A BENEFICIARY'S ENTITLEMENT TO OBTAIN INFORMATION AND TO HAVE AN EXECUTOR OR TRUSTEE REMOVED

Paper delivered at the Law Society of New South Wales Professional Development Seminar on 11 November 2014

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This paper will examine two common forms of dispute between beneficiaries on the one hand and the executors or trustees of estates or funds on the other. The first issue will focus on demands by beneficiaries for access to information, particularly accounting information, in regard to the estate or trust. The second issue concerned the removal of executors or trustees where there has been a breakdown in the relationship between them and the beneficiaries.

Demand for the provision of information is a common issue arising in the administration of estates and trusts. Frequently, it arises where there are other wider matters in dispute between the beneficiaries, and the executors or trustees. Nevertheless, it is often the provision, or the denial of information, which is a prelude to, or trigger for, wider controversy. Further, there can be a wide range of disputes between beneficiaries, and executors or trustees, in which the resolution of the dispute may, at least from the beneficiaries' perspective, be most effectively resolved by removal of the executors or trustees, and their substitution with neutral Court appointed representatives.

To highlight some of the practical problems to which the law in this area may be relevant, a number of scenarios are firstly described. These reveal the writer's experience of common disputes in regard to the administration of estates and trusts. The latter part of the paper will

look at the law governing the provision of information, and removal of executors and trustees, and some of the procedural issues that arise.

Disputes between Beneficiaries and Executors or Trustees – Some Scenarios

Scenario 1

Individual beneficiaries have been demanding that the trustee of a discretionary trust provide them with up-to-date accounts revealing the financial state of the trust, sufficient to reveal its current financial position, and the expenses that have been incurred in the preceding 18 months. The trustees/directors have been dragging their feet in providing this information, asserting that the accounts have not yet been fully prepared.

Scenario 2

The beneficiaries of an estate and testamentary trust have been calling on the executor to sell real estate being the chief asset of the estate, and distribute the proceeds. The executors have declined to proceed to a sale, and have asserted that it was the testator's wish that the property be developed, and the executors are not planning to dispose of it until they have completed an application for sub-division and development. The beneficiaries wish to have the property sold forthwith.

Scenario 3

Within a discretionary trust held amongst members of a family, dissension has appeared between the members of the family as to what assets should be maintained and what distributed. The majority do not consider that substantial advances should be made from income or capital, although the power to make such advances exists. The minority family members wish to see the powers under the trust deed or testamentary trust exercised so as to produce substantial and immediate distributions. All family members are beneficiaries of the trust.

Scenario 4

The same sort of facts as in *Scenario 3* above but with the additional issue that each of the beneficiaries are shareholders of and directors in the trustee company.

Obtaining Information

Beneficiaries of both an estate and a trust are generally entitled to a right of inspection of the accounts that the executor or trustee is in turn obliged to maintain. In regard to estates, there is the statutory obligation upon executors and administrators to pass accounts (*Probate & Administration Act* s.85Y), the Probate Registrar has an entitlement to demand compliance with s.85. However, s.85 is principally concerned with the obligation of the executor to file accounts with the Court within the requisite time. The time is 12 months unless extended under Part 78 Rule 85 *Supreme Court Rules*.

The New South Wales *Trustee Act* makes only slight provision for trustees' general obligations to account in s.51. That section provides that a trustee may in his or her absolute discretion have the trust accounts audited by an accountant, and the fee may be borne by the fund in the fashion set out in the section. This however is clearly a provision to protect or assist the trustee rather than a beneficiary.

Thus the rights of beneficiaries in regard to information are still largely governed by the general law. There is no suggestion in the cases that the principles are different for estates as opposed to trusts. In regard to estates, the rule was simply stated by Ryan J in *Re: The Will of Ruthenburg* (Unreported, Supreme Court of Queensland 27 October 1993):

> "Where an executor is required by the beneficiaries to furnish accounts, he may demand to have the costs of doing so paid or guaranteed before complying with

the request. A beneficiary is not entitled to a copy of the accounts at the expense of the estate, but he is entitled to inspect the accounts kept by the representatives."

An application to Court for an order might be declined if the beneficiary had failed to avail himself or herself of that general right of inspection.

The position was summarised by Young J in *Williams v Stephens* (Unreported, Supreme Court of New South Wales 24 April 1986) in similar terms:

> "Accordingly the executor should be in such a position because of his duty to keep accounts that he can let the beneficiary or her solicitor know in a short space of time what the current situation is. If the beneficiary wishes to go further and obtain a copy of documents, or wishes the executor to go to special trouble to produce information then the executor is not bound to supply it unless the reasonable cost therefore is tendered and paid".

In *Re: Will of Skaftouros (Deceased); Skaftouros v Dimos* [2002] VSC 198 at [11] Mandie J went so far as to say:

> "In relation to communication with beneficiaries, I see no reason why the position of a personal representative should be any different to that of a trustee. An executor, like a trustee, should provide a prompt and proper response to reasonable enquiries and requests for information by beneficiaries. Even onerous, unreasonable, or antagonistic enquiries or requests should, at least in the first instance, receive some appropriate response or acknowledgement."

The principles already described in regard to executors are but a reflection of the general rule in regard to trusts. In regard to trusts *Jacobs Law of Trusts In Australia* (7th Edition Heydon &

Leeming p.381) notes the following general duties of trustees to keep accounts and be ready to render accounts when required by beneficiaries, including duties:

- If a beneficiary enquires about trusts investments to verify the fact of investment;
- If the trust has invested in the shares of a private company, on request to produce the balance sheet and accounts of that company;
- Upon retirement to hand the accounts to new and continuing trustees; and
- The trustee's obligation extends to providing access to the accounts relating to the period prior to the trustee's appointment.

To the relatively simple rules just described an unfortunate layer of qualification must be added especially in circumstances where the beneficiaries requesting access are the beneficiaries of a discretionary trust, or where the documents sought go beyond the accounting records of the trust.

The difficulty in part arises from a controversy regarding the doctrinal foundation of a beneficiary's right to inspect trust documents. A line of authority commencing with *Re: Londonderry's Settlement*; *Peat v Walsh* [1965] Ch 918 reflects the view that a right of inspection derives from the beneficiary's proprietary interest in the trust. This need not be a complete vested proprietary interest in the fund, nevertheless, the extent or nature of the beneficiary's interest in the trust may well on this view, condition the nature of access a beneficiary enjoys to trust documents. A consequence of this view is that access is seen as a right of the beneficiary, reflective of the beneficiary's equitable rights and the trustee's correlative duty.

The Privy Council in *Schmidt v Rosewood Trust* [2003] 2 AC 709 departed from the *Londonderry's Settlement* doctrine in the following fashion:

> "Their Lordships consider that the more principled and correct approach is to regard the right to seek disclosure of trust documents as one aspect of the Court's inherent jurisdiction to supervise, and if necessary to intervene in the administration of trusts. The right to seek the Court's intervention does not depend on entitlement to a fixed and transmissible beneficial interest. The object of the discretion (in including a mere power) may also be entitled to protection from a Court of Equity, although the circumstances in which you may seek protection, and the nature of the protection you may expect to obtain, will depend on the Court's discretion" (at [51].

The Privy Council considered that view to have received the support of the majority of the judges of the New South Wales Court of Appeal in *Hartigan Nominees Pty Limited v Rydge* (1992) 29 NSWLR 405.

The *Rosewood* approach in turn encourages the view that beneficiaries do not have an entitlement as of right to inspect trust documents, but do have an entitlement to seek an exercise of judicial discretion in their favour to permit access, and in this regard the Court need not necessarily distinguish between a beneficiary under a fixed trust on the one hand, or a discretionary beneficiary on the other (although one could envisage circumstances where the distinction was relevant).

A number of first instance decisions have referred to and dealt with the competing doctrinal foundations. A succinct summary of the state of authority as at 2011is given by Hammerschlag J in *Silkman v Shakespeare Haney Limited* [2011] NSWSC 148. His Honour preferred the *Rosewood* approach and dismissed the claim for access. However, the documents sought by the plaintiff went well beyond seeking accounting records.

In *Avanes v Marshall* (2006) 68 NSWLR 595 Gzell J concluded that the *Rosewood Trust* approach was to be preferred. His Honour referred to a general rule that the beneficiary has a right at all reasonable times to inspect trust documents as having derived from *Re: Cowin* (1886) 33 ChD 179. His Honour considered that old approach and the *Re: Londonderry* approach now had to be re-visited in light of *Rosewood.*

His Honour concluded:

> "In my view, the approach in *Schmidt* should be adopted by Australian Courts. The decision should not be regarded as abrogating the trustee's duty to keep accounts and to be ready to have them passed, nor the trustee's obligation to grant a beneficiary access to trust accounts. But when it comes to inspection of other documents there should no longer be an entitlement as of right to disclosure of any document. It should be for the Court to determine to what extent information should be disclosed. I propose to adopt that approach in determining this application."

Despite comments in *Rosewood,* the decision of the New South Wales Court of Appeal in *Hartigan* probably does not constitute a majority for the *Rosewood* principle (it was decided in any event before the Privy Council decision in *Rosewood*). There is presently therefore no binding appellate decision which makes clear which is the preferable approach for Australia.

The current authors of *Jacob's Law of Trusts in Australia,* 7th Edition (JD Heydon & MJ Leeming) conclude that the general obligation to account to beneficiaries of a trust deed was not qualified by the decision in *Schmidt v Rosewood Trust.* (See also the comprehensive analysis of the authorities undertaken by Campbell J in his article "*Access by Trust Beneficiaries to Trustee's Documents, Information and Reasons*" (2009) 3 Journal of Equity 97 - this paper has been indebted to that article for some of its analysis).

These controversies have been further considered by Elizabeth Bishop in an article in the June issue of the Australian Law Journal that proceeds to consider whether it is possible to limit a beneficiary's access to trust documents by the terms of the trust instrument. There is certainly some authority that clauses to that effect may have validity and usefulness. It would not be surprising to find that the Courts do not treat them as conclusive, as this could be tantamount to finding that they have ousted the jurisdiction of the Court in regard to the supervision of a trust. They may however bear upon the exercise of a discretion under the *Rosewood* principle. One can well imagine large commercial trusts in regard to which their orderly administration would require some appropriate restriction on the entitlement of beneficiaries. The reasonableness of the restriction would also no doubt be pertinent (see Bishop; E, *"Limiting the Nature and Scope of a Beneficiary's Entitlement to Receive Trust Information"* (2014) 88 ALR 416).

Finally, the matter has been most recently considered in an article in the Australian Bar Review by Professor G.E. Dal Pont (*Beneficiaries and Trust Information* (2014) 39 Aust Bar Rev 46). Dal Pont criticises the *Rosewood* principle for failing to offer sufficient guidance as to when beneficiaries will be entitled to access documents. He argues that the substitution of a wide ranging judicial discretion for what were previously seen to be reasonably bright edge rules, is to be deprecated. Further, Dal Pont points out that the notion of judicial discretion to grant access to what the Court considers in the circumstances appropriate, will potentially override expectations of setttlors laws or testators who may have expected memoranda of wishes or the like to remain confidential. In *Breakspear v Ackland* [2009] Cth 32 Briggs J concluded that the Rosewood principle had precisely that effect, and that while an expectation or stipulation of confidentiality in regard to a trust document would be a relevant circumstance, it would not conclusively determine whether or not beneficiaries should have access.

Dal Pont argues that the preferable position is to view a beneficiary as possessing a right to access. This right is not a property right in the strict sense, derived from the beneficiaries' interest, if any, in the trust assets. Further, this right ought be recognised as possessed by both the beneficiaries of discretionary, as well as fixed trusts. Dal Pont argues that the judicial control over the right of access is best approached by way of judicially enunciated exceptions to a presumptive rule of access. This, he argues, will produce clearer guidance to both trustees, beneficiaries and their legal advisers. This approach, Dal Pont argues, would be at least consistent with the views expressed by the New South Wales Court of Appeal in *Hartigan Nominees*.

At risk of over-simplification the following appear to be a workable set of principles that have judicial support that would guide practitioners in dealing with this matter.

i. Beneficiaries of a trust with a vested interest will have a right to inspect the accounts of the trust, and if the trustees have failed to bring such accounts into existence a duty to provide the information that ought be revealed by such accounts.
ii. Most probably the entitlement to the accounting information as to the financial state of the trust extends also to discretionary beneficiaries (*Chaine-Nickson v Bank of Ireland* [1976] IR 393; *Jacob's Law of Trusts in Australia* 7th Edition p.384).
iii. Except for the accounting records just described, the entitlement of beneficiaries to other trust documents or information would not be as of right but may be ordered by a Court.
iv. It may be appropriate to refuse access to documents obtained by the trustee within a relationship of confidence, when disclosure would breach that confidentiality.
v. Some other matters that would provide discretionary reasons against disclosure would involve disclosure of matters related to businesses conducted by an estate or

trust where the estate or trust's businesses could be compromised were the material disclosed to some or all of the beneficiaries.

vi. Generally a trustee exercising an absolute discretion will not be obliged to disclose the reasons for exercise of the discretion, and that will extend to the preservation of the confidentiality of documents recording those reasons (see *Mandi v Memart Nominees Pty Limited*; [2014] VSC 290 Macaulay J).

As pointed out by JC Campbell in the article on access, the fact that the current law may be based largely upon the exercise of a judicial discretion to grant access should not be taken as conveying by implication a general right on the part of trustees to refuse access unless and until ordered by a Court. Trustees will still generally be expected to provide to beneficiaries information about the investments and administration of the trust. Where reasonable demands for information and access to documentation have been unreasonably refused, trustees ought not to assume that they will nevertheless be given the benefit of costs orders, or indemnified by the fund, where beneficiaries are forced to take successful action for access orders. By contrast unreasonable beneficiary demands for extensive or historical information would likewise seriously risk refusal with costs.

Removing Executors

The concern of this paper is applications to remove executors where there has been inefficiency, lack of diligence, any form of impropriety or a break-down of the relationship between the executors on the one hand and the beneficiaries on the other. Clearly, executors who have been engaged in fraud or serious impropriety can be removed, but it is now clearly the law that removal may be ordered in cases other than such serious impropriety.

It remains the case that there are procedural differences, although few doctrinal differences, in regard to the removal of executors on the one hand, and trustees on the other. In regard to

executors the New South Wales Court of Appeal in *Bates v Messner* (1967) 67 SRNSW 187 held that the principle was governed by the necessity of ensuring the due and proper administration of the estate in the interests of the parties beneficially entitled. For quite some time there was a commonly held view amongst many New South Wales lawyers that the test in *Bates v Messner* required serious failure of the executor to perform his function such that it could be said that the executorship had been nugatory or useless. That this was an overly restrictive view, was made clear by the Court of Appeal in *Mavrideros v Mack* (1998) 45 NSWLR 80 where delay and inefficiency by an executor in administering an estate was found to be sufficient grounds to order the executor's removal. In *Mavrideros* the Court emphatically rejected any suggestion that it was necessary to establish that the executorship had wholly failed.

Where the complaint is not inefficiency, but a conflict of interest and duty, or duty and duty, the issues are more complex. Courts give considerable weight to the entitlement of a testator to choose his or her own executor. A conflict of interest or duty, of the sort that would have been evident to the testator at the time he or she nominated the executor, would not of itself be treated as a ground of removal, it being presumed that the testator intended the executor to act despite the conflict. However, Young J held in *Morgan v McRae* [2001] NSWSC 1017 that where the conflict has manifested itself by the executor preferring his interests to his duty, removal may be ordered (per Young J at [25]). Further, in light of the reasoning in *Morgan v McRae* one would imagine that where the conflicts were not capable of being foreseen by the testator, less weight should be given to the testator's choice of executor where conflict has arisen.

The removal of an executor involves the exercise of the Court's inherent power (*Estate of George Hardy* [1967] 1 NSWR 638 at 642), (this is another report of the decision in *Gibbs v*

Messner). On the other hand, the power to remove an administrator is statutorily based (*Probate and Administration Act* s.66). The principles governing removal are, however, essentially the same.

Where there are several executors, and it is intended to seek the removal of one, leaving others continuing to act, it is more appropriate to seek a revocation of the earlier grant, and a fresh grant to the remaining executor or executors (see *Riccardi v Riccardi* [2013] NSWSC 1655 per Lindsay J). However, in *Riccardi* Lindsay J noted that in regard to the removal of an administrator of a co-administrator, one simply seeks the removal of the relevant administrator without prejudice to the on-going administration of the continuing administrator.

Justice Lindsay has recently given detailed consideration to the distinctions between a grant of probate in common form on the one hand, and solemn form on the other (see *Estate of Kouvakas; Lucas v Kouvakas* [2014] NSWSC 786). The judgement is notable for its scholarly analysis of the history of probate law and practice in New South Wales, and it probably does not do it full justice to say that one conclusion reached, is that in circumstances where revocation is sought, the fact that a grant has been made in solemn form, as opposed to common form, will be merely one factor and rarely a decisive factor in determining whether or not an order for revocation should be made. Where, of course, the ground upon which revocation is sought relates to the failure of the executor to properly perform his or her duties in the best interests of the estate, and is essentially post-grant conduct, then it is unlikely that the status of the grant will have any but the slightest significance.

The revocation of a grant of probate or administration does not automatically take effect ab initio and conduct undertaken under the original grant, usually has its effect preserved (see s.40D of the *Probate and Administration Act*).

Removing Trustees

The general principle governing the Supreme Court's inherent jurisdiction to remove a trustee is similar to that in regard to an executor. Namely, that a Court will remove a trustee where the welfare of the beneficiaries and of the trust estate requires such a remedy, a condition satisfied where the Court considers that the continuance of the trustee in the trust would prevent its proper execution (per McColl JA in *Juulu v Northy* [2010] NSWCA 211 at [239], and see Jacobs Law of Trusts in Australia, 7th Edition at [1585]).

Beneficiaries disgruntled with the conduct of the trustees of their trust have more options available to them than the beneficiaries of an estate. Firstly, in a trust where all of the beneficiaries are absolutely entitled, and call unanimously for the transfer to them of the trust assets, the trustee has no choice but to comply. This is the so-called rule in *Saunders v Vautier* (1841) Cr Ph 240; 49 ER 282. There are various limits and restrictions on the application of the rule. Most derive from the fact that only an absolute vested and indefeasible interest held by the beneficiaries will be sufficient to entitle them to make a call. In particular, beneficiaries will not usually be in a position to make a call for transfer upon a trustee where they are beneficiaries of a discretionary trust. In part, this is because in most discretionary trusts there is a wide class of potential beneficiaries, possibly including potential beneficiaries not even born at the date of any relevant dispute.

Discretionary trusts are a common means by which wealth has been held in Australia. Many were created to seek advantage in minimising the incidence of death duties, or income tax. They remain popular because of their perceived ability to protect assets in the event of business failure, or as protection against post-death claims on family property. This paper will hereafter concentrate on the issues that arise in regard to discretionary trusts whether created under wills

or inter vivos, where there is complaint by some or all of the discretionary beneficiaries as to the conduct of the trustee.

The instruments establishing discretionary trusts in Australia usually confer very broad powers upon the trustee to appoint income amongst beneficiaries. They also frequently confer a broad power to appoint capital, and accelerate the vesting of the trust. Potential for conflict thus arises if beneficiaries, or a substantial portion of them, consider there is unfairness in the distribution of income or want the trust brought to an end and the capital distributed, and where the trustee refuses to accede to such requests.

Where the discretionary will trusts, or inter vivos trusts confer discretions upon the trustee in broad language or absolute terms, it is often thought that the exercise by the trustee of such discretions is largely unreviewable. Consequently, it is sometimes thought that if beneficiaries are disappointed in the manner in which trustees are exercising their discretionary powers, there is no remedy available to such beneficiaries. Certainly the Courts have traditionally been protective of trustees in the exercise of broadly conferred discretions. However, these are fiduciary powers which a trustee is obliged to exercise honestly and in good faith, so that he or she gives genuine consideration to relevant matters and does not exercise them irresponsibly, capriciously or wantonly. Thus, In *Re: Manisty's Settlement* [1974] Ch 17 at 26 Templeman J said:

> "The Court may also be persuaded to intervene if the trustees act 'capriciously', that is to say, act for reasons which I apprehend could be said to be irrational, perverse or irrelevant to any sensible expectation of the settlor; for example, if they chose a beneficiary by height or complexion or by the irrelevant fact that he was a resident of Greater London."

The clearest statement of the law in Australia on this topic is the decision of Justice McGarvie in *Karger v Paul* [1984] VR 161. In this useful judgment, McGarvie J reviewed a wide range of authorities in regard to the administration of discretionary trusts, and the judgment repays study by anyone who is regularly involved in advising in regard to discretionary trusts.

McGarvie J concluded that discretionary trustees are not generally obliged to give reasons, nevertheless, when trustees do disclose their reasons, the Court may examine them to see whether they are valid reasons, that is, whether they have exercised their discretions in good faith, after real and genuine consideration, and without ulterior purpose.

Ultimately, McGarvie J concluded the grounds of possible review were as follows:

> "The principle I apply does not imply that there are not standards with which Trustees should comply in the process of exercising their discretion. The approach which Trustees should adopt in exercising particular discretionary powers, has been elaborated in some of the cases, eg. *Hay's Settlement Trusts* [1982] 1 WLR 202 at pp 208 to 210, per *Megarry v C*; [1981] 3 All ER 786. When Trustees disclose their reasons, making those reasons examinable, they are examined to see whether they satisfy the standard of being valid reasons. The principle which I apply is that, apart from cases where the Trustees disclose their reasons, the exercise of an absolute and unfettered discretion is examinable only as to good faith, real and genuine consideration, and absence of ulterior purpose, and not as to the method and manner of its exercise."

Since McGarvie J concluded that the beneficiaries had no entitlement to be accorded natural justice, and as the trustees had no general obligation to give reasons, the doctrine is clearly an incentive to trustees wishing to put their conduct beyond review to decline to offer reasons.

The statement by McGarvie J in *Karger v Paul* was referred to by the High Court in *Finch v Telstra Super Pty Limited* (2010) 242 CLR 254 at 57 ff. The Court referred to the "*Karger v Paul* principles" with apparent acceptance that they correctly stated the law governing circumstances in which a genuine discretion in regard to a private trust would be reviewed. However, the Court in *Finch* was concerned with the conduct of a large superannuation trust fund, and the Court, without fully exploring the issue, concluded that the duties upon trustees of such large commercially operated funds are likely to be "more intense" than under the *Karger v Paul* principles. The judgment nevertheless suggests, that for trusts where the trustees are volunteers, and the beneficiaries few in number, such as in a typical family trust, the *Karger v Paul* principles are the applicable law on control of trustees discretions.

To see how the *Karger v Paul* principles may operate in practice it is useful to consider two cases, one in which an attack on the trustee's conduct failed, and another which involved a successful challenge. In *Fay v Moramba Services Pty Limited* [2009] NSWSC 1428 the plaintiff sought removal of a trustee. One of the principal grounds of complaint against the trustee's conduct was failure to give proper consideration to exercise of a power to bring about early vesting. The case concerned both an inter vivos trust with a corporate trustee, and a will trust. Both trusts gave the trustees power to trigger an early vesting. There was a complaint by the plaintiffs that the trustees had failed to give a real and genuine consideration to accelerating the vesting.

Brereton J found, however, that the issue of vesting had been considered by the trustees, that it was not clear the deceased had intended the trust to last only a few years, and that the trustees had at all times acted for reasons that were rational, even if not conclusively establishing the course of conduct they adopted. In considering the applicable legal principles Brereton J emphasised the relatively limited entitlements of the potential beneficiary under a discretionary trust.

More success in application of the doctrine had been met with two years earlier in the Victorian decision of Habersberger J in *Emmanuel Rosenberg & Anor v Fifteenth Eestin Nominees Pty Limited* ([2007] VSC 101). The case concerned many issues, but amongst them was a claim pursuant to the *Karger v Paul* principle for removal of a trustee for its failure to give real and genuine consideration to the exercise of its discretion to make distributions. Amongst the complaints made and found established by Habersberger J were that the trustee had:

a. Left the decision making, particularly in relation to distributions, to its accountant.
b. Habitually used the trust funds to advance the personal interests of two individuals associated with the trust without considering whether doing so was in the interests of the trust or the beneficiaries as a whole.
c. Allowed decisions about distributions to be governed largely by tax minimisation considerations and without giving thought to the individual needs of the potential beneficiaries.
d. Had misapprehensions as to the legal ownership of assets vis a vis other entities related to the trust (at [180] to [183]).

The trustee in *Rosenberg v Fifteenth Eestin Nominees* was a company. The defaults were those of its directors. Habersberger J indicated that he would, on the grounds just described, been prepared to remove the company as trustee.

It is noteworthy that in each of the cases just considered, the relief sought was the removal of the trustees. Brereton J gave consideration to this matter and provided a good summary of the key authorities (at [20] to [25]). His Honour quoted the passage from Dixon J *in Miller v Cameron* (1936) 54 CLR 572 at 580 to 581, on the scope of the Court's inherent power to remove trustees namely:-

> "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 the trustee the Court forms a judgment based upon considerations, possibly large in number and varied in character, which combined 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 sound ground upon which the jurisdiction may be exercised."

Brereton J also noted that where in the context of a discretionary trust the beneficiaries have no vested interest, but merely a right to demand due administration, then the most apt formulation of the scope of the power to remove was that of Street CJ in *Guazzini v Pateson* (1918) 18 SR(NSW) 275 namely that the determinant issue is what is best for the welfare of the trust estate as a whole (see *Fay v Moramba* at [25]). His Honour, however, also noted that some consideration should be given to the confidence reposed by the settlor or testator in his selection of trustees.

In *Fay v Moramba* Brereton J also referred to authorities to the effect that friction or hostility between the trustee and the beneficiaries is not alone a reason for the removal of the trustee, but it may be relevant where it is grounded on the mode in which the trust has been administered, or where the hostility been caused wholly or partially by substantial overcharges against the trust estate (see *Letterstedt v Broers* (1884) 9 AppCas 371).

A Court might grant a lesser remedy than removal of trustees and merely set aside a decision made by trustees and remit the matter for the trustees redetermination. Where there is entrenched hostility between trustees and beneficiaries in a small family trust, this

is unlikely to quell the controversy in the long term. In *Finch v Telstra Super Pty Limited* the High Court was invited to make its own determination standing in the shoes of the trustee on the ground that the trustee could not be relied upon to further deal with the matter in a disinterested fashion. The Court did not consider the trustee was so disabled.

It must be conceded that cases based on the *Karger v Paul* principles are hard cases to make out. There are few reports of successful applications based on these principles. The cases say little as to whether partiality in regard to one group of beneficiaries as opposed to another, which ordinary reasonable people would consider unfair or oppressive, would violate the *Karger v Paul* principles. It might also be difficult to challenge the actions of trustees who could be harbouring bias, animis, or wholly unreasonable attitudes, if they are tactically smart in the way they exercise their powers.

The difficulties of challenging trustees in accordance with the *Karger v Paul* principles place a premium on lateral thinking where practitioners are advising beneficiaries who are disgruntled with the conduct of trustees. If the trustees have performed their duties efficiently, so as to offer no grounds for their removal, then the beneficiaries may be stuck with the discretionary decisions made. However, where trustees have not performed their duties appropriately and have been dilatory, slovenly or inefficient in the management of the trust, then the beneficiaries' best course might be to consider an application for removal of the trustees in the hope that a new independent Court appointed trustee may be more inclined to consider reasonable requests in regard to the future conduct of the trust and the exercise of the trustees' discretions.

In disputes with these trustees the ability to obtain information regarding the conduct of the trust is clearly of great significance, particularly in circumstances where the beneficiaries

are not possessed of sufficient information to justify the commencement of proceedings against the trustees for default, but where they may harbour suspicions.

Company Oppression and Trust Litigation – The *Vigliaroni* Decision

A further weapon in the armoury of disgruntled beneficiaries may lie in a recent Victorian decision revealing that in certain circumstances the statutory remedy for oppression in s.232 of the *Corporations Act* may have application in regard to the affairs of a trust where the trustee is a company and the beneficiaries have standing as directors or shareholders of the company to make application for the statutory remedy.

The statutory remedy for oppression in s.232 of the *Corporations Act* can be triggered by a broad range of factors involving conduct of a company's affairs that are contrary to the interests of the members as a whole, or oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members, whether in their capacity as a member of the company or *in any other capacity.*

The Court is given very broad powers in s.233 of the *Corporations Act* to grant relief against the oppression. Winding up the company, or orders that one group of members buy out the interests of another, are merely two commonly invoked remedies. Section 233 (1)(j) permits the Court to make an order –

> "requiring a person to do a specified act".

In a series of cases, Judges in the Supreme Courts of New South Wales, and Queensland, had held that the statutory remedy was either not available, or that the Court would not exercise its powers, where the conduct complained of, concerned the affairs of a trust of which the company was trustee (see *Kizquari Pty Limited v Prestoo Pty Limited* (1993) 10 ACSR 606; *McEwen v Combined Coast Cranes Pty Limited* (2002) 44 ACSR 244; [2002]

NSW SC 127 at [46]; Re: *PolyResins Pty Limited* [1999] 1 QldR 599 at 614; 28 ACSR 671).

In those cases, judges expressed concern that if the statutory remedy were available it would permit a disgruntled beneficiary of a trust to potentially bypass provisions in a trust deed governing such things as the buy-out of the beneficiary's interest.

In *Vigliaroni v CPS Investment* (2009) 74 ACSR 282; [2009] VSC 428 Justice Davies in the Victorian Supreme Court propounded an entirely new approach to the application of the statutory remedy in regard to corporate trustees. Her Honour noted that the scope of oppressive conduct under s.232 is defined by reference to, inter alia, "the conduct of a company's affairs". The earlier decisions that held chapter 2F of the *Corporations Act* inapplicable to the affairs of a trust of which a company was trustee had apparently overlooked s.53 of the Act, which expressly defined "the affairs of a body corporate" for purposes including those of s.232 and s.233, as extending to a broad range of matters listed in sub-sections (a) to (k) of s.53, and including dealings as trustee, in regard to property held on trust, and liabilities as trustee, and if that were not sufficient, in s.53(b) provides:

> "Matters concerned with the ascertainment of the identity of the persons who are beneficiaries under the trust, their rights under the trust, and any payments that they have received or are entitled to receive, under the terms of the trust".

Her Honour noted that the only limit on the nature of the orders that might be made under s.233 were that they be orders "in relation to the company" and from this Her Honour concluded that all that was required, was a rational and discernible link between the remedy and the company in which the oppression had occurred. The remedy, in other words, should not be extraneous to achieving the object of relieving the oppression, and must be appropriate to putting an end to the causes of oppression, but this may include cases where

the company acts as trustee and the oppression relates to the affairs of the trust, and may permit orders dealing with equitable interests in the trust.

In *Trust Company Limited v Noosa Venture 1 Pty Limited* (2010) 80 ACSR 485 [2010] NSW SC 1334 Windeyer AJ doubted the correctness of the decision in *Vigliaroni,* saying that he found it difficult to accept that an order in "relation to the company" included an order in relation to the affairs of the company as trustee, since if that had been the legislative intention the words "the affairs of the company" should have appeared in s.233(1) of the Act.

With great respect to Windeyer AJ, it is necessary to recognise that s.53 expressly refers to s.232 and 233 and, therefore, the Act must plainly be read on the assumption that the affairs of the company, when referred to in s.232, have the extended meaning given by s.53, and extend to all of the affairs of the company in regard to the exercise of its role as trustee. It would seem perverse of the legislature to have deliberately defined oppression in the extended fashion just described in s.232, but not have intended the relief that might be granted under s.233 to extend to that wider ambit of the company's affairs.

The New South Wales Court of Appeal in *Tomanovic v Global Mortgage Equity Corp Pty Limited* [2011] NSW CA 104 adverted to the decision in *Vigliaroni*, and the New South Wales decisions, including that of Windeyer AJ, and invited further submissions from the parties, but when the respondent objected on the grounds that the issue had not been previously raised, the Court accepted that it was unable to therefore deal with the matter. The *Vigliaroni* decision has now been cited on some eight or nine occasions since the *Tomanovic* decision, in none of these decisions was the central issue of the application of s.232 and s.233 to the affairs of a trust considered.

The present position is that there is a clear conflict between the judgment of Davies J in *Vigliaroni* on the one hand, and the other judgments. It must be said that all those judgments that did not advert to s.53 clearly failed to deal with a crucial consideration, and their reasoning on that ground alone can no longer be persuasive. To the writer of this paper, the reasoning of Davies J in *Vigliaroni* seems more persuasive than that of Windeyer J in *Noosa Venture 1*, but it will clearly require at least an intermediate appellant court to put the matter beyond doubt.

It must immediately be said that there is a serious practical limit on the extent to which a beneficiary can use this statutory mechanism to challenge the conduct of a corporate trustee. Standing to apply for the statutory remedy is limited by s.234 of the *Corporations Act* to members of the company, people who have ceased to be members in the circumstances specified, and persons to whom a share in the company has been transmitted by will or by operation of law.

The proviso to s.232 provides that a person to whom a share in a company has been transmitted by will is taken to be a member of the company. However, this latter provision is said to apply only for the benefit of the executor of a will entitled to achieve registration of shares as representative of an estate, not a beneficiary of a gift of shares pending their registration as member (see Maertin v Klaus Maerin Pty Limited (2006) 54 ACSR 714 at 719).

In practical terms, the decision in *Vigliaroni* offers, in some cases, the prospect of the wide discretionary remedies available under the statutory action for oppression, now being invoked in regard to the conduct of trusts. Potentially, the argument will be available where trustees of discretionary trusts have acted in a fashion which is unfairly prejudicial, or unfairly discriminatory. The words of s.232 require that the oppression be directed "against

a member" but it may be against the member "in that capacity" or "in any other capacity". Thus, where a person holds a share in a company trustee of a small family company, and complains in regard to the way in which the directors are exercising their powers under the trust deed in regard to the beneficial interest held under the trust, if the decision in *Vigliaroni* is correct, that complainant will be able to invoke the statutory remedy.

Dated: 10 November 2014