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Let's chat

Trust distributions 201 – May 2024

With:

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Information provided is general in nature; precise application depends on specific circumstances



Overview

- Not 101 – see other presentations
- Foreign beneficiary exclusion clauses
 - Ambiguity
 - Inadvertent changes
- Trust to trust distributions
- Removing beneficiary unilaterally
- Not all trust deeds made equally – duty family trust exemption



Trust distributions 101

- Will consider if time at the end of the presentation
 - <https://dariuschats.github.io/downloadables/trainings/2023%20-%20Powerpoint%20-%20Discretionary%20trust%20health%20check.pdf>
 - <https://dariuschats.github.io/downloadables/trainings/2022%20-%20Powerpoint%20-%20Trust%20distributions%20for%20June%202022.pdf>
 - <https://dariuschats.github.io/downloadables/trainings/2021%20-%20Powerpoint%20-%20Trust%20distributions%20101.pdf>
 - <https://dariuschats.github.io/downloadables/trainings/2020%20-%20Powerpoint%20-%20Read%20the%20deed%20-%20Presented%20to%20Advisers.pdf>
 - <https://dariuschats.github.io/downloadables/trainings/2019%20-%20Presentation%20Notes%20-%20Trust%20distributions%20-%20Presented%20to%20Accountants.pdf>
 - <https://dariuschats.github.io/downloadables/trainings/2018%20-%20Powerpoint%20-%20Trust%20Distributions%20-%20Presented%20to%20Accountants.pdf>
 - <https://dariuschats.github.io/downloadables/trainings/2017%20-%20Powerpoint%20-%20Trust%20distributions%20-%20the%206%20W's%20-%20Presented%20to%20Accountants.pdf>

Foreign beneficiary exclusion clause



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29. LIMITATION ON DISTRIBUTIONS TO FOREIGN PERSONS

29.1 Despite anything to the contrary in this Deed, if any of the secondary or tertiary beneficiaries are foreign persons within the meaning of the Foreign Acquisitions and Takeovers Act 1975 (the "Act") the percentage of the net income in any year or the corpus of the Fund at any time which the Trustee may distribute to any one of those beneficiaries or any two or more of them must not exceed the maximum percentage which the Trustee can distribute without breaching the Act.

Foreign beneficiary exclusion clause



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- Distribution of dividends made to Australian citizen residing in Singapore
- FATA – *Foreign Acquisition and Takeovers Act 1975 (Cth)*
- Section 4 FATA defines a Foreign Person to include ‘an individual not ordinarily resident in Australia’.
- Section 4 FATA includes corporations and trustees of a trust as potential Foreign Person where ‘an individual not ordinarily resident in Australia’ or a foreign corporation or government holds a substantive interest.

Foreign beneficiary exclusion clause



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- Section 5 FATA states that an:
 - *“individual who is not an Australian citizen is ordinarily resident in Australia at a particular time if and only if:*
 - *(a) the individual has actually been in Australia during 200 or more days in the period of 12 months immediately preceding that time; and*
 - *(b) at that time:*
 - *(i) the individual is in Australia and the individual’s continued presence in Australia is not subject to any limitations as to time imposed by law; or*
 - *(ii) the individual is not in Australia but, immediately before the individual’s most recent departure from Australia, the individual’s continued presence in Australia was not subject to any limitations as to time imposed by law.”*
- Section 5 FATA does not expressly state that an Australian citizen cannot be ordinarily resident. Rather, it only refers to when a non-Australian citizen is considered to be ordinarily resident in Australia.
- Guidance Note 2 – Key Concepts Version 2 (1 July 2023) (**FIRB Guidance Note 2**) provides further information.

Foreign beneficiary exclusion clause



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- Page 5 of FIRB Guidance Note 2 specifically states:
 - *Australian citizens*
 - *An Australian citizen who is living overseas may be a 'foreign person' as defined in the Act. There is no specific rule in the Act for determining whether or not an Australian citizen is ordinarily resident in Australia. It is relevant to have regard to the ordinary meaning of those words and the question is one of fact and degree (see, for example, Wight v Honourable Chris Pearce MP (2007) 157 FCR 485 at [15]). Section 35 of the Regulation provides an exemption for land acquisitions by persons with a close connection to Australia, including Australian citizens not ordinarily resident in Australia.'*
- Therefore, the definition of Foreign Person under FATA is any individual not ordinarily resident.
- FIRB Guidance Note 2 notes, however, that an exemption may be available from Australian citizens having to lodge an application with the Foreign Investment Review Board. The exemption, however, does not prevent the Australian citizen from being a Foreign Person under FATA.

Foreign beneficiary exclusion clause



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- Clause 29 of the Trust deed can be interpreted in two ways, neither of which is clear:
- The first interpretation may be such that:
 - if any of the secondary or tertiary beneficiaries are foreign person;
 - then there is a cap that the percentage of the net income or corpus of the Fund which the Trustee may distribute must not exceed the maximum percentage which the Trustee can distribute without breaching FATA.
- This may suggest that the Foreign Person may still benefit, but their benefit is capped at the maximum percentage allowed such as not to breach FATA.
- The second interpretation is that distributions to:
 - any of the secondary or tertiary beneficiaries who are foreign person in which;
 - the percentage of the net income or corpus of the Fund which the Trustee may distribute must not exceed the maximum percentage which the Trustee can distribute without breaching FATA, has been exceeded,
 - are deemed to be invalid.

Foreign beneficiary exclusion clause



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- Personal position is the first position.
- Clarity can be obtained by asking the Settlor.
- In this case, Settlor (being the law firm that settled the trust) confirmed the first interpretation was the likely intention.
- Noted:
 - Heading of clause 29 notes 'Limitation on distributions to foreign persons'. This may imply that distributions can still be made to foreign persons and such distributions are merely capped.
 - Clause 29.1 operates so that as the Trustee has already made a distribution to a Foreign Person (chosen to make the distribution), clause 29 notes that the percentage a Foreign Person receives cannot exceed a certain percentage.
- Three sets of lawyers considered the interpretation.

Foreign beneficiary exclusion clause



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- Broadness of FATA and definition of foreign person.
- Under FATA, the maximum percentage that can be distributed to a foreign person before a trust may be deemed a foreign person is as follows:
 - one Foreign Person together with any one or more associates, holds an interest of at least 20% of the income or property of the trust; and
 - one or more Foreign Persons together with one or more associates, hold an aggregated interest of at least 40% of the income or property of the trust.
- Section 6 FATA defines who an 'associate' and includes but is not limited to '(a) any relative of the person'.
 - A relative is defined in section 4 FATA as having the same meaning in the Income Tax Assessment Act 1997. Section 995-1 Income Tax Assessment Act 1997 defines a relative to include a person's spouse or the parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descendant or adopted child of a person or that person's spouse.
 - Therefore, where distributions are made from the trust to a Foreign Person and a relative of the Foreign Person, the total distribution available to those persons are capped at the above.
 - This may mean that if distributions are made by the Trust to a Foreign Person and a relative of the Foreign Person in the same income year, then even greater uncertainty will exist as to how such distributions to those 2 or more persons are to be apportioned and capped at the relevant thresholds.

Foreign beneficiary exclusion clause



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Excluded Person means the following (even if any of them is named or would otherwise be or be included in a class of Beneficiary):

- (a) each person named or described in Item 14 in the Schedule or nominated by the Trustee to be an Excluded Person;
- (b) the Settlor and any Child of the Settlor who is at the relevant time under the age of 18 years;
- (c) any corporation in which a person in (a) or (b) above is a director or member or in which any of them has a beneficial interest in any share;
- (d) any trust in which a person in (a) or (b) above has a beneficial interest whether vested, contingent or otherwise; and/or
- (e) any Foreign Person;

Foreign Person means:

- (a) a foreign person or foreign trust for the purposes of Chapter 4 of the Duties Act 2001 (Qld);
- (b) a foreign person or foreign trust for the purposes of Division 4 of Part 3 of the Land Tax Act 2010 (Qld);
- (c) a foreign natural person, a foreign corporation or a foreign trust as defined in section 3 of the Duties Act 2000 (Vic);
- (d) a person holding a controlling interest in a foreign corporation or a substantial interest in a foreign trust for the purposes of sections 3A and 3B of the Duties Act 2000 (Vic) respectively;
- (e) an absentee person as defined in section 3 of the Land Tax Act 2005 (Vic);

- (f) an absentee person holding an absentee controlling interest in a corporation for the purposes of section 3A of the Land Tax Act 2005 (Vic) (unless an exemption under section 3B of that Act applies);
- (g) a foreign person or foreign trust for the purposes of section 3 and/or 4B of the Duties Act 2001 (Tas);
- (h) a foreign person or foreign trust for the purposes of Chapter 3A of the Duties Act 2008 (WA);
- (i) a foreign person or foreign trust for the purposes of Part 2A of the Land Tax Act 2004 (ACT);
- (j) any potential Beneficiary of this Trust who would or might cause this Trust to be or become a foreign person or a foreign trust for the purposes of any of the above provisions;
- (k) any potential Beneficiary of this Trust who would or might cause this Trust to be or become a foreign person or a foreign trust for the purposes of any other statute,

and who, by being a Beneficiary, would or might cause this Trust to be assessed to additional or increased duty or land tax (in excess of any amount which the Trust would be required to pay had the person, corporation or trust not been so classified) in respect of the acquisition or holding of any direct or indirect interest in real property to which any of the provisions above apply, but only while:

- (l) the foreign person, corporation or trust continues to be so classified under the relevant provision; and
- (m) the Trust acquires or holds any direct or indirect interest in real property to which any of the provisions above apply;

Foreign beneficiary exclusion clause



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Beneficiaries means and includes, the Primary Beneficiaries, the Secondary Beneficiaries, the Tertiary Beneficiaries and the Default Beneficiaries, whether named or described in this Deed or appointed or becoming a Beneficiary after the Deed Date, even if:

- (a) any of them may not be in existence or do not come within the meaning of any of those expressions at the Deed Date; and
- (b) in the case of the trustee of any trust or settlement, the trust or settlement has not been formed or is not in existence or does not come within the relevant category of Beneficiary at the Deed Date,

and **Beneficiary** means any of them. The expression excludes all Excluded Persons;

22.6 Excluded Person not to be Trustee

A Trustee may be any person or persons (not under a legal disability) except:

- (a) an Excluded Person; or
- (b) any person who is restricted or prohibited by the Applicable Law from being or becoming a Trustee.

22.7 Office vacated

A Trustee is removed from that office if the Trustee:

23.2 Excluded Person not to be Appointor

An Appointor or Alternative Appointor may be any person or persons (not under a legal disability) except an Excluded Person.

23.3 Office vacated

An Appointor or Alternative Appointor is removed from that office if that Appointor or Alternative Appointor:

- (a) is or becomes an Excluded Person;

20.4 Restriction on appointment

The Rights in clause 20.1 must not be exercised:

- (a) to appoint any Excluded Person as a Beneficiary;
- (b) to appoint or remove as a Beneficiary any person if, as a result, any Excluded Person could or will become a Beneficiary or entitled to or acquire a beneficial interest in any part of the Trust Fund or any part of the Income of the Trust;
- (mm) **Gifts.** To make any donations, gifts or advances which the Trustee decides for any purpose or object. The Trustee may exercise this Right in favour of any person or to any association, institution, corporation or charity except an Excluded Person.

Foreign beneficiary exclusion clause



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- Primary Beneficiaries were:
 - Son (NZ citizen residing in Australia)
 - Dad (NZ citizen residing in NZ)
 - Mum (NZ citizen residing in NZ)
- Appointor included Dad and Mum
- Query whether Dad and Mum are 'foreign persons' under the relevant definition and if so, they are automatically removed as potential beneficiaries

Foreign beneficiary exclusion clause



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- Foreign Person is defined to include ‘a foreign person...for the purposes of Chapter 4 of the Duties Act 2001 (Qld)’.
- Section 234 Duties Act 2001 (Qld) defines a foreign person to include a foreign individual.
- Section 235 Duties Act 2001 (Qld) defines a foreign individual to be an individual other than an Australian citizen or permanent resident.
- Schedule 6 Duties Act 2001 (Qld) defines a permanent resident to mean (a) the holder of a permanent visa as defined by the Migration Act 1958, section 30(1); or (b) a New Zealand citizen who is the holder of a special category visa as defined by the Migration Act 1958 (Cth), section 32.

Foreign beneficiary exclusion clause



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- A New Zealand citizen who is the holder of a special category visa as defined by the Migration Act 1958 (Cth), section 32 = special category visa (subclass 444) which is issued on entry into Australia
 - Side note: anti-avoidance Queensland stamp duty surcharge rules where only purpose to obtain visa was to obtain the lower stamp duty rate
- Permanent resident is a holder of a permanent visa
 - Permanent visa may expire
 - Effect on land tax surcharge for foreigner
 - Simple steps to ensure permanent visa does not expire



Trust to trust distribution

1.07 The Beneficiaries:

- (1) The said [REDACTED] both of 11 [REDACTED] in the State of Queensland.
- (2) Any child, grandchild, further lineal issue or relation by blood or marriage of the said [REDACTED].
- (3) The parents, brothers, sisters, nephews and nieces of the said [REDACTED] [REDACTED] living or born before the perpetuity date.
- (4) The Trustee or Trustees of any Trust or settlement made solely for the benefit of, or under which no person has an interest other than one or more of the beneficiaries mentioned in sub-clauses (1), (2) and (3) of this definition.



Trust to trust distribution

- Item 10 SECONDARY BENEFICIARIES:**
- (a) Any person who is, becomes or has been:
 - (i) a Spouse of a Primary Beneficiary;
 - (ii) a Child, stepchild, grandchild or remoter issue, uncle, aunt, niece, nephew, cousin, parent, brother or sister of a Primary Beneficiary;
 - (iii) a Child, stepchild, grandchild or remoter issue, uncle, aunt, niece, nephew, cousin, parent, brother or sister of a Spouse of a Primary Beneficiary; or
 - (iv) any Spouse, Child, stepchild or grandchild of a person in (ii) or (iii) above.
 - (b) Any person (in that capacity only) who is or becomes the executor or trustee of the estate of any other Beneficiary.

Item 11 TERTIARY BENEFICIARIES:

Subject to clause 3 and to the laws against perpetuities:

- (a) any corporation, whether currently incorporated or incorporated in the future, in which any other Beneficiary is the holder of at least one share or has a beneficial interest in at least one share;
- (b) any corporation, whether currently incorporated or incorporated in the future, in which any other Beneficiary is a director;
- (c) any trust or superannuation fund in which at least one other Beneficiary has a beneficial interest whether vested, contingent or otherwise or is a member;
- (d) any Spouse, Child, grandchild or remoter issue, uncle, aunt, niece, nephew, cousin, parent, brother or sister of the other Beneficiary referred to in (a), (b) or (c) above;
- (e) any trust of which the Trustee of this Trust is, becomes or has been a trustee or a beneficiary (however described);
- (f) where any corporation is named as or becomes a Beneficiary, each of the directors and officers of the corporation and each holder of at least one share or of a beneficial interest in at least one share in the corporation;
- (g) any person who is, becomes or has been:
 - (i) a Spouse of a person in (f) above;
 - (ii) a Child, stepchild, grandchild or remoter issue, uncle, aunt, niece, nephew, cousin, parent, brother or sister of a person in (f) above; or
 - (iii) any Spouse of a person in (ii) above; or
- (h) any church or any religious, cultural, sporting, medical, environmental, research or artistic organisation or entity or any educational institution



Trust to trust distribution

8. Clause 1(b)(iv) of the Family Trust Deed defines the term “General Beneficiaries” to include:

The trustee (in his capacity as such trustee) of any trust or settlement in which any Beneficiary has an interest whether absolute or contingent or by way of expectancy and whether liable to be defeated by the exercise of any power of appointment or revocation or to be diminished by the increase of the class to which that Beneficiary belongs which the Trustee may at any time and from time to time nominate in writing as a General Beneficiary and whether or not such trust or settlement is in existence at the date of this Deed *but provided that the beneficial interest in property provided by such trust or settlement shall vest within the perpetuity period applicable to the trusts of this Deed.*

(Emphasis added.)



Trust to trust distribution

- Domazet v Jure Investments Pty Limited [2016] ACTSC 33
 - Receiving trust had a later vesting period (as established later)
 - Amendment sought to limit the receiving trust vesting period to allow trust distribution
 - Distributing trust, however, (as it was an ACT trust) had a perpetuity period of:
 - 80 years; or
 - such lesser number of years where the applicable law provides for a perpetuity period under the rule known in English law as “the rule against perpetuities”...the expiration of twenty one years from the date of the death of the last to die of such of them the issue of the Late King George the Sixth as are alive at the date of the execution of this Deed (*1 April 1980*)
 - Receiving trust amendment only reduced perpetuity period to 80 years and did not reference the second component
 - Held receiving trust could vest after the distributing trust as in theory all relevant issue of Late King George the Sixth could pass away at the same time and the receiving trust could vest before the 80 years



Trust to trust distribution

- Care when distributing from trust to trust
- Review wording to see if:
 - Only a valid beneficiary if vest within perpetuity period; or
 - Distribution is subject to rule against perpetuities
- First wording is a condition to a valid beneficiary
- Second wording has a work around:
 - Wait and see rule – effect that distribution not invalid unless the distribution doesn't find its way to a beneficiary within the perpetuity period of the distributing trust
 - Provision in property law legislation noting Queensland in the transition from a 1973 legislation to 2023 legislation
 - Need to confirm jurisdiction of relevant trust to confirm existence of wait and see rule



Trust to trust distribution

- Wait and see rule – *Nemesis Australia Pty Ltd v Commissioner of Taxation* [2005] FCA 1273
 - *[44] In the present case, it is, in my view, possible that the trustee of each trust might not exercise the discretion conferred by the other trust deeds to advance the vesting date to a date within the perpetuity period as set out in the SHFT Deed. It can therefore be said that the interest disposed of might not become vested until too remote a time. However, s 210 also provides that where a disposition might be void on the basis that it might not become vested until too remote a time, the disposition must be treated as valid until such time as it is established that the vesting must occur after the end of the perpetuity period, as if the disposition were not subject to the restriction. Therefore, in my view, s 210 operates to validate a disposition and anything done in relation to the interest disposed of by way of the application of intermediate income.*
 - Section 210 is a reference to Property Law Act 1973 (Qld)



Trust to trust distribution

- Wait and see rule – *Nemesis Australia Pty Ltd v Commissioner of Taxation* [2005] FCA 1273
 - *[45] The intention of the wait and see rule is to avoid the draconian consequences which otherwise flow from the rigid application of the rule against perpetuities. It applies in the present case because under each of the relevant trust deeds the trustees possess a discretionary power to advance the vesting date. The definition of “vesting date” in each of the deeds includes a provision that the expression “vesting date” shall mean the specified date or an earlier date nominated by the trustees in their sole and unfettered discretion. Such power includes the nomination of an earlier date within the 80 year period under the SHFT Deed.*
 - *[47] Consequently, in the present case, any possible breach of the rule against perpetuities within the perpetuity period specified in the SHFT deed must be treated as a valid disposition. For this reason, the submission advanced for the Commissioner must fail. In my view, the integers of s 210 are made out in the present case, namely:*
 - *The interest disposed of under the SHFT might not become vested until too remote a time; and*
 - *That disposition must be treated until such time as it becomes established that the vesting must occur outside the perpetuity period as if the disposition were not subject to the rule.*



Trust to trust distribution

- New Property Law Act 2023 (Qld) – passed but not yet enacted (date to be confirmed)
 - Section 200 – rule against perpetuities abolished
 - Section 201 – Perpetuity period :
 - 125 years starting on the day on which the disposition is made; or
 - If the terms of the trust state or imply a shorter period to be the perpetuity period for the distribution...the shorter period
 - Section 203 – Wait and see rule:
 - A disposition of property under a trust to a person is not invalid under section 202 merely because the property may vest in the person after the end of the perpetuity period for the distribution provided it is possible the property may vest in the person before the end of the perpetuity period
 - Section 216 – Allows variation to existing trust deed to extend perpetuity period to 125 years
 - Section 217 – If no variation possible, allows all beneficiaries provided they are adults and of full capacity to extend date (*query CGT consequences*)



Trust to trust distribution

- Opportunity to update trust deed to extend vesting date to 125 years?
 - Queensland trusts only (interstate clients miss out)
 - Ensure valid amendment power (i.e. no restriction to vary vesting date – most deeds merely state amendment cannot breach rule against perpetuities noting the new Queensland law in due course)
 - Update all trusts or only the oldest one
 - Align vesting date of all trusts – the date being the vesting date of the earliest established trust
- When law in effect, we will let you know



Unilateral removal of beneficiary

- Do – undertake actions pursuant to valid power under trust deed
- Don't – undertake actions 'on the vibe'
- Do – undertake actions having taken due care and consideration in making the decisions
- Don't – undertake actions with vindictiveness
- Do – ensure proper documentation are kept in place



Unilateral removal of beneficiary

- Don't:
 - “HIS HONOUR: No, no, no. Please ask; was the wife 50 per cent shareholder in the company that owned [G Street]?”
 - [MR KRUPIN]: Until 2017, your Honour.
 - HIS HONOUR: Until – what happened then?
 - [MR KRUPIN]: **I moved her out from the board of directors because...**
 - HIS HONOUR: What about the shareholding?
 - [MR KRUPIN]: The same. The shares moved to myself.
 - HIS HONOUR: Well, did she transfer her shares to you?
 - [MR KRUPIN]: **I transferred. It wasn't her decision.”**



Unilateral removal of beneficiary

- Note the Court considered whether there was a valid power to remove a person as a beneficiary of the trust:
 - *“My own perusal of the deed of trust did not uncover any specific provision relating to the removal of a beneficiary.”*
- Note the Court considered what could be done if no valid power:
 - *“Under the terms of the trust deed there was no specific power granted to the trustee to merely remove a beneficiary. Accordingly, the only way that could be done legally was through the execution of a deed of variation. There is no deed of variation in evidence before the Court, certainly, my attention has not been drawn to one in the thousands of pages of evidence. It was incumbent upon Mr Krupin to lead evidence to prove that his conduct in removing Ms Krupin as a beneficiary was lawful.”*



Unilateral removal of beneficiary

- Note the Court considered the fiduciary duties in removing a beneficiary:
 - *The relationship between a trustee and a beneficiary is a fiduciary relationship.[4] (Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41 at page 68). In the Hospital Products case Gibbs CJ stated, from page 67:*
 - *“A person who occupies a fiduciary position may not use that position to gain a profit or advantage for himself, nor may he obtain a benefit by entering into a transaction in conflict with his fiduciary duty, without the informed consent of the person to whom he owes the duty.” This principle – some would prefer to say “these principles” – has been described as “inflexible” (Birtchnell v. Equity Trustees, Executors and Agency Co. Ltd. (71)) and “fundamental” (Phipps v. Boardman (72))...*



Unilateral removal of beneficiary

- Note the Court considered the fiduciary duties in removing a beneficiary (cont.):
 - *One of the fundamental duties of the trustee is that he must not act in such a way that a conflict arises between his own interests and his duties as a trustee. Once he got control of B Pty Ltd Mr Krupin acted with vindictiveness in removing or purporting to remove Ms Krupin as a beneficiary. This was a step taken by Mr Krupin in the advancement of his own interests at the expense of one of the beneficiaries, namely Ms Krupin.*
 - *It was incumbent upon Mr Krupin to lead evidence to prove that his conduct in removing Ms Krupin as a beneficiary was lawful. Mr Krupin has failed in this task. The conclusion I have reached is that Mr Krupin had no authority to remove Ms Krupin as a beneficiary in the manner that he did. Apart from anything else – there was a clear conflict of duty and interest on Mr Krupin's part (Phipps v Boardman [1967] 2 A.C. 46). It is further evidence of dishonest conduct by Mr Krupin.*

Beneficiary's right to information



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- General right for beneficiaries to have access to trust documentation
- Distinction between 'fixed trusts' and 'discretionary trusts'
- Regarding discretionary trusts – as beneficiaries have no entitlement to call on income or capital but rather hope the trustee exercises their discretion in the beneficiary's favour, they lack a proprietary interest in the trust estate – accordingly their right to information is reduced
- May be limited to basic trust documentation (deed, variations), financial statements and certain minutes

Beneficiary's right to information



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- Hartigan Nominees Pty Ltd v Rydge (1992) 29 NSWLR 405.
 - [T]he right of a beneficiary to have on request inspection of documents or disclosure of information in relation to the trust is, in general, limited to documents and information which is — or is in the sense here relevant — the property of the trust. It does not extend to documents or information as to which, as a beneficiary, he has no proprietary interest. It is not necessary that he have in it a present proprietary interest quantifiable in nature in a specific asset. A beneficiary may have an interest in it as part of an unadministered fund. But that which is sought must, in the relevant sense, be the property of the trust.
- In the case:
 - Memorandum of wishes prepared for trustee
 - Trustee obtained document in circumstances of confidence (of the trust creator) which bound them not to disclose the contents to potential beneficiaries
 - Document is of confidence and confidentiality to assist the trustee in resolving any conflicting claims of persons and family members
 - Seen as property of the trustee rather than property of the beneficiary



Not all deeds made the same

4.2 Capital of Fund

On the Perpetuity Date that part of the Fund comprising capital shall be held by the Trustee on trust to pay the whole of the same to or for any one or more of the Beneficiaries (whether to the exclusion of some of them or not) in such proportions as the Trustee shall in its absolute discretion think fit and appoint and in default of such appointment to pay the same to such of the Class A Beneficiaries (other than those referred to in paragraph 7 of Schedule 3) as are then living and if more than one in equal shares.

Schedule 3 - Class A Beneficiaries

1. The Principal.
2. The Spouse of the Principal.
3. The widow or widower of the Principal.
4. The children and grandchildren of the Principal and the children and grandchildren of the Spouse of the Principal now living or born before the Perpetuity Date and the Spouses of such children and grandchildren.
5. The parents, parents-in-law, grandparents, brothers and sisters of the Principal and the Spouse of the Principal now living or born before the Perpetuity Date and their Spouses.
6. The uncles, aunts, nephews and nieces of the Principal and the Spouse of the Principal now living or born before the Perpetuity Date and their Spouses.
7. Such other natural persons whether now living or born before the Perpetuity Date as shall be appointed as a Beneficiary by instrument of appointment in writing signed by the Principal and whether expressed to be in the form of a deed or otherwise and delivered to the Trustee provided that the Settlor or his estate shall not be appointed.



Not all deeds made the same

118 Exemption—trust acquisition or surrender in family trust

- (1) Transfer duty is not imposed on a dutiable transaction that is a trust acquisition or trust surrender of a trust interest if—
 - (a) the trust is established and maintained as a discretionary trust primarily for the benefit of the members of a particular family or a family company; and
 - (b) the person acquiring or surrendering the trust interest is a member of the family who, or is a family company that, does not benefit in the capacity of trustee.
- (3) For subsection (1)(a) or (2)(a), a discretionary trust is established and maintained primarily for the benefit of the members of a particular family or a family company if—
 - (a) the primary beneficiaries of the trust consist only of members of the family or the family company; and
 - (b) the takers in default of an appointment for capital by the trustee of the trust consist only of members of the family or the family company.
- (4) However, subsection (3)(b) is taken to be satisfied if the last taker in default of an appointment for capital by the trustee of the trust is—
 - (a) a person decided under the *Succession Act 1981*; or
 - (b) a charitable institution.

- (6) For applying this section, a person (the *first person*) is a member of the particular family of another person (the *other person*) if—
 - (a) the first person is the spouse of the other person; or
 - (b) the first person, or the first person's spouse, is any of the following in relation to the other person, or the other person's spouse—
 - (i) child, stepchild or adopted child;

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2 Transfer duty

- (ii) grandchild or great grandchild;
- (iii) brother, sister, aunt, uncle or cousin;
- (iv) parent, step-parent, adoptive parent, grandparent or great grandparent.

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