"Lazy, hazy, crazy – removing unsuitable trustees, and the incidence of costs"

1. This paper is about removal of Trustees, a hugely important topic in so much trust litigation. Why is it so important? Because so many problems in trust and estate administration can be seen to be caused, or at least catalysed, by the wrong person being in office – someone with a contrary interest perhaps, whether it be personal or financial. And because while it can be incredibly hard to attack a trustee's decision in exercise of a discretionary power by a disliked trustee, once it's made, it may be easier to remove the trustee before they make the decision in the first place. And because the operation of the principles on costs in relation to removal applications can be very effective at putting real pressure on trustees to go voluntarily.

2. I want to take this in three stages

    a. First, a recap of the various jurisdictions or routes that might apply when a beneficiary wants to remove a trustee.

    b. Secondly, a review of the principles that the court will apply when *it* is called on to consider whether to remove a trustee.

    c. Finally, those points on costs.

3. So, what options are available? First, can we remove an office-holder without bothering the court at all? Yes – sometimes – there are three ways one might remove a trustee *without* troubling the court in England and Wales, but only one in Jersey:

4. First, under the instrument. There may be express powers of removal or substitution. The Trusts (Jersey) Law, article 9A, provides expressly that the

reservation to the settlor of powers of removal does not invalidate a trust. If so, and you or someone on your side is the person entitled to exercise them, then there's your answer … or is it? The power of removal may well be a fiduciary power. In England & Wales, unless there is something very unusual in the drafting of the trust instrument, it is almost certain to be fiduciary (see *Re Skeats* from 1889). Over in Guernsey in *Re K Trust* (2015) 18 ITELR 627 the Royal Court thought that a power of removal by a protector probably would be fiduciary, despite s.15 of their Trust Law (art.9A in the TJL).

5. And if it is a fiduciary power, the removal must be for a proper purpose, namely in good faith for the benefit of the beneficiaries collectively, not for your own benefit. To illustrated the point with a case on appointment, in *Jasmine Trustees Ltd v L* [2015] JRC 196, also known as *Re Piedmont Trust*, the Royal Court in Jersey set aside an appointment of a trustee on the ground that the appointor had failed to have regard to relevant matters, and had had regard to irrelevant matters.

6. Secondly, in England only, we have s. 36 of the Trustee Act 1925, if not modified or excluded by the trust instrument. It can only be used in the specified situations: that the trustee is "dead, remains out of the UK for more than 12 months, desires to be discharged, … refuses or is unfit to act … incapable of acting … or is an infant".

7. The "unfit to act" bit looks quite tempting as an option, but no one is going to want to deal with a new trustee where there is an old trustee still furiously asserting that he is not unfit and he was not validly removed, s.36 is rarely appropriate for contentious cases.

8. Thirdly, again only in England & Wales, we have s. 19 of the Trusts of Land and Appointment of Trustees Act 1996. Where all the beneficiaries are of

age and sui juris, they can collectively require a trustee to retire. The power is subject to certain conditions, and not the most useful provision, but should not be overlooked as a solution in the right case.

9. In either jurisdiction, therefore, the options for removing trustees outside court are quite limited. So in a lot of cases, we are going to need to ask the court for help.

10. In England and Wales, there is a rather limited statutory power under s. 41 Trustee Act 1925. That allows the court to replace a trustee, where it is inexpedient, difficult or impracticable to do so without court's assistance. The problem is that the section has been interpreted as applying only where there is no dispute of fact, and if there is, the court may decline to make the order. But one does not need to panic if one has started under s.41 and then find a factual dispute is raised – the court can still proceed to deal with the case under its inherent jurisdiction if that has not been asked for in the claim form: *Re Wrightson* [1908] 1 Ch. 789, 803.

11. I turn now to the inherent jurisdiction of the court to remove trustees, which is the equivalent of article 19 paragraph (4) of the Trusts (Jersey) Law. The court has a discretion, so we need to know what the principles are that the court will apply. And I make no apology for beginning with *Letterstedt v Broers* and Lord Blackburn's leading opinion in the Privy Council from 1884 (9 App Cas 371), because it applies in Jersey as held in the *Eiro v Equinox* case and reiterated in *E, L, O & R Trusts*, *BA v Verite,* and *Trilogy Management Limited v YT & Ors* [2014] JRC 214. It's also been held to apply in Guernsey (*Re K Trust*).

12. Here's what *Letterstedt* actually said.

"In exercising so delicate a jurisdiction as that of removing trustees, their lordships do not venture to lay down any general rule beyond the very broad principle... that their main guide must be the welfare of the beneficiaries... If it appears clear that the continuance of the trustee would be detrimental to the execution of the trusts … and if there is no reason to the contrary from the intentions of the framer of the trust... it seems to their lordships that the court might think proper to remove him."

13. We can narrow that down to two words only: "beneficiaries' welfare". That could mean different things to different people, so we need to look at some later cases to see how that has been applied in practice.

14. One of the key questions is whether there has been any breach of duty or other misconduct that the parties can point at. However, misconduct is neither always necessary nor always sufficient:

"But in cases of positive misconduct, Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property or to shew a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity."

15. Chief Master Marsh provided a useful summary of the relevant principles in *Harris v Earwicker* (a case about executors, but the point is the same) [2015] EWHC 1915 (Ch) at [9]:

"i. It is unnecessary for the court to find wrongdoing or fault on the part of the personal representatives. The guiding principle is whether the administration of the estate is being carried out properly. Put another way, when looking at the welfare of the beneficiaries, is it in their best interests to replace one or more of the personal representatives?

ii. If there is wrongdoing or fault and it is material such as to endanger the estate the court is very likely to exercise its powers ... If, however, there may be some proper

> criticism of the personal representatives, but it is minor and will not affect the administration of the estate or its assets, it may well not be necessary to exercise the power."

16. As a general principle, one has to distinguish breaches that endanger the trust property or show, want of honesty, proper capacity or reasonable fidelity, from mere slips or errors of judgment.

17. But it's clearly not an easy line to draw. In *Brudenell-Bruce v Moore* [2014] EWHC 3469 (Ch)*, the case about the Earl of Cardigan,* there were three fairly substantial breaches of trust shown. One was allowing a non-beneficiary to occupy trust property rent-free, another was failing to repair a property, causing a loss of rent, and a third was paying a lay trustee over £100,000 in unauthorised remuneration. The lay trustee Mr Moore (a barrister's clerk) was removed, but the professional trustee Mr Cotton from Smith & Williamson was allowed to remain in office. What I take from that is that it's terribly subjective, and may just come down to who the court likes the look of.

18. If not a breach, what else may justify removal? Hostility may do. This was something particularly touched on in *Letterstedt* itself:

> "It is quite true that friction or hostility between trustees and the immediate possessor of the trust estate is not of itself a reason for the removal of the trustees. But where the hostility is grounded on the mode in which the trust has been administered, where it has been caused wholly or partially by substantial overcharges against the trust estate, it is certainly not to be disregarded."

19. So again, hostility *may or may not* be enough. In *Angus v Emmott* [2010] EWHC 154 (Ch), [2010] WTLR 531 at [108], another case about estates,

Richard Snowden QC, as he then was, approved this passage in *Williams Mortimer & Sunnucks*:

> "…if the administration has come to a standstill because relations between the personal representatives have broken down, or relations between the representatives and the beneficiaries have broken down, the court will ordinarily remove the personal representatives and appoint new ones to enable the administration to be completed. It is not necessary to establish wrongdoing or fault …. If, for whatever reason, (such as clash of personalities, or the lack of confidence in the personal representative by the beneficiaries, even if unjustified) it has become impossible or difficult for the administration to be completed by an existing personal representative, then an order for his removal will usually be made."

20. In *Natwest v Lucas* [2014] EWCA Civ 1632*,* the case about the estate of national treasure Jimmy Saville, the residuary beneficiary had totally lost confidence in the executor, NatWest bank. But Patten LJ said:

> "the direct intervention by the Court in the administration of a trust … by the removal of the trustee … has … to be justified by *evidence* that their continuation in office is likely to prove detrimental to the interests of the beneficiaries. A lack of confidence or feelings of mistrust are not therefore sufficient in themselves to justify removal unless the breakdown in relations is likely to jeopardise the proper administration of the trust or estate. This is something which requires to be objectively demonstrated and considered on a case-to-case basis having regard to the particular circumstances."
>
> "The judge's finding that the Bank has acted and will continue to act fairly and with proper regard to the interests of the beneficiaries … is therefore … determinative"

21. In *Re A Trust* here in Jersey, confirming that the same principles apply to removal of protectors, it was found that the

> "mutual hostility and distrust between the Representor Beneficiaries and the protector had led to a breakdown of relations that was quite plainly having a seriously detrimental effect on the execution of the trusts and was likely to continue to do

so. This alone would have been a sufficient basis for the exercise of the Court's jurisdiction".

22. Delay may well be a good reason for removal – more relevant perhaps in estate administration than trusts. In *Re Bhusate* [2018] EWHC 2362 (Ch), recently the Chief Master removed an administrator who had failed to administer the estate after 26 years.

23. Then there are conflicts of interest. This is a very important area because particularly in family trusts, an individual may be wearing many hats. There have been a few Jersey cases on removal for conflict, like *BA v Verite*, but often on relatively extreme facts, so I think it's actually more useful to look at some of the less clear-cut English cases. Also it gives me the opportunity to talk about my own case, which of course is what we barristers like to do best.

24. One point to note with conflicts is that the conflict per se is unobjectionable if implicitly sanctioned by the settlor putting the trustee in that situation from the outset. The point was made by Newey J in *Kershaw v Micklethwaite* [2010] EWHC 506 (Ch), where he refused to remove executors, despite a potential conflict arising if they had wanted to purchase trust property. Conflicts can be managed. Moreover, as *Letterstedt* itself shows, some weight should be given to the settlor's own choice of executor or trustee, as well as the wishes of the beneficiaries.

25. But even conflicts into which trustees have been placed by the settlor can justify removal. In *Re Weetman* [2015] EWHC 1166 (Ch), [2015] WTLR 1745 a trust held 50% of the shares in a company for its employees, and 50% for the family. One of the trustees was the company accountant, a *de facto* director. Tensions arose between the family and the employee beneficiaries

about how best to run the company. The family saw the directors and trustees as siding with the employees against the family's financial interests, and so sought the trustees' removal.

26. The court held that, looking at the matter objectively, a well-informed observer would see the accountant's position as impossible or, at least, seriously compromised in the event of a conflict of interest arising between the interests of those in day-to-day control of the company and the family beneficiaries. This was a sufficient ground to remove them.

27. My case of *Griffin v Higgs* [2017] EWHC 2559 (Ch) was also a claim to remove executors on grounds of conflict. The will trustees were two solicitors and an accountant who had acted for the deceased and other members of the family for many years. My client, the claimant, the deceased's daughter, with the support of a majority of the other beneficiaries, wanted them removed, because they had acted on several transactions over the years which had gradually transferred the deceased's wealth to her son Constantine (my client's brother) and his three children. My client thought these should be investigated, to see whether they could be set aside, for the benefit of the estate.

28. She wasn't able to make a positive case that any of the transactions definitely should be set aside, but just that they should be investigated, and that these trustees could not be the ones to carry out those investigations. Having acted on the transfers in the first place, they were hardly likely to conclude that there was undue influence, or sue their clients.

29. The Court held that the appropriate test for investigation by others was as follows:

> "appropriate test to be applied to each allegation is whether there appears to be o… the basis for a claim which has reasonable prospects of success … [which] must enhance the value of the estate relative to the costs of pursuing it."

30. Although some of the points raised would not have justified the removal of the executors, others did, and a replacement was appointed.

31. That test was approved in *Long v Rodman* [2019] EWHC 753 (Ch), where potential claims by an estate against the executor were being contemplated. The Court emphasised that the fact that beneficiaries could bring *derivative* claims, is not an answer to this sort of situation, saying "It is plainly preferable that any claim be pursued by the administrator of the estate".

32. So that is a brief jog through the principles underlying the exercise of the court's discretion to remove trustees under the court's inherent jurisdiction, or art. 19. But what about costs?

33. Naturally, the usual caveat applies – ultimately everything is in the discretion of the court. There are quite a few surprising costs results littering the legal landscape over in England. One such curious case is *Jones v Longley* [2015] EWHC 3362 (Ch). One executor, Mr Jones, a solicitor, applied to remove the other executor, Longley, the deceased's son. The Master ended up removing Jones, but keeping the son. What on the face of it was very strange was that the costs order was that the son was ordered to pay the costs of Jones.

34. This illustrates the principles quite nicely. First we have the usual 'loser pays' principle in hostile litigation, which removal claims will usually be. So if a beneficiary tries to remove a trustee and fails, he or she pays for the outing.

35. But different considerations apply on the trustee's side – he may have his indemnity from the fund to rely on. In England & Wales we look to the

Trustee Act 1925, s.31(1), CPR r.46.3, and Practice Direction 46 paragraph 1.1, Here in Jersey, we turn to article 26 paragraph (2) – "a trustee may reimburse himself out of the trust for all trust expenses and liabilities reasonably incurred in connection with the trust." The same principles apply in both jurisdictions.

36. In *Jones*, the solicitor was held to have done the right thing by bringing a claim in order to resolve the deadlock that had arisen between him and the son, and which was preventing the administration of the estate. On the other hand, Mr Longley had behaved very unreasonably in the litigation, opposing the claim altogether, and increasing the costs. The only reason the son was left in post and the solicitor removed was because the other beneficiaries wanted him to remain, in preference to the solicitor.

37. Back to *Griffin v Higgs*, which on costs drew quite extensively on, and the *BA v Verite, E, L, O & R Trusts* case from here in Jersey I've mentioned. Initially the trustees had resisted the claim, seeking to stay in office, with the strong encouragement of the brother and his children. Then the brother and his children were joined as defendants, resisting the claim for removal, and the trustees thereupon declared themselves 'neutral'.

38. As to costs, there were quite a few arguments as between the different beneficiaries, as can be seen from the slide, but I want to concentrate on the trustees' position. Up to the point when the trustees declared themselves neutral, the Court ordered the trustees, and the brother and his children, jointly and severally, to pay the Claimant's costs. But for the period after that declaration of neutrality, when the brother fought the claim alone, the Court ordered the brother and his children pay the costs of all the other parties – the claimant' and the executors'. But the Court also refused the

trustees an indemnity for both periods, even after being neutral, saying that the trustees had not been acting reasonably in resisting the claim.

39. On appeal the trustees argued that they should be entitled to their costs from the fund, unless they acted unreasonably in resisting their removal. The Judge agreed with that in principle. The trustees then argued that when it came to ordering them to pay beneficiaries' costs, there should be a higher threshold, so that they would have had to have acted in a wholly indefensible manner. The Judge disagreed with that. The usual rule in hostile litigation applied. He agreed with the passage in *Lewin on Trusts* which says that:

> "If a trustee is removed on the ground of conflict of interest and duty, the court might normally be expected to make an order for costs *against* the trustee."

40. But that is not a presumption, as such, just an application of the usual rule that a trustee who acts unreasonably in resisting removal will have to pay costs; if he has been removed on grounds of conflict, his objection is likely to have been unreasonable. The Judge found *BA v Verite Trust Company Ltd* and *Re Piedmont* [2016] 1 JLR 14, to be consistent with that basic position.

41. An extract from the *BA v Verite* case is on the slide, just to show, once again, how nuanced and difficult to predict it can be. That was a case of a clear conflict, but everything depends on the facts of the case.

42. And so the one point on which the appeal in *Griffin v Higgs* succeeded was that the trustees were entitled to their indemnity during the second period, once they had declared themselves neutral. They were necessary parties to the claim, and insofar as they were neutral, they had stopped behaving unreasonably. But that was subject to an important qualification. They were only entitled to that indemnity in respect of costs that were reasonably

incurred *on the footing* of that neutrality. That was a matter for assessment. So if it was unnecessary for a neutral party to pay counsel to attend trial – as happened – then those costs would not be recoverable under the indemnity.

43. The final point I want to make is about what might happen where a removal claim is started, but falls away before it gets to trial. The trustee has initially resisted, but then decides to retire voluntarily, or there is a settlement, or the need for removal passes. What then?

44. One issue is whether it is safe for a trustee to retire voluntarily at all. There are some old cases, recently referred to in the English court in July this year, in *AB v CD* [2019] EWHC 2323 (Ch), that point out that where a trustee retires, knowing that the continuing trustees are intending to commit a breach of trust as soon as they are gone, that trustee could be liable for facilitating that breach. Even retiring voluntarily can be a breach of duty.

45. The other issue is costs – are the trustees liable if they retire before trial? There are perhaps three options.

46. One approach is to say have a full trial of the issues, to work out what costs orders the court would have made on the removal application, had it ultimately decided the question. This is what happened in *Isaac v Isaac* (2005).

47. But a more modern and proportionate approach is illustrated by *Hanspaul v Ward*. The court there held that it was not necessary to order a trial of the issues solely to determine the costs of removal a claim which had been resolved without a trial; it could be decided fairly on submissions. In the event, he ordered the trustees who had retired to pay the costs, because the claimants had got what they wanted, the defendants' conduct in relation to

the trust and the proceedings themselves had been objectively poor. Like the trustees in *Griffin*, they could and should have retired earlier, and they were deprived of their indemnity.

48. Thirdly, as in a recent case of mine, *Price v Saundry* [2019] EWHC 1039 (Ch) you could just get no order as to costs as between the parties, but the trustees' indemnity stands. The claim there started as removal, but by the time it came to trial, the trust fund – a portfolio of rental properties – had been sold and it just needed distribution. So removal became pointless. Despite the clear evidence of various breaches of trust, the court held that without a trial he did not have the material to decide whether the removal was justified or not, and made no order as to costs.

49. So to conclude – life is hard for a trustee threatened with removal. It can be very hard to predict whether the claim will succeed, it can be very hard to predict what the costs outcome will be, and it can even be hard to decide to retire voluntarily. There are big risks for trustees. And that's why it's such a powerful threat in the hands of the beneficiaries.

ALEXANDER LEARMONTH

New Square Chambers, Lincoln's Inn

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Alexander.Learmonth@NewSquareChambers.co.uk