



TRUSTEES IN AN ERA OF UNCERTAINTY



COCKTAIL SPONSOR



Trustee discretion and the proper purpose rule

STA Conference 2025

Henry Brandts-Giesen

Dentons Global Family Office & High Net Worth Group



Legler v Formannoij

Understanding trustee powers
and legal constraints

Case overview and importance

Why this case matters

Trustee discretion and fiduciary limits

The case examines boundaries of trustee discretion and fiduciary power within legal authority limits.

Implications for trust governance

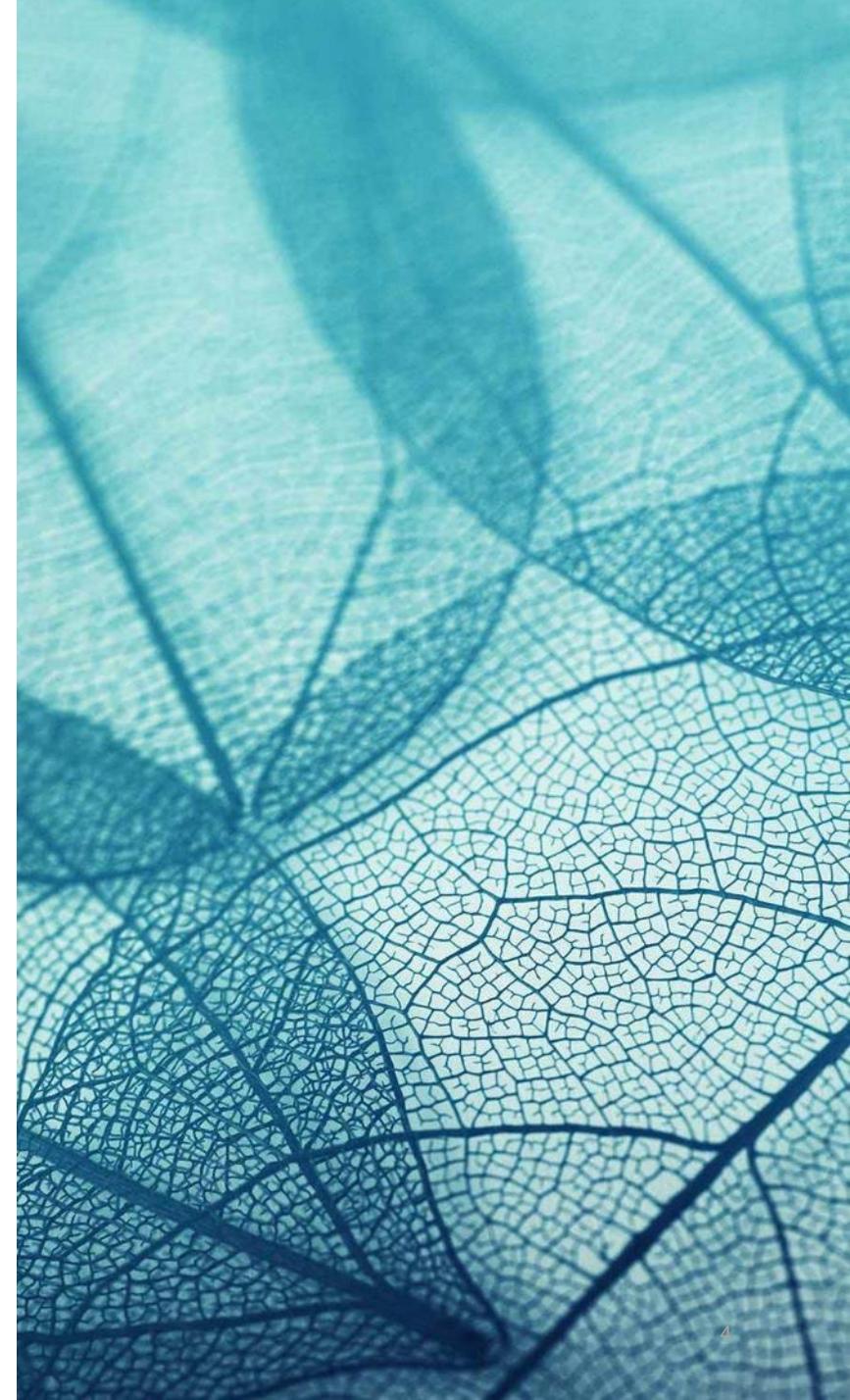
The ruling impacts governance of family trusts, especially those highly control by settlors and beneficiaries.

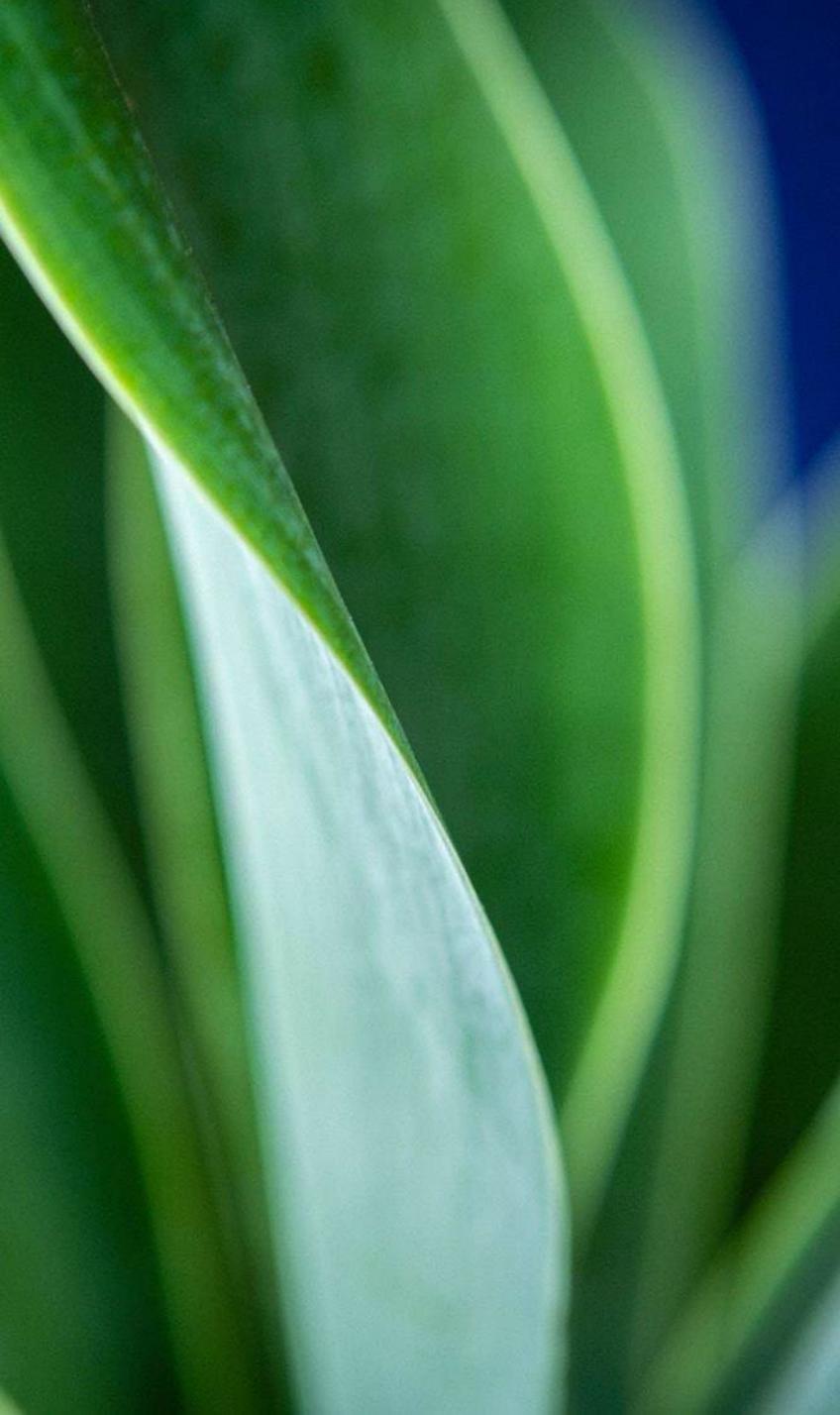
Litigation risks and legal drafting

Highlights risks of litigation and the need for precise trust deed drafting to avoid disputes.

Judicial interpretation of trustee intent

Case illustrates challenges in proving improper purpose and courts' interpretation of trustee intent.



A close-up photograph of green leaves, likely from a plant like a peace lily, with a soft focus and a blueish tint in the background. The leaves are layered, with some in sharp focus and others blurred.

Summary of facts

Trust establishment

Ricco Legler established two trusts for his children and for himself and his wife Marina.

Trustee appointment

Marina appointed Kaahu Trustee Ltd, a company she controlled, as trustee and resigned. The new trustee then changed beneficiaries and distributed the assets.

Dispute over removal of beneficiaries

Children challenged Marina's removal of beneficiaries alleging improper purpose and fraud on a power.

Legal complexity

The Supreme Court examined the scope of trust deed and trustee intent, highlighting trust law complexities.



Legal principles and analysis

Supreme Court decision

Majority opinion

The majority upheld the trust deed allowing appointment of a sole corporate trustee, focusing on Marina's intent at the time the power was exercised.

Subjective test for intent

The court applied a subjective test examining Marina's intent to determine if there was an improper purpose.

Dissenting opinion

Chief Justice Winkelmann dissented, arguing the appointment was unauthorised and served an improper purpose.

Interpretation of trustee powers

The split decision highlights the complex interpretation of trustee powers and fiduciary duties under the proper purpose rule.

Proper purpose rule

Definition of proper purpose rule

The rule requires trustees to use powers only for purposes defined by the trust instrument and its context.

Subjective and objective tests

Subjective test assesses trustee's intent; objective test interprets the trust's purpose to prevent misuse.

Safeguarding fiduciary authority

The rule protects against personal gain and misuse, reinforcing trust administration integrity and lawful governance.



Ultra Vires vs Proper Purpose



Definition of ultra vires

Ultra vires means actions taken beyond the trustee's powers defined by the trust deed, evaluated objectively.



Proper purpose rule

Proper purpose concerns actions within power but done for improper reasons, involving subjective intent evaluation.



Two-step legal analysis

Courts first assess authority scope, then evaluate trustee's intent to determine legitimacy of decisions.

Mixed purposes and causation

Shift in fiduciary law

New Zealand law now uses a 'but-for' test to assess trustee actions with mixed purposes.

But-for test explained

The 'but-for' test invalidates actions where improper purpose was the decisive cause.

Alignment with jurisprudence

This approach aligns New Zealand law with Australian and company law principles.

Enhanced judicial scrutiny

The evolution improves understanding of fiduciary behavior and judicial review.





Practical implications and lessons



Lessons from Legler

Precise trust deed drafting

Precise drafting is critical; the case outcome depended on allowance for a sole corporate trustee controlled by a beneficiary.

Challenges proving improper purpose

Proving improper purpose is difficult due to subjective tests and the need for contemporaneous evidence.

Risk and complexity of litigation

Litigation in trust cases is risky, fact-intensive, and often yields unpredictable results.

Governance and independence

Clear independence requirements and strong governance are essential for effective trust administration.



Practical takeaways

Trustee responsibilities

Trustees must document decisions carefully and seek independent legal advice to handle conflicts of interest transparently.

Clear trust deeds

Drafters should ensure trust deeds are clear on independence, conflict clauses, and corporate structures to reduce litigation risks.

Advisor engagement

Advisors need to provide early, robust guidance and warn clients about misusing corporate entities to evade fiduciary duties.



Comparative and future perspectives

Comparative perspective

Jurisdictional differences

Legler's ruling contrasts with broader trustee power interpretations in *Grand View v Wong*, showing varied fiduciary duties.

Independence factors

Montevento emphasised trustee independence, differing from Legler's approach, highlighting jurisdictional nuances.

Global variances apply

Understanding international trends is crucial for managing cross-border trusts and adapting to local interpretations.



Open questions and future risks

Control and fiduciary limits

Determining how much control settlors or beneficiaries can exert without compromising fiduciary obligations remains uncertain.

Corporate veil piercing

Courts may increasingly pierce the corporate veil in cases of trustee misconduct, raising trust governance risks.

Risks of 'control by stealth'

Practitioners must address hidden control risks through corporate entities to ensure compliance and transparency.

Need for proactive risk management

Legal advisors should design trust instruments with diligence to withstand judicial scrutiny and future challenges.





Closing thoughts

Equity in fiduciary conduct

Equity remains vital in regulating fiduciary powers beyond strict legal instruments, ensuring proper purpose is upheld.

Importance of clarity and independence

Trustees and advisors must emphasise clarity, independence, and documentation to uphold fiduciary integrity effectively.

Future of trustee discretion

The courts will shape trustee discretion through commitment to equitable principles and fiduciary accountability.

Questions?

DENTONS

Thank you



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TRUSTEES IN AN ERA OF UNCERTAINTY



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Case Summary

Representation of Equiom Trust (CI) Limited re Estate of the late
Constantin Mattas

[2024] JRC068

By Nancy Chien, September 2025



Key Issues

- 1 Did the Bequest create a trust?**
- 2 Is the Trust valid assuming it is not charitable?**
- 3 Is the Trust a valid charitable trust?**
- 4 If the Trust is not a valid charitable trust, can aspects of it be saved or severed?**

Background

The case centers on **Clause 11** of the Will of Constantin Mattas, which established a "Trust Fund" from his residuary movable estate.

30 November 1979	Testator died, domiciled and resident in Jersey
16 January 1980	Probate granted to Lloyds Bank Trust Company (Channel Islands) Limited (now Equiom Trust)
30 November 2022	Trust Fund is valued at £26,865,868 and net annual income of £487,833

Key provisions of Clause 11 (the Bequest):

Annual payments to Testator's brother (£1,000) and Juliet McClure (£3,500) for life

Subject to above, accumulate residual income for 20 years post Testator's death

Division into two parcels with income paid to nephews Jean-Pierre (88) and Philippe Mattas (86)

Upon death of surviving nephew, capital and income to Greek Government for "Dr. Constantin Mattas Scholarship Fund"

Fund to provide university education for "**intelligent and promising young men of Orthodox Greek Church religious belief born in Greece**"

Issue 1: Did the Bequest establish a trust?

Clauses 11 (vi) and (vii)

(vi) and upon the death of the survivor of my two nephews Jean-Pierre Mattas and Philippe Mattas to hold the capital and income of both parcels augmented as aforesaid to pay the same to the Greek Government in Athens...and this for the purpose of creating a 'Prêt d'Honneur Trust' to be known as 'The Dr. Constantin Mattas Scholarship Fund' to employ the income arising from the same in such manner as the Greek Government shall see fit to provide further university education in England, France, Germany, Italy and the USSR (subject to the proviso hereinafter contained with regard to the children and grandchildren of the said Jean-Pierre Mattas and Philippe Mattas) for intelligent and promising young men of Orthodox Greek Church religious belief born in Greece of Greek Nationals also of Orthodox Church religious persuasion who shall first have undertaken to practise their profession in Greece for ten years first after qualifying and second after termination of their studies to repay without interest the said 'Prêt d'Honneur Trust' the monies expended on the said further education in ten annual payments subject to this period of repayment being extended at the option of the Greek Government to twelve years should it think fit

(vii) Provided always that the children and grandchildren... of my two nephews... shall be entitled to and have priority to further education... from the [Trust] to be created by the Greek Government from the Trust Fund...

Issue 1: Did the Bequest establish a trust?

Court's Reasoning

- ✓ Testator used the words "upon Trust" and referred to referred to a "Trust Fund"
- ✓ Reference to the name "The Dr Constantin Mattas Scholarship fund suggested separation of assets from Greek government's general assets.
- ✓ The words "for the purpose of" indicated an intention to create fiduciary duties
- ✓ Such duties were created in respect of the young Greek men as well as the nephew's children and grandchildren

Court's Finding

The Court analyzed the language and structure of Clause 11 to determine whether it created a trust or merely a gift.

Finding: The Bequest in Clause 11 of the Will did indeed create a trust and not an outright gift with a condition subsequent

The language used by the Testator clearly indicated an intention to impose fiduciary duties on the Greek Government for the benefit of specified purposes, rather than an outright transfer of ownership. The Bequest does not belong to the Greek Government

Issue 2: Validity as Non-Charitable Trust - Certainty of Beneficiaries

Legal Principle:

For a private trust to be valid, there must be certainty of objects – it can be said with certainty whether an individual "is or is not" a member of the class of beneficiaries

Problematic Criteria

- ✘ "Young" – is a 55 year old wishing to undertake studies young? 55 is the age for early retirement!
- ✘ "Promising" – it is not enough that a person attends university. What other characteristics would show "promise"?
- ✘ "Intelligent" – anyone with lower IQ than Einstein is intelligent?



Issue 2: Validity as Non-Charitable Trust - Certainty of Beneficiaries

Court's Finding

If the Trust were a non-charitable trust, it would fail for lack of certainty



Reasoning: “Intelligent and promising young men” lacked sufficient certainty.

The criteria “Greek national” and “Orthodox Greek religious belief” were sufficiently certain.

It was not possible to “cure” the uncertainty by discretion of the Greek Government “as it sees fit”. Discretion only exercisable in respect of a defined beneficial class.

The words did not allow Greek Government to give effect to an executory trust, i.e. to set further limitations. In any event the criteria are still vague.

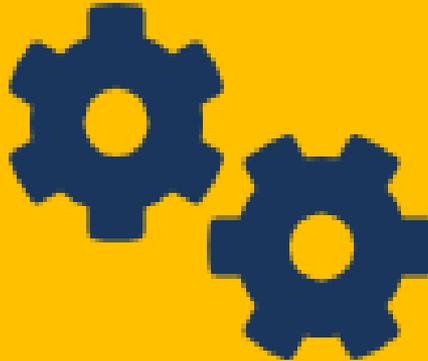
Issue 2: Validity as Non-Charitable Trust - Other Factors

Beyond certainty of beneficiaries, the Court examined three additional factors

Indefinite Duration

Pre-1984 Jersey law followed English common law rule against perpetuities

Finding: The scholarship fund's indefinite duration invalidated it under pre-1984 Jersey law



Administrative Unworkability

The Court assessed whether the trust was administratively feasible to implement

Finding: The Trust would be administratively workable, ie come up with a plan to invite applications, accumulate income



State Immunity

Could the Greek Government claim state immunity in respect of breach of trust claims?

Finding: Sovereign immunity is not a factor in determining whether Trust is invalid

Issue 3: Is the Trust a valid charitable trust?

Requirements for a Charitable Trust:

- ✓ Must be for a charitable purpose (education is recognized as charitable)
- ✓ Must be for the public benefit
- ✓ Must be exclusively charitable

Restrictive Criteria in the Trust:

- ✗ Benefit to be provided to the children and grandchildren of the nephews
- ✗ The nephew's children and grandchildren do not need to be Greek or a member of the Orthodox Church to benefit

The Court examined whether the 'Dr. Constantin Mattas Scholarship Fund' could qualify as a valid charitable trust despite its restrictions

Finding: The scholarship fund was not a valid charitable trust

Despite its educational purpose (which is generally charitable), the Trust also benefited the children and grandchildren of the nephews

The Trust is not exclusively charitable

Issue 4: Can the charitable aspects be saved or severed?

Starting position: if a Trust is not for exclusively charitable purposes, it must fail as a whole



Potential Remedies:

Cy-près doctrine: Where a charitable purpose cannot be carried out exactly, the court may apply the property to a similar charitable purpose

Severance: The ability to sever invalid parts of a will while upholding the valid ones

Coxen Categories:

The Court specifically examined whether a category (d) of the case of *Re Coxen* ([1948] 1 CH 747) existed as it was obiter

“d”: where as a matter of construction the gift to charity is a gift of the entire fund subject to a payment to give effect to a non-charitable purpose, the amount set free by the failure of the non-charitable gift is caught by and passes under the charitable gift



Issue 4: Can the charitable aspects be saved or severed?

Court's Analysis

The Court held category (d) existed and is applicable in Jersey. Therefore, the invalid non-charitable provision can be severed. The whole fund is held for the Greek Government on the death of the last surviving nephew



Finding:

The charitable aspects could be saved because the Bequest (i.e. gift to the children and grandchildren) do not affect the charitable intent

The non-charitable elements, ie the Bequest and the fact that it is of indefinite duration can be severed so as to save the charitable trust

The Court held that if it is wrong about category (d) and it does not in fact exist, the amount of the invalid gift cannot be quantified and so the whole Trust must fail and pass under intestacy

Lessons learned

- 1 Drafting of legal documents is a technical exercise. Even if the text makes sense in layman's terms, it might not be valid legally
- 2 Charitable trusts must always be exclusively charitable. Do not mix charitable and non-charitable trusts!
- 3 Non-charitable trusts must have certainty of beneficiaries. It might be worthwhile reviewing older wills and trust documents to ensure that trusts are sufficiently certain so as to give effect to the settlor/testator's wishes

It's human nature to want more money. Even though the nephews have enjoyed income from the estate during their lifetimes, they want to challenge the charitable trust to receive more funds

Thank you



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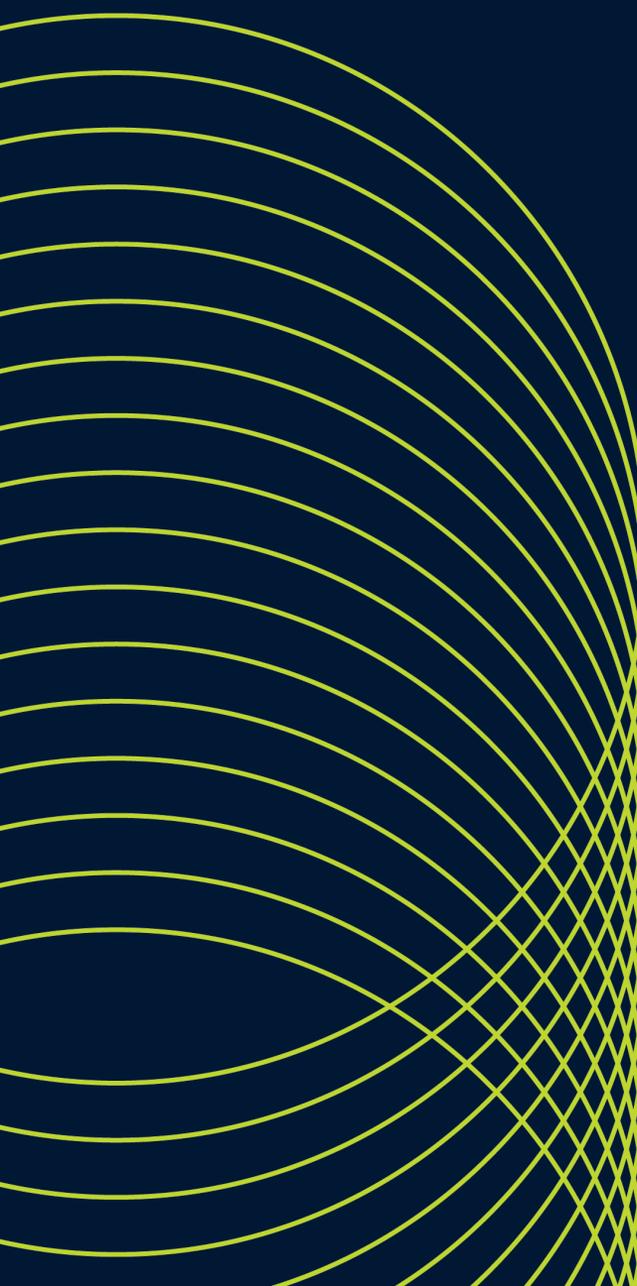


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BUTLER | SNOW

U. S. Tax Update: The More Things Change

By: John Shoemaker, Partner
Butler Snow LLP
London | Singapore | U.S.

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“Uncertainty is the Only Certainty”

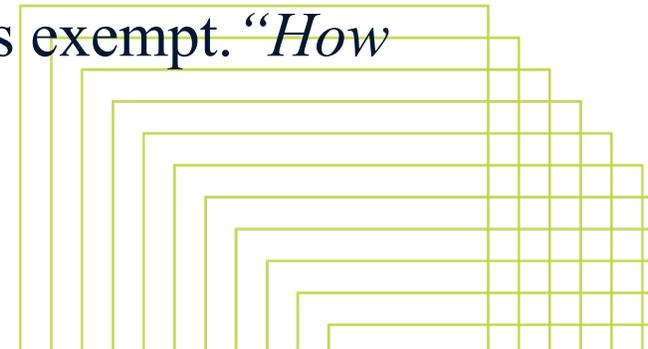
- Tax rules evolve...interpretations evolve faster
- OECD initiatives, FATCA/CRS interplay, and IRS enforcement shifts
- For cross-border advisors and trustees: this isn't new
- Our job: Stay steady, stay aware, and keep moving forward



“Maybe Good, Maybe Bad...”



- A farmer’s horse runs away. The neighbors say, “That’s terrible!” *The farmer replies: “Maybe good, maybe bad.”*
 - The next day, the horse returns—with two wild horses in tow. *Wonderful news!” the neighbors say. “Maybe good, maybe bad,” replies the farmer.*
 - His son tries to tame one, falls, and breaks his leg. *“So unlucky!” “Maybe good, maybe bad...”*
 - Soon after, the army comes looking for recruits—but his son is exempt. *“How fortunate!” Maybe good, maybe bad...”*
-



Trustees and Advisors Weather the Same Storms

- The tax environment is full of volatility & surprises
- One year's opportunity is next year's liability
- What seems like bad news may be a strategic opening
- What looks like good news may trigger long-term complexity
- Our role: *steady hands, patient perspective, and technical readiness*

The U.S. and the OECD: In but Not All In

- The U.S. remains outside CRS but exchanges information under FATCA IGA networks
- Actively participating in BEPS Pillars 1 and 2 discussions, but implementation uncertain
- IRS leveraging OECD frameworks (e.g., beneficial ownership, digital assets)
- Signals of future convergence without full adoption

How OECD Rules Influence U.S. Outcomes Indirectly

- Pressure on U.S. entities/trusts through counterparties in CRS jurisdictions
- Treaties and TIEAs used to route CRS-like information to the IRS
- DOJ/IRS referencing OECD norms in voluntary disclosures and audits
- Increasing expectation of “*functional compliance*” with global transparency

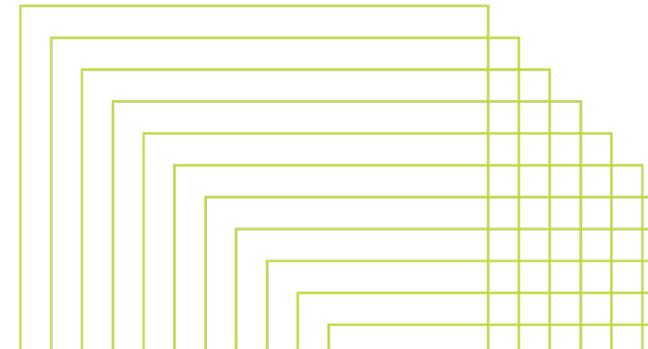


Outbound Gifts & Transfers – A New IRS Focus

- Renewed scrutiny of Forms 706 and 709 for foreign gifts, transfers to non-U.S. persons and foreign estates
- Remittance tax in OBDD
- IRS viewing failures as “substantial” omissions: unlimited SOL risk
- Coordination with Form 3520 (foreign trust reporting)

Common Scenarios with Unexpected Gift Tax Implications

- Gifts of non-U.S. real estate or company shares to children abroad
- Settlor contributions to foreign trusts that weren't reported
- Loans forgiven between family members in different jurisdictions
- Gifting digital assets or NFTs to non-U.S. persons



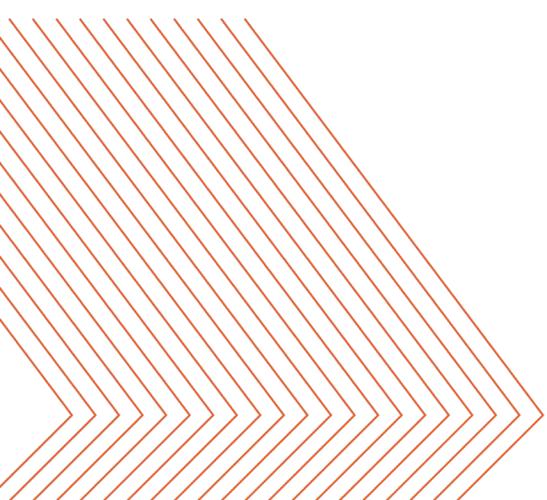
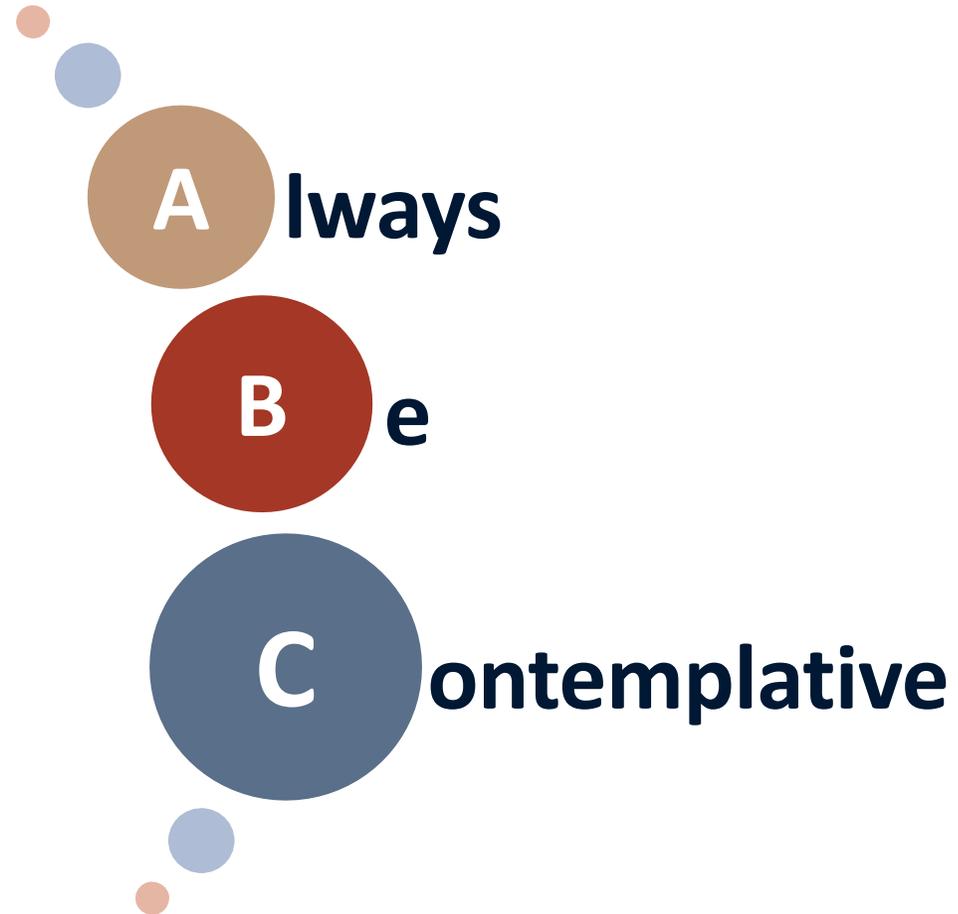
So... Maybe Good, Maybe Bad... But Definitely Changing

- Expect greater coordination between U.S. and international tax authorities
 - OECD frameworks increasingly influence U.S. enforcement priorities
 - Outbound gifts and foreign trust activity under renewed IRS focus...but resources are stretched thin
 - Trustees and advisors must lead with clarity, calm, and contingency plans
- 
-

Focus...Noise...Monitoring

- FATCA, QI, Forms 3520 and 3520-A, Forms 706 and 709
 - Bold Immigration Plans
 - Another bigger more beautiful bill
- 
- A decorative graphic at the bottom of the slide consisting of a solid blue horizontal line on the left and a series of curved blue lines on the right that sweep upwards and to the right.

Fiduciary Duties– The ABC's



Questions? Let's Talk

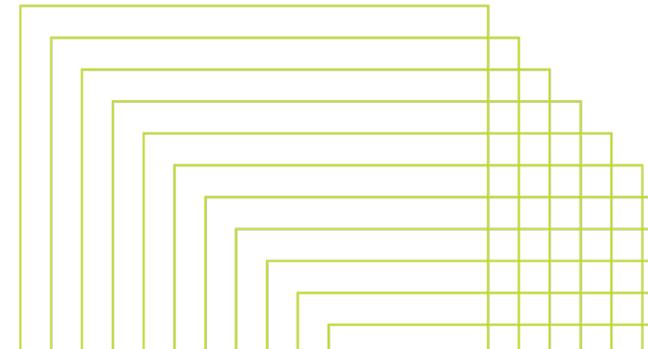
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**Baker
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**Singapore Trustees Association
Conference 2025**

17 September 2025

Wong Tjen Wee

***British and Malayan Trustees
Ltd v Ameen Ali Salim Talib
and others***
[2025] 3 SLR 16

Key Facts

- This case concerns a trust comprising a portfolio of real estate holdings and shares (“Trust”) administered by a Singapore-incorporated trust corporation as the sole trustee (the “Trustees”).
- As a result of an erroneous interpretation of a particular term in the Trust (*pari passu* versus *branch* interpretation), the Trustees had made over- and under-payments of the Trust’s income to several beneficiaries of the Trust for almost two decades.
- The Trustees thus proposed to recoup over-payments from the respective beneficiaries out of their future entitlements to the Trust income, and to thereafter pay such sums to the underpaid beneficiaries with a view of making up the underpaid amounts.
- As the over- and under-paid beneficiaries were divided over whether the Trustees could exercise its right of recoupment, the Trustees sought directions from the court under O 80 r 2 of the Rules of Court (2014 Rev Ed) (“ROC 2014”) on the exercise of its **right of recoupment** based on its proposed plan.

The Erroneous Interpretation

- Under the terms of the trust, the net income from the assets would be divided among the Settlor's children after his death. Each son was entitled to two portions and each daughter entitled to one portion.
- When his children die, their respective portions would be passed on to their male and female children in a 2:1 ratio. Each portion would continue being passed on.
- In the last two decades, the lineages of four beneficiaries have been broken.
- On each occasion, the trustee sought legal advice and decided to divide the shares of these four among all surviving beneficiaries.
- However, the siblings of the beneficiary who died in May 2014 challenged this approach, which led the trustee to seek a ruling from the High Court.
- In November 2019, after considering the conflicting legal opinions, then Judicial Commissioner Vincent Hoong concluded that the interpretation that had been applied by the trustee was incorrect.
- Instead, he ruled that when a beneficiary dies without offspring, his share ought to be divided only among those who were descended from the same child of Mr Sallim Talib.

Key Issues and Holdings

(1) Whether it was appropriate for the Trustees to seek directions in the circumstances of this case.

Holding: The Trustees were entitled to seek directions from the court as they were placed in a difficult position as to whether it could have exercised its right of recoupment.

(2) Whether the Trustees' right of recoupment was barred in the circumstances.

Holding: The Trustees were entitled to exercise their right of recoupment in this case, and the terms of the proposed recoupment were reasonable and appropriate to be implemented.

Key Holding (1) – Seeking Directions from the Court

- There are at least four situations in which a court can be involved in the administration of a trust. In a Category (1) situation, the court considers questions such as the extent of the trustee's powers and the proper construction of the trust instrument

On the facts:

- First, though the Trustees' powers uncontroversially include the right to recoupment, arguments advanced by the overpaid beneficiaries raised the question of whether this right had been impaired, and there is scant local authority on how recoupment operates.
- Second, two different groups of beneficiaries had entrenched, conflicting positions on recoupment.
- Third, the Trustees were not a neutral party and faced the prospect of being attacked in the event it either exercised the right of recoupment or failed to do so,
- Thus, it was evident that the Trustees were in a difficult position as to whether it could exercise the right of recoupment and were entitled to seek the court's directions.

Key Holding (2) – Bars to Right of Recoupment

- A trustee who has made an over-payment or a wrong payment to a beneficiary may recoup the over-payment out of any trust income remaining in, or coming into, the hands of that beneficiary.
- The High Court considered various *potentially applicable* bars to the Trustees' right of recoupment, including:
 - (a) where other remedies lie as against the Trustees;
 - (b) the doctrine of acquiescence;
 - (c) the doctrine of estoppel;
 - (d) the defence of change of position (not pleaded); and
 - (e) the defence of limitation (not pleaded).

Key Holding (2) – Bars to Right of Recoupment

(a) There is no authority suggesting that, in an action *by the trustee* for recoupment, the *underpaid beneficiaries* must first exhaust their remedy against the defaulting trustee. The trustee's duty to administer the trust correctly should *not* be dependent on the inaction of a beneficiary.

(b) While the doctrine of acquiescence could potentially be a bar to the right of recoupment, acquiescence by the underpaid beneficiaries was *not* made out as they were **not aware, nor should they have been aware, that their rights were violated** *i.e.* that they were being underpaid. In any case, even if acquiescence was made out, it was the underpaid beneficiaries, not the *Trustees*, who may be said to have acquiesced.

Key Holding (2) – Bars to Right of Recoupment

(c) While the doctrine of estoppel could potentially be a bar to the right of recoupment, the overpaid beneficiaries in this case did not demonstrate how it would be unjust or unconscionable to carry out the recoupment plan. In any case, even if the *underpaid beneficiaries* were estopped by convention, this did not apply where the *Trustees* were seeking recoupment.

(d) The defence of change of position does *not* generally apply where the overpaid beneficiary is not being asked to pay back that which he has already received and instead will experience a reduction of future payments. However, the overpaid beneficiary may show **special circumstances** such as a commitment already entered to make future expenditures based on the expectation of trust income to be received without any reduction. No such special circumstances exist in this case.

(e) The right of recoupment is *not* subject to any limitation period.

Practical Takeaway – Right to Recoupment

- This case deals with the trustees' exercise of its right to recoupment.
- Due administration of certain trusts, particularly one that makes distributions out of the trust fund, may require adjusting the amounts to be paid, such as where a beneficiary has been over- or under-paid.
- Take precautions whenever there are objections over administration matters.
- Sometimes, a Trustee may be justified *not* to exercise its right to recoup – e.g. where it would be inequitable.
- *If appropriate* – it may be possible for a Trustee to seek the assistance of the Court.

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Presentation on Cai Jin Hong and Recovery Partners GP Ltd v Rukhadze

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Power of Sale - Cai Jin Hong [2024] SGHC 295

- Trustee father held two properties at Chin Swee Road for daughter and son respectively.
- Trustee applied to court to sell:
 - No longer able to pay the outstanding mortgages.
 - He may be retrenched.
- No power of sale clause in the trust deed.
- Had to rely on section 56(1) of Trustees Act 1967
- Application was allowed.

Power of Sale - Cai Jin Hong [2024] SGHC 295

56.—(1) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument (if any) or by law, the court may —

- (a) by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on any terms, and subject to any provisions and conditions that the court thinks fit; and
- (b) direct in what manner any money authorised to be expended and the costs of any transaction are to be paid or borne as between capital and income.

What if there is the Power of Sale in the Trust Deed?

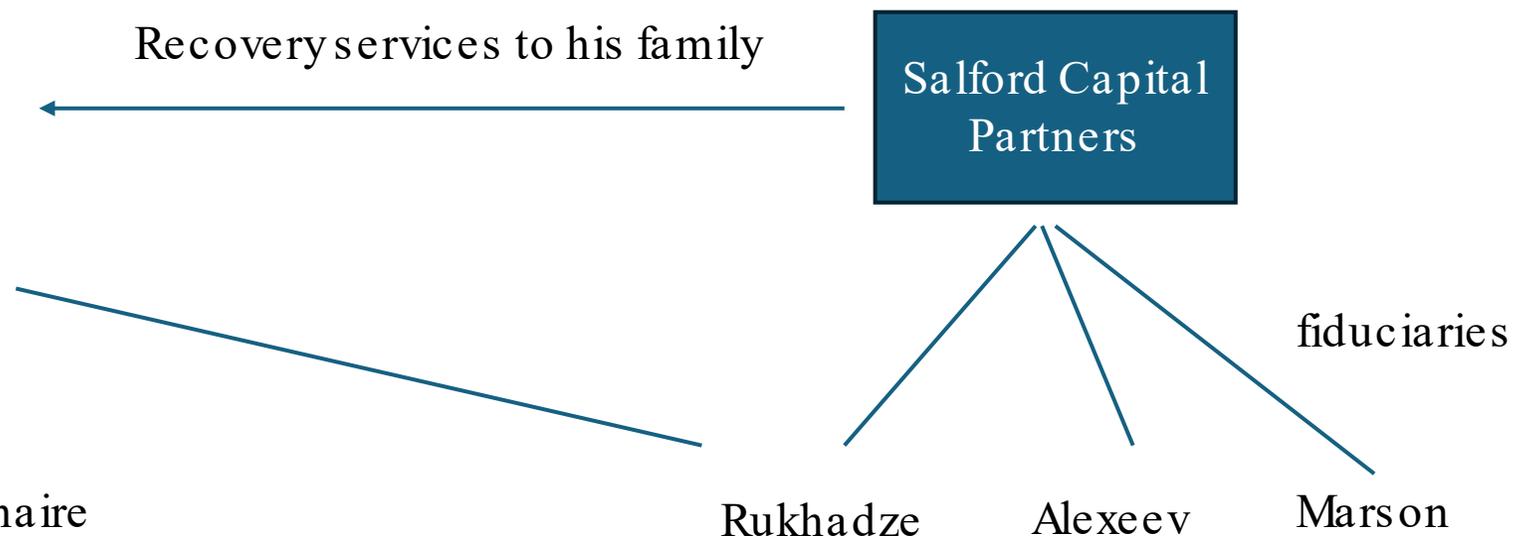
- Trustee may sell without a court order pursuant to section 13 of Trustees Act 1967.
- What if buyers or mortgagees worry about source of title?
 - Remind them of the principle of indefeasibility of title pursuant to section 46 of the Land Titles Act 1993.
 - Note section 47(4) of the Land Titles Act displaces the need for two trustees to give good receipt.
- What about section 16 of Guardianship of Infants Act 1934 whereby the guardian of an infant shall not sell the property of the infant without permission of the court?
 - Live issue which has not been decided yet.
 - Arguable that section 13 of Trustees Act 1967 is the pertinent section which allows a sale without a court order.

Recovery Partners GP Ltd v Rukhadze

[2025] 2 WLR 529



Badri – Georgian billionaire who died intestate in 2008



Preparatory steps
& denigrated Salford in 2011.
Resigned in 2011 and obtained a contract in 2012.
Did the work. Was paid in 2018.
Successors of Salford sued for an account of profits
Lower courts allowed an account of \$ 179 million less
25 % equitable allowance.

Lord Briggs (with whom Lord Reed, Lord Hodge and Lord Richards agreed)

20. It is in my view of particular importance in the present context to note that the fiduciary duty to account for profits is a rule governing the conduct of fiduciaries which exists in its own right. It is a duty or obligation imposed by equity on all fiduciaries, as an inherent aspect of their undertaking of single-minded loyalty to their principals. It is not just a discretionary equitable remedy for the breach of some other duty, such as the conflict rule, nor is it necessarily triggered by some other breach, although it very often is. A fiduciary may come to generate a profit out of his role as such without committing any breach of trust. It may be an authorised use of the trust property, or of his fiduciary powers. But he must then account for that profit if it has been made from or out of his fiduciary position, not keep it for himself. The wrong which may lead to a court order for an account of profits is, in such a case, no more or less than the failure to account itself, by a fiduciary who wishes to keep the profit for himself. The duty to account for profits does not depend upon a demand for an account by the principal, or upon an order of the court. There is simply not the relationship between breach and damages for loss caused by the breach which has to be filled by rules as to causation and remoteness which are routinely applied by the common law, and which almost always involve the erection of a counterfactual.

36. The cases in which the more protean causation analysis had been undertaken for the purpose of identifying accountable profits in the hands of a fiduciary have not involved or required the erection of any such “but for” type of counterfactual. The question is not, would the profit have been made even if there had been no antecedent breach of fiduciary duty, but did the profit owe its existence to a significant extent to the application by the fiduciary of property, information or some other advantage which he enjoyed as a result of his fiduciary position, or from some activity undertaken while he remained a fiduciary which the conflict duty required him to avoid altogether. For that purpose the court looks closely at the facts, ie what actually did happen, but does not concern itself with what might have happened in a hypothetical “but for” situation which did not in fact occur.

Lord Leggatt

(iv) In determining what loss or profit, if any, resulted from the breach, a “but for” test of causation is applied: the fiduciary is liable to compensate the principal for any loss which the principal would not have suffered or to account to the principal for any profit which the fiduciary would not have made but for the breach of duty.

(v) It is not relevant to consider whether, if the fiduciary had sought to obtain the informed consent of the principal to the use made by the fiduciary of the principal’s property (or information or opportunity), such consent would have been given. The breach of duty does not consist in failure to obtain the principal’s

(vi) Applying the “but for” test of causation in this case, the defendants breached fiduciary duties (and duties not to make unauthorised use of confidential information) owed to the claimants by appropriating for themselves the business opportunity of providing the recovery services. But for these breaches of duty, the defendants would not have made any of the profits which they in fact made from providing those services.

(vii) The judge was therefore right to order the defendants to account for those profits, subject to an equitable allowance for the work done to generate the profits.

(viii) It is unnecessary and unsound to postulate a duty owed by a fiduciary who makes unauthorised use of any property, information or opportunity of the principal to disclose and pay to the principal any profits made from such misuse without the need for a demand by the principal or an order of the court.

(ix) The proper analysis is simply that such misuse is a breach of fiduciary duty which renders the fiduciary liable to be ordered by a court to remedy the wrong done (by paying compensation for loss caused or paying over the profits gained to the principal or treating an asset as if it were held on trust for the principal).

Lord Burrows

265. Therefore, rather than saying that the account of profits rests on a primary duty such that the premise of the appellants' submissions is flawed, I consider that it is important to address those submissions head-on by accepting the "remedy for a wrong" analysis so that we are dealing with a disgorgement remedy (the account of profits remedy constituting an award of money to the successful claimant) for the equitable wrong of breach of fiduciary duty. As Cockerill J's judgments make clear ([2018] EWHC 2918 (Comm); [2019] Bus LR 1166, at para 467 and [2022] EWHC 690 (Comm), at para 6), the claimants could have chosen the remedy of equitable compensation for the wrong but have instead opted for an account of profits. That is, the claimants have chosen disgorgement not compensation.

281. The first is that a dishonest, deliberate or cynical wrongdoer should not be allowed to profit from the wrong. A person who perceives that committing a wrong to the claimant is worthwhile, because the profits to be gained exceed the losses to be compensated, should have that incentive removed. One way of removing that incentive, and the minimum necessary to achieve that goal, is to remove the profit by an award of an account of profits to the claimant. In general terms, applicable to torts and equitable wrongs alike, this type of explanation has the support of the Law Commission in its report, *Aggravated, Exemplary and Restitutionary Damages* (1997) (Law Com 247), paras 1.48-1.53.

283. The second, and more complete explanation in this context, is that it would undermine or contradict the purpose of the fiduciary duty if the fiduciary were allowed to keep unauthorised profit. As I have indicated above, at its core, a fiduciary duty imposes a duty of loyalty (or, if one wishes to emphasise the point, a duty of undivided loyalty or single-minded loyalty). It requires a sacrifice of self-interest. It would directly undermine that duty of loyalty for the fiduciary to be allowed to keep profit made from a breach of that duty. In this respect, the duty naturally carries through to the remedy of an account of profits.

287. The important point that follows from those possible explanations is that it would to some extent cut against them if a fiduciary were able to argue that he or she might otherwise have made some, or all, of the profits by not committing the breach of fiduciary duty. The fact is that the fiduciary has committed the breach of fiduciary duty and has made profits by so doing. It maintains the disincentive to a cynical wrong and fully upholds the duty of loyalty for the fiduciary to be denied the possibility of arguing that the same profit could have been lawfully made. Put another way, it would undermine the purpose of the duty of loyalty to allow the fiduciary to dictate a counterfactual investigation of the profits that might lawfully have been made.

291. The conclusion to be reached is that there are good reasons (which one may describe as reasons of principle and policy) why, in respect of an account of profits for breach of fiduciary duty, a “but for” test which incorporates a lawful alternative counterfactual should not be applied.

Singapore's position on fiduciary

- Singapore's position on fiduciary is very strict
 - See *Innovative Corporation v Ow Chun Ming* [2022] SGHC 233 – decision of Ang Cheng Hock J
- Singapore law applies a but-for causation for fiduciaries and account of profits
 - *UVJ v UVH* [2020] SGCA 49
- Singapore law rarely gives equitable allowance.



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Panel Discussion

How are China's Entrepreneurs Protecting Their Wealth?





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Update on Trust-relevant Litigation

Representation of Summit Services Limited re the B, C, D and E Trust [2024] JRC222

Presented by

Alexa Saunders

Head of Trusts and Private Wealth, Jersey

17 September 2025

CAREY OLSEN



Background

- Proposed restructuring of family trusts between four branches of the family.
- Restructuring for three of the four branches completed.
- The fourth branch could not agree allocation of assets between members of that branch.
- Trustee made its own decision to distribute assets equally among three siblings of that family branch.
- Two of the siblings (H and J) disagreed with Trustee's decision. The third sibling (K) agreed with Trustee's decision.

Principles governing Court's jurisdiction to approve a trustee's decision

1. Was the decision formed in good faith?
2. Was the decision one which a reasonable trustee properly instructed could have reached?
3. Is the decision vitiated by any actual or potential conflict of interest?

Criticisms made of Trustee's decision-making process

- No formal minute of Trustee decision.
- But there was a detailed "Determination" – i.e. a document setting out in detail the Trustee's decision and the reasons for it.
- Court satisfied that enough evidence before it to scrutinise Trustee's decision-making process.

Relevant considerations

Five relevant considerations identified by Trustee:

- Settlor's wishes
- MJ's wishes (MJ being the deceased father of H, J and K and the Settlor's son)
- The views of H, J and K, including their financial needs and reasonable expectations
- Contribution made to the family business
- Application of cultural rules and values of 'Country 1'

Criticisms of Trustee's decision

- Trustee gave insufficient weight to Settlor's wishes and MJ's wishes, and that letters of wishes supported stance being taken by H and J. Court did not agree.
- Trustee gave insufficient weight to H and J's wishes and their contribution to family business. Trustee disagreed – any expectations of H and J did not derive from the Settlor, so Trustee was entitled to give less weight to those expectations.
- Country 1's cultural rules and values. Trustee took detailed advice, sought input from H and J. Concluded no extraneous 'doctrine' that H and J subscribed to – rather the views were their own
- Court concluded Trustee had formed decision in good faith, was one that reasonable trustee properly instructed could have reached and not vitiated by any conflict of interest.

The protector's position

- Protector not in favour of Trustee's decision.
- No formal application before the court in connection with the protector's position
- Court gave helpful guidance – *“what is clear is that the Protector's consent is subsidiary to a decision by the Trustee. Without a decision of the Trustee there is nothing to which the Protector can consent. The Protector therefore exercises a review function, irrespective of whether it is a narrow or wider review and is not exercising a power jointly with the Trustee.”*

Questions

CAREY OLSEN



Speaker



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Panel Discussion

Duties of Trustees with Investment Powers





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CLOSING ADDRESS

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