In The Supreme Court of Bermuda

CIVIL JURISDICTION
COMMERCIAL COURT
2018: 18

BETWEEN:

(1)WONG, WEN-YOUNG (also known as Winston Wong)

(2) WONG, RAY-TSENG (also known as Riley Wong) (an infant by his Next Friend, Grace Tsu Han Wong)

-and-

GRAND VIEW PRIVATE TRUST COMPANY LIMITED

RULING ON SUMMARY JUDGMENT APPLICATION

Plaintiffs' application for summary judgment-Defendant's application for joinder with 'main action'-discretionary trust for family beneficiaries with 100 year trust period-removal of family beneficiaries and appointment of trustee of perpetual purpose trust as sole beneficiary-appointment out of entire trust fund to new purpose trust beneficiary-whether scope of powers exercised permitted trustee to change the 'beneficial core' or 'substratum' of the trust-Limitation Act 1984 section 23(3)(proviso)-whether objects of a discretionary power with no fixed interest in the trust assets hold a "future interest" which defeats a limitation defence-impact of remoteness of vesting clause on purported appointment to perpetual purpose trust-requirements for executing deeds-effect of non-compliance with Companies Act 1981 section 23

Date of hearing: April 24-26, 2019
Date of Ruling: June 5, 2019

Mrs Elspeth Talbot Rice QC and Mr Dakis Hagen QC of counsel and Mr Rod S. Attride-Stirling and Mrs Cratonia Thompson, ASW Law Limited, for the Plaintiff

Mr Jonathan Adkin QC and Mr Adil Mohamedbhai of counsel and Mr Scott Pearman and Mr Jonathan Mahoney, Conyers Dill & Pearman Limited, for the Defendant

Introductory

1. The present action was commenced by a Specially Indorsed Writ of Summons filed on February 2, 2018. This Writ was amended by Order dated January 10, 2019. The 1st Plaintiff, Dr Wong, is the eldest son of the later Mr Wang Yung Ching ("YC Wang"), one of the founders of the Formosa Plastics Group of companies ("FPG"), who died in 2008. The 2nd Plaintiff is the grandson of Dr Wong and great-grandson of Mr. YC Wang. The Defendant is the trustee of the Wang Family Trust which was established on May 10, 2001.

2. The present proceedings are closely connected to the 1st Plaintiff's claims against the Defendant and other private trust companies in which the validity of certain purpose trusts and the transfers of assets into the trust are challenged (2018: No.44, the "Main Action"). The moniker 'Main Action' is appropriate because the present proceedings are believed to concern assets worth less than 5% of the value of the total assets in dispute in the Main Action. Nonetheless, the amount in dispute here is by most standards very substantial indeed, a consideration which cannot be ignored in case management terms.

3. The claims raised in the present action are nevertheless distinct claims in relation to a distinct trust, the Global Resource Trust No. 1 also settled on May 10, 2001 ("GRT"), by a Declaration made by its trustee, the Global Resource Private Trust Company (the "Trustee"), which was incorporated on May 8, 2001. The discretionary beneficiaries and ultimate default beneficiaries of the GRT were the children and

remoter issue of Mr YC Wang and his brother Mr YT Yang (together, the "Founders"). The assets of the GRT were shares in Grid Investors Corp ("Grid"), which itself held FPG shares. The Defence admits that on September 26, 2005, the Board of the Trustee executed an irrevocable deed:

(1) adding the Defendant as a beneficiary of the GRT;

(2) removing all other discretionary and default beneficiaries;

(3) declaring that the Trustee would take steps to appoint all the assets of the GRT to the Defendant as trustee of the Wang Family Trust;

(4) declaring that the GRT would thereafter be terminated.

4. The Plaintiffs challenge the legality of these transactions and seek a declaration that the Defendant holds the relevant assets on trust for the GRT, together with other consequential relief (principally the appointment of a new trustee as the Trustee has been dissolved). By a Summons dated December 3, 2018, they seek, *inter alia*, summary judgment under Order 14 of the Rules of the Supreme Court 1985 ("RSC"). The principal assertion is that the replacement of individual discretionary and default beneficiaries with trust purposes combined with the resettlement of the trust assets for the benefit of a perpetual purpose trust were transactions beyond the scope of the relevant discretionary powers. The Defendant filed a Summons on or about April 12, 2019 seeking trial directions "*including a direction that the trial of this action be heard at the same time as the trial of Action 2018: No. 44*".

5. The background to the present dispute and that in the Main Action shares common ground with other family trust disputes only at a superficial level. The Plaintiffs, Dr Wong and Riley Wong, are descendants of one mother and the Defendant is a company whose board of directors includes the children of another mother. However, atypically, the family members who are directors of the Defendant in this action and of the corporate Defendants in the Main Action while seeking to retain control of the lion's share of the assets settled on various purpose trusts are not doing so for their private benefit. Rather, they tacitly claim the moral high ground because the purpose

trusts were apparently established in furtherance of the Founders' ethically evocative "Vision", which essentially posits that persons who acquire wealth do not 'own' it but instead owe a duty to return it to society. By this measure if the parties were weighed in the scales of moral justice, it would be the Plaintiffs who would be found wanting, the Defendant's oral submissions implied. Mr Adkin QC appeared to me to brandish the Founder's Vision like a glittering forensic talisman, inviting the Court to view Mrs Talbot Rice QC's pleas for equitable justice to be done as lacking the lustre which one typically associates with such claims.

6. I caution myself against being swayed by such considerations. It is entirely plausible that the 1st Plaintiff is motivated by concerns such as inclusion and/or status or other non-material concerns. There are many civil law cases the factual matrices of which have a strong moral overlay (e.g. cases pitting weak against strong, poor versus rich and victim versus fraudster). Such cases often entitle the Court to have regard to considerations of what are often referred to as commercial morality. The present case, at this stage at least, does not in my judgment fall into such a category. There is no suggestion of anything but a level playing field between the opposing parties. It is common ground that the contending family members have no pressing financial needs. The Plaintiffs do not allege bad faith. The Defendant does not allege that the Plaintiffs' claims should be refused on the grounds of inequitable conduct on their part. The only formal relevance of the Founders' Vision to the present proceedings is that the Defendant contends that it forms an important plank in the entire rationale behind the establishment of the various purpose trusts, including the Wang Family Trust, and the Trustee's decision to wind-up the GRT in 2005.

7. The main issues raised by the applications presently before the Court may be summarised as follows:

   (a) what principles govern the exercise of the Court's discretion to grant summary judgment or decide issues summarily under RSC Order 14?

   (b) what issues suitable for summary determination (if any) have the Plaintiffs raised?

(c) if (b) is answered affirmatively, how should the issues be determined;

(d) if there are any triable issues, should they be tried together with the Main Action?

8. However before considering the key issues, it is necessary to place them in the context of the pleadings and the evidence filed in relation to the relevant applications.

Principles governing summary judgement applications

9. The governing principles on granting summary judgment applications were not subject to any discernible controversy. How the principles should be applied was the central issue in dispute. The primary source of the relevant provisions is RSC Order 14, which pertinently provides as follows:

> "*1 (1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.*
>
> *2 (1) An application under rule 1 must be made by summons supported by an affidavit verifying the facts on which the claim, or the part of a claim, to which the application relates is based and stating that in the deponent's belief there is no defence to that claim or part, as the case may be, or no defence except as to the amount of any damages claimed…*
>
> *3 (1) Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or the part of a claim, to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part, the Court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed…* "

10. Since Order 14 was initially enacted, it has been complemented by the following ancillary provisions of RSC Order 1A rule 4 upon which the Plaintiff's counsel relied:

> "*(1) The court must further the overriding objective by actively managing cases.*
>
> *(2) Active case management includes— ...*
>
> *(c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others…*"

11. The Plaintiffs relied upon three judicial statements of principle. Firstly, Robert Goff LJ in *European Asian Bank A.G.-v- Punjab & Sind Bank (No.2)* [1983] 1 WLR 642 at 652 stated:

> "*…at least since Cow v Cow [1949] 1 KB 474, this court has made it plain that it will not hesitate , in an appropriate case, to decide questions of law under R.S.C., Order 14, even if the question of law is at first blush of some complexity and therefore takes 'a little longer to understand'. It may offend against the whole purpose of Order 14 not to decide a case which raises a clear-cut issue, when full argument has been addressed to the court, and the only result of not deciding it will be that the case will go for trial and the argument will be rehearsed all over again…The policy of Order 14 is to prevent delay in cases where there is no defence.*"

12. Secondly, in *Mehta-v- Viking River Cruises Ltd* [2014] Bda LR 99, Hellman J opined in similar terms as follows:

> "*18. It has been said that leave to defend should be given where a difficult question of law is raised. See Campbell v Vickers [2002] Bda LR 3, SC, per Meerabux J at page 3, citing Electric Corporation v Thompson-Houston 10 TLR 103. On the other hand, there will be cases where the Court has heard full argument on the question and where the facts necessary to resolve it are*

not in dispute. In such cases, if there is no reasonable doubt that the question should be resolved in favour of the plaintiff, who would in that event be entitled to judgment, then, absent a compelling reason to the contrary, the Court should in my judgment grasp the nettle and decide the question at the summary judgment stage."

13. Thirdly, in *ICI Chemicals & Polymers Ltd. –v- TTE Training Ltd.* [2007] EWCA Civ 725, Moore-Bick LJ stated:

"*12. In my view the judge should have followed his original instinct. It is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better.*

13. In cases where the issue is one of construction the respondent often seeks to persuade the court that the case should go to trial by arguing that in due course evidence may be called that will shed a different light on the document in question. In my view, however, any such submission should be approached with a degree of caution. It is the responsibility of the respondent to an application of this kind to place before the court, in the form of a witness statement, whatever evidence he thinks necessary to support his case. Where it is said that the circumstances in which a document came to be written are relevant to its construction, particularly if they are said to point to a construction which is not that which the document would naturally bear, the respondent must provide sufficient evidence of those circumstances to enable the court to see that if the relevant facts are established at trial they may have a bearing on the outcome.

14… it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction."

14. The Defendant's counsel relied primarily on *dicta* in Hellman J's judgment in the *Viking River Cruises* cases which I cited with approval in *Jack-v- The Minister of Public Works* [2016] SC (Bda) 108 Com:

"*15. The provisions of RSC Order 14 are well known. Where a statement of claim has been served on a defendant and the defendant has entered an appearance in the action, a plaintiff may apply for judgment on the ground that the defendant has no defence to all or part of a claim included in the writ. A defendant may show cause against an application for summary judgment by affidavit or otherwise to the satisfaction of the Court. What the defendant must show is that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of all or part of that claim. The Court may give the defendant leave to defend all or part of the action either unconditionally or on such terms as it thinks fit.*

16. As the commentary to the 1999 edition of the White Book states at 14/4/9:

'The power to give summary judgment under Ord. 14 is "intended only to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment, and where therefore it is inexpedient to allow a defendant to defend for mere purposes of delay" (Jones v Stone [1894] AC 122). As a general principle, where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a bona fide defence, he ought to have leave to defend (Saw v Hakim (1889) 5 TLR 72 ; Ironclad, etc v Gardner (1892) 4 TLR 18 ; Ward v Plumbley (1890) 6 TLR 198 ; Yorkshire Banking Co v Beatson (1879) 4 CPD 213 ; Ray v Barker (1879) 4 Ex D 279).

Leave to defend must be given unless it is clear that there is no real substantial question to be tried (Codd v Delap (1905) 92 LT 519 , HL); that there is no dispute as to facts or law which raises a reasonable doubt that the plaintiff is

entitled to judgment (Jones v Stone [1894] AC 122 ; Thompson v Marshall (1880) 41 LT 729 , CA; Jacobs v Booth's Distillery Co (1901) 85 LT 262 , HL; Lindsay v Martin (1889) 5 TLR 322)…

18. It has been said that leave to defend should be given where a difficult question of law is raised. See Campbell v Vickers [2002] Bda LR 3 , SC, per Meerabux J at page 3, citing Electric Corporation v Thompson-Houston 10 TLR 103 . On the other hand, there will be cases where the Court has heard full argument on the question and where the facts necessary to resolve it are not in dispute. In such cases, ***if there is no reasonable doubt that the question should be resolved in favour of the plaintiff****, who would in that event be entitled to judgment, then, absent a compelling reason to the contrary, the Court should in my judgment grasp the nettle and decide the question at the summary judgment stage.*"[Emphasis added]

15. The words upon which the Defendant's counsel placed emphasis may well have been apposite in the context in which they were articulated in the *Viking River Cruises* case, and perhaps in most cases. However, as I indicated in the course of argument, it is clear that the true governing principle is that if it is appropriate to do so, an application for summary judgment can be finally determined in favour of either the applicant or the respondent.

16. As the English Court of Appeal held in *ICI Chemicals & Polymers Ltd. –v- TTE Training Ltd.* [2007] EWCA Civ 725 (Moore-Bick LJ), the practical rationale underpinning the summary judgment jurisdiction which I adopt for the purposes of the present application as follows:

> "12… *if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against*

him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better."

The Pleadings

The Amended Statement of Claim ("ASOC")

17. For present purposes, the most important averments in the ASOC may be summarised as follows:

    (a) The Plaintiffs are beneficiaries of the GRT which when established in 2001 was subject to the rule against perpetuities (paragraph 9(b));

    (b) in transferring the assets of the GRT to the Wang Family Trust, the Trustee acted in breach of trust because the Trustee (i) was not acting in in the interests of the GRT, and (ii) acted in excess of its powers (paragraph 13);

    (c) the asset transfers were void and of no legal effect (paragraph 15);

    (d) the Plaintiffs accordingly seek a declaration that the Defendant holds the GRT assets on resulting or constructive trust for the GRT (Prayer, paragraph (1).

The Defence

18. For present purposes, the most important averments in the Defence may be summarised as follows. The alleged breach of trust was denied on the grounds that:

    (a) the 1st Plaintiff had no standing as a former beneficiary to pursue the present claims (paragraph 33);

    (b) clause 8 of the GRT deed conferred an unfettered discretion to remove and replace beneficiaries, a power which was not required to be exercised in the interests of the beneficiaries being removed (paragraph 34);

(c) the Trustee did not act in excess of its powers. It was entitled by clause 8 to remove the existing beneficiaries and appoint a new beneficiary. It was entitled to distribute the income and capital to a single beneficiary under clauses 3.1 and 4.1(paragraph 34);

(d) no breach of the rule against perpetuities occurred (paragraph 34);

(e) the 1st Plaintiff's claims were time-barred because of the six year limitation period applied to trust claims by section 23 of the Limitation Act 1984 (paragraph 37).

The Amended Reply to the Defence ("Reply")

19. The Reply (at paragraph 19) set out the following averments which effectively set out the principal legal basis of the Plaintiff's application for summary judgment:

(a) the power to add and exclude beneficiaries under clause 8 had not, as required, been effected by a deed;

(b) the transfer of the entire GRT trust fund to the Wang Family Trust was "outwith" the Trustee's powers because it subverted the purpose of the GRT. The Trustee was not entitled to use its powers to alter the fundamental substratum or underlying purpose of the trust;

(c) the GRT was an irrevocable 100 year express trust for the benefit of the children and remoter issue of YC Wang and YT Wang and the impugned transaction had the practical effect of revoking the GRT and resettling its assets on the trusts of a perpetual non-charitable purpose trust from which the original beneficiaries could never benefit;

(d) the impugned transaction was in breach of the remoteness of vesting rule consisting of the 100 year vesting period as applied to transfers of income and capital to other settlements by clause 9 of the GRT deed;

(e) (implicitly) the standing point does not arise because the purported removal of the Plaintiffs as beneficiaries was void;

(f) the Plaintiffs' claims are not time-barred.

20. The Reply averred in the alternative (paragraph 20) that if the transfer of assets was not void, it was voidable because the Trustee acted in breach of fiduciary duty by taking irrelevant considerations into account. Summary judgment was not sought in respect of this very obviously fact-sensitive alternative claim. It is important to note, however, that neither the ASOC nor the Reply sets out a coherent affirmative breach of trust case which is (to any obvious extent) not parasitic upon the Plaintiff's primary case that the Trustee could not validly use the powers it relied upon to change the underlying character or purpose of the Trust.

The evidence

The Plaintiffs' evidence

21. The principal evidence in support of the Plaintiffs' summary judgment application is the First Affidavit of Anthony Poulton, a partner of the London office of Baker McKenzie LLP. The Affidavit exhibits the key documents by which the impugned transaction was effected. He then deposes that:

> "*11. For the reasons outlined below, Dr Wong and Grace Wong, as Next Friend for Riley Wong, do not believe that the Defence discloses any issue or question to be tried or that there ought for some other reason to be a trial of the action.*"

22. In paragraph 12, the deponent sets out six points, each of which is said to be a "*pure question of law*" and amenable to summary determination. These points essentially correspond to the six points pleaded in the Reply and summarised above in paragraph 19 of the present judgment.

23. In his Second Affidavit, sworn after the filing of the Defence, the deponent avers that he does not believe the "*primary facts*" are in dispute and confirms that he does "*not believe that there is a defence to the claim*" (paragraph 4). In Mr Poulton's Third Affidavit, he avers that the evidence filed on behalf of the Defendant raises no defence to the questions of law upon which the Plaintiffs rely and does not require any response. To emphasise the extent to which the Plaintiffs considered that they had raised questions of law not dependent upon contentious facts, Mrs Talbot Rice QC in the course of her oral submissions made it clear in reply that she was content for the Court to deal with the summary judgment application on the assumption that the Defendant's evidence was true.

24. It bears noting in passing at this juncture, that the technically justifiable failure to respond to the Defendant's evidence which the Plaintiffs implicitly viewed as relevant only to their alternative breach of fiduciary duty claim inevitably creates a strong impression that this scantily pleaded alternative claim is, properly analysed, of peripheral significance to the present action as a whole. This analytical view is not easily arrived at, because the Defendant's primary stance was that the 'real' controversy between the parties was mainly factual and accordingly had to be tried. The Plaintiffs, in contrast, accepted that if their key points of law were resolved against them, there would be important factual disputes to be resolved at trial. This apparent concession to my mind involved an assertive exaggeration of the strength of their alternative claim. The Plaintiffs' general litigation strategy, in this as in Dr Wong's Main Action, appeared to be to march to the militant beat of the Jacob Miller reggae song: "*forward ever, backwards never!*"

The Defendant's evidence

25. The main evidence in opposition to the summary judgment application is the First Affidavit of Susan Wang, the 1st Plaintiff's half-sister. She explains that she and her sister Sandy Wang, together with their cousins William Wong and Wilfred Wang (sons of her uncle, Mr YT Wang) and Mr Hung were directors of the Trustee before it was wound-up. She gives a fulsome account of the decision-making process behind the impugned transactions.

26. The account is not challenged for the purposes of the present application; indeed it is not easy to see how the account is likely to be susceptible to serious challenge by the Plaintiffs, who played no part in the relevant events. Moreover, for summary judgment purposes, Mr Adkin QC conceded in the course of oral argument that the only factual issue which arose for determination at this stage was whether or not any disputed background facts were actually or potentially relevant to the determination of the points the Court was invited to summarily determine. Mrs Talbot Rice QC sought to negate even this evidential inquiry by inviting the Court in her reply submissions to dispose of the summary judgment questions on the assumption that the Defendant's evidence was true. She also was willing to permit the Court to take into account all the evidence the Defendant relied upon, including evidence of subjective intentions which she insisted was strictly inadmissible as an aid to construction[1].

27. An overview of the Defendant's evidence can be gleaned by identifying the main topics which are addressed in the First Susan Wang Affidavit and the highlights of the supporting evidence:

    (a) the introductory paragraphs appear to me to be altogether uncontroversial, summarising the Founders' family, life and establishment of FPG, together with the establishment of various charitable foundations between the 1960's and the 1990's. The Founders' strong belief in the importance of giving back to society is noted;

    (b) the background to the formation of the Wang Family Trust and the GRT is then addressed. It is averred that the Founders never intended any of the assets in the Holding Companies, which included Grid, to be left to their heirs. Instead, it was hoped that those assets would be applied "*towards the perpetuation of FPG*" (paragraph 22). It is deposed that by the summer of 2000, the Founders had turned their attention to succession planning in relation to the business (paragraph 25). Lawyers in New York and Bermuda were instructed to assist (paragraph 26). Critically, it is deposed that the GRT was intended to encourage the Founders' descendants as

[1] Transcript, April 26, 2019, pages 680-684.

potential beneficiaries to "*perpetuate the success of the FPG Companies*" (paragraph 29);

(c) the formation of the Wang Family Trust and the GRT is then addressed. Although it was originally planned to establish a single Bermuda purpose trust, it was ultimately decided to establish purpose trusts alongside a "*Beneficiary Trust*" (GRT);

(d) the background to the winding-up of the GRT is then critically addressed. The critical averments are that although it was Susan Wang's understanding that "[the Founders'] *original intention was to divest themselves of almost all of their personal wealth*", they had concluded that it would be damaging to the public's confidence in FPG if they were to relinquish the majority of their personal shareholdings in FPG. As a result, by retaining their personal shareholdings in FPG, the Founders' children would inherit substantially more wealth than the value of the assets in the GRT. It was hoped that the FPG shares which were inherited would "incentivize" the heirs to support FPG. In these circumstances the private trust was viewed as redundant the Founders had therefore concluded that there was no longer any need for a private trust for the benefit of their children (paragraph 45). The matters taken into account by the GRT Board in deciding to give effect to the Founders' wishes are then summarised (paragraph 46). At a May 9, 2005 GRT Board Meeting, it was decided to add the Defendant as a beneficiary and exclude the existing beneficiaries. Initially it was proposed to make an appointment under clause 9, but pursuant to legal advice the appointments were ultimately made under clauses 3.1 and 4.1 on September 26, 2005.

28. At first blush, it is not easy to distinguish which strands of this evidence (if any) are exclusively relevant to the question of how the Trustee exercised its discretion (the alternative breach of fiduciary duty claim) and which strands potentially shed light on the context in which the instruments were executed and, as a result, the construction of the scope of the relevant powers. This analysis was initially significant, if not pivotal, to the threshold issue of whether or not the Plaintiffs had indeed identified

points of law which are suitable for summary determination. It is initally not pivotal as the Plaintiffs' counsel eventually conceded that for present purposes (a) all the factual assertions made by or on behalf of the Defendant are true, and (b) that all of the Defendant's evidence (including material strictly inadmissible as an aid to construction) may be taken into account for the purposes of construction.

29. Supplementary evidence was filed to establish a point germane to the validity of the deed question, namely that the critical instrument was executed in Taiwan and was valid according to Taiwanese law. Scott Pearman's Second Affidavit, sworn by a partner with the Bermuda office of Conyers Dill & Pearman, took issue with the assertions in the Second Poulton Affidavit about the ability of the Court to decide the posited summary judgment issues without a full trial. The Third Scott Pearman Affidavit supported the Defendant's application for the present action to be tried together with the Main Action and sought ancillary directions in relation to the trial.

Findings: which issues are potentially fit for summary determination?

The Plaintiffs' standing

30. It seems self-evident, as their counsel argued, that the Plaintiffs' standing to seek relief as discretionary and/or default beneficiaries of the GRT is coterminous with the merits of their application for a declaration that their purported removal as beneficiaries is void. The standing point is entirely neutral in terms of an assessment of whether or not the Plaintiffs are potentially entitled to obtain summary judgment.

The scope of the power to remove the original beneficiaries and replace them with a purpose trust

31. The Plaintiffs submitted that the impugned transactions were void because it was not possible to exercise the relevant powers (a) in a manner which was inconsistent with the interests of the defined Beneficiaries (who were said to be still in place when the distribution to the Defendant was approved) or (b) so as to change the substratum of the original GRT. These two points are in substance one serious point. This is the broad assertion that the powers were exercised beyond their permitted scope.

32. The Defendant described the complaint that the substratum of the GRT could not validly be altered as the "subversion" issue. In the Defendant's Skeleton Argument (at paragraph 62), it was submitted that this complaint raised "*four key points*":

    (1) the Trustee clearly had the power under clause 8.1 to remove and add beneficiaries and the onus was on the Plaintiffs to show that the discretion had been improperly exercised;

    (2) the Trustee had the widest possible discretion under clause 8.1and the Court should be slow to interfere;

    (3) the Trustee was clearly not required to have regard to the interests of the original beneficiaries in exercising the discretion to remove them;

    (4) whether the exercise of the powers under clause 8.1 was improper fell to be determined by reference to those matters the Trustee may have considered to be relevant. It was impossible to decide that the relevant matters had not been considered at the summary judgment stage.

33. These submissions are both at first blush and on closer scrutiny fundamentally sound. However, on closer analysis, they are directed almost entirely to the Plaintiffs' alternative breach of fiduciary duty claim and do not meaningfully engage with the overarching legal point raised by the Plaintiffs: assuming the Trustee considered all relevant matters, as a matter of law was it permissible for the admittedly broad discretionary powers conferred to be used to change the underlying character of the GRT? This was either explicable by reference to a misunderstanding of the Plaintiffs' case on an improbable scale or, alternatively, a tactical desire to kick the legal can down the trial road.

34. The central thesis advanced by the Plaintiffs was based on the following key legal assertions (Skeleton Argument, paragraphs 29, 39-40):

(a) a power conferred by a trust instrument may only validly be used for a purpose within the scope of the instrument creating the power. A purported exercise of the power for purposes beyond the scope of the instrument will be void;

(b) a power of addition and removal was "*a power of amendment of a special kind*";

(c) a power of amendment may only validly be used to amend the trust created by the instrument conferring the power. It cannot be used to vary the substratum of the trust and effectively resettle the trust funds n new trusts.

35. In his oral submissions, Mr Adkin QC did not appear to me to convincingly undermine the validity of these general propositions. I felt that the most that he could validly argue was that, properly analysed, the propositions the Plaintiffs relied upon did not support their case.

36. It is ultimately clear that the question of whether or not the impugned powers were exercised for an invalid purpose beyond the scope of the GRT instrument is a question of law the determination of which does not require the analysis of any extraneous controversial evidence. It is a point fit for determination under Order 14 as read with Order 1A because:

(a) it is a discrete point of law which has now been fully argued;

(b) if it is determined in favour of the Plaintiffs it will obviate the need for a trial of the breach of fiduciary duty claim;

(c) if it is determined in favour of the Defendant it <u>may</u> obviate the need for a trial of the breach of fiduciary duty claim, because that claim will potentially be rendered unsustainable, based on the present state of the pleadings and the evidence presently before the Court. It is not clear how the breach of fiduciary claim holds together if it was legally permissible to pursue the practical result which the impugned transactions achieved;

(d) the overlap with the Main Proceedings substantially relates to the alternative breach of fiduciary duty claims which may not have to be tried in any event, the case management benefits of having a joint trial are consequentially quite weak.

37. In my judgment the Court's duty to actively manage cases makes it permissible for me to take into account factors (c) and (d) above as complementary and non-pivotal considerations although they were not canvassed in argument by either party. The Plaintiffs were unwilling to concede the weakness of their alternative claim, for understandable tactical reasons. The Defendant, for less obvious tactical reasons of its own, was unwilling to undermine its case for joinder by acknowledging that the breach of fiduciary duty claim might not in fact have to be tried. It was this claim which most obviously overlapped with some of the claims asserted by the 1st Plaintiff in the Main Action.

38. I do not ignore the Defendant's submission that the Plaintiffs will seek consequential relief in the event that they obtain a declaration that the purported exercise of the impugned powers was void. This would be a comparatively minor part of the Plaintiffs' claim and Order 14 rule 1(1) explicitly applies to "*a claim included in the writ, or to a particular part of such a claim*".

The remoteness of vesting issue

39. Did the terms of clause 9 of the GRT invalidate a distribution of the assets to a perpetual trust? Although a separate point in theory, in practical terms it was complementary to the scope of the powers issue. The Defendant submitted it had no utility as a freestanding point, in part because it was now possible to apply to Court to dis-apply the perpetuity period. In my judgment this point of law can usefully be considered at this stage as an adjunct to the primary "substratum" point, as opposed to as a freestanding ground of invalidity. To the extent that the breach of fiduciary duty claims become the main substantive claims at a trial, the remoteness of vesting point is more appropriate for determination at trial.

The limitation defence

40. Because the limitation defence is potentially a complete answer to the Plaintiffs' entire claim, determining the scope of the power issue summarily makes it desirable to consider the limitation defence issue summarily as well. In his oral submissions, Mr Adkin QC queried whether the validity of the defence could be determined summarily because:

    (a) the merits of an important aspect of the defence were subject to a "lively debate";

    (b) the standing of the Plaintiffs as default beneficiaries had been raised late so the issue had not been addressed in the Defendant's evidence;

    (c) the need to consider discretionary equitable grounds for barring the Plaintiffs' claim on the grounds of delay could not be addressed at this stage.

41. Ordinarily it is the defendant who is keen to dispose of an action summarily on the grounds that a limitation point is a straightforward knock-out point. The Defendant's keenness to postpone adjudicating the merits of the limitation defence suggested either tactical concerns and/or a lack of conviction in its strength. In my judgment the limitation defence raised a point of law (the construction of, primarily, section 23(3) of the Limitation Act 1984) which did not depend on contentious facts. Based on the present pleadings (Defence paragraph 37), the limitation plea does not include any alternative equitable grounds for refusing the Plaintiffs relief.

42. As Mr Hagen QC, pointed out, the 2nd Plaintiff was not even alive during the normal limitation period. The Plaintiffs' pleaded case (Amended Reply to Defence dated December 3, 2018 avers that the 1st Plaintiff did not learn of the existence of the GRT until August 5, 2013. The Defendant's evidence did not join issue with the Plaintiffs in this regard. Nor, ultimately, did Mr Adkin QC identify a basis for rebutting this

assertion in the course of argument when addressing the discovery issue[2]. Based on the resources that have been deployed by the Defendant in relation to the present application, dealing with all points big and small, in my judgment it is inconceivable that the Defendant would not, by the date of the hearing, have identified any credible basis for challenging the 1st Plaintiff's December 3, 2018 pleaded case on when he first learned about the GRT.

43. It seems self-evident that if the defence is a meritorious one, it would be wasteful of costs to have a trial on the merits of the Plaintiffs' primary and alternative claims. If the defence is unmeritorious, it is equally obvious that it is useful in case management terms for the legal point to be disposed of summarily at this stage.

The Invalid Execution Issue

44. The Plaintiffs raised the technical legal issue of whether the instrument effecting the impugned transactions was duly executed as a deed in accordance with the requirements of Bermuda law. The Defendant countered that the GRT instrument defined "deed", as regards instruments executed abroad, in such a way as to engage the relevant provisions of Taiwanese law. The Plaintiffs countered that the provisions of the Companies Act 1981 were clear and superseded any inconsistent provisions in a trust deed.

45. My provisional view in the course of the hearing was that this point did not really 'have legs' as a freestanding point on the hypothesis that the scope of the power issue was resolved against the Plaintiffs. Having further considered the matter, and for the reasons explained in further detail below, I find that this point is not suitable for summary determination in advance of trial.

The Defendant's Summons for Directions

46. The Defendant's counsel advanced an attractive argument that directions should be given immediately for the trial of this action together with the Main Action and the

[2] Transcript, April 26, 2019, page 747, lines 15-20.

Plaintiffs' RSC Order 14 application should be refused on broad case management grounds. That action has been set down for a 10 week trial commencing on October 5, 2020. I refused the 1st Plaintiff's application in the Main Action for preliminary issues to be tried on the grounds that it would be more efficient to have a single trial and a single set of seemingly inevitable appeals[3].

47. I acknowledge that in global dispute value terms the present action superficially seems unlikely to materially complicate or lengthen the Main Action. One key factor undermines the weight to be given to this view. The amount in dispute in this action is sufficient to justify the parties litigating in the highly intense manner in which the Main Action has been fought, an enthusiastically rigorous approach which has already been manifested in this action which cannot fairly be characterised as in any way disproportionate. In my judgment there is an obvious risk that trying this action together with the Main Action could have a disproportionate impact on the length of that trial and that seeking to harmonise the timetable would be problematic.

48. In addition it is important to remember that the summary judgment jurisdiction is a much easier gateway to access than obtaining directions for the trial of preliminary issues. The latter jurisdiction is overshadowed by dark concerns about the dangers of "*treacherous shortcuts*"; the summary judgment jurisdiction is not.

49. On balance I feel that sensible and precautionary case management requires me to avoid the risk of disrupting the settled timetable of the already challenging Main Action by seeking to interpose the present action. The present action in my judgment primarily raises a wholly distinct issue: whether the impugned transactions involved an excessive execution of trust powers. It is possible that the determination of this threshold issue at the summary judgment stage, one way or the other, may be dispositive of the entire action. It would be wasteful of costs to conclude at the end of a three day hearing involving well-resourced legal teams and Leading Counsel on both sides that nothing should be decided and that all the same arguments should be rerun at trial.

[3] *Wong, Wen-Young-v-Grand View Private Trust Company Limited et al* [2019] SC (Bda) 1 Com (4 January 2019).

50. These considerations which arise under RSC Order 1A also influenced my decision to "grasp the nettle" and summarily determine the principal point of law raised by the Plaintiffs' RSC Order 14 application.

Findings: the scope of the power issue

Fraud on a power: governing legal principles

51. Mrs Talbot Rice QC submitted that the donee of a fiduciary power commits a 'fraud on the power' if the power is used for an ulterior purpose. '*Lewin on Trusts*', Nineteenth Edition (paragraph 29-289). *Lewin* also provides (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.*"

52. The same text proceeds (at paragraph 29-291) to give three examples of a fraud on the power, the third of which the Plaintiffs' counsel relied upon as apt for the purposes of the present case:

> "*(1) The power was exercised with a corrupt purpose, that is with a view to benefiting the donee;*
>
> *(2) The power was exercised pursuant to a bargain with the appointor to benefit someone who was not an object of the power;*
>
> *(3) <u>The power was exercised for some other purpose foreign to the power</u>.*" [Emphasis added]

53. *Lewin* cites two authorities in support of these foundational principles to which counsel referred. *Vatcher-v-Paull* [1915] A.C. 372 (Privy Council) at 378 provides high level support for the above-quoted passage in *Lewin* at paragraph 29-290. However Lewin describes[4] the following *dictum* of Lord Westbury LC in *Duke of Portland-v-Lady Topham* (1864) 11 H.L.C. 32 at 54 as the "*classic statement*" on this legal rule:

> "*…[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 and 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.*"

54. Mrs Talbot Rice QC also referred to '*Thomas on Powers*', Second Edition. The learned author states (at paragraph 16.08):

> "*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; and the solution to any question of construction lies, as Brooke LJ put it in National Grid Co. Plc v Mayers*[5]*, in relation to a pension scheme (but in terms which apply to equally to any instrument*)*, 'within the terms of the scheme itself…'.*"

55. I find this submission, 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 be an irresistible one. What appears to me to be the allied principle that discretionary powers are stamped with the character of the instrument that creates them was uncontroversial in *Re a Trust (Change of Governing Law)* [2017] SC (Bda) 38 Civil

[4] At paragraph 29-289 n. 1040.
[5] [2000] ICR 174 at 193.

(a case not cited in argument, but which is mentioned here only to confirm a point I made during the hearing)[6] where I noted:

> "*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)…"*'

56. Mr Adkin QC in opening his oral submissions, asserting that his opponent had only made it clear that she was pursuing a point of construction in her own opening oral argument, did not dispute these principles to any persuasive extent. He appeared to me to place more emphasis on contesting what the applicable rules of construction were.

57. 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. This is in contradistinction to the task of determining whether an otherwise '*intra vires*' exercise of the power was improperly exercised, which will usually be a fact-sensitive inquiry. Perhaps the clearest judicial formulation of this distinction may be found in the judgment of Lord Walker in *Pitt-v-Holt* [2013] 2 AC 108 at 135F-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*

[6] Transcript April 26, 2019, page 687, lines 11-14.

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."

Is the power to add and exclude beneficiaries a power of amendment of a special kind?

58. The Plaintiffs' central thesis was that (a) the power to add and exclude beneficiaries is a special form of amendment power, and that (b) a power of amendment could only be used to amend the terms of the relevant trust, not to alter its substratum (Skeleton, paragraphs 39-43). The first limb of this submission was supported by reference to unambiguous authority. *Lewin* (at paragraph 30-056) states:

> "*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 a class. Such powers may be viewed as a power of amendment of a special kind*…."[7]

59. This general proposition was not directly challenged by reference to any countervailing legal authority. Instead, Mr Adkin QC contended that the critical analysis was the scope of a very broad and unfettered power to add and exclude beneficiaries in an instrument which contained an equally broad power of amendment. 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.

[7] This analysis is also supported, less explicitly, by '*Thomas on Powers*', paragraph 16.09.

Is there a legal prohibition on using general powers of amendment to change the underlying character or substratum of a trust?

60. Putting aside English case law on the Variation of Trusts Act 1958 which primarily concerns the exercise of a statutory power to vary trusts, the Plaintiffs' counsel did cite authority which supported her key proposition. In the course of the hearing I expressed doubts about the persuasive weight of the statutory cases, doubts which do not survive the fuller evaluation of the topic set out below.

61. *Dyer-v-The Trustees, Executors and Agency Co. Ltd* [1935] VLR 273 was a decision of the Full Court of the Victoria Supreme Court on appeal from a first instance judge. The trust was settled to establish a metropolitan orchestra in Melbourne. The relevant facts were crucially summarised at page 275 as follows:

> "*The income of the fund had accumulated, and had been invested by the trustee. Since it had not proved practicable to apply the income as directed, the donor desired to alter the objects of the trust, and a draft deed was prepared to provide that the accumulations of the income of the fund should be paid in various amounts to the Royal Victorian Liedertafel, the Music Teachers' Association of Victoria and the British Music Society of' Victoria, and that the future income of the sum of 10,0001. should be paid to the last-named society until the expiration of twenty years from the death of the survivor of the donor and his wife, whereupon the said sum was to be held upon trust to apply the income for such charitable purposes or objects connected with the advancement of music or of musical education in Victoria as the committee of the society might with the approval of the Attorney-General determine. It being doubtful whether the donor had power to alter the trusts in the way desired an originating summons was taken out by James Dyer, to which the trustee of the fund and the Attorney-General were made defendants.*"

62. The operative holding of the Full Court was that the original trusts were void and so the power of amendment issue did not arise for direct consideration. At first instance

MacFarlan J had refused to approve the proposed change of trust purposes. In their leading judgment, Irvine CJ and Gavan Duffy J held (at 286) as follows:

> "*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 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.*"

63. The learned judges who delivered the leading judgment, without deciding the question, merely expressed doubts as to whether the specific purposes of the original trust could be changed by a broadly expressed power to "vary". Mrs Talbot Rice QC could only point to what were strictly *obiter dicta* in the concurring judgment of Martin J at pages 290-291 to support her key submission:

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

64. It was perhaps because of the somewhat doubtful pedigree of these judicial observations (and the distinguishing contextual features upon which the Defendant relied) that the Plaintiffs' counsel did not initially rely directly upon this case at all. Instead they relied upon the fact that Megarry J had placed his imprimatur on these

observations in the statutory variation context in *In re Ball's Settlement Trusts* [1968] 1 W.L.R 899. As to these pertinent *obiter dicta* in *Dyer*, Megarry J opined as follows (at 905B-C):

> "*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.*"

65. This analysis was applied in disposing of the *In Re Ball's* case. 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 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.*"

66. This principle finds support in other statutory variation cases to which counsel referred. In *Re McCullagh's Will Settlement* [2018] NICh 15, Mr Adkin QC pointed out that McBride J took into account affidavit evidence about the testator's intentions. Here the Plaintiffs ultimately invited the Court to accept for the purposes of the present application that the Defendant's evidence was true and to take it into account as a potential aid to construction although its impact was said to be neutral. More recent support for the proposition that a statutory variation cannot extend to

effectively resettling the trust altogether may be found in *Duke of Somerset-v-Fitzgerald* [2019] EWHC 726 (Ch) where 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."*'

67. 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?

68. It is important to properly identify the character of the relevant rule. *Lewin* (at paragraph 30-074), after noting that express restrictions are sometimes placed on a power of amendment, opines as follows:

> "*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.*"

69. In fact, this implied limit on a power of amendment may be viewed as a rule of construction applicable to powers of amendment generally. *Lewin* cited, as the authority for the just-quoted passage, a non-trust case, *Bank of New Zealand-v-Board*

of Management of the Bank of New Zealand Officers Provident Association [2003] UKPC 38. In that case, Lord Walker opined in salient part as follows:

> "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? Millett J addressed that question in In re Courage Group's Pension Schemes Ryan v Imperial Brewing and Leisure [1987] 1 WLR 495, 505-506:*
>
> > *'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.*
> >
> > *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." [Emphasis added]

70. Mrs Talbot Rice QC in any event demonstrated that the rule of construction relied upon was a general rule of construction, relying in part on 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*…"

71. Against this background, reliance was in my judgment aptly placed upon Lord Sales' April 2, 2019 lecture to the Chancery Bar Association, '*Fraud on a Power: the*

interface between contract and equity'. In that lecture, Lord Sales undertook the task of:

> "*…tracing the development of the doctrine of fraud on a power from an aspect of equity-something distinct from and laid over the top of interpretation of instruments in law-into something which looks increasingly like an aspect of the interpretation of contracts and other legal instruments…*"

72. It is 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. In my judgment it is now settled law 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. This principle must apply with equal force to a power of amendment of a special kind although it will generally be difficult in practice, for the reasons so persuasively advanced by Mr Adkin QC, to contend that exercising a broadly drafted special power of amendment (e.g. to add or exclude beneficiaries) in and of itself amounts to a revocation of the relevant instrument.

73. The supervisory jurisdiction of this Court over trusts routinely requires directions to be given to trustees as to whether proposed transactions fall within or without their discretionary powers. Construing the scope of discretionary powers ought ordinarily to involve an analysis of the relevant trust deed illumined by substantially undisputed affidavit evidence. In my judgment it ought ultimately to be comparatively straightforward in most cases to distinguish between a case where the past or proposed exercise of a power is within or without the scope of a trust instrument. The supervisory jurisdiction of the Court must be readily accessible to trustees of all trusts, both big and small.

74. It may be helpful to summarise my legal findings by reference to two hypothetical scenarios to explain my approach to and understanding of the principle that a general discretionary fiduciary power of amendment of any kind may not be used to alter the substratum of the trust instrument from which the power derives its existence. The two scenarios use facts which are deliberately far less ambiguous than the facts in the present case.

CASE A

The settlor owns a company which holds the patent to potentially valuable intellectual property rights. He establishes an irrevocable discretionary trust the beneficiaries of which are his wife, children and remoter issue and transfers the shares in the company to the A Trust. In a letter of wishes he expresses the desire that the trust be regarded as dynastic in nature and the wish that the children of each generation should lead modest and productive lives. Under the governing law of the trust there is no perpetuity period. In his declining years he becomes attached to his young caregiver, a single mother from an impoverished country who is supporting a large family there. He legally adopts his carer's three children and requests the trustees of the A Trust to consider exercising their power to add and exclude beneficiaries by adding his carer and their children and removing the original beneficiaries. The Trustees are aware that after the A Trust was established, the settlor established an even more successful company the shares of which he has willed to his wife and children. They give effect to the settlor's wishes having satisfied themselves that his family has no objections. After the settlor's death, his eldest son sues the trustees seeking to set aside his removal as a beneficiary arguing (1) the trustees' purported decision was beyond the scope the relevant powers and/or (2) in breach of fiduciary duty.

Hypothetical holding: I would decline to grant summary judgment on the scope of the power issue in favour of the plaintiff because, on balance, the change in the identity of the beneficiaries did not amount to a revocation of the trust. The assets had not been appointed out or settled on entirely new trusts. Whether or not the trustees exercised their discretion lawfully, on the other hand, would be a triable fact-focussed inquiry.

CASE B

A highly successful fund manager settles a substantial amount of cash in an irrevocable discretionary trust managed by professional trustees for the benefit of his wife and children. The main motivation of the trust is to secure

the long-term financial wellbeing of his family, who are both discretionary and default beneficiaries. The trust period is 100 years. The trustees ensure that appropriate tax disclosures are made in respect of the settlor of the B Trust and its beneficiaries who receive distributions from time to time. Five years later, shortly after a stock market crash, the settlor asks the trustees to consider removing his wife and children as beneficiaries, adding himself as a sole beneficiary and appointing out all the trust assets to him. Because he is facing financial ruin, the original purpose of the trust is no longer valid and he needs the cash to fulfil his original aim of safeguarding the financial security of his family. Shortly after receiving this request, an avalanche of lawsuits is filed against the settlor accusing him of running a Ponzi scheme. The settlor provides bank transfer details and indicates that he is now resident in what the trustees consider to be a notoriously 'extradition-proof' country. The settlor's wife confirms that the family's finances are "up the shoot". When the trustees express doubts about their ability to comply with the requests, the settlor telephones them and makes violent threats against them. The trustees of the B Trust apply to Court for directions as to whether the proposed transactions are within the scope of their powers.

Hypothetical holding: I would summarily find that the proposed transactions fall outside the scope of the relevant powers because they amount to a revocation of the original trusts. It would be contrary to the public policy of Bermuda as a reputable trust domicile to permit a settlor to obtain the tax benefits of an irrevocable trust, representing to the relevant tax authorities that he had permanently disposed of substantial wealth, and then simply change his mind later. Despite the broadly drafted discretionary power, the instrument could not be construed so as to permit the powers to be exercised in the proposed manner. The fact that the relevant transaction was said to be motivated by the settlor's desire to achieve the original purpose of the trust in another way would not undermine this legal conclusion.

75. The Defendant's counsel, it must be reiterated, did not ultimately raise an effective or persuasive challenge to these seemingly irrefutable general propositions about the implied limits on broadly defined powers of amendment, focussing instead on the

central task of construing the trust instrument which created the impugned discretionary powers. And it is to that central task that attention must now turn.

Findings: were the powers purportedly exercised by the Trustee on September 26, 2005 beyond the legal scope of the relevant powers?

The key provisions of the instrument

76. The most important provisions of the GRT instrument may largely be elicited from the recitals of the impugned Irrevocable Deed by the Trustee of Global Resource Trust No.1, executed as of September 26, 2005 (the " September 26, 2005 Deed"):

> "***WHEREAS*** *Section 8.1.1 of the Trust authorizes the Trustee by deed to declare that any person shall be included as a Beneficiary of the Trust;*
>
> ***WHEREAS*** *Section 8.1.2 of the Trust authorizes the Trustee by deed to declare that any person then included as a Beneficiary of the Trust shall cease to be a Beneficiary of the Trust;*
>
> ***WHEREAS*** *Sections 3.1 and 4.1 of the Trust authorize the Trustee to pay and appoint property from the Trust to any Beneficiary of the Trust.*
>
> *NOW THEREFORE, the undersigned, being the sole Trustee of the Trust hereby declares as follows:*
>
> *From the date first written above, Grand View Private Trust Company Limited, as Trustee of the Wang Family Trust dated 10 May 2001 (the "Wang Family Trust'), is included as a Beneficiary of the Trust.*
>
> *From the date first written above, with the exception of the Wang Family Trust, all current and future Beneficiaries of the Trust, including those described on the Second Schedule to the Trust, are excluded as Beneficiaries of the Trust.*

The Trustee shall take all steps necessary to pay and appoint the assets of the Trust, whether characterized as capital or income, to the Wang Family Trust.

Following the distribution of all the Trust assets to the Wang Family Trust, the Trust shall be and hereby is terminated."

77. It is for the purposes of the present application common ground that the September 26, 2005 Deed was executed against the following background:

(a) The GRT was originally established for the benefit of the children and remoter issue of YC Wang and YT Wang, on the same date as another purpose trust was established[8];

(b) it was proposed to transfer FPG shares to the GRT and the Founders hoped that the Beneficiaries potential interest in benefiting from the GRT would lead them to support FPG;

(c) the Founders' estate planning unfolded in a different way, critically, with the Founders deciding to benefit their descendants directly through their Estates. This meant that the GRT's original purpose was spent;

(d) the decision to wind-up the GRT and transfer its assets into the Wang Family Trust was taken after consulting with the Founders and taking legal advice;

(e) the majority of the Trustee's directors who executed the September 26, 2005 Deed were discretionary Beneficiaries of the GRT but relinquished their potential interests because of their commitment to the Founders' Vision.

78. Clause 1.1 assigns to "*Beneficiaries*" the meaning in the Second Schedule. Clause 1.6 (which Mr Adkin QC submitted broadened the discretion conferred by Clause 8.1

[8] Reference was made in argument to another purpose trust settled around the same time but this was not apparently addressed in evidence.

even further) defines "person" as including "*any individual, company, partnership and unincorporated association and any person acting in a fiduciary capacity*". Clause 1.11 defines the Trust Period as "*one hundred years from the date hereof (or such longer finite period, if any, as shall for the time being be allowed under the Proper Law of this Trust)*".

79. Clause 2.2 specifies Bermuda as the forum for administration and the laws of Bermuda as the proper law of the GRT. Clause 3.1 provides as follows:

> "*3.1 The Trustees shall, during the Trust Period, hold the Trust fund and income thereof:*
>
> > *Upon such trusts in favour or for the benefit of all or one or more exclusively of the other or 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 trusts*
>
> *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 other power or powers conferred by this Settlement or by law."

80. 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 capita 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 to account for the same think fit.*"

81. 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.*" 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. 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 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 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."

82. Clause 9 confers a power to transfer to the trustee of another trust, subject to remoteness of vesting restrictions, which Mr Hagen QC submitted the Trustee had sought to sidestep with "*a bit of legal trickery*". Clause 10 ("Power to amend") is more pertinent to the scope of the power issue. It provides:

> "*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 Clause 23, which may not be amended.*"

83. Clause 23, it may conveniently be noted at this juncture, provides:

> "*This Declaration shall be irrevocable.*"

84. Clause 15 centrally provides that "*every discretion or power hereby conferred upon the Trustees shall be an absolute and unfettered discretion or power*". Mr Adkin QC submitted that this fortified the unfettered nature of the power conferred by clause 8.1. The Second Schedule critically provides:

> "*In the above written Declaration, the expression 'the Beneficiaries' shall, subject to any exercise of the powers conferred upon the Trustees by Clause 8, mean the following persons now living or hereafter born before the expiration of the Trust Period:*
>
> *The children or remoter issue of Y.C. Wang and the children and remoter issue of Y.T. Wang.*"

85. The Third Schedule provides in salient part as follows:

> "*In default of and subject to the powers contained in Clauses 4 and 5 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 each child 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*…"

86. The GRT Declaration not only conferred broad unfettered powers on the Trustee to add and exclude beneficiaries and make appointments. Its express power of amendment was broad, with the only explicit limitation being that the irrevocable nature of the Trust could not be changed. Mr Adkin QC invited the Court to find that this was sufficient to make the impugned transaction *prima facie* valid, subject to challenge only if the powers were exercised in an invalid manner i.e. without considering relevant matters or taking into account irrelevant matters and/or for improper motives.

87. I have already found above that it is possible to establish that as a matter of construction of the trust instrument a discretionary power had been invalidly exercised because it impermissibly alters the substratum of the original trust. The critical questions accordingly are (1) what was the substratum of the GRT; and (2) was it impermissibly altered?

The substratum of the GRT

88. Identifying what constitutes the substratum of the GRT, with reference to the cases cited in argument, is far from a straightforward matter. In *Wyndham-v-Egremont* [2009] EWHC 2076 (Ch), Blackburne J stated:

> "*22. Section 1(1) of the 1958 Act authorises the court to approve an arrangement varying (or revoking) all or any of the trusts of a will,*

settlement or other disposition[9]*. It does not authorise the court to approve a resettlement. See Re T's Settlement Trusts [1964] Ch 158 at 162. This leads to the second of the matters raised in argument before me which was whether by seeking to introduce a term extending the trust period, and doing so for potentially so lengthy a period, when coupled with the other amendments and insertions, it might be said that the arrangement was not by way of a variation of the trusts of the Fund at all but, in truth, was to be regarded as a resettlement of the Fund.*

23. There is no bright-line test for determining whether it is the one or the other. In Re Balls Settlement Trusts [1968] 1 WLR 899 Megarry J stated at (905) that:

> *'If an arrangement, while leaving the substratum effectuates the purpose of the original trusts 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.'*

24. That does rather beg what is meant by 'the substratum' of the trust and 'the purpose of the original trust' and how one is to distinguish these elements."

89. Blackburne J quoted a passage in the speech of Lord Wilberforce in *Roome v Edwards* [1982] AC 279 at 292-293 which considered in the tax context when a disposition out of a trust did or did not create a new settlement separate and apart

[9] The section critically empowers the Court to approve "*any arrangement (by whomsoever proposed, and whether or not there is any other person beneficially interested who is capable of assenting thereto) 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 to the trusts*".

from the original settlement. Blackburne J then concluded as follows (in a passage upon which the Plaintiffs' counsel relied):

> "*24. With that guidance in mind I have no doubt that the alterations to the pre-arrangement trusts contained in the arrangement which I have approved constitute a variation of those trusts and not a resettlement. 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 the remainder, although the ultimate trust in favour of George and his personal representatives remains the same, and (2) the introduction of the new and extended perpetuity period.*"

90. It is difficult to extract from a decision in which the facts do not come close to changing the substratum of an original settlement a precise formula for working out what a substratum is. However, the implication of the holding in *Wyndham* is that where the trustees and ultimate beneficial interests are changed, it might be said that the substratum has been altered and that more than a mere variation has occurred. Admittedly the decision does suggest that whether the parameters of permissible amendment or variation have been breached primarily depends on the nature of the governing instrument and the changes made to it. As Lord Wilberforce opined in *Roome v Edwards in* the passage cited by Blackburne J in Wyndham (at paragraph 23):

> "*…On the other hand, there may be a power to appoint and appropriate a part or portion of the trust property to beneficiaries and to settle it for their benefit. If such a power is exercised, the natural conclusion might be that a separate settlement was created, all the more so if a complete new set of trusts were declared as to the appropriated property, and if it could be said that the trusts of the original settlement ceased to apply to it. There can be many variations on these cases each of which will have to be judged on its facts.*"

91. In *Duke of Somerset-v-Fitzgerald* [2019] EWHC 726 (Ch), mentioned above, Master Teverson after considering *Roome* and *Wyndham* and opining that "*the substratum of the trust refers to its beneficial core*" , concluded:

> "*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...*"

92. 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.

93. Nonetheless I accept Mr Adkin QC's submission 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: *Re Shiu Pak Nin and HSBC International Trustee Limited* [2014 (1) CILR 173] at paragraph 147; *HSBC International Trustee Limited-v- Poon Lok To Otto* [2014] JRC 254A (Sir Michael Birt, at paragraph 40). I also accept that he identified one judicial statement which at first blush expressly refutes the Plaintiffs' central thesis. In *Re Z Trust* [1997 CILR 248], Smellie CJ opined as follows:

> "*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.*"

94. As is clear from the headnote in the report of that case, the central holding was that the relevant power was a personal and <u>not</u> a fiduciary power. The settlor had intended to confer on the management committee (of which he was initially a member) an absolute discretion unconstrained by the equitable duties which would otherwise be attached to a corresponding fiduciary power. So this *dictum* does not provide a competing legal theory which potentially ousts the scope of power doctrine from its application to the realm of fiduciary powers such as those in issue in the present case.

95. In approaching the question of identifying what the substratum of the GRT may be said to be, I bear in mind the fact that a trust instrument is generally to be construed in a similar manner as a contract. Key terms must be read in their context as part of the relevant document as a whole. This requires a review of the GRT instrument's most important provisions as the substratum concept is in my judgment to be derived from a global view of a trust rather than any single clause. I consider this interpretative task to be a somewhat difficult one and accept the invitation of Mrs Talbot Rice QC to bear in mind the wise words of Lord Mance in *Re Sigma Finance Corp* [2010]1 All ER 571 at 582:

> "*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'..."

96. The express power of amendment in the GRT Declaration itself was expressly limited in one important respect. The irrevocability clause could not be amended. To my mind that is a strong indicator that an important part of the substratum of the GRT is its character as an irrevocable settlement. This provides important and straightforward textual support for construing the Declaration in way which imports by implication an assumption that the settlor did not wish to retain to the right to change his mind and revoke the GRT so as to be able to reclaim the settled assets or resettle them on entirely new trusts. This analysis also helps to illuminate the underlying rationale of the scope of powers rule of construction.

97. The substratum of a trust, in my judgment, need not always be precisely identified when one is pursuing an inquiry into whether or not a fiduciary power falls within or without its scope as defined by the instrument which conferred the power. The critical question invariably is <u>not</u> what is 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. This is the only way to make sense of the consistent approach adopted by British courts to determining whether an application under the Variation of Trusts Act 1958 is either (a) an application to vary, or (b) an application to resettle the original trusts. Perhaps because section 1(1) empowers UK courts to revoke trusts, the analysis was framed <u>not</u> with reference to "variation or revocation" but "variation or resettlement". For present purposes that appears to me to be a distinction without a difference because a resettlement of assets on new trusts appears to me in substance to entail a revocation of the original trusts, even if this is not reflected in the form of the actual transaction. And the variation power could only be exercised where what was sought to be achieved under the guise of variation did not in substance amount to a revocation and/or resettlement of the original trusts.

98. In the present case it is not entirely straightforward at first blush to discern what the dominant purpose of the GRT was, if one takes into account the wider context. I accept the Defendant's evidence that an important aspect of the GRT's purpose, in

terms of the Founders' wishes, was to encourage their children and remoter issue to support FPG. On the other hand, the only purpose which was manifested in the instrument itself, and which obviously informs the character of the GRT, was the goal of personally benefitting the Beneficiaries. The character of the GRT as a "private" trust is reinforced, rather than undermined, by the fact that on the same date it was settled, a separate purpose trust (the Wang Family Trust) was also settled.

99. In my judgment there is (or ought to be) a 'bright dividing line' between what I regard as the dominant purpose of a trust as expressed in terms of its core structure and terms, and as regards the beneficial interests it creates, and the ancillary settlor's (or founder's) motivations and wishes as regards the future administration of the trust within the structure articulated by the governing trust instrument. The pivotal question in the present case is whether the Founders' 'operational' or 'functional' purposes for the GRT are relevant to the substratum of the Trust. To my mind there is potentially an important distinction between what purpose one hopes a trust will serve during its term and the substratum of a trust as defined by its "beneficial core", although the lines between the two concepts may in some instances be blurred to vanishing point. Where the trust is a purpose trust, such as in *Dyer-v-The Trustees, Executors and Agency Co. Ltd* [1935] VLR 273, there is an almost perfect alignment between the functional purpose of the trust and its beneficial substratum:

100. In applications for directions in relation to the administration of trusts, the settlor's wishes are invariably (in my experience) used to justify the propriety of exercising a broad fiduciary power in a certain way, rather than to define the essential character of the trust. This does not exclude the possibility that contextual evidence may be used to shed light on the meaning of obscure terms in a trust document in appropriate cases. It is in my judgment to be assumed that the 'substratum' of the trust can be discerned from its express terms, not (in a 'tail wagging dog' fashion) by reference to extraneous evidence. Accordingly, on balance, I find that the beneficial core of the GRT can most reliably be defined by reference to the trust instrument: the discretionary Beneficiaries and the default beneficiaries are the children and remoter issue of the Founders. An example of a situation where the trust purposes and the scope of a discretionary power were closely aligned is provided by *Dyer-v-The Trustees, Executors and Agency Co. Ltd* [1935] VLR 273where the relevant trust was

established for a single specific purpose. The beneficial interests and the trust purposes were indistinguishable: establishing a metropolitan orchestra in Melbourne. This perhaps explains why the 'substratum' of a trust has been equated to its 'beneficial core'. The core identity of a trust is generally defined by the identity of the beneficial interests the trust is created to serve, not the functional or operational trust purposes (e.g. supporting the family business controlled by the trust and/or ensuring that the beneficiaries lead comfortable but modest and productive lives).

101. The Defendant placed considerable reliance on the Founders' desire to ensure that their children and issue supported FPG and/or their Vision. At first blush these considerations have far more relevance to the question of whether the GRT Trustee appropriately deliberated in exercising its discretion than they have to the question of what the parameters of the discretionary powers created by the trust instrument, properly construed, actually are. The fact that a settlor wished to create a dynastic trust, for instance, is the sort of consideration which is often deployed by a trustee seeking to extend the term of a trust by exercising a discretionary power to amend the terms of the instrument. That wish or motivation would seem to be an entirely different matter to the core (beneficial) purpose of the trust which ought to be ascertainable from a professionally drafted instrument without the need for recourse to extraneous evidence.

102. The submission that there was no change to the substratum of the GRT by winding it up because (a) the Beneficiaries' financial needs had been met from other sources, and (b) their support for FPG would be procured by other means is to my mind inherently problematic in terms of regarding this evidence as a permissible tool for construing the trust instrument. This is in large part because it speaks not to what the instrument meant when it was executed in 2001 but why the GRT was wound-up in 2005. This evidence is highly relevant to the deliberative process undertaken by the Trustee, and why the relevant powers were exercised in the manner which occurred.

103. The evidence relied upon by the Defendant as relevant to determining the scope of the GRT instrument also implicitly seems to presuppose that the Founders' motivations and wishes were, in effect, more important to the Trust's identity than the terms expressed in the instrument itself. Ultimately, it appears to presuppose that the GRT

was settled on terms which were unambiguously expressed to be irrevocable but which conferred an implied power on the Trustee to revoke the Trust at any time and resettle the assets on entirely new trusts. It is difficult to avoid assessing the evidence in this way because it is not easy (yet important) to separate the two main strands of the evidence:

(a) the evidence as to what the Founders' motivations were when they established the various trusts in 2001; and

(b) the evidence as to what the Trustee's deliberations were when they purportedly wound-up the GRT in 2005, and the Founders wishes at that time as part of the relevant deliberative process.

104. Only (a) is relevant to the scope of the power issue as part of the background against which the Trust was settled. It would be wrong to view (b) as wholly irrelevant to the construction of the instrument, but what the Founders' wishes or motivations were four years after the GRT was settled can only be relied upon in a reflective sense as evidence confirming how strongly held the motivations were four years earlier. Since it is not (preposterously) suggested that the Founders intended to make the GRT a revocable trust, despite the express terms of the instrument to the contrary, it is difficult to see how the underlying rationale for establishing the trust can materially influence the construction of its unambiguous express terms. The underlying rationale may be relevant in terms of explaining why administrative or structural changes may be needed to meet changed circumstances. But the rationale for the GRT, or the objectives the Founders hoped the GRT would achieve, are conceptually different from the question of what is the beneficial core of the Trust, as ascertained from the terms of the instrument.

105. The GRT was created as a discretionary trust for the benefit of the Founders' children and remoter issue on express terms that if the assets were not appointed out to those Beneficiaries, a similar class at the end of the Trust Period would be entitled to benefit in the final result. True, broad unfettered powers were conferred to add and exclude Beneficiaries by Clause 8.1 and 8.2, which might potentially expand the original class. But the Trustee would be subject to potential liability for breach of fiduciary

duty if those powers were exercised in an irrational manner. So while the family nature of the GRT Beneficiary class is important, in my judgment this characteristic alone does not sufficiently identify the substratum of the Trust under consideration.

106. The other aspect of the GRT which the Plaintiffs contended was an important limb of the substratum and relevant to defining the scope of the powers to add and exclude and make appointments was the remoteness of vesting clause (Clause 9). Clause 9 (like the Second and Third Schedules, which defined the discretionary Beneficiaries and the default beneficiaries) was subject to amendment. It adds an important additional layer to the character of the GRT in this sense. The instrument as originally drafted expressly contemplated that either the Founders' descendants would receive appointments under clauses 3 and/or 4 within the 100 year Trust Period or the same broad class would benefit as default beneficiaries at the end of that specific period of time. The family flavour of the Trust is sharpened somewhat by the combination of the default rights and the fixed Trust Period which Clause 9 expressly imposes on any appointments made to other trustees.

107. The remoteness of vesting provisions are not, in my judgment, significant freestanding substratum features. These provisions mainly reflect the state of Bermuda law as the governing law of the Trust at the time when the Trust was settled, and a sensible legal goal of ensuring the validity of the Trust. As regards the significance of default provisions, in *Vatcher-v-Paull* [1915] A.C. 372 (PC), Lord Parker of Waddington observed that "*limitations in default of appointment may be looked upon as denoting the primary intention of the donor of the power*".

108. Nor do I consider that anything of significance in the present context attaches to the fact that the change of governing law provision (Clause 21) cannot be exercised in a way which results in a changing of the beneficial interests of the Trust. That in my view standard prohibition merely signifies that if the power is exercised, possibly *in extremis*, existing beneficial interests are preserved unless deliberately changed using other powers in the instrument. It in no way dilutes the breadth of the discretion conferred by clauses 3, 4, 8 and/or 10 to make appointments, add or exclude Beneficiaries and amend the instrument. The Plaintiffs' counsel in her opening

submissions invited me to take Clause 21 into account in construing the GRT instrument without advancing a convincing argument as to what relevance it had[10].

109. The most important features of the GRT may accordingly be summarised as follows:

(a) it 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.

110. All of these features combined to constitute the substratum of the GRT, and the most significant individual feature for present purposes, I find, is the irrevocability clause.

Was the purported decision to appoint the Wang Family Trust (a perpetual purpose trust) as sole Beneficiary in place of the original family Beneficiaries and make an appointment to the Trustee of the Wang Family Trust of all of the GRT assets void because it was beyond the scope of the GRT Trust powers?

111. I find 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. As Mrs Talbot Rice QC submitted in reply[11]:

[10] Transcript, April 24, 2019, pages 41-42.
[11] Transcript, April 26, 2019, page 676.

"*Your Lordship will also have in mind*
7 that the trust is irrevocable. So once it's
8 settled, it's settled and the settlor, or the
9 trustee in this case, can't take it back and
10 do something else with the funds.
11 And it didn't expressly reserve
12 to itself the right to do that, which it
13 could have done but didn't. In fact, here
14 the opposite to that was done, because not
15 only was it made irrevocable, but that clause
16 was made unamendable."

112. I accept this submission as accurately describing in practical terms the fundamental distinction between a revocable and an irrevocable trust. As the Plaintiffs' counsel also submitted, there are usually tax "downsides" to including a power of revocation in a trust[12]. It is accordingly easy to understand why a trust governed by Bermudian law would not be made revocable. The assets of a revocable trust would potentially be regarded in law as owned by the settlor or other person on whom the power of revocation is conferred. In *Tasarruf Mevduati Sigorta Fonu (Appellant) v Merrill Lynch Bank and Trust Company (Cayman) Limited and others* [2011] UKPC 17 (which was not cited in argument but which is mentioned here merely to support a conclusion I would in any event have reached), Lord Collins opined as follows:

> "*62. In the present case the power of revocation cannot be regarded in any sense as a fiduciary power, and the respondents do not suggest otherwise. The only discretion which Mr Demirel has is whether to exercise the power in his own favour. He owes no fiduciary duties. As has been explained, the powers of revocation are tantamount to ownership.*"

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*

[12] Transcript, April 26, 2019, page 639 lines 23-25.

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.

114. It is helpful to return to one or two extracts from the cases relied upon by the Plaintiffs to illustrate why what happened in the present case amounted to impermissible acts in "excessive execution" of the relevant powers:

- *In re Balls Settlement Trusts* [1968] 1 W.L.R. 899 at 905 (Megarry J): "*…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.*";

- *Wyndham v Egremont* [2009] EWHC 2076 (Ch) (Blackburne J): "*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.*";

- *Duke of Somerset-v-Fitzgerald [2019] EWHC 726 (Ch) (Master Teverson): "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. Wilsons wrote a full letter relating to the application to HMRC on 8 August 2018 asking HMRC to confirm that the arrangements should not be regarded as giving rise to a resettlement. HMRC replied by email on 17 September 2018 saying that they did not wish to be*

joined in the proceedings and in the event that the Court approved the proposed variation of the Settlement under the 1958 Act would not seek to argue that there was a resettlement for the purposes of Section 71 TCGA 1992."

115. In the instant case, the key elements of the impugned exercises of the discretionary powers under the GRT instrument were 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.

116. There was ultimately no or no coherent answer which the Defendant was able to mount in answer to the submission that what admittedly occurred changed the substratum of the GRT. Its Skeleton Argument did not engage with the merits of the scope of the power issue at all, although it was clearly set out at paragraphs 38-48 of the Plaintiffs' Skeleton[13]. Mr Adkin QC focussed most of his efforts on seeking to persuade the Court that the point was not a discrete point of law which could be summarily determined. His opponent adroitly and astutely but belatedly invited the Court to take all of the Defendant's evidence into account, accepting it as true (for the purposes of the present application). The argument that the power to add and exclude was a very broad one was the best possible argument which could be advanced but one which fell short in all the circumstances of the present case. The most important features of the surrounding context are, in my judgment, that the GRT was established

[13] The Defendant's attorneys rightly pointed out in commenting on a draft of this Judgment that no such response was in fact possible because Skeletons were exchanged simultaneously.

on the same date as the purpose trusts for the sole benefit of the children and remoter issue of the Founders, who were also made default beneficiaries. This accentuates the family nature of the core identity of the Trust, as expressed in the Declaration of Trust. And it makes 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.

117. For the reasons set out above, I see nothing in the Defendant's evidence explaining (a) the original purpose of the GRT and (b) the conforming purpose underpinning the winding-up of the GRT and resettlement of its assets on the trusts of the Wang Family Trust, which justifies a different conclusion on the scope of the power issue. The central thesis developed by Mr Adkin QC in oral argument at its highest may perhaps be best summarised as follows[14]:

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

[14] In commenting on a draft of this Judgment, the Defendant's counsel complained that this summary does not accurately record their actual submissions. The summary attempts to re-frame the Defendant's case to elevate it to its highest point in light of my legal findings on the applicable rules of construction.

118. It is immediately obvious that this analytical approach effectively invites the Court to paint the instrument itself out of the interpretative picture as if it can be discarded as an artistically unappealing prop. The argument was, in fairness, initially advanced in support of the contention that the evidential background was contentious and could only be adjudicated at trial:

> "*…their complaint is that the*
> *4 power that was exercised under that clause*
> *5 was for a purpose for which it was not*
> *6 conferred.*
> *7 Namely, on their case, to change an*
> *8 immutable family trust into, in effect they*
> *9 would say, a purpose trust.*
> *10 But to answer that question, you have*
> *11 to ask yourself, Was this trust, in fact,*
> *12 intended by those whose bounty was placed*
> *13 within it, to be an immutable family trust?*
> *14 Were the powers conferred by Clause 8.1*
> *15 only ever intended to be exercised in the*
> *16 favor of the existing beneficiaries?*
> *17 And we say, on the evidence in front*
> *18 of the Court, emphatically, no. This was a*
> *19 trust, the genesis of which was in the Wang*
> *20 Family Trust. It was originally conceived*
> *21 as a single trust.*
> *22 It was set up, not with the purpose,*
> *23 emphatically not with the purpose, of*
> *24 supporting the families of the Founders,*
> *25 come what may; it was set up with the*
> *1*
> *2 purpose of supporting the primary object,*
> *3 or a primary object, of the Wang Family*
> *4 Trust, which was to promote the FPG*
> *5 companies long into the future, and do so*

6 by incentivizing the Wang family members in
7 that regard.
8 Now, that is a question of evidence,
9 and it can only be resolved, because we're
10 told it's disputed, at a trial…"[15]

119. This argument, carefully scrutinised however, was in substance a plea to place primary reliance on extraneous evidence and secondary reliance on the actual instrument, adopting a 'Though the Looking Glass' approach to the recognised canons of construction. For instance, Mr Adkin QC went on to beguilingly submit:

"*…your Lordship will no*
3 doubt have seen dozens, possibly hundreds
4 of trusts, family trusts, many of which
5 will look very similar or exactly the same
6 as the one that's before Your Lordship.
7 Your Lordship will have seen them uphill
8 and down dale.
9 But Your Lordship should be extremely
10 cautious to assume that because this trust
11 looks like many other family trusts,
12 which -- undoubted family trusts, which
13 Your Lordship will have seen, because the
14 residuary beneficiaries are the same as the
15 original set of discretionary
16 beneficiaries, which is also completely
17 vanilla standard, that somehow this
18 document is to be treated as being capable
19 only of construction as an immutable family
20 trust.
21 The facts of our case are unique. The
22 evidence as to how all of this came about

[15] Transcript, April 25, 2019, pages 443-444.

23 is unique."

120. Each trust instrument will indeed "come about" through facts which are "unique". But those background facts are only admissible for limited purposes. Lord Mance in *Re Sigma* [2010] 1 All ER 571 (at 580-581) cited the following famous dictum of Lord Hoffman in *Investors Compensation Scheme Ltd.-v- West Bromich Building Society* [1998] 1 All ER 98 at 912-913:

> *"…The principles may be summarised as follows:*
>
> *(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*
>
> *(2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact,' but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*
>
> *(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.*
>
> *(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its*

words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (see Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd. [1997] 2 WLR 945

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in The Antaios Compania Neviera S.A. v. Salen Rederierna A.B. 1985 1 A.C. 191, 201:

> *'. . . if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.'"*[Emphasis added]

121. The primary function of interpreting a contract or other legal instrument is "*the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time*". Background circumstances may be admissible for the purposes of:

(a) explaining the language which was used;

(b) resolving ambiguities; and/or

(c) demonstrating "*that something must have gone wrong with the language*".

122. The Defendant's evidence does not clearly fall into any of these three categories. 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.

123. The Defendant's counsel was unsurprisingly unable to find any cases to illustrate the deployment of contextual evidence in anything resembling the way he sought to deploy evidence of the Founders' intentions in the present case. For example he placed reliance on *Re McCullagh's Will Settlement* [2018] NICh 15 at paragraph [25]. This was a statutory variation case involving an administrative restructuring where there was no change in the identity of the beneficiary. McBride J, after considering evidence about the testatrix's intention, pivotally held:

"*[25] … Having regard to this and the actual wording used in the Will, I am satisfied that the original intention or purpose of the testatrix was to provide for the patient's 'comfort and well-being'. I am further satisfied that the proposed variation seeks to ensure that the patient receives his inheritance in such a way that it benefits him. The proposed arrangement ensures that his inheritance can be used to purchase items for his comfort and welfare rather than increasing his contribution towards his existing residential fees. I therefore consider it is designed to achieve the intention of the testator. Applying the test set out by Megarry J in Re Balls Settlement Trusts I am satisfied that the proposed arrangement effects the testator's intention by other means and is therefore a variation and not a resettlement.*"

124. In that case there was a clean alignment between the beneficiary named in the will, the testatrix's original pre-settlement wishes and the post-transactional beneficial dispensation. I have in the present case nevertheless taken all of the Defendant's evidence into account because Mrs Talbot Rice QC in reply was ultimately justifiably so bold as to submit that even if it was admissible and taken into account, it had no forensic impact on the scope of the power issue:

"*MS. TALBOT RICE: That means, in fact,*
14 that Your Lordship doesn't have to be
15 troubled by what's admissible and what's
16 relevant. You can take it all into account
17 and still come to the same result, which is
18 prime summary judgment territory."[16]

125. 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

[16] Transcript, April 26, 2019, page 681.

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.

126. This evidence, together with the facts that (a) the Trustees acted after receiving legal advice and (b) the Trustees had the support of a significant number of adult Beneficiaries of the GRT, appears on the face of it to be a heavyweight answer to the alternative breach of fiduciary duty claims. It is, however, a featherweight response to the Plaintiff's primary construction argument.

127. This conclusion also conforms to broader legal policy considerations under Bermuda law as a legal system which governs the law of many substantial international trusts. 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.

Summary

128. The Plaintiffs are entitled to a declaration that the purported transactions of September 26, 2005 were void because the relevant deed was beyond the scope of the powers conferred by the GRT instrument.

Findings: the remoteness of vesting issue

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.

130. Mr Hagen QC rightly conceded, despite advancing an intricate and accurate assessment of how strongly expressed the remoteness of vesting provisions were, that these submissions could be viewed as supporting the construction arguments. On a straightforward reading of Clause 9 of the instrument, the remoteness of vesting provisions are of general application to any power exercised by the Trustee. I agree that the mere fact that the 'deed' effecting the transactions did not mention Clause 9 cannot nullify its effect.

131. If I am wrong in my primary finding that the relevant transactions were beyond the scope of the applicable powers, I would not summarily find that they were invalidated by reason of contravening the remoteness of vesting provisions of, *inter alia*, Clause 9. 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.

Findings: the limitation defence

The Defence

134. The Defence alleged that the 1st Plaintiff's claim was time-barred under section 23 of the Limitation Act 1984 because it was commenced more than six years after the impugned transactions occurred in September 2005. Although the Defendant has not yet formally pleaded a limitation defence to the claim of the recently joined minor, the 2nd Plaintiff, it was submitted that his claim was time-barred as well.

The Plaintiff's submissions

135. Section 23 of the Limitation Act 1984 provides as follows:

> "***Time limit; trust property***

23 (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—

(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use.

(2) Where a trustee who is also a beneficiary under the trust receives or retains trust property or its proceeds as his share on a distribution of trust property under the trust, his liability in any action brought by virtue of subsection (1) (b) to recover that property or its proceeds after the expiration of the period of limitation prescribed by this Act for bringing an action to recover trust property shall be limited to the excess over his proper share. This subsection only applies if the trustee acted honestly and reasonably in making the distribution.

(3) Subject to subsections (1) and (2), an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of 6 years from the date on which the right of action accrued.For the purposes of this subsection, the right of action shall not be treated as having accrued to any beneficiary entitled to a future interest in the trust property until the interest fell into possession.

(5) *No beneficiary as against whom there would be a good defence under this Act shall derive any greater or other benefit from a judgment or order obtained by any other beneficiary than he could have obtained if he had brought the action and this Act had been pleaded in defence.*"

136. The Plaintiffs accept that section 23(3) potentially subjects them to a six year limitation period, but rely (as regards the 1st Plaintiff) on the proviso which they contend provides that time only starts running as regards beneficiaries entitled to a

future interest when it actually vests. As the 2nd Plaintiff is a minor, reliance is placed on section 29 of the Act:

> "*(1) Subject to the following provisions of this section, if on the date when any right of action accrued for which a period of limitation is prescribed by this Act, the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of 6 years from the date when he ceased to be under a disability or died (whichever first occurred) notwithstanding that the period of limitation has expired.*
>
> *(2) This section shall not affect any case where the right of action first accrued to some person (not under a disability) through whom the person under a disability claims.*"

137. Since the 2nd Plaintiff was not born, either when the cause of action accrued in September 2005 or when the six year standard time limit expired, it is not immediately obvious how section 29 applies to his claim.

138. Mr Hagen QC referred to cogent authority which supported the proposition that both Plaintiffs are entitled to benefit from the proviso to section 23(3), which is derived from section 21(3) of the Limitation Act 1980 (UK) and in the same terms as section 27(3) the Limitation Law (1996 Revision) (Cayman Islands). In *Lemos-v-Coutts (Cayman) Ltd* [2006] 9 ITELR 616 (Cayman Islands Court of Appeal), Taylor JA (explaining the English Court of Appeal's decision on this topic in *Armitage –v-Nurse* [1998] Ch 241 at 261) opined as follows:

> "*19… What must be the correct meaning is arrived at if the words are taken instead to mean that 'discretionary beneficiaries' or 'objects of a discretionary trust' do not fall within the class of beneficiaries to which the sub-section applies, so that an action by such a person would not, in the words of the sub-section, be 'an action by a beneficiary to recover trust property or in respect of any breach of trust.' They are not excluded by the proviso from the running of time but excluded from the class of beneficiaries to which the sub-section applies. Unless caught by another provision of the statute, a*

person with discretionary status could bring an action for breach of trust at any time, the position prevailing in England with respect to all breach of trust claims prior to 1888, when the first limited statutory limitation was introduced."

139. This analysis of the statutory provision is unequivocally endorsed by '*Underhill & Hayton, The Law of Trusts and Trustees*', 19th edition, at paragraph 94-20, by way of similar interpretation of the English position considered by Millet LJ (as he then was) in *Armitage-v-Nurse*. *Johns-v-Johns* [2004] NZCA 42 took the view that the object of a discretionary power either had no future interest and no right to sue or was bound by the six year limitation period if the object had a right to sue at all. *Lewin on Trusts*, considering *Johns* and *Lemos*, concluded (at paragraph 44-037):

> "*The latter view is less easy to extract from the statutory wording but in our view is more consistent with the policy of the statute as it makes little sense to extend the time for him if has a future interest (however remote) but not to do so if he has not.*"

140. The Plaintiffs in any event submitted that as "*ultimate default beneficiaries with a fixed contingent future interest which is yet to fall into possession*" they fell "*within the meaning of the proviso to section 21(3)*" (Skeleton Argument, paragraph 87).

141. Finally, with reference to their alternative mistake of law claim, reliance was placed on section 33(1)(c) of the Limitation Act:

> "*33 (1)Subject to subsection (3), where in the case of any action for which a period of limitation is prescribed by this Act, either —*
>
> *(a) the action is based upon the fraud of the defendant; or*
>
> *(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or*
>
> *(c) the action is for relief from the consequences of a mistake,*

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it."

142. It was unclear how this last point fell for consideration on the present summary judgment application which did not explicitly seek the summary adjudication of the alternative mistake-based claim.

The Defendant's submissions

143. As regards section 23(3) of the 1984 Act, the Defendant's counsel (who did not seek to embellish his written submissions through oral argument) submitted that discretionary beneficiaries did not fall within the proviso to section 23(3) in reliance upon the views of Topping J in *Johns-v-Johns* [2004] NZCA 42 (at paragraphs 39-41), in preference to the contrary views of Millett LJ in *Armitage-v-Nurse* (at page 261).

144. In relation to the 1st Plaintiff's default status, it was argued that he did not fall within the policy of the proviso as it was obvious that he would never enjoy the benefit of that interest. Millett J's articulation of the policy underlying the proviso (at 261G) was embraced: a person with a future interest "*should not be compelled to litigate…in respect of an injury to an interest which he may never enjoy*". It was tacitly conceded that this point did not apply to the 2nd Plaintiff, who was born 14 years after the commencement of the 100 year Trust Period.

145. As regards the 2nd Plaintiff's reliance upon section 29(1) and being under a present incapacity, it was simply submitted that section 29(1) by its terms applied to persons under an incapacity "*on the date when any right of action accrued*". Mr Hagen QC responded that the standing issue (as regards capacity) fell to be determined at the date of the action which was brought.

Findings on merits of limitation defence

146. I find that the Defendant's limitation defence fails and that the Plaintiffs either fall outside of section 23(3) altogether or have a future interest yet to fall into possession so as to be exempted by the proviso to section 23(3). In *Armitage-v-Nurse* [1998] Ch 241 (at 261E-F) Millett LJ opined as follows:

> "*As the tax cases show, the evident policy of a taxing Act may sometimes make it necessary that an object of a discretionary trust or power should be treated as having an interest and sometimes it may show the contrary. The question thus depends upon identifying the legislative purpose which Section 21 is intended to achieve.*
>
> *The Respondents submit that the policy to which Section 21 of the Limitation Act 1980 gives effect is that it would be unfair to bar a plaintiff from bringing a claim unless and until he is of full age and entitled to see the trust documents and so has the means of discovering the injury to his beneficial interest. The difficulty with this argument, in my judgment, is that it proves too much. Every beneficiary is entitled to see the trust accounts, whether his interest is in possession or not. The rationale of Section 21 appears to me to be different. It is not that a beneficiary with a future interest has not the means of discovery, but that he should not be compelled to litigate (at considerable personal expense) in respect of an injury to an interest which he may never live to enjoy. Similar reasoning would apply to exclude a person who is merely the object of a discretionary trust or power which may never be exercised in his favour.*"

147. I am not able to extract from this *dictum* a clear distinction between beneficiaries with (fixed) future interests and mere objects of a discretionary power with the result that "beneficiaries" fall within the proviso to section 23(3) and objects of a discretionary power fall outside section 23(3) of the Bermudian Act altogether. I say that because objects of a discretionary power are (in my experience) usually defined or described as beneficiaries in discretionary trust deeds (such as the GRT), and are routinely parties to trust administration proceedings, afforded the right to see trust accounts. To

my mind Millett LJ equates the status of both categories of 'beneficiary' when construing the meaning of "*future interest*" in the English counterpart of the proviso to section 23(3) of the Bermudian Limitation Act 1984. It is not obvious to me that in the context of this statute of general application, the fine legal distinctions between beneficiaries with fixed interests and 'mere' objects of a discretionary power are engaged.

148. The New Zealand Limitation Act 1950 section 21(2) corresponds to section 23(3) of the Bermudian 1984 Act. In *Johns-v-Johns* [2004] NZCA 42. The New Zealand Court of Appeal adopted a far more restrictive interpretation of the scope of the proviso and the meaning of "future interest" in a case which did not consider mere object of a discretionary power, but a claimant who also had a future right to income and to share in the residue. The conclusion that the proviso did not apply and the standard limitation period did apply was apparently based on the following interpretation of Millett LJ's judgment in *Armitage-v- Nurse*. Tipping JA stated:

> "*In Armitage v Nurse [1998] Ch 24, which was cited in the present case, but not in Hunt v Muollo, Millett LJ (with Hirst and Hutchison LJJ concurring) said at 44 that the interest of a discretionary beneficiary, such as that now under consideration, did not qualify in terms of the United Kingdom exact equivalent to the proviso to s21 (2). This was because the discretionary beneficiary was merely the object of a discretionary power or trust which might never be exercised in her favour. A little earlier His Lordship had said that the beneficiary in question had only the right to require the trustees to consider from time to time whether to make payment to her, or accumulate, as was the alternative in that case.*"

149. This interpretation of Millett LJ's reasoning and conclusion on this point is wholly inconsistent with the view adopted by the Cayman Islands Court of Appeal in *Lemos-v-Coutts (Cayman) Ltd* [2006] 9 ITELR 616 and the passages in *Underhill & Hayton* and *Lewin* upon which the Plaintiffs relied. In my judgment the latter three authorities are *ad idem* with *Armitage-v-Nurse* in concluding that the object of a discretionary power is not bound by the limitation period imposed for breach of trust claims

because he has no fixed interest to enforce. Taylor JA's analysis in *Lemos* is supported explicitly by '*Underhill & Hayton, The Law of Trusts and Trustees*', 19th edition, at paragraph 94-20, whose learned authors state:

> "*The object of a discretionary trust or power is not, of course, a beneficiary 'entitled to a future interest in the trust property', whose right of action accrues only when his 'entitlement' interest falls into possession…so as to fall outside s.21 (3), though he will fall within it when he does become a beneficiary with an interest in possession of particular trust property: at that time his right of action will accrue to him in respect of that property. The Limitation Acts did not intend to alter the position first established by s 8 of the Trustee Act 1888 that 'time shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession. This means that the liability of trustees of a discretionary trust is open-ended*…"

150. *Lewin* fairly opines that the proposition that objects of a discretionary power fall outside of the proviso to the English equivalent of our section 23(3) as "*less easy to extract from the statutory wording but in our view is more consistent with the policy of the statute as it makes little sense to extend the time for him if has a future interest (however remote) but not to do so if he has not*". In my judgment it matters not whether one views the term "*future interest*" in the proviso as broadly defined so as limit the scope of the limitation defence or more narrowly and technically defined so as to exclude objects of a discretionary power altogether. However the most straightforward application of the persuasive historical analysis set out in the quoted passage in *Underhill & Hayton* combined with the statutory rationale for the proviso articulated by Millett LJ in *Armitage-v-Nurse* is to view the proviso to section 23(3) of the Limitation Act as defining "interest" broadly for the purposes of excluding the operation of the limitation period in relation to claimants of all categories whose future interests have not crystallised or vested. The preponderance of authority which I regard as persuasive points in the same direction and leads to the same practical result. Time has not started running against the Plaintiffs and the limitation defence fails. The position is in my judgment substantially the same as regards the

Plaintiffs' standing as "Beneficiaries" (technically mere objects of a discretionary power) and default beneficiaries under the GRT.

151. It is noteworthy that one of the main rationales of the *Public Trustee-v-Cooper* jurisdiction is to protect trustees from future breach of trust claims when they make momentous decisions. Care is taken to ensure that not only are objects of a discretionary power given notice of such proceedings, but that the interests of minors and the unborn are also taken into account. This practice only makes sense if it is well recognised that:

(a) the limitation period provided for in section 23(3) does not apply to persons with potential future interests in the trust property, whether contingent or prospective, whose interests have yet to vest; and

(b) whether or not such persons have a legal or equitable interest in the trust property in a property law sense, and a cause of action has accrued for limitation purposes, the objects of a discretionary power may at any time at their own election pursue rights of action to enforce the fundamental obligations of the relevant trust instrument. Otherwise, trustees of discretionary trusts such as the GRT would essentially be left to supervise their own compliance with their duties under the trust.

Summary

152. In summary:

(a) I accept the Plaintiffs' primary submission that their claim is not barred by section 23(3) because as objects of a discretionary power they have future interests which are not yet vested so fall within the proviso to that subsection. If that analysis is juristically wrong, I would in the alternative find that the Plaintiffs fall outside the scope of section 23(3) of the Limitation Act 1984 altogether;

(b) I accept the Defendant's submission that section 29 does not apply to the 2nd Plaintiff because he was not under a disability when the cause of action would otherwise have accrued as the statute requires;

(c) I make no findings on the validity of the Plaintiffs' potential reliance on section 33(1) (c) as an answer to the limitation defence as regards the alternative mistake claim, because it does not appear to me to be a point which it is necessary to decide in light of my decision to grant summary judgment on the Plaintiffs' primary claim.

Findings: the Invalid Execution issue

Overview

153. As noted above, my provisional view at the end of the hearing was that the proposition that the deed which purportedly effected the impugned transactions was invalidly executed so that the relevant actions were legally void lacked substance as a freestanding point. The point only arises for active consideration if I am wrong in my primary finding that the transactions were ineffective because the purported exercise of the relevant powers was outside the legal scope of the powers conferred by the GRT instrument.

The Plaintiffs' submissions

154. It is common ground that the GRT instrument defines a deed as "*any instrument in writing which is signed, witnessed and dated, or otherwise validly executed in accordance with the law of the place where it is executed*". The document was purportedly executed as a deed in Taiwan, but was not on its face witnessed.

155. Whether the 'deed' was validly executed under Taiwan law as a deed, not whether it was otherwise validly executed under Taiwanese law, the Plaintiffs submit, is the critical question. It was void because it was not even executed as a deed under Taiwan law. However, the Plaintiffs sought to sidestep the need to inquire into expert

evidence of Taiwanese law at trial by advancing the following submission in their Skeleton:

> "*71. Though the language of the GRT Declaration of Trust at clause 1.3 required the instrument in question to be validly executed under the law of the place where it was executed, the need for it to be 'a deed' nevertheless meant that it had to be in a form which bound Global Resource PTC as having acted by deed. Global Resource PTC is a Bermudian company, incorporated under the Companies Act 1981. The capacity of the company to act is governed by the place of Global Resource PTC's incorporation, which is Bermuda: see Dicey, Morris & Collins, the Conflict of Laws (15th edition) at rule 175; Haugesund Kommune v Depfa ACS Bank [2012] QB 549 at [47] and [48] (per Aikens LJ).*"

156. Mr Hagen QC referred the Court to the version of section 23 of the Companies Act 1981("*Execution of instruments abroad*") which it was agreed was in force in 2005. The section provided:

> "*(1) A company may, by writing under its common seal, empower any person either generally or in respect of any specified matters, as its agent, to execute deeds on its behalf in any place outside of Bermuda.*
>
> *(2) A deed signed by such an agent on behalf of the company and under his seal shall bind the company and have the same effect as if it was under its common seal.*
>
> *(3) A company may in addition to its common seal for use in Bermuda, have for use in any territory or place or one or more duplicate common seals and a deed or other document to which such seal is duly affixed binds the company as if it had been sealed with the company's common seal.*"

157. These requirements having unarguably not been met, the 'deed' was void because it had not been executed by the Trustee as a deed as required by applicable Bermudian company law. It was submitted that failure to comply with these mandatory statutory

requirements rendered otiose the question of whether the instrument had been validly executed under Taiwanese law.

The Defendant's submissions

158. The Defendant submitted in its Skeleton:

> "*97. This case is misconceived for at least three separate reasons:*
>
> *97.1 First, the term 'deed' is defined in the GRT Declaration of Trust expressly set outs the formalities required for the effective execution of such a document. The 25 September 2005 document complied with those requirements;*
>
> *97.2 Second, even if that is wrong, the 26 September 2005 document was in any event executed in such a way as to comply with the applicable requirements under Bermuda law for the proper execution of a deed.*
>
> *97.3 Third, even if all of the above is incorrect, equity will intervene to remedy any defect in the formalities so as to give effect to the clear intention of the GRT Trustee.*"

Findings: are the Plaintiffs entitled to summary judgment on their claim that the transactions were void because the purported deed was invalidly executed?

159. The crucial evidence is that:

(a) the September 25, 2005 document was clearly intended to be executed by the directors as a deed on behalf of the Trustee although no seals were actually affixed next the directors' signatures and the Trustee's corporate seal was not affixed;

(b) the document was executed in Taiwan and, the Defendant's expert will say at trial, the document was validly executed in accordance with local law applicable to documents of such a nature.

160. The crucial issues upon which the determination of Plaintiffs' application for summary judgment turns are:

(a) whether the validity of the execution falls to be governed by Taiwanese law, so the issue can only be determined at trial;

(b) whether equitable relief is available in respect of any formal defects in execution, and the availability of this relief can only be determined at trial; and/or

(c) whether the validity issue is governed by mandatory provisions of Bermuda statutory law and the legal issue can summarily be determined.

161. The definition of the term "deed" in the GRT instrument in my judgment falls to be construed in the straightforward way contended for by Mr Adkin QC on behalf of the Defendant. It reads: "*any instrument in writing which is signed, witnessed and dated, or otherwise validly executed in accordance with the law of the place where it is executed*" (emphasis added). The primary express requirements are that the document be "*signed, witnessed or dated*"; the secondary and alternative express requirements are that the instrument should meet whatever other requirements for executing such a document the law of the place of execution imposes. I would add that by necessary implication the document must appear to have been intended to be executed as a deed for the purposes of the GRT Declaration of Trust to fall within the definition of a deed, as one would expect in relation to any document purporting to execute a power which is required to be executed through a deed.

162. The primary definition of deed corresponds with the requirements of section 6A of the Conveyancing Act 1983, and so in my judgment can only sensibly reflect an intention on the part of the drafter of the GRT instrument to reflect the general requirements of

Bermuda law for executing a deed. The secondary requirements only apply if documents are executed in another place in which case, if the requirements for a deed are different to those under the primary definition, compliance with the applicable foreign execution law for a document of such a nature will suffice.

163. As far as the primary definition in the instrument is concerned, the crucial document is defective in that it was not witnessed. But it is arguably valid under Taiwanese law, which the Defendant is entitled to invoke as the law of the place where the document was executed. The foreign law issues are matters of fact which can only be properly determined at trial. This sub-issue is resolved in the Defendant's favour.

164. Is the Defendant entitled to seek equitable relief in respect of any defects in execution which may be found to exist under Bermudian or Taiwanese law? Mr Hagen QC conceded that there are circumstances where equity will perfect an imperfect gift, but submitted that not all of the circumstances applied to the present case. Accepting that the invalid execution issue would only have to be decided if all other points had been resolved against the Plaintiffs, he submitted that the one requirement for equitable relief which the Defendant could not on this hypothesis meet was showing that the GRT Trustee fell within the category of persons whom equity will assist[17]. He referred the Court to the following passage from *English-v-Keats* [2018] EWHC 673 (Ch) (HHJ Hacon, sitting as a High Court Judge):

> "58. *The sequence of cases following Tollet was considered by the Royal Court (Samedi) of Jersey in Bas Trust Corporation Ltd v MF [2012] JRC 081 (also known as Re Shinorvic Trust). Before the turning to Jersey law, the court considered the position in England, having quoted summaries of the relevant equitable principle set out in Halsbury's Laws of England 4th ed., vol. 36(2), para. 359-362, Snell's Equity 32nd ed., para. 11-006, Lewin on Trusts 18th ed., para. 29-181-9 and Thomas on Powers, 1st ed., paras. 1003-1041. The court said:*

[17] Transcript, April 25, 2019, pages 315-330.

'[43] The text books and counsel are agreed that the necessary conditions for the principle to apply are:-

(i) an intention by the person with the power to exercise it;

(ii) there must have been an attempted execution of the power – there is no jurisdiction to remedy a failure to exercise the power at all or to exercise it in time;

(iii) the defect must be formal rather than going to the substance of the power;

(iv) the purported exercise must have been a proper exercise of the power –the court will not assist where there would be a fraud on the power or a breach of trust;

(v) the doctrine will only operate in favour of certain categories of persons. These are summarised in Halsbury Vol 36(2) para 362 as follows:-

'362. Persons who may claim relief

Equity aids the defective execution of a power only in favour of persons who stand in a particular relationship to the done, and not the creator, of the power. ... Relief will be granted where the following persons claim:-

(i) Purchasers for value ...
(ii) Creditors ...
(iii) Charities
(iv) Persons for whom the appointor is under a natural or moral obligation to provide. Relief may be granted in favour of persons under this head unless the appointor is under an equal obligation to provide for the persons

> *entitled in default of appointment who are unprovided for. Under this head, relief may be granted for the defective exercise of a power intended as a provision for a wife and child, even in favour of volunteer, and the court will not enquire into the quantum of the provision for the wife or child. However, equity will not grant relief in favour of persons for whom the appointor is under no obligation to provide, such as a husband, grandchild, natural child or cousin, nephew or niece or mere volunteer, even if he is the creator of the power."*"

165. In my judgment it would make no sense to resolve this difficult question of whether the GRT Trustee would qualify for equitable relief summarily in light of my previous finding above that, if the validity issue has to be determined at all, it falls to be decided at trial under Taiwanese law. The desirability of deciding this question now is further undermined by the fact that my primary finding is that the Plaintiffs are entitled to summary judgment on other substantive grounds so that the invalid execution point does not strictly arise for determination.

166. It remains to consider whether there are any mandatory statutory provisions of Bermuda law which invalidate the September 26, 2005 document and supersede (a) the requirements of the GRT Declaration of Trust instrument itself and (b) the equitable jurisdiction to grant relief designed to perfect the invalid execution. Mr Hagen QC argued that section 23 of the Companies Act 1981 (as then in force) had such a pivotal effect. I expressed doubts about the purportedly mandatory scope and effect of the section in the course of argument, in particular subsection (1):

> "*(1) A company may, by writing under its common seal, empower any person either generally or in respect of any specified matters, as its agent, to execute deeds on its behalf in any place outside of Bermuda.*"

167. Mr Hagen QC fairly answered that there was no suggestion that the directors had been authorised to execute deeds abroad in this highly formalised manner. He pointed out that the current version of section 23(1) is far more flexible than the version in force

in 2005. The authorisation need only be in writing and not necessarily under the company's seal:

> "*(1) A company may, in writing, authorize any person, either generally or in respect of any specified matter, as its agent, to sign or execute deeds, instruments or other documents on its behalf in any place inside or outside Bermuda.*"

168. This did not address my more fundamental concern, not clearly articulated in the course of the hearing, about whether section 23 could properly be construed as intending to invalidate without more instruments which did not comply with its requirements. In the course of the Plaintiffs' opening submissions, I merely asked whether or not the law did not in general terms favour validating rather than invalidating transactions.[18] When Mr Hagen QC addressed the Court in reply, I more directly (but still somewhat tentatively) attempted to query what the statutory purpose of section 23 of the Companies Act actually was[19].

169. The Defendant's Skeleton did not address section 23 of the Companies Act 1981 at all. The submission that the document was validly executed as a deed under the general law of Bermuda was not, directly at least, responsive to the Plaintiffs' statutory submission. Mr Adkin QC adopted a similar approach in his oral submissions on this point:

> "*The problem, we suggest, with that*
> ***4*** *submission, is that it was founded on the*
> ***5*** *Bermuda legislation, the Companies Act*
> ***6*** *1981. And that legislation is only*
> ***7*** *relevant to the execution of the document*
> ***8*** *as a deed within the Bermuda-law meaning of*
> ***9*** *that term.*
> ***10*** *But that's not what was done. What*

[18] Transcript, April 25, 2019, page 309.
[19] Transcript, April 26, 2019, page 734.

11 *was done was the execution of the deed*
12 *within the declaration-of-trust meaning of*
13 *that term.*
14 *And if Your Lordship is with me, that*
15 *that meaning, after finding Clause 1.3, is*
16 *not the same as the Bermuda-law meaning of*
17 *the word, then that's the end of the*
18 *conflict.*
19 *So, Your Lordship, we do submit that*
20 *not only should summary judgment on this be*
21 *rejected, but Your Lordship should, in*
22 *fact, decide the point in our favor…*"

170. This submission almost assumed, without explaining explicitly why it was contended, that section 23 of the Companies Act 1981 did not have mandatory effect. In some instances, a failure to directly engage with an opponent's case on an issue is a sign of weakness; in other circumstances it may simply reveal a failure to perceive a serious point which calls for a full answer. The present case may well fall somewhere in between. In my judgment, in any event, the Plaintiffs' submission that the document which effected the September 26, 2005 transactions was invalid because it failed to comply with section 23 of the Companies Act 1981 cannot be summarily determined in the Plaintiffs' favour at this stage. In my judgment the point would benefit from further and fuller argument.

171. For example, the 2005 version of section 21 of the Companies Act ("Form of contracts") was not placed before the Court. Section 21(1) (a) (which deals with contracts required by the general law to be under seal) was seemingly amended at the same time as the corresponding provisions of section 23 in 2006. Section 21(1)(a) (as in force in 2005) is potentially relevant to the purpose and meaning of section 23 as regards corporate documents being executed under seal. In my judgment section 23 is, arguably, not designed to impose mandatory procedural requirements on the way corporate documents are documented and render them invalid where non-compliance occurs at all. It is perhaps simply a facilitative provision designed to create a legally binding basis for Bermudian companies to execute documents; a legal basis which

counterparties can rely upon if they wish to avoid future controversy over corporate authority.

172. It is also in my judgment arguable, as the Defendant's counsel expressly contended, that section 23 simply has no operation in circumstances where a document is executed overseas in compliance with local law, particularly in circumstances where there is no suggestion that the directors acted without the requisite corporate authority. This argument is not entirely straightforward as it is clear on the face of the statutory provision that section 23 clearly has, to some extent at least, extra-territorial effect. Nonetheless section 23 is expressed in permissive terms and I am unable to definitively accept or reject at this stage the contention that it is a mandatory provision non-compliance with which results in offending instruments being wholly invalid.

173. For the above reasons I decline to summarily determine the invalid execution issue under RSC Order 14.

Findings: standing

174. The Plaintiffs submitted very simply that if their main claim was summarily resolved in their favour, it followed that they had not been validly removed as "Beneficiaries" and default beneficiaries and it further followed that they had standing to pursue that claim. As I foreshadowed when dealing with the Defendant's limitation defence, this analysis must be correct. The Defendant did not appear to me to seriously contest this analysis. Indeed, its Skeleton accepted that

> "*136. The Standing Issue will turn on whether or not the original beneficiaries of the GRT have been properly removed and replaced with Grand View.*"

Conclusion

175. For the above reasons, I find that the Plaintiffs' summary judgment application succeeds because:

(a) the GRT Trustee had no power under the Declaration of Trust to effectively revoke a private family trust and resettle the trust assets for the benefit of a purpose trust;

(b) the Plaintiffs were not validly removed as Beneficiaries and default beneficiaries and accordingly have standing to bring the present claim; and

(c) their present action is not time-barred. The Plaintiffs fall within the proviso to section 23(3) of the Limitation Act 1984, so the six year limitation period does not operate against them so as to bar them from bringing the present claims more than six years after the impugned transactions were purportedly consummated on September 26, 2005.

176. Having made these primary findings, I decline to summarily determine the Plaintiffs alternative grounds for seeking summary judgment. This was broadly because the points would only need to be determined if my primary findings were held to be wrong and there needed to be a trial of the Plaintiffs' alternative breach of fiduciary duty claims. In that event, it would be more convenient for those other points (that the transactions were invalid for breaching the rules on remoteness of vesting and or because the relevant document was invalidly executed) to be determined at such a trial.

177. The Plaintiffs are entitled to a declaration that the Defendant holds the GRT assets on trust for the GRT and to apply for other consequential relief. I will hear counsel, if required, on the terms of the Order and costs.

Dated this 5th day of June, 2019

IAN RC KAWALEY
ASSISTANT JUSTICE