

# Invalid “illusory” trusts: implications for trust powers held by a settlor or protector

- > **Recent international cases:** what combination of trust provisions and positions in the trust were fatal to the validity of the trust? Which powers are safe to have in the trust deed?
- > **Best practice drafting in order to protect the integrity of the trust:** personal powers, limited personal powers, fiduciary powers, allocation of trust positions and roles

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Zac is a Partner with Spencer West LLP a UK International Law Firm. Zac is also Head of International Private Wealth with Spencer West's alliance firm Gateway Law Corporation in Singapore. Zac is resident in Singapore. Zac has over 20 years post qualification private client experience in all areas of international private client law including cross border trust and estates, tax, family, divorce and succession laws. Zac has particular expertise advising in relation to family business governance and succession planning, and is regularly engaged by a number of leading business families and entrepreneurs based in North Asia, Southeast Asia and Middle East. Zac also has extensive experience advising in relation to creation of Single Family Offices, typically undertaking a “Lead Counsel” role working closely with family members and supporting professionals, including various jurisdiction tax counsels, lawyers and fiduciary service providers. Zac is regularly instructed and retained by leading private banks, multi-family offices and trust company service providers. Zac is admitted to practice in England and Wales, British Virgin Islands (non-practising) and Anguilla (non-practising) and is a registered foreign law in Singapore. Zac has previously chaired a number of international committees, including Singapore Business Families Special Interest Group and BVI Law Reform Committee.

This presentation will discuss the emerging concept of an invalid “illusory” trust and its implications for trust powers held by a settlor or protector. Key judicial decisions will be explained, and the impact of modern trust legislation explored. The session will end with a review of best practice trust drafting recommendations including key provisions that should be avoided in order to protect the integrity of the trust.

### Evolution of Trust Protector

This section will review and explain the evolution of trust powers and the office of protector, with a discussion of current trends and recent trust legislation and the important implications of the recent Bermuda Court of Appeal decision in X Trusts dealing with basis on which a protector may validly exercise a power of consent.

### Exploring the Concept of «illusory» Trusts

This section will explore the emerging concept of an invalid “illusory” trust, with a survey of the leading international cases: what each decided, what combination of trust provisions and positions in the trust were fatal to the validity of the trust. The following leading cases will be considered in detail:

- AQ Revocable Trust (invalid trust, over-reservation of powers and positions)
- TMSF (implications of a power to revoke and asset protection benefits)
- Clayton (a different approach to over-reservation of trust powers resulting in a composite general power of appointment and its asset protection implications)
- Pugachev (hypothetical use of protector powers invalidating the trust, broader implications)
- Webb (over-reservation of trust power and positions, effective power to revoke, invalid trust implications)
- Zhang Lan (invalid illusory transfer of assets into trust, key findings where client does not give up effective control of assets)

### Key Takeaways and Further Exploration

This section will try to distill a workable rule from the leading decisions, answering the simple questions:

- which power or combination of powers will invalidate a trust,
- which powers are safe to have in the trust deed,
- which powers or combination of powers may

introduce some level of risk or ambiguity into the trust. The limits of the “illusory” concept will be explored, including whether an illusory trust is void ab initio or voidable? Whether the illusory concept is simply remedial in nature dependent on a broader fraudulent context.

### Statutory Intervention and Trust Powers

This section will explore some of the key statutory reactions to illusory trusts, including a survey of leading offshore trust jurisdictions and their approach to illusory trusts. Possible judicial approaches to extensive reserved power trusts, whether Clayton may be applied to enable creditor access to a trust created using modern offshore reserved powers trust legislation. Key jurisdictions that have not implemented sufficient statutory protections will be highlighted, including Hong Kong and Singapore, and broader implications for clients that wish to use these jurisdictions.

### Practical Drafting Implications

In the final section of the talk a practical approach will be taken, first by analyzing key drafting amendments that will need to be made in order to protect the integrity of the trust, including:

- use and assessment of limited personal powers: benefits and considerations.
- use and assessment of personal powers: benefits and considerations.
- use of fiduciary powers: benefits and considerations, practical administration implications..
- settlor time-out periods: enhancing trust protector independence and effectiveness.
- allocating trust assets strategically: risk mitigate exercise.
- allocating trust positions and roles strategically: risk mitigation exercise.

By the conclusion of the talk, participants will possess a comprehensive understanding of the evolution trust powers, a profound grasp of «illusory» trusts, insights gleaned from key cases, familiarity with statutory provisions and their jurisdictional variations, and practical strategies for effective trust drafting and governance. This knowledge will help to equip attendees with the ability to recognize and mitigate circumstances where a trust may fail because of the over-reservation of trust powers.

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## PRACTICAL INFORMATION

**Venue**  
Zurich Sheraton Hotel,  
Pfingstweidstrasse 100, Zurich

**Visio conference on Zoom**  
The Zoom link and the documentation will be sent to the participants on 28 September in the afternoon. Academy & Finance provides technical assistance before and during the conference.

**How to register**  
by phone: +41 (0) 22 849 01 11  
by fax: +41 (0) 22 849 01 10  
by e-mail: info@academyfinance.ch  
by post: Academy & Finance SA  
3, chemin de la marbrerie  
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**Fees**  
620 CHF (+ VAT 7.7%)  
Additional registrations from the same company: - 50%

**Registration and payment**  
Payment is made by bank transfer or by credit card. Credit card payments will be debited immediately upon receipt of card details. In any case, we will send you an invoice by email.

**Substitution & cancellation policy**  
Substitutions from the same company are accepted at any time. Cancellation requests must be received in writing, by fax or by post up to the following dates end of business :  
• 22 September refund of 100%  
• after 22 September no refund will be made for cancellation.

## REGISTRATION FORM

I register for the seminar “Invalid “illusory” trusts: implications for trust powers held by a settlor or protector” in Zurich on friday 29 September 2023

I will attend in the conference room       I will attend online on Zoom

### FIRST PARTICIPANT

Full name.....  
Position.....  
E-mail.....

### SECOND PARTICIPANT (-50%)

Full name.....  
Position.....  
E-mail.....

Company.....  
Address.....  
Postcode..... City.....  
Tel ..... Mobile.....

### Person to which the invoice must be sent for payment:

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Cardholder.....  
Date ..... Signature.....

The organisers reserve the right to amend the programme if, despite their best efforts, circumstances oblige them to do so.

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