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TL4 Private Client MAGAZINE

ISSUE 12

IT'S A MATTER OF TRUST

INTRODUCTION

"My father used to say, 'don't raise your voice, improve your argument'"

Desmond Tutu

Welcome to our Private Client Magazine Issue 10 - Contentious Trusts. This issue sees us traveling from the British Virgin Islands to Liechtenstein to learn about the roles of Advisors, Directors, Trustees and more in Contentious Trusts.

As always, thank you to all of our contributors for sharing their articles with our Private Client community.

The ThoughtLeaders4 Private Client Team

Paul Barford
Founder / Managing Director
020 7101 4155
email Paul

Chris Leese
Founder / Chief Commercial Officer
020 7101 4151
email Chris

Danushka De Alwis
Founder / Chief Operating Officer
020 7101 4191
email Danushka

James Baldwin-Webb
Director, Private Client Partnerships
07739 311749
email James

Maddi Briggs
Strategic Partnership Manager
email Maddi

Yoshi Montgomery
Strategic Partnership Executive
email Yoshi

CONTRIBUTORS

Alice Dumoitier, **Equiom**
Michael Ashdown, **Wilberforce Chambers**
Kelly Watson, **Accuro**
Giles Dobson, **Bidwells**
Josh Lewison, **Radcliffe Chambers**
Clementine Dowley, **Payne Hicks Beach**
Andrew Mold KC, **Wilberforce Chambers**
Nicholas Holland, **McDermott, Will & Emery**
Anita Franklin, **McDermott, Will & Emery**
Joanne Morse, **Summit Trust International SA**
Stephan Alexander, **Partner at Mourant Ozannes (Jersey)**
Claudius Müller-Rensmann, **Gasser Partner**
Walter Dorigatti, **Gasser Partner**
Naomi O'Higgins, **Howard Kennedy**
Matt Guthrie, **Ogier (Guernsey)**
Diana Rodriguez, **Ogier (Guernsey)**
Matthew Gilligan, **Saffery Champness Registered Fiduciaries**
Tsitsi Mutendi, **African Family Firms**
Nicholas Brookes, **Ogier**
Sarah Latham, **Ogier**
Rondelle Keller, **Ogier**
Kate Harris, **Birketts**
Maryam Oghanna, **Forsters**
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Jodie Buck, **Irwin Mitchell**
Michael Giraud, **Standard Bank**
Thomas Klemme, **Wedlake Bell**
Emile Simpson, **Pump Court Tax Chambers**
Alicia Tan, **Farrer & Co**
Daniel Pearce, **Farrer & Co**
Kerrie Le Tissier, **HIGHVERN**

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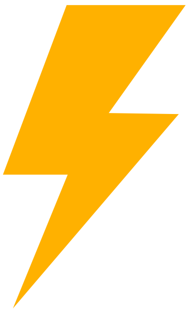
COMMON FACTORS THAT CAUSE CONTENTIOUS SITUATIONS IN TRUSTS

Authored by: Alice Dumoitier, Client Services Director at Equiom

Equiom Jersey's Client Services Director and trustee, Alice Dumoitier, shares her view on the common factors that can contribute to contentious and litigious situations in trusts, drawing from her 25 years in the trust industry.

1. Do you have the power?

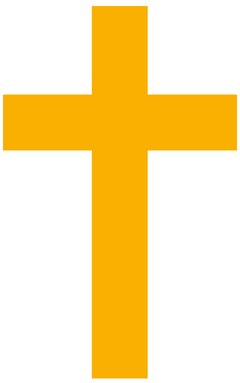


One of the most common reasons for litigation to occur in respect of a trust is in circumstances when a trustee has acted (or failed to act) without having the power to do so, either by the trust instrument or the law. Common breaches of trust are distributing trust assets to a beneficiary who is not appointed or investing funds in a way that is not permitted within the trust instrument.

As every trust instrument is bespoke, it is key for a trustee to check whether they have the power to complete the transaction they are proposing to enter into.

A common scenario is where the beneficiaries are all entirely in agreement about a proposed course of action, however when they present it to the trustee it's not in their best interest. It's not just when the beneficiaries are in conflict that you must consider that something could be heading in the wrong direction.

2. Births, deaths and marriages



The very nature of trusts means they are often dynastic, with the settlor's intention being that the wealth will endure from generation to generation. This generally works well for the first generation whilst the family dynamics remain static, however, the introduction of new spouses or a divorce, can very often see a family trust torn apart as the interests of the beneficiaries are no longer aligned.

Furthermore, as second and third generations reach the age of majority, it is commonplace for them to begin to probe the efficacy of earlier decisions in relation to the trust, which can turn into a contentious matter. The importance of detailed and accurate record keeping is key in these circumstances to provide the trustee with the protection of understanding why a decision, which is now under scrutiny was taken originally even if that was some years ago.

The trustee may have previously enjoyed longstanding relationships with the settlor or a member of the beneficial class, but often there may need to be an adjustment period to take account of the differing situations and views.

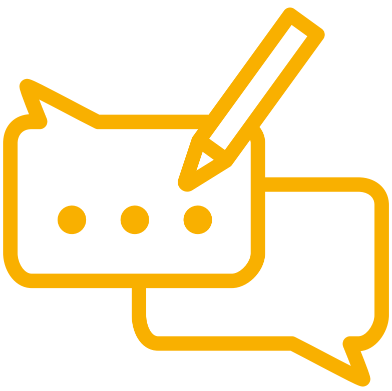
Care must be given to ensure that correspondence and decision making is impartial, taking account of the interests of all the beneficiaries, considering relevant and not irrelevant factors. In some scenarios, the trustee may not feel able to safely make a decision to act, which means an unavoidable application to Court to seek directions, with the possibility of the trustee having to surrender its discretion to the Court.

3. Sale of a family business/asset

The sale of a family business can be a very emotive subject, particularly if the business is being sold to one family member, but another or more than one family member feels they are the best person to run that business going forward.

In these circumstances a trustee must consider the views of all parties. It might be worth considering obtaining an independent market valuation of the family business, particularly if the dispute relates to the value one member of the family is willing to pay. Taking account of other factors, such as latent embedded tax gains and the benefit of receiving cash as a liquid asset versus a non-liquid, higher risk trading asset is key, as these may affect the valuation of the business over which disputes can often arise.

4. Not adhering to advice



Obtaining advice and then not following it is a common error which often leads to litigation. Alternatively, receiving defective advice can be equally as troublesome. In those circumstances, consideration needs to be given to how to remedy any loss to the trust fund. A common route is to apply to Court to set aside a transaction.

The importance of keeping tax and legal advice up to date cannot be underestimated and regular health checks are a key way to mitigate this potential risk for a trustee.

5. The unexpected…

Who can predict the unexpected? A swift change in legislation or a beneficiary changing residency can often have far reaching consequences that were not anticipated when the trust was initially created. It can be possible to mitigate some of these issues, for example including ‘flee clauses’, or automatically removing beneficiaries if they become resident in a certain jurisdiction.

Considering an exit strategy if you have fiduciary duties to discharge is important as it can be very difficult to step back, if necessary. We have all seen cases where a structure has become overly litigious and then you cannot exit the structure because of the fiduciary duties that you must continue to discharge. To mitigate the potential risk, consider putting a strategy in place before you proceed, undertake rigorous due diligence; have access to historic correspondence; meet with the current lawyers and understand the resourcing requirements and overall liquidity of the structure.

Family disputes can be hugely emotive, requiring trustees to balance personal views and relationships as well as their fiduciary duties. A trustee must be mindful that when the beneficiaries themselves are in conflict, they all have their own litigation strategies. Their interests won’t necessarily be aligned, and the trustee must remain impartial, understand the conflicts and work out how to manage them.

The cost of litigating can be huge, not just in terms of the financial burden but the personal stress arising for all involved, and it can serve to further fracture already strained relationships.

> ***Whilst the common belief is that if you win you will receive your costs, the reality is that you will never receive the full amount of your costs, and most likely only between 50% to 65%.***

Wherever possible, some form of mediation (family, lawyer to lawyer) or financial dispute resolution is always preferable to costly legal challenges in terms of ironing out disputes. The important thing is to understand what everyone would like to achieve from a mediation session, keeping in mind how expensive these exercises can be and trying not to drift away from the goal of resolution.

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BREACH OF TRUST, DIRECTORS AND CORPORATE TRUSTEES:

MULTIPLE DERIVATIVE CLAIMS FOLLOWING MCGAUGHEY V USS

Authored by: Michael Ashdown, Barrister at Wilberforce Chambers

It is commonplace now for the trustee of almost any sort of trust to be a company, and for the individuals who may colloquially be referred to as "the trustees" to in fact not be trustees at all, but to be the directors of the trustee company. Occupational pension schemes have been particularly keen adopters of this structure. In some respects it makes little difference to the beneficiaries: the trustee is the trustee, whether an individual or a company. But when the individuals involved are alleged to have acted in breach of their duties, the corporate structure allows for more complex claims than the ordinary breach of trust claim that would be brought against individual trustees.

In particular, the company itself will often have a claim against its directors for breaches of their statutory duties (under sections 171 to 177 of the Companies Act 2006) which are owed to the company. Where the company has shown no inclination to pursue such claims itself, beneficiaries of the trust may wish to do so in its place. When (if ever) that sort of claim is possible was the subject of the lengthy and detailed judgment of Leech J in McGaughey v Universities Superannuation Scheme Ltd [2022] EWHC 1233 (Ch) (24 May 2022).

The claims

The Claimants in McGaughey v USS are both members of the Universities Superannuation Scheme (the Scheme), and the Defendant (USS), a company limited by guarantee, is the Scheme's Trustee. The Scheme has both defined benefit and defined contribution elements. Following the Scheme's 2020 valuation, USS proposed and then introduced an increase in both employer and member contributions, together with changes that would reduce benefits for some members.

The Claimants subsequently made four allegations against the directors of the Trustee, all relating to the administration of the Scheme: the directors were said to have breached their statutory and fiduciary duties (i) in relation to the conduct of the 2020 valuation, (ii) by changing the benefit and contribution structure in a manner which amounted to unlawful discrimination, (iii) by allowing management costs and expenses to increase significantly, and (iv) by failing to create a credible plan for divestment from fossil fuels.

Test for permission to continue the claims

The legal context was the need for the Claimants to obtain the Court's permission to continue the claim. Leech J accepted that this was not a "derivative claim" as defined by section 260 of the Companies Act 2006, because the Claimants were not members of the Trustee company. In Boston Trust Co Ltd v Szerelmey Ltd [2021] EWCA Civ 1176, Sir David Richards further distinguished "double derivative claims", where the members of a holding company bring a claim on behalf of a direct subsidiary company, and "multiple derivative claims" where there are multiple intermediate companies (see [17]-[18]). Leech J followed this classification, but expanded the definition of a "multiple derivative claim" to include all derivative claims which are not within the section 260 definition or Sir David Richards' definition of a "double derivative claim" (see [19], [21]-[22]). The Judge also followed Boston Trust in applying the permission and procedural requirements in CPR 19.9 by analogy (see [20]). The test for permission was held (uncontroversially) to require the Claimants to satisfy four requirements (see [23]):

(1) They have sufficient interest or standing to pursue the claims on a derivative basis on behalf of the company or other entity;

(2) They establish a prima facie case that each individual claim falls within one of the established exceptions to the rule in Foss v Harbottle;

(3) They establish a prima facie case on the merits in respect of each claim; and

(4) It is appropriate in all the circumstances to permit them to pursue the derivative claim or claims.

First, in relation to "sufficient interest or standing", Leech J held that it was possible in principle for members of a pension scheme to have standing to bring a derivative claim, such as "where the directors of the corporate trustee conspire to misappropriate the scheme's assets on an industrial scale" and the directors are the only members of the corporate trustee ([28]). But Leech J also accepted USS's submission that "members of a pension scheme would only have standing if the loss which the subject company (or the scheme) is claimed to have suffered is reflective of their own loss" (see [29]-[30]). The Judge did not, however, accept that the possibility of the beneficiaries bringing an alternative claim (e.g. a breach of trust claim) would necessarily deprive them of standing in relation to the multiple derivative claim (at [32]-[33]).

Second, in relation to the "established exceptions to the rule in Foss v Harbottle", the Claimants relied on the fourth exception, namely that a "fraud has been committed and the minority (or other interested stakeholders) are prevented from remedying the fraud because the subject company is controlled by the wrongdoers" ([34]). Leech J followed the decision of McCombe LJ in Harris v Microfusion 2003-2 LLP [2016] EWCA Civ 1212 that this required the Claimants to "establish a prima facie case that the defendants have committed a deliberate or dishonest breach of duty or that they have improperly benefitted themselves at the expense of the company (although the nature of that benefit need not be exclusively financial)." Mere "equitable fraud" or "fraud on a power" would not be sufficient ([40]-[43]).

Third, in relation to whether there is a "a prima facie case on the merits", Leech J held that, where the relevant facts are disputed, "the appropriate course is to find that a prima facie case has been made out only where I am satisfied that there are issues of fact on which it would be wrong to accept the Company's evidence without cross-examination", reflecting the fact that there is no live evidence at the permission stage ([44]-[45]).

Fourth, in relation to whether it is "appropriate in all the circumstances" to give permission, Leech J held that he would consider, inter alia, the alternative claims said to be available to the Claimants ([33], [46]-[47]).

The Claimants, however, failed to obtain the Court's permission in relation to any of the four claims.

Claim 1: the 2020 valuation

The first claim concerned the 2020 valuation of the Scheme, which was alleged to have been conducted by the directors in a manner which did not promote the best interests of the Scheme's beneficiaries, failed to take into account relevant considerations (including possible ways of avoiding the need to raise contribution rates or to reduce benefits) or to exclude irrelevant considerations, and which improperly fettered their discretion ([70]). These alleged breaches of duty were said to have been intended to reduce future defined benefit accrual in the Scheme ([72]).

Permission was refused by Leech J because the Trustee did not itself suffer any loss by carrying out the 2020 valuation as alleged, and even if it did, that loss was not reflective of a loss suffered by the Claimants. The Claimants' benefit entitlements will be lower, but that will cause a reduction in the Trustee's liabilities. The increased contributions due from both employers and members will cause the Trustee's assets to increase: the Trustee will in fact be better off as a result of the changes. Leech J consequently found that the Claimants did not have a "sufficient interest or standing" in relation to the first claim ([130]-[132]).

Had this claim not failed on the first limb of the permission test, Leech J would also have turned it down on the basis that it was not within the fourth exception to Foss v Harbottle, because there was not "sufficient evidence from which to draw the inference that the Directors were pursuing their own ends or motivated by their own personal interests" ([145]), or a prima facie case on the merits.

Interestingly, though, Leech J would not have refused permission on the fourth limb, if the others had been satisfied, notwithstanding the other possible routes to bringing a claim in these circumstances. Leech J recorded that:

The Claimants submitted that any complaint to the Pensions Ombudsman or breach of trust claim was fraught with difficulty, that a complaint to the Ombudsman was not suited to a group or class action of this kind and that a court claim by a beneficiary would face considerable and practical hurdles. In his oral submissions Mr Grant emphasised that beneficiary claims are rare (as opposed to employer or trustee claims) and that the practicalities involved in trying to ensure that 470,000 members were properly represented meant that I could not be confident that it would be straightforward or that the Claimants would be able to make or fund a claim. ([153])

Leech J accepted that "the Claimants were not overstating the difficulties which they would have faced in pursuing a trust claim (and which they may still face)" ([155]). The Judge clearly felt some discomfort at permitting the Claimants to avoid the effect of CPR 19.3, which provides that "[w]here a claimant claims a remedy to which some other person is jointly entitled with him, all persons jointly entitled to the remedy must be parties unless the court orders otherwise", but nevertheless would not have refused permission on this basis, since "If the Claimants had been able to bring themselves squarely within the fourth exception to the rule in Foss v Harbottle, then the constitution of a company limited by guarantee clearly lends itself to wrongdoer control. Moreover, McDonald v Horn provides authority (if it is needed) that the Court could give permission to members to bring a multiple derivative claim in those circumstances." ([157]).

In other words, if bringing the sort of multiple derivative claim envisaged here was the only way to see justice done, the Court would not stand in the Claimants' way if the first three limbs of the permission test could be met just because they might proceed in another way, with different procedural requirements.

Claim 2: unlawful discrimination

The second claim concerned the benefit changes introduced by USS, which were alleged to "indirectly discriminate against women, younger and black and ethnic minority members contrary to section 19 of the Equality Act 2010" ([101]). This was said to amount to a breach by the directors of their duties to the Trustee, which exposed the Trustee to discrimination claims by Scheme members ([103]).

Leech J refused permission for the same reason as in the first claim: neither Claimant has a discrimination claim himself, and "[i]f an individual member brings a claim in the Employment Tribunal or a civil court, the liability of the Company to pay compensation is not reflective of any loss which the individual member has suffered because he or she has a direct claim against the Company." (]160]) Furthermore, that liability of the Trustee to the member discriminated against does not give the Claimants a sufficient interest to bring a claim against the directors, there being no "causal connection between the Company's liability to pay compensation to members for indirect discrimination and the benefits to which the Claimants are entitled" ([161]).

The second claim would also have failed on the second and third limbs of the test (it being relevant to the prima facie case on the merits that, even if unlawful discrimination could be proved, the directors had acted on legal advice that the benefit changes did not amount to unlawful discrimination ([171])). Permission would also have refused as a matter of discretion: "[i]f individual members have claims for discrimination, it is far better that they should make them directly against the Company either individually or in group litigation" ([174])

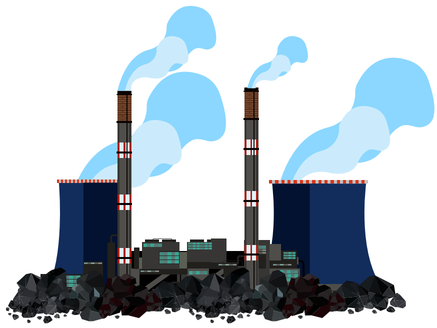
Claim 3: costs and expenses

The third claim concerned the Scheme's costs expenses, which were said to have increased by 320% from 2007 to 2020, including a 1318% increase in investment management personnel costs ([109]). This was said to amount to a breach by the directors of their duties to the Trustee, and to have been to the personal advantage of the directors ([110]).

This claim did not fall down on "sufficient interest or standing": the Trustee conceded that "the wrongful depletion of the Scheme's assets would involve a loss to the Company and potentially a reflective loss to members if the Scheme was unable to pay promised benefits as a result" and Leech J held that this was enough to meet the first limb ([175]-[176]).

It did, however, fail on the second limb, there being no allegation that the directors "used their control over the Company to confer benefits on themselves through increased fees or salary" ([178]), and on the third, the Claimants not having made a sufficiently particularised case on the merits ([184]). Leech J would, though, have been prepared to give permission if the first, second and third limbs had been satisfied, for the same reasons as in relation to the first claim.

Claim 4: fossil fuels



The fourth claim concerned the Scheme's investment in fossil fuels. The Claimants alleged that the directors' failure to divest from fossil fuels or to make an adequate plan for divestment was a breach of their duties to act for proper purposes and to promote the success of the Trustee ([120]).

Leech J here refused permission on the first limb, the Claimants not having satisfied the Court that the Trustee had suffered any immediate financial loss, or, if they had, that it was reflective of any financial loss that they had suffered, there being no causal link alleged between fossil fuel investment and the benefit changes which had been implemented ([191]). It would also have failed on the second and third limbs, and would have been refused on the fourth limb as a matter of discretion, Leech J stating that he: "would not have exercised my discretion to permit the Claimants to continue Claim 4 but would have left them to pursue a direct claim for breach of trust. The Claimants have not sought an injunction to compel the Directors to adopt an immediate plan for divestment or specified what plan they should adopt and I am not satisfied that the Court would be prepared to grant declaratory relief in the vague terms sought in the prayer for relief or, indeed, that any useful purpose would be served by doing so" ([197]).

Where does this leave beneficiaries?

Leech J's judgment is necessarily a long and detailed one, which is dominated by a meticulous analysis of the four claims and the complex facts and allegations which underpin them. Much of what is said is therefore of relevance only to the parties. It is nevertheless clear that there are a number of important lessons for trust beneficiaries (and their advisers) contemplating claims against the directors of a corporate trustee, perhaps as part of a wider consideration of other possible claims, including breach of trust claims against the corporate trustee itself.

First, and perhaps most importantly, Leech J accepted that this sort of claim would be possible in the right circumstances. If the mere existence of an alternative claim would suffice to deprive beneficiaries of standing, that would almost always make this sort of claim impossible, since a breach of trust claim will generally be available against the corporate trustee. As already noted (at paragraphs 15 and 16 above) there are real difficulties involved in bringing such a claim, and the Court is entitled to have regard to those difficulties in deciding whether to give or refuse permission. Beneficiaries may be motivated to pursue a multiple derivative claim, notwithstanding the enormous difficulties it presents, because of its undoubted procedural advantages in other respects: in particular, there being no need to join every other beneficiary or make arrangements for them to be represented (see paragraph 15 above), and the possibility of obtaining a prospective costs order (though this was refused in this case at [198]).

It is notable that in this case Leech J would have given permission (had the other limbs of the test been satisfied) on the first and third claims, but not the second or fourth. In the latter two, there was either a more obviously sensible way to proceed, or no useful purpose in the claim proceeding. The door is therefore left open, in principle, for a multiple derivative claim to succeed in the trust context.

Second, the major hurdle to surmount will often be establishing a "sufficient interest or standing" since that entails establishing both that the corporate trustee has suffered a loss and that this loss is reflective of the claimant beneficiaries' own loss. Where the claim is for the misappropriation of trust assets, Leech J's treatment of the third claim suggests that this will not cause much difficulty (see paragraph 21 above): if the trustee's money is stolen, it has less with which to pay members or beneficiaries. But in every other case this hurdle was insuperable: in the first and fourth claims it was far from clear that any loss was actually suffered by the Trustee, and in the second claim there was held to be no link between the Trustee's (hypothetical) liability to pay damages for discrimination and the Claimants' benefit entitlement.

The latter point is perhaps particularly difficult in defined benefit pension cases, where members' benefit entitlements are usually prescribed by the scheme rules, and do not depend (as long as the scheme is sufficiently funded) on the actual assets held by the scheme's trustee. It may still be open to argue that exposing a trustee to damages claims for discrimination would cause a loss to the trustee which is reflective of a beneficiary's own loss if the beneficiary were entitled to part of the trust fund, the value of which is diminished by the liability to pay damages.

Third, Leech J's rejection of the Claimants' argument that the fourth exception to Foss v Harbottle could be satisfied in cases of "equitable fraud" or "fraud on a power" ([36], [42]-[43] – see paragraph 7 above) will rule out this sort of claim in most cases, except where a director has acted dishonestly. It will only be in rare cases that beneficiaries will be able to meet the high hurdle of making even a prima facie case that "the defendants have committed a deliberate or dishonest breach of duty or that they have improperly benefitted themselves at the expense of the company" ([43]).

The practical effect of this is that where directors have arguably committed lesser breaches of duty – such as ordinary negligence – but control the company, a multiple derivative claim will not provide a route f or beneficiaries to pursue the claim that the company will not.

This is said to accord with the rationale for the fourth exception to Foss v Harbottle, with Leech J holding that "parties are free to choose majority rule and that equity will only step in where the majority have abused that power to excuse their own dishonest and deliberate breaches of duty or to excuse their actions in improperly benefitting themselves at the expense of the subject company". In such cases the beneficiaries will have to look to other routes to relief.

Fourth, it follows that the sort of multiple derivative claim pursued in McGaughey v USS is likely to be exceptional in future: this was a bold attempt to make use of this procedural route to obtain relief in the context of a pension scheme trust, and it is hard to see how the Claimants (or their advisers) could have done more to succeed. But it is clear from Leech J's judgment that, as the law stands, the odds are stacked against trust beneficiaries being given permission to continue a multiple derivative claim.

A director who dishonestly misappropriates trust funds to the disadvantage of the beneficiaries and then stymies any attempt by the corporate trustee to bring a personal or proprietary claim may well find that the court would be willing to permit the beneficiaries to bring the corporate trustee's claim against the director. Following McGaughey v USS, it is hard to see a less extreme case succeeding.

CONTENTIOUS TRUSTS – WHAT'S IN A NAME?

Authored by: Kelly Watson, Client Services Director at Accuro

Shakespeare said "That which we call a rose by any other name would smell as sweet." A trustee who actively chooses to take on the role of trustee of a structure involved in contentious matters is often referred to as a "White Knight Trustee" or a "Contentious Trustee". Neither are quite correct labels to apply but does it matter?

When trust structures are established, it is often done on the back of sophisticated financial planning and extensive expert legal and tax advice but this doesn't guarantee that any such structure will be problem free for the duration of its existence. Families fall out, mistakes can occur and sometimes, litigation can ensue. Most trustees prefer to avoid litigation for obvious reasons. A "White Knight" or "Contentious Trustee" does the opposite; actively seeking out opportunities to assist with trusts that are trying to navigate their way through contentious matters.

A trustee of this kind needs to be particularly strong on the technicalities of trust and company administration, able to deal with families that may be in dispute with each other and the volatile emotions that ensue in these circumstances, as well as readily able to deal with the complexities of litigation. It is no surprise therefore that contentious trustees are often experienced lawyers – after all, the labelling of "contentious trusts" derives primarily from the classification by lawyers of matters involving trust disputes.

That said, in my experience, specialising as a contentious trustee goes much further than just working on entities that are involved in litigation. Over the years, I have gained considerable experience in working with individuals and structures that many trustees actively avoid for a whole host of reasons, including:

- trust structures that are subject to tax investigations;
- trust assets are under a seizure order (known in Jersey as a saisie);
- trust structures subject to a "no consent" restriction following the submission of a suspicious activity report thus preventing the ordinary operation of the structure;
- one of the connected parties, such as the settlor or a beneficiary, is under criminal and / or tax investigation; and / or,
- a trust structure is heading towards insolvency.

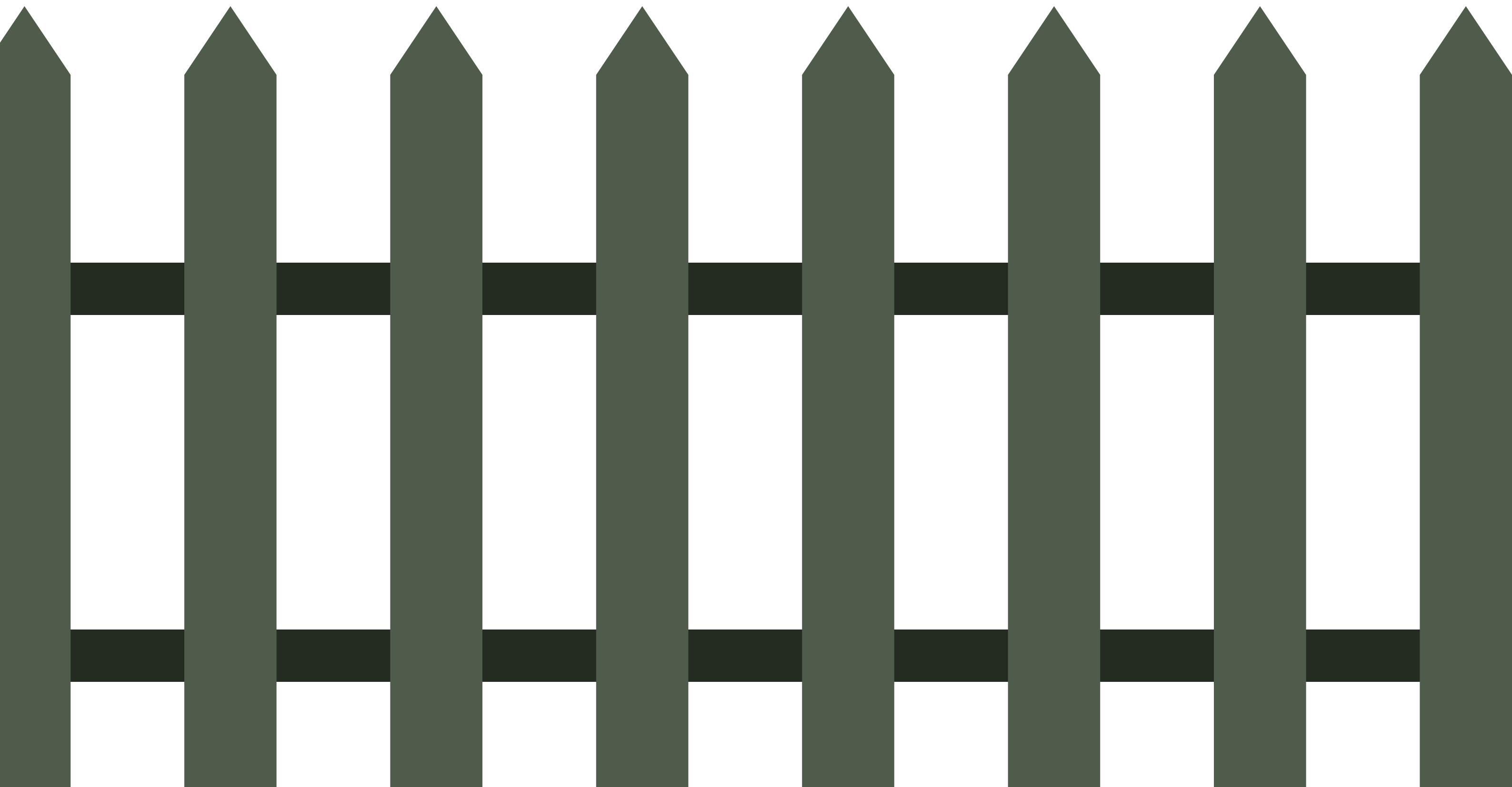
In these scenarios, there can often be consequential and unusual difficulties to overcome such as the termination of existing banking relationships by a bank or banks thus requiring the establishment of new banking relationships in short order (not something that is easy to achieve with ongoing investigations taking place) and any existing debt to be refinanced. Or where a saisie is in place, all activity is subject to the consent of the Viscount in Jersey, which can lead to a delicate balancing act for the trustee vis-à-vis their fiduciary duties towards the beneficiaries.

Despite unusual circumstances of this nature, these so called contentious trusts are the same as any other trust in that they continue to have assets that need to be administered. The primary difference is that the administration of those assets has to be much more carefully undertaken, with a keen regard to whatever the relevant individual circumstances that make that particular structure fall to be labelled as contentious.

Another key difference for trustees to bear in mind, in the management of contentious work within their businesses. In accepting such work, trustees should consider their own internal corporate structuring, with a view to ring fence and manage their own risks (including reputational) as often such work does end up in the public domain via the Courts. They should also ensure that the trustees' insurers are made aware of and become comfortable with the controls put in place to manage such risks.

It is not all negativity and caution however, there are some upsides of dealing with contentious structures! Often when taking on so-called contentious trusts as the incoming trustee, you tend to be alive to the major issue(s) affecting the structure and can plan accordingly, even on occasion putting conditions in place on appointment as trustee – for example, obtaining written agreement from beneficiaries that there will be no distributions requested or paid whilst there is a tax investigation ongoing. It is always better to know and address issues upfront than to take on a structure unawares and identify them later on.

Correctly managed, being a "Contentious Trustee" can be hugely gratifying, particularly when successful outcomes are reached for all involved and a trust once considered "contentious" reverts to being just a regular trust structure.



60-SECONDS WITH:

GILES DOBSON
MANAGING PARTNER
BIDWELLS

Q What is your area of practice?

A I am Head of Rural at Bidwells and specialise in the strategic management of privately owned rural estates stretching across the length and breadth of the country.

Q What motivated you to pursue this specialisation?

A I am passionate about the countryside, and thoroughly enjoy working with interesting and dynamic individuals who are keen to improve and enhance their own corner of England. The variety of what we face on a day-to-day basis is second to none.

Q What is the most rewarding thing about your work?

A I love working with my team of over 70 professionals, who each have their own thoughts and ideas about how to approach any challenge. It is incredibly rewarding to see them grow and develop their own careers in our fascinating industry.

Q Do you have any career aspirations, and have you achieved any of them so far?

A I was delighted to be promoted to Head of Rural at the beginning of 2023, and I am keen to grow and strengthen our already strong team of professionals.

Q What do you see as being the biggest trends of 2023 in your practice area?

A Natural Capital and Renewable Energy will undoubtedly be the most important issues for the rural economy in 2023 and beyond, and there are both opportunities and challenges for all of us. Many rural estates are already setting their own 'Net Zero' targets, and it will be fascinating working with them to achieve these.

Q What has been your most memorable experience during your career so far?

A Being chased around a set of farm buildings by an angry adder which my client had been poking with a stick! All escaped unscathed, even the adder.

Q How do you deal with stress in your work life?

A Walking my young English Springer Spaniel through the Suffolk Countryside – and giving myself an entirely different type of stress when she chases deer, hare, birds, rabbits etc…

Q What is your ideal holiday?

A Walking in the hills of Mallorca with my wife, Angela. Amazing countryside, glorious food, and spectacular sunsets.

Q What was the last book you read?

A Who Owns England by Guy Shrubsole. A fascinating account which I would highly recommend to anyone who is involved in the management of rural land.

Q Do you have a favourite food?

A A lovely old Rioja Reserva, enjoyed on a Mallorcan hillside. I suppose I could be persuaded to eat a lump of manchego with it, if you really insist that Rioja isn't a food!

Q What cause are you passionate about?

A We support a wonderful charity called Five Talents which helps economically and socially marginalised communities in Africa through microfinance and business training. An amazing charity which appeals to my sense of fairness and also to my economics background.

Q Do you have a New Year's Resolution, and if so, how do you plan to keep it?

A More walking in the hills of Mallorca with my wife, Angela!! By buying shares in Ryanair!

Q What are you looking forward to in 2023?

A Warmer weather – either here in the summer, or Mallorca before then.

TO CATCH A TRUSTEE (PART DEUX)

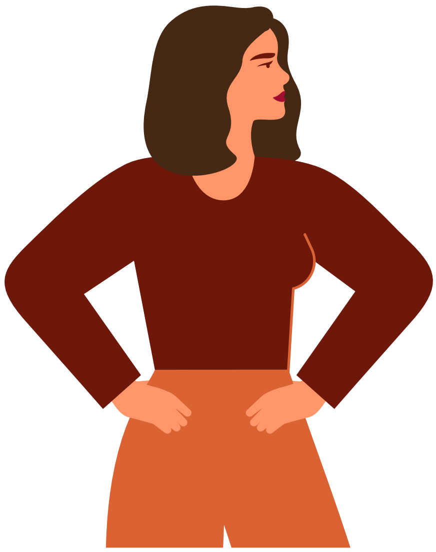
Authored by: Josh Lewison, Barrister at Radcliffe Chambers

What a difference a year makes. This time last year I wrote an article looking at how to bring proceedings in England and Wales against foreign trustees. At that time, Practice Direction 6B of the Civil Procedure Rules provided a few grounds, known as gateways, under which English proceedings could be served on trustees abroad. Service out of the jurisdiction is the prerequisite to suing a foreign trustee in England.

Since then, the gateways have been updated. They now have a much wider scope, which tracks the idea advanced by Lord Sumption in Abela v. Baadarani [2013] 1 W.L.R. 2043 that it is no longer appropriate to talk about "exorbitant jurisdiction", implying that service out of the jurisdiction is exceptional. Modern litigation involves making pragmatic judgments about the efficient conduct of litigation, and it is legitimate for cases to be heard in jurisdictions with which they have a substantial connection.

Of the old gateways, three were the most relevant: the trust was governed by English law; the trust included a jurisdiction clause in favour of England and Wales, and the claim was made against the defendant as constructive trustee and arose out of acts committed in England. Those Gateways covered many sins, but gaps remained.

One of the leading cases on jurisdiction clauses is Crociani v. Crociani [2014] UKPC 40. The Privy Council, on appeal from Jersey, held that a clause designating the "forum for the administration" of a trust was not a jurisdiction clause. It was concerned not with disputes but with the ordinary administration of the trust. For England, the decision – which might have been persuasive here – has now been reversed. The English court can take jurisdiction if the trust instrument "designates England and Wales as the principal place of administration".



An interesting new gateway is for a claim over a trust "created" in England. According to the explanatory notes, the inclusion of this new gateway was intended to bring the trust gateways into line with the contractual gateways. Claims about contracts made in England and Wales have long been subject to the jurisdiction of the English courts.

Here's an idea of when the creation gateway would be useful. Consider, Toni, a Swiss businesswoman. She lives in Monaco. Some years ago, Toni came over to England where she executed a trust governed by the law of the Cook Islands, with a Nevis trustee, holding cash and investments through a Seychelles company. The initial fund was £100 paid from her Monegasque bank account. Toni is now concerned that the trustee has misappropriated or misapplied the fund.

The courts of Nevis and the Cook Islands are famously protective of local trustees, so that Toni may well wish to sue elsewhere. Under the old rules, Toni might well have been out of luck. The trustee is domiciled abroad, the trust is governed by a foreign law, and we can assume that it contains no jurisdiction clause. So there would have been no route to bringing a claim in England.

With the introduction of a gateway for claims relating to trusts created in the jurisdiction, the courts are opened to those in Toni's situation. And there are lots of them. In the 1990s and 2000s, it was common for English firms of solicitors to do the heavy lifting in setting up trusts. They would do the drafting, liaise with the client and arrange for the execution of the documents. That was so even if the proper law were a foreign law, the trustee was offshore and the fund would be administered abroad. Claims arising trusts created in that way are now brought back onshore.

Another new gateway is for breach of trust claims "where the breach is committed or likely to be within the jurisdiction." This one may be relevant where the principal administration is elsewhere, but enough is in England that there has been a breach here.

The expansion of the gateways will naturally throw a greater focus on two other aspects of cross-border litigation. The first is whether, having been started in England, the claim will be allowed to continue here. The second is whether any judgment will be enforceable abroad.

Despite formally having jurisdiction, the English court can decline to hear a claim if there is a more obviously appropriate foreign forum. The leading case is still Spiliada Maritime Corp. v. Cansulex [1987] 1 A.C. 460 and the test is (i) whether another forum is available and (ii) whether that forum is clearly and distinctly more appropriate than the English courts.

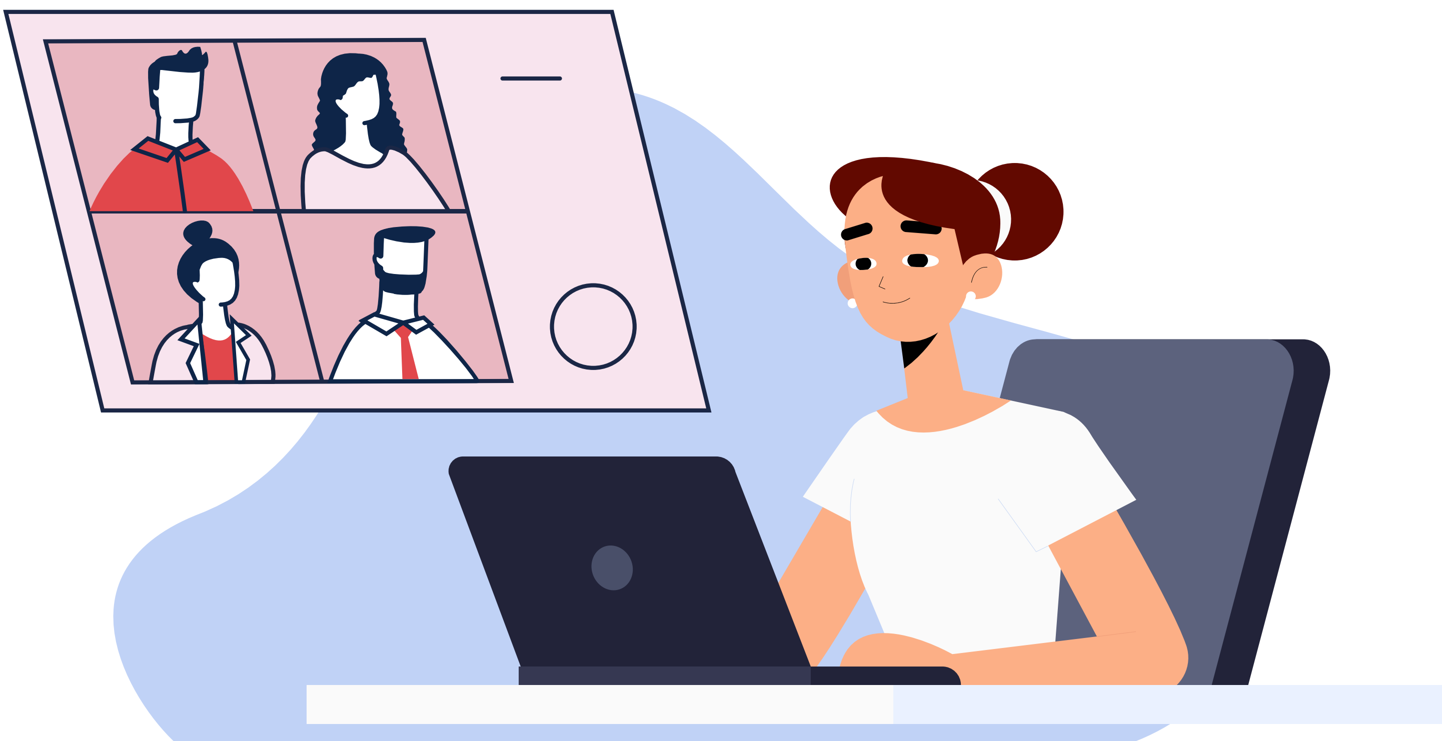
Since the 1980s, the world has got much smaller, and many foreign courts have got much better. In times past, the English court might have looked askance at determining difficult questions of trust law in a foreign court, with limited expertise in the local profession and judiciary. As many of us can attest, those days are gone. In a cross-border case, it is now more likely that there will be an available foreign forum, especially if that forum takes a broad view of its own jurisdiction.

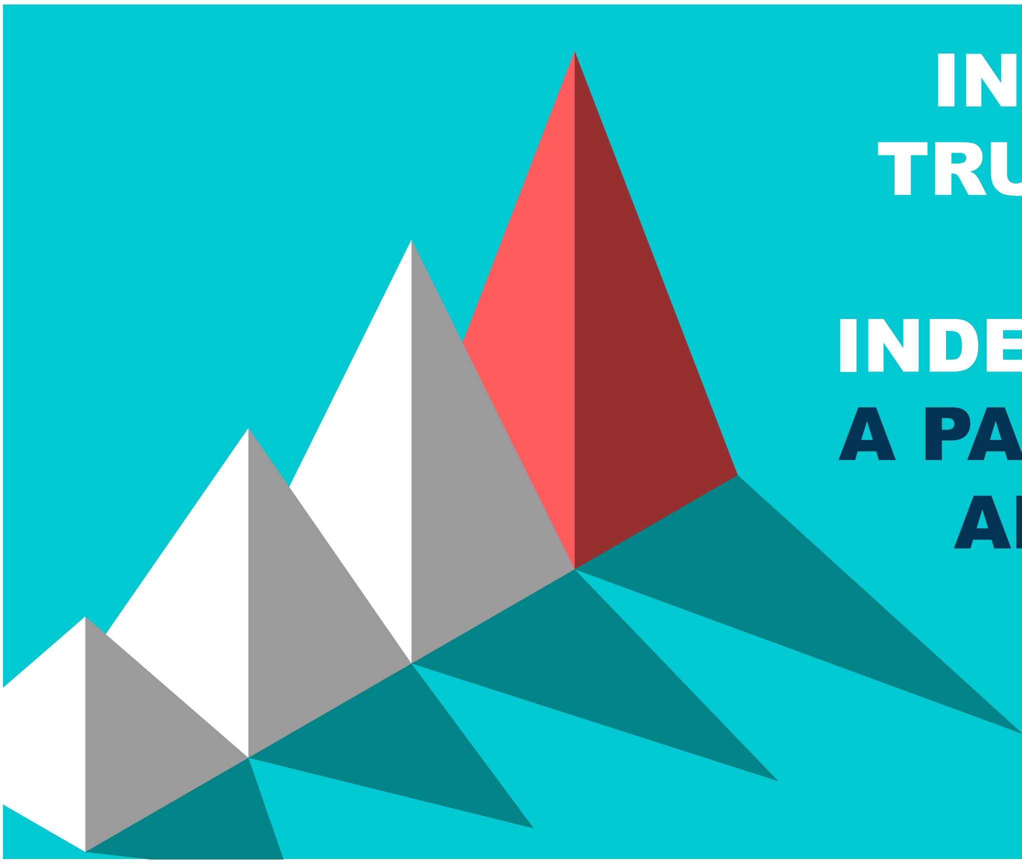
But on the other hand, the "clearly and distinctly" test may now be harder to satisfy – in both directions. Until comparatively recently, documents might have been held in hard copy, while witnesses and lawyers might have found it difficult to travel. Practicalities could thus have influenced the appropriateness of a given forum. Nowadays, though, electronic documents can be easily transferred. Witnesses and lawyers can travel easily, if they need to travel at all, rather than appearing remotely.

With the homogenisation of venues for litigation, it is now increasingly important to start proceedings promptly, to secure your forum of choice. Your opponent will find it harder to argue for a more appropriate court abroad. And the same is true in reverse: if your opponent gets to court first, you may be stuck with their choice.

Finally, the problem of enforcement remains. It's all very well getting a judgment from the English court. Doing something useful with it is another question. If enforcement will be sought abroad, it is always worth taking local advice at the start to ensure that your goals can be met. With the English courts' expanded jurisdiction, that has become all the more important, since there is less of a natural filter on claims.

The new PD6B offers some welcome new opportunities to help our clients, but we must make sure that the practicalities don't get lost in the excitement.





INSOLVENT TRUSTS AND TRUSTEE INDEMNITIES: A PARI PASSU APPROACH

Authored by: Clementine Dowley, Associate at Payne Hicks Beach

In October last year, the Privy Council handed down its judgment in Equity Trust (Jersey) Ltd v. Halabi (as executor of the estate of the late Madam Intisar Nour) and ITG Ltd and others v Fort Trustees Ltd [2022] UKPC 36.

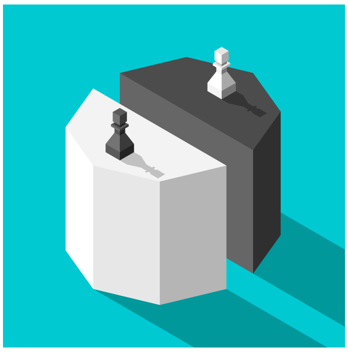
The decision concerned two unconnected appeals, one of which originated in Jersey and the other in Guernsey. Both, however, concerned questions of Jersey law, by which the relevant trusts were governed.

The central issue in dispute in each appeal was: in what order of priority do trustees' indemnity claims rank where the trust assets are insufficient to satisfy them all?

Reversing the Court of Appeal's decision, the Privy Council held, by a 4:3 majority, that in such circumstances, those claims would rank pari passu with one another.

This article considers the conclusions of the minority and majority, outlines the reasoning behind them and reflects on the questions to which the judgment may give rise in future.

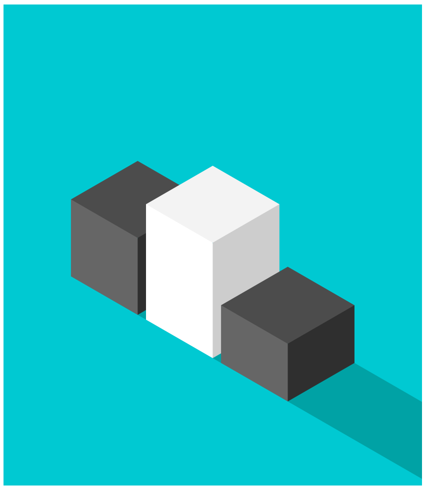
Decision



The Privy Council began by making number of observations (with which all members of the panel agreed) about the nature of trustees' indemnity claims. In particular, they stated that a trustee's right of indemnity confers an equitable proprietary interest in the trust assets, and that this equitable proprietary interest survives the transfer of trust assets to successor trustees.

Opinion diverged, however, on the question of priority. Whilst the minority (comprising Lord Richards, Lord Stephens and Sir Nicholas Patten) were of the view that the claims of earlier appointed trustees should rank first, the majority (comprising Lord Briggs, Lady Rose, Lady Arden and Lord Reed) favoured a pari passu approach.

The minority decision

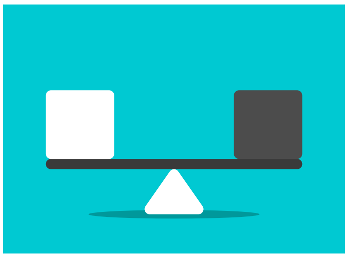


The minority relied on principle in reaching its conclusion, asserting that the general rule as to the priority of equitable interests was that they ranked in the order in which they were created, and that there was no reason to depart from that rule in respect of a trustee's right of indemnity.

In their joint judgment (with which Lord Stephens agreed), Lord Richards and Sir Nicholas stated:

"In our view, the priority ranking of successive trustees' equitable interests in the trust property should be governed in accordance with principle. The general rule applicable to competing equitable interests is that priority is determined by the order of creation, and we see no sufficient reason for developing and applying a different principle to the equitable interests of trustees in respect of their rights of indemnity" (para. 210).

The majority decision



The majority, on the other hand, considered that there were "powerful reasons of justice, equity, fairness and common sense" for preferring a pari passu rule of priority for these claims (para. 239).

Lord Briggs, who gave the leading majority judgment, stated that the general rule as to the priority of equitable interests was not appropriate to the specific nature of a trustee's right of indemnity: this was a sui generis right and as such "worthy of a carefully worked out priority rule of its own" (para. 250).

He went on to point out that the "first-in-time" rule could well operate arbitrarily, in that there may not be any correlation between the date on which trustees were appointed and what was just in terms of their indemnification rights. Where, for example, trustees had been appointed in quick succession and all acted jointly, prioritising the claims of those appointed first could cause serious injustice.

Lord Briggs also emphasised that his perception of a trust as a "form of continuing institution or scheme" so that "trustees are all (even if at different times) trustees of the same trust" was central to his conclusion regarding pari passu treatment. In that light:

"A competition for priority between trustees' liens seems to me to be alien to the very nature of the office to which the lien is an incident […] Why should fiduciaries who have worked as such together in a common enterprise, for the benefit of others rather than themselves, not be paid pari passu from a deficient fund? Their respective dates of appointment would be mere happenstance, having no connection of any kind with equity or justice […] The notion that, in the event of an insufficiency of the fund they would share wholly unequally in the residue in the exercise of their liens, could not but be detrimental to their sense of common purpose as fiduciaries, in administering the fund for the benefit of the beneficiaries. The insufficiency of the fund to meet in full the value of their respective liens would be, to all of them, a common misfortune, in which their natural expectation would be to bear the pain equally" (paras. 254-5).

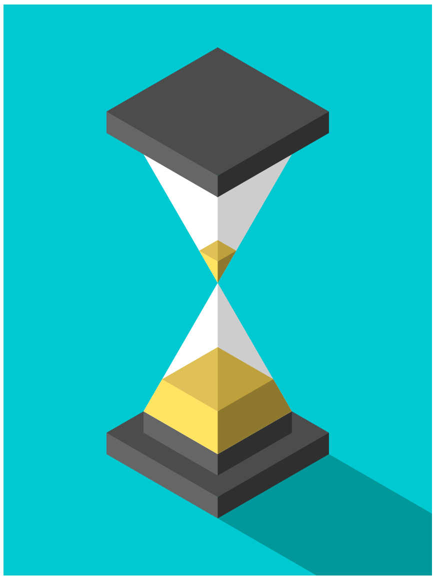
Having set out his arguments in favour of a pari passu rule, Lord Briggs went on to acknowledge that it "will not work perfect justice in every case [and] in many cases it will do no more than rough justice" (para. 277). He considered, however, that it was the "fairest, or least worst, general rule", in that "there is an inherent justice in equal division, or equal sharing of a common misfortune, which is captured in the equitable maxim "equality is equity", and on that basis, it was appropriate to adopt it.

Conclusions

The Privy Council's decision is helpful in that it resolves, at least for now, an issue which had for some time been the subject of protracted litigation, bringing a welcome degree of certainty. It does, however, leave a number of questions unanswered, as Lord Briggs himself acknowledged. For example:

- Is there scope for the courts to deviate from the pari passu rule where a strict application of it would operate inequitably?
- What is the procedure for distributing funds pari passu, and will the court's involvement be required?
- Can the general rule of pari passu priority be excluded by the trust instrument?
- What is the position as to the priority of claims between trustees and trust creditors?

These, and the question whether the decision represents the position in England and Wales and other common law jurisdictions, may well give rise to further litigation in due course.



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For further information please contact:
Robert Brodrick, Partner, Private Client rbrodrick@phb.co.uk
Richard Manyon, Partner, Dispute Resolution rmanyon@phb.co.uk
Jessica Henson, Partner, Dispute Resolution jhenson@phb.co.uk

Payne Hicks Beach LLP, 10 New Square, Lincoln's Inn, London WC2A 3QG
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DOES A THIRD PARTY OWE A DUTY OF CARE TO A BENEFICIARY?

Authored by: Andrew Mold KC, Barrister at Wilberforce Chambers

Establishing that a duty of care is owed to a beneficiary by a third party (i.e. someone other than the trustee or a person with whom the beneficiary has a contract) is not a straightforward exercise. In practice, it will usually require the beneficiary to show either that there has been an assumption of responsibility by the third party towards the beneficiary or that denying such a duty would lead to an absence of accountability on the part of the third party by analogy with the approach in White v Jones.[1]

This important issue for private client and trust lawyers was recently considered in depth by the Privy Council in JP SPC 4 v Royal Bank of Scotland International Ltd[2]. The decision provides a useful discussion of the relevant considerations and the general approach the Courts will take when deciding whether a duty of care exists.

The claimant was an investment fund based in the Cayman Islands which established a scheme by which investors were to lend money to solicitors for the pursuit of litigation. The loans were to be advanced and repaid through an Isle of Man company, called Synergy, using bank accounts Synergy held with RBS. The claimant issued proceedings against RBS in the Isle of Man for the recovery of losses which it alleged to have suffered as a result of a fraud carried out by Synergy and its owners. Under the fraud, money beneficially owned by the claimant was paid out of Synergy's accounts with RBS for the benefit of its owners rather than for the loans the scheme was intended to make.

RBS applied for summary judgment/strike out on the basis that it did not owe a duty of care to the claimant. This issue made it all the way up to the Privy Council.

Importantly, for the purposes of the application, it was assumed (reflecting the claimant's factual case): (i) that RBS knew (or ought to have known) that the claimant was the beneficial owner of the moneys in the accounts; and (ii) the circumstances were such that a reasonable banker would have had grounds for considering that there was a real possibility that the claimant was being defrauded.

When approaching whether a duty of care is owed, Courts will usually consider first whether such a duty falls within an established category of duties based on existing authority and, if not, whether such a duty should be found by way of incremental development of the law. This was the approach the Privy Council also followed.

The Privy Council considered first the Quincecare[3] duty of care which is a duty owed specifically by a bank to its customer (arising as an aspect of a bank's implied contractual duty and co-extensive tortious duty of care) to refrain from executing a customer's order if the bank has reasonable grounds for believing that the order is an attempt to defraud the customer. This basis for a duty to the claimant was rejected because the Privy Council confirmed that the Quincecare duty is owed only to a bank's customer which in the present case was Synergy and not the claimant.

The claimant also relied on the decision of Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA[4] in which Peter Gibson J had accepted that:

1 [1995] 2 AC 207

2 [2022] UKPC 18, [2022] 3 WLR 261

3 Barclays Bank plc v Quincecare Ltd [1992] 4 All ER 363

4 [1993] 1 WLR 509 at [349]. This is a decision better known for its (now discredited) five-fold classification of the scale of knowledge in relation to dishonest assistance.

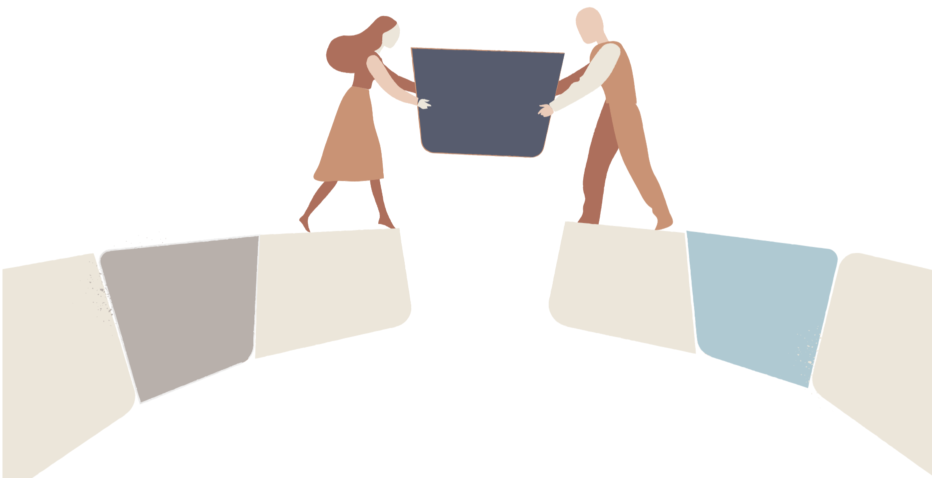
> **‘where a paying bank is on notice that its customer is a fiduciary in respect of moneys in an account with the bank it owes a duty of care to the persons beneficially interested in those moneys, as soon as the bank is put on such notice’.**

However, whilst Baden clearly supported the claimant’s position, the Privy Council considered it was clear that in the light of subsequent developments in the law of negligence, Baden no longer represented good law. This was because Peter Gibson J had based his decision on the two-stage approach to determining whether a duty of care was owed as laid down in Anns v Merton London BC[5], i.e. (i) whether it was reasonably foreseeable to the defendant that the claimant would be likely to suffer loss from the defendant’s careless conduct; and if so (ii) were there good policy reasons why that prima facie duty should be negatived or limited. However, Anns v Merton and the approach it espoused had long since been overruled[6].

The Privy Council considered whether a duty of care based on an ‘assumption of responsibility’ by RBS towards the claimant should be held to exist. The factors which have particular relevance in determining whether there has been an assumption of responsibility in relation to a task or service include: (i) the purpose of the task or service and whether it is for the benefit of the claimant; (ii) the defendant’s knowledge and whether it knows (or ought to know) that the claimant will be relying on it to act with reasonable care; and (iii) the reasonableness of the claimant’s reliance. In the present case, the claimant had pleaded no factual basis (and there was no evidence) on which a duty of care based on an assumption of responsibility could be established.

Turning to the incremental development of the law, the claimant argued that a duty of care should be held to exist by analogy with the decision of White v Jones (and similar cases), otherwise there would be a lacuna. However, the Privy Council considered that there was no lacuna in the present case because RBS’s customer, Synergy, had a valid claim for negligence against RBS under which, if successful, Synergy would have been entitled to recover the loss suffered by the claimant for whom it was trustee. It did not matter that, in practice, Synergy was unlikely to bring an action against RBS. Furthermore, the claimant would have a claim to recover its loss against Synergy for breach of fiduciary duty. Therefore, White v Jones was distinguishable and there was no need for the law to fashion a remedy. Therefore, the Privy Council (upholding the decision of the Staff of Government (Appeal Division)) concluded that no duty of care was owed by RBS to the claimant. The key lessons from this important decision for those looking to establish that a third party owes a duty of care to a beneficiary (in a category not already covered by existing case law) are:

- A duty of care may be owed to a beneficiary by a third party on the basis of an ‘assumption of responsibility’. This is likely to require that the service provided by the third party is for the benefit of the beneficiary and that the beneficiary (to the third party’s knowledge) reasonably relies on the third party to exercise reasonable care. Importantly, the test for establishing a duty based on an assumption of responsibility is objective. Therefore, it will normally need to be shown that there were relevant exchanges crossing the line between the third party and the beneficiary.
- If one can show that there is truly a lacuna in legal accountability – by analogy with White v Jones – then that will provide a good basis for establishing a duty of care owed to a beneficiary. However, the Courts will consider carefully whether that is the case, taking account of other avenues of relief.
- The scope of duties owed by banks are increasingly well developed. The Courts are reluctant to extend those duties in a way which risks placing an unacceptable burden on banks going outside of their contractual relationship with their customers. The Courts’ reluctance may be less forceful in relation to other service providers.
- The Courts will also be reluctant to impose a duty of care where to do so would cut across the requirements of accessory liability. In order to establish accessory liability for assisting in a breach of fiduciary duty, one must prove dishonesty[7]. On the assumption that there had been a breach of fiduciary duty by Synergy to the claimant, if RBS was liable to the claimant for the tort of negligence, this would be tantamount to holding RBS liable for having negligently assisted a breach of fiduciary duty.



5 [1978] AC 728

6 See Murphy v Brentwood DC [1991] 1 AC 398

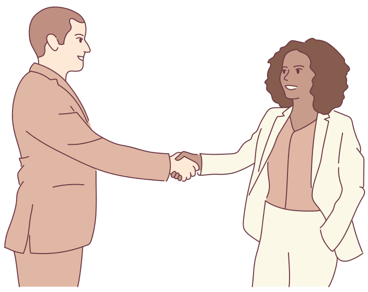
7 Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 AC 378; Twinsectra Ltd v Yardley [2002] 2 AC 164; Barlow Clowes International Ltd v Eurotrust International Ltd [2006] 1 WLR 1476.

ASK NOT TELL: THE OBLIGATIONS OF TRUSTEES TO NOTIFY DISCRETIONARY BENEFICIARIES OF THEIR INTEREST IN A TRUST

Authored by: Nicholas Holland, Partner, and Anita Franklin, Associate at McDermott, Will & Emery

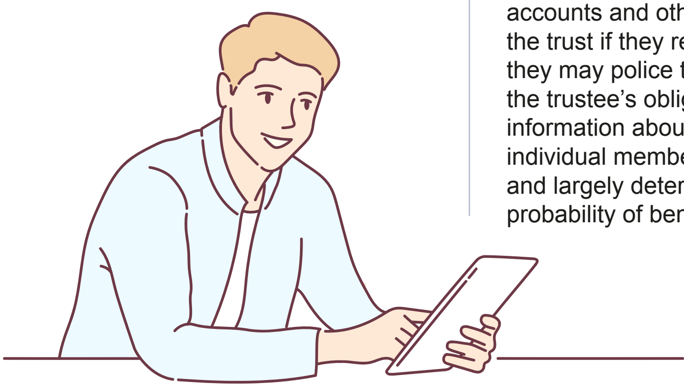
Whilst it is widely understood that a trust can be valid only if it has an object, when it comes to discretionary trusts the beneficial class can be incredibly broad and many members of the class are unaware that that they have a right to be considered for an entitlement under a trust. That then begs the question: To what extent are trustees obliged to notify members of the class of potential objects of the existence of the trust?

The easy answer



The starting point is that trustees are obliged to administer a trust in accordance with the provisions of the settlement deed and the law. In addition, trustees owe specific duties to beneficiaries, including the duty to act in good faith and to account to their beneficiaries by keeping accurate records of the administration of the trust.

The beneficiaries of an interest in possession trust have a known interest in the trust property and an entitlement, possibly contingent or future, to either capital or income or both. It is well-established that the trustee has a duty to inform a beneficiary who is entitled to benefit, or has actually benefited, from the trust (rather than merely hoping to benefit), about the existence of the trust and the nature of their interest in the trust. Trustees also have a duty to inform beneficiaries with a contingent but defined right (for example, an entitlement to capital at a certain age) that a trust exists and the nature of their interest in the trust.



Where things get a bit more complicated

However, under a discretionary trust, the members of the potential class of objects or beneficiaries do not have any legal entitlement to either income or capital but merely a spes or hope of benefit. The trustee must still administer the trust in line with the terms of the trust documents and at least some members of the class are entitled to accounts and other information about the trust if they request them so that they may police the trust. However, the trustee's obligation to disclose information about the trust to any individual members is indeterminate and largely determined by their probability of benefit from it.

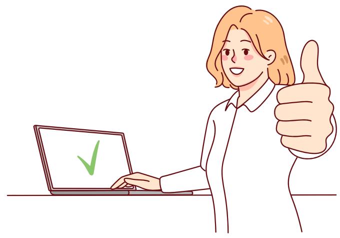
The right to information about the trust used to be thought of in proprietary terms. In Re Londonderry's Settlement [1964], the court held that the right to trust information should be regarded as a proprietary right, and the requirement for a trustee to provide information should be limited to ownership, management and administration of trust property rather than to any information relating to the rationale and processes of decision-making.

However, in the case of Schmidt v Rosewood Trust Limited [2003], the Privy Council made clear that the right to information was driven by the need for the objects of a trust as a whole to have sufficient information to police the trustee.

The court made clear that no one beneficiary is entitled to or has a right to disclosure of trust documents, and disclosure to a beneficiary is not dependent on the beneficiary having a proprietary interest in the trust assets. Whilst the beneficiaries as a whole must have sufficient information to be able to seek relief from the courts, the Privy Council noted that in evaluating any one beneficiary's claim for information the trustees have to balance competing differing interests in determining whether to disclose trust information. As a result, trustees should have regard to the nature of each request for trust information in light of the underlying principle that any right to disclosure is based upon the fundamental obligation of trustees to act in the interest of beneficiaries as a whole, and they should therefore consider whether there are any factors that may weigh against the provision of information to a particular beneficiary.

There is no case in England or the offshore world that has held that every member of the beneficial class of a discretionary trust must be notified by a trustee of their potential interest in a trust. In some ways that is hardly surprising, given how broad the potential class might be; in some instances, trusts purport to potentially benefit hundreds of thousands of members of the class (i.e., where trusts purport to have a duration of 500 or 600 years!). However, at least one member of the beneficial class must be aware of the trust as the objects as a whole must be able to police the trust.

Trustees must advise members of the trust if asked



There is of course an inherent conflict in the trustee's position. Only beneficiaries with a realistic prospect of benefiting from the trust are typically advised of its existence and provided with trust information, but it is also the trustee that decides who is likely to benefit from the trust. Yet the trust information is being provided so that the objects may police the trustee. The trustee is thus discouraged from benefiting inquisitive or difficult members of the class, the very members most likely to actively police the trustee.

It is perhaps troubling that such members are often unaware of the existence of the trust let alone provided with any trust information. There is of course a solution of sorts, if perhaps unsatisfactory. Whilst the trustee may not be under any obligation to notify all of the members of the class of its existence, those members are entitled to be advised of the existence of the trust if they make enquiry of the trustee. Whether they are entitled to further trust information may prove to be another matter, but they will at least be aware that they might be well placed to make further enquiry.

60-SECONDS WITH:

JOANNE MORSE
HEAD OF FAMILY OFFICE
SUMMIT TRUST INTERNATIONAL SA

Q What is your area of practice?

A I'm a trustee.

Q What motivated you to pursue this specialisation?

A I'm not sure anyone starts out wanting to be a trustee! I started off as a private client solicitor in the UK before moving to Geneva to work for Summit Trust International SA. Summit has a reputation for having expertise in holding in trust not only portfolio assets but also real property (residential and commercial), intellectual property, trading companies and family businesses, fine art, bloodstock and chattels such as jewellery, aircraft and ships. This all sounded a lot more fun than drafting wills and administering estates, so when I was invited to an interview I jumped at the chance.

Q What is the most rewarding thing about your work?

A The relationships we build: with the families we work with, our colleagues and other professionals. We have an insight into the most fascinating world with complex matters/personalities and relationships. There is never a dull moment.

Q Do you have any career aspirations, and have you achieved any of them so far?

A I always wanted to be a solicitor, but in this multi-faceted role I've achieved things I never knew I wanted to!

Q What do you see as being the biggest trends of 2023 in your practice area?

A The increased use of technology when communicating with families and their advisers. With Whatsapp/Teams and Zoom, you are expected to be available and camera ready at all hours!

Q What has been your most memorable experience during your career so far?

A Putting on a hard hat and overalls and going to visit (by speedboat!) a dry bulk ship in Amsterdam that we were selling from a structure, and then eating at the Captain's table after a tour. A very random day at the office.

Q How do you deal with stress in your work life?

A I make a list of my non-negotiable tasks for the next day at the end of each working day so that I have a plan. And I run.

Q What is your ideal holiday?

A Something by the sea, with lots of seafood dinners, cocktails and afternoon naps.

Q What was the last book you read?

A Slug…and other things I've been told to hate by Holly McNish

Q Do you have a favourite food?

A Crisps in any shape or form.

Q What cause are you passionate about?

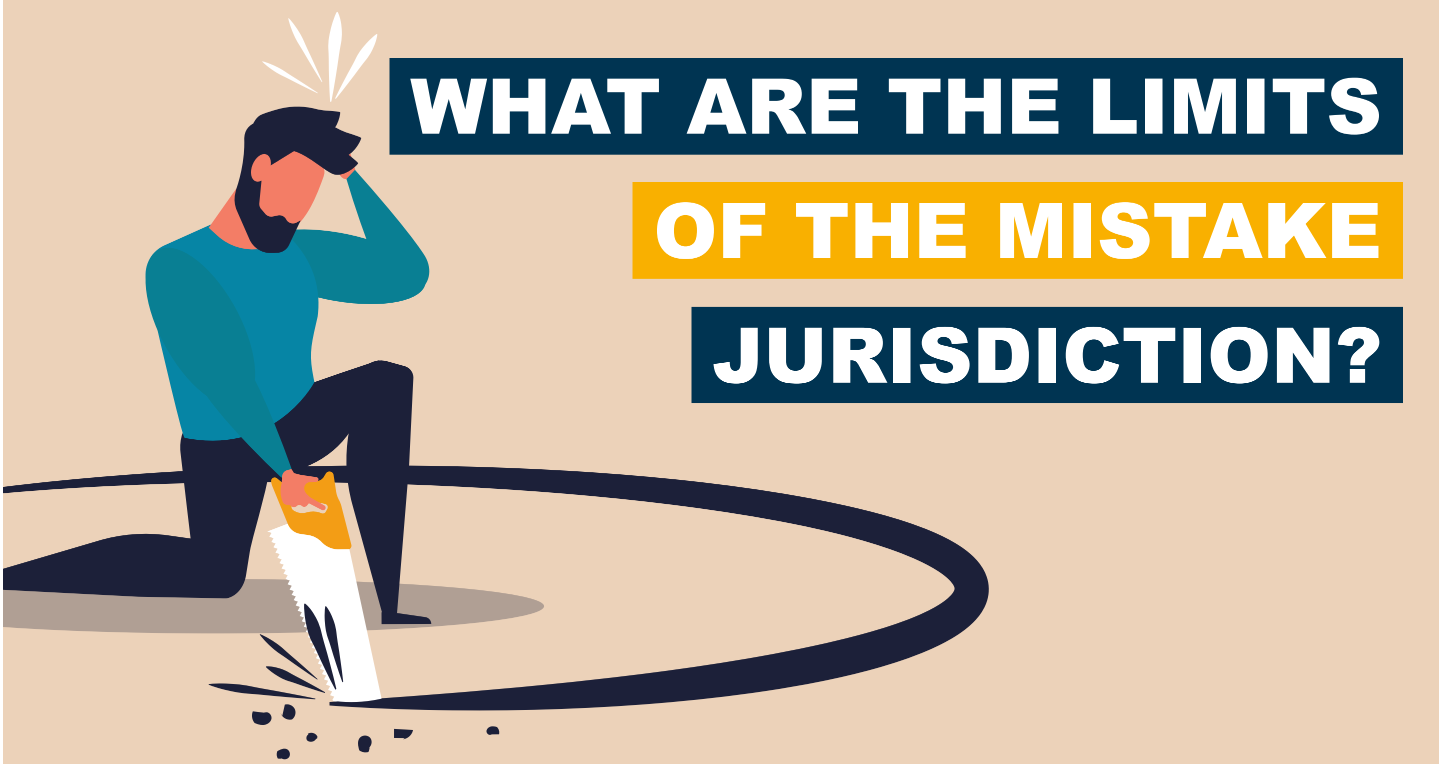
A Mental health- even more so after COVID.

Q Do you have a New Year's Resolution, and if so, how do you plan to keep it?

A No. I've never managed to keep them!

Q What are you looking forward to in 2023?

A The Private Client Summer School at Downing College, Cambridge. I went for the first time last year and loved it, so really looking forward to doing it all again this year.



WHAT ARE THE LIMITS OF THE MISTAKE JURISDICTION?

Authored by: Stephan Alexander, Partner at Mourant Ozannes (Jersey)

The ability to apply to the courts in Jersey and elsewhere on equitable grounds to set aside mistaken transfers of assets into trust or mistaken decisions of fiduciaries has proved important. Typically, the mistake is a tax mistake and unravelling matters can provide a more straightforward remedy for the settlor and beneficiaries than potentially costly and uncertain litigation against advisers. However, the Jersey courts have identified the limits of the jurisdiction. This article explores those limits.

Background

The Trusts (Amendment No. 13) (Jersey) Law 2013 introduced statutory versions of two important rules derived from English equity. The first concerns the setting aside of voluntary dispositions into a trust on the ground of the settlor's mistake. The second, conventionally known as the rule in Hastings-Bass[1], concerns the setting aside of decisions made by fiduciaries after inadequate deliberation. The jurisdictions are contained in Articles 47A to 47J of the Trusts Law. This falls within Part 2 of the Trusts Law, which applies only to trusts whose proper law is the law of Jersey[2].

In many cases of mistaken transfers into trust or mistaken decisions of fiduciaries, the transfer is unfortunate because it has given rise to an unforeseen UK tax liability. The settlor or beneficiaries might seek to sue their advisers, if at all possible, but in most cases a quicker and less risky option is to seek to have the transfers into trust, or the relevant decisions, set aside on the ground of mistake, using the statutory jurisdiction in Jersey.

The basic statutory test in Jersey for the court's intervention on the ground of mistake follows, for practical purposes, the test which the Jersey courts had already applied prior to 2013. This test is, in turn, is drawn from the old English Court of Appeal decision in Ogilvie v Littleboy[3]. In most respects the test has been affirmed by the Supreme Court in Pitt as the appropriate test in English law but there are still some important differences, outlined below.

There are three parts. Firstly, was there a mistake on the part of the settlor in relation to the establishment of the trust or the transfers of assets into trust? Secondly, would the trust or transfers into trust not have been made but for the mistake? Thirdly, was the mistake of so serious a character as to render it just for the Court to make declaration?

1 Re Hastings-Bass [1975] Ch 25. The description of the rule is a misnomer for the reasons explained in Pitt v Holt, Futter v Futter [2013] 2 AC 108.

2 In relation to a non-Jersey trust, the Jersey court will still have jurisdiction under Article 5 of Trusts (Jersey) Law 1984 where the trustee is resident in Jersey, trust assets are situated in Jersey or the administration of the trust is carried out in Jersey. The statutory Hastings-Bass and mistake provisions are not available but the court may reach the same result applying foreign law (as in the recent case of In the matter of the Mileham Discretionary Trust [2020] JRC 045) or non-statutory Jersey law depending on the conflicts of law analysis.

3 (1897) 13 T.L.R. 399

What type of mistake?

"Mistake" for this purpose is defined very broadly and includes a mistake as to the effect or consequences of the action concerned and any advantage to be gained from it. It also expressly includes a mistake of law as well as fact. It has been confirmed many times that this includes mistakes relating to tax; indeed practically all the applications to date have been tax-related.

When the legislation was drafted there was still doubt as to whether the anticipated judgment of the Supreme Court in Pitt would affirm the requirement in English law, deriving from the Court of Appeal decision in Gibbon v Mitchell, that the mistake must relate to the legal effect or nature of the transaction and not merely its consequences (which might be tax consequences). The Jersey provisions addressed this by expressly stating that the mistake can relate to consequences as well as effect. In the event the Supreme Court departed from Gibbon v Mitchell by declining to constrain the doctrine to the legal effect of a transaction. The result in English law is therefore similar to the statutory position in Jersey.

The Jersey court also applies a simpler approach than the Supreme Court to the nature of mistake, it being held inappropriate to make the fine distinctions made in England, after Pitt, between mistakes which are caused by "incorrect conscious beliefs", "incorrect tacit assumptions" and "mere causative ignorance", the last being insufficient in English law[4]. In the court's view such distinctions were artificial. Instead the court's focus is on applying the statutory test to the particular facts.

The limits of the jurisdiction: when will mistake applications be refused?

Quantum: The Jersey courts have expressed the view that a tax mistake may not be regarded as sufficiently serious if the quantum of exposure is small compared to the trust or remaining assets of the settlor[5].

Delay: There are no set time limits to bring an application but to avoid difficulty applicants should act promptly on becoming aware of the mistake. In one case a delay of a year was said to be "on the margins of what is acceptable"[6]. In another there was a delay of over five years but the Jersey court did not consider it would be right to penalise the applicants, who had been badly let down by advisers and had not acted unreasonably[7].

Tax avoidance: The question of what is just has vexed the court where the trust was part of a foreign tax avoidance scheme. Nevertheless, the court will look at the position of the parties closely; it will consider the question of justice on the facts and in the round. Even in a case where the applicants had negotiated an indemnity from their negligent tax advisers the court was prepared "by a small margin" to grant the relief[8]. More recently the court has emphasised that it has a real discretion to exercise[9]. Much clearly depends being able to present a persuasive case based on the overall justice to the individuals concerned.

Calculated risks: The Jersey court has expressed reluctance to grant relief on the grounds of mistake in circumstances where, rather than a settlor being unaware of and therefore mistaken as to the risks of a transaction, the settlor has taken risks in accordance with advice but misjudged the extent of those risks[5]. However, ultimately, the court concluded that the criteria described in paragraph 5 above were satisfied in this case such that it was appropriate to exercise its discretion to grant the relief sought.

Consequential orders

In common with the position in England, a disposition into a trust set aside on the ground of mistake is voidable, rather than void, but its exact effect is subject to the discretion of the court. The Jersey court may declare that the disposition (i) has such effect as the court may determine or (ii) is of no effect from the time of its exercise[11]. Which order is appropriate is fact-dependent and requires close analysis. The court will also allow a trustee acting in good faith to retain fees and absolve it from liability arising solely from the court's order setting aside the disposition in question.

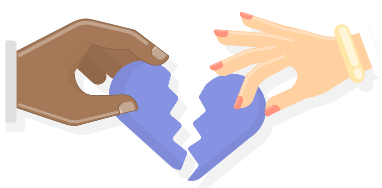
4 In the Matter of the G Trust [2019] JRC 056
5 In the Matter of the G Trust [2019] JRC 056
6 In the Matter of the B Trust [2019] JRC 035
7 In the matter of the Mileham Discretionary Trust [2020] JRC 045; the Jersey court was in this case applying English law
8 In the Matter of the S Trust and T Trust [2015] JRC 259
9 In the Matter of the G Trust [2019] JRC 056
10 In the Matter of the E Settlement [2022] JRC 5
11 The options under (i) include declaring the transfer to be voided from the time of its having taken place but nonetheless having such effect as the court may determine and declaring declare the transfer to be voided from a date subsequent to the time of its having taken place: BNP Paribas Jersey Trust Corporation Limited and Others v Crociani and Others [2018] (2) JLR 175.

TRUSTS AND DIVORCE IN LIECHTENSTEIN

How to Protect the Trust when Happiness is Over

Authored by: Claudius Müller-Rensmann, Senior Associate, and Walter Dorigatti, Senior Associate at Gasser Partner

Introduction



As early as 1926, Liechtenstein was the first country in continental Europe to adopt its own trust law, which was significantly inspired by Anglo-Saxon trust law. Since then, a thriving fiduciary and legal market has developed and today provides long-standing experience and expertise in trust practice and the setting-up and administration of trusts and other private wealth structures (particularly foundations and establishments).

This experience relates also to defending private wealth structures and is particularly important in cases where the trust and the underlying structure are under attack. In this context, notably, international divorce proceedings may have dire consequences.

Where spouses have concluded neither a prenup nor a postnup to manage the financial consequences of divorce, Liechtenstein courts will determine the division of assets according to Art. 67 et seq. of the Liechtenstein Marriage Act (Ehegesetz). In the case of a maintenance claim, the court will consider both the income and the assets of spouses, which are not subject to the initial separation of assets. However, only assets that are earned jointly by the spouses in the course of the marriage are considered in the settlement (assets subject to division). Assets which were contributed to the marriage by a single spouse or assets that one of the spouses has inherited or received as a gift by a third party are not taken into account.

As a general rule, the provisions regarding non-contentious proceedings (Ausserstreitverfahren) are applied to divorce proceedings in Liechtenstein. However, maintenance claims and other monetary claims must be asserted by way of contentious proceedings.

Relevant Case Scenarios

Two practically relevant case scenarios in which trusts may be considered in the context of divorce proceedings are (i) One of the spouses is the settlor of the trust and has reserved the right of revocation. The assets of the trust may therefore be attributed to him. (ii) One of the spouses is a beneficiary of the trust and the distributions are attributed to the joint matrimonial property. Many different case scenarios involving trusts and divorce may appear, however, these are very common cases in practice, in particular when it comes to international high net worth individuals (HNWI).

Financial Disclosure in Divorce Proceedings

Spouses generally have a strong interest in assessing trust assets and determining whether the trust assets are part of the matrimonial property and, therefore, to be considered.

In principle, trustees are bound by a strict professional secrecy according to Art. 21 of the Trustee Act (Treuhändergesetz). Trustees therefore may not disclose any information about the trust to unauthorized persons. This does not apply to the settlor, or to entitled beneficiaries. However, the trustee may not disclose information about the trust assets to discretionary beneficiaries.

If a spouse asserts claims to receive information against the other spouse as nominee beneficiary, it is to be considered that non-contentious proceedings (Ausserstreitverfahren) do not provide for information claims. However, in Liechtenstein law, information claims under Art. XV of the Introductory Act to the Code of Civil Procedure and the Jurisdiction Rules (Einführungsgesetz zur Zivilprozessordnung und der Jurisdiktionsnorm) are applied analogously. Therefore, it is a prerequisite that the claimant spouse is able to provide information about the hidden assets and testify to a connection with the divorce proceedings.

International Decisions: Recognition and (Un) enforceability

A pressing issue in international divorce cases involving Liechtenstein trusts is often how to proceed with enforcement once a decision of a foreign court has been obtained.

Since most trust-related divorces are not executed in Liechtenstein, but abroad, the issue of recognition and enforceability of foreign judgments regularly arises in Liechtenstein trust practice.

In general, foreign court decisions are not recognized and enforceable in Liechtenstein, as Liechtenstein is neither a signatory to the Lugano Convention nor subject to the Brussels Regulation. Exceptions of note are judicial decisions originating from Switzerland and Austria with whom Liechtenstein has concluded bilateral treaties on recognition and enforcement. Deviating from the general rule discussed above, judicial decisions in divorce matters which are covered by the Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations are enforceable.

Although there is no automatic recognition and enforcement of foreign judgments in Liechtenstein, such judgments may be made enforceable if they are deemed equivalent to domestic judgments by way of reinstitution proceedings (Rechtsöffnungsverfahren). The court assesses whether foreign judgments may be a reasonable suitable basis for a title of enforcement.

Financial Obligations

One of the pressing questions is the issue of financial obligations that a spouse beneficiary has to the other spouse after the divorce proceedings.

According to Art. 914 (2) of the Persons and Companies Act (Personen- und Gesellschaftsrecht), creditors of a beneficiary may assert claims against the trust property by way of enforcement or insolvency proceedings only to the extent that the beneficiary is entitled to a claim against the trust property. This means that creditors of a beneficiary may only claim the amounts that the beneficiary himself also is entitled to receive.

Therefore, to ward off claims against the trust property, it is crucial to ensure that the trust deed provides that beneficiaries may not be deprived of their beneficial interest by their creditors (Unentziehbarkeit).

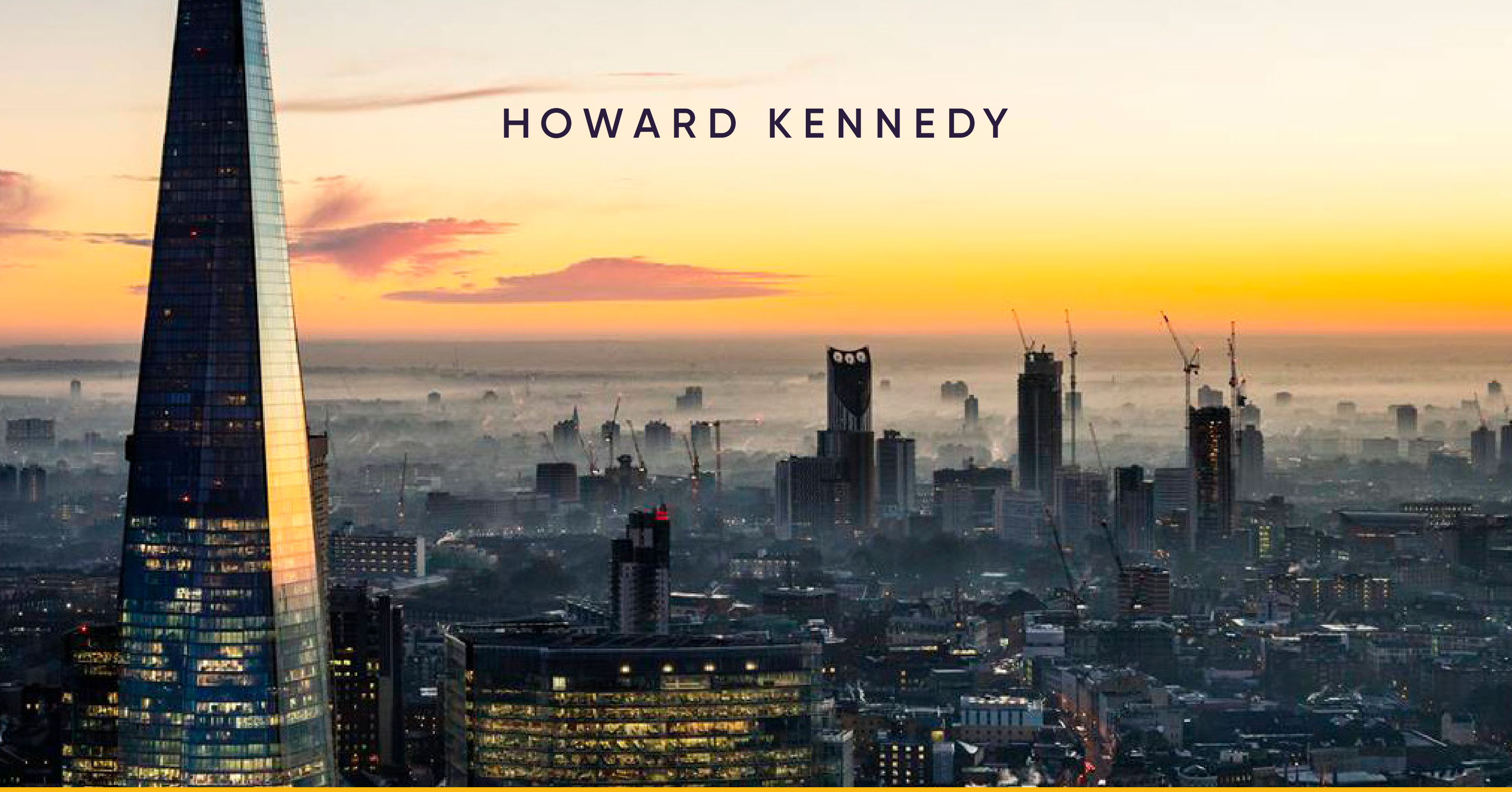
Transfer of Assets Before Divorce

In some cases, a spouse contributes assets to a trust during the marriage without the other spouse noticing the contribution. Since there is no obligation to have a trust entered into the Commercial Register (Handelsregister) and discretionary beneficiaries are not mentioned in the Register of Beneficial Owners, it is considerably difficult for beneficiaries to be discovered in Liechtenstein.

Nevertheless, it is to be considered that some jurisdictions provide for a prohibition on the reduction of joint matrimonial assets. In Germany, for example, one spouse may only dispose of the matrimonial assets as a whole with the consent of the other spouse (§ 1365 BGB, German Civil Code; Bürgerliches Gesetzbuch).

In Liechtenstein, if a spouse, without the express or tacit consent of the other spouse, reduces matrimonial property or matrimonial savings in a way that is contrary to the spouses' living arrangements during the matrimonial relationship, within two years before a claim for divorce is filed, the value of what is missing shall be included in the division (Art. 84 para. 1 of the Marriage Act). However, this is issue of international private law and the law applicable to the marriage which must be assessed on a case-by-case basis.

HOWARD KENNEDY



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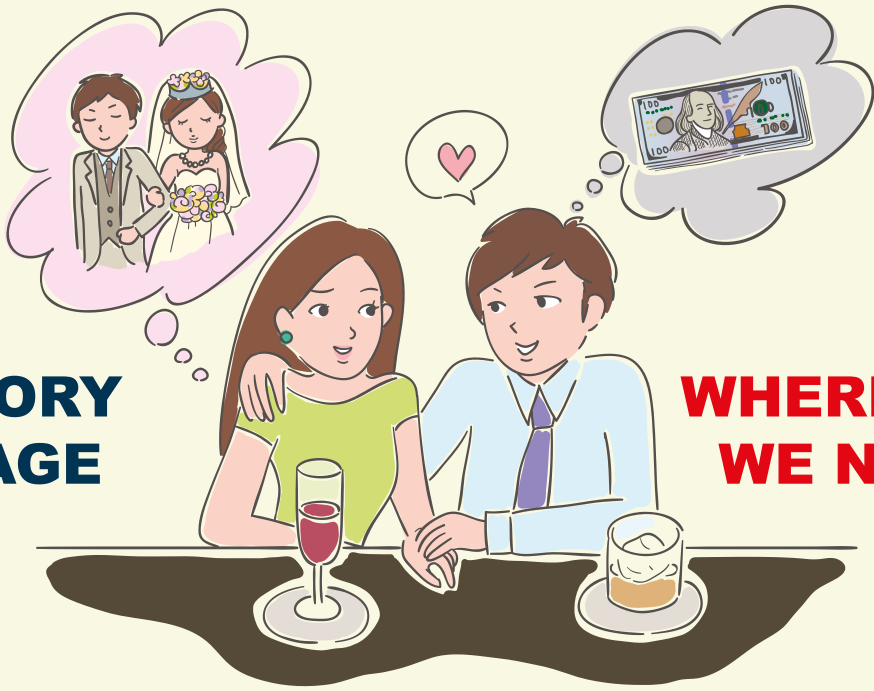
PREDATORY MARRIAGE



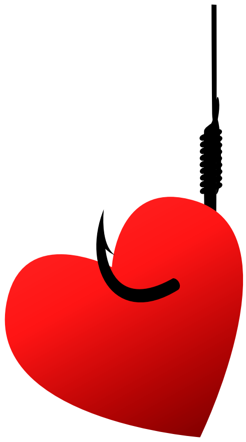
WHERE ARE WE NOW?

Authored by: Naomi O'Higgins, Head of Trusts and Estates Disputes at Howard Kennedy

The numbers of predatory marriages have been rising in the last decade. This is thought to be due to a combination of factors including our aging population, an increase in the rates of dementia, and recent changes in favour of spouses increasing their entitlement when their husband or wife dies without leaving a will.

Increasing isolation of elderly people may also be a factor in some cases, with families tending to live further apart than in the past. However, this is by no means universal – predators find a way to access and control their chosen victims even with family in close and regular contact.

What is predatory marriage?

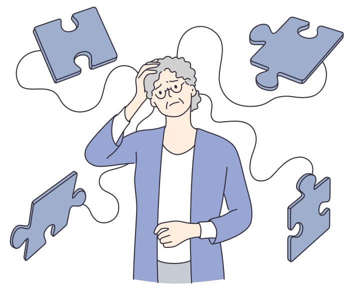


The term predatory marriage describes a situation in which a vulnerable person who does not have mental capacity to marry is lured into marriage by someone who is seeking to gain financial advantage. Such predators are exploiting a gap in the current law in England and Wales, whereby marriage has the effect of automatically revoking a will (unless the will was prepared in contemplation of marriage). These marriages often take place in secret without the knowledge of the vulnerable spouse's family.

If, following the marriage, the vulnerable person lacks capacity to prepare an updated will, the intestacy rules will apply so that:

- The new spouse will inherit:
  - the first £270,000 of assets and all personal possessions, whatever their value; and
  - Half of the rest of the estate;
- The other half will be divided equally between any surviving children of the deceased. If the deceased has no children, the entire estate will pass to the spouse.

How is it being addressed?



This issue has received greater media coverage recently thanks to the work of Predatory Marriage UK (formerly "Justice for Joan"). This campaign was started by Daphne Franks who, following the death of her 91 year old mother, Joan Blass, in 2016, discovered that Joan had married a much younger man in secret five months prior to her death. Joan had severe dementia and terminal cancer and never knew that she was married.

In Joan's case, despite evidence from the registrars showing that aspects of her demeanour during the marriage had given rise to concerns, the marriage went ahead. Part of the reason for this in her case, and others, is that registrars are not trained to assess capacity. In addition, the test of capacity to marry is significantly lower than that to make a will, for example.

As a result of the marriage, Daphne and her family were not only disinherited, but also lost the right to have a say in how or where her funeral took place, or other arrangements following her death.

They were hampered also by the fact that under the law as it stands, once a party has died, it is no longer possible to annul the marriage even if it is possible to prove that one of the parties did not have capacity to marry.

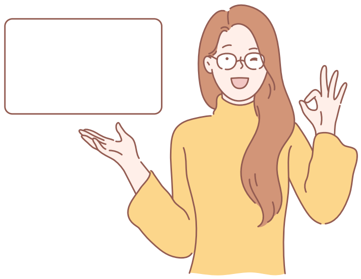
Daphne set up Predatory Marriage UK in an attempt to prevent this happening to other families. Among other aims, the campaign, which has received support from Fabian Hamilton MP, seeks to achieve the following:

Change the law such that a marriage does not automatically revoke a will.

- **Create an offence of Predatory Marriage, perhaps as a subset of Forced Marriage.**
- **Publish Notices/Banns on the Internet.**
- **Train registrars to look for signs of insufficient mental capacity to marry.**
- **Add a robust set of questions for registrars to ask at marriage, with clear procedures for them to follow if correct answers are not given.**
- **Ensure registrars will stop a marriage ceremony if there are any doubts as to the capacity of one of the parties to marry.**
- **Add "The marriage was fraudulent" to the permitted reasons to annul a marriage after one party has died.**

The Law Commission published its report into the reform of marriage laws in July 2022, and has looked at the issue of predatory marriage.

What are the recommendations of the Law Commission?



The Commission recommends a more rigorous notice procedure with marriage notices being displayed on a publicly accessible Government website for the waiting period. Having notices of marriage displayed online will make it easier for concerned families to check whether a wedding is planned to take place. Those who are aware of an imminent marriage may enter a caveat where there is a risk that a person lacks the capacity to marry.

The Report also recommends that officiants should have a specific duty to ensure that the parties freely express consent to marry each other during the ceremony, which implies a duty to ensure that both parties have capacity to marry and are freely agreeing to be married.

The Report noted that specific concerns about the impact of predatory marriages on an existing will will be addressed in the Law Commission's project on wills. This was paused at the Government's request while the Law Commission prioritised their work on weddings. It has now re-started, and the Commission aims to publish a supplementary consultation in September 2023.

How will the implementation of the Law Commission's proposals address the issue of predatory marriage?

The Commission has provisionally proposed in previous initial reports that, in the event that a marriage continues to revoke a will, it should not do so where a person has capacity to marry but does not have (and is unlikely to recover) testamentary capacity.

If that proposal is enacted, while it will not address all the concerns relating to predatory marriage, it is likely to resolve one of its most egregious consequences. It is to be hoped that this will remove a significant financial incentive for a predatory marriage, and deter potential predators from exploiting vulnerable people in this way.

TRUSTEES CLEANING OUT THEIR CLOSETS... TRENDS ACROSS THE TRUST INDUSTRY

Authoured by: Matt Guthrie, Partner, and Diana Rodriguez, Senior Associate at Ogier (Guernsey)

Working day in and day out with trust companies both in Guernsey and further afield, as advisers we are well placed to see common trends and themes developing. One of the most prevalent in 2021 and 2022 has been the rise of trustees filing suspicious activity reports (SARs) in relation to their client structures.

Taking a step back and confining ourselves to Guernsey for present purposes, trust companies in Guernsey are licensed under the Regulation of Fiduciaries, Administrations Businesses and Company Directors etc (Bailiwick of Guernsey) Law, 2020 and are required to comply with Guernsey's anti-money laundering framework. This requires them to identify and verify the identity and source of wealth of their customers and, where they have grounds to believe that their customers may have committed a money laundering offence, to make a suspicious activity report to their money laundering reporting officer (MLRO). By doing so, the individual employee of the trust company is relieved of any liability for failing to disclose and the MLRO in turn then makes a decision about whether or not to file a SAR with the Guernsey Financial Intelligence Unit (FIU).

The threshold for having a suspicion is low – the trust company employees need only form a view that there is a possibility that is more than fanciful that the relevant facts (which give rise to the suspicion) exist.

As such, there is an increasing trend to report suspicious activities where there is any risk at all that there may be an issue. It is easy to have sympathy with that approach in circumstances where the penalty for not so reporting can be very significant fines or a criminal sentence.

However, where a SAR has been filed, the trustee can be left in a very difficult position if it is then not provided with consent by the FIU to proceed with any requested transaction in relation to the client structure.

Trust companies are increasingly spending time reviewing their historic client files to ascertain whether there are any grounds that give rise to such suspicion. Where such grounds are identified, it may be many years after the structure was first taken on and now extremely difficult to obtain the necessary documentation to allay those suspicions and to prove the legitimacy of the funds in the structure. The impetus for such reviews may be updates to the Guernsey Handbook on Countering Financial Criminal and Terrorist Financing in Guernsey which took effect in 2019, an impending regulatory visit (or the aftermath of one) or an exercise undertaken in anticipation of a sale of the trust company's business.

The practical effect is an informal freeze of the structure together with a risk of committing the offence of tipping off if the existence of the SAR is disclosed to the underlying principals behind the client structure. The informal freeze may continue for an indefinite period.

Guernsey's new summary civil forfeiture regime

Guernsey has introduced a new summary civil forfeiture procedure that will have an impact on just these situations. The Forfeiture of Money etc, in Civil Proceedings (Bailiwick of

Guernsey) (Amendment) Ordinance (the Ordinance) came into effect on 31 January 2023. It allows the court to make an order for the forfeiture of assets in a Bailiwick bank account where a relevant consent request has been made and refused at least 12 months previously. The order can only be made on the application of His Majesty's Procureur on the basis that she has reasonable grounds to believe that the funds in the account are linked to criminality. The FIU's "no consent" is likely to satisfy that test.

Guernsey has had a non-conviction based forfeiture regime since 2008. But it has only been available where assets have been previously frozen or detained, and the authorities have had the burden of persuading the court that on the balance of probability the assets are either the proceeds of criminal conduct or intended for use by any person in unlawful conduct. The Ordinance reversed the burden of proof.

Under the new summary procedure, a forfeiture notice with details of the court hearing will be served on the bank account holder and the bank at which the account subject to the "no consent" is held. If the account holder fails to appear, the court can make the forfeiture order. If the account holder does appear, they have the option to request a later hearing date, or they can try to satisfy the court there and then that the funds are not tainted.

Where trust assets are the subject of a summary forfeiture notice, it is likely to be the trustee as account holder who is served with the notice. The trustee will need to consider:

- to what extent it should participate in the proceedings?
- its duties to the beneficiaries as a whole. If the target of the forfeiture notice is a single beneficiary, do the interests of the other beneficiaries require a challenge to be made?
- if the procedure stems from a SAR filed by the trustee, can it demonstrate why the SAR was filed and that there are grounds for continuing to hold suspicion? The procedure applies to existing SARs, and any time that has passed between the FIU notifying the account holder of the refusal of consent and the commencement of the Ordinance will be taken into account in calculating the 12 month period.

Conclusion

The summary forfeiture procedure means that trustees will need to be very careful when deciding to file a defensive SAR in the first instance as there may now be more far-reaching consequences from doing so. Where SARs have been filed prior to the entry into force of the Ordinance, trustees should now carefully review the position to ascertain what steps they now need to take. That may involve now proactively investigating the matter more carefully to ensure the trustee is well placed to address any summary forfeiture notice.

Upcoming Events

2023

23rd May	Non-Dom Tax conference: An annual review of all that's key for those advising non-dom clients
27th Jun	Contentious Trusts: Trusts under Attack
28th Jun	Crypto in Disputes
30th - 1st Aug Sep	TL4 & ConTrA Private Client Summer School: The Ultimate Insider's Guide
20th - 21st Sep	Wealth / Life Middle East (DXB)
26th Sep	Private Client: Guernsey
5th Oct	Private Client: Jersey

For more information: **thoughtleaders4/private-client.com**
For event queries contact: **paul@thoughleaders4.com**

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CONTENTIOUS TRUSTS

PREVENTION BY ANTICIPATION

Authored by: Matthew Gilligan, Associate Director at Saffery Champness Registered Fiduciaries

When it comes to family offices, arguably the most valuable, and potentially volatile, asset in any structure is the relationships between the family members. Similar to how an investment adviser will analyse market trends in an attempt to foresee potential losses, a prudent trustee should seek to anticipate risks of contention within the dynamics of a family and work proactively to mitigate them.

Shifts in interpersonal relationships, whether sudden or a slow burn, are inevitable in any family, but can become particularly contentious when it comes to wealth. While the depreciation of some material assets can be forecasted and calculated, the deterioration of family relationships cannot be predicted in the same manner. Potential areas of dispute can be best identified by asking the right questions at the right time, and listening carefully to what information is, or is not, volunteered in the answer.

The ability to ask those questions without being intrusive, and the comfort of the client in answering them, is a delicate balancing act between maintaining clear professional boundaries, while building trusting personal relationships.

Family dynamics are deeply personal and private; a trustee cannot bulldoze their way through the walls each family member has built. It is only through long-established relationships, underpinned by the consistent delivery of excellent client service, that a trustee will be able to break down barriers and understand the roles and objectives of individuals within the collective.

A hugely important part of building and maintaining those relationships is to meet with clients in person. Nuances in body language, tone and any hesitation on particular topics can be helpful indicators of areas of current or potential disagreement.

Understandably, emotions can run high when contentious matters arise within family structures. It is essential that a trustee remains objective, planted firmly in the middle ground on any issue. Our role is to preserve and protect the wealth for all beneficiaries of a structure, not to take sides or fan the flames of disharmony.

Whether dealing with a divorce, death or dispute, clients often turn to a trustee in times of familial conflict. The stage at which a trustee becomes involved is subjective; sometimes we are advised at the outset, other times we are only told of a problem once a resolution has been found.

In instances where our advice is sought, we act as facilitators, connecting family members to specialist advisers and professionals – for example lawyers or counsellors – who are best placed to support conflict resolution.

A trustee must be mindful that they are only able to deal with the information they have been given access to. If a trustee has only ever had contact with the Settlor of a trust, for example, it would be impossible to know the full story as, inevitably, the trustee would only ever have one side. To avoid this pitfall, we endeavour to get to know every member of the family where possible. There are instances where this is not possible, for example in the case of minors, or in structures where the beneficiaries may not be privy to the details, or existence, of the trust.

Seeking to be proactive - rather than reactive - to matters which may result in disaccord, we often suggest that our clients instruct a suitable third-party to prepare a family charter.

A charter is a means of addressing contentious matters before they arise, with each adult family member agreeing to the terms on its establishment. The charter may direct how assets are to be distributed between beneficiaries or how matters of contention should be discussed.

A family charter differs to a letter of wishes, which is written by the settlor and not usually seen by beneficiaries until after the settlor's death, if at all. A letter of wishes will be personal to its author and may not necessarily reflect the wishes of the inheriting generation. A prudent trustee should be conscious when dealing with a letter of wishes that, while not legally binding, adhering to, or straying from, its guidance can be legally challenged.

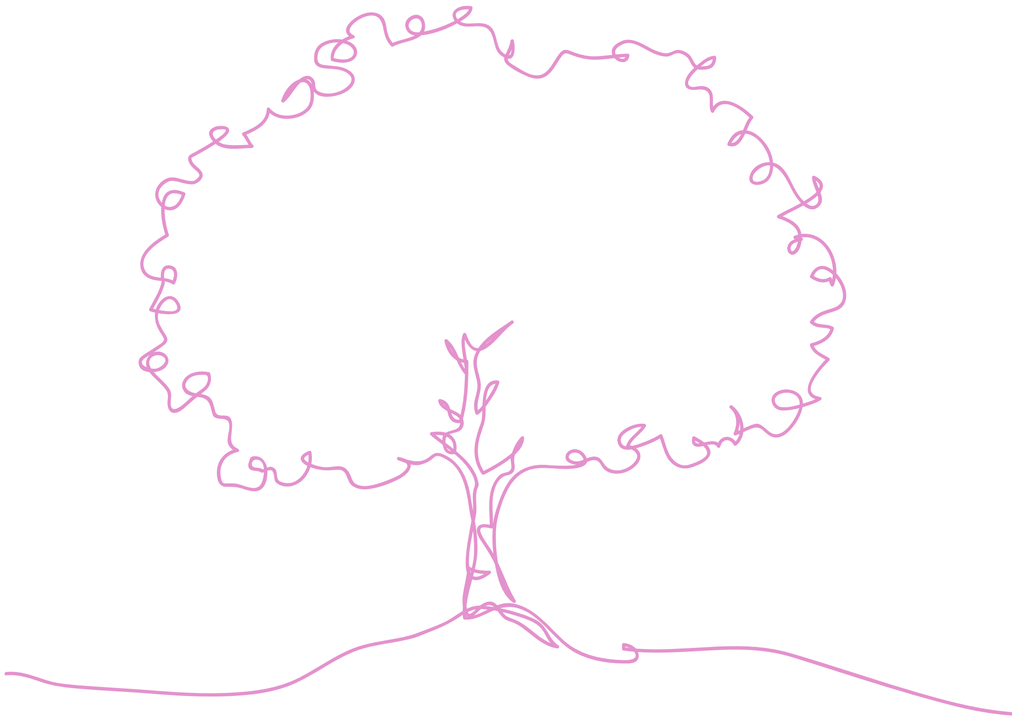
Decades of experience in individual and family client service, as well as personal experiences with our own families, allow us to recognise where issues may arise. This experience, coupled with building relationships with all members of the family, can direct us in our careful questioning of family dynamics. For example, our independent relationships with both a parent and child may result in identifying fundamental differences in their objectives for any family business, or their opinions on wealth.

It is important for trustees to understand the potential impacts of "The Great Wealth Transfer" – whereby the generation inheriting family wealth are often more socially and environmentally conscious – which may lead to a shift in priorities when it comes to investments and growing and redistributing wealth.

Responsible trustees should be prepared for potentially conflicting views arising from this shift. Ideologies continue to evolve as the landscape in which each generation operates changes, and the impact of the actions of previous generations are felt by the next, a trend which is not unique to wealthy families.

With a shift towards corporate social responsibility and environmental, social and governance initiatives, it is likely that inheriting generations will scrutinise the origins of their family wealth. For example, it could be the case that a family business was established in an environmentally unfriendly industry which, although deemed acceptable when the wealth was generated, is now criticised for its unsustainability. This could lead to members of the inheriting generation seeking to distance their wealth from the industry in which it was generated or look to increase philanthropic investments to balance the scales, both of which have the potential to be polarising for members of the family.

By keeping a weather eye on the horizon and understanding not only individual family members but also generational trends, a responsible trustee can play an integral role in alleviating the impact of contentious matters.



CONTENTIOUS TRUSTS AND THE PURPOSEFUL ADVISOR

Authored by Tsitsi Mutendi, Lead Advisor Nhaka Legacy Planning and Co-Founder at African Family Firms

Like the rise and fall of the tides of the oceans, all relationships have highs and lows. The individuals within these relationships navigate these waters like ships on the sea. Navigating to an unknown destination but holding the course when they can. Sometimes the waters are smooth sailing, and other times they can be perilous for the ships navigating them. At times the captains of the vessel can see with experience that the weather may take a turn and the storms as they reveal themselves. At times for the less experienced, the weather turns before they prepare, and they suddenly become perilous. Their ships can be taken into dangerous waters, and at times they can be sunk by an iceberg like the ill-fated Titanic. The biggest lesson that came from the Titanic was that being prepared. No matter how experienced the captain is or sturdy and seemingly "unsinkable" the ship may seem. If everyone is ready for disaster, they act accordingly, and more lives are saved. As advisors of families, we sometimes become captains of these ships that are navigating perilous waters. Our passengers may or may not have experience in the waters we sail. If they know the waters well, they can give us the right advice and tools to navigate our ship. However, in most cases, the passengers themselves get caught up in the moment and can obstruct or cause a lack of preparedness or ability to navigate the waters. So what should we know walking into these perilous waters? For the intents and purposes of this article, let's tackle the seas that are contentious estates and trusts. Contentious trusts & probate is the term used to refer to disputes over the administration of a deceased person's estate, including the validity or interpretation of a Will, inheritance, and the way the estate is being administered. In most cases, these are caused when families have conflict over an estate amongst themselves or with appointed trustees. Walking into this storm needs great care as it may come in different formats.

As we all know, no matter how close a family is, there will surely be moments when they disagree or have differing points of view. Family conflicts can affect anyone regardless of their family structure, size, or any other number of factors, and the cause of conflict can come from a difference of opinion, experience, preference, perspective, personality, or beliefs. Relationships are the foundation of most people's lives, and in the thrust of emotions, they cannot see the possibility of ever reaching land (peace and stability) safely. Using a mediator after a parent dies may be helpful when emotions are running high, especially among siblings. In many cases, sibling disputes often erupt after a parent dies, and it's time to divide up the assets of an estate, and these fights can result in lengthy and expensive legal actions. When dialogue is open, engaging a skilled conflict resolution specialist may be a tool one can use, especially if the family is open to looking past legal action. Ultimately it builds the trust relationship between the advisor and the family, especially when the family navigates these seas without too much loss.

A common reason contentious trust happen is a sham trust. This usually happens when a trust is created and intended to appear legitimate but does not affect the rights and obligations of those named as the beneficiaries. For a sham to be established, a common intention is required between the trustees and the settlor. Sometimes, a trust is not a sham, but members of the deceased family may feel it is if they are excluded from the will or the benefits of the trust. In such cases proving the trust is a sham, or not can be a challenging task. Most commonly, after a loved one passes, there is a sea of emotions that all members of the family face. Establishing the key members of the family and those of the trust is essential. Creating a space of dialogue separately with each party and creating a rapport is a great starting point. Remaining objective whilst establishing the critical issues will really help moreso if arbitration is still an option. The first port of call is where relationships can be salvaged and dialogue encouraged. However, this may not always be an option.

As the saying goes, "prevention is better than cure." How can an advisor help in the mitigation and or prevention of contentious trust and probates:

Estate-Planning Steps for Parents

Nothing is as certain as death and taxes. At some point, we will face both. Planning saves us the burden that comes with both. As obvious as that may seem, we all face clients who resist this conversation.

However, a continuous reminder, even if very subtle, is always advantageous to us as advisors and, more so, to the family who will face many of the challenges that come with mourning and losing a loved one. In families planning before death can address many of the issues that arise after a principal dies. Moreso if they are parents. As we mentioned before, sibling conflict and rivalry is the leading cause of family conflict. The most important action a parent can take is to have a will that specifies which sibling receives what in terms of property. Questions as complex as "Who inherits the house? A business? A valuable painting?" Or simple conversations like "Who inherits a family pet or even an heirloom?" can be quickly answered and spelt out in a will.

Respect Differing Opinions

Empathy and respect are integral to maintaining healthy relationships with family, friends, and coworkers, even when you don't share the same ideas. Everyone is entitled to have their own opinions and beliefs, even if they do not always align with ours. However, what leads to contention could be the inability to accept or understand the other person's viewpoint. For advisors, engaging tools like an empathy map when we face arbitration is invaluable. It allows us to navigate the clients in ways that will enable them to perceive the viewpoint of the other person at the negotiating table. This means ensuring the family stays focused on the issue at hand instead of launching ad hominem attacks on the intelligence, integrity, or character of the person they are experiencing a conflict with. It's vital for you, the advisor, and all the parties to remember that not all conflicts or disagreements can be resolved, but they can always decide to treat their family member (or anyone else) with respect. At the very least, if empathy is not possible and the relationship cannot be salvaged, respect is a necessity.

Consider the Bigger Picture

In most cases, conflicts usually seem to hinge on one person or side coming out as the "winner." The focus becomes on the "winning or losing" narrative, which sometimes calls to our carnal urge to want to win and feel inconsolable if we lose. However, conversations with family shouldn't be viewed as battlegrounds if there is an outlook to preserve the relationship and reach a solution that both sides can be happy with. Family conflicts can be used as an opportunity to build the family's communication skills, which in turn can create a situation where the family can realise that they are "a team", and they can find a collaborative solution. As an advisor, we can be the outsider who can be a team coach who helps them work with each other to ensure that through dialogue, they are practising respect, active listening, and empathy, even in situations where there's no clear-cut resolution.

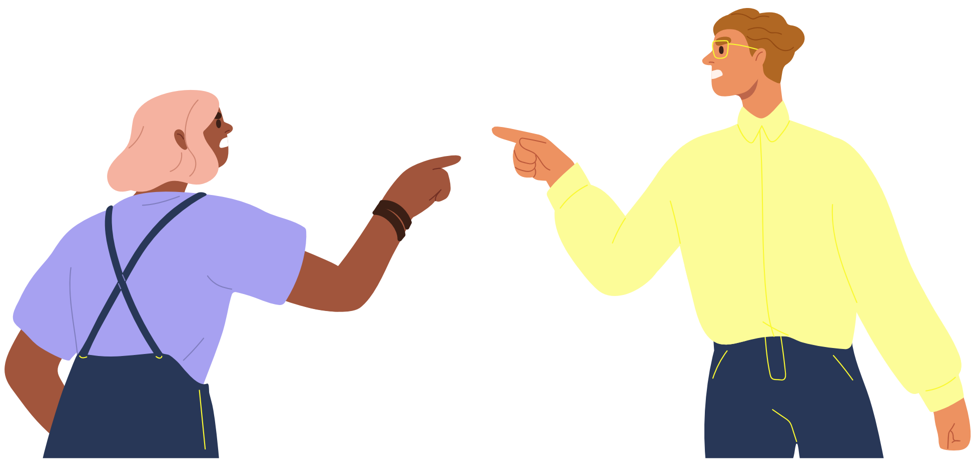
Create Safe Boundaries

In any friction and conflict, there are opposing sides. While, as advisors, we cannot control what someone says or does in a conflict, we can make our clients aware that they can control how they respond to the situation. It is in our interests and that of the client that we make them aware that setting boundaries is an effective way to practice self-care and self-respect when they start to feel overwhelmed by a conversation. Often times conflicts can lead to meaningful conversations and open up the opportunity to heal stressful relationships. However, if family members become aggressive or become too distressed during dialogue, setting up a boundary and putting the conversation on hold is essential. Psychological safety is an important conversation which is defined by all members in a conversation feeling that they are in an environment where their contribution is heard and acknowledged. If any parties feel unsafe in a situation, it's time as an advisor that you may introduce the need to seek additional outside help, such as law enforcement, a lawyer, an arbitrator, or a therapist. Communication is critical to finding common ground and working toward a solution that is ideal for everyone involved.

Accept what you can and cannot control.

As an advisor, this also applies to family members, no matter how much one may want to find a resolution. One cannot control the behaviour of others. You have to make it clear to your client that they can only control how they respond. As an advisor, you can use your experience on the conflicts you've handled in the past, how your clients reacted, and what the outcomes were. It's also imperative that in cases where you advise your client, you also communicate that if the dialogue does not go the way they expect that there may be a need to change their response and make it less predictable, making it harder for them to be triggered or manipulated into further conflict. Suppose all parties have communicated as effectively as possible, and it is still not well received. In that case, this may indicate a need to redefine the boundaries and expectations in their relationship.

As an advisor, if the results don't match your expectations, you can reflect on your approach and if it accurately reflects your clients' intended needs or requests. This will help you assist your client in a way that maintains their self-respect and the respect for the relationship they have with their family. Your opinion and support may not always be accepted or welcomed. This happens, and you should not allow it to affect how you handle clients and their needs. In some cases, you, as an advisor, may decide to pass on the case to someone else who may be able to handle it in a way that is in line with the client's needs if it conflicts with your values.



Let any anger subside

In cases of extreme anger and aggression, it's always better to let things calm down before trying to resolve a conflict so that all parties can have a rational and constructive conversation. When emotions are high, the human brain's functional partly goes offline, making it hard to have a reasonable discussion with practical solutions. Discussions in times of extreme emotions, like during or immediately after a funeral or during times of a principal's illness, are usually highly stressful and emotional. Logic does not always apply during this time. Putting emotions aside may not be possible. Trying to resolve a conflict while people are angry and lashing out may result in failure or even worsen the situation further. The emphasis to yourself and your client is to remember that the goal is not to win an argument but to find a healthy and mutually beneficial resolution. Allowing a "reflective/calming down period" may find all parties "fresh" and ready to tackle the conflict or its source from a different mindset.

Minimise or end contact completely if nothing helps

While it often pays off to reach out rather than withdraw and create a battleground, some conflicts are simply unresolvable. Both client and advisor are better off minimising or ending contact entirely.

As an advisor, it is essential to highlight that this applies particularly to situations where abuse has occurred and there is an indication that it could continue in the future. Ending contact is usually the last option for all parties, but it's worth considering for your clients, especially if their health and well-being are at risk.

As captains of these ships, we should try to be attuned to the family, its members, and their needs and temperaments. It makes it a little easier to use arbitration as a resolution. As with the points above, contentious estates may also be beyond just sibling conflict and become a toxic sibling rivalry that even outdates the ship's captain. They may not be even between siblings but between parents and children, aunts, uncles or cousins. As we know, modern families come in various myriads and diversities. Knowing when the situation and the individuals you are working with are beyond verbal or assisted resolution is also essential for you, the captain, to recognise and navigate as necessary. Creating a diverse network for you to tap into various disciplines and talent pools may also be very helpful for you as an advisor to tap into when faced with the opportunity for other resolutions outside contentious estates and probate.

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Jersey Zoo is the heartbeat of the Durrell Wildlife Conservation Trust. All of their conservation work around the globe is underpinned by the zoo. Despite their hardest efforts, the present pandemic is having a devastating effect on the income of Durrell.

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Find out more about the Durrell Wildlife Conservation Trust, their work and the frogs on their website **www.durrell.org**

The Blue Poison Dart Frog

(dendrobates tinctorius azureus)
Native to Suriname

The poison frogs of Central and South America are famous for their toxic secretions, used by native communities when hunting. The poisons are not made by the frogs themselves, but are taken up from their diet of invertebrates, which have in turn ingested plant chemicals. However, in captivity the poison decreases considerably in strength as the food chain needed to supply them with their raw materials does not exist.

The frogs' bright colours advertise their poisonous nature. The blue poison frog's pattern of black spots on a blue background is particularly striking and varies from individual to individual. After they metamorphose into tadpoles, the male carries the young on his back to a small pool, water trapped in a hole or a bromeliad, where they develop into frogs after 10-12 weeks.

With the world's amphibians in crisis, captive populations are vital to conservation efforts.

Extremely sensitive to environmental change, amphibians give us early warning of problems that might be due to global warming, pollution and so on. The blue poison frog, like many others, is threatened with extinction.

Durrell has successfully bred this species, and their biosecure facilities at the Trust's headquarters in Jersey will enable them to continue studying and breeding the blue poison dart frog and other threatened amphibians in captivity, developing techniques to help slow their decline.

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23-27 Seaton Place
Jersey JE2 3QL

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46 Chancery Lane
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WC2A 1JE

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A CAUTIONARY TALE OF TWO COURTS:

THE RISKS OF SEEKING NOVEL INTERIM RELIEF IN THE CONTEXT OF CONTENTIOUS TRUSTS

Authored by: Nicholas Brookes, BVI Head of Dispute Resolution, Sarah Latham, Senior Associate, and Rondelle Keller, Associate at Ogier

Both the Commercial Court in the British Virgin Islands (BVI), and the Grand Court of the Cayman Islands, have confirmed they have jurisdiction to grant a novel form of interim relief sought by the beneficial owner under a nominee arrangement. However, the BVI Court was confronted with the issue of the duty of full and frank disclosure and fair presentation, the court's view of which was negatively reinforced by the presentation of the novelty of the ex parte relief sought.

This article considers the judgment of the BVI Court in this case of Chia Hsing Wang v XY and XYZ, in which a beneficiary sought to appoint joint provisional liquidators (JPLs) over a professional fund in the BVI (the Fund), via interim receivers. The judgment provides a cautionary tale to contentious trusts practitioners looking to deploy intricate relief at the ex parte stage.

Background

A nominee Swiss bank held shares on behalf of Mr Wang in the Fund, which was in turn managed by a wealth management company (Floreat). Mr Wang was said to be the ultimate beneficial owner of over 97% of the shares in the Fund, valued at over US$200 million. The relationship between the Swiss bank and Mr Wang was governed by a custody agreement, which expressly provided that the bank would not engage in any legal action in connection with disputes concerning the shares.

A similar arrangement was in place in relation to the shares in three Cayman funds.

Mr Wang alleged that Floreat and its principals were engaging in serious wrongdoing and mismanagement of the funds. In particular, he claimed that there were misrepresentations in the offering memoranda, that the funds had been used to buy property well over the market value to curry favour with a Sheikh who was the vendor, and the use of the funds' real estate and art collection as the personal property of Floreat's principals. He further alleged that the funds had also been used to cover the personal expenses of fund managers. The alleged wrongdoing was said to be in the range of several million USD.

Relief sought

Given that the terms of the custody agreement prevented the Swiss bank from instituting proceedings, Mr Wang filed proceedings to compel the Swiss bank to transfer the shares to him. He simultaneously filed an ex parte application for receivers to be appointed over the shares. He asserted that the receivership was necessary to prevent a forced redemption of his shares and the dissipation of the funds' assets. The receivership application was granted in the BVI and in Cayman.

Shortly after the receivers were appointed, winding-up proceedings were instituted by Mr Wang and the Swiss bank (acting via the receivers), together with an ex parte application for the appointment of JPLs to investigate the allegations of wrongdoing in the funds. This application was also granted in both the BVI and Cayman.

Floreat sought to intervene and applied for the ex parte relief to be discharged; which was met with different outcomes.

Discharge of the orders

This two-stage approach was described by Mr Wang's counsel as "a novel route for beneficial owners of shares […] to access statutory shareholder remedies where those shares are held through nominee structures where those nominees are unwilling/unable to act."

In the BVI, Wallbank J discharged both the receivership and JPL orders. He found that Mr Wang had failed to give full and frank disclosure and a fair presentation of the alternative remedies, the circumstances surrounding the right of forced redemption of his shares and the original purpose for his investment in the Fund, which was to provide his family with liquidity where there were overseas court orders preventing access to his assets. On the JPL application, Wallbank J found that Mr Wang's counsel had misrepresented the urgency of the application and the risks of redemption of his shares so as to insist upon and persuade the other judge to proceed and grant the ex parte relief. Wallbank J considered that the claimant had done this in order to present a "fait accompli", by having the ultimate relief of a just and equitable winding-up brought off the back of the interim receiver appointment.

Wallbank J was particularly concerned that the entire "novel" strategy was a "device". He concluded that while the BVI Court had the power to grant the relief sought, where a two-pronged strategy of relief was to be deployed in such a novel manner, the litigant "comes under a duty to give full and frank disclosure and fair presentation of the whole plan."

Wallbank J considered that these breaches of full and frank disclosure were not innocent and that it would be against the interests of justice to regrant the relief.

The contrasting position in the Cayman Islands

The approach taken by the BVI Court is to be contrasted with the approach taken in the Cayman Islands.[1]

The Honourable Justice David Doyle concluded that the Cayman Court had jurisdiction to appoint receivers and that it was just and convenient to do so, providing Mr Wang with a springboard from which to launch an application for the appointment of JPLs. At the ex parte hearing of the JPL applications, Doyle J considered that the receivers had standing to bring those applications and that it was necessary to make the appointments, given there were no other more proportionate and reasonable alternatives available.

The Cayman Court accepted that it had jurisdiction to grant the form of interim relief that was sought. However, unlike the BVI Court, the Cayman Court did not expressly opine upon the novelty of the form of relief; nor did it consider that the receivership application was "artificial". This is despite both courts being informed that the purpose of the receivership application was to enable the bringing of the JPL applications. Further, the Cayman Court continued the receivership and JPL orders at the subsequent inter partes hearing, notwithstanding the applications to discharge the orders on similar grounds of a failure to provide full and frank disclosure and lack of fair presentation.

The major differences between the conclusions of the two courts were:

- The BVI Court considered that the allegations of wrongdoing concerned only a small proportion of the total assets under management and that the overall performance of the Fund's assets appeared to be satisfactory. Further, the BVI Court had not been told that there was a major dispute between Mr Wang and Floreat concerning Floreat's unpaid fees. In comparison, the Cayman Court concluded that there was ample evidence of a risk of dissipation and of wrongdoing before it in relation to the Cayman funds. It considered that even if the orders had to be discharged because something material had been missed, they would have been re-granted because any omissions were innocent non-culpable omissions and the interests of justice required the re-granting of the orders
- The BVI Court noted that the representations by Mr Wang that Floreat had an absolute right to redeem the Fund's shares, and thus that he had no protection, were wrong, and had been the only points on which the court had proceeded to consider the provisional liquidation application on an ex parte basis. The BVI Court concluded that this breach of full and frank disclosure was not innocent. In contrast, the Cayman Court considered that Mr Wang's concerns over a compelled redemption of his shares in the Cayman companies had been put properly
- The BVI Court noted that there were at least three alternative remedies to a JPL/JL order that were arguably available: a staged redemption of the Fund's shares, an unfair prejudice action, if necessary supported by an injunction and/or a stop order, or legal proceedings for breach of duty and/or conspiracy. The Cayman Court was presented with the same options, but took the view that it was unrealistic for Floreat to suggest that Mr Wang's interests could have been properly protected by a stop order, an injunction, undertakings or some other remedy

Conclusion

Novel and complex forms of relief beleaguer applications in contentious trust situations where HNW individuals have implemented elaborate wealth structuring. This is particularly so where obtaining interim relief requires ingenious steps to be taken in short order, either to avoid putting adverse parties on notice or to avoid constraints that exist within aspects of the corporate structure.

The approach taken here was successful in Cayman and was in principle successful in the BVI. However, the conclusions drawn by the BVI Court are a cautionary tale: while the BVI Court is willing to be flexible and to grant a novel remedy in appropriate circumstances, those who seek to persuade the court to do so on an ex parte basis must be very careful to consider the novelty within the context of the duty of full and frank disclosure. The perception by the court of a failure to do so may lead to one being hoist by one's own petard.

1 For reasons of confidentiality, it is not possible to cite the judgment of the Grand Court.

IS THERE STILL A PLACE FOR SECRET TRUSTS IN TODAY'S WORLD?

Authored by: Kate Harris, Legal Director Contentious Trusts & Probate at Birketts

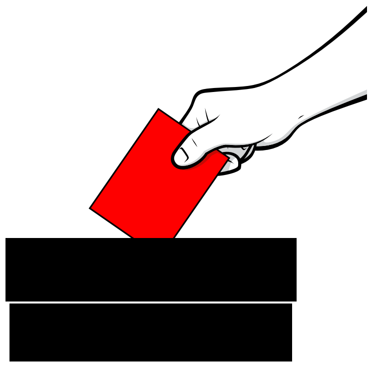
The doctrine of a secret trust is one which may not be familiar to all, especially those of us whose law school days are now a dim and distant memory. In spite of this, they are a relatively common occurrence and there will be a not insignificant proportion of Private Client practitioners who have come across them in practice and who have, perhaps, needed to dust off their textbooks to remind themselves of the relevant law. The question we must ask ourselves is whether what may seem like an antiquated construct has any place in a modern world. In short, should secret trusts be upheld?

What is a secret trust?

A secret trust arises where a testator leaves a gift in their will which is expressed, on the face of it, to be for the benefit of a recipient, but is actually to be held on trust by that recipient for another beneficiary. To make matters more complicated, there are two types of secret trust; a fully secret trust and a half-secret trust.

A fully secret trust arises where the trust is not apparent from the face of the will. In other words, the gift appears to be an outright gift of an asset to the recipient, who is actually the trustee and who has told the testator that he, or she, will pass the asset onto a third party. On the other hand, a half-secret trust does show that the recipient of the gift is receiving it as a trustee, but the terms of the trust and the identity of the beneficiary are not disclosed.

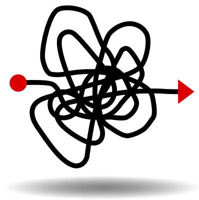
How do you make a secret trust?



There are some basic, and essential, elements of a secret trust. First, the testator must intend to create a trust; crucially, the intention must be to create a trust and not simply a moral obligation on the intended "trustee". Secondly, that intention must be communicated to the intended trustee and the trustee must confirm acceptance of their role, either expressly or by implication. There must also be compliance with the three certainties; intention, subject matter and object.

In the case of a half-secret trust, the existence of the trust must be communicated and accepted by the trustee before, or when, the will is made. This is different to the case of a fully secret trust, when the agreement can be made at any time before the testator's death. The discussions in relation to the half-secret trust must also be consistent with the description contained in the will.

The problems



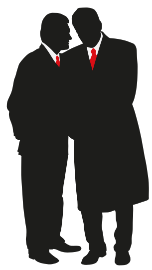
It will be clear to many of us that secret trusts appear to ride roughshod over the requirements of the Wills Act 1837, which set out the statutory formalities for a properly executed will or testamentary document. It is not surprising, therefore, that many academics have questioned why the Courts have continued to uphold the existence of secret trusts as a legal construct. In short, the rationale is that a secret trust falls outside of the requirements of the Wills Act 1837 because it is not a testamentary disposition but an inter vivos trust, which operates outside, or dehors, as the French would say, of the terms of the will; the trust is created by the agreement between the testator and the trustee, vested in the trustee on death and enforceable, not because of the terms of the will, but because of the original agreement. This justification is not without its problems and has been widely debated, not least because secret trusts seemingly also depart from trust law by declaring an immediate trust of future property.

An alternative theory is that secret trusts are permitted under the maxim that equity will not allow a statute to be used as an instrument of fraud. The Courts have adopted this rationale in cases where the evidence has demonstrated that a secret trust must be imposed to prevent a fraud by the secret trustee.

However, this is hard to justify in the case of a half-secret trust, where the existence of a trust is clear from the face of the will and there is therefore no possibility of the trustee taking the property even if the existence of a half-secret trust was denied; in those circumstances, the trust property would be held on resulting trust for the testator's estate.

So, can the existence of secret trusts be justified notwithstanding these problems? This is a question which remains unanswered but should, surely, be considered in the context of the benefits that secret trusts may continue to offer to testators who wish to preserve an element of secrecy when deciding how to distribute their estate.

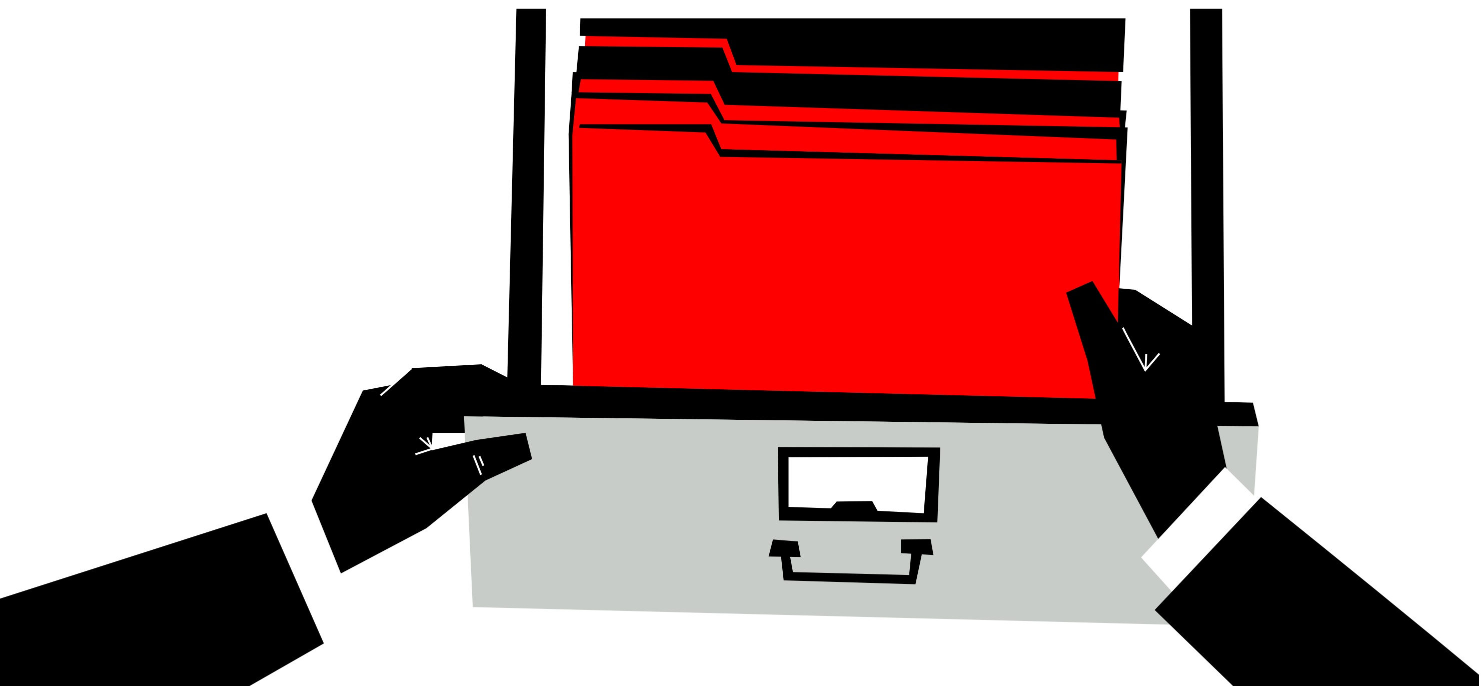
What are the benefits?



It has been suggested that the need for secrecy is far less in a modern world and that secret trusts are therefore obsolete. Whether or not this is true remains open to debate, especially with the ever-increasing number of blended and unconventional family arrangements we find in today's society. It cannot be denied that these types of structure lead to unrest and tension, especially after the death of the testator, who is likely to have acted as the glue keeping everyone together, which then fast dissolves after their death, and when skeletons begin to appear out of the closet.

With the above in mind, there is certainly justification for a structure which allows for gifts, or provision, to be made for individuals who are either not known to, or not approved of by, the family, such as an illegitimate child or a secret mistress. It is not difficult to see that the possibility of a post-death dispute could be minimised, or even avoided, if a secret trust is used in these circumstances so that the surviving family members have no knowledge of who is to really benefit from the testator's estate and so will not be fuelled into pursuing litigation by feelings of resentment and chagrin.

One thing is certain; if a testator instructs you to include a secret trust in their will, you must ensure that this is carefully drafted and that evidence to meet the requirements listed above is preserved to avoid uncertainty and inevitable dispute after death. You may also wish to consider advising your client to explore alternatives, such as a broad discretionary trust accompanied by a private letter of wishes. Ultimately, however, each case will be different and until we have a definitive change in the law, secret trusts look set to stay.



CLAIMS AGAINST ACCESSORIES TO BREACH OF TRUST:

SPOTLIGHT ON DISHONEST ASSISTANCE INTRODUCTION

Authored by: Maryam Oghanna, Senior Associate at Forsters

Dishonest assistance is one of a limited number of claims that may be brought against a person, other than a trustee, who has assisted the trustee in committing a breach of trust. Where the remedy against the trustee would be inadequate, accessory claims against a third party (particularly where they involve large financial institutions) can be an appealing prospect. If the claim is successful, the third party is liable to personally account for the breach of trust as if they were the trustee.

In order to bring a successful dishonest assistance claim, a claimant would need to meet the following test:

1. **There is a trust;**
2. **There is a breach of trust by the trustee of that trust;**
3. **The defendant induces or assists that breach of trust; and**
4. **The defendant does so dishonestly.**

As we discuss further below, the final test – showing that the defendant acted dishonestly – is the most difficult hurdle for a claimant to overcome. There is no requirement for the trustee to have acted dishonestly in committing the underlying breach of trust. But, given that the accessory defendant is one step removed from the breach of trust, the additional requirement of dishonesty is unsurprising.

Standing

Although the basis of liability is in equitable wrongdoing, a dishonest assistance claim derives from a breach of trust by a trustee. Therefore, the same rules apply in respect of standing to bring the claim. It has been more common for a successor trustee (including administrators) or wronged beneficiaries to bring the claim against the third party, but it is also possible for the trustee who committed the breach of trust to bring the claim.

Untangling the Claim

Requirement 1 - 'There is a trust'

It must be shown that a trust exists. However, there is no requirement for a formal trust which expressly vests property in a trustee. There need only be a fiduciary duty in relation to that property. For example, a director of a company might be deemed to be a trustee in relation to the company's property for these purposes, even though the company owns its property.

Requirement 2 – 'There is a breach of trust by the trustee'

If there is no breach of trust (which includes breach of fiduciary duty), it cannot be shown that the defendant was an accessory. Therefore, it is essential that a breach of trust claim against the relevant trustee has been established prior to the bringing of a dishonest assistance claim.

Requirement 3 – 'Inducing or assisting the breach of trust'

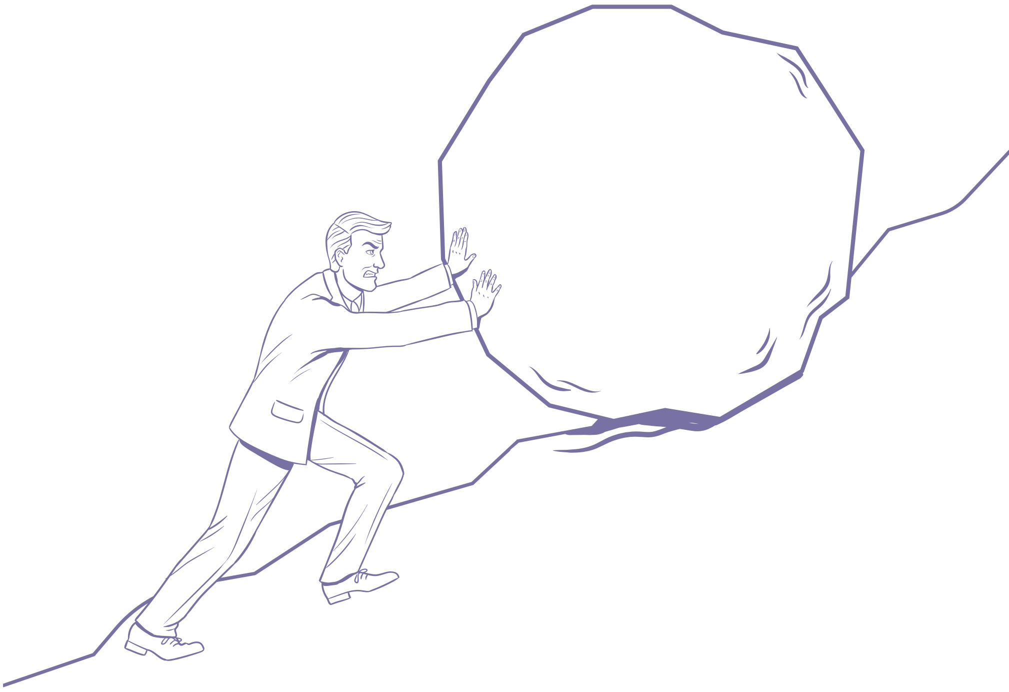
Whether the defendant induced or assisted the breach of trust will be a matter of fact, and there is no subjective element to this requirement. It must be shown that the defendant's conduct did, in fact, assist the trustee in committing a breach of trust. The assistance must be more than just of minimal impact, but it need not be shown that it would inevitably lead to the losses that were suffered. Unlike a claim for knowing receipt, the defendant need not have received or handled property.

Requirement 4 – 'Dishonesty'

The test for dishonesty in a claim of accessory liability for breach of trust is set out in Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 AC 378 at [389], and clearly indicates an objective test of honesty which is a question of law. However, this is to be determined in light of the defendant's knowledge of the breach and dishonesty at the time, creating a subjective element to the test.

The test has since developed to accept that a defendant does not need to be aware that his conduct would be characterised as dishonest by ordinary standards (Ivey v Genting Casinos (UK) Ltd [2017] UKSC 67; [2018] A.C. 391 at [62]). The subjective element extends to the circumstances at the time, and even the defendant's own experience and intellect (Twinsectra Ltd v Yardley [2002] UKHL 12; [2002] 2 A.C. 164 at [121]).

Further, when considering the defendant's 'knowledge' at the time of the breach, a defendant may be found liable if they suspected that they may be assisting a breach of trust but wilfully took no steps to ascertain either way: referred to as 'blind-eye knowledge' (Manifest Shipping & Co Ltd v. Uni-Polaris Insurance Co Ltd [2003] 1 AC 469 at [112]). Carelessness will not on its own be sufficient to establish knowledge, but it may be deemed to be a contributing factor.



Where the allegations are against a company or legal person, the dishonesty must still be evidenced by reference to one or more natural persons (Stanford International Bank Ltd v HSBC Bank plc [2021] EWCA Civ 535 at [47]).

Comment

Dishonest assistance is a fault-based and serious claim and the test for the dishonesty requirement has, perhaps unsurprisingly, generated much discussion.

Any allegations of fraud or dishonesty must be clearly pleaded in statements of case, which may cause a significant hurdle and additional cost risk for many claimants who may have limited knowledge of the particulars of the dishonesty.

Further, success of the claim will likely hang on the evidence before the court in relation to the defendant's dishonesty, which, if the defendant is competent in their deception, may well be document-light. In those circumstances, oral evidence at trial can carry much weight (as seen in the rather surprising decision of the Supreme Court of Gibraltar in Lavarello v Jyske Bank (Gibraltar) Ltd, unreported, May 17, 2017, Gib SC, later overturned by the Court of Appeal for Gibraltar in Lavarello v Jyske Bank (Gibraltar) Ltd 2017/ CACIV/006 & 007).

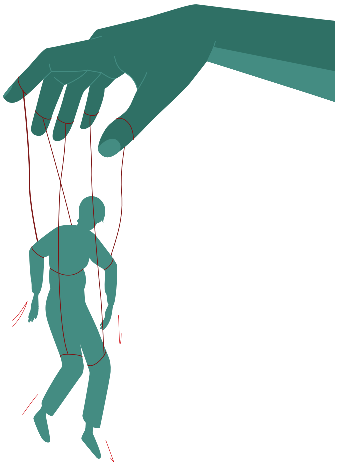
Despite the difficulties in bringing the claim, the benefit of pursuing a remedy against another, potentially more affluent, party in relation to a breach of trust is weighty. This is particularly the case if trust assets have been dissipated as a consequence of the breach of trust. Accessory claims are therefore likely to remain a regular feature in the English and Welsh High Court.

TRUSTEES & BENEFICIARIES:

WE CAN'T GO ON TOGETHER WITH SUSPICIOUS MINDS

Authored by: James Laycock, Partner, and Jodie Buck, Solicitor at Irwin Mitchell

Overview



The nature of the trustee/beneficiary relationship can often be a recipe for hostilities and disputes. The trustees are tasked with administering the trust for the benefit of the beneficiaries, but the beneficiaries can sometimes feel that they are at the mercy of the trustees with little to no power over the trust, and they may find themselves feeling unhappy about how the trustees are or are not performing their duties. This can lead to a breakdown in relations which can be very difficult for both sides. This article examines the options available to beneficiaries where they feel that the trustees should be removed from their roles and considers the recent case of Ramus v Holt [2022] EWHC 2309 (Ch).

Trustees' duties

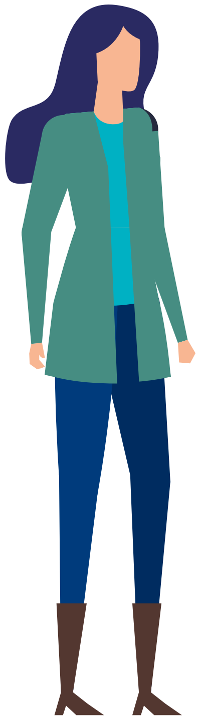
The role of a trustee should not be taken on lightly. Trustees have many duties and obligations and they can be held to account by the beneficiaries, and ultimately the court, if they are not adequately performing their duties. It is therefore crucial that trustees are aware of their obligations and what the role entails before taking on this appointment, or else they may find themselves on the receiving end of a legal challenge and potentially an adverse cost order which they could be ordered to pay personally.

The duties that trustees have to abide by include (but are not limited to):

- To comply with the terms of the trust;
- To act impartially between the beneficiaries;
- To keep accurate records and accounts, to account to the beneficiaries and provide information where requested;
- To exercise reasonable care;
- To not profit from the trust or place themselves in a position of conflict (unless the trust deed states otherwise); and
- To act unanimously (unless the trust deed states otherwise).

Beneficiaries' rights & options

If the beneficiaries of a trust encounter any issues with the trustees and the way in which they are (or are not) performing their duties, there are options available for them to be removed as trustees. These types of



applications can be complex, costly and are not without risk. Such applications will be considered on a case by case basis and the court will not be quick to remove a trustee unless there is sufficient and compelling evidence to warrant the removal.

Where the beneficiaries are concerned about the trustees' actions and/or omissions or the way in which they are exercising their powers, they should attempt to raise and resolve the issues directly with the trustees. This may not always be possible but it is sensible to try and avoid court proceedings and to attempt to reach a resolution without resorting to court. The court will expect the beneficiaries to do this in any event in accordance with litigation pre-action protocols.

Beneficiaries are likely to find it difficult to challenge or apply for the removal of the trustees merely because there is hostility or friction between them. If the hostility or friction is impeding or imperilling the proper administration of the trust to the prejudice of the beneficiaries, then the court may become more engaged with the suggestion of removal.

Where the trustees are given discretion by the trust instrument as to how to manage and administer the trust, it is often difficult for the beneficiaries to successfully challenge decisions. The beneficiaries will not be able to challenge the trustees' decision making simply because they believe it to be unfair; they will need to show that the trustees have breached their duty in some respect when reaching their decision, which can be difficult to prove. If it can be shown that irrelevant considerations have been taken into account or relevant ones ignored when reaching the decision or if the decision is capricious and outside the bounds of what a reasonable trustee would do, these can form grounds for a challenge, but evidencing these grounds may be difficult. To make an application to remove the trustees without this evidence can be premature, as discovered in Ramus v Holt

Ramus v Holt

In Ramus v Holt, the Claimant (and beneficiary of the trust) had concerns that one of the trustees, her daughter with whom she did not have a good relationship, would not act in her best interests. As part of the Claimant's claim pursuant to the Inheritance (Provision for Family and Dependants) Act 1975 ("the 1975 Act"), the Claimant raised a novel point and asked the court to remove the trustees as she did not feel that she was guaranteed reasonable financial provision from her deceased husband's estate whilst her daughter was a trustee. The deceased's last will provided for the majority of his estate to pass into trust, over which the Claimant had a life interest. There were three trustees of the trust who jointly had the power to apply capital for the Claimant's benefit and also to terminate her life interest. Subject to the life interest, the residuary estate was to be held on a discretionary trust, with the Claimant and deceased's children/remoter issue as the discretionary beneficiaries.

The Claimant's concern was that the trustees had the absolute power to terminate her life interest, payment of income and could refuse to advance capital. The three trustees confirmed that they intended to act in accordance with their duties and to pay the income to the Claimant (as per the deceased's letter of wishes).

The judge dismissed the Claimant's claim, stating that reasonable financial provision does not become unreasonable because of the identity of the trustees. The judge also stated that a personality clash between a beneficiary and trustee would not of itself justify the removal of a trustee and it is therefore difficult to see how this could support a claim that the will failed to make reasonable financial provision. The judge also highlighted that the trustees could only exercise their powers unanimously, and as such, the daughter alone could not prevent the Claimant from receiving income etc. The judge stated that trustees have duties to act responsibly, in good faith, to take only relevant matters into account, to act impartially and not to act for an ulterior purpose and in this case, the judge accepted the evidence of all of the trustees in that they would take their obligations seriously and would follow the deceased's wishes. The judge also held that he had no jurisdiction under the 1975 Act to remove trustees.

If the Claimant has concerns regarding the trustees' actions in the future, she would be able to consider the options below in respect of their removal.

Legal bases to remove/ substitute a trustee

If the issues are not capable of a resolution, the beneficiaries have a number of options in relation to the removal/substitution of the trustees, some of which include:

a. There may be an express power in the trust deed which provides for the removal/substitution of the trustees – the trust deed will need to be analysed to see whether this is an option and, if it is, the specific terms of the express power must be carefully considered.

b. The court can order the appointment of a new trustee in substitution for or in addition to any existing trustee under section 41 of the Trustee Act 1925. This is generally the last resort and the court will only make such an order where:

- **It is expedient to do so; and**
- **It is inexpedient, difficult or impracticable to do so without the assistance of the court.**

This type of application should not be made if there are other routes for the removal/substitution of the trustees (for example, an express power in the trust deed or if section 36 of the Trustee Act 1925 can be invoked).

c. The court also has an inherent jurisdiction to remove trustees.

In cases of expediency and where there are no factual arguments between the beneficiaries and trustees, the statutory power pursuant to section 41 of the Trustee Act 1925 is the more appropriate route. If there are disputes of fact, these are more appropriately addressed within the scope of the court's inherent jurisdiction. In practice, when an application for removal/ substitution is brought, it is often sensible to seek this pursuant to both section 41 of the Trustee Act 1925 and pursuant to the inherent jurisdiction of the court. This then allows the court to consider which jurisdiction is most appropriate for the particular case.

When the court is considering applications for the removal/substitution of trustees, the decisions will be made on a case by case basis, having regard to the particular facts of the case. The court will be mostly concerned with ensuring that the trust is administered competently and that decisions are made in line with the welfare and best interests of the beneficiaries.

Although not considered in this article, there are other ways by which trustees can be removed/substituted including pursuant to section 36 of the Trustee Act 1925 (where a trustee is dead, remains out of the UK for more than 12 months, desires to be removed, refuses or is unfit to act, is incapable of acting, or is a minor) and section 19 of the Trusts of Land and Appointment of Trustees Act 1996 (where all the beneficiaries are of full age and capacity and are collectively absolutely entitled to the trust fund, and they come together to appoint a new trustee or retire an existing trustee, where the trust does not nominate a person to appoint new trustees). These statutory provisions can be useful but they only apply in specific circumstances and legal advice should be sought on the availability of these options.

Conclusion

Friction or hostility between trustees and beneficiaries is rarely enough for the successful substitution of a trustee by the court. If, however, hostility arises because the trustees are failing to perform their duties or the relationship is affecting the administration of the trust, this may form the basis of an application to remove a trustee. These can be difficult to prove, however, and careful thought needs to be given to the available evidence prior to pursuing court proceedings.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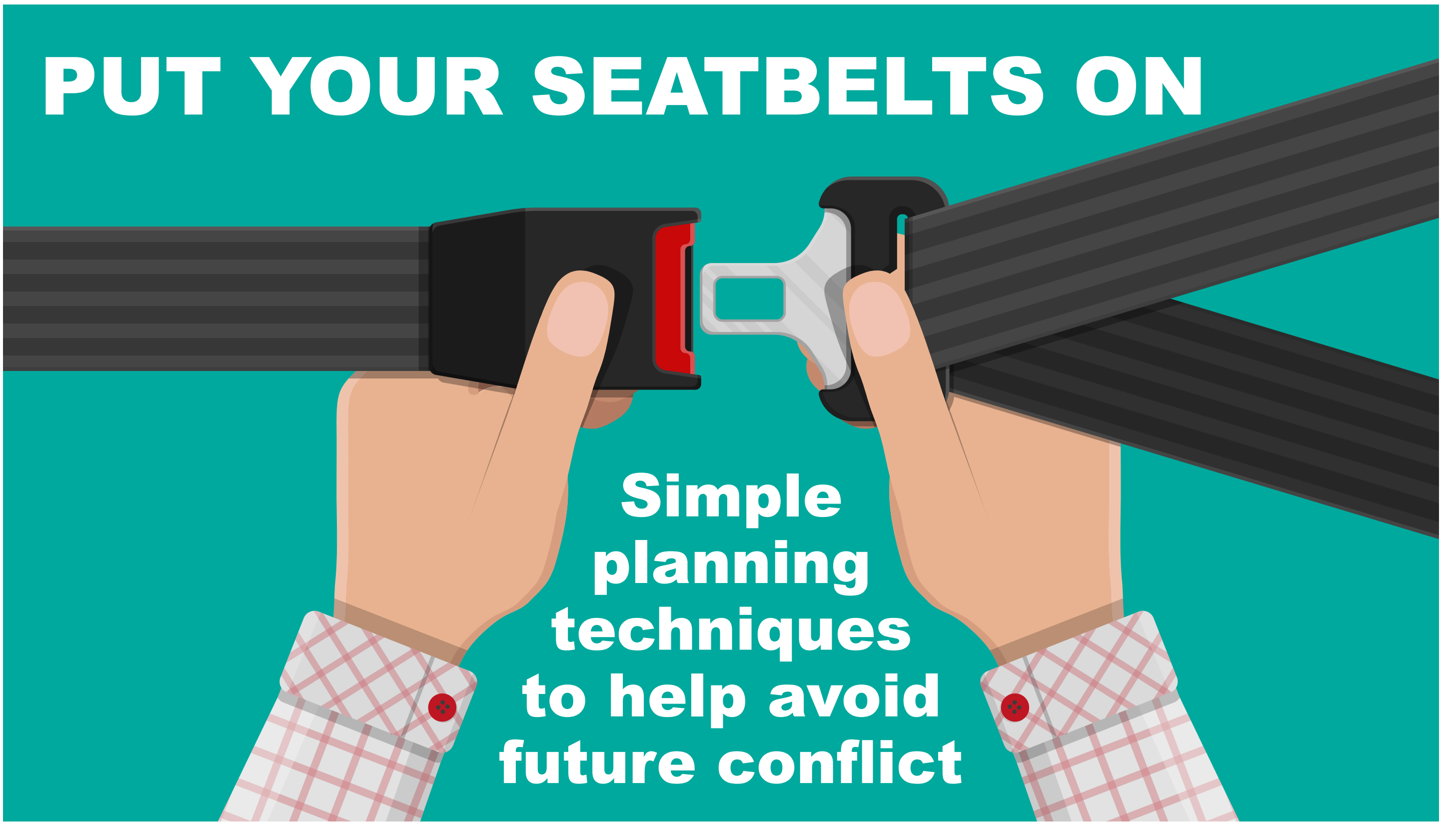


PUT YOUR SEATBELTS ON

Simple planning techniques to help avoid future conflict

Authored by: Michael Giraud, Head of Fiduciary Services at Standard Bank

No one sets out on a car journey with the intention of crashing, and yet everyone puts on their seat belt before setting out. It pays to be prudent and so why would one take unnecessary risks if they can be easily avoided? This is as true in everyday life as it is in business, and even more so when establishing a trust structure that needs to contend with family dynamics, cross-border planning, and complex asset classes.

The origins of trusts are well known and, although there have been huge changes to trust laws and tax legislation through the centuries, the underlying characteristics of a trust remain the same. A settlor (often a matriarch or patriarch) transfers the legal ownership of assets to a trustee to hold, administer, and manage for the benefit of the trust's beneficiaries who will usually consist of members of the same family. The settlor's rationale for settling the assets will often be to protect the assets from a wide range of future uncertainties (political, economic, family conflict, spendthrifts, creditors, future marriage, and divorce, etc) and to provide an enduring legacy for future generations of their family. Despite a settlor's good intentions, matters can sometimes go awry, and families can find themselves in conflict and their trustees drawn into contentious situations.

Thankfully, conflict amongst beneficiaries, and/or with the trustee, is by no means a certainty, yet it is a possibility. Much like wearing a seatbelt when travelling in a car, it would be prudent to prepare for the worst even if the likelihood of it happening is remote. Failing to implement effective planning, like not wearing a seatbelt, can lead to quite painful consequences. Advisors and trustees should proactively look to build protections into trust documents that provide for uncertainties and potential conflicts. To be clear, this is not a suggestion that structures should be over-engineered, as doing so can tie families and trustees in knots, making them difficult and expensive to administer. As we know, each family's circumstances are unique and as such their structure should be as well.

Most advisors and trustees will have witnessed poorly thought-out drafting which will have hampered the administration of a structure and potentially lead to conflict amongst the beneficiaries.

So, what are the more rudimentary pitfalls that can easily be avoided?

At both the drafting stage and throughout the life of a trust it is essential that a trustee is transparent and has clear communication channels with its beneficiaries. Not only will this ensure that the trustee is known to a good proportion of the beneficiaries, but it will also ensure that a trustee is in good standing with the beneficiaries and more able to act decisively and proactively when a matriarch or patriarch passes away.

Where a protector's powers are widely drafted, care needs to be taken in terms of the protector's residence, but it is also important to ensure that the protector's duties can be properly discharged.

We have even very recently seen a settlor wishing to establish a trust with a protector committee with an even number of members (which of course only works whilst all parties agree and are alive).

Depending on where a family is from, and where a protector is resident, the protector may have wide powers of direction or veto. Overly restrictive protectors' powers can severely hamper a trustee's ability to make decisions and administer a structure. They can also lead to increased costs and make a trustee dependent on a protector's ability to respond in a timely and decisive manner. It is worth remembering that the power to hire and fire is often the most powerful, while also allowing the trustee the flexibility to administer a structure in a cost-effective manner. A family should be able to trust the trustee to exercise its discretion, as the trustee will have hopefully been through a rigorous selection process (and not chosen purely on cost).

As professional trustees, we know that families evolve over time and, for a trust to remain relevant, it is important that it too evolves to accommodate the family's shifting strategies, aspirations, changes of residence, family dynamics, etc. It is important that a trustee has

the ability to adapt and that the trust instrument provides the flexibility to do so.

Appointments made to a trust committee (or any role which includes the appointment of a successor trustee) should be carefully thought-out and drafted into the trust deed, ensuring a succession process that allows for continuity and effective administration. With modern drafting, a trust should not be left in a position where an essential role is not filled on account of a failed succession process. The cost of resolving this can be expensive, especially if the trustee needs to involve the courts to remedy the situation.

Depending on why a trust was established and the family's risk appetite, it is quite viable that a trustee may be asked to hold an asset that is outside its comfort area from a fiduciary perspective. This may give rise to tension between the trustee and the beneficiaries. A way to potentially avoid this happening in the future may be to draft reserved powers into a trust instrument or a specified asset clause with a robust and carefully drafted anti-Bartlett clause (as confirmed in Zhang Hong Li & Ors v DBS Bank (Hong Kong) Ltd & Ors [2019] HKCFA 45).

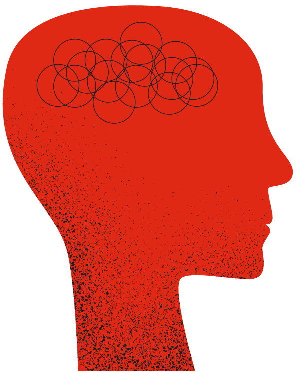
In addition to the above, the effectiveness of a properly implemented family constitution should not be underestimated. Having the family all buy into the constitution and operating as a cohesive unit in conjunction with the trust structure, is invaluable in helping resolve potential conflicts, ensuring succession mechanisms, and setting out how persons will interact with and benefit from the structure.

Distance between beneficiaries on account of global migration, marriage, and differing aspirations between generations all add to the likelihood of family conflicts. However, transparency, engagement, modern estate planning techniques, professional trustees, modern trust legislation, and well-thought-out drafting are all contributing mitigants that will hopefully help to ensure a conflict-free dynastic trust structure.

THOUGHTS ON HOW TRUSTEES AND EXECUTORS CAN DEAL WITH DISGRUNTLED BENEFICIARIES AND POSSIBLE COURT PROCEDURES AVAILABLE TO THEM

Authored by: Thomas Klemme, Associate at Wedlake Bell

Introduction



Every trustee and executor's nightmare is dealing with disgruntled beneficiaries who constantly threaten claims against them. This not only poses a risk to them personally, but it can also hamper the efficient and proper administration of the trust or estate to the detriment of other faultless beneficiaries. This can include delayed distributions, a failure to sell assets for the best price, and a precipitous and disproportionate escalation of legal costs.

However, given the onerous fiduciary duties imposed on trustees and executors, they cannot ignore the demands of their beneficiaries or treat them as they would a normal opposing party to litigation. Therefore this article will examine the best ways of managing this careful balancing act so that trustees can best avoid becoming ensnarled in endless and costly disputes. In doing so, it will briefly examine what can be done pre-action before looking at the various forms of relief which the Court can offer including when and how to apply for a 'put up and shut order', where a *Public Trustee v Cooper application may be appropriate and if there is a possibility of obtaining a Benjamin type order to protect against future claims. It will also touch on the recent cases of Brown v New Quadrant Trust Company & Anor [2021] EWHC 1731 (Ch) and Parsons & Another v Reid & Another [2022] EWHC 755 (Ch), which provide helpful guidance.*

Pre-Action

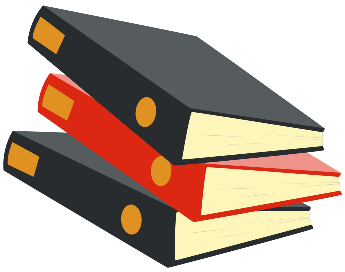
In situations where disgruntled beneficiaries intimate claims without bringing them, they usually seek further disclosure. This battle for information can be a tiring process and trustees and executors are advised to consider the following steps:

Firstly, they should seek to engage with the disgruntled beneficiary to see if they can resolve matters amicably. All too often hasty hostility can entrench positions and make litigation or costly correspondence more likely. This approach can also show the Court that trustees or executors have acted reasonably.

Failing this, they are advised to promptly establish if the disgruntled beneficiary has any viable claims that they are willing to pursue. Whilst this can be a delicate balancing act, failing to flush out claims at an appropriate stage often leads to escalating costs. To do this they should consider refusing to correspond further regarding the purported claims until they have been properly particularised. In relation to requests for disclosure it can be helpful to require disgruntled beneficiaries to set out if they are seeking information by way of the principles established in Re Londonderry and Schmidt v Rosewood or via a pre-action disclosure application pursuant to CPR 31.16. They should also require them to set out how they meet the tests under the applicable jurisdiction. Responding to such a request will require proper legal advice and upfront cost; it can cause many a disgruntled beneficiary to abandon their claims.

Alternatively, if the required response is provided, trustees and executors can better assess the merits of the purported claims against them.

Court Procedures



However, if matters cannot be resolved by pre-action correspondence and negotiation, especially where threatened claims mean further distributions cannot be made in order to protect a trustee or executor's lien, then they may have to consider Court action.

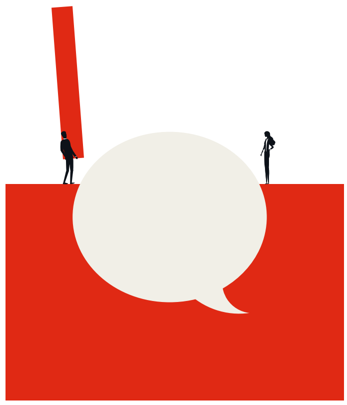
The first order trustees and executors should consider is a 'put up or shut up' order. The Court confirmed in Cobden-Ramsay v Sutton [2009] WTLR 1303 that it has the jurisdiction to order a time limit for a potential claimant to bring a claim after which trustees and executors will be protected from liability. Parsons v Reid has given recent guidance on how to obtain these orders.

The conclusion is, unsurprisingly, that they will not be granted lightly, with Master Clark stating that "[f]ull disclosure is the price to be paid by the claimants for the exoneration they seek". This means that any application will need to provide a detailed witness statement setting out the reasons for seeking the order along with full disclosure justifying them in much the same way as in a Public Trustee v Cooper blessing application. This is so that the Court can assess whether it and the respondent have everything in front of them before the Court effectively exercises its discretion to extinguish a potential claimant's rights. Therefore not only are applications for 'put up or shut' orders likely to be relatively costly, trustees and executors must have a strong view on the merits as if they fail they would have potentially disclosed information regarding their reasoning which could be used against them to advance the very claim or claims that they had hoped to extinguish.

Another application to consider is a Public Trustee v Cooper blessing application. Generally these are thought of as consensual applications, but the recent case of Brown v New Quadrant shows that the Court may grant the requested blessing in the face of opposition. In this case, a beneficiary applied for an injunction as part of a removal application to prevent a share sale; the trustees counter-claimed for a blessing of their decision to make the same share sale. The Court refused the injunction and instead granted the blessing of the share sale. It noted that as long as the four limb test set out in Cotton v Earl of Cardigan [2014] EWCA Civ 1312 is met, then there is no reason why an ongoing and unresolved removal application or specific beneficiary objections to the proposed "momentous decision" should by itself prevent the Court's blessing. Whilst a blessing application is likely to be similar in detail to one for a 'put up or shut up order', it has the practical benefit of protecting trustees from liability immediately. However, the use of such an application to progress trust administration is likely to be limited and applicable only where a disgruntled beneficiary has already brought proceedings.

Finally, it is unclear whether Parsons v Reid leaves open the possibility of obtaining a Benjamin type order in the face of intimated claims by a disgruntled beneficiary. Paragraph 28 of the judgement quotes Lewin, On Trusts, which in turn states that such an order may be applicable where there is an adverse claim to trust assets by a third party and the claim is "insubstantial". There is no reason to believe such an order cannot be extended to a claim by a disgruntled beneficiary. The advantage of obtaining such an order is that it does not require the detailed evidence that the other two orders necessitate. It was also what the will trustees in Parsons v Reid applied for, although it was refused on the basis that the Court did not have before it sufficient information to decide whether the claimant's case was insubstantial. Therefore. in a case where the claim is manifestly without merit and this can be shown to the Court, this type of order may be something that trustees and executors could still consider.

Conclusion



Whilst litigation is always best avoided in situations where a disgruntled beneficiary is preventing the proper administration of a trust or estate and causing legal costs to escalate, trustees are advised to try and flush out any viable claims as quickly as possible. Failing this, they should consider if any of the Court remedies available to them are justified in the circumstances.

THE TRUST SERVICES PROHIBITION IN THE UK'S RUSSIA SANCTIONS REGIME

Authored by: Emile Simpson, Barrister at Pump Court Tax Chambers

On 16 December 2022 the UK introduced into its Russia sanctions regime a prohibition on trust services; the prohibition also has effect in the Overseas Territories and Crown Dependencies[1]. The prohibition comprises two rules, as follows:

- "A person must not provide trust services to or for the benefit of a designated person" – a "designated person" means a person sanctioned by the UK under its Russia sanctions regime.
- "A person ("P") must not provide trust services to or for the benefit of a person connected with Russia ("C") unless pursuant to an ongoing arrangement pursuant to which P provided those trust services to or for the benefit of C immediately before 16th December 2022" – as regards individuals, a "person connected with Russia" means a person "ordinarily resident" or "located" in Russia (thus, importantly, Russian nationality is irrelevant)[2].

Practically, whether the prohibition applies can be determined by working through these questions:

(1) Is the service provider bound by the trust services prohibition?

In UK law, the prohibition binds: any person in relation to conduct within the UK; and UK nationals and UK incorporated entities worldwide. This is modified in the law of each of the Overseas Territories and Crown Dependencies.

For example: if trust services are provided by a UK national in Luxembourg, they are bound by the prohibition, by virtue of their nationality; conversely, a Luxembourg national in Luxembourg who is a trustee of a trust whose beneficiaries are UK nationals would not be bound, unless any of the conduct involved in the provision of those trust services took place in the UK.

1 The UK's Russia sanctions regime is set out in the Russia (Sanctions) (EU Exit) Regulations 2019. All references to regulations ("regs.") below are to regulations therein. The trust services prohibition is set out at reg. 18C; various exceptions to the prohibition are set out at reg. 60ZZB.

2 It further means: "a person, other than an individual, which is incorporated or constituted under the law of Russia, or which is domiciled in Russia".

(2) Is the service a trust service?

"Trust services" are defined as follows:

- The creation of a trust or similar arrangement.
- The provision of a registered office, business address, correspondence address or administrative address for a trust or similar arrangement.
- The operation or management of a trust or similar arrangement.
- Acting or arranging for another person to act as trustee of a trust or similar arrangement, where "trustee", in relation to an arrangement similar to a trust, means a person who holds an equivalent or similar position to a trustee of a trust.

Practically, a key question will often be whether, by the provision of the service, the person operates or manages a trust or similar arrangement. A central distinction is between: (1) the trustees and others who administrate the trust or similar arrangement; and (2) persons who provide advisory services only.

For example, if a lawyer or an accountant provided advice to the trustees, they would not thereby operate or manage the trust, so would not provide trust services under that part of the definition.

However, advisory services could fall within other parts of the definition. For example, a lawyer drafting a deed of appointment for a trustee provides trust services, since that goes to arranging for another person to act as trustee.

Whether an arrangement is a "similar arrangement" to a trust needs to be considered on the facts.

(3) If the service is a trust service, would it provided to, or for the benefit of a designated person or a person connected with Russia?

The provision of a trust service "to" such a person is not further defined. But a trust service is provided "for the benefit" of such a person if they are:

- a beneficiary of a trust or similar arrangement;
- referred to as a potential beneficiary in a document from the settlor relating to a trust or similar arrangement (such as a letter of wishes); or

having regard to all the circumstances, the person might reasonably be expected to obtain, or to be able to obtain, a significant financial benefit from the trust or similar arrangement.

In relation to the last requirement, as regards designated persons, a key circumstance is likely to be whether the trustees can be assumed to comply with UK law (or the law of the relevant Overseas Territory or Crown Dependency). If yes, while each case will need to be considered on its own facts, the start point is likely to be that the requirement is not met: since, were the trustees though their actions to confer a significant financial benefit on the designated person, they would breach other prohibitions in the Russia sanctions regime.

(4) If the trust services prohibition is engaged, is there an applicable exception or licence available to allow the service to be provided in a way that would not breach the prohibition?

A key exception as regards persons connected with Russia (but not designated persons) is if the service is provided pursuant to an "ongoing arrangement", as defined above.

There are various further exceptions.[3] For example, if the person connected with Russia is under 18 years old, trust services may be provided to them, or for their benefit, so long as those services are not provided "primarily" to, or for the benefit of, a designated person.

Alternatively, a licence from the relevant regulatory authority may be available.[4]

Reporting requirements

Note that the definition of "trust services" in the trust services prohibition introduced on 16 December 2022 re-cast the reporting requirements in relation to trust services under the Russia sanctions regime; however, only "relevant firms" are subject to those reporting requirements.[5]

Other prohibitions

Practitioners considering whether the trust services prohibition applies may also need to consider the (separate) prohibitions on professional services to persons connected with Russia, in particular those on accounting, auditing, and business and management consulting relations services.[6]

Finally, be aware that there is a separate EU sanctions law trust services prohibition, which inter alia binds any person who is an EU national worldwide.[7] Unlike the UK prohibition, Russian nationality is relevant to the EU prohibition.

3 See reg. 60ZZB.
4 See reg. 64.
5 See reg. 71, and Part 8. "Relevant firm" is defined at reg. 70.
6 See reg. 54C.
7 See Art. 5m of Council Regulation (EU) No 833/2014.

WHAT HAPPENS IN THE TWILIGHT ZONE?

MODERNISING THE CONCEPT OF TESTAMENTARY CAPACITY

Authored by: Alicia Tan, Associate, and Daniel Pearce, Trainee Solicitor at Farrer & Co

The medical world appreciates capacity as a complex and context-specific issue, wherein a person can fluctuate between cognitive ability and inability over time, or perhaps in relation to particular tasks. By sharp contrast to this contextual medical understanding, the legal test for capacity in the context of will-making is binary in nature; a testator will either be found to have full capacity to make a will, or to entirely lack such capacity. This binary approach arises from the Banks v Goodfellow [1861-73] All ER Rep 47 four-staged test, which requires that a testator with capacity must:

(1) appreciate the nature and consequences of making a will;

(2) understand what property they own;

(3) consider any moral claims to their estate (even if they choose not to act upon them); and

(4) not be affected by an disorder of the mind or insane delusion.

Notably the Banks v Goodfellow test has not been replaced by the test in the Mental Capacity Act 2005 in the context of will-making, as recently confirmed in the High Court on appeal in Clitheroe v Bond [2021] EWHC 1102 (Ch).

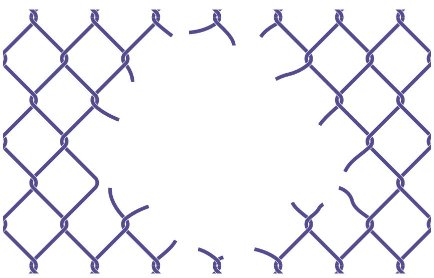
It is not always easy to establish that an individual understands what making a will means, appreciates what property they own and appreciates that their dependents might expect some provision. However, it is nonetheless a slightly easier exercise than assessing the fourth limb of the test – is the individual affected by a disorder of the mind? As Clitheroe confirms, the common law test for delusion is that of a false belief which is both irrational and fixed in nature. Necessarily, fluctuating cognitive ability of the kind which might, for example, be identified in cases of dementia makes meeting this 'fixed in nature' test rather difficult. More generally, the outdated language of the test frustrates its clear and precise application to medical conditions as understood in a modern society.

The disparity between the medical reality of fluctuating capacity and the defined binary test for legal capacity in will-making can result in problematic instances (either on a temporary or permanent basis) wherein a testator retains legal capacity yet simultaneously de facto lacks full cognitive ability. These are situations where important legal decisions can be made without an appropriate level of decision-making ability. The failure of the law to recognise the existence of this grey area between full and absent legal capacity for will-making is clearly a source of vulnerability for testators, and a tool for those who might seek to take advantage of them.

Concerningly, the number of people who find themselves in this grey area of capacity will only increase in line with an ageing population and expanded life expectancy. Instances of dementia specifically are estimated to double every 20 years.[1] The increased need for care, and the corresponding strain placed on the care industry, could further increase the vulnerability of individuals; with demand outstripping supply, standards and vetting processes for carers could be at risk of slipping. This is a huge concern given the great reliance which vulnerable individuals place on their carers.

1 Martin Price et al, World Alzheimer Report 2015, Alzheimer's Disease International, https://www.alzint.org/resource/world-alzheimer-report-2015/

Vulnerability to abuse – insufficient legal protections



The vulnerability of this capacity grey zone is heighted by the lack of legal recourse for those whose weaknesses are preyed upon. Undue influence is hard to make out, particularly because the test requires the testator to have been subject to coercion rather than mere persuasion (Wingrove v Wingrove (1885) 11 P.D. 81). This can be evidentially challenging, not least because in most cases where a will is subject to legal challenge, the main witness is now dead.

The limited framework of legal protection forces the onus of recognising vulnerability, and providing protection from those who would seek advantage, on the loved ones and professional advisors surrounding the individual. However, these safety nets are under challenge. For example, in the context of the doctor-patient relationship a changing practice towards online or telephone GP consultancy post-pandemic is necessarily reducing the ability for doctors to accurately assess the capacity of their patients. Similar concerns can arise in online attendance between advisors and their client, with the opportunity to notice a decline in cognitive ability reduced.

A preference for in-person meetings with those clients more likely to become vulnerable, perhaps those who are older or with a family history of cognitive issues, is one way to better assess capacity. More generally, advisors can better safeguard their clients by being alert to signs of capacity issues. As examples, these signs could include a client's dramatic departure from previous intentions, rambling or inconsistency, incoherent instructions, or perhaps severe emotional responses which appear unconnected to their life events (mood swings being an indicator for Alzheimer's). Collaboration with other professional advisors and loved ones, subject to client consent and being mindful of confidentiality, is a means of better appreciating a client's capacity from different perspectives.

Being alert to signs of abuse is also important. For example, in situations where instructions are taken through a third party and the client is not copied into emails or involved in discussion there might be a risk of coercion. Online meetings pose a particular risk in that there might be other individuals in the room, not visible on camera to the doctor or adviser on the other end of the line, influencing the client. If the client is making decisions which would lead to a manifestly negative outcome, this could be another sign that they are being unduly influenced.

An area ripe for policy change?

Whilst the adoption of safeguarding practices is an advisable action, there is ultimately only so much advisors can do within the current framework. At present, the murky zone between cognitive ability and legal incapacity affords ample scope for those who would take advantage of clients.

Civil jurisdictions invoke rules of forced heirship whereby a fixed shares of a testator's assets will pass to certain family members irrespective of their wishes. This certainly reduces the risk of malicious external pressures influencing will choices, but it necessarily does so at a huge cost to the testator's autonomy. Other policy changes, such as a limitation on post-pandemic remote will-making, might tackle issues of undue influence but will do so at the risk of accessibility for will-making – particularly for those less mobile, or whose health is precarious.

Indeed, this is the tension that lies at the heart of this area of law, between safeguarding vulnerable individuals and increasing accessibility to will-making. It is clear to many practitioners that a more nuanced understanding of capacity in the medical world needs to be reflected in the Banks v Goodfellow test. However, the answer to how this nuance is to be found, and how the balance should be struck, remains the open question that needs to be answered, and one that all who operate in this area of both law and medicine should have at the forefront of their minds.

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Alan Milgate
Senior Partner
AMilgate@RHTrust.ky

Tamara Corbin
Partner
TCorbin@RHTrust.ky

Amanda Bako
Partner
ABako@RHTrust.ky

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Partner
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MENTAL CAPACITY ISSUES - WHAT TRUSTEES NEED TO KNOW

Authored by: Kerrie Le Tissier, Client Director at HIGHVERN

Mental capacity is a complex issue and often difficult for trustees to navigate – most of us are not qualified to assess an individual's mental health and raising concerns in respect of an individual's mental health is a delicate and emotive matter.

But the risks of not spotting when a settlor or power-holder (e.g. a settlor who has reserved powers under the terms of the trust, or a protector) does not have capacity are significant – the trust may be invalid, the individual's appointment as the power-holder may automatically terminate, any exercise of their powers may be open to challenge and the trustee's own actions (or inactions) may be criticised.

What does 'mental capacity' mean?

Generally speaking, having mental capacity means being able to make one's own decisions, which requires a level of understanding of the information on which a decision is based. Mental capacity may be affected by a number of factors such as mental or physical illness, age or drugs and alcohol abuse.

The applicable legal test to determine mental capacity varies between different jurisdictions and may also differ depending on whether an individual is setting up a trust or exercising a power under the terms of a trust.

Under English law, the common law test set out in Banks v Goodfellow is applied when a trust is set up – in order to set up a trust, the settlor must understand:

(i) the nature of their act and its effects;

(ii) the extent of the property of which they are disposing; and

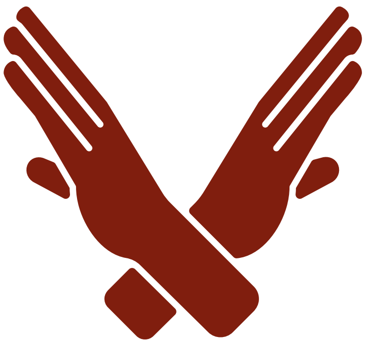
(iii) the claims to which they may give effect.

However, when assessing the capacity of a power-holder after the trust has been created, the test under the Mental Capacity Act 2005 (the MCA) is usually applied. Under section 2 of the MCA, "a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain". A similar capacity test applies under Guernsey and Jersey law[1].

Other jurisdictions have applied the Banks v Goodfellow test to the question of whether an individual had the mental capacity to exercise certain powers. For example, the Court in the Cayman Islands applied this test last year in Re Poulton Trust[2] where the settlor exercised his powers to remove his children as beneficiaries and to terminate the trust in his own favour. In that case, the settlor was terminally ill, and the children had concerns about whether he was capable of making such important decisions at a time when he was dependent on prescription medications and suffering from chemotherapy side-effects.

Impact of mental capacity issues on trusts

Trust creation



In most jurisdictions, if a settlor is found not to have had capacity when creating the trust, the trust will not be valid. For example, under Guernsey law, a Guernsey trust is invalid and unenforceable to the extent that the Royal Court of Guernsey declares that the settlor was, at the time of the creation of the trust, incapable of creating the trust .

The consequences of the trust not being valid are likely to be significant. If the trust is not valid, it is as though it never existed. The property is likely to revert to the settlor – under Guernsey law the property would be held by the trustees on bare trust for the settlor (or, if they are dead, their personal representatives), unless the Royal Court orders otherwise.

This is likely to impact any succession, estate and tax planning behind setting up the trust – for example, the settlor and their advisers, believing a particular asset had been put into a trust, may not have made any specific provision for that asset in the settlor's will so the asset may pass under intestacy rules if the settlor dies.

Validity of acts of power-holders

Where a power-holder exercises a power (e.g. to remove a beneficiary) at a time when they lack mental-capacity, there is a risk that the exercise of their power (the removal) could be set aside.

This is one of the issues the Cayman Court had to consider in Re Poulton Trust ¬ - whether the removal of the beneficiaries and the termination of the trust should be set aside. In that case those actions were not set aside on the basis of mental capacity as the Court found that, despite the settlor's ill health and temporary cognitive impairments, his mental capacity was sufficient to take the steps he did (i.e. he understood what he was doing).

Termination of appointment

Trust instruments often provide for the appointment of a power-holder to terminate when they become incapacitated and for their powers to pass to a successor if they lose capacity. Such a provision often requires an assessment by a medical professional to determine that the individual has lost capacity.

However, issues can arise when the trustee or another interested party has concerns that a power-holder has lost capacity, or may be likely to lose capacity – that person's appointment will not necessarily have terminated yet under the terms of the trust (because the formal assessment triggers the termination).

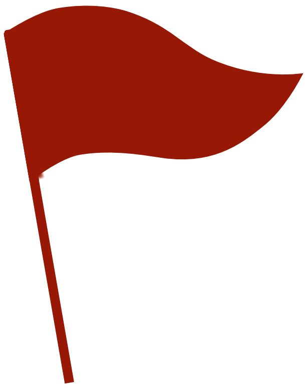
In those circumstances, the trustee could attempt to expedite the assessment process required by the terms of the trust. Alternatively, it may be possible under the terms of the trust to remove the power-holder from their position. Or there may be applicable statutory provisions which dictate what the trustees should do – for example, under Guernsey law, where the trustee of a non-charitable purpose trust has reason to believe that the enforcer is incapable of acting, the trustee must apply to the Royal Court for the removal of the enforcer and the appointment of a replacement[3].

1 Section 4 of the Capacity (Bailiwick of Guernsey) Law, 2020 (as amended) and section 4 of the Capacity and Self-Determination (Jersey) Law, 2016 respectively.

2 In the matter of the Poulton Trust FSD 121 of 2016.

3 Section 12(9) of the Guernsey Trusts Law.

Red flags

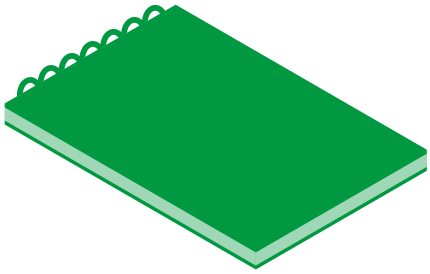


But how would a trustee know when an individual may be lacking mental capacity to make certain decisions? We are not medical professionals and will not always have face-to-face contact with the individual at the point a decision is being made, particularly when dealing with international clients , or where we usually deal with their other professional advisers or family office representatives.

There are a few red flags to watch out for, and one or more of these red flags can be seen in most cases involving mental capacity issues:

- **A settlor has a sudden change of heart and makes a decision, or attempts to take an action, that is at odds with the trustee's understanding of their wishes, as set out in their letter of wishes or as otherwise conveyed to the trustee or family members.**
- **The trustee becomes aware that a power-holder has an illness which it suspects could affect their mental capacity, e.g. Alzheimer's, or for which the power-holder is taking strong medication that could affect their capacity, e.g. strong painkillers.**
- **The trustee does not have any direct contact with the settlor or power-holder, and there are concerns that another individual is attempting to make their decisions for them (this could also be a red flag for undue duress).**
- **The settlor or power-holder is elderly or otherwise vulnerable, particularly where beneficiaries may be unhappy with their actions (e.g. because they are being removed).**

What can a trustee do if they suspect mental capacity issues?



Trustees are under a duty to act in the interests of the beneficiaries which will include ensuring powers are properly exercised (so that the trust is properly administered) and avoiding the financial and emotional consequences of litigation that could result if a settlor or power-holder's mental health is challenged.

Trustees should therefore remain alive to potential red flags and take proactive steps to reduce the risks including:

- Keeping detailed file notes of meetings with the settlor and their professional advisers, including a note of the trustee's own observations.
- Maintaining some direct contact with the settlor or power-holder, e.g. periodic in-person meetings, or telephone or video calls.
- Obtaining medical reports where appropriate.

Finally, given the complexities and the significant consequences of not managing mental capacity issues properly, trustees should always take appropriate legal advice as soon as they have any concerns about a settlor or power-holder's mental capacity.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