# STRATEGIES FOR ESTATE LITIGATION

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## Introduction

Solicitors are frequently consulted by clients who are unhappy with their treatment in the will of a recently deceased family member, or other person from whom they may have expected more generosity. Such clients do not usually come equipped with knowledge of the potential rights they may exercise against the estate of a deceased person, and a lawyer consulted by such a client has to give consideration to the many different strategies that could result in some further provision. Some of these strategies are well known to almost all practising solicitors in New South Wales, others are less well known and understood. The following list is far from exhaustive but contains many of the most important options that would need to be considered in advising any such client:-

- A challenge to the validity of a will so as to permit an earlier will to be proved or intestacy provisions to be applied.
- Seeking rectification of a will so as to ensure it gives effect to the testator's intentions (Succession Act s.27).
- Seeking to enforce a contract against the deceased's estate based on a legally enforceable agreement made with the deceased during his or her lifetime as to the way he or she would dispose of some of all of their estate.
- Seeking an order for provision pursuant to Family Provision legislation (Succession Act Chapter 3).
- Where properties have been left on trust, seeking to terminate the trusts or accelerate the vesting of the trusts so as to permit immediate distribution.
- Seeking to remove trustees who are unfairly exercising discretions under will trusts.

- If the will has made a gift of shares in a private company and the executor or trustee is exercising his or her powers in an unfair fashion, giving consideration to invoking the statutory remedy for oppression in regard to a company's affairs (Corporations Act chapter 2F).

Of the matters just listed, the application for provision under family provision legislation is by far the most commonly invoked strategy. The broad discretion conferred upon the Court to make further provision, coupled with the facility under notional estate provisions to claw back property into an estate, gives such applications a wide field of operation, and they are procedurally simple.

Family provision type applications are, however, dependent upon the client being an eligible person within the definitions of the *Succession Act*. Further, even with the flexible concept of need applied in family provision applications, clients who are already well off may struggle to establish that they have not been adequately provided for by the deceased.

The balance of this paper will not further examine general issues in probate or family provision applications, but concentrate instead on issues generated by trusts associated with a deceased's estate.

Discretionary trusts have long been popular with solicitors, accountants and financial planners in Australia as a means of distributing the income from family businesses amongst family members in a way which legitimately minimises tax liabilities. There are many old family trusts which date back to times when there were concerns with death duties. One now regularly sees trusts which appear to have been created for the purposes of litigation proofing an estate.

Trust issues may arise in regard to trusts created under the will. Testamentary trusts appear to be enjoying a resurgence of interest amongst will drafters. Trust issues also arise where the deceased had been the controller of a trust, and upon his or her death questions arise as to what entitlements, if any, in relation to that trust, repose in that individual's estate.

There is a commonly held view amongst many New South Wales lawyers to the effect that few if any claims can be made against a discretionary trustee by the discretionary beneficiaries unhappy with the conduct of that trust. While it is true that the remedies available to the discretionary beneficiaries are limited, I will argue below that they are not as limited as commonly thought.

**Early Termination of a Trust**

Where a private trust is created for named individuals all of whom are sui juris, those beneficiaries, if they act unanimously and are absolutely entitled, may call upon the trustee to convey the trust property to them, or dispose of it at their direction. This principle is the often cited rule in *Saunders v Vautier* (1841) Cr Ph 240; 49 ER 282.

The rule in *Saunders v Vautier* was considered in some detail by the High Court in *CPT Custodian Pty Limited v Commissioner of State Revenue of the State of Victoria* (2005) 224 CLR 98 at 119 ff. In *CPT* the Court emphasised that the application of the rule depended not only upon the whole of the beneficiaries acting together, but of the necessity for their interest to be an absolute vested and indefeasible interest. In *CPT* the manager of the unit trust had an entitlement to be paid fees from the trust corpus, and so long as those fees were unascertained, and remained an unsatisfied liability of the trust, it could not be said that the beneficiaries were absolutely entitled to the fund.

The rule in *Saunders & Vautier* does, however, operate to defeat a limitation restricting an adult beneficiary from obtaining a vested interest until that beneficiary attains some age older than his or her majority, thus a trust for an adult child until they attain 25 or 30 for example, will, absent some other complication, be ineffectual to postpone vesting beyond the beneficiary's 18th birthday.

The rule in *Saunders v Vautier* can be defeated where there is a trust including a class of beneficiaries which is liable to remain open until the vesting day. Thus, if a trust is left for "A" for life and to such of "A's" children as are alive and have attained the age of 30 years upon his death, it will only be known at the death of "A" which beneficiaries form the class of remaindermen, since the law considers it possible that "A" may continue to have children, no matter how improbable, until his death, and any children in existence may die prematurely. In a class gift of this sort, the rule in *Saunders v Vautier* can have no immediate application because the individuals entitled to call for a transfer of the trust property cannot be ascertained prior to the date of vesting.

A typical family discretionary trust also defeats any easy application of the rule in *Saunders v Vautier,* because a class of discretionary beneficiaries is usually broadly defined and includes the children yet to be born of the existing members of the class of beneficiaries.

**The Doctrine of Acceleration**

It is not uncommon for testamentary trusts to involve a gift to a beneficiary for life and then a remainder interest to a class that may potentially remain open for many years. In these circumstances the doctrine of acceleration becomes important.

The doctrine of acceleration deals with the circumstances in which a surrender by a life tenant of his or her interest may bring about an early closing of the class of remaindermen, thus triggering an acceleration of the vesting of their gifts. In the simple example of the life estate described above, if "A" surrendered his life interest, and there were children of "A" who had attained the requisite age, they would immediately come into the gift in possession. However, because "A" remains alive with the capacity to have further children, a question arises as to whether the class of remaindermen has closed. A line of English authorities held that, at least on the construction of the usual class gifts, the surrender of the life interest did not close the class and permit early distribution (see *In Re: Harkers Will Trusts* [1969] 1 WLR 1124 per Goff J, following Stamp J in *Re: Kebty: Fletcher's Will Trust; Public Trustee v Swan & Snowden* [1969] 1 Ch 339).

This esoteric corner of trust law was considered in detail by Windeyer J in an illuminating discussion of the relevant authorities in *Bassett & Ors v Bassett* (2003) 58 NSWLR 258 at 263 ff, where His Honour concluded:

> "After much consideration I have come to the conclusion that it is somewhat artificial to treat acceleration separately from class closing. If an event accelerates an interest then it seems to me that the closing rule should be applied on the basis of non-existence of the interest revoked, forfeited, disclaimed, surrendered or otherwise brought to an end. The task then is to see whether the language of the will demands or leads to a finding against closure. It is not, I think, possible to distinguish cases where acceleration occurs through an act of a beneficiary from those cases where it occurs by an act of the testator or operation of law." at [18]

The conclusions of Windeyer J perhaps reflect a modern Australian propensity to prefer a result in which the collective wishes of beneficiaries are afforded greater weight than the administration of the trust according to its strict terms.

The decision of Windeyer J thus suggests that where it is possible to seek cooperation between the life tenant and remaindermen, a surrender of the life tenancy will permit the doctrine of acceleration to be brought into play so as to bring about an early termination of the trust, and distribution to the then existing beneficiaries. This would be prevented only if the trust was expressed in such terms as to incorrigibly displace any possible application of the acceleration principle. In practice, there is no objection to the life tenant surrendering his or her interest in exchange for a payment from the remaindermen.

Where there is any doubt about whether or not the arrangements reached will effectually terminate the trust, the trustee would, of course, be advised to seek the protection of judicial advice pursuant to s.63 of the *Trustee Act* (1925 NSW).

**Court ordered Distribution**

Apart from the doctrine of acceleration, another approach may permit the early distribution of an estate. In *Wilcox v Poole* [1974] 2 NSWLR 695, Mahoney J declared that trustees were entitled to distribute an estate in which property had been left upon trust for the deceased's daughter for her life, and thereafter for an unclosed class of children of the daughter. Evidence revealed that the daughter was 58 years of age, and it was improbable that she would have any further children. Mahoney J concluded the Court possessed a discretion to direct distribution of the property without reference to the contingency of further additions to the open class. However, in exercising this power the Court was not curtailing the interest of any individual who may later come into existence. Such late addition to the class would be entitled to seek reimbursement from the other beneficiaries for that portion to which, under the strict terms of the trust, he or she would be entitled. It was the practice in England for such reasons to require a recognizance to be entered, but this is not the case in Australia.

In *Simpson v Trust Company Fiduciary Services Limited* [2009] NSWSC 912 Ward J considered all of the relevant authorities and applied the principle stated in *Wilcox* and permitted early distribution of the estate,

**Conflict in the Operation of Discretionary Trusts**

The strategies discussed in the preceding section generally require unanimity amongst the interested parties. This does not always exist. Further, a discretionary trust with a broad class of discretionary beneficiaries may offer no prospect, even if there is unanimity amongst all

the beneficiaries presently alive, as many may not be sui juris, and there may be a strong probability more beneficiaries will come into existence.

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

The discretions under a typical family trust deed, or conferral of discretion under a will trust, usually confers such discretions in the very broadest terms, and it is often thought that the exercise by the trustee of such discretions is largely unreviewable. Consequently, it is often thought that if trustees consistently decline to exercise power in favour of some beneficiary, while consistently exercising power in favour of other beneficiaries, the disappointed beneficiary has no general right of complaint. However, the critical question is always whether the trustee has exercised his or her powers honestly and in good faith, so that he or she has acted upon a genuine consideration of relevant matters and not acted irresponsibly, capriciously or wantonly.

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 recently 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 beneficiaries are volunteers, and few in number, such as in a typical family trust the *Karger v Paul* principles are the applicable law on control of trustees discretions.

It might have been considered several years ago that the *Karger v Paul* principles should be supplemented by reference to the so called rule in *Hastings-Bass* (In *Re: Hastings-Bass* [1975] Ch 25). The so called or purported rule referred to the Court's power to set aside the trustee's exercise of discretion when its effect was not as intended by the trustee, and it could be shown that he would not have acted as he did but for having either ignored relevant

considerations, or considered irrelevant matters. Importantly, a breach of the so called rule was said to lead to the impugned decision being void.

*Hastings-Bass* has received little support in Australian jurisprudence, and in March this year the English Court of Appeal overruled the *Hastings-Bass* decision and cases that have followed it (see *Pitt v Holt* and *Futter v Futter* [2011] 2 All ER 450). At this stage one would be inclined to declare the *Hastings-Bass* experiment dead.

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:

- Left the decision making, particularly in relation to distributions, to its accountant.
- 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.

- Allowed decisions about distributions to be governed largely by tax minimisation considerations and without giving thought to the individual needs of the potential beneficiaries.
- 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 with 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.

Brereton J also referred to authorities to the effect that friction or hostility between the trustee and the beneficiaries is not alone or 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's 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.

**Evidence and Procedural Matters**

Potential beneficiaries of a discretionary trust do have rights to see trust documents. So much was stated by Salmon LJ in *Re Londonderry's Settlement* [1965] Ch 918 at 938. The matter was considered by the New South Wales Court of Appeal in *Hartigan Nominees Pty Limited v Rydge* (1992) 29 NSW LO 405, nevertheless it is not entirely clear just how far the entitlement to see trust documents extends, and whether or not discretionary beneficiaries have an entitlement to demand to see papers or merely the entitlement to request the Court to exercise a power to order the trustee to make them available.

In all cases involving trust litigation one should never under estimate the importance of making reasonable requests in writing to trustees to provide information and to disclose accounts. Courts will be influenced by whether trustees give good reasons for seeking to preserve confidences, or whether they unreasonably refuse beneficiaries or potential beneficiaries access to information to which they are legitimately entitled.

Likewise, when it comes to the exercise of discretions in regard to distributions, despite their lack of formal right, beneficiaries who put well-reasoned and cogent submissions to trustees seeking the exercise of discretions in their favour, place trustees in a position where they may feel bound to respond or risk being seen as intransigent and hostile.

**Company Oppression and Trust Litigation – The *Vigliaroni* Decision**

A testator may have arranged his affairs in such fashion as to preserve substantial assets, not in his own name, but in a trust, so that the assets thus form no part of the deceased's estate. It is possible if some formal mechanism of control had been retained by the testator, such as a power of appointment, that the property could be characterised as notional estate.

Sometimes, however, power has been diffused through a family, and the deceased may have had no formal mechanism of control during his or her lifetime over the family trust, and there is no means by which its property can be characterised as part of the estate.

In such circumstances family members unhappy with the way the trust is administered after the deceased's death are, in large part, relegated to the strategies discussed in the previous section.

Nevertheless, a recent Victorian decision suggests another alternative method for dealing with the affairs of a trust. Its applicability depends upon the interaction between the statutory remedy for oppression in regard to a company, and the affairs of a trust of which that company is trustee.

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 of 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 QdR 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)

> "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 discernable 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.

At the date of this paper, the decision of *Vigliaroni* appears to have been considered in only two instances. 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 present position then is that there is a very 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, importantly, 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.

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.

Where a testator owns property through companies and disposes of those shares in his will by way of gift, then the recipients of that gift of shares will have standing to make application under the statutory remedy. The company may not even be a trust company, but merely a vehicle for holding assets. In such cases, there can be no doubt about the availability of the statutory remedy, and if the executors in control of those companies fail to deal with them properly, the statutory remedy can be invoked directly.

**A General Remedy for Oppression in regard to the Affairs of a Trust?**

The decision in *Vigliaroni* raises an interesting aspect of our current law regarding the holding of property through trusts and companies. A minority shareholder in a small family company has a range of powerful statutory remedies at his or her disposal, where the affairs

of that company are conducted in an unfair fashion. On the other hand, where property is held through the vehicle of a trust, particularly a discretionary trust, then whether or not disgruntled beneficiaries can invoke the statutory remedy will depend upon the fortuitous circumstance as to whether or not they also hold a share in the trustee company.

One might wonder whether the policy reasons that have been used to justify the protection of trustees from anything but scant judicial review or supervision, should continue to be accorded such weight. I suggest there is an argument for a statutory remedy for oppression in regard to a trust's affairs comparable to that which presently exists in regard to companies.

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