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1 Abject failure to seize control of over $200M of trust

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In modern Australian trust law, there are arguably 3 foundational principles that are universally true, namely:

A. the starting point in any situation is to read the deed;

B. family discretionary trusts are the optimal structure for single family units, and often an unmitigated disaster where there are multiple families;

C. specialist trust advisers have to date had little exposure to periods of slow workflow.

The decision in *Boyded Industries Pty Ltd & Anor v Heartland One Pty Ltd & Ors* [2025] NSWSC 1344 provides evidence of each of the above principles.

The case involved various family members of the 'Heartland Motors Group' and is the latest instalment in intra-family litigation that has extended over many years. The disputes include a further recent decision in *Turner v Richards* [2025] NSWCA 83, where one member of the family unsuccessfully argued that a single conversation in 2019, which was not recorded in any contemporaneous document, took place to validly appoint him as chair of the board of directors of all of the companies in the Group.

In the case here, that same family member contended that he had been given 'sole responsibility' to approve and execute all documents, on behalf of a trustee company - an argument the court rejected given:

(A) the lawyers for the trust drafted documents on the basis that the board needed to approve their execution;

(B) the family member informed the lawyers he intended to get the relevant documentation signed at a forthcoming board meeting;

(C) the family member attempted to find (and subsequently created) evidence some 7 years later to support an argument that a board meeting had occurred.

The Group had a relatively standard corporate structure (helpfully set out in the judgment by way of a diagram, see at the end of this article).

One of the subsidiary companies also acted as trustee of a discretionary trust, which owned a significant property portfolio that based on the decision was likely valued in excess of $200M (with many of the properties leased back to the operating companies).

While not expressly suggested in the decision, the factual matrix indicates the trustee may not have obtained (or at least, may not have acted on) extensive specialist advice since establishment of the trust in 1980, for example:

(a) little regard appears to have been given to the asset protection risks of owning multiple properties within one structure (ie 'domino' risk), nor owning assets of different risk profiles (eg listed shares, commercial property, residential property);

(b) a range of second order consequences of having multiple material assets owned via the one trust (for example, succession planning, financier restrictions, land tax planning, the same vesting date applying to all assets regardless of the acquisition date);

(c) failure to discharge the duty to consider before making distributions (it appears all substantive distributions were habitually made essentially 'in lock step' with the shareholding percentages of the ultimate holding company of the Group);

(d) having a trustee company that was owned as a lower level subsidiary of a wider trading group of companies;

(e) allowing the original (corporate) appointor of the trust to be deregistered, leaving the trust without an appointor for over 20 years (a situation explored in another recent decision, namely in *The application of Dhuramein Nominees Pty Ltd* [2025] NSWSC 1329, where only the appointor had the power to vary the trust deed; here the trustee retained an ability to vary the trust deed);

(f) possibly failing to understand that anyone acting as an appointor was automatically excluded from the range of potential beneficiaries under the trust deed.

Many aspects of the decision focused on the credibility of the evidence advance by each key witness, and (apparently ever escalating) tensions between branches of the extended family.

In relation to the trust, the key issues of focus were an attempt to appoint a new person as appointor (being the same director who unsuccessfully claimed he had been given sole control of the trustee company), and that new person then exercising the powers of the appointor to unilaterally change the trustee and control structure of the trust to persons and entities sympathetic to the objectives of the new appointor.

In holding that the purported appointment of appointor was void (and thus all other steps taken to seize control of the trust were also invalid) the court observed:

1. The ability to rely on section 1322 of the Corporations Act (which allows a court to overlook procedural irregularities, which here were suggested to be a failure to achieve a quorum for a director meeting) is predicated on the key features of the factual matrix having in fact occurred (here the court held no board meeting in fact took place), and further:

(a) the thing that was in fact done (namely, the passing of a resolution by the agitating family member alone) differed in form, substance and effect from the thing that ought to have been done (namely, the consideration and, if thought fit, passing of a resolution by the board of the trustee company (see *Onefone Australia Pty Ltd v One.Tel Ltd* [2010] NSWSC 1120);

(b) the conduct of the family member some 7 years after the alleged board meeting of creating two versions of the minutes for the alleged meeting indicated the family member in fact understood that the agreement of the board was essential;

(c) substantial injustice would have been caused by the failure to seek the agreement of the board to the resolution.

2. The provisions of a power to vary a trust deed must be considered carefully, with reference to leading decisions - here the relevant variation power was almost identical to that in one of the trust deeds considered in the decision of *Mercanti v Mercanti* [2015] WASC 297, which the court flagged had not been considered appropriately in submissions. While expressly not deciding whether the trust deed here permitted the purported variation, the court did set out in detail the key conclusions from that earlier decision, namely:

(a) the natural and ordinary meaning of the words 'the Trustee may … vary … the trusts hereinbefore provided' does not extend to varying the terms and conditions of the trust deed dealing with the office of Appointor as distinct from the trusts created by the trust deed;

(b) the (trust deed) distinguishes between 'the trusts' and 'the trusts powers and provisions' of the trust deed. The definition clause defines 'Trust' to mean 'the trusts powers and provisions as constituted by this Deed of Settlement';

(c) the word 'Trust' appears in cl 15.4 which refers to persons claiming a beneficial interest in over or upon 'the property subject to this Trust'. Clause 15.10 specifies that the law applicable to 'this Trust' shall be the law of the place of the residence of the Trustee;

(d) in contrast, the power of amendment in cl 14 refers to varying 'the 'Trusts' herein before provided not 'the Trust'. Perhaps more persuasive is that cl 2.1, in which the Settlor declares the trust, distinguishes between 'the trusts' and 'the powers and provisions' in the trust deed.

3. Again, while not needing to determine the issue, the court confirmed that it would have been possible for the trustee (if it otherwise had the power) to simultaneously amend the deed and then exercise the power created by the amendment, in particular:

(a) it is correct that a trustee must exercise a power at the time it falls to be exercised, and cannot fetter its exercise of discretion by determining to exercise a power in advance (see *Fitzwood Pty Ltd v Unique Goal Pty Ltd* (2001) 188 ALR 566, *Thacker v Key* (1869) LR 8 Eq 408 and *Re Baron Vestey's Settlement* [1951] Ch D 209);

(b) this said, here the trustee had not impermissibly 'fettered its discretion' regarding the manner in which its power would be exercised in the future, by determining who should be appointed as appointor of the trust in advance of the trustee having (mere moments later) the power to do so.

4. Although a power to appoint a trustee might not be correctly characterised as a 'fiduciary power', the power is controlled by the doctrine of 'fraud on a power', such that it must be exercised bona fide for the purpose for which it was conferred (see *Baba v Sheehan* [2021] NSWCA 58 and *Mercanti v Mercanti* (2016) 50 WAR 495), thus:

(a) the question of the purpose for which an appointor exercises a power to replace the trustee is a question of fact and, if the appointor does so as a result of a legitimate concern to protect or advance the interests of the objects of the trust, then the appointor will be acting for a proper purpose (even if the appointor replaces the existing trustee with a trustee which the appointor controls);

(b) for example, if the appointor, in good faith, has formed the view that the replacement trustee (which the appointor controls) is better qualified to manage the affairs of the trust, in the interests of the objects of the trust, then there will be no 'fraud on the power';

(c) if, however, the appointor is not, in fact, acting out of any legitimate concern for the interests of the objects of the trust, but is instead replacing the existing trustee in order to gain, or maintain, control of the management of the affairs of the trust, or to remove such control from other directors or shareholders of the existing trustee, then the appointor will be exercising the power for a foreign purpose, and this will be void and ineffective.

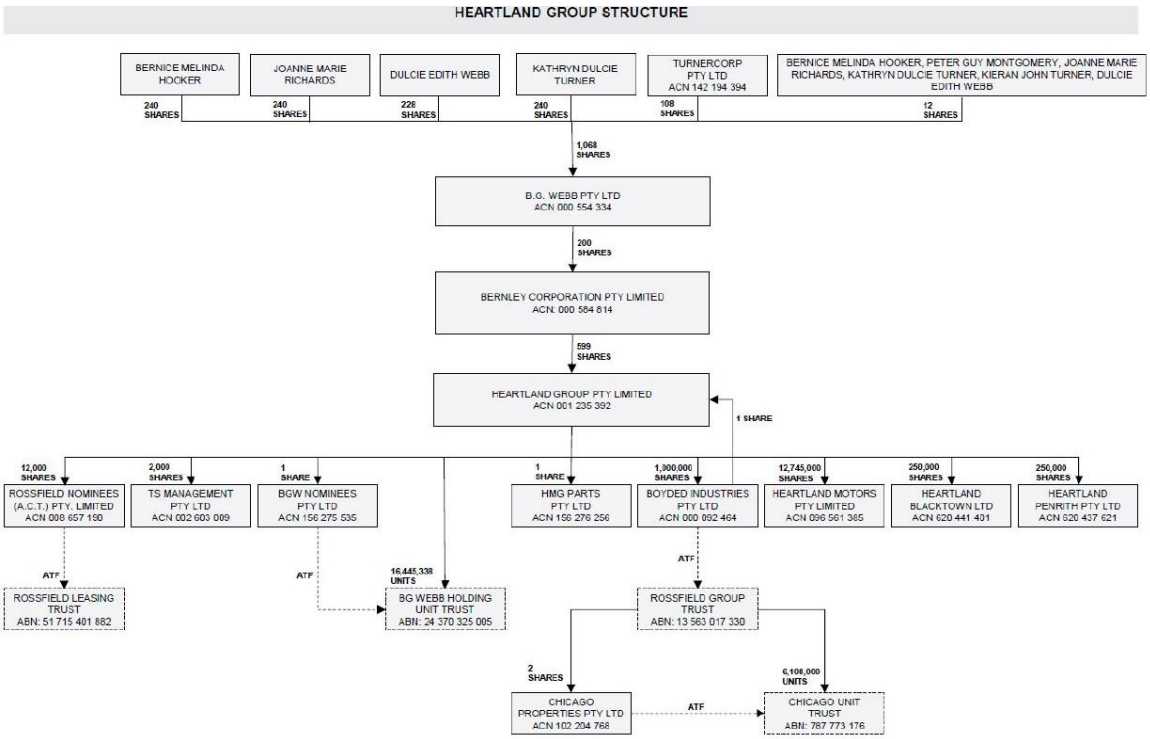
5. As a discretionary power, a power to appoint a trustee may, like a discretionary power of a trustee, be impugned on the basis that it was exercised without giving a real or genuine consideration to the exercise of the discretion, which means:

(a) there must be 'the exercise of an active discretion' and that there be consideration of whether or not to exercise the power (see *Owies v JJE Nominees Pty Ltd (in its capacity as the trustee for the Owies Family Trust)* [2022] VSCA 142;

(b) it is relevant to look at 'the inquiries which were made … , the information [the trustees] had and the reasons for, and manner of, their exercising their discretion' (see *Karger v Paul* [1984] VR 161);

(c) a decision may be reviewable for want of 'properly informed consideration' - if the consideration is not properly informed, it is not genuine (see *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254);

(d) a discretionary power to remove or appoint a trustee must be exercised personally and not in conjunction with, or under the direction of, another person (see *Scaffidi v Montevento Holdings Pty Ltd* [2011] WASCA 146, although overturned on appeal on unrelated grounds in *Montevento Holdings Pty Ltd v Scaffidi* (2012) 246 CLR 325.

6. Here, the relevant family member was held to not be acting out of a legitimate concern to protect the interests of the objects of the trust when purporting to exercise the powers of the appointor, but was instead 'acting out of a desire to gain exclusive control of the management of the affairs of the trust' and to frustrate the attempts of other family members to gain control. As such, he was exercising his powers as appointor for an improper purpose. Thus, even if he had been validly appointed as appointor of the trust, the court would have found that the purported exercise of the appointor powers were invalid and of no effect.

7. Interestingly however, a suggestion that the (ultimately failed attempt) to appoint a new trustee company controlled by the new appointor was not for the personal benefit of the new appointor, given that under the terms of the trust deed the appointor was excluded on their appointment from the class of potential beneficiaries.