

Discretionary Trusts – challenging the trustee's discretion

Presenter:
David W Marks QC, CTA, TEP, QLD Bar

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Unhappiness – The Wolfram Trust

- ▶ Mum & Dad set up a trust for injured son, Cain
- ▶ Mum & Dad are trustees
- ▶ Both sons, Cain & Abel, as well as tiers of further relatives, are objects and beneficiaries, both for capital and income
- ▶ Always kept the existence of trust from Abel
- ▶ Always claimed the core of the trust was Cain's personal injury settlement

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Developments chez Wolfram

- ▶ Never any distribution to Abel & his kids (all overseas)
- ▶ \$10m of initial sum invested in Direct Property – very successful
- ▶ And \$10m invested in br-in-law's coy, & is a Dud investment
- ▶ Abel accidentally learns of the trust one day ...

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Information

- ▶ Without information cannot hold trustee to account
- ▶ Duty to inform of rights? – *Segelov's* case
- ▶ Access to documents:
 - ▶ "trust" documents & "confidential" trust documents;
 - ▶ Discretionary approach: *Erceg v Erceg* [2017] 1 NZLR 320
 - ▶ Privileged trust documents: *Lambie Trustee v Addleman* [2021] 1 NZLR 307
 - ▶ Rights on discovery/disclosure

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Bad investments

- ▶ Assuming post-1999 law applies
- ▶ Standard of conduct – s22 *Trusts Act 1973 (Qd)*;
- ▶ Now possible to ask that successes be set off against failures
 - ▶ But look at what you have to prove – s24(1), 30B, 30C
 - ▶ Did they have a duty to supervise *Dud Properties P/L?*
 - ▶ Did they have an *Anti-Bartlett* clause: *Zhang Hong Li v DBS Bank (Hong Kong) Ltd* [2019] HKCFCA 45

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Excluding Abel from benefit

- ▶ Trustees have 2 reasons to exclude him
 - ▶ They feel threatened and annoyed by his probing
 - ▶ They want to reduce land tax for the trust as a whole by removing a foreigner
- ▶ If Abel can prove the former was an operative or actuating purpose, it will look like fraud on a power
- ▶ Always – problems of proof

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Attacking appointments of Y/K to Cain

- ▶ Again, this is a question of proper exercise of a power, eg
 - ▶ *Ippollo v Conti*
 - ▶ *Sinclair v Moss*
- ▶ Real problems of proof here
- ▶ And why shouldn't the trustees take into account a beneficiary's disabilities in favouring him



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Putting the shoe on the other foot

- ▶ Abel becomes appointor on death of parents
- ▶ Abel appoints new trustee, Abel Trading, & he's sole director
- ▶ Abel Trading appoints the whole capital to Abel's kids
- ▶ Can Cain:
 - ▶ Set aside the appointment of the new trustee, or remove trustee?
 - ▶ Set aside appointment of capital to Abel's kids?



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Tax effects

- ▶ Setting aside a distribution – whether retroactive
- ▶ Other approaches where suitable:
 - ▶ Rectification – correcting the expression in a directors' resolution distributing amounts – in concept it just clarifies the written expression, so retroactive in a sense
 - ▶ Disclaimer – sometimes you don't want a gift – whether retroactive is on appeal to HCA, awaiting hearing (Carter).



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Tax drivers are the last thing considered

- ▶ Family disputes are emotional, irrational
- ▶ Tax drivers are the last thing considered
- ▶ But get things straightened out by orders of the State courts, before engaging in tax litigation



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Discretionary Trusts – challenging the trustee's discretion

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