LAWSG134 International and Commercial Trusts Law

Work produced in an 8-hour exam

Question 2,3,6. Bibliographies attached at the end for an uninterrupted page count.

2. 'Neither the beneficiaries of trusts nor the objects of mere powers are adequately protected by the current law governing the disclosure of trust documents.' Discuss.

Trust documents, as restated by Harman LJ at pages 932-933 in *Re Londonderry's Settlement* (1964) from Lord Wrenbury's observations in *O'Rourke v Darbishire* (1920), must be accessible by beneficiaries because it is their "proprietary right". However, at page 933 Harman LJ then cautioned against taking Lord Wrenbury's comments as general guidance, primarily because it was a not made in a situation where the trustees' rationale was at risk of being divulged. These statements together accurately showcase the predicament that the courts face when deciding the extent of disclosure necessary to provide beneficiaries of trusts and objects of mere powers in order to protect them. It is not that the courts are incapable of providing full protection, but because it has to balance conflicting legal principles. This problem is exacerbated by letter of wishes, whose nature as trust documents has not been unanimously agreed.

This essay explains how, considering all the difficulties the courts face when deciding whether to disclose trust documents, the solution it has reached more than adequately protect beneficiaries and objects of mere powers.

Protection involves more than just protecting proprietary rights

Adequately protecting beneficiaries does not necessarily equate to solely protecting their proprietary rights. Continuing from *Re Londonderry's Settlement*, it is important to first note that Harman LJ held at page 928 that "in the absence of bad faith", trustees do not need to disclose their rationale for reaching their conclusions, and that such serves to ensure that the trustee office will have undertakings. When there is no conflict with "proprietary" rights, because the information sought lies not in trust documents, there is no problematic conflict to consider, the trustees discretion will be protected and there is no need to disclose the information. Thus, at page 933, Harman LJ confirmed that the minutes of trustees' meetings, and a portion of their meeting agenda need not be disclosed, because they contain the "motives and reasons" for the trustees' decision, but are trust documents. Harman LJ however found, at pages 933-934, that although the trustees' communications amongst themselves is not "proprietary", communication with their solicitor was. Thus, it seems that upon the classification of information containing the rationale of trustees as trust documents, the courts will be stonewalled.

Fortunately, this is not true, for Harman LJ held at page 933 that even if documents containing the rationale of trustees is classified as trust documents, it is "in the true interest of the beneficiary" that the discretion of trustees be protected, and Harman LJ was willing to go so far as to hold that it took precedence over the rule that trust documents may be disclosed, and should not be disclosed. Danckwerts LJ, at page 934, agreed with Harman LJ, and at pages 935-936 added that trust documents containing the rationale of trustees should not be disclosed for it will result in more harm to the family than the advantages inspections may bring, and will also hamper trustees from properly fulfilling their duties. Thus, we observe here that the courts, by protecting the trustee's discretion, are effectively also protecting beneficiaries. Salmon LJ also agreed with Harman LJ at page 936. Additionally, at page 938, Salmon LJ noted the characteristics of trust documents as being those that the trustee has acquired through his office, "contain information the beneficiaries are entitled to know", and in which beneficiaries have a "proprietary interest". Thus, it seems that although disclosure of trust documents was not permissible in *Re Londonderry's Settlement*, that prohibition ultimately serves to protect the beneficiaries, or as the case may be, objects of mere powers, although not necessarily their proprietary rights.

Protection achieved through flexibility

Later, in *Schmidt v Rosewood* (2003) the courts developed even more means to protect beneficiaries and objects of mere powers. At [50], the Privy Council acknowledged Lord Wrenbury's observations in *O'Rourke v Darbishire*. However, the Privy Council clarified that disclosure need not necessarily be on a "proprietary basis". Instead, the Privy Council held at [51] and [66] that disclosure is "one aspect of the court's inherent jurisdiction to supervise". Furthermore, the Privy Council also held at [54] and [67] that it is not bound to

order disclosure even if a proprietary right is present, especially if confidentiality is crucial, because that is its discretion. At [54], the Privy Council then held that in exercising its discretion, it will consider whether "the discretionary object… should be granted relief", the type of documents involved, and if any measure of protection is necessary. Thus, although the courts have seemingly weakened the proprietary rights of beneficiaries. Their newfound, wider discretion to take into account differing factors as well as relief from selecting between competing goals, balances all the rights of beneficiaries, and serves to protect them better.

Achieving the same effect as proprietary rights, but through statute

In *Dawson-Damer v Taylor Wessing* (2017), a solicitor firm was appointed as advisor to trustees of a Bahamian trust. Thus, they had information pertaining to its beneficiaries. The beneficiaries sought that information via section 7(2) of the Data Protection Act 1998 (DPA), which requires that it be supplied upon receipt of a written request and the necessary fees. However, the beneficiaries felt that the solicitor firm failed to adequately supply the desired information, and thus, requested the courts to make an order compelling such. As summarised by Arden LJ at [20]-[23], the High Court dismissed the beneficiaries' application for information under section 7(2), because it concluded that firstly, the solicitor firm can rely on the legal professional privilege exception under paragraph 10 of Schedule 7 to the DPA, for it extended to trust documents which trustees need not disclose in the Bahamian proceedings. This is because the DPA merely transposed a Directive and it is incorrect to interpret it literally, because the DPA is not intended to enable fishing of information to be used for litigation, because disclosure and the legal professional privilege cannot be divided, and because action against the trustees must take place in the Bahamas anyway. Secondly, because it requires a disproportionate effort from the solicitor firm to discover the necessary documents, and thus, they can rely on section 8(2) DPA. And thirdly, because the Courts have discretion under section 7(9) DPA to refuse disclosure, and it decided to exercise its discretion because it is neither appropriate to use "the DPA to assist… in the Bahamian proceedings", nor appropriate to use it to acquire documents that a foreign jurisdiction has rejected disclosure.

However, at [114], Arden LJ ordered the disclosure be made. She held at [40] that firstly, it was not parliaments intention to create legislation that dealt with issues that went beyond the United Kingdom (UK), and therefore, Arden LJ held at [45] that the legal professional privilege does not apply beyond the UK. Additionally, Arden LJ held at [54] that the DPA does not extend to documents beyond ordinary privileged documents. Secondly, Arden LJ held at [75] that section 8(2) DPA places the duty on the data protector to show that a disproportionate effort is required. Arden LJ held at [84] that such was not shown. And thirdly, Arden LJ held at [111] that it is incorrect to "claim that something was personal data" so as to aid litigation, but that does not mean that legitimate personal data may not be utilised in litigation. This is because the court's jurisdiction must remain "general and untrammelled". Additionally, Arden LJ held at [113] that the Court of Appeal was not intervening in matters that are within the remit of foreign courts. Thus, there was no reason to exercise its discretion against disclosure.

Although *Dawson-Damer* does not pertain to the disclosure of trust documents, Holcombe (2017) admitted at page 775 that post *Dawson-Damer v Taylor Wessing*, there is potential for beneficiaries to seek disclosure of trustee's reasoning for the exercise of their powers. However, Holcombe argues that, following the European case of *YS v Minister voor Immigratie* [2015], wherein the Court of Justice held that legal analysis will not be classified as personal data under the DPA, it is possible to argue the same for the deliberations of trustees. However, Holcombe admitted that such is ultimately for the courts to decide. He further argues at page 777 that "trust still governs a beneficiary's rights to obtain documents, rather than information", and that it will be futile for beneficiaries' to rely on the DPA for the disclosure of trust documents, for it is simply not the correct means. However, Holocombe failed to consider the more pertinent question of what the courts will do if the personal data is in trust documents, which also contain the deliberations of trustees. Thus, it is not wrong to argue that there is potential that the courts will allow the DPA to penetrate trust documents, just like it penetrated trust, and that the interest of beneficiaries will be protected.

The problematic letter of wishes

Letter of wishes are, as Briggs J held at [5] in *Breakspear v Ackland* (2008), a means for settlor to express their "non-binding requests" to trustees, and thus, as Briggs J held at [6], it is unsurprising that their use has increased alongside the greater prevalence of discretionary trusts. However, before we consider *Breakspear* in further, we must admit that if it is in statute that letter of wishes may not be disclosed, as in Section 83(8) Bahamas Trustee Act, which states that "trustees shall not be bound or compelled by any process of discovery or inspection or under any equitable rule or principle to disclose… letter of wishes…", or Section 38(1) Trusts (Guernsey) Law 2007, which states that "A trustee is not, subject to the terms of the trust and to any order of the Royal Court, obliged to disclose... any letter of wishes", then it is the will of the legislator that the protection of beneficiaries, stemming from disclosure in respect to letter of wishes be, be weakened. However, such will not diminish our position that beneficiaries are more than adequately protected by the laws of disclosure in relation to trust documents. To do so, one will have to argue convincingly that letter of wishes is indeed also trust documents. This has not been settled, but it is not the scope of this essay to consider such.

Instead, we focus only on the consideration of whether the courts must disclose letter of wishes, so as to protect beneficiaries of trusts and the objects of mere power. Hayton (1999) argues at pages 573-574 that letter of wishes may be "legally binding", "morally binding", or "legally significant". Hayton stated at 574 that legally significant letter of wishes will require trustees to exercise their discretion with care. Hayton then argued that if terms are used to exclude letter of wishes as being legally binding, they should, as opposed to merely morally binding, be legally significant. This is because, practically, that must be the intention of settlors who go through the trouble of creating the wish letter. Categorising letter of wishes as such, Hayton then argued at page 575 that legally binding letter of wishes, like trust documents, must be disclosed, but not morally binding letter of wishes. Hayton further argued that disclosure of legally significant letter of wishes must depend on the intentions of settlors. Thus, an express clause of confidentiality will prevent disclosure. However, absent such a clause, Hayton argued at page 576 that disclosure must be made, for it must then be the intention of settlors that beneficiaries can properly "monitor the trustee's… exercise of powers". Hayton's arguments were made at a time before *Schmidt v Rosewood*. Thus, although it does support our arguments that the court will protect beneficiaries but for the intention of the settlor, which must remain dominant, and order disclosure, there is a need to reconsider if the courts will decide the same post-*Schmidt v Rosewood*.

Indeed in *Breakspear v Ackland* (2008), we see that the courts has indeed adopted the *Schmidt v Rosewood* approach towards the disclosure of letter of wishes. Briggs J held at [24] that letter of wishes are not documents that may avoid disclosure by the exempted categories established in *Re Londonderry's Settlement*, because they were not even contemplated then. Briggs J then held at [52] that whether letter of wishes should be disclosed is best determined by the courts discretion, and not on proprietary rights, because that will allow for a "clear, principled basis". Briggs J at [24] and [54] accepted *Londonderry* as establishing that the discretion of trustees should be kept confidential, for that will allow them to make more careful investigations, decreasing unnecessary litigations, and motivating them to take office, and these are to the beneficiaries' advantage. Briggs J then added at [58] that letter of wishes are part of that discretion, and thus, should also be subject to the confidentiality principle. Thus, Briggs J held at [62] that ordinarily, letter of wishes should remain confidential, unless trustees, when exercising their discretion, find that it would in the beneficiaries' interest that disclosure be made. Briggs J re-emphasised this at [66]. Additionally, Briggs J held at [67] that trustees need not give reasons when exercising their discretion, whatever the conclusion they reach. Nevertheless, and despite the general rules that Briggs J laid out, he held at [98] and [101] that when trustees request the court to approve a "scheme of distribution", they will lose confidentiality and must provide reasoning for their decisions. This is because, as Briggs J held at [98], such is a "special context" where the need for future beneficiaries must be permitted to provide their inputs on the sanction, and such outweighs the merely speculative argument that family division may occur upon disclosure.

Thus, we see that the court in *Breakspear* has, as *Schmidt v Rosewood* proposed in relation to trust documents, discretion in deciding whether to disclose letter of wishes, and even more, it was willing to exercise that discretion in favour of beneficiaries. Thus, the courts do not only protect adequate protection for beneficiaries in the disclosure of letter of wishes, they go even further and consider a spectrum of circumstances. As argued earlier, it matters not for the sake of our argument whether letter of wishes are trust documents, because if they are, the courts do more than adequately protect beneficiaries, but if they are not, they do not affect our argument.

Conclusion

With the wide measure of powers, courts can more than adequately protect both beneficiaries as well as objects of mere powers.

3. 'The appointment of protectors causes more problems than it solves.' Discuss.

Goodman and McCall (2016) found that the use of protectors is on the rise, for they are perceived by settlors as a means through which they can maintain certain control of the trust, and safeguard the essence of their settlement (Page 1). Thus, they are especially popular amongst settlors who have created trusts in unfamiliar foreign jurisdictions. Unfortunately, although protectors do typically wield supervisory powers, the full extent of their powers is extremely broad. Because of that wide extent, and also the unusual nature of the powers they may be provided, the courts are unsure if they can intervene in the decisions of protectors. These problems all stem one source, that is the deed of settlement, which creates the role of the protector, and must be interpreted on a case by case basis.

This essay examines the disputes pertaining to the nature of the powers of protectors and the court's uncertainty in intervention, to show that the lack of general principles, and need to analyse each protector individually cumulates to too much of a problem.

Solution to what problem?

As stated in our introduction, protectors are installed in hopes of controlling the trust. However, trusts without protectors are not problems, even if they are based in a foreign jurisdiction. This is because if there really was a problem, to which a solution is required, the better solution would be for the settlor to create the trust in an alternative jurisdiction. Even more ironic is for the office of protectorship to be created in a local trust. What then is the problem, if it was self-created? Thus, the protector is not a solution to any problem, but a want for control. Nevertheless, we consider the problems the protector office creates.

Uncertain scope of powers

Conaglen and Weaver argued at page 19 that it is hard to define protector without "specific context" because protectors may have initiative powers, as in *von Knieriem v Bermuda Trust Co* (1994), but other times, they may only be limited to veto, as in *Rawcliffe v Steele* (1993), where the protector only had veto over trustee's power of appointment. Next, Protectors usually have powers to "appoint or remove trustees", but as Duckworth pointed out in 'Protectors: Fish or Fowl' (1996), they may also have powers to "approve trustee remuneration, approving, or making amendments to the trust, reviewing the trust's administration, nominating auditors, settling disputes regarding the trust, terminating the trust..." Additionally, Conaglen and Weaver also correctly noted at page 20 that certain jurisdictions require protectors to have powers to enforce the trust, such as Anguilla, but others do not, and that some jurisdictions have statutes that lists available powers of protectors, to be selected by settlors, such as the Bahamas, but other jurisdictions have statutes that provide default powers which settlors may alter, such as the Cook Islands.

Additionally, Goodman also noted that in the Bahamas, the Bahamas Trustee Act 1998 sets out powers of protectors in statute, but declare that they are not exhaustive. With such varying permutation of powers settlors may afford protectors, it is a practical problem for the courts to determine what the powers of each and every individual protector has. This requires extensive and cumbersome fact finding from, and interpreting of the trust deed, which is of no value to the courts generally but to the specific protector.

Uncertain nature of protectors and their powers

In *Centre Trustees v Pabst* (2009), two businessmen, Mr Pabst and Mr Van Rooyen each settled trusts that equally owned a company, and were the protector and appointer of each other's trust. When Mr Van Rooyen passed away, Mr Pabst attempted to use his powers as protector to channel monies from Mr Van Rooyen's trust into his own. Thus, the trustees, Centre, sued to remove Mr Pabst as protector and make him pay for the costs. Mr Pabst did not oppose his removal, but opposed the payment of costs. At [23], the Royal Court of Jersey cited Lewin that "an office created by the trust instrument… will be there for the protection of the protection of the beneficiaries and his powers will be fiduciary", and that the power to remove or appoint a protector is also fiduciary, and within the remits of the courts powers, to enable trusts to take effect. The Royal Court found at [24] that the trust "creates and office" and "vest the power to appoint a protector in the appointer". Thus, the Royal Court found at [25] that the powers of protectors will usually be fiduciary.

However, the Royal Court understood that it was not dealing with a usual case, for the trust deed expressly provided that "no power is vested in the Protector in a fiduciary capacity". Again, the Royal Court cited Lewin at [27], who proposed that powers may be classified into three categories, beneficial, limited, and fiduciary. Beneficial powers are free of any restrictions. Limited powers must be "exercised in good faith for the purposes for which they are given… for the benefit of… the beneficiaries other than the donee." And fiduciary powers are a category of limited powers, with an additional duty that exercise of the power be considered occasionally. Thus, despite the express provision in the trust deed that the powers of its protectors are not fiduciary, the Royal Court, held at [28] that they were at least limited. Protectors of the trust need not occasionally consider exercising their powers, but when they do exercises it, must act in the interests of beneficiaries, and will be held to the same standard as fiduciaries.

Centre Trustees v Pabst shows there is no general powers of protectors, and that the identification of any powers must be determined by reference to the settlement deed. Although a solution was reached in *Centre Trustee*, by using Lewin's threefold classification, the question remains as to how the courts will classify protectors if the deed provides that the powers of protectors are neither fiduciary nor limited.

In certain jurisdictions such as Guernsey, it is in statute that Protectors do not have fiduciary duties (S 15(2) of Trusts (Guernsey) Law 2007). However, in other jurisdictions such as Bermuda, there statutes has permitted settlors to create the office of protectors without fiduciary duties (Trusts (Special Provisions) Amendment Act 2014 added s 2A(6) to Trusts (Special Provisions) 1989). Once again this shows the uncertain nature of protectors, which may or may not be fiduciary or otherwise, depending on the jurisdiction. This add costs to the determination, which has to be taken alongside the trust deed. Making matters worse is that despite statutory authority in these jurisdictions, it appears that divergence is still possible, as in the Guernsey case of *K Trust* (2016), where the court acknowledged at [27]-[28] that Guernsey law "does not… impose any fiduciary duty". However, after considering at [27] that "everyone had proceeded for many years on the basis that the powers… were fiduciary", at [28] that the protector's powers were expansive, with powers to "appoint new or additional trustees… [and] to appoint a successor protector", as well as concluding at [33] that "section 15(2)(b) does not… apply", the Court concluded that it was the settlor's intention that the powers be fiduciary. Thus, if anything the cases can provide regarding the nature of protectors, it is that it depends on each individual trust. Such is contrary to certainty, and is problematic.

What we have sought to show thus far is aptly summarised by Conaglen and Weaver (2012). At page 20 they argued that whether protectors are fiduciaries must be determined on a "case-by-case basis", "by asking whether a particular power held by a particular protector is-or is not-held in a fiduciary capacity". This is so because firstly, protectors may wield a plethora of differing powers. Secondly, because the definition of fiduciary is not settled, and there are sub-classes of fiduciary powers, such as limited powers. Under these differing powers, protectors must consider exercising them, but may exercise it for their own benefit. (Page 20). Thirdly, because some jurisdictions have statutes stating that the powers of protectors are ordinarily fiduciary unless amended, such as Anguilla, but for other jurisdictions, such as the Cook Islands, the reverse is true. (Page 21) And fourthly, because certain

protectors may hold powers as fiduciary, but other protectors may hold those same powers in a capacity other than fiduciary. (Page 23)

Once again, it is also acknowledged by Goodman and McCall (2016) at page 2 that the examination of whether a protector is a fiduciary must begin with the trust itself. Only when it fails to direction, can deeper analysis be undertaken. Goodman and McCall then provided the "indicators" that the courts may consider when making such a determination, including the scope of the protector's powers, the wider, the more likely it is fiduciary, whether the protector was also a "fiduciary services professional or a lawyer", whether the protector received compensation or "indemnification", and whether the settlor "intended" that an office be created. Nevertheless, Goodman and McCall also admitted that those "indicators" were ultimately only guidance. Such is yet another blow towards the determination of the nature of protectors. Not only are they uncertain, the factors that will determine their nature are also uncertain, and there is no test besides the indication that one must turn to trust itself.

In *JSC Mezhdunarodniy Bank v Pugachev* (2017), the Hight Court held at [184] that broadly, it is possible for protectors without fiduciary powers to exist. However, it seems that it does not matter whether protectors are. The court explained at [185]-[186] that the term "fiduciary" is but a mere label, and "does not matter", and courts may intervene the decisions of protectors. The cumulation of our analysis of the nature of protectors is so as to aid the determination of whether courts can intervene in the decisions of protectors. *Pugachev*, suggests that the courts can intervene regardless, and if true on both counts, it seems that the nature of protectors will not be problematic, and neither will the courts ability to intervene. However, from the long line of authorities which provide that the settlement deed must be interpreted to determine what a fiduciary is, it does not seem that *Pugachev* is like to be expanded beyond its facts. Nevertheless, we consider the courts powers of intervention.

Court's intervention

In *Centre Trustees v Pabst* (2009), at [30], the Royal Court cited Hart J in *Public Trustee v Cooper* (2001), that trustees whose position may be conflicted because of their personal interest must "resign", "surrender their discretion to the court", or "allow their proposed exercise of discretion to be scrutinised in advance by the court", and held at [31] that the same should apply to protectors. However, the Royal Court added at [32] that protectors may retain their position if they "honestly and reasonably believe that [they] can discharge [their] duties in the interests of the beneficiaries." Nevertheless, the Royal Court held at [33] that the duty to resign was triggered for the protector was attempting to claim against the trust.

In *Re Application for Information about a Trust* (2013), a beneficiary sought information and accounts of a trust from its trustees. However, two clauses in the trust deed, taken together, prevented anybody but the protector from requesting access to the trust accounts and information. The Chief Justice in the Supreme Court of Bermuda concluded that the clause was valid, but did not oust the supervisory jurisdiction of the Court. Thus, the Chief Justice ordered disclosure. The protector appealed against the Court's exercise of its supervisory jurisdiction.

In considering its right of intervention, the Court of Appeal reiterated at [38] that its supervisory jurisdiction has been approved in *Schmidt v Rosewood* (2003), amongst others. At [40], the Court restated Underhill and Hayton who claimed that trustees must owe a duty to beneficiaries for obligations, and therefore, trusts to exist. Similarly, beneficiaries must have the right to enforce the trust by having access trust accounts, and if access is solely that of protector's, courts will impute that they have a fiduciary duty for beneficiaries. At [44], the Court cited Justice Hayton, who saw the courts general jurisdiction as necessary to "secure the good operation of trusts", and thus, must be available even if the duties of protectors are not fiduciary. Justice Hayton believed that it is unlikely that courts will invalidate the powers of fiduciaries, but saw excess power as a prompt for the courts intervention. However, Justice Hayton went further and claimed that courts will impute fiduciary duties where there is none, if that was what it took to hold controller of trusts "properly accountable". Taking these authorities into account, the Court held at [45] that the powers of protectors must be utilised

for beneficiaries, even if he owed no fiduciary duties. Therefore, the Court can intervene, and order a disclosure.

Despite establishing the authority to intervene, the Court was less clear regarding its exercise of powers of intervention. At [45], the Court admitted that there was no "threshold", and that it will be decided "by reference to the Court's willingness", depending on whether the applicant can "show that the order should be made in the circumstances" by "establish[ing] a prime facie case". The Court, at [48]-[49] followed the Chief Justice's conclusion in the Supreme Court, that there should be intervention and disclosure, because that prime facie case has been made, and evidence that it is a "real cause for concern" can be found.

Re Application for Information about a Trust shows that the court has a wide discretion to intervention. This is problematic for there is a lack of certainty. *Davidson v Seeling* (2016) is an good example of a case where the court found power to intervene, but refused to do so. For all that Seelig sought, the court found, at [57], [61], [63] and [64] that he lacked standing, because he was acting alone instead of, as required by the trust, jointly with the other protectors. Additionally, the court also found at [58] and [61], against Seelig's request for the removal of the trustees and protector, that the beneficiaries also had the rights to apply for their removal, but did not. Instead, the beneficiaries were happy for the trustees and protector to remain, their wishes should be respected. Furthermore, the courts, at [63] refused to intervene to require that the trustees provide Seelig with information, because Seelig had "no obvious right to require information", and it was unclear whether he could even retain his office as protector. Nevertheless, the court did admit that the dilemma of whether protectors should be provided information is still in its infancy. Lastly, the court also found, at [64] that it was both outside the protectors limited powers, and the courts inherent jurisdiction to remove the settlor's power of appointment.

Richardson (2016) at Page 1072 questioned the approach to court took, claiming that protectors must have access to that information, even if they act alone, for otherwise they will not be able to fulfil their fiduciary duties.

Another example to show that the Courts has acted against protectors is *K Trust* (2016), wherein the Royal Court found at [36] that it had powers to intervene, stemming from its "inherent jurisdiction", and even if the status of the protector cannot be settled, from Guernsey statute. Although the Royal Court acknowledged at [39] that such "is not a jurisdiction to be exercised lightly", it decided to intervene and remove the protectors because it found at [37] that, like trustees, protectors must act in the "welfare of the beneficiaries and the competent administration of the trust". The Court found at [40]-[41] that the protector failed to act appropriately, because "more than personal hostility" was present, resulting in defective relations, and failure of the trust to operate accordingly. The Court also found at [42] that the relation between the trustees and protector went "beyond mere mutual hostility and distrust", and could be harmful to the beneficiaries' interest.

<u>Conclusion</u>

There is no significant need for protectors to exist, instead, they only cause more problems, for the nature of their powers, and the ability for when the courts can intervene, and why, is uncertain. At best, it can be said that there is certainty from the trust deed, but that does not reduce the problems associated with it, for the courts will have to interpret each individual protector in each jurisdiction, individually, and such a painstaking process, which cannot be justified by the value protectors "bring".

6. 'If a clause in a contract prevents the assignment of a contractual right, it should also be interpreted as preventing the declaration of a trust of that right, as otherwise the device of declaring a trust can be used to circumvent the non-assignment clause.' Discuss.

A contractual right is a type of chose in action. Prior to the enactment of section 25(6) of the Supreme Court of Judicature Act 1873, chose in actions may not be assigned. Today, section 136 of the Law of Property Act 1925 permits chose in actions to be legally assigned upon fulfilment of its conditions, namely that the assignment must be absolute, and that the

"person from whom the assignor would have been entitled to claim" is provided "notice in writing". The failure to adhere to those conditions are, fortunately, not fatal to the assignment for it can still occur in equity. Of greater concern however, is the almost pervasive use of non-assignment clauses in the commercial world, for that begs the question of whether equity may then intervene to enable the assignment. It is often claimed that equitable assignments involve the creation of trusts. This essay first argues that such is untrue. It then argues that although equitable assignment achieves the same result as through the utilisation of trusts, non-assignment clauses only catches the use of equitable assignment, but not the use of trusts.

Trust are different from equitable assignments

In *Roberts v Gill (2011)*, a beneficiary of a trust sued the solicitors that advised the trustee for negligence. However, after the expiration of the limitation period, he attempted to sue in his personal capacity, on behalf of the trust. The Court of First Instance dismissed the application, stating that no special circumstances had been triggered to allow the claim. The Court of Appeal held that there were such special circumstances, but that the claim cannot be brought without the trustees being joined as defendants. The court of Appeal refused to permit the addition of the trustees to the claim, for such was not required by the original action, and thus dismissed the appeal.

The case was brought to the Supreme Court which also dismissed the appeal. We are not concerned with the full reasoning behind that conclusion, but only of Collins LJ's analysis pertaining to the requirement for trustees to be brought as joined defendants. At [62], Collin LJ held that such is an established principle, and correctly so, to guarantee that the joinder is "bound by any judgement", to prevent repetitive actions, and because the beneficiary is commencing the action in place of the trustee. Collin LJ then held at [63] to [67] that such is the main difference between trusts and equitable assignments, for although in equitable assignments the assignee must join the action as co-defendant, failure to ensure such will not disallow the action to continue, for it can be remedied. Collin LJ added at [71] that although bringing an action under an equitable assignment without the assignee as co-defendant is not the norm, unlike under an ordinary trust, he reasoned at [70] that, it is possible under equitable assignments because "the assignee is the true owner and the assignor is the bare trustee".

Despite drawing the differences between trust and equitable assignments, LJ Collins oddly concluded by terming the assignor as a "trustee", suggesting that even if equitable assignments do not involve the creation of trusts, they rely on the concept of trusts to stand. Nevertheless, that does not make equitable assignment trusts, and it remains clear from Collin LJ's dicta that because of those crucial differences, equitable assignments are not trust.

Edelman and Elliot (2015) are proponents for equitable assignment as involving trusts. At pages 230-231, Edelman and Elliot summarised the problems associated with the "transfer conception of equitable assignment" because firstly, there is no principled basis for transfer, for there is nothing to be transferred. Some have incorrectly claimed that the equitable right is transferred, but fail to understand that "equitable rights do not co-exist with the legal rights of a person who is absolutely entitled. Secondly, and similarly, when there is a sub-assignment, assuming that the initial assignment was somehow valid, we once again face the difficulty of identifying the specific right that has been transferred. This is because, once the sub-assignor has transferred rights to the sub-assignee, for him to remain in the picture as he does, that right he transferred must be different from the rights he received in the initial assignment. And thirdly, at page 233, Edelman and Elliot added that if a transfer has truly occurred, assignors should have no trustee-like duties to act for the benefit of assignees.

Thus, Edelman and Elliot suggested at pages 232-234 that the better conception would be to accept assignment as a trust because firstly, it does not involve a "transfer" but the creation of new rights, and thus, unlike the transfer concept, it does not suffer from the inexplicable right issue. Secondly, because it is a natural historical development from the concepts of novation and power of attorney, which to allow new parties to benefit from the rights of assignors. Thirdly, because the criteria for equitable assignment to properly occur is the same as that of trusts, namely, that there must be intention, an identifiable subject, and certainty. And fourthly, because it helps explain the occurrence of assignment despite the failure to comply with statute, for it can then takes effect as a constructive trust.

However, contrary to Edelman and Elliot's position, the Court of Appeal in *Barbados Trust v Bank of Zambia* (2007) seemingly accepted the transfer basis for equitable assignment. Edelman and Elliot attempted to argue against such by confining *Barbados Trust* to its facts, claiming that the view it took was a result of interpreting its non-assignment clause. Nevertheless, Edelman and Elliot admitted that there is not yet any clear answer. We beg to differ, for the answer is as it is described in *Barbados Trust*.

We consider that there is authority in case law clearly provides authority that equitable assignments are not trust. Firstly, in *Don King v Warren* (1999), Lightman J at page 321 parties could have contracted to prohibit the declaration of trusts if they so wished. Additionally, Lightman J also held that the mere fact that the rule that applies to trusts in *Saunders v Vautier* (1841), to dissolve the trust and take the assets, does not apply does not mean that there was no trust, but merely that there was no determinable property.

Additionally, in *Barbados Trust*, at [43], Waller LJ held that although the debt may not be equitably assigned, "a declaration of trust is not an equitable assignment". This is because, unlike a trust, equitable assignments may be converted to legal assignments under Section 136 of the Law of Property Act.

Trusts are not caught by non-assignment clauses

As equitable assignments are not trusts, it is necessary to consider if non-assignment clauses catch trusts as well. In *Don King*, A UK boxing promoter entered into a partnership agreement with a US boxing promoter, and purportedly assigned their own contracts to the partnership. However, not only did most of the contracts contain non-assignment clauses, all the contracts required the conduct of personal services. Thus, the assignment could not have occurred.

Before we consider the Court of Appeal's decision, the decision of Lightman J in the High Court must be visited, for the Court of Appeal largely agreed with the Lightman J's reasoning. Lightman J first held at page 316 that it was the intention of the partners that the contracts be assigned to the partnership, or held for its benefit. Next, he held at page 317 that trusts may be conceived to not only hold the "rights conferred, but also the benefit of being a contracting party". Lightman J, at pages 318-320, then summarised the necessary principles. Amongst others, he stated that assignments are possible when the obligee's identity is not crucial, but that the contract will be the ultimate determinant to assignability and may expressly permit assignment when it would otherwise be prohibited, and that assignments are different from the creation of trusts. Applying the principles, Lightman J held at page 320 that assignment was not possible because the contracts prohibited them, but that they did not prohibit the creation of trust.

Lightman J then held at page 320 that a trust may be declared even if the object involves a contract that requires personal skill and confidence, because there was no conflict of interest. The fact that the contracts were non-assignable also did not defeat the possibility for a trust to be declared. Lightman J at page 321 explained that such was so because, for amongst other reasons, the parties could have contracted to prohibit the declaration of trusts if they so wished, and because ordinary trust principles would apply, and special claims such as the *Vandepitte* procedure would not be available to interfere with the rights of contracting parties. Thus, Lightman J favoured "freedom to contract", and allowed the trust to stand.

Like Lightman J, Morrit LJ also approved Lord Browne-Wilkinson's dicta in *Target Holdings v Redferns* [1996], that generic trust principles must apply, but not more, and certainly not the "specialist rules". Morrit LJ interpreted the contract of the parties at [30], and concluded that they must have intended that the benefit of the UK boxing promoter's contract with third parties be partnership property. He then held that since there was a no-assignment clause, the only possible way that their intentions could be achieved is through a trust, and thus, the trust must be valid.

In *Don King*, the courts permitted the trust because they viewed it as the intent of parties, despite the non-assignment clause. Since that was the parties' intentions, it cannot be argued that their use circumvents the non-assignment clause. The non-assignment clause was not intended to prevent the creation of trust to begin with. Thus, minimally, it seems that

it is the intentions of parties that will determine the scope of non-assignment clauses, and a claim that there is a general prohibition is wrong.

In the case of *Bank of Zambia*, Bank of Zambia (BoZ) purportedly assigned a debt to Bank of America (BoA). BoA declared a trust over the debt in favour of Barbados Trust (BT). BoA did such because the facility did not allow further assignments. BT, as beneficiary and bringing BoA as second defendant, attempted to sue BoZ via a Vandepitte procedure. BoZ defended by claiming that their assignment to BoA was never valid to begin with, because it was conducted before they provided consent (as the facility requires), and that BT was not entitled to sue. The no-assignment clause cannot be avoided by the declaration of a trust. Only the latter issue of our concern, thus it is sufficient to say that Waller LJ declared that the assignment to BoA as valid, but Rix LJ and Hooper LJ decided that the initial assignment of the debt from BoZ to BoA is invalid.

For reasons already stated above, Waller LJ allowed the trust to stand. Additionally, although Rix LJ and Hooper LJ held that the assignments as invalid, they nevertheless considered whether the facility prevented assignment, whether BoA can declare a trust in favour of BT, and whether BT was permitted to sue under the trust. Rix LJ stated at [77] that there is good authority for trusts to be utilised when assignments fail. He found that authority from *Re Tucan* (1889), wherein Lord Browne-Wilkson held that "although he could not assign... the power to recover the money… he could validly make a declaration of trust", and at [80]-[82], from Lightman J in *Don King*, who held that "a declaration of trust… is different in character from an assignment of the benefit of the contract to that party", and approved by Morritt LJ. Rix LJ concluded at [89] that nothing in the contract prevented the creation of trusts, and thus, it was validly created. Rix LJ then considered if BT can avail themselves the Vandepitte claim. However, Hooper LJ held at [139] that although the facility does not prevent the creation of trust, it does not allow the creation of trust for the sake of utilising the Vandepitte procedure to make a claim which would otherwise not be permissible.

Nevertheless, for purposes of our arguments, it seems that the courts will not view non-assignment clauses as preventing a trust to be found.

<u>Eradicating non-assignment clauses</u>

As we have argued, non-assignment clauses do not prevent trusts from being created, and for another reason the non-assignment clause should be circumvented: They should be prohibited. As Beale, Gullifer, and Paterson (2016) argued at pages 206-207, the typical users of no-assignment clauses are professional companies, who are unlikely to be careless in the fulfilment of their obligations, because the cost of amending accounts is no longer significant, because the character of the contracting party is not always of concern, because set-offs are infrequent, because it is a challenging task for assignees to review all contracts for no-assignment clauses, and because non-assignment clauses do not bring any benefit to their users, but imposes burdens, and is "inefficient". Beale, Gullifer, and Paterson added at page 299 that assignment clauses as being necessary because they are "out of proportion to the benefits" they bring, and because their current existence is reliant on flimsy principles that the judiciary may incorrectly undermine. Thus, as Beale, Gullifer, and Paterson argued at pages 211-213 that if one wants to avoid the "workaround" that must exist to allow no-assignment clauses to be utilised, one must also prevent non-assignment clauses from being valid.

<u>Conclusion</u>

In summary, although equitable assignments might seem like a trust, and even utilise concepts seemingly borrowed from trust, it is not a trust. Trusts may still be created even when assignments (legal and equitable) are prohibited. However, what is most important remains the agreement for which parties have made, for it is the intentions that the court will give effect, and if the intent of parties that the non-assignment clause also capture trust, then that is the exactly what the court will give effect. On a practical level, it is difficult for the courts to stretch their interpretation that far. Nevertheless, there is emergence of consideration as to whether non-assignment clause should be ban.

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