serlespeak
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Producer interest: recent disclosure decisions from private trust litigation

A NUMBER OF RECENT CASES FROM OFFSHORE JURISDICTIONS HAVE EMPHASISED THE FLEXIBILITY AND BREADTH OF THE COURT'S POWERS WHEN ORDERING DISCLOSURE UNDER ITS SUPERVISORY JURISDICTION TO ADMINISTER PRIVATE TRUSTS.

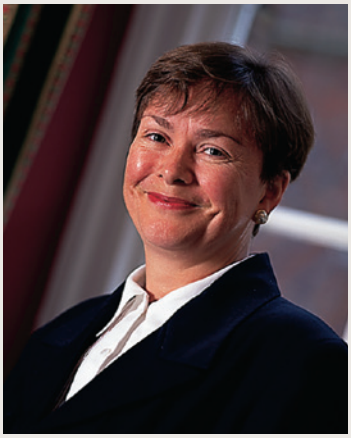
In *Re an Application for Information about a Trust* [2013] CA (Bda) 8 Civ (reasons, 5/2/14) the Bermuda Court of Appeal considered an information request by a beneficiary despite a clause in the trust instrument preventing trustees from disclosing information without protector consent, which had been withheld. The court thought the clause in question valid, but nevertheless found that its supervisory jurisdiction could not be ousted by a provision in the instrument. It further found that 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. Although the protector's power was expressly non-fiduciary, the court held that, nonetheless, the protector's power under the clause had to be exercised in the interests of the trust and of its beneficiaries. The court ordered production of the information; an appeal to the Privy Council is awaited.

This reasoning echoed similar observations of the Royal Court of Jersey in *Y Trust* [2014] JRC 027 (28/1/14). There it was inappropriate to disclose information to a former beneficiary seeking it solely to assist a claim by her husband against a third party (the settlor). The court considered whether on such applications it should merely review the decision of the trustee to produce or withhold information or whether the court should itself exercise a discretion as to whether disclosure should be made. Although the court did not decide the point, the sympathies of the judge were clearly with the court having discretion whether to order disclosure rather than merely reviewing the trustees' decision. An approach where the court did not consider for itself the question of whether documents should be disclosed, the judge said, *"could arguably represent a material dilution of the rights of beneficiaries to have the court enforce the trustees' fundamental obligation to account"*.

Similarly Guernsey has favoured an expansive view of the court's powers in the context of their supervisory jurisdiction. In *R and RA Trusts* [470/2014] (21/5/14) the Guernsey Court of Appeal considered a decision by the Royal Court where it had refused an application by trustees to require disclosure *from* a beneficiary.

The matter was complicated by an earlier Jersey case (*BCD* [2010] JLR 653) where a trustee had sought a disclosure order against beneficiaries who were directors of companies, connected with a trust. The Jersey court had held that it went beyond its jurisdiction so to order on the facts of that case (there the beneficiaries in question had held the desired documents in their capacity not as beneficiaries but as directors). The Guernsey court, by contrast, declined to limit the court's jurisdiction, albeit that, when considering its discretion, the court should, it said, consider whether there is sufficiently close connection between the position of a beneficiary as a beneficiary of the trust and the relief sought so as to justify the court's intervention. Since the Guernsey Court of Appeal and Jersey Court of Appeal (whose justices are drawn from the same pool) have now differed on the limits of their jurisdiction, the Privy Council may in due course have to resolve the position.

DAKIS HAGEN specialises in all aspects of trusts litigation, both international and domestic. In the last year he has been involved in cases litigated in Bermuda, Jersey, Nevis and Gibraltar as well as London.



I am very pleased to introduce this new edition of Serlespeak, focussing on the law of trusts and succession. In the article below, Adrian de Froment and I evaluate the Supreme Court's recent treatment of proprietary claims for breach of fiduciary duty in the *FHR* case. Elsewhere, Dakis Hagen notes recent developments in the attitudes of offshore jurisdictions to ordering disclosure as between trustees and beneficiaries. Continuing the edition, Matthew Morrison considers how the limits imposed on the *Hastings-Bass* doctrine by the Supreme Court have fared in recent cases. Subsequently, Professor Jonathan Harris discusses the serious practical difficulties created by the civilian doctrine of clawback in the context of cross-border estates, including in the English courts. Finally, Zahler Bryan examines the Supreme Court's decision on limitation for claims ancillary to a breach of trust in *Williams v Central Bank of Nigeria*. **Elizabeth Jones QC**

Proprietary interests in profits by fiduciaries; more questions remain

WITH THE RECENT DECISION IN *FHR EUROPEAN VENTURES LLP v CEDAR CAPITAL PARTNERS LLC* [2014] 3 WLR 535, THE SUPREME COURT, WITH A 7 MAN PANEL AND A SINGLE JUDGMENT, HAS OBVIOUSLY AIMED TO PUT AN END TO DEBATE ABOUT PROPRIETARY CLAIMS FOR BREACH OF FIDUCIARY DUTY.

It will not do so because the decision is based on policy and does not sufficiently address principle. This article considers three aspects; when the trust arises, limitation, and what the trust attaches to.

In paragraph 47 the judgment in *FHR* refers to the suggestion in *Metropolitan Bank v Heiron* (1880) 5 Ex D 319 that a trust might arise once the court had given judgment for the equitable claim. The judgment comments that this *"seems to be based on some sort of remedial constructive trust which is a concept not referred to in"* the earlier cases referred to in paragraphs 13, 14 and 16 of the judgment in *FHR*, and *"which has been authoritatively said not to be part of English law"*, citing Lord Browne Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 at pages 714 to 716. In fact in *Westdeutsche* at p 716G, Lord Browne Wilkinson suggested that the remedial constructive trust might provide a satisfactory way forward for developing proprietary restitutionary remedies, pointing out that in this way the remedy could be tailored to the circumstances of the particular case.

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A remedial constructive trust is not necessary in order to force a fiduciary to disgorge profits he is not entitled to keep (a) where the property was trust property before the relevant transaction (since the beneficiary is in fact simply claiming his property) or (b) in cases where the act complained of was within the scope of the fiduciary obligation (since the beneficiary can affirm the transaction and take the whole benefit of it). But where neither of these factors are present, the only basis for imposing a trust is the disabling principle that the fiduciary must be stripped of any profit which he makes where his duty and interest (or duty and duty) conflict, or where the fiduciary has in fact made a profit from use of his fiduciary position. The recent decision in *FHR* was a lost opportunity to recognise that in fact what the courts have been doing in this last category is imposing a remedial constructive trust as a response to the actual actions of the defendant (albeit in a situation where the policy of equity disables him from acting in a particular way) and not arising from a pre-existing right of the plaintiff to claim property as in cases (a) and (b) above. The court's expressed desire to align the law of England and Wales with other common law jurisdictions would also have been better served by this course.

Linked to this is the issue of limitation. The basis in *Metropolitan Bank v Heiron* for saying that the limitation period applied was that the action was based on the concealed fraud of the defendant, so that there was no trust until the court had decreed there to be a trust; in other words that the defendant was a "type 2" rather than a "type 1" constructive trustee (for this distinction, see Zahler Bryan's article below). Is the consequence of the institutional constructive trust which is now said to arise automatically as soon as a benefit is received in breach of the no dealing or no conflict rules that all such claims are against "type 1" constructive trustees so that there is no limitation period? Lord Millett, writing extra-judicially in *"Bribes and secret commissions again"*, has certainly asserted that this is so. But *Metropolitan Bank v Heiron* is not the only authority which says that limitation does apply to such a claim; so does *Taylor v Davies* [1920] AC 636. *Taylor v Davies*, and the distinction between assets in the hands of the defendant as trustee prior to the transaction complained of, and assets coming into the hands of the trustee as a result of the action complained of notwithstanding that the recipient is already a fiduciary, is a fundamental part of the reasoning in the recent decision of the Supreme Court in *Williams v National Bank of Nigeria* [2014] 2 WLR 355. *Williams* was, but *Taylor v Davies* was not, cited in *FHR*; see also *Gwembe Valley Development Company Ltd v Koshy* [2003] EWCA Civ 1048 at paragraph 119.

Next is the question of what the trust attaches to. In *John v James* [1991] FSR 397 contracts between Elton John and Dick James Music Ltd ("DJM") were entered into whereby song copyrights were assigned to DJM in return for an agreement to pay a share of the royalties received to Elton John. It was held that the terms of those contracts imposed a fiduciary duty on DJM not to make any profit which was not brought into account in calculating the writer's share of the royalties. DJM set up subsidiaries in overseas territories and entered into contracts with them which had the effect that a large share of the profits from the copyrights were received by the subsidiary and Elton John was excluded from sharing in those profits. DJM was ordered to account for the royalties received by the foreign subsidiaries, but, relying on *O'Sullivan v MAM* [1985] 1 Q.B.428, which itself relied upon *Boardman v Phipps* [1967] 2 AC 426, was entitled to an allowance so as to do justice between the parties, which was fixed at the amount an independent sub-publisher would have charged. If, as *FHR* now holds, any benefit received where there is use of a fiduciary position is held immediately and automatically on trust for the beneficiary, is there any scope for any allowance for skill and care, let alone a sharing in the profits? How can there be an immediate trust if the extent of it cannot be worked out until the court has exercised its discretion? Again, is the court not in reality deciding whether to impose, and the extent of, a remedial constructive trust? These and many other questions will fall to be worked out in the years to come.

ELIZABETH JONES QC appeared in *John v James* and has been involved in many cases relating to profits made by fiduciaries in the fields of entertainment law, commercial fraud and express trusts.
ADRIAN DE FROMENT will start practice as a tenant in Chambers in October 2014 in all areas of commercial chancery practice.

Limitation & Fraudulent Breaches of Trust

IN THE RECENT CASE OF *WILLIAMS v CENTRAL BANK OF NIGERIA* [2014] 2 WLR 355 THE SUPREME COURT HAD THE CHANCE TO SHED SOME LIGHT ON SECTION 21(1)(A) OF THE LIMITATION ACT 1980.

Dr Williams claimed he was the victim of a fraud perpetrated by the Nigerian State Security Services in 1986, a fraud to which the Central Bank of Nigeria was party. Dr Williams' case against the Central Bank of Nigeria was for an account on the basis of dishonest assistance and knowing receipt, and turned wholly on whether these claims were subject to a 6-year limitation period under section 21(3) of the 1980 Act. Section 21(1)(a) of the 1980 Act reads:

"(1) 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".

Williams v Central Bank of Nigeria required an answer to the following two questions:

(1) Is a stranger to a trust who is liable to account on the grounds of knowing receipt of trust property and/or on the grounds of dishonest assistance a "trustee" for the purposes of section 21(1)(a)?; and

(2) Does an action "in respect of" any fraud or fraudulent breach of trust under section 21(1)(a) include an action against a party which is not itself a trustee?(see *Williams* at [40] *per* Lord Neuberger PSC)

The meaning of "trustee"

By a majority of 4:1 the Supreme Court answered the first question in the negative, drawing on the well-known distinction between classes of constructive trustee articulated by Millett LJ in *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400 :

" In the first class of case…. [the trustee's] possession of the property is coloured from the first by the trust and confidence by means of which he obtained it… …The second class of case … arises when the defendant is implicated in a fraud…. Such a person is not in fact a trustee at all, even though he may be liable to account as if he were."

It is only the first class of trustee, in whom trust property was lawfully vested, who are properly described as trustees i.e. persons in whom trust is reposed.

The second category of trustee, although liable to account as if they were trustees, never acquire that status as the required trust and confidence has never been placed in them. The same logic applied with greater force to dishonest assisters. A narrow construction of "trustee" in section 21(1)(a) was also reinforced by the requirement that "trustee" was to have the same meaning as in the Trustee Act 1925.

The meaning of "in respect of"

By a bare majority of 3:2, the Supreme Court also answered the second question in the negative. What is now section 21 was intended to relieve trustees, save in the cases specified in section 21(1), from the consequences of the equitable rule which held them liable to account without limitation of time. This rule never properly applied to strangers subject only to ancillary liability. This interpretation of section 21 accorded with the inclusion of the phrase "to which the trustee was a party or privy". If section 21(1)(a) was not limited to claims against the trustee specified at the end of paragraph (a), it was difficult to see what meaning could be given to this phrase. In addition, the use of the definite article was hard to understand unless "the trustee" is a reference to the fraud or fraudulent breach of trust of the particular trustee sued.

Whilst this decision accords some protection to accessories, a potential claimant would do well to remember that accessories may often fall within s.32 of the 1980 Act under which a limitation period may begin only once fraud or deliberate concealment is discovered or discoverable with reasonable diligence (cf. *Williams* at [119]).

ZAHLER BRYAN accepts instructions in all areas of Chambers' practice, with a particular focus on trusts.

Fleeing *Futter’s* fetters

IT IS NOW OVER A YEAR SINCE THE SUPREME COURT *“PUT THE LAW BACK ON THE RIGHT COURSE”* AND RESTRICTED THE SCOPE OF THE SO-CALLED RULE IN *RE HASTINGS-BASS* IN THE CONJOINED APPEALS OF *PITT & ANR v HOLT & ORS* AND *FUTTER & ANR v FUTTER & ORS* [2013] UKSC 26.

The Supreme Court distinguished between trustees whose actions are void because they have erroneously gone beyond the scope of their powers (described as excessive execution) and trustees who have failed to give proper consideration to relevant matters in making a decision within the scope of the relevant power (described as inadequate deliberation). In the latter case, the trustees’ action is not void and is voidable only if the failings of the trustee amount to a breach of fiduciary duty.

One consequence of this is that trustees’ claims to set aside their actions as voidable will involve *“asserting and relying on their own failings”* and therefore *“…in general it would be inappropriate for trustees to take the initiative in commencing proceedings of this nature”* ([2013] UKSC 26 at paragraph [69]). Further, the Supreme Court held that where trustees had taken competent legal advice, it would be unlikely that the requisite breach of fiduciary duty would be established ([2013] UKSC 26 at paragraphs [78] to [90]).

These facets of the Supreme Court’s decision have recently been considered in the first instance decisions of *Roadchef (EBT) Limited v Ingram Hill & Ors* [2014] EWHC 109 (Ch) and *Top Brands Limited & Anr v Sharma & Anr* [2014] EWHC 2753 (Ch).

In *Roadchef* the corporate trustee of an employee benefit trust for a company’s employees (EBT1) brought proceedings seeking the return of shares which had been transferred to a newly created employee benefit trust for the same company’s senior management (EBT2).

Because the transfer had been for the benefit of the company’s chairman rather than the members of EBT1, Proudman J concluded that the transfer was void as an excessive exercise of the trustee’s powers and as a fraud on the power.

Nevertheless Proudman J held *(obiter)* that, if the transfer had not been void, *Hastings-Bass* relief would have been available on the *trustee’s* application. In Proudman J’s view, the EBT1 trustee’s claim was very far from the type of situation Lord Walker had in mind where trustees wished to have their own decisions reversed for fiscal reasons. Instead, the EBT1 trustee sought *Hastings-Bass* relief because it was no longer under the control of the chairman of the company. Further, the beneficiaries of EBT1 would otherwise have been unable to seek redress for certain of the breaches of duty and all considered that the trustee of EBT1 was the appropriate party to bring the claim (paragraphs [124] to [125]).

In *Top Brands* HHJ Simon Barker QC sitting as a High Court judge held that although generally a breach of fiduciary duty will not be established where competent legal advice has been sought, this will not always be so.

Accordingly the defendant liquidator was held to have been in breach of fiduciary duty when authorising a payment out of the liquidation estate to a party asserting a proprietary interest despite having sought legal advice before doing so. This was because the instructions given to the legal advisers were partial, misleading and incorrect by virtue of the liquidator’s failure properly to investigate the circumstances of the proprietary claim (paragraph [33]). By the same logic it would appear that a breach of fiduciary duty may also be committed (and *Hastings-Bass* relief available) notwithstanding the taking of legal advice where a fiduciary fails properly to implement the advice that has been given.

In light of these two cases, it can be seen that in the early life of *Pitt* and *Futter* Courts have been willing to permit exceptions to some of the apparent restrictions imposed by the Supreme Court on the availability of *Hastings-Bass* relief and the circumstances in which breaches of fiduciary duty will be established.

MATTHEW MORRISON has acted for a number of trustees and beneficiaries in claims seeking to unravel dispositions on the basis of *Hastings-Bass* principles and mistake as well as in connection with a wide range of other trust issues.

Chambers news

People

We are delighted that both of our current pupils Amy Proferes and Adrian de Froment have been offered tenancy and have accepted. They will become members of Chambers in October when they have completed their respective pupillages.

Directories and awards

The Citywealth Leaders List 2014 was published earlier this year and Serle Court has 12 barristers recommended as prominent barristers in the field of contentious trusts: Alan Boyle QC, Kuldip Singh QC, Frank Hinks QC, Dominic Dowley QC, Philip Jones QC, Jonathan Adkin QC, William Henderson, Daniel Lightman, Timothy Collingwood, Giles Richardson, Dakis Hagen and Robin Rathmell.

We were delighted to have been included as finalists in the Chambers of the Year category at this year's Lawyer Awards. We have also recently received three nominations for this year's Chambers and Partners Bar Awards. The nominations are for Chancery Set of the year, Philip Marshall QC for Chancery Silk of the year and Dakis Hagen for Chancery Junior of the year.

Seminars and books

For the seventh year running we sponsored the prestigious Trusts & Estates Litigation Forum. The forum is the leading event in its field attracting the very best speakers and attendees. The main theme this year was *"The new frontiers: Pathfinders in trust litigation"* and Alan Boyle QC spoke on *"Insolvent trusts: What happens when the money runs out?"* whilst Dakis Hagen spoke about *"Thrashing a dead dog - is there any life left in dog leg claims?"*

We also sponsored the International Trusts & Private Client Forum in Jersey. The Forum, the biggest trusts conference in Jersey, presented an unrivalled line-up of international speakers and discussion topics.

Frank Hinks QC spoke on *"Disclosure of Confidential Trusts Information"* and William Henderson covered *"The Brave New World for Jersey Charities in 2014"*.

On 22 September, we will be hosting a full day Litigation Conference at Merchant Taylors' Hall, in London. The conference will cover topical and practical litigation issues across a large number of practice areas. It will include panel sessions, breakouts and a mock injunction, and over 30 members of Chambers will be taking part.

On 26 November we will be hosting a Trusts and Commercial Litigation conference in Cayman.

Full details of both of these forthcoming events are available on our web site.

Suzanne Rab has co-authored a new book: *Media Ownership and Control: Law, Economics and Policy in an Indian and International Context.* The book examines the legal, economic and policy issues relating to regulation of ownership and control of media markets. Many emerging economies including India are seeking to adopt their own regulation in this area taking their lead from the UK.

The 1st supplement to the 15th edition of *Dicey, Morris and Collins, The Conflict of Laws* has recently been published. Professor Jonathan Harris is an editor of this leading work on private international law, and is responsible for eleven chapters in the supplement on aspects of jurisdiction, enforcement of foreign judgments and choice of law

LinkedIn

We have 4 discussion groups on LinkedIn to enable Serle Court members and clients to discuss topical issues in Partnership and LLP Law, Fraud and Asset Tracing, Contentious Trusts and Probate, and Competition Law; please join us.

Edited by JONATHAN FOWLES

Clawback: foreign succession law meets English trusts law

WHERE A PERSON DIES DOMICILED OVERSEAS, OR OWNS LAND OVERSEAS, ENGLISH COURTS CAN AND DO APPLY FOREIGN SUCCESSION LAWS THAT MAY LIMIT FREEDOM OF TESTATION. IN CALCULATING THE FORCED HEIR'S SHARE, HOWEVER, CIVILIAN LEGAL SYSTEMS FREQUENTLY INCLUDE ASSETS ALIENATED BY THE DECEASED *INTER VIVOS*.

This phenomenon, known as "clawback", is anathema to English law, which considers that assets validly disposed of *inter vivos* cannot form part of the deceased's estate; and foreign succession laws cannot be applied to assets which the testator no longer owns.

These issues were revisited recently when three daughters of Lord Lambton, who died domiciled in Italy, claimed shares of his patrimony under Italian law, including valuable English land disposed of by Lord Lambton *inter vivos*. Their brother, the Earl of Durham, the sole beneficiary of Lord Lambton's English will, asserted that Italian clawback rules were inapplicable. Both sides started proceedings: the Earl of Durham sought declaratory relief in England that the *inter vivos* dispositions were valid and unimpeachable; whilst the three sisters challenged the jurisdiction of the English courts and started proceedings in Italy. In the event, the jurisdiction challenge was dismissed and the case subsequently settled.

Meanwhile, the UK recently decided not to opt into the EU Succession Regulation, citing clawback as its principal concern. Unlike English law, which is wedded to the schismatic approach of applying the law of the deceased's last domicile to succession to movables and the law of the *situs* to land, the Regulation adopts the law of the deceased's last habitual residence in respect of all assets. Crucially, it states that this law will also apply to *"any obligation to restore or account for gifts, advancements or legacies when determining the shares of the different beneficiaries"*- so allowing for the possibility of clawback.

The English resistance to clawback places a party's freedom to alienate property and the sanctity of *inter vivos* transactions above the protection of family members. The charitable sector can be more confident in dealing with donations. Clawback might also be problematic for the Land Registry and upset the guarantee of title. But this also creates a clash of cultures with civilian systems which may give rise to serious practical difficulties in respect of cross-border estates. The Succession Regulation will apply in all EU Member States (bar the UK, Ireland and Denmark) to persons dying on or after 17 August 2015 anywhere in the world. Those who have, or once had, assets abroad, or who may wish to move abroad to retire, or to work, face the prospect that 25 Member States may take a different view as to the rights of their family should they die in that State- even in respect of property located in England. Moreover, since English courts also apply a foreign country's own choice of law rules, this means that English courts *will* have to apply the Regulation indirectly- meaning that problems concerning cross-border succession, and clawback, in particular, will inevitably arise again in future.

PROFESSOR JONATHAN HARRIS led by Dominic Dowley QC, acted for the Earl of Durham in *Earl of Durham v Lambton* (2013).

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