

# STEP AUSTRALASIAN CONFERENCE 2016

Thursday 17 – Friday 18 March 2016



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## International Trust Update

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# International Trust Update

## The Difficult and Demanding Trust Client and Beneficiary and How they should be managed?

STEP Australasian Conference 2016

The Pullman Hotel, Auckland

New Zealand

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Simon Beck

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# Agenda



# Agenda

- Power of Appointment – Schroder Cayman Bank and Trust Company Limited v Schroder Trust A.G. (FSD 122/2014)
- Mistake - Nourse v Heritage Corporate Trustees Limited (Royal Court of the Island of Guernsey – 15 January 2015)
- Equitable Lien – In the Matter of the Representation of C and the 2 Trusts (I to VIII [2015] JRC 031)
- Illusory Trusts and Property Interests – Clayton v. Clayton – NZ Court of Appeal [2015] NZCA 30
- Removal of Trustee – Brudenall-Bruce v Moore & Cotton ([2014] EWHC 3679 (Ch))
- Momentous Decision – Cotton v Earl of Cardigan ([2014] EWCA Cir 1312)
- Change of Trustee – In the Matter of the Hugh Green Trust and the Hugh Green Property Trust – [2015] NZHC 1218
- Mental Capacity and Undue Influence – Re BKR ([2015] SGCA 26)
- Fraud on the Power - In the Matter of the Y Trust (Jersey Royal Court – 2014)
- Worldwide Marava Injunction – JSC Mezhdungroodniy Pronyshlenniy Bank v Pugachev ([2015] EWCA (English Court of Appeal))

# POWER OF APPOINTMENT

Schroder Cayman Bank and  
Trust Company Limited vs  
Schroder Trust A.G.

# Schroder Cayman Bank and Trust Company Limited vs Schroder Trust A.G. - FSD 122/2014

- In 2000, UK company established an Employee Benefit Trust under Cayman Law to benefit the Employees and wives, husbands, widows, widowers and children or step-children and remoter issue.
- In 2011, proposed changes to UK tax law would cause UK tax on distributions in the hands of a Beneficiary.
- Upon advice from UK Counsel, trustee of the Cayman trust appointed funds to 3 new Jersey trusts (Employee Financed Retirement Benefit Schemes or EFRBS).

# Schroder Cayman Bank and Trust Company Limited vs Schroder Trust A.G. - FSD 122/2014

(continued)

- Beneficiaries of EFRBS included “any other person who in the opinion of the Trustees ...is dependent upon the Member for the ordinary necessities of life at the date of the Member’s death”.
- In 2013, UK revenue claimed that the Appointments triggered a charge to UK Inheritance Tax.
- Cayman Trustee applied to Cayman Court for an order that the appointment to the EFRBS were:
  - void for excessive execution or
  - should be set aside for mistake



# Schroder Cayman Bank and Trust Company Limited vs Schroder Trust A.G. - FSD 122/2014

(continued)

- Initial issue was applicable law. Both Cayman and Jersey laws have “firewall legislation” applying their law. Court held that in such cases common law should be applied to identify “the system of law most closely connected with the transactions under challenge”.
- Court ruled that Cayman law should apply.
- Court held that the Appointments were void given that the EFRBS being discretionary could benefit dependents, who were not entitled to benefit under the Cayman trusts.

# Schroder Cayman Bank and Trust Company Limited vs Schroder Trust A.G. - FSD 122/2014

(continued)

- As regard mistakes, Court applied the English Supreme Court decision in *Pitt v Holt*, namely:
  - was the mistake so grave that it would be unconscionable to refuse relief, and
  - that the mistake was causative not based on more ignorance or misprediction.

# Schroder Cayman Bank and Trust Company Limited vs Schroder Trust A.G. - FSD 122/2014

(continued)

- Court found that the Trustee had acted in reliance on incorrect legal advice as to the effect of the appointments “in terms of both the issues of revocability and tax planning [which] caused severe consequences to the Trusts which were never intended and that the Appointments would not have been made but for these mistakes.
- The mistake was sufficiently grave to set aside the Appointments on the basis of mistake.

# Mistake

# Nourse v Heritage Corporate Trustees Limited

Royal Court of the Island of Guernsey - 15 January 2015



## Mistake – Nourse v Heritage Corporate Trustees Limited – Royal Court of the Island of Guernsey – 15 January 2015

- Nourse was principal shareholder and director of BIGDUG Limited a wire shelving business.
- Offers had been made by several competitors to purchase the business.
- Nourse engaged BCMS to assist with the proposed sell and to find multiple buyers to increase the potential sale price.
- BCMS introduced Nourse to Mark Hodge, a solicitor, and to the Wissenbach Group, who specialised in wealth planning tax structures.

## Mistake – Nourse v Heritage Corporate Trustees Limited – Royal Court of the Island of Guernsey – 15 January 2015 - (continued)

- Wissenbach proposed a complex “remuneration trust” and provided him with a legal opinion that explained how by transferring his shares to the trust, no tax would be payable on the subsequent sale of the business and that the capital would accumulate tax free.
- Nourse was told he could access the funds by way of loan.
- Nourse met with Hodge to discuss the scheme.

## Mistake – Nourse v Heritage Corporate Trustees Limited – Royal Court of the Island of Guernsey – 15 January 2015 - (continued)

- Nourse knew that he would not be a beneficiary but was not told that his children would also be excluded.
- Nourse was prevented from taking independent legal advice by a confidentiality agreement and all advice was procured by lawyers associated with Wissenbach's associates, who introduced him to a London law firm, Davenport Lyons.

## Mistake – Nourse v Heritage Corporate Trustees Limited – Royal Court of the Island of Guernsey – 15 January 2015 - (continued)

- On 16 April 2009, he met the law firm and was provided a letter of engagement and a standard form letter of advice dated the same day. The letter specifically provided that Nourse's family could receive the trust funds tax free after his death.
- Nourse was not taken through the documents.
- Nourse transferred 52 of his 61 shares the same day, which transfer was ratified by BigDug the following day.



## Mistake – Nourse v Heritage Corporate Trustees Limited – Royal Court of the Island of Guernsey – 15 January 2015 - (continued)

- Nourse applied to court to rescind the transfer of his shares to the trust on the ground that:
  - He had been induced to transfer the shares based on fundamentally inaccurate advice given that the sale of the stock would trigger capital gains tax to him, and that income tax would be chargeable to him on future income generated from the sale proceeds, and further upon his death UK inheritance tax would apply.

## Mistake – Nourse v Heritage Corporate Trustees Limited – Royal Court of the Island of Guernsey – 15 January 2015 - (continued)

Court found:

- Nourse had assigned his shares as a result of inaccurate legal advice.
- Nourse was out of his depth and pressured by a series of advisors.
- Had he known the true tax position he would not have made the transfer.
- Fact that he had transferred 52 out of his 61 shares made the mistake of sufficient gravity

## Mistake – Nourse v Heritage Corporate Trustees Limited – Royal Court of the Island of Guernsey – 15 January 2015 - (continued)

- Court considered the fact that Nourse was participating in a scheme to avoid payment of UK taxes but, notwithstanding Lord Walker's comments in Pitt v Holt did not regard that fact as preventing them from setting the share transfer aside.
- Court held that it would be unjust to leave the mistake uncorrected.

# EQUITABLE LIEN

## In the Matter of the Representation of C and the 2 Trusts

I to VIII [2015] JRC 031



## In the Matter of the Representation of C and the 2 Trusts – I to VIII [2015] JRC 031

- Mrs. C had established 8 Jersey trusts of which Equity Trust (Jersey) Limited was the original trustee.
- In 2006, Equity Trust retired. The successor trustee of Z.I and Z.II was Volain Trustee Limited and of Z.III to Z.VIII Barclay's Private Bank and Trust. Equity had received chain indemnities from Volain and Barclay's.
- The Trusts had financial difficulties, including claims of GBP 25 million and an actual claim against Equity Trust for breach of trust.
- Mrs. C decided to appoint a new single trustee, Rawlinson & Hunter in Switzerland to replace Volain and Barclays.

## In the Matter of the Representation of C and the 2 Trusts – I to VIII [2015] JRC 031 (continued)

- Deeds of Appointment and Removal were drafted, but Equity refused to be a party and sought confirmation from the Court that it held an equitable right to the trust property, as it was concerned that the appointment of a non Jersey trustee would render the enforcement of its rights under the contractual indemnities more difficult.
- court confirmed that “rights of indemnity give [a trustee] a proprietary equitable charge over or equitable interest in the trust property, and there is no reason why this charge or interest should disappear upon the appointment of new trustees”.

## In the Matter of the Representation of C and the 2 Trusts – I to VIII [2015] JRC 031 (continued)

- Given the animosity between Equity Trust and Mrs. C the Court determined that it was important to fully acknowledge the existence of Equity's rights over the property to ensure that their right to indemnification was not eroded.
- As regards to order of priority of payments, the Court ordered "it is tolerably clear...that a trustee's equitable right takes priority over the claims of the beneficiaries."
- The order of priority is less clear where there are multiple claims by trustees.
- Court held that Equity Trust did not have to enter the Deed of Appointment and Removal so long as some separate document was executed which gave them the indemnities required in accordance with the 2006 Indemnities.

# Clayton v Clayton

NZ Court of Appeal; [2015] NZCA 30

# Clayton v Clayton – NZ Court of Appeal; [2015] NZCA 30

- Divorce case between H and W after 17 years of marriage.
- During the marriage H had settled various discretionary trusts including the Vaughan Road Property Trust (VRPT).
- W claimed she was entitled to 50% of the value of the trust assets.
- H was the Settlor and sole trustee of the VRPT. The discretionary beneficiaries included H as the “Principal Family Member”, W and their two daughters.
- H had a general power of appointment which allowed him to appoint himself as the sole discretionary beneficiary.

## Clayton v Clayton – NZ Court of Appeal; [2015] NZCA 30 - (continued)

- Appeal from the judgment of the High Court which itself had heard an appeal from the Family Court.
- Family Court had held the trust to be illusory given that the trustee was not accountable to the beneficiaries but that the trust was not a sham.
- The High Court agreed that the trust was not a sham, but found the trust to be illusory based on H's general power of appointment.

# Clayton v Clayton – NZ Court of Appeal; [2015] NZCA 30 - (continued)

- The Court was faced with the following key questions:
  - Was the VRPT a sham or illusory?
  - Was the right to exercise the general power of appointment “relationship property”?

# Clayton v Clayton – NZ Court of Appeal; [2015] NZCA 30 - (continued)

## Court of Appeals

- There is no distinction between a “sham” or an “illusory” trust. The terms were effectively synonymous.
- A trust is either valid or it is not. It was wrong to argue that a trust which is not a sham could still be invalid as an illusory trust.
- Hence in the absence of a “sham” or the existence of a statutory power, the Court had no power to set the trust aside.



# Clayton v Clayton – NZ Court of Appeal; [2015] NZCA 30 - (continued)

- The Court adopted the Privy Counsel’s decision in TMSF v Merrill Lynch Bank and Trust Co.
- Where a donee of a power is entitled to appoint the subject matter of the power to himself without regard to the interests of the others, the donee is the effective owner of that property.
- It was clear from the trust deed that H intended to confer the power of appointment on himself in his capacity as the “Principal Family Member” and not in his capacity as trustee.

## Clayton v Clayton – NZ Court of Appeal; [2015] NZCA 30 - (continued)

- The Court held that the power of appointment was property under Section 2 of the Property (Relationships) Act 1976 which includes “any other right or interest”.
- The value of the right to the holder of the power is the value of the property received in the event that the power was exercised (i.e.; the net value of the trust).

# REMOVAL OF TRUSTEE

Brudenall-Bruce v Moore &  
Cotton

[2014] EWHC 3679 (Ch)

## Brudenall-Bruce v Moore & Cotton [2014] EWHC 3679 (Ch)

- Earl of Cardigan family's estate was held 49% in a bare trust for the Earl of Cardigan and 51% in a trust established for his son Viscount Savernake contingent upon his reaching the age of 40.
- Trustees were Mr. Cotton, a professional trustee, and Mr. Moore, a lay trustee.
- The value of his trust assets had significantly reduced causing the trustees to sell assets, including valuable paintings. This led to the Earl of Cardigan commencing proceedings against the trustees for damages and for removal of the trustee.

# Brudenall-Bruce v Moore & Cotton [2014] EWHC 3679 (Ch) (continued)

- Court held that under English law, a trustee may be removed if there has been a total breakdown in relations between the trustee and beneficiary.
- Relations between the Earl and Mr. Moore had broken down to such an extent that Mr. Moore had filed numerous criminal complaints against the Earl.
- Court held that it would be difficult for Mr. Moore to convey an appearance of impartiality and ordered his removal.
- It was irrelevant that the majority of the blame for the breakdown lay with the Earl.

## Brudenall-Bruce v Moore & Cotton [2014] EWHC 3679 (Ch) (continued)

- As regards Mr. Cotton, the Court found the allegations made between him and the Earl to be baseless and refused to order his removal
- The Court noted the cost involved with removing Mr. Cotton and appointing another professional trustee.

# MOMENTOUS DECISION

Cotton v. Earl of Cardigan

[2014] EWCA Cir 1312

## Cotton v. Earl of Cardigan [2014] EWCA Cir 1312

- In a separate action relating to same trusts as in Brucknell Bruce action, trustees determined the need to sell Tottenham House, the trust's most valuable asset.
- An independent realtor, Knight Frank, marketed it to a closed list of buyers, and an offer was made of GBP 11.25 million.
- Knight Frank recommended that the trustee accept the offer. The Earl agreed that it should be sold but took the view that the offer was too low.



## Cotton v. Earl of Cardigan [2014] EWCA Cir 1312 (continued)

- Trustee sought the approval of the Court.
- The High Court approved the sale but subject to the conclusion of the action to remove the trustees. However, subsequently the Court issued an emergency order to permit the sale. The Earl appealed to the Court of Appeal.

## Cotton v. Earl of Cardigan [2014] EWCA Cir 1312 (continued)

- Court of Appeal held that to approve a momentous decision, the Court must be satisfied:
  - that the trustees had decided to act in a particular way;
  - that the decision was one which reasonable and properly instructed trustees could make; and
  - the trustees had no conflict of interest.

## Cotton v. Earl of Cardigan [2014] EWCA Cir 1312 (continued)

- Court noted that although the burden is on the trustee to provide sufficient evidence of the need to approve a decision, the “Court should not place insurmountable hurdles in the way of trustees”.
- The trustee must put the Court “in possession of all relevant facts so that it may be satisfied that the decision of the trustees is proper and for the benefit of the beneficiaries” and that the exercise of its discretion is “untainted by any collateral purpose”.
- Court held that although the trustee had failed to disclose some information, this non disclosure was not sufficient to invalidate the High Court’s order, further the fact that the Trustee was concerned to improve the financial position of the Trust was not a collateral purpose.

# In the Matter of the Hugh Green Trust and the Hugh Green Property Trust

[2015] NZHC 1218

# In the Matter of the Hugh Green Trust and the Hugh Green Property Trust – [2015] NZHC 1218

- The Green family had a complex group of businesses established by Hugh Green. These were held principally in 2 trusts, the Hugh Green Trust and the Hugh Green Property Trust.
- Hugh's children had worked in the Green Group, but only Maryanne worked there consistently and worked alongside her father.
- Hugh became terminally ill. Over a period of months before his death, he signed documents to:
  1. put full control in the Group in his sons, John and Frances, and a lawyer, Mr. Michael Fisher, and
  2. to completely remove Maryanne.

# In the Matter of the Hugh Green Trust and the Hugh Green Property Trust – [2015] NZHC 1218 - continued

- Maryanne argued:
  1. Hugh did not have capacity to understand the effects and implications of the exercise of his powers.
  2. Undue influence by John and Mr. Fisher.
  3. Improper exercise of the fiduciary power by Hugh.
  4. That some of the existing trustees should be removed and replaced because of misconduct or because they were incapable of acting even-handedly towards her and her daughter.

# In the Matter of the Hugh Green Trust and the Hugh Green Property Trust – [2015] NZHC 1218 - continued

## 1. Lack of Capacity

- Evidence did not prove that Hugh lacked capacity at the time he executed the deed to change the trustee.

# In the Matter of the Hugh Green Trust and the Hugh Green Property Trust – [2015] NZHC 1218 - continued

## 2. Undue Influence

- When Hugh executed the deeds appointing Mr. Fisher as trustee he was subject to influence from John, to such an extent that his will was overborne.
- Evidence showed that John's wish to have Mr. Fisher appointed caused Hugh to act as John was driving the agenda.
- Although Mr. Fisher was acting as Hugh's lawyer, all instructions came from John.



# In the Matter of the Hugh Green Trust and the Hugh Green Property Trust – [2015] NZHC 1218 - continued

## 3. Improper Exercise of Fiduciary Power

- Court found that it was reasonable that Hugh had wanted to have his son's involved in the business and as such appointed as trustees.
- Despite some irregularities, regarding certain cheque payments by John, Court did not find Hugh to have breached his fiduciary responsibility in appointing John or in removing Maryanne.
- It was reasonable for him to have appointed Mr. Fisher as an independent trustee.

# In the Matter of the Hugh Green Trust and the Hugh Green Property Trust – [2015] NZHC 1218 - continued

## 4. Removal of Trustees

- Court considered application to remove, John, Frances and Mr. Fisher for dishonest conduct and hostility towards Maryanne, and in relation to Mr. Fisher for conflict of interest.
- Court referred to Court of Appeal in *Kain v Hutton* “mere incompatibility between trustees and beneficiaries is not enough”. It must be shown that the proper administration has been seriously effected and it has become difficult for a trustee to act in the interests of the beneficiaries.

# In the Matter of the Hugh Green Trust and the Hugh Green Property Trust – [2015] NZHC 1218 - continued

## 4. Removal of Trustees (continued)

- Court found that John had clearly engineered Maryanne's departure from the business and Mr. Fisher could not respond fairly or in an unbiased matter to Maryanne and the relationship had broken down between Frances and Maryanne.
- Court did not find that Mr. Fisher had a conflict of interest given his role in the arrangement.
- Court also noted that the trustees had not provided information to Maryanne and her daughter, Alice.
- Court found that the trustees could not act fairly and ordered the removal of John and Frances.
- It was not necessary to remove Mr. Fisher as Court had previously ruled his appointment invalid for undue influence.

# In the Matter of the Hugh Green Trust and the Hugh Green Property Trust – [2015] NZHC 1218 - continued

- Court had on the facts held that Maryanne's removal had been cancelled by Hugh and that she remained as trustee, but left it open for the defendants to apply to remove her.

**Decision of the High Court is currently on appeal to the Court of Appeal.**

# MENTAL CAPACITY AND UNDUE INFLUENCE

Re BKR [2015] SGCA 26

## Re BKR [2015] SGCA 26

- In October 2010 BKR established a BVI Trust
- In 2007 BKR had established 2 prior trusts, one with JP Morgan to provide for herself and the other with UBS to provide for the education of her 8 grandchildren

## Re BKR [2015] SGCA 26 (continued)

- In a letter of wishes dated the same date as the trust, BKR expressed the wish that:
  1. during her lifetime SGD 5MM be settled into [B] Ltd.'s bank account and replenished periodically
  2. upon her death [B] Ltd. should have its account topped up to SGD 10 MM and [B] Ltd. should be transferred to the ownership of the Protector
  3. after her death, the trustee should apply the trust property to charitable causes as recommended by a philanthropic panel chaired by her daughter, a Singapore psychiatrist
- On 27 July 2012 a deed of understanding was entered between BKR, the trustee and the daughter which provided that during BKR's lifetime the funds in [B] Ltd. would be used for the exclusive purpose of maintaining BKR

## Re BKR [2015] SGCA 26 (continued)

- BKR came from a prominent family and had a net worth of SGD 200 million
- She had 3 children; the eldest son, a doctor; a second son, a barrister in Hong Kong; and the youngest daughter, a psychiatrist
- The sons and BKR's sisters alleged BKR had lost her mental capacity and that her memory had declined over the years
- The sons and the sisters accused the daughter and her husband of having exercised undue influence over BKR



## Re BKR [2015] SGCA 26 (continued)

- Singapore Court of Appeal: in determining that BKR was unable to make decisions relating to her property and affairs:
  - could not see any purpose in setting up the trust
  - there was no evidence that she intended to disinherit her sons in favor of the daughter and husband or give the majority of her wealth to charity
  - BKR was unable to explain why it was necessary or even desirable to set up the trust
  - BKR believed she set up the trust because her eldest son would have taken her wealth and left her bereft

## Re BKR [2015] SGCA 26 (continued)

- Court found that she had acted under the undue influence of her daughter and her son-in-law
- that the statutory test for mental incapacity had been satisfied
- that she had lacked the ability to make the decision to set up the trust
- Court set aside the dispositions

# Fraud on the Power

# In the Matter of the Y Trust

(Jersey Royal Court – 2014)

# Fraud on the Power – In the Matter of the Y Trust – Jersey Royal Court - 2014

- H & W were engaged in lengthy and costly divorce proceedings
- H's father had during his lifetime settled a Jersey Trust. W and her children were beneficiaries. H was excluded from benefit.
- It was understood that H would indirectly benefit.
- As part of divorce settlement, H and W agreed that H would receive a lump sum distribution of £12 million from the trust.

## Fraud on the Power – In the Matter of the Y Trust – Jersey Royal Court – 2014 (continued)

- Trustee was unwilling to make the distribution as H was excluded.
- Proposal that the adult beneficiaries (i.e. W) bring the trust to an end, so that W could then make the distribution herself. This required amending the trust to remove the minor children and unborn.
- Trustee applied to Court to surrender its discretion to amend the trust deed.

# Fraud on the Power – In the Matter of the Y Trust – Jersey Royal Court – 2014 (continued)

## Jersey Court

- Surrender of discretion was a “last resort where no sensible alternative exists”.
- Trustee had a significant conflict of interest as amending the deed would enable it to avoid the risk of being sued and hence this interfered with its duty to act in the best interest of the beneficiaries.
- Court permitted the trustee to surrender its power.

# Fraud on the Power – In the Matter of the Y Trust – Jersey Royal Court – 2014 (continued)

- Court considered whether amending the trust deed was a “fraud on the power” (i.e. to permit the exercise of a power to benefit a non beneficiary).
- Test to determine whether it is a “fraud on the power” includes considering the primary purpose of the proposed variation.
- Court noted that amending the trust would bring closure to the long running and hostile divorce litigation which was depleting the trust and would end the “extraordinary hemorrhaging of the trust fund”.
- Secondly the wife’s health was being impacted and a “clean break” from H would be highly beneficial.

## Fraud on the Power – In the Matter of the Y Trust – Jersey Royal Court – 2014 (continued)

- Court held that the variation was not a fraud on the power.
- Court ordered that the children, grandchildren and unborn be separately represented.
- Court stated that it had to be convinced that the proposed arrangement were not to be “intended to defeat the interests of those who cannot yet speak for themselves”.
- On hearing evidence of the close relationship between W and her children and that they would be financially secure, the Court granted the order.



# WORLDWIDE MARAVA INJUNCTION

JSC Mezhdungroodniy  
Pronyshlenniy Bank v  
Pugachev

[2015] EWCA (English Court of Appeal)

## JSC Mezhdungroodniy Pronyshlenniy Bank v Pugachev [2015] EWCA (English Court of Appeal)

- Pugachev was a co-founder of a Russian bank, Mezhprom. In November 2010, the Moscow Arbitrazh Court found the bank to be insolvent
- In January 2011, the Russian authorities began a criminal investigation with regard to the insolvency of Mezhprom and Pugachev fled Russia
- In December 2013, proceedings were brought against Pugachev

# JSC Mezhdungroodniy Pronyshlenniy Bank v Pugachev [2015] EWCA (English Court of Appeal)

(continued)

- On 23 July 2014, the English Court granted a worldwide freezing order. Pugachev provided a schedule of assets, listing his interest as a discretionary beneficiary of 4 New Zealand discretionary trusts
- On 25 July 2015, Court ordered Pugachev to identify the trustee, settlor, protector and beneficiaries of each trust, details of the trust assets and copies of trust deeds
- Pugachev appealed claiming as a discretionary beneficiary that he had no interest

# JSC Mezhdungroodniy Pronyshlenniy Bank v Pugachev [2015] EWCA (English Court of Appeal)

(continued)

- In following interlocutory hearings, the Court ordered Pugachev not to leave the jurisdiction, and to surrender his passport
- Pugachev surrendered his Russian diplomatic passport but not a French passport. Further, he boarded his private boat, and despite an order for him to disembark, subsequently left the UK and took up residence in the south of France

# JSC Mezhdungroodniy Pronyshlenniy Bank v Pugachev [2015] EWCA (English Court of Appeal)

(continued)

- Shortly after, the trustees of the 4 trusts (4 NZ private trust companies) were removed by Pugachev and his son Victor, and replaced by 4 newly established PTCs, the directors of which included his personal Russian lawyer and a New Zealand lawyer

# JSC Mezhdungroodniy Pronyshlenniy Bank v Pugachev [2015] EWCA (English Court of Appeal)

(continued)

- On 23 April 2015, the Moscow Court gave judgment against Pugachev of US\$1.5 billion
- New Zealand trustees sought direction from the New Zealand Court
- English Court gave permission to use information from the trust disclosure order to serve a freezing order against a London clearing bank. the Bank agreed to freeze the account of a connected company, Luxury Consulting Limited, but not the accounts of the 4 trusts

# JSC Mezhdungroodniy Pronyshlenniy Bank v Pugachev [2015] EWCA (English Court of Appeal) (continued)

- On a request to the Court to extend the freezing order to the accounts of the trusts, evidence showed that Pugachev and his son, Victor, had settled the trusts, had transferred their funds to the trusts, were the principal beneficiaries and had received significant distributions from the trusts following their departure to France

# JSC Mezhdungroodniy Pronyshlenniy Bank v Pugachev [2015] EWCA (English Court of Appeal)

(continued)

- Court denied the order principally on the basis that there was no evidence of a risk of dissipation of assets that had not already taken place and that relief could wait the decision of the New Zealand Court on the application for directions



# JSC Mezhdungroodniy Pronyshlenniy Bank v Pugachev [2015] EWCA (English Court of Appeal)

(continued)

- Court of Appeal
  - Disagreed completely with the Court of First Instance
  - As regards the fact that the new trustees had sought directions in New Zealand, the Court held that it was always open to Pugachev to seek a variation of the English Court Order if required

## Tax Planning and Trusts

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# STEP AUSTRALASIAN CONFERENCE 2016

## TAX PLANNING AND TRUSTS DRAWING THE LINE



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# TAX AVOIDANCE AND PORNOGRAPHY

## A brief history

*“I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [“hard-core pornography”], and perhaps I could never succeed in intelligibly doing so. But I know it when I see it...”*

(Justice Potter Stewart in describing his threshold test for obscenity in *Jacobellis v Ohio* 378 U.S. 184 (1964))

# TAX AVOIDANCE AND PORNOGRAPHY

## A brief history

*“Tax avoidance is a bit like pornography. I can’t define it, but I know it when I see it.”*

(Stephen Tomlinson, 2002)

# TAX AVOIDANCE AND PORNOGRAPHY

## A brief history

*“Tax planning is a bit like pornography. At first you think you are screwing the Revenue, but as soon as your back is turned, the Revenue is screwing you.”*

(Stephen Tomlinson, 2016)

# TAX PLANNING AND TRUSTS

## Historical reasons why trusts were used to minimise tax

- Minimising exposure to estate duty
- Income splitting with spouse and children
- Exploiting misalignment of tax rates
- Maximising tax effectiveness of charitable donations
- Sheltering offshore income
- Effective use of tax losses
- Eliminating FBT and deemed dividend issues
- Maximising interest deductions
- Limiting “tainting by association”

# TAX PLANNING AND TRUSTS

## Factors that have limited the tax effectiveness of trusts

- Repeal of estate duty
- Enactment of the minor beneficiary rule
- Progressive flattening of personal tax rates
- Enactment of transitional residence rules
- Repeal of limits for charitable donations
- Alignment of the trustee tax rate and the top personal tax rate
- Changes to the “associated persons rules”
- Developments in tax avoidance jurisprudence concerning diversion of personal services income
- Blurring of the boundary between acceptable and unacceptable tax planning
- Possible imposition of shortfall penalties



# TAX PLANNING AND TRUSTS

## Reasons why trusts are still used in tax planning

- Diverting passive income to spouse and adult children
- Distributing non-imputed income to beneficiaries with tax losses
- Restructuring borrowings to maximise interest deductibility
- Structuring provision of non-cash benefits without being subject to FBT or treated as “deemed dividends”
- Use in conjunction with LTCs as an alternative to the traditional trading trust structure
- Use of pre-migration trusts to shelter offshore income beyond the 4-year transitional residence period

# TAX AVOIDANCE AND TRUSTS

## “Reading the tea leaves”

- Legislation: Section BG 1 of the Income Tax Act 2007
- Case Law: *Ben Nevis* (SC); *Penny and Hooper* (SC); *White* (HC)
- Inland Revenue’s Bible: Interpretation Statement IS 13/01
- Practical Guidance: QB 14/11; QB 15/01; QB 15/11
- Revenue Alerts: RA 11/02

# TAX AVOIDANCE AND TRUSTS

## The “Parliamentary contemplation” test

*“The taxpayer must satisfy the Court that the use made of the specific provision is within its intended scope. If that is shown, a further question arises based on the taxpayer’s use of the specific provision viewed in the light of the arrangement as a whole. If, when viewed in that light, it is apparent that the taxpayer has used the specific provision, and thereby altered the incidence of income tax, **in a way which cannot have been within the contemplation and purpose of Parliament** when it enacted the provision, the arrangement will be tax avoidance.”*

*(Ben Nevis Forestry Ventures Ltd v C of IR, para 107)*

# TAX AVOIDANCE AND TRUSTS

## Drawing the line

*“On the approach we have set out, taxpayers have the freedom to structure transactions to their best tax advantage. They may utilise available tax incentives in whatever way the applicable legislative text, read in the light of its context and purpose, permits. They cannot, however, do so in a way that is proscribed by the general anti-avoidance provision.”*

*(Ben Nevis Forestry Ventures Ltd v C of IR, para 111)*

# TAX AVOIDANCE AND TRUSTS

## Overview of IS 13/01

- Identifying the arrangement
- Identifying the purposes of the arrangement
- Determining the purpose of the relevant tax provisions
- Considering the commercial and economic reality of the arrangement
- Determining whether the arrangement is consistent with Parliament's purpose
- Considering whether any tax avoidance purpose or effect is "merely incidental"

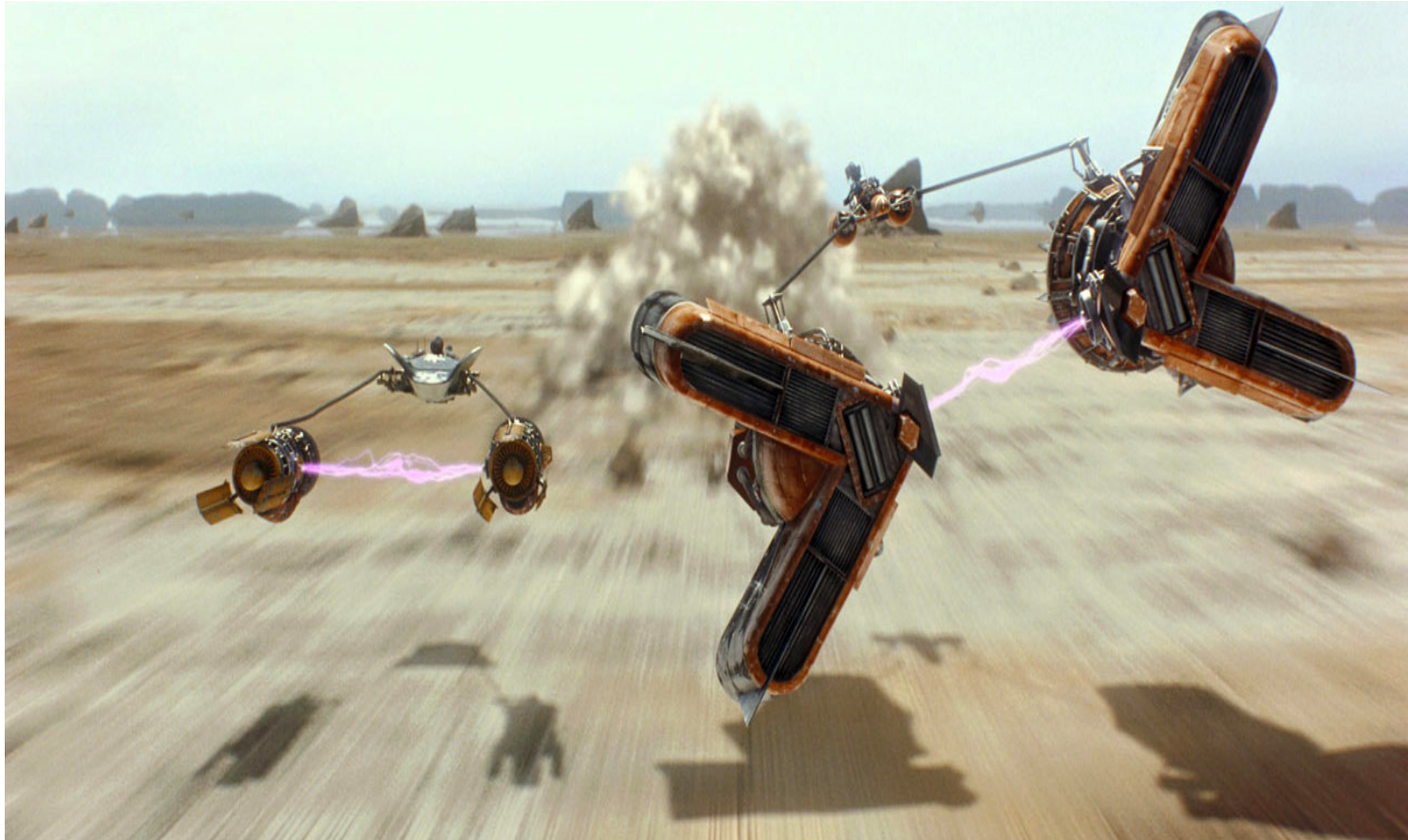
# TAX AVOIDANCE AND TRUSTS

## QB 15/11 and trust arrangements

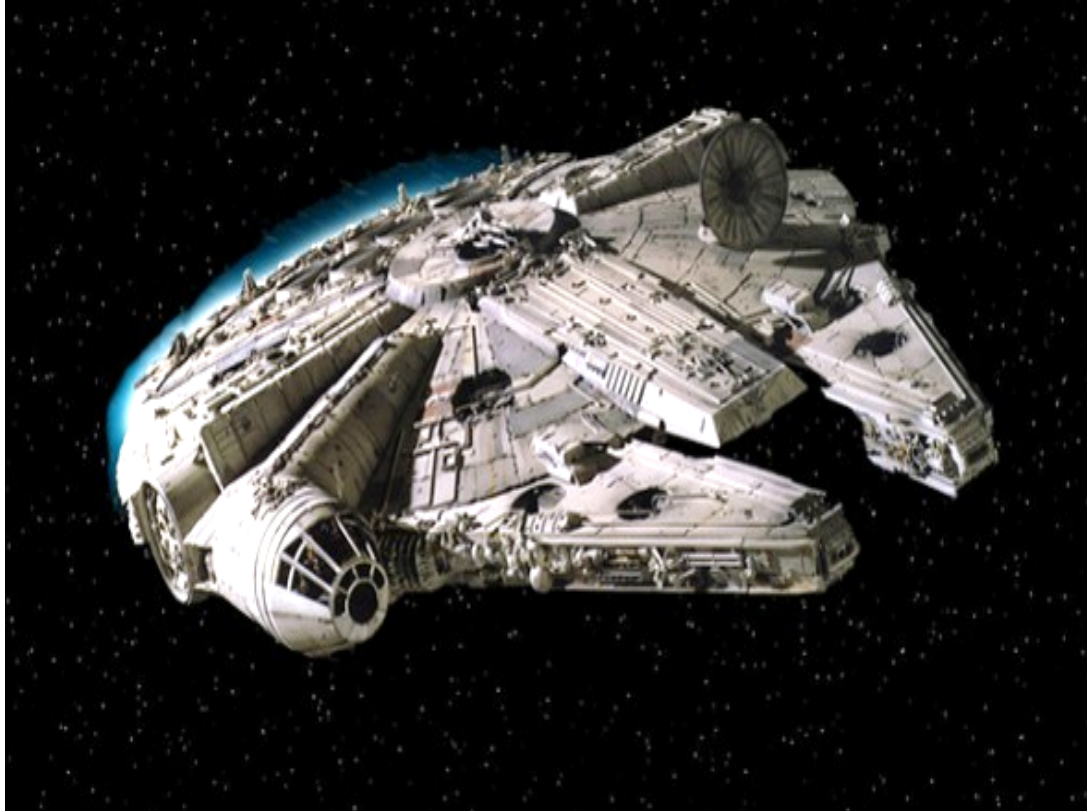
- Standard trust arrangements that comply with trust law unlikely to be tax avoidance arrangements
- Arrangements to distribute passive income to adult beneficiaries on lower marginal tax rates and beneficiaries with tax losses likely to be acceptable tax planning
- Arrangements where no real distributions are made or the beneficiary is not really a beneficiary of the trust likely to be tax avoidance arrangements
- Complex trust arrangements may require consideration of other tax provisions (e.g. company loss grouping rules) before determining whether there is tax avoidance



# CASE STUDY 1



# CASE STUDY 2





# CASE STUDY 3



# CASE STUDY 4



# QUESTION TIME





# STEP AUSTRALASIAN CONFERENCE 2016

## TAX PLANNING AND TRUSTS DRAWING THE LINE



**Stephen Tomlinson**  
**TOMLINSON LAW**  
taxation • trusts • charities

# STEP AUSTRALASIAN CONFERENCE 2016

Thursday 17 – Friday 18 March 2016



**Martelli M<sup>c</sup>Kegg**  
lawyers



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# Taking care of Information: Trustees' Duties in Confidentiality, Privacy and Disclosure

*Kathryn Dalziel, Partner & Ingrid Taylor, Partner, Taylor Shaw Barristers & Solicitors*



# Taking Care of Information ♪

## Trustees' Duties (and Powers) ♪ in Confidentiality, ♪ Privacy and Disclosure ♪



Ingrid Taylor ♪  
Kathryn Dalziel ♪

# We are going to talk about:♪ ♪

- Types of information♪
- Disclosure of Trust Documents to Beneficiaries♪
- Law Commission Recommendations♪
- Disclosure of “Non-Trust” Documents♪
- Confidentiality ♪
- Privacy♪
- Case study♪





# Types of Information:♪

## Trust Documents♪

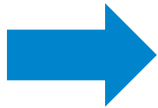


## Non- Trust Documents♪

# Disclosure of Trust Documents to Beneficiaries♪



- What are the duties of disclosure?♪
- Do I have to disclose everything?♪
- What about beneficiaries under age 20?♪



Inconsistent disclosure practices♪

# Disclosure of Trust Documents to Beneficiaries♪



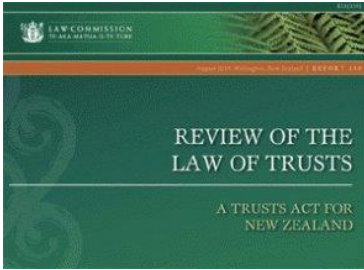
- *Schmidt v Rosewood Trust Ltd*♪
- *Foreman v Kingstone*♪

No absolute right of disclosure♪

Personal or commercial confidentiality♪

Assessing documents and necessary safeguards♪

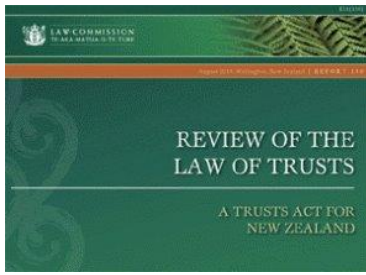
Balancing competing interests♪



# Law Commission Recommendations♪

- Codify *Schmidt*♪
- Beneficiaries should receive information which is reasonably necessary to allow trust to be enforced♪
- Trustees to notify beneficiaries of basic trust info♪
- Presumption of disclosure (unless good reason to withhold)♪
- Consider charging♪
- Apply to Court for direction if necessary♪





# Law Commission Recommendations♪

## *Factors in exercise of discretion♪*

- nature of interests held by beneficiaries♪
- issues of personal or commercial confidentiality♪
- age & other circumstances of beneficiaries♪
- impact on trustees, other beneficiaries, & third parties♪
- would notification/non-notification embitter family feelings & relationship between trustees & beneficiaries to detriment of beneficiaries?♪
- expectations/ intentions of settlor (see Trust) as to notification♪
- can some or all of documents be disclosed?♪
- can safeguards be imposed on use of documents ♪  
♪(eg undertakings, professional inspection)♪

# Disclosure of “Non-Trust” Documents♪



## *Breakspear v Ackland*

*“ There are no fixed rules, and the trustees need not approach the question with any predisposition towards disclosure or non-disclosure. All relevant circumstances must be taken into account, and in all cases other than those limited to a strict review of the negative exercise of a discretion, both the trustees and the court have a range of alternative responses, not limited to the black and white question of disclosure or non-disclosure.”*

# Confidentiality ♪



# Privacy🎵

- Only collect personal information if you really need it.
- Collect it from the people concerned.
- Tell them what you're going to do with it.
- Be considerate when you're getting it.
- Take care of it once you've got it.
- People can see their information if they want to.
- People can correct their information if it is wrong.
- Make sure information is correct before you use it.
- Get rid of it when you're done with it.
- Use it for the purpose you got it.
- Only disclose it if you have a good reason.
- Only assign unique identifiers where permitted.





# Case Study

Beneficiary A (Ingrid) emails the trustees to tell them her sister, Beneficiary B (Kathryn) is drinking and gambling too much and should not receive a lump sum distribution at this time as Kathryn is likely to spend it immediately at the Auckland Casino. The trustees make limited enquires as to Kathryn's "problems" and agree that now would not be a good time to give her any property. Kathryn is unhappy with this decision (she was confident 22 black was a winner this week and Veuve Cliquot was on special) and asks the trustees for disclosure of all trust documents including all communications about her.

What should the trustees do?

# Be Like Us ...♪





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# Equitable Compensation for Breach of Trust: Off Target

*Prof. Matthew Conaglen, Faculty of Law, University of Sydney*



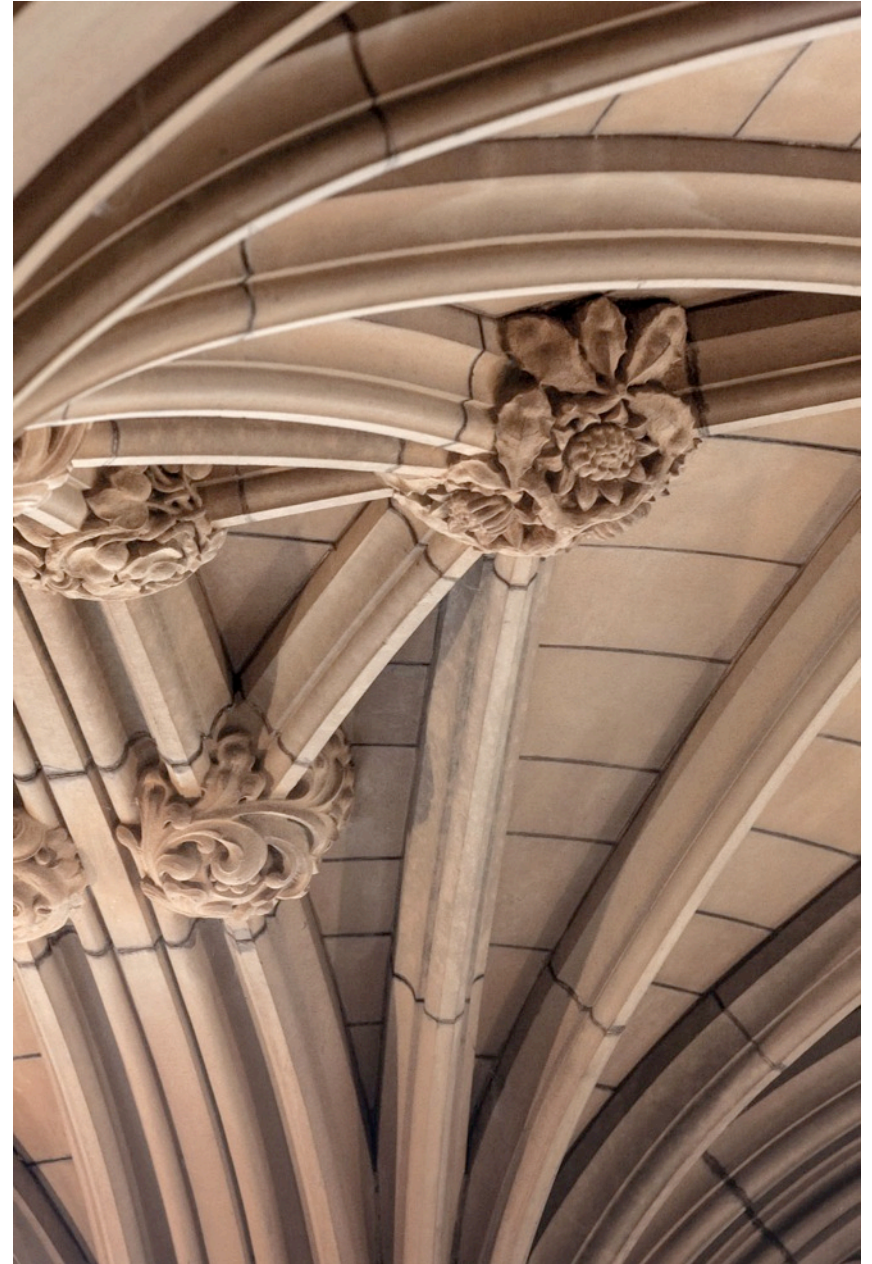


# Equitable Compensation for Breach of Trust: *Off Target*

Professor Matthew Conaglen  
Sydney Law School



THE UNIVERSITY OF  
SYDNEY



# Introduction

- M Conaglen, “Equitable Compensation for Breach of Trust” *Off Target*” (2016) 40 Melbourne University Law Review (forthcoming)
- “of a more absolute nature than the common law obligation to pay damages for tort or breach of contract” – *Re Dawson* (dec’d) [1966] 2 NSWLR 211, 216

# Introduction

- *Target Holdings Ltd v Redfern* [1996] AC 421
- *AlB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2015] AC 1503
- J D Heydon, M J Leeming & P G Turner, *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies* (LexisNexis, 5<sup>th</sup> ed, 2015), [23–210]-[23–215]
- *Youyang Pty Ltd v Minter Ellison Morris Fletcher* [2003] HCA 15, (2003) 212 CLR 484

# Traditional Principles

## Types of Accounts

- Account of profits
- Account of administration
  - Account in common form
  - Account taken on the basis of wilful default



# Traditional Principles

## Accounting mechanisms

- Surcharging
- Falsification
- Examples:
  - Income received but not entered in accounts (surcharge; common account)
  - \$100,000 spent to buy unauthorised shareholding (falsify; common account)
  - Debts which should have been collected for the trust (surcharge; wilful default account)

# Traditional Principles

## Role of Causation

- Common Accounts
  - “once the fact is established that money belonging to this trust has got into the hands of one of the trustees without the consent of the others, and that by the default of the bank, we are not at liberty to speculate whether the same result might not have followed whether the bank had been guilty of that default or not.” – *Magnus v Queensland National Bank* (1888) 37 ChD 466, 472 per Lord Halsbury LC

# Traditional Principles

- Common Accounts
  - “the strength of the argument on behalf of the Appellants rests upon a fallacious and misleading use of the expression, ‘loss caused by the conduct of the bank’; [...] The loss occurred as soon as the money which belonged to the trust was diverted into the hands of a person who had no right to represent the trust. The proposition presented to us by the Appellants, if divested of its popular and specious look, is this, that we ought not to visit those who lose trust property with the consequence of having to make it good, provided it can be shewn or surmised that, if they had made it good, somebody else would have lost it over again. Is that a tenable proposition? A man knocks me down in Pall Mall, and when I complain that my purse has been taken, the man says, ‘Oh, but if I had handed it back again, you would have been robbed over again by somebody else in the adjoining street.’ ” – *Magnus v Queensland National Bank* (1888) 37 ChD 466, 477 & 480 per Bowen LJ

# Traditional Principles

## Role of Causation

- Common Accounts
  - *White v Baugh* (1835) 3 Cl & Fin 44 (6 ER 1354)
  - *British America Elevator Co Ltd v Bank of British North America* [1919] AC 658, 663-664, 665 & 666 (PC)
- Wilful Default Accounts
  - *Re Brogden* (1888) 38 ChD 546 (CA)

# Modern Changes

## Equitable compensation without an accounting

### England

- *Target Holdings Ltd v Redfern* [1996] AC 421
- *AlB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2015] AC 1503

# Modern changes

## Australia

- *Youyang Pty Ltd v Minter Ellison Morris Fletcher* [2003] HCA 15, (2003) 212 CLR 484

Object	Amount
Buy bearer deposit certificate (to mature in 2003)	\$257,000
Minters expenses	\$ 22,000
To ECCCL	\$221,000
<b>Total investment value in 1993:</b>	<b>\$500,000</b>

# Modern Changes

## New Zealand

- *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA)
- *Lee v Torrey* [2015] NZHC 2834 at [115]
- *Fisk v McIntosh* [2015] NZHC 1403 at [41] & [50]
- *Eden Refuge Trust v Hohepa* [2010] NZHC 371 at [225], [2011] 1 NZLR 197

# Conclusions

- *McIntosh v Fisk* [2016] NZCA 74 at [21]
- “It is just as if I go along to my solicitors, I put the solicitors in funds to complete the purchase of Blackacre, there is authority to pay out Blackacre, the proceeds to the vendor – that does not happen, they are paid somewhere else – and I go back to the solicitor and say, ‘Where is my money?’ ” – *Youyang Pty Ltd v Minter Ellison Morris Fletcher* [2002] HCA Trans 577 at lines 1431-1435



## Mediation of Trust Disputes: Risks for Trustees

*Jeremy Johnson TEP, Partner, Wynn Williams, Christchurch*



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*lawyers*



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# Disputes, Settlements and Compromise: Risks and Strategies for Trustees

PRESENTED BY: Jeremy Johnson TEP



## Introduction

- Increasing number of trusts means increasing number of trust disputes
- What is the ability of trustees to settle or compromise claims?
- Understand nature of the dispute

## We will look at

- **Classification of trustee disputes**
- **Limitations on the ability to settle**
- **Suggestions for how to handle**
  - Court applications
  - Possible reforms

## Classification of trust disputes

- **Generally will reflect nature of the trust**
  - Commercial trusts – disputes with third parties
  - Domestic trusts – claims under PRA
    - S44 and s44C claims
  - Trusts used to defend assets – challenges to the existence of the trust or disposition of assets into it
  - All trusts – claims by beneficiaries against trustees

# Classification of trust disputes

- **What is the theoretical framework?**
  - *Alsop Wilkinson v Neary* [1995] 1 All ER 431
    - Picking up on *Re Buckton*
    - Often cited in New Zealand when dealing with trustee costs
  - Mr N stole £1m from firm's trust account – case about attempts to defeat dispositions to trusts
  - Trustees unsure whether to defend and sought prospective costs orders

## Classification of trust disputes

- **Lightman J refined the three accepted areas:**
  - Trust disputes – about the existence or terms of the trust
    - Friendly
    - Hostile
  - Beneficiary disputes – a challenge by beneficiaries to trustee actions either past or future
  - Third party disputes – e.g. disputes with other contracting parties

## Classification of trust disputes

- These are recognised as not definitive
- *Singapore Airlines Ltd v Buck Consultants Ltd*
  - SAL Pension Scheme – Buck retained as consultants to advise on documents
  - SAL and trustee sued Buck for negligence
  - Preliminary questions of construction were considered – Buck largely won
  - HC told SAL to pay Buck on a scale basis and indemnified for balance
  - CA reduced indemnification to 50% due to Buck's self-interest



## Limitations on the ability to settle

- **Where does the ability to settle come from?**
  - NZ – s20(g) Trustee Act 1956
  - England – s15 Trustee Act 1925
    - must be non-negligent – s11 Trustee Act 2000
  - NSW – s49 Trustee Act 1925
  - Vic - s19 Trustee 1958

## Limitations on the ability to settle

- **Third party disputes**
  - Basic trustee duties apply
    - Act in good faith in best interests of the beneficiaries (in England non-negligently)
  - *Ludwig v The Public Trustee*
    - Beneficiary sued trustee in negligence for agreeing to compromise a claim brought by a car rental company
    - Public Trustee had sought advice about strength of claim and was advised to compromise
    - If settled on basis of legal advice then “in many circumstances” an adequate demonstration of acting properly
    - In some circumstances – such as where advice does not appear to accord with commercial common sense – second opinion should be sought
    - Commented on duty of good faith – obtaining and relying on sensible advice is acting in good faith

## Limitations on the ability to settle

- **“Friendly” trust disputes**
  - Involve genuine questions that need resolution
  - Trustees can play a full role and have costs paid out of trust funds
  - Unlikely to be any real questions of settlement as there are genuine questions that need answering

## Limitations on the ability to settle

- **“Hostile” trust disputes:**
  - Claims to set aside disposition of assets into trust
  - Claims arising out of failed relationships
  - Claims arising under family protection legislation

## Limitations on the ability to settle

- **“Hostile” trust disputes – claims involving disposition of assets**
  - No duty to defend trust assets from external claims – leave to beneficiaries
  - Why? Because if claimant successful trustee holds on trust for her/him
  - But what if the protagonists settle?

## Limitations on the ability to settle

- **“Hostile” trust disputes – claims involving disposition of assets**
  - What does the settlement require of the trustee?
    - *In re Earl of Stafford* – dispute about family chattels
    - Settled by dividing chattels between trust and some beneficiaries absolutely and those same beneficiaries giving up interests
    - Challenged on basis outside power to compromise
    - Held was within power as did not involve trustee varying trusts but beneficiaries voluntarily relinquishing entitlements

## Limitations on the ability to settle

- **“Hostile” trust disputes – claims involving disposition of assets**
  - What are the terms of the trust?
    - Trustees need to consider all beneficiaries
    - If minor, unborn or unascertained may need court approval
    - No need to consult or have everyone agree – it is a trustee discretion
    - Economic considerations not paramount – family peace important too

## Limitations on the ability to settle

- **“Hostile” trust disputes – family breakdowns**
  - Treading a fine line – must not actively participate but nor can just be a rubber-stamp
  - Be practical:
    - Ensure settlement does not involve variation
    - Ensure minor, unborn or unascertained beneficiaries are protected
    - Get Court orders



## Limitations on the ability to settle

- **“Hostile” trust disputes – family breakdowns**
  - Other ways to settle?
    - Resettlement of property on to two new trusts
    - Purchase of one party’s interest by the other

## Limitations on the ability to settle

- **“Hostile” trust disputes – family protection legislation**
  - Duty to uphold will needs to be balanced against letting protagonists fight it out
  - Be mindful of requirement for court orders

## Limitations on the ability to settle

- **“Hostile” trust disputes – family protection legislation**
  - *Hodge v Depasquale*
    - FPA claim brought by daughter Pia (who received specific bequest)
    - Rose (mother) was executor and also beneficiary
    - Other daughter Norina got residue up to a certain amount

## Limitations on the ability to settle

- **“Hostile” trust disputes – family protection legislation**
  - Rosa settled claim - \$250,000.00 more for Pia
  - Norina sued Rosa as it effectively came from her
  - Court found power to compromise did not extend to such claims as an alteration of beneficial entitlements
  - Pia did not have to repay and Rosa personally liable as acted in conflict

## Limitations on the ability to settle

- **Beneficiary disputes**
  - Involves questions of trustee conduct
  - No right of indemnity from trust fund (unless within terms of indemnity in trust fund)
  - Cannot compromise claim unless involves own funds

## Limitations on the ability to settle

- **Beneficiary disputes**
  - *Sheanhan v Thompson*
  - Claim by new trustees against old
  - Old trustees had been sued by potential beneficiaries – alleged had taken trust assets for own purposes illegitimately (and acted in contempt of court)
  - Settled that by two payments totalling AU\$2.2m

## Limitations on the ability to settle

- **Beneficiary disputes**
  - *Sheanhan v Thompson*
  - New trustees' claim successful
  - Basic principle is cannot use trust assets to settle a claim against you for breaching trust
  - Supported by terms of power to compromise
  - Highlights need for insurance

## Solutions for trustees: practical and theoretical

- **Practical:**
  - Carefully assess nature of dispute and role
  - Structure so as to avoid issues
    - Don't alter beneficial entitlements (even if power in deed to do so)
    - Remember minor, unborn and unascertained
  - Seek proper legal advice before compromising
  - Look to the Court for approval if needed



# Solutions for trustees: practical and theoretical

- **Theoretical**
  - Amend Trustee Act 1956 to make category of disputes and powers clearer
  - Change HCRs to enable a swift summary procedure for court approval of settlements

# Questions



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Thank you

