Discretionary trusts – challenging the trustee's discretion

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Abstract: Disputes about family trusts are on the rise. Attacking the exercise of a discretion has always required subtlety, sometimes directed at telling the client they have no evidence to do so. Through a series of case studies, based around turmoil in the fictitious Wolfram family, we see how to begin the work, by seeking information. Then we see how important administrative discretions can be, such as investment decisions. We move on to look at decisions to appoint income and capital, and remove a beneficiary or a trustee. Finally, we consider possible tax consequences flowing from a successful review of (or revision to) a decision.

Role of trusts

Private client work does not have quite the same profile as the corporate work which turns up on the front page of the *Australian Financial Review*. But it is just as demanding and requires a special set of skills.

By 2022, some expect there to be over one million trusts in Australia.[1]

The last publicly available figures from the Australian Taxation Office, for 2013–14, showed there were about 630,000 discretionary trusts in Australia straddling investment, trading and administrative activities.[2]

With more than 600,000 discretionary trusts operating in Australia, this means more than 600,000 year end decisions about who (if anyone) should benefit from trust income each year.

And this is just the beginning.

Operating a trust always involves decisions and value judgments. And every time a decision is made, potentially, someone is benefitted and others are disappointed.

What then is the scope to review the exercise of a discretion by a trustee?

How can professional advisers avoid being caught up in the dangers?[3]

Is it done often? How do you do it? What are the effects, including tax effects? What does it involve practically?

The basic rules about exercise of a power are easy to state. The trustee[4] must act in good faith, responsibly and reasonably. The trustee must inform itself before making a decision of matters relevant to the decision. This is not limited to matters of fact. Quite often, this will involve taking advice from experts. But it is a matter for the advisers to *advise*, and for the trustee to decide, and there are real limits on the ability of a trustee to delegate. Practically, this can cause real difficulties for lay trustees looking at masses of highly technical data.[5]

But we immediately run into complications. There is a difference between *excessive* execution of a power (purported execution of a power in a way the law renders partially ineffective)[6] and fraud on a power.

Fraud on a power is defined classically, both positively and negatively, in *Duke of Portland v Topham*.[7] The trustee must act in good faith and sincerity, and with an entire and single view to the real purpose and object of the power. A power is not to be exercised for the purpose of accomplishing any bye or sinister object, going beyond the purpose and intent of the power.

Further, where there has been excessive execution of a power, the trustee is not automatically liable, but may escape liability where it has acted conscientiously in obtaining and following advice that is apparently competent, even if the advice turns out to be wrong.[8]

Finally, for present purposes, it may not be sufficient to prove that a trustee has failed to consider relevant information. The information must be such as would have changed the decision, not simply such as might have changed it.[9]

This may be a little difficult to take in. The best way to approach this is with a practical example.[10]

Unhappiness with the Wolfram Trust

Mr and Mrs Wolfram set up the Wolfram Trust to provide for one of their two sons, Cain. The other son was Abel.

Cain had been badly injured in an accident when young, and his parents were concerned that he should have access to substantial capital when he was older, since he would not have the same opportunities as Abel. Although Cain's injuries were principally physical, there had always been a concern about how he might cope in stressful situations, and whether there was a cognitive impairment or educational disadvantage that would require more assistance in business matters.

Mr and Mrs Wolfram are the trustees. They are now elderly.

The deed provided that the trust fund might be invested in land and in securities, in addition to the usual cash assets.

In fact, one half of the original trust capital, $10m, was invested in shares in Dud Properties Pty Ltd (the "Dud Investment"), a speculative property vehicle controlled by Mr and Mrs Wolfram's brother-in-law, Mr Dud.

The other half, $10m, has been profitably invested directly in land in the west of Brisbane (the "Direct Property"), and has benefitted from successive town planning decisions enabling the land to be subdivided with enormous success.

The primary income and capital beneficiaries of the Wolfram Trust were named as Cain and Abel, with tiers of other relatives also named. However, Mr and Mrs Wolfram never referred to this trust when speaking to Abel, and it was kept secret from Cain until he achieved his majority.

Primary beneficiaries take unless income is appointed away by year end; likewise capital, unless otherwise appointed before the vesting date.

Lower tiers of beneficiaries, such as any children of Cain or Abel (second tier), only become default income and capital beneficiaries if all beneficiaries in all higher tiers have died. All tiers of beneficiaries are objects of discretion (whilst alive).

Unfortunately, the Dud Investment soured, losing half the capital so invested. Mr and Mrs Wolfram regret that they did not insist on having a seat on the board of that company, in which they had invested $10m of the trust's capital. They had not insisted on seeing financial reports. They simply trusted their brother-in-law, but he made some elementary errors in the approach he took to property investment through Dud Properties Pty Ltd, leading to substantial losses.

The Direct Property investments had been supervised closely by Mr and Mrs Wolfram, albeit with the usual consultants providing assistance. These had enjoyed the enormous success mentioned above.

At no stage was income of the Wolfram Trust ever appointed in favour of Abel. Further, a view was taken that the trust fell within the excepted income provisions, as the seed capital came from the personal injury compensation paid in favour of Cain. Thus, substantial distributions were made each year to Cain to provide ongoing medical expenses and assistance with his particular educational and social needs.

Twenty years on, Cain and Abel live in different countries, and rarely speak. Cain never married, in part owing to his childhood injuries, but retained a vital interest in the property development activities which continue to occur through the Wolfram Family Trust. He has gathered around him a group of trusted professional advisers, in relation to his legal and accounting requirements, but also his property development activities.

Abel married and has children who are potential objects of discretion under the Wolfram Family Trust. But he has only just learnt of the existence of this trust.

Abel wonders why he was never told about this trust, having learnt about it only through a careless line in a newspaper report concerning the fabulous wealth generated over the past decades through Cain and his parents' efforts concerning the Direct Property.

Abel has his solicitor write to Cain enquiring whether Abel and his family are beneficiaries or objects of discretion under the Wolfram Trust. On the assumption that they are, the solicitors ask for the trust deed and full accounts of the trust back to the time when the trust was settled.

Immediate areas of dispute

From the above facts, we can foresee that the trustee may fall into dispute with Abel about:

- whether Abel has been properly considered for distributions, and how he and his children might be considered for distributions in future; and
- the monumental losses incurred by the trust through its investment in shares in Dud Properties Pty Ltd, the Dud Investments.

Cain may also attempt to join the fray, in his capacity as a beneficiary. There are limits to his ability to do so. But he will likely be joined in any proceedings, and he will have to decide whether he takes an active part in such proceedings.[11]

But the first point which may divide the parties is access to information. It is fundamental that the actions of a trustee or fiduciary should be capable of review.[12] Without basic information, such as whether Abel is a beneficiary or object of discretion, Abel is hamstrung, seeking to call into question any of the affairs of the trust.

Access to information

Unsurprisingly, access to information is a vital step toward articulating complaints about trustee exercises of discretion or other misfeasance.

Without information, a beneficiary cannot hold a trustee to account.

Duty to inform beneficiaries of their rights

The position differs as between an object of discretion and a beneficiary of a strict trust. And these might be regarded as extremes of a range.

A beneficiary of a strict trust must be informed by the trustee of his rights under the trust when of full age and capacity.[13]

Objects of discretion, on the other hand, are not as clear. The exact obligation to tell a mere object of the possibility that he might be considered for a distribution was again left unexplained in *Segelov v Ernst & Young Services Pty Ltd*:[14]

> "It is, however, a much larger step to suggest that in all trusts a beneficiary's right to inspect the trust documents, including the trust deed, gives rise to a corresponding duty of disclosure owed by the trustee to the beneficiary to have his or her rights explained to them, including in the case of potential objects of a discretionary trust their entitlement to an interest in the trust fund once determined by the trustee. … This contention should be rejected. To accept such a proposition would be to impose a duty on trustees without regard to the nature and the terms of the relevant trust and the social or business environment in which the trust operates …"

In the present case, if we assume that Cain was a default beneficiary as to capital, with his brother Abel, then arguably both were entitled to be told of their respective beneficial, vested interests upon attaining majority. Cain was told. Abel was not, and was thus never in a position to make representations to the trustees as to his needs, if any, which could have been met using discretionary powers to appoint income or capital.

On the other hand, Abel's children might[15] effectively only be objects of discretion as to income, or as to capital, and might yet not have obtained majority. Real problems arise where such persons are second or lower tier default beneficiaries, for example, ranking behind their parents, and thus have only a contingent interest (dependent upon other lives falling). And such a contingent interest is liable to be defeated by appointment in favour of a discretionary object.

Some of the case law about the rights of those who take only in the event of the happening of a contingency does look decidedly dated in the face of the modern discretionary trust deed.[16] Indeed, some of the distinctions drawn in the cases not only look dated, but are also decidedly difficult to apply in practice.

"Trust documents"

The first issue is whether a document is a "trust document", or something private to the trustees.

Examples given in *Hartigan Nominees Pty Ltd v Rydge*[17] of documents which may be property of the trustee, and may have come into existence in relation to the administration of the trust, but nevertheless will not be a "trust document" include:

- a letter from a possible beneficiary conveying information about the beneficiary's circumstances;
- a note for or by a trustee of discussions with other beneficiaries to assist the trustee to decide how to exercise a discretionary power; and[18]
- a memorandum of wishes.[19]

"Confidential" trust documents

Next, there are questions of confidentiality which may justify withholding a document from a beneficiary.[20]

In *Hartigan Nominees*, much of the debate was about a memorandum of wishes. This was not a "trust document".

But you could also imagine a case where disclosure of information or a document, such as a secret recipe or other confidential information, could cause jeopardy to the other beneficiaries and objects. Yet, the document recording the secret recipe could be a "trust document".

A good example was *Rouse v IOOF Australia Trustees Limited*[21] where the trustee acted for investors in a forestry project. The trustee was suing people.

There was a question about whether the trustee ought to provide information to beneficiaries about that litigation, including the brief to counsel.

Critically, in that case, the beneficiaries had not claimed that they had been prevented from exercising rights under the trust deed; nor that their attempts to exercise such rights had been frustrated. And, importantly, they had not shown that reasonable requests for information about the course of the litigation had been rejected, as distinct from requests for access to particular primary documents.[22]

Doyle CJ said that the trustee was entitled to refuse access to trust documents (in cases going beyond a necessity to maintain confidentiality in the reasons for exercise of a discretion).[23] Doyle CJ said:[24]

> "There must be various situations in which a trustee, particularly a trustee conducting a business, would be put in an impossible position if the beneficiary of the trust could, as a matter of right, claim to inspect documents in the possession of the trustee and relevant to the conduct of the business. It is readily conceivable that there will be situations in which an undertaking of confidentiality is not sufficient protection. The fact that the trust is one in which numerous beneficiaries have an interest, and the further fact that those beneficiaries may have differing views about the wisdom of the course of action being pursued by the trustee, only served to emphasise, in my opinion, the need for the law to recognise some scope for a trustee to refuse to disclose information on the grounds that it is confidential and on the further ground that the disclosure *is not in the interests of the beneficiaries as a whole*." (emphasis added)

Theoretical basis for beneficiary access to documents

Once we get past the issues of whether something is a "trust document", and whether something should otherwise not be disclosed because it is "confidential", we get to the more difficult question yet, which is the basis upon which a beneficiary may assert an entitlement to see a trust document, absent any threat of litigation.

Rouse adverts to, but does not decide, whether the claimed entitlement has to be decided by reference to whether a beneficiary has a *proprietary interest* in a trust document, or on the basis that a fiduciary must be ready with his accounts.[25]

The sea change, in favour of a *flexible* approach, requiring disclosure to the extent necessary to enable a beneficiary or object to hold a trustee to account, came with the Privy Council decision of *Schmidt v Rosewood Trust Ltd*:[26]

> "Their Lordships have already indicated their view that a beneficiary's right to seek disclosure of trust documents, although sometimes not inappropriately described as a proprietary right, is best approached as one aspect of the court's inherent jurisdiction to supervise, and where appropriate intervene in, the administration of trusts. There is therefore in their Lordships' view no reason to draw any bright dividing line either between transmissible and non-transmissible (that is, discretionary) interests, or between the rights of an object of a discretionary trust and those of the object of a mere power (of a fiduciary character). …
>
> … [No] beneficiary (and least of all a discretionary object) has any entitlement as of right to disclosure of anything which can plausibly be described as a trust document. Especially when there are issues as to personal or commercial confidentiality, the court may have to balance the competing interests of different beneficiaries, the trustees themselves, and third parties. Disclosure may have to be limited and safeguards may have to be put in place. Evaluation of the claims of a beneficiary (and especially of a discretionary object) may be an important part of the balancing exercise which the court has to perform on the materials placed before it. In many cases the court may have no difficulty in concluding that an applicant with no more than a theoretical possibility of benefit ought not to be granted any relief."

That is a decision on appeal from the Isle of Man. It does not bind an Australian court. The decision has been debated in Australia, with no ultimate appellate court decision about whether to apply it.

A recent case, going the other way, sticking with a proprietary approach, is *Chan v Valmorbida Custodians Pty Ltd*.[27]

But I think we will eventually go down this more flexible course.

Thus, we are seeing further citations in Australia of the New Zealand Supreme Court decision of *Erceg*,[28] which involves a multifactorial approach, giving effect to *Schmidt v Rosewood Trust Ltd*.[29]

Erceg draws together the various threads in the cases as follows.

The matters that needed to be evaluated in relation to an application for the disclosure of trust documents include the following:[30]

> "*(a) The documents that are sought.* Where a number of documents are sought, each document (or class of document) may need to be evaluated separately, given that different considerations may apply to basic documents such as the trust deed and more remote documents such as the settlor's memorandum of wishes.
>
> *(b) The context for the request and the objective of the beneficiary in making the request.* The case for disclosure will be compelling if meaningful monitoring of the trustee's compliance with the trust deed in the administration of the trust could not otherwise occur. In this regard, it may be relevant that disclosure has been made to other beneficiaries. However, assuming no improper motive on the part of the beneficiary seeking information, the fact that disclosure has previously been made to other beneficiaries will rarely be a decisive factor against disclosure.
>
> *(c) The nature of the interests held by the beneficiary seeking access.* The degree of proximity of the beneficiary to the trust (or likelihood of the requesting beneficiary or others in the same class of beneficiaries benefitting from the trust) will also be a relevant factor.

(d) *Whether there are issues of personal or commercial confidentiality.* Recognition should be given to the need to protect confidential matters of a personal or commercial nature. The Court should also take into account any indications in the trust deed itself about the need for confidentiality in relation to commercial dealings or private matters in relation to particular beneficiaries.

(e) *Whether there is any practical difficulty in providing the information.* If the information sought by the person requesting the information would be difficult or expensive to generate or collate, that may be a factor against requiring its disclosure.

(f) *Whether the documents sought disclose the trustee's reasons for decisions made by the trustees.* It would not normally be appropriate to require disclosure of the trustees' reasons for particular decisions.

(g) *The likely impact on the trustee and the other beneficiaries if disclosure is made.* In particular, would disclosure have an adverse impact of the beneficiaries as a whole that would outweigh the benefit of disclosure to the requesting beneficiary? In the case of a family trust, this may include the possibility that disclosure would embitter family feelings and the relationship between the trustees and beneficiaries to the detriment of the beneficiaries as a whole. However, on the other hand, non-disclosure may have a similar effect.

(h) *The likely impact on the settlor and third parties if disclosure is made.* The impact that disclosure will have on the settlor and/or on third parties will need to be considered.

(i) *Whether disclosure can be made while still protecting confidentiality.* This may require that copies of documents supplied to a beneficiary are redacted to ensure nondisclosure of confidential information.

(j) *Whether safeguards can be imposed on the use of the trust documentation.* Examples would include undertakings and inspection by professional advisers only and other safeguards to ensure the documentation is used only for the purpose for which it was disclosed."

Claims of privilege

Overlaying the debate about entitlement to trust information and trust documents would be any claim for legal professional privilege on the part of the trustees, as against the beneficiaries.

A recent New Zealand Supreme Court authority, *Lambie Trust Ltd v Addleman*, appears to be largely conventional. It upholds the idea that advice for which the trustees have sought indemnity from the trust fund will generally be the subject of a joint privilege, shared between the trustee and the beneficiaries. Thus, the trustee cannot claim privilege as against the object/beneficiary.[31]

Unfortunately, it is not as simple as that. The trustees may be in litigation against a beneficiary, and may be properly defending their actions using the resources of the trust to do so. In that case, the trustees will be entitled to assert legal professional privilege, as against the litigious beneficiary.[32] The Supreme Court said:[33]

> "With one exception involving an unusual fact pattern, the cases cited to us in which it has been held that a beneficiary did not have a joint interest in trustee-commissioned legal advice concerned advice received after litigation had been commenced (or perhaps when it was very imminent). In contradistinction, the general pattern of the authorities is that advice received before litigation is contemplated is subject to the joint interest exception. There has, however, been little focussed discussion in the cases as to the persistence of the joint interest in the period between contemplation and commencement of litigation.
>
> We accept that the joint interest exception may cease to apply prior to litigation being commenced, for instance where the parties have reached the point in which their positions are sufficiently conflicting to justify the conclusion that the trustees are taking advice for the purpose of resisting claims or demands by the beneficiary. …"

This is difficult and continuing litigation. The New Zealand Supreme Court has asked for further submissions about one class of documents. In the meantime, it is understood that Mrs Addleman has applied to put an interim receiver into the trust.

But in summary:

- where the litigation is against a third party (not a requesting beneficiary):
  - a beneficiary may be denied access, where the requester may use the documents to prejudice the trustee in its conduct of the litigation or other beneficiaries; and[34]
- where the litigation is against the requesting beneficiary:
  - a beneficiary is not entitled to advice sought by trustee about the substance of a dispute with the trustee.[35]

A final point that remains unresolved is a case where a trustee (or prospective trustee) pays for legal advice itself. It might want to know, privately, what its responsibilities or downsides are, personally, of doing something. I gather there is a view that such an advice, though privileged, might be accessed by a beneficiary, as subject to joint privilege with the beneficiaries. For myself, I should think that would be a hard result, and contrary to the point of the privilege — to enable a person to obtain frank advice from a lawyer, about one's own position.

Disappointment with investments

The power to invest is administrative, not donative. But many administrative powers are important.

While the Direct Property has done fantastically well, recall that the Dud Investment was unsuccessful.

Abel gets accounts

As a default beneficiary attempting to investigate, for the first time, his rights and entitlements under the trust, Abel will have access to the accounts. And the accounts must be disclosed to him without time limit, in principle.[36]

Abel will have access to the trust deed, to know the extent and nature of his entitlement.

On perusing the accounts, Abel will doubtless understand that the trustees invested half the initial fund in Dud Properties Pty Ltd. The accounts may reveal the losses; or his investigations (including a request to the trustee to provide the accounts of Dud Properties Pty Ltd[37]) may show the losses.

Standard

In the mid to late 1990s, the Australian states followed New Zealand law reform, and introduced template laws modernising the rules about trust investment.[38] This article is based on a seminar in WA, which passed the laws in 1997, and the changed laws will hereafter be referred to as the "post-1997 WA law" for that reason.

Let us assume that the post-1997 WA law applies. But mention needs to be made, for comparison, of the state of the law immediately prior, since the new law assumes that the older standard applies to some extent.

Under s 18 of the *Trustees Act 1962* (WA), a non-professional trustee is held to this standard — the trustee must:

> "if the trustee is not engaged in such a profession, business or employment, *exercise the care, diligence and skill that a prudent person would exercise in managing the affairs of other persons*." (emphasis added)

Under the general law, pre-1997 WA law reform, Abel is not obliged to give credit to the trustees for success, and can attack their failures without set-off.[39] On a discretionary basis, the court may allow set-off now.[40] Matters to which the court has regard are:[41]

> "(a) the nature and purpose of the trust;
>
> (b) whether the trustee had regard to the matters set out in section 20 so far as is appropriate to the circumstances of the trust;
>
> (c) whether the trust investments have been made pursuant to an investment strategy formulated in accordance with the duty of a trustee under this Part; and
>
> (d) the extent the trustee acted on the independent and impartial advice of a person competent (or apparently competent) to give the advice."

The matters set out in s 20(1) of the *Trustees Act 1962* (WA) are:

> "(a) the purposes of the trust and the needs and circumstances of the beneficiaries;
>
> (b) the desirability of diversifying trust investments;
>
> (c) the nature of and risk associated with existing trust investments and other trust property;
>
> (d) the need to maintain the real value of the capital or income of the trust;
>
> (e) the risk of capital or income loss or depreciation;
>
> (f) the potential for capital appreciation;
>
> (g) the likely income return and the timing of income return;
>
> (h) the length of the term of the proposed investment;
>
> (i) the probable duration of the trust;
>
> (j) the liquidity and marketability of the proposed investment during, and on the determination of, the term of the proposed investment;
>
> (k) the aggregate value of the trust estate;
>
> (l) the effect of the proposed investment in relation to the tax liability of the trust;
>
> (m) the likelihood of inflation affecting the value of the proposed investment or other trust property;
>
> (n) the costs (including commissions, fees, charges and duties payable) of making the proposed investment; and
>
> (o) the results of a review of existing trust investments."

Review of the investment decision – Dud Investment

The halving of the value of the Dud Investment can be attacked with ease, but defended only meticulously and at expense. A basic issue here was lack of diversification. Property development might also be said to involve higher risk, and this requires a balancing act between risk and return overall. Half the fund went into an illiquid, high-risk investment run by a brother-in-law.

Worse, the trustees admit they ought to have better supervised the Dud Investment. After all, the property development they made directly themselves, prospered, and they are in danger of being held to a higher standard as experienced investors.

Under the general law, the trustee is obliged to supervise the investment, if made through a company, at least where there is a capacity to control the company. As explained in the leading Hong Kong text:[42]

> "…if a trust has a large investment in shares of a company, the share ownership usually comes with consequent right to vote and control the company's actions. As it is generally accepted that the starting point for trustees in their duties to the trust is to safeguard the trust and ensure its investment is protected, this is interpreted as a duty to monitor any underlying corporate structure. However, many family trusts are settled with shares in underlying family companies, and the settlors often wish to retain their control over the actions of the underlying company free from interference from the trustees …"

This follows from *Bartlett v Barclays Trust Co (No. 1)*.[43]

Some trust deeds attempt to overcome the onerous duties of a trustee, to supervise investments made through a company such as Dud Properties Pty Ltd, by a so-called "anti-Bartlett" clause. Such a clause was upheld in 2019, in *Zhang Hong Li v DBS Bank (Hong Kong) Ltd*, a decision of the ultimate appellate court, the Hong Kong Court of Final Appeal.[44]

The remedy which was sought there was to have the trustees reconstitute the fund.

In the present case, such a liability would be ruinous for the non-professional trustees of the Wolfram Trust. It would be said that they ought to have made and supervised the investment more carefully.

Nowadays, an efficient way of seeking remedy in Western Australia is s 94 of the *Trustees Act 1962* (WA) (a provision which Queensland borrowed and improved[45]).

This short-cut provision provides that a person who has an interest of various types in trust property, and who is aggrieved by a decision of a trustee in the exercise of a power conferred by that Act, may apply to court to review the Act. The relevant power here would be the investment power in s 17 of the *Trustees Act 1962* (WA).

Because the trustee might claim to act under a power in the deed, in states other than Queensland, it might also be prudent to commence proceedings calling into question the exercise of any power of investment contained in the trust deed, in the alternative.[46] That would be the procedure in other states and territories which do not yet have the short-cut provision I have mentioned.

Reviewing exclusion as beneficiary

A discretionary trust contains powers to appoint income, capital or both.

Often, Australian trust deeds contain provisions stating which beneficiaries (and in which order of priority) will take in default of a valid appointment of the income or the capital, or both.

In the present scenario, the trustees are the parents of Abel and Cain, now old and frail.

They have been concerned about Abel's requests for information. They have now been served with legal process calling into question the investment decisions (including supervision of the investments) to do with the Dud Investment.

They consult their lawyers and express the view that Abel should be removed as a beneficiary.

Their lawyers point out the complications with stamp duty and direct taxes, but also point out that the question is timely, since Abel now lives overseas. In one of the states where the trust holds land, there are provisions penalising the trustees of a trust that owns land if a beneficiary is a foreigner. Abel falls within the definition of "foreigner" for these purposes.

Can the trustees exercise the following power to exclude Abel from any further benefit?[47]

> 16. The Trustee may at any time exclude a beneficiary from the class of beneficiaries hereunder and such person shall not thereafter form a member of the class of General Beneficiaries for the purpose of this Deed and no further sums whether of income or of capital shall be allocated set aside for paid to or other applied to or for the benefit

> of such person provided however that any such notice shall not affect the beneficial entitlement to any amount set aside for such beneficiary or amount held in trust for such beneficiary.

Powers of exclusion

The above power is not uncommon. Such powers were useful where having someone as a beneficiary jeopardised the future of the trust in a more general sense, say, in a tax haven. Most recently, I saw one that was used to cut off a sibling who had had her portion, so as to simplify her life in the high-tax jurisdiction she had since moved to. However, these powers have come into their own in the current environment where there are surcharges and levies based on a beneficiary being a foreigner.

In the present case, it is apparent that the trustees could have two reasons for acting to remove Abel, the foreigner.

The first reason concerns the substantial additional land tax levy payable each year in the state where some of the real property is located. The second reason that they might think to act is to remove a beneficiary from further benefit in a case where his actions are causing disturbance to them as trustees.

One would have thought that the latter reason is not a good reason to act. On the face of it, a beneficiary who is simply trying to hold trustees to account, by asking measured questions about the investments and trust documents, is doing no more than the beneficiary is entitled to do.

This kind of dispute does happen.

In *Curwen v Vanbreck Pty Ltd*,[48] the trust deed empowered the trustee, in its absolute and uncontrolled discretion, to exclude from the class of beneficiaries a person who would otherwise be a beneficiary.

A dispute arose among the family about the directorship of the trustee company. One of the brothers made a formal request to access trust documents.

Shortly afterward, and without giving a reason, the trustee exercised its power to exclude that person as well as his brother as beneficiaries. The first brother had not even been given access to the trust documents.

Principles for deciding these cases

As with many cases about powers, the question revolves around whether the disappointed beneficiary can show that the power (here a power of exclusion) had been exercised for some purpose other than a proper purpose. Often, this will come down to a construction of the trust deed as a whole, and to matters of inference that the court is invited to draw.

One valuable inference in most civil litigation is the inference that might be drawn by the failure to tender a document or call a witness, where that document or witness might be adverse to the defendant's case.[49]

The reason why inference is so important here is that you may not get reasons from the trustee about why it exercised a power, and thus may be unable properly to commence litigation.

Recall that such reasons are regarded as private documents, and not trust documents, and thus probably will not have to be given to a beneficiary on the basis of disclosure of trust documents. Also, however, note that in the course of civil litigation, disclosure obligations may turn up such documents, even if they are not trust documents to which a beneficiary is entitled in the absence of litigation. But to commence litigation, without evidence, is a serious matter.

I return to *Curwen v Vanbreck*, mentioned above. The Court of Appeal said that the former beneficiaries in that case had the onus to establish that the trustee's exercise of discretion was not made for a proper purpose.[50]

What the beneficiary in that case had to establish was a fraud on a power. Classically, that required that the former beneficiary establish that the trustee has trespassed beyond what is permitted, in this sense:[51]

> "The donee of a limited power must exercise it bona fide for the end designed by the donor, which requires that the power can be exercised only in favour of the objects of that power and in furtherance of the purpose for which it is conferred. If the donee, in good faith, exercises a power in favour of a stranger or in some other way which is not consistent with the terms and scope of his power, such exercise … is excessive. If, however, the donee deliberately attempts 'to secure the effect of an excessive execution without actually making one', the exercise of the power is not simply excessive: it is in fact fraudulent and void."

The difference between an excessive appointment, and a fraudulent appointment, can be difficult to discern. For the purposes of this exercise, we have been let inside the solicitor's office to listen to the conversation between the elderly trustees, and the long-time adviser, and we know the two reasons available to the trustees to act to remove Abel as a beneficiary.

The trustees have now excluded Abel, but have not provided any reasons to Abel. They have provided him with a brief letter pointing to the power in the trust deed and the fact of its execution depriving him of any further benefit under the trust deed.

Result in Curwen v Vanbreck

The Victorian Court of Appeal said that if a trustee, in deciding to exercise the power, "acted upon the dual consideration of whether the beneficiaries ought to be entitled to a potential distribution of trust assets and whether those beneficiaries ought to be given access to trust documents, so that the latter consideration should be regarded as part of the trustee's primary intention, it would be an invalid exercise of power".[52]

In other words, there was no requirement that the improper purpose be the "primary or dominant purpose". The improper purpose "will constitute a fraud on the power if it be an operative or actuating purpose".

So in the present case, if an operative or actuating purpose was to retaliate against Abel for his requests for documents, or for his seeking to review investment decisions, it does not matter that there is another perfectly good reason, being the desire to save the trust fund as a whole from heavy annual taxes which were avoidable by removing Abel as a beneficiary.

The difficulty for Abel, of course, is that Abel is not party to the conversation that the trustees have had with the solicitor.

He has difficulties of proof.

As in *Curwen v Vanbreck*, Abel may not be able to draw together the threads sufficiently to prove such fraud on a power. The result in that Victorian case was that the two brothers who were excluded from benefit under that trust were unable to draw together the threads sufficiently. As the Court of Appeal said:[53]

> "Neither at trial nor on the appeal did the appellants' case rise higher than the suggestion that, because the trustee's decision was made in the context of the beneficiary's request for access to the documents, that must have been a reason for the exercise of the power of exclusion."

Appointments of income and capital to Cain

From the books of account, Abel has deduced that Cain has been favoured with income and capital distributions over many years. The actual identity of the beneficiary favoured is sometimes hidden, as this is regarded as private. Nevertheless, by dint of the fact that Cain has no children or other close relatives with whom he associates, and by further dint of the fact that the accounts show large distributions of income and capital over many years, Abel has been able to deduce that Cain could only be maintaining his luxury lifestyle because of distributions from the trust fund.

As shown above, Abel will be unable to obtain, as trust documents, any notes or resolutions concerning consideration of the merits of distributions to the various objects. Abel would be able to seek disclosure in litigation of some of those documents, probably, but faces a "chicken and egg" problem that he is not properly able to commence litigation to impugn distributions without some solid basis.

This is a usual problem faced by many litigants. However, a couple of cases indicate how this kind of problem can be approached.

Ioppolo v Conti

From the Western Australian Court of Appeal, *Ioppolo v Conti*[54] is a case about a superannuation fund. While I have had the argument over the years about whether superannuation is a fixed trust or a discretionary trust, and have heard people defend superannuation trust deeds as fixed trusts, the level of discretion given by most deeds, particularly and relevantly in relation to death benefits and reconstitutions of the fund on exit, is so large that no one can deny those elements of discretion. Thus, it is proper to consider superannuation funds in the current article.

The simple facts in this case involved a husband and wife who were the trustees and beneficiaries of a self-managed superannuation fund. When the wife died, the husband became the sole trustee. He exercised a power under the deed to transfer benefits in his wife's account to himself.

The case is largely about the superannuation regulations. But it is also useful for the passage concerning an exercise of the power to allocate the benefit from the wife's account to the husband's account.

Martin CJ said that the question came down to whether the remaining trustee "failed to address the question of whether it would be inequitable or inappropriate to pay the benefit to himself, as the Nominated Dependant".[55]

Again, the matter came down to evidence. The Chief Justice considered that there was no evidence available to support an attack on exercise of the discretion by the remaining trustee. The question came down to whether "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".[56]

The court concluded that there was no evidence that there was a sham, and there was no cogent evidence that the trustee's determination miscarried.

The important point that sometimes arises in this context is whether the trustee faced a conflict between his duty as trustee and his interest as a beneficiary. That was covered by a clause in the deed which excused such conflicts. Such conflicts cannot be ignored in any analysis.

Sinclair v Moss

The opposite result occurred in *Sinclair v Moss*.[57]

This involved a testamentary trust under which there was power to pay income to a widow, but only such income as necessary and sufficient for her support. The trustees failed to consider her other sources of income. This is an unusual power, and thus an unusual case. The appointments of income to the widow were attacked on the principle that the trustees had considered the wrong question, or (in considering the right question) they did "not really apply their minds to it or perversely shut their eyes to the facts, or that they did not act honestly or in good faith".[58]

In that case, there was a requirement to consider the extent to which the widow required support. It was proved by the claimant that the trustees simply determined how much income was available each year, and decided as between the widow and her stepchildren how that income "should be fairly distributed" without taking into account the question of need of the widow.[59]

The important decision in this case was that the determinations of the trustees were void. This required the widow to repay the distributions.[60]

The like argument also occurred in Western Australian litigation, in lengthy litigation, which had earlier determined that a trust had vested years earlier, but that discretionary distributions had continued. A claim was brought against beneficiaries who had been given discretionary distributions requiring them to disgorge the amounts. But a beneficiary successfully ran a defence of her change of position, on the faith of receipt of the wrongful distributions, thus terminating the action against her.[61]

Removal of trustees and removal of appointors

Usually, the provision to remove a trustee will be construed as a fiduciary power, in Australia, but it is truly a matter of construction.

In *Re Burton; Wily v Burton*, Davies J said:[62]

> "But perhaps the more important point is that the power to remove a trustee and to appoint a new trustee is neither a general power of appointment nor a power which may be executed in the interests of the Appointor. The interests of persons other than the Appointor must be taken into account. The power is a trust or fiduciary power, being a power conferred by a deed of trust, and must be exercised accordingly, in the interests of the beneficiaries."

The Full Court of South Australia suggests this was an over-simplification, but:[63]

> "… fiduciary duties will arise where there exists a power or discretion, to be exercised in the interests of and for the benefit of another, and where that other is vulnerable in the sense that the relationship is one of trust and dependency. That will undoubtedly arise, as in this case, where beneficiaries rely on the integrity of the appointor to appoint a competent person to carry out the terms of the trust. The most important single component, however, is the duty to act with loyalty to and in the interests only of another. A person cannot be said to be acting in the interests solely of that other where his own interests conflict with those of the other."

Finn, in *Fiduciary obligations*, doubted a power of appointment of a trustee, if conferred on a *beneficiary*, is subject to fiduciary obligations. Finn gives examples, including of the power of debenture-holders to appoint a trustee of the debenture trust deed.[64]

Davies J in *Burton* (1994),[65] as quoted by the Full Court of South Australia in *Pope* (1999),[66] had actually gone on to deal with the matter in terms of fraud on a power as

well. So does the majority of the Western Australian Court of Appeal in *Scaffidi v Montevento Holdings Pty Ltd*.[67] The New South Wales Court of Appeal in *El Sayed v El Hawach* (2015) notes the difference in approach between Finn (1977) and Davies J in *Burton*, but declines to decide the point.[68] The Western Australian Court of Appeal in *Mercanti v Mercanti* (2016)[69] also does not resolve the difference. Finn (1977) is an extra-judicial text. Davies J in *Burton* (1994) decided the case primarily on a basis contrary to Finn (1977), following *In re Skeats*.[70]

In *Mercanti*, Newnes and Murphy JJA say of a clause providing for appointment and removal of a trustee there:[71]

> "The object of the power under a provision such as cl 21 is to facilitate the appointment of a new or replacement trustee. A trustee is the archetype of the fiduciary and the office of trustee only exists for the benefit of the beneficiaries. A power of this kind conferred in a trust instrument has generally been construed as having been conferred by the settlor not for the purpose of advancing the personal interests of the appointor or otherwise for the personal enjoyment of the appointor, but rather for the due execution of the trusts for the benefit of the objects of the trust."

There are cases where it has been construed otherwise,[72] but the tendency at least in Australia is to require that the holder of the power, usually called an appointor or some similar designation, act for the benefit of the beneficiaries as a whole when deciding whether to remove or replace a trustee. He may not act selfishly.

Likewise, we have seen cases on the eastern seaboard where people have attempted to use powers in trust deeds to remove or replace the appointor itself. Those cases have turned, more, on the construction of the power to amend.

Present scenario

Assume that under the trust deed, and for historical reasons now forgotten, Abel is the appointor upon the death of his parents. This might have been done because of the concern about Cain's ability to deal with this power in the traumatic circumstances of the death of his parents, and given his disability.

Assume that the stress of litigation had taken a toll upon the parents, and each dies quickly in succession. This leaves a vacancy in the role of trustee, which Abel decides to fill by appointing as trustee Abel Trading Pty Ltd (Abel Trading).

Abel is the sole director of Abel Trading. Abel Trading's first act as trustee is to cut off the weekly pin money on which Cain has depended for his out of pockets, such as coffee and cigarettes.

The next act undertaken by Abel Trading is to appoint the whole of the capital in favour of Abel's children. (Recall that, though the previous trustees had purported to remove Abel as a beneficiary, there was no mention in the resolution of his children.)

Cain is quite concerned. He has never been capable of working except in a highly supported environment, has depended on money from the trust all his life, and will find it difficult to obtain social security support for the next five years or so, given his association with the trust, now purportedly vested.

Cain will probably attempt to review the appointment of Abel Trading as a trustee. He will also attempt to review the appointment away of the whole of capital in favour of Abel's children.

Change of trustee

In *Wareham v Marsella*,[73] again a case about self-managed superannuation, the Court of Appeal in Victoria upheld a decision to remove trustees who had decided to pay the whole of the death benefit to the husband of a remaining trustee. This was despite the fact that the trust deed gave the trustees a discretion as to which of a deceased beneficiary's dependants should receive a death benefit.

That was a case of a blended family, by the looks of things, where such debate can be willing. The remaining trustee had decided to favour her part of the family, and ignore the claim of the second husband of the deceased.

The Court of Appeal considered that the obligation of trustees properly to inform themselves of the needs of the beneficiaries was "more intense" than in other, private discretionary trusts.[74]

The trial judge had found:[75]

> "On balance, the inference to be drawn from the evidence is that the first defendant acted arbitrarily in distributing the fund, with ignorance of, or insolence toward her duties. She acted in the context of uncertainty, misapprehensions as to the identity of a beneficiary, her duties as trustee, and her position of conflict. As such, she was not in a position to give real and genuine consideration to the interests of the dependants. This conclusion is supported by the outcome of the exercise of discretion."

Turning now to the present case, Abel Trading's first act as trustee is to deprive a disabled man of any future support. This will not go down well with the court.

Further, in *Wareham v Marsella* above, the court was moved to remove the trustee. The fact that there had been a resolution to wind up the trust was no impediment to making remedial orders,[76] and the distributions were set aside in that case.

Challenge to appointment

See heading "Appointments of income and capital to Cain" for the principles that apply.

Tax, rectification and disclaimer

Improper distributions

We have seen above that one case held that distributions, improperly made, were "void".[77] Another case determined to set aside distributions, and facilitated a new trustee re-exercising the discretion.[78]

It had been thought, historically, that a mere excessive exercise of a power would be upheld to the extent possible under the power, but void beyond that.[79] But a fraudulent appointment was void (if equitable), and voidable if legal title passed.[80]

This leads to difficulties in assigning a tax character to a payment *actually* made or credited.

A search on the term "fraud on a power" within the CCH reports, *Australian tax cases*, gives little guidance. The odd case of *U201*[81] considers an unusual situation, where distributions were made to an accountant's trusts, unconnected with the client's family:

> "**Fraud on power and breach of fiduciary duty**
>
> Looked at from another viewpoint there would appear to be a fraud on a power for the family trust company to exercise the power not for any discernible purpose of the settlement but for the purpose of minimising the tax of beneficiaries under the settlement by diverting income to an accountant's trust. These considerations apply to both the 1980 and 1981 income tax years. Learned senior counsel also submitted that the trust deed did not envisage corporations or discretionary trusts as beneficiaries. We agree.
>
> To exercise the power to vary the trusts given by cl. 7, so as to appoint, not different beneficiaries, but a different trust, is not only to appoint a new trustee of part of the income, but to provide for the money to be held expressly upon the trusts of a different settlor which trust is not subject to

the same exclusions from benefit as the family trust. We do not consider the decisions in *Totledge Pty. Ltd. v. F.C. of T.* 80 ATC 4432 [1128] and, on appeal, 82 ATC 4168 at p. 4173 give any sanction to such a variation. It would be entirely possible for the trustee of the accountant's trust to direct the income so received from the family trust by means of a variation of trust to the very persons excluded from benefit under the family trust namely the settlor and the trustee, the trust company. In our opinion the variations purporting to make the accountant's trusts Nos. 80 and 81 beneficiaries under the family trust are invalid, and the three taxpayers remained presently entitled to the income as assessed.

Constructive trusts

A further submission was made that the appointments of funds under the family trust to the accountant's trusts was in breach of fiduciary obligation and should be disregarded so that the accountant's trusts should be regarded as constructive trustees for the family trust company. It is of course a very strange situation in which a trusted confidential adviser arranges his client's affairs so as to divert the income of a family trust to trusts controlled by himself or his nominees. Whether his motives be to assist his clients or otherwise, such actions on the part of a practising solicitor would, in the absence of independent legal advice to the client, rightly merit the strongest condemnation by the courts. Providing a sheaf of barristers' opinions in general terms given to the accountant, to the client is no substitute for proper advice. In our opinion once an accountant, who is not qualified to practise as a solicitor, takes it upon himself to advise upon and settle documents dealing in property, in which his clients have an interest, he incurs the fiduciary obligations which apply to those persons who are authorised to deal with property under the *Legal Practitioners Act 1898* (N.S.W.). See *Haywood v. Roadknight* (1927) V.L.R. 512, *Daly v. Sydney Stock Exchange Ltd.* (1987) Australian Securities Law Cases ¶76-106; (1985-1986) 160 C.L.R. 371 at p. 377. However it appears to us that the transactions are voidable but not necessarily void upon the ground of breach of this duty. The only proper place to determine that issue is in proceedings before a court exercising equitable jurisdiction."

The suggestion is, then, that the distributions were voidable, and that an argument that the recipient held on a constructive trust had to be tested in an ordinary court of equitable jurisdiction.

This suggests that litigation about these issues involves sequencing, in the state courts for relief about who was actually entitled (and the consequences, such as a declaration that someone held on a constructive trust), and in the limited federal jurisdictions for the review or appeal, once the state courts have made their determinations.

In a practical sense, a time-limited power of appointment of income, modelled on those in *Ramsden*,[82] would mean that a failure effectively to appoint income by the end of 30 June in a year would result in the default gift. Many deeds in Australia have that version of power, rather than the *unlimited* timing seen in *BRK (Bris) Pty Ltd.*[83]

The *BRK (Bris)* pattern of drafting leaves the trustee obliged to consider making an appointment, if the trustee has not effectively done so (nor effectively decided to accumulate), and the obligation persists after year end. This leads to complications of multiple potential assessments.

Retroactive solutions? Rectification and disclaimer

It is possible to *rectify* a unilateral document, such as a resolution of directors.[84]

It is not possible to rectify documents at will. There must be a good reason which lies in the mistaken representation, in written form, of the intended agreement or (in this case) resolution. A mere mistake as to the legal effect is not enough.

Since the court is rectifying a document, to accord with the actual agreement (or the actual resolution), the result can be seen to have an element of retroactivity.

Again, there is no point prosecuting a review or appeal against tax, until the rectification has been ordered. Some illustrative cases make the point.

The first case is *Mayo v W & K Holdings (NSW) Pty Ltd (in liq) (No. 2)*.[85] The Court of Appeal applies the above strict principle, again affirming the care with which a case must be formulated in seeking rectification.

The second case, *SAMM Property Holdings Pty Ltd v Shaye Properties Pty Ltd*,[86] demonstrates how difficult a case may be for both sides. Although the standard cross-examination manual from the US, which I have used, speaks of this aspect of advocacy as a science: it is still an art. And the rub of the green can be determinative.

Whilst you will always be told, at the outset, that rectification is an inherently difficult remedy, this illustrative case demonstrates that a determined applicant, with the right evidence, can succeed.

Mayo v W & K Holdings (NSW) Pty Ltd (in liq) (No. 2) concerns equipment leases drawn by an accountant. They contained four key errors. The GST error arose this way.

Ms Mayo bought plant, which she let on to the company. The invoiced price of the plant, to Ms Mayo, included GST.

The accountant, purporting to act for Ms Mayo, the company and the guarantor, completed the leases by calculating lease instalments by reference to the GST-inclusive price, but then including GST on the lease instalments (in six of the eight leases). This resulted in GST being charged twice.

The trial judge found that the parties had a common intention when entering into the leases, that "GST be appropriately treated in the leases".[87] Ms Mayo challenged this, in effect contending that the parties wanted GST to be treated inappropriately by the leases.[88]

The interesting point in the case was Ms Mayo's contention about *Commissioner of Stamp Duties v Carlenka Pty Ltd*.[89] There, McLelland AJA had pointed out that:

> "In general, the remedy of rectification of an instrument is available where it is established by clear and convincing proof that at the time of execution of the instrument the relevant party or parties as the case may be had an actual intention (if more than one party, a common intention) as to the effect which the instrument would have which was inconsistent with the effect which the instrument as executed did have in some clearly identified way. In this context "*effect*" means the legal and factual operation of the instrument according to its true construction, *but does not include legal or factual consequences of the operation of the instrument of a more remote, or collateral, kind (for example, its liability to stamp duty).*" (emphasis added)

Part of that passage is extracted by Sackville AJA, before answering the contention that the trial judge had erred in proceeding on the basis that "the parties intended the leases to achieve a particular effect, namely for GST to be charged correctly".[90]

Sackville AJA then stated:[91]

> "Here the effect of the leases as executed was that the charge for GST was duplicated. The leases failed to achieve their intended effect as to the amount to be charged to the company for GST. This was not a legal or factual consequence of the operation of the leases of a remote or collateral kind of the type referred to by McLelland AJA in Carlenka, where rectification would not be appropriate."

This passage is difficult. It shows that care must be taken in positioning a claim that an instrument does not achieve a particular tax effect, where seeking rectification. Perhaps here it was simpler to do, given that the error was directly to do with GST, rather than an effect that generates a GST effect. But the distinction is elusive, at one level, and there is room for advocacy here.

And it seems to follow from *Carlenka* that the effect of the order has an element of retroactivity.

Disclaimer — sometimes an exercise of discretion (or a failure to exercise discretion) leaves a beneficiary or object with unwanted amounts.

Suffice to say that the old theory that the effective disclaimer was retroactive[92] has been disturbed recently,[93] and that an appeal is pending before the High Court.[94]

For what it is worth, I consider that the right of a person not to have property forced on the person is fundamental. The Roman law heritage of the common law on the point can be seen from this passage from *Doctor and student*.

Christopher Saint Germain's *Doctor and student* (1518 CE) is a series of contrived dialogues between a doctor of the civil laws, and a student of the common law. In the dialogue of interest, the doctor asks the student whether the common law allowed a person in holy orders to refuse a legacy made to his "house" (or, perhaps, order). The student replies:[95]

> "I think that every prelate … may refuse any legacy that is made to the house:
>
> for the legacy is not perfect till he to whom it is made assent to take it:
>
> for else, if he might not refuse it, he might be compelled to have lands, whereby he might in some case have great loss.
>
> But that if he intend to refuse, he must, as soon as his title by the legacy falleth, relinquish to take the profits of the thing bequeathed;
>
> for if one takes the profits thereof, he shall not refuse the legacy…
>
> …
>
> For if a gift be made to a man that refuseth to take it, the gift is void …"

Conclusion

Though these scenarios are a work of fiction, the scenarios are inspired by real cases.

Real families have this level of disfunction.

As Tolstoy wrote:[96]

> "All happy families resemble one another, every unhappy family is unhappy after its own fashion."

The tax drivers are often the last thing considered, in ridding a trust of an inconvenient beneficiary, or in reinstating moneys improperly lost or paid.

But the tax drivers are incredibly difficult, and largely unresolved by case law.

You should resolve the trust dispute by orders of the ordinary civil courts, before approaching the AAT or Federal Court for a tax dispute. Indeed, there is a school of thought that you are stuck with the facts as at the time of the objection determination.[97]

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References

1 A de Silva et al, *Current issues with trusts and the tax system*, a report commissioned by the Australian Taxation Office, p 3.

2 Ibid, p 20.

3 They face exposure as assisting in breach of trust or fiduciary duty, and also for negligence in advising the decision-maker.

4 Or the other person holding the power, the donee.

5 Paraphrasing *Pitt v Holt* [2013] 2 AC 108 at [10].

6 *Pitt v Holt* [2013] 2 AC 108 at [80].

7 [1864] EngR 339.

8 *Pitt v Holt* [2013] 2 AC 108 at [80].

9 *Pitt v Holt* [2013] 2 AC 108 at [92].

10 The examples in this case study are fictitious. Any similarity in names or fact patterns with real life is entirely coincidental.

11 Cain must not ignore the costs consequences of any attempted intervention.

12 *Armitage v Nurse* [1998] Ch 241 at 253, speaking of an irreducible core of obligations. There, the context was a broad exemption clause in a trust deed. As to provision of information in England, see *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26.

13 *Re Emmet's Estate* (1881) 17 ChD 142 at 149; H Ford and W Lee, *Law of trusts*, Law Book Company, para 9.4610.

14 [2015] NSWCA 156 at [130].

15 During Cain and Abel's lives.

16 *Re Tillott* [1892] 1 Ch 86; *Re Dartnall* [1895] 1 Ch 474; D Heydon and M Leeming, *Jacobs' law of trusts in Australia*, 8th ed, p 350, para 17-15, fn 135; G Dal Pont, *Equity and trusts in Australia*, 7th ed, [20]-[30].

17 (1992) 29 NSWLR 405 at 433.

18 Ibid.

19 Ibid at 437.

20 Ibid at 433F.

21 *Rouse v IOOF Australia Trustees Limited* [1999] SASC 181 (*Rouse*).

22 *Rouse* at [74].

23 *Rouse* at [98].

24 *Rouse* at [100].

25 *Rouse* at [88]-[92].

26 [2003] UKPC 26 at [66] and [67].

27 [2020] VSC 590.

28 *Erceg v Erceg* [2017] NZSC 28 (*Erceg*), cited, eg, in *Jordan v Goldspring* [2021] NSWSC 7; *Webster v Murray Goulburn Co-op* [2018] FCA 990.

29 [2003] UKPC 26.

30 *Erceg* at [56].

31 C Passmore, *Privilege*, 4th ed, Sweet & Maxwell, para 6-022.

32 *Lambie Trust Ltd v Addleman* [2021] NZSC 54. See also *Dawson-Damer v Taylor Wessing* [2020] Ch 746. I have simplified the analysis, as this article is not about access to trust information as such, but rather, this article means to signpost areas of potential dispute in gaining access to trust documents and information.

33 [2021] NZSC 54 at [91] and [92].

34 *Webster v Murray Goulburn Co-Op* [2018] FCA 990.

35 C Passmore, *Privilege*, 4th ed, Sweet & Maxwell, para 6-022.

36 Compare *Addleman v Lambie Trustee Ltd* [2019] NZCA 480 at [23].

37 This was the course taken in *Addleman v Lambie Trustee Ltd* [2017] NZHC 2054 at [23].

38 H Ford and W Lee, *Law of trusts*, Law Book Company, para 10-1000. The NZ reforms of 1988 have themselves been overtaken by s 30 of the *Trusts Act 2019* (NZ).

39 H Ford and W Lee, *Law of trusts*, Law Book Company, para 10.18120.

40 S 26C of the *Trustees Act 1962* (WA).

41 S 26B of the *Trustees Act 1962* (WA).

42 S Gallagher, *Equity and Trusts in Hong Kong*, 2nd ed, Sweet & Maxwell, para 17.12.2.

43 [1980] Ch 515.

44 [2019] HKCFA 45 (Mr Justice Ribeiro PJ, Mr Justice Fok PJ, Mr Justice Cheung PJ, Mr Justice Tang NPJ and Ld Neuberger of Abbotsbury NPJ).

45 S 8 of the *Trusts Act 1973* (Qld), which was borrowed from WA and modified by Queensland.

46 When Queensland adopted this provision from the older Western Australian Act, Queensland drafted more widely to pick up a person who is aggrieved by exercise of a power conferred by the Queensland Trusts Act, or "by law or by the instrument … creating the trust". On the next review of the Western Australian Act, it would be worthwhile the Western Australian Parliament adding this further scope to s 94 of the Western Australian Act.

47 This has been adapted from a clause in a model deed in Y Grbich, G Munn and H Reicher, *Modern trusts and taxation*, Butterworths, 1978, pp 294-295. The model clause was a self-exclusion clause, able to be used by the beneficiary. I have changed it to be a clause enabling the trustee to exclude.

48 [2009] VSCA 284.

49 *Jones v Dunkel* [1959] HCA 8.

50 [2009] VSCA 284 at [30].

51 G Thomas, *Thomas on powers*, 2nd ed, Oxford University Press, 2012, p 400.

52 [2009] VSCA 284 at [42].

53 Ibid at [49].

54 [2015] WASCA 45.

55 Ibid at [75].

56 Ibid at [77].

57 [2006] VSC 130.

58 Ibid at [17].

59 Ibid at [18].

60 Ibid at [91].

61 *Clay v James* [2001] WASC 101.

62 [1994] FCA 1146 at [10].

63 *Pope v DRP Nominees Pty Ltd* [1999] SASC 337 at [47]. The potential "over-simplification" is a reference to the contention in Finn, *Fiduciary obligations* (1977), that the analysis is more correctly framed as whether there has been a fraud on a power.

64 P Finn, *Fiduciary obligations*, Law Book Company, Sydney, 1977, paras 627 and 644.

65 [1994] FCA 1146 at [11].

66 *Pope v DRP Nominees Pty Ltd* [1999] SASC 337 at [46].

67 [2011] WASCA 146 from [144]. The point did not arise on appeal to the High Court of Australia: [2012] HCA 48.

68 [2015] NSWCA 26 at [69]. The difference in approach is also simply noted by the trial division of the Victorian Supreme Court in *Ying Mui Pty Ltd v Hoh* [2017] VSC 730 from [498].

69 [2016] WASCA 206 at [398], per Newnes and Murphy JJA. Compare Buss P on this point at [316]-[319].

70 (1889) 42 ChD 522 at 527 (Kay J).

71 [2016] WASCA 206 at [397]. Compare Buss P on this point at [316]-[319].

72 *JSC Mezhdunarodniy v Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch), unreported, 11 October 2017

73 (2020) 61 VR 262.

74 Ibid at [60].

75 Ibid at [62].

76 Ibid at [106].

77 *Sinclair v Moss* [2006] VSC 130 at [84].

78 *Wareham v Marsella* (2020) 61 VR 262 at [105].

79 D MacLean, *Trusts and powers*, LBC, 1989, p 126.

80 Ibid, p 125.

81 87 ATC 1122 (AAT).

82 [2004] FCA 632.

83 [2001] FCA 164.

84 *Trani v Trani* [2018] VSC 274 at [151].

85 [2015] NSW ConvR ¶56-350 (Meagher & Gleeson JJA, Sackville AJA).

86 (2016) 102 ATR 833 (Stevenson J).

87 At [93].

88 At [94]-[95].

89 (1995) 41 NSWLR 329.

90 *Mayo* at [98].

91 At [100].

92 *Ramsden v FCT* [2004] FCA 632 at [51], [66] and [67]; *Carter v FCT* 2020 ATC ¶20-760 (FCAFC).

93 *Chief Commissioner of State Revenue v Smeaton Grange Holdings Pty Ltd* (2017) 106 ATR 151. Special leave refused: [2017] HCASL 309 on the basis that the "decision" of the New South Wales Court of Appeal "was clearly correct".

94 *FCT v Carter* [2021] HCATrans 72.

95 I have inserted paragraphing. I have the Legal Classics Library's reprint of William Muchall's 17th edition, 1787, chapter XXXIII, pp 206-207.

96 L Tolstoy, *Anna Karenina* (trans Nathan Haskell Dole), TY Crowell & Co, NY 1886.

97 *Ramsden v FCT* [2004] FCA 632 at [51], [66] and [67].