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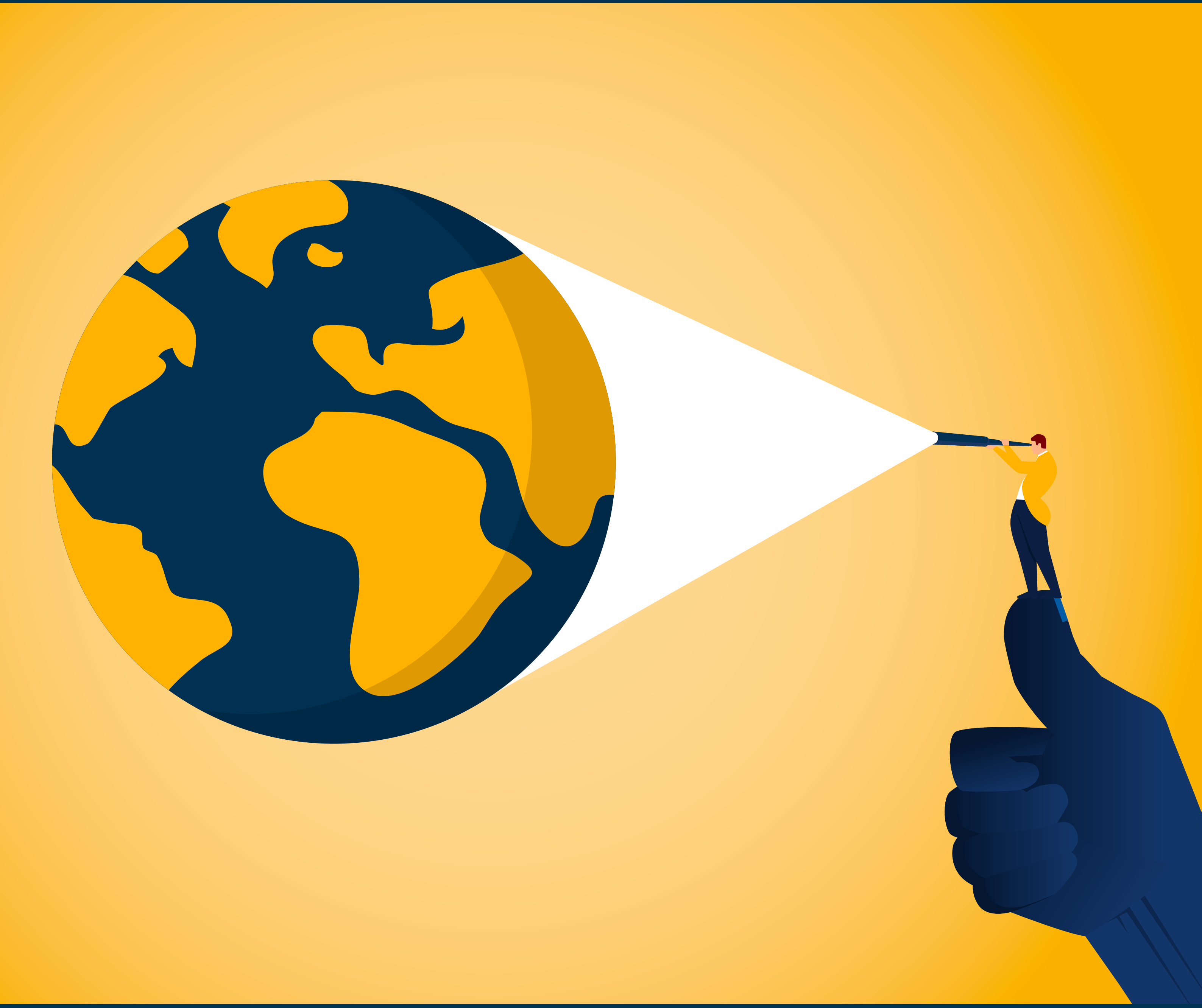

TRUSTS UNDER FIRE: SPOTLIGHT ON CONTENTIOUS TRUSTS MATTERS

INTRODUCTION

"We should not forget that it will be just as important to our descendants to be prosperous in their time as it is to us to be prosperous in our time".

Theodore Roosevelt

We are delighted to present the Contentious Trusts edition of the Private Client Magazine. In Issue 14, we unveil the challenging landscape of trust disputes. From family dynamics to the evolving legal frameworks across different jurisdictions, our authors examine the intricacies involved in resolving contentious trust matters. We hope you find the following pages insightful, as they shed light on familial relationships and legacy preservation.

We would like to thank our community partners and contributors for their ongoing support. Your support and collaboration have been instrumental in shaping our Private Client community.

We look forward to seeing you at our upcoming Contentious Trusts 2024: The 3rd Annual Summit in London, on Thursday 4th July. Our expert speakers will explore the emerging trends in Contentious Tax issues, Trusts in Divorce, Estate Management and much more.

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Through our members' focused community, both physical and digital, we assist in personal and firm wide growth.

Working in close partnership with the industry rather than as a seller to it, we focus on delivering technical knowledge and practical insights. We are proud of our deep industry knowledge and the quality of work demonstrated in all our events and services.

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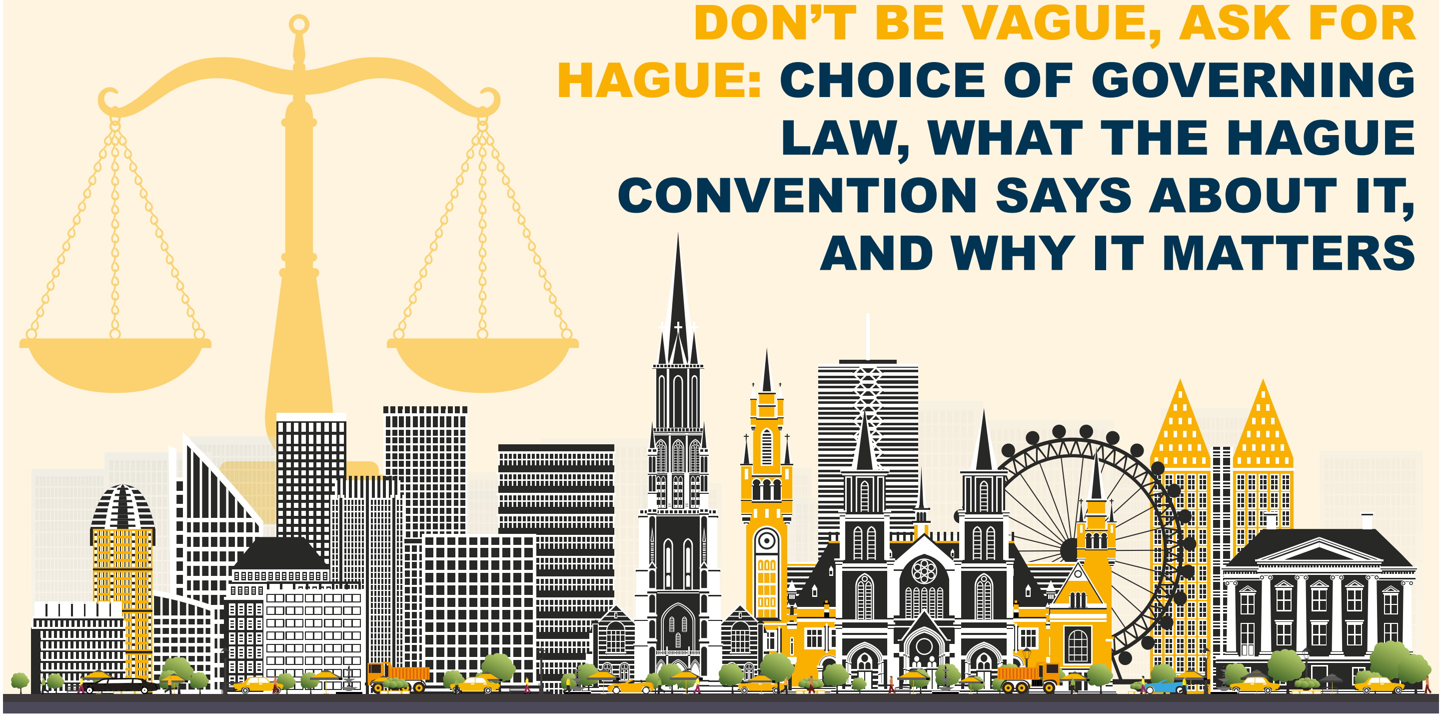
DON'T BE VAGUE, ASK FOR HAGUE: CHOICE OF GOVERNING LAW, WHAT THE HAGUE CONVENTION SAYS ABOUT IT, AND WHY IT MATTERS



Authored by: Sydney Lee (Associate) and Dominic Lawrance (Partner) – Charles Russell Speechlys

Common law jurisdictions generally take a laissez faire approach to gifts and other dispositions. Broadly, individuals are given the freedom to dispose of their assets as they wish.

How far does this freedom extend when creating a trust? Does a settlor have absolute freedom? More specifically, does a settlor have absolute freedom to choose the governing law of the trust?

The Recognition of Trusts Act 1987 incorporates into English law the Hague Convention on the Law Applicable to Trusts and on their Recognition (the Convention). The territories that have ratified the Convention include Australia, Italy, Luxembourg, Monaco, Switzerland and the UK. However, despite being signatories to the Convention, the USA and France have not ratified it, and are therefore not required to comply with it.

The core provision of the Convention is Article 6, which provides that a trust shall be governed by the law chosen by the settlor. Such choice may be express, or implied by the terms of the trust. However, as explained below, this freedom is subject to various limitations, and the Convention does not cover all aspects of the creation of a trust.

Article 4 specifies that the Convention "does not apply to preliminary issues relating to the validity of wills or of other acts by virtue of which assets are transferred to the trustee". This obliges a settlor to ensure that the trust assets have been validly transferred to the trustees in accordance with the relevant law.

The relevant law will be determined by applying "conflicts of laws" rules. Such law may be different to the law that the settlor has chosen to govern the trust.

Where will trusts are concerned, it is necessary to distinguish between the law which governs the formal validity of the will, the law which governs the substantive validity of the will (which may include "forced heirship" rules, which could conflict with the provisions of the will), and the law governing the trust. In principle, each of these three laws may be different. In fact, there can be multiple laws governing substantive validity, as there are different rules for land and for movable assets. This is a highly complex area. The exclusion contained in Article 4 means that there are various "hoops" which the settlor must jump through for the valid creation of a will trust.

Further, Article 5 provides that the settlor's choice of law will not be effective where the law chosen "does not provide for trusts or the category of trust involved". So for example, a choice of Swiss law to govern a trust would be ineffective, for the simple reason that Switzerland does not have a domestic law of trusts. Equally, a choice of English law to govern a non-charitable purpose trust would typically be ineffective, as generally such trusts cannot be created under English law.

If the settlor does not choose a governing law expressly or impliedly, or their choice of law is ineffective, the Convention steps in to decide for them. Article 7 provides that "a trust shall be governed by the law with which it is most closely connected" and specifies four considerations when determining the most closely connected law:

1. The place of administration of the trust designated by the settlor.
2. The situs of the assets of the trust.
3. The place of residence or business of the trustee.
4. The objects of the trust and the places where they are to be fulfilled.

In practice, the provisions of the trust instrument will also be examined. If the instrument contains provisions that would be valid if the trust were deemed to be most closely connected to one potential governing law, but which would be invalid if the trust were most closely connected to another, the court will take this into account.

It should be stressed that once a given law has been identified as the governing law of a trust, the provisions of that law won't necessarily override other laws with which it is in conflict. Article 15 provides that "the Convention does not prevent the application of provisions of the law designated by the conflicts rules of the forum, in so far as those provisions cannot be derogated from by voluntary act". In particular, this applies to provisions regarding the protection of minors and other incapable persons, the effects of marriage, succession rights, transfers of property and creditor protection.

In addition, Article 18 allows the other provisions of the Convention to be disregarded "when their application would be manifestly incompatible with public policy".

It is possible that Article 18 would be invoked if English situs real estate were transferred to English resident trustees to hold subject to a private trust which, under the chosen governing law, would not be subject to a perpetuity period or any other restriction on its duration. Such a trust might be regarded as manifestly contrary to English public policy. However, it is suggested that an English domiciliary could transfer foreign assets to trustees resident overseas to hold subject to such a trust, without Article 18 applying. The precise scope of Article 18 is a matter for debate.

This brings us to the differences between different countries' trust laws and the potential advantages of choosing one governing law over another. Some settlors will be attracted by the ability to create a private trust of unlimited duration, such as is permitted by Jersey law. Other issues which may be affected by the chosen trust law include beneficiaries' rights to information, the ability of the trustees to set aside previous actions without it being shown that they acted in breach of duty, the ability to create non-charitable purpose trusts, and protection of the trust assets from matrimonial or "forced heirship" clawback claims.

The ability of a settlor to choose the governing law of a trust can be beneficial in many respects, but any prospective settlor needs to understand the limits of that freedom and also the legal implications of their choice. Clear advice on this is important. No adviser should be vague when their client is depending on Hague.

60-SECONDS WITH:

CLAUDIUS MÜLLER-RENSMANN SENIOR ASSOCIATE GASSER PARTNER

Q Why did you choose a career path in the legal industry?

A The legal industry offers a broad range of challenging questions. The work with international clients and colleagues and to find solutions for legal and tax problems in different jurisdictions is fun although it might sound boring at first.

Q What do you see as the most important thing about your job?

A Trust and confidence. Setting up and administrating structures for high-net-worth individuals from different countries and cultures and to transfer their assets can only be done when the clients trust their lawyers and trustees. This trust is not gained via video conferencing, but via personal meetings and the famous “handshake mentality”.

Q What motivates you most about your work?

A Let us be honest: Lawyers are no doctors; we are not saving lives in the night or helping babies to get born (although some lawyers might think so). However, the challenge to set up structures for international clients and thus to find solutions in complex tax and asset protection matters is motivating.

Q What is one work related goal you would like to achieve in the next five years?

A I have always been dreaming of starting my own business. Perhaps this is something in the future.

Q What has been the best piece of advice you have been given in your career?

A Seize the opportunity when it comes up. Life (in particular work life) is too short to wait for another one.

Q What is the most significant trend in your practice today?

A We can see that in an ever faster-paced world and with an increasingly insecure world and a new real threat of wars, in particular in major industrialised nations, the desire for security and protection for the family is of great importance for the clients. This is why more and more people want their assets to be in a safe haven. This does not only consider the top one percent but a broader range of clients.

Q Who has been your biggest role model in the industry?

A I am not the type of person who worships a supreme court judge because of his life’s work. There were various people who influenced me and showed me opportunities, and I am very grateful to them for their advice.

Q What is one important skill that you think everyone should have?

A There are two: To sell your own work. This is very important. However, there is another skill which is perhaps more important: managing expectations. Lawyers are no magicians but are limited in the legal framework. Therefore, honest communication to the client what is possible and what is not possible is key for a long-lasting relationship.

Q What cause are you passionate about?

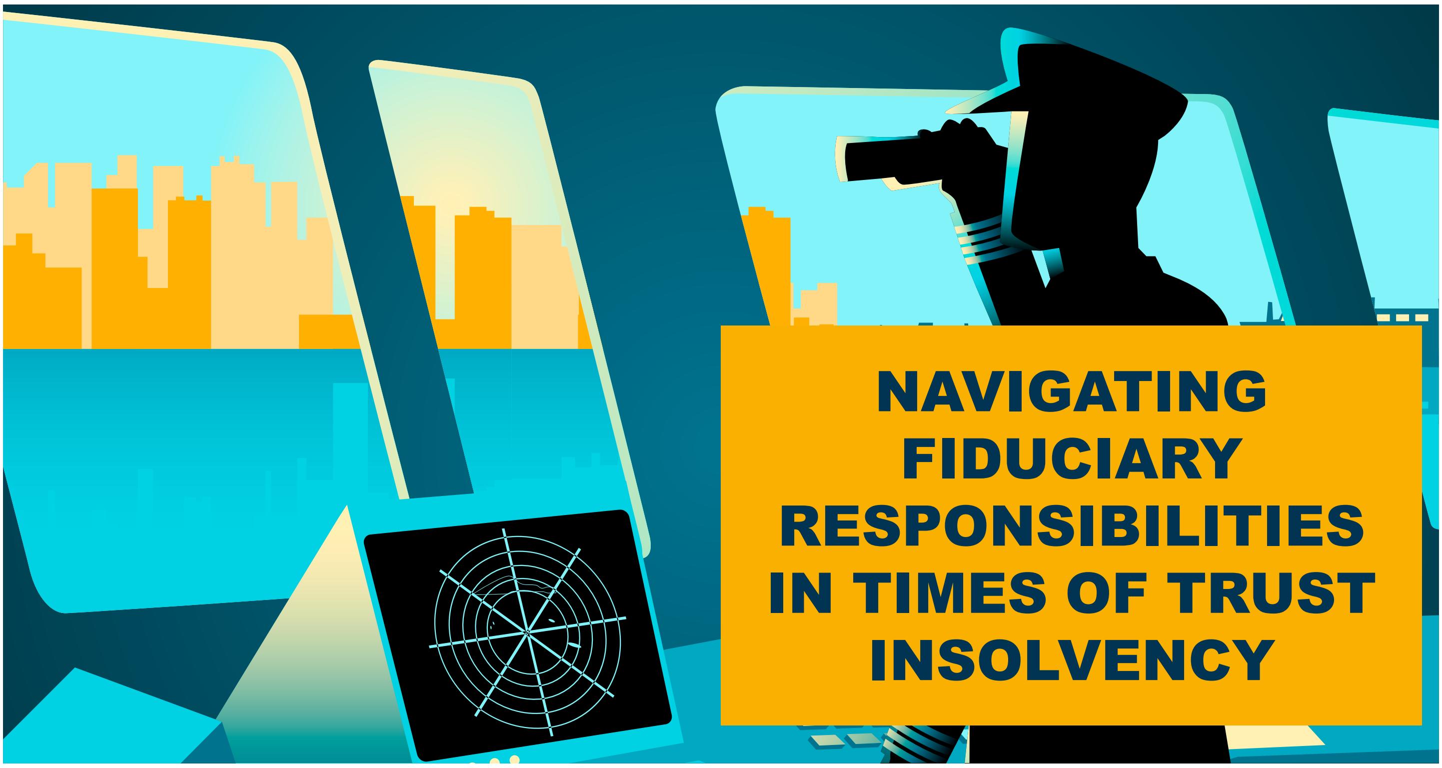
A Beside my work? There is not much time left. Spending time with my fiancé is really important to me. And having good (or bad) round of golf with the boys and standing in the stands watching a good match of Borussia Dortmund on Saturday is something I can relate to.

Q Where has been your favorite holiday destination and why?

A I like Southern France (Provence area). It is a great destination with a good atmosphere. I also like Sylt, an island in Northern Germany which is always windy and never really warm. And of course, there should be a fun weekend at Mallorca (the most German place outside of Germany) every year.

Q Dead or alive, which famous person would you most like to have dinner with, and why?

A I think a dinner with Helmut Kohl (the former German chancellor) would be great. I have a few questions to him, but I think that this would be also an extensive dinner (google him, you will understand).



NAVIGATING FIDUCIARY RESPONSIBILITIES IN TIMES OF TRUST INSOLVENCY

Authored by: Kerrie Le Tissier (Director) – Highvern

As trustees, safeguarding our clients' assets, reputation, and overall best interests are at the heart of everything we do. However, fulfilling these responsibilities isn't just about administering and distributing those assets. In what are challenging global conditions, we must increasingly guard against insolvency. Two Privy Council decisions, both involving trusts governed by Jersey law, have brought this issue to the fore, and they're likely to impact how both Guernsey and English law treats any similar situations.

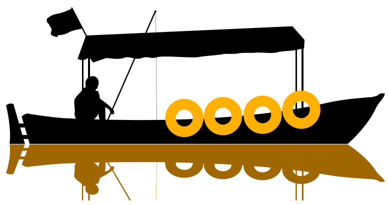
In the past, trustees may have thought that because a trust is not a legal entity, a trust can't be deemed insolvent. While technically that's true, practically the insolvency relates to there being insufficient liquidity in the trust assets to meet trust liabilities (that is, liabilities of the trustee incurred in its capacity as trustee). When that happens, the fiduciary obligations of the trustee shift from the beneficiaries to the creditors, similar to a corporate insolvency where the director's fiduciary obligations also shift to the creditors.

As trustees, we hold positions of great responsibility and should be fully aware of all aspects of the solvency of the trust so we can not only mitigate against the risk of insolvency, but also act without impunity should it happen.

This therefore doesn't mean just undertaking a thorough annual review into the accounts – whilst important, that isn't sufficient. It doesn't protect against the possibility that circumstances might dramatically change during the course of the year. A large drop in asset values, a global situation that impacts investments, or an unexpected tax liability could mean the trust becomes insolvent before the next annual review.

We also need to look to corporate insolvency for guidance on how to act in the event of a trust becoming at risk of insolvency – whilst this appears to be untested in the courts, there is a possibility that if a trustee continues to take actions as the trust is heading into insolvency, there could be the equivalent of wrongful trading liability for trustees.

So, what should we be doing?



Policies and Procedures

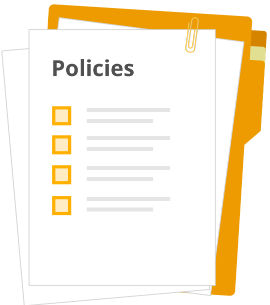
We need to put in place robust policies and procedures to ensure we have sufficient oversight of assets and liabilities (including potential and contingent liabilities), and that we can take appropriate action promptly in the event of potential solvency issues. For example:

An investment monitoring policy and procedure to ensure that investment performance is monitored and reviewed, with regular reporting to the trustee and clear action points should performance decline.

A contracts management policy and procedure should be in place to ensure future and contingent liabilities are assessed, recorded and monitored. We need to fully understand who the trust's creditors are, the scale of liabilities and when these might fall due.

Distribution, and lending and

borrowing policies and processes should ensure routine solvency testing before making distributions, taking out loans and entering into other contractual obligations.



Risk Monitoring and Mitigation

All trustees have a responsibility to understand the financial positioning of the trust and to identify any vulnerabilities. We should regularly review trust expenditure, investments, and revenue streams to gauge sustainability. Watching economic and market conditions can also signal when to reconsider the trust's risk tolerance or make contingency plans.

As trustees, we should:

1. Review solvency on a regular basis and consider it as part of our risk assessments.
2. Increase monitoring for trusts at a higher risk of insolvency.
3. Record and ensure the accessibility of information on solvency – making sure it is up to date and available before key decisions are made.
4. Get appropriate legal and accounting advice at the earliest opportunity when solvency issues arise.
5. Incorporate flexible provisions into the trust instrument, allowing adjustments to be made in reaction to changing circumstances without needing court approval.
6. Stress test, whether that's financial modelling of downturn scenarios, beneficiary claims, interest rate changes, or asset concentration etc.

What Type Of Trust Could Be Most At Risk?

Overspending might bring about a slow and inevitable insolvency, but the problem cases often involve volatility in value, unexpected tax liabilities or concealment of a fraud, or incompetence. Older trusts, for example, or those where there has been changes of trustees and trust companies, might have been set up prior to today's more stringent controls and regulation. Other more 'at risk' trusts might be those caught up in a Court Appointed Receivership, POCA receiverships or acting as Trustee in bankruptcy.

At the first hint of a problem with an asset, whether that's not getting a satisfactory response to an audit style question, or getting vague or inconsistent reports on an asset, take advice. Investigate. Delay could make things worse and may result in liability on the part of the trustee.

What If I Think My Trust Is Heading Towards Insolvency?

No trustee can predict the future and even the best monitoring and mitigation of risk will sometimes unfortunately not be enough. The first step is to seek legal advice as early as possible. If insolvency does occur, immediate actions should not disregard beneficiary interests altogether. When evaluating options that may impact distributions or remaining assets, trustees still have a duty to consider the interests of and, if appropriate, communicate with beneficiaries.

If a trustee has been conducting periodic risk assessments and stress testing trust portfolios against different scenarios, it you will be in a good position to make more proactive and informed decisions quickly. If a trust looks to be heading towards insolvency territory, then the trustee's procedures and policies should include enhanced monitoring and mitigation and it should also fully understand who the creditors are and what and when liabilities will occur.

By monitoring risks, weighing beneficiary and creditor interests and needs appropriately, and adequately protecting remaining assets post-insolvency, trustees can best fulfil their fiduciary duties in difficult periods and avoid legal repercussions down the line. No insolvency situation is a good one and the best option is to ensure it doesn't get to that point. However, sometimes circumstances are out of our control, no matter what policies, procedures, and mitigating factors we put into play. If a trustee has put these safeguards in place, then it will have at least navigated a challenging situation with integrity and professionalism to ensure the best outcome for all interested parties.

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About Kerrie

Kerrie is a Director at HIGHVERN based in Guernsey and part of the senior team in Private Wealth department. She is also a Guernsey Advocate and a member of the Executive Committee of the Guernsey Association of Trustees and leads the association's Technical Committee.


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NOT SO QUICK, OLIVER: INHERITANCE DISPUTES IN SALTBURN

Authored by: Andrew Reay (Probate Manager) – Harbottle & Lewis

I watched Emerald Fennell's Saltburn (without my mother, thankfully) over the Christmas break. For those who have yet to brave it – spoiler alert – it tells the story of Oliver Quick, an unsettling yet oddly charming young man, who manages to manipulate and murder his way to becoming the de facto lord of Saltburn manor. Having successfully bumped off his new wife, Lady Catton, the last surviving member of the Catton dynasty, Oliver frolics naked through the house to 'Murder on the Dancefloor' and the credits roll. Totally unhinged, and I loved it.

Once the film had finished (and after a moment of stunned silence, and then raucous laughter), I couldn't help but consider what advice I might give to the Cattons' more remote family members – i.e. the lucky few who survived the Oliver cull – and what claims they might have against him, or how they might stop him from inheriting Saltburn.

I can understand why Ms Fennell didn't feel the need to include much about Lady Catton's Will in the script for Saltburn, and I also appreciate that I am possibly in the minority for always wanting a bit more probate-based dialogue. But this does mean that I have needed to make certain assumptions, namely that either Lady Catton left a Will in which she left Oliver everything (a conventional approach for married couples, not least to secure the spousal exemption from inheritance tax), or that she died without a Will (and without children – Oliver saw to that), in which case Oliver would have inherited everything under the intestacy rules in any event. The gaiety with which Oliver cavorts about Lady Catton's lifeless body and the devilish glint in his eye do seem to be fairly concrete – at least in cinematic terms – pieces of evidence to suggest that this was indeed the case.

Either way, a significant hurdle stands in the way of Oliver's inheritance: the "forfeiture rule" set out in the Forfeiture Act 1982 (and clarified for inheritance purposes in the Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Act 2011). In essence, the rule precludes a person who has unlawfully killed another "from acquiring a benefit in consequence of the killing." In practice, this means that the killer is – in an inheritance context – treated as having died before the victim, and therefore cannot benefit from their Estate.

Oliver would not necessarily need to be convicted of the murder for the forfeiture rule to apply. The Catton family (who might otherwise have inherited, whether under the Will or via the laws of intestacy) could bring a claim against him in the civil courts, in which case the standard of proof is of course "on the balance of probabilities" rather than the higher standard in criminal proceedings ("beyond reasonable doubt"). This is the sort of claim seen more commonly in the US; think for example of OJ Simpson who was found 'guilty' of killing Nicole Brown on the balance of probabilities in a civil claim, but not of course in criminal proceedings.

The burden of proof would, however, be with those alleging that Oliver had unlawfully killed inter alios Lady Catton, and would therefore need to produce compelling evidence of this. In the case of Re Dellows Will Trusts [1964] the Court considered the standard of proof and Ungoed-Thomas J found that "the more serious the

allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it."

If the Court were to find, on the balance of probabilities, in Oliver's favour (things do often seem to go his way) and the forfeiture rule is not therefore applied, this would likely mean disastrous costs consequences for the family. This is not necessarily the end of the story, however, for assuming that they had the means and the inclination, they might have other claims against Oliver.

The family could, for example, seek to have Lady Catton's Will set aside by the Court on the basis that it was made under Oliver's undue influence, or that Oliver had poisoned Lady Catton's mind somehow.

The claim with the strongest legs, however, would probably be in the hands of cousin Farleigh. Farleigh has been taken in by the Cattons and lives harmoniously (at least, until Oliver comes along) with them at Saltburn. As a financial dependant of the Cattons, Farleigh is likely to have a claim against Lady Catton's Estate under the Inheritance (Provision for Family and Dependants) Act 1975.

Although Farleigh's claim would not affect the formal validity of Lady Catton's Will, if successful it could mean that Oliver – as the presumed sole heir of the Catton fortune – would be forced to pay a certain amount of maintenance to Farleigh.

Ultimately, the path to Oliver getting his hands on the cash is likely to be a long and difficult one.

I suppose I can only hope that Ms Fennell is working her magic on a courtroom-style sequel, documenting in granular detail the claims which the family intends to make against Oliver. Ideally cinema-goers of Saltburn 2 would be treated on arrival with an enormous court bundle to pore over while munching popcorn as the pre-movie adverts play. I wonder whether Ms Fennell is looking to cast an up-and-coming probate expert to play Oliver's lawyer. If so, perhaps someone could let her know I'm available.

PRESERVING VALUE DURING FUND RUN OFF PERIODS: THE LONG-TERM BENEFIT OF A LIQUIDATING TRUST

Authored by: Ed Ford (Associate Director) and Owen Walker (Director) – R&H Trust and Corporate and R&H Restructuring

How to effectively manage the end of life of a collective investment vehicle has long presented challenges for fund managers balancing a reduction in economic returns, as capital is returned to investors with ongoing and seemingly ever expanding regulatory and other obligations associated with the proper administration and maintenance of a modern fund structure.

Trapped assets, in particular those with limited current value or liquidity, can make the managed wind-down of a fund particularly difficult. We are seeing an increase in open-ended and closed-ended funds who wish to proceed with dissolution but remain in limbo, with no end in sight due to issues with realising and distributing certain assets and investments.

Not only does a prolonged wind-down result in unnecessary time spent by management but it can also result in excessive service provider costs and holding fees which become disproportionate to the returns and assets under management, to the detriment of investors.

When paired with a solvent voluntary liquidation, the establishment of a liquidating trust for the assignment of trapped or illiquid assets can be an effective solution for any fund wishing to preserve potential long-term asset realisation whilst freeing up resources via timely dissolution to the benefit of all stakeholders. The objective of a liquidating trust is to expedite the wind-down process and to create efficiencies, allowing investors to receive proceeds in an orderly manner. A liquidating trust also reduces the potential of liability claims against the funds and/or its directors, allowing for a final resolution to the fund's affairs whilst providing a means for which long-tail assets can be managed down and ultimately distributed to the investors in a manner which maximizes value.

This pairing is not only beneficial to the fund but, where relevant, the trustee can engage with existing management, its principals, and directors in a consulting role so that asset background and understanding is not lost during the wind-down process. Again, this can be invaluable to the preservation of value. This flexibility and ability to retain knowledge in the asset wind-down period can be an important factor when looking to drive efficiencies and ensure maximum final returns to investors.

Alternatively, existing management can also choose to remove themselves entirely from the process should they wish not to assume any significant role following the establishment of the liquidating trust. This can be a useful consideration if the incumbent fund management is looking to say retire from the industry and there is no other viable succession plan in place.

Why A Liquidating Trust?

A liquidating trust in the Cayman Islands can be established for the benefit of any asset type, save there being no restrictions or known contingent litigation, and can be tailored to the requirements of the fund as the trust's settlor.

Asset types that we have seen structured into liquidating trusts include potential class action claims which have yet to be consummated, shareholdings in private operating companies, portfolios of small to mid-cap publically listed equities, litigation stubs and illiquid investment portfolios with limited secondary market opportunities. Common amongst these asset classes was the long tail to the expected realisation timelines, with recovery periods ranging from twelve months to in excess of five years.

The form of liquidating trust can vary in both structure (standalone or umbrella) and type (discretionary, revocable, irrevocable trusts, etc.). A discretionary Cayman Islands STAR Trust is especially well suited to a liquidating trust scenario in situations of prolonged wind-down due to the flexibility it allows when determining the trust's objects.

The trust may be set up for a purpose or for persons or indeed a mix of both. Investors may be named as discretionary beneficiaries and would therefore not have entitlement to the assets, other than on a realisable event. Alternatively, if the STAR trust is set up whereby the trust's primary purpose is to carry out a business plan, the business plan may be drafted to provide clear guidance to the trustee when exercising its discretion and it would be an integral part of the trust deed. Examples of the guidance that may be incorporated into a business plan could include details of the specific assets that the trust is intended to hold, how these assets are intended to be realised, which investors are intended to benefit and to what extent, and any other relevant provisos. The business plan would also be clear on the parties who hold the power to vary it if needed.

This means that investors not only benefit from future asset realisations, which could have been disclaimed or written-off prior to commencing a standalone voluntary liquidation, but also from the cost efficiencies that can be achieved from both a timely dissolution of the fund and the realisation and distribution of any residual assets in an efficient and practical manner.

In the Cayman Islands, a regulated trust company, would act as trustee and have absolute discretion over the management and administration of the STAR trust.

Although, where relevant, the trustee may also seek the assistance of other professionals to manage the realisation of the residual assets, be it asset auctions or sales in the secondary market, as well as those principals or directors who wish to remain engaged in a consultative capacity following the voluntary liquidation. Furthermore, a STAR trust requires the appointment of an enforcer who will ensure that the trustee fulfils their fiduciary obligations in accordance with the trust instrument. This role may be delegated to a third party and further provides comfort to investors that the liquidating trust is being administered for their benefit and in accordance with the provisions of the trust deed.

With market pressures, high interest rates and volatility likely to continue into 2024, it is likely that a growing number of funds and fund managers will be considering options as to how a managed wind-down might be effectively delivered and the use of a liquidating trust should be an option which is explored given the potential to unlock long term value.

About R&H Trust & Corporate

R&H Trust & Corporate (operating as 'The R&H Trust Co. Ltd.') has offered a comprehensive range of professional services for over 40 years to become the largest independent trust company in the Cayman Islands. R&H Trust & Corporate ('RHTC') is an affiliate of Rawlinson & Hunter LLP in the Cayman Islands. Our relationship with this international grouping both locally and globally provides us with immediate access to a global network of expertise on private wealth management matters so we can effectively service our clients anywhere in the world.

About R&H Restructuring

R&H Restructuring is a multidisciplinary team with a diverse range of offshore multi-jurisdictional advisory, restructuring and insolvency experience with offices in the Cayman Islands and British Virgin Islands. Their team of insolvency practitioners, asset recovery experts and qualified accountants has great depth of experience in dealing with distressed situations and the associated complexities of cross-border insolvencies and disputes in the Cayman Islands, British Virgin Islands and Bermuda, as well as across the Eastern Caribbean region. R&H Restructuring is an affiliate of Rawlinson & Hunter LLP in the Cayman Islands.

60-SECONDS WITH:

JOE CROME
HEAD OF BUSINESS DEVELOPMENT AND CAF AMERICAN DONOR FUND
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Q: Why did you choose a career path in the legal philanthropy industry?

A: I suppose like many of us, my career found me rather than the other way around. After travelling after leaving school, I volunteered at a new local youth charity before I was due to attend university. As it turned out, I decided to defer my university place, help get the charity up and running, and then spent several happy years leading the organisation as it grew to help more young people. In the end I never did circle back to get that degree! I enjoyed the challenges of running small and medium sized charities, but as part of that, I experienced working with a number of major donors. It was this which kickstarted my interest in philanthropy specifically and I became keen to contribute on the 'other side of the fence', by helping steward funding from donors to charities.

Q: What do you see as the most important thing about your job?

A: The most important thing about my job is helping our clients start to understand, and then navigate, their philanthropic giving. The worst-case scenario is that people do not pursue charitable giving out of fear or lack of confidence, so if we can make it as easy and as comfortable as possible for clients, using expertise and guidance, we can enable more giving and better giving to benefit charities around the world.

Q: What motivates you most about your work?

A: For me, what gets me out of bed every day is knowing that the better we are at our jobs as philanthropy advisers, the more donations we can unlock and contribute to good causes. Navigating complex gifts and cross-border donations is difficult work, but by being at the top of our game we can help realise the giving ambitions of our clients, and that helps improve the lives of people across the world.

Q: What is one work related goal you would like to achieve in the next five years?

A: CAF has always been an innovator in the charitable giving space. Our aim is not only to see a major increase in philanthropic giving, but to be a part of creating new charitable giving products and services that can add value on a global scale. We are working on some big new ideas and I am excited to see those opportunities develop in the coming years…

Q: What has been the best piece of advice you have been given in your career?

A: Be yourself! If you ever feel that you are not the smartest or most charismatic person in the room, remember that hard work, thoughtfulness and saying yes to opportunities will take you the furthest.

Q: What is the most significant trend in your practice today?

A: As the great wealth transfer unfolds, the shift in attention to how we, as advisers, engage the next generation is essential. Philanthropy and social impact speaks strongly to the next gen and therefore our advice and services are more important now than ever.

Q: Who has been your biggest role model in the industry?

A: In 2022 I completed the Chartered Advisor in Philanthropy accreditation with the American College of Financial Services, and the course professors, Phil Cubeta and Dien Yuan, were incredible sources of knowledge and wisdom, particularly regarding where philanthropic advice meets tax efficient planning.

Q: What is one important skill that you think everyone should have?

A: We all have different skills and that's important for diversity, but everyone can be kind!

Q: What cause are you passionate about?

A: The cause area I am most passionate about is the fight to end modern slavery. Charities like Justice and Care do an incredible job striving to end human trafficking around the world, including here in the UK.

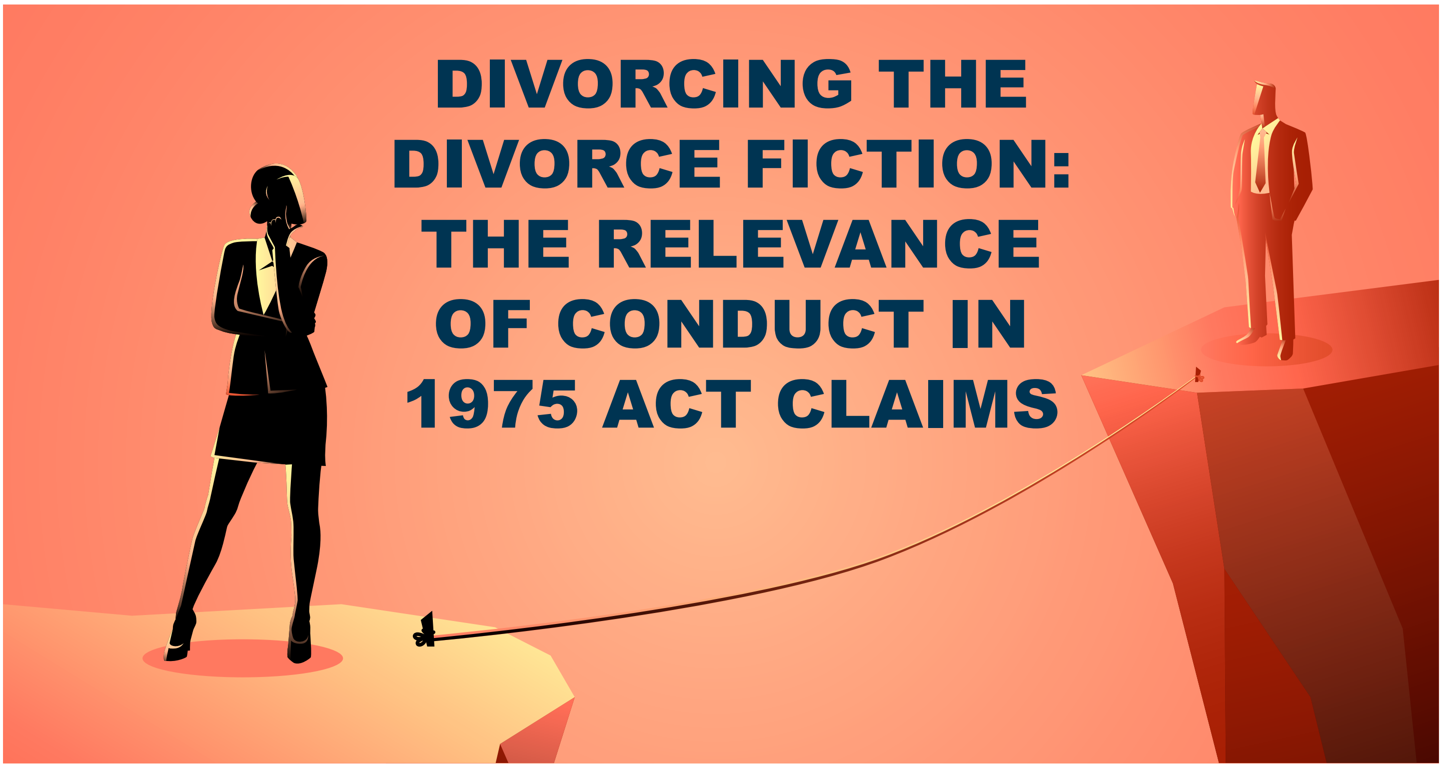
Q: Where has been your favorite holiday destination and why?

A: Costa Rica, with Lake Como as a close second!

Q: Dead or alive, which famous person would you most like to have dinner with, and why?

A: Barack Obama. It's rare for a world leader to come from relatively humble beginnings and his time spent as a community organiser on the South Side of Chicago led him to support and advocate for real people living in difficult circumstances. He even inspired me to become involved with local politics as a district councillor, which in turn helped me to better understand issues affecting my own local community.

DIVORCING THE DIVORCE FICTION: THE RELEVANCE OF CONDUCT IN 1975 ACT CLAIMS



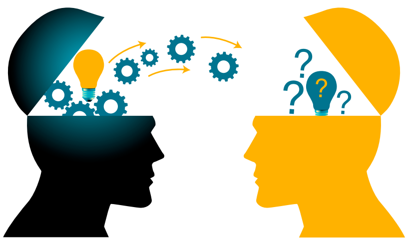
Authored by: Alicia Tan (Associate) and John Davies (Partner) – Farrer & Co

The concept of the 'divorce fiction' within claims under the Inheritance (Provision for Family and Dependants) Act 1975 ("1975 Act) will be familiar to most probate lawyers. This involves drawing a comparison between the position of a widowed spouse, and that of a divorcing one. The history of this connection arose in the early 1970s, when the Law Commission recognised that these two jurisdictions, although contextually different, are inextricably linked.[1] Based on these considerations, in order to standardise the position, the 'divorce fiction' (by which the court is to consider the level of provision that the spouse would have been expected to receive if the marriage had ended in divorce rather than death) was introduced to the list of factors a court must consider when determining whether reasonable provision has been made under the 1975 Act.[2]

However, there are key differences between the two jurisdictions– in particular the relevance of conduct of the parties and the quality of the relationship at the time of either death or divorce, as the case may be.

In both jurisdictions, conduct can be a relevant consideration for the court, but the statutory wording makes clear that there is a difference of approach.

While the 1975 Act permits the court to consider "relevant"[3] conduct, the Matrimonial Causes Act 1973 ("MCA") only permits conduct to be considered if it would be "inequitable to disregard it"[4]. The bar within a divorce context is therefore higher, and this difference is borne out in the case law.



How Is Conduct Assessed In The 1975 Act Context?

The key principles are clarified in Ilott v Mitson [2017] UKSC 17, where the court's analysis is described as a "value judgment"[5], implying normative considerations when analysing "the reasonableness of the deceased's decisions"[6]. See, for example, Re Snoek [1983] C.L.Y. 3919, where the court referred to the widow's "atrocious and vicious behaviour", in particular towards her terminally ill husband. It was therefore decided that the deceased husband "had not failed to make reasonable financial provision for the applicant by providing nothing" (though a small award was ultimately made to reflect the widow's contributions at the beginning of the marriage).

Conversely, an applicant who was in a loving and happy relationship with the deceased can be expected to do better in court. In Re Besterman [1984] Ch. 458, the court noted that the widow was "wholly blameless" and indeed that

1 Family Law: First Report on Family Property, A New Approach (1973) Law Com No 52 para 61(b) (reiterated in Family Law: Second Report on Family Property, Family Provision on Death (1974) Law Com No 61, para 2(b)).

2 1975 Act s 3(2).

3 1975 Act s 3(1)(g).

4 MCA s.25(2)(g).

5 At [24] .

6 At [17].

she was “a faithful and dutiful wife”. Similarly, in Re Bunning [1984] Ch. 48 the widow was described as “a loyal, dutiful and hard-working wife”.

Courts are even willing to examine the relationship not only as it existed at the date of death, but the trajectory of any ongoing reconciliation.

In P v G (Family Provision: Relevance of Divorce Provision [2006] C.L.Y. 4091, the court found that even though “the future would have been likely to be turbulent, the probability is that the fundamental relationship …would have endured”[7], and this was taken into account when determining the appropriate award.

That is not to say that conduct should always be raised. An over-reliance on conduct where it is not pertinent, or making exaggerated claims as to conduct which are not supported by the evidence, will be frowned upon by the courts. This may lead to adverse costs consequences.[8]

Ilott clarifies that claims under the 1975 Act are not “rewards for good behaviour on the part of the claimant or penalties for bad on the part of the deceased”. However, this contradicts the court’s tendency to consider how “deserving” the applicant is, which necessarily imposes a moral or value judgment on the parties’ conduct.

Conduct In The Divorce Context?

In the context of a financial claim upon divorce, there are four types of conduct case: (i) gross and obvious personal misconduct, (ii) cases where one party has wantonly and recklessly dissipated assets, (iii) non-disclosure cases, and (iv) cases involving litigation misconduct. The latter two classes of conduct are inevitably not comparable to the approach under the 1975 Act.

The bar for successfully pleading (mis) conduct under either of the first two categories above is high. In order to be successful under the first category, a party must prove exceptionally serious wrongdoing, likely as serious as attempted murder.[9] They will also need to demonstrate a negative financial impact upon the victim generated by that behaviour (for example, that their financial needs have increased as a result).

The principles applied in cases where one party alleges the other has wantonly and recklessly dissipated assets is best illustrated by MAP v MFP (Financial Remedies: Add-Back) [2015] EWHC 627 (Fam), where the wife alleged that the husband had spent £6,000 per week on drugs (and more on sex workers), and argued that he should effectively receive a lesser share of the assets as a result (as, but for his behaviour, the assets for division would be greater). The court noted that “many very successful people are flawed” and concluded that while the husband’s behaviour was “irresponsible” it did not amount to “deliberate or wanton dissipation”. It would have been wrong to take into account the husband’s abilities in generating assets for the family whilst effectively punishing him for personality flaws that were part and parcel of his being.

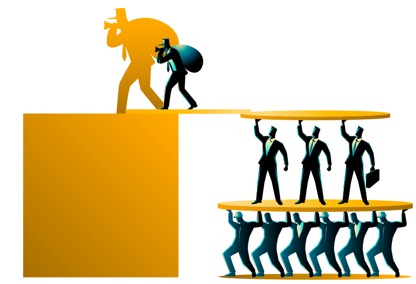
The above demonstrates that courts in the matrimonial context are extremely reluctant to engage in “value judgments” or consider either the quality of a relationship or one party’s behaviour, instead taking each individual as they find them: bad behaviour up to a certain point will not sway a court.

A widowed spouse in a 1975 Act claim may consider it surprising that any analysis of morality may at least in theory, be considered in the context of their marriage in circumstances where it would likely not have been had they divorced.

Concluding Thoughts – Relationship Between 1975 Act And The Divorce Fiction

The changes introduced to the 1975 Act were designed to bring spousal claims into line with the position on divorce. However, authorities have emphasised[10] the difference between the claims, and the divorce fiction, while of assistance in the context of 1975 claims, must be used with caution.

For now, the divorce fiction lives on. However, there is a clear divergence between the approach to conduct under the 1975 Act, and in the context of divorce. Is it now time to do away with that fiction, and instead write a new narrative that expressly considers the quality of a relationship without an arguably misplaced foray into the realms of the family courts?



7 [187]

8 See Lilleyman v Lilleyman [2012] EWHC 1056 (Ch) and Wooldridge v Wooldridge [2016] C.L.Y. 210)

9 H v H (Financial Relief: Attempted Murder as Conduct) [2005] EWHC 2911 (Fam)

10 See Fielden v Cunliffe [2005] EWCA Civ 1508.

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CONFIDENTIALITY AND DISCLOSURE BY TRUSTEES TO BENEFICIARIES – SOME ASPECTS

Authored by: Edward Sawyer (Barrister) - Wilberforce Chambers

This article looks at some aspects of the impact of confidentiality on requests by a trust beneficiary to the trustees for documents/information about the trust.

Since the decision in Schmidt v Rosewood Trust [2003] 2 AC 709, it has been clear under English law that (outside adversarial litigation where different principles apply) beneficiaries do not have an absolute right against the trustees to information and disclosure. Rather, questions as to the provision of information and disclosure are resolved under the court's inherent jurisdiction to supervise and if necessary intervene in the administration of the trust. It has recently been confirmed that the principles in Schmidt govern only cases where disclosure is sought by a beneficiary (or potentially another person interested under the trust) in his/her capacity as such, and do not apply to applications for disclosure by or against third parties: Walsh v Spence [2023] EWHC 1661 (Ch) at [149], [201].

Under the Schmidt approach, the trustees, and ultimately the court, have a discretion whether to provide information/documents, to be exercised in the interests of the sound administration of the trust and the best interests of the beneficiaries. However, the discretion is not at large and is overlaid by some important principles: such as that beneficiaries are generally entitled to sufficient information to enable them to hold the trustees to account; and the key principle derived from Re Londonderry's Settlement [1965] Ch 918 that trustees are entitled not to disclose the reasons for their discretionary dispositive decisions.

Re Londonderry's Settlement confirms at 935-6 that:

> ***"where trustees are given discretionary trusts which involve a decision upon matters between beneficiaries, viewing the merits and other rights to benefit under such a trust, the trustees are given a confidential role and they cannot properly exercise that confidential role if at any moment there is likely to be an investigation for the purpose of seeing whether they have exercised their discretion in the best possible manner."***

In Breakspear v Ackland [2009] Ch 32 at [58], Briggs J endorsed this view of the confidential nature of trustees' dispositive decision-making. He accordingly regarded a settlor's letter of wishes, likely to contain expressions of view about the beneficiaries, as equally confidential and not disclosable to beneficiaries upon request.

It is against this background that we turn to the question whether confidentiality is a good ground for a trustee to object to disclosure of information to a beneficiary about the administration of a trust. In a sense, the question is beside the point, because the entire process is inherently confidential and all documents and information are likely to be confidential to some degree; so the question "confidential or not?" does not help differentiate situations where the trustees must disclose from situations where they are justified in not giving disclosure.

The reality, though, is that there are degrees of confidentiality and sensitivity. The trust deed and trust accounts may well contain information that is confidential as against the rest of the world, but in all but extreme circumstances, one would expect beneficiaries to be entitled to disclosure of such information.

At the other end of the spectrum, minutes of trustee meetings weighing up the merits of whether to distribute money to particular beneficiaries, and the settlor's letter of wishes expressing his/her views on the character and merits of the various beneficiaries, are not only confidential as against the rest of the world but (applying the Londonderry and Breakspear approach) are likely to be regarded as confidential as against the beneficiaries and not disclosable to them.

It is not that easy to identify the touchstone for deciding what kind of confidentiality justifies withholding documents/information from a beneficiary. A balancing exercise is involved. As Lord Walker explained in Schmidt v Rosewood Trust at [67]:

"Especially when there are issues as to personal or commercial confidentiality, the court may have to balance the competing interests of different beneficiaries, the trustees themselves, and third parties. Disclosure may have to be limited and safeguards may have to be put in place."* [1] *And as Briggs J said in Breakspear v Ackland at [56]: "the general principle of confidentiality is subject to being overridden as a matter of discretion by the court."

The test probably comes back to whether disclosure is in the interests of the sound administration of the trust and the beneficiaries as a whole. Confidential information which is needed for a beneficiary to be able to hold trustees to account is likely to bedisclosable;[2] whereas if there is confidential information which is not needed for that purpose and whose disclosure could be harmful to the trust or its beneficiaries, the trustee may well be justified in not disclosing it. The settlor's expression of desire to keep matters confidential from the beneficiaries, while relevant, is not probably not determinative: see Foreman v Kingstone [2004] 1 NZLR 841. On the Londonderry analysis, the trustees' reasons for their discretionary dispositive decisions are par excellence confidential information that it would be harmful to the interests of the trust as a whole to disclose, and hence non-disclosable.

Some examples may serve to illustrate the issues involved:

1. In Rouse v IOOF Australia Trustees [1999] SASC 181, Supreme Court of South Australia, the trustee was trustee of an investment scheme with over 20,000 investor beneficiaries, with investments in forestry companies. The trustee was in litigation against the forestry companies. The claimants were beneficiaries of the investment scheme and they sought disclosure of confidential legal advice obtained by the trustee on the litigation; however the claimant beneficiaries included the defendants to the litigation and allied parties. Thus the beneficiaries had a commercial interest opposed to that of the trust and disclosure would have harmed the trust's interests in the litigation. Unsurprisingly, the court refused to order disclosure of the confidential legal advice.

2. In Erceg v Erceg [2017] NZSC 28, Supreme Court of New Zealand, a beneficiary sought disclosure of confidential information about the trust, the beneficiaries, the distributions to them and the trustees reasons for distributions. The claimant beneficiary had a very remote interest and had stirred up discord within the family and launched numerous pieces of vexatious litigation, making various threats along the way. The court declined to order any further disclosure: the beneficiary had not had any reasonable prospect of a receiving anything from the trust, and any information provided to him was likely to be used to harass the other beneficiaries. Thus while a beneficiary might normally be expected to have a good case for disclosure of at least the trust deed and financial statements, the court declined to provide even these to the claimant beneficiary.

3. In Butt v Kelson [1952] Ch 197, CA, it was said that a situation where it might be inappropriate to order disclosure of corporate documents to the beneficiary is where a company owned by the trust was carrying on the business of exploiting some secret process and the beneficiary runs a rival business. In such a case, it is easy to see how disclosure to the beneficiary could harm the interests of the trust via the company it owns.

4. In contrast, in Goodrich v AB [2022] EWHC 81 (Ch), it was held to be proper for the trustees of employee benefit trust A to disclose confidential information about its distribution policy to EBT B (for the same company and with overlapping beneficiaries), and vice versa, so that a co-ordinated scheme of distribution could be achieved in the interests of the beneficiaries as a whole. The court applied Briggs J's dicta in Breakspear that the trustees and the court can relax confidentiality in a suitable case.

Thus one can see from the case-law that some types of confidentiality – confidential consideration of dispositive discretions by the trustees, confidential information about family members that may stoke family enmity, business confidences – may furnish a good ground for trustees deciding not to disclose information or documents to a beneficiary in the out-of-court situation being considered here. Only the of first these, concerning confidential consideration of dispositive discretions, enjoys near-absolute immunity from disclosure; other types of confidentiality are more of a grey area and it is possible that the sound administration of the trust might require the confidentiality to be overridden depending on the circumstances.

In the UK, the above trust law principles must also now be treated as subject to the requirements of the UK GDPR which sometimes compels trustees to disclose personal data they hold about the beneficiaries. But that is a topic in itself and not covered in this short article. For readers interested in the subject, a good starting point is Dawson-Damer v Taylor Wessing [2017] 1 WLR 3255, CA, and its sequel at [2020] Ch 746, CA.

1 Obtaining confidentiality undertakings from the beneficiaries or even inspection via professional advisers may be necessary.

2 See Henchley v Thompson [2017] EWHC 225 (Ch) and Ball v Ball [2020] EWHC 1020 (Ch) as to the beneficiary's right to seek an account and what information should generally be provided (and the right is exercisable against former trustees too: Alizade v Kudlick [2023] EWHC 1082 (Ch) at [35]). However, as Henchley makes clear, the court has a discretion as to whether to order an account.

HIRACHAND: IS THERE A NEED FOR SUCCESS?

Authored by: Laura Gabrel (Associate Solicitor) and Lynne Johnson (Practice Development Lawyer) - Irwin Mitchell

The Supreme Court heard the appeal of Hirachand (Appellant) v Hirachand and another (Respondents) [2021] EWCA Civ 1498 ('Hirachand') on 18 January 2024. Judgment is awaited.

The Supreme Court was asked if the Court of Appeal 'was wrong in law to decide that a conditional fee agreement ('CFA') success fee is a debt, the satisfaction of which may constitute a "financial need" for which the court may make provision in an award'[1] under the Inheritance (Provision for Family and Dependants) Act 1975 (the '1975 Act')?

In answering this question, is it possible for the Supreme Court to provide justice within the law as it stands?

The problem

Where a Deceased's estate does not provide reasonable financial provision for certain persons[2] connected to the Deceased, the 1975 Act may save such people from financial distress or financial need. The 1975 Act gives the Court the power to make provision for these persons as claimants seeking provision or greater provision out of the estate of the Deceased.

The very nature of the claim means some claimants under the 1975 Act will not have funds to finance legal representation. An example might be the long-term partner of a Deceased who died intestate, on whom the partner was financially dependent but not married or in a civil partnership. Another example might be a child excluded from their Deceased parent's estate purely because they were born after the parent's last will.

One method of filling the financial void between the impecunious claimant and the funding of legal representation is a Conditional Fee Arrangement (CFA). Sometimes, this may be the only option offered to the claimant to fund their representation. If the claimant's claim is successful under the CFA, they will pay a success fee for their legal representation in addition to the legal fees incurred.

The effect of The Courts and Legal Services Act 1990 Pt II s.58A(6) is that a success fee payable under a CFA cannot be recovered by way of a 'costs order' from the other parties to the claim. An award under the 1975 Act is, however, calculated by reference to the financial needs of the claimant. To pay a success fee from this award would deplete it, leaving the claimant short of the sum assessed to be 'reasonable financial provision'.

Enter Hirachand. In this judgment, the Court of Appeal upheld the High Court's decision that "the [party]'s liability for the CFA success fee was a debt, the satisfaction of which was a 'financial need' within the meaning of section 3(1)(a) of the 1975 Act, for which the Court might in its discretion make provision in an award under the 1975 Act"[3].

1 Hirachand (Appellant) v Hirachand and another (Respondents) - The Supreme Court

2 As defined by s.1 of the 1975 Act.

3 Hirachand (Appellant) v Hirachand and another (Respondents) - The Supreme Court

A round of applause for the Court of Appeal. Problem solved. If you can only bring a 1975 Act claim with a CFA, the Court has the power to class the success fee as a 'debt' that forms part of the award. This answer to the problem seems obvious – add the success fee to the award, rather than taking the success fee from the award, leaving the amount necessary for reasonable financial provision intact.

Where one problem is solved, however…

The Problems Remaining After Hirachand…

The judgment in Lilleyman[4] reported the disparity between the cost regimes of 1975 Act cases and financial relief proceedings arising from divorce. In the latter, to paraphrase paragraph 26 of that judgment, the emphasis is on open offers so that costs can be taken into account when calculating 'financial provision'. In 1975 Act claims, however, costs offers are made 'without prejudice' so the Judge cannot take account of costs when calculating financial provision, even though the fundamental goal of both types of proceedings is the same.

This is clearly an unacceptable state of affairs. Hirachand attempts to bring the two cost regimes closer together, but struggles to achieve this reconciliation due to the Civil Procedure Rules ('CPR'). 1975 Act claims operate within the CPR which provide that costs are determined after trial. Attempting to determine costs before this may cause problems.

Hirachand refers to one of the potential problems at paragraph 63 of the judgment: "there is the potential for a situation where a claimant is awarded a contribution to her CFA uplift but is subsequently ordered to pay the defendant's costs of the claim where, for example, the claimant won overall but failed to beat a Part 36 offer." Even though the judgment goes on to demonstrate that this situation is only a slight risk, the risk exists.

Another issue arising is that success fees are often determined as a percentage of base costs. The evidence on base costs needs, therefore, to be submitted at trial. The success fee will be calculated by reference to the base costs and the lump sum to cover the debt created by the success fee will be determined accordingly. The party who is effectively discharging this success fee therefore has no power to have the figures, on which the success fee is calculated, assessed.

One could argue that, although Hirachand brings the costs regimes of financial relief proceedings and 1975 Act claims closer together, it also drives the costs regimes of other CPR claims and 1975 Act claims further apart, which is also unacceptable.

The respondent in the Supreme Court showed, however, that success fees are included in awards in other areas of law as well. The Court was directed to the Jackson Report[5] which recommended that the level of costs for general damages be increased by 10% across the board to assist personal injury claimants in meeting the success fees out of damages. No assistance was recommended for 1975 Act claimants in this report as it was expected that Legal Aid would be available to them so they would not need CFAs. On this view, it would seem unreasonable for a 1975 Act claimant not to have their success fee covered by their award as they do not have recourse to Legal Aid as expected.

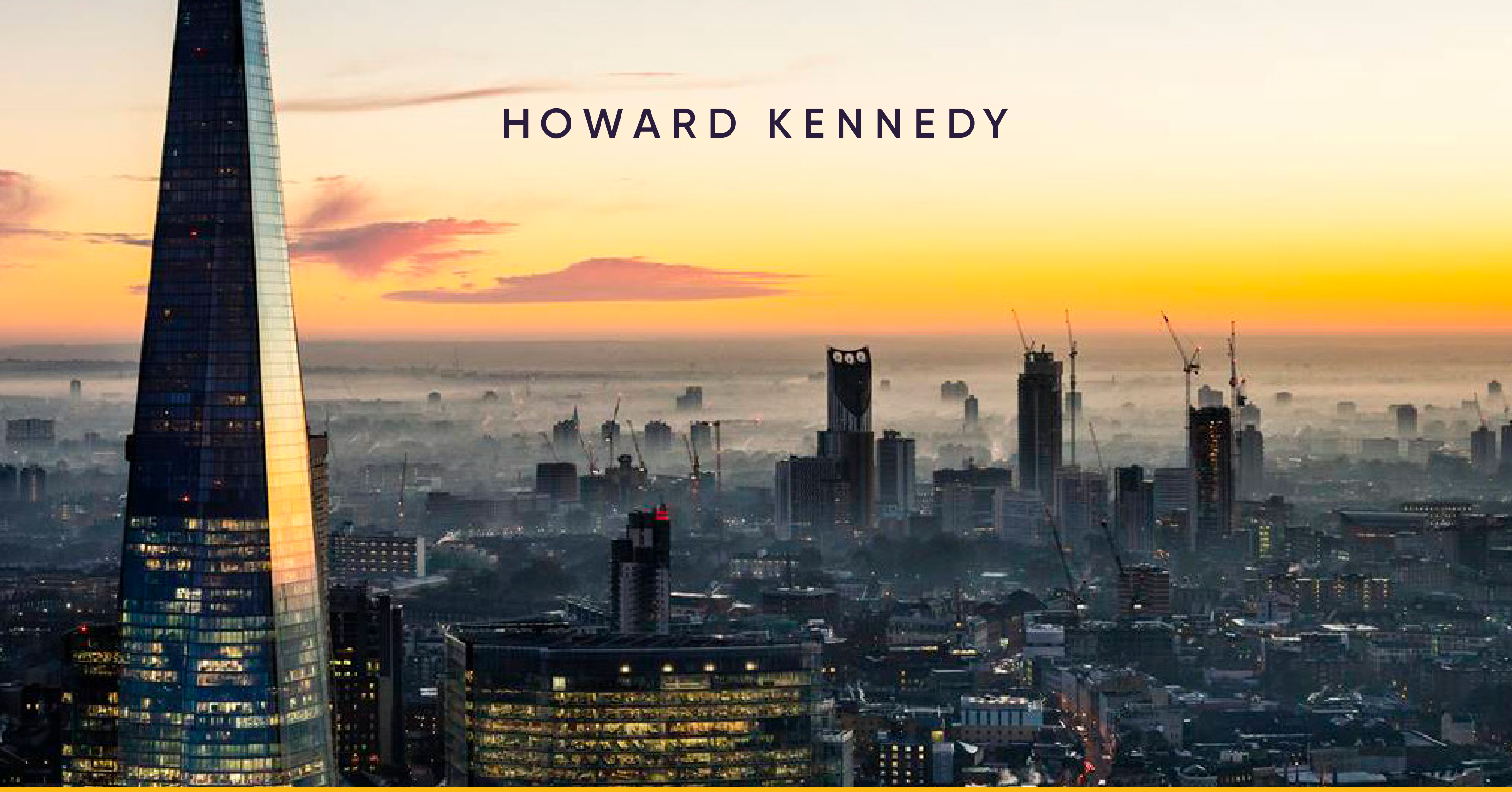
It was also highlighted during the Supreme Court hearing that a key difference between 1975 Act claims and most claims brought under the CPR is that the Deceased's estate often pays the claimant's costs of the 1975 Act claim if the claim is reasonably brought. It is rarely the fighting party who pays the claimant's costs, as happens in most CPR proceedings, so there is justification for 1975 Act claims to be treated differently to some other types of proceedings under the CPR.

And Finally…Can The Supreme Court Uphold Hirachand?

The respondent reminded the Court that, in Simmons v Castle [2012] EWCA Civ 1288 ([15]), awards of general damages were uplifted to compensate for the loss of the recoverability of the ATE premiums and success fees from a defendant. As mentioned, this was following a recommendation made by the Jackson Report. Does it follow that legislative change is not necessary in order for an award to be uplifted to cover a success fee in 1975 Act claims, as the Court of Appeal has successfully already done this in the field of PI? One Lord Justice asserted that the judgment in Simmons v Castle was following a substantial policy review culminating in the Jackson Report which provided authority for the Court of Appeal to give this judgment. There is no such review for 1975 Act claims, but if Hirachand is not upheld, hopefully there will be one.

4 Lilleyman v Lilleyman [2012] EWHC 1056 (Ch)

5 Review of Civil Litigation Costs: Final Report December 2009



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VARIATION OF TRUSTS: AN OVERVIEW

Authored by: Anna Trafford (Trainee Solicitor) - Howard Kennedy

There are myriad reasons why it might be necessary to vary a trust. For example, a variation may be required in the interest of efficient administration, or trustees may lack a particular power, which they need to effect a specific transaction.

A change in a beneficiary's circumstances may also make a variation appropriate, or it may be desirable to postpone the vesting of the trust assets beyond the age of majority to avoid beneficiaries inheriting wealth before they are mature enough to manage it.

In this article, we touch on some of the key routes for variation of trusts, including those accessible without recourse to the court.

Non-Court Driven Processes

In the interest of avoiding unnecessary expense and delay, trustees should first consider options that do not involve the court. There are two potential non-court routes:

1. Rely on the trust deed

In some instances, trust deeds expressly permit trustees to vary the terms of the trust. In this case, trustees can rely on the relevant provision to effect the necessary amendments, subject to any restrictions or conditions attached. This is usually the simplest and quickest way in which to effect a variation.

2. By consent of the beneficiaries

Under the principle established in Saunders v Vautier , if all potential beneficiaries of a trust are absolutely entitled to the trust assets and of age and full capacity, they can direct the trustees to bring the trust to a close and distribute the assets.

Given that this route depends on the type of trust, the circumstances of the beneficiaries and their inclination to agree, it has quite limited applicability. Exercise of this power is also restricted. Beneficiaries cannot choose to vary an existing trust and keep it in existence. If they wish to keep the assets in trust, they must dissolve the structure and resettle the assets, which may have adverse tax or other consequences.

Court Driven Processes

1. Section 57 Trustee Act 1925 (TA 1925)

Where a trustee does not have sufficient powers under the trust deed to carry out certain transactions, the court has power under s57 TA 1925 to authorise specific administrative or management-related acts. The key is that the court must consider them to be expedient and beneficial to all the beneficiaries. This might include actions of sale, lease, mortgage, investment, expenditure, or other transactions.

An application under section 57 is usually made by the trustees, but can also be made by those with a beneficial interest in the trust. Regardless

of the applicant, the court must be satisfied that the authority sought is in the best interests of the trust as a whole.

The added advantage of an application under section 57 is that the court has power to confer a general administrative power on the trustees going forwards, where it considers that would be appropriate. This enables trustees to avoid the need for further applications to court and to adapt to changing circumstances. The 2015 case Re Portman Estate , however, suggests that the court is unwilling to go so far as to confer on trustees a general power to amend the administrative powers in the future.

2. Section 14 of the Trusts of Land and Appointment of Trustees Act 1996 (TLATA 1996)

Applications under section 14 TLATA 1996 may be made by trustees or by those with an interest in property subject to the trust. The court has power to make an order either relating to the exercise by the trustees of any of their functions or to declare the nature or extent of a person's interest in property subject to the trust.

Applications under section 14 are usually made where there is a dispute in relation to trust property. For example, the applicant may ask the court to quantify respective beneficial shares or to determine whether a property should be sold, particularly in situations where one co-owner wishes to sell and the other does not. Trustees may also wish to make an application under this section where they want to be able to sell property subject to a trust without obtaining the beneficiaries' consent.

3. Applications under the Variation of Trusts Act 1958 (VTA 1958)

Under VTA 1958, the court has the power to approve variations of trust for certain categories of beneficiaries, who are unable to approve variations themselves. These include minors, beneficiaries lacking capacity within the meaning of the Mental Capacity Act 2005, those with a hope or expectation of benefitting, unborn beneficiaries and persons with discretionary interests under protective trusts, where the protected life interest has not yet ended.

The court's jurisdiction under VTA 1958 is wide-ranging; the court may order any arrangement which varies or revokes the trust or enlarges the management and administrative powers of the trustees. The court will not, however, approve arrangements that amount to resettlement of a trust on completely different terms.

This route may be used, for example, to terminate a discretionary trust or split a trust fund between certain categories of beneficiary. Applications under VTA 1958 are the most common types of application made where the trust deed does not contain an express power of variation.

4. Section 64 of the Settled Land Act 1925 (SLA 1925)

To authorise specific transactions where trusts are subject to the SLA 1925, trustees may make an application under this section. Since TLATA came into force on 1 January 1997, it is no longer possible to create trusts subject to SLA 1925, but there are such trusts made before that date that still exist.

The court can order that transactions affecting settled land (which are not otherwise authorised under the Act) may be carried out by a life tenant. The court has jurisdiction to order this where, in the court's opinion, it is for the benefit of the settled land or any part of it, and the transaction could otherwise be validly carried out by an absolute owner. "Transaction" has been given a wide interpretation by the court, per Hambro v Duke of Marlborough. It could include, for example, raising money to satisfy the liabilities of the tenant for life.

The power of the court under this section is more-wide ranging than the power under section 57 TA 1925 as it is not limited to management and administrative actions.

Trustees may also apply to vary beneficial interests arising under a trust. Regardless of the nature of the powers sought, the court must have regard to all the circumstances of the case in deciding whether to exercise its discretion.

Conclusion

The appropriate route to effect a variation of trust depends on the category of applicant, type of trust and amendment sought. While non-court processes are clearly preferable, not least for reasons of speed and cost, these options are not always available. However, in such a situation, there are several alternative court-based routes that may be appropriate depending on the needs and circumstances of a particular client.

CAPACITY AND TRUSTS

IT PAYS TO BE PREPARED

Authored by: Sean Knight (Associate) - Payne Hicks Beach

This article will look at some of the practical and pre-emptive steps that can be taken to minimise the complications and risks affecting trusts in the event that one or more of its connected power-holders loses mental capacity.

In the climate of ever-rising life expectancy and increasing rates of dementia diagnoses, capacity issues are becoming more common in the context of trusts. The World Health Organisation projects that by 2050, the world's population of people aged 60+ will be 2.1 billion (22% of the world's total population)[1].

Loss of capacity can be difficult to identify: it can of course fluctuate, and can be a very emotionally charged issue to address. Whether or not a power holder has lost capacity to uphold their office may be a contentious issue, particularly when there are competing interests.

Trusts are often established by settlors who are intelligent and successful people whilst in their prime and, understandably, they may not consider or adequately address the potential issues that their advancing years may present for the trust that they have established.

We do not cover the applicable legal tests and the process required to establish capacity, or otherwise, but instead focus on some of the practical steps that can be taken to pre-empt such issues.

The Trustee

If a trustee's capacity is in question, the most appropriate party to investigate the issue will likely be a co-trustee, if there is one, or a protector or beneficiary. Once a trustee is determined to lack capacity, it is crucial that appropriate steps are taken to establish who can fulfil the role, including:

1. An attorney may be able to act on the trustee's behalf in some respects and as authorised by the trust instrument. The power of attorney must comply with s.25 of the Trustee Act 1925 and, in order to survive the trustee's loss of capacity in England & Wales, must be a Lasting (or Enduring) Power of Attorney. However, s.25(2) limits the maximum period of delegation to 12 months.
2. Replacement or removal. If a trustee does not have capacity to retire, s.36 TA 1925 confers a power to remove a trustee, unless that trustee is also a beneficiary of the trust where leave of the Court of Protection is necessary. The court can replace or add trustees under s.41 TA 1925 and remove trustees under its inherent jurisdiction. In limited circumstances, the beneficiaries of a trust may give written directions appointing a new trustee under s.20 Trusts of Land and Appointment of Trustees Act 1996.

1 https://www.who.int/news-room/fact-sheets/detail/ageing-and-health#:~:text=By%202030%2C%201%20in%206,will%20double%20(2.1%20billion).

The Protector

The majority of jurisdictions do not have legislative provisions for a protector's loss of capacity. There may be a provision in the trust instrument, otherwise the court has an inherent jurisdiction to remove or suspend protectors.

Practical Considerations

Some practical considerations for power holders before and after the establishment of a trust include:

1. The applicable/governing law of the trust. Often, and with understandable reason, settlors will prioritise a jurisdiction for reasons of inter alia privacy and asset protection, but capacity should not be overlooked. Firewalls in offshore jurisdictions provide for the exclusion of foreign law when determining settlor capacity.

2. The terms of the trust instrument:

- Settlors and trustees should be encouraged to include practical provisions to reduce the risk of disputes and the court's intervention. For example, consider including a provision that the loss of capacity shall, with the support of a capacity assessment report, be determined by the trustee(s). That should help to avoid conflicting capacity assessments and, although the trustee's determination may be subject to challenge, it will narrow the issues in dispute and provide the trustee(s) an assumption on which to proceed.

- Consideration should be given to the question of who, if a settlor loses capacity, assumes authority in relation to any powers reserved by the settlor and what impact there is on the trustee(s) to administer the trust if settlor consent is required.

- Consider the terms on which trustees are allowed to delegate their authority, including for how long, and consider whether it would be appropriate for a trustee to execute an LPA expressly covering the relevant trust(s).

- Consider whether the protector and/or trustees are automatically removed on loss of capacity. The role of the protector varies widely between trusts. As capacity is case specific, the requisite degree of understanding may depend on the nature of the protector's powers.

- Consider who can exercise the power to replace/remove trustees and on what terms.

3. For existing trusts, it may be a useful exercise to stress test the loss of capacity of power holders and establish if the existing trust instrument (along with the relevant statute) makes adequate provision.

4. Record keeping. Whilst it is common for settlors to execute a letter of wishes (and to update them periodically as necessary), it is less common for trustees to record their approach to the administration of the trust and how they have interacted with the beneficiaries. It could be helpful for trustees, particularly those who had/have a close relationship with the settlor(s), to do so in order for replacement trustees to include it as a relevant consideration.

It is important to recognise that, even with the benefit of pre-emptive action, in circumstances where a power holder loses capacity there may still be complications, particularly where there are competing interests among the beneficiaries. However, addressing the issues at an early stage, obtaining suitably tailored legal advice and implementing appropriate measures as part of a considered, long-term strategy, ideally with the buy-in of all interested parties, can go a long way towards insulating the trust from at least some of the expense, stress and uncertainty that a loss of capacity can bring.

60-SECONDS WITH:

SIMON ATKINSON
BARRISTER
WILBERFORCE CHAMBERS

Q: Why did you choose a career path in the legal industry?

A: For the intellectual stimulation and the freedom of being self employed.

Q: What do you see as the most important thing about your job?

A: First, giving clear, frank and practical advice. Secondly providing clear, frank and robust court room advocacy.

Q: What motivates you most about your work?

A: The variety of the workload, the wonderful colleagues I work with (and sometimes against!) and knowing that I am providing specialist help to those who need it.

Q: What is one work related goal you would like to achieve in the next five years?

A: A trip to the Supreme Court would be nice! I made it to the Privy Council during Covid but the hearing was remote unfortunately.

Q: What has been the best piece of advice you have been given in your career?

A: Everyone suffers the same sense of aching self-doubt even if they don't show it. It's a useful reminder which comes to my mind frequently.

Q: What is the most significant trend in your practice today?

A: I have seen a huge surge of contentious probate work since the pandemic. Many of my largest and most complex instructions I am currently working on are probate matters.

Q: Who has been your biggest role model in the industry?

A: Jonathan Evans KC (one of my former pupil supervisors, now a vicar). A man who embodies that rare combination of intellectual acuity, incisive advocacy, dedication, professionalism and innate kindness. Plus the confidence and maturity to know when it is time to pursue another calling. A salutary reminder to us all as to how to live.

Q: What is one important skill that you think everyone should have?

A: Does respect count as a skill? Advocates who respect their opponents, the judge and the witness are frequently the most persuasive (and unflappable) advocates in my experience.

Q: What cause are you passionate about?

A: Education. I am a governor of an academy primary school in Cambridge. It has been wonderful to see the hard work and enthusiasm of the staff and students make the school a really special and thriving community. Given all the funding strains and recruitment difficulties facing the education sector, it is heartening to see such drive for the next generation to succeed.

Q: Where has been your favorite holiday destination and why?

A: Portugal. But my husband is French-Portuguese, so I would have to say that wouldn't I? Seriously, though, Lisbon is stunning.

Q: Dead or alive, which famous person would you most like to have dinner with, and why?

A: Kane Williamson. Who wouldn't want to meet the world's number 1 test batsman and a kiwi to boot? My husband would NOT be invited. He hates cricket.

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NAVIGATING FAMILY DYNAMICS: CHALLENGES IN CONTENTIOUS TRUST MATTERS

Authored by: Zac Hanley (Manager) – Saffery Trust

In the vast landscape of client service, trustees often find themselves navigating not only legal complexities and financial intricacies but also the difficulties of family relationships.

Family dynamics can pose significant challenges, often becoming the epicentre of contentious issues that trustees must address. From conflicting interests to generational shifts, the nuances of family dynamics can complicate decision-making, heighten emotional tensions, and test the resilience of wealth frameworks.

Some of the key risks for contention surrounding family wealth are marriages, divorces, and blended families (where two families are joined by marriage resulting in "step" and "half" relationships). It is estimated that one in three families in the UK are blended families, with Office of National Statistics results revealing over 32% of marriages include at least one partner who is remarrying.

The divergence of one household and the establishment of a new, blended family poses unique challenges for high-net-worth (HNW) families and their trustees.

The complexity of each scenario is weighted heavily on both the drafting of the Trust instruments, but also the dynamics between each family member and whether separations are acrimonious.

While divorce is, most likely, not at the forefront of mind for couples about to marry, it is prudent to discuss the possibility of a separation, particularly where substantial family wealth is a consideration for one or both parties. This applies to the Settlor and the potential addition of their new spouse to the beneficiary class, but also the next generation of beneficiaries marrying.

It is not only spouses who can safeguard family assets in the event of divorce or separation. For example, the settlor of a trust may wish to include or exclude their children's partners from benefitting from trust assets and can be particularly useful when the Trust Deed has a wide-reaching beneficiary class.

Another consideration for trustees dealing with contentious matters is the phenomenon of increasing divorce rates in older couples – dubbed the "Grey Divorce".

Couples who have been married for decades will, often, have more complex financial arrangements to consider including pensions and jointly owned assets. It also may be the case that wealth has been generated through the course of the marriage.

The widely publicised divorce settlement between Amazon's multi-billionaire founder, Jeff Bezos, and MacKenzie Scott, is the "largest in history", with Ms Scott being awarded a 4% stake in Amazon, with an estimated value of close to £30bn. The case is a stark reminder of how a couple's financial situation can change dramatically through the course of a marriage, as Bezos founded Amazon a year after the couple wed.

HNW families will experience the same highs and lows as any family, however substantial wealth can pose additional complications.

It is important that trustees build relationships with their clients, including all beneficiaries where appropriate, to be able to engage in open and honest discussions to ensure that the wealth structures remain fit for purpose, as over time, both families and their needs can change drastically.

Conversations about potential issues including separation, divorce and death are ones which trustees should have with their clients to ensure wishes are clearly understood. Trustees will often engage in "mapping" conversations to encourage clients to consider "what if" scenarios to better prepare for the future.

Relationships between trustees and a family are usually long-lasting and will see the transfer of wealth to the next generations of the family, as well as the transfer of trust administration to the next generation of professionals.

A thorough understanding of the dynamics within a client family can help a trustee to spot potential red flags. This can include asking the right questions when being asked to do things that fall outside the ordinary running of the trust or identifying conflicting views within the family as to the growth, diversification, and distribution of wealth.

In my experience of dealing with contentious trust matters, the transfer of wealth between different generations of the family poses increasingly high risks for disputes. The transfer of wealth to children with significantly different circumstances and views can pose considerable challenges.

Take for example a case where a settlor has established a trust to benefit their two children. One child plays an active role in the family business through their working life, directly contributing to the growth of the family wealth before retiring. The other child was not involved in the family business and is dependent on the assets of the trust fund, with no wealth held outside the structure.

It is likely that the child who contributed to the family business may feel that they should benefit more from the trust assets than their sibling. Meanwhile, the other sibling may feel entitled to a "fair share" of the family wealth.

What is "fair" is subjective and trustees must balance several factors including the wishes of the settlor, the reliance of each beneficiary on the trust assets and the protection and preservation of wealth for future beneficiaries. Trustees must continually evaluate whether each beneficiary is being treated fairly, while being mindful that "fair" does not necessarily mean "equal".

Notwithstanding the efforts of the trustee, relationships between family members can become so fraught when disputes arise that it may be necessary to facilitate connections between clients and intermediaries including lawyers, mediators, or counsellors.

It is paramount that trustees have a strong network of specialist client service providers to call upon when conflicts arise.

Trustees are custodians not only of wealth, but of legacies, and should address conflict with resilience, empathy, and a dedication to acting in the best interests of all beneficiaries. By fostering constructive dialogues and embracing the principles of fairness and impartiality, trustees can support clients through all manner of contentious matters.

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COULD LIFE INSURANCE BE AN EFFECTIVE SOLUTION IN SOME CIRCUMSTANCES FOR CONTENTIOUS TRUSTS?

Authored by: Jonathan Morris (Senior Associate) – John Lamb Hill Oldridge

Trusts serve to oversee and manage assets throughout an individual's life and often intergenerationally, normally for tax planning or safeguarding purposes. Despite their undoubted benefits sometimes contentious situations may arise prompting trustees to consider terminating trusts or advancing capital to current beneficiaries so that remaindermen can have their share of capital immediately.

Breaking up trusts will have legal and financial implications, and it should be approached with caution, with individuals and trustees taking robust tax advice and a thorough assessment of the specific situation.

Potential Reasons Why Trustees Might Choose To Wind Up A Trust

1. Irreparable conflict among beneficiaries.
2. Trustee mismanagement: Allegations or evidence of mismanagement, such as financial impropriety
3. Disagreement on investment strategy
4. Challenges to trust validity: legal challenges may prompt dissolution to avoid prolonged legal battles.
5. Significant changes since the trust's establishment may render its terms obsolete
6. Tax planning: dissolution may be driven by tax planning for some/all current beneficiaries.
7. Cost considerations: High periodic charges and administration costs may justify dissolution, particularly if the value of the trust has been depleted, whether through withdrawals, poor investment performance of inflation
8. Desire for independence: Beneficiaries seeking greater autonomy and to gain control over the assets.

Below, I have explored two scenarios where life insurance could offer a solution for trustees, a life tenant and/or beneficiaries.

Case Study 1 – Gift Of Assets From The Life Tenant To The Beneficiaries

An 80-year-old is the current life tenant of an Immediate Post Death Interest (IPDI) trust, established following the death of her late husband. A dispute has emerged between the widow and the children from his first marriage, stemming from their desire to access their assets immediately rather than waiting until her death.

In the event of distribution of all/part of the trust's assets to the beneficiaries, these transfers will constitute a gift from the life tenant and will be treated as Potentially Exempt Transfers (PET) for inheritance tax (IHT) purposes, with a 7-year tail of IHT if the widow dies within this window. To mitigate potential IHT liabilities on failed PETs, the life tenant, beneficiaries or trustees may consider securing insurance coverage for these gifts.

Outlined below are indicative costs for a life insurance policy that would provide cover for a gift of £1,000,000 from the life tenant, for an initial sum assured of £400,000 tapering after year 3 in line with the inheritance tax liability (£1,000,000 @ 40% IHT = £400,000 – without taking into consideration any Nil

Rate Band that may be available).

80-year-old, female, non-smoker:

Year	Sum Assured	Annual Premium
Year 1	£400,000	£11,769
Year 2	£400,000	£11,769
Year 3	£400,000	£11,769
Year 4	£320,000	£9,562
Year 5	£240,000	£7,352
Year 6	£160,000	£5,139
Year 7	£80,000	£2,696

Total premiums payable of the term	**£60,056**
Costs as a % of the gift	**6%**

On termination of the whole/part of the widow's entitlement there will be a loss of income. The beneficiaries/trustees and indeed the life tenant may wish to explore alternative measures for providing the lost income. One viable solution could be to procure a Purchased Life Annuity (PLA), which provides a continuous guaranteed income stream until the death of the annuitant. These annuities can incorporate annual escalation, ensuring that the income grows by a predetermined percentage each year. Furthermore, as the income provided by PLA varies in line with interest rates and therefore now is an opportune moment to purchase.

Client	Annual Benefit	Cost for Purchased Life Annuity
80-Year-Old Female	£30,000	£291,710

This approach could provide an accommodating solution for both the life tenant and the beneficiaries. Serving the dual purposes of facilitating the timely transfer of assets while safeguarding the financial wellbeing of the life tenant throughout their lifetime.

The purchase of the annuity will lead to a loss of capital from the life tenant's estate so there is an effective 40% IHT saving in addition.

Case Study 2 – Life Insurance Vs The Periodic Charge

Where you have trust funds for younger lives, trustees might want to consider both the impacts of the 10 yearly periodic charges and the annual accounting costs. When opting for a trust, the periodic charges and administration overheads can accrue overtime, potentially impacting the overall value of the assets held within the trust. Moreover, the meticulous record-keeping and reporting obligations can add to the administrative burden, necessitating ongoing attention and resources. It can be useful to compare this to the costs of maintaining a life insurance policy.

Trustees may hesitate to release assets to younger beneficiaries due to concerns about their maturity and financial responsibility. Entrusting significant sum to inexperienced individuals could hinder their pursuit of financial independence and personal ambitions.

The below illustration is based on an initial trust value of £1m and an equivalent sum assured with IHT at 40% if the assets were not held in trust. We have assumed a fund growth rate of 3% annually and an equivalent 3% escalation rate of the sum assured, with premiums increasing by 4.5%. The client is a 26-year-old non-smoker.

Start of Year	Trust Value	Periodic Charge	Cumulative Periodic Charge	Sum Insured	Term to 90 Premium	Cumulative Premium	Whole of Life Premium	Cumulative Premium
1	1,000,000	-	-	400,000	£458	£458	£1,958	£1,958
10	1,304,773	78,286	78,286	521,909	£681	£5,628	£3,308	£25,808
20	1,648,296	98,898	177,184	701,402	£1,057	£14,368	£5,924	£72,026
30	2,082,261	124,936	302,120	942,626	£1,641	£27,941	£10,609	£154,796
40	2,630,482	157,829	459,949	1,266,811	£2,549	£49,020	£18,999	£303,024
50	3,323,039	199,382	659,331	1,702,488	£3,959	£81,754	£34,025	£568,478
60	4,197,933	251,876	911,207	2,288,001	£6,148	£132,590	£60,934	£1,043,865
70	5,303,171	318,190	1,229,397	3,074,882	-	-	£109,123	£1,895,211

When comparing the cumulative periodic charges with the cumulative premiums over both the short and long term, for a term life insurance policy running until age 90, the total cost of purchasing life insurance is significantly cheaper. Even when comparing the cost of purchasing a whole of life policy, the premiums would only surpass the cumulative periodic charges when the client reached age 79. Additionally, this comparison does not factor in any additional costs associated with the trust except the periodic charges.

As such, the overall trust charges may be higher meaning the costs of the whole of life cover could remain the cheaper option for longer.

Taking out a life insurance policy to cover the IHT liability on the assets can provide a simple and cost-effective solution in comparison to placing assets into trusts. Paying an annual premium of either £458 or £1,958, in this instance, is far more manageable and the planning is less complicated than co-ordinating the cash necessary for payment of a 6% periodic charge.

Secondly, depending on the assets within the trust, there may not be sufficient liquidity to pay the periodic charges. Illiquid assets, such as property, art portfolios or investments, may not generate regular income or easily convert into cash. As a result, trustees may face difficulty in raising the necessary funds to cover the ongoing and periodic charges. The illiquidity of certain assets can strain trust cash flow, demanding careful trustee financial planning. Life insurance offers a cost effective, easily administered alternative to asset retention in trusts.


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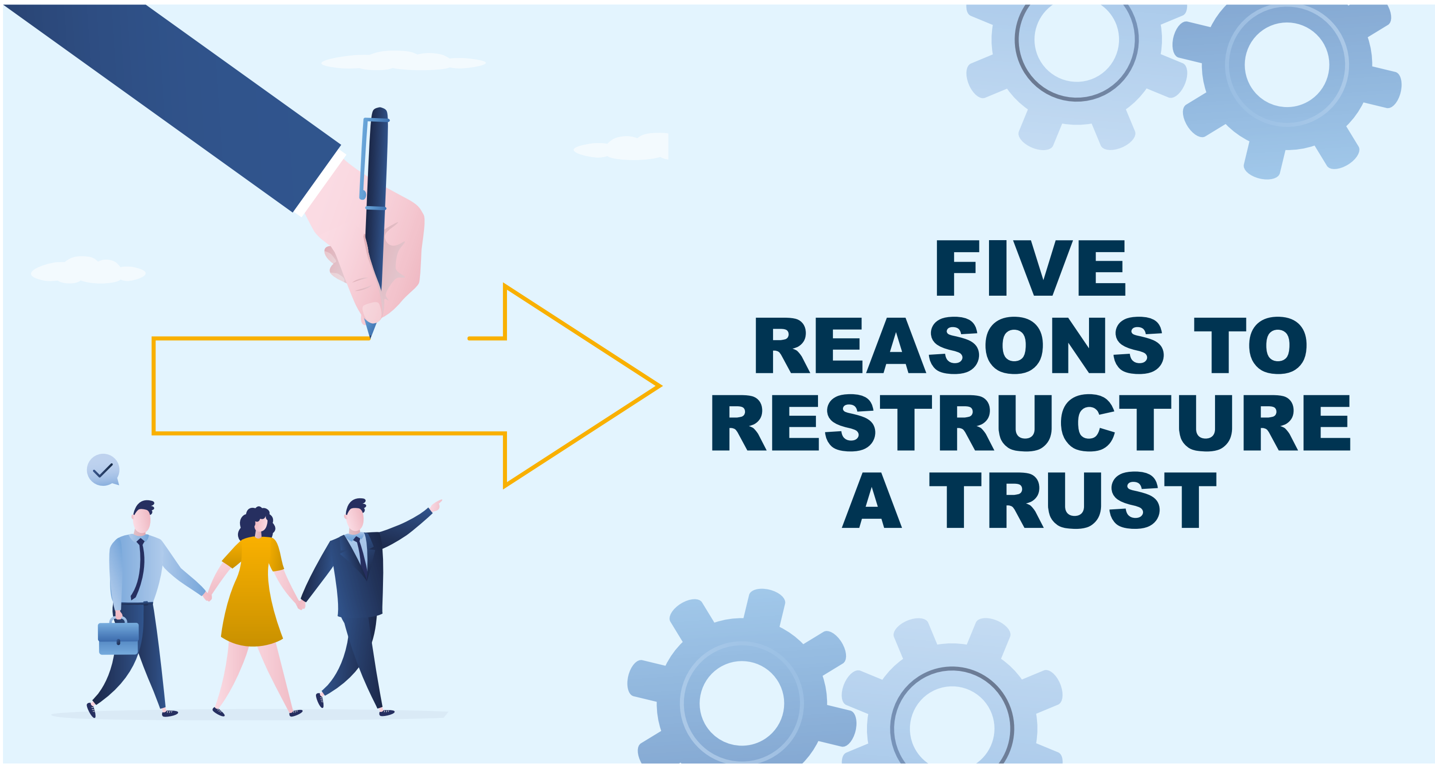


FIVE REASONS TO RESTRUCTURE A TRUST

Authored by: Judith Swinhoe-Standen (Associate) – Stewarts

Trust restructuring cases are on the rise, suggesting that the prospect is increasingly at the forefront of trustees' and beneficiaries' minds.

The exact reason for each restructuring depends on the circumstances in question. It can result from a dispute, shifting family dynamics or a change in the family's aims. Restructuring is not necessarily contentious, and trustees can initiate it pre-emptively to prevent conflict down the line.

So why restructure a trust?

1. The Beneficiaries Have Fallen Out

If the beneficiaries have fallen out and want to reduce or cease contact with each other, they might want to segregate their interests in the trust so they do not have to remain tied together by benefiting from the same fund.

This segregation can also make life easier for the trustee. It reduces the risks of them being inadvertently dragged into beneficiary communications by having to act as a 'messenger' or bearing the brunt of a disagreement. This might arise, for example, if one beneficiary discovers the other has received comparatively more from the trust and accuses the trustee of favouritism.

In this situation, dividing the trust can be a sensible solution.

2. Irreconcilable Tension Between The Trustees And The Beneficiaries

Where tension has arisen between trustee and beneficiary, the beneficiary might no longer want that trustee to manage their trust.

In Representation of B and C [2022] JRC 086, there were trust structures in Jersey and Guernsey. Two beneficiaries applied to remove the Guernsey trustee and the protector in both Jersey and Guernsey. The court found that the applicants had subjectively lost trust and confidence in the protector. However, rather than granting the application for removal, the court suggested the trusts be restructured.

3. Flexibility Around Family Structure

Family structures have changed considerably in recent decades. The nuclear family is less common than it was, and it is not uncommon to have multiple family branches or not get married at all. Further, longer life expectancies mean that four or even five generations of a family might exist at once. As a result, the younger generations are not closely related to each other and might feel less reticent about bringing claims against each other than siblings perhaps would. Trustees need to be adaptable to this and make appropriate adjustments to the trusts.

4. A Beneficiary Is Divorcing

Similarly, trustees must be alive to potential attacks on the trust resulting from divorce.

It is common for the class of beneficiaries of a trust to include spouses. Therefore, a divorced spouse will almost always be excluded from the class once the divorce is finalised.

However, issues arise when a couple has received distributions from the trust to maintain their lifestyle during their marriage as this means the trust is a marital resource that can be factored into the division of assets.

One option to resolve this is to provide the divorcing spouse with a lump sum from the trust before they are excluded. Another option is to carve out a portion of the trust funds and settle it on a separate trust for the divorcing spouse.

Both of these options have the potential to ruffle feathers among the other beneficiaries as the effect of extracting a sum from the trust means there is less available for their benefit. In Re the V, W, X and Y Trusts [2021] JRC 208, the trustees tried to pre-empt this risk by seeking the court's approval to settle a new trust whose purpose would be to meet the 'needs' element of any claims by the beneficiaries' future spouses on divorce. Ultimately, the court declined to bless the decision due to a number of uncertainties in the proposal presented to the court. Nonetheless, it shows the trustees were thinking forward and planning for that eventuality.

To further avoid the risk of trust litigation caused by divorce, trustees could consider encouraging beneficiaries to enter into pre-nuptial agreements that address how the trust will be treated upon divorce.

5. The Existing Trust Does Not Match The Goals Of The Settlor Or Beneficiaries

On the whole, the next generation seems to be more engaged than their parents or grandparents with global issues such as the environment and combating inequality.

At times, that ethos can clash with existing trust arrangements. Recent case law shows a trend of beneficiaries expressing a view that aspects of the trust should be altered to align better with the wider social picture. For example, in Re ABC Trusts [2015] SC (Bda) 29 Civ, a beneficiary opposed a trustee's proposal to reach an agreement with the onshore tax authorities, arguing that there was a social responsibility to pay a "demonstrably fair amount of taxation" rather than negotiating with a view to paying the least possible tax. Although the court found this position to be unreasonable, it shows that younger beneficiaries may not want their trusts to be managed in the same way as previous generations.

Conceivably, not all parties will feel the same about these issues, which might create tension between groups of beneficiaries. A solution could be to divide the trust so that each part can be managed in a way that matches the priorities of each group.

Adaptability Is Key

When managing trusts, trustees must be attentive to family and societal changes as well as disputes on the horizon, and remain flexible in addressing the risks in question. Restructuring is not always a smooth process, but the rewards can outweigh the risks if it helps keep the peace.

INHERITANCE TAX – IS IT A GAME OF HIGHER OR LOWER?

Authored by: Helen Briant (Partner), Elizabeth Mulley (Managing Associate) and Hannah Jakeman (Associate) – Trowers & Hamlins

Inheritance tax, also known as IHT, is payable on an entire estate upon the death of an individual, except when:

1. The value of the estate is below the threshold of £325,000; or
2. You leave your entire estate over the threshold to your spouse, civil partner, a charity or a community amateur sports club.

If you decide to give away your home after death to either your children or your grandchildren, it is possible for the tax threshold to be increased to £500,000. The standard rate of IHT is 40% and it is only charged on the part of the estate that is over the relevant threshold. As with the majority of taxes that have to be paid there are a number of tax reliefs and exemptions available and that may apply to a variety of circumstances. This includes the possibility to have business relief applied to some assets which means they can be passed on free from inheritance tax or with a reduced amount of tax payable.

With the collection of IHT now being an established part of the administration process following a person's death, it has been recorded that the amount of IHT collected by HMRC over recent years has increased. The most recent figures that have been published show an increase of £0.4billion compared to the previous year.[1] In addition to this there has also been a reported increase in the number of estates where huge sums are being received by way of inheritance due to the overall size of the estates being so much higher than they have been historically.

It is believed that this increase in the value of estates, especially at the higher end, is what has driven the increase in the amount of IHT that has been paid to HMRC. An additional factor is the increase in the overall value of houses – as the market has continued to increase the value of houses until only recently when the market has started to begin to slow.

There has also been an increase in the value of other assets alongside property which has resulted in the general value of assets being increased across the board.

With the increase in revenue being received from the collection of IHT, the Government have started to review the IHT regime. The proposed changes to the IHT rules and the current thresholds were circulated towards the end of last year. The possible proposals to amend the IHT rules included a reduction in the percentage of IHT that would be payable on an estate that was valued over the threshold. As far as we are aware, the threshold would remain the same and the application of the IHT would still only apply to the part of the estate that is over and above the threshold. It was thought that any possible changes by the current Government would be referred to in the budget in March 2024[2] and that such changes would be as previously alluded to by the Prime Minister. The budget, however, seemingly remained silent on any changes to IHT. With the increases

1 IHT receipts £0.4 billion higher than same period previous year - Today's Wills and Probate (todayswillsandprobate.co.uk)

2 Rishi Sunak considering inheritance tax cut, report says | Inheritance tax | The Guardian

in IHT being received by HMRC it seems unlikely that a Government, either current or future, in the middle of a cost-of-living crisis will reduce any form of long standing tax that is payable by a seemingly ever increasing number of estates.

Should the proposed changes to the percentage of IHT be implemented in the future, one advantage of a reduction in the payment of IHT is that it may allow more claims relating to disputes over estates to be settled as the burden of the IHT liability will no longer be a blocker to settlement (or as much of a blocker as it might have been previously). It can sometimes be the case that whilst parties can agree to the transfer of the estate assets to another party to the dispute, the IHT is still due and payable by the estate. If the beneficiary or third party receiving the asset(s) as part of the settlement is unable, or in some cases, unwilling to settle the IHT liability relating to the asset(s) they receive, the liability automatically falls back on to the estate and ultimately, the executors. This is a burden on the executors that they may not be able to meet if there are not enough funds left within the estate. The executors could ultimately find themselves personally liable for the IHT. The IHT liability does not simply go away once the asset has been gifted. This, therefore, could make the dispute almost impossible to resolve by way of settlement or any form of alternative dispute resolution as well as subjecting the executor to substantial cost exposure.

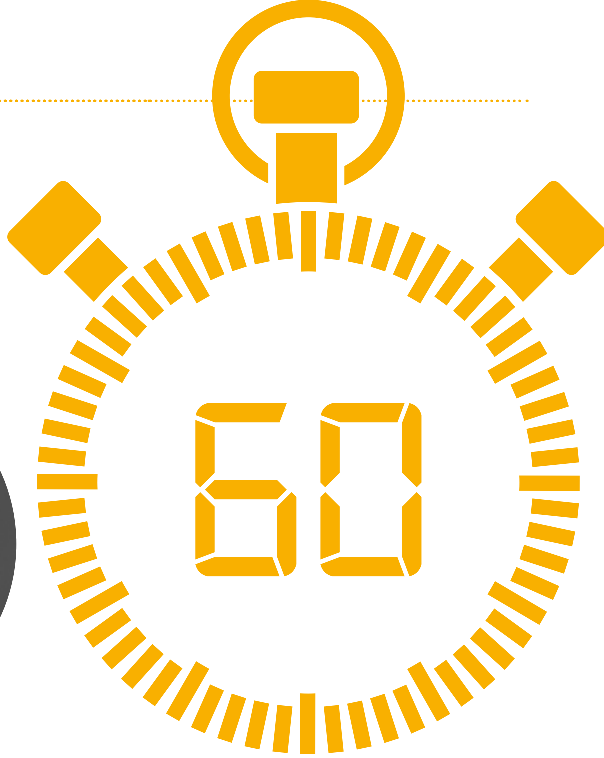
With any proposed changes being made to the IHT regime there will inevitably be individuals that benefit and others that will not benefit. If the percentage of IHT decreases, it would mean that there will be a number of estates being administered that will become liable to pay less IHT compared to the current percentage of IHT payable. This will make it easier for the executors to administer the estate and it will inevitably place a smaller financial burden upon the estate and ultimately the executors, compared to the current percentage of IHT that is applicable.

Should the amount of IHT payable increase, it may be possible that more estates could fall into disputes as those administering them may find it difficult to realise the estate assets to pay the IHT required.

At this time, it is still unclear what changes could be made to IHT, when those changes could be made or if the current government will make any changes at all, especially now the budget has been announced with no adjustments to IHT published. From the perspective of the government, it is becoming an increasingly profitable tax with the amount of IHT recently paid increasing year upon year. Until any changes are formally made, and fully introduced, the payment of IHT will need to continue to be factored into the administration of all estates by all executors and personal representatives following a person's death. It will also be essential for IHT to remain at the forefront of any discussions when estates are not only being administered, but also during disputes and the gifting of large assets.

60-SECONDS WITH:

KELLY WATSON
CLIENT SERVICES DIRECTOR
ACCURO



Q Why did you choose a career path in the legal industry?

A My father wasn't keen on me studying music and instead suggested I become a lawyer as I was good at arguing!

Q What do you see as the most important thing about your job?

A Finding solutions to problems that seem insurmountable.

Q What motivates you most about your work?

A Helping fix things that are broken including families.

Q What is one work related goal you would like to achieve in the next five years?

A Make Accuro number one in the offshore market in the area of contentious trust work.

Q What has been the best piece of advice you have been given in your career?

A Honesty is the best policy.

Q What is the most significant trend in your practice today?

A Increased recognition of the need for trustees who are willing to take on distress structures.

Q Who has been your biggest role model in the industry?

A Paul Douglas – he has taught me a lot about giving people space and opportunity to excel.

Q What is one important skill that you think everyone should have?

A The ability to truly listen.

Q What cause are you passionate about?

A Openness about miscarriage and childlessness.

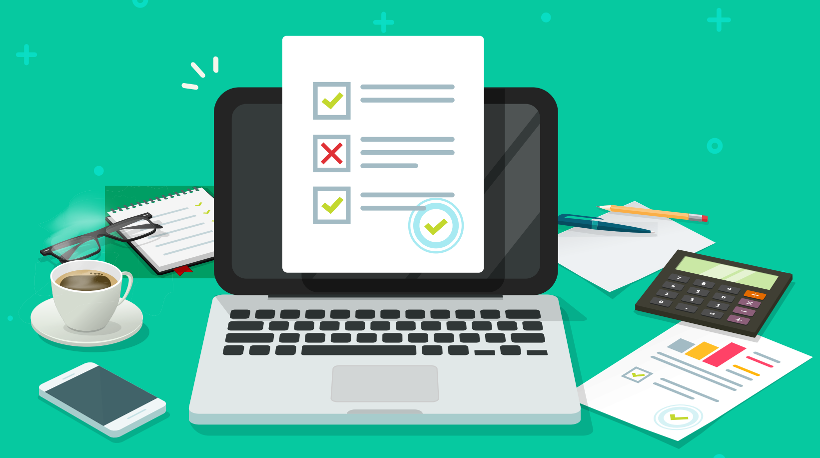
Q Where has been your favorite holiday destination and why?

A Most recently France – days of cycling, drinking and eating with friends – just perfect!

Q Dead or alive, which famous person would you most like to have dinner with, and why?

A Maria Callas – one of my all-time favourite opera singers – I would like to understand how she managed to get such passion in to her singing.

ELECTRONIC WILLS



A SCEPTICAL VIEW

Authored by: Kevin Kennedy (Partner) - Burges Salmon

We are awaiting the results of The Law Commission's consultation on electronic wills.

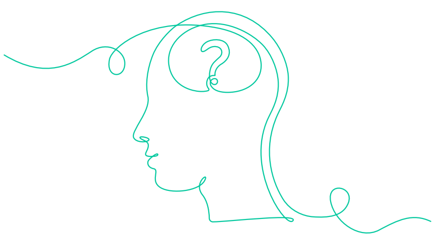
The issues around this are complicated but for many lawyers dealing with private clients there is a real concern that long term and concerted efforts to democratise legal process will have a detrimental effect on the security and perception of wills amongst clients. Ultimately, that may leave the will-making process weaker rather than stronger.

One reason for this is the economic direction of travel. Seeing a will advertised on the back of a bus for £99 makes it very clear that for a large part of the consumer market this is a commodified product already. That will only advance with the ability to deliver wills electronically. There will be many seeking to bring the cost-benefit of online scalability to this market, in the hope that they can make money even at low fixed prices.

So what? Is that not simply the grumblings of someone in a firm where will and estate planning is for HNW clients who require bespoke advice that is priced accordingly? Don't reforms of this sort instead achieve greater protection for the majority, and surely having some inexpensive and easily obtained process around testamentary dispositions is better than nothing? Perhaps, but the UK experience over the last 30 years is not one in which the population can have particular confidence that the market can deliver a fair and good quality product. Instead, there are many examples that can be thought of where a liberalised approach has led to a race to the bottom. Over this hangs the idea of the loss leader – the inexpensive will leading to the more lucrative probate. That is perhaps something to be more concerned about.

But that is taking a sceptical view of the market. The changes do not themselves mean that there has to be a poor market response. Instead, we could see a flourishing of will providers who are liberated by the ability to deal with their clients' wills electronically, from inception to execution and future storage.

The greater concern arises from the direction of travel towards electronic preparation and particularly execution of wills.



On the current line of thinking, electronic wills will require the amendment or replacement of the Wills Act 1837. The rule there is that a valid will has to be in writing, signed by the testator in the presence of two other witnesses each of whom then sign the will (there are certain limited exceptions but in the main this is how wills have to be executed).

In turn, the will that is signed is usually the result of a series of contacts between the lawyer or will writer and the will-maker, against the unusual setting of what is probably best described as qualified confidentiality for the will-maker, given the impact of Larke v Nugus, the case that set the approach for the examination of an otherwise-privileged will file in the event of a challenge.

If a challenge to the will arises, those contacts with the lawyer preparing the will, and the circumstances around the execution of the will, become very important and subject to close scrutiny.

This is not just a case of the majority of will-makers having to jump through hoops because of the minority where disputes emerge, however. The nature of the scrutiny that is given to wills when subject to challenge, whether as a consequence of being required to be proved in solemn form or being subject to a direct challenge by a third party, should be reflected in the processes to be undertaken for the preparation of all wills, including that majority that will never be subject to challenge. It is those safeguards that make wills so robust, and such an important part of succession planning.

A realistic concern is that anything that waters down the onerous requirements around the execution of wills (and which in turn, is likely to have a watering down effect on their preparation, in reality) is not to be encouraged.

It sounds like a protectionist argument, but the nature of wills and their role in documenting the disposition of the estates (often of significant value) of individuals, executed by the older generation, who can in reality be more subject to pressure or influence, means that the hoops that have to be jumped through appear worthwhile, because they protect the maker of any particular will. That protection is derived both from the degree of caution needed in the will-making process, and then in the awkward need for manual execution in almost all circumstances, with two witnesses.

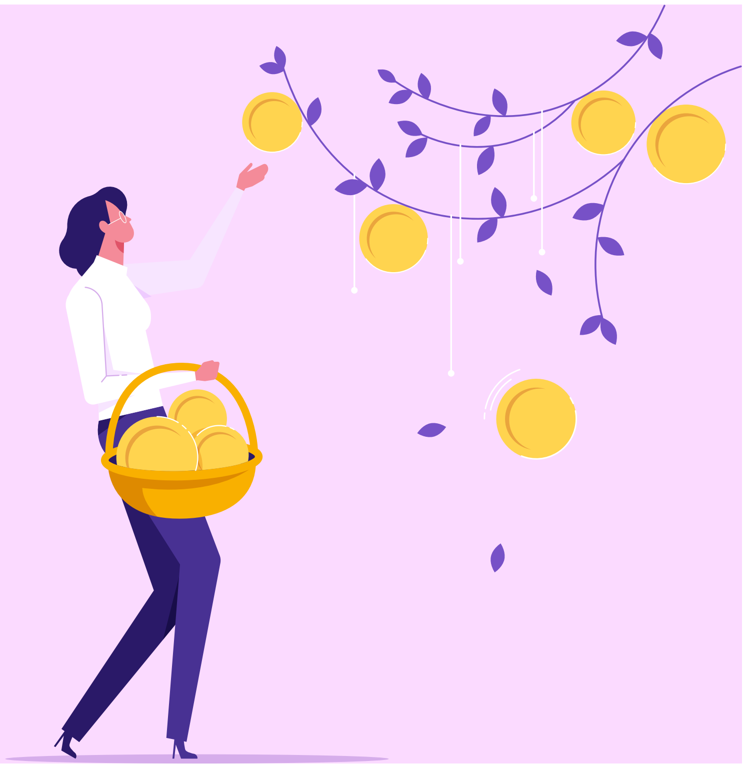
While the commercial world has clearly shown the ability to adjust to an online approach, with the electronic execution of documents being widespread, and regarded as safe, the circumstances between many of the transactions relying upon that technology and the individual nature of someone making a will means that the adoption of technology in one area is not necessarily a reliable indicator of how it will impact a very different area.

Collectively the current rules around wills, while no doubt creating some frustration both for those making the will and those drafting them, present a robust system where will-makers can have confidence that, while they cannot rule out a challenge being made to their will, the strength of the process around it means that the opportunity to interfere with the wishes of the will-maker is more limited. In turn, that means that their wishes stand a better prospect of being respected.

So the brave new world that may be coming may be helpful in certain respects – wills might be turned around faster, and there might be less drama around their execution.

But there could be longer term consequences, including a weakening of the will as an operative document in itself. It is to be hoped that the risk of this will give rise to a cautious approach before there is a fundamental change in the system.

TRUST LITIGATION IN SCOTLAND – CHANGES ON THE HORIZON



Authored by: Sarah-Jane Macdonald (Partner) – Wright, Johnston & Mackenzie

With Royal Assent being granted to the new Trusts and Succession (Scotland) Act 2024 (the "Act") on 30 January 2024, Scotland is embarking on a wholesale reform of trust law.

Whilst most of the Act merely codifies the law as it has always been understood, there are several new provisions that could give rise trust litigation, covering Trustees, Powers and Terms & Routes.

1. Trustees
    - A higher duty of care on professional trustees.
    - An ability to remove "incapable" trustees.
2. Powers
    - The introduction of protectors without restriction on their powers.
    - An ability to delegate dispositive powers.
3. Terms & Routes
    - A new route to alter the terms of a trust by a wide range of parties.
    - Routes to seek information from the court.

Trustees

Duty of Care

Historically, Scotland has not required any greater duty of care by someone acting in a professional capacity, e.g., a solicitor or accountant. s31(2) of the Act now requires such a trustee "to exercise such skill, care and diligence as it is reasonable to expect from a member of the profession in question".

Although there is no case law on this point yet, it was suggested during the consultation process that practitioners should refer to professional negligence cases.

This opens the door to potential litigation that might otherwise have failed were it not for a trustee's profession. This can't be used retrospectively for breaches that occurred before the section is enacted, but it does apply to all trusts (including those created before the new Act).

Ability to Remove

Practitioners have welcomed the provisions allowing the removal of an incapable trustee without recourse to the court (s9(1)). Whilst in most cases this will offer a practical solution, it is open for abuse.

Take for example, two sibling trustees that do not get along, one perhaps with difficulties but who could (with support) continue to act. The "capable" trustee could unilaterally remove their sibling and assume trustees aligned with their own interests. Such trustees could then appoint the trust fund to the entire exclusion of the removed trustee (or their family).

There appears no statutory recourse to a removed trustee to contest this decision, albeit the common-law nobile officium could be an option. However, such a party may have to act quickly to seek Interdict from the court to stop their co-trustee from taking any actions meantime.

Powers

Protectors

Chapter 7 of the Act formally introduces the concept of protectors. Whilst this generally brings Scotland in line with other jurisdictions, the Act (s53(2)) has given an unfettered ability to give protectors any powers that a settlor sees fit – for example powers to direct that the trustees appoint assets to a certain beneficiary, or to direct the removal of a party.

This could be subject to litigation where a settlor appoints themselves as protector and the trustees have their hands tied to only do as the settlor directs. Scotland doesn't have the concept of a "sham" trust, as England & Wales do, but it could certainly be argued in the future. Likewise, HM Revenue & Customs may be inclined to challenge such trusts.

More broadly, any action raised by a beneficiary would still, by default, be against the trustees. Trustees would then need to rely on s57 to seek that the protector be personally liable.

Delegation

s22 of the Act allows trustees to appoint agents and whilst s22(5) does restrict this by stating certain powers cannot be delegated - this is overruled if "the trust deed expressly provides otherwise". Much like protectors, it opens the doors for dispositive powers to be exercised (and abused) by non-trustees.

Whilst the trustees would have recourse against the agent to hold them to account for any troublesome actions, beneficiaries would still have a right to seek redress from the trustees. Trustees would need to defend their decision to appoint the agent, and their supervision over the agent that allowed the breach to occur.

In practice, trustees ought to seriously consider delegating such powers given that liability can ultimately rest with them.

Terms & Routes

Change of Trust Purposes

s65 introduces a new court action available to various parties to have a trust's purposes changed if there has been a material change in circumstances. This is open to a very wide class including the settlor and any descendant of the settlor – even if they are not potential beneficiaries of the trust.

This has never been possible before and the uses of the section seem unlimited.

One potential use would be for a scorned party who was excluded from a Will to seek entitlement to a trust created under a Will, or an inter vivos trust by the deceased. They would need to show that there had been a "material change in circumstances" and persuade a court that it the purposes ought to be altered.

Provision of Information

s29 now sets out what information trustees ought to provide to a beneficiary, and what is, generally, regarded as being excluded (e.g., letters of wishes and minutes of decisions). However, it also allows a range of people to seek the court to overrule a trustees' decision not to disclose information. Much like s65 (above), it is open to any potential beneficiary and certain non-beneficiaries.

A caveat was included that persons could only do so if their interest was not of "negligible value". That could open a debate as to whether an action would be competent, before even considering the basis of their request.

When Will This Be In Force?

With all these changes afoot and new case law that has yet to be developed, it should be noted that the Act is not yet in force. The Scottish Ministers are required to introduce further regulations enacting the sections, which could be done in a piece-meal fashion.

That said, anyone acting for parties who are beneficiaries of Scottish trusts, or where the domicile of a trust may be in question, should be live to the changes now and taking advice as appropriate.

NO-CONTEST CLAUSES: ON ONE CONDITION...

Authored by: Helena Taylor (Associate) – Wedlake Bell

Sim v Pimlott and others [2023] EWHC 2296 is the latest case to consider the efficacy of "no-contest" clauses. Such clauses can be included in a Will in order to disincentivise a potentially disappointed beneficiary from challenging its provisions.

Background

This case concerned the late Dr David Sim and his wife, Valerie Sim. Mr and Mrs Sim had been separated for many years. They shared a fraught history littered with various proceedings; Mrs Sim having made serious allegations of abuse and violence against Mr Sim. Despite this, by the time of Mr Sim's death in January 2018, they had not divorced.

Mr Sim left a Will that stated that his wife was to receive a life interest in the residuary estate and two pecuniary legacies: one for £250,000 and one for £125,000. Both legacies were, however, subject to certain conditions. In accordance with the Will, Mrs Sim was only to receive the sum of £125,000 if she released her interest in a Dubai property they owned jointly and she would only receive the sum of £250,000 if she executed a deed of release in respect of any claim she may have under the Inheritance (Provision for Family and Dependants) Act 1975 (the Act).

Mrs Sim declined to comply with either of the above conditions. Instead, she commenced proceedings under the Act on the basis that Mr Sim's Will did not provide her with reasonable financial provision.

The Inheritance (Provision for Family and Dependants) Act 1975

The Act gives a spouse and certain other classes of eligible claimant including those financially dependent on the deceased, the ability to bring a claim against the deceased's net estate if a Will or intestacy fails to make reasonable financial provision for that person.

In such a claim, the court is able to make a wide variety of awards including a transfer of property and/or payment of a lump sum from the deceased's estate.

When considering whether or not to make an award, the court will consider a number of factors including the needs and resources of all relevant parties and the size and nature of the estate. Where the claimant is the spouse or civil partner of the deceased, the provision required need not be for the claimant's maintenance; instead it is based on what is reasonable for the claimant to receive, whether or not it is for that person's maintenance.

Findings

The judge in this case took the view that in light of the history between Mr and Mrs Sim, it was not unreasonable for the Will to have been drafted in the way it was. Mr Sim was deemed to have executed his Will in such terms to ensure that his wife received no more than the reasonable financial provision that would be awarded to her on any claim under the Act.

The judge made clear, however, that it was not the role of the High Court to consider whether the deceased's intentions were reasonable. Instead, the issue to consider was whether the Will made reasonable financial provision for Mrs Sim, having regard to the various factors set out in section 3 of the Act. After carrying out this assessment, the judge found that had Mrs Sim met the conditions attached to the legacies (which, evidently, she had not), such payments would have amounted to reasonable financial provision. Following this finding, the next question for the Court to consider was whether a claimant can subsequently argue that reasonable financial provision has not been made as a result of an effective no-contest clause.

The Court found that "it would be wrong in principle for a claimant to pursue a… claim [under the Act] in the knowledge that in doing so, they will forego a certain benefit, and then to say that, because they have forgone that benefit, the will fails to make reasonable financial provision".

This suggests that where no-contest clauses have been included in a Will that contains objectively reasonable provisions and conditions, a potential claimant cannot refuse to comply with such conditions and then challenge the level of financial provision made as a result of the enforcement of such a clause.

Whilst in this case, the Court did ultimately override the terms of Mr Sim's Will to provide Mrs Sim with suitable housing (as it was held that the life interest in the residue was insufficient for this purpose), this does not alter the findings in relation to no-contest clauses generally. It remained that Mrs Sim had forfeited her right to receive the pecuniary legacies that had the conditions attached to them. The no-contest clauses were effectively upheld.

Wider Implications

The case of Sim v Pimlott and others is a useful reminder that no-contest clauses can be effective if they are drafted in a reasonable manner. Those who wish to include a no-contest clause should therefore seek professional advice to ensure that any such clause is incorporated in a suitable form. Failing to attach the right conditions to the right amount of financial provision will mean that there is a lesser chance of the no-contest clause being upheld.

In addition, this case highlights the need to assess the merits of a case before issuing proceedings under the Act. Such cases are highly fact specific and a careful assessment of the circumstances and the associated risks is required before proceedings are commenced. This is particularly the case due to the possibility of being penalised on costs if a court considers the approach taken to a challenge to be unreasonable. By way of example, in this case, the wife was penalised at the costs hearing (Sim v Pimlott [2023] EWHC 2298 (Ch)) both for her conduct in bringing the case and also ignoring a Part 36 offer.

It is therefore important to seek specialist advice before embarking on a claim under the Act.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Authored by: David McGuire (Principal Associate) – Weightmans

What Is A Protector?

A protector is an entity independent of the trustees of a trust and holds powers under that trust. They have fiduciary or personal powers to oversee or control the administration of the trust and are usually appointed in the trust document or alternatively in a separate, standalone document.

What Do They Do?

If a settlor decides to provide for a protector, they will usually be given the power (either via the trust document, statute or impliedly) to appoint and remove the trustees of the trust, in order to mitigate against the difficulties that can arise between beneficiaries and trustees.

A protector can also approve numerous matters pertaining to the administration of the trust, for example trustees' self-dealing and remuneration, accounts and decisions made during the course of the administration.

A protector can, therefore, provide an extra layer of comfort to a settlor where they are appointing unfamiliar trustees, particularly where a protector is a close friend or family member (as is often the case).

What Is The Nature Of Their Powers?

A protector's powers are typically considered to be fiduciary. It follows that any powers must be exercised in good faith and in the interests of the beneficiaries as a whole.

A protector can also have personal powers and where those powers are unlimited the protector can exercise them for any purpose (including to their own benefit).

If they are limited personal powers, they are more akin to those which are considered to be fiduciary. The main difference between limited personal powers and fiduciary powers is that in respect of the former there is no duty to consider whether or not to exercise them.

Can They Be Liable?

Yes, they can be, and the trust document will usually limit, include or exclude a protector's liability.

Are Protectors Paid?

If a protector properly incurs expenses in carrying out their fiduciary duties they will usually have a right to be reimbursed for those expenses. The trust instrument may provide the protector with an express indemnity in this regard. If it does not, the protector may have an implied right to an indemnity (subject to the express provisions of the trust).

Problems Arising Out Of A Protector's Appointment

The extent of a protector's powers can give rise to a number of issues. If, for example, a protector can release a trustee from liability for a breach of trust, that could in theory leave the beneficiary without any remedy (and it is unlikely to be a power exercisable in the beneficiaries' best interests). The same can be said in respect of permitting the non-disclosure of trust information by trustees.

Whilst there has been some debate as to the extent to which protectors can veto decisions made by the trustees, it seems that a protector can in theory veto a rational decision made by a trustee as protectors have been appointed precisely to exercise their own judgment. This can result in a greater prospect of deadlock between protectors and trustees.

That said, the position is likely to be different in circumstances where the protector disagrees with the trustees and also all of the beneficiaries (who are in agreement between themselves). By way of example, it is unlikely that the Court would allow a protector to remove a trustee if all of the beneficiaries did not wish for their removal. That position is aligned with the requirement for a protector to exercise their fiduciary powers to advance the beneficiaries' interests (and it is the beneficiaries' assessment of that which will prevail).

Another potential issue is that excessive powers in the hands of a protector can effectively render the trust within the protector's control. If, for example, a protector who is also a settlor can veto any decision and remove trustees at the protector's sole discretion, the Court may ultimately determine that the trustees are holding the assets upon trust for the protector. This may render the trust non-existent or a sham and the beneficiaries will have no rights under the same.

Conclusion

Broadly speaking, a protector's powers tend to be fiduciary. They cannot, unless they are also a beneficiary and/or there is express provision to the contrary in the trust document, use their powers for their own benefit and they must be exercised in the interests of the beneficiaries. Whilst beneficiaries can take some comfort in that, they are to some extent relying on the interpretation of the trust documentation, obtaining copies of which can be difficult in itself.

As for trustees, they must obey the protector's directions or otherwise risk falling foul of the terms of the trust documentation. They should, however, exercise care when doing so, ensure that the protector is exercising their power for a proper purpose and be mindful of their own responsibilities and potential liability.

NAVIGATING CONTENTIOUS ESTATES:

THE ROLE OF FAMILY GOVERNANCE

Authored by: Tsitsi Mutendi (Co-Founder) – African Family Firms

Contentious estates often become the epicenter of family conflicts, creating rifts that can last for generations. In such challenging times, establishing a robust family governance system can prove to be a crucial tool for maintaining harmony and ensuring the smooth transition of assets. This article delves into the complexities of contentious estates, explores the benefits of family governance, and provides guidance on what steps to take when governance falters and communication breaks down.

Contentious estates arise when family members are confronted with the distribution of assets, often leading to disagreements, disputes, and emotional turmoil. The absence of clear guidelines and effective communication channels can exacerbate conflicts, turning a grieving process into a battle for possessions.

Family governance involves the establishment of structures and processes to facilitate effective decision-making and communication within a family. When applied to estate planning, it can significantly mitigate the potential for conflicts. Here's how family governance can help navigate contentious estates:

1. **Clear Guidelines and Expectations:** Establishing protocols for estate planning within the family provides clarity on how assets will be distributed. This can help manage expectations and reduce the likelihood of disagreements among heirs.

2. **Open Communication:** Family governance encourages open and transparent communication. Regular family meetings, facilitated by a neutral third party if necessary, create a platform for discussions about the estate plan, ensuring that everyone is on the same page.

3. **Conflict Resolution Mechanisms:** Including mechanisms for resolving conflicts within the family governance structure is vital. Mediation and arbitration processes can offer alternatives to litigation, promoting resolution without damaging familial relationships.

4. **Succession Planning:** Clearly defined succession plans outline how leadership and decision-making responsibilities will transition within the family. This prevents power struggles and ensures a smooth handover of control.

Case Study: The Smith Family - Navigating a Contentious Estate Through Family Governance

The Smith family, a prosperous business-oriented clan, found themselves facing the challenging task of managing a sizable estate after the patriarch, Mr. Robert Smith, passed away unexpectedly. With a diverse portfolio of assets, including a successful family business and various properties, the potential for conflicts among the heirs was high.

Background: The Smiths recognized the need for a strategic approach to estate planning early on. In anticipation of potential challenges, they decided to implement a comprehensive family governance structure. This included regular family meetings, a clearly defined succession plan, and a dispute resolution mechanism facilitated by an impartial family advisor.

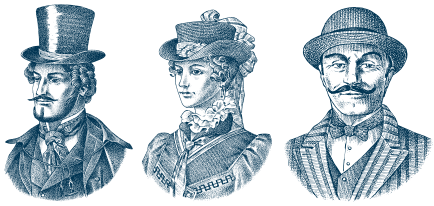
Establishment of Family Governance:

1. Regular Family Meetings: The Smiths initiated quarterly family meetings where all members, regardless of their role in the family business or the hierarchy, could openly discuss matters related to the estate. These meetings created a space for transparent communication and allowed each member to express their concerns and expectations.

2. Succession Planning: Recognising the importance of succession planning, the family established a clear roadmap for the transition of leadership roles within the family business. This plan not only outlined the responsibilities each member would assume but also detailed the criteria for decision-making and the distribution of assets.

3. Dispute Resolution Mechanism: The family engaged the services of a professional mediator who, in times of disagreement, would facilitate discussions and guide the family towards mutually agreeable solutions. This proactive approach aimed to prevent disputes from escalating into prolonged conflicts.

The Challenge: Despite their efforts, the Smith family faced a considerable challenge when it came to distributing ownership shares of the family business. Differing opinions on the valuation of the business and each member's contribution led to a deadlock that threatened to strain family relationships.



Successful Implementation of Governance:

1. Mediation Process: When the dispute over the business shares arose, the family immediately activated their dispute resolution mechanism. The professional mediator was brought in to objectively assess the situation and facilitate negotiations among family members.

2. Open Communication: The established communication channels proved to be invaluable during this challenging time. Family members were encouraged to express their concerns and viewpoints openly during the mediation sessions, fostering an environment of trust and understanding.

3. Adaptation of Governance: Recognizing the unique nature of the business share dispute, the family used this experience to refine their governance structure. They adapted their governance protocols to include specific guidelines for addressing valuation issues, ensuring a more streamlined process for future disagreements.

Outcome: Through the mediation process and adherence to their family governance principles, the Smiths successfully reached an agreement on the distribution of business shares. The resolution not only preserved family relationships but also reinforced the importance of the established governance structure

Key Takeaways: The Smith family's case demonstrates that proactive implementation of family governance can effectively navigate contentious estate matters. By fostering open communication, engaging in a structured dispute resolution process, and adapting their governance structure when necessary, the Smiths turned a potential family feud into a learning opportunity. This case underscores the value of a well-thought-out family governance system in preserving familial bonds and ensuring a harmonious transition of assets during challenging times.

When Governance Fails:

Despite the best intentions, family governance can falter. In such cases, it is essential to have contingency plans and strategies in place to address breakdowns in communication and rising hostilities.

1. Seek Professional Mediation: Engaging a professional mediator can provide an unbiased perspective and facilitate discussions between family members. Mediation often helps parties find common ground and work towards mutually acceptable solutions.

2. Legal Intervention: In extreme cases, legal intervention may be necessary. Seeking the guidance of estate planning attorneys can help resolve disputes within the bounds of the law, ensuring a fair and legally binding resolution.

2. Family Counseling: Emotional aspects often underpin estate disputes. Family counseling can be a valuable tool to address these emotional barriers, fostering understanding and empathy among family members.

3. Reevaluate Governance Structures: If the breakdown in communication is due to flaws in the existing governance structure, it may be necessary to reassess and refine these structures. Learning from the failure can lead to a stronger, more resilient system.

Case Study: The Johnson Family - Unsuccessful Governance in Contentious Estate Management

The Johnson family, owners of a substantial real estate portfolio and successful family business, embarked on the challenging journey of managing their patriarch's estate after Mr. William Johnson passed away. Despite initial efforts to establish family governance, the Johnsons faced significant challenges that led to the breakdown of their governance structures and strained family relationships.

Background: The Johnsons, aware of the complexities involved in managing their diverse estate, decided to implement a family governance system. This included regular family meetings, a defined succession plan, and a dispute resolution mechanism. However, internal conflicts and deep-seated resentments within the family would eventually undermine these efforts.

Establishment of Family Governance:

1. Regular Family Meetings: The Johnsons initiated quarterly family meetings to discuss estate matters and ensure transparency in decision-making. However, these meetings became a platform for airing grievances rather than constructive conversations.

2. Succession Planning: While a succession plan was outlined, the lack of clarity on decision-making roles and responsibilities fueled tensions among family members. The ambiguity surrounding leadership transitions created an environment ripe for power struggles.

3. Dispute Resolution Mechanism: A dispute resolution mechanism was established, with the family opting for legal mediation in case disagreements arose. Unfortunately, this mechanism became a contentious issue in itself, with family members hesitant to involve external parties in their private matters.

The Challenge: The Johnson family faced a significant challenge related to the distribution of shares in the family business. Disagreements over the valuation of assets, unequal contributions, and long-standing personal conflicts came to a head, leading to a breakdown in communication.

Unsuccessful Implementation of Governance:

1. Failure of Communication: Despite having family meetings, the Johnsons struggled to maintain open communication. Resentments and unresolved issues among family members began to fester, overshadowing any attempts at collaborative decision-making.

2. Ineffective Dispute Resolution: When the dispute over business shares escalated, the family's chosen legal mediation process exacerbated tensions. Family members became entrenched in their positions, viewing the involvement of external mediators as a betrayal of trust.

3. Power Struggles: The lack of clarity in the succession plan contributed to power struggles within the family business. Instead of fostering a smooth transition, the ambiguous succession structure intensified conflicts, leading to a divisive atmosphere.

Outcome: The Johnson family's governance structures ultimately failed to address the deep-seated issues within the family. The disputes over asset distribution and succession planning escalated to the point where family members ceased communication, further fracturing family bonds.

Key Takeaways: The case of the Johnson family illustrates the pitfalls of unsuccessful family governance in contentious estate management. Ineffective communication, reluctance to engage external mediation, and poorly defined succession plans led to the breakdown of the family governance structure. This case serves as a stark reminder that the success of family governance relies not only on its establishment but on its continuous adaptability and the commitment of family members to open communication and conflict resolution. In the absence of these key elements, even the most well-intentioned governance systems can crumble under the weight of familial tensions.

Contentious estates pose a significant challenge to family relationships, but proactive measures like family governance can provide a framework for resolution.

Establishing clear guidelines, fostering open communication, and having mechanisms for conflict resolution are critical components of successful family governance. In instances where governance fails, seeking professional mediation, legal assistance, or family counseling can help mend relationships and navigate the complexities of estate distribution. By addressing these issues head-on, families can minimize the impact of contentious estates and preserve the bonds that tie them together.

Disclaimer: The provided case studies are fictional and created for illustrative purposes only. Any resemblance to real persons, living or dead, or actual events is purely coincidental, and the examples are not intended to represent specific individuals, families, or situations.

Tsitsi Mutendi is the author of 'Raising the Baobab: A Collection of Tools for Multigenerational Wealth Building in Family Businesses'.

60-SECONDS WITH:

DANIEL LEU
PARTNER
BÄR & KARRER

Q Why did you choose a career path in the legal industry?

A To be frank, I was undecided for a long time. Architecture, design, and economics also fascinated me.

In the end, I decided to study law because it gives you access to almost anything. The law is a web spanning through everything: private and business relationships, society, and political landscape, locally and globally.

I never regretted my decision: I love the structured thinking, the reasoning, the precise use of language, and the creative potential in finding solutions for our clients.

Is there a profession that is more varied and versatile? I doubt it.

Q What do you see as the most important thing about your job?

A To be a good lawyer, knowing the law and technical brilliance is not enough. Just as important are listening skills, empathy, commonsense, and the ability to come up with solutions rather than being limited to the analysis of problems.

Q What motivates you most about your work?

A Nothing motivates me more than happy clients! The highest of feelings – the icing on the cake – is finding solutions that our clients did not expect, that wow them.

Another motivating factor is working as a team on highly complex client matters, hand in hand with other specialists who are among the best in their field.

Q What is one work related goal you would like to achieve in the next five years?

A As the newly appointed Co-Head of our firm's Private Clients Team, I will focus on providing leadership and on supporting our younger lawyers in becoming their best.

We will have to work hard and constantly develop and grow to retain our position as one of Switzerland's finest private client teams.

Q What has been the best piece of advice you have been given in your career?

A "Do what you love, and give it your all" as my dad has preached, for as long I can remember. Another one that stuck: "think before you speak".

Q What is the most significant trend in your practice today?

A Regarding our clients: more litigious matters.

Regarding our role: more interdisciplinary work in teams of specialists across jurisdictions.

Regarding our legal talent: more demand for balance, coaching and mentoring, personal development.

Q Who has been your biggest role model in the industry?

A My partners Tina Wüstemann and Andreas Bär, both world-class:

- Tina in client handling, empathy, social intelligence, energy, networking and relationship building,
- Andreas in developing creative solutions, seeing the big picture, immediately evoking trust.

Q What is one important skill that you think everyone should have?

A Humour, including, most importantly, the ability – and joy – to laugh about yourself.

Q What cause are you passionate about?

A My most important passion: spending time with my wonderful wife and our two whirlwind kids (10 and 8)!

At our firm Bär & Karrer, I have always had a passion for supporting and mentoring our young lawyers in their journey to become outstanding lawyers.

Q Where has been your favorite holiday destination and why?

A I love to travel and to explore new and exotic places. But no matter how idyllic, spectacular, and unique the destination: my favorite place on earth are the Swiss Alps. They are my source of energy and place of power. There is just nothing like it.

Q Dead or alive, which famous person would you most like to have dinner with, and why?

A Dinner with Ernest Hemingway would certainly be spectacularly gripping albeit detrimental to my liver.

I picture us sitting by the fire in worn leather chairs, listening to my favorite Nina Simone, singing just for us and joining us for a chat during breaks...

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(Chancery: Traditional, Chambers High Net Worth 2022)

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CONTENTIOUS TRUSTS – A CASE STUDY

Authored by: Thomas Barker (Associate Director) – Charter Tax

Contentious trusts can arise from the most well meaning of situations. Take the below situation:

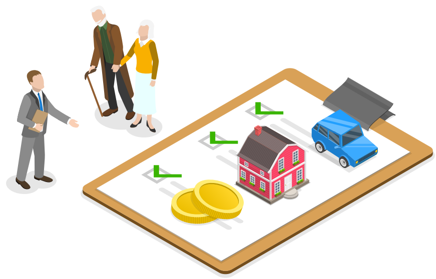
1. Father sets up and runs a successful trading business in the UK
2. During his lifetime, he gifts 25% of the shares to his son who shows an interest in taking over the business
3. In his Will, Father leaves the remaining 75% of the shares in discretionary trust for the benefit of his two adult children – his son who runs the business and his daughter who is not involved in the business ("brother" and "sister")
4. The trustees of the trust and executors of the Estate are two advisors and brother and sister
5. There are cash reserves in the business available in excess of the requirements for running the business
6. The siblings have been at odds over what to do to make things fair between them and have missed the two year window to vary the Will. The business has also increased in value since their father's death

This situation is not unusual. A parent has built a successful business and wants to benefit his children. However, this business is almost a third child, and he wants to protect it after his death. When one child is involved in the business and the other isn't, conflict is never far away, – particularly if (as was the case here) the children do not see eye to eye.

If sister wants to break ranks and take her share in the estate to invest separately, how can this be achieved? The short answer is; with difficulty – not least because the tax implications of trying to divide things up can make equitable division difficult to achieve.

Legal Options Available

There are of course legal options for brother or sister to consider such as removing trustees or directors (which are beyond the scope of this article). These would almost certainly involve the courts and high fees. We therefore consider in this article some of the other options and attendant tax implications.



Distribution Of Shares

Perhaps the first option the trustees might consider now that they are beyond the window to extract the shares from the trust by way of a variation of the Will, would be a distribution to the siblings.

Generally, there would be an IHT charge on the distribution from a trust. It would be necessary to review the business to consider whether it meets the conditions for Business Property Relief. If so, the distribution could be free from IHT. There would be capital gains tax on the distribution since the distribution would be at market value. However, holdover relief would be available, and the brother and sister would take on the shares at the probate vale on their father's death. Sister would now own her shares outright, however, there might be limited options for her to encash her position.

Company Pays A Dividend

Another option is that a dividend is declared by the directors of the company. This requires brother to agree to the dividend approach. Given that there is only one class of shares, all shareholders would receive their allocation and would pay tax accordingly. This means that brother would receive 25% of the gross dividend, and we note that the trustees would pay top rate tax on the dividend. This means that the trustees would only be able to pay around 41% of the gross dividend to sister. There would be an element of tax credit to claim but sister would still be left with around 45% of the dividend declared – something she is unlikely to see as equitable.

Company Purchase Of Own Shares

If sister is looking to exit and receive cash, one option that can sometimes be considered in the right scenario is the company purchasing back sister's shares. The advantage of such an approach in situations where there is family disagreement is that the exiting shareholder is compensated but capital gains tax treatment can be available if certain conditions are met. With the purchase being paid in cash, the capital gains tax then becomes affordable for the vendor.

However, where the shares are held in trust, the trustees as a body are one shareholder and so it cannot be said that the repurchase of some of the 75% trust shareholding meets the condition to buy out the exiting shareholder and that they are left with only a minimal shareholding afterwards.

In the absence of meeting the company purchase of own share rules, we are back into the realms of paying tax at dividend rates on the repurchase which is unlikely to satisfy the parties.

Perhaps then it is worth distributing the shares first and then waiting for the five year period to expire so that the parties can make use of the company purchase of own share provisions. This would of course be a long time to wait – particularly if sister is worried about the medium-term health of the business. Brother may also be worried about sister holding a 37.5% share in the business because she would then have a veto on special resolutions since brother's holding would be below 75%. Brother may also begrudge sister enjoying any uplift in value over that 5 year window.

Trustees Take Out A Loan

If the terms of the trust permit, the trustees could consider taking out a loan against the business to make a distribution to sister who could then be removed as a beneficiary of the trust so that brother and sister can go their separate ways.

Wrapping Up

While tax should not dictate decisions, the implications of different approaches can have a significant impact on the net result for disputing parties and so is a necessary consideration. The non-tax implications (such as years of deadlock and legal fees) will also need to be taken into account. In the above scenario, the final answer was to sell the business and go separate ways – but of course each case is different – which is what makes the role of the advisor indispensable!

TL4 Private Client

2024 Upcoming Events

Private Client Next Gen Academy
23 April 2024 | The Dilly, London

Contentious Trusts Circle
25 - 26 April 2024 | Ashdown Park Hotel & Country Club, UK

Private Client Circle of Trust UK
2 - 3 May 2024 | Ashdown Park Hotel & Country Club, UK

Tax for Non-Doms: Annual Review
23 May 2024 | Central London

Private Client Advisory and Litigation Forum: Paris
12 - 14 June 2024 | Waldorf Astoria, Versailles, Paris

Contentious Trusts: Trusts Under Attack
27 June 2024 | Central London

TL4 & ConTrA Private Client Summer School: The Ultimate Insider's Guide
22 - 23 August 2024 | Downing College, Cambridge, UK

TransAtlantic Tax & Estate Planning
17 September 2024 | Central London

Contentious Trusts Next Gen Summit
18 - 20 September 2024 | The Conrad Hotel, London

Private Client: Jersey
October 2024 | Jersey

Private Client: Guernsey
October 2024 | Guernsey

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BEDDOE APPLICATIONS FOR OFFSHORE TRUSTEES

Authored by: Gerrard Tin (Associate) and Jeremy Child (Partner) – Harneys

Introduction

Offshore jurisdictions remain important centres for the establishment and administration of trusts. What should an offshore trustee do when facing the prospect of litigation with a hostile foreign party? This article will examine how a trustee can seek the court's approval of its participation in any such litigation by ordering that the trustee be indemnified in respect of costs from the trust funds.

Cross-border trusts disputes add a layer of complexity: despite the overlap between trusts law in England and Wales and British Overseas Territories, it is wrong to assume that the position offshore will be the same. This article will examine some local considerations when applying for Beddoe relief in certain offshore jurisdictions.

Applications For Beddoe Relief

An application for Beddoe relief is made in (A) response to or (B) anticipation of a claim brought by or against a third party, referred to as the 'main action'. The purpose of the Beddoe application is to obtain the court's (typically) pre-emptive permission to litigate the main action, thereby gaining the protection of the trust funds from which the trustee may be indemnified if they become subject to an adverse costs order.

The main relief sought in the Beddoe application is of course the indemnity for costs. The test is that the court must be satisfied that the trustee is justified in either (A) defending or (B) (i) bringing or (ii) continuing the litigation: if so satisfied, then the court will order that the trustee may be indemnified out of the trust funds. This indemnity will extend to both (i) the trustee's own costs and (ii) any costs which are awarded against the trustee if they lose the main action.

The eponymous Victorian authority from which this powerful relief derives is of course the judgment of Lindley LJ in the case of Re Beddoe, Downes v Cottam[1]. In that case, the court enunciated the trustee's right to participate in litigation, in its capacity as trustee (as opposed to the trustee's personal capacity), holding that a trustee mat be indemnified in respect of the costs of the litigation from the trust funds in situations where the trustee's actions were justifiable. The relief was and remains discretionary and so will always depend heavily on the specific facts of the case.

At p.558 of Re Beddoe, Lindley LJ held that:

> ***"I entirely agree that a trustee is entitled as of right to full indemnity out of his trust estate against all his costs, charges, and expenses properly incurred: such an indemnity is the price paid by cestuis que trust for the gratuitous and onerous services of trustees; and in all cases of doubt costs incurred by a trustee ought to be borne by the trust estate and not by him personally."***

1 [1893] 1 Ch 547 (CA).

(emphasis added).

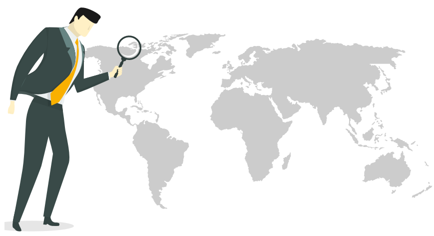
Lindley LJ continued as follows, emphasising the risk of participating in litigation without seeking this anticipatory relief:

"But, considering the ease and comparatively small expense with which trustees can obtain the opinion of a Judge of the Chancery Division on the question whether an action should be brought or defended at the expense of the trust estate, I am of opinion that if a trustee brings or defends an action unsuccessfully, and without leave, it is for him to show that the costs so incurred were properly incurred. The fact that the trustee acted on counsel's opinion is in all cases a circumstance which ought to weigh with the Court in favour of the trustee; but counsel's opinion is no indemnity to him, even on a question of costs." (emphasis added).

Therefore, the risk which arises should a trustee fail to apply for Beddoe relief is the very serious consequence of having to pay the costs of the main action personally should they lose.[2]

Beddoe applications should be made in separate proceedings to prevent the court hearing the 'main action' from being privy to the strengths and weaknesses of the trustee's case. See Lightman J at p.436 of Alsop Wilkinson v Neary[3].

The next part of this article looks at local practice when applying for Beddoe relief in two offshore jurisdictions, namely the (1) Cayman Islands and (2) British Virgin Islands. Both jurisdictions' trusts laws have their foundations in English common law and equity, which continue to be of guidance in both the (i) interpretation and (ii) application of trusts law in the local courts, however it is important to apply local case law and variations in practice when making applications for Beddoe relief.



The Cayman Islands

Cayman Islands' court procedure is governed by the Grand Court Rules (the GCR) (which are based on the pre-1999 'Rules of the Supreme Court' from England and Wales): Order 85 rule 2(2)(a) GCR permits an applicant to seek a court determination of any question arising in the execution of a trust. Section 48 of the Cayman Islands Trusts Act (2021 Revision) (the Cayman Islands Trusts Act) also contains the power for a trustee to apply to court for advice and directions. Section 48 states that:

"Any trustee or personal representative shall be at liberty, without the institution of suit, to apply to the Court 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, such application to be served upon, or the hearing thereof to be attended by, all persons interested in such application, or such of them as the Court shall think expedient". (emphasis added).

Therefore within the ambit of both (i) the court's inherent jurisdiction and (ii) s.48 of the Cayman Islands Trust Act the jurisdiction for granting Beddoe relief is well-established in the Grand Court of the Cayman Islands (the Grand Court). Section 48 may not be invoked in cases of fraud.

2 For a comprehensive practitioners guide to Beddoe relief, see also: Lewin on Trusts (20th Edn), 48-106.

3 [1995] 1 All E R 431.

An important judgment is In the Matter of a Trust Known as Stingray Trust, an unreported judgment of Justice Parker from 2018 (Stingray Trust). In Stingray Trust, the Grand Court granted retrospective Beddoe relief in circumstances where a trustee participated in proceedings for urgent injunctive relief in order to challenge a foreign court's jurisdiction. The urgency of the case and the trustee's demonstrable desire to protect the trust's assets persuaded the court to grant the relief retrospectively: this should not be seen as the optimal way to proceed.

The British Virgin Islands

The court's jurisdiction to make Beddoe orders is well-established in BVI law. See, for example, paragraph [16] of Ieremeieva an Anor -v- Estera Corporate Services (BVI) Limited et al[4].

Offshore trustees in the BVI should note that there is a statutory provision for a trustee to apply to court for advice and directions: section 6 of the Trustees' Relief Act 1877 (Revised 1991) (Cap 304):

"Any trustee, executor, or administrator shall be at liberty, without the institution of a suit, to apply by petition to any Judge of the High Court, or by summons upon a written statement at any Judge at Chambers, for the opinion, advice, or direction of such Judge on any question respecting the management or administration of the

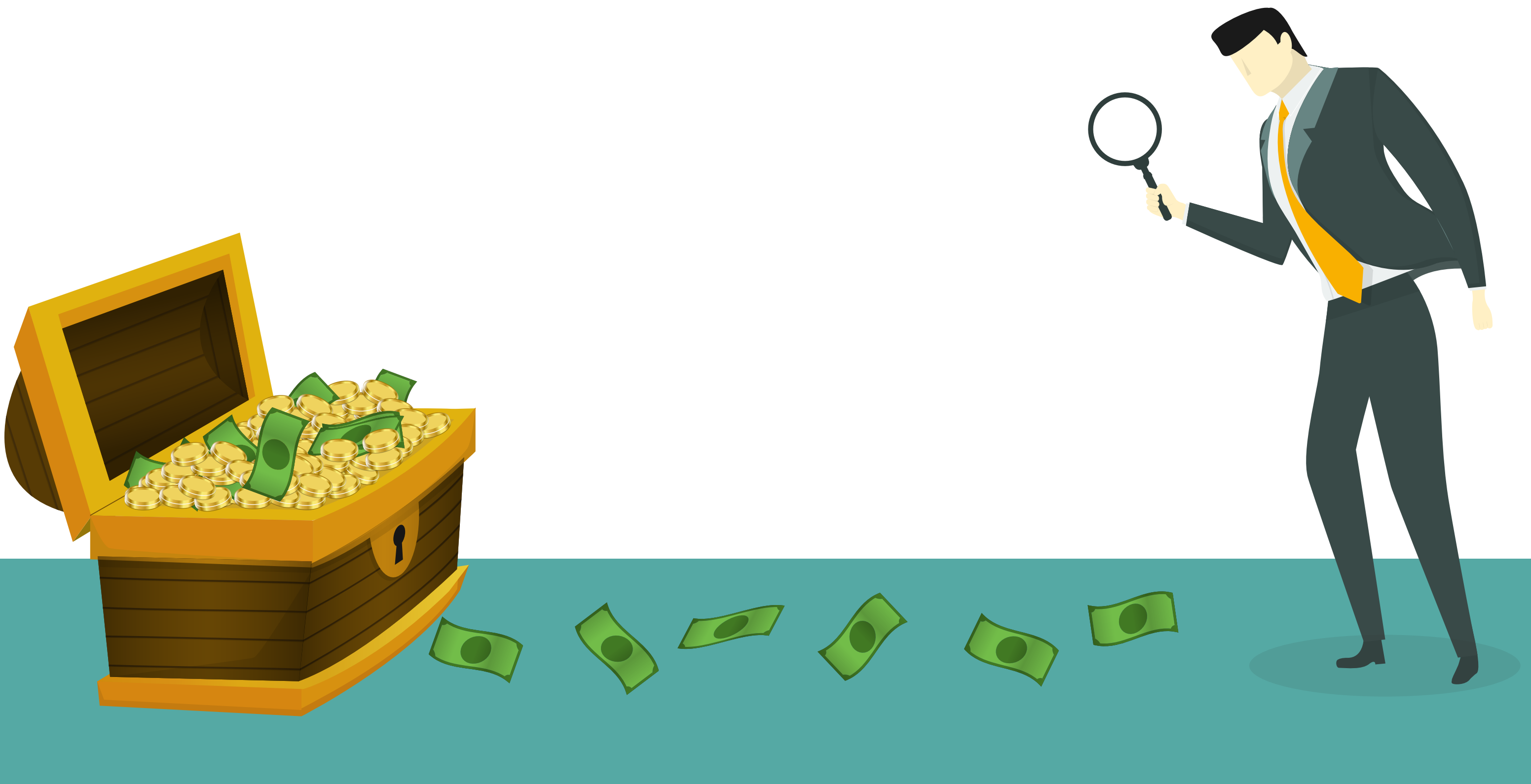
trust property, or the assets of any testator or intestate, such application to be served upon, or the hearing thereof to be attended by, all persons interested in such application, or such of them as the said Judge shall think expedient". (emphasis added).

Beddoe relief is frequently applied for in the BVI Commercial Court. The question of whether retrospective relief may be granted has not yet been tested.

Concluding Remarks

The obtaining of a Beddoe order to gain an indemnity against the prospect of adverse costs orders remains available to trustees based in the Cayman Islands and the British Virgin Islands. For the optimal deployment of any Beddoe order-related litigation strategy, it is imperative that trustees facing the prospect of litigation (particularly urgent proceedings and / or foreign litigation) seek legal advice as soon as possible if they wish to limit their exposure to personal liability for potential adverse costs.

4 [BVIHC (COM) 118 of 2017] (4 April 2019, unreported).



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