



Challenges to trusts internationally and firewalls

Nicholas Le Poidevin QC
New Square Chambers
Lincoln's Inn
London



Gibraltar reforming legislation on private wealth

- Already in force (17 September 2015):
 - Trusts (Private International Law) Act 2015 – introduces firewall
 - Private Trust Companies Act 2015 - statutory basis for PTCs
 - Purpose Trust Act 2015 – non-charitable purpose trusts
- Further proposed legislation:
 - Private Foundations Act – draft out for consultation



Firewalls – general purpose

- Protection of trusts against:
 - Matrimonial claims
 - Forced heirship
 - Insolvency
- Firewalls cover:
 - Local proceedings to enforce rights under foreign law
 - Foreign judgments enforcing rights under foreign law



Structure of Trusts (Private International Law) Act 2015

- Core provision: s. 4, applying to Gibraltar trust (= trust with Gibraltar proper law)
- Applies to trusts whenever created: s. 8
- S. 4(1) applies Gibraltar law alone to questions of:
 - Validity of trust or disposition into it
 - Capacity of settlor or other interested party
 - Administration of trust
 - Powers and duties of trustees
 - Extent and validity of powers



Structure of Trusts (PIL) Act 2015, *contd.*

- Subs. (2) excludes any challenge based on:
 - Non-recognition of trusts by foreign law
 - Rights or claims by virtue of “personal relationship” with settlor or others
 - Heirship rights or claims
 - Foreign judgment enforcing such rights or claims
- Subs. (3) – exceptions for:
 - Dispositions of property if settlor does not own it
 - Foreign formalities for property transfers applicable under Gibraltar’s choice-of-law rules
 - Foreign immovables
- Subs. (5) – foreign judgment as to Gibraltar trust:
 - not enforced or recognised if foreign court applied rules “substantively different” from rules identified in s. 4



Matrimonial orders

- Foreign divorce court makes financial order:
 - (1) Awarding spouse part of trust assets – ignoring separate existence of trust; or
 - (2) Varying trust under statutory power; or
 - (3) Taking trust assets to be resource of paying spouse when fixing amount of award



Matrimonial orders, *contd.*

- Firewall probably protects against foreign orders (1) and (2) if paying spouse is beneficiary or object:
 - Orders made to enforce claim conferred by reason of “personal relationship” to a beneficiary (i.e. paying spouse) within s. 4(2) *and*
 - S. 4(2) precludes enforcement if trustees “subjected to any obligation or liability” or other beneficiaries “deprived of any right, claim or interest”
- Compare *Re B Trust, RBS Coutts (Cayman) Ltd v. W* (2010) 14 I.T.E.L.R. 557 (Cay. Is.) on narrower legislation, Trustee Ordinance, s. 83A



Matrimonial orders, *contd.*

- Query effect of s. 4(5) where foreign matrimonial legislation is same as Gibraltar:

Gibraltar Matrimonial Causes Act,
s. 35(1)(c) authorises an order:

“varying for the benefit of the children of the family any ante-nuptial or post-nuptial settlement ... made on the parties to the marriage”

English Matrimonial Causes Act 1973,
s.24(1)(c) authorises an order:

“varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement ... made on the parties to the marriage”



Matrimonial orders, *contd.*

- But trustees' powers may be wide enough to give effect to foreign order, by appointing assets out
- Trustees may then choose to give effect to order:
 - On their own authority; or
 - After seeking approval of court
- Court might direct trustees to give effect to order if a decision not to do so was unreasonable
 - So held in Jersey in *Re IMK Family Trust* [2008] J.L.R. 250 (affd. on appeal)
 - Said not to be inconsistent with Jersey firewall (Trusts (Jersey) Law 1984 (2014 rev.), art. 9)



Matrimonial orders, *contd.*

- Note also foreign community of property regimes:
 - under married couple's personal law, property may be owned 50:50
- If settlor is spouse, may then not be outright owner
- Trusts (PIL) Act 2015, s. 4(3)(a):
 - Subss. (1), (2) “do not validate any disposition of property which is neither owned by the settlor nor the subject of a power of disposition vested in the settlor ...”



Forced heirship

- Heirship claims specifically covered by Trusts (PIL) Act 2015:
 - “Heirship rights” are broadly defined (s. 2)
 - Heirship rights cannot give rise a claim to set aside a disposition in favour of a trust (s. 4(2)(b))
 - Nor can a foreign judgment enforcing them (*ibid.*)
 - Attempts to say that settlor lacked capacity to settle assets because of heirship rights are anticipated (“nor is the capacity of any settlor to be questioned”)
 - Prohibition reinforced by s. 4(5) (judgment applying substantively different rules)



Forced heirship, *contd.*

- What about disposition to a trust-owned company, not directly to trustees?
- Query whether within words “disposition ... to or upon such a trust” in s. 4(2)
- If not, *Prest v. Petrodel* judgment (that company holds assets on resulting trust for transferor) may not be blocked by firewall



Insolvency

- Possible challenges from:
 - Settlor's trustee in bankruptcy
 - Creditor saying transfer into trust is fraudulent conveyance
- No specific provision in Trusts (PIL) 2015
- Insolvency Act 2011, s. 419A – transfer into trust protected if:
 - Settlor not insolvent at date of transfer (liabilities not exceeding assets)
 - Settlor does not become insolvent
 - Transfer is registered under regulations



Limits to firewall

- Applies only to trusts – not outright gifts
- Applies only to Gibraltar trusts
 - But will be proper to change proper law to Gibraltar law to protect trust (cf. *Re Golden Trust* [2012] 2 C.I.L.R. 355 (Cay. Is.) (change to make available rectification))
- May not help if assets situated where claims can be enforced



Limits to firewall, *contd.*

- European context – Gibraltar part of E.U.
- Trusts (PIL) Act 2015, s. 7(b) – Act is trumped by:
“any EU Regulation, EU Directive or international convention by which Gibraltar is bound, or may become bound, which in relation to particular matters, contains rules as to ... the recognition or enforcement of judgments”
- Re-cast Brussels Regulation No. 1215/2012:
 - Requires automatic recognition and enforcement of E.U judgments: arts. 36(1), 39(1) – no review as to substance: art. 52
 - Applies to “civil and commercial matters” but not rights in property arising out of a matrimonial relationship, insolvency, or wills and succession: art. 1
 - When foreign judgment for a clawback based on forced heirship, is that a matter of succession (i) by Gibraltar law, (ii) by the foreign law or (iii) by some autonomous characterisation?