

## Attacks on Trusts in Hong Kong

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Trusts have long been used by high net worth individuals in Hong Kong as an estate planning, tax planning and asset protection tool. The benefits of using trusts are widely recognised and include continuity, flexibility and confidentiality. Trusts are usually set up to protect assets from creditors' claims; to prevent assets from falling within the matrimonial pot in the event of a divorce; and to avoid the probate process in the event of a death.

A fundamental feature of a trust is the separation of legal and beneficial ownership of assets. The person putting assets into a trust is referred to as the settlor and passes legal ownership of his/her assets to a third party, called the trustee. The trustee holds the trust assets for those who benefit from the trust, called the beneficiaries. The terms of the arrangement are set out in a document called the trust deed.

In conventional trusts, the trustee generally has a high degree of control over the trust assets and the settlor has no rights left after contributing the assets. However, in practice, many settlors are uncomfortable with the idea of handing over complete control of their assets to a third party. Therefore, very often, settlors will reserve certain rights and powers to themselves in the trust deed, such as the power to remove the trustee and appoint a new one.

There are many ways that a trust can be attacked, depending on the relationship of the attacker to the trust parties and the powers reserved by the settlor. Potential attackers include disgruntled beneficiaries/heirs/family members and divorcing spouses. Lines of attack often involve challenging the validity of the trust or setting aside transfers into a trust intending to defeat claims.

In the case of *Tam Mei Kam v HSBC International Trustee Ltd & others*, the mother of Anita Mui, a famous celebrity in Hong Kong, challenged the validity of her Will and the validity of a trust set up by Anita shortly before her death. Madam Tam could not accept that Anita had left her entire estate to the Trust and that HSBC, as trustee of the Trust, was requested by Anita to: (1) distribute all shares in two private companies to fashion designer Eddie Lau all shares in two private companies each holding a real property; (2) set aside a sum of HK\$1,700,000 to finance the education of her nephews and nieces; and (3) hold the balance of the trust fund for the purpose of paying HK\$70,000 per month to Madam Tam for her use during her lifetime, with the remaining balance to be distributed to New Horizon Buddhist Association Limited after Madam Tam's lifetime.

Disgruntled by the contents of Anita's Will and the trust arrangement, Madam Tam argued that Anita lacked the mental capacity and did not sufficiently know and approve of the contents of the Will and the trust documents. After considering all the evidence, the Court concluded that Anita had the testamentary capacity to make the Will and the mental capacity to settle the Trust and that both the Will and trust deed were duly executed.

Given the wide range of arguments potential attackers may make to undermine the integrity of a trust, careful planning and drafting is crucial. Trust advisors must thoroughly understand the circumstances of individual settlors and carefully consider the likely sources of attack. A well-designed structure not only achieves the objectives and purposes of a trust, but also goes a long way toward saving time, costs and the pain of defending a trust from attack.


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