

TRUSTS - AN AUSTRALIAN PERSPECTIVE*

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- 1 The general topic on which I have been asked to speak is an “Australian perspective” on trusts. Originally I was asked to speak on the topic “*When do Australian courts intervene in trust arrangements.*” That threw up questions of the review of the exercise of a trustee’s discretion, the right of a beneficiary to trust documents which a trustee does not wish to disclose, the court’s power to vary the terms of a trust, and the extent to which a court can “look through” a trust in the exercise of statutory powers in respect of property held by a trustee, for example, in the family law context or in the context of a court’s power to appoint receivers to property of persons under investigation by the corporate regulator. Although the topic has been widened, I will take advantage of that only to address one or two issues arising from two High Court decisions in revenue cases: *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 and more particularly *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* (2005) 224 CLR 98.
- 2 I propose to address:
 - a the nature of a beneficiary’s “interest” in a trust;
 - b the court’s supervisory role over discretionary trusts, including the review of the exercise or non-exercise by a trustee of discretionary power, the appointment and removal of trustees, and a trustee’s duty to provide documents or information relating to a trust and reasons for decisions;
 - c the court’s jurisdiction to vary the terms of a trust, in particular the court’s “expediency” jurisdiction; and
 - d whether through the exercise of statutory powers the court can disregard, overcome or circumvent the use of discretionary trusts.
- 3 This paper is presented in two parts. The first issue is addressed in Part I, and Part II covers the second to fourth issues. A substantial amount of material could easily be devoted to each of these issues, but the confines of time and space necessarily require an abridged discussion. The paper will also confine its examination of these issues as they arise in the context of express trusts.

Part I. The nature of a beneficiary’s “interest” in a trust

* This is a slightly revised version of a paper delivered at a Higher Courts Seminar in New Zealand arranged by the New Zealand Institute of Judicial Studies and held in Auckland and Wellington on 21 and 24 May 2010. The revision incorporates additional matters addressed at the Wellington seminar following discussion at the Auckland seminar on a beneficiary’s right to have access to trust documents. Thanks are due to my tipstaff, Ms Michelle Wibisono, for her research and contribution to the preparation of the paper.

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4 The best exposition of the subject is found in Hope JA judgment in *DKLR Holding Co (No. 2) Pty Ltd v Commissioner of Stamp Duties* [1980] 1 NSWLR 510 (at 518 to 521), and it is an important reference point when considering this issue. *DKLR Holding* was a stamp duty case. A, the registered proprietor of land, resolved to ask B to act as trustee for it by accepting a transfer of land owned by A on the basis that B would hold only the legal estate of the land, there being no intention on the part of A to part with beneficial ownership of the land (thereby hoping to avoid a liability to stamp duty on the transfer). B's directors resolved to accept a transfer of the land on that basis and resolved that B should execute a declaration of trust in favour of A. B's directors resolved that B should affix its seal to a transfer of the bare legal estate in the land. B executed a declaration of trust in relation to the land. A and B executed a memorandum of transfer of the land in the usual form. The question was whether the memorandum of transfer and the declaration of trust were liable to *ad valorem* stamp duty. One of the issues was what was the nature of the property conveyed by the transfer. It was argued that the only property transferred was the bare legal estate because immediately after the transfer, A was the absolute owner of an equitable estate in fee simple.

5 I extract the relevant passages as follows as it would detract from the value of his Honour's exposition by attempting to summarise it:

"[(14)] [After discussing the origin of equitable estates and interests]...After some hesitation, a trust interest in respect of land came to be regarded, not merely as some kind of equitable chose in action, conferring rights enforceable against the trustee, but as an interest in property. The fact that equitable estates were not enforceable against everyone acquiring a legal title to the property did not prevent them from being so regarded; a legal owner of land could lose his estate in, or become unable to enforce his rights in respect of, land in a number of ways. Although there has long been a controversy whether trust interests are true rights in rem...there can be no doubt that the interest of the cestui que trust is an interest in property...

*[(15)] These essential features of interests arising under private trusts are thus described in Jacobs' Law of Trusts, 3rd ed, p 109: "... the trustee must be under a personal obligation to deal with the trust property for the benefit of the beneficiaries, and this obligation must be annexed to the trust property. This is the equitable obligation proper. It arises from the very nature of a trust and from the origin of the trust in the separation of the common law and equitable jurisdictions in English legal history. The obligation attaches to the trustees *in personam*, but it is also annexed to the property so that the equitable interest resembles a right *in rem*. It is not sufficient that the trustee should be under a personal obligation to hold the property for the benefit of another, unless that obligation is annexed to the property. Conversely, it is not*

sufficient that an obligation should be annexed to property unless the trustee is under the personal obligation."

[(16)] Several consequences follow. Firstly, an absolute owner in fee simple does not hold two estates, a legal estate and an equitable estate. He holds only the legal estate, with all the rights and incidents that attach to that estate. If he were to execute a declaration that he held the land in trust for himself absolutely, the declaration would be of no effect; it would give him no separate equitable rights; he would remain the legal owner with all the rights that a legal owner has. At least where co- extensive and commensurate legal and equitable interests are concerned, "... a man cannot be a trustee for himself.": Goodright v Wells, per Lord Mansfield. "You cannot have a legal estate in trust for yourself.": Harmood v Oglander, per Lord Eldon. Secondly, although the equitable estate is an interest in property, its essential character still bears the stamp which its origin placed upon it. Where the trustee is the owner of the legal fee simple, the right of the beneficiary, although annexed to the land, is a right to compel the legal owner to hold and use the rights which the law gives him in accordance with the obligations which equity has imposed upon him. The trustee, in such a case, has at law all the rights of the absolute owner in fee simple, but he is not free to use those rights for his own benefit in the way he could if no trust existed. Equitable obligations require him to use them in some particular way for the benefit of other persons...

[(18)] This position can be analyzed in a similar way in respect of all the rights given to a trustee who holds property at law in trust absolutely for a beneficiary. In some cases the rights vested in the trustee may be such that he cannot be compelled to allow the beneficiary to exercise it except (unless, because of the nature of the right, it is not permissible to do so) in his, the trustee's, name. If this analysis be correct, although the beneficiary has an interest in the trust property, the content of that interest is essentially a right to compel the trustee to hold and use his legal rights in accordance with the terms of the trust. Where the trustee holds absolutely for the beneficiary, the beneficiary has a right in equity to be put, so far as practicable and generally subject to appropriate indemnities being given, into a position where directly, or indirectly, or for all practical purposes, he enjoys or exercises the rights which the law has vested in the trustee...

[(20)] What then is the result of the actions of the plaintiff [B, the putative trustee] and of 29 Macquarie [A, the registered proprietor], and of the instruments executed by them; or, rather, what will their effect be when the transfer has been registered? Before the passing of the resolutions and the execution of the instruments, 29 Macquarie was the registered proprietor of the land for an estate in fee simple. It can, no doubt, be said that it was the beneficial owner of that land, but it held no separate equitable interest in the land; the statement means merely that it was the legal owner, and there was no equitable right in anyone to regulate or control the way in which it might exercise the rights which the legal ownership gave

to it. The passing of the resolutions and the execution of the instruments have not yet changed that position. When the transfer is registered, the plaintiff will undoubtedly be the registered proprietor of the land for an estate in fee simple, and will have, at law, all the rights and powers in respect of the land which the ownership of the fee simple will give. However, consequent upon its becoming entitled to these rights and powers, there will be created, at the same time as it becomes so entitled, an equitable estate in the land in 29 Macquarie, an estate which will entitle 29 Macquarie to require the plaintiff to hold and exercise its rights and powers, so far as practicable, as 29 Macquarie shall direct. Although it may not matter, the interest so arising in 29 Macquarie will not flow from the simple circumstance that the transfer was made without valuable consideration; it will arise (so far as it appears in the stated case) because of the intention of the parties evidenced by the resolutions and the declaration of trust. The interest will arise only because the rights and powers which were previously vested in 29 Macquarie have been transferred to the plaintiff. It would not have been possible for 29 Macquarie to have acquired its equitable interest by some kind of exception from the transfer of the legal title. In a loose or popular sense, it may be said that 29 Macquarie transferred a bare legal title to the plaintiff and retained for itself the beneficial ownership, but that is not a correct description of what the memorandum of transfer, and the resolutions and declarations of trust achieved. They achieved a transfer of the estate in fee simple and, thereupon, the creation of an equitable estate in 29 Macquarie.” (my emphasis; footnotes omitted)²

- 6 Three important observations follow. First, the content of a beneficiary’s interest is a right to compel the trustee to adhere to the terms of the trust.³ Secondly, and importantly, a beneficiary’s interest is engrafted onto or imposed on the holder of legal title; it is not carved out of the legal estate. The implications of this are not explored in this paper.
- 7 Thirdly, Hope JA also points out that to describe a legal owner of property as also being the beneficial owner means that there is no one else with an “equitable right” to regulate or control the way in which it might exercise the rights which the legal ownership gave to it. His Honour was presumably referring to another person with rights amounting to ownership who can compel the legal owner to exercise his or her rights in respect of the property in a certain way. Otherwise, the statement should be qualified, for if an owner enters into a contract as to how he or she will or will not exercise rights of ownership, and if those rights are enforceable by injunction, there is someone else who may have an equitable right to

² See also the comments of McLelland J in *Re Transphere Pty Ltd* (1986) 6 NSWLR 309 on the correctness of Hope JA’s exposition extracted above, and *Commissioner of Taxation v Linter Textiles Australia Ltd (in liq)* (2005) 220 CLR 592 at 606 [30], approving the passages extracted from *DKLR Holding*.

³ This is discussed further below: see paragraph [95] below and following

control rights of ownership, but it does not mean that the owner's "beneficial ownership" is diminished in some way. A mortgagee may have rights that regulate the mortgagor's ability to deal with property (e.g. to lease it or grant further security over it), but it does not mean that the mortgagor is not the "beneficial owner" of the property.

- 8 If the trustee has incurred liabilities for which he or she is entitled to be indemnified, the beneficiary's interest in the trust assets is thereupon qualified, or deferred, because the beneficiary cannot assert a right to compel the trustee to adhere to the terms of the trust to hold the property on the beneficiary's behalf without allowing for the trustee's right of indemnity. In *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360, Stephen, Mason, Aiken and Wilson JJ said (at 367) that a trustee:

"is entitled to be indemnified against [liabilities incurred in discharge of the trust] from the trust assets held by him and for the purpose of enforcing the indemnity the trustee possesses a charge or right of lien over those assets ... the charge is not capable of differential application to certain only of such assets. It applies to the whole range of trust assets in the trustee's possession except for those assets, if any, which under the terms of the trust deed the trustee is not authorised to use for the purposes of carrying on the business. ..."

In such a case there are then two classes of persons having a beneficial interest in the trust assets: first, the cestuis que trust, those for whose benefit the business was being carried on; and secondly, the trustee in respect of his right to be indemnified out of the trust assets against personal liabilities incurred in the performance of the trust. The latter interest will be preferred to the former, so that the cestuis que trust are not entitled to call for a distribution of trust assets which are subject to a charge in favour of the trustee until the charge has been satisfied."
(citations omitted)

- 9 Notwithstanding the description of the trustee's right of indemnity as a charge and a lien, the High Court held in *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 that the right of a trustee to be indemnified out of the trust assets was not in the nature of an encumbrance. The High Court said (at 264):

"[48] Until the right to reimbursement or exoneration has been satisfied, 'it is impossible to say what the trust fund is.' [Dodds v Tuke (1884) 25 Ch D 617 at 619] The entitlement of the beneficiaries in respect of the assets held by the trustee which constitutes the 'property' to which the beneficiaries are entitled in equity is to be distinguished from the assets themselves. The entitlement of the beneficiaries is confined to so much of those assets as is available after the liabilities in question have been discharged or provision has been made for them. [Kemtron Industries Pty Ltd v Commissioner of Stamp Duties (Q) [1984] 1 Qd R 576 at 587] To the extent that the assets held by the trustee are subject to their

application to reimburse or exonerate the trustee, they are not 'trust assets' or 'trust property' in the sense that they are held solely upon trusts imposing fiduciary duties which bind the trustee in favour of the beneficiaries. [Octavo Investments Pty Ltd v Knight (1979) 144 CLR 360 at 370]"

- 10 It may be accurate to describe a trustee's right of indemnity as a right in **the nature of** a lien or charge, but that is so only in the sense that a court of equity may authorise the sale of trust assets to satisfy the trustee's right of reimbursement or exoneration, and it can be enforced notwithstanding a change of trustees.⁴
- 11 The nature of a beneficiary's interest in a trust was the subject of the High Court's decision in *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* (2005) 224 CLR 98, where the High Court pointed out that the nature of the beneficiary's interest is shaped by the terms of the trust in question. The question before the High Court was whether the holders of units in trusts, the trustees of which were the registered proprietors of certain land, were "owners" of land for land tax purposes. "Owner" in the land tax legislation was defined as "every person entitled to any land for any estate of freehold in possession." The relevant trust deeds provided that the beneficial interest in the fund was divided into units, each said to confer an equal interest in all property for the time being held by the trustee. No unit conferred any interest in any particular part of the trust fund or any investment, and unit holders were not entitled to lodge caveats or require a transfer of any property comprising the fund except as provided for by the trust deed. Unit holders were entitled to periodic distributions of income and to pro-rata distribution of the proceeds of realisation of the fund upon determination of the trust. The trustee and manager were entitled to significant fees to be paid out of the trust fund and to monthly reimbursement of their costs, charges and expenses from the trust fund. The High Court held that the unit holders did not have a proprietary interest amounting to "ownership" for the purposes of the legislation.
- 12 First, the High Court applied *Glenn v Federal Commissioner of Land Tax* (1915) 20 CLR 490, respecting the similar definition of "owner" in predecessor land tax legislation, to conclude that the unit holders' interests did not answer the statutory definition of "owners." In *Glenn*, Griffiths CJ said that it was not correct to assume that where the legal owner of property holds it on trust, "there must be some person other than the trustee entitled to it in equity for an estate of freehold in possession," namely the beneficiaries. Griffiths CJ said: "there is a prior inquiry, namely, whether there is any such person. If not there is not, the trustee is entitled to the whole estate in possession, both legal and equitable." The High Court in *CPT Custodian* said

⁴ See also *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd* [2008] NSWSC 1344.

(at 112) that these remarks were a “*prescient rejection of a ‘dogma’ that, where ownership is vested in a trustee, equitable ownership must necessarily be vested in someone else because it is an essential attribute of a trust that it confers upon individuals a complex of beneficial legal relations which may be called ownership.*”

- 13 *Glenn* concerned a testamentary trust, which was subject to a trust for accumulation and under which beneficiaries were to take the residuary estate. The question was whether the beneficiaries held equitable interests in possession or in remainder, and were “*owners*” under the land tax legislation. Griffith CJ held that the settlor had created only future equitable rights, with no present estate in possession in that property in any person other than the trustee until the end of the stipulated period of accumulation of income by the trust. It is not always the case that an equitable estate in possession is held by someone other than the trustee (at 498). An essential element of “*ownership*” in the legislation, which required an “*estate of freehold in possession,*” was the present right to enjoy the “*fruits*” from the trust fund. In *Glenn*, the beneficiaries could not take until the stipulated period of accumulation ended and thus had no such present right of enjoyment. Although they might be equitable owners “*in one sense,*” they were not owners of a freehold estate in possession. Similarly, the unit holders in *CPT* could not be said to have any present enjoyment of the fruits of the trust fund. The trustee received rents and profits generated by the trust property but did not necessarily pass the gross receipts to the unit holders directly. Rather the trustee might apply the receipts derived from the trust assets in various ways, e.g. to discharge liabilities or make investments and to distribute available “*income*” to the beneficiaries. That is distinct from a bare trust, where the trustee merely holds the trust assets and passes the total receipts derived from the trust assets to the beneficiaries.

- 14 Secondly, the High Court rejected the Commissioner’s argument that it was a “*hallmark*” of a unit trust that the unit holders had an equitable estate or interest in the fund as a matter of general law that answered the statutory definition of “*owner*”. That “*hallmark*” right was said to be in contrast to the position of shareholders (see *Charles v Federal Commissioner of Taxation* (1953) 90 CLR 598 at 609) and manifest in decisions like *Costa & Duppe Properties Pty Ltd v Duppe* [1986] VR 90. In *Costa & Duppe*, Brooking J considered a trust deed on similar terms to the ones in *CPT*, and held that the unit holders in question held interests that supported a caveat because they had a proprietary interest in the whole of the trust assets, and thus, an interest in each of the assets of which the entirety was composed. The High Court rejected this contention, saying the correct approach was to first ascertain the terms of the trust on which the property was held, and secondly construe the statutory definition to ascertain whether the beneficiaries’ rights answered the definition. One could not rely on generic notions of “*property*”, “*ownership*” or “*interest* (or other cognate terms)

divorced from the statutory context in which those terms were employed.⁵ The High Court also considered that *Charles v Federal Commissioner of Taxation* turned on the particular trust deed in that case, which differed from the trust deeds in *CPT*, such that it did not support any direct or simple conclusion about “proprietary interests” of unit holders at large.

- 15 Lastly, could a sole unit holder, or all unit holders if *sui juris*, be said to be “entitled to any land for any estate of freehold in possession” (and therefore be “owners”) if they could bring the trust to an end and call for a transfer of trust property under the rule in *Saunders v Vautier*? The High Court’s answer was no. One reason was that under the trust deed, the trustees and managers were entitled to fees for performing their duties and in that sense they were interested in the due administration of the trusts. This followed *Sir Moses Montefiore Jewish Home v Howell and Co. (No. 7)* [1984] 2 NSWLR 406, where Kearney J said (at 410-411) that the power to require a trustee to bring the trust to an end by calling for a transfer of trust property was reposed in all the persons entitled to call for the due administration of the trust. The trustees’ right of indemnity and exoneration meant that the unit holders were not the only persons in whose favour the trust property might be applied, so that the unit holders were not entitled to call for a transfer of the trust property under the rule in *Saunders v Vautier*. Secondly, the trustees’ rights of indemnity or exoneration were also unsatisfied, so that it was “impossible to say what the trust fund in question was.” That also prevented the unit holders from calling for a transfer of the trust property.
- 16 The conclusion in *CPT Custodian* that 100% unit holders did not own the land is easier to accept than the premise that unit holders could not call for the transfer of the land because of an unsatisfied right of indemnity or exoneration. It is not clear why the existence of those rights should prevent unit holders from calling for a transfer. The beneficiaries’ interest in the trust property is deferred to the trustee’s right of indemnity, so that if they called for the transfer of the trust property where the right was unsatisfied, it would be a simple matter of realising the trust property and applying sufficient funds to satisfy the right of indemnity before distributing the remainder to the beneficiaries. Indeed, that is commonly one of the mechanisms for which a trust deed provides when a trust is to be terminated.
- 17 A further question is whether the beneficiaries have no proprietary interest if it is “impossible to say what the trust fund in question was” where unsatisfied rights of indemnity or exoneration exist. The reason given in *Lord Sudeley v Attorney-General* [1897] AC 11 for why a beneficiary of an unadministered estate does not have a proprietary interest in the estate’s assets is that until the testator’s debts are paid, it is not possible to identify

⁵ See also discussion at paragraphs [122] to [125] below.

any part of the assets of the estate as those to which the beneficiary is entitled. The implications of the High Court's statement in *Buckle* and *CPT Custodian* that it is impossible to say what the trust fund is where the trustee has an unsatisfied right to indemnity or exoneration for the characterisation of the beneficiaries' interests have yet to be worked out. The answers will depend on the context in which the question arises. Where tax legislation is concerned, it makes sense that the "interest" would need to be capable of some precise ascertainment before it can be taxed.⁶ In *CPT Custodian*, land tax was levied annually with the requisite "ownership" determined at 31 December each year. The trustees' right of indemnity was expressed as a liability in the trust accounts at 31 December such that in the absence of statutory mechanisms that, for example, required the liability to be disregarded, it would be difficult to say what the taxpayer "owned" and what exactly the tax was being levied on. The High Court in *CPT Custodian* did not deny that a unit holder had a proprietary interest in the trust at large but simply held that the unit holders did not have a proprietary interest amounting to ownership and that the content of its interest turned on the terms of the particular trust deed.⁷

- 18 Outside the tax context, the nature of a beneficiary's interest also arises in considering whether a unit holder is entitled to lodge a caveat. Caveat provisions in New South Wales are found in the *Real Property Act 1900* (NSW), which relevantly provides as follows:

74F Lodgment of caveats against dealings, possessory applications, plans and applications for cancellation of easements or extinguishment of restrictive covenants

- (1) *Any person who, by virtue of any unregistered dealing or by devolution of law or otherwise, **claims to be entitled to a legal or equitable estate or interest in land under the provisions of this Act** may lodge with the Registrar-General a caveat prohibiting the recording of any dealing affecting the estate or interest to which the person claims to be entitled...*

74K Power of Supreme Court to extend operation of a caveat lodged under section 74F

- (1) *Where a caveator is served with [a lapsing notice under section 74I (1) or (2), 74J (1) or 74JA (3)], the caveator may prepare, in the manner prescribed by rules of Court, an application to the Supreme Court for an order extending the operation of the caveat.*

⁶ As reflected in cases like *Gartside v Inland Revenue Commissioners* [1968] AC 553.

⁷ See comments of Gzell J on the implications of *CPT Custodian* in *CPT Manager Ltd v Chief Commissioner of State Revenue* [2006] NSWSC 1286; (2006) 64 ATR 654 at [43]-[50].

(2) ...on the hearing of an application made under subsection (1), the Supreme Court may, **if satisfied that the caveator's claim has or may have substance**, make an order extending the operation of the caveat concerned for such period as is specified in the order or until the further order of that Court, or may make such other orders as it thinks fit, but, if that Court is not so satisfied, it shall dismiss the application..." (emphasis added)

19 In *Composite Buyers Ltd v Soong* (1995) 38 NSWLR 286, Hodgson J said (at 289) that the words in s 74F "under the provisions of this Act" qualify only the word "land" and did not require the equitable estate or interest relied upon to arise under the provision of the Act (which in any event would be impossible as an interest under the Act is *ipso facto* a legal one).

20 It has almost always been assumed that a unit holder has a caveatable interest based on decisions such as *Costa & Duppe*, to which the High Court referred to in *CPT*. In *Costa & Duppe*, Brooking J held (at 96):

"To my mind, having regard to [New Zealand Insurance Co Ltd v Commissioner of Probate Duties [1973] VR 647], [Octavo Investments Pty Ltd v Knight (1979) 144 CLR 360] and what is said in Charles v Federal Commissioner of Taxation, the conclusion is inescapable that the unit-holders in the Costa and Duppe Properties Unit Trust have a proprietary interest in all the property which is for the time being subject to the trust deed. This proprietary interest is recognized by CL7(a) of the deed. CL7(a) and CL8(a) cannot mean that the unit-holders, while having a proprietary interest in the whole, have no such interest in any of the constituent parts. If there is a proprietary interest in the entirety, there must be a proprietary interest in each of the assets of which the entirety is composed: cf Smith v Layh (1953) 90 CLR 102, at pp. 108-9. What CL8(A) recognises is that no unit-holder can claim to have any particular asset appropriated to his share or transferred to him otherwise than in accordance with the deed. ...

In my opinion, CL7(a) and CL8(a) do no more than recognize what the effect of the trust deed would be in the absence of express provision. A unit-holder has a proprietary interest in each asset of the trust notwithstanding the possible duration of the trust, the extremely wide powers or management given to the trustee and the possibility that the trust might lose the whole or part of its capital through unprofitable trading or speculation."

21 The trust deed in question defined "unit" as an undivided part or share in the trust fund having the characteristics provided in the deed. Clause 7(a) provided that "The beneficial interest in the Trust Fund as originally constituted and as existing from time to time shall be vested in the Unit Holders for the time being," and clause 8(a) that "Each Unit shall entitle the registered holder thereof together with the registered holders of all other Units to the beneficial interest in the Trust Fund as an entirety but subject thereto shall not entitle a Unit Holder to any particular security or investment comprised in the

Trust Fund or any part thereof and no Unit Holder shall be entitled to the transfer to him of any property comprised in the Trust Fund other [sic] than in accordance with the provisions hereinafter contained."

- 22 However, the limitations of this decision as authority for the proposition that a unit holder has a caveatable interest should be appreciated. The parties chose to contest the case solely on the basis that a caveatable interest existed if the unit holder had a proprietary interest in the land subject to the trust, regardless of whether the nature of the estate or interest claimed in the caveats could support a caveat for the purposes of the real property legislation.⁸ His Honour made it clear that his decision was confined to determining the existence of a proprietary interest.⁹
- 23 Other authorities that accept that a unit holder has a caveatable interest because the unit holder is said to have a "proprietary" interest in the trust assets on the terms of the relevant trust deed include *Schmidt v 28 Myola Street Pty Ltd* [2006] VSC 343 at 455-457 (although Warren CJ clearly appreciated the limitations of *Costa & Duppe*) and *Binningup Nominees Pty Ltd v Brogue Tableau Pty Ltd* [2004] WASC 14 at [26]. As in *Costa & Duppe*, those cases considered unit trust deeds that similarly provided that the beneficial interest in the trust was divided into units and vested in the unit holders from time to time, and that the unit holders had a beneficial interest in the trust assets as a whole but could not call for the transfer of any specific asset or claim ownership of any particular asset. As Brooking J explained in *Costa & Duppe* (at 96): "If there is a proprietary interest in the entirety, there must be a proprietary interest in each of the assets of which the entirety is composed." Thus provisions to the effect that a unit holder has no entitlement to in any particular asset in the trust fund or to an interest in any particular asset (even though they have an interest in the whole) have been construed as meaning no more than that the unit holder is not entitled to the exclusive use or ownership of any particular asset other than in accordance with the trust deed.¹⁰
- 24 In *Evindon Pty Ltd v Ambasax Pty Ltd* (1995) V Conv R ¶54-534; (1995) ANZ Conv R 398, O'Bryan J concluded that the unit holder in question had no caveatable interest at all and ordered that the caveat lodged by the unit

⁸ In *Costa & Duppe*, the caveats claimed "an equitable estate or interest in fee simple".

⁹ In *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)*, the High Court refrained from deciding whether *Costa & Duppe* correctly decided the requirements in Victoria for a caveatable interest (at 32).

¹⁰ See e.g. *Commissioner of Stamps v Softcorp Holdings Pty Ltd* (1987) 47 SASR 382 at 385-6; *Aust-Wide Management Ltd v Chief Commissioner of Stamp Duties (NSW)* (1992) 92 ATC 4740 at 4747; *Commissioner of State Taxation (WA) v Merifield Cooksey Holdings Pty Ltd* (1994) 94 ATC 4774 at 4784-5; *Suncorp Insurance & Finance v Commissioner of Stamp Duties* [1998] 2 Qd R 285 at 293; *Arjon v Commissioner of State Revenue* (1988) 167 CLR 57 at 61-2.

holder be removed from the title. O'Bryan J accepted that the unit holder had a proprietary interest in the land subject to the trust, but did not consider that the proprietary interest conferred a caveatable interest on two grounds. First, the nature and purpose of the Torrens system of land registration was to protect a caveator's interest from being defeated by the registration of a dealing without the caveator first having had an opportunity to invoke the court's assistance to give effect to his or her interest. The caveator's purpose was to advance its interests in the litigation against the trustee of the unit trust, which was unrelated to the purpose of the Torrens regime as identified. Secondly, and more importantly, the lodgment of the caveat was inconsistent with the wide powers and discretions that the trust deed conferred on the trustee to deal with the trust assets, including borrowing and raising money. The caveat was hindering the trustee's ability to obtain refinancing for the trust assets. O'Bryan J said that the legal relationship between the trustee and unit holder did not confer on the latter a right to frustrate or curtail the exercise of the powers of management conferred on the trustee by the trust deed. Upholding the caveat might result in the trust losing the whole or part of its capital through a mortgagee sale.

- 25 As set out in paragraph [18] above, in New South Wales, the right to lodge a caveat is conferred on a person claiming "*to be entitled to ...[an] equitable estate or interest*" in real property.¹¹ It remains to be decided whether a unit holder under a typical trust deed has an equitable estate or interest in the land where the trustee has an unsatisfied right of indemnity. There is also the separate question whether a caveat should remain on title where its effect is to restrain a trustee's dealing with the land pursuant to powers under the trust deed. When that latter question is raised, then O'Bryan J's reasoning in *Evindon* is engaged.¹² Caveats should not remain on title if they interfere with any authorised dealings by the trustee in respect of the

¹¹ With variations in other Australian jurisdictions, e.g. "*a person claiming an interest in the land*": s 104, *Land Titles Act 1925 (ACT)*; "*Any person claiming any estate or interest in land under any unregistered instrument or dealing or by devolution in law or otherwise*": s 89, *Transfer of Land Act 1958 (Vic)*; "*a person [who] claims an estate or interest in registered land under an unregistered dealing, or by devolution in law or otherwise*": s 133, *Land Titles Act 1980 (Tas)*; "*a person claiming an interest in a lot*": s 138, *Land Title Act (NT)*; "*Any beneficiary or other person claiming any estate or interest in land under the operation of this Act*": s 137, *Transfer of Land Act 1893 (WA)*; "*any person claiming to be interested at law or in equity, whether under an agreement, or under an unregistered instrument, or otherwise howsoever in any land*": s 191, *Real Property Act 1886 (SA)*; "*a person claiming an interest in a lot*": s 122, *Land Title Act 1994 (Qld)*. Also, a person "*claiming to be entitled to or to be beneficially interested in any land*": s 137(1)(a), *Land Transfer Act 1952 (NZ)*

¹² See e.g. *Floriston Nominees Pty Ltd v Kingsley Brown Finance Pty Ltd* [2005] VSC 467, although in that case, the unit holder's major difficulty was that Hansen J considered that the interest claimed in the caveat was too wide (an estate in fee simple in its entirety when the unit holder only held 1% of the units) and therefore not maintainable on an application to remove it.

trust property. Similarly, in *Schmidt v 28 Myola Street*, Warren CJ referred (at [30]-[32]) to the difficulties in allowing a caveat to remain if it would result in detriment to the trust as a whole (rather than merely unit holders holding larger interests). These considerations are particularly important in the context of statutory trusts called 'managed investment schemes' that are registered under the *Corporations Act 2001* (Cth), since the responsible entity (trustee) of the scheme must comply with various statutory duties, including the duty "to act in the best interests of the members".¹³ Members of the scheme cannot hinder the responsible entity's ability to comply with those duties by lodging caveats.

26 As in *CPT Custodian*, modern unit trust deeds also often provide that no unit holder is entitled to lodge a caveat claiming an estate or interest in the trust assets or particular asset or investment (a "no caveat" clause). In *CPT Custodian*, the High Court commented in a footnote that there may be a question whether a "no caveat" clause would be enforced in equity, "given the policy of the law perceived from the scope and purpose of the Torrens system legislation."¹⁴

27 One could enter into a lengthy debate on whether a "no caveat" clause should be characterised as adjusting the bundle of proprietary rights conferred by a unit, such that the unit holder has no caveatable interest, or if it is founded merely in contract. This brings to mind the relationship between contract and trust. In *Caboche v Ramsay* (1993) 119 ALR 215 at 232, Gummow J observed that "many equitable rights and interests have their genesis in contract or voluntary covenant," and referred to *Gosper v Sawyer* (1985) 160 CLR 548 where Mason and Deane JJ said (at 568-9):

"The origins and nature of contract and trust are, of course, quite different. There is however no dichotomy between the two. The contractual relationship provides one of the most common bases for the establishment or implication and for the definition of a trust. Conversely, the trust, particularly the resulting and constructive trust, represents one of the most important means of protecting parties in a contractual relationship and of vindicating contractual rights."

28 Depending on the terms of the particular trust deed, a "no caveat" clause may affect only one or both of the unit holder's equitable rights or contractual rights. On one view, a "no caveat" clause is merely a negative contractual stipulation and does not alter a unit holder's equitable rights. If that is so, a unit holder would still be entitled to an estate or interest in the land and thus has a right to lodge a caveat despite its promise not to do so. The unit holder has merely waived its statutory right. That conclusion is supported by *Australian Property and Management Pty Ltd v*

¹³ See e.g. s 601FC(1) of the *Corporations Act*.

¹⁴ *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* at footnote 59.

Defevi Pty Ltd (Supreme Court of New South Wales, Young J, 7 April 1997, unreported). In that case, Young J considered whether to extend a caveat where the caveator had entered into an agreement containing a “no caveat” clause. Although his Honour refused to extend the caveat because the “no caveat” clause made it inequitable to do so, his Honour acknowledged the caveator’s statutory right to lodge the caveat. His Honour said:

“The promise that [the caveator] would not lodge a caveat did not, of course, prevent the plaintiff as a matter of law from lodging a caveat but that is the sort of promise that the Court would in appropriate circumstances enforce at least by way of injunction... The promise not to exercise a statutory right ... is one which the Court takes very seriously. It would seem to me for this reason alone that it would be inequitable for the Court to extend the caveat... The Court has said in cases ... that it will not allow caveats, even if they are legitimate caveats, to oppress the registered proprietor unduly. The Court does not live in some commercial vacuum. The Court knows that the mere presence of a caveat may prevent a whole series of bona fide commercial transactions taking place and if a case gets into that sort of area the Court will be extremely careful as to whether the caveat should be retained.”

- 29 In a practical sense, a caveat may be a useful tool for the unit holder to prevent the trustee from pursuing a transaction of which the unit holder disapproves. However, as O’Byrne J rightly points out in *Evindon* the caveat cannot frustrate the trustee’s exercise of powers and discretions that are authorised by the trust deed, and therefore cannot remain on the title. Of course if the trustee acted in a manner unauthorised by the trust deed, the unit holder could pursue the trustee for a breach of trust and obtain appropriate remedies. There may in fact be little room left for caveatable interests in the context of modern unit trusts where the trust deed usually confers such wide powers and discretions on the trustee so as to make it essentially the absolute owner of the property with only a duty to account to the unit holders. Further, if a modern unit trust deed were drafted as a trust for sale, conferring on unit holders an interest in personalty (i.e. in the proceeds of realisation of the trust property on termination) rather than realty, there may be a question of whether those unit holders have any interest in the real property subject to the trust, although that would need to be construed against clauses providing that a unit confers a beneficial interest in the trust fund.

Part II. The court’s supervision of trusts

- 30 In *Re Gaydon* [2001] NSWSC 473, Barrett J stated, “It is the duty of the Court to uphold and protect trusts, not to destroy them... [I]n the absence of applicable statutory powers, it is no business of the Court to act so as to put an end to a trust.”

- 31 In *Chapman v Chapman* [1954] AC 429, the House of Lords was asked whether the courts of equity had jurisdiction to vary a trust for reasons that it would be advantageous for the infant beneficiaries. Lord Simonds explained (at 445-446):

“It is the function of the court to execute a trust, to see that the trustees do their duty and to protect them if they do it, to direct them if they are in doubt, and, if they do wrong, to penalise them. It is not the function of the court to alter a trust because alteration is thought to be advantageous to an infant beneficiary.”

- 32 These statements illustrate the scope of the court’s traditional jurisdiction over trusts that has developed at equity to supervise and protect trusts and see that they are properly executed, as well as some of the bounds of that jurisdiction. In modern times, Parliament has seen fit to enact statute to codify matters over which the court has inherent jurisdiction, but also to extend the court’s traditional jurisdiction where lacunae have been perceived (such as the issue presented in *Chapman v Chapman*) as well as to disregard the use of trusts, particularly discretionary trusts. The remainder of this paper addresses these issues.

Certain aspects of the court’s supervisory role over trusts

A. Winding up trusts

- 33 Contrary to what some might assume, the court’s inherent jurisdiction’s over trusts does not extend to winding up trusts: *Re Gaydon* at [29]-[30] per Barrett J. It would be contrary to the court’s duty to uphold and protect trusts if that jurisdiction included the destruction of trusts, even if the trustees have been recalcitrant and even if the beneficiaries seek and consent to the termination of the trust.

- 34 The power to wind up a trust lies in the beneficiaries. In a discretionary trust, all the objects acting together, provided they are all *sui juris* and absolutely entitled to the trust property and the class of objects is closed,¹⁵ can terminate the trust and require the trustee to transfer the trust property to them under the rule in *Saunders v Vautier* (1941) 4 Beav 115; 49 ER 282, although in light of *CPT Custodian* it seems that the trustee’s right of indemnity must be satisfied before the objects can invoke that rule.¹⁶ In *CPT Custodian*, the High Court referred to the “modern formulation” of the rule as found in *Thomas on Powers* as follows:

“Under the rule in Saunders v Vautier [(1841) 4 Beav 115 [49 ER 282]; affd Saunders v Vautier (1841) Cr & Ph 240 [41 ER 482]], an adult beneficiary (or a number of adult beneficiaries acting together) who

¹⁵ *Sir Moses Montefiore Jewish Home* [1984] 2 NSWLR 406 per Kearney J.

¹⁶ *CPT Custodian Ltd v Commissioner of State Revenue (Vic)* at 120-121.

has (or between them have) an absolute, vested and indefeasible interest in the capital and income of property may at any time require the transfer of the property to him (or them) and may terminate any accumulation.”¹⁷

- 35 It may be observed that in practice this result may be difficult to achieve if the class of objects is so widely described as to prevent identification and because it would be rare for the class to be closed against future adherents who would acquire interests on joining the class. However if the rule in *Saunders v Vautier* were properly invoked the court would, if asked, make a declaration that the actions of the beneficiaries directed towards the termination of the trust had been effective to achieve that end.
- 36 Otherwise trust deeds usually specify the circumstances in which the trust would be wound up. The court would in that case give effect to any terms of the trust providing for what is to occur on its winding up.
- 37 Statute may intervene to confer power on the court to wind up a trust. For instance, Chapter 5C of the *Corporations Act* 2001 (Cth) which governs managed investment schemes,¹⁸ empowers the court to wind up the scheme in various circumstances and upon certain procedures being complied with. That the court’s power to wind up is founded in statute highlights that it is not an inherent power.

B. Review of exercise (or non-exercise) of discretionary powers

- 38 The supervisory jurisdiction of the courts protects (within bounds) the rights of objects of a “discretionary” trust¹⁹ as it would any other beneficiary of a “non-discretionary” trust. Courts have an inherent jurisdiction to supervise trustees by reviewing their exercise or non-exercise of a discretionary power and to provide appropriate remedies if required.
- 39 It is well known that an object under a discretionary trust has a right to enforce the trustee’s obligation to exercise properly its discretionary powers: *Gartside v Inland Revenue Commissioners* [1968] AC 553 at 617 per Lord Wilberforce.²⁰ This right to due administration, which right constitutes an equitable chose in action, arises independently of the terms

¹⁷ *CPT Custodian Ltd v Commissioner of State Revenue (Vic)* at 119 [47].

¹⁸ *Re Investa Properties Ltd* [2001] NSWSC 1089 per Barrett J at [13]-[14].

¹⁹ Here we are talking about the “classic” discretionary trust where the entitlement of beneficiaries to income, or to corpus, or both, is not immediately ascertainable. Rather, the trustee or some other person may select beneficiaries from a nominated class and this power may be exercisable once or from time to time. See *Federal Commissioner of Taxation v Vegners* (1989) 20 ATR 1645 at 1649.

²⁰ See also *In re Baden’s Trusts; McPhail v Doulton* [1971] AC 424 at 456 (Lord Wilberforce); *Kennon v Spry* (2008) 238 CLR 366 at [77]-[78], [125].

of the trust but the content of that right will be governed by the terms of the relevant trust.

- 40 Where a mere power²¹ is concerned, the trustee is not bound to exercise it but must from time to time consider whether or not to exercise it. In this case, the object's right is for the trustee periodically to consider properly whether to exercise its discretion, consider the range of objects of the power and consider the appropriateness of individual appointments.²² In the absence of the trustee's giving proper consideration to these matters, the court may (as discussed below) order the removal of the trustee and appoint a replacement trustee whom it is hoped would not be recalcitrant. If the power in question is in the nature of a power to advance, support or maintain, the court may exercise the discretion itself in certain circumstances.²³ However, the court cannot otherwise compel the trustees to exercise the discretion.²⁴
- 41 Where the power in question is a trust power, the right to due administration comprises the trustee's duty to consider how to distribute (previously a "duty to survey" but since *In re Baden's Trusts; McPhail v Doulton* [1971] AC 424 it is referred to as a "duty to inquire or ascertain"²⁵) and a duty to distribute, which requires the trustee to:

"examine the field, by class and category; ...make diligent and careful inquiries, depending on how much money [the trustee] had to give away and the means at [the trustee's] disposal, as to the composition and needs of particular categories and of individuals within them; decide upon certain priorities or proportions, and then select individuals according to their needs or qualifications."

²¹ It is not within the scope of this paper to discuss in detail the distinction between a mere power and a trust power, but it should suffice to say that the difference lies in the intention of the settlor in conferring a power on the trustee. If the settlor intends that the objects should take only upon an exercise by the trustee of its discretionary power, the power is a mere power; if the settlor intends that the objects should take in any event and the trustee's power is to decide how and when those objects will take, then the power is a trust power. A mere power can be attached to a trust. See IJ Hardingham and R Baxt, *Discretionary Trusts*, 2nd ed (1984) Butterworths at 6 [202] and the cases cited therein.

²² *Re Hay's Settlement Trusts* [1982] 1 WLR 202 per Megarry VC at 210.

²³ E.g. *Re Roper* (1879) 11 Ch D 272; *Re Wise* [1896] 1 Ch 281; *Klug v Klug* [1918] 2 Ch 67; *Re Hodges* (1878) 7 Ch D 754; *Re Lofthouse* (1885) 29 Ch D 921 (per Bacon VC).

²⁴ *Lutheran Church of Australia South Australia District Inc v Farmers Co-operative Executives and Trustees Limited* (1970) 121 CLR 628 at 652 per Windeyer J.

²⁵ *McPhail v Doulton* per Lord Wilberforce (with whom Lord Reid and Viscount Dilhorne concurred) at 449. The learned authors of Hardingham and Baxt, *Discretionary Trusts* consider (at 29 [218]) that *McPhail v Doulton* has been accepted as good law in Australia citing *Horan v James* [1982] 2 NSWLR 376 at 379. The learned authors of *Jacob's Law of Trusts in Australia*, 7th ed (2006) LexisNexis Butterworths, are of the same view (at [527]).

42 If a trustee fails to exercise a trust power, the court may execute the trust power in the manner best calculated to give effect to the settlor's or testator's intentions. That may involve changing the trustee or the court may think fit to exercise the discretion itself by making an appropriate selection and distributing the trust property. In *McPhail v Doulton*, Lord Wilberforce made clear (at 451-452) that the court was not limited to merely making an equal division of the trust property between objects in accordance with the "equity is equality" maxim because it could make a selection and distribution "according to the merits" after appropriate inquiry.

43 Even where the trust instrument confers wide discretionary powers on the trustee that are described as "absolute" or "uncontrolled" or as though the trustee were the "absolute owner" of the property, the breadth of discretion does not authorise the trustee to do what it likes with the trust fund or commit any breach of trust that it cares to commit.²⁶ In *Randall v Lubrano* (NSWSC, Holland J, 31 October 1975, unreported), Holland J said:

"... no matter how wide the trustee's discretion in the administration and application of a discretionary trust fund and even if in some or all respects the discretions are expressed in the deed as equivalent to those of an absolute owner of the trust fund, the trustee is still a trustee."

44 Further, as Lord Reid said in *Wishaw v Stephens; Re Gulbenkian Settlement Trusts* [1970] AC 508 at 518:

"But [the trustees'] "absolute discretion" must, I think, be subject to two conditions. It may be true that when a mere power is given to an individual he is under no duty to exercise it or even to consider whether he should exercise it. But when a power is given to trustees as such, it appears to me that the situation must be different. A settlor or testator who entrusts a power to his trustees must be relying on them in their fiduciary capacity so they cannot simply push aside the power and refuse to consider whether it ought in their judgment to be exercised. And they cannot give money to a person who is not within the classes of persons designated by the settlor: the construction of the power is for the court."

45 The court may control the exercise (or non-exercise) of a discretionary power where:

"...it was exercised in bad faith, arbitrarily, capriciously [In re Pauling's Settlement Trust [1964] Ch 303 at 333], wantonly, irresponsibly [Lutheran Church of Australia South Australia District Inc v Farmers Co-operative Executives and Trustees Limited (1970) 121 CLR 628 at 639], mischievously or irrelevantly to any sensible expectation of the settlor [In re Manisty's Settlement [1974] Ch 17], or without giving a

²⁶ As noted in *Elovalis v Elovalis* [2008] WASCA 141 per Buss JA at [63]. See also *Randall v Lubrano* (NSWSC, Holland J, 31 October 1975, unreported) at [36].

real or genuine consideration to the exercise of the discretion [Karger v Paul [1984] VR 161, which includes a survey of the authorities]. The exercise of a discretion by trustees cannot of course be impugned upon the basis that their decision was unfair or unreasonable [see Dundee General Hospital's Board of Management v Walker [1952] 1 All ER 896] or unwise [Gisborne v Gisborne (1877) 2 App Cas 300 at 307]"²⁷

- 46 As to the last point, the authorities indicate that even if the discretion is "absolute" or "uncontrollable," the court will set aside an arbitrary or unreasonable exercise of the discretion if there has been *mala fides* on the part of the trustee (*Tabor v Brooks* (1878) 10 Ch D 273 at 277-278; *Gisborne v Gisborne* (1877) 2 App Cas 300). As a matter of principle, unreasonableness is not itself a ground for setting aside a decision, but may evidence that the exercise was *mala fide* or otherwise not within power.²⁸
- 47 The exercise of discretion may also be impugned if it is not exercised in accordance with the purposes for which the power was conferred, that is, it is a fraud on the power. The classic formulation of what constitutes a fraud on the power is set out in *Duke of Portland v Topham* (1864) 11 HLC 32; 11 ER 1242²⁹ as follows:

"The appointor under the power, shall at the time of the exercise of that power, and for any purpose for which it is used, act with good faith and sincerity, and with the entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object (I mean sinister in the sense of its going beyond the purpose and intent of the power) which he may desire to effect in the exercise of the power."

- 48 What is outlined above reflects the proposition that there are certain fundamental duties owed by a trustee and correlative rights enforceable by beneficiaries that come under the broad spectrum of what comprises beneficiaries' rights to due administration. In *Armitage v Nurse* [1998] 1 Ch at 253-254, Millett LJ stated that there is an "*irreducible core of obligations*"³⁰ owed by a trustee, which constitute the minimum necessary to give substance to a trust because "*if the beneficiaries have no rights enforceable against the trustees there are no trusts.*" That "*irreducible core*" is said to

²⁷ *Attorney General (Cth) v Breckler* (1999) 197 CLR 83 at [7].

²⁸ Although in *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 428, Mahoney JA observed that the principle was not clear.

²⁹ As adopted by the High Court in *Gilbert v Stanton* (1905) 2 CLR 447; *Cock v Smith* (1909) 9 CLR 773; *Redman v Permanent Trustee Co* (1916) 22 CLR 84 at 93, 94 and by the Federal Court in *Dwyer v Ross* (1992) 34 FCR 463. See also *Vatcher v Paull* [1915] AC 372 at 378.

³⁰ Australian courts have accepted this, see e.g. *Wilden Pty Ltd v Green* [2005] WASCA 83 at [485]-[493] per Hasluck J; *Leerac Pty Ltd v Garrick E Fay* [2008] NSWSC 1082 at [23]-[24] per Brereton J; *Mango Boulevard Pty Ltd v Spencer* [2008] QSC 117 at [65] to [70] per Chesterman J.

consist of “[t]he duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries.” (Millett LJ did not consider that it included the duty to act with skill and care, prudence and diligence.) There are also some duties that a trustee is likely to have as part of its office as trustee unless the contrary is found in the trust documents or constituent circumstances. The responsibilities above and beyond these minimum thresholds will of course depend on the particular terms of the trust and the settlor’s likely intentions. For present purposes, it suffices to say that the trustee’s fundamental (whether part of the “irreducible core” or a likely duty) include must the duty to give proper consideration to discretionary decisions and exercise them properly (as just discussed) and the duty to account to beneficiaries for the administration of the trust property (this is discussed in further detail below).

C. Appointing and removing trustees

- 49 It is a fundamental principle of equity that a trust will not fail for want of a trustee. Courts of equity therefore have an inherent jurisdiction to appoint trustees to carry out the trust if the settlor has omitted to appoint a trustee or if the trustees appointed are dead, refuse to act or become incapable of acting. The appointment of a new trustee pursuant to the court’s inherent jurisdiction by itself does not cause the trust assets to vest in it. However the court has power to make necessary *in personam* orders to vest trust assets in the new trustee.
- 50 The court’s inherent powers of appointment are codified in the trustee legislation enacted in the various Australian states and territories,³¹ which also sets out the requirements for the vesting of assets in the new trustee. The appointment of a trustee may also be effected pursuant to the express terms of the trust instrument, which commonly govern the occasions for and manner of appointment.
- 51 The court generally appoints trustees pursuant to its inherent jurisdiction where both statute and the trust instrument have been exhausted, and the statutory provisions tend to only be engaged if the terms of the trust are

³¹ *Trustee Act 1925 (NSW) s 70; Trustee Act 1893 (NT) s 27; Trusts Act 1973 (Qld) s 80; Trustee Act 1898 (Tas) s 32; Trustee Act 1958 (Vic) s 48; Trustees Act 1962 (WA) s 77*, which all provide that the Court may appoint a new trustee either in substitution for or in addition to existing trustees or although there is no existing trustee whenever it is expedient to do so, and it would be inexpedient, difficult or impracticable to do so without the Court’s assistance. *Trustee Act 1925 (ACT) s 70 and Trustee Act 1936 (SA) s 36* provide that the appointment, removal or replacement of a trustee may be ordered if the Court is satisfied that it is desirable in the interests of beneficiaries or to advance the purposes of the trust.

silent on the power to appoint.³² It has been held that the Court is not deprived of its statutory powers to appoint a trustee merely because the terms of the trust provide that a power of appointment resides in someone else, as there may be other circumstances that engage the court's jurisdiction under the relevant statute: *Pope v DRP Nominees Ltd* (1999) 74 SASR 78 at 88 (Bleby J).

52 Part of the court's supervisory jurisdiction over trusts is its ability to remove trustees and appoint others in their place in the hope that the trusts will be properly executed by the replacement trustees. The removal of trustees often gives rise to questions of appointing a suitable replacement trustee. There is significant overlap in the considerations involved in removing and appointing replacement trustees as they share the same underlying premise for, as Lord Blackburn said in *Letterstedt v Broers* (1884) 9 App Cas 371 at 387, "It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate." The question of removal is often raised when beneficiaries allege that the trustee has miscarried in its duty or that conflict exists between the trustee and beneficiary, which are often related.

53 In *Letterstedt v Broers*, one of the two the leading cases on this issue, the Privy Council sought to lay down a broad, general rule to be applied by the courts in determining whether to remove a trustee. Lord Blackburn at 385-6 referred to Story's *Equity Jurisprudence*, s. 1289 which stated:

"But in cases of positive misconduct, Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property or to shew a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity."

54 That, according to Lord Blackburn, was no more than a statement of what is ancillary to the court's primary duty to see that trusts are properly executed. His Lordship (at 386) agreed with Story that misconduct by the trustee was not determinative to the removal of the trustee as the question was whether the court was satisfied that the continuance of the trustee would prevent the trusts from being properly executed. At 387, his Lordship continued:

"In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated, that their main guide must be the welfare of the beneficiaries. Probably it is not possible to lay down any

³² For a recent example, see *Everest Capital Limited v Trust Company Limited* [2010] NSWSC 231 at [48]-[49].

more definite rule in a matter so essentially dependent on details often of great nicety. But they proceed to look carefully into the circumstances of the case."

- 55 Dixon J (with whom Evatt and McTiernan JJ concurred) stated in the oft-cited *Miller v Cameron* (1936) 54 CLR 572 at 580-581:

"The jurisdiction to remove a trustee is exercised with a view to the interests of the beneficiaries, to the security of the trust property and to an efficient and satisfactory execution of the trusts and a faithful and sound exercise of the powers conferred upon the trustee. In deciding to remove a trustee the Court forms a judgment based upon considerations, possibly large in number and varied in character, which combine to show that the welfare of the beneficiaries is opposed to his continued occupation of the office. Such a judgment must be largely discretionary. A trustee is not to be removed unless circumstances exist which afford ground upon which the jurisdiction may be exercised."

- 56 It is difficult to pronounce any "rules" that are more definitive than what has been outlined above. The matter is clearly a discretionary one, and the result will turn on the facts of each case. The court must weigh up the relationship between the incumbent trustee and beneficiaries, the type of trust and trust property, the nature and origins of any conflicts between the trustee and beneficiary, the financial position of the trustee, and the gravity of any misconduct alleged against the trustee. However, the court should not exercise its jurisdiction to vindicate beneficiaries' allegations of breaches of trust or to punish the trustee; that much is clear from the statements set out above.³³

- 57 Although Brereton J in *Fay v Moramba Services Pty Ltd* [2009] NSWSC 1428 at [24] observed that the essential issue in the context of a discretionary trust is:

"whether the due and proper administration of the trust is opposed to the trustee's remaining in office. In this respect, regard must be had not only to the interests of the plaintiffs, but to those of all the potential beneficiaries. Moreover, in the context of discretionary trusts, some consideration is to be given to the confidence reposed by the settlor – and in the case, here, of the will trusts, by the testator – in his selected trustees to exercise appropriately the discretions vested in them,"

his Honour was not necessarily postulating a special and different approach if the trust is "discretionary". The same broad fundamental consideration applies across all trusts, namely whether the trustee can be expected properly to carry out the trust if he or she remains in office. The resolution of that question will be shaped by the peculiarities of the trust and facts before the court.

³³ As observed in *Elovalis v Elovalis* at [30].

- 58 Brereton J rightly observed in *Fay v Moramba Services* at [25] that the power to remove a trustee is not one that would be exercised lightly. Removal is not inevitable just because some or even all of the beneficiaries wish it,³⁴ or on the mere whim of a beneficiary or without reasonable cause.³⁵ Friction or hostility between the trustee and the beneficiaries is not of itself a reason for the removal of the trustee,³⁶ although where the hostility is grounded on the mode in which the trust has been administered, or has been caused wholly or partially by substantial overcharges against the trust estate, it is not to be disregarded.³⁷ Where there are conflicts between trustee and beneficiary, the court should enquire who was to blame for the dissension since otherwise beneficiaries could raise quarrels with the trustee and then apply for their removal.³⁸ Refusal by trustees for no corrupt motive to exercise a purely discretionary power in favour of a beneficiary is no reason for removing them.³⁹ Further, mere resistance to a claim for removal is not sufficient to manifest such an animosity as to support an order of removal; otherwise, any trustee who resisted a beneficiary's claim would need to consent to judgment for fear that resistance would found a finding of animosity.⁴⁰
- 59 If there is conflict between the trustee and beneficiaries, and the beneficiaries cannot engage the court's inherent or statutory jurisdiction to remove the trustee, the beneficiaries must either keep the trust on foot (in which case the trusts would continue to be executed by trustees appointed pursuant to the original trust instrument or statute, but not by trustees arbitrarily selected by themselves), or such beneficiaries may choose to put an end to the trusts under the rule in *Saunders v Vautier* if they are all *sui juris* and together absolutely entitled to trust property (see paragraph [34] above).
- 60 A trustee who is not charged with misconduct but is in so impecunious a position that there is likely to be a strong propensity or temptation to misapply the trust funds may be removed. Thus a trustee who becomes an undischarged bankrupt is, as a general rule, removed almost as a matter of course but might be reinstated once discharged if the bankruptcy is "*explained by financial misfortune without moral fault and the trustee has recovered from pecuniary distress.*"⁴¹

³⁴ *Guazzini v Pateson* (1918) 18 SR (NSW) 275 at 294; *Re Brock Bank* [1948] Ch 206.

³⁵ *O'Keeffe v Calthorpe* (1739) 1 Atk 17, 26 ER 12.

³⁶ *Forster v Davies* (1861) 4 De G F & J 133, 45 ER 1134

³⁷ *Letterstedt v Broers* (1884) 9 App Cas 371 at 389.

³⁸ *Forster v Davies* (1861) 4 De G F & J 133; 45 ER 1134.

³⁹ *Lee v Young* (1843) 2 Y & C Ch 532, 63 ER 238; *Fay v Moramba Services* at [39], [158].

⁴⁰ *Fay v Moramba Services* at [125].

⁴¹ *Miller v Cameron* at 575 per Latham CJ.

61 In *Miller v Cameron*, Dixon J also noted (at 581) that the decision of the primary judge was to be given especial weight given the nature of the task before the court. In that case, his Honour agreed with the primary judge's view that the trustee's questionable use of funds (although not necessarily amounting to misconduct) was sufficient to give rise to a lack of confidence in the trustee's further administration of the trust to justify his removal.

D. Disclosing reasons for discretionary decisions

62 The principle that is usually said to apply is that a trustee is not obliged to provide reasons for the exercise of its discretionary power provided it has exercised the power bona fide and with no improper motives, and that there is no scope for the court to examine the validity of the trustee's reasons unless the trustee has provided reasons: see for instance *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 434; *Karger v Paul* [1984] VR 161 at 165-166 following a review of the relevant authorities.

63 This position is often said to derive from *Re Beloved Wilkes Charity* (1851) 3 Mac & G 440; 42 ER 330. However, for reasons adumbrated below, it would be unwise to adopt it as an invariable principle. The outcome must vary from trust to trust because, as with the trustee's duty to disclose documents or information relating to a trust, the answer must lie in what equity would regard as the faithful performance of the settlor's likely intentions of the terms of the particular trust in question. Faithful performance, on a construction of those intentions, may or may not require the trustee to disclose the reasons sought or for those reasons to be kept secret. *Re Beloved Wilkes Charity* sought only to promulgate a general rule and the decision not to order disclosure of reasons in that case was appropriate on the court's construction of the settlor's likely intentions.

64 In *Re Beloved Wilkes Charity*, the trustees were to choose a boy for education as a minister of the Church of England whose parents could not afford to maintain or educate him. The trustees were to prefer candidates belonging to four named parishes but were permitted to choose a boy from any other English or Welsh parish. The trustees chose a boy from outside the four named parishes. The father of a boy belonging to one of the four parishes objected to that decision and sought, *inter alia*, reasons for the trustees' decision. The reporter noted that the trustees deposed that they were all well acquainted with their respective parishioners and families, and in particular one of them knew the boy whose father raised the objection to the decision.

65 Lord Truro LC identified the question as whether the trustees were bound to provide reasons for the decision to show that they considered the

circumstances of the case and had come to their conclusions accordingly. The Lord Chancellor noted that the trustees' job of determining eligibility was of a "delicate nature" and put the trustees in a "very painful" situation. His Lordship stated that the court's supervisory jurisdiction over trusts was confined ensuring that the trustees' deliberation was conducted with honesty, integrity and fairness but not to the accuracy of the conclusions "except in particular cases" (although the report gives no clue as to what those particular cases are). His Lordship emphasised that if the trustees exercised the power properly, that is, with no improper motives and with honesty, integrity and fairness, the reasons for the decision were immaterial.

- 66 His Lordship also said that if the trustees did not state their reasons (which he thought in this case, and in many cases, was "prudent and judicious"), and in the absence of contrary proof, there was no foundation on which the court could base a conclusion that the trustees had miscarried in their duty. His Lordship then stated (at 449; 334) that:

"... as a general rule, ... the Court ought not to require persons to state reasons for conduct which they are authorised to pursue, because such a statement made in one case, where it may possibly be done without evil and mischief, has a tendency to create an objection against those who, in other cases, do not make it, where a statement of reasons might be most mischievous. In the present instance, I do not know, nor have I any judicial means of knowing, whether the trustees acted upon the ground of the father's competency, or on anything in respect of the son: they have forborne to state anything in the slightest degree disrespectful or painful to either, and in that I think they have acted a very judicious part; for they would, undoubtedly, have greatly increased that feeling of disappointment and displeasure which has arisen at the election of [the successful candidate], if they had entered into any statement reflecting upon either [the father] or his son."

- 67 In other words, there was a sound basis in this case for concluding that the trustees were under no obligation to disclose their reasons. His Lordship considered what the settlor would have intended the trustees to do where they were part of the local community and were likely to have personally known potential candidates and their families. In those circumstances, it was unlikely that the settlor would have intended the trustees to be under a duty to publicly disclose their reasons in performing their office as trustee. That would have been likely to cause personal embarrassment to the trustees and hurt to the disappointed candidates and their families.
- 68 Cases such as *In re Londonderry's Settlement* [1965] Ch 918 and *Karger v Paul* [1984] VR 161 have subsequently relied upon *Re Beloved Wilkes Charity* as promoting the free-standing "principle" supposedly espoused in that decision. For obvious reasons, caution must be exercised in doing so.

Rather, the court's analysis should be informed by the construction of the terms of the trust and settlor's likely intentions.

E. Trustee's duty to disclose documents and information about the trust

- 69 As a precursor to or as part of proceedings to remove trustees or pursue claims that the trustee has miscarried in its duty to properly consider to exercise, or exercise, a discretionary power, beneficiaries often seek access to documents and information about the trust and reasons for the trustee's decisions. However, judicial approaches to the question of the trustee's duty to disclose documents or information about the trust, and beneficiaries' correlative rights to such disclosure, have not been uniform and this is thus an area fraught with much uncertainty.
- 70 The analysis has been approached by asking whether the document in question is a "trust document" and therefore one which a beneficiary could inspect by virtue of having a "proprietary" interest in it: see *In re Londonderry's Settlement* [1965] Ch 918, *O'Rourke v Darbishire* [1920] AC 581 per Lord Wrenbury (although the other Law Lords did not assent to that view), *Re Fairbairn (dec'd)* [1967] VR 633, Mahoney JA in *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405.
- 71 There is a further theory that the entitlement to trust documents arises on the beneficiary's having a beneficial or proprietary interest in the trust property (see *Avanes v Marshall* [2007] NSWSC 191; (2007) 68 NSWLR 595 at [3] referring to *Re Cowin* (1886) 33 Ch D 179, and *McDonald v Ellis* [2007] NSWSC 1068; (2007) 72 NSWLR 605). If, as was argued in *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709, such an interest is an essential condition to a beneficiary's being entitled to inspect trust documents or to obtain information from the trustee, an object under a discretionary trust with no vested interest in the trust fund would have no such entitlement.
- 72 In *Schmidt v Rosewood Trust Ltd*, the Privy Council held that a beneficiary's entitlement to disclosure of documents or information relating to the trust depended for its existence on the court's exercising its discretion to allow access. A proprietary interest in trust property was neither necessary nor sufficient.
- 73 The difference in judicial opinion is very much alive in New South Wales. In *Avanes v Marshall*, Gzell J held that it is for the court to determine on a discretionary basis beneficiaries' entitlement to inspect documents, except for the trust accounts which beneficiaries had a right to see. In so holding, Gzell J followed the decision of the Privy Council in *Schmidt* except for the qualification regarding the trust accounts.

- 74 Bryson AJ in *McDonald v Ellis* disagreed with the approach *Avanes v Marshall* took in following *Schmidt*. His Honour held (at [35]) that a beneficiary entitled to an interest in remainder under a testamentary trust had a right to information about the trust and to see trust documents because it was information about that beneficiary's own property. His Honour considered that a claim by an object under a discretionary trust with no vested interest had a less clear and compelling basis, and left open the question whether it would be appropriate to follow *Schmidt* in such a case despite contrary authority in New South Wales. In the proceedings before his Honour, the plaintiff beneficiary had a vested interest, so it would have been "a departure from clearly established opinion in New South Wales not to treat the claim to information as based on a proprietary interest....".
- 75 The "clearly established opinion" to which his Honour referred is the majority decision of the Court of Appeal in *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405. The contrary New South Wales authority is *Randall v Lubrano* (NSWSC, Holland J, 31 October 1975, unreported) and *Spellson v George* (1987) 11 NSWLR 300. Each of these authorities is briefly considered below.
- 76 *Hartigan Nominees v Rydge* concerned access to a memorandum of wishes that Sir Norman Rydge had provided to the trustee of a discretionary trust set up for Sir Norman's family. The plaintiff, his grandson, sought access to the memorandum. He was an object of the trustee's power of appointment and had a vested future interest in the income and capital of the trust. Mahoney and Sheller JJA (Kirby P dissenting) both held that the grandson was not entitled to inspect the memorandum but on different bases. The following shows that there is very little common ground between the decisions of Sheller and Mahoney JJA.
- 77 Mahoney JA distinguished between the right of a beneficiary to access documents either outside litigious contexts or through the process of discovery and interrogatories for the purposes of litigation, the former being the relevant context in the proceedings. His Honour held that a beneficiary with a contingent interest had standing to request inspection because he had a proprietary right (citing *Spellson v George* discussed below), although doubted (but did not decide) that an object without such an interest had that right. His Honour considered that the right to documents or information was only in respect of those that were "property of the trust" and in which the beneficiary thus had a "proprietary interest". However, there were four exceptions. First, where the class of beneficiaries is so wide that it is unlikely to be the trustee's duty to seek out all beneficiaries and inform them that they may take under a discretionary power. Secondly, where the documents are not "property of the trust" because it is property of the trustee or has come into existence for or relation to the administration or execution of the trust.

Examples are notes made by trustees or documents received or prepared by the trustees for their own purposes. Thirdly, where the settlor has given confidential information in respect of the exercise of discretion. Fourthly, if disclosure would make known the trustees' reasons for the exercise of discretion. These exceptions were considered as forming the basis of *In re Londonderry's Settlement*; *Peat v Walsh* [1965] Ch 918.

- 78 His Honour decided that it was probable that the memorandum was directed to administrative matters and was therefore not part of the trust property. Disclosure might also give rise to family friction. For these reasons, his Honour did not grant the access sought.
- 79 On the other hand, Sheller JA identified and criticised the circularity of analysing the question as whether the document in question was a "trust document". His Honour also rejected the test based on whether the beneficiary had a proprietary interest in the trust document. His Honour considered that the memorandum did not need to be disclosed because it had been given to the trustee in confidence.
- 80 *Hartigan Nominees v Rydge*, which is the only appellate decision on the present topic, does not contain any binding *ratio decidendi* except in closely analogous factual situations.⁴²
- 81 In *Randall v Lubrano*, all of the objects of a discretionary trust sought access to trust accounts and full information as to the amount of the trust property and its investments. In a brief decision, Holland J made orders for the trustee to grant those documents and information. In *Spellson v George*, Powell J upheld the right of a potential object of a discretionary power to inspect documents and records relating to the administration of the trust. His Honour acknowledged the House of Lords' decision in *Gartside* concerning the rights of objects to due administration of the trust, and considered that objects might have other rights protected and enforced by courts of equity.
- 82 Both of these decisions, which recognised the entitlement of the objects to the documents and the trustee's correlative duty to provide them were reached by considering the nature of a trust and the trustee's obligation to hold and deal with trust property on behalf of others which the beneficiaries could enforce. A necessary corollary of that obligation (and the beneficiaries' correlative rights) was the trustee's duty to account to the objects, which required the trustee to keep proper accounts and allow

⁴² See speech given by Campbell JA, "Access by trust beneficiaries to trustees' documents, information and reasons" accessible at <[http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/campbell230808.pdf/\\$file/campbell230808.pdf](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/campbell230808.pdf/$file/campbell230808.pdf)> at [138]. A modified version of this speech has been published under the same title in (2009) 3 Journal of Equity 97.

beneficiaries to inspect them, and on the request of beneficiaries, give information and explanations as to the investment of and dealings with the trust property. This approach was followed in related proceedings in *Spellson v Janango* (NSWSC, Hodgson J, 8 December 1987, unreported).

83 It seems logical to derive the basis of the trustee's duty to provide documents or information from the trustee's duty to account. Without those documents or information, it would be impossible for beneficiaries to detect or investigate any breaches of trust. However, Powell J and Hodgson J went further and considered that beneficiaries had a general or fundamental right to documents or information which was not conditioned on any purpose of investigating possible breaches of trust. Powell J reasoned that it was because beneficiaries could always approach the court to enforce the trustee's personal obligations and duty to account, and that did not require alleging a breach of trust. Similarly, Hodgson J considered that it was based on a beneficiary's right to know what the trust property is and how it has been and is being administered by the trustee, which also did not necessitate an allegation of misconduct by the trustee. Hodgson J indicated that the right could be exercised to ascertain the beneficiary's position generally, for instance, to find out if there had in the past been an exercise of discretionary in his or her favour in relation to property which he or she had not received, However, his Honour did accept that this general right was not an unbridled one and might not be exercised, for instance, as part of an abuse of process.⁴³ The documents required to be produced were "trust documents and documents relating to the administration of the trust" with liberty to apply in relation to particular documents. It was common ground that documents which disclosed the reasons for the trustees' discretionary decisions should be excluded. There was liberty to apply in relation to any documents in relation to which the trustee owed an obligation of confidentiality to a third party.

84 Once one has waded through the variances in judicial opinions, the most that can be said is that the above authorities recognise to some extent the court's power to enforce the entitlement of an object under a discretionary trust to information about the trust. However, the exact nature and extent of that entitlement depends on the individual facts presented to the court in each case. Thus, there are clear difficulties with espousing invariable principles regarding a trustee's obligation to provide documents or information about the trust to a beneficiary, whether the beneficiary has a vested interest or not. One reason for the difficulty is that this is not an area of law that easily lends itself to a discussion in concrete terms without being presented with a live issue being litigated. The process of litigation

⁴³ In that *Spellson v Janango*, it was contended that the proceedings before Hodgson J were an abuse of process because the object may have been seeking information on the affairs of the trust to use in unrelated proceedings in the Family Court.

tends to unearth appropriate qualifications and nuances to the application of principles to the facts in issue.

- 85 More fundamentally, the difficulties arise because equity looks at each situation on its individual facts and fashions a remedy to redress or make good, in so far as possible, any departure from standards of conduct required by equity. The result will vary from trust to trust. Each trust depends on its constituent documents or circumstances which may modify the trustee's obligations (and beneficiaries' correlative rights), and such obligations and rights may also be modified by statute. Where the terms of the trust (as modified by statute) are silent on a particular duty of trustee or correlative right of a beneficiary, the courts must construe the trust deed to determine what course of action is appropriate in light of the settlor's likely intentions.⁴⁴
- 86 Thus, the content of the trustee's duty to provide documents or information may be articulated in the following broad terms. The duty stems from the court's inherent jurisdiction to supervise trustees by determining whether the trustee would be performing the settlor's intentions in providing those documents or information to the beneficiaries. In general terms, the nature of the trust relationship regulated by broad equitable principles requires the trustee, in faithfully holding and dealing with property for the benefit of others, to account to the beneficiaries for the administration of the trust property. The duty to account encompasses providing both written and unwritten information to beneficiaries, which should at least include the terms of the trust and the trust accounts, which the trustee must keep.⁴⁵ Even if this is not part of the "irreducible core" of the trustee's obligations, it is a duty the trustee is likely to have unless the contrary is found in the constituent documents or circumstances.⁴⁶
- 87 The duty to account exists regardless of whether the beneficiary has a vested interest or not. However, the specific content and extent of that duty must depend on what the terms and circumstances of the specific trust require for equity to say that the trustee has faithfully performed its duty to account. If the terms of the trust are silent, the general law then determines, as a matter of implication, the content of the trustee's obligation to account based on what the settlor's likely intentions were.

⁴⁴ See Campbell JA's speech (at note 42) at [179]-[181].

⁴⁵ The court has also held the beneficiary entitled to see opinion of counsel in administering the trust but not advice to the trustee to defend an allegation of a breach of trust unless the trustee paid for that advice out of the trust funds: e.g. *Devaynes v Robinson* (1855) 20 Beav 42; 52 ER 518; *Talbot v Marshall* (1865) 2 Dr & Sm 549; 62 ER 728.

⁴⁶ See Campbell JA's speech (at note 42) at [173].

The duty is thus shaped by the terms of the trust and the settlor's intentions, properly construed.

- 88 The terms of the trust may for instance impose specific obligations on the trustee to account to certain persons at particular times, or conversely, excuse the trustee from keeping, rendering or making available certain types or records to particular persons in which case the trustee cannot be faulted for not providing such information. As to the rendering of accounts, to be regarded as faithfully performing their office, one would expect that trustees should keep books of accounts that are easily understandable to others and provide sufficient detail about the trust's investments, income, expenditure and distributions.⁴⁷
- 89 As to the provision of documents or information, that may be a relatively straight forward question where for instance there is only a handful of possible objects under a power of appointment (in which case the court may easily find that the trustee should grant wide access to the information), but a different outcome may be warranted if there is an unwieldy number of objects, which was a difficulty identified by Mahoney JA in *Hartigan Nominees v Rydge* (at 432F). More complexity will be involved in an intermediate situation, for instance where there are 20 or even 50 objects. Under the terms of a testamentary trust where the beneficiaries are caught up or predisposed to conflict regarding their inheritance and the testator has given confidential information to the trustees, the court may be justified in finding that the testator would not have intended for the trustees to disclose that confidential information. Further, contrary to what one might draw from *McDonald v Ellis*, the terms of a trust may require that the trustee not provide information to a person with a vested interest. If that were so, equity would not regard the trustee as having not faithfully performed its office by withholding such information.
- 90 It may be unhelpful to address the question of whether an object under a discretionary trust has any rights to documents or information by posing a further question of whether the party seeking it has a "proprietary" interest (or cognate terms, such as a "beneficial" interest) in the trust.⁴⁸ Attempts to define a beneficiary's rights as "proprietary" have little meaning unless that task takes place within a specific context, such as under statute.⁴⁹ This is because "property" and cognate terms are not

⁴⁷ See Campbell JA's speech (at note 42) at [177].

⁴⁸ It may be observed that the circularity of approaching the analysis by asking if a document is a "trust document" has been identified and strongly criticised (e.g. *Hartigan Nominees v Rydge* per Kirby P (at 413, 418) and Sheller JA (at 442-443)).

⁴⁹ This is discussed in greater detail below in the context of the court's statutory powers to control trusts.

“monolithic notion[s] of standard content and invariable intensity.”⁵⁰ Indeed, there is much truth in the observations of Bagnall QC (as he was then) that “it is a fallacy to talk of an interest as if it were a piece of cheese.”⁵¹ Therefore it is undesirable to adopt theories based on a beneficiary’s “proprietary” interest, regardless of whether that is an “interest” in the trust property or the “trust document” in question. In extra-curial remarks made by Campbell JA in a speech on beneficiaries’ access to documents and information relating to a trust and trustee’s reasons,⁵² his Honour examined and put forward compelling arguments to debunk the soundness of those theories.

- 91 There is no need to posit a single theoretical foundation for the right to see trust documents. It seems right in principle to say that documents of title to trust property in which the beneficiary has a vested interest should be made available for inspection because such documents are property of the beneficiary. Even that position may be qualified if disclosure would be contrary to the express or implied intention of the settlor. But there is no satisfactory definition of trust documents. Nor is it satisfactory that the right to inspect trust documents should depend on the documents themselves, considered as chattels, being property of the beneficiary.
- 92 *Spellson v George* contains persuasive reasoning that a right to inspect trust documents should be considered as a corollary of the trustee’s obligation to account. However, apart from the dissenting judgment of Kirby P in *Hartigan Nominees Pty Ltd v Rydge*, I am aware of no Australian authority that supports the view that a beneficiary should be allowed to inspect trust documents simply to ensure the trustee’s accountability (that is, so that the beneficiary has the information needed to decide whether to challenge the exercise or non-exercise of a trustee’s powers), as distinct from enforcing the trustee’s obligation to provide an account as to how the trust property has been administered.
- 93 Writing extra-judicially, Campbell JA has said⁵³ that in deciding who is entitled to receive some degree of explanation of the affairs of a trust, the court is deciding a matter of the settlor’s likely intention. He said, rightly in my view, that even a beneficiary with a right vested in interest should not necessarily be entitled to inspect the trust accounts, e.g. if a settlor in establishing a family trust forbade the trustee from disclosing anything about the trust to a child lest it sap the child’s initiative. The manner and extent to which the trustee is obliged to account depends on the

⁵⁰ *Yanner v Eaton* (1999) 201 CLR 351 at 366, [19].

⁵¹ Bagnall QC in address to the Court of Appeal in *Re Holmden's Settlement Trusts* [1966] Ch 511 at 526.

⁵² See note 44 above.

⁵³ Footnote 42 (at [181])

constitutive documents of the trust.⁵⁴ Nor is there an invariable principle that a trustee is not obliged to give reasons for a discretionary decision. It depends on discerning the settlor's intentions.

94 The weight of authority and extra-judicial analysis seems to indicate the following. Subject to the terms of the trust deed and subject to what may be implied as to the settlor's intentions from the nature of the trust or the circumstances of its creation:

- (a) beneficiaries, whether they have a vested or contingent interest in the trust property or are merely discretionary objects, have the right to inspect trust accounts – in other words, to see how the trust fund has been invested and the dealings in the trust property, including how it has been distributed;
- (b) trustees are not required to disclose confidential communications whether with a beneficiary, settlor, or otherwise;
- (c) trustees are not required to disclose documents which would reveal the trustees' reasons or the process of reasoning in making discretionary decisions; and
- (d) in family discretionary trusts preference has been given to maintaining confidentiality, and respect for the decision of the settlor in selecting the persons to be trustees, over the full exposure of the trustees' processes to enable a disgruntled beneficiary to ascertain whether he or she has grounds for making a trustee accountable. The courts have been wary of the litigious response which might otherwise follow.

Varying the terms of a trust

95 The duty of a trustee (and '[p]erhaps the most important duty'⁵⁵) is to adhere rigidly to the terms of the trust. A trustee will be liable for departing from the strict letter of the trust unless that deviation takes place in certain circumstances: first, where all of the beneficiaries if *sui juris* and absolutely entitled unanimously direct the trustee to depart from the strict

⁵⁴ *Ibid* at [184]

⁵⁵ *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484 at [32].

terms of the trust or even put an end to the trust;⁵⁶ secondly, where the terms of the trust are incapable of being carried out (in which case, the trustee should apply to the court for appropriate directions); thirdly, where compliance is affected by statute or court order; fourthly, pursuant to the court's inherent jurisdiction to sanction deviations from the terms of the trust (and thus effectively vary the trust) in exceptional circumstances, namely:

- changing the nature of an infant beneficiary's property, for instance, directing investment of personalty in real property;
- allowing maintenance out of income to beneficiaries even though the testator or settlor had directed income to be accumulated;
- in the administration of trust property directing, by way of salvage, that some transaction unauthorised by the terms of the trust be carried out;
- approving a compromise on behalf of infants and possible after-born beneficiaries.⁵⁷

96 Lastly, the court's jurisdiction to vary trusts has been far extended by statute. This is discussed in more detail below.

97 The court's inherent jurisdiction to vary the trusts is of an exceptional nature because the business of the court is to execute the terms of the trust as constituted by the settlor or testator, not alter them. The strictness of this was demonstrated in *Chapman v Chapman*, where the House of Lords was asked to consider whether in the absence of an express amending power in the trust deed the court had "*an inherent jurisdiction in the execution of trusts of a settlement to sanction on behalf of infant beneficiaries and unborn persons a rearrangement of the trusts of that settlement.*"

98 In that case, the settlors had settled property on trust for all or any of the children of the settlor's son who should attain the age of 21 years or die under that age leaving issue. The settlement terms also provided for the maintenance of the children. Some years after the settlement, it became apparent that it would be advantageous to vary the settlement terms to remove the provisions relating to the maintenance of the children to avoid attracting a significant liability to estate duty.

99 The House of Lords held that the court had no inherent jurisdiction to vary or modify the terms of a trust even though such modification was thought to be advantageous for beneficiaries. Its inherent jurisdiction was limited to the four categories outlined above. That limitation is a long-standing one. Lord Simonds, in reaching his decision, stated (at 445):

⁵⁶ *Griffiths v Porter* (1858) 25 Beav 236 at 241.

⁵⁷ *Chapman v Chapman* [1954] AC 429 at 451.

“The major proposition I state in the words of one of the great masters of equity. ‘I decline,’ said Farwell J in In re Walker [1901] 1 Ch 879 at 885 ‘to accept any suggestion that the court has an inherent jurisdiction to alter a man’s will because it thinks it beneficial. It seems to me that it is quite impossible.’

- 100 There has not been any decision at the appellate level whether *Chapman v Chapman* should be accepted in Australia, but it has been accepted in general terms that the court has no inherent jurisdiction to alter beneficial interests in a trust⁵⁸ or to vary a trust even where the settlor’s intentions would otherwise be thwarted.⁵⁹ Where a charitable trust is concerned, the court may direct a scheme if it becomes impossible to continue to give effect to a charitable intention or if it becomes impracticable to carry out the declared trusts: *Ku-ring-gai Municipal Council v Attorney-General* (1954) 55 SR (NSW) 65 at 74.
- 101 In *Tickle v Tickle* (1987) 10 NSWLR 581, Young J considered whether the court had jurisdiction to vary trusts in favour of minors and decided not to follow *Chapman v Chapman*. His Honour accepted (at 586) “that there is no power to alter a trust merely because the current trustee and beneficiaries perceive that the altered trust would suit them better, [but] the court has power to alter a trust involving infants where circumstances have occurred which have tended to thwart the testator’s or settlor’s intention and the parties or their guardians have consented to a course which will effect such intentions *cy pres*.” His Honour otherwise considered that the alteration also fell within the court’s statutory jurisdiction in s 50 of the *Minors (Property and Contracts) Act* 1970, which confers wide power on the court to make various orders for the benefit of minors. The decision that the inherent jurisdiction existed was heavily supported by jurisdiction conferred by statute, and in any event may be limited to variation of trusts where minors are concerned.
- 102 To remedy the lacuna in the court’s powers demonstrated in *Chapman v Chapman*, the UK Parliament enacted the *Variation of Trusts Act* 1958. Section 1 of that Act authorised the court to approve an arrangement “varying or revoking any or all of the trusts” on behalf of persons who were not *sui juris* such as infants, persons unborn or persons not of sound mind. *Chapman v Chapman* has been nullified by statute in most Australian jurisdictions and in New Zealand⁶⁰ but not in New South Wales, the Northern Territory or the Australian Capital Territory. The closest analogy in New South Wales is the “expediency jurisdiction” conferred by s 81 of

⁵⁸ See e.g. *Perpetual Trustee Co Ltd v Godsall* [1979] 2 NSWLR 785 at 795 per Rath J.

⁵⁹ See *James N Kirby Foundation Ltd v Attorney-General (NSW)* (2004) 62 NSWLR 276.

⁶⁰ *Trustee Act* 1958 (Vic), s 63A; *Trusts Act* 1973 (Qld), s 95; *Trustee Act* 1936 (SA), s 59C; *Variation of Trusts Act* 1994 (Tas), ss 13, 14; *Trustees Act* 1962 (WA), s 90; *Trustee Act* 1956 (NZ), s 64A.

the *Trustee Act 1925* (NSW), which also appears in trustee legislation in other Australian jurisdictions and in New Zealand.⁶¹

103 Section 81 provides:

- “(1) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or disposition, or any purchase, investment, acquisition, expenditure, or transaction, is in the opinion of the Court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the instrument, if any, creating the trust, or by law, the Court:*
- (a) may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, including adjustment of the respective rights of the beneficiaries, as the Court may think fit, and*
 - (b) may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.*
- (2) The provisions of subsection (1) shall be deemed to empower the Court, where it is satisfied that an alteration whether by extension or otherwise of the trusts or powers conferred on the trustees by the trust instrument, if any, creating the trust, or by law is expedient, to authorise the trustees to do or abstain from doing any act or thing which if done or omitted by them without the authorisation of the Court or the consent of the beneficiaries would be a breach of trust, and in particular the Court may authorise the trustees:*
- (a) to sell trust property, notwithstanding that the terms or consideration for the sale may not be within any statutory powers of the trustees, or within the terms of the instrument, if any, creating the trust, or may be forbidden by that instrument,*
 - (b) to postpone the sale of trust property,*
 - (c) to carry on any business forming part of the trust property during any period for which a sale may be postponed,*
 - (d) to employ capital money subject to the trust in any business which the trustee are authorised by the instrument, if any, creating the trust or by law to carry on...”*

⁶¹ *Trustee Act 1925* (ACT), s 81; *Trusts Act 1973* (Qld), s 94; *Trustee Act 1936* (SA), s 59B; *Trustee Act 1898* (Tas), s 47; *Trustees Act 1962* (WA), s 89; *Trustee Act 1956* (NZ), s 64. These are modelled on the *Trustee Act 1925* (UK), s 57. In the *Trustee Act 1893* (NT), s 50A, “expediency” is not the criterion for the court’s jurisdiction. The court’s authority is available “as the court thinks fit” and for purposes for which the trustee has no power.

- 104 The court's jurisdiction is invoked under s 81 where there is a "question" (that is, a problem rather than a topic concerning which there is real doubt) as to whether "any sale, lease, mortgage, surrender, release, or disposition, or any purchase, investment, acquisition, expenditure, or transaction" is in the court's opinion expedient "in the management or administration of any property vested in trustees" but cannot be effected: *Stein v Sybmore Holdings Pty Ltd* [2006] NSWSC 1004 at [37]-[42].⁶² The power for the particular purpose must also be absent from the trust deed, which seems to include an express prohibition against the exercise of the power.⁶³
- 105 In *Riddle v Riddle* (1952) 85 CLR 202, Dixon J said (at 215) that "when s 81(1) says that the Court may by order 'confer upon the trustees ... the necessary power for the purpose', it is referring back to the various purposes mentioned earlier in the sub-section, namely, any sale, lease, mortgage, surrender, release, or disposition, or any purchase, investment, acquisition, expenditure, or transaction [in the management or administration of the trust property]".
- 106 The curial approach has been to construe s 81 in very broad terms. Such breadth of interpretation is usually attributed to the judgment of Dixon J in *Riddle v Riddle* where his Honour said (at 214) that "the powers conferred by s 81 were not intended to be restricted by any implications" and that what is expedient is "a criterion of the widest and most flexible kind." In *Riddle v Riddle*, Williams J also said (at 221-2) that expediency means "advantageous", "desirable", "suitable to the circumstances of the case" and includes expediency created by "sound practical business considerations" (at 223). Expediency should be determined by having regard to the objects or purpose of the trust.⁶⁴
- 107 The type of expediency required under s 81 is not completely open-ended. In *Riddle v Riddle*, Dixon J said that expediency means "expediency in the interest of the beneficiaries" and Williams J applied the test of "expedient for the trust as a whole."⁶⁵ Campbell J (as his Honour was then) said in *Stein v Sybmore Holdings* at [50] that the "expedient for the trust as a whole" test espoused by Williams J creates difficulties when applied to a discretionary trust, which of its nature involves the trustee having a power to completely cut out some of the potential objects of the trust. His Honour

⁶² Citing *Ku-Ring-Gai Municipal Council v Attorney General* (1954) 55 SR (NSW) 65 at 74 per Roper CJ in Eq, Brereton and Maguire JJ.

⁶³ *Perpetual Trustees WA Ltd v Attorney-General (WA)* (1992) 8 WAR 441 considering the WA equivalent.

⁶⁴ *Stein v Sybmore Holdings Pty Ltd* [2006] NSWSC 1004; *Trust Company Fiduciary Services Ltd v Challenger Managed Investments Ltd* [2008] NSWSC 1155.

⁶⁵ See also *Re Craven's Estate* [1937] Ch 431 at 436, per Farwell J saying that "in order that the matter may be one which is in the opinion of the Court expedient, it must be expedient for the trust as a whole."

did not consider that the test was required by the words of s 81 and was a gloss on the statute.

- 108 Putting aside whether a particular “transaction” (to use a convenient term) would be expedient for s 81, it is not difficult to identify the types of transactions that clearly come within or fall outside the phrase “*in the management or administration of any property vested in trustees.*” Transactions that are clearly administrative or procedural dealings with respect to the trust property, such as sales of trust property in the absence of any power of sale in the trust instrument (*Stevenson v McPhillamy* (1949) 23 ALJ 649), advances out of the corpus of the trust to meet a life tenant’s debts subject to recoupment (*Re Salting* [1932] 2 Ch 57), and investment in shares even though the terms of the trust contained no power to invested in unauthorised securities (*Riddle v Riddle*),⁶⁶ or varying the power of appointment of trustees in the trust deed⁶⁷ would prima facie come within s 81. In *Stevenson v McPhillamy*, Roper CJ in Eq said that the sale of trust property clearly arose in the management or administration of the trust property, stating “*when one finds a property vested in trustees, that any proposed dealing with it is a dealing with the management and administration of the property.*”
- 109 In contrast, authorities have clearly stated that altering the beneficial interests of beneficiaries,⁶⁸ “*subvert[ing] the beneficial disposition in the trust instrument*”⁶⁹ or creating a new set of beneficial rights⁷⁰ are not within the scope of s 81. Section 81 cannot be regarded as a substitute for variation of trusts legislation and would not, for instance, be able to cure the absence of the court’s inherent jurisdiction exposed in *Chapman v Chapman*.⁷¹ Thus it would seem that s 81 could not be used to alter or widen the class under a discretionary trust (which would affect the existing objects’ interests and/or create new interests) or to otherwise alter the substantive nature of the trust or determine the trust.
- 110 Less straightforward cases may include a “transaction” that concerns both (i) the management or administration of the trust property and (ii) the affectation of beneficiaries’ rights. Section 81(1)(a) contemplates only an

⁶⁶ Although the trustee legislation now allows the trustee to invest in any form of investment unless expressly forbidden by the terms of the trust, e.g. s 14 of the *Trustee Act* 1925 (NSW), *Trustee Act* 1925 (ACT), s 14; *Trusts Act* 1973 (Qld), s 21; *Trustee Act* 1958 (Vic), s 5; *Trustee Act* 1936 (SA), s 6; *Trustees Act* 1962 (WA), s 17; *Trustee Act* 1898 (Tas), s 6; *Trustee Act* 1893 (NT), s 5.

⁶⁷ *Re J T C Mayne* (1928) 28 SR (NSW) 157.

⁶⁸ *Audio Visual Copyright Society Ltd v Australian Record Industry Association Ltd* (1999) 152 FLR 142 at [76].

⁶⁹ *Arakella Pty Ltd v Paton* [2004] NSWSC 13; (2004) 60 NSWLR 334 at [112].

⁷⁰ *Perpetual Trustee v Godsall* [1979] 2 NSWLR 785 at 794-795 per Rath J.

⁷¹ This was also observed by Austin J in *Arakella v Paton* at [102].

incidental adjustment of the beneficiaries' rights but the decision of *Arakella Pty Ltd v Paton* (2004) 60 NSWLR 334 (discussed below) seems to put a gloss on that limitation.

- 111 Examples abound of the courts' adoption of a wide construction of the phrase "*in the management or administration of any property vested in trustees.*" For instance, in *Stein v Sybmore Holdings*, Campbell J held that the expression included taking steps to preserve the property and to make the property financially productive (which included planning to minimise the impact of tax and duties on the trust property) and transferring part or all of the trust property from time to time to those who have become entitled to it. In that case, the settlor, in setting up the trust, had not realised that the vesting date set out in the trust instrument resulted in unfavourable tax consequences and sought to defer it. His Honour had regard to the purpose of the trust and found it expedient "*in the management and administration of any property vested in trustees*" to extend the vesting date of the trust because of the tax advantages that would flow from it. The tax advantages were important because they facilitated the achievement of the purpose of the trust, which was to provide benefits after the death of the settlor.
- 112 In *Arakella Pty Ltd v Paton* [2004] NSWSC 13; (2004) 60 NSWLR 334, Austin J considered an application under s 81 to empower the trustee to restructure a trust by establishing a company to acquire all of the units held by members, which company would issue a proportionate number of shares in exchange. The unit holders would thus cease to hold beneficial interests in the trust. His Honour held (at [91]-[92]) that:

"[91]... The process of maintaining the register of unitholders ... is one of the essential managerial and administrative functions of the Trustee. It is a process that encompasses the admission and removal of "members" from time to time by issue, redemption and transfer of units. In my opinion matters touching upon the issue, redemption and transfer of units are therefore matters arising in the management and administration of the stationery and office supply business conducted by the Trustee.

[92] The Trustee has formed the opinion, in the course of management and administration of the Trading Trust, that a restructuring is necessary, a major component of which is to replace unitholdings with shareholdings. The purpose of the restructuring is to avoid the difficulties [concerning compliance with the trust deed provisions relating to the issue/redemption of units and unit pricing, and with the fundraising, licensing and managed investment scheme provisions of the Corporations Act (Cth)], touching upon the process of issue, transfer and redemption of units. The "expediency" of implementation of the Trustee's proposal, if it is in fact expedient (a matter upon which the Court still has to form an opinion), is an expediency relating to that

process and therefore relating to the management and administration of trust property."

- 113 For this and other reasons, the application "was a proper case for the making of an order under s 81" to empower the trustee to replace units with shares.
- 114 The various purposes in s 81 concern powers over procedural or administrative matters in respect of the trust property, as distinct from affecting beneficiaries' rights in that property unless only incidentally. To some extent, any dealing with the trust property alters what the beneficiaries have rights in, but that is only incidental and thus permitted by s 81. As Austin J correctly identified, s 81 cannot be used to subvert beneficial dispositions in the trust instrument or create new beneficial interests. The corollary of creating beneficial interests must be their extinguishment. The replacement of units with shares extinguishes beneficiaries' rights in the trust property; shares do not confer the same interests in respect of property held on the terms of a trust.⁷² It would not necessarily help to construe the term "transaction" to include extinguishment or creation unless only incidentally, because it should be construed *eiusdem generis*, that is, the preceding words would naturally limit its meaning.⁷³
- 115 Thus, *Arakella v Paton* takes an expansive view of the jurisdiction conferred by s 81. Nonetheless *Arakella v Paton* has been approved and followed by *Hornsby v Playoust* [2005] VSC 107; (2005) 11 VR 522 (per Mandie J) and *Trust Company Fiduciary Services Ltd v Challenger Management Investments Ltd* [2008] NSWSC 1155; (2008) 68 ACSR 356 (per Rein J). In *Hornsby*, Mandie J considered a restructure proposal that was similar to the one considered in *Arakella*. His Honour, referring to *Arakella*, made orders under the s 81 equivalent to confer power on the trustees to transfer the assets of an estate to a company, which then issued shares to the beneficiaries in proportion to their original interests in the estate. The in specie distribution of shares was said to arise in the "administration" of the trust property. The trust created by the will was brought to an end once that was done.
- 116 In *Trust Company v Challenger*, Rein J considered that a proposal for the trustee to release security in one form to obtain security in another form came within s 81. That would seem to fall within s 81, which contemplates

⁷² *Charles v Federal Commissioner of Taxation* (1953) 90 CLR 598 at 609.

⁷³ Although this has not been how the courts have approached the construction of "transaction". In *Re Bowmil Nominees Pty Ltd* [2004] NSWSC 161 at [16], Hamilton J held that "transaction" in s 81 could be construed broadly enough to include an amendment to the trust deed. This was followed in *James N Kirby Foundation Ltd v Attorney-General (NSW)* (2004) 62 NSWLR 276 at [16]-[17].

“surrender, release, disposition” of trust property. Thus, his Honour considered (at [29]) that the “management and administration” of the property was not confined to powers to be exercised to retain the trust property but rather what power should arise in the course of managing or administering the property. That proposition is clearly correct.

117 However, his Honour also considered that orders were s 81 were supported by *Arakella* and *Hornsby*. Those cases supported the proposition that the court could make orders under s 81 to empower a trustee to replace a beneficiary’s interest in the trust with other property (being shares in those cases). In referring to that proposition, his Honour mentioned *Re Sykes and the Trustee Act* [1974] 1 NSWLR 597 where Helsham J made orders pursuant to s 81 to empower the trustees to transfer grazing property to a company in exchange for shares to avoid NSW death duty. That case was said (at [32]) to demonstrate that “a change in assets from land to shares in a company can be treated as a matter in the management or administration of the property”, and presumably justified the approaches taken in *Arakella* and *Hornsby*. The difficulty with that statement is that there is no equating of *Sykes* with *Arakella* and *Hornsby*. The former concerned changing the nature of the trust property but under the same trust (which change does undoubtedly arise in the “management or administration” of the trust property), whereas the latter cases were directed at extinguishing the nature of the beneficiary’s interest in the trust such that their beneficial interests ceased to exist.

118 It might also be observed that the authorities have placed some importance on the beneficiaries being fully informed and consulted and having shown unanimous consent, or at least overwhelming support, for the proposal the subject of the s 81 application.⁷⁴ In reality, those matters might have some impact on the court’s consideration of whether the transaction is “expedient” for the beneficiaries’ interests. However, as noted by Campbell J in *Stein v Sybmore* at [56], the beneficiaries’ support may give only the court a measure of comfort about the expediency of the proposal sought to be approved, but it is not strictly relevant to the inquiry under s 81. It may be observed that undue reliance on the beneficiaries’ unanimous consent might call into question why the court should not leave it to the beneficiaries, if all *sui juris* and absolutely entitled, to cause a resettlement of the trust pursuant to the rule in *Saunders v Vautier*.⁷⁵

⁷⁴ *Hornsby v Playoust* [2005] VSC 107 at [23]. In *Arakella v Paton*, Austin J did not want to make the order under s 81 until satisfied that all the unit holders had been given a proper opportunity to be heard: at [116]. In *Re Bowmil Nominees Pty Ltd* [2004] NSWSC 161 at [18], Hamilton J considered that the court should not act on a s 81 application without the attitude of the beneficiaries being made clear to it.

⁷⁵ See e.g. *Re Bowmil Nominees Pty Ltd* [2004] NSWSC 161 at [16] and [20], where Hamilton J held that if the beneficiaries who were *sui juris* consented to the variation, it was not necessary for the court to make orders under s 81 and preferred to make

Courts exercising statutory powers to disregard, overcome or circumvent the use of discretionary trusts

119 Through the exercise of statutory powers, the courts may disregard, overcome or circumvent the use of trusts, particularly discretionary trusts.

120 For example, s 79 of the *Family Law Act* 1975 (Cth) allows the court to make orders to alter the interests of the parties to the marriage in the matrimonial property (or order a property settlement in substitution for any interest in such property), which matrimonial property may include property impressed with the terms of a discretionary trust. As Bryant CJ noted in *Stephens v Stephens* (2007) 212 FLR 362⁷⁶ at [44]:

“Were it otherwise, it is obvious that a party could, by simply acquiring or placing assets in a discretionary family trust, effectively avoid an order being made which would enable the other party to share in the property owned by the trust.”

121 Secondly, s 1323 of the *Corporations Act* 2001 (Cth) confers power on the court to appoint a receiver to the “property” of a person, which may include property held on the terms of a discretionary trust. Thirdly, s 37A of the *Conveyancing Act* 1919 (NSW) and s 121 of the *Bankruptcy Act* 1966 (Cth) allow the court to set aside an alienation of property to the trustee of a discretionary trust if done to defraud creditors.

122 But before turning to consider those provisions, it is important to recognise the difficulties that arise when the statute in question uses the term “property” (or cognate terms), such as in *CPT Custodian*. Although “property” is generally regarded as a bundle of rights,⁷⁷ the content of those rights is elusive if considered divorced from the specific context in which the term is used. This is because when it is used in a statute, it takes its meaning from the context of and objects of the statute. As Gummow J cautioned in *Yanner v Eaton* (1999) 201 CLR 351 at 388-9, [85], there is significant risk of confusion:

“when, without further definition, statutory or constitutional rights and liabilities are so expressed as to turn upon the existence of an “interest” of a particular “kind”. In that situation, the content of the statutory expression is a question of statutory or constitutional interpretation.”

123 Further, as Gummow and Hayne JJ state in *Kennon v Spry* (at [90]):

declaratory orders that the proposed transaction was expedient and that it was appropriate for the trustee to act in accordance with it.

⁷⁶ This case was the decision of the Full Court of the Family Court of Australia, which on appeal was *Kennon v Spry* (2008) 238 CLR 366.

⁷⁷ *Minister for the Army v Dalziel* (1944) 68 CLR 261 at 285, per Rich J.

“...as statements by this Court illustrate, the term “property” is not a term of art with one specific and precise meaning. It is always necessary to pay close attention to any statutory context in which the term is used. In particular it is, of course, necessary to have regard to the subject matter, scope and purpose of the relevant statute.

The questions that arise in these matters raise a dispute about construction of the [Family Law Act]. That dispute is not resolved by considering only the ways in which the term “property” may be used in relation to trusts of the kind described as ‘discretionary trusts’...[T]hat an interest ... ‘may not qualify as ‘property’ for the general purposes of the common law does not mean that it is also excluded from the reach of the statutes...” (footnotes omitted)

- 124 This has particular force when considering “property” or “interests” in respect of a discretionary trust because the expression “discretionary trust” itself has no fixed meaning and its meaning varies according to its usage rather than doctrine.⁷⁸ The High Court has also cautioned that describing “interests” in a “discretionary trust” as “beneficial interests” is apt to mislead.⁷⁹
- 125 Where statute requires the court to exercise powers in respect of “property” or “property of [a person]”, the task is to construe what the statute in question means by “property” and what the word “of” denotes. It would be circular to first ask if there is “property” and seek to answer that based on *a priori* assumptions and generic notions about “property,” for example, inquiring whether the “property” belongs to another, whether there is “property” because the law recognises the exercise of power over the thing, whether it is assignable, or whether there are “equitable” or “proprietary” remedies to protect it such as specific performance.⁸⁰ The same difficulties arise when statute creates rights and issues arise as to whether those rights are “property” under the general law or for the purposes of another statute.⁸¹

⁷⁸ *FCT v Vegners*, approved by the High Court in *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)*.

⁷⁹ *MSP Nominees Pty Ltd v Commissioner of Stamps (SA)* (1999) 198 CLR 494 at 509 [34].

⁸⁰ See discussion in *Yanner v Eaton* (1999) 201 CLR 351 at 365-368.

⁸¹ This is an important question arising in the context of the protections contained in the Australian Constitution (s51(xxxi)) which prevent acquisitions of “property” other than on just terms and precludes the Commonwealth from taxing the “property” of a State. For instance, in *Yanner v Eaton* (1999) 201 CLR 351 the High Court considered whether an Act, which provided that all fauna (which included wild animals) was the property of the Crown, was sufficient to extinguish a native title holder’s right to hunt crocodiles, and if so, if that extinguishment constituted an acquisition of “property” for the purposes of s 51(xxxi). Other examples are the diminution in the statutory right of a doctor to obtain payments from the Health Insurance Commission (*Health Insurance Commission v*

A. Family Law Act

126 Section 79 of the *Family Law Act* relevantly provides:

“79 Alteration of property interests

(1) *In property settlement proceedings, the court may make such order as it considers appropriate:*

(a) *in the case of proceedings with respect to the property of the parties to the marriage or either of them--altering the interests of the parties to the marriage in the property; or*

...

including:

(c) *an order for a settlement of property in substitution for any interest in the property; and*

(d) *an order requiring:*

(i) *either or both of the parties to the marriage; or*

(ii) *the relevant bankruptcy trustee (if any);*

to make, for the benefit of either or both of the parties to the marriage or a child of the marriage, such settlement or transfer of property as the court determines.”

127 “Property” in s 79 means “property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion”: s 4. The court may only make orders under s 79(1) if it is satisfied that it is “just and equitable” to make the orders: s 79(2), and must take into account various factors in making the orders: s 79(4). Those factors include the “financial resources” of each party (s 79(4)(e) and s 75(2)(b)).

128 The key issue is the construction of the expression “property of the parties to the marriage or either of them.” There is no New Zealand parallel to s 79 (including s 79(4)(e)),⁸² but it may be observed that the provision raises issues universally encountered by courts of equity, namely, how courts would otherwise apply orthodox equitable principles to identifying the “property of” a person where a discretionary trust is concerned.

129 Aside from direct ownership of property, the classic case in which courts find that the husband (in the usual case) owns the “property” subject to a discretionary trust for the purposes of s 79 is where, first, he is or has the capacity to become an object under the trust, secondly, he is or controls the trustee or has the capacity to appoint himself as trustee, and thirdly, the trustee can exercise wide powers of appointment in its absolute discretion

Peeverill (1993) 179 CLR 226) and amendments to statutory rights under a mineral exploration permit (*Commonwealth v Western Mining Corp Resources Ltd* (1998) 194 CLR 1).

⁸² See *Official Assignee v Wilson* [2008] 3 NZLR 45.

in favour of the objects.⁸³ Cases in the Family Court have held that those circumstances establish the necessary connection between the husband and the trust property to make it property “of” the husband for the purposes of s 79. That connection is usually framed in terms of the husband having “de facto legal and beneficial ownership” or “effective ownership” of the trust property. Sometimes these determinations are supported by conclusions that the trustee was the husband’s “alter ego”, “creature” or “puppet”.⁸⁴ The significance of such findings is perhaps another way of saying that the husband controls, or is in a position to control, the exercise of the trustee’s powers over trust property. This in turn then raises the question as to whether the husband’s control over assets, although not amounting to ownership, is sufficient to support a finding that the assets are “property of the parties to the marriage” for s 79 purposes, as discussed above.⁸⁵

130 A finding that property of a discretionary trust falls within s 79 means that it is included in the matrimonial pool of assets for division under the property settlement. The entire value of the trust property is attributed to the matrimonial pool,⁸⁶ even though it would seem difficult, at least from an actuarial perspective, to value “property” in the form of control of a trustee, the ability to change or appoint oneself as trustee and the potential for an object to take under the trust.

131 A number of observations follow. First, although it is accepted objects under a discretionary trust have rights to due administration of the trust protected by equity (as discussed above), the s 79 decisions do not stand for the proposition that an object under a discretionary trust has an equitable or proprietary interest in the trust fund or in a particular trust asset. The position is summed up in *Public Trustee v Smith* [2008] NSWSC 397 at [125]:

“It is perfectly understandable that in the context of s 79 the expression “property of the parties to the marriage or either of them” should be read as extending not only to property owned by a party to the marriage but also property controlled by a party to the marriage where the control is such as to put the party in the same position as if he or she were the

⁸³ Some examples are *In Marriage of Davison (No. 2)* (1990) 101 FLR 373, *In Marriage of Ashton* (1986) 11 Fam LR 457, *In Marriage of Goodwin* (1990) 101 FLR 386, *In Marriage of Harris* (1991) 104 FLR 458, and *In Marriage of Gould* (1993) 115 FLR 371.

⁸⁴ See note 83.

⁸⁵ See also *Public Trustee v Smith* [2008] NSWSC 397 at [110] to [120], which considered and commented on the family law cases in footnote 83 and noted the use of those expressions.

⁸⁶ See for instance *In Marriage of Harris* (1991) 104 FLR 458 at 467-8, and *Kennon v Spry* (2008) 238 CLR 366 at 411 per Gummow and Hayne JJ, although French CJ at 394 acknowledges the difficulties with valuing the rights of a beneficiary under a discretionary trust.

owner of the property... It involves no stretching of the concept of property to construe the expression "property of a party" as extending to property which a party owns or which the party controls as if he or she were the owner. It comes down to what the word "of" in the phrase denotes – whether it means ownership only, or whether it includes control as effective as ownership. This is the context in which the family law cases must be read. In my view, they do not support the wider proposition that as a matter of general law an object of a discretionary trust can be described as the beneficial owner of the property held by the trustee, merely by virtue of his or her being a discretionary object and also controlling the trustee." (emphasis added)

- 132 Whether rights to due administration are "proprietary" in nature has been the subject of much judicial exegesis and debate among commentators. The view frequently expressed is that although those rights are protected by equity and approach rights in *rem*, it does not mean that an object has a proprietary interest in the trust assets.⁸⁷ The House of Lords in *Gartside v Inland Revenue Commissioners* stated that the "interest" of a beneficiary depends on the terms of the trust, and that the beneficiary's right to due administration may be described as some form of "interest" having some degree of concreteness which equity will protect, but may not answer the use of the expression "interest" (or cognate expressions) in a particular statute.⁸⁸ A taxing statute is likely to be interpreted as requiring that the "interest" be capable of precise ascertainment (to some relevant extent) before it can be taxed. Arguments may in fact be mounted in support of the view that an object's right to due administration may be "proprietary" in nature.⁸⁹
- 133 Secondly, although the s 79 cases treat a trustee's powers of appointment as "property" for the purposes of s 79, that should be understood in the context of the provision. It may be tempting to read too much into Gummow J's statement in *FCT v Vegners*⁹⁰ that a general power of appointment, being a power of appointment exercisable in favour of any person including the donee of the power, is "tantamount to" ownership of the property concerned. It does not provide a complete explanation for the outcomes of the family law cases. In principle there is a difference between

⁸⁷ See e.g. *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at 729, FW Maitland, *Equity: A Course of Lectures*, 2nd ed (1949) Cambridge University Press at 29, *Dwyer v Ross* (1992) 34 FCR 463 at 465-6; *Suncorp Insurance and Finance v Commissioner of Stamp Duties* [1998] 2 Qd R 285 at 293; *Chief Commissioner of Stamp Duties v ISPT Pty Ltd* (1999) 45 NSWLR 639.

⁸⁸ See the decision of the House of Lords in *Gartside v Inland Revenue Commissioners* [1968] AC 553 at 617-618, which has been accepted in Australia. See *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* (2005) 224 CLR 98 and *Kennon v Spry* (2008) 238 CLR 366.

⁸⁹ See e.g. D Barnett, "The nature of a beneficiary's interest in the assets of an express trust" (2004) 10 APLJ 1 at 27ff.

⁹⁰ *FCT v Vegners* (1989) 20 ATR 1645 at 1649.

“power” and “property” as explained by Fry LJ in *Ex Parte Gilchrist; Re Armstrong* (1886) LR 17 QBD 521 at 530-531:

“No two ideas can well be more distinct the one from the other than those of ‘property’ and ‘power’. ... A ‘power’ is an individual personal capacity of the donee of the power to do something. That it may result in property becoming vested in him is immaterial; the general nature of the power does not make it property. The power of a person to appoint an estate to himself is, in my judgment, not more his “property” than the power to write a book or to sing a song. The exercise of any one of those three powers may result in property, but in no sense which the law recognises are they property.”

134 The distinction between power and property arose in *ASIC v Carey* (No. 6) (2006) 153 FCR 509 before French J (as his Honour was then). That decision is considered below but it is convenient to observe his Honour’s approach to the issue at this juncture. After considering a number of family law cases and Gummow J’s statement in *Vegners*, his Honour stated (at 516) that: “At least by analogy it may be observed that a beneficiary who effectively controls the trustee of a discretionary trust may have what approaches a general power and thus a proprietary interest in the income and corpus of the trust.” For completeness, and with respect to his Honour, some reservations about his Honour’s statement may be expressed.

135 First, it is difficult to apply that analogy to the usual family discretionary trust, which provides for a special rather than general power of appointment. One can accept that a beneficiary’s control of a trustee’s powers of appointment, whether by itself or in combination with other factors, may answer the terms “property” employed in a statute or provide the connection by the statute between the property and person in question required. However, that does not then turn the trustee’s power into a general power of appointment.⁹¹ Secondly, the statement that having what approaches a general power “and thus a proprietary interest” seems to take Gummow J’s statement too far. Gummow J did not say that a general power of appointment necessarily conferred a proprietary interest in the trust assets but simply that it was “tantamount to ownership.”

136 While on the subject of s 79, I should mention the well-known decision of the High Court in *Kennon v Spry* (2008) 238 CLR 366.⁹² That concerned a family discretionary trust, the ICF Spry Trust, of which Dr Spry was (and is) settlor and trustee, and was empowered to appoint additional trustees and remove trustees. Under the terms of the trust, Dr Spry, Mrs Spry and their four children were objects under broad powers of appointment held

⁹¹ See also *Public Trustee v Smith* [2008] NSWSC 397 at [135].

⁹² See also J Gleeson, “*Spry’s case: Exploring the limits of discretionary trusts*” 84(3) ALJ 177.

by Dr Spry over the income or capital of the fund. Dr Spry subsequently disclaimed all beneficial interest in the trust. In 1998, when the marriage was already in trouble, he unilaterally varied the trust to remove Mrs Spry as a capital beneficiary and in 2002 he applied all of the capital and income of the ICF Spry Trust (approximately \$4.6 million) to four separate trusts that he had set up for his children.

137 At first instance, the Family Court set aside the 1998 and 2002 instruments and transactions under s 106B of the *Family Law Act* because they were made without Mrs Spry's knowledge or consent and to defeat anticipated Family Court orders. This had the effect of restoring the income and capital of the children's trusts to the ICF Spry Trust, although Dr Spry's remained excluded as a beneficiary. The Court held that under s 79 the matrimonial property (about \$10 million) included the whole of the property of the ICF Spry Trust and was to be split 52/48 in Dr Spry's favour. Dr Spry was ordered to pay just over \$2 million to Mrs Spry. Dr Spry's appeal to the Full Court of the Family Court was dismissed, as was his further appeal to the High Court.⁹³ Of main relevance in the decision of the High Court is the joint judgment of Gummow and Hayne JJ.

138 Gummow and Hayne JJ held that the court was empowered to proceed in the property settlement proceedings "as if" changes to property rights that would have otherwise been brought about by their divorce had not yet occurred, provided it was just and equitable to proceed in that manner.⁹⁴ Dr Spry had no assets in the trust since he was not a beneficiary. However, the inquiry was not directed to identifying what was Dr Spry's property. Since s 79 refers to the broader question of identifying the "property of the parties to the marriage or either of them", the court must examine the parties' property as if changes to property rights brought about by their divorce had not yet occurred and have regard to the combined positions of husband and wife. The key point stated at [137] was that:

"once the 1998 and 2002 instruments were set aside by the s 106B orders, the "property of the parties to the marriage or either of them" was to be identified as including the right of the wife to due administration of the Trust, accompanied by the fiduciary duty of the husband, as trustee, to consider whether and in what way the power should be exercised. And because, during the marriage, the husband could have appointed the whole of the Trust fund to the wife, the potential enjoyment of the whole of that fund was "property of the parties to the marriage or

⁹³ The appeal was dismissed 4:1 with Heydon J dissenting. Kiefel J dismissed the appeal on a different ground to French CJ and Gummow and Hayne JJ. French CJ, although giving a separate judgment, agreed with the key findings of Gummow and Hayne JJ.

⁹⁴ Their Honours did not consider that the situation of the children made it other than just and equitable to set aside the 1998 and 2002 instruments and the 2002 disposition of the ICF Spry Trust property to the children's trusts, and there were no third party interests involved.

either of them". Furthermore, because the relevant power permitted appointment of the whole of the Trust fund to the wife absolutely, the value of that property was the value of the assets of the Trust." (emphasis added)

- 139 This differs from the usual case because although Dr Spry was trustee, he was not an object and therefore had no ability to take under the power of appointment. The orthodox approach that the Family Courts have adopted would not apply. Gummow and Hayne JJ focused on the property rights of both or either of Dr Spry and Mrs Spry. Their Honours' decision did not necessarily test the limits of discretionary trusts as the conclusions were reached through an exercise in statutory construction.
- 140 Heydon J (in dissent) did not consider Mrs Spry's position as no more than an object of a bare power constituted "property" for the purposes of s 79 for various reasons.⁹⁵ His Honour considered that "property" contemplated interests in property either owned otherwise as trustee or owned as beneficial interests in a trust so that those interests can be adjusted by orders made under s 79, but it did not contemplate entitlements as trustee. His Honour considered that a contrary interpretation would have an absurd result: it would mean that if a husband or wife were trustee of a discretionary trust with a power of appointment among people unrelated to the trustee and did not include the trustee, the trustee would have "property" in the trust assets and could be added to the matrimonial pool of assets.
- 141 It has been suggested that the underlying justification for the court's approach to discretionary trusts under the *Family Law Act*, particularly in light of *Spry's case*, is that where the trust as established or as operated constitutes a vehicle for holding and accumulating matrimonial assets, which in other circumstances might be held in joint names, the court can deal with those assets in the altered circumstances after the marriage has broken down.⁹⁶
- 142 Further developments have arisen since the High Court handed down its judgment as to the enforcement of the court orders.⁹⁷ Dr Spry has applied to the High Court for special leave to appeal from subsequent enforcement

⁹⁵ At [160]-[165], [175]-[177], namely, that it was not assignable, that it would result in an unreasonable extension of the definition of "property", that her potential enjoyment in the trust property depended on a decision by the trustee in his "absolute discretion", and that the words of the statute did not clearly allow the court to make s 79 orders in respect of the assets of a discretionary trust, and that Dr Spry's power of appointment was different from ownership, citing Fry LJ in *Ex parte Gilchrist; In re Armstrong* (1886) 17 QBD 521 at 531-532 (referred to above).

⁹⁶ See J Gleeson (at note 92) at 184.

⁹⁷ *Stephens v Stephens* [2009] FamCA 156; *Stephens v Stephens (enforcement)* [2009] FamCAFC 240; *Stephens v Stephens (Stay Application)* [2010] FamCAFC 20.

decisions in the Family Court. The issue seems to be that because the orders were made against Dr Spry personally and not against him as trustee of the trust, he would be committing a breach of trust by using his position as trustee to pay Mrs Spry from the trust assets to satisfy his personal liability arising from the court orders. Dr Spry claims that Mrs Spry's only alternatives are either for him to obtain court orders exonerating him for what would otherwise be a breach of trust (which he refuses to do), or for her to institute bankruptcy proceedings against him. Dr Spry relies on the following paragraphs in the decision of Gummow and Hayne JJ:

"[138] If the husband wishes to satisfy his obligations to the wife under [the order to pay the \$2 million to Mrs Spry] by recourse to the augmented assets of the Trust then it is open to him to approach the court for an appropriate order to assist him in doing so. By such an order the court would provide the machinery whereby the Trust was to be administered "as if" the wife had not ceased to be the spouse of the husband, and there was an application by the husband as trustee of a stipulated sum in favour of the wife in pro tanto discharge of his obligation to her under [the order to pay the \$2 million to Mrs Spry]. It would be for the court to determine whether, putting aside the interests of the children of the marriage for the reasons already given, it was just and equitable to make the order having regard to the interests of any third parties who may also fall within the defined class of "beneficiaries".

[139] Whether or in what circumstances the wife may apply for orders of this nature need not be further considered here."

- 143 It is worth noting authorities⁹⁸ that provide that a court order to the husband to pay a lump sum to the wife (after augmenting the matrimonial assets with the trust property) do not treat the husband (or trustee of the relevant trust) as thereby committing a breach of trust. The court assumes the trustee will exercise its discretion in good faith, upon genuine consideration and in accordance with the appropriate purpose.⁹⁹ Although an expectation exists that the husband or trustee would exercise its discretionary power to appoint the trust funds to the wife, that expectation does not equate to a preordained exercise of powers or presupposition that none of the other beneficiaries would be considered, particularly because the trustee is often conferred broad powers of appointment. As the court order is not framed against the trustee and does not purport to bind it, the court does not compel a distribution from the trust fund, even if it contemplates that as possible or likely. The court would of course

⁹⁸ See in particular *BP v KS* (2002) 177 FLR 354 at [78] – [85]; *Andco Nominees Pty Ltd v Lestato Pty Ltd* (1995) 126 FLR 404 at 429 to 433.

⁹⁹ This includes the trustee's duty to properly consider whether he or she should exercise the power, the range of objects and the appropriateness of individual appointments: *Re Hay's Settlement Trusts* at 209-210.

review the exercise of discretion if the trustee did commit a breach of trust but cannot pre-empt or predict that such a course would occur.

B. Appointing a receiver to trust property

144 Section 1323 of the *Corporations Act* relevantly provides:

“1323 Power of Court to prohibit payment or transfer of money, financial products or other property

(1) *Where:*

(a) *an investigation is being carried out under ... this Act in relation to an act or omission by a person, being an act or omission that constitutes or may constitute a contravention of this Act;*

...

and the Court considers it necessary or desirable to do so for the purpose of protecting the interests of a person (in this section called an aggrieved person) to whom the person referred to in paragraph (a) ... (in this section called the relevant person), is liable, or may be or become liable, to pay money, ... the Court may, on application by ASIC or by an aggrieved person, make one or more of the following orders:

...

(h) *an order appointing:*

(i) *if the relevant person is a natural person – a receiver or trustee, having such powers as the Court orders, of the property or of part of the property of that person.”*

145 Subsections 1323(2A) and (2B) provide:

“(2A) A reference in paragraph (1)(g) or (h) to property of a person includes a reference to property that the person holds otherwise than as sole beneficial owner, for example:

(a) *as trustee for, as nominee for, or otherwise on behalf of or on account of, another person; or*

(b) *in a fiduciary capacity.*

(2B) Subsection (2A) is to avoid doubt, is not to limit the generality of anything in subsection (1) and is not to affect by implication the interpretation of any other provision of this Act.”

146 “Property” is defined in s 9 as follows:

“property means any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description and includes a thing in action.”

147 The court can clearly exercise its powers under s 1323 to appoint a receiver to the legal title to property held by the “relevant person” as trustee or to the “interest” held by that person as a beneficiary of a trust, including a discretionary trust. A less straightforward question is whether it can appoint a receiver to trust property on the basis that it is property “of” the relevant person who is a beneficiary and not the trustee but may be said to control the trustee. This question arose in *ASIC v Carey* (No. 6). ASIC sought orders from the court to appoint receivers to property that included “property held by a Third Party, as trustee for a trust, where the Individual Defendant is a beneficiary of the trust (including as a general beneficiary of a discretionary trust)” (at [8]). French J approached the question of whether receivers should be appointed to the assets of discretionary trusts where the defendants, who were “relevant persons”, were discretionary objects, according to whether or not they had a contingent interest in the property of the trust or “effective ownership.” His Honour said (at [36]):

*“The difficulty with applying the notion of contingent interests to beneficiaries of a discretionary trust lies partly in the uncertain scope of the distribution be it income or capital, which may be made in favour of any given beneficiary. I am inclined to think that a beneficiary in such a case, at arms length from the trustee, does not have a ‘contingent interest’ but rather an expectancy or mere possibility of a distribution. In some discretionary trusts, and there is an example among those of which Mr Beck is a beneficiary, charities as a class are included in the class of beneficiaries. It could hardly be said that every charity in Australia has thereby acquired a contingent interest in that trust. On the other hand, where a discretionary trust is controlled by a trustee who is in truth the alter ego of a beneficiary, then at the very least a contingent interest may be identified because, to use the words of Nourse J [in *Inland Revenue Commissioners v Trustees of Trustees of Sir John Aird's Settlement* (No. 1) [1982] 2 All ER 929 at 940], ‘it is as good as certain’ that the beneficiary will receive the benefits of distributions either of income or capital or both.”*

148 One of the “relevant persons” was an object under the discretionary trust, director and secretary of the trustee company and his wife was the appointor. His Honour stated ([41]-[42]) that the relevant person:

“would appear, through the trustee, to have effective control of the assets of the trust. At the very least he has a contingent interest in the sense used earlier. His interest would appear to amount to effective ownership of the trust property. The property of that trust is, in my opinion, amenable to control by the receivers under s 1323.”

149 Another “relevant person” was an object under a discretionary trust and held powers of appointment and the power to remove and appoint trustees. The trustee of that trust had “every power as if it were the absolute owner of the trust fund.” His Honour also decided that this

relevant person had a “contingent interest” in the trust property if not a general power that approached ownership, and that the property subject to the trust was amenable to control by the receivers appointed under s 1323. In reaching these conclusions, his Honour drew on Gummow J’s statement in *Vegners* and the findings in the s 79 cases referred to previously.

150 On a strict construction of s 1323, if a receiver is to be appointed to the property “of” a relevant person, and that property is the person’s contingent interest in the trust, the receiver should be appointed to the person’s contingent interest itself. However, his Honour appears to have proceeded on the basis that the power under s 1323(1)(h) to appoint receivers to the property “of” that person extended to the appointment to the trust property, rather than merely to that person’s contingent interest. Perhaps the result is really explained by equating the person’s contingent interest with effective ownership of trust property, which falls short of actual ownership but provides the necessary connection between the person and the property denoted by the word “of” for the purposes of s 1323.¹⁰⁰

151 As with the s 79 cases discussed previously, *ASIC v Carey (No. 6)* should not be taken as authority for the proposition that a beneficiary’s control of the appointment or removal of the trustee or exercise of the trustee’s powers and ability to appoint trust property to himself or herself confers on it a proprietary interest in the trust property irrespective of the terms of the trust. It must be confined to the statutory context in which it was decided.

C. Alienation of property to defraud creditors

152 The nature of a discretionary trust is particularly suited to protecting assets from creditors. One way in which the courts control those arrangements is by setting aside fraudulent conveyances that seek to defeat creditors’ claims under s 37A of the *Conveyancing Act 1919* (NSW) and s 121 of the *Bankruptcy Act 1966* (Cth).

153 Section 37A of the *Conveyancing Act* provides:

“(1) Save as provided in this section, every alienation of property, made whether before or after the commencement of the *Conveyancing (Amendment) Act 1930*, with intent to defraud creditors, shall be voidable at the instance of any person thereby prejudiced.

(2) This section does not affect the law of bankruptcy for the time being in force.

¹⁰⁰ See *Public Trustee v Smith* at [138].

(3) *This section does not extend to any estate or interest in property alienated to a purchaser in good faith not having, at the time of the alienation, notice of the intent to defraud creditors.*"

- 154 Section 37A, which had its origins in the *Statute of Elizabeth*, is an alternative provision to s 121. They were in virtually identical terms until s 121 was recast in 1996. Without extracting s 121, the relevant difference is that s 121 requires establishing a "main purpose" rather than "an intent" in s 37A.¹⁰¹
- 155 The provisions clearly encompass transfers to the trustee of a discretionary trust. Thus, the courts have had little difficulty in holding that property that is not beneficially owned by the debtor or bankrupt is recoverable under s 37A and s 121 if it has been transferred to the trustee of a discretionary trust with the intent (s 37A) or main purpose (s 121) of defrauding creditors, unless in good faith to a bona fide purchaser for value without notice.¹⁰²
- 156 The notion that the trust is a "sham" often arises in the context of s 37A and s 121 because if the trust is a sham, it follows that the transfer to the trust is also a sham and should be disregarded. That leaves ownership of the property remaining squarely with the debtor or bankrupt. Examples abound of this although more commonly in the s 121 rather than s 37A context.¹⁰³
- 157 It is not necessarily clear why there is any need to resort to the "sham" argument in the s 37A/s121 context. Perhaps the apparent pre-occupation with shams arises because those provisions are concerned with fraud. The "sham" test is also framed in language of fraud so the argument arises naturally. However, it seems unnecessary to establish a "sham" trust to succeed under s 37A and s 121, which on their terms would restore title to

¹⁰¹ Section 121(4) also contains a similar carve-out to subsection (3) of s 37A.

¹⁰² See for example *Williams v Lloyd* (1934) 50 CLR 341, *Dueeasy Pty Ltd v D & M Hughes Civil Engineering Pty Ltd (in liq)* [2006] NSWSC 333, *Prentice v Cummins (No. 6)* [2003] FCA 1002; *Deryk Rowan Andrew as trustee of Estate of Colin George Ward (Deceased) v Zant Pty Ltd* [2004] FCA 1716. See also *Silvera v Savic* (1999) 46 NSWLR 124 (per Hodgson CJ) at [62] regarding the relationship between s 37A and the indefeasibility provisions in the *Real Property Act* 1900 (NSW). His Honour's comments were accepted in *Regal Castings Ltd v Lightbody* [2008] NZSC 87 at [75].

¹⁰³ See for example *Baker v Official Trustee in Bankruptcy* (unreported, 3 August 1995, FCA, Burchett, Ryan and Carr JJ); *Official Trustee in Bankruptcy v Alvaro* (1996) 138 ALR 341; *Re Estate of Wynyard (dec'd)*; *Ex parte Official Trustee in Bankruptcy* (unreported, 8 July 1987, FCA, Wilcox J); *Wily (as trustee for the bankrupt estate of Fuller) v Fuller* [2000] FCA 1512; *Faucilles Pty Ltd (in its capacity as trustee of the John Kakridas Family Trust No 2) v Commissioner of Taxation (Cth)* (unreported, 20 December 1989, FCA, Lockhart, Neaves and Hill JJ). This has also been the approach in New Zealand: e.g. *Official Assignee v Wilson* [2007] NZCA 122.

the property in question to the debtor or bankrupt even if the property is subsequently impressed with the terms of a trust.

- 158 The “sham” argument also often arises in the context of revenue and family law cases. A “sham”, for the purposes of Australian law, is stated in *Sharrment Pty Ltd v Official Trustee in Bankruptcy* (1988) 18 FCR 449 at 454:

“something that is intended to be mistaken for something else or that is not really what it purports to be. It is a spurious imitation, a counterfeit, a disguise or a false front. It is not genuine or true but something made in imitation of something else or made to appear to be something which it is not. It is something which is false or deceptive.”

- 159 This statement and the recognised test for a “sham” stem from *Snook v London and West Riding Investment Ltd* [1967] 2 QB 786 (CA) at 802 where Diplock LJ said:

“I apprehend that, if it [the word “sham”] has any meaning in law, it means acts done or documents executed by the parties to the “sham” which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual rights and obligations (if any) which the parties intend to create ... [F]or acts or documents to be a “sham”, with whatever legal consequences flow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of the “shammer” affect the rights of a party whom he deceived.”

- 160 Australian courts have applied this passage in considering if a trust is a “sham”.¹⁰⁴

- 161 The majority decision of the High Court in *Commissioner of Stamp Duties (Qld) v Jolliffe* (1920) 28 CLR 178 is often cited in “sham” cases concerning trusts. Jolliffe tried to circumvent legislation that prevented persons from opening more than one bank account in the Queensland Government Savings Bank by opening an account in his late wife’s name as her trustee and declared in writing that he held the moneys in the account on trust for her. If the trust were upheld, the moneys in the account would form part of his wife’s estate and thus subject to probate duty. Jolliffe contended that despite the express declaration of trust, he did not intend to create a trust but only wanted to earn interest on the deposited moneys, claiming that Mrs Jolliffe was unaware of the existence of the bank account. The majority decision did not employ the term “sham” but effectively treated it as such, saying at [181]:

¹⁰⁴ See for example the cases referred to in note 103.

“[W]e are bound to assume for the purpose of the appeal that it was not the real intention of the respondent to make a gift to his wife, but that the money was placed in the account for the sole purpose of procuring interest which the respondent believed would not be procurable from the Savings Bank if the money were placed in his own name... We know of no authority, and none was cited, which would justify us in deciding that by using any form of words a trust can be created contrary to the real intention of the person alleged to have created it. In our opinion the law is accurately stated in Lewin on Trusts, 11th ed., at p. 83: ‘It is obviously essential to the creation of a trust, that there should be the intention of creating a trust, and therefore if upon a consideration of all the circumstances the Court is of opinion that the settlor did not mean to create a trust, the Court will not impute a trust where none in fact was contemplated.’”¹⁰⁵

162 When it comes to “shams”, two pertinent questions are: (i) whose intention is relevant, and (ii) does one look to subjective or objective intention?

163 As to whose intention, in *Jolliffe*, it was the intention of the person who was both settlor and trustee in a unilateral transaction.¹⁰⁶ In *Raftland Pty Ltd v Commissioner of Taxation of the Commonwealth of Australia* [2008] HCA 21; (2008) 238 CLR 516, a recent High Court decision that addressed the “sham” argument in a bilateral transaction (i.e. where the settlor and trustee were different parties), held that the intention of the trustee was “specifically relevant to a question of whether the trusts apparently created by the [trust deed] were wholly or partly a pretence”. The plurality (Gleeson CJ, Gummow and Crennan JJ) stated that the settlor’s intention was not separate from the trustee’s intention, and emphasised (citing *Jolliffe*) that the creation of an express trust depends on the intention of the person alleged to have created it (at 535). Presumably that meant that once the court determined the trustee’s intention, it would also have determined the settlor’s intention. *Raftland* indicates that the intention of both the

¹⁰⁵ Note the vigorous dissent of Isaacs J, who upheld the trust by holding that (i) the open, express declaration of trust was “final and beyond recall” and acted to vest property in equity for the beneficiary, (ii) the parol evidence rule is not available to contradict a written document and (iii) public policy in that *Jolliffe* should not be able to escape liability by relying on his own moral turpitude.

¹⁰⁶ The New South Wales Court of Appeal in *Shortall v White* [2007] NSWCA 372 stated at [24] that the principle in *Jolliffe*, “that no form of words will create a trust contrary to the real intention of the person alleged to have created it”, may be accepted as applying in unilateral transactions where the beneficiaries and third parties are not informed. Also, the High Court in *Kauter v Hilton* (1953) 90 CLR 86 described *Jolliffe* as deciding, for the purposes of the legislation there in question, that “[a]ll the relevant circumstances must be examined in order to determine whether the depositor really intended to create a trust”.

settlor and trustee are relevant in a bilateral transaction.¹⁰⁷ In *Raftland*, the primary beneficiaries were the directors of the trustee company and thus also would have shared the trustee's intention.

- 164 It may be observed that although the issue in *Raftland* was, in broad terms, one of whether the trust in question was a "sham", the plurality judgment did not analyse the impugned trust deed in terms of a test that required proof of a fraudulent purpose. The plurality judgment characterised the case as one where "other evidence of the intentions of the relevant actors shows that the document [i.e. the trust deed in question] was brought into existence 'as a mere piece of machinery' for serving some purpose other than that of constituting the whole of the arrangement"¹⁰⁸ and focused the inquiry on the intentions of the "relevant actors." Gleeson CJ, Gummow and Crennan JJ cautioned against the use of the term "sham" (at 531 -532):

"[35] The term "sham" may be employed here, but as Lockhart J emphasised in Sharrment Pty Ltd v Official Trustee in Bankruptcy the term is ambiguous and uncertainty surrounds its meaning and application. With reference to remarks of Diplock LJ in Snook v London and West Riding Investments Ltd, Mustill LJ later identified as one of several situations where an agreement may be taken otherwise than at its face value, that where there was a "sham"; the term, when "[c]orrectly employed", denoted an objective of deliberate deception of third parties.

[36] The presence of an objective of deliberate deception indicates fraud. This suggests the need for caution in adoption of the description "sham". However, in the present litigation it may be used in a sense which is less pejorative but still apt to deny the critical step in the appellant's case. The absence of a present entitlement within the meaning of s 100A(1)(a) of the [Income Tax Assessment Act 1936 (Cth)] may appear from an examination of the whole of the relevant circumstances, and these are not confined to the terms of the Raftland Trust instrument." (footnotes omitted)

- 165 Presumably the rationale behind the requirement for the settlor to have the shamming intention is that the settlor "creates" the trust and confers powers on the trustee at that point, such that the absence of any intention to create the trust is fundamental to its non-creation. If the settlor had the

¹⁰⁷ See also *Horleck v Horleck* [2008] FamCA 506, although *Faucilles Pty Ltd (in its capacity as trustee of the John Kakridas Family Trust No 2) v Commissioner of Taxation (Cth)* seems to have been decided only on the basis of the settlor having a "shamming" intention. See discussion of "sham" trusts in D Hayton (ed), *Underhill and Hayton, Law relating to trusts and trustees*, 17th ed (2006) LexisNexis Butterworths at [4.6] to [4.14], J Mowbray et al, *Lewin on trusts*, 18th ed (2008) Thomson/Sweet & Maxwell at [4-19] to [4-22] and PW Young, C Croft, ML Smith, *On Equity* (2009) Lawbook Co at [6.340].

¹⁰⁸ Citing *Hawke v Edwards* (1947) 48 SR (NSW) 21 at 23 per Jordan CJ and the remarks of Windeyer J in *Scott v Federal Commissioner of Taxation [No. 2]* 1955) 40 ALR 265 at 279.

“shamming” intention but the trustee remained ignorant of it, the property held by the trustee on the non-existent “sham” trust would be subject to a resulting trust in favour of the settlor. A difficulty may arise where a settlor, having a “shamming” intention, settles a nominal sum on the trustee as the initial trust fund and there are further accretions to the trust fund – what is the effect of the “sham” in respect of the further accretions? One possibility is that the further accretions of property may be subject to a resulting trust in favour of the person or persons who had transferred it to the trustee.

- 166 It is also suggested that the trustee must also share in the “shamming” intention because it needs to go along with the settlor’s shamming intention and carry out the sham.¹⁰⁹ It seems logical that there would be a “sham” trust if both settlor and trustee possessed the “shamming” intention. However, if the settlor had the requisite intention to create a trust but the trustee did not, the trustee would nonetheless be bound by the terms of the trust so equity would intervene if the beneficiaries complained of a breach of trust. It may be observed that some overseas authority appears to require all of the settlor, trustee and beneficiaries to share in the “shamming” intention.¹¹⁰ Clearly there can be no trust if those persons intend that it be so. In *Horleck v Horleck* [2008] FamCA 506, Carmody J also observed that a trust which was legitimately created for genuine purposes can be subsequently used to facilitate a sham transaction but that requires the trustees and all, or at least the controlling, beneficiaries to collude.
- 167 As to subjective or objective intention, *Raftland* inquired into the subjective intention of the settlor/trustee.¹¹¹ In *Sharrment*, Beaumont J (at 456) also expressed the view that the result of Diplock LJ’s formulation in *Snook* logically required a subjective test of intention. Of course, it would be open to the court to examine objective evidence to support a finding of the requisite subjective intention.

¹⁰⁹ *Lewin on Trusts* (at note 107) at [4-22].

¹¹⁰ “*On Equity*” (at note 107) at 409 notes that this has also been the approach of courts in foreign jurisdictions which are seen as tax havens citing *Abacus (CI) Ltd v Sheikh Fahad* [2003] JRC 092 (Jersey Royal Court) (2005) 79 Australian Law Journal 472, where trusts were set up in the Channel Islands for tax avoidance purposes and the settlor subsequent became insolvent. Creditors who sought to set aside the trust were met with the successful defence that the beneficiaries did not share in the settlor’s “shamming” intention.

¹¹¹ The plurality judgment did not specifically say they inquired into the subjective intentions of the parties but the analysis of intention indicates this. Kirby J at [126] specifically states that the inquiry is into the parties’ subjective intention. There are decisions that apply an objective test, e.g. *Shortall v White* at [29].

168 It has also been said that a sham trust cannot be raised as a defence to “innocent third parties”.¹¹² That might be the problem with the majority decision in *Jolliffe*, which allowed Jolliffe to raise a sham trust as a defence to the paying of probate duty on the money in the bank account that he opened as trustee for his wife. This was one of the grounds of Isaacs J’s dissent.

¹¹² *Shalson v Russo* [2003] EWHC 167 (Ch); [2005] Ch 281 at [190].