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Details matter when wanting to unilaterally remove a trustee

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Previous articles in this Bulletin have considered various aspects of the rules in relation to any role that grants a party the right to change the trustee of a trust (for example see 2022 WTB 39 [458] and 2023 WTB 17 [226]).

Many - although certainly not all - trust deeds have a role that allows for the unilateral removal of an incumbent trustee, most often referred to as an appointor, however also referred to as a principal, guardian, protector, or nominator.

The exact rights that may be exercised will depend on the precise terms of the trust instrument; a concept otherwise captured by the often recited "read the deed" mantra.

Leading case

One of the leading cases in this area is the High Court decision in Montevento Holdings Pty Ltd v Scaffidi [2012] HCA 48, where a disgruntled beneficiary attempted to rely on a technical interpretation of the way the appointor of a trust could exercise their power under the trust deed to change the trustee to support the argument that the change was ineffective.

The relevant clause in the trust deed precluded individual appointors from personally being appointed as trustee. The individual appointor appointed a company as trustee of which he was personally the sole director and shareholder. The newly appointed trustee company then promptly distributed all assets to the appointor personally (in his role as a beneficiary).

The High Court held that the ordinary and natural meaning of the clause was that an individual person holding the office of appointor could not personally appoint themselves as trustee. However, because the trust deed consistently distinguished between individuals and companies, it did not prohibit the appointment of a corporate trustee, even if that trustee was controlled by the individual appointor.

The steps taken by the appointor were therefore valid and not open to challenge.

Further key case

Other decisions confirm the same principles as in Montevento, for example the case of Baba v Sheehan [2019] NSWSC 1281.

In Baba, a party that controlled one of 3 unitholders of a unit trust, appointed a new trustee of the unit trust which was controlled solely by him. The previous trustee was controlled by the principals of all 3 unitholders.

When the 2 unitholders excluded from the new trustee company challenged the exercise of the appointor's decision the Court confirmed:

1. Unless prevented by the trust instrument (as was the case in Montevento), there is unlikely any rule prohibiting an appointor appointing themselves as trustee.

2. Here, as in Montevento, the appointment of a separate legal entity (controlled by the appointor), being a company, was clearly permissible.
3. The power of appointment held by an appointor is unlikely to be a fiduciary power.
4. This being said, if the power is used in a manner that disregards the interests of the beneficiaries, a purported change of trustee may be held to be invalid.
5. Here, there was no such evidence and therefore the change was held to be valid.

Fiduciary duty?
The Baba decision also considered the often asked question of whether an appointor role is a fiduciary one.
This was in the context that if an appointor is a fiduciary they will be unable to appoint themselves as trustee of a trust.

The case mentioned as possible authority for the conclusion was Re Skeats' Settlement (1889) 42 Ch D 522, where it was held as follows:

"The ordinary power of appointing new trustees, under a settlement such as this is, of course imposes upon the person who has the power of appointment the duty of selecting honest and good persons who can be trusted with the very difficult, onerous, and often delicate duties which trustees have to perform. He is bound to select to the best of his ability the best people he can find for the purpose.
Is that power of selection a fiduciary power or not? The answer is that he cannot exercise the power for his own benefit. Why not again? The answer is inevitable. Because it is a power which involves a duty of a fiduciary nature; and I therefore come to the conclusion, independently of any authority, that the power is a fiduciary power."

This (as noted, without authority) conclusion has been criticised in leading textbooks.

It was also discredited in Baba for the following 2 key reasons.

1. Provisions allowing for an appointor to appoint a new trustee are commonplace in discretionary trust deeds and it would be surprising if such provisions were subject to a rigid, but unexpressed, limitation preventing the appointment of the appointor.

2. If there was such a rule, the clause in the Montevento trust deed expressly preventing an appointor from appointing themselves, would have been unnecessary.

On appeal, in Baba v Sheehan [2021] NSWCA 58, it was further confirmed that the conclusion an appointor power is a fiduciary power is open to serious doubt. This said, the appeal decision also confirmed the following.

• The doctrine of "fraud on a power" does, however, operate to constrain the power of an appointor to appoint trustees.
• A purported exercise of an appointor power will be void if exercised for a purpose, or with an intention, beyond the scope of, or not justified by, the instrument creating the power.
• Here, the primary judge made an assessment of the credibility and reliability of the appointor's evidence as to his motives in exercising his power and concluded that there was no basis to justify a conclusion that the decision to change the trustee was improper.

• Ultimately, a purpose of maintaining or exerting control of a trust, absent any evidence that the appointee intends to act other than properly in accordance with its responsibilities as trustee, is consistent with the purpose for which an appointor power is created. This conclusion is particularly the case in the context of the modern discretionary trust.
• In other words, usually a significant, if not dominant, purpose of this type of power of appointment is to reserve to the appointor the ability to "control" the trust by removing and replacing the trustee (see In the Marriage of K R and M I Davidson (No 2) (1990) 14 Fam LR 817 and Mercanti v Mercanti [2016] WASCA 206).

The above conclusions however are predicated on the trust deed not itself prohibiting or restricting certain steps by the appointor, that is "much will depend on the terms of the trust instrument" (see Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liquidation) [2001] FCA 1628).

For example, in Austec Wagga Wagga Pty Limited v Rarebreed Wagga Pty Limited [2012] NSWSC 343, an appointor was prevented from appointing a company he heavily influenced as a replacement trustee, on the basis that the trust deed mandated that the appointor power "not be exercised in favour of the person exercising" it.

Recent decision
In the 2024 decision of VOVI International Pty Ltd v VOVI Australia Charity Association Incorporated [2024] QSC 38, the primacy of the terms of the trust deed are again highlighted.

In this case, under the relevant trust deed, the power of removal and appointment of trustee was held by the appointor, or, if there was no such person, the trustee.

The term "appointor" was relevantly defined as "Si Hang Luong, the Spiritual Leader of the VOVI religion, or in the event of his death the Spiritual Leader for the time being of the VOVI religion".

Following the death of the Spiritual Leader, a dispute arose due to the purported removal of the incumbent trustee by a self-proclaimed new Spiritual Leader.

The Court concluded however that neither the trust deed nor any aspect of the evidence adduced provided any guidance or recognised means of ascertaining whether anyone, and if so whom, became the Spiritual Leader for the time being of the VOVI religion subsequent to the incumbent appointor's death.

Thus, pursuant to the terms of the trust deed, the power of changing the trustee automatically passed to, and were held by, the incumbent trustee company itself.