Chancery Bar ASSOCIATION

ChBA Geneva Conference

Thursday, 18th April 2024

WELCOME!

Chancery Bar Association

ChBA Geneva Conference

Introduction

Iain Quirk KC,
Chair of the International Subcommittee

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Arbitration: Issues in Shareholder, Insolvency and Trust Disputes

Jennifer Haywood
Thomas Robinson
Alex Potts KC

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Giving effect to arbitration clauses in shareholder and partnership disputes

Jennifer Haywood
Serle Court

The significance of equitable relief in common law shareholder disputes

- Just and equitable winding up in England and Wales
  - Section 35(f) Partnership Act 1890
  - Section 122(1)(g) Insolvency Act 1986
  - Section 122(1)(e) Insolvency Act 1986, as modified and applied to LLPs by SI 2001/1090, reg 5 and Sch 3

Just and equitable winding up in England and Wales

- Section 122(1)(g) Insolvency Act 1986:

  "A company may be wound up by the court if … the court is of the opinion that it is just and equitable that the company should be wound up."

Other equitable relief in England and Wales

- Compulsory share acquisition and other minority shareholder relief
  - *Syers v Syers* (1876) 1 App Cas 174
  - Sections 994 and 996 Companies Act 2006

Unfair prejudice relief in England and Wales

- Section 994 CA 2006: A member may petition the court if the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of its members.

- Section 996 CA 2006: If satisfied that the petition is well founded, the court may make such order as it thinks fit for giving relief, including providing for purchase of the shares of any members.

The power to stay court proceedings in England and Wales: Section 9 of the Arbitration Act 1996 gives effect to Art II NY convention:

"(1) A party to an arbitration agreement against whom legal proceedings are brought … in respect of a matter which under the agreement is to be referred to arbitration may … apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter."

Mandatory stay subject to an exception

Section 9 of the Arbitration Act 1996:

"(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."

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

- Unfair prejudice petition under s994CA 2006
- No express reservation of a right to apply to court in s996 CA
- s996 CA 2006 relief not necessarily a class remedy attracting public interest
- Underlying dispute suitable for determination in arbitration

Cayman Islands statutory relief in shareholder disputes

Section 95(3) Companies Act (2022 Revision):

> "If the petition is presented by members of the company as contributories on the ground that it is just and equitable that the company should be wound up, the Court shall have jurisdiction to make the following orders, as an alternative to a winding-up order, namely …(d) an order providing for the purchase of the shares of any member…"

Power to stay in the Cayman Islands: Section 4 Foreign Arbitral Awards Enforcement Act (1997 Revision)

> "If any party to an arbitration agreement … commences any legal proceedings in any court against any other party to the agreement … in respect of any matter agreed to be referred, any party to the proceedings may … apply to the court to stay the proceedings and the court, unless satisfied that the arbitration agreement is … inoperative … shall make an order staying the proceedings."

FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corp [2023] UKPC 33

- Winding up petition stayed pending determination by an arbitral tribunal of the questions of fact about the relationship between the shareholders.

- Court to determine whether it is just and equitable that the company be wound up and what relief is appropriate.

FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corp [2023] UKPC 33

Privy Council emphasised:

- Giving respect to the autonomy of the parties to choose how they wish their disputes to be resolved; and

- International jurisprudence on the New York Convention.

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Relief in English courts in support of foreign arbitrations

Thomas Robinson
Wilberforce Chambers

This talk considers 3 stages when the English court may make orders in support of foreign arbitrations:

- Before the arbitral tribunal is constituted
- Once constituted, if the tribunal grants interim measures
- Enforcing an award

(1) Before the tribunal is constituted

- The court will only act to the extent that the tribunal & any relevant arbitral institution has no power or is unable to act effectively (s.44(5) Arbitration Act 1996)

- What if an Emergency Arbitrator is possible? Can they act "effectively" e.g. quickly enough, ex parte, with teeth, and / or binding third parties?

(1) Before the tribunal is constituted

- What can the court do? (s.44(2) and (3) AA 1996)
- If the case is "of urgency":
  - preserve evidence
  - preserve assets (including contractual rights)

- If the case is not "of urgency":
  - need parties' or tribunal's agreement, but then
  - wider range of relief (appoint receiver; order sale)

(2) Enforcing interim measures from the tribunal

- For example an order to maintain the status quo, preserve evidence, freeze assets.
- Detailed code in Article 17 of UNCITRAL Model Law
- I recommend *Castello & Chahine*, Enforcement of Interim Measures, GAR 17.5.23

(2) Enforcing interim measures from the tribunal

- English courts enforce "awards", meaning decisions with a degree of finality. See *EGF v HVF* [2022] 2 CLC 449.

- They can also enforce "provisional awards" (*YDU v SAB* [2022] EWHC 3304), and make orders in support of tribunal's preemptory orders (s.42 AA 1996).

(3) Enforcing final awards from the tribunal

- An award from Switzerland, like other NY Convention states, can only be refused enforcement on the grounds in NY Convention (s.103 AA 1996)
- Focus is on procedural matters, e.g. composition of tribunal, not substance.
- Public policy as a ground to refuse enforcement? Difficult: e.g. challenge to Swiss award failed in *Omnium v Hilmarton Ltd* [1999] 2 All ER (Comm) 146.

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Insolvency and Trusts: Arbitrability?

Alex Potts KC
4 Pump Court

Insolvency v. Arbitration: un sujet brûlant…

- England and Wales: *Salford Estates v Altomart*
- Cayman Islands: *Re Times Property Holdings Ltd v Re Grand State Investments Ltd & Re BPGIC Holdings Ltd*.
- Bermuda: *Re Titan Petrochemicals*
- British Virgin Islands:
  - *Jinpeng Group Ltd v Peak Hotels and Resorts Ltd*
  - *Sian Participation Corp v Halimeda International Ltd*, Privy Council appeal pending

Insolvency v. Arbitration: encore un sujet brûlant…

- Hong Kong: *Lasmos Ltd v Southwest Pacific Bauxite (HK) Ltd*, *But Ka Chon v Interactive Brokers LLC*, *Simplicity & Vogue Retailing (HK) Co Ltd*, appeal pending
- Singapore: *AnAn Group (Singapore) Pte Ltd v VTB Bank*, *Founder Group (Hong Kong) Ltd v Singapore JHC Co Pte Ltd*
- Canada: *Peace River Hydro Partners v Petrowest Corp*
- USA: *In Re US Lines Inc*, *Re Bethlehem Steel Corp*, *MF Global v Bermuda Insurers*
- New Zealand: *Zurich Australian Insurance Ltd v Cognition Education Ltd*

Insolvency v. Arbitration: une partie du problème…

- Conflicting public policies:
  - Collective insolvency proceedings, v.
  - Party autonomy, and international recognition & enforcement
- Not all jurisdictions have stay provisions in the same terms, relating to arbitration agreements: eg

… null and void, inoperative or incapable of being performed ***or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred*** ***…***

- Cayman has different legislation for foreign arbitration agreements and domestic arbitration agreements!
- Abuse of Process and Bad Faith: *l'éléphant dans la pièce*

Part of the solution? Déjà-vu …

- IBA Toolkit on Insolvency and Arbitration
- Pending decision of the Privy Council in *Sian Participation Corp v Halimeda International Ltd*,
- The pro-arbitration reasoning of the Privy Council in *FamilyMart*
- Article 697n of the Swiss Code of Obligations

Trusts v. Arbitration: une plaisanterie éculée, ou un vieux châtaignier?

- *Grosskopf v Grosskopf* [2024] EWHC 291 (Ch)
  - Court application for appointment of Judicial Trustee in place of existing Trustees of a family trust
  - Parties entered into arbitration agreement regarding earlier claim for 'full disclosure of estate/assets' and 'any other issue'
  - Arbitration still pending
  - Following *FamilyMart*, Court granted a stay of the Court application in favour of arbitration

But what if there is no arbitration agreement?

- A Trust Deed is not an agreement with all beneficiaries / parties (settlor, trustee, protector, successors), but beneficiaries can be bound by an exclusive jurisdiction / forum of administration clause (benefit + burden)

  - Logically, beneficiaries should be *capable* of being bound by an arbitration clause in a trust deed, BUT

  - Law Commission and academics disagree
  - What of the Court's supervisory and statutory jurisdiction / forum for administration?
  - International enforceability of such a clause under the NY Convention and local legislation?

Legislation almost certainly required…

- Bahamas' Arbitration Act 2009, and section 91A of Trustee Amendment Act 2011

- *Delanson Services Limited v Volpi*, Supreme Court of the Bahamas, 28 December 2023, upheld Arbitration Tribunal's Award (Dr Georg von Segesser, Lord Neuberger, Professor Avv Alberto Malatesta)

- Also Guernsey, Singapore, New Zealand, Arizona, Florida, Idaho, Washington

Some reasons for not encouraging Trusts Arbitration…

- Binding effect of Court judgments (on all parties, and non-parties on notice)
- Availability of judgments *in rem*
- Availability of statutory powers & remedies
- Established (and evolving) reported case law
- Availability of confidentiality in Court proceedings
- Access to the Court at modest expense
- Availability of ADR & mediation

Any Questions?

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UK Tax Issues

Amanda Hardy KC
Oliver Marre

5 Stone Buildings

This talk

This talk was going to be about

- Excluded property settlements
- Registration of beneficial owners
- Protected settlements and
- Trust residence issues.

Then politics intervened.

The politicians

The politics

Labour (1 March 2023): Foreign domiciliaries are "*wealthy tax avoiders*".

Conservatives (6 March 2024): "*those with the broadest shoulders should pay their fair share*".

Labour (9 April 2024): the government plans are "*semi-skimmed*" and full of "*loopholes*".

The current law

"Real" (general law) domicile:

- Origin
- Dependency
- Choice (intention + main residence).

Deemed domicile

- Long term (15 year) residence
- Returners

The current law

Foreign domiciliaries can:

- Opt into the remittance basis for foreign income and gains.
- Settle protected trusts to allow foreign income and gains to accrue offshore untaxed unless benefits are taken.
- Settle excluded property trusts of foreign situs assets which remain outside UK IHT.

The current law

Some current areas of controversy:

- Domiciles of choice.
- Tainting of protected trusts by adding value or failing to pay interest on loans at the official rate.
- IHT transparency of residential holding structures and what constitutes excluded property.

April 2025

The Government plans to:

- Sever the link between tax and domicile from 6 April 2025.
- Simplify the system.
- Increase the tax take.
- Avoid an exodus of foreign domiciliaries.

The proposed measures - IHT

If they remain in power, the government would:

- Replace domicile as a relevant factor for Inheritance Tax with a long-term residence test, probably operating after a decade of UK residence under the Statutory Residence Test.
- Provide a 10-year tail for individuals subsequently becoming non-resident.
- Permit excluded property settlements made before 6 April 2025 to continue.
- Consult!

Proposed measures – IT and CGT for individuals

If they remain in power, the government would:

- Institute a new regime for the first four tax years that an individual is UK tax resident after a period of 10 years non-UK tax residence.
- Eligible individuals will not pay tax on offshore income or gains (“FIG”) arising in the first four years, where a claim is made, and will be able to remit these funds to the UK without additional charges.

Proposed measures – transitional provisions

- 1 year, 50% reduction in the amount of foreign income that will be subject to tax for individuals who move from the remittance basis to the arising basis from 6 April 2025 and who are not eligible for the new 4-year FIG regime.
- All individuals who have claimed the remittance basis and are neither UK domiciled nor UK deemed domiciled by 5 April 2025 can elect to rebase assets for CGT to 5 April 2019 values.
- A new 12% rate of tax for remittances of FIG in tax years 2025-26 and 2026-27. Note that the technical note specifies that these will be restricted to circumstances "where the FIG arose to the individual personally in a year when the individual was taxed on the remittance basis and the individual is UK resident in the relevant tax year".

Proposed measures – IT and CGT for trusts

- The 12% tax rate for 2025 to 2027 will be unavailable to trusts.
- Protected settlements (at least for settlor-interested trust structures) will no longer be available for non-domiciled and deemed domiciled individuals who do not qualify for the new FIG regime.

Proposed measures – economics

- Labour, in 2023, claimed an extra £3.2bn in tax if the link between taxation and domicile was severed.
- The methodology assumed
  - Knowledge of foreign domiciliaries' income and gains;
  - A tiny number of departures;
  - No knock-on effects to other taxes.

Proposed measures – economics

- At the time, the government disputed this. They now, more or less, adopt it. But their predictive methodology is unpublished.
- It emerges from any analysis that any economic forecasts for the tax to be raised by the new regime are guess-work. It is impossible to know how people will respond. What is almost certain is that they will not respond by taking no steps other than to opt in to the UK tax net.

Proposed measures – simplification?

- The construction of the Statutory Residence Test will become an area of controversy.
- As will other provisions protecting settlors and beneficiaries from trust tax charges, such as motive defences and questions of gratuitous intent.
- The transitional provisions are complex and there are no drafts.

Election

- Mid November 2024 is the most likely time for an election. In any event, it will take place before 6 April 2025.
- Query if there will be a budget in time; or if there could be one year of the current plans, whatever the election result.

Election

- Current polls:
  - Conservative – 20%
  - Labour – 47%
  - Lib Dems – 9%.

  (Ipsos.)

Labour's plans

- To close "loopholes" and in particular
  - No excluded property settlements and
  - No 50% income tax break for the first year.

  - No public response on the 4 year FIG regime or any other transitional measures.
  - No briefing on the treatment of historic excluded property trusts but a promise of some £2.8bn for the economy.

Planning?

- There will be people for whom the new regime is beneficial – for example people born in the UK with a domicile of origin here, who have worked abroad and wish now to return.
- There are others for whom it will be, most likely, neutral, subject to what Labour does to excluded property trusts – for example people who are intending to come to the UK for only a brief period, or those who have existing structures and a good claim for a motive defence.
- For many clients, however, decisions will need to await at least draft clauses, and at best full knowledge of the legislation as a whole.
- The best that individuals can do is weigh up the most likely costs and benefits under the new regime as quickly as possible.
- For people in a fiduciary position, such as trustees, there will be additional concerns and they would be well-advised to take comprehensive advice on their options.

Disclaimer

- This talk and these slides are intended to aid discussion and understanding but do not constitute any form of legal advice. No action should be taken (or not taken) as a result of anything said or written.

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Enforcing Swiss Judgments in England and Wales

Chair: Andrew Twigger KC, Maitland Chambers

Roger Laville, Five Paper & Andreas Giannakopoulos, Ten Old Square

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Enforcing Swiss Judgments in England and Wales After Lugano

Roger Laville – Five Paper

Enforcement of Foreign Judgments under Common Law Rules

The Lugano Convention has ceased to apply in the UK in relation to proceedings commenced after midnight CET on 31 December 2020: reg 92 Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019/479.

Enforcement of Foreign Judgments under Common Law Rules

English common law rules of private international law apply, supplemented by ss31-38 Civil Jurisdiction and Judgments Act 1982.

Foreign judgments are enforceable as an obligation to which English law will give effect.

The English court will not re-examine the merits of the foreign judgment.

Enforcement of Foreign Judgments under Common Law Rules

Three aspects to the rules:

- Is the judgment suitable for enforcement?
- Did the foreign court have jurisdiction over the debtor?
- Does the debtor have a defence?

Suitability for Enforcement – Common Law Rules

A foreign judgment is only suitable for enforcement where it is:

- final and conclusive on its merits;
- for a definite sum; and
- justiciable, ie not based on a foreign penal, revenue or public law.

Suitability for Enforcement – Comparison with Lugano

Finality:

- Appeals. Under both common law and Lugano (art 37), a judgment under appeal can be final and conclusive, although asset enforcement might be stayed.
- Default judgments. Unlike common law, Lugano grants qualified recognition of default judgments (art 34).

Lugano permits enforcement of judgments which are not for definite sums of money, for example orders for specific performance of a contract.

Justiciability: Lugano also does not apply to most penal, revenue or public law (art 1).

Suitability for Enforcement – Limitation

Under common law, limitation period of 6 years from when foreign judgment because enforceable: s24(1) Limitation Act 1980.

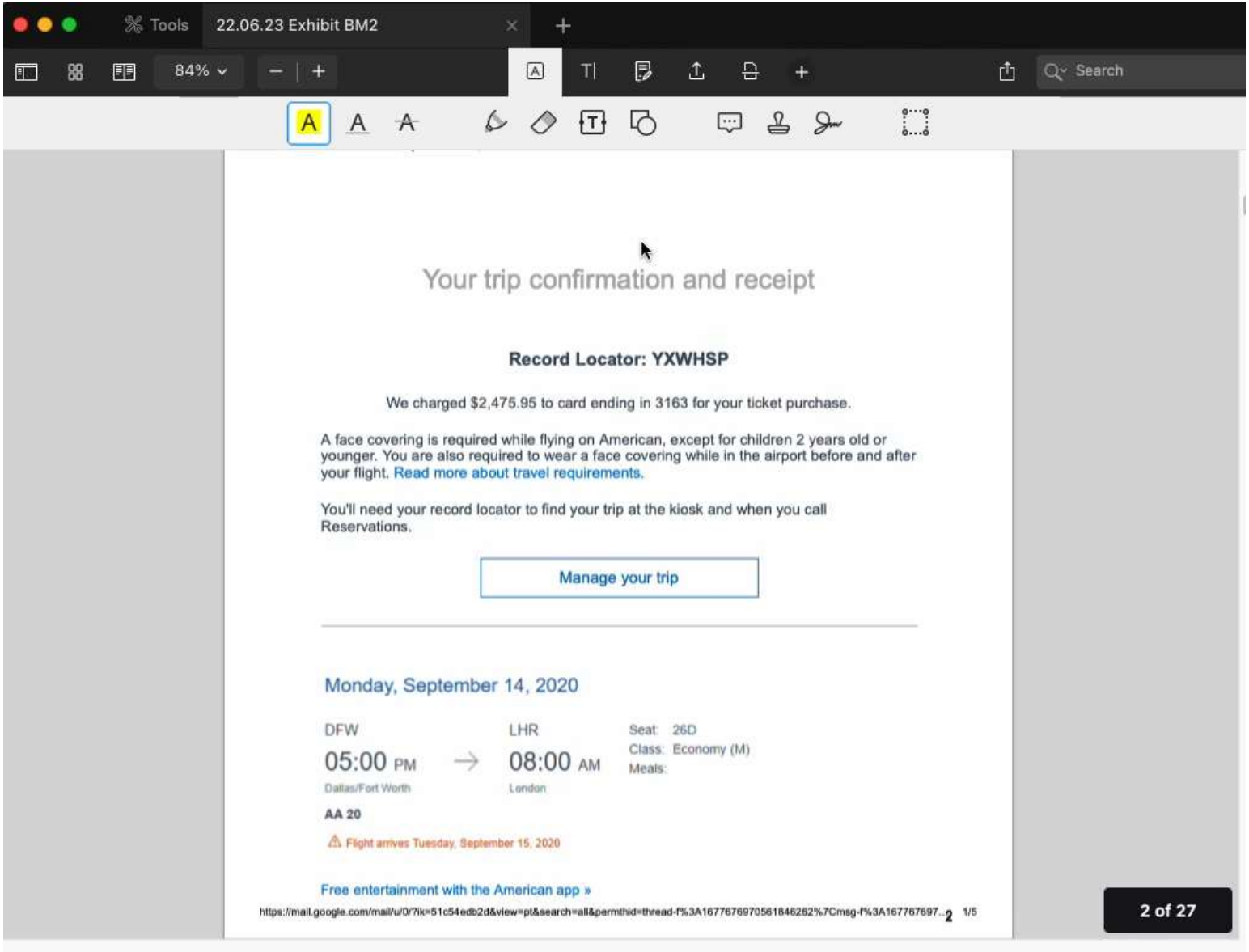
Under Lugano, there is no limitation rule, but the judgment must remain enforceable in the foreign country.

Jurisdiction of the Foreign (Swiss) Court – Common Law Rules

Judgments *in personam*:

- Presence at the time of commencement (ie service). Not necessarily residence/domicile.
- Submission.
  - By appearance or by agreement.
  - Not solely to dispute jurisdiction.

Note that no issues of *forum conveniens* arise.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Record Locator: YXWHSP
We charged $2,475.95 to card ending in 3163 for your ticket purchase.
A face covering is required while flying on American, except for children 2 years old or younger. You are also required to wear a face covering while in the airport before and after your flight. Read more about travel requirements.
You'll need your record locator to find your trip at the kiosk and when you call Reservations.
Manage your trip
Monday, September 14, 2020
DFW
05:00 PM
Dallas/Fort Worth
LHR
08:00 AM
London
Seat: 26D
Class: Economy (M)
Meals:
AA 20
Flight arrives Tuesday, September 15, 2020
Free entertainment with the American app »
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Jurisdiction of the Foreign (Swiss) Court – Common Law Rules

Judgments *in rem*:

- Eg rights to possession, ownership to movable or immovable property.
- If the property in question was, at the time of judgment, situated within the foreign jurisdiction.

Jurisdiction of the Foreign (Swiss) Court – Comparison with Lugano

- Under common law, enforcement unavailable against debtors *in personam* who have avoided presence in or submission to the foreign jurisdiction.
- No equivalent to the bar to recognition where the judgment conflicts with the jurisdiction rules at sections 3 or 4 of Lugano (insurance and consumers).
- Enforcement of judgments *in rem* broadly comparable (art 22).

Defences - Common Law Rules

The debtor will have a defence where:

- the foreign (Swiss) judgment was:
  - obtained in breach of contract, eg an arbitration or jurisdiction clause, s32 CJJA82;
  - procured by fraud; or
  - entered contrary to the rules of natural justice; or
- enforcement would be contrary to English public policy or the Human Rights Act 1998 (which implements the European Convention).

Defences – Comparison with Lugano

- Jurisdiction agreements.
- The "*[m]anifestly contrary to public policy*" equivalent to common law rule (art 34.1).
- Under Lugano, no express equivalents to the fraud and natural justice defences, but many situations covered by the public policy defence.
- No direct common law equivalent of the "irreconcilability" defences in Lugano at art 34.3-4, but might fall into natural justice defence: *ED&F Man (Sugar) Ltd v Haryanto (No 2)* [1991] 1 Lloyd's Rep 429.

Procedure – Common Law Rules

- Claim form.
- Service. Usually by post, deemed served 2 days after posting.
- Judgment:
  - Default judgment (ie where undefended) from minimum of 14 days from service.
  - Summary judgment, typically within three to six months of issue.
  - Judgment at trial, typically within 18 months of issue.

Procedure - Comparison with Lugano

Claim rather than application for a declaration of enforceability: court fees.

Under Lugano, appeal within one/two months (depending on domicile). No equivalent under common law.

Under common law, no need for a certificate from Swiss court.

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The Impact of Jurisdiction Clauses on Enforcement in the United Kingdom post-Lugano

Andreas Giannakopoulos
Ten Old Square

Transitional Provisions

- Lugano Convention continues to apply to recognition and enforcement of judgments from Lugano Contracting States in the UK where the proceedings were started before 31 December 2020 at 12:00 AM (CET): Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019/479, reg. 92.

- Judgment rendered in proceedings brought in breach of a dispute resolution agreement cannot be refused recognition on that basis: art. 34 and 35 LC; *Liberato v Grigorescu* C-386/17 (*mutatis mutandis*).

The Position post-Lugano

- Recognition of Swiss judgments rendered in proceedings commenced after 31 December 2020 is governed by the common law rules (including statute).

- Switzerland is not a signatory to the Hague Convention on Choice of Court Agreements of 2005 or the Hague Judgments Convention of 2019.

- At common law, assuming the foreign court has international jurisdiction, there are several defences to recognition, both statutory and judge-made.

Section 32 of the Civil Jurisdiction and Judgments Act 1982

s. 32: Overseas judgments given in proceedings brought in breach of agreement for settlement of disputes

(1) Subject to the following provisions of this section, a judgment given by a court of an overseas country in any proceedings shall not be recognised or enforced in the United Kingdom if—

(a) the bringing of those proceedings in that court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country; and

(b) those proceedings were not brought in that court by, or with the agreement of the person against whom the judgment was given; and

(c) that person did not counterclaim in the proceedings or otherwise submit to the jurisdiction of that court.

(2) Subsection (1) does not apply where the agreement referred to in paragraph (a) of that subsection was illegal, void or unenforceable or was incapable of being performed for reasons not attributable to the fault of the party bringing the proceedings in which the judgment was given.

(3) In determining whether a judgment given by a court of an overseas country should be recognised or enforced in the United Kingdom, a court in the United Kingdom shall not be bound by any decision of the overseas court relating to any of the matters mentioned in subsection (1) or (2).

(4) Nothing in subsection (1) shall affect the recognition or enforcement in the United Kingdom of—

(a) A judgment which is required to be recognised or enforced there under the2005 Hague Convention or the 2007 Hague Convention;

(b) a judgment to which Part I of the Foreign Judgments (Reciprocal Enforcement) Act 1933 applies by virtue of section 4 of the Carriage of Goods by Road Act 1965, section 17(4) of the Nuclear Installations Act1965, . . . regulation 8 of the Railways (Convention on International Carriage by Rail) Regulations 2005. . . Or section 177(4) of the Merchant Shipping Act 1995.

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(a) A judgment which is required to be recognised or enforced there under the2005 Hague Convention or the 2007 Hague Convention;

(b) a judgment to which Part I of the Foreign Judgments (Reciprocal Enforcement) Act 1933 applies by virtue of section 4 of the Carriage of Goods by Road Act 1965, section 17(4) of the Nuclear Installations Act1965, . . . regulation 8 of the Railways (Convention on International Carriage by Rail) Regulations 2005. . . Or section 177(4) of the Merchant Shipping Act 1995.

Trust jurisdiction clauses

- Variety of wordings and conflicting judicial approaches to enforcement. Distinction sometimes drawn with forum for administration clauses: e.g. *Koonmen v Bender* [2007] WTLR 293 (JCA); *Crociani v Crociani* [2015] WTLR 975 (JCPC).

- Where trustee initiates proceedings in breach of trust jurisdiction clause, arguable that s.32 applies to resulting judgment.

- Where proceedings initiated by beneficiaries, application of s.32 much more difficult to justify, as a matter of language and principle: see P. Matthews, What is a Trust Jurisdiction Clause? (2003) 7 Jersey Law Review 232; *contra*, J Harris, Jurisdiction and judgments in international trusts litigation – surveying the landscape (2011) 17 Trusts & Trustees 236.

"In the case of a clause in a trust, the court is not faced with the argument that it should hold a contracting party to her contractual bargain. It is, of course, true that a beneficiary, who wishes to take advantage of a trust can be expected to accept that she is bound by the terms of the trust, but it is not a commitment of the same order as a contracting party being bound by the terms of a commercial contract. Where, as here (and as presumably would usually be the case), it is a beneficiary who wishes to avoid the clause and the trustees who wish to enforce it, one would normally expect the trustees to come up with a good reason for adhering to the clause, albeit that their failure to do so would not prevent them from invoking the presumption that the clause should be enforced."

(*Crociani v Crociani* [2014] UKPC 40 at [36] *per* Lord Neuberger (emphasis added))

ChBA Geneva Conference

Afternoon tea

Chancery Bar ASSOCIATION

Enforcement of IP rights online

Mark Wilden
3PB

Enforcement of IP rights online

1. Overview of intellectual property rights
2. Targeting consumers in the EU
3. Online sales into the EU
4. Remedies
5. Take-away points

1. Intellectual property rights: overview

- Patents: inventions
- Trade marks: brands
- Copyright: creative works
- Designs: appearance of a product
- Databases: collections of information

1. Intellectual property rights: common features

- Law is harmonised by treaties (to an extent)
- Infringement is by acts, not goods themselves
- Territoriality of protection
- Some common defences
- Enforcement: generally civil; sometimes criminal

2. Targeting: cross-border TM use

Lifestyle Equities v Amazon UK [2024] UKSC 8

- "BEVERLY HILLS POLO CLUB" TM licensed to different parties in US and UK/EU
- Amazon.com sells US products into UK/EU
- EU licensee sues Amazon for TM infringement

Q: Does Amazon.com "use" the TM in the UK/EU?

Yes, if Amazon.com website pages target consumers in UK/EU

2. Targeting: cross-border TM use

What is "targeting"?

Website is TARGETED at UK/EU if consumers in the UK/EU consider that it is targeted at them

- Intention of trader is not decisive!
- National courts must decide on case-by-case basis
- No 'single meaning'
- Look at all relevant circumstances: TLD; offer to deliver; content and appearance of website

2. Targeting: application to copyright

Criminal Proceedings against Donner (Case C-5/11)

- Vendor in Italy offers goods to consumers in DE
- Goods not protected by © in IT, but were in DE
- Goods sold in IT, then delivered by D to Germany
- D sentenced for aiding & abetting prohibited commercial exploitation of © works

ECJ: This arrangement was "distribution to the public" in DE by Vendor

3. Online sales into the EU: cross-border delivery

Blomqvist v Rolex SA (Case C-98/13)

- B bought a counterfeit watch on website in China
- Watch is posted to B from Hong Kong
- Danish customs seize watch
- B denies TM infringement: bought for personal use

Q: Had the seller used the Rolex TM in Denmark?

Yes; there was no need to show that the offer/advertising had been targeted at Denmark

3. Online sales into the EU: cross-border delivery

Blomqvist applied in *Lifestyle Equities*:
Amazon "sale" was completed in US (not in UK/EU)

- EWHC: Blomqvist does not apply here
- EWCA: Blomqvist does apply even if sale takes place abroad and there's no targeting
- UKSC: No comment!

Blomqvist refers to "sale to a customer in the [EU]"
Did not analyse where the sale took place

4. Remedies for infringement of IP rights

Typical remedies claimed:

- Declaratory relief
- Injunctive relief
- Damages / account of profits

Be aware of territorial/jurisdictional limitations…

4. Remedies where goods are stored abroad

Extreme Durable I ZR 205/22

- D offers diving accessories on Amazon.de under C's trade marks
- D stores goods in Spain
- Goods sold by D into Germany do not use C's TMs

Q: Can C stop D possessing goods abroad for purpose of offering/selling into Germany?
Referred to CJEU in 2024-01…

5. Take-away points

What can be prevented online?

- Advertising / offering for sale: if targeted
- Actual sales: no targeting required

Where to start a claim?

- Where rights are protected
- Where infringing acts can be proven
- Where suitable remedies are available

Chancery Bar Association

Powers and duties: trustees vs protectors

Edward Hewitt, 5 Stone Buildings

Tom Dumont KC, Radcliffe Chambers

Chancery Bar ASSOCIATION

Powers and duties: trustees vs protectors

Wong, powers and the proper purpose rule

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Outline

- Factual background
- *Wong v Grand View* [2022] UKPC 47
- Some take home points

Factual background

- In the 1950s, 2 Taiwanese brothers, YC Wang & YT Wang founded Formosa Plastics Group
- Between them, they had 17 children and many grandchildren
- YC Wang died in 2008; YT Wang died in 2014

Factual background

10/05/2001

Global Resources Trust (GRT)

objects: children & remoter issue (also default Bs)

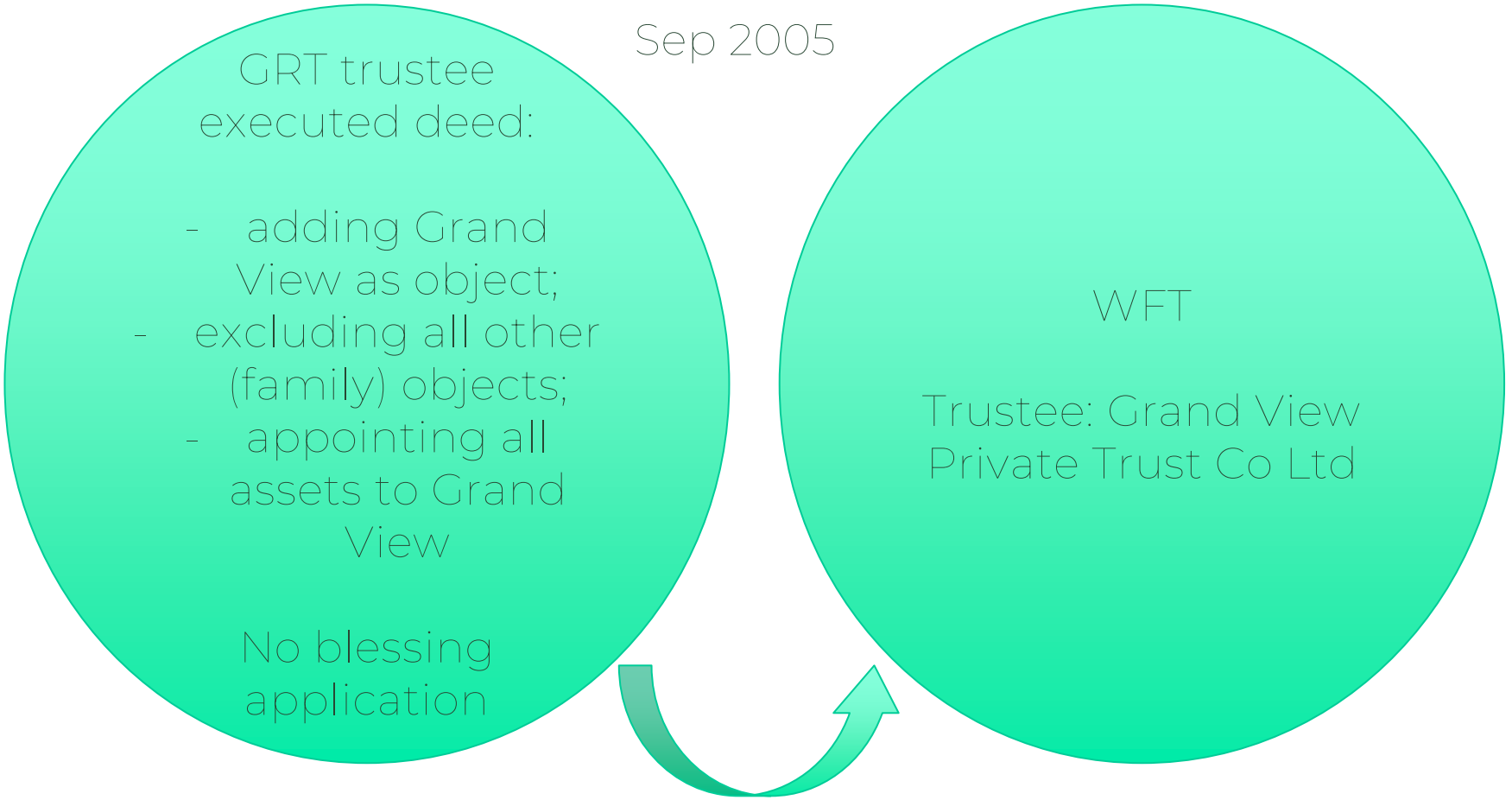
Assets: shares in FPG worth $90m when created & $560m at time of appeal in Bermuda

Wang Family Trust (WFT)

Bs: charitable & non-charitable purpose; family excluded

Assets: shares in FPG worth $567m when created & $3.5bn at time of appeal in Bermuda

Factual background



Factual background

- Basis: founders had decided to keep large sh/h in FPG, which children would inherit; so GRT no longer needed to incentivise
- Feb 2018: Winston Wong (eldest son of YC Wang) issued claim in Bermuda against Grand View
- Alleged Sep 2005 decision was breach of trust because:
  (a) Trustee took irrelevant considerations into account & did not act for benefit of Bs of GRT;
  (b) Acted in excess of its powers;
  (c) Failed to exercise powers for purposes for which conferred;
  (d) Breach of rule against remoteness of vesting

Factual background

- Dec 2018: Winston Wong applied for summary judgment on (b)-(d)
- 05/06/2019: Kawaley AJ granted summary judgment
- 20/04/2020: Bermuda Court of Appeal allowed Grand View's appeal
- 08/12/2022: Privy Council allowed Winston Wong's appeal

Factual background

- In parallel, Winston Wong also challenging validity of various purpose trusts set up 2001-13 to hold BVI companies and/or of transfers into them:

(a) Mistake by founders: didn't understand giving away wealth forever and family would not benefit

(b) Trusts void because their purposes are an impermissible mix of charitable and non-charitable

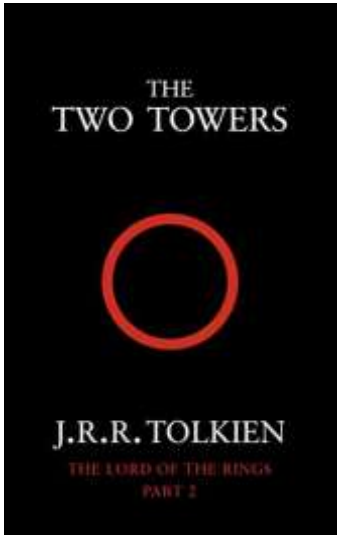
Factual background

(c) Transfers to trusts not evidence by signed writing, as required by Statute of Frauds 1677 – part of BVI law?

- 80-day (remote) trial Apr-Sep 2021

before Kawaley AJ

- 471-page judgment delivered June 2022
- Claims dismissed (almost) entirely
- Outstanding appeal to Bermuda CoA



Wong v Grand View [2022] UKPC 47

1. "Substratum rule" does not exist
2. (Im)proper purpose rule does

The latter is distinct from scope of power:

1. *Whether the way in which the power has been exercised is not within, or contrary to, the express or implied terms of the power*
2. *Whether the use of the power, although within the power's scope, was for an improper purpose, i.e. a purpose other than the purpose/purposes for which it was conferred*

- stop calling it "fraud on a power": no need for any reprehensible conduct

Wong v Grand View [2022] UKPC 47

Proper purpose rule: 2 stages:

1. Ascertain purpose/range of purposes for which power granted
2. Ascertain whether purpose(s) of trustees' exercise of power was proper

Wong v Grand View [2022] UKPC 47

Re stage 1: common ground that purpose/range of purposes is:

(a) to be determined at the date of the instrument conferring the power

(b) objectively determined: court can admit trust deed and "*substantially contemporaneous documents which are intended to be read with the trust deed*", such as (initial) letter of wishes

Re stage 2: determine trustees' subjective intention when exercising power – question of fact

Some take home points

- Trustees under duty to ascertain purpose of power
- Tighter drafting? NB: seems cannot 'repurpose' trust
- Are LoW now (always) disclosable? And trustees' reasons for exercising power? Cf. *Londonderry* & *Breakspear v Ackland*
- More blessing (*Public Trustee v Cooper)* applications?

Powers and duties: trustees vs protectors

Protectors' powers & duties, and the proper purpose rule affect them, too?

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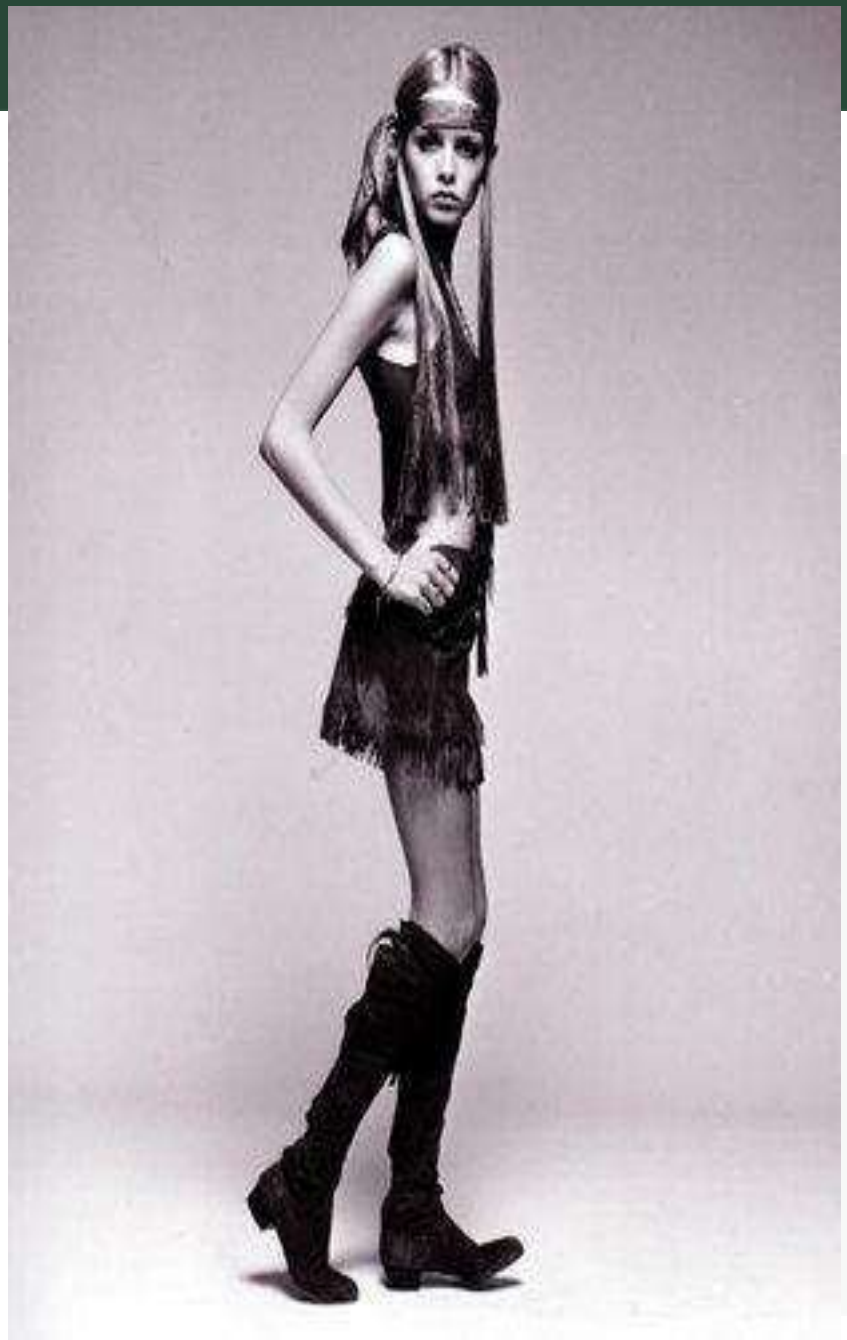
Protectors

- Why do we have them?
- Are they fiduciaries, and if so, what does that mean?
- What role do they play?

The Wider View

The Narrower View



Wider 2 v Narrower 1 ?

- Narrower:
  Bermuda CA – Re X

- Wider:
  UK – PTNZ
  Jersey – Piedmont

- But narrower view is the most recent?


QANTAS
MakeAGIF.com

If power to add in Wong had been subject to Protector's consent?

- Does that avoid the need for establishing the purpose of the power?
- Would your answer be different if the trustees' power to add was a power to add a beneficiary nominated by two current beneficiaries?
- Do we have confidence that judges with no experience of trusts are getting these cases right?

Some take home points

- Importance of protectors understanding exactly what their role is:
  - on the terms of the specific trust, &
  - in whatever jurisdiction they are.
- Crucial to draft trust so that there can be no doubt whether Protector's role is wide or narrow.
- Consider early application to court, if doubt exists

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The removal of protectors

Penelope Reed KC and William East

5 Stone Buildings

An Overview

We will cover:

- The principles which apply to protector removal claims
- Some examples from multiple jurisdictions going back to early 2000s
- Further issues: (1) is a removal claim needed in the first place? (2) the appointment of new protectors by the court and (3) the costs of removal claims

Development of the principles in removal claims

- Use of protectors a feature of offshore trusts going back 40 or 50 years: *Re X Trusts* [2023] CA (Bda) 4 Civ, para 129
- However, little reported case law on removal of protectors until early 2000s
- Courts have had to work through principles which should apply to such claims, and the extent to which they should differ from trustee removal claims

The protector as fiduciary

- Rawcliffe v Steel [1993-1995] MLR 426 (Isle of Man): protector owes fiduciary duty to beneficiaries; position is analogous to that of a trustee
- Court's inherent jurisdiction extends to being able to appoint a protector where the office is vacant and the machinery of trust would otherwise fail.
- Elucidation of protector's role: "*to ensure that both the letter and the spirit of the settlement are complied with.*" Protector cannot however e.g. merely refuse to provide consent because of settlor's wishes.
- Identification of protector as fiduciary sets stage for removal if duties not complied with.

Re Papadimitriou - are exceptional circumstances needed?

- *Re Papadimitriou* [2004] WTLR 1141 (Isle of Man) – early consideration of the test
- Protector appointed additional independent trustees to investigate transactions related to trust
- Beneficiary who had interest in impugned transactions sought protector's removal.
- Counsel for protector submits court has no power to remove her.
- Reference to *Letterstedt v Broers* (1884) 9 App Cas 371

Re Papadimitriou - are exceptional circumstances needed? (cont.)

- Re Papadimitriou [2004] WTLR 1141 at [71]:

I am not prepared to say that the court does not have, in any circumstances, an inherent power to remove a protector, if that were necessary to protect the assets of a trust or to prevent the trusts failing, or if the continuance of a protector would prevent the trusts being properly executed. However, I consider that the court would only so act in exceptional circumstances.

- Application dismissed.

Is the protector a fiduciary after all?

- *Re Freiberg Trust* [2004] JRC 056 (Jersey): court's power of removal a "*necessary incident of the duties to protect the interests of beneficiaries, especially minor and unascertained beneficiaries and to ensure that the wishes of the settlor are respected as far as may be possible and appropriate*".
- Possible exception to fiduciary role (and therefore possibly to removal): where protector appointed for purpose of safeguarding own position as beneficiary: Rawson Trust Co Ltd v Perlman (1990), referred to in *Re Circle Trust [2007] WTLR 631 at 639* (Cayman).
- Court reluctant however to conclude that protector not fiduciary, even where this is stated by the trust instrument: see *Centre Trustees Ltd* v *Van Rooyen* [2010] WTLR 17 (Jersey).

Deciding not to re-invent the wheel: Re the A Trust

- Clarification that test for removal is the same as that for trustees: *Re the A Trust* [2013] WTLR 1117 at [8] (Jersey). Key question as per *Letterstedt*: whether the *"continuance of the trustee [or protector] in office would be detrimental to the execution of the trusts"*.
- Court rejects idea that 'exceptional circumstances' needed, but jurisdiction not to be exercised lightly. See also *Re Piedmont Trust [2015] JRC 196* at [128] (Jersey).

Re the A Trust: other jurisdictions follow suit

- *Re K Trust* (Guernsey, 2015): adopts the test set out in *Re A Trust*, expressly declines to follow *Re Papadimitriou* re the need for 'exceptional circumstances'.
- *Re FA and FB Trust* [2021] SC (Bda) 2 Civ (Bermuda): protector's powers to remove and appoint trustees suspended pending determination of removal claim. Court follows *Re A Trust* and *Re K Trust*.`

Examples of removal

- Cases involving serious misconduct: *Re Freiberg Trust* (fraud), *Re FA and FB Trust* (CBS 60 Minutes sting operation)

Examples of removal (cont.)

- However, misconduct does not need to be shown under the *Letterstedt* test.
- Cases involving a conflict of interest: *Centre Trustees* (see also *Re Piedmont*). Duty of trustees to apply for removal, where justified by conflict. BUT: not every conflict of interest will necessitate removal. Procedure where conflict comes to light: as first step, protector should disclose conflict to trustee and beneficiaries.
- Breakdown in relations between protector and beneficiaries: *Re the A Trust, Re K Trust*
- Protector playing an overactive part in trusts/ following perceived wishes of settlor too closely: *Re the A Trust, Re K Trust* ('de facto trustee').

Is a claim for removal needed?

- May be an express power of removal of the protector available: see for example *Re K Trust* at [47].
- Was the appointment of the protector valid in the first place? See e.g. *Re Circle Trust, Re Piedmont Trust*.
- Power to appoint new protector is fiduciary power and must be exercised in line with relevant fiduciary duties, see *Re Piedmont* at [45].
- *Re Piedmont*: court held that appointment of protectors was invalid where they had major conflict of interest with representor beneficiary, had not previously exercised duties as company directors properly, and there was a complete breakdown of relations between them and representor.

When will the court appoint a new protector?

- Where protector needed, court will not allow trust to fail for want of protector: *Rawcliffe v Steele.*
- Court may not decide to appoint anyone, leaving trustees to make decisions: see *Re Freiberg Trust* (no consent needed in absence of a protector).
- Court may decline to appoint where there is an express power to appoint new protector. *Re Piedmont Trust* at [156].
- In theory, the court could supply necessary consent itself, although it would not normally do this: *Rawcliffe* at 495.

Costs of removal claims

- Opposing removal in a clear case risks an award of indemnity costs against the protector: see *Centre Trustees*
- However, a costs order is not inevitable even where a protector is removed: see *Re Piedmont* costs decision at [2016] JRC 016. Court will focus on whether protector's conduct has been reasonable.
- In *Re Piedmont*, court refused to make an order for costs against purported protectors and father who appointed them, despite e.g. findings of sons having clear conflict of interest. See [48] to [50].
- Protector is not entitled to pre-emptive award of costs: see Re FA and FB Trust [2019] SC (BdA) 77 Civ

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Cross Border Protection of Adults

Richard Dew (Ten Old Square)
Robert Avis (Charles Russell Speechlys)

The Issue

i. Increasing number of persons lacking capacity

ii. Multiplicity of systems for representing incapable persons

iii. Necessity for forms of representation to be recognised internationally

In practice : Switzerland

i. W appointed as Swiss curator to represent incapable H.
ii. Worldwide litigation to recover assets appropriated by one son.
iii. Defendant to that litigation challenges the appropriateness of the appointment of W and her ability to conduct litigation

In practice: England

i. Recognition of Swiss appointment: the Hague Convention, Schedule 3 to MCA and *Re various foreign powers* [2019] EWCOP 52

ii. Appointment of W as litigation friend for H (CPR Part 21)

The result

i. W eventually removed as litigation friend

ii. W then also removed as curator

iii. Litigation settled.

Reform?

i. Reform of CPR Part 21

ii. Reform and implementation of Hague Convention

iii. In meantime, consider carefully whether(and how) representation will be recognised in the jurisdiction where it is needed

Chancery Bar Association

ChBA Geneva Conference

Conclusion

Andrew Twigger KC,
Chair, Chancery Bar Association

0.6 mi
14 minutes

Route from Novotel Geneve Centre

to

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