

Viva la Singapore Trusts: Lessons from *La Dolce Vita*

Since the release of the judgment in *La Dolce Vita Fine Dining Company Ltd v Zhang Lan & Ors* [2022] SGHC 287 (*La Dolce Vita*), ultra-high net worth clients, trust companies, wealth planners and private bankers have been concerned about the potential ramifications *La Dolce Vita* might have on existing and future trust structures in Singapore.

This article examines, and distills lessons from, the facts and the reasoning of the General Division of the Singapore High Court (**High Court**) in *La Dolce Vita*. Crucially, the case highlights the importance of ensuring the proper settlement of assets into trusts. It also demonstrates the inverse relationship between control retained by the settlor over trust assets and asset protection capability of the trust – the more unfettered control the settlor has over the trust assets, the greater the impediment to the trust achieving its objective of asset protection.

Background

The first defendant (**D1**) was the founder of the upscale restaurant chain South Beauty Group. The plaintiffs acquired shares in companies in the South Beauty Group (**Acquisition**). As part of the Acquisition, the plaintiffs paid approximately US\$254 million into D1's bank account. These monies were then transferred to bank accounts in Singapore (**Bank Accounts**) held in the name of the fourth defendant (**D4**). D1 was then the sole shareholder and director of D4.

The plaintiffs subsequently obtained judgments in Hong Kong against D1, the second and third defendants (but *not* D4) based on an arbitration award made by the China International Economic and Trade Arbitration Commission (CIETAC) for negligent misrepresentation arising from the Acquisition. The Hong Kong judgments were registered in Singapore (**Singapore Orders**). The plaintiffs sought to enforce the Singapore Orders by the appointment of receivers over assets in the Bank Accounts in the name of D4.

Prior to 4 June 2014, D1 was the owner of the sole share in D4. On 4 June 2014, D1 transferred the sole share in D4 to AsiaTrust Limited, the trustee of Success Elegant Trust, which was a family trust settled by D1 for the benefit of her son, grandchildren and remoter issues. The declaration of trust was dated 3 June 2014.

Even after divesting her share in D4, the establishment of Success Elegant Trust and ceasing to be the director of D4, D1 authorised and directed the transfer of approximately US\$67 million from the Bank Accounts in the name of D4 to parties including herself.

The question before the High Court was whether receivers could be appointed over the Bank Accounts in the name of D4 to satisfy the judgment sums owed by D1. To answer this question, the High Court had to determine whether the Bank Accounts were owned beneficially by D1.

The High Court's Decision

The High Court held that D1 retained her beneficial interest in the Bank Accounts for the following reasons:

- (a) D1 transferred monies from the Bank Accounts for her own purposes without complaint from D4. Therefore, D1 clearly considered herself free to make use of the monies in the Bank Accounts and this was because she never intended to relinquish her beneficial interest in the Bank Accounts to D4;
- (b) D1's haste in transferring monies out of one of the Bank Accounts after having notice of freezing orders obtained by the plaintiffs in Hong Kong, which were only directed against her. D1 had done this because she considered the monies in the Bank Accounts to be hers instead of being settled into the trust and that they were therefore at risk from the plaintiff's claims if she did not take steps to move those monies; and
- (c) D1's lawyers' confirmation on her behalf that she had "*maintained*" the Bank Accounts. For someone to be said to maintain an account, that account must be his/hers.

It further opined that "*had [D1] gifted the funds to [D4] they would indeed have been beyond the plaintiffs' reach*". However, "[D1's] *subjective intention at the time when she transferred moneys into the Bank Accounts was not to make a gift of them but instead to retain beneficial interest in them*".

The High Court therefore appointed receivers over the Bank Accounts.

It is clear that the High Court was not concerned about whether the trust had been validly set up. Rather, the more pertinent question was whether the Bank Accounts had been properly settled into the trust (i.e., D1 had truly relinquished ownership) or whether D1 had in fact retained beneficial ownership over the Bank Accounts.

Learning Points on Wealth Planning

To be clear, the decision in *La Dolce Vita* does not sound a death knell for Singapore trusts. The decision is largely confined to the facts of the case.

There are, however, various learning points from the decision in *La Dolce Vita*:

- (a) **Proper settlement of assets into trusts:** It is a basic principle that, for a trust to be properly incepted, there must be a transfer of the trust asset to the trustees. In addition to the proper documentation for such transfers, the conduct of the settlor would be relevant for the purposes of determining whether the settlor has relinquished his/her ownership of the asset to the trust.
- (b) **Sensible amount of control:** While it is understandable and common for settlors to wish to retain some control over the assets, there has to be a balance as to the extent of control. A high level of control may detract from the intention to relinquish ownership and to transfer the asset to the trust. Where the settlor continues to have unfettered control over the assets which had been settled into the trust such that he/she may deal freely with them for his/her own benefit, questions then arise as to whether the settlor remains the beneficial owner of such assets.

- (c) **Proper documentation for the operation of the trusts:** Trustees should take care to ensure that there is proper documentation for the operation of the trusts. For instance, where a trust asset is operated or managed by a third party (such as D1 in the case), there should be documentation such as a deed of delegation or a power of attorney to explain the third party's control over a trust asset.
- (d) **Proper banking and corporate documentation:** The plaintiffs in *La Dolce Vita* relied on bank documentation which stated that D1 was the beneficial owner of the Bank Accounts. While the High Court did not appear to rely on such bank documentation to reach its finding, it would be prudent to ensure that all banking and corporate documentation accurately, or are updated to, reflect the beneficial ownership position.
- (e) **Common Reporting Standard (CRS) and Foreign Account Tax Compliance Act (FATCA) reporting:** It is also important to accurately reflect the beneficial ownership position in CRS and FATCA reporting. In *La Dolce Vita*, D1 and D4 sought to rely on the Certificates of Foreign Status of Beneficial Owner for United States Tax Withholding and Reporting (**W-8 BEN Forms**) which provided that D4 was the beneficial owner of the Bank Accounts. The High Court acknowledged that the W-8 BEN Forms were consistent with D1's case that D4 beneficially owned the Bank Accounts, but the forms were outweighed by the rest of the evidence which demonstrated that D1 did not intend to make a gift of the Bank Accounts.

Importance of Proper Wealth Planning

La Dolce Vita clearly illustrates the need for a proper understanding of a trust and its operation in order that its intended objectives can be achieved. The Singapore trust, as with other trusts, can be set up for asset protection and the Singapore courts have been known to uphold such trusts whether in the context of a creditor, spousal or other claims. It should however be borne in mind that the robustness and integrity of any structure trust may be undermined if the structure is not managed or operated in accordance with the set-up. Such was the case in *La Dolce Vita*.

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