



I am very pleased to introduce this edition of Serle Speak on the topic of trusts. Below, I examine the attitude of the family courts to offshore trusts. Elsewhere, Peter McMaster QC explores the scope for dog-leg claims and James Corbett QC provides warning for offshore trustees at risk of personal liability arising from a settlor-beneficiary's

business ventures. Also inside, Will Henderson considers unconscionability in property transactions and Dakis Hagen sets out the latest thinking on the confidentiality of settlors' letters of wishes.

Finally, you will find enclosed with this edition Chambers' review of some of the highlights of 2007. **ALAN BOYLE QC, HEAD OF CHAMBERS**

Divorce and trusts

ACCORDING TO THE COURT OF APPEAL IN *CHARMAN V CHARMAN*, MY ARGUMENT "LACKED FORENSIC INTEGRITY", WAS "SCARCELY ARGUABLE", DEMONSTRATED "CHOP LOGIC OF THE MOST SPECIOUS KIND", WAS PRESENTED "CASUISTICALLY", WAS "PERIPHERAL", INVOLVED THE "CYNICAL DEPLOYMENT OF CONTRADICTORY ARGUMENTS", "FORFEITED FORENSIC CREDIBILITY", INVOLVED "CONCEPTUAL CONFUSION", HAD "NO LOGICAL PATH" AND INVITED "A SHAMEFUL EMASCULATION OF THE COURT'S DUTY". WHY?

The facts of the case were these: the husband's overall wealth was £131 million, of which £68 million was held in a conventional discretionary trust in Bermuda. The beneficiaries were the husband, the wife, their children and future issue. There was no protector, and the husband had a power to remove the trustees. The husband signed an initial letter of wishes, saying that he wished to protect and conserve the assets for the benefit of himself and his family and to have the fullest possible access

to capital and income. A later letter of wishes said that he wished to be treated as the primary beneficiary, but also said that he expected the trustee to consider the interests of other immediate family beneficiaries as appropriate. No capital had ever been distributed to the husband or any other beneficiary, and he had received insignificant amounts of income in the early life of the trust. The rest of the income had been re-settled.

The wife's case was that the entire assets of the trust were a "resource"

available to the husband for the purposes of section 25 MCA 1973, and therefore fell to be included in the assets on divorce. The premise of this case was that if the husband asked the trustee to distribute the entire assets of the trust to him, it would be likely to do so. This was an issue of fact, on which the actual views of the trustee would be determinative.

The wife won the right to put some direct questions to the trustee in Bermuda, but did not seek to ask the crucial question ("would the trustee be prepared to distribute all of the capital to the husband?"), and chose not to ask even the permitted questions. The trial therefore took place without any direct evidence from the trustee.

...the power to remove trustees is fiduciary

Before the judge, the wife's only argument for saying that all of the trust assets were available to the husband was that he had the power to remove the trustee, and could therefore compel a distribution of all the capital to himself. This ignored the well established principle that the power to remove trustees is fiduciary (a point conceded in the Court of Appeal).

Both the judge and the Court of Appeal found that in a typical discretionary trust, the court can

attribute the entirety of the trust assets to the husband for the purposes of division on divorce upon proof of three minimal facts: (1) the husband is the settlor, (2) the assets in the trust derive from his business abilities, and (3) there is a letter of wishes saying he wants to have full access to the capital and income of the trust and to be the primary beneficiary. Moreover, the court can do this without any evidence at all from the trustee, or any consideration of the potential interests of other beneficiaries, and without any application for variation of the trust (which would necessitate the other beneficiaries being joined and heard).

The Court of Appeal, in reasoning both circular and illogical, held (a) that the making of the lump sum order could itself be relied on as creating the conditions which would be likely to induce the trustee to advance capital to the husband, and (b) that the court could invent hypothetical catastrophic circumstances affecting the husband's business to show that the assets in the trust were available to him.

In big money cases, it may no longer be appropriate for offshore trustees to sit back and take no part in English divorce proceedings. The strikingly different results which may occur when they give evidence to the divorce judge are illustrated by *A v A* [2007] 2 FLR 467. **ALAN BOYLE QC** acted for the husband in *Charman v Charman*.

it may no longer be appropriate for offshore trustees to sit back



Trustees' Liabilities to Third Parties – A Cautionary Tale

NOT UNCOMMONLY, A TRUSTEE MAY BE ASKED BY A BENEFICIARY TO INVOLVE HIMSELF IN THE BENEFICIARY'S TRADING ACTIVITIES, EITHER THROUGH THE INVESTMENT OF TRUST ASSETS IN A BUSINESS PROJECT OR BY GIVING A GUARANTEE OF A LIABILITY (OR SOMETIMES BOTH).



of £1.5 million" and (b) entered into a further express obligation that after the duration of the Loan D2 "will procure the repayment of the Loan together with all outstanding interest thereon". At about the same time, D2 executed a Guarantee in favour of Nearfield up to a maximum of £1.5 million or the value of the trust fund at the relevant date. Both the JVA and Guarantee were governed by English law.

Unless capped in some way, the liability under a guarantee may exceed the assets of the trust. A cautionary tale emerges from the recent decision of the English High Court in *Nearfield Limited v Lincoln Nominees Limited* [2007] 1 All ER (Comm) 441.

The development was not successful. There was a shortfall in principal owed to Nearfield of just over £2.25 million with interest (then) of about £1.030 million. D2 submitted to judgment under the Guarantee. It was later found that the value of the trust fund was nil. Nearfield therefore claimed damages under the JVA for D2's failure to procure D1 to repay the loan in full.

It might have been thought that, an express guarantee limited in amount having been given, the effect of the procurement obligation under the JVA was unlikely to be held to be for the full amount of the loan. Not so, according to Peter Smith J.

Further, under English law (unlike Jersey law), the liability of a trustee who had contracted as such was not limited to the value of the trust assets in its hands. D2 was therefore liable to pay all sums outstanding. Unfortunately, the beneficiaries then challenged D2's right to rely on its trustee indemnity, alleging that it was a breach of trust not to include a limitation of liability in the JVA. The lesson for all trustees (especially offshore trustees entering into contracts governed by English law) is obvious. ⚡ JAMES CORBETT QC appeared for the Defendants in *Nearfield v Lincoln Nominees*.

...a cautionary tale emerges from the recent decision,

D2 was a Jersey trust company. D1 was a company incorporated in the BVI and was used by the trustee as a nominee in its offshore business. The trust was a fully discretionary trust governed by Jersey law. B, the Settlor wanted to develop a building in the City. £3 million of the funding was to be provided by a business acquaintance of B, through a shell company called Nearfield Limited.

Nearfield, D1 and D2 entered into a Joint Venture Agreement (JVA). Under its terms, Nearfield agreed to lend £3 million to D1, and D2 (a) entered into an express obligation to provide a guarantee of D1's liability to repay "50% of any net funds loaned by Nearfield to [D1] up to a maximum

Canine Capers

RECENT YEARS HAVE SEEN THE EMERGENCE OF A NEW CLAIM FOR BREACH OF TRUST. STYLED THE 'DOG-LEG' CLAIM, IT IS DEPLOYED AGAINST THE DIRECTOR OF A CORPORATE TRUSTEE BY A BENEFICIARY WHO MAINTAINS THAT THE CORPORATE TRUSTEE HAS ACTED IN BREACH OF TRUST SO AS TO CAUSE HIM LOSS: THE BENEFICIARY JOINS THE DIRECTOR OF THE CORPORATE TRUSTEE WHO HAD RESPONSIBILITY FOR THE ADMINISTRATION OF THE TRUST AND SEEKS DAMAGES AGAINST HIM PERSONALLY.



The theoretical viability of a dog-leg claim was recognised by Lindsay J in *HR v JAPT* [1997] PLR 99, but for these claims to succeed, it is crucial that the company's cause of action against its director has become an asset held for the benefit of the trust and not for the benefit of the company. If this has happened, the beneficiaries by derivative action can sue the director.

The cases show that a successful dog-leg claim will require exceptional facts. In *Alhamrani v Alhamrani* Jersey lawyers, assisted by members of Serle Court, succeeded in striking out dog-leg claims against the directors of corporate trustees.

The director, of course, owes the aggrieved beneficiary no duties under the trust and cannot normally be brought within any of the classes of strangers to the trust who incur personal liability to a beneficiary (eg knowing assistance, receipt of trust property, trusteeship *de son tort*).

To make out his cause of action, the beneficiary exploits the director's duty to the corporate trustee itself. The director will ordinarily owe duties of skill and diligence to the company; so where the director's negligence resulted in the breach of trust by the corporate trustee, the trustee will have a cause of action against the director for breach of duty. In a dog-leg claim the beneficiary exploits this cause of action for the beneficiary.

Dog-leg claims will normally fail because the benefit of the corporate trustee's causes of action against its director will rarely, if ever, become trust assets; they will normally be held by the company for its own benefit. Usually, the director owes his duties to the corporate trustee generally and not purely in relation to a particular trust. In these cases the cause of action resulting from a director's breach of his duties is held by the company for its own benefit, it is not one of the assets it administers under the particular trust in relation to which the claim has arisen.

The exceptional case is a corporate trustee that administers only one trust and has no assets other than those that it holds on trust. This was the assumed position in *HR v JAPT*, where it was decided only that the dog-leg claim was 'not unarguable'.

It is perhaps unsurprising that there is no reported instance of a successful dog-leg claim. ⚡ PETER MCMASTER QC

How confidential are a settlor's wishes?

BREAKSPEAR & ORS V ACKLAND & ANR [2008] EWHC 220 (CH) IS THE FIRST REPORTED ENGLISH DECISION ON WHETHER A SETTLOR'S LETTER OF WISHES SHOULD BE DISCLOSED AT THE REQUEST OF A BENEFICIARY.

In *Breakspear*, the (de facto) settlor had created the trust in connection with his divorce from his second wife. The beneficiaries were the settlor, his children, remoter issue and such other persons to be appointed by the trustees. Later, the trustees, who included the settlor, appointed his third wife a trustee; she then, with her co-trustees, appointed herself a beneficiary. Immediately thereafter, the trustees granted her a reversionary interest in the income of the trust fund, arising on the settlor's death. The settlor then died and the other beneficiaries came to learn of the trust only after correspondence relating to his estate. The trustees later informed certain of the beneficiaries that they intended to sell trust land

and make a final distribution of the trust fund, for which they would obtain the sanction of the court.

The claimant beneficiaries sought (among other things) disclosure of the settlor's wishes including a letter of wishes prepared by him. Briggs J ordered disclosure, but only because of the trustees' decision later to return to court to seek sanction of their proposed scheme of distribution. He held that trustees surrender their confidentiality protection against a full disclosure and examination of their reasoning by making such an application.

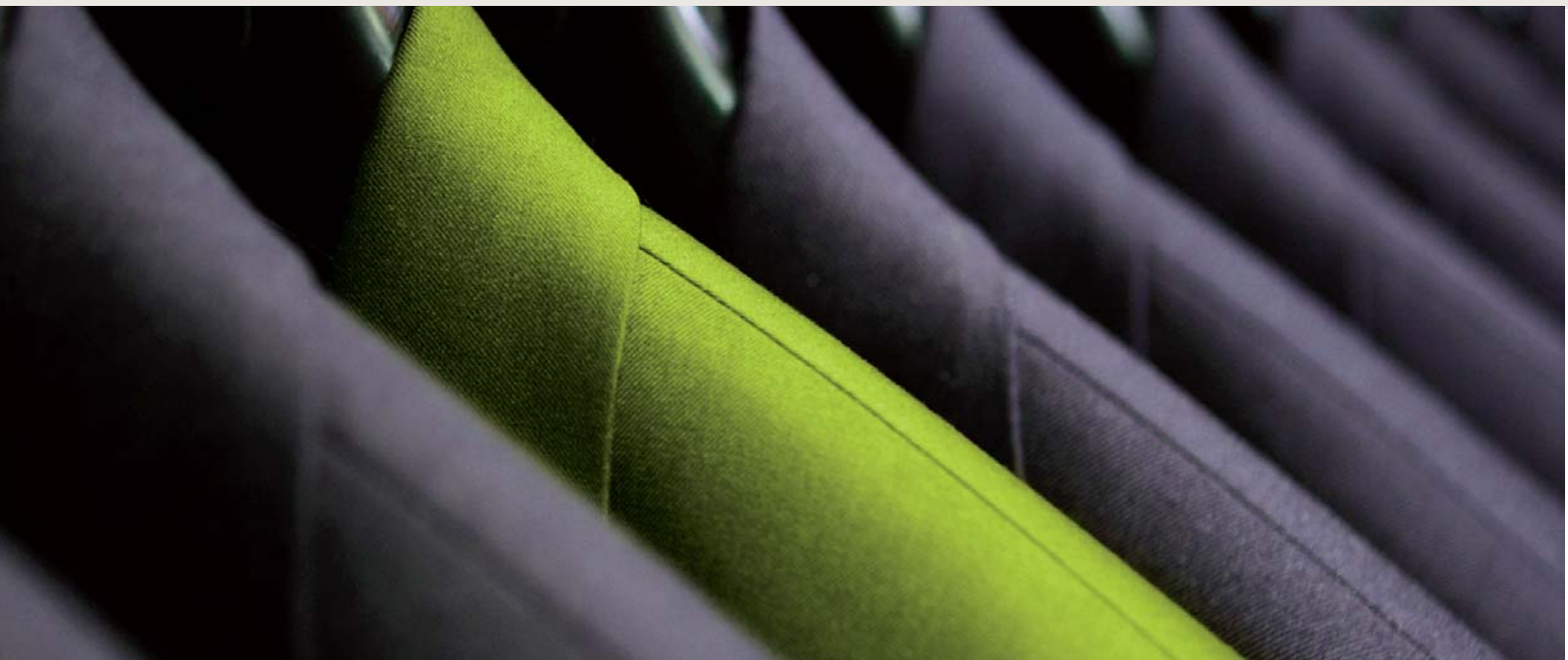
The judge concluded that the so-called *Londonderry* principle remains good law in England (see *Re Londonderry's Settlement*



[1965] Ch 918). Essentially, it is in the interests of beneficiaries of family discretionary trusts, and advantageous to the due administration of such trusts, that the exercise by trustees of their dispositive discretionary powers be regarded, from start to finish, as a confidential process. The judge then concluded that the trustees need not disclose letters of wishes to beneficiaries merely because they request it unless disclosure is in the interests of the sound administration of the trust. Once the trust is completely constituted it is essentially a matter for the trustees whether they preserve, relax or abandon the confidence of the letter. This discretion arises regardless of the incapacity, death or change of heart of the settlor. If the trustees are requested to disclose a letter they are not bound to give reasons for their decision (unless the trustees seek the guidance of the court, in which case

“...a mere refusal to disclose will not be enough for a beneficiary to challenge a decision”

they are bound to give their reasons for refusal and make full disclosure, which disclosure can be limited as against particular beneficiaries if needs be). A mere refusal to disclose will not be enough for a beneficiary to challenge a decision under the court's administrative jurisdiction in relation to trusts (there would need to be evidence of, for instance, mala fides or unfairness). However, if the trustees volunteer reasons for their refusal, the court may investigate those reasons, and call for such factual material as may be thought fit. DAKIS HAGEN



Sales by trustees and tricky buyers

A PURCHASER OF LAND FROM TRUSTEES MAY HAVE TO RETURN THE LAND IF THE STATE OF HIS KNOWLEDGE AT THE TIME OF ACQUISITION MAKES IT UNCONSCIONABLE FOR HIM TO RETAIN THE BENEFIT OF ITS RECEIPT.



In this context the statutory overreaching provisions of the Law of Property Act 1925 and the Land Registration Act 2002 give protection to bona fide purchasers for value of land from trustees, provided that any statutory requirements or relevant entries on the register have been complied with. However, when the purchaser has acted sufficiently unconscionably, the principle of “unconscionable receipt of trust property” may apply. Despite “unconscionable receipt” being a personal claim, the court might provide a proprietary remedy.

The touchstone is “unconscionability”: *BCCI (Overseas) Ltd v Akindele* [2001] Ch 437 per Nourse LJ at p455G:

“... just as there is now a single test of dishonesty for knowing assistance, so ought there to be a single test of knowledge for knowing receipt. The recipient’s state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt.”

Nourse LJ’s decision in this regard has been criticised as being unduly vague and uncertain as to its application. I respectfully disagree with that criticism. The circumstances in which behaviour may be “unconscionable” are infinitely varied.

The flexibility of Nourse LJ’s formulation is demonstrated in the decision of the Court of Appeal in *Criterion Properties PLC v Stratford UK Properties LLC* [2002] EWCA Civ 1883 [2003] 1 WLR 2108 (NB Decision reversed by the House of Lords).

The core of Nourse LJ’s formulation is flexibility. However, the starting point probably remains that of actual knowledge that the assets received are traceable to a breach of trust (see per Nourse LJ in *Akindele* at p 453). To this can be added:

- The seriousness of the breach. In the absence of fraud or the like, is it necessarily “unconscionable” for a purchaser to hold the trust to a bad bargain (*Criterion* at para 32)?
- Constructive notice will rarely be sufficient in the context of commercial transactions.
- Whether either or both parties had legal advice and, if so, whether the advisers were fully informed of the relevant facts.
- Timing of the receipt by the defendant of knowledge of the material facts (*Criterion* at para 32).
- The existence and reliance upon the relevant provisions of the Law of Property Act 1925 and the Land Registration Act 2002.

In conclusion, a purchaser who thinks or knows that he is acquiring a bargain from dozy trustees may not

“...so ought there to be a single test of knowledge for knowing receipt”

be able to rely upon the protective provisions in the Law of Property Act 1925 and the Land Registration Act 2002 so as to maintain his title against the beneficiaries of the trust if his knowledge of the trustees’ failings and the size of his bargain is such as to make it unconscionable for him to retain the benefit of his bargain. ⚡ WILL HENDERSON

Chambers news

People

We are delighted to announce that Paul Johnson has joined Serle Court’s Alternative Dispute Resolution Panel as a mediator. Paul is an experienced mediator in civil and commercial disputes. He was a partner in Pannone LLP before becoming a full-time mediator in 2006 with Kings Chambers.

Serle Court extends its congratulations to Peter McMaster and Nicholas Lavender, who have both been successful in their applications for silk. We are equally pleased for David Casement, one of our associate tenants, who has also been appointed QC.

We are also delighted that one of our associate tenants Kathryn Purkis has been sworn in as an Advocate of the Royal Court of Jersey. As the Deputy Bailiff of Jersey commented at the ceremony, Serle Court has long had close connections with the Royal Court - former members of chambers Richard Southwell QC and Howard Page QC both sit as Commissioners in Jersey, and a number of our members are regularly to be seen in court “tugging at the gowns” of the Jersey Advocates with whom they work closely.

Both of our present pupils Daniel Fritz and Gareth Tilley have accepted our offers of tenancy. They will become members of Chambers in October.

Awards

Serle Court is one of only four sets short-listed for the ‘Best Marketed Chambers’ award at the Legal Marketing Awards 2008. The winners of the awards will be announced at the gala dinner on the 29th May at the Marriott Grosvenor Square Hotel, London.

Publications

Victor Joffe QC, David Drake, Daniel Lightman and Giles Richardson have published the Third Edition of ‘Minority Shareholders: Law, Practice and Procedure’. This edition includes updated text on derivative claims and unfair prejudice, a new chapter on directors’ duties and incorporates discussion of changes under the new Companies Act.

Seminars and roadshows

This year we are continuing with our programme of seminars and roadshows. To date we have held seminars on recent developments in property litigation, restrictive covenants in partnerships and LLPs, and ecclesiastical law society lectures. We will be running a roadshow in Bristol in late June. Details of all our seminars and roadshows are posted on our web site and you can book online. ⚡

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