Asset Protection

Trusts and the use of corporate appointors

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Overview

A debate is raging about the use of corporate appointors instead of individuals. This presentation examines the benefits of corporate appointors in its use in asset protection, including:

- Corporate appointors and decision-making – are they better where there is more than one sibling?
- What's wrong with individual appointors anyway?
- Corporate Appointors:
    - Shareholders and agreements between shareholders;
    - Directors – who and how they should operate;
- Reviewing the trust deed for corporate appointors – does the deed assume individuals?
- Asset protection risk in appointors:
    - Appointor rights – divisible property of a bankrupt?
    - Does the use of a corporate appointor avoid the alter ego problem?

1 The position of "appointor" generally

1.1 In the context of general trust law, the term "appointor" is used when describing a ***power*** to ***appoint income or capital*** of a trust. However, the term "appointor" has been used in recent times to describe a position common in modern trust deeds, being a person who holds a position which contains a power to appoint and remove a trustee of a trust estate.

1.2 It is the latter position that is dealt with in this paper – the power to appoint and remove trustees.

1.3 Indeed, the use of the term "appointor" may cause confusion to trusts and estate practitioners. As a result, it is essential to determine who holds what position, and what powers that position confers on the holder.

1.4 The power of appointment and removal of a trustee may be defined in a particular trust deed in one of a number of ways, for example (and by no means limited), an "appointor", a "protector" or a "guardian".

1.5 As well as the power to appoint or remove trustees, such a position may also give the holder other "reserve powers". For example, a "guardian" named in a trust estate may need to be consulted before any terms of a trust deed may be varied, or a "guardian" may need to be consulted (and may have veto power) before income and / or capital is distributed to (say) a minor beneficiary.

1.6 That is, the position of "appointor" is provided for in the constituent documents of a trust estate. The person who holds such a power has the opportunity (in exercising any powers provided for) to participate in the administration of a trust (usually in a limited context.

1.7 The essential elements of a (non-charitable) trust relationship require the three "certainties" to be established, being that there is a trustee, beneficiary / beneficiaries (assuming that the trust has not been established for charitable purposes), trust property. The trustees rights / obligations attach to the trust property with respect to the beneficiaries.

1.8 Importantly, the position of "appointor" is not one which is required in the context of general trust law principles. Rather, the position of appointor is a creation of any particular trust deed / constituent documents being considered.

1.9 The position of "appointor" is recognised in legislation. For example, section 6 of the *Trustee Act 1925* (NSW) (***"the Trustee Act"***) provides that a trustee may be appointed pursuant to that section – but always subject to the terms of the relevant trust instrument. That is, if a trust instrument provides for a particular method of appointing trustees, then notwithstanding the methods of appointment provided for in section 6 of the *Trustee Act*, the method provided for in the trust instrument must be complied with.

1.10 *Holden* in *Trust Protectors (**"Holden"**)*, provides a working definition of the term "protector" (that is an "appointor") at [1.6], when it is observed that:

> "*Protector" means a person occupying an office created by a trust instrument distinct from that of a trustee, whether or not referred to as a protector, upon which has been conferred power(s) or right(s) enabling the office-holder to participate in the administration of the trust or the disposition of trust assets.*

1.11 Underhill & Hayton in *Law of Trusts and Trustees* (18th Ed) observes at paragraph 1.78 that:

> *A trust instrument sometimes provides for a "protector" in its definition clause and goes on to confer some powers or rights on such protector to enable the protector to play a role in the life of the trust. The protector can then be regarded as holding an office, just as a trustee holds an office. The same office can be filled by a "committee" or "board" or "guardian" or company which could be independent of, or be controlled by, the settlor. The rights and powers of a protector that create the nature of his role will depend upon the terms of the trust instrument. A protector may have negative powers, as where his consent is required before the trustees carry out certain transactions, or have positive overriding powers enabling him to direct the trustees in certain manners or to appoint or remove trustees. Because the protector merely has powers vested in him and not trust property, he is not a trustee. Exceptionally, if the trusteeship is a sham so that the trustees are wholly nominees holding property in trust for the protector bound to do his bidding for the benefit of the beneficiaries (or, perhaps, of himself) then the protector will be regarded as a*

> *trustee of his equitable interest for the beneficiaries (or, in an extreme case, where the settlor is a protector, as sole beneficial owner thereof).*

1.12 That is, in order for there to be an "appointor" / "protector", then the following elements need to be satisfied:

1.12.1 there being a **person**;

1.12.2 occupying an office;

1.12.3 created by a trust instrument;

1.12.4 distinct from that of a trustee;

1.12.5 whether or not referred to as a protector / appointor (etc);

1.12.6 upon which has been conferred power(s) or right(s);

1.12.7 enabling the office-holder to participate in the administration of the trust or the disposition of trust assets.

1.13 *Holden* observes that the position of a "corporate" protector / appointor is distinct from that of a person who is (say) a Director of such a corporate entity. At [4.54], *Holden* observes that:

> *A corporate protector is an artificial entity, and as such can only exercise its powers through the actions of individuals. However, because a corporate protector has a legal personality distinct from its individual shareholders, those shareholders are not able to exercise the powers of a protector in their own right. Instead, the right of an individual or group of individuals to exercise the power of the protector will depend on the constitution of the protector, the terms of the trust instrument, and an application of the relevant rules of the company and agency law.*

1.14 That is, in determining both the scope of the position of appointor, and whether or not that power has been validly exercised, regard needs to be given to both the trust deed establishing that power, and any constituent documents which govern the internal administration of the appointor / protector.

2 Appointors as "fiduciaries"

2.1 Trustees are clearly fiduciaries in that they act for, or in the interests of their *beneficiaries*. A trustees powers are given to them in order to enable them to better carry out their duties, and to be exercised for the benefit of others.

2.2 So too are 'appointors' fiduciaries. They are granted powers within a trust's constituent documents which give them powers concerning the administration of a trust estate. As a result, an appointor is charged with pursuing the powers revered in them for the ultimate purpose of taking part in the administration of a trust for the best interests of the ***beneficiaries*** of the trust.

2.3 Given that an appointor is granted reserve powers for the purpose of the administration of a trust estate, and the beneficiaries of the trust are dependent on the appointor exercising those powers properly, an appointor has certain fiduciary duties.

2.4 The general scope of a "fiduciary' relationship is therefore important to defined.

2.5 Mason J said in *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 96-7:

> *The accepted fiduciary relationships are sometimes referred to as relationships of trust and confidence or confidential relations..., viz., trustee and beneficiary, agent and principal, solicitor and client, employee and employer, director and company, and partners. The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions 'for', 'on behalf of', and 'in the interests of' signify that the fiduciary acts in a 'representative' character in exercise of his responsibility, to adopt an expression used by the Court of Appeal.*

2.6 It is partly because of fiduciary's exercise of the power or discretion can adversely affect the interests of the person to whom the duty is owed and because the latter is

a the mercy of the former that the fiduciary comes under a duty to exercise his power of discretion in the interests of the person to whom it is owed.

2.7 Fletcher Moulton LJ in *Re Coomber* [1911] 1 Ch 723 at 728 observes that:

> *Fiduciary relations are of many different types. They extend from their relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another where one is wholly in the hands of the other because of his infinite trust in him.*

2.8 Asquith LJ in *Reading v R* [1949] 2 KB 232 at 236 observed that:

> *A consideration of authority has suggested that for the present purpose a "fiduciary relation" exists (a) whenever the plaintiff and trusts to the defendant property, including the intangible property as, for instance, confidential information, and relies on the defendant to deal with such property for the benefit of the plaintiff or for the purposes authorised by him, and otherwise... and (b) whenever the plaintiff entrusts the defendant a job to be performed, for instance, negotiation of a contract on his behalf or for his benefit, and relies on the defendant to procure for the plaintiff the best terms available...*

2.9 As an appointor is entrusted with powers, which are to be exercised consistent with the purposes of a trust, an appointor is a fiduciary.

2.10 Ford & Lee (Principles of Law of Trusts), 3rd Ed, 1996 at [22-40] observes that:

> *A fiduciary relationship exists where:*
>
> *(a) one person, the fiduciary, has undertaken to act in the interests of another person, the principal, or in the interests of the fiduciary and another person;*
>
> *(b) as part of the arrangement between the fiduciary and the principal, the fiduciary has a power or a discretion capable of being used to affect the interests of the principal in a legal or practical sense;*
>
> *(c) the principal is vulnerable to abuse by the fiduciary or of his or her position; and*

> *(d) the principal has not agreed, as a person of full capacity who is fully informed, to allow the fiduciary to use a power to a discretion otherwise in the principal's interests.*

2.11 It should be noted that the position of fiduciaries, and their duties and obligations which they owe are not always the same in all circumstances. Lord Browne-Wilkinson in *Henderson v Merrett Syndicates* [1955] 2 AC 145 at 206 observed that:

> *... the phrase (fiduciary duties) is a dangerous one, giving rise to a mistaken assumption that all fiduciaries owe the same duties in all circumstances. This is not the case. Although so far as I am aware, every fiduciary is under a duty not to make a profit from his position (unless such profit is authorised) the fiduciary duties owed, for example, by an express trustee are not the same as those owed by an agent.*

2.12 That is, the particular fiduciary duties owed by an "appointor" will depend on the scope of the powers conferred on the appointor in the trust deed. For example, the "protector" of a trust that has power to veto decision making of a trustee may owe a higher fiduciary duty to a "protector" that is merely consulted before the amendment of a trust's constituent documents.

2.13 <u>*Underhill and Hayton*</u> at [1.79] discussed the fiduciary nature of a power of "protector" / appointor in the context of trust estates – and why such powers are reserved:

> *The particular powers conferred upon a protector are normally fiduciary powers intended to enable him to play a fiduciary role (unless expressly or necessarily implied otherwise in the trust instrument or from the circumstances, as where the settlor or beneficiary is a protector with power to protect his own selfish interests).* ***The fiduciary powers are to enable the protector to safeguard the trust from various hazards, whether relating to the trustee*** *(eg exorbitant charges, inadequate investment performance, unsatisfactory exercise of distributive functions vis-a-vis discretionary beneficiaries)* ***or to beneficiaries*** *(eg disputing what the trustee might do on their own if not protected by having the consent of a reliable trust protector)* ***or to the trust arrangements*** *(eg tax or other problems relating to the trust jurisdiction or to a corporate trustee's change of residence or ownership or*

> *opening of offices in a jurisdiction where pressure could be exerted).*
> [emphasis added]

2.14 <u>*Underhill and Hayton*</u> at [1.83] discusses the personal nature of a "guardian" / "protector" of a trust estate:

> *However, normally where the settlor or a beneficiary is a protector* ***the powers of such protector that affect the investment and managerial role of the trustee will be presumed fiduciary so far as concerns the exercise of a power of removal and appointment of trustees*** *in the exercise of a power to direct investments to be made by the trustees, because those powers will be presumed to be exercisable to promote the interest of the beneficiaries as a whole. In respect of the trustees' role as discretionary distributors of income or capital to beneficiaries,* ***it seems that there is good scope for argument that a protector's power to withhold consent to proposed distributions or to direct distributions is a personal power, especially in the case with a settlor who is a protector****.* [emphasis added]

2.15 That is, an "appointor" is a fiduciary, and typically has administration and management powers with respect to a trust estate. The powers reserved in such a position is typically personal in nature.

3 Duties to exercise a fiduciary discretion

3.1 A valid exercise of the discretion of a power by an appointor would require that the appointor:

3.1.1 acts in good faith (*Karger v Paul* [1984] VR 161 at 164);

3.1.2 takes into account relevant matters (*Pitt v Holt* [2012] Ch 132 at [127]); and

3.1.3 unless the constituent documents provide explicitly or by implication otherwise, acts impartially as between the objects of the power .

3.2 The above are the general principles with respect to the rules about fiduciary powers, and whether they should be so exercised. When the above three principles are considered, then the power may be exercised in the manner in question.

3.3 This, however, may be distinguished with the doctrine of excessive / fraudulent exercise of a power – where there may be a power to exercise that power, but the exercising of the power is done for an improper purpose (see **[xx]** below).

4 Differentiating between "trusts" and "powers"

3.4 As the position of appointor is a "power" it is essential to explain what a "power" in fact is. There is a fundamental distinction between a "trust" and "power". Specifically:

3.4.1 a trust imposes an obligation, or creates a duty. A trust is imperative;

3.4.2 a power confers an option; and

3.4.3 a power is discretionary;

3.5 The Court will compel the execution of a trust, but it cannot compel the execution of a power (*Re Gulbenkian's Settlements* [1970] AC 508 at 518 and 525, *McPhail v Doulton* [1971] AC 424 at 440-1, 444 and 449*, Marquis of Camden v Murray* (1880) 16 Ch D 161).

3.6 As a result, in the event that there is a power of appointing and removing a trustee, a Court will not compel the execution of that power. That does not mean that a Court will not change a trustee. For example, in New South Wales – if there is good enough reason to – a Court will remove a trustee pursuant to section 70 of the *Trustee Act*.

3.7 *Thomas on Powers* at [1.40] observes that:

> *However, although the two concepts are fundamentally different, in many circumstances the dividing line is often indistinct. Powers may be, and often are, conferred on trustee's qua trustees. In such cases, basic distinction between powers and trusts hold true, and the trustee has a discretion which, as a general rule, he is not compelled to exercise. However the fact that the power has been conferred on a trustee distinguishes it from a power conferred on an ordinary individual (a non-fiduciary): it has been conferred in order to enable a trustee the better to carry out the trusts or obligations imposed on him. The trustee is therefore subject to certain duties in relation to such a power – in particular, to consider its exercise from time to time and to make appropriate efforts to inquire into and ascertain the range and composition of*

the class of objects of the power – to which an ordinary individual (a non-fiduciary donee) is not subject.

3.8 That is, the donee of a power of appointment has exactly that – a power. As a result, and subject to the terms of the trust deed and equitable principles (such as the doctrine of fraud on the power), the donee of a power of appointment has a discretion as to the use of a power of appointment as it thinks / deems fit.

5 General powers and special powers

5.1 Further, there are different types of "powers". Powers of appointment are most important and the most common dispositive powers. They are usually sub-classified as general powers, special powers or hybrid (or intermediate) powers.

5.2 A power will be regarded as a "general power" only if it is equivalent to absolute ownership by the donee of the property which is the subject of the power (*Re Earl of Coventry's Indentures* [1974] Ch 77 at 93 per Walton J*).* That is, if a person who has the power to appoint capital of a trust estate at anyone (including itself), then that power will be considered a "general power".

5.3 However, if the donee can appoint to himself, such as where he is a member of a limited class of objects (see *Re Penrose* [1933] Ch 793), or where he may appoint anyone except another person (the donee not being the other person) (*Rous v Jackson* (1885) 29 Ch D 521), then the power may be regarded as a general power.

5.4 A special power of appointment is the opposite of a general power of appointment – it does not allow the donee to exercise the power in favour of itself.

5.5 An intermediate, or hybrid, power to appoint to anyone in the world except the donee himself (see *Re Park* [1932] 1 Ch 580) or to anyone in the world with the consent of another (who could be, for example, the trustee of a settlement, or a parent of a donee) (*Re Triffitt's Settlement* [1958] Ch 852 at 860 and 861), will all be regarded as special powers.

6 Powers and property

6.1 It is important to distinguish between a "power" and "property". As Fry LJ observed in *Ex p* Gilchrist, (1886) 17 QB D 521 at 531-2:

No two ideas can well be more distinct the one from the other than those of "property" and "power". A "power" is an individual personal capacity of the donee of the power to do something. That it may result in property becoming vested in him is immaterial; the general nature of the power does not make it property. The power of a person to appoint an estate to himself is, in my judgment, no more his "property" than the power to write a book or to sing a song. The exercise of any one of those three powers may result in property, but in no sense which the law recognises are they "property". In one sense no doubt they may be called the "property" of the person in whom they are vested, because every special capacity of a person may be said to be property; but they are not "property" within the meaning of that word as used in law. Not only in law but in equity the distinction between "power" and "property" is perfectly familiar, and I am almost ashamed to deal with such an elementary proposition. We all know that, when the Statute of Uses enabled persons to declare uses, conveyancers availed themselves of it, and were in the habit of reserving powers to alter the uses declared by conveyances or settlements of land. But powers remained just as they were before the Act – they were not property, they were merely an individual capacity to do something.

Again, when the equitable Doctrine of Trusts was reconstituted after the passing of the Statute of Uses, the Courts of Equity recognised the capacity of certain persons to declare trusts by deed or will, and thus to mould or modify the existing trusts of property. This capacity, however, was only a power to do something; it might result in property, but it was not property at all. These are powers of the same kind as that with which we are now dealing – powers to modify either existing legal uses or existing equitable trusts. I repeat that such powers are not more property than a power to do any act which an individual may do.

That being so, have the Courts ever said that such powers are "property"? If they have, it would be our duty to follow their decision. But no such imputation can with propriety be cast on the Courts of Law or Equity; they have always recognised its distinction between "powers" and "property".

6.2 At [1.05] in *Thomas on Powers*, it was observed that the distinction is also crucial in the context of insolvency because, in the absence of specific statutory provisions to

the contrary, a "power" over assets does not itself constitute "property" and those assets cannot, therefore, be said to be part of the insolvent's estate.

6.3 Indeed, it was observed by Fry LJ in *Re Armstrong* (1886) 17 QB D 521 at 531 that:

> *A "power" is an individual personal capacity of the donee of the power to do something.*

6.4 The High Court in *Hudson & Gray* (1927) 39 CLR 473 at 515 confirmed that a power of appointment (with respect to capital) is not "property".

7 Does the trust deed allow for corporate appointors?

7.1 There is no prima facie limitation on a company holding a position of "appointor" / "protector" / "guardian" (etc) of a trust estate. *Hubbar*d at [3.23] – [3.26] observes that:

> *Partly no doubt, on grounds of confidentiality, corporations are frequently appointed to act as protector. These may be corporations specially accredited to be the protector of a particular settlement or companies offering to act as protector of unrelated settlements and a professional trust service. It appears that a corporate protector could be validly appointed in all the jurisdictions considered in this work.*

7.2 *Hubbard* at [3.26] further observes that:

> *The appointment of a corporate protector can allow a number of individuals to have a say in the protector's decision-making by acting as its directors and shareholders and might conveniently be resorted to in a situation where the appointment of co-proctors is desired but the trust instrument forbids simultaneous appointments. There is, of course, an in-built possibility in such arrangements disputes arising between the directors and shareholders or inter se. If a corporate protector is appointed, provision also needs to be made for the various ways in which such a protector may temporarily or permanently cease to be able to act.*

7.3 It is essential to review the terms of the relevant trust deed so as to determine:

7.3.1 who holds that position; and

7.3.2 whether that position can change / be moved.

7.4 In the event that an individual person is appointed, and there is no ability to change the person that holds that position, then the better view is that that position is intended (by the settlor of the trust) to be held by the person who is named in the trust deed.

7.5 When that person dies, so too will the position of appointor die with that person.

7.6 However, if the trust deed provides that the position of appointor may pass, and if there is no term of construction or provision of limitation within the trust deed that specifically provides that the position must be held by a natural person, then the better view is that the position may be held by any (legal) person – such as a company.

7.7 This, however, will essentially be a matter of construction of the relevant trust instrument.

8 Corporate appointors

8.1 The advantage of a corporate appointor is the perpetual nature of companies. That is, a company may survive individuals. As a result, the uncertainties regarding individuals do not *prima facie* arise with respect to corporate appointors.

8.2 However, those issues still do arise in the context of corporate appointors. For example, in the context of a corporate appointor with a sole director / shareholder that loses capacity. As a Director of a company cannot delegate its powers pursuant to the director's (personal) power of attorney, the incapacity of a sole director / sole shareholder of a corporate appointor is problematic.

8.3 Further, while a company ay grant a power of attorney to another legal entity (as opposed to the Directors of such a company doing it, which is not effective), it is submitted that just as Directors cannot appoint donate the powers / obligations of a Directorship, it is also questionable whether a corporate appointor can delegate the reserve powers vested in it pursuant to a trust deed.

8.4 However, a corporate appointor's constituent documents may provide for a the movement of shareholders / directors of a corporate appointor. For example, upon a shareholder of a corporate attorney becoming legally disabled, then the constituent

documents for the corporate appointor may provide for the automatic removal of that disabled shareholder and a substitution of a new (pre-determined) person.

8.5 *Underhill and Hayton* at [1.84] discusses issues with respect to succession of an appointor / protector of a trust:

> *Rather than rely on default law, a settlor should consider (with the benefit of professional advice) what mechanism should be employed for succession of the protectorship (even though it appears that the Court has inherent jurisdiction to appoint someone to be a protector, where it is clear that such an office is crucial to the operation of the trust and, equally, has inherent jurisdiction to remove or suspend a protector in breach of a protectorship duties or mentally incapacitated) and what particular powers, duties, rights and exemptions he wishes to confer on his protector. It is up to the settlor alone to decide how to deal with the settlor's property by transferring it to the trustees for the benefit of the beneficiaries, who will not look a gift-horse in the mouth and so must take the benefit with associated burdens arising from the existence of fiduciary or personal powers – unless they choose to disclaim their interest.*

8.6 Further, *Underhill and Hayton* at [1.92] observe that:

> *Ultimately, one must be aware that the intentions of the settlor govern the position and that all settlors are different. It is up to the draftsperson (or, in default, the Court) to make clear what was authorised by the power so long as giving effect to the purpose for which the settlor conferred the powers; what was the extent of the duties, if any, intended to apply to the exercise of, or the consideration of exercising or not, particular powers of the power-holder; what rights were intended to be conferred on the power-holder to enable him to perform his duties; and what were the obligations of the trustee in respect of exercises of powers by the power-holder.*

8.7 One way of dealing with such issues is to draft particular terms into the corporate appointors constituent documents, or by having a shareholders agreement.

8.8 However, an issues that needs to be considered is the enforcement of such agreements. For example, if a shareholder of a corporate appointor breaches a shareholders agreement, the only parties that may have standing are the other

parties to such an agreement (e.g. the other shareholders) and (prima facie) not the beneficiaries of the trust estate.

8.9 That in itself brings up complications. Whilst a shareholders agreement will govern the relationship as between the shareholders of the corporate appointors, the corporate appointor itself, being the holder of a fiduciary position, will be required to exercise its powers for the purposes constituent with the terms of the trust – and always in the best interests of the beneficiaries.

8.10 Further, an agreement pursuant to which (for example) the shareholders of a corporate appointor agrees (i.e. fetters its discretions) may be considered improper in the eyes of equity. It may be that a equity may consider that if a settlor of a trust estate intended that certain powers be fettered, the settlor would have intended for that in the trust instrument.

8.11 The establishment of a shareholders agreement, which outlines the respective duties, rights and obligations may open the corporate appointor up for a claim that it is not acting in the best interests of the beneficiaries.

8.12 Further, there is a question as to whether the fettering of a corporate appointor's decision making powers (and indeed, in the event that there are reasons for decisions which may therefore be challenged) may be challenged as the best interest of the trust estate are not being pursued.

8.13 That is, there is a nature tension as between a standard "corporate governance" method that may be utilised in (for example) a shareholders agreement approach, as compared to general fiduciary / equitable powers which a (corporate) appointor may possess in the context of a trust estate.

Further, there are difficulties with having one (corporate) appointor when dealing with extended families, where different parts of the family wish to control particular trust assets.

9 Unauthorised delegation of a power

9.1 As discussed above, the assumption – pursuant to the maxim ***delegatus non potest delegare*** – it is assumed that a settlor did not intend that a donee of a power exercise that power personally.

9.2 Unless there is express authorisation, a fiduciary (such as an appointor) cannot delegate its functions. This prohibition extends to the delegation to an agent – where there is a power to appoint an agent.

9.3 It should also be noted that co-appointors with joint powers cannot delegate the exercise of their powers to the other (joint) appointors (Niak v Macdonald [2001] NZCA 123 at [17]).

9.4 If a fiduciary wrongfully delegates its powers, then any purported exercise of the powers will be void. Further, the appointor will be accountable for any irreparable loss caused by the wrongful decision (Re Boulton's Settlement Trust [1928] Ch 703 at 709).

9.5 However, an appointor may consult (for example beneficiaries, trustees, advisers, etc) before personally exercising any power that it may have. It was observed in Fraser v Murdoch (1881) 6 App Cas 855 at 867 per Lord Blackburn that:

… they may inquire as to what are the wishes and opinions of others, especially those who are interested, before they finally determine what, in the exercise of their own discretion, they think expedient…

9.6 However, whether delegation is permitted is always a matter of construction of the relevant constituent documents. As a result, in the event that a delegation (or indeed an alternative decision making mechanism) is contemplated by the donor, the better approach is to have that decision making process imbedded in the trust instrument (which itself may not be a delegation, but the appointment of a new donee in certain circumstances).

10 Multiple appointors?

10.1 However, it is considered that a better approach may be to have multiple appointors that have powers with respect to different (sub) trusts. For example, say there is a trust estate established under one trust deed. Assume that the relevant trust deed allows for multiples appointors that can exercise their powers with respect to particular items of trust property and with respect to particular trustees.

10.2 If Child A controls Trustee A, and Trustee A holds Property A, Child A may hold the power of appointor with respect to Trustee A. That is, Child A may appoint a new trustee with respect to Property A and / or remove Trustee A.

10.3 If Child B controls Trustee B, and Trustee B holds Property B, Child B may hold the power of appointor with respect to Trustee B. That is, Child B may appoint a new trustee with respect to Property B and / or remove Trustee B.

10.4 However, Child A may not appoint a new trustee with respect to Property B, and does not have the power to remove Trustee B, and vice versa with respect to Child B.

10.5 In the event that the trust instrument does not allow for the separate appointors with respect to separate items of trust properties and trustees, then regard should be given to appointing corporate trustees (controlled by particular parts of the family – for example, two corporate trustees – one controlled by Child A and the other by Child B), with the succession planning /movement of control of the trust properties dictated by the movement of the shares within the respective corporate trustees.

11 Decision making process – delegation of power?

11.1 Regard needs to be given to the decision making process within the trust instrument. For example, does the trust instrument:

11.1.1 require unanimous consent before a power can be exercised;

11.1.2 require majority approval before a power can be exercised;

11.1.3 have a deadlock mechanism; and

11.1.4 deal with disputes.

11.2 All of the above issues should be provided for with respect to any decision making process within a trust instrument.

11.3 Regard also needs to be given to whether the donee of a power has the ability to delegate its decision-making powers. Generally speaking, as (for example) the position of trustee is personal – so too is the decision making process by a trustee. The Trustee Act (for example) allows the delegation of a trustee's duties / powers in limited circumstances.

11.4 On the basis that the power of appointment is a fiduciary position, one would expect that equities reluctance to allow the donee of such a power to be able to delegate.

11.5 As a result, whenever tooking o (for example) enter into decision making arrangements, one needs to query whether it is an inappropriate delegation of a donee's power.

11.6 However, if a trust instrument allows for a delegation, or better still, for alternative holders of the power – then I consider that equity would be less reluctant to allow for such decision making-processes to occur.

12 Scope of the protector / appointor corporate constitution

12.1 At common law, the ability of a company to act as a fiduciary (such as an appointor) was restricted by the scope of its constitution. If the exercise of the power was outside the scope of the company's objects, as defined in the company's constituent documents, then it would be ultra vires the company, and void.

12.2 However, the doctrine of ultra vires has been abolished in Australia pursuant to subsection 124(1) of the *Corporations Act 2001 (Cth).* Subsection 124(1) of the *Corporations Act* provides that *"a company has the legal capacity and powers of an individual both in and outside of this jurisdiction...".*

12.3 *Holden* at [4.56] observes that:

> *The waning influence of the ultra vires doctrine is welcome. It would now be unusual for the exercise of a corporate protector's power to be criticised as ultra vires the company's objects. However, especially in those jurisdictions where the doctrine has not been abolished in its entirety, it is sensible for a practitioner drafting the constitution of a corporate protector to include widely drafted objects, ensuring that the protector is empowered to exercise all the powers conferred on it by the trust instrument.*

12.4 In particular, it is prudent to ensure that the decision making processes contemplated is contained in both the constituent documents of the trust, and the corporate appointor.

13 Individuals holding the power to appoint

13.1 An issue to consider when having individuals holding powers of appointment in a replacement of trustees, is that on the basis that such a power is personal, in the event that there is no reserve power to replace such persons then there cannot be a replacement either by the person who holds the power, using the power to amend within the Trust Deed. The decision of Douglas J in *Georgina Venessa and Peter George Jenkins v Joyce Elizabeth Ellett* [2007] QSC 154 demonstrates such an issue. At [14] Douglas J observes that:

> *The essential issue seems to me to be whether the power given to the trustee to vary the trusts declared can extend to the removal of the Principal, especially where it is the Principal who alone, in the Trust Deed as originally drafted, has the power to appoint and remove the trustee.*

13.2 In considering the issue, Douglas J considered the power to amend as contained in the Trust Deed. It was observed by Douglas J at [18] that the New South Wales Court of Appeal authority in *Kearns v Hill* (1990) 21 NSWLR 107 probably did not extend to the power to amend so as to ensure desirable flexibility in managing of the trust fund. Douglas J at [18] further observed that:

> *Clause 12's purpose of allowing the removal of a trustee is also inconsistent with the possibility that the trustee could negate the operation of the power by amending the schedule to the deed to change the identity of the* Principal.

13.3 That is, Douglas J considered that any power to amend the trust deed may be inconsistent with the reserve power of the trustee to amend the deed. Douglas J at [18] further observed that:

> *Nor is it the case that the structure of the deed requires some continuing identity between the Principal and the trustee or trustees named under it so that there is a build-in safeguard against the Principal's position being subverted.*

13.4 Douglas J at [19] observed that:

> The Principal's ability to remove and replace a trustee seems to me to be one of the fundamental features of the structure of this deed, one setting

> up a family discretionary trust. The maintenance of that power is obviously designed to ensure that the control of the trust will remain with the significant intended beneficiary, here George Jenkins, and after him his spouse or his executor, as follows from the definition of "The Principal" in the Schedule. To allow the power in Clause 12 to be subverted by the trustee it was designed to supervise purporting to use Clause 11's powers to amend the deed rather than the trust declared by the trust deed is not, in my view, permissible. It is akin to destroying the substratum of the Deed.

13.5 That is, Douglas J in *Jenkins v Ellett* [2007] QSC 154 considered that the power of amendment as contained in the relevant trust deed could not be used to subvert the settlor's appointed principal. Such a use of the power to amend would have been a subversion of the settlor's intent.

14 The power to appoint and replace trustees – when will the "alter ego principle" apply?

14.1 The alter ego principle may apply in the context of:

14.1.1 Asset protection generally

14.1.2 Family law

14.1.3 Family provision

14.2 The alter ego relationship between a trustee and the controller between a corporate trustee, and the controller of the corporate trustee was described by Danckwerts J in *Re The French Protestant Hospital* [1951] 1 Ch 567 at 570:

> *The property of the charity is, of course, vested in and held by the corporation. It is a perpetual person which exists, however, only according to the rules of law, and it is not an actual person capable of acting on its own motion in any way whatever. It seems to me that in a case of this kind, the Court is bound to look at the real situation which exists in fact. It is obvious that the corporation is completely controlled under the provisions of the charter by the governor, deputy governor and directors, and that those are the persons who in fact control the corporation and decide what shall be done.*

(i) Asset protection and trusts: The current state of play following the fall out from the Richstar's case

14.3 The *Richstar Enterprises Case*[1] concerned the collapse of the Westpoint Group. The Australian Securities and Investment Commission ('**ASIC**') had already obtained orders that receivers be appointed to the property of a number of Westpoint directors and companies controlled by them. The point of these actions was to preserve property of the individuals and companies to prevent it being dissipated pending the ASIC enquiries.

14.4 The question before the Court was whether a receiver could be appointed to property held in trust. The relevant provision was section 1323 of the Corporations Act. This section allowed the Court on application by ASIC or an aggrieved person to appoint inter alia a receiver to property of a person, who is subject to an investigation being carried out under the ASIC Act or the Corporations Act. 'Property' is defined as meaning:

> *'any legal or equitable estate or interest (whether vested or contingent) in real or personal property of any description and includes a thing in action'.*[2]

14.5 The Court was satisfied that it could make such an order where the property was held as trustee by the persons being investigated and in relation to superannuation funds where the individuals were members. In each instance it was considered that the individuals subject of investigation had an 'interest' (legal or equitable).

14.6 The 'interest' of the individuals in discretionary trusts posed a more difficult question because the objects have nothing more than a right to be considered by the trustee as a potential beneficiary of the trustee's largesse as to income or capital.

14.7 French J undertook a detailed (but in the writer's view not exhaustive) review of the case law on the powers of trustees and their controllers. The two most telling observations made by the Court were these:

> *'in the ordinary case the beneficiary of a discretionary trust other than perhaps the sole beneficiary of an exhaustive trust, does not have an*

[1] *Australian Securities and Investments Commission: In the matter of Richstar Enterprises Pty Ltd (ACN 099 071 968) v. Carey* (No 6) [2006] FCA 814.

[2] Section 9 Corporations Act.

> *equitable interest in the trust income or property which would fall within even the most generous definition of 'property' in s9 of the Act and be amenable to control by receivers under s.1323. I distinguish the 'ordinary case' from the case in which the beneficiary effectively controls the trustee's power of selection. Then there is something which is akin to a proprietary interest in the beneficiary.'3*

And:

> *'I am inclined to think that a beneficiary in such a case … at arm's length from the trustee, does not have a 'contingent interest' but rather an expectancy or mere possibility of a distribution … On the other hand, where a discretionary trust is controlled by a trustee who is in truth the alter ego of a beneficiary, then at the very least a contingent interest may be identified because, in the words of Nourse J 'it is as good as certain that the beneficiary will receive the benefits of distributions either of income or capital or both'.4*

14.8 In a wealth preservation and tax planning context it might well be said that 'it is as good as certain that the beneficiary will not receive the benefits of distributions …'

14.9 The Court Concluded that a Mr Beck who was the sole director and secretary of a corporate trustee of a discretionary trust had an interest in property of the trust (it did not matter that his wife was the Appointor):

> *'Mr Beck is a beneficiary of the Agribusiness Annuity Trust of which Eagle Bluff Nominees Pty Ltd is a trustee. He is the director and secretary of that trustee company. He is the original appointor under the trust and his wife, Anne Beck, the current appointor. The trustee has a wide discretion including the power to prefer one or the other beneficiary to the total exclusion of any other beneficiary. Mr Beck would appear, through his trustee company, to have effective control of the assets of the trust. At the very least he has a contingent interest in the sense used earlier. His interest would appear to amount to effective ownership of the trust property. The*

[3] *Richstar* at para. 25.

[4] *Richstar* at para. 36.

property of that trust is, in my opinion, amenable to control by the receivers and s.1323'.5

14.10 Does this decision sound the death knell of discretionary trusts as wealth preservation mechanisms?

14.11 In this writer's view – no and for two reasons. The first, technical differences between the legislation under consideration in *Richstar* and the Bankruptcy Act. The second reason, a practical one, lack of assured funds on the part of trustees in bankruptcy.

14.12 The property of a bankrupt at the time the person became a bankrupt passes to the trustee in bankruptcy.[6] However, property held on trust for another is specifically excluded.[7] In addition, the power of appointment of the trustee is not property which passes to the trustee in bankruptcy.[8]

14.13 Division 4A of the Bankruptcy Act specifically contemplates and makes provision for the circumstances where a bankrupt controls a trust.[9] In these circumstances it can be vigorously argued that the Bankruptcy Act recognises that the interest of the bankrupt in a discretionary trust is not attainable by a trustee in bankruptcy. For a somewhat contradictory view see the paper prepared by Justice Branson for the ITSA Bi-Annual Congress 2006.10

14.14 In any event, if the contingent interest that French J has identified passed to the trustee in bankruptcy – what is the true practical effect. The right as a beneficiary is to be considered and no more. That is not an attractive outcome for a trustee in bankruptcy.

14.15 The more practical aspect is that a trustee in bankruptcy personally takes on the risk of litigation. If he or she fails then there is a personal loss. This is a significant deterrent to pursuing cases which have a significant risk of failure.

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[5] (2006) FCA814 at para. 41.

[6] Subsection 116(1) Bankruptcy Act.

[7] Paragraph 116(2)(a) Bankruptcy Act.

[8] *Re Burton; ex parte Wily v. Burton* (1994) 126 ALR 557.

[9] Division 4A relates to entities controlled by the bankrupt and 'entity' includes a trust.

[10] 'The Bankrupt, His or Her Spouse and the Family Trust: A consideration of Part VI Division 4A of the Bankruptcy Act.'

14.16 It is recognized that a trustee in bankruptcy may have access to litigation funding. However, a litigation funder would take a very considered view of the implications of *Richstar* (after having first identified significant assets which might be accessed).

14.17 In the writer's view the decision is not one which will cause the trust edifice to crumble. However, it may in truly risky environments be wise take French J's structuring message into account. Actions which might be taken are:

14.17.1 the risk exposed person might be excluded as a direct object of the trust. An indirect benefit might be obtained through another discretionary trust brought into the objects clause through the spouse or children;

14.17.2 the risk exposed person might be one only of a number of directors of the corporate trustee and the decisions need genuinely to be made jointly;

14.17.3 the risk exposed person would not be the Appointor or, if an Appointor, is one of a number of such persons and does not have a casting vote. An Appointor stripping clause may also be appropriate.

14.18 Careful attention to the trust deed may avoid the implications of the decision in *Richstar.*

(ii) The Principles to Apply In Family Court Property Matters

Family Law Act

14.19 Pursuant to section 79 of the ***Family Law Act*** the Family Court has the power to alter the property interest of the parties in their property (referrable to s4(1)(ca)). These interests may include business assets, property inherited by one of the parties, separate investments and pre-maritally owned property: ***Carter and Carter*** (1981) FLC 91-061.

14.20 Section 79(1)(a) of the ***Family Law Act*** provides:

> *"In property settlement proceedings, the court may make such order as it considers appropriate in the case of proceedings with respect to the*

> *property of the parties to the marriage or either of them – altering the interests of the parties to the marriage in the property."*

14.21 By virtue of s 4(2) of the ***Family Law Act***, the phrase *"the parties to the marriage"* in s 79(1) includes a reference to a person who was a party to a marriage which has been terminated by a divorce at a time before the court makes orders under s 79(1): See ***Kennon v Spry*** (2008) 238 CLR 366; 251 ALR 257; 83 ALJR 145; 40 Fam LR 1; [2008] FLC 93-388; [2008] HCA 56 at [94] per Gummow and Hayne JJ.

14.22 The word "*property*" as it is used in s 79 is subject to s 4(1) of the **Family Law Act** which provides:

> *" property, in relation to the parties to a marriage or either of them – means property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion."*

14.23 The word "*property*" as it appears in s 79 of the Family Law Act has been construed by reference to its ancestry in matrimonial causes statutes and has been given a wide meaning: See **Kennon v Spry** at [54] per French CJ.

The process to be followed in s79 proceedings

14.24 The Family court typically takes "a four step approach" when dealing property division11. The steps are:

14.24.1 determine the pool of assets and liabilities;

14.24.2 evaluate each of the parties' financial and non-financial contributions during the marriage and post separation;

14.24.3 determine if that contribution figure requires adjustment in light of the relevant s.75(2) factors;

14.24.4 consider whether the proposed result is just and equitable in all of the circumstances having regard to the actual result in dollar terms.

[11] For example see ***Pastrikos v Pastrikos*** (1980) FLC 90-897, 6 Fam LR 497; ***Lee Steere v Lee Steere*** (1985) FLC 91-626, 10 Fam LR 431; ***Ferraro v Ferraro*** (1993) FLC 92-335, 16 Fam LR 1; ***Davut v Raif*** (1994) FLC 92-503; ***In the Marriage of Hickey*** (2003) FLC 93-143; *C & C* (2005) 33 Fam LR 414. ***Milankov and Milankov*** [2002] FamCA 195; (2002) FLC 93-095 at [112] – [115]

How the Family Court manages its limitations of power when dealing with property Settlement

14.25 As the Family court is a court of statutory creation its powers are limited. For example the Family Court does not have powers in respect of the law partnership but it can exercise its powers under s.79 to alter the interests of the parties to the marriage in that part of their property which is represented by their interests in the partnership it would need to be satisfied that there was a partnership and up to what date the partnership subsisted or whether it still subsists: R v Ross-Jones; Ex parte Beaumont [1979] HCA 5; (1979) 141 CLR 504 **per Gibbs J at 602**.

14.26 The Family court can order accounts of the property of the parties to a marriage with particular reference to an account of their property as partners although it cannot order partnership accounts as such: ***Summitt & Summitt and Ors*** [2009] FamCA 371 at 603.

14.27 In order to do justice and equity to the parties, the value of assets which no longer exist may be notionally considered so as to determine what a fair share of the existing pool of assets should be. This often involves a notional consideration of assets, which had been in the possession of one of the parties at some time after separation, but which had been dispersed for that party's own use.

14.28 The inclusion of notional add-backs ought not to be seen as a method of increasing the size of the pool. One cannot make an order adjusting an interest in an asset that does not physically exist at the time of hearing but the Court can factor its value in to the ultimate decision: see ***Milankov and Milankov*** (2002) FLC 93-095, 88,864.

Kennon v Spry (2008) 238 CLR 366

14.29 Relevantly the facts with regard to the trust in ***Spry*** were, in part, as follows:

14.29.1 the husband was the only person entitled in possession to the assets of the Trust.

14.29.2 No object of the Trust had any fixed or vested entitlement.

14.29.3 the husband was, after execution of the 1983 Instrument, left in possession of the assets of the Trust, with the legal title to them, and to the income

which they generated, unless and until the husband should decide to apply any of the capital or income to any of the continuing beneficiaries.

14.29.4 the husband was not obliged to distribute to anyone.

14.29.5 The default distribution gave male beneficiaries other than the husband no more than a contingent remainder. None had a vested interest subject to divestiture.

14.29.6 the husband was the sole trustee of a discretionary family trust and the person with the only interest in its assets as well as the holder of a power, inter alia, to appoint them entirely to the wife.

14.30 After considering the above factual scenario French CJ held that the "*true character*" of the Spry Trust was a vehicle for the husband and wife and their children to enjoy assets.

Majority judgment

14.31 In summary French CJ held that the Trust assets were "*property of a party to the marriage*" because:

14.31.1 the husband had legal ownership of the Trust assets;

14.31.2 the husband had power as a trustee to appoint the assets to his spouse; and

14.31.3 The wife had a right to be considered.

14.32 In summary Gummow and Hayne JJ held that for the purposes of s79, the Trust property was the wife's property because:

14.32.1 The wife had a right to due administration;

14.32.2 The husband had a duty as trustee to consider how to exercise the power of distribution;

14.32.3 The power could have been exercised entirely in favour of the wife.

14.33 The Chief Justice, at [59] – [62], held the assets of the Spry Trust could be made the subject of orders under s 79 of the Family Law Act because those assets constituted "*property of the parties to the marriage*" within the meaning of that section.

14.34 Where property is held by a party to a marriage under a non-exhaustive discretionary trust with an open class of beneficiaries and there is no obligation to apply the assets or income of the trust to anyone, and where this property has been acquired by or through the efforts of that party or his or her spouse, whether before or during the marriage, the property does not necessarily lose its character as "*property of the parties to the marriage*" just because the party has declared a trust of which he or she is trustee and can, under the terms of that trust, give the property away to other family or extended family members at his or her discretion: see French CJ in ***Spry*** at [62] – [80].

14.35 Aside from the fact that by the execution of the 1983 Instrument the husband excluded himself from the class of beneficial objects of the Trust, the circumstances remarked upon by His Honour were entirely commonplace in the context of discretionary trusts: See ***Thurlstone (Aust) Pty Ltd v Andco Nominees Pty Ltd*** [1997] NSWSC 517.

Minority Judgment

14.36 In summary Heydon J held as follows:

14.36.1 The objects of a discretionary trust do not have "*property*" in the assets of the trust in the sense in which "*property*" is understood in the general law or in the way in which that word is used in a number of important statutes.

14.36.2 The word "*property*" as used in s 79 should not be given an extended meaning.

14.36.3 Even if, contrary to the foregoing, Mrs Spry did have "*property*" rights (eg by virtue of her position as an eligible object of benefaction under the Spry Trust having a right to compel the trustee to duly administer the Spry Trust) within the meaning of s 79, the orders sought by Mrs Spry were directed to gaining access to the assets of the Spry Trust (as opposed to access to the "property right" just described) and Mrs Spry had no property in those assets. As such, the "*asset orders*" sought by Mrs Spry did not meet the

description "*proceedings with respect to the property of the parties to the marriage or either of them*".

14.36.4 The definition of "*property*" in s 4(1) does not contemplate entitlements to property as trustee.

14.36.5 The Family Court, in making orders under s 79, cannot ignore the existence of trust obligations which limit the rights of a party who owns the property and holds the office of trustee.

14.37 Heydon J also considered, albeit in summary form, the application of s 85A of the Family Law Act to the Spry Trust. His Honour rejected the application of that section.

'Control' analysis [12]

14.38 Who has control over the assets?

14.39 The concept of "control" has been addressed in a number of cases in the Full Family Court 13:

14.40 In ***Goodwin and Goodwin Alpe*** (1991) FLC 92-192, French CJ said at [58]:

> *"Prior to the 1983 Deed [the Husband] as sole trustee had the "absolute discretion" to apply all or any part of the income and/or capital of the fund to himself as one of the "beneficiaries". On the basis of that power, and consistently with authority including the decisions of the Full Court referred to above, the assets of the Trust would properly have been regarded as his property as a party to the marriage for the purposes of s 79.*
>
> *The authorities establish that in certain circumstances the assets of a third party, such as a trust, can be treated as the property of a party to the marriage: see also Stein and Stein [1986] FamCA 27; (1986) FLC 91-779; Davidson and Davidson (1991) FLC 92-197; Webster v Webster [1998]*

[12] The 'control' analysis concept is articulated and argued by Peter Hannan in his article "Kennon v Spry: An extended reach for s 79?" (2010) 1 Fam L Rev 18.

[13] see ***Stephens v Stephens*** [2009] FamCAFC 240 at [37] per May, Boland and O'Ryan JJ; ***In the Marriage of Kelly (No 2)*** (1981) 7 Fam LR 762; ***Ashton and Ashton*** [1986] FamCA 20; (1986) FLC 91-777

> *FamCA 1517;(1998) FLC 92-832; JEL and DDF (No 2) (2001) FLC 93-083 and Milankov and Milankov [2002] FamCA 195; (2002) FLC 93-095."*

14.41 In the ***Spry case*** at first instance Strickland J found that the husband's level of control over the assets of the trust meant that the assets could be treated as a "*financial resource*"; although his honour treated them as the husband's property.

14.42 The High court's decision in ***Spry*** does not use the word 'control' but the concept is implicit, at least, in the majority judgments.

14.43 When one has in mind the purpose of discretionary trusts as developed in the 19th century and the purpose of s79 and 16B of the ***Family Law Act*** it is trite to say that trusts, or at least discretionary 'family trusts', are treated in a fundamentally different way in the Family Law jurisdiction as compared to equity and at least at this stage 'never to twain shall meet'.

Section 85A argument

14.44 The wife raised the s85A argument for the first time in the High Court. Keifel J was the only judge to fully consider the s85A argument.

14.45 Section 85A provides:

> *"(1) The court may, in proceedings under this Act, make such order as the court considers just and equitable with respect to the application, for the benefit of all or any of the parties to, and the children of, the marriage, of the whole or part of property dealt with by ante-nuptial or post-nuptial settlements made in relation to the marriage.*
> *(2) In considering what order (if any) should be made under subsection (1), the court shall take into account the matters referred to in subsection 79(4) so far as they are relevant.*
> *(3) A court cannot make an order under this section in respect of matters that are included in a financial agreement."*

14.46 Kiefel J analysed referred to the report of the Joint Select Committee on the Family Law Act July 1980, volume 1 and at [209] determined that:

> *"s 85A was directed to the use of discretionary family trusts and other structures used for holding assets acquired in the course of a marriage, for tax-related and other purposes. Vehicles such as these had been in common use for some time prior to 1983. It is apparent that s 85A was intended to give the Court power to deal with property which could not be the subject of an order under s 79, but which accorded with current conceptions of what was a "settlement" of property in matrimonial law."*

14.47 Ultimately her Honour found that s85A provided the Court with the appropriate mechanism to satisfy the payment of the sum ordered by the wife directly out of the trust and stated:

> *"The primary judge found that the wife should receive a sum of money, in addition to specific property, representing her contribution to the pool of assets which had been created by the endeavours of the husband and wife. The problem that faced his Honour was how the husband could meet that sum from the assets at his disposal. His Honour's answer to that question was that it could, and should, come from the Trust property. His Honour found that the wife should be paid out of the Trust, but considered that that result could only be effected by the husband. That was not a correct view, having regard to s 85A(1). Action, on the part of the husband, was not necessary to appropriate so much of the Trust property as was necessary to meet the primary judge's order. The Court could make an order directly applying that property to her benefit. It did not need to have regard to the status of either the wife or the husband as beneficiaries in order to do so."*
> (emphasis added)

14.48 Since the ***Spry*** decision has been handed down (in December 2008) there have been very few cases that that have considered s85A and Kiefel J's minority decision in any depth. As far as I am aware none have involved orders as contemplated by Kiefel J in paragraph [209].

15 Exercising the power of appointment under a trust deed – fraud on power?

15.1 The power to remove or appoint a trustee is a fiduciary power and must be exercised in the interests of the beneficiaries and solely for the furtherance of the purposes of the trust for which it was conferred; it cannot be exercised in the interests of the appointor: see: *Re Burton, Wily v Burton* (1994) 126 ALR 557 at 559; *Jacob's Law of*

Trusts 7th ed. 2006 at [1512]; *Hillcrest v Kingsford* [2010] NSWSC 285; *Rayner and Ors v N J Sheaffe Pty Ltd and Ors* [2010] NSWSC 810 at [149]; **Scaffidi v Montevento Holdings** [2011] WASCA 146 at [144]ff]].

15.2 It is improper for an appointor to exercise his or her power of appointment for his or her own benefit. Rather the power to remove and appoint a trustee must be exercised for the benefit of the beneficiaries of the Trust.

15.3 In the context of an appointor of a trust 'fraud' does not necessary denote conduct that will be termed 'fraud' at common law. Rather, fraud on a power means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified, by the instrument creating the power: see Young et al in ***On Equity***, (2009) Lawbook Company at [8.880] and the cases cited therein.

15.4 In ***Re Burton; Wily v Burton*** [1994] FCA 1146; (1994) 126 ALR 557 at 559-560 Davies J held: -

> *"When the power is contained in a deed of trust, the donee of the power is even more constrained to act in the interests of the persons for whose benefit the power was conferred. Thus, in Re Skeats' Settlement (1889) 42 Ch D 522, Kay J held that, as a power of appointing new trustee was fiduciary power, the donee of the power may not exercise it so as to appoint himself. At 527, His Lordship said:*
>
> *...the universal rule is that a man should not be judge in his own case; that he should not decide that he is the best possible person, and say that he ought to be the trustee.*
>
> *Naturally no human being can be imagined who would not have some bias one way or the other as to his own personal fitness, and to appoint himself among other people, or excluding them to appoint himself, would certainly be an improper exercise of any power of selection of a fiduciary character such as this is."*

15.5 In ***Fitzwood Pty Ltd v Unique Goal Pty Ltd*** [2001] FCA 1628; (2001) 188 ALR 566 (reversed on other grounds at [2002] FCAFC 285) Finkelstein J held at [98]: -

> *"I am prepared to accept that a power of removal of a trustee may be a fiduciary power that must be exercised for the benefit of the beneficiaries*

and not for the benefit of the donee of the power, at least when the donee is not a beneficiary, although much will depend upon the terms of the trust instrument: Re Skeats' Settlement (1889) 42 Ch D 522 at 526; [1886-90] All ER Rep 989 at 990; Inland Revenue Commissioners v Schroder [1983] STC 480 at 500."

Fraud on power

15.6 A fraud on a power occurs when the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified, by the instrument creating the power: ***Vatcher v Poull*** [1915] AC 327, 378; *On Equity,* (2009) Lawbook Company at [8.880].

15.7 The term "fraud on a power" does not necessarily denote any conduct in the common law meaning of the term which could be properly termed dishonest or immoral. "It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power": ***Vatcher v Poull*** [1915] AC 327, 378.

15.8 A distinction may be made between a purported exercise of power by a trustee in excess of the power and an exercise of a discretion that was within power but which constitutes an abuse of the power conferred. In the former instance, the act done in excess of power is void. In the latter instance, the act that constituted the abuse of power may be voidable at the instance of a beneficiary who is adversely affected: ***Pitt v Holt; Futter v Futter*** [2011] EWCA Civ 197; [2012] Ch 132 (Lloyd LJ).

15.9 An exclusion clause will protect a trustee as long as he is acting *bona fide* in what he considers to be the best interest of the beneficiaries. However an exclusion clause will not protect the trustee if he disregards the interests of the beneficiaries and an exemption clause cannot absolve a trustee from liability for knowingly participating in a fraudulent breach of trust: see ***Reid v Hubbard*** [2003] VSC 387 at [23] – [24]; ***Pope v DRP Nominees (No.2)*** [2000] SASC 65 at [101].

15.10 If a court finds that there was a fraud on power, the trustee will bear the onus of establishing that it is protected by any clause in the Deed excepting it from personal liability. In such circumstances any exemption clause will be construed narrowly against a trustee seeking to rely on it: ***Walker v Stones*** [2000] 4 All ER 412 at 445-446 per Slade LJ.

15.11 An exclusion clause does not exempt a trustee from liability for breach of trust, even if committed in the genuine belief that it was in the interest of the beneficiaries, if the belief was so unreasonable that no reasonable trustee could have held it: ***Armitage v Nurse*** [1998] Ch 241 at 660; ***Charles Delius Somerville Alexander and Ors (t/as Minter Ellison) v Perpetual Trustees WA Limited (ACN 008 666 886) and Perpetual Trustee Company Limited (ACN 000 001 007)*** [2001] NSWCA 240 at [70]

15.12 Where there has been a fraud on power (and therefore necessarily a breach of fiduciary duty) and the beneficiary suffers loss the Trustee will be liable *qua* trustee and also personally: *Wong v Burt* [2004] NZCA 174; [2005] 1 NZLR 91 [59].

16 Austec Wagga Wagga Pty Limited v Rarebreed Wagga Pty Limited [2012] NSWSC 343

16.1 The issue of a fraud on a power by an appointor was recently considered in ***Austec Wagga Wagga Pty Limited v Rarebreed Wagga Pty Limited*** [2012] NSWSC 343.

16.2 In ***Austec*** a business was the property of a family trust. Both the business and family trust were managed through a corporate trustee - Austec. The wife was the director of the corporate trustee and the husband was the appointor of the family trust.

16.3 The family trust was a discretionary trust and whilst there were a number of objects of the trust, eg husband, wife and children, the husband and wife had been the only objects to receive distributions.

16.4 The couple fell into dispute and it became very difficult, if not impossible, for them to continue to work together in the business. The wife, as director of the corporate trustee, appointed an administrator over Austec. The husband on becoming aware of the appointment of an administrator exercised his power of appointment and removed Austec as corporate trustee of the family trust and replaced it with Rarebreed as corporate trustee.

16.5 This removed the control of the business from the administrator and placed it into the hands of the director of Rarebreed.

16.6 It was conceded by the husband that whilst the he was not a director of Rarebreed he had an "*influence*" and provided guidance" to Rarebreed.

16.7 An action was brought in the Supreme Court by the administrator of Austec seeking declarations and orders to regain control over the business. The application was essentially that the husband had perpetrated a fraud on a power by appointing Rarebreed as corporate trustee over the family trust.

16.8 The court found that the husband has perpetrated a fraud on his power as appointor by removing Austec and appointing Rarebreed on the basis that he had acted to advantage himself and contrary to the power permitted to him under the trust deed.

17 Non-application of the judicial advice or the breach of trust exculpation provisions

17.1 In most States there are statutory provisions that deal with judicial advice for trustees. These are contained in section 63 of the *Trustee Act 1925 (NSW)*, section 63 of the *Trustee Act 1925 (ACT)*, sections 96 and 97 of the *Trusts Act 1973 (Qld)*, sections 91 and 93 of the *Trustee Act 1936 (SA), General Rules of Procedure in Civil Proceedings 1996 (Vic)* Rules 54.02 and 54.03, sections 92 and 95 of the *Trustee Act 1962 (WA).*

17.2 There are no equivalent statutory provisions in Tasmania or the Northern Territory. Such applications in Tasmania and the Northern Territory are brought following the principles outlined in *Re Beddoe* [1893] 1 Ch 547.

17.3 Importantly, subsection 63(1) of the *Trustee Act 1925 (NSW)* provides that:

> *A trustee may apply to the Court for an opinion advice or direction on any question respecting the management or administration of the trust property, or respecting the interpretation of the trust instrument.*

17.4 That is, a trustee may seek judicial advice pursuant to subsection 63(1) of the *Trustee Act 1925 (NSW).* However, it should be noted that only a "trustee" may obtain such an advice. The term "trustee" is defined in the Interpretation of the *Trustee Act 1925 (NSW)* as *"... has the meaning corresponding with that of trust; and includes a legal representative and the NSW Trustee and a trustee company".* The word "trust" is in turn defined as *"... does not include the duties and incident to an estate conveyed by way of mortgage; but, with this exception, includes implied and constructive trusts, and cases where the trustee has a beneficial interest in the trust property, and the duties incident to the office of legal representative of a deceased person".*

17.5 That is, someone who has a power of appointment and removal of trustee may not in fact be a "trustee" for the purposes of s.63 of the *Trustee Act 1925 (NSW).*

17.6 Subsection 63(2) of the *Trustee Act 1925 (NSW)* provides that:

> *If the trustee acts in accordance with the opinion advice or direction, the trustee shall be deemed, so far as regards the trustee's own responsibility, to have discharged the trustee's duty as trustee in the subject matter of the application, provided that the trustee has not been guilty of any fraud or wilful concealment or misrepresentation in obtaining the opinion advice or direction*.

17.7 That is, a "trustee" may avail itself of the mechanism in section 63 of the *Trustee Act 1925 (NSW)* so as to obtain an opinion from the Court as to the management and administration of a trust estate.

17.8 Section 63 of the *Trustee Act 1925 (NSW)* seems prospective in its nature.

17.9 However, section 85 of the *Trustee Act 1925 (NSW)* provides relief of a trustee with respect to excusable breaches of trust. Subsection 85(1) of the *Trustee Act 1925 (NSW)* provides that:

> *Where a trustee is or may be personally liable for any breach of trust, the Court may relieve the trustee either wholly or partly from personal liability for the breach.*

17.10 Subsection 85(2) of the *Trustee Act 1925 (NSW)* provides that:

> *The relief may not be given unless it appears to the Court that the trustee has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the direction of the Court in the matter in which the trustee committed the breach.*

17.11 That is, section 85 of the *Trustee Act 1925 (NSW)* seems to look at past actions of a "trustee".

17.12 The equivalent of section 85 in the other States and Territories includes section 85 if the *Trustee Act 1925 (ACT),* section 49A of the *Trustee Act (NT)*, section 76 of the *Trusts Act 1973 (Qld),* section 56 of the *Trustee Act 1936 (SA)*, section 50 of the

Trustee Act 1898 (Tas), section 67 of the *Trustee Act 1958 (Vic)* and section 75 of the *Trustees Act 1962 (WA).*

17.13 That is, although the appointor of a trust does have fiduciary obligations, the holder of such a position cannot avail itself of relief under section 85 of the *Trustee Act 1925 (NSW)* or obtain judicial advice pursuant to section 63 of the *Trustee Act 1925 (NSW).*

17.14 As a trustee who is acting honestly and reasonably would be able to avail itself of section 85 of the *Trustee Act 1925 (NSW)*, obtaining judicial advice pursuant to section 63 of the *Trustee Act 1925 (NSW)* would demonstrate that a trustee was acting reasonably – provided that the trustee provides all relevant information to the Court when obtaining the judicial advice.

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