The Representation of Rysaffe Fiduciaires Sarl

Jurisdiction:	Jersey
Judge:	Deputy Bailiff
Judgment Date:	10 September 2021
Neutral Citation:	[2021] JRC 230
Reported In:	2021 (2) JLR 85
Court:	Royal Court

Text

[2021] JRC 230

ROYAL COURT

(Samedi)

Before:

R. J. MacRae, **Esq.**, Deputy Bailiff, **and** Jurats Crill **and** Dulake

In the Matter of the Representation of Rysaffe Fiduciaires Sarl
And in the Matter of the G 2000 Trust and the G 2008 Settlement
And in the Matter of Article 51 of the Trusts (Jersey) Law 1984 ("The Law")

Advocate L. A. Woolrich **for Rysaffe Fiduciaires Sarl (The "Trustee")**.

Advocate J. P. Speck **for F**.

Advocate D. Evans **as guardian *ad-litem* for the minor and unborn beneficiaries**.

Authorities

Re Osias Settlements [1987–88] JLR 389.

Re Ball's Settlement Trusts [1968] 2 All ER.

Lewin on Trusts.

Wong Wen-Young v Grand View Private Trust Co. Ltd [2019] SC (Bda) 37 Com.

Grand View Private Trust Company Limited v Wong & Ors Civil Appeal No. 5A of 2019.

Pitt v Holt [2013] 2 AC 108.

Wigwam Trust [2020] JRC 228.

May Trust [2021] JRC 137.

Re S Settlement [2001] JLR Note 37

Trust — reasons for approving the Trustee's decision

Deputy Bailiff

THE

Introduction

1 On 19 th July 2021 the Court made various orders in this case on the representation of Rysaffe Fiduciaires Sarl (the "Trustee"). The Trustee is trustee of two discretionary trusts settled by the Settlor. The first was settled on 14 th June 2000 and is known as the G 2000 Trust and the second was settled on 3 rd April 2008 and is known as the G 2008 Settlement.

Background

2 In order to understand the beneficial class, it is appropriate to set out the relationship between the Settlor and other beneficiaries. By the Settlor's first marriage he had two adult children, B and C. B has a minor child D who is aged one. He then had a partner who he did not marry but together they had a child, E, who is now an adult aged 18.

3 In 2008 he married his second wife, F, who is now 54 years old and had a child from a previous relationship who is now 18 years old called M who the Settlor treated as a child of

his own.

4 The Settlor also had a sibling, H, who has three adult children, I, J and K.

The G 2000 Trust

5 The G 2000 Trust was established by Instrument of Trust made between the Settlor and the First Trustee of that Trust. The current Trustee was appointed in 2014. The proper law of the G 2000 Trust is Jersey.

6 The beneficiaries of the Trust are set out in Clause C2 as the Settlor, any person who is at the time or at any time have been a spouse of the Settlor, the issue of the Settlor, other issue of the Settlor's parents, and any person who shall for the time being or any time been a spouse of the issue of the Settlor or issue of the Settlor's parents and, finally, any organisation, the objects of which are charitable.

7 In relation to the G 2000 Trust, and specifically in respect of the status of M as a beneficiary, the Court noted that " *issue*" is defined in the Trust as " *children and remoter issue whether legitimate, illegitimate, legitimated or adopted and includes such issue "en ventre sa mere" at the relevant time who shall be born live and "child" has a corresponding meaning and also includes step-children*".

8 Accordingly, although M is not a blood relative of the Settlor, she is a beneficiary. Therefore, the Trustee considered the class of beneficiaries of the G 2000 Trust as being the persons named at paragraphs 2, 3 and 4 and the Settlor's first wife and his brother's ex-wife L.

9 The interests of the beneficiaries other than F, C, B, E and M are considered by the Trustee too remote in the sense they were not intended by the Settlor to benefit whilst his current wife and children are alive. Each of the " *remote beneficiaries*", as they were described, had written confirming that they are aware of the contents of the Trustee's representation, and have no objection to the Trusts being applied for the exclusive benefit of the Settlor's wife and children.

10 The total value of the G 2000 Trust as at 31 st December 2019 was just under £3,500,000.

11 The investments are largely held in a portfolio of investments, cash, loans receivable and two paintings. On 30 th April 2009, the Settlor signed a letter of wishes in relation to the G 2000 Trust, expressing a wish that the Trustee should treat him as the principal beneficiary during his lifetime and thereafter his wife, which the Trustee has taken to mean F, in her lifetime. The Trustee requested that on his wife's death, the G 2000 Trust should be held for

" *our children*" which the Trustee has interpreted to mean B, C, E and M, although of course the Settlor did not have any children with F. We regarded the Trustee's interpretation of the Settlor's wishes as being natural and appropriate.

The G 2008 Settlement

12 As to the G 2008 Settlement, this was created by a deed made between the Settlor and the original trustee. The Trustee was appointed trustee of the Settlement pursuant to a deed of appointment and retirement dated 7 th July 2015. The governing law was originally expressed to be the law of the Cayman Islands and was changed to Jersey on 13 th July 2020 with this application in mind. Some of the assets of the Settlement are located in Jersey, including a Jersey company.

13 The only beneficiary identified in the Settlement during the Settlor's lifetime was the Settlor. However, pursuant to a deed of addition dated 16 th December 2015, after his death, the World Wildlife Fund (UK) and the British Red Cross were added as default beneficiaries. Pursuant to an undated Memorandum of Wishes apparently made on or about April 2008, the Settlor expressed the wish that after his death the Trustee add " *my children*" to the class of beneficiaries. There was no indication as to whom the term " *child*" meant to encompass. But " *children*" and " *issue*" are defined in the Settlement as including children and remoter issue, whether legitimate, illegitimate, legitimated or adopted. The Trustee accordingly considered that the term referred to the Settlor's three biological children but not M.

14 The Settlement owns four companies, one incorporated in Jersey and three incorporated in the British Virgin Islands ("BVI"). The companies hold a mix of assets including substantial loans receivable from the Estate of the Settlor. The Settlor died suddenly on 4 th August 2015 aged 58. He did not leave a will. The application to the Court was the culmination of long-standing attempts to agree a division of the assets of the Estate and the two trusts to which the children, F and the Trustee have participated.

The Estate

15 The Settlor's Estate consisted of a house in the UK worth between £5–£6 million, subject to a mortgage in favour of a bank of £1,250,000 (this was the home where the Settlor lived with F and where F and M still live); a property abroad valued at just under €3 million at the Settlor's death; and various other assets of a much lower value including the Settlor's life insurance, cash, shares and gold coins. The Estate had outstanding general debts of between £400,000 and £500,000 and loans repayable to the 2008 Settlement now totalling approximately £5,750,000. The loans taken out by the Settlor prior to his death were in part loans made by companies owned by the Trust which were largely used to fund the Settlor's personal expenses including his obligations towards F and E. These are called the " *non-property loans*" and total approximately £2,350,000; the balance were principally loans for

the purchase and payment of stamp duty land tax on the property in the UK and came to approximately £2,630,000. These loans were a tax efficient way for the Settlor to receive funds from the Trusts during his lifetime rather than by way of a distribution.

The proposal

16 The key elements of the proposal are:

(i) That the Estate, including the property in the UK and the Settlor's chattels, are to be appointed to the benefit of F absolutely except that:

(a) each of C, B and E may request to receive a chattel at their election and E will receive the benefit of the life assurance policy;

(b) the one third share of one of the freehold titles comprising the property held by one of the BVI companies (the balance of two thirds is held by the Estate) will also be transferred to F;

(c) the loan from the G 2008 Settlement to the Estate to make a payment on account of inheritance tax will be repaid to the Trustee by the Estate;

(ii) The G 2000 Trust will be held for the principal benefit of F during her lifetime and thereafter for the benefit of M. Accordingly, a life interest in the income of the Trust will be appointed to F with the Trustee retaining the power to appoint capital to her: the remaining funds to be held for M and her remoter issue. All beneficiaries other than F and M shall be revocably excluded from the class of beneficiaries of the G 2000 Trust.

(iii) As to the G 2008 Settlement, C, B and E and their remoter issue, shall be added as beneficiaries of this Settlement, with F being added as a beneficiary for the limited purpose (and for the limited period) of waiver or appointment (for F's benefit) of certain loans made to her benefit and thereafter irrevocably excluded from benefit under the Trust. These loans are the non-property loans and the property loans referred to above (i.e. the latter used to purchase the home in the UK) with the benefit of the same being appointed to F for this sole purpose. The Trustee of the G 2008 Settlement will acquire the foreign property at market value in consideration for forgiveness of equivalent value of the property loans owed by the Estate to the G 2008 Settlement. Without fettering its discretion, the Trustee will treat the trust fund of the G 2008 Settlement as three separate funds, one for the benefit of each of C, B and E, with the foreign property forming part of C's and B's funds, and E receiving certain funds and future maintenance at an agreed amount, with the balance of cash remaining in the Trust being divided equally between C, B and E's sub-funds.

17 There are further terms of the proposal, but the principal ones have been summarised above.

18 The Trustee, having considered all relevant matters, including taking legal and taxation advice, wishes, in its capacity as Trustee of both Trusts, to enter into certain documents having the effect of implementing the proposal and seeks the Court's approval of its " *in principle*" decision to enter into those documents so as to give effect to the agreement reached regarding the division and allocation of assets held in the Trusts and the Estate of the Settlor.

19 The decision which the Trustee seeks the approval of the Court for is to:

> (i) execute all necessary documents in relation to each Trust so as to document the arrangements referred to above; and
>
> (ii) add F as a beneficiary of the G 2008 Settlement;
>
> (iii) make a significant distribution to F by appointing the benefit of the non-property loans and the balance of the property loans and thereafter irrevocably exclude F as a beneficiary of the G 2008 Settlement;
>
> (iv) revocably exclude all beneficiaries other than F and M from the class of beneficiaries of the G 2000 Trust; and
>
> (v) appoint F a life interest in the income of the G 2000 Trust with the Trustee retaining the power to appoint capital to F and, subject to the interests of F, for the remaining funds to be held for the benefit of M and her remoter issue.

20 All counsel supported the Trustee's application.

The letters of wishes

21 The Court paid close attention to the letters of wishes. Such documents are of course not binding on the Court or the Trustee but are something that a Trustee ought to have regard to in relation to a decision such as this, particularly where the assets of the Trust were donated by the Settlor and it is the Settlor and his family who were at all times the principal beneficiaries of the Trust.

22 Although not exhibited to the affidavits, the Court, at its request, was provided with copies of the letters of wishes executed by the Settlor in relation to the two Trusts. In the letter of wishes dated April 2009 in respect of the G 2000 Trust, the Settlor does not specify who he was referring to when he speaks of the Trust being held " *for the benefit of our children*" after the death of himself and his " *wife*" but in this context " *wife*" must mean F as this letter was executed after his marriage to F and, in the circumstances " *our children*" must, in view of the fact that M is F's only child, include reference to her as well as C, B and E. The letter of wishes indicated that subject to any provision made by the Settlor during his lifetime, then the children would receive one third of their respective share at age 25 years, the

remaining two-thirds to be retained until they reach 35 years of age.

23 As to the G 2008 Settlement, the memorandum of wishes was executed on an unknown date in 2008 (the Trustee's electronic system suggests 4 th April 2008). This memorandum, expressed to be a " *guide*" to the Trustee from time to time of the Trust, said that the *Settlor's "overall purpose in establishing the Trust"* was to have an arrangement in place which would provide financially for his family *"in a controlled manner"*. After his death he expressed the wish that the Trustee should " *add my children to the class of beneficiaries*" and " *after my death you should regard my children as the principal beneficiaries of the Trust.* At present they are young and it is impossible to know their requirements or what their attitude to money will be". The Trustee was invited to use its discretion in dealing with them " *in the light of how they developed*". Nonetheless, the Settlor expressed the wish (there are amendments to this particular clause made in the Settlor's hand) that the children receive all the income from the Trust once they had reached the age of 18 and if more than one then equally, with each child's notional share of the income accumulated until he or she had reached the age of 18 and added to the capital of the Trust. Whereas the letter of wishes for the G 2000 Trust indicated that the principal beneficiary after the Settlor's death should be his wife, there is no such indication given in respect of the memorandum of wishes for the G 2008 Settlement.

24 The UK property was purchased in September 2008 and was originally held within the 2008 Settlement through the Jersey company owned by it. However, the property was ultimately, for taxation reasons, sold to the Settlor in 2015.

The evidence from the Trustee

25 The affidavit sworn in support of the Trustee's application by the managing director of the Trustee sets out the evolution of the Estate pursuant to English intestacy laws; particularises the loans, all of which are fully repayable to the Trusts and which have been summarised above, and the potential claims of the parties which are compromised by the proposal. These include claims the parties may have under the Inheritance (Provision for Family and Dependants) Act 1975 and Schedule 1 to the Children Act 1989, principally claims which F, M and E had or have. It is not necessary to summarise the nature of those claims or their merits – nonetheless all were potentially valid claims.

26 The proposal is plainly inconsistent with the Settlor's wishes insofar as they relate to the G 2008 Settlement as the letter of wishes does not envisage benefit to the Settlor's wife, who was not appointed a beneficiary during his lifetime but stands to substantially benefit during the limited duration of her appointment as a beneficiary by writing off the substantial loans made to the Settlor by way of a distribution to her of the benefit of the same, so as to permit her to retain occupation of the UK property. Nonetheless, the overall effect of the proposals in relation to the Estate and the Trust, taken as a whole, is that 52% of the assets will be available for F, from which M will ultimately benefit, with the remaining 48% of the assets

held for the benefit of C, B and E in broadly equal shares.

27 In reaching its decision, the Trustee considered, amongst other things, the needs of the beneficiaries as well as their wishes.

28 F does not have access to significant funds of her own and has no independent income. She has received financial support from the Trust since the Settlor's death, as has M. M is aged 18 years old, currently at school and has no independent wealth. Her biological father is unable to provide maintenance to her. The Trustee believes that both F and M should continue to reside in the UK property and that, in due course, M will one day be the main beneficiary of F's estate. C and B are independent adults and have their own careers and income. They were provided for by the Settlor during their upbringing by way of school fees and care and maintenance. They wish appropriate provision to be made for their stepmother F and their younger sister E. E is now just 18 and needs suitable funds for her education. Her mother does not have significant independent wealth and the Trustee considers it necessary to continue to support E. Pursuant to a Schedule 1 Children Act 1989 claim, the Settlor settled £400,000 on trust for the benefit of E in 2011, the said benefit to accrue to her upon the age of 25. Further, following the Settlor's death, the Trustee has made loans to the benefit of E for a sum in excess of £220,000 and ultimately the Trustee will treat these loans as distributions from the Trust.

29 The Trustee has given weight to the separate letters of wishes but notes that they were executed at a different time some years before the Settlor's death and were not updated to reflect the change in position as regards the assets of the Trusts, particularly to account for the non-property loans and the property loans.

30 It is the Trustee's firm belief from conversations that the managing director of the Trustee had with the Settlor and based on information received by him that he would have wished F to be able to remain in the UK property and be reasonably provided for during her lifetime. He also would have wished for his own children to be adequately provided for and would have wished for matters to be resolved in an amicable fashion with a view to avoiding disputes.

31 One issue that the Court needed to determine was a matter which arose from advice taken by the Trustee from one of two leading counsel consulted by the Trustee regarding the waiver of the loans for the benefit of F. As noted above F is neither a current beneficiary of the 2008 Settlement nor does the letter of wishes express or wish that she be appointed as such. The issue identified by leading counsel first instructed was whether it was within the Trustee's powers to use the G 2008 Settlement to benefit F on the footing that notwithstanding the Trustee's discretionary power to add a beneficiary under the G 2008 Settlement it was said that " *this power should not be exercised so as to "destroy the substratum of the Trust*"". Leading counsel subsequently instructed by the Trustee did not think that such a rule, if it applied, presented any impediment at all to the Trustee exercising its powers in the way envisaged so as to add F as a beneficiary to the G 2008 Settlement.

The so-called substratum rule

32 This matter does not appear to have been considered before by a Jersey court, at least in this context. In *Re Osias Settlements* [1987–88] JLR 389 in the context of the Court's power to approve an arrangement varying a trust under Article 43 (as it then was) of the Law, Tomes DB, giving the judgment of the Court noted that in *Re Ball's Settlement Trusts* [1968] 2 All ER at 422–443 Megarry J had said:

> ***"If an arrangement changes the whole substratum of the trust, then it may well be said that it cannot be regarded merely as varying that trust."***

33 Tomes, DB, having considered this authority and other English cases said the following at page 408 line 25:

> ***"The court proposes, subject to one important reservation, to adopt the principles enunciated in*** *In re Seale's Marriage Settlement (8)*, ***in*** *In re Holt's Settlement (5)* ***and in*** *In re Ball's Settlement Trusts (1)*. ***The jurisdiction of art. 43 of the Law is as beneficial as the Act of 1958 and, in the court's judgment, should be construed widely.*** The one reservation that the court has relates to the substratum doctrine. The first is the practical difficulty of deciding when the substratum has been changed. Different judges may come to different conclusions on the same facts. Indeed, the same judge may change his mind in different cases. See, for example, the difficulties that Megarry, J. had in *In re Holt* ***and*** *In re Ball*. ***The second problem is one of principle.*** If, as we said earlier, the court under art. 43, is merely supplying the consent on behalf of beneficiaries which they are not in a position themselves to give, and if all beneficiaries being sui juris can put an end to the trust and re-settle the trust property as they please, whether the substratum of the new trust be the same as the old or not, we can see no justification for implying any limit on the scope of the arrangement to which the court can give approval beyond the words of the article itself. The article says nothing about substrata and indeed refers to "varying or revoking the terms of the trust". The only limitation on the court's power to give consent is that contained in art. 43(2), i.e. that the carrying out of the arrangement appears to be for the benefit of the person on whose behalf the court's approval is being given. The court has power to convert a Jersey trust into a trust governed by some other system of law and, therefore, in the instant case, into a trust governed by the law of Florida. The court has power to approve an arrangement which effectively revokes and then sets up new trusts."

34 The substratum rule was referred to in the current edition of Lewin on Trusts published on 31 st March 2020, but prior to a significant decision of the Bermuda Court of Appeal, to which we will turn in a moment.

35 Paragraph 33–058 of Lewin says:

> ***"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. In consequence they attract the implied limitation on a power of amendment that it should not be used to change the substratum of a trust, a limitation considered in the next section. The use of a power of addition to add as a beneficiary the trustee of a new trust, of a power of exclusion to exclude all the other beneficiaries and of a power of appointment to appoint all the assets to the new trust has been held, in the circumstances, beyond the scope of those powers."

36 Lewin goes on to say at paragraph 33–079:

> ***"… the use of a power of amendment must be confined to such amendments as can be reasonably be considered to have been within the contemplation of the parties when the trust instrument was made, having regard to its nature and circumstances.*** Another way of expressing the point is that an amendment must not change the whole substratum of the trust or its basic purpose. The substratum or basic purpose may, however, undergo a gradual change and the validity of an amendment is to be judged, it seems, by reference to matters as they stood immediately before the amendment and not as they stood at the creation of the trust."

37 Lewin goes on to note the difficulty in applying the principles relating to any limitation on a power of amendment " *lies in defining the substratum of the trust or the purpose of the power*". Lewin says:

> ***"The terms of the trust may be such that there is no identifiable substratum, or none capable of providing much of a limit on the power of amendment.*** In a discretionary trust there may be no substratum to be preserved beyond the provision of benefits to the class of objects, which may be very widely expressed."

38 The relevant paragraphs of Lewin, in particular 33–058 and 33–079, contain reference to authority including the (first instance) decision of the Supreme Court of Bermuda in *Wong Wen-Young v Grand View Private Trust Co. Ltd* [2019] SC (Bda) 37 Com. The Grand View Trust case involved two settlors of two separate trusts set up to further their philanthropic aims and to align the interests of their children with the growth of various family companies following their death. The first trust was a private Bermuda discretionary trust. The second trust was a mixed charitable purpose trust whose trustee was Grand View Private Trust Company Limited. The first trust established that the beneficiaries were subject to the exercise of powers conferred upon the trustees permitting them to, *inter alia*, declare that any person shall be included as a beneficiary or cease to be a beneficiary. The settlors

later decided that there was no need for a private trust to benefit their children and the relevant trustee decided that the appropriate course was for the assets of the first trust to be transferred to the second. Consequently, the first trustee executed a deed appointing Grand View Private Trust Company Limited as beneficiary and excluding the existing beneficiaries, paying and appointing the assets of the first trust to the second and thereafter terminating the first trust. This was challenged by certain beneficiaries on the footing that the replacement of the individual discretionary and other beneficiaries combined with the resettlement of the trust assets for the benefit of a perpetual charitable and purpose trust were beyond the scope of the discretionary powers afforded to the first trustee under the terms of the trust.

39 The judge at first instance agreed and granted summary judgment. The trustee of the second trust appealed.

40 Clarke P, giving the principal judgment of the Court of Appeal for Bermuda (*Grand View Private Trust Company Limited v Wong & Ors Civil Appeal No. 5A of 2019*), reviewed the case law which led the judge at first instance to hold that there was a legal prohibition on using general powers of amendment to change the underlying character or substratum of a trust. The trial judge had held that the most important features of a trust were that it was an irrevocable discretionary trust for the benefit of the settlor's children and remoter issue; that the default beneficiaries were also his children and remoter issue; that broad powers of amendment, addition and exclusion of the beneficiaries and appointment out were confirmed on the Trustee; that the trust period was 100 years; and the irrevocability clause was not capable of amendment.

41 Clarke P said at paragraph 73 of the judgment: " *All of the features, he held, combined to constitute the substratum of the [first trust] and the most significant individual feature for present purposes was the irrevocability clause*." The trial judge went on to hold at paragraph 113 of his judgment:

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

42 At paragraphs 96 to 167 inclusive, Clarke P carried out an extremely comprehensive analysis of the authorities as to the history, meaning and extent of the substratum rule.

43 Clarke P began his " *discussion*" (paragraph 168) by referring to the judgment of Lord Walker in *Pitt v Holt* [2013] 2 AC 108 as follows:

> ***"There are, as Lord Walker explained in** Pitt v Holt*, ***three relevant questions in determining whether the purported exercise by a trustee of a power such as the present one has been invalid:***
>
> ***"(a) Whether the way in which it has been exercised is not within, or contrary to, the express or implied terms of the power (the scope of the power rule);***
>
> ***(b) Whether the trustee has given adequate deliberation as to whether and how he should exercise the power; and***
>
> ***(c) Whether the use of the power by the GRT Trustee, although within its scope, was for an improper purpose i.e. a purpose other than the one for which it was conferred (the improper purpose rule)."***

44 As to the specific power given to the first trustee, he said:

> ***"172. The proper classification of the power given to the GRT Trustee in the present case is that it is neither a general power exercisable in favour of anyone nor a specific power exercisable in favour of a specified class; but an intermediate power, being a fiduciary power to benefit anyone but the trustee, by the addition of that person as a beneficiary and by the exclusion of other previous members of the discretionary class*** .
>
> ***173. The nature of a power such as the present was considered by Templeman J (as he then was) in** Re Manisty's Settlement, Manisty v Manisty* [1973] 2 All ER 1203, [1974] Ch 17. ***The central issue in that case was whether the power to add and exclude beneficiaries was invalid for uncertainty or unworkability (which it was not).*** Templeman J held that a power granted to trustees to add to the class of beneficiaries was a valid intermediate power, saying ([1973] 2 All ER 1203 ***at 1206***, [1974] CH 17 ***at 21:***
>
> ***"The power to add beneficiaries and to benefit the persons so added is exercisable in favour of anyone in the world except the settlor, his wife, the other members of the excepted class for the time being and the trustees, other than the settlor's brother Henry who was one of the original beneficiaries.*** This is not a general power exercisable in favour of anyone, nor a special power exercisable in favour of a class, but an intermediate power exercisable in favour of anyone, with certain exceptions."
>
> ***He then made clear the nature of the duty of adequate deliberation in the following way*** ([1973] 2 All ER 1203 ***at 1210***, [1974] Ch 17 ***at 26):***
>
> ***"… in the case of an intermediate power the settlor has no doubt good reason to trust the persons whom he appoints as trustee …***

The conduct and duties of trustees of an intermediate power, and the rights and remedies of any person who wishes the power to be exercised in his favour, are precisely similar to the conduct and duties of trustees of special powers and the rights and remedies of any person who wishes a special power to be exercised in his favour. In practice, the considerations which weigh with the trustees will be no different from the considerations which will weigh with the trustees of a wide special power. In both cases reasonable trustees will endeavour, no doubt, to give effect to the intention of the settlor in making the settlement and will derive that intention not from the terms of the power necessarily or exclusively, but from all the terms of the settlement, the surrounding circumstances and their individual knowledge acquired or inherited. In both cases the trustees have an absolute discretion and cannot be obliged to take any form of action, save to consider the exercise of the power and a request from a person who is within the ambit of the power." [emphasis added by Clarke P]

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

45 As to the scope and purpose of the power, Clarke P made the following observations at paragraph 184:

"THE SCOPE OF THE POWER

[184] We should apply, as the settlors, both actual and economic, would be entitled to expect, the ordinary rules of construction to the terms of the declaration of trust which was made. Under those rules, most recently expounded in *Arnold v Britton* ***and*** *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] 4 All ER 615, [2017] AC 1173, ***the meaning of the words is plain.*** The GRT Trustee can join or remove any beneficiary; as the settlor must be presumed to have intended. As Smellie J observed in *Re Z* ***'any' means 'any'.*** There is, in my view, no sound basis upon which (reading the deed as a whole and in its overall context) to imply any restriction on 'any'. Any such restriction is neither obvious nor necessary and its scope would be unclear. The addition of Grand View, as trustee of the Wang Family Trust was, in my judgment, within the scope of the power.

THE PURPOSE OF THE POWER

[185] The relevant question is that set out at para [168](c) above. If the 'substratum rule' as relied on by the Respondents is only another way of expressing, or synonymous with, the basic principle it adds nothing. If it means something else it is not, in my view, supported by authority. Whether or not the use of a power is destructive of the substratum (whatever precisely that means) may be relevant in determining whether the power has been used for a purpose

for which it was not intended, as may be the case where its use is fundamentally inconsistent with the purpose of the trust. But I would reject, as did the Chief Justice in *Mirvac*, ***the proposition that there is some absolute rule which, whatever the terms of the power or the circumstances of the trust, prohibits the exercise of specific powers of addition and exclusion of beneficiaries from altering the substratum of the trust – a metaphorical term the characteristics of which it may be difficult to define, and which may not necessarily exist***.

[186] As Lord Hoffmann said in *Lawson v Serco Ltd*, *Botham v Ministry of Defence*, *Crofts v Veta Ltd* [2006 UKHL 3, [2006] 1 All ER 823, [2006] ICR 250, ***at [19]:***

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

…

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

46 Clarke P then set out an extensive list of 12–16 separate reasons why it was not necessary to conclude that the scope of the power was limited in the way argued for by the respondents. During the course of that analysis he said the following at paragraph 199:

"In those circumstances, if one is to use the geological metaphor, which I would not, the substratum of the GRT Trust, if there is one, is to benefit the Beneficiaries as they may from time to time be; and not that those Beneficiaries shall, immutably, be the Founders' issue or their families or those related to or connected with them. As Lewin 30-075(1) observes "In a discretionary trust there may be no substratum to be preserved beyond the provision of benefits to the class of objects which may be very widely expressed" (and, I would add, in this case widely capable of alteration). The fact that the Founders' issue are the Beneficiaries initially identified does not conclusively determine the scope of a power whose purpose is to change them."

47 Although Clarke P began his analysis with the terms of the power contained within the trust instrument, he made the following remarks when considering whether or not the trustee was limited to ascertaining the intentions of the settlor by considering the terms of the trust and nothing more. He said that was not correct and, inter alia, said the following:

"[216] Lastly under this heading paras 29 – 162 of Lewin on Trusts (19th edn) sets out the position at length, including the following:

"Trustees therefore rightly give great weight to the settlor's wishes, either expressed from time to time during his lifetime or recorded, usually in documentary form before his death … The settlor's wishes, the Supreme Court has held "are always a material consideration in the exercise of fiduciary discretions" .

"It was previously well established that the trustees are entitled to take serious account of the settlor's wishes and it is the better view that they are bound to do so."

"Moreover, trustees are entitled to have regard to the settlor's wishes expressed from time to time and are not confined to those expressed contemporaneously with the creation of the trust";
Schmidt Rosewood Trust Ltd [2003] UKPC 26 ***at [20][33]'*** .

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

[217] It is material to distinguish a number of related questions. The first is whether the settlors' subjective view as to what the terms of the trust meant can be used to interpret them. The second is whether evidence of the settlor's subjective intentions in setting up the trust and his purpose in granting the powers contained in it, is admissible in determining the ambit of the purpose of the power when considering the fraud on a power doctrine. The third is whether, if the proposed use of the power is within its scope and not contrary to its purpose, the trustees can have regard to the wishes of the settlor, including the economic settlor, when deciding whether and, if so, how to exercise the power. The answers to the first and third questions are 'No' and 'Yes' .

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

48 Allowing the appeal and setting aside the summary judgment granted by the judge at first instance, Clarke P said:

> ***"Conclusion***
>
> ***[227] In my judgment it is well arguable that the addition of Grand View, as trustee of the Wang Family Trust as a beneficiary of the Global Resources Trust and the distribution to it of the assets of the trust was within the scope of the powers given to the GRT Trustee under the Trust, and did not constitute a fraud on those powers*** .
>
> ***[228] None of this means that the power of the GRT Trustee under clause 8 was beyond any form of equitable constraint or that the GRT Trustee could do whatever it felt like.*** The three methods of control identified by Lord Walker in *Pitt v Holt* ***applied.*** The first and third were arguably satisfied. The second of those was that it was necessary for the GRT Trustee carefully to consider whether the power should be exercised, taking into account all relevant and ignoring irrelevant considerations. This is not properly to be regarded as some perfunctory or feeble constraint."

49 We adopt these principles as we consider them to be a correct analysis of the law. There is no substratum rule. It is unnecessary for such a rule to be adopted, as the approach of Lord Walker in *Pitt v Holt* referred to at paragraph 42 above is sufficient. Powers of addition and exclusion are to be given their natural meaning when considered with the three questions posed by Lord Walker in mind. The relevant power of addition in this case was in wide terms and provided as follows at Clause 8.1 of the G 2008 Settlement:

> *"During the Trust Period, the Settlor and after his death the Protector [there was no protector in office so the trustee must exercise the power to add] may by instrument in writing delivered to the Trustees revocably or irrevocably, declare that any person or persons or member or members of a class of persons, named or specified (whether or not in existence or ascertained) (excluding for the avoidance of doubt, any Excluded Person) in such declaration shall from then on, or for such subsequent period specified, be included within the class of Beneficiaries."*

50 Further, Clause 8.3 of the Settlement provides that:

> *"In the exercise of the powers contained in Clauses 8.1 and 8.2, the Settlor or the Protector as the case may be shall not owe any duty to any Beneficiary and the Settlor or Protector shall be entitled to exercise the powers in his or its absolute discretion without regard to any existing or potential interest of any person in the Trust Property."*

51 The power of exclusion is also wide at Clause 9.1 of the Settlement. The members of the Court did not think it was appropriate to identity a " *substratum*" and confined themselves to

considering whether the proposed exercise of the Trustee's power was permitted by the terms of the Trust, whether the Trustee had given adequate deliberation as to whether or not it should exercise the power and whether the use of the power to add F was for a proper purpose. The Court concluded that the proposed exercise of the power to add F was permitted; that it had been given adequate consideration and was for a proper purpose having regard to all the circumstances of the case, including the terms of the Trust and the Settlor's wishes as expressed from time to time.

The minors and unborn

52 When the representation was issued there were three minor beneficiaries – D, E and M in addition to any unborn. Since the representation was issued in 2020, E and M have reached their majority. Since then they were convened to the proceedings in their own right. Accordingly, Advocate Evans represented D and the unborn issue of the Settlor and other issue of the Settlor's parents. Although all such persons will be excluded from benefit under the G 2000 Trust with the intention that they should not benefit during the lifetimes of F or M; B, C and E and their remoter issue, including D, will be added as beneficiaries to the G 2008 Settlement as explored above.

53 The Court was concerned about the position of the minor and unborn beneficiaries, particularly of the 2008 Settlement as they were, by reason of the proposal to be excluded from benefit thereunder in large part.

54 In respect of the unborn children of the " *remote beneficiaries*" Advocate Evans submitted that as it was accepted that the interests of their parents and grandparent were remote, the same applied to their potential interest. He observed that the Trustee's proposals were consistent with the wishes of the Settlor's and the Court was reminded of its observations in relation to " *benefit*" in the *Wigwam Trust* [2020] JRC 228 and the decision in the *May Trust* [2021] JRC 137. This is not an application to vary a trust under Article 47 of the Law but in such cases, and indeed this case, on the authority of the cases referred to above and the cases referred to within them, we adopt a wide definition of benefit which is not restricted to financial benefit. In the latter case, the position was summarised by Commissioner Sir William Bailhache as follows:

> ***"61. In summary, the decision of a trustee that a particular appointment is for the benefit of a beneficiary in the case of a discretionary trust must of course be one to which the trustee could reasonably arrive having regard to the terms of the deed. In making that journey, the trustee will have regard to the law which is to the effect that "benefit" is to be widely construed. Thus, unless the deed otherwise provides, "benefit" as a matter of principle:***
>
> ***(i) goes wider than financial benefit and includes donations to charity*** (*Re Wigwam*), ***the payment of debts to HM Revenue*** (*Re Bolan*) ***and avoiding the detriment of parents of beneficiaries facing large tax claims arising***

from the transfers into the trust which they have made (*Re N*).

(ii) may include the application of trust monies to provide social or educational benefits for the beneficiary in question .

(iii) may include the application of trust monies in discharge of a moral obligation which the beneficiary, in receipt of the appointment which the trustees have resolved to make in his favour, accepts is one that should be discharged from that appointment."

55 In this case the proposal will achieve a global settlement in respect of all issues relating to the trusts and the Estate; it ensures that there will be no litigation between the beneficiaries, in particular it does away the need for any future litigation before the English courts; it provides for a clean break and a separation out of the interests of different branches of the family by way of the separation of the interests of the widow and stepchild under one trust and the other principal beneficiaries by way of sub funds under the 2008 Settlement and provides properly for a reasonable and appropriate provision for the Settlor's widow and for a reasonable standard of living for her in the future.

56 All these arrangements are to the ultimate benefit of all beneficiaries including those as yet unborn.

Conclusion

57 Applying the well-known test in *Re S Settlement* [2001] JLR Note 37 we find as follows:

58 The Trustee has formed its opinion in good faith. Its decision permits implementation of the proposal, which achieves a pragmatic solution — allocating the assets of the Trusts and Estate so as to promote family harmony and preserve family relationships in the interests of all beneficiaries.

59 As to the second limb of the test, the decision of the Trustee is a reasonable one. The alternatives are for the Estate to be administered in accordance with the English law of intestacy (which itself has not been conclusively determined) and then for the Trustee to make assessments in the light of competing claims following this exercise. That would probably result in litigation which would reduce the assets available for distribution to the beneficiaries. The beneficiaries' agreement to the proposal and to the application to the Court made by the Trustee is additional evidence that the Trustee's decision is fair and reasonable.

60 As to the third limb, the Trustee's decision has not been vitiated by any actual or potential conflict of interest.

61 Accordingly, we approved the Trustee's decision and made various consequential orders.