Editorial

Trustee companies in with a chance of making celibacy hereditary: from the old Rule in *Strong v Bird* to the new science of cryopreservation via a vital distinction obvious to osculating schoolboys but not to the normally perceptive Courts of Jersey and the Isle of Man. Whether ‘piercing the corporate veil’ is the only way of piercing the corporate veil

Tony Molloy QC* and Toby Graham**

Setting aside voluntary transactions for mistake as to their effects, but not as to their consequences

The courts of Jersey and the Isle of Man appear to view the distinction—drawn by Lord Millett in *Gibbon v Mitchell*—between mistake as to the effect of a transaction, and mistake merely as to its consequences, as nitpicking, up with which they will not put.

In this Issue, Simon Davies’ and Nicole Martin’s paper on the Colour Trusts indicates that the Royal Court of Guernsey does not agree with the Jersey/Isle of Man approach.

This is unsurprising when—nine months on from a lunchtime knee-trembler behind the school bike shed with a lusty fourth form co-ed—even an academically underachieving adolescent schoolboy would readily agree with Lord Millett’s reminder (also in this Issue) that:

one can say ‘Her kiss had an extraordinary effect on me’ while substituting the words ‘consequence for me’ would change the meaning.

Collins J has warned that to ignore Lord Millett’s distinction is to risk opening a can of worms. The Jersey/Isle of Man approach, as Dorothy Parker once said of a certain book, therefore ‘should not be tossed aside lightly—it should be flung with great force’.

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1. [1990] 1 WLR 1304.

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Nitpicking

Impatience with ‘nitpicking detail’ can cause problems for settlors and donors as well as for judges.

The estate of the late Sir Malcom Arnold provides a case in point. His ‘Bridge on the River Kwai’ counter-march to Colonel Bogey \(^3\) (with its delicious insults to the adequacy, for knee-trembling purposes, whether behind bike sheds or anywhere else, of each and all of Hitler, Goering, Himmler, and Goebbels), among many other pieces, is familiar to thousands who can whistle it but might be unable to put a name to it. It was part of the score that won him Academy and Grammy Awards for the eponymous movie tribute to Brit grit.

In this Issue, the travails of Sir Malcolm’s estate enable Luke Harris to present a refresher course on the old Rule in *Strong v Bird*, the formalities for inter vivos gifts, bailment, attornment, estoppel, and limitation.

Likewise, the travails of Arkadi Patarkatsishvili’s estate—including litigation on a forged Will through the Tbilisi City Court, the Court of Appeal, and the Supreme Court of Georgia—enable Mr WH Henderson to discuss Sales J’s creative use in the Chancery Division of long-established probate and administration remedies to resolve the resulting disarray.

Commercial use of the trust

The traditional family trust is founded on the settlor’s transfer of property on the basis of the trustee’s obliging himself to hold it on the terms communicated by, or understood with, the settlor.

Trusts can arise in commerce on the like basis. In *Barclay’s Bank v Quistclose Investments Ltd*\(^4, 5\) the House of Lords held that where, under a loan contract, A transfers money to B—solely to enable B to transfer it to C—the money (assuming it to have been kept separate or identifiable) remains A’s in equity until B pays it to C. If B’s projected transfer to C is aborted, equitable title to the money remains in A and does not pass\(^6\) to B’s creditors.

The settlor of a traditional family trust passes legal title to the trustee, and beneficial rights to the beneficiaries. The settlor faces the possibility of reacquisition by way of resulting trust if the class of beneficiaries should die out before the fund shall have been fully distributed.

A *Quistclose* trustor also passes legal title to the payee—who, like the trustee of a traditional family trust, acquires no beneficial interest in the property. This trustor, also, faces the possibility that the payee may not make the transfer to C (who has no right to any such payment *from the trustor*, and accordingly is not like the beneficiary of a traditional family trust).

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\(^4\) Lord Millett’s statement in “Restitution and Constructive Trusts” (1998) 114 LQR 399, 405 is valuable on this:

‘An express trustee is the paradigm example of the fiduciary. As Maitland explained, the relationship between the trustee and the settlor is one of trust and confidence, but the trustee owes no fiduciary duties to the settlor. There is no such relationship between the trustee and the beneficiaries. The fiduciary duties which an express trustee owes to the beneficiaries, therefore, are based, not on the relationship between them, but on his voluntary undertaking to the settlor to manage the trust property for their benefit and not his own. To derive his fiduciary character from the trust, that is to say, from the separation of the legal estate and the beneficial interests, is simply nonsense. They both derive from the same source, that is to say the obligations which he undertook when he voluntarily accepted the office of trustee.

The same applies where the trust is implied. If the trustee is to be treated as a fiduciary, this must be because he has knowingly subjected himself to fiduciary obligations. These are not created by the separation of the legal and equitable titles, though they may be created by the same circumstances which gave rise to the separation. But where the only relationship between the parties, who may not even know of each other’s existence, is that one holds the legal title and the other is the equitable owner, there can be no fiduciary relationship.

It follows that, as in the United States, a constructive trust is not itself a fiduciary relation, although the circumstances which give rise to it will often, perhaps usually, subject the legal owner to fiduciary duties. In similar fashion a resulting trust is not a fiduciary relation, though the circumstances which give rise to it may, perhaps more rarely, be sufficiently known to the trustee to subject him to such obligations.’


\(^6\) ibid, 580.
Pending any transfer from B to C, the beneficial interest is in neither of the latter. It remains with A subject to the power A has given to B.

Gusts of argument still swirl around the Quistclose trust, and Jonathan Edwards enters the fray in the present Issue. He is unconvinced by aspects of the exegeses offered by various judges and commentators, including, in this journal, a recent article by Michael Smolyansky and Lord Millett’s riposte.

One law of companies in the Chancery Division and a different law of companies in the Family Division?

Piercing the veil has intrigued equity lawyers for a long time. One Lord Chancellor imagined a country in which it was an important custom:

When they’re thinking of getting married, they do something that seemed to us quite absurd, though they take it very seriously. The prospective bride, no matter whether she’s a spinster or a widow, is exhibited stark naked to the prospective bridegroom by a respectable married woman, and a suitable male chaperon shows the bridegroom naked to the bride. When we implied by our laughter that we thought it a silly system, they promptly turned the joke against us.

‘What we find so odd,’ they said, ‘is the silly way these things are arranged in other parts of the world. When you’re buying a horse, and there’s nothing at stake but a small sum of money, you take every possible precaution. The animal’s practically naked already, but you firmly refuse to buy until you’ve whipped off the saddle and all the rest of the harness, to make sure there aren’t any sores underneath. But when you’re choosing a wife, an article that for better or worse has got to last you a lifetime, you’re unbelievably careless. You don’t even bother to take it out of its wrappings. You judge the whole woman from a few square inches of face, which is all you can see of her, and then proceed to marry her—at the risk of finding her most disagreeable, when you see what she’s really like. No doubt you needn’t worry, if moral character is the only thing that interests you—but we’re not all as wise as that, and even those who are sometimes find, when they get married, that a beautiful body can be quite a useful addition to a beautiful soul. Certainly those wrappings may easily conceal enough ugliness to destroy a husband’s feelings for his wife, when it’s too late for a physical separation. Of course, if she turns ugly after the wedding, he must just resign himself to his fate—but one does need some legal protection against marriage under false pretences.

In A v A (St George Trustees Ltd, Interveners),10 Munby J expostulated that:

There is not one law of “sham” in the Chancery Division and another law of ‘sham’ in the Family Division. There is only one law of “sham”, to be applied equally in all three Divisions of the High Court, just as there is but one set of principles, again equally applicable in all three Divisions, determining whether or not it is appropriate to “pierce the corporate veil”.

In this Issue Jonathan McDonagh and Co-Editor Toby Graham point out that his Lordship previously had accepted earlier authority apparently contrary to that corporate veil piercing point.

A company exists if a valid certificate of incorporation says it does. As we noted under the immediately preceding heading of this Editorial, a trust exists when a trustee becomes obliged to hold property on terms communicated by, or understood with, the settlor. There is no certificate that precludes inquiry into the genuineness of these obligations.

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10. [2007] EWHC 99 (Fam), [2007] 2 FLR 467 at [19].
Was Munby J changing his mind, or was his earlier decision simply recognising that a certificate of incorporation does not preclude inquiry into whether the company is the beneficial, or merely the legal, owner of the property to which it has title?

Moylan J took the latter approach in adjudicating on the relationship property dispute between oil baron Michael Prest and his wife Yasmin. In the Court of Appeal, Thorpe LJ agreed with him, but was outvoted.

Mrs Prest has leave to appeal to the Supreme Court.

The article considers the likely outcome, and the arguments that may remain open if the appeal either does not proceed or does not succeed.

**More testing of the bounds of judicial supervision of trusts**

The Hon Justice Campbell, of the Court of Appeal of the Supreme Court of New South Wales, summarised his deep and scholarly article in the *Journal of Equity*,\(^\text{11}\) ‘Access by trust beneficiaries to trustees’ documents information and reasons’, in these paragraphs (emphasis added):

In my view there is no invariable principle whereby the trustee is not obliged to disclose reasons for a discretionary decision. Rather, courts need to decide, construing each trust deed individually in its context, whether *faithful performance of the intention of the settlor of that particular trust deed requires information of the type that the court is considering to be disclosed to the relevant class of beneficiary, to be kept secret from the relevant class of beneficiary, or to be disclosed or not disclosed as the trustee thinks best.\(^\text{12}\)

In my view, recognising that an order of a court concerning disclosure of information relating to a trust to a beneficiary or potential beneficiary is discretionary does not involve deserting the firm ground of sure principles for a trackless sea of uncertainty. It is doing no more than recognising that trust obligations need to be decided as a matter of implication when the trust documents are silent, and that every equitable remedy is discretionary.

... In the context of disclosure of information concerning trusts, the exercise of any of these discretions must take into account the relevant principle, namely, that the task of the court is to require the particular trustee in question *faithfully to perform the intention of the settlor and the office of trustee*, and if the trustee has strayed from that course, to make whatever order is appropriate in the circumstances to enable that intention to be effected, and whatever is necessary to carry out that office to be done. Concerning very many situations where a beneficiary seeks access to information about a trust, the outcome will be every bit as predictable as the outcome of, say, a suit for specific performance that is, there will be some clear cases, and some not so clear cases.

I do not believe that explicit recognition that access to information is granted as an exercise of the inherent jurisdiction over trusts, and involves some discretionary judgments, involves any greater uncertainty than was recognised in previous decisions. The previous case law has recognised, even concerning cases where the beneficiary has a vested interest, that the beneficiary is usually entitled to information, but entitlement always depends on the circumstances of the individual case.

... In my view *Schmidt* did not discard an old principle for a new. Rather, it applied the principle that has always been the generative principle of the court’s role in enforcing trusts.\(^\text{12}\)

In this context, Michael Gibbon has discussed *Breakspear v Ackland* in a recent Issue,\(^\text{13}\) and in this

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12. ibid, 145–47.
13. ‘Beneficiaries’ information rights’ (2011) 17(1) Trusts & Trustees 27.
Issue Edward Mackereth and Shaun Maloney discuss *Re HHH Employee Trust and the B Sub-Trust*, in which—without mentioning Justice Campbell’s paper—the Jersey Royal Court, approving the Guernsey Royal Court’s application of the Schmidt approach to a protector, proceeded to consider its application to a settlor which had reserved certain powers to itself.

Another test for the bounds of judicial supervision will arise if and when a STAR Trust washes up on English shores. Raymond Davern discussed the British Virgin Islands version in ‘Legislating on Purpose’ in an earlier Issue. In this Issue Anthony Duckworth—following his article on protectors in last month’s issue—discusses the Cayman version, and how to avoid a finding in England of resulting trust for the settlor.

**The heir en ventre sa frigidaire**

Close acquaintance with the bizarre detail of the common law rule against remoteness of vesting—more often, but less accurately, called the rule against perpetuities—immediately exposes one as being of a certain age. We exposed ourselves in that regard in our November 2009 Editorial in Volume 15 No 9, in which we referred to ‘that bizarre world, peopled with unborn widows, fertile octogenarians and children en ventre sa Frigidaire’.

The latter was a fanciful parody on the ‘child en ventre sa mere’ which figured in so many cases. We cited Dean J, in the Supreme Court of Victoria, in *Re Fawaz* [1958] VR 426, 431:

The attitude of the law on this matter would not commend itself to an intelligent layman. It is prepared to concede that a deceased person cannot have children, but it will concede no more. The fact that by a surgical operation a woman’s organs of generation have been removed, or the fact that she is of an advanced age, will not in the eye of the law exclude the possibility of further children being born to her. . . . [T]he rule dates from a time when the science of gynaecology was almost unknown.

To which, had he been giving judgment today, the learned judge might have added, ‘and when the science of Assisted Reproduction Technology was scarcely imaginable’.

Yesterday’s parody having become today’s scientific reality, the paper by Anne Gibson, Simone Boesch, and Marnin Michaels is essential reading for the professions engaged in the trust and succession areas: not because it deals with the law—which it does not—but because it provides background that any educated lawyer or enterprising trust professional working in the field ought to have.

Much as he would have understood Lord Millett’s distinction between the effects of osculation, and its potential gynaecological consequences, that schoolboy in his momentary seizure behind the bike shed would have had a very old-fashioned single-mindedness that left no room for wonderment that technology now makes it possible that, as our authors write, ‘reproduction can be distanced from a sexual act between two people not only in space but also in time, thus granting individuals greatly extended, and even post mortem, fertility’.

**Trustee companies and Aristotle**

Will the trust company of the near future need to supplement its bank of precedents with a *minus* sperm and gamete cryopreservation unit, plus, of course, insurance against power failure? Might celibacy become hereditary?

With questions like these hanging over trusteeship it is little wonder that Robert Clifford’s paper should be urging that:

Where there is room for trustees to embrace new technology, and work in ways that better suit the needs of
settlers, beneficiaries, advisers and employees alike the role and its responsibilities demand it.

Trustee complacency is often shattered only by the inevitable outcome of poor and unsystematic work:

Before any litigation, the most usual indicators of trustee performance are cost and administrative efficiency. When and if litigation commences there is a sudden sea change in opinion and, unsurprisingly, everything turns on the quality of trustee decisions.

Mindless adoption of the word of an adviser remains one of the better ways for lowering that quality, for:

good decisions are not always about rubber-stamping legal advice; hopefully good trustees can still add value through the exercise of judgment.

Mr Clifford’s reminder of the extent of the investigation into the trustee’s decision-making, apparent from Re the Esteem Settlement, Grupo Torras SA v Al-Sabah & ors is timely for trustees and trust administrators not imbued with Will Durant’s summary of Aristotle’s Nicomachean Ethics—a summary that has been attributed to Aristotle himself—that ‘We are what we repeatedly do. Excellence, then, is not an act but a habit’.

Trustees and trust administrators not so imbued appear to be the only subjects for whom, at least in the eyes of Bertrand Russell, this work of Aristotle has any value:

What he has to say is what will be useful to comfortable men of weak passions!

As often happens with summaries, the original has more punch, and fully supports Robert Clifford’s choice of title:

Moral virtue comes about as a result of habit, whence also its name [in Greek] is one that is formed by a slight variation from the word [in Greek for] (habit). . . . Men will be good or bad builders as a result of building well or badly. . . . Thus, in one word, states of character arise out of like activities. . . . It makes no small difference, then, whether we form habits of one kind or another. . . .; it makes a very great difference, or rather all the difference.

Excellence is, indeed, a habit. Where trusts are concerned, there is no room for adherents of GK Chesterton’s maxim that ‘If a thing is worth doing, it is worth doing badly’.


‘This quote is always attributed to Aristotle and yet it was never written by Aristotle. This quote is from Will Durant’s The Story of Philosophy, published in 1926, and it’s Durant’s distillation of Aristotle’s thought in Aristotle’s work The Nichomachean Ethics.

What it means is simply this: We ARE that which we do. Our actions define who we are. If we want to be excellent at something then we must do that thing repeatedly until we excel at it. For example: if you wanted to be a really great basketball player but all you did was sit and watch other people play basketball and you, yourself, never picked up a ball, you would wind up becoming an excellent basketball-watcher but not at all an excellent basketball player, nor a player of any kind.’