

Leading Hong Kong Barrister Andrew Lynn Surveys the World of Trusts & Structuring

Andrew Lynn is a barrister practising law in Hong Kong, specialising in civil and commercial disputes, and more particularly in trust disputes. He says that while a trust is in essence a relatively simple structure - no more than a fiduciary arrangement that allows a trustee to hold assets on behalf of beneficiaries - it is the precise mechanisms for holding the assets sufficiently at arms' length from the original owner of those assets that can be so complex. This complexity also leaves trusts and trustees prone to different interpretations and potentially challenges in the courts from beneficiaries or third parties, with the judges then determining the outcomes and, in the process, constantly expanding the relevant case law in the universe of trusts. Hubbis met with Andrew recently and quickly learned of his very evident intellectual interest in his chosen sphere of practice, as well as his genuine enthusiasm for helping his clients. We heard of some of the solutions and advice he proffers clients and gleaned some fascinating insights into his work with wealthy clients in the region. And we heard how despite the travel restrictions, he is content in Hong Kong, enjoying family life with his wife and young son, and also finding time for another favourite practice, this time of Thai kickboxing.

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Andrew opens the

conversation by explaining that his law practice in Hong Kong centres on very wealthy clients who establish trusts for all the usual reasons, ranging from asset protection to tax mitigation to succession management and succession planning. As so many of Asia's wealthy have amassed their fortunes through building companies amidst the region's economic boom of recent decades, trusts, he says, are especially useful in preserving company shareholdings for continuity, for example if the founder or his/her spouse pass away. "If the estate is split up, and the shareholdings as well, on the death of a key individual, then the shareholding would likely be split into smaller units, effectively meaning control of that company is lost," he notes.

"This can potentially open the door to a host of problems later on. Very simply, the settlor of the trust, although not necessarily needing to surrender the entirety of his or her ability to control the assets in the future, does, at the very least, need to accept that there is some significant surrender of control required."

Trusts can be challenged

He also explains that trusts are not bullet proof. They can be challenged by beneficiaries or other third parties and can become subject to litigation through the courts down the line if they are created without full transparency and with insufficient thought and attention.

"As a first step in the process, the client must appreciate that there is a significant surrender of control of the assets required at the outset, and this is too often somewhat brushed over by

professional trustees, because quite understandably, they want to please their clients, and they want to obtain the business," he cautions. "This can potentially open the door to a host of problems later on. Very simply, the settlor of the trust, although not necessarily needing to surrender the entirety of his or her ability to control the assets in the future, does, at the very least, need to accept that there is some significant surrender of control required."

Transparency required from day one

If not, he warns this would be a sham trust. "We find from our extensive experience that the real problem that leads to trouble down the line is very often the hesitancy of the trustees to properly explain in sufficient detail to what extent

control should be surrendered and how this can be mitigated legally," he elucidates. "Actually, there are ways that the trust can be structured so as to preserve a certain degree of control and influence from the settlor; this is permissible, but it can never be total. I reiterate that there has to be some surrender of control, otherwise, you don't have a trust."

The core paradox

Andrew zeros in on the essential paradox of the settlor having

to surrender control in order to establish a true trust, but wanting to retain control, and how to overcome some of these issues. He points to what are termed 'reserved powers', for example, which allow someone establishing a trust – the settlor – to reserve certain powers under the trust. Without going into immense detail and legalese, he notes, for example, that one of these powers might be the ongoing ability to remove or replace the trustee, with the trust remaining intact, only the trustee being replaced.

He elaborates on this, noting that the critical downside of this is that the more control that is ultimately reserved to the settlor, the greater the risk of a creditor of the settlor attacking the trust if there was a bankruptcy or insolvency situation. And also, the greater the risk of an unhappy spouse attacking the trust in the case of a divorce, or perhaps a disgruntled or bypassed would-be beneficiary taking up a case against the trust.

Courses of action

He explains that sometimes, even better than the settlor reserving powers, it may be useful to establish the office of a protector. This confers upon another party – the protector, who is neither the trustee nor the beneficiary – certain powers such as the ability to remove the trustee, but also certain powers to consent or not to consent to certain actions by the trustees, for example over investments.

"What I am referring to here are not particularly radical solutions, they are quite commonly seen, but they do go some way towards solving this basic paradox of a trust, which is that the settlor wants to establish the trust and



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obtain the benefits of that but also wants to retain a degree of control.”

Seeking the best advice

Andrew advises any potential client seeking professional and dispassionate trust advice and expertise to hire someone who is a member of STEP, the Society of Trust and Estate Practitioners. “And here I mean not only the trustee themselves but also the people and firms they use for legal and other advice and for execution,” he says. “Although the lawyers are not involved in actually establishing the trust or advising on the establishment of a trust, if the client does get involved in litigation at any stage, a lawyer who is a member of STEP will guarantee a baseline of knowledge and competence in relation to the practice and administration of trusts.”

He adds that while all lawyers, in common-law jurisdictions at least, study trust law on their road to qualification, and also that the deep principles of trust law have not really changed for a century or more, the actual practice of trust administration has evolved “massively”.

“Moreover,” he says, “the types of assets held, especially in offshore

trusts, are far more extensive and diverse than in the early days of trusts in England when trusts were established essentially to hold land and estates of the very wealthy,” he reports. “In short, my strong advice to anyone considering a trust is hire the right people, and my advice to any lawyer or practitioner is to obtain the STEP qualifications, a vital additional expertise a lawyer can add to his or her armoury.”

Trustees beware...

Andrew’s overall perception is that the volume of disputes in Hong Kong today is perhaps roughly the same today as some years ago, but the nature of the disputes has shifted from breach of trust in the strict sense more to failings in trustees’ decision-making processes.

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“The key aspect is that in the exercise of their discretionary powers as trustees, there are a number of principles that regulate the exercise of those discretions,” he explains. “Even if a trust on the face of it confers what’s called an “absolute discretion” on trustees, nevertheless, the courts have a supervisory jurisdiction and can be called upon to intervene if that discretion is not properly exercised.”

For example, he explains that if a trustee wishes to sell a family company or sell a family estate, they must consider the settlor’s wishes, which, although they do not bind

the trustees, should still be taken into account.

Trusts cover a diverse world of assets

Moreover, the trustee’s decisions must take into account relevant considerations, ignore irrelevant considerations, and not be irrational, otherwise disgruntled beneficiaries could potentially challenge the exercise of the trustee’s decision-making powers. “This means that the trustee should consider taking expert advice on areas in which they do not have the requisite experience,” he says. “After all, many investments are very complex.”

Finally, there is the potential for both conflicts of interest and conflicts of duty, which the trustees

need to continually be aware of and monitor. “For example,” he elucidates, “if a trustee is a trustee of multiple trusts, that could possibly give rise to conflicts of duty between the obligations the trustee has to those separate trusts.”

What if...

An interesting area today, and this is of course across the globe, is the position of trusts in divorce cases. Andrew explains that such cases are a regular feature before the Hong Kong courts, where the treatment is similar to that prevailing in England and Wales, whereby the trusts might be treated as a resource of

one of the spouses in a divorce, even if that spouse is merely, for example, a discretionary beneficiary. He explains that if there is a pattern of behaviour proven that shows the trust is effectively a resource of one spouse, the value of that trust fund can be divided between the parties to the divorce.

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of protecting the wealthier party in a divorce, but more recent cases prove that is no longer necessarily the case," he says. "The result is that this topic remains a very hotly contested issue in jurisdictions like Hong Kong."

Leaving the right legacy

He concludes the conversation by reiterating the value of the right

advice and expertise from the outset. For those settlors who do not approach this with the right attitude and the acceptance that they need the best professional advice, there are risks that might surface down the road, or potentially after the settlor's demise, and that is certainly not the type of legacy any HNW or UHNW client wants to leave their heirs and beneficiaries. ■

Getting Personal with Andrew Lynn

Andrew comes from Southport in the northwest of England. His academic education is remarkably extensive. He completed his first degree in English Literature at Edinburgh University, then went on to his Master's degree in Renaissance Literature at Magdalene College, Cambridge, during which time he won a Benefactors' Scholarship to later complete a PhD in Renaissance Literature at St. John's College, Cambridge.

"After those wonderful years of study, I was 26 by then, but still did not really know what I wanted to do," he reports. "I actually felt rather adventurous, which led me to take my first job at Beijing Foreign Studies University, which is one of the best universities in China, specialising in languages, foreign literature and foreign history, training many of the diplomats, interpreters, and party members in China."

He went there originally for one year, but then started learning Mandarin Chinese, enjoyed that immensely, and ended up teaching and learning at the same time, staying there nearly five years.

"By then, I thought I really should settle down and get a real job, and so I went back to the UK, completed my law studies in Chester, then took up a job offer with an international law firm in Hong Kong," he recalls. "However, that was not quite my thing, so I quickly switched to do my pupillage in chambers on the way to become a barrister in Hong Kong. I certainly do not regret that, and truly enjoy my role here and the many fascinating challenges."

On qualifying as a barrister, he was soon involved in a wide range of different civil cases, and several family cases, which is how he first moved into the world of trusts. His first big case was the Otto Poon divorce case, acting for Poon's wife in what was a high-profile action.

"Although I was still relatively junior at the time, his wife wanted me to take and lead the case, which was immensely challenging, but she ultimately obtained an award amounting to around HKD840 million and the rest is history," he reports. "The interesting aspect for my ongoing work in the ensuing years is that there was a trust involved, and the legal issue was whether or not that was a resource of Otto Poon himself, to be divided between the parties. Ultimately, my client won the case in the Court of Final Appeal, after a long and drawn-out battle. I found it fascinating, and it really propelled me into trust disputes, which is today a mainstay of my practice."

Andrew has made a home together with a Taiwanese lady, Gina, whom he met by chance on the MTR. He describes their meeting as rather a romantic encounter, and that soon led to settling down together, and

the couple today has a young son of 20 months old. “Harry Aristotle Lynn, we call him Ari, is gorgeous,” he says, “although I am naturally somewhat biased. By the way, the Aristotle name came about because I was reading Aristotle in the months before he was born. Philosophy is one of my hobbies.”

Another rather less sedentary hobby is watching and also participating in Muay Thai, or Thai kickboxing. “I do it several times a week, but only sparring, not actually full-on fighting,” he reports. “I started about eight years ago now, and there are quite a few lawyers and other professionals doing this in Hong Kong. It is incredible for fitness and health, and huge fun - the atmosphere in those Thai gyms is amazing, so friendly, all about learning a beautiful art and doing it in a fun way, while getting fit and healthy.”

Another interest is cryptocurrencies, about which he says he first had many doubts but now is far more interested.

“One of my more interesting clients is Roger Ver, one of the early Bitcoin entrepreneurs,” he explains. “The assignment working for him has opened my eyes to Bitcoin and other cryptocurrencies, and I am increasingly fascinated by the legal questions surrounding cryptocurrencies and the blockchain, which I can now see have the potential to radically transform our world because they offer a sort of financial liberation from a control network, you could say, as they are obviously peer to peer, and don’t require any intermediaries to process transactions. The downside is criminal and clandestine activity, the upside is that we are in an age of increasing censorship and state control the world over, and perhaps cryptocurrencies have the potential to liberate us financially.”

