



# TRUSTEE LIABILITY PRIVATE CLIENT

 VIRTUAL ROUND TABLE

**8 JULY 2020**

**4:00PM (SINGAPORE / MALAYSIA)**

**3:00PM (THAILAND / INDONESIA)**

**RAJAH & TANN**

**Shook Lin & Bok**

**MCCARTHY  
DENNING**

**Sabara Law LLC**

**Rhône**



# MALAYSIA PRIVATE CLIENT VIRTUAL ROUND TABLE

AUGUST 2020

Labuan IBFC

Shearn Delamore & Co.

MCCARTHY  
DENNING

H&P





**Vikna Rajah**  
Partner  
Rajah & Tann



**Zac Lucas**  
Partner  
McCarthy Denning



**Tony Ribeiro**  
Partner  
Rhone Trustees



**Tan Woon Hum**  
Partner  
Shook Lin & Bok



**Yeoh Lian Chuan**  
Partner  
Sabara Law (Deloitte)

# Agenda:

- **Introduction**

- Covid-19 | Investment Losses | Fiduciary Liability

- **Case Study 1**

- Duty | Liability Exclusion | Gross Negligence | Settlor Liability | Protector Liability

- **Case Study 2**

- Bartlett Clause | *Zhong Hong Li* Case | TCA-N03 - FATF Guidance Interaction

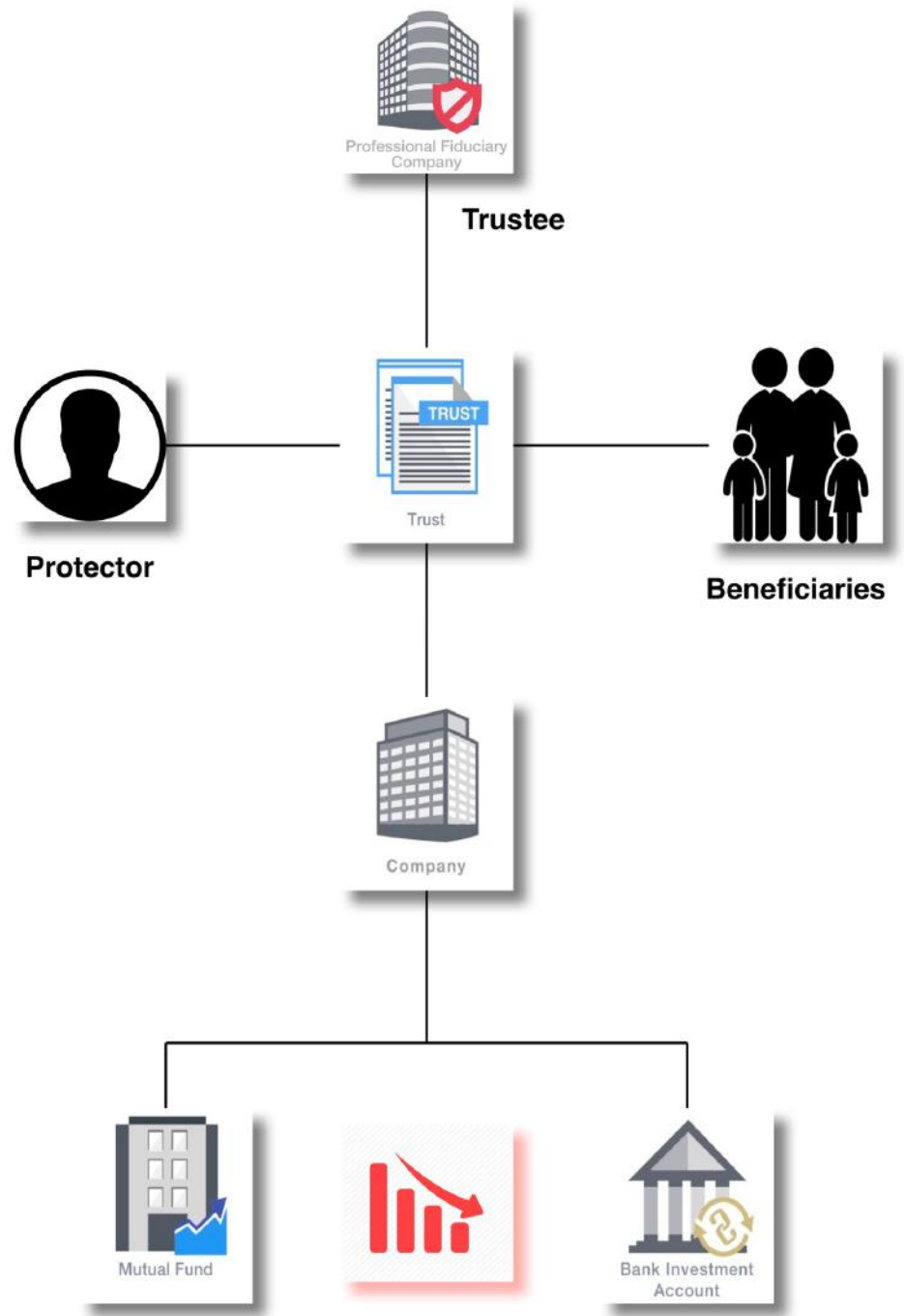
- **Case Study 3**

- Private Trust Company | Judgement Proof | Director Liability | Trustee Removal

- **Case Study 4**

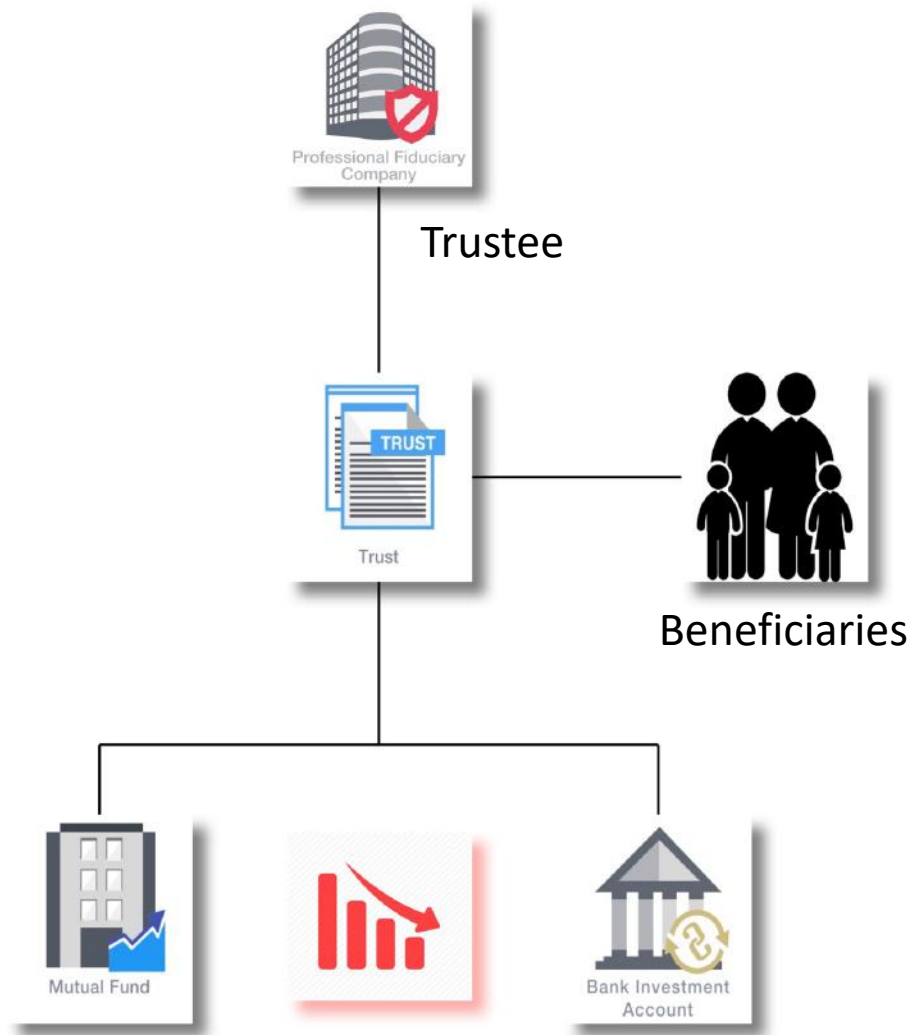
- Singapore Administered Foreign Trusts | Fiduciary Protections | Local Supervision

Introduction:



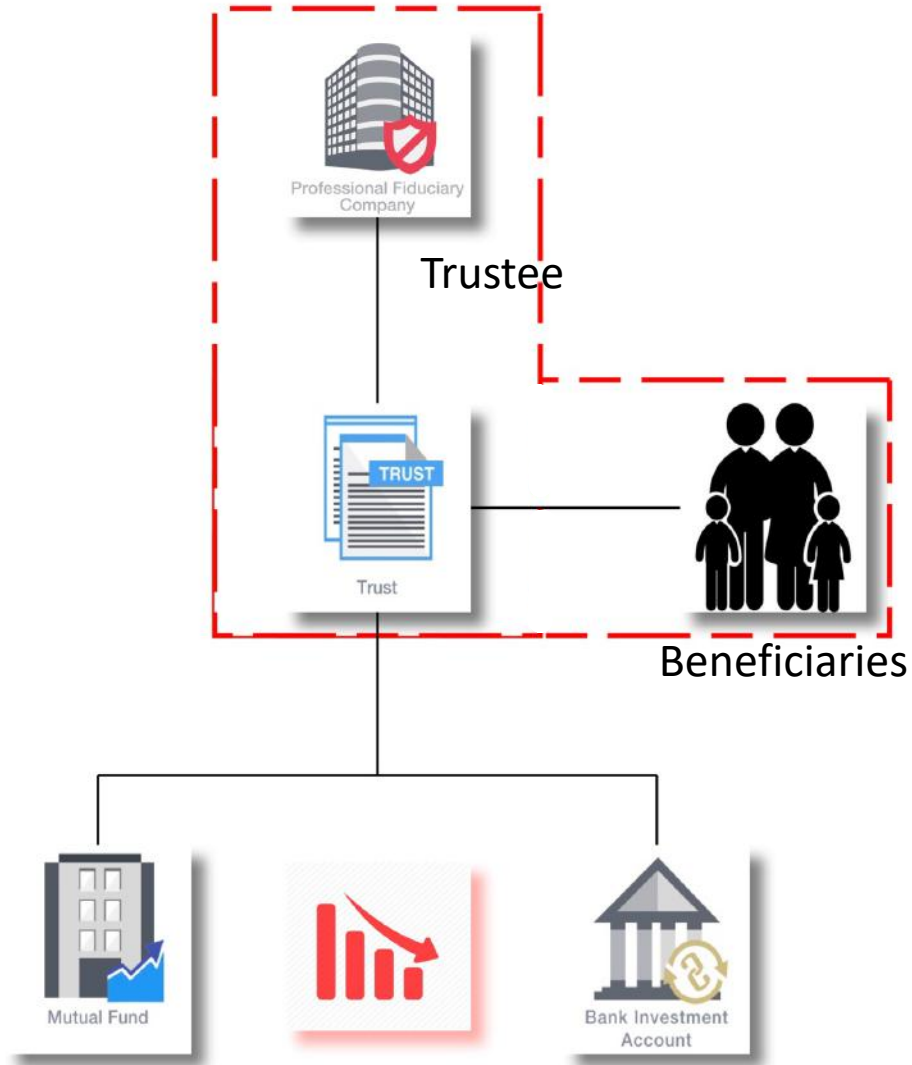
- Covid-19
- Trust Fund Investment Losses
- Fiduciary Liability Exposure

# Case Study 1:

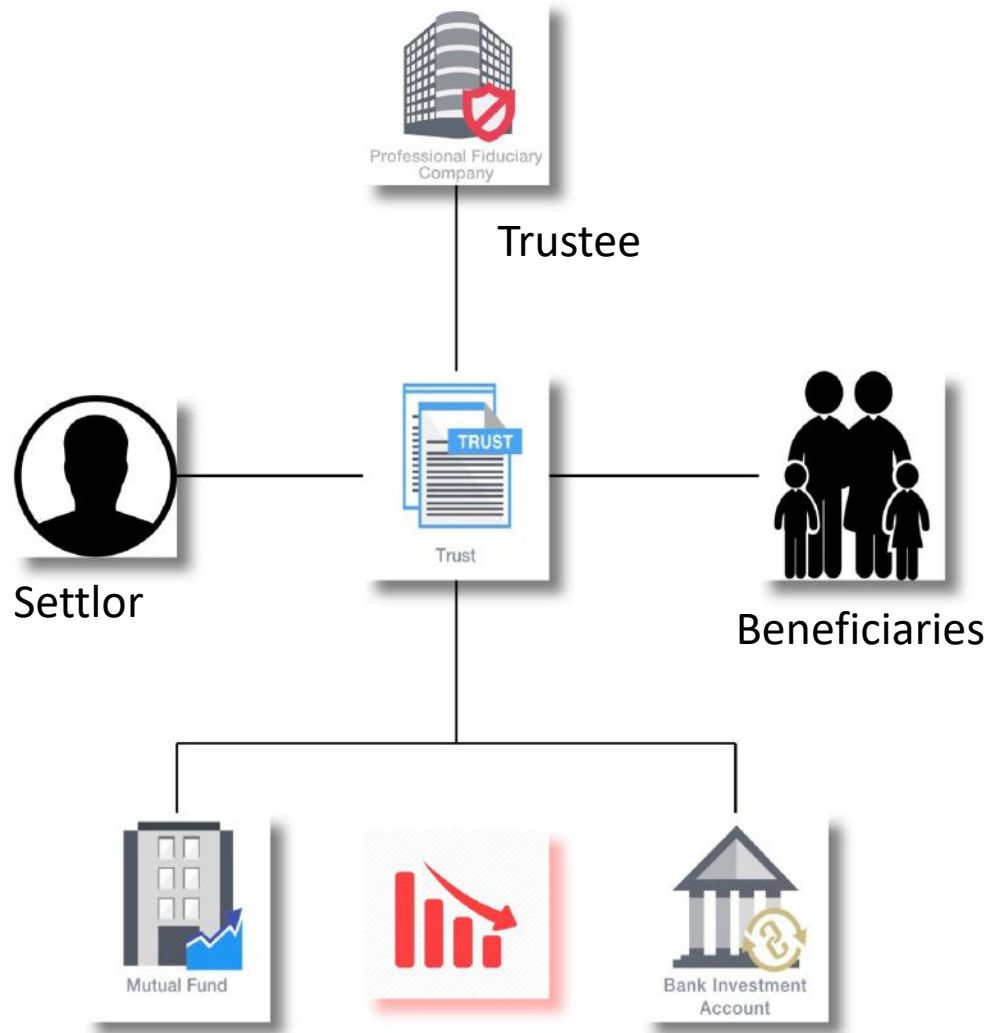


- As Trustee what are my investment obligations?
- Can I effectively exclude liability for investment losses?

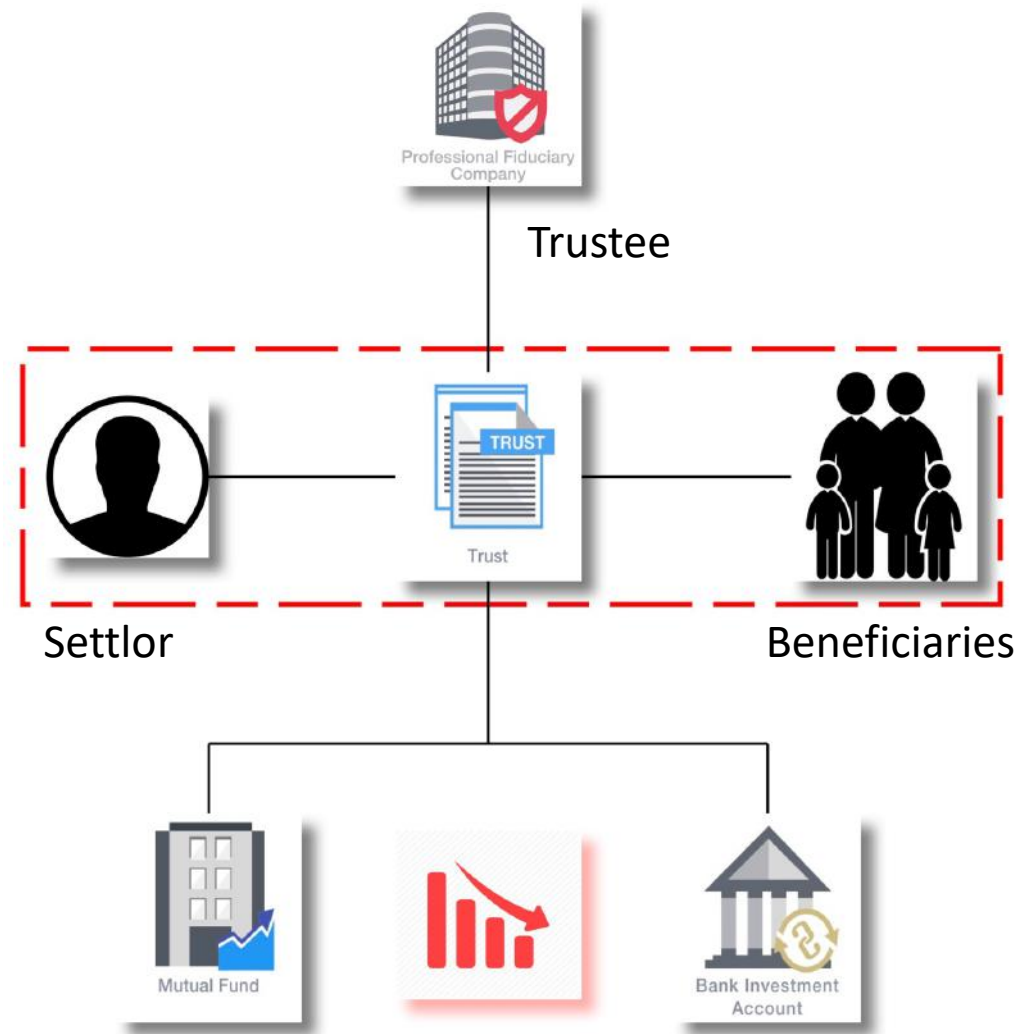




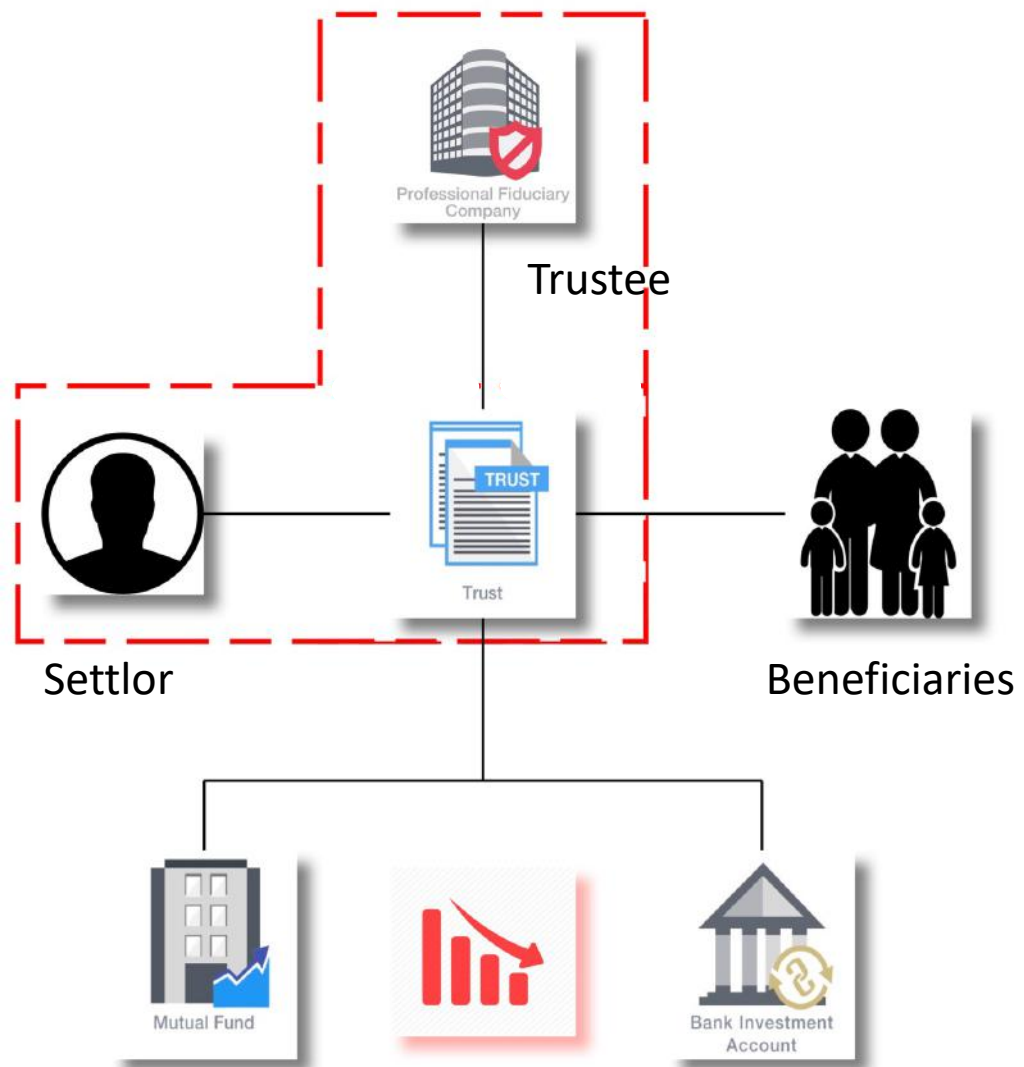
- Statutory Duty of Care – s.3A TA
- Exclusion: Duty of Care – s.3A(2) TA
- Exclusion: “*Standard Investment Criteria*” – s.5 TA
- Exclusion: “*Proper Advice*” Requirement – s.6 TA
- Exclusion: “*Policy Statement*” Delegation Asset Management – s. 41F TA
- Exclusion: Duty to Review Agent | Policy Statement – s. 41M TA
- Exclusion: Gross Negligence vs. Wilful Default?
- Duty to Inform Settlor – Exclusion Clause?



- As a Settlor with reserved investment powers what are my obligations?
- Am I liable for investment losses to the trust?



- Trustee Act s. 90(5) – Declaratory
- Fiduciary vs. Personal Power?
- Liability Exposure – Duty of Care?
- Liability Exclusion Clause?
- What about a Non-Settlor Protector?



- Trustee Supervision of Settlor Reserved Powers?
- Trustee exonerated when complying with Settlor Investment Direction?  
[HK Trustee Act s. 41X(2)]

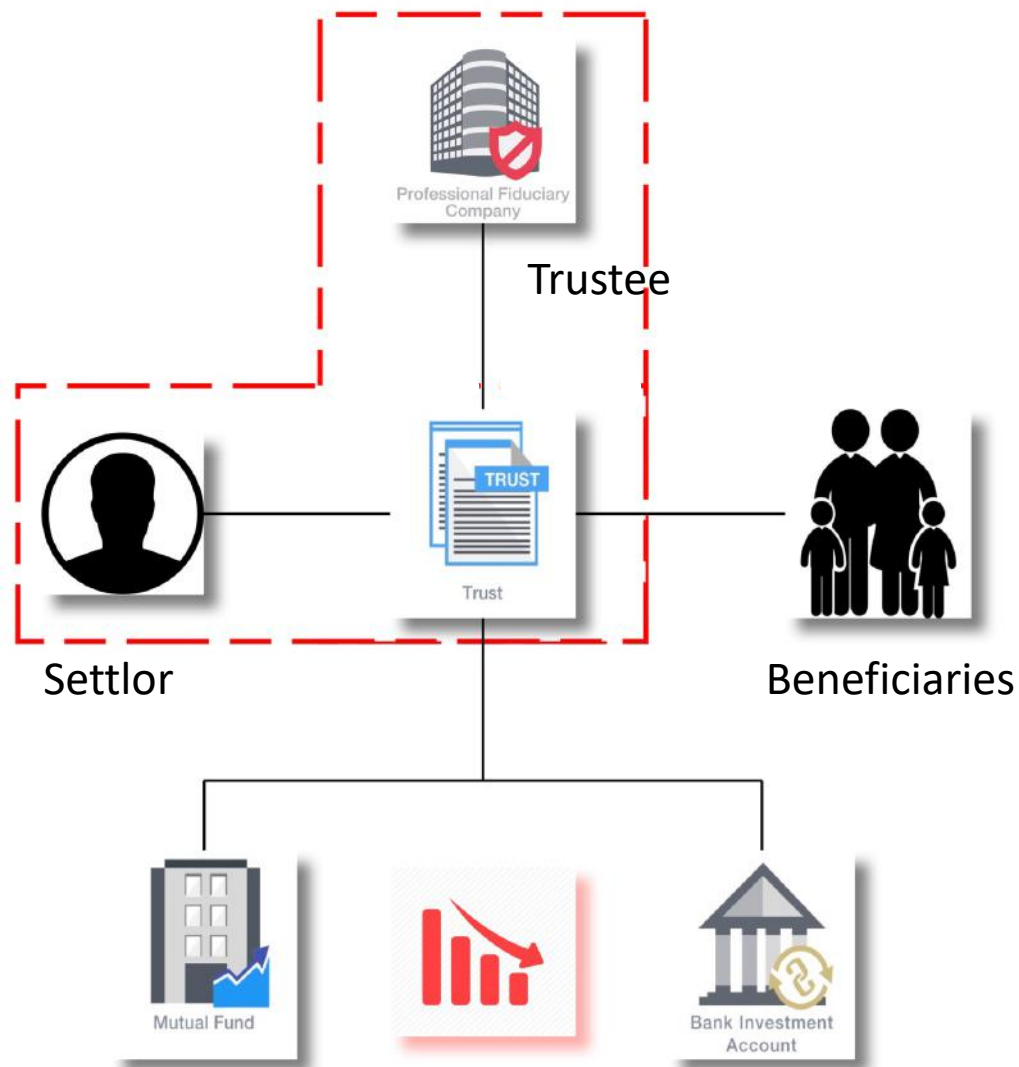
## Part 4D

### Reserve Power and Transfer of Movable Property

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

#### 41X. Reserve power of settlor

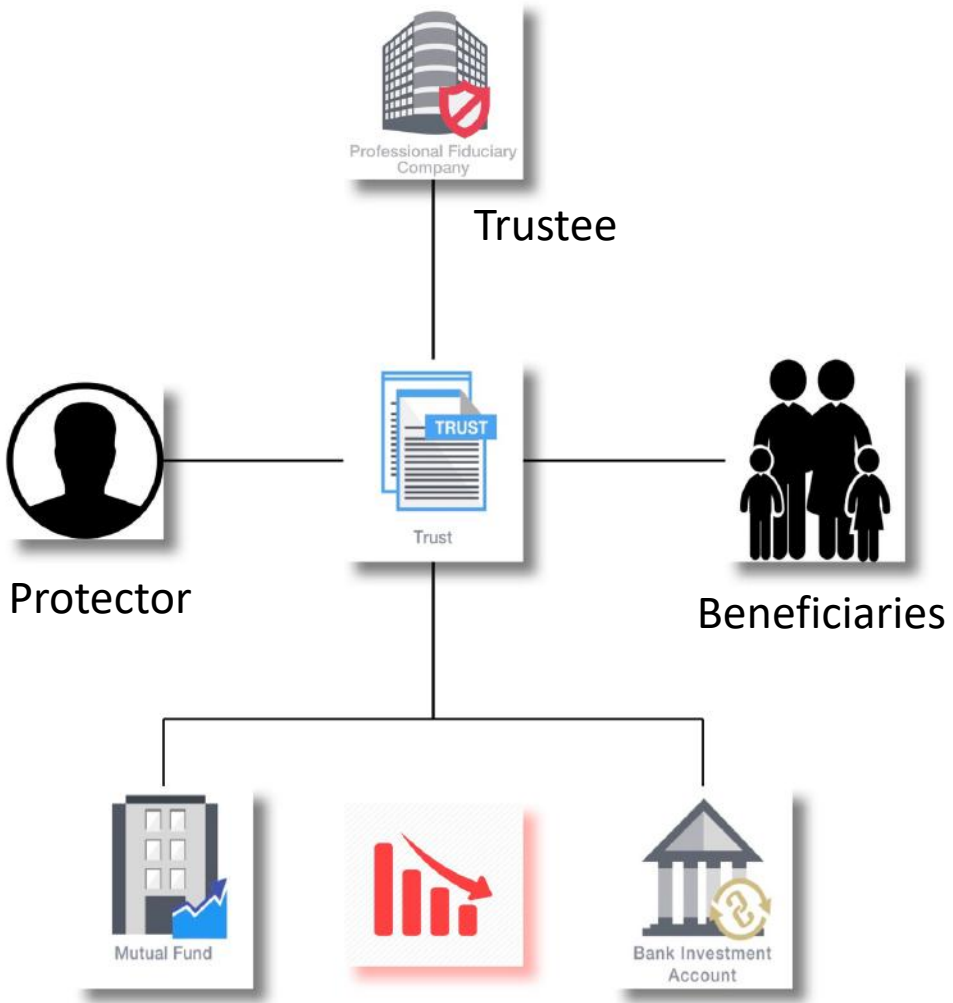
- (1) A trust is not invalid only because of the person creating the trust (*the settlor*) reserving to the settlor any or all powers of investment or asset management functions under the trust.
- (2) If a power or function referred to in subsection (1) has been reserved by the settlor, a trustee who acts in accordance with the exercise of the power or function is not in breach of the trust.
- (3) If a trust was declared invalid by the court before the commencement date\* of the 2013 amending Ordinance, subsection (1) does not operate to revive the invalid trust on or after that date.
- (4) Subject to subsection (3), if the validity of a trust (whenever created) is being questioned, the court may take into account subsection (1) in determining the validity.

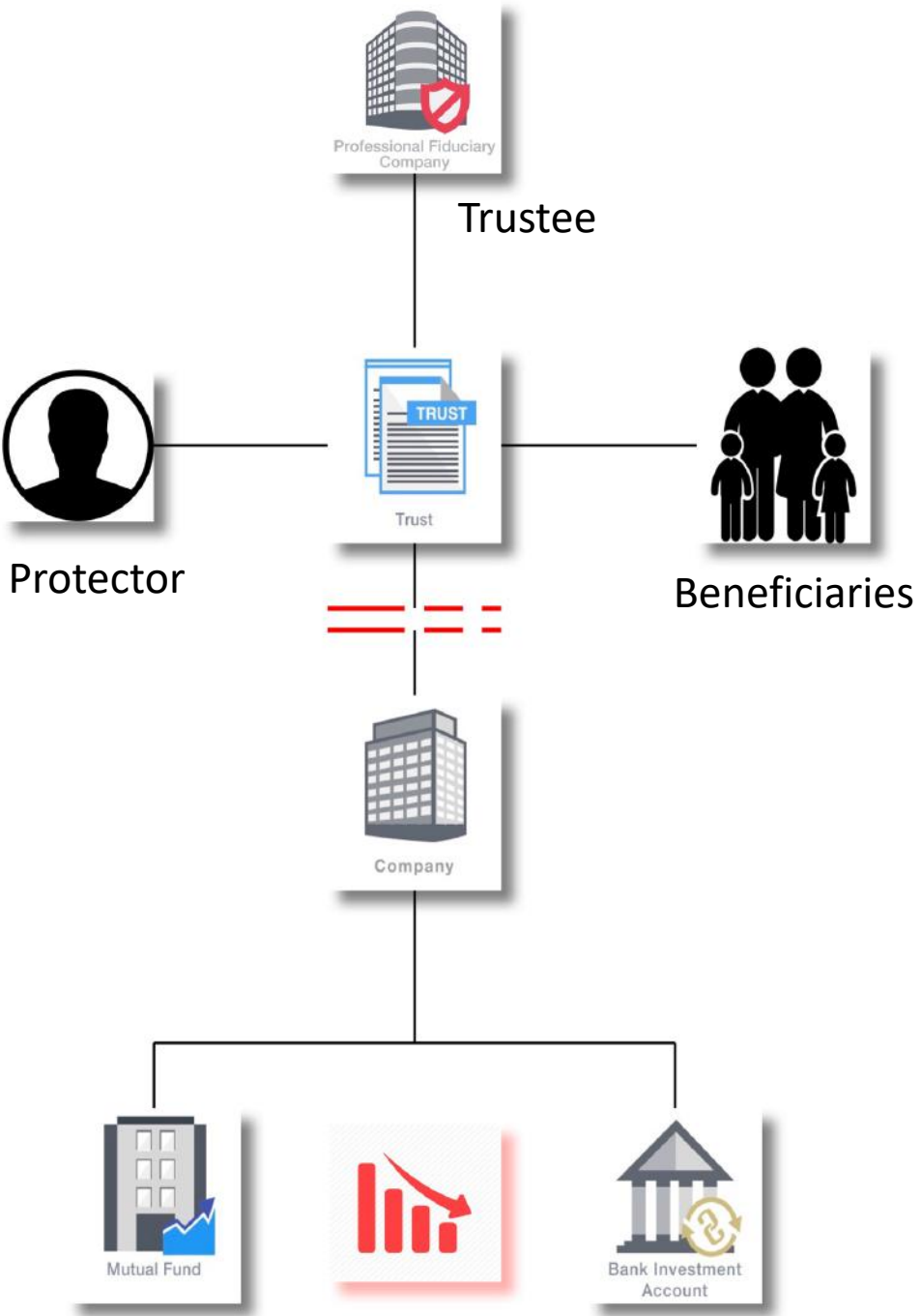


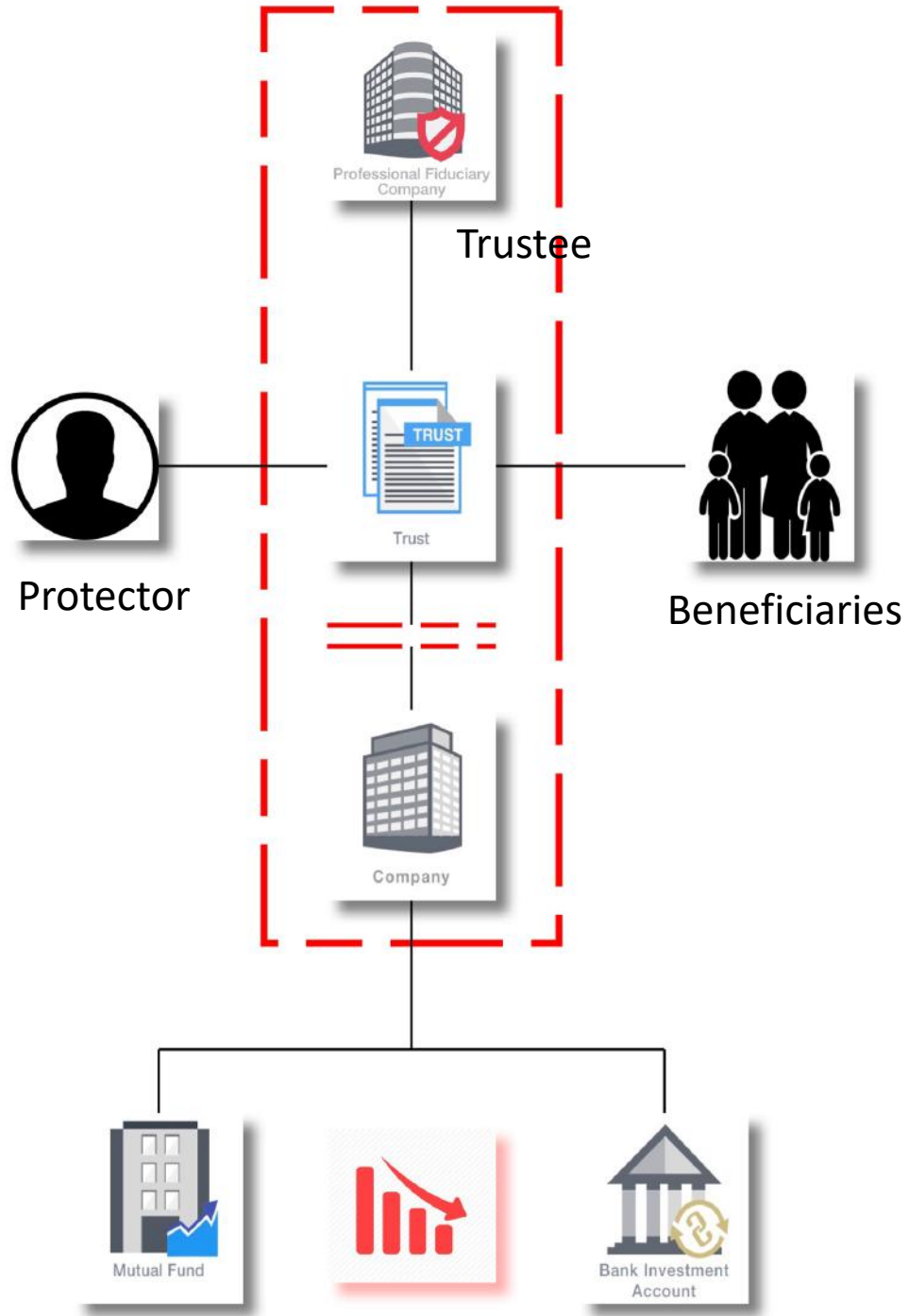
- Trustee Supervision of Settlor Reserved Powers?
- Trustee exonerated when complying with Settlor Investment Direction?  
[HK Trustee Act s. 41X(2)]
- Singapore Court Attitude?



## Case Study 2:







- Bartlett Clause
- *Zhang Hong Li* Decision

IN THE COURT OF FINAL APPEAL OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
FINAL APPEAL NO. 2 OF 2019 (CIVIL)  
(ON APPEAL FROM CACV NO. 138 OF 2017)

BETWEEN

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

1<sup>st</sup> Plaintiff  
2<sup>nd</sup> Plaintiff  
3<sup>rd</sup> Plaintiffs  
(1<sup>st</sup> Respondent)

4<sup>th</sup> Plaintiff  
(2<sup>nd</sup> Respondent)

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)

1<sup>st</sup> Defendant  
2<sup>nd</sup> Defendant  
(1<sup>st</sup> Appellant)

3<sup>rd</sup> Defendant

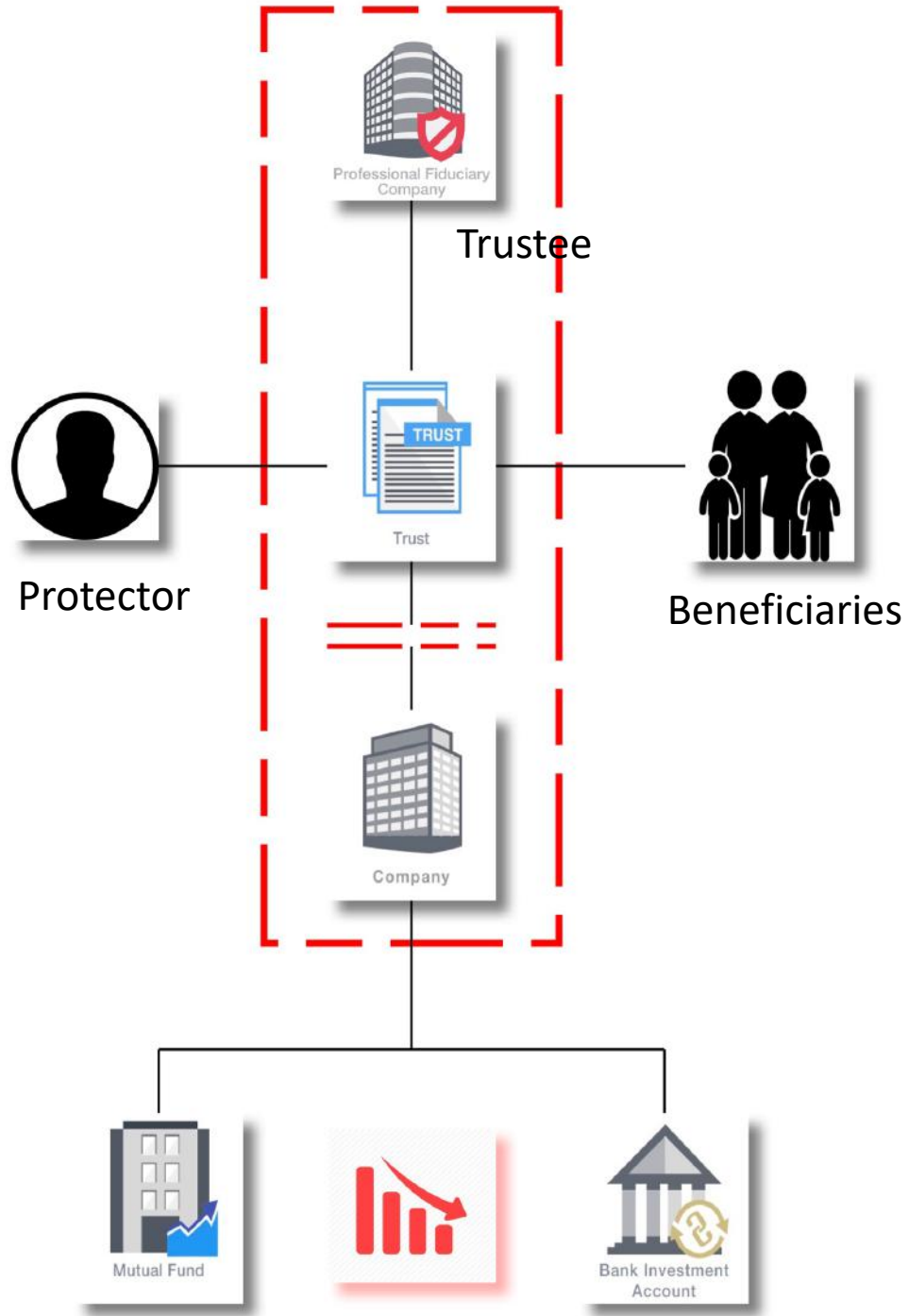
DHJ MANAGEMENT LIMITED

4<sup>th</sup> Defendant  
(2<sup>nd</sup> Appellant)

LEE KWOK TAI, PETER  
LIM LEUNG YAU, EDWIN  
LIU HIU HONG, LINDA

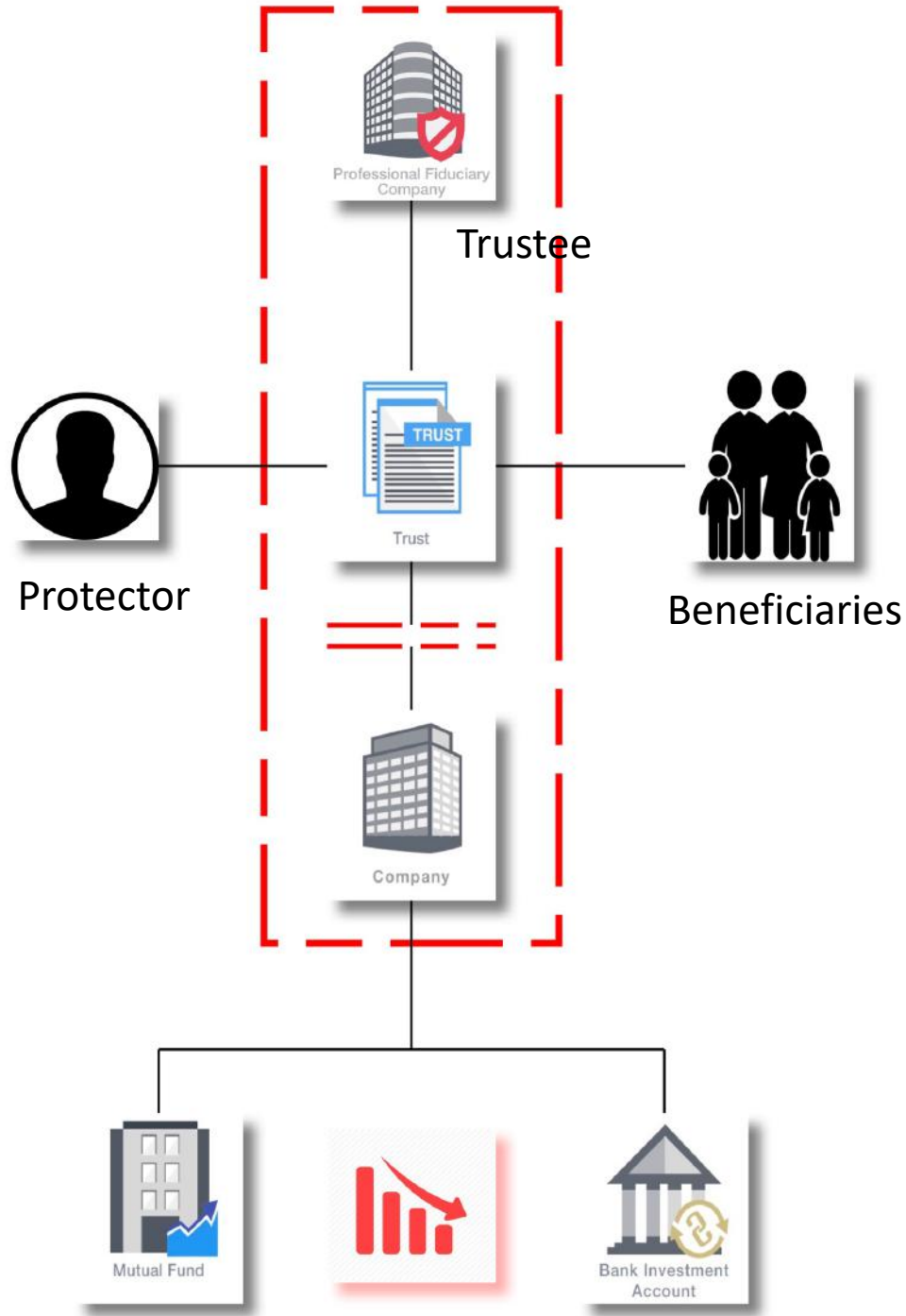
5<sup>th</sup> Defendant  
6<sup>th</sup> Defendant  
7<sup>th</sup> Defendant

- Bartlett Clause
- *Zhang Hong Li* Decision

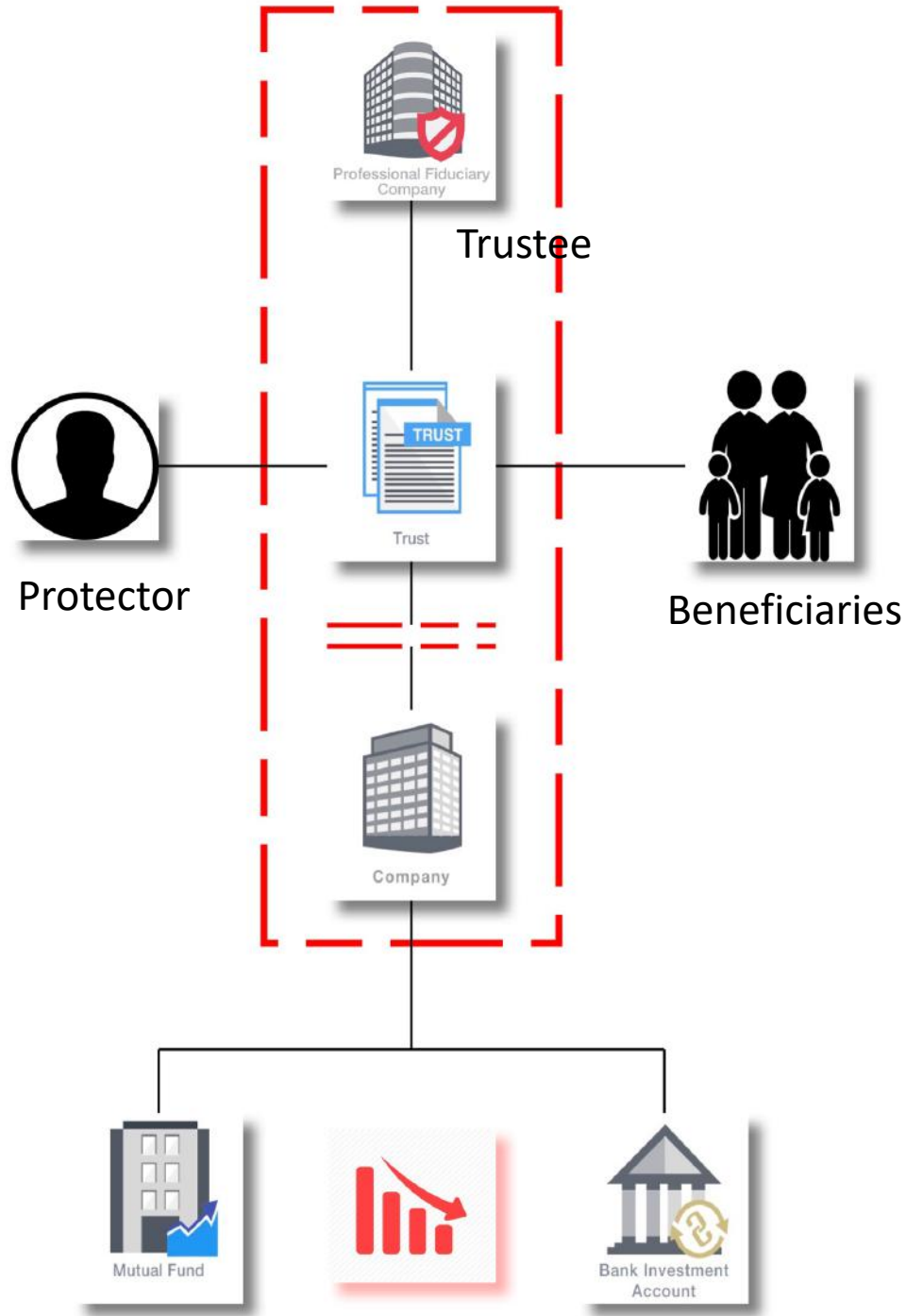


- Bartlett Clause
- *Zhang Hong Li* Decision
- What is the current position?





- Can a Trustee rely on a “Bartlett Clause” where they supervise and intervene in the activities of an underlying company?



- Is the use of a “Bartlett Clause” compatible with modern AML Requirements?
- MAS Notice TCA-N03
- FATF TCSP Guidance

## Case Study 3:



PTC Trustee



Trust



Protector



Beneficiaries



Company

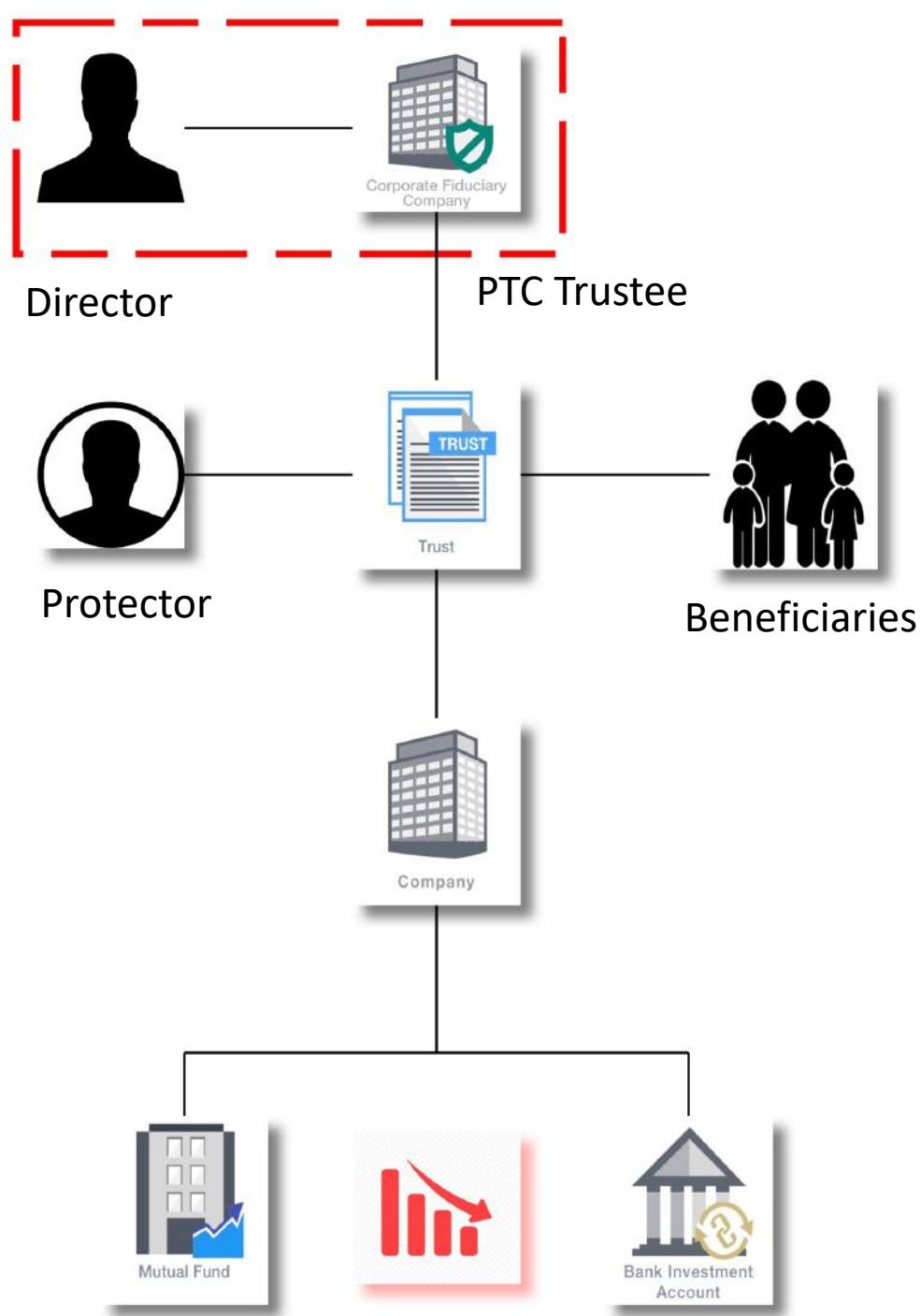


Mutual Fund



Bank Investment  
Account

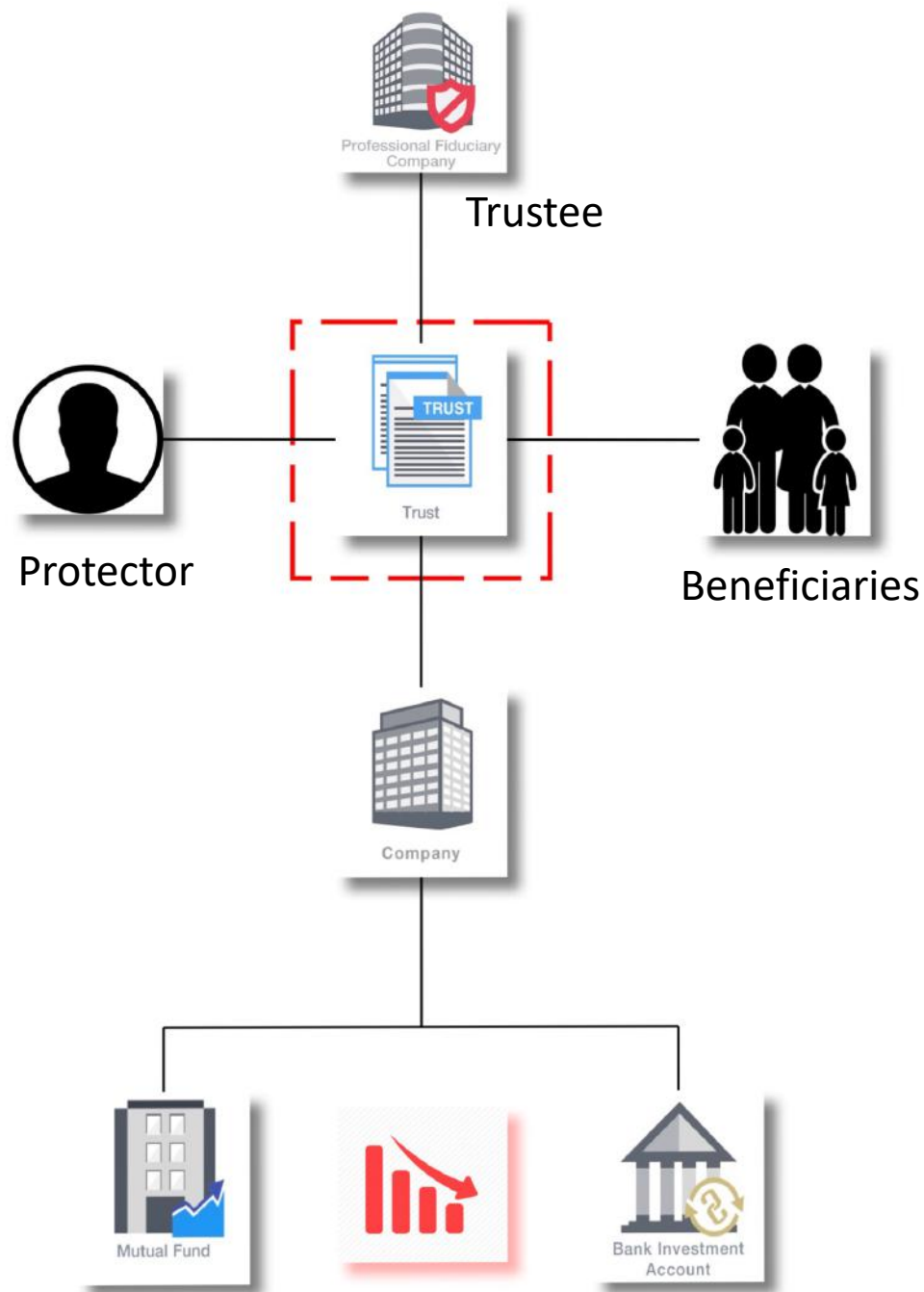
- Private Trust Company –  
Judgement Proof (Paper Company)



- Private Trust Company – Judgement Proof (Paper Company)
- Director Liability – “*Dog Leg Claim*”
- Gregson vs. HAE Trustees Ltd [2008][EWHC 1006 Ch]
- Trustee Removal Proceedings – Section 42(1) TA

## Case Study 4:





- Will protections contained in a locally administered foreign law trust be enforceable in Singapore?
- Singapore Court Supervision?
- *Crociani* [Privy Council 2014]

Q&As



**RAJAH & TANN**  
**Vikna Rajah**  
Partner  
Vikna.rajah@rajahtann.com

**ShookLin&Bok**  
**Tan Woon Hum**  
Partner  
woonhum.tan@shooklin.com

**M<sup>C</sup>CARTHY  
DENNING**  
**Zac Lucas**  
Partner  
zlucas@mccarthydenning.com

**Sabara Law LLC**  
**Yeoh Lian Chuan**  
Partner  
lcyeh@sabaralaw.com.sg

**Rhône**  
**Antonio Ribeiro**  
Partner  
aribeiro@rhoneservices.com