



WEALTH TALKS



香港信託人公會

Trustee Hong Kong Trustees' Association

# Family Office Trust

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29 NOV 2022



5:00 PM HKT



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King's Counsel



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XXIV

OLD BUILDINGS

SPENCER  
WEST



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# Agenda

- Family Office Trust – Governance Framework
- Excessive Reservation – Developing Case Law
- Hong Kong Assessment
- Countermeasures
- Next Actions ➡

# Governance Framework:

## Trustee



Professional Fiduciary  
Company

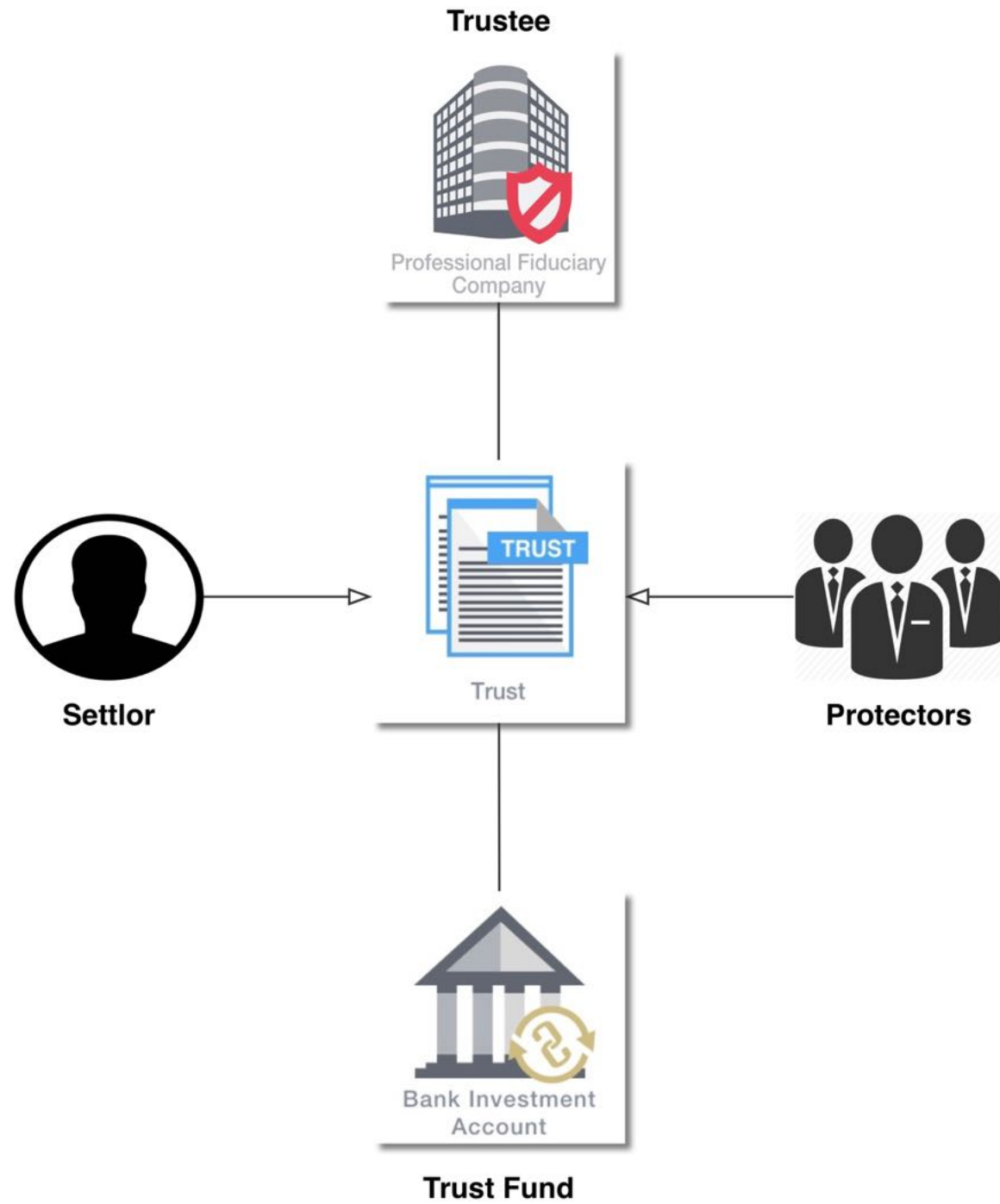


Trust

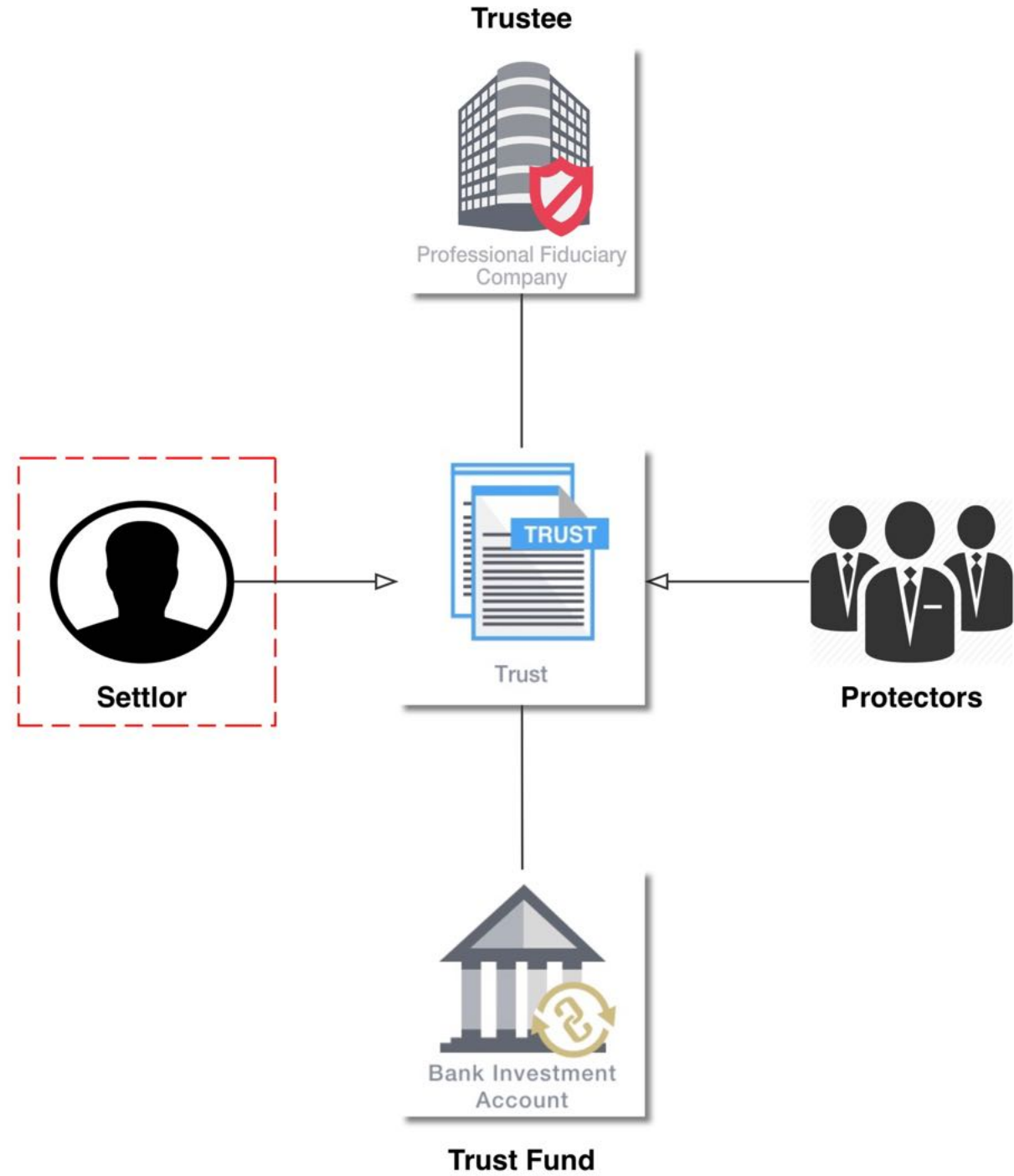


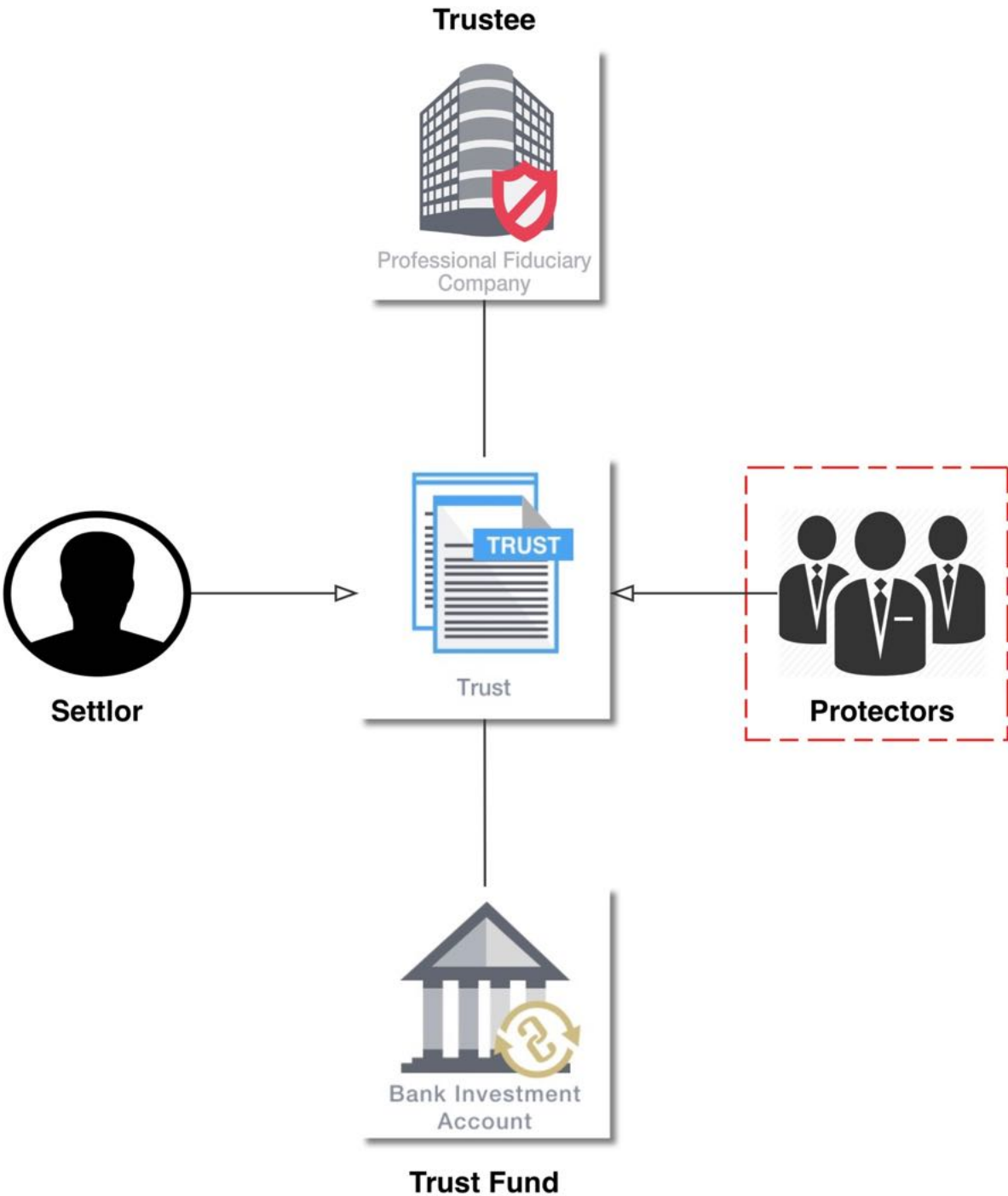
Bank Investment  
Account

## Trust Fund

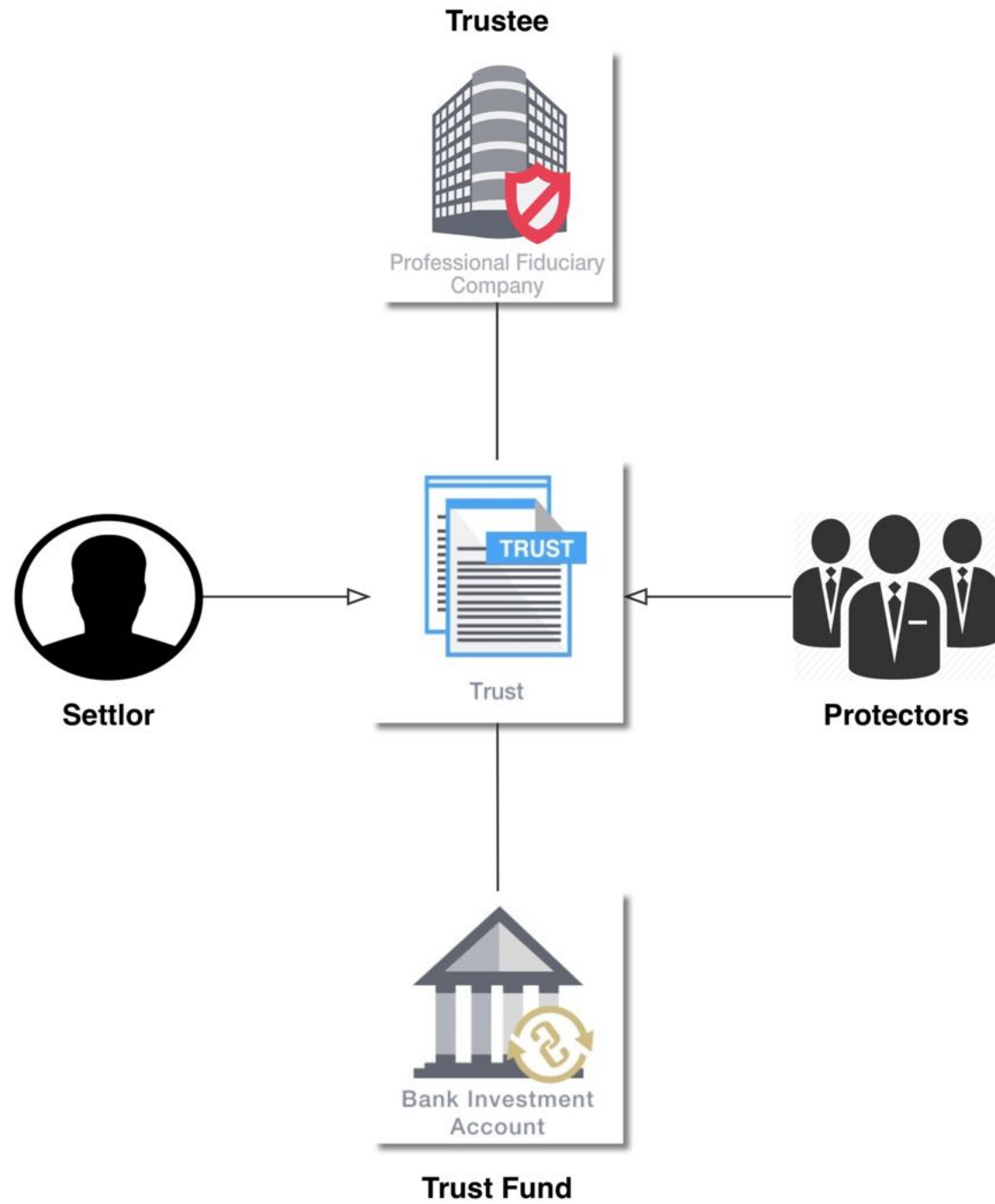


Settlor





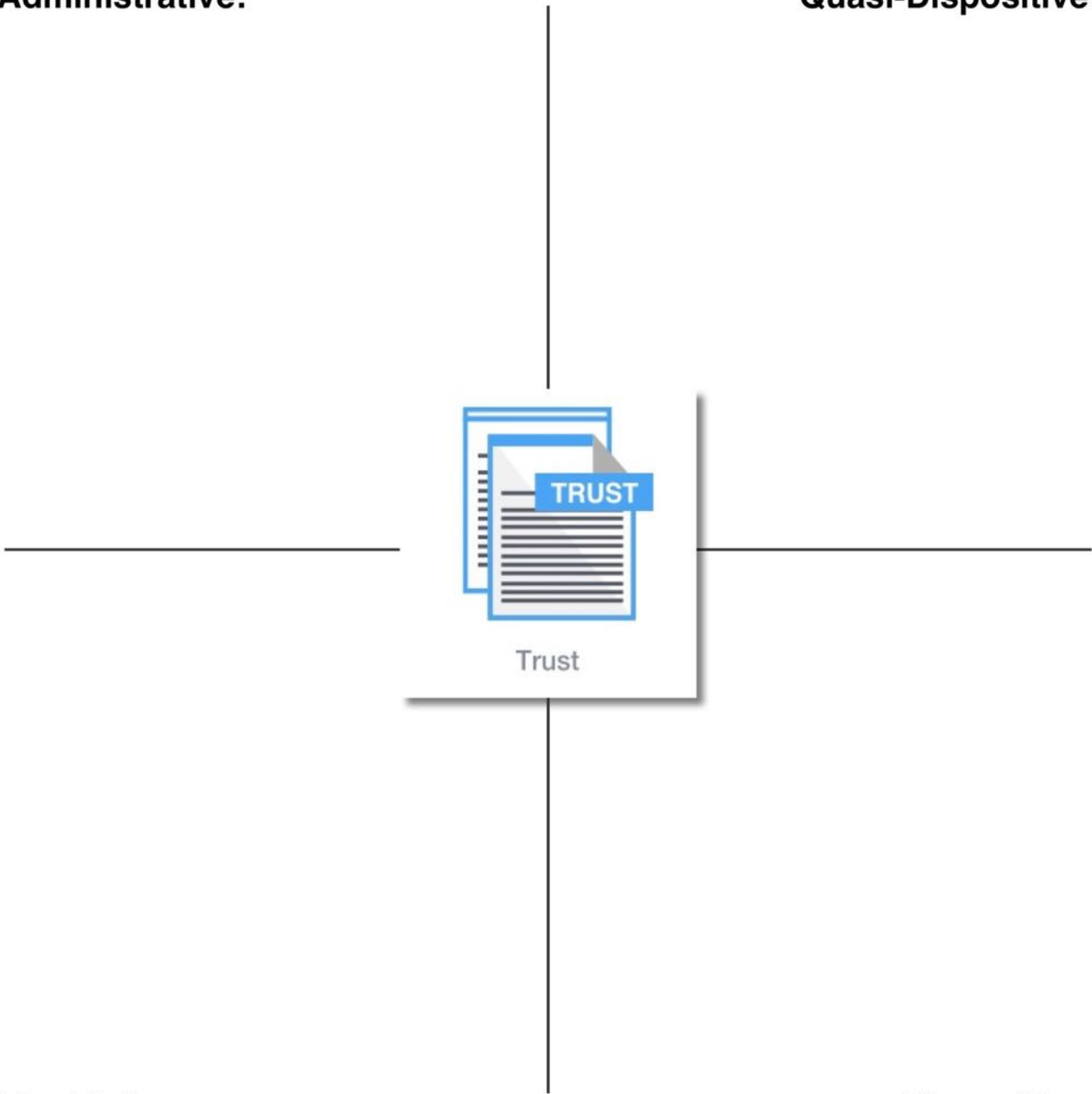




**Trust Powers**

**Administrative:**

**Quasi-Dispositive:**



**Restrictive:**

**Dispositive:**

## Trust Powers

### Administrative:

- Investment Directions
- Appointment / Removal Directors
- Appointment / Removal Investment Managers
- Change Proper Law
- Change Exclusive Jurisdiction

### Quasi-Dispositive:



Trust

### Restrictive:

### Dispositive:

## Trust Powers

### Administrative:

- Investment Directions
- Appointment / Removal Directors
- Appointment / Removal Investment Manager
- Change Proper Law
- Change Exclusive Jurisdiction

### Quasi-Dispositive:

- Power to Amend / Vary Trust
- Power to Add / Remove Beneficiary
- Power to Appoint / Remove Trustee



Trust

### Restrictive:

### Dispositive:

## Trust Powers

### Administrative:

- Investment Directions
- Appointment / Removal Directors
- Appointment / Removal Investment Manager
- Change Proper Law
- Change Exclusive Jurisdiction

### Quasi-Dispositive:

- Power to Amend / Vary Trust
- Power to Add / Remove Beneficiary
- Power to Appoint / Remove Trustee



Trust

- Power of Appointment
- Power to Direct Income
- Power to Revoke

### Restrictive:

### Dispositive:

## Restrictions

### Administrative:

- Investment Directions
- Appointment / Removal Directors
- Appointment / Removal Investment Manager
- Change Proper Law
- Change Exclusive Jurisdiction

### Quasi-Dispositive:

- Power to Amend / Vary Trust
- Power to Add / Remove Beneficiary
- Power to Appoint / Remove Trustee



Trust

- Trust Information
- Legal Redress
- Limited Obligations

- Power of Appointment
- Power to Direct Income
- Power to Revoke

### Restrictive:

### Dispositive:

**Settlor Reserved Powers:**

**Administrative:**

- Investment Directions
- Appointment / Removal Directors
- Appointment / Removal Investment Manager
- Change Proper Law
- Change Exclusive Jurisdiction

**Quasi-Dispositive:**

- Power to Amend / Vary Trust
- Power to Add / Remove Beneficiary
- Power to Appoint / Remove Trustee



Trust

- Trust Information
- Legal Redress
- Limited Obligations

- Power of Appointment
- Power to Direct Income
- Power to Revoke


**Restrictive:**

**Dispositive:**

# Developing Case Law:



# Developing Case Law

- *TMSF vs. Merrill Lynch Trust* [2011] UKPC 17
- *Mezhprom Bank vs. Pugachev & Ors* [2017] EWHC 246 (Ch)
- *Webb vs. Webb* [2020] UKPC 22 

# *TMSF vs. Merrill Lynch Trust*



[2011] UKPC 17  
Privy Council Appeal No 0036 of 2010

## JUDGMENT

Tasarruf Mevduati Sigorta Fonu (Appellant) v  
Merrill Lynch Bank and Trust Company (Cayman)  
Limited and others (Respondents)

From the Court of Appeal of the Cayman Islands

before

Lord Hope  
Lord Mance  
Lord Collins  
Lord Clarke  
Lord Reed

JUDGMENT DELIVERED BY  
Lord Collins  
ON

21 June 2011

Heard on 31 January – 1 February 2011

## Background Facts:

- Failed Turkish Bank
- Settlor Misappropriated Assets
- Turkish Judgement Against Settlor – Judgement Creditor
- Settlor created trusts in Cayman Islands ➡

**Reserved Powers:**

**Administrative:**

**Quasi-Dispositive:**

- **Power to Amend | Vary Trust**



Trust

- **Power to Revoke**

**Restrictive:**

**Dispositive:**

# *TMSF vs. Merrill Lynch Trust*



[2011] UKPC 17  
Privy Council Appeal No 0036 of 2010

## JUDGMENT

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Merrill Lynch Bank and Trust Company (Cayman)  
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From the Court of Appeal of the Cayman Islands

before

Lord Hope  
Lord Mance  
Lord Collins  
Lord Clarke  
Lord Reed

JUDGMENT DELIVERED BY  
Lord Collins  
ON

21 June 2011

Heard on 31 January – 1 February 2011

## Court Decision:

- Powers vs. Property?
- Fiduciary vs. Non-Fiduciary?
- Equitable Execution? ➡

# Mezhprom Bank vs. Pugachev & Ors

Before:  
THE HON. MR JUSTICE BIRSS

---

Between:  
(1) JSC MEZHDUNARODNIY PROMYSHLENNIY  
BANK  
(2) STATE CORPORATION "DEPOSIT  
INSURANCE AGENCY"

Claimants

- and -

(1) SERGEI VIKTOROVICH PUGACHEV  
(2) KEA TRUST COMPANY LIMITED  
(3) FINETREE COMPANY LIMITED  
(4) BRAMERTON COMPANY LIMITED  
(5) BLUERING COMPANY LIMITED  
(6) MARU LIMITED  
(7) HAPORI LIMITED  
(8) MIHARO LIMITED  
(9) AROTAU LIMITED  
(10) LUXURY CONSULTING LIMITED  
(11) VICTOR SERGEYEVITCH PUGACHEV  
(12) ALEXIS SERGEEVICH PUGACHEV  
(13) IVAN SERGEEVICH PUGACHEV  
(14) MARIA SERGEEVNA PUGACHEV  
(The 12th, 13th and 14th Defendants by their  
litigation friend ALEXANDRA TOLSTOY)

Defendants

---

STEPHEN SMITH QC, TIM AKKOUH and CHRISTOPHER LLOYD (instructed by HOGAN  
LOVELLS INTERNATIONAL LLP) appeared on behalf of the Claimants.  
HODGE MALEK QC and PAUL BURTON (instructed by DEVONSHIRES SOLICITORS LLP)  
appeared on behalf of the Twelfth to Fourteenth Defendants.  
Hearing dates: 4th, 5th, 10th - 13th, 28th 31st July

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HTML VERSION OF JUDGMENT

## Background Facts:

- Failed Russian Bank
- Settlor Misappropriated Assets
- Judgement Against Settlor – Judgement Creditor
- Settlor created irrevocable trusts in New Zealand
- Settlor was First Protector and a Beneficiary ➡

## Summary Powers:

### Administrative:

- **Direct: Investments**

### Quasi-Dispositive:

- **Consent: amendment | variation**
- **Consent: beneficiary removal**
- **Direct: beneficiary addition**
- **Appoint | Remove Trustee (*"without cause"*)**



- **Consent: income distribution**
- **Consent: appoint capital**

### Restrictive:

### Dispositive:

# *Mezhprom Bank vs. Pugachev & Ors*

Before:  
THE HON. MR JUSTICE BIRSS

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Between:  
(1) JSC MEZHDUNARODNIY PROMYSHLENNIY BANK  
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HTML VERSION OF JUDGMENT

## Court Decision:

- First Protector's Powers: Fiduciary vs. Non-Fiduciary?
- Material Factors:
  - Beneficiary
  - Extensive Reserved Powers
- Third Party Protector – Different Outcome?
- Illusory Trust | Sham Trust ➡



# Webb vs. Webb

[2020] UKPC 22  
Privy Council Appeal No 0013 of 2019

## JUDGMENT

Webb (Appellant) v Webb (Respondent) (Cook  
Islands)

From the Court of Appeal of the Cook Islands

before

Lord Wilson  
Lord Carnwath  
Lady Black  
Lord Briggs  
Lord Kitchin

JUDGMENT GIVEN ON

3 August 2020

Heard on 20 and 21 January 2020

*Appellant*  
Sean Owen McAnally

*Respondent*  
Isaac Hikaka  
Tim Mullins

## Background Facts:

- Matrimonial Dispute
- Settlor created Cook Islands Trusts
- Settlor Appointed Sole Trustee
- Settlor Appointed “Consultant”
- Settlor Beneficiary ➡



## Summary Powers:

### Administrative:

### Quasi-Dispositive:

- **Consent: amendment | variation**
- **Power: add | remove beneficiaries**
- **Power: appoint | remove Trustee**



- **Trustee “No Conflict Rule” excluded**

- **Power to apply income and capital (as Trustee)**

### Restrictive:

### Dispositive:

# Webb vs. Webb

[2020] UKPC 22  
Privy Council Appeal No 0013 of 2019

## JUDGMENT

Webb (Appellant) v Webb (Respondent) (Cook  
Islands)

From the Court of Appeal of the Cook Islands

before

Lord Wilson  
Lord Carnwath  
Lady Black  
Lord Briggs  
Lord Kitchin

JUDGMENT GIVEN ON

3 August 2020

Heard on 20 and 21 January 2020

*Appellant*  
Sean Owen McAnally

*Respondent*  
Isaac Hikaka  
Tim Mullins

## Court Decision:

- Cumulative effect of retained powers and roles: no effective alienation of beneficial interest
- No Extensive Fiduciary vs. Non-Fiduciary Analysis? ➡

## Settlor:

## Administrative:

- Investment Directions
- Appointment / Removal Directors
- Appointment / Removal Investment Manager
- Change Proper Law
- Change Exclusive Jurisdiction

## Quasi-Dispositive:

- Power to Amend / Vary Trust
- Power to Add / Remove Beneficiary
- Power to Appoint / Remove Trustee



Trust

- Power of Appointment
- Power to Direct Income
- Power to Revoke

## Restrictive:

## Dispositive:

## Protector?

### Administrative:

- Investment Directions
- Appointment / Removal Directors
- Appointment / Removal Investment Manager
- Change Proper Law
- Change Exclusive Jurisdiction



Trust

### Quasi-Dispositive:

- Power to Amend / Vary Trust
- Power to Add / Remove Beneficiary
- Power to Appoint / Remove Trustee

- Power of Appointment
- Power to Direct Income
- Power to Revoke ➡

### Restrictive:

### Dispositive:

Hong Kong:

# Hong Kong Trust Law

T-2 Cap. 29		
<b>Trustee Ordinance</b>		
<b>(Cap. 29)</b>		
<b>Contents</b>		
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- Application English Common Law [Basic Law, Ch 1, Article 8]
- Trustee Ordinance - Settlor Reserved Power (section 41X)

# Hong Kong Trust Law

## Part 4D

### Reserve Power and Transfer of Movable Property

*(Part 4D added 13 of 2013 s. 27)*

#### 41X. Reserve power of settlor

- (1) A trust is not invalid only because of the person creating the trust (*the settlor*) reserving to the settlor any or all powers of investment or asset management functions under the trust.
- (2) If a power or function referred to in subsection (1) has been reserved by the settlor, a trustee who acts in accordance with the exercise of the power or function is not in breach of the trust.

- Application English Common Law [Basic Law, Ch 1, Article 8]
- Trustee Ordinance - Settlor Reserved Power (section 41X)
- Permitted Reservations: Limited to Investments / Settlor Only?

# Hong Kong Trust Law

**DETAILED LEGISLATIVE  
PROPOSALS  
ON TRUST LAW REFORM**

**CONSULTATION PAPER**

Financial Services and the Treasury Bureau  
[www.fstb.gov.hk](http://www.fstb.gov.hk)  
March 2012

- Application English Common Law [Basic Law, Ch 1, Article 8]
- Trustee Ordinance - Settlor Reserved Power (section 41X)
- Permitted Reservations: Limited to Investments / Settlor Only?



# Hong Kong Trust Law

## J. Validity of Certain Trusts

### Background

2.52 It is generally acceptable under the law for a settlor to reserve to himself some powers to control over the trust property. For example, a settlor may wish to reserve to himself a power to remove and appoint a trustee so as to ensure that his wishes will be fully carried out. However, if the settlor reserves to himself excessive powers, the court may consider that there is insufficient certainty as to the settlor's intention to create the trust and may treat the arrangement as a sham. In Hong Kong, the question of whether a settlor's reserved powers will affect the validity of a trust instrument remains to be governed by case law.

- Application English Common Law [Basic Law, Ch 1, Article 8]
- Trustee Ordinance - Settlor Reserved Power (section 41X)
- Permitted Reservations: Limited to Investments / Settlor Only? ➡

# Hong Kong Trust Law

## Part 4D

### Reserve Power and Transfer of Movable Property

*(Part 4D added 13 of 2013 s. 27)*

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- (2) If a power or function referred to in subsection (1) has been reserved by the settlor, a trustee who acts in accordance with the exercise of the power or function is not in breach of the trust.

- **Quality of Reserved Power:**
  - Fiduciary
  - Limited Personal Power
  - Unlimited Personal Power
  - Position of Trustee?
  - Position of Trust? (*Armitage vs. Nurse*)

# Hong Kong Trust Law

## Part 4D

### Reserve Power and Transfer of Movable Property

*(Part 4D added 13 of 2013 s. 27)*

#### 41X. Reserve power of settlor

- (1) A trust is not invalid only because of the person creating the trust (*the settlor*) reserving to the settlor any or all powers of investment or asset management functions under the trust.
- (2) If a power or function referred to in subsection (1) has been reserved by the settlor, a trustee who acts in accordance with the exercise of the power or function is not in breach of the trust.

- **Quality of Reserved Power:**
  - Fiduciary
  - Limited Personal Power
  - **Unlimited Personal Power**
  - Position of Trustee?
  - Position of Trust? (*Armitage vs. Nurse*)

# Hong Kong Trust Law

## Part 4C

### Exemption from Liability

*(Part 4C added 13 of 2013 s. 27)*

#### 41W. Trustee is not exempted from liability for breach of trust

- (1) Subject to subsection (2), this section applies to a trustee who—
  - (a) acts in a professional capacity; and
  - (b) receives remuneration for the trustee's services provided to, or on behalf of, the trust.
- (2) This section does not apply to an approved trustee of a registered scheme under the Mandatory Provident Fund Schemes Ordinance (Cap. 485).
- (3) The terms of a trust must not—
  - (a) relieve, release or exonerate a trustee from liability for a breach of trust arising from the trustee's own fraud, wilful misconduct or gross negligence; or
  - (b) grant the trustee any indemnity against the trust property for the liability.

- **Type Reserved Power:**

- Fiduciary
- Limited Personal Power
- Unlimited Personal Power
- Position of Trustee

- **Trustee Exoneration:** Section 41W(3) Trustee Ord “Gross Negligence” ➡

# Hong Kong Trust Law

**ZHANG HONG LI**

**JI ZHENGRONG**

**BRUNO ARBOIT and RODERICK JOHN SUTTON**

(suing in their capacity as the current Trustees of the Amsun Trust)

**WISE LORDS LIMITED**

and

**DBS BANK (HONG KONG) LIMITED**

**IQ EQ (NTC) TRUSTEES ASIA (JERSEY) LIMITED**

(formerly known as DBS TRUSTEE HK (JERSEY)

LIMITED, NAUTILUS TRUSTEES ASIA LIMITED and

FIRST NAMES (NTC) TRUSTEES ASIA LIMITED)

(in their capacity as the former Trustee of the Amsun Trust)

**NAUTILUS CORPORATE SERVICES LIMITED**

(formerly DBS CORPORATE SERVICES (HONG KONG)

LIMITED,

NAUTILUS CORPORATE SERVICES LIMITED and

NAUTILUS CORPORATE SERVICES (HONG KONG)

LIMITED)

**DHJ MANAGEMENT LIMITED**

**LEE KWOK TAI, PETER**

**LIM LEUNG YAU, EDWIN**

**LIU HIU HONG, LINDA**

## Restriction of Duties:

- **Zhang Hong Li vs. DBS Bank**
- **Anti-Bartlett Clause**
- *“No duty to supervise or intervene unless actual knowledge of Dishonesty”*
- **Scope of “Supervision” | Waiving the Bartlett Protection?**
- **Scope of “Dishonesty” ➡**



**Countermeasures:**

# Countermeasures

- Drafting Best Practice
- Private Trust Company ➡

# Drafting Amendments

DATED 2022

BETWEEN

John Doe  
Settlor

- and -

International Trustee Ltd  
Trustee

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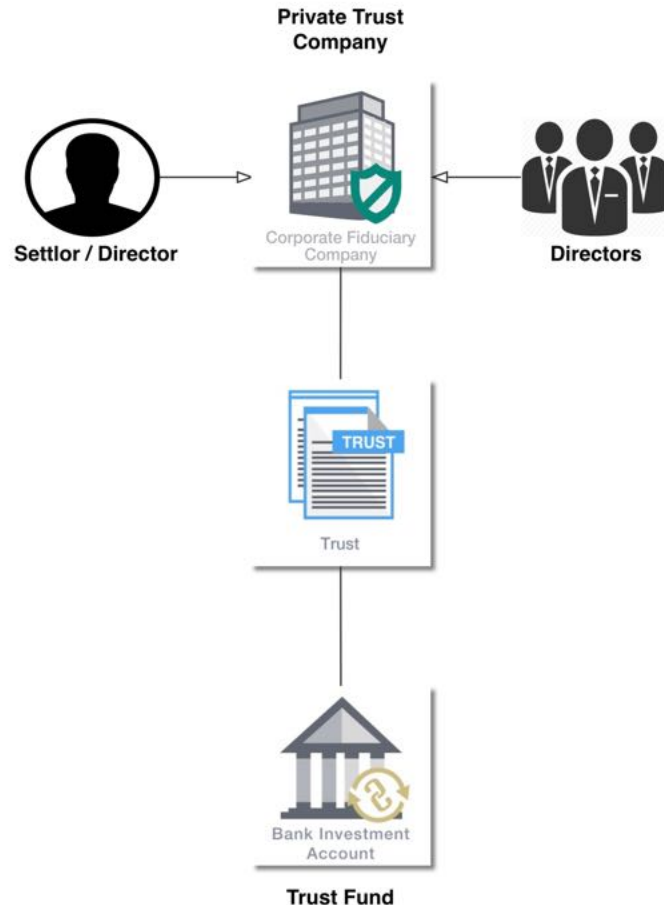
FAMILY OFFICE TRUST  
relating to the John Doe Family

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- Reserved Powers to Avoid?
- Express: “*Fiduciary*” “*Limited Personal*” or “*Unlimited Personal Power*”?
- Excessive Restrictions:
  - Rights of Access to Information
  - Compulsory Arbitration Clause
  - No Contest Clause ➡



# Private Trust Company



## Single Trust PTC:

- PTC Director Liability:
  - Dog Leg Claim
  - Accessory Claim
  - Insolvency Proceedings
- Illusory Trust?
- Sham Trust: Settlor Sole/Dominant Director?
- Best Practice Board Composition? ➡

**Next Actions:**

# Next Actions

- Trust Review - Out of Date Precedents
- Risk Review Legacy Business | Client Engagement
- New Business Protocols | Client Engagement
- Ongoing Case Law Monitoring
- Educate Staff and Execute Remedial Action ➡

Q&As

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WEALTH TALKS



香港信託人公會

rustee Hong Kong Trustees' Association

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**David Brownbill**

King's Counsel



**Zac Lucas**

Partner

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