The Court of Appeal for Bermuda

CIVIL APPEAL No. 5A of 2019

B E T W E E N:

GRAND VIEW PRIVATE TRUST COMPANY LTD.

Appellant

-v-

WONG, WEN-YOUNG (A.K.A. WINSTON WONG)

1st Respondent

-and-

WONG, RAY-TSENG (A.K.A. RILEY WONG)
(an infant by his next friend, Grace Tsu Han Wong)

2nd Respondent

-and-

WANG, VEN-JIAO (A.K.A. TONY WANG)

1st Intervenor

-and-

WU WANG, HSUEH-MIN (A.K.A. JENNIFER WANG)

2nd Intervenor

Before: **Clarke, President**
Smellie, JA
Subair Williams, JA

Appearances: Mark Howard QC, Jonathan Adkin QC and Christian Luthi, Conyers Dill & Pearman Ltd., for the Appellant;
Elspeth Talbot Rice QC, Dakis Hagen QC and Rod Attride-Stirling, ASW Law Ltd., for the 1st and 2nd Respondent;
Richard Wilson QC and Fozeia Rana-Fahy, MJM Ltd., for the 1st Intervenor
Keith Rowley QC and Mathew Watson, Cox Hallett Wilkinson Ltd., for the 2nd Intervenor

Date of Hearing: **17, 18 & 19 November 2019**
Date of Judgment: **20 April 2020**

JUDGMENT

Addition of a beneficiary to a trust and transfer to it of the whole of the trust assets – Whether such addition and transfer was within the scope of the power to add a beneficiary contained in the trust deed – whether what was done constituted a fraud on the power

I N D E X

Topic **Page No.**

CLARKE P:

Introduction

1. The question at issue in this appeal is whether the execution by the Trustee of the Global Resource Trust ("GRT") of a power contained in the Trust Deed to add a beneficiary to which it then transferred the whole of the assets of the Trust was valid or, as Kawaley AJ held on an application under Order XIV of the RSC, invalid as being beyond the power of the GRT Trustee. The assets of the GRT consisted of shares worth over US $560 million. The case raises fundamental issues as to the scope of powers of amendment contained in Trust Deeds and of the doctrine of "*fraud upon a power*"[1].

The Facts

2. Wang, Yung Ching (YC Wang), who died on 15 October 2008, and Wang, Yung Tsai (YT Wang), who died on 27 November 2014, (together "the Founders"), were brothers, who were born into a poor family. In 1954 YC Wang founded Fu-Mao Plastics Corporation which later changed its name to Formosa Plastics Corporation. In 1958 YT Wang joined him in the business. This led in due course to the formation of a group of companies called the Formosa Plastics Group ("FPG"), of which YC Wang was the Chairman, which became, and remains, one of the largest conglomerates in Taiwan. The assets of the GRT Trust consisted of an indirect interest in shares in FPG companies.

3. The Wang Family Tree is extensive. One of **YC Wang's** sons, by his second wife, was Wong, Wen-Young, also known as Winston Wong ("Dr Wong"). Dr Wong is a plaintiff

[1] It is for that reason that I have included in this judgment a summary of the very substantial submissions made to us and of the many authorities relied on, several of which were not before the learned judge. The dispositive part of my decision begins at paragraph [168].

in the action, and hence a respondent, together with Wong, Ray-Tseng, known as Riley Wong, Dr Wong's grandson and YC Wang's great-grandson. Dr Wong has four half-sisters, children of YC Wang's third wife, including Susan and Sandy Wang.

4. **YT Wang** had five children by his first wife. They are William, Wilfred, Sarah, Jennifer and Hsiueh-Kuang Wang (hereafter "the first family"). He had three children by his second wife who are, to use their common abbreviations, Tony, Tammy and Janis Wang (hereafter "the second family"). Dr Wong and the second family take a diametrically opposing view to that of YC Wang's children by his first wife as to the correctness of the judgment below.

The History

5. The evidence of Susan Wang[2], which I summarise in this and the following paragraphs, is that the Founders felt strongly that, whenever possible, one must give back to society. They regarded FPG itself as one of their greatest legacies to Taiwanese society and, also, made very substantial sums available to establish a number of higher education institutions, hospitals and other charitable foundations. Her understanding, based on many conversations with YC Wang, her father, YT Wang, her uncle and Mr Wen-Hsiung Hung ("Mr Hung"), a close friend and confidant of YC and YT Wang, over the years until their respective deaths, was that the ownership of various holding companies established in Liberia and the BVI ("the Holding Companies"), which owned shares in FPG companies (worth in the year 2000 around US $1.8 billion), one of which was **Grid Investors Corp ("Grid Investors")**, had been entrusted to Mr Hung on the basis that he would use them for such purposes as might be directed by the Founders.

6. These purposes included the continued holding and purchase of shares in the FPG companies in order to assist the perpetuation of FPG and to provide funding for the

[2] Since the judgment appealed against was under Order 14 the Court proceeds, as Mrs Talbot Rice QC accepted below that it should, on the basis that the evidence is accurate. The question is whether, on that assumption, there is any defence.

charitable foundations which the Founders had established. By 2000 FPG had become very successful and the Founders extremely wealthy in their own right. By 2008 FPG was one of the largest conglomerates in Taiwan.

7. YC Wang had made clear to Susan Wang that neither of the Founders intended that the assets in the Holding Companies should ultimately form part of their estates upon their death – specifically they did not wish to leave these assets to their heirs by way of inheritance. Her father indicated to her that the Founders' wishes were that those assets should be applied towards the perpetuation of FPG and the fulfilment of the Founders' vision of giving back to society. The Founders hoped that their descendants would assume the role of caretakers or managers of that wealth for the greater good of society.

Developments in the early 2000s

8. By the summer of 2000 the Founders had turned their attention to succession planning. This included making arrangements to perpetuate and formalise the basis on which the Holding Companies would be held over the long term, and to put in place structures that would subsist long after the Founders and Mr Hung had died. Ultimately it was decided that a significant proportion of assets should be placed into a Bermuda Purpose Trust, which ultimately led to the creation in May 2001 of the **Wang Family Trust** (see [10] ff below). The Founders' original idea was that a single Bermuda Purpose Trust would be established to hold the FPG shares, whose purposes would include the continuous growth and prosperity of FPG and the support of the Founders' various charitable foundations. At that time the Founders also had in mind that the trust would make provision for those family members who served as directors of the company which was to be the trustee of the proposed Bermuda Purpose Trust to benefit personally in some very limited way. This was intended to ensure that the family members who devoted time and energy in supporting the growth and prosperity of FPG and the various charitable foundations were sufficiently motivated to carry out their duties as effectively as possible.

9. In early 2001, following further discussion, the original proposal was modified. It was decided that, instead of making provision within the Bermuda Purpose Trust for family members to be incentivised, there would be a separate private Bermuda discretionary trust from which those family members could potentially benefit. This is what became the **Global Resource Trust**. The structure was designed to align the interests of the Founders' children (as potential beneficiaries of the GRT) with the continued growth, and perpetuation of the success, of the FPG companies. The formation of the GRT was intended to incentivise the descendants of YC Wang and YT Wang to perpetuate the success of the FPG companies, and thereby to achieve the wider goals of the Founders and ensure that their philanthropic views were given effect, by providing them with an interest in shares in those companies which would form the assets of the Trust. It is apparent from this description that the GRT was not simply a trust to benefit the Founders' issue but a means of achieving, through them, the ongoing prosperity of the FPG and fulfilment of the Founders' vision.

10. The proposals for what became the Wang Family Trust and the GRT were set out in a Memorandum prepared in April 2001 by Susan Wang. In it she explained the structure that was to be adopted in relation to the Wang Family Trust. In addition to its board of directors Grand View Private Trust Company Limited ("Grand View"), which was to be the trustee, was to have a business management committee ("BMC") which at that the time was to be composed of Susan Wang, Sandy Wang, William Wang and Wilfred Wang. It was subsequently decided that Mr Hung should also be a member.

11. The memorandum confirmed that it was no longer proposed that the directors of Grand View or the BMC members should receive annual remuneration although this would be considered in future. Susan Wang explained that in addition to the Wang Family Trust, it was now proposed that another beneficiary trust would be established and that, although the planning of this trust had not yet been

completed, it was envisaged that it should be for the benefit of the children of the Founders (it being understood that their children would serve as directors of the Wang Family Trust with William Wong, Wilfred Wang, Susan Wang and Sandy Wang serving as the first directors).

12. All the proposed members of the BMC and both the Founders signed the document. The memorandum contained the following sentence:

> *"The other trust* (i.e. other than the Wang Family Trust) *is a private trust,* ***the assets of which may be used for any purpose[3].*** *The plan is [for the trust] to benefit the children of the Chairman and the President.* [i.e. the Founders]*."*

The Establishment of the Wang Family Trust and the GRT

13. On **8 May 2001** Global Resource Private Trust Company ("the GRT Trustee") was incorporated in Bermuda. Its objects included "*to act as trustee of certain interrelated personal express trusts to be designated GRT Number 1 through 20".*

GRT No 1

14. On **10 May 2001** the GRT Trustee declared Global Resource Trust No 1 ("the GRT") by deed. By clause 2.2. of the Trust Deed the proper law of the Trust was that of Bermuda.

15. The first Recital to the Declaration of Trust declared that the Original Trustee (i.e. the GRT Trustee) had received the Initial Property (US$100) with the intention that it should create a private express trust and that, pursuant to such intention, the Original Trustee wished to make such declaration with respect thereto.

16. The "*Beneficiaries*", as defined in clause 1.1 and the Second Schedule were,

[3] Bold added for emphasis in this and other citations and paragraphs

> *"**subject to any exercise of the powers conferred upon the Trustees by clause 8,** [to] mean the following persons now living or hereafter born before the expiration of the Trust Period:*
>
> *The children and remoter issue of Y.C. Wang and Y.T. Wang"*
>
> Clause 1.1. defined "*person*" as including "*any individual, company, partnership and unincorporated association and any person acting in a fiduciary capacity*". It defined "company" as any company and "*any body, incorporate or established in any part of the world, which has a legal existence independent of that of its members".*

17. The Trust Period was to be 100 years from 10 May 2001 (or such longer period, if any, as should for the time being be allowed under the Proper Law of the Trust (as defined). The Trust Deed contained in clause 8 powers of addition and removal of Beneficiaries; and in clause 10 a general power of amendment.

18. After the execution of the Trust Deed Mr Hung, the confidant of the Founders, transferred shares in Grid Investors, which held some $90 million worth of shares in FPG companies, to the Trust. Mr Hung had worked for many years in the FPG companies, as an executive or consultant, until his death in December 2015. He had held those shares subject to a limited power of appointment executed on 15 July 1996.

The Wang Family Trust

19. Also on **10 May 2001** Grand View, the Respondent herein, declared the Wang Family Trust (the "WFT"). The WFT is a perpetual mixed charitable and purpose trust with no perpetuity period from which, despite its name, members of the Wang family can never benefit. It, too, is governed by the law of Bermuda.

20. Recital A to the Declaration of Trust records that the Original Trustee (i.e. Grand View) had received the Initial Property (US$100) with the intention that it should

create a trust for certain charitable and non-charitable purposes. Recital C declared that the Trust was being declared in order to fulfil the purposes described therein and that the fulfilment of such purposes should be accomplished, to the greatest extent possible, following and consistent with the spirit of YC and YT Wang ("the Founders"). This was reflected in a statement written by them regarding the background and the purposes and vision for the major foundations they had established, and their objectives and wishes for the Formosa Group of Companies. The Recital then set out a substantial statement by the Founders as to their beliefs and objectives, including their duty to pay back to society, the projects that they had founded, and their specific wishes for the Formosa Group of Companies and for their foundations.

21. Clause 1 (1) of the Bye-laws of Grand View contained a similar statement of principle beginning with the words *"It should first be recognized that all assets come from society, and, if they are from society, they should be used for the benefit of society"*.

22. Shares in seven companies holding shares in FPG companies, worth US$567 million as at 2001, were transferred to the Wang Family Trust. Further Bermuda purpose trusts were formed thereafter. These are known as the China (formed in June 2002), and the Ventura, Universal Link and Ocean View Trusts (formed in May 2005). I refer to all five purpose trusts as "the Five Bermuda Purpose Trusts". In Action 2018 No. 44 (the "Main Action"), currently set down for hearing 1 March 2021 to 27 May 2021, Dr Wong raises claims against Grand View and the other trust companies which impugn the validity of the trusts and the transfer of assets into them.

23. Grand View and the GRT Trustee had five directors namely Mr Hung, Susan and Sandy Wang (daughters of YC Wang) and William Wong and Wilfred Wang (sons of YT Wang). (The same personnel were also directors of the four private trust

companies incorporated in respect of the four other trusts referred to in the preceding paragraph).

24. On 20 May 2004, YC Wang sent a letter to all of his children setting out his philosophy concerning wealth and the inheritance of wealth and his intentions in relation to his own wealth. In it he expressed the hope that his children would support his decision to leave his personal wealth to the public, so that it could continue to promote social progress, improve public welfare and perpetuate the businesses the he had founded in a way that benefitted the staff and society long into the future. Susan Wang believes that YT Wang, her uncle, had expressed similar views to his own children.

Developments in 2005

25. In early 2005 YC Wang explained to Susan Wang that, after discussing the position with each other and with Mr Hung and with lawyers, the Founders, who had intended to divest themselves before death of almost all of their personal wealth, had concluded:

(i) that it would be damaging to public confidence in FPG if they were to relinquish the majority of their personal shareholdings in FPG, then worth hundreds of millions of dollars;

(ii) that, if they retained their personal shareholdings in FPG, their heirs (including their children) would, when they died, inherit wealth which was very significantly in excess of the value of Grid Investors[4]; and

(iii) that there was, therefore, no longer any need for a private trust for the benefit of their children in addition to the personal wealth (largely in the form of FPG shareholdings) which their children would inherit upon the Founders' death.

[4] We were told that the Founders' issue had inherited about US$100 million each.

This wealth would, the Founders hoped, incentivise their children in any event to support FPG.

26. It was, Susan Wang says, apparent from this discussion that the Founders wished the GRT Trustee's Board to take these matters into account in determining the future appointment or distribution of the assets of the GRT.

27. In the light of the Founders' view, as expressed to Susan Wang by her father, the Board of directors of the GRT Trustee decided that the appropriate course was for the assets of the GRT to be transferred to the Wang Family Trust. The Board is said to have taken into account the Founders' view, expressed in YC Wang's discussions with Susan Wang, that the Founders felt that there was no longer any need for a private trust from which the children could potentially benefit; and considered that there had been a change of circumstance which altered the basis on which the GRT Trust had been formed in that (a) the Founders' children would now be inheriting substantial wealth from the Founders in any event; and (b) a private trust was no longer needed to incentivise them to be interested in the success of FPG companies, given that they would now be inheriting significant shareholdings in FPG companies upon the deaths of the Founders. The decision to wind up the GRT and to distribute the assets to the Wang Family Trust is said by Susan Wang to have been supported by, and consistent with the wishes of, her father and her uncle.

The Addition of Grand View as a Beneficiary

28. On **9 May 2005** the directors of the GRT Trustee determined, at their annual meeting, that the GRT Trustee would transfer the assets of the GRT to Grand View, as trustee for the Wang Family Trust. The GRT Trustee was authorised to execute an irrevocable deed by which (a) Grand View would be added as a beneficiary of the GRT; (b) except for Grand View, all the current beneficiaries of the GRT would be excluded as beneficiaries thereof; and (c) the assets of the GRT would be transferred to Grand View as trustee of the Wang Family Trust. It was also resolved that the GRT Trustee should take all necessary steps to terminate the GRT and that

following that termination, Grand View should be liquidated. The matters resolved upon did not immediately happen.

29. It was subsequently decided, after consultation with the GRT Trustee's lawyers, that it was in the best interests of the Wang Family Trust that the relevant assets should be paid and appointed to the trustee of the Wang Family Trust as an appointment or distribution under clauses 3.1. and 4.1 of the Declaration of Trust rather than by the exercise of a power in clause 9 to transfer capital or income to another trust. I refer to these clauses below.

30. By a declaration executed on **25 September 2005** by all five directors of the GRT Trustee it was recorded that the Directors had concluded that it was in the best interests of the Wang Family Trust, "*as a beneficiary of the* [GRT] *Trust*" (which at that moment it was not)[5] that the Trust Fund of the GRT be paid and appointed to the Wang Family Trust as a distribution pursuant to the power and authority contained in sections 3.1. and 4.1. of the Trust[6]. The Directors of the GRT Trustee then resolved, *inter alia*:

(i) that the GRT Trustee, in its capacity as Trustee of the GRT, should execute an Irrevocable Deed pursuant to which all of the assets of the GRT should be paid and appointed to the Wang Family Trust as a distribution from the GRT;

(ii) that, following that distribution, the GRT Trustee should terminate the GRT.

31. On **26 September 2005** the directors of the GRT Trustee executed, in Taiwan, an instrument described as an Irrevocable Deed whereby:

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[5] It does not seem to me that what happened can be said to be an intention to benefit a non-beneficiary because it was clear from May 2005 onwards that the intention was to benefit Grand View when it became a beneficiary, an addition that was itself intended.

[6] The Wang Family Trust was not made a beneficiary *totidem verbis*. Its trustee, Grand View, was made a beneficiary, in its fiduciary capacity as trustee for that trust.

(i) from 26 September 2005 Grand View, as Trustee of the Wang Family Trust, was included as Beneficiary of the GRT;

(ii) from the same date, with the exception of the Wang Family Trust, all current and future Beneficiaries of the GRT, including those described in the Second Schedule to the Trust Deed were excluded as Beneficiaries of the Trust;

(iii) it was declared that the GRT Trustee should take all steps necessary to pay and appoint the assets of the GRT to the Wang Family Trust;

(iv) it was declared that, following the distribution of all of the Trust Assets to the Wang Family Trust, the GRT should be and was thereby terminated.

32. The effect of what happened in September 2005 was that the entirety of the assets of the GRT passed to Grand View as Trustee of the Wang Family Trust and thus became assets of that Trust. That that is so is confirmed by the letter of addition from the GRT Trustee to Grand View of 27 September 2005 which provided:

> *"…we wish to add and hereby distribute our entire interest in 48,000 shares of U.S. $1.00 par value in Grid Investors Corp …**as an addition to the Trust Fund of the Trust*** **(i.e. the Wang Family Trust**)
>
> *To signify the Trustee's acceptance of the Property **as an addition to the Trust Fund, please arrange for an appropriate officer of the Trustee to sign a copy of this letter…"***

An officer of Grand View then signed under the following:

> *…By my signature below I (i) certify my authority to act on behalf of [Grand View] as the trustee of the Wang Family Trust and (ii) accept the Property on behalf of [Grand View PTC] **as an addition to the trust fund of the Wang Family Trust**".*

The Key Provisions of the GRT

33. **Clause 3.1**. provides as follows:

> *"The Trustees shall, during the Trust Period, hold the Trust fund and income thereof:*
>
> > *Upon such trusts in favour of or for the benefit of all or one or more exclusively of the other of others of the Beneficiaries;*
> >
> > *In such shares or proportions if more than one Beneficiary with and subject to such:*
> >
> > > *powers and provisions for advancement, maintenance, education or other benefit or for the accumulation of income;*
> > >
> > > *administrative powers; and*
> > >
> > > *discretionary or protective powers or trust*
>
> *as the Trustees shall, in their discretion, appoint, provided that the exercise of this power of appointment shall:*
>
> > *be subject to any applicable rule governing the remoteness of vesting;*
> >
> > *be by deed, or deeds revocable during the Trust Period or irrevocable and executed during the Trust Period; and*
> >
> > *not invalidate any prior payment or application of all or any part or parts of the capital or income of the Trust Fund made under any power or powers conferred by this Settlement or by law."*

34. **Clause 4.1.** provides as follows:

> *"4.1. In default of and subject to any appointment made under Clause 3, the Trustees may, during the Trust Period, pay, transfer, appropriate or apply the whole or any part of*

> *the capital or income of the Trust Fund to or for the maintenance, advancement, education or other benefit of all or such one or more exclusively of the other or others of the Beneficiaries in such shares and manner as the Trustees shall in their discretion and without being liable or account for the same think fit."*

35. **Clause 5** provides that "*Subject as aforesaid the Trustees shall, at the expiration of the Trust Period, hold the capital and income of the Trust Fund upon the trusts set out in the Third Schedule*". The Third Schedule provides, so far as material:

> "*In default of and subject to the powers contained in Clause 4 and 5*[7] *respectively of the above written Declaration, the Trustees shall, at the expiration of the Trust Period, divide the trust Fund into equal parts so that there shall be one such equal share for each of the children of Y.C. Wang and Y.T Wang and one such equal share for the issue, collectively, of such children of Y.C. Wang and Y.T. Wang who shall not then be living but who shall have left issue who shall then be living".*

Quite how this division was expected to work out in 2101 it is fortunately unnecessary to decide.

36. **Clause 6** provides that if all the previously defined trusts fail, the capital and income at the end of the Trust Period shall be held for charitable trusts.

37. **Clause 8.1.** provides as follows:

> *"8.1. The Trustees may, at any time before the expiration of the Trust Period by deed revocable during the Trust Period or irrevocable, declare that:*
>
> > *8.1.1 any* ***person or class or description of persons*** *shall, as from either the date of such deed or such later date as is specified and permanently or for such period as is therein mentioned, be* ***included***

[7] This must be a misprint for clauses 3 and 4.

as a Beneficiary *for the purposes of this Declaration, and any such declaration may be expressed to refer either to the whole or some part or share only of the Trust Fund and shall have effect accordingly; and*

8.1.2 any ***person or class or description of persons*** *then included as a Beneficiary shall, as from either the date of such deed or such later date as is specified and permanently or for such period as is therein mentioned****, cease to be a Beneficiar****y for the purposes of this Declaration, and any such declaration may be expressed to refer either to the whole or some part or share only of the Trust Fund and shall have affect accordingly",*

38. Clause 9 provides:

"Any power hereby or by law conferred on the Trustees to appoint, pay, transfer, appropriate or apply any capital or income of the Trust Fund to or for the benefit of any Beneficiary may, at the discretion of the Trustees , be validly exercised (without prejudice to the generality of such power or to any other mode of application) by ***paying or transferring the same to the trustees of any settlement*** *(wherever such trustees are resident and whether or not the proper law of such settlement is the Proper Law of this Declaration)* ***the provisions of which are in the opinion of the Trustees for the benefit of such Beneficiary****, notwithstanding that such settlement may also contain trusts , powers or provisions (discretionary or otherwise) in favour of some other person or object , but so that* ***no such payment or transfer shall be made which would or might infringe any applicable rule governing remoteness of vesting".***

39. Clause 10, headed "*Power to Amend*" provided:

"The Trustees may at any time and from time to time by deed supplemental hereto, amend in whole or in part any or all of the provisions of this Declaration except for the provisions of clause 23, which may not be amended".

40. Clause 23 provided that "*This Declaration shall be irrevocable*".

41. Clause 15 provides that "*every discretion or power hereby conferred upon the Trustees shall be* ***an absolute and unfettered discretion*** *or power*".

The Claim in the Action

42. The Plaintiffs, now Respondents, challenge the legality of the transaction effected on 26 September 2005 and seek a declaration that Grand View holds all the relevant assets on trust for the GRT Trustee together with other consequential relief. By a Summons under Order 14 dated 3 December 2018 the Plaintiffs sought, *inter alia*, summary judgment, their principal claim being that the replacement of individual discretionary and default beneficiaries combined with the resettlement of the trust assets for the benefit of a perpetual purpose trust were transactions beyond the scope of the discretionary power afforded to the GRT Trustee under the GRT.

The Judgment

43. The judgment of Kawaley AJ is a substantial work. In the following paragraphs I endeavour to summarise its essential reasoning.

44. The learned judge began by setting out the principles governing summary judgment applications [9] – [20]. He then turned to an overview of the evidence [27] – [29]. Having taken into account a number of considerations he decided [50] that it was appropriate for him summarily to determine the principal point of law raised by the Plaintiffs namely whether the exercise by the GRT Trustee of the powers under clause 8 of the Trust Deed was beyond the scope of the power.

45. The judge set out the submission of Mrs Talbot Rice QC for the Respondents that the donee of a fiduciary power commits a fraud on the power if the power is used for an ulterior purpose. As to that she had cited *Lewin on Trusts* 19th Edition at paragraph 29-290:

> "*The term fraud in this context does not necessarily denote any conduct on the part of the appointor amounting to fraud in the common-law meaning of the term or any conduct which could be properly termed dishonest or immoral. It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power. Such an exercise is void.*"

and, in particular the example given at 29-291 (3) that there is a fraud on the power if "*the power was exercised for some other purpose foreign to the power*".

46. He referred to the dictum of Lord Westbury LC in *Duke of Portland -v -Lady Topham* (1864) 11 HLC 32, at 54:

> "*…[T]he donee, the appointor under the power, shall, at the time of the exercise of that power, and for any purpose for which it is used, act with good faith and sincerity, and with the entire and single view to the real purpose and object of that power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object (I mean sinister in the sense of its being beyond the purpose and intent of the power) which he may desire to effect in the exercise of the power.*"

47. The judge accepted the principle that the scope of a power in a trust deed (a) may potentially be determined as a matter of construction of the instrument (without regard to extraneous evidence) and (b) limits the way in which the power may validly be exercised. To that, he said, there was an allied principle that discretionary powers are stamped with the character of the instrument that creates them, observing that that was uncontroversial in *Re a Trust (Change of Governing Law)* [2017] SC (Bda) 38 Civil, a case where he himself had said:

> "*20…As Mr Green QC and Mr Elkinson submitted in the Plaintiff's Skeleton, and Mr Barlow QC agreed:*

> *'27. There is a sound and long established jurisprudential basis for this view. As a matter of principle, the exercise of powers of appointment under discretionary trusts take their authority and character from the trusts themselves- that which is appointed is to be treated as 'written into the [trust] which created the power' (Muir v Muir [1943] AC 468, 481) …'*

48. The judge recorded [57] that it was ultimately common ground that the scope of a power conferred on trustees by a trust instrument may be determined as a matter of construction, citing a passage from the judgment of Lord Walker in *Pitt v Holt* [2013] 2 AC 108 at 135 F-G:

> "*60. In the core of his judgment Lloyd LJ correctly spelled out the very important distinction between an error by trustees in going beyond the scope of a power (for which I shall use the traditional term '**excessive execution'**) and an error in failing to give proper consideration to relevant matters in making a decision which is within the scope of the relevant power (which I shall term **'inadequate deliberation'**). Hastings-Bass and Mettoy were, as he rightly observed, cases in quite different categories. The former was a case of excessive execution and the latter might have been, but in the end was not, a case of inadequate deliberation. Lloyd LJ therefore withdrew his doubts about the conclusions that Lightman J had reached in Barr's Case [2003] Ch 409.*"

49. The judge then accepted [59] the submission of Mrs Talbot Rice that the power to add and exclude beneficiaries was a power of amendment of a special kind (the view expressed in *Lewin* at 30-056) but observed that this meant nothing more than that the practical effect of adding and excluding beneficiaries was to amend the terms of the original instrument and, when that power was conferred, it could be viewed as a power to amend the trust instrument in a specific as opposed to a general manner. I agree. He added:

> "*This categorisation is only significant in the present case as a gateway through which the rules of construction governing the implied limits on general powers of amendment may be accessed."*

50. The judge then turned to consider whether there was a legal prohibition on using general powers of amendment to change the underlying character or substratum of a trust. He concluded that there was, relying on a number of cases.

51. The first was *Dyer v The Trustees, Executors and Agency Co.td* [1935] VLR 273. The trust had been settled with a donation of £10,000, the purpose of which was expressed to be to assist in founding a permanent fund for establishing and maintaining a permanent metropolitan orchestra in the State of Victoria. Thereafter members of the public contributed to the fund. The income of the fund had been accumulated and invested by the trustee. It had not proved practicable to apply the income to establish the orchestra and the donor desired to alter the objects of the trust by the use of a general power reserved to himself in the trust deed to vary "*all or any part of the trusts and powers".* A draft deed of variation was prepared to provide that the accumulations of the income of the fund should be paid to three musical associations, and that future income should be paid to the last of those three until the expiration of 20 years from the death of the survivor of the donor and his wife, whereupon the income was to be applied for charitable purposes connected with the advancement of music or musical education in Victoria. The deed was submitted to the Court for approval.

52. The first instance judge had refused to approve the proposed change on the footing that it was impossible to hold that there was a power to depart from the purpose of the original donation or gift. No perpetuity issue was argued before him. On appeal, the Full Court of the Victoria Supreme Court held that the original trust was void, because it infringed the law against perpetuities[8].

[8] "*The trust to expend the income for the maintenance of an orchestra is therefore one which will become active only on an orchestra of the kind in question being established. It is impossible*

53. In their leading judgment on the appeal Irvine CJ and Gavan Duffy J dealt briefly with the variation point and held as follows:

> *"As to the argument that the proposed deeds of trust were within the power to "vary" …we have had some doubt. "Vary" itself, is apt enough to describe the substitution of one trust for another. The deed, however, has to be read as a whole, and on consideration we agree with the views expressed by Macfarlan J."*

54. In that case the deed declared its purpose in terms because of the expressed purpose of the donation (see [51] above), and because the trust deed directed the trustee to hold the £10,000 and all sums thereafter given or bequeathed in augmentation of the said sum, and the income thereof, upon trust to apply the income in or towards the maintenance of an orchestra in the State of Victoria.

55. In his concurring judgment Martin J observed:

> "*It would be strange if the donor who desired to help in founding a fund for a particular purpose,* ***and who expected others to contribute to that fund****, attempted to reserve to himself a power to* ***change the whole substratum of the gift,*** *not only as regards his own donation, but also the donations of others who subscribed money for the particular purpose. A power to revoke is common in deeds of this nature, and I cannot believe that the draftsman would not have included such a power had it been intended that the donor was to be entitled to benefit an object other than the one nominated in the deed. What are the limits of the power to vary is a very difficult question, which does not call for determination here, but I consider none of the draft deeds submitted falls within those limits, and that MacFarlan J. was right in*

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to say that such an orchestra will necessarily be established at all, let alone within any definite period; and as in our opinion there is no intention other than to maintain such an orchestra, the trust is void, and there is a resulting trust to the settlor, who can put the trust fund to any use he desires."

> *holding that 'it was impossible to use the moneys in such a way as will depart from the original purpose of the gift'.*"

56. In relation to those observations Megarry J, in *In re Ball's Settlement Trusts* [1968] 1 WLR 899 observed:

> "*That case, of course, is very different from this. No question arises here of other people subscribing to the trust fund, nor is there here present the form of wording upon which MacFarlan J. to some extent depended. But I borrow with gratitude from the language of Martin J. If an arrangement changes the whole substratum of the trust, then* ***it may well*** *be that it cannot be regarded merely as varying that trust.*
>
> *But if an arrangement, while leaving the substratum, effectuates the purpose of the original trust by other means, it may still be possible to regard that arrangement as merely varying the original trusts, even though the means employed are wholly different and even though the form is completely changed.*"

57. In that case Megarry J was concerned with whether the arrangement in question constituted a variation within the meaning of the *Variation of Trusts Act* or a resettlement[9]. He was not holding that an arrangement which changes the substratum of the trust could not be a variation but only that it might be ("*it may well be that*"). Much less did he have under consideration express powers of addition and exclusion of a beneficiary under a fully discretionary trust instrument.

58. Similarly, in *Re Courage Group's Pension Schemes-v-Imperial Brewing & Leisure Ltd* [1987] 1 WLR 495, there was an express prohibition on using the power of

[9] The distinction is potentially a fine one. The arrangement that was approved in *Ball's Settlement Trust* had been described, perhaps maladroitly, in the originating summons seeking approval as one *"revoking the trust of the above-mentioned settlement and resettling the subject-matter [thereof]*". In addition, Megarry J observed at 903 E that it did not follow that "*merely because an arrangement can correctly be described as effecting a revocation and resettlement it cannot also be described as effecting a variation in the trusts*". On that footing the question becomes whether the arrangement is a resettlement that can also be described as a variation or a resettlement that cannot because it goes further than a variation.

amendment to change the purposes of the pension scheme. Nonetheless, Millett J (as he then was) stated (at page 505):

> "*This is a restriction which cannot be deleted by amendment since it is implicit anyway.* ***It is trite law that a power can be exercised only for the purpose for which it is conferred, and not for any extraneous or ulterior purpose.*** *The rule-amending power is given for the purpose of promoting the purposes of the scheme, not altering them.*"

59. This passage was cited with approval by Lord Walker in the *Bank of New Zealand* case referred to at [63] below. Grand View submits, and I accept, that this was an orthodox expression of the improper purpose rule and not of a substratum rule of the type expounded by the Respondents.

60. The judge also referred to *Duke of Somerset-v- Fitzgerald* [2019] EWHC 726 (Ch), another 1958 Act case, in which the variation proposed was, in essence, the disapplication of the *Settled Land Act* to an existing settlement. In that case Master Teverson stated:

> "*19. In Wyndham v Egremont [2009] EWHC 2076 (Ch), Blackburne J. considered whether a term extending the trust period, and doing so for potentially so lengthy a period, when coupled with the other amendments and insertions in the proposed arrangement before him, were to be regarded as a resettlement of the fund. He said there was no bright-line test for determining whether an arrangement was a variation or a resettlement. He referred to what was stated by Megarry J in Re Ball's Settlement Trusts [1968] 1 WLR 899 at 905: -*
>
> *'If an arrangement changes the whole substratum of the trust, then it may well be that it cannot be regarded merely as varying that trust. But if an arrangement, while leaving the substratum effectuates the purpose of the original trust by other means, it may still be possible to regard that*

arrangement as merely varying the original trusts, even though the form is completely changed.'

20. Blackburne J. commented that this did rather beg the question what was meant by "the substratum" of the trust and "the purpose of the original trust". He said that useful guidance was to be found in Roome v Edwards [1982] AC 279. With that guidance, he concluded that the alterations contained in the arrangement before him were a variation of the pre-arrangement trusts and not a resettlement. He said at [24]: -

> *'The trustees remain the same, the subsisting trusts remain largely unaltered and the administrative provisions affecting them are wholly unchanged. The only significant changes are (1) to the trusts in remainder, although the ultimate trust in favour of George and his personal representatives remains the same; (2) the introduction of a new and extended perpetuity period.'*

21. In my view, the substratum of the trust refers to ***its beneficial core****. In Re Ball's Settlement Trusts at 905F Megarry J stated: -*

> *'In this case, it seems to me that the substratum of the original trusts remains. True, the settlor's life interest disappears; but the remaining trusts are still in essence trusts of half of the fund for each of the two named sons and their children in place of provisions for a power of appointment among the sons and their children and grandchildren and for the sons to take absolutely in default of appointment.'*
> *....*

26. I am satisfied looking at the arrangement as a whole that it takes effect as a variation rather than a resettlement. The substratum of the Settlement remains in place. The dynastic nature of the Settlement under clause 4 remains unchanged. The trustees remain unchanged. The beneficial interests are varied only to a very limited extent..."

61. Kawaley AJ referred to a passage in *Lewin* at 30-074 where, after noting that express restrictions are sometimes placed on a power of amendment, the authors say:

> *"A power of amendment must, like other limited powers, be used only for the purpose for which it is given and may be expressly confined in some way….*
>
> *Otherwise, its use must be confined to such amendments as can reasonably be considered to have been* ***within the contemplation of the parties when the trust instrument was made****, having regard to the nature and circumstances. Another way of expressing the point is that an amendment must not change the whole substratum of the trust or its basic purpose."*

62. The judge observed that this implied limit on a power of amendment could be viewed as a rule of construction applicable to powers of amendment generally and referred to the case cited in *Lewin* as authority for the passage cited above, namely *Bank of New Zealand* v *Board of Management of the Bank of New Zealand Officers Provident Association* [2003] UKPC 38. The issue in that case was whether a power to amend an occupational pension scheme extended to (i) granting benefits out of surplus to retired employees who were no longer members of the scheme; and (ii) imposing new contribution obligations on scheme employers.

Bank of New Zealand

63. In the *Bank of New Zealand* case Lord Walker said this:

> "18. *The crucial issue in this appeal is the scope of the power of amendment contained in rule C 1.5.1 of the current rules. That power is subject to some express restrictions, but it is not suggested that the proposed amendments would infringe them (all existing pensioners and members will retain their accrued rights, and their rights will continue to be amply secured). Nor is the power subject to the wide restrictions contained in section 9 of the Superannuation Schemes Act 1989, since the*

scheme was established by statute, not by a trust deed. ***Any relevant restriction is to be derived from the general principle that a power must be used only for the purposes for which it must be supposed to have been intended.***

19. Formulated in that way, the general principle tends to beg the question. How is the court to discern the limits of the proper purposes and scope of a power of amendment?

....

Before I consider this question, I should make some general observations on the approach which I conceive ought to be adopted by the court to the construction of the trust deed and rules of a pension scheme. First, there are no special rules of construction applicable to a pension scheme; nevertheless, its provisions should wherever possible be construed to give reasonable and practical effect to the scheme, bearing in mind that it has to be operated against a constantly changing commercial background. It is important to avoid unduly fettering the power to amend the provisions of the scheme, thereby preventing the parties from making those changes which may be required by the exigencies of commercial life. This is particularly the case where the scheme is intended to be for the benefit not of the employees of a single company, but of a group of companies. The composition of the group may constantly change as companies are disposed of and new companies are acquired; and such changes need to be reflected by modifications to the scheme.

Secondly, in the case of an institution of long duration and gradually changing membership like a club or pension scheme, each alteration in the rules must be tested by reference to the situation at the time of the proposed alteration, and not by reference to the original rules at its inception. By changes made gradually over a long period, alterations may be made which would not be acceptable if introduced all at once. Even the main purpose may be changed by degrees..."

64. Kawaley AJ accepted that the rule of construction relied on was a general rule of construction, as appeared from the following passage from *Hole-v-Garnsey* [1930] A.C. 472 at 500 where Lord Tomlin opined as follows:

> "*In construing such a power as this, it must, I think, be confined to such amendments as can reasonably be considered to have been within the contemplation of the parties when the contract was made, having regard to the nature and circumstances of the contract. I do not base this conclusion upon any narrow construction of the word amend in Rule 64, but upon a broad general principle applicable to all such powers.*
>
> *If no such principle existed, I see no reason why a dairy society in Wiltshire should not by means of the exercise of such a power as the one under consideration find itself converted into a boot manufacturing society in Leicester...*"

65. The upshot of his analysis was that the judge held there to be two legal rules applicable as a matter of settled law (whether as a rule of construction or a species of fraud on a power), namely:

(a) that a general power of amendment may not be exercised in a way which results in what amounts to a revocation and resettlement of the original trusts [72];

(b) that a general discretionary fiduciary power of amendment on any kind may not be used to alter the substratum of the trust instrument from which the power derives its existence [74].

66. The judge then turned to consider, by reference to the cases cited to him, how you identify what constitutes the substratum of the GRT, which he said was far from a straightforward matter. He referred to the observations of Blackburne J (see [60] above) in *Wyndham v Egremont.* The judge said that he found it difficult to extract from a decision in which the facts did not come close to changing the substratum

of the trust a precise formula for working out when they would. But he thought that the implication of *Wyndham* was that where the trustees and the ultimate beneficial interests are changed it might be said that this was an alteration of the substratum.

67. The judge then referred to *Duke of Somerset-v-Fitzgerald*. As to that he percipiently observed:

> "*The rule of construction which is engaged by the present inquiry, it is important to remember, does not only apply to instruments with narrowly defined trustee powers. The primary purpose of the rule is to ensure that the wishes of the settlor as expressed in the instrument (and, to a lesser extent, in letters of wishes) are honoured in the administration or implementation of the trust. A secondary function of the rule of construction is, it seems to me, to lay down implied outer boundaries for the exercise of broadly drafted discretionary fiduciary powers, such as powers of amendment whether simpliciter or of a special kind. So there is some circularity in the Defendant's insistence that the breadth of the powers conferred on the Trustee of the GRT makes it impossible, breach of fiduciary duty apart, to impose any implied limits at all on their exercise. On the other hand, any case for imposing implied limits on the scope of broadly drafted powers (such as those conferred by clauses 8.1 and 8.2) must deal with the inevitable counterpoint that express limits could have been imposed."*

68. The judge accepted [93] the submission of Mr Adkin QC for Grand View that "*it cannot be beyond the scope of a broad power to add and exclude beneficiaries that the power should be exercised in the interests of the beneficiaries it is proposed to remove*". It is plain that what he meant was that powers of addition and exclusion do not have to be exercised for the benefit of the existing beneficiaries "*for if that were so it is hard to see how* [the duty to consider exercising the power] *could be exercised at all and it must be owed more widely*": *Lewin* at 30-058; *Shui Pak Nin and HSBC International Limited* [2014 (1) CILR 173 at [147].

69. He also accepted that Mr Adkin had identified one judicial statement which at first blush refuted the Respondents' central thesis. In *Re Z Trust* [1997] CILR 248 Smellie J (as he then was) observed:

> *"As was emphasized in the Australian case Kearns v Hill, which was cited in the arguments, a power of variation in the trust instrument is not to be construed in a narrow or unreal way. A power which (on the facts of that case) on its natural meaning included a power to vary the identity of beneficiaries of a trust by the addition of beneficiaries* ***could not be limited by reference to an historical presumption against variations which alter the main structure of, or beneficial entitlements under, trusts. In other words, 'any' means 'any': 21 N.S.W.L.R. at 109, per Meagher J."***

70. The judge pointed out, however, that the central holding in that case was that the relevant power was a personal and not a fiduciary power so that the dictum did not provide a competing legal theory which potentially ousted the scope of power doctrine from its application to the realm of fiduciary powers such as those at issue in this case

71. The judge expressed the view that the substratum concept was to be derived from a global view of the trust rather than a single clause [95]. He referred to the "*wise words"* of Lord Mance in *Re Sigma Finance Corp* [2010] AER 571, 582 where he said:

> "*12. In my opinion, the conclusion reached below attaches too much weight to what the courts perceived as the natural meaning of the words of the third sentence of clause 7.6, and too little weight to the context in which that sentence appears and to the scheme of the Security Trust Deed as a whole. Lord Neuberger was right to observe that the resolution of an issue of interpretation in a case like the present is an iterative process, involving 'checking each of the rival meanings against other provisions of the document and investigating its commercial consequences'…*"

72. The judge went on to find that the fact that the express power of amendment could not extend to amending the irrevocability clause was a strong indication that an important part of the substratum of the GRT was its character as an irrevocable settlement. This supported a construction of the Declaration which imported by implication an assumption that the settlor did not wish to retain the right to change his mind and revoke the GRT [96]. He then went on to say that "*the critical question invariably is not what was the substratum of the trust but whether or not (assuming the trust to be an irrevocable one) the impugned exercise of the power amounts to a necessarily impermissible revocation of the original trust*".

73. The judge summarised the most important features of the GRT as follows [109]:

(a) i*t was an irrevocable discretionary trust for the benefit of the Founders' children and remoter issue;*

(b) the default beneficiaries were also the Founders' children and remoter issue;

(c) broad powers of amendment, addition and exclusion of beneficiaries and appointment out were conferred on the Trustee;

(d) the Trust Period was 100 years; and

(e) only the irrevocability clause was not capable of amendment.

All of these features, he held, combined to constitute the substratum of the GRT and the most significant individual feature for present purposes was the irrevocability clause.

74. The judge then turned to consider whether the decision to appoint the Wang Family Trust as sole beneficiary in place of the original family beneficiaries and make an appointment to the Trustee of that trust of all the GRT assets was void because it

was beyond the scope of the powers of the GRT Trustee. As to that he found that any transaction which effectively revoked the Trust and resettled the assets on new trusts would prima facie involve changing the substratum of the Trust [111]. He went on to find as follows:

> "[113] *The original trusts in the present case consisted of family Beneficiaries and default beneficiaries whose rights would vest in 100 years. Replacing the family Beneficiaries and default beneficiaries with purpose trusts which are perpetual* ***would prima facie constitute resettling the Trust assets on entirely new trusts and effectively revoking the original trusts altogether rather than merely amending or varying them.*** *The transactions expressly contemplated the liquidation of the Trustee. This finding is based on the legal proposition that a general power of amendment may not be used to change the substratum of a trust, because such powers are limited to deployment in implementation of the original trusts, not to bring them to a premature end."*

75. He contrasted what had happened in this case with the facts of three cases previously referred to (In *Re Balls Settlement Trusts*; *Wyndham v Egremont;* and *Duke of Somerset v Fitzgerald*) where there was not held to be a change in the substratum. He identified [115] the key elements of the impugned exercise of the discretionary powers as follows:

> *"(1) the family Beneficiaries and default beneficiaries were excluded and a purpose trust was added as the sole Beneficiary;*
>
> *(2) all of the assets in the GRT were appointed to the Defendant as Trustee of the purpose trust;*
>
> *(3) the Trustee of the GRT was subsequently wound up and dissolved;*
>
> *(4) the substantive result was that the assets of the GRT were resettled on the trusts of the Wang Family Trust,*

which were entirely different to the original beneficial core of the GRT."

76. He then accepted that what occurred changed the substratum of the Trust; a conclusion which was not defeated, he held, by the fact that the power to vary was a very broad one. As to that, the most important features of the surrounding context were, in his judgment, that the GRT was established on the same date as the purpose trusts, for the sole benefit[10] of the children and remoter issue of the Founders, who were also made default beneficiaries. This accentuated the family nature of the core identity of the Trust, as expressed in the Declaration of Trust, and made it impossible to infer an intention (or contemplation) that (a) the power to add and exclude beneficiaries should be used to create entirely new beneficial interests instead; and (b) that the powers of appointment should be used to resettle all of the assets on new trusts long before the end of the Trust Period.

77. The judge summed up the oral argument that had been presented to him at its highest as the following [117]:

"(a) the GRT and the purpose trusts were settled in 2001 as part of a composite estate planning exercise by the Founders who had initially envisaged a single trust;

(b) the overarching impulse for all trusts was the Founders' Vision that their children and descendants should contribute to society and live modest lives;

(c) the GRT made modest financial provision for the Family in line with that Vision and was primarily intended to encourage support for FPG;

(d) by 2005 the estate planning exercise had been modified so that the function served by the GRT was met through alternative means. Accordingly, the winding-up of GRT and resettlement of assets on new trusts was in reality merely

[10] The Deed does not say that. The issue of the Founders were the beneficiaries specified in Schedule 2 subject to the power to add or exclude.

> *an administrative change and the 'new trusts' were in reality no different to the old."*

78. The judge went on to consider the extent to which evidence of background facts was admissible [120] – [121] and held as follows [122]:

> *"The Defendant's evidence does not clearly fall into any of these three categories [*of admissible background material – see [121]). *It sheds light on the Founders' motivations and wishes, and effectively confirms that the GRT instrument actually reflects the drafter's intention at the time. The evidence does not seek to resolve ambiguities in the language nor does it suggest anything has "gone wrong" with the language used. Most clearly the Defendant's evidence explains why the GRT was brought to an end in 2005 and how the resettlement of the assets on the purposes of the Wang Family Trust was essentially in fulfilment of the same broadly defined trust purposes as those of the original Trust. This evidence is clearly admissible (and relevant) in defence of the breach of fiduciary duty claim; it is almost as clearly inadmissible and/or unpersuasive in any event as an aid to construing the GRT instrument.* ***What happened after the instrument was executed is wholly irrelevant****. The fact that the Founders wished to incentivize the Beneficiaries to support FPG does not undermine the meaning to be assigned to the key provisions in the instrument: that the Trust was expressed to be "irrevocable"; that the Beneficiaries were all family members; that the default beneficiaries were also family members. It is one thing to demonstrate that contextual evidence is potentially relevant to the construction of an instrument. It is another to demonstrate that the potentially relevant evidence does in actuality logically support a particular interpretation of the document under consideration."*

79. In a later paragraph [125] he said:

> *"The best informal indication of the force and inherent merits of the Plaintiffs' construction argument is the great lengths to which the Defendant's counsel went to persuade the Court that extraneous evidence needed to be explored at*

trial rather than welcoming a summary analysis of the key characteristics of the GRT as expressed in the Trust instrument. The interpretative task entailed in deciding whether the impugned transactions fell within the scope of the GRT instruments' relevant powers, absent ambiguities and/or linguistic infelicities, requires the focal point of the analysis to be the instrument; not the surrounding context and rationales. The Defendant's evidence (assumed for present purposes to be true) shows that the instrument formed part of a wider estate planning process and that, viewed from that strategic standpoint, winding-up the GRT and transferring its assets to a purpose trust ***was seen as no more than an 'internal' administrative change****. This explains why the Trustee exercised its powers in the way it did in 2005 without shedding any meaningful light on the beneficial character and purpose of the GRT when it was settled in 2001 as a discretionary trust with family beneficiaries.*

80. The judge added [127]:

"*The walls of the trust law temple will potentially tumble down if settlors are permitted to execute instruments on an irrevocable basis and later effectively revoke them for the* ***purposes of little more than administrative convenience, almost as if the terms of the instrument have no legal significance****. If I regard any provisions in the GRT as critical to this analysis, it is the provisions of the amendment power (Clause 10) which specify that the irrevocability clause (Clause 23) may not be amended. This aspect of the instrument was unambiguously intended to be "immutable". It ought to be possible for even mere objects of a discretionary power, particularly where they and their issue are also default beneficiaries, to rely on the express terms of an irrevocable instrument such as this and make their own estate and tax plans accordingly. In the unlikely event that the crafters of trust instruments wish to assume the legal and other consequences of diluting the irrevocable element of discretionary trusts, this intention should be clearly expressed. Trustees can then enjoy the benefits of*

increased flexibility in terms of winding-up trusts to meet the exigencies of unexpected changes of circumstances."[11]

81. Accordingly, the judge found [128] that the Plaintiffs were entitled to a declaration that the purported transactions of 26 September 2005 were void because they were beyond the scope of the powers conferred by the trust instrument.

82. The judge then addressed the remoteness of vesting issue (with which I deal below); and the alleged limitation defence, which he rejected: [134] – [152]. He also considered the invalid execution issue, namely the contention that the deed which purportedly affected the impugned transactions was invalidly executed and declined to determine the point summarily: [153] – [173].

83. In conclusion the judge found [175], *inter alia*, that the GRT Trustee had no power under the Declaration of Trust effectively to revoke a private family trust and resettle the trust assets for the benefit of a purpose trust. The judge found that the Plaintiffs were entitled to a declaration that Grand View held the assets of the GRT on trust for the GRT.

The Parties' Submissions

84. We have received very extensive submissions, both in writing and orally, for which we are grateful, from Counsel for, on the one hand (a) the Appellant; and (b) Jennifer Wang in support of the Appellant; and (c) the Respondents; and (d) Tony Wang, in support of them, together with five lever arch files of authorities, from several different jurisdictions, many of which have been cited by both sides but for different purposes. I set out below what seems to me the kernel of these submissions. In

[11] Grand View submits, in my view correctly, that this formulation does not take sufficient account of the fact that the existing beneficiaries as at 2005 had no property interest in the assets of the trust, only a right, whilst they remained beneficiaries, to be considered, and that, in circumstances where the assets could be appointed to any one or more of the beneficiaries and any one or more of them could be excluded, any assumption by an existing beneficiary that he or she would receive any aliquot portion of the trust assets was speculative or, at best, uncertain.

doing so I shall set out the salient passages of the authorities to which counsel referred. Since Grand View submits that the Respondents have stitched together a series of quotations at times taken entirely out of context, I shall add to the summary reference to matters not referred to in the submissions which may qualify what has been said.

The Appellants

85. The Appellants have three basic submissions.

86. First, they submit that the Trust Deed gave to the GRT Trustee very extensive powers of amendment. In addition to the general power of amendment under clause 10, the limits of which might have been debatable, clause 8 of the Deed gave the GRT Trustee very specific powers to declare that any person or class or description of persons, should be included as a beneficiary; or that any person or description of persons included as a beneficiary should cease to be a beneficiary. "*Person*" was very widely defined (see [16] above) and included someone acting in a fiduciary capacity.

87. The terms of the power could scarcely have been wider. "*Any*" means what it says; there was no restriction whatsoever on who might be added. The power to add was a discretionary power which was, therefore, only to be exercised after "*adequate consideration*".[12] But the power was not expressed to be subject to any fetter; nor should any be implied. On the contrary, clause 15 provided that "*every discretion or power hereby conferred upon the Trustee shall be an absolute and unfettered discretion or power*". Those words mean what they say and freed the GRT Trustee from any fetter that might otherwise have affected its ability to appoint "*any*" person as a Beneficiary. It is difficult to see how the draftsman could have made it clearer than he did that the power granted was not to be subject to some implied fetter

[12]The Respondents accept that they were not entitled to summary judgment on the alternative claim that the 2005 Transactions were void or voidable because they were undertaken with inadequate deliberation by the GRT Trustee.

restricting the use of the power to the addition of beneficiaries in accordance with some putative but unexpressed scope. The judge did not apply the ordinary rules of construction. In effect he ignored the plain and unambiguous meaning of the words used in the Declaration.

88. Secondly, not only was there no basis for implying the restriction which the judge did but the reasoning by which he deduced a "substratum", which limited the scope of the powers conferred on the GRT Trustee to add beneficiaries, was unsound and the conclusion that he reached unsupported by the authorities on which he relied or by principle.

89. Thirdly, in finding an interference with the substratum the judge misdirected himself by treating the distribution of the trust assets as if it were a revocation of the GRT. It was no such thing. The GRT Trustee appointed Grand View as a beneficiary. It then distributed all the assets of the GRT to Grand View as a result of which the trust came to an end. The Trust Deed gave the settlor, which in this case was the GRT Trustee, which had declared the trust, no power to revoke; it did not do so; nor were the assets resettled. If the GRT had been revoked the assets would have reverted to the settlor - as explained by Lord Collins in the Privy Council's decision in *TMSF v Merrill Lynch Bank and Trust Co Ltd* [2012] 1 WLR 1721[13] - but they never did. The Trust was fulfilled by the distribution of its assets to a person, as defined, which was validly added as a beneficiary.

90. The judge appears also, from one passage of his judgment to have regarded the Founders or Mr Hung and not the GRT Trustee as having made the decision to add Grand View as a discretionary beneficiary and remove the existing ones, and transfer the assets to Grand View. In [127] of his judgment he said (see above):

> *"The walls of the trust law temple will potentially tumble down if* ***settlors*** *are permitted to execute instruments on an*

[13] See also *Waters' Law of Trusts in Canada* (4th edition, 2012) at pages 384 to 385.

> *irrevocable basis and later effectively revoke them for the purposes of little more than administrative convenience, almost as if the terms of the instrument have no legal significance."*

91. In fact, the relevant decisions, which did not constitute a revocation, and were not affected for administrative convenience, were taken by the Board of the GRT Trustee, taking account, as they were bound to do, the wishes of the Founders (the economic settlors).

92. The Appellants submit (and, as will become apparent, I agree) that the applicable legal framework is as follows:

(a) A challenge may be made on the basis that the trustee has acted beyond the scope of the relevant power. Whether he has done so or not depends on the proper construction of the power; see *Thomas* on Powers 12th Edition at 8-06. This is Lord Walker's "*excessive execution*";

(b) A challenge may be made on the basis that the trustee has failed to give proper consideration to relevant matters in making a decision which is within the scope of the power: Lord Walker's *"inadequate deliberation*";

(c) A challenge may be made on the basis that the trustee has acted ostensibly within the scope of the relevant power but for an improper purpose. This is a question separate and distinct from the excessive execution doctrine, as was explained in *Eclairs Group v JKX Oil & Gas Plc* [2016] 3 All ER 641 by Lord Sumption (with whom the rest of the UK Supreme Court agreed on this point) at paragraph 15:

> *"… the proper purpose rule is not concerned with excess of power by doing an act which is beyond the scope of the instrument creating it as a matter of construction or implication. It is concerned with abuse of power, by doing*

acts which are within its scope but done for an ulterior purpose."[14]

93. As to the scope of the power, the principles of construction which apply to a document such as a declaration of trust are the same as those which apply to a contract: *Marley v Rawlings* [2015] A.C. 129, [17]- [23]; *Richards v Wood & Wood* [2014] EWCA Civ 327. The most important aspect of the process of construction is to consider the meaning of the words used; per Lord Neuberger at [17] and [18] of *Arnold v Britton [*2015] A.C. 1619. The meaning of clause 8.1. is unambiguous. The GRT Trustee had power to include **any** person; the person could be one in a fiduciary capacity (e.g. as trustee of the Wang Family Trust); and the addition of Grand View in that capacity was plainly within the scope of the power (as was the removal of the existing beneficiaries)[15]. The unfettered nature of the power is confirmed by the provisions of clause 15.

94. There is no need to imply a term which cuts down the breadth of the powers of addition and exclusion. In contract for such a term to be implied it must be either necessary to give the contract commercial or practical coherence, or so obvious that it goes without saying: see *Marks and Spencer plc v BNP Paribas Service Trust Co (Jersey) Ltd* [2016] AC 742 per Lord Neuberger (with whom the majority of the UK Supreme Court agreed) at paragraphs 17 to 21.[16] This approach should be adopted in relation to the implication of terms in unilateral instruments such as trust deeds. There is no need to imply some restriction to give the Declaration of Trust commercial or practical coherence. The trust was created by the bounty of the settlor; and the original beneficiaries were mere volunteers[17] so that no implied term

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[14] See also the decision of Lord Wilberforce giving the judgment of the Privy Council in *Howard Smith v Ampol Ltd* [1974] AC 271 at 834A-D.

[15] It is not strictly necessary to consider the power of exclusion because, if the power to add was valid, the assets could be distributed to the added beneficiary whether or not the existing beneficiaries were excluded.

[16] This approach was adopted by the Privy Council in *Paymaster (Jamaica) Ltd v Grace Kennedy Remittance Services Ltd* [2017] UKPC 40.

[17] Each beneficiary had a defeasible right whilst he/she remained a beneficiary to be considered from time to time as a recipient from the trust, subject to the right of the Trustee to add different beneficiaries and, in any event to distribute to someone other than him or her.

is necessary to provide commercial coherence to the Declaration. On the contrary there is no reason to suppose that the settlors did not wish their Trustee to enjoy the maximum flexibility to meet unforeseen circumstances. Any implied term which would preclude what happened in 2005 is far from obvious. Further, the case put forward by the Respondents would have the paradoxical consequence that what is known to be the way in which the settlors would have chosen to respond to the change in circumstances (because they said so), is, despite the clarity of the language of the Declaration which must be taken to have reflected the intentions of the settlors when setting up the Trust, forbidden.

95. The judge was in error in saying (see [49] above) that the rules of construction governing the implied limits on general powers of amendment could be applied. That observation failed to take into account the marked difference between a general power of amendment, such as that contained in clause 10, and the very specific powers of amendment and exclusion contained in clause 8. In the case of a clause such as clause 10, the question may arise whether the change proposed can properly be said to constitute an '*amendment*', or whether the change goes further than that word will allow. Conversely, where there are specific powers to add and exclude '*any person*' as a beneficiary, as there are in the Declaration of Trust, no such question arises, because the terms of the powers unambiguously extend to the addition and exclusion of anyone. No authority was cited to the judge, or has since been found, in which the scope of clauses such as clause 8 has been cut down.

The substratum rule

96. The second error underlying the judge's conclusion was the Respondents' proposition, accepted by the judge, that there exists a rule of construction which prohibits powers of amendments from being exercised in a manner which alters the "substratum" of the trust. In truth there is no such rule. The adoption of such a rule would constitute a fundamental departure from the ordinary principles of

construction and implication of terms. See the passage from *Thomas on Powers* cited by the judge at paragraph [54] of the judgment:

> *"As with all other powers, the scope of a power of amendment will depend on its express terms, or on what may properly be implied. This is a process of ascertaining the meaning of the provision under review."*

97. The cases relied on by the judge and the Respondents do not establish such a proposition. *In Re Dyer*, which appears to be the *fons et origo* of the "substratum" concept lays down no general rule. The passage in the judgment of Martin J referred to at [55] above simply points out that, in circumstances where the settlor has established a fund for a particular expressed purpose to which he expected others to contribute, it can hardly have been intended that he reserved to himself the power to alter that purpose as part of a general power to 'vary' the terms of the trust deed. Martin J does not refer to the existence of any rule of construction prohibiting the use of powers of addition and removal of beneficiaries so as to prohibit the alteration of any 's*ubstratum*' of the relevant trust. The facts of the case were markedly different from the present case, where there is no expression of a specific purpose of the trust in the Declaration of Trust itself and no expectation that others would contribute to the fund; and where the relevant power whose exercise is under attack is not a general power to 'vary' but specific, express and wholly unambiguous powers of addition and exclusion.

98. The judge was also in error in his reliance on the line of cases decided under the *Variation of Trusts Act 1958*, section 1(1) of which confers jurisdiction on the Court "*to approve any arrangement…varying or revoking*" a trust on behalf of a minor. Authority establishes that the Act does not confer jurisdiction on the Court to approve a resettlement of the trust. The position is summarised in *Snell 33rd edition* at 29-051 as follows:

> *"… before the Act the court had no power to direct a settlement of a minor's property, and so it has refused to construe the Act as conferring such a jurisdiction."*

99. In that context, in a number of cases decided under the 1958 Act, the Courts have found it useful, in considering whether the proposal before them amounted to a variation or a resettlement to consider whether it would alter the substratum of the trust, picking up from Martin J's *obiter dictum* in *Dyer*. *Re Ball's Settlement Trust*, cited in the judgment, was such a case. The same approach was adopted in later decisions under the 1958 Act cited by the judge namely *Wyndham v Egremont*; *Re McCullagh's Will Settlement* [2018] NICh 15, which was a decision under legislation in materially the same terms as the 1958 Act in which the Court adopted the approach set out in *Re Ball's Settlement Trusts;* and *Duke of Somerset v Fitzgerald*.

100. None of these cases establish any rule which prohibits the powers of addition and removal in clause 8 from being used to alter the substratum of the trust. The question whether or not a particular proposal would alter the substratum of the trust arises in the 1958 Act cases in the context of deciding whether or not such a proposal would constitute a variation or a resettlement (a distinction not always easy to draw), and consequently whether the approval of it would fall within the powers given under the Act. The question in the present case is not whether the 2005 transaction effected a "variation" within the meaning of the 1958 Act or, instead, effected a resettlement; nor whether it constituted a "a variation"; but whether the addition of Grand View as a beneficiary fell within the scope of the power to add "any person" as such[18].

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[18] The Judge was mistaken in his observation at paragraph 67 of the Judgment that *"… if an unfettered statutory discretion to vary a trust is constrained by an* ***implied requirement*** *to have regard to the substratum of the relevant trust, ought the case for imposing such restraints when construing an instrument in the context of exercising a purely equitable jurisdiction not be even stronger?"* The Court was not constrained in the 1958 Act cases by an implied requirement to have regard to the substratum of the relevant trust, but only by the language of the statute, read in its context, which permitted the Court to approve a variation of the relevant trust but not a resettlement.

Other cases relied on by the judge

101. Grand View submits that the other cases referred to by the judge do not support the proposition either. The dictum of Millett J (as he then was) in *Re Courage Group's Pension Schemes v Imperial Brewing Ltd* [1987] 1 WLR 495 at page 505, which concerned an express restriction in a pension trust prohibiting the use of the power of amendment to change the purposes of the pension scheme, does not do so either.

102. It is indeed trite law, as Millett J said, that a power can be exercised only for the purpose for which it is conferred, and not for any extraneous or ulterior purpose. That is an orthodox expression of the improper purpose doctrine. It does not evidence the existence of some free-standing rule prohibiting a power of amendment, still less powers of addition and exclusion, from being used in a way that might be said to alter the 'substratum' of a trust. The same goes for the dictum of Lord Walker in *Bank of New Zealand v Board of Management of the Bank of New Zealand Officers Provident Association* [2003] UKPC 38, *"The crucial issue in this appeal is the scope of the power of amendment contained in rule C 1.5.1 of the current rules. That power is subject to some express restrictions, but it is not suggested that the proposed amendments would infringe them … Any relevant restriction is to be derived from the general principle that a power must be used only for the purposes for which it must be supposed to have been intended."*

Hole v Garnsey

103. The judge also cited [70] a passage from the judgment of Lord Tomlin in the House of Lords case of *Hole v Garnsey* [1930] AC 472. The question in that case was whether a power of amendment contained in the rules of a society registered under the *English Industrial and Provident Societies Act 1893*, which permitted amendments passed by a two-thirds majority of members, could validly be used to require a member of the Society to subscribe for additional shares in the society if

he had neither voted in favour of the amendment nor otherwise assented to it. The majority found that it could not.[19]

104. **Viscount Dunedin** reasoned (page 490) that the alteration *"did not simply affect the rights of the member in the capital of the Society, but imposed a perfectly new and outside liability on him"* and rejected the amendment on that basis. **Viscount Sumner** (page 490) characterised the Society's argument as *"virtually a claim that an association, registered under the Industrial and Provident Societies Acts, can, by the exercise of its power to make regulations and to alter or rescind them, compel members to invest capital in its business against their will without, so far as I can see, any limit at all."*

105. **Lord Atkin** said (page 493) that "*If a man enters into association with others for a business venture, he commits himself to be bound by the decision of the majority of his associates on matters within the contemplated scope of the venture. But outside that scope he remains dominus, and cannot be bound against his will."* He further held (at page 496) that *"I think that the consent of a member to such a rule as [the amendment rule] is not an assent to have the purposes of the society or the amount of his share subscription altered against his will."*

106. **Lord Tomlin** concluded (page 501) that the society could only make the alteration it sought to make *"if the power to amend the rules justifies it as a matter of contract. In my opinion the power does not justify it. I do not think that it is within the contemplation of the parties to a bargain of this kind that they should be made liable for a compulsory levy or expenditure over and above the contributions payable or to become payable under the original terms. On the contrary I think the basis of such a bargain is that the extent of the member's liability is limited by the original terms and that it cannot be enlarged by any amendment of the rules."* At page 500 Lord Tomlin expressed the view which is quoted at paragraph 70 of the Judgment in the present

[19] Lord Buckmaster dissented and did not express a view on the point presently in issue.

case and in paragraph [64] above.[20] Both Viscount Sumner and Lord Toulmin looked at the effect of the alterations in substance, which was to compel the members of the Society to pay over again for two-thirds of the nominal value of their original shares.

107. These dicta of the majority, the Appellant submits, make the same essential point: a general power of amendment contained in a multilateral agreement (such as the rules of the society in that case) cannot be used so as to impose new obligations on the parties to that agreement if the use of the power for that purpose was not within the contemplation of the parties to the agreement when it was agreed. That makes perfect sense: where parties have contracted and provided consideration on a particular basis it is unlikely they would have intended to confer a power to alter wholesale the basis on which they contracted so that further burdens could be imposed upon them unilaterally.

108. This is very different from saying, as the Respondents do, that in a non-commercial trust for volunteers, which contains express powers to add and exclude any person as a beneficiary, the exercise of those powers is constrained by an implied prohibition on the alteration of the 'substratum' of the trust, even where the powers are exercised by the trustee in accordance with what it knows to have been the settlor's wishes both when the trust was established and when the powers were exercised.

Authorities not cited to the judge

109. The Appellant submits that there are a number of authorities, only one of which was cited to the judge, in which the court has made clear that the scope of a widely drafted power of amendment should not be cut down in reliance on some supposed presumption against making a fundamental change to the relevant trust.

[20] This is also the foundation of the passage from *Lewin* cited by the Judge at paragraph 68 of the judgment and at [61] above.

Kearns v Hill

110. The first of those (not cited to the judge) is the decision of the Court of Appeal of New South Wales in *Kearns v Hill* (1990) 21 NSWLR 107, which concerned a fiduciary power to "*vary or amend any of the provisions*" of a trust deed (with one immaterial exception). The trustee sought to exercise the power to add a new class of beneficiaries under the trust and was permitted to do so. In the Court of Appeal, Meagher JA (as he then was), after referring to cases in which it was said courts had read down wide powers of variation, made the following observations at paragraphs 110-111:

> *"Such cases certainly exist. Duke of Bedford v Marquess of Abercorn is one. Re Dyer is another, and it was cited with approval by Megarry J, as he then was, in Re Ball's Settlement Trusts. In the Duke of Bedford's case it was held that, in determining the ambit of a variation clause it is legitimate to consider its scope and evident purpose, but that consideration is not of much use when the evident purpose of the power is to ensure maximum flexibility. In Re Dyer it was held that the power of variation contained in a particular trust deed did not extend to varying the trust in a way which would destroy its 'substratum'. That, again, is not really helpful in the present context, where either it is impossible to locate any substratum at all, or alternatively, the relevant substratum is the benefit of the descendants of a named person, and the interests of that class are being actively promoted rather than diminished by the [proposed variation]. I put to one side the obvious consideration that each deed must be considered in its own particular context, so that no other deed executed in different circumstances and in different language can decide the fate of a given deed. I also put to one side the equally obvious consideration that the conditions which existed in England in 1850 are not necessarily the same as those which existed in New South Wales in 1970. On the other hand, it is impossible to discern in the deed of trust any intention that the list of beneficiaries contained in cl. 1 should remain perpetually inviolate."*

111. Mahoney JA held at paragraph 108 as follows:

> *"[Counsel for the respondents] properly submitted that, in determining the construction of a clause authorising the variation of the provisions of a trust, it is legitimate to consider what was the purpose and intent of that clause. In earlier times, the view was taken in some cases that, as [counsel] submitted, the intention of the settlor was that the alterations to be made should not alter the main structure of the trust or the beneficial entitlements under it. I doubt that that would be seen as the intention of such a clause at the present time. As the precedent books show, discretionary trusts have in more recent times been used to provide to the settlor or the person having the benefit of the power of variation the power to make fundamental changes in the structure of the trust document and the entitlements under it. In England, the desire of settlors to retain such flexibility as would allow them to meet the changes resulting from war, taxes and depression is, I think, clear. And there are reasons why, in Australia, a power of variation of greater rather than lesser extent has been seen as desirable. Therefore I do not think that any limitation should be placed upon the generality of the power of variation by reason of the factors referred to in the cases cited (108)."*

112. The same approach was expressly followed in the decisions of (i) the Court of Appeal of New South Wales in *Lewis v Condon* [2013] NSWCA 201; (ii) the Court of Appeal of Western Australia in *Mercanti v Mercanti* [2016] WASCA 206; and (iii) the New South Wales Supreme Court in *Re Anloma Pty Ltd* [2018] NSWSC 1818 (none of which were cited to the judge).

Lewis v Condon

113. In *Lewis v Condon* Leeming JA (with whom the rest of the Court agreed) stated, at paragraph 89 of his judgment, in relation to the exercise of a power of amendment in that case, as follows:

> *"The power [of amendment][21] resembles that contained in the trust deed considered by this Court in Kearns v Hill (1990) 21 NSWLR 107, where Mahoney JA saw no reason to place any limitation upon its generality, and Meagher JA,*

[21] Which was a power "*to alter revoke or add to any of the provisions*" in the Trust Deed and was used to replace one person by another as the holder of a power of appointment.

> *with whom the other members of the Court agreed, said that the evident purpose of the power to vary "any" provision was to ensure maximum flexibility. The same reasoning is apt to apply here."*

Mercanti v Mercanti

114. In *Mercanti v Mercanti* Buss P held, at paragraph 265, that in a discretionary family trust where the deed was drafted "*to confer maximum flexibility in relation to the beneficiaries of the trust*" the '*substratum*' of the trust was simply the conferral of benefits from time to time on one or more of the beneficiaries for the time being of the trust as determined from time to time by the trustee for the time being.

Re Anloma

115. In *Re Anloma* Rees J concluded at paragraph 50 that a power to alter, revoke or add to any of the provisions of the trust deed "*should be interpreted expansively and includes adding or removing beneficiaries"*. Such an observation, in relation to a general power of amendment, is difficult to reconcile with the existence of a 'substratum rule'. Grand View submits that the fact that *Bargwanna* (see [136] below) was not cited does not, as the Respondents contend, make this authority unsound. It reflects, they suggest, the fact that, in Australia, the comments made in *Bargwanna* do not establish any general rule of law. This is particularly so given that *Kearns v Hill, Lewis v Condon, Cachia* and *Mercanti v Mercanti* were all cited or referred to.

116. These authorities, Grand View submits, significantly undermine the judge's finding that a widely drafted power of amendment in a trust deed can somehow properly be cut down by reference to an implied presumption that it cannot be used to alter the 'substratum' of the relevant trust. They apply *a fortiori* in respect of the Judge's further finding that such a presumption arises in the present case so as to limit the clear and unambiguous words of the powers of addition and exclusion.

Re Z

117. The case which was cited to the judge was *Re Z.* The question in that case was whether certain amendments to a trust deed were within the scope of the power of amendment. That power, which was contained in article 4B of the trust deed, was set out at page 258 of Smellie J's judgment under the heading '*The scope of the art. 4B power*' as follows:

> *"Articles 4A and 4B must be read together:*
> *'A. This trust is and shall be irrevocable. Transfers of assets to the corpus or principal of this trust are likewise irrevocable.*
>
> *B. Notwithstanding the provisions of para. A of this art. 4,* ***this trust and any of its provisions may during the joint lives of the grantor and [Mrs. D] be altered or amended with the unanimous written consent of the grantor and the management committee,*** *executed with the same formality as this trust and delivered to the trustee. Upon the death of any one of the grantor and [Mrs. D] this power of alteration and amendment shall lapse and expire. Thereafter none of the provisions* ***with respect to the identity of beneficiaries****, the proportions of payment of principal or income, the times of payment of principal or income or the structure, operation or powers of the management committee of special companies as defined in art. 7 hereof may be amended, changed or modified. No changes, modifications or alterations may be made which would materially affect the obligation, liability or remuneration of the trustee without its consent." [Emphasis supplied.]'*
>
> *From the words [emphasised] the generality of the power as well as its limitations are immediately apparent. The words "this trust and any of its provisions" admit of a power of amendment of the terms of the trust itself as well as of the deed of settlement. Indeed the words which come below—"provisions with respect to the identity of beneficiaries, the proportions of payment of principal or income, the times of payment of principal or income…"—clearly contemplate a power to change even beneficial entitlements, including by way of dispositive powers of appointment of the widest kind. It is also significant that the power extends to permit*

> *changes in "the structure, operation or powers of the management committee."*

118. Having concluded from its terms that the power of amendment in clause 4B clearly contemplated a power to change beneficial entitlements, Smellie J went on to consider the scope of the power at page 280 as follows:

> *"… The power in art. 4B is one which, on its face, expressly contemplates the ability to alter or amend beneficial entitlements, "any" beneficial entitlements. It may not be construed as meaning only such alterations to beneficial entitlements which enhance only the interests of a particular class or group, or which do not diminish the interests of a particular class or group, or which do not augment or advance the interests of a particular class or group. As was emphasized in the Australian case Kearns v. Hill, which was cited in the arguments, a power of variation in a trust instrument is not to be construed in a narrow or unreal way. A power which (on the facts of that case) on its natural meaning included a power to vary the identity of beneficiaries of a trust by the addition of beneficiaries could not be limited by reference to an historical presumption against variations which alter the main structure of, or beneficial entitlements under, trusts.* ***In other words "'any' means 'any'"****: 21 N.S.W.L.R. at 109, per Meagher, J.A."*

119. The judge distinguished that case from this one [93] on the footing that it was concerned with a non-fiduciary power. Grand View submits that it is not clear why that distinction is relevant when determining the scope of a fiduciary power and that Smellie J's reference to *Kearns v Hill,* which did concern a fiduciary power of amendment, strongly suggests that he intended his observations to apply irrespective of whether or not the power was fiduciary. I agree that there seems no good reason why the *construction* of the instrument should differ as between a general and a fiduciary power. At the same time the case does not deal with or refer to any substratum rule or to the fraud on a power doctrine.

Mirvac v Mirvac Funds

120. Another case which was not cited to the judge was the decision of the New South Wales Supreme Court in *Mirvac v Mirvac Funds* [1999] NSWSC 457. That case concerned the proposed exercise of a general power of amendment in the trust deed of a unit trust. Austin J, referring to a previous unreported decision of the Chief Justice, held at paragraphs 45 and 46 of an *ex tempore* judgment as follows:

> *"In the Permanent Trustee case to which I have referred, McLellan [Chief Justice in Equity] was asked to consider whether a provision in a trust deed similar to the alteration* [sic] *in this case was effective to permit the adoption of a scheme of reconstitution not entirely dissimilar from the present proposal. He expressed the view that the alteration power was very wide and was in quite unlimited terms. He rejected an argument to the effect that the alteration power was to be confined to amendments which could reasonably have been foreseen at the time when the deed was made, or that there was some limit by reference to destruction of substratum. In his opinion the only relevant limitation was that the power of amendment was to be used only for the purpose for which it was conferred. He took the view that the evident purpose of the wide power before him was to ensure maximum flexibility. […]*
> *I am content to adopt and apply McLellan CJ in Eq's reasoning with respect to the similarly worded powers of amendment before me in this case…"*

The Respondents' submissions

121. The Respondents submit that Kawaley, AJ, was entirely right to hold that the GRT Trustee's purported exercise of powers was void and to give summary judgment. It is a fundamental principle of trust law that discretionary powers of amendment, even when stated to be uncontrolled and absolute, can only be used for the purpose for which they were given and cannot be used to change or destroy the substratum of the trust. There may be cases where the rule is difficult to apply. But this is not one. An avowedly private 100 year, irrevocable, family trust has been transmogrified into a perpetual trust from which the family can never benefit. This is about as extreme a paradigm of a breach of the substratum rule as it is possible to imagine.

122. The power given by clause 8 was a power of amendment of a special kind i.e. a specific species of a power to amend the terms of the original instrument. Its use was thus circumscribed by the same equitable regulatory rules and controls as any other power of amendment.

123. The rule that a power can only be used for the purpose for which it was conferred is a rule of general application applicable to all powers and all trusts and it imports limitations into powers which are expressed in unlimited terms.

124. That this is so appears from the words of Lord Tomlin in *Hole v Garnsey* (see [106] above); and of Lord Steyn in *Society of Lloyd's v Robinson* [1999] 1 WLR 756 at 765[22]:

> *"it is true that there is a well established line of authority which holds that a power of amendment reserved in a trust must be exercised for the purpose for which it was granted: see Hole v. Garnsey [1930] A.C. 472. This principle is closely linked with the general proposition that the power must not be exercised beyond the reasonable contemplation of the parties on which Nourse L.J. founded his judgment. All this is hornbook law."*
>
> See, also, the *Bank of New Zealand* case where it was made clear that restrictions placed on powers are *"derived from the general principle that a power must be used only for the purposes for which it must be supposed to have been intended."*

British Airways v Airways Pension Scheme Trustee

125. The principle has been more recently described and applied by the English Court of Appeal *in British Airways v Airways Pension Scheme Trustee Ltd* [2018] Pens LR 19. Patten LJ [43]-[45] described it as follows (emphases added):

[22] A case which, as Lord Steyn pointed out, did not concern a traditional trust created by the bounty of a settlor but Lloyd's premium trust deeds, which were a means of creating security in favour of policyholders.

"It is a long-established principle in trust law that a discretionary power conferred on Trustees, however widely expressed, must not be exercised for an improper purpose. Although the rule has an obvious application where the trustee acts for what is traditionally described as a corrupt purpose (for example, in order to benefit himself) the scope of the rule is much wider. It also encompasses cases where there is no personal benefit or bad faith involved but where the trustee has exercised, for example, a power of appointment in order either directly or indirectly to benefit a non-object of the power. Closer to the present case, the Trustees of a pension fund have been held to have acted for an improper purpose when, in the absence of any power to return a surplus to the employer, they transferred funds to another scheme so as to enable the return of capital to be made: see Hillsdown Holdings plc v Pensions Ombudsman [1997] 1 All ER 862.

44. Cases of improper purpose therefore include circumstances where the appointee (under, for example, an appointment of capital) is literally outside the class of permitted objects of the power. But the rule is not limited to excessive exercises of this kind. As the decision in Hillsdown Holdings illustrates, the rule can equally apply where the Trustees act within the letter of their powers but do so for a purpose which is not permitted by or provided for under the trust instrument and is therefore beyond the scope and purpose of the power which was granted.

45. ***The problem which arises in the present appeal is to identify the circumstances in which the exercise of a widely drafted power of amendment may nonetheless be curtailed by resort to what can be identified as the purpose or purposes of the Scheme*** *and in particular whether the purposes relied on in this case are in substance synonymous with and limited by the terms of the Trust Deed itself so that any challenge to the exercise of the power depends upon the construction of the Trust Deed (including any implied terms) and so becomes essentially a question of vires. Allied to this is the fact that a power of amendment is by its very nature designed to allow the Trustees to effect changes in the existing terms of the Trust Deed or the Rules. The objection that the Trustees are seeking to achieve an outcome not so far provided for under the Scheme is not therefore sufficient in itself. It must be possible to identify some other features or provisions in*

the Scheme which render the use of the clause 18 power so as to create the new Rule 15 proviso improper and invalid in this case."

Lewison LJ identified those features [110] as follows:

"It is true, as Patten LJ points out, that exercise of the power conferred by the proviso requires the trustees to balance the interest of the employer against other considerations. But I do not regard that as detracting from the fundamental point that the trustees are arrogating to themselves the responsibility for designing as opposed to managing and administering the scheme, in circumstances in which (a) the fund is in deficit and (b) the employer would be required to make additional contributions not for the purpose of funding benefits already promised but for funding additional benefits decided upon by the trustees. That is not the trustees' constitutional function under the trust deed. In my judgment ***the amendment goes beyond the purpose of the power of amendment*** *contained in clause 18 of the trust deed."*

And Peter Jackson LJ [121]-[122]:

"there is nothing to suggest that the power of amendment was intended to give the trustees the right to remodel the balance of powers between themselves and the employer. In my view, ***the amendment to Rule 15 resulted in a scheme with a different overall purpose****, in which the trustees effectively added the role of paymaster to their existing responsibilities as managers and administrators. The observations of Sir Andrew Park in Smithson, cited by Lewison LJ, are in my view persuasive.*

122. ***It is no answer to this to say that the power of amendment is framed in general terms*** *and contains safeguards in requiring proper trustee-like behaviour, the taking of advice and the achievement of a supermajority. These are brakes on the power of amendment, but the question here is not whether the brakes are working but whether the journey itself is permitted."*

126. I would observe that in that case the trustees were the trustees of a company pension fund. The power of amendment (clause 18) provided that the provisions in the trust deed might "*be amended or added to in any way*" if the amendment was approved by at least 2/3 of the managing trustees. The amendment effected was to confer on the trustees a power to review and, at their discretion, amend the annual rate of payment under the scheme beyond that which would otherwise be permitted under a particular rule. Patten LJ, in the minority took the view that there had been no breach of the proper purpose rule. The majority thought that there had. It is to be noted that in the majority judgements referred to clause 4 of the Trust Deed, which defined the trustees' functions as being to "*manage and administer the Scheme*" and not, as Lewison LJ put it, "*to design it*". The case is an entirely orthodox application of the proper purpose rule. It does not feature any substratum rule.

127. The application of the proper purpose rule is not, the Respondents submit, limited to where the purpose of a power is either expressed in the instrument or can be implied in it: see Lord Sumption in *Eclairs Group* and *Mercanti v Mercanti*. That said, the Court ascertains the purpose of a fiduciary's power of amendment (and therefore a power to add or exclude beneficiaries), and whether its exercise has made a permissible alteration to a trust, or has gone beyond the limits of the power, objectively, by reference to the terms of the trust or instrument in question, and not by reference to subjective intentions, and has to "*have … regard to the original purpose of the … Trusts*" (*Re McCullagh Will Trusts* at [25])[23], the substratum of such original trust being *"its beneficial core"*: *Duke of Somerset v Fitzgerald*.

128. As to the objective approach to discerning the purpose of the trust and the settlor's true intentions, see too e.g. *Thomas on Powers* at 9.03, *Mackinnon v Regent Trust* [2004] JLR 477 at [47]: "*Subject only to established causes of action…the intentions*

[23] The judge in that case did indeed say that but then went on to consider an affidavit of the solicitor who drafted the will as to the testatrix's concerns and what he believed to have been her intentions from which, in his judgment, he said that some assistance could be gleaned.

of a settlor must be ascertained from the trust deed" and *Tao v HSBC International Trustee* [2019] HKCFI 1268 e.g. at:

> [44] *"Extrinsic circumstances are not admissible to add to, contradict, vary, or alter the express terms of a trust deed"*;
>
> [46] *"if there is a declaration between the settlor and the trustee (for example as contained in a trust deed), that will generally be "decisive, regardless of the subjective intentions of either of them"*;
>
> [48] *"Thus…(i) the Trust Deed is conclusive as to the relationship between Mr Lo and the plaintiff (as de facto settlors) and the defendant; and (ii) the plaintiff's or Mr Lo's subjective intention (e.g. as to the purpose of the Trust, or as to the beneficial interests held by the Trust is completely irrelevant"*.

129. The judge was, however, right to hold [73] that it does not matter what theoretical legal category this settled legal rule belongs to, whether a particular rule of construction applicable to powers or a separate fraud on the power / proper purposes doctrine. A similar approach was adopted by Warren J in *PNPF Trust Company Ltd v Taylor & Ors* [2010] EWHC 1573 (Ch) at [144]:

> *"144 The 'reasonable contemplation' of the parties, or rather what can 'reasonably be considered to have been within the contemplation of the parties' imports an objective test. It is not, in my view, relevant to know what the parties did or did not actually consider. I am not, for instance, concerned with what the directors of any of the CHAs discussed in their boardroom or considered with their lawyers….*
>
> *145 There has been some debate about whether the principle in Hole v Garnsey has a separate life from the principles applicable to construction and implication. I see this as a* ***somewhat arid debate****. The object of the exercise in all three cases is to ascertain the meaning of the language which has been used. The question in the present case is whether the scope of the power under Rule 9(1)(a) is limited in one or more of the ways that some of the CHAs suggest,*

> *or is unlimited in the way that the Members suggest. I do not see a different answer to the question being given depending on whether the matter is viewed through a Hole v Garnsey telescope or a construction/ implication telescope. And, as Lord Hoffmann has pointed out in relation to the implication of terms, there is a danger of alternative formulations (in the case of amendments we have reasonable contemplation, no change in whole substratum, no change in basic purpose) taking on a life of their own when the enquiry, as I see it, is what is meant by the words used."*

Grand View submits, correctly in my view, that this case does not establish any substratum rule.

130. There is, the Respondents submit, a substratum rule. This is because the use of powers in a trust deed to destroy the substratum amounts to the use of trust powers for which they were not conferred because powers in trust deed are conferred *"for the purposes of promoting* ***the purposes of the [trust]*** *not for altering them"* (Millett J in *Re Courage Group's Pension Schemes v Imperial Brewing Ltd* above. See, to the same effect, Lord Walker in *Bank of New Zealand* at page 505.)

131. Thus, in *PNFP v Taylor supra* Warren J said that what can reasonably be considered to have been within the contemplation of the parties *is consistent with descriptions of the restriction on the scope of a power to alter the objects or purposes of the trust;* ***the amendment must not change the whole substratum of the trust*** *(see in an analogous situation Re Ball's Settlement Trusts [1968] 1 WLR 899 ; and also Kearns v Hill)* ***or its basic purpose*** *(see Bank of New Zealand v Board of Management of New Zealand Officers' Provident Association [2003] UKPC 58).* See, also, Buss P in *Mercanti* at [101].

132. *Dyer v Dyer* is the *fons et origo* of the rule. Although the observations of the Court of Appeal on this point were *obiter,* the decision at first instance was not (although, it would appear to me that, in the light of the decision on appeal it must now be so

regarded). It was not based on the fact that others were contributing to the fund but by viewing the power to vary in the context of the terms of the deed as a whole. The power in question was a power of amendment rather than a power of addition or exclusion, but the principles are equally applicable: if an otherwise unlimited power to vary does not give power to depart from the purpose of the original gift, nor does a power to vary in a specific way (to add or exclude beneficiaries).

133. *Dyer* is directly in point. It held that an unlimited power of variation could not be used to alter the purpose for which the trust had been established (far less destroy it); so too, in this case unlimited specific powers of variation (powers of addition and exclusion) cannot be used to alter or destroy the purpose for which the GRT was established, being the benefit of the children and issue of YC and YT Wang – a classic dynastic trust. That fundamental and central characteristic of the trust - its substratum – could not be destroyed by powers conferred to assist the trustee in the administration of the trust in order to achieve that purpose.

134. The approach in *Re Dyer* has been endorsed and applied in many subsequent cases, as set out by the Judge in paragraphs 64-67 of his judgement *(Re Ball's Settlement Trust*; In *re Courage Group's Pension Schemes v Imperial Brewing & Leisure Ltd; In re McCullagh's Will Settlement; Duke of Somerset v Fitzgerald*.

135. That some of these cases were cases under the English *Variation of Trusts Act 1958*[24] does not mean that the principles expressed in them are not of general application: in such cases the Court is concerned to ensure that the variation proposed is a true variation and not a resettlement as, whilst it can consent to a variation on behalf of minor and unborn beneficiaries, it cannot consent to a resettlement on their behalf. Hence the Court focuses on the proposed variation in order to ensure that it does not go beyond varying the trust and instead of varying

[24] The same approach is also adopted in other jurisdictions e.g. in Canada under the *Variation of Trusts Act 1970*: *Re Irving* (1979) 11 O.R. (2d) 443.

it, turns it into a different trust. The principle to be derived from these cases is that a variation which alters the substratum of the trust does go beyond varying the trust. If a variation which alters the substratum of the trust goes beyond varying the trust, it is not a variation properly so called and cannot fall within the scope of a power to vary.

Commissioner of Taxation v Bargwanna

136. The existence of the substratum rule has been specifically acknowledged at the highest level in Australia, by the High Court of Australia in *Commissioner of Taxation v Bargwanna* [2012] HCA 11. In their joint judgment, French CJ, Gummow, Hayne and Crennan JJ observed at [13]:

> *"…the reference in cl 6 to the absolute and uncontrolled discretions and powers of the trustees should be read in light of the authorities which treat such apparently* ***unconfined discretions and powers as not extending to alteration of the substratum*** *of this trust for charitable purposes".*

137. Two points are said by the Respondents to be of significance. First, *Bargwanna* concerned a charitable trust and thus a trust for volunteers. In those circumstances the distinction which Grand View seeks to draw between trusts for non-volunteers and trusts for volunteers, in an attempt to explain away the cases relied upon by the learned Judge, is non-existent; the principle is a principle of universal application to different types of trust.

138. Second, the observation was not limited in its terms to powers of amendment; rather it clearly envisages that the substratum rule applies to powers generally. Indeed, clause 6, to which their Honours were referring, is a not uncommon clause providing that every discretion and power conferred on the trustees "*shall be an absolute and uncontrolled discretion or power"* (i.e. the same words as used in clause 15 of the GRT Declaration of Trust).

139. There are, however, in my view, two further points to be made. The first is that *Bargwanna* was not actually concerned with a power of amendment but a power of investment. The second is that the case concerned the construction and operation of the *Australian Income Tax Assessment Act 1997*. There was, as Grand View observes, no detailed consideration of the relevant principles, the observations of the Court appearing in an introductory section in which the Court provided a general commentary on the law. For that reason, it cannot be treated as establishing the substratum rule as relied on by the Respondents.

140. The existence and currency of the rule is, the Respondents submit, reflected in the leading texts on trusts and powers: *Thomas on Powers* (2nd edition) at 16-07; *Lewin on Trusts* at 30-074. Its existence has long been recognized by Bermudian practitioners: see a paper by Alec R. Anderson, head of the trust department of Conyers, Dill & Pearman, *"The International Academy of Estate and Trust Law: Modification of Trusts and Planning for Change: Bermuda"* dated 30 April 2009 at 6.3. Examples of its application in practice include *Re Ball's Settlement Trusts* (see 905F): *Dalriada Trustees Limited v Faulds* [2012] ICR 1106 at [76][25]: *British Airways v Airways Pension Scheme* where the majority of the Court of Appeal decided that the use of a power to amend which had the effect of arrogating to the trustees the responsibility for designing the pension scheme went beyond the purpose of the power of amendment, with Peter Jackson LJ rejecting (at [126]) as *"mere polemic the submission that this conclusion emasculates clause 18* [the power of amendment]*"*.

141. Grand View observes:

(a) that the passage from *Thomas* at 16-07 in fact contains the following orthodox statement of the law:

[25] Where Bean J (as he then was) adopts Warren J's analysis in *PNPF*

> *"an exercise of a power of amendment is subject to the same rules and controls as other powers.* ***For example it can be exercised only for the purpose or purposes for which it was conferred*** *and it may not to* [sic] *exercised beyond the reasonable contemplation of the parties…****There may be difficulties in ascertaining the true purpose of a particular arrangement, and, therefore, of a power of amendment contained within it. Nevertheless, whatever the difficulties, the basic principle remains and the underlying purpose must be ascertained and adhered to***".

and

(b) that the *British Airways* case makes no reference to any substratum doctrine.

142. The authorities now cited by Grand View, in essence, the Respondents submit, boil down to one: *Kearns v Hill*. All the others save *Mirvac* simply cite it and add nothing further. Furthermore, Grand View's list of cases does not include those in which *Kearns v Hill* has been distinguished, e.g. *Jenkins v Ellett* [2007] QSC 154, in which Douglas J held that the Principal's ability to remove and replace a trustee was a fundamental feature of the structure of the trust deed which created a family discretionary trust and that amending that power was not permissible[26] as it was akin to destroying the substratum of the deed [16], [18]-[19]; and takes no account of the decision in the High Court of Australia in *Bargwanna supra* which expressly acknowledged the existence and general application of the substratum rule on apparently unconfined discretionary fiduciary powers of trustees.

[26] The relevant power was a power to release or vary all or any of the trusts in the deed by any variation , alteration or addition made from time to time and also a power to declare new or other trusts or powers concenring the Trust. The judge concluded that the clause should be construed so that its powers of amendment did not extend to a proviso such as the definition of the Principal (who had the power to remove the Trustee and appoint another one). He said it was akin to destroying the substratum of the trust.

143. The decision in *Kearns v Hill* (1990) 21 NSWLR 107 was about whether a general power of amendment ("*to vary or amend any of the provisions contained in this Deed other than clause 2"*) in an ill-drafted trust deed; "*replete with references to persons who are not beneficiaries but are "capable" of becoming beneficiaries"* could be used to add the present beneficiaries' children to the class of beneficiaries. The Judge at first instance said it could not be. The Court of Appeal said that it could. The decision is not therefore about whether the power of amendment was limited to amendments which did not destroy the trust's substratum because that is not what the Court was dealing with. It is not surprising in those circumstances to see Meagher JA refer to the substratum doctrine as *"not really helpful in the present context":* he found that the relevant substratum of the trust (if one could be found) was the benefit of the descendants of a named person, and that the interests of that class were being actively promoted rather than diminished by the variation. *Kearns v Hill* is therefore the polar opposite of this case. In this case, far from being promoted, the interests of the class of beneficiaries of the GRT were being expunged.

144. The Respondents submit that Ranero in *Failure of Substratum in Commercial Trusts* (1999) 18(1) UTasLawRw 126 at p.133 was correct to say:

> *"It is submitted that if the trustees in Kearns v Hill purported to include third persons as beneficiaries who were in no way connected with the family and therefore not within the scope of the class of intended beneficiaries, a different finding would likely have resulted".*[27]

145. That *Kearns v Hill* is not authority (even in Australia) for the proposition that the substratum rule does not exist is shown by the fact that, notwithstanding the observations in it, the rule has been accepted in subsequent decisions in other courts in Australia. It has found subsequent judicial approval in the High Court of Australia in *Bargwanna* (by reference to the analysis of the authorities by Hely J

[27] This is debatable. Meagher JA thought that one possibility was that it was impossible to locate any substratum at all.

in *Cachia v Westpac Financial Services Ltd* [2000] FCA 161; (2000) 170 ALR 65 at 82-83).

146. I would observe, however, that in *Cachia* Hely J said, at paragraph 68, that authorities which suggest that a power to vary a trust deed may be held not to extend to a variation which would alter the substratum of the trust "*may be no more than an application of the equitable doctrine of fraud on the power*". He described that doctrine as follows (at paragraph 74): "*The equitable doctrine of "fraud on the power" requires that a power, including an amendment power, reserved in a trust must not be exercised for a purpose, or with an intention beyond the scope of or not justified by the instrument creating the power".* In other words, Hely J was not holding that there was some separate 'substratum rule'; but that the question, in each case, is whether or not a power has been used for the purpose for which it was conferred.

147. The Respondents refer to the fact that in *Jenkins v Ellett* Douglas J cited with approval the following extract from *Thomas on Powers* (1st edition, 1998 at pp.585-586):

> *"In all cases, the scope of the relevant power is determined by the construction of the words in which it is couched, in accordance with the surrounding context and also of such extrinsic evidence (if any) as may be properly admissible. A power of amendment or variation in a trust instrument ought not to be construed in a narrow or unreal way. It will have been created in order to provide flexibility, whether in relation to specific matters or more generally.* ***Such a power ought, therefore, to be construed liberally*** *so as to permit any amendment which is not prohibited by an express direction to the contrary or by some necessary implication,* ***provided always that any such amendment does not derogate from the fundamental purposes for which the power was created.*** *Thus, a power of amendment will undoubtedly be capable of making amendments which are essentially ancillary to, and for the better execution of, such fundamental purposes, e.g. so as*

> *to substitute an easier form of communication or service for the one originally stipulated, or so as to make other powers exercisable in writing rather than by deed, or, indeed, introduce other amendments which are not simply administrative or managerial in nature. It does not follow, of course, that the power of amendment itself can be amended in this way. Indeed, it is probably the case that there is an implied (albeit rebuttable) presumption, in the absence of an express direction to that effect, that a power of amendment (like any other kind of power) cannot be used to extend its own scope or amend its own terms. Moreover,* ***a power of amendment is not likely to be held to extend to varying the trust in a way which would destroy its 'substratum'. The underlying purpose for the furtherance of which the power was initially created or conferred will obviously be paramount.****"*

148. It is material, however, to note that Douglas J made plain in paragraph 7 that "*the decision depends on the proper construction of the power to vary the trusts*". The decision is a decision on what the trustee could do as a matter of construction, although in reaching it the judge decided that to allow the power to be used in the way that it was would be "*akin to destroying the substratum of the deed".*

Grand View's other cases

Re Z

149. Other cases relied on by Grand View take the matter no further. *Re Z* is another case (like *Kearns v Hill*) in which the Court was not considering the substratum rule at all. It was concerned with whether a power of amendment of the trust and any of its provisions including *"provisions with respect to the identity of beneficiaries*" was a fiduciary power (such that it engaged the self-dealing rule and could not be exercised by a board on which the settlor's daughter sat, to increase her interest under the trust to an interest in 50% of the capital, she having previously been entitled only to income) or a personal power (which did not engage the self-dealing rule) – as Smellie J (as he then was) held to be the case.

150. As Smellie J made clear (at p.256) authorities on the nature of powers did not really assist him in determining whether the power he was considering was personal or fiduciary as that was a determination which had to be arrived at within the context of the circumstances of that particular case; and the particular wording of the power of amendment in that case specifically contemplated amendment to beneficial entitlements.

151. It was in the specific context of a consideration of whether a power to alter or amend the trust and any of its provisions with the unanimous written consent of the grantor and the management committee was a fiduciary power or a personal power that Smellie J said what is quoted in [118] above. The paragraph in question starts "***When viewed in that light"***. That is a reference to the previous paragraph in which the point was made that if the power was construed as a fiduciary rather than a personal power, its exercise in favour of all but two beneficiaries and their dependants would have been precluded by the self-dealing rule.

152. That is the context of the quotation cited by Grand View (which, for the sake of convenience I repeat):

> *"When viewed in that light, the wide power of amendment, including the power to alter beneficial entitlements, becomes something else altogether. The power in art.4B is one which, on its face, expressly contemplates the ability to alter or amend beneficial entitlements, "any" beneficial entitlements. It may not be construed as meaning only such alterations to beneficial entitlements which enhance only the interests of a particular class or group, or which do not diminish the interests of a particular class or group, or which do not augment or advance the interests of a particular class or group".*

153. The Court was not, therefore, considering the existence or application of the substratum rule at all [because it was not, as Smellie J accepted, dealing with a fiduciary power but a personal power which could be used to distribute to anyone],

and, when put in its proper context, what Smellie J said in *Re Z* does not support the proposition put forward in Grand View's skeleton argument that *"there are a number of authorities in which the Court has made clear that the scope of a widely drafted power of amendment should not be cut down in reliance on some supposed presumption against making a fundamental change to the relevant trust."*

154. Smellie J then referred, in passing, to *Kearns v Hill* which had been cited to him in argument. But it was not necessary to his reasoning (which is identified above) and, no doubt because it was not relevant to the point with which he was dealing, there does not appear to have been full citation of the relevant authorities on the substratum rule.

155. What I take Smellie J to have been saying was that since, if the power was a fiduciary one, it could not have been exercised in favour of existing beneficiaries who were members of the management committee or linked in any relationship of amity or dependency with any member (page 280), and could, thus, only be exercise in favour of a couple of people, that would conflict with the width of the power of amendment, which supported the idea that the power was not fiduciary at all. So, no question as to the ambit of fiduciary duties arose. Nevertheless, this was a case in which a power to add any Beneficiary was held to <u>mean</u> (i.e. as a question of construction) what it says – an analysis that does not seem to me to depend on whether the power is fiduciary or not.

Mirvac

156. Grand View's reliance on *Mirvac* is, the Respondents say, misplaced. The applications made came before Austin J *ex parte*, on an urgent basis and related to the exercise of powers of amendment in unit trusts which were to be adopted by special resolution of the unitholders. Austin J referred to an unreported decision of McLelland CJ made in August 1994 in a case called *Permanent Trustee Co Limited v National Australia Managers Ltd,* including his (McLelland CJ's) rejection of an

argument that the power of amendment in that particular case was limited by reference to destruction of substratum. The Respondents submit that no assistance can be drawn from Austin J's reference to McLelland CJ's finding in *Permanent Trustee* because insufficient is known about that case to draw any assistance from it. That there was no limit on the power of amendment in that particular case by reference either to what was contemplated by the parties or to the destruction of substratum is not a statement of general application because if it was:

(i) It would have amounted to a general rejection of the principle that the power must not be exercised beyond the reasonable contemplation of the parties, such principle being described in *Society of Lloyds v Robinson supra* as "*hornbook law*", and

(ii) It would be wrong in the light of the later decision of *Bargwanna*, a decision of the highest judicial authority in Australia which specifically acknowledges the existence and general application of the substratum rule.

157. As to this I would observe that what the Chief Justice is said not to have accepted was *"that there was some limit by reference to destruction of substratum. In his opinion the only relevant limitation was that the power of amendment was to be used only for* ***the purpose for which it was conferred****."* He appears therefore to have been declining to use the substratum metaphor as an appropriate characterisation of the proper purpose rule.

Lewis v Condon

158. *Lewis v Condon* does not, the Respondents submit, concern a substratum rule. I agree. In that case Leeming JA agreed with the proposition that there was no reason to place any limitation on a general power to vary, and that the evident purpose of a power to vary "any" provision was to ensure maximum flexibility. That is, Grand

View submits, irreconcilable with the Respondents' contention that there is a generally applicable 'substratum rule' which precludes the exercise of such powers of amendment in such a way as to alter the 'substratum' of the trust, or that *Bargwanna* (which pre-dates the decision in *Lewis v Condon*) had the effect of recognising any such rule.

Mercanti

159. The passage cited by Grand View see [109] above from *Mercanti* is simply a recitation of what was found in *Kearns v Hill*, which does not take matters any further. In his judgment Buss P said:

> *"98. The rules that are applicable to the construction of an express power to vary a trust deed (and trust deeds generally) are separate and distinct from limitations which may apply, independently of the language of the power, to its exercise. Limitations of that kind include, for example, the equitable doctrine of fraud on a power.*
>
> *99. The power of variation in* ***Cachia*** *was apparently unconfined. Hely J (like Meagher JA in* ***Kearns****) noticed, however, that there are some authorities which suggest that a power to vary a trust deed may be held not to extend to a variation which would 'alter the substratum of the trust' [68]. He referred to* ***Re Dyer*** *[2935 VR 273;* ***Re Ball's Settlement Trusts*** *[1968] 1 WLR 899;* ***Re Blocksidge*** *[1997] 1 Qd R 234;* ***Kearns****;* ***Lock v Westpac Banking Corporation*** *(1991) 25 NSWLR 593.*
>
> *100. In [Bargwanna]…French CJ, Gummow, Hayne and Crennan JJ noted that references in a trust deed to 'the absolute and uncontrolled discretions and powers of the trustees' should be read in light of authorities which treat such apparently unconfined discretions and powers as not extending to the alteration of the substratum of the trust [13]. Their Honours referred with approval to the analysis of the authorities by Hely J in* ***Cachia*** *[67]-[76].*
>
> *101. Hely J said that the authorities which suggest that a power to vary a trust deed may be held not to extend to a variation which would 'alter the substratum of the trust'*

> *may be 'no more than an application of the equitable doctrine of fraud on the power' [68]. His Honour's view is, in my respectful opinion, correct, having regard to the decisions of the High Court in* ***Byrnes*** *and* ***Montevento****, which have held that the rules applicable to the construction of contracts apply also to trusts, and to the decision of the High Court in* ***Bargwanna****. In other words, the notion of an alteration to the substratum of the trust is not an aspect of the rules applicable to the construction of a trust but is, rather, an application of the equitable doctrine of fraud on a power."*

This passage makes plain, as it seems to me, the distinction between a question of construction and a separate equitable principle, and the absence of a rule precluding variation of the substratum as some independent principle.

Re Anloma

160. *Re Anloma* was an Australian case involving an unopposed application by the trustee for directions *inter alia* as to the validity of previous variations and as to the trustee's entitlement to vary the definition of beneficiaries to include the spouses of the trust's beneficiaries [6]. Rees J held that the power of amendment in that particular case enabled the trustee to add or remove beneficiaries [50]. This was a decision on its own facts and, the Respondents submit, says nothing of assistance to this Court in relation to the substratum rule. The substratum rule was not raised or discussed and accordingly the main relevant authorities on substratum, including *Bargwanna*, were not cited.

The Respondents' conclusion

161. In short, the substratum rule exists, and it is apparent that the use made of the clause 8 power was a breach of it and/or the use of the power for a purpose for which it was not intended. The original purpose of the GRT was to benefit the children and remoter issue of the Founders. It was they who were specified in the definition subject to a valid exercise of the clause 8 power. Clause 5 and the Third Schedule provided that the ultimate trust was in favour of the Founders' children

or, if they were deceased, their remoter issue. Clause 8 gave the GRT Trustee no power to alter the default beneficial class and as observed in *Vatcher v Paull* [1915] AC 372 at 379, "*the limitations in default of appointment may be looked upon as embodying the primary intention of the donor of the power*"[28].

162. The trust was to be a private, as opposed to a purpose trust: see Recital A; and the objects clause of the GFT Trust Company makes clear that the GFT was to be a private trust. The definition of "*person* "did not include purposes; so that clause 8 is subject to an implicit fetter in that the addition of purposes as Beneficiaries is not permitted. Clause 3.1. restricts the use of the power of appointment to appointments which do not infringe any applicable rule relating to remoteness of vesting. This expressly envisages that the assets vest within the 100-year Trust Period and implicitly prohibits the addition as a Beneficiary of a perpetual purpose trust.

163. Clause 9 prohibits transfers to a trustee of a perpetual purpose trust with no provisions requiring the vesting of capital (as in the case of the WFT) because such a transfer might infringe the rule against remoteness of vesting. Clause 23 provided that the Declaration was irrevocable so that the trust could not be revoked in favour of a resettlement on a perpetual purpose trust.

164. So, the one thing which the GRT Trustee could **not** do with its powers was to supplant the children and remoter issue of the Founders with the WFT as the only Beneficiary. That destroyed the core characteristic of the GRT as an irrevocable, 100-year private trust for YC and YT Wang's children and remoter issue and thus destroyed the substratum of the trust; or, to use an alternative formulation of the principle, it was not reasonably within contemplation at the time that the GRT was declared that the powers within the GRT Declaration of Trust would or could be

[28] But these words do not state that the intention is immutable and they are followed by: "*To defeat this intention the power must be bona fide exercised for the purpose for which it was given".*

utilised to divert all of the assets away from the family beneficiaries in favour of a perpetual purpose trust from which none of them could ever benefit.

165. The purpose of powers such as clause 8 is to avoid any argument that a general power of amendment does not enable amendments to be made to the beneficial class, and not to provide limitless ability to add or exclude anyone or anything.

166. The judge did not say that there was *in fact* a revocation. His point was that what happened was *in effect* a revocation and resettlement because what happened was equivalent to that. The Founders, who were the economic settlors, wanted the trust assets to be taken out of the GRT and put into the WFT. That which they could not do themselves they purported to effect by an amendment to the beneficiaries by the Trustee. The judge no doubt had in mind that where a power of revocation is exercised together with a power to resettle the assets on new trusts, the revocation and resettlement are treated as a single step and the property never returns to the settlor in any practical sense (See *Lewin* para 30-102 and *Saunders v Evans* (1861) 8 HL Cas 721, 739: "*You revoke the old uses, and you proceed instantly upon the same sheet of paper, before the revocation can have operated, to appoint new uses.*")

167. It matters not whether you analyse the substratum of the trust as being

(a) irrevocability which was broken by what was in effect a revocation and a resettlement or

(b) a dynastic family trust whose dynastic family nature was expunged by the transfer of all the assets of the trust, settled for the benefit of the family members, to a trust from which no family member could ever expect to benefit; or as including

(c) the fact that the GRT Trustee had no power to add a purpose as a beneficiary

(d) the fact that the assets had to vest within a 100-year perpetuity period and yet they are now held on perpetual trust

or whether you take these substratum features all together and however one weighs them in order of importance.

Discussion

168. There are, as Lord Walker explained in *Pitt v Holt*[29], three relevant questions in determining whether the purported exercise by a trustee of a power such as the present one has been invalid:

(a) Whether the way in which it has been exercised is not within, or contrary to, the express or implied terms of the power (the scope of the power rule);

(b) Whether the trustee has given adequate deliberation as to whether and how he should exercise the power; and

(c) Whether the use of the power by the GRT Trustee, although within its scope, was for an improper purpose i.e. a purpose other than the one for which it was conferred (the improper purpose rule).[30]

169. These questions, sometimes conflated in the case of (a) and (c)[31], involve different considerations and different principles: see *Thomas* 8.06; *Howard Smith v Ampol Petroleum Ltd* [1974] A.C. 821,835F. Question (a) is a question of construction or implication (the implied term may be that a power cannot be used in the way that

[29] Above, at 135 F-H

[30] The judge regarded the scope of the power as an issue of construction [57]; but later [72], in relation to the supposed rule prohibiting the use of powers of amendment from altering the substratum of the trust said that it was "*not necessary for me to decide what theoretical legal category the legal rule contended for belongs to, whether a rule of construction or a species of fraud on the power.*"

[31] In particular because the use of the phrase "*within the scope of the power*" is capable of meaning both (a) within its terms as a matter of construction; and (b) in accordance with the purpose for which it was given,

it was). If the answer to question (a) is "No", question (c) does not arise. The power does not extend to allow the use that was made of it. To say that there is a fraud on a power when the power to do what has been done does not, as a matter of construction or implication, exist, seems to me a contradiction in terms [32]. You cannot abuse a power you do not have.

170. Question (c) involves wider considerations than question (a) which may include the subjective intention of the Trustee and others involved in the exercise of the power. Severance may be possible in a case where the use of the power has exceeded its scope; but not when it has been used for an improper purpose.

171. As to question (b) it is not suggested that at this summary stage the 2005 transactions can be set aside on the grounds of inadequate deliberation. As to (c) Grand View accepts that the improper purpose rule is a rule of general application applicable to all powers (including powers of amendment) and trusts; and that it is capable of being engaged even where the relevant power is expressed in unlimited terms.

172. The proper classification of the power given to the GRT Trustee in the present case is that it is neither a general power exercisable in favour of anyone nor a specific power exercisable in favour of a specified class; but an intermediate power, being a fiduciary power to benefit anyone but the trustee, by the addition of that person as a beneficiary and by the exclusion of other previous members of the discretionary class.

173. The nature of a power such as the present was considered by Templeman J (as he then was) in ***Re Manisty's Settlement*** [1974] Ch 17[33] . The central issue in that

[32] This is so, even though, if the power is used for a purpose which is outlawed as a matter of construction or implication it can, in a loose sense, be said to have been used for an improper purpose

[33] In ***Re Hay's Settlement Trust*** [1982] 1 WLR 202 Sir Robert Megarry, V-C, having been expressly invited to hold that ***Manisty*** was wrongly decided, refused that invitation and instead

case was whether the power to add and exclude beneficiaries was invalid for uncertainty or unworkability (which it was not). Templeman J held that a power granted to trustees to add to the class of beneficiaries[34] was a valid intermediate power, saying:

> "*The power to add beneficiaries and to benefit the persons so added is exercisable in* ***favour of anyone in the world except*** *the settlor, his wife, the other members of the excepted class for the time being and the trustees, other than the settlor's brother Henry who was one of the original beneficiaries. This is not a general power exercisable in favour of anyone, nor a special power exercisable in favour of a class, but an intermediate power exercisable in favour of anyone, with certain exceptions."*

He then made clear the nature of the duty of adequate deliberation in the following way:

> *"…in the case of an intermediate power the settlor has no doubt good reason to trust the person whom he appoints as trustee.…The conduct and duties of trustees of an intermediate power, and the rights and remedies of any person who wishes the power to be exercised in his favour, are precisely similar to the conduct and duties of trustees of special powers and the rights and remedies of any person who wishes a special power to be exercised in his favour. In practice, the considerations which weigh with the trustees will be no different from the considerations which will weigh with the trustees of a wide special power.* ***In both cases reasonable trustees will endeavour, no doubt, to give effect to the intention of the settlor in making the settlement and will derive that intention not from the terms of the power necessarily or exclusively, but from***

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expressed his respectful agreement with Templeman J's judgment: see [1982] 1 WLR 207H-208G. ***Manisty*** was also referred to with approval by the Privy Council in ***Schmidt v Rosewood Trust Ltd*** [2003] 2 AC 709 at §§35, 42.

[34] The power (clause 4(a)(iii)) was to declare that any person, corporation or charity, other than a member of an excepted class or a trustee, be included in the class of beneficiaries. (The original class was the settlor's issue, and his two brothers and their issue. The excepted class was the settlor, his wife, and any other person or his spouse settling properly on the trusts of the settlement).

> ***all the terms of the settlement, the surrounding circumstances and their individual knowledge acquired or inherited. In both cases the trustees have an absolute discretion and cannot be obliged to take any form of action, save to consider the exercise of the power and a request from a person who is within the ambit of the power."***

The duty of adequate deliberation obliges the trustee to act rationally and in good faith, not capriciously, to give proper consideration to all relevant matters and ignore all irrelevant ones: *Edge v Pensions Ombudsman* [2000] Ch 602, 627.

174. A form of intermediate power of this kind is thus a well- established and judicially endorsed kind of power. Such powers, we were told, are common in Bermudian trusts, as they are in discretionary trusts generally, enabling settlors to divest themselves of ownership of trust property while preserving some influence over where it goes because the trustee will take account of the wishes of the settlor. That that is so is apparent from, *inter alia,* the express provisions in sections 2A (1), (2)(b), and (2)(g) of the *Trusts (Special Provisions) Act 1989.*

175. That question (c) is separate and distinct from question (a) is apparent from what was said by Lord Sumption in *Eclairs Group Ltd v JKX Oil and Gas plc* at paragraph 30 (in the context of a power contained in a company's articles of association):

> *"The [improper purpose] rule is not a term of the contract and does not necessarily depend on any limitation on the scope of the power as a matter of construction. The proper purpose rule is a principle by which equity controls the exercise of a fiduciary's powers in respects which are not, or not necessarily, determined by the instrument. Ascertaining the purpose of a power where the instrument is silent depends on an inference from the mischief of the provision conferring it, which is itself deduced from its express terms, from an analysis of their effect, and from the court's understanding of the business context."*

Lord Sumption also made clear in the same paragraph that the proper purpose rule was not based on the implication of any terms into the relevant power, and in doing so upheld the dictum of Briggs LJ (as he then was) in the Court of Appeal in *Eclairs* [2014] 4 All ER 463 at paragraph 99 that the rule *"is not a question of implied terms at all"* and does not operate by the application of the common law test for the implication of terms.

176. To similar effect is the judgment of Morgan J in the first instance decision in *British Airways v Airways Pension Scheme Trustee Ltd* [2017] EWHC 1191 (Ch) at [351]. The distinction between questions (a) and (c) is also apparent from *Mercanti v Mercanti* where Buss P held [97] in terms that "*the rules that are applicable to the construction of an express power to vary a trust deed (and trust deeds generally) are separate and distinct from limitations which may apply, independently of the language of the power, to its exercise. Limitations of this kind include, for example, the equitable doctrine of fraud on a power."*

177. The improper purpose may take a number of different forms. It may be that the power is being exercised for some dishonest or improper purpose e.g. to benefit the donee of the power or to disable a beneficiary (by excluding him) from pursuing a complaint against the trustee; or pursuant to a bargain between the appointor and the appointee by which some person who is not an object of the power is to obtain a benefit: *Vacher v Paul* [1915] 1 A..C. 372, 379. Or it may be being exercised for a purpose which is not dishonest but is an ulterior purpose for which the power was not intended e.g. a suspension of shareholders' rights, not for the purposes of eliciting information that had not been given, but for blocking their opposition to resolutions at an AGM: *Eclairs Group*.

178. In many cases the considerations relevant to questions (a) and (c) are similar. In determining the true construction of the express words of a power, or whether any restriction is to be implied therein, it is relevant to consider what the settlor or the

parties must have meant by them or what they must be taken to have had in contemplation at the time. In determining whether the exercise of a power, although within its scope, is for an improper purpose one of the considerations, but not the only one, is the wording of the instrument.

179. Each trust, and the powers contained within it, has to be considered in the light of its own nature, terms and context. There is, in this respect, a potentially important difference between a trust that arises as a result of commercial arrangements such as a pension fund, or a trust to which parties other than the settlor contribute for a particular purpose (such as the funding of an orchestra), on the one hand, and a non-commercial discretionary trust, funded entirely by the bounty of the settlor, on the other.[35]

180. In the former category the parties (or some of them) who may be prejudicially affected by the proposal have given consideration so that, as Grand View submits and as I agree, the touchstone for identifying the purpose (or at any rate the limits) of a power of amendment is likely to be the need to uphold the bargain of the parties or the purpose of their contribution. As a result the power may, on its true construction or by implication, or having regard to its purpose, be limited so as not to enable the trustee to produce a situation where the contributors get much less, or have to pay much more, than they bargained for; or find that their contributions are directed to something other than that for which they subscribed.

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[35] For a graphic description of the difference see Sir Nicolas Browne-Wilkinson V-C (as he then was) in *Imperial Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 1 WLR 589 at page 597: *"Pension scheme trusts are of quite a different nature to traditional trusts. The traditional trust is one under which the settlor, by way of bounty, transfers property to trustees to be administered for the beneficiaries as objects of his bounty. Normally, there is no legal relationship between the parties apart from the trust. The beneficiaries have given no consideration for what they receive. The settlor, as donor, can impose such limits on his bounty as he chooses, including imposing a requirement that the consent of himself or some other person shall be required to the exercise of the powers. As the Court of Appeal have pointed out in Mihlenstedt v Barclays Bank International Ltd [1989] IRLR 522 a pension scheme is quite different."* See also Arden LJ (as she then was) in *Stevens v Bell* [2002] EWCA Civ 672 at [27].

181. In the latter category the touchstone may be to give effect to the wishes of the settlor, or what could properly be thought to be his wishes, in the circumstances which have developed. In the case of a single settlor of a discretionary trust there may be no compelling need to restrict the ambit of a wide power of variation as a matter of construction, or to hold its exercise to be illegitimate as inconsistent with the purpose for which it was given. Giving effect to the settlor's wishes in non-commercial trusts in which the beneficiaries have provided no consideration will not usually constitute a fraud on the power: see *Re Shiu Pak Nin* [2014] (1) CILR 173 (Grand Court of the Cayman Islands) Cresswell J at [147]; and *Re Beatty* [1990] 1 WLR 1503 where Hoffmann J (as he then was) held at page 1506A-B that what trustees are required to do is exercise their powers *"in accordance with what they honestly consider to have been the purpose for which [the settlor] created the powers.*[36]*"* There can be little doubt, on the present state of the evidence, that in the present case the Trustee honestly believed that it was exercising its powers by effecting the 2005 Transactions in accordance with the purpose for which they had been created.

182. If the power given to the trustee is expressed in very wide terms its scope will be commensurably large, especially if it is given by the settlor in a deed executed by him in respect of a trust whose assets are derived wholly from himself. In such circumstances there may be no basis for an implied restriction as a matter of construction and, it may well be difficult, or impossible, to say that, nevertheless, the power was invalidly exercised because it was exercised for a purpose beyond that which was contemplated. The natural source of the purpose of a power is to be found in the terms of the trust and the power; and the width of the terms of the latter may, itself, indicate that the use of the power is not to be confined, if what is done is within its scope.

[36] It would follow that they must be able to take into account evidence of what the settlor intended.

183. In the present case the power under clause 8 was given in very wide terms. (It is difficult to see how it could have been more widely drawn). The relevant powers were not confined to a general power of amendment, which might, on its true construction, have been limited so as not to allow the addition or exclusion of beneficiaries (or the addition of a particular beneficiary). They included in clause 8, which must have been intended to go further than clause 10, power to add or exclude any beneficiary or any class or description of beneficiary. The Declaration could easily have included a limitation on those who might be added to a particular class, or a restriction on the beneficiaries who might be removed; but it did not. I do not accept that there is no practical difference between a general power of amendment and a specific power of addition and exclusion. The addition of the specific power serves to indicate that it is not restricted in such a way as to preclude changes in the beneficiaries (by addition or exclusion); and the use of "any" without restriction indicates that no restriction on the choice of beneficiary is intended.

The scope of the power

184. We should apply, as the settlors, both actual and economic, would be entitled to expect, the ordinary rules of construction to the terms of the declaration of trust which was made. Under those rules, most recently expounded in *Arnold v Britton* and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, the meaning of the words is plain. The GRT Trustee can join or remove any beneficiary; as the settlor must be presumed to have intended. As Smellie J observed in *Re Z* "*any*" means "*any*". There is, in my view, no sound basis upon which (reading the deed as a whole and in its overall context) to imply any restriction on "any". Any such restriction is neither obvious nor necessary and its scope would be unclear. The addition of Grand View, as trustee of the Wang Family Trust was, in my judgment, within the scope of the power.

The Purpose of the Power

185. The relevant question is that set out at paragraph 168 (c) above. If the "*substratum rule"* as relied on by the Respondents is only another way of expressing, or synonymous with, the basic principle[37] it adds nothing. If it means something else it is not, in my view, supported by authority. Whether or not the use of a power is destructive of the substratum (whatever precisely that means) may be relevant in determining whether the power has been used for a purpose for which it was not intended, as may be the case where its use is fundamentally inconsistent with the purpose of the trust. But I would reject, as did the Chief Justice in *Mirvac*, the proposition that there is some absolute rule which, whatever the terms of the power or the circumstances of the trust, prohibits the exercise of specific powers of addition and exclusion of beneficiaries from altering the substratum of the trust – a metaphorical term the characteristics of which it may be difficult to define, and which may not necessarily exist.

186. As Lord Hoffmann said in *Serco Ltd v Lawson* [2006] ICR 250:

> *"Experience shows that rules formulated in terms of metaphors always cause trouble when it comes to their interpretation and the more striking the metaphor, the more likely it is to distract attention from the real issues in the case."*

187. I respectfully agree. The same observation would seem to me applicable to the reference to the "*beneficial core*" of the trust in the *Duke of Somerset* case. These metaphors are inapposite in a case such as this where, on any view, the GRT Trustee was entitled to add or exclude new classes or descriptions of beneficiaries. If a metaphor has to be used (which it does not) then either there was no substratum or the substratum of the GRT was one that could shift (as Schedule 2 provided) and the beneficial core was a flexible one, since the beneficiaries and the classes and

[37] See Lewin 30-*56 "A power of amendment must … be used only for the purpose for which it was given…Another way of expressing the point is that an amendment must not change the whole substratum of the trust or its basic purpose"*

descriptions thereof were capable of alteration from time to time throughout the life of the trust.

188. I note that the concept of substratum does not find mention in any English appellate cases and that none of the cases relied on by the Respondents deals with a clause like clause 8 in a discretionary trust similar to the GRT. Any such rule might preclude the GRT Trustee from taking account of a change of circumstances when that is exactly what the power was intended to accommodate.

189. The critical question in the present case is whether, despite the fact that the addition of any beneficiary is within the scope of the power, the purpose for which the power to do so was granted must be taken to be limited in a way which precludes its use in the way in which it was used. On the material presently before us it seems to me that it should not. I say that for the reasons set out below.

190. First, the power relied on (clause 8) is couched in the broadest possible terms in a professionally drawn declaration, not part of any commercial arrangement, to which only the settlor was a party. It is a specific power of addition and exclusion of any beneficiary or class or description of beneficiary, given in addition to the general power to amend in clause 10, which alone, and without clause 8 and the reference to clause 8 in the Second Schedule, might not have extended to the addition or removal of a beneficiary: *Duke of Bedford v Marquess of Abercorn* [1836] 1 My & Cr 312, although more modern authorities are to a different effect: see the discussion at *Lewin* 30-075 (2). Clause 8 cannot have been intended to go no further than the clause 10 power. It was plainly more than a power to make administrative changes to the GRT. In those circumstances the *prima facie* assumption should be that the purpose of the settlor in giving the GRT Trustee the power in clause 8 was that it should not be restricted so as to limit the beneficiaries who could be added, subject, of course, to the duty of the Trustee only to add a Beneficiary and distribute to him/her/it after adequate deliberation.

191. Put more shortly, the Founders, the economic settlors, should, in the absence of some convincing reason to the contrary, be assumed to have intended that the power which they granted to the GRT Trustee, whose directors were the Founders' trusted children and their long-time confidante Mr Hung, to add any person or class or description of persons and distribute the trust assets to him/it (see clause 4) could be used to do what it says i.e. to add any beneficiary. That is consistent with the Commonwealth authorities[38] that make clear that broad and unlimited powers of amendment should be given effect to in accordance with their terms; and the authorities which have dealt with the addition of beneficiaries by either a general or a special power[39].

192. In this respect the provision of clause 15 that the power should be "***an absolute and unfettered power***" is, at the lowest, a strong pointer against confining the power of amendment in the manner sought. A provision such as this may not be determinative as to whether there has been a use of a power for a purpose for which it was not intended. It would not, for instance, save the exercise of a power in favour of a beneficiary in fulfilment of an agreement that the assets would in fact go to a non-beneficiary. But, in a case such as this, the words indicate, expressly, an intention not to restrict the GRT Trustee from exercising the power given in accordance with the terms of the GRT Trust, including clause 8.

193. Second, and allied to the first, it would have been very easy to limit the use of the clause 8 power in some way so as to provide that it could only be used for the benefit of the families of the Founders' issue (possibly with a wide definition of "family") or those in some form of relationship with such issue. The fact that that was not done, suggests that the omission was intentional, particularly when (a) in clause 10 the

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[38] *Kearns v Hill* (1990) 21 NSWLR 107*; Re Z* [1997] CILR 248*; Mirvac v Mirvac Funds* [1999] NSWSC 457; *Lewis v Condon* [2013] NSWCA 201; *Mercanti v Mercanti* [2016] WASCA 206; *Re Anloma Pty Ltd* [2018] NSWSC 1818.

[39] *Re Manisty* [1973] Ch 17.21-2; *Kearns v Hill*; *Re Z*; *Tam Mei Khan v HSBC International Trustee Ltd* [2008] HKCFI 496; *Re Shiu Pak Ni; Re Shiu Pak Nin [*2014] (1) CLR 173 at [234]; *Re R Trust* [2015] JRC 267A.

draftsman did provide an exception to the power of amendment (irrevocability); and (b) if the trust is to be restricted to family you would need some definition of that term in order to determine what degree of remoteness from the Founders' issue is to be embraced. .

194. Third, an obvious reason for granting the GRT Trustee a power as wide as this in a 100-year trust is to allow the GRT Trustee to take account of changes, including in particular unforeseeable or unforeseen ones, in relation to which a wide power of addition and exclusion might be necessary, or at any rate desirable. Such changes might include the fact that the need to benefit the Founders' issue had been satisfied by other means, or that such issue were no longer appropriate recipients of the economic settlors' bounty. I do not, in this connection, derive much assistance for present purposes from the provisions of the Third Schedule as to what was to happen in 100 years' time to assets of the GRT which had not previously been disposed of. I do not regard these provisions, which address a remote contingency, which may never happen and will only do so absent the disposal of the trust assets under clauses 3 and/or 4, as an indication of some immutable nature of a trust which has the specific powers of addition and exclusion in clause 8; or as limiting the purpose of a power to add and exclude beneficiaries, when that power was available to be used during the 100 years before the Third Schedule could take effect.

195. Fourth, the natural assumption as to what the economic settlors contemplated as the purpose of the conferment of the power was that the GRT Trustee would, if it thought it right, exercise the power having regard to the economic settlors' known intentions and wishes when setting up the trust and from time to time thereafter, however such intentions and wishes were communicated; or at any rate in a manner which it was thought that they would have wished (and, *a fortiori*, in the manner which they did, in fact, wish).

196. Fifth, given that the initial class of discretionary beneficiaries consisted of volunteers, and that the power was a power to add or exclude beneficiaries, the starting assumption should be that the discretion could be exercised in a way which was not confined to promoting the interests of the existing beneficiaries by favouring their family or their connections. As the judge accepted, it cannot be a requirement of a broad power to add or exclude beneficiaries that such a power must be exercised in the interests of beneficiaries it is proposed to remove or who may be disadvantaged by the addition of new ones.[40]

197. Sixth, the wide definition of "*person*" in clause 1.6 to include *any individual, company, partnership and unincorporated association and any person acting in a fiduciary capacity*" makes it difficult to argue that the power to add and exclude any such person was only capable of being properly exercised in a manner which preserved what is said to have been the Trust's character as a 'dynastic family trust'. The definition does not:

(a) limit the company, partnership, unincorporated association or person acting in a fiduciary capacity, which may be added, to one which has a connection with the existing beneficiaries i.e. the Founders' issue (a condition which the Wang Family Trust would satisfy since four out of five of the directors of Grand View, its Trustee, were such issue), or specify the nature or limit of any such connection; or

(b) limit the distribution to be made to a person added as a beneficiary to one which would benefit or advance the Founders' issue or those related to or connected with them; or

[40]It is not surprising that the authors of *Lewin* express themselves unaware of any decision on the application of the doctrine of fraud on a power to intermediate powers and express the view that since such powers can properly be used very extensively the scope for any notion of improper purpose was correspondingly narrow. [30-051]

(c) limit the "*person acting in a fiduciary character*" to a fiduciary for one of the Founders' issue or some person related to or connected with them.

198. Seventh, I accept that the discretionary beneficiaries specified in the Declaration were the children of the Founders and later issue as were the residuary beneficiaries. But Schedule 2 made clear from the start that the identity of the Beneficiaries was subject to the exercise by the GRT Trustee of its powers of addition and exclusion of any beneficiary, so that the beneficiaries to whom a distribution was made might be those who were not the issue of the Founders and might be anyone else. I accept Grand View's contention that the proposition that the family nature of the trust was intended to be immutable is circular, because it depends on assuming that the powers of addition and exclusion were constrained (in a way not expressed in their terms) so as to prohibit the removal of some or all of the Founders' descendants or the addition of someone who was not related to or connected with them in some (unspecified) way. If the economic settlors had intended that characteristic to be immutable, they would surely have said so (as they did in respect of the irrevocability of the trust) by confining the addition of beneficiaries to (for instance) members of the families of the Founders' issue, or those connected to them whether by affinity or dependence. Given that they did not do so it is difficult to see why one should reduce the scope or application of the language that they used. To do so would appear to me to defeat the intentions of the Founders rather than to give effect to them. In effect the Founders gave to the GRT Trustee a power to do what they could have done at the outset, i.e. to make a choice of beneficiary, during the lifetime of the trust.

199. In those circumstances, if one is to use the geological metaphor, which I would not, the substratum of the GRT Trust, if there is one, is to benefit the Beneficiaries as they may from time to time be; and not that those Beneficiaries shall, immutably, be the Founders' issue or their families or those related to or connected with them. As *Lewin* 30-075 (1) observes "*In a discretionary trust there may be no substratum to be preserved beyond the provision of benefits to the class of objects which may be*

very widely expressed" (and, I would add, in this case widely capable of alteration). The fact that the Founders' issue are the Beneficiaries initially identified does not conclusively determine the scope of a power whose purpose is to change them.

200. Eighth, the power was to add "*any person or class or description of persons*". The beneficiaries initially specified were a class, consisting of the issue of the Founder; but there was power in clause 8 to add a different person or class or description of beneficiary, into which category Grand View would fall.

201. Ninth, it seems to me that the way in which the clause 8 power was exercised paid due regard to the economic settlors' intentions in setting up the GRT and their wishes in relation to the use of the power both when it was granted (namely to afford maximum flexibility for the future) and when it was exercised. When the GRT was created, it was to be a means to incentivise the Founders' children and their further descendants to support the FPG Group, the success of which was the Founders' lifetime achievement and the means of fulfilling their vision. This was to be done by providing them with shares in FPG companies, which they were not due to receive by inheritance. The idea that, even though, as it unexpectedly turned out, they were to receive such shares by inheritance, with a value greatly in excess of anything that they might receive under the GRT, and at the same time receive more shares under the GRT, would be difficult to square with the Founders' deeply held belief that wealth ultimately belongs to society. It was in the light of that change that the GRT Trustee, after consultation with the Founders, decided that, in those changed circumstances, the clause 8 power should be used to place the GRT assets into the Wang Family Trust a principal object of which was to support FPG.

202. Tenth, I do not regard a number of the points made by the Respondents as well founded. The fact that Recital A declares the trust to be a private express trust would not mean that a transfer to the trustee of the Wang Family Trust could not have been contemplated. The Wang Family Trust, not being an exclusively charitable trust, is a private trust too: *Snell's Equity* 23-001. Its trustee is Grand

View *Private* Trust Company Limited. Even if it was not, that would not mean that the GRT Trust ceased to be a private trust, or that Grand View was an impermissible beneficiary. Similarly, the fact that the object of the GRT Trust Company was to act as trustee of certain interrelated personal express trusts begs the question of the breadth of "*person*" inherent in the adjective, the answer to which is to be found in the definition thereof in the Trust Deed.,

203. Next, the fact that clause 1.6 does not include "*purposes*" within the definition of "*person*" is true: but what was added as a beneficiary was not a purpose but a company which is within the definition; which includes someone acting in a fiduciary character which was the capacity in which Grand View received the trust assets.

204. Tony Wang submits that the transfer to the Grand View was an impermissible exercise of the power because it did not confer a benefit on Grand View and, instead, benefitted the WFT i.e. a non-object of the GRT. I do not regard this submission as well founded. A power which is exercisable for the benefit of any "*person*" is , generally, interpreted as permitting an exercise of such power by a transfer to a person for the benefit of purposes*: Re Dilke* [1921] I Ch 34 at 40; *Re Harvey dec'd* [1950] 1 AER 491, 493 *("if there is a power to appoint generally to persons that involves necessarily that the persons who are the recipients of the bounty of the creator of the power can themselves be made the instruments to effect particular purposes*"[41]); *Re Triffin's Settlement* [1958] Ch 852, 862.[42] In any event the terms of the GRT expressly permitted the addition of a beneficiary acting in a fiduciary capacity – a definition which does not (as it easily could have done) exclude a person acting in a fiduciary character for a purpose trust. Payment could be made under

[41] In that case the persons were, in one case, trustees on trusts to establish "*a home for poor and aged persons of genteel birth*" and in the other trustees for the purposes of establishing "*a home for needy persons".*

[42] In *Harvey*, as is apparent, the powers in question were general powers but Vaisey J made plain (493D) that it made no difference whether the power was general, special or intermediate. In *Triffitt* the powers were hybrid,

the GRT to a person - here Grand View -in the fiduciary character in which it was added. There is, in addition, no provision in the Trust which precluded any purpose from benefitting by reason of the exercise of the power under clause 8.

205. Clause 9 does not, in my view, lend any assistance to Tony Wang's submissions. It addresses an entirely different situation where a payment is made to the trustee of any settlement whose provisions are for the benefit of a Beneficiary notwithstanding that the trustee was not itself a beneficiary, as opposed to the entirely different situation where a trustee of another trust was added as a beneficiary. In addition, clause 9 expressly provided that the extension to existing powers which it permitted was "*without prejudice to the generality of any such power or to any other mode of application*".

206. Eleventh, the GRT was, it is clear, irrevocable. But it was not revoked. The whole of the assets of the GRT were distributed by the GRT Trustee to Grand View, the added beneficiary, as clause 4.1 expressly permitted. In determining the validity of the exercise of the power it is necessary to consider what actually happened in (accurate) legal terms. Nor was there, as it seems to me, a resettlement. The GRT Trustee created no new trust. But, if, contrary to that view, the distribution of assets to a fiduciary is to be treated as a resettlement, that was expressly permitted. Further, if the addition of a new beneficiary and a distribution to him is invalid because it amounts to an *effective* revocation and resettlement (although that is not what it is in law) it is difficult to see why that would not always be the case when assets are distributed to a new beneficiary, as the GRT expressly contemplates. I note (see footnote 9 to paragraph 57) that Megarry J in *Re Ball's Settlement*, when dealing with a variation, spoke of a resettlement which was also a variation, on which footing the use of a power to add a beneficiary, which clause 8 plainly gave, could be said always to amount to a form of resettlement.

207. Twelfth, I do not accept that the intentions of the settlor in establishing the trust and his purpose in granting the power can only be determined by reference to the

terms of the trust and nothing more. The cases cited by the Respondents do not bear that out.

208. The first is *Mackinnon v Regent Trust* [2004] JLR 477. In that case the Jersey Royal Court had to consider whether to strike out allegations that a trust was a sham trust. The Court concluded that there was no jurisdiction vested in the Court allowing it to look behind a trust deed in order to determine the subjective intentions of the settlor and to set aside the terms of a trust deed if those subjective intentions differed from the express trusts. Such evidence was sought to be adduced in order to impugn the validity of the trust deed. The case was not concerned with whether or not the Court could look at extrinsic evidence when considering the purpose for which a power was conferred.

209. The second is *Tao v HSBC International Trustee* [2019] HKCFI 1268 in which the Court stated, at paragraph 44, that evidence of extrinsic circumstances was not admissible to add to, contradict, vary or alter the express terms of the trust deed. The question in that case was whether there was a common understanding that the trustee was obliged to comply with the plaintiff's instructions. The case has no relevance for present purposes. Grand View does not ask the Court to add to, contradict or vary the express terms of the Declaration of Trust. Nor does it seek to examine the subjective view of the settlor as to what he thought the terms of the GRT meant in order to interpret them. Rather, the issue in the present case is whether the purpose for which the powers of addition and exclusion in clause 8 were conferred may be determined by reference not only to the terms of the Declaration of Trust, but also to extrinsic evidence as to the relevant context in, and intention with which the Declaration of Trust was set up and the powers were given.

210. The third authority relied on by the Respondents in this regard is paragraph 9-03 of *Thomas on Powers*. In that paragraph the authors say that "*whether the real purpose of a power may be ascertained by reference to extrinsic evidence is also a*

matter of some difficulty and uncertainty". The paragraph, which pre-dates *Eclairs, British Airways and Mercanti,* expressly recognises that, at least in a case involving what the author describes as a complex commercial arrangement, "*it may be necessary, in order to give business efficacy to the arrangement, and to reflect the true intentions of the parties, to resort to extrinsic evidence in order to establish both the intended scope and purpose of the power*". If that is permissible in a case involving a complex commercial arrangement, it is difficult to see why it should not be so in the context of a discretionary trust. The lengthy discussion in 9-03 ends with the suggestion that, in appropriate circumstances, the true purpose of a power may be proved in principle by means of extrinsic evidence.

211. There are other relevant cases. In *Re Manisty's Settlement* [1973] Ch 17 Templeman J said (at 26E-F) in relation to both special and intermediate powers : "*reasonable trustees will endeavour, no doubt,* ***to give effect to the intention of the settlor in making the settlement and will derive that intention not from the terms of the power necessarily or exclusively,*** *but from all the terms of the settlement, the surrounding* ***circumstances and their individual knowledge acquired or inherited***". He described an intermediate power, in contrast to a special power, as "*a weapon which will enable [trustees] to consider all developments and all future mishaps and disasters.*"

212. To similar effect are the observations of Lord Walker in *Schmidt v Rosewodd Trust* [2003] 2 AC 714 at [1]:

> "*The trusts and powers contained in a settlement established in such circumstances* [seeking advantages of tax havens*] may give no reliable indication of who will in the event benefit from the settlement. Typically it will contain very wide discretions exercisable by the trustees (sometimes only with the consent of a so-called protector) in favour of a widely-defined class of beneficiaries. The exercise of those discretions may depend on the settlor's*

wishes as confidentially imparted to the trustees and the protector."

See, also, his survey of how the forms and functions of settlements have changed over the years at [34]- [35].

213. In *Accurate Financial Consultants Pty Ltd v Koko Black Pty Ltd* [2008] VSCA 86 Dodds-Streeton JA, with whom the rest of the Court agreed, concluded at paragraph 105 that *"neither the authorities, nor the relevant equitable principles prohibit the consideration, in an appropriate case of parol and extraneous evidence in order to discern the purpose of a trust power."*

214. In the *British Airways* case Patten LJ held at [70]:

> *"The equitable overlay embodied in the proper purposes rule can have no application in my view unless it is clear that the Trustees intend to use the powers they were granted to achieve something which can be characterised as improper. Even if one puts aside Lord Sumption's suggestion in Eclairs that this involves a subjective test of intention, it clearly requires regard to be had to the terms of the trust instrument* ***and any other relevant background material*** *in order to construct the limits of the discretion."*

215. In the same case Lewison LJ, with whose reasoning Peter Jackson LJ agreed at paragraph 127), held at paragraph 100 as follows:

> *"As Patten LJ has pointed out, by reference to Bank of New Zealand, the `objects clause is the first port of call, but it is not decisive. As Lord Sumption said in Eclairs at [30]:*
>
> > *'Ascertaining the purpose of a power where the instrument is silent depends on an inference from the mischief of the provision conferring it, which is itself deduced from its express terms, from an analysis of their effect, and from the court's understanding of the business context.'"*

216. Lastly under this heading paras 29-162 of *Lewin on Trusts* 19th edition sets out the position at length, including the following:

> *"Trustees therefore rightly give great weight to the settlor's wishes, either expressed from time to time during his lifetime or recorded, usually in documentary form before his death.… The settlor's wishes, the Supreme Court has held*[43] *"are always a material consideration in the exercise of fiduciary discretions"*
>
> *"It was previously well established that the trustees are entitled to take serious account of the settlor's wishes and it is the better view that they are bound to do so."*
>
> *"Moreover, trustees are entitled to have regard to the settlor's wishes expressed from time to time and are not confined to those expressed contemporaneously with the creation of the trust"; Schmidt Rosewood Trust Ltd [2003] UKPC 26 at [20][33]"*

See to similar effect *Re A Trust* [2012] JRC 066 at [63]; *Re C Trust* [2012] JRC 088B at [136]; *HSBC International Trustee Ltd v Poon* [2014] JRC 254A (distribution to a settlor to enable him to meet part of a divorce award followed exclusion of the wife, both at the request of the settlor).

217. It is material to distinguish a number of related questions. The first is whether the settlors' subjective view as to what the terms of the trust meant can be used to interpret them. The second is whether evidence of the settlor's subjective intentions in setting up the trust and his purpose in granting the powers contained in it, is admissible in determining the ambit of the purpose of the power when considering the fraud on a power doctrine. The third is whether, if the proposed use of the power is within its scope and not contrary to its purpose, the trustees can have regard to the wishes of the settlor, including the economic settlor, when deciding whether

[43] *Pitt v Holt* at [66]

and, if so, how to exercise the power. The answers to the first and third questions are "No" and "Yes".

218. As to the second question, it seems to me that, when considering the equitable rule that a power may not be used otherwise than in accordance with the purpose for which it was given (even if the use falls within the scope of the terms of the trust) Equity should not, in a case such as this, close her mind to extrinsic evidence of the settlor's intentions, when setting up the trust and when granting the power, particularly when it is the wishes of the settlor that the trustee is required to take into account when deciding on the exercise of the power. To do so would not offend the rules of construction or implication because the evidence would only be relevant after it had been concluded that the proposed exercise of the power was not outlawed as a matter of construction or implication[44].

219. I would be minded to accept that, if the use of the power, although within its scope, was not within its purpose as originally intended, the fact that, when the power was used, the settlor wanted it to be used in the way in which it was, would not mean that the use was a proper one. There is, however, evidence as to the intentions of the economic settlors in relation to the power, when the GRT was set up, which was that the GRT was to be a trust "*the assets of which may be used for any purpose*", although the [then] plan was for it to benefit the children of the Founders: : see the memorandum referred to at [12] above.

220. Even if there was no such evidence, the fact that the economic settlors, and the trustee/settlor approved of the use of the power when it was exercised, may be taken as some indication that they did not regard its use as inconsistent with their purpose in granting the power in the first place. Further, the settlors' intentions as to the trust (that it should provide an incentive to their issue to foster the success

[44] Mrs Talbot Rice submitted that a letter from the settlor saying that the power of amendment was inserted in the widest terms to cater for any unforeseen circumstances of any kind would be admissible if scheduled to the Trust Deed but not otherwise.

of the FPG, an aim which would be achieved by the receipt of shares FPG by way of inheritance) were relevant to any consideration as to whether the use of the power in 2005 went beyond what could be taken to have been contemplated.

221. If the above analysis be wrong, and the only admissible source from which to discern the intentions of the settlor and the purpose of the power is what is contained in the Trust Deed in the context in which it was made, then those terms do not, either on their true construction or by implication prevent the GRT Trustee from adding a beneficiary of a different class or description. They expressly allow it.

222. Thirteenth, I do not regard the cases on the *Variation of Trusts Act* 1958, and the difference between a variation and resettlement, as of great assistance or in any way determinative. The question in those cases (in which the Court, in essence, has jurisdiction to consent on behalf of infant or unborn beneficiaries to a variation of the trust – but nothing more) was whether the proposal went further than a variation and amounted to a resettlement. The question here is a different one, namely whether what was done fell within the scope and purpose of specific powers of addition and exclusion of any person or any class or description of person. It is not right to approach the issue as if the power in issue was a power simply to vary or amend the trust (as clause 10 provided for) in which case it may be arguable that the trust must in some sense remain the same trust as it was before. Nor do these cases cast any light on what constitutes the substratum (if there is any) of a trust such as the GRT.

223. Fourteenth, I have considered the arguments skilfully advanced by Mrs Talbot-Rice QC for the respondents. She submits that the concentration by Grand View on clause 8, to the exclusion of other considerations is misplaced and that the relevant considerations, looking at the case as a whole, include (a) the absence of any reference in the GRT to a purpose in the definition of "person" coupled with the creation on the same day of two different trusts - the WFT, a purpose trust, and the GRT; (b) the character of the default beneficiaries in the Third Schedule; (c) the

fact that the trust property had to vest within 100 years which contemplated its enjoyment by a definable person; (d) the impossibility of transfer under clause 9 to another trust where such vesting might not happen within the perpetuity period; and (e) the fact that the GRT was irrevocable. Reliance is placed on para 46 of Susan Wang's first affidavit where she said that "*there had been a change of circumstances which altered the basis upon which the [GRT] had been formed"*. The reality of the case is, she submits, that the intention of the change was to benefit a non object i.e. the WFT by transferring the assets from what was a family to a purpose trust.

224. It seems to me, however, that clause 8 is not to be regarded as only ancillary and subordinate to a trust whose beneficiaries had to be the family of the Founders' issue, and was intended to do no more than permit the inclusion of further family or family related beneficiaries. On the contrary, the combination of the definition of beneficiary in the Second Schedule and the width of clause 8, therein referred to, together with the definition of "person" in clause 1 and the provisions of clause 15 appear to me to be pivotal to an understanding of the purpose of the power, which was to give the GRT Trustee the maximum flexibility possible. A number of cases indicate the need for such flexibility: e.g. *Kearns v Hill; Re Z; Mercanti v Mercanti; Mirvac v Mirvac Funds; and Bank of New Zealand.* I would not accept that such flexibility could only be obtained by a trust which was, *ab initio*, stated to be for X and Y or for anyone in the world except the settlor.

225. Fifteenth, we have had our attention drawn to a raft of authorities the kernel of which I have endeavoured to summarise. I am not persuaded that any of them (and certainly none that bind us) dictate a different answer to the one that I have reached; and several of them support it.

226. Sixteenth: we are here concerned with an application under Order XIV. It does not seem to me that the Respondents have established that they are unarguably correct, which is the applicable test.

Conclusion

227. In my judgment it is well arguable that the addition of Grand View, as trustee of the Wang Family Trust as a beneficiary of the Global Resources Trust and the distribution to it of the assets of the trust was within the scope of the powers given to the GRT Trustee under the Trust; and did not constitute a fraud on those powers.

228. None of this means that the power of the GRT Trustee under clause 8 was beyond any form of equitable constraint or that the GRT Trustee could do whatever it felt like. The three methods of control identified by Lord Walker in *Pitt v Holt* applied. The first and third were arguably satisfied. The second of those was that it was necessary for the GRT Trustee carefully to consider whether the power should be exercised, taking into account all relevant and ignoring irrelevant considerations. This is not properly to be regarded as some perfunctory or feeble constraint.

229. On the assumed facts it is certainly arguable that the Powers of Addition and Exclusion were exercised for the purpose for which the powers were granted, namely to meet the significantly changed circumstances which arose in 2005, in which, as a result of the Founders' decision not to divest themselves of their personal shareholdings in FPG so as to avoid harming the group, (a) the Founders' descendants were to obtain by inheritance greater wealth than was ever envisaged or intended when the GRT was set up; and (b) the Founders' descendants would be incentivised to support FPG in any event through the inheritance of their valuable personal shareholdings in the group. Redirecting the Founders' bounty placed into the GRT to a trust which had amongst its principal purposes the support of FPG long into the future reflected the actual wishes of the Founders in the changed circumstances.

230. But whether there was adequate deliberation must, if necessary, be the subject of further consideration.

Remoteness of Vesting

The Respondents' submissions

231. By a Respondents' Notice the Respondents contend that the judge could and should have found that the Deed was void because it breached the prohibition relating to remoteness of vesting contained in clause 9.

232. Clause 1.1. provides that the length of the Trust Period is 100 years. Clause 3.1. (the power of appointment) provides that its exercise shall be subject to "*any applicable rules governing remoteness of vesting*").

233. For ease of reference I set out the terms of clause 9 again:

> *"Any power hereby or by law conferred on the Trustees to appoint, **pay**, transfer, appropriate or apply any capital or income of the Trust **Fund to or for the benefit of any Beneficiary** may, at the discretion of the Trustees , be validly exercised (without prejudice to the generality of such power or to any other mode of application) by **paying or transferring the same to the trustees of any settlement** (wherever such trustees are resident and whether or not the proper law of such settlement is the Proper Law of this Declaration) the provisions of which are in the opinion of the Trustees **for the benefit of such Beneficiary**, notwithstanding that such settlement may also contain trusts , powers or provisions (discretionary or otherwise) in favour of some other person or object , but so that no such payment or transfer shall be made which would or **might infringe** any applicable rule governing remoteness of vesting".*

234. The Respondents submit that in order to interpret this clause it is necessary to understand its proper legal context which is, they submit, as follows.

235. There are two distinct rules which are not to be confused. One is the rule against perpetual trusts. The other is the rule against remoteness of vesting, otherwise known as the rule against perpetuities which requires the assets to vest within a particular time which, in the case of the GRT was 100 years from its creation. If property is appointed from trust A to trust B, both of them being discretionary, that is not vesting. Vesting requires that it be ascertained not only who will take the assets but also precisely what benefit they will take: *Lewin* 5 -060.

236. The rule against perpetual trusts / inalienability requires trusts established for non-charitable purposes to have a duration and not be perpetual. At common law, non-charitable purpose trusts are usually void because there is no beneficiary to enforce them, but they are also objectionable because they may be perpetual.[45]

237. The common law rule against perpetual trusts was expressly disapplied by section 12A (4) of the *Trusts (Special Provisions) Act 1989* (as amended in 1998) so as to permit a purpose trust (as defined in that Act) to carry on forever i.e. be a perpetual "purpose trust". That section provides:

> *"(4) The rule of law (known as the rule against excessive duration or the rule against perpetual trusts) which limits the time during which the capital of a trust may remain unexpendable to the perpetuity period under the rule against perpetuities shall not apply to a purpose trust."*

238. By contrast, the rule against remoteness of vesting was specifically preserved and applied to "purpose trusts" by section 12A (5) of the same Act as it was in force at the time of the Irrevocable Deed.[46] Section 12A (5) provided, unambiguously:

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[45] See the English Law Commission's Report on The Rules Against Perpetuities and Excessive Accumulations (LC251, 1998) at para 1.14.

[46] The section was repealed in 2009 i.e. 4 years after the purported exercise by the GRT Trustee of its powers.

> *"(5) The rule against perpetuities (also known as the rule against remoteness of vesting) as modified by the Perpetuities and Accumulations Act 1989 shall apply to a purpose trust."*

239. The Respondents further submit that the learned Judge fell into error (in reliance upon an erroneous submission made by Grand View: see [132] of the judge's judgment cited at [248] below) in conflating the two rules, relying on section 12A(4) at paragraph 132 of the Judgment and erroneously holding that the rule against ***remoteness of vesting*** did not apply to the WFT when it did; and in failing to find that the rule against remoteness of vesting applied to the appointment by the GRT Trustee, whose trust was governed by an explicit perpetuity period, to another trust (whatever was the nature of that other trust).

240. In order to appreciate the meaning and effect of clause 9 it is necessary, the Respondents submit, to consider the history and effect of the rule against remoteness of vesting.

241. At common law if, at the time of the creation of the trust, there was any possibility that a future interest might vest outside the perpetuity period, it was immediately void by virtue of the rule against remoteness of vesting, even if the property does in fact vest inside the period (see *Lewin* at 5-057 and 5-60; *Megarry & Wade* 8-018).

242. Where a perpetuity period is specified in an instrument containing a special power of appointment, that power of appointment cannot be used to take property out of that settlement and settle it on new trusts, or to transfer it to the trustees of another trust, so that the funds are held in trust without vesting (in the new settlement) for longer than the perpetuity period contained in the original i.e. the transferring trust. The perpetuity period in respect of the funds appointed to the new settlement therefore runs from the date of the original settlement (see *Lewin* at 5-125).

243. This common law rule was relaxed by the *Perpetuities and Accumulations Act 1989* which was the legislation applicable at the time of execution of the Irrevocable Deed in 2005. That Act

i. provided for instruments to contain a 100-year perpetuity period (as in the GRT Declaration of Trust);

ii. by a combination of ss. 3(1) and 3(2), provided that where a disposition is made under a special power of appointment (as in the present case) the period set out in the instrument shall apply in relation to any disposition under the power as it applies in relation to the power itself. In simple terms, it preserved the common law rule that funds appointed into a new settlement could not be held in trust for longer than the perpetuity period of the original trust and accordingly required that property disposed of from the GRT to another trust had to vest within what remained of the hundred year perpetuity period of the GRT; and

iii. introduced (by s.5)[47] a "wait and see" provision, such that even though there was a possibility that a future interest "*might*" (to use the statutory language) vest outside the perpetuity period, the trust, power or disposition thereunder was not rendered immediately void, but treated as valid until such time as it was established that the vesting must occur, if at all, after the end of the perpetuity period. Section 5 thus tempered the common law rule and imported a distinction between situations where: (i) a disposition "*might*" not become vested until too remote a time; and (ii) it becomes established that

[47] Which provides: *"5 (1) Where… a disposition would be void on the ground that the interest disposed of <u>might</u> not become vested until too remote a time, the disposition shall be treated, until such time (if any) as it becomes established that the vesting must occur, if at all, after the end of the perpetuity period, as if the disposition were not subject to the rule against perpetuities; and its becoming so established shall not affect the validity of anything previously done in relation to the interest disposed of by way of advancement, application of intermediate income or otherwise."*

the vesting "must" occur if at all after the end of the perpetuity period. In the former case under the statute, the disponor can "wait and see".

244. The "wait and see" rule gives rise to great uncertainty. A trustee settling property on different trusts with a longer (or, in the case of the WFT, no) perpetuity period will never know for sure whether it has validly disposed of its trust assets until (possibly) the conclusion of what remains of the disposing trust's perpetuity period. The property might come back, but only once it is clear that the rule against remoteness of vesting has definitely been infringed.

245. It was precisely that uncertainty that the GRT Declaration of Trust sought to avoid by the language of clause 9. This is because it expressly prohibits dispositions to other trusts not merely when the rule against remoteness of vesting "*would*" be infringed, but also when it "*might*" be infringed, a phrase which plainly echoes the language of the "wait and see" rule in the statute. The draftsman stipulated in clause 9 that the trustee of the GRT cannot transfer assets to trustees of other trusts when there is any *risk* that the property in question could boomerang back sometime later, after the "wait and see" rule had run its course. It was a clause designed to force the GRT Trustee only to dispose of its assets in a manner which would stand the test of time.

246. The express prohibition in clause 9 was not in standard form. The standard form of wording is to be found in the *Trusts (Special Provisions) Act 1989*. Section 17 of that Act provides that *"Any instrument creating any trust may incorporate by reference any of the provisions set out in the Schedule"*. Clause 3 of the Schedule provides:

> *"ANY power by this instrument or by law conferred on the Trustees to pay transfer appropriate or apply the Trust Fund or any income thereof for the benefit of any beneficiary may at the discretion of the Trustees be validly exercised (without prejudice to the generality of such power or to any other mode of application)—*

> *(a) by paying or transferring the same to the trustees of any settlement (whether or not such trustees are resident in Bermuda and whether or not the proper law of such settlement is the law of Bermuda) the provisions of which are in the opinion of the Trustees for the benefit of such beneficiary notwithstanding that such settlement may also contain trusts powers or provisions (discretionary or otherwise) in favour of other persons or objects Provided however that no such payment or transfer shall be made **so as to infringe** the rule against perpetuities as applicable to the trusts created by this instrument…"*

i.e. the prohibition is limited to actual as opposed to possible infringement.

247. In the present case the transfer of the trust assets made in purported pursuance of the power was a trust to trust transfer; the transfer was to the WFT, a perpetual trust; the rule against remoteness of vesting applied; and the disposition might infringe an applicable rule governing remoteness of vesting. There was, accordingly, by virtue of clause 9, no authority to make a transfer of the Grid Investors shares under which they *migh*t ultimately vest outside the GRT perpetuity period of 100 years and the transfer was therefore void. The wait and see rule does not help Grand View.

The Judge's View

248. In the light of his earlier conclusions the judge dealt with this matter briefly. He said that, if he had not concluded that the relevant transactions were beyond the scope of the applicable powers, he would not summarily have determined that they were invalidated by reason of contravening the remoteness of vesting provisions of, *inter alia*, Clause 9. What he said was this:

> *"129 In reaching my findings on the scope of the power issue above, I indicated that I would not place pivotal reliance on the fact that the GRT contained remoteness of vesting provisions which were purportedly breached by appointing out the assets to a perpetual purpose trust. This*

is fundamentally because, viewed in isolation, these provisions could simply have been amended if it was open to the Trustee to replace the original Beneficiaries with a perpetual purpose trust.

131 ….In my judgment it is open to the Court to construe the addition of the Wang Family Trust (a perpetual purpose trust) and the exclusion of the Family Beneficiaries as:

(a) involving the exercise of a power of amendment of a special kind, and

(b) having the effect by necessary implication of amending the instrument to nullify the remoteness of vesting provisions for so long as a purpose trust was the sole beneficiary.

132 Mr Adkin QC submitted that: "It cannot be said that the transfer of assets from the GRT into the Wang Family Trust involved the possible infringement of any applicable rule against the remoteness of vesting in circumstances where there was no such rule applicable to the latter trust" (Defendant's Skeleton Argument, paragraph 126). Reliance was rightly placed on section 12A (4) of the Trusts (Special Provisions) Act 1989 (effective 1998), which provides:

"(4) The rule of law (known as the rule against excessive duration or the rule against perpetual trusts) which limits the time during which the capital of a trust may remain unexpendable to the perpetuity period under the rule against perpetuities shall not apply to a purpose trust."

133 If I was required to decide this issue summarily, I would resolve it in the Defendant's favour. However, if my primary findings on the scope of the power are found to be wrong and there is a trial on the breach of fiduciary duty claims, in my judgment this point would more appropriately be determined at such a trial as its adjudication might be impacted by the analysis of the more substantive claims."

249. The learned judge appears in the passage at 132, with its acceptance that reliance was rightly place on section 132(4), either to have conflated subsection (4)(the rule against excessive duration) with subsection (5) (the rule against remoteness of vesting) or regarded the latter as inapplicable for reasons not fully explained.

Grand View's submissions

250. Grand View submits that the Respondents are wrong for a number of reasons. First and foremost, it says, neither clause 3 nor clause 9 has any application to the distribution made for the following reasons.

251. Clauses 3.1 and 4.1 of the Declaration of Trust are dispositive powers of different kinds (see *Lewin on Trusts*, 19th 3-054 – 3-064, and *Bond v Pickford* [1983] STC 517): Thus:

iv. Clause 3.1 (in summary) confers on the trustee an overriding power to appoint new trusts for the benefit of the Beneficiaries. If new trusts are appointed in exercise of a power in this form, the property comprised in the trusts will often remain comprised in the settlement (note the word "hold" in clause 3.1)[48].

v. Clause 4.1 (in summary) confers on the trustee a power (in default of and subject to any appointment under clause 3) to pay or apply property to or for the benefit of a Beneficiary. Property paid or applied in exercise of a power in this form will often cease to be comprised in the settlement.

vi. By contrast, clause 9 is not a free-standing dispositive power. It enlarges the powers in clauses 3.1 and 4.1 by authorising the transfer of property to a settlement the provisions of which are in the trustee's opinion for the benefit of a beneficiary in whose favour those powers are exercised, notwithstanding that such other settlement may also benefit some other person or object. An example of the type of transfer authorised by clause 9 would be a distribution from a settlement whose sole beneficiaries were X and Y to a settlement under which X and his spouse, children and remoter issue were beneficiaries.

[48] For the potential difficulty in deciding whether they do *see Bond v Pickford* at 522 b-d.

252. By the Deed of 26 September 2005, the GRT Trustee added as a discretionary beneficiary *"Grand View Private Trust Company Limited as Trustee of the Wang Family Trust dated 10 September 2001"*. The discretionary beneficiary so added was Grand View, acting in its fiduciary capacity, not the purposes for which Grand View was trustee.

253. The Deed, having recited that clauses 3.1 and 4.1 "*authorise the Trustee to pay and appoint property from the Trust to any Beneficiary of the Trust*", proceeded to declare that "*the Trustee shall take all steps necessary to pay and appoint the assets of the Trust … to the Wang Family Trust*".

254. The Deed did not create new trusts. It made an absolute appointment of the trust assets to Grand View, acting in its fiduciary capacity. This was capable of being achieved by an exercise of the clause 4.1 power alone. The reference to the clause 3.1 power added nothing. The Deed does not refer to clause 9, and the disposition made by the Deed does not depend for its validity on the enlargement of the powers in clauses 3.1 and 4.1 made by clause 9.

255. It would, in any event, have been wrong to invoke clause 9 because the GRT Trustee did not transfer the trust assets to a trust of which the appointee, Grand View, was a beneficiary. Instead, the GRT Trustee transferred the trust assets to a trust of which the transferee, Grand View, was a trustee. Accordingly, the Respondents' reliance on the concluding words of clause 9 is misplaced. The clause 4.1 power, without the extension provided for by clause 9, was sufficient to make the distribution.

256. Second, Grand View submits, that, even if clause 9 was applicable to the distribution to itself, that distribution was not such as would or might infringe an applicable rule governing remoteness of vesting. The correct position, Grand View submits, is as follows:

257. A purpose trust is a trust for purposes, not persons, so a disposition creating a perpetual purpose trust does not create future interests that may vest in persons. If a person receives a distribution from a purpose trust, it is not because he or she is an object of the trust, but because the distribution is a means of advancing the purpose of the trust: *London Hospital Medical College v Inland Revenue Commissioners* [1976] 1 WLR 613 at 620E; *Latimer v Commissioners of Inland Revenue* [2004] 1 WLR 1466 at 1475B.

258. For these reasons, the common law rule against perpetuities, or remoteness of vesting, operates differently in relation to purpose trusts to the way that it does in relation to trusts for persons: it is not concerned with distributions made from purpose trusts, but instead limits the duration of purpose trusts to a perpetuity period: *Morris and Leach, The Rule Against Perpetuities* 2nd ed, p. 321; *Maudsley, The Modern Law of Perpetuities*, p 170; *Perpetuities and Accumulations Act 1989* section 14.

259. The rule against remoteness of vesting is concerned with the vesting of **interests**, not **assets**. Use of the term "assets" obscures the point that distributions from purpose trusts do not cause interests to vest under the rule against remoteness of vesting.

260. Section 12A of the *Trusts (Special Provisions) Act* 1989, as originally enacted by amendment in 1998, provided:

> *"(4) The rule of law (known as the rule against excessive duration or the rule against perpetual trusts) which limits the time during which the capital of the trust may remain unexpendable to the perpetuity period under the rule against perpetuities shall not apply to a purpose trust.*
>
> *(5) The rule against perpetuities (also known as the rule against remoteness of vesting) as modified by the*

Perpetuities and Accumulations Act 1989 shall apply to a purpose trust."

261. Subsection (5) was repealed by the *Perpetuities and Accumulations (Amendment) 2009.* But both subsections (4) and (5) were in force when the Global Resource Trust was established and when the distribution to the Appellant was made in 2005.

262. When both subsections were in force (i) they were to be reconciled by excluding purpose *trusts of indefinite duration* from the scope of subsection (5): See *Hayton, The International Trust,* 3rd ed. para 5-173; such that (ii) a disposition creating a purpose trust of indefinite duration did not, therefore, infringe the rule against remoteness of vesting (although the rule was engaged if a disposition created a purpose trust to commence or end at specified future times).

263. The Respondents, Grand View submits, proceed on the basis that when both subsections were in force it was possible to have a purpose trust of indefinite duration, because section 12A (4) says so; but distributions from it would be void if made after a perpetuity period . That would be an irrational position, and the legislature cannot be taken to have intended it.

264. Against this background, the rule against remoteness of vesting applies to the distribution to the Wang Family Trust in the following way:

(a) The distribution itself occurred within the perpetuity period of the Global Resource Trust.

(b) The distribution was to the trustee of a perpetual purpose trust. By the combined effect of subsections (4) and (5) of Section 12A of the Trusts (Special Provisions) Act 1989, the terms of the trust did not infringe any rule against remoteness of vesting. (per Hayton above).

(c) The possibility that distributions of assets out of the purpose trust might be made after the expiration of the perpetuity period of the GRT was irrelevant: the rule against remoteness of vesting is not concerned with distributions of assets from a perpetual purpose trust.

265. If the position were not as stated above, the GRT Trustee could not lawfully have added a charity as a discretionary beneficiary of the Trust, even alongside the original class of Beneficiaries. That would plainly be an absurd conclusion. Therefore, the distribution to the Appellant was not such as "*would or might infringe any applicable law as to remoteness of vesting*". If clause 9 was applicable to the distribution, the distribution complied with the clause.

Conclusions on clause 9

266. The submissions of Grand View as to the non-applicability of clause 9 are, in my view, well founded.

267. Firstly, it does not seem to me that the GRT Trustee needed to make use of clause 3 or that it did so. The September 2005 transactions did not have the effect, which clause 3 contemplates, that the GRT Trustee held the trust fund upon any new trusts. The GRT Trustee made a straight transfer of the GRT's assets to Grand View, in its fiduciary character as trustee of the Wang Family Trust. Thereafter the GRT Trustee did not hold the trust assets at all, let alone hold them upon some trust.

268. The GRT Trustee made the transfer pursuant to clause 4. It did not need to rely on clause 9 nor did it do so, so that any restrictions in clause 9 are inapplicable. Clause 9 is an extension to the powers in clauses 3 and 4 which may be used (provided it is applicable) and is without prejudice to the generality of any power in the Trust Deed to pay capital or income to any Beneficiary, of which clause 4 is one,or to any other method of applying it.

269. Clause 9 provides an extension to the power of the GRT Trustee to pay money to, or for the benefit of, a beneficiary (here, for instance, Grand View) so as to allow the GRT Trustee to pay the Trust Fund to the trustees of another settlement (e.g. a third party trust) whose provisions were for the benefit of such beneficiary (e.g Grand View) and others as well, provided that the GRT Trustee took the view that to do that was for the benefit of such beneficiary (e.g. Grand View). Grand View received the assets as a trustee for the Wang Family Trust (a third party trust). I doubt whether such a transfer is to be regarded as "*for the benefit*" of Grand View, within the meaning of the clause. The clause as a whole allows a payment (i) "to" Grand View as a fiduciary, or (ii) for the benefit of Grand View. What happened seems to me to fall within (i). But, even if that be wrong, the provisions of the Wang Family Trust were not for the benefit of Grand View. Grand View was not a beneficiary of the WFT and the provisions of the WFT confer no benefit upon it; nor did the GRT Trustee form the opinion that they did. Those who would benefit from the Wang Family Trust, were the various purposes for the fulfilment of which it was established.

270. Clause 9 was thus inapplicable. I see no sound basis to imply some term whereby it must apply to every trust to trust transfer, regardless of whether the trust to which a transfer was made was for the benefit of the beneficiary in question, and regardless of whether it was necessary to make use of clause 9 in order to effect it.

271. At one stage in his judgment the judge said [130] that "*On a straightforward reading of Clause 9 of the instrument, the remoteness of vesting provision is of general application to any power exercised by the Trustee*". I disagree. If the Trust has power to do something, without having to rely on clause 9, it is not restricted in doing so by the limitations that would apply if it had to rely on clause 9. That is particularly so in the light of the words "*(without prejudice to the generality of such power or to any other mode of application)".*

272. In those circumstances it is not necessary to decide whether the distribution to Grand View might infringe any applicable rule governing remoteness of vesting.

273. The question is not without difficulty. Subsection (5) in terms provides for the rule against perpetuities to apply to a purpose trust. It is, moreover, apparent that the decision to exempt purpose trusts from the rule against inalienability or perpetual purpose trusts but to continue to subject them to the rule against remoteness of vesting was a deliberate decision by the relevant Law Reform Sub Committee: see para 3.11 and 3.13 of their report. Further, the rule against remoteness of vesting undoubtedly applied before 1989 to purpose trusts - so subsection (5) was making no change.

274. It is, also, necessary to consider sections 2 and 3 of the *Perpetuities and Accumulations Act 1989,* which provide:

> *"2 In this Act—*
>
> *"power of appointment" includes any discretionary power to create or transfer a beneficial interest in property without the provision of valuable consideration;*
>
> *3 (1) Subject to section 11 (3) and subsection (2) of this section, where the instrument by which any disposition is made so provides, the perpetuity period applicable to the disposition under the rule against perpetuities instead of being of any other duration, shall be of a duration equal to such number of years not exceeding one hundred as is specified in that behalf in the instrument.*
>
> *(2) Subsection (1) shall not have effect where the disposition is made in exercise of a special power of appointment, but where a period is specified under that subsection in the instrument creating such a power the period shall apply in relation to any disposition under the power as it applies in relation to the power itself…"*

The power of appointment under the GRT Trust is a special power: see section 9.

275. In the light of those provisions, as the parties accept, the 100-year period under the GRT applied to a disposition under that Trust. Prima facie, therefore, in respect of any disposition by the GRT Trustee under clause 3.1. or 4.1. to another trust, e.g. the Wang Family Trust, the perpetuity period is 100 years from the creation of the GRT. It is then necessary to consider what is meant by vesting in this context.

276. As to that the Respondents submit that an interest is only "vested" when the following conditions are satisfied:[49]

a) The taker is ascertained; and

b) Any condition precedent attached to the interest is satisfied such that the interest is ready to take effect in possession forthwith and is only prevented from doing so by the existence of some prior interest(s); and

c) Where the interest is included in a gift to a class, the exact amount or fraction to be taken is determined (so a discretionary trust does not qualify).

277. If any of these conditions is not satisfied, the interest is not "vested" but contingent. Subjecting the taking of an interest to the discretion of the trustee does not amount to vesting. A classic example of property vesting in the context of a purpose trust is an appointment of the income of the trust to some association or body satisfying the purpose of the trust and to be applied for that purpose. That would be a good vesting for the purpose of the rule against remoteness of vesting: see *Re Wightwick* [1950] 1 Ch 260.

278. In those circumstances, so the Respondents submit, the assets appointed to Grand View as trustee for the Wang Family Trust did not vest in the purposes of the Wang

[49] As set out in *Morris & Leach, The Rule Against Perpetuities* (2nd edition 1962, suppl. 1964) at p 37

Family Trust on their transfer because no decision had been made to decide as to how they should be distributed (if at all).

279. Accordingly, the interest in the Grid Investors shares **might** vest outside of the GRT's perpetuity period. (This was a possibility which the draftsman must have sought to avoid, because it would mean that assets reverted to the GRT a century after the disposition). The transfer accordingly breached the prohibition governing remoteness of vesting which was the result of the perpetuity period in the GRT and the provisions of section 3 (2) of the 1989 Act. Accordingly, if clause 9 is applicable (which in my view it is not), the transfer of shares in Grid Investors to Grand View was one which "*might **infringe** any applicable rule governing remoteness of vesting*".

280. Grand View for its part submits that this is simply wrong. When assets are settled on a purpose trust, the purpose(s) are not beneficiaries; and have no interest as beneficiaries, and it is interests with which the rule against remoteness of vesting is concerned. In the present case the relevant vesting occurred when Grand View received the assets in its capacity as trustee of the Wang Family Trust.

Conclusions on remoteness of vesting

281. The questions posed by this controversy are somewhat recondite; the judge did not address them; and there is no authority on the relevant (but now repealed) sub-section. In those circumstances what I am about to say must be regarded as a preliminary analysis. It must also be regarded as secondary to my conclusion that Clause 9 was not, in any event, invoked.

282. There are two relevant considerations. The first is that if the relevant vesting for a purpose trust is to be regarded as a distribution by the trustee for the benefit of one of the purposes, the Legislature would appear to be giving a right to create a perpetual trust for purposes, but if money was paid from another 100 (or shorter) year trust to the purpose trust and remained undistributed after the 100 years (or

less) it would have to revert. It is debatable whether that was what the Legislature must have intended.

283. The second is that subsection (5) cannot be ignored. It is necessary to determine what the remoteness of vesting rule (expressly applicable to purpose trusts) involves.

284. The answer as it seems to me is that when the assets of the GRT were transferred to Grand View as trustee for the Wang Family Trust there was, then and there, a vesting of those assets for the purpose of the rule against remoteness of vesting. Any subsequent distribution of the assets of the WFT would not constitute a vesting for the purposes of the rule, which is concerned to preclude the vesting of **future interests in property** after the perpetuity period: *Megarry & Wade* 8-18. But the purposes which the WFT could benefit would never enjoy any such interest: see *London Hospital Medical College* ("*an individual scholar is not per se an object of the charity")* and *Latimer* ("*individuals may benefit from the application of trust moneys , but they are not, as individuals, beneficiaries of the trust*").[50].

285. In the case of a trust to trust transfer from discretionary trust A to discretionary trust B, it can properly be said that there is no vesting upon the transfer because the recipient of the beneficial interest in the assets is yet to be determined. But in the case of a purpose trust, although the purposes may benefit from the trustee's decision to support them with money from the trust, they have no contingent interest in the assets of the trust. Under such a trust the trustee does not determine that one of its purposes shall become entitled to, and the purpose never receives, a beneficial interest in the trust. The trustee decides who shall receive money from the trust assets. After the trustee receives the trust assets there is no further vesting to be done.

[50] In the course of argument Mr Dakis Hagen QC accepted, rightly in my view, that a transfer to the charitable trustees of a "Save the Whale" charity would amount to a vesting. I can see no material difference if the transfer is to a purpose trust one of whose purposes is animal welfare.

286. Consistently with that, clause 4.1. of the WFT Trust Deed provides that the Trustees shall "*pay or apply the whole or part of the Trust Fund in fulfilment of the Purposes* [defined in clause 3] *and the Founders Vision*".

287. How then does the remoteness of vesting principle (preserved by section 12 A (5)) apply to purpose trusts? There is no authority on the question and I confess some difficulty in finding room for the application of the rule against remoteness of vesting in relation to a purpose trust. Grand View suggests that the rule is applicable if the purpose trust is not of indefinite duration but is to be for, say, 125 years after which the assets of the trust were to go to another beneficiary such as the settlor's children. That would mean that the children's interest would vest beyond the 100-year period permitted under section 3 of the Perpetuities and Accumulations Act 1989. That view is supported by a passage in Hayton[51] *The International Trust* 5.173 which reads:

> "*Thus, a purpose trust of indefinite duration can now be created in Bermuda: it will continue until all its capital has been distributed or expended. However, if the purpose trust is not of indefinite duration, the date of its termination and the vesting of interests at that time must all occur within a perpetuity period not exceeding 100 years (as under TSPA 1989)"*

288. Not without some hesitation, I incline to the view that this analysis is right. But I do not propose to address this question further since it seems to me that, in the present case, the only relevant vesting took place in 2005.

Disapplication of clause 9

289. The judge held that it was open to the Court to construe the addition of Grand View, as Trustee for the Wang Family Trust and the exclusion of the family beneficiaries

[51] David Hayton, a former Justice of the Caribbean Court of Justice. We were told that he was not the author of the relevant section.

as *"having the effect by necessary implication of amending the instrument to nullify the remoteness of vesting provisions for so long as a purpose trust was the sole beneficiary"* (see para 131(b) of the Judgment). This was not something that had been the subject of any argument. The Respondents contend that he was wrong.

290. Grand View contends that he was right. The GRT Trustee must be taken to have disapplied clause 9 by an implied exercise by it of the power of amendment in clause 10. As to that it submits that an intention to exercise a power can be imputed, unless the facts justify the inference that there was a positive intention not to exercise the power: *Davis v Richards & Wallington Industries Ltd* [1990] 1 WLR 1511 at 1530A – 1521F.

291. As to that, it submits, the Deed of 26 September 2005 plainly manifests the GRT Trustee's intention to distribute the trust fund of the GRT to the Wang Family Trust. Clause 9 of the Declaration of Trust was capable of amendment by the power of amendment in clause 10. If the distribution would have been prohibited by the concluding words of clause 9, an intention can be imputed to the GRT Trustee to exercise the power in clause 10 to amend clause 9 so far as necessary to enable the distribution to take effect. This could be done by removing the words "*or might*" at the end of clause 9. The Judge was correct to identify this argument as open to Grand View.

292. In *Davis v Richards & Wallington Industries Ltd* a question arose as to whether the execution of a definitive deed for a group pension scheme by Richard & Wallington Industries Ltd ("Industries"), the parent company of the group, represented by implication an exercise of a power by Industries to remove a trustee who had not executed the power, when his concurrence was necessary. (Industries and the other two trustees had thought that the relevant individual was no longer a trustee because he had resigned, but the submissions before the judge had assumed –

wrongly as the judge held - that his resignation had been ineffective to remove him as a trustee).

293. Scott J (as he then was) referred to cases in which a disposition of property may be regarded as an implied exercise by the disponor of a power vested in him, even if he makes no mention of it. He said that the principle was not confined to a disposition of property and could see no difference in principle between a case where A's disposal of property cannot be effective without the exercise of a particular power and a case, as in the one before him, where Industries and two trustees purported to bring into effect valid rules for a pensions scheme and it was objected that the third trustee was a trustee whose concurrence was necessary. There was no reason why the courts should not be prepared to apply "*an ameliorating principle of equity*" only to dispositions of property. The principle was applicable in the case before him unless it could be inferred that there was an intention on Industries' part not to exercise the power. It was not necessary to infer a positive intention (which in that case would have been impossible) to exercise the power. The intention would be imputed.

294. The Respondents draw attention to *Re Lawrence's Will Trusts* [1972] A.C. 481 in which the question was whether there had been an exercise, in a will, of a power of appointment. In considering this Megarry J said:

> *"If the instrument shows the intention not to exercise the power, then it is inconceivable that it should be exercised. If on the other hand it shows an intention to exercise the power, I can see no reason why that intention should not suffice. If the instrument displays no intention one way or the other then I would hold that prima facie the power has not been exercised. The donor of the power had confided to the donee power to make the appointment and , statute apart, I do not think that to hold that the donee has exercised the power unawares is likely to accord with the intention of either the donor or the donee".*

295. *Re Lawrence's Will Trusts* was not cited in *Davis v Richards*. Further, there seems to me a difference between an implied exercise of a power of appointment and an implied exercise of a power of amendment of the nature relied on, in the circumstances applicable in this case. It is one thing to impute to a donee of a power the exercise of a power of appointment when he is unaware that he has done so (and would not, therefore, have applied his mind to the relevant considerations). It is another to impute to a Trustee who has decided to exercise a power that he does have (under clause 4) to remove a removable impediment to his doing so.

296. In *Kain v Hutton* [2008] NZC 61, in which *Davis v Richards & Wallington Industries* does not appear to have been cited, but *Re Lawrence* was, the Supreme Court of New Zealand held that where trustees had attempted to use a power they did not in fact enjoy the courts would not treat their action as if they had been exercising a power that they did actually possess. A resettlement which failed as the exercise of a power of advancement could not, therefore, be treated as the exercise of a power of appointment. The trustees were aware of the difference between the two and were intent on doing one (advancement) and not the other.

297. In *Briggs v Gleeds* [2015] Ch 42 Newey J (as he then was) considered *Davis v Richards & Wallington Industries* and *LRT Pension Fund Trustee Co Ltd Hatt* [1993] Pen L.R. 227, to the same effect, as well as *Kain v Hutton*. Newey J regarded the reasoning in the latter case as not wholly consistent with *Davis'* case and the *LRT* case, which he thought he should follow. (I am not sure about any inconsistency. It seems to me that the *New Zealand* case can be looked upon as a case in which the court found that there was an intention not to exercise the relevant power.) Newey J held that the approach adopted in those two cases could not be applied if there was doubt as to whether trustees would have chosen to exercise the power in question had they taken into account matters relevant to its exercise which were not relevant to the power they believed themselves to be exercising.

298. In *Coats UK Pension Scheme Trustees Ltd v Styles* [2019] EWHC 35 Morgan J followed *Davis v Richards* and presumed that the Trustee intended to exercise the power by which alone it could give effect to certain provisions.

299. The Respondents contend that there was a discernible intention not to exercise the clause 10 power of amendment to vary clause 9. Reliance is placed on the first affidavit of Susan Wang. In it she explained [47] that, prior to the transactions in issue, on 9 May 2005 she chaired an initial meeting of the GRT Trustee Board. At that meeting, which was attended by two personnel from Appleby Trust Bermuda Limited and a US lawyer, it was resolved that the GRT Trustee would use a combination of clauses 8 and 9 of the Trust deed to effect the removal of the Beneficiaries, the addition of the WFT as a Beneficiary, and the transfer of the GRT assets to the WFT. This was reflected in the relevant minute.

300. She then says (para 48):

> "*Subsequently, after we had further consulted Global Resource PTC's lawyers (in respect of which no privilege is waived), I and my fellow board members decided that it was in the best interests of the Wang Family Trust that the relevant assets should be paid and appointed to the trustee of the Wang Family Trust as an appointment or distribution (under Clauses 3.1 and 4.1 of the Declaration of Trust), rather than by an exercise of the power in Clause 9 to transfer capital or income to another trust…*"

Since a conscious decision was taken not to use clause 9 it is impossible, the Respondents submit, to impute to the GRT Trustee an intention to amend it.

301. In my judgment this is a case in which it is well arguable that the ameliorating principles of equity apply. It is plain that everyone concerned intended the disposition of September 2005 to take effect – both the economic settlors and the GRT Trustee. If , contrary to my view, the disposition would fail on account of clause 9, it is well arguable (a) that there should be imputed to the GRT Trustee an

intention to amend clause 9 under the power contained in clause 10 insofar as was necessary for the disposition to be effective, and (b) that the fact that the GRT Trustee chose not to use clause 9 to effect the disposition (but, rather, clause 4) is not to be regarded as an intention not to use clause 10 to amend clause 9, insofar as was necessary to do so in order to give effect to the disposition which it was intended to make (otherwise than under clause 9). I cannot see that there was some matter relevant to the exercise of the power to amend which was not also relevant to the exercise of the power contained in clause 4.

302. The transaction in this case was effected by what is said to have been a Deed. There is an issue as to whether the Deed was validly executed and whether it constitutes a deed, which does not presently fall to be decided. Nor is it necessary presently to decide whether, if there was no document which counts as a deed, the imputation principle is capable of application.

303. For the reasons given above, I would allow the appeal.

SMELLIE JA:

304. I agree with the conclusions reached and with the reasons given by the President, in his comprehensive judgment.

305. The case raises the fundamental issues identified - the scope of powers of amendment contained in Trust Deeds and the doctrine of "fraud upon a power". The central issue is whether unrestricted powers conferred on a trustee to add or exclude beneficiaries are to be given effect in accordance with their plain terms or are to be restricted, as Kawaley AJ held and as the Respondents contend, by reference to an implied limitation prohibiting their application so as to alter what has been described as the "substratum" of the trust. Given the obvious import of the central issue, I feel obliged to add the following brief comments.

306. Its constitution as a discretionary trust settlement is of primary importance to the construction of the terms of the GRT and to an understanding of the limitations upon the powers vested in the Trustee.

307. The meaning of terms and limitations upon powers which more suitably appear in and apply to commercial trusts such as contributory pension schemes, will not necessarily apply to a discretionary settlement such as the GRT – one which by definition, regards beneficiaries as volunteers without vested entitlement to benefit unless and until the trustee , after due deliberation, decides to bestow benefit.

308. The discretionary powers of the GRT Trustee were expressed in the broadest terms.

309. While the "*Beneficiaries*" meant "*The Children and remoter issue of Y. C. Wang and Y.T. Wang*", this was, as clause 1.1 and the Second Schedule provided, "subject *to any exercise of the powers conferred upon the Trustees by Clause 8*."

310. And while it was the exercise by the Trustee of the Clause 8 power to add Grand View (qua Trustee of the WFT) as beneficiary and remove the children and remoter issue that lies first at the heart of this dispute, the language of Clause 8.1 is itself clear and unambiguous.

311. The Trustee had power by deed revocable during the Trust Period or irrevocable to **include any person or class of persons** as beneficiaries under the Trust and **to exclude any person or class of persons** as beneficiaries and could do so in either respect either permanently or for such period as it decided and in relation to the whole or only a part of the trust fund.

312. The term "*person"* was defined by clause 1.6 to include "*any individual, company, partnership and unincorporated association and any person in a fiduciary capacity*." The express terms of clause 8.1 therefore extended to permit the addition of Grand

View as a discretionary beneficiary in its capacity as trustee of the WFT (subject to any question of remoteness of vesting).

313. By Clause 3 the Trustee had power to hold the trust capital and trust income upon such trusts in favour of all or any one or more of the beneficiaries (to the exclusion of the other beneficiaries) as it chose to appoint (the "Power of Appointment"). By Clause 4, the Trustee also had power to pay the trust capital and income to any one or more of the beneficiaries (exclusively of the rest) in such shares and in such manner as they in their discretion thought fit (the "Power of Distribution").

314. Thus, on its plain terms, the GRT was not an immutable dynastic family trust for the benefit only of the children and remoter issue of the economic settlors. It was amenable to being amended, among other ways, by the addition of "any" person (including a corporation such as Grand View) as beneficiary (the "Power of Addition") and by the exclusion of any person as beneficiary, including any or all children or remoter issue (the "Power of Exclusion"). The beneficial class was amenable to alteration by the Trustee and the distribution of the assets to some, all or only one beneficiary, all as a matter of the exercise of discretion.

315. This is all plainly apparent from the terms of the Trust Deed, despite its expressed irrevocability upon which great emphasis was placed by the Respondents and by the learned judge.

316. The limitations upon the exercise of the Powers of Appointment, Addition, Exclusion and Distribution (together the "Dispositive Powers") must now be regarded as a matter of settled law. Illuminatingly discussed by the President beginning at [168] relying upon ***Pitt v Holt***[52], three relevant questions arise in determining whether the purported exercise by a trustee of the Dispositive Powers has been valid. These

[52] Above, at 135 F-H

are also very helpfully identified and discussed in the Appellants' written submissions:

(i) Whether the way in which the power has been exercised is not within, or contrary to, the express or implied terms of the power (the scope of the power rule). A challenge may be made on the basis that the trustee has acted beyond the scope of the relevant power. Whether or not this is so will depend on the construction of that power: '*an allegation of excessive exercise involves a question of construction of the terms of the power and of the purported execution (which may, of course, sometimes be a difficult matter): has the particular execution exceeded that which is authorized in terms?*": ***Thomas on Powers***[53] This issue is what is referred to by Lord Walker in ***Pitt v Holt***[54] as "*excessive execution*".

(ii) A challenge may also be made on the basis that the trustee has failed to give proper consideration to relevant matters in making a decision which is within the scope of the relevant power. This is referred to by Lord Walker as "*inadequate deliberation.*" And, as Lord Walker also importantly observed at [66] of ***Pitt v Holt***, one matter which is always a material consideration is the settlor's wishes, and in a non-commercial trust such as the GRT, where the settlors conferred their bounty on the trust as a gift, such wishes are particularly significant. As noted in ***Lewin on Trusts***[55]***:*** " *In a conventional family trust the funds comprised in the settlement are the settlor's bounty. Except to the extent that he has reserved powers to himself or conferred them on third parties, the trustees are the means by which he has chosen to benefit beneficiaries out of property of his own. He could have done so by gifts made directly to them but instead has interposed a trust, so as to make continuing provision for them after his death or to give them the security of a proprietary*

[53] 2nd Edition, 2012 , at [8-06]
[54] Ibid
[55] 19th Edition , 2015 at [29-162] to [29-163].

interest, rather than a precarious dependency on him, or to take advantages of tax planning or for a variety of other reasons. So far as the trustees are given dispositive powers, they are to make choices which the settlor could have made for himself. Trustees therefore rightly give great weight to the settlor's wishes, either expressed from time to time during his lifetime or recorded, usually in documentary form, before his death…The significance of the settlor's wishes has grown with the growth of wide discretionary trusts and powers in preference to trusts comprising wholly or mainly fixed interests. Without some guidance from the settlor, trustees would often have difficulty in identifying who ought to benefit." It was [even before ***Pitt v Holt****] previously well established that the trustees are entitled to take serious account of the settlor's wishes[56] and it is the better view that they are bound to do so[57]; the notion [raised in some of the cases] that the trustee may be entitled to take it into account but not bound to do so is in our view wrong., for it is either a relevant consideration which in view of its importance ought to be taken into account or an irrelevant one which should not. The trustees may properly be led by the settlor's wishes to take a decision which they would not otherwise have taken."*

(iii) As ***Lewin*** also goes on to explain at [29-164] no particular formality is required to convey or record the settlor's wishes, and trustees are entitled to have regard to the settlor's wishes expressed from time to time and are not confined to those wishes which were expressed contemporaneously with the formation of the trust: ***Schmidt v Rosewood*** (above) at [20], [33] and ***Re Esteem Settlement[58].***

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[56] Citing, among other cases, ***Re Manisty's Settlement*** (above), ***Kain v Hutton*** [2005] W.T.L.R. 1024 at [301] NZ HC and ***Charman v Charman*** [2005] EWCA Civ 1606; [2006] 1 W.L.R 1053 at [12].

[57] Citing, among other cases ***, Kain v Hutton*** (above), ***Schmidt v Rosewood Trust Ltd*** [2003] UKPC 26; [2003] 2 A.C. 709 at [19], [33], [68(4)] "exceptionally strong claims to be considered.").. And noting, on the significance of the settlor's wishes in the execution of a discretionary trust by the court, see ***McPhail v Doulton*** [1971] A.C 424 HL, at 457 (execution "in the manner best calculated to give effect to the settlor's or testator's intentions").

[58] 2003 J.L.R. 188, at [215].

317. Finally**,** a challenge may be made on the basis that the trustee has acted ostensibly within the scope of the relevant power, but for an improper purpose. This is referred to by Lord Walker in ***Pitt v Holt***[59] as the doctrine of "improper purpose" and has been described variously as the "fraud on a power", "abuse of power" or the "proper purpose" rule. The rule is separate and distinct from the excessive execution doctrine, as was explained in ***Eclairs Group v JKX Oil & Gas Plc***[60] by Lord Sumption (with whom the rest of the UK Supreme Court agreed on this matter): " *… the proper purpose rule is not concerned with excess of power by doing an act which is beyond the scope of the instrument creating it as a matter of construction or implication. It is concerned with abuse of power, by doing acts which are within its scope but done for an ulterior purpose.*[61]"

318. Here, it is unclear whether the exercise by the GRT Trustee of the Dispositive Powers so as to exclude the children and remoter issue, to add Grand View as sole beneficiary and to distribute the assets to Grand View as trustee of the WFT, is challenged for being an excessive exercise or for being a fraud on the powers[62]. It is not said that the powers did not exist (they plainly did exist). What is primarily claimed by the Respondents (Plaintiffs) in their Order 14 summons is that the replacement of individual discretionary and default beneficiaries combined with the resettlement of the trust assets for the benefit of a perpetual purpose trust were transactions *beyond the scope* of the discretionary powers afforded the GRT Trustee under the GRT.

319. Just in what manner the transactions were said to be beyond the scope of the powers was not specifically cited in the summons. Instead, the arguments developed as a matter of construction of the terms of the Trust Deed and as the

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[59] Ibid.
[60] [2016] 3 All ER 641 at [15].
[61] See also the decision of Lord Wilberforce giving the judgment in the Privy Council in Howard Smith v Ampol Ltd [1974] AC 271 at 834 A-D. (exercise of directors' fiduciary power to issue shares).
[62] Even while it is acknowledged that for the purposes of Order 14 summary judgment, a fact sensitive enquiry of "inadequate deliberation" is not engaged.

President explains at [43] to [49], the arguments came to alight upon the proposition that the GRT Trustee had committed a fraud upon the powers as the powers had been used "*for an ulterior purpose*" or "*for some ..purpose foreign to the power*".

320. Based on the arguments, Kawaley AJ had come to accept in principle that the scope of a power in a trust deed (a) may potentially be determined as a matter of construction of the instrument (without regard to extraneous evidence) and (b) limits the way in which the power may validly be exercised. To that, he said, there was an allied principle that discretionary powers are stamped with the character of the instrument that creates them, observing that that was uncontroversial (following *Re a Trust (Change of Governing Law* (above), which cited dicta *Muir v Muir* [1943] AC 468, 481. Kawaley AJ then turned to consider the most controversial aspect of his approach to construction – whether there was a legal prohibition on the use of general powers of amendment (such as it seems he regarded the Dispositive Powers), to change the underlying character or substratum of a trust, concluding that there was indeed, such a prohibition. He discussed a number of cases which, along with others not cited to or discussed by the learned judge, the President has examined in detail above.

321. These were conclusions reached by the learned judge notwithstanding the background to the establishment of the GRT (as well as the WFT) and the change of circumstances which led to the addition of Grand View as a beneficiary –the latter as explained, in particular and uncontestably by Susan Wang. And, all as concisely summarized by the President at [2] to [32] of his judgment.

322. This was, in my view, an erroneous approach to the construction of the powers. Overlaid with the notion of a limiting substratum rule, it was an approach which, in my view, did not pay sufficient regard to the plain words of the Trust Deed. Nor was there sufficient regard paid to the wishes of the settlors as uncontestably (for summary judgment purposes) explained by Susan Wang. Had proper regard been had for the wishes of the settlors as the GRT Trustee is said to have felt itself

compelled, it is difficult to see how the appointment of Grand View for the fulfilment of those wishes could be found to be outwith the scope of or a fraud upon the powers which, upon their plain wording, clearly allowed it.

The Implication of Terms

323. There was no proper basis for implying a term into the Dispositive Powers to limit their meaning so as to prohibit their use to alter the so-called "substratum" of the Trust. I accept, as the Appellants submit, that consistent with ***Marley v Rawlings***[63]***,*** for a term to be implied, it must be either necessary to give practical effect or coherence to the Trust Deed, or so obvious that it goes without saying. While ***Marley v Rawlings*** dealt with the construction of wills, I accept that the same approach should be adopted to the implication of terms in a unilateral dispositive instrument, such as the GRT Trust Deed.

324. There was no need to imply the so-called substratum rule into the Dispositive Powers in order to give the Trust Deed effective or practical coherence. The effect of the implication would be that the express power to remove any, some or all beneficiaries would be rendered meaningless because the practical result would be to destroy the supposed beneficial interests which are so germane to the notional "substratum". Yet, the original discretionary beneficiaries were mere volunteers who provided no consideration for any interest under the Trust, and the absence of an implied substratum term is therefore not necessary to provide commercial

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[63] [2015] AC 129, where at [19]- [20] Lord Neuberger (giving the lead judgment of the Court) adopted as relevant to the interpretation of wills, the approach to the interpretation of contracts and stated : *"When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in the light of the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (b0 ignoring the subjective evidence of any party's intentions.…When it comes to interpreting wills, it seems to me that the approach should be the same."*
In the field of contract, it is now well-established that for a term to be implied it must be either necessary to give the contract commercial or practical coherence, or so obvious that it goes without saying : see ***Marks and Spencer plc v BNP Paribas Service Trust Co (Jersey) Ltd*** *[*2016] AC 742 per Lord Neuberger [17]-21]

coherence to the Trust Deed (as it conceivably might in the context of a commercial trust).

325. Nor could the existence of an implied substratum term be said to be so obvious that it goes without saying: there is no reason to suppose that the Settlors did not wish to confer on the Trustee the maximum flexibility to meet unforeseen changes in circumstances, but instead intended to constrain the Trustee by reference to some wholly unexpressed "substratum".

326. On the basis of Susan Wang's evidence (the assumed facts of the present case) it is apparent that the Trustee's decision to undertake the 2005 Transactions was an appropriate response to the unforeseen circumstances which developed after the establishment of the GRT Trust and which properly reflected the intention of the Settlors /Founders not to divest themselves of their personal shareholdings in FPG so as to avoid harming the group. Indeed, in the present case, the Trustee had the added benefit of knowing how the Settlors would have chosen to respond to that change of circumstances since both of them (as well as Mr Hung) were alive at the time it occurred. No complaint of inadequate deliberation is or can, on the assumed facts, be raised. It would therefore be surprising if, having exercised the widely framed Dispositive Powers in a manner which was plainly within the unambiguous language of the Trust Deed, and on a basis which properly reflected the Settlors' intentions, the Trustee was nonetheless found to have acted beyond its powers or for an improper purpose by way of a fraud upon the powers.

327. Moreover, in finding that there had been an unauthorized interference with the substratum, the learned judge was also erroneously persuaded to the view that there had been tantamount to what was an impermissible revocation of the GRT. As explained by the Privy Council in ***TMSF v Merrill Lynch*** (above), revocation would have resulted in the assets being returned to the settlors (or their estates). No such thing happened here.

Remoteness of vesting

328. Instead, as the President concludes and explains, and as I accept, the assets were transferred to Grand View (qua trustee of the WFT) as the sole remaining beneficiary of the GRT.

329. More specifically, I agree with the President that the submissions of Grand View as to the non-applicability of Clause 9, are well founded. The transfer of the assets to Grand View, as the Deed records, took place pursuant to the powers given by Clause 4.1. The assets thereupon became vested in Grand View which then became able to apply them for the purposes of the WFT.

330. In keeping with the conclusions expressed by the President at [227], it is well arguable (as the antithesis for an award of summary judgment), that the addition of Grand View as a beneficiary of the GRT and the distribution to it of the assets of the GRT (qua trustee of the WFT) was within the scope of the powers given to the GRT Trustee under the Trust; did not constitute a fraud upon those powers and that there has been no infringement of the principles governing remoteness of vesting.

331. I agree that the appeal should be allowed.

SUBAIR WILLIAMS JA:

332. My Lords, I have had the privilege and delight of reading the leading judgment of this Court. I too agree, for the reasons given by the learned President that this appeal must be allowed.

333. Notwithstanding the unanimously agreed decision of this Court to allow the appeal, I readily commend the 84-page ruling of the learned judge, Kawaley AJ, as a valiant *tour de force*. Regrettably, as observed by Clarke P, several of the case authorities to which we were referred were not placed before the learned judge during the hearing of the summary judgment application in the Court of first instance.

334. I would also laud appearing Counsel on behalf of each of the parties for the eloquence and skilfulness of their competing submissions which merited our careful and extensive deliberation.

335. I do not propose to restate in any detailed narrative the rivalling points of law or the facts contained in the evidence of Ms. Susan Wang (as presumed to be undisputed only for the purpose of this appeal and the underlying summary judgment ruling made under RSC Order 14) since this has all been thoroughly achieved in the leading judgment of Clarke P.

336. This concurring judgment is submitted merely for the purpose of offering a short summary of my observations on the issues relating to a fraud on a power and the so-called substratum doctrines. I also wish to make brief remarks on the remoteness of vesting issues raised under the Respondent's Notice.

The Fraud on a Power Doctrine and 'the Substratum Doctrine'

337. Quintessentially, the merits of this appeal have been determined by an application of the ordinary rules of construction for a deed of trust. This, as opposed to the so-called free-standing substratum doctrine, was the measuring stick used in assessing whether or not there was a fraud on a power. However, the Respondents' case that the trustee of the GRT "the GRT Trustee" committed a fraud on a power in exercise of the impugned clauses in the trust settlement has been worth the considerable inspection and reflection given.

338. The original trust instrument was first established on 10 May 2001 by a Declaration of Trust ("the trust deed"). Under the Second Schedule of the trust deed, the only Beneficiaries listed are "*the children and remoter issue of Y.C. Wang and the children and remoter issue of Y.T. Wang*". In this judgment I have proceeded on the basis that the Respondents' claim that the family nature of the GRT, as it was first

created, is correctly described as having been the core beneficial component of the GRT, i.e. the substratum of the trust.

339. Under Clause 8.1 of the trust deed, the trustees were empowered to amend the GRT by a revocable or irrevocable deed to declare the permanent or determinate inclusion or exclusion of '*any person or class or description of persons*' as a Beneficiary with express reference to either the whole or part of the trust fund.

340. By Clause 8.2 the GRT Trustee was given intermediate powers of addition and exclusion. ("*The powers referred to in Clause 8.1 may be delegated to any extent to any person, whether or not including the Trustees or any of them, provided, however, such person may not exercise the powers referred to in Clause 8.1 in his or her own favour, in favour of his or her creditors, in favour of his or her estate or the creditors of his or her estate.*")

341. In Lewin on Trusts (Nineteenth Edition) [30-043] it is said:

> "*An intermediate power is one which lacks a recognisable class of objects, so is not a special power, but which does not permit the donee to appoint outright to himself, so is not a general power. Examples include:*
>
> *(1)* *a power to appoint to anyone in the world except the donee himself* (*Re Park* [1932] 1 Ch. 580.);
>
> *(2)* *a power to appoint to anyone in the world except the donee's husband if the donee had no children* (*Re Harvey* [1950] 1 ALL E.R. 491.)
>
> *(3)* a power to appoint to anyone in the world living at the donee's death (*Re Jones* [1945] Ch. 105.)"
>
> …
>
> *(9)* *a power, clearly intended to be fiduciary because vested in trustees as such, to appoint anyone in the*

> *world without exception (including the trustees themselves)* (*Re Beatty* [1990] 1 W.L.R. 1503.)
>
> *Such powers have long been known. A power of addition, i.e. a power to add persons to a class of beneficiaries, exercisable in favour of anyone in the world except certain excluded persons, has been treated as an intermediate power.* (Citing in a footnote *Re Manisty's Settlement* [1974] Ch. 17, referred to with approval in *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26…)

342. There is no contention or doubt challenging the applicability of the fraud on a power doctrine to intermediate fiduciary powers. Equally, it was readily understood by all that the relevant fraud on a power category with which the Court was concerned referred to a power which was '*exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power.'* Lewin [para 29-290]. On the Respondents' case, the term '*scope of … the trust instrument*' meant the substratum of the GRT.

343. The alleged fraud on a power is said to have been committed when the GRT Trustee executed an irrevocable deed made on 26 September 2005 which amended the original trust instrument. The Respondents say that the GRT Trustee, as the donee or appointor of an intermediate fiduciary power, perpetrated the fraud on the power by using that power (i.e. executing the irrevocable deed) for an ulterior purpose.

344. The controversial amendment (i) added the Appellant/Defendant, Grand View (as the trustee of the Wang Family Trust) as a new beneficiary of the GRT; (ii) removed all of the then existing discretionary and default beneficiaries (amongst whom were the Respondents/Plaintiffs); (iii) paid and appointed all of the GRT's assets to the Wang Family Trust and (iv) declared that the GRT would thereafter be terminated: "*Following the distribution of all of the Trust assets to the Wang Family Trust, the Trust shall be and hereby is terminated.*"

345. The Respondents persuaded the learned judge that the amendment unlawfully destroyed the substratum of the GRT. They argued that the underlying purpose of the GRT, being a private family discretionary trust, was to benefit only the heirs of both YC and YT Wang and not a charitable or other purpose.

346. In an outline of the meaning and effect of the supposed substratum doctrine, the Respondents described a rule akin to a legal embargo against the inclusion of any provision in a trust instrument which would seek to undermine or do away with its basic and underlying purpose. Thus, on the Respondents' case, it is never open to the draftsman of any trust deed to insert a clause into an original trust instrument where such a clause would expressly and purposefully empower the donee to amend the trust deed in a manner which transforms the core characteristics of the original instrument to something new.

347. Put another way, the purported equitable doctrine is said to make it legally impermissible for a settlor of a trust to instruct the inclusion of a clause which would confer unfettered powers of amendment which are intended from the outset to be capable of defeating the substratum of the original trust.

348. Respectfully, if this was so, the so-called equitable doctrine would ineluctably have its place as an established exception to the ordinary rules and principles on the construction of trust instruments.

349. The opening statement by the authors of Lewin [para 30-074] on the scope of a power of amendment is this: "*A power of amendment must, like other limited powers, be used for the purpose for which it is given and may be expressly confined in some way…*" The authors do not purport to say that the purpose for giving a power of amendment must be confined to only one purpose nor do the authors suggest that the original purpose for conferring the power must be narrowed to exclude an intention to enable a donee from altering the principal object(s) or substratum of the trust. (Further below, I return to this aspect of my analysis in more detail.)

350. Notwithstanding, it is accepted that a power of amendment is described as an example of a limited power. What then are these implicitly automatic limitations?

351. In this case the Court is especially concerned with the power of addition and the power of exclusion as exercised by the GRT Trustee under Clause 8.1.

352. The authors of Lewin provide a general commentary on powers of addition and exclusion [30-056]:

> "*It has become common in settlements containing wide discretionary powers to confer on the trustees or on the settlor or, less frequently, on others a power to add a person to a class of beneficiaries or a power to exclude a person from such as class. Such powers may be viewed as a power of amendment of a special kind. Indeed, a power of amendment may be used to add beneficiaries if such an exercise is within the terms of the power and possibly to exclude beneficiaries also.*"

353. The learned judge offered the following unobjectionable remarks on the above passage in Lewin [para 59]:

> "*…I nonetheless accept Mrs Talbot Rice QC's submission that the power to add and exclude beneficiaries may, in the words of Lewin, "be viewed as a power of amendment of a special kind." To my mind, this means nothing more than this. The practical effect of adding and excluding beneficiaries is to amend the terms of the original instrument and when the power to do this is conferred, the power may be viewed as a power to amend the trust instrument in a specific as opposed to a general manner. This categorisation is only significant in the present case as a gateway through which the rules of construction governing the implied limits on general powers of amendment may be accessed.*"

354. Where Kawaley AJ states "… *the rules of construction governing the implied limits on general powers of amendment",* he appears to endorse the so-called substratum rule as a sub-rule under the ordinary rules of construction. The learned judge relied on *Re Ball's Settlement Trusts* [1969] 1 W.L.R. 899 where Megarry J said [para 905B-C]:

> "…*If an arrangement changes the whole substratum of the trust, then it may well be that it cannot be regarded merely as varying that trust. But if an arrangement, while leaving the substratum, effectuates the purpose of the original trust by other means, it may still be possible to regard that arrangement as merely varying the original trusts, even though the means employed are wholly different and even though the form is completely changed.*"

355. Megarry J in *Re Ball's Settlement Trusts*, was indeed concerned with two distinguishing features: (i) the Variation of Trusts Act 1958 which governs England and Wales and (ii) the construction of a general power of amendment (as opposed to an intermediate fiduciary power)

356. At paragraph 67 of his Ruling the learned judge stated:

> "*The proposition that a general power of amendment may not be used to change the substratum of a trust in my judgment is recognised as a general equitable principle which is not, properly understood, dependent on any statutory constraints. Mr. Adkin QC was eager to foment my doubts about the persuasive value of the statutory variation cases, but did not point to any relevant statutory restrictions which might be said to be the exclusive source of the limiting principle upon which the Plaintiffs relied. On reflection, if an unfettered statutory discretion to vary a trust is constrained by an implied requirement to have regard to the substratum of the relevant trust, ought the case for imposing such restraints when construing an instrument in the context of exercising a purely equitable jurisdiction not be even stronger?*"

Cases decided under the Variation of Trusts Act 1958 do not assist

357. It is not possible to fully grasp the context of the commentary offered by the authors of Lewin or the true value of Megarry J's remarks in *Re Ball's Settlement Trusts* without first further examining the Variation of Trusts Act 1958 ("the 1958 Act") and the Court's usual approach to an application made under the 1958 Act.

358. In the preamble, the 1958 Act provides: "*An Act to extend the jurisdiction of courts of law to vary trusts in the interests of beneficiaries and sanction dealings with trust property.*" So, as a starting point, the jurisdiction of the High Courts of England and Wales was extended specifically to enable the Court to vary a trust in (my emphasis) the interests of beneficiaries. So, the Act is designed for the purpose of safeguarding the interests of beneficiaries in the exercise of the Court's jurisdiction to sanction the variation of a trust. This point is reinforced by the proviso under section 1, to which I will return further below.

359. Section 1 empowers an English High Court judge with a wide and unfettered discretionary power in deciding whether to make an order under the Act: "*…the court may if it thinks fit by order approve…*". Thus, cases decided under the 1958 Act are hardly likely to be determined on a pure exercise of construction given that the test calls for an exercise of judicial discretion.

360. The object of the Court's discretionary power of approval is "*any arrangement … varying or revoking all or any of the trusts, or enlarging the powers of the trustees of managing or administering any of the property subject of the trusts…*" on behalf of persons of various specified categories who have possession or possessionary proximity to assets of the trust. I am left with no real doubt that the terms 'variation' and 'amendment' are used interchangeably in English case law and by the authors of Lewin where the scope of the powers of amendment in a trust are extensively examined.

361. The authors of Lewin [para 45-063] offer some insight on the boundaries of the term "variation" for the purpose of the 1958 Act:

> "*The principal provision of the 1958 Act is that the trusts may be varied or revoked wholly or partially. There is, however, no power to approve a complete resettlement, and the claim form should not use the word "resettle"* (citing *Re Ball's Settlement Trusts* in a footnote). … *On the other hand, the arrangement proposed may, as a matter of machinery, provide for the revocation of the existing trusts and the substitution of new as long as the result is in substance only a variation. It seems, moreover, that if the arrangement preserves the substratum of the original trusts by effectuating their purpose it will be a permissible variation even though the means are different and the form completely changed* (again, citing *Re Ball's Settlement Trusts* in a footnote)…"

362. This illuminates the much-referred-to passage in Lewin [30-074] which, at first blush, appears to confirm a free-standing substratum restriction on a power of amendment which is not expressly confined: "*Another way of expressing the point is that an amendment must not change the whole substratum of the trust or its basic purpose…*"

363. There is a proviso under section 1 of the 1958 Act: "*Provided that except by virtue of paragraph (d) of this subsection the court shall not approve an arrangement on behalf of any person unless the carrying out thereof would be for the benefit of that person.*"

364. Lewin [45-071-45-072]:

> *"Benefit and discretion*
>
> *The court has no power to approve an arrangement on behalf of any person other than those listed in that subsection. Accordingly, it is not concerned with the wisdom or fairness of the arrangement from the point of view of the*

proposer or any other person who is of full age and capacity and assenting for himself. Given that, the court is still concerned with benefit (to the beneficiaries within section 1(1)) in the majority of cases. What is and what is not a sufficient benefit depends largely on the particular terms of the original trusts and of the proposed arrangement, but the following guidance may be gleaned from the reported cases and the practice under the 1958 Act.

General Considerations

If the arrangement is beneficial even by the narrowest margin, the jurisdiction is founded; but the proviso does not require approval in that even and the court retains a discretion. The court will not confine itself to looking at the alleged benefit to those persons for whom it has jurisdiction to approve but will examine the arrangement as a whole, in light of the purpose of the trust as disclosed by the trust instrument and any other available evidence. It will undertake a practical and businesslike consideration of the arrangement, including the total amounts of the advantages which various parties obtain, and their bargaining strength…Nevertheless, the 1958 Act does not require that in every possible circumstance there will be a benefit for the persons on whose behalf the court is acting. The arrangement may be acceptable although in certain events no benefit, or even a loss, may result. The court will take the same sort of risk as a reasonable adult would be prepared to take. But if the risk is at all substantial, it is usual to ensure against it."

365. I dare say that it is a near certainty that an amendment like that which was effected by the 2005 irrevocable deed would have failed if it were ever decided under the 1958 Act because an English High Court judge is most often concerned with sanctioning arrangements (i.e. the variation / amendment to the trust) for the primary benefit of the beneficially interested applicant. This is also because under the 1958 Act, an amendment to a trust is restricted to the statutory meaning of "variation" which has been interpreted by the English Courts to be incapable of lawfully unravelling the whole substratum of a trust without being deemed void as a resettlement.

366. The extended jurisdiction of the English Courts under the 1958 Act, however, cannot and ought not to be injected into Bermuda law as a side-door attempt to import the preserve-substratum approach. Under Bermuda trust law, the following two questions are ordinarily determinable purely on the ordinary rules of construction of the trust instrument: (i) the scope of a power of amendment and (ii) an assessment as to whether there has been a fraud on a power on the grounds that '*the power was exercised for some other purpose foreign to the power*'.

367. For these reasons, I agree with My Lord Clarke P that the cases decided under the Variation of Trusts Act 1958 are of no persuasive value. I do not see how such cases could meaningfully assist this Court in assessing the general scope of an unfettered discretionary power of addition and exclusion which, on its literal construction, expressly and unambiguously permits a settlor, a trustee or other delegated person to alter or change the original purpose or beneficial core of the trust.

There is no sub-stratum doctrine in law or equity

368. While I have given my primary reasons for rejecting the applicability of the preserve-the-substratum approach in the English case law decided under the 1958 Act, I consider it equally necessary to offer a brief explanation for my concurrence with Clarke P in discarding the Respondent's notion of a sub-stratum doctrine as a free-standing rule of equity under English case law.

369. In summary, I agree that the English authorities shown to us unanimously point to the Court's ultimate aim to unveil the original intention and purpose for conferring the power of amendment in question. This judicial task is generally approached with a conservative recognition of the balance between the 1958 Act and the application of the ordinary rules and principles of construction.

370. In the face of ambiguity (i.e. a general power of amendment which is not expressly contained) English law is designed to err cautiously in favour of the interests of the existing beneficiaries. However, where there is a power of amendment of a special

kind conferred by a clause which empowers a donee to exclude or include beneficiaries, the power cannot logically be exercised for the benefit of the existing beneficiaries who are liable to removal. (See *Shui Pak Nin and HSCBC International Limited* [2014] (1) CILR 173 [147].)

371. For a special power, the conservative approach to construction of the amendment clause will be to preserve the substratum of the trust. However, this is not to be mistaken for an automatic prohibition on a settlor from conferring an intermediate power of amendment which expressly and unambiguously permits the donee of the power to alter the beneficial core of the trust in exercise of the power to amend.

372. Where the power of amendment is not expressly confined, the authors of Lewin suggest that "*…its use must be confined to such amendments as can reasonably be considered to have been within the contemplation of the parties when the trust instrument was made, having regard to its nature and circumstances.*" This approach is alternatively described in the same passage; "*Another way of expressing the point is that an amendment must not change the whole substratum of the trust or its basic purpose…*"

373. The passage in Lewin [para 30-074] is an analysis of how a power of amendment is to be interpreted <u>not</u> confined. The execution of a power of amendment is restricted to the purpose for which the amendment was given. Often enough, the purpose for which such power was given may be discerned by looking at the substratum of the trust. But not always.

374. I do not accept that the authors of Lewin are suggesting that the substratum or underlying purpose of a trust cannot be amended or changed <u>even where it can</u> "*reasonably be considered to have been within the contemplation of the parties when the trust instrument was made, having regard to its nature and circumstances".* (See *Hole-v-Garnsey* [1930] A.C. 472 at 500, per Lord Tomlin)

375. The question on what can reasonably be considered to have been within the contemplation of the parties when the trust was created will invariably be construed and judged on the natural meaning of the clause in the trust instrument and on the facts of the particular case. This point was fittingly made by Smellie J (as he then was) in *Re Z Trust* [1997] CILR 248, a passage most appropriately relied on by Mr. Adkin QC:

> *"As was emphasized in the Australian case Kearns v Hill, which was cited in the arguments, a power of variation in the trust instrument is not to be construed in a narrow or unreal way. A power which (on the facts of that case) on its natural meaning included a power to vary the identity of beneficiaries of a trust by the addition of beneficiaries could not be limited by reference to an historical presumption against variations which alter the main structure of, or beneficial entitlements under, trusts. In other words, 'any' means 'any': 21 N.S.W.L.R. at 109, per Meagher J."*

376. In the judgment delivered by the Australian Court of Appeal of New South Wales in *Kearns v Hill* (1990) 21 NSWLR 107 Mahoney JA found that [111] "… a *power of variation should not be imposed with a general limitation on the power* (and that) *each deed must be considered in its own particular context, so that no other deed executed in different circumstances and in different language can decide the fate of any given deed*". (See also the Court of Appeal of Western Australia decision in *Mercanti v Mercanti* [2016] WASCA 206.)

377. In the line of authorities cited by Kawaley AJ the Courts were concerned with what could reasonably be said to be the purpose and object of the power conferred, identifiable by reference to the wishes of the settlor at the time of the making of the trust. This fact-finding mission was determined on the wording of the trust instrument and, to a lesser extent, on the evidence disclosed by the settlor's letter of wishes (e.g. *Duke of Somerset-v-Fitzgerald* [2019] EWHC 726 (Ch)). In the cases cited by the judge, the wishes and original intentions of the donor or settlor of the

trust were always central to the Court's consideration (e.g. *Society of Lloyd's v Robinson* [1999] 1 WLR 756 [765], per Lord Steyn; *Dyer v The Trustees, executors and Agency Co. Ltd* [1935] VLR 273 [290-291], per Martin J (concurring judgment))

378. The prominent focus on what was intended by the settlor in conferring the power is evident even in the descriptive wording given to this category of a fraud on a power. Kawaley AJ cited *Duke of Portland v Lady Topham* (1864) 11 H.L.C. 32 at 54:

> "*[T]he donee, the appointor under the power, shall, at the time of the exercise of that power, and for any purpose for which it is used, act with good faith and security, and with the entire and single view to the real purpose and object of that power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object (I mean sinister in the sense of its being beyond the purpose and intent of the power) which he may desire to effect in the exercise of the power.*"

379. Simply put, it would not be open to this Court to find that there is fraud on a power merely because the substratum has been altered despite clear evidence that the purpose and intent of the power given was to allow the donee to do exactly that. Under such circumstances, an application of the so-called substratum doctrine would be tantamount to outright ignoring the purpose and intent for which the power was given, a position not supported by any one authority cited.

380. The implied limits on a power of amendment are most heavily featured in a general power of amendment or a power of amendment of a special kind. However, the GRT Trustee was given intermediate powers of addition and exclusion under clause 8.2 of the trust deed. In principle, an intermediate power is not a special power and the donee, in executing an intermediate power, is limited only by the prohibition against making an appointment outright to himself.

381. An exercise of an intermediate power of amendment is extensive and rarely, if ever, subject to a judicial finding that the donee exercised the power for an improper purpose. In the words of the authors of Lewin [30-051]:

> "*We are not aware of any decision on the application of the doctrine of fraud on a power to intermediate powers. Since the power can properly be used very extensively, the scope for any notion of improper purpose is correspondingly narrow…*"

382. For these reasons, I agree that the assertion of a fraud on the power fails and that the 'substratum doctrine' has no status as a general rule of law or equity which would automatically injunct an intermediate power of amendment from being used to alter the substratum of the trust instrument.

Remoteness of Vesting

383. In a separate Notice filed by the Respondents, the learned judge's 5 June 2019 Ruling is sought to be affirmed on grounds other than those relied on. *Inter alia*, the Respondents complain that the learned judge did not find that transactions executed under the 26 September 2005 irrevocable deed were void for having breached clause 9 of the trust deed on the basis that the assets might vest outside the GRT's 100-year trust period.

384. Section 12A(5) of the Trusts (Special Provisions) Act 1989 provides:

> *"The rule against perpetuities (also known as the rule against remoteness of vesting) as modified by the Perpetuities and Accumulations Act 1989 shall apply to a purpose trust."*

385. Clause 9 of the trust deed provides:

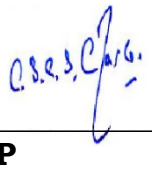
> *"Any power hereby or by law conferred on the Trustees to appoint, pay, transfer, appropriate or apply any capital or*

income of the Trust Fund to or for the benefit of any Beneficiary may, at the discretion of the Trustees , be validly exercised (without prejudice to the generality of such power or to any other mode of application) by paying or transferring the same to the trustees of any settlement (wherever such trustees are resident and whether or not the proper law of such settlement is the Proper Law of this Declaration) the provisions of which are in the opinion of the Trustees for the benefit of such Beneficiary, notwithstanding that such settlement may also contain trusts , powers or provisions (discretionary or otherwise) in favour of some other person or object , but so that no such payment or transfer shall be made which would or might infringe any applicable rule governing remoteness of vesting".

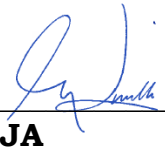
386. The transfer of the GRT assets to Grand View (for its exclusive benefit in its capacity as the new beneficiary of the GRT immediately prior to its declared termination) constituted a clause 4.1 transfer of the whole of the capital and /or income of the GRT.

387. For this reason, I agree with the learned President of this Court that clause 9 of the trust deed was not engaged by the 26 September 2005 irrevocable deed.

388. I would accordingly allow this appeal.



CLARKE P



SMELLIE JA

SUBAIR WILLIAMS JA