
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CHAMBERS

CITATION : BLENKINSOP -v- BLENKINSOP NOMINEES PTY
LTD AS TRUSTEE FOR THE BLENKINSOP
FAMILY TRUST [2015] WASC 463

CORAM : ALLANSON J

HEARD : 4-6 NOVEMBER 2015

DELIVERED : 8 DECEMBER 2015

FILE NO/S : CIV 2074 of 2013

MATTER : Section 77 of the Trustees Act 1962

BETWEEN : JUDITH ANNE BLENKINSOP
Plaintiff

AND

BLENKINSOP NOMINEES PTY LTD AS TRUSTEE
FOR THE BLENKINSOP FAMILY TRUST
First Defendant

SILVERGLADE PTY LTD AS TRUSTEE FOR THE
BLENKINSOP FAMILY TRUST NO 2
Second Defendant

SCOTT FREDERICK BLENKINSOP
Third Defendant

ROSS ALEXANDER BLENKINSOP
Fourth Defendant

TRACEY ANN JAKOVICH
Fifth Defendant

KIM ROSINA HOLLAND
Sixth Defendant

CHRISTINE MARION THURTELL
Seventh Defendant

Catchwords:

Trusts - Family trusts - Trustee companies unable to execute role - Application to appoint replacement trustees - Turns on own facts

Legislation:

Corporations Act 2001 (Cth), s 347A
Criminal Code (WA)
Trustees Act 1962 (WA), s 77

Result:

Application allowed

Category: B

Representation:

Counsel:

Plaintiff	:	Mr C R Bailey
First Defendant	:	No appearance
Second Defendant	:	No appearance
Third Defendant	:	No appearance
Fourth Defendant	:	In person (on 4 November only)
Fifth Defendant	:	No appearance
Sixth Defendant	:	No appearance
Seventh Defendant	:	Mr M D Cuerden SC & Mr P G Donovan

Solicitors:

Plaintiff	:	Williams & Hughes
First Defendant	:	No appearance
Second Defendant	:	No appearance

Third Defendant : No appearance
Fourth Defendant : In person
Fifth Defendant : No appearance
Sixth Defendant : No appearance
Seventh Defendant : MDS Legal

Case(s) referred to in judgment(s):

Elovalis v Elovalis [2008] WASC 141
Miller v Cameron [1936] HCA 13; (1936) 54 CLR 572
Porteous v Rinehart (1998) 19 WAR 495

1 **ALLANSON J:** By originating summons, filed 9 July 2013 and subsequently amended, the plaintiff seeks the following substantive orders:

2. Pursuant to Section 77 of the Trustees Act and the Court's inherent jurisdiction Jeffrey Lawrence Herbert of PPB:

2.1 be appointed as trustee of the Blenkinsop Family Trust;
and

2.2 be appointed as trustee of the Blenkinsop Family Trust No 2.

3. The Guardian(s) of the Blenkinsop Family Trust and Blenkinsop Family Trust No 2 be removed.

2 Initially the plaintiff sought an order that the time for hearing of the action be abridged. It was not resolved quickly. Attempts to resolve the disputes between the parties without proceeding to trial proved unsuccessful.

3 Eventually the matter was heard on 4, 5 and 6 November 2015. All of the evidence relating to the replacement of the trustees was heard on those days. Further hearing days are required to complete the evidence on whether the Guardian of each trust should be removed, but I am satisfied that it is both possible and desirable to deal separately with the application to appoint a replacement trustee to each trust. First, the issue is discrete and all of the evidence has been heard. It is possible to determine this question, and give reasons for doing so, without making findings that impinge on the remaining issues. Second, the only parties who sought to be heard on this part of the application agree to the court proceeding in this way. I have, however, also taken into account that the class of beneficiaries under the two trusts is not confined to the present parties and, in particular, includes beneficiaries who are not adult. Third, I am satisfied that something needs to be done relatively quickly to ensure the satisfactory execution of the trusts and preservation of the trust property. The evidence discloses some controversy about what the assets of the two trusts are - including whether particular assets are owned by the trusts or by the plaintiff, and whether the trusts are indebted to the plaintiff. An independent trustee may begin a proper analysis of the financial affairs of the trusts.

4 Certain of the trustees' powers are subject to consent of the Guardian, and the need for unanimity in making decisions by the Guardian gives an effective power of veto to any of the multiple Guardians. But it is not

inconceivable that important decisions may still be made and implemented if they are shown to be in the interest of the beneficiaries.

The parties

5 The plaintiff is the widow of the late William Frederick Blenkinsop.

6 The first defendant is the trustee of the Blenkinsop Family Trust, and the second defendant is the trustee of the Blenkinsop Family Trust No 2. Those trusts were created during the lifetime of the late William Frederick Blenkinsop. The trustees were not represented in the action and did not appear at the hearing.

7 The other defendants are the children of the plaintiff and her late husband. They (and the plaintiff) are the directors of the two trustee companies. Since August 2011, they have also been acting jointly as the Guardians and appointors of the trusts. Although the validity of those appointments has been questioned, it is not directly raised in these proceedings.

8 For clarity in these reasons, where it is necessary to refer to individual members of the Blenkinsop family who use the family name, I have used their first names. In her affidavits, the plaintiff refers to her late husband, William Frederick Blenkinsop, as Fred and I will follow her practice. The seventh defendant is named under her married name, Christine Thurtell, and made affidavits in that name. When she gave oral evidence, she said that she uses the name Christine Blenkinsop, and I will follow her preference.

9 Christine supports the relief claimed in the originating summons. The other defendants gave notice that they do not wish to be heard on the relief sought with regard to replacement of the trustees. Scott wished to be heard only on the proposal to remove the Guardians.

10 Shortly before the hearing, Ross also gave notice of his intention to file an affidavit - on the basis that he did not believe that all relevant evidence had been placed before the court by the parties. He sat at the bar table for the first morning of the hearing, but only for the first morning.

The evidence

11 The parties filed a considerable volume of evidence in this matter, although not all affidavits were read in the hearing.

12 In support of the application, the plaintiff read the affidavits of:

- (1) Judith Anne Blenkinsop, sworn 8 July 2013, and 9 September 2015; and
- (2) Christine Marion Blenkinsop, sworn 15 July 2013 and 10 September 2015 (sworn in the name Christine Thurtell); and
- (3) Jeffrey Laurence Herbert, sworn 24 July 2013 and 9 September 2015. Mr Herbert has signed a notice of consent to act as trustee.

13 In relation to the application to remove the Guardians, Scott read two affidavits: his own affidavit of 23 October 2015; and an affidavit of Kim Rosina Holland, sworn 23 October 2015.

14 Christine and Scott were cross-examined.

Removal of a trustee - the principles

15 There are two sources of the court's jurisdiction to remove a trustee: the inherent jurisdiction of the court, and s 77 of the *Trustees Act 1962* (WA). The plaintiff relies on both. The principles regarding the exercise of the jurisdiction from either source are essentially the same. The dominant consideration in the exercise of the jurisdiction is the welfare of the beneficiaries of the trust. In *Miller v Cameron* [1936] HCA 13; (1936) 54 CLR 572, Dixon J (Evatt & McTiernan JJ agreeing) said:

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 (580 - 581).

16 In *Porteous v Rinehart* (1998) 19 WAR 495, White J said:

It was held in *Hunter & Anor v Hunter* [1938] NZLR 520 that the jurisdiction of the Court to remove a trustee is ancillary to its principal duty to see that the trusts are properly executed and, if the Court is satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee may be removed. The main guide in the exercise of this jurisdiction must be, not whether the trustee has committed breaches of trust, but the welfare of the beneficiaries (508).

And see *Elovalis v Elovalis* [2008] WASCA 141.

The trusts

17 Fred Blenkinsop was a farmer, but engaged also in other businesses. In particular, he acquired properties in Geraldton, Albany and Kalgoorlie where squash courts and bowling rinks operated, as well as other farming properties.

Trust No 1

18 Trust No 1 was created by a deed dated 1 July 1973. The initial trustees were Fred and Judith Blenkinsop. Fred was the appointor. The trust deed did not include provision for a guardian.

19 By supplemental deed of settlement dated 25 September 1996 the structure of Trust No 1 was substantially changed. To some extent this appears to have reflected matters which had already occurred, including the resignation of the original trustees. Blenkinsop Nominees Pty Ltd was now the sole trustee and had been acting as trustee since soon after it was formed in 1981. The powers of the trustee now, in some instances, were to be exercised with the consent of a Guardian - initially Fred Blenkinsop.

20 The primary beneficiaries of Trust No 1 are the children of Fred and Judith, their children and remoter issue, and their respective husbands, wives, widowers and widows for the time being. The general beneficiaries are the primary beneficiaries and Judith.

21 The powers of the trustee are, in most instances, exercised as the trustee 'thinks fit'. By cl 2(e) that is intended to give the trustee 'the widest and most absolute and unexaminable discretion including the power to prefer any one or more Beneficiaries to the total exclusion of any other or others of them'. The discretion is, in some respects, limited by the requirement for the written consent of the Guardian.

22 In particular, the power to pay, apply or set aside the whole or any part of the net income of the Trust Fund for an accounting period for the benefit of one or more of the general beneficiaries requires the consent of the Guardian, while there is a Guardian in existence: cl 5(a). Similarly the power to appoint a day for vesting of the trust, earlier than the 'Vesting Day' specified in the Deed, may also be exercised with the consent of the Guardian.

23 Some powers - including a power of appointment - may only be exercised with the consent in writing of the Guardian while there is a Guardian in existence, and there is no such power of appointment if there is no Guardian in existence: cl 6(a).

24 The schedule provides for who is to hold office as guardian and appointer. The same provision is made for each of those offices:

Frederick William Blenkinsop during his life or any person who he may by Deed or Will appoint and failing appointment then Judith Anne Blenkinsop during her life or any person who she may by Deed or Will appoint and failing appointment then the Primary Beneficiaries jointly during their lifetimes and thereafter the survivors thereof during his or her lifetimes and thereafter any person whom he or she or they unanimously may appoint and in the absence of unanimity no such appointment shall be made.

25 Having regard to the potential size of the class of primary beneficiaries, if no appointment were made by Fred or Judith the number of appointors and guardians was always likely to be impractical.

Trust No 2

26 Trust No 2 was created by deed of settlement dated 25 October 1993. The primary beneficiaries are the children of Fred and Judith Blenkinsop. General beneficiaries include the primary beneficiaries, Fred and Judith, and others. The vesting day is 30 June 2072.

27 The provisions relating to distributions of income and capital, including the requirement for consent of the Guardian, are similar to those in Trust No 1.

28 Again the deed provides for who are to be guardians and appointors:

- (a) William Frederick Blenkinsop and Judith Anne Blenkinsop jointly during their lifetimes; and
- (b) on and from the death of the survivor of William Frederick Blenkinsop and Judith Anne Blenkinsop such person or persons as the survivor may by deed or will nominate; or
- (c) on and from the death of the survivor of William Frederick Blenkinsop and Judith Anne Blenkinsop if no nomination is made by deed or will by the survivor or if the nominee has died or ceased to be in existence or is unwilling to act as Guardian [Appointor] of this trust, then the personal representative of the survivor.

The trustee companies

29 Blenkinsop Nominees Pty Ltd was first registered in April 1981.

30 Fred and Judith were the two directors from 16 April 1981. Following Fred's death in 2004, Christine was appointed as director on 14

May 2004. In March 2007, Ross was appointed a director. The other three children (Kim Holland, Tracey Jakovich and Scott) were appointed in January 2009.

31 When these proceedings were commenced in 2013 the directors were Judith and the five children. Judith and Kim Holland were the company secretaries.

32 Silverglade Pty Ltd was first registered in August 1993.

33 Fred and Judith were the directors from October 1993, and Christine was appointed in July 2004, after her father's death. As for Blenkinsop Nominees, the other children were appointed as directors in 2007 (Ross) and 2009 (the other three).

34 Originally each of the trustee companies had only two shares. On 26 August 2011, 10 additional shares were issued in each company. Judith Blenkinsop and her five children now each hold two shares in each company.

35 There is some controversy about what assets are held by each trust. While the trust companies were controlled by Fred and Judith, and later by Judith and Christine, the distinction between personal and trust assets was not strictly observed. To complicate matters, the long standing accountant of both trusts died in early 2014. Scott, and perhaps some of his fellow directors, claims that certain properties which Judith regards as her own property are actually trust assets.

36 In a separate action, Judith also claims that the trusts are substantially indebted to her.

37 These proceedings do not require a determination of who is correct in either of these disputes. I intend to express no view about the possibility or correctness of competing claims.

The events following the death of Fred Blenkinsop

38 During his lifetime, Fred was the Guardian and Appointor for Trust No 1, and held those offices jointly (with Judith) for Trust No 2. When he died in 2004, he had not appointed a successor as Guardian or Appointor for Trust No 1, either during his life or by will. By operation of each trust deed, Judith became Guardian and Appointor of each trust.

39 For some years following Fred's death, Judith and Christine (and later Ross) were the directors of the two trust companies. During that

period, the trusts were basically operated for the benefit of Judith, and there was little attempt to distinguish between trust and personal assets. Christine acted in her role as director in accordance with her mother's wishes.

40 In about 2009, the family began a process designed to achieve equality between the family members in both the governance of the trusts, and the entitlement to assets. That process was first conducted with advice and assistance of Brett Davies Lawyers. It appears to have been initiated by Ross and Tracey Jakovich. Scott then became the contact person for the lawyers - perhaps because of his legal training - although Judith was, at least formally, the client.

41 In 2009, the family ended the retainer with Brett Davies Lawyers and began dealing with another firm, Willpower.

42 While there were some variations in the draft documents prepared by the different firms, the intended arrangement was to be achieved by a series of steps to ensure Judith and the children:

- (1) had equal shareholding in the trust companies;
- (2) were the directors of the trust companies;
- (3) were to be jointly Guardian and Appointor.

43 To achieve this position, the trust deeds were to be amended by deeds of variation. And, once shares had been issued to the children, the shareholders were to execute a shareholders' agreement to give effect to the aims of the arrangement, including a trust distribution policy. To the extent necessary, the constitution of each trustee company would be amended consistently with the proposed arrangement. The number of directors of Blenkinsop Nominees could not be more than five unless otherwise determined by the company in general meeting: Articles of Association, cl 79 and Third Schedule. The evidence does not show whether the company in general meeting approved the increase to six directors.

44 At the same time, instructions were given and implemented for Judith to make a will and execute an enduring power of attorney.

45 Most of these steps were carried out over the following years. But the process was not completed. Significantly, no shareholders agreements

were executed, and the constitution of each company was not altered. By the middle of 2013, the arrangements were in disarray.

46 The signs of impending difficulties can now be seen quite early in 2009, although they may reflect even more long standing issues in the family.

47 The family members had a group email account. This enabled emails to be sent to the group, and any email sent from one person to another was also available to the other members of the group. Much of the evidence is found in those emails.

48 In 2009 those children who had not previously been directors of the trust companies were appointed. On 15 February 2009, Scott informed the other family members by group email that they were now all directors of both trust companies. On 17 February 2009, Ross sent an email stating that he was 'deeply suspicious' of the unilateral decision to appoint further directors. The reply from Scott suggests that there were other simmering disagreements. In particular he refers to Ross' current role as one of three directors giving him and his co-directors the ability to make appointments 'to your families alone'. Throughout the remainder of 2009, the email exchanges in the group email account, primarily between Scott and Ross, disclose no lessening of hostility between them. That conflict continued over the following years.

49 The boards of the two companies held some meetings in 2009. At a meeting on 14 March 2009, the boards resolved to issue two shares to each of the children. This decision was not implemented until 2011.

50 Neither company board met in 2010.

51 Further steps were taken in the second half of 2011. Shares were issued to each of the children in August 2011. A further step in the proposed arrangements also took place in August 2011, when the deed of variation for each trust was executed by Scott and Ross, as directors of each company. It was signed also by Judith. The circumstances in which Judith signed the documents and the validity of the variations are subjects of some controversy, but it is not necessary to resolve those questions in these reasons.

52 Now that the children were all shareholders, the family were in a position to execute the shareholders' agreements. On 5 March 2012, at a meeting of the boards, the directors resolved to execute the shareholders agreement. It was not done. The email exchanges on this topic disclose

that Ross was unwilling to sign an agreement, and was expressing dissatisfaction with some elements of the proposed agreement.

53 The meeting of 5 March 2012 also considered a proposal by Scott to restrict Judith's ability to deal with bank accounts and incur expenditure for the Gingin farm. No resolution in those terms was put, but Judith left the meeting in tears.

54 By September 2012, the conflicts, particularly that between Scott and Ross, were having an effect on other members of the family. In an email dated 13 September 2012, Tracey Jakovich expressed dissatisfaction at the fighting and general lack of trust and suggested, in effect, that the trusts should be brought to an end, the trust property should be sold, and the proceeds divided. Kim Holland concurred.

55 The disagreements between Scott and Ross were now being expressed more trenchantly, and becoming quite personal. At least part of the dispute revolved around the extent to which Scott was, or was perceived by Ross to be, controlling the dealings with the solicitors regarding the reorganisation of the trust businesses. Meetings on 15 and 29 October 2012 resulted in abuse and name calling between Scott and Ross.

56 The conflict was also spilling over to other members of the family. In October 2012, Kim Holland warned Ross not to visit her home, going so far as to include copies of the relevant *Criminal Code* provisions on trespass with her email. In late January 2013, there was a particularly ill-tempered exchange between Scott and Ross. The allegations were now becoming more serious, although guardedly expressed.

57 Areas of dispute included Ross' concern that a majority of directors may be able to vote out another director. In February 2013, Scott questioned whether Ross was exercising undue influence over his mother. By March, in relation to the proposed sale of a property owned by the trusts, allegations of fraudulent conduct were made by some the members of the family against others. Family members took sides.

58 A series of emails in March 2013 carried the subject heading 'bury the hatchet', but there is little indication that goodwill would prevail.

59 On 8 March 2013, Scott posted an email addressed to Ross on the group email site, citing the protection for whistle blowers under the *Corporations Act 2001* (Cth) and threatening that any adverse action against him would be prosecuted 'by both myself and ASIC'.

60 A meeting on 15 March 2013 also fell into abuse between Scott and Ross, and Christine walked out.

61 There were two issues which came to a head at a series of meetings of the boards of both companies in June 2013, immediately before these proceedings were brought.

62 The first relates to attempts by Christine to obtain copies of trust documents. By an email dated 15 April 2013, Christine asked Scott for certain documents relating to the trusts, including the deeds of settlement and the variations made in 2009. I infer from the terms of her email that Christine was already receiving legal advice in April.

63 Scott did not immediately reply. On 20 April 2013, Christine sent an email to Kim Holland, who was company secretary, asking whether she had the documents and could provide a copy of each of them. She continued:

Company Directors are entitled to have all relevant documentation so that they can properly fulfil their duties as Directors. Given that, I think that all of the Directors of Blenkinsop Nominees and Silverglade, not just me, should have copies of all the documents I listed in my email below.

I understand that if necessary an order can be sought and obtained in the Supreme Court that compels the person or people that hold particular documents to provide those documents. I would hope that this will not be required but if that is what it takes, then that is what I will do.

64 Kim Holland replied questioning the 'threat' to take her to the Supreme Court and asked if Christine was attempting to intimidate her. Christine responded that she was not attempting to intimidate, and said, 'You've said that you haven't got them. That's fine.'

65 Later, on 20 April, Kim Holland replied again, this time to the effect that Christine had been secretary of the companies and should still have the documents, and that she (Kim) had not received any documents other than at meetings or through the group email.

66 On 21 April 2013, Scott eventually responded to the request for documents. This email is an indication of how strained the relations between directors had become. In an email with the subject 'Re: Blenkinsop Nominees Documentation', he wrote:

Strictly Confidential Communication Under Whistleblower Provisions - Corporations Act. Further Disclosure Strictly Prohibited.

I would have thought the Supreme Court would be loath to assist persons in 'victimising' a 'Whistleblower' under the Corporations Act. A *criminal offence*.

Especially persons who has been complicit in many a dealing not in the best interests of the Corporate Trustee, Trust, Beneficiaries.

I would draw to the attention of all the *very strict confidentiality restrictions* concerning 'Whistleblowers'. That is, *zero disclosure* by the persons to whom the Whistleblower makes the disclosure. Except with the consent of the Whistleblower. That *includes prohibition of disclosure to legal advisers*. Disclosure is also a *criminal offence*.

Enjoy the weekend. I will. (Emphasis in original)

67 About 25 minutes later, Scott sent a further email with the same subject and heading, in which he said:

Just to clarify, a Disclosee is prohibited from disclosing the identity of, or any information which would indicate the identity of, a Whistleblower.

Perhaps this bridge has already been crossed. I understand these matters can be investigated by the Federal Police. Or ASIC. But personally I wouldn't bother with the latter.

68 Christine replied on 22 April that she had taken urgent legal advice regarding the reference to the whistleblowing provisions and the implied threat to refer the matter to the Federal Police. She said that she had a right to access the documents she had requested and that her request had nothing to do with any dealings with a whistleblower.

69 Scott replied the same day. Included in his reply is the following:

I know what you are up to as Ross has told us - it is in one of his emails. This is no simple request for documents. It is about retribution.

It is about seeking to remove, Kim, Tracey and I as Directors so that the companies can return to the halcyon days of the Padgett Thurtell 'management'.

70 Eventually the lawyers who had been advising Judith and Christine, but had not up to then directly contacted any of the other parties, began to write on their behalf. This did not lessen the tension between the parties.

71 On 15 June 2013, Scott proposed as an agenda item for the next meeting of the directors, 'Legal Threats to Fellow Directors'.

72 A meeting of the boards of the two companies was held at Scott's home on 21 June 2013. All directors attended, Tracey Jakovich by telephone. Christine again raised the issue of the documents, in particular the deeds of variation. Those documents were held by Scott in his safe. Judith testified (and it was not challenged) that Scott was prepared to show the deeds of variation to her, but would not allow her to touch them. When she snatched one of the documents from him, he attempted to take it back and abused her. It seems, however, that the meeting was able to continue.

73 The directors considered a resolution to distribute the trust income for the year. The recommended resolution from the accountant (and apparently the standing practice) was that 100% of the trust income, and any tax credits, should be distributed to Judith. But on this occasion, the resolution for distribution of income was expressed to be subject to the passing of the other resolutions for the distribution of capital (a substantial amount from the sale of a trust asset and the repayment of a loan) to the children only (that is, excluding Judith).

74 Following the meeting, on 22 June 2013, Scott sent an email with the subject 'Misinformation' to the other directors. He complained about the conduct of Judith, Christine and Ross at the meeting, alleging that they had baited and attacked him 'based on a lie', and suggesting there had been a deliberate plan to derail and frustrate the meeting.

75 On the 23 June 2013, Ross sent an email with the subject 'deluded'. Scott replied the same day. It is not necessary to set out the detailed content of the emails. They show that the level of conflict between the brothers remained high and each was now invoking matters which were quite personal to the family but unrelated to the conduct of the trusts.

76 On 24 June 2013, Scott sent another email to the group, with the subject 'Deeds of Variation of Family Trusts - Meeting'. In it he said that, based on Judith confirming her signature on the Deeds of Variation, and his own knowledge of her signature, he had 'completed the Attestation of Witness details on the Deeds'. Scott further questioned the conduct of other directors in calling into question the efficacy of the deeds. He also alluded to other questions regarding the conduct of fellow directors, saying:

There will be serious consequences should no meeting (or no proper meeting) be held by 30 June. In particular, it is not open to persons to divert Trust funds for their own purposes (or others purposes) without the authority of the Trustee and consent of the Guardian. Unless the mess is

sorted out, this will impact on numerous persons. So, Christine, I suggest you pack up your attempt to frustrate and derail and get on with it.

77 A second meeting was held on 28 June 2013. On this occasion, Scott produced a document entitled 'Deed of Settlement and Release', the terms of which included an affirmation of the validity of each trust and each trust deed, and the validity of the appointment of each of the Guardians and Appointors. The Deed of Settlement and Release has not been executed.

78 Ross left the meeting on 28 June about an hour after it began, proposing to have another meeting the following day at his house. He may have intended the meeting to end. But after Ross had left, Scott and Kim Holland said that the meeting was not over. Proposals were then put for resolutions that the income of the trust be distributed solely to Kim Holland, and that Christine be removed as a signatory to the trust accounts at the Karrinyup branch of the CBA that held the undistributed income and capital of the trusts. Those resolutions were passed, with Christine and Judith voting against them.

79 At the meeting the following day (Judith on this occasion attended by telephone), the resolutions which had been passed on 28 June were confirmed. The evidence does not disclose whether effect was given to the resolution to distribute the income to Kim Holland. On 30 June, Scott contacted the trusts' accountant, attaching the resolution regarding distribution of income, and advising that it had been passed on 28 June and ratified on 29 June at properly convened meetings of the directors. He advised, 'Ignore any instructions to the contrary. The ATO will be advised accordingly first thing Monday morning'.

80 Although the board had power to pass such a resolution by majority it could not be given effect because, under the terms of each trust deed, a resolution to distribute the income of the trust required the consent of the Guardian. It is not clear whether the intent behind the resolution was that Kim Holland would actually receive the whole of the income, to the exclusion of her mother, or whether it was to ensure that a distribution was made for tax purposes. Distribution to Kim Holland was the most effective measure for tax purposes.

81 On 2 July 2013, the solicitors for both Judith and Christine wrote to the directors of the family trusts. Each of them asserted that the two trustees had embarked upon a course of action which was or would be a wilful breach of trust. The solicitors for Christine requested an undertaking that until the appointment of an independent trustee there

would be no dealings with trust property and no directors meetings would be called without providing at least five business days' notice.

82 On 4 July 2013, Scott circulated proposed resolutions of the two companies. In particular, he recommended that the directors be empowered to act to protect the interests of the trustee companies and the trusts, and be properly funded to protect those interests.

83 On 4 July 2013, Scott also wrote to the solicitors for Christine, complaining that the demand which had been made in the letter of 2 July was 'hopelessly vague' and the timeframe 'equally ridiculous'. Relevantly, he also asserted that no attempt had been made to distribute money to Kim Holland without the consent of the Guardians. In that email, Scott also asserted that Judith is 'within the thrall of your client and ... habitually acts in accordance with your clients [sic] demands'; that Christine had been removed as a signatory on bank accounts 'due to her habit of signing cheques on accounts on which she is not authorised to sign and of which she is not a holder'; and that the objections of Judith and Christine to the way the trusts was running was because 'they can no longer run the Trusts as a personal fiefdom'. He also questioned where capital and income got in by the trusts during the preceding year had gone.

84 In July 2013, Judith, with the support of Christine, commenced these proceedings. Since then, the ability of the trusts to function has been even further limited.

85 In August 2013, I refused an application for 'interlocutory' relief in which Judith requested the court to order an interim distribution of capital in her favour.

86 On 10 September 2013, the parties signed a deed of settlement by which they agreed to a range of measures designed to enable the trusts, at least in the short term, to continue to function with the present trustees. Terms of the settlement included:

- (1) the parties agreed to adjourn the proceedings on the terms set out in the deed;
- (2) the parties agreed that each of them is a Guardian and Appointor of each Trust and will at all times act jointly and unanimously: cl 3;

- (3) no general or directors' meeting of the Trustee Companies would occur without an independent chairman, to be a retired Supreme Court judge or a senior counsel: cl 4(a)(b);
- (4) no circular resolutions shall be passed without unanimous consent of all directors: cl 4(f);
- (5) costs of the parties to date were fixed to be paid forthwith by the Trusts - the costs fixed at that stage already exceeded \$500,000: cl 7.

87 The parties proposed the appointment of the Hon Neville Owen as independent chair. Ultimately he was unable to accept the appointment, and senior counsel, Matthew Zilko SC, accepted appointment.

88 No directors meetings had been held between 29 June 2013 and 10 July 2014. With Mr Zilko SC as independent chairman, four meetings were held between 10 July and 18 September 2014. The solicitors for Judith and Christine remained involved, and proposed resolutions and provided written submissions in support of them for the meetings of the boards.

89 No directors meetings have been held since 18 September 2014. While Mr Zilko SC was prepared to accept reappointment, Ross did not agree. No one else has been approached. Without an independent chair, the directors cannot meet and have not met since September 2014. Resolutions may now only be passed by unanimous assent to a circular resolution and unanimity is not readily achieved. Resolutions have been passed permitting the payment of accounts, and some steps have been taken to secure a property in Kalgoorlie that was subject to vandalism, but otherwise the business of the trustees has been very limited. Acts which might not normally require a meeting and resolution of the board - such as filing a BAS return - cannot be done because some of the parties object to any one of them acting without board approval.

90 Since this action commenced, further events have affected the trustees.

91 In January 2014, Mr Holmes, the long standing accountant of the trusts died. The decision about who should be appointed to replace Mr Holmes resulted in further dispute.

92 On 23 April 2014, Judith issued a separate writ against the trustees, claiming that they were very substantially indebted to her. Christine

supported this action, preparing affidavits to support the claim, and later in support of an application for summary judgment. The capacity of the trust companies to respond to this claim has been compromised by the fact that two directors were behind the action against them.

93 On 12 September 2014, Kim Holland obtained a violence restraining order against Ross.

94 Tracey Jakovich resigned as director on 14 November 2014.

95 In July 2014, Scott took proceedings in the Fair Work Commission, alleging bullying by Christine and Ross.

96 Ross Blenkinsop now refuses to recognise that Scott and Kim Holland still hold office as directors.

97 No tax returns have been filed since 2013.

98 The companies have not filed financial reports. In 2015, Scott questioned whether he could agree to a solvency resolution for the companies under s 347A of the *Corporations Act*.

Conclusion

99 In determining whether the trustee of each trust should be replaced, it is not necessary to determine where fault lies for this situation. It has happened, and the evidence strongly suggests that it is likely to continue. The preservation of property in the quite considerable trust estates requires more effective management than can now be achieved by these companies. The welfare of the beneficiaries - particularly Judith Blenkinsop who relies upon the family trusts set up by her late husband for her income - is not secure without an effective trustee.

100 These proceedings were brought in an atmosphere of patent conflict and distrust between members of the family who constitute the boards of the two trust companies. For some time, communications between directors (and members of their families) have included name calling, allegations of wrongdoing, threats, and obscenities. Meetings of the boards of the two companies have been affected by this behaviour. This may have been worsened by the patent conflict between the directors over the current proceedings, and the further proceedings commenced by Judith in 2014.

101 These companies were formed to be the trustees of family trusts. They rely for their effective operation on personal relationships, and

mutual trust and confidence. That basis for effective operation is now long gone.

102 The problems are not, however, confined to issues of personal conflict. The arrangements under which the children were all to become directors and shareholders were unlikely to be effective without a binding shareholders' agreement and agreed policy (consistent with the terms of each trust) guiding the distribution of the income and capital. The parties were unable, over four years, to put those arrangements in place. On the whole of the evidence, I cannot see how either company can now carry out its role as a trustee and properly execute the trusts.

103 The result of all of this is that the companies are not carrying out their role as trustees except in a very limited and inadequate way.

104 I will make orders for the replacement of each trustee, and the appointment of Mr Herbert, together with consequential orders for the vesting of trust property in the new trustee.