



Bermuda conference 2019

## Trust & Probate Panel

*Chair:*

**Keith Robinson**

(Carey Olsen, Bermuda)

*Panel:*

**Nicholas Le Poidevin QC**

(New Square Chambers)

**Mathew Roper** (5 Stone Buildings)

**Greg Williams** (Coram Chambers)



## Extracting trust information – (1)

Trust documents may become disclosable in litigation between third parties – *North Shore Ventures Ltd v. Anstead Holdings Inc.* [2012] W.T.L.R. 1241 (Eng. C.A.):

- Judgment against F and P for \$35 million on guarantee – largely unpaid
- F and P had shunted assets into BVI company, thence to trusts
- Post-judgment discovery sought re trusts; test of “control”



## Extracting trust information – (1)

Held (at [38]):

“Family trusts are a well known possible device for trying to place assets ostensibly beyond the reach of creditors ....

[There was] ... reasonable ground to infer that there was in truth some understanding or arrangement between the appellants and the trustees by which they were to shelter the appellants’ assets, ... such that the trustees would take whatever steps the appellants wished in the administration of the trusts.”

So F and P had “control” of documents



## Extracting trust information – (1)

F and P ordered in *North Shore Ventures* to produce:

- Trust instruments
- Letters of wishes
- Documents identifying settled assets
- Minutes of trustees' meetings

No order against trustees – but likely to co-operate



## Extracting trust information – (1)

*North Shore Ventures* followed:

- Divorce – trust alleged to be device to defeat matrimonial claims: *Thursfield v. Thursfield* [2012] EWHC 3742 (Ch) (Eng. H.C.)
- Where litigant under control of third party: *Suez Fortune Investments Ltd v. Talbot Underwriting Ltd* [2014] EWHC 2848



## Extracting trust information – (2)

U.K. data protection legislation – Data Protection Acts 1998 and 2018 and GDPR:

- Give right to “data subject” to see personal data held by data controller
- Data controllers include trustees, lawyers, accountants, investment managers
- May be useful source of trust information



## Extracting trust information – (2)

DPA 1998 construed in *Dawson-Damer v. Taylor Wessing* [2017] 1 W.L.R. 3255 (Eng. C.A.):

- Appointments out of Bahamian trust
- Challenge to appointments – failure to act reasonably
- Hard to succeed without disclosure of trustee's reasons but Bahamas not friendly to disclosure (*Londonderry*; Bah. Trustee Act 1998, s. 83)
- But trustees used Taylor Wessing in London
- Application made for disclosure of personal data



## Extracting trust information – (2)

Held by Eng. C.A.:

- Irrelevant that claimant wanted data for use in Bahamian litigation
- Protection in DPA for legal professional privilege did not cover material within Londonderry or Bah. Trustee Act 1998, s. 83
- Disclosure ordered

Raised concerns that offshore trusts with English lawyers were exposed – only personal data disclosable but might include letters of wishes





## Extracting trust information – (2)

Concerns led to change in Eng. DPA 2018:

[The relevant GDPR provisions] do not apply to personal data that consists of—

...

- (b) information in respect of which a duty of confidentiality is owed by a professional legal adviser to a client of the adviser

So trust information is protected if held by lawyers but probably not if held by other professionals



## Extracting trust information – (2)

Postscript –see too:

- *Dawson-Damer v. Grampian Trust Co Ltd* – (2017) 20 I.T.E.L.R. 722 (Bah. S.C.) – some disclosure ordered in Bahamas
- *Dawson-Damer v. Lyndhurst Ltd* [2019] SC (Bda) 8 Civ (Ber. S.C.) – preservation injunction granted in Bermuda



## Extracting trust information – (3)

Material in confidential hearing in offshore court may be ordered to be disclosed elsewhere - *Tchenguiz-Imerman* divorce:

- Divorce proceedings by wife in England
- Trustees apply in Jersey re participation in English proceedings:
  - Beneficiaries (not wife) served with confidential material
  - Jersey application heard in private
  - Some beneficiaries were parties to divorce proceedings
  - Wife's lawyers wished to know what was said in Jersey
  - Beneficiaries sought leave of Jersey court to disclose material as price of staying in divorce proceedings



## Extracting trust information – (3)

- Jersey court reluctantly gave leave, *Re M Trust* 2012 (2) J.L.R. 51 (at [21]-[22]):

“... [T]rustees should be able to come before this Court in private, confident in the knowledge that they may speak frankly to the Court and that what is said or produced to the Court and to the other parties to the private proceedings will not be released to third parties or used for purposes other than the private proceedings.  
We would hope that the Family Division would ... take note of those concerns.
- English court orders disclosure anyway: *Tchenguz-Imerman v. Imerman* [2013] EWHC 3627 (Fam)



## Extracting trust information – (3)

### Warning from Jersey court (at [24]):

If this Court were to find that the Family Division began routinely to make orders requiring disclosure of applications by trustees brought in private, the Court would have to consider amending its procedures either so as to heavily redact any material served on English resident beneficiaries or to preclude material from being sent out of the jurisdiction and allowing only inspection within the jurisdiction.

Stringent confidentiality orders well-known in Bermuda