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Trusts, Tax, Probate & Estates

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Contents

The Earl of Cardigan's case:

removing trustees and equitable compensation

Clare Stanley QC and Jack Watson acted for: the professional trustee

Despite its somewhat Dickensian facts, the decision of Newey J in *Brudenell-Bruce v Moore & Cotton* [2014] EWHC 3679 (Ch), provides the setting for the latest substantial guidance from the High Court as to the approach that the courts will take to compensating beneficiaries for trustees' breaches of trust, and to contested applications for the removal of those trustees.

Facts

Lord Cardigan is the 49% beneficiary of a bare trust established in 1951 ('the 1951 Trust') with the remainder being held for the benefit of a trust established for Lord Cardigan's son upon him reaching the age of 40 (the 'Children's Settlement'). The Trustees of the 1951 Trust were John Moore, a senior barristers clerk, and Wilson Cotton, a highly experienced professional trustee and founder of STEP. Following the Trustees' decision to sell a number of the paintings belonging to the 1951 Trust (which itself was the subject of a decision of the high court: [2012] EWHC 1024 (Ch)), Lord Cardigan embarked on a course of conduct designed to remove the Trustees by alleging substantial breaches of trust, dishonesty and a breakdown in the relationship of trustee and beneficiary. In addition, Lord Cardigan sought in the region of £4million in compensation for alleged breaches of trust, the most significant of which was an alleged failure to maintain the Stable Block of Tottenham House, the seat of the Cardigan family for many generations.

Three important points come from the judgment.

Point 1:
Assessment of Equitable Compensation for Breach of Trust

In a careful and detailed judgment, Newey J held that the claims for breach of trust substantially failed and, in particular, that the failure to weatherproof the Stable Block was a reasonable one in all the circumstances. However, he went on to consider the way in which damages ought to be assessed. On behalf of Lord Cardigan it was suggested that the measure of damages in a breach of

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trust case is the cost of reinstating the asset to the state that it ought to be in, rather than the diminution in value of that asset, even if the costs of reinstatement were significantly greater than the diminution in value of the asset. Newey J had little hesitation in rejecting this submission. He held instead (citing the decision of the Supreme Court in *AIB v Mark Redler* [2014] UKSC 58 and the line of breach of contract cases following *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344) that the measure of damages was the diminution in value of the asset, thereby reinforcing the fact that while the rules of remoteness of damage do not applying to compensation for breaches of trust, the rules of causation certainly do.

Point 2:
Who to pay and how much?

Newey J did, however, find that on certain minor issues, the Trustees had acted in breach of trust. Yet it appeared that Viscount Savernake, who would be the sole entitled beneficiary of the Children's Settlement upon his reaching the age of 40, had acquiesced or concurred in the breaches of trust. Accordingly, two issues arose: (1) whether Lord Cardigan could require the Trustees to fully reconstitute the 1951Trust or, given the potential acquiescence of Viscount Savernake, whether Lord Cardigan could only require the payment of 49% referable to his share (2) relatedly, whether payment should be made to the 1951 Trust or directly to Lord Cardigan as an absolutely entitled beneficiary.

Applying the AIB decision, the Judge held that Viscount Savernake was not an absolutely entitled beneficiary (having not achieved the age of forty) and therefore that full reconstitution of the 1951 Trust was required. He suggested that there may be scope for dealing with Viscount Savernake's actions by impounding his interest by way of indemnity to the trustee (see section 62 of the Trustee Act 1925 and Underhill and Hayton, at paragraphs 97.1, 97.21 and 97.22).

The counter-argument to this approach is that while the beneficiaries of the Children's settlement were not absolutely entitled, the trustees of that settlement were so entitled and appeared to have simply followed Viscount Savernake's directions, thereby adopting his acquiescense/concurrence. Nevertheless, it appears that the court will, even where there is potential acquiescence by some of the beneficiaries, be reluctant to reduce the award (or award damages directly to the beneficiary) and that, instead, a trustee should make a claim under s.62 Trustee Act 1925 to impound the acquiescing beneficiary's interest. Of course there may be practical difficulties with such an approach (such as where a trustee has since retired) and the judgment of Newey J does not preclude a claim that damages should be paid only to the beneficiary in circumstances where the acquiescing beneficiary is absolutely entitled. Accordingly, the argument that damages ought to be referable only to the non-acquiescing beneficiary's share and ought to be paid directly to that beneficiary may meet with greater success on more appropriate facts.

Point 3:
Applying the test for removal of trustees

On the issue of removal, the judge started with the classic distinction between a breakdown in relations between trustee and beneficiary (which would justify the removal of the trustee) and mere friction which would not.

In Mr Moore's case, he had made several criminal complaints against Lord Cardigan. As a result, Newey J reluctantly held that Mr Moore ought to be removed as a trustee as a result of the irretrievable breakdown in relations and the effect that would have upon the appearance of impartiality necessary to perform the office of Trustee ([257]-[262]). However, in the case of Mr Cotton, the judge declined to order removal, finding instead that while Lord Cardigan had made several complaints in relation to Mr Cotton's conduct, those complaints were unfounded ([263]-[269]). In particular, the court noted that the cost of appointing new trustees was a significant factor (in the context of a Trust in serious financial difficulty) which weighed against removal (at [263]).

Newey J's approach suggests that the court will adopt a robust approach to applications for the removal of trustees. In particular the courts will be wary of beneficiaries seeking to manufacture a breakdown in relationships in order to secure the appointment of replacement trustees. Accordingly, in the case of experienced professional trustees, given the significant expense involved in removing and replacing them, it will likely to be necessary to demonstrate either a significant breach of trust or a complete breakdown in relations in order to justify that expense.

Clare Stanley & Jack Watson

Hinds v Hinds:
locus standi and laches in probate cases

Clare Stanley QC acted for the co-defendants and Tom Lowe QC acted for the executor defendant

This was a case about two intestate estates: husband and wife. The husband died in 1978. The wife died 32 years later, in 2010. The Plaintiff was the only biological child of the marriage. The 2nd – 4th defendants (Clare's clients) were the wife's children from her first marriage who were treated by the husband as if they were his own biological children throughout his life. The 1st Defendant was the wife's administrator for whom Tom Lowe QC acted.

When the husband died in 1978 the wife became his personal representative. For the following 30 plus years she treated all the assets in the estate as though they had passed to her absolutely. The vast majority of the assets were parcels of real property in the Cayman Islands. She dealt with them as though she were the beneficial owner – she sold some of the parcels, and transferred others.

By the time of her death in 2010, however, there were still a number of parcels of land which had not been disposed of. By this time, those parcels of land were worth very substantially more than had been the case in 1978 when the husband died.

The Plaintiff brought proceedings shortly after his mother's death claiming that these properties (amongst others) were not part of his mother's estate, but were held for him on the statutory trusts arising on the intestacy of the husband, as the husband's only child. He also claimed that he was the beneficial owner of these assets. The Defendants argued that the claim was flawed procedurally and legally and that it should in any event be dismissed on the grounds of acquiescence and laches. Foster J agreed with the Defendants.

First, Foster J held that the Plaintiff, as a beneficiary of his late father's estate, had no locus to bring the claim on behalf of that estate. The person with legal title to sue is the only proper plaintiff, and this applies as much to beneficiaries under a trust as it does to executors, as the cases recited by Lord Collins in *Roberts v Gill* [2011] 1 AC 240 show. The proper plaintiff to recover the property in the husband's estate was the administrator of that estate. Herein lay the first problem for the Plaintiff, namely that he was not the administrator of his late father's estate.

Of course, in exceptional cases the beneficiary may sue, but in those cases the trustee/executor must be formally joined to the proceedings. Here was the second problem for the Plaintiff. Leaving aside whether he might have been able on the facts to establish exceptional circumstances, it was simply not possible for him to join the administrator. His mother (the wife) had been the administratrix of the husband's estate, but she was now dead. Following her death there had been no new administrator appointed of the husband's estate and there was therefore no one to join. The action was therefore doubly improperly constituted.

Secondly, the essence of the claim was that the Plaintiff said he personally had a proprietary interest in the various parcels of land. The problem with this claim was that a beneficiary of an unadministered estate has no interest in the underlying assets themselves: see *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] AC 694. All that he has is a right to sue the administrator for the due administration of the estate. The position is essentially identical to that which obtains when a liquidator/office holder administers the assets of a company in liquidation. The creditors (and shareholders) have no interest in the company's assets. They have rights to ensure that the liquidator carries out his statutory duties to administer the estate, but no property right in the assets themselves. They obtain no proprietary interest until a distribution (dividend) is actually made to them: *Ayerst (Inspector of Taxes) v C&K Construction Limited*

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[1976] AC 167 (House of Lords). Therefore, the Plaintiff's claim ran into the sand as a matter of law because he did not have the proprietary interest that he claimed.

Thirdly, Foster J held that in any event, the Plaintiff's claim should be dismissed on the grounds of acquiescence and laches. After considering *Duke of Leeds v Earl of Amherst* (1846) 2 Ph. 117 *Evans v Benyon* (1887) 37 Ch D 329, *Holder v Holder and Others* [1968] 1 All E.R. 665, and *Re Pauling's Settlement Trust* [1962] 1 WLR 86 Foster J described the principle as follows:

"in order for the court to determine whether there has been acquiescence it must consider all the circumstances of the case and in particular must establish what facts the plaintiff knew and what he did, whether actively or passively, in light of that knowledge. There is no hard and fast rule that the plaintiff's ignorance of his legal rights is a bar but the court must apply equitable principles in all the circumstances in order to decide whether it would be just to allow the plaintiff to assert the remedy he claims."

On the facts, Foster J found that the Plaintiff had known about his legal rights as a beneficiary of the husband's estate since the late 1980s, but had stood by and allowed the wife to deal with / dispose of the estate for the following 30 years, contrary to the Plaintiff's legal entitlement. Foster J had little hesitation in holding that this amounted to acquiescence.

Finally, and in any event, Foster J also held that the Plaintiff's claims were barred by laches. He held that laches could defeat a claim notwithstanding that such claim would not have been statute barred. This was a case where the wife (as administratrix) was a "Class 1" type of trustee, and thus as a matter of statutory limitation there was no limitation period (i.e. it fell within the Cayman Islands equivalent of s. 21(1)(b) of the Limitation Act 1980).

In considering the application of laches to the facts, Foster J applied the modern English approach described in *Frawley v Neill* [2000] CP Rep 20, which requires a value judgment by the Court as to whether it would be unconscionable in view of the delay for the claimant to be allowed to bring this claim.

The delay in bringing the claim had meant that key witnesses had died, and documents had inevitably been lost. These facts in and of themselves caused great prejudice to the Defendants, and Foster J concluded "quite likely a denial of justice" (e.g. paragraph 17.11).

Furthermore, during the period of delay the value of the land in question had risen very significantly, and Foster J considered that it would be fundamentally unfair for the Plaintiff to be able to take advantage of this. That analysis must be right, because if the Plaintiff had made a claim against his mother during her lifetime it would have had to have been for her to account for her administration, which likely would have involved a sale of all of the assets (at the reduced historical prices). In other words, his delay would enable him to profit.

Foster J unhesitatingly came to the conclusion that the delay was inexcusable and unconscionable and that the claims should be dismissed on the grounds of laches.

This decision is currently on appeal to The Cayman Islands Court of Appeal. Robert Ham QC is acting for the Plaintiff/Appellant.

Clare Stanley

Round-up of other key cases

FHR European Ventures LLP v Mankarious [2014] UKSC 45

Emily Campbell

At the end of the judgment of the Sir Terence Etherton C, sitting in the Court of Appeal in the FHR case, he identified a need for informed debate and ultimately determination by the Supreme Court of a number of matters. One of these was as to which of certain authorities should be preferred on the question of whether secret profits earned by a fiduciary were subject to a proprietary or merely a personal claim. The decision of the Court of Appeal in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2012] Ch 453, applying and following an earlier case of *Lister & Co v Stubbs* (1890) 45 Ch D 1, had favoured the personal claim. An earlier decision of the Privy Council in Attorney General of *Hong Kong v Reid* [1994] 1 AC 324, had favoured a proprietary claim.

An appeal to the Supreme Court in the FHR case followed, which appeal has now been determined, putting to bed at least one of the Chancellor's areas of concern. The Supreme Court ruled on 16 July in favour of a proprietary claim in addition to the personal claim which was available, thereby overruling various inconsistent authorities. The FHR case concerned an agent, who received a commission in respect of a transaction in which he was acting, namely the purchase of a hotel.

The classification of a claim for secret profits as a proprietary claim has a number of consequences. Examples are as follows: a proprietary claim is of greater value in an insolvency situation than a personal claim. A proprietary claim is not subject to the statutory limitation defences available in respect of personal claims. A proprietary claim provides an easier route to tracing and the receipt of investment returns on the secret profits than a personal claim. The FHR decision is good news for claimant beneficiaries, as well as for those who prefer the law to be certain rather than food for academic debate.

Emily Campbell

Crociani v Crociani [2014] UKPC 40

Michael Ashdown

When is an exclusive jurisdiction clause not an exclusive jurisdiction clause? This was the issue before the Privy Council in this important appeal from Jersey. The relevant clause in the trust deed provided that if new trustees were appointed, the trust fund would be held "... subject to and governed by the law of the country of residence of incorporation of such new Trustee or Trustees and thereafter the rights of all persons and the construction and effect of each and every provision shall be subject to the exclusive jurisdiction of and construed only according to the law of the said country which shall become the forum for the administration of the trusts hereunder". In issue was whether the decision of Jersey trustees to resign and appoint a Mauritius company as sole trustee conferred exclusive jurisdiction on the Mauritius courts, so that a beneficiary was not entitled to bring breach of trust proceedings before the Jersey's Royal Court.

First, the Board advised that the clause in question was not an exclusive jurisdiction clause. "[T]he forum for the administration of the trust" could just as well refer to the place where the trust is administered as to the court which can enforce the trust, and even if these words did confer jurisdiction on the courts of Mauritius, the reference to "the forum" was not enough to render that jurisdiction exclusive. The Board also attached weight to the failure of the clause to refer to the courts of the country, and to the reference to "exclusive jurisdiction" being found in a clause primarily concerned with choice of law. Even if this clause did confer exclusive jurisdiction, it would operate in favour of the jurisdiction whose law was the proper law at the time of alleged breach.

Secondly, the Board was of the view that exclusive jurisdiction clauses should not be given the the same weight in trusts as in contracts. Whereas a contracting party must show "strong reasons" to persuade a court not to give effect to such a clause, it should be "less difficult" for a trust beneficiary, who should not be viewed as having made a "commitment of the same order as a contracting party". The Board would not have given effect to the clause, in view of Jersey law being applicable to most of the issues, and the trust administration and relevant documents being in Jersey

The Privy Council has clearly taken a very restrictive view of exclusive jurisdiction clauses in trusts. Whilst there was clearly some ambiguity in the words used, it is arguably surprising that a clear reference to "exclusive jurisdiction" was so readily explained away, and trustees and their advisers ought now to check whether their own trusts use similar language. Although applying the clause at the time of the relevant breach of trust is conceptually pure, this may lead to serious practical difficulties where related claims are made against trustees but are subject to different exclusive jurisdictions. Failing to give exclusive jurisdiction clauses the same weight

in trusts as in contracts allows the Court a degree of flexibility, but the price seems too high: uncertainty and an increase in forum-shopping will doubtless follow. It is in any case unclear why a volunteer beneficiary does not take his or her gift from the settlor strictly on the terms upon which it is offered. Should a beneficiary find those terms unacceptable, he or she may of course disclaim.

Michael Ashdown

AIB v Redler [2014] UKSC 58

James Goodwin

In *AIB v Redler*, the Supreme Court considered the principles governing a beneficiary's claim against a trustee who has wrongly paid money out of the trust fund, and affirmed the general approach outlined by Lord Browne-Wilkinson in *Target Holdings v Redfern*.

In brief, the case concerned a property owned by S, previously valued at around £4.25m, which was subject to a legal charge in favour of Barclays, securing a debt of some £1.5m. S then sought to borrow £3.3m from AIB, also to be secured on the property. It was a condition of AIB's loan agreement that Barclays' existing mortgage was to be fully redeemed, such that AIB would have the first legal charge on the property. AIB transferred £3.3m to the defendant solicitors to hold on trust (for AIB) until completion. D paid money to Barclays, but were at fault in failing to discharge the full amount of the debt, with the result that AIB held only a second charge over the property; Barclays continued to hold a first charge over the undischarged element of their debt (of some £300,000). On S's default, the property was repossessed and sold by Barclays for £1.2m. Barclays, as first secured creditor, received £300,000, leaving only the balance for AIB.

The unanimous decision of the Supreme Court was that the loss to the trust estate as a result of D's breach was £300,000, comprising the pecuniary difference made by AIB obtaining a second charge as opposed to a first charge. AIB's argument that it was entitled to £3.3m, less the £800,000 received, was rejected.

Any criticism of Redler is most likely to focus not on the result, but on the reasoning. The claim here was conceptualised as "equitable compensation for breach of trust", and the result justified by reference to causation: D as trustee had to restore the trust fund to the position it would have been in but for the breach (and if the trust has come to an end, to compensate the beneficiary directly). An alternative analysis is based on the trustee's liability to account. AIB were not entitled to pay out the monies until the first charge was redeemed, which never occurred. Therefore the payment out of the trust fund could have been falsified, the trustee coming under an obligation to restore the fund to the position it ought to be in. But the Supreme Court has come down in favour of an analysis based on equitable compensation for breach of trust; and as a matter of authority causation now undoubtedly plays a central role in quantifying a beneficiary's loss where a trustee wrongfully pays money out of a trust fund. One practical effect of Redler, therefore, is to forestall claims for losses which were not caused by the trustee's breach, such as losses suffered by reason of a fall in the market.

Although on these facts, the characterisation of the claim made no practical difference to the result, one can posit situations where this might not be so. For example, if a beneficiary has suffered consequential loss, falsifying the account would merely restore the sum that had been removed from the trust, whereas equitable compensation could in principle cover the extra loss that the beneficiary has suffered. This places a greater burden on the trustee, one that goes beyond mere responsibility for the correct stewardship of the property. Therefore, Redler is also important in potentially opening the door to these types of claims.

James Goodwin

Exoneration clauses and self-dealing: Barnsley v Noble [2014] EWHC 2657 (Ch)

James Walmsley

The *Barnsley v Noble judgment* of Nugee J is the latest instalment in the fallout of the demerger of the Noble Organisation, an extremely successful entertainments, restaurant and property group built and run by two brothers, Michael and Philip. Michael died in April 2006, leaving a widow, Gill, and after his death it was agreed, in broad terms, that the business would demerge so that "Gill's side" would acquire the property side of the business and "Philip's side" would acquire the trading businesses. The demerger was negotiated over 2008/2009. A number of claims were brought in these proceedings by Gill's side against Philip in relation to the value of certain particular assets that formed part of the subject matter of the demerger. Claims were brought for breach of contract, deceit, negligence and (focusing on the fact that Philip was an executor of Michael's will) breach of the self-dealing rule and breach of fiduciary duty.

The short answer to the claims brought against Philip in his capacity as executor was that, in relation to the demerger transaction, he had the benefit of an exoneration clause under the terms of the will. This is explained by Nugee J at paragraphs 284 to 292. The clause was in a standard form. Two points of interpretation arose.

First, it was argued on behalf of the Claimants that the words at the start of the exoneration clause "In the professed execution of the trusts and powers..." meant that the Defendant could not rely on it unless he was consciously seeking to exercise a particular power. Nugee J rejected this argument: paragraphs 285 to 288.

Second, it was argued on behalf of the Claimants that on the proper interpretation of the carve-out from exoneration for "wilful and individual fraud or wrongdoing", any "wrongdoing" on the part of the Defendant disapplied the exoneration, and that "wilful and individual" did not qualify "wrongdoing" as that term appeared in the clause. Nugee J rejected this as contrary to both authority on identically worded clauses and in any event contrary to a fair reading of the clause: paragraphs 289 to 290.

Philip also raised other defences based on (a) the proper interpretation of an authorisation clause authorising self-dealing in certain circumstances, (b) the type of transactions to which the rule about self-dealing applies (relying on *Farrar v Farrars Ltd* (1888) 40 ChD 395), (c) circumstances in which the self-dealing rule has no application (relying on *Holder v Holder* [1968] Ch 353 and *Sargeant v National Westminster Bank* (1990) 61 P&CR 518), and (d) appealing to the application of discretion by the Court (relying again on *Holder v Holder*).

These defences did not succeed before the Judge (see paragraphs 263 to 283 and 292 to 298) but in the circumstances the Defendant did not need them.

James Walmsley

Akers et al (as joint official liquidators of Saad Investments Company Limited) *v Samba Financial Group [2014] EWCA Civ.1516*

When is a Trust an oxymoron?

Tom Lowe QC

What happens when foreign trust property is in a country which does not recognise the concept? What if the settlor makes a nonsensical choice of law? Is the trust invalid under the Hague Convention on the Law Applicable to Trusts and on their Recognition (the "Convention")? This was the issue in *Akers et al* (as joint official liquidators of Saad Investments Company Limited) *v Samba Financial Group* [2014] EWCA Civ. 1516 which answered the question in the negative.

Why has this question not been tackled by the Courts before? In the course of its judgment the Court of Appeal observed that it was "surprising that the questions raised by this appeal have seemingly never been fully addressed before." After all "there must be large numbers of trusts established under the laws of common law jurisdictions, onshore or offshore, that comprise registered shares in civil law countries amongst their assets."

Mr. Al-Sanea, a Saudi Arabia citizen, declared himself a trustee of certain shares for the benefit of his own vehicle, a Cayman Islands company ("SICL"), now in liquidation. He declared himself trustee in a series of separate transactions. The early transactions were governed by a Saudi choice of law clause that expressly purports to govern "the relationship of the parties" in connection with, amongst other things, the creation of an express trust. The later transactions were all the subject of separate

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declarations of trust that neither included nor referred to any express choice of law.

The shares in question formed part of a portfolio of companies incorporated in Saudi Arabia and listed on the Tadawul, the Saudi Arabian stock exchange. They were registered in Mr. Al Sanea's name. It is well-established that the ownership of shares is determined by the law of the place where the shares are registered as lex situs for this purpose (see *Macmillan v Bishopsgate Trust Plc No 3* [1996] 1 WLR 387).

Immediately before SICL was wound up, notwithstanding the earlier declaration of trust, Mr. Al Sanea transferred the shares to Samba in purported discharge of personal indebtedness. The question was whether he was able to do so or whether he was disposing of property that already belonged to SICL. That question in turn depended on the validity of the various declarations of trust. The Chancellor, held that whichever analysis was sought to be adopted the Convention inexorably pointed to Saudi Arabian law as governing the validity of the trusts. He therefore held that SICL had no beneficial interest.

Art. 4 provides that the Convention does not apply to preliminary issues relating the validity of acts by which property is transferred to a trustee. This relates to the so-called "rocket-launching" issues. The liquidators' position was that Art.4 only governed the validity of the transfer of legal title to the trustee and not any other questions such as validity of the "transfer" of the beneficial interest to the beneficiary affected by the declaration of trust. This along with other matters set out in Art. 8 of the Convention would therefore be settled by the law chosen by the settlor under Art. 6 or, if no law recognizing trusts was chosen, the proper law of the trust determined in accordance with Art. 7. Samba argued that the validity of the trust itself was covered by Art. 4, with the consequence that the lex situs of the trust property governed these matters.

The Court of Appeal agreed with the liquidators. It held that there was a clear distinction between the capacity to alienate property (which is governed by the lex situs) and the capacity to create the trust structure (which is governed by the law of the trust). The interest of the lex situs was engaged on the question whether the settlor could alienate the trust property. Once it was accepted that Mr. Al Sanea could dispose of the shares, Saudi law law no longer governed the validity of any trust. That question had to be determined in accordance with Part II of the Convention. Delivering the judgment of the Court Vos LJ said:

"Provided that the property that is made the subject of a trust can be alienated at all under the lex situs , questions as to the validity and effect of placing such assets in trust, even though the assets are shares in a civil law jurisdiction, can be determined by the governing law of the trust."

In doing so, the Court distinguished the Scottish decision in Joint Administrators of *Rangers Football Club Plc* [2013] 2 BCLC 436 on the footing that the future receipts (which were arguably the subject of a trust) could not be alienated in the first place under Scottish law, accepting the interpretation of that case put forward by Professors Hayton and Harris.

The Court of Appeal also rejected the argument that Art. 15(d), which preserves the application of mandatory rules of the lex situs concerning "transfer of title to property", applied to the creation of equitable interests rather than the proper law of the trust. The Court of Appeal held that the purpose of Art. 15(d) is to prevent certain mandatory rules of the lex situs from being overridden by the law of the trust. That law could not be used, for example, to ignore conveyancing formalities of the lex situs. Nor could the trust override the non-derogable rights of, for example, a child entitled to an inheritance or those of a wife.

Samba argued that a number of mandatory Saudi rules applied which prevented equitable title from vesting. The Court of Appeal held that the evidence was not sufficient to establish that any of these rules applied on a summary application. In reality, the Court of Appeal cautioned, there has to be a distinction between laws, which merely amount to local non-recognition, and others which amount to a positive prohibition of the recognition of equitable interests. The evidence did not suggest that Saudi law went that far.

At least the decision of the Court of Appeal now confirms that so long as the settlor is able to alienate property, the trust is not invalidated merely because the lex situs cannot recognise the division of legal and equitable title, so long at least as a rational choice of law can be applied to the trust itself, either by choice or by the Article 7 factors.

Tom Lowe QC

Forthcoming book

Trustee Decision Making: The Rule in Re Hastings-Bass

Hardback | March 2015

Michael Ashdown

Michael Ashdown's forthcoming book **"Trustee Decision Making: The Rule in *Re Hastings-Bass*"** analyses and explains the ways in which the courts control the exercise of trustees' powers and discretions, in the light of the momentous decision of the Supreme Court in *Pitt v Holt*. It sets out to explain both the duty of trustees to take into account all relevant and no irrelevant considerations, and the consequences, for both trustees and beneficiaries, of a breach of that duty. It particularly focuses on the many practical questions which will continue to arise in this complex area, including how far trustees are protected from liability by reliance on their professional advisers, and the application of the *Re Hastings-Bass* principle to administrative powers, and to fiduciaries other than trustees. The book also considers the operation of the long-standing but often misunderstood doctrines of fraud on a power and mistake, and the overlap between these and *Re Hastings-Bass*.

Case Watch

Chinachem

Chinachem (April 2015) Hong Kong Court of Final Appeal - the latest stage of litigation concerning the estate of the late Nina Wang, who died in 2007, reputedly the richest woman in Asia, leaving an estate leaving worth HK $82.86bn. The case concerns the construction of a home-made will leaving the entire estate to a charitable corporation, the question being whether it took beneficially subject to the performance of certain conditions, or whether the imposition of those conditions caused it to hold on charitable trust. Final hearing April 2015. Brian Green QC and Mark Studer act for the appellant.

Ackerman v Line Trusts & ors

Ackerman v Line Trust & ors (November 2015) Gibraltar - a 4 week trial concerning (a) trustees' duties in respect of companies owned by the trust (b) the validity and operation of anti-Bartlett clauses and (c) reflective loss and other remedies issues. Terence Mowschenson QC and Jonathan Hilliard act for the defendants; John Wardell QC and Andrew Mold for the claimants.

Re Martin Montis

Re Martin Montis (October-November 2015) Chancery Division - a 6 week trial concerning a host of important issues, such as (a) when trustees can retain commissions that are paid to associated entities (b) when dividend distributions from foreign companies are capital or income and (c) whether founders' rights for a Liechtenstein Anstalt pass under a will or outside it. Michael Furness QC and Tiffany Scott act for one trustee, who is also a beneficiary; Emily Campbell and Simon Atkinson act for another trustee.

Samarkand

A film partnership scheme run by Future Capital Partners set up two film partnerships, Proteus and Samarkand, which attracted about £31m in investment. The investment money was used to purchase rights in famous Hollywood movies such as The Queen, Irina Palm and Oliver Twist. The rights were leased back to the studio, allowing investors to claim tax relief on the expenditure on the acquisition of films and certain other costs incurred by each respective partnership.

The partnerships are appealing to the Upper Tribunal the decision of the First-Tier Tribunal heard in May 2011. The appeal took place in June 2014 and the parties are awaiting a decision. Michael Furness QC represented the taxpayers in the appeal to the Upper Tribunal.