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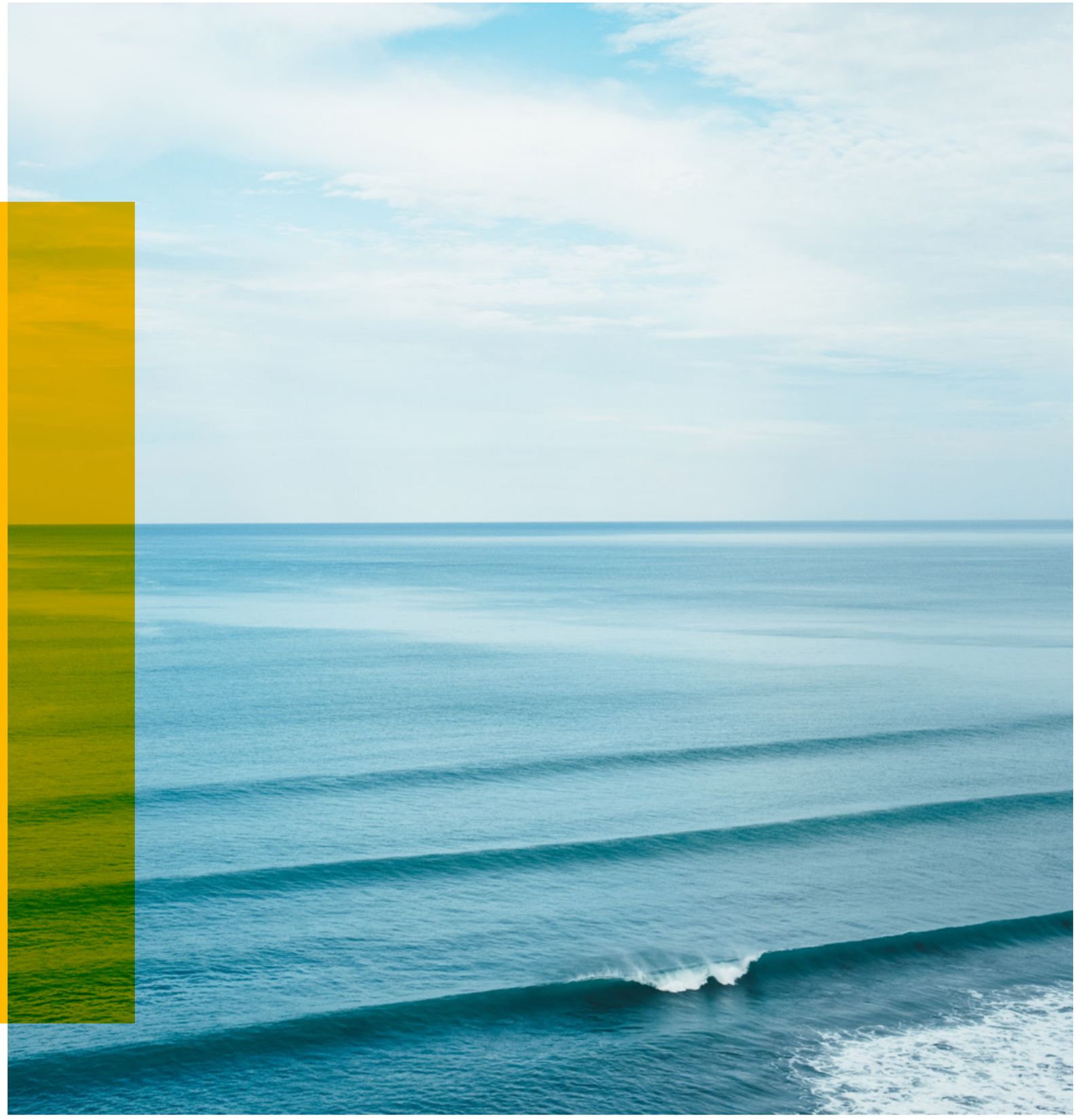
HIGH NET WORTH TRUST CLAIMS: > THE COMING WAVE

We have seen a notable recent increase in interest from law firms and clients seeking third party funding for high value contentious trusts disputes often involving a significant offshore, multi-jurisdictional element. In this article, we examine with Jonathan Hilliard QC of Wilberforce Chambers why it is that disputes of this type can be obvious candidates for funding.

Those offshore trusts that contain the largest sums are often set up by individuals who understandably wish – having generated their wealth – to retain some influence over its disposition even once it is housed in a trust for asset protection or other purposes. A close relationship between the person setting up the trust (the "settlor") and trustee, and any other officers of a trust (such as the "protector", who the settlor sometimes appoints to watch over the trustees) will ideally continue throughout the duration of the settlor's life.



ONCE THE SETTLOR DIES, SADLY EXPERIENCE TELLS US THAT THIS CLOSE RELATIONSHIP WILL NOT ALWAYS SURVIVE INTO THE NEXT GENERATION. THE SUCCESSORS TO THE SETTLOR MAY DISLIKE WHAT THEY SEE AS THEIR INHERITANCE BEING LOCKED UP IN A TRUST, MAY NOT HAVE A CLOSE RELATIONSHIP WITH THEIR SIBLINGS, AND MAY HAVE BUSINESS PLANS OF THEIR OWN THAT THEY WOULD LIKE TO USE THE MONEY TO IMPLEMENT

However, once the settlor dies, sadly experience tells us that this close relationship will not always survive into the next generation. The successors to the settlor may dislike what they see as their inheritance being locked up in a trust, may not have a close relationship with their siblings, and may have business plans of their own that they would like to use the money to implement. Add to this the possibility that the settlor may, on his death, have chosen to ask the trustees to pass some of the trust assets to a person (such as a second wife) that the next generation do not like and you have a combustible mix that has the capacity to spill over into litigation, involving significant sums across multiple jurisdictions, in which different assets and elements of the trust structure are situated.

In light of this, it is unsurprising that the case law of the offshore jurisdictions has been littered over the last decade with litigation spawned by second generation beneficiaries seeking to:

- question trustee decisions;
- find out more about the structures into which assets may have been placed; and
- recover assets from those into whose hands they have been passed.

The critical questions for a party seeking to attack an offshore structure are:

1. how to obtain sufficient information about the structure in order to attack it;
2. the grounds upon which to attack the structure;
3. the jurisdiction(s) in which to attack;
4. how to enforce any award; and
5. (given the complexities of (1)-(4)) how to fund any attack when the funds are held in the trust structure.

Each of these questions is important, interesting and difficult.

Question (1) has spawned a fascinating body of case law that is testament to the creativity of those attacking offshore structures, most recently in the *Dawson-Damer v Taylor Wessing* [2017] 1 WLR 3255 litigation in which the data protection legislation in England was used to obtain information about the offshore trust, as well as the use of information leaks from offshore jurisdictions such as the "Panama Papers" incident.

Question (2) encompasses – to give but a few examples – the issue of the flexibility allowed to trustees and other officers in exercising their discretions (see e.g. Pitt v Holt [2013] 2 AC 108), the grounds on which trusts can be held to be shams, and the question of when an elderly settlor will lack capacity, or when his intentions in establishing the trust have been vitiated by the influence or pressure of others.

Question (3) takes one into the different "firewall" legislation in the offshore jurisdictions that serve as an important part of the financial products that they offer, and the potential vulnerabilities within such statutes.

Question (4) is generally a conflict of laws question, requiring an understanding of private international law and how this is modified by the special legislation on the topic in the jurisdiction(s) in question. Critically for the beneficiary having succeeded in his action (and thereby having obtained an award in his favour) the successful navigation of these rules will result in the relevant jurisdiction upholding the award and allowing access to the underlying trust assets.

It is question (5), however, that is often in practice the most important one from the outset, because an attacking beneficiary is very often faced with a well-funded structure on the other side of the action but with no access to trust assets that may be required to fund the attack. The question of how to fund the action is therefore critical, and it is in this sphere that third party litigation funding has an important role to play.

WITH THE BENEFIT OF OUR RELATIONSHIPS AND OUR FINANCE PRODUCTS, A CLAIMANT WHO EITHER CANNOT, OR DOES NOT WISH TO, FUND THE LITIGATION HIMSELF, CAN ENGAGE A TEAM OF TOP-TIER PROFESSIONALS TO MAXIMISE THE PROSPECTS OF SUCCESS

It is clear that offshore trusts disputes can present unique challenges to claimants, lawyers and funders alike. We recognise that multi-jurisdictional litigation and subsequent enforcement action takes time – measured in years, not months – and our non-recourse finance products are aimed at enabling claimants (if they wish) to pursue their claims to the fullest degree whilst not suffering an adverse financial impact. Moreover, our interests as the provider of non-recourse finance are fully aligned with those of the claimant (and, indeed, the claimant's lawyers where they are acting on a full CFA basis). Put simply, we only receive a return on our investment if the claimant actually recovers proceeds from the litigation. If the case is unsuccessful, our investment is written off and the claimant pays nothing.

However, we can add value through more than just the provision of a multi-million-pound funding solution. We operate at the centre of the global dispute resolution industry, and our network of relationships with lawyers and experts around the world means that if the claimant needs to build a team to fight their litigation, we can help identify the right people. With the benefit of our relationships and our finance products, a claimant who either cannot, or does not wish to, fund the litigation himself, can engage a team of top-tier professionals to maximise the prospects of success. That success will most obviously come in the form of a favourable judgment. In many cases, however, it will be through obtaining a more advantageous settlement at an earlier stage of the proceedings, because the tactical advantage often enjoyed by well-funded trustees or other officers will have been eradicated, thus making an early settlement a more attractive proposition on the defendant side. This strategic – rather than purely financial – benefit of third party funding is something that is often overlooked.