

# Family court third party powers

## IMPACT OF FAMILY LAW ON TRUST DISTRIBUTIONS AND ORDERS AGAINST TRUST PROPERTY.



### INTRODUCTION

In *Kennon v Spry* [2008] HCA 56 the majority of the High Court considered the combination of the relationship of the husband as controller of the trust together with the right of the wife as a beneficiary to the due administration of the trust as **property of the parties of the marriage**. Even though the Court held the assets of the trust were not property of the parties to the marriage or either of them, by equating the value of the property constituted by the combination of the husband's power and the wife's right with the value of the assets of the trust, the court, in effect was able to include assets of the trust in the property settlement payable to the wife.

As a means of giving the wife indirect access to trust assets (Heydon J dissenting, para 187), the Court set aside a deed of variation (**1998 Instrument**) which excluded the husband and wife as capital beneficiaries and an instrument (**2002 Dispositions**) appointing and assigning the right to all of the income and capital of the trust to four new trusts, one established for the benefit of each of the four daughters of the marriage (**Children's Trusts**). The Court also included unpaid income distributions to the daughters in the asset pool notionally available to pay the wife and clearly indicated that it would, if necessary, order the trustee to distribute trust assets to the wife even though, by reason of her divorce, she was no longer a beneficiary of the trust.

*Spry's* case may be distinguished from previous Family Court (**FC**) cases because Dr Spry whilst the controller of the trust was not a beneficiary of the trust. *Spry* means effective control may equate

to ownership of assets under the *Family Law Act 1975*.<sup>1</sup> This principle conflicts with the object of asset protection which is to achieve effective control for the key individual without ownership of assets.

Since 1 March 2009, the FC now has jurisdiction over property disputes as well as parenting issues between parties to a de facto relationship including same sex couples (now defined under some legislation but not the FLA as "domestic partner relationships"). References in this article to "**spouse**" include married and de facto partners. References to "**the relationship**" are to the parties to a marriage or de facto relationship.

Advisers must consider the expansive view of property adopted in *Spry* when structuring discretionary trusts and the court's power under s 79 to alter the interests or rights of beneficiaries under the trust deed when considering distributions of income or capital. The only limitation on the powers of the FC appears to be the statutory requirement that the parties contributed to the property s 79(4).

*Spry* also raises the possibility of conflict between the application of taxation laws and the powers of the FC, retrospectively to alter the rights and liabilities of the beneficiaries of a trust.

This article considers the circumstances in which the FC may:

1. include the value of trust assets in a family law settlement;
2. make orders against a spouse trustee, appointor or shareholder in a corporate trustee; and
3. make orders against third party trustees or appointors or affecting third party beneficiaries.

### SPRY'S CASE

Dr Spry was the settlor, sole trustee and sole appointor of a discretionary trust he established prior to his marriage. He had absolute discretion to vary the terms of the trust and to appoint all of the income and capital of the trust to one beneficiary to the exclusion of the others and did so as evidenced by the 2002 Dispositions.

The wife was a beneficiary of the trust by reason only of her inclusion as "a spouse" upon her marriage to the husband. Soon after the marriage and prior to any separation, the husband excluded himself as a beneficiary of the trust.

By a majority of four to one of the judges of the High Court, the Court found in favour of the wife but the reasoning of the majority was different; only Gummow and Hayne JJ delivered a joint judgment (**majority judgment**). With the exception of Kiefel J, the Court, including Heydon J considered what constitutes "property" for the purposes of s 79 and determined the appeal on that basis.

The majority judgment at para 137 held that the husband's power of appointment as trustee and the wife's right to the due administration of the trust constituted property of the relationship within the meaning of the FLA. French CJ agreed with much of the majority judgment but he also said:

"Dr Spry's power as trustee to apply assets or income of the Trust to Mrs Spry prior to the 1998 Instrument was... a species of property held by him as a party to the marriage... even though it may not be property according to the general law. It had an attribute in common with the legal estate he had in the assets as trustee. He could not apply them for his own benefit but that did not take them out of the realm of property of a party to the marriage for the purposes of s79..."[79].

"The assets of the Trust, coupled with Dr Spry's power to appoint them to his wife and her right to due consideration, were, until the 1998 Instrument, the property of the parties to the marriage for the purposes of s79. The fact that Dr Spry removed himself as a beneficiary by the 1983 deed does not affect that conclusion. Because the 1998 Instrument effectively disposed of Mrs Spry's equitable right to be considered in the application of the Trust fund, and having regards to the trial judge's conclusions about the purpose of the instrument, the order setting it aside was an appropriate exercise of the Family Court's power under s106B. Mrs Spry's equitable right could then be considered as part of the property of the parties to the marriage..." [81].

Kiefel J found for the wife on the basis of s 85A of the FLA. Kiefel J held the word "property" in s 85A ("property dealt with by ante-nuptial or post-nuptial settlements made in relation to the marriage") is to be read as:

"including those assets to which the parties have contributed throughout the course of their marriage and which are held for their use and benefit. The Trust assets constitute property, much of which was obtained by way of the parties' contributions to the marriage." [225]

Heydon J held that the trust's assets were not property of the parties to the marriage.<sup>2</sup> Therefore, the Court had no jurisdiction under s 79 to alter the interests of the parties in the trust's assets.

## PROPERTY AND CONTROL

Section 4(1) of the FLA defines "property" as follows:

"**Property**, in relation to the parties to a marriage or either of them, means property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion".

The "interest" of the object of a bare power of appointment (a beneficiary of a discretionary trust) is not a proprietary interest.<sup>3</sup>

The primary judge, Strickland J held control equated to property.<sup>4</sup> However, prior to the decision in *Spry*, trust assets had been treated as "property of the parties to a marriage or either of them" within the meaning of s 79 only when the spouse trustee and/or appointor was also a beneficiary of that trust.<sup>5</sup> In *Stephens v Stephens*,<sup>6</sup> Bryant CJ said:

"at least on its face, and absent any other factors, a party who is the trustee of a discretionary trust, or has the capacity to appoint himself as trustee,

and is also a beneficiary, or who has the capacity to become a beneficiary or become a majority shareholder in a company (who is or can become a beneficiary) can have the assets of the trust treated as if they are his or her own property".

Therefore the Full Court of the FC (Finn J dissenting) reinstated the husband as a beneficiary so that the trust assets could be treated as his property.

However, the majority judgment and Heydon J clearly held that the husband's control of the trust was not property within the meaning of the FLA.<sup>7</sup> Finn J also held that control of a trust does not constitute property for the purposes of the FLA.<sup>8</sup>

It is the combination of being a beneficiary and having control of that trust that makes trust property under FLA vulnerable to being classified as property of that beneficiary controller.<sup>9</sup> But this combination is not "property" in trust law<sup>10</sup> nor, despite the decision of French CJ in *ASIC v Carey* (No 6),<sup>11</sup> under the *Corporations Act 2001*.<sup>12</sup>

In *Wily v Burton & Ors*<sup>13</sup> the court held an appointor's power of appointment of a new, additional or replacement trustee is "a trust or fiduciary power... and must be exercised ...in the interests of the beneficiaries" and is not "property" or "a power" "as might have been exercised by the bankrupt for his own benefit". But the Full Court has held, "the power of appointment is not a fiduciary power" and may be exercised by the appointor spouse "for his own benefit if he so chooses".<sup>14</sup> However:

"When faced with a family trust, the family court will not simply ignore the traditional laws of trusts and automatically deem the trust assets to be property of the parties available for division. The court needs to consider the trust deed and surrounding facts to determine the degree of control exercised by a party to the marriage. If that party controls the trust completely, either through the deed or by past conduct, then the Court will ignore the trust structure and include the trust assets within the asset pool of the parties. If the deed does not provide complete control then the situation may well be treated differently".<sup>15</sup>

The decision in *Coventry v Coventry*<sup>16</sup> illustrates the importance of reading the trust deed.

## TESTAMENTARY TRUSTS V DISCRETIONARY TRUSTS

Generally, the assets of testamentary trusts established by a parent for their children are more protected from FLA than

the assets of inter vivos trusts because the assets of a testamentary trust are not contributed by a child who is a party to a relationship. Instead, property passes directly from the estate of the testator to the testamentary trusts thus bypassing the beneficiaries.

Before the FC can make any orders under s 79 or s 85A, the FC is obliged to take into account:

"the financial contribution made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them...", s79(4)(a).

In *Coventry*, the trust was established by the father of the spouse. Sometime after the death of the father, the spouse's relationship broke down. In determining the asset pool, the FC took into account the value of all of the assets of the trust. The FC allowed in favour of the spouse the value of contributions to the trust assets made by the father but it also took into account the net growth in the assets of the trust to which the spouse contributed during his marriage. In the event, the FC determined the spouse's wife was entitled to 12.5% of the total net assets. This decision was affirmed on appeal to the Full Court.<sup>17</sup>

Therefore the assets of a testamentary trust may be exposed to the risks of a family law property settlement where, as occurred in *Coventry*, an adult child makes contributions of "enormous significance"<sup>18</sup> to the net growth in the assets of the trust (Mr Coventry worked full time at various grazing properties owned by a company all of the shares in which were owned by the trust).

Depending upon the nature of the assets owned by a testator and the extent to which the children are to benefit from those assets, it may be appropriate for the testator to establish only one testamentary trust for the benefit of all of the children's families instead of one testamentary trust for each child or their family. Where the will only creates one testamentary trust and more than one child of the testator controls the trust and all of the testator's children are primary beneficiaries of the trust then in the absence of clear words in the will to the contrary, it would be difficult for the FC to hold the trust property to be the property of any one particular child's relationship.

## EXTENT OF CONTROL

Where the FC determines that a spouse has the “fullest power of disposition”<sup>19</sup> over income and capital of a discretionary trust and that spouse and/or his partner is a beneficiary of the trust then the value of the assets of the trust will be taken into account in determining the property settlement. If a spouse ordered to pay money to their partner has insufficient assets outside of the trust then the FCA may:

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Advisers must consider the expansive view of property adopted in *Spry* when structuring discretionary trusts and the court’s powers under s 79 FLA.

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- order a spouse in control of the trust to pay cash or distribute capital with injunctions;
- make a mandatory injunction against the spouse to cause the trustee to distribute capital;
- order the transfer of shares in a corporate trustee from one spouse to the other; or
- replace a controlling spouse as appointor with another person.

Where a spouse does not have substantial or major control of a discretionary trust then the assets of that trust are not treated as an asset of the parties, a relationship or either of them but as a “financial resource” of the spouse who indirectly or directly can benefit from the discretionary trust s 75(2).

In *Spry* there was a notional inclusion of the trust’s assets in the pool of assets available for distribution between the parties. But no order was made by the Court requiring the trustee spouse to distribute trust assets to give effect to the court order. However, the majority of the Court<sup>20</sup> indicated that on application by the wife it would make appropriate orders to ensure the trust’s assets were distributed or paid to the wife. Further, the majority judgment said the FC had power to order

the husband trustee to appoint the capital of the trust to the wife “as if” the wife had not ceased to be the spouse of the husband<sup>21</sup> (that is a beneficiary of the trust by reason of the wife’s divorce prior to the resolution of the property settlement).

## FAMILY COURT THIRD PARTY POWERS

To date **the FC has not used all of its powers against a third party** who is unrelated to the relationship and in control of a trust. However, where the FC finds,

as in *Spry*, that a trust’s assets have been built up over a long relationship and as a result of the contributions or efforts of both spouses then the FC may “attack” trust property.

The new Part VIII A third party powers were introduced by *The Family Law Amendment Act 2003*. Section 90AE(2) provides that in proceedings under s 79, the court may make an order that:

- (a) directs a third party to do a thing in relation to the property of a party to the marriage; or
- (b) alters the rights, liabilities or property interests of a third party in relation to the marriage.

In *B Pty Ltd and Others & K and Anor*<sup>22</sup> the wife sought orders pursuant to s 90AE(2)(a) and/or s 90AE(2)(b) that each of the directors of the corporate trustees of certain trusts jointly and severally do all such acts and things and execute all such documents to cause the trustees to make a capital distribution in favour of the husband with the husband to hold such sums distributed to him upon trust for and to pay the same to the wife. The third parties and the husband submitted the new Part VIII A third party powers were unconstitutional.

The Full Court of FC indicated it would have made orders in respect of third parties had the wife’s case been in order. It also clearly indicated there was sufficient nexus between the matters in respect of which laws may be made by the Federal Parliament under the constitution of the Commonwealth of Australia and the wording of the provisions in the FLA for the court to find that s 90AE is valid and therefore the court can make orders under that section.

As the wife’s application for amendment and joinder of new third parties was not in order and the wife failed to show that trust assets were property of the parties to the marriage (the husband only was a trust beneficiary and the wife did not control the trusts) it was unnecessary for the court to make orders in respect of the constitutional validity of s 90AE.

Even before the introduction of s 90AE, the High Court recognised in *Ascot Investments Pty Ltd v Harper*<sup>23</sup> that in appropriate cases the FC could make orders against a third party. For example, “in the case of shams, and companies that are mere puppets of a party to the marriage”.<sup>24</sup>

Further, the Court said it was not doubted that the rights of third parties may be indirectly affected by orders of the FC.<sup>25</sup>

In *Ascot’s case*, the primary judge ordered that a transfer of shares in the company from the husband to the wife be registered by the company. The husband and the sons of the relationship were the directors of the company. The company refused to register the transfer. However, despite all attempts by the husband to frustrate the property settlement, the Court held there must be “cogent evidence” to suggest the husband had exercised control over the company before it would order the company to register the share transfer. The Court found the sons had not been “overtly influenced” by the husband. The Court held the FC had no power to order directors of a company to register shares, where the constitution of the company enabled them to decline to do so, at least where the company was not controlled by the husband.<sup>26</sup>

**The FC has made orders which affect the rights of third parties in respect of trust assets.**

In *Spry*, the Court chose not to make orders against the trustees of the Children’s Trusts even though those trusts between them

held all the assets of the trust established by Dr Spry (**Family Trust**). Instead, the Court chose to include the trust assets in the property settlement by setting aside the 1998 Instrument and 2002 Dispositions under s 106B.

Further, Strickland J said that if the assets of the Family Trust were not property of the marriage then he would have set aside Mr Kennon's appointment as joint trustee with Spry of the Children's Trusts so that the assets of those trusts could be taken into account as a financial resource of Spry.<sup>27</sup>

The majority of the High Court had no difficulty in making orders which affected the interests of the children to the marriage because it considered the children had supported the husband's conduct in making the 2002 Dispositions to them and the 1998 Instrument removing the wife as a beneficiary of the Family Trust and those instruments were made to defeat an anticipated order under the FLA.<sup>28</sup>

Further, Kiefel J held that unlike the facts in *Ascot*, the facts in *Spry* showed the key individual **had exercised control over the trust** and affected the rights of third parties.<sup>29</sup> Therefore the Court could make orders which would operate to the detriment of third party beneficiaries of the Family Trust including the children.

*"Here the interests of the other beneficiaries, in the due administration of the Trust, were always subject to the husband's control. The extent of that control, to the detriment of the third parties' interests, was shown by the attempted distribution of the entire Trust property to the children's trusts" [236].*

## TAX CONSEQUENCES

In *Spry*, distributions of income had been made to the children as beneficiaries of the Family Trust but those distributions were unpaid to the extent of \$114,000. Strickland J initially deducted the **unpaid entitlements** from the net asset pool but added them back in.

Consequently, if the trustee were ordered to distribute all of the income and capital of the Family Trust to the wife then there would be no trust funds to pay out the unpaid entitlements. In other cases a trust fund may be insufficient to pay all entitlements.

As the unpaid entitlements should have been included in the income of the children for the financial year in which the distributions were made and the children would have been liable to pay tax on that income, the children would have been taxed on money distributed but not paid to them and potentially not recoverable by them against the trust fund.

Query whether the children could have relied on the orders of the Court made 3 December 2008 to amend<sup>30</sup> their prior years' income tax returns to reduce their income by the amount of the unpaid entitlements when as a matter of fact trust income had been distributed to them.<sup>31</sup>

It is unlikely that unpaid entitlements due to a party genuinely unrelated to the relationship would be set aside by the FC.

The majority judgment said that before making any order in respect of the trust property, it would have to consider whether it were "just and equitable"<sup>32</sup> to do so having regard to the interests of any third parties<sup>33</sup> other than the children who may also fall within the class of beneficiaries.<sup>34</sup> Further, both the majority judgment and Heydon J<sup>35</sup> cited *Ascot* as authority for the principle that the rights and obligations of third parties should not be extinguished or enlarged "in the absence of clear and unambiguous words".<sup>36</sup>

The Family Trust may have been liable to pay **capital gains tax** on the 2002 Dispositions. Had that been the case and if the tax remained unpaid then it is unlikely the FC would deduct it from the asset pool but rather from the husband's share as in Commissioner of Taxation & Worsnop.<sup>37</sup>

Consequently, there is the possibility that tax paid prior to FC orders may not be recoverable if the tax event occurred prior to the orders being made.

Further, the Commissioner of Taxation may, where FC orders have been made, only be able to recover tax debts from the spouse the FC finds should be responsible for the tax.

## STRUCTURING DISCRETIONARY TRUSTS

The court in *Spry* did not question the effectiveness of any of the following asset protection mechanisms which involve the appointment of:

- a third party as trustee and/or appointor (eg a corporate trustee or corporate

appointor with different people as shareholders in each company or as shareholders and natural person trustees or appointors);

- at least two natural person trustees and two natural person appointors with the appointor to include one person who is independent of the business and relationship risks of the key individual; and
- different people if only one person is to act as trustee and another as appointor.

It is now common practice not to include the role of guardian or supervisor in trusts. However, these roles were useful when occupied by a different person to the trustee in restricting the control of the trustee by making the exercise of some powers of the trustee subject to the consent of the guardian or supervisor. The extent of the trustee's control of the trust property may also be restricted by expanding the role of the appointor to include a requirement for the trustee:

- to obtain the consent of the appointor to all (or all significant) distributions of capital;
- to obtain the consent of the appointor to any variation or amendment of the trust deed;
- to obtain the consent of the appointor to bringing forward the vesting date; and
- to obtain asset protection advice from a lawyer or accountant with expertise in that area prior to winding up the trust prior to the vesting date.

It is most important that there is an independent appointor to protect the surviving spouse of the current generation from the risks of entering into a new relationship. Upon the death of the current generation it may be appropriate to include all of the children of the next generation as the appointors and the shareholders of a corporate trustee as it would be difficult for the FC to find that trust assets are the property of any one spouse when each of the children is in a relationship.

It is also important that the independent appointor be a person who will not simply follow the instructions of the key individual (alter-ego) but will make their own determination. For example, even though the "independent appointor" is likely to

consent to a capital distribution they have the power to choose not to do so.

## CONCLUSION

There is potential conflict between the application of taxation laws (including State Duties laws) and FLA. Further, FC orders may retrospectively affect rights and obligations. How such conflict should be determined is unclear. It does appear though that in matters before the FC involving assets acquired either prior to (as in *Spry*) or during marriage, and where there is a long marriage, the FC will use its powers to apply the law in favour of determining a “just and equitable” settlement between the parties of the relationship irrespective of how that affects the rights of third parties.

Therefore, when structuring new discretionary trust deeds or advising clients in relation to the transfer of existing trust assets to the next generation, an adviser should perhaps recommend to the key individual that they and upon their death, their spouse and upon the survivor’s death, their children have limited control of a discretionary trust. This may be achieved, if it is possible and appropriate to do so, by:

- varying the trust deed by giving the appointor protective powers;<sup>38</sup> and/or
- by changing the persons who are appointors (eg to include an independent) or trustees.<sup>39</sup>

Whilst limiting the control of a spouse over a trust may not ensure the trust assets are not classified by the FC as a financial resource of a surviving spouse or the next generation, it is still important to limit control especially where the trust assets comprise real property used by a family business or perhaps, a holiday house.

Once a relationship has broken down then regard must be had to the powers of the FC before taking any action in respect of the trust including distributions of income (eg by ensuring that they are paid).

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## Appendix

### Relevant provisions of *Family Law Act 1975*

#### **Definition of “Property” in section 4(1)**

**property**, in relation to the parties to a marriage or either of them, **means property to which those parties are<sup>40</sup>**, or that party is, as the case may be, **entitled**, whether in possession or reversion.

#### **Section 79**

- (1) In property settlement proceedings, the court may make such order as it considers appropriate:
  - (a) in the case of proceedings with respect to the property of the parties to the marriage or either of them **altering the interests** of the parties to the marriage **in the property**;

#### **Section 80**

- (1) The court, in exercising its powers under this Part, may do any or all of the following:
  - (d) **order that any necessary deed or instrument be executed** and that such documents of title be produced or such other things be done as are necessary **to enable an order to be carried out effectively** or to provide security for the due performance of an order;
  - (e) appoint or remove trustees;

#### **Section 85A**

- (1) The court may, in proceedings under this Act, make such order as the court considers just and equitable with respect to the application, for the benefit of all or any of the parties to, and the children of, the marriage, of the whole or part of property dealt with by ante-nuptial or post-nuptial settlements made in relation to the marriage.

#### **Section 106B**

- (1) In proceedings under this Act, the court **may set aside or restrain the making of an instrument or disposition** by or on behalf of, or by direction or in the interest of, a party, which is made or proposed to be made **to defeat an existing or anticipated order** in those proceedings or which, irrespective of intention, is likely to defeat any such order.
- (3) The court must have regard to the interests of, and shall make any order proper for the protection of, a bona fide purchaser or other person interested.

#### **Section 114**

- (3) A court exercising jurisdiction under this Act in proceedings other than proceedings to which subs (1) applies **may grant an injunction**, by interlocutory order or otherwise (including an injunction in aid of the enforcement of a decree), in any case in which it appears to the court to be **just or convenient to do so** and either unconditionally or upon such terms and conditions as the court considers appropriate.

## Reference notes

- 1 Relevant provisions are set out in the Appendix to this article.
- 2 [187].
- 3 *Spry’s case Heydon J* [160] and *ASIC v Carey (No 6)* [2006] FCA 814 per French J [29]; cf *Spry’s case per French CJ* [81].
- 4 *Spry’s case French CJ* [26 – Strickland J at point 3]; French CJ [79].
- 5 *Ashton v Ashton* (1986) FLC 91-777; *Davidson v Davidson* (1991) FLC 92-197;  
*Harris v Harris* (1991) FLC 92-254; *Goodwin and Goodwin Alpe* (1991) FLC 92-192; *Coventry v Coventry* [2004] Fam CA 249.  
(2007) 212 FLR 362 [43].
- 6 *Spry’s case Gummow and Hayne JJ* [137]; *Heydon J* at [176]; cf *Carey (No 6) case French J* [19] [29] [37].
- 7 *Spry’s case see Gummow and Hayne JJ* [124].
- 8 *Carey (No 6) case per French J* [19] [29] and [37].
- 9 *Wily v Burton & Ors* 126 ALR 557; *Public Trustee v Smith* [2008] NSWSC 397.
- 10 Above n 1.
- 11 *Spry’s case Heydon J* [160].
- 12 Above n 8.
- 13 *Goodwin’s case* [78273].
- 14 *Michael Taussig QC and Peter Trimbois, “Trust Busters: Does the Family Court Ignore Trusts?” paper delivered at the 11th National Family Law Conference in September 2004, at 54.*
- 15 *Coventry’s case* [174] [179] and [193].
- 16 *Coventry’s case* [174] [179] and [193].
- 17 *Ibid* [174].
- 18 Above n 4.
- 19 *Spry’s case Keifel J* [237] *Gummow and Hayne JJ* [138].
- 20 *Ibid* [138].
- 21 [2008] FamCAFC 113.
- 22 (1981) 148 CLR 337.
- 23 *Ibid* Gibbs J [137].
- 24 *Ibid* Barwick CJ [343], Gibbs J [354].
- 25 *Ibid* Barwick CJ [343], Gibbs J [354].
- 26 *Spry’s case see French CJ* [30 point 6].
- 27 *Ibid Gummow and Hayne JJ* [138], French CJ [81].
- 28 *Ibid* [236].
- 29 Assuming the period for amending any assessment had not expired.
- 30 In or about 2003-2005.
- 31 The court cannot make an order under s 79 unless it is “just and equitable” to do so s 79(2) FLA.
- 32 Section 106B(3) FLA requires the court to have regard to the interests of third parties and to make any order proper for their protection.
- 33 *Spry’s case Gummow and Hayne JJ* [138].
- 34 *Ibid* [136] and *Heydon J* [175].
- 35 *Ascot’s case Gibbs J* at 354-355, (*Stephen Aickin and Wilson JJ agreeing*).
- 36 [2009] FamCAFC 4.
- 37 Note: any variation permitted by the trust deed may constitute a resettlement and therefore the issue of resettlement must be addressed before varying a trust deed.
- 38 If the trustee holds any land then duty may be payable upon the change in trustee.
- 39 *Writer’s emphasis.*
- 40