A 2014 REVIEW OF RECENT TRUST LAW DEVELOPMENTS

Hon Mr Justice David Hayton, Caribbean Court of Justice

Limitation periods for recipients of property in breach of trust or fiduciary duty and dishonest assistants in such a breach: *Williams v Central Bank of Nigeria* [2014] UKSC 10

The Supreme Court in allowing an appeal has simplified and clarified the law, bringing finality as to limitation periods in respect of recipients of trust or fiduciary property in breach of trust or other fiduciary duty and dishonest assistants in such a breach. There is a six year period in these cases where the trust affecting the defendant arose *by reason of* the impeached transaction and so not before such transaction.

Limitation Act 1980 s 21 (1) states as follows. "No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action –

(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use."

The Supreme Court by a majority allowed the appeal from the Court of Appeal which had taken a broad view of "in respect of" in s 21(a) so as to hold that it extended beyond actions against trustees to actions against all third parties involved in a breach of trust to which the trustee was a party or privy. The Supreme Court held that the burden of s 21 only applies to persons who have accepted the role of a trustee or fiduciary in respect of particular property *before* the occurrence of the impeached transaction.

Thus, it does not extend to third parties only treated as personally liable as constructive trustees by reason of their dishonest assistance in a breach of trust or fiduciary duty. Nor does it extend to recipients of trust or fiduciary property in breach of trust or fiduciary obligations who become liable to return the property as soon as they receive the property and continue with such liability so long as having traceable substitutes for such property, but do not become liable to personal or compensatory remedies until they become aware of the breach but dishonestly do not immediately return the property or its traceable substitutes to augment the property subject to the trust.

These third parties involved in a breach of trust can claim the benefit of the six year limitation period in s 21(3), six years after the claimant's right of action accrued to him. This will be the date of the dishonest assistance or of the wrongful beneficial receipt of the trust or fiduciary property or the date a bailee of such property dishonestly dealt with it after rightfully receiving it or the date a delegate who rightfully received title to intangible property (like shares or bank credits) dishonestly dealt with it. Note, however, that by s 32 if the action is based upon the defendant's fraud or if any fact relevant to the claimant's right of action has been deliberately concealed from him by the defendant, the six year period does not begin to run until the claimant has discovered the fraud or concealment or could with reasonable diligence have discovered it.

Proprietary and personal equitable claims via the tracing process and unjust enrichment claims: *Relfo Ltd v Varsani* [2014] EWCA Civ 360

At first sight, the Court of Appeal with one of its alternative *rationes decidendi* involving an unjust enrichment claim, seems to have quietly made it possible to rely upon strict liability of a defendant for having been unjustly enriched at the expense of the claimant instead of having to prove fault on the defendant's part to make him liable in equity for 'knowing receipt' viz unconscionable or dishonest dealing with trust or fiduciary property that the defendant has received but not returned after becoming aware of the position.

No mention, however, was made of *Bank of Credit & Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437 at 456 where Nourse LJ (with whom Ward and Sedley LJJ concurred) doubted "whether strict liability coupled with a change of position defence would be preferable to fault-based liability in many commercial transactions, for example where the receipt is of a company's funds which have been misapplied by its directors….it would appear to be commercially unworkable and contrary to the spirit of the rule in *British Royal Bank v Turquand* (1856) 6 E & B 327 that, simply on proof of an internal misapplication of the company's funds, the burden should shift to the recipient to defend the receipt either by a change of position or perhaps in some other way." Nor was there any mention of the High Court of Australia in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 which had unanimously strongly rejected such a strict restitutionary basis put forward by the New South Wales Court of Appeal. The High Court stated at [154] that "the restitution basis reflects a mentality in which considerations of an ideal taxonomy prevail over a pragmatic approach to legal development. [It] was imposed as a supposedly inevitable offshoot of an all-embracing theory. To do that was to bring about an abrupt and violent collision with received principles without any assigned justification." In *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* [2014] HCA 14 the High Court affirmed the need for inequitable or unconscionable conduct of the defendant before an unjust enrichment claim could succeed: see [1], [65], [78].

Received principles are that while *legal* proprietary rights are rights in rem binding the whole world, *equitable* proprietary rights, hidden behind such legal rights, are more difficult to spot so that they do not bind bona fide purchasers for value without notice and, indeed, will not make a gratuitous recipient personally liable until he or she becomes aware of the equitable rights and unconscionably or dishonestly fails to return the relevant property to its rightful owners[1]. Thus such recipient cannot be liable if before attaining such awareness he dissipates the property by spending the received money or the proceeds of sale of the received property.

The oversight of the above cases and received principles was possible because it seems that the defendant/appellant's counsel was content to assume that an unjust enrichment claim could be made because he felt confident that he could easily defeat the claim by relying on the straightforward defence that an unjust enrichment claim requires the defendant to be directly enriched by the claimant except where the claimant can trace his property into the defendant's hands. If, as he claimed, tracing was not possible, then the unjust enrichment claim must fail because no property passed directly from the claimant to the defendant. By way of response, the claimant/respondent's counsel was content simply to argue that "as a matter of substance or economic reality" the defendant was a direct recipient of the claimant's money.

Thus the Court of Appeal assumed that an unjust enrichment claim could lie but, just as Viscount Simonds stated in *Kirkness v John Hudson & Co Ltd* [1955] AC 696 at 714, "the

[1] Further see D Hayton, "Lessons from knowing receipt liability and unjust enrichment in Australia' (2007) 21 Trust LI 55

beliefs or assumptions of those who frame Acts of Parliament cannot make the law"[2], so the beliefs or assumptions of the Court of Appeal cannot make the law as emphasised by Russell LJ in *National Enterprises Ltd v Racal Communications Ltd* [1975] Ch 397 at 406 and by Lord Diplock in *Baker v The Queen* [1975] AC 774 at 788 in relation to an earlier Privy Council case.. The Court of Appeal gave no thought whatsoever to whether strict liability for unjust enrichment could be relied upon to by-pass the conventional fault-based liability for 'knowing receipt'. The issues at [3] for the Court of Appeal were (1) Could the credit to the defendant's Singapore bank account be regarded as the traced equivalent of the company's money, in which event the defendant was personally liable for knowing receipt; (2) otherwise (assuming that the defendant could be liable for having been unjustly enriched at the company's expense) had he actually been enriched at the company's expense when the payment into his bank account had not come directly from the company. "Yes" was the answer to both questions.

The details of the case

Mr Gorecia, a close friend and adviser to the Varsani family, was embarrassed by large losses flowing to the family from his advice. As controlling director of Relfo Ltd, an English company, on 4th May he caused it in breach of his duty to the company, to transfer US$890,050 (equivalent to £500,000) into a Latvian Bank account of Mirren Ltd, a BVI company. On 5th May Intertrade Group LLC, a Wisconsin company used by Ukrainian businessmen, paid $878,479.35 from its Lithuanian bank account to Mr Varsani's Singaporean Citibank account. Such amount represented $890,050 less 1.3%. After deduction of a $10 banking fee $878, 469.35 was credited to Mr Varsani's Citibank account on 10 May. On 13th May he transferred $100,000 from Citibank to Mr & Mrs Gorecia.

Crucially, there were no payments of Relfo's money from the Mirren account to the Intertrade account that could have funded the Intertrade payment to Mr Varsani. Sales J, however, held at [77] that "Mr Goracia caused the Relfo/Mirren payment to be made, intending to produce the result that the funds so paid should, by means to be devised by his Ukrainian contacts, be paid on to Bimji Varsani, and it is likely that they acted so as to bring about the result" in return for a 1.3% commission. Earlier at [59] the judge had found that Mr Gorecia had contacts with Ukrainian businessmen who "had access to networks of entities which could be used as different

[2] Applied by Goff LJ in *Pritchard v Briggs* [1980] Ch 338 at 398 (erroneous assumption that rights of pre-emption were interests in property)

vehicles to effect payments in ways which obscured the true source of monies and were used to preparing corrupt and fraudulent accounting books and records". Thus Relfo's £500,000 could be traced into Varsani's Citibank account.

No proprietary claim, however, could succeed because Relfo's liquidator had produced no evidence that money still remained in the Citibank account or that payments therefrom had been used to buy particular traceable assets. There was, however, a personal liability for knowing receipt of Relfo's traceable property. Sales J further held that even if the money had not been traceable, the defendant would still have been personally liable on the alternative ground of Varsani having been unjustly enriched at Relfo's expense.

The factual findings of Sales J were not challenged and the Court of Appeal upheld his judgment, while making clear at [1],[3],[69],[99], per Arden LJ, at [105] Gloster LJ and at [123] Floyd LJ that there were two alternative *rationes decidendi*: (1) Relfo's £500,000 could be traced to the extent of US$ 878,469.35 into the defendant's Singapore bank account, the parties accepting that the defendant was therefore personally liable for knowing receipt; (2) although the US$878,469.35 had not come directly from Relfo's account to show that the defendant had been unjustly enriched at Relfo's expenses, in substance and economic reality the defendant had been unjustly enriched at Relfo's expense, the parties accepting that the defendant therefore became liable for such unjust enrichment.

Arden LJ made it clear that tracing is not concerned with a particular asset but the value inherent in it and focuses on matters that are causally and transactionally linked. She stated at [62], "the fact that Mirren did not reimburse anyone for the Intertrade payment until after the Intertrade payment had been made does not matter. On the judge's findings, the Intertrade payment and the other payments made [involving corrupt Ukrainian businessmen] were made on the faith of the arrangement that Mirren would provide reimbursement. By making that arrangement Mirren exploited and used the value inherent in Relfo's money."

At [63], "*Agip (Africa) Ltd v Jackson* [1990] 1 Ch 265 is authority for the proposition that monies held on trust can be traced into other assets even if those other assets are passed on before the trust monies are paid to the person transferring them, provided that that person acted on the basis that he would receive reimbursement for the monies he transferred out of the trust funds."

Even if the tracing process had not justified the defendant being personally liable for the money received in his Citibank account, he would alternatively have been liable for having been unjustly enriched at Relfo's expense. While a "but for" test is too wide to use in the unjust enrichment context and though Mr Varsani had not actually been directly enriched by Relfo but by Intertrade, there was a sufficient proximity between him and Relfo to treat him as unjustly enriched at Relfo's expense. "As a matter of substance or economic reality, Mr Varsani was a direct recipient": see [97] (and [103] & [115]).

Why use English law as the governing law subject to Futter v HMRC and Pitt v HMRC when the Trusts (Amendment No 6) (Jersey) Law 2013 and other jurisdictions' laws that will surely follow Jersey's example create greater protective flexibility for undoing errors?

It will be recalled that the Supreme Court in *Futter v HMRC* and *Pitt v HMRC* [2013] UKSC 26 killed off the *Hastings-Bass* principle that enabled trustees themselves to have the Court set aside a decision they would not have made but for failing to take into account relevant considerations or but for taking account of irrelevant considerations. Now, it is only where this occurred through a breach of duty by trustees e.g.in not obtaining advice that they ought to have sought, that the beneficiaries can have the trustees' decision set aside. Where trustees duly took needed expert advice which turned out to be incorrect and to cause loss to the trust fund, then their only remedy is to recover the amount of loss by suing the expert for negligence.

Jersey, however, has passed legislation that has the *Hastings-Bass* principle continuing to apply in Jersey under Trusts Jersey Law articles 47D and H, so making Jersey an attractive jurisdiction and so, no doubt, leading other offshore jurisdictions passing similar legislation.

It is noteworthy that the Supreme Court's drastic restriction of the *Hastings-Bass* principle was counterbalanced by its enlargement of the jurisdiction to set aside a transaction for mistake by not distinguishing between the effects and consequences of a decision. All that is needed is a causative mistake of sufficient gravity "either as to the legal character or nature of a transaction or as to some matter of fact or law which is basic to the transaction." The Supreme Court, however, at [114] laid down a significant restriction: a person's transaction will not be set aside if "the circumstances are such as to show that he deliberately ran the risk, or must be taken to have run the risk, of being wrong." Indeed (at [135]) "In some cases of artificial tax avoidance the court might think it right to refuse relief, either on the ground that such claimants acting on supposedly expert advice, must be taken to have accepted the risk that the scheme would prove ineffective, or on the ground that discretionary relief should be refused on grounds of public policy……artificial tax avoidance is a social evil which puts an unfair burden on the shoulders of those who do not adopt such measures."

It is most dubious, however, whether in England public policy can be relied upon when Parliament has recently enacted a General Anti-Avoidance Rule and the Courts in devising ways to deal with artificial tax avoidance e.g. in *Ramsey v IRC* [1982] AC 300 have not relied upon public policy but on principles of statutory construction as brought out in *Barclays Mercantile Finance Ltd v Mawson* [2005] 1 AC 684. Thus, it is the "running the risk" argument that will feature in future English cases.

In Jersey, however, in *Re Representation of Boyd Re the Strathmullan Trust* [2014] JRC 056, where the settlor's tax adviser overlooked the settlor's deemed domicile continuing for three years after leaving the UK, the Deputy Bailiff, WJ Bailhache QC, considered the avoidance of English tax not a matter for Jersey's public policy and ignored the running the risk argument when applying s 11 of the Trusts (Jersey) Law enabling a trust to be set aside for mistake. Intriguingly, he considered he could rely on s 11 without the need to consider applying the
the new Arts 47E and 47G of the Trusts (Jersey) Law which set out the Courts' new powers where a disposition has been made by a settlor or a trustee under a causative mistake of so serious a character as to render it just for the court to declare the disposition "voidable" to have no effect from the time it was made or have "such effect as the court may determine".

It seems that this latter power should not be construed so as to enable the court to rectify a document in retrospective fashion, instead of setting aside a document for mistake so that a new prospective attempt can be made to achieve a particular aim. Thus, Jersey law is limited as under English law[3] to rectifying an error as to the effective meaning of a document so that it does not extend to rectifying an error as to the consequences, fiscal or otherwise. This latter error only enables a disposition to be set aside so that a new attempt can be made to achieve a relevant consequence. However, new legislation in Jersey and elsewhere could permit rectification for

[33] *Racal Group Services Ltd v Ashmore* [1995] STC 1151 cited approvingly on this by Lord Walker in *Futter v HMRC* [2013] UKSC 26 at [131]; *Allnutt v Wilding* [2007] EWCA Civ 412; *Gilbert v RNIB* [2014] EWHC 1373 (Ch).

mistakes as to consequences as well as the effective meaning of language: cp US Uniform Trust Code ss 415,416.

Private international law matters, however, must not be overlooked e.g. if the question arose as to whether a settlor had mistakenly transferred English land or company shares to Jersey trustees or had mistakenly omitted to do so. The *lex situs* covers the validity of transfers of immovables and normally covers transfers of other assets, though in a case concerning a transfer of French shares to a Jersey trustee the Jersey Royal Court in *Re S Trust* [2011] JRC 117, 14 I.T.E.L.R. 663 upheld the English settlor's submission that Jersey law governed the transfer due to a restitutionary obligation of the Jersey trustee in respect of an unjust enrichment, the trustee unsurprisingly not demurring from this submission. Query whether the English courts would take the same approach if faced with a transfer of English shares to a Jersey trustee: the *lex situs* would appear applicable from *Akers v Samba Financial Group* discussed below.

Note that in considering a change of a proper law to that of another jurisdiction to obtain the benefit of that other law it will be unlikely that the new law can apply to matters happening before the change unless the new law expressly provides for this e.g. Cayman Trusts 2011 Revision s 90 applied in *Re Goldentrust, Megerisi v Protec* (discussed at last year's conference). Nevertheless, while the Cayman forum may decide that Cayman law is the *lex causae* applicable to events before the change of proper law to Cayman, if the relevant property is in another forum the courts of that forum may decide that the *lex situs* shall determine the issue and so come to different conclusion.

Clauses as to governing law and jurisdiction: *Crociani v Crociani* [2014] JCA 089

The Jersey Court of Appeal accepted Professor Paul Matthews' strong criticism of its controversial decision in *Koonmen v Bender* [2002] JCA218 so as to disown it, not being bound under Jersey law by its previous decisions.

It will be remembered that in *Koonmen* there were two key definitions. First, "the Proper Law" was defined to mean "the law to the exclusive jurisdiction of which the rights of all parties and the construction and effect of each and every provision of this settlement shall from time to time be subject and by which such rights construction and effect shall be construed and regulated." Second, it was declared "the Proper Law shall be the law of Anguilla which said island shall be the forum for the administration hereof." Surprisingly, the Court of Appeal held that that the first clause gave exclusive jurisdiction to the courts of the proper law and the second clause extended beyond day-to-day administration to hostile breach of trust disputes. These views were rejected in *Crociani:* the first clause was not a jurisdiction clause but a substantive law clause simply providing for exclusive subjection of the trust to the chosen proper law, while the second clause dealt with day-to-day administration, not breach of trust disputes.

In *Crociani* clause 12 empowered the trustees of a trust with a Jersey governing law to appoint new trustees in another jurisdiction and to declare that the trusts shall be read and take effect according to the laws of the country of the residence or incorporation of the new trustees. On such power being exercised "thereafter the rights of all persons and the construction and effect of each and every provision hereof shall be subject to the exclusive jurisdiction of and construed only according to the law of the said country which shall become the forum for administration of the trusts hereunder." The Court of Appeal held that on exercising the power to have a Mauritius trustee, the trust thereafter became exclusively subject to the new governing law of Mauritius, but Mauritius was only the place for the day-to-day administration of the trust under the ultimate supervision of the Mauritius court, not for breach of trust disputes. Thus breach of trust disputes concerning matters when Jersey law was the proper law were not subject to the exclusive jurisdiction of the Mauritius court.

As Martin JA stated at [155] in a short judgment concurring with the President's judgment, so as "not to invite misconstruction", "It would be better if the expression 'exclusive jurisdiction' were reserved for cases where it is genuinely intended to confer exclusive jurisdiction over all trust disputes in the courts of a particular country; and better if the expression 'forum for administration' were abandoned altogether."

Incidentally, one needs to beware the ramifications of Article 23(4) of the Brussels Judgments Regulation 44/2001, replaced from 10 January 2015 by Article 25(3) of the recast Regulation 1215/2012. The Article provides that the courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between those persons or their rights and obligations under the trust are involved. This provision is not qualified by a contrary intent such as "unless the trust instrument provides otherwise", unlike the exception allowed under Articles 23(1) and 25(1) respectively.

It is noteworthy, however, that if contrary to an exclusive jurisdiction clause, proceedings are first instituted in another jurisdiction, any proceedings in the exclusive jurisdiction have to be stayed until a court in the other jurisdiction has decided that it ought not to be seised of the matter, which could delay matters. Article 31 (2) of the Recast Brussels Regulation (No 1215/2012) strengthening the protection of a choice of jurisdiction clause in an agreement does not extend to choice of jurisdiction in a trust instrument.

Declarations of trust in private international law: *Akers v Samba Financial Group* [2014] EWHC 540 (Ch)

What is the position if a Saudi Arabian settlor owning shares in a company incorporated in a State like Saudi Arabia that has no trust concept recognising a division of legal and beneficial ownership, purports to declare a trust of the shares for Z Ltd a Cayman company? If the trust is governed by Saudi law as the law with which the trust is most closely connected there will be no trust conferring a proprietary interest on Z Ltd. In this event it was accepted in *Akers* that the settlor-trustee's disposition for value of the shares to the defendant, Samba, after commencement of the winding up of the insolvent Z Ltd, cannot rank as a "disposition of the company's property" that is void under s 127 Insolvency Act 1986. The English proceedings were then stayed, the courts of Saudi Arabia being clearly and distinctly more appropriate to hear matters, the settlor-trustee-transferor being the Saudi Arabian owner of a group of companies with headquarters in Saudi, Z Ltd being a Cayman company within the group, while Samba was a Saudi bank with a branch in England.

If the trust of Saudi shares for Z Ltd is governed by the law of a trust State, such as Cayman or England, is it totally impossible for the beneficiaries to have any rights? Under Article 15(1)(d) of the Hague Trust Convention the forum has to apply the law designated by its private international law rules to "the transfer of title to property", namely, the Saudi *lex situs* of the Saudi company shares. The settlor has not *transferred* title but has retained title while purporting to create a new interest in the property. Nevertheless, the vesting of a new beneficial proprietary entitlement to property in Z Ltd can still be regarded as a transfer of a new title to property as held by the Chancellor at [63]. Thus, whether Z Ltd owns a proprietary interest is determined by the *lex situs* of the shares, Saudi law (like Scots law in *Re Clark and Whitehouse (Joint*

Administrators of Rangers FC [2012] CSOH 55 discussed at last year's conference*)* and under Saudi property law Z Ltd has no proprietary interest capable of binding third parties.

There is no reason, however, why a settlor, who as full owner of his property can dispose of it (except so as to create proprietary interests unknown to the *lex situs*), should not be able to declare himself a trustee of property for others with personal rights against him, but no proprietary rights against third parties. This is recognised by Article 15(2) of the Trusts Convention which states "If recognition of a trust is prevented by application of the preceding paragraph, the court shall try to give effect to the objects of the trust by other means." Thus the settlor's trust structure can be treated as creating rights similar to contractual rights and by s 436 of the Insolvency Act 1986 choses in action rank as property within s 127. Indeed, in *Akers* Z Ltd would appear to have had enforceable personal rights ranking as choses in action within s 127 when the settlor-trustee could be regarded as a nominee for Z Ltd or as the '*amin'* of an '*amaana'* for the benefit of Z Ltd (analogous to bailment but capable of extending beyond tangibles). Nevertheless, it was not these rights of Z Ltd against the settlor-trustee that were assigned by the latter to Samba in *Akers,* but the shares in Saudi companies. Query the position in Saudi law if Samba was not a bona fide purchaser of those shares but a party to a conspiracy to defraud Z Ltd.

The strength of the Courts' powers to intervene under *Schmidt v Rosewood Trust*: *Re an Application for Information about a Trust* [2013] CA (Bda) 8 Civ

The court's power is an independent one, not limited to reviewing a decision of a trustee or protector. Notwithstanding that the protector was a beneficiary and owed no fiduciary duties according to clause 28, his power to refuse consent to the trustee's release of information to beneficiaries had to be exercised in the interests of the trust and the beneficiaries. Evans JA for the Court stated at [45]:

> "45. In our judgment –
>
> (a) The Chief Justice held, and it is common ground, that clause 9.2 does not purport "to oust the jurisdiction of the Court";
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> (b) however, the Court will not exercise its power to intervene without due regard to the terms of the Trust Deed; these, on their true construction, indicate what the Settlor's intention

was, and the Court's primary concern is to give effect to that intention;

(c) the Court will assume that the Settlor intended to create a valid and lawful trust, to be enforced in accordance with its terms by or on behalf of the beneficiaries specified by him;

(d) clause 9.2 on its true construction provides that the Trustee shall not release information to the beneficiaries without the consent of the Protector;

(e) the Protector's power under the clause must be exercised in the interests of the Trust and of its beneficiaries, notwithstanding that the Protector owes no fiduciary duties (clause 28) and notwithstanding that the Protector is one of the beneficiaries;

(f) the Protector who is a beneficiary therefore cannot withhold consent where a Protector who was not a beneficiary would not be justified in doing so;

(g) the Court has power to order disclosure to an individual beneficiary which it considers justified in the circumstances of the particular case, taking account of the terms of the Trust Deed;

(h) there is no defined "threshold" which the Applicant must cross before the Court's power can be exercised: the beneficiary's right is defined by reference to the Court's willingness to make the order sought, and it follows from this that the burden on the Applicant is to show that the order should be made in the circumstances of the case; as the Chief Justice put it, he must establish a prime facie case that the order should be made;

(i) further to (g), the Court's power is not limited to reviewing a decision made by the trustees or by the Protector; and

(j) the Court's power may be exercised when the trustees or the Protector have discriminated between beneficiaries without authority from the settlor or other proper grounds for doing so.

[46] It is immaterial in our view whether the legal analysis is that the power given by the Trust Deed is subject to the inherent powers of the Court or that the express term is interpreted as being subject to the Settlor's intention to create a valid trust."

Is it not the latter that establishes the existence of an obligation under a trust and so attracts the inherent powers of the Court to enforce the obligation?

The limits upon deeming persons to have exercised powers: *Briggs* v *Gleeds Head Office* [2014] EWHC 1178 (Ch)

In *Crociani* it so happened that under clause 12 Jersey trustees retired and were replaced by a Mauritius trustee and the parties *recited* a wish to declare the trust to be governed by Mauritius law but in the operative part of the instrument did not *actually declare* the trust to be so governed. Nevertheless, since the intention of the parties was clear the court gave effect to the intention and accepted that the trust was governed by Mauritius law, applying *Re Shinorvic Trust* [2012] JRC 081, [2013] WTLR 337 at [36]-[37] discussed at last year's Conference.

The principle deeming a power to have been exercised is that the court will deem that a particular power has been exercised by implication on the exercise of another power that could not achieve what was intended unless the particular power had been exercised. Thus in *Davis v Richards & Wallington Industries Ltd* [1990] 1 WLR 1511 a definitive trust deed to be effective needed to have been executed by the employer and all the trustees. It was erroneously thought that one trustee had resigned so the deed was executed by the employer and the remaining trustees. There was imputed to the employer an intention to exercise its power to remove that person as trustee and to treat the power as exercised by the employer's execution of the definitive deed, so that execution also by the other trustees rendered the deed effective. Similarly, in *LRT Pension Fund Trust Ltd v Hart* [1993] Pens LR 227 the trustees could not have replaced themselves with a trustee which was not a trust corporation within the EU without having first exercised a power to amend the trust instrument to make this possible. Knox J treated the trustees in their deed of appointment of the new trustee as having first exercised their power of amendment to permit the appointment of a non-EU trust company so as to achieve their purpose of appointing such a trust company.

This deeming principle, however, needs to be qualified in two respects as pointed out by Newey J in *Briggs v Gleeds Head Office* [2014] EWHC 1178 (Ch) at [90]-[96]. First, it can apply only if it allows the whole of what the relevant decision-maker was trying to do to be achieved, the deeds in *Davis* and *LRT* having full effect. If the decision-maker has decided upon a set of changes in a single document the principle cannot validate a particular element if the remainder cannot be saved as in *Briggs*.

Second, the decision-maker cannot be deemed to have exercised a power that he did not have in mind if the exercise of that power required examination of materially different considerations from those relevant to the exercise of the power that he was consciously exercising. After all, as the Supreme Court held in *Pitt* and *Futter v HMRC* [2013] UKSC 26 if trustees fail to take account of a material consideration in making a decision this can be a breach of trust enabling the decision to be set aside. Thus, in *Kain v Hutton* [2008] NZSC 61 the trustees purported to exercise a power of advancement in favour of Mrs Coupar who was not an object of such power, but who was an object of a broad discretionary power of appointment. The NZ Supreme Court held that the decision to be made over a possible advancement is of a materially different character from a decision on an appointment, so that the purported exercise of the power of advancement could not be validated by deeming it to have been the exercise of the power of appointment.

Personal liability of persons who in breach of trust or fiduciary duty fail to acquire property: *Libertarian Investments Limited* v *Hall* [2013] HKCFA 94

What is the measure of liability of T where P gave him money on trust to buy shares up to a 10% shareholding in a company but T did not take advantage of the opportunity to buy 1,777,700 shares, dissipating the money that should have been used in the purchase? Is he merely liable for the sum of money and interest thereon? The Hong Kong Court of Final Appeal (on which Lord Millett sat) held at [123]-[125] and [153] that T was precluded from denying that he had performed his primary obligation and could not set up a case inconsistent with it. Indeed, T had pretended he had bought 1,777,700 shares in January 2004 having withdrawn £5,463,508 allegedly for that purchase. In February 2006 P wanted to sell the shares to a Japanese company making an open cash offer for them. The offer was oversubscribed so that the Japanese company only bought 42% of the shares offered to it. T's prevarications (before he was found out) prevented any sale but if 42% of the shares had been sold the proceeds would have been £9,855,942 for which T was held accountable by the Final Court.

What about the remaining 58% of the shares? When judgment was given at first instance on Feb 25 2011 the company had become publicly quoted on the London Stock Exchange as 'Betfair' and 58% of a 1,777,700 shareholding would have been worth £9,114, 623. This robust measure of compensation should be taken against the defendant, an intransigent wrongdoer, thereby avoiding the expense, delay and grave uncertainties in ordering further accounts and inquiries as to what sales of this 58% shareholding ought to have produced at particular times. Stone J and the Court of Appeal had ordered an interim payment of £5million odd and accounts to be taken on the footing of wilful default.

The defendant was ordered to pay the plaintiff £9,855,942 plus £9,114,623 (relating respectively to 42% and 58% of the 1,777.700 shareholding) plus £37,054, representing other unauthorised withdrawals, minus the interim payment ordered by the Court of Appeal.

Since the defendant was ordered to pay compensation on the basis of gains which would have accrued to the plaintiff if the defendant had duly performed his fiduciary duty, only simple interest from the date of the writ was awarded at 2% above Bank of England base rate to the date of the CFA judgment, the Hong Kong judgment rate applying thereafter.

Lord Millett agreed with the above and added a short useful commentary. An order for an account is not a remedy for a wrong: it enforces specific performance of the obligation at the core of a trust: [167]. It is a preliminary first step in a process to identify the appropriate means by which to remedy any deficit in the trust fund: [168].

If a figure for an unauthorised disbursement is discovered in the accounts it can be falsified i.e. disallowed. This means that there will be a deficit to be made good *in specie* or by money. This will restore to the trust fund the extra value that would have been there if the defendant had properly performed his obligations but that is missing due to non-performance of such obligations: [168].

A claimant, however, may wait for further inquiries to reveal what the defendant did with the money. Did he dissipate or invest it? If he dissipated it or invested it at a loss, the disbursement of the money will be disallowed. If he invested it at a profit the claimant will claim the traced investment as an authorised investment that is an *in specie* part of the trust fund: [169].

A claimant can surcharge the accounts where the trustee has behaved negligently or, as here, failed to acquire for the benefit of the trust property that he was obliged to acquire, namely more TSE shares when available up to a maximum of a 10% shareholding. The failure of the accounts to show an acquisition of the 1,777,700 shares entitled the claimant to surcharge the account on the footing of wilful default and obtain equitable compensation akin to damages for loss: [170].

As to the award of equitable compensation where the absence of evidence was the consequence of the fiduciary's breach of duty, resort could be had to three principles: [174]. The court can (1) use the fiduciary's own falsehoods against him, even though knowing them to be untrue; (2) make every assumption against the party whose conduct has deprived it of necessary evidence; (3) can be robust and do rough and ready justice without having to justify the amount of its award with any degree of precision.

Trustees contracting with third parties: beware the extent of personal liability: *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* Guernsey Royal Court Judgment 38/2013

The judgment of Sir John Chadwick (former English LJ) reveals how important it is for trustees to consider expressly protecting themselves from potential personal liability when dealing contractually with third parties. The Guernsey trustees of a trust governed by Jersey law found that the protection accorded to them by Art 32 of the Trusts Jersey Law (below), did not cover loans the governing law of which was not Jersey law, but either Guernsey or English law. Thus, they were personally liable, though having a right of indemnity against the trust assets if sufficient.

By Art 32(1) of Jersey's Trust Law, "Where a trustee [of a trust governed by Jersey law] is a party to any transaction or matter affecting the trust

(a) If the other party knows that the trustee is acting as trustee, any claim by the other party shall be against the trustee as trustee and shall extend only to the trust property;

(b) If the other party does not know that the trustee is acting as trustee, any claim by the other party may be made against the trustee personally (though without prejudice to his or her personal liability, the trustee shall have a right of recourse to the trust property by way of an indemnity)."

By Art 32(2) "Paragraph (1) shall not affect any liability the trustee may have for breach of trust."

Compare s 42 of Guernsey's Trust Law,

(1) Subject to subsection (3), where in a transaction or matter affecting a trust [governed by Guernsey law], a trustee informs a third party that he is acting as trustee or the third party is otherwise aware of the fact, the trustee does not incur any personal liability and a claim by the third party in respect of the transaction or matter extends only to the trust property.

(2) If the trustee fails to inform the third party that he is acting as trustee and the third party is otherwise unaware of the fact (a) he incurs personal liability to the third party in respect of the transaction or matter, and, (b) he has a right of indemnity against the trust property in respect of his personal liability, unless he acted in breach of trust.

(3) Nothing in this section prejudices a trustee's liability for breach of trust or any claim for breach of warranty of authority.

(4) This section applies to a transaction notwithstanding the *lex causae* of the transaction, unless the terms of the transaction expressly provide to the contrary.

This last clause will be effective before Guernsey courts, so persons dealing with Guernsey trusts need to be careful, but not before other courts whose private international law rules can characterise the issue as one not involving trust law but contract law, governed by a *lex causae* other than Guernsey law.

Trustees' remuneration: *Pullan v Wilson* [2014] EWHC 126 (Ch)

Pullan ('P') was beneficiary under ten family trusts with about £100 million. Wilson ('W'), a specialist tax accountant, was appointed third trustee on retirement of the third trustee by the remaining two trustee, P's parents. P complained of excessive charging of fees (£849,890) 12 March 2007 to 4 November 2010 when W was a trustee.

Having regard to the nature and value of the services provided, taking account of experts' evidence, a proper reasonable charging rate was £330 per hour for W and £165 per hour for his assistant in his firm. Nevertheless, on the evidence it appeared that the appointing trustees and P had at the outset agreed to W's standard charging rate of £400 per hour (which fed into an appropriate assistant's rate of £200 per hour) so W could claim fees at that rate, but subject to a 7.5% discount for "excess administration and other non-productive time amply evident in the time records." No adjustment was made for services charged in respect of company-specific activity arising from W's remunerated non-executive directorship of three underlying family companies.

A trustee is entitled to his standard charging rates if approved (ideally, in his engagement letter) by the trustees and the principal beneficiaries even if it turns out that such rates were not reasonable and proper in the circumstances of the particular trust(s): see [54]-[55]. Judge Hodge QC in his extempore judgment gave no thought as to the implications of the appointing trustees apparently committing a breach of trust and the possibility of later legal proceedings by non-consenting beneficiaries like minors and unborns.

Conclusions

This has been another fertile year for trust law. The next year should prove at least as fertile starting off with decisions of the Supreme Court in *AIB Group (UK) PLC v Mark Redler & Co* [2013] EWCA Civ 45 (hearing 5 June 2014) and in *FHR European Ventures LLP v Cedar Capital Partners LLC* [2013] EWCA Civ 17 (hearing 17, 18 & 19 June before seven judges). The former appeal concerns the proper equitable principles governing the measure of compensation where a solicitor held re-mortgage money on trust to pay it over to the mortgagor only after two prior mortgages with Barclay's Bank had been discharged. The money was paid over in breach of trust after only one prior mortgage had been discharged so that the re-mortgagee lost money when the security was sold. The latter appeal concerns the borderline between proprietary and personal remedies where a secret commission or bribe is taken by a fiduciary. Was Lord Neuberger correct in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA 347 to reject the Privy Council decision in *Att-Gen for Hong Kong v Reid* [1994] 1 AC 324. He is down (on 3 June 2014) to preside over the appeal, so he should have an interesting time if he does preside.

3 June 2014