ThoughtLeaders4 Private Client • February 2022

Private Client MAGAZINE

ISSUE 6

LET'S TALK CONTENTIOUS TRUSTS

INTRODUCTION

"Don't raise your voice, improve your argument."

Desmond Tutu

In Issue 6 of Private Client Magazine, our authors focus on all things Contentious Trusts; from Sham trusts and the protectors' power of consent, to NFT's, digital art and money laundering. We also find out a little bit more about our members with a series of quickfire 60 second interviews.

As we settle into the new year, 2022 will bring fresh knowledge, insights, and opportunities to bring the Private Client community together. We predict an action-packed year, and we look forward to welcoming you at some of our events both virtually, and in-person.

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60-SECONDS WITH:

OLIVER AULD PARTNER CHARLES RUSSELL SPEECHLYS

Q What would you be doing if you weren't in this profession?

A Before I was lured by the glamorous world of domestic and international trust and succession disputes, I was strongly considering either being a teacher or working in children's social services. I am fascinated by people and I believe that had I not pursued a career in law, I would have followed one of these, or a similar path where you are trying to make a difference to people's lives. I am fortunate in my profession to have had the opportunity to help people at what has often been a difficult juncture in their lives, which is always the greatest motivation.

Q What's the strangest, most exciting thing you have done in your career?

A The most memorable experience in my career that I can recall being both strange and exciting at the same time was probably the time when my colleagues and I (along with our client, a well-known former professional footballer) were 'papped' by a swarm of newspaper photographers as we walked to court on the first day of a three-week trial. It was a brief, surreal episode in what was otherwise a relatively dry pensions and financial services claim. The media exposure was seemingly too much for our opponents, who dramatically settled the claim after suffering a grueling first day in court.

Q What is the easiest/hardest aspect of your job?

A I am sure that everyone in our profession will say that one of the easiest aspects of our jobs is getting absorbed in our cases, as we all love what we do and want to achieve the best for our clients. Conversely, leaving work behind and switching off at the end of the day can be the hardest task.

Q If you could give one piece of advice to aspiring practitioners, what would it be?

A I would recommend any aspiring practitioner to find the specialism that they truly love and enjoy doing, to grasp opportunities when they present themselves and to not be afraid to make their own opportunities to get what they want when they need to.

Q What do you think will be the most significant trend in your practice over the next 12 months?

A The market growth in the wills, probate and trust sector is believed to have grown by over 4% in the last couple of years during the Covid-19 pandemic, including a significant increase in applications that have been made to the probate registry. This sad consequence of the pandemic has seen to a similar increase in contentious probate cases, which I believe will continue at least over the next 12 months while life gets back to normal. I have seen a particular increase in challenges to the validity of Wills compared to previous years, which may reflect the constrained and hurried circumstances in which individuals have sought to put their estate planning arrangements in place. The economic strain caused by the pandemic is also likely to result in more families looking to inheritances and other sources of family wealth to meet the rising costs of living. We are likely to see a greater number of claims under the Inheritance (Provision for Family and Dependants) Act 1975 and claims against trust assets as a result.

Q If you could learn to do anything, what would it be?

A If I could ever envisage having the spare time, I would learn something self-indulgent like playing the guitar. I would insist on teaching myself and would inevitably be very bad at it.

Q What is the one thing you could not live without?

A My family, including our 10-month old daughter, 20-month old Labrador puppy and 30-month old son, who seem to occupy all of my waking hours outside of work (which I wouldn't have any other way).

Q If you could meet anyone, living or dead, who would you meet?

A My father, who passed away in April 2020 from Covid-19, having suffered from dementia in the last few years of his life. I would love to meet him again from a time before he started to decline.

Q What songs are included on the soundtrack to your life?

A It would have to start with 'Mony Mony' by Billy Idol, which was the first record I ever bought (I was very young). 'Sabotage' by the Beastie Boys was my favourite song from my teenage years. It immediately takes me back to that age every time I hear it. 'So What' by Miles Davis is probably amongst the songs I listen to most of the time these days. It is a great song to get lost in and distract you from the day's worries.

Q What does the perfect weekend look like?

A The perfect weekend for me would be spent taking my family back to Jersey where I grew up and spending a couple of perfect summer days playing with the children on the beach before having dinner at the Crab Shack watching the sunset over St Brelade's Bay.

Q Looking forward to 2022, what are you most looking forward to?

A I am looking forward (hopefully) to seeing the world start to get back to normal (or at least a new kind of normal), with an end to Covid-19 restrictions and the interminable debate over the adverse consequences of Brexit. That is not too much to expect, is it?


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DATA SUBTERFUGE ACCESS REQUEST

ARE THE DOCUMENTS I SEND TO MY LITIGATION LENDER SAFE FROM THE OTHER SIDE?

Authored by: Alex Hulbert – Schneider Financial Solutions

Introduction

In 2006 Clive Humby, mathematician and the man behind the Tesco Clubcard, claimed "data is the new oil". As our lives became increasingly digitized, big corporations began to refine that oil and used it to more effectively market and sell to consumers, and the volumes of data held increased exponentially.

Steadily, one scandal and data breach at a time, it became clear that the old data protection frameworks (mostly drafted in an age before "big-data") needed to be brought into line with modern life. Enter, in 2018, the EU's General Data Protection Regulation ("GDPR"), which was enacted into the UK's Data Protection Act 2018 ("DPA 2018") and remains in force regardless of Brexit.

Under the terms of the GDPR, organisations must ensure that personal data is gathered under strict conditions, and those who collect and manage it must protect it from misuse.

Individuals whose data is held have specific rights over that data, including the right to be forgotten and the right to access their data, normally made by way of something called a Data Subject Access Request ("DSAR") [1].

While almost everyone would agree that the rights afforded to individuals within the DPA 2018 are entirely appropriate, there is the potential for friction in the context of litigation, and particularly within the context of litigation lending. As your litigation lender, we are a "data controller", as through the application process we gather and hold significant personal data about your client. Importantly though, we have also likely been provided with significant data about the other side and the case generally.

In post-GDPR 2018, I wondered whether, sooner or later, an "other side" would have a go at making a DSAR in an attempt to obtain information about a funded client's case. Given that the data we hold often includes assessments about at what point a client might be willing to settle and points they may concede, such a request handled incorrectly could be catastrophic. While rare, such requests do happen, and in the rest of this article I will explain the protections in place and how your lender should deal with those misguided enough to make them.

The law and process

Under DPA 2018, an individual can make a DSAR to a data controller and request all personal data that the data controller holds in relation to the individual. If the data controller fails to comply, the individual can make an application to court.

The Court of Appeal, in Dawson-Damer v Taylor Wessing LLP [2], confirmed that while the court retains its discretion and may refuse to make an order if it amounted to (for instance) an abuse of process, a data subject is in principle entitled to make a DSAR in order to obtain information for the purposes of litigation, whether or not the information would be disclosable in the litigation in question.

1 Section 45, DPA 2018; Article 15(3) GDPR.

2 [2017] EWCA Civ 74

However, the DPA 2018 contains a number of exemptions from the data controller's obligation to comply with the DSAR. Where the personal data consists of information in respect of which a claim to legal professional privilege could be maintained, the data controller does not have to comply with the DSAR [3] (the "privilege exemption"). This echoes the exemption to the rights of access in the GDPR at section 19 of Schedule 2 of the DPA 2018.

For the purpose of the privilege exemption, "legal professional privilege" includes both legal advice privilege and litigation privilege. [4] It is also likely to extend to "common interest privilege", which applies to documents shared between parties who have a "common interest" that are otherwise privileged. Such a common interest exists between a litigation lender and the funded litigant.

The fact that most information and documents held by your lender will be subject to privilege does not obviate the requirement for us to identify and consider the data and respond to the request, and it is possible that certain data provided to your lender may arguably be outside the scope of privilege. For example, certain information provided to assist in the assessment of credit risk may pre-date the litigation or (arguably) have only the loan (and not the litigation) as its dominant purpose. This would usually include at least the occupation, date of birth and even income of the other side, but we have yet to encounter a situation where it has extended further.

To place all this in context, we once had a funded client's spouse contact us, through their solicitor, requesting documents provided to us relating to our client's application. In response, the individual received a copy of our client's application form, redacted in its entirety save for his own name, address and occupation. We never heard from him again.

Recommendations

While I hope the information above would assuage the majority of concerns about sharing information with your lender, there are some extra tips to bear in mind if you wish to be extra-careful:

- Only ever send your lender the information necessary for them to transact with you, which will usually be only the information expressly required by the application form. There is always the risk that superfluous data (e.g. information about some future plans your client may have) could fall outside the scope of privilege. The less data held, the smaller the pool of data vulnerable to a DSAR. If your lender requires further information or documents, they will tell you.
- You may wish to consider marking correspondence send to your lender as being in contemplation of and for the dominant purpose of litigation. Whilst no such marking is ever definitive, and the court will always look at the substance of the document, it can help to evidence the intention behind the documents.
- Either as a belt-and-braces step generally, or if you are concerned that there are some documents your lender may need to see which risk not being covered by privilege, consider asking your lender to enter a Confidentiality Agreement. All lenders worth their salt will deal with NDAs and Confidentiality Agreements regularly and should have templates available for you if needed. Such a document can bolster any claim your lender has to privilege.

A note on "lending"

Whilst increasingly common in family law, litigation lending has its place in many civil cases also. As a civil litigator you will of course be familiar with traditional non-recourse litigation funding, in which the funder takes an equity style position in the case, i.e. In the event of a loss here is no obligation to repay the funder, however in the event of a successful outcome the funder will take a substantial slice of the damages or award. Such funding is often required for good cases to succeed, however in many trust or probate disputes the level of risk is sometimes lower and therefore a full recourse lending model may be considered, which will be substantially lower in cost than funding or often CFA's.

If you would like to discuss any of the issues raised in this article please feel free to contact the writer, Alex Hulbert, at alex.hulbert@schniederfs.com.

3 Section 9, Schedule 11, DPA 2018;

4 Dawson-Damer v Taylor Wessing LLP

Upcoming Events 2022

22nd Mar	Landed Estates / Farm Tax
26th Apr	Death in the Modern Age: Post-Death Claims
28th-29th Apr	Contentious Circle of Trust
11th May	Tax for Non-Doms
23rd-25th Jun	NextGen Circle of Trust
5th Jul	The Modern Trust: Contentious Trusts in a Changed Social Landscape
24th-26th Aug	Private Client Summer School
29th-30th Sep	International Trusts Summit
4th Oct	Private Client: Jersey
6th Oct	Private Client: Guernsey
15th-17th Nov	Private Client Middle East

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HOW SHOULD A PROTECTOR GO ABOUT GIVING OR REFUSING CONSENT?

Authored by: Paul Buckle – Ocorian, Guernsey

It is very common for trust deeds to provide for trustees' powers to be exercisable only with the prior or simultaneous consent of a protector selected by the settlor and who is frequently a family member or confidante. That way, the settlor can be sure that trustees who may be unfamiliar with family circumstances or culture make decisions that will reflect the settlor's wishes and intentions for the trust.

Such powers are generally treated as at least limited fiduciary powers in the protector's hands, that is, powers that must be exercised for the benefit of the trust and not for the protector itself. Until recently, however, there was little clear authority on how protectors should exercise a power of consent, and their role in cases where trustees seek court approval for a decision which requires protector consent. In particular, no case had considered in detail how a protector should go about deciding whether or not to give its consent, and what things it should consider.

How should protectors go about deciding whether or not to consent?

That changed in an English case called PTNZ v AS, [1] where Master Shuman said there were two possibilities; either a joint power with the trustees, or a power of review. Under the former, the protector could withhold consent even if the trustees were acting reasonably and for proper purposes; under the latter, its role was limited to ensuring the trustee was not acting unreasonably or for an improper purpose, rather like the role of the court in a Public Trustee v Cooper application. The Master preferred the former on the construction of the instrument, but also because a joint power was

"……consistent with an offshore trust which typically appoints a protector. The trustee may very well be a corporate entity located in a different jurisdiction. the settlor and trustee may not know each other and there may be limited trust between them. In that context the imposition of a power of consent in the sense of being a joint power rather than a restrictive review power provides a solution to control the power exercised by the trustee". [2]

The two alternatives were considered in Jersey in In re Piedmont and Riviera Trusts. [3] In that case, trustees sought the court's blessing to a restructuring under Cooper category 2. Before giving consent in principle, the protector had questioned the trustee about its proposal. The protector's approach was thought excessive. The court therefore had to decide whether the protector should reach its own decision in good faith in the beneficiaries' interests, or whether it needed only to assess the

1 [2020] EWHC 3114.
2 Ibid, [99].
3 [2021] JRC248.

rationality or lawfulness of the trustee's proposed decision. The former, wider role was preferred, although not the joint power. The protector's duty was to act in good faith in the beneficiaries' best interests. The court had a limited function in Cooper 2 cases, because the settlor chose the trustee and not the court as its trustee, so that the court's role was purely supervisory and not to make decisions on the trustee's behalf. The protector was different. That the settlor had insisted certain matters needed the protector's consent, meant the settlor intended the protector to exercise its own judgment and not simply judge rationality. [4] It was therefore essential the trustees and the protector worked together in the interests of the beneficiaries and

"….perfectly reasonable for a protector to explain his concerns about a particular proposal by a trustee and the trustee may often be willing to modify his proposal to take account of these concerns or the protector may be satisfied after the trustee has explained his thinking". [5]

This makes good sense. If the protector had the narrower role, it would be confined to assessing whether a trustee's decision was rational, and not whether the decision was in the beneficiaries' interests. That would surely be inconsistent with the settlor's intentions when creating the office of protector, as

"A decision by trustees to appoint a comparatively large sum (perhaps at the request of a beneficiary) is unlikely to be categorised as irrational but this is just the sort of situation where a settlor would no doubt intend that a protector should be able to see that the trust is administered in accordance with his (the settlor's) wishes by refusing consent. One can think of many other examples. It seems inherently unlikely that settlors would go to the trouble of appointing themselves or trusted friends or advisors as protectors if they intended the role of protector to be limited to that of assessing rationality. ". [6]

How should trustees and protectors work together?

These cases explain not only how protectors should go about deciding whether or not to consent to a trustee decision, and the extent of their duty. They also say something about the relationship between the trustee and the protector. Both have responsibilities beyond simply behaving rationally.

They must also make and agree to decisions which genuinely benefit the trust and take account of the settlor's intentions, the latter always being relevant if not binding considerations.

Also, although they do not share a joint power, trustees and protectors must work together and be prepared to challenge one another's thinking. This is not a perfunctory exercise, but one intended to arrive at the best possible decisions for the trust.

It might be thought that giving the protector the wider role is a recipe for conflict, and can only make the decision-making process more cumbersome. To some extent that may be true, as giving them the wider role does mean protectors have a responsibility to inform themselves to a similar degree to the trustees whom they are there to police. That said, ongoing dialogue during the process should avoid any unexpected surprises and if a settlor really did not intend consent to mean anything other than mere review, it may be best to change the trust to reflect that.

4 Ibid [91].

5 Ibid, [93].

6 Ibid,[117].

60-SECONDS WITH:

CLAIRE VAN OVERDIJK
COUNSEL
CAREY OLSEN BERMUDA LIMITED

Q What would you be doing if you weren't in this profession?

A I'd like to say something exciting like music journalist or rally driver but in reality I'm fairly sure I'd be in academia. I've accepted since an early age that my pleasure in work comes with a thirst for knowledge and inspiring others to learn.

Q What's the strangest, most exciting thing you have done in your career?

A Most exciting: moving from the London Bar to an offshore law firm in Bermuda. I'm 5 months in and still haven't shaken the feeling I am on holiday (when not in the office of course…)

Strangest: attending HM Prison Shrewsbury while 9 months pregnant to represent a twice convicted murderer in a parole review hearing during a snow storm… it seemed perfectly reasonable at the time.

Q What is the easiest/hardest aspect of your job?

A There is nothing easy about my job, and rightly so. As soon as a job becomes easy it's a sign you've outgrown it and need to move on to a new challenge!

The most rewarding aspect of my job is appearing in court, distilling complex legal issues into succinct and persuasive submissions, and achieving a good outcome for the client.

The most challenging aspect is perfecting court preparation; anticipating the arguments that are likely to come up, knowing when to stop preparing and trusting your instincts. It's an art that takes years to refine.

Q If you could give one piece of advice to aspiring practitioners, what would it be?

A Don't rely on external validation as the bench mark for success and don't fear failure; my biggest mishaps have been the most valuable learning experience.

Q What do you think will be the most significant trend in your practice over the next 12 months?

A The Covid pandemic has without a doubt given HNW individuals an opportunity to self-reflect and take stock of their personal affairs resulting in an increase in the number of trusts being created or varied. I think we will continue to see a rise in the use of trusts for wealth management. Bermuda in particular offers unique features for trusts, particularly for private trust companies (PTCs) and trust restructuring, which makes it an attractive jurisdiction.

Q If you could learn to do anything, what would it be?

A To be a music journalist and rally driver of course.

Q What is the one thing you could not live without?

A Music (and my kids… in case they read this!)

Q If you could meet anyone, living or dead, who would you meet?

A Franz Kafka. He has been a major influence on my learning of law and literature. "By believing passionately in something that still does not exist, we create it. The nonexistent is whatever we have not sufficiently desired." I would adore a few moments in his head to explore the kaleidoscope of realism and fantasy with messages of wisdom peppered throughout.

Q What songs are included on the soundtrack to your life?

A It's a long list but here are some highlights (in no particular order)

Wake Up (Arcade Fire)

Love Will Tear Us Apart (Joy Division)

One day Like This (Elbow)

Landslide (Fleetwood Mac)

Tangled up in Blue (Bob Dylan)

Glorious (Macklemore)

Q What does the perfect weekend look like?

A Like I said, I still feel like I am on holiday so every weekend! I'm very lucky to be spoiled for choice in Bermuda.

Q Looking forward to 2022, what are you most looking forward to?

A Exploring my new home, in person events and not working from home.

Bringing US Back Together

We want you to have total confidence when booking your ticket at our Private Client events. We fully appreciate the need for flexibility in times of uncertainty. Therefore, TL4 is adapting to the new normal and aiming to provide this certainty to support your decision-making. Our **'Book with Clarity'** policy is designed to assure you that there is a **contingency plan and refund policy** in place in case you need to change your booking at any point for any Covid related reason.
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SHAM TRUSTS – THE IMPORTANCE OF ACTUAL INTENTION

Authored by: Lydia Carter and Robert Christie – Bedell Cristin (Jersey)

The recent decision of the Jersey Royal Court in Estate of the Late J.D. Hanson [2021] JRC 319 provides illuminating guidance on the scope of the sham trust doctrine. Whilst there are several strands to the case the sham trust ruling is of particular interest, especially the Court's comments on the importance of an actual intention to give a false impression to third parties or to the Court.

The facts

The late Mr Hanson led a successful professional life as a partner and managing director of Arthur Andersen. He had complex private financial affairs, which included a 99% ownership of Creditforce Limited (a UK company).

Mr O'Leary, a successful investment manager, met Mr Hanson in the late 1970s. Mr O'Leary claimed that he had a continuous professional relationship with Mr Hanson, saw or spoke to him nearly every day and was regarded by him as his 'right hand man.' Mr O'Leary was also a director of Creditforce from 2008-2017.

In 2004, Mr Hanson purportedly settled the SR Charitable Trust (the "Trust"). The trustees were Mr O'Leary, Miss Bonney (an accountant to Creditforce) and Anchor Trust Company Limited ("Anchor"), represented by Mr Shelton.

The assets settled into the Trust were the shares of a Jersey company, Arbitrage Research and Trading Limited ("ARTL") which became a substantial company with assets worth approximately £30 million. Mr O'Leary was appointed as director of ARTL in 2004.

Who was the settlor?

In 1996, ARTL issued 1,010 B shares to Miss Holt (Mr Hanson's then girlfriend, a US resident) for £1,449,443. To fund the purchase, Creditforce advanced Miss Holt assets by way of a loan (although, at least initially, these assets actually remained under the control of Creditforce). Her acquisition of the shares resulted in no economic benefit to her and, when she ceased to be US resident, she was directed to sell the shares to a Miss Ruddick (another US resident) for £1 (even when they were worth several million).

Both Miss Holt's and Miss Ruddick's evidence suggested that they knew very little about the transactions taking place and that the transfers lacked any commercial rationale. However there was clearly a UK tax benefit to the shares being held by non-UK residents. The Court ruled that both Miss Holt and Miss Ruddick were directed by Mr Hanson, with the shares being held by them as Mr Hanson's nominee.

On 3 September 2004, Miss Ruddick purportedly settled the Trust. However, in the view of the Court, she did so as nominee for Mr Hanson and Creditforce. Mr Hanson was the sole director of Creditforce at the time and therefore Mr Hanson was the settlor of the Trust and not Miss Ruddick.

At around the same time, ARTL issued 1,980 of its shares to Creditforce which subsequently settled them onto the Trust in 2005; transactions which were apparently arranged by Miss Ruddick.

However, the Court ruled that there was no evidence that Miss Ruddick had any understanding of these transactions, and that she was simply doing what Mr Hanson directed her to do.

Evidence revealed that Mr Hanson continued to regard both ARTL and the Trust as his own assets after the Trust was established. For example, documents prepared in respect of Mr Hanson's financial affairs referred to him owning various investments through ARTL (when in fact they were owned by the Trust).

Despite the fact that the Trust was purportedly charitable, there were no dividends paid to the trustees of the Trust from ARTL during its lifetime in order for it to make charitable payments. ARTL instead made several loans and payments in order to benefit Mr Hanson's own personal and business interests. Of particular note were the 25 payments paid by ARTL (at Mr Hanson's request) to benefit his then girlfriend in refurbishing her home, totalling £393,796.61.

The plaintiffs (being the estate of the late Mr Hanson and Creditforce) claimed sham, seeking declaratory relief and equitable compensation or damages.

Sham

Before there can be a finding of sham, there must be proof of the Settlor's intention:

(1) that the assets would be held upon terms otherwise than as set out in the trust; and

(2) to give a false impression to third parties and/or the Court.

In the leading Jersey case of Re Esteem Settlement [2003] JLR 188, it was ruled that in both cases the intention had to be shared by the trustees, although as to (1), it was sufficient if the trustees had gone along with the settlor's intention without knowing or caring what they had signed in creating the trust. As to (2), however, it appeared that reckless indifference was not enough. There needed to be evidence that the trustees, like the settlor, actually intended to give a false impression.

It is unusual for this evidential issue to arise before the Jersey Courts. However, in this case there were three trustees party to the trust instrument and the Court was therefore required to consider the state of mind of each of them in addition to the settlor.

The Court considered submissions for the plaintiffs, relying upon English authorities which, they argued, resulted in a different approach. Such cases suggested that it is possible to infer an intention to mislead third parties from mere indifference to the terms of a trust instrument.

For example, in A v A [2007] EWHC 99 (Fam), it was ruled that "What is required is a common intention, but reckless indifference will be taken to constitute the necessary intention." Similarly, the decision of the High Court in Pugachev [2017] EWHC 2426 has been considered in various commentaries and the Court had regard to the article by Brightwell and Richardson (2018) 24 Trusts and Trustees 398, 403-404 where it was stated that "in that the trustee goes along with the settlor's intention without knowing or caring what it signed, it is also clear that the parties must also have dishonestly intended to mislead third parties in some way."

Despite these submissions, the Jersey Court regarded such indifference as only being sufficient to prove the first element of the settlor's intention, but not the second, i.e. the intention to give a false impression to third parties or the Court.

In respect of Mr Hanson, the settlor, and Mr O'Leary, the "lead trustee", the Court had no doubt that the Trust was set up to shelter assets that Mr Hanson regarded as his own from UK tax. Neither party intended for the Trust to be genuinely charitable and both had held the actual intention necessary for a finding of sham. However, for both Miss Bonney and Mr Shelton, it was held that, although they were both recklessly indifferent to the terms of the Trust, there was not sufficient evidence to find that they intended to give a false impression to third parties or the Court as to the nature of the Trust. Therefore, there was no sham.

Conclusion

Despite ruling that there was no sham, ultimately the Court ruled the Trust was invalid on its terms (a separate strand to the case). However, the Court's comments in respect of sham are illuminating.

The case affirms the importance of establishing actual intention to give a false impression, on the part of all trustees.

Whilst the Court conceded that "a uniform approach to the invalidity of a trust on the grounds of sham is a desirable one", it still dismissed the interpretation of English authorities that reckless indifference could amount to constructive intention to give a false impression.

Whilst this arguably suggests that the burden of proof in respect of a sham claim could be higher in Jersey than in other common law jurisdictions, the Court also commented on the importance of legal certainty, i.e. that third parties are entitled to rely upon the sanctity and validity of a trust instrument. For this reason, mere indifference to a trust instrument's terms is not enough. As a matter of public policy, it is necessary for intention to be subsequently proved, because there should be an expectation that a trust validly executed in Jersey will be enforced.

Jersey as a jurisdiction must be seen to take sham trusts seriously. However, legal certainty is clearly a vital component of the trust industry in Jersey and its reputation. This case provides reassurance that at least for the time being in Jersey, the validity and sanctity of a trust instrument will be upheld unless exceptional circumstances apply and actual intention to give a false impression is proven.

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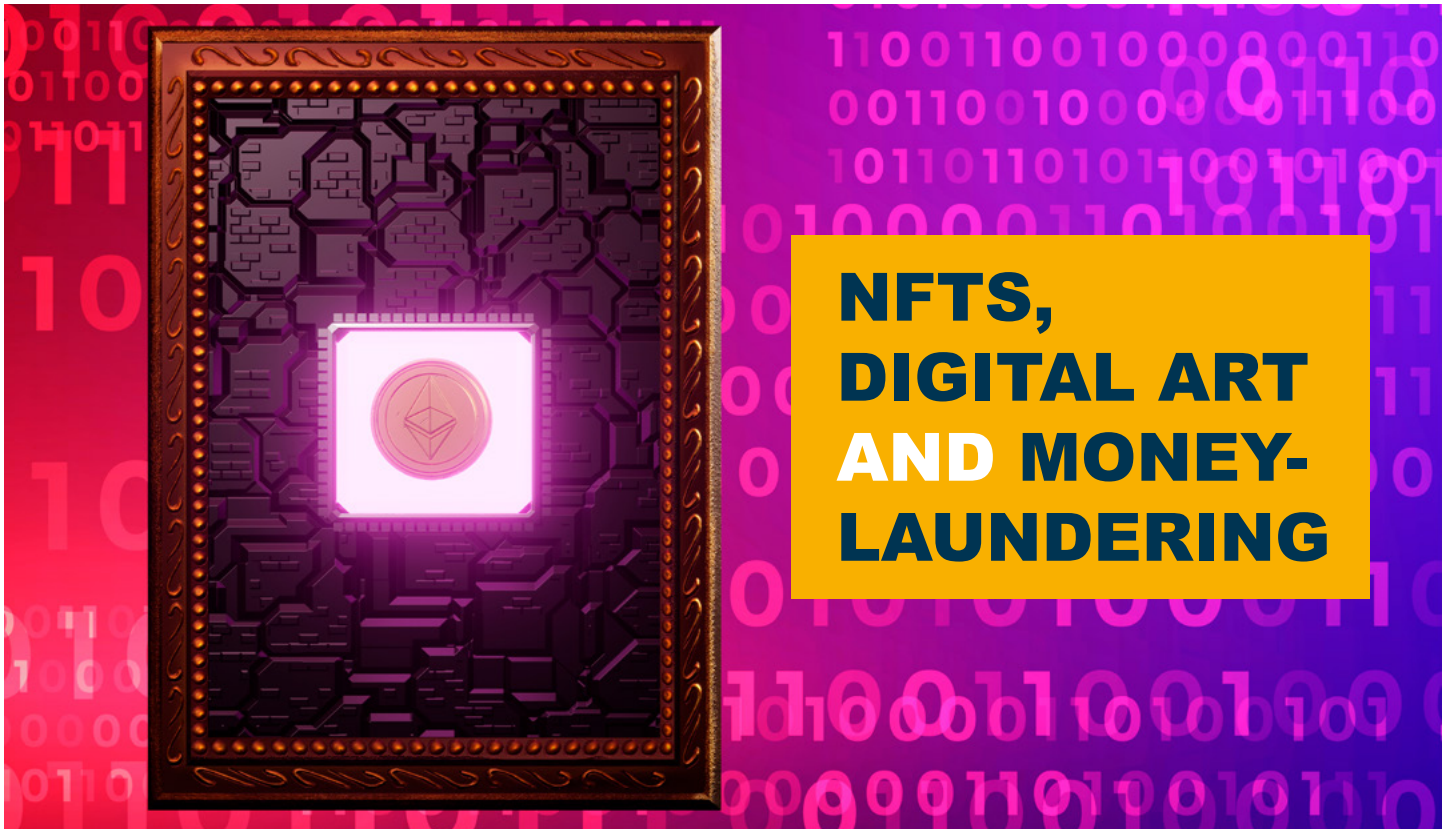


NFTS, DIGITAL ART AND MONEY-LAUNDERING

Authored by: Anita Shah – McDermott Will & Emery

Introduction

The world of digital art is on a meteoric rise, with blockchain technology offering a revolutionary new way of selling art in the form of Non-Fungible Tokens (NFTs), and giving a new meaning to what many consider art to be. With seemingly anyone now able to become a digital artist, and anyone from celebrities to children trying their hand at selling or collecting digital art, contemporary art sales are at an all-time high, with art-market profits now spreading much wider than simply auction house or gallery bank accounts.

Before we get into trying to understand the implications of NFTs from a legal perspective, it is important to first understand what NFTs are, and how they are being used.

NFTs – what are they?

Essentially, NFTs are a digital certificate of ownership that can be bought and sold. Each NFT is entirely unique, and, as with cryptocurrency, the record of ownership and any transaction is stored on, logged and shared on the blockchain – a type of public ledger invented in 2008 to record the movement of cryptocurrency and to ensure its integrity by encrypting, validating and permanently recording transactions.

For the world of art, this means any digital file – a song, a video, a jpeg image file, a meme, a voice recording, even a GIF – can be attached to an NFT, making it a unique and original digital asset that can be collected and traded in much the same way as an original Van Gogh. Whilst there is nothing to stop anyone copying the digital art, and in fact it has never been easier to do by simply googling, sharing or downloading a digital file, it is only the buyer of the NFT that owns the "token" which proves they own the "original" work therefore distinguishing it from any copy – similarly there may be millions of identical prints of the Mona Lisa but there is only one original painting (although the procedure for issue a certificate of authenticity for physical art is often significantly more complex than with digital art).

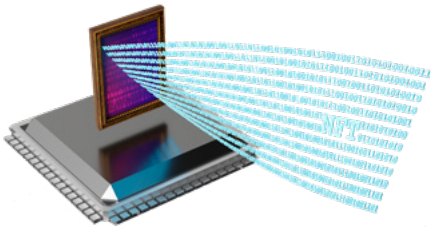
This means that while a buyer does not acquire the intellectual property right to the work, they are in fact acquiring the proprietary right to the original work via the unique token.

While anyone can simply tokenise their creation to sell as an NFT, spotlight in recent times has been on the multi-million-dollar NFT transactions.

For example, the most expensive NFT is a digital collage of images by Beeple (a digital artist called Mike Winkelmann) which sold in March 2021 for $69 million through Christie's.

This is $15 million more than Van Gogh's Irises oil painting. After that, Jack Dorsey, CEO of Twitter, sold an image of the first ever tweet for $2.9m and Grimes, the musician, sold a set of videos to her original songs for nearly $6m.

Unlike the existing trading model associated with commercial galleries and traditional auction houses, NFTs may cut out the need for art dealers, enabling artists to trade directly online. Artists can embed their contracts in NFTs so that they can be rewarded for resale royalties, earning them a percentage every time their work is purchased or re-sold, something that is absent from the physical art world. Further, digital art has traditionally been difficult to value due to the relative ease of replication and lack of verifiable records of authenticity or demarcation of an "original"; however NFTs may offer assurance of authenticity because of the immutable record.



Money-laundering risks

Nevertheless, NFTs sit at the crossroads of two sectors that are already characterized by high money laundering risk: fine art and cryptocurrencies, which means that the exposure to risk can be particularly perilous. Money laundering in the traditional art scene has been subject to debate and scrutiny for decades, largely due to the fact that the value of art, whether traditional or digital, is largely subjective and contextual, meaning that it is often hard to predict a fair market value of a particular piece, making it easier to disguise sham transactions.

This is compounded in NFTs, where the ability to create legitimate-appearing artwork that is in fact worthless is not only extremely accessible, but also straightforward to do, and NFTs are even harder to value due to their often unstable price fluctuations and a lack of expert appraisers. Furthermore, NFT transactions may involve cryptocurrency, which already presents a significant concern from an anti-money laundering perspective due to their anonymized nature.

The risk of money-laundering is then heightened by the notably under-regulated market place that NFTs operate in, and the uncertainty of what appropriate regulatory regime, if any, is applicable.

Future of regulation

In recent times however, there has been a global recognition that existing protections in the art world are not particularly robust for traditional art works let alone the digital pieces. As a result, the regulatory landscape, particularly in Europe and the US is evolving in a promising direction. For example, at the beginning of last year, the UK implemented the Fifth EU Money Laundering Directive in the UK in January 2020, which required all art market participants (AMPs) to register with HMRC for anti-money laundering supervision by 10 June 2021. AMPs include auction houses, art dealers or anyone trading or acting as intermediaries in the trade of works of art valued at €10,000 or more. Under the new AML rules, the UK art market has also been subject to other requirements, such as carrying out risk assessments and due diligence on buyers and sellers to verify their identity.

The UK government identified cryptoassets as an area that risks consumer protection, and so has employed a restricted notion of a 'qualifying cryptoasset' so that cryptoasset exchange providers and custodian wallet providers fall within the expanded scope of the new AML regulations. The UK has also reserved its right to expand the UK regulatory perimeter to a broader range of tokens in the future, which will inevitably have a significant impact on the rapid growth of the digital art world. Despite the broadening of AMPs to include a wide range of art dealers in both the traditional and modern digital forms, there is some concern that not all dealers are implementing AML controls or investing in the necessary subscriptions to assist with customer due diligence procedures. While it may be too early at this stage for one to fully assess the impact of the implementation of the new AML laws for the art market, we certainly expect it to continue to be an area of great interest, and one that all lawyers, trustees, and estate planners should be following closely.

60-SECONDS WITH:

JOE DONOHOE
DIRECTOR
ASSET RISK CONSULTANTS

Q What would you be doing if you weren't in this profession?

A My first career idea was journalism so I like to think that after an award-winning career as an investigative journalist I would have gone on to write a string of bestselling crime novels. Or maybe a postman.

Q What's the strangest, most exciting thing you have done in your career?

A Although I have had many memorable adventures during my time as a trustee, I would have to say that accepting a job in Paris as a newly qualified accountant, without knowing anyone or speaking the language probably wins the prize.

Q What is the easiest/hardest aspect of your job?

A Although the exact nature of my job has changed many times during my career, it has generally involved dealing with the affairs of private clients. I have always felt it important to keep a level of professional detachment remembering that in the end I was a hired help and not a family member. Depending on the client, that was usually either the easiest or hardest part of the job.

Q If you could give one piece of advice to aspiring practitioners, what would it be?

A I have been asked this question many times and I always say the same thing: "be nice to people". Actually, I usually say "don't be an arsehole". Our world is full of professionals who are very good at their job so no matter how brilliant you think you are, if you are not nice to people, they will find somebody equally brilliant to work with in your place.

Q What do you think will be the most significant trend in your practice over the next 12 months?

A I hope it will be a seamless return to pre-2020 working practices and the consignment of Zoom and webinars to a museum.

Q If you could learn to do anything, what would it be?

A To swim. I know that may not sound particularly challenging to most people but despite many attempts over the years I have never succeeded. The problem is that I refuse to believe that people are designed to float and so tend to sink once I remember that fact.

Q What is the one thing you could not live without?

A Addressing this figuratively rather than literally, or sentimentally, the shortlist would include red wine, good coffee and a constant supply of crime fiction

Q If you could meet anyone, living or dead, who would you meet?

A I have been a fan of Marvel comics for fifty years so I think it would be great to meet the late Stan Lee and talk to him about how he went about creating that whole universe pretty much singlehandedly.

Q What songs are included on the soundtrack to your life?

A In no particular order, an incomplete list which would probably change tomorrow might include:

Band of Gold – Freda Payne

In My Life – The Beatles

Life on Mars – David Bowie

All the Young Dudes – Mott The Hoople

Geno – Dexys Midnight Runners

Levi Stubbs Tears – Billy Bragg

All I Want For Christmas is a Dukla Prague Away Kit – Half Man Half Biscuit

Don't Look Back in Anger – Oasis

Q What does the perfect weekend look like?

A When the Irish and English football seasons overlap, a Shamrock Rovers win on Friday evening, a Manchester City victory on Saturday and resounding defeat for Manchester United on Sunday to round things off

Q Looking forward to 2022, what are you most looking forward to?

A I refer you back to Q5. Although restrictions are being lifted, I am mostly looking forward to people acting normally and not including an observation about pandemics in every conversation. Oh, and City winning the Champions League

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WHEN THE MUSIC STOPS...

Authored by: David Sowden and Angela Roberts – Grant Thornton

Issues within the private wealth management space can arise in different ways, but the most common we see are:

- disagreements between beneficiaries and related parties where the dispute is primarily linked to the value and the perceived ownership of or entitlement to trust assets; and
- regulatory-related actions involving the trustees, often surrounding the identification of the source of wealth (SOW) or the competency of the Trust and Corporate Service Provider (TCSP) to manage the trust assets in an ever-changing world.

We have seen cases where disagreements have arisen over the ownership of assets, and whether they were in fact properly settled into a trust structure at all. The way in which the settlor (and frequently still the ultimate beneficial owner) run their worldwide financial arrangements, using any corporate vehicle which has cash as a piggy bank for lifestyle expenses, as well as for funding investments or supporting trading entities, without any real regard to corporate bookkeeping and financial accounting, may lead to overly complex structures and loan arrangements. When something goes unexpectedly wrong, it can be a bit like playing musical chairs with the consequence that the participants are on the wrong chair (or miss out on a seat altogether). This can include the premature death of the wealth generator, leaving succession unplanned for, or an insolvency related to the wealth generator. Unwinding the position which arises when the music stops and trying to recreate the intended, or claimed intention, of the settlor, can lead to protracted, and expensive litigation.

Many disputes arise from family conflict where a settlor may be on their second or third marriage, with children from previous relationships where arguments arise over the deceased's assets. The day-to-day financial relationships may be planned with apparently standalone trust and corporate structures, but often the need for funds by the settlor can lead to raids on the separate structures resulting in transfer of assets out of a structure which the beneficiaries were not aware of or can result in complex loan arrangements which are not commercially viable or recoverable. This may be further complicated by the lack of documentation, particularly around the terms and security associated with loan agreements, or where assets may have been pledged as collateral.

This situation can be exacerbated when a number of differing professionals, TCSPs or family office advisers become involved. Disputes have arisen because the portrayal of ownership did not in fact follow the actual legal ownership. We have seen instances of disputes as to whether assets were settled into trusts and where assets which were so settled have been transferred on. In the more complex trust structures, the involvement of the extensive use of treasury vehicles, special purpose vehicles, holding companies and intercompany and trust loans, means that an extensive forensic analysis, asset tracing exercise and the recreation of accounts is required. The use of different TCSPs to oversee discrete parts of the

worldwide financial arrangements again can lead to separation of control where one may manage part of a structure, such as the holding company, while another manages the asset-generating subsidiaries resulting in misunderstandings or deliberate misrepresentation. We have seen instances where trustees may own the shares or have an interest in an asset but have no real control over the ownership company. We have also seen instances where the lack of documentation resulted in differing understandings between the parties as to whether funds were provided to an investment opportunity on the basis that it was a loan or an equity acquisition.

We are now seeing the dawn of the most significant inter-generational wealth transfer in history.

There are many varying assessments of the size and timing of the great wealth transfer – but all agree that many trillions of pounds held in private wealth structures will be transferred from one generation to another over the coming decades.

Whilst the Baby Boomer generation may have been focused on building up wealth and increasing affluence in a post-war world, the younger generations are proving to have a different mindset. Millennials and Generation Z appear have a greater focus on purpose and bettering the world to tackle the climate crisis. They are more driven by sustainable and ethical investment options and are more likely to ask about ESG scoring, whilst being more alert to "green-washing". However, as laudable as such objectives are, there is a balance to be struck between the social objective, asset preservation and the need for wealth generation. Conflicting views and aspirations of the differing interested parties can result in challenges to the way assets have been managed, again this will increasingly lead to disputes.

Covid-19 has also impacted on real-estate as one of the traditional investments to preserve wealth. With uncertainty over the future of office space, high street retail space and the hospitality industry, we are seeing a move towards investments in non-traditional classes of assets such as crypto-currencies and Non-Fungible Tokens used for digital artwork. However, these come with heightened risks such as cyber-security and the volatile fluctuations in value of such assets.

Trustees and professional advisers regularly become targets because it is seen as easy to blame those responsible for managing trust assets and they need to balance reputational damage which can arise.

It is against this background that we are seeing an increasingly proactive and interventionist role by regulators in a number of jurisdictions. There is pressure on regulators to show to the world that they are overseeing a well-regulated financial sector, with high reputational regard to financial performance as well as robust anti-money laundering controls and enforcement, including increasingly evidence of enforcement sanction and in some instance criminal prosecutions.

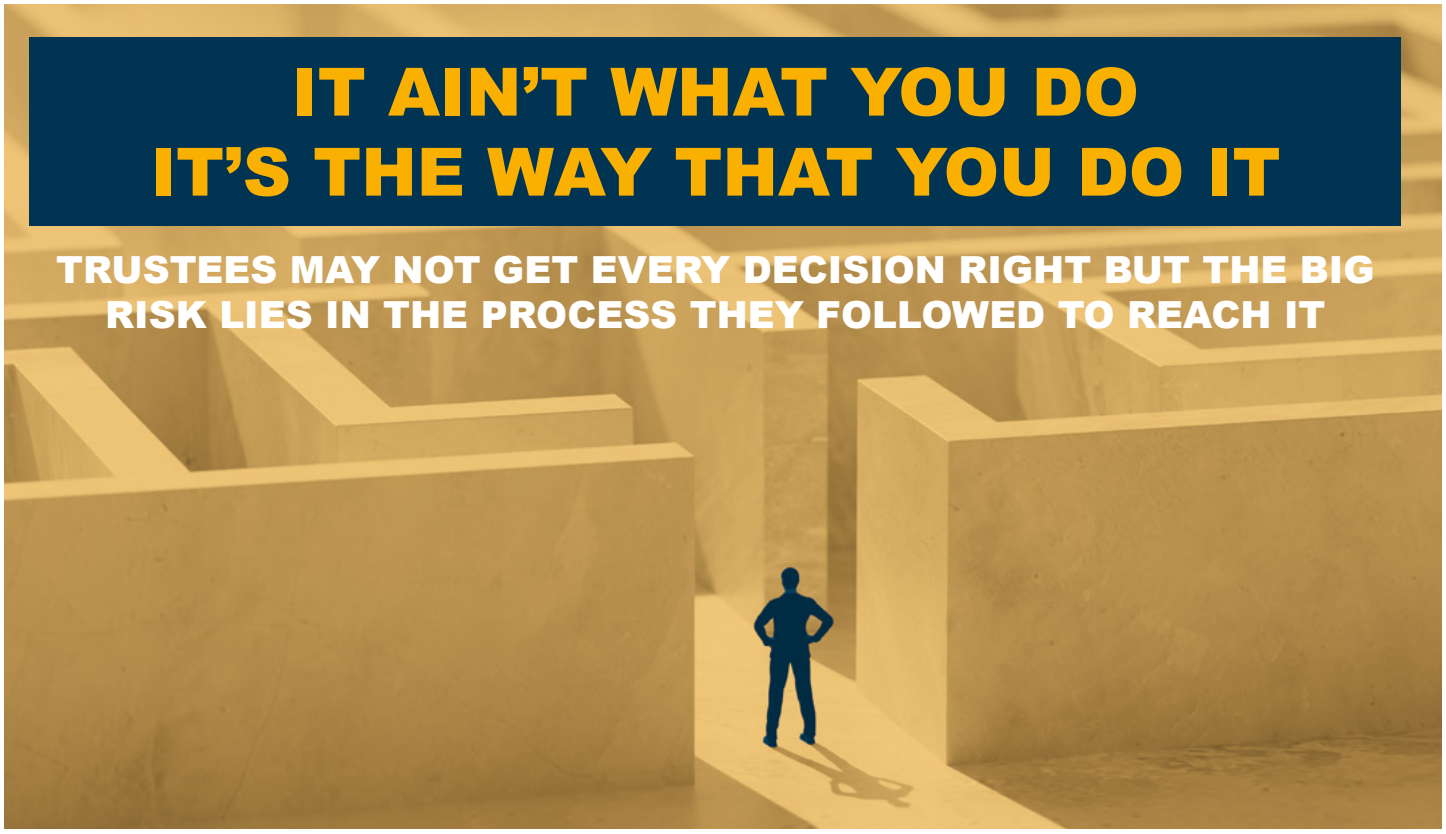
Trustees are increasingly coming under scrutiny from the regulators, including intrusive inspections and compliance review. This can often include issues surrounding the identification of the SOW for an individual, the funds provided for a specific transaction and the rationale of a structure. Trustees sometimes rely on historic assertions, habitually based on reference to earlier file notes, stating the SOW of an individual, which may not in fact be the case. In some instances, the SOW is documented on a previous file which may not now be capable of being located, or there may be no evidence that such a check was in fact made, rather there is a reliance on familiarity with the individual being well known and a long-standing client. Often there is no regard to confirming that the individual's current circumstances still accord with those which may have been documented years, or even decades, ago. Furthermore, there is a reliance on a one-size-fits-all approach, and whilst the documented SOW may have been applicable to earlier transactions, it may not now apply to more recently received funds or assets which are generated from a completely different source.

This situation can be complicated in instances where the management of a client or trust structure is transferred from one TCSP to another, or where one TCSP acquires a book of business from another. The file handover may be incomplete, and this may not be considered or identified at the time or may be lacking key aspects and it would be wise to critically question the reason for multiple changes in short time period or why the information is incomplete. If the previous TCSP was unable to get the client to provide information, this should be seen as a red flag which may cause issues further down the line.

In summary, our experience is that in some instances the purported reason for a trust or wealth holding structure may not in fact be correct and when the music stops the financial relationships may not be as expected, resulting in the potential for dispute.

IT AIN'T WHAT YOU DO IT'S THE WAY THAT YOU DO IT

TRUSTEES MAY NOT GET EVERY DECISION RIGHT BUT THE BIG RISK LIES IN THE PROCESS THEY FOLLOWED TO REACH IT



Authored by: Joe Donohoe – Asset Risk Consultants

In a world where everyone carries a camera on their phone and stores pictures on their laptop, the name Kodak may not have the resonance it once had. But for those of a certain age, it will always be synonymous with photography, especially the birth of popular colour photography. Check out Paul Simon's Kodachrome, a paean to the power of colour photos. So it wasn't all that strange that in 1951 Charles G Dumont wrote in his will that he wished his trustees to retain the holding of Kodak shares which comprised the bulk of his estate. Specifically he asked his trustees not to sell the shares "for the purposes of diversification" although they could sell them if there was "some compelling reason other than diversification" to do so. Fast forward to 2004 and the beneficiaries of the estate took the trustees to court claiming their failure to sell the shares at an appropriate time had resulted in a loss to the trust in excess of $20m. The court of first instance in New York found against the trustees. The biggest single criticism levied by the court in its judgement was not that the trustees did not sell the shares but that the trustees could show no evidence that they had even considered whether they should sell them until it was too late.

Although the judgement was subsequently reversed on appeal, the criticism remained on the record and should act as a warning sign to trustees in respect of any assets they hold but most especially investment portfolios.

Whatever decisions trustees might or might not make in respect of investments, they must have a systematic process to regularly review the assets under their stewardship and consider if they remain appropriate in the context of the trust and the needs of the beneficiaries. In the case of investment portfolios that review process should also consider the role of third-party fund managers engaged by the trustees. The appeal court in the Kodak saga overturned the lower court's decision primarily because they did not think it appropriate to now apply hindsight to investment decisions made many years earlier. This is still likely to be the approach of a court today, but if there is no evidence that the trustees regularly reviewed the investments and actively made decisions then they will be on much shakier ground.

Apart from the potential protection that such a review process might provide in the event of a future litigation, there is an immediate and ongoing benefit to the trustees in conducting a regular review of investment portfolios. Although often thought of as part of risk mitigation, the ability for a trustee to periodically report back to beneficiaries with a measured and performance-based review of the investments in the trust will help to foster positive relations with the beneficiaries and aid the general good management of the trust.

Trust companies choosing to implement a regular investment review process can choose to conduct it using in-house resources or outsource the work to an independent consultant. Some large trust companies will feel that they have the appropriate skills and personnel to carry out this work themselves. These might be trust companies owned by a wider financial services firm so there is some rationale in using the expertise available in the building. There are also smaller trust companies who consider that a detailed regular review of portfolios is part and parcel of the work of the trustee and should be undertaken by trust officers. In each case there is an argument to be made for this approach but each also comes with some risks.

In the case of the large multi-disciplinary businesses, the lack of obvious independence of the people carrying out the reviews might serve to undermine the outcomes.

Additionally, if the trustee is invested in products or services provided by an associated investment management company there is an obvious conflict which can cause external perception issues and possibly internal tensions.

With the smaller trust companies, the trust officers carrying out the investment reviews may not have the specific expertise to undertake this work to the required level and are unlikely to have the wider industry knowledge to put performance into context.

In both cases the cost of properly resourcing an internal review process is likely to be more than engaging the services of an external expert. In the final analysis the decision is a business one and will vary from firm to firm.

An additional factor for the trustee to consider in this area was raised in the case of Onzm & Anor v Watson & others in 2018. The specific facts of this case are unimportant for our present purposes. The key point was the assessment in the judgement of the appropriate rate of interest to be applies to an equitable compensation payment ordered against a trustee. A notional cash return rate and a more adventurous rate based on what the plaintiff said they would have invested in were both rejected by the Court. Instead, the Court considered the ARC Private Client Indices and the STEP indices, identifying these as independent peer group indices which gave a realistic idea of what the trustees might have achieved over the relevant period. This judgement was upheld on appeal. It is likely that the same approach will be adopted in other cases where compensation based on investment performance is being sought. Taking this into account, it is important for trustees to understand on an ongoing basis how the performance of the investments they hold compare to the opportunity set represented by peer group indices.

There is not, nor ever has been, a requirement for a trustee to possess a crystal ball or an ability to see into the future. It will always be recognised that a trustee may get some decisions wrong and may make genuine errors of judgement. What trustees must always be able to do is demonstrate that the basis any decision they make is based on a comprehensive process designed to put them into the best possible position to make that decision whatever the subsequent consequences.

60-SECONDS WITH:

ZIVA ROBERTSON
PARTNER
MCDERMOTT WILL & EMERY

Q What would you be doing if you weren't in this profession?

A I would own a café bookshop where people would spend whole days discovering new worlds through books they may not have considered otherwise. My father instilled in me the love of books, which is something that has remained a constant for me since childhood: I read every day, and use books as a pressure-valve that helps me alleviate the stress of everyday life. I would love to share my love of books with others.

Q What has been the most interesting case you have done recently?

A I acted for a beneficiary who was concerned that the Protector was defrauding the trust by misappropriating assets and transferring them to a non-beneficiary. The beneficiary's suspicions were well-placed, and when we started looking for the directors of the private trust company it transpired that they did not exist – they were fictitious persons who were used as a cover for a whole host of irregular transactions. We ultimately secured a committal order against the Protector for breach of court orders directing him to furnish the court with relevant information.

Q What's the strangest, most exciting thing you have done in your career?

A I am not sure it was very exciting (cold and rainy, more like), but some years ago I had a case where executors of an estate were conned into agreeing to sell an estate property at an undervalue, and I went on surveillance with an investigator to a seaside town to try and find the culprits. We waited for hours and they did not turn up… but we did manage to bring the case to a successful conclusion in the end.

Q What is the easiest/hardest aspect of your job?

A The easiest aspect is doing work I love with wonderful colleagues I appreciate and respect. The hardest aspect is that sometimes cases can take a long time to be resolved and the pain, grief or stress experienced by the clients can be very great, and my ability to alleviate it sometimes limited.

Q If you could give one piece of advice to aspiring practitioners, what would it be?

A When I was a law student, one of my professors told me that I seek certainty where there is none to be found. He was probably right, but I think that in most cases there is a right answer, and if it can be found there must be a way to reach it. My advice to aspiring practitioners would be to seek out the right answer, and not be daunted by the fact that others have not yet found the way to achieve it yet.

Q What do you think will be the most significant trend in your practice over the next 12 months?

A The global drive for transparency has not skipped trusts and their beneficiaries, who wish to have more information about their trusts to be able to 'police' them. I expect applications for disclosure and holding trustees to account would be on the rise in the next 12 months and beyond.

Q If you could learn to do anything, what would it be?

A If I could have any superpower it would be to fly in the air. I would love to learn how to hang-glide: I think that would be the closest I am ever likely to get to that superpower.

Q What is the one thing you could not live without?

A Beyond the obvious - my family, my books (see question 1) – I guess I could live without my dogs, but I'm not sure it would be a great living.

Q If you could meet anyone, living or dead, who would you meet?

A I would love to meet Nelson Mandela, and understand how he could have gone through the life he lived and emerge with love, forgiveness and wisdom, and the power to heal a nation. We need more of him in the world.

Q What songs are included on the soundtrack to your life?

A The first album I ever bought was Carol King's Tapestry. I still love that album as a whole, but would choose 'Beautiful' as a guide: you get back what you put in, so try to live in happiness and compassion. The Carpenters' 'Stand By You' is another song that I have loved since I first heard it.

Q What does the perfect weekend look like?

A Get up late (not a morning person…); go for coffee; a scenic walk with my family and dogs and a trip to an art or antiques fair.

Q Looking forward to 2022, what are you most looking forward to?

A The return to a more normal routine: seeing my colleagues, meeting up with friends, weekends with my family. I have a number of new and interesting cases to get my teeth into, so a good balance between work-life and life-life, with fewer restrictions on the latter, would be nice!

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TO CATCH A TRUSTEE

Authored by: Josh Lewison - Radcliffe Chambers

Where a trust is administered by a foreign trustee, beneficiaries based in England may be reluctant to litigate in a foreign forum or, at any rate, may prefer to bring proceedings in their home court. Their advisers will first have to consider whether it is really desirable to sue in England. Certainly, litigating in the well-known offshore jurisdictions should be acceptable to a properly advised claimant. The key issue will be whether the judgment can be enforced abroad, having regard to firewalls and the foreign jurisdiction's general rules on the enforcement of judgments. If the decision is to sue in England, the next step is to consider whether the court has jurisdiction. That's what this article is about: how to nail down a foreign trustee in England and Wales.

Jurisdiction here, and in other places that follow our model, is based on whether the rules of procedure permit the defendant to be served with proceedings, whether within or outside the jurisdiction. Where a claimant wants to serve a defendant outside the jurisdiction, the court's permission is normally required.

For service out of the jurisdiction, the first port of call will be Practice Direction 6B to the CPR, which provides for two specific grounds on which a trustee may be served abroad. First, where the trust is governed by English law and, second, where the trust instrument confers jurisdiction on the English court.

So, the starting point will be to look at the trust instrument to see whether the proper law is English law and whether there is a jurisdiction clause. If the instrument provides for English law to be the proper law of the trust, or if there is a jurisdiction clause, then that's a good start, but it may not be the end.

That's because modern trust instruments normally include a power to change the proper law of the trust. A power of that kind may be exercised without giving notice to the beneficiaries. Indeed, in a case that I was involved in, Volpi v. Delanson [2018] 1 BHS J. No. 195, it was argued convincingly, if unsuccessfully, that the trust instrument was drafted in such a way that the proper law changed automatically with the change in domicile of the trustee.

Something else to bear in mind is that although PD6B requires the trust itself to have been created or evidenced in writing, it does not require the choice of English law to have been made in writing. If the trust instrument is silent, it may still be possible to show that English law applies on the basis either that there has been an implied choice of law or that the trust is most closely connected with England and Wales: Hague Convention art. 6 and 7, as implemented by the Recognition of Trusts Act 1987.

A jurisdiction clause, on the other hand, must be in writing if it is to satisfy PD6B. Again, modern trust instruments often include a power to change a jurisdiction clause, which can be exercised without notice to the beneficiaries. It must also in fact be a jurisdiction clause: in Crociani v. Crociani [2014] UKPC

40, despite mentioning "exclusive jurisdiction" the relevant clause was only concerned with the administration of the trust and not the resolution of disputes.

One of the interesting manoeuvres in the Crociani litigation was the purported change in jurisdiction by the appointment of a new trustee. The change was later found to have been made in order to evade the Jersey court's jurisdiction to hear the dispute, but only after argument in both Jersey and Mauritius. If there are concerns that a trustee might try a similar trick, it may be appropriate to apply for an injunction to restrain the exercise of the relevant power.

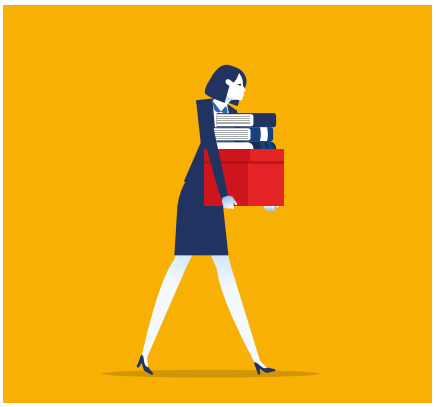
It is said, justifiably, in my experience, that the court will readily exercise its ability to grant injunctions to protect trusts and the interests of the beneficiaries.

The court can restrain the exercise of both dispositive and administrative powers, so as to freeze the assets and to prevent the trust from slipping its moorings and sailing off on the evening tide. An injunction will be granted on the ordinary American Cyanamid principles. So, the claimant must show that there is a serious issue to be tried, that damages will not be an adequate remedy and that the balance of convenience favours the grant of an injunction.

In addition to an injunction against the trustee, where someone is holding trust assets in England and that person is amenable to the English court's jurisdiction, then it may be possible to obtain an injunction against them, even if they are not a party to the action. Broad Idea v. Convoy Collateral [2021] UKPC 24 is a recent decision of the Privy Council on this topic, and is likely to be followed in England. Although the principles, known as Chabra relief, have been developed in the context of Mareva injunctions (i.e. injunctions preventing the dissipation of assets belonging to the defendant), I recently obtained an injunction to freeze trust assets on the same basis.

What if the trust is governed by a foreign law, there's no jurisdiction clause, or there's an exclusive jurisdiction clause in favour of a foreign court? The first thing to do is to re-evaluate whether litigating abroad is really so unpalatable. But if that's really not an option, then it may be worth trying to find some other means of bring the claim in England.

Where there's an unfavourable jurisdiction clause, that may not be the end of the story. In Crociani, Lord Neuberger held that the enforcement of such a clause was discretionary. The court might be less strict about enforcing a jurisdiction clause in a trust than it would be if the clause were in a contract, for which both parties had bargained.



If there is another person who can clearly be sued in England, such as an onshore adviser, or perhaps a constructive trustee, then proceedings can be brought against them and the trustee joined as an additional party. Alternatively, the trustee might have enough of a connection with England so as to be present within the jurisdiction. In a case I'm currently working on, an offshore trustee held land registered in England and had given the Land Registry an English address for service. We used that to show that the trustee was carrying on business in England so that it could be served by serving on its director, who was present in England.

So, where it really is desirable to sue a foreign trustee in England, it can often be possible to do so, even if it requires a bit of lateral thinking.

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INHERITANCE (PROVISION FOR FAMILY AND DEPENDANTS) ACT 1975

ROUND UP

Authored by: Hannah Mantle and Maryam Oghanna – Forsters

As we are all too aware, claims under the Inheritance (Provision for Family and Dependants) Act 1975 (the "Act") are notoriously discretionary and fact specific. For that reason, many of the claims that reach the Courts (rather than settling) include a novel point, or clarify points which are too often disproportionate to argue; so it can be useful to have a look at the year's cases in summary.

Unusual claims:

Some of the sections of the Act which are less commonly used are sections 9, 10 and 11, namely to enable joint property to be treated as forming part of the estate, to defeat dispositions which were intended to defeat applications under the Act, and to defeat a contract made by the deceased to leave certain property under his will.

Section 9 was considered by the High Court in Beg v Beg [2021] EWHC 2598 Ch. Under the terms of her late husband's will, Mrs Beg was the principal beneficiary of his estate. However, the matrimonial home had been owned in the joint names of the deceased and his brother. Firstly, the Court had to determine whether the property was owned by the brothers as joint tenants or tenants in common – the surviving brother successfully argued that the property was owned as joint tenants and passed to him by survivorship. However, Mrs Beg had also claimed under the Act (including s9) and was partially successful in arguing that the deceased's half share of the property should be treated as part of the estate for the purposes of her claim for financial provision. The sum of £80,000 was treated as part of the estate, which was not the full value of the deceased's half share, but was sufficient to allow Mrs Beg to repay the mortgage on another property in the estate, thereby giving her a different home to live in which provided reasonable financial provision.

Section 11 was also considered last year, for the first time, in the case of Sismey v Salandron [2021] 10 WLUK 372. The claim was brought by the son of the deceased from his third marriage. During the deceased's divorce from the claimant's mother, he had agreed by a deed (the terms of which were enshrined in a consent order) to leave his English home to their son. He later married his fourth wife, with whom he also had a child. She was widowed shortly after their marriage, and the estate passed under the intestacy rules. The Court found that the agreement was valid and enforceable (as it complied with the Law of Property (Miscellaneous Provisions) Act 1989 s2), and so went on to consider whether it could effectively be set aside by s11 of the Act. It found that, whilst the agreement was a contract entered into with the intention of defeating a claim (amongst other factors), the condition in s.11(2)(c) was not met as full consideration had been given by his ex-wife, by giving up claims to alternative assets including her share of the property and the deceased's pension (from which the widow was now due to benefit). The son from the earlier marriage therefore inherited the property, as provided for by the deceased prior to his remarriage.

Minor and vulnerable children:

Various reported cases last year considered the position of minor or vulnerable children of the deceased. For example, Re R (Deceased) [2021] EWHC 936 (Ch), where a father had died, leaving his estate to his parents and his new partner, to the exclusion of his two sons. The deceased and the sons' mother had divorced six years previously, and the deceased had only maintained a very limited relationship with his sons for a short time. The mother and her subsequent husband had borne the costs of raising and educating the claimants privately, as the deceased had paid no maintenance or child support. The Court found that it would be highly unusual for a parent/minor child relationship to breakdown so significantly that it would be reasonable to make no financial provision, even if someone else had taken on financial responsibility for them. Conversely, it found that the sons (or their mother) could not expect all of their costs to be met from the estate following their father's death, as a sort of balancing exercise. The Court made an award based on the estate meeting between 50% and 100% of various itemised expenses for each of the sons from the date of death, until a year after they finished university, including accommodation, private school fees, cars, and counselling.

A slightly earlier case where the claimant reached majority after issuing his original claim was Wickham v Riley [2020] EWHC 3711 (Fam). The claimant had originally made a claim under the Act in 2017, after his father died in 2014. He had acted by his litigation friend until he reached adulthood in 2018 and subsequently discontinued the proceedings in 2019. The matter returned to Court in 2020, to address whether the discontinuance had been valid (including whether the claimant had litigation capacity at the time) and request permission under CPR r38.7 to make a new claim. The Court considered the evidence of the claimant's diagnosis of autism spectrum disorder and expert evidence on his capacity. The Court concluded that, whilst vulnerable, the claimant was and remained capacitous, and (having opened the judgment with a quote from Bleak House) granted permission for him to issue a new claim under the Act.

Adult children and step-children:

There were, of course, cases this year which confirmed the view that adult child (or step-child) cases often require an additional element in order to succeed (e.g. Re Mohammed (Deceased) [2021] EWHC 2532 (Ch) where the claimant could not show a maintenance need, or Miles v Shearer [2021] EWHC 1000 (Ch) where the claimants could not show needs for maintenance and had also been told by the deceased not to expect any further provision from him). Nevertheless, there were others where adult children or step-children were noticeably successful.

The Court of Appeal case of Hirachand v Hirachand [2021] EWCA Civ 1498 has been much commented in relation to the decision regarding the cost uplift under a conditional fee agreement, so I do not propose to do so again here. A point which has perhaps been discussed less is the other ground for appeal, namely that the video-link trial did not provide sufficient access to the defendant widow, who was elderly, deaf and living in a care home. The defendant had been debarred from participating in the proceedings, after twice failing to file an acknowledgement of service or evidence, despite having obtained legal advice. She attended the remote hearing following assistance from the claimant's solicitors and had been provided with all relevant material. The Court of Appeal dismissed the appeal and found that there is no obligation on a court to proactively manage the attendance of a debarred party.

Another case dealing with CFAs and adult claimants was Higgins v Morgan [2021] EWHC 2846 (Ch). In this case, the claimant step-son of the deceased who had died intestate was awarded £55,000, including a contribution of £15,000 towards his CFA success fee (or a total of about 25% of the estate) after successfully making out a need for maintenance. The Court also found it relevant that the deceased had had a close relationship with the claimant and had made various assurances to the claimant about provisions that would be made for him in future. A contribution towards the uplift for the success fee was granted on the basis that it is a factor when considering the claimant's needs for the purpose of the Act.

Watch this space:

When the Law Commission considered the future of the Act in order to develop the Inheritance and Trustee Powers Act 2014 (the "2014 Act"), it considered whether the Act should be broadened to include deceaseds who were not domiciled in England and Wales (whether generally, or, for example, those who had real property here). As the 2014 Act did not, in the end, include any provision for claims on the estates of people not domiciled in this jurisdiction, a gap potentially arises in the law in providing for people who live or have assets here, but do not intend to remain here permanently. This may have contributed to the interesting outcome in the divorce of Hasan v Ul-Hasan [2021] EWHC 1791 (Fam), where the claimant's matrimonial financial remedy proceedings were (understandably) found to be incapable of continuing following the death of her late husband. If the proposals prior to the 2014 Act had been incorporated into the Act, it is quite possible the Mrs Hasan would have been able to bring a claim under the Act. Instead, the case is being leapfrogged to the Supreme Court to decide whether she can continue her financial remedy proceedings on divorce. It will be interesting to watch the outcome and whether it affects any potential claimants under the Act.

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60-SECONDS WITH:

PAUL BUCKLE
DIRECTOR
OCORIAN

Q What would you be doing if you weren't in this profession?

A The honest answer is I don't know - I'm not sure that I am very good at much else, or rather not good enough to make a living out of it. You ask me what I would be doing, not what I would want to be doing. So, we can ignore being a professional sportsperson, a marine biologist, or living on my own private island somewhere in the South Pacific. I'm tempted to say I would probably be a teacher or lecturer or the like, and either in law or Latin and ancient Greek.

Q What's the strangest, most exciting thing you have done in your career?

A I knew you'd ask this. The strangest I guess, was whilst I was an in-house lawyer at a local utility, who were trying to install services on the land of someone who had self- proclaimed himself the monarch of his own kingdom, with his subjects being the various insects and invertebrates that lived there; yes, you heard me correctly - insects and invertebrates. The whole saga was part of a wider claim he was making in some sort of planning dispute that the Guernsey Court had no jurisdiction over his kingdom, and we had to threaten proceedings when he refused us access.

Fascinating as that episode was, it certainly wasn't the most exciting. That must go to the time I was lucky enough to have the honour of presenting a session at the Provence trust litigation conference with the late Lord Peter Millett. As a judge and academic I had always admired his wisdom and passion for the law, and his penetrating analysis of things. I remember we focussed on one of his favorite subjects, whether bribes were held on a constructive trust and Hong Kong v Reid was correctly decided - he said of course it was. It was a great session and his immense knowledge shone through, as did his humor and humility. He will be greatly missed.

Q What is the easiest/hardest aspect of your job?

A Now I'm a trustee, the easiest aspect of my job is that I no longer have to give advice; I take it instead. The hardest is remembering I no longer have to give it.

Q If you could give one piece of advice to aspiring practitioners, what would it be?

A It sounds obvious, but first, to find something you enjoy doing within the profession. People tend to specialize so much these days, which is understandable, but you do need to pick your specialism carefully, as most likely, it will determine your entire career. And if you don't enjoy it, you won't do it well. Secondly, always listen and be prepared to ask - there's no such thing as a bad question, and none of us can ever know everything. The wisest people are often those who understand their limitations. Thirdly, always remember that different things are important to different people and there is rarely an absolute right and wrong. An argument wouldn't be an argument without two sides, and not everyone sees things as you do.

Q What do you think will be the most significant trend in your practice over the next 12 months?

A A steady rise in contentious trust cases, which is where we come in, as at Ocorian, we're actively after taking these on.

Q If you could learn to do anything, what would it be?

A Play the piano - it's a wonderful instrument and far more neighbourly than the drums, which I do play, badly.

Q What is the one thing you could not live without?

A My drums, and even though I play them badly. A close joint second come (in no particular order) my collections of music, books, malt whisky, my family, our various pets and our garden.

Q If you could meet anyone, living or dead, who would you meet?

A David Attenborough. I marvel when I think of his life, what he has done (and still does) for us, and what he will have achieved for our future generations. I cannot imagine the world without him. How anyone will begin to assume his legacy I don't know. But someone or more likely a very large number of us are going to have to do so, as we owe it to him and our planet, and to our children and their children to carry on his work.

Q What songs are included on the soundtrack to your life?

A Good heavens - what a question! I'm not going to give the usual answers to this - "I did it my way", Sinatra (or the Pistols!) or Python, "Always look on the bright side", etc, but Queen, "The show must go on", whilst in similar vein, is still a classic. Aside of that, if we are talking songs, not pieces of music, then Mahler's das lied von der erde is probably the one thing amidst the mass of 70s/80s rock my wife would not burn given half the chance.

Q What does the perfect weekend look like?

A Erm - how about you mind your own business! OK, if you're pushing me, then a combination of cooking for my family, pottering in the garden and our hot house, a nice country walk and taking a five for in front of a packed members' pavilion at Lords. Yeah right, a nice country walk.

Q Looking forward to 2022, what are you most looking forward to?

A Doing more yoga, which I took up last year and which has helped my aging frame considerably. And the cricket season - mine I mean, not the England one if the tour down under was anything to go by. Also, I'm hoping to climb my 50th Munro this year - only about 225 to go. My climbing partner of thirty years died last year, far too young, and I've got this urge to honour his memory by spending time in the hills. Finally, I'm hoping we can all see a return to something like how things used to be. The last two years have been an immense challenge for all of us, and tested our spirit as a race, but it does seem we may now be coming out of the worst of it. For those of us who have lost loved ones, or been kept from seeing their families, the end cannot come soon enough as a final acknowledgement of all our sacrifices. And people of all ages need to start living their lives again.

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THE PROTECTORS' POWER OF CONSENT

AN EVOLVING CONCEPT

Authored by: David E. Grant – Outer Temple Chambers

Introduction

Three recent cases in three different jurisdictions [1] have considered a hitherto unexplored question in the law of trusts, namely the scope of a protector's power of consent. The different conclusions of, on the one hand, the English High Court and the Royal Court of Jersey and, on the other, the Supreme Court of Bermuda create uncertainty as to what approach a protector should adopt when invited to provide the necessary consent and increase the prospect and need for further consideration of the point, preferably at appellate level. [2]

Issue for Resolution

The common issue for resolution was the nature of the decision that a protector has to make when exercising their consent power. [3] The question can be posited in different ways but it boils down to this: does a protector whose consent is required for a trustee to exercise a power have an independent decision-making discretion amounting to a power of veto ("the wider view") or does the protector merely have a discretion to determine that the Trustees' decision was rational and valid amounting to a rationality review ("the narrower view") analogous to the role of a court in a Public Trustee v Cooper [4] category 2 application. [5]

Context

All three cases were or related to blessing applications. PTNZ concerned the restructuring of four family trusts and redistribution of funds. The hearing before the Master was the first of two hearings to determine the validity of the appointment of the protector and what role they were to play at the substantive blessing application. Conversely, in X Trusts, AJ Kawaley had already approved the plaintiff trustees' proposals for the long term administration of the trusts subject to determination of the scope of the protectors issues. Piedmont concerned an application to appoint all the assets of the trusts amongst the beneficiaries in specified proportions upon which the trusts would be terminated.

In PTNZ the argument was between the neutral trustees, who assumed responsibility for arguing for the narrower view [6], and the protector who argued for the wider view. In X Trusts the A Branch of the family argued for the narrower view, i.e. seeking to uphold the trustee's decision while the B Branch argued for the wider view. In Piedmont the protector objected to an initial proposal but consented to a subsequent, revised one. The protector argued for the wider role [7] while the adult grandchildren, who favoured the trustees' original proposal, argued for the narrower role. [8]

1 The cases are:
PTNZ v AS & Ors [2020] EWHC (3114 (Ch) November 2020, a decision of Master Shuman (as she was) ("PTNZ")
In the matter of the X Trusts [2021] SC (Bda) 72 Civ, a decision of Assistant Justice Kawaley ("X Trusts")
In the matter of the Piedmont Trust and Riviera Trust, Jasmine Trustees & Anor v M & Ors [2021] JRC24, a decision of the Royal Court (Samedi) (Sir Michael Birt, Commissioner and Jurats Ramsden and Olsen) ("Piedmont").
2 At the time of writing it is not clear if either 2021 decision is being appealed.
3 PTNZ at [74].
4 Public Trustee v Cooper [2001] WTLR 901.
5 The question was identified in PTNZ at [92] as whether the protector held effectively a joint power with the trustee or whether he had a power of review.
6 See [86] where it is recorded that counsel for the trustee was expressly not adopting the position he was advancing. It was an influential part of the successful argument in X Trusts that there had not been full adversarial argument in PTNZ. See [105].
7 See [87].
8 See [33].

Applicable Wording

In PTNZ Master Shuman provided [9] a precis of the expanded powers of the protector under the deed of variation: "The trustees shall not exercise specified powers and discretions without the written consent of the protector"[10]. Of relevance were the power to appoint the trust fund and apply capital and the power to add or remove any persons from the category of beneficiaries. In X Trusts ¬¬the Judge set out a sample clause [11] restricting the Trustees' power to appoint capital "The Trustees shall not exercise any power to appoint, distribute or pay any part of the Trust Fund…without obtaining the prior written consent." In Piedmont any appointment of capital or income was to be "with the written consent of the Protector". [12]

The question of whether the wider view or the narrower view was to prevail was defined in X Trusts as the Interpretation Issue. [13] In PTNZ the relevant question was posed more broadly, namely "whether [the protector's] consent is required in relation to the decisions of the trustee that are the subject of the blessing application."[14] In Piedmont, the court initially appeared to consider the issue not as one of construction of the relevant provisions before it but as a general question of the role of a protector.[15] Interestingly, in the postscript prepared after the draft judgment had been circulated in response to which the court was furnished with a copy of the decision in X Trusts, the Royal Court referred to "the correct interpretation of a protector consent clause" [16]

Despite the nature of the issues before the courts, i.e. the construction of the respective trust deeds [17], this is not an issue where the precise wording is as involved or as decisive as with other trust powers. As is apparent from the above summary, the three cases concerned materially identical language requiring written consent on the part of the protector as a condition precedent to the exercise by the trustee of the power in question.

Rationale for Protectors

The phrase "protector" is not a term of art [18] and there are many unresolved issues as to the classification and scope of a protector's power. At a high level, though, a settlor appoints a protector to exercise due control over the trustee absent judicial intervention. [19] A trustee's powers can be unilateral or joint and, without limitation, may cover the appointment or removal of trustees, the appointment of beneficiaries and restoration of hostile beneficiaries as well as consenting to distributions or the sale of trust property.

Irrespective of the question of whether the narrower or wider view prevails, there are certain pre-existing controls as to a protector's consideration and exercise of power. It was common ground in PTNZ that the protector's powers were to be exercised in good faith and for the purpose for which they are conferred (the fraud on a power rule). [20] It was common ground in X Trusts [21] and Piedmont [22] that powers were fiduciary. This is to be distinguished from PTNZ where it was contended on behalf of the trustee that the powers of consent are fiduciary while the protector argued that the power was a limited or restricted one. [23]

Previous authority and outcome

The courts in PTNZ and Piedmont commented on the lack of authority on the point generally and particularly the lack of authority in support of the narrower view. [24] After the Royal Court circulated its draft judgment, it was provided with X Trusts in response to which it added a postscript to the judgment. [25] The Royal Court was not shown PTNZ upon which it considered no great weight could be placed, despite agreeing with the outcome. [26] X Trusts had the most detailed argument and the most sustained examination of authorities and academic writings even if the decision is – as a matter of construction - one which many practitioners will consider to be wrong, no matter the benefits of the narrower view.

In essence, the task of construction is to ascertain the objective meaning of the words used and the objective intention of the parties (in the case of a unilateral document, the settlor).[27] On a literal reading, the wider view prevails.[28] The literal reading represents the start of the iterative constructive process and, increasingly, the conclusion of that process. [29] This begs the question of on what basis the Bermudan court departed from the literal reading (and its own first impression). In essence, having regard to the academic commentary and

9 At [76(b)].

10 One assumes that the text is very close, if not identical, to the actual wording.

11 At [11]. There were several trusts.

12 See [70] According to the judgment, there was similar wording in relation to other powers of disposition to beneficiaries while the wording in the Riviera Trust was similar but not identical.

13 See the Summons set out at [3].

14 See the summary of issues at [4(2)(b)].

15 See [87] – [95], particularly at [90].

16 At [116(ii)]

17 As just indicated, Master Shuman and AJ Kawaley explicitly recognised this. The position of the Royal Court was different.

18 In PTNZ Master Shuman accepted at [96] that there was no magic in the word protector.

19 According to Hayton, The International Trust 3rd ed, "The term is usually used to describe a person, who is not one of the trustees of a trust, but upon whom the trust deed confers a 'watchdog' role in respect of the administration of the trust by the trustees." See X Trusts at [85].

20 See [79].

21 See [9]

22 See [79]. The Court expressly explained that it had not considered the position if the protector were not a fiduciary.

23 See [80]. The Royal Court also held at [89] that the paramount duty of a protector was to act in good faith in the best interests of the beneficiaries.

24 See [93] of PTNZ and [89] of Piedmont.

25 At [112]-[120].

26 See [116(ii)]

27 See the joint statement of legal principles in PTNZ at [42].

28 See X Trusts at [65] and [114].

29 See the authorities cited at PTNZ at [36] to [43] and AJ Kawaley's acceptance in X Trusts at [24] that primacy should ordinarily be given to a textual analysis of trust instruments.

downplaying the decision in PTNZ[30], AJ Kawaley was persuaded by the practical consequences of the wider view and the fact that a review function was consistent with the supporting watchdog role of a protector.[31] He was of the opinion that the narrower view was still a very substantial power[32] a decision with which the Royal Court disagreed, categorising the role - if the narrower view were correct - as a "fundamentally limited one".[33] The Royal Court rightly observed that one of the reasons why the court exercises a limited review function on a blessing application is that the settlor does not choose the court as a trustee.[34] Such considerations do not apply to a protector.

Continuing with the question of the protector's role, and developing the analogy accepted by AJ Kawaley between private trusts and pension schemes,[35] pension deeds contain a balance of powers between trustee and employer. Almost invariably,[36] the most important powers are bilateral, whether in the hands of the employer with the trustee's consent or vice versa. Although it is possible to draft a pension deed in such a way that the consent required can only be withheld in limited circumstances (comparable to wording often found in leases), it has never been argued that the trustee or employer, as the case may be, has a limited review power. Rather, the power is one of veto so that the power is effectively a joint one.

Practical consequences

It is undoubtedly true that the wider view increases the prospect of a deadlock[37] for the simple reason that trustee and protector can hold equally rational, but opposed views, as to how the trust should be distributed. The Royal Court held this to be the natural consequence of the settlor's decision to introduce the office of protector into the trust deed.[38] A true deadlock may still arise if the narrower view is correct (most obviously if the protector considers that the trustee has taken into account an irrelevant consideration or failed to consider a relevant one) and, in any event, can be resolved by an application to court.

In this context, it is pertinent to consider the earlier observation of the Royal Court that a protector's discretion lies within a narrower compass than that of a trustee.[39] This seems to suggest a third way between a full power of veto and a power of review although such a test may be difficult to apply in practice. Furthermore, as each of PTNZ, X Trusts and Piedmont confirms, the role of a protector hardly abrogates the need for a blessing application when significant sums of money are at stake. Although one should not make light of the consequences of applying to court, Vos LJ noted in Cotton v Earl of Cardigan[40] that the procedure is intended to be "quick and accessible."

Going forwards – consequence of applying wrong test

Given the different outcomes in these cases, protectors in all jurisdictions have a dilemma when their consent is sought as to which test to apply. The first issue is whether the fact that the protectors might ask themselves the wrong question automatically vitiates their exercise of the power of consent. If so, the next issue is what impact that has upon the trustee's decision.[41] Practically, there are four possible scenarios, only two of which are problematic. If (i) a protector gives their consent applying the wider test, it is implicit that they would give their consent under the narrower test. In such a case, a court is most unlikely to entertain any challenge. Equally, if (ii) a protector objects to a proposal which they consider to be irrational, applying the narrower test, it follows that they would not give their consent on the wider view. The complication arises if a protector would consent on the narrower view but not on the wider view. In this case the application of the test is critical to the granting of consent. Here the protector's decision is subject to challenge if they (iii) grant consent wrongly applying the narrower test or (iv) withhold consent thinking the wider test governs. This is sufficient reason for the protector to seek specialist advice and potentially judicial determination. While there will always be difficult cases, the hope is that much of the current doubt can be addressed. When parties to a trust are faced with monumental decisions, it is surely desirable that applications to court are limited to whether the court will give its blessing, not to the ancillary question of what the protectors' role is.

30 On the basis that it was the decision of a Master who had not had the benefit of full adversarial submissions. See [105].

31 At [99].

32 [97].

33 At [116(iv)].

34 See Piedmont at [90].

35 At [24].

36 The principal exceptions concern industry wide schemes which may have hundreds of employers and it is more likely to find unilateral powers vested in the trustee.

37 See X Trusts at [99] and Piedmont at [118].

38 [118].

39 [92].

40 [2014] EWCA Civ 1312 at [78].

41 Note that the exercise of a power vested in joint donees who must act together will be vitiated if only one of them has an improper purpose and intention. See Lewin on Trusts 20th ed at 30.080.

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LEGAL RIGHTS:

THE SCOTTISH PROBLEM AND INTERACTION WITH TRUSTS

Authored by: Sarah-Jane Macdonald – Gillespie Macandrew

With domicile being incredibly fluid in this modern world, cross-border estates are becoming commonplace. Professional advisors therefore need to be more attune than ever to the quirks that crop up either side of that dividing line, one of which is legal rights.

Unlike our counter-parts South of the border, where a testator has freedom to dispose of their estate (subject to claims under the Inheritance Act 1975), Scotland has a form of forced heirship known as legal rights. If a person dies domiciled in Scotland, legal rights will operate to give a fixed share of the deceased's estate to any spouse/civil partner and/or any descendants.

Despite being a uniquely Scottish concept, it does have multi-jurisdictional impact.

Aside from the fact that parties entitled to legal rights may be domiciled anywhere in the world, legal rights is calculated with reference to the deceased's net worldwide moveable estate. If domicile is uncertain and parties believe they might have a greater (or at least a fixed) benefit under legal rights, this can also lead to actions being raised to clarify domicile.

Unfortunately, the law on legal rights is not straightforward. It is derived from common law and many of the cases are now historic. As parties are often reluctant to litigate, many disputes are settled out of court, impeding the development of clear judicial authority on many key issues.

Practitioners will often come across clients seeking to minimise the entitlement where there is for example a "black sheep" child or an ex-spouse/civil partner delaying a divorce/dissolution. Even where families appear amicable prior to a death, true colours can soon emerge once parties discover they have an entitlement to legal rights. On death, this can lead to numerous contentious issues from agreeing what is moveable, to proper valuation, appropriate deductions, and so on.

There is often a misconception that assets held in trust are out of reach from legal rights claims. However, that is not the case and there are two main situations where assets gifted to trusts may form the basis of legal rights disputes. These are:-

1. **Where the assets are still deemed to be part of the testator's estate and included in a legal rights calculation; or**
2. **Where assets have been gifted to one or more children via a trust structure and these may need considered to equalise legal rights claims.**

It is irrelevant what jurisdiction the trust is administered under, provided that the deceased is domiciled in Scotland at the time of their death such that legal rights apply. This could therefore cause issues to trustees throughout the UK and beyond.

Assets Deemed Part of the Testator's Estate

From a Scots' law point of view, in order for a gift to be validly made and the asset excluded from a legal rights calculation, the doner must have fully divested themselves of all interest in the asset, i.e. there should be no reservation of benefit.

This means that if a trust is settlor-interested, gifts to it will still need to be included in a legal rights calculation and there is various Scottish authority where such gifts to settlor-interested trusts have failed for legal rights purposes. That said, where the interest was merely a potential right of reversion to the settlor, one that never materialised, a Court has held the assets in such a trust to be excluded from legal rights.

If the trust has been set up to give the appearance of putting assets outside of the estate of the settlor, but the settlor retains full control such that the assets won't transfer until after their death, this would also likely be caught by some form of "sham" arrangement in the relevant jurisdiction. Lord Ormidale in the Scottish case of Buchanan v Buchanan (1876) 3 R 556 put it best when he deemed such gifting "a mere bit of acting", whilst in England the sham principles of Snook v London & West Riding Investments Ltd [1967] 2 QB 786 (CA) may apply.

If there is some form of sham arrangement, then the assets would be deemed to be held for the testator as bare trustee and form part of their estate (and any legal rights calculation).

Trustees acting for Scottish domiciled (or potentially domiciled) parties may therefore wish to take care when creating or transferring assets to trusts to ensure such issues can be avoided for the trustees in the future.

Gifts Used to Equalise Payments

There is a further concept known as "collation", which aims to equalise what children (or other descendants) have received by treating certain lifetime payments as advances from their legal rights entitlement. It doesn't increase the amount of legal rights available, but alters the division of the legal rights fund between the claiming parties to create equality. This too can therefore be a bone of contention.

For collation to apply there must have been a loss to the doner's estate and a gain to the recipient's estate. As such, gifts made to a trust where there is a subsequent payment to a legal rights claimant could, potentially, be brought back into account. It will very much depend on the facts and circumstances: how distinct the trustees were to the doner, whether the onward payment was pre-ordained, how independent the decision of the trustees was and so on.

This could cause issues for trustees where they are called upon to give evidence. Not only are there issues around requirements to disclose such information, but the trustees will owe a duty of impartiality to beneficiaries and if multiple parties are trust beneficiaries, the trustees could breach that fiduciary duty.

Advice for Practitioners

With contentious trusts and estates generally on the rise, practitioners should be mindful of seeking Scottish advice where there is any potential cross-border issue, particularly with legal rights.

Whilst this article focuses on some of the problems for trustees, the risks posed by legal rights are numerous, so seeking advice will help the client, but will also protect the practitioners if issues do crop up later.

60-SECONDS WITH:

RICHARD DEW
BARRISTER
TEN OLD SQUARE

Q What would you be doing if you weren't in this profession?

A I often wonder! I come from a family of doctors so truthfully if I had not become a lawyer, I probably would have followed that path, although what decided it is that I hate the sight of blood. But in my wilder dreams I would love to pursue my passion for scuba diving, and picture myself travelling the world to exotic and warm locations to explore the underwater world.

Q What's the strangest, most exciting thing you have done in your career?

A My job is often strange, but generally any excitement comes with a fair amount of terror, usually when appearing in front of difficult Judges or in difficult cases. Probably one of the strangest – and perhaps most exciting – briefs was being sent by the Official Solicitor to a far-flung court to try to extricate him from a family trusts dispute only for the mother to behave so badly in court that she was sent to the cells. On another occasion, at the conclusion of a trial a minor riot took place leading to numerous police swooping into Central London County Court. Such things are not usual for a chancery practice!

Q What is the easiest/hardest aspect of your job?

A I enjoy most the flexibility of being self-employed and the variability that comes from having lots of different cases, with many different challenges. The most intense periods come from trials, and I find that putting together an effective cross examination involves a lot of work and anxiety. But successes in court (when they happen) are the most rewarding aspects of the job.

Q If you could give one piece of advice to aspiring practitioners, what would it be?

A Don't be too hard on yourself. I don't want to sound like a self-help book but if you are not occasionally failing at something you are not pushing yourself hard enough. But when the failures do come learn from them and move on. I think a lot of junior lawyers are used to performing brilliantly in exams and other settings and so find it very hard when things don't go quite right in their professional life. But my experience is that knock-backs and the occasional mistake make us all better lawyers.

Q What do you think will be the most significant trend in your practice over the next 12 months?

A Practice at the bar is very unpredictable. I look at my diary for the next year knowing that it will probably turn out very differently. However, something I am seeing a lot of recently – and have just been involved in a large case about – are disputes in the Court of Protection about people's affairs or their Wills which perhaps in the past would not have arisen until after their death. These cases are often very complex and can involve a lot of parties and issues so they are both challenging and interesting to be involved in. I am sure there will be a steady growth in this type of work.

Q If you could learn to do anything, what would it be?

A To speak a language. I am always amazed by the ability of our foreign colleagues to speak English and somewhat ashamed of my total inability to speak their language (and the assumption that they will speak English!). I also think the ability to speak a person's language gives you a much greater insight into their thinking and their culture and can avoid the misunderstandings that are often the source of disagreements.

Q What is the one thing you could not live without?

A Personally, my family, professionally, my chambers. One thing I learned from lockdown (aside from the mute button) is how much I have relied upon my colleagues for friendly chat, the occasional advice or steer and to regale my successes to when (occasionally) they happen. I am sure that working from home is here to stay but I still hope we can keep some part of that chambers environment.

Q If you could meet anyone, living or dead, who would you meet?

A Never meet your heroes. But I am reading a book about Alexander Hamilton, having seen the musical (a must see). He seems to have been extraordinarily gifted and incredibly hard working but also incredibly fortunate to live when he did – at the formation of a country going from essentially nothing to a fully functioning constitutional democracy. With our modern eyes, the sheer volume of work that he did seems almost unimaginable, especially when you consider it was done under candlelight and with quill and ink. That for the most part the work was also brilliant and forward thinking is incredible.

Q What does the perfect weekend look like?

A Early morning runs, coffee and a newspaper, driving the kids somewhere (but preferably not having to stay!), Saturday evening with a takeaway and the tv, Sunday roast, a nice bottle of red wine.

Q Looking forward to 2022, what are you most looking forward to?

A Travel! I last got on a plane in February 2020. It will be great to see friends and colleagues at some of the conferences this year and I am really looking forward to seeing some different places with the family. And of course, there are a few scuba trips planned, including a world 'top ten' to the wrecks at Scapa Flow in the Orkneys.

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