



Beneficial Ownership of Trust Assets in an International Reality: an Intersection between Trust Law, Tax and Crime Prevention

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Abstract

In this article different definitions and concepts are compared in the quest to determine who qualifies as beneficial owners of trust assets. The phrase "beneficial owners" is found in trust and tax law, as well as in various pieces of legislation aimed at the combatting and prevention of the financing of terrorism and international money-laundering. Worldwide, there are civil, criminal and tax courts charged with the task of determining who qualifies as beneficial owners of a particular legal entity or trust. A number of attempts have been made by international organisations, such as the OECD and FATF, as well as by way of legislation, such as the FATCA, to establish definitions to identify beneficial owners. The application of the beneficial-ownership concept by the courts in certain jurisdictions, as well as the appropriation thereof within the European Union's money-laundering prevention initiatives, are considered in this contribution. Beneficial ownership has featured locally in various contexts, such as trust law, tax legislation and divorce. In an apparent absence of any attempt to coordinate the different definitions and descriptions of the concept of beneficial ownership, the question is whether any synergy exists between the manner in which the concept has developed in South African trust law, compared to the different definitions and applications thereof in international instruments and the courts. In this article the underlying motivations for the concept in various forms – be it legislation, conventions, treaties, or courts of law – are identified. The author concludes that the various role-players are not pursuing the same goals, resulting in unnecessary confusion regarding the concept.

Keywords: beneficial ownership; trust law; anti-avoidance measures; substance-over-form approach

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1 INTRODUCTION

It has been claimed that the secret to success is to own nothing, but control everything,¹ which is exactly the type of sentiment that has contributed to the world-wide preoccupation with concepts such as beneficial ownership. The term is believed to have originated in English trust law, which distinguishes between legal ownership and beneficial ownership.² Today it is applied to a variety of situations that do not necessarily involve trusts. The essence of the concept, however, is similar to the English trust concept, and refers to the person or persons who ultimately control an asset and can benefit from it.³ The control referred to in this context is often not a direct or overt form of control and is not necessarily visible to the outside world. Although the concept of beneficial ownership is used by fiduciary and trust lawyers, tax authorities, financial service providers and crime investigators, in this article the concept will be evaluated within the framework and application of South African trust law.⁴ While the trust lawyer wants to understand the intention of the founder or settlor of the trust, the financial service provider's interest lies in the business and financial relationship it is entering into with the trust and its trustees. The tax authority and crime investigator both approach beneficial ownership of trust assets from the premise that any trust may be used to either deceive the receiver of revenue or to create an appearance of legitimacy, when in fact it is a facade. In the international onslaught on tax evasion, money-laundering and organised crime, financed and orchestrated by the monetary powers of the modern world, the former legal concept of beneficial ownership has been tainted by non-legal applications within so-called "opaque ownership structures."⁵ The question is whether this entanglement of the idea of beneficial ownership has had any impact on the development – be that good or bad – of the concept within the South African trust-law environment. In this article, the regulation and application of the term in the different domains of trust law, tax law, financial intelligence and money-laundering, will be investigated and compared. One of the questions to be answered is whether the true test for beneficial ownership has been crystallised. Is it about substance-over-form, control versus enjoyment, an economic-versus-legal test, or is it something totally different? In an attempt to identify a common thread, the expression of the concept in South African trust law and legislation will be compared with some definitions of beneficial ownership in the global arena.

2 BENEFICIAL OWNERSHIP IN SOUTH AFRICA

2.1 Beneficial Ownership of Trust Assets

South African trust law has developed somewhat independently as far as the ownership of trust assets is concerned and provides for both the ownership trust and the bewind trust.⁶ The trustee administers trust property either as owner or as mere administrator.⁷ In the case of an ownership trust, the right of ownership vests in the trustee, albeit separate from his/her personal estate, and in the case of a bewind trust, ownership vests in the beneficiary.⁸ A more contentious issue is the legal position, and even the rights of, the beneficiary of the ownership trust. The triangular relationship between the trustees and the beneficiaries, and at the same time the beneficiaries and the trust property, must be considered when evaluating the nature and content of the beneficiaries' rights.⁹ The pinnacle of the ownership trust in South Africa

1 This has been attributed to Nelson Rockefeller, a former governor of New York and vice president of the United States.

2 See Pettit *Equity and the Law of Trusts* (2006) 12–13, 27; Martin *Modern Equity* (2005) 8–10 for more on the nature and development of English trust law.

3 See Watt *Trusts and Equity* (2006) 11–12 on the distinction between equity and ownership in English law.

4 The main exposure of the concept internationally has been in the arena of money-laundering and tax evasion. See Marriage "Secret Structures, Hidden Crimes: Urgent Steps to Address Hidden Ownership, Money Laundering and Tax Evasion from Developing Countries" 2013 Report to the European Network on Debt and Development (Eurodad).

5 *Ibid* 3.

6 See Cameron, De Waal and Solomon *Honoré's South African Law of Trusts* (2018) 324–327; 577–583.

7 See the definition of "trust" in s 1 of the Trust Property Control Act 57 of 1988.

8 *Ibid*. See s 12 of the Trust Property Control Act 57 of 1988 (TPCA) for the separation of trust property from the trustee's personal estate. See *CIR v MacNeillie's Estate* 1961 3 SA 833 (AD) 840G-H on the vesting of trust assets in the trustee.

9 Olivier, Strydom and Van den Berg *Trustreg en Praktyk* (2018) para 4.3.

has always been the fact that ownership in the assets does not vest in the beneficiary until the trustees, within their absolute discretionary power, decide for vesting to take place.¹⁰ The exercise of a discretion by the trustees not only protects the trust assets from the beneficiary, but also from the beneficiary's creditors. This protectionist aspect became the motivation for the creation of thousands of ownership trusts during the past two centuries.¹¹ South African law does not allow two kinds of ownership in the same asset at the same time, and the beneficiary therefore has only a personal right to enforce against the trustee.¹² In the trust-law environment, it is common to refer to the beneficial ownership or the beneficial interest of a beneficiary. In this context, beneficial interest in the trust assets is differentiated from the "legal ownership" of the assets, which vests in the trustees.¹³ Thus, the *nudum dominium* (bare ownership) of the trustee contrasts with the *utile dominium* of the beneficiary, which has been described as beneficial ownership.¹⁴

The vesting of trust property has more than one meaning, but in the context of ownership it includes not only the right of ownership, but also "the right of enjoyment."¹⁵ When the trustee owns the rights to the trust property, the beneficiary cannot claim ownership, but does have a personal right which is worthy of protection.¹⁶ In *Griesel*¹⁷ the respondent's right consisted of the privilege to visit from time to time the trust property, a farm with a game reserve. Due to his resistance towards the development of the farm for commercial purposes this benefit was taken away from him "without a justifiable basis."¹⁸ It can be argued that the contingent beneficiary's right to be protected against maladministration¹⁹ has been developed to "a right to be protected against arbitrary and discriminatory treatment."²⁰ Due to this protected right of the contingent beneficiary of the ownership trust, the beneficiary's position has sometimes been inadvertently described as beneficial ownership.²¹ In the *Yarram* case, the court stated that "the trustee is not the beneficial owner of trust assets. His title is usually described as 'bare ownership' (*'nudum dominium'*) – sometimes also called 'legal ownership' – while 'beneficial ownership' (*'utile dominium'*) is said to vest in the beneficiaries of the trust."²² The court decided that the trustees, as the legal owner(s) of the property, held it in trust for the beneficiaries as beneficial owners.²³ In particular circumstances the courts may even consider an individual who does not qualify as beneficiary of a particular trust, as a beneficial owner of the property of such trust.²⁴

The use of the term beneficial ownership to describe the personal right of the beneficiary, and legal ownership with reference to the trustee, has been criticised as being too close to the

10 See discussion on vesting of rights in Nel *The Business Trust and its Role as an Entity in the Financial Environment* (LLD thesis, Nelson Mandela University, 2012) 92–95.

11 See Nel *The Business Trust* 109 on the aspect of asset protection as motivational factor in the establishment of trusts.

12 See Cameron "Constructive Trusts in South African Law: the Legacy Refused" August 1998 *Edinburgh Law Review* 1–26 13,14.

13 See Cameron *Honoré's Law of Trusts* 398. See Brand JA in *Yarram Trading CC t/a Tijuana Spur v Absa Bank Ltd* 2007 2 SA 570 (SCA) para 10, stating that "trust assets form a separate estate in the hands of the trustee." Compare s 11 and 12 of the TPCA.

14 *Yarram* case para 10. Compare *Braun v Blann & Botha* 1984 2 SA 850 (A) 859H and 860A. The Latin word *utilis* literally means "useful; expedient; profitable; advantageous", which carries the idea of usefulness, and in the context of *utile dominium*, to have a useful and advantageous benefit, without being the real thing.

15 *Potgieter v Potgieter* [2011] ZASCA 181; 2012 1 SA 637 (SCA) para 28; *Jewish Colonial Trust v Estate Nathan* 1940 AD 163 175. For a discussion on the different forms of vesting of trust property, compare Cameron *Honoré's Law of Trusts* 574–575. See also Pace and Van der Westhuizen *Wills and Trusts* (2018) 21.6.2.

16 See Cameron *Honoré's Law of Trusts* 598. See *Griesel v De Kock* (unreported case no 334/18) [2019] ZASCA 95 (6 June 2019) para 17. In the *Potgieter* case para 28 it was stated that it makes no difference whether this established right is enforceable, conditional or contingent. See Olivier *Trustreg en Praktyk* 4.3.3.2 for a detailed discussion on vested and conditional rights.

17 Compare *Griesel* case.

18 *Griesel* case para 18.

19 *Potgieter* case para 28. See Du Toit, Smith and Van der Linde *Fundamentals of South African Trust Law* (2018) 170–171 for the difference between a contingent beneficiary and a potential beneficiary.

20 *Griesel* case para 17. See Claassen "Die Wysiging van *Inter Vivos*-trustaktes: 'n Evaluerende Perspektief op die Potgieter-saak" 2014 *Acta Juridica* 243–267, 256–263 for a discussion on the difference between a contingent right in the technical sense (conditional) and in the broad sense (a mere spes).

21 See *Ex parte Kelly* 1942 OPD 76 82.

22 Paragraph 10.

23 *Ibid.* Compare *Jowell v Bramwell-Jones* 1998 1 SA 836 (W) 872D-E.

24 See reference to Lamont J as court of first instance in *WT v KT* 2015 3 SA 574 (SCA) para 24. Compare *Commissioner, SA Revenue Service v Higgs* 2007 2 SA 189 (C) 196H-I.

dual-ownership concept in English law, which has no place in South African trust law.²⁵ In South African trust law, the separation of the control of trust assets by way of management and/or ownership from the beneficial enjoyment of the trust property has painted a particular picture of the concept of beneficial ownership.²⁶ It is often a reference to nothing more than a mere personal right against the trustee in respect of the trust property.²⁷

2 2 Beneficial Ownership as Applied in *ST v CT*²⁸

In a disputed divorce trial, dealing with, among other issues, an accrual claim, the Supreme Court of Appeal recently had the opportunity to evaluate the application of the beneficial ownership concept by the court of first instance, which ruled that the “corporate veil must be lifted” and that the appellant was the “true beneficial owner” of certain assets held by companies and trusts.²⁹ The appellant had a number of business interests in companies registered in South Africa, Namibia, France and the British Virgin Islands, as well as a South African trust and an offshore trust, with shares in some of the entities held by another entity in trust for the appellant.³⁰ The court of first instance held that the appellant was, contrary to the factual shareholding, the beneficial owner of certain assets, and that the purported ownership of it by a particular company was a “sham” and the formation of the offshore trust was described by the court as being “sinister.”³¹ In a detailed judgment, the court of appeal properly analysed the complex business structure of the appellant and determined that its intricacy was intelligible within the context of proper tax and estate planning.³² Although the court was not impressed by the “high-handed and cavalier fashion” in which the appellant dealt with the respondent and her legal team, it did establish that the appellant’s beneficial ownership was aligned with his actual legal ownership of the assets by way of shareholding.³³ The court could not find that the appellant had deliberately tried to mislead the respondent, and accepted that he truly intended the ultimate benefit of his children. The finding by the Supreme Court of Appeal revealed the potential pitfalls when the complexity and motivation of some business structures are misjudged or haphazardly evaluated. It further highlighted the fact that not every tax and estate planning exercise is *mala fide* and aimed at hiding beneficial ownership, and that a legal rather than economic test will reveal the true identity of the beneficial owners.

2 3 Beneficial Ownership in Legislation

2 3 1 Income Tax Act

The meaning of the term beneficial ownership in local tax law is of particular importance.³⁴ In the Income Tax Act, a beneficiary in relation to a trust is defined as “a person who has a vested or contingent interest in all or a portion of the receipt or accruals or the assets of the trust.”³⁵ The concept of beneficial ownership is used, in this Act, only within the scope of dividend withholding taxes, with a beneficial owner defined as “the person entitled to the benefit of the dividend attaching to the share.”³⁶ Oguttu has recommended that a definition

25 See Cameron *Honoré’s Law of Trusts* 598. For the tension between beneficial ownership and beneficial interest, see *Adam v Jhavary* 1926 AD 147 153; *Ex Parte Kelly* 1942 OPD 76 82.

26 See *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA) para 19–24.

27 See Cameron *Honoré’s Law of Trusts* 67.

28 [2018] ZASCA 73; 2018 5 SA 479 (SCA); [2018] 3 All SA 408 (SCA).

29 Paragraph 41.

30 The jurisdiction of the offshore trust was moved from Guernsey to a blind trust in Monaco, but the appellant was not a beneficiary of the trust; neither was he a beneficiary of the SA family trust. The appellant held 26% of the shares in two of the SA companies and 25,1% of the shareholding in another SA company, and was the sole director of all three companies as well as of the Namibian company.

31 Paragraph 62.

32 Paragraphs 48–49.

33 Paragraph 86.

34 See art 3(2) of the Organisation for Economic Co-operation and Development Model Tax Convention. Compare para 3 1.

35 Section 1 of Act 58 of 1962, as amended by s 3 of the Revenue Laws Second Amendment Act 32 of 2005. See Cameron *Honoré’s Law of Trusts* 575 for a discussion on the contingent rights of beneficiaries of discretionary trusts.

36 Section 64FA(2), 64G(2) and 64H(2)(a) of the Income Tax Act 58 of 1962. The concept is not defined in the Security Transfer Tax Act 25 of 2007, but it is accepted that the participant who effects the transfer on behalf of the beneficial owner is liable for the tax. See Oguttu “Curbing ‘Treaty Shopping’: the ‘Beneficial Ownership’ Provision Analysed from a South African Perspective” 2007 40(2) *CILSA* 237–258 252.

of the term beneficial ownership be included in the Income Tax Act as it would also be helpful in interpreting the term for the purposes of tax treaties.³⁷ National Treasury is of the view that the beneficial owner in relation to shares is not necessarily the person who holds legal title to the share, but the one “who holds the right to the benefits derived from the share.”³⁸ It is submitted that in South Africa the term beneficial ownership is generally used differently from the concept of ownership. It refers to the party who, in substance, derived the pecuniary benefit from the asset.³⁹ It is clear that not all beneficiaries for tax purposes are necessarily beneficial owners for dividend tax purposes, as a mere interest in the receipt, accrual or asset is adequate to qualify as beneficiary. To qualify as a beneficial owner for dividend purposes, it is necessary to be entitled to the benefit of the dividend. Engelbrecht concludes that, in the context of dividend income, the trust beneficiary remains the beneficial owner of the dividend income received by the trust if it has been distributed by the trustees in terms of their discretion.⁴⁰ She further suggests that, in the case of contingent beneficiaries, the trust itself, “with the trustees acting in their official capacity on behalf of the trust”, could be seen as the beneficial owner of the dividend income.⁴¹

2 3 2 Companies Act

The notion of a beneficial interest in terms of the Companies Act⁴² is limited to company securities in the context of a right or entitlement, through ownership, agreement, relationship or otherwise, to receive or participate in securities, to exercise rights attaching to securities, or to dispose of company securities.⁴³ The listing requirements for companies listing on the Johannesburg Stock Exchange define beneficial ownership, in relation to an equity security along similar lines, as a person or entity holding *de facto* rights or entitlements to receive dividends, interest or other income connected to the equity security; or to vote, converse or redeem such security; or to dispose of the equity securities or a distribution in respect thereof.⁴⁴

2 3 3 Financial Intelligence Centre Act

Regulation 15(e)(i) of the regulations issued in terms of the Financial Intelligence Centre (FIC) Act⁴⁵ only makes provision for beneficiaries referred to “by name” in the trust deed, but the FIC Amendment Act⁴⁶ defines the term beneficial owner in respect of a legal person, as:

- a natural person who, independently or together with another person, directly or indirectly –
 (a) owns the legal person; or (b) exercises effective control of the legal person

Trusts have been excluded from the definition of “a legal person”.⁴⁷ Trustees are, however, included in the definition of accountable institutions and must comply with certain minimum due diligence processes regarding legal persons that they control (e.g. shareholding companies), including the ownership and control structure of the legal person.⁴⁸ In terms of the 2017 amendment to FICA, accountable institutions are required to establish certain information

37 Oguttu *CILSA* 253.

38 Parak and McKerrow “A Grey Area in Securities Transfer Tax” April 2018 *Without Prejudice* 28.

39 Parak and McKerrow 28. In applying the beneficial ownership concept to securities transfer tax, however, the authors refer to the transmittance of shares from one owner to another – the ownership of the shares in substance changes hands.

40 Engelbrecht *A Critical Analysis of the Meaning of Beneficial Owner of Dividend Income Received by a Discretionary Trust* (MAcc (Taxation) Dissertation, University of Stellenbosch, 2013) 72.

41 *Ibid.*

42 Act 71 of 2008.

43 Section 1 of Act 71 of 2008. S 56(1) provides that “... securities may be held by, and registered in the name of, one person for the beneficial interest of another person.” Compare s 56(2) for an associated provision.

44 Section 1 of the JSE Equities Rules, dated 9 December 2019.

45 In terms of s 77 of Act 38 of 2001.

46 Section 1 of Act 1 of 2017.

47 Section 1(1) of Act 1 of 2017 defines a legal person as “... any person, other than a natural person that establishes a business relationship or enters into a single transaction with an accountable institution and includes a person incorporated as a company, close corporation, foreign company or any other form of corporate arrangement or association, but excludes a trust, partnership or sole proprietor.” See Duri and Matasane “Regulation of Beneficial Ownership in South Africa and Zimbabwe” 2017 *Journal of Anti-Corruption Law* 175–195.

48 Section 21B(1) and (2) of FICA 2001. See National Treasury “A New Approach to Combat Money Laundering and Terrorist Financing” (2017) 1 <http://www.treasury.gov.za/legislation/regulations/FICA/A%20new%20approach%20to%20combat%20money%20laundering%20and%20terrorist%20financing.pdf> (accessed 10-10-2019).

about the trust, including beneficial ownership, when acting in pursuance of a trust agreement as a client.⁴⁹ South Africa endorsed the G20 high-level principles on beneficial ownership transparency in 2015, and committed itself to concrete action in the form of legal, regulatory and institutional frameworks with respect to such transparency. The above legislative measures were the first steps in this process.⁵⁰ In terms of these commitments, legal and beneficial ownership information must ultimately be available online.⁵¹

2 3 4 Trust Property Control Act

In terms of trust legislation, a trust is defined as an “*arrangement through which the ownership in property*” is made over,⁵² which resonates with the concept of a *legal arrangement* in some international instruments.⁵³ Reference is made to the “*designated beneficiaries*” in the trust instrument, as well as a “*trust beneficiary*”, the “*ascertained beneficiaries*” and “*beneficiaries*” in general, but the term “*beneficial owner*” does not appear anywhere in the Act.⁵⁴

From this potpourri of definitions and descriptions of the terms beneficial interest and beneficial ownership, running from an entitlement to a mere interest and from a right to dispose to effective control, it is not possible to identify one clear, encompassing meaning of the concept within a South African context.

3 BENEFICIAL OWNERSHIP IN GLOBAL INITIATIVES

3 1 Organisation for Economic Cooperation and Development (OECD)

Although the beneficial ownership concept is absent from international trust conventions,⁵⁵ it has become a useful tool in the international fight against illicit financial flows.⁵⁶ With taxation at the core of countries’ sovereignty, domestic laws are often not adequately aimed at creating coherence with the tax legislation of other countries. The OECD Action Plan on Base Erosion and Profit-sharing (BEPS) is an attempt to establish international coherence of corporate income taxation, restore the benefits of international standards, ensure transparency and certainty, and improve the implementation of instituted measures.⁵⁷ Irrespective of public beneficial ownership registries (BORs) in some jurisdictions, most disclosed information is never verified or tested, which raises questions about the accuracy and truthfulness of the declared data.⁵⁸ In the case of trusts, every party to the legal arrangement qualifies as a beneficial owner, including the settlor, trustees, protector, beneficiaries and “every individual with control over

49 Section 21B(4)(e)(ii) of FICA 2001 (as amended). The Master of the High Court does not yet have beneficial ownership registers in place

50 See the “3rd South African Open Government Partnership Country Action Plan 2015-2017” https://www.corruptionwatch.org.za/wp-content/uploads/2016/05/South_Africa_Third_-AP.pdf (accessed 05-11-2020).

51 See the “4th SA Action Plan 2016-2018” <https://www.opengovpartnership.org/members/south-africa/> (accessed 05-11-2020).

52 Section 1 of the TPCA.

53 See the Financial Action Task Force (FATF) recommendations below.

54 See s 1, 12, 13, 14, 20 and 21 of the TPCA.

55 There is no reference to the beneficial ownership concept in the Hague Convention on the law applicable to trusts and on their recognition of 1985, in terms whereof the trust assets vest in the trustee, for the benefit of the beneficiary. See arts 2(b), 11 and 12 of the Convention. Book X on trusts for European law, as per draft common frame of reference (Book X) makes provision for a beneficiary with “a right to benefit or to have an eligibility for benefit, without any reference to a beneficial owner of trust assets. The trust fund is to be regarded as a patrimony distinct from that of the trustee, while it vests in the trustee. See 1:206(1) and (2), 1:202(1) and (2) of Book X.

56 See Knobel “Beneficial Ownership Verification: Ensuring the Truthfulness and Accuracy of Registered Ownership Information” 22 January 2019 *Tax Justice Network 2*.

57 The OECD/G20 Inclusive Framework of BEPS, based on the three legs of coherence, substance and transparency, was implemented by 139 countries and jurisdictions, and the BEPS Multilateral Instrument was entered into force on 1 July 2018, covering 94 jurisdictions, and ratified by 49. See the Action Plan on Base Erosion and Profit Shifting by the OECD (2013) at https://read.oecd-ilibrary.org/taxation/action-plan-on-base-erosion-and-profit-shifting_9789264202719-en, identifying a series of domestic and international actions to address the problems of tax avoidance. Compare further the OECD Secretary General Tax Report to G20 Finance Ministers and Central Bank Governors, delivered in Saudi Arabia (July 2020) at <https://oecd-secretary-general-tax-report-to-g20-finance-ministers-july2020.pdf> for the latest developments and the implementation of the 2013 Action Plan (accessed 13-06-2021).

58 The EU requires public beneficial ownership registries for companies and trusts, while the UK and Denmark have already complied with open-access registries.

the trust.”⁵⁹

The somewhat enigmatic concept of beneficial owner was introduced by the OECD Model Tax Convention,⁶⁰ although a workable definition has not been introduced, and the variety of interpretations of the term by courts and tax administrations worldwide caused concerns of double taxation on the one hand and fiscal evasion or avoidance on the other.⁶¹ The term is widely used in the Convention, but is not defined, as one would have expected.⁶² It was advocated from the beginning that the term beneficial owner should not be used in a narrow legal sense as understood in the common-law trust environment, although the domestic law meaning should by the same token not be ignored either.⁶³ Commentators support a position where the domestic law meaning of the term is used to the extent that it is consistent with the Convention.⁶⁴

Parties were advised by the OECD to rather use the concept in a tax treaty context, considering a variety of factors, such as intermediate recipients, ownership of the underlying assets, the technical meaning of the term, and the role of the trustees.⁶⁵ Legal ownership on its own will not be the decisive factor in determining beneficial ownership, if the legal owner has limited authority regarding the income deriving from the assets.⁶⁶ A beneficial owner, however, is expected to have the full right to the use and enjoyment of the taxable income.⁶⁷ To clarify this interpretation, an example is used: if the trustees of a discretionary trust do not distribute profits earned during a given period, these trustees could be regarded as the beneficial owners of such income for the purposes of the Convention.⁶⁸ This is clearly an extension from the enjoyment of the benefits to the control thereof. This is further supported by Damon, who submits that the beneficial owner is the person “who legally, economically or factually controls the attribution of the income.”⁶⁹ In this context, therefore, beneficial ownership is established by way of substantive economic control, and not so much the enjoyment of the income or the assets.⁷⁰ It has been submitted that the concept of beneficial owner “is not capable of fulfilling the anti-avoidance role that treaties assign to it.”⁷¹

59 In terms of the FATF Recommendations: International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation, and the EU Anti-Money Laundering Directive <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018L0843> (accessed 15-02-2020). See Knobel *Tax Justice Network* 17–19.

60 Since 21 November 2017 it is called the Model Tax Convention on Income and on Capital. The term beneficial owner is not defined in art 3 of the Convention, but is referred to in arts 10 (dividends), 11 (interest) and 12 (royalties). See the Action Plan on Base Erosion and Profit Sharing by the OECD above.

61 Articles 10(2), 11(2) and 12(2). The beneficial ownership concept was first introduced in the FATF Recommendations. The concept was expanded to include control of the trust, alternatively management of the trust, as relevant elements when determining beneficial ownership. See Jansen van Rensburg *A South African Perspective on the Meaning of ‘Beneficial Ownership’ in Article 10 of the OECD Model Tax Convention on Income and Capital in the Context of Conduit Company Treaty Shopping* (LLD thesis, UP 2018) 13.

62 It is used in arts 10 (dividends), 11 (interest) and 12 (royalties). See the Action Plan on Base Erosion and Profit Sharing by the OECD above.

63 See “Commentaries on the Articles of the Model Tax Convention” 187 and 211 <https://oecd.org/berlin/publikationen/43324465.pdf> (accessed 13-06-2021).

64 *Ibid.*

65 See the public discussion draft, “Clarification of the Meaning of ‘Beneficial Owner’ in OECD Model Tax Convention”, issued by the OECD in April 2011, which aimed at clarifying the interpretation of beneficial ownership. It is acknowledged that trust law may differentiate between legal and beneficial ownership. Compare the 2011 directive by the International Bureau of Fiscal Documentation.

66 See Oguttu *CILSA* 245, stating, in reference to para 23 of the *OECD Report on Conduit Companies*, that legal ownership is not enough to constitute beneficial ownership.

67 See Engelbrecht *MAcc Dissertation* 24–25.

68 See art 10(2), as well as the footnote to para 12.1 of the Commentary on the OECD Draft.

69 Damon *Switzerland’s Direct and International Taxation of Private Express Trusts: with Particular Reference to US, Canadian and New Zealand Trust Taxation* (2004) 134, in an attempt to create a tax model for Switzerland tax trusts directly.

70 See Martin Jiménez “Beneficial Ownership: Current Trends” 2010 *World Tax Journal* 35–62, 41, explaining that the recipient of the income must be able to enjoy the economic benefits thereof to be regarded as a beneficiary.

71 Jain, Prebble and Bunting *Conduit Companies, Beneficial Ownership and the Test of Substantive Business Activity in Claims for Relief under Double Tax Treaties* *eJournal of Tax Research* 11(3) Dec 2013 388 Universität Wien International Taxation Research Paper Series.

3 2 The US Foreign Account Tax Compliance Act (FATCA)

In terms of the US Foreign Account Tax Compliance Act (FATCA),⁷² all US citizens are compelled to file annual reports on any foreign account holdings, and to require from non-US foreign financial institutions to search their records for customers with indication of a connection to the US. This includes any indication of birth or prior residency in the US, in which case the identities of such persons and any applicable assets must be reported to the US Department of Treasury. In terms of FATCA,⁷³ a beneficial owner is a person who is “the owner of the income for tax purposes and who beneficially owns that income,” and a person “receiving income in a capacity as a nominee, agent or custodian for another person is not the beneficial owner of the income.” This definition thus focuses on ownership in the legal sense and not on the control of the income or assets.

3 3 Financial Action Task Force (FATF)

In terms of the Financial Action Task Force (FATF) recommendations,⁷⁴ a trust is a “legal arrangement”, and a beneficiary in trust law refers to “the person or persons who are entitled to the benefit of any trust arrangement”, and can be a natural or a legal person.⁷⁵ The meaning of the control aspect in terms of the FATF recommendations include not only the power to appoint trustees, but also powers relating to the change of the class of beneficiaries, varying or terminating the trust and powers to invest or otherwise deal with trust property.⁷⁶

A beneficial owner, however, is defined by the FATF as “the natural person(s) who ultimately own(s) or control(s) a customer and/or the person on whose behalf a transaction is being conducted” ... including the person(s) who “exercise(s) ultimate effective control over a legal person or arrangement.”⁷⁷ This definition implies that only a natural person can be the ultimate beneficial owner. The logical conclusion is that all legal persons are ultimately controlled by a natural person. The essence of beneficial ownership within this understanding does not have to do with legal title to assets, but exactly the opposite.⁷⁸ In a trust, this ultimate control can be with the trustee, the founder or the beneficiary. Both real ownership and ultimate control of the legal entity will qualify.

The FATF recommendations cover the criminal justice system and law enforcement, the financial system, and international co-operation. Lately, it has focused more on customer due diligence requirements and beneficial ownership detail – in particular regarding corporate vehicles.⁷⁹ Service providers within the financial advisory and banking environments have become the intelligence agents of the task force. The nature of compliance is that every legal entity is suspected of harbouring one or more beneficial owners with criminal intent in its midst. The service provider has to move its client-oriented focus to an in-depth evaluation of all potential beneficial owners and controllers of the entity.⁸⁰ It seems as if a substantive investigation on a number of levels is expected, determining who ultimately owns or controls

72 A US federal tax law of 2010. See the Deloitte FATCA Glossary of Acronyms at <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-fatca-glossary-of-acronyms-081916.pdf> (accessed 08-05-2020).

73 Definition in terms of FATCA Glossary of Acronyms 3.

74 The FATF was established in 1989 by the G7 (Group of Seven), an intergovernmental economic organisation consisting of the seven largest economies in the world. See above for more on the recommendations. The FATF sets International Standards for measures to combat money laundering, terrorist financing and the financing of the proliferation of weapons of mass destruction which threaten the international financial system.

75 FATF Recommendations above 22 and 110. Trusts are referred to as “legal arrangements” due to their special nature. The FATF 40 Recommendations are a comprehensive and consistent framework of measures which countries should implement in order to combat money laundering and terrorist financing, as well as the financing of proliferation of weapons of mass destruction.

76 See Riches (ed) “The Private Wealth & Private Client Review” (2017) *The Law Reviews* vii–ix.

77 FATF Recommendations 15. See <http://www.fatf-gafi.org/dataoecd/7/40/34849567.pdf> (accessed 15-02-2020). The reference to “customer” and “transaction” in this definition is for the purposes of banks in particular, since they have an obligation to establish the identity of the potential customer’s beneficial owner before carrying out any transaction on the customer’s behalf or doing business with the customer. Compare FATF Recommendations 110.

78 Interpretive Note to Recommendation 24 at para 3 makes it clear that the definition of beneficial owner in the context of legal persons must be distinguished from the concepts of legal ownership and control.

79 See Chapter V, “Enhancing the Transparency of Legal Persons” in FAFT Guidance: Transparency and Beneficial Ownership (2014) 12 <http://www.fatf-gafi.org/documents/news/transparency-and-beneficial-ownership.html> (accessed 16-06-2021).

80 FAFT Guidance 39–40. See Recommendations 24 and 25 on 44–46.

the customer, or who is actually guiding the activity. All information is merely a starting point to considering all economic realities in the process of determining beneficial ownership in a very broad sense.

3.4 Beneficial Ownership as Interpreted by the Courts in Europe and Canada

Some commentators argue that the manner in which certain terms are interpreted in tax treaties should be different from the way they will be interpreted in domestic law.⁸¹ Due to the division between legal ownership and beneficial ownership, which is known to common-law jurisdictions but at the same time a foreign concept in civil-law countries, one can expect different ways of development. In this context, Geçer has compared the interpretation of beneficial ownership by the courts in the UK, France and Canada, while Engelbrecht refers to a number of international tax cases that are wrestling with the beneficial ownership concept.⁸²

In English law, the notion of beneficial ownership was initially used in agreements relating to the sale of land. The courts distinguished between beneficial and non-beneficial legal owners, as well as legal and beneficial ownership in the law of equity.⁸³ The emphasis was on the aspect of ownership of the asset and not so much the income produced from the asset.⁸⁴ As the income is the important matter that international tax law concerns itself with, this illustrates the tension between the original motivation for the concept of beneficial ownership, which was settled in international tax law, and the manner in which it developed in domestic trust law.⁸⁵ In *Indofood International Finance Ltd v JP Morgan Chase Bank NA*,⁸⁶ the beneficial owner of the interest, in an international fiscal context and not in terms of domestic law, was the party who enjoyed the full privilege to benefit from the income.⁸⁷

It has been alleged that the French courts, a civil-law jurisdiction, have applied the flexibility of the beneficial ownership test as a general anti-avoidance provision in determining whether certain actions amount to legitimate estate planning practices or illegal tax schemes.⁸⁸ It is submitted that the French courts, by focusing on the intention of the parties in determining whether beneficial ownership is present or not, went beyond the original interpretation of the concept.

In Canada, this issue is dealt with very differently, in that the economic aspect is accepted as only one of the factors in identifying beneficial ownership.⁸⁹ A beneficial owner is described as "a person who receives the income for his own use and enjoyment and (who) has the risk and control over what is received."⁹⁰ This approach seems to be better aligned with the meaning of the term as intended in international tax treaty law. In *Prévost Car Inc and Her Majesty the Queen*,⁹¹ the court found that beneficial ownership did not exist, because there was no predetermined flow of funds, as dividends had to be first declared by the directors and then approved by the shareholders.⁹² In *Velcro Canada Inc v The Queen*,⁹³ the court took the following aspects into consideration when determining beneficial ownership: possession, use,

81 Geçer *A Practical Matter Test: the Concept of Beneficial Ownership in International Tax Law* (2014) 10. Contra Lang and Brugger "The Role of the OECD Commentary in Tax Treaty Interpretation" 2008 *Australian Tax Forum* 23 and 97, arguing that there is no unique interpretation method for tax treaties.

82 See discussion by Engelbrecht MAcc Dissertation 27–35.

83 See Geçer *Practical Matter Test* 17.

84 *Wood Preservations Ltd v Prior* [1968] 45TC112CA as cited in Geçer *Practical Matter Test* 17.

85 See Geçer's reference to Jones *et al* "The Origins of Concept and Expressions used in the OECD Model and their Adoption by States" 2006 *Bulletin – Tax Treaty Monitor* IBFD 246.

86 [2006] EWCA Civ 158 (2 March 2006).

87 The *Indofood* case was in actual fact not about the application of English law, but the parties decided that an English court must solve any dispute between them. The matter dealt with the actions of an Indonesian parent company raising loans by way of notes through a subsidiary Mauritian company. See discussion of this case by Jansen van Rensburg LLD thesis 180.

88 Compare Gouthiere "Beneficial Ownership and Tax Treaties: A French View" April/May 2011 *Bulletin for International Taxation* 218. See Bernstein "Beneficial Ownership: an International Perspective" 26 March 2007 *Tax Notes International* 1214. See in particular the decision by the French *Conseil d'Etat* in *Royal Bank of Scotland* No. 283314 (RBS) on 29 December 2006, where a pure economic approach was followed.

89 Geçer *Practical Matter Test* 20.

90 Geçer *Practical Matter Test* 20 cited *Prévost Car Inc v Canada*, DTC 3080 [2008] TCC. For detailed analysis of the case see Geçer *Practical Matter Test* 23–26. Compare further *Velcro Canada Inc v the Queen*, TCC57 [2012].

91 [2008] TCC 231.

92 This decision was confirmed on appeal by the Canadian Federal Court of Appeal (CFCA) in *The Queen v Prévost Cart Inc.* [2009] FCA 57. Compare Jansen van Rensburg LLD thesis 198.

93 2012 TCC 57 (Canadian Tax Court).

risk, and control of the payment.⁹⁴

In the Swiss Federal Administration Tribunal,⁹⁵ beneficial ownership was analysed based on the underlying economic reality instead of the legal form. The tribunal took into account who held the authority and power to have decided on the distribution of income, as well as who assumed the risks associated with the income. In the Dutch Supreme Court Case No 28638, it was confirmed that the beneficial owner does not have to be the owner of the assets. It does seem as if a pure economic perspective on beneficial ownership will result in the concept being treated as just another broad anti-avoidance tool.⁹⁶

Geçer submits that “the notion of beneficial ownership has a *sui generis* character”, different from the meanings developed by the courts in common-law jurisdictions, and should not give preference to the control aspect over the enjoyment, nor the other way round.⁹⁷ A reasonable level of rights to use and enjoy the income might be adequate for a beneficiary to qualify as a beneficial owner of the income. In a trust context it may be someone like a beneficiary vested with a limited right to receive part of the income. Geçer therefore, submits that for international tax treaty purposes “the beneficial owner is the person who legally, contractually or factually, has some power to use and enjoy the income concerned.”⁹⁸ Martin Jiménez however, supports a strict legal approach instead of an economic, or so-called substance-over-form, approach.⁹⁹ The author is of the opinion that a legal, instead of an economic approach, will detach the beneficial ownership concept from broad anti-avoidance provisions. At the same time is it important not to allow the fear of potential wrongdoing to inhibit economic growth and entrepreneurial potential.

3.5 European Union and United Kingdom Anti-Money Laundering Directives

The European Union Regulations (EU) 2019 (Anti-Money Laundering Beneficial Ownership in Trusts), which came into operation on 29 January 2019, activated the obligations imposed on EU states by the 2015 Fourth Anti-Money Laundering Directive (AMLD), and deals in particular with beneficial ownership of trusts.¹⁰⁰ It follows the FATF formula and defines a beneficial owner of a trust as “any natural person(s) who ultimately own(s) or control(s) the customer and/or the natural person(s) on whose behalf a transaction or activity is being conducted”,¹⁰¹ and includes the settlor, the trustees, the protector, the beneficiaries, any class of persons in whose interest the trust was set up, and any other natural person “exercising ultimate control over the trust by means of direct or indirect ownership or by other means.”¹⁰² The focus is on the collection of information from trustees and beneficiaries, which must be made available to tax authorities worldwide. The Fifth AMLD extended the requirement of inclusion in Ultimate Beneficial Ownership Registers (UBO registers),¹⁰³ to non-EU resident trusts which own fixed property in the United Kingdom (UK) or “which have a business relationship with an obliged entity in the UK”, including a bank, accountant, trustee or lawyer,¹⁰⁴ in an attempt to centralise

94 For more detailed discussion, compare Jansen van Rensburg LLD thesis 205.

95 FAC ruling A-6537/2010 (7 March 2012). See Jain and Prebble “The Swiss Swap Case Revisited” https://www.business.unsw.edu.au/About-Site/Schools-Site/Taxation-Business-Law-Site/Documents/The_Swiss_Swap_Case_Revisited_Jain_and_Prebble.pdf (accessed 16-06-2021).

96 See Martin Jiménez *World Tax Journal* 35–63 49. See Jansen van Rensburg LLD thesis 162 on the use of a substance-over-form approach in Dutch jurisprudence.

97 Courts should rather consider the arrangement holistically and determine the reasons why someone receives immediate benefits. See the reference to Jain “Effectiveness of the Beneficial Ownership Test in Conduit Company Cases” 2013 *International Bureau of Fiscal Documentation (IBFD)* XII.

98 Geçer *Practical Matter Test* 37.

99 Martin Jiménez *World Tax Journal* 62.

100 The 4th AMLD became effective in June 2015 and was amended by the 5th AMLD in 2018.

101 Article 3(6)(b) of the 4th AMLD. This definition was extended to the ownership or control of corporate entities by the 2016 Regulations (EU Anti-Money Laundering: Beneficial Ownership of Corporate Entities), in terms of which 25% plus one share is regarded as evidence of indirect ownership.

102 See <https://www.algoodbody.com/insights-publications/european-union-anti-money-laundering-beneficial-ownership-of-trusts-regulat> (accessed 12-04-2020).

103 The UBO register system is generally aimed at helping curb terrorist funding, money laundering and tax evasion by assisting national financial intelligence units and tax authorities to access beneficial ownership information.

104 See article in Step Industry News, dated 18 April 2019, on the UK’s consulting process on the transposition of the EU Fifth Anti-Money Laundering Directive at <https://www.step.org/news/uk-begins-consultation-eu-5amlld> (accessed 30-09-2019). EU member states had to enshrine the 5th AMLD in their domestic law by 10 January 2020. Trust registries will be openly accessible to any person demonstrating a legitimate interest.

bank account registries and data retrieval systems. Trust registries will be openly accessible to any person demonstrating a legitimate interest.¹⁰⁵ Most EU member states have, however, failed to implement publicly available centralised registers of beneficial ownership by the January 2020 deadline.¹⁰⁶

Although now outside the EU,¹⁰⁷ in terms of the regulations enacted in the United Kingdom, implementing the Fourth Directive, trustees must maintain records of all beneficial owners as well as any potential beneficiaries of the trust.¹⁰⁸ In the UK Money Laundering Regulations of 2017 separate descriptions for the term beneficial owner are given, depending on whether it is in relation to a legal entity, a body corporate, a partnership, a trust, foundation or similar arrangement, or in relation to the administration of a deceased estate.¹⁰⁹ In relation to a trust it includes not only the settlor, the trustees and the named beneficiaries, but also any class of persons in whose main interest the trust was set up and any individual who has control over the trust.¹¹⁰ South African trusts will only be affected by these regulations if they receive income from a source in the UK, as SA trusts are not allowed in terms of exchange-control regulations to hold offshore assets.¹¹¹ If a trustee of a SA trust has UK tax liabilities, such trustee is obliged to supply beneficial ownership information and details about the local trust.¹¹² The regulations may affect the way beneficiaries and potential beneficiaries are defined in trust deeds in future.¹¹³

4 CONCLUSION

The concept of beneficial ownership as it has been developed by international initiatives to prevent and expose the financing of terrorism, money-laundering and tax evasion, cannot really be compared to the way it has been applied within the trust-law environment. While it became a well-known concept in relation to tax matters, most trust lawyers will argue that the mere intention of parties to obtain a tax benefit is irrelevant when determining where beneficial ownership lies.¹¹⁴ In the financial services industry, for instance in banking, insurance and investments, client relationships are often sacrificed at the altar of financial intelligence, with the identification of beneficial ownership as the ultimate idol. Even within a regulatory environment based on Twin Peaks, it is debatable whether an equal evaluation of beneficial ownership between trust law, tax and international crime prevention can be determined.¹¹⁵

105 Article 31 of the 5th AMLD extends access to trust beneficial ownership information in cases where a trust with EU exposure owns or controls a company incorporated outside the EU.

106 Only five of the 27 EU states, namely Bulgaria, Denmark, Latvia, Luxembourg and Slovenia, had established free public registers by 10 January 2020.

107 The withdrawal of the UK from the EU on 31 January 2020 is commonly referred to as Brexit.

108 The UK Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, No. 692, came into force on 26 June 2017, replacing the 2007 Regulations (2007/2157 and 2007/3298), and contained updated provisions that implemented in part the Fourth Money Laundering Directive 2015/849 of the European Parliament and of the Council. "Potential beneficiaries" are those referred to by the settlor in a document such as a letter of wishes.

109 See reg 5 and 6.

110 Regulation 6 (1). In terms of para 6 (1)(e) control means a "power (whether exercisable alone, jointly with another person or with consent of another person) under the trust instrument or by law to – (a) dispose of, advance, lend, invest, pay or apply trust property; (b) vary or terminate the trust; (c) add or remove a person as a beneficiary or to or from a class of beneficiaries; (d) appoint or remove trustees or give another individual control over the trust; (e) direct, withhold consent to or veto the exercise of a power mentioned in subparagraphs (a) – (d)."

111 See the Exchange Control Regulations of 1961 (as amended), issued in terms of the Currency and Exchanges Act 9 of 1933. See Nedbank Private Wealth Fiduciary Focus Newsletter, dated 25 July 2017 on the changing global regulatory environment at <https://www.nedbankprivatewealth.co.za/content/private-wealth-sa/south-africa/en/info/FiduciaryFocus5thEdition.html> (accessed 18-06-2021).

112 See reg 6 and 44 of the UK Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, No. 692.

113 See Luckhurst "How to Assess Beneficial Ownership of Trusts" 30 August 2017 FT Advisor 1–4. <https://www.ftadviser.com/regulation/2017/08/30/how-to-assess-beneficial-ownership-of-trusts/> (accessed 02-10-2019).

114 See Jansen Van Rensburg LLD thesis 34.

115 The Twin Peaks model is aimed at synchronising systemic risks within countries, and was legislatively implemented in SA by way of the Financial Sector Regulation Act 9 of 2017. It should eliminate multiple regulators involved in the prudential and supervisory environments and avoid unnecessary conflicts of interest. Without proper co-operation, however, regulatory overlaps are a real threat and will in any event make compliance more costly and time-consuming. It will most probably also raise the barrier of entry into the financial sector even further.

Although the right to use and enjoy trust assets served as point of departure for determining beneficial ownership in the quest for deterring tax avoidance, terrorist activities, co-ordinated crime and money-laundering, it evolved into a more broadly set requirement of entitlement, ownership and control. It seems as if both the FATF recommendations and the EU AML directives are pushing towards a formal quantitative threshold, focusing on who theoretically possesses a strong enough legal claim to guide decisions. The tax and civil courts in developed tax regimes alternate between ownership, the intention of the parties, and a pure economic test, which places beneficial ownership largely within the anti-avoidance arena. The application of the beneficial ownership notion to trusts has in a European context been referred to as “delicate.”¹¹⁶

In South Africa, the legislator followed mainly the international trend in tax and company regulations, but did allow for both the economic and legal aspects. The mere fact that trust agreements are structured to minimise taxability or maximise effective estate planning, should not be determining factors, as motive or purpose often differs from intention.¹¹⁷ The tax courts did lean in the direction of a more economic test. Adjacent to that, however, and totally oblivious to the developments of the concept of beneficial ownership in the tax and crime-prevention domains, the South African civil courts have wrestled with this concept from time to time,¹¹⁸ but always within the broader understanding of enjoyment of the benefits of ownership, without the beneficiary being the legal owner.¹¹⁹ The separation of control and enjoyment is a cornerstone of the discretionary trust and non-compliance may result in the abuse of the form.¹²⁰ In the event of fraudulent or other illegitimate actions, with the purpose and intention of misrepresenting, the trust structure is clearly bogus and the enquiry should look past the purported veil as far as ownership and beneficial ownership is concerned.¹²¹

As there is evidence of support both for a legal and an economic approach in determining the exact meaning and content of the concept of beneficial ownership, no legal certainty exists as to which test will be applied in future. Tax authorities and tax tribunals may, in general, lean more towards an economic approach, with civil courts approaching it from a technical–legal angle. Jansen van Rensburg concludes that the beneficial ownership concept appears to have retained its anti-avoidance character internationally.¹²² She submits that it is more likely that South African courts will in future adopt a legal approach rather than an economic approach to the concept.¹²³

The EU AMLD’s two-pronged definition requires ultimate ownership *and* control, which excludes a person who satisfies the control aspect, without any personal benefit, as well as a person who benefits personally, but has no control. The FATF, on the other hand, introduces entitlement as backstop-requirement, which includes a person who has a right to benefits, without any control over the entity.¹²⁴ Both these definitions are very different from the interpretation of the concept in a tax- and trust-law environment, with an anti-avoidance approach in tax and a purely juristic approach in trust law, based on a legal interest in the assets and income of the entity.

The author supports Geçer in so far as he submits that “the notion of beneficial ownership has a *sui generis* character.”¹²⁵ The question remains, however, which investigative approach to

116 Lepage *Application of the Beneficial Ownership Requirement to Trusts under Double Tax Conventions Concluded by Switzerland* (Master’s dissertation, University of Neuchâtel 2016) 32.

117 See *Commissioner SARS v Bosch* (2014) ZASCA 171 para 40; *Hippo Quarries (Tvl) (Pty) Ltd v Eardley* 1992 1 SA 867 (A).

118 In *Strydom v De Lange* 1970 2 SA 6 (T) 11–12 it was used loosely, referring to the personal right of the beneficiary against the trustee.

119 *Braun* case 859E-F.

120 *Land and Agricultural Bank* case para 37 – 38.

121 *Hippo Quarries* case.

122 Jansen van Rensburg LLD thesis 346.

123 Jansen van Rensburg LLD thesis 347.

124 In terms of FIC Draft Guidance Note 7 on the implementation of various aspects of the Financial Intelligence Centre Act 38 of 2001, Aug 2017, ‘effective control’ means the “ability to materially influence key decisions in relation to a legal person (e.g. the manner in which most voting rights attached to shareholdings are exercised, the appointment of directors of a legal person, decisions taken by a board of directors, key commercial decisions of a legal person), or the ability to take advantage of capital or assets of a legal person” <https://www.fic.gov.za/Documents/Revised%20draft%20guidance%20Ver2%20Aug%202017%20CLN.pdf> (accessed 20-05-2020).

125 Courts should rather consider the arrangement holistically and determine the reasons why someone receives immediate benefits. See the reference to Jain *International Bureau of Fiscal Documentation* XII. See *Braun*

follow to identify beneficial ownership in a particular instance. It is submitted that a substance-over-form approach, as expressed in the maxim *plus valet quod agitur quam quod simulate concipitur*,¹²⁶ based on the true intention of the parties, will provide a solid base for determining whether an individual is indeed a beneficial owner or not. Such a substantive approach will encourage the evaluator of beneficial ownership to use the legal information as starting point, while weighing both the legal and economic realities in differentiating between the parties who guide the decisions of the entity, and those benefiting from the assets or income of the entity. The intention test is of a *de iure* nature, while the economic test evaluates the *de facto* reality.¹²⁷ In that sense, the beneficial owner of a trust is an individual who legally holds a beneficial interest in the trust, which interest is of an economic nature. It is submitted that beneficial ownership in the trust-law context is not reliant on the control of the assets of the trust.

The guidance given by the FIC to financial service providers in South Africa unfortunately creates a different picture, namely that the concept of beneficial ownership in the context of a trust “encompasses all the natural persons who may be associated with the trust.”¹²⁸ This statement is questionable in light of the fact that the FIC Act merely requires the establishment of the identities of all parties associated with the trust.¹²⁹ Equalising all parties associated with the trust with the beneficial owners of the trust is confusing for trustees and beneficiaries and does not contribute to a sound application of the beneficial ownership principle. The fact that the FIC Act is focused on the combatting of financial crimes and ultimately the integrity of the South African financial system, while the Income Tax Act and the Companies Act have other purposes, may have contributed to the lack of synergy when it comes to the development of definitions for beneficial ownership. It is submitted that, even when consideration is given by the judiciary to the purpose of the particular legislation or treaty in issue, it is in the interest of legal certainty to develop a less fragmented approach to the meaning of beneficial ownership.

It is submitted that the way the court of appeal in *ST v CT* dealt with the evaluation of beneficial ownership as opposed to legal ownership of the trust assets *in casu*, supports the call for a substance-over-form approach.¹³⁰ Neither the anti-avoidance approach of tax authorities, nor an overarching economic assessment based on prejudicial presumptions of wrongdoing, as employed in international instruments and by regulatory authorities, contribute to the development of a judicially accountable test for beneficial ownership of trust assets.

case 859E-H for application of the *sui generis* principle on trusts.

126 Translated as “what is done more avails than what is pretended to be done.” See application in *Commissioner of Customs and Excise v Randles, Brothers and Hudson Ltd* 1941 AD 369, 395–396.

127 See how the *de facto v de iure* test was applied by the court in *Badenhorst v Badenhorst* 2006 2 SA 255 261A.

128 See para 18 of FIC Draft Guidance Note 7.

129 See s 21B (4) of the FIC Act.

130 See para 86. Lepage Master’s dissertation 15 favours an autonomous meaning instead of a domestic approach, as application of the domestic law “increases the risk of divergent applications and disputes between the OECD member states.” See 32 where she stresses the potential difficulties encountered in determining who the controlling person of a trust is.