Innovative trust provisions being considered in onshore courts

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The next 45 minutes

- Reserved powers to settlors/effective control of a trust
- The attitude of the family courts to offshore structures and firewalls
- Information restrictions in offshore trusts and ways around them (Data protection legislation and restriction of rights of beneficiaries and others to information under trust laws)
- Mistakes, rectification and variation of trusts – offshore vs onshore. (section 47 - the magic bullet in Bermuda; moves in Cayman to change the need to demonstrate benefit on VTAs to “no detriment)
RESERVED POWERS

What is meant by effective control of a trust?

- Surely the trustee is meant to be in control of a trust? So what does this mean?
  - Settlor reserved powers
  - Illusory trusts
  - Shams
  - Private trust companies (PTCs)
  - Anti-Bartlett clauses
What are Settlor Reserved Powers Trusts?

• This is where there is some element of settlor control reserved over administrative and/or dispositive powers.

• Often these include powers for the settlor or an appointee of the settlor (such as a protector) to change trustees, direct investments, change the proper law of the trusts, amend or revoke the trusts or veto dispositions.

• Some of these powers can usually only be exercised in a fiduciary or qualified fiduciary manner such as the power to hire and fire trustees (Re Skeats). Others can be purely personal powers reserved to the settlor.

• These can be dangerous powers for the settlor to reserve to him or herself in the context of divorce proceedings.
Dangers of reserved powers

• Clear that the courts are prepared to require those with reserved powers to exercise them.
  • *TMSF v Merrill Lynch* [2011] PC case – power of revocation – held to be the personal property of the settlor making the asset US$27m in the trust available to receivers appointed by way of equitable execution.
    • “The powers of revocation are such that in equity, in the circumstances of a case such as this, Mr Demirel can be regarded as having rights tantamount to ownership. The interests of justice require that an order be made in order to make effective the judgment of the Cayman court recognizing and enforcing the Turkish judgment.”
  
• *Pugachev case* [2017] EWHC 2426 (Ch) – Birss J – Protector powers vested initially in the settlor.
  
• *US v Arline Grant* (2005) – The courts sought to force a widow of the settlor to exercise her powers to change the Bermudian/Jersey trustees to local US trustees so that debts due to the IRS would be discharged from trust assets. When she refused to do so, and later received US$500,000 from the trusts, she was prevented from being able to receive any further benefit from them (she and her family would risk being in contempt if she did)
Pugachev

• Brief facts
  • Mr Pugachev – Russian entrepreneur – founder of Russian bank – in trouble during financial crisis and received central bank funding – alleged that a proportion of that funding misappropriated by him.
  • Alleged that part of those proceeds traceable into the assets held on trust.
  • Claimed that the trusts were:
    • Illusory (see also Clayton v Clayton [2016] NZSC 29)
    • Shams
    • Could be set aside under section 423 of the IA 1986 as transactions to defraud creditors
Pugachev - the decision and what it tells us

• The decision

• Why was the decision as it was?

• How will it be received?

• Contrast with the offshore approach in Re Esteem (2003) JLR 188
Anti-*Bartlett* clauses

• What they are

• Offshore innovations- BVI VISTA trusts


• Ways around them? (a) Where interfere in business (b) residual monitoring obligation (c) others?
ATTITUDE OF THE FAMILY COURT TO OFFSHORE TRUSTS AND FIREWALLS

Sham

• The early attitude

• A v A, St Georges Trustees [2007] EWHC 1810

• The effect of A v A

• Will Pugachev herald a change in approach?

• What about successor trustees? A v A
ATTITUDE OF THE FAMILY COURT TO OFFSHORE TRUSTS AND FIREWALLS

Other means of dealing with company control

*Civil law approach*

- *Rybolovlev v Rybolovleva* (Geneva) [2014-15]

- Effect of VISTA or STAR trusts

- Use of PTCs
Attitude of Family Courts to offshore trusts and firewalls- OTHER MEANS OF DEALING WITH CONTROL OF COMPANIES

Resource arguments
- Charman [2005] EWCA Civ 1606
- Otto v Kwan [2014] HKCFA 66

Resulting trusts and constructive trusts
- The principles
- The encouragement in Prest [2013] UKSC 34
- An example of the attitude post-Prest: R v R
- How far should it go? Briggs LJ Actaps annual lecture; Gany Holdings v Khan [2018] UKPC 21
ATTITUDE OF THE FAMILY COURT TO OFFSHORE TRUSTS AND FIREWALLS
Other means of dealing with company control

Nuptial settlement jurisdiction

- s.24(1)(c) MCA in England, and in HK the Matrimonial Proceedings and Property Ordinance s.6(1)(c)


- The basics
  
  (a) Where the companies are “pockets”, Court may well want to look through them

  (b) More difficult where full trading group?
Attitude of Family Courts to offshore trusts and firewalls-
FIREWALLS

- The characteristics of firewalls
  (a) Governing law provisions
  (b) Refusal to enforce certain foreign judgments
  (c) Other asset protection features
  (d) Confidentiality

- Examples
  - Jersey / Cayman etc
  - Cook Islands + Nevis

- How far do some of them go? E.g. Nevis
- How will they be interpreted by offshore Courts? Re B (Cayman) [2010] 2 CILR 348 - related to H v W [2014] HKEC 955 in HK.
Attitude of Family Courts to offshore trusts and firewalls- FIREWALLS

Issues this throws up for English Courts: enforcement
(1) How to make an order that will be able to be enforced
(2) What if anything the applicant needs to show about prospects of enforcement? *Goyal v Goyal* [2016] 4 WLR 170
(3) How onshore Court can encourage enforcement
(4) (Non-participation) of trustees and how to deal with it
Restrictions to beneficiaries rights to information

- Beneficiary rights to information have become a battle ground in the onshore and offshore worlds.
- Accountability of trustees vs confidentiality
- The orthodoxy regarding the rights of beneficiaries of discretionary trusts to information:
  - *Schmidt v Rosewood* [2003] UKPC 26;
  - *Re Londonderry* [1965] Ch 918 (CA);
  - *Breakspear v Ackland* [2008] EWHC 220 (Ch).
- Disclosure of trust information in a divorce context – *Tchenguiz v Immerman* [2013] EWHC 3627 (Fam) (Moylan J decision)
- Movement in the offshore world to restricting beneficiary rights to information.
  - Bahamas - Section 83 of its Trusts Law 1998.
  - Jersey - Trusts (Amendment No.7) (Jersey) Law 2018
  - Cayman – STAR Law 1997/ Confidential Information Disclosure Law 2017
  - BVI – VISTA
  - The rise in the offshore world to non-charitable purpose trust legislation and foundations law restricting the rights of disclosure (usually to enforcers).
Rights to data - SARs

- Data Protection Act 1998 (‘DPA’) (similar provisions in HK – Personal Data (Privacy) Ordinance (Cap. 486) which was enacted in 1996 in response to the then EU Data Directive and has since been updated)

- Subject Access Requests
- The interplay between restrictions over the rights of beneficiaries to information under the laws of the trust and rights to information under the DPA.

- *Dawson Damer v Taylor Wessing* [2017] EWCA Civ 74

- The Claimants made subject access requests to Taylor Wessing under section 7 of the then DPA1998.

- Taylor Wessing responded to the SAR asserting that the data was exempt from disclosure under DPA Sch 7, para 10 (‘the Legal Professional Privilege Exception’).

- The Claimants applied to the court for an order under DPA s7(9) compelling Taylor Wessing to comply with their SAR.
Reaction to the Court of Appeal’s decision in Dawson Damer.

- Multiple SAR requests being made to UK law firm - £10 per request. £100ks of irrecoverable costs being incurred by UK law firms.
- There was widespread criticism of the position as undermining the Court of Appeal’s decision in Re Londonderry protecting the trustee from disclosing their deliberations). This was raised when the DPA 2018 was going through Parliament (Lord Pannick argued for an amendment which would exclude personal data processed by trustees recording the deliberations of an exercise of a power or discretion – see similar provisions in the laws in the Bahamas, Jersey and Guernsey).
- DPA 2018 para 19, part 4, schedule 2:
  - “The listed GDPR provisions do not apply to personal data that consists of-
    - (a) information in respect of which a claim to legal professional privilege or, in Scotland, confidentiality of communications, could be maintained in legal proceedings, or
    - (b) information in respect of which a duty of confidentiality is owed by a professional legal adviser to a client of the adviser.”
- The new second limb of “confidentiality” appears to be broader than the legal professional privilege exception. Problem solved?
- The Government also indicated (in response to questions) that if the problem persists they could consider passing statutory instruments to deal with any issues.
Mistake, rectification and variation of trusts: MISTAKE

The onshore approach

- *Pitt v Holt, Futter v Futter* [2013] UKSC 26 - the two jurisdictions; *Chu Wen Jing Jennifer v Sin Hon Wai* [2016] HKEC 2474

- Jurisdiction 1: mainly requires beneficiaries to bring

- Jurisdiction 2: what mistakes count?

- Onshore Courts taken fairly broad view post-*Pitt v Holt* to what mistakes count: e.g. *van der Merwe v Goldman* [2016] EWHC 790 (Ch), *Kennedy v Kennedy* [2014] EWHC 4129 (Ch)

Offshore jurisdictions:

- *AB v CD* (2016) CHP 2017/0007 (Isle of Man), *Re the L Trust* [2017] JRC 191 (Jersey), *M v St Anne’s Trustees Ltd* 20.6.18 (Guernsey CA)

- Statutory innovations
Mistake, rectification and variation of trusts: VARIATION

Onshore statutes and their limitations
- HK Trustee Ordinance s.56, England Trustee Act 1925 s.57
- HK Variation of Trusts Ordinance, England VTA 1958

Offshore innovations
- Bermuda- s.47 Trustee Act 1975 (see Re ABC Trusts [2012] Bda LR 89)
- Cayman- coming down the tracks…
CONCLUSIONS

- Need to understand offshore innovations
- Settlor or beneficiary reserved powers may be dangerous
  – particularly when viewed from an asset preservation context (divorce and creditor claims)
- Onshore Courts may have more sceptical eye
- The offshore jurisdictions should have a wary eye on the attitude the onshore courts might take in relation to their more innovative legislation particularly in the new world order of greater transparency.
- Increasing body of case law from variety of different jurisdictions, from England to HK and NZ