts to put those assets beyond the reach of her disappointed daughter. The then-trustees, of whom Mme Crociani was one, purported to change the proper law of the trust to that of Mauritius and to retire in favour of a Mauritius trustee. By that time, at least one letter of claim had been sent and relations between mother and daughter had completely broken down.

In the judgment (Crociani v. Crociani 2017 (2) JLR 303) following the eventual hearing of the claim – in which Mme Crociani declined to take part – it was held that the appointment of the Mauritius trustee was a "tactical move, the purpose of which was to impede Cristiana's claims." It was therefore void and would be set aside.

The cases offer us two extremes: the variation cases are clearly for the benefit of the class of beneficiaries as a whole; the litigation advantage cases are equally clearly not. But where the situation is something in between, the picture gets a bit murkier. If the proposed claim is unmeritorious then it might well be to the advantage of the trust as a whole if the proceedings can be avoided.

It thus appears that there may not be an absolute rule against severing ties with a jurisdiction to gain a tactical benefit. But is that benefit a practical one? The trust may have severed connections with its starting jurisdiction for the future, but does that insulate the trustee from liability from its past actions?

In England, CPR PD6B para. 3.1(12E) now explicitly allows the court to exercise jurisdiction where a breach of trust was committed in England and Wales. Other jurisdictions may recognise similar grounds to hear a claim without needing express provision. Thus, in Crociani [2014] UKPC 40, the Privy Council held that there was a strong case for contending that whether the change in jurisdiction was a breach of trust should be decided by the Jersey court under Jersey law.

Can the trustee take any steps to protect the decision to move jurisdiction? There is the possibility of a blessing in advance of the exercise of the power. But the application may involve joining the hostile beneficiary – who might respond with an application for an injunction – and would probably require airing the dispute before the court. The trustee would have to find a careful balance between showing that the proposed claim is so unmeritorious that a change in jurisdiction is justified, but not showing that it could strike out the claim or get summary judgment.

There may be no such middle ground, and the trustee would be in a worse position for having telegraphed its intentions.

The risk, then, is that the trust slips its moorings and sails away on the evening tide, but the disappointed litigant, like Ariadne, may still exact a terrible revenge. And if the court has jurisdiction over the trust, even post-departure, a judgment might be entered that can be enforced in the new jurisdiction.