

## **TRUSTEE LITIGATION CASE BOOK**

Trustee actions can be classified under three heads, these are:

- Construction (validity).
- Administration (internal).
- External (third party claims).

### **Examples of Construction actions or validity actions are:**

- Failure to meet general principles.
- Lack of legal capacity.
- Execution defects on testamentary dispositions.
- Fraud on creditors.

### **Examples of Administrative actions are:**

- Negligence / fraud.
- Breach of directors duties.
- Beneficiaries obtaining information.
- Letter of Wishes compliance.
- Protector powers.

### **Examples of third party actions are:**

- General Commercial Actions.
- Torts by the trustees.
- Contractual disputes.

**Relevant construction cases are:**

- Rahman v Chase Bank and Trust Company (C.I.) Limited and Others (1991) JLR 103.  
Jersey case.
- Fundamental point on the facts the trust was a sham because Mr. Rahman had never intended to lose control of the trust assets and continued to make all decisions relating to the management of the assets.
- Gentry case (Unreported) Jersey Case.
- Caution on protector powers if too restrictive could be a Rahman problem.

**Relevant cases on the three certainties -**

- The three certainty test must be known or ascertainable beneficiaries Steele v Paz Limited and Others 10/10/95 CH 1992/95. Isle of Man case.

**Relevant cases on legal capacity -**

- Harrison Case (Swiss 1972) was held to be substantially effective because Mr. Harrison had the power to create a trust under the laws of his domicile.

Contrast with the Cayman cases of:

- The Lemos Trust Settlement (1992-93) CILR 26 and Lemos and Others v Coutts & Co. (Cayman) Limited and Others (1992-93) CILR 5. Key facts assets in a Civil Law jurisdiction. Greek case.

- The main issues were never tried but the actions in Greece and Cayman caused 8% of the trust assets to be distributed to two forced heirship beneficiaries. The forced heirship override provisions in Cayman Law were effectively overcome.

### **Relevant cases of Improper Execution -**

- Invalidly executed Will difficulty is illustrated in Re Pfrimmer's Estate (1936) 2 DLR 460 (Manitoba). Canadian case. Purported trust set up to avoid probate held that the purported trust was an invalidly effected Will.
- Problem with non-mainstream trust law is that it may be too bespoke and therefore provide the settlor with too much control so that there may be uncertainty how courts in other common law jurisdictions will react given the persuasive dicta in the Pfrimmers Estate case.

### **Relevant cases of Fraudulent transfer**

- Duttie v Bandler Kass (1992) 82 Cir 5084 (KMW) - Kimba Woods. New York case. Claim for U.S.\$3,866,714.62 assets with a Liechtenstein trust. Trustee refused to submit to the court's jurisdiction. The learned judge had no difficulty in assuming jurisdiction over the trust's assets which were physically located in New York.
- Same result but on grounds of a sham in the Midland Bank v Wyatt (1994) EGCS 113. English case. Mr. Wyatt purported to put his assets in favour of his wife and children and then merely put the declaration away in his safe.
- Under the dicta of this case there must be some worries about revocable trusts or an arrangement that defacto leaves the settlor in control perhaps through appointing the settlor as a director of a wholly owned investment company.
- The trust records must show that all parts of the Trust and corporate structure are genuine, scrupulously administered and that the trustee exercises proper control over the assets in the best interests of the beneficiaries. (Care over file notes which refer to "client" or "customer") as this could indicate a nominee or agency arrangement.

## **Relevant Trustee Administration cases:**

### **Negligence**

- Bartlett v Barclays Bank Trust Co. Limited (1980) I All ER 139. English case. Trust set up in 1920 by Mr. Bartlett (senior) included as its major asset the controlling shareholding in a family trading company.
- This case emphasised the importance of trustee safeguarding the trust assets and makes it clear that a trustee has a duty to keep informed and a positive duty to act if the trust assets are in danger.
- Midland Bank Trustee (Jersey) Ltd. & Ors v Federated Pension Services (1996). Jersey case.
- Kitchen v RAF Association (1958) 2 All ER 241. English case.

### **Fraud**

- West v Lazard Brothers Co. (Jersey) Limited 1993 Jersey Unreported Judgements 136 (18/10/93). Jersey case.
- Trustee was responsible for losing nearly all the trust assets. Trustee tried to escape liability by relying on exoneration clauses in the trust deed. **N.B.** a shelf trust deed. Mr. West had never had the exculpation clauses explained to him.
- Breach of directors duties Agip (Africa) Limited v Jackson and Others (1992) 4 All ER 451. English case.  
Again established that a “nominee” director does not exist.
- Armitage v Nurse & Others - Court of Appeal (1997) All ER Vol 2 705. English case.  
The principal beneficiary alleged various breaches of trust by the trustees who claimed they were exonerated by the exemption clause in the trust deed. The Court found that actual fraud required proof of dishonesty. Gross negligence was not enough and neither was “equitable” fraud and that a deliberate breach would not necessarily be fraudulent if

done in good faith. The Court questioned the extent to which professional trustees should seek to limit liability for breaches of trust.

### **Constructive notice of Fraud**

- Royal Brunei Airlines SDN BHD v Tan (1995) 3 WLR 64 held that a third party who dishonestly assisted a trustee to commit a breach of trust.
- Mulligan - PGC (1996) not yet reported failure to diversify into equities was negligent. New Zealand case.
- Springfield Acres Ltd (In Liquidation) v Abacus (Hong Kong) Ltd (1994) 3 NZLR 503. New Zealand case.

### **Attempts by beneficiaries to obtain copy documents**

- Hartigan Nominees Pty Limited and Another v Rydge (1992) 29 NSWLR 405. New South Wales case. Established that while beneficiaries do have a proprietary interest in trust documents. Re Londonderrys Settlement (1965) Ch 918. English case. A Letter of Wishes is not a trust document as the deed or the Letter of Wishes said to be a private document between the trustee and the settlor.
- The Lemos Trust Settlement (1992-93) CILR 26. Cayman Islands. And Lemos and Others v Coutts and Company (Cayman) Ltd and Others (1992-93) CILR 5. Cayman Islands case. The Court of Appeal confirmed the proprietary right of a beneficiary to see trust documents but emphasised that this was not an absolute right.
- Ojeh Trust (1992-93) CILR 348. New South Wales case. Established the right of Trustees to restrict information about the Trust's underlying companies.
- O'Rourke v Darbishire (1920) AC 581. English case. Established right of beneficiary to see all trust documents which relate to his entitlement under the trust.

- X and Blampied and Abacus (CI) Ltd (1994) Unreported Judgments (28/1/94). Jersey case. Established right of personal representatives of deceased settlor to be given information concerning settlements in order to make an estate tax return.

### **Letters of Wishes compliance:**

- The Bank of Nova Scotia Trust Company (Bahamas) Ltd v Nelia Ricart de Barletta and others (1985) Unreported (11/3/95). Bahamas case. Established that a letter of wishes was not legally binding on the discretion of the Trustees.

### **Protector Powers:**

- Rawson Trust v Pearlman (1990) Unreported (25/4/90). Bahamas case. The Protectors of the Trust were also beneficiaries and the court decided that the protectors were not fiduciaries and could exercise their powers of veto in their own interests.
- Von Knieriem v The Bermuda Trust Company Ltd (1994) Unreported (13/7/94) otherwise known as the Star Trusts Case, and Steele v Paz Ltd and Others (1995) Unreported CH 1992/95 (10/10/95). Bahamas case. Established that the powers of a Protector to appoint and remove trustees were fiduciary.
- Re Burton; Wily v Burton and Others (1994) Fed C of A 557. Australian case. Under Australian law the power of an appointor was held to be fiduciary and could only be exercised in the interests of the beneficiaries and solely in the furtherance of the purpose for which it was conferred.