

# Bahaman courts further affirm arbitration of trust disputes

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**In the final days of 2023, whilst the rest of the World was closing down for the year and migrating towards beaches, holiday homes and campgrounds, Justice Loren Klein of the Supreme Court of the Bahamas handed down the latest judgement in the everlasting and increasingly renowned *Volpi* dispute.<sup>3</sup> This piece will provide an overview of the dispute and then delve into the two facets of the specific proceeding; the challenges on the tribunal's jurisdiction and the technical trusts discussion in the judgement.**

## The Never-ending *Volpi* Dispute

At the heart of the dispute are the Summer, Winter and Spring Trusts (the "**Trusts**") which were settled by Nigerian-Italian businessman Gabriele Volpi and collectively hold assets worth billions of dollars. The beneficiaries were Gabriele, Matteo Volpi, Simeone Volpi, and their descendants. The trusts were wound up in 2018 by the trustee, Delanson Services Limited, with the assets being distributed to Gabriele. Matteo initiated proceedings claiming that

the distributions were in breach of trust and made for an improper purpose.

Since that point, there have been several sets of legal proceedings in this dispute, including among others, a challenge over whether the Court can order a stay over an arbitration tribunal,<sup>4</sup> whether New Zealand or Bahaman law applies to the dispute,<sup>5</sup> and the primary arbitration proceedings which determined that the trustee did breach their duties. Before these proceedings, the arbitration tribunal had found that the trustee

did breach trust by making the distributions to Gabriele and that Gabriele is liable for knowing receipt concerning property he received from the distributions. The tribunal made a partial award in favour of Matteo and declined Gabriele's application for an additional award.

## This Chapter of the Proceedings

This case is a further challenge to the award made by the arbitration tribunal. Gabriele and Delanson made separate applications, but broadly they accused the arbitration tribunal of acting beyond its powers which caused a serious irregularity and substantial injustice as a result. Applications were made under every available heading of the Arbitration Act 2009 (The "**Act**"), which resulted in a 168-page judgment.<sup>6</sup>

Klein J broke the matter down into three parts:

1. whether the tribunal lacked substantive jurisdiction;
2. whether the Act allows Courts to grant leave to hear an appeal on a point of law from the tribunal, and if so what the legal test is; and
3. whether the tribunal committed any serious irregularities of such a kind that a substantial injustice was caused.

Within these headings are also the Court's analysis of a variety of technical trust matters. These included whether the three trusts were authorised purpose trusts, whether a fraud on power makes an action void or merely voidable, whether the tribunal reasons behind its decisions concerning the additional and partial awards were inconsistent with each other,

and if so what the effect of that inconsistency is.

In short, the Court dismissed all the challenges made by both Gabriele and Delanson.

## Substantive Issues

### (i) Jurisdiction

The contentions put forth by Gabriele and Delanson were two-fold. First, the tribunal's finding that the trusts were not "authorised purpose trusts" ("APTs") and therefore the tribunal did not have jurisdiction over them pursuant to clauses six and seven of the trust deeds, and second that the tribunal did not have authority over Gabriele's counterclaim for mistake.<sup>7</sup> The relevant provision for this issue is s 89 of the Act.<sup>8</sup> In short, there must be a valid arbitration agreement, the tribunal must be properly constituted and the matter must be properly referred to arbitration.

The Court determined that this matter was one of admissibility, not jurisdiction. Even if evidence should not have been admitted on this basis, the tribunal should have merely been stayed whilst a declaration was sought. The litmus test to determine

whether the matter is one of jurisdiction or admissibility is whether the "objecting party is aiming at the tribunal or the claim". If it is the former it is an issue of jurisdiction, and the latter is admissibility.<sup>9</sup> Klein J said:

*"A wide body of case law from multiple jurisdictions and the views of leading academic writers all redound to the view that matters which go to compliance with pre-arbitral procedures or pre-conditions for bringing arbitration concern admissibility and not the substantive jurisdiction of the tribunal. No parade of learning is necessary to explicate this point..."<sup>10</sup>*

### (ii) Appeal on a Point of Law

The legal principles for this question are contained within s 91 of the Arbitration Act.<sup>11</sup> This section was based on s 68 of the United Kingdom's Arbitration Act.<sup>12</sup>

The only difference between the two provisions is that Bahama's statute omits from stating whether the Court can hear an appeal on a point of law from an arbitration tribunal's decision, and if so what

test should be applied. The question for the Court was whether this means an appeal can be heard or not, and if so what the test is. The Court determined that Parliament's omission from including a provision was deliberate, given the balance of the provision so closely resembled the United Kingdom's statute. On that basis a Court can't hear an appeal on a point of law given that was Parliament's intention.

Gabriele also pushed an argument that there is implied consent between the parties so that an appeal could be heard. This argument, whilst receiving praise for being novel, was rejected because it would "...require the Court to import procedure provisions of the law existing at the time the agreement was made into every arbitration agreement."<sup>13</sup>

Klein J finished by noting that even if an appeal were to be allowed, the test would be the same stringent test that applies in the United Kingdom's legislation, that the matter substantially affects the rights of one party and the tribunal was obviously wrong or the matter is of substantial importance and the

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3 *Volpi v Delanson et al* [2020] CLE gen 00632.

4 *Volpi v Delanson et al* BS [2020] CA 39.

5 *Volpi v Delanson Services Ltd* [2018] CLE gen 00474.

6 The Arbitration Act 2009 (Bahamas) (The "Act").

7 *Volpi*, above at n 3, at [134].

8 The Act, s 89 titled 'Challenging the award: substantive jurisdiction'.

9 *Volpi*, above at n 3, at [154] – [168].

10 *Volpi*, above at n 3, at [158].

11 The Act, s 90 titled 'Challenging the award: serious irregularity'.

12 The Arbitration Act 1968 (United Kingdom), s 68 titled 'Challenging the award: serious irregularity'.

13 *Volpi*, above at n 3, at [385].

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decision is open to serious doubt.<sup>14</sup> In all likelihood, this would not be made out in Klein J's view.

*"...the applicants/appellants would not be able to meet the criteria for the grant of leave, applying either by analogy the stringent test contained at s. 69(3) of the English Act or the more general common-law test."<sup>15</sup>*

(ii) *Serious Irregularity*

Irregularities were the primary area of consideration for the Court. Klein J summarised the requirements from s 90 of the Act into 5 short points.<sup>16</sup>

- a. *"Breach of general duty enshrined in s 44;*
- b. *Excess power by the tribunal;*
- c. *Breach of agreed procedures;*
- d. *Failure to deal with all the issues put to it;*
- e. *Uncertainty or ambiguity in the award."<sup>17</sup>*

In addition to satisfying one of these criteria, the party must have pointed out the irregularity at the tribunal, unless the ground could not be reasonably discovered at the time, and the irregularity must result in a serious injustice to the wronged party.

The first specific argument undertaken by the appellants was

that the tribunal overlooked relevant considerations and therefore breached its general duty, and agreed procedures. Where the tribunal makes an error in applying its power that constitutes an excess use of power, which is a serious irregularity under the statute. The Court distinguished an erroneous use of power from an excess use of power. Regardless of any errors the tribunal may have made, the only time an excess use of power claim can be successful is if the tribunal purports to or actually does issue orders beyond its scope.<sup>18</sup> Given the Court dismissed the ability to appeal a point of law, Klein J was not inclined to allow this argument due to concerns it would circumnavigate that finding and be used as a method to allow the Court to hear appeals on points of law.

The second line run by the appellants was that testimony evidence provided by their witnesses at the tribunal was not considered which amounted to a breach of agreed procedures. The omission from considering that evidence was an excessive use of power and breached the implicit agreement between the parties. The Court dismissed this advance also. First, on the basis that the Court does not believe that insufficiently considering a

witness' testimony is an excessive use of power.<sup>19</sup> Second, the Court held that to the extent such an omission is an excessive use of power, that omission does not meet the substantial injustice threshold required to establish a serious irregularity.<sup>20</sup>

The third substantive advance was that the tribunal made an uncertain and ambiguous award on the basis that the Court did not accept Delanson's reasons for restricting the trustee's powers over the three trusts. The Court dismissed this argument citing that this is not a procedural enquiry but rather one challenging a finding of fact by the tribunal, which would be appealing a point of law. Regardless the tribunal did not draw an adverse inference from the lack of consideration, therefore the matter was not material enough to meet the sufficient injustice threshold.<sup>21</sup>

### **Relevant Points on Trust Law**

Of additional interest are the findings relating to the specific areas of technical trusts law. Unfortunately, these findings are significantly constrained by the determination that the Court cannot hear an appeal on a point of law. Klein J uses this point as a shield to omit greater analysis of trust issues. Despite that, there were five key

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14 The Arbitration Act 1996 (United Kingdom), s 69(3) titled 'Appeal on point of law.'

15 *Volpi*, above at n 3, at [386].

16 The Act, s 90 titled 'Challenging the award: serious irregularity'.

17 *Volpi*, above at n 3, at [91].

18 *Volpi*, above at n 3, at [437].

19 *Volpi*, above at n 3, at [453].

20 *Volpi*, above at n 3, at [454].

21 *Volpi*, above at n 3, at [481].

technical trust questions discussed:

- a. whether the three trusts were authorised purpose trusts;
- b. whether the trustee's reasons for the distributions were valid;
- c. whether a fraud on power automatically renders the distribution void, or merely makes it voidable;
- d. whether Gabriele was liable for knowing receipt; and
- e. whether the tribunal's reasoning behind its decision for the partial and additional award was inconsistent with each other, and if so what impact does this have on the tribunal's findings?

(i) ATPs

The first issue discussed by Klein J was whether the trusts were ATPs per the Purpose Trust Act 2004, which related to the jurisdictional question already discussed.<sup>22</sup>

Gabriele's argument was that the trust deed should be interpreted as being for an authorised specific purpose as the argument was addressing how the trust deed should be interpreted. However, Klein J took the view that the purpose of the argument was actually jurisdictional as fundamentally Gabriele's position was questioning the tribunals ability to hear the argument. As such Gabriele failed to establish the

authorised purpose of the trusts, which were held not to be ATP's.

(ii) *Validity of the Trustee's Reasons for Distributions*

This question concerns how the tribunal considered evidence to determine if the trustee's reasons for the distributions from the trusts were valid. This is important in a trust's context because the method for investigating trustees' actions is the point of the enquiry. Essentially Gabriele and Delanson's argument boils down to whether certain testimonial evidence was ignored, and if so whether that was proper. The claim is based on the United Kingdom case *P v D*,<sup>23</sup> which ruled that an arbitration exercises excess power when it makes a ruling on a core issue without consideration of the main witness of the party against whom the award was made.<sup>24</sup> Additionally, the claim is that the tribunal breached its duty of fairness under s 44 of the Act.<sup>25</sup>

Klein J begins by dismissing this point on the basis that regardless of his finding the tribunal did not cause a serious injustice. Klein J expressed worry that allowing this ground to stand would open a "backdoor route" to allow appeals on points of law.<sup>26</sup> The ruling also concluded that the tribunal had considered all relevant evidence and that the

duty under s 44 did not require the tribunal to believe all evidence submitted was material.

(iii) *Fraud on Power*

The challenge advanced by Gabriele and Delanson is that while the tribunal may have ruled that there had been fraud on power on the part of Delanson as trustees, that merely made the trustee's distribution voidable, not void in and of itself.

Klein J again dismisses this challenge on the basis that it is an appeal on a point of law, and further because even if the finding of the tribunal was incorrect that did not amount to a serious injustice as if an action is voidable it can become void without interference from the trustee.<sup>27</sup> To the extent that the determination of the tribunal was ambiguous, which would satisfy serious irregularity, Klein J determined that the finding was clear that the distribution was void.<sup>28</sup>

More importantly, the Court was content with the finding that where an action amounts to fraud on power, that action is void, rather than voidable. The basis for this finding was Matteo's argument that to find differently would place Bahaman law out of step with the United Kingdom's law, citing *Pitt v Holt* which referred to the following

22 The Purpose Trust Act 2004 (Bahamas).

23 *P v D* [2019] EWHC 1277 (Comm)

24 *Volpi*, above at n 3, at [478].

25 The Act, s 44, titled 'General duty of the tribunal.'

26 *Volpi*, above at n 3, at [486].

27 *Volpi*, above at n 3, at [526].

28 *Volpi*, above at n 3, at [527].

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passage from *Lewin on Trusts*.<sup>29</sup>  
“[i]t is well established that both an attempt to appoint outside the class of objects, and an attempt to subvert the power by committing a fraud on it, are void rather than voidable.”<sup>30</sup>

On that authority, Klein J determined that even if the Court could enquire into appeals on points of law, distributions found to be improper were automatically void.

#### (iv) *Knowing Receipt*

Gabriele challenged the tribunal’s finding that Gabriele was liable for knowing the receipt of trust property as a result of the trustee’s distributions and therefore is a constructive trustee of the property received.

Klein J again dismisses this challenge on the basis that it is an appeal on a point of law, and in any case, is on the fringes and would not amount to a serious injustice. The judgement confirmed the tribunal relied on the correct test for knowing receipt from *Bank of Credit and Commerce v Akindele*, which is:

“[a]ll that is necessary is that the recipient’s state of knowledge should be such as to make it unconscionable for him to retain the benefit of the receipt.”<sup>31</sup>

Gabriele contended that the tribunal

inferred that he knew of the context of the distributions rather than making a positive finding because the tribunal phrased its view as being “unlikely that Gabriele didn’t know” about the limited scope of the distribution powers of the trustee. Gabriele’s view is that the tribunal should be certain he did know.<sup>32</sup>

Klein J did not entertain this position. He found that the tribunal’s phrasing is simply another way to say that on the balance of probabilities, Gabriele probably did know of the scope of powers. Klein scolded this type of “nit-picking and looking for inconsistencies and faults” as a task that the Court should steer clear of.<sup>33</sup>

#### (v) *Consistency of the Tribunal Justifications*

Gabriele argued that the justification for granting the partial award, and dismissing the additional award contradicted each other. The justification for the partial award is that it restricts the trustee’s power by detailing something the trustee cannot do with their distribution powers. However, the reasoning for declining the additional award was partly on the basis that the restriction imposed did not prevent the trustees from distributing the entire trust. Hence, a contradiction appears to exist.

Klein J describes this argument

as “artful” and he “admits that it is somewhat novel and rarefied”.<sup>34</sup> However, Klein rejects it on the basis that the argument cannot be “buttonholed” into the various categories of serious irregularity within the Act and reiterates that an error of law cannot be appealed.<sup>35</sup> Despite this, the ruling does not address the contradiction itself. I suspect the tribunal’s decision could’ve been justified on the basis that the restriction applies to the context of the distribution, not the scale of the distribution. However, Klein J’s omission from that justification may suggest he has sympathy for the applicant’s arguments. The lack of obiter means we cannot be sure.

### Conclusion

It is heavily ironic that the parties that originally sought the dispute be referred to an arbitrator are now challenging that very tribunal’s jurisdiction to hear the matter. Yet, despite that novelty, the Court looked upon the applicant’s arguments unfavourably and systematically dismissed them. The message above all else that can be dissected from *Volpi*, in this decision and in the dispute as a whole, is that the judiciary supports trust disputes being arbitrated and will avoid parent-like supervision of a tribunals handling of the issues it hears.

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29 *Pitt v Holt* [2013] UKSC 26.

30 *Lewin on Trusts*, Underhill ad Hayton on the law Relating to Trusts and Trustees.

31 *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch. 437 CA at [69].

32 *Volpi*, above at n 3, at [551].

33 *Volpi*, above at n 3, at [552].

34 *Volpi*, above at n 3, at [605].

35 *Volpi*, above at n 3, at [605].

## About the authors



### Jeremy Johnson

Jeremy is an experienced litigator and dispute-resolution specialist. A leading Barrister, Jeremy has considerable experience in commercial, insolvency, relationship property, equity and trust law. He is frequently instructed to appear as counsel in the courts and before arbitral tribunals and he is recognised as a leading senior junior with considerable experience in leading multi-week trials against senior counsel.

Since 2013 Jeremy has been ranked as a leading dispute resolution practitioner in the Chambers Asia Pacific and Chambers Global directories. Jeremy works on cases across New Zealand and in the wider Asia-Pacific region. Jeremy is a member of Bankside Chambers in Singapore. He is registered with the Singapore International Commercial Court. Jeremy has considerable experience in high-value and legally complicated matters, including as lead counsel in large multi-week trials, complex appeals, and multi-jurisdictional cases. He also has experience acting as an arbitrator in shareholder and leasing disputes.

Jeremy is a member of the Society of Trust and Estate Practitioners (STEP) and holds a STEP Advanced Certificate in Trust Disputes. He was the youngest person to become a Fellow of the Arbitrators' and Mediators' Institute of New Zealand. He also received the Ronald Davison Award for excellence in arbitral award writing. Outside of work, Jeremy is active in the community. He serves as Deputy Legal Adviser to the Primate of New Zealand and is the Chancellor of the Anglican Diocese of Waiapu. From 2008 to 2020 was the Vice-Chancellor and then Chancellor of the Anglican Diocese of Christchurch. He also served as a member of the Legislation Design Advisory Committee which reviews proposed legislation for the Attorney-General and Parliament. Jeremy is actively involved in governance. He is a Fellow of Christ's College, Canterbury, and is a past President of the Christ's College Old Boys' Association. He is also the Chair of the New Zealand String Quartet Trust.



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Callum is a Law Clerk for Jeremy Johnson, having joined Bankside Chambers in July 2023. Callum attends the University of Auckland where he is in the third year of his Bachelor of Laws (Hons) degree. Callum has had success in mooting competitions, including appearing in the final of the 2023 John Haigh KC Moot at the Auckland High Court. Callum is gaining experience and developing an interest in a range of disputes including commercial, relationship property, trusts, estates and shareholder litigations. Once admitted, Callum aims to have a court-focused career appearing in arbitrations, mediations, and Courts regularly.