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Decisions, Decisions, Decisions - International Case Update

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Introduction: A Whistlestop Tour of Trust Cases from the Past 12 Months

1. There is a growing tendency for courts, when faced with novel points of trust law, to look to the jurisprudence of other trust jurisdictions, in a way that is seldom seen in other areas of the law. This two-way traffic fosters consistency across trust jurisdictions and results in a growing body of 'international' trust laws.

2. Another recent trend is the relative decline in the popularity of the English trustee and of the English law trust. This is the product of successive Chancellors' tax changes. It might be thought that this would lead to a decline, relative to offshore jurisdictions, in trust cases before the courts of England and Wales. It emerges from the research carried out for today's talk that trust jurisprudence continues to thrive in England and Wales.[1]

3. There is also a significant volume of trust and estate cases from other courts. This sheer volume makes it difficult to do justice to all that has gone on over the last year in such a short space of time. It is also difficult to discern particular trends, as each case is fact-specific, and every situation is different. I have sought to focus on cases which seem genuinely noteworthy from various jurisdictions (England and Wales, Grenada, Trinidad and Tobago, the Isle of Man, the EU, the Cayman Islands, Bermuda, Guernsey, New Zealand, and Canada).

(1) *Byers v Saudi National Bank* [2022] EWCA Civ 43[2]

4. The appellants were a Cayman Islands company (SICL) and its joint liquidators. SICL was the beneficiary of a Cayman Islands trust which owned shares in five Saudi Arabian banks. The trustee had transferred the shares to another Saudi Arabian bank (Samba) to discharge part of a debt that he owed to Samba. The share transfer was governed by Saudi Arabian law. The appellants considered that the transfer was in breach of trust and brought a claim based on knowing receipt against Samba. Dismissing the claim, Fancourt J found that SICL had no continuing proprietary interest in the shares post-transfer because Saudi Arabian law made no distinction between legal and beneficial ownership. Thus, Samba's title extinguished or overrode SICL's proprietary interest, even if Samba knew of it. In other words, Samba acquired good title.

5. The Court of Appeal rejected the liquidator's appeal. It agreed that a continuing proprietary interest in the relevant property is necessary to support a claim for knowing receipt. In the words of the court:

[1] This is based on a Westlaw search, using the terms "trust", "trustee", "breach of trust", "settlement", and "Trustee Act 1925", which generated 90 hits for the 12-month period from 1 February 2022 to 1 February 2023.

[2] Additional resources:

- Alexander Gergiou, 'Knowing Receipt: Continuing Trusts and Conscionability' (2023) 86(1) Modern Law Review 276-288.

- Alan Roxburgh, 'Knowing receipt: the "continuing proprietary interest"' (2022) 28(8) Trusts & Trustees 801.

> "78. In all the circumstances, it seems to us that the Judge was right to conclude that a knowing recipient "must have held trust property, not property to which from the moment of receipt he had good title" and that "a claim in knowing receipt, where dishonest assistance is not alleged, will fail if, at the moment of receipt, the beneficiary's equitable proprietary interest is destroyed or overridden so that the recipient holds the property as beneficial owner of it". That conclusion is, as the Judge said, borne out by "a consistent line of case law" in which it has either been decided that "a claim in knowing receipt cannot succeed unless the claimant has a continuing proprietary interest following the impugned transfer" or that has been assumed to be correct.
>
> 79. In short, a continuing proprietary interest in the relevant property is required for a knowing receipt claim to be possible. A defendant cannot be liable for knowing receipt if he took the property free of any interest of the claimant. It follows that, as the Judge held, "absent" a continuing proprietary interest in the Disputed Securities at the time of registration, the claim in knowing receipt as pleaded will fail".

6. Further, in relation to the Saudi law issue, the court refused to interfere with the judge's finding that, as a matter of Saudi Arabian law, the appellant had no continuing proprietary interest in the disputed securities to support the claim. The court affirmed that, where a foreign law is codified, statutory, or otherwise derived from a written source, the court's task will be to determine, as a question of fact, how foreign courts would interpret and apply it based on expert evidence. It is not generally the role of the court to consider how it would itself interpret and apply a provision, except "[…] where the nature of the foreign law means that the English Court's expertise approaches that of any foreign law expert […]".[3] In this case, bearing in mind that the only relevant authorised texts were in Arabic and the significant contextual and practical differences between the Islamic and common law systems, the judge had adopted the correct approach by relying on expert evidence.

7. Finally, as the unsuccessful claimants have obtained leave to appeal to the Supreme Court, this will not be the last word on this matter.

(2) *Von Westenholz v Gregson* [2022] EWHC 2947 (Ch)

8. The first claimant bought 80,000 shares in companies ("ASL Group") run by his son-in-law ("Mark"). The claimant had intended that the shares would be held for the other claimants, namely his wife and children. No shares were issued to any of the claimants; instead the shares ended up in Mark's name. In 2014, Mark admitted to the defendants, who were non-executive directors of ASL Group, that he had improperly taken £2 mil from ASL Group to fund a gambling addiction. Following this, the defendants took control of ASL Group and worked hard to deal with the fallout of Mark's actions. Mark entered into a charge in favour of ASL Group over the 80,000 shares (it being represented that Mark owned them beneficially). Then in 2015, Mark transferred the shares to two directors to hold on trust for him, subject to a right to sell them and use the proceeds to reduce Mark's debt to ASL Group. In 2018, the board resolved to pay a dividend of £400,000 in respect of the 80,000 shares. The dividend was retained by ASL Group in reduction of the amounts owed to it by Mark.

[3] [104].

In 2019 ASL Group was placed into administration. The claimants claimed the shares were held by Mark on trust, and that the actions of the two director trustees resulted in personal liability based on the *Guardian Trust* principle.

9. The claim succeeded. Mark held the shares either on express or resulting trust. Although the shares were not originally settled on express trust, the later correspondence, when read as a whole, was sufficient to create an express trust in favour of the claimants despite the absence of an overt declaration, or use of the word 'trust'. In the alternative, when considering whether a resulting trust arose, the question was whether there was a common intention as to the beneficial interest in the shares.[4] On the facts, it was found that the original purchaser had not intended to gift the shares to Mark, nor had Mark expected to become the beneficial owner of the shares. In such circumstances, a resulting trust arose in favour of the individual who provided the funds for the original purchase.

10. The claimants gave notice to the defendant director trustees of their interest in the shares. This engaged the principle in *Guardian Trust and Executors Company of New Zealand Limited v Public Trustee of New Zealand*[5] where the following passage from Lord Romer is oft cited:[6]

> "[…] if a trustee or other person in a fiduciary capacity has received notice that a fund in his possession is, or may be, claimed by A, he will be liable to A if he deals with the fund in disregard of that notice should the claim subsequently prove to be well founded".

11. Here, the claimants notified the director trustees on multiple occasions that they had a beneficial interest in the shares. The director trustees took a conscious decision to disregard this claim and instead applied the dividend in partial satisfaction of Mark's debt to the company.

12. Liability under the *Guardian Trust* principle "[…] does not depend on dishonesty or some other lack of probity. All that is required is that the person holding the assets is a fiduciary who has notice of a claim to those assets from a third party but nonetheless deals with them in a way which disregards the claim […]".[7] In the event that the trustees are required to act, they should seek to protect themselves by applying for a 'put up or shut up' order against the third party, or alternatively a *Re Benjamin* order.[8]

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[4] See Lord Browne-Wilkinson in *Westdeutsche Landesbank v Islington LBC* [1996] A.C. 669 at 708: "Under existing law a resulting trust arises in two sets of circumstances: (A) where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions. It is important to stress that this is only a presumption, which presumption is easily rebutted either by the counter-presumption of advancement or by direct evidence of A's intention to make an outright transfer".

[5] [1942] AC 115.

[6] *Guardian Trust and Executors Company of New Zealand Limited v Public Trustee of New Zealand* [1942] AC 115, 127.

[7] [200].

[8] See, *Lewin* (20th ed) at 39-31 to 39-036.

(3) *Kekwick v Kekwick and Ors* [2022] EWHC 2563 (Ch)

13. The dispute in *Kekwick* arose from the defendant trustees' failure to distribute the trust fund to the claimant who in 2009 obtained an absolute infeasible interest. The trustees explained the claimant had not complied with their attempts to verify his identity and address (leading to a risk of breach of trust for failing to distribute to the right person).

14. The judgment summarised the trustees' duty to ensure there are no doubts over the identity of a beneficiary, before making payments:

> "60. Were authority needed, it can be found at *Holdford v Phipps* (1841) 49 ER 170, with commentary at Lewin 24-004, where the duty is described as the trustee's obligation to 'satisfy himself beyond doubt who are the parties legally and equitably entitled to it … . … he may compel all persons who claim to be beneficiaries to set forth their title … .'.
>
> 61. Were the Trustees to fail to take sufficient steps in this direction, then a claim would lie against them, since the duty is one of strict liability: Lewin, 24-005. So they cannot be criticised, much less regarded as in breach of duty, for refusing to distribute until identity and address had been established".

15. Of course, compliance with anti-money laundering obligations is also relevant but such obligations do not give rise to a duty under trust law. The evidence was that the trustees had attempted, over a long period, to satisfy themselves as to the claimant's identity.[9] However, for reasons which are unclear, the claimant had failed to comply. Therefore**,** the court held that:[10]

> 70. […] without satisfactory evidence the duty to distribute simply does not arise, since it cannot be fulfilled without breaching, or risking breaching, a concurrent duty on the trustee to establish beyond doubt the identity of the person to whom the assets are being distributed. Further, I am entitled to and do conclude that even if the Trustees had repeated the request during this period, the required information would not have been forthcoming. I say that with a high degree of confidence, based on the fact that on every subsequent occasion on which the information has been requested, it has not in fact been provided, even to the point of James failing to provide such information in order to satisfy the conditions imposed on the distribution of the interim sum ordered by the Court. At any stage since 2009 James could have provided sufficient proof of identity and address to trigger the Trustees' duty to distribute. He has never done so, and he cannot rely on his own omissions to claim a breach of duty by the Trustees, who want nothing more than to distribute the Trust Fund in accordance with their duty, allowing them to bring the Trust to an end.
>
> 71. To conclude, the Trustees were not in breach of their duty to distribute whether all or part of the Trust Fund. To do so without establishing the identity and address of James would itself have been a breach of duty; the duty to distribute must operate subject to the duty to establish identity. In such

[9] See, [60]-[69].
[10] [70]-[71].

circumstances, the Trustees are not in breach of failing to distribute the Trust Fund or any part of it.

16. This decision is to be welcomed as providing a common-sense protection for trustees.

(4) *Re Smith* [2022] EWHC 3053 (Comm)

17. *Re Smith* concerned a trust created under a commercial agreement to provide litigation funding. The trust in question attached to recoveries from the litigation; it was designed to secure the funder's entitlements to such proceeds under the funding agreement. A number of issues arose in connection with this trust (known as the Harbour Trust). A Part 8 claim was brought by putative trustees of the Harbour Trust to confirm their status and investment powers and functions. The court found one of the trustees (Mr Thomas) had not been a truthful witness; it found Mr Thomas had gone along with transfers to the arch fraudster (Dr Gerard Smith) in breach of the Harbour Trust; Mr Thomas and his co-trustees had since acted "in a manner which, at first sight, appears calculated to advance the interests of third parties who have opposing interests to those of the beneficiaries under the Harbour Trust, rather than the beneficiaries". The court considered "the due and proper administration of the trust is opposed to the trustees remaining in office, with regard to the interests of all the potential beneficiaries".[11] Accordingly, the Court felt it necessary for them to be removed immediately from office. Two individuals were nominated by the beneficiaries of the Harbour Trust to act as replacement trustees. These individuals received the court's approval; they were to be formally appointed at a later point in time. The question was whether the removal of Messrs Thomas and Taylor should take effect immediately, leaving the Harbour Trust with no trustee. The court held that this was possible, under the court's inherent jurisdiction. It cited the following passage from *Lewin* at [14-074]:

> "104. Where the removal of a trustee is required without the appointment of a new trustee in his place, or where for any other reason the statutory power under section 41 is not applicable (or is unsuitable), recourse must be had to the inherent jurisdiction of the court. The court has an inherent jurisdiction in executing the trusts to remove a trustee without appointing a new trustee in his place, and even though his consent or cooperation is not forthcoming. But the court will not make an order removing a trustee without an appointment in his place unless either an adequate number of trustees will remain after the removal, or the need for removal is urgent, in which case the court would normally appoint a receiver pending an appointment of new trustees by the court later on, or other appropriate arrangements are in place for the ongoing administration of the trust, for example where the trust is being administered by the court."

The judgment continues:

> "108. I accept that removal of the only trustees without replacing them will be a rare, perhaps exceptional, course, but I am not persuaded that it cannot be done. If, for example, there is a pressing need to remove the existing trustees

[11] The leading authority is of course the decision of the House of Lords in *Letterstedt v Broers* (1884) 9 App Cas 371.

> because they are unable to act, or are unsuitable to remain in office, or some combination of the two, I am not persuaded that the court would be precluded from acting simply because it had not, at the stage of the removal application, been possible to identify a suitable person willing to assume the office of trustee. The court will exercise its power to remove trustees if this promotes the welfare of the beneficiaries and the competent administration of the trust (*Letterstedt v Broers* (1884) 9 App Case, 371, 386), and if the due and proper administration of the trust is opposed to the trustees remaining in office, with regard to the interests of all the potential beneficiaries (see [84] above). If these considerations require the immediate removal of the existing trustees, but do not require the immediate appointment of a replacement, then I am satisfied that the court can proceed on that basis, at least as an interim measure, while keeping the position under review."

18. It is perhaps significant that the trust in question was a bare trust arising under a commercial agreement.[12] In Foxton J's words, the trust was a "[…] very limited commercial trust [which is a] fundamentally different […] animal from the traditional trusts at which the Trustee Act 1925 is principally aimed […]".[13] The trustees' purpose was a limited one being to receive and hold assets pending distribution according to the terms of the trust. Therefore, it will be interesting to see whether the Court will be as willing to remove trustees in a traditional trust, where the trustee has a more active role.

(5) *Whittle v Whittle* [2022] EWHC 925 (Ch)[14]

19. The Court upheld a claim of fraudulent calumny and set aside a will in which the testator, Gerald Whittle, had left his residuary estate to his daughter and her partner, with Gerald's son receiving only cars and the contents of a shed and garage on the condition that the son agreed to clear them out. The son challenged the will on the basis that the daughter and other defendants had procured it through fraudulent calumny; they had communicated though a number of false accusations to Gerald to the effect that the son was a thief, a violent man, whose wife was a prostitute. The judge noted that Gerald was in failing health and suffered from confusion. Gerald had therefore taken what he was told at face value, became upset at his son's behaviour, and determined to change his will, to the son's detriment. The new will was executed a month later.

20. The Court drew on the summary of fraudulent calumny provided by Lewison J in *Edwards v Edwards* [2007] WTLR 1387:

[12] See, [28]-[30], and [31]-[38].
[13] [37].
[14] Additional resources:

- Ken To and Catherine Hau, 'Fraudulent calumny: setting aside wills obtained by lies' (2022) 237(Oct) Trusts and Estates Law & Tax Journal 41.

- Harry Samuels, 'Lessons from a successful fraudulent calumny claim: Whittle v Whittle [2022] EWHC 925 (Ch)' (*XXIV Old Buildings Private Client Update: Issue 26,* June 2022) <https://xxiv.co.uk/lessons-from-a-successful-fraudulent-calumny-claim-whittle-v-whittle-2022-ewhc-925-ch/>

"39. I am grateful to Mr Auld for so succinctly setting out the law under this particular head. He has referred me to the well-thumbed judgment in *Edwards v Edwards* [2007] WTLR 1387. Quoting the words of Lewison J (as he then was), the law in this area may be summarised thus:

> *"There is no serious dispute about the law. The approach that I should adopt may be summarised as follows:*
>
> […]
>
> *vii) There is a separate ground for avoiding a testamentary disposition on the ground of fraud. The shorthand used to refer to this species of fraud is "fraudulent calumny". The basic idea is that if A poisons the testator's mind against B, who would otherwise be a natural beneficiary of the testator's bounty, by casting dishonest aspersions on his character, then the will is liable to be set aside;*
>
> *viii) The essence of fraudulent calumny is that the person alleged to have been poisoning the testator's mind must either know that the aspersions are false or not care whether they are true or false. In my judgment if a person believes that he is telling the truth about a potential beneficiary then even if what he tells the testator is objectively untrue, the will is not liable to be set aside on that ground alone;*
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> *ix) The question is not whether the court considers that the testator's testamentary disposition is fair because, subject to statutory powers of intervention, a testator may dispose of his estate as he wishes. The question, in the end, is whether in making his dispositions, the testator has acted as a free agent."*

21. Applying this to the facts, the Court held that the daughter made statements knowing them to be false, as she was not able to produce any evidence of the source or basis of her accusations and was therefore unable to demonstrate that she believed they were true. These false statements had poisoned Gerald's mind to the extent that he had been compelled to exclude his son from a greater share of his estate. The requirements for fraudulent calumny were therefore met. The Court made an order against the will, granting letters of administration to the son, and Gerald was held to have died intestate.

(6) *Gorbachev v Guriev* [2022] EWCA Civ 1270[15]

22. The usual way to obtain evidence from a non-party who is based outside the jurisdiction is by means of a letter of request / the Hague Convention on obtaining evidence abroad. This case establishes that the jurisdiction for ordering third party disclosure, found in section 34 Senior Court Act 1981, could be employed to obtain disclosure of documents held in England and Wales on behalf of a non-party who was located outside the jurisdiction.

23. Two companies, based in Cyprus, acted as the trustees of a trust which had been created for the benefit of the claimant. The claimant alleged the trustee companies had been operated by close associates of the defendant. This fact was relevant to a wider dispute concerning a fertiliser business based in Russia. The documents in question were held by the trustees' English solicitors, Forsters. The key question was whether the jurisdiction to order third party disclosure was available in situations where the third party was outside the jurisdiction. The court granted the application. It considered jurisdiction derived from gateway 20[16] ("gateway (20)"), which provides:

> "(20) A claim is made –
>
> (a) under an enactment which allows proceedings to be brought and those proceedings are not covered by any of the other grounds referred to in this paragraph […]"

24. The words "claim" and "proceedings" were construed widely to include an application for third party disclosure. The trustees applied to set aside the order. This was refused. The trustees appealed against each of these findings. The Court of Appeal refused the appeal. The Court of Appeal agreed that the words "claim" and "proceedings" were to be defined broadly so as to include procedural applications. Further, although the principle of territoriality prevented parties from bringing proceedings against persons outside of England and Wales, it had little or no application where the documents requested were located within England and Wales. This is because the production of documents located within the jurisdiction does not involve any illegitimate interference with the sovereignty of another state. This means an application may be brought against a third party trustee outside the jurisdiction for disclosure of documents held by solicitors or other advisers located in England and Wales.

[15] Additional Resources:

- Joseph de Lacey, Jennifer Ridgway, Niamh Herrett, 'How wide is the net? Lessons for offshore trustees after *Gorbachev v Guriev*' (2023) 1 Private Client Business 1-11.

[16] CPR Practice Direction 6B, para 3.1.

(7) *Hopes v Burton* [2022] EWHC 2770 (Ch)[17]

25. The trustees of a trust executed two deeds of appointment to effect minor changes in beneficial interests. This took the form of a revocation of qualifying interests in possession (with the result that the underlying property was treated as forming part of the qualifying beneficiary's estate) and created new non-qualifying interests in possession in their place. The trustee thought the effect of this would be plain vanilla but in fact it resulted in an immediate tax charge of £365,000, plus interest of over £68,000. In addition, under the relevant property regime, ten-year anniversary charges would apply and appointments out of the trust would be subject to exit charges. The trustee applied to set aside the deeds of appointment on grounds of mistake, applying the principles in the Supreme Court's decision in *Pitt v Holt.*[18] The application was heard by Master Price who was satisfied that the adverse tax consequences were not contemplated or intended and were sufficiently serious to make it unjust for the donee to retain the property they received, so justifying a claim for rescission.

(8) *Laird v Simcock* [2022] EWHC 1865 (Ch)

26. A claim was made for rectification of a deed of appointment executed by the executors and trustee of a will trust. This provided that the entire income of the trust fund should be paid to the Deceased's widow. The trustee (Ms Laird) explained that this was the result of a clerical error by the drafting solicitor (Mr Sharp). Mr Sharp's intention had been to limit the appointment to the Inheritance Tax-bearing assets (excluding assets which were relievable property on the grounds that they were eligible for agricultural property relief or business property relief).

27. Even though the application was not opposed, Master Clark rejected it. Her judgment records the court's traditionally cautious approach towards rectification and quotes from the leading authority of *RBC Trustees (CI) Ltd v Stubbs*[19] which set out the requirements for strong evidence that the document does not express the relevant party's intention:[20]

> "39. Firstly, because the remedy must be treated with caution, the claimant's case should be established by clear evidence of the true intention to which effect has not been given in the instrument. Such proof is on the civil standard of balance of probability. But as the alleged true intention of necessity contradicts the written instrument which is ordinarily regarded as the only manifestation of the party's intent, there must be convincing proof to counteract the evidence of a different intention represented by the document itself.
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> 40. Secondly, there must be a flaw in the written document such that it does not give effect to the parties'/donor's agreement/intention, as opposed to the

[17] Additional resources:

- Lawrence Hiller-Wood and Richard Dew, 'Tax: Operative Mistakes and Unintended Consequences' (2023) 240 (Jan/Feb) Trusts and Estates Law & Tax Journal 38.

[18] [2013] UKSC 26.
[19] [2017] EWHC 180 (Ch), at [39]-[42].
[20] [43].

parties/donor merely being mistaken as to the consequences of what they have agreed/intended. For example, it is not sufficient merely that the document fails to achieve the desired fiscal objective.

41. Thirdly, the specific intention of the parties/donor must be shown; it is not sufficient to show that the parties did not intend what was recorded; they also have to show what they did intend, with some degree of precision.

42. Fourthly, there must be an issue capable of being contested between the parties notwithstanding that all relevant parties consent to the rectification of the document."

28. Master Clark summarised Ms Laird's evidence: "Although she says that she relied on Mr Sharp to advise her, she does not state that he did. I am not therefore satisfied that she had any intention as to what she was achieving by executing the Deed. Her only intention was to sign the document which Mr Sharp put before her to sign." Further "if she had understood what Mr Sharp says he was intending to achieve by the Deed, it is difficult to see how having read the Deed, she could have signed it". Thus, Master Clark did not consider Ms Laird had adduced clear evidence as to her true intention, justifying the conclusion that Ms Laird's intention was different to that expressed in the deed.

(9) *Prickly Bay Waterside Ltd v British American Insurance Company Ltd (Grenada)* [2022] UKPC 8[21]

29. The Privy Council reviewed the principles applicable to Quistclose trusts, arising from a contract for the sale of land in Grenada to Prickly Bay Waterside Ltd. The seller (Mr Steele) agreed to defer part of the sale price for a two year period. Mrs Lee, the wife of the majority shareholder of Prickly Bay, deposited an amount equivalent to the deferred consideration with BAICO, an insurance company in Grenada, on behalf of Prickly Bay. This was the premium for an annuity payable to her for the two-year term of the policy, with the premium repayable to Mrs Lee on maturity, which she assigned to Prickly Bay so as to enable it to satisfy payment of the outstanding balance. The judgment records that the purpose of these arrangements was to maximise the payment of interest (the annuity arrangement gave Mrs Lee interest at the rate of 8.42%). Two weeks before the completion date and maturity of the annuity, BAICO was placed in judicial management (insolvency). Proceedings were brought against Prickly Bay in the Eastern Caribbean Supreme Court seeking payment of the balance due. It said that any claim which Mr Steele might have lay against BAICO, which was later joined as a defendant to the claim, on the basis that the effect of the annuity and its assignment to Prickly Bay was that BAICO held the sum deposited for the specific purpose of paying Mr Steele on completion and so was

[21] Additional resources:

- Ada Yee Lam Leung and Samuel Yee Ching Leung, 'Whither Quistclose trusts? A non-linear development of the doctrine' (2022) 29(2) Trusts & Trustees 1.

- Sukhninder Panesar, 'Quistclose trusts: a high threshold of facts' (2022) 234(Jun) Trusts and Estates Law & Tax Journal 6.

held by the judicial managers of BAICO under a Quistclose trust rather than as part of BAICO's assets to be distributed among all its creditors.

30. The judge dismissed the argument that a Quistclose Trust arose and granted relief to enforce payment to Mr Steele by Prickly Bay. Prickly Bay's appeal was rejected by the Court of Appeal and then the Privy Council. Lady Arden's judgment begins with the following summary of the principles:

> "1. Trusts for the transfer of money or other property for a specified purpose, in this appeal for the payment of debts, may arise where, for instance, one person, A, establishes a trust for the payment of the debts of A or another person by providing property (often money), whether by gift or loan, to a recipient, B, who has either a power or a duty to pay those debts. If the specified purpose is or becomes incapable of being carried out, the purpose is said to fail, and (subject to any contrary provision) A may bring proceedings to ensure the money is repaid to him or her, or as he or she directs. A trust for the payment of debts of this kind may be established by an express trust, but to the extent that it is not an express trust, but it is shown that a fiduciary relationship between A and B was intended and that a beneficial interest in the property remains in A, a resulting trust may arise by operation of law. These trusts are not new but have come before the courts in several important cases in the last 50 years or so. Trusts of this kind are known as "Quistclose" trusts after the case from which the modern development of these trusts stems.
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> 2. That case was *Quistclose Investments Ltd v Rolls Razor Ltd [1970] AC 567*, in which a bank lent money to a company in financial difficulty so that it could pay a dividend that had already been declared. The money was paid into a separate account appropriated to that purpose. The company went into liquidation before the dividend was paid. The Appellate Committee of the House of Lords held that the moneys were held on trust, as a primary trust in favour of the creditors (ie the shareholders entitled to the dividend) and secondly, on failure of the purpose, for the lender, and so did not form part of the general assets of the borrower. But the development of the law in this field has not been linear and the precise analysis has been refined in later authority.
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> 3. The nub of the present appeal […] is that Mrs Rosa Lee ("Mrs Lee") paid to the respondent ("BAICO") a sum of money ("the Moneys") which […] the appellant ("Prickly Bay") [claims] was intended to be used for the purpose of payment in two years' time of an amount which would then have become due and payable to a Mr Steele. BAICO had given a guarantee ("the Guarantee") that this sum would be duly paid. Prickly Bay contends that, when the full context of the arrangements between the parties is considered, Mrs Lee retained the beneficial right and title to the Moneys and that BAICO, having failed to pay under the Guarantee, was liable to return the Moneys to her under the principles referred to above."

31. Thus, the key question was whether the parties intended the money to be at the free disposal of the payee, BAICO. In deciding intention, the court was not confined by the canons of construction applicable to contracts:[22]

> "[t]he court is not necessarily constrained, as it would be where it was undertaking the task of construing a written contract, where there are some limitations on the matters that can be taken into account. So, in determining whether a Quistclose trust had been created, the court could take into account events and documents, such as the assignment, which postdate the date on which the Quistclose trust was said to be created. On the other hand, the court may decide that little weight should be given to such matters. As indicated by Webster JA (Ag), little if any weight can be given to what parties say was the nature of the transaction at a subsequent point in time".

The judge at first instance did not find that there was such intention: "Mrs Lee was concerned to maximise the payment of interest. Mrs Lee's evidence did not support the creation of a trust of any kind and she understood that the transaction was structured as it was so that she would get interest." Prickly Bay argued the judge had failed to pay sufficient regard to the assignment of the annuity. The Privy Council's judgment concludes:

> "The Board considers that the assignment should be given some weight because it was clearly part and parcel of the whole transaction, but on examination the Board does not, for the reasons given in the next two paragraphs, conclude that the assignment is sufficient to lead to the conclusion that there was a Quistclose trust. The Board would further attach minimal weight to what BAICO subsequently said about the whole transaction.
>
> 38. The conditions of the Annuity and the assignment were equally consistent with Prickly Bay providing collateral to BAICO as security for its Guarantee. Webster JA (Ag) so concluded in his final paragraph. Prickly Bay would be under an implied obligation to reimburse BAICO for moneys expended under the Guarantee. The assignment expressly contemplates the possibility that Mr Steele might be paid under the Guarantee.
>
> 39. Moreover, the assignment has no real weight for a more fundamental reason. As the courts below pointed out, it is clear from the authorities that it is not enough that there is a purpose: there must be something more to indicate that the Moneys are subject to a trust. Lord Davidson [for the appellant] is wrong to criticise para 35 of the judgment of the ECCA where this point is made. In this case, the deposit of the Moneys and the assignment cannot be considered as establishing that something more in the absence of the Annuity.
>
> 40. For the reasons given below, the issue of the Annuity is inconsistent with the Quistclose trust relied on.
>
> 41. Firstly, when Mrs Lee paid the premium for the Annuity, she paid for an investment product with an agreed rate of return. The Annuity provided therefore for investment of the premium at the discretion of BAICO, and for payment of a fixed sum to her on maturity. If the fixed sum was not available

[22] [37].

from investment of the premium it would have to be found by BAICO from its other funds. All this is normal commercial practice.

42. Secondly, under a Quistclose trust, as already discussed, the subject-matter of the trust will normally be segregated from other assets of the recipient. The recipient here was BAICO but there was no express requirement that it should keep the premium separate from its other funds. The Board recognises, as did Webster JA (Ag), that segregation is not always required but it conspicuous by its absence. The absence of a provision for segregation is a powerful factor which indicates that there is no Quistclose trust. It followed that the Moneys were, subject to the contract flowing from the Annuity, at the free disposition of BAICO to invest. There was no restriction on what BAICO could do with the Moneys. Its only obligation was to pay the agreed sums on maturity of the Annuity.

[…]

44. There was nothing to indicate that Prickly Bay retained any beneficial interest in the Moneys or that the Moneys did not form part of the general assets of the payee apart from the "tailoring" of the Annuity and the assignment to meet the obligations owed to Mr Steele. As explained, that was equivocal (para 42 above)".

(10) *Moses v Moses* [2022] UKPC 42

32. This concerned land in Trinidad originally owned by Milton Moses. Milton's will left the land to his widow, Mrs Jude Moses (who by the time of the appeal had passed away; the executor of her estate was her daughter, Flora Moses). Jude was also executor of Milton's will. In that capacity Jude executed a deed conveying the land to her son, Selwyn, the Appellant. The validity of this deed was the subject of challenge. The claim was that Jude had been mistaken in thinking Selwyn entitled to the Land under Milton's will. On realising this was not the case, a year later in 1985, Jude executed a Deed of Assent by which she assented and conveyed the same land to herself. Around 1999–2000, Jude put the land up for sale. Selwyn wanted to buy the land and, upon making inquiries at the Land Registry, discovered for the first time the existence of the disputed deed conveying the land to him (the deed had not previously been communicated by Jude to Selwyn). Believing himself the owner of the land, Selwyn sold the land under two deeds of conveyance in 2001. The land was developed, subdivided into lots, and sold to various buyers. In 2009, one of these subsequent buyers commenced proceedings against Jude (the Respondent to the Privy Council appeal) seeking confirmation of his legal title. Upon that dispute being settled, the Respondent joined the Appellant to the proceedings, claiming various forms of relief against him, including setting aside the disputed deed in equity on the basis of mistake. The first instance judge found the disputed deed had not been made as the result of any mistake on the part of Jude. The Respondent's claim was therefore denied. The Respondent appealed to the Court of Appeal of Trinidad and Tobago. The Court of Appeal reversed the decision of the High Court and found that in executing the disputed deed, Jude acted under a mistake of fact and the disputed deed should be set aside in equity. The Privy Council allowed the appeal. The majority held that even if, under the principles for equitable mistake found in *Pitt v Holt,* the conveyance could have been set aside, there were well-recognised bars to

recission. Here it is not in dispute that the land had been sold by Selwyn Moses to a bona fide purchaser for value without notice. Jude could not therefore "pull back" legal title to the Land by rescission. A claim in unjust enrichment for the profit received by Selwyn on the sale was successful and a sum of $300,000 was payable.

(11) *RBS International Ltd v JP SPC 4* [2022] UKPC 18[23]

33. The claimant, an investment fund that was based in the Cayman Islands, established a scheme by which investors were to lend money to solicitors in England and Wales to finance their pursuit of litigation. Under the scheme, the loans were to be advanced and repaid through an Isle of Man company called Synergy (Isle of Man) Ltd ("SIOM"), using bank accounts that SIOM held with the defendant bank. SIOM was owned by Mr Timothy Schools and Mr David Kennedy. They fraudulently took funds for themselves. The Privy Council's judgment summarised the fraud as follows:

> "Mr Schools and Mr Kennedy, through SIOM, misapplied the Fund's moneys, using the Main Account such that, rather than the flow of funds being from the Fund to the solicitors for the pursuit of legal cases and paid back upon case settlement or success, moneys were diverted from the Main Account directly or via another account at the Bank held by SIOM (the "House Account") to numerous third party accounts. The payments into those third party accounts were ultimately for the benefit of Mr Schools and Mr Kennedy, such payments being contrary to the scope of SIOM's authority under the Scheme documentation.
>
> 16. Between July 2009 and October 2012, approximately £110m of investors' money was transferred from the Main Account, purportedly to law firms as loans made as part of the supposed investment, but of this amount only £65m in fact went to law firms. Mr Schools and Mr Kennedy were able to transfer approximately £37.8m from the Main Account, in some cases via the House Account, to various third parties (excluding the law firms) in which they had a beneficial interest and to their own personal accounts in Switzerland, France and the Isle of Man. Of the £65m that did go to law firms, around £40m went to law firms in which Mr Schools had an interest which had not been disclosed to investors, contrary to the terms of the Scheme".

34. The claimant contended that the defendant owed it a duty of care in negligence to exercise reasonable care and skill by reason of the bank's actual or constructive knowledge that the moneys in SIOM's bank accounts were beneficially owned by the claimant and not SIOM. The claimant's case was that the circumstances were such that a reasonable banker would have had grounds for considering that there was a real possibility that the claimant was being defrauded. The defendant applied for summary judgment and/or for the claim to be struck out, on the ground that there was no arguable pleaded basis on which the claimant could establish that the defendant

[23] Additional resources:

- Harry Samuels, 'Bank to basics: a return to orthodoxy for the Quincecare duty?' (*XXIV Old Buildings*, 12 July 2022) <https://xxiv.co.uk/bank-to-basics-a-return-to-orthodoxy-for-the-quincecare-duty/>

- Peter Watss QC, 'Playing the Quincecare Card' (2022) 138(Oct) Law Quarterly Review 530.

owed it the alleged duty of care. The Deemster dismissed the defendant's application but the Staff of Government (Appeal Division) allowed the defendant's appeal, struck out the claim and entered summary judgment for the defendant.

35. The leading authority on bank's duty of care is that of *Barclays Bank plc v Quincecare Ltd* (*"Quincecare"*).[24] This concerned a loan of £400,000 to a company. Under the loan facility, the chairman of the company caused the bank to transfer some £340,000 to a firm of solicitors who, under prior arrangements with him, then transferred that sum into his account in the USA. This constituted a defrauding of the company by the chairman. In the bank's action against the company for repayment of the loan, the company counterclaimed for loss caused by the bank's breach of a duty of care owed to the company. Steyn J carefully formulated and explained the bank's duty of care that was in issue on the counterclaim as follows:[25]

> "37. […] the *Quincecare* duty of care is […] a duty on a bank to refrain from executing a customer's order if, and for so long as, the bank is "put on inquiry" in the sense that the bank has reasonable grounds for believing—assessed according to the standards of an ordinary prudent banker—that the order is an attempt to defraud the customer."
>
> […]
>
> "39. There are three main points to highlight about the Quincecare duty of care as explained by Steyn J.
>
> (1) The Quincecare duty of care is an aspect of the bank's duty of reasonable skill and care in and about executing the customer's orders and arises by reason of an implied term of the contract and under a co-extensive duty of care in the tort of negligence.
>
> (2) Steyn J recognised that this particular duty of care has to be carefully calibrated to reflect the fact that the duty of care is counteracting the receipt by the bank of what appears to be a valid and proper order which it is prima facie bound to execute. In other words, the duty of care runs counter to the bank's standard contractual duty to comply with a valid order of the customer. In line with this, Steyn J was at pains to make clear that the standard of care imposed should not place too onerous a burden on banks.
>
> (3) Steyn J's statement that "the law should guard against the facilitation of fraud, and exact a reasonable standard of care in order to combat fraud and to protect bank customers *and innocent third parties*" (emphasis added) must be read in context. There was no question on the facts of the case of any duty of care being owed by the bank to innocent third parties. That was not in issue. The relevant parties were the bank and the customer. They were in a contractual relationship and the question was how far an implied term or a duty of care in the tort of negligence should be imposed to protect the customer. It is therefore clear that the reference to protecting innocent third parties was merely to the effect that combating fraud committed against a bank's customer,

[24] [1992] 4 All ER 363.
[25] [37], [39]. Also, see generally, [36]-[44]

> by recognising a duty owed to the customer, protects not only the customer but also other innocent victims of a fraud."

36. The claimant was not the bank's customer. It was a third party in the sense described by Steyn J in the final quoted paragraph. Subsequent authorities of *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd* [2020] AC 1189 and *JP Morgan Chase Bank NA v Federal Republic of Nigeria* [2019] 2 CLC 559 emphasised the narrow scope of the duty. The Board saw "no good reason in this case for incrementally developing the tort of negligence, beyond the well-established Quincecare duty of care, so as to impose on a bank an equivalent duty of care to a third party who is not a customer of the bank". The Board noted that the Supreme Court has previously emphasised (in *Michael v Chief Constable of South Wales Police* [2015] UKSC 2 and *N v Poole Borough Council* [2019] UKSC 25) that "the common law does not generally impose liability for failure to prevent harm caused by others". In order to do so, the defendant must have some special level of control over the source of danger, or have assumed a responsibility to protect the claimant from the danger. In the present case, the Bank had no special level of control over the source of danger (i.e. it was not in control of the fraudsters) and could not be said to have assumed responsibility to protect the claimant from the fraud.

(12) *Annaluisa Pesenti Mazzoleni v Summerhill Trust Company (Isle of Man) Limited* (2021) 2DS 2021/3

37. This appeal concerned the respondent trustee's refusal to appoint a protector to a Manx trust. The appellant was a beneficiary. The trust in question is one of four related family trusts which are the subject of Italian proceedings, which include challenges to their validity under Italian heirship laws. The trust's previous protector resigned in 2017. Therefore, within the context of ongoing hostile litigation between the appellant and respondent, the appellant in 2018 asked the respondent to appoint a new protector. The trustee declined. The court summarised their reasons for refusal as follows:[26]

> "(1) the Trustee did not consider there was any need to appoint a protector for either trust at that time. The only substantive reason which had been advanced by the Appellant and her sister had been to ensure the provision of financial information, but as that was being provided anyway, it was unnecessary to appoint a protector to the [settlements];
>
> (2) furthermore, the Four Trusts were involved in acrimonious litigation in Italy which had caused conflict within the family and the Respondent did not wish to take any unnecessary steps which might add to those hostilities;
>
> (3) all the Trusts settled by Mrs Pesenti (which we take to mean the Four Trusts) had considerable inter-relationships of trust assets and in some cases of beneficiaries. Those inter-relationships required some unity of decision-making across the trust structures. With that in mind it would not be desirable for the [some] settlements to have protectors, or different protectors to the other trusts, without good reason; and

[26] See, [21].

> (4) the Trustee considered that it was essential that any individual considered for the role of protector should be impartial and independent in relation both to the family and the Italian Proceedings in order to avoid any further aggravation within the family. The Trustee had to deal fairly with all of the beneficiaries. Given the hostile litigation, it was difficult to conceive of an individual who might be regarded by all of Mrs Pesenti's descendants as impartial and independent. The letter confirms that the Respondent would give full transparency as to the assets of the […] settlements and would give full details of the trust accounts going forward."

38. The appellant sought an order compelling the trustees to appoint a protector. Their claim had two grounds: (1) whether, as a matter of construction of the Trust Deed, the appointment of a protector was mandatory or simply a mere power exercisable by the Trustee; and, (2) if the appointment of a protector were a mere power, whether the court should nevertheless intervene so as to compel the Trustee to appoint a protector or alternatively direct it to reconsider its decision.

39. In relation to issue (1), the court found that the power was not an imperative one on the basis that, as a matter of language, the settlor's use of the word "may" within the relevant clause does not and cannot mean "must".[27] In relation to issue (2), despite the non-intervention principle, the court felt able to intervene in the trustee's decision and found that trustees reasons for not exercising the power were inadequate. Their analysis is worth setting out more fully:[28]

> 50. In our judgment [the first] reason does not stand up to analysis for two reasons. First, there is all the difference in the world between being provided with financial information at the discretion of the Trustee and having an entitlement to financial information which enables the person so entitled to press for clarification or further information as the case may be. It is the difference between a supplicant and a person entitled – using other language, the Trustee may decide to give financial information to the Appellant, but it must give such financial information to the protector. It should not be forgotten that the protector not only has the ability to apply to court for an order directing the trustees to do that which the Trust Deed requires them to do, but also the protector has the wherewithal to compel the trustees directly to perform their functions in that respect, because he has the power of dismissal.
>
> 51. Secondly, obtaining financial information is not the only function of the protector. In that context, as noted by Deemster Corlett in IFG International Trust Company Ltd v French 2012 MLR 637, the precise role assigned to a protector under the trust instrument is of particular significance. In the present case, those different functions have been fully set out […] above. Indeed, in any case where protector powers come to be considered, the precise role of the protector is obviously an essential starting point. […]
>
> 52. In our judgment the powers conferred on the protector in the instant case have been so conferred with a view to ensuring the proper exercise of the powers of the trustees. They are fiduciary powers which must be exercised bona fide for the purpose for which they were conferred, and in accordance

[27] See, [47].
[28] The court's full analysis is to be found in the judgment at [49]-[66].

with their terms. In *Rawcliffe*, Deemster Smith made the observation at 529 (lines 6 – 19) that the role of the protector was to assist in the administration of the trust, and to express to the trustees the settlor's wishes as to how the trust is operated.

53. It was said, in our judgment rightly, that the protector would owe a fiduciary duty to the beneficiaries as to how his powers should be exercised. Those comments, of course, need to be considered in the light of particular protector powers concerned in that trust because it is a question of construction of the particular trust deed as to whether or not a particular power of a protector is fiduciary or personal.

[…]

56. The Trustee appeared to have considered the need for the appointment of a protector solely in the context of the provision of financial information to beneficiaries on the basis that was the reason advanced by the Appellant and her sister Camilla. In approaching the matter in that way, the Trustee was in error. The power to appoint a new protector was a fiduciary power which had to be exercised in the interests of all of the beneficiaries and while the reasons advanced by the Appellant were relevant for the Trustee to consider, it was for the Trustee to review the possible exercise of the power on a wider basis. It should therefore have considered all the various protector powers as contained in the Trust Deed as to whether it was necessary or desirable that its powers to appoint a new protector should be exercised. In that context, the so-called blended approach, which has been discussed above, would also have been a relevant consideration.

[…]

57. The second reason […] given can only mean that the Trustee took into account the wider interests of the whole family, including the branches of the family other than that of the Appellant and her issue. Avoiding taking steps which might add to hostilities within the family would be a proper consideration for the Trustee if "family" meant only the Appellant and her issue. If, however, it meant it would be in the interests of the wider family and not in the interests of the Appellant and her issue to avoid such hostilities, the Trustee would be taking into account the interests of those who were not beneficiaries in deciding whether or not to exercise the fiduciary power to appoint a new protector.

58. It seems to us likely that the commencement of the litigation in Italy has indeed resulted in acrimony. That would not be entirely surprising. It is in the interests of the Appellant and her issue that the litigation is satisfactorily resolved whether that occurs by judicial decision or by settlement. We consider this reason given by Messrs Cains, which follows the Trustee's board minute of 25 January 2019, as leaving behind a lurking question as to whether "family" included all branches. On balance, we consider that it probably did, but it would be surprising to conclude that it was a good enough reason to justify not appointing a protector in the light of the acrimony which the Italian Proceedings might have been expected to engender in any event.

[…]

60. In our judgment [the third] reason, like the first reason given, does not stand up to analysis. It is of course true that the Four Trusts have inter-relationships of trust assets, as the structure of those assets set out at paragraph 8 above makes plain. That does mean, necessarily, that it will be in the interests of the beneficiaries of each trust that a satisfactory modus operandi is in place to ensure that the inter-relationships work for the benefit of that particular trust. But what if they do not? The present case is one where all the adult beneficiaries of the Trust support the attack which the Appellant has made on the structure as a whole. One could reasonably anticipate that the minor and unborn beneficiaries would probably take the same view as their parents or grandparents. That unity amongst the adult beneficiaries is the clearest indication that the inter-relationships are not perceived to be working as far as the Trust is concerned, a conclusion which the Trustee ought to recognise. When it comes to taking any particular decision, the Trustee naturally has to have regard to the interests of the beneficiaries, and only the beneficiaries, in respect of that decision. The validity of the decision will stand or fall by the rationale which leads to it being taken. If unity of itself was the rationale for a particular decision, then one would expect that sooner or later there would come a time when the decision taken would favour the beneficiaries of other trusts but not the beneficiaries of the Trust. For the reasons we go on to consider shortly, that position might well have arrived already here. For the moment, however, dealing with the matter only as one of theory, it seems to us impossible to say that unity of decision-making across the Four Trust structure is necessarily in the interests of the beneficiaries of the Trust. We have reached a similar conclusion in relation to the issue as to whether the Trust should have the same protector as the other Trusts. For the same reasons as are the conclusion of our analysis below in respect of the fourth reason given by the Trustee for its decision, we take the view that it is not necessarily appropriate or desirable at the present time that the Trust should have the same protector as the other Trusts.

61. The fourth reason given by the Trustee perhaps puts the other reasons into direct focus. Ms Bermingham accepted in oral argument that "family" here extended to the wider family. In other words, it is being suggested that the protector of the Trust should be impartial and independent in relation to litigation between the Appellant and other members of her family when the Appellant is a beneficiary of the Trust but the other members of the family are not. It could not be clearer that by giving this reason the Trustee has acknowledged that it is taking into account the interests of people who are not beneficiaries of this Trust for the purposes of exercising, or not exercising, its fiduciary power to appoint a protector".

(13) *Smith and Another v Athol Administration Ltd and Others* (2020) CHP 2020/93[29]

40. The claimants applied for rescission of a sale of shares to two Isle of Man companies ("MPPT") which had, unwittingly, exposed them to significant tax liability. The claimants made the transfer in 2012, following advice as to how best to preserve increase in the value of their company ("Milewood") in the most tax efficient manner. The claimants gave evidence that their intention in transferring the shares was that they would continue to grow Milewood, and that any such growth would accrue in the shares held by MPPT for the benefit of them and their families. Further, that had the claimants known of the risk presented by the mistaken tax advice, they would not have undertaken the planning in the manner they did.

41. Although unrepresented at the hearing, HMRC filed a letter with the court in which they submitted that, as the shares had been transferred in return for consideration, the contractual rules on mistake (and not the equitable rules) should be applied. It is worth setting out the HMRC's letter in full for context:[30]

> ***"RE: Michael Alexander James and Simon Craig Philpot vs Athol Administration Limited, Flametree Investments Limited, Hightown Investments Limited and Others (CHP20/0093)***
>
> *1. We write to the Court concerning the claim by Michael Alexander James Smith and Simon Craig Philpot to have their sale of 10,290 'A shares' in Milewood (Holdings) Limited to two Isle of Man companies, Hightown Investments Limited ("Hightown") and Flametree Investments Limited ("Flametree"), rescinded, or alternatively set aside, on the grounds of mistake.*
>
> *2. The point of the proceedings is to relieve the claimants of future potential liabilities to tax in the United Kingdom, specifically under the Transfer of Assets Abroad provisions (s.720 Income Tax Act 2007) and the Disguised Remuneration Rules (ss.23A-H Income Tax (Trading and Other Income) Act 2005).*
>
> *3. HMRC request that the contents of this letter and its attachments be drawn to the attention of the judge hearing the forthcoming application and (subject to developments in the meantime) at any later hearing. This would be consistent with long-standing practice recently encapsulated in the observations of HH Judge Hodge QC, sitting as a judge of the High Court in Hartogs v Sequent (Schweiz) AG and others [2019] EWHC 1915 (Ch):*

[29] Additional resources:

- Martine Fleming, 'Grounds for Equitable Mistake' (2021) 3 STEP Journal 17.
- John Rimmer, *Smith and Philpott v Athol Administration Limited and ors, the MIlewood Purpose Trust* (2021), CHP2020/93 (Case Note) (2021) 27(9) Trusts & Trustees 949.

[30] [66] (italicisation original).

> *"… the Court is always willing to consider anything that HMRC may wish to say about claims of this nature, even if it is only in the form of a written letter to be placed before the Court by the claimant's own solicitors."*

4. In the absence of any opposition, the Court must still be satisfied that relief ought to be granted, as sought or otherwise (Wright v National Westminster Bank plc [2014] EWHC 3158 (Ch) at [10]).

5. HMRC recognise that the governing law of the Milewood Purpose Trust is that of the Isle of Man. We submit that Manx Courts have always paid close attention to the decisions of English Courts and have always attempted to keep the jurisprudence of the two jurisdictions closely aligned. It is HMRC's understanding that the Isle of Man generally follows English law in relation to the doctrine of mistake and the following is written on that basis.

Mistake in contract, not mistake in equity.

6. There is no doubt that the Court has the equitable power to set aside a voluntary disposition. However, the sale of the A Shares on 9 August 2012 was not a voluntary disposition or a gift. It was a contract, for consideration (£10,290).

7. In support of this, see: the witness statement of Michael Alexander James Smith, paragraph 63 where he says he 'sold' the shares 'for £10,290'; also the transaction is also described as a 'sale at par value' in paragraph 13 of the Details of Claim.

8. There are two distinct sets of rules dealing with setting aside transactions on the ground of mistake, one for contracts and one for gifts: common law rules apply to the former and equitable rules apply to the latter. The 'Details of Claim' are asking the Court to apply what would be, in England and Wales, the wrong branch of the law.

9. We respectfully draw the Court's attention to Van der Merwe v Goldman and another [2016] EWHC 790 (Ch). A copy of the judgment is enclosed. There, Morgan J considered the question of which set of rules should be applied and found that it turned on whether consideration had been given:

> *31 In my judgment, the difference between the cases where the equitable rules apply and those where they do not turns on whether consideration has been given for the benefit conferred by the transaction. If the effect of rescission (or a declaration that a transaction is void) would deprive a party of a benefit for which he gave consideration, then the common law rules apply and there is no separate equitable jurisdiction to order rescission.*

10. Since the relevant transaction was a contract, the relevant legal principles for setting it aside for mistake are those in Great Peace

Shipping Ltd v Tsavliris Salvage (International) Ltd ("The Great Peace") [2002] EWCA Civ 1407. A copy of the judgment is enclosed.

11. The grounds on which a contract can be declared void for mistake at common law are very narrow. As described in The Great Peace, they are as follows:

> *"the following elements must be present if common mistake is to avoid a contract: (i) there must be a common assumption as to the existence of a state of affairs; (ii) there must be no warranty by either party that the state of affairs exists; (iii) the non-existence of the state of affairs must not be attributable to the fault of either party; (iv) the non-existence of the state of affairs must render the performance of the contract impossible; (v) the state of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible." [76]*

12. In particular, we draw the Court's attention to point (iv): that the non-existence of the state of affairs must render the performance of the contract impossible. It is difficult to see how the (unforeseen) tax consequences in this case rendered performance of the contract impossible at the time of sale in 2012.

13. We also note that there is no separate equitable jurisdiction to grant rescission for common mistake in circumstances that fall short of those in which the common law holds a contract void. (The Great Peace, paras 118, 126, 131, 132, 154, 156, 157, 160).

14. We therefore ask the Court to apply common law rules for mistake in contract to the 9 August 2012 transactions.

15. In the alternative, if the court is minded to apply Lord Walker's judgment in Pitt v Holt [2013] STC 1148 as requested by the claimants, HMRC notes that in Pitt, Lord Walker stated at [135] that:

> *In some cases of artificial tax avoidance the Court might think it right to refuse relief, either on the grounds that such claimants, acting on supposedly expert advice, must be taken to have accepted the risk that the scheme would prove ineffective, or on the ground that discretionary relief should be refused on grounds of public policy.*

16. The Claimants entered into bespoke arrangements designed by professional advisers to reduce their tax liabilities in the UK. We invite the Court to consider whether the Claimants must be taken to have accepted a risk by participation in a tax avoidance scheme.

17. It is clear from Lord Walker's reasoning that the test for mistake is an objective test and that it must be unconscionable for some specific person or class of persons to retain the relevant property. It is not clear

> *how it would be 'unconscionable' for Hightown and Flametree to retain the property in this case.*
>
> *18. HMRC advances all the above observations in the hope they will assist the Court."*

42. The court rejected this approach as artificially imposing rules designed to enforce agreements between commercial parties to a failed plan to improve tax efficiency.[31] Rather, the court held that:[32]

> "[…] it is correct in this case to approach the question of whether it is appropriate to apply the equitable rules by asking if this is a transaction "by which one party intends to confer bounty on another" (to adopt the language of Millett J)."

43. Applying this to the facts, the court found that the intention underpinning the transaction was to confer the bounty of the future growth value of the company. Although there was no inherent bounty in the sale of the shares at their face value in 2012, their future increase in value as a result of the claimants' continued work in the company, was sufficient to engage the equitable jurisdiction.[33]

44. The court then considered how that jurisdiction is to be applied. The mistake relied upon by the claimants was their failure to appreciate the significant negative tax consequences of the 2012 disposition. The court found that the transfer of shares was a mistake, and that the proceeds of sale were held on bare trust for the claimants on the basis that:

> "76. Given the consequences [of the incorrect tax advice], each of the Claimants made a grave mistake. They made this mistake as a result of believing that they would obtain tax benefits that were illusory or non-existent. Indeed, the serious mistake is likely to give rise to a significant tax liability for both Mike and Simon for many years to come. The Claimants have clearly stated that they would not have transferred their A Shares to the MMPT if they had known of the consequences.
>
> 77. Further, they would not have done so had it been made clear to them that they would be unable to benefit from the growth in value of Milewood which was clearly an express intention when the MPPT was being established.
>
> 78. Ultimately, the Claimants did not receive the tax benefits they envisaged, nor did they achieve their aim of "future-proofing" the value of Milewood for their families."

45. Interestingly, although the trend within the Isle of Man authorities was in favour of rescission in cases of mistaken tax advice, the court highlighted that claimants should

[31] [67].
[32] Ibid.
[33] See, [71].

not necessarily expect relief to follow as a matter of course, especially where relief might be sought by means of a professional negligence claim against the adviser.[34]

(14) *WM and Another v Luxembourg Business Registers* (C-37/20 and C-601/20)[35]

46. The decision concerned the implementation of the requirements in the 5th Money Laundering and Terrorist Financing Directive into Luxembourg law. The clause in question was Article 30(5)(1)(c) of Directive 2015/849, which – as amended – stated:[36]

> "5. Member States shall ensure that the information on the beneficial ownership is accessible in all cases to:
>
> (a) Competent authorities and [Financial Intelligence Units], without any restriction;
>
> (b) Obliged entities, within the framework of customer due diligence in accordance with Chapter II;
>
> (c) Any member of the public.
>
> The persons or organisations referred to in point (c) shall access at least the name, the month and year of birth, the nationality and the country of residence of the beneficial owner as well as the nature and extend of the beneficial interest held."

47. The effect of Luxembourg's implementation of Article 30(5)(1)(c) was to enable the general public to access information regarding the beneficial ownership of registered entities. However, entities could request that access to their information be restricted in exceptional circumstances. A beneficial owner and a company launched proceedings in Luxembourg against the Luxembourg Business Register's refusal to restrict access to their information. The Luxembourg District Court referred the matter to the Court of Justice of the European Union ("the CJEU") for a preliminary ruling on the validity of the of Article 30(5)(1)(c).

48. The CJEU found that, as the data concerned identified individuals, access to this data necessarily engages the fundamental rights to respect of an individual's private life and protection of personal data, under Articles 7 and 8 respectively of the Charter of Fundamental Rights of the European Union ("the Charter"). Moreover, although the measure was a largely proportionate means of achieving a legitimate aim, its interference with fundamental rights was not limited to what was strictly necessary.

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[34] See, [61].

[35] Additional resources:

- Policy Paper, 'Supplementary ECHR memorandum: amendments made to parts 1-3 Economic Crime and Corporate Transparency Bill (BEIS measures)' (*Department for Business Energy and Industrial Strategy*, 30 January 2023) paragraphs [25]-[34].
- Thomas Wahl, 'CJEU: No Unrestricted Access to Data of Beneficial Owners' (*Eucrim*, 10 January 2023) < https://eucrim.eu/news/cjeu-no-unrestricted-access-to-data-of-beneficial-owners/>

[36] See, [8].

When comparing the previous version of the provision, which required members of the general public to demonstrate a legitimate interest in the information in order to access it, the CJEU held that the fact that demonstrating such an interest is difficult does not mean that the information should be made accessible to the general public. Therefore, the CJEU held that the provision was invalid.

49. The UK's Economic Crime and Corporate Transparency Bill provides for beneficial owner information to filed at Companies House. This information is to be available for inspection. The requirement that applicants demonstrate a "proper purpose" to access registrable beneficial ownership data is being abolished for two reasons. First, the proper purpose requirement is thought to be potentially onerous, leading to the potential threat of litigation over an applicant's motivations. Second, the Bill includes provision for individuals to apply to the Registrar for their information to be supressed from the publicly inspectable register where disclosure would put the individual, or a member of their household, at serious risk of being subject to violence or intimidation. A recently published Policy Paper, cited at footnote 35, suggests that the proposed regime will be compliant with the ECHR as interpreted by CJEU.

(15) *In the matter of the X Trust and the Y Trust* FSD 57 of 2022

50. The trustee of a trust governed by the law of the Cayman Islands sought the Court's blessing for the liquidation of certain trust investments at below market value to pay their reasonable fees of administering the trusts. The defendant, appointed to represent all beneficiaries, agreed in principle that the trustee was entitled to remuneration, but objected to the proposed liquidation on the basis that (1) the difference between the asset's market value and proposed sale value was too great a loss, especially when considering more commercial alternatives (such as a short-term loan secured against trust assets); and, (2) that the funds generated would be far in excess of the trustee's current or foreseeable fees, given that the beneficiaries were contemplating replacing the trustee. In addition, the court noted that there were third parties who may have a proprietary claim over the trust's assets.

51. The court held that:

> "22. The Trustee's application […] was entirely rational and afforded no basis for second-guessing their business judgment. Their fees and expenses had been unpaid for some time, there were no cash assets available out of which to indemnify themselves and the beneficiaries had failed to formulate any concrete alternatives to the Trustee's proposed realisation of the most liquid Trust assets. The law clearly supported the proposition that the mere fact that notice had been received of a possible third-party proprietary claim to the Trust assets was no impediment to their pursuing the proposed transaction on notice solely to the known beneficiaries."

52. The reference in the final quoted sentence to notice of possible third-party proprietary claims is to the *Guardian Trust* principle,[37] considered already in (2) *Von Westenholz v Gregson* (see above). The Grand Court summarised the principle in the following terms:[38]

[37] This principle is also discussed in relation to *Von Westenholz v Gregson* [2022] EWHC 2947, above.
[38] [13].

> "13. The *Guardian Trust* principle is that a trustee will be liable for dealing with assets contrary to the interests of actual or potential proprietary claimants who subsequently establish their interest in the relevant fund. The principle explains why an application to Court to bless the proposed dealings with the disputed assets is required, not how any such application should be adjudicated."

53. Although there was no directly relevant authority addressing the payment of a trustee's fees in the face of potential third-party claims to the trust assets, the court favoured the practical approach advanced in counsel's submissions:[39]

> *"25. The Court has jurisdiction to permit such payments to be made despite the possibility of third party proprietary claims, as the cases set out below show. Such jurisdiction is founded in practicality: a trust fund needs to be administered for the benefit of whoever turns out to be the beneficial owner of it. Where it is being administered by professionals, they need to be paid. They should therefore be allowed to pay the trust's costs and expenses out of the fund in the ordinary way because their administration of the fund redounds to the benefit of the beneficiaries of the fund, whoever those beneficiaries turn out to be.* […]*"*

54. In its review of analogous authority, the court attached particular significance to the fact that the payment of a professional trustee's fees ensures that the trust is properly and competently administered for the benefit of whomever is ultimately found to be the true beneficiary. The court concluded that:[40]

> "21. Looking at these judicial statements as a whole, it is noteworthy that then Chief Justice Smellie explicitly viewed a trustee administering contested trust funds and a liquidator administering funds which either belonged to the company or were held in trust for the benefit of third-parties as parallel but analogous legal spheres: *Re Saad Investments Co Ltd,* FSD 15 of 2010 (ASCJ), Judgment dated 1 October 2019 (at paragraph 79). I accordingly drew from these *dicta* strong indirect support for the following proposition. *Essentially for reasons of both pragmatism and principle, a trustee holding assets for named beneficiaries which are subject to potential third-party proprietary claims, and invoking this Court's supervisory jurisdiction under section 48 of the Trusts Act, will generally be entitled to payment of its reasonable fees and expenses out of the relevant fund in relation to:*
>
> *(a) work done in accordance with the terms of the trust instrument before notice was received of the third-party claims; and*
>
> *(b) work done (and to be done) to administer the trust assets after receiving notice of the potential third-party proprietary claim in accordance with the best interests of whomever may ultimately be confirmed to be the true beneficiaries of the express or constructive trust."*

55. Nevertheless, given that the third parties were not before the court, a precautionary approach and a 'somewhat modified' version of the test for blessing in *Public Trustee*

[39] [14], quoting the submissions of Mrs Talbot Rice KC (emphasis original}.
[40] [21] (emphasis added).

v Cooper was required. Therefore, the court ordered that the beneficiaries should have a short further opportunity to 'concretise' their proposal and only such assets as were needed to pay fees already incurred should be liquidated at present.

(16) *In the Matter of the Poulton Family Trust* FSD 121 of 2016 (IKJ), 18 Feb 2022

56. The case concerned a family settlement, established in 2003 by a successful entrepreneur, Mr Alan Poulton for the benefit of himself and his descendants. Mr Poulton was a protector of the trust. The trust's assets principally comprised a portfolio of commercial properties. The trust was governed by the law of the Cayman Islands. In 2014, the trustees informed Mr Poulton that he faced substantial IRS liability in the US because he had not disclosed the existence of the trust. Mr Poulton was advised by his Florida attorneys to (1) enter the IRS' voluntary disclosure scheme, paying any outstanding tax and penalties in order avoid imprisonment; and (2) arrange for the trust assets to be distributed to himself, terminate the trust, pay his outstanding tax liabilities, and re-settle the remaining assets.

57. In 2015, Mr Poulton was diagnosed with terminal cancer and sought to act on this advice. However, his children believed that his ill health was impacting his state of mind and that his current wife was exercising undue influence so as to effectively disinherit them. This latter concern was compounded by the children's feeling that the wife was acting as a gatekeeper and limiting their access to their father. Over the course of 2015 and 2016, Mr Poulton acted on the advice by removing his children as beneficiaries, receiving the trust assets, and terminating the trust. As Mr Poulton died before constituting the new trust, the assets passed to his wife. The children issued proceedings seeking relief on five grounds: (1) that Mr Poulton lacked the necessary mental capacity when he terminated the trust; (2) that, if Mr Poulton did not lack capacity, he was unduly influenced to collapse the trust by Mrs Poulton; (3) that Mr Poulton, in his capacity as a protector, had committed a fraud on a power in terminating the trust; (4) that Mr Poulton had made representations to his children which amounted to an estoppel; and, (5) the defendants conspired to injure the children by encouraging Mr Poulton to act on the advice.

58. In relation to issue (1), Kawaley J held that held that, although he suffered from temporary impairments, there was no evidence that Mr Poulton was suffering from any impairment sufficient to amount to lack of capacity at the time he terminated the trust. As to issue (2), the range of conditions Mr Poulton suffered from, together with his dependence upon Mrs Poulton, both for day-to-day care and in assisting Mr Poulton receive legal advice, led Kawaley J to infer that Mrs Poulton had assumed moral command over Mr Poulton, and that she had used this to advantage herself to the detriment of Mr Poulton's children. Given the conclusion to issue (2), Kawaley J's comments on the other issues were *obiter*. In relation to issue (3), Kawaley J said that he would have found Mr Poulton's protector powers to have been validly exercised, he did not rule on issue (4), and stated that he would have rejected the children's submissions in relation to issue (5).

59. Kawaley J's judgment will be of interest chiefly due to its summary of the present Cayman Island's law of mental capacity and undue influence. As ever, where an individual's mental capacity is in doubt, expert medical advice should be sought before they exercise powers, and proper records of this advice kept. Advisers should be keenly aware of the risk of undue influence, even in those with strong

personalities. Here, Mr Poulton – a strong-willed and successful entrepreneur – was nevertheless found to have been overborne by his wife.

(17) *Butterfield Trust (Bermuda) Ltd v Watson* [2022] SC (Bda) 92 Civ

60. *Butterfield Trust* concerned whether changes made to a trust – namely, altering its governing law from English to Bermudian, and extending the trust period – amounted to a resettlement of the trust.

61. Drawing on *Roome v Edwards* [1982] AC 279 (HL), the court set out the following guidance when considering the question of whether a set of facts amounts to a settlement:[41]

> (i) the Court will ask what a person with knowledge of the legal context of the word settlement, and who applies this knowledge in a practical, common-sense way, would conclude;
>
> (ii) the intention of the trustees, as objectively ascertained, is relevant and of assistance in determining whether or not a resettlement has taken place;
>
> (iii) a single settlement is likely where, following an appointment, the provisions of the original settlement continue to apply to the appointed fund;
>
> (iv) the existence of separate and defined property, separate trust, separate trustees, and separate disposition establishing the trusts, may be indicative of a separate settlement;
>
> (v) there is no single decisive factor, and it is necessary to consider all the facts of a particular case; and
>
> (vi) in *Bond v Pickford* [1983] STC 517 (CA), Slade LJ held that a separate settlement will exist if there is a new set of trusts such that the original settlement ceases to apply to it.

62. Applying these criteria, the court held that the proposed changes would not result in a resettlement of the trust. For, despite the proposed variation, the principal trusts of the main settlement remained operative and fundamentally unaltered. Furthermore, the trustees' clear intention was that they did not intend to create a separate settlement.[42] In considering whether the change of governing law or extension of trust period affected this conclusion, the court held that:[43]

> "18. […] it is to be noted that the English courts have clearly held that neither the mere change of governing law nor the mere change in the perpetuity period amounts to a resettlement of the trusts. It is doubtful whether it is a useful exercise to compare and contrast the differing provisions of different systems of governing law for the purposes of determining whether the change in governing law of a trust amounts to a resettlement of the trust. In any event, even if it is a legitimate exercise, the Court does not consider that the

[41] See, [7]-[8].
[42] [9].
[43] [18].

differences in English and Bermuda trust law, as outlined above, are of such magnitude so as to make the change in governing law from English law, to Bermuda law, a resettlement of the trusts."

(18) *Dorey v Ashton* [2022] GRC 063

63. The Royal Court of Guernsey gave a judgment on "[…] a preliminary issue of whether an Advocate who takes instructions for, prepares and supervises a will for execution by a testator owes any duty to the persons who would benefit from the testator's estate if no such will were executed to take care to establish that the testator has testamentary capacity."[44] The court rejected that Advocates owed any such duty. Instead, they held that:[45]

> "99. The basic duty of an advocate instructed to prepare a will, is competently to assist his client to achieve his objective, namely the making of an effective will in the desired terms. If there is doubt as to the client's capacity, then unless that doubt is so great that the advocate does feel that he really cannot have obtained valid instructions, he should proceed on the basis that the instructions are valid, and the testator has capacity, but make comprehensive notes and records as to what he did, what he observed, and what happened. The risk of declining to act, if his client in fact does have the necessary capacity is that his client's legitimate intentions will have been thwarted, and there is also, then, the possibility that his client may not be able to obtain legal advice and assistance which he ought to have been able to obtain. That, to my mind, is more of an evil than the evil that, in a difficult case, a will may have been made for a client who did not, in practice, have the necessary capacity. The process of obtaining probate is designed to enable any such question, if in dispute, to be determined, appropriately, after the testator's death, and the solicitor who implements his client's apparent intentions whilst taking appropriate steps as regards considering capacity, and recording the circumstances in sufficient detail to assist if any subsequent question arises, strikes me as carrying out his professional duties with proper balance.
>
> 100. In other words, the proper course is that summed up in *Scott v Cousins* (above) at [70, which I repeat]:
>
> > "At the very least, the solicitor must make a serious attempt to determine whether the testator or testatrix has capacity and if there is any possible doubt - or other reason to suspect that the will may be challenged – a memorandum or note of the solicitor's observations and conclusions should be retained on the file…… Some of the authorities go further and state that the solicitor should not allow a will to be executed unless, after diligent questioning, testing or probing he or she is satisfied that the testator has testamentary capacity. This, I think, may be a counsel of perfection and impose too heavy a responsibility. In my experience, careful solicitors who are in doubt on the question of capacity, will not play God – or even judge - and will supervise the

[44] [1].
[45] [99]-[100].

> execution of the will while taking and retaining comprehensive notes of their observations on the question."
>
> I would agree that the "counsel of perfection" there mentioned does, in my judgment, put the standard too high. In cases of doubt the "fail safe" approach (or rather the "fail safer" approach, having regard to the purpose of the advocate's retainer) is to proceed to make the will, with precautions, rather than to decline the retainer."

(19) *D and E Ltd v A, B and C* [2022] NZCA 430

64. The three adult children – referred to as A, B, and C within the anonymised judgment – of a violent man who had abused them verbally, physically, and sexually during their childhood brought a claim that property settled on trust by their father before his death had been transferred in breach of his fiduciary duties towards them, and that it was held on constructive trust for their benefit. They succeeded in this claim in the High Court.

65. The trustees appealed. The Court of Appeal agreed with A, B, and C that the relationship between parent and child was inherently fiduciary in nature at least for so long as the parent was responsible for the care of the child. In some circumstances, the inherently fiduciary relationship might continue after the child became an adult, for example in the case of a severely disabled child. However, in the present case, at the time he transferred the assets to the trust, the father had been under no fiduciary duty to provide for his children. They had ceased to rely on their father for anything once they had left home; there had been an absence of contact, and in transferring assets, their father had been dealing with his own assets over which the children had had no proprietary claim.

66. Although the claimants were ultimately unsuccessful in arguing that a constructive trust existed over the assets, the case remains interesting in its move away from tying fiduciary duties to purely economic interests. However, it should be noted that the Court framed the familial fiduciary duty as imposing a negative, rather than positive, obligation upon its holder, per Kós P:[46]

> "[…] the relevant fiduciary duty in a familial environment should be framed in negative terms. Here the fiduciary responsibility is not a duty to act generally in the best interests of the child, in disregard of the parent's personal interests. That would invite claims based on contested exercises of parental discretion where reasonable minds would disagree, such as on housing, location, education, medical care and diet. The fiduciary duty is to refrain from acts that fundamentally violate the relationship of trust inherent in a parent-child relationship. Foremost within a duty expressed in such terms is to refrain from sexually and physically abusing the child."

(20) *Palichuk v Palichuk* [2023] ONCA 116

67. In this case, the Ontario Court of Appeal rejected the possibility that a will's validity could be challenged during the lifetime of the testator. The testator has two daughters, Linda and Susan. In 2020, the testator executed a series of instruments

[46] See, [161].

which favoured Susan, including a will which disinherited Linda and named Susan as the main beneficiary. Linda made an application to declare the instruments invalid on the basis that the testator lacked capacity or, in the alternative, that they had been the result of Susan's undue influence.

68. In reaching its decision, the court cited particularly strong public policy arguments against permitting challenges to wills prior to the testator's death:

> "[71] […] there are strong public policy reasons not to permit a challenge to a will prior to the death of a testator. A testator may change their will as often as they like. It is entirely unknown how much, if any, money or property there will be left to dispute until the testator dies. It cannot be known if any of the beneficiaries will have predeceased the testator. Thus, the common law insists upon the death of the testator before litigation. Otherwise, the courts would be inundated with litigation that is hypothetical during the lifetime of the testator, with the potential for re-litigation after their death."

69. Given the inherent force of these arguments, the decision is to be welcomed as providing a common-sense approach towards will validity. However, as is ever the case when confronted with potential capacity issues, seeking appropriate expert assessment of the testator – and maintaining proper records of any such assessment – is vital.

Toby Graham/Farrer & Co/6 March 2023