TWO
WENTWORTH

WAR ON TRUSTS: Fortifying the Defences

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Contents

1. TRUSTEE DISCRETION TO DISTRIBUTE INCOME AND CAPITAL

1.1 In his paper "*Should the rule in Hastings-Bass be followed in Australia? Trustees' duty to enquire and trustees' mistakes"* (2011) 34 ABR 254, the Hon JC Campbell describes the trustee's duties as depending on "the precise terms of the individual trust in question, the circumstances surrounding its setting up, and the nature of the property involved… Any trustee's duty is one that the Court has arrived at by deducing or implying what, in the context of the particular trust and its particular circumstances, the trustee must do if the settlor's intention is to be carried out".

1.2 Leave aside fixed trusts where the beneficiaries of a trust are absolutely entitled to the whole of the assets and can direct the trustee to deal with the trust property by giving a valid discharge to the trustee: *Saunders v Vautier* (1841) 4 Beav 115; 49 ER 282.

1.3 The rule in *Saunders v Vautier* is best described as a power on behalf of the beneficiaries not to require the trustees to perform the trust but to bring the office of the trustees to an end. The power is subject to the trustee's right to reimbursement or exoneration from the trust for the discharge of liabilities incurred in the administration of the trust. See *Beck v Henley* [2014] NSWCA 201 at [33], [36] – [38] and [41].

1.4 Also leave aside those fixed trusts which have a small number of beneficiaries but the trustee has a discretion as to distribution of income and capital between them. Where the class is closed and those beneficiaries are of full age and capacity, they can join together to cause the trust to be distributed: *Thomas on Powers 2nd Ed* at [2.84] citing *Re Smith* [1928] Ch 915 and *Re Nelson* [1928] Ch 920.

1.5 Discretionary trusts are the focus of this paper. The duties of a trustee of a discretionary trust with power to distribute income and/or capital are to consider periodically whether or not it should exercise the power, to consider the range of objects of the power, and to consider the appropriateness of individual appointments: *Re Hay's Settlement Trusts* [1982] 1 WLR 202 at 211; *McPhail v Doulton* [1971] AC 424.

1.6 The rights of an object of a discretionary trust have been described as a right to be considered as potential recipient of benefit from the property which is the subject of a trust, a right to compel the trustees to consider the exercise of their discretion from time to time and a right to compel the trustees to distribute the trust property over which such discretion has been exercised: G Thomas, *Thomas on Powers 2nd Ed*, Oxford University Press, 2012 at [3.83].

1.7 The extent to which a Court will examine the exercise of a discretion of a trustee is subject to the limits explained by McGarvie J in *Karger v Paul* [1984] VicRp 13; [1984] VR 161 at 163-6 as follows:

> "…In my opinion the effect of the authorities is that, with one exception, the exercise of a discretion in these terms will not be examined or reviewed by the courts so long as the essential component parts of the exercise of the particular discretion are present. Those essential component parts are present if the discretion is exercised by the trustees in good faith, upon real and genuine consideration and in accordance with the purposes for which the discretion was conferred. The exception is that the validity of the trustees' reasons will be examined and reviewed if the trustees choose to state their reasons for their exercise of discretion."
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> …
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> In my view, in this case it is open to the Court to examine the evidence to decide whether there has been a failure by the trustees to exercise the discretion in good faith, upon real and genuine consideration and in accordance with the purposes for which the discretion was conferred. As part of the process of, and solely for the purpose of, ascertaining whether there has been any such failure, it is relevant to look at evidence of the inquiries which were made by the trustees, the information they had and the reasons for, and manner of, their exercising their discretion. However, it is not open to the Court to look at those things for the independent purpose of impugning the exercise of discretion on the grounds that their inquiries, information or reasons or the manner of exercise of the discretion, fell short of what was appropriate and sufficient. Nor is it open to the Court to look at the factual situation established by the evidence, for the independent purpose of impugning the exercise of the discretion on the grounds the trustees were wrong in their appreciation of the facts or made an unwise or unjustified exercise of discretion in the circumstances. The issues which are examinable by the Court are limited to whether there has been a failure to exercise the discretion in good faith, upon real and genuine consideration and in accordance with the purposes for which the discretion was

> conferred. In short, the Court examines whether the discretion was exercised but does not examine how it was exercised".

1.8 The *Karger v Paul* principles have been often applied: *Attorney General (Cth) v Beckler* (1999) 197 CLR 83; *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254; *Wareham v Marsella* [2020] VSCA 92 at [59] – [61]; *Cardaci v Cardaci* [2023] WASCA 158 at [201] – [206].

1.9 The focus is on the integrity of the decision-making process rather than the accuracy of the decision or whether the Court would have made the same decision: D Clarry, *The Supervisory Jurisdiction over Trust Administration*, Oxford University Press, 2018 at [9.08].

1.10 It may be open for a beneficiary to seek a declaration that discretionary decisions are void if the plaintiff can establish that the essential components from *Karger v Paul* are absent, or that a particular discretionary decision is so *grotesque* that no reasonable person could have reached that decision (so that absence of the *Karger v Paul* components may be inferred).

1.11 Discretionary decisions which are within power but were not made with real and genuine consideration are voidable rather than void: *Owies v JJE Nominees Pty Ltd* [2022] VSCA 142 at [140] - [147]; *Hitchcock v Pratt* [2024] NSWSC 1292 at [292].

1.12 The usual remedy for breach of duty is for the trust fund to be ordered to be replenished: *Patridge v Equity Trustees Executors & Agency Co Ltd* (1947) 75 CLR 149 (in the case of wilful default); *Maguire v Makaronis* (1997) 188 CLR 449 and *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484 (in the case of solicitor's breach of duty). The exception is where the trust is at an end, in which case equitable compensation could be claimed directly by a beneficiary.

1.13 In failure to give due consideration cases, if the trust deed provides for default income beneficiaries or accumulation in the absence of an effective determination to distribute income, the default provisions will apply upon declaration the purported income determination is void, but it is necessary to seek consequential orders: *Owies v JJE Nominees*.

1.14 *Karger v Paul* suggests Courts will only interfere with discretionary decisions in particular, limited circumstances. Replenishment of the trust fund may not provide a valuable outcome if the same trustee is tasked with making the same decision again.

2. REMOVAL OF TRUSTEE

2.1 The scope for removal of a trustee is broad, whether in the inherent jurisdiction of the Court, or pursuant to legislation: s 70 *Trustee Act* 1925 (ACT); s 70 *Trustee Act* 1925 (NSW); s 27 *Trustee Act* 1893 (NT); s 12, Div 4 *Trusts Act* 1973 (Qld); s 36 *Trustee Act* 1936 (SA); s 32 *Trustee Act* 1898 (Tas); s 48 *Trustee Act* 1958 (Vic); s 77 *Trustees Act* 1957 (WA).

2.2 In *Kanjian Holdings No 1 Pty Ltd v Kanjian; Kanjian v Kanjian (No 3)* [2021] NSWSC 839 Henry J said at [1037] – [1043] (emphasis added):

> "[1037] The Court has the power to remove trustees in its inherent jurisdiction or pursuant to its power under s 70 of the *Trustee Act 1925* (NSW).
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> [1038] The dominant consideration in the exercise of the power to remove trustees is the **interests of the beneficiaries** and **whether the efficient management and implementation of the trust will be facilitated and the trust property preserved**. It is not whether the trustee has committed a breach of trust: *Miller v Cameron* (1936) 54 CLR 572; [1936] HCA 13 at 579 (Starke J); *Aspinall v Aqua Sports Pty Ltd* [2018] NSWSC 706 at [18]; *Juul v Northey* [2010] NSWCA 211 at [239].
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> [1039] In *Miller v Cameron* at 580, Dixon J (Evatt and McTiernan JJ agreeing) identified the matters relevant to the removal of a trustee:
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> > 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.

[1040] Courts will have no issue removing trustees for **misconduct**, although not every mistake or neglect of duty, or inaccuracy of conduct of trustees, will induce courts to adopt such a course. **The acts or omissions must be such as to endanger the trust property or to show a want of honesty, a want of proper capacity to execute the duties, or a want of reasonable fidelity**: Heydon and Leeming, *Jacobs' Law of Trusts* at 318–9, quoted in *Re Reserve Hotels Pty Ltd* [2021] NSWSC 376 at [141].

[1041] The fact that some or even all of the beneficiaries wish for the removal of a trustee does not necessarily mean that the jurisdiction will be exercised. As Brereton J stated in *Fay v Moramba Services Pty Ltd* [2009] NSWSC 1428 at [25]:

> Removal is not inevitable, just because some or even all of the beneficiaries wish it. The court will not remove a trustee for the mere caprice of a beneficiary or without reasonable cause. Friction or hostility between the trustee and the beneficiaries is not of itself a reason for the removal of the trustee, 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.
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> (Citations omitted)

[1042] Where the trustee is a company, a deadlock between its directors such that it is not attentive to performance of the trust may also justify the appointment of independent trustees: *Aspinall v Aqua Sports at [56]; Rosenbaum v Baidarman (No 2)* [2021] NSWSC 574 at [678].

[1043] Where past conduct of the trustee is relied upon as a ground for their removal, the Court must assess whether that conduct demonstrates the unsuitability of the trustee continuing in their role, having regard to the interests of the beneficiaries. Past failures do not necessarily justify a prediction that similar failures will occur in the future. All relevant circumstances must be examined before determining whether removal is warranted, such as the reasons for the earlier failures: *Titterton v Oates* (1998) 143 FLR 467at 480 – 1."

2.3 On the considerations in appointing and removing a trustee, in *Hancock v Rinehart* [2015] NSWSC 646 (emphasis added) Brereton J said:

> [120] The dominant consideration in appointing (and removing) a trustee is the **welfare of the beneficiaries** [*Walters v Ryan* [1933] NZLR 821; cf (in relation to removal of a

trustee) *Letterstedt v Broers* (1884) 9 App Cas 371, 386; *Miller v Cameron* (1936) 54 CLR 572, 575 (Latham CJ), 579 (Starke J), 580-581 (Dixon J); *Wells v Wily* (2004) 50 ACSR 103; [2004] NSWSC 607, [21]]. In *Mendelssohn v Centrepoint Community Growth Trust* [1999] 2 NZLR 88, the New Zealand Court of Appeal said (at 97):

> If there is a general principle, it is that the Court's task is to appoint the person or persons best suited to administer the trust in the circumstances prevailing.

[121] Three main considerations inform the court in appointing a new trustee [*Re Tempest* (1866) LR 1 Ch App 485, 487-488 (Turner LJ)], although these are "general guidelines" [*Global Funds Management (NSW) Ltd v Burns Philp Trustee Co Ltd (in prov liq)* (1990) 3 ACSR 183, 185 (Rolfe J)], or “rules of practice”, rather than “hard and fast rules” [*Hobkirk v Ritchie* (1934) 29 Tas LR 14, 46].

[122] The first is **the wishes of the persons by whom the trust was created, if expressed or implicit in the trust instrument**. Such wishes need not be express, and may be *inferred* from the terms of the trust, or the identity or description of the original trustee.

[123] The second is that a trustee should **not be appointed with a view to promoting the interests of some of the beneficiaries in opposition either to the wishes of the settlor or the interests of the other beneficiaries**.

This is concerned with avoiding conflict of interest, and is reflected in the court’s preference not to appoint a beneficiary, or the relative of a beneficiary, as trustee [*Ex parte Conybeare's Settlement* (1853) 1 WR 458; *Johnstone v Johnstone* (1902) 2 SR(NSW) Eq 90; *Re Cunningham's Settled Estates* (1909) 27 WN(NSW) 28; *Re Roberts* (1983) 20 NTR 13; (1983) 70 FLR 158; *Saul v Lin (No 2)* (2004) 60 NSWLR 275; [2004] NSWSC 332, [9]].

However, this general preference is not an absolute rule. Thus it may be moderated by a contrary intention on the part of the settlor: not infrequently, a settlor or testator may indicate a contrary intention by appointing a beneficiary at the outset, or by limiting the class of those who can be appointed. And it also yields to necessity: the court may appoint a beneficiary (or relative of a beneficiary) if there is no one else suitable or willing to act [*Ex parte Conybeare's Settlement*; *Waddell v Patterson* (1865) 2 WW & A'B Eq 36; *Re Ferrett's Trusts* (1894) 6 QLJ 183; *Re Simmonds* [1954] QWN 3; *Re Neeve* [1956] QWN 21; *Re Paroz* [1956] QWN 37; *Re Grace* [1955] QWN 81; *Re Greenfield (No 2)* (1909) 12 GLR 22].

The disinclination to appoint a beneficiary (or relative) has prevailed in cases where it was possible to appoint an independent trustee, where the trustee’s discretions have been such as to create a significant potential for conflicts of interest

and duty, and/or where there were additional reasons for considering the beneficiary candidate unsuitable. In *Re Tempest* itself, the proposed trustee was found to have been proposed with a view to acting in the interests of some only of the beneficiaries and not as an independent trustee for the benefit of all the beneficiaries. In *Johnstone v Johnstone*, there was ill-feeling between the beneficiary proposed for appointment and other beneficiaries, and no reason why an independent rival nominee could not be appointed. In *Re Cunningham's Settled Estates*, the trustee had a wide discretion as to investment such that the life tenant (who sought to be appointed) could advantage himself over the remaindermen, and there was no evidence that an independent trustee could not be appointed. In *Re Roberts*, the Public Trustee, whose conduct had not been unsatisfactory, was willing to continue to act as trustee of a trust for the benefit of the testator's widow and her children, and the widow admittedly had immediate plans to move out of the jurisdiction. In *Saul v Lin (No 2)* [2004] NSWSC 332, the new trustee would be in a position to administer the trust in such a way as may benefit the life tenant to the disadvantage of the remaindermen, or vice versa, and there was no reason why an independent trustee could not be appointed.

[124] The third of the *Re Tempest* considerations is that in appointing a trustee, regard should be had to **whether the appointment would promote or impede the execution of the trust**. Ford & Lee, *Principles of the Law of Trusts,* [8290], suggest that in connection with this, "it would appear that ... the court may wish to ascertain the acceptability of the proposed trustee to the beneficiaries of the trust; for it may well be that their relationship will bear upon the efficiency with which the trust can be carried out". In *Wallace v Wallace (No 2)* (1899) 24 VLR 893, Hood J said (at 895) that "the court ought not appoint a trustee - there being no reason for it - who is obnoxious to the whole of the *cestuis que trustent*".

2.4 In *Mir v Mir* [2025] NSWCA 154, Ward P (with whom Leeming JA and Payne JA agreed) said:

"[139] There was no dispute as to the applicable principles on an application to remove a trustee (whether pursuant to the statutory power contained in s 70 of the *Trustee Act* or as an incident of the Court's inherent supervisory jurisdiction over the administration of trusts). It was accepted that the power is to be 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" (see Dixon J at 580 in *Miller v Cameron*).

[140] In *Welker v Rinehart (No 10)* [2012] NSWSC 1330, Brereton J, rejecting a submission that the "safety of the trust" was the

> sole or essential consideration in determining whether to remove a trustee, identified one of the Court's central concerns (if not the predominant one) as being the due administration of the trust (see at [10]).
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> [141] …it is recognised that there must be caution in the exercise of the power to remove a trustee; and not every mistake or misconduct will warrant the removal of a trustee (see *Letterstedt v Broers* (1884) 9 App Cas 371 at 385*;* [1881-5] All ER Rep 882). That said, where a trustee has demonstrated a want of honesty, proper capacity to exercise the trustee's duties, or of reasonable fidelity to the trust with which they have been /reposed, this would be a basis on which the court in its supervisory jurisdiction may well decide to remove a trustee (Leo here referring to *Guazzini v Pateson* [1918] NSWStRp 39; (1918) 18 SR (NSW) 275 at 292-293 (Street CJ)).

3. PROPER PURPOSE AND GOOD FAITH DISTINGUISHED

3.1 In G Thomas, *Thomas on Powers 2nd Ed*, Oxford University Press 2012 the learned author describes at [9.02] the "*slippery concept*" as requiring proof of:

a. A disposition beyond the scope of the power by the donee whose position is referable to the terms, express or implied, of the instrument creating the power; and

b. Deliberate breach of the implied obligation not to exercise that power for an ulterior purpose.

3.2 Categories of fraud on a power have been said to include:

a. Corrupt purpose

b. Bargain to benefit non-object

c. Other foreign purpose

Lewin on Trusts 20th Edition at [30-066] – [30-078]; *Thomas on Powers 2nd Ed* at [9.13].

3.3 In *Hancock v Rinehart* [2015] NSWSC 646 the doctrine of fraud on a power was described in the following terms:

> "[57] A power must be exercised in good faith for the purpose for which it was given, and not for an ulterior purpose - whether for the benefit of the trustee or otherwise - not contemplated by the instrument creating the power [*Vatcher v Paull* [1915] AC 372,

378 (Lord Parker); *Cowan v Scargill* [1985] Ch 270, 288D (Megarry VC)]. A "fraud on a power" is an exercise of a power for such an extraneous purpose; in this context, the term "fraud" does not necessarily involve conduct which would ordinarily be described as dishonest or immoral [*Vatcher v Paull,* 378; *Re Crawshay* [1948] Ch 1234]. Such an exercise of power for an extraneous purposes is invalid and void, as Dixon J said in *Mills v Mills* (1938) 60 CLR 150 (at 185):

> Directors of a company are fiduciary agents, and a power conferred upon them cannot be exercised in order to obtain some private advantage or for any purpose foreign to the power. It is only one application of the general doctrine expressed by Lord Northington in *Aleyn v Belchier*: "No point is better established than that, a person having a power, must execute it bona fide for the end designed, otherwise it is corrupt and void."

See also *Peters' American Delicacy Co Ltd v Heath* (1939) 61 CLR 457, 511; *Ngurli Ltd v McCann* (1953) 90 CLR 425, 438-9; 447-8.

[58] The doctrine applies to the exercise by a trustee of a discretion. In *Pitt v Holt; Futter v Futter* [2011] EWCA Civ 197; [2012] Ch 132; [2011] All ER (D) 101 (Mar), Lloyd LJ said (at [96]):

> The purported exercise of a discretionary power on the part of trustees will be void if what is done is not within the scope of the power.
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> There may be a procedural defect, such as the use of the wrong kind of document, or the failure to obtain a necessary prior consent.
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> There may be a substantive defect, such as an unauthorised delegation or an appointment to someone who is not within the class of objects. Cases of a fraud on the power are similar to the latter, since the true intended beneficiary, who is not an object of the power, is someone other than the nominal appointee.
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> There may also be a defect under the general law, such as the rule against perpetuities, whose impact and significance will depend on the extent of the invalidity. In re Abrahams Will Trusts and In re Hastings-Bass, decd together show that the effect on an advancement of invalidity by reason of something such as the rule against perpetuities may be such that what remains of the advancement is not reasonably capable of being regarded as for the benefit of the advancee. In that case the advancement will be void, since the power can only be used for the benefit of the relevant person and the purported exercise was not for his or her benefit. That is an example of an exercise outside the scope of the power.

[59] While, on appeal, the Supreme Court acknowledged that the issue of fraud on a power was a "difficult question" which might need to be revisited, it did not otherwise cast doubt on Lloyd LJ's above exposition [*Futter v Revenue and Customs* [2013] UKSC 26; [2013] 2 WLR 1200, [61]]. And in *Wong v Burt* [2004] NZCA 174; [2005] 1 NZLR 91, the New Zealand Court of Appeal explained:

> [27] The notion of a fraud on a power itself rests on the fundamental juristic principle that any form of authority may **only be exercised for the purposes conferred, and in accordance with its terms**. This principle is one of general application.
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> [28] The particular expression, a "fraud on a power", applies to both a power and a discretion. The word "fraud" here denotes an **improper motive, in the sense that a power given for one purpose is improperly used for another purpose**.
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> [30] … The central principle is that if the power is exercised with the intention of benefiting some non-object of the discretionary power, whether that person is the person exercising it, or anybody else for that matter, the exercise is void. If, on the other hand, there is no such improper intention, even although the exercise does in fact benefit a non-object, it is valid. See *Vatcher v Paull* [1915] AC 372 at 378 per Lord Parker (PC Jersey).
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> …
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> [33] As to the effect of a finding of a fraud on a power, it has long been held that where a power is successfully impugned, its exercise is totally invalid (*Re Cohen* [1911] 1 Ch 37), unless the improper element in the appointment can be severed from the remainder of that appointment (*Topham v Duke of Portland* [1863] EngR 1051; (1858) 1 De GJ & S. 517; 46 ER 205).

[60] In determining whether a power has been exercised for an extraneous or ulterior purpose, the Court determines **first, as a matter of law, for what purpose or purposes the power may properly be exercised** and **secondly, as a matter of fact, whether the purpose for which the power was in fact exercised was within the category of permissible purposes** [*Chameleon Mining NL v Murchison Metals Limited* [2010] FCA 1129, [112]]. In ascertaining the purpose for which the power was in fact exercised, the Court is concerned with the state of mind of the trustee and is informed by the surrounding circumstances, as was explained by the Privy Council in *Howard Smith Ltd v Ampol Ltd* [1974] AC 821 (at 835, citing *Hindle v John Cotton Ltd* (1919) 56 Sc LR 625, 630-631 (Viscount Finlay)):

> Where the question is one of abuse of powers, the state of mind of those who acted, and the motive on which they acted, are all important, and you may go into the question of what their intention was, collecting from the surrounding circumstances all the materials which genuinely throw light upon that question of the state of mind of the directors so as to show whether they were honestly acting in discharge of their powers in the interests of the company or were acting from some bye-motive, possibly of personal advantage, or for any other reason.

[61] In that respect, the burden of proof is born by those who allege a fraud on the power [*Askham v Barker* (1853) 17 Beav 37, 44; 51 ER 945, 948 (Romilly MR); see also *NSW Medical Defence Union v Crawford* (1993) 31 NSWLR 469, 485-6 (Kirby P)]. However, the crucial question is simply whether the power (or discretion) was exercised bona fide for a proper purpose, and an answer that it was not does not depend in every case on proof of what the extraneous purpose was, so long as it can be established that the power was not exercised bona fide for the purpose for which it was conferred. In other words, it may be discernible that the power (or discretion) could not have been exercised bona fide for a proper purpose, without proving for what collateral purpose it was in fact exercised.

3.4 The proper purpose rule was described in *Hitchcock v Pratt* [2024] NSWSC 1292 as follows:

> "[171] In determining whether a power has been exercised for an extraneous or ulterior purpose, the Court determines: first, as a matter of law, for what purpose or purposes the power may properly be exercised; and secondly, as a matter of fact, whether the purpose for which the power was in fact exercised was within the category of permissible purposes: *Hancock v Rinehart* at [60]. The burden of proof is borne by those who allege a fraud on the power or improper purpose: *Hancock v Rinehart* at [61]
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> [172] The proper purpose or purposes of a power is to be objectively determined at the date of the instrument conferring the power, by reference to: **(a) the rest of the instrument containing the power; (b) documents which objectively inform the context of the instrument; and (c) substantially contemporaneous documents intended to be read with the trust deed, such as a letter of wishes**: *Grand View* at [61]-[63]. The purpose for which the power may permissibly be exercised may be illuminated by the terms of the trust, and in particular the nature and extent of the trustee's powers and discretions: *Hancock v Rinehart* at [73].
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> …
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> [181] Within the realm of the exercise of powers, "good faith" involves

> a subjective inquiry into whether the powerholder "is aware of her power, the terms on which it is held and requires her to have consciously considered whether the specific exercise of power is permitted by the terms": Hudson (Jessica Hudson, "The Proper Purpose Rule: Preventing Law's Intentional Abuse", *Supreme Court of NSW Annual Conference*, 2024) at 24. Like the proper purpose rule, good faith requires the powerholder to believe that her purpose is proper: Hudson at 24.
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> [182] However, **good faith differs from the proper purpose rule as the latter also requires the powerholder to be *correct* in her belief according to the terms of the power**: Hudson at 24. Thus, powerholders might exercise power in good faith, believing that their purpose was proper, but be found to have acted improperly because of a mistaken understanding of the terms and the purposes which they authorised: Hudson at 24."

3.5 *Mercanti v Mercanti* [2015] WASC 297 at [158] – [167] concerned the proper purpose of the power to appoint a new Appointor contained in a trust deed. At [164] the Court cited *Scaffidi v Montevento Holdings Pty Ltd* as authority for the proposition the width of a power to appoint and remove trustees was a matter of construction (citing *Scaffidi v Montevento Holdings Pty Ltd* [2011] WASCA 146) and at [167] the Court said it looks to the intention or purpose of the appointor at the date of the exercise of the power.

3.6 The principles were also summarised in *Mercanti v Mercanti* [2016] WASCA 206 at [226] –[245].

4. GENUINE CONSIDERATION

4.1. The duty to give real and genuine consideration to the exercise of a discretionary distribution power is one of a number of duties owed by trustees (see the list in *Thomas on Powers 2nd Ed* at [10.04]) but it is the most interesting. The well-known Australian authorities only scratch the surface.

4.2. In *Re Owies Family Trust* [2020] VSC 716 at [93] and [94], after referring to *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254; [2010] HCA 36, the Court said the obligation of a trustee, in giving genuine consideration, to be properly informed is universal, although the extent of the obligation will be dependent on the particular circumstances, including the nature of the trust. The size and scale of the trust, the nature of the relationships

that may subsist, and the purpose of the power will all be relevant. At [95] the Court said:

> "In the case of some trusts, the number of potential objects might be very large and a requirement to undertake a detailed analysis of the identity and needs of each would be unworkable. Having considered whether or not to exercise the power and understood the range of objects that might benefit, the trustee is required to give adequate consideration as to how to exercise the power."

4.3. The Hon JC Campbell in the paper "*Should the rule in Hastings-Bass" be followed in Australia?*" said:

a. Just how far the trustee needs to go in gathering facts will depend on the particular trust.

b. Sometimes the fact that the trustee is someone who the settlor would know was familiar with the circumstances relevant to making the choice involved… is a reason why the Court has inferred that the trustee is entitled to rely on her or his own knowledge of the subject matter (citing *Karger v Paul*).

c. At other times, if the trustee is not in a position to know the facts relevant to the exercise of the power, the duty of giving real and genuine consideration would require the trustee to ascertain enough about the circumstances in life of the potential beneficiaries to be able to say that the settlor's intention about the manner in which the power would be exercised has been complied with.

4.4. In considering the appropriateness of particular distributions, in M J Ashdown *Trustee Decision Making: The Rule in Re Hastings-Bass*, Oxford University Press 2015 at [5.06] the learned author suggested the question should be: what would a reasonable and responsible trustee take into account in order to be able to effectively consider whether and how to exercise the power or discretion? More specifically, the learned author referred to any factor which the trust instrument expressly or by implication, requires them to take into account [5.05]; the settlor's intentions or wishes, fiscal considerations [5.09] and any other factually relevant matter which has a substantial nexus to the exercise of the power [5.10].

4.5. *Lewin on Trusts 20th Edition* at [29-051] suggests the wishes and needs of beneficiaries are common matters for trustees to take into account.

4.6. *Thomas on Powers 2nd Ed* focuses on the construction of the trust document as the key ingredient to determining the width of enquiry required by a trustee. The learned author offered this formulation at [10.10]: "The broad aim is to find the meaning which the document would convey to a reasonable person having all the background knowledge reasonably available to the parties, including anything which would have affected the way a reasonable man would have understood it, but excluding previous negotiations and declarations of subjective intent".

4.7. The learned authors of *Lewin on Trusts 20th Ed,* Thompson Reuters 2020 distinguish between an executed trust where the beneficiaries' interests are defined and an executory trust where the trust instrument consists of instructions for performing the trust in the future. It is suggested at [7-002] - [7-019] and [7-084] strict rules of construction apply to an executed trust, but are more relaxed for executory trusts.

4.8. In considering the range of objects, "…there is no need to compile a complete list of the objects, or even to make an accurate assessment of the number of them: what is needed is an appreciation of the width of the field… Only when the trustee has applied (its) mind to "the size of the problem" should (it) then consider in individual cases whether, in relation to other possible claimants, a particular (distribution) is appropriate": *Hay's Settlement Trusts* at 211.

4.9. Assessing in a businesslike way "the size of the problem" is what the trustees are called on to do: *Re Baden's Deed Trusts (No 2)* [1973] Ch 9 at 20.

4.10. In furtherance of the construction of the document analysis, *Thomas on Powers 2nd Ed* suggests at [10.13] the terms of the power may imply an order of priority or preference, citing *Re Manisty's Settlement* [1974] Ch 17. Do "primary beneficiaries" require greater enquiry in the exercise of the duty to consider than "secondary beneficiaries" even if the powers in the trust deed to distribute income and capital to both classes are the same? Considering the meaning of the words on the page suggests, yes

primary beneficiaries may have a degree of priority over secondary beneficiaries.

4.11. But ascertainment of the duty to enquire, as a matter of construction of the trust instrument, is affected by surrounding circumstances. In *Re Manisty's settlement,* Templeman J, after referring to the trust in *Re Gestetner Settlement* [1953] Ch 672, suggested surrounding circumstances may give rise to the need for greater enquiry concerning some members of a class (children) than others (employees) at [25]:

> "If a settlor creates a power exercisable in favour of his issue, his relations and the employees of his company, the trustees may in practice for many years hold regular meetings, study the terms of the power and the other provisions of the settlement, examine the accounts and either decide not to exercise the power or to exercise it only in favour, for example, of the children of the settlor. During the period the existence of the power may not be disclosed to any relation or employee and the trustees may not seek or receive any information concerning the circumstances of any relation or employee. In my judgment it cannot be said that the trustees in those circumstances have committed a breach of trust and that they ought to have advertise the power or looked before the persons who are most likely to be the objects of the bounty of the settlor…"

[This hypothetical was not the trust the subject of the judgment, and is illustrative rather than authoritative.]

4.12. *Lewin on Trusts 20th Ed* suggests at [21-010] the trustees need to identify those discretionary beneficiaries who are, in the circumstances, real candidates for benefit in the proper exercise of the discretion under the trust or power, and disclosure of the trust should be made to those persons, but that circumstances may change which may require disclosure to other persons during the continuance of the trust.

4.13. Where the class of potential objects is small (such as the children and grandchildren of the settlor), *Thomas on Powers 2nd ed* suggests at [10.12] the trustee may be expected to inquire and ascertain the personal needs, health, financial and employment circumstances of each beneficiary.

4.14. The duty of superannuation trustees to properly inform themselves has been described as more intense compared to discretionary trusts with a broad class of beneficiaries: *Finch v Telstra Super Pty Ltd* [2010] HCA 36, (2010) 242 CLR 254 at [66]; *Wareham v Marsalla* at [60]; *In the matter of Gainer Associates Pty Limited* [2024] NSWSC 1138 at [96].

4.15. This is perhaps one explanation why superannuation fund trustees take so long to determine payment of death benefits. Some industry funds are proposing to amend their trust deeds to mandate payment of death benefits to the surviving spouse: *Cbus to simplify death benefit payouts to reduce delays*, Australian Financial Review, 15/9/25. This is an issue for another paper, but I would suggest there is much to be said for a legislative mandate for death benefits to be paid to the estate (noting the tax consequences will be different).

4.16. In *Gainer*, a judicial advice application, the trustee was found to have exercised real and genuine consideration by obtaining legal advice and contacting eligible recipients and seeking full information about their circumstances. A timesheet was in evidence showing the professional director had agonized in coming to the discretionary decision.

4.17. Discretionary distribution type decisions are distinguished from cases in which it is necessary for a trustee to obtain information and form an opinion (for example, about a member's incapacity to work) as an ingredient in the performance of trust duty: *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254 at [30]; *Tambakeras v UniSuper Limited* [2022] NSWSC 1162 at [186].

4.18. But even in those type of cases, the extent to which a trustee ought to make further enquiries will vary with the circumstances. It is a matter of degree: *Tambakeras* at [191] – [192]

5. THE RULE IN HASTINGS-BASS DISTINGUISHED

5.1. In *Re Hastings-Bass (deceased)* [1975] Ch 25 Buckley LJ said at 41:

> "where by the terms of a trust… a trustee is given a discretion as to some matter under which he acts in good faith, the Court should not interfere with his action notwithstanding that it does not have the full effect he intended, unless (1) what he has

> achieved is unauthorized by the power conferred upon him; or (2) it is clear that he would not have acted as he did (A) had he not taken into account considerations which he should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account."

5.2. This statement of principle was cited in first instance judgments in the UK for many years as a basis for setting aside certain trustee transactions because of deficiencies in the way in which they the decision to undertake them was made.

5.3. In his paper "*Should the rule in Hastings-Bass be followed in Australia? Trustees' duty to enquire and trustees' mistakes"* (2011) 34 ABR 254 the Hon JC Campbell argued the "rule in Hastings Bass" incorrectly conflated two different streams of principle, one concerning the duties of trustees in making decisions and the other concerning transactions entered through mistake or ignorance.

5.4. His Honour said "As the pursuers of poltergeists and flying saucers are well aware, as soon as one coins a name, people will assume that there really is something that is referred to by the name".

5.5. The rule in *Hastings-Bass* was later pared back in *Pitt v Holt*; *Futter v Futter* [2013] UKSC 26 which held that sufficiently serious breach of fiduciary duty was essential and setting aside a voluntary transaction for mistake must be considered as a separate doctrine.

5.6. In *Pitt v Holt* at [41] it was said: "If in exercising a fiduciary power trustees have been given, and have acted on, information or advice from an apparently trustworthy source, and what the trustees purport to do is within the scope of their power, the only direct remedy available (either to the trustees themselves, or to a disadvantaged beneficiary) must be based on mistake (there may be an indirect remedy in the form of a claim against one or more advisers for damages for breach of professional duties of care)". See further on mistake, *Lewin on Trusts 20th Edition* at [30-032ff].

5.7. There are full discussions of these topics contained in D Clarry, *The Supervisory Jurisdiction over Trust Administration,* Oxford University Press, 2018 Chapter 9, in M Ashdown, *Trustee Decision Making: The*

Rule in Re Hastings-Bass, 2015 Chapters 3-5, in G Thomas, *Thomas on Powers 2nd Ed*, Oxford University Pres 2012 at 8.03 and 10.78-10.95 and in Lewin on Trusts 20th Ed at [30-040] ff.

6. OWIES V JJE NOMINEES PTY LTD [2022] VSCA 142 (AN APPEAL FROM RE OWIES FAMILY TRUST [2020] VSC 716)

6.1. *Owies v JJE Nominees Pty Ltd* concerned the Owies Family Trust, established by deed made in 1970. The Trust had assets in excess of $23million, and an annual income of hundreds of thousands of dollars.

6.2. The beneficiaries of the trust included the late Dr John and Dr Eva Owies and their (adult) children Michael, Deborah and Paul. The three children were the Primary Beneficiaries.

6.3. The Preamble to the trust deed provided that the settlor settled the sum "being desirous of making provision for the Primary Beneficiaries and the General Beneficiaries".

6.4. Clause 3 of the trust deed provided with respect to the income of the trust:

a. "The Trustees shall in each accounting period until the Vesting Day pay apply or set aside the whole or such part (if any) as they shall think fit of the net income of the Trust Fund of that accounting period for such charitable purposes and/or to or for the benefit of or for all or such one or more exclusive of the others or other of the General Beneficiaries living from time to time in such proportions and in such manner as the Trustees in their absolute discretion and without being bound to assign any reason therefor (but after considering the wishes of the Guardian) shall think fit;

b. the Trustees shall hold so much of the income of the Trust Fund as the Trustees shall not pay apply or set aside pursuant to the powers contained in paragraph (i) of this Clause in trust for the persons successively described in paragraphs (a) (b) and (c) of Clause 4 hereof as though each date on which such income becomes subject to the Trusts hereof were the Vesting Day specified in the Schedule;

c. notwithstanding anything contained in paragraphs (i) and (ii) of this Clause the Trustees may determine in their absolute discretion before the expiration of any accounting period prior to the Vesting Day to accumulate all or any part of the income arisen or arising during such period and such accumulation shall be dealt with as an accretion to the Trust Fund."

6.5. The vesting day was due to be 30 June 2050. Clause 4 of the trust deed dealt with distribution of capital on the vesting of the trust:

> "As from the Vesting Day the Trustees shall stand possessed of the Trust Fund and the income thereof in trust for such charitable purposes and/or for such of the General Beneficiaries for such interests and in such proportions and for one to the exclusion of the other or others as the Trustees may with the consent of the Guardian by instrument in writing revocable or irrevocable before the Vesting Day appoint PROVIDED ALWAYS that the Trustees shall not without such consent revoke any revocable appointment AND PROVIDED FURTHER that if there is no Guardian alive the Trustees shall have no such power of appointment and in default of and subject to any such appointment in trust –
>
> (a) for such of the Primary Beneficiaries as shall be living on the Vesting Day and attain the age of twenty-one years as tenants-in-common in equal shares absolutely PROVIDED ALWAYS that the children (if any) who shall be living on the Vesting Day of any Primary Beneficiary who dies before the Vesting Day (and the descendants of any of such children or the children of such children who dies before the Vesting Day) shall take as tenants-in-common a share calculated per stirpes which such deceased Primary Beneficiary would have received had he or she survived to the Vesting Day;
>
> (b) if in the events which happen or if for any reason whatsoever any part or parts of the Trust Fund shall not be effectively or validly disposed of by the trusts declared by this Deed or by any Deed from time to time in force varying altering or adding to such trusts the Trustees shall stand possessed of such part or parts of the Trust Fund as aforesaid for the statutory next of kin (excluding the Settlor) who are according to law next of kin of the Guardian first named in the Schedule who are living when the same falls or fall into possession as tenants-in-common in equal shares absolutely and if there shall be no such next of kin upon trust for such charitable purposes as the Trustees may determine any resulting trust to the Settlor being hereby expressly negatived".
>
> ...

6.6. Clause 17 provided, subject to provision to the contrary "every discretion vested in the Trustees shall be absolute and uncontrolled and every power vested in them shall be exercisable at their absolute and uncontrolled discretion".

6.7. Clause 20 provided "the Trustees for the time being may at any time and from time to time by deeds with the consent of the Guardian if alive revoke

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

6.8. Clause 22 was a power to appoint and remove the trustee. The initial appointor was John and after his death Eva.

6.9. In a deed made in 2002 John and Eva were appointed as joint appointors and guardians. In a deed made in 2010, John was given those roles, after his death Eva, and after her death Michael. In a deed made in 2017, Michael was given those roles and after his death his legal personal representative.

6.10. It was contended in the proceedings:

a. The deeds of variation were all invalid.

b. The trustee failed to make any resolution distributing the income of the trust for the years 2010 to 2017.

c. The trustee should be removed because of the failure to properly administer the trust.

6.11. The trial judge found the deeds of variation were invalid as the trust deed did not permit amendment to the identity of the appointor and guardian. The Court determined as a matter of construction the words "the trusts hereinbefore limited" in the cl 20 power of amendment was limited to the accumulation of obligations that rest upon the trustee but not the powers concerning the same which were given to the Guardian and Appointor.

6.12. From 2011 to 2018 the income of the trust was paid as to 40% to each of John and Michael and 20% to Eva. None was paid to Deborah or Paul. In 2019 all of trust income was paid to John.

6.13. The evidence was that Deborah had a low income, and various health conditions. She lived in a unit owned by the trust, which the trustee later resolved to distribute to her. Deborah was estranged from Eva from 1986 to 1998. After that there were some periods of close contact and annual

phone contact but there were some periods where Deborah did not see her mother for years.

6.14. Paul was financially independent from his parents. He saw them most weeks from 1993 and 2013. His evidence was that he had a good relationship with John until 2013 and a somewhat distant relationship with Eva between 2010 and 2013. He had no contact with his parents between January 2014 and October 2016. He saw John in an aged care facility on 30 November 2016. He met with Eva on 20 January 2017 but then did not see her until July 2017.

6.15. It was alleged that the trustee had not made resolutions concerning the trust income. This claim failed. Minutes of resolutions regarding trust income were available for 2010, 2012, 2015 and 2017, but not for 2011, there were unsigned draft minutes for 2013, 2014 and 2016. The accountant's evidence of his usual practice of calling one of the directors in June and preparing a draft minute of resolution was accepted. The financial statements recording the income distributions were presumed to be an accurate record of their contents: s 1305 *Corporations Act* 2001 (Cth).

6.16. It was alleged the trustee had not given proper consideration to the circumstances of Paul and Deborah and had not exercised the income discretion with due and proper consideration. The issue was considered at [205]- [304].

6.17. The Court said:

a. At [312], assessment of whether the trustee gave real and genuine consideration as to whether an income distribution should be made to Paul or Deborah must be considered in a temporarily specific way by reference to when each of the seven income resolutions were made by the trustee.

b. At [313], it is necessary to focus on the information which the trustee had at each of these different times. This is not straightforward. The knowledge which the trustee had at any particular time is the sum of the knowledge which it had previously accrued.

c. At [316], it is relevant to look at evidence of the inquiries which were made by the trustees, the information they had and the reasons for, and manner of, their exercising their discretion. These matters are to be considered by reference to the nature, scope and purpose of the discretion in issue, properly construed.

6.18. The inadequate consideration claims were successful in respect of Paul and Deborah for the years 2015, 2016 and in the case of Deborah 2018. This was found to be a breach of trust. Claims for the other years were not made out, because of contact between Paul and Deborah and Eva and/or John during that time, and the likelihood of personal or financial information being communicated during that time (the information imputed to the trustee through Eva and/or John).

6.19. The Court dismissed the claim for one third of the income distributions for the years 2015, 2016 and 2018. The Court found that the income distributions were voidable rather than void, and no application had been paid in the originating process for orders setting them aside. A late application for leave to amend was refused.

6.20. The application to remove the trustee and appoint a new trustee was dismissed. This issue was considered at [349] – [388]. The Court considered the various bases upon which a trustee might be removed: unfitness, the welfare of the beneficiaries, misconduct and lack of impartiality. The Court found that welfare of the beneficiaries, in light of a capital distribution (Yarra unit) made to Deborah in 2019, was not opposed to the trustee's continued occupation of office in the circumstances having regard to the pleaded case and the findings made.

6.21. The Victorian Court of Appeal referred to the principles relevant to the fiduciary obligations of a trustee of a discretionary trust as follows:

[82] "A trustee in the exercise of its fiduciary discretions is under constraints that do not apply to adult individuals disposing of their own property (*Pitt v Holt* [2013] YKSC 26; [2013] 2 AC 108; [10]; [2013] UKSC 26 (Lord Walker)). In *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] EWHC 318; [1998] 2 All ER 705, Robert Walker J said (at 717):

> Certain points are clear beyond argument. Trustees

> must act in good faith, responsibly and reasonably. They must inform themselves, before making a decision, of matters which are relevant to the decision. These matters may not be limited to simple matters of fact but will, on occasion (indeed, quite often) include taking advice from appropriate experts, whether the experts are lawyers, accountants, actuaries, surveyors, scientists or whomsoever.

…

[85] In *Karger* (*v Paul* [1984] VR 161), McGarvie J said (at 163-4):

> In my opinion the effect of the authorities is that, with one exception, the exercise of a discretion in these terms will not be examined or reviewed by the courts so long as the essential component parts of the exercise of the particular discretion are present. Those essential component parts are present if the discretion is exercised by the trustees in good faith, upon real and genuine consideration and in accordance with the purposes for which the discretion was conferred. The exception is that the validity of the trustees' reasons will be examined and reviewed if the trustees choose to state their reasons for their exercise of discretion.

...

[89] *Wareham* (*v Marsella* (2020) 61 VR 262; [2020] VSCA 92) provides an illustration of a failure to give real and genuine consideration by a trustee. In that case, the trustee misapprehended the identity of a beneficiary and proceeded on an incorrect basis that had the effect of excluding a potential beneficiary from consideration for the payment of a death benefit.

[90] The Court explained that the application of the ground in a given case requires consideration of three matters. First, what are the relevant matters that must be considered? Second, what standard of review should the Court adopt in assessing whether there has been non- compliance with the obligation? Third, what is the consequence of a failure by the trustee to give real and genuine consideration?"

6.22. At [92] the Court said that the nature of the trust and the terms in which the power is expressed will be important in determining the matters to which the trustee must have regard in the exercise of the power.

6.23. At [93] and [94], after referring to *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254; [2010] HCA 36, the Court said the obligation of a trustee to be properly informed is universal, although the extent of the obligation

will be dependent on the particular circumstances, including the nature of the trust. The size and scale of the trust, the nature of the relationships that may subsist, and the purpose of the power will all be relevant.

6.24. At [95] the Court said:

> "In the case of some trusts, the number of potential objects might be very large and a requirement to undertake a detailed analysis of the identity and needs of each would be unworkable. Having considered whether or not to exercise the power and understood the range of objects that might benefit, the trustee is required to give adequate consideration as to how to exercise the power."

6.25. The Court had regard to the Preamble to the trust, the settlor "being desirous of making provision for the Primary Beneficiaries and the General Beneficiaries", and the fact the three children were default income beneficiaries, in determining the content of the trustee's fiduciary duty to give real consideration to the exercise of the power to distribute income.

6.26. The Court allowed the appeal, finding that the trustee had not given real consideration to the discretion to distribute income for the whole of the 2011 to 2019 period having regard to:

a. The absence of enquiry of Deborah and/or Paul as to their circumstances during that time.

b. The substantial income generated by the trust, which Eva and John had no need for in light of their substantial credit loan accounts.

c. Deborah's parlous financial circumstances.

d. The discernible pattern of trust distributions.

e. The antipathy between Eva and Paul and Deborah at different times.

6.27. The Court determined that the trustee should be removed, and an independent trustee appointed. The Court said at [158] the trustee had, over a number of years, failed to act impartially, failed to give real and genuine consideration to the interests of two of the primary beneficiaries, relations between the beneficiaries and those involved in managing the trustee were irreconcilably damaged, and it was not in the best interests of

the beneficiaries for the trustee to continue in office.

6.28. The Court did not order that Paul and Deborah receive one third of the income distributions for the years in which the breach occurred, because the distributions were voidable rather than void, and the appellants sought no orders setting them aside or for equitable compensation.

7. FORTIFYING THE DEFENCES

7.1. *Re Owies* is a rare instance of the Court finding the trustee had given inadequate consideration to the exercise of a discretionary power in line with the *Karger v Paul* principles. The concept of this paper was around the steps which a trustee might consider to prevent, and meet, claims of this type which may include a removal of trustee application.

7.2. I suggest the risks arising from these types of claims can be addressed in broad compass at the following stages:

a. Drafting of the trust deed;

b. Periodic trustee decision making with a proper process and signed trustee minutes;

c. Taking a birds eye view of the trust landscape when claims are asserted, taking counsel's advice early, considering judicial advice and what course of action furthers the interests of the trust estate.

8. DRAFTING OF THE TRUST DEED

8.1. The extent of the duty to enquire is a matter of construction of the trust instrument in light of the surrounding circumstances: *Thomas on Powers 2nd Ed* at [10.10ff]. Viewed another way, it is necessary to consider the wishes of the persons by whom the trust is established: *Hancock v Rinehart* [2015] NSWSC 646 at [122]; *Lewin on Trusts 20th ed* at [29-046]. A Memorandum of Wishes prepared after the establishment of a trust may be considered (*Cardaci v Cardaci* [2021] WASC 331 at [327]), but the drafting of the trust instrument is self-evidently critical.

8.2. Whilst acknowledging the asset protection and potential tax benefits of a discretionary trust is affected by the width of the class of discretionary

objects, one mechanism for limiting the extent of the duty to enquire is to have a narrower class of objects.

8.3. A second mechanism for limiting the extent of the duty to enquire is to include specific terms in the trust giving more guidance around the matters a trustee must or may consider in the exercise of particular dispositive powers, or to the circumstances in which beneficiaries other than the primary beneficiaries are required to be considered.

8.4. A third mechanism is to define the duty to enquire – set out in the trust deed the matters which the trustee is required to consider at the time of exercise of dispositive powers. Rarely, a settlor might consider excluding the duty to enquire from the duties of the trustee: but that is a matter which should not form part of a general precedent, and should be the subject of specific instructions.

8.5. A fourth mechanism is for the settlor to leave a letter of wishes for the trustees, setting forth more specific guidelines, without intending to be binding, for the trustees to consider: *Lewin on Trusts 20th ed* at [29-046]

8.6. When implementing drafting mechanisms it must be understood that fewer beneficiaries, more specific terms and defining the duty to enquire will give more substance to the rights of preferred beneficiaries, whilst removing substance from the rights of others.

9. DECISION MAKING PROCESS

9.1. One matter of controversy in the *Owies* case was the absence of signed trust minutes for some of the years in which income resolutions were made. It is not ideal that a *failure to give genuine consideration* case also required *general practice evidence* and *unsigned draft minutes* in order to obtain findings that decisions about income were made *at all*.

9.2. The integrity of the decision-making process is critical to meeting claims that a trustee has failed to give genuine consideration to exercise of powers to dispose of income and capital.

9.3. The terms of the trust instrument are the starting point. Survey of the field of discretionary objects is critical. The extent of the duty to enquire about the material and financial circumstances of discretionary objects is a matter of construction of the trust deed in light of the surrounding circumstances. Where the class of discretionary objects are small it is best practice to make the enquiry at intervals prior to the time for the exercise of a dispositive decision. Where the trust deed gives indicators of the relative priority of particular classes of beneficiary, either by the language used (primary as opposed to secondary) or by the circumstances (children as opposed to employees), assess in a businesslike way the size of the problem.

9.4. Keep proper trustee minutes recording the power exercised and the decisions made by the trustee. Understand there is no obligation for a trustee to give reasons for the decisions that are made.

10. JUDICIAL ADVICE

10.1. Judicial advice is available in each jurisdiction: s 63 *Trustee Act* 1925 (ACT); ss 96-97 *Trusts Act* 1973 (Qld); s 63 *Trustee Act* 1925 (NSW); O 54 *Supreme Court Rules* 1987 (NT); s 95 Succession Act 2023 (SA); r 604 *Supreme Court Rules* 2000 (Tas); ss 92, 95 *Trustees Act* 1972 (WA) but in Victoria similar applications may be made pursuant to r 54.02 *Supreme Court (General Civil Procedure) Rules* 2025 (Vic).

10.2. Section 63 of the *Trustee Act* (NSW) provides:

(1) A trustee may apply to the Court for an opinion advice or direction on any question respecting the management or administration of the trust property, or respecting the interpretation of the trust instrument.

(2) If the trustee acts in accordance with the opinion advice or direction, the trustee shall be deemed, so far as regards the trustee's own responsibility, to have discharged the trustee's duty as trustee in the subject matter of the application, provided that the trustee has not been guilty of any fraud or wilful concealment or misrepresentation in obtaining the opinion advice or direction.

10.3. Judicial advice is conceptually distinct from other forms of relief available to a trustee such as an application pursuant to Part 54.3 of the *Uniform Civil*

Procedure Rules 2005 (NSW) ("**partial administration suit**") to determine a question arising in the administration or execution of a trust, concerning the composition of a class of persons or the rights of persons concerning the trust. The relief obtained in a partial administration suit takes the form of a declaration of a legal right, not private advice to a trustee on a discretionary management question (*Estate late Chow Cho-Poon; Application for judicial advice* [2013] NSWSC 844 at [31] (**Chow Cho-Poon**).

10.4. The only jurisdictional bar to an application for judicial advice is that the applicant must be able to demonstrate the existence of a question respecting the management or administration of trust property or a question respecting the interpretation of the trust instrument: *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66; [2008] HCA 42 per Gummow ACJ, Kirby, Hayne and Heydon JJ at [58].

10.5. Usually a Court will not give judicial advice to a trustee as to the manner in which a discretion is to be exercised (in contrast to advice whether a trustee is justified in making a particular decision in light of a defined controversy).

10.6. Advice as to whether a trustee should commence or defend litigation is sometimes referred to as a *Re Beddoe* [1893] 1 Ch 547 application.

10.7. The plurality said in *Macedonian Church* at [71]:

> "… provision is made for a trustee to obtain judicial advice about the prosecution or defence of litigation in recognition of both the fact that the office of trustee is ordinarily a gratuitous office and the fact that a trustee is entitled to an indemnity for all costs and expenses properly incurred in performance of the trustee's duties. Obtaining judicial advice resolves doubt about whether it is proper for a trustee to incur the costs and expenses of prosecuting or defending litigation. No less importantly, however, resolving those doubts means that the interests of the trust will be protected; the interests of the trust will not be subordinated to the trustee's fear of personal liability for costs".

10.8. In *The application of the NSW Trustee & Guardian* [2014] NSWSC 423 at [3] Kunc J described the proper approach to these types of applications is as follows:

> "The trustee (to which I shall refer for convenience alternatively in the neuter gender), with the assistance of such advice as it may think appropriate, must first decide what it is going to do in a given situation and then, if it wishes, seek judicial advice as to whether it is justified in acting in accordance with that decision. In almost all circumstances any application for judicial advice should be accompanied by counsel's opinion fully dealing with all the facts known to the trustee, all of the relevant legal issues and expressing a reasoned opinion in support of the particular decision which the trustee has made…"

10.9. The question to be addressed was described by Palmer J in *Application of Macedonian Orthodox Church St Petka Inc (No 3)* [2006] NSWSC 1247 at [80]:

> "In a judicial advice application in which the trustee asks whether it is justified in prosecuting or defending litigation, all the Court does is to reach a view as to whether the Opinion of Counsel satisfies it that there are sufficient prospects of success to warrant the trustee in proceeding with the litigation. Counsel's Opinion must address the facts necessary to support the legal conclusions reached and must demonstrate that the propositions of law relied upon for those conclusions are properly arguable. Whether, in the light of Counsel's Opinion, there are "sufficient" prospects of success calls for another judgment, founded upon such considerations as:
>
> - the nature of the case and the issues raised;
> - the amounts involved, including likely costs
> - whether the likely costs to be incurred by the trustee are proportionate to the issues and the significance of the case;
> - the consequences of the litigation to the parties concerned;
> - in the case of a charitable trust, any relevant public interest factors".

10.10. The above passage was referred to with approval by the High Court in *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66; [2008] HCA 42 at [162].

10.11. The Court is not required to express any final view on the merits of the litigation. In *Bianca Hope Rinehart as trustee of the Hope Margaret Hancock Trust* [2017] NSWSC 282 at [33] Rein J said:

> "As *Macedonian* makes clear, the Court on an application for judicial advice is expressing only a view as to whether the trustee is justified in bringing or defending an action. It follows that the Court is not called on to express a view as to the ultimate outcome or indeed as

> to whether any of the allegations which found the claims or the defence will be made out in the proceedings after due consideration of all of the relevant evidence tendered by the parties."

10.12. The Court will have regard to the best interests of the trust estate in deciding whether to grant the advice sought: *Application by Marilyn Joy Cottee; Estate of Gwenyth Shirley Smith* [2013] NSWSC 47 at [35]; *Estate late Chow Cho-Poon; Application for judicial advice* [2013] NSWSC 844 at [45].

10.13. Surrounding circumstances may come into play. In judicial advice concerning a removal of trustee application, it may be relevant to consider whether the interests of the trust are served by the incumbent trustee remaining in office. In *Re Mary Donald Nominees Pty Ltd as trustee for the DJ Maccormick Family Trust* [2024] WASC 284 at [53] the fact the personalities behind the Trustee were central to the success of the Trustee's business (and having regard to Counsel's Opinion establishing the legal issues were properly arguable) was a factor in favour of advice being given that the Trustee was justified in defending removal proceedings. The judicial advice in *Maccormick Family Trust* did not extend so far as to authorize the trustee to pay costs from the trust, costs being left to the trial judge.

10.14. Consideration of the best interests of the trust estate highlights that the Court has a discretion whether or not to give the advice sought, even if the Opinion of Counsel provides a reasoned analysis and appropriate conclusion as to prospects of success. Advice may be declined on the basis of characterization of the dispute as a beneficiaries' dispute: *Re Lidgett* [2023] VSC 673.

10.15. Obtaining judicial advice is not essential in any trust litigation- there may be instances where there are sufficient non-plaintiff beneficiaries willing to support and perhaps indemnify the trustee which make a further set of proceedings unnecessary. It is also uncommon in the defence of routine family provision claims, where the cost of a second set of proceedings is not justified.

10.16. But in trustee removal proceedings, judicial advice should be considered. The requirement for a reasoned Opinion of Counsel and consideration of whether there are "sufficient prospects" (in the sense described by Palmer J

at first instance in *Macedonian Church* extracted about) requires reflection concerning the dispute, the interests involved, and whether pursuit of litigation, or a compromise position should be pursued at an early stage. There may be good reasons why it is in the interests of all for the trustee to resign: *Lewin on Trusts 20th ed* at [14-084].

11. CLOSING REMARKS

11.1. Accepting the scope of the duty to enquire is largely a matter of construction of the trust instrument in light of the surrounding circumstances, together with any record of the settlor's wishes, drafting detail and a proper process will likely be the most effective means of curtailing the potential for disputes. Once a dispute arises, judicial advice should be considered, together with the scope for compromise. *Re Owies* and *Cardaci v Cardaci* are rare examples of removal of a trustee for failure to give due consideration which seem to have run to a hearing due to a confluence of circumstances. But they are examples of that sort of outcome rather than development of new law. The *Karger v Paul* principles remain authoritative.

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