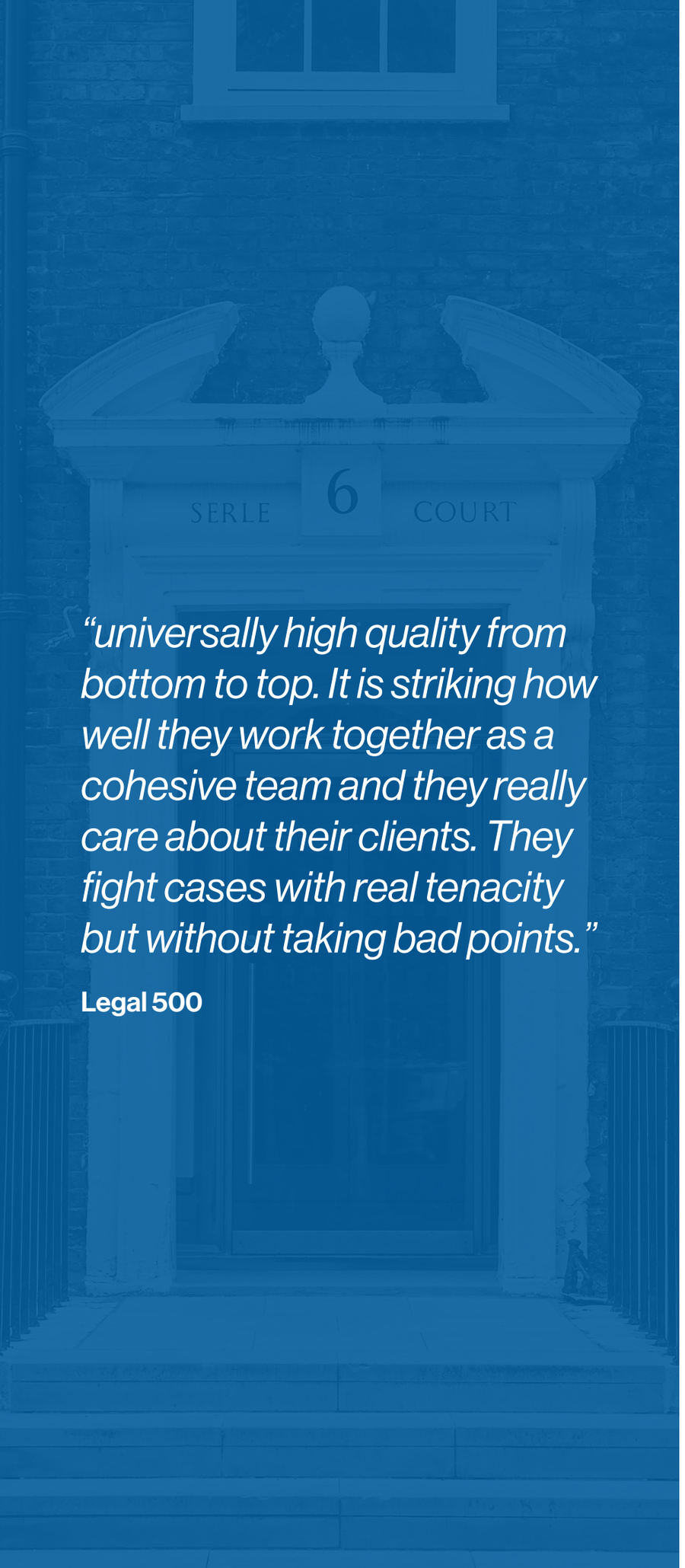
ISSUE 27

serlespeak

RAISING THE BAR IN CHANCERY & COMMERCIAL

Trusts



"universally high quality from bottom to top. It is striking how well they work together as a cohesive team and they really care about their clients. They fight cases with real tenacity but without taking bad points."

Legal 500

I am delighted to introduce this new edition of Serlespeak on the law of trusts. In my lead article I examine the position of adopted and illegitimate children under trusts which pre-date modernising legislation enacted to give them equal status with other children. There are then two articles about enforcement in a trusts context: Kathryn Purkis argues that the Jersey Royal Court was wrong to hold that a remedy of enforcement could not be granted against beneficial interests under discretionary trusts; James Weale considers the willingness of the English courts to use the doctrine of resulting trust to defeat judgment debtors' attempts to hide behind the corporate veil. Zahler Bryan then discusses the effects on the law of trusts and fiduciaries of the Supreme Court's decision in the charities case of *Children's Investment Fund Foundation*. Finally, Max Marenbon addresses the question of when to seek an order for cross-examination of witnesses on applications to remove trustees.

Constance McDonnell QC

Chambers News & Events

People

After 47 years of practice at the Bar (12 of those as Head of Chambers), Alan Boyle QC is retiring from the Bar. We would like to thank Alan for his years of dedication to chambers and send our best wishes for a happy and healthy retirement.

We would like to congratulate Jennifer Haywood on her appointment to the BVI International Arbitration Centre Panel. Jennifer has been developing her arbitration practice since becoming a fellow of the Chartered Institute of Arbitrators and has acted as both sole arbitrator and co-arbitrator on international arbitrations across sectors as diverse as pharmaceuticals, media and financial services.

In December 2020, Ruth Jordan was called to the Bar of the Bahamas via Zoom. Ruth's practice covers litigation, drafting, and advisory work across the areas of tax litigation, insolvency, trusts, charities, and public law.

We are pleased to announce that Professor Suzanne Rab has been appointed as one of the new four members of the UK Regulators Network (UKRN) Expert Advisory Panel. UKRN has appointed experts to the Panel reflecting areas of focus for their member organisations including consumer protection, regulatory law and economics, for an initial period of three years in an individual capacity.

ICC FraudNet Global Report 2021

We are pleased to introduce ICC FraudNet's inaugural Global Report on *International Developments and Perspectives in the field of Fraud, Financial Crime and Asset Recovery*. Lance Ashworth QC and Matthew Morrison have contributed to the report at page 130 in an article titled *Ethics in Without Notice Orders - Frankly, the Judge Needs to be Told.* The article looks at the duty to give full and frank disclosure when seeking orders without notice to the opposing party.

Remote events programme

To meet the challenges that the global pandemic has presented, Serle Court has reinvigorated its business development programme and instead of in-person seminars and conferences we have been delivering an extensive bespoke webinar programme across all of chambers' practice areas. At the start of 2021 we have presented around 20 bespoke sessions to clients.

We continue to deliver a series of webinars and round table sessions across all practice areas, covering topics such as *Recent Updates in Civil Fraud, Corporate Governance, Practical Property Litigation, Terminating Trusts, Using Resulting Trusts to Attack Company Assets, Equitable Interest following Watson v Kea Investments, Cross-border jurisdiction and judgments after the EU Withdrawal Period, CIGA and Directors' Duties, Software Disputes*, and a series of IP and Competition Law webinars.

International and Offshore events

A series of online webinars will be delivered to our clients in Dubai, discussing recent developments in the DIFC as well as Arbitration in the Middle East.

Serle Court has teamed up with lawyers from The Maples Group to present a series of Private Client Trusts Panels. The first panel session will be launched in April and will discuss 'Momentous decisions in light of *Grand View v Wong*'.

In November last year, we announced the postponement of Serle Court's International Trusts and Commercial Litigation Virtual Conference, which we planned to film in chambers. However, due to the start of the second lockdown in England, the event's logistics were compromised as the filming and streaming would have required staff and members of chambers to travel to chambers. Following the Prime Minister's recent announcement of a roadmap to easing the lockdown restrictions, and to allow us to prepare for a potential in-person event, we have asked our clients to complete a short survey to tell us when they would feel comfortable travelling to New York for the next conference. Once we have considered the results of the survey we will be contacting clients with further information regarding the planning of the next conference.

All the above events are supported by our Business Development team and Clerks who organise and deliver the events. The success of this programme has been such that webinars will continue to be part of the business development programme in the post-COVID world.

Awards and Directories

We are thrilled to announce that Serle Court was awarded two prestigious awards in November; Chambers of the Year at the British Legal Awards 2020, and Chancery Set of the Year at the Chambers Bar Awards 2020. We also congratulate Philip Marshall QC and Emma Hargreaves who received awards at the Chambers Bar Awards for Chancery Silk of the Year and Chancery Junior of the Year respectively. We would like to thank our longstanding clients for their ongoing support and the Legal Week and Chambers' editorial teams for selecting Serle Court as the 2020 winners in these categories.

We are delighted to announce that Serle Court has been ranked as a leading set in the following practice areas of the Chambers Global 2021 guide; Dispute Resolution: Commercial, Dispute Resolution: Commercial Chancery, Offshore (Bar) and Restructuring/ Insolvency. 37 members have received rankings across 7 practice areas as global specialists, with a total of 70 individual rankings across chambers.

Serle Court has been shortlisted for *Best Chambers for Work/Life Balance* at the Legal Cheek Awards 2021. Serle Court prides itself upon its approach to the wellbeing of its barristers, pupils, clerks and staff and as such we have made positive steps to ensure that chambers provides a supportive working environment for all concerned. The Legal Cheek Awards 2021, sponsored by BARBRI, takes place virtually on the evening of Thursday 25 March 2021.

Dominic Dowley QC, Richard Wilson QC, Dakis Hagen QC and Emma Hargreaves have all been selected for the Private Client Global Elite Directory 2021 in conjunction with Legal Week International. The Global Elite Directory is a list of the world's most respected lawyers advising UHNW clients, all of whom have been recommended by their peers in the industry.

We are delighted that members of Serle Court feature in the Spear's 500 2021 edition. Members include Richard Wilson QC ('Top Recommended' in Contentious Tax & Trust Lawyers), Dakis Hagen QC, and Giles Richardson, also featured in Contentious Tax & Trust Lawyers. Spears500 is a directory of the top private client professionals focused on wealth management, law and advisory services.

SerleShare

SerleShare is a new marketing initiative for Serle Court that came to life in July 2020 when we spotted an opportunity to deliver focused thought leadership content direct from Serle Court's Barristers, Arbitrators and Mediators. The initiative aligns chambers' marketing strategy with the current working environment and the evolving demand for quality and informative digital legal content. The articles focus on Commercial Chancery content in the Practice Area Analysis. Since its launch, SerleShare has published 25 articles and has generated over 30k views. Please visit the SerleShare page of our website and follow #SerleShare on LinkedIn to stay up to date with our latest cases and updates.

Social Media

We have six designated discussion groups on LinkedIn to enable Serle Court members and clients to discuss topical issues. These groups are:

- Contentious Trusts and Probate
- Fraud and Asset Tracing
- Intellectual Property
- Middle East and Arab Law
- Competition Law
- Partnership and LLP Law
- Property Law

Please join us, and follow us on Twitter @ Serle_Court.

SerleSpeak is edited by Jonathan Fowles.

Modernising trusts: how to ensure that a child is a 'child'

Nelson Mandela said in 1995: '*There can be no keener revelation of a society's soul than the way in which it treats its children*'. It is reassuring that our judges have demonstrated in recent years their alignment with society's attitudes towards adopted and illegitimate children, so that such persons will now readily qualify as 'children' in trusts, even if such trusts were created at a time when such children were classified separately to natural and legitimate children. The potential emotional impact of such perceived legal segregation upon family relationships and upon the individual children is hard to overstate, but is repeatedly recognised by the Court.

Illegitimate children have had the same legal status as legitimate children as beneficiaries of trusts created since 4 April 1988, pursuant to ss.1(1) and 19(1) Family Law Reform Act 1987. Adopted children have been treated in law as the children of their parent(s) for the purposes of trusts with effect from 31 December 1975: s.39 and Schedule 2 para 6, Adoption Act 1976. However, judges have had to grapple with the difficulty that these statutes did not have retrospective effect.

In *In re Erskine 1948 Trust* [2013] Ch 135, Mark Herbert QC held that the Human Rights Act 1998 could be retrospective in cases where that is achieved without unfairness. He employed the HRA 1998 to construe the phrase '*statutory next of kin*' in a 1948 settlement so as to include adopted children. The deputy judge held that there were special features in this case, observing that the settlement did not explicitly exclude adopted children, and that a trust for a person's next of kin was unique because it did not create vested or contingent interests until the death of that person.

Rose J (as she then was) considered in *In re Hand's Will Trust* [2017] Ch 449 a testamentary trust of residue in favour of the testator's children for life with remainder to their '*child or children who attain the age of 21 years*'. The testator (T) died in 1947, and two adopted children of his second son brought the claim, asserting their rights under Articles 8 and 14. Rose J held that reading down the adoption legislation so as to make the Adoption Act 1976 compliant with the claimants' rights would not be giving retrospective effect to the HRA because the question of whether T's second son had any '*children*' only fell to be determined in 2008 when he died. She said that the approach in *Erskine* was '*wrong*' in seeking to give retrospective effect to the human rights legislation in similar circumstances.

Re Hand has received mixed judicial treatment:

• In *PQ v RS* [2019] EWHC 1643 (Ch), Chief Master Marsh held that Rose J's decision was '*controversial*' and noted that its effect was to impute to Parliament an intention by the HRA to contradict the policy of the relevant earlier adoption legislation. He referred to the legal advice to the trustees in that case that the position was not free from doubt and that it would be unwise to rely upon *Re Hand* as a basis for making an appointment from a 1968 trust in favour of an illegitimate child. The Chief Master stated that he expressed no view as to whether *Re Hand* was correctly decided, but noted that there was '*appreciable uncertainty*' as to whether it would be followed in other cases or approved in due course by the Court of Appeal;

• in the event, *Re Hand* was followed (albeit in a case in which *PQ v RS* does not appear to have been cited in argument) by HHJ Keyser QC in *Re the JC Druce Settlement* [2019] EWHC 3701 (Ch). This was an application by trustees under section 48 of the Administration of Justice Act 1985 for permission to proceed on the basis of counsel's advice that certain categories of persons, including illegitimate descendants, were included as beneficiaries of a trust created in 1959. Counsel had opined and submitted that ***Re Hand*** applied to the question of legitimacy under the Family Law Reform Act 1987. The judge held that: '*As regards reading down, in Re Hand's Will Trust Rose J was not considering the 1987 Act; nevertheless, the ratio of her decision is binding on me insofar as it has application to the present case, unless it is plainly wrong*'.

I suggest that HHJ Keyser QC was not in fact 'bound' by Rose J's reasoning in *Re Hand*, and that it would have been helpful had the Chief Master clarified in *PQ v RS* why he was declining to follow Rose J's reasoning. One view is that in both 2019 decisions HHJ Keyser QC and Chief Master Marsh were in a position of comity in respect of Rose J's decision in *Re Hand,* and could have followed the usual practice as between High Court judges and Masters of following a relevant High Court decision unless convinced that it is wrong. Alternatively, Chief Master Marsh could have considered that he was bound by *Re Hand* following the principles stated obiter in *Coral Reef Ltd v Silverbond Enterprisess Ltd* [2016] EWHC 874 (Ch).

An alternative approach was taken by Master Teverson in a case in which I was involved this year, *QR v ST*, concerning illegitimate children. Instead of becoming embroiled in the debate about the *Re Hand* decision, the Master exercised the court's power under the Variation of Trusts Act 1958 to provide consent on behalf of minor and unborn children to vary a 1942 trust so as to update the definition of 'issue' by reference to current law. The Master had '*no doubt at all*' that it was for the benefit of existing and future legitimate members of the family that the doubt about whether illegitimate children were beneficiaries was resolved, and that this was '*in line with the modern approach and attitudes to family life*'. This application was based upon cogent evidence as to the impact upon the family of any differentiation between legitimate, legitimated and illegitimate children, but it is hard to imagine a family who would not be similarly impacted if such archaic distinctions were imposed upon their children by the terms of a decades-old trust.

Constance McDonnell QC acted for the minor and unborn beneficiaries in QR v ST.

Creditor v beneficiary: enforcement actions against interests under Jersey trusts

The Royal Court of Jersey recently handed down its judgment in ***Kea Investments Ltd v Watson and others*** [2021] JRC 009. The gist of the judgment was to deny that the Plaintiff, Kea, was entitled to distrain against the beneficial interests of a judgment debtor, Eric Watson, in three Jersey discretionary trusts (though it succeeded in its uncontroversial claim to distrain on various loans owed to Watson by his trustees and a trust-owned company). The court thereby confirmed the conventional wisdom that interests under discretionary trusts are beyond the reach of creditors. Nonetheless, there was more to this claim than that bromide suggests, and there are good reasons under Jersey law why Kea has reason to be disappointed with the outcome.

In 2018 Kea had succeeded in the English courts in obtaining equitable compensation from Watson in response to instances of fraudulent misrepresentation, with interim payment orders. After many months of Watson resisting Kea's every effort to enforce its judgment, Kea registered its interim payment orders in Jersey. Such registration gave the orders the status of Jersey money judgments which carry the right to distrain against the debtor's movable property unless the court orders otherwise. Such a right is known in Jersey as an *arrêt*. It is a local discretionary remedy of enforcement granted over movables; it is a judicially granted proprietary security interest. The customary law contains no obvious limitations on the precise subject-matter which can be targeted, though traditionally of course it was chattels which were realised by the Viscount.

Article 1(1) of the Trusts (Jersey) Law 1984 defines 'beneficiary' as 'a person entitled to benefit under a trust or in whose favour a discretion to distribute property held on trust may be exercised', and accordingly includes discretionary beneficiaries. Article 10(10) provides 'the interest of a beneficiary [itself defined as the beneficiary's interest under a trust] shall constitute movable property'. Further, Article 10(11) provides that "subject to the terms of the trust, a beneficiary may sell, pledge, charge, transfer or otherwise deal with his or her interest in any manner".

The provision in Article 10(10) has no internal relevance to the 1984 Law; its purpose is to allocate trust interests a place in the taxonomy of the general law of Jersey and for that reason, *prima facie* facilitates the remedy of *arrêt* applying. The provision in Article 10(11) means that beneficial interests (as defined) under Jersey trusts are transmissible property interests, unless the trust says otherwise (which these did not): the relevance being that they can be acquired and enjoyed by third parties as against the trustee. There are in fact likely to be wealth-holding structures that make explicit use of this characteristic.

For these reasons, coupled with the strong factual case (being pursued with some success in England) concerning evidence of a conspiracy by Watson to defeat his creditors, the contention looked attractive. But the court held nonetheless that the discretionary interests of Watson could not be distrained upon, essentially because the terms of the Watson trusts neither expressed the interests to be assignable (turning Article 10(11) a mechanism whereby any proposed transferee could be onits head) nor provided properly added to the beneficial class. Without such a mechanism, it was said, the transferee's rights would have no utility, because the trustee would essentially be being asked to commit a fraud on whichever power or powers it happened to be exercising in the transferee's favour.

Kea had necessarily accepted that it would not by *arrêt* acquire any better interests than Watson himself had in the trusts, which (though he had vested proprietary interests in the trusts, albeit defeasible future ones, as a default beneficiary), in the immediate present were the rights to due consideration, proper administration and to give good discharge. As the court recognised, the argument was akin to asking for Kea to be subrogated to all of Mr Watson's rights.

The court held that such notional subrogation would not circumvent the fraud on a power problem, and that it could not grant a discretionary remedy that had no utility, no matter how deserving the case. But one has to ask why the court was so reticent. The whole concept of subrogation is an equitable fiction by which parties step into the rights of others without regard to questions of privity. It is not strange to the trust context: a trust creditor (and not necessarily a contractual relation) has a direct claim on trust property by subrogation to the trustee's right of indemnity secured by lien. Kea was effectively asking for the *arrêt* to function as judicial sanction for a red-pencil exercise in which the trustee could consider Kea's claims on the trust as if it were a beneficiary, with all its own characteristics (having a large unsatisfied debt) being relevant to the trustee's determination. There is a close parallel in Article 43(2)(c)(iii) of the Security Interests (Jersey) Law 2012, which Article governs the enforcement of contractually granted securities: by that provision the creditor is empowered to ask third parties who have obligations in relation to the collateral to carry out those obligations for it, instead of for the debtor. If the States can achieve that by legislation for consensually granted securities, what is so problematic about expecting judicially granted ones to have the same feature? Kea asked this question directly, but it was not addressed.

It was always well understood that the Jersey courts might be reluctant to have creditors arresting debtors' trust interests: the asset protection purpose could be seen to be effectively destroyed, with consequences for the island's trust industry, if the remedy were to be effectively destroyed, with available in every case. But consider these countering points. First, the remedy must surely be available in cases where a beneficiary has a vested interest in possession. Thus, it is discretionary vehicles only about which there can be any concern (admittedly these constitute the majority), yet it is a difficult distinction to maintain where, as is often the case and was so here, the objects of powers during the lifetime of the trust take fixed interests on termination in default of the exercise of discretion. The difference between the two becomes only a waiting game. Secondly, as Article 10(11) provides, it is perfectly possible to provide expressly in the trust instrument that the interests it creates are not transmissible, so ensuring that the industry can protect itself. Thirdly, the Royal Court has on many occasions set its face against the abuse of structures in the jurisdiction. That being so, why would it not be possible to use the judicial discretion to grant the remedy as a filter to limit the confirmation of arrêts of beneficial interests under trusts to cases in which it could be shown (as here) that there was a good arguable case that the beneficiary was making use of the structure in question to defeat a judgment creditor?

The consequence of declining to declare the law in this way, and throwing out the baby with the bathwater, is that an unscrupulous judgment debtor who squirrels his assets into a Jersey discretionary trust will always be able to oblige the judgment creditor to pursue a full second set of proceedings to bust the trust, these being (unless you are lucky) highly fact-intensive, expensive and relatively slow, before obtaining recourse. Given that the Trusts (Jersey) Law 1984 overtly provides good groundwork for an alternative outcome, this is regrettable indeed.

Kathryn Purkis specialises in contentious trusts litigation, particularly offshore. She is also a Jersey Advocate, and lived and practised on the island for nearly a decade.

Using resulting trusts to attack company assets

James Weale acted for the successful Claimant in Cobussen. He is recognised in the directories as a leading practitioner in commercial and traditional chancery and commercial litigation and currently acts (with Richard Wilson QC, Jonathan Harris QC and Charlotte Beynon) in Wang v Grand View Private Trust Company, a multi-billion dollar dispute listed for a 4 month trial in April 2021.

The story is a familiar one: a businessman with apparently substantial assets becomes a judgment debtor; his response is to assert that, despite all outward appearances, the assets are not his, but are owned by a company and/or held within a discretionary trust and therefore cannot be touched by his creditors. The recent judgment of Edis J in *Cobussen Principal Investment Holdings Ltd v Ghouse Akbar* [2020] EWHC 2805 (QB) confirms the willingness of the courts to invoke resulting trusts in order to defeat such a defence.

Following substantive proceedings in the BVI, Mr Akbar was ordered to pay around $16m. The Claimant registered that judgment in England and applied for a charging order over a property believed to be owned by Mr Akbar in Trevor Square (valued at £9m). In response, Mr Akbar contended that the property – which he and his family had occupied rent free since 2005 – did not belong to him, but was beneficially owned by a company (Legacy Holdings Limited), which was in turn held within a discretionary trust (the Garden Trust). For good measure, Mr Akbar contended that the acquisition of the property had been funded, and the Garden Trust had been settled, by an elderly relative (Mrs Mumtaz).

The Supreme Court in *Prest v Petrodel Resources Ltd* [2013] 2 AC 415 firmly closed the door on attempts by claimants to pierce the corporate veil. However, more importantly for present purposes was how the Supreme Court concluded that assets held by a company could be attacked on a different basis (at para 52): the ownership and control of a company by a spouse is "*likely to justify*" an inference that the family home held by that company is subject to a resulting trust.

The tension between the above analysis and earlier authority (not cited in *Prest*) which appeared to reach the opposite conclusion (i.e. that the natural inference to be drawn from the use of a holding company is that the latter was intended to be the beneficial owner of the underlying property) was considered in *NRC Holdings Ltd v Danilitskiy* [2017] EWHC 1431 (Ch). The Court concluded that the earlier cases could be distinguished on their facts and endorsed the more expansive approach encouraged by *Prest*.

In finding that Mr Akbar was the beneficial owner of the property, the judgment of Edis J in *Cobussen* (at paras 44-49) confirms the modern trend towards a more expansive approach to resulting trusts. It now seems clear that – absent credible evidence of a commercial/tax purpose behind the use of a company or trust structure – a resulting trust is likely to be inferred where the defendant: (i) funds the acquisition; (ii) uses the property gratuitously (or on uncommercial terms); and (iii) is the effective controller of the property's holding company. *Cobussen* also serves as a warning to dishonest litigants: having advanced a fundamentally dishonest case as to the acquisition of the property, Mr Akbar was unable to put forward a credible explanation for the use (by him) of the corporate/trust structure.

Once more unto the breach – fiduciaries and the non-intervention principle

In *Children's Investment Fund Foundation v Attorney General* [2020] 3 WLR 461 the issue before the Supreme Court was whether, and if so on what basis, there was jurisdiction to direct a member of a charitable company how to exercise his power.

The case arose from the breakdown of the marriage between Sir Christopher Hohn and Ms Jamie Cooper, which resulted in the need to change the governance of the Children's Investment Fund Foundation (**"CIFF"**), a charitable company limited by guarantee which they had established together. Sir Christopher and Ms Cooper agreed that Ms Cooper would resign as a member and director of CIFF and CIFF would make a substantial grant to another charity founded by Ms Cooper. The trustees of CIFF applied to court for approval of the grant, thereby surrendering their discretion.

At first instance Sir Geoffrey Vos C held that the grant was a payment for loss of office which required approval by a resolution of CIFF's members under section 217 of the Companies Act 2006. Dr Lehtimäki, the sole non-conflicted member of CIFF, was joined to the proceedings by the court but maintained a position of 'studied neutrality' on the resolution. The Chancellor held that Dr Lehtimäki was a fiduciary, that the grant was in CIFF's best interests and directed Dr Lehtimäki to vote in favour of the resolution.

The Court of Appeal allowed Dr Lehtimäki's appeal. Although Dr Lehtimäki was a fiduciary, under the non-intervention principle the court could not substitute its view for that of Dr Lehtimäki's unless there was a breach of fiduciary duty. There was no breach of duty in this case and therefore no jurisdiction to direct Dr Lehtimäki to vote for the resolution.

The Supreme Court agreed with both courts below that as a member of CIFF Dr Lehtimäki owed a fiduciary duty to exercise his voting power in the best interests of the charitable purposes of CIFF. Allowing the appeal, however, the majority held that Dr Lehtimäki's threat not to vote for the grant was a threatened breach of fiduciary duty which justified the court's intervention. CIFF was not an ordinary commercial company in which the directors and the members of the company could legitimately have a different agenda – for both the trustees and the members the question was whether the grant was in the best interests of CIF's charitable purposes. Once the court had reached the decision that it was, that question had been finally resolved (subject only to an appeal or possibly a significant change in circumstances). Even though Dr Lehtimäki had not surrendered his discretion, the court's decision was binding on all interested parties joined to the proceedings. Once the court had made its final determination a fiduciary's duty was to give effect to that decision.

This case has potentially far-reaching consequences for members of charitable companies, although it is worth noting that the Court of Appeal suggested the outcome might have been different in relation to mass membership charities such as the National Trust. As the Supreme Court declined to address this question, it remains to be seen exactly how far-reaching the consequences are.

In the law of trusts, however, the majority's reasoning may have significant implications for the way in which the courts approach the question of whether a trustee has been in breach of fiduciary duty. If the question had been simply whether Dr Lehtimäki was acting in what he in good faith considered to be in the best interests of CIFF, in accordance with the conventional approach, it is questionable whether the Chancellor's decision that the grant was in CIFF's best interests would have rendered his conduct a breach of duty. The majority's decision was premised on the applicable standard no longer being a subjective one: it was irrelevant that Dr Lehtimäki might have a reasonable and bona fide belief that the grant was not in the best interests of the charitable purposes of CIFF, because the effect of the Chancellor's decision was to determine that the opposite was true.

Zahler Bryan has a broad commercial chancery practice, with a particular emphasis on contentious trusts, civil fraud and commercial disputes.

"Crossing" the CPR Boundaries in Trustee Removal Claims

In this article I examine recent developments in relation to applications to cross-examine in claims to remove trustees under the inherent jurisdiction.

A claim made under the court's inherent jurisdiction to remove a trustee should normally be brought under CPR Part 8: *Schumacher v Clarke* [2019] EWHC 1031 (Ch) at §[22]. The default position in claims brought within the boundaries of Part 8 is for evidence to be given in writing, but the court may traverse into the Part 7 procedural landscape by directing a witness to attend for cross-examination (CPR 8.6(2)-(3)). Applying to cross-examine a witness can be a worthwhile exercise despite the courts' reluctance to grant such applications in inherent jurisdiction trustee removal claims.

Schumacher clarified (at §[17]) that the same principles apply to such claims as to claims for the removal of personal representatives, where "*Although it is not common, and should not be common, for evidence in a section 50 application to be tested by cross-examination, it cannot be assumed... that cross-examination will not be required*": *Long v Rodman* [2019] EWHC 753 (Ch), §[29](3). Given this restrictive approach, when should litigants apply for cross-examination, and what considerations will the court take into account in determining such applications?

Claims for removal of trustees under the inherent jurisdiction often involve allegations of misconduct by a trustee, or a relationship breakdown between trustees and beneficiaries, which can involve disputes of fact that require to be viewed under the lens of cross-examination. Where a trustee denies committing the acts said to constitute the misconduct, the opposing parties will likely wish to test the credibility of that denial in cross-examination. Similarly, where a beneficiary asserts a breakdown in relations, opposing trustees may argue that the genuineness of the beneficiary's expressed feelings should, and can only fairly, be tested by cross-examining them in court.

Litigants may also have some tactical motivations for applying to cross-examine the other side's witnesses. The target of a successful application is subjected to the pressure, scrutiny, and – in high-profile cases – publicity of taking the stand.

As for the court's likely approach, the overriding objective of the CPR dictates that "*the issue for the court is whether the claim can be tried fairly... without the witnesses being cross-examined*" (*Schumacher*, §§[33], [35]). *Schumacher* was unusual in that the claim had been brought under CPR Part 7, but given the court's decision that it should have been brought under Part 8 and that (as in Part 8 Claims) there would be no cross-examination by default at trial, its reasoning applies equally to Part 8 claims.

Following on from this, the courts will require cross-examination where the fair resolution of disputed factual issues demands it. In the analogous context of claims to remove personal representatives, cross-examination has clarified disputed issues such as the representative's independence, honesty and probity (*Perry v Neupert* [2019] EWHC 52 (Ch) §§[60], [71], [73]) or his attitude to a beneficiary (*Heath v Heath* [2018] EWHC 779 (Ch) §§[15]-[17]). It follows from this that cross-examination may indeed be required to test allegations of a breakdown in relations between trustees and beneficiaries as "*it will rarely suffice for the claimant, whether a beneficiary, executor or trustee, merely to say that they have fallen out with the personal representatives or trustees and or that some action or behaviour is unsatisfactory. The personal representatives or trustees should not be held hostage to allegations which may simply be mischievous*" (*Schumacher*, §[20]).

Nevertheless, litigants applying to cross-examine an opposing party's witnesses should be aware that the court will hesitate to make factual findings that could influence a subsequent claim for breach of trust (*Schumacher* §21(iv)). Thus, they may minimise the likelihood of such a claim or argue that only cross-examination will allow the court to exercise the inherent jurisdiction fairly by assessing the factual allegations without finally determining them. That the court can have regard to such contested factual allegations without determining them was confirmed, in a similar context, in *Schumacher v Clarke* [2020] EWHC 3358 (Ch) at §[21]).

An application to cross-examine witnesses is a useful weapon in the armoury of parties to claims for the removal of trustees under the court's inherent jurisdiction. The Part 8 procedural frontier is steep, but not insurmountable. Where the need for the court to assess disputed factual allegations, such as whether a trustee committed the alleged acts or had the alleged mental state, coincides with the tactical advantages of an application to cross-examine, litigants should give serious thought to making one.

Max Marenbon acted for the Defendant will trustees in the Schumacher v Clarke litigation, led by Elspeth Talbot Rice QC of XXIV Old Buildings and James Brightwell of Serle Court. Richard Wilson QC and Jamie Randall of Serle Court appeared for the Claimant.

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