



VOISIN LAW

While I was munching on my walnuts over the Christmas period, I had an opportunity to review the 2004 American film, Team America: World Police. For those who have not seen it, it is a satirical look at the global impact of US politics.

Some of us are embarking upon the new year 'un trionfo'. Of course, I am referring to the fact that 3 Italians were cleared last month in relation to a £20 billion fraud attempt involving a local bank.

In addition (and I must declare a professional interest in this matter), a judgment was published in November in relation to a challenge by a number of parties concerning, amongst other things, the validity of the Taxation (Exchange of Information with Third Countries) (Jersey) Regulations 2008 ("TEIA").

Let's not fool ourselves. Both of these processes have been expensive. I am also aware that the challenge to the validity of the TEIA is the subject of various appeals.

Given the fact that the Italian 3 were cleared, inevitably the public will pick up part, if not the majority, of the costs of the proceedings. On any analysis, a significant cost.

Why is it that Jersey wants to be at the forefront of this? I appreciate that we need to keep our international reputation intact but does our small island have to be the world police with all the financial cost that that entails? There is not only a legal cost but I have no doubt that the proceedings had a significant cost on the bank involved. This was not only a financial burden but it would have had a significant impact on staff personally.

What Jersey and its legal world are good at policing is matters pertaining to the administration of trusts. Last month saw a publication of a significant judgment concerning a long-running case involving allegations of, amongst other things, breach of trust and dishonest assistance.

*MacFirbhisigh and Ching -v- CI Trustees and Executors Limited and Others* has provided clarification in relation to a number of areas, such as confirmation that the limitation period in Jersey for a breach of fiduciary duty is analogous with tort and thus there is a three year prescription period rather than ten. From a litigation perspective, the case confirmed that a party can cross examine an expert witness even if there is no opposing expert or opposing expert evidence.

From a trustee point of view, the case reiterated the requirements of a trustee to ensure that a settlor clearly understands what arrangements are being put in place. This may sound like a case of stating the obvious but perhaps this is a timely reminder that such an obvious obligation has been ignored in the past. Regardless, a trustee must ensure that the settlor knows what arrangements are being put in place.

A further example of the Court's ability to "police" trust matters was reflected in a judgment of Commissioner Clyde Smith in November. The case dealt with an application by a representor to set aside a settlement. It had been the representor's intention to create a flexible and tax efficient vehicle to assist him in financial planning for him and his family.

Notwithstanding that the representor had received advice, it became clear that contrary to the advice, the transfer of the assets into the trust gave rise to immediate and future substantial inheritance tax



liability.

The Court reminded itself of the questions it must ask in these situations:

1. Was there a mistake on the part of the representor?
2. Would the representor not have entered into the transaction but for 'the mistake'? and
3. Was the mistake of so serious a character rendering it unjust on the part of the trustee to retain the property?

In this particular case, the Court declared that the trust was established by mistake and was therefore invalid.

Once again a perfect example of what Jersey does best.