ThoughtLeaders4 Private Client • September 2020

Private Client

MAGAZINE

ISSUE 2

NEXT GEN WEALTH
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ADVISING THE NEXT GENERATION OF HNW'S

INTRODUCTION

"I personally have felt for some time that the non-contentious Private Client world in particular lacks a really thriving community aimed at the Next Generation of the wealthy and their advisors and this is very much what I hope this will become"

- Chris Moorcroft, Harbottle & Lewis, Next Gen Wealth Founding Committee Member

With the old guard of HNWs passing on their wealth to the next generation, advisors are having to adapt and change their approach when dealing with the next wave of HNW millennials and Generation Z.

ThoughtLeaders4 Next Gen Wealth initiative is specifically targeted at the Next Generation of wealth and the Next Generation of advisors, bringing together Private Client practitioners to share their expertise and experience of advising the next generation of HNWs.

With this in mind we are delighted to bring you the Second Edition of the Private Client Magazine, showcasing the diverse interest, breadth and depth of the knowledge of our community.

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EXTRATERRITORIALITY IN JERSEY LEGISLATION - – AN EXTERNAL THREAT TO TRUSTS?

Authored by: Stephen Alexander and Chris Vincent - Mourant Ozannes

In the matter of the Saisies Judiciaries of Robert Tantular [2020] JRC 058 (8 April 2020)

This is the first of the two recently published cases dealing with the potential extraterritorial effect of legislation, both following the recent decision of the English High Court in R (KBR Inc) v Director of the Serious Fraud Office [2019] 2 WLR 267, and earlier Supreme Court authority. Both cases have implications for Jersey trusts.

By way of brief background, in 2013 and 2014 the Royal Court granted two saisie judiciaires over the realisable property of Mr Tantular. These applications were brought at the request of the Indonesian Government, following the convictions in Indonesia of Mr Tantular for fraud and money laundering, to preserve assets pending the enforcement of financial confiscation orders made in Indonesia. Saisie judiciaires are a form of Royal Court order restraining the use of assets imposed under Article 16(1) of the Proceeds of Crime (Jersey) Law 1999, as modified by the Proceeds of Crime (Enforcement of Confiscation Orders) (Jersey) Regulations 2008 ("the Modified Law").

Mr Tantular did not own property in Jersey. However, he was the settlor and a beneficiary of the Jasmine Investment Trust, a discretionary trust governed by Jersey law ("Trust"). The only valuable assets of the Trust were the shares in a BVI company ("Jonzelle") which, in turn, held a residential property in Singapore ("the Property").

In the present application, Mr Tantular contended that, upon a proper construction of the legislation, the saisie judiciaires were limited to assets in Jersey, and therefore did not extend to the shares in Jonzelle or the Property. This argument was founded upon the well-known rule of construction that legislation should not be given extra-territorial reach unless it contains clear language to that effect. In support of this analysis, reliance was placed on Jersey's international obligations under various conventions which, it was said, made clear that territorial limits should be observed and only obliged Jersey to enforce confiscation orders in respect of property situated in Jersey, as well as King v Director of Serious Fraud Office [2009] 1 WLR 718 and King v HM Procureur [2011-12] GLR 285 in which the English and Guernsey Courts respectively declined to extend comparable legislation to assets outside their respective jurisdictions.

The starting point for the Royal Court was to observe that the law had moved on since King v Director of Fraud Office [2009] 1 WLR 718 in connection with the presumption against extra-territorial reach. As per Gross LJ in in R (KBR Inc) v Director of the Serious Fraud Office [2019] 2 WLR 267, the question of whether a statutory provision applied to persons or matters outside the jurisdiction depended on its proper construction. It was not, or at least was no longer, necessary to search for express authorisation or for necessary implication.

The Royal Court concluded that, as a matter of construction of the Modified Law, a saisie judiciaire under that law is not limited to property situated in Jersey. The primary reason for this was that it was clear on the face of the statute that Articles 16(4)(b) and (c) were intended to apply to property situated in Jersey or elsewhere. This was consistent with the unambiguous definition of property in Article 1 ("…whether situated in Jersey or elsewhere…") and reinforced by the contrary language of Article 16(4)(a), which makes clear that the content of that sub-section is limited to property situated in Jersey (no such limitation being present in Articles 16(4)(b) and (c), both referring only to "realisable property").

The thrust of the Royal Court's analysis was that the purpose of the Modified Law and analogous legislation was to comply with Jersey's international obligations to assist in the fight against cross-border financial crime, and it would be surprising if this legislation did not apply to assets held through the very structures for which Jersey is most known. It would also be surprising if a defendant could use a common feature of such structures to argue that certain assets were beyond the Court's reach.

Guardian Global Capital (Suisse) SA v JFSC [2020] JRC 073 (29 April 2020)

This is the second of the two recently published cases dealing with the potential extraterritorial effect of legislation, again following the recent decision of the English High Court in R (KBR Inc) v Director of the Serious Fraud Office [2019] 2 WLR 267, and earlier Supreme Court authority.

Article 32(2) provides: "(2) If the Commission has reasonable grounds to suspect that a person has contravened Article 7, 39G or 39L, the Commission, an officer or an agent may, by notice in writing served on that person, require the person to do either or both of the following – (a) to provide the Commission, an officer or an agent, at such times and places as are specified in the notice, with such information or documents as are specified in the notice and as the Commission, an officer or an agent reasonably requires for the purposes of investigating the suspected contravention; (b) to attend at such times and places as are specified in the notice and answer such questions as the Commission, an officer or an agent reasonably requires the person to answer for the purpose of investigating the suspected contravention."

Guardian Global Capital (Suisse) SA ("GGC"), a Swiss company, sought relief by way of judicial review of the power of the Jersey Financial Services Commission ("Commission") to issue a notice under Article 32(2) of the Financial Services (Jersey) Law 1998 ("Law") to compel it to provide documentation and information held within Jersey by one of its directors or officers. The basis for the issuing of the notice was that the Commission suspected that GGC, through a Jersey-resident director, had conducted unauthorised trust company business in or from within the Island in contravention of Article 7 of the Law. Article 7(1)(a) of the Law has application to foreign companies and provides that, except as registered under the Law, "a person shall not carry on financial service business in or from within Jersey". The documentation required to be produced by the Commission was held in Jersey and the trusts in question were Jersey trusts. GGC challenged the Notice on the ground inter alia that it was a Swiss-resident entity and Article 32(2) has no extra-territorial effect.

The Royal Court confirmed and applied the findings in R v Jimenez [2017] EWHC 2585, namely that whether legislation has extraterritorial effect is a question of construction informed by the purpose of the legislation, the public interest which it serves, and the extent to which its application or enforcement abroad would cut across or offend against the territorial sovereignty of another state.

In its consideration of the earlier authorities, the Royal Court quoted the following extract from Patten LJ in R v Jimenez

"But recognition of a principle that Parliament can generally be presumed not to have legislated in respect of persons resident or events occurring abroad does not prevent particular legislation from being construed as having some extra-territorial effect if such an interpretation can be derived from the language of the statute and its purpose"

The Royal Court also had regard to the decision in R (KBR Inc) v Director of the Serious Fraud Office [2019] 2 WLR 267. In that case, the English High Court upheld a notice under s 2 of the Criminal Justice Act 1987 issued by the SFO and served in the UK on a company officer of a US company for the production of material held overseas. The Court stated that a UK company could be compelled by a notice to produce documents it held overseas, but that the extra-territorial effect was in effect limited to foreign companies in respect of documents held overseas where there is a "sufficient connection" between the company and the UK. As a matter of fact the Court found in that case that the US company had such a sufficient connection.

The Royal Court held that on a proper construction of the Law, the Commission had power under Article 32(2) of the Law to compel a foreign entity to produce documents held in Jersey. The combination of Article 7, Article 32(2) and Article 40(4) of the Law (the latter expressly providing for the service of notices on companies incorporated outside Jersey) showed that the legislature understood that there would be some extra-territorial reach to the statute. This was supported by an underlying public interest in the Commission investigating businesses potentially carrying out unlawful trust operations, as the entire thrust of the Law was to protect the Island's reputation and to create a properly regulated financial services industry.

Comment

There is a degree of friction between extraterritoriality and the principle of comity, where foreign matters are usually determined by the domestic courts of the most closely aligned jurisdiction, subject to applicable conflict of laws rules.

However, it is widely held that extraterritoriality may be an important legislative tool in the areas of crime and financial regulation. As was recognised in the English case of KBR,

"were a UK company in position to forestall a serious fraud investigation by transferring

documents abroad…it would be in the highest degree unfortunate" and "most such investigations will have an international dimension, very often involving multi-national groups conducting their business in multiple jurisdictions"

It makes sense, in these circumstances, for appropriate powers be given to, and exercised by, the relevant authorities to facilitate the investigation of crime and upholding proper financial regulation where a connection exists sufficient for the domestic Court to exercise its jurisdiction. Indeed, the position might be exacerbated in the case of Jersey specifically and in respect of "the very structures for which Jersey is most known" (per the Commissioner Clyde-Smith in Tantular).

But is extraterritoriality appropriate in a trust context? Perhaps. Many would say that it is appropriate that powers are given to, and are being exercised by, the relevant authorities in combating financial crime and/or upholding financial regulation. They would say that the recent decisions of Tantular and Guardian Global Capital emphasise and support Jersey's position as leader amongst the international finance centres and a safe, secure and rigorous jurisdiction for asset administration. They might also say that the extraterritoriality of this legislation has its limits. There must be a sufficient connection with Jersey. In Tantular, that connection was the trustee (in its capacity of a Jersey law governed trust) which held the relevant foreign property was a trust company incorporated and regulated in Jersey, and in Guardian Global Capital, it was, inter alia, the presence of one of the company's officers in Jersey.

However, on the other hand, it could also be said that this development is a further, external control over a trustee of a trust which may have little connection with Jersey. It is also a control which, in many cases, would not be welcomed by the trustee, settlor or beneficiaries. There may be fresh, complex jurisdictional considerations for trustees, particularly if the jurisdiction in which the assets are based does not recognise the Jersey orders. And what about the reaction overseas? The possible risks of Jersey attempting to exercise jurisdiction over property situated in other sovereign countries is confusion, multiplication of effort and expense and potentially even disquiet in other countries.

However, as matters stand, the decisions would appear to have clearly confirmed the extraterritorial scope of these statutes. Trustees may need to be mindful of the same in their administration of trust assets, even where situated outside of Jersey.

Article 32(2) provides: "(2) If the Commission has reasonable grounds to suspect that a person has contravened Article 7, 39G or 39L, the Commission, an officer or an agent may, by notice in writing served on that person, require the person to do either or both of the following – (a) to provide the Commission, an officer or an agent, at such times and places as are specified in the notice, with such information or documents as are specified in the notice and as the Commission, an officer or an agent reasonably requires for the purposes of investigating the suspected contravention; (b) to attend at such times and places as are specified in the notice and answer such questions as the Commission, an officer or an agent reasonably requires the person to answer for the purpose of investigating the suspected contravention."

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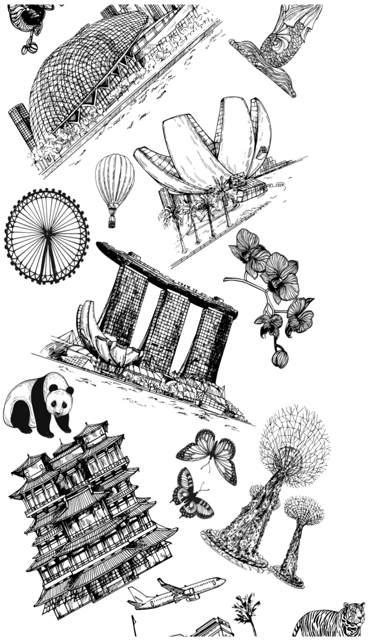
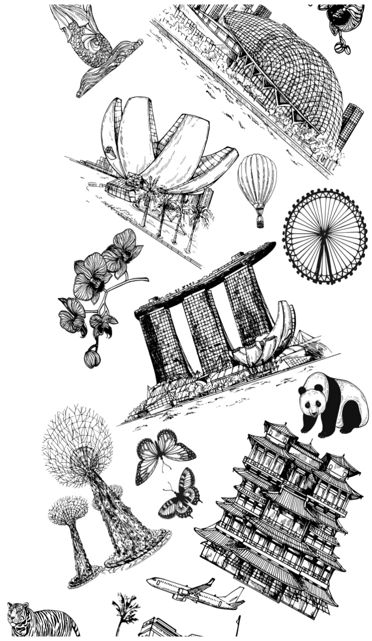


WHEN DOES FOREIGN ILLEGALITY VITIATE THE ENFORCEMENT OF A SINGAPORE TRUST?



Authored by: ZHUO Jiaxiang and Danny QUAH – Providence Law Asia

1. Would certain false declarations made to the US courts by the settlor of a Singapore trust would void the trust for illegality? The Singapore International Commercial Court ("SICC") recently had the opportunity to consider this issue in the case of Baker, Michael A (executor of the estate of Chantal Burnison, deceased) v BCS Business Consulting Services Pte Ltd and others [2020] SGHC(I) 10 ("**Chantal**").

Salient facts

2. In Chantal, the executor of a deceased's estate commenced a suit against a Mr Weber for misappropriating funds that were allegedly subject to a trust. The executor asserted that Mr Weber was the trustee of a trust constituted by the deceased, Ms Chantal, at the material time, and that the funds were assets of the trust (save for a 5% fee payable to Mr Weber).

3. Mr Weber disputed that the funds belonged to Ms Chantal's estate and that he was a trustee of the said funds. In the alternative, even if he was found to be a trustee, Mr Weber argued that the trust was void for illegality.

4. What had happened at the material time was as follows.

5. In 1980, Ms Chantal invented a chemical compound known as the "Ethocyn" compound, which was a key component for a skin product that was said to make the skin look younger and better toned. The finished skin products were sold over the counter and to cosmetic manufacturers who would incorporate the compound into their products. Ms Chantal assigned the intellectual property rights associated with the Ethocyn compound ("**Ethocyn IP**") to her company, Chantal Pharmaceutical.

6. In 1996, an involuntary Chapter 11 bankruptcy petition was filed against Chantal Pharmaceutical, which was eventually converted to a voluntary debtor in possession Chapter 11 case.

7. The US Public Trustee then appointed a creditors' committee, which in turn retained investment bankers and other professionals to locate a potential buyer for the Ethocyn IP. A prospectus was prepared and sent out to about 20 prospective buyers.

8. However, there was ultimately only 1 bidder: a New Zealand corporation named Renslade Holdings Ltd ("**Renslade NZ**").

9. In 1999, Renslade NZ entered into an agreement with Chantal Pharmaceutical for the purchase of, inter alia, the Ethocyn IP. The US Bankruptcy Court subsequently granted the order approving the sale as there were no other bidders. It was later revealed that Ms Chantal was the prime mover behind Renslade NZ and had contributed the funds for the purchase of the Ethocyn IP (although all this was obscured behind a wall of opaque international corporate structures).

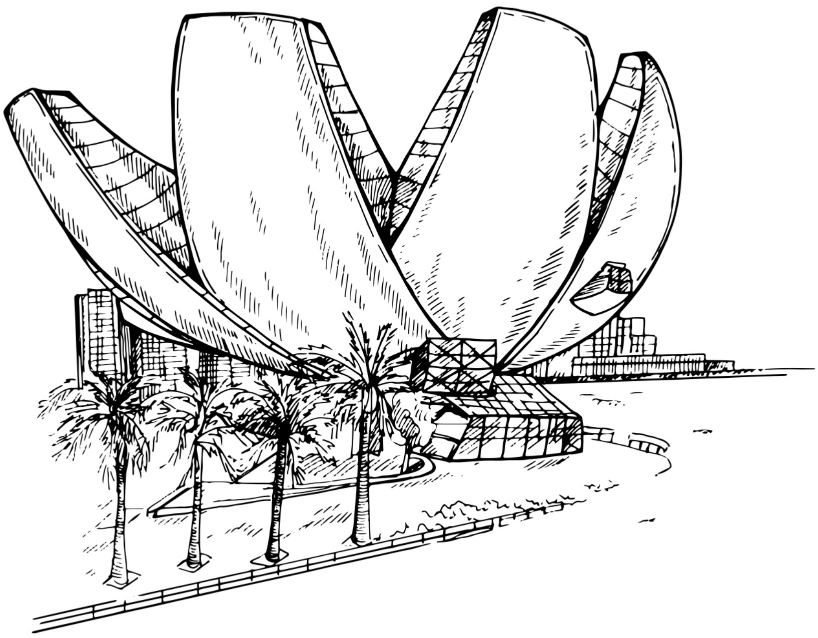
10. In 2000, the Ethocyn IP was transferred from Renslade NZ to Renslade Singapore Pte Ltd ("Renslade SG"). Mr Weber was the beneficial owner of Renslade SG. The US Bankruptcy Court again sanctioned this transaction.

11. Around this time, Ms Chantal engaged Mr Weber to assist her with various transactions involving the Ethocyn IP and to run her business. Over the next 15 years, she transferred significant funds to Mr Weber and/or his companies, allegedly on trust, for the purpose of exploiting the Ethocyn IP (the "**Trust Arrangement**")

12. In 2015, Ms Chantal was diagnosed with colon cancer. From May 2016 until her death in October 2016, she repeatedly sought an account of the trust assets which had been transferred to Mr Weber.

13. However, Mr Weber disagreed that the Trust Arrangement existed and claimed that he was offered and purchased the Ethocyn IP from Renslade NZ as a personal investment opportunity and the Ethocyn IP and all monies earned from them belonged to him and his companies. He also alleged that such a trust or arrangement would be illegal, void or unenforceable.

14. After Ms Chantal's death, the



executor of her estate commenced this suit against Mr Weber and his companies for breach of trust, breach of fiduciary duties, conspiracy to injure and unjust enrichment.

SICC's decision

15. The SICC found that there was a Trust Arrangement and that Mr Weber was a trustee of the said funds under the trust. As such, by refusing to return the funds to the estate, he had acted in breach of trust.

16. What is more interesting for our purposes is the SICC's analysis of the illegality argument, i.e. that the Trust Arrangement was unenforceable because it was illegal or for an illegal purpose.

17. Mr Weber's argument on illegality was that Ms Chantal orchestrated Renslade NZ's purchase of the Ethocyn IP, provided the funds to acquire the same and arranged for Mr Weber to acquire the Ethocyn IP from Renslade NZ and hold the same and any income or proceeds generated from them on trust for her.

18. Mr Weber asserted that Ms Chantal made the following false declarations in support of the application to the US Bankruptcy Courts to approve the sale to Renslade NZ:

- neither she nor her companies were owners, officers or directors of Renslade NZ or its affiliates;
- she did not ask Renslade NZ to require that the Ethocyn IP be transferred as part of the sale; and
- Renslade NZ had an arm's length relationship with Chantal Pharmaceutical, and all terms and conditions contemplated under the sale had been fully disclosed and Renslade NZ was purchasing the assets in good faith.

19. Mr Weber further submitted that Ms Chantal's conduct in arranging for Renslade NZ to purchase the Ethocyn IP out of bankruptcy and to have them held on trust for her benefit, using funds secretly provided by her, was contrary to her declaration under oath to the US Bankruptcy Courts, which is a crime under U.S. law.

20. The SICC agreed with Mr Weber that Ms Chantal's declarations were false. It then went on to consider the effect of the false declarations on the enforceability of the Trust Arrangement under Singapore law pursuant to the principles set out in the recent Court of Appeal decision in Ochroid Trading Ltd v Chua Siok Lui (trading as VIE Import & Expert) [2018] 1 SLR 363 ("Ochroid Trading"). There, it was held that a two-stage test applies to whether an agreement may be enforceable due to illegality.

- Under the first stage, the court will ascertain whether the agreement, as opposed to the conduct of the parties, is prohibited by statute, an established head of common law public policy; or if the contract, while not unlawful per se, is tainted by illegality in that they involve the commission of a legal wrong in their formation, purpose or manner of performance. In a shift from the traditional common law approach of refusing to enforce such "tainted" contracts, the Court of Appeal affirmed the principle in Ting Siew May v Boon Law Choo [2014] 3 SLR 609 ("Ting Siew May") that such enforcement is subject to the limiting principle of proportionality. This is a fact-centric inquiry taking into account the following factors:
  - whether allowing the claim would undermine the purpose of the prohibiting rule;
  - the nature and gravity of the illegality;
  - the remoteness or centrality of the illegality to the contract;
  - the object, intent and conduct of the parties; and
  - the consequences of denying the claim.
- If the agreement is not prohibited following the inquiry above, then it may be enforced. But if it is prohibited, then the court will undertake the second stage of the inquiry to ascertain whether, notwithstanding the fact that there can be no recovery pursuant to the (illegal) agreeemnt, there might nevertheless be restitutionary recovery of the benefits conferred thereunder (as opposed to recovery of full contractual damages).

21. On the facts, the SICC held that the Trust Arrangement was not prohibited under any Singapore statute or any established heads of common law public policy.

22. The SICC noted that a Singapore court will not enforce a trust if its object or purpose would involve doing an act in a foreign and friendly state which would violate the law of that state. However, the SICC found that the object of the trust arrangement was not unlawful as there was nothing wrong with Ms Chantal arranging for Mr Weber to hold intellectual property and attendant rights on trust for her with

Mr Weber being remunerated from the proceeds generated from those rights.

23. The SICC rejected Mr Weber's argument that the object of the Trust Arrangement was to keep trust assets out of creditors' reach because there were no other buyers interested in the Ethocyn IP despite the best efforts of the creditors' committee. If Ms Chantal had not made the false statements, it would, in all probability, only result in the creditors attempting to obtain a better price for the Ethocyn IP. Whether Ms Chantal would have agreed to pay more, or whether the deal would have collapsed, was pure speculation.

24. Further, the SICC held that the false declarations pre-dated the Trust Arrangement, so they cannot be said to have formed the object and purpose of the Trust Arrangement.

25. Although there was some suggestion by Mr Weber that the purpose of the Trust Arrangement was to evade taxes, the SICC stated that it would not consider this issue because it was not pleaded.

26. Nonetheless, the SICC held that while the Trust Arrangement was not unlawful per se, it was tainted by illegality because Ms Chantal had made false representations to the US Bankruptcy Courts, and the corpus of the trust was obtained partly through such false declarations.

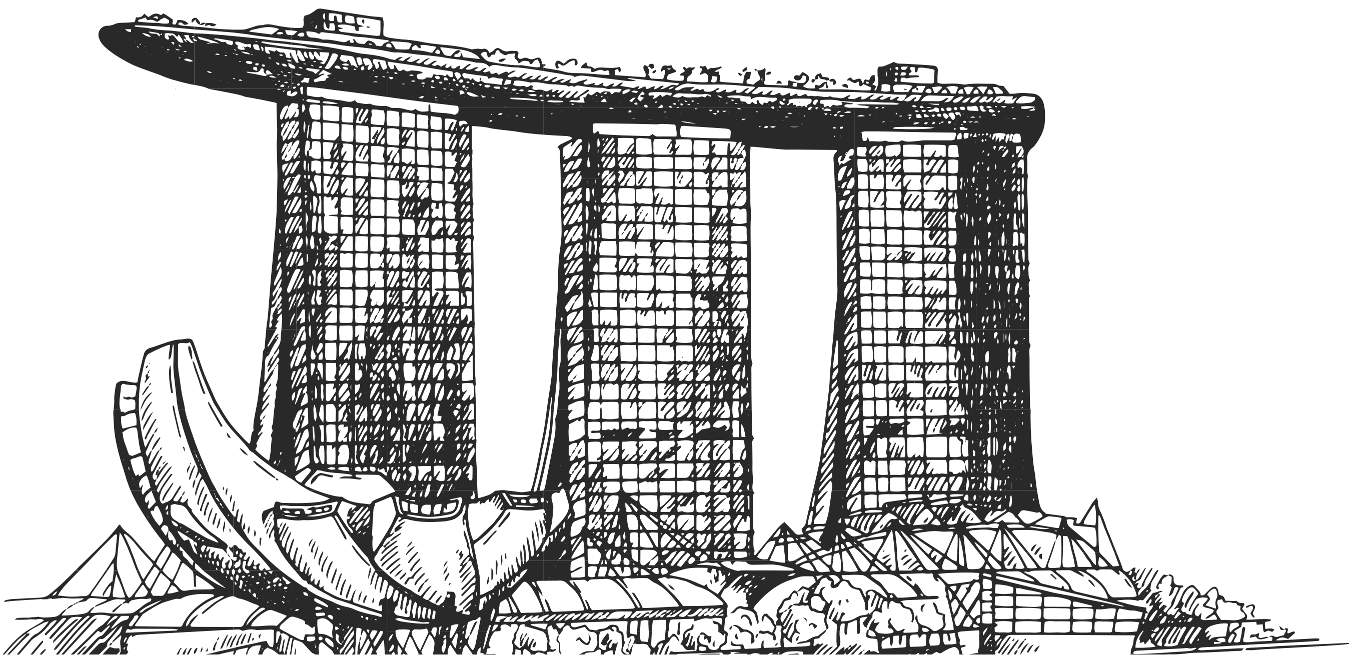
27. However, the SICC found that it was disproportionate to refuse enforcement of the Trust Arrangement because:

- The nature and gravity of the false declarations were not so severe as to weigh against enforcement of the trust arrangement. There is no prohibition against a debtor in bankruptcy proceedings buying back its own assets. The only difference is that the courts will apply a higher level of scrutiny to ensure that the sale is fair.
- On the question of whether the bankruptcy sale was fair, there was an active creditors' committee which hired investment bankers and other professionals to market the Ethocyn IP to 20 potential buyers. In spite of the creditor committee's best efforts, no other offers were forthcoming.
- The false declarations were remote from the Trust Arrangement. As the declarations were made about 2 months before the Trust Arrangement had been set up, there was no overt step in carrying out any unlawful intention as the said unlawful act had been carried out by the time of the Trust Arrangement. Further, the false declarations were not the only bases on which the US Bankruptcy Courts approved the sale. This approval was also some 20 years prior to the present proceedings, and from 2002 to 2015, parties abided by the arrangements in managing the trust assets. Hence, the false declarations had no strong or central connection to the Trust Arrangement.
- Mr Weber stood to benefit from Ms Chantal's work over the last two decades if the Trust Arrangement is voided, when he was a trustee who had acted in flagrant breach of his duties by attempting to misappropriate trust properties.

28. In light of the above, the SICC found the Trust Arrangement to be valid and enforceable, and that Mr Weber had breached his fiduciary duty to Ms Chantal by failing to provide an account of the trust and the trust funds.

Commentary

29. Chantal is an interesting case because it demonstrates the extremely fact sensitive nature of cases involving the illegality doctrine. It also sheds light on the manner in which the Singapore courts apply the principle of proportionality as first espoused in Ting Siew May and Ochroid Trading. This is an important development and is likely to assist lawyers and parties in navigating the challenges that inevitably accompany trusts that may be tainted by illegality.



FAMILY GOVERNANCE IN AN AGE OF UNCERTAINTY

Authored by: Patricia Boon - Forsters LLP

As we witness the impact that the pandemic is having on economies across the globe, there is a natural apprehension about what the future might hold in a post-Covid 19 world.

Uncertainty, apprehension, and concern for the future may be catalysts which prompt high and ultra-high net worth families to review their existing succession planning or (where a family has no succession planning in place at all) to consider options which might be appropriate for them. This may be especially the case in cultures where it is discouraged or taboo to talk about subjects like death.

Implementing flexible and adaptable family governance solutions remains particularly crucial for inter-generational family businesses and, if the circumstances are appropriate, this could be a timely moment in which trusted family advisors can talk to clients about family governance and succession planning considerations.

Of the key points outlined below, some are particularly pertinent to living in a world in lockdown. However, the greater majority are of ongoing application and relevance, and will continue to be important to clients in the long-term:

Update the Will of the patriarch/matriarch:

This is particularly important for individuals who made their Wills some years ago and have not reviewed them since. They should consider whether all the provisions still meet their wishes and intentions and reflect their present circumstances. If their Will includes a discretionary trust, they should also review the Letter of Wishes to check that it is still up-to-date and, if there are family trust structures, check that the Will and Letter of Wishes dovetail with such trusts.

If they do not already have a Will, talk to them about the need for a Will:

For those of us who work in the private wealth industry, a Will represents the most basic form of succession planning. However, there are surprising cases where individuals holding substantial wealth, with personally-owned assets in many different jurisdictions, have no Will. In the current situation it may be timely to offer advice to clients about the benefits of having a Will to avoid the need for obtaining probate in multiple jurisdictions and the potential pitfalls of an intestacy situation.

Review trust structures and Letters of Wishes:

This is a good opportunity for clients to conduct a health check of their structures. If the settlor of any family trust (or trusts) is still alive, they should be encouraged to review their Letter of Wishes. They may wish to consider whether there is, or should be, any mechanism for updating the Letter of Wishes or the philosophy behind the trust in the future (e.g. whether the members of the most senior generation of the family should be able to make certain amendments). To the extent that younger generations are not already aware of any family structures, thought may be given, as part of any review, to the way in which members of the next generation should be introduced to the family governance plan.

Role of the Protector:

Many of our clients are concerned about building and, perhaps even more importantly, maintaining a circle of dependable individuals whom they can trust to be involved in their structures over the years. A Protector-type figure, in particular, can often have a significant part to play in the life of a family structure. It is unwise for clients to become too reliant on one such individual and there may be circumstances where a Protector

Committee may be appropriate. A general overhaul of family trusts (or equivalent vehicles) may focus minds on considering potential successors and/or the benefits of a committee in the event of the sudden incapacity or death of a Protector.

Family Constitutions and other governance mechanisms:

The form of such Charters or Constitutions can vary widely, and some may provide for how the Family Council (or similar body) should communicate and interact with one another. Most documents of this type would already provide for the parties to meet remotely (which is a much more acute issue in the current situation). The same applies to company board meetings, including meetings of private trust company boards (the mechanics of which may be set out in the documents comprising a family's overall governance plan). However, there are questions arising from this virtual, remote form of interaction which should be raised in discussions with families, so that they can take them into consideration, including:

- Decision-making: should all decisions always be able to be made virtually, or are there any decisions which are (or should be) required to be made in physical meetings? Should special exceptions be made only for "emergency situations" and how would such situations be defined?
- Family interaction: will some family members be able to dominate virtual meetings in a way that might be harder in a physical meeting (where body language and dynamics might be easier to read)?
- Regulatory and tax (relevant to company board meetings): where are various directors participating in meetings and making decisions? Directors who find themselves in lockdown in high-tax jurisdictions should ensure, as far as possible, that they do not make actual decisions relating to the company, if that is practicable. In order to evidence how (and where) decisions have been taken, there should be a full record of decisions taken and a note of the physical location of officers involved.
- Confidentiality: is the family concerned about a potential lack of confidentiality in virtual meetings and sharing information using digital technology?

Encouraging clients to review, or to implement, their long-term succession goals is, of course, not just relevant in a time of international emergency. However, this period in which we are living has thrown into sharp relief the importance of having robust and flexible structures and mechanisms in place to govern family businesses and family dynamics. Without these mechanisms, there is a much higher risk of division and dispute between individuals, resulting in the potential dissipation of wealth.

RE H – A NEW DAWN FOR 75 ACT CLAIMS?

Authored by: James Lister - Stevens & Bolton LLP

Claims under the Inheritance (Provision for Family and Dependants) Act 1975 (the Act) focus on financial provision for the beneficiaries and claimant(s) to an estate. Although the Act requires the balancing of a number of factors in considering any claim including the relationships between the parties and the moral obligations which might have arisen between the deceased and the beneficiaries/claimant, a primary focus for the Court in determining such claims is the financial provision made for the claimant (if any) and the parties' respective financial needs and resources. This enables the Court to deal with whether reasonable financial provision has been made for the claimant already, and if not to determine what the claimant should receive. It also enables the Court to be the subject of colourful headlines around rewriting a person's will, but that is a topic for a different article.

Success Fee Recovery

In April 2013, when the Legal Aid and Punishment of Offenders Act 2012 abolished the recovery of success fees under conditional fee agreements (CFAs) from the losing party to litigation, the move was generally seen as a positive step – an end to unmeritorious claims being pursued and defendants being compelled to settle them in order to avoid the risk of a substantial costs award against them in due course if the claim was worth more than £0. That applied too to claims under the Inheritance (Provision for Family and Dependants) Act 1975 (the 1975 Act), where the previous rules had allowed a large number of claims (predominantly those by adult children, but not exclusively) to be pursued at no cost and at very little risk to the putative claimant – after all, why wouldn't you litigate when you had to pay nothing for your legal fees at all if you didn't win, and would recover most of those fees from your opponent or the estate if you did? Of course it was also a significant incentive to the defendant/estate to settle your claim early too – if the estate was faced with potentially paying out double the claimant's costs bill if the claim succeeded, that risk needed to be bought off as early as possible.

Unfortunately, however, the loss of the ability to recover success fees from the losing party had an unwelcome effect on claims under the Act too – it meant that genuinely financially impecunious claimants with good claims often had no means of funding their claim without resorting to a CFA which would in turn then reduce the amount of their award when they had to pay their success fee to their solicitors. Briggs J (as he then was) identified this tension (although on a different question of costs) when he wrote in his judgment Lilleyman that the detailed and careful analysis of the trial judge to ensure that reasonable provision was made for a claimant was "undermined" by the later application of the costs rules or (in the case of a CFA success fee) by the recovery of that fee from the successful claimant. After all, when the role of the Court is to order such financial provision as is reasonable for the claimant to receive, how can the Court be expected to do that fairly when an unknown liability falls onto the claimant after the event, which could significantly change the claimant's true financial position?

Sea Change & Re H

That question has been discussed by the Courts a great deal of late – in three decisions: Clarke v Allen , Bullock v Denton and Re H . The position now is that the door is ajar for claimants to argue that they should be allowed to recover their success fee (or part of it) from the estate on their claim as it is required to help meet their financial need. Such a sea-change is a significant development for claims under the Act.

In Clarke, the judge was addressed on exactly this point – it was submitted that the claimant there should be allowed to include her success fee payable to her solicitors as part of her claim for financial provision. The Judge dismissed that argument as being "contrary to the deliberate policy of the legislature that the losing party should not be responsible for the success fee" and because allowing such recovery would "put a CFA funded litigant in a better position in terms of negotiations due to the risk of a substantial costs burden". That was a clear statement of the law as it then stood and, one might have thought, the obvious answer – why, after all, should claims under the Act be the only claims which could ignore the otherwise-applicable legislation? If Parliament had intended to do this, it plainly could have.

However, that position was then challenged in April 2020 in Bullock v Denton. The judge in that case found that he was entitled to take the claimant's obligation to pay her success fee to her solicitors as part of her financial need. He said that if he "[made] no award under this head of claim, the Claimant will have a substantial debt that she could only pay out of [her award]…" and that for this not to happen would place the overall aim of the Court to provide for the claimant's reasonable financial needs as "in jeopardy".

So it was that these two entirely conflicting authorities came before the High Court in Re H in May 2020. The judge was addressed on both Clarke and Bullock and decided that he should give the claimant some of her success fee as part of her award. The judge said that this was for case-specific reasons which focussed on the fact that the award made to the claimant was small and that failing to help her with her success fee would mean that her "primary needs will not be met". The judge held that "it would not be fair…for me to ignore completely [the claimant's] liability to her solicitors". The judge then went on to award the claimant 25% of her success fee as a contribution to her liability.

Points to Note

Being a judgment of the High Court (and subject to any interference with that decision by the Court of Appeal), the decision is binding on lower courts and likely to be followed in the High Court itself. That represents a major change to the way in which a good claim under the Act can now be put – a claimant's inability to fund his or her claim no longer means that they need to sacrifice so much of their award to pay their solicitors a success fee, although the cautious should note that the Courts may be reluctant to apply the same reasoning in "bigger" money cases. The judge felt able to award the claimant part of her success fee in H because not to have done so would have made a significant dent in the claimant's financial award – that will not always be the case, but it is easy to imagine that arguments will ensue in larger cases when the success fee is proportionately larger that the same reasoning should apply.

Good news for access to justice and financial provision for genuinely needy claimants – bad news for defendant estates and beneficiaries who will want to reflect carefully on whether it is worth buying off the risk of having to pay part of a claimant's success fee early on.

[1] *2012 EWHC 1056 (Ch)*

[2] *2019 EWHC 1193*

[3] *Unreported*

[4] *2020 EWHC 1134 (Fam)*

SHELTER FROM THE STORM: THE DYNAMIC ROLE OF THE TRUSTEE DURING TIMES OF CRISIS

Authored By: Joe Woodward - Oak Group (Guernsey)

With the Covid-19 pandemic hopefully, and thankfully, past its peak, we are all left assessing the damage, wondering what positives we can take with us into the future but more than anything contemplating what the longer term impact will be. As trustees, we have the additional responsibility of not only going through these thought processes for ourselves but also for our beneficiaries. With many predicting that pandemics will become more frequent in our globalised and highly mobile world, we all have a duty to ourselves, and others, to be better prepared for an uncertain future in which the only thing we can predict is unpredictability…

Decisions, decisions

Whether it's the calm before the storm, its peak or its aftermath, our duties as trustees never change, at least not from a statutory perspective. However, it is in times of crisis that beneficiaries are most likely to look to us for guidance. The crisis may be global but it could just as easily be (and is actually more likely to be) personal. For example, when the world's stock markets are in freefall, trustees need to act diligently and work closely with investment managers to navigate their way through choppy waters.

On a more personal level, it may be that a family business in which a trustee is invested is experiencing its own tough time. In many respects, decisions that are 'closer to home' are much more difficult to make: do you support a struggling business unwaveringly and risk 'throwing good money after bad', or do you cut losses and decide enough is enough? There is no right answer, as each situation will be different. However, the most important thing is for trustees to show that they have given the matter due consideration and can evidence how/why a decision was taken. Needless to say that such evidence will be invaluable in defending against potential future claims/attacks, but taking a more proactive approach, trustees should endeavour to communicate their reasoning to beneficiaries at the time.

It's good to talk

The Trusts Guernsey Law imposes a duty on trustees to act in the interests of beneficiaries, or "en bon père de famille" (a good father of the family). Other jurisdictions have legislation imposing similar fiduciary duties. In playing their role as the 'head of the family', trustees should communicate with beneficiaries as often as possible, giving them reassurance and documentary proof such as minutes of trustee meetings that indicate everything is under control and the necessary steps are being taken. Having an open and consistent dialogue will not only help put the minds of beneficiaries at ease, their input will also help trustees make well-informed and appropriate decisions for the family's future.

One of the long-term impacts of the pandemic will almost certainly be increased use of digital conferencing facilities. When physical meetings are not possible, there is no excuse not to be in regular communication with stakeholders. Trustees should therefore make every effort to 'touch base' with beneficiaries as often as possible. Likewise, if trustees cannot meet in person they may need to resolve matters in writing. It is therefore important for trustees to check the relevant trust instruments to ensure they permit the use of virtual meetings and/or written resolutions. This may be particularly important for directors of private trust companies (PTC's), which could have bespoke articles stipulating how decisions should be reached (quorum, etc.). Finally, trustees (and directors) should work closely with relevant advisers to ensure that the situs of control and management does not have any negative implications, tax or otherwise.

Getting – and keeping – the house in order

When a storm hits, trustees should review the trust assets and obtain updated financial information (accounts, valuations, etc.). Trust instruments and agreements entered into by trustees may also put certain obligations on them and a familiarity with such documents cannot be overestimated. In times of crisis, trustees may seek to renegotiate certain terms (assuming other parties are willing). Amendments may be commercial but could just as easily be practical, for example requirements for the execution of documents. It is important for trustees to check whether there are requirements or restrictions regarding instruments in writing, witnessing or signatures in person, as the execution of documents can be voided if such formalities are not followed.

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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.

When they wrote to inform us that their global conservation program and 61-year history of saving species and habitats from the brink of extinction was in real danger due to the financial impact of the pandemic on Jersey Zoo, we asked how we could help.

After discussions with Durrell, we are delighted that ARC is now the proud sponsor of their Blue Poison Dart Frogs display.

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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SOFER V SWISSINDEPENDENT TRUSTEES: IS IT A LOAN OR IS IT A DISTRIBUTION?

Authored by: Charles Gothard, Robin Vos, Sam Epstein - Macfarlanes LLP

The Court of Appeal has ruled that a breach of trust claim against the trustees of a trust relating to loans made to the settlor could go ahead even though the trust deed included an exoneration clause that excluded trustee liability except where the trustee is guilty of fraudulent bad faith and the claimant had indemnified the trustee against any liability in respect of the loans

Background

The case concerned a trust settled by the claimant's father and known as the Puyol Trust. The Defendant in this case, SwissIndependent Trustees SA, was the trustee of the trust. It was intended that the Claimant would be the main beneficiary of the trust, but shortly after it was created, the Claimant's father was added as a beneficiary.

The trust deed included a restriction preventing the trustee from making distributions out of the trust until the settlor had died. However, the trustee was permitted to lend money to the beneficiaries.

The trust deed also included an exoneration clause, providing that the trustee would not be liable for any loss unless it has "been caused by acts done or omissions made in personal conscious and fraudulent bad faith by the Trustee".

Over a period of 10 years, $19.2m was paid out from the Puyol Trust to the Claimant's father. The payments were recorded by the trustee as loans, but without provisions for security, interest or repayment. Some small amounts were repaid, but the estate of the Claimant's father after his death did not have sufficient funds to repay the vast majority of the amount outstanding.

The Claimant had entered into a deed of indemnity with the trustee in respect of several of the payments to his father, the purpose of which was to indemnify the trustee in respect of the amounts lent to his father.

The Claimant sought to recover the amounts paid to his father by the trustee. He argued that these payments, although described as loans, were in fact outright distributions in breach of the trust deed, which prohibited such payments being made.

The case considered two key issues.

1. 1. Were the payments made in fraudulent bad faith, the result of which would be that the exoneration clause would not protect the trustee from being held liable for the loss to the trust funds?

2. Even if the exoneration clause did not protect the trustee, did the deeds of indemnity entered into by the Claimant prevent the Claimant from being able to claim for these amounts against the trustee?

   The case was a preliminary hearing, and the court was not ruling on the merits of the parties' arguments; it was instead tasked with determining whether the Claimant had a reasonable prospect of success in his arguments.

   The High Court ruled in favour of the trustee. Addressing each question above:

3. it was accepted that to show fraudulent bad faith, the Claimant was required to evidence dishonest breach of the trust by the trustee. Applying the test set out in Fattal v Walbrook Trustees (Jersey) Ltd [2010] EWHC 2767 (Ch) (as set out below) for dishonest breach of

trust, the High Court held that the Claimant's particulars of claim were not sufficient to evidence dishonest breach of trust by the trustee; and

4. the High Court held that since the Claimant had signed deeds of indemnity in respect of the payments to his father out of the trust, he would not be able to succeed with his claim even if the trustee could not rely on the exoneration clause. The Claimant therefore had no real prospect of success, and he was therefore precluded from advancing his claim.

Court of Appeal

The Court of Appeal disagreed with the High Court and allowed the Claimant's appeal.

Evidence of fraudulent bad faith

The Court of Appeal agreed with the High Court that the appropriate test for determining dishonest breach of trust is the test set out in Fattal, but disagreed with the High Court's conclusions. Applying the Fattal test, in order to show dishonest breach of trust, the Claimant must show:

- a deliberate breach of trust;
- committed by a professional trustee:

  – who knows that the deliberate breach is contrary to the interests of the beneficiaries; or

  – who is recklessly indifferent whether the deliberate breach is contrary to their interests or not; or

  – whose belief that the deliberate breach is not contrary to the interests of the beneficiaries is so unreasonable that, by any objective standard, no reasonable professional trustee could have thought that what he did or agreed to do was for the benefit of the beneficiaries.

The Court of Appeal noted that the Claimant's case was built on an inference of dishonesty from the facts set out in the particulars. Specifically, the Claimant argued that the amount of the payments, the length of time over which they had been made and the fact that the trustee had not investigated the prospects of the loans being repaid supported his case that the trustee had deliberately breached the terms of the trust and that the trustee:

- knew the payments were being made contrary to the beneficiaries' interests;
- was recklessly indifferent to the beneficiaries' interests in making the payments; or
- was wholly unreasonable in believing that the payments were in the beneficiaries' interests.

Moreover, the fact that the Claimant's father was a beneficiary did not absolve the trustee from considering the position of other beneficiaries.

In Lord Justice Arnold's view, the Claimant's particulars of claim **did** contain sufficient details (if the facts set out in the particulars of claim were proved) to infer that there had been a dishonest breach of trust by the trustee, which could be sufficient to overcome the trustee exoneration clause. The Claimant therefore had a reasonable prospect of success and should be allowed to proceed with his claim.

Deeds of indemnity

In respect of the deeds of indemnity, the Court of Appeal considered it arguable that:

- the indemnity provided to the trustee was not wide enough to indemnify the trustee for the payments if they were not in fact loans but distributions; and
- the indemnity was subject to an implied term that disapplied the indemnity where the trustee acted dishonestly.

Based on these factors, the Claimant had a reasonable prospect of succeeding in his argument that the deeds of indemnity did not protect the trustee from any claims.

Comment

Although the Court of Appeal did not rule on the merits of the Claimant's case, this case nevertheless serves as a reminder to trustees that characterising a payment to beneficiaries as a loan does not definitively make it so. Real thought needs to be given as to whether:

- the beneficiary has, or will ever have, adequate funds to repay the loan;
- the loan will in fact be repaid; and
- the trustees have considered the interests of other beneficiaries when making a loan.

This includes considering whether the loan should bear interest, whether there should be a fixed repayment date and whether any security should be provided.

This case highlights that if a loan is made without a prospect of repayment, that loan could rightly be characterised as a distribution rather than a loan.

Loans are often used by trustees as a tax efficient method for beneficiaries to receive benefits from a trust, but it should be borne in mind that there is an inherent risk in making open-ended, unsecured and interest-free loans without an intention to ever be repaid. Trustees should consider the interests of all beneficiaries when making loans, even to a beneficiary, as this could be determinative of whether a court (with the benefit of hindsight) considers there to have been a dishonest breach by the trustees.

Furthermore, although an exoneration clause in a trust deed goes some way to providing protection for the trustees, trustees should consider that the test for proving fraudulent bad faith in order to overcome such a clause is not the same as fraud or common law dishonesty. For trustees to be considered as acting with fraudulent bad faith there does not need to be any intention to benefit themselves; in accordance with the Fattal test, all it requires is for the trustees to have knowledge that they are breaching the terms of the trust and for them to give insufficient thought to the position of the other beneficiaries. This is a lower threshold than proving the trustees were fraudulent or dishonest in their actions. Finally, trustees should note that the existence of an indemnity from other beneficiaries of the trust in respect of claims does not automatically preclude a claim from being made. Trustees should be wary of narrowly drafted indemnities, as these may not protect them against claims. If trustees are aware that their actions could potentially be construed as a breach of trust, then to ensure that their actions do not fall outside the terms of the indemnity it would be sensible for them to obtain a widely drawn indemnity and be able to evidence that the beneficiary was made aware of any specific concerns.

ATTACKING AND DEFENDING TRUSTS IN DIVORCE

Authored by: Stella Mitchell-Voisin – Summit Trust

To paraphrase a comment recently made at a conference by a senior family court judge, if the impression that the trust fund is a resource of one of the parties is not corrected, a decision will be taken on the understanding that it is. The family law concept of the 'ATM Trust Fund' needed little explanation.

Two basic thoughts occurred to this trustee: fair enough; and why are trustees still letting this happen?

On the first point, while no doubt decisions will be taken on the facts of the specific case, the Mr Charmans, the Mr Prests, the Mr Pugachevs do leave an impression - in the latter case, complete with the image of a James Bond baddie stroking an Angora Cat[1]. The lesser-known trustees in some tucked away jurisdiction make something less of an impression. Or at least not one that supports a case for robust trusteeship.

On the second point, the most often cited and valid reason is that the trustee will not wish to unwittingly submit to a foreign court. Legal guidance would usually be taken when being asked to assist in a beneficiary divorce that should ensure that this does not happen. The other reason may be simply because the files do not read well. Within the context of defending the integrity of a trust relationship, words such as 'client' (denoting the settlor) and 'instruction' littered throughout will not be helpful. Or maybe the files barely read at all. If the exercise of discretion cannot be shown to have been properly considered and/or the trust has been poorly administered the beneficiary will surely struggle to dispel the family court's impression that the trust fund is a personal resource. The trustee then is likely to have an unwelcome 'judicially encouraged' distribution decision on its hands.

Examples of the sort of disclosures requested to trustees in divorce cases include: copies of trust deeds; financial statements of trusts and underlying companies; supplemental instruments, letters of wishes; schedules of underlying assets; distribution schedules (including the date of the request, identity of the requesting party, reason for the request, the amount and nature of the provision requested, a copy of the actual request, a copy of the response to the request, the amount and nature of the provision made pursuant to the request, the recipient of any such provision, in the event of any such request having been refused, the reason given for the refusal.

Assuming that the trust was settled on discretionary terms for multigenerational benefit, trustee cooperation in the above requests (absent good reasons to refuse disclosure) should be helpful in dispelling misconceptions. All of the above-mentioned documents should be immediately at hand for the trustee of a professionally administered trust. There will be (or should be!) some considerable embarrassment for a professional trustee if any of these documents cannot be located or proceedings are held up while historical financial details are hurriedly pulled together from scratch.

As a side point, much of the trust information may very well be already in the divorce jurisdiction, such as copies of deeds and financial statements sent to beneficiaries, making it potentially subject to a court subpoena. As a result, uncooperative trustee behaviour in withholding trust information will be ineffective in concealing information and serving simply to prolong and increase the overall cost of the divorce.

Having touched upon cost, the trustee should keep their duty to account in mind. They should engage in rigorous - and recorded - scrutiny of legal bills (ensuring that the lawyers performed only the work for which they had been engaged) before settling them out of the trust fund.

As any trustee knows, usually they are adapting to imperfect 'we are where we are' circumstances. In non-contentious family circumstances, oftentimes the trustee will have communicated trust information more regularly with one senior family member beneficiary, rather than each individual adult beneficiary equally. Done not out of a desire to conceal the trust from other beneficiaries, rather on the implicit understanding the immediate family beneficiaries' interests would be broadly aligned with the family's natural financial provider. Trustee neutrality is a widely accepted as a general guiding principle when two members of a discretionary class of beneficiaries decide to divorce. The word 'neutrality' can convey an impression of passivity or inaction. It is rarely thus: adopting a stance of 'co-operative neutrality' can require some tough decisions, often beginning with any information imbalance being readdressed.

Each circumstance involving divorce will clearly be different but a trustee with complete and well organised files that demonstrate the integrity discretionary trust that properly considers all the beneficiaries' interests, will always have more options should the time come to defend it. History cannot be re-written, so the time to ensure this is from the outset, rather than the storm clouds of divorce on the horizon. And well before that lift shaft is set in motion[2].

[1] Para 438 in the decision of MezhProm Bank v Pugachev in relation to an illusory trust refers to a phenomenon in patent law known as the Angora cat problem first identified by Professor Franzosi:"When validity is challenged, the patentee says his patent is very small: the cat with its fur smoothed down, cuddly and sleepy. But when the patentee goes on the attack, the fur bristles, the cat is twice the size with teeth bared and eyes ablaze."

[2] Mostyn J in E v. E (1990) "In my judgment, in a variation of settlement case, the court can, metaphorically speaking, travel right down the lift-shaft from the top floor to the basement, without having to stop at any floor in between."

DEFINED BENEFIT PENSIONS

Authored By: Chris Plews - Gilson Gray LLP

Can you clarify the terminology around Defined Benefit, Final Salaries, Defined Con-tribution and Money Purchase pensions?

Defined benefit pensions are often called final salary schemes and refer to pensions that will provide a guaranteed income linked to how long you worked for an employer. Defined contribution pensions are often called money purchase pensions and refer to pensions where your contribution is invested and what you get will depend on the value of your pot at retirement. Increased life expectancy has made defined benefit pensions unaffordable for many private sector firms which is why we are seeing generous transfer values being offered. The public sector does not offer transfer busy.

We take a cautious approach to Defined Benefit Transfers and the Financial Con¬duct Authority state that the default advice should be to remain in the scheme, why would you remain when offered a generous transfer value?

Question you have to ask is, is it worth selling a guaranteed income for life? With large transfer values there is a danger of viewing them like lottery wins but it is a big decision as you are giving up a guaranteed income for life so you must take your time when deciding. Ian provided the example of his mum who is now 96 and still receiving a pension income so has had value out of a final salary scheme that nobody could have imagined.

If it is the only asset a client holds then we would always advise against transfer. A client must have the appropriate attitude to risk and capacity for loss to consider transferring. We always stress test against a market crash and recent events show the value in doing so.

Naturally the next question would be in what circumstances might a transfer be appropriate?

First point would be that whether you remain or leave, taking advice is absolutely key but general points we are looking for would be:

- Within 10 years of retirement
- Other assets
- Investment experience, do not want anyone to take undue risk, must be appropriate risk for the client

Being able to access a pension flexibly is often a significant driver. Increasingly clients are phasing in retirement so control over how they take their income is key to ensure they do so in the most efficient way.

Different stages of retirement produce different expenditure requirements:

- 55-75 “Go Go” – more active
- 75-85 “Go Slow” – reduced activity
- 85+ “No Go” – limited activity as health deteriorates

Each stage requires different levels of income so flexibility over their income can help planning.

Death benefits are also a consideration for many clients. Defined benefit offers a very valuable 50% guaranteed income for the spouse but limited beyond that.

Clients often want to create a legacy for their children and de¬fined contribution pensions can be left to whoever they nominate.

Clients with substantial assets and a potential inheritance tax issue may also consider a transfer as a defined contribution would be outwith their estate and they could take their retirement income from other sources.

Those with reduced life expectancy may also have concerns about getting the value out of a defined benefit scheme however it should not be forgotten the example of Ian's mum – 96 and still receiving pension income!!

What companies are offering transfer values?

Financial services (RBS, HBoS, Standard Life) are particularly active but we have also seen companies such as Scottish Power and whisky companies. I would stress however it does not always mean it is right for everyone who has worked for these companies to transfer, key that they get advice.

Often we find that the best outcome is where they have other DB schemes either themselves or a spouses that can be kept then they are left with a bit of guaranteed income and a bit of flexibility.

Have the current conditions due to Covid-19 impacted values?

Possibly too early to say but at the moment we have not seen any changes. Values are linked to gilt yields which at the moment are very low.

What is the process for someone considering a defined benefit pension transfer?

First of all it is vital that they take their time, we would anticipate the process taking 3-6 months.

- We would look to establish that they are the right sort of client – risk profile etc
- Request a guaranteed transfer value from the provider
- Analyse pros and cons of each option
- Stress test possible investment solution
- Test against average life expectancy

Key that it is based on each individuals situation not one size fits all solution.

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THE AUSTRIAN PRIVATE FOUNDATION

Authored by: Dr. Niklas J.R.M. Schmidt, TEP – Wolf Theiss

1. INTRODUCTION

Since the Austrian Act on Private Foundations came into force in 1993 (over 25 years ago), pri-vate foundations (Privatstiftungen) may be established in Austria. Originally, the intent of the legis-lator was to offer an Austrian wealth management vehicle and to thereby prevent capital from be-ing moved to foreign structures, notably to foundations established in nearby Liechtenstein. There exist currently over 3,000 private foundations in Austria, with an estimated total wealth of approx. EUR 70 billion (64% of which is held through companies and 24% through real estate). 80 of the Austria's 100 largest companies are being controlled by private foundations, with a total of around 400,000 jobs indirectly depending on private foundations. Most private foundations were founded in the year 2000 (approx. 800), since then the number of private foundations being established has decreased. All wealthy Austrian families have set up private foundations. The list of the larg-est private foundations in Austria is almost identical to the list of the richest Austrians.

2. DEFINITION

The Austrian private foundation: (i) is a legal entity without owners, members or shareholders (meaning that there is nobody holding shares in a private foundation); (ii) is established through a declaration of intent by the founder under private law (rather than under public law); (iii) is en-dowed with assets by the founder (either at establishment or at a later point in time); (iv) is to serve a legally valid purpose determined by the founder; (v) is not allowed to carry out a commercial ac-tivity exceeding a merely ancillary activity nor to be a general partner of a registered partnership; (v) is represented in its dealings through a board of directors; and (vi) is registered with the com-mercial register as a result of which it comes into legal existence.

3. PURPOSES

Austrian private foundations can be used for many purposes, including the following: (i) for holding wealth and supporting the members of a family; (ii) for estate planning (e.g., in order to prevent the fragmentation of shares in an incorporated family business due to successive cases of inher-itance); (iii) for asset protection (e.g., in order to keep assets out of reach of creditors or spouses in the event of divorce); (iv) for the avoidance of inheritance tax (but this is no longer relevant in Austria since 1 August 2008, when such tax was abolished); and (v) for charitable purposes (e.g., in order to operate a museum).

4. DEED OF FOUNDATION

A private foundation can be set up by one or more founders, who can be individuals or legal enti-ties. For this, the founders have to sign a deed of foundation in the form of a notarial deed. This has to contain: (i) the assets to be endowed to the private foundation (at least EUR 70,000); (ii) the purpose of the private foundation; (iii) the body which determines the beneficiaries (e.g., the board of directors); (iv) the name of the private foundation (which must contain the wording "Privatstiftung"); (v) the legal seat of the private foundation (which must be in Austria); (vi) the names, postal addresses and dates of birth (in case of individuals) or registration numbers (in case of legal entities) of the founders; and (vii) the term of the private foundation (which may be limited or unlimited). Certain rights of the founder have to be contained in the deed of foundation in order to be valid, such as the right to amend the deed of foundation, the right to revoke the private foundation as well as the admissibility of setting up a supplementary deed of foundation.

5. SUPPLEMENTARY DEED OF FOUNDATION

In practice, the founder of a private foundation will always reserve the right to set up a supplemen-tary deed of foundation. Since the latter does not need to be disclosed to the commercial register, details of a more private nature are usually regulated therein. Typically, it will contain: (i) detailed provisions regarding the determination of the beneficiaries and the distributions to them; (ii) further endowments to be made by the founder to the private foundation exceeding the minimum en-dowment of EUR 70,000; and (iii) the fees to be paid to the members of the various bodies of the private foundation. The supplementary deed also has to be set up in the form of a notarial deed and may be signed by the holder of a power of attorney or by a nominee acting for the founder.

6. ENDOWMENT OF ASSETS

As mentioned above, assets in a value amounting at least to EUR 70,000 must be endowed by the founder to the private foundation. In case there are several founders, it is not necessary that every founder contributes the same amount. Often, when a private foundation is set up, minors contribute a nominal amount (e.g., EUR 1,000), in order for them to acquire the status as a founder, which enables them to exercise the rights associated therewith. In practice, it does not make sense to set up a private foundation with assets of less than EUR 5 million. Assets endowed may consist in cash or in kind. In the latter case, an audit will be necessary to determine the value. After the establishment of a private foundation, subsequent endowments by the founder are still possible. Also, it is possible for non-founders to make endowments; however, this does not result in these persons thus becoming founders.

7. REGISTRATION

Once the deed of foundation and the supplementary deed of foundation, if any, have been signed, the first board of directors must apply for registration of the private foundation in the com-mercial register.

8. CONCLUSION

Foundations serve similar purposes in civil law countries as trusts in common law countries. Since 1993, Austria offers its own form of foundation, the private foundation, which has seen much suc-cess in the past, both for Austrian and non-Austrian clients.

WORKING WITH START-UPS AND YOUNG ENTREPRENEURS

Authored by: Kerrie Le Tissier - Bedell Cristin

Private client practice usually focuses on individuals and families who already have considerable wealth – those that have been successful in business, those who have made wise investments and those who have inherited substantial wealth and property. As private client practitioners, we set up structures to hold and manage the wealth of people who are already wealthy, and we aim to ensure that it is protected as much as possible for present and future generations. The type of clients we usually mean when we refer to 'private clients' are high net worth individuals and their families and family offices.

A new type of private client

One aspect of private client practice that is often overlooked is working with and advising individuals that are at an earlier stage of their wealth creation and generation – start-ups and young entrepreneurs. Start-ups are new businesses which are set up by one or more individuals to develop a new and innovative product or service. The founders are generally young, hungry and ambitious entrepreneurs who have a great idea (or several ideas) that have the potential to generate significant profits or capital growth but they have yet to make their millions (or billions).

While start-ups are risky and many fail, some go on to be hugely valuable and generate substantial wealth for their founders (think Uber and Airbnb) and some of the world's most well-known and wealthy entrepreneurs founded start-ups (Microsoft was once a start-up which a young Bill Gates founded to develop and sell computer programs).

Different priorities but similar needs

Setting up a trust or foundation is probably not on the start-up founder's radar – certainly the costs could be disproportionate at a time when they are likely to be investing heavily in the business - and they may have no need for one, either now or further down the line. Even if they have started planning for the future, they may have little interest in, or knowledge of, the more traditional wealth-holding structures and any conversation about them may be an unwelcome distraction from their goals of developing and launching their product or service, seeing that succeed and making money.

However, these business owners have the same needs as the high net worth individuals we are used to dealing with – asset protection, succession planning and good governance. Whilst they may not be ready for a trust or a foundation, or anything more complicated than a simple limited company to hold their intellectual property and through which to trade, these needs can still be met by private client practitioners in the early stages of the wealth generation.

What can we do for start-ups and young entrepreneurs?

- **Share expertise:** Find out about the business and consider sharing any relevant expertise on the industry sector and business management generally. Many successful start-ups appoint one or more business advisers or set up an advisory board and it might be appropriate for them to engage one or more private client practitioners to provide advisory services.
- **Asset ownership:** Understand what assets are integral to the business and generate, or have the potential to generate, value (e.g. intellectual property, real property or plant and equipment) and ensure that they are owned by the founder or under their control. Encourage them to take expert legal advice in the place where each asset is situated.
- **Wills:** Ensure that each founder has a will in place, and that it is up to date and takes into account their interest in the business. The will should leave the business, including any business assets, to the person(s) they would want to benefit from it if they were to die. Refer them to a lawyer in their place of domicile and/ or the location of the assets if they do not have a will or if there are any concerns about whether it adequately covers their business and assets.
- **Tax advice:** Encourage each founder to take tax advice on how to structure the business, including any investment they or others make in the business and how they will be paid (e.g. a salary, consultancy fees or dividends). The arrangements should be appropriately documented in the constitutional documents

of the business, employment agreements, consultancy agreements and/or shareholder agreements (as applicable).

- **Company administration:** Most start-up businesses are put into a corporate structure to limit liability. The founders are likely to be unfamiliar with keeping corporate books and records or making statutory filings so may want to appoint a corporate service provider as administrator.
- **Business succession plan:** Work with the founders to put in place a business succession plan which identifies who will take over the business if a founder is no longer able to run it (due to incapacity or illness), or if they want to sell it or transition it to the next generation. This should have some input from their tax adviser and a lawyer with experience of business succession planning.
- **Shareholders agreement:** Encourage each founder to enter into suitable legal arrangements with any co-owners dealing with matters such as business succession and decision-making powers (usually in the form of a shareholders agreement).
- **Funding:** If the founders are raising further funds (whether from lenders or investors) ensure that their interests and the business are adequately protected and that the proper documentation is put in place. If there are loans, whether from a bank, an alternative lender such as a debt fund or a government scheme (such as the UK's proposed Future Fund) or even a friend or family member, ensure a suitably qualified lawyer reviews the loan documents and any security agreements on their behalf. If they receive external investment, ensure that they have taken advice on any legal or regulatory issues in respect of the fund-raising. It may be appropriate to have a prospectus or term sheet for investors, which include disclaimers and warnings, and an investment or subscription agreement which covers matters such as confidentiality.
- **Structuring options:** Talk to the founders about their goals and future plans and give them a flavour of their structuring options if they do find themselves generating significant wealth. Tell them about the services you offer and the types of clients you work with and want to work with (they might be inspired by hearing that you already work with successful entrepreneurs who started out like them).

Looking to the future

Getting these foundations right in the early stages of the business will help ensure that the founders' interests are protected, that their new wealth is preserved and that their intentions in respect of future generations are taken into account. As the business grows and there is more wealth at stake, or as individual needs change, a more complex structure may be appropriate. If the business is managed appropriately in the early stages, it will be more straightforward to restructure it at a later date and by working with the founders now, there is an opportunity to become a trusted adviser and to be their 'go to' provider of private client services throughout their wealth generation journey.

LEARN FROM ADVERSITY

Authored by: Tim Bennett - Killick & Co

2020 has proven to be a challenging year so far when it comes to building and protecting wealth. However, the "new normal" that has been adopted, in working patterns, the way our children are schooled, or our relationship with the community, has also provided an opportunity to reflect on how we manage our financial lives. Here are three personal takeaways from what has been a tumultuous year across just about every market and asset class.

Learn from adversity

As a child of the 1970's, I was raised to the sounds of Queen, Fleetwood Mac and Stevie Wonder. Back then, home computing was non-existent, as were smartphones and streaming services. Yet, as far removed as those years may seem, the arrival of coronavirus, with all the ensuing mayhem it has wrought, has made me realise that this distant decade can remind us of some important lessons.

The first relates to investing. In the bear market of the early 1970's, UK stocks lost around two-thirds of their value. The decline was so steep that I would not be surprised if it frightened off many long-term investors for good. We now know that the stock market not only recovered but went on to scale new highs, albeit not without some sharp spells of subsequent volatility. History will likely look back on 2020's hugely volatile markets, in everything from oil and gold to bonds and shares, with a similar degree of detachment. I therefore conclude that unless one sharp downturn has the power to destroy your faith in our ability to progress economically and financially over the long-term, quiet optimism remains the best emotional bet now just as it was back then.

My second lesson from the 1970's relates to the way we choose to live. When I was growing up, we didn't worry much about the outside world at weekends – a feat made easier by the absence of mobile devices and the presence of a television that only offered a handful of channels. We just talked, played, chatted and ate. Now that people have been forced to "self-isolate" it seems they are rediscovering some of the joys of a simpler existence. A crisis like this should throw into sharp relief the fact that living in a global economy, with all the independence and opportunity it creates, does not really make us any less dependent on other people when it comes to the crunch. Indeed, in an era when the cost of everything from education to care is rising and State support is on the wane, the strength and support of other family members, within and across generations, is more important than ever.

Avoid financial regret

As I finalised my New Year's resolutions back in January, a phrase climbed to the top of my banned-for-2020 list – "What if?". It got there thanks to a conversation with a friend. He asked me, "do you know how much money you would have today if you had invested £100 in Amazon at its Initial Public Offering (IPO)?". Before I could answer he said "£140,000". I tried to look impressed, but I was feeling irritated. Factoids like that make you feel inadequate ("why didn't I invest?") and promote dangerous thinking ("what if I can catch the next Amazon?")

Let's return to that IPO to see why this is unlikely to happen. Had I put £100 into Amazon when it first came to the public markets in 1997, I would have had to stay invested as the firm racked up $3bn of cumulative losses in its first 21 months post-IPO. I would then have had to hang on as my shares fell by 95% between 1999 and 2001. To stay the course subsequently I would have needed massive faith in the firm when so many others were falling by the wayside. Seen in that context, my friend might as well have asked me where I would be now if I had trained to become an astronaut.

Fast forward to today and some people will be beating themselves up about the arrival of coronavirus – "why didn't we take evasive action. And sooner?" Again, this is not helpful thinking. The truth is that very few people saw this pandemic coming and fewer still did anything about it. So, let's stop asking "what if?" – it focuses us on the past (which we cannot change) rather than the future (which we can). It also dredges up the negative (things we did not do) rather than the positive (things we did). My suggestion therefore is, the next time someone starts a phrase with the words "What if?" counter them with, "So what?"

Give something back

A recent US study found that once our annual income goes beyond $75,000, we derive less and less relative pleasure from each extra dollar that is added to our pay checks. This suggests that, at a certain level of financial wealth, the path to happiness lies elsewhere. For many people, fulfilment comes, not only from building wealth but also, at a certain point, giving some of it back. The disparity of experience and hardship caused by COVID-19 across different parts of society has reinforced this desire in many people.

The good news is there are many ways to do it. Some of us focus on raising and supporting children and grandchildren who will hopefully become good citizens and make a positive contribution. Then there is charitable giving in its many forms. I work for a firm that prides itself on giving back through the work of a Charitable Trust. Our Founder and SEO, Paul Killik, also helped pioneer the Share Gift scheme, which allows people to donate low value shareholdings to charity at minimal cost (sharegift.org).

For my part I can reach thousands of people on a weekly basis with my free Killik Explains videos and guides. I may, or may not, be "the best financial educator on YouTube" but I hope I am doing my bit to help families to make sense of the financial world.

FIREWALLS AND FAMILIES:

ANALYSIS OF RECENT CAYMAN CASE LAW AND LEGISLATIVE CHANGES TO CAYMAN'S FIREWALL PROVISIONS IN RELATION TO FOREIGN DIVORCES WITH A CAYMAN CONNECTION.

Authored by: Robert Lindley and Wesley O'Brien - Conyers Dill & Pearman

Matrimonial disputes can be a trying and traumatic state of affairs for all involved, including trustees. Where a family trust is involved, the more contentious of marital disputes can quickly draw trustees into the ring for a bout over rights to information regarding, or even to assets held in, the trust. If foreign matrimonial proceedings seek to encroach on the administration of a Cayman Islands ("Cayman") trust, the trustee is protected in many respects by what are known as the "firewall provisions" of the Trusts Law (2020 Revision) ("Trusts Law"). Judgments delivered by the Grand Court of the Cayman Islands ("Cayman Court") in 2016 & 2019 and recent legislative reform have affirmed the operation and robustness of the firewall provisions and reinforced the need for a trustee of a Cayman trust under attack in foreign matrimonial proceedings to ensure that its response is, at all times, in the best interests of the trust.

Extension of the "firewall" provisions

Cayman's firewall legislation in Sections 90-93 of the Trusts Law confirms that a Cayman trust can only be varied in accordance with Cayman law and only by a Cayman court, and any foreign order would not be enforceable against the trustee, the beneficiaries of the trust or the trust fund. Prior to its recent reform, the Trusts Law's firewall legislation protected Cayman trusts from being attacked because a foreign law conferred a party with an interest in the trust's assets by virtue of their personal relationship with the settlor. Because the provision only made reference to a personl relationship with the settlor, questions arose as to the protection afforded to the settlor's descendants once the settlor was no longer living. In order to avoid any technical difficulties in this regard, the relevant provision (being sub-section 91(b)) was amended in 2019 by extending the reference to a "personal relationship to the settlor" to include a personal relationship to any beneficiary including a discretionary beneficiary. The legislative amendment has enhanced the protection offered by the "firewall" so that it is clearly available to all beneficiaries in countering any potential claims against a trust's assets such as financial awards in foreign divorce proceedings.

The Cayman Court's Approach

The cases discussed in this article are helpful affirmations of the approach previously taken by the Cayman Court in RBS Coutts (Cayman) Ltd -v- W and Others (known as "Re B Trust"), which confirms that an order of the English High Court is unenforceable in Cayman, whether or not the trustee submits to the jurisdiction because of the terms of the firewall legislation. In that case, the Cayman Court held that a trustee must "jealously guard" its independence and noted that it would be unwise and inappropriate for a trustee to allow itself to be placed in a situation where its trust obligations come into conflict with an obligation to obey an order of a foreign court.

In the Matter of the A Trust

This 2016 case concerned a Cayman STAR Trust (the "Trust") which was the subject of proceedings in Cayman commenced by the trustee. In establishing the Trust, its settlor had executed various Letters of Wishes, which set out his very detailed views about who should and should not benefit from the Trust ,how the assets should be applied and grow from generation to generation, and to also provide support for specified charitable objects.

The settlor and his wife, N, both of whom were excluded from the Trust, subsequently became involved in divorce proceedings before the English High Court ("English Proceedings"). The main asset of the Trust was shares in a Cayman company, which itself owned shares in other companies holding legal title to very substantial property assets in the UK. In the course of the English Proceedings, N was seeking orders to vary the Trust and set aside her exclusion as a beneficiary of the Trust so that she might have an interest in it. Flowing from that, requests were made of the Cayman trustee to release Trust information for the purposes of the English Proceedings.

The trustee determined that it was not in the best interests of the beneficiaries to submit to the jurisdiction of the English High Court or to disclose confidential information to the parties to the English Proceedings. Its concern was that, in doing so, it would confer, on the English High Court, an enforceable power to act to the detriment of the beneficiaries and to the benefit, instead, of either the settlor or N. However, recognising that it was an important step for a professional trustee to refuse to submit to the jurisdiction of a foreign court, the trustee applied to the Cayman Court for Beddoe-type directions . The trustee's position was that any variation of the Trust's terms or any challenge to N's exclusion from the settlement should only be made in accordance with Cayman law by the Cayman Court and as such further disclosure was not necessary.

The Cayman Court confirmed:

- The claims by N, to vary the trust and to set aside her exclusion using provisions in a foreign statute, were, in essence, third party claims, and it was the trustee's duty to protect and preserve the Trust from such claims.
- Pursuant to Cayman's firewall legislation, any order made by the English High Court against the trustee would not be enforceable against the trustee, the beneficiaries of the trust or the trust fund.
- N had already been given the trust deed and all supplemental instruments, and full financial information for the underlying companies in the structure. The Court found it was reasonable to conclude that N had sufficient information to understand the terms of the trust and its finances, and that for the trustee to submit to the jurisdiction of the English High Court or to provide further information was not in the best interests of the beneficiaries, in all the circumstances.

In the Matter of HSBC International Trustee Limited v Tan Poh Lee et al

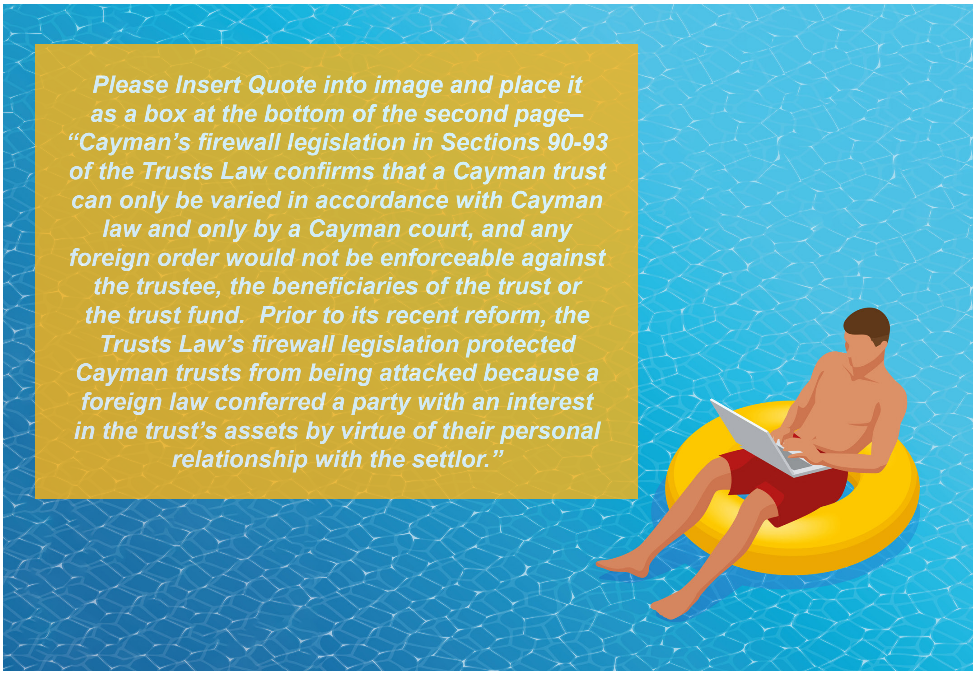
This 2019 case relates to a Cayman trustee's application for Beddoe-type relief in respect of proceedings issued in Singapore by one of the beneficiaries of a Cayman trust (the "Trust"), seeking an order that the Trust be terminated (the "Singapore Proceedings").

The Cayman Court affirmed that the basis for seeking Beddoe relief was in accordance with the firewall provisions whereby all questions arising in relation to a Cayman law trust are to be determined in accordance with Cayman law and without reference to the laws of any other jurisdiction. Further, it was held that:

- the Cayman Court had exclusive jurisdiction in connection with all such questions relating to the Trust on the basis of the both section 90 of the Trusts Law and the provisions of the trust deed.
- any orders made by the Singapore Court which did not result from the application of Cayman law should not be recognised or enforced for reasons of public policy which runs contrary to any attempt by a foreign court to effectively administer a Cayman trust without applying Cayman law.
- in relation to the trustee seeking a declaration that a Singapore court order will not be enforced, recognised or give rise to any estoppel in Cayman, the judge referred to the cases of Re B Trust and the A Trust (as referred to above) and considered that although those decisions did not fully consider the question of a mandatory need for the Cayman Court to deal with questions concerning a Cayman trust, the judge accepted that it is not clear that the legal position is that a foreign court cannot under any circumstances, even applying Cayman law, deal with such issues..
- the Cayman Courts are willing to act as an auxiliary to the Singapore Court for the purposes of determining any questions relating to, inter alia, the administration of the Trust so as to ensure these questions would be dealt with in accordance with Cayman law.

Conclusion

Divorcing families and related cross-border disputes over asset-protection structures, including Cayman trusts, can place trustees in a challenging, and unenviable, position. However, given the robustness of Cayman's Trusts Law, and the decisions of the Cayman Court, there is a clear set of rules as to how trustees should approach a foreign challenge to a Cayman trust. While these rules may not assist in tempering the trauma of matrimonial proceedings, they will, nonetheless, give the parties clarity to their rights and standing in relation to any such challenge, and be of great support to the trustee in its decision-making processes.



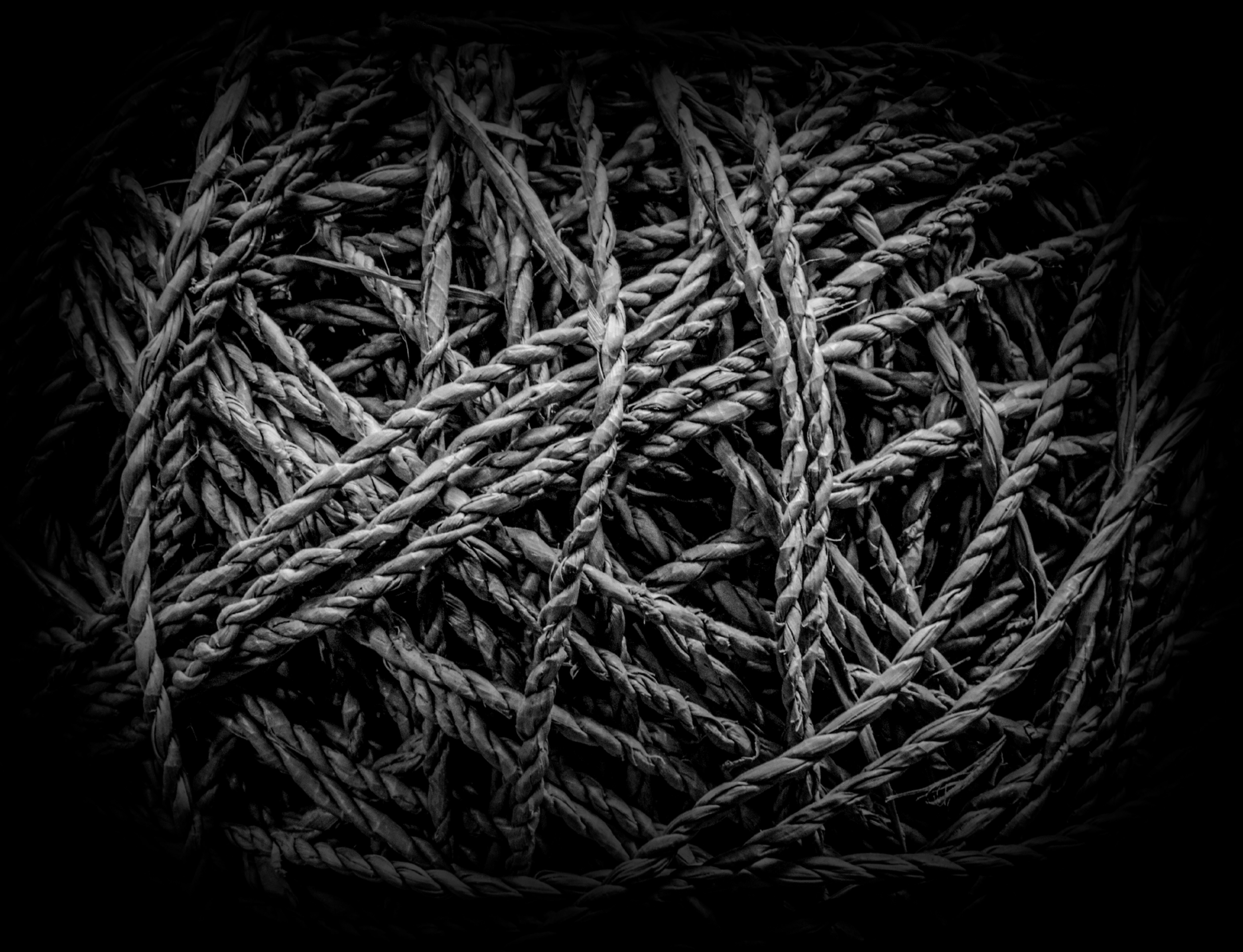
[1] *[2010] 2 CILR 348*

[2] *[2016] 2 CILR 416*

[3] *Pursuant to Section 48 of the Trusts Law which enables a trustee of a Cayman trust to apply to the Court at any time for "an opinion, advice or direction on any question respecting the management or administration of the trust money or the assets of any testator or intestate…". Provided that the trustee acts on the opinion, advice or direction given by the Court, he or she will be deemed to have discharged his or her duty as trustee in respect of the subject matter of the application.*

[4] *FSD 175 of 2019 (IKJ)*

[5] *Specifically, section 90 of the Trusts Law*



AKHMEDOVA V AKHMEDOV AND ORS [2020] EWHC 1526 (FAM)

Authored By: Rachel Turner and Andrew McLeod - PCB Litigation LLP (act for Ms Akhmedova)

The value and importance of litigation funding, described by the Court of Appeal as "an accepted and judicially sanctioned activity perceived to be in the public interest", has received a further endorsement by the recent judgment of the Family Division of the High Court in Akhmedova v Akhmedov and ors [2020] EWHC 1526 (Fam). It also represents a clear signal that speculative challenges to legitimate funding arrangements will not be entertained. Whilst the judgment is plainly relevant to family proceedings, it also has wider application to litigation financing across the board.

The latest judgment in these proceedings arises out of Ms Akhmedova's ongoing attempts to enforce a financial award of over £450 million against her ex-husband, Farkhad Akhmedov ("FA"), awarded to her by Mr Justice Haddon-Cave (as he then was) in December 2016. It is well known by now that FA has refused to pay a penny of the award voluntarily, and that he has been engaged in "an elaborate and contumacious campaign to evade and frustrate the enforcement of the judgment debt". Ms Akhmedova's enforcement proceedings now include claims against the couple's son, Temur Akhmedov ("TA"), in which she says that he received substantial assets from FA, as part of FA's schemes to put those assets beyond her reach.

In response to the proceedings now brought against him, TA filed a counterclaim for an injunction seeking to restrain Ms Akhmedova from instructing any solicitors funded by her agreement with Burford Capital. TA argued that the funding agreement was unlawful on the grounds that:

i. such agreements were contrary to public policy against the champertous maintenance of litigation; and

ii. he had also raised a novel and important issue of public policy in the conduct of family proceedings, where third parties should not "traffic" in the outcome of the spoils of matrimonial litigation.

Ms Akhmedov applied to strike out that counterclaim and, following a 4-day hearing in May, Mrs Justice Knowles granted Ms Akhmedov's application. The court found that Temur had no standing to bring the claim and no grounds in fact and law for asserting that the arrangements were unlawful or contrary to public policy.

The judgment contains a useful summary of principles for litigation funding, including:

- **Compliance with Code of Conduct:** The judgment represents a significant endorsement of the Code of Conduct produced by the Association of Litigation Funders ("ALF", of which Ms Akhmedov's funder Burford are founding members). The Code of Conduct has already received the endorsement of the Civil Justice Council, and the Court of Appeal in Excalibur Ventures LLC v Texas Keystone Inc [2016] EWCA Civ 1144). Mrs Justice Knowles concluded: "It is thus difficult to envisage how litigation funding conducted by a responsible funder adhering to the Code of Conduct could be construed to be illegal and offensive champerty or might be held to corrupt justice."
- **No exception for family proceedings:** Family proceedings are not inherently different to other proceedings. The judgment referred to other first instance decisions in the Family Division, recognising that funding can be a "necessary and invaluable service in the right case". TA invited the court to draw an analogy between litigation funding and conditional fee agreements (which are expressly not permitted in family proceedings by statute) but Mrs Justice Knowles refused to do so on the basis that such argument was "misplaced".
- **Rights of control:** A funder of litigation is not forbidden from having rights of control, and public policy would only intervene to prohibit a funder from exercising rights of control in a manner which would be likely to undermine or corrupt the process of justice, such as if (as stated in Davey v Money) that control would allow the funder "to suppress evidence, influence witnesses, or procure an improper settlement". In fact, it promoted the administration of justice for

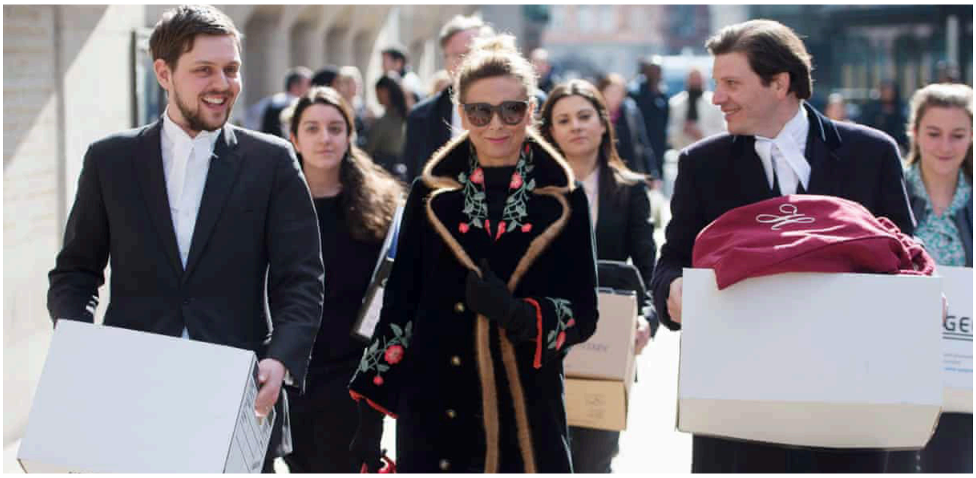
responsible funders to be involved in rigorous analysis and review of the litigation which they fund.

- **Settlement:** This is particularly the case in relation to settlement. Even if Mrs Akhmedova were required to obtain Burford's consent before settling her case, that would appear to be a perfectly proper protection for Burford as funder and would not tend to corrupt justice.
- **Value irrelevant:** The fact there is a significant value of the financial investment, or any profit obtained from it, has no bearing on whether a funding arrangement is champertous.

The judgment also contains useful guidance that those wishing to challenge litigation funding agreements should heed:

- Knowles J stated that it was necessary for TA "to show some prejudice or injustice to him arising from those funding arrangements or that the funding arrangement may be champertous". However, given he had failed to do so, and in the context of a litigation funder adhering the ALF's Code of Conduct, "[i]n my view, he cannot sensibly maintain, in the light of the Court of Appeal decision in Excalibur, that the litigation funding in this case is prima facie champertous."
- It is well-established that the court will not stay a bona fide action even if it were to be supported by a champertous funding agreement. In circumstances where TA had pleaded no cause of action, and had also failed in oral argument to demonstrate that there were any legally recognisable grounds to challenge the legality of those arrangements, TA had no standing to seek relief in any event.
- Without such good reason, a party cannot be granted disclosure of the terms of the funding agreement, in order to investigate whether it is in fact champertous: "Ignorance as to the precise terms of the Wife's funding arrangements does not, of itself, justify further enquiry or disclose reasonable grounds for bringing the application particularly in circumstances where the Wife's litigation funder adheres to the ALF's Code of Conduct."

Finally, the judgment recognised that champerty was "increasingly recondite area of law", and "is not a developing area of jurisprudence which requires detailed consideration by this court". Unsurprisingly, however, in this heavily fought litigation TA is seeking permission to appeal from the Court of Appeal.



PRESERVING MULTI-GENERATIONAL FAMILY WEALTH ON DEATH AND DIVORCE

Authored by: Jordan Williams - Artorius & Abby Buckland - Kingsley Napley

Families are increasingly concerned about succession and preserving family wealth across multi-generations. Integral to this is designing and implementing estate planning measures to provide for, and benefit, their children and future generations. The irony is that in seeking to support their children and to protect, preserve and ensure the safe succession of their wealth to the next generation, parents may well be putting a significant part of the family wealth at risk, should their adult child get divorced in the future.

Jordan Williams, wealth manager at Artorius, and Abby Buckland, Senior Associate in the family and divorce team at Kingsley Napley, believe that a collaborative approach at an early stage is necessary. In this article, they share some of the practical ways in which family wealth can be preserved in the event of divorce or death.

Time must be taken to discuss what is important to a particular individual/family today, tomorrow and for future generations. Good wealth managers work with clients and their advisors, reviewing their financial situation to ensure their affairs are appropriate and providing guidance and assistance to address any areas of need.

The pace of planning for succession and providing for the next generation has undoubtedly accelerated for many families in recent months with the outbreak of the global COVID-19 pandemic. The speed, surprise and severity of the coronavirus pandemic has caused untold hurt, hardship and loss for many. One direct consequence of its devastation has been the growing desire of many families to review their financial affairs, ensuring they are fit for purpose, with appropriate succession plans in place that can be implemented in case of death. Matters that have often been overlooked, or placed to the bottom of the pile, which have nothing to do with directly growing wealth, but are absolutely key to protecting and preserving wealth. These include IHT & Estate Planning, Life Insurance, Wills and Lasting Powers of Attorneys, which are now rightly at the forefront of discussions and at the top of many families' agendas.

Measures to protect family wealth in the event of divorce

However, in devising and seeking to implement such succession and estate planning measures comes the realisation for many parents that their children will stand to receive significant amounts of wealth, and the resulting concern about what effect a divorce could have on this wealth.

Whether parents are making lifetime gifts to their children, providing capital for a child's business venture, or simply naming them as beneficiaries to their estate, the end result is that a significant part of the family wealth, which the parents have conceivably worked hard to generate, is now out of their control and exposed to potential challenge.

Divorce is not what any parent wishes for their children, but the number of parents raising the issue and seeking advice as to what measures can be taken to limit this risk is growing rapidly. Rightly, it is a subject which should be addressed when reviewing a family's overall wealth management strategy and is integral to maintaining a sustainable wealth plan.

There are measures which can be taken, and key to a successful outcome is unquestionably having joined up advice between the family's wealth manager, who is fully aware of the family's overall wealth position and family dynamic, and expert matrimonial lawyers, who in collaboration, can guide the family on what actions can be taken, by whom, and when?

There are a number of proactive steps that can be taken to help preserve wealth intended for immediate family, in the event of a divorce later down the line.

Prenuptial agreements

Prenuptial agreements ("pre-nups") are often used to protect family wealth and any contributions parents have made, or intend to make, to their children.

If a parent wants to make a gift, transfer properties or assets, or leave inheritance to an adult child (including as part of early estate planning measures), but protect them from division in the event of a future divorce, a prenuptial agreement is essential. Some parents make it a condition of a gift or advance that such an agreement is entered into.

Whilst currently there is no act of Parliament in England and Wales making these agreements binding, in practice they will be enforced so long as they are freely entered into by both parties with a full appreciation of its implications and, importantly, the agreement does not lead to an outcome which leaves one party in real financial need.

There has been a steady rise over the last 10 years in those seeking to have a pre-nup in place. They are much more common than they were a decade ago and increasingly, clients are looking to prepare pre-nups to give them more certainty about their financial rights and obligations if the marriage breaks down and also to tackle financial, tax and succession planning.

A pre-nup needs to be approached carefully and sensitively; there is a distinct lack of romance in contemplating a marriage breakdown before (or shortly after) a wedding but looking ahead is essential for families who are concerned with succession planning and preserving family wealth. Very often the desire to have such an agreement in place comes from family in the background and when that is the case, a delicate balance needs to be struck between keeping all future relationships intact but achieving the required agreement. A good matrimonial lawyer will help you to accomplish that.

Postnuptial agreements

After marriage, a postnuptial agreement ("post-nup") serves the same purpose as a pre-nup and can be entered into at any time. In exactly the same way, a post-nup sets out how assets should be distributed should the marriage break down.

The most common reasons why a post-nup, rather than a pre-nup is entered into is that it was not thought about before the marriage, the couple simply ran out of time before the marriage to have a properly considered, negotiated and executed pre-nup drawn up (the Law Commissions recommendation is that the agreement should be entered into at least 28 days before a wedding) or there has been a change in financial circumstances (such as a gift or advanced inheritance) for one of the parties to the marriage.

Loan agreements

If a parent expects repayment of their contribution to an adult child's finances, then this should be set out in writing when the money is advanced.

It is increasingly common for parents to contribute money to their offspring for a family home, or property renovations and if that contribution is a loan, not a gift, then a properly drawn up loan agreement can provide an added layer of protection in helping to ring-fence that money upon a future divorce.

In a divorce, it will be far easier to persuade a judge that the contribution from one party's parents towards the deposit on the family home was a firm loan which needs to be repaid, rather than a gift, if there is a clear, contemporaneous agreement drawn up and signed. Ideally this should be a formal loan deed drawn up by a lawyer and should set out the sum to be loaned, the purpose of the loan and detailing repayment terms and conditions.

No-one goes into marriage wanting to think about and plan for divorce and for parents, asking a child and their (future) spouse to do so is not an easy task at all. However, an experienced matrimonial lawyer will help to address this sensitively and cohesively, whilst achieving the necessary protection required and working closely with relevant wealth management advisors.

HNW CLIENTS & CORONA VIRUS

Authored by: Hetty Gleave - Hunters Law

The Coronavirus pandemic is having a huge impact on families across the socio-economic spectrum, but the scale of potential losses faced by HNW clients will be particularly daunting.

Solicitors with HNW clients are likely to see a rise in clients whose matters have recently concluded looking to revisit capital settlements, as they may well have businesses or investments that have suffered from, or even collapsed, as a result of the economic disruption caused by the pandemic.

Often, the financially stronger party (whom I'll refer to as the husband) will have retained his businesses and investments, and have been ordered to pay a lump sum, or series of lump sums, to the other. If the value of the assets the husband is retaining have crashed, then the cash sum he has been ordered to pay may amount to a far higher proportion of the overall assets than had ever been intended.

The Court of Appeal considered this scenario following the 2008 crash, in Myerson v Myerson [2009] EWCA Civ 282, where, as a result of a dramatic fall in the value of the husband's business following the financial crash, the wife's award of £11 million ended up reflecting more than 100% of the assets, rather than the 43% that had been anticipated.

As practitioners will know, under the Barder jurisdiction, a financial remedy order may be set aside where a new event has invalidated the basis on which the order was made. Mr Mostyn QC, then at the bar, successfully argued for Mrs Myerson that asset depreciations resulting from the financial crash did not amount to Barder events.

The Court of Appeal in Myerson built on the judgment of Hale J (as she then was) in Cornick v Cornick [1994] 2 FLR 530 (in which Mr Mostyn also acted for the successful party). In Cornick, Hale J had held that it was necessary to distinguish between cases where

"an asset…correctly valued at the date of the hearing changes value within a relatively short time owing to natural processes of price fluctuation", and those where "something unforeseen and unforeseeable had happened since the date of the hearing which has altered the value of the assets".

Only if a case fell into the latter category, rather than the former, could the order be set aside under Barder.

In Myerson, it was held that the case clearly fell into the first category; what had resulted from the economic crash was part of the natural process of price fluctuation in share values. The court also noted that the husband had chosen the more speculative option by retaining the riskier assets, and queried why the court should now relieve him of the consequence of his speculation, as well as noting that what had gone down in value could increase again, and that the husband would be able to take advantage of the opportunities in a bear market.

However dramatic and unforeseeable the Coronavirus pandemic has been, its main impact on asset schedules will be a result of market fluctuations. Hale J in Cornick specifically stated that unforeseeability does not turn something which is not a Barder event into one. Nevertheless, there may be a case where the impact of the pandemic has such a dramatic impact on a family (perhaps beyond asset values) that an argument could be made that it falls within Barder. Such an application would be speculative, but may be warranted in an appropriate HNW case. In order to ensure the other requirements of Barder are met, the order being challenged will need to have been made relatively shortly before the outbreak of the pandemic (within a year and ideally less), and the application will need to be made promptly.

Alternatively, there may be another option if the final order provided for the lump sum to be paid in instalments (as distinct from a series of lump payments). It will be possible with any lump sum order to apply for an extension of time for payment, but with a lump sum payable in instalments, s31(2)(d) MCA 1973 not only allows the court to vary the timing and quantum of the instalments, but also empowers the court to vary the overall quantum of the lump sum.

A lump sum payable in instalments is distinct from a series of lump sums, and it may not always be clear into which category an order falls. The Court of Appeal in Hamilton v Hamilton [2013] EWCA Civ 13 confirmed whilst ordinarily a reference in the order to "lump sums" (in the plural) will mean that there is a series of lump sum payments, this is not necessarily so, and indeed, was not definitive in the case. Rather, the court must look at the context and consider whether, objectively, the order was for one overall sum which was payable in instalments for reasons of convenience, or whether there are genuinely separate lump sums. A recital explaining whether the payments are a series of lump sums or a lump sum payable in instalments is likely to be conclusive.

Even if it is established that there is a lump sum payable in instalments, a high bar has to be met before a court would vary the overall quantum. The Court of Appeal in Westbury v Sampson [2002] 1 FLR 166 held that this

"should only be countenanced when the anticipated circumstances have changed very significantly, and/or for cogent reasons rendering it quite unjust or impracticable to hold the payer to the overall quantum of the order originally made".

In Horne v Horne [2009] EWCA Civ 487, another failed attempt to invoke Barder following the 2008 crash, Thorpe LJ indicated that the court's approach in applications to vary the overall quantum of a lump sum by instalments should be "almost as stringent" as in determining a Barder appeal. However, he did recognise that more latitude exists in such cases.

Finally, of course, maintenance orders always remain open to variation. This may, however, be less relevant to HNW clients, who are more likely to have been able to afford to capitalise maintenance claims at the time of the original order.

DIVORCED FROM REALITY: PUGACHEV, WEBB, AND ILLUSORY TRUSTS IN DIVORCE PROCEEDINGS

Authored by: Gemma Willingham, Luke Richardson and Gareth Roberts - Baker & McKenzie LLP

Executive summary

Illusory trusts are (for now) a reality, even if the term itself is not widely recognised by the courts. The concept gained widespread coverage following the first instance decision of JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev [2017] EWHC 2426 (Ch). Since then, its relevance to divorce proceedings came into sharp focus in the Cook Islands' Court of Appeal decision of Webb v Webb [2017] CKCA 4. Webb was then appealed to the Privy Council, whose judgment is eagerly awaited.

Therefore, we should shortly receive persuasive guidance from the Privy Council on the existence and scope of illusory trusts. Until then, existing case law suggests that the illusory trust concept is an attractive weapon in the armoury of applicant spouses seeking to attack trusts in financial remedy proceedings, and a growing concern for those seeking to "divorce-proof" assets using trusts.

Pugachev and illusory trusts

Pugachev concerned five New Zealand discretionary trusts settled by Sergei Pugachev between 2011 and 2013. Pugachev was also a beneficiary of the trusts (together with his family members) and the protector. As protector, he had wide-ranging powers, including the ability to veto trustee decisions.

Mezhprombank was a Russian bank formed by Pugachev that entered liquidation in 2010. Pugachev was accused of misappropriating huge sums from the bank, resulting in the bank and its liquidator obtaining judgments against him. They then sought to enforce those judgments against the trust assets through the English courts. The claimants' case included an argument that the trusts were "illusory" on the basis that the trust instruments did not divest Pugachev of beneficial ownership of the trust assets, given Pugachev's extensive protector powers and the fact that he was a beneficiary.

The judge noted that he did not find the term 'illusory trust' to be a helpful one. Nonetheless, he found for the claimants on the substance of this point and held that the trustees in fact held the assets on bare trusts for Pugachev rather than on the terms of the trust instruments. Therefore, the trusts provided no protection from Pugachev's creditors and their assets were available to the claimants to satisfy the judgments.

The court's determination that the protector's powers in the trust instruments were personal rather than fiduciary was crucial to its finding that Pugachev had not divested himself of beneficial ownership of the assets:

- if the powers had been fiduciary, Pugachev would have been obliged to exercise them in the interests of all beneficiaries and so may have divested himself of beneficial ownership; but
- as the powers were held to be personal, Pugachev could exercise them for his personal benefit without considering the interests of other beneficiaries.

Webb and illusory trusts in divorce proceedings

The judgment in Pugachev was swiftly followed by the Cook Islands decision in Webb, which deals with trusts in the context of divorce proceedings.

Two trusts had been settled by the respondent spouse, Mr Webb. The applicant, Mrs Webb, argued that the trust assets should be considered matrimonial property and subject to division between the parties, because she said the trusts that purported to hold them were invalid (as they were effectively illusory trusts, although this term is not used in the judgment). Having been unsuccessful in the High Court, Mrs Webb succeeded before the Cook Islands' Court of Appeal.

The key issue in Webb was similar to that in Pugachev - whether, on an objective analysis of the settlor's reserved powers in the trust deeds, Mr Webb had demonstrated an intention irrevocably to relinquish beneficial interest in the trust assets.

The Court of Appeal tested this by reviewing the reserved powers and asking what would happen if the settlor tried to recover the property apparently settled on trust. They considered that:

- if this would: (i) require agreement from a truly independent person, or (ii) be subject to an enforceable fiduciary duty on his part, the trust would be a valid trust; but

- if the trust instrument reserved an uncontrolled power for the settlor to recover the assets, the settlor would not have divested himself of beneficial ownership, and the trust would be invalid (i.e., effectively an illusory trust).

In the Webb trusts, Mr Webb was the settlor, trustee and a discretionary beneficiary. These roles together afforded him many powers, including an ability to:

- appoint a consultant to advise the trustee. The consultant had powers relating to investment, removing and replacing trustees, and veto powers on the acceleration of final vesting and variations to the trust deed. Mr Webb appointed himself as consultant;
- exercise his powers and discretions even if his interests or duties might conflict with his duty to the trust or any beneficiary;
- distribute capital or income to any beneficiary (including himself). He could also resettle the trust or vary its terms (the latter with the consultant's consent, i.e., his own consent), to vest all trust property upon any beneficiary (again, including himself). Any resultant breach of fiduciary duty would be negated by the above conflicts clause;
- replace beneficiaries, including nominating himself as the sole beneficiary; and
- retain a high level of control as consultant even if he resigned as trustee. The consultant's power to remove and replace trustees was exercisable "at his absolute discretion and without giving reasons therefore". The Court determined that this power was non-fiduciary, allowed Mr Webb to dispose of uncooperative trustees, and added to "the picture of a settlor who has never intended to alienate his beneficial interest for the purpose of the law of trusts".

After considering the above, the Court of Appeal concluded that Mr Webb had not alienated his beneficial interest in the trust assets, as his powers meant he could recover the property he had purported to settle on trust at any time. The trusts were therefore deemed to be invalid, and the Court of Appeal ordered that a leasehold interest in the matrimonial home allegedly held on trust should instead vest in Mrs Webb.

Mr Webb appealed to the Privy Council, which heard the case in January 2020 (https://www.jcpc.uk/cases/jcpc-2019-0013.html). Judgment is eagerly anticipated, as it should provide persuasive authority from the highest court on the existence and scope of the illusory trust principle.

Considerations

Subject to any changes following the Privy Council's judgment in Webb, determinations as to whether trusts are invalid on "illusory" grounds will be made on a case-by-case basis, based on the terms of the trust instrument in question. These are therefore important issues for applicant spouses seeking to attack trusts and those seeking to "divorce-proof" trust assets.

For applicant spouses:

1. The illusory trust principle provides another method for challenging trusts and may be easier to prove than the usual alternative of demonstrating that a trust is a "sham". The latter is notoriously difficult (and expensive) to establish, as it requires factual evidence of a joint shamming intention of the settlor and trustee. In contrast, establishing the existence of an illusory trust may be more straightforward (and cheaper), as this depends only upon an objective reading of the trust instrument.
2. Normal enforcement considerations will apply. Applicant spouses should consider the trust's governing law and the location and nature of its assets before determining whether an attack is feasible.
3. If a trust holds substantial assets and might be vulnerable to being deemed "illusory", this may provide a useful negotiating tool for applicants seeking an early and attractive settlement without the need for significant court intervention.

For those divorce-proofing assets:

1. The trust terms are crucial to determining whether a trust is vulnerable to attack. To reduce the risks, settlors should be encouraged to reduce any control that they retain over the trust assets. In particular, they should consider:
   a. minimising the number and type of any reserved powers that they have;
   b. particularly limiting the number and type of any personal powers that they have. Whether a power is personal or fiduciary can be a matter of interpretation, but it will be still helpful for trust instruments to state expressly where a power is intended to be fiduciary;
   c. avoiding including any settlor powers to revoke the trust or a general power of appointment over the assets, as these powers in particular might point to invalidity; and
   d. avoiding the settlor also serving as trustee and/or protector, particularly if they are also a beneficiary.
2. Jurisdictional considerations are key and settlors should consider carefully where to establish their trusts:
   c. illusory trusts are less likely to be found when they are governed by the laws of jurisdictions with wide-ranging reserved powers legislation. The trusts in both Pugachev and Webb were governed by laws without such legislation; and
   d. the existence and type of firewall legislation in overseas jurisdictions will be important to consider, although the effectiveness of such legislation may reduce if the trust assets are not located in the same jurisdiction as the governing law of the trust.
3. Seek specialist independent advice on the nature of the trust instrument and the settlor's powers at the earliest possible stage and ensure that all decisions and arrangements are documented.

LEGAL AND PRIOR RIGHTS UNDER SCOTS SUCCESSION LAW

Authored by: Euan Fleming - Gilson Gray LLP

Under Scots law, it is often assumed that a deceased's spouse or civil partner or children will automatically inherit the estate if they die so there is no reason to make a will. If, however, you die without leaving a will in Scotland (known as dying intestate) there are various rights available to your spouse or civil partner and children on your estate (known as prior rights and legal rights) which are designed to protect spouses and civil partners and children from being disinherited.

Prior rights are only available to your spouse or civil partner and these are the first call on your estate.

"Your surviving spouse is entitled to a heritable property up to the value of £473,000, furniture and personal effects with a value up to £29,000 and then a cash right of £50,000 if there are children and £89,000 where there are no children."

For a number of clients, this means that their spouse or civil partner is entitled to their whole estate which means there is no provision for children. If however, this does not exhaust the entire estate then there is a further entitlement known as legal rights. Under legal rights, the spouse is entitled to a further one-third of the net moveable estate if there are children and a half if there are no children. Children have a similar claim.

"Importantly, legal rights are also available to spouses or civil partners even when there is a will."

However, legal rights cannot be claimed alongside any entitlement under the will. The option is to forego the provision in the will and claim legal rights or take your entitlement under the will – you cannot claim both. Claims can be made for 20 years following death. There is no claim for an unmarried partner however they could make a co-habitation claim under section 29 of the Family Law (Scotland) Act 2006 depending on circumstances.

The remaining estate is then passed to the surviving children if any and in the event that there are no children in terms of the Succession (Scotland) Act 1964.

The process for dealing with an intestate estate is more complicated as you need to petition the court to have an executor-dative appointed to deal with the estate and sometimes also the need to apply for a Bond of Caution. This is an insurance policy which safeguards the estate and requires to be put in place for all intestate estates over £36,000 where the spouse or civil partner does not take the entire estate by virtue of their prior rights.

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