

STEP Conference Cayman Islands 2023 – Top Takeaways

UPDATE

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The Society of Trust and Estate Practitioners (STEP) held its annual *International Wealth Structuring Forum* in the Cayman Islands on 19 and 20 January 2023 at the Ritz-Carlton, Grand Cayman. The forum was an opportunity for leading trust and wealth management professionals to gather and discuss the latest local and international developments impacting the industry. Hector Robinson KC and James Anson-Holland of Mourant attended the forum and have summarised the top three takeaways from the panel discussions.

The mercurial modern assets

Trustees are being asked to manage and protect an increasingly diverse array of modern assets, including cryptocurrencies and non-fungible tokens. These assets can raise many varied and complex questions for trustees and the courts. A particularly interesting aspect of cryptocurrency relates to private keys (ie a secure code that is used to complete transactions and prove ownership). A trustee tasked with holding cryptocurrency will have to think carefully about how private keys are held and to ensure appropriate protocols are in place to prevent theft, determine possession following death or illness, and to respond to court orders seeking to enforce judgments against underlying asset. The importance of this is illustrated by the recent High Court of England and Wales decision *Tulip Trading Limited v Bitcoin Association for BSV* [2022] EWHC 667 (Ch), which considered whether software developers on a particular blockchain owed fiduciary and/or tortious duties to owners of cryptocurrency on that blockchain to help them access their assets when they lost their private keys. Although it was held that that software developer did not owe these specific fiduciary and tortious duties, the decision is currently being appealed so a further judicial pronouncement is expected in the near future.

Grappling with insolvent trusts

The recent Privy Council decision *Equity Trust (Jersey) Ltd v Halabi* [2022] UKPC 36 has placed a spotlight on insolvent trusts. The decision principally concerned what happens if there are insufficient trust assets available to indemnify two or more trustees. The majority favoured the *pari passu* ranking of trustees' claims over the minorities 'first in time' approach that the courts of equity traditionally use to resolve competing claims. There are, however, many further unresolved questions when it comes to insolvent trusts that Commonwealth courts will have to grapple with in the future. This includes the nature and scope of creditors' rights against a trustee or a beneficiary to recover distributions that are made when a trustee knows, or ought to know, that a trust is insolvent. The potential liability of the directors of corporate trustees in such situations is also ripe for exploration. That is, whether a director of a corporate trustee may be liable to beneficiaries through a direct fiduciary duty, some sort of accessory liability, or by way of a 'dog-leg' claim (whereby a corporate trustee's right of action against a director for breach of director duties is treated as a chose in action that is property of the trust).

The future of trust and estate litigation

The future of trust and estate litigation, much like the future of civil litigation more generally, is likely to include:

- **The increased use of technology:** The proliferation (and, to an extent, normalisation) of hearings and trials being conducted remotely and electronically provides an increased level of accessibility for litigants and witnesses located overseas. It also mitigates against the increasing costs and environmental effects associated with in-person and paper-based litigation. However, it will be paramount to ensure the principles of open justice are maintained.
- **A greater focus on alternative dispute resolution (ADR) processes:** If the use of mediation, arbitration, expert determination, and other ADR processes help to resolve trust and estate disputes quicker and more cost-effectively than litigation, this is to be welcomed. However, the willingness of the Cayman Islands courts to hear and determine disputes in private and at relatively short notice often attenuate the benefits of some ADR processes.
- **The increased use of artificial intelligence:** The introduction of generative artificial intelligence software like the recently released online chatbot ChatGPT will no doubt play a role in future litigation. While that precise role is not yet clear, its ability to accurately process large swaths of often complex information and answer questions in clear, well punctuated prose will no doubt assist parties to disputes in the future.

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