Wilberforce CHAMBERS

Private Client eYearbook 2022

A COLLECTION OF RECENT EBRIEFING ARTICLES

Written by Members of Wilberforce Chambers,
co-edited by Emily Campbell and Michael Ashdown

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Introduction

Welcome to the first edition of our Private Client Yearbook, which gathers together the articles our team have published in the fortnightly eBriefings over the course of 2021. We hope you have found these articles, together with the accompanying selection of news items, useful. Let me remind you about some of the topics we have been writing about.

Want to know how to advise your clients whilst managing the risk? Then my four-part article *Defensive Advising Strategies* is for you! Elsewhere, you will find discussion on possible taxation reform as well as a Budget 2021 overview, a discussion of the UK Trust Register and suggestions on how to avoid restating a qualifying interest in possession.

We have trawled the case-law for the latest on trustees' powers – bringing you topics including benefiting non-objects, implied revocation of appointments by Will, what counts as a *"prior interest"* for the purposes of the statutory power of advancement, trustee conflicts of interest and the thorny issue of the role of the protector. The topic of missing beneficiaries is not missed!

Michael Ashdown, who has kindly been helping me with the eBriefing project in his role as Co-Editor, has written an important article on the precedent value of Chancery Masters' decisions – the article is a handy resource, given the number of cases listed in front of Chancery Masters, many of them making it into the law reports.

Our articles look backwards as well as forwards. I interviewed *Brian Green* QC on what has changed over his time in practice; I spoke to him about my predictions for the future. Speaking of looking backwards, we look far back too with two articles on legal history, one on the history of income tax and another highlighting life in Lincoln's Inn in the Victorian age.

We have lots of energy and ideas for articles in 2022, so watch your e-mail for more of our eBriefings!

Emily Campbell, **Editor**

Author Biographies

Emily Campbell (Editor)

Emily has been described by The Legal 500 as *"a trust law genius, who is incisive and practical"*. She has over 25 years of experience of both contentious and non-contentious private client work and has been widely known as an expert in the private client field since the publication in her early practice of her book "Changing the Terms of Trusts". Private client advice is inextricably linked to tax planning, and throughout her practice she has advised on all areas of personal taxation. Emily is ranked in band 1 in the current editions of Chambers and Partners (Chancery: Traditional) and in The Legal 500 (Private Client: Trusts and Probate), as well as being recommended in both directories in tax and pensions. Emily advises beneficiaries, trustees and personal representatives and her client base includes many traditional family trusts, trusts created in relation to successful family businesses and offshore trusts. In her spare time, Emily is a student and tutor of pure mathematics, an energetic reader of German newspapers and co-parent to a beautiful cocker spaniel.

Michael Ashdown (Co-Editor)

Michael's practice encompasses all aspects of trusts, probate and estates, and related tax and professional negligence matters, together with pension schemes and commercial trusts and fiduciaries, both in England and offshore. His experience encompasses advising, drafting trust documents, and litigating, in relation to offshore trusts and cross-border estates as well as domestic matters. He is often instructed as sole counsel by trustees, beneficiaries and personal representatives, on both contentious and advisory matters (including those with a foreign element) and regularly appears before the High Court, but also has substantial experience of acting as a mediation advocate. Prior to coming to the Bar, he spent six years as a trusts law academic, as Fellow & Tutor

in law at Somerville College, Oxford, and author of *Trustee Decision-Making: the Rule in Re Hastings-Bass.* He is also one of the general editors and authors of the forthcoming new edition of *Thomas on Powers.* Michael is ranked as a Rising Star in The Legal 500 2021 (Private Client: Trusts and Probate) and is described as having *'extraordinary technical knowledge and a keen eye for detail – he has an exceptional understanding of trust law in particular and is able to grasp and advise upon extremely complex matters quickly.'* He is also ranked as a Leading Junior in The Legal 500 2021 (Offshore).

Brian Green QC (Head of Chambers)

Brian is widely recognised as one of the leading silks at the Chancery Bar. He has been Chambers & Partners' Chancery QC of the Year and the Society of Trust and Estate Practitioners' Barrister of the Year, and is consistently star and top rated in Chambers & Partners and The Legal 500 directories. He has appeared as Lawyer of the Week in The Times and has been featured as one of the "Top 50 lawyers" in the UK by The Sunday Times. Equally recognised and recommended for contentious and non-contentious work, and UK and offshore work, his cases involve private and commercial trusts, complex pensions issues, and estates and revenue related planning. Chambers & Partners 2022 describes Brian as *"the Rolls-Royce of the Chancery Bar". "He is a leading trusts expert in the offshore world"* and *"his ability to take command of very complex cases and lead a judge through it is second to none".* The Legal 500 2022 says he is *"a genius and brilliant in all respects… a joy to work with".*

Robert Ham QC

Robert has a litigation and advisory practice, largely related to trust law. It covers not only traditional private client work, and associated tax law, but also pension schemes together with professional negligence in those fields. He handles both contentious and non-contentious matters, and in England a judge has called him a *"leading expert in the law of trusts".* He has appeared in trust

cases all over the world, from Borneo to the BVI. He is a bencher of the Middle Temple and was formerly a Deputy High Court Judge. The Legal 500 2022 says Robert *"provides real gravitas to any case"* and that *"his technical ability is matched by his approachability"*. Chambers & Partners 2022 describes him as a *"top-notch trusts silk"*; he is *"fantastically knowledgeable and provides very clear and concrete advice on trust and other matters"*.

Michael Furness QC

Michael has extensive experience of litigating contentious trust disputes in many jurisdictions. He is accustomed to working with families in dispute with a view to devising litigation and negotiating strategies which offer the best chance of a successful resolution from the client's point of view. Ideally such disputes will end in a compromise, which will usually need to be blessed by the Court. However, on occasion the issues need to be litigated at trial. At that point Michael can draw upon his extensive trial experience in a range of jurisdictions, not just in trust matters but in commercial litigation as well, in particular in occupational pensions, tax and related professional negligence. The Legal 500 2022 describes Michael as *"simply superb"* and and *"outstanding technician – absolutely unparalleled technical knowledge, he is someone judges listen to"*. Chambers & Partners 2022 notes that he provides *"first-class advice"*.

Gilead Cooper QC

Gilead has appeared in many high-profile cases in recent years, both in the UK and abroad. He receives praise for "his ability 'to pull rabbits out of hats' in fiendishly difficult cases" (HNW Guide), and is consistently recommended in the major legal directories. Gilead specialises in complex, high-value disputes, often involving allegations of fraud, breaches of trust and fiduciary duties, and professional negligence. He also has "a notable specialism in matters involving art and antiquities" (Chambers & Partners). He has been involved in a number

of restitution claims before the Spoliation Panel, and often advises and represents major national museums and galleries.

Paul Newman QC

Paul has a litigation and advisory practice concentrating on financial and private client disputes, most notably pensions, financial services and trusts. A substantial proportion of his practice also involves advising on and acting in liability and negligence disputes involving professionals. Paul has considerable experience acting in Private and Commercial Trust matters. His experience in this area dates back to his early years in practice working on cases relating to Lloyds Names' Premium Trust Deeds. Paul's expertise includes advising and acting on trust matters, both in the UK and overseas, particularly Jersey and the Caribbean, involving disputes concerning the role of protectors, claims by beneficiaries and the role and duties of trustees. Paul has recently acted for a very high profile overseas-resident businessman in connection with a dispute relating to several family trusts, and for one of the professional trustees in the long-running litigation involving the Blenkinsopp estate in Northumberland: *Howell v Lees-Millais*.

Simon Atkinson

Simon has a specialist trusts and estates practice. He is frequently instructed in his own right, although he also acts as junior counsel in more substantial disputes. He undertakes a mixture of contentious and non-contentious work, both onshore and offshore. His instructions span the whole spectrum of Chambers' work including: advising trustees in relation to the administration of a trust (including charitable trusts as well as commercial and private trusts), appearing as sole and junior counsel in breach of trust claims and claims challenging trustees' decision-making generally, acting in probate disputes and Inheritance Act claims and advising in relation to TOLATA claims and family trust disputes. Simon is also instructed in traditional private client work, including

advising upon and drafting trust deeds and related documentation, advising upon estate administration and non-contentious probate matters and discrete tax issues connected with such matters.

Elizabeth Houghton

Elizabeth's practice is focused on complex trusts litigation, often with an international element. She frequently advises both trustees and beneficiaries on contentious and non-contentious trust issues. Elizabeth enjoys all aspects of private client work. Recent cases include acting for the successful appellant in *Ravendark v Rotenberg* (led by Jonathan Seitler QC), a matrimonial case in the Court of Appeal involving resulting and constructive trusts. She has recently acted for a number of offshore trustees in different cases involving allegations of sham, some led and some in her own right. She also acts for offshore trustees in an ongoing and complex forced heirship dispute, and has recently acted in several trusts and divorce cases. Elizabeth has extensive experience in multi-jurisdictional trust litigation, and is familiar and comfortable with the challenges posed by cross-jurisdictional disputes. She was ranked as a Leading Junior for Offshore work by the Legal 500 UK Bar in 2021.

Jamie Holmes

Jamie acts and advises as sole counsel and as a junior on contentious and non-contentious trust, will and probate matters, often in cases involving allegations of fraud or dishonesty, and has experience acting in cases with a multi-jurisdictional or offshore element, complex trust or corporate structures, or in the enforcement or asset recovery context. He has been ranked as a "Rising Star" in both the Legal 500 2021 and 2022 for offshore work, in which he has been described as "*A supremely bright junior, [who] leaves no point unconsidered.*" and "*Exceptionally hard working and a real pleasure to work with, highly responsive and astute, and tactically very good.*" Jamie spent a month in late 2018 on secondment to Ogier's offices in the Cayman Islands

where he worked with Rachael Reynolds QC and her team on a number of contentious trust matters. He acts for the claimants in on-going complex, multi-jurisdictional probate proceedings as part of a team of juniors led by Elspeth Talbot Rice QC. Recent instructions as sole counsel include advising and drafting as to the perpetuities and accumulations consequences of the variation of a Jersey trust, and to appear for the primary respondent-beneficiary to *Beddoe* proceedings brought by the interim administrators of an estate.

Jia Wei Lee

Jia Wei has a burgeoning commercial chancery practice, spanning Chambers' main practice areas. His practice presently involves a wide range of both contentious and advisory work, and he is comfortable being instructed as part of a team, or in his own right. Jia Wei taught and examined undergraduate courses in trusts law at the University of Cambridge and University College London. He is currently developing a wide trusts and probate practice. He is also a contributor to the chapter on professional trusteeship in the *Professional Negligence and Liability* (Simpson ed.). Jia Wei has recently advised trustees of a multi-million dollar Guernsey settlement as to any claims in restitution, misrepresentation, breach of trust or mistake that may lie against the beneficiary's guardian, and has advised and drafted a counterclaim in professional negligence proceedings arising out of the Royal Court's refusal in 2018 to reconstitute a sizeable trust fund notwithstanding a finding that the trustees had acted in breach of trust.

Daniel Petrides

Daniel is developing a diverse commercial chancery practice spanning all of Chambers' core practice areas. He frequently appears as sole counsel in both the High Court and the County Court, as well as retaining a focus on drafting and advisory work. Many of his cases have an international dimension, and he

has experience of ADR procedures including arbitration. Equally comfortable acting alone or as part of a larger team. Daniel's private client practice spans both contentious and non-contentious matters. He also retains an interest in the intersection between the law of trusts and other areas of law. Recent experience includes advising in relation to a claim for breach of trust against trustees based in the Isle of Man, the payability of SDLT by public bodies entering into leases and proceedings against the executor of a will.

Lemuel Lucan-Wilson

Lemuel has gained a wide experience of Chambers' key practice areas and is developing a broad commercial chancery practice. He has recently acted as junior counsel (led by Jonathan Hilliard QC) advising a beneficiary of an UHNW multi-jurisdictional trust in overseas proceedings brought by the trustee due to unprecedented geo-political circumstances. He also has experience of advising parties to prospective TOLATA proceedings. Lemuel joined Chambers in September 2020 upon successful completion of his pupillage in which he gained a wide variety of experience across Chambers' key areas of practice such as trusts, property, insolvency, company law and commercial disputes. Lemuel is happy to be instructed as part of a larger counsel team, or on his own, and has experience of litigation in both roles. Prior to joining chambers, Lemuel worked as a paralegal assisting with matrimonial finance cases, and cohabitation disputes, particularly those involving trusts.

Ram Lakshman

Ram joined Chambers in September 2021 upon successful completion of his pupillage. He is building a broad practice across all of Chambers' core practice areas, including trusts, property, pensions, insolvency, company law and commercial disputes. Ram obtained a First Class law degree from the University of Oxford and went on to obtain a Distinction in the BCL. He received prizes for achieving the best results in his year in five separate modules (including both

commercial law and trusts) as well as the best overall results across the law moderations exams. He also won the University's largest undergraduate mooting competition. Prior to coming to the bar, Ram also taught and examined the law of trusts at two Oxford colleges.

Defensive advising strategies for legal professionals

Commentary by Emily Campbell, 18th March 2021

Over a series of short articles, I intend to examine ways in which legal advisers in the field of trusts and tax can methodically minimise risk in the way that they advise. This first piece examines how we have got to where we are.

The solicitors profession has longer experience of professional negligence actions against it than the Bar. The liability of a solicitor was established beyond doubt by the time of the decision in *Nocton v Lord Ashburton* in 1914[1]. By contrast, the liability of the Bar was established relatively late. Perhaps the earliest instance of an action against a barrister is the 1792 case of *Fell v Brown*[2]. It was an action for negligent pleading, and it failed on a point of principle, Lord Kenyon commenting that *"he believed this action was the first, and hoped it would be the last, of the kind"*. In subsequent decisions, reliance was placed on a decision of 1860[3], so that a barrister was immune from action even for paperwork until 1967[4], when the immunity was limited to court work, being wholly abolished only in 2002.

This background may have informed the Bar's traditional style of advising, which was often confident and cryptic. Two anecdotes illustrate the point. The first

[1] [1914] AC 932.
[2] (1792) Peake 131.
[3] *Swinfen v Lord Chelmesford* (1860) 5 H. & N. 890.
[4] *Rondel v Worsely* [1967] 1 AC 191.

relates to the late William OAJ Danckwerts KC (father of well-known judge). Of him, JD Casswell recalled[5]:

> *"It was [in a solicitor's office in Essex Street] that I first learnt the value to a barrister of a clear, logical mind going immediately to the kernel of a problem and ignoring all extraneous matters: I had drafted long, detailed instructions for an opinion by [him], on an intricate local government law case and I waited anxiously to receive the document which stated his considered views. I was somewhat disconcerted on the return of the papers to find that his opinion was as follows:*
>
> *(1) No.*
>
> *(2) No.*
>
> *D*".

The second relates to FE Smith (later the Earl of Birkenhead LC). As recorded in *FE Smith, First Earl of Birkenhead*[6], Smith was called to the Savoy hotel in London on urgent legal business, where he encountered a stack of papers nearly four feet high. He was required to advise by nine o'clock the following morning. He ordered a bottle of champagne and two dozen oysters, working all night. The following morning he gave his opinion (correctly, as it transpired): "*There is no answer to this action for libel, and the damages must be enormous.*"

Old habits die hard, and even to this day there are those who simply answer the question posed, state their opinion confidently and do not engage in any further analysis of what this means to the client in terms of risk or how that risk might be mitigated. I can imagine that in the past, once the great man had opined, it would have been considered bad form to ask: "*But what if you are wrong?*", postulating as it did the unthinkable: the great man was fallible! Can you imagine?!!

[5] *A Lance for Liberty*, Harrap (1961).
[6] By John Campbell, Pimlico (1983).

The world is changing. In everyday life, the dimensions of risk have unfolded like the petals of a flower. Clients now want to know: *"But how sure are you?"; "Can you put a figure on that?"; "What are the consequences for me if your opinion is wrong, if a Court disagrees"; "How can I provide against the risk?"; "What risk is it reasonable for me to take?"; "What would you do in my position?".*

This series of articles will be in the following instalments:-

(1) What you learn from practising in the field of professional negligence;

(2) Know your client; and

(3) Risk bargaining between adviser and client.

Watch this space...

Defensive Advising Strategies 1: What you learn from practising in the field of professional negligence

Commentary by Emily Campbell, 13th May 2021

Relatively speaking, barristers usually have rather broad practices. Even if (like me) a significant part of their practice is concerned with advisory work and drafting, barristers are often also engaged on various litigious matters relating to their underlying area of expertise, including professional negligence claims. By contrast, despite exposure to a variety of areas of practice whilst training, the organisation of many firms of solicitors can often have the effect that private client solicitors know little of litigation. For example, I once saw a draft witness statement prepared by a private client solicitor, where the parties in the heading were referred to separately in each capacity - as with a deed. And it is particularly problematic that private client lawyers often do not know very much about the field of professional negligence.

Limitation periods - be aware!

One significant matter relates to limitation periods. On a number of occasions, solicitors have come to me following the discovery of a problem with a trust – say an error in a draft deed. I might be asked to advise on whether the deed can be rectified or set aside. I am often not explicitly asked about any related professional negligence claim, but the first thing I would look at is whether any limitation period is about to expire. Whatever the questions set out in my instructions or the actual scope of my duty of care, I do not want to find out a limitation period has lapsed on my watch. Nor will those instructing me be very happy if I fail to help them dodge the bullet.

Some private client solicitors - and tax accountants can be added to this - have very little appreciation of limitation periods. There may be a vague sense that you have three years from finding out about the error, which is better than nothing but is in any event an oversimplified approach to section 14A of the Limitation Act 1980. Even so, who wants to have to try to rely on section 14A, if they can start their claim within six years of accrual (accrual being a nuanced concept)? And there are many solicitors who are wholly unaware of the 15-year longstop provision in section 14B.

I would advocate that all private client solicitors should familiarise themselves with the law of limitation as it applies to professional negligence claims, and that placed firmly on the checklist when considering how to remedy an error in a trust is the question of whether there might be an associated professional negligence claim and when this might need to be protected (by standstill agreement or protective claim form).

Such an approach should also help a solicitor to flag up whether the firm might have a conflict of interest. Was the firm involved in the error in some way? Sitting on a problem caused by the firm may feel like a good idea at the time, especially whilst it is being investigated whether the damage can be mitigated, but it may well just make things a lot worse for everyone. The client might subsequently be able to rely on section 32 of the Limitation Act 1980 (deliberate concealment) and the firm's professional indemnity insurers may be able to accrue defences (e.g. failure to notify or even dishonesty). An allegation of deliberate concealment is also likely very damaging to a professional's reputation compared with simply making a mistake.

Scope of retainer – not a magic bullet

Another point I would suggest is that, although the terms of the retainer may be carefully limited, a solicitor is aware of the duties which can arise if something untoward is noticed in the course of advising on something else. The solicitor may not be able to just turn a blind eye to it rather than pointing out to the client

that there is an issue, even if it is an issue upon which advice is needed from someone else.

Although in *Midland Bank v Hett, Stubbs & Kemp*[7], Oliver J stated: *"… the court must beware of imposing upon solicitors … duties which go beyond the scope of what they are requested and undertake to do … the duty is directly related to the confines of the retainer…"*, the Court of Appeal of New Zealand in *Gilbert v Shanahan*[8], which is mentioned approvingly in *Jackson & Powell on Professional Liability*[9], stated: *"Solicitors' duties are governed by the scope of their retainer, but it would be unreasonable and artificial to define that scope by reference only to the client's express instructions. Matters which fairly and reasonably arise in the course of carrying out those instructions must be regarded as coming within the scope of the retainer."*

There is certainly arguably a duty on a solicitor (or other professional) to point out to the client anything outside the scope of the retainer which does or would to a reasonable similar professional *"jump off the page"*. So, best practice is not to seek complete solace in the express terms of the retainer. I also often think that, where a solicitor or other professional has an ongoing role in relation to the client, he or she may have a duty to ensure that the client *"has all their beans in a row"* – that is to say that the professional has ensured that the client is told that they need certain types of advice from others (e.g. tax or foreign law advice). I have pleaded and successfully settled claims on both these bases.

Causation – a final tip

If a client regrets a transaction, it is very easy for that client to nit-pick the advice they were given and allege that if only they had been told such-and-such, they would not have entered into it. The solicitor may know or suspect that this allegation of causation is false, but it is surprisingly difficult to contradict a client's

[7] [1979] Ch 384 at 402-403.
[8] [1988] 3 NZLR 528.
[9] (8th ed) at [11-169]

own word on this without evidence. Advice is usually formulated in a way that focuses on the points which the solicitor believes at the time – perhaps following various conversations - are material to the client, rather than listing a whole lot of peripheral points, and I would not suggest that it should be otherwise. However, it is important that a solicitor records in as much detail as possible what the client says at the time is and – perhaps most importantly - is not regarded as important.

Defensive Advising Strategies 2: Know Your Client

Commentary by Emily Campbell, 22nd July 2021

With a history in the world of financial services regulation, *"know your customer/client"* or *"KYC"* is a cornerstone of professional practice. What does it mean for legal professionals? In this instalment of my series on defensive advising strategies, I consider three aspects of KYC which are particularly relevant to lawyers, with an emphasis on the interface between solicitors and other professionals and the barristers they instruct. This perspective is based on my own experience as a practitioner and raises issues which crop up relatively frequently.

Identifying and managing conflicts of interest

Firms of solicitors and accountants can develop long-standing relationships with particular families or groups of companies in a way that barristers do not. It can therefore be difficult for, say, a firm of private client solicitors to identify at any particular time which individuals the firm is acting for. It is accordingly not always easy to ensure that conflicts of interest are properly identified and managed, sending off a client to obtain independent legal advice where appropriate.

The situation is brought into sharp focus when Counsel is instructed. For some reason, at least a third of the instructions I receive from private client solicitors outside of the context of litigation do not in the Instructions expressly identify on whose behalf they are given. I then have to follow this up politely (because asking directly who the client is can sound like a stupid question!) through the clerks. Money Laundering documents, if supplied, might implicitly answer the question, but why play *"guess the client"*? Once, my clerk came back to me after a conversation with a solicitor about some new instructions, in which he had

asked for clarification on who I was acting for, and he relayed to me what the solicitor has said to him: *"Why does she need to know?"*

Sometimes, a barrister may be told simply that they are instructed on behalf of the *"current trustees"*, without it being clarified who these are. It is important to know the identity of the exact individuals, so that it can be seen whether they may also be beneficiaries who are proposing to take action in relation to which they have a conflict of interest and where there may be problems with the equitable rules – a point which is often overlooked.

The worrying thing is that if those instructing are not clear about who they are acting for, they may not be clear in their own minds and the critical point of monitoring for potential conflicts of interest will not have been addressed. I would add that focus on the identity of trustees may help to identify circumstances where those trustees have not been validly appointed.

Money Laundering

Large firms of city solicitors usually have entire compliance departments, who are able to develop and implement money laundering checks as required by law as well as identifying and managing conflicts of interest. For smaller legal practices, including barristers' Chambers, attending to money laundering can be a struggle. It has recently been reported that the SRA has begun a money laundering clampdown, with several firms being fined[10]. So, it is clear that KYC failures can have serious professional consequences.

Barristers in the tax and private client field often perform work within the scope of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017. Specifically, barristers can fall within the definition of *"independent legal professional"* within Regulation 12(1) when they are involved in transactional advice, such as preparing trust documents. The words in Regulation 12(1): *"a person participates in a*

[10] Law Society Gazette, 23 June 2021.

transaction by assisting in the planning or execution of the transaction or otherwise acting for or on behalf of a client in the transaction" are wide. Alternatively, barristers can fall within the definition of *"tax adviser"* in Regulation 11(d). It is understood that the Bar Council's Money Laundering Working Group continues to work with other professional bodies to seek to improve the way anti-money laundering legislation applies to barristers, and as such the experience of the Revenue Bar Association (whose members are frequently subject to the legislation because they are within the definition of "tax adviser") is of considerable use to them.

The inclusion of this section is really a plea to those instructing barristers, whether they are solicitors or other professionals such as accountants, to have greater awareness of the obligations which fall on barristers under current legislation. Many firms permit Counsel to rely on that firm's own certificate that it has met its obligations. Whether that will be sufficient going forward cannot be assumed, particularly where enhanced customer due diligence is appropriate. In any event, it is notable that some firms have in recent months ceased to provide such certificates, but in circumstances where they have no formal alternative arrangements in place to administer client due diligence for the purposes of instructing Counsel. Barristers, of course, ordinarily have no direct contact with the lay client, other than through the instructing firm. How this unsatisfactory state of affairs has come about, I do not know, but I have a suspicion that it is aided and abetted by wide-spread non-compliance by some barristers. It is invidious for a barrister, who is only trying to do the right thing, to be seen to be throwing up unexpected obstacles when accepting instructions, when what the barrister really wants to do is to appear helpful and welcoming to the instructing party and their clients. Money laundering compliance is a reality of professional life and it benefits all involved to ensure that the rules are satisfied in full and without too much trouble.

Assessing the client's attitude to risk

Good knowledge of the identity of the client and their circumstances is critical to assessing their attitude to risk and therefore giving best advice. This is especially so in the risky area of litigation. A commercial client may be prepared to litigate on the basis of a pure cost-benefit analysis. But a private client in a probate action, by contrast, may not be able to afford to lose. It interests me how risk is presented to clients and how different ways of presenting essentially the same advice can have a very different impact on different types of client.

Consider the following ways of presenting advice to a client who is considering challenging the validity of a parent's Will under which they take no benefit, in all cases where the client has been made aware (at least in the small print) that the loser usually pays the winner's costs:-

Approach 1: You have a 60% chance of winning;

Approach 2: You have a 40% chance of losing;

Approach 3: You have a 70% chance of winning, provided your lead witness performs well; and

Approach 4: In litigation like this, before even looking at any weaknesses in your particular case, you have at least a 30% chance of losing, bearing your own costs (at least £50k) and paying the other side's costs (also at least £50k – i.e. at total costs bill of £100k).

Approaches 1 to 2 are materially identical, but different personality types may react differently to the presentation – a scientific study of this phenomenon would be very interesting! It would also be interesting to know how independent lawyers really are when presenting their advice, given that certain presentations are – as they must at least subconsciously know – more likely to generate further professional fees than others.

Approach 3 is common in barristers' opinions, but is not very satisfactory. You should not give a percentage chance at a midpoint during the analysis, with

further caveats unaccounted for in the figure: it gives undue prominence to the 70% figure. I have used Approach 4 where I suspect that a client cannot afford to litigate. It can get through to a client when they are their most receptive to rational arguments, i.e. before the emotional interference which an analysis of the strengths and weaknesses of their particular case in a family dispute sets in.

Conclusion

So, KYC is key to the process of advising clients effectively. It helps ensure compliance, the identification and management of conflicts of interest and suitable advice in relation to risk. It is not always given the prominence it deserves, although it is to be noted that paragraph 8.1 of the 2018 SRA Code of Conduct for Solicitors, RELs and RFLs in terms requires that when solicitors are providing services to the public or a section of the public they identify who they are acting for in relation to any matter. On the subject of risk, the next part in this series will focus on a phenomenon which I term "risk bargaining", so watch this space!

Defensive Advising Strategies 3: Risk Bargaining Between Adviser and Client

Commentary by Emily Campbell, 7th October 2021

What is risk bargaining?

The concept of *"risk bargaining"* is a not a term of art. However, I am sure that risk bargaining, as I describe it below, is something well-known to experienced professional advisers in their dealings with their clients.

In an ideal world, a client would ask for advice in clear terms and the adviser would give only the advice sought. The distribution of risk in the transaction would be clear: The client would bear the risks associated with the advice being non-negligently wrong and in relation to those matters upon which advice was not sought; and the adviser and their professional indemnity insurers would bear the risk that the advice was negligently wrong. In the real world, matters are often not so straight-forward. In particular, experience shows that each party to the transaction often tries to push the boundaries to explore how much risk can be transferred to the other, often without the latter noticing. This process is a trap for the unwary or inexperienced. I will give some examples of how this happens in practice, before going on to consider how an adviser or client can best deal with these situations. If the reader has any good anecdotes or tips on this theme, I would love to hear them!

The client who doesn't want advice

Early on in my practice, I was somewhat surprised to encounter clients who appeared to be already quite clear in their view of the answer to the question that was being posed. Why did they want the advice if they already felt they knew the answer? In some situations, e.g. family disputes, this could be put down

to the underlying issue provoking strong emotions. However, other situations were not so obvious, such as where the client was acting in a professional capacity. I came to conclude that there was a category of client who was only interested in taking advantage of your insurance policy. A strong indicator here might be advice being sought of very junior counsel for a modest fee in circumstances where the matter at hand was worth a lot of money. A client who was genuinely interested in obtaining advice might be expected to instruct an experienced counsel and to pay a substantial sum for it.

The adviser who doesn't want to advise

There are undoubtedly some legal advisers, both solicitors and counsel, who like to sit on the fence. Failing to express a view may feel like the safe option for an adviser, who can simply lay out the competing arguments, without running the risk of backing the wrong horse. Whether this approach is actually less likely to result in a claim against the adviser is doubtful, and it is certainly not what the client is paying for. I have, nonetheless, read opinions of counsel, which only effectively say *"on the one hand and on the other"*, the punchline being missing. I was once told by a senior barrister that, during his pupillage, his pupil master (later a judge) had said to him after a con, twinkle in eye, *"Did you notice, I didn't actually give any advice?!"*.

The client who wants to get extra advice without paying for it

There are situations where clients want to try to get their adviser *"on the hook"* in case some aspect goes wrong, without expressly asking for advice on the subject and certainly without wanting to pay for it or (in some cases) to run the risk that the *adviser* will tell them something they don't want to hear. Put simply, the client wants to try to get a bit more bang for their buck.

As a barrister, I have come across numerous examples. One is The Passive-Aggressive E-mail: For example, *"Enclosed copy report FYI"*, where it is not anticipated that you will be expected to read the report. Another is a conversation which might go something like this:-

Barrister: *"You are not actually asking me to advise on XXX, though?"*

Solicitor: *"No"*. Pregnant pause. *"Not unless you think there is something wrong with it."*

Yet another example is The Enhanced Fee Quote. For example, *"Counsel is asked to consider the proposed tax planning, and if she thinks it will work, to provide an estimate for advising on the same and drafting the necessary document, so that those instructing can seek approval of the same from our client"*.

I was once advising the defendant in a professional negligence case. The client claimed the adviser should have given certain tax advice, given he was aware of a particular aspect, although tax advice had not been expressly sought. The heads of loss included the cost of the claimant obtaining tax advice for the purposes of formulating the claim: £500k. The advice on the same topic which it was contending had been implicitly within the adviser's duty of care. Advice for which the client had not in fact paid the adviser. Hardly credible, but very stressful for the adviser when having to defend the claim, nonetheless.

How to deal with advisers or clients who are risk bargaining

Dealing with advisers who are avoiding expressing a view is simple once detected. The client is the paying party and can address the problem directly – the challenge for the client (and this might include a solicitor instructing a barrister) is noticing when it is happening in the first place, especially if the adviser is charismatic and/or charming and/or good at waffle.

Dealing with clients who are risk bargaining is trickier and requires some tact. Where one is dealing with a client who is not actually looking for advice, the temptation is to say: *"If you wish to take a policy of insurance with my insurers, kindly do so directly!".* The reality is that the adviser will not say this, but when not expressing the desired view, the client will probably just make the adviser's life a misery for a bit before trying to get out of paying the fees and the adviser will regret ever having taken the matter on. The trick here is therefore to spot what is happening early on, before too much work has been done, and at a stage where it is easier to have a frank conversation with the client.

Finally, as concerns clients who are trying to get that extra bit of advice, there is good scope to deal with the situation politely but firmly. Asking the client whether they would like a fee quote for advice on the particular aspect will often do the job!

Time to act: the UK Trust Register and the Fifth Money Laundering Directive

Commentary by Michael Ashdown, 19th January 2021

HMRC's registration requirements for trusts may not have been the focus of many practitioners' attention during 2020, but the 31 January 2021 deadline for Trusts Registration Service notifications is likely to focus minds not just on annual compliance requirements, but also on the myriad of changes that have taken place over the past year.

This change has been driven by the EU's Fifth Money Laundering Directive, the effect of which has (despite Brexit) been brought into English law by the Money Laundering and Terrorist Financing (Amendment) (EU Exit) Regulations 2020, most of which came into force on 6 October 2020 ("**2020 Regulations**"). The regulations amend the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (SI 2017/692) ("**2017 Regulations**") and significantly expand the scope of HMRC's Trust Registration Service.

Four features of the new regime are particularly important to note.

First, the scope of the obligation to register has been made much wider. Under the 2017 Regulations, only "taxable relevant trusts" had to register – in the case of UK trusts, this meant express trusts which were liable to pay UK taxes (including income tax, CGT, IHT, and SDLT). Under the 2020 Regulations, all UK express trusts will have to be registered, unless explicitly exempted (regulation

45ZA of the 2017 Regulations as amended). However, trustees will have until at least 10 March 2022 to register such trusts (regulation 45AZ(5)).

Second, the exemptions in schedule 3A to the 2017 Regulations (as amended) are narrow and potentially complex. Some are obvious and straightforward enough, such as for registered pension schemes, and most UK charitable trusts. Some are more problematic, such as the exemption for will trusts, but only as long as the trusts do not continue for more than two years after the testator's death (although the statutory intestacy trusts are wholly exempt). Some will be more complicated to apply. For example, death benefit trusts for minors are not exempt as a class, though some historic death benefit trusts arising by will or intestacy may fall within the exemption in clause 16 for trusts for bereaved minors (see further Emily Campbell's September 2020 note on death benefit trusts). Bare trusts and nominee arrangements are not exempted at all, so assets held for a minor by his or her parent would (unless falling within another exemption) require registration.

Third, the obligation to provide information to HMRC has been made more onerous. UK trusts (and some non-UK trusts too – see regulations 45(10B) and (10C) of the 2017 Regulations as amended) are now required to provide more information about beneficial owners, and potential beneficiaries mentioned in letters of wishes. The information required under the 2017 Regulations already included a beneficiary's name, NI number or address, date of birth, and role in relation to the trust. Trustees remain obliged to provide this information about beneficiaries, together with information about the trust itself, by 31 January after the tax year in which they first became liable to UK taxes, and to notify HMRC of any changes (or to confirm that there are none) by the same deadline each year. However, the information requirement is to be extended (from March 2022) to encompass each beneficiary's countries of residence and nationality and, perhaps most importantly, the "nature and extent" of their beneficial interest.

Fourth, the deadlines for providing information will in future be much shorter. At present trustees generally have until at least 5 October following the end of the tax year (where the trust has a new liability to CGT or income tax liability) and 31 January (in all other cases). From 9 February 2022, information will have to be provided within 30 days of creation of the trust, or of a change to the registered information requiring notification.

As the UK moves towards increasingly comprehensive registration of trusts, there will be much for trusts and tax practitioners to digest and act upon to ensure compliance with the extended regulatory regime. With just over a year until almost all trusts become registrable and more extensive information has to be provided, it is certainly time to get started.

You raise me up; but for how much longer? CGT and the uplift on death

Commentary by Simon Atkinson, 1st February 2021

The cost of the ongoing pandemic to the Exchequer is well documented. Late last year the OBR[11] forecast that over £270bn would be borrowed by the government in the nine months to December 2020, which figure could increase to over £390bn by the end of March 2021. In these straitened times (and as the spring budget hoves into view) we can anticipate that the government will scrutinise closely the opportunities for increasing the tax take. Given the recommendations made in OTS's recent first report into CGT, CGT could prove a ripe target for HMRC's plucking.

It is true that CGT provides relatively modest revenue. In the 2017-18 tax year £9bn of CGT was paid on reported net gains of £58.9bn, of which £0.6bn was paid by trustees on £3.5bn of trust gains (the remainder was paid by 265,000 individual taxpayers).[12] This compares with £180bn of Income Tax paid by 31.2m individual taxpayers over the same period. For those who pay CGT, however, the amounts can be substantial. The mean CGT liability was £32,000. This compared with a mean Income Tax liability of £5,800.

[11] See ONS's announcement of 22 January 2021 on public sector finances, UK: December 2020 (accessed at https://www.ons.gov.uk/economy/governmentpublicsectorandtaxes/publicsectorfinance/bulletins/publicsectorfinances/december2020)

[12] Office of Tax Simplification, Capital Gains Tax review – first report: Simplifying by design, p. 20 (accessed at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/935073/Capital_Gains_Tax_stage_1_report_-_Nov_2020_-_web_copy.pdf)

The most headline worthy recommendations of OTS's report concerned the interaction between the CGT and Income Tax regimes, and the possible closer alignment of rates of tax. One option obviously available to the Chancellor would be to raise CGT Rates to be in closer alignment with Income Tax rates. Another option clearly would be to reduce the annual exempt amount for CGT (which presently stands at £12,300).

OTS's report contains other noteworthy recommendations, however, which, if implemented, could have very profound impacts for taxpayers and advisors alike. One such recommendation is the possible abolition of the capital gains uplift on death either in respect of assets which benefit from favourable IHT treatment only, or more widely on all the assets in the estate.

To recap, at the moment, when a person dies there is no CGT liability on any unrealised gains on those assets. Further, the person who inherits those assets benefits because the base cost of each asset is deemed for the purposes of CGT to be the market value of that asset on the date of death. Accordingly, any previous gain (or loss) which accrued to, but was not realised by, the deceased is wiped out.

OTS points out the uplift has a 'lock in' effect. 66% of respondents to OTS's survey said that CGT was a barrier to passing on assets. Asset holders are often advised to retain the asset until death because of the CGT benefits. This can lead to stagnation of a business, say, while at the same results in differential treatment between *inter vivos* disposals and testamentary disposals.

The OTS proposes as a possible alternative a 'no gain no loss' approach, whereby a recipient is treated as acquiring the assets at the historic base cost of the person who has died. The OTS acknowledges that there would be administrative challenges with such an approach. That seems something of an understatement. How is an executor to value the gain to an asset held for a long time where perhaps records of acquisition might not have been kept by

the deceased? To mitigate this problem OTS proposes a rebasing of assets to, say, 2000. Given that is now 21 years ago, however, it can be expected that this will still leave a plethora of difficulties in practice: many individuals will have acquired assets after that date and not have kept records at this remove of time. Headaches for executors (and beneficiaries) loom.

There is also the obvious risk, adverted to by the OTS, that abolition of the uplift on death might result in a new distortion in favour of lifetime transfers. Two possible mechanisms are proposed to counter this: either the value of the estate for IHT purposes could be reduced by the amount of CGT that would have been charged assuming the asset had been sold on death; or alternatively the full amount of IHT could be paid but with a CGT credit applied against eventual sale of the asset.

One wonders how realistic these mitigation strategies are either practically or as a matter of principle. Increasing the immediate IHT burden raises obvious cash flow problems for estates, while the application of credit creates accountancy and future planning issues for beneficiaries.

As a matter of principle, it would be tempting for the government simply to avoid this issue entirely by treating IHT and CGT on death quite separately (as the OTS adverts is indeed a possibility), resulting in an increase to the overall tax burden. Yet IHT is already one of the most reviled taxes. Taxpayers structure their affairs to try to minimise their estate's liability to this tax.

If CGT were to be payable on the assets held at death (whether immediately by the estate or upon a subsequent disposal by the estate or the beneficiaries), one rather expects that asset holders will during their lifetimes focus even more energetically on the sort of estate planning that is already such a rich stream of work for private client advisors. Where assets will not benefit from IHT relief, there will be yet more incentive for those holding assets to try to divest themselves of assets more than 7 years before death. Where assets will

continue to benefit from IHT relief, then a testator will have to weigh up the IHT savings against the liability to CGT. Given the current rates of CGT liability, and the fact that CGT is charged on gain not asset value, it would presumably often be in the interests of asset holders to retain the assets. Depending on the rates of CGT and/or the domicile of the testator, however, *inter vivos* disposal might be preferable.

All of these issues would need to be grappled with if the uplift on death for CGT purposes was to be abolished or restricted. Accordingly, while the treatment of capital gains on death is an issue which is ripe for reconsideration, its technicality and nuance with IHT render it rather unlikely in this author's opinion that any concrete announcements will be made in the forthcoming Budget. It is perhaps more likely that eye-catching changes to the rates of CGT and/or reductions to annual allowances will be made. Nevertheless, expect to see the Exchequer scrutinising closely the uplift on death in these troubled economic times.

Postscript: *Since publishing the above we have of course had the spring budget, followed by the announcement in September 2021 of the new Health and Social Care Levy, and then in November 2021 the Chancellor's response to the OTS's reports on IHT and CGT. As to the last of these, while a handful of modest recommendations made by the OTS have been accepted by the government, none of the more headline-catching recommendations regarding CGT was accepted. In particular, with the increase to the tax base provided by the new Health and Social Care levy, the current government has expressed no interest in increasing the tax take from CGT by raising the current rates so as to align more close with income tax rates or by reducing the annual allowance or by abolishing the uplift on death. Given the current political winds, this author does not expect any of these to rear their heads again for consideration in the current parliamentary term. Should, however, there be a change of government at the next election, and should the government's finances remain*

burdened by the impacts of the coronavirus pandemic, CGT reform could provide a target too good to refuse for an incoming, cash-strapped government.

The modern family – the interpretation of children, spouses and civil partners in older trust deeds

Commentary by Lemuel Lucan-Wilson, 17th February 2021

Postscript: *the writer is aware that following this article, several cases have been heard involving the question of wider "benefit", and the decision in Hand, including involving members of Wilberforce Chambers. There are not, at the time of writing, any further reported cases or decisions, but clearly this will be an area of significant development over the next few years.*

It has become cliché to say that modern familial arrangements are vastly different now to how they were 50 years ago, but that does not make it any less true. In 2019, almost half of all births were outside of a marriage or civil-partnership[13], and 3,440 children were adopted from local authority care[14]. With the passage of the Marriage (Same-Sex Couples) Act 2013, and the Civil Partnership (Opposite Sex Couples) Regulations 2019, the range of relationships that can be legally recognised, and the form that this recognition takes are also very different. Given the age of many settlements, traditional definitions of "children" or "spouse" can cause real difficulties.

Children

Historically, the common law definition of "children" did not include adopted or illegitimate children. These was addressed by the Adoption Act 1976 and the

[13] Office for National Statistics, Birth Characteristics 16 November 2020; table 1.
[14] Children looked after in England including adoptions, 10 December 2020,

Family Law Reform Act 1987, but the changes were purely prospective– they did not apply to previous dispositions or settlements. The treatment of previous settlements is an issue which has plagued the courts for a significant time but was addressed relatively recently in *Hand υ George*[15]. There, it was held that the limitation in the Adoption Act to solely future settlements meant that adopted children's rights to respect of their private and family life and non-discrimination had been infringed. Rose J also concluded that whilst recognition of these rights from the date of the Human Rights Act 1998 taking effect might reduce the *value* of the vested interests held by certain grandchildren, some fluctuation had always been foreseeable from the birth of the settlement since there could have been any number of grandchildren, and that the right to non-discrimination overrode any arguments that could be raised on the grounds of the non-adopted grandchildren's property rights under Article 1 of the First Protocol to the ECHR.

A similar decision was taken regarding illegitimate children in *Re Druce's Settlement Trusts*[16]. Although this was a decision relating to the Court's powers to approve a suggested course of action under s48 Administration of Justice Act 1985 rather than a substantive decision, HHJ Keyser QC expressed his view that the reasoning in *Hand* could apply to the Family Law Reform Act 1987. Thus, the rights of illegitimate children could be protected the same way as in *Hand;* nor would retrospectivity be a problem since the "expanded" definition would only apply to dispositions made after the HRA came into effect. Although this may seem settled, *Hand* has yet to be considered in the Court of Appeal, and there is considerable academic disagreement on it; as commented in *PQ υ RS*[17], *"there is doubt as to whether it will be followed".*

[15] [2017] Ch 449.
[16] [2019] EWHC 3701 (Ch).
[17] [2019] EWHC 1643 (Ch) at [24]

Spouses and Civil Partners

For married couples, similar reasoning might be possible: the Marriage (Same-Sex Couples) Act has as a similar provision relating to its purely prospective effect (Sch 4, Pt 1 para 1). There is, however, no similar provision in the Civil Partnerships Regulations, and the position remains unclear, although there are also no pre-existing common law rules which could serve to reduce the scope of the definition. In that absence, it may be that the court would be simply forced to make a declaration of incompatibility, which would do little to protect rights in question. The issue regarding marriages and civil partnerships is yet to be considered on any level.

Other developments

Alongside challenges to the definitions themselves, there is a growing trend of variation of trusts applications dealing with these issues. The courts are, on the whole, generally willing to approve variations that enlarge the class of beneficiaries to include adopted and illegitimate children, as well as same-sex spouses and opposite sex civil partners, given the societal changes which have taken place, see *Duke of Somerset v Fitzgerald*[18] and *PQ v RS* itself. Whilst a variation requires "benefit", it is now settled that this benefit does not have to be financial and can include the "moral" benefit of fairness that comes with the knowledge that due respect is being given to relationships which modern society now recognises as worthy of it.

Conclusion

This is an uncertain area likely to be the result of further decisions once more contested applications are made. Clearly, in some cases the definition of "children", "spouse" or "civil partner" is likely to make a significant difference to the outcome, and it will be interesting to see if the reasoning *Hand* stands the test of time.

[18] [2019] EWHC 726 (Ch)

Budget 2021: an overview

Commentary by Jia Wei Lee, 4th March 2021

The Chancellor of the Exchequer delivered his Budget yesterday afternoon. A number of tax measures were introduced to ease the financial burden on businesses and individuals. Some were simply extensions of short-term tax relief, including a holiday on business rates for 3 months, maintaining the £500,000 SDLT nil-rate band, and a freeze on alcohol and fuel duties. In this update, I focus on some longer-term measures designed to promote a post-Covid rebound.

Corporation tax

The Chancellor announced a significant increase in corporation tax beginning April 2023. At the same time, he introduced capital allowances intended to encourage investment, the most eye-catching of which is a 2-year "super-deduction", which provides first-year allowances of 130% of the value of plant or machinery acquired after 1 April 2021. A lower, 50% allowance applies for special rate assets. The draft legislation makes it clear that certain expenditures will be excluded from the allowance, however, including for expenditure on second-hand assets and expenditures on contracts entered into before 3 March 2021 (even if the expenditures themselves are incurred after April 2021).

Personal tax

Tax thresholds for CGT, IHT and income tax have been frozen in the tax years up to and including 2025/26:

a. the income tax personal allowance is set at £12,570, and the basic rate limit at £37,7000;
b. the nil-rate band for inheritance tax continues at £325,000, and the residence nil-rate band at £175,000;
c. the CGT Annual Exempt Amount remains at £12,300 for individuals, personal representatives, and some types of trusts for disabled people, and at £6,150 for trustees of most settlements;
d. the standard lifetime allowance for pensions is fixed at £1,073,100.

Outside of these threshold freezes, there were few significant changes to personal taxes. This is unsurprising, given the Conservative commitment to a "triple tax lock". Nonetheless, there are two issues to note in respect of CGT.

First, there had been speculation about whether the Budget would introduce sweeping changes to the CGT regime. This followed the Office of Tax Simplification's report, published in November 2020, which recommended aligning CGT rates with income tax rates, the abolition of the CGT uplift on death, and the abolition of business asset disposal relief in favour of a more retirement-focused regime (trust and private client practitioners interested in the impact of these changes can read this excellent primer by my colleague Emily Campbell). However, the 2021 Budget was probably too early to expect any changes. The OTS is set to publish a further report dealing with technical and administrative issues in 2022, and one can expect any major policy shifts to follow its publication.

Second, the Finance Bill 2021 will contain a minor amendment to s167(2) of the Taxation of Chargeable Gains Act 1992. The current legislation disapplies entitlement to business gift hold-over relief where the transferee is a person not resident in the UK, and connected with the person making the disposal. The Finance Bill 2021 will include a clarification ensuring that the rule applies where

the transferor controls the transferee. Draft legislation is yet to be published, but on its face, any changes will only address a relatively minor ambiguity.

Tax administration and anti-avoidance

The Budget document sets out a number of policies for tackling tax avoidance and non-compliance. Very few represent substantial policy moves. Of most significance is the announcement that a new penalty regime will be introduced for VAT and Income Tax Self-Assessment. The new regime imposes a financial penalty of £200 only after the taxpayer reaches a points threshold (which varies depending on the taxpayer's submission frequency).

Two other anti-avoidance measures are given brief mention, but represent a portent of things to come. First, in July 2020, the government proposed a series of changes to the DOTAS legislation, which would have given HMRC expanded powers to issue information to suspected promoters of tax avoidance schemes, and widen the definition of a "promoter" to capture individuals utilising corporate structures. The government did not, in the 2021 Budget, commit to implementing this proposal, but has published a summary of responses to its consultation. These proposed changes to the DOTAS regime are potentially extensive, and worth keeping an eye on.

Second, despite significant public criticism of HMRC's continued use of the loan charge legislation to pursue claims against individuals for historic use of disguised remuneration schemes, the Budget commits to providing HMRC resources to continue its compliance work on the loan charge. It is clear that notwithstanding the negative press, HMRC will not relent in its enforcement of these highly controversial retrospective charges.

Conclusion

The draft legislation effecting the policies announced by the Chancellor today will be published over the next few days, and will no doubt reward careful

reading. In the meantime, the tax measures introduced by the 2021 Budget, while themselves relatively modest, may foreshadow more structural reforms in the months and years to come. We may learn more on 23 March 2021, when the Government publishes a number of tax consultations.

An enlightened approach to taxpayer confidentiality: The story of the first income tax

Commentary by Paul Newman QC, 6th April 2021

Confidentiality is a fundamental concept at the heart of the modern taxation system. The need to strike a balance between the taxpayer's right to privacy and the requirement of HMRC to carry out its functions has been the subject of much legislation and litigation.[19] There has been an explosion in the exchange of information between revenue authorities of different countries and British politicians have for years been under pressure to emulate the tradition of American presidents publishing their tax returns. But there is nothing new under the sun: the introduction of income tax in Britain at the end of the 18th century was dominated by concerns over taxpayer confidentiality, which led to measures being developed which have left their mark on today's income tax system.

One of the principal objections to the introduction of the mandatory payment of income tax by Pitt the Younger in 1799[20] was the fear that it would lead to the public disclosure of taxpayers' financial circumstances. This went against

[19] For recent examples, see ss.18-23 of the Commissioners for Revenue and Customs Act 2005 (duties of HMRC in relation to taxpayer information); *R (Ingenious Media Holdings plc and another) v Revenue and Customs Commissioners* [2016] 1 WLR 4164 (scope of exception to taxpayer confidentiality in s.18(2) of the 2005 Act).
[20] Duties on Income Act 1799.

the grain of the independently minded Briton, seeking to protect their property from the consequences of revolution in France and rebellion in Ireland, and to safeguard their standing in society and in commerce: in an age of patronage and credit, what a person appeared to be was as important as what they actually were. Pitt accordingly built into the first income tax legislation provisions designed to maintain confidentiality – or 'secrecy' as it was then known.

The need to protect the taxpayer from disclosure led to the tax being implemented by self-assessment, only requiring the taxpayer to declare a sum which represented not less than 10% of their income;[21] and the declaration was to be made to a body known as the Commissioners,[22] who were persons of wealth, integrity and independence rather than mere officials, in whom the taxpayer could safely repose their trust, particularly as the Commissioners were required to swear an oath of secrecy.[23]

To provide further protection for commercial income, a specialist tribunal was established to deal with their affairs: the Commercial Commissioners, chosen by and from the commercial community. The system of self-assessment here, too, was designed to ensure secrecy: any person or company engaged in any trade or manufacture could be assessed to tax, either as to their entire income or as to that part arising from trade, declared in a sealed statement in a prescribed form which meant that the Commissioners would not know what part of the income derived from trading and non-trading sources.[24] Similarly, the examination of witnesses by these Commissioners could only take place before those who had sworn the oath of secrecy.[25] The final assessments were recorded in confidential books, and the taxpayer received a certificate with a

[21] *Ibid,* s.2.
[22] *Ibid,* s.11.
[23] *Ibid,* s.22.
[24] *Ibid,* ss.95-97.
[25] *Ibid,* s.98.

number or letter code, which they would use, instead of their names, when paying the tax directly to the Bank of England.[26]

It appeared that these provisions materially contributed to the failure of the new tax to yield as much as had been expected. The inadequacy of the returns and the lack of resources of the Commercial Commissioners to investigate under-declared income led to less than £1.2m being paid in tax from commercial incomes, compared to the hoped-for £4m. This led to Pitt introducing a Bill in 1800 which would have reversed many of the secrecy provisions, but it was defeated in Parliament.

Pitt's successor, Addington, proposed and passed legislation in 1803[27] which removed the general declaration and the anonymous treatment of commercial income, whilst at the same time introducing two measures which together satisfied popular demand for secrecy. The first was the system requiring each taxpayer to return their income under different schedules according to the source of their income, so that each return was to be made to a different official in charge of a particular schedule, which ensured that no single civil servant would know the whole of the taxpayer's financial situation. The vestiges of the schedular system were an explicit feature of the Income and Corporation Taxes Act 1988 (albeit that separate returns have long been abolished), and are implicitly continued in the legislation which has overtaken it. The second was the deduction of tax at source, directed at the origin of the payment rather than the receipt of income, which permitted the taxpayer not to disclose the details of the transaction in issue or their own financial circumstances. Of course, there are many examples today of the deduction of tax at source, one being the PAYE system.

[26] *Ibid,* ss.99,106,108.
[27] Property Duty Act 1803

These practical measures went a long way to achieving the goal of confidentiality which was regarded as vital to the proper working of the taxation system, and in the process introduced the concepts of the schedular system and the deduction of tax at source, which have long been features of the tax system. Whilst Addington, and not Pitt, has been called the author of modern income tax,[28] one should not overlook the importance of the desire for taxpayers to maintain confidentiality over their financial affairs.[29]

[28] A. Farnsworth, *Addington: the Author of the Modern Income Tax* (London, 1951).
[29] For further reading, see Chantal Stebbings, *The Budget of 1798: Legislative Provision for Secrecy in Income Taxation* [1998] BTR 651; J.F. Avery Jones, *The Sources of Addington's Income Tax* in Harris & De Cogan (eds.) *Studies in the History of Tax Law,* vol.7 (London, 2015), ch.1.

Benefiting non-objects with powers of appointment: Squaring the circle?

Commentary by Emily Campbell, 15th April 2021

Private client practitioners will be familiar with the principle that powers of advancement can be used to create new powers (notwithstanding the rule against delegation) and to benefit non-objects (notwithstanding the rules on excess of power) if it is for the benefit of an object to do so. Powers of advancement are generally thought of as being the statutory power of advancement (as usually extended to the whole share rather than the half) and other powers of trustees "to apply" capital which are expressed to be exercised for the benefit of an object.

The principle that a power of advancement may be used to benefit a non-object if it is for the benefit of an object is often referred to as the *"Re Clore"* principle[30]. Practitioners were reminded of the need to adopt an approach to the principle which was not overly liberal in the judgment of Hart J in the later case of *X v A*[31]. A similar approach to the word "benefit" has been taken in the context of applications under the Variation of Trusts Act 1958[32].

[30] After *Re Clore* [1966] 1 WLR 955. In relation to the possibility of delegation, see *Pilkington v IRC* [1964] AC 612.
[31] [2005] EWHC 2706 (Ch). See generally on this *Lewin on Trusts* (20 ed), paras 32-015 to 32-016.
[32] See *Re CL* [1969] 1 Ch 587.

These days, powers of appointment in many trusts (even older ones) contain an express power to delegate by the creation of new powers, which has reduced the need for debate on delegation. But what of the possibility of benefiting non-objects? Can they be used in a similar way to powers of advancement where they are expressed to be exercisable *"for the benefit of"* an object? Or is there some magic in the verb *"to apply"* rather than *"to appoint"*. There is a surprising dearth of authority on this[33].

In my 2002 book, *"Changing the Terms of Trusts"*[34], I commented that I was not in favour of drawing a distinction between powers of appointment and powers of advancement but commented that the practitioner should exercise caution owing to the absence of any positive authority saying that it was permissible to use a power of appointment to benefit non-objects. *Lewin on Trusts*[35] states (in fairly uncompromising terms) that *"A power to appoint in favour of one or both of A and B is plainly not well exercised by an appointment in favour of C or of A, B and C … Unless the appointment is in substance to an object and is made with the consent of that object".* There is a useful discussion in *Thomas on Powers*[36], which (after identifying the lack of clear authority on the position) concludes: *"…while acknowledging the differences between the two kinds of power … there may be little logic or sense in distinguishing between them on the basis of a narrow point of construction".*

Against this backdrop, I would draw readers' attention to the 2019 case of *PQ v RS*[37], which is a decision of Chief Master Marsh. In that case, there was doubt as to whether illegitimate children were capable of benefiting from a power of

[33] A case which might suggest that the use of the words *"for the benefit of the beneficiaries"* do not make any difference to the limited scope of a power of appointment is *Re Hunter's Will Trusts* [1963] Ch 372 (see per Cross J at 380).
[34] *Butterworths Lexis Nexis*, at [2.31].
[35] (20 ed), para 30-019 and note 67. In relation to the proviso, see 30-075. See also 30-022 (in relation to express powers to make transfers to other settlements).
[36] (2nd ed), para 9.51 to 9.58.
[37] [2019] EWHC 1643 (Ch).

appointment and this was relevant in relation to a child V, whose birth pre-dated her parents' marriage. It was desired to exercise the power so as to ensure that illegitimate, legitimated and adopted children could benefit and to make provision for V. The exercise was to be made on the basis that it was for the benefit of the undoubted objects RS (V's father) and TU (a sibling of RS). The Court authorised the exercise of power, having been addressed on the differences between powers of appointment and powers of advancement. There was no authority to rule out the proposed exercise of power. The Master found that the word "appoint" was not uncommon and was wide and the power in question was widely drafted.

This is an important case, which is deserving of greater attention than it has received. It is submitted that it is correct. Whether, however, it is a clear enough authority to enable practitioners to adopt the approach which it suggests without the comfort of a Court Order is less clear.

Trusts taxation reform: not today please!

Commentary by Michael Ashdown, 29th April 2021

What are the principles underpinning the taxation of trusts, and does the law as it stands align with them? These were the two broad questions asked by the HMRC consultation document on the taxation of trusts, published back in November 2018, and following from the government's commitment at the autumn 2017 budget to consult on *"how to make the taxation of trusts simpler, fairer, and more transparent"*. The consultation developed these ideas, asking a mixture of very general questions (e.g. about possible measures to "enhance transparency", and the use of non-resident trusts), and very specific ones (e.g. on the income tax treatment of trust management expenses, the consequences of transactions being declared void, and the simplification of vulnerable beneficiary trusts).

Although the consultation closed in January 2019, HMRC's summary of consultation responses was only recently made available (in March 2021). The consultees were primarily tax advisers (mostly accountants and solicitors), umbrella groups for such advisers (e.g. the Chancery Bar Association) or their clients (e.g. Historic Houses) but also included campaigning organisations (e.g. Church Action for Tax Justice).

At the highest level of generality, there was broad support for the principles of transparency, fairness and neutrality, and simplicity. Whilst doubtless gratifying for HMRC to be told that tax and trusts practitioners and others endorse their approach, I do wonder whether they really expected anyone in 2019 to respond

that they were looking for unfair advantages for their clients and therefore would prefer a complex and opaque system? Some respondents did at least point out that the long-term use of trusts across generations also requires a focus on certainty and stability, though it is hard to imagine this being popular with any government which enjoys the ability to tinker with the tax system from year to year.

On transparency, HMRC was careful to ask about appetite for further measures, rather than about the popularity of the burdens imposed by the current regime (including the Trust Registration Service, and the DOTAS requirements). Although practitioner respondents were of the firm view that enough is enough, HMRC are surely more likely to invoke in future the views of *"respondents outside of the trust and taxation professions"* who were more concerned that *"trusts used for illicit purposes can sometimes prove too elusive to track down and prosecute those behind them"*.

A similar split was seen in relation to the use of non-UK trusts. HMRC asked about the use of non-resident trusts *"for avoidance and evasion"*. Practitioners thought that existing money laundering and professional conduct rules made this rare – presumably they had unlawful evasion primarily in mind, rather than the kind of lawful mitigation that HMRC might seek to stigmatise as "avoidance". Non-practitioner respondents were apparently more concerned with high-profile cases where investigations *"were said to have been hampered because of the inclusion of a trust within wider complex structures"*. Again, it is easy to imagine HMRC keeping this response in its pocket to wheel out when a justification for future legislation is needed.

On points of detail, there were no surprises: the IHT regime treats lifetime transfers into trust (which are immediately chargeable) unfairly by comparison with outright gifts (which are PETs), but 6% is about right for the ten-year anniversary charge for "relevant property". The existing rules on private

residence relief, trust management expenses, and transactions declared void were broadly supported. However, the special regimes for disabled person trusts and bereaved minor trusts were considered too complex, and capable of producing unfairness.

HMRC's stated conclusion – that *"responses did not indicate a desire for comprehensive reform of trusts at this stage"* – is arguably correct as far as it goes, but incomplete. After all, the tenor of the practitioner responses on transparency appears to have been that most would welcome a rolling back of existing regulation – but HMRC was only consulting on appetite for further measures. On the technical detail, HMRC was primarily consulting on aspects of the law where they might take the view that trusts are treated too generously – so maintaining the status quo is about as good a result as practitioner consultees could hope for. If HMRC had asked whether the Finance Act 2006 should be repealed they might have received rather more radical responses! As it is, this consultation can now be filed for no further action, and the law governing the taxation of trusts will continue to develop piecemeal though Finance Acts and judicial decisions.

Let's talk about trusts law: A look back at the development of trusts law and what has changed over the years.

Emily Campbell **interviews** Brian Green QC, 27th May 2021

Emily: So, this is the first of our 'Let's talk about trusts' talks and, Brian, I'm going to be interviewing you looking back at the past, and in the next one, you're going to be interviewing me and we're going to be looking at the future. So, can you tell us how did you come to specialise in private client work?

Brian: It's the usual combination of accident and good fortune. The accident was I had taken a lectureship at the LSE when I left University, where they got me teaching land law and trusts, and the good fortune is that that enabled me to go to the Bar with the princely salary I was receiving from the LSE. I did a land law pupillage and a trusts pupillage, and the trusts pupillage was the second one, and it was with Robert Walker. It gelled and I found myself practising in the area in which I had actually been teaching, and that gelled too, and I absolutely loved every moment of it.

Emily: Being Robert Walker's pupil must have been really interesting.

Brian: It was absolutely fascinating and I learned an awful lot from him, and I'd like to think that many of the things that he taught me I still put into practice today. An almost obsessive fascination with precision in drafting and also in expression when it comes to written work, which was a real hallmark of the way in which he practised. As it happens, he was able to bring such precision to bear using a dictating machine. I have to use more laborious processes. Buthe was an inspirational teacher and a very good colleague and friend as it turned out.

Emily: Did you have any other pupil masters?

Brian: Well, my first pupil master in land law was Nick Patten. He was the land law pupil master in a different set.

Emily: A distinguished set of pupil masters.

Brian: Yes, he went on to become a Court of Appeal Judge. They were both fantastic pupil masters, great people and they became great good friends.

Emily: Through you?

Brian: [Confusion at being at cross-purposes – after a pause!] Oh no, no I'm not sure they were very good friends themselves, though that's not in any way casting aspersions. No, they were very good friends to me, and I became very good friends with them at the time.

Emily: So, over the years, you must have seen some really substantial changes in private client practice?

Brian: I think so. When I first came to the Bar, private client was regarded as, as it were, "the Rolls Royce" of Chancery practice, rightly or wrongly, and many of the most distinguished practitioners, and many of the most distinguished and most respected judges were private client practitioners. The Chancery Bench had a whole series of specialist private client judges. They obviously could turn their hands to other things, but they were very noted for their [private client] expertise. Other Chancery Judges would very willingly seek out private client cases because they enjoyed them, they thought it was interesting, they thought it was the sort of work that they wanted to be somehow associated with. Why that was I couldn't really tell you. I think part of it may have been snobbery, the notion that private client was to do with landed estates and that made it rather interesting for people to have an association with it, but whatever the reason it was very, very fashionable in those days. These days, it's quite different, as you know.

Emily: Yes, and do you think that they enjoyed being able to have a role in policy? For example, is it good for young people to have too much money too soon? Is it permissible to help avoid taxes?

Brian: They certainly had views on those things, certainly so far as regards young people and very often they would obviously be thinking about their own children, nephews, nieces or children of friends. In the early days, certainly it was the case that there was a certain reluctance to postpone vesting for the benefit of children too far. It's not like today, where you can put a 125-year

perpetuity period in on the basis [that property] is never going to vest in anyone [in particular] ever?

Emily: They never like cutting people down to life interests?

Brian: Well, they saw the point that it was undesirable for property to vest in such a way as to crystallise a capital gains tax charge, which was the bug bear for a long period. Then it became possible to hold over as against that possibility and then it ceased to be possible to hold over again. But so far as regards tax, of course, in the early years, even before Ramsey and after Ramsey, when it came to variations, judges always thought tax avoidance was a jolly good thing.

Emily: And what about the composition of the Bench these days?

Brian: Absolutely Emily, that's the other side of the coin. You look at the Chancery Bench these days and it's got a composition of fantastic practitioners, obviously, but there's not a single private client judge. Everything has changed. The last private client judge was probably Nick Warren. Whether there will ever be another one again, one wonders because it's been the policy of Chancellors, probably since Terence Etherton, to move private client business across to Masters. They do variations these days, which judges used to do.

Emily: And what about economic circumstances, do you think different Governments have influenced private client work?

Brian: I don't think that they have directly influenced it. Indirectly they may have affected the composition of the work. Post-Thatcher, there's new money and new money came to eclipse old money in terms of the size of the trusts that you were dealing with and the objectives with which trusts were being set up and the objectives which variations and the re-direction of the interests under some of the trusts were designed to achieve. So that's one indirect effect, the other indirect effect, I suppose, is that Governments have had aspirations as regards the taxation of trusts and, in their different approaches to the taxation of trusts, they probably made private client work a good deal less interesting than it was in earlier days because, certainly the taxation of trusts in the UK now is essentially transparent, it's not very interesting at all.

Emily: And what about technology, how have you seen that change over the years?

Brian: The world has changed completely, hasn't it? I suppose the two major developments that I've seen in my practical life are firstly STEP, which has been an astonishing organisation, growing from very small beginnings to what it is now.

Emily: Worldwide.

Brian: Worldwide, absolutely, and the education that it provides to people and the resources and the know-how are absolutely fantastic. A wonderful thing. Corresponding to that, on perhaps a slightly more informal basis, are online search engines, which have revolutionised practice, and also the availability of precedents online means that perhaps some of the know-how that individual practitioners used to be able to pedal is no longer required, or at least no longer cherished, in the same way as it was.

Emily: And last question: what's the most unusual piece of work you've done?

Brian: It's a good job that you gave me notice of that question so that I can answer it! The most unusual piece of work that I've done is that, when I was a senior junior, I was approached by the London Rubber Company, who were the then owners of Durex, who had a particular problem, and the problem was that Richard Branson and the Virgin brand were attempting to enter the market over which they had total domination and they were seeking to prevent this. You may ask, what does that have to do with me? Well, the answer is that the pitch of Virgin was that a percentage of the profits that came from the condom sales were going to go to charity - this was a pitch on the side of the box. The London Rubber Company was sceptical in relation to this pitch and it actually commissioned me to settle a letter to Virgin to put them to proof as to what their actual intentions were. Well, to cut a long story short the net result was a nine-month delay in the marketing of Virgin condoms and I can only imagine, I speculate, that the children born as a result are probably approaching the age of 30 now, and it's all down to me!

Emily: Thank you very much, Brian.

Let's talk about trusts law: A discussion on the future of trusts law and upcoming trends

Brian Green QC **interviews** Emily Campbell, 10th June 2021

Brian: This is the second 'Let's talk about trusts' video. The last video, as you may have seen, was Emily interviewing me about developments in trusts in the past and now I'm going to be interviewing Emily about what the future holds. Emily, you were my pupil back in 1996 and it's been a pleasure to see the flourishing practice in the years since. What do you see as the prospects for private client in the coming years?

Emily: Okay, so I think we're going to see major changes in the make-up of the legal profession and the Bench. I think we're going to see changes in the shape of the family and the trusts that people set up for them. I think we're going to see big economic changes in the country that are going to influence the range of clients we see and their objectives, and I think we'll see a lot more technological development.

Brian: And so as regards the legal profession and the Bench what do you think is going to happen there?

Emily: Well, I think that the legal profession is going to become even more diverse especially at senior levels, which I certainly think is a good thing! Post-Covid working practice is going to make working life more flexible and I think that's going to encourage a more diverse workforce. You've mentioned yourself the lack of specialist judges in the private client area and the expectation it can all be dealt with by Masters and we've obviously seen a number of recent examples, variations and so on. I think it's unsustainable to think that Masters

can deal with all of these technical types of cases. We need some specialists and one possibility that occurred to me was that they could recruit from the ranks of senior solicitors. One thing that I've seen changing is more in-house specialism in solicitors' firms in this area and I think that that would be a good place to look.

Brian: That's a very, very good idea I think. Lawrence Collins was a very distinguished solicitor, wasn't he? He progressed to the Bench and added greatly to the law. And you say that you think that the change in the nature of family is going to have an effect on private client in the coming years, what do you mean by that?

Emily: It interests me that we've got these 125-year perpetuity periods, and we presume to think we can dictate how families or people are going to live in 125 years' time. I wouldn't presume to say how life is going to look in 125 years' time, other than to say it's going to be very different from how it is now. I mean, 125 years ago, who would have foreseen same-sex marriages, "test tube" babies and so on. An example I saw online is that, in California, a polyamorous throuple, three fathers, have been put on a birth certificate and I think that shows that we just don't know the way people are going to live in the future and we don't really know what the options are going to be for creating babies in the future, what with scientific developments and so on. I think the whole idea of dynastic wealth is rather outmoded. It has this sort of patriarchal feel to it, which is bound to change, but what I would say is that if we get rid of surnames, let's hope we don't all become part of a dystopian society, where people are just known by numbers!

Brian: Well, you can imagine that would make some difficulty in defining beneficial classes! The other thought I had actually, when you said polyamorous throuples, was how that would work in terms of stirpital devolution of property, who's the heads of stocks!?

Emily: Quite, quite!

Brian: The third thing that you mentioned was how economic changes are actually going to impact on private client. What do you think there, what's going on there?

Emily: The way I see it is you've got property inflation, a high proportion of family home is going to be inherited with relatively low rates of inheritance tax. I feel we are facing a divided society, where some people will have a foot on the property ladder through inheritance, and other people won't have a chance even if they work really hard, and I think a society of 50% haves and 50% have nots is a new phenomenon and I don't really know what kind of effect that would have on the dynamic in society, but I think that's it's going to change

attitudes. I think attitudes towards inheritance, which at the moment are fairly positive, might become more negative and I think that for better or worse we are likely, in the next couple of decades, to see something like a wealth tax.

Brian: Right and you mentioned technological changes and the effect that those may have on private client, how do you see that developing?

Emily: Well, we have had recently, because of Covid, an experiment with remote witnessing wills and I think that that measure may well be made permanent. I think it goes on until January 2022 at the moment? I would expect it to be rolled out eventually to deeds, remote witnessing of deeds, and in fact I expect to see paper instruments got rid of altogether. A bit like we are becoming cashless, we may become deedless, and it would help people not to lose things, I suppose. Do you get deeds and they've been treated as counterparts? You've got one signature and there's never any expectation that you will see all the signatures, and it's not quite satisfactory.

Brian: That's true, it's far from satisfactory, but there's a kind of abiding assumption that all the other counterparts must exist and have been signed and that's completely neutralised, hasn't it, the importance of the signature? Because everyone assumes, yes, the formalities must have been complied with.

Emily: And do you think people are downloading just the signature page and, I mean, is that actually valid? So I think all of these questions can be dealt with if they have some sort of remote system. It could be also registering legal documents in some sort of bank of documents. Anyway, there's that and I think we'll see huge steps towards the use of artificial intelligence in decision making. I was looking at an HMRC decision tool, I think it's a "check employment status" tool the other day and it's quite rudimentary, but in principle something like that would be extremely useful, and so I think that we are going to see a lot more of that sort of thing in the future.

Brian: Well how would that work in a private client context?

Emily: Well I think it's going to be quite helpful for tax. Anything where you've got a complex system of rules that can take you through the algorithm and certainly look at key indicators, especially things that the Revenue regard as relevant, which is you know what the clients want to know – how the Revenue's going to see something.

Brian: And you spoke a bit earlier about, you know, how do we know where anyone's going to be in a 125 years' time, which is obviously absolutely right and it's funny, isn't it, the way there's been these abiding assumption in relation to trusts from the year dot almost or since, as it were, perpetuity

periods were introduced that you can prescribe for such long periods. Of course, in 125 years' time there probably won't be perpetuity periods one imagines, that the world will probably have changed completely, won't it, as you say?

Emily: Yes, I mean 125 years was presumably judged as being slightly longer than any life in being could be but 125 years is presumably not going to be length of life in being; in 125 years' time, you'll get people who are, I don't know, limping on with some robotic method.

Brian: And artificial intelligence!

Emily: Yes.

Brian: Do you look forward with optimism to the next 25 years in private client?

Emily: Well, I'm hoping that more people are going to develop the speciality and continue the tradition at the Bar of having that knowledge, which I think helps. Even if you're not doing private client practice, it's always good to have a grounding in trusts and tax.

Brian: Hear, hear. I couldn't agree more.

New world order for trusts?: The meaning of 'prior interest' in section 32

Commentary by Robert Ham QC, 24th June 2021

The statutory power of advancement conferred by section 32 of the Trustee Act 1925 is a valuable tool for trustees given them as an aid to enable trust property to be used for the fullest benefit of a beneficiary with an interest in capital: see *Lord Inglewood v IRC* [1983] 1 WLR 366, 372–3 per Fox LJ, a judgment which contains a useful catalogue of ways in which the power has been exercised.[38]

But the power is not unrestricted:

- Unless section 69(2) it applies only if and so far only as a contrary intention is not expressed in the trust instrument and takes effect subject to the terms of that instrument.
- For trusts created before October 2014 it is limited to one half, unless extended by the trust instrument.
- Paragraph (c) of the proviso to section 32(1) says that no advance may be made that would prejudice any person entitled to any prior life or other interest, whether vested or contingent, unless that person is in existence and of full age and consents in writing to the advance.

In *Womble Bond Dickinson Trust Corporation v Glenn* [2021] EWHC 624 (Ch) Master Clark had to consider how that last restriction applied to a trust in

[38] The judgment downplays the flexibility given by section 32, understandably in the context of a Revenue argument that the statutory power was inconsistent with accumulation and maintenance trust status. But the cases referred to by Fox LJ speak for themselves.

Hancock v Watson [1902] AC 14 form, that is to say a trust where there there is an absolute gift to a beneficiary in the first instance and trusts are engrafted or imposed on the interest of the beneficiary. In such cases, the court reconciles the two inconsistent dispositions made by the absolute gift, on one hand, and by the engrafted trusts, on the other hand, by imputing to the settlor an intention to modify the absolute gift only in so far as necessary to give effect to the engrafted trusts. If the engrafted trusts fail for any reason, the result is that the initial absolute gift stands except to the extent to which it is cut down in the events which have actually happened.

The *Hancock v Watson* principle does not apply where there is no separate initial gift but merely a gift coupled with a series of limitations over so as to form (as it is put) one system of trusts – for example .where a trust fund is divided into shares, each held on trust for a beneficiary for life, with remainder to his/her children and an ultimate trust for the beneficiary if the share is not wholly disposed of, without an initial trust of the share for the beneficiary.

In the *Womble Bond Dickinson* case, there was a trust in favour of a class of beneficiaries made up of the settlor's present and future grandchildren contingently on attaining the age of 25 in such shares as the trustees should appoint. The next clause – which was in the form of a proviso – then laid down that the share taken by any of the beneficiaries should not vest in him or her absolutely but should be retained by the trustees (a) on trust for the beneficiary for life, and subject thereto (b) for the sons of the beneficiary in tail with remainder (c) to the beneficiary absolutely.

The trustees wished to advance capital for the benefit of grandchildren to enable them to buy homes to live in. The question was whether there was power to do so, and the Master held that they did:

(1) Much of the judgment consists of an analysis of whether the rule in *Hancock v Watson* was engaged, and the Master held that it was notwithstanding the inclusion of a trust of capital for the beneficiary in

the engrafted trusts. This was (she said) insufficient to displace the inference to be drawn from the other features of the trust deed: in her judgment this was a "belt and braces" provision by the drafter, seeking to draft provisions falling within the rule in *Hancock v Watson* or, putting it another way, the drafter was, by including the beneficiary as ultimate beneficiary, acknowledging that *Hancock v Watson* was intended to apply.

(2) The Master then held that the grandchildren had interests in capital for the purposes of section 32.

(3) Finally, she held that the interests of the unborn beneficiaries were not "prior" interests for section 32 purposes.

There can be no doubt that the grandchildren had interests in capital, but it is not clear what part (if any) the rule in *Hancock v Watson* has to play in the case of trusts where (as in this case) the engrafted trust are exhaustive and themselves contain a trust of capital for the beneficiary. The function of the rule is to reconcile two inconsistent dispositions made by (a) the absolute gift, and (b) the engrafted trusts and to determine the devolution of the trust property if the engrafted trusts fail. But here there is no inconsistency and there is no possibility of the engrafted trusts failing, given that the grandchild beneficiary has a vested interest in capital under the engrafted trusts.

Nor is it clear that the Master was right to hold that the interests of the unborns were not prior to those of the grandchildren. She treated "prior" as referring to the order in which the trust property is enjoyed, with a life interest being enjoyed before the interest in remainder and her starting point was the position if a son is born to a grandchild. This would (said the Master) cause the grandchild's absolute interest to become a life interest, limiting his or her entitlement to the income of the trust property. That interest was a "prior life interest" to that of the son, and it followed that the son's interest, even when unborn, was not prior, but subsequent, to that of the grandchild, and fell outside para (c) of the proviso.

The result is convenient, because as the Master pointed out the trustees as fiduciaries were bound to consider the interests of the unborns, but provided they have done so, and made a balanced decision, the power was there to be used.

However, as a matter of substance – and putting on one side the question whether the rule in *Hancock v Watson* applies – the interests in capital of unborn sons (and their heirs under the entails) rank ahead of the interest in capital of a grandchild. It is clear that the settlor intended capital to go to the sons of his grandchildren (and their heirs) rather than the grandchildren themselves and whether or not the interests of the sons are classified as prior interests it is suggested that the decision frustrates the intention of the settlor. The status of decisions of Masters as a matter of precedent is not clear, but whatever that may be, it would not be safe to rely on this decision in other cases without a further application to the court.

What's the point? – some questions in the interpretation of wills

Commentary by Daniel Petrides, 8th July 2021

In *Wood v Capita* [2017] UKSC 24, Lord Hodge boldly declared that "*the recent history of the common law on contractual interpretation is one of continuity rather than change*".[39] At a high level of principle this is true: the 'modern' approach formulated by Lord Hoffmann in his landmark judgment in *Investors Compensation Scheme Ltd v West Bromwich* [1996] UKHL 28; [1998] 1 W.L.R. 896 remains an authoritative summary of the exercise in which the courts are engaged when construing written instruments.[40] But the judicial implementation of that exercise in the intervening period has revealed significant differences in judicial taste, with the cases in the years immediately following *ICS* appearing to favour contextualism and purposive interpretation, while more recent decisions following *Arnold v Britton* [2015] UKSC 36 have signalled an apparent (re)turn to textualism, and a greater reluctance on the part of the courts to interfere with the bargain which the parties appear (objectively) to have concluded.

[39] [19].

[40] The court's aim is to determine "*the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract*" (*ICS* at 912).

Some types of instrument have been partially sheltered from this storm by unique considerations arising from their purpose or status.[41] Wills are not among them. In *Marley v Rawlings* [2014] UKSC 2 Lord Neuberger – building on his own earlier judgment in *RSPCA v Sharp* [2010] EWCA Civ 1474 – held that, subject to the intervention of statute, the approach to construing wills should be the same as that adopted by the courts when interpreting commercial contracts. But given the apparent flux in the prevailing approach to interpreting commercial contracts, can this really be the case in practice?

A will, being a unilateral instrument, does not represent a compromise between competing interests; its sole purpose is to express the testamentary wishes of a testator. Accordingly, it is suggested that purposive construction should have a greater role to play in the interpretation of wills than it does in the prevailing approach to interpreting bilateral contracts, where the language used is the sole record of the transitory confluence of competing intentions at the moment when the contract is executed. While certainty is of paramount importance in preventing satellite disputes which may diminish the deceased's estate and create tension between potential beneficiaries, it is surely a corollary of English law's preference for testamentary freedom that the courts should not adopt an unduly technical approach to construction which may frustrate the intentions of the testator where imperfectly expressed.

In keeping with this, the approach of both Parliament and the courts reflects a greater willingness to go behind (or beyond) the language used in the will itself, and therefore appears closer to the pre-*Arnold* approach.

The most notable example is s.21 of the Administration of Justice Act 1982, which represents a substantial departure from the approach to the construction of contracts. As is well known, s.21 permits the court, in cases of

[41] For example, Land Registry documents (*Cherry Tree Investments Limited v Landmain Limited* [2012] EWCA Civ 736), the articles of association of a company (*Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10) and pension trust deeds (*Barnardo's v Buckinghamshire* [2018] UKSC 55).

meaninglessness or ambiguity, to undertake the otherwise heretical act of using extrinsic evidence of the testator's subjective intention as an aid to construction.[42]

This frequently operates as a gateway to the controversial practice of rectification by construction. In *Marley* itself, the Lord Neuberger declined to reach a definitive view on the "*difficult question*" of whether a will could be rectified by way of construction in the way envisaged by Lord Hoffmann in *Chartbrook.*[43] However, subsequent decisions lend support to the view that this is permissible, and even desirable. So, for example, in *Slatterly v Jagger* [2015] EWHC 3976 (Ch) HHJ Hodge QC cured the mistaken omission of the identity of the beneficiary from a will by way of construction.[44]

Similarly, in *Knipe v British Racing Drivers' Motor Sport Charity* [2020] EWHC 3295 (Ch) the court was confronted by a will which purported to leave the residue of the deceased's estate to several charitable organisations, one of which was named as 'The British Racing Drivers Club Benevolent Fund'. The only difficulty was that no such charity in fact existed. On the executor's application to the court for directions, it was held that this should be construed as a reference to the British Racing Drivers' Motor Sport Charity, the benevolent arm of an unincorporated association called the British Racing Drivers' Club of which the deceased (who was a professional racing driving) had been a member for many years. The judge pithily reasoned that "*this is a simple case of construing the words in the will in the context in which the deceased used them*".[45]

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[42] The continuing prohibition on this in the contractual context was firmly upheld in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38.

[43] [22] – [23]; cf. *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 in which a reference to '13th January' in a break notice was, famously, construed as a reference to '12th January'.

[44] See [95].

[45] [15].

However, there are limits on how far the courts will go to cure ambiguity. In particular, it seems that the courts will generally be more reluctant to have recourse to the concept of 'common sense' than in cases involving professionally drafted commercial contracts. Although there is a longstanding convention that wills are construed against outcomes which would be manifestly capricious or frustrate the purposes of the will by creating a partial intestacy, the courts have also long recognised that private individuals may deal with their own property in ways that result in what may be regarded morally or financially undesirable outcomes.[46] Therefore, aside from its power to redistribute the estate under the Inheritance (Provision for Family and Dependants) Act 1975, the courts will usually refuse interfere with the testamentary freedom of the deceased by re-writing the will in a way that it considers would be fairer or more practicable.[47] Furthermore, following Lord Walker's hostility towards the suggestion that the court should rescue parties from the adverse tax consequences of their mistakes in *Pitt v Holt* [2013] UKSC 26, it also seems doubtful that the courts will resolve ambiguity in the most tax-advantageous way for the estate.

One unintended consequence of the combined effect of s.21 and the court's greater interpretative interventionism would appear to be to limit the scope for the doctrine of rectification in cases concerning wills. The power to rectify wills – which was once thought not to exist at common law – was created by s.20 of the Administration of Justice Act 1982. The power under s.20 is limited to failures in expression arising from "*clerical error*" or "*failure to understand* [the testator's] *instructions*". Interestingly in *Marley* Lord Neuberger suggested in *obiter* at [28] that, had s.20 not existed, he would have been "*minded to hold that it was, as a matter of common law, open to a judge to rectify a will in the*

[46] Although it should be noted that serious irrationality on the face of a will may be a factor casting doubt on the testator's capacity – see for example *Sharp v Adam* [2006] EWCA Civ 449.

[47] See *Illott v The Blue Cross* [2017] UKSC 17.

same way as any other document". It is not clear whether he envisaged that the doctrine would have wider application that the narrow circumstances laid down in s.20.

As is well known, *Marley* itself – in which a couple's solicitor mistakenly gave them each other's wills to sign – was resolved by way of rectification. It was held that the term "*clerical error*" should be given a wide meaning so as to capture an error of this nature. This is a fair and pragmatic outcome, but one which still leaves the statutory power considerably narrower than any common law equivalent may be. This in turn creates the risk that some cases may fall between the operation of s.21 and statutory rectification.

Take the example of *Re Butlin's Settlement Trusts* [1976] Ch 251*,* the leading case on rectification of unilateral settlements, in which the settlor had included a provision allowing the trustees to act by "*unanimous decision*", mistakenly believing that the word 'unanimous' was a synonym for 'majority'. Brightman LJ granted rectification of the trust deed due to the unilateral mistake of the settlor, but it is not clear either of the gateways for s.20 to be engaged would have allowed a similar result to be reached if the instrument in question had been a will. Furthermore, it seems unlikely that s.21would have been engaged due to the absence of ambiguity. If clear evidence of a mistake on the part of the testator (especially a lay testator drafting a will without professional advice) exists, it would seem unjust that this should not be capable of rectification; whether the courts will definitively extend the common law doctrine of rectification to cover wills remains to be seen.

Implied Revocation of Deeds of Appointment? *Equiom v Velarde*

Commentary by Elizabeth Houghton, 5th August 2021

In the recent case of *Equiom (Isle of Man) Ltd v Velarde* [2021] EWHC 1528 (Ch) it was held that a wide power of appointment contained in a will had the effect of impliedly revoking previous deeds of appointment and making a new appointment.

This case concerns the will ("the **Will**") of a Mrs Patricia Moores, who died in 2017, and a settlement created many years before by her father ("the **Settlement**"). During her lifetime Mrs Moores had a special power of appointment over property in a sub-fund of the Settlement. The power could be exercised by deeds revocable or irrevocable, or by will or codicil.

The special power of appointment over the sub-fund had been exercised twice by Mrs Moores during her lifetime. First, in 1981, Mrs Moores, appointed (with effect from her death) the sub-fund between her 3 children (Christian, Rebecca and Matthew). That appointment was expressed to be revocable by deed, will or codicil ("the **1981 Appointment**")

Secondly, in 1997, Mrs Moores revoked the 1981 Appointment and instead appointed (from and after her death) the sub-fund on trust to Christian and Rebecca, cutting out Matthew ("the **1997 Appointment**").

Mrs Moores' Will was made in 2007. Clause 7 of the Will provided (emphasis from judgment):

> *"I LEAVE DEVISE BEQUEATH AND* ***APPOINT*** *the whole of my real estate and the rest residue and remainder of my personal estate wheresoever situate and of whatsoever kind of or to which I shall be seised possessed or entitled at the date of my death* ***or over which I shall have any power of testamentary disposition whatsoever…*** *unto my children […]."*

The question for the Court was whether or not clause 7 of the Will revoked the 1997 Appointment. If it did, then the sub-fund would be shared equally between the siblings; if not, then it would be shared only between Christian and Rebecca.

The Claimant trustees took a neutral stance. Christian argued that clause 7 did not revoke the previous 1997 Appointment. Matthew argued that it did. Rebecca did not participate in the proceedings but supported Matthew's position.

The Court repeated the now well-established principles governing the interpretation of wills, and set out how those principles differ from those applicable to commercial contracts.

The Master found (para 23) that, absent the previous Appointments, clause 7 would have had the consequence of appointing the sub-fund equally between Christian, Rebecca and Matthew. The position was complicated because of those two Appointments. Both sides accepted that it was necessary for clause 7 to revoke the 1997 Appointment before a fresh appointment could take effect, but they disagreed as to whether it did effect such a revocation.

After reviewing the relevant authorities and commentary, the Master summarised the position (at para 55) as:

1. An intention to exercise a power of revocation must be apparent from the instrument.
2. A power of revocation is distinct from a power of appointment.
3. Thus the mere exercise of a power of appointment will not, without more, operate as a revocation.

4. However, a power of revocation may be exercised other than in express terms.

5. If a testamentary gift framed in general terms will fail altogether unless it is construed as entailing the exercise of a power of revocation (so as to bring within the ambit of the will the property which is the subject of such power), the instrument will be taken as an exercise of the power.

Turning to the interpretation of clause 7, the Master found that the following were relevant and admissible facts:

1. Mrs Moores was well aware of the existence of the Settlement and her powers when she made her Will.

2. Mrs Moores had no other power of appointment vested in her under other trusts. The only power was her power of appointment conferred by the Settlement.

The Master concluded that if Christian's interpretation were adopted, the relevant part of clause 7 would be meaningless. Bearing in mind the relevant factual matrix, the Master concluded that the Court should approach the Will on the basis that, so far as possible, every part of it was to have meaningful effect (para 64). He therefore concluded that clause 7 intended to revoke the 1997 Appointment and make a fresh appointment in favour of all three children equally (paras 66, 67).

Practitioners in this area might well be initially surprised at this decision, and possibly concerned to learn that a general power of appointment in a will might have the (unintentional) effect of revoking earlier appointments. However, the specific facts in this case meant that the "power" referred to in clause 7 could only be a reference to the special power of appointment held and previously exercised by the deceased. That fact coupled with the very wide words of

clause 7 brings the decision in line with established principles. The case is not authority for a broader principle that general powers of appointment in a will should generally be read as revoking previous appointments. If the words in clause 7 had been narrower, the decision in this case might well have been different.

It is understood that permission to appeal has been granted by the Master.

***Postscript**: The appeal in this case was heard by Mr Ashley Greenbank (sitting as a High Court Judge) and is reported at Equiom (IOM) v Velarde [2022] EWHC 11 (Ch). The Judge distinguished between "one power" and "two power" cases, and held (at para 77) that the Master's general conclusion – that a revocation will be implied if general words would otherwise be meaningless – went too far, and was an overreach. He agreed with Christian that it should not be assumed that the purpose of a residuary gift is to reflect a testatrix's intention to revoke prior appointments and make new ones. However, the Judge concluded that although he had reservations about the way in which the Master had expressed some of the principles, he was not convinced that the Master's decision was wrong (para 80). The appeal decision tempers and clarifies the principles applicable in cases involving a general power of appointment and issues of revocation.*

Trustee-beneficiaries: Can they have the cake and eat it too?

Commentary by Simon Atkinson, 19th August 2021

The time of cakeism is at hand, and not just in the field of UK trade negotiations. Many trustees of modern trusts find themselves both owning the trust assets and objects of the powers of appointment; legally holding the cake and with a beneficial interest in its enjoyment too.

While the prospects for trustee-beneficiaries may sound tempting, serious indigestion awaits the unwary. As trustees they are subject to fiduciary duties, including to avoid conflicts between their interests and their duties; yet as beneficiaries they are personally invested in how powers of appointment are exercised. The twin risks of scrutiny and criticism from disgruntled non-trustee beneficiaries are ever present.

What is a trustee-beneficiary to do? What steps can a trustee take properly to appoint to himself or herself a slice of the trust assets? Conversely, how can a non-trustee beneficiary impugn dubious decisions of the trustees? This eBriefing suggests some answers.

The principles

The starting point is the well-known equitable rule that a fiduciary is not entitled to put himself or herself in a position where interest and duty conflict, unless authorised under the trust instrument. This is a prophylactic rule; it exists to discourage fiduciaries from preferring their own interests over those of their beneficiaries: *Bray v Ford* [1896] AC 44. Where trustees have acted in breach

of this rule, their purported decision may be voidable at the instance of the prejudiced beneficiary (or possibly void *ab initio*): *Lewin on Trusts* (20th ed.), §46-073.

Authorisation of a conflict between interest and duty may of course be given expressly by the terms of the trust (see, e.g., Step Standard Provisions (2nd ed.), clause 9); alternatively the rule may be impliedly excluded for certain trustee-beneficiaries (e.g. where the settlor has in the trust instrument appointed a beneficiary as one of the original trustees: *Lewin*, §46-079 *et seq*).

Many private trusts will, however, not give such authorisation or provide for such exclusion. Indeed, many older private trusts will contain an express prohibition against a trustee exercising any power in such a way as would result in any of the income or capital being applied for his or her benefit.

Where there is no express or implied authorisation or exclusion of the rule, acute difficulties (or, at the very least, uncertainty) can arise for trustees. This is particularly so when they are proposing to exercise a dispositive power. While a trustee is entitled (subject to his or her usual duty to act in good faith, to consider all relevant but no irrelevant factors, etc.) to be partial in the exercise of powers of appointment and to prefer some beneficiaries over others, this does not necessarily mean that a fiduciary dispositive power can properly be exercised in favour of a person who is both an object of such a power and simultaneously a trustee: *Lewin*, §46-073 and §46-076.

What can trustees practically and pragmatically do to avoid criticism and challenge of any decisions to appoint to a trustee-beneficiary? Below are some possible routes through.

Resolving the issue (1): *"I'll just step out of the room"*

One possible workaround may be for the conflicted trustee-beneficiary simply to sit out the decision-taking process in question. This is only possible if such a mechanism is expressly provided for by the trust instrument. As a matter of

general principle, all trustees must act, and decisions must be taken unanimously. A conflicted trustee-beneficiary therefore cannot simply 'leave the room' – and the rest of the trustees cannot properly act without that conflicted trustee-beneficiary joining in the decision – unless the trust instrument allows this.

Some private settlements contain mechanisms for decisions to be taken by majority where one or more trustees is or are conflicted. In this author's experience, private settlements dating from the latter half of the twentieth century sometimes adopt such mechanisms. In these cases, the trust instrument (a) expressly prohibits a trustee from exercising powers in such a way as would or might result in a distribution being made in his or her favour but (b) also expressly authorises the taking of such a decision by the balance of the non-conflicted trustees.

In more recent settlements, however, this rather cumbersome mechanism has largely given way to standard terms which expressly authorise the taking of a unanimous decision by the trustees, which would or might benefit a conflicted trustee-beneficiary, provided that there is at least one non-conflicted or independent trustee.

Resolving the issue (2): *a pas de deux?*

For those trustees whose trust instruments do not authorise a conflict, restrict the application of the equitable rules, or otherwise provide a mechanism for dealing with a conflict, other solutions must be found. One such solution frequently alighted upon by the trustees themselves – once the existence and consequences of the conflict are appreciated – is to suggest that the conflicted trustee resign and a new non-conflicted trustee be appointed; then, so the thinking goes, the newly constituted group of trustees will be able to take the decision in question untainted by conflict.

In theory this is a perfectly acceptable solution, provided of course that the newly constituted trustee body considers the matter entirely afresh. It is this

proviso that causes difficulties in practice. Frequently, the trustees will have decided in principle, before the conflicted trustee has resigned, that they wish to make a distribution that will result in one or more of their number receiving a benefit. It is then only at that stage that the conflict is appreciated and steps are taken to replace the conflicted trustee(s); a new trustee is then appointed and shortly thereafter the trustees again resolve to make exactly the same appointment. The decision-making process can readily appear to the beneficiaries (and possibly to a court in due course) to be something of a stich-up, particularly if the newly appointed trustee is a friend or confidante of the former trustee(s). A two-step, pre-determined arrangement is improper; such a *pas de deux* just won't do.

Resignation may lead to other problems. Trustees must be alive to the risk of judicial criticism if the resignation of one or more trustees will lead to additional administrative burdens or expense on the trust fund or otherwise prejudice the interests of the beneficiaries. Thus in *Public Trustee v Cooper* [2001] WTLR 901 Hart J observed (*obiter*) that the resignation of a trustee:

> *"...will not always provide a practical or sensible solution. The trustee concerned may represent an important source of information or advice to his co-trustees or have a significant relationship to some or all of the beneficiaries such that his or her departure as a trustee will be potentially harmful to the interests of the trust estate or its beneficiaries."*

Resignation may be a solution, but if there are decisions which need to be made quickly and/or if the matters relating to the trust are especially complex such that it would take a long time for a new trustee to get to grips with matters, this is unlikely to be the best way forward.

Resolving the issue (3): next stop, Chancery Lane

The difficulties arising from the existence of conflict amongst the trustees may be resolved by approaching the court for directions. Most usually this will take the form of a blessing application to the Chancery Division under the High

Court's inherent jurisdiction as explained in *Public Trustee v Cooper*. The trustees must give full and frank disclosure, which will of course include an explanation of the existence and nature of the conflict which has necessitated the application. Where the trust instrument authorises the taking of decisions by the non-conflicted trustees only, the proposed distribution is usually structured in such a way that the conflicted trustee will sit out most of the transactional steps, although he or she will of course be joined as a party to any blessing application.

Either the court will sanction the taking of the decision (in which case the trustees will be protected from future criticism) or it will not (in which case the trustees will at least know that they are at risk if they proceed in any event).

It is important to remember, however, that while courts are generally sympathetic to the realities faced by trustees and their need in many cases to seek the comfort of judicial blessing, the size of the trust fund and the issues at stake ought to justify the expense of full-blown High Court litigation. No doubt if the trust fund is limited and/or the issues to be decided modest in nature a costly application to court for blessing may be criticised. Trustees of more modest trusts may need to consider other alternatives.

Resolving the issue (4): variations to the trust or possible retrospective sanction?

Other options potentially available to trustees would be to apply to court for a variation (under the Variation of Trusts Act 1958) or for the conferral of additional powers (under the Trustee Act 1925, s. 57) to permit conflicts of interest. It is quite common to see in VTA applications where the trustees seek a new perpetuity period of 125 years a simultaneous proposal to adopt new standard administrative provisions, including provisions limiting the application of equitable rule prohibiting conflicts of interest and duty. Such applications of

course present their own hurdles in satisfying the court that departures from general equitable principles ought to be permitted.

A further possibility is that the trustees might simply take the decision in any event. They might do so for any number of reasons: perhaps they are ignorant of the implications of the conflict; perhaps they are unwilling to incur disproportionate costs for a modest trust fund; or perhaps they are just willing to run the risk of future criticism. If they do proceed in this manner, can they obtain the court's sanction *ex post facto*?

Although the matter is not free from doubt, *Lewin* suggests that the court has jurisdiction to give retrospective approval: *Lewin*, §46-069. While that may be so, the author wonders how likely it would be for approval to be given, at least in circumstances where a beneficiary has in fact intimated criticism of the decision. There is little difference in practice between the court's giving approval and dismissing a claim for breach of trust. A claim for breach of trust may be preferable for the trust as a whole: in such a claim the trustees and the complaining beneficiary are the parties principally at risk of costs if they lose; in an application for directions the trust will very likely be bearing all parties' costs. Perhaps though, if the trust is a modest one or the risks of future criticism at the time of the decision were considered very remote, a court might be willing to adopt a pragmatic and sympathetic approach given the difficult position the trustees find themselves in.

Tips for disgruntled beneficiaries

What about the beneficiaries of trusts who see trustees distributing trust assets to trustee-beneficiaries? What can they do?

It is important to remember that just because a trustee-beneficiary has received a distribution it is not necessarily wrongful. The rule against conflict of interest and duty has been described as *"riddled with exceptions"*: *Lewin*, §46-078. Additionally, where a trustee is an object of the power which is then exercised wholly or partly in the trustee-beneficiary's favour, it is not for the

trustee to prove positively that the power was exercised properly; it is for the challenging beneficiary to prove that the power was exercised improperly: *Lewin*, §46-073.

Whether a power was exercised rationally, properly and for a proper purpose is of course a highly fact dependent question. There will be some cases in which the exercise of the power looks very fishy; there will be others where the decision is far less obviously improper. The beneficiary may not have easy access to trust papers and the burden is always on the complaining party to prove the wrongdoing.

At the very least, however, beneficiaries are usually well advised to press their trustees for an explanation. Any information disclosed may reveal whether a claim for breach of trust has legs; on the other hand, a blanket refusal to provide information may look defensive and create a presentational and costs risk for the trustees in any subsequent litigation.

Conclusion

The exercise of a fiduciary power of appointment in favour of a trustee-beneficiary can be fraught with risk: criticism and challenge may ensue. While there are potential ways of dealing with such conflict prospectively (and possibly retrospectively), the options can be limited, cumbersome and/or expensive. Care is required and the trustees will generally be wise to seek legal advice. In short, while trustee-beneficiaries may be able to have the cake and eat it too, they must be alive to the risks attendant with doing so. If they are not, they might find themselves in something of a sticky situation.

Missing Persons – guardianship and presumption of death

Commentary by Michael Furness QC, 9th September 2021

This briefing is an introduction to two complementary pieces of legislation which are of relevance in circumstances where an individual has gone missing. These are the Guardianship (Missing Persons) Act 2017 and the Presumption of Death Act 2013. The former is available where it is desired to appoint a guardian to manage the assets of a missing person, and the latter is designed to enable declarations of death to be obtained in appropriate circumstances.

It has to be said that neither piece of legislation is without its challenges, and although devoted to closely linked issues, they are not designed as a unified code.

The Guardianship Act

The Guardianship Act is a very detailed and prescriptive piece of legislation. The Act itself is long, having regard to its limited subject matter. There are then the rules in CPR57.25 to 57.32 and accompanying notes, and Practice Direction PD57C,. There is then the 81 page Code of Practice published by the Ministry of Justice to consider[48]. The sheer mass of material to be assimilated, and the detailed requirements placed in the way of applicants, may account for what appears to be the limited use made of this legislation. My understanding is that two applications under the Act on which I appeared earlier this year were the

[48]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/822418/missing-people-code-of-practice.pdf

first applications which had been made under the Act in the Chancery Division. There may also have been one in the Family Division and maybe a few in District Registries. There are no reasoned judgments available for any of these applications.

In addition to the material referred to above, there is a guide to the legislation for the judiciary written by former Chief Master Marsh. This has not been published, which is unfortunate because it is very useful. It has a checklist of all the matters which the Court needs to consider before making an order (totalling 26 items), and a couple of draft orders. If you have an application under the Act I suggest you ask the judge if you can see the Guidance, or at the least the checklist and the draft orders.

You should watch out for the fact that the Court may require the provision of a security bond by the person being appointed guardian. In both of my recent applications the Court dispensed with that requirement, but it would be as well to have a bond lined up in case the Court decides to require one.

If successful the guardian will have authority to manage the assets of the missing person, and will be under a duty to do so to have regard to the missing person's best interests (the Act prescribes the matters which must be considered in that regard – this is a concept seemingly borrowed from the Mental Capacity Act 2005). The guardian will act under the supervision of the Public Guardian. The duration of the order must be specified, and any power to make gifts must be specifically conferred by the order.

The Presumption of Death Act

The Presumption of Death Act has been the subject of a number of decided cases – see below. The problem with this Act is the drafting of the requirements for getting a declaration. The substantive requirement for a declaration is set out in section 2(1) which reads as follows:

(1) On an application under section 1, the court must make the declaration if it is satisfied that the missing person—

(a) has died, or

(b) has not been known to be alive for a period of at least 7 years.

Section 2 goes on to provide as follows:

(2) [The court] must include in the declaration a finding as to the date and time of the missing person's death.

(3) Where the court—

(a) is satisfied that the missing person has died, but

(b) is uncertain at which moment during a period the missing person died,

the finding must be that the missing person is presumed to have died at the end of that period.

(4) Where the court—

(a) is satisfied that the missing person has not been known to be alive for a period of at least 7 years, but

(b) is not satisfied that the missing person has died,

the finding must be that the missing person is presumed to have died at the end of the period of 7 years beginning with the day after the day on which he or she was last known to be alive.

This rather convoluted set of provisions is intended to address the problem of the need for a date of death where someone is presumed to have died. One might have thought that the approach of taking 7 years from the date of disappearance ought to be available whenever the Court is uncertain as to the date of death, but that is not so. It is only available where the Court is "not satisfied" that the person has died. That would seem to indicate that the parties and the Court must first grapple with whether or not, on the balance of

probabilities[49], the person has died, and only after deciding that the evidence does not justify that finding can the Court proceed to apply the seven-year presumption.

There have been a number of decided cases on these provisions:

Re Bingham [2015] EWHC 226 (Ch), in which the Court concluded that the missing person (Lord Lucan) had died on the seventh anniversary of his last being seen alive;

A v H [2016] EWHC 762 (Fam), which made a finding that the missing person was presumed to have died on the seventh anniversary of her last being seen alive;

Greathead v Greathead [2017] EWHC 1154 (Ch), which found that the "balance of probabilities" threshold of proof applies to cases such as these, and that the evidence was such in this case that it enabled the Court to find that the missing person died on the day he went missing;

EA v NA [2018] EWHC 583 (Fam), which found that the missing person was presumed to have died seven years after he was last known to be alive by the applicant.

In the Matter of the Presumed *death of AB* [2019] EWHC 2785 (Ch) where the Court found that the missing person was dead and declared the date of death to be the date of the hearing.

In *AvH* Peter Jackson J found that it was more likely than not that the missing person had died (judgment para 16), but then proceeded to make a declaration under section 2(4), saying (para 17):

> "I think it is probably safer to make the necessary declaration on the basis that she [the missing person] is not known to have been alive. I say that only because there is no particular incident (as there sometimes is)

[49] See *Greathead v Greathead* at [21]

> where people are specifically known to have perished as part of a group that is likely to have included the individual person."

This indicates that the Court may have some latitude in determining whether it is satisfied that a person has died, certainly where it is not clear what particular event caused the death. In Lord Lucan's case (*Re Bingham*) Asplin J did not consider it necessary to make a finding as to whether she was, or was not, satisfied that Lord Lucan was dead (see para 5 of the judgment). She, quite understandably, skipped over the thorny questions of whether Lord Lucan was actually dead, and if so when he died, and went straight to an application of the seven-year presumption of death. Asplin J's approach can only be justified on the basis that the words "where the court is not satisfied the missing person has died" are really equivalent "where the court has not made a finding that missing person has died".

Assuming that the Court is able to make a declaration of death, the next question is what date to fix for the date of death. If the declaration is made on the basis of the seven-year presumption, the date must be the expiry of the seven-year period. Otherwise, the Court is thrown back on section 2(3), and must declare the person dead at the end of the period within which in which he is thought to have died. As Chief Master Marsh observed in *In the Matter of the Presumed Death of AB* at [19]

> "If the court is uncertain at which moment the missing person died, it will often be artificial for the court to reach a conclusion about a date by which uncertainty disappears, even on the balance of probabilities."

The Chief Master pointed out the date of death can be important for practical reasons, for example if the missing person has been in receipt of a pension which will come to an end on death. The case of *AB* the Court decided that where the Court was satisfied that the person had died, but it was wholly uncertain when he had died, the appropriate order was to declare them dead

at the date of the Order. That avoids any inconvenience arising out of the date of death being backdated.

The interaction between the two Acts

Clearly there may be situations in which the evidence shows that on balance the missing person is dead, but the family do not wish to take the step of having him or her declared dead while there is still hope, and want a guardianship order instead. There is no reason why this should not be possible, and indeed a guardianship order was made in those circumstances in one of the two Guardianship Act applications I appeared on earlier this year. However, the Court will be astute to ensure that the Guardianship Act is not abused. If the evidence shows that there is no realistic possibility of the missing person being alive, then the Court may well refuse to make a guardianship order. Note that, under CPR 57.33(3), if the Court determines that the missing person has not been known to be alive for a period of seven years the Court may order that the claim should continue as if made under the Presumption of Death Act. In any case, it is open to a person who has an interest in obtaining a declaration of death to apply for one, and bring the guardianship order to an end.

Qualifying interests in possession: Restating the problem

Commentary by Jamie Holmes, 23rd September 2021

Is it possible to taint an interest in possession, thereby losing its transitional protection under the Finance Act 2006 and triggering adverse inheritance tax consequences? Can this be done by merely restating the interest without a change of beneficiary? This article explores these questions in light of the recent case of *Ware v. Ware* [2021] EWHC 694 (Ch).

A. Summary of the statutory regime

Where assets are held subject to a trust, the starting point in determining whether inheritance tax ("**IHT**") is payable is to ask whether at least one beneficiary has a qualifying interest in possession ("**QIIP**") in the settled property. If there is at least one such beneficiary then the property settled under the trust in which the beneficiary has a QIIP will at least generally be treated for IHT purposes as forming part of that beneficiary's estate, to be taxed upon their death or on termination of their interest during their lifetime.

If and to the extent that there is no beneficiary with a QIIP then (again generally) a number of IHT charges will be applied to the trust under "**the 'relevant property' regime**". The applicable charges include (i) a charge payable every 10-years over the life of the trust, (ii) an 'exit' charge whenever capital is distributed, and (iii), most notably, a 20% 'entry' charge whenever assets are made subject to the trust.

Following amendments introduced by the *Finance Act 2006* ***("the FA 06")***, there are broadly (for IHT purposes) four groups of interest in possession that qualify as a QIIP under the *Inheritance Tax Act 1984* ***("the IHTA")***, *Sections 59, 49* and as follows:

First, a saving provision was effectively included for any interest in possession to which a beneficiary had become entitled prior to 22 March 2006.

Second, three further sets of transitional provisions were also included across the *IHTA, Sections 49B-E* for interests in possession that arose before 22 March 2006 and passed thereafter in the period before, to and/or after 6 October 2008 ('transitional serial interests'; the conditions for each are different).

Third, the new regime does not apply to an interest in possession for the benefit of a 'disabled person' as defined in the *IHTA, s89B-89C* (and see the *Finance Act 2005, Schedule 1A* for the definition of 'disabled person') (a 'disabled person's interest').

Fourth, the regime does not apply to an interest that arises as a result of a will or intestacy, to which the beneficiary became entitled upon the death of the testator or instate (an 'immediate post-death interest', per *IHTA, Section 49A*).

These four bases for a QIIP are not the whole story and the detailed provisions of *the IHTA* and other related legislation repay careful reading. In particular, it should be noted both that (a) even where there *is* a QIIP, that can cease to be the case, without a substantive change of income beneficiary; and (b), even if there is *no* QIIP, a trust may nonetheless still avoid the application of the relevant property regime to the extent that property so held falls outside of the definition of 'relevant property' in the *IHTA, Section 58* (such as 'excluded property' under the *IHTA, Section 48*).

B. The risk posed by a restatement

That an interest can cease to be a QIIP is to at least some degree uncontroversial: the *IHTA, Section 49(1)* provides for this expressly. The focus of this article is the position that appears to have been adopted by HMRC (and which has been adopted in at least one recent first instance decision of Master Clark) as to the breadth of the circumstances in which property will be said to have been re-settled (or, alternatively subject to a new non-qualifying interest in possession) so as to fall outside of the first of the four bases to qualify as a QIIP above.

On this view, any amendment of a trust (including by the exercise of a power of appointment or advancement) that includes a restatement of an interest in possession will have the effect of removing its status as a QIIP. That is so even if the amendment merely sets out the interest without any substantive alteration to it, with the substantive amendments instead addressing e.g. the interests in remainder. On this view, the effect of any such restatement will be to create a new interest in possession, which – long after 2006 – will not be a QIIP. This would typically trigger a lifetime inheritance tax charge and a gift with a reservation, together with entry into the relevant property regime – the worst of all worlds.

That this is HMRC's interpretation of the legislation has been at least alluded to for some time. An example can be seen in the answer given (concerning an exercise of the statutory power of advancement) to question 6 of the questions put to HMRC by STEP and CIOT as to the changes introduced to the *IHTA* by the *FA* 2006. The relevant example, question and answer (most recently updated on 3 October 2008) are not reproduced here and can be found on *Practical Law*.

A clearer warning can be seen from the recent decision of Master Clark in ***Ware v. Ware*** [2021] EWHC 694 (Ch); [2021] S.T.I. 1296; [2021] P. & C.R. DG6. By two testamentary trusts created by a 2005 deed, a father's interest in the family

home and his residuary estate were to be held for life for his wife ('the mother'), with the remainder to their only son (or to his issue by substitution), subject to overriding powers of appointment. In 2013, advice was sought as to the effect of the son pre-deceasing the mother, to ensure that the mother could remain in the property in that event. It was advised that a number of amendments should be made to the trusts to achieve this by way of the exercise of a power of appointment; so as to add additional default beneficiaries. In doing so, new 2013 deeds of appointment restated how the interests in possession were held pursuant to the 2005 deed.

HMRC did not participate in the hearing in ***Ware***, nor tender any evidence or submissions, save to request that the Court be referred to a number of authorities. Nonetheless, all parties appear to have proceeded on the basis that the effect of the 2013 deeds restating the interests was (i) to terminate the pre-2006 interests, (ii) to create new interests in their place that did not qualify as QIIP, and (iii) which new interests were subject to the relevant property regime and the charges it levies.

Indeed, Master Clark found to that effect at paragraphs 33 to 36 of her judgment and accordingly, whether or not the above was or remains HMRC's view, there is now at least one first instance authority[50] that this is the proper interpretation of these statutory provisions. Master Clark then went on, at paragraphs 37 to 56 of her judgment, to grant rectification of the 2013 deeds so as to avoid the outcome above. See also, to some degree similarly, ***RBC Trustees v. Stubbs*** [2017] EWHC 180 (Ch); [2017] 2 P. & C.R. DG5, in particular at ¶¶28, 34, 58, per Rose J.

[50] The status of Masters' decisions as precedent is the subject of an upcoming article by Michael Ashdown.

C. How to mitigate the risk in practice in the circumstances

The general advice in such circumstances has to be to draft deeds of appointment or advancement in a way that does not restate or otherwise set out an existing interest in possession again, unless, for example, a change of substance to that is intended. This can be done relatively easily by omitting mention of the interest in the deed and to instead merely provide that the previous trust(s) continue(s) to apply, subject (only) to the (following – setting those out) particular amendments.

D. The law going forwards

Was the decision in ***Ware*** (at least largely confined to the single paragraph 33) correct on this point? The remainder of this article poses three counterarguments.

First, tax is supposed to be charged as to substance and not form: at least insofar as that is established under the ***Ramsay*** principle of statutory construction. Indeed, somewhat ironically, it is typically HMRC taking this position.

Second, by way of an example, that focus on substance over form is reflected in the approach taken by HMRC in *Statement of Practice 7 of 1984* as to the CGT implications of the exercise of a power of appointment or advancement.

Third, that approach is also reflected in the VTA authorities as to whether there has been a variation or a resettlement, as summarised in ***Wyndham v. Egremont*** [2009] EWHC 2076 (Ch); [2010] 1 P. & C.R. DG9 at paragraphs 17-24, per Blackburne J. It is notable that a variation can avoid being classified as a resettlement, despite having the effect that a new perpetuity period applies thereafter to the trust.

E. Conclusion

In the circumstances, a prudent draftsperson will avoid the risk of an IHT charge by drafting around the problem. It is suggested however that ***Ware*** may not be the last word on this subject and that its reading of the law may not be the better one.

When is an order under s48 AJA appropriate? That's a matter of opinions

Commentary by Ram Lakshman, 21st October 2021

S48(1) of the Administration of Justice Act 1985 empowers the High Court to authorise personal representatives or trustees to take action on the basis of counsel's opinion where any question of construction has arisen out of the terms of a will or trust. The opinion must be given by counsel with a minimum of 10-years High Court qualification. If so authorised, the personal representative or trustee will be protected from liability for mismanagement of the estate or breach of trust.

Where the High Court exercises its powers under s48, it can do so on the basis of the papers and without hearing argument. Consequently, the process under s48 has the potential to offer a quick and cost-effective route for personal representatives and trustees to gain protection where a question of construction has arisen, without having to make a full claim for interpretation of the will or trust pursuant to CPR part 64.

However, s48(2) provides that *"the High Court shall not make an order under subsection (1) if it appears to the court that a dispute exists which would make it inappropriate for the court to make the order without hearing argument."*. This begs the question: when is it inappropriate (or, conversely appropriate) for the court to make an order without hearing argument?

One possible answer is that the procedure can only be used where it is clear what the correct construction should be. This is the approach taken in Theobald

on Wills (19th Ed, para [20-006]) and in the Chancery Guide (para 29.105), both of which state that *"s48 is intended for use in clear cases only"*.

Yet this answer must be overly simplistic. It cannot be the case that s48 can only be used where it is clear what the correct construction should be:

- Firstly, if it was clear what the correct construction should be, then arguably there would be no *"question of construction"* as required under the Act;
- Secondly, if it was clear what the correct construction should be, then there would be no reason for the personal representatives or trustees to seek the advice of experienced counsel;
- Thirdly, if it was clear what the correct construction should be, then the personal representations or trustees could confidently act in accordance with the opinion of counsel, without requiring the authorisation of the court.

Defenders of Theobald and the Chancery Guide are likely to be jumping to their feet at this point: what the authors of these texts surely meant was not that it must be completely clear what the correct construction should be, but just that it must be clear ***enough***. But this response raises more questions than it answers. Just how clear must the question of construction be for it to be suitable for determination without hearing argument?

This article aims to provide guidance to trustees and personal representatives (and their legal advisers) who are considering making use of the s48 procedure. Part (A) sets out the requirements for an application and the process which is to be followed. Part (B) then considers the question of when it is appropriate to make an application under s48 AJA, having regard to the cases on this subject.

(A) The process under s48 AJA

In order for an order to be made under s48 AJA, the following requirements must be met:

1) A question of construction must have arisen out of the terms of a will or trust;
2) An opinion in writing must have been obtained on that question by the personal representatives or trustees under the will or trust;
3) The opinion in writing must have been given by a person who has a 10-year High Court qualification, within the meaning of s71 of the Courts and Legal Services Act 1990 (a **Qualified Person**);
4) An application to the High Court must be made by the personal representatives or trustees;
5) The application must be asking the court to authorise the personal representatives or trustees to take steps in reliance of the said opinion;
6) There must be no dispute which makes it inappropriate for the court to make the order without hearing argument.

Further guidance as to the process for making an application is set out in the Chancery Guide (at paras 29.29 onwards). The application should be made using a Part 8 claim form, without naming a defendant.

The application should be supported by a witness statement or affidavit exhibiting:

1) Copies of all relevant documents;
2) Instructions to the Qualified Person;
3) The Qualified Person's Opinion; and
4) Draft terms of the desired order.

The witness statement or affidavit should state:

1) the reason for the application;
2) the names of all persons who are, or may be, affected by the order sought;
3) all surrounding circumstances admissible and relevant in construing the document;
4) the date of qualification of the Qualified Person and his or her experience in the construction of trust documents;
5) The approximate value of the fund or property in question;
6) Whether it is known to the applicant that a dispute exists and, if so, details of such dispute; and
7) What steps are proposed to be taken in reliance on the opinion.

The file will initially go before a Master, who will consider whether the evidence is complete and, if so, whether she can deal with it herself or whether it is necessary to send the file to the Judge. If the Master or Judge is satisfied that the order sought is appropriate, it will be made and sent to the applicant. Alternatively, the Master or Judge might direct that further information is required or that notices should be served on parties who might be affected by any order made (ie: the potential beneficiaries under the will or trust).

If an order is made, the effect will be to protect the personal representatives or trustees from liability for misadministration of the estate or breach of trust. It will not determine the substantive question of construction, and the beneficiaries will remain free to contend later for a different construction and, if necessary, follow any estate property distributed in reliance on the order.

(B) When is an order appropriate

A useful starting point is the case of *Greenwold v Pike* [2007] EWHC 2202. The issue in that case was whether the word "spouse" used in a settlement included

a "widow". The trustees applied for an order under s48 to administer the estate on the basis that "spouse" did include "widow". This was in accordance with an opinion which had been given by Mr Michael Waterworth of counsel.

However, prior to coming before the court, the trustees received an opinion from Mr Brian Green QC which stated that, in the absence of evidence as to conversations which were had between the deceased and the draftsman of the will, he considered it by no means clear that the clause should be construed so that "spouse" included widow.

Mr Justice Briggs held that the case was not appropriate for making an order under s48. In particular, he held that:

1) He was not persuaded that the evidence of conversations which were had been the deceased and the draftsman could be taken into account in determining an application under s48, which deals with questions of construction and not rectification.

2) Given that there was a clear difference of opinion between well qualified counsel as to the true construction of the clause (if regard was not had to that evidence) it would be inappropriate to resolve that difference without hearing argument.

However, *Re BCA Pension Plan* [2015] All ER(D) 38 provides a more positive outlook on the potential availability of orders under s48. The question of construction related to the increase rule within a pension scheme. The trustees had obtained an opinion from Mr Paul Newman QC which stated that it was obvious that a mistake had been made in omitting certain words from the rule, which had been included in previous versions of the rules of the scheme, and without which the provision was nonsensical. Mr Justice Snowden considered the caselaw on construction and concluded that the court was entitled to cure an obvious and easily-correctible mistake as a matter of construction (without a need for rectification). Consequently, he was prepared to grant an order

authorising the trustees to administer the scheme as if the words had been included in the rule.

Where do these cases leave us? The reality is that there remains a considerable degree of uncertainty as to when it is appropriate to make an order under s48. On one end of the spectrum there are cases where the correct construction is clear, or an obvious mistake has been made. On the other end of the spectrum are cases where the issue of construction is so unclear that experienced counsel might reasonably reach different views. But in between these two extremes, there may well be lots of cases, where a particular construction is by far the most likely one but not clearly or obviously correct. It would be disappointing if s48 was not available to assist personal representatives and trustees in these cases. However, further guidance from the courts would be very helpful.

Protectors' Powers: The Siren Song of the "Narrower View"?

Commentary by Gilead Cooper QC, 4th November 2021

The term "Protector" is not a term of art in trust law. The duties and the powers of any given protector are defined, subject to any applicable statute, by the trust instrument, and the resolution of any doubts will therefore always begin with a question of construction. Partly as a consequence, there is relatively little judicial guidance on the general principles applicable to all protectors. Nevertheless, two recent decisions, one from Bermuda and the other from Jersey, have sought to clarify one question that is likely to apply to many, if not all, protectors where the powers conferred on them are fiduciary. Interestingly, the two cases reached opposite conclusions.

The question in issue in both cases concerned the common situation where a power vested in the trustees can only be exercised with the consent of a protector. Was the role of the protector in such cases limited to asking whether the decision of the trustees was one which a trustee could reasonably arrive at (the "Narrower View")? Or was the protector to exercise an independent discretion in deciding whether or not to consent ("the Wider View")? The Narrower View would limit the function of the protector to something similar, if not identical, to that of the court in a blessing application: if the trustees' decision was within their powers and was rational, the protector would have no choice but to consent. On the Wider View, a protector would be entitled, exercising his

own judgment, to withhold consent even if the proposed exercise of power was one which a reasonable body of properly informed trustees was entitled to decide upon.

In *In the Matter of the X Trusts* [2021] SC (Bda) 72 Civ (7 September, 2021), Kawaley J came down in favour of the Narrower View. In a lengthy and careful judgment, he accepted that on a literal reading of the relevant provisions, the Wider View appeared persuasive. He acknowledged that the dictionary meaning of the word "consent" was "agreement or permission", which implied an element of choice. He also agreed that the Narrower View echoed the test in a *Public Trustee v Cooper* Category 2 case, in which the function of the court was to adjudicate on the question whether the decision for which approval was sought was one which a reasonable body of properly informed trustees was entitled to take: if so, the court did not have any discretion to exercise. And he accepted that, in the only case to have considered the question, *PTNZ v AS* [2020] WTLR 1423, Master Shuman had decided in favour of the Wider View, holding that "the protector's powers of consent are independent of the powers of the trustee and are to be exercised by the protector on the basis of his own discretion."

Despite these considerations Kawaley J was persuaded that the Narrower View was, in fact, correct. As he put it, "…the logic of Mr Green QC's submissions gradually grew in its cogency until, like a Siren song, it became almost irresistible." The core of those submissions was that the roles of the trustees and that of the protector were fundamentally different: the Wider View would instead result in a duplication of roles, and essentially mean that the decision was the product of a joint exercise of discretion by the protector and the trustees.

In response to the argument that the Narrower View made no commercial sense because it added nothing to what might have been done by the court,

Kawaley J accepted the answer that it provided the beneficiaries with a less expensive and time-consuming option.

The second case in which this question arose was *In the Matter of the Piedmont Trust & Riviera Trust* [2021] JRC 248, which came before the Jersey Royal Court in July 2021. A draft judgment was circulated on 28 September, deciding in favour of the Wider View, but before it was formally handed down one of the parties drew the attention to the court to the *X Trusts* (dated 7 September 2021). The Jersey court nevertheless maintained its original conclusion, but added a Postscript explaining why it disagreed with Kawaley J.

The only material difference between the facts of the two cases was that the trust deeds in the *X Trusts* did not give the protector an indemnity; but Sir Michael Birt, giving the judgment of the Royal Court, did not consider that that was sufficient to distinguish the case. However, he firmly rejected the argument that the role of the protector was the same as that of the court in a *Public Trustee v Cooper* application for blessing, because "…if the role of a protector was simply to review the trustee's decision in the same way that the Court would do, his role would be almost redundant; he would bring nothing to the table that the Court itself would not bring on a blessing application."

Sir Michael Birt also pointed out that, if the protector's role was essentially the same as that of the court, "…the key requirement for a protector would be a legal qualification rather than knowledge of the settlor's wishes and sound judgment as to what is in the best interests of particular beneficiaries." But in practice, that is rarely if ever the basis on which settlors choose the protectors of the trusts they create: the protector is chosen because he has personal knowledge and understanding of the settlor, his wishes, and the family circumstances. Often – particularly in the case of offshore trusts – the trustee is a professional trust company, and the settlor has no personal knowledge of the company or its officers.

At the same time, the protector was not another trustee: "…a protector's discretion lies within a narrower compass than that of a trustee…A protector may often find that he should consent to a discretionary decision of a trustee on the basis that it is for the benefit of one or more of the beneficiaries even though, if he had been the trustee, he might have made a different decision which he thought to be even more beneficial."

Both *The X Trusts* and *The Piedmont & Riviera Trusts* are carefully reasoned decisions by outstanding judges. But they can't both be right: it seems inevitable that this question will have to be reviewed at a higher level. I would respectfully suggest that Kawaley J ought to have remembered that the Sirens were not reliable guides, but dangerous seducers who lured those who listened to them to their destruction on the rocks.

Precedent value of Chancery Masters' decisions

Commentary by Michael Ashdown, 18th November 2021

Role of Chancery Masters

The Masters of the Chancery Division of the High Court have always played an important role in getting Chancery litigation trial-ready. Traditionally associated with such matters as case management conferences, procedural applications under the CPR, and the approval of compromises, their decisions were often of vital importance for the parties, but of little wider significance. After all, how much value could a decision on, say, whether to exercise discretion to extend time for the service of witness statements have, in cases with a completely different factual and procedural context?

But that picture has become out-dated. Pursuant to CPR rule 2.4, an act of the High Court may be performed *"by any judge, Master, Registrar in Bankruptcy or District Judge of that Court"*, subject to any contrary enactment, rule or practice direction. The principal source of such limitations is Practice Direction 2B, which excludes such matters as search and freezing orders (paragraph 2), and orders which relate to the liberty of the subject, or to appeals from Masters and District Judges. In relation to Chancery matters specifically, though, the jurisdiction of Masters is almost unlimited (save for the specific exceptions for Patents Court business and company law derivative actions in paragraph 7B). This is contrasted with the position of District Judges, who are excluded from a whole range of everyday Chancery matters, such as trustees' applications for

Beddoe relief, and Variation of Trusts Act 1958 applications, unless they have the consent of the local Supervising Judge. This "anything goes" approach to the jurisdiction of the Chancery Masters is bolstered by modern practice: as the Chancery Guide makes plain (at paragraphs 14.3 and 14.4), Masters can and do deal with the whole range of Part 7 and Part 8 claims, including both applications and trials, and it is expected that all applications with Masters can deal with (other than interim injunctions, which are normally heard in the applications court by a High Court Judge) will be listed in the first instance before a Master.

The result is that the Chancery Masters now decide a wide range of cases, not only at the interlocutory stage, but also in making final orders after trial. At the same time, the electronic "reporting" of judgments which would never previously have been formally reported in any series of law reports, however minor or specialist, means that more decisions of Chancery Masters than ever before are making their way onto Westlaw, BAILII and the like. Any lawyer researching a point of law is now likely to come across these decisions. But what precedent value do they have? Should they be cited before other courts? Does anyone have to follow them?

Rules of precedent

The rules of precedent in the English courts are relatively well-understood at the highest levels. Decisions of the Supreme Court bind all lower courts, and generally itself too, subject to an exceptional power to depart from its own previous decision. Court of Appeal decisions bind all lower courts and also itself, subject only to narrow and well-known exceptions set out in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718. Below the Court of Appeal, the position has always been less clear.

The High Court is not strictly bound to follow its own previous decisions, but they are highly persuasive: *"the modern practice is that a judge of first instance will*

as a matter of judicial comity usually follow the decision of another judge of first instance unless he is convinced that that judgment was wrong" (Halsbury's Laws of England, Civil Procedure, vol 11, para 32).

Whether the County Court was bound to follow a first-instance High Court decision (as opposed to one made on appeal from the County Court) was open to dispute until the Court of Appeal's decision in *Howard de Walden Estates Ltd v Aggio* [2007] EWCA Civ 499. The Court of Appeal held that even though both courts exercised the same first instance jurisdiction, they were not co-ordinate courts (as one High Court Judge is to another): the High Court is a superior court, and the County Court is an inferior court, and so the latter is bound by the former's decisions (see paras 86 to 95).

Masters' decisions: within the High Court

So where does that leave Chancery Masters (and indeed, Queens Bench Masters too)? No consistent position clearly emerges from the disparate case law.

In *Randall v Randall* [2014] EWHC 3134 (Ch) Deputy Master Collaço Moraes held that *"a decision of a Master and a Judge of the High Court are of the same standing in terms of the doctrine of precedent"* since *"[t]hey both are judges of the High Court exercising the same jurisdiction"* (at para 82), and it was therefore open to him to choose which of two earlier High Court judgments to follow, in circumstances where one was a decision of a Master and the other a decision of a Circuit Judge sitting as a High Court Judge (though nothing turned on that judge not being a High Court Judge).

This was followed by Master Matthews in *Coral Reef Ltd v Silverbond Enterprises Ltd* [2016] EWHC 874 (Ch). He noted that in the past *"the 'off the cuff' view of most High Court judges would have been that masters were obviously inferior to, and therefore bound by the decisions of, judges"* (at para 39) but considered that *"the world has moved on"* (para 40), including in the abolition of the right to a rehearing before a Judge of an application previously

made to a Master. He also noted that in *Howard de Walden Estates Ltd* the Court of Appeal had expressed itself in terms of the inferiority of the County Court to the High Court, and not in terms of the status of the individual judges involved (paras 42-43). However, on appeal ([2016] EWHC 3844 (Ch)) David Foxton QC, sitting as a Deputy High Court Judge, took the opposite view, and concluded that *"the fact that a High Court judge and a master sit in the same court, namely the High Court, is not determinative of the question of whether the doctrine of precedent applies as between them"* (para 61) and that *"the decision of a High Court judge in terms of its clear ratio is binding on a master, absent either conflicting decisions of another judge at the same level of the High Court judge, or obviously of superior courts"* (para 67).

Two later decisions of Master McCloud – *Paxton Jones v Chichester Harbour Conservancy* [2017] EWHC 2270 (QB) and *Abdule v Foreign and Commonwealth Office* [2018] EWHC 692 (QB) – followed the decision of Master Matthews without reference to David Foxton QC's different view, with Master McCloud in the latter case referring to *"the relationship of equality between judgments of puisne judges and Masters at first instance"* (para 82).

Given the state of the case law, the status of Chancery Masters' decisions cannot be regarded as settled once and for all, and it would plainly be desirable for the Court of Appeal to address this (as it did in *Howard de Walden Estates* in relation to the County Court). The position is of course exacerbated by the fact that the decision of a higher court on a question of precedent is extremely unlikely to form part of the *ratio* of that court's decision. If a Master's decision on a point of law is appealed to a High Court Judge (including for present purposes a Circuit Judge or Recorder sitting as a High Court Judge under section 9(1) of the Senior Courts Act 1981, or a lawyer sitting as a Deputy High Court Judge under section 9(4)), and it is said that the Master went wrong by failing to follow a previous decision of a different High Court Judge, the appeal will not be allowed or dismissed by reference to precedent alone. The Court hearing the

appeal has to decide itself whether, on the substantive point of law, it will follow the earlier decision when (as explained above) it is not strictly bound to. If the appeal is allowed, it is because the appeal court agrees that the law is as stated in the earlier decision, and the Master made an error of law in reaching a different conclusion. If the appeal is dismissed, it is because the appeal court thinks that the earlier decision was wrong and declines to follow it, notwithstanding that it might be said that the Master ought to have followed it anyway as a matter of precedent. In either case the *ratio* is the appeal court's reasons for finding the substantive law to be as it is. Its views on how the Master should have treated the earlier decision can only ever be *obiter dicta*.

Nevertheless, it is likely that for practical purposes the decision of David Foxton QC in *Coral Reef* was correct, and will be followed in future – not least since it is cited and explained in the *White Book* notes to CPR rule 2.4 (so it is unlikely now to be overlooked) and is treated there as authoritative. This must be right as a matter of practical justice: the organisation of the judicial system in England and Wales is the result of an organic process, and no special significance can really be attributed to the fact that Master and Judges both hold judicial office in relation to the same court. As David Foxton QC pointed out (*Coral Reef* para 61), the fact that appeals from Masters' decisions are heard by High Court Judges surely makes clear their relative status. It would be peculiar if decisions of High Court Judges on appeal from Masters were binding, and other decisions were not – and would be inconsistent with the approach taken in *Howard de Walden Estates*, which refused to draw that distinction between High Court decisions at first instance and those on appeal from the County Court.

This does not mean that the decisions of Chancery Masters have no value except to the parties. True it is that they are probably now bound to follow the decisions of High Court Judges, whilst such Judges are not bound to follow Masters' decisions. But they can still have great practical significance. As Master Matthews noted in *Coral Reef, "no High Court judge, having had cited to him or*

her the reasons for a decision of a master that was in point, would today simply ignore them" (para 46). David Foxton QC did not dissent from this, pointing out that *"judgments of masters are now sometimes cited on particular issues and are likely to have particular weight when the master is a specialist in the relevant area"* (para 58). Masters' decisions may not bind, but they can still inform and persuade.

Furthermore, since it is always open to a High Court Judge to decline to follow a previous decision of a High Court Judge because it is wrong, the practical position when appearing before a High Court Judge is not very much different between the previous decisions of Judges and Masters. Both are likely to be followed if the present tribunal agrees with them, and to be departed from if it does not!

Masters' decisions: the County Court

The case law does not address the question of whether Masters' decisions bind judges sitting in the County Court. It is at least arguable that combined effect of *Howard de Walden Estates* and CPR rule 2.4 is to make Masters' decisions binding in the County Court, on the basis that (i) the County Court, as an inferior court, is bound by the decisions of the High Court, as a superior court (as explained above), (ii) when Masters make decisions they do so in the exercise of the jurisdiction of the High Court, and (iii) the special considerations which arise as between Masters and High Court Judges do not arise as between the High Court and County Court as separate courts.

However, that would be a rather surprising practical conclusion. Circuit Judges are not usually seen as hierarchically inferior to Masters (and indeed Master Matthews, who decided *Coral Reef* at first instance, was subsequently appointed as a Specialist Circuit Judge). That this is the commonly-held view is borne out by the arrangements for judicial salaries: Circuit Judges and Masters receive the same salary, with the Senior Master and the Chief Master paid a little

more, and Senior and Specialist Circuit Judges more still. Circuit Judges are also seen primarily as trial judges, with a relationship to the District Judges of their courts not dissimilar to the relationship between High Court Judges and Masters (albeit that in Chancery matters the jurisdiction of District Judges is rather more limited, as explained above). Most tellingly, appeals from Circuit Judges are heard by High Court Judges (and Deputies), and not by Masters, pursuant to CPR Practice Direction 52A, paragraph 3, which expressly distinguishes Masters and Judges for this purpose.

Whilst *Howard de Walden Estates* did not advert to this point, it probably does leave the common-sense conclusion open as a matter of law: the Court of Appeal referred expressly (at para 89) to the decisions of High Court Judges and Deputy High Court Judges, to make the point that the latter would be equally binding in the County Court. The Court of Appeal must surely therefore be taken to have intended not to decide anything about the status of Masters' decisions. Indeed, it may simply be that it would not have occurred to anyone to argue that Masters' decisions should be binding.

Without authority the position is unclear, but it seems likely that Masters' decisions should be afforded the same treatment in the County Court as before a High Court Judge: as helpful and persuasive authority, often with the benefit of particular expertise in the subject matter, and not too lightly to be departed from (and especially in matters more often seen by Chancery Masters than by most judges of the County Court e.g. in relation to probate), but not binding as a matter of precedent.

Too many hats, not enough time and the wrong people – the difficulties of Smith v Michelmores Trust Corporation

Commentary by Lemuel Lucan-Wilson, 2nd December 2021

The recent case of *Smith v Michelmores Trust Corporation* [2021] EWHC 1425 (Ch) is a timely reminder for trustees of the need to critically evaluate the intended uses of powers of appointment, how beneficiaries may be interested in their usage, and the importance of actively managing conflicts of interest between different offices or trusts.

Facts

Mrs Crawshay died on 3 November 2010. She had four children, and the residuary estate was split into four equal parts – 3 of the children took a portion absolutely, but the remaining quarter was left on discretionary trust for her son John, his children and remoter issue. At the date of the hearing, John had 3 children and one grandchild. That trust contained a power of appointment exercisable in favour of any of the beneficiaries.

After the death of Mrs Crawshay, the executors brought proceedings against John relating to his actions whilst in partnership with the deceased. The executors were successful at trial, and were awarded £391,417 plus costs. John failed to pay this sum, and the executors subsequently presented a petition for his bankruptcy, based on a statutory demand for £505,815. John was adjudged bankrupt on 15 May 2020 (and would, without an application for suspension, be

discharged on 15 May 2021) and trustees in bankruptcy were appointed on 9 June 2020. The surviving executor and discretionary trustee was appointed as one of John's trustees in bankruptcy.

John's debt formed a large part of the deceased's estate, the only other asset was £233,836 held in a bank account. As a result, the trustees in bankruptcy suggested that a distribution be made to John from the discretionary trust during his bankruptcy, so that it would instead vest in his trustees and reduce the debt.

The executors made a distribution of £220,000 to the residuary beneficiaries under the deceased's will, and the discretionary trustees then brought *Public Trustee v Cooper* proceedings to bless the momentous decision that they appoint the £55,000 which had been received from the deceased's estate to John whilst he was an undischarged bankrupt.

The proceedings

Unhelpfully for the trustees, the decision to make the appointment was only reached on 7 May 2021. The hearing took place on 14 May 2021; 1 day before John's discharge from bankruptcy.

The Decision

HHJ Paul Matthews refused to sanction the trustee's decision, for four reasons:

First, the claim had been improperly constituted. John's children and grandchild had not been joined to the proceedings. Although an application had been made for the representation of unborn and unascertained beneficiaries, the already existing beneficiaries were in a different situation; by appointing to John at this point, the trustee would be actively deciding against appointing to any of the existing beneficiaries. Whilst the trustees accepted that these beneficiaries could challenge the decision later since they were not joined, the Court considered that this would still be inappropriate where the purpose of the *Public Trustee v Cooper* jurisdiction as to give certainty, and the CPR required that the

beneficiaries had a chance to make representations. It was also not clear why the residuary beneficiaries under the will had been joined when they had no interest in the proceedings, and their views could not be taken into account by the discretionary trustees.

Second, that in any event it could not be said that the appointment would be for John's benefit. The judge considered that there could be no direct benefit accruing to John from the clearing of 11% of the judgment debt. Nor would there be any indirect benefit for John. In fact, the next day, the same decision would have given him a direct financial benefit. It was therefore "*impossible*" to say that the proposed arrangement was for his benefit.

Third, that the appointment would be fraud on a power. As the judge noted, whilst the trustee must normally be alive to the possibility that an appointment would benefit non-objects, in this case it was obvious that non-objects would be benefited because of the effect of insolvency law. Further, the entire purpose of the appointment was to benefit non-objects; i.e the deceased's estate, and it was therefore an "*irrational*" decision.

Fourth, there was a stark conflict of interest. The judge gave short shrift to suggestions made by the executor about the need to maximise the deceased's estate; whilst that duty existed, it did not override her duty as a discretionary trustee to act in the best interests of the discretionary beneficiaries. As discretionary trustee, it was not permissible for her to take into account the interests of the residuary beneficiaries. The judge noted that different trustees could have been appointed or the trustees could have surrendered their discretion to the court, but neither of these steps was taken. *Public Trustee v Cooper* jurisprudence made it clear that the failure to acknowledge and manage a conflict of interest could be fatal to an application, and the judge considered that here, it was. Similarly, the judge was unpersuaded by evidence given by the executor about the unfairness of the situation for John's siblings; that was a result of the deceased's choice to set up a trust, the decision of the

executor to petition for bankruptcy and the dual positions held by the executor (in conflict of interest) which had made an appointment seem possible.

Lessons for practitioners

The main lesson to draw from Smith is the need to ensure full compliance with the procedural rules. Here, the primary reason the application failed was the failure to join the other living beneficiaries (which could not be rectified given the limited time before John's discharge from bankruptcy). It is therefore worth undertaking a critical analysis as to which beneficiaries need to be joined when contemplating proceedings; whilst as the judge noted some beneficiaries may have their interests align in such a way that only one of them needs to be joined, that is not always the case. John's bankruptcy meant that he was in a different category to the other beneficiaries, and his interests would not be the same as theirs.

The decision also highlights the need for trustees to fully think about the capacities in which they act; as the judgment makes clear, where there is a conflict of duties between different capacities, the trustee cannot decide that one overrides the other – they are separate. Moreover, trustees may need to consider more carefully the enforcement remedies available to them; John's bankruptcy meant that without an application for suspension of discharge, his debts would be discharged after one year. It is difficult to see how an appointment to John during his bankruptcy (and where there was no application for suspension) could be to his benefit, or for the benefit of the objects of the discretionary trust.

Finally, there is the all important reminder to be aware of the time limits involved; the decision to appoint to John was made one week before the discharge of the bankruptcy, and it seems likely that this will have naturally reduced the time available to cure any defects, but also to set out the evidence in the most extensive way.

Hopefully, by following these lessons practitioners will be able to avoid the substantial cost consequences suffered by the trustees in this case; as set out at [2021] EWHC 1521 (Ch). The trustees agreed to pay John's costs and to not take their costs out of the discretionary trust, but asked to take them out of the remaining residuary estate. As might be anticipated, the Court was not sympathetic to this – the trustees had only been able to bring the claim as discretionary trustees, not as personal representatives, and it was not the business of the estate generally. The capacities had, once again, been confused.

Chancery barrister and mathematician: Arthur Cayley (1821-1895)

Commentary by Emily Campbell, 16th December 2021

The Chancery Bar has a long history of mathematician barristers, some of them famous. For a period, there was a tradition that the "Senior Wrangler", the student[51] who had performed best in the Cambridge university mathematical tripos exams, should go on to pursue a career as a barrister in Lincoln's Inn. Moreover, the man in whose honour my Chambers is named, the late Richard Wilberforce, was a gifted mathematician, with a lifelong interest in mathematics and science.

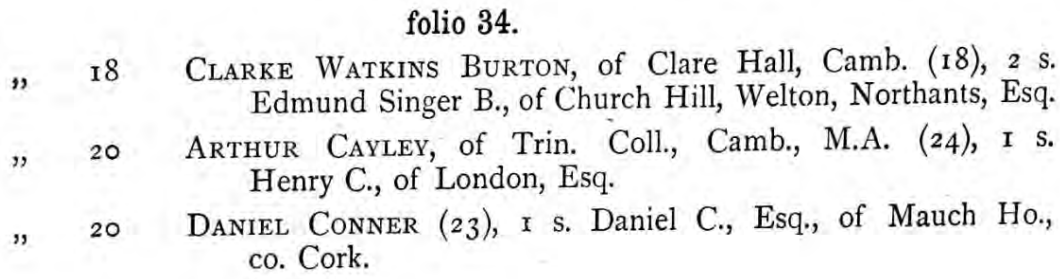
As mathematics was my favorite subject at school, it has always interested me how the process of analysis seems to be different for those with alternative academic backgrounds. Mathematicians, for example, appear often to make significant use of visualisation when thinking about problems. How the process of analysis occurs is, however, rarely spoken about. "*Aren't companies round and aren't the trustees at the top?*", I ask a colleague. "*At the top of what?*" he answers. "*I think in words*".

The journalist Dominic Lawson recently described his "aphantasia" – an inability to form mental images[52]. However, visualisation is particularly helpful for trust and tax lawyers, as they are required to be able to understand complex

[51] I should really say "male student". In 1890, Philipa Fawcett was placed first in the exams, but as such was awarded the place of "*above the Senior Wrangler*", the latter accolade being reserved for a man. Of course, no woman was admitted to the Bar by Lincoln's Inn until some 30 years later.
[52] Daily Mail, 1 November 2021.

abstract structures. So, it was with delight that I recently learned that perhaps the finest English mathematician of the Victorian age was also a Chancery barrister, and it is the purpose of this article to tell you a bit about him.

Arthur Cayley was born on 16 August 1821 in Richmond, Surrey, the son of a merchant to Russia. Spending part of his early life in Russia, the young Cayley returned to England with his family in 1829. The family settled in Blackheath, and Cayley attended a private school there, before moving to King's College School, London at the age of 14. His exceptional ability in mathematics was evident from an early age, and at his senior school he added to this a flair for chemistry, an area of interest which he maintained throughout his life. In 1838 he went up to Trinity College, Cambridge, going on to become Senior Wrangler in the mathematical tripos exams as well as winner of the prestigious Smith's Prize. A sketch of his presentation to the Vice Chancellor as Senior Wrangler survives[53]. He became a fellow of Trinity College later that year, one of the youngest of the 19th century. The fellowship was of limited duration, however, and therefore his long-term options in Cambridge were to take holy orders (for which, although a devout Christian, he felt no vocation) or to obtain a permanent position at the university, if available. In the event, he had no option but to choose a profession – and he chose the law.



folio 34.

„ 18 CLARKE WATKINS BURTON, of Clare Hall, Camb. (18), 2 s. Edmund Singer B., of Church Hill, Welton, Northants, Esq.

„ 20 ARTHUR CAYLEY, of Trin. Coll., Camb., M.A. (24), 1 s. Henry C., of London, Esq.

„ 20 DANIEL CONNER (23), 1 s. Daniel C., Esq., of Mauch Ho., co. Cork.

Fig. Extract from Admissions Records of the Honourable Society of Lincoln's Inn, 20 April 1896

[53] Victor A Huber, *The English Universities* (London, 1843).

Cayley was not the first lawyer in his family. His great-great-grandfather, Cornelius Cayley (1692-1779) had been a prominent member of the Bar and a Recorder in Kingston-upon-Hull. On 20 April 1846, Cayley was admitted as a member of Lincoln's Inn, becoming a pupil of the famous conveyancer, Jonathan Henry Christie. Christie was a colourful character, of some notoriety. In February 1821, he was one of the last men to fight a duel by pistols on English soil, for which he was tried for murder and acquitted. The duel, which took place at a popular duelling spot by Chalk Farm Tavern, near Primrose Hill, was the result of a literary spat.

The conveyancer M G Davidson, nephew to the pre-eminent conveyancer Charles Davidson[54], reported the following story of Cayley's first interview with Mr Christie at his Chambers based in 2 Stone Buildings:-

"*Mr Cayley arrived at Stone Buildings, sent in his card, was admitted, and asked to be taken as a pupil. Christie inquired whether he had any introduction; the reply was, No. Had he been at a University? Yes. Christie, who seldom had a vacant chair in his pupil room, used to describe himself as not having been very favourably inclined towards this monosyllabic applicant. However, he had been at the University and it might be worth while to inquire further. Christie did so, and by successive and separate questions elicited the information that Cayley's University was Cambridge; his college Trinity; that he had taken a degree; in honours; in mathematical honours; that he had been a Wrangler; that he had been Senior Wrangler. That, of course, was enough and Christie managed to find room for this applicant, whose modesty appeared to be as remarkable as his distinctions…*"[55]

[54] Author of *Davidson's Precedents and Forms in Conveyancing*, mentioned in the text below.
[55] *The Institute, A Club of Conveyancing Counsel: Memoirs of Former Members (1895-1907)*, John Savill Vaizey.

A fellow pupil, T.C. Wright[56], said:-

> "*…We fellow-pupils knew that Arthur Cayley had been the Senior Wrangler of his year, and that he possessed extraordinary abilities; but they were not indicated by his personal bearing, and the retiring modesty of his disposition prevented him from ever alluding to the honours he had won at Cambridge. He had one of the most unsophisticated minds I have ever known; jokes, and the badinage of the pupil-room, seemed to be delightful novelties to him, and his face beamed with amusement as he listened to them without taking much part in the conversation, being content to devote his time assiduously to work which I suspect was not altogether congenial to his taste…*"[57]

Cayley was called to the Bar on 3 May 1849 and proceeded to act as devil for Christie, the former eschewing his own work to allow time for his substantial mathematical endeavours. Despite his lively youth, Christie was spoken of as the greatest conveyancer of his day and, with a large practice, becoming one of the first six conveyancing counsel of the Court. Cayley later spoke of work which Christie did while he was with him for clients such as the following: the Law Life Assurance Company, The Marquis of Bute, the Black Sluice Drainage, the Portarlington Estates, Settlements of the Staffordshire Estates of the Earl of Shrewsbury and the Lancashire Estates of the Earl of Crawford and Balcarres. Christie retired from practice in 1862 at the age of 70. It is unlikely to be a coincidence that Cayley left the Bar in 1863 to take up the Sadlerian Professor of Pure Mathematics at Cambridge.

Unsurprisingly, Cayley was a gifted draftsman. A precedent work praises his skill. In *Davidson's Precedents and Forms in Conveyancing* (3rd ed, 1873)[58], the author adds a footnote to a precedent calling "*attention to the remarkable skill exhibited in* [a] *settlement, the work of Arthur Cayley*". No doubt he could have

[56] Also the first pupil of Charles Davidson.
[57] *The collected mathematical papers of Arthur Cayley* (1895), Cambridge University Press ed AR Forsyth.
[58] Part II, p 1067.

been an easy rival and successor of Christie. But he never let his legal work distract from his true calling as a mathematician. Many of his friends around legal London were Cambridge-educated mathematicians. One of them, James Joseph Sylvester[59], was an actuary-turned barrister and Sylvester is himself regarded as having made fundamental contributions to mathematics. Sylvester and Cayley would walk round the squares of Lincoln's Inn discussing mathematical ideas, one area of particular interest to them being an important field of study in the late 19th century, that of invariant theory, which is related to the idea that certain points are stable under transformations such as reflections. Other friends of Cayley included Charles Hargreave (1820-1866), who also worked for Christie and won a Royal Society Gold Medal in 1844 for his work on differential equations.

In June 1848, during his pupillage, Cayley travelled to Dublin, where he attended lectures by the Irish mathematician, William Rowan Hamilton, on *quaternions*, a number system extending the complex numbers and incorporating the surprising aspect that the square of each of three of these numbers (*i, j* and *k)* is equal to -1 and that multiplication is not commutative – i.e. a different result may be obtained by the multiplication of two numbers, depending on which number is placed first. A famous story attends the discovery of quaternions by Hamilton in 1843. He was walking out along the Royal Canal in Dublin with his wife when the solution suddenly occurred to him, causing him to carve the relevant equation using a penknife into the side of the nearby Broom Bridge (a plaque is now to be found there).

Cayley was fascinated by quaternions, and rightly so given his interest in abstract or structural algebra. In 1854, he published his paper *On the theory of groups*. The importance of group theory in the development of pure mathematics cannot be underestimated, nor can the role of Cayley. To this day,

[59] In 1837, Sylvester came second in the Cambridge mathematics tripos exams, but was prevented from taking his degree, as he was Jewish and therefore could not fulfil the religious requirements. He worked as a barrister between 1850 and 1855, when he left to become a professor of mathematics.

certain tables used in group theory are named after him ("*Cayley* tables"). A group is a set of processes, which can be combined together in certain symmetrical ways to produce other members of the set. It was discovered that groups could only take a finite number of abstract template structures. To take an example, groups with four elements either have the same structure as the group of the four rotations of the square ("*the cyclic group of order 4*") or the group of four symmetries (rotations and reflections) of the rectangle ("*the Klein group, V*"). The quaternion group can similarly be seen to define a particular group structure ("*the dicyclic group of order 8*"),

Cayley's mathematical output during his 14 years at the Bar was prodigious. He wrote between two and three hundred papers during the period 1849 to 1863, including some of his most brilliant discoveries. He was elected a member of the Royal Society on 3 June 1852.

After Cayley left the Bar, he remained as Sadlerian Professor for the rest of his life. He married in 1863, the year he went back to Cambridge, to Susan, and they had two children. Theirs is said to have been a very happy marriage. Cayley died in 1894, aged 74.

A rumour attributed to Cayley the statement that "*the object of law was to say a thing in the greatest number of words, and of mathematics to say it in the fewest*", a view and the possibility of ever having held it which he repudiated. Had he said it, he would no doubt have had scores of sympathisers.

The heirs of the skills and drafting work practised by Christie, Cayley and their contemporaries remain today at the Chancery Bar in Lincoln's Inn, albeit in modest numbers – some of them at Wilberforce Chambers. The Chancery Bar has expanded greatly, but mainly in the field of litigation, as cross-fertilised by the work of the Commercial Bar. Court-work and the fanfare of the advocacy qualification that is the appointment as Queen's Counsel dominate attention and prestige. I would, however, argue that the heart and soul of Lincoln's Inn

remains in its traditional roots. When one looks at the likes of Arthur Cayley, we can be sure that it is an honour to act as their successors.

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