A 2017 Review of Significant Trust Cases over the Last Twelve Months

Justice David Hayton, Caribbean Court of Justice

Trusts of foreign property and s 127 Insolvency Act 1986

Akers v Samba Financial Group [2017] UKSC 6

This was an appeal from [2014] EWCA Civ 1516 that was reviewed at the 2015 Geneva Conference since it covered interesting points on The Hague Trusts Convention.

Mr Al Sanea (Al), a Saudi citizen and resident, closely involved with a Cayman family investment company, SICL, had declared himself trustee for SICL of six Saudi shareholdings worth US$318 million in total. In the Supreme Court, despite disagreement below, the parties agreed that the governing trust law was Cayman law. Six weeks after SICL had gone into liquidation Al transferred the shares to Samba in discharge of debts owed by him to Samba, a Saudi company having a registered London office.

Akers, SICL's liquidator, claimed that the share transfers were void as dispositions of SICL's property within s 127 of the Insolvency Act. Samba then applied for a stay of Akers' action. The basis for this was that England was not the appropriate forum: Saudi Arabia was, in which event since it knew nothing of equitable proprietary interests under trusts, the claim would fail so that, essentially, the stay application amounted to a strike out application.

The decision of the UKSC, however, turned on the proper interpretation of s 127 Insolvency Act 1986. Nevertheless, it usefully brings out the significance of independent personal and proprietary rights of beneficiaries and analyses the legal position of trusts of assets in foreign countries that know nothing of equitable proprietary interests of beneficiaries, while some obiter dicta involve the Trusts Convention.

S 127

By s 127 "In a winding up by the Court any disposition of the company's property made after the commencement of the winding up is, unless the court orders otherwise, void." By s 436 "'property' includes money, goods, things in action, land and every description of property, wherever situated, and also obligations and every description of property and every description of interest arising out of, or incidental to, property."

The liquidator argued that if SICL had an equitable proprietary interest, then Al's transfer of the registered shares to Samba would, assuming Samba had no notice of SICL's interest, have been a disposition of such interest to Samba, because Samba would thereupon become full beneficial owner of the shares.

The UKSC pointed out that *even if* SICL had a proprietary interest, Al had no power to make a disposition of SICL's proprietary interest to Samba. Al only had power to transfer his registered legal titles in the shares to Samba. This did not extinguish SICL's proprietary interest in the shares which remained to be asserted against Samba. It so happened that if Samba had no notice of SICL's interest in the transferred shares such interest would automatically cease due to the very nature of an equitable interest, though the Company's personal rights against Al as trustee would remain.

Thus, there was no disposition by a disponor to a disponee of a proprietary interest nor of personal rights within s 127.

<u>Common law courts' views of trusts of foreign assets in States not knowing beneficiaries' interests under trusts as proprietary in effect</u>

Lord Mance, giving the leading judgment (with which all Justices agreed), provided an analysis of a trust of assets in a country the domestic law of which did not recognise any division of full ownership into legal and equitable interests as follows. First, (at [20]) he stated the general rule that "where under the lex situs of the relevant trust property the effect of a transfer of the property by a trustee to a third party is to override any equitable interest which would otherwise exist, that effect should be recognised as giving the transferee a defence to any claim by the beneficiary", citing *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 WLR 387.

He then stated, (at [22]) "A common law court concerned with Cayman Island trusts in respect of Saudi Arabian shares will give them their intended effect to the greatest extent possible, having regard to the overriding effect of any disposition under their lex situs." Having explained the extensive equitable in personam jurisdiction of English Courts of Equity to enforce in personam against English residents common law trusts of property abroad, he went on to say at

[42] that he regarded "the present trusts not only as intended to create, but also as creating *equitable proprietary interests in the Saudi Arabian shares* (my italics), enforceable at common law as between SICL and Mr Al-Sanea and anyone else other than a transferee from Mr Al-Sanea in circumstances giving the transferee a good title under Saudi Arabian law."

Lord Mance and Lord Sumption in a supporting judgment, however, pointed out that a third party's conscience can be bound by the equitable obligations forming the nucleus of a trust. As Millett J (as he then was) stated in *El Ajou v Dollar Land Holdings Plc [1993] 3 All ER, 736-737*, "An English court of equity will compel a defendant who is within the jurisdiction to treat assets in his hands as trust assets, if, having regard to their history and his state of knowledge it would be unconscionable for him to treat them as his own." An in personam order can be made against a defendant to transfer trust assets to the person rightfully entitled to them.

Thus, it was possible, if the pleadings were amended, to allege that the state of Samba's conscience was such that it held the shares on constructive trust to transfer them or their value to the liquidator.

Dicta on Arts 4, 11 and 15(d) Trusts Convention

As seen, it did not matter whether the Convention applied or whether SICL's interest could properly be described as proprietary. The issue was simply whether, whatever the nature of SICL's interest under the trusts, there was any disposition by Al of SICL's 'property' within s 127 of the 1986 Act. There was no such disposition.

Art4

Art 4. "The Convention does not apply to preliminary issues relating to the validity of wills or other acts by virtue of which assets are transferred to the trustee".

This Article was first raised in the Court of Appeal which held that its exclusion literally only applied to preliminary issues involving whether assets had been validly "transferred to the trustee". It did not cover a settlor already having assets who declared himself trustee of designated assets. The Court of Appeal considered at [56]-[57] that the Convention applied to a self-settled trust but necessarily only if, as a key preliminary matter, the settlor had power under the lex situs to alienate property in the sense of being able to transfer the relevant property to others.

Lord Mance considered at [38] that even if the Court of Appeal was wrong in narrowly restricting Article 4 to the settlor’s capacity to alienate intended trust property “on which it is unnecessary to reach any final conclusion, there was nothing invalid about the declaration of trust.”

Thus, Art 4 is understood as simply stating that trust law under the Convention does not apply to determine whether the assets which the trustee claims to hold as trustee were validly transferred *to* him. This preliminary issue is left to be governed by the law chosen by the conflicts rules of the forum, normally the lex situs. Thus, the validity of a declaration of trust, whether made by a settlor when transferring assets to a trustee or declaring himself trustee of designated assets that he owns, is governed by a trust law determined under the Convention. Putting it another way, Lord Sumption stated at [91], “Article 4 provides that the Convention does not apply to issues as to the validity of *instruments* (my italics) creating a trust. But there is no question as to the validity of the trusts in issue here, since they are certainly valid under the law of the Cayman Islands which governs them.”

Incidentally, however, it would seem that if the Convention did not apply to treat Al’s self-settled declarations of trust as valid, English conflict of laws’ rules would.

Art 15

Art 15 similarly sets out issues not to be governed by trust law but, more appropriately, the law chosen by the conflicts rules of the forum.

By Art 15 the provisions of the law designated by the conflicts rules of the forum, in so far as those provisions cannot be derogated from by voluntary act, must be applied, in particular to the following matters:

(a) the protection of minors and incapable parties;
(b) the personal and proprietary effects of marriage;
(c) succession rights, testate and intestate, especially the indefeasible shares of spouses and relatives;
(d) the transfer of title to property and security interests in property;
(e) the protection of creditors in matters of insolvency;
(f) the protection in other respects of third parties acting in good faith.

Art 4, as seen above, deals with the initial transfer of title to property ***to*** a trustee, so it seems that Art 15(d) must be concerned with non-derogable mandatory rules concerning transfer of title to an asset ***by*** a trustee to third parties or to beneficiaries, though the propriety of the decision to benefit a particular beneficiary will be governed by the law governing the trust. Indeed, whether a person is a beneficiary with vested, contingent or defeasible rights under a trust will also be governed by trust law, whether the declared trusts arose from a transfer to trustees or a declaration of the settlor as trustee.

Lord Mance supports such interpretation by stating at [40] "Article 15 itself appears as designed to address the impact of relationships or transactions separate from the trust itself." The trust structure is governed by trust law, but has to give way to other applicable laws where more appropriate than trust law. Lord Mance stated at [40] that "when determining what, if any, rights and obligations Samba may have in relation to the shares as a result of their transfer to Samba by Mr Al-Sanea", "it is in my opinion the last sentence of Article 11(d), not Article 15 (e) or (f) which is primarily applicable".

Art 11

Art 11 crucially provides for recognition of a trust to imply

(a) that personal creditors of the trustee shall have no recourse against the trust assets;

(b) that the trust assets shall not form part of the trustee's estate upon his insolvency or bankruptcy;

(c) that the trust assets shall not form part of the matrimonial property of the trustee or his spouse nor part of the trustee's estate upon his death;

(d) that the trust assets may be recovered when the trustee, in breach of trust, has mingled trust assets with his own property or has alienated trust assets. *However, the rights and obligations of any third party holder of the assets shall remain subject to the law determined by the choice of law rules of the forum"* (emphasis added).

Lord Mance pointed out at [41] that this last sentence "on the face of it" therefore remits to Saudi law (*the lex situs of the Saudi shares*) the question whether Samba acquired free of SICL's interests under the Cayman trusts (presumably basing this on *Macmillan* that he had cited at [20] quoted above).

This prima facie position would change, however, if the state of Samba's knowledge of SICL's interest was such that under the English in personam equitable jurisdiction Samba would hold the shares on constructive trust to transfer them or their value to SICL's liquidator.

Lord Sumption gave a separate concurring judgment, though he stated at [91], "the only potentially relevant provision of the Convention is Article 11 which determines the extent to which obligations under a trust are to be effective in England. But as between SICL and Samba it does no more than refer the latter's liabilities to the law selected in accordance with the choice of law rules of the forum, in this case the law of *the Cayman Islands*" (emphasis added).

With all due respect, Article 11 is concerned to ensure that all countries that implement the Convention as a minimum recognise an obligational trust of ring-fenced assets, thereby leaving it open for common law countries to go further and recognise traditional proprietary trusts. Moreover, Cayman law applies to govern the internal trustee-beneficiary relationship and also the extent of the trust fund under following and tracing rules, *but* subject to the lex situs as to the protection of third party recipients of trust property. Whether or not third parties take free from beneficiaries' proprietary (*in rem*) rights is characterised as a matter of property law, not trusts law. Thus, matters hinge upon the Saudi Arabian lex situs governing transfers of Saudi companies' shares. By this law Samba appears to receive good title to the Saudi shares.

Nevertheless, once an English court has jurisdiction over Samba with its registered London office it can exercise its extensive overriding equitable in personam jurisdiction. In *Deschamps v Miller* [1908] 1 Ch 856 at 863, cited by Lord Mance at [27], Parker J stated that the court would act where there was "some personal obligation arising out of a contract or implied contract, fiduciary relationship or fraud or other conduct which, in a view of a Court of Equity in this country, would be unconscionable" and that whether it would do so did not depend "on the law of the locus of the immovable property" (the lex situs). In *El Ajou v Dollar Land Holdings* [1993] 3 All ER at 737 cited by Lord Sumption at [86], Millett J stated, "An English court of equity will compel a defendant who is within the jurisdiction to treat assets in his hands as trust assets if, having regard to their history and his state of knowledge, it would be unconscionable for him to treat them as his own."

The English court then provides an appropriate equitable remedy under its procedural rules

Thus, as recognised by Lord Sumption at [90] (and the Chancellor in the High Court [2014] EWHC 540 (Ch) at [54]), SICL can allege that the state of Samba's conscience is such that it is accountable as a constructive trustee of those shares and so must transfer them or their value to the liquidator.

As a result, the UKSC in deciding that the proceedings should either be stayed or struck out allowed the parties within 21 days to make written submissions inviting an order for remission to the High Court to enable an application to save the proceedings by amendment of the pleadings.

Exemption clauses and self-dealing clauses

Barnsley v Noble [2016] EWCA Civ 799, [2016] WTLR 1501

"My trustees shall have power to enter into and complete contracts or other transactions with themselves or any of them (acting in their own interests as individuals or in some other fiduciary capacity) for the sale purchase exchange or otherwise of any part or parts of my residuary estate provided that:

(i) every trustee personally interested therein shall have acted in good faith and either:

(ii) at least one of my trustees shall have no interest in the contract or transaction (as the case may be) save as one of my trustees or

(iii) (in the case of a sale purchase exchange or like transaction) an independent and duly qualified valuer instructed by and acting exclusively for my trustees in their capacity as such shall have certified that in his opinion my trustees will receive full value in money or money's worth pursuant to such transaction."

Proviso (iii) (of this para 18 in a Will schedule) was accepted not to be satisfied but the defendant submitted that (i) and (ii) were satisfied. The trial judge agreed on (i) but not (ii) since one trustee who was trustee of another trust had a minor interest as such trustee. The Court of Appeal dealt solely with whether the defendant was saved from liability by an exemption clause in clause 14 of the will.

"In the professed execution of the trusts and powers hereof no trustee shall be liable for any loss to the trust premises arising by reason of any improper investment made in good faith or for the negligence or fraud of any agent employed by him or any other trustee hereof although the employment of such agent was not strictly necessary or expedient or by reason of any other matter or thing except wilful and individual fraud or wrongdoing on the part of the trustee who is sought to be made liable ….”

Nugee J held cl 14 to protect the defendant who with his deceased brother had built up the "Noble Organisation". The executors were the deceased's widow, the defendant and an accountant. The Organisation was demerged so that the widow took the property assets and the defendant the business assets on the basis of a broad equality of value. During the 2008-2009 negotiations on this division the law as to VAT repayment claims was changing due to judges' rulings so that the defendant's business assets recovered much more VAT than the parties had contemplated. Among other monetary claims rejected by Nugee J, "equitable compensation" was sought against the defendant for breach of fiduciary duty in not making full and frank disclosure relating to VAT repayment claims. Nugee J held that clause 14 protected the defendant from such claims, although it would not have protected him if rescission of the division agreement had been claimed.

The Court of Appeal upheld Nugee J. It first rejected the submission that Cl 14 had no application in respect of a breach of the self-dealing rule, such breach being exclusively covered by a self-contained code within para 18. The court explained that the clauses dealt with different issues. Where para 18 applied to a transaction the executor-trustee would not have breached any obligation, so that there could be no question of rescission of the transaction or any liability to pay equitable compensation. Cl 14 only applies where, but for the clause, a trustee would be liable for loss and no such liability could arise if the trustee's conduct was authorised under para 18.

Second, the Court rejected the submission that the defendant had not acted "in the professed execution of the trusts and powers hereof" as a condition precedent for the operation of cl 14 because he never consciously thought that he was acting pursuant to the authority of para 18 when negotiating the demerger and considering VAT implications: he had not purported to act under para 18. The court held that an executor is acting in the professed execution of his trusts and powers if he is dealing with the estate in his capacity as executor as the defendant clearly was e.g. in signing documents expressly as executor.

Third, the Court rejected the submission that in negotiating the demerger and signing documents the defendant engaged in "wilful and individual fraud or wrongdoing" so as to fall outside clause 14. The basis for this submission was that "wilful" has the wide meaning of "intentional" and a person acts intentionally if he intends to do a specific act or intends to makes a specific omission , while "wrongdoing" can cover breaches of fiduciary duties. The retort is that it is the wrongdoing, not the doing, which must be wilful. Conscious wrongdoing is thus needed.

"Equitable compensation": damages or debt -the need for clarity

Interactive Technology Corporation Ltd v Ferster *[2017] EWHC 217 (Ch)*

At [2016] EWHC 2896 (Ch) Morgan J on 15 Nov 2016 had held Ferster liable as managing director of a company for a breach of fiduciary duty by paying himself sums of money, ostensibly as remuneration, which the company had not authorised. Certain matters were dealt with on 19 December 2016 including an agreed form of order, with other matters (eg an interim payment) to be dealt with on 7 Feb 2017.

Then, the company sought to change the agreed form of order or, in default, to have the Court determine the meaning of the order. Interactive did this because there was a choice of remedies. Directors are regarded as in a trustee-like position in regard to their company's assets.

The company could simply elect to be restored to the position in which it would have been if Ferster had observed his fiduciary duty and not paid himself unauthorised remuneration[1]. It could thus claim an account of Interactive's money paid out as unauthorised remuneration to Ferster together with the directly consequential money paid out for his benefit as PAYE tax and Nat Insurance, and an order for restoration to Interactive of the *debt* found due. As Millett LJ stated in *Jervis v Harris* [1996] Ch 195 at 202, a claimant "who claims payment of a debt need not prove anything beyond the occurrence of the event or condition on the occurrence of which the debt became due. He need prove no loss: the rules as to remoteness of damage and mitigation of loss are irrelevant."

[1] Cp the position of directors who paid out dividends unlawfully: *Revenue and Customs Commissioners v Holland* [2010] UKSC 51, [2010] I WLR 2793 at [49], [124] & [146] endorsing Rimer LJ [2009] EWCA Civ 625 at [96]

Alternatively, the company could claim *damages* as compensation for loss caused by breach of fiduciary duty. In the latter case questions of causation arise. Ferster could, however, argue that the company had suffered no loss because the market value of his services was the remuneration that he had paid himself or that that remuneration would have been agreed by his fellow directors if he had asked them, though if they had disagreed he would have resigned and the new managing director would have needed to be paid the full remuneration paid to him.

Morgan J held it was too late to change the court order, the relevant paragraph of that order being as follows:

> "Compensatory relief
>
> 9. Judgment be entered for ITC for equitable compensation to be assessed in respect of the payment to Mr Jonathan Ferster of unauthorised remuneration from ITC that was in excess of Mr Jonathan Ferster's entitlement under Para 6 above."

The proposed replacement was:

> "Unauthorised Remuneration
>
> 9. For the purpose of quantifying the liability of Mr Jonathan Ferster in Paragraph 6(2) and (3) hereof, an account ("the Account") be taken of all monies paid out of ITC's assets in connection with the Remuneration above the Lawful Remuneration."

Para 6(2) stated "all increases in the Remuneration above the Lawful Remuneration were unauthorised and must be repaid by [JF] to ITC; and 6(3) stated "he is liable to account to ITC for all payments made out of the assets of ITC in respect of the Remuneration beyond the Lawful Remuneration."

Morgan J interpreted the original remuneration order. "[It] provides for ITC to receive compensation for losses resulting from the payment of unauthorised remuneration. That is a different remedy from the remedy provided in the new draft. I cannot construe the remuneration order as having the same effect as the new draft."

Although ITC's elected claim was thus for compensation for losses resulting from breach of fiduciary duty it claimed it could establish such loss by showing that before the payment of unauthorised remuneration it had the money in question and after the payment it did not. Its losses were simply the amount paid away.

Ferster, however, claimed he was entitled to try to show that there was no loss because all that he received was the market value of his services.
Morgan J declined to determine this dispute at this stage. He needed to know more about the implications as to causation, while there were likely differences between fraudulent and honest breaches of fiduciary duty, and matters might not be straightforward in the light of *AIB Group (UK) plc v Mark Redler* and a Hong Kong Final Court of Appeal case *Tang Ying Ip v Tang Ying Loi* sent to him by counsel after the hearing and just before the judgment.

Tang Ying Ip v Tang Ying Loi [2017] HKFCA 3

The Defendant administrator of his intestate father's estate without authority paid HK$11,480,000 of estate money into his own account in order to purchase a property for a cost of HK$28,413,050 million (40.4% to 59.6%), declaring he held the property on trust for his corporate vehicle. He later assigned the property to that company. His intention was to borrow the money as a bridging loan, it being more convenient to use this money than other resources. Within seven months he repaid the money with 3% interest, this being more than banks were paying depositors but less than banks were charging borrowers.
Subsequently, the property appreciated in value very significantly. When one of the Defendant's four brothers found out what had happened he sued to recover his share of the secret profit made by the Defendant in breach of fiduciary duty, the Defendant's self-interest conflicting with his fiduciary duty. The Defendant contended that he had discharged his liability in full by repaying the loan.
Lord Millett pointed out that the courts below had made heavy weather of a simple case when they dealt with tracing and secret profits caused by a breach of the fiduciary no-conflict of interest rule.
Lord Millett held that it was a simple breach of trust claim where the Defendant had to be deterred "from using the trust fund as his personal bank account, borrowing from it for his own private purposes and merely repaying the amount borrowed. Such conduct puts the trust fund at risk without hope of gain. Equity's response is to insist that any profit is for the beneficiaries and any loss for the trustee"- at [27].
He pointed out that on discovering the unauthorised payment of HK$11,480,000 the beneficiaries had a right to reject (or falsify) it, claiming repayment with interest or affirm it treating it as if an authorised investment. They affirmed it.

The Defendant's repayment of the unlawfully loan was an attempt to buy out the beneficiaries' affirmed investment and the beneficiaries were entitled to reject it.

Lord Millett, however, held that the courts below had rightly concluded that there had to be accounts and inquiries for the Defendant to pay one fifth of the profit to the Plaintiff. It appears from the Court of Appeal [2015] HKCA 523 that the Defendant was liable to the estate for 40.4% of the profit accruing from the rise in the value of the property since it was purchased and the Plaintiff was entitled to a fifth of those profits.

Thus the Defendant retained 59.6% of the profits as if his property had been innocently mixed with others' property.

Query if the Plaintiff should have taken a tougher line and claimed that the Defendant as a wrongdoing trustee could not be allowed to argue that he should be treated as an innocent co-purchaser. Thus, he could only have a lien for his contribution, the HK$28,413,050 less HK$11,480, 000, being HK$16,933,050 with interest? Cp query of Lord Carnwath in *Akita Holdings Ltd v Att-Gen of Turks & Caicos Islands [2017] UKPC 7 at [12]* where 30.08% of the property represented the Appellant's part of the proper purchase price and 69.92% the Government's and the Govt claimed only 69.92% of the profit accruing from the development of the land – and Lord Carnwath wondered whether there should have been an accountability to the Govt for a greater share of the profits.

Since the case involved an account of profits automatically flowing from investment of trust money one can distinguish the ratio of Lord Millett's judgment. However, where a claimant seeks an account in common form Lord Millett made clear that where the account shows that trust money was paid away without authorisation, that debit entry is rejected (i.e. falsified) so that a credit appears for unauthorised payments and the defendant trustee/fiduciary must make good that credit with interest.

AIB Group(UK) Ltd v Mark Redler & Co [2014] UKSC 58

This is subject to the restrictive ruling in the *AIB Group* case to which Morgan J referred. *AIB* involved a commercial contract under which a solicitor, acting for an intended new mortgagee in respect of a property valued at £4million, held the mortgagee's funds of £3.3million on trust for the mortgagee until completion of the transaction by discharging two existing mortgages so that on completion the new mortgagee would have a first mortgage. Unfortunately, the solicitor only paid off one old mortgage so that the other old mortgage for £273,000 remained as a first mortgage. It turned out that the mortgaged property had been dreadfully over-valued, only £1,140,000 being received on selling it upon the mortgagors' default. After discharging the prior £273,000 mortgage only £867,000 remained for the new mortgagee.

The new mortgagee, seeking to make the solicitor liable for the mortgagee's acceptance of wholly inadequate security, boldly claimed the solicitor had to replace the unauthorised payment of £3.3 million less the net £867,000 sale proceeds so as to be indebted to the mortgagee for £2,433,000. The UKSC rejected this as artificial and unrealistic, pointing out that if the solicitor had duly performed the trust obligation and discharged both prior mortgages, the mortgagee would only have received the £1,140,000 proceeds of sale as opposed to the £867,000 it had actually received, so its real loss was £273,000. Thus, the solicitor was only liable for the £273,000.

It follows that in the case of a liability to account for a breach of trust in a contractual context the courts will not put the claimant in a better position than would have been the case if the defendant had duly carried out the trust obligation. As Lord Toulson stated in *AIB* at [62, "Absent fraud which may give rise to other public policy consideration, it would not in my opinion be right to impose or maintain a rule that gives redress to a beneficiary for loss which would have been suffered if the trustee had properly performed his duties." Thus, a breach of trust committed in the performance of a contract cannot put the claimant in a better position than if a breach of contract had been claimed.

Conclusion

Since Morgan J rejected the replacement order that spelled out a claim to an account as opposed to a claim for reparation of loss, it would appear likely that the defendant will be permitted to raise causation issues unless regarded as a dishonest person (see [237] in Ferster v Ferster [2016] EWHC 2896 (Ch)) who might be precluded on policy grounds from alleging that even if he had not been dishonest the loss would still have been incurred.

The duty of care in trustee investment and loss measurement

<u>Daniel v Tee [2016] EWHC 1538 (Ch)</u>

This case involved allegations of negligent investment with impermissible delegation of investment decision-making an aspect of negligence [188].

The deputy judge held that the trustees had breached their duty of care in deciding on a portfolio consisting of 80%-85% equities, such being a decision which no reasonable trustee acting prudently could reasonably have made, applying the test laid down in *Wight v Olswang [2000] Lloyd's Law Rep PN 662,* endorsed on appeal *[2001] Lloyd's LR PN 269*. However, in fact only 30%-37% was invested in equities. Looking at specific investments that were made and the amounts held in cash from time to time the claimants established some breaches but, like the claimant in *Nestle v National Westminster Bank [1993] 1 WLR 1260,* they had failed to prove they had suffered loss as a result of those breaches.

At the end of the hearing the claimants were allowed to amend their claim to allege that no loss needed to be proved where there had been unauthorised transactions, the related debit entries needing to be replaced by credits which the defendants had to account for [74]. The judge, after emphasising that this was not a case of unauthorised transactions involving betrayals of trust and confidence, opined that redress will not be given for a loss that would have been suffered if the trust had been properly performed, as he found to be the case in the peculiar circumstances of the case, while he held that there had been no impermissible delegation of investment-making decisions: [188]-[190].

In any event, if there had been any personal liability he would have granted relief under s 61 of the Trustee Act 1925 [200].

A beneficiary's application to trustees for disclosure of trust information
Ivan Erceg v Lynette Erceg and others [2017] NZSC 26

The NZSC usefully reviewed *Schmidt v Rosewood Ltd* [2003] UKPC 26 , 2003] 2 AC 709*, Breakspear v Acland* [2008] EWHC 220 (Ch), [2009] Ch 32, and *Foreman v Kingstone* [2004] 1 NZLR 841.

It had earlier [2016] NZSC 135 rejected an application by the respondent trustees for an order preventing publication of certain matters if referred to in oral argument in the course of this appeal. It held that it did have an inherent power to make non-publication orders binding the public at large, not following the Privy Council in *Independent Publishing Co Ltd v Att-Gen of Trinidad &*

Tobago [2004] UKPC 26, [2005] 1 AC 190. However, the respondents had not "demonstrated to the requisite high standard that the interests of justice required a departure from the usual principle of open justice." It did not suffice that family members were the subject of media attention and that family relationships might be strained further and that security consultants had been called in. The respondents would have an opportunity to counter any unfounded allegations and any fair and accurate report of the proceedings would have to reflect that response.

Ivan, the deceased settlor's brother, was a member of a class of primary discretionary beneficiaries and of final beneficiaries of the Acorn Foundation Trust set up in 2004 and of a class of secondary discretionary beneficiaries and of a class of final beneficiaries of the Independent Group Trust set up in 2002. This was the stated position at [83]-[84] without the trust deeds having been disclosed to the courts.

The trust funds substantially comprised shares in the settlor's business, Independent Liquor (NZ) Ltd, (ILNZ). The settlor died in 2005, the shares in ILNZ were sold in December 2006 and both trusts were wound up in December 2010. Ivan had been adjudicated bankrupt in February 2010, despite having inherited NZ$95 million under the settlor's will. He was discharged from bankruptcy in May 2014, but his bankruptcy had not been annulled.

Ivan was a highly litigious person, involved in over 50 court proceedings, and a divisive family member. In 2009 he had sent Lynette an email threatening to discuss family matters in the media, commenting, "when my story has been told, the need to continue life's journey will no longer be required. The blood and death that will flow will stain both Darryl and Lynne [trustees of the two trusts]. The costs will be greater than can be imagined at this time." Ivan had been the driving force behind his mother's successful application for her and her legal adviser to obtain disclosure of the trust deeds and deeds of variation and financial statements (not to be disclosed to Ivan), subject to redactions and undertakings as to confidentiality: *Erceg v Erceg* [2014] NZHC, [2015] NZAR 1227.

Ivan sought disclosure of:

1. The Trust deed and any deeds of variation for both Trusts.
2. All trustee resolutions and minutes for the Trusts.

3. Details and documents relating to all share transfers involving the sale and other dealings between the Trusts and ILNZ.
4. Share valuation reports and other financial material that supported the trustee resolutions re ILNZ.
5. Details of all debts due to the Trusts and all gifting documents prepared by the late settlor.
6. Financial statements (and accountants' working papers) for the Trusts from their date of inception.
7. Bank statements for the Trusts since their date of inception.
8. Financial statements of ILNZ for 20002-2007, including the Australian and English-based manufacturing companies.
9. Copy of the ILNZ share register, interests register and minute book.

Courtney J [2015] NZHC 594 held Ivan had no locus standi since his right to information amounted to property that had vested in his trustee in bankruptcy, but she would not have ordered disclosure anyway in the unusual circumstances. The Court of Appeal [2016] NZCA 7 held Ivan did have standing by virtue of his status as a beneficiary. As to disclosure there was no presumption in favour of or against disclosure. It was a matter for the exercise of the trustees' discretion and this was not a special case where a court could be justified in interfering with the trustee's exercise of her discretion. The court should not intervene unless the trustees erred in law or principle, overlooked a relevant point, factored in an irrelevant point or made a decision that was simply outside the permissible ambit of the trustees' discretion: see [32].

The NZSC rejected the court's role being limited to reviewing whether there were special grounds to justify interfering with the judge's exercise of a discretion. "The court must exercise its jurisdiction as a court of equity, exercising its own judgment as to whether disclosure ought to be made at all and, if so, to what extent and on what conditions": see [18]. It is fundamental that a court of equity has inherent jurisdiction to supervise and, if appropriate intervene in the administration of a trust, discretionary or otherwise, citing *Schmidt v Rosewood* and *Foreman v Kingstone.*

The NZSC set out ten matters that need to be evaluated in an application for disclosure of trust documents, but summarised the starting point as follows:

> "[60] As noted earlier, the starting point is the obligation of trustees to administer the trust in accordance with the trust deed and their duty to

account to beneficiaries. So, the strongest case for disclosure would be a case involving a request from a close beneficiary for disclosure of the trust deed and the trust accounts, which would be the minimum needed to scrutinise the trustees' actions in order to hold them to account.

[61] The appellant relied on *Foreman* for the proposition that there is a presumption that a discretionary beneficiary is entitled to be provided with copies of trust documents demonstrating how the trust has been administered and managed and what has become of the trust property. He argued the presumption should be applied in the present case, something that was strongly resisted by the trustees.

[62] In the normal run of things, trustees will provide these to close beneficiaries on request or proactively, without the need for a request. If they refuse, a court will be likely to require disclosure unless, to use Potter J's formulation, there are "exceptional circumstances".[56] This is the so-called "presumption" of disclosure, noted earlier. We see it more as an expectation that basic trust information will be disclosed to a close beneficiary who wants it. But there may be room for debate about who is a close beneficiary and the request for disclosure may go beyond such basic information. The greater the scope of the request and the remoter the interest of the beneficiary, the more room there will be for argument about the appropriateness of disclosure."

The ten matters to be evaluated are as follows:

"(a) *The documents that are sought*. Where a number of documents are sought, each document (or class of document) may need to be evaluated separately, given that different considerations may apply to basic documents such as the trust deed and more remote documents such as the settlor's memorandum of wishes.

(b) The context for the request and the objective of the beneficiary in making the request. The case for disclosure will be compelling if meaningful monitoring of the trustee's compliance with the trust deed in the administration of the trust could not otherwise occur. In this regard, it may be relevant that disclosure has been made to other beneficiaries. However, assuming no improper motive on the part of the beneficiary seeking information, the fact that disclosure has previously been made to other beneficiaries will rarely be a decisive factor against disclosure.

(c) The nature of the interests held by the beneficiary seeking access. The degree of proximity of the beneficiary to the trust (or likelihood of the requesting beneficiary or others in the same class of beneficiaries benefitting from the trust) will also be a relevant factor.

(d) Whether there are issues of personal or commercial confidentiality. Recognition should be given to the need to protect confidential matters of a personal or commercial nature. The Court should also take into account any indications in the trust deed itself about the need for confidentiality in relation to commercial dealings or private matters in relation to particular beneficiaries.
(e) Whether there is any practical difficulty in providing the information. If the information sought by the person requesting the information would be difficult or expensive to generate or collate, that may be a factor against requiring its disclosure.
(f) Whether the documents sought disclose the trustee's reasons for decisions made by the trustees. It would not normally be appropriate to require disclosure of the trustees' reasons for particular decisions.
(g) The likely impact on the trustee and the other beneficiaries if disclosure is made. In particular, would disclosure have an adverse impact of the beneficiaries as a whole that would outweigh the benefit of disclosure to the requesting beneficiary? In the case of a family trust, this may include the possibility that disclosure would embitter family feelings and the relationship between the trustees and beneficiaries to the detriment of the beneficiaries as a whole. However, on the other hand, non-disclosure may have a similar effect.[55]
(h) The likely impact on the settlor and third parties if disclosure is made. The impact that disclosure will have on the settlor and/or on third parties will need to be considered.
(i) Whether disclosure can be made while still protecting confidentiality. This may require that copies of documents supplied to a beneficiary are redacted to ensure nondisclosure of confidential information.
(j) Whether safeguards can be imposed on the use of the trust documentation. Examples would include undertakings and inspection by professional advisers only and other safeguards to ensure the documentation is used only for the purpose for which it was disclosed."

The documents sought by Ivan were categorised as follows.
Category 1: Ivan's items 1 and 6 – the trust deeds and deeds of variation and financial statements.
Category 2: Ivan's item 2 – minutes and resolutions regarded as similar to category 1 except that disclosure without redactions might reveal trustees' reasons.
Category 3: Ivan's items 3,4, 5 and 7- raised issues of commercial confidentiality.

Category 4: Ivan's items 8 and 9 (corporate documents of ILNZ- not really trust documents at all, though copies of accounts would have been held by trustees when shareholders in ILNZ).

In evaluating the ten matters above, the UKSC was particularly influenced by Ivan being "on something of a fishing expedition" [77] and a highly litigious person. As a divisive figure in the Erceg family he was likely to go to the media and to harass the trustees and those discovered to have received large distributions, though one would start with the expectation that there should be disclosure of category 1 documents and that in respect of such category not much weight should be attached to any confidentiality provision in the trust deed. As Ivan was bankrupt at the time the trust funds were distributed he could not have expected a distribution to be made to him so as to benefit his creditors. Disclosure had already been made to a beneficiary, Ivan's mother.

Ultimately the NZSC at [101 "concluded that, given the unusual features of this case, disclosure should not be ordered even in relation to category 1 documents relating to the Acorn Foundation Trust." "The risk of harassment by the applicant is significant and the benefits of disclosure are outweighed by that potential detriment." A fortiori no disclosure should be ordered in the case of the Independent Group Trust where Ivan's interest was weaker than under the Acorn Foundation Trust.

Finally, the NZSC opined that the status of discretionary beneficiary suffices to seek disclosure of trust information from the trustees or the court, it being immaterial that such beneficiary might be bankrupt.

Beneficiaries' information-gathering under Data Protection Act

["See you later when I've got the data"]

Dawson-Damer v Taylor Wessing [2017] EWCA Civ 74

When trust law creates difficulties for beneficiaries seeking information from trustees a Data Protection Act (e.g. of England or Jersey or elsewhere) may enable beneficiaries to obtain the desired information.

Three beneficiaries in a Bahamian discretionary trust with assets valued at £411million were aggrieved when £402 million was appointed out to new trustees to hold on discretionary trusts for the other beneficiaries. Their solicitors challenged the Bahamian trustee on the validity of these appointments, so that English legal professional privilege arose between the

trustee and its London solicitors. The beneficiaries needed further information to help them in Bahamian proceedings against the trustee.
Under s 83 (8) of the Bahamian Trustee Act 1998 no trustee can be compelled to disclose trust documents such as a letter of wishes, any document disclosing any deliberations of the trustees as to the exercise of their discretions or disclosing any reasons or any material upon which their reasons might have been based or any other document relating to the exercise or proposed exercise of any discretion (including legal advice). Under s 83(10) even the Bahamian Court cannot order such disclosure.
The three beneficiaries therefore served a request under s 7(2) of the DPA upon the defendants as the trustee's London solicitors. The request sought all data of which the requesting beneficiaries were the data subjects, enclosing the requisite fee.
Taylor Wessing relied upon the Sched 7 exemption in respect of personal data that consists of "information in respect of which a claim to legal professional privilege could be maintained in legal proceedings." They argued that this privilege exemption extended beyond the privilege as narrowly defined in English law to the bases upon which disclosure could be refused under Bahamian law.
The CA took the narrow view, holding Sched 7 only applied to information covered by English legal professional privilege.
The CA also rejected Taylor Wessings' claim that their s 7 obligation was excused by s 7(1)(c)(i) because the supply of copies of the information "would involve disproportionate effort": this had not been shown on the evidence produced. The burden of proof is on the data controller to show that it has taken all reasonable steps to comply with the request and to rely upon any specific exemption to refuse to supply data. "The word 'supply' is used so that what is weighed up in the proportionality exercise is the end object of the search, namely the potential benefit that the supply of the information might bring to the data subject, as against the means by which that information is obtained. It will be a question for evaluation in each particular case whether disproportionate effort will be involved in finding and supplying the information as against the benefits it might bring to the data subject."
Under s 7(9) where the court is satisfied that a request has not been complied with "the court *may* order him to comply with the request." The CA rejected

TW's submission that no order should be made if the applicant proposes to use the information obtained for some purpose other than verifying or correcting the data held about him. It did not matter that the information was requested for the collateral purpose of assisting in litigation or for the purpose of discovering information not obtainable under the law governing the trust. Note that English law is restrictive in not affording beneficiaries a right to see documents relating to the exercise of discretions, though not going so far as the Bahamian Trustee Act.
The CA made the order, remitting the matter to the Chancery Division. Note that in May 2018, the Data Protection Directive implemented by the DPA will be replaced by the more extensive directly applicable (BREXIT notwithstanding since still within EU) General Data Protection Regulation, EU 2016/679.

Honesty is the only policy in creating a trust

Al Tamimi v Al Charmaa [2017] JRC 033

H and W were married 2002-2015. In 2007 H arranged for two Jersey companies to be formed with two £1 shares each held by corporate incorporation agents before being transferred to W. The application forms to the Jersey Financial Services Commission stated that the ultimate beneficial owner of the companies was to be W and that she was supported by H who would be financing property acquisitions by the companies. Loans were made to the companies by H described in company minutes and other documents as "husband of the Beneficial Owner." H also organised loans by banks to the companies and guaranteed repayment. H was also granted a power of attorney to act on W's behalf in relation to the companies' properties, till W revoked it in 2014.
H alleged that he and W had an oral agreement or understanding (not amounting to a contract) that W held the shares as nominee or trustee for him. Alternatively, there was a resulting or constructive trust for H or W had been unjustly enriched at his expense.
The Royal Court Bailiff held there had been no agreement or understanding that W was to be a nominee or trustee for H. Because deliberately misleading or procuring, attempting or conspiring to mislead the JFSC on incorporation of Jersey companies could be a criminal offence and H was a successful Middle Eastern lawyer, H at [83]"could be assumed not to have proceeded with any criminal intent and, accordingly, when he instructed those making

arrangements for the incorporation of the companies in Jersey that the Defendant was to be the beneficial owner of those companies, he must have meant it."

The Bailiff further stated for himself and his Jurats at [117] that "even if we had been satisfied that the shares were held as nominee or on trust for the Plaintiff, or that the Defendant had been unjustly enriched at the expense of the Plaintiff, we would not have been prepared to grant relief in the exercise of our equitable discretion." This was because in the light of the concerns of the International Monetary Fund and the OECD's Financial Action Task Force, "there is a public interest – a very strong public interest- in the Island being able to demonstrate that it has the ability to identify the beneficial owners of companies or the beneficiaries under trusts." Thus, it would not have mattered if H had had a written declaration of trust in his favour signed by W.

The Bailiff held there was no resulting trust of the shares because H had not transferred the shares to W, in whose favour there was, anyhow, a presumption of advancement to her by H by way of gift.

No constructive trust arose because there was nothing operating on W's conscience to make it unconscionable if she did not hold the shares on constructive trust for H. The incorporation of the companies and the acquisition of valuable English properties by the companies were carried out to secure the future of W and her children. H and W had separated after H had an affair and W only agreed to take him back upon financial security being provided.

These circumstances meant that W's enrichment was not unjust. Thus all H.s claims failed

The limits of rectification

<u>RBC Trustees (CI) Ltd v Stubbs</u> [2017] EWHC 180 (Ch)

In 2004 by deeds of revocation and appointment one sixth of a trust fund had with the settlor's requisite consent, been appointed to B for life remainder to her husband, H, for life and one sixth to C for life remainder to his wife, W, for life, but otherwise subject to the Settlement Trusts.

Upon B taking proceedings to divorce H, it was agreed by the trustees, the settlor and B that H's life interest be revoked. In the light of the earlier use of deeds of revocation and appointment this was achieved in 2008 by a deed of revocation of the two life interests of B and H and appointment of a life interest in favour only of B, subject to the Settlement Trusts.

Upon C taking proceedings to divorce W it was similarly agreed that W's life interest be revoked and this was achieved in 2014 as in H's case above.

It was then discovered that the revocation and re-appointment of the life interests of B and C had catastrophic tax consequences due to the major changes in the IHT treatment of interest in possession trusts created after the Finance Act 2006. Thus, rectification was sought so that the 2008 and 2014 deeds did not revoke the pre-existing life interests of B and C, only the succeeding life interests of their spouses.

Rose J granted rectification, having found convincing evidence that the trustees and the settlor intended only the spouses' life interests to be revoked, with B and C continuing to have their life interests. It was not intended or thought that their interests would be affected in any way. It was clear what was intended as to the scope of the deeds, so that they had to be rectified to record the true agreement that only the spouses' life interests were to be revoked.

Rose J at [38] accepted Barling J's point in *Giles v RNIB* [2014] EWHC 1373 (Ch) that "there must be a flaw in the written document such that it does not give effect to the parties'/donor's agreement/intention as opposed to the parties/donor merely being mistaken as to the consequences of what they have agreed/intended. For example, it is not sufficient merely that the document fails to achieve the desired fiscal objective." In such circumstances where the mistaken failure to achieve a desired fiscal consequence arose from trustees' breach of duty one may rely upon rescission for mistake under *Pitt v Holt*. This only allows one to start out afresh, whereas rectification has retrospective effect.

This has recently been emphasised by the Supreme Court of Canada in *Att-Gen of Canada v Fairmont Hotels Inc* [2016] SCC 56 at [12]. "If by mistake a legal instrument does not accord with the true agreement it was intended to record - because a term has been omitted, an unwanted term included or a term incorrectly expresses the parties' agreement – a court may exercise its equitable jurisdiction to rectify the instrument so as to make it accord with the parties' true agreement." At [19] "Rectification aligns the instrument with what the parties agreed to do, not what, with the benefit of hindsight, they should have agreed to do." At [3] "While a court may rectify an instrument which inaccurately records a party's agreement as to what was to be done, it may not change the agreement to salvage what a party hoped to achieve. Moreover, these rules confining the availability of rectification are generally applicable where (as here) the unanticipated effect takes the form of a tax liability."

Personal or fiduciary powers of protectors

Blenkinsop v Herbert [2017] WASCA 87 Western Australia CA

This provides [69]-[156] the best guidance as to whether a power is personal or fiduciary, what duties are attached thereto, and the jurisdiction to remove a power-holder. The problem was that the "Guardian" comprised six Primary Beneficiaries required to act jointly and unanimously where six powers required the consent of the Guardian.

The parties accepted that if the powers were not fiduciary then the Guardian could not be removed, as held by the trial judge in holding that each of the six could act in his or her own best interests, ignoring other beneficiaries' interests when deciding whether to consent or not.

The CA dismissed the appeal in 157 paragraphs with 157 footnotes. It did, however, consider that it had a broad jurisdiction to remove the Guardian if necessary to secure the due execution of the trust (even if the powers were personal). Since it had considered that the settlor's intention was for there to be a Guardian with a check on the trustees' exercise of their powers (he and his widow being the first Guardians before the six Primary Beneficiaries), presumably there would need to be an application to remove *and* replace the Guardian.