SUPREME COURT OF QUEENSLAND

CITATION:	*Schuhmacher v Emmerson & Ors* [2013] QSC 205
PARTIES:	**TREVOR JOHN SCHUHMACHER** (applicant) **v** **PAUL JAMES EMMERSON (AS EXECUTOR OF THE ESTATE OF ARTHUR HENRY PHILLIP SCHUHMACHER AND AS TRUSTEE OF THE ARTHUR SCHUHMACHER FAMILY DISCRETIONARY TRUST)** (first respondent) and **KAY NARELLE POWERS AND KAYRELLE JOHENNE POWERS** (second respondents)
FILE NO:	BS 10167 of 2012
DIVISION:	Trial Division
PROCEEDING:	Originating application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	13 August 2013
DELIVERED AT:	Brisbane
HEARING DATE:	1 February 2013 Written submissions
JUDGE:	Daubney J

ORDERS:

1. The originating application filed 30 October 2012 is dismissed.

2. It is ordered pursuant to s 114 of the *Land Title Act* 1994 (Qld) that Paul James Emmerson as trustee of the Arthur Schuhmacher Family Discretionary Trust be registered as proprietor of each of the following properties, namely:

(a) Lot 74 on Crown Plan CH 31283, County of Churchill, Parish of Ferguson, being all the land contained in title reference 16150086;

(b) Lot 1 on Registered Plan 21361, County of Churchill, Parish of Ferguson, being all the land contained in title reference 11232227;

(c) Lot 82 on Crown Plan CH 31341, County of Churchill, Parish of Ferguson, being all the land

contained in title reference 16150087.

3. **It is declared that the moneys held by Arthur Henry Phillip Schuhmacher in Bendigo Bank account No 138362892 as at the date of his death were held on trust for Kayrelle Johenne Powers.**

4. **I will hear the parties as to costs in respect of the originating application and the cross-application.**

CATCHWORDS: EQUITY – TRUSTS AND TRUSTEES – EXPRESS TRUSTS CONSTITUTED INTERVIVOS – DECLARATION OF TRUST – NECESSITY FOR INTENTION – OTHER MATTERS – where the applicant argues that no trust was created – whether there was sufficient certainty of subject matter – whether there was sufficient certainty of intention – whether the monies which were held in the Building Account were held on trust for one of the second respondents or whether they fall to be deal with as part of the Deceased's estate – whether the originating application filed 30 October 2012 should be dismissed.

EQUITY – TRUSTS AND TRUSTEES – APPOINTMENT, REMOVAL AND ESTATE OF TRUSTEES – RETIREMENT AND REMOVAL – where the Deceased left a will by which he appointed his solicitor, Mr Emmerson, as sole executor and trustee of the Deceased's estate – where the applicant argues that Mr Emmerson should be removed as executor and trustee – whether the current trustee so conducted himself as to jeopardise the due and proper administration of the estate in the interests of the beneficiaries – whether, pursuant to s 6 of the *Succession Act 1981* (Qld) and Rule 597 of the UCPR, some other proper person or trustee company should be appointed as the administrator and trustee of the Deceased's estate.

Land Title Act 1994 (Qld), s 114
Trusts Act 1973, s 16

Baldwin v Greenland [2007] 1 Qd R 117, cited.
Colston v McMullen [2010] QSC 292, cited.
Herdegen v Federal Commissioner of Taxation (1988) 84 ALR 271, cited.
Knight v Knight (1840) 3 Beav 148, cited.
Re Cotter [1915] 1 Ch 307, cited.
Re Earl of Stanford [1896] 1 Ch 288, cited.
Re Kayford Ltd [1975] 1 WLR 279, cited.
Re McPhillamy's Trusts (1909) 10 SR (NSW) 42, cited.
Saunders v Vautier (1841) 49 ER 282, cited.

Scaffidi v Montevento Holdings Pty Ltd [2011] WASCA 146, cited.

COUNSEL: ME Steele for the applicant
DM Favell for the first respondent
RT Whiteford for the second respondent

SOLICITORS: Slater and Gordon for the applicant
Richard Gray and Associates for the first respondent
The Estate Lawyers for the second respondent

[1] Arthur Henry Phillip Schuhmacher ("the Deceased") died on 25 February 2010.

[2] At the time of his death, the Deceased held seven of the ten shares issued in the capital of Westdale Holdings Pty Ltd ("the Company"). The other three shares were, and are, held by the applicant, Trevor John Schuhmacher ("Trevor"). The Deceased and Trevor were the directors of the company. The only activity of the Company was, as it had been for many years, to act as the trustee of the Arthur Schuhmacher Family Discretionary Trust ("the Trust").

[3] The Deceased, whose wife had predeceased him, is survived by two children – Trevor and the first-named second respondent, Kay Narelle Powers ("Kay"). The Deceased also had four grandchildren, one of whom is the second-named second respondent, Kayrelle Johene Powers ("Kayrelle"), who is Kay's daughter.

[4] As at the Deceased's death, there were a number of properties of which the Company was the registered proprietor; these are conveniently described as:

- Lot 74 Bexleigh Road, Calvert ("Lot 14")
- Lot 1 Kuss Road, Calvert ("Lot 1")
- Lot 82 Kuss Road, Calvert ("Lot 82")

[5] It was ultimately not in issue before me, and indeed was clear enough on the evidence of the Deceased's accountant, that each of these properties was held by the Company as trustee for the Trust.

[6] The Deceased also had a number of bank accounts in his own name when he died:

- Bendigo Bank account number 138362892 – this account was named "Building Account", and was opened by the Deceased on 16 October 2009 with the transfer of $250,000 into that account.[1] At the date of the Deceased's death, this Building Account had a balance of $248,460 (plus interest).[2] After the Deceased's death, a further $72,543.84 was transferred into the Building Account from another of the Deceased's account. The Building Account was closed on 5 July 2010, and the total balance of $321,015.72 was paid to an account of the Deceased's estate.

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1 Bank statement, affidavit of Kayrelle sworn 14 November 2012, p 5.

2 Advice from Bendigo Bank dated 15 June 2010, affidavit of Paul Emmerson sworn 16 November 2012, Exhibit PJE5.

- Bendigo Bank term deposit for some $70,000 plus interest.[3] It seems that this was the source of the $72,543.84 subsequently deposited to the Building Account.

[7] The Deceased had held another Bendigo bank account, styled "Retirement Account". This account had been closed on 20 February 2010, and the balance of $42,030.02 was transferred to a joint account held by Trevor and his wife.

[8] Information received from the Bendigo Bank[4] discloses that there were other accounts held in the name of the Deceased and the Company which were closed before his death, and the balances of these were transferred either to the Building Account or to the Retirement Account.

The will

[9] The Deceased left a will dated 21 December 2009 by which he appointed his solicitor, the first respondent ("Mr Emmerson"), as sole executor and trustee of the Deceased's estate. Clause 3 of the will provided:

> "3. **I GIVE DEVISE AND BEQUEATH** the whole of my estate both real and personal of whatsoever nature and kind and wheresoever the same may be situated **UNTO** my Trustees **UPON TRUST**:-
>
> (a) To pay my just debts funeral and testamentary expenses and all death and estate duties payable upon the whole of my dutiable estate are to be paid from monies owed to me by the Arthur Schuhmacher Family Trust;
>
> (b) While my land at Bexleigh Road and Kuss Road is owned by Westdale Holdings Pty Ltd, it is my wish that:-
>
> (1) Lot 74 be given to my Son **TREVOR JOHN SCHUHMACHER** and his wife **ADELE DOROTHY SCHUHMACHER**;
>
> (2) Lot 1 be given to my Daughter **KAY NARELLE POWERS**;
>
> (3) Lot 82 be sold and the proceeds divided between **TREVOR JOHN SCHUHMACHER**, **ADELE DOROTHY SCHUHMACHER**, **KAY NARELLE POWERS, MATTHEW JAMES POWERS, VICKI ADELE WATKINS** and **TREVOR JOHN SCHUHMACHER as Trustee for KAREN DOROTHY McLAUGHLIN.**
>
> If this land remains in the Company my Executor is to sell the respective blocks to beneficiaries as above, pay costs, taxes and duties from the proceeds of Lot 82 and distribute the cash on winding up of Westdale Holdings Pty Ltd to such beneficiaries to provide funds to simultaneously purchase the land and to distribute the shares in Westdale Holdings Pty Ltd in such proportions to the above beneficiaries to facilitate these transactions.

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3 Advice from Bendigo Bank dated 15 June 2010.

4 Letter dated 1 December 2010.

> (c) To give the sum of **TWENTY FIVE THOUSAND DOLLARS** ($25,000.00) to my Grandson **MATTHEW JAMES** POWERS for his sole use and benefit absolutely;
>
> (d) To give my motor vehicle to such of the abovenamed beneficiaries who bids the highest and to divide the proceeds between such of **TREVOR JOHN SCHUHMACHER**, **ADELE DOROTHY SCHUHMACHER, KAY NARELLE POWERS, MATTHEW JAMES POWERS, VICKI ADELE WATKINS, KAREN DOROTHY McLAUGHLIN** and **KAYRELL JOHENNE POWERS** as shall survive me and if more than one as tenants in common in equal shares;
>
> (e) To give any cash at Bank in my name or Westdale Holdings Pty Ltd, after deducting the sum of **TWENTY FIVE THOUSAND DOLLARS ($25,000.00)** referred to in clause 3(c) above, to **TREVOR JOHN SCHUHMACHER** PROVIDED HOWEVER and I hereby declare that if I sell any of my land the proceeds of sale shall be held separately and given to the devisees of the land in the same proportions as the land was to be distributed pursuant to paragraph 3(b) above, and include the distribution of shares provision for Westdale Holdings cash to go to **TREVOR JOHN SCHUHMACHER**;
>
> (f) To give the rest and residue of my estate to such of my Son **TREVOR JOHN SCHUHMACHER** and my Daughter **KAY NARELLE POWERS** as shall survive me and if more than one as tenants in common in equal shares."

[10] Probate of this will was granted on 18 May 2013.

The Trust

[11] The Trust was established by a Deed of Trust executed on 16 March 1978. Clause 4 of the Deed of Trust defined the "primary beneficiaries" as follows:

> "4. PRIMARY BENEFICIARIES
>
> In this Deed of Trust the primary beneficiaries shall mean and include Arthur Henry Phillip Schuhmacher, Nellie Schuhmacher and Trevor John Schuhmacher their children (natural and adopted) grandchildren, greatgrandchildren, their respective brothers, sisters, parents and grandparents, the spouses for the time being at any time of all or any of the foregoing persons and the children of any such marriage, any company now or hereafter, incorporated in which all or any of the foregoing persons may at any time be a director and/or member, any trust estate now in existence or hereafter created in-which all or any of the foregoing persons may at any time be a trustee and/or beneficiary and whether the beneficiary entitlement be fixed vested contingent prospective or otherwise."

[12] The original Deed of Trust was misplaced, and it became necessary in 1999 for a copy of the original Deed of Trust to be stamped. In support of the application for the copy of the Deed of Trust to be stamped, the Deceased made a statutory declaration in which he said:

> "The beneficiaries of the Trust were:

Arthur Henry Phillip Schuhmacher

Nellie Schuhmacher

Trevor Schuhmacher."

[13] Principally on the basis of that statutory declaration, Trevor advanced the proposition that he was the sole surviving beneficiary of the Trust, and consequently sought to invoke the rule in *Saunders v Vautier*[5] to terminate the Trust and have all of the Trust's assets distributed to him.

[14] Evidence was called at trial from the solicitor who drew the Deed of Trust. It became clear from this evidence that the beneficiaries of the Trust were not limited to the individuals mentioned in the Deceased's statutory declaration, but were defined by reference to cl 4 of the Deed of Trust in the terms set out above.

[15] Following the evidence from that solicitor, counsel for Trevor informed the Court that Trevor no longer maintained that he was the only beneficiary of the Trust.[6]

[16] Further, cl 10 of the Deed of Trust relevantly provided:

> "10. APPOINTMENT AND DISCHARGE OF TRUSTEE
>
> (i) A Trustee shall cease immediately to be the Trustee of the Trusts created hereunder and shall be discharged from the office of such trusteeship in all or any of the following circumstances:
>
> ...
>
> (d) if the Appointor for the title (sic) being shall by instrument in writing remove the Trustee from the Trusteeship.
>
> ...
>
> (iii)
>
> ...
>
> (b) the Appointor shall have sole power to appoint a new Trustee or Trustees consequent upon the retirement or removal of the Trustee pursuant to Sub-Clause (i) of this Clause.
>
> ...
>
> (v) For the purposes of this Clause 'The Appointor' shall be and mean Arthur Henry Phillip Schuhmacher & Nellie Schuhmacher acting jointly by unanimous resolution in writing or the survivor of them and after his death such person as may by instrument in writing signed by him be nominated or in default of such writing his personal representative."

[17] On 25 October 2012, Mr Emmerson, as personal representative of the Deceased, executed a Deed of Removal and Appointment of New Trustee by which the Company was removed as trustee as Mr Emmerson was appointed trustee of the Trust.

This proceeding

[18] By an originating application filed on 30 October 2012, Trevor sought the following relief:

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5 (1841) 49 ER 282.

6 T 1-60.

"1. That the Respondent be removed as executor and trustee of the estate of Arthur Henry Phillip Schuhmacher (**Estate**) pursuant to sections 6 and 52 of the *Succession Act 1981* (Qld) and section 80 of the *Trusts Act 1973* (Qld);

2. That the grant of probate granted to the respondent on 18 May 2010 in relation to the Estate is revoked pursuant to Rule 642 of the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**);

3. That pursuant to section 6 of the *Succession Act 1981* (Qld) and Rule 597 of the UCPR, some other proper person or trustee company be appointed as the Administrator and trustee of the estate of the late Arthur Henry Phillip Schuhmacher (**deceased**) and be granted Letters of Administration with the Will dated 21 December 2009 attached;

4. That compliance with the requirements of Rules 598(1) to 598(3) of the *Uniform Civil Procedure Rules 1999* (Qld) be dispensed with in relation to the application referred to in Order 3.

5. Pursuant to section 6 of the *Succession Act 1981* (Qld), the estate of the Arthur Henry Phillip Schuhmacher be administered as follows:

   a. within two days of the date of this order:

      i. the Respondent resign as director of Westdale Holdings Pty Ltd;

      ii. the Respondent provide written notice to Westdale Holdings Pty Ltd of his resignation in accordance with clause 88 of the Articles of Association of Westdale Holdings Pty Ltd;

      iii. by way of ordinary resolution, the Respondent and the Applicant appoint the Administrator as Director of Westdale Holdings Pty Ltd pursuant to clause 95 of the Articles of Association of Westdale Holdings Pty Ltd;

   b. within 7 days of the date of this order, the Administrator and the Applicant, as directors of Westdale Holdings Pty Ltd, sign and provide to the Applicant and Kay Narelle Powers share transfer forms effecting the transfer of the deceased's 7 shares in Westdale Holdings Pty Ltd in the following manner:

      i. 3 shares to the Applicant;

      ii. 3 shares to Kay Narelle Powers; and

      iii. 1 share to the Applicant and Kay Narelle Powers, to be held jointly;

   c. within 14 days of the date of this order, the Administrator transfer $25,000 from the money derived from the deceased's bank accounts to Matthew James Powers;

   d. within 14 days of the date of the Order, the Administrator transfer the balance of the money derived from the deceased's bank accounts to the Applicant after deducting $25,000 referred to in Order 5(c);

   e. within 14 days of the date of this order, the Administrator distribute the residuary estate of the deceased equally between the Applicant and Kay Narelle Powers;

6. Within 7 days of the date of the order, the Respondent exhibit on oath in the Court an inventory of the assets and liabilities of the deceased's

estate and an account of the administration of the estate pursuant to sub-section 52(1)(b) of the *Succession Act 1981* (Qld) and Rule 645 of the *Uniform Civil Procedure Rules 1999* (Qld);

7. A declaration that the Arthur Schuhmacher Family Discretionary Trust is determined and the property of the Arthur Schuhmacher Family Discretionary Trust is vested in the Applicant absolutely;

8. In the alternative to paragraph 7, the Respondent be removed as trustee of the Arthur Schuhmacher Family Discretionary Trust pursuant to section 80 of the *Trusts Act 1973* (Qld) and Westdale Holdings Pty Ltd be appointed as trustee of the Arthur Schuhmacher Family Discretionary Trust;

9. The Applicant's costs of and incidental to this Application be paid out of the estate of Arthur Henry Phillip Schuhmacher on an indemnity basis;

10. That the Respondent is restrained from selling, transferring or otherwise dealing with the properties located at 95 Kuss Road, Calvert Qld 4340 (Lot 74 CH31283), 107 Kuss Road, Calvert Qld 4340 (Lot 1 RP21361) and / or Lot 82 Blexleigh Lane, Calvert Qld 4340 (Lot 82 CH31341) until the Court has determined this Originating Application;

11. Such further or other order as this Honourable Court may deem appropriate."

[19] As a consequence of the concession made by Trevor in the course of the trial, it is no longer necessary to deal with the relief sought in paragraph 7 of the the originating application.

[20] On 31 January 2013, Mr Emmerson filed a cross-application seeking the following relief:

"1. An order pursuant to s114 of the *Land Title Act* 1994 (Qld), that the First Respondent be registered as owner of the following properties in his capacity as trustee of the Arthur Schuhmacher Family Discretionary Trust:

   (a) Lot 1 on RP 21361, Title Reference 11232227;

   (b) Lot 74 on CP CH31283, Title Reference 16150086;

   (c) Lot 82 on CP CH31341, Title Reference 16150087.

2. A direction pursuant to s96 of the *Trusts Act* 1973 (Qld), that the First Respondent is entitled to the view (subject to the final determination of this proceeding) that the monies held in the name of Arthur Schuhmacher in Bendigo Bank Account No. 138362892 (**the Disputed Account**) are held on trust for Ms Kayrelle Powers.

3. A declaration that the monies held in the Disputed Account are held on trust for Ms Kayrelle Powers."

[21] The monies held in what is described as the "Disputed Account" are, for present purposes, those monies which were previously held in the Deceased's Building Account. It is convenient to consider first the questions raised with respect to those monies – apart from being raised directly on the cross-application, those questions necessarily impact on the relief sought in paragraph 5(d) of the originating application.

Building Account

[22] In February 2004, Kayrelle purchased a house at Tiger Street, Ipswich ("the Tiger Street property") for $290,000. Kayrelle renovated the Tiger Street property, and did not move into that property until September 2005. At that time, she was in a de facto relationship. She moved into the Tiger Street property with her partner and her two young children.

[23] In October 2005, Kayrelle's relationship with her partner broke down, and he moved out. She then suffered financial distress, and listed the Tiger Street property for sale. Kayrelle discussed her financial situation with her grandfather, the Deceased. He did not want her to sell the Tiger Street property, and assisted her by making mortgage repayments. This enabled Kayrelle to take the property off the market.

[24] Kayrelle's evidence was that her plan at that time was to return to the workforce as soon as she could find a job which suited her children's school hours. She then wanted to refinance the loan secured by the Tiger Street property so that she could settle her property dispute with her ex-partner and keep ownership of the Tiger Street property.

[25] In early 2007, Kayrelle reached a property settlement with her ex-partner, as a consequence of which her ex-partner abandoned any claim on the Tiger Street property. The Deceased then offered to pay out the balance of the mortgage debt which was owing on the Tiger Street property. Kayrelle says that she suggested that, in exchange, she would transfer the Tiger Street property to the Deceased.

[26] Pursuant to this arrangement between the Deceased and Kayrelle, in March 2007 the Company purchased the Tiger Street property from Kayrelle for $275,000. That was the amount needed to discharge the debt owed on the Tiger Street property. Kayrelle did not receive any part of the purchase price. The purchase price was paid from monies held in a Bendigo bank account in the name of the Company as trustee for the Trust.

[27] In October 2009, the Company sold the Tiger Street property for $388,505. At settlement, the net proceeds of sale ($388,005.82) were paid by a cheque payable to "A H P Schuhmacher". These monies were banked in the Deceased's own name. The accounting records of the Trust which were put into evidence before me record that, during the 2010 financial year, a repayment of $389,005.82 was recorded against the balance of the Deceased's beneficiary account in the Trust.[7] In short, the books of the Trust were regularised to reflect the fact that the monies received from the sale of the Tiger Street property were ultimately paid to the Deceased personally.

[28] From the proceeds of sale, the deceased deposited $32,690.09 into a Bendigo Bank term deposit account, and $355,315.73 into the Retirement Account. As already noted, on 16 October 2009, the Deceased opened the Building Account, and transferred $250,000 into the Building Account from the Retirement Account.

[29] The circumstances leading to the opening of the Building Account were explained by Kayrelle as follows[8]:

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7 The difference of $1,000 between the net settlement proceeds and the amount recorded in the Trust records was explained in evidence before me as being the amount of the deposit which had been paid when the contract for the sale of the Tiger Street property was signed.

8 Affidavit sworn 13 December 2012.

> "17. Between June 2009 and October 2009, my grandfather, my mother Kay Narelle Powers and I had many discussions regarding my future living arrangements.
>
> (a) Originally my grandfather told me that he wanted to pay me and my mother $125,000.00 each.
>
> (b) My grandfather told me that he had discussed the gift of the $125,000.00 to my mother and he had suggested to my mother and my mother agreed that my grandfather should use the money which he wanted to give to her and the $125,000.00 which my grandfather was going to give me, to build me a house for me to live in.
>
> 18. My grandfather told me that he would open a new bank account and place $250,000.00 in it. The agreement was that those funds would be used for my benefit to pay for the house which was to be constructed for me and my children to live in.
>
> 19. My grandfather and I discussed the creation of the bank account which we called the 'house account' a number of times:
>
> (a) My grandfather originally wanted the account to be opened in my name. I was working shift work at the time the account was to be opened and I was not going to be available to sign the cheques as and when they were needed by the builder during the construction of the house. I did not want to leave signed blank cheques in the house.
>
> (b) We then discussed the possibility that the account should be opened in my mother's name. After further discussion we agreed that the account should be opened in my grandfather's name and that the account didn't need to be opened in my mother's name as well. We decided that instead my mother would be a signatory to the account because then there would be two people who could sign cheques.
>
> 20. During the numerous discussions regarding the establishment of the house account and the plans to build the house, my grandfather told me he was going to make a new Will. He told me that he did not need to include a gift of the $250,000.00 to me in his Will because I was receiving the benefit of that money now."

[30] In a previous affidavit[9], Kayrelle had said in relation to the monies deposited into the Building Account:

> "13. The deposit was made pursuant to an agreement I had with my Grandfather that he would establish a bank account with $250,000.00 in it for my benefit. We agreed that the funds were to be used to construct a house for me and my two daughters to live in. The title of the house would be in my name."

[31] Under cross-examination, Kayrelle confirmed that in 2009, she and the Deceased had had discussions in which he told her that he would build a house for her to live in on the same block of land as the house in which Kay was living. There was cross-examination as to whether the Deceased had said that he was going to open the Building Account in his name or Kayrelle's name, and Kayrelle accepted that the account was opened neither in her name nor in her mother's name. In relation to

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9 Affidavit sworn 14 November 2012.

the location of the house, Kayrelle explained further that the house was to be built as a "dual occupancy" on the same land as the house in which her mother lived – the land could not be subdivided, but it was possible for a second dwelling house to be built on the land. Importantly, Kayrelle confirmed that the title of the house was not going to be in her name.[10]

[32] Kayrelle agreed that between the time her grandfather first suggested building the house for her and the time of his death, they had some heated discussions and "damn fine arguments", but they did not go so far as to constitute serious fallings out with her grandfather.

[33] Kay gave evidence about attending with her father to open the Building Account. She said[11]:

> "3. On 16 October 2009 I attended at the Bendigo Bank Rosewood Branch with my father. My father and I met with Ms Anita Carpenter. Ms Carpenter was the Manager of the Rosewood Branch of the Bendigo Bank at that time.
>
> 4. I was present and heard my father's instructions to Ms Carpenter during the meeting. My father told Ms Carpenter 'I want to establish a new account as a trust account in my name with my daughter Kay as a signatory. The trust account is for building a house for my granddaughter Kayrelle and her two daughters.'"

[34] Under cross-examination, Kay confirmed that the house in which she lives is owned by the Company, and that she had lived there for 20 years.

[35] She was cross-examined as to the conversation which had actually been held between her father and the bank manager when the Building Account was opened, and denied the suggestion that the money for the Building Account was supposed to have been transferred by Kayrelle rather than the deceased. This suggestion clearly arose, and was founded on, the following statement made in a letter from the Bendigo Bank branch manager, Ms Carpenter, to Mr Emmerson dated 1 December 2010 in which Ms Carpenter provided Mr Emmerson, as executor, with information about the Deceased's accounts, and then said:

> "I can confirm that I spoke with Mr A Schuhmacher in relation to opening an account for his granddaughter who would be making a large deposit that he would be holding on her behalf until such time as the funds were required. He informed me that his daughter and granddaughter were to have access to this account as signatories but am unaware as to why this did not occur."

[36] Ms Carpenter did not give evidence before me, and the version set out in this paragraph in her letter was not tested. The suggestion that the money to be banked into the Building Account was to be derived from Kayrelle flies in the face of the banking transactions upon the sale of the Tiger Street property, to which I have referred above, and simply does not reflect Kayrelle's impecuniosity. I do not accept the version set out in the letter from Ms Carpenter regarding the source of funds for the Building Account as accurate.

[37] Under cross-examination, Kay was challenged on this point, and was adamant that the source of the funds for the Building Account was always to be her father.

[38] Further in her cross-examination, Kay confirmed[12]:

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10 T 1-31.

11 Affidavit sworn 13 December 2012.

- the plan was that the Deceased was to build a house for Kayrelle to live in;
- the house was to be built on land owned by the Company;
- the house would be owned by the Company;
- the Company would allow Kayrelle to live in the house, just as the Company allows Kay to live in the house in which she has lived.

[39] Mr Emmerson gave evidence[13] of an attendance by him on the Deceased on 21 December 2009, when the Deceased came to Mr Emmerson's office to provide instructions for a will. Mr Emmerson said:

> "During our conversation, Arthur told me that the Ipswich property, which in the then current will was to be given to Kay, Kayrelle and Matthew, had been sold and that he had put aside $250,000 in a Bendigo Bank account in his and Kay's name for building a house on his land for Kayrelle. He referred to this account as the 'house account'. Arthur told me that the money in the 'house account' was for Kayrelle (Arthur's granddaughter) to build a house and that it was Kayrelle and her mother's share of the sale of the Ipswich house so that the house (Kayrelle's) was paid for."

[40] Under cross-examination, Mr Emmerson confirmed that the Building Account was not, in fact, in Kay's name or Kayrelle's name, but said that the Deceased had told him that he had done this. Mr Emmerson said that if the Deceased had told him that the Deceased had kept the money in an account in the Deceased's name, Mr Emmerson would have advised the Deceased to make specific provision for that money under the will.[14]

[41] Mr Emmerson also confirmed[15] that the instructions he received from the Deceased were that the Deceased was going to build a house for Kayrelle to live in on land owned by the Company, and that he had put money in a bank account in the Deceased's name and Kay's name to make sure that this happened.

[42] An affidavit by Trevor[16] explained in some detail the progress of funds from the sale of the Tiger Street property into the Building Account. Trevor said that, during a telephone discussion with the Deceased some time in October or November 2009, he and the Deceased spoke about building a second house on the same block of land as Kay's home. He said that he and the Deceased knew that they could not subdivide that parcel of land, but his father was adamant about building the second house there. Trevor said that his father said words to the following effect:

> "I have spoken to Peter Utz and he can build a nice little three bedroom house for $250,000. I have set aside $250,000."

[43] Trevor then spoke of a further conversation he had with his father in December 2009, when the Deceased said that he and Kayrelle had been arguing. Trevor said that the Deceased said words to the effect:

> "Kayrelle expects me to use all the money from Tiger Street to build. She keeps harping on that I can't build a house for $250,000. I told her that I only want to spend $250,000 and if I can't build a house for $250,000, I won't build at all."

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12 T 1-36.
13 Affidavit sworn 3 December 2012.
14 T 1-50.
15 T 1-51ff.
16 Sworn 15 January 2013.

[44] Trevor further deposed to discussions that he had with his father between December 2009 and early February 2010 when, according to Trevor, the Deceased told him that the Deceased and Kayrelle had been arguing, including over matters such as Kayrelle allowing her children to eat fast food rather than fish cooked by the Deceased.

[45] Trevor said that on 15 February 2010, the Deceased told him that he was going to change all of the bank accounts to joint accounts with Trevor and his wife. On the following day, Trevor, his wife and the Deceased attended at the Bendigo Bank at Rosewood. Trevor said that, just before they went to the bank, the Deceased told him that the Deceased had two bank accounts and a term deposit, the Deceased could not transfer the term deposit because its term was not to expire until April 2010, and that he needed to get a cheque book from Kay so that he could close an account. Trevor said the Deceased then went down to Kay's house, but returned without the cheque book because Kay was not home. Trevor said that he then went with his wife and the Deceased to the Bendigo Bank on 16 February 2010. The Deceased transferred $42,030.02 from his Retirement Account to a joint account with Trevor and his wife, and closed the Retirement Account. He said that the Deceased told the bank manager that he could not close the Building Account and transfer the money into a joint account with Trevor because Kay had the cheque book for the account and the cheque book was needed to be handed in in order to close the account. He said that, as they walked out of the bank, the Deceased said to him:

> "I have no money now. I'll be a kept man – you'll have to keep me. That other pair can't get anything out of me any more."
>
> [Trevor said that he understood the reference to "the other pair" as meaning Kay and Kayrelle.]

[46] Trevor also relied on an affidavit by Ms Margaret Sherlock[17]. Ms Sherlock and her late husband had been friends of the Deceased for many years. She said that on two occasions, on 13 December 2009 and 1 February 2010, the Deceased phoned her to speak about Kayrelle. She said that on each occasion, the Deceased was very upset and angry about Kayrelle. Ms Sherlock deposed:

> "During our discussion on 13 December 2009, Arthur said to me words to the effect 'Kayrelle and I have had a falling out. I put money aside to build a house. She wants a large expensive house. She keeps demanding all the money from the sale of the house in Ipswich. I told her that I won't give her the money and I will build a house on the property near her mother and she can live there. The house in Ipswich was owned by me so she isn't entitled to the money.'"

[47] Mr Peter Utz, the builder with whom the Deceased had spoken, also gave evidence. In his affidavit[18], Mr Utz said that on 6 February 2010, he was phoned by the Deceased. The Deceased told him that he wanted to build a house for Kayrelle at a property situated at the corner of Kuss Road and Bexleigh Lane, Calvert. Mr Utz said that he, the Deceased and Kayrelle met about a week later to draw a rough plan. Mr Utz also arranged for a soil test.

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17 Sworn 16 January 2013.

18 Sworn 7 December 2012.

[48] Mr Utz deposed to further discussions with the Deceased in which he was told that the site had been cleared and that the Deceased wanted building to start as soon as possible, even in Council approval was not to hand. Mr Utz said:

> "7. On the same day I observed that Arthur's health was deteriorating. I asked him what would happen if I started the house and something happened to him. He told me there was 'nothing to worry about because I have money set aside.'
>
> 8. I was not satisfied with this answer and so I asked Arthur more about the money which was set aside. He told me 'I have $250,000 in trust in a separate bank account for Kayrelle's house and Kay and I are signatories so if anything happens to me, Kay can sign.'"

[49] Under cross-examination, Mr Utz was challenged, by reference to a statutory declaration he had previously given, as to whether the Deceased had actually used the words 'in trust" when referring to the money he was holding for construction of the house. Mr Utz conceded (quite appropriately, in my view) that he did not remember the exact words used by the Deceased, but remembered that the Deceased had said that the money had been put aside in a separate account "where Kay could sign it as well as [the Deceased] if anything happened".[19]

[50] Against that background, the issue is whether the monies which were held in the Building Account were held on trust for Kayrelle or whether they fall to be dealt with as part of the Deceased's estate.

[51] It has long been held[20] that the creation of an express trust requires three certainties:

- certainty of creation or intention;
- certainty of subject matter;
- certainty of object.

[52] In the present case, it was conceded on behalf of Trevor that certainty of object with respect to the money in the Building Account was satisfied, i.e. there was no issue that Kayrelle was the object.

[53] It was submitted, however:

(a) that there was no certainty of intention, and

(b) that there was no certainty of subject matter.

[54] In ascertaining whether there was the necessary certainty of intention, it is not necessary for a particular form of words to have been used. As Megarry J said in *Re Kayford Ltd*[21]:

> "It is well settled that a trust can be created without using the words 'trust' or 'confidence' or the like; the question is whether in substance a sufficient intention to create a trust has been manifested."

[55] The submission that there was a lack of certainty of intention in the present case was founded particularly on the terms of the letter from Ms Carpenter of the Bendigo Bank, in which she appeared to refer to the source of the funds for the Building Account being a person other than the Deceased. It was contended that this reading of Ms Carpenter's letter should be preferred to the otherwise significant

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19 T 1-39.

20 *Knight v Knight* (1840) 3 Beav 148.

21 [1975] 1 WLR 279 at 282.

body of evidence from which it could clearly be inferred that it was the Deceased's intention to deposit monies into the Building Account, and indeed be preferred to the fact that the Deceased did in fact cause the monies to be deposited into the Building Account. As I have already intimated, I do not give Ms Carpenter's letter the conclusive weight which Trevor would seek to ascribe to it.

[56] It was further contended that Ms Carpenter's letter showed that the Deceased not only "did not intend to contribute to the bank account, but that the account was not in fact even established".[22] Again, this submission cannot stand in the face of the clear fact that on 16 October 2009 the Deceased transferred $250,000 from his Retirement Account into the newly opened Building Account.

[57] For completeness, I note that it was clear on the evidence that, although the monies ultimately deposited into the Building Account had originated in the sale of trust property (the Tiger Street property), the Trust's working papers and accounts for the relevant financial year made it clear that these monies were distributed out of the Trust to the Deceased as a repayment on his beneficiary account. In short, they were the Deceased's funds, in respect of which he was able to create a trust.

[58] In Ford & Lee "Principles of the Law of Trusts"[23] it is said at [2015]:

> "Certainty of intention to create a trust requirements are minimal. Trust terms need not be set out by the trust creator, so long as there is sufficient certainty of subject matter and certainty of objects. Powers, duties and liabilities of trustees, rights of beneficiaries and whether the settlor has power to revoke the trust may all, in an appropriate case, be established by the rules of equity and legislation."

[59] In my view, apart from the fact that the Deceased's intention may clearly be gleaned from the fact that he deposited money into an account expressly entitled "Building Account", the Deceased's intention to create a trust in favour of Kayrelle is to be inferred from:

(a) the evidence of Kay as to the statements made by the Deceased at the time the Building Account was opened;

(b) the statements by the Deceased to Mr Utz as to the fact that $250,000 had been placed in a separate bank account for Kayrelle's house;

(c) the fact that the Deceased arranged for Kay to have a cheque book for drawing on the Building Account – the fact that Kay was given this cheque book is inconsistent with the Deceased retaining control or ownership over the money in the Building Account, because it facilitated the use, independently of the Deceased, of the money in the Building Account;

(d) Mr Emmerson's evidence of the instructions he had received from the Deceased that money had been put into a bank account to make sure that a house was built for Kayrelle;

(e) Kayrelle's evidence of having been informed by the Deceased that the money in the Building Account would be used for her benefit to pay for the house which was to be constructed for her and her children to live in.

[60] In all those circumstances, it seems to me that the requirement as to certainty of intention on the part of the Deceased was satisfied.

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22 Applicant's submissions, para 44.

23 2013 Thomson Reuters.

[61] The submission on behalf of Trevor that there was no certainty of subject matter such as to give rise to a trust relied on the fact that the Building Account was opened in the name of the Deceased, rather than in Kay's name. It was noted, in this regard, that Mr Emmerson's evidence was that he had been told by the Deceased that the money had been put into a bank account in the name of the Deceased and Kay, and reference was also had to Ms Carpenter's letter in which she referred to the fact that the Deceased had told her that Kay and Kayrelle "were to have access to this account as signatories but [Ms Carpenter was] unaware as to why this did not occur". I note parenthetically that Kay did, in fact, have access to the account as a cheque signatory. It was argued that because such an account, i.e. an account opened at least with Kay named as one of the account holders, had not been opened, then it ought be inferred that there was, in fact, no trust fund established.

[62] This argument on behalf of Trevor is, in my view, completely outweighed by the fact that the particular account into which the Deceased deposited his funds was specifically entitled "Building Account". That fact alone points significantly to supporting the notion that the funds placed in this account were effectively set aside and separately identifiable as the subject matter of the trust created by the Deceased.

[63] Accordingly, I reject the submission on behalf of Trevor that there was no sufficient certainty of subject matter.

[64] In reaching these conclusions, I am mindful of the fact that the Deceased obviously created this Trust in the context of "private family dealings where some imprecision of thought and expression might perhaps be expected". [24]

[65] Counsel for Trevor also relied on evidence of statements made by the Deceased after the Building Account was established – this was couched as a submission that the Deceased changed his mind about assisting Kayrelle before the trust was perfected. Trevor's counsel pointed to the evidence of arguments between the Deceased and Kayrelle and the evidence of Ms Sherlock about what she had been told by the Deceased. I find, however, that these events occurred after the trust in favour of Kayrelle was created by the opening of the Building Account on 16 October 2009. Evidence of statements made and conduct by the Deceased after the creation of the trust for Kayrelle is only admissible to the extent it is against the Deceased's interests.[25] The trust for Kayrelle was created by the Deceased on 16 October 2009; the fact that he may later have sought to renege on that creation of trust because he had fallen out with Kayrelle does not operate to vitiate the trust he had created.

[66] The fact that the Company owned the land on which the house for Kayrelle was to be built also did not preclude the creation of the trust for Kayrelle. A side argument by counsel for Trevor that the trust failed for lack of compliance with s 11(1)(b) of the *Property Law Act* 1974 (which requires a declaration of trust respecting any land to be proved by writing) cannot be maintained because this clearly was not a trust respecting the land owned by the Company, but was a trust in respect of the money deposited into the Building Account.

[67] Accordingly, I find that a trust was created and that from 16 October 2009 the Deceased held the money in the Building Account on trust for Kayrelle. It follows

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24 *Herdegen v Federal Commissioner of Taxation* (1988) 84 ALR 271 at 277.

25 *Herdegen v Federal Commissioner of Taxation* (supra) at 276; *Calverly v Green* (1984) 155 CLR 242, per Mason J and Brennan JJ at 262.

that the money now contained in the Disputed Account should be regarded as being held on trust for Kayrelle, and that the monies contained in the Disputed Account do not form part of the Deceased's estate.[26]

Application for removal of executor and trustee

[68] It is convenient next to deal with Trevor's applications for the removal of Mr Emmerson as executor and trustee of the Deceased's estate.

[69] So far as the Deceased's estate is concerned, Trevor has applied for:

(a) removal of Mr Emmerson as executor and trustee of the Deceased's estate;

(b) revocation of the probate granted to Mr Emmerson, and

(c) appointment of an administrator of the Deceased's estate.

[70] Trevor has also applied for orders that Mr Emmerson be removed as trustee of the Trust and for the Company to be appointed as trustee of the Trust. I will deal with those issues separately.

[71] Before turning to the arguments advanced on these applications, it is appropriate to set out, albeit in summary form, a chronology of events, including Mr Emerson's activities, from the death of the Deceased to the initiation of these proceedings:[27]

- The Deceased dies on 25 February 2010;
- In March 2010, Mr Emmerson starts securing assets, including by depositing money from the sale of cattle into his Trust Account;
- April and May 2010 - initial correspondence between Mr Emmerson and Trevor concerning the disposition of particular assets between Trevor and Kay;
- 18 May 2010 - probate granted;
- 25 May 2010 - Mr Emmerson appointed director of the Company, and transfers the Deceased's seven shares in the Company to himself as executor;
- May-June 2010 – Trevor and Mr Emmerson meet with the Deceased's accountant, Mr Turner, to review the current position of the Company, the Trust and another company controlled by the Deceased, 2 Ezy Pty Ltd. It is resolved at the meeting that Trevor would contact real estate agents to arrange to list Lot 82 for sale and to obtain market appraisals (to calculate estimates of stamp duty and capital gains tax) of Lot 82 and Lot 74;
- June 2010 – correspondence between Mr Emmerson's law firm and Bendigo Bank concerning the Deceased's bank accounts;
- 28 June 2010 – Mr Emmerson writes to Trevor confirming steps taken to date in the administration of the estate;
- July 2010 – Mr Emmerson's law firm receives $321,015.72 in trust from the Deceased's Bendigo Bank accounts; $72,543.84 is placed on term deposit as trustee for the Deceased's estate and $248,471.88 is placed in a separate term

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26 It will be a matter for the Deceased's personal representative to comply with the requirements of s 16 of the *Trusts Act* 1973 in order to give effect to the Trust created by the Deceased for Kayrelle.

27 This review is derived principally from the "Agreed Chronology" provided jointly by the parties after the conclusion of the hearing.

deposit as trustee for Kayrelle (this is the "Disputed Account" referred to above at [20]);

- Between February 2010 and October 2012 – Mr Emmerson pays expenses of the estate and of the Trust from the funds held in his law firm's trust account;
- 12 October 2010 – Mr Emmerson lodges changes with ASIC regarding 2Ezy Pty Ltd, of which the Deceased was sole director and shareholder;
- About 7 December 2010 – Mr Emmerson sends a brief to counsel seeking advice with respect to, inter alia, whether the monies in the Disputed Account are held on trust for Kayrelle;
- November 2010 – correspondence and discussions between Mr Emmerson and Trevor concerning the Deceased's personal items; an agreement is reached between Trevor and Kay in relation to those items;
- Late 2010 – discussion between Mr Emmerson and Trevor in which Trevor indicates that he does not accept that the money held in the "Disputed Account" is not part of the Deceased's estate; Mr Emmerson's view is that those monies do not form part of the estate;
- 9 November 2010 – Mr Emmerson writes to Bendigo Bank at Rosewood seeking information about the funds held by the Deceased and the Company "for the purpose of establishing who is entitled to same on distribution from his estate";
- 1 December 2010 – Ms Anita Carpenter, Branch Manager of Bendigo Bank writes to Mr Emmerson with information;
- 23 December 2010 – Mr Emmerson receives advice from counsel;
- Circa 25 January 2011 – Mr Emmerson, Trevor and the accountant Mr Turner meet to discuss the Deceased's wishes. These discussions included the fact that there cannot be a distribution of any of the properties to Trevor or Kay until Lot 82 is sold so that the funds from that sale can be used to pay capital gains tax and stamp duty;
- 2 February 2011 – Mr Emmerson has a discussion with Kay in relation to the monies held in the "Disputed Account" and inquires whether Kay is aware of any material or evidence as to whether the funds are held on trust for Kayrelle or form part of the estate;
- 3 February 2011 – Mr Emmerson writes to Trevor concerning the Deceased's estate. That letter includes:

> "We also note that you dispute that monies held in the House Building Account are held on Trust for Kayrell. We confirm that we have obtained Counsel's Opinion in regard to that entitlement and you have indicated that you will be obtaining your own legal advice in respect of that Account. As discussed with you we enclose herewith copies of the following:-
>
> 1. Front cover of Bendigo Bank account;
> 2. Letter from Anita Carpenter, Branch Manager of Bendigo Bank, Rosewood dated 1st December, 2010;
> 3. Bendigo Bank Statement – Building Account – 138362892.
>
> We also confirm that your Father instructed the writer that he had put $250,000.00 into an Account in Kay's name for Kayrell to build a house and

> we have a signed Statement from a friend of your Father who confirms that your Father spoke to them on 1st December, 2009 and again about ten days later and told them that he had set aside $250,000.00 for Kayrell to build a house and that everything was done by way of helping his grandchildren.
>
> We also confirm that the sum of $1540.00 was withdrawn from that account to pay for site works and we are instructed that Kayrell had commenced negotiating with a building Contractor including preliminary plans for construction of the house on reliance of the deposited funds.
>
> In the circumstance we confirm that unless you agree and acknowledge this money is set aside for Kayrell then we will be obliged to obtain a Direction of the Court as to who is entitled to that Account.
>
> We would be pleased if you would obtain your own independent Advice and advise us of the outcome thereof and request your legal advisor to communicate with us.";

- 17 May 2011 – Trevor's solicitors write to Mr Emmerson asking for copies of certain documents and advising that they are in the process of obtaining advice from counsel and would provide Mr Emmerson with Trevor's instructions as soon as possible. This letter seeks an undertaking "that the estate will not be distributed until the issue regarding the Bendigo Bank Building Account is resolved";
- 9 June 2011 – Trevor's solicitors write to Mr Turner seeking information about the Company;
- 14 June 2011 – Mr Emmerson responds to Trevor's solicitors;
- 23 June 2011 – Mr Turner sends an email to Trevor's solicitors attaching copies of documents concerning the Company;
- 25 August 2011 – Trevor's solicitors send an email to Mr Turner seeking advice with respect to tax consequences if the Company were to sell "Rosewood Properties";
- 17 September 2011 – Mr Turner responds to Trevor's solicitors, giving advice with respect to capital gains tax liability;
- 17 January 2012 – Trevor's solicitors write to Mr Emmerson responding to his letter to Trevor of 3 February 2011 and the proposal to treat the funds in the Disputed Account as being held on trust for Kayrelle, asserting that there is insufficient certainty of intention or certainty of subject matter to support the creation of an express trust in Kayrelle's favour, and also asserting that it is incumbent on Mr Emmerson, as executor of the Deceased's estate, to:

  (a) transfer the funds from the Deceased's bank accounts to Trevor in accordance with the will;

  (b) transfer the Deceased's shares in the Company equally to Trevor and Kay;

  (c) after payment of the estate's liabilities, transfer the residue of the Deceased's estate to Trevor and Kay, and

  (d) then resign as a director of the Company and agree to another director being appointed;

- 23 January 2012 – Trevor's solicitors write to Kay enclosing a copy of their letter to Mr Emmerson and suggesting that she obtain independent legal advice;
- Early 2012 – Mr Emmerson seeks advice from counsel as to whether he should withdraw from acting as solicitor for the estate and engage an independent third party solicitor to act as solicitor for the estate;
- 26 March 2012 – Trevor's solicitors write to Mr Emmerson regarding his withdrawal from acting as solicitor for the estate, and advising that it is appropriate "if not essential" that he withdraw from acting as solicitor for the estate as he "may be a witness to any proceedings regarding the alleged trust for Kayrelle". Trevor's solicitors agree to the appointment of Mr Gray as solicitor for the estate on the basis that he is an independent person;
- 17 April 2012 – Trevor's solicitors write a follow up letter to Mr Emmerson;
- 17 April 2012 – Mr Emmerson writes to Trevor's solicitors advising that he has engaged Richard Gray & Associates to act on his behalf;
- 18 April 2012 – Trevor's solicitors write to Richard Gray & Associates requesting administration of the Deceased's estate in accordance with the Deceased's will;
- 18 April – 9 May 2012 – telephone conversation between Mr Emmerson's solicitor and Trevor's solicitor with respect to arranging an informal conference;
- 9 May 2012 – Trevor's solicitors write to Mr Emmerson's solicitors outlining a proposed agenda for the informal conference;
- 16 May 2012 – Trevor and Mr Emmerson attend an informal settlement conference with their respective legal representatives;
- 5 June 2012 – Mr Emmerson's solicitor sends an email to Trevor's solicitor advising that Kay has collected documents from Mr Emmerson to take to her own solicitor and that he would advise in due course of the identity of that solicitor. Trevor's solicitors respond asking Mr Emmerson to find out and advise whether Kayrelle also intends to obtain independent legal advice;
- 19 June 2012 – Trevor's solicitors send a follow up email to Mr Emmerson's solicitors;
- 22 June 2012 – Mr Emmerson's solicitors email Trevor's solicitors advising that Kay and Kayrelle have engaged a solicitor and providing contact details;
- 26 July 2012 – Mr Emmerson's solicitors email Trevor's solicitors advising that they have spoken with the solicitor retained for Kay and Kayrelle, who have advised that he hoped to meet with them and obtain final instructions shortly;
- 8 and 9 August 2012 – Kay and Kayrelle's solicitor writes to Trevor's solicitor and Mr Emmerson's solicitor advising that they have received instructions to act for Kayrelle and asking that Trevor delay any foreshadowed administration action against the estate for a month to enable them to advise Kayrelle;
- 9 August 2012 – Trevor's solicitors respond to Key and Kayrelle's solicitors rejecting a delay of four weeks, and requiring a response by 24 August 2012;

- 22 August 2012 – Kay and Kayrelle's solicitors write to Trevor's solicitors and Mr Emmerson's solicitors asking that Mr Emmerson's solicitors advise his clients position regarding the alleged trust in favour of Kayrelle;
- 11 September 2012 – Kay and Kayrelle's solicitors write to Trevor's solicitors and Mr Emmerson's solicitors seeking disclosure of the accounts for the Trust;
- 14 September 2012 – Trevor's solicitors write to Kay and Kayrelle's solicitors asserting that Kay and Kayrelle are not beneficiaries of the Trust (referring to the Deceased's statutory declaration of 18 January 1999); the solicitors for Kay and Kayrelle respond on the same day disputing this assertion by Trevor's solicitors, and asserting that both Kay and Kayrelle are beneficiaries of the Trust;
- 21 September 2012 – Trevor's solicitors write to the solicitors for Kay and Kayrelle taking issue on the question of the beneficiaries of the Trust, and asserting that in any event the Trust is a discretionary trust and Kay and Kayrelle have no immediate entitlement to the Trust property;
- 25 September 2012 – the solicitors for Kay and Kayrelle write to Trevor's solicitors questioning whether the email of 21 September 2012 was a concession that Kay and Kayrelle are eligible beneficiaries of the Trust;
- 19 October 2012 – Mr Emmerson's solicitors write to Trevor's solicitors and the solicitors for Kay and Kayrelle advising, amongst other things, that Mr Emmerson is in the process of finalising the undisputed assets of the estate, confirming that it is Mr Emmerson's view that the money held in the Disputed Account does not form part of the estate but is held on trust for Kayrelle, but also noting Trevor's disagreement with that position, and advising that Mr Emmerson does not intend to distribute those funds until that issue has been resolved. The letter further refers to the assets of the Trust and the terms of the Trust Deed, and advises:

  > "We are instructed to advise the parties that Mr Emmerson is minded to exercise his power under clause 10 of the Trust Deed and remove Westdale Holdings Pty Ltd as trustee. Mr Emmerson is also minded to appoint himself as the new trustee. Before deciding whether to exercise his power, Mr Emmerson would appreciate the views of the parties with respect to the proposed course."

- 19 October 2012 – Trevor's solicitors write to Mr Emmerson's solicitors advising that it is not necessary for Mr Emmerson to concern himself with the management of the Company or its capacity as trustee and requesting Mr Emmerson to take steps to finalise the administration of the estate by "transferring to our client Trevor Schuhmacher any bank accounts in Arthur Schuhmaher's name, and transfer the shares in the Company to the residuary beneficiaries". Trevor's solicitors also advise that they are instructed to bring an application in the event that Mr Emmerson does not take steps to finalise the estate or seek directions of the Court;
- 25 October 2012 – by Deed of Removal & Appointment, Mr Emmerson removes the Company as trustee and appoints himself as trustee of the Trust;
- 26 October 2012 – Mr Emmerson's solicitors email a copy of the Deed of Removal & Appointment of new trustee to, inter alia, Trevor's solicitors and the solicitors for Kay and Kayrelle;

- 29 October 2012 – Trevor's solicitors write to Mr Emmerson's solicitors asserting that Trevor is the sole beneficiary of the Trust and calling on the trustee "to immediately transfer the trust property to him and terminate the Trust".
- 30 October 2012 – the originating application in this proceeding is filed on behalf of Trevor.

Application for removal of Mr Emmerson as executor

[72] The Court's jurisdiction to remove a person as executor and trustee of a deceased's estate was canvassed by White J (as her Honour then was) in *Colston v McMullen*[28] in the following passage (omitting references and citations):

> "[38] The jurisdiction to remove an executor of a deceased estate is sourced in s 6 and, possibly, s 52(2) of the *Succession Act* 1981 (Qld) and, with respect to executors and trustees, ss 5 and 80 of the *Trusts Act* 1973 (Qld). The court also has an inherent power to supervise executors since 'the real object [of the grant of probate] ... is the due and proper administration of the estate and the interests of the parties beneficially entitled thereto'; and to supervise trustees in the administration of trusts. The office of executor and the office of trustee are, by virtue of modern statutory intervention, now very similar, although there are also marked distinctions.
>
> [39] The court may remove an executor to whom a grant of probate has been given. This occurs by the revocation of the grant. **Such a removal will occur when the court is persuaded that the due and proper administration of the estate in the interest of those beneficiaries entitled has been put in jeopardy, or prevented, by reason of the acts or omissions of the executor or, because of matters personal to him or her, or for some good reason the executor is not a fit and proper person to carry out the executorial duties.**
>
> [40] The jurisdiction to remove a trustee is exercised by the court to protect the interests of the beneficiaries. In *Letterstedt v Broers*, Lord Blackburn described the jurisdiction to remove a trustee as 'delicate'. In *Miller v Cameron*, Dixon J stated:
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> > 'The jurisdiction to remove a trustee is exercised with a view to the interests of the beneficiaries, to the security of the trust property and to an efficient and satisfactory execution of the trusts and a faithful and sound exercise of the powers conferred upon the trustee. In deciding to remove a trustee the Court forms a judgment based upon considerations, possibly large in number and varied in character, which combine to show that the welfare of the beneficiaries is opposed to his continued occupation of the office. Such a judgment must be largely discretionary. A trustee is not to be removed unless circumstances exist which afford ground upon which the jurisdiction may be exercised. But in a case where enough appears to authorise the Court to act, the delicate question whether it should act and proceed to remove the trustee is one

[28] [2010] QSC 292.

> upon which the decision of a primary Judge is entitled to especial weight.'
>
> That passage was cited with approval by Macrossan J (as his Honour then was) in *Re Whitehouse*. His Honour then said:
>
> 'I appreciate that the disputes between C. M. Whitehouse and his sons should not by themselves be regarded as constituting sufficient ground for removal as trustee. As was pointed out in *Forster v Davies* (1861) 4 De G. G. & J. 133, it would be necessary to enquire further to see who was to blame for any dissension since otherwise *cestuis que trust* would be placed in a falsely powerful position of being able to raise a dispute with their trustee and then apply for his removal.'" (emphasis added)

[73] Relevant also, on an application to remove an executor, are the following observations by Jerrard JA (with whom McMurdo P and Helman J agreed) in *Baldwin v Greenland*[29]:

> "[44] The jurisdiction, both statutory and inherent, is a supervisory and a protective one. **It is always appropriate and necessary for a court asked to exercise it to have regard to the testator's wishes as to the identity of an executor or trustee. The testator's choice may be based on loyalty, or on respect, or on necessity, or on the profession of the chosen person, or on other matters the testator knew about the chosen person; the reason for the choice might never be clear to a court. The overriding assumption must be that the testator thought the person chosen was worthy of trust, even when well aware when making a choice of existing hostility (from family members) toward the chosen executor or trustee, or of other grounds for doubt about the wisdom of the choice**. The decision in *Gowans v. Watkins*, to which Mr Stephens referred, is an example of a court respecting a testator's wishes, where no great mischief in administering the estate had been done by the person chosen by the testator, and where there were serious family hostilities. But the overriding object of the power remains the due and proper administration of estates." (emphasis added)

[74] It was argued for Trevor that Mr Emmerson ought be removed as executor because:

(a) Mr Emmerson failed to appreciate "that the will could not be administered in relation to the purported gifts of land"[30];

(b) Mr Emmerson failed to take steps to seek directions from the Court with respect to that issue;

(c) Mr Emmerson did not act as a disinterested administrator of the estate as a consequence of having adopted the view that the money in the Disputed Account was held on trust for Kayrelle;

(d) Mr Emmerson failed to take steps to seek directions from the Court with respect to the claim by Kayrelle;

(e) Mr Emmerson only sought to obtain separate legal advice with respect to the monies in the Disputed Account "when it became clear that [Mr Emmerson's]

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29 [2007] 1 Qd R 117.

30 Applicant's submissions, para 68.

position in that regard conflicted with his duty to impartially and efficiently administer the estate".[31]

[75] The first of these arguments was obviously premised on the notion that, under his will, the Deceased had purported to make gifts of Lot 74, Lot 1 and Lot 82 when, clearly enough, each of those lots was owned by the Company as trustee for the Trust. Indeed, counsel for Trevor put on extensive written submissions in support of an argument that, to the extent that the Deceased, by his will, purported to leave gifts of that land, those gifts must fail.

[76] In my view, however, the premise on which these submissions were based is wrong. The premise posits the notion that, by cl 3(b) of the will, the Deceased made, or purported to make, gifts of each of the lots. A plain reading of cl 3(b) as a whole, reveals that the Deceased well appreciated that the land was held in the name of the Company as trustee for the Trust, that it was not his to give, and that the most he could do was express a wish as to how the lots held in the Trust should be dealt with. Counsel focused on the second full paragraph of cl 3(b), commencing with the words "If this land remains in the Company my executor is to sell the respective lots ...", and submitted that, because the Deceased did not have an interest in the various properties, cl 3(b) could not be construed so as to give it any meaningful effect. That paragraph, however, needs to be read in the full context of cl 3(b). The clause commences with the expression by the Deceased as to how he would wish the respective lots be dealt with by the Company; the second paragraph ought be read as a further expression of the Deceased's wishes as to the mechanics of the transaction which would need to be undertaken if his primary wish is given effect.

[77] But even if that construction of the Deceased's will be incorrect, it does not determine the relevant question, which is whether Mr Emmerson so conducted himself as to jeopardise the due and proper administration of the estate in the interests of the beneficiaries. It is difficult to see how Mr Emmerson's efforts to follow the Deceased's expression of desire has had that effect. It is even more difficult to see how Trevor can contend for that conclusion when it is recalled, as is apparent from the chronology set out above, that, from very soon after the death of the Deceased, Trevor was assisting Mr Emmerson in attempting to put the Deceased's wishes into effect – as early as May or June 2010, Trevor had met with Mr Emmerson and Mr Turner and had agreed to contact real estate agents to arrange to list Lot 82 for sale and to obtain market appraisals for calculating estimates of stamp duty and capital gains tax. The contention that the estate ought not be administered in that way and that the Will ought be construed in the way contended for at trial was first raised in the letter from Trevor's solicitors dated 12 January 2012, nearly two years after the death of the Deceased.

[78] Particularly when one has regard to Trevor's complicity in the way in which Mr Emmerson approached the administration of the Deceased's estate, I do not think Trevor can now level any cogent criticism of Mr Emmerson's conduct as an executor.

[79] To the extent that Trevor's argument relied on the view which Mr Emmerson had taken of the monies in the Disputed Account, it is clear, for the reasons I have given above, that Mr Emmerson was correct in the view that he had taken. His conduct in separating out those monies was completely appropriate. It is not correct, as was argued by Trevor, that Mr Emmerson delayed in taking independent legal advice on

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31 Applicant's submissions, para 74.

this matter. As the chronology makes clear, Trever first made this argument in late 2010, and Mr Emmerson sent a brief to counsel for advice in December 2010. It is clear enough that he then acted on the advice received from counsel. Again, it is difficult to see how these actions by Mr Emmerson can be criticised as having been such as to have run the risk of jeopardising the proper administration of the estate. Despite assertions in Trevor's written submissions that Mr Emmerson failed to make a disinterested assessment of the validity of Kayrelle's claim, and took an active role in advancing Kayrelle's claim, it is quite clear that Mr Emmerson acted with complete propriety by obtaining and acting on counsel's advice with respect to the issue. There is no evidence that Mr Emmerson in any way adopted the role of advocate for Kayrelle.

[80] The criticism of Mr Emmerson arising out of the need for him to retain independent solicitors once it became apparent that there was to be a dispute in relation to Kayrelle's entitlement is also, I think, unfair. Pre-litigious agitation commenced with the letter from Trevor's solicitors of 17 January 2012. Within a very short time after that, Mr Emmerson properly retained an independent law firm to act on his behalf. So much is also apparent from the chronology set out above.

[81] The criticism of delay is also difficult to maintain, given that Trevor's solicitors had, in May 2011, sought Mr Emmerson's undertaking that the estate not be administered until the issue with the Building Account was resolved.

[82] In short, Trevor has not demonstrated any proper case for the removal of Mr Emmerson as executor and trustee of the Deceased's estate.

Application for removal of Mr Emmerson as trustee

[83] There was no issue before me that, by the express terms of the Deed of Trust, Mr Emmerson, as personal representative of the Deceased, had the power to remove the Company as trustee of the Trust and to appoint a new trustee. Trevor's argument was that Mr Emmerson should not have exercised that power to appoint himself as trustee for the following reasons:[32]

(a) the reason for Mr Emmerson having the power was because he was acting as executor of the estate, and he was therefore required to exercise the powers as appointor only for the purpose of administering the estate;

(b) there was no proper purpose in removing the Company as trustee;

(c) Mr Emmerson ought no have appointed himself as trustee;

(d) the exercise of the power of appointment was for an improper purpose.

[84] Counsel for Trevor argued that, by reference of the terms of the Deed of Trust, the power of appointment was conferred on Mr Emmerson only in his capacity as the Deceased's personal representative, and that, on that basis, he was required to exercise the power "solely in furtherance" of the purpose for which it was conferred, i.e. to administer the Deceased's estate. It was argued that nothing in the evidence disclosed any reason for the removal of the Company as trustee. It was further contended that, by appointing himself as trustee, Mr Emmerson's conduct

32 Applicant's submissions, para 83

was sinister in that it was an attempt to reduce Trevor's influence over the affairs of the Trust and that it had the effect of disenfranchising him as a beneficiary of the Trust. Moreover, so it was argued, completion of the administration of the Deceased's estate would necessarily involve transfer of the Deceased's shares in the Company so as to make Trevor its majority shareholder, and it would only be at that point, i.e. completion of administration of the Deceased's estate, that Trevor would have control of the Company and thereby effective control of the Trust. In those circumstances, removal of the Company as trustee amounted to conduct which would necessarily interfere with the Trust after the Deceased's estate was fully administered.

[85] Counsel for Trevor again relied on clause 3(b) of the Will, arguing that it constituted an invalid gift of land and that Mr Emmerson's conduct in appointing himself as trustee was for the purpose of securing an outcome which could not be achieved under the terms of the Will, i.e. a distribution of the assets of the Trust. This, it was said, amounted to a breach of the fiduciary obligations owed to all beneficiaries of the Trust.

[86] The difficulty with the picture sought to be painted on Trevor's behalf, however, is that it ignores the claims, and the effect of the claims, which were being made on Trevor's behalf from early 2012.

[87] From January 2012,[33] Trevor asserted that:

(a) clause 3(b) of the wWll did not effect a gift of the land held in the Trust, and

(b) the money in the Disputed Account was not held on trust for Kayrelle. The consequence of this assertion was that, under clause 3(e) of the will, Trevor would receive all of the cash in the Deceased's estate (apart from the specific request of $25,000 to Michael Powers).

[88] From mid 2012, Trevor asserted that he was the sole beneficiary of the Trust. This assertion was apparently made in a letter from Trevor's solicitors dated 27 July 2012 containing an "open offer" to settle the dispute between the parties. That letter was not in evidence before me, but the "open offer" element was referred to in a letter from Kay and Kayrelle's solicitors dated 14 September 2012, which was in evidence, in which it was said that Trevor's "open offer contained in your correspondence dated 27 July 2012 was prepared on the basis of your client's incorrect assumption that he is the sole surviving beneficiary of the Trust". In any event, in a letter to Kay and Kayrelle's solicitors dated 14 September 2012, Trevor's solicitors expressly asserted that Trevor was the sole surviving beneficiary of the Trust.

[89] The net effect of these claims by Trevor was that the position he adopted against the other beneficiaries of the Deceased's estate and the other beneficiaries of the Trust was that:

(a) Apart from the proceeds of sale of the deceased's vehicle being split (it was purchased by Trevor for the grand sum of $2,500), the specific bequest to Michael of $25,000, and Trevor and Kay receiving the Deceased's non-cash assets as tenants-in-common in equal shares (noting that these consisted of the shares in the

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33 Letter from Trevor's solicitors dated 12 January 2012

Company, which of themselves were of minimal value, and the Deceased's personal goods and chattels), Trevor would receive all of the cash in the Deceased's estate, totalling some $281,000 (being the amount in the Disputed Account plus the amount in the term deposit), and

(b) Trevor would receive all of the real property held in the Trust. This position was confirmed by his call on 29 October 2012 for the Trust to be terminated and for the Trust property to be transferred to him.

[90] Indeed, this contention that Trevor was personally solely entitled to the bulk of the Deceased's estate, to the exclusion of the other beneficiaries, and to whole of the Trust's assets, to the exclusion of the Trust's other beneficiaries, was maintained at trial,[34] at least to the point when, after the evidence had concluded, counsel for Trevor informed the court that Trevor no longer maintained that he was the only beneficiary of the Trust.

[91] Having regard to these claims asserted by Trevor against the Deceased's estate and the Trust's estate, it was clearly in contemplation that, upon achieving a majority shareholding position in the Company, Trevor would effectively compel the Company as trustee to distribute all of the Trust's assets to Trevor personally, to the exclusion of the other beneficiaries.

[92] In those circumstances, it seems to me that it was completely appropriate for Mr Emmerson, as personal representative of the Deceased and having regard to all of the beneficiaries, to exercise the power of appointment.

[93] The real question is whether Mr Emmerson, having appointed himself as the new trustee of the Trust, should now be removed. There is no doubt that the language of clause 10 of the Deed of Trust was, on its face, sufficiently wide to allow him to appoint himself. It was argued for Trevor, however, that he should not have appointed himself, and therefore should now be removed.

[94] Self appointment to the position of trustee has long been frowned on in equity. It is sufficient in that regard to refer to the following statements of principle collected in the joint judgment of Murphy JA and Hall J in *Scaffidi v Montevento Holdings Pty Ltd*:[35]

> "146 Even where the language is wide enough to permit the appointor to appoint himself or herself as trustee, it is a 'very salutary' or 'most salutary' rule that the power should only be exercised to that end in 'exceptional circumstances' or 'special circumstances': ***Montefiore v Guedalla*** (725, 726); ***In re Christina Brown*** (93 - 94); ***In re Power's Settlement Trusts*** [1951] Ch 1074, 1080.
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> 147 In a discretionary trust (and subject to the terms of the instrument) the power to appoint trustees may be construed as a 'fiduciary power': ***In re Skeats' Settlement*** (1889) 42 Ch D 522, 526; ***In re Newen*** (1894) 2 Ch 297, 309; ***Re Burton*** [1994] FCA 1146; (1994) 126 ALR 557, 559 - 560; ***Pope v DRP Nominees Pty Ltd*** [1999] SASC 337; (1999) 74 SASR 78 [46] - [48].
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> 148 In ***Re Skeats'*** case, Kay J said (526 - 527):
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> > The ordinary power of appointing new trustees, under a settlement such as this is, of course imposes upon the

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34 T 1-57, 58

35 [2011] WASCA 146.

> 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?
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> ...
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> Now what is the rule, the universal rule, observed in Courts of Justice as to a duty of that kind? The universal rule is that a man should not be judge in his own case; that he should not decide that he is the best possible person, and say that he ought to be the Trustee. Naturally no human being can be imagined who would not have some bias one way or the other as to his own personal fitness, and to appoint himself among other people, or excluding them to appoint himself, would certainly be an improper exercise of any power of selection of a fiduciary character such as this is.
>
> In my opinion it would be extremely improper for a person who has a power to appoint or select new trustees to appoint or select himself, for that principal reason. Has, then, the practice of such a person appointing himself been sanctioned by conveyancers or the profession in general? The answer must be, certainly not.

149 Even if not correctly technically described as a 'fiduciary power' (see the discussion in Finn PD (as his Honour then was), *Fiduciary Obligations* (1977) [627], [644]), such a power must nevertheless be exercised bona fide for the purpose for which it was conferred: ***Re Burton*** (559); ***Duke of Portland v Topham*** (1864) 11 HLC 32, 54. The purpose of the power of removing and appointing trustees is ascertained by reference to the fiduciary nature of the office the object of the appointment. The Trustee is the 'archetype' fiduciary: ***Maguire v Makaronis*** [1997] HCA 23; (1997) 188 CLR 449, 473. The office exists for the benefit of the beneficiaries: ***Letterstedt v Broers*** (1884) 9 App Cas 371, 386. It is an essential element of the Trust that the Trustee is under a personal obligation to deal with the Trust property for the benefit of the beneficiaries, an obligation giving correlative rights to the beneficiaries. There is an irreducible core of obligations owed by the Trustees to the beneficiaries and enforceable by the beneficiaries which is fundamental to the concept of a trust: Heydon JD and Leeming LJ, *Jacobs' Law of Trusts in Australia* (7th ed, 2006) [110], [1620]. If these do not exist, or if the beneficiaries have no rights to enforce them, there is no trust. The minimum duty is the duty to perform the Trust honestly and in good faith, for the benefit of the beneficiaries. See ***Armitage v Nurse*** [1998] Ch 241, 253 - 254.

150 Accordingly, notwithstanding the breadth of the discretion conferred on the Trustee in an instrument such as the one in this case, the discretion is to be exercised by reference to the objects and purposes of the Trust, having regard to the competing interests of the various potential beneficiaries, and without taking into account improper, irrelevant or irrational considerations. The

> discretions must be exercised personally and not in conjunction with, or under the direction of, somebody else. See ***Elovalis v Elovalis*** [2008] WASCA 141 [51], [70]. For a case illustrating a breach of trust in such circumstances, see for example, ***Nicholls v Louisville Investments Pty Ltd*** (1991) 10 ACSR 723."

[95] As I have already said, when one has had regard to Trevor's stated claim as being beneficially entitled to all of the assets of the Trust, and the prospect of him achieving a distribution of the Trust assets to himself once he gained a majority shareholding in the company, I am satisfied that it was appropriate for Mr Emmerson, in his capacity as appointor, to remove the Company and appoint a new trustee.

[96] It is also clear enough that the objects and purposes of the Trust were to benefit all of the beneficiaries under the Trust, not just Trevor. It is relevant, too, that the Deed of Trust expressly precludes the Trustee from altering the Trust so as to enable the Trustee "to acquire a beneficial or equitable interest in the income and/or capital of the Trust Fund or to have or acquire either directly or indirectly any possession enjoyment or benefit of whatsoever kind or in any way whatsoever from the income and/or capital of the Trust Fund."[36] The prospect of Mr Emmerson acquiring a personal interest for his own benefit in any of the Trust property was thereby excluded.

[97] In the particular, indeed exceptional, circumstances of the present case, I think the appointment of Mr Emmerson of himself as trustee of the Trust was justifiable. Once Trevor accepted, as he ultimately did at trial, that he was not the sole beneficiary of the Trust, the large part of the sting of his attack on Mr Emmerson was necessarily removed – those beneficially entitled under the Deceased's estate are the same persons as those beneficially entitled under the Trust. Mr Emmerson has not in any way demonstrated any partisanship by Mr Emmerson towards Kay and Kayrelle at the expense or detriment of Trevor, and there is no reason to think that he would not be able to exercise the fiduciary obligations he owes to the beneficiaries under the Deceased's estate simultaneously with the fiduciary obligations he owes to the beneficiaries under the terms of the Deed of Trust.

[98] I should say that it is possible that if Mr Emmerson, rather than exercising the power of appointment, had made application to the Court for the Court to appoint a new trustee, I may have preferred to appoint another party (probably a completely independent solicitor) as trustee of the Trust in the expectation that that new trustee would work collaboratively with Mr Emmerson in the winding up of the Deceased's estate and in the further dealings with the beneficial interests of the parties entitled under the Deed of Trust. The fact that I would not have made the same appointment does not, however, necessarily warrant my interference with the way in which Mr Emmerson exercised his power of appointment.[37]

[99] In all the circumstances, Trevor has not satisfied me that the exercise of the power to appoint by Mr Emmerson was "without good ground or merely capricious, and not made bona fide".[38] I am therefore not persuaded that this is an appropriate case for the removal of Mr Emmerson as trustee of the Trust.

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36 Deed of Trust cl 14.

37 *Re Earl of Stanford* [1896] 1 Ch 288; *Re McPhillamy's Trusts* (1909) 10 SR (NSW) 42; *Re Cotter* [1915] 1 Ch 307.

38 *Re Earl of Stanford (supra)* at 296.

Conclusion with respect to the originating application

[100] The arguments that I have dealt with above address the principal points argued on the originating application. With this resolution of the beneficial ownership of the moneys in the Disputed Account and the other questions addressed above, Mr Emmerson will now be in a position to proceed with the expeditious administration of the estate. I think it unnecessary to make any specific orders such as those set out in paragraph 5 of the originating application, and counsel for Trevor did not press for such orders being made.

[101] Accordingly, the originating application will be dismissed.

The cross-application

[102] The relief sought in the cross-application is set out above at [20].

[103] Given my conclusion with respect to Mr Emmerson's standing as trustee of the Trust, it is clearly appropriate that there be an order pursuant to s 114 of the *Land Title Act* 1994 for the vesting of the real property held in the Trust to him.

[104] It is also, in light of my findings concerning the money in the Disputed Account, appropriate to make a declaration concerning those moneys.

[105] It is not, however, necessary for there to be a direction pursuant to s 96 of the *Trusts Act*, as contemplated in paragraph 2 of the cross-application, and counsel for Mr Emmerson did not press for such a direction to be made.

Orders

[106] For the foregoing reasons, there will be the following orders:

1. The originating application filed 30 October 2012 is dismissed.

2. It is ordered pursuant to s 114 of the *Land Title Act* 1994 (Qld) that Paul James Emmerson as trustee of the Arthur Schuhmacher Family Discretionary Trust be registered as proprietor of each of the following properties, namely:

   (a) Lot 74 on Crown Plan CH 31283, County of Churchill, Parish of Ferguson, being all the land contained in title reference 16150086;

   (b) Lot 1 on Registered Plan 21361, County of Churchill, Parish of Ferguson, being all the land contained in title reference 11232227;

   (c) Lot 82 on Crown Plan CH 31341, County of Churchill, Parish of Ferguson, being all the land contained in title reference 16150087.

3. It is declared that the moneys held by Arthur Henry Phillip Schuhmacher in Bendigo Bank account No 138362892 as at the date of his death were held on trust for Kayrelle Johenne Powers.

4. I will hear the parties as to costs in respect of the originating application and the cross-application.