CHANCERY BAR

Chancery Bar Association's Bermuda Conference

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Introduction by Eason Rajah QC, Chair of the Association

Welcome Address by Chief Justice Hargun

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Shareholder Disputes Panel

Chair: James Potts QC

Panel: Christopher Harrison
Anna Markham
Albert Sampson

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Shareholder Disputes

"I am an unhappy shareholder …
… what should I do?"

Chris Harrison
4 Stone Buildings

What do you want?

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(1): I have had enough of this company: Can I exit and recover my investment?

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(2): Why should I be pushed out? Can I stay in and make sure the company is properly run and obtains redress for wrongs?

What do you want?

(1): I have had enough of this company: Can I exit and recover my investment?

(2): Why should I be pushed out? Can I stay in and make sure the company is properly run and obtains redress for wrongs?

(3): Can I buy out the other shareholders, so that I can take control of the company?

An additional factor

I would like to go to court, but there is an arbitration or ADR clause. Is this a problem?

Option (1): Exiting the company

(A) Share buy-out: s.111 oppression/prejudice jurisdiction

(B) Winding-up: s.161(g) just and equitable jurisdiction

Option (1): Exiting the company

(A) Share buy-out: Oppression / prejudice jurisdiction

Companies Act 1981, section 111

- Affairs of the company *"are being conducted or have been conducted"* in a manner *"**oppressive or prejudicial** to the interests of some part of the members, including [the petitioning member]"*

- Relief if facts would justify winding up on the just and equitable ground but winding up would *"unfairly prejudice"* the petitioning member

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- Relief is *"**such order as [the court] thinks fit**", eg "regulating the conduct of the company's affairs"* or *"the purchase of the shares of any members"*

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Hybrid of old UK Companies Act 1948, s.210, & later UK provisions (now UK Companies Act 2006, s.994 & 996)

Option (1): Exiting the company

(A) Share buy-out: Oppression / prejudice jurisdiction

Pros:

- Best route if you really want to exit
- A direct remedy for you
- 'Oppressive / prejudicial' test is quite broad. Affairs of subsidiary may be affairs of holding company: *Neath Rugby (No 2)* [2009] EWCA Civ 291
- Permission not required
- No formal limitation periods (but be aware of laches)
- Sometimes, pro rata value, ie no minority discount

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Cons:

- Expensive
- Slow
- Uncertain

Option (1): Exiting the company

(B) Winding-up: just and equitable jurisdiction

Companies Act 1981, section 161(g)

- The court may wind up the company if the court *"is of the opinion that it is **just and equitable** that the company should be wound up"*

Same as UK position, now in UK Insolvency Act 1986, s.122(1)(g)

Option (1): Exiting the company

(B) Winding-up: just and equitable jurisdiction

Pros:

- Not many. May exert additional pressure on wrongdoers.

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Pros:

- Not many. May exert additional pressure on wrongdoers.

Cons:

- Unlikely to lead to full recovery of share value.
- Winding up will be expensive and damaging to the business.

Option (2): Staying in, with redress for wrongs

(A) Direct claim: personal rights

(B) Derivative action: common law jurisdiction

(C) Regulation of company: oppression/prejudice jurisdiction

Option (2): Staying in, with redress for wrongs

(A) Direct claim: personal rights

Infringement of a personal right. Eg a right to:

- vote
- receive a preferential dividend
- strike down resolutions
- exercise pre-emption rights
- exercise drag/tag rights
- challenge rights issues

Option (2): Staying in, with redress for wrongs

(A) Direct claim: personal rights

Pros:

- A surgical strike
- Straightforward, and therefore relatively quick and cheap
- Available in a wide variety of situations
- Claim may lend itself to interim injunctive relief

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(A) Direct claim: personal rights

Pros:

- A surgical strike
- Straightforward, and therefore relatively quick and cheap
- Available in a wide variety of situations
- Claim may lend itself to interim injunctive relief

Cons:

- None in particular, if this is the only relief you want

Option (2): Staying in, with redress for wrongs

(B) Derivative action: common law jurisdiction

Shareholder brings claim on behalf of the company.

Exception to usual fundamental principle that claim is to be brought by the company.

Exception arises where wrongdoers control the company and so can prevent it from bringing the claim.

Option (2): Staying in, with redress for wrongs

(B) Derivative action: common law jurisdiction

In UK, now a statutory basis: UK Companies Act 2006, s.260

Bermudian jurisdiction derives from common law

But recent Bermudian requirement for leave, Ord.15 r.12A

Option (2): Staying in, with redress for wrongs

(B) Derivative action: common law jurisdiction

May be able to obtain costs indemnity from company, but in UK courts are taking a cautious approach:

- *Wallersteiner v Moir (No 2)* [1975] QB 373
- *Bhullar v Bhullar* [2015] EWHC 1943 (Ch)

Recognised by Order 15 r.12A(13):

"The plaintiff may include … an application for an indemnity out of the assets of the company in respect of costs incurred or to be incurred in the action, and the Court may grant such indemnity upon such terms as may in the circumstances be appropriate"

Option (2): Staying in, with redress for wrongs

(B) Derivative action: common law jurisdiction

Pros:

- An effective weapon, if you want to stay in
- Particularly useful where may be hidden future value, eg *Airey v Cordell* [2006] EWHC 2728 (Ch)
- If leave obtained, wrongdoers are facing serious claim
- 'Thorn in side' exerts tactical pressure
- Costs indemnity

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- If leave obtained, wrongdoers are facing serious claim
- 'Thorn in side' exerts tactical pressure
- Costs indemnity

Cons:

- Damages are paid to the company, not to you
- Stuck in a company with a broken relationship
- Front loaded costs
- Permission hurdle

Option (2): Staying in, with redress for wrongs

(C) Regulation of company: oppression/prejudice jurisdiction

Companies Act 1981, section 111

Court's wide jurisdiction:

- to make *"such order as it thinks fit"*
- including *"regulating the conduct of the company's affairs"*
- to remedy *"oppressive or prejudicial"* conduct

Option (2): Staying in, with redress for wrongs

(C) Regulation of company: oppression/prejudice jurisdiction

Pros:

- A useful route to address a discrete matter
- But compartmentalisation is rare; may morph into wider dispute

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- But compartmentalisation is rare; may morph into wider dispute

Cons:

- Uncertainty

Option (3): Taking control

Reverse share buy-out: oppression/prejudice jurisdiction

ie, can s.111 require the majority to sell their shares to you?

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Reverse share buy-out: oppression/prejudice jurisdiction

ie, can s.111 require the majority to sell their shares to you?

Sometimes, yes – eg: *Oak Investment v Boughtwood* [2009] EWHC 176 (Ch) affirmed [2010] EWCA Civ 23.

Arbitration / ADR

UK experience: arbitration clauses are generally effective

Fulham Football Club (1987) Ltd v Richards [2011] EWCA Civ 855

But, will still need court involvement after facts found, for:

- s.111 'prejudice' relief affecting third parties
- s.161(g) 'just and equitable' winding up

ADR clauses also increasingly likely to be effective.

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Derivative actions: a topical review

Anna Markham
4 Stone Buildings

The requirement for leave: an overview

- Order 15 Rule 12A in force in Bermuda from 9 July 2018.
- The international context.
- Multiple derivative actions – special considerations.

The substance of the leave requirement

- O.1.5 r.12A requires leave to continue a derivative action.
- Identical terms to Cayman O.15 r.12A.
- A gatekeeper provision: protection against frivolous or vexatious shareholder claims.
- Not normally necessary or appropriate for the company to take an active part: *Roberts v Gill* [2009] 1 WLR 531.

International derivative actions
When is leave required, and from which court(s)?

- Derivative action may be brought in forum other than that in which the subject company is incorporated (though relatively rarely appropriate: Lawrence Collins J in *Konamaneni* [2002]).

- Leave may be required by the laws and rules of the forum.

- Is leave also required from the place of incorporation?
  - Yes, if that place has a substantive leave requirement (e.g. BVI).
  - No, if it has a purely procedural leave requirement (e.g. Cayman).

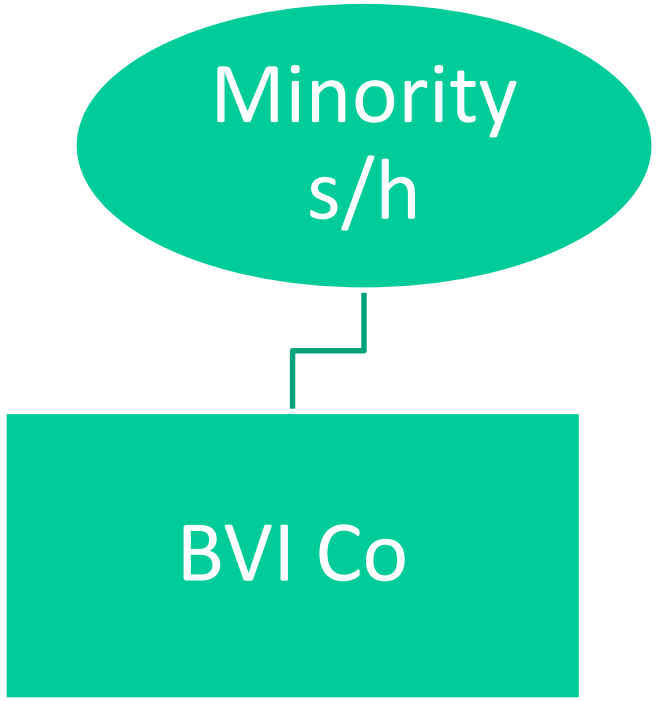
BVI statute:
An example of a substantive leave requirement

BVI Business Companies Act 2004, s184C:

> *(6) Except as provided in this section, a member is not entitled to bring or intervene in any proceedings in the name of or on behalf of a company.*

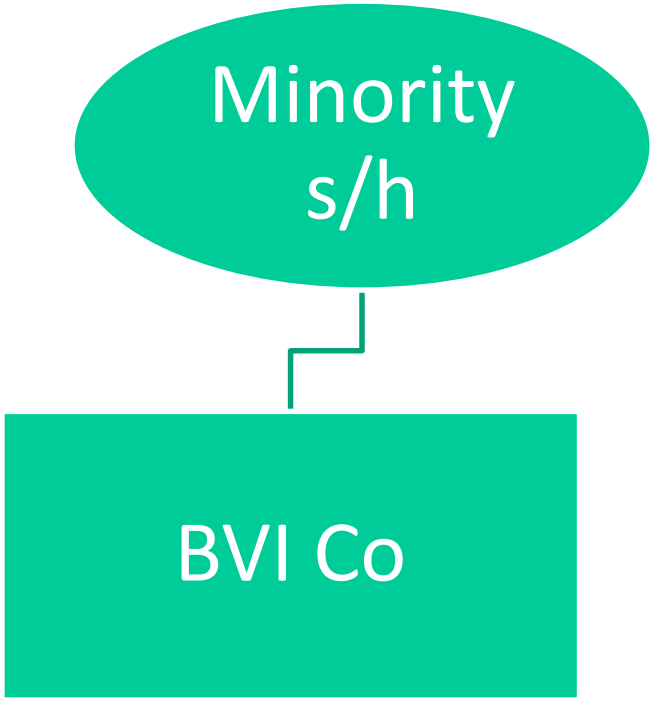
- A “shut-out” rule.

Wong Ming Bun v Wang Ming Fan (Hong Kong, 2014).



- No leave obtained in BVI.
- Action therefore defectively constituted.
- Could not be remedied retrospectively.
- Derivative action struck out.

Novatrust v Kea Investments & ors (England, 2014).



- English jurisdiction for foreign DA survives CA2006.
- No leave sought in BVI, so C lacked locus standi.
- Permission refused for service out of derivative claim (bound to fail).

Cayman O.15 r.12A:
An example of a purely procedural leave requirement

12A. (1) This rule applies to every action begun by writ by one or more shareholders of a company where the cause of action is vested in the company and relief is accordingly sought on its behalf (referred to in this rule as a "derivative action").

[…]

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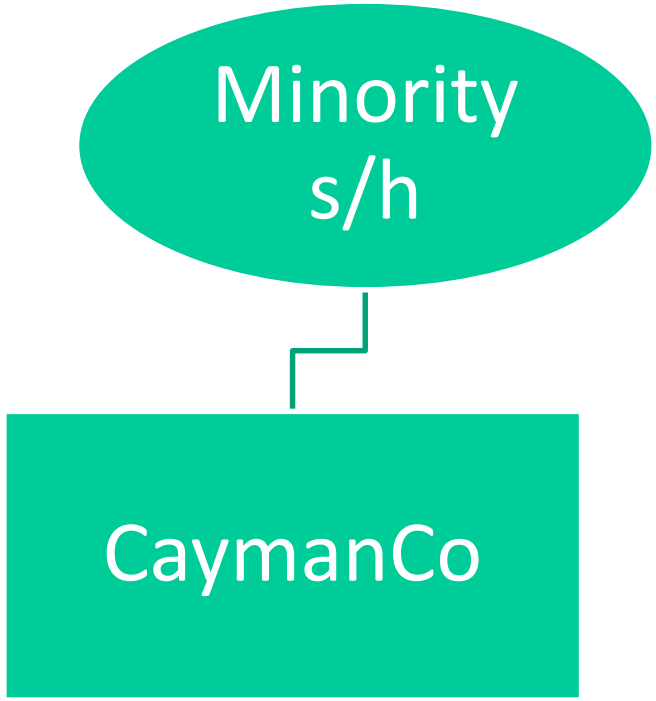
- *"Begun by writ":* jurisdiction-specific terminology.
- No shut-out rule akin to BVI s184C(6).
- So absence of leave ≠ absence of locus standi.

Top Jet v Sino Jet (Cayman, 2018) – main litigation in Missouri.



- Cayman's O.15 r.12 does not apply to foreign DA.
- Purely procedural: applies only to a DA before the Grand Court.
- No jurisdiction to grant leave.

Relevance to Bermuda, and Bermudian companies?

- Expect *Top Jet* [2018] to be followed in Bermuda – leave rule exactly the same as Cayman's. If so…

Relevance to Bermuda, and Bermudian companies?

- Leave likely required for all DAs in Bermuda, whether or not the subject company is Bermudian.

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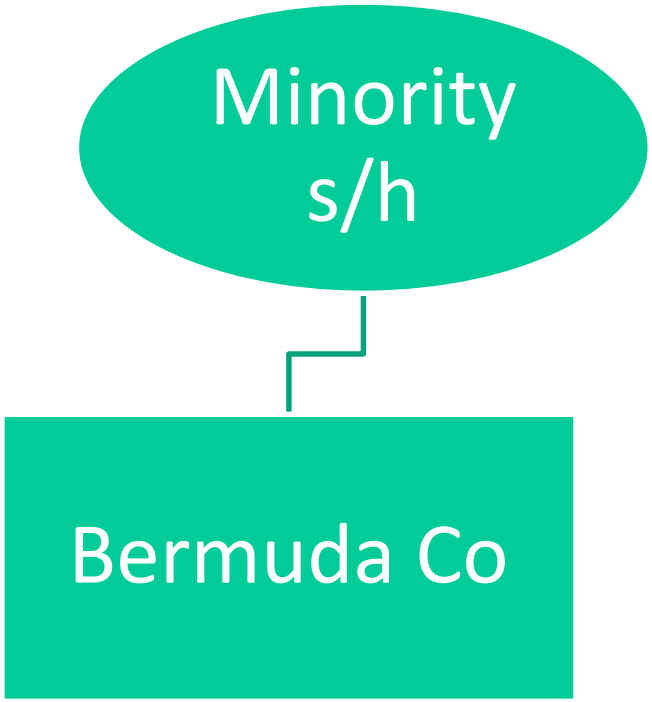
- “Company” includes overseas company: BCA 1981 ss2, 4(1).

Relevance to Bermuda, and Bermudian companies?

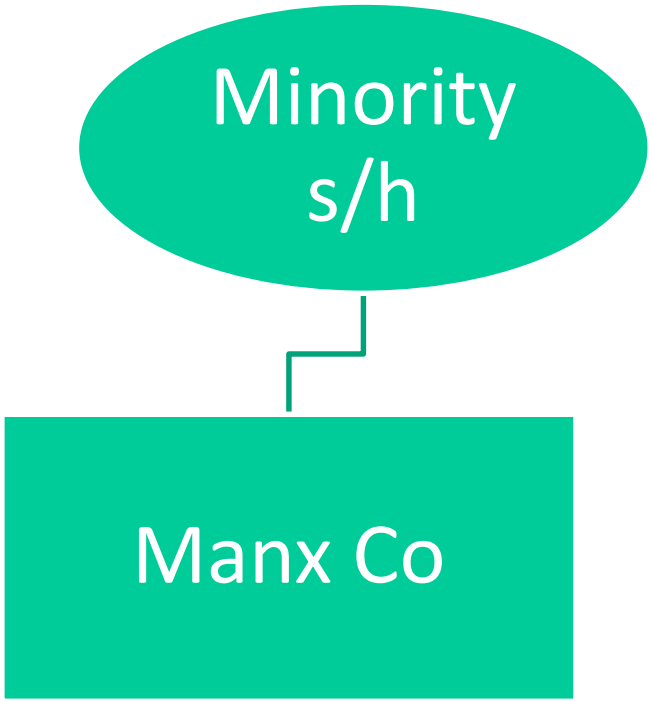
- Leave not required/available from Bermudian court for overseas DA concerning a Bermudian company…
- … applying *Top Jet* [2018]: a purely procedural leave rule.

Hypothetical case: DA in England on behalf of Bermudian Co.



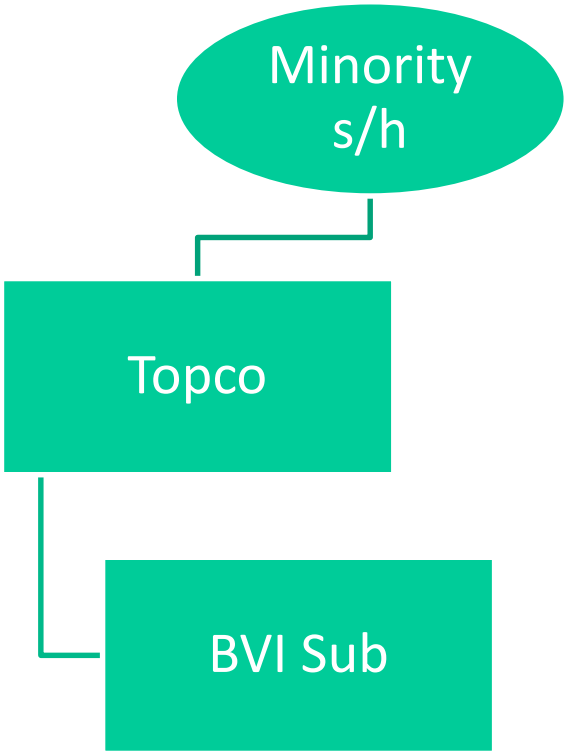
- Permission required in England under CPR 19(9)A (per CPR 19(9)C).
- If *Top Jet* [2018] followed, no leave required in Bermuda.

Hypothetical case: DA in Bermuda on behalf of Isle of Man Co.



- Need leave in Bermuda (*qua* forum).
- IOM CA 2006 s175: leave provision same as BVI.
- So: likely need leave from Isle of Man Court.

Hypothetical case: MDA in Bermuda on behalf of BVI Sub.



- Need leave in Bermuda (*qua* forum)?
- Bermuda's O.15 r.12 does not explicitly contemplate an MDA - but precedent in Cayman: *Renova Resources v Gilbertson* [2009].
- Would BVI court grant MDA leave? Not available under S184(C): *Microsoft Corp v Vadem* [2013].
- Common-law DA does not survive in BVI: *Novatrust* [2014]. But: MDA??

Room for a common-law MDA in BVI?

BVI Business Companies Act 2004, s184C:

> *(6) Except as provided in this section, **a member** is not entitled to bring or intervene in any proceedings in the name of or on behalf of a company.*

Precedents for survival of common-law MDA after codification:

- *Waddington v Chang Chun Hoo Thomas* [2008, Hong Kong].
- *Universal Project Management v Fort Gilkicker* [2013, Eng].

Failure to prove leave in place of incorporation – always fatal?

Popely v Popely: [2018] EWHC 276 (Ch)

> *"I do not interpret* [*Novatrust*] *as requiring a shareholder in all cases positively to prove that it has a right to a derivative claim under the foreign law. If the party resisting the derivative claim is content to presume that the foreign law is the same as English law (as was the case here* […]*), then I see no advantage in forcing a derivative claimant through additional hurdles."*

David Green (Deputy HC Judge) rejecting appeal v permission to continue DA.

Conclusion: no room for afterthoughts

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Privilege & discovery: some knotty issues

Albert Sampson
4 Stone Buildings

Three questions

(1) Can a shareholder see legal advice given to the company?

(2) Can advice be shared without waiving privilege?

(3) How can a shareholder see advice given to the company?

Can a shareholder see legal advice given to the company?

The (English) principle - ***Woodhouse & Co Ltd v Woodhouse*** **(1914) 30 TLR 559**:

"The principle was that if people had a common interest in property, an opinion having regard to that property, paid for out of the common fund, i.e., company's money or trust fund, was the common property of the shareholders, or cestuis que trust. But where the parties were sundered by litigation such an opinion obtained by one of them was privileged" (per Phillimore LJ, at 560).

Can a shareholder see legal advice given to the company?

The exception to ***Woodhouse*** (*"sundered by litigation")* - ***Arrow Trading & Investments Est 1920 v Edwardian Group Ltd*** **[2004] BCC 955**:

"the essential distinction is between the advice to the company in connection with the administration of its affairs on behalf of all of its shareholders, and advice to the company in defence of an action, actual, threatened or in contemplation, by a shareholder against the company" (*per* Blackburne J at [24]).

Can a shareholder see legal advice given to the company?

The litigation exception – some nuances:

(1) Is there hostile litigation between company and member?

(2) What is the extent of the privilege?

(3) Is litigation threatened or in contemplation at the time of the advice?

Can a shareholder see legal advice given to the company?

English principle has been applied in the Cayman Islands, see e.g.:

- ***In re Fortuna Development Corporation*** **[2004-05] CILR 197** (Cayman Islands)
- ***In re Torchlight Fund LP*** **[2016] CILR Note 9** (Cayman Islands)

Sharing advice: the principle

Waiver of privilege can be partial (see e.g. ***Gotha City v Sothebys (No 1)*** **[1998] 1 WLR 114** and ***B v Auckland District Law Society*** **[2003] 2 AC 736**)

Principle has been applied outside of England & Wales:

- ***Citic Pacific Ltd v Secretary of State for Justice*** **[2012] HKCA 153** and **[2015] HKCA 293** (Hong Kong)
- ***Primeo Fund v Bank of Bermuda (Cayman) Limited*** **[2016] (2) CILR 353** (Cayman Islands)

Discovery and inspection: how does a shareholder get the company's advice?

Outside of proceedings:

- **Companies Act 1981, s. 82** – entitles members to inspect all minutes of general meetings directors' meetings
- **Companies Act 1981, s. 87** – entitles members to receive financial statements of the company
- **Companies Act 1981, s. 110** – enables members to instigate an investigation into the company's affairs by inspectors appointed by the Minister of Finance, which results in the production of a report

Discovery and inspection: how does a shareholder get the company's advice?

In the context of shareholder disputes:

***Westport Trust Company Ltd v Paragon Trust Ltd* [2010] Bda LR 35**: the company should not generally become involved in shareholder litigation unless it is necessary and expedient in the interests of the company as a whole (*per* Kawaley J at [17])

RSC 1985, Order 24, r 8: court can order discovery under rules 3 or 7, but such discovery must be necessary for disposing fairly of the cause or matter or for saving costs.

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Share Valuation Session

Matthew Morrison

Donald Lilly

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Price and Prejudice:
Share Valuation in the context of s.994/s.111 Petitions

Matthew Morrison
Serle Court Chambers

UK Legislation: s.994, Companies Act 2006

- Any member or person to whom shares have been transferred by operation of law may petition (s.994(1)-(2))

- Affairs of the company *"are being conducted or have been conducted"* in a manner *"that is **unfairly prejudicial** to the interests of members generally or of some part of its members (including at least* [the petitioning member])*"* or *"that an actual or proposed act or omission…is or would be so prejudicial"* (s.994(1))

- Court can make any order it things fit including providing for *"the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly"* (ss.996(1) & 996(2)(e))

Bermudian Legislation: s.111, Companies Act 1981

- Any member may petition (s.111(1))

  Full Apex (Holdings) Ltd [2012] SC (Bda) 9 Com at [8]-[10]

- Affairs of the company *"are being conducted or have been conducted"* in a manner *"**oppressive or prejudicial** to the interests of some part of the members, including* [the petitioning member]*"* (s.111(1))

  Bermuda Cablevision Ltd [1998] AC 198 at 211C-F; *Paladin Limited* [2014] SC (Bda) 66 Civ at [33]-[34]; *Fort Knox Bermuda Ltd* [2014] SC (Bda) 15 Com at [58]; *Kingboard Chemical Holdings Limited* [2015] SC (Bda) 76 Com at [16] / [2017] CA (Bda) 3 Civ at [18]

- Additional requirements under s.111(2): the facts would justify the making of a winding up petition on the just and equitable ground but winding up would prejudice the petitioning member(s)

  Orient Express Hotels Ltd [2010] Bda LR 32 at [64]; *Kingboard:* Bda SC at [13] and [178]-[179]

Bermudian Legislation: s.111, Companies Act 1981

- Court may make any order it sees fit including *"for the purchase of the shares of any members of the company by other members of the company or by the company and in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise"* (s.111(2))

- Limited Bermudian jurisprudence consistent with buy out being at *"fair price"* / *"fair value"* (i.e. same as *"fair market value"* under UK Law)

  Fort Knox at [105]-[108]; *Kingboard:* Bda SC at [27]

- Cannot seek relief in respect of shares acquired <u>after</u> petition presented (but may be able to in respect of shares acquired after oppressive conduct occurred)

  Bermuda Cablevision Ltd at 212E-G; *Full Apex* at [20]; *Kingboard:* Bda SC at [26]-[35] / Bda CA at [91]-[93]

Valuation Issues

- Basis of valuation (going concern/break up; discounted cash flow; capitalized dividend; capitalized maintainable earnings; comparable transaction; adjusted net assets; any fair alternative tailored to particular industry of company…)
  Re Edwardian Group Limited [2019] EWHC 873 (Ch) at [15]-[33]

- Adjustments for unfairly prejudicial conduct

- Date of valuation and quasi-interest

- Benefit of hindsight

- Minority discount

Date of Valuation / Quasi-interest

- Starting point is the date of the order on the basis that an asset should be valued at the date of purchase

BUT

- Overriding requirements are fairness and remedying unfair prejudice

- Offers to purchase/sell shares may also be material

- The Court may order "quasi-interest" if, among other things, an earlier date is selected

  Re London School of Electronics Ltd [1986] Ch 211 at 224; *Profinance Trust SA v Gladstone* [2002] 1 BCLC 141 at [61]

Date of Valuation / Quasi-interest

- Earlier date may be justified in the petitioner's favour to reflect the misappropriation of assets or a "sea change" in the company's business / market movements

  Re Annacott Holdings ltd [2011] EWHC 3180 at [13] (not appealed - [2013] 2 BCLC 46 (CA) at [2]); *Croly v Good* [2010] 2 BCLC 569 at [105]-[117] cf. *Bennett v Bennett* (unreported judgment of Behrens J 17/1/03 at [105]-[118]); *Re Cumana Ltd* [1986] 2 BCC 99453 at 492

- Earlier date may also be justified out of fairness to the Respondent

  Re Edwardian Group Ltd [2018] EWHC 1715 at [632ff.]

Benefit of Hindsight

- If earlier date selected, subsequent events should be ignored
  Shah v Shah [2011] EWHC 1902 at [54]-[55]

HOWEVER:

- Subsequent events may inform what forecasts could reasonably have been made at the valuation date
  Buckingham v Francis [1986] BCLC 353

- The Court can see whether future intentions were acted upon and/or whether contingencies/uncertainties came to pass
  Re Abbington Hotel Ltd [2012] 1 BCLC 410 at [143]; *Annacott* (CA) [2013] 2 BCLC 46 at [19]

- The Court may assume that a purchaser would have included a formula taking into account subsequent performance
  Edgar v Munro [2017] EWHC 1814 (Ch) at [14]

Minority Discount: Past Certainties

- No discount in the case of a quasi-partnership which exists at the date of petition save where exclusion justified or non-discounted buyout disproportionate to prejudice suffered

  Re Bird Precision Bellows Ltd [1984] Ch 419 at 430-431; *CVC/Opportunity Equity Partners Ltd v Demarco Almeida* [2002] 2 BCLC 108 at [41]-[42]; *Fort Knox* at [60] (Bermudian recognition of quasi-partnership concept)

- Minority discount otherwise the default position

  "A minority shareholding…is to be valued for what it is, a minority shareholding, unless there is some good reason to attribute to it a pro rata share of the overall value of the company. Short of a quasi-partnership or some other exceptional circumstances there is no reason to accord to it a quality which it lacks" (*per* Blackburne J in *Irvine v Irvine No.2* [2007] 1 BCLC 445 at [11]; see also *Strahan v Wilcock* [2006] 2 BCLC 555 at [17] and *Annacott* (HHJ Hodge) at [18]-[21])

Minority Discount: Present Uncertainty

- Default rule should be no discount to avoid rewarding the oppressing majority and improperly treating the petitioner as a willing seller save if shares acquired at a discount or exclusion justified

  Re Blue Index Ltd [2014] EWHC 2680 (Ch) at [23]-[37]; *Re Addbins Ltd* at [87]-[91]; *Re Autobody Ringway Limited* [2018] EWHC 2336 (Ch) at [113]-[114]; *Re Westshield Ltd* [2019] EWHC 115 (Ch) at [138]

OR

- No general rule either way, but the Court must have regard to all of the circumstances

  Re Edwardian Group Limited [2018] EWHC 1715 at [640]-[652] / [2019] EWHC 873 (Ch) at [7]-[13]; *Re AMT Coffee Limited* [2019] EWHC 46 (Ch) at [194]-[216]

Minority Discount: Some Questions for Coffee

- Should it make a difference that the petitioner can establish that he would have obtained an order for a just and equitable winding up?
- If so, would the default rule in Bermuda be no discount?
- What if the petitioner acquired a minority shareholding at full market value or (more likely) acquired a majority shareholding which has subsequently been diluted?
- What if it could be shown that one or more respondents responsible for the prejudicial conduct had been influenced by a desire to buy out the minority on the cheap?

CHANCERY BAR

Is all Fair in Share Valuation?

Donald Lilly
4 Stone Buildings

Coffee Break

CHANCERY BAR

Recent Developments in English Charity Law

Judge Alison McKenna
Chamber President
First-tier Tribunal
(General Regulatory Chamber)

Charities Act 2006 (now Charities Act 2011)

* New definition of “charity”

* Express public benefit test

* New powers for Charity Commission

* Created Charity Tribunal

Tribunals, Courts and Enforcement Act 2007

New statutory framework:

"The Charity Tribunal" becomes

"The First-tier Tribunal (General Regulatory Chamber) (Charity)"

Onward appeals to:

Upper Tribunal (Tax and Chancery Chamber)

Court of Appeal

Supreme Court

1. Meaning of “charity”

(1)For the purposes of the law of England and Wales, “charity” means an institution which—

(a)is established for charitable purposes only, and

(b)falls to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities.

2. Meaning of “charitable purpose”

(1)For the purposes of the law of England and Wales, a charitable purpose is a purpose which—

(a)falls within section 3(1), and

(b)is for the public benefit (see section 4).

3. Descriptions of purposes

(1)A purpose falls within this subsection if it falls within any of the following descriptions of purposes—

(a)the prevention or relief of poverty;

(b)the advancement of education;

(c)the advancement of religion;

(d)the advancement of health or the saving of lives;

(e)the advancement of citizenship or community development;

(f)the advancement of the arts, culture, heritage or science;

(g)the advancement of amateur sport;

Charitable Purposes continued….

(h) the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;

(i) the advancement of environmental protection or improvement;

(j) the relief of those in need because of youth, age, ill-health, disability, financial hardship or other disadvantage;

(k) the advancement of animal welfare;

(l) the promotion of the efficiency of the armed forces of the Crown or of the efficiency of the police, fire and rescue services or ambulance services;

(m)any other purposes—

(i)that are not within paragraphs (a) to (l) but are recognised as charitable purposes by virtue of section 5 (recreational and similar trusts, etc.) or under the old law,

(ii)that may reasonably be regarded as analogous to, or within the spirit of, any purposes falling within any of paragraphs (a) to (l) or sub-paragraph (i), or

(iii)that may reasonably be regarded as analogous to, or within the spirit of, any purposes which have been recognised, under the law relating to charities in England and Wales, as falling within sub-paragraph (ii) or this sub-paragraph.

4. The public benefit requirement

(1) In this Act "the public benefit requirement" means the requirement in section 2(1)(b) that a purpose falling within section 3(1) must be for the public benefit if it is to be a charitable purpose.

(2) In determining whether the public benefit requirement is satisfied in relation to any purpose falling within section 3(1), it is not to be presumed that a purpose of a particular description is for the public benefit.

(3) In this Chapter any reference to the public benefit is a reference to the public benefit as that term is understood for the purposes of the law relating to charities in England and Wales.

(4) Subsection (3) is subject to subsection (2).

Appeals against Charity Commission Decisions to enter onto the register (and to remove from the register…)

1Click

The Human Dignity Trust

Cambridge Target Shooting Association

Full Fact

Crocels Community Media Group

Graham Hipkiss

See http://charity.decisions.tribunals.gov.uk/

Charities Act continued…

326 References by Attorney General

(1)A question which involves—

(a)the operation of charity law in any respect, or

(b)the application of charity law to a particular state of affairs,

may be referred to the Tribunal by the Attorney General if the Attorney General considers it desirable to refer the question to the Tribunal.

(2)The Attorney General is to be a party to proceedings before the Tribunal on the reference.

(3)The following are entitled to be parties to proceedings before the Tribunal on the reference—

(a)the Commission, and

(b)with the Tribunal's permission—

(i)the charity trustees of any charity which is likely to be affected by the Tribunal's decision on the reference,

(ii)any such charity which is a body corporate, and

(iii)any other person who is likely to be so affected.

Decided Charity References:

Her Majesty's Attorney General v The Charity Commission for England and Wales and others: [2012] UKUT 420 (TCC)

The Independent Schools Council v The Charity Commission for England and Wales, The National Council for Voluntary Organisations, HM Attorney General and Others: [2011] UKUT 421 (TCC)

Discussion of Procedure for Charity References:

"*Technical Issues in Charity Law*" Law Commission Report 2017, chapter 15

Further Reading:

"Appealing the Regulator"

Not-for-Profit Law CUP 2014

"*How Does Charity Law Develop in the Age of the Tribunal?*"

Charity Law and Practice Review volume 20 2018

CHANCERY BAR

What might Bermuda learn from the English experience with Land Registration?

Chair: Amanda Tipples QC

Panel: Guy Fetherstonhaugh QC
Nat Duckworth
Nicholas Isaac QC
Sam Laughton

CHANCERY BAR

INTRODUCTION TO THE ENGLISH EXPERIENCE OF LAND REGISTRATION:

AND WHAT IF ANYTHING MIGHT BERMUDA LEARN FROM IT?

A Paper for the Chancery Bar Association Bermuda Conference

Friday, 10 May 2019

GUY FETHERSTONHAUGH QC

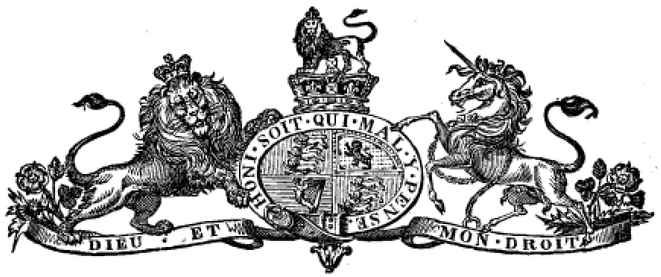
FALCON CHAMBERS

Comments on the proposed new title registration system …

But, but, but the law firms will lose a fortune by not providing this archaic paper based service anymore!
Truth is killin'me 

I suspect that you still need to have some bonded person double check the transaction and verify all information to prove a clear and free title for the bank for a mortgage.
LOL 

Very valid concerns what with the level of illiteracy around here. The smallest/simplest error could be a disaster if it's made permanent.
Toodle-oo 



ANNO VICESIMO QUINTO & VICESIMO SEXTO

VICTORIÆ REGINÆ.

****

C A P. LIII.

An Act to facilitate the Proof of Title to, and the Conveyance of, Real Estates. [29th *July* 1862.]

WHEREAS it is expedient to give Certainty to the Title to Real Estates, and to facilitate the Proof thereof, and also to render the dealing with Land more simple and economical: Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

1. This Act shall apply to *England* only. Extent of Act.

PART I.

As to the Registration of Real Estates, and the Title thereto.

2. There shall be established a Registry of the Title to Landed Estates. Registry to be established.

HM Land Registry, 32 Lincoln's Inn Fields, 1913 to 2011

Blockchain

Press release

HM Land Registry to explore the benefits of blockchain

HM Land Registry is exploring how blockchain technology could be used to provide quicker and simpler services.

Published 1 October 2018
From: HM Land Registry

The Land Registry's director of digital, data and technology speaking on a podcast regarding the use of Blockchain.

The Royal Gazette

Bermuda's land registry to go on blockchain

Published Jun 28, 2018 at 1:00 pm (Updated Jun 28, 2018 at 11:36 pm)

8 Comments

CHANCERY BAR

QUALIFIED INDEFEASIBILITY OF REGISTERED TITLE: ALTERATION, RECTIFICATION & INDEMNITY

Chancery Bar Association Bermuda Conference

Friday, 10 May 2019

NAT DUCKWORTH

FALCON CHAMBERS

Questions

1. Who can apply to alter the register?
2. To whom should an application to alter the register be made?
3. What is the difference between *rectification* and *mere alteration* of the register and why does this matter?
4. When will the register be rectified?
5. When will the register be altered (ie *without* rectification)?
6. When is a Schedule 1 indemnity available?
7. To whom should an application for an indemnity be made?
8. What losses will the indemnity recover?
9. Does the Land Title Registrar have any defences to an indemnity claim?
10. If the Registrar pays out on an indemnity, can he get the money back from someone else?

Alteration of the Register under Sch. 6

Two Kinds:

(1) Alteration which is "**rectification**"

(2) Alteration which is ***not*** **rectification** (ie mere alteration)

Why does it matter?

In rectification cases:

- Harder to succeed if respondent is "**in possession**" of the land(fraud/lack of proper care or unjust not to rectify)

- **Indemnity** for losing party under Schedule 1

Definition of Rectification: Para 1 of Sch 6.

Rectification is an alteration of the register "which –

- Involves the correction of a **mistake**; and
- **Prejudicially affects** the title of a registered owner"

What is a mistake?

NRAM Ltd v Evans and The Chief Land Registrar [2017] EWCA Civ 1013

There is a "mistake" whenever the Registrar:

i. makes an entry in the register that he would not have made;

ii. makes an entry in the register that would not have been made in the form in which it was made;

iii. fails to make an entry in the register which he would otherwise have made; or

iv. deletes an entry which he would not have deleted;

had he known the true state of affairs at the time of the entry or deletion

Examples of “mistakes”

- Fraudulent transfer
- Prior adverse possession
- No adverse possession
- Innocent lender’s charge registered with fraudster
- Lease not forfeited
- No authority to release charge

Non Mistakes

- *NRAM Ltd v Evans and The Chief Land Registrar* [2017] EWCA Civ 1013
- *Antoine v Barclays Bank UK Ltd* [2018] EWCA Civ 2846
- Misrepresentation, undue influence, duress, incapacity
- Rectification

"Prejudicially affecting" the registered owner

- Mostly intuitive
- Beware: overriding interest of someone in actual occupation:

Swift 1st Ltd v The Chief Land Registrar [2015] EWCA Civ 130

CHANCERY BAR

Boundary disputes under a registered land system

Nicholas Isaac QC, Tanfield Chambers

(Bermudian) Land Title Registration Act 2011, section 17 (part):

(1) The boundary of a registered estate as shown for the purposes of the register is an indicative boundary.

(2) An indicative boundary does not determine the exact line of the boundary of the registered estate.

(UK) Land Registration Act 2002, section 60 (part):

(1) The boundary of a registered estate as shown for the purposes of the register is a general boundary, unless shown as determined under this section.

(2) A general boundary does not determine the exact line of the boundary.

Land Registry plans do not show legal boundaries

Relevant evidence (in rough order of priority)

- Conveyances
- Measured site survey (now)
- Historic site surveys/ – check local surveyors' firms
- Land Valuation Department records
- Evidence of land surveyors as to staking
- Aerial photographs
- Other photographs – taken at time of purchase etc
- Parish vestry records
- Lay witnesses (and their memories)

CHANCERY BAR

The Priority of Competing Interests in Registered Land

Sam Laughton
Ten Old Square

The doctrine of notice in unregistered land

Legal rights are good against all the world; equitable rights are good against all persons except a bona fide purchaser of a legal estate for value without notice, and those claiming under such purchaser.

Megarry & Wade, The Law of Real Property (9th edn) at 4-012

The doctrine of notice in registered land

The doctrine of notice – notice in the sense of knowledge, rather than in the sense of an entry on the register – has no place in registered conveyancing ...

(Megarry & Wade at 4-080)

That statement appears to be unduly optimistic, since there are in fact areas where notice still plays a part, eg in deciding whether the interests of squatters or persons in actual occupation override registered interests.

Land Title Registration Act 2011

The 2011 Act is largely modelled on the UK Land Registration Act 2002, and the equivalent sections are as follows:

Bermudian Act	UK Act
29	11
30	12
47	28
48	29
49	30

First registration – freehold estates with absolute title

s.29

(4) The estate is vested in the owner subject only to the following interests affecting the estate at the time of registration …

First registration – interests that affect the estate

(a) interests which are the subject of an entry in the register in relation to the estate

(i.e. interests that the Land Title Registrar discovers from an investigation of the unregistered title and therefore notes on the new registered title)

First registration – interests that affect the estate

(b) unregistered interests which fall within any of the paragraphs of Schedule 2

(These 'overriding interests' include most short leases, interests of persons in actual occupation other than beneficial interests under a trust, legal easements and profits à prendre and public rights. NB this list does not entirely coincide with the position at common law: see Emmet & Farrand on Title at 5.103.)

First registration – interests that affect the estate

(c) interests acquired under the Limitation Act 1984 of which the owner has notice

(The effect of this is that squatters' rights are significantly downgraded: see Emmet at 5.104. A squatter will only have priority under this provision if the limitation period has expired and if the owner has notice of his interest. 'Notice' for this purpose is undefined.)

First registration – leasehold estates with absolute title

Interests that affect a leasehold estate are the same as for a freehold estate, with the addition of:

... implied and express covenants, obligations and liabilities incident to the estate ...

See s.30(4)(a)

Dispositions of registered land – the basic rule

s.47

(1) Except as provided by sections 48 and 49, the priority of an interest affecting a registered estate or a registered charge is not affected by a disposition of the estate or charge.

(2) It makes no difference for the purposes of this section whether the interest or disposition is registered.

Effect of the basic rule

The effect of [the basic rule] is that the date of the creation of the interest determines its priority: the first of the competing interests to be created has priority.

Megarry & Wade at 6-060

Dispositions of registered estates for valuable consideration

s.48(1)

If a registrable disposition of a registered estate is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration.

Registrable dispositions: grants of leasehold estates

All grants of leasehold estates are treated for this purpose as if they were registrable dispositions, even if they are not in fact: s.48(4).

Fraudulent dispositions

It has been held that a 'disposition' for the purpose of s.48 does not include transfers which are void, e.g. because of fraud.

Fitzwilliam v Richall Holdings Services Ltd [2013] EWHC 86 (Ch) following the Court of Appeal decision in Malory Enterprises Ltd v Cheshire Homes (UK) Ltd [2002] Ch 216

(NB The decision in Malory has been the subject of much controversy. But it seems that despite the criticisms in Swift 1st Ltd v Chief Land Registrar [2015 Ch 602, it has not been overruled on this point: Rashid v Nasrullah [2018] EWCA Civ 2685.)

Valuable consideration: meaning

Valuable consideration does not include marriage consideration or a nominal consideration in money: s.3(1)

Valuable consideration: burden of proof

The legal and evidential burden of proving a disposition was made for valuable consideration rests on the party asserting it. If the burden is not discharged, the basic rule applies.

Halifax plc v Curry Popeck (a firm) [2008] EWHC 1692(Ch)

Effect of postponing an interest

Although strictly s.48 operates merely to postpone unprotected interests, its practical effect is destroy them as against a subsequent disponee.

See Ruoff & Roper: Registered Conveyancing at 15.039

Protecting the priority of an interest – freehold & leasehold estates

The priority of an interest is protected if it falls into one of the following categories: s.48(2)(a).

Interests whose priority are protected – freehold & leasehold estates

(1) Registered charges

Interests whose priority are protected – freehold & leasehold estates

(2) Interests which are the subject of a notice in the register.

A notice is an entry in respect of the burden of an interest affecting a registered estate: s.50(1). However no notice may be entered in respect of any of the following:

(a) an interest under a trust or settlement;

(b) a leasehold estate for a term of three years or less from the date of the grant which is not required to be registered;

(c) a restrictive covenant made between a lessor and lessee.

Protecting the priority of an interest – freehold & leasehold estates

(3) Interests falling within Schedule 5.

These 'overriding interests' include:

(a) certain leasehold estates;

(b) certain interests of persons in actual occupation;

(c) certain easements and profits à prendre; and

(d) public rights.

However, the priority of interests that have been the subject of a notice in the register at any time are not protected under this head: s.48(3).

Sched 5 para 2: Interests of persons in actual occupation

An interest belonging at the time of the disposition to a person in actual occupation is an overriding interest, so far as relating to land of which he is in actual occupation, with certain exceptions, such as:

(a) a beneficial interest under a trust or settlement, and

(b) an interest of a person of whom inquiry was made before the disposition and who failed to disclose the right when he could reasonably have been expected to do so.

Sched 5 para 2(c): non-obvious occupation

An important exclusion from overriding interests is an interest -

(i) which belongs to a person whose occupation would not have been obvious on a reasonably careful inspection of the land at the time of the disposition, and

(ii) of which the person to whom the disposition is made does not have actual knowledge at that time.

This re-introduces the doctrine of notice into registered conveyancing: Emmet at 5.105. But the test in (i) is hypothetical: Thompson v Foy [2009] EWHC 1076 at [132].

Dispositions of registered charges for valuable consideration

Similar provision is made in s.49 for the protection of interests where a registrable disposition of a registered charge is made for valuable consideration.

Protecting the priority of an interest – leasehold estates only

In the case of a disposition of a leasehold estate, the priority of an interest is protected if the burden of the interest is incident to the estate: s.48(2)(b)

Lunch

CHANCERY BAR

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)

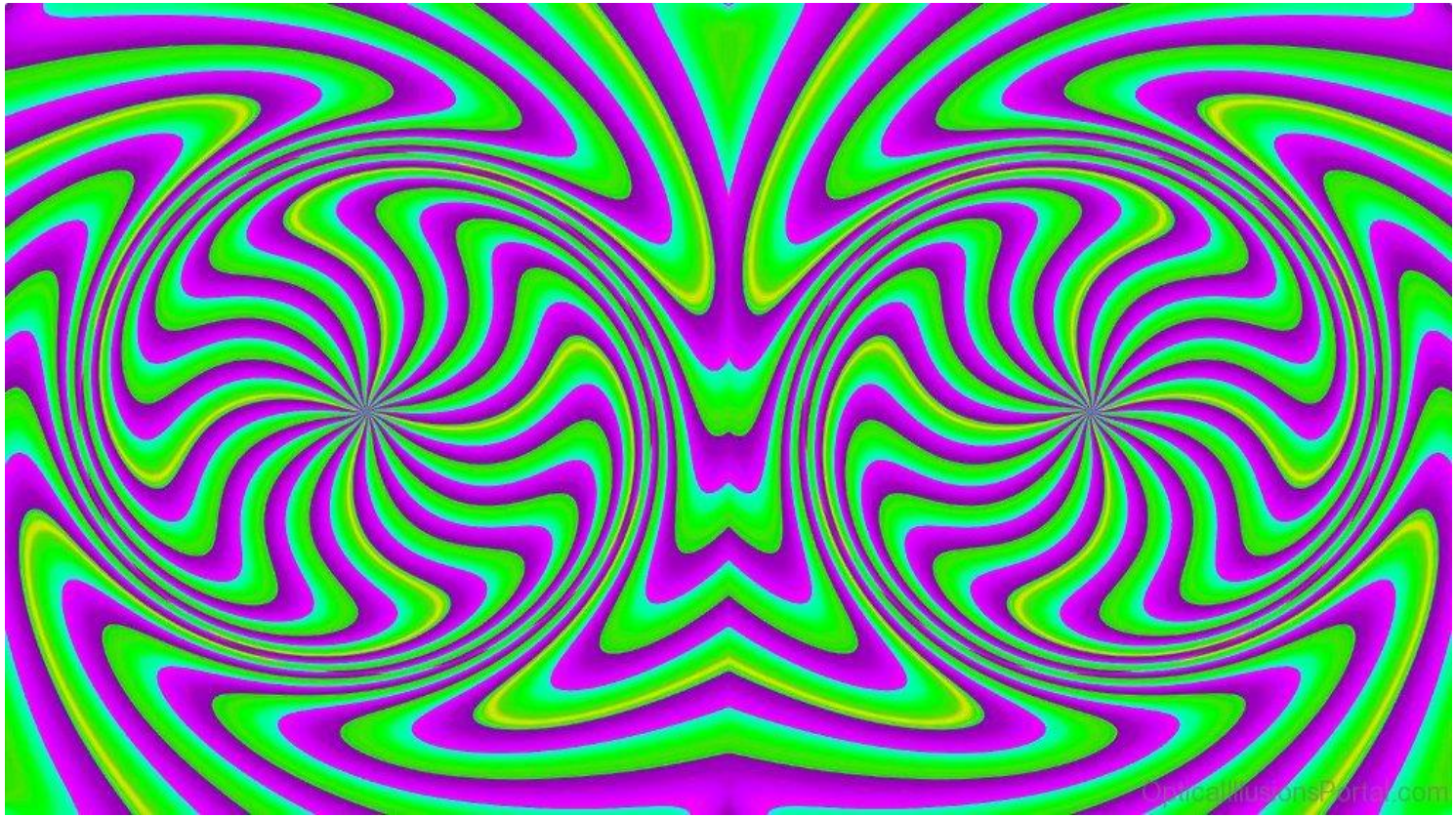
Greg Williams (Coram Chambers)

CHANCERY BAR

Illusory Trusts

Mathew Roper
5 Stone Buildings

“Illusory” Trusts (1)



"Illusory" Trusts (2)

Narrow

- No accountability
- Trustee usurpation

Wide

- Reality of control
- No meaningful accountability

Re AQ Revocable Trust

"…the cumulative effect of the trust documents, when taken with the de facto situation, means that the settlor as trustee could not effectively be called to account during his lifetime. Crucial to this conclusion is art VIII H, which allows the settlor to absolve himself as trustee from any and all breaches of trust. While it may be that I would not have come to that conclusion had art VIII H been coupled with a distinct and independent trustee, in this case it is the combination which pushes it over the top…"

Clayton v Clayton

Family Court:

- No accountability

High Court:

- Reality of control

Court of Appeal:

- *"…there is either a valid trust or there is not."*

Supreme Court:

- *"…a matter of some complexity on which the Court does not have a concluded unanimous view."*

Pugachev (1)

Pugachev (2)

"The case [Clayton v Clayton] *shows that when considering what powers a person actually has as a result of a trust deed, the court is entitled to construe the powers and duties as a whole and work out what is going on, as a matter of substance. Even though the VRPT deed in that case named more than one Discretionary Beneficiary and named Final Beneficiaries which did not include Mr Clayton, when the deed is examined with care, what emerged is that in fact Mr Clayton had effectively retained the powers of ownership."*

Mezhprom Bank v Sergei Pugachev (3)

"I conclude…that on their own terms these trusts do not divest Mr Pugachev of the beneficial ownership he had of the assets transferred into them. In substance the deeds allow Mr Pugachev to retain his beneficial ownership of the assets."

Issues

- Taxation
- Insolvency
- Matrimonial finance
- Hague Trusts Convention
  - “Control”/“Accountability”
- Trusts (Special Provisions) Act 1989

CHANCERY BAR

The Family Divison's approach to Sham Trusts

Greg Williams
Coram Chambers

The Family Division's approach to Sham Trusts (1)

Introductory Principles:

- Diplock L.J. in *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786, at 802: a sham means "*acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create*."

The Family Division's approach to Sham Trusts (1)

- *Snook (con.):* To be a sham, all parties to it "*must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating*", per Diplock L.J. (ibid).

- *Hitch and others v Stone (Inspector of Taxes)* [2001] EWCA Civ 63 – Arden LJ's 'five points of identification'.

The Family Division's approach to Sham Trusts (1)

- Reckless indifference would be taken to constitute the necessary intention: *Minwalla v Minwalla and others* [2004] EWHC 2823 (Fam).

- In principle, a trust which was not initially a sham could not subsequently become a sham: *Shalson v Russo* [2003] EWHC 1637 (Ch) at para [190].

The Family Division's approach to Sham Trusts (2)

Examples in the Family Division and elsewhere:

- *ND v SD and Others (Financial Remedies: Trust: Beneficial Ownership)* [2018] 1 FLR 1489, Roberts J. – The 'ABC trust'
- *A v A* [2007] 2 FLR 467, per Munby J. – note Munby J's comments about the 'intellectual discipline' of pleadings.
- *M and L Trusts, Re; Nearco Trustee Co (Jersey) Ltd v AM* (2003) 5 ITELR 656 (Jersey Royal Court)

Judicious 'encouragement' (1)

The use of judicious encouragement:

- Section 25 (2)(a) MCA 1973 – The Court is to have regard to the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future.

- *Howard v Howard* [1945] 1 All ER 91 – inappropriate to force trustees to make provision for a discretionary beneficiary merely to discharge a Family Court order.

Judicious 'encouragement' (1)

- But: *Thomas v Thomas* [1995] 2 FLR 668, per Waite L.J. at 670: *"The availability of unidentified resources may… be inferred from a spouse's expenditure or style of living..."*
- And … *"Where a spouse enjoys access to wealth but no absolute entitlement to it … there will be occasions when it becomes permissible for a judge deliberately to frame his orders in a form which affords judicious encouragement to third parties."*
- See also: *Charman v Charman (No 4)* [2007] 1 FLR 1246

Judicious 'encouragement' - observations for the future (2)

- Post Pugachev?
- A return to the: "*Red rag to a bull*" and "*skulduggery is instantly presumed*" line of thinking? c.f. Coleridge in *J v V (Disclosure: Offshore Corporations)* [2003] EWHC 3110 (Fam)?
- Or maybe not?: *Daga v Bangur* [2018] EWFC 91 per Holman J.

Tactics and tips for Trustees (1)

Avoiding submitting to the jurisdiction:

- Being joined as a party in England and Wales does not give rise to automatic submission to jurisdiction.
- Seek directions from Home Court / follow those directions.
- If no submission to jurisdiction, H or W will have enforcement issues.

Tactics and tips for Trustees (2)

Or try settling away from the Court:

- Early Neutral Evaluation
- 'Private' FDRs (Financial Dispute Resolution Hearings)
- Caption Credit: @MandyinListing

CHANCERY BAR

Extracting Trust Information

Nicholas Le Poidevin QC
New Square 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: *Tchenguiz-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

CHANCERY BAR

UK tax update on international issues - implications for Bermudian Trusts and Corporate Structures

Amanda Hardy QC and Sam Chandler

5 Stone Buildings

www.5sblaw.com

Introduction

- Recap on changes to taxation of foreign domiciliaries introduced in FA (No.2) Act 2017 and FA 2018; *Barclays Wealth* and trust protections;
- New tax on profit fragmentation where Bermudian offshore entities are involved;
- Proposed new 1% SDLT surcharge for non-residents and IHT charges on indirectly held UK residential property.

Introduction

- The impact of the Trusts Consultation for Bermuda;
- Update on HMRC treatment of international entities including Requirement to Correct enquiries and discovery assessments;
- New legislation on disclosable arrangements;
- Effect of EU exit on tax provisions and recent case law.

Taxation of Foreign Domiciliaries: FA (No.2) Act 2017 and FA 2018

- Non domiciled settlor + non-UK situs assets = excluded property trust
- Escapes IHT.
- Watch:
  - Assets held: e.g. UK property holding structures. New IHT res prop transparency (see below).
  - Actual, historic and new deemed domicile provisions.

Domicile/Deemed Domicile

- Old law
  - General law domicile – residence & intention
  - IHT deemed domicile 15/17 years rule

- New law: Deemed domicile for IHT, CGT & IT
  - 15 year rule
  - Returning UK domiciliaries of UK origin (formerly domiciled residents)

Barclay's Wealth: excluded property settlements

- *Barclays Wealth Trustees (Jersey) Ltd and Michael Dreelan v HMRC* [2017] EWCA Civ 1512
  - D was domiciled in Ireland but subsequently became deemed domiciled in the UK.
  - Before he became a UK domiciliary:
    - In 2001, he settled a trust (the "2001 Settlement")
    - In 2003, he transferred shares in a UK company to the trustees

Barclay's Wealth: excluded property settlements

- After D became a UK domiciliary:
  - Settled a new trust.
  - The trustees of the 2001 Settlement transferred the shares to new trust. (The shares were deemed to remain in the 2001 Settlement for the purpose of the relevant property regime but were not excluded property; that would have required the new trust to have been made by a non-domiciled settlor.)
  - The trustees sold the shares.
  - The trustees transferred cash back to the 2001 Settlement. The trustees of the 2001 Settlement transferred cash into a Jersey bank account.

Barclay's Wealth: excluded property settlements

- Excluded property?
- Settlor UK domiciled at the time the settlement was made?
- Court of Appeal said a settlement is a single settlement even if a number of transfers are made into it.
- D was not domiciled when he first made the 2001 Settlement.
- The foreign assets were therefore not subject to the anniversary charge.
- Not necessary to test the domicile of the settlor every time funds are transferred between excluded property trusts.
- Can deemed domiciled settlors add property to pre-deeming excluded property settlements? Court of Appeal expressly refused to rule on that point.

Trust Protections

- As a result of the deemed domicile provisions, protections have been introduced in trust taxation for non-doms and those deemed domiciled under the long-term residence rule.
- Otherwise:
  - ITTOIA and TOAA provisions would bite. These deem settlors with interests in trust property to be taxable on trust income.
  - s 86 TCGA could apply to deem settlors taxable on trust gains.

Trust Protections

- When protected, the charge applies to benefits received from the trust, rather than income/gains in the trust.
- This is subject to a number of anti-avoidance provisions, some still being legislated. (E.g. Onwards gifts, via people outside the charge.)
- One area of concern is tainting. If the settlor adds to the trust once UK deemed domiciled, or adds value to the trust, then the whole trust property loses protection.
- Tainting can include as little as a loan on un-commercial terms, but not failing to revoke.

Profit Fragmentation - introduction

- Applies from April 2019, this targeted legislation aims to prevent UK traders and professionals from avoiding UK tax by arranging for their UK-taxable business profits to accrue to entities resident in territories where significantly lower tax is paid than in the UK. The counteraction will be effected by adding those profits to the profits of the UK trade.
- A number of conditions need to be satisfied.

Profit Fragmentation - Conditions

- There must be a transfer of value from the UK trader to an offshore entity - this could be a diversion of income to the offshore entity, or payment of expenses to the offshore entity.
- The effect of the arrangement must be that a significantly lower level of tax is paid on the profits than would be the case if they were correctly taxed in the UK in accordance with the current law.
- The proprietor of the business, whether a sole trader or partner in an unincorporated business, or as director and/or shareholder of a company must be able to enjoy the profits that have been diverted.
- The UK person must have arranged for the profits to be diverted to the offshore entity.
- The diversion or payments mentioned in the first condition are not commensurate with the work undertaken by the offshore entity.

Profit Fragmentation

- Where these conditions are present the arrangement is to be counteracted by bringing the profits back into UK tax by attributing the correct amount of profits to the UK-taxable source.

Profit Fragmentation - notification

- A person will be required to notify HMRC on their tax return if the first four conditions set out above apply to their arrangements but they have not made the necessary adjustments to profits in accordance with the legislation.
- Notification will be required on or before the time that the relevant person is required to submit their tax return for the relevant period.

Profit fragmentation - action

- The PF legislation is far-reaching and is likely to bring more transactions into the spotlight, especially where these transactions are not conducted on an arm's length basis.
- Review should be undertaken to establish whether provisions apply and to provide evidence that the transactions are priced at arm's length.
- A transfer pricing style report may help taxpayers gain comfort on their filing position.

Proposed new 1% SDLT surcharge for foreign purchasers

- On 11 February 2019, the government published details of its proposed 1% SDLT 'surcharge' for foreign purchasers of residential property in England and Northern Ireland. Consultation open until 6 May 2019.

Who is a foreign purchaser for the purposes of the surcharge?

- Non-UK resident individuals and non-natural persons (including companies, trusts and partnerships) purchasing residential property (freehold or leasehold) in England and Northern Ireland.
- The surcharge is proposed to apply to the purchase of properties in England and Northern Ireland only (Scotland and Wales having their own equivalent SDLT charges) but note that residence in any part of the UK (including Wales and Scotland) is relevant when determining eligibility for the surcharge.

Proposed new 1% SDLT surcharge for foreign purchasers

Who qualifies as a 'non-resident' individual?

- Simplified test of residence to determine whether an individual is a "non-resident" purchaser as compared to the statutory residence test which is used to determine residence status for income and capital gains tax (CGT).
- Under the proposed surcharge test, anyone who spends fewer than 183 days in the UK in the twelve months ending with the date on which the property transaction (i.e. the purchase) occurs would be classified as "non-resident". The government says that this test "is intended to be as simple as possible … in recognition of the fact that most people buying homes will not use a professional tax adviser."

Proposed new 1% SDLT surcharge for foreign purchasers

How will non-UK resident individuals moving to the UK be treated?

- It is proposed that non-UK resident individuals moving to the UK be subject to the surcharge. However the government is proposing that affected individuals will be able to claim a refund for the additional 1% if they are in the UK for 183 or more days in the twelve months following the date of the purchase of the property.

Proposed new 1% SDLT surcharge for foreign purchasers

How will the residence status of companies be determined?

- There is currently no concept of corporate residence within the SDLT rules so the government proposes introducing a test in order to determine liability to the surcharge. This is to borrow largely from the test of company residence used for corporation tax purposes.
- If a company is non-UK resident under this test it will be treated as a non-UK resident purchaser and will be subject to the surcharge. In the case of a UK resident company with non-UK resident participants, the company will be treated as non-UK resident and liable to the surcharge.

Proposed new 1% SDLT surcharge for foreign purchasers

How will the surcharge interact with existing SDLT reliefs and rules?

- The government's intention is that the surcharge will apply on top of the existing SDLT rules and existing tax rates which apply to the purchase of residential property. In most cases this means that existing SDLT reliefs (i.e. multiple dwellings relief) and specific rules (i.e. those in relation to mixed use transactions and purchases of six or more dwellings) will continue to be available. The surcharge does not extend to the purchase of non-residential (i.e. commercial) property and land.

Proposed new 1% SDLT surcharge for foreign purchasers

How will joint purchasers be treated?

- If a property is jointly purchased, it is proposed that all purchasers must be UK resident otherwise the surcharge will be levied. This means that affected joint purchasers will need to carefully consider who buys a property where, for example, one half of a married couple spends at least half of the year outside of the UK for work.

When will the surcharge take effect?

- The Consultation does not give any details about when the proposed surcharge will come into force. However, it is expected to be made law in either late 2019 or early 2020.

Proposed new 1% SDLT surcharge for foreign purchasers

- The SDLT rules have undergone extensive reform since 2012 following the introduction of the 15% rate for purchases of residential property worth more than £500,000 (originally £2m when introduced) by non-UK companies.
- Difficulty is going to centre around who qualifies as a "non-resident" buyer. Focussing on residence is an obvious solution but attempting to adopt a separate simplified residence test may paradoxically lead to confusion and complexity for taxpayers. Foreign buyers could be in a position where they are UK resident for income and CGT purposes but non-UK resident for SDLT purposes and vice versa.

Proposed new 1% SDLT surcharge for foreign purchasers

- Interaction with EU law and whether such an attempt to impose a surcharge on foreign purchasers (including those from the EU) as opposed to their UK resident counterparts is discriminatory.
- At odds with the government's stated post-Brexit objective of continuing to attract foreign investment in the UK. The government will be conscious of the need to balance this message against supporting UK resident potential home-buyers. This area may well be picked up on in the responses to the consultation.

IHT Residential Property Transparency

Trust

|

Holding Company

|

UK residence

- Interests in partnerships
- Loans to trusts
- Interests in partnerships
- Loans to companies?
- The TAAR

Trust Consultation

- HMRC published a new consultation 'The Taxation of Trusts: A Review' considering whether the current system for taxing trusts meets the principles of transparency, fairness, neutrality, and simplicity. Number of questions.

Q1: whether the principles of transparency, fairness and neutrality, and simplicity constitute a reasonable approach to ensure an effective trust taxation system; including views on how to balance fairness with simplicity where the two principles could lead to different outcomes.

Q2: given that there is already significant activity under way in relation to trust transparency, whether there are other measures it could take to enhance transparency still further.

Trust Consultation

Q3: the benefits and disadvantages of the UK's current approach to defining the territorial scope of trusts and on any other potential options.

Q4: the reasons a UK resident and/or domiciled person might have for choosing to use a non-resident trust rather than a UK resident trust.

Q5: any current uses of non-resident trusts for avoidance and evasion, and on the options for measures to address this in future.

Q6: the case for and against targeted reform to the Inheritance Tax regime as it applies to trusts; and broad suggestions as to what any reform should look like and how it would meet the fairness and neutrality principle.

Trust Consultation

Q7: a) the case for and against targeted reform in relation to any of the possible exceptions to the principle of fairness and neutrality detailed at paragraph 5.6 of the document;

b) any other areas of trust taxation not mentioned there that would benefit from reform in line with the fairness and neutrality principle.

Q8: options for the simplification of Vulnerable Beneficiary Trusts, including their interaction with 'age 18 to 25' trusts.

Q9: any other ways in which HMRC's approach to trust taxation would benefit from simplification and/or alignment, where that would not have disproportionate additional consequences.

Update on HMRC treatment of international entities including Requirement to Correct (RTC) enquiries

- RTC - The Requirement to Correct ('RTC') was a statutory obligation for taxpayers with overseas assets to correct any issues with their historic UK tax position. Those who failed to do so face punitive financial penalties and other severe sanctions.
- The RTC applied to any person with a potential undeclared UK income tax, capital gains tax and/or inheritance tax liability, i.e. individuals, partnerships, trustees or non-resident landlord companies.

RTC and FTC

- What was the deadline?
- RTC period started on 6 April 2017. Taxpayers were expected to take steps to correct their UK tax position by 30 September 2018.
- What happens if an error was not corrected by 30 September 2018?
- After 30 September 2018, the 'Failure to Correct' ('FTC') regime began.
- The FTC regime include punitive penalties, including:

RTC and FTC

- a tax geared penalty of between 100% and 200% of the tax not corrected
- a potential asset based penalty of up to 10% of the value of the relevant asset where the tax at stake is over £25,000 in any tax year
- potential "naming and shaming" where over £25,000 of tax per investigation is involved
- a potential additional penalty of 50% of the amount of the standard penalty, if HMRC could show that assets or funds had been moved to attempt to avoid the RTC.
- No penalty will be chargeable where the taxpayer had a reasonable excuse for failing to correct the position.

Discovery Assessments

- Enquiry window closes one year from the date of the filing of a taxpayer's return.
- No enquiry can be raised beyond this period.
- However, under s. 29 TMA 1970, HMRC has the power, subject to various conditions, to amend a taxpayer's return outside the enquiry window where a "loss of tax" is discovered.

Conditions and limits:

- Condition 1: Careless or deliberate conduct on the part of the taxpayer in bringing about the loss of tax (s. 29(4)).

- Condition 2: Assessing officer could not have been reasonably expected to be aware of the situation on the basis of the disclosure provided by the taxpayer at the time of the closure of the enquiry window (s. 29(5)).

- Time limits: 4 years from end of the relevant year of assessment, unless careless (6 years) or deliberate (20 years), or if offshore legislation applies, 12 years.

Important development offshore:

- Policy Paper dated July 2018 proposed to introduce a new time limit of 12 years for losses of tax "*involving offshore matter or offshore transfer*".

- Enacted in Finance Act 2019, and in force from February 2019 – see section 36A TMA 1970.

Checklist:

- Has there been a discovery?
- Is it in time?
- If not caused by carelessness or deliberate conduct, should there have been reasonable awareness on the part of HMRC?
- Was the return made in accordance with generally prevailing practice?

New IHT DOTAS disclosure rules

- Section 306 of FA 2004 provides a power to prescribe in regulations the description of schemes that must be disclosed.
- Sections 308, 309 and 310 of FA 2004 require certain persons to provide information to HMRC about schemes falling within a hallmark.

http://www.legislation.gov.uk/uksi/2017/1172/made

New IHT DOTAS disclosure rules

4.—(1) ...would be reasonable to expect an informed observer (having studied the arrangements and having regard to all relevant circumstances) to conclude that condition 1 and condition 2 are met.

New IHT Disclosure Rules

(2) Condition 1 is that the main purpose, or one of the main purposes, of the arrangements is to enable a person to obtain one or more of the following advantages in relation to inheritance tax (the "tax advantage")—

(a) the avoidance or reduction of a relevant property entry charge;

(b) the avoidance or reduction of a charge to inheritance tax under section 64, 65, 72 or 94 of IHTA 1984;

(c) the avoidance or reduction of a charge to inheritance tax arising from the application of section 102, 102ZA, 102A or 102B of the Finance Act 1986(4) in circumstances where there is also no charge to income tax under Schedule 15 to the Finance Act 2004 (charge to income tax on benefits received by former owner of property);

(d) a reduction in the value of a person's estate without giving rise to a chargeable transfer or potentially exempt transfer.

New IHT DOTAS disclosure rules

(3) Condition 2 is that the arrangements involve one or more contrived or abnormal steps without which the tax advantage could not be obtained.

"HMRC has shared draft guidance with stakeholders and is in the process of updating it to reflect their helpful and constructive feedback. The guidance will explain how the hallmark works, the conditions to be met for arrangements (or proposals for arrangements) to be notifiable, and the circumstances in which arrangements are excepted from disclosure. ...

The guidance will be published in good time before the hallmark comes into force on 1 April 2018."

Grandfathering

5.—(1) Arrangements are excepted from being prescribed under regulation 3 if they—

(a)implement a proposal which has been implemented by related arrangements; and

(b)are substantially the same as the related arrangements.

(2) In this regulation "related arrangements" means arrangements which—

(a)were entered into before 1st April 2018; and

(b)at the time they were entered into, accorded with established practice of which HMRC had indicated their acceptance.

(Also, apply only to transactions post 1 April 2018)

DOTAS - guidance

- Status of guidance?
- The types of examples: caught, not caught, maybe caught.
- The ‘maybe maybe not’ example: transfer of BPR shares, followed by sale back. Guidance says depends on context.
- The ‘EBTs are never OK’ example.

Trustees of P Panayi A & M Settlements v HMRC (Case C-646/15) CJEU

- Section 80 export tax charge on a trust becoming non resident was found to impede freedom of establishment.
  - *the activity of the trustees in relation to the trust property and the management of its assets were inextricably linked to the trust.*
  - *trust should be considered an entity which, under national law, has rights and obligations that enable it to act as such within the legal order concerned.*
  - *may rely on freedom of establishment.*
- Any restriction must not go beyond what was necessary to attain the public policy objective.
- Free movement of capital also applies to trusts?
- UK legislative response. Also see *Routier* and *Fisher*.

Thank you!

These notes have been prepared for discussion purposes only and should not be relied upon as legal advice.

Tea Break

CHANCERY BAR

Corporate Restructurings: Who is in control?

- **The uses and abuses of Provisional Liquidators**
- **Jurisdictional issues, forum shopping, and COMI-shifting**
- **The balancing act between collective, class, and individual rights**

Alex Potts QC, Michael Todd QC, Ian Clarke QC

CHANCERY BAR

Corporate Restructurings: Who is in control?
The balancing act between collective, class and individual rights

Alex Potts QC
Kennedys, Bermuda

CHANCERY BAR

Corporate Restructurings: Who is in control?
Uses and abuses

Ian Clarke QC
Selborne Chambers

Uses and abuses

Provisional liquidation as a restructuring mechanism/administration alternative in England & Wales

Uses and abuses

Duties and obligations

Uses and abuses

Costs

CHANCERY BAR

Corporate Restructurings: Who is in control?
Jurisdictional issues, forum shopping, and COMI-shifting

Michael Todd QC
Erskine Chambers

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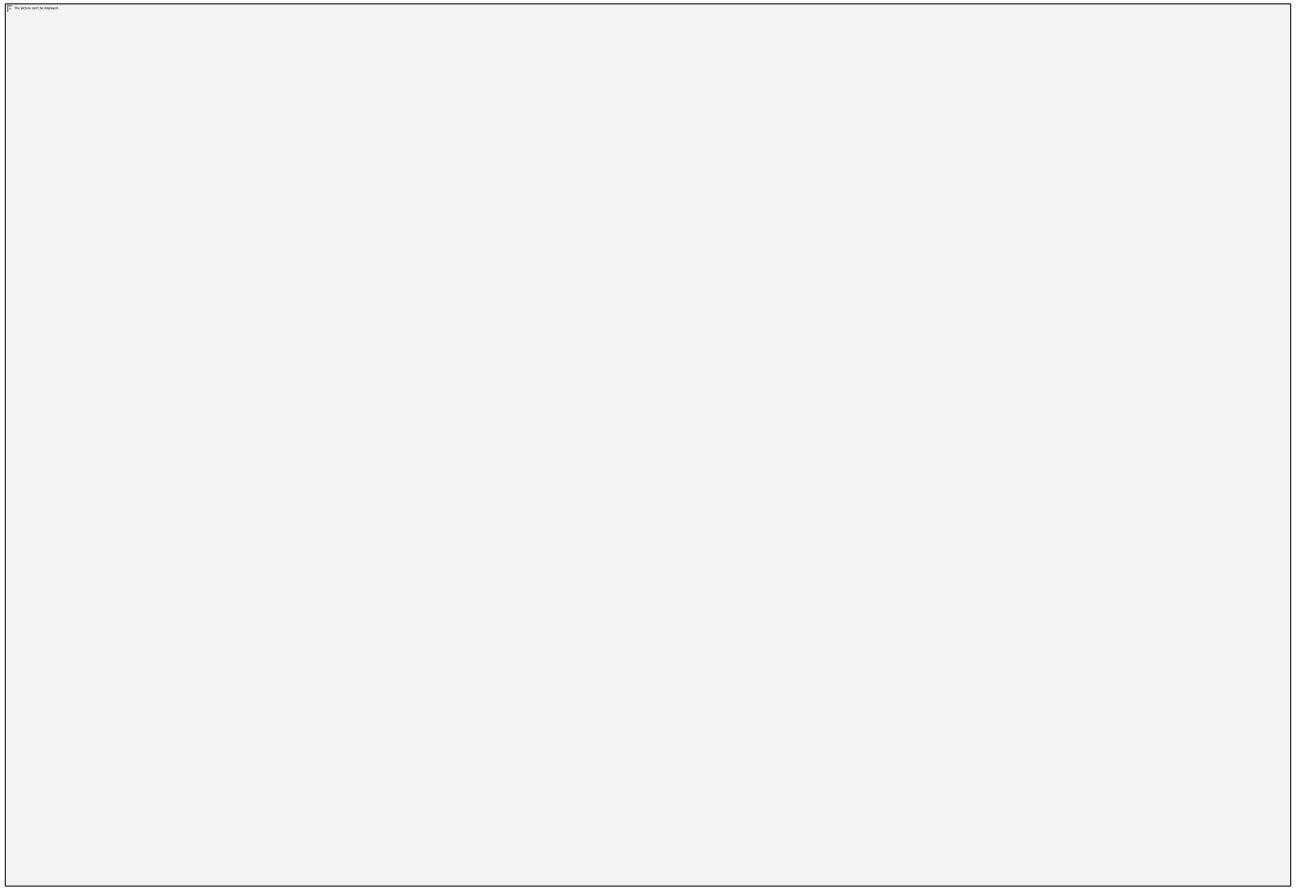
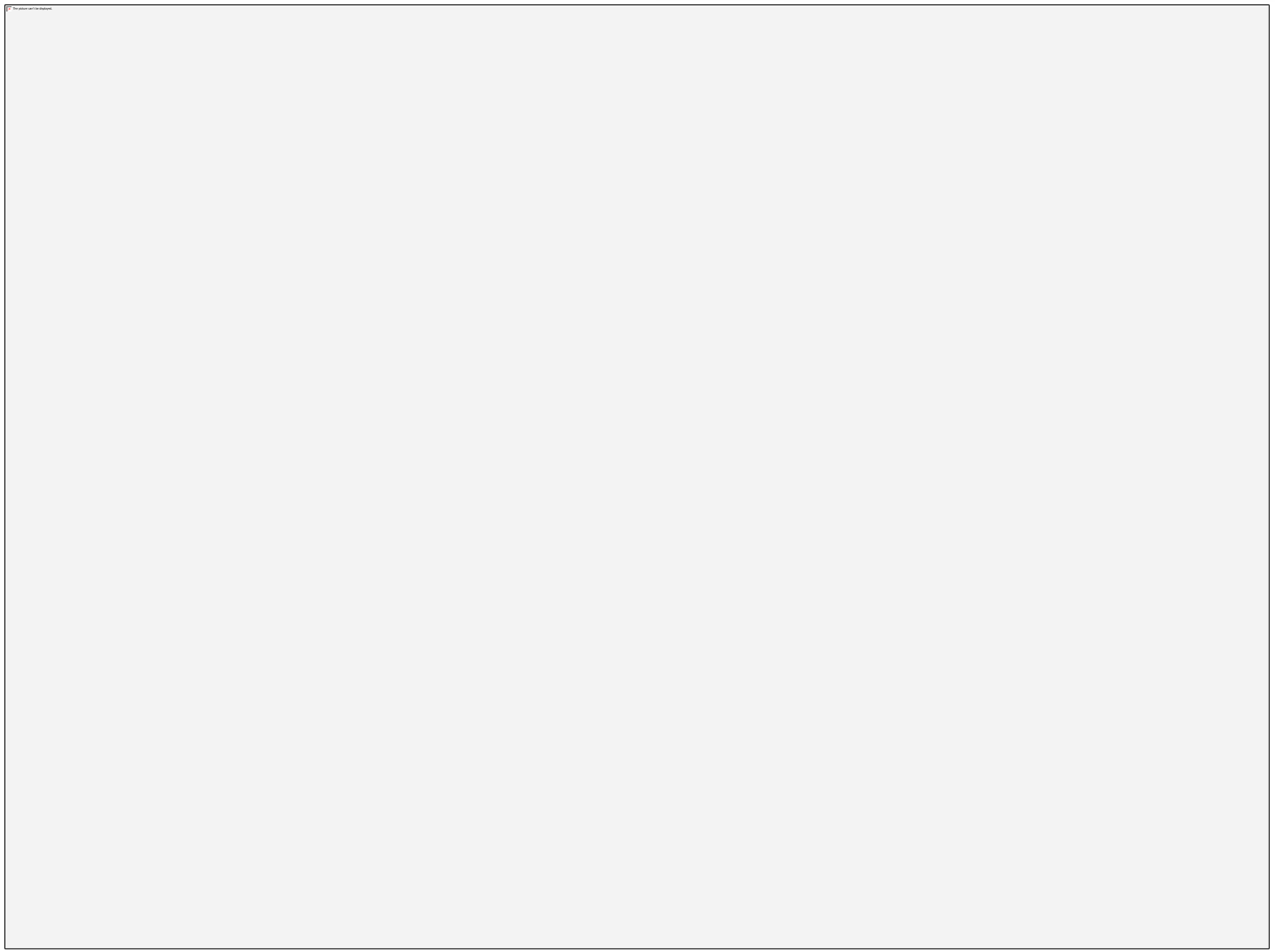
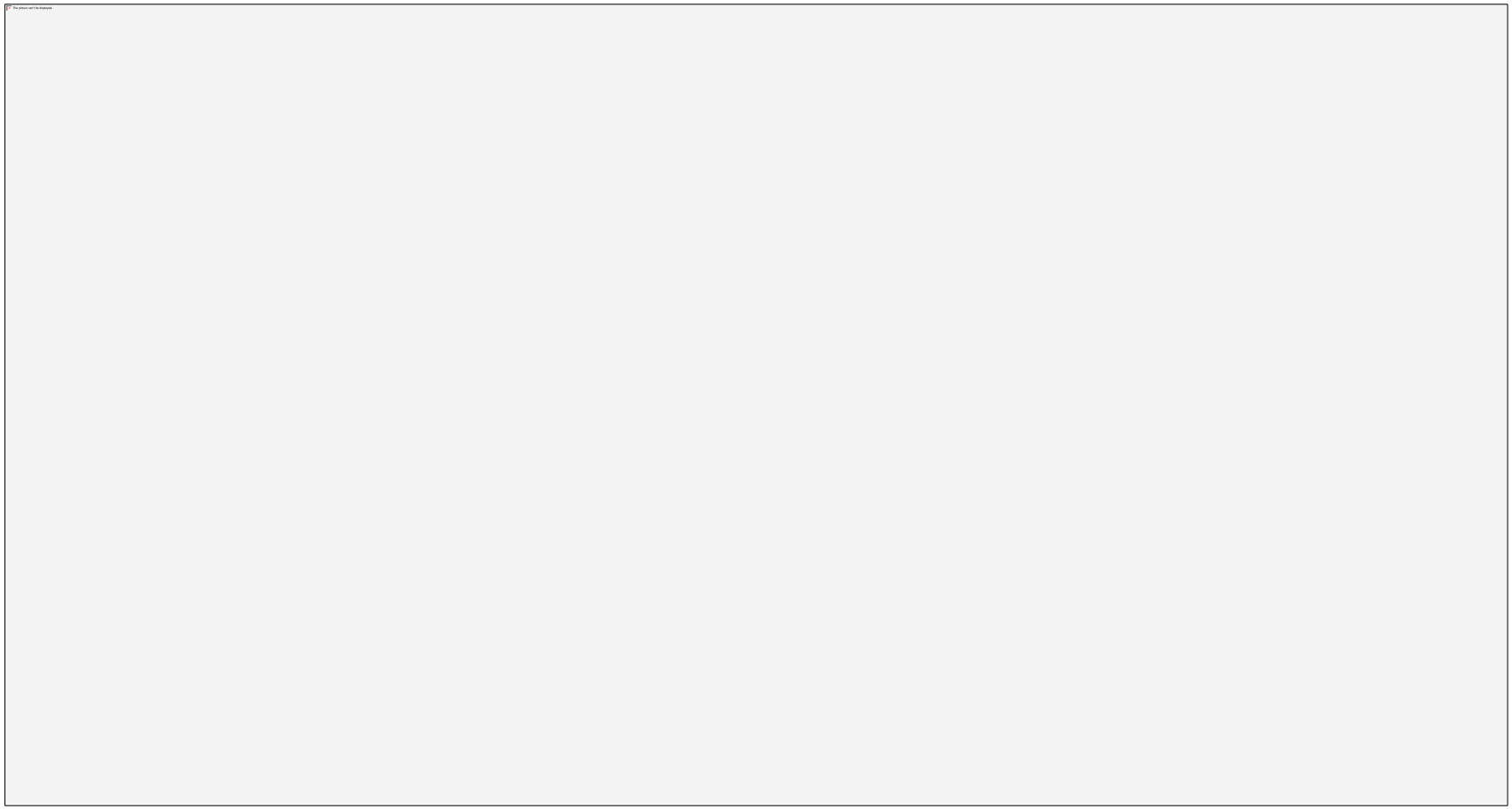
From Clergy to Companies
150 years of Bermuda Jurisprudence in the Privy Council

Catherine Newman QC

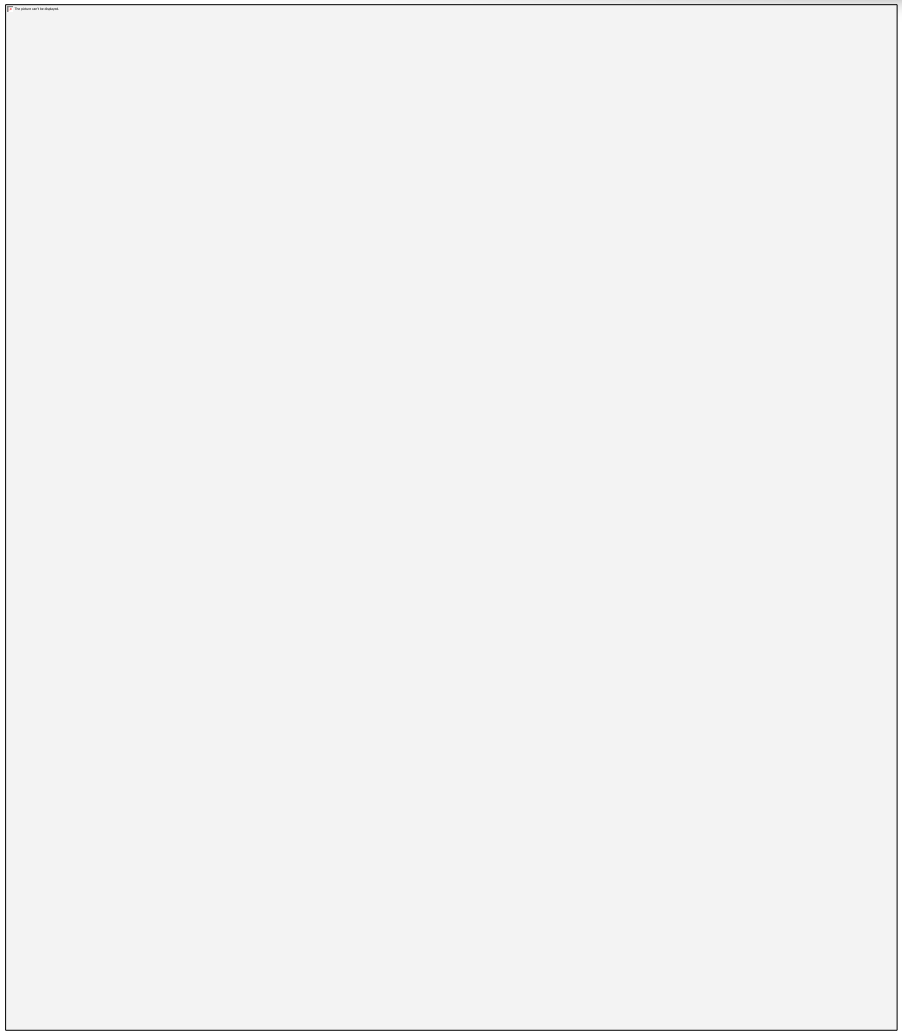


The 1603 Diego Ramirez map





Map made by Admiral Sir George Somers – two copies exist – one is in Bermuda and the other in the British Library



William Strachey

A True Reportory

For four and twenty hours the storm in a restless tumult had blown so exceedingly as we could not apprehend in our imaginations any possibility of greater violence. Yet did we still find it not only more terrible but more constant, fury added to fury, and one storm urging a second more outrageous than the former, whether it so wrought upon our fears or indeed met with new forces.

The waters like whole rivers did flood in the air. And this I did still observe that whereas upon the land when a storm hath poured itself forth once in drifts of rain, the wind, as beaten down and vanquished therewith, not long after endureth. Here the glut of water, as if throttling the wind erewhile, was no sooner a little emptied and qualified but instantly the winds, as having gotten their mouths now free and at liberty, spake more loud, and grew more tumultuous and malignant. What shall I say? -- Winds and seas were as mad as fury and rage could make them.

The boatswain sounding at the first found it thirteen fathom, and when we stood a little in, seven fathom; and presently heaving his lead the third time had ground at four fathom. And by this we had got her within a mile under the southeast point of the land, where we had somewhat smooth water. But having no hope to save her by coming to an anchor in the same, we were enforced to run her ashore as near the land as we could, which brought us within three quarters of a mile offshore; and by the mercy of God unto us, making out our boats, we had ere night brought all our men, women, and children, about the number of one hundred and fifty, safe into the island.

We found it to be the dangerous and dreaded island, or rather islands, of the Bermuda……

And hereby also I hope to deliver the world from a foul and general error: it being counted of most that they can be no habitation for men, but rather given over to devils and wicked spirits; whereas indeed we find them now by experience to be as habitable and commodious as most countries of the same climate and situation, insomuch as if the entrance into them were as easy as the place itself is contenting, it had long ere this been inhabited as well as other islands.

In September and at Christmas I saw young birds, and in February, at which time the mornings are there, as in May in England, fresh and sharp.

…….It is like enough that the commodities of the other western islands would prosper there, as vines, lemons, oranges, and sugar canes.

They are full of shaws (copses) of goodly cedar….

Likewise there grow great store of palm trees ….. in the top grow leaves, the most inmost part whereof they call *palmetto*, so white and thin as it will peel off into pleats as smooth and delicate as white satin into twenty folds, in which a man may write as in paper, where they spread and fall downward about the tree like an overblown rose or saffron flower not early gathered. So broad are the leaves as an Italian *umbrello*. A man may well defend his whole body under one of them from the greatest storm rain that falls. For they being stiff and smooth, as if so many flags were knit together, the rain easily slideth off.

The shore and bays round about, when we landed first, afforded great store of fish, and that of divers kinds and good.

…. I think, no island in the world may have greater store or better fish

The contents for the most part of all our preacher's sermons were especially of thankfulness and unity, etc.

…We had knowledge that there were wild hogs upon the island at first by our own swine preserved from the wrack and brought to shore.
For they straying into the woods, an huge wild boar followed down to our quarter, which at night was watched and taken in this sort: One of Sir George Summers' men went and lay among the swine. When the boar being come and groveled by the sows, he put over his hand and rubbed the side gently of the boar, which then lay still, by which means he fast'ned a rope with a sliding knot to the hinder leg, and so took him, and after him in this sort two or three more.

The tortoise is reasonable toothsome, some say wholesome meat. I am sure our company liked the meat of them very well. And one tortoise would go further amongst them than three hogs. One turtle, for so we called them, feasted well a dozen messes, appointing six to every mess. It is such a kind of meat as a man can neither absolutely call fish nor flesh, keeping most what in the water, and feeding upon sea grass like a heifer in the bottom of the coves and bays, and laying their eggs (of which we should find five hundred at a time in the opening of a she-turtle) in the sand by the shore side….

… Safely in harbour
Is the king's ship; in the deep nook, where once
Thou call'dst me up at midnight to fetch dew
From the still-vex'd Bermoothes, there she's hid:
The mariners all under hatches stow'd;
Who, with a charm join'd to their suffer'd labour,
I have left asleep; and for the rest o' the fleet
Which I dispersed, they all have met again
And are upon the Mediterranean flote,
Bound sadly home for Naples,
Supposing that they saw the king's ship wreck'd
And his great person perish.

Jenkins v Att-Gen of Bermuda
(1868) UKPC 26

Kelly v Cooper [1995] AC 205

Re Application for Information about a Trust
[2014] 2 WLUK 129

Singularis Holdings Limited v Price Waterhouse Coopers [2014] UKPC 36

Per Lord Sumption:

….It is right for the Bermuda court, within the limits of its own inherent powers, to assist the officers of the Cayman court to transcend the territorial limits of that court's jurisdiction by enabling them to do in Bermuda that which they could do in the Cayman Islands. But the order sought would not constitute assistance, because it is not just the limits of the territorial reach of the Cayman court's powers which impede the liquidators' work, but the limited nature of the powers themselves. The Cayman court has no power to require third parties to provide to its office-holders anything other than information belonging to the company. It does not appear to the Board to be a proper use of the power of assistance to make good a limitation on the powers of a foreign court of insolvency jurisdiction under its own law. This was in substance the ground on which the liquidators failed in the Court of Appeal when they characterised the present application as "forum-shopping". In the opinion of the Board it is correct.

Wrap Up

Michael Gibbon QC, Chair of the International Subcomittee
&
Eason Rajah QC, Chair of the Chancery Bar Association

Followed by a reception on the terrace