AN OPPRESSION REMEDY FOR BENEFICIARIES OF A TRUST?

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Introduction

For many decades now, there has existed under Australian company law, statutory remedies for oppression in regard to the conduct of a company's affairs. These provisions are presently contained in Sections 232 to 235 of the *Corporations Act* 2001. These statutory remedies have grown out of, and supplement, common law remedies such as for fraud on the minority, itself a development of the broader doctrine of fraud on a power.

One of the distinctive aspects of the law of oppression is that it may be invoked by a shareholder, and a remedy obtained, even though he or she cannot point to any actual unlawful conduct by, for example, the directors or the company. The doctrine of oppression is a means by which conduct in the affairs of the company which is lawful, may nevertheless be the subject of complaint where it is said to be unfair in the fashion prescribed by the statute. To obtain curial intervention under s.233 of the *Corporations Act*, it is sufficient to show that the conduct of the company's affairs is contrary to the interests of the members as a whole, or oppressive to unfairly prejudicial to, or unfairly discriminatory against members. This now well recognised statutory action confers an extremely broad and powerful remedy upon shareholders.

There is no comparable doctrine of oppression in regard to the affairs of trusts. That is not to say that disgruntled beneficiaries may not have recourse to legal action where they complain about the manner in which a trust is being conducted. However, generally those grounds of recourse depend upon establishing that there has been breach by the trustee of the terms of the trust, or other unlawful conduct by the trustee. There is no general entitlement on a beneficiary's part to complain that a trustee is conducting the affairs of a trust in an oppressive, prejudicial, or discriminatory manner.

Of course, one fundamental difference between company law and trust law is that usually the directors of a company are expected to treat all shareholders of a class equally. By contrast, the trustee of a discretionary trust is frequently entitled by the terms of the Trust Deed to discriminate in any fashion it sees fit between members of the class of discretionary beneficiaries. This power is not without some restraint derived from concepts such as good faith, and the need to give due consideration to the claims of all the beneficiaries. Nevertheless, it might be said, that at least to some extent, in certain trusts, discrimination between beneficiaries is permitted under the Trust Deed. However, despite the thin basis for complaint about the exercise of trustee's discretions, there are still grounds for complaint, even under the existing law, regarding the way trustees exercise those discretions. Nevertheless, beneficiaries of a trust are further hampered by the usual entitlement of a trustee not to have to give reasons in regard to the exercise of discretion, and the forensic difficulty of demonstrating whether trustees have inappropriately exercised their powers.

The absence of a general oppression remedy for beneficiaries of trusts has led to consideration of reform of the law in that regard by the Victorian Law Reform Commission by a report of 2015, and by the New South Wales Law Reform Commission which issued a consultation paper in 2016, and which is poised to issue a final report on the subject, which report had not yet been issued as at the date of writing this paper. This paper considers the background to the Law Reform Commission enquiries, the possible outcome from those enquiries, and in what way the existing law may provide some remedies to beneficiaries who consider the affairs of a trust are being conducted in an oppressive fashion.

Background to the Victorian Law Reform Commission Report

One of the reasons for the reference to the Victorian Law Reform Commission of the topic of beneficiary's rights, was the much discussed decision of Justice Davies of the Victorian Supreme Court in *Viglaroni v CPS Investment* (2009) 74 ACSR 282; [2009] VSC 428. In that decision Her Honour rejected an approach taken in decisions in several other States, especially New South Wales, each of which had concluded that the statutory remedies for oppression under the *Corporations Act* could not be invoked where the corporation was a trustee, if the remedies were being sought in regard to the affairs of the trust, as opposed to simply the affairs of the company (see *Kizquari Pty Limited v Prestoo Pty Limited* (1993) 10 ACSR 606; *McEwen v Combined Coast Cranes Pty Limited* (2002) 44 ACSR 244; [2002] NSWSC 127 at [46]; and *Re Poly Resins Pty Limited* (1999) 1 Qld R 599 at 614; (1998) 28 ACSR 671).

In the cases just referred to, which are all first instance decisions, the judges had expressed concern that if the statutory remedy were available, it would permit a disgruntled beneficiary of a trust to evade or bypass the terms of the trust deed. The trust deed may have expressly provided for such things as the buy-out of a beneficiary's interest, and the statutory remedy might provide a means by which those provisions could be circumvented. Further, in each of these decisions, the Court had considered the respective oppression provisions of the then applicable Corporations legislation did not confer a power on the Court to make orders in respect to the affairs of a trust of which a company was trustee. Those decisions further held that even if that were not the case, the Court ought as a matter of discretion, not to grant the remedy in any event.

In the *Viglaroni* case, Justice Davies declined to follow the *Kizquar*i decision, and those that reached similar views on the oppression remedy. A substantial reason for coming to that different conclusion was that the earlier decisions appeared to have overlooked s.53 of the *Corporations Act* (a similar provision appeared in the earlier *Corporations Law*). Section 53 expressly provided that in regard to the oppression provisions of the *Act* a reference to the – "affairs of a body corporate" included all of the affairs of the company, including control and transactions and dealings with property, including property held as trustee.

Justice Davies consequently concluded that as the *Act* so provided in s.53, it had necessarily conferred jurisdiction upon the Supreme Courts and the Federal Court to grant remedies for oppression in regard to a company, not only in regard to the affairs of the company strictly considered, but also in regard to the affairs of any trust of which the company was trustee. If such jurisdiction had been conferred upon the Court it would be an error to refuse to give consideration to whether or not it ought be exercised, and nor could it be contended that simply because the respective affairs in regard to which the remedy was sought were the affairs of a trust, that necessarily any oppression application would be refused.

The principle enunciated by Davies J in the *Viglaroni* case does not give rise to a general oppression remedy in regard to the affairs of a trust. Firstly, it is still the case that it will apply only where there is a corporate entity involved, usually as trustee, and it is still necessary that any orders made must be in relation to the company. Davies J concluded that this would be satisfied provided that there was a rational and discernible link between the remedy, and the company in which the oppression had occurred. Nevertheless, the statutory remedy would include cases where the company acts as trustee and the oppression relates to the affairs of the trust, and would permit orders dealing with the equitable interest in the trust.

There are however further limits on the usefulness of the *Viglaroni* principle. Section 234 of the *Corporations Act* specifies those persons entitled to make an application for relief under the statutory remedy. They include shareholders and directors, and those that have held such positions in regard to the relevant company. However, s.234 does not confer standing to make an application for oppression in regard to the affairs of a company upon a person whose sole connection with the company is that they are the beneficiary of a trust, of which the company is trustee. Many family trusts, or trading trusts might loosely be described as *quasi* partnerships. It may well be that the beneficiaries complaining about the affairs of the trust, are also shareholders in the trustee company. If so, under the *Viglaroni* principle, they would have standing to invoke the statutory power. However, frequent litigants in regard to trusts are beneficiaries, especially of family discretionary trusts, who do not hold shares in the trustee company. Such persons have no standing to make an application for relief under the existing statutory provisions against a corporate trustee.

After the decision in *Viglaroni* the issue again came before the New South Wales Supreme Court in *Trust Company Limited v Noosa Venture One Pty Limited* (2010) 80 ACSR 485; [2010] NSWSC 1 334. Windeyer AJ doubted the correctness of the decision in *Viglaroni,* saying that he found it difficult to accept that an order in relation to a company included an order in relation to the affairs of the company as trustee. Windeyer AJ concluded that if it had been the legislative intention to extend the section to trusts, the words "the affairs of the trust" 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 as trustee.

The matter came before the New South Wales Court of Appeal in *Tomanovic v Global Mortgage Equity Corp Pty Limited* [2011] NSWCA 104. Prior to disposing of the appeal, the Court drew the attention of the parties to the decision in *Viglaroni* and the New South Wales decisions, and invited further submissions from the parties as to whether those principles were applicable. The respondent objected on the grounds that the issue had not been previously raised, and the Court accepted that it was unable to therefore deal with the matter. Consequently, the opportunity for the issue to be resolved in an intermediate appellate Court went unrealised.

In Victoria there have been two further decisions, each of Justice Ferguson in *Wain v Drapac* (2012) VSC 156; and *Arhanghelschi v Ussher* (2013) 94 ASCR 86, in which the *Viglaroni* principle has been applied. In *Wain v Drapac* Justice Ferguson made orders for the purchase of both shares and units in a unit trust at fair value, and to value the interests cumulatively.

This survey of the case law was representative of the position at the time the Victorian Law Reform Commission produced its Report – "Trading Trusts – Oppression Remedies" in January 2015, namely that there was one view of the operation of the *Corporations Act* with support in the Victorian Supreme Court, while in New South Wales a different approach had been taken, and no decision in that State had yet followed the *Viglaroni* principle. It remains the state of the case law to the present time, namely that the *Viglaroni* principle continues to be followed in Victoria, but has not been embraced in any other State, and no intermediate appellate Court has considered the matter.

The Victorian Law Reform Commission Report

The Victorian Law Reform Commission final Report on the subject issued in January 2015 was a long and detailed survey of the law on the topic. It is a significant resource on the law in the field, and contains in the fourth chapter a survey of existing equitable and statutory relief that could be invoked by beneficiaries with a complaint regarding the conduct of a trust.

The Law Reform Commission recommended that there should be a remedy for beneficiaries of trading trusts subjected to oppressive conduct, on application to the Supreme Court of Victoria. It further recommended that the remedies be in terms similar to those in s.233 of the *Corporations Law*. It recommended that the persons entitled to apply would include a beneficiary of a trust. It recommended that the changes be effected by an amendment to the *Trustee Act* 1958 (Vic).

The Victorian Commission recommended the remedy be available in regard to trading trusts, and explained that by this term it meant to encompass all trusts where some property was held by the trustee that was employed in the conduct of a business. Nevertheless, the Commission recommended that there be carved out of that definition managed investment schemes, charitable trusts, and regulated and statutory superannuation trusts. Each of these entities were subject, it considered, to sufficient regulation under Commonwealth and Victorian law, and it would create unnecessary complexity, and potential jurisdictional issues to have applied the remedy to those entities.

The Victorian Commission was of the view that reform of the law was necessary, firstly, to ensure clarity and simplicity. The differing first instance decisions in regard to the application of the statutory remedy in regard to corporate trustees created uncertainty. Secondly, even if the proper construction of the *Corporations Act* provisions was ultimately resolved by judicial decision, that would leave a situation in which some beneficiaries, who also happen to be shareholders or directors of the corporate trustee, may have access to this statutory remedies, while other beneficiaries would not (at paragraphs 1.24 to 1.26).

Also the Victorian Commission concluded that there was considerable functional similarity between companies on the one hand, and unit trusts on the other (at paragraph 2.48). Beneficiaries of unit trusts were usually investors who paid for their equity, and in economic and practical terms were akin to the shareholders of a company. There was a strong argument that there should be comparable remedies for oppression without distinction between the status of shareholder on the one hand, or unit holder on the other.

The Victorian commission considered that there might be only a few circumstances in which a discretionary beneficiary of a discretionary trust could complain of oppression, but nevertheless recommended that the statutory remedy for oppression in regard to a trust extend to discretionary trusts.

Despite the Victorian Commission Report having been issued over three years ago, no legislation has been introduced in Victoria to implement the Report's primary recommendation.

The New South Wales Law Reform Commission Reference

In April 2017 the New South Wales Attorney-General referred two issues to the New South Wales Law Reform Commission concerning the law of trusts. The first being the liability of beneficiaries to indemnify trustees or creditors, and the second to enquire into whether oppression remedies available under company law should be extended to the beneficiaries of trading trusts.

The obligation of beneficiaries under the law to indemnify trustees for the expenses incurred by the trustee in the conduct of the trust, exposes beneficiaries to a potential unlimited liability, unlike the shareholders of a company. That liability can be limited or eliminated by the terms of the trust deed itself, but that is not without its own complexities. This issue was a substantial concern of the Review and Consultation paper 19.

In light of the comprehensive analysis by the Victorian Commission in regard to oppression, it was unnecessary to repeat that exercise and the consultation paper largely summarises the Victorian report. Only a few submissions were received in response to the New South Wales report, but they expressed divergent views on the issue. Both the New South Wales Bar and the New South Wales Law Society supported the adoption of the Victorian Law Reform Commission recommendation.

The New South Wales Law Reform Commission in its expression of preliminary views appeared minded to follow the Victorian recommendation, and especially if Victoria was to legislate, it recommended that New South Wales should follow suit.

Of a special interest in regard to the New South Wales enquiry was the submission of the Honourable R.I. Barrett, previously a Judge of the New South Wales Court of Appeal. Mr Barrett questioned whether there are real life situations and concrete cases which have established a need for a law to give trust beneficiaries an oppression remedy similar to that available to company shareholders. Mr Barrett further questioned whether the equitable remedies presently available were as deficient as had been assumed by the authors of the consultation paper. Mr Barrett refers to the decision of Young CJ in Eq in *McEwen v Combined Coast Cranes* suggesting a possible equitable oppression doctrine in regard to the affairs of a trust. Something is said about that below. One gained an impression from reading all of the submissions (of which there were only 10) that it was far from certain that the New South Wales Commission would make a comparable recommendation to the Victorian Commission.

The Future for the Law regarding Oppression of Beneficiaries

Nothing may come by way of legislative change from either of the Victorian or New South Wales Law Reform Commission enquiries in the near future. Further, a number of submissions to the New South Wales enquiry emphasised the need for a wider ranging and national approach to the reform of this area of the law. If that approach were to be adopted, any reform would depend upon co-ordination between the Commonwealth and all the States.

Pending any legislative change, it is likely that at some point the issue determined in the *Viglaroni* decision will make it to an intermediate appellate court which would then be likely to settle the matter concerning the extent of the jurisdiction conferred under the *Corporations Act*. However, even if that is resolved in favour of the broader approach found by Davies J in *Viglaroni*, that still leaves no broad based general remedy for oppression where the trustees are not corporations, or the beneficiary complaining does not hold shares in the trustee.

Comment was made in the submissions to the New South Wales Commission as to the low level of interest in the referral from many of the institutions with an interest in the field, as well as investor associations, small business organisations or the like. This was indeed disappointing. One would have thought there were objective grounds for such groups to have an interest in the reform of this area of the law.

I suspect that the paucity of submissions to the New South Wales Commission reflected the fact that the problems associated with the administration of trusts are widely dispersed, and it is chiefly commercial and trust lawyers who act in litigation in such matters who would be the repositories of knowledge about the extent to which there are practical issues that call for legal change. There are many cases litigated every year in Australia concerning disputes in regard to the administration of trading trusts, including family discretionary trusts. In many of these disputes the beneficiaries have recourse to the existing armoury of legal and equitable doctrines to challenge the conduct of the trustee, seeking to demonstrate breaches of trust by the trustee, and hence grounds for removal of the trustee.

Many of the current cases against trustees are resolved by appeal to arcane law, or fine distinctions in regard to the potential meaning of terms of the trust deed. It can be extremely difficult to predict with accuracy the likely outcome of cases where the points in contest are often divorced from the principal grounds of dissatisfaction by beneficiaries with the conduct of the trust. There is always a likelihood in such cases that the ultimate determination of the matter may have been strongly influenced by the court's impression of where the overall justice of the case lay, but the Court may not be entitled to appeal to this matter directly except in the most limited fashion, in justification of the decision.

Put differently, there are oppression cases brought by beneficiaries in regard to trusts frequently. However, they are limited to the patchwork of legal rights and remedies when the real complaint may be that a business partner or family member has come to be in control of a trust and is conducting its affairs in a fashion that an ordinary reasonable person would consider to involve unfairness, in the sense captured by the existing law of company oppression.

The submissions of the Law Societies, and Bar Associations of Victoria and New South Wales, all adverted to disputes between beneficiaries and trustees, as regular subjects of litigation. The commercial Bar Association of Victoria submitted to the Victorian Commission that there was anecdotal evidence of hardship resulting from the existing law in the form of extensive costs investigating ways to brings claims within the existing complex patchwork of rights, and through oppressed unit holders not taking action because of the difficulties, and uncertainties of litigation, given the present state of the law.

The experience of the author of this paper is that legitimate complaint by beneficiaries regarding the conduct of trusts, both unit trusts and discretionary trusts, is a frequent cause of dispute. Many Australians have some, or substantial portions of their wealth, held through trusts. Not all of these people are exceptionally rich. Frequently, the parties involved in the conduct of these trusts, and even in some instances their professional advisors, have an inadequate understanding of the legal rights and obligations surrounding the conduct of the trust.

Once trusts are established and substantial property has been accumulated within the trusts, they can be difficult to dismantle because of the tax or stamp duty implications if one seeks to then reorganise the assets into a simpler legal structure. Consequently, a trust may live on for many decades. They may come to function in a fashion quite different from that originally intended.

There are sufficient difficulties generated by the conduct of trusts in Australia that it appears, at least to the author, likely that some change or reform of the law may well be effected in the future, even if postponed until incorporated into a national response. If that is so, it will ultimately have a significant effect upon the operation of trusts. Until such reforms take place, there will still remain the disputes that are common, and those advising the parties to those disputes will need to have regard to the existing law. To highlight some of the case for reform, this paper concludes with an analysis of one part of that existing law, namely, the law governing the challenge to the exercise by a discretionary trustee of the discretion to appoint income and capital between the beneficiaries, or to bring forward the vesting date.

Challenges to the Exercise of a Trustee's Discretion

Discretionary trusts are a common means by which wealth has been held in Australia. They have been popular for different reasons at different times. They were once thought to be a means of minimising the instance of death duties or of income tax. They are thought to have the ability to protect assets in the event of business failure, or as protection against post death claims on family property. The creation of discretionary trusts in wills is widely advocated by some wealth planners and probate lawyers at the present time.

After being established, discretionary trusts often survive for many decades. For the reasons discussed above, dismantling them may be difficult and/or expensive. Further, discretionary trusts that have survived for many decades may come to be controlled by the children, or other successors of the original founders. This second generation of controllers and beneficiaries may not share the same views as the original trust founders, and may not enjoy the same degree of consensus.

The instruments establishing discretionary trusts in Australia usually confer the broadest powers upon the trustee to appoint income amongst beneficiaries, to advance capital, and to accelerate the vesting date. Potential for conflict thus arises if the beneficiaries, or a substantial group of them, consider there is unfairness in the distribution of income, or want the trust brought to an end and the capital distributed in circumstances where the trustee refuses their requests.

The common wisdom of the legal profession is that the exercise of discretion by the trustee of a discretionary trust is largely unreviewable. Consequently, it is often thought that beneficiaries, disappointed in the manner in which trustees are exercising their discretionary powers, have no effective remedy available to them. Indeed, this in part is the reason why many consider that property held in a discretionary trust is, if not *de jure*, at least *de facto*, the property of the person who is in control of the trust, for he or she could choose if they wish, to give it all to themselves and no other discretionary beneficiary could complain. Control is usually reposed in that person who has the power to change or replace the trustee, usually called "the appointor".

However, practitioners ought be wary of advising clients to place their property in a discretionary trust, even if they appear to have control over the levers of power in regard to that trust. Technically the property is no longer that of the trustee or appointor, their powers are fiduciary powers, and the exercise of those powers can be challenged by any of the discretionary beneficiaries. While the discretionary beneficiaries may struggle to successfully challenge the exercise of the discretionary power, they are entitled to call for an account from the trustee, and they can generally seek access to the records of the trust, although the juridical basis of that entitlement in regard to discretionary beneficiaries is not entirely clear.

Further and most importantly, if the trustee of the discretionary trust, whether an individual or company, can be shown to have breached the terms of the trust in a sufficiently serious fashion (often a result of sheer ignorance by the lay directors of the trustee), a case could be brought for removal of the trustee and appointment of an independent trustee. The original settlor could thus find that he or she has lost all control over what they had assumed to be their property.

The limited grounds upon which the exercise of discretion by a discretionary trustee may be challenged, were classically stated by Justice McGarvie in *Karger v Paul* [1984] VR 161. His Honour reviewed the extensive authorities in regard to the administration of discretionary trusts and distilled out the key obligations that must be met by the trustees if their decisions are not to be successfully challenged. His Honour concluded in the following terms:-

> "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."

As McGarvie J had also concluded that beneficiaries of a discretionary trust 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.

The *Karger v Paul* principles were applied in an interesting decision of June this year, *Patrizia Trani v Macro Trani & Anor* [2018] VSC 274, a decision of Daley AsJ of the Victorian Supreme Court. The matter concerned a family trust. The trust was established by the parents of the litigants, and on the death of the mother the relationship between the daughter and her two brothers irretrievably broke down. The two brothers ultimately exercised powers conferred upon them to remove their sister as a director of the trustee company and ultimately distributed the entire fund of the trust to themselves in equal shares and nothing to their sister. Their sister contended that their actions were not in good faith, or for a proper purpose. She contended that they had been motivated by animosity towards her and acted out of greed.

In application of the *Karger v Paul* principles, the two brothers, who had exercised the powers of the board of the trustee company, initially exercised their right to silence regarding the reasons for the manner in which they had exercised the trustee's power. The Victorian Court of Appeal in *Curwen & Ors v Vanbreck Pty Ltd* (2009) 26 VR

335 at [25] had stated that an inference of improper purpose could not be drawn from a trustee's non-disclosure of reasons for exercising the trustee's discretion in a particular way, even if the trustee was on notice that the exercise of discretion was impugned. The onus of establishing a breach of the improper purpose tests rested upon the person alleging it, without the ability to draw an adverse inference from silence (see the discussion in *Trani* at [178]).

Daley AsJ also referred to the decisions which had considered whether there could be discovery against trustees to oblige them to produce a written record of their reasons. She noted the caution of Courts in ordering such discovery, but concluded that *Karger v Paul* did not entirely exclude the possibility of some forensic evaluation of the decision making and reasoning process (at [181]).

The defendants' also relied upon the decision of Hayne J in *Esso Australia Limited v Australian Petroleum Agents and Distributors Association* [1993] 3 VR 642 in which His Honour had said that bad faith or impropriety could not ordinarily be proved by merely pointing to the effect of the exercise of the decision. Thus, where as in *Trani* the two brothers exercising the powers of the trustee had given the whole of the fund to themselves, one could not draw an adverse inference of bad faith or impropriety from that fact alone.

The significance of the *Karger v Paul* principles was displayed rather dramatically by reference by Her Honour to her ruling in the trial that the two defendants could not be cross-examined on their reasons for making the decision they did. Allowing such cross-examination would have effectively obliged them to give reasons for their decision. However, they were in the unfortunate position of needing to seek rectification of minutes of the decision, and for that purpose they were obliged to go into the witness box. Her Honour concluded that she was entitled to use such evidence as they gave, and such cross-examination as was permitted to make determinations as to the lawfulness of the exercise of their discretion. The *Karger v Paul* principles did not preclude such an investigation.

However, it is at this point that the *Karger v Paul* principles do descend into a level of what appears to modern ears as pedantry. The *Karger v* Paul principles permitted challenge to the decision on the ground that it was made for an improper purpose, but not as to the manner in which the decision was made. The consequence of this is that the Court could look at evidence to see whether there had been a failure by the trustees to exercise the discretion for proper purposes, but it was not open to the Court to look at the evidence of the enquiries or examinations the trustee had made in order to impugn the exercise of the discretion on the grounds that the enquiries, information or reasons as the manner of the exercise fell short of what was appropriate and sufficient. However, this evidence of failure to enquire may be sufficient to demonstrate that there has been a failure to act in good faith, or give real and genuine consideration to the claim of the beneficiaries.

Additionally to these complexities, Her Honour had also concluded that it was permissible to look at the evidence of the surrounding circumstances and the subjective understanding of the parties regarding their rights, and the rights and entitlements of others in assessing whether the trustee had acted in bad faith or for an improper purpose (at *Trani* [197]).

All of this leads to this statement of law by Her Honour, namely:-

> "in my view all of the evidence can be examined for the purpose of determining whether the trustee exercised its discretion lawfully. What it cannot be used for is to determine whether a lawfully exercised discretion was exercised properly or reasonably. However, evidence of a failure to make proper enquiries may well support a finding that the trustee had not given real and genuine consideration to the beneficiaries of the trust. Further, the evidence of what consideration was in fact given to the beneficiaries of the trust is directly relevant to the question of whether that consideration was real and genuine" (at *Trani* [204]).

Her Honour's statement of the existing law appears to be correct. Nevertheless, one cannot help but gain the impression reading the judgment in *Trani* that Her Honour was struggling to distinguish the proper and improper purposes for which evidence might legitimately be used. The fact that inadequate enquiries had been made by a trustee, could possibly be used as evidence to demonstrate that there had been no genuine consideration given to the situation of beneficiaries, but not used to show that the trustee had unreasonably or unsatisfactorily informed him or herself prior to making the relevant decision.

These distinctions may strike some as principled. They certainly reflect the long entrenched attitude of the law to protect trustees from scrutiny by beneficiaries. Perhaps, however, the time has come to question whether the social purpose of protecting trustees from unwanted scrutiny has resulted in legal rules of needless complexity, based on artificial distinctions. Indeed, the rule not merely entitling trustees to give no reasons for their decision, but blocking adverse inferences from the failure to provide reasons, or the nature of the decision itself, seems an overly generous protection to individuals often in the control of very substantial and valuable property.

How a statutory oppression remedy of the sort recommended by the Victorian Commission would affect the outcome of a case such as *Trani* is something that would need to be worked out through a sequence of decisions. Some Judges might be reluctant to see such statutory remedies sweep aside the entrenched protections of a trustee against the need to give reasons, and the inferences that might be drawn from what could appear to be unreasonable behaviour. It might be thought that the purpose of the proposed statutory remedy could not extend to converting the largely unfettered discretion of a discretionary trustee to one tightly constrained by principles of fairness or reasonableness. However, I shall leave to others the task of defending trustees' rights to behave unreasonably.

Dated 2 August 2018