

Workshop 1

Disputes over trusts that hold corporate structures

Problem

Law Firm X has an associated trustee company that it set up, Trusted Solutions Ltd. A number of the law firm's partners are directors of the trust company.

The trust company signs up a new client, Leonard Rusovsky, a successful businessman with a network of companies. Leonard owns 100% of the shares in the controlling company of the group beneficially. Leonard transfers his shareholding into a new discretionary trust, the Leonard Settlement, with Trusted Solutions Ltd as sole trustee and Leonard as principal beneficiary during his life.

The companies' directors are Leonard's trusted advisers, Vince and Raquel.

The companies make some terrible investments, losing much of their value, so Leonard turns his attention to whether he can hold the trustee responsible.

The trust company's standard trust terms include the following anti-Bartlett clause:

THE Trustee shall not be bound or required to interfere in the management or conduct of the affairs or business of any company in which the Trust Fund may be invested (and whether or not the Trustee have the control of such company) And they may leave the same (including the payment or non-payment of dividends) wholly to such directors And no beneficiary is entitled as such beneficiary in any way to compel control or forbid the exercise (including in any particular manner) of any voting or other rights at any time vested in the Trustee with regard to such company including without prejudice to the generality of the foregoing any powers the Trustees may have (even if also director of such company) of compelling such company to distribute any dividend.

(a) Does it matter to the validity of the clause that the exclusion of the Trustee's duty is expressed in unqualified terms? If not, are there any limits on the exclusion e.g. cases where the Trustee knows of wrongdoing at the company level?

(b) Would it make any difference to the validity of the clause if the following qualification was added?

THE Trustee shall not be bound or required to interfere in the management or conduct of the affairs or business of any company in which the Trust Fund may be invested (and whether or not the Trustee have the control of such company) And so long as no trustee of this instrument has notice of any wilful negligence wilful default or fraud or dishonesty on the part of the directors having the management of such company they may leave the same (including the payment or non-payment of dividends) wholly to such directors And no beneficiary is entitled as such beneficiary in any way to compel control or forbid the exercise (including in any

particular manner) of any voting or other rights at any time vested in the Trustee with regard to such company including without prejudice to the generality of the foregoing any powers the Trustee may have (even if also director of such company) of compelling such company to distribute any dividend. [Emphasis added]

Are there any arguments that such clause is invalid?

(c) Before setting up the trust, one of the partners at the law firm went to see Leonard to find out what sort of trust he might be interested in and what terms he wished it to have. The Law firm then drew up the trust instrument for Leonard's approval, although he was not required to execute and it is unclear if he ever read it in detail. The partner did not mention to Leonard that the anti-Bartlett clause was included. Is this a problem for the validity of the clause?

(d) If you think not, would it make any difference to your conclusion if the partner admitted that he knew that Leonard did not appreciate that such a clause would be included and that Leonard may have been expecting the trustee to maintain a supervisory role over what the companies' affairs?

2. Say that the trustee did not know in any detail what was going on at the company level but, if it had taken steps to obtain information about the company's dealings, it would have been obvious that something very wrong was going on.

(a) Can the trustee rely on the anti-Bartlett clause?

(b) Would it make any difference to your conclusion if the clause went on to say that

*The Trustee is under no duty to **enquire** into the conduct of, or obtain any information regarding, a company in which they are interested and, unless it has actual knowledge of circumstances which call for enquiry, it may assume at all times that the business of any such company is being conducted diligently in its best interests and that all information received is accurate and truthful (emphasis added)?*

3. Say the law firm has a partner and associate (who are not directors of the trustee) on the board of the underlying companies.

(a) Do you think this stops the trustee being able to rely on the anti-Bartlett clause?

(b) If you think not, would it make any difference to your conclusion if the partner and associate were directors of the trustee as well?

(c) Would it make any difference to your conclusions if there were careful periodic reporting lines up to the trustee, who received an annual report from the top company, which did not reveal anything untoward?

(d) One of the theories Leonard is thinking through is that there was a conspiracy on the company board between Vince, Raquel and the law firm associate and partner. Can he bring a conspiracy claim against them (and therefore effectively bypass the trustee)

(e) Leonard also asks the trustee to use its powers to cause the underlying companies to sue their directors, including the law firm associate and partner. What should the trustee do? Does it have a conflict problem?

4. To make matters worse, the company that holds the main valuable asset of the structure is being sued by a third party who claims the asset is his. Can the trustee seek Beddoe directions about what to do or is there some other appropriate course?

5. In light of the problems with the trust and Leonard's criticisms of them, the trustee decides to find out more about what has been going on at the company level.

(a) It finds out that much of the information is not held at company level but is in the hands of Leonard. Can the trustee seek disclosure of this information from Leonard?

(b) Leonard seeks copies of all the legal advice taken by the trustees about their duties in respect of the companies before the present dispute arose. The trustee wishes to assert privilege. Can it do so?

(c) If it had been Leonard's friend, the protector, who sought the information, would that make any difference to whether the trustee could assert privilege?