

Memoranda of Wishes

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- 1 In the 20th century there was a significant move away from the use of fixed interest Trusts to discretionary Trusts. With a fixed interest Trust the settlors have little or no discretion and they simply implement the settlor's instructions as to which beneficiaries are to receive capital, which are to receive interest, and in what sequence.
- 2 The inflexibility of fixed interest Trusts was a problem that would be resolved by creating discretionary Trusts where trustees would have freedom to distribute income and capital as they wished.
- 3 Trusts are not created in a vacuum and it is obviously important that trustees of discretionary Trusts should try to learn the kind of distribution arrangements that the settlor intends for a Trust.
- 4 The way that this has commonly been done is by the settlor making a "*Memorandum of Wishes*" or Memorandum of Guidance when the Trust is formed in which his/her intentions for the Trust are recorded. And because a settlor's intentions for the Trust will usually change over the course of time, the practice has arisen of settlors making a series of Memoranda of Wishes as their intentions for the Trust change.
- 5 I suspect that most lawyers would consider the process of making Memoranda of Wishes to be sensible and helpful for trustees and that it should be upheld by the Courts.
- 6 So, too, did I until I read an article that was published in the journal *Trusts & Trustees* in 2019 where it was said that letters of wishes are not relevant when trying to discern the purpose of a Trust power.
- 7 The two authors of the article are accomplished Trust specialists – Toby Graham of Farrer & Co in London and David Russell QC. Toby practises in a leading London law firm and David is an Australian QC who practises in (among other countries) Australia, England and Dubai. They are the current co-editors of *Trusts & Trustees*.
- 8 They referred in their article to two cases in which the English Court of Appeal and the English Supreme Court had identified the purpose of powers in (a) a Company and (b) a pension scheme.¹ In discerning the purpose of a power that is available to directors of a Company it was held that a Court should consider the Company's Memorandum and Articles of Association, using established principles for the construction of documents – except where the purpose of a power is expressed in one or other of those documents – which will hardly ever happen.
- 9 The authors also referred to a summary of the principles set out in *Lewin on Trusts*² that courts should use when construing the meaning of a Deed of Trust, where the authors of that book say:

"What counts is the objective meaning that the words of a document convey to the court when considered as a whole in the light of the surrounding circumstances. Save in exceptional cases of latent

1 *Eclairs Group Limited v J K X Oil & Gas Plc* [2015] EKSC 71 and *British Airways Plc v Airways Pension Scheme Trustee Limited* [2018] EWCA Civ 1533.

2 Lynton Tucker, Nicholas Le Poidevin, and James Brightwell *Lewin on Trusts* (19th ed, Sweet & Maxwell, 2018) at [6-004].

ambiguities, the admissible circumstances do not include the subjective intention of the settlor.”

They go on to say that when determining the “*matrix of fact*”:

“The circumstances or facts admissible for this purpose are objective external facts; they do not include direct evidence of the subjective intentions of the settlor, except in a case of latent ambiguity.”

- 10 After referring to the two recent decisions of the Court of Appeal and the Supreme Court the authors say:

“What both of these cases show is that letters of wishes are simply not relevant to an enquiry into the purposes of a trust. To treat them as relevant would, in our view, be wrong in principle. Once a trust is created, the settlor’s identity is no more than a matter of historical record; he has no role in the operation of the trust. To allow him, through the original (or later) letter of wishes, to frame and reframe the purpose of the trust effectively gives him a power to amend the trust not found in the instrument... To put it another way, in this conception, the letter of wishes might be said to displace the express wording of the trust instrument and/or to exceed the permissible bounds for a valid trust.”³

- 11 They go on to say:

“If a settlor wishes a trustee’s powers to be circumscribed in particular ways and for those powers only to be exercised for a proper purpose, then it is essential for these limitations and the purpose of the trust to be spelled out in the trust instrument.... a failure to do so could lead to sham or other validity problems or could give the trustees an entirely free hand. Any of these could give rise to a negligence action against draftsmen or claims to set the trust aside. The answer must be to take more care in the drafting of the trust instrument and not to look to the letter of wishes as the panacea.”⁴

- 12 The Russell/Graham thesis is echoed in one of the most reputable practitioner texts on Trusts – *Thomas & Hudson on Trusts*:

“The role of settlor is simply that of creator. Once creation has taken place, then there is no evident role for the settlor in the operation of the trust in his capacity as settlor... When an express trust is declared the settlor is required to demonstrate an intention to create such a trust, and to identify with sufficient certainty the property which is to be held on trust and those who are to take beneficial interest in that property. Beyond that, however, the settlor has no further role to play in the trust qua settlor. The settlor, instead, drops from the picture absolutely and has no rights, qua settlor, either to direct the trustees how to deal with the trust property or to reclaim the property which has been settled on trust. In

3 David Russell QC and Toby Graham “Letters of wishes and understanding the purposes of a trust” (2019) 25 *Trusts & Trustees* 277 at 280-281.

4 At 282.

consequence, on the creation of an express trust, the beneficiaries acquire ultimate beneficial title to the trust fund and the settlor qua settlor relinquishes all property claims against that property.”⁵

Alarm

- 13 I suspect that many of you will be taken aback by the Russell/Graham thesis since you will be so familiar with the use of Memoranda of Wishes and of statements from judges that trustees should pay close attention to them.

The Current NZ Enthusiasm for Memoranda of Wishes

- 14 Here are some recent examples. In *Clement v Lucas*,⁶ Justice van Bohemen considered a case where parents had made five Memoranda of Wishes over the course of time. The Memoranda expressed the general wish that there should be an “evening-up” of the family assets between the children of the settlors.
- 15 Van Bohemen J went so far as to set aside a decision of the trustees on the grounds that they had paid insufficient attention to the various Memoranda of Wishes.
- 16 In setting aside the decision, he said:

“The first question I have to decide is whether it was a purpose of the Trust and the intention of the Settlers that the Trust should be used to ‘even the ledger’ among the siblings, taking into account pre-Trust distributions? I consider the answer to that question is clearly ‘Yes.’ This is apparent from the Pre-Trust correspondence and from the Memoranda of Wishes. The evidence of Keith and Brian and the letters Nola wrote around the time she made the last Memorandum of Wishes reinforce that conclusion.” [87]

“There can be no doubt that the Trustees were under a duty to consider the purposes for which the Trust was established and the intentions of the Settlers even if, as Ms Robertson properly reminded me, the Trustees have a wide discretion in exercising their powers under the Trust Deed. As I have already held, the purposes of the Trust and the intentions of the Settlers included ‘evening the ledger’ among the siblings by having regard to earlier distributions. On its face, failing to have regard to such matters amounts to a breach of the Trustees’ duty.” [98]

“My conclusion, therefore, is that before deciding to sell the assets the Trustees should have had regard to the fact that one of the purposes of the Trust was to ‘even the ledger’ as between the siblings and in that regard they should have taken pre-Trust distributions into account and in failing to do they breached their duty as Trustees. The fact they sought and obtained apparently competent professional legal advice after that decision does not obviate the breach of duty. I am satisfied that consideration of that purpose and the earlier distributions, would or might have affected ‘the Trustees’ decision – in the words of Lightman J in *Abacus*

5 Geraint Thomas and Alastair Hudson *The Law of Trusts* (2nd ed, Oxford University Press, 2010) at 1.37-1.38 [Tab 8].

6 *Clement v Lucas* [2017] NZHC 3278 (21 December 2017).

Trusts in a passage quoted with approval by Lord Walker in *Pitt v Holt*.”
[102]

“I consider that the circumstances warrant setting aside the initial decision to sell the Trust properties and to direct the Trustees to reconsider both that decision and the decision in principle to distribute the net proceeds equally among the beneficiaries...” [104]

- 17 Similarly, in *Pollock & Another v Pollock and Others*⁷ Justice van Bohemen said that factors that favoured the making of a significant distribution to a beneficiary from a Trust included:

“The clear guidance in successive Memoranda of Wishes...” and “The clear statements in successive Memoranda of Wishes... including the last Memorandum... that while it was important that the capital of the Trust Fund be maintained, that should not be to the extent of denying beneficiaries access to funds when of most use to them and their families.”

The Reason Why a Settlor’s Subjective Intentions for a Trust are Irrelevant when Considering the Purposes of a Trust

- 18 If the purpose(s) of a Trust is to be interpreted by reference to the subjective intentions of the settlor, it would be necessary for a lawyer advising on the meaning and purpose of a Trust to have access to a document that records the intentions. The obvious document is the Deed of Trust and if the intentions do not appear in the Deed, there is unlikely to be a document from which the lawyer could discern the intentions. It is commercially objectionable for the meaning of Trusts to be interpreted by reference to thoughts which have not been set out on paper or which, if they have been set out on paper, are not typically available to a person who is asked to advise on the meaning of the Deed of Trust.

- 19 The authors of *Lewin* have expressed this principle in the following way:

“The reason for the rule is that otherwise no lawyer would be safe in advising on the construction of a written instrument, nor any party in taking under it. This is to understand, however, not as excluding parol evidence of the surrounding circumstances to explain the objective meaning of the settlement or evidence to show what the words mean, but forbidding evidence called to show the subjective intention of the settlor was different from what the settlement itself expresses.”⁸

- 20 This reasoning is logically sound. So where does that leave the law, with so many judges saying that Memoranda of Wishes are an important aid for trustees etc?
- 21 I will refer first to the way in which the Courts’ enthusiasm for a Memorandum of Wishes can be made to mesh with the principles in the Russell/Graham article.

⁷ *Pollock & Another v Pollock and Others* [2020] NZHC 648 (25 March 2020).

⁸ Tucker, Le Poidevin and Brightwell, above n 1, at [6-004].

A Solution

- 22 Where a written Deed of Trust exists, the Court will refer to that document for its meaning and purpose. If the document records that the settlor may provide a Memorandum of Wishes from time to time and he/she would like the trustees to take note of the wishes, the Court will have an express reference in the Deed to the need for trustees to consider Memoranda of Wishes.

Extending the time for providing Memoranda of Wishes

- 23 With Trusts lasting 125 years, a settlor will die long before the vesting date of a typical Trust is reached. The settlor may consider that after his/her death, a nominated person should be able to make Memoranda of Wishes. If, say, the settlor has a wise and trusted child who the settlor thinks will be able to guide the trustees sensibly after the settlor has died, there is no reason why the settlor should not record in the Deed of Trust that after his/her death, the child has been nominated as a person who is authorised to provide future Memoranda of Wishes.

Recommendation

- 24 I therefore recommend that all Deeds of Trust should provide for Memoranda of Wishes to be provided to the trustees by the settlor and, perhaps, nominated successors to the settlor.

Who Can Provide Memoranda of Wishes?

- 25 It is appropriate to say something about the people who are to be authorised to provide Memoranda of Wishes.
- 26 Conventionally, the settlor alone has that entitlement. He or she has created the Trust and it is appropriate that that person should be able to speak about the intentions for the Trust.
- 27 Difficulty can arise when a Trust is created without a nominated settlor or where the main settlor is not what might be termed, "*the real settlor*". I have in mind Trusts where a friendly lawyer or a friendly accountant is recorded as being the settlor.
- 28 Where the named settlor is a friendly lawyer or accountant who has agreed to take on the role of settlor, it will not be appropriate for that person to make Memoranda of Wishes. The Deed should therefore record that Memoranda of Wishes may be provided to the trustees during the life of the Trust and the people who are authorised to provide the Memoranda should be identified.

The Importance of the Memoranda of Wishes

- 29 The logic of the Russell/Graham thesis is compelling, and I therefore recommend that Deeds of Trust should be modified – where this can be done – to make express provision for Memoranda of Wishes to be provided by one or more identified people.

- 30 The following is an extract from a Deed of Trust that I read recently. The Deed contains a clause which states that:

“The settlor has the right, without in any way limiting the discretions given to the trustees to

(a) Provide the trustees periodically with a Memorandum of Wishes containing advice to the trustees of his, her or their wishes in relation to the Trust Fund.

(b) Advise the trustees periodically of his, her, or their wishes in relation to the Trust Fund.”

The clause goes on to say that the Memoranda of Wishes are not binding on the trustees.

The Need for a Comprehensive Set of Principles to be Stated in the Deed

- 31 It is my experience that a Statement of Wishes will invariably express only a few of a settlor’s wishes. If the settlor changes the wishes in a subsequent Memorandum, some judges become sceptical and say that the settlor is trying to modify the nature of the Trust without authority.
- 32 In one of the cases in which I have acted recently the original Memorandum of Wishes made no reference to a principle that I believe most settlors would wish to implement, namely a wish that the Trust should not become a means to demotivate beneficiaries. It is only when the Trust is beginning to achieve that outcome that a settlor will usually wish to inform the trustees that he/she does not want them to make distributions to a beneficiary if the outcome is that a beneficiary will lose the will to work.
- 33 It may therefore be appropriate in some cases for there to be a reference in the Deed of Trust (or perhaps in a schedule to the Deed) of some general principles that the settlor would like the trustees to follow. They could include a clause that might say something along the following lines:
- a) *In general, I do not want the Trust to demotivate any beneficiaries or make them lazy. I would rather see the assets and income of the Trust be given to charitable causes than to relatives who become demotivated by an expectation that they can rely on distributions from the Trust and cease to work productively.*
 - b) *In general, I would like Trust wealth to be used to assist beneficiaries to gain a head-start in life e.g. by paying for their education and paying for them to acquire skills.*
- 34 After a description of some general principles of this nature the settlor might proceed to speak more specifically about his/her intentions for particular beneficiaries.

Some Recent Cases on Memoranda of Wishes

- 35 I will next refer to some recent cases on Memoranda of Wishes.

- 36 Some of the recent cases may be suspect – to the extent that the Memoranda conflict with the purpose(s) of a Trust. Even so, they express principles that are likely to be applicable in respect of Memoranda of Wishes that conform with the purpose(s) of a Trust.

In the Matter of the R Trust [2019] SC (Bda) 36 Civ (3 June 2019)

- 37 This was a case from the Supreme Court of Bermuda.
- 38 A Trust was formed in 1995 and it owned a house. In 2008 the settlor made a letter of wishes which began:

“The Trust gives you wide discretionary powers over capital and income...”

“While I am aware that these discretions are under your absolute and unfettered control, you may find it helpful if I express in this letter my considered view as to how I would like you to exercise them. In view of recent changes in my circumstances, I now revise my request as follows:...”⁹

The settlor went on to say that he wanted to be treated as the primary beneficiary during his lifetime; that his wife should have sole occupation of the house after his death; and that after the wife’s death, their daughter should own the house.

- 39 In 2011 he made a Will in which he gave different directions. The Will provided that if the property was owned by a Company at the time of his death, he wanted all the shares to be owned by his wife. In other words, the wife was upgraded from having a life interest in the house to being the outright owner of the property.
- 40 The trustees allowed the wife to live in the property for her life and then said it was to go to the daughter. The wife complained saying the Will should prevail and that she should own the house outright. Her lawyers said the Will, having been made three years after the letter of wishes, contained the last expression of the settlor’s wishes and the Will should supersede the Memorandum of Wishes.
- 41 The wife’s lawyers made a full-frontal attack on the trustees. They said *“It would be a breach of Trust in our client’s view for the trustee to ignore the clear statement of the settlor’s wishes. If the trustee has any doubt about the meaning and effect of the relevant clauses in this regard, it is the Trustee’s duty to seek the Court’s construction of this part of the Will.”*

The wife’s lawyers contended “That the trustee is bound to take into account the wishes of the Settlor” as recorded in the Will. They said that “If the Trustee is going to depart of the wishes expressed by the Settlor, then the Trustee is under an obligation to explain to the Court rationally why it has not followed the wishes of the trustee.” They said the trustee “is duty-bound to explain why it has not done so.” Hargun C J rejected these submissions. He held that:

“The relevance of wishes expressed by the Settlor in the Trustees’ decision-making process was addressed by the Supreme Court [of England] in *Pitt & Another v Holt & Another* [2013] 2 AC 108 confirming that such wishes

⁹ *In the Matter of the R Trust* [2019] SC (Bda) 36 Civ at [11].

were a relevant consideration for the Trustees to consider and take into account with other relevant considerations. However, the Trustees were under no obligation to follow such wishes in preference to other relevant considerations.”¹⁰

Hargun C J then quoted from Lord Walker’s decision in *Pitt v Holt* where Lord Walker said:

“The Settlor’s wishes are always a material consideration in the exercise of fiduciary discretions. But if they were to displace all independent judgment on the part of the Trustees themselves... the decision-making process would be open to serious question...”¹¹

Hargun C J went on to say:

“In my judgment there is no obligation on Trustees to explain specifically why a particular wish of the Settlor was not followed by the Trustees. For the purposes of this application, it is sufficient for the Trustee to explain the relevant factors it took into account in coming to the decision and that the decision made by the Trustee is a reasonable one in the sense that it is a decision which could be made a reasonable body of Trustees.”¹²

- 42 I suspect most lawyers in New Zealand assume that trustees do not have to give reasons for their decisions. Hargun C J’s statement in the passage quoted above is important in this context. He says that *“it is sufficient for the Trustee to explain the relevant factors it took into account in coming to the decision...”*
- 43 When making a decision that may be challenged, trustees should be aware that they may be required by a Court to explain the factors they took into account when they made the decision. This is not the same as giving the reasons for the decision – merely the factors that were taken into account.
- 44 In practice the two may not be much different. If the trustees say they took factors 1-6 into account when factors 7-10 would be the most important factors, the trustees will have exposed themselves to immediate criticism for having not taken the most significant factors into account.

The Obligation on Trustees to Disclose Memoranda of Wishes

- 45 In *Vandy v Vandy & Others*,¹³ Smith AJ ordered trustees to disclose Memoranda of Wishes. The application was opposed by the trustees who said that Memoranda:

“Are not relevant to the issue of the propriety of the exercise of the Trustee’s discretion”

10 At [36].

11 At [36].

12 At [37].

13 *Vandy v Vandy & Others* [2019] NZHC 3080 (25 November 2019).

And that they:

“Are not normally disclosable to beneficiaries.”

Smith AJ said:

“The memorandum of wishes may be redacted to delete any parts that do not contain statements or express wishes relating to the sale or future use of the property, or to the direct or indirect payment or distribution of any Trust assets to or for the benefit of [X]”¹⁴

- 46 The Deed of Trust stipulated that the trustees were to take account of Memoranda of Wishes. Clause 18.1 of the Deed of Trust said that the trustees were expressly permitted to give preference to the wishes of the settlor.¹⁵ The Judge held that “*the extent to which the trustees took into account the settlor’s views on the issues referred to at [93] above is directly in issue in the first cause of action.*”¹⁶ The full Memorandum of Wishes was said to be relevant to the three particular issues.¹⁷ Discovery was also sought of five Wills “*to the extent they contain any expression relevant to the intention and purpose of the Trust.*”¹⁸

The Supremacy of the Deed of Trust

- 47 The case of *Mackie Law Independent Trustee Limited & Others v Chaplow*¹⁹ illustrates how a Memorandum cannot override a Deed of Trust. Justice Courtney held that trustees had misunderstood a Memorandum of Wishes. The Memorandum said that a Ms Lu was to be allowed to occupy a Trust property following the settlor’s death but Ms Lu was not a beneficiary of the Trust. It was held that the trustees, in allowing her to occupy the property, had acted in breach of Trust.
- 48 The *Mackie* case also shows the need for trustees to keep a record of their decisions. Courtney J said:

“There is nothing in the material before me to indicate that the trustees actually considered the meaning of the Memorandum of Wishes or whether it was appropriate to adhere to it. In the trustees’ correspondence there is frequent reference to a Memorandum of Wishes but little to the Trust Deed itself. No signed Minutes or Resolutions by the trustees were produced, merely an undated and unsigned document described as ‘minutes/resolution of trustees’ meeting which referred to the trustees’ resolution [t]o exercise Trustee’s discretion with reference to implementation of the Memorandum of Wishes of the Settlers... no mention was made of the Trust Deed itself.”²⁰

14 At [148].

15 At [128].

16 At [95].

17 At [97].

18 At [98].

19 *Mackie Law Independent Trustee Limited & Others v Chaplow* [2017] NZHC 1570 (10 July 2017).

20 At [35].

“In my view, the trustees acted in breach of their obligations under the Trust Deed by insisting on adherence to what they (incorrectly) perceived was required by the Memorandum of Wishes...”²¹

- 49 The Memorandum of Wishes required the trustees to consult with Ms Chaplow as to her wishes regarding the property. It was held that the trustees “(a)...misunderstood the effect of the Memorandum of Wishes and so failed to properly consult Ms Chaplow as to her wishes...”²²

Memoranda that Conflict with a Deed of Trust

- 50 The incorporation of a Letter of Wishes into the Deed of Trust as an exhibit can cause difficulties since the letter may become discoverable by beneficiaries who may use the letter as an opportunity to increase the likelihood of getting a distribution, or who may find the letter hurtful.
- 51 If the Letter of Wishes contradicts the terms of the Deed of Trust the contradiction could be used as evidence of ambiguity and expose the Trust to attacks from dissatisfied beneficiaries.

Construing a Settlor’s Intentions

- 52 There are jurisdictions where a settlor’s intention is to be determined solely by reference to the plain language of the Deed of Trust itself. For example, in Illinois, the common law provides that the general goal for trustees is to construe a Deed of Trust so as to determine the settlor’s intentions and to give effect to his/her intentions if they are not contrary to law or public policy. In doing this, the settlor’s intentions are to be determined by reference to the plain language of the Deed of Trust itself and not to a separate Memorandum of Wishes. To the extent that the Deed of Trust refers expressly to the settlor’s wishes, this constraint can presumably be overcome or its influence lessened.
- 53 A major criticism of Letters of Wishes is that they can have the effect of amending a Deed of Trust by a method that is unauthorised. In the United States many Trust statutes require amendments to be made in accordance with the terms of the Deed of Trust but a significant number of States allow a Trust to be amended “by any other method manifesting clear and convincing evidence of the settlor’s intent.” Arguably, a Letter of Wishes expressing a settlor’s specific desire as to what distributions should and should not be made could function as an amendment but strangely, no United States Federal or State Court has addressed this topic.

A Need to Take All Relevant Factors into Account

- 54 A Memorandum of Wishes will almost never contain all of the factors that a trustee should take into account. In *Chambers v S R Hamilton Corporate Trustee Limited*,²³ the Court of Appeal held that:

“Wishes can only be taken into account if they are not inconsistent with the purposes of the Trust as appears from its written terms. Trustees

21 At [37].

22 At [98].

23 *Chambers v S R Hamilton Corporate Trustee Limited* [2017] NZCA 131.

should not blindly obey all settlor instructions. It is necessary for trustees to read and understand the Memorandum of Guidance to discern the settlor's wishes, and then with those wishes in mind make an independent assessment of the appropriate cause of action taking into account not just the Memoranda, but all relevant factors."

Multiple Memoranda: Which One Should Prevail?

55 If a settlor has expressed his/her wishes on more than one occasion, is one of the Memoranda to be accorded greater relevance? It would appear from Lightman J's decision in *Abacus v Barr*²⁴ that the wishes of the settlor at the time the trustee is due to exercise a power is the most relevant time.

56 Mr Justice Briggs gave a decision in *Breakspear v Ackland*²⁵ in which he appeared to have some reservations about this. He said that:

"For the present purposes I am concerned with a wish letter which is substantially contemporaneous with the settlement itself. The question whether later wish letters have the same status is beyond the scope of this judgment."

57 In an important article on this topic,²⁶ Stephen Moverley Smith QC and Andrew Holden state that:

"While the explanation for the relevance for the settlor's current wishes... is open to question, there is a very good reason why the settlor's founding wishes for the Trust should be a material consideration in the trustee's decision-making process."

However, they go on to say that:

"...There is a clear line of authority – culminating most recently in the decision of the Supreme Court in *Pitt v Holt* – that the trustee's duty extends beyond the settlor's original, founding purposes, and that the trustees are under an 'on-going' obligation to consult the settlor and to take into account his wishes when administering the Trust."²⁷

58 This kind of dispute can be overcome by stating in the Deed of Trust that the settlor may provide the trustees with a number of Letters of Wishes and if he/she should do so, the trustees should give greater weight to the most recent statement of wishes.

24 *Abacus v Barr* [2003] Ch 409.

25 *Breakspear v Ackland* [2009] Ch 32, 36.

26 Stephen Moverley Smith QC and Andrew Holden "Letter of Wishes and the ongoing role of the settlor" (2014) 20 *Trusts & Trustees* at pages 712-724.

27 At 716.

A Settlor's Oral Wishes Should Also be Considered

- 59 A settlor's wishes should be considered, even if they have not been formally recorded: see *Re A Trust, Investec Co Trustees Limited v Kidd*²⁸ and *Slutsker v Haron Investments Limited*²⁹ which was affirmed in [2013] EWCA Civ 430, (2013-2014) 16 ITELR 257.

Trustees Have a Fiduciary Duty to Ascertain the Wishes of a Settlor.

- 60 Ascertaining a settlor's intentions is not to be regarded as a discretionary task that a trustee can decide to accept or ignore. In the *Abacus* case,³⁰ Lightman J said that "*The fiduciary duty of the Trustee required the Trustee to ascertain the wishes of the Settlor, in particular since he was the life tenant whose interests in the Trust Fund was to be overridden and since it was his wishes that the appointment was intended to give effect to. The Trustee failed to take adequate measures to ensure that it received a correct rather than a garbled version of the Settlor's wishes.*"
- 61 This passage was approved by the Court of Appeal in the *Futter – Pitt* case where Lloyd LJ stated that "*Abacus v Barr* shows that the wishes of a settlor may well be one thing that trustees should take into account."³¹
- 62 The facts of the *Abacus* case were unusual. A settlor informed a person that he wished the trustee to distribute 40% of the Trust Fund for the benefit of his sons. The third person mistakenly told the trustee that the settlor wanted to transfer 60% of the Trust Fund and the trustee did so. It was held that the trustee ought not to have relied on the request of the third party but should have made independent enquiries of the settlor.
- 63 In a similar way, in *Re Esteem Settlement* the Court said:
- "It is quite clear that a settlor to whom, after all, the funds belonged before he decided to give them to the trustees, is entitled to express his wishes from time to time to the trustees..."³²

Concluding Observations

- 64 The greatest comfort that I draw from the cases to which I have referred comes from Lord Walker's decision in the *Futter – Pitt* case where he said on behalf of the Supreme Court of England and Wales that:
- "The settlor's wishes are always a material consideration in the exercise of fiduciary discretions."³³

28 *Re A Trust, Investec Co Trustees Limited v Kidd* [2012] JRC 066 at [62]-[63].

29 *Slutsker v Haron Investments Limited* [2012] EWHC 2539 (Ch) at [37].

30 *Abacus Trust v Barr*, above n 24, at [27].

31 *Pitt v Holt; Futter v Futter* [2012] Ch 132 at [114].

32 *Re Esteem Settlement* [2003] JLR 188.

33 [2013] WTLR 977 at [66] on page 1001.

- 65 Lord Walker was one of the finest Equity Judges in England in the 20th century and that sentence should provide a measure of comfort to lawyers who are unsettled by the Graham/Russell thesis.
- 66 The Graham/Russell thesis is focussed on the *purpose* or *purposes* of a Trust. Lord Walker's statement is not focussed on the purpose of a Trust but on a settlor's contemporary wishes for the Trust. If the wishes conflict with the purpose or purposes of a Trust, then the trustees should ignore the Memoranda.
- 67 The way to safeguard a Trust so that its trustees will be likely to implement a settlor's intentions is to stipulate in the Deed of Trust that the settlor, or other identified people, may provide Memoranda of Wishes from time to time – in the way that I have described earlier in this paper.
- 68 When talking of the "*purpose*" or "*purposes*" of a Deed of Trust I have in mind a practical problem that I experienced recently with a Judge. A settlor provided a Memorandum of Wishes at the time of the Trust's creation when it was anticipated that the outcome would be A. The outcome was Z and the settlor's intentions were being comprehensively defeated.
- 69 In the course of litigation, the settlor made a second Memorandum of Wishes which was intended to deal with the new situation but the Judge considered that the original Memorandum of Wishes expressed the purposes of the Trust rather than the subsequent Memorandum and the first Memorandum should prevail.
- 70 The end result, from the settlor's perspective, was a disaster.
- 71 Lawyers should try to organise their clients' affairs in such a way as will avoid the prospect of litigation, since the litigation process involves expense and stress that almost all clients wish to avoid. The way to avoid, or at least reduce, problems of the type I have described, is to stipulate in a Deed of Trust that:
- The settlor (and perhaps other nominated people) may provide the trustees from time to time with Memoranda of Wishes.
 - There are some general principles that the settlor has in mind for the Trust, that are set out in a Schedule to the Deed of Trust.
 - If, during the course of time, there are a number of Memoranda, the trustees are to primarily focus on the most recent Memoranda since it is likely to be the most reliable account of the settlor's wishes for the Trust.
- 72 If these guidelines are followed, they will hopefully enable a settlor to make his/her wishes clear and for there to be a reasonable prospect that the trustees will implement them.