ISSUE 18 JUNE 2022
QUARTERLY NEWSLETTER

STEP AUSTRALIA *NEWSLETTER*

CONTENTS

STEP Australia
ADVISING FAMILIES ACROSS GENERATIONS

WELCOME
FROM STEP AUSTRALIA CHAIR

Well done to the Newsletter Sub-committee for organising another informative issue of the *STEP Australia Newsletter*.

The STEP Australia National Conference took place in Sydney in April. The Sofitel Sydney Darling Harbour hotel provided an amazing venue for a wonderful conference. A big thank you to the organising committee, the speakers, the delegates, the sponsors and indeed the Governor of New South Wales, Her Excellency Margaret Beazley AC QC, who graciously opened the conference.

The STEP Australia National Mentorship Pilot Programme is alive and well and, by all accounts, both mentors and mentees are gaining a great deal from it. In 2023 the full programme will be rolled out. If you know anyone whom you believe would benefit from the programme, please let them know.

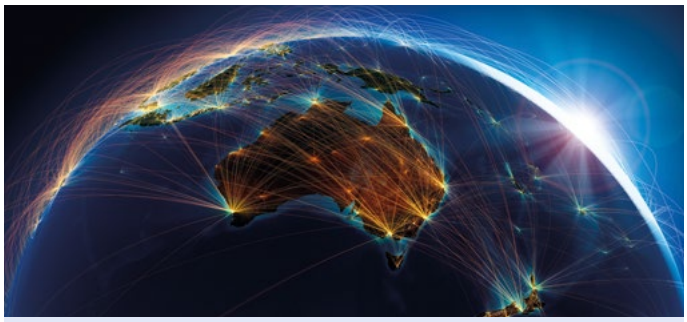
The National Committee dealing with policy and advocacy has been very active. I suggest you check the STEP Australia website to see all the various submissions that have been made.

There are many ways you can get involved in STEP in Australia. Here are a few:

- Reach out to your branch Chair/Committee.
- Advocacy – our National Advocacy Committee would love to hear from you.
- Newsletter – contribute to our *STEP Australia Newsletter*.

With best wishes,

Bryan Mitchell TEP,
STEP Australia Chair



STEP AUSTRALIA CONTACT INFORMATION

Australia STEP Australia Board Chair
Bryan Mitchell TEP
bmitchell@mitchellsol.com.au
www.stepaustralia.com/about-us/step-australia-board

NSW STEP New South Wales Branch Chair
Mark Streeter TEP
mark@streeterlaw.com.au
www.stepaustralia.com/branch/step-new-south-wales

QLD STEP Queensland Branch Chair
Jeff Otto QC TEP
jotto@northquarterlanechambers.com.au
www.stepaustralia.com/branch/step-queensland

SA STEP South Australia Branch Chair
Richard Ross-Smith TEP
rross-smith@anthonymasonchambers.com.au
www.stepaustralia.com/branch/step-south-australia

VIC STEP Victoria Branch Co-Chairs
Mercia Chapman TEP and David Gibbs TEP
mchapman@eqt.com.au
www.stepaustralia.com/branch/step-victoria

WA STEP Western Australia Branch Co-Chairs
Loreena Gillon TEP and Janene Bon TEP
janene.bon@hhg.com.au
www.stepaustralia.com/branch/step-western-australia

What recent trusts decisions from Bermuda and Jersey mean for guardians in Australia

GRAHAME YOUNG TEP, BARRISTER, FRANCIS BURT CHAMBERS, PERTH

One of the many advantages of being a member of STEP is that it is an international organisation. Membership has made me aware, through the *STEP Journal* and the STEP International News Digest, of trust cases from a range of jurisdictions I would never have thought of as having value for me in Australia.

When I previously thought of Bermuda, which was not often, the things that came to mind were the Bermuda Triangle and Bermuda shorts. Now, I can add the decisions of the Supreme Court of Bermuda (the Supreme Court).

I would like to discuss two decisions from that jurisdiction; coincidentally, the Royal Court of Jersey (the Royal Court) has considered both. The first, *Grand View*,[1] concerns the 'substratum rule' and the second, *Re X Trusts*,[2] the nature of a protector's role.

It should be no surprise that the courts of offshore financial centres from the common-law legal tradition have developed expertise and a well-deserved reputation of excellence in trust law.[3] Trusts have been established in these jurisdictions and subject to their laws in individual cases with assets of billions and, in aggregate, trillions of dollars.

Their courts are called on to adjudicate disputes and advise trustees and beneficiaries, assisted by counsel of the highest calibre.

I suggest that the first case accurately states the law for Australia, but the second is of limited, if any, use as to the role of a protector; usually called a 'guardian' in Australian discretionary trusts, this is a person with a power of veto of certain trustee decisions.

'It should be no surprise that the courts of offshore financial centres from the common-law legal tradition have developed expertise and a well-deserved reputation of excellence in trust law'

GRAND VIEW

The facts in *Grand View* were complex. The essence of the proceedings was that the Global Resource Trust No 1 (GRT Trust) was established for the benefit of members of the Wang family but the variation was to include the Wang Trust as a beneficiary and to exclude all other beneficiaries. The Wang Trust was a mixed charitable and purpose trust under which the family members could not benefit. All the assets of the GRT Trust were to be transferred to the Wang Trust and the GRT Trust terminated.

Two of the family members challenged the variation, principally on the basis of the substratum rule either directly or indirectly because the alteration of the substratum showed that the power was used for an improper purpose (a fraud on the power).

The substratum rule prohibits a power of variation being used to alter the substratum of a trust. If valid, it is a universal implied restriction on the extent of the variation power in any trust deed despite the use of the widest possible words.

The substratum of the GRT Trust was said to be to benefit members of the Wang Family, but the variation resulted in them being excluded from any benefit.

The Supreme Court reviewed the authorities, commencing with *Dyer*[4] and including a number of Australian cases,[5] and concluded there was no such rule. Further, the court found that the particular exercise of the power was not a fraud on the power: that is, the power ►

had not been exercised for an improper or ulterior purpose.

I suggest the reasoning of the Supreme Court is compelling and, in light of the fact that Australian authorities were relied upon, *Kearns* v *Hill* in particular, it is almost certain that Australian courts will reach the same conclusion.

In *Re Rysaffe*,[6] the Royal Court followed the decision in *Grand View* and, at [49], stated bluntly: 'There is no substratum rule.'

'Although it may be true that the courts of the offshore jurisdictions proceed on familiar equitable principles, they do so in different contexts and against different statutory backgrounds'

RE X TRUSTS

In the second case of *Re X Trusts*, there was a proposal to divide assets of a trust in proportions of two-thirds and one-third between two branches of a family. The consent of the protector was required. The issue was whether a wide or narrow view should be taken of the nature of the power of the protector to give or withhold consent.

The wide view was that the protector had an independent exercise of discretion. The narrow view was that the protector only needed to be satisfied that the proposed determination was one a reasonable trustee could make. The Supreme Court found in favour of the narrow view.

The decision of the Royal Court[7] was made without knowledge of the Supreme Court decision and found the protector had wide, but not unlimited, powers to grant or withhold consent. In a postscript added after a draft of the judgment was circulated (but before publication) the Royal Court discussed the Supreme Court decision but declined to reopen the matter and respectfully differed from the decision in *Re X Trusts*.[8]

WHAT THIS MEANS FOR GUARDIANS IN AUSTRALIA

With equal respect, I suggest neither decision can shed much light on the role of a guardian in typical Australian discretionary trust deeds.

In offshore trusts, a settlor places significant assets into the hands of unknown persons beyond the control of the settlor in foreign jurisdictions offering special advantages in terms of confidentiality, asset protection and more flexible trust legislation. A primary purpose is to protect assets from the depredations of creditors and fiscal authorities. Secondary purposes include maintenance of confidentiality as to the extent of assets from family members and criminal elements.

It became readily apparent that there was also a need to ensure the trustee and those appointed by the trustee to assist in the administration of the trust administered the trust as intended by the settlor. The means chosen was typically the appointment of an aptly named protector.

A feature of many Australian trust deeds is that the matriarch and patriarch responsible for founding the trust are often the initial trustee, or the only shareholders and directors of a corporate trustee as well as the guardian/s.

My conclusion is that this demonstrates that the holders of the office of guardian are only intended to play an active role after the founders are no longer involved in the administration of the trust, whether that occurs from death or incapacity or from a conscious decision to pass control to the next generation.

Further, depending on the circumstances of each trust, the guardian may be able to exercise the power of veto solely in their own interests, subject only to the doctrine of fraud on the power or, if the power is not purely personal, then in the interests of the beneficiaries or only some of them, as determined by the guardian.

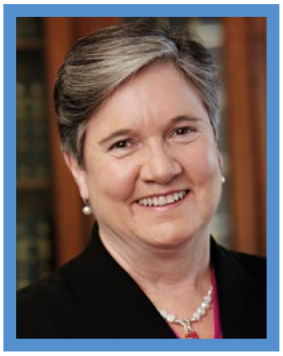
Although it may be true that the courts of the offshore jurisdictions proceed on familiar equitable principles, they do so in different contexts and against different statutory backgrounds. The differences in the circumstances and roles, in my opinion, mean that Australian courts should be wary of too readily adopting decisions from offshore jurisdictions as to protectors and applying them to the Australian office of a guardian. ■

1 *Grand View Private Trust Company Ltd* v *Wong Court of Appeal for Bermuda* (2020) Civil Appeal 5A of 2019; followed in *Re Rysaffe Fiduciaires SARL* [2021] JRC 230
2 *Re X Trusts* SC (Bda) (2021) 72 Civ; not followed in *Jasmine Trustees Ltd* [2021] JRC 248
3 For example, David Hayton, a most distinguished lawyer and co-author, among many other publications, of *Underhill and Hayton Law of Trusts and Trustees*, served as a judge of the Supreme Court of the Bahamas and the Caribbean Court of Justice for many years
4 *Dyer* v *The Trustees, Executors and Agency Co, Ltd* [1935] VLR 273
5 *Kearns* v *Hill* (1990) 21 NSWLR 107, *Jenkins* v *Ellett* [2007] QSC 154, *Lewis* v *Condon* [2013] NSWCA 201, *Mercanti* v *Mercanti* [2016] WASCA 206 and *Re Anloma Pty Ltd* [2018] NSWSC 1818
6 *Re Rysaffe Fiduciaires SARL* [2021] JRC 230
7 *Jasmine Trustees Ltd* [2021] JRC 248
8 [2021] SC (Bda) 72 Civ

Trustee disputes and cost considerations

JENNIFER BATROUNEY AM QC, VICTORIAN BAR

This article will look at a couple of decisions where Australian trustee litigants have been criticised for the costs they have incurred in running litigation (rather than settling their dispute).



ALTERNATIVE DISPUTE RESOLUTION

If trustees cannot agree upon a course of action, a practical first step that could be taken by them would be to hold a facilitated workshop with the object of resolving the dispute. Alternatively, mediation is often, if not always, to be preferred to costly litigation.

ONUS OF PROOF

If the matter does proceed to court, the court will generally only examine the exercise of a discretionary power by a trustee in order to determine whether there has been a failure on their part to exercise the discretion in good faith, upon real and genuine consideration and in accordance with the purposes for which the discretion was conferred. In short, the court examines whether the discretion was exercised but does not examine how it was exercised.[1]

It should also be borne in mind that the onus of establishing that a power was exercised in an illegitimate fashion lies on the person seeking the court's intervention.[2]

> 'There is a continuing duty on the trustee to exercise the care and diligence that a person of ordinary prudence would exercise. This is apart from their obligations under the *Civil Procedure Act 2010 (Vic)*'

RECENT EXAMPLES OF TRUSTEES INCURRING EXCESSIVE COSTS

In the *Scots' Church* case[3] the Presbyterian Church sued the trustees of the church hall over a property deed involving the church hall site in Collins Street, Melbourne.

The case ran in the Supreme Court of Victoria (the Supreme Court) over many years and included three failed mediations. The presiding judge, Justice Sifris, commented that the position taken by one of the parties 'from beginning to end was extravagant, unrealistic, disproportionate and perhaps opportunistic'.[4] He noted that the submissions on costs alone exceeded 150 pages[5] and concluded that:

> *'... this was a most unnecessary and undignified dispute. It is in fact shameful. The matter should never have come to court, particularly given the identity of the litigants. I am almost mindful to call for an inquiry into costs. No doubt millions of dollars could have been deployed for charitable purposes. What a waste of considerable time and money.'*[6]

In *Hopkins* v *Edwards*,[7] Justice Lyons dealt with the costs ramifications of a dispute involving the interpretation of a charitable trust deed that led to one faction of the family trustees purporting to remove two trustees from a rival faction of the family trustees. The plaintiff trustees were seeking an order from the court that their purported removal was invalid. The corpus of the trust was about AUD30 million.

The plaintiff trustees filed a large volume of evidence and the court book was over 3,000 pages. The defendant trustees chose not to file any witness statements in the proceeding.

The dispute was settled at a mediation that commenced after the third day of the trial. The plaintiff trustees were reinstated and the settlement was found to amount to a complete capitulation by the defendant trustees. The plaintiff trustees' legal costs were about AUD1.8 million and the defendant trustees' costs were about AUD1 million.

There was a hearing on costs over two days, during which the parties filed over 1,200 pages of materials. The defendant trustees had obtained a *Beddoe* order and both sides sought to have their costs paid on an indemnity basis from the trust.

The Attorney General submitted that it was not appropriate for the defendant trustees to be indemnified from trust assets for the costs incurred by the plaintiffs and for the defendant trustees' own costs in the proceeding, let alone on an indemnity basis.[8]

The Supreme Court held that the making of an order that a trustee is justified in defending a proceeding (a *Beddoe* order) is not a 'carte blanche' for the trustee to incur whatever legal costs they see fit. There is a continuing duty on the trustee to exercise the care and diligence that a person of ordinary prudence would exercise. This is quite apart from their ►

obligations arising under the *Civil Procedure Act 2010 (Vic)* (the Act).[9]

The Attorney General submitted that the defendant trustees were not acting in the best interests of the trust but were motivated by personal interest, in particular a desire that their conduct in the management of the trust not be subject to review – including avoiding claims for personal liability.[10]

Lyons J summarised the relevant principles in relation to a trustee's right to costs as follows:

'(1) the trustee is entitled to indemnity for costs, expenses and liabilities which are not shown to have been improperly incurred;
(2) this right of indemnity belongs to the trustee subject to circumstances being present which suffice to deny the right;
(3) the question of whether a cost, expense or liability was not improperly incurred depends on the duty upon, or power in, the trustee which resulted in incurring the cost;
(4) in the case of the costs of litigation or liabilities incurred in litigation, the relevant duty is likely to be whether in incurring the cost or liability the trustee failed to exercise the care and diligence that a person of ordinary prudence would exercise;
(5) even in proceedings involving a trustee which are adversarial in nature or where the trustee's personal interests are at stake, the court must consider whether the costs incurred by the trustee were not improperly incurred in the sense set out in (3) and (4) above; and
(6) a Court must be cautious before concluding such costs, expenses or liabilities were improperly incurred as to deprive a trustee of his or her right of indemnity.'[11]

Lyons J summarised the tenor of the proceedings as follows:

'... although this proceeding in one sense involved issues relating to the administration of the Trust, namely the proper composition of the trustees, it is far from an ordinary trust dispute involving the administration of the Trust. Rather, I consider it involved personal elements on both sides and took on elements of an adversarial proceeding.'[12]

Lyons J found that both parties requested and obtained 'Rolls Royce' representation and the way in which the proceeding was prosecuted and defended was both extravagant and not proportionate to the issues in dispute.[13] For that reason, if it were necessary to do so, he would have formed the view that each side had breached the obligation imposed by s.24 of the Act, namely to:

> 'Lyons J found that both parties requested and obtained "Rolls Royce" representation and the way in which the proceeding was prosecuted and defended was both extravagant and not proportionate to the issues in dispute'

'... use reasonable endeavours to ensure that legal costs and other costs incurred in connection with the civil proceeding are reasonable and proportionate to—
(a) the complexity or importance of the issues in dispute; and
(b) the amount in dispute'.[14]

He also noted that:

'While an ordinary litigant is perfectly free to spend as much money as he or she wishes on the conduct of litigation, even though little of it may be recoverable on an assessment of costs at the end of the day, a trustee litigant does not have that luxury when expending trust resources in litigation: as I have said, the trustee's expenditure must be prudent and reasonable.'[15]

In the end, Lyons J made orders that the defendants pay the costs of the plaintiff on a standard basis and be reimbursed out of the trust for the costs payable to the plaintiffs; and that the defendants, in turn, be reimbursed out of the trust for their costs in defending the proceeding on a standard basis.

In a further hearing three months later,[16] Lyons J noted that the parties had been unable to agree on the way costs were to be assessed. He ordered that the costs be assessed by a special referee (to be nominated by the court) at an estimated cost of AUD55,000.

CONCLUSION

The foregoing is but a sample of the many cases dealing with trust disputes of one kind or another. The common thread running through them is the spectre of costs. Thus, in deciding whether to pursue a trustee dispute through the courts, practitioners need to be mindful of other options to avoid litigation, as well as their obligations under s.24 of the Act. ■

1 *Karger v Paul* [1984] VR 161, 163-166 cited in *Wareham v Marsella* [2020] VSCA92 at [59]
2 *Attorney-General v Trustees of National Art Gallery of New South Wales* (1945) 62 WN (NSW) 212 at 214 per Roper J
3 *Attorney-General of Victoria on the relation of the Presbyterian Church of Victoria Trusts Corporation v Dorothy Rae Anstee & Ors as Trustees of the Scots' Church Properties Trust and as Trustees of the Assembly Hall of the Presbyterian Church of Victoria* [2018] VSC 200 27 April 2018 (*Scots' Church*)
4 *Scots' Church* at [46]
5 *Scots' Church* at [11]
6 *Scots' Church* at [62]
7 [2020] VSC 456 (31 July 2020) (*Hopkins*)
8 *Hopkins* at [10]
9 *Hopkins* at [200]
10 *Hopkins* at [85]
11 *Hopkins* at [234]
12 *Hopkins* at [266]
13 *Hopkins* at [271]
14 *Hopkins* at [291] and [317]
15 Citing *Re Application of Macedonian Orthodox Community Church St Petka Inc (No 2)* [2005] NSWSC 558 [71]-[72] (Palmer J) [72]
16 *Hopkins v Edwards (No 2)* [2020] VSC 698

FIRB obligations for foreign persons inheriting Australian assets

LYN FRESHWATER TEP, SENIOR TAX CONSULTANT, BNR PARTNERS

One of many changes to the foreign investment law that took effect from 1 January 2021 means that the foreign investment framework now applies to the acquisition of relevant assets (Australian land or a substantial interest in securities in an Australian entity) under a will by a beneficiary who is a foreign person. Interestingly, assets that devolve by operation of law, such as under an intestacy, continue to remain outside the framework.[1]

In the context of estate administration, FIRB Guidance Note 2 (V)[2] indicates that a beneficiary (that is a foreign person) is considered to have taken a relevant action when the legal interest in the asset is acquired on completion of administration.

The beneficiary is expected to submit their relevant foreign investment notification/application within 30 days. Fees are payable in respect of each notice given under the *Foreign Acquisitions and Takeovers Act 1975*, the amount varies generally depending on the value of the underlying property. Fees for residential properties are broadly in a range from AUD6,350 for acquisitions of AUD1 million or less, to AUD503,000 for acquisitions of more than AUD40 million. FIRB Guidance Note 10 contains more information about fees.

Importantly, be aware that just because a notice is given (and fees paid) does not mean the beneficiary can continue to own the asset. Indeed, administration practices may need to change – for example, assets sold by the legal personal representative rather than transferred to the beneficiary.

PENALTIES

Failure to give a relevant notice can attract significant penalties. Penalties relating to residential land breaches are explained in FIRB Guidance Note 14 (the Note). The Note strongly encourages foreign persons who think they may have breached the law to self disclose this to the Australian government. Lower penalties may apply if a breach is self-reported.

The case of *C of T* v *Balasubramaniyan*,[3] shows that the government and courts take compliance with the rules very seriously. The landowner in the case failed to notify the treasurer of four residential land acquisitions and breached temporary resident requirements. The Commissioner of Taxation (the Commissioner) chose not to issue infringement notices that could have attracted total maximum penalties of AUD68,400. Rather, as a deterrent, the Commissioner sought to have the court impose a civil penalty. Ultimately, penalties totalling AUD250,000 were imposed, including AUD30,000 for each failure to notify. At the time of those breaches, the relevant maximum penalty amounts were 10 per cent of the acquisition cost or market value of the residential land; these are now 25 per cent and there is a new test based on the capital gain from the asset (as defined for FIRB purposes).

REVIEW OF CHANGES

The Department of the Treasury (the Treasury) was required[4] to conduct a review of the changes that took effect on 1 July 2021, to determine what impact they had on foreign investment in Australia and the broader Australian economy, and whether the right balance is struck between welcoming foreign investment and protecting Australia's national interests.[5]

STEP, through its advocacy committee, made a submission[6] to that review noting, among other things, that:

- the devastating consequence that a child who is a foreign person (because they are not ordinarily resident in Australia) could be forced to dispose of the family home that they inherited because they are a foreign person at that time and do not meet any of the criteria for an exemption;
- the absurdity of professionals perhaps being required to advise a client to embrace an intestacy (partial or full) approach to ensure lands pass to selected beneficiaries; and
- many foreign person beneficiaries simply will not have the financial resources to go through the approval process.

Ultimately, the Treasury's evaluation did not reflect any of the STEP concerns (other than in respect of fees). However, the government indicated a package of reforms would be pursued in the second half of 2022 that focus on ensuring Australia's foreign investment framework continues to strike a balance between facilitating investment and protecting the national interest (including national security)[7]. It is hoped that STEP's concerns will be addressed in these reforms. ■

1 Amendment of Regulation 29 of the *Foreign Acquisition and Takeovers Regulation 2015 (Cth)* **2** All guidance notes can be accessed by using this link firb.gov.au/guidance-notes [2022] **3** FCA 374 **4** Section 4 *Foreign Investment Reform (Protecting Australia's National Security) Act 2020* **5** Evaluation of the 2021 foreign investment reforms; treasury.gov.au **6** All submissions are available at the previous link **7** Government response to the evaluation of the foreign investment reforms; Foreign Investment Review Board; firb.gov.au

ONLINE RESOURCES

STEP AUSTRALIA EVENTS PROGRAMME

View the full events programme at
www.stepaustralia.com/events

We welcome all STEP members to attend events hosted by other branches. For more information on the STEP Australia events calendar, contact Dior Locke at **dior.locke@step.org**

SEE MORE ON EVENTS AND KEEP UP-TO-DATE

Keep informed on upcoming STEP events via the following links:

STEP AUSTRALIA EVENTS PROGRAMME: **www.stepaustralia.com/events**

STEP EVENTS: **www.step.org/events**

Register your interest to be a speaker at STEP Australia events by emailing Dior Locke at **dior.locke@step.org**

Can't make an event? Many speakers provide a paper for members. Get in contact to find out more.

STEP AUSTRALIA WEBSITE: **www.stepaustralia.com**
STEP WEBSITE: **www.step.org**

STEP AUSTRALIA WEBSITE

The STEP Australia website has recently undergone a site-wide redesign, which brings a revitalised, modern aesthetic to the STEP brand.

On our upgraded site, you will find many new pages, member functions and publicly displayed content, including: advocacy, events, conferences, industry news, webinars on demand, national newsletters, the members' technical resource library and international connections.

www.stepaustralia.com

VISIT OUR NEW WEBSITE