

SVENSON
BARRISTERS



Trading Trusts Explained

MICHAEL HEATON QC

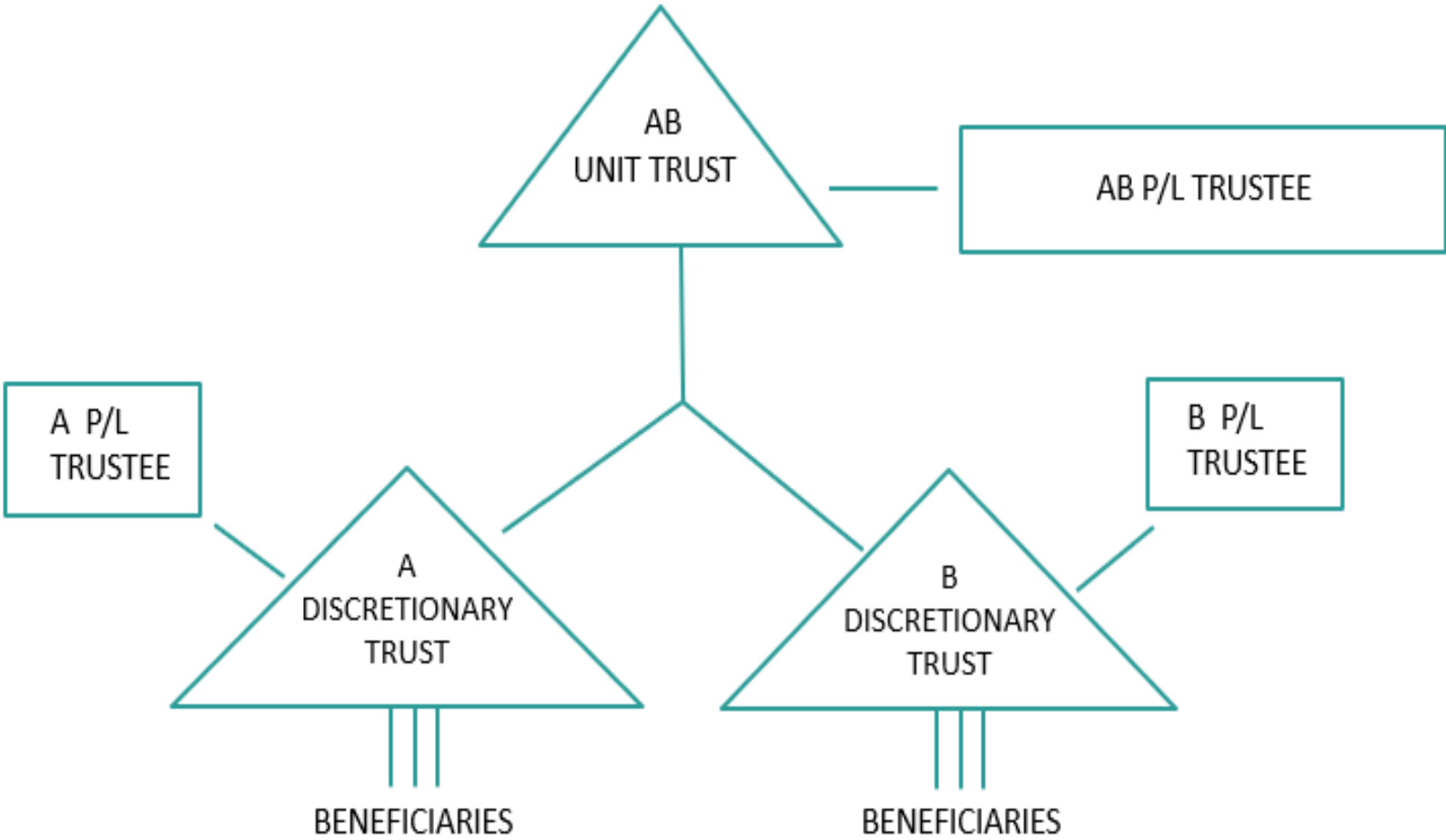
PETER AGARDY

HADI MAZLOUM

Trading Trust

Definition:

- A trust over goodwill and business assets by which a trustee conducts a business in accordance with and under the authority of the terms of the trust instrument



Trading Trust

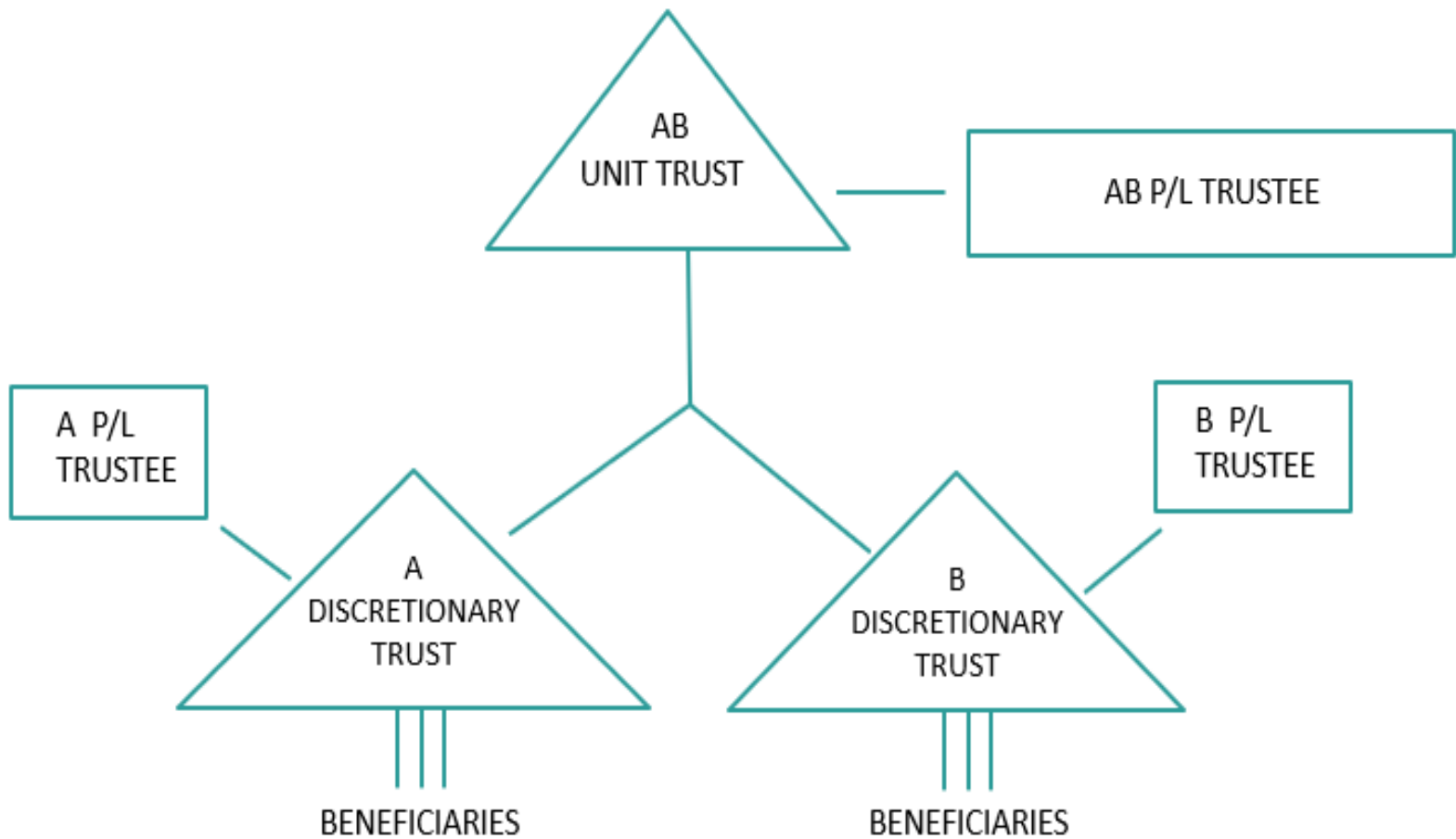
- Trading Trusts
- Advantages/Disadvantages
- Existence
- Right of indemnity
- Asset protection?

Trading Trust

- Exposure of directors
- Dispute
- Winding up
- Liquidator's remuneration
- Recommendations

Trading Trust

- Not an entity but a relationship
- Trustee, property, beneficiary
- Public unit trust / private trading trust
- Use of trusts for business – 1970+
- Prime motivation – tax avoidance



Advantages

- Statutory regulation
- Tax
- Flexibility
- Control without ownership – Rockefeller
- Asset protection

Disadvantages

- Administration costs
- Dispute
- Insolvency
- Asset protection
- Ford: commercial monstrosity

Tax advantages – an example

- Trust – more advantageous?
- Independent advice
- Numerous variables
- Assumptions:
 - One discretionary trust / one shareholder
 - Dividends fully franked
 - Partner – no alternative income – also beneficiary to trust
 - A taxed at highest rate – 45%
 - Company/trust taxable income = \$100,000
 - FY17/18

Tax paid – company structure

- Company pays tax on the \$100,000: $0.3 \times \$100,000 = \$30,000$
- Company distributes the remaining \$70,000 to the single shareholder (A).
- **A will receive:** Dividend – Tax + Franking Credit
- **Franking Credit** = $[\text{Dividend Amount} / (1-0.3)] - \text{Dividend Amount}$
- **Franking Credit** = $\$70,000/0.7 - \$70,000 = \$30,000$
- **A receives** = $\$70,000 (0.45 \times \$70,000) + \$30,000 = \$68,500$
- **Tax paid by A** = $\$70,000 - \$68,500 = \$1,500$
- Total Tax paid
 - Company = \$30,000
 - A = \$1,500
 - Total = \$31,500

Tax paid – trust structure

- Trust not taxed on \$100,000
- Beneficiaries taxed.
- The trust distributes \$100,000 to A's partner and \$0 to A
- Tax paid by A's partner = $\$19,822 + (0.37 \times (100,000 - 87,000)) = \$24,632$
- Total tax paid = \$24,632
- "Saving" = $\$31,500 - \$24,632 = \$6,868$

Existence of trust

- Trust deed
- Trustee minutes
- Accounts
- Bank statements
- ABN
- Trust tax returns
- Court directions

Right of indemnity

- Trustee personally liable
- *Vacuum Oil* – (1945) HC
- Indemnity against trust assets
- Statute
- Deed
- Indemnity from beneficiaries
- *Broomhead* – (1985) Vic

Asset protection

- Indemnity against trust property
- Indemnity from beneficiaries
- Excluded by deed?
- Not discretionary trust

Exposure of Directors

- Insolvent trading
- Corporations Act s.588G
- Corporations Act s.197
- Director of trustee company
- Where right of indemnity not available

Dispute

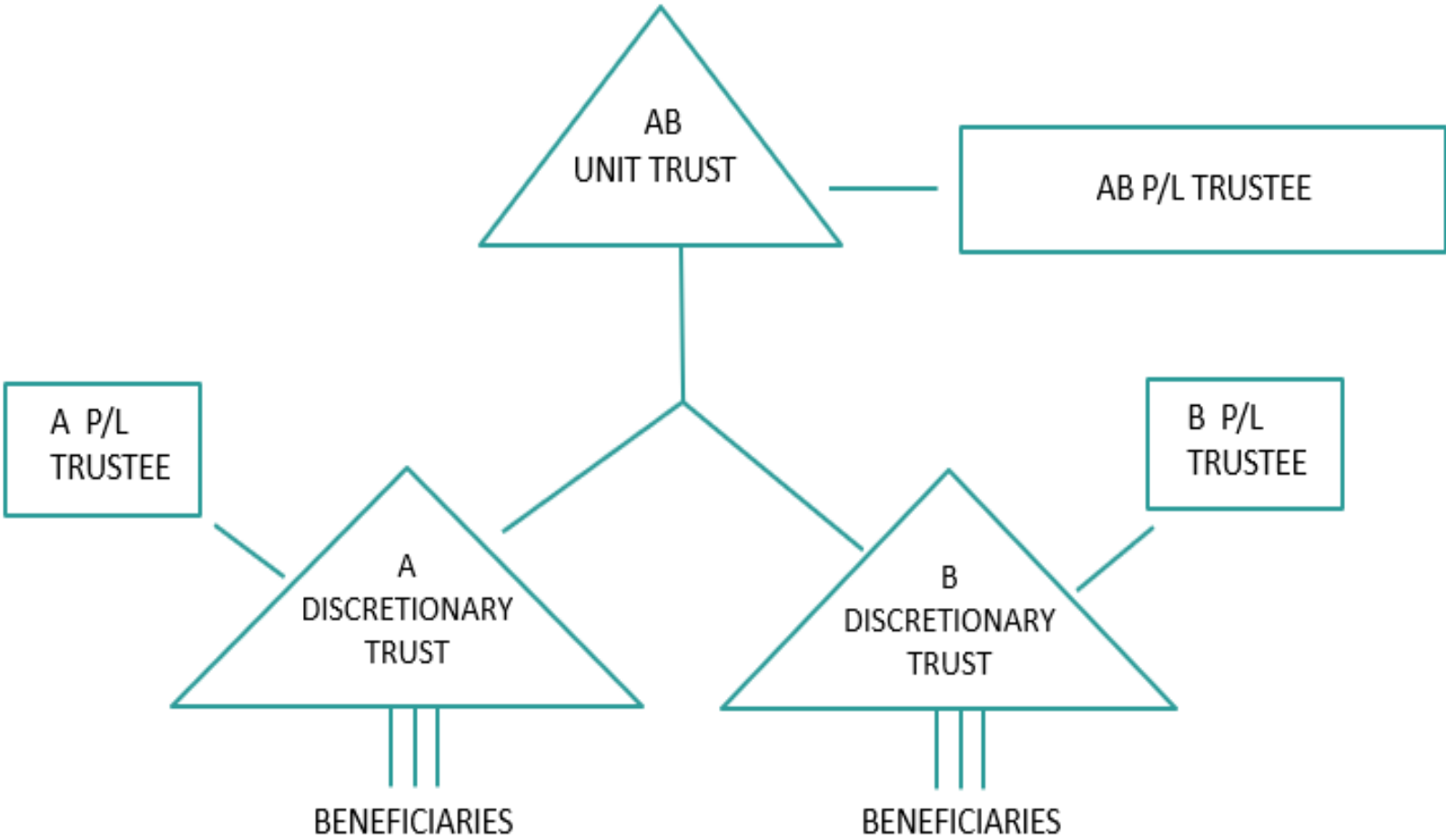
- Replace trustee
- Trustee Act s.48
- *Benson* – (2015) Tas
- Family dispute
- Independent trustee appointed

Dispute

- Oppression proceedings
- Corporations Act s.233
- Oppression proceedings available for units in trust?
- Affairs of the company
- Corporations Act ss. 9 & 53
- Includes transactions as trustee

Dispute

- *Viglioroni* – (2009) Vic
- *Noosa Ventures* – (2010_ Vic
- Victorian Law Reform Commission
- Recommends amendment of Trustee Act



Dispute

- Mediation options
- A buys out B
- B buys out A
- Sell business
- Wind up
- Continue, with adjustments
- Costs - *Voltaire*

Winding up

- Wind up trustee company
- Liquidator receiver of trust
- Wind up trust
- Exercise right of indemnity
- Creditor access limited

Liquidator's Remuneration

- Assessment
- Factors s.473(10)
- Proportionality
- *Sakr Nominees (2017) NSW*

Liquidator's Remuneration

- Trust assets available?
- *Re Enhill* – (1983) Vic
- *Suco Gold* (1983) SA
- *Re Amerind* (2017, 2018) Vic
- Employee priority?

Recommendations

- One trustee & one trust
- Separate books of account
- Trustee minutes
- No trustee business in own right
- Declaration of trust of land

Recommendations

- Director liability awareness
- Trustee personally liable for debts
- Indemnity in trust deed
- Power of sale in deed
- Shareholders' & unitholders' agreement