

Settlor Control of Trusts: Sham, Illusory Trusts, and the True Purpose of the Trust: Is There a Trust?

by

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Steven Gallagher was awarded a first class LL.B. He was called to the Bar of England and Wales in 2006. Steven teaches equity and trusts, property law, and a course on art, antiquities, cultural heritage and the law. In September 2023, Steven began teaching a new course on digital technology and law. Steven has presented over 200 continuing professional development courses for solicitors in Hong Kong on many topics associated with property. Steven's research interests include equity and the law of trusts, cultural heritage law, Chinese custom and law, and legal history. In 2023, Steven published a textbook on Digital Technology and Law. He is not a technologist.

Reserved power trusts are increasingly popular with settlors wishing to retain control over their property while still distancing themselves for tax planning and asset protection purposes. However, there may be issues with reserving certain powers and/or reserving too much power for themselves—including whether there is actually a trust. Further issues arise when settlors adopt the role of protector for the trust, again reserving powers which may be inconsistent with a trust, and which they may exercise without a fiduciary obligation.

Trustees face consequent issues with their obligation to comply with the reserved powers and possible conflict with their fiduciary duties to the trust and the potential beneficiaries. In particular, these trusts often involve shares in an underlying company as the main subject matter of the trust. The Bartlett duty of supervision has made it common practice to include “anti-Bartlett” clauses in trusts to cancel this duty, coupled with exclusion clauses to protect the trustee from liability for not interfering in the supervision of the underlying company.

This seminar considers how a settlor may reserve control over the trust and how a trustee may mitigate their fiduciary obligations. The seminar will conclude by considering whether a settlor should retain control over a trust and whether a trustee should mitigate their fiduciary obligations.

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Some of the topics considered in this course include:

- What powers may a settlor reserve?
- When will reserve powers affect the recognition of the trust;
- The power of revocation after *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Company (Cayman) Limited* [2011] UKPC 17;
- Protectors, reserved powers and ancillary relief after *Kan Lai Kwan v Poon Lok To Otto & HSBC International Trustee Ltd* [2014] HKCFA 66;
- The doctrine of sham for trusts;
- Interpreting the "True Effect of the Trusts" after *Mezhdunarodniy Promyshlenniy Bank and another v Pugachev* [2017] EWHC 2426;
- How may a trustee mitigate their fiduciary obligations?
- Anti-Bartlett clauses with exclusion clauses;
- Anti-Bartlett provisions and the trustee's "irreducible core of obligations" after *Zhang Hong Li v DBS Bank (HK) Ltd* (2019) HKCFA 45;
- The liability of others;
- The liability of trustees outside their fiduciary obligations;
- The continued liability of trustees for their core fiduciary obligations.

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Code:	EVT000000428	Level:	Intermediate
Date:	3 May 2024 (Friday)	Language:	English
Time:	14:30 - 17:45 (Reception starts at 14:00)	Accreditation(s):	LSHK 3.0 CPD Points
Venue:	Option of: (1) Online via Zoom; or (2) Kornerstone Institute 15/F, Hip Shing Hong Centre 55 Des Voeux Road Central Central, Hong Kong	Request for Rerun:	Please Contact Us for Details 

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