

## Nicholas Le Poidevin QC

Called: 1975

Silk Date: 2010

"Hugely intelligent and brilliant at untangling very complex and messy matters. He is technically one of the best you will see."

Chancery: Traditional - Chambers UK Bar 2019



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### Practice Overview

Nicholas Le Poidevin specialises in trusts and estates work, both contentious and advisory. He has appeared in significant cases in England at the highest level in both areas of practice, *Crociani v Crociani* (2014: trust jurisdiction clauses) in the Privy Council and *Marley v Rawlings* (2014: switched wills) in the Supreme Court. Over half of his work comes from overseas, especially Jersey and Guernsey, and he also appears in courts abroad. He is familiar with the trust laws of most of the offshore jurisdictions. A particular interest is the conflict of laws and the problems it causes in both trust and estate administration.

He is an editor of the leading practitioners' textbook, *Lewin on Trusts*, and is a frequent speaker at conferences. His practice extends also to property law, company law and insolvency, either in their own right or in connection with trusts and estates.

*"He's a truly fêted authority in this industry, who is a giant in this market and a top-quality lawyer."*

Chancery: Traditional - Chambers UK Bar 2018 )

### Trusts and Estates

#### Trusts

Nicholas is highly regarded in the field of trusts. Legal 500, ranking him as a leading silk, refers to his "great reputation". Chambers UK Bar calls him "one of the top experts in the international trust arena" and says, "Any superlative would not do him justice. His advice is superb, his drafting is elegant and he is tremendous in conference."

It was recorded in Legal 500 2016 that "Given his notable intellect and wide experience, he is someone you very much want on your side".

Chambers UK Bar (Trusts) & Chambers Global (Private Wealth) 2017 describe him as "Bright, up to speed and a lawyer with a very nice persuasive advocacy style. He's absolutely substance not show."

Who's Who Legal (UK Bar 2016) states in its Private Client section that Nicholas Le Poidevin QC is *"incredibly bright and effective"*.

Chambers UK Bar 2016 (Chancery Traditional) states that *"He is an absolute wordsmith and can convey complex ideas very well. A superb advocate, he is a great person to have in your team."*

He litigates trust disputes of all kinds and advises on difficulties in trust administration. He is relied on by leading firms of solicitors and advocates both in England and abroad. In *Crociani* he argued the construction of a trust jurisdiction on appeal from Jersey and had earlier run a similar argument in Bermuda in *Re A Trust*. He is glad to work with local advocates in assisting their preparation of cases, as in *Re B*, dealing with French threats of criminal proceedings against a Guernsey trustee.

For many years he has been an editor of *Lewin on Trusts* (19th ed., 2015) and has written in detail elsewhere about sham trusts; writing and practice inform each other. He is often asked for contributions at conferences, for example speaking on trust investment at the first STEP Global Congress in Miami in November 2014.

#### Wills and Estates

Nicholas deals with all aspects of wills and estates, both litigation and advice. Chambers UK Bar records *"Learned but practical and able to take a commercial approach. Whatever he says about the law, you feel comfortable with, and he's very good at working with you and seeking out your ideas."*

He has a special expertise in cases involving cross-border issues, such as conflicting rules of succession, getting in foreign assets and questions of the jurisdiction in which a grant of representation should be sought. He recently appeared in the first probate case to be decided in England's highest court for over 50 years, *Marley v Rawlings*, where husband and wife signed each other's wills; and he was later successful in seeking from the Supreme Court an order for costs directly against the insurers of the negligent solicitor.

He has written on problems in estates and spoke on cross-border issues at the STEP Caribbean conference in 2013.

#### Offshore

Who's Who Legal (UK Bar 2016) states in its Private Client section that Nicholas Le Poidevin QC is particularly well known for his work in the offshore market and is *"a pleasure to work with"*.

In Chambers UK Bar & Chambers Global 2017 Offshore section Nick is described as *"Technically astute and someone with excellent skills."*

Nicholas frequently appears in courts in offshore jurisdictions, including Bermuda, the B.V.I., the Isle of Man and the Cayman Islands, and also takes instructions for litigation or advice in Jersey, Guernsey and elsewhere. Notable cases offshore include *Serena v Equity Trustee Ltd* in the B.V.I. in 2014 and *Re A Trust* in Bermuda in 2012. He has a special expertise in firewall legislation and issues arising under the Hague Convention. He has also acted as an expert when issues have arisen about trusts in foreign proceedings.

As an editor of *Lewin on Trusts* (19th ed., 2015), he has had particular responsibility for its treatment of the conflict of laws. He has lectured widely abroad on matters within his practice and contributes articles to legal publications. He is a member of STEP and has sat on its International Committee.

#### Property

General property law

Nicholas maintains an active involvement in property law, such as advising on easements and restrictive covenants. Having sat as a Commons Commissioner (until the abolition of the office by the Commons Act 2006), he has a special interest in rights of common and appeared in *R. (Littlejohns) v Devon C.C.* (2015), funded by the N.F.U., to establish the status of unregistered rights.

His familiarity with both real property law and company and insolvency law prove useful in trust and estate work, where such ancillary questions often arise. He is instructed in the winding-up in the Isle of Man consequent on *Prest v Petrodel Resources Ltd.*

## Cases

### Name: **Crociani v Crociani**

**Reference:** [2014] UKPC 40; [2014] All ER (D) 287 (Nov)

**Date:** 1st November 2014

**Court:** Privy Council

**Practice Area:** Trusts and Estates

### Name: **Marley v Rawlings**

**Reference:** [2014] UKSC 2; [2015] A.C. 129; [2014] 2 W.L.R. 213; [2014] 1 All E.R. 807; [2014] 2 F.L.R. 555; [2015] 1 F.C.R. 187; [2014] W.T.L.R. 299; 16 I.T.E.L.R. 642; [2014] Fam. Law 466; and as to costs [2014] UKSC 51; [2015] A.C. 129; [2014] 2 W.L.R. 213; [2014] 1 All E.R. 807; [2014] 2 F.L.R. 555; [2015] 1 F.C.R. 187; [2014] W.T.L.R. 299; 16 I.T.E.L.R. 642; [2014] Fam. Law 466

**Date:** 1st November 2014

**Practice Area:** Trusts and Estates

### Name: **Re A Trust**

**Reference:** [2012] Bda LR 79 (Bermuda)

**Date:** 12th December 2012

**Court:** Supreme Court, Bermuda

#### **Comment:**

In late 2011 the Bermuda court approved an elaborate scheme to compromise a dispute concerning a family trust holding assets worth some U.S.\$1 billion. The trust deed contained a provision making Bermuda the administrative forum of the trust. One of the main beneficiaries threatened proceedings in a different jurisdiction to compel the trustee to disclose information about the underlying operating company. Another member of the family sought to restrain the threatened proceedings and more generally to prevent any challenge to the scheme

of compromise. The trustee, represented by Nicholas, joined in seeking an injunction against the threatened proceedings. Held: The clause that the courts of Bermuda should be the "forum for the administration" of the trust conferred exclusive jurisdiction on the courts of Bermuda, the threatened proceedings fell within it and an injunction to restrain them should be granted.

The scope and effect of clauses identifying the forum of or for the administration of the trust have been controversial. The judgment is a clear decision that such clauses are exclusive jurisdiction clauses and will be enforced by injunction.

**Practice Area:** Trusts and Estates

**Name: Chan v Terra International Holding Inc**

**Reference:** 5 July, 2011, unreported but online

**Date:** 5th November 2011

**Court:** High Court, British Virgin Islands

**Comment:**

The sole surviving executor of a Hong Kong testatrix sought rectification of the share register of Terra to substitute his name for the testator as the sole holder of the only share in issue. Terra was the trustee of a trust in which the estate and other members of the family were interested. The trust held some \$30 million through a subsidiary. The application was resisted by other members of the family as part of a family dispute. Held: Under Terra's articles, which were in common form, it was bound to register a personal representative as holder of a share in the name of the deceased on production of probate or letters of administration.

This sort of dispute is not unusual. The decision is that a company is bound to give effect to its articles. If there is some wider dispute, those who want to restrain a personal representative have to find some other basis for doing so and cannot interfere with the entitlement of the representative to be registered. There have been linked proceedings in Canada, see *Chan v Chan* 2012 BCSC 192.

**Practice Area:** Trusts and Estates

**Name: Alhamrani v Alhamrani**

**Date:** 2nd February 2009

**Court:** Royal Court of Jersey

**Comment:**

This is a long-running set of claims for breach of trust. The trial began in November 2008 and settled in July 2009 after 101 court days. There were two trusts, of which the beneficiaries were a Saudi Arabian family, and the principal complaint was that the trustees paid too much attention to the wishes of one member of the family, investing money in a business which has now failed. The case has given rise to various reported decisions, including one at [2007] J.L.R. 44, [2008] W.T.L.R. 753 on the 'dog-leg' claim against directors of a corporate trustee

**Practice Area:** Trusts and Estates

**Name: González Gómez v Gómez-Monche Vives**

**Reference:** [2009] Ch 245 (CA)

**Date:** 3rd October 2008

**Court:** Court of Appeal

**Comment:**

This was an application by a defendant, resident in Spain, challenging the court's jurisdiction under Council Regulation (EC) 44/2001. The Regulation governs the jurisdiction of the English court when a defendant is resident in the E.U. She was being sued by a beneficiary of a trust who alleged that the trustees, in breach of trust, had made distributions to her (also a beneficiary) to which she was not entitled. Art. 5(6) of the Regulation confers a special jurisdiction in trust matters. Morgan J. ruled that the court had no jurisdiction. On appeal - Held:

(i) the fact that the proper law of the trust was English made the trust "domiciled" in England for the purpose of art. 5(6) and (ii) the court had jurisdiction, because the defendant was being sued "as &hellip; beneficiary" within art. 5(6), the claim being that she had received distributions in excess of her entitlement. There was no appeal from Morgan J.'s decision that the court could not have declined to exercise jurisdiction on grounds of forum non conveniens.

English-law trusts with international elements are common. Here the beneficiaries were Spanish, the trustees were based in Liechtenstein and the B.V.I. and the trust property was shares in a Cayman company. The scope of art. 5(6) of the Judgements Regulation, which allows service abroad in most of Europe without permission, is crucial for the enforcement of such trusts. The decision defines the scope of the jurisdiction of the English to enforce English-law trusts even though the defendant is based elsewhere in the E.U.

**Practice Area:** Trusts and Estates

**Name: Close Trustees (Switzerland) SA v Vildosola**

**Reference:** [2008] 10 ITELR 1135; [2008] WTLR 1543

**Date:** 9th June 2008

**Court:** High Court

**Comment:**

The claimants were the trustees of an English-law trust who were being sued by the life tenant in California for breach of trust, negligence and fraud because her income had been substantially diminished. The trustees were defending the claim but, if successful, the California court would not make an order for the costs of the claim against the life tenant. The trustees would instead be entitled to take their costs from the trust fund (which was ample for the purpose). The trustees raised the question, however, whether those costs should or might be held ultimately to fall on income and not capital and, if so, whether they should be making a retention out of the income otherwise payable to the life tenant, aged 76.

Held:

The trustees had power to make a retention out of income, both under the general law and under the particular trust instrument. Whether it would be reasonable for them to exercise the power (they had not surrendered any discretion they had to the court) depended on various factors, including the uncertainty whether the costs would

be held to fall on income or capital, the likely amount of the costs, the life tenant's needs and her life expectancy. On the facts, it would not be reasonable to exercise the power of retention out of income.

The power of trustees to make a retention out of trust assets to meet a known or possible liability is well established. What was new in this case was the need to consider the burden of a retention as between income and capital. Making no retention would have the consequence, if the life tenant did not live for long enough, that capital might end up bearing the costs even if it were eventually held that they ought ultimately to be borne by income.

**Practice Area:** Trusts and Estates

**Name: Gregson v HAE Trustees Ltd**

**Reference:** [2008] 2 BCLC 542; [2008] WTLR 1623

**Date:** 8th May 2008

**Court:** High Court

**Comment:**

The claimant sued both a corporate trustee and its directors alleging a breach of trust, for failing to diversify the trust fund; they had retained shares in a family company put into the trust many years before and the company was now insolvent. Against the directors she relied on the "dog-leg" claim, the contention that if the directors were in breach of their duty to the corporate trustee its claim against them was part of the trust property and could be enforced by her as a beneficiary. The directors applied to strike out the claim.

**Held:**

(i) the dog-leg claim was not maintainable, for the directors' duties were owed to the corporate trustee in its own right and so a claim for breach of them was not part of the trust property; but (ii) the directors were wrong in contending that, because the shares were property originally settled, the shares were not "investments" within the Trustee Act 2000, s. 4 (obliging trustees to review investments).

It has been a vexed question for some time how far, if at all, directors of a corporate trustee can be made liable for breach of trust on the part of the trustee. A corporate trustee may (as here) have no assets to meet any liability. (Legislation in Guernsey and Jersey which formerly made the directors liable as guarantors for payment of a judgment against the trustee for breach of trust has been repealed.) The dog-leg claim, which offered the only possibility of making the directors liable, can now succeed, if at all, in very limited circumstances.

**Practice Area:** Trusts and Estates

**Name: Wingate v Butterfield Trust (Bermuda) Limited**

**Reference:** [2008] WTLR 357; costs at [2008] WTLR 543

**Date:** 14th December 2007

**Court:** Supreme Court, Bermuda

**Comment:**

The plaintiff was a major discretionary beneficiary of a trust of which the defendant was, and had since 1979 been, the trustee. The plaintiff sought, by way of summary judgment application in his breach of trust claim against the defendant, disclosure of information and documentation relating to the trust's affairs (in particular in relation to investments and distributions made by the defendant and in respect of the defendant's remuneration and expenses) together with a common form account.

Held:

Bell J ordered disclosure of all the information and documentation referred to in the plaintiff's application, on the basis that an important discretionary beneficiary was entitled to have his reasonable questions about the trust answered. The judge refused to exercise his discretion to order a common form account, because the information and documentation of which disclosure was ordered would provide much of the information that would be obtained by the taking of such an account.

The decision invokes the jurisdiction recognised in *Schmidt v. Rosewood Trust Ltd* to obtain information about a trust fund from its trustees. It was held that an interim application for disclosure can be made in pending breach of trust proceedings; that major beneficiaries should have their reasonable questions about a trust answered, by disclosure of relevant information and documentation; and that the right to information and documentation is 'free-standing' and not linked to any breach of trust claim, meaning that a trustee is not entitled to raise a limitation defence to counter such an application.

**Practice Area:** Trusts and Estates

**Name:** *Howell v Lees-Millais*

**Reference:** [2007] EWCA Civ 720

**Date:** 4th July 2007

**Court:** Court of Appeal

**Comment:**

This was an appeal against a judge's refusal to recuse himself from hearing a Beddoe application, where one of the parties was a partner in a firm of solicitors with whom he had previously had relations ending in disappointment and animosity. It was submitted that there was a real danger of bias from the bench.

Held:

That where there has been personal friendship or animosity between a judge and one of the parties in a case he is hearing, the test of a real danger of bias can be satisfied. That was distinguished from a case in which a judge has made an adverse ruling against a party but has had no personal dealings with the party.

The court held that the judge should have recused himself, as the test for bias was clearly met. The test of a 'real chance' of bias established by personal friendship or animosity between a judge and firm of solicitors. The court also found that the judge's conduct during the case was "somewhat extraordinary", and that the judge was giving evidence of fact during the hearing.

The Court of Appeal also found that the judge's conduct during the case was 'somewhat extraordinary', and that the judge was giving evidence of fact during the hearing.

**Practice Area:** Trusts and Estates

**Name:** *Three Individual Present Professional Trustees v An Infant Prospective Beneficiary*

**Reference:** [2007] WTLR 1631

**Date:** 2nd January 2007

**Court:** High Court

**Comment:**

This is the anonymised title of a *Beddoe* application. The judge considered the impact of the Human Rights Act 1998 on such applications and gave directions suitable where one of the beneficiaries was also a proposed defendant in the intended main proceedings.

**Practice Area:** Trusts and Estates

**Name: X v A**

**Reference:** [2006] 1 WLR 471

**Date:** 29th November 2005

**Court:** High Court

**Comment:**

Trustees proposed to make large charitable donation as an advance to the life tenant.

**Held:**

The trustees' proposal was not for the benefit of the life tenant.

Widely reported decision on the limits of what can be said to benefit a beneficiary of trust so as to allow the trustee to make an advancement for that purpose. A great sense of moral obligation held by a beneficiary did not on the facts make the proposed charitable gift of benefit to that beneficiary

**Practice Area:** Trusts and Estates

## Articles

Date	Title	Contributors
15th March 2019	Trusts in Europe and Brexit—a view from the Bar Published In <i>Lexis PSL - March 2019</i>	Nicholas Le Poidevin QC
20th February 2015	Trust jurisdiction clauses: <i>Crociani v Crociani</i> Published In <i>New Square Chambers</i>	Nicholas Le Poidevin QC

<b>Date</b>	<b>Title</b>	<b>Contributors</b>
8th October 2013	Jurisdictional Conundrums Published In <i>Trusts &amp; Trustees</i>	Nicholas Le Poidevin QC
5th April 2012	A choice selection Published In <i>Trusts and Estates Law &amp; Tax Journal</i>	Nicholas Le Poidevin QC
31st October 2009	Alhamrani Published In <i>New Square Chambers</i>	Nicholas Le Poidevin QC
31st October 2009	Appropriation – a “novel remedy” Published In <i>New Square Chambers</i>	Nicholas Le Poidevin QC
31st January 2009	Serving abroad in trust disputes Published In <i>New Square Chambers</i>	Nicholas Le Poidevin QC
31st January 2008	The Money Laundering Regulations 2007 Published In <i>New Square Chambers</i>	Nicholas Le Poidevin QC
30th June 2006	Charity ends at home Published In <i>New Square Chambers</i>	Nicholas Le Poidevin QC

## Publications

<b>Date</b>	<b>Title</b>	<b>Contributors</b>
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<b>Date</b>	<b>Title</b>	<b>Contributors</b>
1st January 2015	Lewin on Trusts 2015 Sweet & Maxwell	Lynton Tucker Nicholas Le Poidevin QC
31st October 2013	Sham Transactions 2013 Oxford University Press	Edwin Simpson Nicholas Le Poidevin QC
30th June 2011	A Practical Guide to the Transfer of Trusteeships 2011 STEP	Nicholas Le Poidevin QC
30th June 2007	A Portrait of Lincoln's Inn 2007 Third Millenium Information	Nicholas Le Poidevin QC