THIRTEEN WENTWORTH SELBORNE

Managing Trusts

LegalWise Seminars
Estate Planning Challenges

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Contents

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 (**"Protectors"**).

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 Protector 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 Protector 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 Protectors 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 Protectors 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 at 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 *Underhill and Hayton* 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 *Underhill and Hayton* 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, a Protector 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 Protector:

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.

4 Differentiating between "trusts" and "powers"

4.1 As the position of Protector 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:

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

4.1.2 a power confers an option; and

4.1.3 a power is discretionary;

4.2 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).

4.3 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*.

4.4 *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.*

4.5 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 Whether a Protector can resign (absent a Court order)

5.1 An issue that often arises is whether a person who holds a specific position (e.g. a Protector) in a trust relationship can resign. For example, a person who holds a power to appoint and remove trustees, or a person whose consent is required before a power can be exercised.

5.2 Absent an express provision in the Trust Deed which allows such a resignation of the Protector (or an ability pursuant to statute), and if the position is fiduciary in nature, then it may be that the Protector cannot resign without an order of the Court.

5.3 It would, of course, be dependent on the terms of the relevant trust deed.

5.4 Thomas, G at [17.02] to [17.09] in *Thomas on Powers* (OUP, London, 2012), opines that a "*… power coupled with a trust or duty cannot be released in the absence of express authority to do so …*". Regard therefore needs to be given to whether the Protector being considered has powers.

5.5 If the Protector is a fiduciary, then the Protector also has duties (i.e. Hohfeldian "duties" which correlate with a "right" that the power be properly exercised – see for example [44] in *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* (2005) 224 CLR 98 at 119 ([44]).

5.6 This is also the situation with trustees. Absent a provision in a trust deed which allows for a resignation, and putting aside any statutory right of a trustee to retire (see for example section 8 of the *Trustee Act 1925* (NSW)) – a trustee cannot merely retire. Any such retirement would be of no effect ([17.01 in *Thomas on Powers*)

5.7 Davies J in *Re Burton; Wiley v Burton* (1994) 126 ALR 557 at 560 considered that a power to appoint trustees is a fiduciary power.[1]

5.8 This position is confirmed by subsection 28(1) of the Conveyancing Act, which provides that:

> *A person to whom is given any power (other than a power coupled with a duty), whether coupled with an interest or not, may by deed release or contract not to exercise the power.*

5.9 That is, if the relevant position is a power coupled with a duty, and if there is no provision in the trust's constituent documents that allow the Protector to resign, then the better view seems to be that the Protector cannot merely resign the position.

5.10 This position was also confirmed by Hubbard, M in *Protectors of Trusts*, Oxford University Press, 2013. At [3.67] (omitting references), it was observed that:

> *Amounts to a release of the powers given him by the trust instrument. A fiduciary may not release his power except where this is permitted by the terms of the trust instrument or under an order of the court. Therefore, if a protector holds at least one power in a fiduciary capacity, he will probably not be able to retire voluntarily, at least not as holder of such powers, without an express power to do so contained in the trust instrument or the court's permission.*

5.11 At [3.68] (omitting references), Hubbard observed that:

> *In England and in any jurisdiction having the equivalent of s. 156(1) Law of Property Act 1925,[2] any power not held in a fiduciary capacity may be released. This provision, or rather its statutory predecessors, by which the change was first made on 1 January 1882, changed the law. The rule in equity had been that a power held by someone who held no interest in the property affected could not be released, unless the power was held for the benefit of the donee personally, rather than for the benefit of another. It follows that, assuming the proper law of the trust is the same as the current law of England in this respect, a protector holding only personal powers may effectively retire voluntarily. In this case a protector may therefore retire without there being any provision permitting his retirement in the trust instrument.*

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[1] Elements of the principle outlined in *Re Burton; Wiley v Burton* (1994) 126 ALR 557 were queried by Davies J (a different Davies J as that in *Re Burton*) in *Royal v El Ali* [2016] FCA 782, which is subject to an appeal. However, this particular finding by Davies J was *obiter dictum* of her Honour, given that her Honour found that the relevant properties in that case were not held subject to trusts in any event.

[2] The NSW equivalent is s 28 of the Conveyancing Act

6 Removing a Protector by the Court (or resignation with the consent of the Court)

6.1 There is authority for the proposition that a Court may exercise its inherent jurisdiction to remove a "protector" of a trust (i.e. the Appointor), if that person are fiduciaries (see for example [3.76] to 3.78] in Hubbard, *Protectors of Trusts*).

6.2 The circumstances which warrant a removal are similar to those that relate to trustees.

6.3 There is also authority for the proposition that a "protector" can resign with the consent of the Court (see [11.10] in Holden in *Trust Protectors*, Jordans, 2011).

6.4 Slattery J in *John Leslie Kennedy v Glenn Raymond Kennedy* [2011] NSWSC 1619 made orders (pursuant to section 70 of the Trustee Act) removing an appointor of a trust. His Honour did not analyse the power that the Court to do so.

6.5 I however query whether section 70 of the Trustee Act cannot be used to remove appointors. That section refers only to "trustees" (as defined in section 5 of the Trustee Act).

6.6 It is unclear whether the Court's inherent jurisdiction can be invoked to remove a Protector.

7 Individuals holding the power to appoint

7.1 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.*

7.2 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.

7.3 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.*

7.4 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.*

7.5 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.

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

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

8.1.1 Asset protection generally

8.1.2 Family law

8.1.3 Family provision

8.2 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

8.3 The *Richstar Enterprises Case*[3] 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.

8.4 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'.*[4]

8.5 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).

8.6 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.

8.7 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 equitable interest in the trust income or property which would fall within even the most generous*

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

[4] Section 9 Corporations Act.

> *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.'5*

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'.6*

8.8 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 …'

8.9 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 property of that trust is, in my opinion, amenable to control by the receivers and s.1323'.7*

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

8.11 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.

8.12 The property of a bankrupt at the time the person became a bankrupt passes to the trustee in bankruptcy.[8] However, property held on trust for another is specifically

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[5] *Richstar* at para. 25.

[6] *Richstar* at para. 36.

[7] (2006) FCA814 at para. 41.

[8] Subsection 116(1) Bankruptcy Act.

excluded.[9] In addition, the power of appointment of the trustee is not property which passes to the trustee in bankruptcy.[10]

8.13 Division 4A of the Bankruptcy Act specifically contemplates and makes provision for the circumstances where a bankrupt controls a trust.[11] 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 2006.12

8.14 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.

8.15 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.

8.16 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).

8.17 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:

8.17.1 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;

8.17.2 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;

8.17.3 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.

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

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

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

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

8.18 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

8.19 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.

8.20 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."*

8.21 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.

8.22 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."*

8.23 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

8.24 The Family court typically takes "a four step approach" when dealing property division13. The steps are:

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[13] 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]

8.24.1 determine the pool of assets and liabilities;

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

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

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

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

8.25 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.

8.26 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.

8.27 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.

8.28 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

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

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

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

8.29.3 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.

8.29.4 the husband was not obliged to distribute to anyone.

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

8.29.6 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.

8.30 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

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

8.31.1 the husband had legal ownership of the Trust assets;

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

8.31.3 The wife had a right to be considered.

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

8.32.1 The wife had a right to due administration;

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

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

8.33 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.

8.34 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].

8.35 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

8.36 In summary Heydon J held as follows:

8.36.1 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.

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

8.36.3 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*".

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

8.36.5 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.

8.36.6 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 [14]

8.37 Who has control over the assets?

8.38 The concept of "control" has been addressed in a number of cases in the Full Family Court 15:

8.39 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] 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."*

8.40 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.

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

8.42 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'.

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[14] 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.

[15] 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

Section 85A argument

8.43 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.

8.44 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."*

8.45 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."*

8.46 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)

8.47 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].

9 Fraud on power

9.1 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].

9.2 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.

9.3 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).

9.4 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].

9.5 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.

9.6 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]

9.7 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].

10 *Austec Wagga Wagga Pty Limited v Rarebreed Wagga Pty Limited*

10.1 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.

10.2 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.

10.3 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.

10.4 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.

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

10.6 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.

10.7 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.

10.8 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.

11 *Mercanti v Mertcanti* [2016] WASCA 206

11.1 The Western Australian Court of Appeal's decision in *Mercanti v Mercanti* [2016] WASCA 206 (**"Mercanti"**) is important when considering the scope of a power to amend. Indeed, the importance of the decision is highlighted given that the High Court in Merca*nti v Mercanti* [2017] HCASL 59 refused special leave.

11.2 The relevant facts were as follows:

11.2.1 Michael Angelo Mercanti (*Michael*) ran a retail shoe repair business.

11.2.2 In 1977, the M Mercanti Family Trust (*MMF Trust*) was established to acquire the business from Michael. Michael was the initial guardian and appointor of the MMF Trust. The trustee was Slondia Nominees Pty Ltd (*Slondia*).

11.2.3 Michael later acquired a wholesale shoe repair supplies business. In 1996 the Footwear Wholesale Trust (*FW Trust*) was established to acquire this business. The initial appointor was also Michael, and the trustee was a company called Citycourt Pty Ltd (*Citycourt*).

11.2.4 Michael and Sybil Yvonne Mercanti (*Yvonne*) intended their son, Tyrone Kane Mercanti (*Tyrone*), to inherit the shoe repair business. To give effect to this, in 2004 the respective trustees of the trusts executed Deeds of Variation pursuant to which provisions appointing Michael as appointor/guardian were amended so that Tyrone would occupy these positions (*Deeds of Variation*).

11.2.5 In late 2012 the relationship between Tyrone and his parents broke down, following which on 30 July 2013 Michael and Yvonne as shareholders of Slondia and Citycourt removed Tyrone as a director of those companies while Tyrone was on a business trip in China and took control of the business premises and the business operations. The following day, Tyrone removed Slondia as trustee of the MMF Trust and Citycourt as trustee of the FW Trust and by written notice appointed Parradele Pty Ltd (*Parradele*), a company controlled by Tyrone's wife, in their place (*Written Notices*).

11.2.6 Michael commenced proceedings challenging the legal validity of the Deeds of Variation and the Written Notices.

11.2.7 At first instance, Justice Le Miere in *Mercanti v Mercanti* [2015] WASC 297 (**"First Decision"**) found that the variation to the FW Trust was not effective but that the variation to the MMF Trust was effective.

11.2.8 In considering the FW Trust, Le Miere J had to consider the power which provided ([98] of the First Decision):

> *The Trustee may at any time and from time to time … by deeds revoke add to or vary all or any of the trusts hereinbefore provided or the trusts provided by any variation alteration or addition made thereto from time to time and may by the same or any other deed declare any new or other trusts or powers concerning the Trust Fund or any part thereof the trusts whereof shall have been so revoked added to or varied …*

11.2.9 At [101] of the First Decision, in finding that the relevant trust deed (for the FW Trust) distinguished between 'the trusts' and the 'trusts powers and provisions' of the trust deed, Le Miere J considered that "*… the natural and ordinary meaning of the words 'the trustee may … vary … the trusts hereinbefore provided' does not extend to varying the terms and conditions of the trust deed dealing with the office of Appointor as distinct from the trusts created by the trust deed …*"

11.2.10 Michael appealed the decision in relation to the MMF Trust. The relevant ground of appeal included whether the Deeds of Variation in relation to the MMF Trust was valid. If not, Tyrone's purported replacement of Citycourt with Parradele as trustee of the MMF Trust would not have been effective.

11.3 In Mercanti (i.e. the Western Australian Court of Appeal), the dispute revolved around (amongst other things) the scope of the reserve power to amend the "MMF Trust", being clause 28, which provided (see [349] in Mercanti):

> *Subject to Clause 10 hereof the Trustees for the time being may at any time and from time to time by deeds revocable or irrevocable revoke add to or vary all or any of the Trust's terms and conditions hereinbefore contained or the Trust's terms and conditions contained in any variation or alteration or addition made thereto from time to time and may in like manner declare any new or other trusts terms and conditions concerning the Trust Fund or any part or parts thereof the Trusts whereof shall have been so revoked added to or varied provided that the rule known as the Rule against Perpetuities is not thereby infringed and provided that such new or other trust powers discretion alterations or variations –*
>
> *(1) insofar as the beneficial interest created by this Deed are revoked added to or varied shall be for the benefit of all or any one or more of the General Beneficiaries or any one or more persons born or unborn being lineal descendants of whatever degree (or the spouse of any lineal descendent of any grandparent of any General Beneficiary; but*
>
> *(2) shall not be in favour of or result in any benefit to any member of the excluded class;*

(3) shall not affect the beneficial entitlement to any amount set aside for any beneficiary prior to the date of the variation alteration or addition; and

(4) shall not (save as provided in paragraph (1) of this clause) enlarge the number of persons capable of falling within the description "beneficiary" hereinbefore contained.

Save as provided in this clause these presents shall not be capable of being revoked added to or varied.

11.4 As was observed by Newnes and Murphy JJA in *Mercanti* at [351] the appellant's contention concerned the meaning to be assigned to the words "*trusts terms and conditions hereinbefore contained*" in Clause 28, read in the context of the relevant Trust Deed as a whole. At 353 of *Mercanti* it was observed that:

> *The next point raised by the appellants is, in effect, that the words "trust terms and conditions hereinbefore contained" should be read as "the terms and conditions of the trusts hereinbefore contained". This point also should be rejected. The MMF Trust Deed is to be construed by reference to the objective meaning of its terms, read as a whole. The power of variation in the MMF Trust Deed is to be construed according to its natural and ordinary meaning, and not in any narrow or unreal way. The meaning contended for by the appellants puts a gloss on the words and does not reflect their ordinary meaning. As a primary judge observed, the words "trust terms and conditions" are, in their ordinary meaning, a list. That is, the words mean "trusts and terms and conditions" and not "the terms and conditions of the trusts". The second and third items in the list may, to some extent, be synonymous but, singularly or collectively, they are words of expansion and differentiation from the word "trust", and do not merely serve to elaborate on the scope of the word "trust" within the phrase "trusts terms and conditions".*

11.5 At [145] in *Mercanti* Buss P observed that:

> *In my opinion, the phrase "the Trust's terms and conditions hereinbefore contained in CL28 refers:*
>
> *(a) in the case of "the Trust", to the Trust created or declared in provisions of the Deed appearing before CL28; and*
>
> (b) *in the case of "the … terms and conditions, to the other provisions of the Deed (that is, the provisions apart from those declaring or creating trusts) appearing before CL28.*

12 *Ioppolo & Anor v Conti & Anor* [2015] WASCA 45

12.1 In *Ioppolo & Anor v Conti & Anor* [2015] WASCA 45, the Western Australian Court of Appeal (Martin CJ, Buss JA and Beech J) confirmed that upon the death of a member of a self-managed superannuation fund, the *Superannuation Industry (Supervision) Act 1993* (**SIS Act**) permitted, but did not require the executor of the deceased member's estate to be appointed as a trustee of the SMSF. Of concern was section 17A of the SIS Act, which provides that:

Subsection 17A(1) of the SIS Act contains the "basic conditions" that need to be satisfied for funds other than single member funds, in order to be a self-managed super fund. Subsection 17A(2) of the SIS Act contains for the "basic conditions" for single member funds so as to meet the definition of a "self-managed superannuation fund".

12.2 Subsection 17A(1) of the SIS Act provides:

*(1) Subject to this section, a superannuation fund, other than a fund with only one member, is a **self managed superannuation fund** if and only if it satisfies the following conditions:*

(a) it has fewer than 5 members;

(b) if the trustees of the fund are individuals--each individual trustee of the fund is a member of the fund;

(c) if the trustee of the fund is a body corporate--each director of the body corporate is a member of the fund;

(d) each member of the fund:

(i) is a trustee of the fund; or
(ii) if the trustee of the fund is a body corporate--is a director of the body corporate;

(e) no member of the fund is an employee of another member of the fund, unless the members concerned are relatives;

(f) no trustee of the fund receives any remuneration from the fund or from any person for any duties or services performed by the trustee in relation to the fund;

(g) if the trustee of the fund is a body corporate--no director of the body corporate receives any remuneration from the fund or from any person (including the body corporate) for any duties or services performed by the director in relation to the fund.

12.3 Subsection 17A(2) of the SIS Act provides:

*(2) Subject to this section, a superannuation fund with only one member is a **self managed superannuation fund** if and only if:*

(a) if the trustee of the fund is a body corporate:

(i) the member is the sole director of the body corporate; or
(ii) the member is one of only 2 directors of the body corporate, and the member and the other director are relatives; or
(iii) the member is one of only 2 directors of the body corporate, and the member is not an employee of the other director; and

(b) if the trustees of the fund are individuals:

(i) the member is one of only 2 trustees, of whom one is the member and the other is a relative of the member; or
(ii) the member is one of only 2 trustees, and the member is not an employee of the other trustee; and

(c) no trustee of the fund receives any remuneration from the fund or from any person for any duties or services performed by the trustee in relation to the fund;

(d) if the trustee of the fund is a body corporate--no director of the body corporate receives any remuneration from the fund or from any person (including the body corporate) for any duties or services performed by the director in relation to the fund.

12.4 However, whilst subsections 17A(1) and (2) of the SIS provide that members of a self-managed super fund must also be trustees, or directors of corporate trustees, subsection 17A(3) provides that certain other persons may be trustees, by providing that:

(3) A superannuation fund does not fail to satisfy the conditions specified in subsection (1) or (2) by reason only that:

(a) a member of the fund has died and the legal personal representative of the member is a trustee of the fund or a director of a body corporate that is the trustee of the fund, in place of the member, during the period:

(i) beginning when the member of the fund died; and
(ii) ending when death benefits commence to be payable in respect of the member of the fund; or

(b) the legal personal representative of a member of the fund is a trustee of the fund or a director of a body corporate that is the trustee of the fund, in place of the member, during any period when:

(i) the member of the fund is under a legal disability; or
(ii) the legal personal representative has an enduring power of attorney in respect of the member of the fund; or

(c) if a member of the fund is under a legal disability because of age and does not have a legal personal representative:

(i) the parent or guardian of the member is a trustee of the fund in place of the member; or
(ii) if the trustee of the fund is a body corporate--the parent or guardian of the member is a director of the body corporate in place of the member; or

(d) an appointment under section 134 of an acting trustee of the fund is in force.

12.5 Circumstances in which entity that does not satisfy basic conditions remains a self managed superannuation fund.

12.6 The term "legal personal representative" for the purposes of subsection 17A(3) of the SIS Act is defined in section 10 of the SIS Act as:

> *... means the executor of the Will or administrator of the estate of a Deceased person, the trustee of the estate of a person under a legal disability or a person who holds an enduring power of attorney granted by a person.*

12.7 *Ioppolo v Conti* is authority for the proposition that the SIS Act permits, but does not require, the executor of a deceased member's estate to be appointed as a trustee of a self-managed super fund.

12.8 The broad facts in *Ioppolo v Conti* were that:

12.8.1 Mrs Francesca Conti and Mr Augusto Conti established the "Conti Superannuation Fund" in 1992.

12.8.2 The Conti Superannuation Fund was established pursuant to the terms of a trust deed.

12.8.3 Pursuant to the trust deed, Mr and Mrs Conti were the Fund's trustees and members.

12.8.4 The trustee mandated that the Fund was to be conducted pursuant to the terms of the SIS Act, so as to obtain favourable tax treatment which was given to complying superannuation funds.

12.8.5 Since the establishment of the Fund (in 2002), Mr and Mrs Conti made contributions to the Fund. Those contributions were recorded in the accounts of the Fund as standing to the benefit of their respective member accounts.

12.8.6 Mrs Conti passed away on 5 August 2010.

12.8.7 On 28 October 2010, probate of Mrs Conti's Will was granted to her son and daughter, them being the executors of the late Mrs Conti's estate.

12.8.8 Mrs Conti's son and daughter (who are the executors) were issue from a previous marriage of Mrs Conti (that is, they were not Mr Conti's biological children).

12.8.9 On 3 February 2011, Mr Conti (in his capacity as trustee of the Fund) determined that the benefit standing to the account of his wife were to be paid to him rather than to any of her children. Mr Conti did this after obtaining legal advice.

12.8.10 After making the determination, Mr Conti elected to take the benefit in the form of a pension, with the pension being paid to him out of the assets of the Fund.

12.8.11 On 4 February 2011, Mr Conti resigned as a trustee of the Fund and Augusto Investments Pty Ltd was appointed the trustee of the Fund.

12.8.12 Agusto Investments Pty Ltd was a company which Mr Conti was a sole director.

12.9 The executors commenced proceedings claiming:

12.9.1 As a trustee of the Fund, Mr Conti was required pursuant to section 17A of the SIS Act to appoint one of them to act as a trustee of the Fund in place of the late Mrs Conti.

12.9.2 Until such an appointment was made, Mr Conti had no power to deal with the interest that the late Mrs Conti had in the Fund in his capacity as trustee of the Fund.

12.9.3 The executives contended that Mr Conti's determination to confer the interest of the late Mrs Conti to himself was void, and that Mr Conti had acted in bad faith in making the determination by preferring his own interest to the interest of Mrs Conti's children.

12.10 The Western Australian Court of Appeal dismissed the executor's claims, and upheld the decision at first instance (see *Ioppolo & Hesford v Conti* [2013] WASC 389).

12.11 Martin CJ at [71] considered that there were no words in subsection 17A(3) of the SIS Act which mandated the appointment of a legal personal representative to be a trustee, or a director of a corporate trustee of a self-managed superannuation fund. It was observed at [71] that:

> *Significantly, however, there are no words in s17A(3), or any inference of legislative intension to be drawn from the operation or effect of the subsection viewed in the context of the section or in the context of the SIS Act as a whole, to suggest that a fund is obliged to utilise the opportunities for compliance provided by the subsection either within any particular time, or at all, if there are other means by which the fund can be brought into compliance. Nor is there anything in the language in of the subsection or any inference of legislative intent to be drawn from the effect of the subsection viewed in the*

context of the section or the SIS Act as a whole to suggest that any constraint is placed upon the powers of the trustee unless and until the opportunities for compliance provided by the subsection are utilised.

12.12 The other provisions in s17A(3) are, as the executors rightly concede, permissive rather than mandatory. There is no sufficient basis to construe par(a) of s17A(3) differently. Rather, Martin CJ at [72] observed that:

To the contrary, a consideration of other provisions of the SIS Act compels the conclusion that s17A(3) should be construed in accordance with its natural and ordinary meaning – that is, as providing opportunities for compliance with the other requirements of the section which might, or might not, be taken up. As I have noted, pt 6 of the SIS Act contains a number of provisions with respect to the governing rules of superannuation entities and includes s52 which contains a number of specific convents to which trustees have regulated funds are subject. If it had been the intention of the legislature to impose obligations upon trustees for the protection of the interests which beneficiaries or dependents of deceased members may have in the benefit standing to the account of a deceased member, Part 6 of the Act would have been the obvious place in which to provide such obligations, rather than in s17A which stipulates the conditions which must be met in order for a regulated fund to achieve the tax concessions which attend satisfaction of those conditions.

12.13 The Western Australian Court of Appeal also rejected the executor's claim that Mr Conti had acted in bad faith in making the determination that the late Mrs Conti's interest in the Fund should be conferred on him. In the context of the burden of proof, Martin CJ at [81] observed of the lack of discharge of the burden that:

As it is the executors who assert that Mr Conti did not exercise a discretion conferred upon him as trustee of the Fund in a bone fide manner, they carry the burden of proving that assertions on the balance of probabilities. They have made no attempt to discharge that burden other than by asserting that an inference is to be drawn as to Mr Conti's reasons from the terms of the letter of advice received from Norton & Smailes. No attempt was made to adduce evidence as to the respective financial positions of Mrs Conti's children, as compared to Mr Conti, and Mr Conti was not cross-examined on his Affidavit. If and to the extent that Mrs Conti's wishes were relevant to the exercise of the discretion, as the Master pointed out, the evidence with respect to her wishes was equivocal, given the terms of the Will are inconsistent with binding beneficiary nomination forms which she executed both before and after her Will. It is therefore impossible to draw an inference of lack of bona fides from, for example, an assertive failure to take into account the clear and unequivocal wishes of a deceased. It was open to Mr Conti to consider that the subsequent execution of the binding nomination meant that the expression of intension in the Will had been superseded, and was no longer worthy of weight as an expression of the intention of the deceased member as to what should happen on her death.

12.14 The Western Australian Court of Appeal noted that the Deceased had made binding beneficiaries nomination forms, which had both lapsed. Those nomination forms nominated Mr Conti as the recipient of a death benefit from the Fund. Martin CJ at [74] considered that:

> *There is a cogent argument to the effect that the beneficiary nomination form is executed by Mrs Conti, although deprived of their characteristic as being binding beneficiary nominations by the lapse of time, nevertheless, satisfied the requirement of identifying a person nominated by her as a person she wished to receive her benefit in the event of her death, which is an apt way of describing the role of a Nominated Dependent.*

12.15 As a result, Martin CJ considered that (given the lapsed nomination forms) the only way that the executors could succeed in their argument of lack of bona fides was to demonstrate that the *"... Mr Conti, in his capacity as trustee, failed to address the question of whether it would be inequitable or inappropriate to pay the benefit to himself..."* ([75]).

12.16 However, Martin CJ considered that that question did not need to be resolved as there was no evidence capable of sustaining the conclusion that the exercise of the discretion miscarried ([76]).

12.17 Martin CJ at [77] observed that:

> *In the course of presenting oral argument on these issues, Senior Counsel for the executors advanced a nuanced position not previously evident in either the pleadings, the proceedings before the Master, the grounds of appeal or the written submissions in support of those grounds. It was asserted that it should be concluded that there was in fact no exercise of discretion by the trustee, but rather, Mr Conti simply determined that he should have the benefit of Mrs Conti's interests in the Fund for himself. Assuming, for the sake of argument, that it is open, notwithstanding the way in which the case was conducted before the Master, it is difficult to see how this proposition adds anything to the executors' fundamental argument, which is to the effect that it should be concluded the exercise of the trustee's discretion miscarried because he did not give full and proper consideration to the competing interests of the prospective beneficiaries as required by the principle enunciated in Karger v Paul as developed by the High Court in Finch v Telstra Super Pty Ltd. But whichever way the argument is presented, it must fail on the evidence.*

12.18 Martin CJ observed that Mr Conti's evidence advanced a series of propositions, which was based on information that he received in advice from solicitors. These propositions included that the executors (in their capacity as children of the deceased) only have a right to be considered by the trustee in the exercise of the discretion of who to pay out any death benefit ([79]).

12.19 The executor's argument (which was not accepted) was that Mr Conti acted pursuant to the legal advice, but excluding that portion of the advice which refers to the right of Mrs Conti's children to be considered in the exercise of the trustee's discretion. The Court considered that *"there is simply no basis in evidence for drawing any inference to that effect"* ([80]).

12.20 It was also noted that there was a clause in the trust deed which provides that a trustee may exercise a power or a right even where there is a conflict of interest, provided that the power of right is exercised in a bona fide manner. There was no argument that that particular provision was offended.

13 Non-application of the judicial advice or the breach of trust exculpation provisions for Protectors

13.1 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).*

13.2 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.

13.3 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.*

13.4 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".*

13.5 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).*

13.6 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*.

13.7 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.

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

13.9 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.*

13.10 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.*

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

13.12 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).*

13.13 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).*

13.14 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.

13.15 It is also unclear whether relief may be sought, by a Protector pursuant to Part 54 of the Uniform Civil Procedure Rules 2005 (NSW). Would the relevant proceedings be (for example) a "… question arising in … the execution of a trust …" (per Rule 54.3(2)(a) of the UCPRs)?