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Super and insurance – the good, the bad and the ugly

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of trust property – trustees, trusts and beneficiaries

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Super and insurance - the good, the bad and the ugly



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The Good

- Premiums are deductible (s295-465) for:
 - life insurance (in full)
 - TPD in full (any occupation) or in part (own occupation) – TR 2012/6
- Proceeds paid into the super fund are:
 - not counted for the contributions caps; or
 - Taxed (for TPD and trauma must allocate to member's account s118-37)
- Benefits paid to members aged 60+ are (currently) tax free
- Benefits (eg TPD) paid to members below 60 are concessionaly taxed (max 20%)
 - increase in tax free component for disability lump sums (s307-290)

Super and insurance - the good, the bad and the ugly



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The Bad

- Insurance must, from 1 July 2014, match a condition of release (i.e. no own occupation insurance) – regs 4.07C and 4.07D SIS Regs
 - Pre – 1 July 2014 arrangements grandfathered (reg 4.07D)
 - No “own occupation”
 - No cross insurance
 - No trauma insurance
- Cannot acquire policies from members (s66 SIS Act)
- Proceeds to non-dependants taxed up to 31.5%
- Requirement to consider and regularly review insurance for members (reg 4.09(2))
- Must have insurance for certain collectables (reg 13.18AA(5))

Super and insurance - the good, the bad and the ugly



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The Ugly

- Does using a SMSF for holding insurance under a buy sell agreement breach the sole purpose test?
 - ATOID 2015/10 - yes
 - Buy-sell agreement entered into with a specific purpose of obtaining a particular significant, albeit indirect, benefit to party to the buy-sell agreement
 - Is a sought-for benefit that certainly isn't a mere incidental benefit
 - There is a deliberateness and purposefulness to this course of action which is difficult to reconcile with the underlying intention of the sole purpose
 - Having regard to all the facts and circumstances of the arrangement-most significantly, that the policy would not be purchased at all if it cannot be purchased by the SMSF in accordance with the terms of the agreement-leads to the conclusion that, in purchasing and holding the policy, the SMSF is not being maintained in accordance with the sole purpose requirements
- This view does not apply to insurance arrangements in public offer super funds



“Beneficial interests” in and “beneficial ownership” of trust property – trustees, trusts and beneficiaries

Rob Jeremiah
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Determination of the interests of beneficiaries in a trust and the property of a trust?



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From the unanimous decision of the Full Court of the High Court in *CPT Custodian v Commissioner of State Revenue* [2005] HCA 53 at paras. 14 and 15:

“Statutory construction and the general law

[14] Something now should be said respecting the task of statutory construction which was presented to Nettle J and then to the Court of Appeal. There were two steps to be taken. They were correctly identified in the submissions by the taxpayers to the Court of Appeal. The first step was to ascertain the terms of the trusts upon which the relevant lands were held. The second was to construe the statutory definition to ascertain whether the rights of the taxpayers under those trusts fell within that definition.”

Determination of the interests of beneficiaries in a trust and the property of a trust? (cont.)



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“[15] In taking those steps, a priori assumptions as to the nature of unit trusts under the general law and principles of equity would not assist and would be apt to mislead. All depends, as Tamberlin and Hely JJ put it in Kent v SS ‘Maria Luisa’ (No.2), upon the terms of the particular trust. The term “unit trust” is the subject of much exegesis by commentators. However, “unit trust”, like “discretionary trust”, in the absence of an applicable statutory definition, does not have a constant, fixed normative meaning which can dictate the application to particular facts of the definition of s.3(a) of the Act.”

Determination of the interests of beneficiaries in a trust and the property of a trust? (cont.)



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From the headnote in CPT Custodian:

“Section 51 of the Land Tax Act 1958 (Vic) (the Act) subjected “the owner of any equitable estate or interest in land” to assessment “as if the estate or interest so owned by him was legal”. Section 3 defined owner to include “(a) every person entitled to any land for any estate of freehold in possession”.”

The division of legal and equitable estates in trust property



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From CPT Custodian at para.25 in citing Griffith CJ from Glenn v Federal Commissioner of Land Tax [1915] HCA 57 with approval:

“based on the assumption that whenever the legal estate in land is vested in a trustee there must be some person other than the trustee entitled to it in equity for an estate of freehold in possession, so that the only question to be answered is who is the owner of the equitable estate. In my opinion, there is a prior inquiry, namely, whether there is any such person. If there is not, the trustee is entitled to the whole estate in possession, both legal and equitable.”

The division of legal and equitable estates in trust property (cont.)



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In CPT Custodian the High Court in its unanimous judgment then commented at para.25 on the opinion of Griffith CJ:

“That statement was a prescient rejection of a “dogma” that, where ownership is vested in a trustee, equitable ownership must necessarily be vested in someone else because it is an essential attribute of a trust that it confers upon individuals a complex of beneficial legal relations which may be called ownership.”

From CPT Custodian at para.26 in citing with approval Griffith CJ in Glenn:

“In my opinion, therefore, when the equitable rights created by a will, which may be as diverse as the testator thinks fit, are such that the beneficial enjoyment of property by a particular object of his bounty cannot begin until the expiration date of a determinate or indeterminate period, there is no present estate in possession in that property in any person other than the trustees of the will. In one sense, perhaps, the persons who are for the time being entitled to share in the fruits of the land may collectively be called the equitable owners, but that is not material to the present case.”

Unit Holders as owners?



The High Court confirmed in CPT Custodian at para.28:

“In the present case, Nettle J, who was upheld on this issue by the Court of Appeal, applied to the definition of “owner” in s.3(a) of the Act the reasoning in Glenn. His Honour rejected the submission of the Commissioner, in essence reviewed in this court, that the entitlements of the unit holders made each unit holder an “owner” in the relevant sense. His Honour was correct in doing so.”

CPT Custodian and “Hallmark of the unit trust”



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From para.29 of CPT Custodian:

“The alleged hallmark is that, unlike shareholders with respect to the property of the company, unit holders do have beneficial interests in the assets of the trust; no other persons or class of persons has such an interest and, if not with the unit holders, where else rests the beneficial interest?”

Gartside [1968] AC 553 and “beneficial interest”



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From para.31 of CPT Custodian citing Lord Wilberforce in Gartside:

“It can be accepted that “interest” is capable of a very wide and general meaning. But the wide spectrum that it covers makes it all the more necessary, if precise conclusions are to be founded upon its use, to place it in a setting: Viscount Radcliffe, delivering the Board’s judgment in Commissioner of Stamp Duties (Queensland) v Livingston shows how this word has to do duty in several different legal contexts to express rights of very different characters and that to transfer a meaning from one context to another may breed confusion.”

CPT Custodian and the “dogma” respecting legal and beneficial interests



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Confirming from para.31 of CPT Custodian:

“When Livingston had been before this court, Fullagar J and Kitto J each had spoken to similar effect. Hence, perhaps, the development of the “dogma” respecting concurrent and exhaustive legal and beneficial interests which has been referred to earlier in these reasons and which was decisively discounted by the Privy Council in Livingston. Terms are used here which lack a universal contemporary or historical meaning, divorced from the context, particularly any statutory context in which they are employed.”

CPT Custodian on Charles and the interests of a unit holder – distinguishable or in conflict?



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From Charles (1954) 90 CLR 598 as quoted in para.34 of CPT Custodian:

“But a unit under the trust deed before us confers a proprietary interest in all the property which for the time being is subject to the trust of the deed; so that the question whether moneys distributed to unit holders under the trust form part of their income or of their capital must be answered by considering the character of those moneys in the hands of the trustees before the distribution is made.(emphasis added)”

From para.35 of CPT Custodian:

“The reference by the court in Charles to the first of the Archer-Shee cases cannot attribute to that decision a general significance which today, in the light of the more recent authorities to which reference has been made above, it does not have. Lady Archer-Shee held a life interest in the income of the residuary estate of her father. The will was in simple form, with one tenant for life and no other object of the trust to be considered. The contrast between that situation and the trusts with which Karingal and CPT are concerned will be readily apparent. No one, as Kitto J later pointed out, doubted that Lady Archer-Shee had a beneficial interest in the income. But, did the moneys paid by the trustees to her account answer the statutory description of income of Lady Archer-Shee “arising... from” the stocks and shares in which the residuary estate was invested? Lord Wrenbury held that the answer was “yes” because she “had an equitable right in possession to receive during her life” the dividends...”.

CPT Custodian and Charles – distinguishable or in conflict? (cont.)



From para.36 of CPT Custodian:

“The deed considered in Charles divided the beneficial interest in the trust fund into units (cll 6, 7), and the trustees were bound to make half-yearly distributions to unit holders, in proportion to their respective numbers of units, of the “cash produce” which had been received by the trustees (cll 13A, 13B). Karingal and CPT rightly stress that the deeds with which this litigation is concerned were differently cast and in terms which do not support any direct and simple conclusion respecting proprietary interests of unit holders such as that reached in Charles.”

The interest of a unit holder under the deed



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From para.37 of CPT Custodian:

“On this issue, remarks by Nettle J are in point and conclusive. His Honour said:

It may well be that the income of the fund as finally constituted and distributed will include all of the rents and profits generated by a particular parcel of land within the fund. But it is distinctly possible that it will not. Each of the deeds gives power to the trustee to provide out of receipts for future and contingent liabilities; to apply receipts in the purchase of any property or business; to invest receipts in authorised investments and to deal with and transpose such investments; and the only right of the unit holder is to a proportionate share of the income of the fund for the year.”

The sole owner of all issued units



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From para.46 of CPT Custodian:

“The submissions respecting the beneficial ownership by each unit holder have been rejected earlier in these reasons. The trusts exemplified in the deed recognised (cl.29.4) that all issued units might be in the one beneficial ownership, but the trusts were drawn in terms of conferring individual rights attached to each unit. They were not drawn to provide a single right of cumulative nature so that the whole differed from the sum of the parts. There could be no such single right unless held jointly or in common, but the deed was not cast in such terms.”

The sole unit holder of all units and the rule in Saunders v Vautier



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From para.47 and 48 of CPT Custodian:

“[47] There is a further consideration. The facts of the present cases do not, in any event, answer the modern formulation of the rule in Saunders v Vautier, stated as follows in Thomas on Powers:

Under the rule in Saunders v Vautier, an adult beneficiary (or a number of adult beneficiaries acting together) who has (or between them have) an absolute, vested and indefeasible interest in the capital and income of property may at any time require the transfer of the property to him (or them) and may terminate any accumulation.

Lightman J said in Don King Productions Inc. v Warren that the rule only applies if, as was not so there, the beneficiaries were entitled to wind up the trust and require the trustee to assign to them the subject-matter of the trust.”

The sole unit holder of all units and the rule in Saunders v Vautier (cont.)



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“[48] ... Isaacs J [in Glenn] concluded:

The trustees have prior duties to other legatees having definite interests, and the strict performance of those duties requires the trustees to retain possession of the property, to receive the profits, and to deal with them otherwise than by paying them to the appellants... It is obvious, therefore, that the principle in Saunders v Vautier cannot apply, for the trusts are not exclusively for the appellants' benefit.”

The sole unit holder of all units and the rule in Saunders v Vautier (cont.)



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From para.50 of CPT Custodian:

“The classic nineteenth century formulation by the English courts of the rule in Saunders v Vautier did not give consideration to the significance of the right of the trustee under the general law to reimbursement or exoneration for the discharge of liabilities incurred in the administration of the trust. ... However, his Lordship’s [Lord Davey’s] discussion of the authorities does indicate that the rule in Saunders v Vautier could not apply if, by reason of the charging of legacies on the fund and accumulations, the persons seeking to put an end to the accumulations were “only entitled to an undetermined and uncertain surplus (if any) which might be left of the fund after payment of the legacies”.”

From para.51 of CPT Custodian:

“In the present case, the unsatisfied trustees’ right of indemnity was expressed as an actual liability in each of the relevant accounts at each 31 December date and rendered applicable the sense of the above words of Lord Davey. Until satisfaction of rights of reimbursement or exoneration, it was impossible to say what the trust fund in question was.”

From para.52 of CPT Custodian:

“There is a further, and related, point. ... It is one thing to say, as in Wharton v Masterman, that a court of equity will not enforce a trust for accumulations in which no person has an interest but the legatee, and another to determine for a statutory purpose that there is a presently subsisting interest in all of the trust assets at a particular date (...) because of what could thereafter be done in exercise of a power of termination of the trust in question but at that date had not been done. Equity often regards as done that which ought to be done, but not necessarily that which merely could be done. In any event, what is at stake here is the operation of statutory criteria upon general law concepts of equitable ownership.”

Unit holders (beneficiaries) – ownership or a beneficial interest in property of a unit trust?



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1. This question is to be answered firstly, at general law, through the ascertainment of the terms of the trust upon which the relevant assets are held and secondly, where relevant, through construing the statutory definition to ascertain whether the rights of the objects under the trusts fell within that definition – CPT Custodian para.14.

Unit holders (beneficiaries) – ownership or a beneficial interest in property of a unit trust? (cont.)



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2. In the recent decision of Davies J in *ElecNet (Aust) Pty Ltd v Commissioner of Taxation* [2015] FCA 456 (which decision is on appeal), the decision in *CPT Custodian* was summarised in para.41 as follows:

“CPT Custodian also does not assist the Commissioner’s argument. The issue in CPT Custodian was whether unitholders “owned” property held by the unit trust within the meaning of “ownership” as defined in s.3 of the Land Tax Act 1958 (Vic) to mean “every person entitled to any land for any estate of freehold in possession”. The High Court rejected the Commissioner’s argument that the interests of the unitholders under the trust deed gave them beneficial ownership of the property, reasoning that the units were discrete bundles of rights, not a single right of a cumulative nature which gave them ownership jointly or in common of the property. The Court further reasoned that the unitholders’ rights were subject to the trustee’s right of indemnity which takes priority over the rights of the beneficiaries in respect of the trust assets so that until satisfaction of that right of indemnity, “it was impossible to say what the trust fund in question was” to which the beneficiaries had entitlement, citing Commissioner of Stamp Duties (NSW) v Buckle [1998] HCA 4 at 246: CPT Custodian at 121.”

Continuing from ElecNet (Aust) from paras.41 and 42:

“[41] ... That reasoning is not pertinent in the present case where the statutory question is whether workers have a “beneficial interest in property” of the EISS, not whether the workers have rights of ownership over the assets comprising the trust fund.

[42] It follows that I accept the submission for ElecNet that the terms of the EISS deed confer rights in workers of a proprietary, not merely personal, nature in the trust fund to the extent of their respective entitlement, albeit that a worker’s interest in the trust fund is contingent upon the happening of a severance event in relation to the worker.”



3. In ElecNet, Davies J, in considering whether workers as beneficiaries had “*a beneficial interest, however described, in any of the income of property of the [relevant] trust estate*”, applied the reasoning of Gummow J in *Caboche v Ramsay* [1993] FCA 611 which was referred to and applied in *Benson v Cook* [2001] FCA 1684 “*that the appellant in that case had an interest of an equitable proprietary nature in trust funds, although there was no immediate right to payment*” – refer para.37 in ElecNet.

4. Davies J continues in ElecNet at para.39:

“Such a clause does not deny a beneficiary an interest in the trust fund, but simply entitled the trustee to have resort to the trust fund to meet expenses and the like as authorised by the clause. In the present case, the workers’ interest of a proprietary nature in the trust fund derives from terms of the EISS under which contributions are made in respect of, and held by the trustee for the benefit of, the workers and which the trustee must credit to the workers’ accounts but from which the trustee is also authorised to debit taxes, costs and expenses as provided for in clause 7.1. The effect of clause 7.1(e) is not to deny any interest of a proprietary nature in the trust fund. Rather, the effect of the clause is that such interest is subject to the right of the trustee to debit such amounts.”

Unit holders (beneficiaries) – ownership or a beneficial interest in property of a unit trust? (cont.)



In ElecNet from para.14 it was submitted that:

“... the entitlements held by the workers under the terms of the EISS constitute a “beneficial interest” in the property of the trust because: (1) the contributions are held on trust for the workers in respect of whom they are made; (2) the terms of the EISS give each worker a discrete interest in the trust fund to the extent of his or her entitlement to severance payments paid out of the contributions made by members in accordance with clause 4; and (3) the interest of each worker therefore falls within the statutory description of “unit” in s.102M as constituting a “beneficial interest... in the property of the trust”.”

“Beneficial ownership” of trust property?



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From CPT Custodian at para.49:

1. Unit holders or beneficiaries of a trust are not subject to any provision to the contrary in the trust deed, “*the unit holders were not the persons in whose favour alone the trust property might be applied by the trustee*”.
2. “... *the rule in Saunders v Vautier did not give consideration to the significance of the right of the trustee under the general law to reimbursement or exoneration for the discharge of liabilities incurred in the administration of the trust.*” – refer CPT Custodian at para.59.



“Beneficial ownership” of trust property?

From H.A.J. Ford, Chapter 15 ‘Public Unit Trusts’, *The Law of Public Company Finance*, ed. Austin and Vann, The Law Book Company Ltd 1986, p.400:

“The Unit Holder as a Beneficial Owner

... But in a unit trust the trustee’s ownership of the property of an enterprise is not beneficial ownership. The beneficial interest is in the unit holders in fractions proportional to the number of units held by each of them. Under the terms of the deed, as usually drawn, a unit does not confer any interest in any particular part of the trust fund or any particular investment but only such interest in the trust fund as a whole as is conferred on a unit under the deed.”

“Beneficial ownership” of the assets of a trust in a statutory context – an example



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1. An example of the necessity to consider the meaning of “beneficial ownership” in the context of a trust arises under section 115-45(2) and (3) ITAA97:

“When a capital gain is not a discount of capital gain

115-45(2) – Your capital gain from a CGT event happening to:

(a) your share in a company; or

(b) your trust voting interest, unit or other fixed interest in a trust;

is not a discount capital gain if the 3 conditions in subsections (3), (4) and (5) are met. This section has effect despite section 115-5 and subsection 115-30(2).

“Beneficial ownership” of the assets of a trust in a statutory context – an example (cont.)

Under section 115-45(3) ITAA97:

*“You had at least 10% of the equity in the entity before the event
115-45(3) – The first condition is that, just before the CGT event, you and
your associates beneficially owned:*

*(a) at least 10% by value of the shares in the company (except
shares that carried a right only to participate in a distribution of
profits or capital to a limited extent); or*

*(b) at least 10% of the trust voting interests, issued units or other
fixed interests (as appropriate) in the trust.”*

“Beneficial ownership” of the assets of a trust in a statutory context – an example (cont.)



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2. The question to be answered under section 115-45(3) where shares in the relevant company are held by the trustee of a trust is are those shares “beneficially owned” and if so by whom.

3. From Glenn and CPT Custodian (para.25 of CPT Custodian) if there is not a person other than the trustee who is the owner of “*an estate in freehold in possession*” in the property of a trust it will be “*the trustee who is entitled to the whole estate in possession, both legal and equitable*”. – refer Glenn.

“Beneficial ownership” of the assets of a trust in a statutory context – an example (cont.)



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4. Therefore from the principles in (3) where under the terms of a trust deed, the trustee of which holds shares in a company, the beneficiaries of the trust do not hold an estate in freehold in possession in the property of the trust, the shares will be beneficially owned by the trustee of the trust.

5. Where “*at least 10% by value of the shares in*” a company are beneficially owned by a trustee or the trustee and its associates, the first condition in s.115-45(3) would seem to be satisfied.

The nature of interests in and ownership of assets held on trust of trustees, trusts and beneficiaries?



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1. From CPT Custodian it is the terms of a trust deed that will determine the nature of interests in and ownership of assets held on trust.
2. The description of a trust as for example a “unit trust” or “discretionary trust” will not have any bearing on the question.

3. In ATO ID 2003/778 the ATO expresses the view:

“Under ordinary legal concepts, where there is a discretionary trust deed, no beneficiary is entitled to income or capital of the trust until the trustee exercises its discretion to distribute income or to make an appointment of capital. Because the beneficiary of a discretionary trust does not hold an interest in any asset of the trust or in the ordinary income derived from the asset until the trustee's discretion is exercised, it would not be possible for a discretionary trust to satisfy the continuing majority underlying interests test set out in subsection 149-30(1) of the ITAA 1997.”



4. Whether the stated view in ATO ID 2003/778 is correct will depend on the terms of a trust deed being considered in the context of section.149-30(1) ITAA 97. It may be that under a particular trust deed there are beneficiaries who have both fixed and indefeasible interests in property of the trust and beneficiaries who are completely dependent upon the exercise of the discretion of the trustee in their favour for them to have any beneficial interest in any of the trust assets.

Trusts and the ownership/vesting of the legal and equitable estates in assets



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1. In a completely constituted trust the trust property will be owned by and vested in the trustee – refer Jacobs' Law of Trusts in Australia, 7th edition at 640 and refer CPT Custodian.
2. From earlier in the presentation the ownership/vesting of the legal and equitable estates in the assets of a trust will be determined by:
 - 2.1. firstly the terms of the trust deed (including the original and varied terms);
 - 2.2. secondly, the exercise of any discretion or power vested in the trustee to create or appoint a legal or equitable estate in the assets of a trust – in which event a capital gains tax event may occur; and
 - 2.3. thirdly, the terms on which the trust is terminated and any remaining assets are transferred to be vested in the beneficiaries.

The right of indemnity of a trustee – its meaning and the liabilities to which it applies



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1. From paras.50, 51 and 52 of CPT Custodian (referred to earlier in this presentation), the High Court referred to the right of a trustee to be indemnified or reimbursed for liabilities incurred in the administration of a trust as “*the unsatisfied trustees’ right of indemnity*”.
2. The High Court continued “*until satisfaction of rights of reimbursement or exoneration*” (that is the right of indemnity) of a trustee, “*it was impossible to say what the trust fund in question was*”.



A “beneficial interest” in trust property?

1. On “interest” refer to earlier para.31 CPT Custodian.
2. The development of the dogma “respecting concurrent and exhaustive legal and beneficial interests... referred to earlier in these reasons... was decisively discounted... in Livingston. Terms are used here which lack a universal contemporary or historical meaning, divorced from the context particularly any statutory context in which they are employed”. – refer para.31 CPT Custodian.
3. A person who has a life interest in the income of a residuary estate will have a beneficiary interest in that income. – refer para.35 CPT Custodian.



A “beneficial interest” in trust property? (cont.)

4. In Charles the trust deed “*divided the beneficial interest in the trust into units... and the trustees were bound to make half-yearly distributions to unit holders in proportion to their respective number of units, of the cash produce... Karingal and CPT rightly stress that the deeds with which this litigation is concerned were differently cast and in terms which do not support any direct simple conclusion respecting proprietary interests of unitholders such as that reached in Charles.*”

5. Whether an interest is a “beneficial interest” will be determined by the terms of the trust deed and the interests and rights created under it.



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Thank you for your attention