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FOREWORD THE EDITORS

KEEping UP WITH THE JONES’

The articles in this edition dovetail and remind us that the STEP practitioner is not only a global creature, but also one who is up to date with modern professional requirements.

Never far from the thoughts of every professional is the need for compliance – from us and from our clients – with our duties. Those duties are often onerous and ever-increasing. But, thankfully, two of the articles in the December Trust Quarterly Review assist with those tasks.

Legal practitioners and other professionals who assist clients with their will-drafting and estate planning are ever at risk of being sued for errors.

Lord Atkin famously postulated the rhetorical question in Donoghue v Stevenson: ‘Who, then, in law, is my neighbour?’ As the law of negligence has developed, the answer to that question in the context of will-making has become wider.

Our neighbourhood extends not only to those who are our clients, but also to those who are disaffected by the errors of the professional. As clients become increasingly aware of their rights, that neighbourhood becomes more densely populated. Teresa Rosen Peacocke TEP’s article on professional negligence re White v Jones will bring you up to speed with recent authorities, and the width of the circumstances that may attract negligence.

An essential requirement for practitioners in the present age is the need to keep up to date with regulatory requirements and changes in practice. To that end, John Riches TEP and Samantha Morgan TEP’s article on beneficial ownership registers for companies and trusts looks at the development and expansion of the requirements to keep such registers. The article serves as a timely reminder of the existing obligations on trustees related to beneficial ownership registers.

They also look at the effect of the EU’s Fifth Anti-Money Laundering Directive, due to take effect by January 2020. Significant changes have been introduced that widen the scope of the trusts about which information must be provided. Practitioners who work with EU-domiciled trusts, as well as entities that have connections with EU-domiciled trusts, would benefit from a close reading.

Practitioners will also be able to keep up to date with the issues that arise when trusteeship is transferred to a new trustee. The obligations that often face an incoming trustee, the range of indemnities appropriate for the outgoing trustee, and many of the practicalities of the transfer, are dealt with in the third edition of the STEP and Globe Law and Business publication A Practical Guide to the Transfer of Trusteeships. Keith Wallace reviews the text and notes the useful guidance contained within.

Practitioners with a cross-border practice in Spain, keen to keep on top of the tax issues faced by their clients, will be well served by Alberto Pérez Cedillo TEP’s piece on the Spanish treatment of international trusts. As the trust is not a structure recognised in Spain, there are uncertainties surrounding the tax treatment of...
international trusts with a Spanish connection. The article is a useful look at the approach taken by revenue authorities in a range of circumstances involving foreign nationals domiciled in, or assets held in, Spain.

For practitioners looking to expand their horizons to Latin America, or interested in learning about the structures available to families holding wealth in those jurisdictions, Isaac Cattan’s contribution will be of particular interest. His article ‘Use of Trusts/Fideicomisos for Succession Planning in a LatAm Jurisdiction’ won this year’s STEP LatAm Thesis Writing Competition, and has been adapted and featured here. Cattan is a Lawyer based in Brazil, which is to host next year’s STEP LatAm Conference, and his paper sets out the history and use of structures analogous to (but not the same as) ‘trust’ and ‘protectorship’ structures in Latin America. It is clearly an area where the use and understanding of such structures is evolving.

The writing competition is a STEP LatAm initiative aimed at encouraging students and young professionals to write a scholarly thesis paper. In this first year of the competition, the judges were impressed with the quality, and quantity, of the papers submitted. The runners-up in the competition were Flavia Allegro Gerola (Trench Rossi Watanabe, in cooperation with Baker McKenzie) and Kevin Fernández (Casahierro Abogados). Congratulations to all of them.

We commend this edition to you, as part of the trust practitioner’s continuing need to keep abreast of professional developments and obligations around the world.

THE EDITORS
WHITE v JONES REVISITED

The current scope of the doctrine in wills and UK trust cases

BY TERESA ROSEN PEACOCKE

ABSTRACT

• In this paper, I confine my attention to White v Jones cases, properly so called – that is, cases of liability for professional negligence in relation to wills, gifts and trusts, for pure economic loss (or failure to confer a benefit), and in the absence of reliance. Although some part of the perceived doctrine of White v Jones is often advanced in a wider class of case, especially in relation to commercial transactions,1 that is a much wider topic, to be addressed elsewhere.

• The principal issues addressed here concern the extension of White v Jones liability to inter vivos cases, especially gifts and trusts as part of estate planning exercises, and in particular its application to claims for negligent advice to settlors and/or trustees, following the potential for renewed focus on professional liability after Pitt v Holt.2

In White v Jones, the House of Lords (by a bare majority) extended the duty of care owed to a client by a solicitor who accepts instructions to prepare a will to the intended beneficiaries under that will, so that a beneficiary who suffers loss as a result of a breach of the solicitor’s duty of care will have a remedy in damages.

Salient points to bear in mind about the underlying basis for the decision in White v Jones include the following: in White v Jones, the duty owed to the client was extended to the person(s) intended to benefit under the proposed will for the simple, practical reason that the nature of the will-making exercise is such that its failure (in whole or in part) will have no repercussions for the client, but would defeat the object of the retainer, unless those intended to benefit under the will can claim compensation for any breach of the solicitor’s duty of care to the testator in relation to its preparation. This is the lacuna in the law: the only person to whom the duty is owed will, by virtue of the nature of the exercise, suffer no loss, and the only person who has suffered loss would have no claim.

1 E.g. Elite Property Holdings Ltd v Barclays Bank Plc [2016] EWHC 3294 and CGL Group Ltd et al v RBS et al [2017] EWCA Civ 1073
2 [2013] UKSC 26
‘The difference between testamentary and inter vivos gifts is whether the consequences of the negligence are (at least prima facie) capable of being remedied by the solicitor’s client’

Understood in this way, there is also no conflict of interest between the duty owed to the client/testator and that owed to the intended beneficiaries, which thus avoids problems such as those addressed by the Court of Appeal in Clarke v Bruce Lance.3

FAILED OR MISDIRECTED INTER VIVOS GIFTS
In White v Jones, Lord Goff made the following remarks about gifts:4

‘Let me take the example of an inter vivos gift where, as a result of the solicitor’s negligence, the instrument in question is for some reason not effective for its purpose. The mistake comes to light some time later during the lifetime of the donor, after the gift to the intended donee should have taken effect. The donor, having by then changed his mind, declines to perfect the imperfect gift in favour of the intended donee... I for my part do not think that the intended donee could in these circumstances have any claim against the solicitor. It is enough, as I see it, that the donor is able to do what he wishes to put matters right. From this it would appear to follow that the real reason for concern in cases such as the present lies in the extraordinary fact that, if a duty owed by the testator’s solicitor to the disappointed beneficiary is not recognised, the only person who may have a valid claim has suffered no loss, and the only person who has suffered a loss has no claim.’

Lord Browne-Wilkinson contrasted gifts with wills as follows:5

‘... in transactions inter vivos the transaction takes immediate effect and the consequences of solicitors’ negligence are immediately apparent. When discovered, they can either be rectified (by the parties) or damages recovered by the client. But in the case of a negligently drawn will, the will has no effect at all until the death. It will have been put away in the deed box not to surface again until the testator either wishes to vary it or dies. In the majority of cases the negligence will lie hidden until it takes effect on the death of the testator, i.e. at the very point in time when normally the error will become incapable of remedy.’

These passages seem to emphasise that the difference between testamentary and inter vivos gifts is whether the consequences of the negligence are (at least prima facie) capable of being remedied by the solicitor’s client.

Between the hearings of White v Jones in the Court of Appeal and the House of Lords, the case of Hemmens v Wilson Browne was decided.6 There, a donor resiled from an arrangement with a donee under which they would leave their spouses and set up home together, but he decided to recompense the donee by having his solicitors draw up a document entitling her to call upon him in the future for GBP110,000. The document drawn up and executed was ineffective, and the donor refused to perfect it, so the donee sued the solicitors. HHJ Moseley held that the solicitors owed the claimant no duty of care. The primary basis for the decision was the principle (gleaned then from Sir Donald Nicholls VC in the Court of Appeal in White v Jones) of the irremediability of a testamentary gift, which could not apply by analogy to the lifetime gift.

The position under White v Jones as to failed or defective lifetime gifts seems to have remained consistent. In Joseph v Farrer & Co,7 HHJ Purle QC dismissed a claim by a donee against her wealthy lover’s solicitors when trustees of the donor’s family trust ceased making payments

3  [1988] 1 WLR 881
4  Obiter at 262D-G
5  At 276D-F
6  [1995] Ch 223
7  [2017] EWHC 2072
pursuant to the donor’s letter of wishes. The decision was consistent with authority and grounded primarily on the proper basis of avoiding a conflict of interest, which is an essential feature of White v Jones liability.

The judge said:8

‘I do not consider that Farrer owed any duty of care towards the claimant in relation to the work they did … there were in my judgment sufficient tensions between the interests of the claimant and the interests of [the donor] to burden [the solicitors] with a duty to act in both their interests. On a superficial level, as [the solicitor] himself recognised in his oral evidence, there was no conflict of interest because both [the donor] and the claimant wished to achieve the same result. But in terms of how far [the solicitor] should press the trustees in obtaining as close as he could get to a commitment, there were differing interests of the claimant and [the donor] … This tension, as I have said, makes it inappropriate for any duty to be imposed.’

**PITT v HOLT AND FUTTER v FUTTER: THE TRUST CASES**

In Pitt v Holt; Futter v Futter,9 the Supreme Court (the Court) substantially curtailed the availability to trustees of the remedy of rescission under the so-called rule in Hastings-Bass, by which unexpected and unwanted fiscal consequences of trust dispositions could be undone. The Court also clarified the grounds for rescission based on mistake. One of the practical effects of this decision is to throw into sharp relief a specific type of claim in professional negligence, based on advice to settlors or trustees on the tax consequences of proposed dispositions of trust property, or property into trust.

It turns out that the basis for and proper analysis of such claims are not easily delineated, and this area of law runs squarely into outstanding questions about the scope and application of the decision in White v Jones. The two classic questions arise in relation to professional negligence claims arising from advice to settlors or trustees: to whom is the duty owed, and what kind of damage falls within the scope of the duty owed by advisors to trustees?

The claims against advisors illustrated by Mrs Pitt (and others) as settlor and by trustees in relation to the Futter settlements are examples of claims in negligence against solicitors (or other advisors) for damages representing avoidable tax charges accruing on a settlement created by the client/settlor, or a disposition by trustees under an existing trust, in reliance on the professional’s advice. Although these claims concerned the tax consequences of the settlements, such claims may well extend to any losses of trust assets, losses relating to defects in form, including ambiguities or mistakes in drafting necessitating remedial actions for construction or rectification, and/or additional expenses.

The existence of a duty of care owed by advisors to a settlor or trustees, pursuant to their retainer, is indisputable. What is less obvious, however, is the precise basis on which substantial damages would be recoverable where:

- a settlor, in reliance on negligent advice, creates a settlement with fiscal disadvantages or other costly defects that do not constitute losses suffered by the settlor; or
- negligence on the part of advisors results in a trustee appointing property from, or taking other steps under, an existing trust, which attracts unexpected tax charges or is otherwise defective or causes loss to the trust estate or to individual beneficiaries.

**LIABILITY FOR NEGLIGENCE: EXISTING TRUST CASES**

In the case of advisors to trustees in relation to the operation of an existing trust, such as that illustrated by the problems with the Futter settlements, the answer to the question of to whom the advisors owe a duty of care is thought to be the trustees and not the beneficiaries – except when it isn’t.

The traditional doctrine is that, where trustees engage advisors who give negligent advice that is intended to be relied and acted upon by the trustees in the administration of the trust, the cause of action vests, in general, in the trustees, not the beneficiaries. Normally, beneficiaries have no personal cause of action in contract or tort against the agents of the advisors.

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8 At [4]
9 [2013] UKSC 26
trustees, and only trustees are generally the proper claimants to recover losses suffered by beneficiaries of a trust, including damages arising out of a professional claim; see Royal Brunei Airlines Sdn Bhd v Tan, Roberts v Gill, and Webster v Sanderson Solicitors. The beneficiaries do not need to be joined as claimants or defendants to such a claim. White v Jones is said to have no application to trusts. If the trust has suffered loss due to the negligence of professional advisors, the trustees can sue to recover that loss on behalf of the beneficiaries. There is no lacuna.

In Chappell v Somers and Blake, Neuberger J considered that an executor was entitled to sue on behalf of the beneficiaries of the estate. He gave the example of a bare trustee who seeks professional advice as to whether to distribute trust property, where the right advice is to distribute as soon as possible, since the income would attract a much lower rate of tax in the hands of the beneficiary than in the hands of the trustee. If the professional delayed giving this advice for five years, Neuberger J considered that it would be the trustee, and not the beneficiary, who would be entitled to sue the solicitor for the extra tax paid during that period. Neuberger J even considered (although he said that it was unnecessary to decide the point) that the trustee should have a claim even in a case where the last instalment of extra tax was payable by the beneficiary after distribution. Chappell was approved in the Court of Appeal in Shell UK v Total UK Ltd.

In Malkins Nominees Ltd v Societe Financiere Mirelis SA, Laddie J considered that a trustee, just as much as an executor, could sue in tort to recover damages on behalf of the beneficiaries on the basis that the trustee neither holds the property nor realises its value for themselves. He upheld a trustee’s claim in the tort of conversion. He clearly considered that a trustee could also sue in negligence, as he expressly acknowledged that his decision was an extension of Chappell v Somers and Blake.

But then there is Yudt v Leonard Ross and Craig. There, liability under the Hedley Byrne principle was extended to beneficiaries for whom professional advisors had assumed responsibility. Solicitors to trustees were found to have been under a duty of care also towards beneficiaries in whose favour an invalid appointment was made, and to have been negligent. The disappointed beneficiaries recovered damages for their loss, even though their only interest was under the power of appointment.

Ferris J held that a beneficiary of an existing trust could sue a solicitor who had given negligent advice to the trustees for loss suffered by the beneficiary. There was no contractual duty because the contract was between the defendants and the trustees. There was also no lacuna, the defendants said: the trustees could sue in respect of the duty owed to them and recover any loss to the trust fund.

Ferris J further held that the special conditions of a White v Jones liability did not need to be satisfied in a case where the claimants are beneficiaries under a disposition under a trust created before the negligence was committed. Such beneficiaries, he held, have...
‘There is tension between the analysis in *Yudt*, founded on the proposition that the cause of action in negligence is a proprietary interest of the beneficiaries, and the established principle that a trustee’s cause of action in negligence against a third party can be an asset of the trust’

a proprietary interest in the trust property. If solicitors instructed by the trustees are negligent, causing loss to the trust property or the interests of the beneficiaries, the loss resulting from such negligence will ultimately fall on the beneficiaries, even if it is the trustees who incur it in the form of a diminution of the trust property held by them or of the need to expend money to protect the trust. By accepting instructions to act for the trustees, the solicitors are assuming to act, to the extent of the matters within their instructions, in the affairs of the beneficiaries. In such circumstances, the solicitors owe to the beneficiaries the same duties of care in tort as they owe to their clients, the trustees. Ferris J did, however, concede that the position might be different where the claimant is a person who has never become a beneficiary – e.g. a mere object of a fiduciary power vested in the trustees that the trustees wish to exercise in their favour, but fail to exercise because of the negligence of solicitors instructed by the trustees to draft the requisite instrument. Such a claimant might only succeed, he said, if the relationship was of the special nature recognised in *White v Jones*.

The authors of *Lewin on Trusts* describe the position thus:19

‘While it is arguable that imposing liability for breach of a responsibility assumed in this way opens the door to direct actions in tort generally by existing beneficiaries of existing trusts against the professional advisors retained by the trustees, it is thought that beneficiaries are entitled to recover directly in tort only in respect of loss which they themselves suffer, beyond the non-recoverable reflective loss which they suffer by reason of a diminution in the value of the trust fund in consequence of negligence of the trustees’ professional advisers, and the consequential diminution in their respective existing interests in the trust fund. In the common case where the negligence has an adverse effect on the trust fund, it is thought that the correct claimants are the trustees, and that the beneficiaries should be entitled to claim only by a derivative action … Otherwise the professional advisors would face a multiplicity of actions in respect of the same loss from trustees and beneficiaries which those principles seek to avoid.’

There is tension between the analysis in *Yudt*, founded on the proposition that the cause of action in negligence is a proprietary interest of the beneficiaries, and the established principle that a trustee’s cause of action in negligence against a third party can be an asset of the trust. In *Royal Brunei Airlines v Tan*,20 Lord Nicholls in the Privy Council said:21

‘It is against this background that the question of negligence is to be addressed. This question, it should be remembered, is directed at whether an honest third party who receives no trust property should be liable if he procures or assists in a breach of trust of which he would have become aware had he exercised reasonable diligence. Should he be liable to the beneficiaries for the loss they suffer from the breach of trust? The majority of persons falling into this category will be the hosts of people who act for trustees in various ways: as advisors, consultants, bankers and agents of many kinds. This category also includes officers and employees of companies, in respect of the

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19 At para.43-022
20 [1995] 2 AC 378
21 Obiter at 391F
‘The position of advisors to settlors in relation to the creation of an inter vivos trust is similarly confused. It is especially tricky when the negligent advice relates to estate planning exercises undertaken inter vivos with a view to minimising inheritance tax on death’

application of company funds. All these people will be accountable to the trustees for their conduct. For the most part they will owe to the trustees a duty to exercise reasonable skill and care. When that is so, the rights flowing from that duty form part of the trust property. As such, they can be enforced by the beneficiaries in a suitable case if the trustees are unable or unwilling to do so. That being so, it is difficult to identify a compelling reason why, in addition to the duty of skill and care vis-a-vis the trustees which the third parties have accepted, or which the law has imposed upon them, third parties should also owe a duty of care directly to the beneficiaries. They have undertaken work for the trustees. They must carry out that work properly. If they fail to do so, they will be liable to make good the loss suffered by the trustees in consequence. This will include, where appropriate, the loss suffered by the trustees being exposed to claims for breach of trust.’

LIABILITY FOR NEGLIGENCE: THE CREATION OF A TRUST

The position of advisors to settlors in relation to the creation of an inter vivos trust is similarly confused. It is especially tricky when the negligent advice relates to estate planning exercises undertaken inter vivos with a view to minimising inheritance tax (IHT) on death.

The claim illustrated by Mrs Pitt against her advisors in Pitt v Holt was for damages representing avoidable tax charges accruing on a settlement she created as settlor in reliance on the professional’s negligent advice.

The closest case by analogy on the facts is Estill v Cowling Swift and Kitchin. In Estill, a settlor (through her executors) and the trustees of a voluntary settlement of shares created by her sued solicitors (and counsel) who advised and assisted in the creation of a discretionary trust that had adverse inter vivos IHT consequences.

Damages were claimed by both the settlor and trustees, represented by the initial and periodic IHT charges, the loss of the proceeds of a life insurance policy (to cover IHT arising from a lifetime potentially exempt transfer within seven years of death), additional professional fees and statutory interest.

Arden J held without hesitation that there was no overlap (or risk of double recovery) between Mrs Estill as settlor and the trustees, and it was clearly foreseeable that negligent advice to Mrs Estill that resulted in liability for tax by the trustees would cause the trustees to suffer a loss.

A HYBRID CASE: NEGLIGENCE IN THE CREATION AND OPERATION OF A TRUST

The case of Hughes v Colin EG Richards concerns claims by settlors and beneficiaries, and relates to both the creation and the operation of a trust.23 The settlors were parents of the beneficiaries, who acted on the defendant accountant’s advice to create an offshore trust to fund their children’s school fees. The entire, costly, exercise failed and the whole fund was exhausted in taxes and charges. The trustee, a Swiss bank, was not a party to the claim. The claim was brought by the parents as settlors and the children as beneficiaries for negligence in the creation and operation of the trust. The defendant accountant applied to dismiss the children’s claim, which failed before Norris QC (sitting as a deputy) and in the Court of Appeal.

As to the creation of the trust, the children complained that the trust scheme devised by Mr Richards was unsuitable for tax purposes, and the

22 [2000] Lloyd’s Rep PN 378
23 [2004] EWCA Civ 266
‘A crucial question in relation to White v Jones is whether anyone, and if so who, can recover substantial damages against negligent advisors in an inter vivos testamentary estate planning exercise that fails, resulting in otherwise avoidable IHT after death’

... in any event the present case seems to me plainly one where the relevant area of law is still subject to some uncertainty and developing and where it is highly desirable that the facts should be found so that any development of the law should be on the basis of actual and not hypothetical facts. That is underlined by the fact that both the children and the parents make claims for loss which, while partly identical, are not wholly so. I of course accept it is a cardinal principle that there cannot be double recovery in respect of the same loss. It is not asserted otherwise by the children.’

A crucial, and as yet not finally resolved, question in relation to White v Jones, concerning wills and trusts and inter vivos gifts, is whether anyone, and if so who, can recover substantial damages against negligent advisors in an inter vivos testamentary estate planning exercise that fails, resulting in otherwise avoidable IHT after death.

Vinton v Fladgate Fielder was such a claim, as was Rind v Theodore Goddard, but their (relatively) complicated facts and multiple capacity parties (a testatrix who was also a shareholder or director, and beneficiaries who were company directors, attorneys for the testatrix) made them unsuitable for summary disposal (and no doubt too costly to take to trial).

But amid the struggle for a proper analysis came what should have been the delightfully simple case (on the facts) of Daniels v Thompson. Mother and son sought advice from solicitors about reducing IHT on her death. The defendant advised the testatrix to transfer her home to her son so as to take it outside her estate for IHT purposes, but he failed to mention the gift-with-reservation provisions. The mother remained in occupation and the unavoided IHT of GBP30,980 was charged on the estate. The son was the sole executor and sole beneficiary and sued the solicitor in his capacity as executor on behalf of the estate (but with an unsuccessful last-minute effort to include a personal claim as executor). There is a tantalising discussion in the literature as to whether the son would have succeeded in his claim if he had sued as a disappointed beneficiary under White v Jones, or on the basis of a Hedley Byrne v Heller duty arising from reliance. Dyson LJ remarked (obiter) that there was a ‘reasonable

24 At [50]
‘The position at present appears to be that the impulse to do practical justice prevents courts from sustaining the *White v Jones* orthodoxy’

analogy’ between the facts of this case and the disappointed beneficiary cases of which *White v Jones* was the leading example. There is nothing in any of the judgments to suggest that their Lordships would have ruled against a claim by the testatrix’s son in his capacity as a beneficiary.

More recently, Lord Tyre of the Scottish Outer House, Court of Session, grappled with the same question, in *Steven v Hewats et al.* The case was one of two actions: the first by the beneficiary of a lifetime gift of her aunt’s house, with the intention of saving IHT on the donor’s estate, which failed for the same reason as in *Daniels v Thompson*. The second action was brought on similar grounds by the donor’s executors.

Lord Tyre was concerned only with the defenders’ application to dismiss the beneficiary’s claim, which he declined to do. He held that *White v Jones* applied in Scotland, and said that ‘there is no reason why *inter vivos* gifts should not be capable of falling within the scope of the *White v Jones* principle’. As for Lord Goff’s *dicta* distinguishing will cases from *inter vivos* gifts in *White v Jones*, Lord Tyre said:

‘This passage seems to me to make clear that what matters, so far as the principle is concerned, is not whether the gift is testamentary but rather whether the consequences of the negligent act are capable of being rectified by the solicitor’s client. Only if they are not does the concern underlying the principle arise.’

Lord Tyre went on to say:

‘The position of a donee may, however, differ from that of a testamentary beneficiary in one respect. The testamentary beneficiary will inevitably be an entirely passive recipient of benefit. A donee may or may not be a passive recipient. The question then arises of whether the existence of a transactional element in a lifetime gift takes it outwith the scope of the *White v Jones* principle. In my opinion the answer to that question will vary according to circumstances. The test, in my view, is still the same, namely whether the donor’s solicitor can be held to have assumed responsibility towards the recipient of the gift. In some cases, the existence of a conflict of interest between donor and donee may afford an indication that there has been no such assumption of responsibility. I do not, however, consider that a hypothetical possibility of a conflict of interest arising is necessarily sufficient in itself.’

After citing Norris J in *Vinton v Fladgate Fielder*, Lord Tyre said:

‘It is apparent that Norris J did not see the transactional element of the tax planning scheme as precluding the application of *White v Jones*, and that the issue of whether or not there was unity of interest was regarded as an issue to be decided after evidence was led. In my opinion the case affords support for the proposition that potential conflict of interest is not sufficient to exclude its application, and that the question whether the existence of an actual conflict of interest is sufficient to do so is a matter to be decided on the whole facts and circumstances of the case.’

Finally, in answer to the argument that there was no lacuna, as the donor had a cause of action in her lifetime, Lord Tyre said:

‘There is, in my opinion, no reason in principle why the existence of a claim for loss sustained as a consequence of a solicitor’s negligent act or omission should of itself exclude the making
of a *White v Jones* claim for a different loss sustained by a different person as a consequence of the same act or omission. In the circumstances of the present case it would seem to me to be absurd to hold that the pursuer’s claim would be excluded if it were the case that [the donor] had sustained an entirely different loss consisting of the cost of the ultimately unsuccessful remedial conveyancing.’

For completeness, I mention *Herring v Shorts Financial Services*, where HHJ Behrens dismissed a claim against a financial advisor for failing to properly explain to solicitors who prepared a will in favour of the claimants the operation and effect of *inter vivos* trusts created in their favour by the testatrix on the defendant’s advice, in order to reduce IHT payable on her death. The solicitor wrongly assumed the amount of funds from the trusts passing to the claimants, which resulted in an inadequate amount being left to them under the will.

The claim against the solicitors who prepared the will had been compromised, but HHJ Behrens nevertheless made the following comments:31

‘It is difficult to resist the conclusion that [the solicitor] was in breach of his duty to [the testatrix] and to the claimants. In my view he should have made sufficient enquiries to satisfy himself that the relevant trust moneys would in fact pass to the claimants on [the testatrix’s] death. Alternatively, he should have devised a form of words to ensure that the claimants each received GBP200,000 after taking into account any moneys they received under the two trusts. In my view it was negligent to draft the will based solely on the material in the aide-memoire and the short conversation. This is not therefore a case where the claimants have no claim against anyone. I agree ... that the fact that they have chosen to compromise that claim [against the solicitors] cannot affect the question of whether there was a duty of care owed by [the financial advisor] ... This case is not on all fours with any of the decided cases. It is plainly distinguishable from *White v Jones* and *Carr-Glynn*. [The financial advisor] was not instructed in the will-making process. He did not know the identity of the beneficiaries or the amount intended to be left to them. It would in my view involve a considerable extension to the principle in *White v Jones* to impose a duty of care in this case.’

The position at present appears to be that the impulse to do practical justice prevents courts from sustaining the *White v Jones* orthodoxy, limiting its operation to cases where there would otherwise be a lacuna in the law, properly so called, and rejecting its application in any case where there is a conflict between the interests (not the objectives) of the client and the beneficiary/donee, which would rule out most *inter vivos* cases except as regards gratuitous lifetime gifts.

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30 Leeds County Court, 9 May 2016
31 At [96(4)-(5)]
Abstract

- The trust is a legal instrument under Anglo-Saxon law that has no equivalent in Spanish law and, as such, uncertainty often arises when Spanish tax authorities seek to establish their treatment and regulation of international trusts.
- The Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition (the Convention) was drawn up in the hope of shedding some light on the issues deriving from such a lack of knowledge about this instrument in many legal regimes. The Convention became effective on 1 January 1992, but was only ratified by a few states. At the time of writing, 13 countries have ratified the Convention; Spain is not included among them.
- Although this instrument is not recognised and does not have a clear-cut equivalent in Spain, this does not mean that trusts are tax-exempted. In this regard, the General Tax Law (Ley 58/2003, General Tributaria) states which individuals are to be deemed liable taxpayers, and sets forth other types of entities that fall, for tax purposes, under the trust category: ‘Estates of deceased persons, joint-property entities and other entities with no legal status that may create an economic unit or separate equity subject to taxation’.1

In Spain, the taxes derived from trusts should be borne by the beneficiaries, and the following three key factors should be analysed on a case-by-case basis to determine whether such taxes should be paid in Spain:
- the identity of the individuals concerned;
- their place of residence for tax purposes; and
- the situs of the trust assets.

To obtain legal certainty as to the treatment of an international trust by the Spanish authorities, individuals can issue ‘binding consultations’. These are writs whereby any liable taxpayer can make a formal enquiry with the local administration as to how trust standards are to be applied and construed. A response from the Spanish Tax Authority (the Authority) is the only possible way to construe tax regulations.

This article offers an analysis of several consultations on the treatment and reporting of trusts that have been addressed by the EU’s Directorate-General for Taxation and Customs Union, and which offer useful insight on the handling of international trusts in Spain.

Determining Tax Liability

C.V V1991-08, 30/10/2008

In this case, the enquirers’ grandmother, who was of Panamanian nationality, had died on 15 March 2008, having spent the last four years of her life in her domicile in Madrid. Although she lived there, she never changed her domicile for tax purposes to Madrid, nor did she register herself...
before the City Council of Madrid. The enquirers were subsequently visited by trustees from a trust constituted by their grandmother in the UK more than ten years earlier in order to govern her estate. According to the trustees, the enquirers had been appointed as beneficiaries after her demise (up to that moment, the grandmother was the sole beneficiary). Until then, the enquirers had received no amount or asset whatsoever from the trust.

The Spanish tax authorities consider that the trustee’s powers are limited to the administration and custody of the funds received on behalf of the beneficiaries. The trustee cannot dispose of such funds for any purposes other than those set out under the trust constitution document (to the attention of the beneficiaries), and any distributions must be authorised by the protectors. Therefore, the Authority is aware of the fact that the trustee may be the formal owner of the funds, but must keep them separate from their own property.

Two issues were raised in this enquiry:
• whether the fact that the enquirers had been appointed as the trust beneficiaries by their grandmother as of her demise constituted a taxable donatio mortis causa acquisition; and
• whether the fact that the settlor was not registered in Madrid for either tax or municipal purposes was a determinant factor of her status as tax resident in said territory.

RESOLUTION BY THE DIRECTORATE-GENERAL FOR TAXATION
First, the Authority established that, although pursuant to Anglo-Saxon law, the trust is a legal institution under family and inheritance law, such an instrument is not recognised under Spanish law.

Therefore, for the purposes of Spanish law, the relationship between the enquirers and their grandmother through the trust was deemed to be a direct one between the parties.

Likewise, under Spanish law, the enquirers’ appointment as the trust beneficiaries made them subject to taxation as stated in Law 29/1987 of 18 December, on Inheritance and Donations Tax, since it accounted for an acquisition of assets and titles conveyed by inheritance, legacy or any other inheritance title. The taxable event begins to accrue on the settlor’s death.

‘The Spanish tax authorities consider that the trustee’s powers are limited to the administration and custody of the funds received on behalf of the beneficiaries’

Second, to establish the domicile for tax purposes of the enquirers’ grandmother, the Authority considered that the law sets out that those taxpayers who have their ordinary place of residence in Spain shall be fully liable to tax, regardless of the situs of the assets or titles incorporated to their taxable property.

The law on personal income tax (Impuesto de Renta sobre las Personas Físicas, IRPF) governs the presumptions whereby the Authority may consider an individual to be a resident, namely:• when the subject stays in Spain for more than 183 days during the Spanish tax year (1 January to 31 December);• when their core business or economic activity is performed in Spain, either directly or indirectly; and• when Spain is the place of residence of their spouse and minor children.

Other than the very specific circumstances mentioned above, the Directorate-General for Taxation has clearly indicated, and it is therefore one of the relevant outcomes of this case, that whether or not one is tax resident in Spain is a matter of fact and so can be proved through any evidence admitted by law. There is not a single test for tax residency in trust that should apply across the board.

DETERMINING TAX OBLIGATIONS ON REVENUE
C.V V1016-10, 14/05/2010
In this case, a trust was established in Gibraltar. The settlor was a UK tax resident residing in Spanish territory who could contribute savings thereto on its constitution. The distribution of the trust revenue and/or lump sums would be performed on a future date, at the settlor’s discretion.
The consultation was made by an entity domiciled in Gibraltar that wanted to trade a product (the Plan) with British nationals (the Members) residing in Spanish territory by constituting a trust in Gibraltar, for which the entity would act as trustee.

RESOLUTION BY THE DIRECTORATE-GENERAL FOR TAXATION
The entity that would act as trustee raised the following issues:

• **Subjecting the tax on capital transfers and documented legal acts to the ‘corporate transaction’ modality**
  The Authority stated that trusts are not subject to the tax on capital transfers and documented legal acts under the ‘corporate transaction’ modality, insofar as trusts are not recognised under Spanish law. Therefore, and as a logical outcome therefrom, the trust cannot exercise any rights and obligations in Spain. In brief, neither the constitution of a trust nor the performance of operations in Spanish territory would be subject to the corporate transaction modality, as per the tax on capital transfers and documented legal acts.

• **Reporting obligations when using tax havens**
  As per art.1.8 of Royal Decree 1080/1991 (Real Decreto 1080/1991) as amended, Gibraltar is included on the list of ‘tax havens’ and is therefore considered as such for the purposes of Spanish tax regulations. In turn, Spanish tax law states that taxpayers shall furnish information on any transactions, operations, payments and collections performed or arising from the holding of securities or assets associated with countries officially classified as tax havens by the above-mentioned Royal Decree.

‘Both the amounts collected by the heirs and those received by the family members or dependants designated by the Member shall be considered a profit’

• **Tax treatment of savings kept in the UK and transferred to Spain**
  Another issue was raised concerning the tax treatment of transferring savings under a UK savings plan to the Plan. If such funds were transferred by individuals who are tax resident in Spain and are liable for payment of taxes in Spain for their global revenue, the transfer shall be governed by the provisions contained in the Spanish income tax legislation.

• **Taxation on the revenue arising from the trust**
  The enquirer asked whether the revenue accrued by the trust would be subject to taxation before the beneficiary collects it. The revenue accrued by the trust herein must be understood to be earned directly by the trust settlor, that is, an individual residing in Spain. Therefore, such revenue shall be taxed as per the IRPF rules.

• **Tax treatment in case of the settlor’s demise**
  The entity asked which tax regime would apply to the amounts collected by the beneficiaries in case of death of the trust settlor. Both the amounts collected by the heirs and those received by the family members or dependants designated by the Member shall be considered a profit. Further, such amounts must arise from a legal business of the _donatio mortis causa_ type, which, by its nature, requires the settlor to be dead.

  These amounts will constitute _donatio mortis causa_ profitable acquisitions, whether they are received by individuals in their condition as heirs or as beneficiaries. In both cases, they shall be subject to the tax on inheritance and donations.

  Heirs, legatees or any beneficiary of the deceased settlor shall pay the relevant tax on inheritance and donations under any of the following circumstances:
  • when they reside in Spanish territory; or
  • when they receive assets and titles that are located or that may be exercised or must be fulfilled in Spanish territory.

  On the other hand, given the fact that they are _donatio mortis causa_ acquisitions, the tax...
‘The relationship between individuals established through trusts is deemed to have been directly created by the individuals involved, as if the trust did not exist’

base will be reduced according to the degree of kinship between the taxpayer and the settlor.

As to tax accrual, it is evident that it will begin on the settlor’s death, notwithstanding the fact that a long time may go by until the beneficiaries’ identity becomes known.

• Taxation on the remuneration for the trust management and administration

The enquirer also asked whether the remuneration to be received on account of the trust management and administration would be taxed in Spain.

We cannot stress enough that, according to Spanish law, the Directorate-General for Taxation has made clear, regarding the tax treatment of any income received as a trustee, that any activity that is carried out in Spain when the trustee is tax resident in Spain, and when the trust is incorporated in a country classified as a tax haven, as in the case of Gibraltar, would be taxable in Spain.

DETERMINING TAX OBLIGATIONS ON REVENUE C.V V1495-16, 08/04/2016

This time, the enquirer was a US citizen who had recently become a Spanish resident for tax purposes. However, her family members were of US nationality, with the US as their place of residence for tax purposes. Her parents had property in the US that was held in several trusts, pursuant to the law of the state of California. Some of those trusts created to the benefit of the enquirer were irrevocable.

The enquirer’s parents (the settlors) contributed different movable assets and real estate to the trusts. All the assets were located in the US and several trustees were appointed to administer them. The enquirer, together with her siblings, was the beneficiary of the trusts. In this regard, the enquirer did not hold any right over such trusts or the assets thereunder, since the trustees were the ones responsible for managing and maintaining them.

The question raised was about taxation in the event of the parents’ demise if the trust property was acquired by a US company (as the trust’s beneficiary) that was fully owned by the enquirer, who was resident in Spain for tax purposes.

RESOLUTION BY THE DIRECTORATE-GENERAL FOR TAXATION

The enquirer’s parents were considering the possibility of restructuring their estate, as per US law, by modifying the trust beneficiaries. After such a property rearrangement, a company incorporated in the US would be appointed as the beneficiary of some of such trusts, instead of the enquirer. That US company would then be fully owned by the enquirer, who, in her condition as the sole shareholder, would have full control of its activity and revenue distribution.

The creation of several trusts by her parents in favour of the enquirer constitutes an act subject to taxation as per the law, since it entails the acquisition of assets and titles conveyed by donation or any other non-onerous inter vivos business. Insofar as the relationship between the enquirer and her parents is through direct trusts between the parties, the relevant tax begins to accrue on the constitutions of such trusts.

Finally, there was the question of taxation in the event of the parents’ demise if the trust assets were acquired by a US company acting as the trust beneficiary but fully owned by the enquirer (having domicile in Spain for tax purposes). The answer was that the enquirer would have to pay the corresponding corporate income tax (Impuesto de Sociedades) applicable to legal entities.

CONCLUSION

The relationship between individuals established through trusts is deemed to have been directly created by the individuals involved, as if the trust did not exist (trust fiscal transparency). Spanish residents earning any trust-related amounts shall be deemed liable taxpayers ‘regardless of the situs of the assets and titles incorporated to their taxable...
property’.  Further, the IRPF shall be applied to any other trust yields.

As to the creation of trusts, the acquisition of assets and titles conveyed by inheritance, legacy or any other inheritance title, and the acquisition of assets and titles through donation or any other legal non-onerous *inter vivos* business, shall be subject to taxation.

The Authority’s treatment of these cases makes clear its very simplistic and straightforward approach to foreign trusts. It also makes evident that, for tax planning purposes, trusts in Spain must be considered specifically, case by case, carefully analysing each individual situation in order to determine their efficiency. The main assumption to be made is that, where one person holds property on behalf of another by setting up a trust, Spanish law shall not recognise a fiduciary. The trust will be ignored, and its assets considered to be owned either by the settlor or, in certain cases, by the beneficiaries of the trust.

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DEMYSTIFYING TRUSTS IN LATIN AMERICA

The challenges surrounding the use of trusts as a tool for succession planning in Latin American civil-law jurisdictions

BY ISAAC CATTAN

ABSTRACT

• The origins of the trust as a legal institution lie in medieval England, and began with ‘tenures’, a legal instrument that made it possible for conqueror kings to distribute taken lands without losing their property. When this system showed itself to be unable to generate the confidence needed between owners and fiduciary parties, the law evolved to provide parties with a new legal instrument deemed suitable to establish such an arrangement. And so Anglo-Saxon case law forged a new legal instrument with a name that represented its ultimate goal: the trust.

• Later, as Spanish and Portuguese settlers began to colonise South American countries from the 17th century, many European families found an environment propitious to prosperity but a legal system lacking in certainty. Such families became the perfect recipients for the institute of trusts. In this scenario, many genuine worries started to arise, such as:
  - How would local tax authorities construe the rights of beneficiaries under a trust deed?
  - How would local courts apply the succession and inheritance laws on the transmission of assets held by trustees?
  - How would foreign exchange authorities regulate the inflows and outflows of funds from and to a trustee based abroad?

• Such questions pertain to modern Latin American jurisdictions, and the only way to answer these is to cautiously fit each of the aspects of trusts into the national legal instruments, and then analyse the feasibility, advantages and disadvantages of their use in succession planning.

• This article offers an analysis of the use of trusts in Latin American civil-law jurisdictions, as well as looking at solutions to the various challenges facing the use of trusts in such jurisdictions, such as how to balance out the local legal concepts and the underlying trust rationale, and offering theoretical and practical guidance for practitioners operating in the region on the advantages and the real purposes of trusts.
In civil-law systems, the right to property is ruled by the principle of *numerus clausus*, pursuant to which it is necessary for all new kinds of *in rem* rights to be introduced and regulated by the legislator.

The origins of the trust as a legal institution lie in medieval England, and the upheaval in the population sparked first by the conquests of the land by the barbarians and subsequently by continental wars and the Crusades.

The earlier phase saw the introduction of ‘tenures’, a legal instrument that made it possible for conqueror kings to distribute taken lands without losing their property. ‘Tenants’, as individuals granted with a tenure by the king, could in turn appoint new tenants, creating a chain of suzerains and vassals.

In the second phase, as warriors left Britain to fight in Europe and the Middle East, leaving their property and families behind, the tenure had to evolve to encompass situations faced by family fathers: chiefly, how to ensure the protection of the family’s wealth during their absence and, worse, in case of their death. It was in this context that the concept of ‘use’ was first recognised. This allowed the use of a given property by a person appointed by the owner, who could employ such property at his own discretion, subject to a few limits imposed by the common law.

When this system showed itself to be unable to generate the confidence needed between owners and fiduciary parties, the law had to evolve again to provide parties with a new legal instrument deemed suitable to establish such an arrangement. And so Anglo-Saxon case law forged a new legal instrument with a name that represented its ultimate goal: the trust.

**RIGHT OF PROPERTY**

With the introduction of the trust, for the first time, the right of property was deemed to be possibly ‘dual’. This was inconceivable from a civil – or Roman – law perspective, which designed the right of property as an *erga omnes* right, that is, absolute, exclusive and plain: a right effective against any third parties concentrating different rights within itself. This perspective survives in many civil-law jurisdictions, including Latin American ones, to this day, for example, art.1,228 of the Brazilian Civil Code (the Code), which sets forth that ‘the owner has the right to use, benefit from, and dispose the thing owned, and the right to retrieve it from whoever unfairly possesses or holds it’.

This feature of the property right in civil law generates difficulties for trusts to be understood and, by extension, recognised in Latin American jurisdictions. Since beneficiaries have a beneficial interest in the assets held under trusts (being entitled to the income or capital from those assets), most lecturers tend to construe the legal relationship between trustees and beneficiaries as a contractual obligation between two parties, and not to recognise an *in rem* right of the beneficiaries over the assets. However, as an example of the ‘dual property’ system established by trust law, it is known that trust assets form a separate estate protected from the claims of the trustee’s private creditors – since they are held in the benefit of third parties.

Indeed, there are still controversies about this aspect of trusts even within the common-law doctrine. According to Honoré, ‘the beneficiary’s protection consists in the right to exclude the trustee’s private creditors, a right which can hardly be construed as a property right’.

Further, in civil-law systems, the right to property is ruled by the principle of *numerus clausus*, pursuant to which it is necessary for all new kinds of *in rem* rights to be introduced and regulated by the legislator, in line with the rules previously set forth in their respective civil codes. The creation of new types or rules applicable to...

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1. Original wording: ‘Art. 1,228. O proprietário tem a faculdade de usar, gozar e dispor da coisa, e o direito de reavê-la do poder de quem quer que injustamente a possua ou detenha’

property cannot be privately established, even without affecting third parties’ interests. This is an essential difference between real rights and the legal discipline of contracts and obligations (which can be freely determined by the parties as a result of the guaranteed freedom of contract).³

DONATIONS AND GIFTS
The first well-known civil-law legal instrument that comes to mind when comparing those available to trusts used for succession purposes is the ‘donation’ or ‘gift’. This is because, by using a trustee as an ‘intermediate entity’, it is possible to assume that a donation starts in the moment of the settlement of a trust and ends when the trustee transfers the assets to the beneficiaries. At this moment, it is not even necessary for the settlor to be alive, as it is the trustee, not the settlor, who performs the legal act of the transmission.

However, it is not possible to construe that at the final moment the assets are still part of the settlor’s estate: they ceased to be at the moment of the settlement of the trust. With the distribution of assets to the beneficiaries, what happens is the accomplishment of the initial donation, through an action by the trustee (as intermediary).

The transmission of assets held under trusts to the relevant beneficiaries shall occur independently from the legal partition and succession proceedings happening in the jurisdiction where the settlor is domiciled. However, in Brazil, as in most civil-law countries, it is forbidden to heirs to omit their receipt in the succession process, thus unbalancing the proportion of distribution of assets prescribed by law and/or by the will of the deceased. Pursuant to art.1,995 of the Code,⁴ heirs who omit their receipt may be obliged to compensate the other heirs or because minimum means of subsistence can be freely determined by the parties as a result of the guaranteed freedom of contract).³

rules for the protection of heirs in Brazil seek either to restrict a person’s ability to:
• make certain donations during their lifetime, either because they are detrimental to certain
heirs or because minimum means of subsistence are not reserved to donor; or
• to deprive certain heirs of a minimum part of the estate on death.

The restrictions on lifetime donations are contained in art.549 of the Code,⁵ pursuant to which a person cannot donate more than the share of their wealth that they could freely dispose of under Brazilian forced heirship rules. That share is one half of their total wealth under art.1,846 of the Code.⁶

Brazilian law also forbids donations by living persons from being made whenever that amount and extent would impair the means of livelihood of the donor.⁷

As to the second provision, it refers to transfers on death of a person. In this case, the spouse, children or ancestors cannot be deprived by will or any other act of more than half of the person’s estate at the moment of death.⁸ All these aspects shall be considered by a Brazilian judge when ruling on any matters involving trusts.

FORCED HEIRSHIP
With regards to the enforcement of trusts by Brazilian courts, it is necessary to analyse where Brazilian law would apply to the construing of trusts and the consequences arising therefrom. Brazilian law would necessarily apply to any core legal matters that may impact Brazilian public order or sovereignty.⁹ Public order is not a clearly defined concept, but under Decree-law No. 4,657/42¹⁰ any rules directed at the protection of Brazilian necessary heirs as well as core legal principles in each area of law (such as the protection of donors) would be covered by this concept.

In summary, the considerations above lead to the following conclusions:
• Though trusts have no equivalent in Brazil, a trust created under non-Brazilian laws should notwithstanding be accepted by Brazilian courts.

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4 Original wording: ‘Art. 1.995. Se não se restituirão os bens sonegados, por já não os ter o sonegador em seu poder, pagará ele a importância dos valores que ocultou, mais as perdas e danos’
5 Original wording: ‘Art. 549. Nula é também a doação quanto à parte que exceder à de que o doador, no momento da liberalidade, poderia dispor em testamento’
6 Original wording: ‘Art. 1.846. Pertence aos herdeiros necessários, de pleno direito, a metade dos bens da herança, constituindo a legítima’
7 art.548. Original wording: ‘Art. 548. É nula a doação de todos os bens sem reserva de parte, ou renda suficiente para a subsistência do doador’
8 arts 1.845 and 1.846 the Code
9 art.17 Decree-law No. 4.657, 4 September 1942. Original wording: ‘Art. 17. As leis, atos e sentenças de outro país, bem como quaisquer declarações de vontade, não terão efeito no Brasil, quando ofenderem a soberania nacional, a ordem pública e os bons costumes’
10 Also known as ‘Introduction to Brazilian Law Statute’
• Brazilian forced heirship rules, as well as rules in Brazilian civil law directed at the protection of donors, would be applied by Brazilian courts whatever the law chosen to govern the trust.
• Finally, such Brazilian rules of mandatory application would prevent donations to the detriment of issue, living ancestors or spouse, and prevent donations whenever their amount and extent would impair the means of livelihood of the donor.

Also, tax concerns promptly arise. Beneficiaries are only required to declare such assets to the local tax authorities when they acquire legal disposition of them, in other words, at the ‘vesting’ moment. Donation tax should be levied on the assets transferred to the trustee by the settlor and afterwards received by beneficiaries, but this is not applicable to new assets effectively earned by the trustee as a result of the management of the wealth held under trust. In such cases, only income tax would be levied on the assets received by the beneficiaries, and only over the portion that exceeds the amount originally transferred by the settlor.

PROTECTORS, FIDUCIARIES AND FIDEICOMISSOS

Another advantage of using trusts in Latin American jurisdictions is the possibility of appointing ‘protectors’ to serve as a safeguard in favour of the beneficiaries. According to the Anglo-Saxon doctrine:

‘at the very least, a trust protector must act solely for the benefit of the trust beneficiaries and cannot use his or her powers for personal benefit. In other words, a trust protector owes a duty of loyalty to trust beneficiaries that is similar to that owed by trustees’.11

The appointment of a protector in the context of a trust settlement is more flexible than other similar protectorship regimes offered by Brazilian law. For example, the Brazilian instrument of ‘guardianship’ (tutela) may be established with the death of the minor’s parents or when a judge removes the ‘family power’ from parents.12

On the other hand, protectorship can be freely established by a settlor of a trust, and the powers of the protector are much more dependent on the intention of the settlor than powers imposed by Brazilian law for guardians (tutores).

Additionally, interests of the beneficiaries are safe due to the fiduciary duties of protectors, while such a fiduciary relationship does not exist in similar cases in the civil-law jurisdictions.13

The support provided by protectors makes them an important tool for succession plans, as one of the greatest challenges facing those seeking to transfer wealth is to find enforceable and effective legal mechanisms to ensure the implementation of the idealised management and transmission of wealth.

Brazilian law also sets forth the ‘fideicomisso’, which has similar features to the trust, but is not sufficiently equivalent.14 Due to the use of its homonym in Spanish, its use is frequently misunderstood. In Brazil, a fideicomisso means only the power of the testator to appoint a third-party fiduciary (natural person) to ‘receive’ the inherited assets and manage them until that fiduciary’s death, in the benefit of the heir.

Another possible confusion arising from the coincidence of words to be clarified is that the third party ‘fiduciary’ is not bound to the ‘fiduciary duties’ generally applicable to trustees. At most, it is possible to assert that the fiduciary linked to a fideicomisso is bound by ‘moral’ duties (just as a trustee is) naturally related to any fiduciary relationships. This concept is clearly explained by Harding:

12 art.1,728 the Code
13 Even though guardians (tutores) are obliged to render annual accounts to a judge that approved their appointment
14 art.1,951 the Code. Original wording: ‘Art. 1.951. Pode o testador instituir herdeiros ou legatários, estabelecendo que, por ocasião de sua morte, a herança ou o legado se transmite ao fiduciário, resolvendo-se o direito deste, por sua morte, a certo tempo ou sob certa condição, em favor de outrem, que se qualifica de fideicomissário’
‘If it can be shown that moral duties grounded in respect arise in fiduciary relationships, then, because of the strong association between fiduciary relationships and trust, it may be asserted with confidence that there is a strong contingent connection between trust and those moral duties.’

There have been attempts by the National Congress of Brazil to regulate trusts in Brazilian law, enabling a treatment of trusts by courts that would not depend on broad construing exercises and would provide Brazilian families with higher legal certainty with regards to their succession plans. This was the case with the 1998 Bill of Law No. 4,809 (the Bill). Article 1 of the Bill defined trusts (or the ‘fiduciary agreement’) as follows:

‘By means of the fiduciary agreement, one of the parties, called the “settlor” (“fiduciante”), transfers the fiduciary property of assets or rights to another party, called the “trustee” (“fiduciário”), for such party to manage the assets in the benefit of a third party, called “beneficiary”, or of the “settlor” himself, and transfers the assets thereto or to other third parties, as established in the deed.’

It must be noted that, in line with the abovementioned ‘numerus clausus’ principle, the Bill had the deficiency of not creating a new in rem or property right (and therefore, not really capable of introducing the trusteeship regime in Brazil).

A similar initiative was tried in France. In February 2007, the French Parliament introduced the ‘fiducie’, based on the commitments undertaken pursuant to the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition (the Hague Convention). Despite the absence of real or in rem rights of the fiducie, the protections granted to the beneficiary were still more effective than in a purely contractual arrangement.

Obviously, the ‘fiduciary agreement’ is not capable of encompassing all the complexity of trusts recognised by common law and developed by centuries of case law. The admission of the divisibility of property is not easily accepted in Latin American countries, and it would impact other institutes. As such, the Bill has never been approved. Rather, there have been more attempts of issuance of regulations concerning the taxation of distributions made by trustees to Brazilian citizens, since collection of taxes is a higher priority of the local government. However, no specific regulation for taxation of trusts has been enacted so far, and lawyers all over the country keep construing theories of what the correct taxation would be, based on the comparison of the taxation of other ‘similar’ transactions, such as the donation.

SETTLEMENT
Another aspect to be explained (and implemented) is that the settlement of a trust is not different in its essential aspects from other kinds of ‘disposition’ of assets, and must follow the rules applicable thereto. For example, as the case may be, the settlement must be preceded by the authorisation from spouses (depending on the marital regime), the forced heirship shares shall be respected, the settlor shall preserve in their ownership sufficient assets for their livelihood, and the rights of creditors of the settlor shall be observed (otherwise, the settlement of the trust would consist in a fraud). In this case, even the courts of the jurisdiction governing the trust would not enforce the rights of the beneficiaries under the trust.

Another important matter to be considered in Latin American jurisdictions is the enforceability that local courts would provide the settlement with, especially if the trustee holds assets in the jurisdiction of the settlor and beneficiaries. For example, in Brazil, according to the Brazilian Code of Civil Procedure, Brazilian courts are able to judge matters in which: the defendant (or its subsidiaries, affiliates or branches) is domiciled in Brazil, the obligation should have been accomplished in Brazil, and the matter or action discussed occurred in Brazil.

### Footnotes


16 Original wording: ‘Art. 1. Pelo contrato de fidúcia uma das partes, denominada fiduciante, transmite a propriedade fiduciária de bens ou direitos a outra, denominada fiduciário, para que este os administre em proveito de um terceiro, denominado beneficiário, ou do próprio fiduciante, e os transmite a estes ou a terceiros, de acordo com o estipulado no contrato’

17 Chapter 14 the Code

18 Available at www.hccch.net/index_en.php?act=conventions.status&cid=59#nonmem. Last accessed 26 May 2018


The same applies to lawsuits involving consumer relationships with Brazilian residents and when the parties agree to accept the Brazilian jurisdiction. On the other hand, matters involving Brazilian real estate properties and matters of heirship related to assets in Brazil must be exclusively ruled by Brazilian courts. In this sense, it would be acceptable for local courts to rule matters involving trusts as far as local courts understand that a relationship between clients and banks is a ‘consumer relationship’, and also when and if the assets held under trusts are located in Brazil.

Another aspect to be considered is the applicability of the Hague Convention. According to it, trusts should be ruled preferably by the law chosen by the settlor or, if none is chosen, by the laws of the jurisdiction of the trustee, of the assets held under trust or of the place where the goals of the trusts should be performed.

‘JUST A BENEFICIARY’: NEGATIVE PR

Another barrier to be overcome for a broader use of trusts in Latin American jurisdictions is the prejudice suffered by trusts due to their recent use for criminal purposes, especially by politicians in money laundering schemes. The most high-profile case in Brazil involved the former Speaker of the House, Eduardo Cunha, who affirmed to a parliamentary inquiry committee that he had no foreign bank accounts. After the discovery of accounts linked to Cunha, he argued that he was not the owner of the accounts, but ‘just their beneficiary’ under a trust. Despite the argument being technically valid, Cunha’s argument was evidently cynical, and it was not long until the cancellation of his parliamentary mandate and, following that, his arrest.

In this context, the function of trusts needs to be correctly and patiently explained to Latin American families, as does the necessity of ensuring transparency and disclosure in strict compliance with local laws.

In countries adhering to the civil-law system, it is also essential that the trust deed does not breach any ‘public order’ rules, as explored above. According to Salomão Neto, breaching such rules would prevent trusts that violate the rules of forced heirship from being recognised in Brazil. The concept of ‘public order’ is indeed (and intentionally) open, but it undeniably encompasses the individual guarantees of natural persons, the constitutional dispositions about the economic order, as well as the basic principles of civil and criminal laws.

This said, it is evident that the use of trusts for wealth and succession planning purposes should be demystified and encouraged in Latin American jurisdictions. The challenges will be huge and will continue as long as ancient legal traditions remain in force; but, once these frameworks are properly understood they may be harnessed, and will surely provide lawyers and advisors with an even bigger field to act, educate and create.

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22 Available at www.hcch.net/index_en.php?act=conventions. status&cid=59#nonmem. Last accessed 26 May 2018
23 Pursuant to art.6, which sets forth: ‘A trust shall be governed by the law chosen by the settlor or, if none is chosen, by the laws of the jurisdiction of the trustee, of the assets held under trust or of the place where the goals of the trusts should be performed.’
24 Available at www.bbc.com/portuguese/noticias/2015/11/151115_cunha_versoes_ms_ab. Last accessed 23 May 2018
25 A remarkable episode of the proceeding for cancellation of the parliamentary mandate of Eduardo Cunha was the questioning of the Congressman Julio Delgado, who asked Mr Cunha if ‘the trust’ was the one who drank the wines bought with the money held in foreign accounts. Available at www1.folha.uol.com.br/poder/2016/05/172919-queem-bebe-vinhos-de-us-1000-o-senhor-ou-o-trust-questiona-deputado-a-cunha.shtml. Last accessed 23 May 2018
26 Eduardo Salomão Neto, O Trust e o Direito Brasileiro (São Paulo: Trevisan, 2016), pp.107-108
27 This article is adapted from that winning thesis.
A NEW WORLD OF TRANSPARENCY

Beneficial ownership registers for companies and trusts in the EU

BY JOHN RICHES AND SAMANTHA MORGAN

ABSTRACT

- The compliance burden for those involved in the trust business has rapidly increased over recent years. It has been necessary for settlors and beneficiaries to get used to the idea that information about both them and the trusts will be provided to tax and other authorities and third parties as part of their know-your-customer processes. For some families, particularly those used to keeping their personal matters private, this has been a painful experience.

- In the wake of Financial Action Task Force requirements and subsequent EU-wide anti-money laundering directives (4AMLD and 5AMLD) in 2017 and 2018, a fast pace of change is upon us, and practitioners must quickly familiarise themselves with the new requirements. This article provides some of the background to these, as well as addressing the wider implications for practitioners and their clients as we enter this new world of transparency.

The genesis of beneficial ownership registers can be seen in recommendations that were issued by the Financial Action Task Force (FATF) in February 2012 (the Recommendations).¹ The Recommendations formed part of the drive to raise international standards in order to combat money laundering and the financing of terrorism. One of the key objectives of the Recommendations was to enable competent authorities to more easily discern the ultimate beneficial ownership of companies (legal persons) and trusts and foundations (together referred to as legal arrangements). Set out below are the terms of the two key Recommendations on transparency (Recommendations 24 and 25):²

¹See above, note 1, p.22

Importantly, in relation to the identification of the ultimate beneficial owner of legal persons and arrangements, this requires FIs to obtain information to enable them to understand ‘the ownership and control structure of the customer’.

**RELEVANCE OF BENEFICIAL OWNERSHIP REGISTERS IN THE CONTEXT OF RECOMMENDATIONS 24 AND 25**

The short Recommendations are extended considerably in a series of so-called ‘interpretive notes’.

The interpretive notes to Recommendation 24 proceed on the assumption that, for companies, there will always be a national companies registry to hold and retain information about the directors and shareholders. Paragraph 7 of the interpretive notes also requires countries to put in place measures so that beneficial ownership information can be determined in a timely manner. Paragraph 8 acknowledges that, among the measures that can be taken to ensure access to beneficial ownership information, one possible method is to oblige companies themselves to hold up-to-date information on their beneficial owners. Paragraph 12 then sets out a requirement for competent authorities to have all relevant powers under domestic law to obtain timely access to beneficial ownership information that is held by companies.

The interpretive notes to Recommendation 25 state that countries should require trustees of any express trust governed under their law to obtain and hold adequate, accurate and current beneficial ownership information regarding the trust. This should include information on the settlor, trustee(s), the protector (if any), the beneficiaries or class of beneficiaries, and any other natural person exercising ultimate effective control over the trust. Countries should also require trustees of any trust governed under their law to hold basic information on other regulated agents of, and service providers to, the trust, including investment advisors or managers, accountants and tax advisors.

The rationale for these measures is the need for national governments to act to prevent the ‘misuse of legal persons and legal arrangements for money laundering or terrorist financing’. The core proposition is that this is achieved by ensuring that there is appropriate information available on beneficial ownership and control of legal persons, and equivalent information around persons connected with trusts, notably the settlor, trustees and beneficiaries.

The other key measure that connects with the theme of beneficial ownership is Recommendation 10. This places an obligation on financial institutions (FIs) – and other regulated persons – to undertake so-called customer due diligence when dealing with customers, which requires identification of the ultimate ‘beneficial owner’.

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3 See above, note 1, pp.86-93
The publication of the Panama Papers fuelled the view of EU policymakers that the more extensive transparency measures proposed by the FATF in 2012 should be enacted

Connecting factor. This was pointed out to the FATF, and an expansive view has been taken when transposing this into EU law, as we will see, so that it extends to all trusts residing in a jurisdiction.

Paragraph 2 reinforces the position by setting out a requirement for a legal basis for trustees to disclose their status to relevant regulated counterparties, providing information on the beneficial ownership and assets of the trust. The thinking here is to counter any argument that might be put forward to resist such disclosure based on the trustee’s duty of confidentiality.

Turning to para. 3, reference is then made to a variety of measures that can be taken by countries to ensure that there is appropriate information on trusts. Among the measures suggested are:

1. a central registry of trusts;
2. the holding of information by other competent authorities (such as tax authorities); and
3. the holding of information by (regulated) agents and service providers to the trusts.

The Picture in 2012

If one thinks about the context of the Recommendations that were made in February 2012 by the FATF, clearly, the existence of a central corporate registry was standard in most onshore jurisdictions (even though standards as to what information on the register was generally available to the public varied widely). It was, however, normally possible, even where the information on the register was available to the public (except in the case of certain listed companies), to maintain confidentiality with regard to the real beneficial owners by holding the shares in the company through a nominee where the name of the nominee was shown in the register as the shareholder so that the ‘real’ beneficial ownership was not apparent to the public from an inspection of records at the relevant corporate registry. In 2012, the concept of a central beneficial ownership register for a trust was rarely used (with the exception of South Africa), although, for legal arrangements such as foundations, corporate registries were commonly required.

Crossover into Tax Information Exchange

Parallel to the developments on seeking transparency on beneficial ownership for the purposes of countering money laundering and terrorist financing, the Common Reporting Standard (CRS) was adopted in 2016 (the model CRS treaty having been published in 2014) with a view to obtaining transparency about beneficial ownership of companies, trusts and foundations for tax authorities.

Specifically, the CRS adopted the extended definition of beneficial ownership found within the Recommendations and used this as the basis for the purpose of defining ‘controlling persons’, who are the persons treated as the beneficial owners of financial accounts, trusts and companies.

Impact of the Panama Papers

The publication of the Panama Papers in 2016 fuelled, to a significant extent, the view of EU policymakers that the more extensive transparency measures proposed by the FATF in 2012, where control of information on beneficial ownership was in the hands of competent authorities, should be enacted. This clearly favours a greater emphasis on the use of central registries compared with reliance on regulated parties in the private sector, such as banks and professional firms, to review and hold the relevant information about beneficial owners.

4 The term ‘Panama Papers’ is really a misnomer based on an investigation into a Panama-based law firm, Mossack Fonseca, published by journalists coordinated by a Washington-based consortium (ICIJ) on 3 April 2016. A significant part of the concern raised in the Panama Papers revolved around the use of so-called ‘shell’ corporations where it was not possible to easily discern beneficial owners of offshore companies with corporate registries that were not open to public scrutiny and did not require the collection of beneficial ownership information (notably the British Virgin Islands).
POLITICAL COOPERATION AND THE ROLE OF THE UK GOVERNMENT

In tandem with these developments, shortly after the release of the Recommendations, there was an important G8 summit hosted by the then British Prime Minister, David Cameron, at Lough Erne in Northern Ireland.5 Action Point 3 from the declaration stated:

‘Companies should know who really owns them and tax collectors and law enforcers should be able to obtain this information easily.’

This led to the introduction in the UK of a new requirement to identify beneficial owners of companies in the public corporate register (the ‘Persons with Significant Control’, or PSC, Register). This measure was adopted in tandem with the concept of corporate beneficial ownership registers required by the EU’s Fourth Anti-Money Laundering Directive (4AMLD) with effect from 30 June 2016. Prime Minister Cameron’s objective was for the UK to stand out as a jurisdiction with high standards of business behaviour and corporate governance, and his express aim was to allow ‘information about the ownership and control of UK corporate entities to bring benefits for law enforcement, business, civil society and citizens’.

In particular, the UK government stated that ‘by making this information publicly available, free of charge, the government is setting a standard that we are persuading other countries to follow’.

COMPARISON BETWEEN 4AMLD AND 5AMLD

4AMLD is an EU-wide measure that was adopted in 2016 and came into force on 26 June 2017. Hard on its heels was 5AMLD, which was approved by the European Parliament and EU Council during April and May 2018. Following its publication in the official journal of the EU on 19 June, EU Member States are required to transpose it into their national law by 10 January 2020.

The rules on beneficial ownership registers relating to companies and trusts are set out in arts.30 and 31 of 4AMLD, and 5AMLD operates by way of an amendment to the existing terms of arts.30 and 31.

ARTICLE 30 – CORPORATE REGISTERS

4AMLD

The original text of art.30 in 2017 required the creation of ‘adequate, accurate and current information of beneficial ownership produced by EU Member States’. Under 4AMLD, access to the beneficial ownership information on companies that was required to be collected was restricted to:

• competent authorities;
• regulated entities, such as banks and FIs; and
• persons who could demonstrate a ‘legitimate interest’.

It is interesting to note, at this point, that, while the UK PSC Register provided for public access, the original version of the EU corporate registers under 4AMLD did not. The concept of ‘legitimate interest’ is explored in the preamble to 4AMLD and generally contemplates an investigative journalist or a non-governmental organisation with a track record in exposing corruption or otherwise working in the transparency arena.

When looking at the information that was originally accessible by those who could demonstrate a legitimate interest under 4AMLD, special arrangements were required to protect information about an individual’s date of birth and home address on the grounds of data protection.

Further, the access provided to non-competent authorities, i.e. FIs and persons of legitimate interest, could be redacted in ‘exceptional’ circumstances where access would expose the beneficial owner ‘to the risk of fraud, kidnapping, blackmail, violence or intimidation or where the beneficial owner is a minor or otherwise incapable’.

5AMLD

If one then looks to the revised version of art.30 that will take effect under 5AMLD in January

2020, the major change in relation to access to corporate registries is that the information on companies throughout the EU is now to be wholly public, with no legitimate interest test to be satisfied. Access to information on date of birth and contact details (such as home address) can be redacted in order to comply with data protection rules.

5AML D also carries a greater focus on the need to verify information in the central registries so that it is accurate. There is also a requirement for the ultimate linking of all beneficial ownership registers in the EU in the next few years.

In terms of the threshold to justify redacting information about individuals, the revised directive talks about exposing beneficial owners to ‘disproportionate risk’ if information is made public, and obliges Member States to conduct a detailed evaluation of the ‘exceptional nature of the circumstances’ rather than accepting an assertion to this effect at face value.

ARTICLE 31
4AML D
In terms of its scope, art.31 is intended to apply to trusts and ‘other types of legal arrangements’. This includes foundations and similar structures. The obligation of Member States under art.31 is to ensure that trustees are obliged to provide information on their beneficial owners; the list of information includes an obligation to identify, in relation to every trust, those persons who are specified in the FATF 2012 guidelines, namely:
• settlor;
• trustees;
• protector;
• beneficiaries; and
• ‘any other natural person exercising effective control over the trust’.

Article 31.4 requires such information to be held ‘in a central register when the trust generates tax consequences’. Importantly, however, access is initially limited to competent authorities with the possibility of permitting access to FIs and other regulated entities for customer due diligence purposes. Under the original version of art.31, there was no provision whatsoever for any form of access to the beneficial owners of a trust to be provided to those who could demonstrate a legitimate public interest, as in the case of the original version of art.30 as it applies to corporate registries. This was based largely on human rights arguments around privacy.

5AML D
5AML D introduces significant changes in relation to the scope of trust registers. In particular, those trusts where information is required to be held in a central registry are no longer restricted to those generating ‘tax consequences’; the condition now extends to all trusts where the trustee of the trust ‘is established or resides’ in the relevant EU jurisdiction.

Alongside the core group of trusts ‘resident’ in EU Member States, 5AML D takes matters significantly further by then requiring information to be retained on non-EU resident trusts in two circumstances. These are in circumstances where the non-EU resident trust either:
• ‘enters into a business relationship in the EU’; or
• ‘acquires real estate in the name of the trust’.

While the latter requirement is unlikely to be unduly onerous in civil-law countries in the EU, given that trusts are rarely used to hold real estate in the EU outside common-law countries, the obligation for non-EU resident trusts to register in circumstances where they form a ‘business relationship’ is very intrusive, as it potentially contemplates any form of ongoing retainer with either a financial institution or professional advisor located in an EU jurisdiction.

The precise definition of business relationship is a matter that will fall to be determined in national laws of Member States; it is possible a narrow construction will be placed on this term compared with the generic definition provided for the purposes of 4AML D as amended.

Turning to the question of public access, a key change is to allow information held in a central trust register to be accessed by any person or organisation that can demonstrate a ‘legitimate interest’. The concept of legitimate interest here is the same as that originally contemplated under 4AML D for companies.

The final category of applicant who can be provided with information on trusts subject to registration is important. In any circumstances where a trust is subject to registration (and for this purpose this includes non-EU resident trusts that are subject to registration by holding land or
EU BENEFICIAL OWNERSHIP REGISTERS

JOHN RICHES AND SAMANTHA MORGAN

having a business relationship within the EU), if the trust concerned has a ‘controlling interest in a non-EU company’ then any person, on request, can apply to obtain access to the information held with respect to the trust. It should be noted that, where the company concerned is, itself, subject to an obligation to provide a beneficial ownership register under art.30, i.e. by being an EU resident company, there is no equivalent access right.

What is unclear from the terms of this application provision is how an individual would, in the first instance, learn about the connection between the non-EU company and the trust. It may be that there will be privacy arrangements in place that guard against the possibility of some form of fishing expedition being launched by somebody who suspects there may be a trust with information on the register holding an interest but without any actual link.

Clearly, however, in circumstances where an investigative journalist is provided with access under a legitimate interest application, that could itself generate further enquiries by individuals who do not come within the legitimate interest category but who have gleaned information about a trust structure from information that has fallen into the hands of investigative journalists or otherwise into the public domain.

One important issue to be considered is precisely what information would be accessible about beneficiaries, where this information has to be disclosed under the terms of art.31, which states as follows:

‘[T]he information accessible to persons or organisations referred to in point c and d of this paragraph shall consist of the name, month and year of birth, country and residence and nationality of the beneficial owner ... as well as the nature and extent of the beneficial interest held.’

It is understood in this context that the references to ‘nature and extent of beneficial interest held’ do not imply any form of disclosure of value of trust assets, as the premise behind the register in the first instance is just to identify beneficial owners, as opposed to the value of trust assets. This is a point of contrast with the CRS, where there is very detailed provision for information reporting around the value of an individual’s interest in a trust (but only to tax and other government authorities).

COMPARISON OF EXISTING EU TRUST REGISTERS

One key issue that will need to be addressed as matters go forward is precisely who falls within the scope of reporting as a ‘beneficial owner’ with respect to trust registers in the EU. In this context, as noted above, the Recommendations contain a concept of a natural person exercising effective control as a disclosable person in relation to trusts. It should be noted that any such person is to be disclosed as an additional category to persons who are named as protectors.

Whatever the thinking behind the draftsman of the Recommendations, this phrase has never been fully defined since 2012, although the formula of including reference to this category has been adopted in all of the measures mentioned above, including the CRS definition of ‘controlling person’, and persons to be disclosed within the context of 4AMLD and 5AMLD by reference to trusts.

The regulations introduced in the UK in 2017 to create the UK’s domestic trust register in compliance with its obligations under 4AMLD define ‘control’ in a very expansive manner. Similarly, in Malta, the only other EU jurisdiction (other than France) that has currently introduced specific trust register rules, there is an equivalent concept of ‘material action’ with a requirement for persons who can sanction material actions to be disclosed on the Maltese Trust Register.

As a separate matter, the FATF has recently been reviewing its 2008 guidance for trust and corporate service providers. It is possible that the amended text will also give more detailed guidance on the meaning of a ‘natural person exercising effective control’ in a trust context. If it does, this will have a direct impact on CRS reporting for trusts in the light of the linkage mentioned above in the CRS model treaty.

‘The regulations introduced in the UK in 2017 define “control” in a very expansive manner’
Any extensions to the definition of controlling persons may impact:

- influence exercised by committees where, to date, it has been argued that no one individual can personally decide on a course of action;
- influence exercised in an indirect manner by a family individual who does not serve as a protector as such, but instead has a power to appoint or remove protectors; and
- influence exercised by those with negative ‘veto’ powers but without positive powers to decide on specific matters that impact the relevant trust.

It is timely, therefore, for advisors to consider whether current governance arrangements for the oversight of a trust will render a large category of persons with a governance role notional ‘controlling persons’ within a potentially wider context.

**DEVELOPMENT OF PUBLIC BENEFICIAL OWNERSHIP REGISTERS OUTSIDE THE EU**

In an Act of Parliament that received Royal Assent on 23 May 2018, the *Anti-Money Laundering Act 2018*, ss.50 and 51 provide for the introduction of public registers of beneficial ownership of companies registered in British Overseas Territories (OTs) by the end of 2020. The British Virgin Islands is challenging this.

The Cayman Islands already has a beneficial ownership register for companies. It is limited in scope, however, as it is not accessible by the public, and companies that are owned by regulated entities (e.g. regulated trust companies), which are required to retain information about beneficial owners under appropriate anti-money laundering rules, are not required to provide information about beneficial owners on the register.

At present, the scope of the OT public registers is limited to companies and does not extend to trusts.

The constitutional status of the Crown Dependencies is different from that of the OTs, and the UK is not in the same position to impose equivalent legislation. There are already indications, however, that they will come under significant pressure from the UK authorities to follow suit.

It also remains to be seen to what extent the EU and UK will seek to ‘encourage’ other jurisdictions to follow their lead in establishing public beneficial ownership registers of companies and indeed trusts.

**CONCLUSION**

Given the scope of the new legislation, it is now necessary to face the fact that unprecedented amounts of information will now potentially be available in the public domain. Practitioners must ensure they are in the position to advise those who are affected as to what information may be made available in the public arena. It is essential for those involved in both setting up and those involved in administering trusts to have an understanding of what information has to be provided (and what can be kept confidential) as part of know-your-customer and disclosure regimes.

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This work has had three consulting editors and over 20 contributors. Although it is said to be angled towards private trusts, many of the lessons are common to public and commercial trusts, so it has a wider professional utility. As the title suggests, it focuses solely on the transfer of trusteeships, with the first 60 pages outlining English and Welsh law. Then follow snappier chapters describing the equivalent in 12 Anglophone, common-law jurisdictions to constitute the first half of this volume.

The second half contains precedents for all of the Anglophone jurisdictions previously featured, with the understandable exception of the US, where, trustee appointment being a state concern, precedents cannot practicably be offered.

Unsurprisingly, the principles involved in each jurisdiction have many similarities, though some individual quirks show one should take nothing for granted. In the US, replacement of a will trustee requires court approval (something that seems needlessly intrusive), while in Hong Kong the presence of a trust corporation as trustee by law prevents the appointment of additional trustees. One suspects the legislative motive may have been business, rather than consumer, protection.

Each jurisdiction is approached using a common topic template, though no index is included, which would be a useful addition to any new editions.

Reading a work like this makes one realise that elements of the law have lost touch with reality. An incoming trustee’s duties are supposed to embrace checking past instruments and actions to see that these have been valid and that there have been no breaches of trust. It is not uncommon to be asked to assume the trusteeship of a fund that proves to constitute, say, the remaining undistributed quarter of a one-third portion of a one-fifth share of the original settlement or will, constituted 40 or 50 years ago.
Is it really justifiable that the incoming trustee should spend (or fritter away) the beneficiary’s money in a historic quest over the fate of all of the previously distributed funds?

At the practical level, too, it should be borne in mind that a transfer of trusteeship is rarely an occasion where the outgoing trustee is able or wholeheartedly willing to supply the data and answer the probing questions that the conscientious incoming trustee is expected to pose. The occasion for replacing a professional trustee may have involved dissatisfaction on one or both sides: a deceased or mentally incapable trustee cannot help; and an individual trustee voluntarily retiring through advancing years may be resentful or defensive when asked questions about their stewardship. The construction placed on such an interrogation is likely to be uncharitable.

An incoming trustee gets one chance only to assess and obtain the data essential to the future smooth running of the fund. If it comprises real estate, where are the ancillary documents? It is no good obtaining title to a settled skyscraper, for example, if one does not have the lift maintenance contract. Nor is it helpful to succeed to trusteeship copyright if one does not have the associated publishing agreements.

The subject of protecting an outgoing trustee against known exposures is handled in detail, with excellent precedents, these extending to ‘chains’ of indemnities in appropriate cases. The greater problem here, of course, is what Donald Rumsfeld called the ‘unknown unknowns’. There may well be exposures of which the outgoing trustee has been entirely ignorant – e.g. a remediation duty over contaminated land, which extends without any limitation in time against each owner.

A fuller examination of those cases where appointments commence or retirements occur without any deed would be helpful, though these situations occur more usually in public and commercial trusts, e.g. appointment by an external body or by an AGM, retirement by the act of either of these two, or by effluxion of a set period of office. For these, the assets may not effectually vest in the first place, there is no scope for obtaining express documents of indemnity against known or unknown exposures, and whether (and how) a discharge is obtained is unclear.

The topic of effectual discharge itself is treated without much elaboration. It may be helpful to have a summarising section that explains precisely why obtaining an effectual discharge is critically important and the legal consequences for a trustee that has ceased to hold office but is nevertheless on the hook without a discharge.

One wonders whether the sections on the handover of papers might go further towards reflecting recent case law and the modern, digitised world. The advice is, merely, to keep copies of instruments that describe or evidence an ongoing exposure, and hand over the rest. However, an outgoing trustee may be under a duty ‘to account’ to some beneficiaries without any time limitation. Indeed, as the case of Re Henchley has shown, even where any claimed breach of trust or restitution at the suit of a beneficiary may be time-barred, there is nevertheless the power of the court to direct that an ‘account’ be rendered, essentially without limitation of time (in Henchley it was 20 years after the trust’s distribution). Faced with these risks and duties, I would have thought an outgoing trustee should be advised to keep copies of all the essential material from their trusteeship: accounts, minutes and instruments.

Further components that could usefully be added for the fourth edition of this work might include encouragement to identify every asset, associated contract and potential exposure; check carefully whether contracts can be brought under the control of the new team of trustees; and review which assets within the fund do not pass under any automatic machinery, but require separate instruments and processes.

All in all, a useful work. STEP is to be thanked for promoting it, and the editors and contributors for their hard work.

KEITH WALLACE IS A CONSULTANT AT REED SMITH AND A MEMBER OF THE TRUST QUARTERLY REVIEW EDITORIAL BOARD

1 [2017] EWHC 225 (Ch)
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