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JACKY CAMPBELL, JUNE 2015
CCH LAW CHAT

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In *Segelov v Ernst & Young Services Pty Ltd* [2015] NSWCA 156, the New South Wales Court of Appeal considered the question of whether a trustee owed a duty of notification to a beneficiary of a discretionary trust. The beneficiary did not know that she was a beneficiary of the trust or that she received distributions from the trust. The issue arose after the beneficiary separated from her husband who was a partner of a large accounting firm. The outcome was primarily determined by the wording of the trust deed, but the Court of Appeal also made statements of more general application. The decision serves as a reminder to family lawyers of the importance of obtaining full disclosure of the interests or possible interests of the parties in trusts.

## Ms Segelov's claims

On 1 July 2006, Ms Segelov was nominated as a beneficiary of the Ernst & Young Services Trust by her husband, Mr Joseph, shortly prior to him becoming a partner of Ernst & Young. The trustee, Ernst & Young Services Pty Ltd, exercised its discretion and made distributions of over $460,000 over a 6 year period into accounts in the joint names of Ms Segelov and her husband. They separated in November 2011 and Ms Segelov discovered that she had received the distributions when her new accountant obtained copies of her tax returns from her previous accountant. She had not previously seen them and had not signed them.

Ms Segelov said that she, at all relevant times, did not know that:

1. She was a beneficiary of the trust;

2. Distributions from the trust were made to her;

3. The payments into the joint bank accounts.

She claimed that she derived no use or benefit from the payments.

She claimed that the trustee owed her a duty as a beneficiary of the trust, to inform her that she was a beneficiary and when she became entitled to a distribution. She also alleged that the trustee owed her a duty to ensure that she received the benefit of distributions to her. She

alleged that the trustee breached these duties by failing to notify her of her entitlements under the trust when they were determined by the trustee in late June of each year. She claimed equitable compensation of $468,995.39.

Ms Segelov also claimed that the payments, which had been made into the joint bank accounts prior to 30 June each year, were not payments of income of the trust (as defined in the trust deed) and accordingly the trustee was not entitled to the benefit of the discharge provided by the receipts clause in the trust deed. She characterised these payments as advances of expected income but not income. She said she received no benefit from any of the payments into the joint bank accounts because her former husband used them for his own purposes.

**Outcome of trial**

At trial, Nicholas AJ rejected Ms Segelov's claim that the trustee owed her duties in the terms she alleged. He held that the distributions paid into the joint bank accounts prior to 30 June each year were payments of income of the trust which attracted the benefit of the discharge under the trust deed. He dismissed her claim with costs.

**The appeal**

Ms Segelov appealed to the Court of Appeal of the Supreme Court of New South Wales. Her primary contention was that the trial Judge erred in holding that the trustee did not owe her a duty to inform (also referred to as a duty of notification). Her other contentions included that the trial Judge erred in finding that the trust deed was ineffective in giving the trustee a valid discharge in respect of the payments into the joint bank accounts prior to 30 June each year.

Gleeson JA, with whom Meagher and Leeming JJA agreed, dismissed Ms Segelov's appeal.

In relation to the interim distributions, Gleeson JA relied upon the trust deed. He interpreted the relevant clauses to find that the interim distributions were not advances but were income and the trustee was provided a full discharge. There was no requirement that income be held until the end of the financial year before the trustee exercised its power. The trustee was also not restricted to exercising its power to apply income towards a beneficiary on only one occasion in any financial year or at any particular time.

The source of the trustee's duty was a matter in dispute although ultimately Ms Segelov's Counsel accepted in oral argument the correctness of the approach of Campbell JA in *SAS Trustee Corporation v Cox* [2011] NSWCA 408; 285 ALR 623. Campbell JA explained that, to the extent that the duties of trustees are not expressly stated in the trust instrument, a trustee's duties are arrived at by implication from the nature of their office. On this approach, the duty of any particular trustee depends on what is involved in faithfully carrying out the office of being trustee of that particular trust.

The trial judge concluded that there was no duty of notification of the kind asserted, expressed or implied by the terms of the trust deed. The Court of Appeal agreed with this and said that the trial judge was correct to observe that Ms Segelov was asserting that the trustee should have undertaken an additional duty, which was not required under the trust deed. Furthermore, it was not necessary for the trustee to seek or obtain any acknowledgment of payment. This was inconsistent with Ms Segelov's contention that for the payment to be effectual, the beneficiary needed to be aware that he or she had an entitlement under the trust. Once payment was made by the trustee into the joint bank accounts, Ms Segelov was taken to have received the distributions for the purpose of the trust deed. As a result, the duties of the trustee to Ms Segelov were discharged.

Counsel for Ms Segelov contended that for the payments to be effectual, direct notification to the beneficiary was required and without such notification, the beneficiary may not obtain the "practical" benefit of the distribution.

Gleeson JA said (at para 118) that the use to which the monies in the joint bank accounts were put after the payment of the distributions, did "not inform, let alone provide a foundation for the asserted duty of notification at an earlier point in time."

Gleeson JA distinguished the facts from *Hawkesley v May* (1956) 1QB 304 and *Hawkins v Clayton* [1988] HCA 15; 164 CLR 539. *Hawkesley v May* involved a deed of settlement which benefited an identified brother and sister. The trustee was held to be under a duty to inform the brother that he had an interest in the capital and income of the trust funds when he turned 21 and his interests under the trust accrued. Havers J distinguished earlier authorities which held that there was no legal duty on an executor to give notice of the terms of a legacy to the legatee on the grounds that a Will was a publicly available document at the probate office, whereas a trust deed was private document. Brennan J in *Hawkins v Clayton* relied on *Hawkesley v May* to support his conclusion that the custodian of a Will after the death of the testator owed a duty of care in tort to disclose the existence of the Will to the nominated executor and beneficiary including taking steps to locate that person to discharge that duty.

Gleeson JA distinguished these cases and said (at para 130):

> "It is however, a much larger step to suggest that in all trusts a beneficiary's right to inspect the trust documents, including the trust deed, gives rise to a corresponding duty of disclosure owed by the trustee to the beneficiary to have his or her rights explained to them, including in the case of potential objects of a discretionary trust their entitlement to an interest in the trust fund once determined by the trustee. Implicit in Ms Segelov's reliance on *Hawkesley* was that it established a principle of general application. This contention should be rejected. To accept such a proposition would be to impose a duty on trustees without regard to the nature and the terms of the relevant trust and the social

> or business environment in which the trust operates, contrary to the approach explained in *SAS Trustee Corporation v Cox*."

Gleeson JA held that the particular features of the trust deed and the effect of payment into the joint bank accounts were inconsistent with there being a duty of notification to Ms Segelov.

Gleeson JA referred to *Jacobs' Law of Trust in Australia* (7th Ed 2006, Lexis Nexis Butterworths) where it was stated [at 1715] that "There is no general duty on trustees to volunteer documents or information to beneficiaries or possible beneficiaries". However, it also stated that a "trustee is bound to inform a beneficiary, who on attaining majority is entitled to a share in a trust fund, of that interest". Other texts making similar propositions were also cited, but Gleeson JA concluded (at para 135):

> "On a close reading, nothing in the generalised statements in the identified passages in those texts, specifically addresses the foundation for the asserted duty of notification in the present, that is having regard to the terms of the particular trust here under consideration. I do not consider that assistance is to be gained from these sources."

Gleeson JA concluded (at para 136) that "the faithful performance of [the trustee's] duties as trustee did not require [the trustee] to take the additional step of notifying Ms Segelov of its decision to make a distribution in her favour, in circumstances where the terms of the trust deed afforded [the trustee] a full and final discharge upon payment of the distributions to a joint bank account in the name of the beneficiary without the necessity of any receipt executed by or on behalf of the beneficiary."

Gleeson JA also looked at the practicalities of imposing a duty on the trustee to notify beneficiaries. It was relevant that the trustee was not in possession of contact details of the nominated beneficiaries. The trustee only had bank account details (or in this case, joint bank accounts) for each beneficiary. The practical difficulties of the trustee obtaining the contact details of the beneficiaries, maintaining an up-to-date register of beneficiary contact details and how often it was required to actively seek out information, reinforced that the terms of the trust deed were inconsistent with the asserted duty of notification to the beneficiary.

**Implications for family lawyers**

This case is a reminder of the importance of obtaining trust deeds for any trust of which one of the parties to a marriage, or a de facto relationship, is a beneficiary, to allow a check to be done as to whether the other party is a potential beneficiary. If so, the financial statements and tax returns of the trust should be obtained.

By failing to do so, the party may be unaware of loan accounts, income which should be declared to the Australian Taxation Office, tax liabilities and potential tax liabilities. In addition, the party

may fail to disclose a property interest, being a right to due administration of a trust, which may be a property right to be adjusted under s 79 *Family Law Act 1975* as in *Kennon v Spry* [2008] HCA 56.