



DVC Trusts, Estates and Succession Series

Distributing and dealing with trust assets: the boundaries of discretion



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Distributing and dealing with trust assets: the boundaries of discretion

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A qualified solicitor in Hong Kong since 2000, Alfred is skilled in helping individuals and their families manage personal and wealth-related matters, including trust and probate (both contentious and non-contentious), family and mental capacity issues. He was also admitted as a Solicitor of England and Wales in 2002.

He is one of the few probate practitioners in Hong Kong who are vastly experienced in both non-contentious and contentious probate issues. He regularly advises clients on long term estate planning, ranging from the proper drafting of a will to constructing complicated trusts, airtight from any potential perils.

Alfred is appointed by Court as an administrator in estate disputes and advises professional administrators on legal aspects of estate administration, both in Hong Kong and internationally.

In contentious cases, he acts for clients in probate actions, ranging from propounding the Will to having an executor removed. For clients requiring help in estate administration problems such as declaratory relief or disclosure of account, Alfred will apply to Court for the necessary directions and orders.

Alfred's professional skills are enhanced by his membership of the Society of Trust and Estate Practitioners ("TEP"), and of the Chartered Institute of Arbitrators. He is a CEDR accredited Mediator and a Notary Public. His practice is recognized by all major legal publications including the Legal500, Chambers and Partners, Private Client Global Elite, Benchmark Litigation, Who's Who Legal, Doyle's Guide and Citywealth.

In March 2017, Alfred was appointed to sit as a Deputy District Judge.



Kerby Lau

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Kerby was admitted to University under the Early Admissions Scheme with a full scholarship and obtained first class honours in his undergraduate degree and his Bachelor of Civil Law degree from the University of Oxford.

He came top at Oxford for chancery law subjects, being awarded prizes for best performance in Trusts Law and Company Law.

Kerby joined Des Voeux Chambers in 2013. His practice has a particular emphasis on advisory and advocacy work involving (i) contentious probate, wills, trusts and estates litigation; and (ii) company and insolvency law. He has provided expert evidence on HK probate and estates law in foreign proceedings. He has also appeared in all levels of court, and argues cases regularly both on his own and as junior counsel.

Kerby has authored and contributed to numerous books and publications, including “Company Law - Powers and Accountability” (2nd Edition) which he co-authored with DVC’s William Wong SC, JP and Dato Loh Siew Cheang in 2017. He is a Contributing Editor to Hong Kong Company Law Cases (2008 - 2019) - published in 2020 by DVC in collaboration with Kluwer and the Hong Kong Civil Procedure (the White Book).



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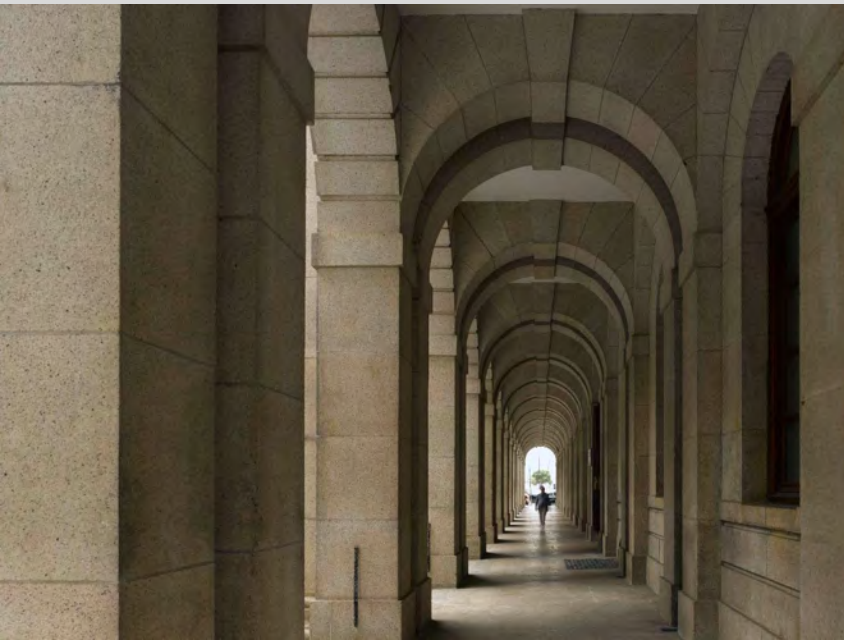
Joshua is a Bar Scholar. He joined Chambers in 2022 upon completion of his pupillage with Mr. Tony Li (now Mr. Tony Li SC), Mr. Christopher Chain, Miss Connie Lee and Mr. Kerby Lau.

Prior to joining Chambers, Joshua graduated from The Chinese University of Hong Kong, ranking first in his LLB class for all four years of study. He went on to complete his Master of Law from the University of Cambridge with First Class Honours. During his studies, Joshua was awarded a string of scholarships and prizes for academic excellence and achievements in debating and mooting. Joshua is currently appointed as a coach of The Chinese University of Hong Kong Jessup Moot Team.

Joshua is developing a broad civil practice and accepts instructions in all areas of work. He has also published extensively in the areas of competition law and unjust enrichment, where he maintains a keen academic interest. Joshua has appeared as an advocate before the Court of Appeal, Court of First Instance, and District Court. He has also been instructed to provide legal opinions on Hong Kong law for use in foreign proceedings.

Joshua is fluent in English, Mandarin and Cantonese, and is experienced in drafting legal documents in both simplified and traditional Chinese.

OVERVIEW



1. Role and function of discretion in distribution and use of assets
2. Guiding factors for exercising discretion (Positive)
3. Avoiding pitfalls (Negative)



ROLE AND FUNCTION OF DISCRETION

HANDLING TRUST ASSETS



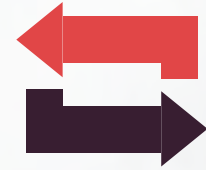
Acquisition

- ❖ Primary duty to acquire property
- ❖ Pressing for payment and taking proceedings



Management

- ❖ Preservation and management
- ❖ *Barlett* duty



Migration/Transfer

- ❖ Safe custody
- ❖ Insurance

HANDLING TRUST ASSETS

❖ Investment

- ❖ Section 4 *Trustee Ordinance* (Cap. 29) (“**TO**”)
- ❖ Terms of Trust Deed
- ❖ The role of proper advice
- ❖ Duties on the Trustee
 - ❖ No ulterior purpose
 - ❖ Act for benefit of beneficiaries as a whole
 - ❖ Suitability of investment
 - ❖ Diversification of portfolio
 - ❖ Act fairly and impartially between beneficiaries with different interests?
- ❖ Periodic Review of Investment

HANDLING TRUST ASSETS

❖ Sale

- ❖ Section 13 Trustee Ordinance (Cap. 29) (“**TO**”)
- ❖ Duty to obtain best price
- ❖ Act in good faith
- ❖ Consider all relevant circumstances

ENGAGING PROFESSIONALS

- ❖ Part 4A TO – appointment of Agents, Nominees and Custodians
- ❖ Delegation of duties?
 - ❖ Matters incapable of delegation
- ❖ Obligations on Trustee
 - ❖ Duty of care in choice of professional
 - ❖ Obligation of supervision: sections 41M to 41O TO
- ❖ Restrictions
 - ❖ Terms of Engagement: sections 41E, 41K TO
 - ❖ Remuneration
 - ❖ Sub-delegation
- ❖ Liability for Acts of Professional: section 41O TO

ADDING, REMOVING AND EXCLUDING BENEFICIARIES AND PROTECTORS

- ❖ Preliminary Issue: What is a Protector?
- ❖ Source of Powers – Conferred by Trust Deed
- ❖ Duties on Trustee
 - ❖ Duty to consider exercising the power
 - ❖ Date of ascertainment of class
 - ❖ *Bona fide* and no ulterior motive
 - ❖ Fraud on the power



GUIDING FACTORS FOR EXERCISING DISCRETION

EQUITY EQUALS EQUALITY?

- ❖ Role of maxim: Fall-back position
- ❖ Commonly used: family trusts, limited class of objects
- ❖ Not always suitable, since it could cause injustice and may be contrary to settlor's wishes (McPhail v. Doulton [1970] 2 W.L.R. 1110):
 - ❖ Where full class of objects is not ascertainable
 - ❖ Where wishes was to keep estate/trust whole
 - ❖ May be premature

TESTATOR'S / SETTLOR'S WISHES

❖ Sources:

- ❖ Express provisions in the trust deed/Will
- ❖ Letter of wishes/Statement of wishes
- ❖ Presumed intention

❖ Interpretation of the wishes of the settlor

❖ Letter of wishes: not binding, but weighty

- ❖ Form?
- ❖ Cannot override independent judgment of trustee
- ❖ Subsequent statement: relevant to consider v. proper purpose (Grand View Private Trust v. Wong [2022] UKPC 47); 3-fold duty
- ❖ “De facto” Settlers?
- ❖ Conflict with express terms of will/trust

❖ Presumed: HSBC Trustee (Hong Kong) Ltd v. Alexander Laufer And Ors [2017] 2 HKC 17

BENEFICIARIES' WISHES

- ❖ Entitlement of Discretionary Beneficiaries
- ❖ Generally no duty to consult
- ❖ Not binding, but material
- ❖ Impartiality amongst different beneficiaries? – applicable to discretionary trusts?
- ❖ All the beneficiaries collectively:
 - ❖ “even all the beneficiaries collectively cannot direct the trustees in the exercise of their powers”
 - ❖ BUT: *Saunders v. Vautier* rule

IN SPECIE v MONETARY DISTRIBUTION

- ❖ Settlor's wishes
- ❖ Nature of property:
 - ❖ Divisible personal property: share transferred in specie unless disproportionate advantage
 - ❖ Indivisible property; land: sale followed by distribution
- ❖ Payment of expenses/debts
 - ❖ Power of sale
 - ❖ Trustee's lien



AVOIDING PITFALLS

TRANSFERRING ASSETS AWAY

- ❖ Common in modern discretionary settlements
- ❖ Must be exercised for one or more beneficiaries
 - ❖ Comparison of the terms of both trusts
- ❖ No ulterior purpose
- ❖ *Grand View Private Trust Co. Ltd v Wong* [2022] UKPC 47

FETTERING DISCRETION

Duties on Trustee

- ❖ Act responsibly and in good faith
- ❖ Genuine consideration of powers to be exercised
- ❖ Take relevant matters into account
- ❖ Not act for an ulterior purpose

Common “fettters” of discretion

- ❖ Wishes of Settlor
- ❖ Wishes of Beneficiaries

ADVANCEMENTS / INTERIM DISTRIBUTIONS

- ❖ Definition of “Advancement”

- ❖ “*the establishment in life of a beneficiary*”

- ❖ Anticipated or accelerated vesting of beneficiary’s interest in a trust

- ❖ Duty to account

- ❖ Section 34 TO

- ❖ Duties on Trustee

- ❖ Consent requirement



Thank you

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