

The Three Little Pigs & The Big Good Wolf

Recovering assets from offshore trusts

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New Square Chambers





**Not very long ago, in a jurisdiction far or not so far
away....**

Where and what is “offshore”?

- Anguilla, Antigua, Barbados, Bahamas, Belize, **Bermuda**, **British Virgin Islands**, Brunei, **Cayman Islands**, Cook Islands, Cyprus, Curaçao, Delaware, Dominica, Dubai, **Guernsey**, Hong Kong, **Isle of Man**, **Jersey**, Labuan, Liberia, **Liechtenstein**, Luxembourg, Malta, Marshall Islands, Mauritius, Montserrat, Nevis, **San Marino**, St Vincent & Grenadines, Seychelles, **Switzerland**, Turks & Caicos...**UK ?**
- Foreign governing law, foreign residence of trustee, foreign situs of assets

There were once three very naughty little pigs who stole from the farmer

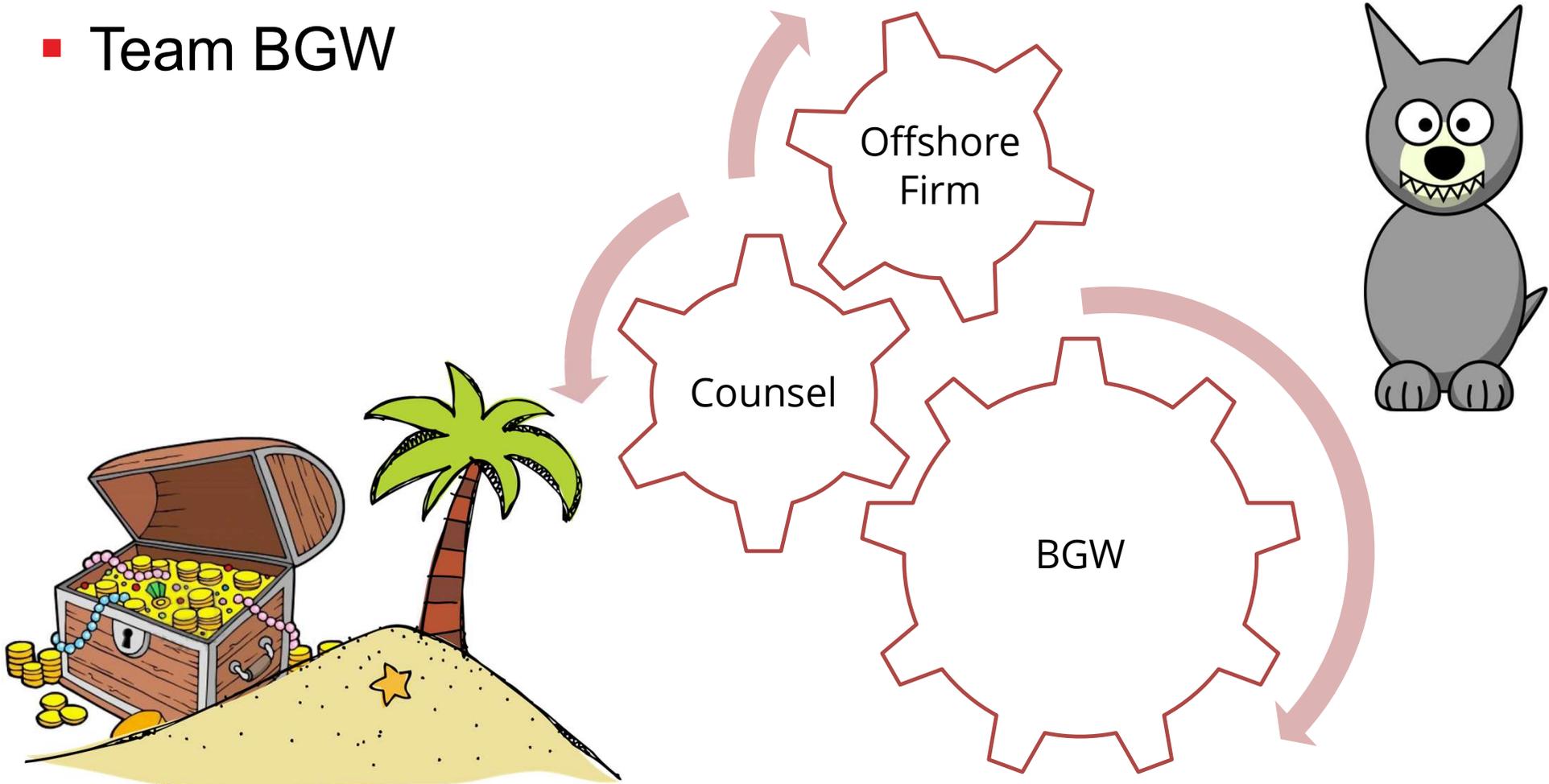


and hid all his money, far away from the farm yard....

**And the farmer's IP
instructed BGW LLP
to go and get it back**



- Team BGW



And the first little pig built a trust made out of straw



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The trust made out of *straw*

- Transfers of assets into trust are gifts and can be set aside under insolvency legislation
- Transfers of assets to trust or companies under trust may fail to transfer beneficial interests (resulting trust)
- “Trust” can fail to be (or to be recognized as) a disposition of settlor’s beneficial interest or can fail for technical reasons
- “Trust” can also sometimes be a nominee arrangement in disguise (sham)
- Trust can contain backdoors which BGW can exploit, including reserved non-fiduciary powers and crystalized beneficiary rights

Setting aside transfers into trust under insolvency law

- IA 1986, s.339 transactions at an undervalue
- *Reed v Ramlort* (2004)
- IA 1986, s.423 transactions defrauding creditors
- *Hill v Spread Trustee* (2006)
- **Extraterritorial scope of IA 1986, s.423 (and not limited to insolvency)**
- Offshore/foreign law often does not have equivalent provisions, but may have equivalent of former Law of Property Act 1925, s.172 on “fraudulent transfers”

Resulting trust

- Failure to transfer settlor's beneficial interest to trust structure
- Assets very often held by company owned by trustee rather than directly
- How did assets become owned by company ?
- Source of funds ?
- Legitimate inferences re ownership from use of assets ?
- *Gany Holdings v Khan* (2018, PC)

A total fail

- Trust may be void under their governing law for technical reasons
 - Uncertainty of terms
 - Uncertainty of objects
 - Uncertainty of intention to create an inter vivos trust
 - Breach of perpetuities rule (where still relevant)
- “Charitable”/non-charitable purpose trust may be vulnerable, *Re Hanson Decd* (2021, Jersey)
- Courts outside home jurisdiction of trust may be more willing to set aside *Pugachev* (2017), contrast decisions re same trusts in NZ

Sham trust

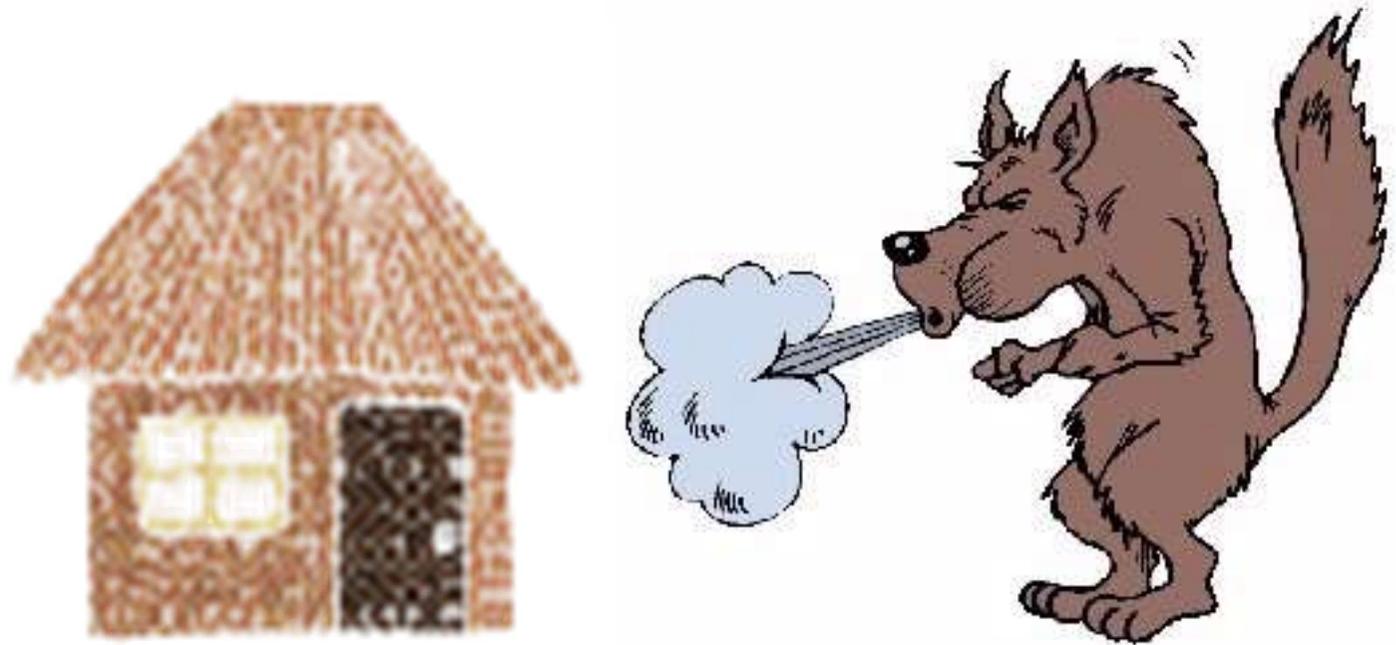
- Joint dishonest intention of settlor and trustee from the beginning that **trustee should hold assets for settlor as nominee** in order to deceive/harm a third party
- Contrast badly-run trusts/breach of trust cases
- *Shalson v Russo* (2005); *A v A* (2007)
- Perhaps “recklessness” of trustee re settlor’s (subjective?) intentions is enough, *MP Bank v Pugachev* (2017)

Reserved powers & beneficiary rights

- Some kinds of reserved power can be regarded as the powerholder's property
 - Power to revoke the trust *TMSF* (2011, PC)
 - Power of appointment *Clayton v Clayton* (2015, NZ)
 - Power of, um, er... *VTB Bank v Skurikhin* (2015)
 - Complete personal powers of veto? *MP Bank v Pugachev* (2017)
- Receiver by way of equitable execution can be appointed over power on application of settlor's creditor
- Beneficiary rights vs trustee may also be the subject of enforcement, *Brake v Guy* (2022) *Lindsay v O'Loughnane* (2022)

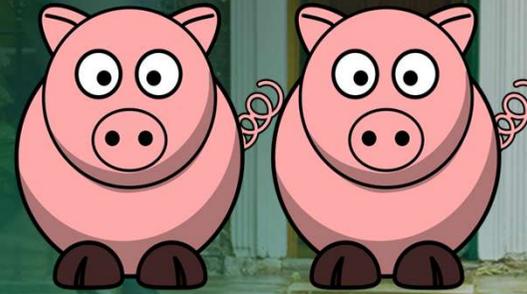
Too controlling ?

- *VTB Bank v Skurikhin* (2015) “control” = ownership ?
- *Moorgate Industries v Mittal* (2022) “control” over trust via protector powers (*Pugachev*) leading to control over company for purposes of IA 1986, s.435



And BGW blew it down....

And the second little pig built a trust made out of sticks



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The trust made out of *STICKS*

- Trustee may incur personal (or, in some jurisdictions, impersonal) liability to a creditor and allow access to trust assets via subrogation to the trustee's right of indemnity
- Creditor may be able to control trustee via directions application

Control of trustee – jumping the firewall ?

- Directions can be sought from foreign or creditor may seek orders that discretionary powers are exercised or not exercised to “benefit” a beneficiary
 - *Grupo Torras v Al Sabah* (2004, Jersey);
 - *Re IMK Family Trust* (2009, Jersey);
 - *Re F Settlements* (2013, Guernsey);
 - *In the Matter of the R Trust* (2015, Jersey)

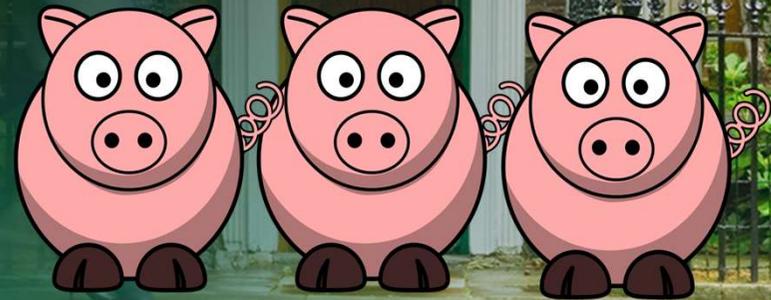
Trustee liability to creditors “of the trust”

- Trustee contracts personally and with personal liability
- Trustee, acting properly, is indemnified from trust assets
- Creditor of the trustee can claim on that indemnity by subrogation
- *Halabi v Equity Trust* (2022, PC)
- Statutory intervention in Jersey, Guernsey and now Isle of Man to limit trustee personal liability to creditors
- Insolvent trusts, *Z Trusts* (various, Jersey), *Investec v Glenalla* (various, Guernsey)



And BGW blew it down....

But the third little pig built a trust made out of bricks



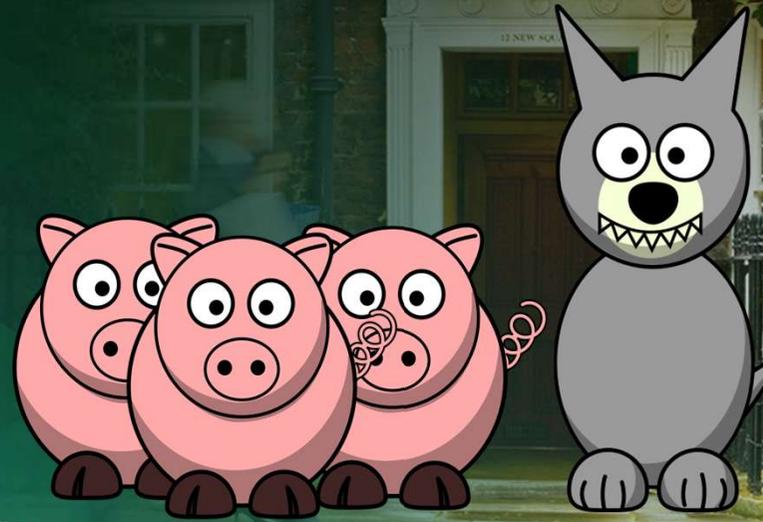
The trust made out of **BRICKS**

- Recovery of assets from a properly formed and competently run offshore trust remains challenging
- Firewall legislation may prevent use of foreign law (including insolvency law)
- Jurisdictions may appear protective of local professional trustees in terms of legislation on (for example) limitation and in the results of claims
- The discretionary trust remains an effective barrier to most forms of direct litigation attack vs a settlor, trustee or beneficiary, e.g. *Kea Investments v Watson* (2021, Jersey)
- Shouting “fraud” does not necessarily help



And BGW huffed and puffed, but could (probably) not blow it down....

Q & A



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