

Application under the Trust (Guernsey) Law 2007 dealing with a grantor's powers, third party consent holder's powers and trustee's powers in relation to a general power of appointment.

[2024]GRC043

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

Between:

OAK TRUST (GUERNSEY) LIMITED
(in its capacity as Trustee of the HKS Second Gen A Trust)

Applicant

-and-

(1) MURRAY ALEXANDER CRAIG STEWART

(2) SUNTERA PRIVATE WEALTH (GUERNSEY) LIMITED
(in its capacity as Trustee of the HKS Future Gen Trust)

(3) HELEN KEITH STEWART

(4) HKS2 LIMITED

Respondents

Judgment handed down: 5th June 2024

Before: Jessica Roland, Deputy Bailiff

Counsel for the Applicant: Advocate C J Hay

Counsel for the First Respondent: Advocate J M Wessels

Counsel for the Second Respondent: Advocate H M Sandy

Counsel for the Third Respondent: Advocate E R Gray

Cases, texts & legislation referred to:

The Trusts (Guernsey) Law, 2007

In the matter of the K Trust [2020] GCA080

In the Matter of the Internine and Intertraders Trusts [2005] JLR 236

In The Matter of The Circle Trust HSBC International Trustee Limited v Wong And Five Others [2006 CILR 323]

Representation of Centre Trustees (CI) Limited [2009] JRC 109

In the Matter of the Piedmont Trust & Riviera Trust [2021] JRC 248

Investors Compensation Scheme Ltd. v. West Bromwich Bldg. Socy. [1998] 1 W.L.R.896

Public Trustee v Cooper (2001 WTLR 901)

Kea Trust Co Limited v Pugachev [2015] NZHC 2412

Grand View Private Trust Co Ltd and another v Wong and others [2022] UKPC 47

In the matter of the X Trusts [2023] CA (BDa) 4 Civ

Lewin on Trusts 20th Edition

Thomas on Powers 2nd Edition

Underhill and Hayton Law of Trusts and Trustees 20th Edition

Introduction

1. This is an application by Oak Trust (Guernsey) Limited (“Oak”) as trustee of the HKS Second Gen A Trust (“the A Trust”) pursuant to section 68, 69 and 71 of The Trusts (Guernsey) Law, 2007 (“the Trust Law”) and/or the inherent jurisdiction of the Royal Court for the following orders:
 - (i) the determination of the terms on which HKS2 Limited (“HKS2”) holds its powers as Third Party Consent Holder (“TPCH”) as a matter of construction of the Instrument of Settlement of the Trust dated 28 February 2021 (“Trust Instrument”);
 - (ii) the determination of whether an attempt to grant an unfettered general power of appointment by the Third Respondent to Catherine Stewart Selvan for the reasons set out in Mr Sharman’s affidavit, if consented to by HKS2, would be an exercise of the Grantor’s power under clause 30.3 of the Trust Instrument for a proper purpose and, if not, whether such an attempt would be void;
 - (iii) all such directions and other relief consequential to those determinations as the Court deems fit; and
 - (iv) Oak be entitled to meet its costs of and occasioned by this Application from the Trust on an indemnity basis.

Background

2. As has been the protocol during these proceedings, without any discourtesy meant to the parties, I will refer to the First Respondent as Murray and to the Third Respondent as Helen.
3. As I have set out in previous judgments in relation to this matter, the background to this dispute starts with the AACS settlement which was declared on 20 December 2001 by the late Alistair Alexander Craig Stewart, deceased (“the Deceased”) who died on 7 September 2018. He was survived by his wife, Helen who is the Third Respondent, his son Murray, the First Respondent and his daughter Catherine Stewart Selvan (“Catherine”). Catherine is married to David Selvan (“David”) and they have two children together, Alexander who is now an adult and Clare who is still a minor. The beneficiaries of the AACS settlement were the deceased, Helen, Murray and Catherine and all the issues of the deceased born within the trust period of 100 years from 20 December 2001. Fairbairn Trust Company Limited became the sole trustee of the AACS settlement in 2004. After a number of corporate reorganisations and name changes Fairbairn Trust Company Limited became Suntera Private Wealth (Guernsey) Limited. I shall refer to the Second Respondent (and associated companies) as Suntera in this judgment save where it is necessary to refer to it by the name of its previous manifestations. After the move to Suntera, the relationship between the Stewart family and Suntera was primarily managed by Mr Nathan Lihou until he left the business in January 2023. On 20 October 2014, the Deceased provided a letter of wishes to Suntera. This indicated that the Deceased wished for the income and capital of the AACS settlement to be available to Helen for her life, which the Deceased expected would be sufficient to support her lifestyle, such that he did not wish capital to be distributed to her “*unless it is absolutely necessary*”. On the death of the survivor of the Deceased and Helen, the Deceased wished the Trust to be regarded as “*split into two equal notional sub-funds, one for the benefit of ... Murray and his issue...and one for the benefit of... Catherine and her issue*”. The Deceased expected the income of the AACS settlement to be sufficient to cater for

“the needs of my children and their respective families”, but he asked Suntera *“to give sympathetic consideration to any reasonable request for capital”*.

4. The assets of the AACS settlement were largely in the form of a 100% holding in the shares of HKS Limited, a Guernsey company under the control of Suntera which owned investments which were professionally managed by Canaccord Genuity. On 30 January 2019, Suntera declared a further discretionary trust, the HMC settlement. The beneficiaries of the HMC settlement were Helen, Murray and Catherine and the issue of Catherine and Murray. Helen, Murray and Catherine were to be regarded as primary beneficiaries of the Trust. After the HMC settlement was established around US \$85 million was appointed out of the AACS settlement to the HMC settlement.
5. On 28 February 2021, a series of instruments were executed which were intended to have the effect of appointing all the assets of the AACS settlement and the HMC settlement to Suntera as trustee of three new Trusts declared by Suntera on the same day, such that the AACS and HMC settlements would be fully administered and would terminate. The A Trust was declared by Suntera by Trust instrument dated 28 February 2021. The other two Trusts are known as HKS Second Gen B Trust (the “B Trust”) and HKS Future Gen Trust (the “Future Gen Trust”). \$15 million was appointed to the A Trust and the B Trust respectively. \$85 million was appointed to the Future Gen Trust.
6. On or around 28 February 2021, Suntera as trustee of the A Trust loaned the full US \$15 million appointed from the AACS settlement to HKS 2 Limited (“HKS2”). There is no formal loan agreement but it is understood that the loan was made on the basis it was unsecured, interest free and repayable on demand. According to Mr Sharman’s affidavit loan repayments have since been made to meet sundry administration costs of the A Trust, as required.
7. On 21 September 2021 Murray made an application to remove Suntera as Trustee of the A Trust (the “Removal Application”).
8. On 10 July 2022, Suntera and/or HKS2 Limited (in the person of Mr Lihou) were invited by Helen as Grantor of the A Trust to consent to the exercise of her power as Grantor, under clause 30.3 of the Trust Instrument to grant a general power of appointment to Catherine. To date there has been no decision regarding the consent request. In an undated covering letter addressed to Mr Lihou, Helen explains that her reasons for wishing Catherine to hold the general power of appointment were bound up with the disputes involving Murray and the family trusts, both before and after the restructuring, and in particular, his Removal Application. In that letter, she invited Mr Lihou to cause HKS2 to consent. She invited Mr Lihou to cause this to happen by 10 July 2022 and not to give prior notification to any other party, stating that if notification was given *“I will treat this as a breach of your duties to me and hold you responsible for the consequences.”*
9. On 24 August 2022, Suntera applied to the Royal Court as Trustee of the A Trust, pursuant to section 68, 69 and 71 of the Trust Law and rule 35 of the Royal Court Civil Rules, 2007 for orders that the court should accept a surrender of Suntera’s own discretion in relation to the Consent request and/or bless Suntera’s actions (“Suntera’s August Application”).
10. On 19 December 2022, the Royal Court determined that Suntera should be removed as Trustee of the A Trust and replaced with Oak. On 22 March 2023, Oak Directors Limited was appointed in place of Suntera Private Wealth Directors Limited and Suntera Private Wealth Secretarial Limited resigned as Company Secretary without replacement.
11. After Suntera was removed and Oak installed as the new Trustee of A Trust, rather than proceed with Suntera’s August Application, Oak commenced this application to construe the Trust Instrument so far as it contains provisions relating to powers vested in Helen and HKS2.

12. In order to address how the relief sought should be approached, the following list of issues was identified by the parties:

A Factual Context

1. *By what steps was the A Trust constituted on or by 28 February 2021.*
2. *What was the factual context in which the A Trust was constituted on or by 28 February 2021. In particular what was:*
 - 2.1 *the origin, purpose(s) and development of the Restructuring of the Old Trusts (the AACCS Settlement and the HMC Settlement), which led to the creation of the New Trusts (the A Trust, the B Trust and Future Gen Trust);*
 - 2.2 *the role and relevance of US tax considerations;*
 - 2.3 *the role and relevance of South African tax considerations; and*
 - 2.4 *the relevance of the personal relationships between Helen, Caroline, Murray and of their respective financial and personal situations and of the relationships between each of them and Suntera with respect to the Restructuring and more widely.*

B Exercise of Power to Grant

3. *As a matter of construction of the Trust instrument in the relevant factual context and/or under general law, are the powers held by Helen under clause 30.1 (power of revocation) and clause 30.3 (power to grant a GPOA to any descendant of hers (**Power to Grant**)) subject to the proper purposes rule. In particular, is the Power to Grant fiduciary, limited or beneficial in nature and/or is the power held as nominee or bare trustee.*
4. *If so:*
 - 4.1 *what was Helen's purpose when she exercised the Power to Grant; and*
 - 4.2 *is that purpose one for which the Power to Grant may be validly exercised.*
5. *In view of the answers to issues 3 and 4, is Helen's exercise of the Power to Grant capable of being valid, if consented to by HKS2 Limited.*

C HKS2 Limited's Powers of Consent

6. *As a matter of construction of the Trust Instrument in the relevant factual context and/or under general law:*
 - 6.1 *to what duties, if any, is HKS2 Limited subject as Consent Holder in relation to the powers of consent it holds (**Powers of Consent**);*
 - 6.2 *to whom are any such duties owed; and*
 - 6.3 *to what constraints, if any, is HKS2 Limited under as a result or for any other reason in relation to an exercise of its Powers of Consent. In particular, are the Powers of Consent fiduciary, limited or beneficial in nature and/or are the powers held as nominee or bare trustee.*
7. *In view of the answers to issue 6 above, is HKS2 obliged to give consent to an exercise by Helen of the Power to Grant.*

D Position of Oak

8. *In view of the above to what duties, if any, is Oak subject as trustee of the A Trust in relation to the exercise by HKS2 Limited of its Powers to Consent:*

8.1 in relation to Helen's exercise of the Power to Grant; and

8.2 generally.

E Potential Conflict

9. *In view of the determination of issues 6 to 8 above, is there any conflict between Oaks' duties as trustee of the A Trust and in that capacity as the sole shareholder of HKS2 Limited and HKS2 Limited's duties as Consent Holder and if so what steps may Oak take to manage or resolve any such conflict.*

13. I also directed that the parties should agree a single joint expert in US and South African tax law respectively who were instructed to provide their expert opinions and also for the parties to determine the questions that those experts were asked to address in their expert opinions. These questions were largely agreed with the final version being determined with assistance from the court. The opinions of Mr Michael Karlin of Karlin & Peebles, LLP as the US tax expert and Mr Trevor Emslie SC of Pump Court Tax Chambers as the South African tax expert were before the court. The court also had the benefit of the affidavit of Christopher Sharman of Oak Trust (Guernsey) Limited, the current trustee of the A Trust dated 6 April 2023, the affidavit of Helen dated 6 June 2023 and the affidavit of Marcus Raymond Prevel of Suntera Private Wealth (Guernsey) Limited in its capacity as trustee of the HKS Future Gen Trust dated 9 June 2023. Extensive oral and written submissions were made by the parties save that the Fourth Respondent which is a company wholly controlled by the Applicant was not represented but was joined to ensure that it was bound by any orders in relation to its powers.

The Trust Instrument

14. The Trust Instrument provides in its definition clause: (clause 1.1) that the Third Party Consent Holder ("TPCH") means HKS2 or

".....in the event of its dissolution; any other person appointed by deed delivered to the Trustees and executed by the Grantor while she is alive and not under an incapacity specifying the order in which any one or more person shall serve as a Third Party Consent Holder; provided that no Person shall serve as the Third Party Consent Holder hereunder unless such a Person is a "related or subordinate party" with respect to the Grantor within the meaning of section 672(c)."

15. Section 672(c) refers to the section in the United States Inland Revenue Code ("IRC") which defines "related or subordinate party" as:

"any nonadverse party who is –

IRC paragraph 672(c)(1) – the grantor's spouse if living with the grantor;

IRC paragraph 672(c)(2) – any one of the following: The grantor's father, mother, issue, brother or sister; an employee of the grantor; a corporation or any employee of a corporation in which the stock holdings of the grantor and the trust are significant from the viewpoint of voting control; a subordinate employee of a corporation in which the grantor is an executive."

16. IRC Section 672(c)(2) also provides that, for the purposes of IRC section 672(f) and sections 674 and 675:

“...a related or subordinate party shall be presumed to be subservient to the grantor in respect of the exercise or nonexercise of the powers conferred on him unless such party is shown not to be subservient by a preponderance of the evidence.”

17. Clause 5 of the Trust Instrument provides:

“The Trustee shall stand possessed of the Trust Fund:

(a) Upon trust during the Trust Period to pay appropriate or apply the whole or such part of the income of the Trust Fund as the Grantor, with the prior written consent of the Third Party Consent Holder, may direct.”

18. Clause 7 of the Trust Instrument provides:

“Notwithstanding anything herein contained in this Settlement:

(a) no trust power or provision hereby or by law conferred on the Trustee shall be exercised and no part of the income or capital of the Trust Fund shall be paid or lent to or settled on or applied in such a way for the benefit either directly or indirectly of any Excluded Person in any circumstances whatsoever or in any way that could benefit any Excluded Person.”

19. Clause 13 provides that:

“13.1 The Trustee shall exercise (or refrain from exercising) the trusts powers and discretions vested in it as the Trustee shall think fit for the benefit of all or any one of more of the Beneficiaries (or in the case of the power to add beneficiaries in the interests of any one or more of the person who may be added as a Beneficiary) and for the advantage of one at the expense of another or for the benefit of any one or more of them without being obliged to consider the other or others.

13.2 Subject to clause 13.1 and clause 24 every discretion vested in the Trustee shall be absolute and uncontrolled and every power in the Trustee shall be exercisable at its absolute and uncontrolled discretion and the Trustee shall have the same discretion in deciding whether or not to exercise any such power.”

20. Clause 27 provides that:

“Subject always to clauses 7 and 30 and notwithstanding anything else herein contained to the contrary, the Trustee shall have power by irrevocable Deed during the Trust Period to make any additions alterations or deletions to the trusts powers and provisions of this Settlement (whether of a dispositive or administrative nature) which the Trustee considers in its absolute discretion to be for the benefit of any one or more of the Beneficiaries and any such Deed shall specify the date from which such additions alterations or deletions shall take effect, which date may not be earlier than the date of such Deed.”

21. Clause 30.1 provides that:

“During the life of the Grantor and before the expiry of the Trust Period, the Grantor shall have the power to revoke this Settlement in whole or in part by deed signed by the Grantor and delivered to the Trustees and, in the case of a partial revocation, specifying the trust property to which such revocation applies. Any such deed need not take effect immediately, may be amended in like manner before it takes effect, and may be contingent upon the occurrence or non-occurrence of any event. Immediately upon the effective date of any such revocation, title to the trust property to which such revocation applies shall be vested absolutely in the Grantor.”

22. Clause 30.2 provides that:

“It is the understanding of the Original Trustee that this Settlement as currently constituted shall be (i) treated for United States Federal income tax purposes as a trust described in Section 672(f)(2)(A)(i) of the Code and (ii) classified as a “foreign trust” within the meaning of Section 7701(a)(31)(B) of the Code.”

23. Clause 30.3 provides that:

“The Grantor shall have the power by deed delivered to the Trustees and executed by the Grantor while she is alive and not under an Incapacity to grant a general power of appointment (within the meaning of Section 2041 of the Code) over all or any portion of the Trust Fund to any descendant of hers, provided that no such power of appointment shall be exercisable by any such descendant while such descendant is a resident of the United States of America (“US”) for purposes of the US estate, gift, and generation-skipping transfer taxes. Any such grant of a general power of appointment may be revoked by the Grantor in like manner before it is exercised, need not take effect immediately, and may be contingent on the occurrence or non-occurrence of any event.”

24. Clause 30.4 provides that:

“The exercise of the Grantor’s powers conferred under this Clause 30, whether by the Grantor herself or by a person who has unrestricted authority to exercise such power on her behalf while she is under an incapacity, shall be of no force or effect unless it shall have attached the written consent thereto of the Third Party Consent Holder.”

25. Paragraph 4 of Schedule 1 provides that:

“4. Trustee not bound to interfere in business of Company in which Settlement is interested

4.1 *The Trustee shall not be under any duty nor shall the Trustee be bound to interfere in the business of any Company in which this Settlement is interested and in particular:*

(a) the Trustee shall not be under any duty to exercise any control the Trustee may have over or to interfere in or become involved in the administration management or conduct of the business or affairs of any Company in which this Settlement is or may be interested whether or not this settlement holds the whole or a substantial proportion of the shares carrying the control of the Company and without prejudice to the generality of the foregoing the Trustee shall not be under any duty to exercise any voting powers or rights of representation or intervention conferred on the trustee by any of the shares in respect of such Company;

(b) the Trustee shall leave the administration management and conduct of the business and affairs of such Company to the Officers and other persons authorised to take part in the administration management or conduct thereof and the Trustee shall not be under any duty to supervise such Officers or other persons so long as the Trustee does not have actual knowledge of any dishonesty relating to such business and affairs on the part of any of them; and

(c) the Trustee shall assume at all times that the administration management and conduct of the business and affairs of such Company are being carried on competently honestly diligently and in the best interests of the Trustee in its capacity as shareholder or howsoever the Trustee is interested therein until such time as it shall have actual knowledge to the contrary and so that the Trustee shall not be under any duty at any time to take any steps at all

to ascertain whether or not the assumptions contained in this paragraph 4.1 are correct.

4.2 *Without prejudice to the generality of the foregoing the Trustee shall be under no duty:*

(a) *to exercise any rights or powers (whether available to it as shareholder debenture holder or otherwise) enabling it to appoint or elect or to remove an Officer or other person authorised to take part in the administration management or conduct of the business or affairs of such Company and in particular the Trustee shall not be under any duty to take any steps to see that any Trustee or any Officer or nominee of the Trustee becomes an Officer of such Company; or*

(b) *to exercise any power to require the payment of a dividend or other distribution of profit and whether of an income or capital nature.”*

Schedule 4 defines “Excluded person” as

“The Trustee and its Officers each in their respective personal capacities Catherine Jane Craig Stewart (provided that she shall not be an Excluded Person for the purposes of the exercise of any personal powers held by her (if applicable) under this Settlement).”

Legal Principles

26. The parties agree that when dealing with the construction of a Guernsey trust, the court should follow the guidance set out by the Court of Appeal in *In the matter of the K Trust* [2020]GCA080 at paragraph 13 endorsing the summary of Bailiff Collas contained in his Royal Court judgment in the same matter at paragraph 10:

“10.....The aim is to establish the presumed intention of the Settlor from the words used in the Trust Instrument, construed against the background of the surrounding circumstances or matrix of facts existing at the time the... Trust was created, the critical provisions being read in the context of the document as a whole, giving words their ordinary meaning as far as possible. When comparing different constructions, a construction that leads to a very unreasonable result would be relevant; the more unreasonable the result, the less likely it would represent the Settlor's intention. In looking at the matrix of facts, evidence of subjective intention, drafts and other matters extrinsic to the Trust Instrument is inadmissible.”

27. Further the parties agreed that the court should also take into account the approach of Commissioner Page at paragraphs 62 and 63 of *In the Matter of the Internine and Intertraders Trusts* [2005] JLR 236 which were cited with approval as also representing the law of Guernsey by the Court of Appeal in *In the matter of the K Trust* (*ibid*) at paragraphs 30-31:

“62. The correct approach to the task before the court is to a large extent the same as it is for any instrument the meaning of which is in contention:

(i) *the aim is to establish the presumed intention of the maker(s) of the document from the words used: in the present case, there being no settlor-signatory, the maker must be taken in each case to be the trustee - or possibly the trustee and Sheikh Abdullah as the parties to the letters of instruction which conferred authority on the trustees to execute the declarations of trust (it makes little difference which in the present case);*

(ii) *words must, however, be construed against the background of the surrounding circumstances or “matrix” of facts existing at the time when the document was executed – a principle that has been a bedrock of English law since the*

judgment of Lord Wilberforce in Prenn v. Simmonds ([1971] 1 WLR 1381) and appears now to have been accepted as also properly reflecting the approach that this court should adopt in relation to such matters;

- (iii) *the circumstances relevant and admissible for this purpose are those that must be taken to have been known to the maker at the time or, where there are more than one, known to the makers of or the parties to the document, and include (to use the language of Lord Hoffmann in Investors Compensation Scheme Ltd. v. West Bromwich Bldg. Socy. ([1998] 1 W.L.R. 896, at 913), from whose speech only Lord Lloyd of Berwick dissented) – “. . .absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man”;*
- (iv) *evidence of subjective intention, drafts and negotiations and other matters extrinsic to the document in question is inadmissible, as is evidence of events subsequent to the making of the instrument (evidence of this kind being relevant where an estoppel is said to arise but not in this jurisdiction, unlike some others, as an aid to construing the original meaning of the document);*
- (v) *the critical provisions, cll. 2(b), 6(c) and 6(f), as with all words and phrases, have to be read in the context of the document as a whole;*
- (vi) *words should as far as possible be given their ordinary meaning: “Loyalty to the text of a commercial contract, instrument, or document read in its contextual setting is the paramount principle of interpretation”: per Lord Steyn in Society of Lloyd’s v. Robinson ([1999] 1 W.L.R. 756, at 763); and*
- (vii) *this last precept may, however, have to give way if consideration of the document as a whole, having regard to the principles set out above or common sense, points to a different conclusion: “common sense” in this context being best reflected by the passage from the speech of Lord Reid in Schuler (L.) A.G. v. Wickman Machine Tool Sales Ltd. ([1974] A.C. 235, at 251) in which he observed:*

“The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear.”

(See also Lord Steyn, again in Society of Lloyd’s v. Robinson ([1999] 1 W.L.R. 756, at 763), and Lord Hoffmann’s observations in the Investors Compensation Scheme case concerning the need, on occasion, for a court to accept that the parties must have used the wrong words or syntax.)

63. It is also elementary, first, that when attempting to discern the true meaning of a power conferred in a trust deed or other instrument the court must have regard to the nature of the deed and the purpose for which the power appears to have been granted – though this will depend to a large extent on the terms of the instrument itself; and secondly, that a power of amendment reserved in a trust must be exercised for the purpose for which it was granted and not for one beyond the contemplation of the makers of the original instrument (Lord Steyn (ibid.), citing Hole v. Garnsey [1930] A.C. 472.).”

28. Also, the parties agreed that it is the objective meaning that must be determined as recently confirmed in Grand View Private Trust Co Ltd and another v Wong and others [2022] UKPC 47 at paragraph 57 where Lord Richards says:

“The familiar approach to the construction of legal documents applies to the construction of a trust deed as it does, for example, to contracts, with the necessary modification that it is the intention of the settlor (or, in the present case, the Founders), rather than the intention of contracting parties, which is to be objectively determined by the terms of the instrument, construed in light of the circumstances in which it was made.”

29. As the parties set out in the submissions, there are three types of powers: beneficial, limited and fiduciary powers. In Representation of Centre Trustees (CI) Limited [2009] JRC 109 the Jersey Royal Court sets out a useful summary of the powers which I gratefully adopt:

“In broad terms, those classifications can be described as follows. Beneficial powers can be exercised in any way for the benefit or purposes of the donee, as the donee wishes without restriction. Limited powers must be exercised in good faith for the purposes for which they are given. They differ from beneficial powers in that they are conferred for the benefit of one or more of the beneficiaries other than the donee. The constraints on the exercise of a limited power are expressed in the doctrine of a fraud on a power. An exercise of the power can be impeached for example if it was made for a corrupt purpose, such as for the benefit of the donee himself. Fiduciary powers are a class of limited powers. The significance of the distinction, which according to Lewin has been elaborated in a recent authority, is that the donee of a fiduciary power owes a duty to the objects of the power to consider from time to time whether and how to exercise it and they have various remedies open to them if the donee does not or cannot do so. He is not bound to exercise it merely by virtue of its being a fiduciary power, the duty being to consider its exercise, although in the case of what is called a trust power he is bound to exercise it. If he does exercise it, the donee is subject to the doctrine of a fraud on a power, in the same way as the donee of non-fiduciary limited power.”

30. The parties were also largely agreed that I should adopt the principles set out in Grand View Private Trust Co Ltd v Wong (ibid) when considering the scope of the powers contained in the Trust Instrument although there was some difference in emphasis. Paragraphs 54 and 55 of Grand View Private Trust Co Ltd v Wong (supra) identify two stages: first determine, as a matter of construction, the scope of the power and then whether the exercise of the power was within the terms of the power. The judgment relies on the speech of Lord Sumption in Eclairs Group Ltd v JKX Oil & Gas plc [2015] UKSC 71 at paragraphs 15 and 30:

“15...The important point for present purposes is that the proper purpose rule is not concerned with excess of power by doing an act which is beyond the scope of the instrument creating it as a matter of construction or implication. It is concerned with abuse of power, by doing acts which are within its scope but done for an improper reason.”

“30...The rule is not a term of the contract and does not necessarily depend on any limitation on the scope of the power as a matter of construction. The proper purpose rule is a principle by which equity controls the exercise of a fiduciary's powers in respects which are not, or not necessarily, determined by the instrument.”

External Materials

31. The parties did not agree on the external materials that were admissible in construing the powers in the A Trust. In this case the Trust Instrument is only signed by Suntera however the recitals state that Helen “*is desirous of making such Settlement as is hereinafter contained*” clearly identifying her as the Settlor. Thus, it is the surrounding circumstances which existed or were in reasonable contemplation of both Helen and Suntera when the Trust was settled. However, in construing the terms of the A Trust what counts is the objective meaning that the words of the document convey to the court when considered as a whole in light of the surrounding

circumstances. The intention that the court seeks is the intention as expressed at paragraph 7-005 of Lewin:

“the way in which the document is to be understood, not the purpose or motive, desire of other subjective state of mind of the settlor. The reason for the rule is that otherwise no lawyer would be safe in advising on the construction of a written instrument, nor any party in taking under it. ...”

32. The surrounding circumstances or matrix of fact includes anything which would have affected the way in which the language of the document would have been understood by a reasonable man but does not include the previous negotiations of the parties and their declarations of subjective intent (See the speech of Lord Hoffman at page 913 of *Investors Compensation Scheme Limited v West Bromwich Building Society* [1998] 1WLR 896). The Privy Council in *Grand View Private Trust Co Ltd v Wong* (*ibid*) reaffirmed this position when it said:

“The familiar approach to the construction of legal documents applies to the construction of a trust deed as it does, for example, to contracts, with the necessary modification that it is the intention of the settlor (or, in the present case, the Founders), rather than the intention of contracting parties, which is to be objectively determined by the terms of the instrument, construed in light of the circumstances in which it was made.”

33. As Lewin says at paragraph 7-011 in construing a family settlement the state of the settlor’s family is often the most relevant background information and the nature of the settlor’s assets may also be relevant. In terms of the documents, again, Lewin is useful at paragraph 7-006:

“Although the rule is called the parol evidence rule, it does not exclude oral evidence only, but all extrinsic evidence. For instance, drafts of a deed cannot be referred to in order to interpret it, nor can preliminary negotiations, nor can the written opinions of counsel who drafted a settlement be looked at to ascertain the subjective intention of the settlor. An unambiguous declaration of trust will not be altered even by a recital of the intention of the settlor, let alone by any extrinsic expressions of intent on the settlor’s part.”

34. This was dealt with recently in the Privy Council decision of *Grand View Private Trust Co Ltd v Wong* (*ibid*) and in particularly paragraph 63:

*“There was some debate before the Board as to the extent to which external materials may be admissible in determining the purpose of a fiduciary power. It was common ground, and in the Board’s view correct, that documents which objectively inform the context of the instrument in question, such as in this case the WFT trust deed, are admissible, as are substantially contemporaneous documents which are intended to be read with the trust deed, such as a letter of wishes provided by the settlor or economic settlor (although there was no letter of wishes in this case). It was common ground that, while trustees could legitimately have regard to wishes later expressed by the settlor, or in this case the Founders, as to how the trustees should exercise their dispositive powers, such wishes were not admissible in determining the purpose of those powers. There is a need for certainty, given that the terms and purpose of a trust instrument and the powers it confers create rights for beneficiaries and impose duties on trustees. Having regard to these factors and to what Lord Sumption said in *Eclairs* at para 30, the view of the Board is that the intention of the settlor in conferring a power is to be ascertained by applying ordinary rules of construction to the trust deed and in the light of the admissible factual matrix.”*

35. Taking into account this guidance, and the principles set out in *In the matter of the K Trust* (*ibid*), in the instant case the Letter of Wishes dated 25 February 2021 (the “Letter of Wishes”)

was executed three days before the A Trust by Helen. I have come to the conclusion that as this is a contemporaneous document which was intended to be read with the Trust Instrument, it is admissible, however, not as evidence of the subjective intentions of Helen but rather the state of her knowledge at the time the A Trust was made. I also consider the AACS Trust Instrument and the HMCS Trust Instrument are an essential part of the background of the A Trust along with the AACS Settlement Deed of Appointment and Retirement of Trustees dated 12 October 2004; the AACS Settlement Instrument of Amendment dated 28 February 2021; the AACS Settlement Instrument of Appointment and Indemnity dated 28 February 2021; and the Memorandum and Articles of Incorporation of HKS2.

36. However, I do not agree with Helen’s characterisation of the Step Plans which are documents created by Werksmans South African Attorneys as coming within the “*objective factual background*”. Werksmans were originally asked by David to consider the restructuring. There were various versions of the restructuring, for example it appears that as late as 19 February 2021, Werksmans proposed, on the basis of US tax advice, that Murray would be the Grantor of the A Trust. Whilst inevitably these documents do contain certain objective facts nevertheless essentially these are documents created by the South African advisers to some of the Stewart family in an iterative process of discussion and drafting leading to the creation of the A Trust along with other Trusts (the B Trust and the Future Gen Trust) which were drafted by Suntera’s Guernsey Advocates. The Step Plans are described on the face of the documents as “*strictly for illustrative purposes*” along with numerous caveats as to the scope of the document at the conclusion of the document. In my view these come within “*evidence of subjective intention, drafts and negotiations and other matters extrinsic to the document in question*”¹ and are thus inadmissible in the determining the construction of the terms of A Trust. Even if I were wrong in that conclusion, and such materials were admissible, there is nothing in this documentation which assists the Court in the determination of the issue of construction which arises for current consideration. Also inadmissible are the various pieces of advice from Werksmans, Stonehage Fleming Law USA and Withers obtained before and after the A Trust were formed.
37. With regard to the expert evidence Oak’s position was that the expert evidence is not admissible or, if admissible, not helpful to the issues before the Court, as it does not form part of the factual background, in contrast to what it must be taken was known to the parties on the subject of US tax and South African tax (based on the advice they had received) when the Trust Instrument was executed on 28 February 2021. Oak also says none of the words used in the Trust Instrument has a technical meaning in US law or South African law. Oak says there is no special meaning to “*consent*” or “*related or subordinate party*” or “*subservient*” that would displace the ordinary meaning of the words in the Trust Instrument. Oak also makes the point that although it is referred to frequently in submissions, “*subservient*” does not actually appear in the Trust Instrument at all. The other parties all relied to a lesser or greater extent on the opinions in their submissions. I have come to the conclusion that the expert evidence received from the US expert is admissible in relation to the technical meaning of the references to the United States Internal Revenue Code of 1986 (“US Tax Code”) (see Lewin 7-010). However, although I was grateful for the South African opinion from Mr Emslie SC, I consider that Oak was correct in its conclusion that this was not admissible as there were no words in the Trust Instrument which had a technical meaning in South African law.

The Issues

38. The parties having identified the issues which they consider are necessary to be answered in this application, I have used this format in this judgment on the basis that this will, I hope, be the most helpful to the parties. In these proceedings Oak adopted a neutral stance but made submissions regarding the possible answers to the list of issues.

¹ See *In the matter of the K Trust (ibid)*.

Issue 1 Factual Context

1. **By what steps was the A Trust constituted on or by 28 February 2021.**
 2. **What was the factual context in which the A Trust was constituted on or by 28 February 2021. In particular what was:**
 - 2.1 **the origin, purpose(s) and development of the Restructuring of the Old Trusts (the AACS Settlement and the HMC Settlement), which led to the creation of the New Trusts (the A Trust, the B Trust and Future Gen Trust);**
 - 2.2 **the role of relevance of US tax considerations;**
 - 2.3 **the role and relevance of South African tax considerations; and**
 - 2.4 **the relevance of the personal relationships between Helen, Caroline, Murray and of their respective financial and personal situations and of the relationships between each of them and Suntera with respect to the Restructuring and more widely.**
39. The relevant facts were largely undisputed and to an extent repeat the background that I have set out above:
- (i) The AACS Settlement was declared on 20 December 2001 by the Deceased who died on the 7 September 2018. The beneficiaries of the AACS Settlement were Alistair, Helen, Murray and Catherine and all the issue of Alistair born within the Trust Period of 100 years from 20 December 2021. The original trustee was Praxis. Suntera became sole trustee of the AACS Settlement in 2004. Alistair issued a number of Letters of Wishes, the last being dated 20 October 2014.
 - (ii) On 30 January 2019 Suntera declared a further discretionary Guernsey trust, the HMC Settlement. The beneficiaries were Helen, Murray and Catherine and the issue of Murray and Catherine.
 - (iii) Murray is unmarried and to date has no children. Catherine is married to David and has two children: Alexander who is now an adult and Clare who is still a minor.
 - (iv) Helen who is now in her mid-80s has had concerns about Murray's financial prudence. The origin of the decision to restructure the AACS and HMC trusts was an intention to create a fund of USD15 million for Murray to give him a degree of financial independence during Helen's lifetime.
 - (v) Correspondence variously between Suntera, Helen and Murray and/or their respective legal advisers shows that this \$15 million fund was in discussion on and off from the end of 2019 until the A Trust was settled on 28 February 2021.
 - (vi) Relations between Murray and Suntera deteriorated in 2020. Although Suntera consistently denied there was any reason for Murray to lose trust and confidence in Suntera, Suntera accepted that this is what happened. The loss of Murray's trust and confidence in Suntera was triggered in part from the abortive purchase of a property in South Africa resulting in Murray's application to remove Suntera being foreshadowed in correspondence in April 2020.
 - (vii) Werksmans, who are South African attorneys, were engaged to advise on the restructuring by the Stewart Family (not including Murray) and Suntera. After they had reviewed the AACS structure and related entities and assets, over the proceedings months they provided a number of documents which they described as "Steps Plans". These show the development of the plans for the restructuring from

April 2020 up to February 2021. Werksmans produced a formal letter of advice dated 24 February 2021.

- (viii) HKS2 was formed on the 24 February 2021 for the benefit of the soon to be settled A Trust.
- (ix) On 28 February 2021, the terms of the AACS Settlement were amended to grant Helen a limited power of appointment, subject to the consent of a consent holder, that consent holder being HKS Limited (a company incorporated in Guernsey, wholly owned by the AACS Settlement). HKS Limited was the owner of the investment portfolio held with Canaccord Genuity. On 28 February 2021, Helen exercised her limited power of appointment with the consent of HKS Limited and appointed USD 15 million previously held by the AACS Trust to the A Trust. She also appointed the entire issued share capital of HKS2 to the A Trust. Helen is defined as the Appointor in the Instrument of Appointment and Indemnity.
- (x) Murray is the only named beneficiary of the A Trust. The other beneficiary of the A Trust is Suntera as trustee of the Future Gen Trust (whose beneficiaries are Helen, Catherine's children and any remoter issue). A similar sized fund to the A Trust was created for Catherine with her children as beneficiaries known as the B Trust. The Future Gen Trust is the third fund formed out of the AACS and HMC Trusts with trust property of approximately USD 85 million.
- (xi) Helen, Murray, Catherine and her children are all resident in South Africa but Catherine's children are citizens of the US. Helen has said at various times that she may wish to relocate to the US one day. Although Helen has speculated that Murray may relocate to the US this is not agreed by Murray and there is no evidence other than Helen's belief that he may one day relocate there. The tax implications of these factors were built into the A Trust based on the advice received from Werksmans. Werksmans in turn appears to have obtained US tax advice on the structure.
- (xii) Werksmans advice was for the A Trust to be structured so as to qualify for what is known as Foreign Grantor Trust² status under US tax law and that it was possible to do this whilst still being structured in a way that did not adversely impact on tax in South Africa and whilst remaining a Guernsey Trust.
- (xiii) In order for the A Trust to qualify as Foreign Grantor Trust, the Trust Instrument gives powers to the Grantor (i) to revoke the Trust and (ii) to pay or apply all or part of the income of the Trust to any of the Grantor's descendants. To ensure that this power did not adversely impact on tax in South Africa (otherwise the Grantor's powers would be treated as valuable rights and the party holding those rights including the power of appointment would be taxed as the owner of the Trust assets), the Trust Instrument provides that the Grantor's powers are subject to the consent of TPC. HKS2 is appointed as the TPC in the Trust Instrument. Helen is defined as the Grantor in the Trust Instrument.
- (xvi) Suntera is the only party to the Trust Instrument and was the original trustee (the "Original Trustee"). The A Trust is a fully discretionary Guernsey trust. Following the removal of Suntera, Oak was appointed as trustee ("Trustee") on 22 March 2023.
- (xv) HKS2 is a Guernsey company and is a wholly owned subsidiary of the A Trust. HKS2's director is Oak Directors Limited part of the same group as the Trustee. This reflects a similar arrangement that was in place when Suntera was Trustee. Oak also acts as administrator.

² Mr Karlin's opinion makes clear that this references to "grantor trust" is a widely used shorthand and not defined under the US Tax Code (see footnote 3).

- (xvi) HKS2 was incorporated on 24 February 2021 registration number 68853. Suntera as Nedgroup Trust Limited was registered as the holder of the only issued share on that date. From 14 April 2021 that share was held expressly on trust by Suntera as trustee of the A Trust. HKS2 has standard form articles of association. Suntera as trustee for of the A Trust loaned USD 15,000,000 to HKS2 (there is no formal loan documentation) although there is a HKS2 Board minute ratifying and approving the loan from the A Trust (dated 28th 2021 (sic)). The money is invested on behalf of the Trustee through Canaccord Genuity.
 - (xvii) Helen executed a Letter of Wishes 3 days before the A Trust Instrument was settled.
 - (xviii) The A Trust is a discretionary trust with the trustee having a complete discretion as to the distribution of income and capital to the beneficiaries as defined in Schedule 3 of the Trust Instrument. Catherine is excluded from the A Trust and Murray is excluded from the B Trust. Both Catherine and Murray are excluded from the Future Gen Trust.
 - (xix) Although Murray knew that the AACS and HMC trusts were being restructured, he was not involved in the restructuring and was provided with the draft trust deed for the A Trust on 25 February and asked to comment by the next day due to South African tax consequences if the restructuring was not completed by then. He was not asked to comment on the remaining restructuring.
40. There is still contention about whether Murray is the primary or principal beneficiary of the A Trust. However, I have already found in my *extempore* judgment dated 19 December 2022 that whilst Murray may not be defined as the principal beneficiary, nevertheless it is evident from the Trust Instrument and the Letter of Wishes, that the intention is that the trustee of the A Trust is to consider his needs during his lifetime. When the A Trust was settled, the focus was to set up a discretionary trust of which Murray was primarily able to receive income but also potentially capital. However, it is also correct that it is a dynastic trust with an expectation that capital will benefit the next generation.

Issue 2: Exercise of the Powers under clause 30 of the Trust Instrument

- 3. As a matter of construction of the Trust instrument in the relevant factual context and/or under general law, are the powers held by Helen under clause 30.1 (power of revocation) and clause 30.3 (power to grant a GPOA to any descendant of hers (Power to Grant)) subject to the proper purposes rule. In particular, is the Power to Grant fiduciary, limited or beneficial in nature and/or is the power held as nominee or bare trustee.**
 - 4. If so:**
 - 4.1 what was Helen’s purpose when she exercised the Power to Grant; and**
 - 4.2 is that purpose one for which the Power to Grant may be validly exercised.**
 - 5. In view of the answers to issues 3 and 4, is Helen’s exercise of the Power to Grant capable of being valid, if consented to by HKS2 Limited.**
41. By the time of the hearing the parties agreed that Helen’s power of revocation was an unlimited personal or beneficial power to which the proper purpose rule does not apply (see paragraph Lewin 33-012). This means that she has “*an absolute disposing power*” over the property. (Thomas on Powers at paragraph 1.16). Under such a power, the donee can make the property his or her own and do as he or she pleases. The proper purpose rule does not apply (see Lewin 33-012). The requirement to obtain consent of HKS2 does not impact on the construction of Helen’s own power under clause 30.1.

42. However, there remains considerable dispute between the parties about the nature of Helen's power under clause 30.3 of the Trust Instrument. Suntera's position is that this power is a special power which is limited but not fiduciary in nature. Oak says that the power under clause 30.3 is a special power due to the limitations placed on the objects of the power. It says it is not necessary for the donees of the grant to be limited to the beneficiaries of the trust for it to be special or limited power. Rather only that it be limited to a class of objects. In this case clause 30.3 sets out that the object of the power must be a descendant of Helen. As a special or limited power it is subject to the proper purpose rule which means that it "*can be exercised only for the purpose for which it is conferred, and not for any extraneous or ulterior purpose*". (see paragraph 60 Grand View Private Trust co Ltd v Wong (*ibid*)).
43. Oak also submits it means that Catherine as the object of the special power cannot be bound by the Grantor to exercise the power in a particular way. If it exercised other than for the purpose for which it was conferred, then it is void. I must consider Helen's subjective state of mind when she purported to exercise the power.
44. Helen says it is wrong to construe Helen's power under clause 30.3 in isolation. The existence of a power of revocation in her favour under clause 30.1 is important context when construing the provisions of the Trust Instrument as a whole. The inclusion of this provision points to the clear and significant importance of Helen's role in determining the future of the A Trust. Further the context of the A Trust is that it is Foreign Grantor Trust under US Tax law and the drafting has been deliberate to ensure that the construction of the A Trust is interpreted in that context. Helen refers to the reference within clause 30.3 to the meaning of general power of appointment being "*within section 2041*". This is a reference to a section of the US Tax Code and she says that the court must look at that code to construe the meaning of "*a general power of appointment*". She relies on the wording of section 14(2) of the Trusts Law which provides that there is an exception for the general rule that Guernsey law governs all questions relating to a Guernsey Trust, where there is an express provision to the contrary in the terms of the trust. She says that the reference to section 2041 of the US Tax Code is such an express provision. Section 2041 defines a general power of appointment as "*a power which is exercisable in favour of the decedent, his estate, his creditors, or the creditors of his estate*". She says that the reference in section 2041 to a "*decedent*" cannot have been intended to apply literally and this must be read within the context of clause 30.3 which provides for the power to be exercised in favour of the Grantor's "*descendant*". The effect being that the class of persons to whom Helen can grant the general power of appointment includes persons who are not beneficiaries of the A Trust. She says that it is expressly stated to be a general power of appointment which does not require Helen to consider the interests of anyone else. She says that the holder of a general power of appointment is free to appoint to himself or herself without considering the interests of anybody else and relies on paragraph 33-003 of Lewin:

"The distinctive feature of a general power is that the donee is free to appoint to himself without considering the interests of anyone else. It is a power to call for the property subject to the power for the donee's sole benefit. The donee is under no duty to exercise or to consider exercising the power. It is therefore akin to ownership, and for some purposes is treated as equivalent to ownership, but it remains a power and not property."

45. Further she says that this is more likely to be a beneficial power because it doesn't have to be exercised in favour of someone who is a beneficiary (although she says it does not matter much in the circumstances of this case). She also says the person to whom the general power of appointment may be granted does not require the consent of anybody else in order to exercise that power. There is no such express requirement in clause 30.3 itself and a general power of appointment would not fall within section 2041 of the Code if such a power did require the consent of the creator of the power or someone with a substantial interest in the property. If it is a beneficial power, then it is not subject to the proper purpose rule.

46. However, she says that if the power in clause 30.3 is a limited power, then she accepts it must be exercised in good faith for the purposes for which the power is given and would be subject to the proper purpose rule.
47. If I find that the proper purpose rule does apply to clause 30.3 the parties all agree that the effect of the proper purpose rule is that the power cannot be exercised for an improper purpose. The exercise of the power:

“...can be impeached if (i) it was made for a corrupt purpose, such as the benefit of the donee himself, (ii) it was made pursuant to a previous agreement between the donee and the appointee for a person who was not an object to receive a benefit or (iii) it was made for a purpose foreign to the power, even if not communicated to the appointee.” (Lewin paragraph 28-017).

The exercise of the power contrary to the rule will make its exercise void.

48. It was agreed by the parties that the evidence of the purpose of the exercise by Helen is found in the correspondence dated 10 July 2022 from Helen to Nathan Lihou of Suntera when she sought the exercise of the clause 30.3 resulting in Suntera’s August Application, a letter from Carey Olsen dated 12 December 2022 and her affidavit. There is however sharp disagreement about whether this shows an improper purpose or otherwise and also whether clause 7(b) of the Trust Instrument applies to the Grantor’s powers in clause 30.
49. Helen says her purposes which she set out in the correspondence to Suntera and then through the Carey Olsen letter were plainly within the purposes of the power in clause 30.3 and are valid. Reducing litigation is a proper purpose and a Star Trust would help manage the conflict. This is not about preventing Murray from benefitting from the Trust assets.
50. She says the court needs to take the approach of ascertaining “the mischief” as identified at paragraph 61 of *Grand View Private Trust Co Ltd v Wong* (*ibid*):

“61. It is common ground on this appeal that the proper purpose, or purposes, of a fiduciary power is to be determined as at the date of the instrument conferring the power and is to be objectively determined. In the case of a settlement such as the GRT trust, it is a question of determining objectively the intention of the settlor (or in this case the Founders). In Eclairs, Lord Sumption considered the approach to be adopted at [30]:

"Ascertaining the purpose of a power where the instrument is silent depends on an inference from the mischief of the provision conferring it, which is itself deduced from its express terms, from an analysis of their effect, and from the court's understanding of the business context".

51. Helen says clause 30.3 enables the Grantor to put in place a mechanism for the Trust assets to be appointed out of the A Trust, which is what Helen wishes to achieve. She says she wishes to use the power to enable the A Trust to be replaced with a different type of trust, albeit with similar beneficial interests; but if she wished to, the clause is wide enough to bring an end to the A Trust and the beneficial interests in the trust property. She says there is no corrupt purpose here of intending to benefit herself through the exercise of the general power of appointment nor is the general power of appointment being exercised pursuant to an agreement in order to benefit a person who was not the object of the general power of appointment. She says that the object of the appointment is to benefit the same class of persons but through a different trust structure. It is not made for a purpose foreign to the power. The purpose is to bring about an end to the A Trust in order to replace it with a different trust structure to benefit the same class of persons. Helen’s powers under clause 30.3 should not be treated in isolation and must be read alongside and be consistent with all of her powers. The existence of a power of revocation in her favour under clause 30.1 is in and of itself important context when construing the provisions of the trust instrument as a whole. It points to the clear and significant importance of Helen’s role in determining the future of the trust.

52. Helen says that the restrictions contained in clause 7 of the Trust Instrument do not apply to the exercise of the Grantor's powers but to the exercise of the Trustee's powers.
53. In relation to the latter issue Oak in written argument agreed with Helen that it applies only to powers vested in the Trustee and not to powers vested either in the Grantor or the TPC. However, during the course of the oral hearings it moved to a position that it agreed that there was a tension in the wording of clause 7(b) which appeared to go beyond the exercise of only the Trustee's powers where it reads "*and no part of the income or capital...*" etc.
54. Murray does not say that it is a special power but that it is broadly analogous to a special power of appointment. Helen can, subject to HKS2's consent, confer the benefit of the grant on her descendants. Murray's position is that clause 7 of the Trust Instrument which is headed as an "*Overriding Exception*" creates a broad prohibition of benefitting an Excluded Person whether through the use of the general power of appointment or otherwise. The "*and*" and subparagraph (ii) of clause 7(b) contemplates that various matters would be contrary to Trust Instrument and go beyond the exercise of only the Trustee's powers. The wording is very broad and includes actions unrelated to the Trustee. He says that this makes sense in a deed that confers powers on the Trustee and on others i.e. the Grantor. He also argues that consistency between what the Trustee can do and what the Grantor can do makes sense. A general power of appointment is tantamount to bestowing ownership of the trust assets. It would be illogical, he says, for the Trustee not to be permitted to benefit Catherine as an Excluded Person and yet for it to be permissible for the Grantor to exercise a power of appointment to Catherine which will give her the ownership of the same Trust assets.
55. Murray says that in any event Helen's proposed exercise of the use of the power is for an improper purpose. The mischief is that she is dictating the exercise of the power of appointment in a way which she cannot do under the terms of the A Trust. Helen can only exercise clause 30.3 to benefit her descendants and not herself. However, "*the plan*" as she calls it in her affidavit or "*the purpose of appointing the assets*" as she sets in the Carey Olsen letter means that she is deciding how the power of appointment is to be used by Catherine when she does not have the power to do this. Murray relies on the *Re Turners Settled Estates*:
- "But if the Court finds not only that there was an antecedent contract, but that that contract was the causa sine qua non of the appointment, or, to use the language of Lord Romilly in Birley v. Birley (2), " the reason of the appointment being made to the appointee," or, to use the language of Lord Justice Knight Bruce in Pryor v. Pryor (3), " if the just result of the evidence is that the appointment would not have been made but for the bargain," then the case is different, and the appointment is bad."*
56. Murray says that there is "*an overt and predetermined intention*" as to how the general power of appointment would later be exercised and that Helen's expectation would be far more than a "*hope*" that Catherine would act. This is the reason why the general power of appointment is being exercised and is an improper purpose based on Helen's own evidence. What Helen complains about and gives as the reasons behind the plan are structural tensions and the use by Murray of the Court's supervisory jurisdiction. It is not a proper exercise of her power to bring an end to this trust. The primary purpose of the A Trust is to be a trust not an abstract tax efficient device. This is supported by the Letter of Wishes which goes to the purpose of the A Trust which is for the benefit of the beneficiaries of the A Trust by way of income and capital.
57. Oak also considers that taking into account reasons expressed by Helen for her attempt to exercise the Grantor's power, the exercise is unlikely to be valid. Namely: in exercising the power of appointment against Murray's wishes when he is the primary beneficiary; that she is seeking to exercise her power in response to Murray's attempts to obtain the Court's assistance in the removal of Suntera as trustee of the A Trust, the appointment of Oak in Suntera's place and the transfer of the trust assets to Oak, all of which were successful; that she is doing so to prevent future litigation by him in relation to the Old Trusts or the New Trusts, whatever its merit; her intention to transfer the assets of the A Trust to Catherine, who is not a beneficiary

of the A Trust or of the Future Gen Trust and is an Excluded Person in respect to both of those trusts; to ensure that Murray ceases to have any ability to enforce any trust for his benefit that Catherine may choose to create in future; and in the context of open hostility between Helen and Murray.

58. Suntera submits that clause 30.3 is drafted specifically so as to ensure (so far as permissible) that the A Trust is treated as a Foreign Grantor Trust. The provisions of clause 30.2 are also significant in this respect where it says that “[i]t is the understanding of the Original Trustee that this Settlement as currently constituted shall be (i) treated for United States Federal income tax purposes as a trust described in Section 672(f)(2)(A)(i) of the Code and (ii) classified as a “foreign trust” within the meaning of Section 7701(a)(31)(B) of the Code.” Suntera also says that paragraph 3.6 of the Letter of Wishes is relevant to considering the purpose of clause 30.3:

“It is also my wish that the HKS Future Gen Trust should be the primary capital beneficiary of [the] HKS Second Gen A Trust, with the intention that the capital of the HKS Second Gen A Trust and the balance of its income should be transferred to the trustees of the HKS Future Gen Trust in the event of Murray's passing or in the circumstances contemplated in 6 or 7 below, in order to benefit future generations of the Stewart family (which will include Murray's descendants if any).”

59. Relying on this paragraph Suntera says that the exercise of the power of appointment to Catherine by Helen is quite clearly in the interests of the A Trust and of the future generation of beneficiaries under the HKS Future Gen Trust to prevent Murray using the A Trust funds recklessly (see Carey Olsen letter 12 December 2022). Murray’s case shows an inability to recognise any interests apart from his own and this further shows that the concerns of the Helen are well-founded.
60. Suntera agrees with Helen that clause 7(b) only applies to the exercise of power by the Trustee and not by Helen as Grantor. The purpose of clause 7(b) is to preclude the Trustee from taking positive steps to benefit an Excluded Person: it cannot be read as placing a positive duty to intervene to prevent an Excluded Person from benefiting. Schedule 4 carves out that Catherine is not an Excluded Person for the purposes of the exercise of any personal powers held by her (if applicable) under A Trust. The appointment proposed by Helen would be an exercise of a personal power by her and is thus permitted.

Discussion

61. The AACS Trust did not have a role for a grantor, nor did it have the role of consent holder until the role of consent holder was added by the Instrument of Amendment executed on the same date as the settlement of the A, B and Future Gen Trusts. By the Instrument of Amendment Helen’s power to appoint out of the AACS Trust was limited to USD15 million to any one or more individuals or organisations including but not limited to “*herself her estate her creditors and the creditors of her estate*”. Catherine was given a power of appointment in relation to the balance of the AACS Trust. Both powers of appointment were subject to the prior or simultaneous consent of HKS Ltd.
62. The full provisions of clause 30.3 of the A Trust are set out above. In terms it gives Helen the power by deed to grant a general power of appointment (within the meaning of the section 2041 of the IRS code) over all or any portion of the Trust Fund to any descendant of hers. Therefore, although it is referred to as a general power of appointment, it contains restrictions on who can be the donee of such a power and these do not include Helen herself. Therefore it cannot be a general power of appointment as described at paragraph 33-003 of Lewin however, I agree with Helen that it is my task to ascertain the meaning of the clauses at the time that the instrument was made (see paragraph 61 of *Grand View Private Trust Co Ltd v Wong (ibid)*).
63. Paragraph 1.17 of Thomas on Powers sets out that:

“A special power (sometimes referred to as a limited power) ...is generally defined as a power which can be exercised only in favour of certain specified persons or classes, such as children, issue or relations.”

64. In Lewin paragraph 28-017 it says:

“A special power of appointment is an example [of a limited or restricted power] being a power to appoint a beneficial interest to a given beneficiary or one or more of a class of beneficiaries.”

65. Whilst this paragraph of Lewin refers to beneficiaries, contrary to the submissions of Helen, I do not consider that these are references which are limited to the beneficiaries of a trust but rather the persons who should benefit from the appointment. This is made clearer by paragraph 33-017 where it says:

“Special powers of appointment confine the donee by restricting his choice to the members of a class of objects, identified either by name or by description, e.g. the issue of X. The class may be very wide but it remains a special power.”

66. The A Trust is foremost a discretionary Guernsey Trust. However, it has been structured to qualify as a Foreign Grantor Trust under U.S. tax law³ as it says at clause 30.2 *“for US income tax purposes”* but not as the prism through which the entire settlement is seen and interpreted. Further it also has features such as the TPCCH so in order to ensure that those provisions do not undermine the status of the A Trust under South African tax law. Thus although clause 30.3 refers to Section 2041 of the US Tax Code, as a matter of construction I consider that this is another signpost that the intention is that it qualifies as a general power of appointment under the Code for US income tax. However, it does not incorporate the terms of the Code into the A Trust nor does it change the nature or the terms of the power under clause 30.3 which is more limited than the objects permissible under the Code (which would include Helen herself and her creditors).

67. The Letter of Wishes does not address the issue of the Grantor’s power but perhaps that is unsurprising as it is addressed to the Trustee. However, relevantly the Letter of Wishes shows that at the time of the settlement of A Trust that this was a dynastic trust where the family was already in dispute. It is also useful in terms of evidencing the Settlor’s understanding of the relative importance or otherwise of the tax consequences in the operation of the A Trust. Tax is limited to a paragraph requesting that *“the Trustees take such steps from time to time as they deem advisable in order to mitigate the issue of taxation on the HKS Gen A Trust and/or any other beneficiaries under the HKS Second Gen A Trust (primarily Murray)”*. It also places the mitigation of tax for Murray first.

68. The objects of the clause 30.3 appointment are limited in the clause to the descendants of Helen and do not include Helen herself. The objects are certain and unambiguous. The clause further limits the exercise of the appointment such that it cannot be exercisable by any descendant whilst he or she is resident in the U.S. Thus, Helen cannot benefit whomever she wants under this clause and by these restrictions it cannot be said to be akin to ownership. The prescribed

³ Mr Karlin’s opinion informs us that the terms “grantor trust” and “non-grantor trust” do not appear in the Internal Revenue Code. Rather, “grantor trust” is a widely used shorthand way to refer to a trust where the grantor is treated for tax purposes as the owner of the trust income and, in most cases, the owner of the trust assets. A grantor trust is one where the grantor retains certain rights or powers, such as the right to receive income without the consent of an adverse party, some less obvious such as the right of the grantor to control the disposition of trust assets or income or certain administrative powers.

Where the grantor is foreign, two rules would cause the trust to continue to be treated as a grantor trust: The first is where the trust contains a power to re-vest absolutely in the grantor title to trust property exercisable solely by the grantor either without the approval or consent of any other person or only with the consent of a related or subordinate party who is subservient to the grantor (a trust containing such a power is commonly referred to as revocable trust). The second is not relevant.

class of persons who can benefit, means that this power has the attributes of a special or limited power and not a general power. Having come to the conclusion that it is a special power or limited power, none of the parties submits that this special power is a fiduciary power. However, as Lewin sets out in paragraph 28-017, limited powers must be exercised in good faith for the purposes for which they are given. Even if exercised in good faith it does not mean that if the power is used for a purpose not falling within the purposes for which the power is conferred, its exercise can be contrary to the proper purpose rule.

69. However, Murray says that the terms of clause 30.3 do not contain all the limits on the scope of the power under clause 30.3. Therefore, I must consider whether clause 7 which is described in the Trust Instrument as an “*Overriding Exception*” applies to clause 30 or is limited, as Helen and Suntera submit, to the exercise of powers of the Trustee.
70. It is notable that clause 7 begins with the phrase “*Notwithstanding anything herein contained in this Settlement*”. Clause 30 and the Grantor’s powers have not been carved out either here or at clause 30 nor however is there a specific reference to the Grantor’s powers being included.
71. Clause 7(a) says “*no trust power or provision hereby or by law conferred upon the Trustee shall be exercised...*” From this wording it is clear that clause 7(a) of the Trust Instrument only applies to the Trustee. Thus, this would capture any payment by the Trustee to an Excluded Person under a direction by the Grantor under clause 5(a) which provides that:

“The Trustee shall stand possessed of the Trust Fund:

(a) upon trust during the Trust Period to pay appropriate or apply the whole or such part of the income of the Trust Fund as the Grantor with the prior written consent of the Third Party Consent Holder, may direct:”

72. However clause 7(b), contrary to the truncated excerpt contained in Suntera’s written submissions, after setting out “*[N]o trust power or provision hereby or by law conferred on the Trustee shall be exercised*” goes on to say “*and no part of the income or capital of the Trust Fund shall be paid or lent to or settled on or applied in such a way for the benefit either directly or indirectly of any Excluded Person in any circumstances whatsoever or in any way that could benefit any Excluded Person*”.
73. The sub-sub paragraphs set out examples where arrangements can be for the benefit of an Excluded Person. At clause 7(b)(i) these include enabling an Excluded Person if they are a Trustee or a Protector etc to receive remuneration and expenses under clause 22 and also to the release of liability under clause 20. At clause 7(b)(ii) where an Excluded Person enters into a contract with the Trustee or the beneficiaries (as defined in the A Trust) it is not deemed a benefit for the Excluded Person under the A Trust.
74. Excluded Persons is defined at clause 1.1 as “*(a) all and any persons and classes of persons specified in Schedule 4; and (b) such other persons and classes of person as are declared to be Excluded Persons in exercise of the powers conferred upon the Trustee under this Settlement*”.
75. The words used in a legal instrument are approached as being those which the maker has chosen to use to convey the intended meaning but the exercise of finding the intended meaning, when the instrument is to be construed, also requires the words to be considered in the context of the instrument, and the setting in which the instrument has been made. I consider that the methodology of Lord Hodge JSC in *Wood v Capita* which is quoted in the *In the matter of the X Trusts [2023] CA (BDa) 4 Civ* to be particularly useful here where he says at paragraph 12:

“This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: the Arnold case, para 77 citing In re Sigma Finance Corpn [2010] 1 All ER 571, para 12, per Lord Mance JSC. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its

context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.”

76. Taking this approach, the plain meaning of this clause of the Trust Instrument is that it applies to all parts of the operation of the A Trust including clause 30. I must set clause 7(b) in the context of the A Trust as a whole and in the context of the circumstances in which the A Trust was established. The purpose of the inclusion of the words “*Notwithstanding anything herein contained in this Settlement*” is to enable the reader to understand that this applies to each and every part of the Trust Instrument. If I was to adopt the construction which Suntera and Helen wish me to adopt then it would mean ignoring the plain reading of this sentence. Whilst as I have said above, clause 7(a) is directed towards the Trustee, the use of the words “*and no part of the income or capital of the Trust Fund shall be paid or lent or settled on or applied ...in any circumstances whatsoever or in any way that could benefit any Excluded Person*” in clause 7 (b) is directed at the exercise of powers of the Trustee and any other person who may be able to exercise these powers. If it was correct to read it the way Suntera and Helen encourage me to do it would mean ignoring the words that increase the scope of this section namely “*and no part of the income or capital*” and “*in any circumstances whatsoever*”. This deliberately wide inclusion must include the exercise of the clause 30.3 power of appointment to an Excluded Person as this could be exercised for the benefit to the Excluded Person “*directly or indirectly*”. I also take the view that it would mean ignoring the intention that the A Trust was formulated out of an intention to have separate funds for Murray and for Catherine as Helen set out in Helen’s Letter of Wishes and the establishment of two separate Trust Funds with Catherine and Murry being excluded from the A Trust and B Trust respectively as well as both being excluded for the Future Gen Trust. I have also considered the definition of Excluded Person in the Trust Instrument and at Schedule 4. I do not agree that the carve out in relation to personal powers means that Catherine is not an Excluded Person on an appointment by Helen. Such an appointment does not give Catherine powers under the A Trust.
77. The natural meaning of clause 7 is that the Excluded Person cannot benefit from the A Trust. If the intention had been to give effect to the meaning that Helen and Suntera contend, clause 30 could have been carved out. The fact that Helen could grant the power to other descendants including Catherine’s children does not change the construction and effect of this clause.
78. As Catherine is an Excluded Person the granting of the power of appointment under clause 30.3 to her is impermissible and outside of the scope of the Grantor’s power and is therefore void.
79. Whilst this could be the end of the matter, given the nature of family breakdown in the Stewart family, it is appropriate for me to consider the remaining issues identified by the parties.
80. From the authorities it appears that almost all of the cases dealing with the proper purpose rule concern the exercise of special powers of appointment. At paragraph 71 in *In the matter of the Bird Charitable Trust [2008 JLR1]* the judgment of the Jersey Royal Court sets out a useful summary of the principle quoting Thomas & Hudson *The Law of Trusts* paragraph 19-01 at 579-580:

“The donee of a limited power must exercise it bona fide for the end designed by the donor, which requires that the power can be exercised only in favour of the objects of that power and in furtherance of the purpose for which it was conferred. If the donee, in good faith, exercises a power in favour of a stranger or in some other way which is not consistent with the terms and scope of his power, such exercise is excessive. If, however, the donee deliberately attempts to secure the effect of an excessive execution without actually making one, the exercise of the power is not simply excessive: it is fraudulent and void. The donee

‘ . . . must act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or

carrying into effect any bye or sinister object (sinister in the sense of being beyond the purpose and intent of the power).’”

81. Continuing at paragraph 73 of the Jersey Royal Court judgment observed:

“73 A simple example illustrates the difference referred to in the extract from Thomas & Hudson above. If the donee of a special power of appointment makes an appointment in favour of A (who is not within the class of objects of the power), that is an invalid exercise of the power because the power of appointment does not entitle the appointer to appoint assets to A. It is simply an excessive exercise of the power. If, on the other hand, the appointer makes an appointment in favour of B (who is an object of the power) but with the intention that B should immediately transfer the assets to A, that would be a fraud on a power. The appointment is valid on its face, in that it is an appointment to an object of the power, but the true intention of the appointer is to benefit A, who is not an object of the power. He has therefore exercised the power for a purpose or with an intention beyond the scope of or not justified by the instrument creating the power.”

82. In this case Murray argues that the exercise by Helen falls into the category of a bargain to benefit a non-object. The non-object is said to be Helen herself because she is dictating how the power of appointment should be exercised in order in effect to achieve an appointment of her own which she (as she is not a descendant) cannot be the donee of under the A Trust because she is not one of the objects. This to me is a circular argument that does not appear to be supported by the authorities. Whilst there does appear from Helen’s own evidence a firm intention about what the plan is devised between Helen and Catherine (which for these purposes I am ignoring my finding above that Catherine is not an object because although she is a descendant, she is an Excluded Person), if I take the agreement as a firm one (I have not had any evidence from Catherine about her understanding the plan) the agreement is not to benefit a non-object.

83. The quote that Murray relies on in *Re Turner Settled Estates* needs to be placed in its context. In that case the underlying “bargain” was to benefit non-objects.

84. The Court of Appeal in the preceding paragraph discussed that:

“the mere existence of an antecedent contract between the donee of the power and the appointee for a re-settlement conferring benefits on a stranger is not enough to invalidate the appointment.”

It then gives various example of cases where this has been found to be the case and then leads on to the paragraph relied on by Murray where the court says in terms that it will be in breach of the rule where the contract was the reason for the appointment being made. However, underpinning this principle is the agreement or intention to confer a benefit on a stranger. I am unpersuaded by the argument put forward by Murray that the Grantor’s benefit in this case is the influence and direction of the Grantor on the appointee, who is an object and where that intention is to benefit other objects, is sufficient to be seen as conferring a benefit on the Grantor who is not an object. But for being an Excluded Person, Catherine would be an object of the power and the agreement is only to benefit objects of the power. The objects are her descendants and not the beneficiaries of the A Trust. The subjective purpose of the appointment by Helen is to benefit the objects of the power. In this case of course because Catherine is an Excluded Person, thus this exercise would be void, but if such an arrangement had been with say Catherine’s son even if the consequences were to do so in the face of Murray’s opposition (or any of the other reasons cited by Oak) then I have come to the conclusion that would not be a breach of the proper purpose rule. However, because of my decision on clause 7(b) Helen’s exercise of the Power to Grant to Catherine is not capable of being valid, even if it was to be consented to by HKS2 Limited.

C HKS2’s Powers of Consent

6. As a matter of construction of the Trust Instrument in the relevant factual context and/or under general law:

6.1 to what duties, if any, is HKS2 subject as Consent Holder in relation to the powers of consent it holds (Powers of Consent);

6.2 to whom are any such duties owed; and

6.3 to what constraints, if any, is HKS2 under as a result or for any other reason in relation to an exercise of its Powers of Consent. In particular, are the Powers of Consent fiduciary, limited or beneficial in nature and/or are the powers held as nominee or bare trustee.

7. In view of the answers to issue 6 above, is HKS2 obliged to give consent to an exercise by Helen of the Power to Grant.

85. As set out above, clause 30.4 of the Trust Instrument provides that the exercise of the Grantor's power conferred under clause 30 has no force or effect without the written consent of the TPC. The definition of TPC is set out above such that until it is dissolved it is HKS2. Oak says that it would appear that whilst any successor must be a "related or subordinate party", as defined in section 672(c) of the US Tax Code this requirement does not explicitly apply to HKS2. Oak says HKS2 would exercise its power as a fiduciary and can take into account the objects of the power and Helen as well as the interests of the beneficiaries in a similar way to a trustee in the same position (See Lewin 33-098). HKS2 is not obliged to refuse to consent if it does not benefit the beneficiaries as its duties are wider than the beneficiaries if it considers appropriate to do so. If HKS2 is the holder of a fiduciary power then it is not obliged to exercise its power. Alternatively, if it is not a fiduciary power then it is a limited power with the Trustee ensuring that HKS2 exercises that power for its proper purpose.

86. Murray also says that HKS2's power to consent or not is fiduciary and Helen's interests might be taken into account. However, it matters not whether HKS2's powers are found to be limited powers where the only restraint is the proper purpose doctrine. He relies on the limited difference in practical effect outlined in the judgment of the New Zealand High Court in *Kea Trust Co Limited v Pugachev* [2015] NZHC 2412 at paragraphs 48 and 52.

"[48] The debate about whether, in any given case, a protector exercises a fiduciary or personal power may be arid because of the need, in either event, for the power to be exercised for proper purposes. The doctrine of fraud on a power is equally applicable to both types of power. The inquiry focuses on whether the power has been exercised for a purpose, or with an intention, that goes beyond the scope of or is not justified by the instrument creating the power."

87. And also paragraph 52 of the same judgment:-

"[52] Whether, in this case, the Protector is or is not labelled a fiduciary is unlikely to affect the duty cast upon the Protector to exercise powers to promote the objects of the trust. There is nothing in the Declaration to suggest that the basic duty of loyalty to beneficiaries has in any way been compromised [in] its terms. As Matthew Conaglen and Elizabeth Weaver⁴ have said:

The paramount consideration is the settlor's intention, as derived from construction of the trust documentation. Not only will that determine whether the protector is a fiduciary, but also what sort of a fiduciary role the protector has. As we have shown, the fiduciary label can cover a number of situations and fiduciary and personal powers can co-exist in the hands of a protector. Where the purpose and intention of the settlor

⁴ Matthew Conaglen and Elizabeth Weaver, *Protectors as Fiduciaries: theory and practice* (2012) 18(1) *Trusts and Trustees* 1 at 19.

was that the protector was also to be able to benefit under the trusts, the courts will usually respect that intention and not find fiduciary obligations which would disable the protector from acting in his own interest, although they might still hold that the protector owes limited or qualified fiduciary duties to consider the exercise of his powers on a regular basis. On the other hand, the cases show that powers which impinge upon the trustees' position as 'ultimate guardians of the trust' are likely to be treated as fiduciary, to some degree at least, so that the court can retain a supervisory jurisdiction. We suggest that it is unlikely that the court will allow that supervision to be avoided by language purporting to free the protector from any fiduciary obligations, but, again the touchstone is always the settlor's objectively determined intention."

88. The fact that the New Zealand court in that case was referring to a protector's powers makes no difference as it is a matter of construction of the particular trust instrument as to whether the power of the protector, or in this case the power of HKS2, is fiduciary or not. It may well be the case that, in relation to a particular trust, some powers of a protector are fiduciary and others are personal⁵.
89. Murray says HKS2 could just ignore the purported appointment altogether and that there is no basis for saying it is obliged to consent. He says that where a power is not held by a settlor nor by a beneficiary, it is a pointer that it might be a fiduciary power. Logically, he says, if you want somebody to protect your own interests solely, then you appoint yourself and you have beneficial powers. However, where powers are held by someone not socially connected to the trust they tend to be treated as a fiduciary.
90. Relevantly he says there is no express direction that HKS2 must abide by Grantor's wishes. Rather the language describing the TPC is a strong indicator to it having an independent role. It is relevant that it is an ongoing office with a defined role. If however the powers are not fiduciary but are limited, the proper purpose rule would mean that it gets you to the same place.
91. He also relies on paragraph 114 of *Grand View Private Trust co Ltd v Wong (ibid)* where Lord Richards said:

"While the Board rejects the substratum rule as an absolute principle, the purpose of a trust is of central importance in determining the purpose of a power to amend it, as it is indeed also for determining the purpose of powers to add or exclude objects or beneficiaries, such as that contained in clause 8 of the GRT trust deed."
92. The requirement of the consent of HKS2 must be as an obstacle to protect the beneficiaries from the exercise of the Grantor's power i.e. that is the purpose of HKS2's power. It is a mechanism to stop the Grantor doing what she wants (not to facilitate it). In order to persuade the court that Helen is right in her arguments about the consent of HKS2, she requires the court to ignore that the TPC, and the choice of who the TPC is, is deliberately there to fetter her power primarily to protect the beneficiaries of the A Trust. Murray also remarks on the irony of Helen arguing the importance of the Foreign Grantor Trust status when if she makes the appointment to Catherine the plan is to end the A Trust.
93. There are currently no US taxpayers who are beneficiaries of the Trust. Murray says there is a duty on HKS2 to refuse to consent unless it is to benefit the beneficiaries of the A Trust where the expectation from the Letter of Wishes is that in addition to income, capital payments to Murray should be considered. Helen's interests can be taken into account if she is treated as a beneficiary and could prevail but not in the particular circumstances of the purported exercise by Helen in July 2022. The arguments on whether this is a review of a decision or not, are irrelevant to this exercise. This is not a situation where a trustee's powers have been exercised

⁵ *In the matter of The Bird Charitable Trust (ibid)* and paragraph 72.2 of Underhill 20th Edition.

and the court is considering the role of the protector in reviewing or not reviewing the Trustee's decision. The Grantor is not a fiduciary.

94. Suntera says that considering the position of a protector who will often have this type of “veto” power is useful. However, there is no general rule as to what sort of power that will be: “*Powers of veto conferred on third parties over the exercise of administrative or dispositive powers may be of any kind.*” (see Lewin 28-040). In this case the A Trust has a protector and Suntera submits that the power of the TPCCH was deliberately kept separate from those of the protector, precisely in order to avoid the inference that the TPCCH was a fiduciary. It says that HKS2 should consent because the proper construction of the A Trust is that it is necessarily subservient to Helen's wishes. This supports a conclusion that the power is not a fiduciary one. The construction of the A Trust with its reference to section 672 (c) of the US Tax Code makes this clear. The TPCCH's sole function is in respect of the consent or otherwise to the exercise of the Grantor's powers under clause 30 of the A Trust Instrument. It is not afforded the right of exoneration or indemnity under the A Trust; it does not have the ability to release its powers (which the Protector does under clause 25 of the Trust Instrument); and it has no right to remuneration or reimbursement for expenses incurred in carrying out its duties under the A Trust. Where HKS2 is dissolved it is the Grantor who appoints its replacement. All of this points towards it not being an office holder and not being a fiduciary but rather a limited personal power. This means that the TPCCH must exercise its power for a proper purpose and it does not need take into account the interests of the beneficiaries. Suntera says that the reasons articulated by Helen are for a proper purpose. The appointment proposed is not to deprive Murray of the benefits of the A Trust but rather to preserve the dynastic trust in another form. However, if the power is found to be a fiduciary power it should be construed narrowly as a review following the principles set out in *In the Matter of the X Trusts [2023]BA (Bda) 4 Civ* not as an independent discretion as articulated in the wider view set out in the Jersey Royal Court in *In the Matter of the Piedmont Trust & Riviera Trust [2021] JRC 248*.
95. It says that despite Suntera's August Application, it no longer considers that the Trustee has a discretion in relation to the consent request. The decision to consent is one that HKS2 has to make. Although it recognises that the officers of HKS2 and the Trustee are the same people (as was the case when Suntera was the trustee) Suntera says that the Trustee is able not to have a role in the giving of consent because it can rely on the anti-Bartlett provision at Schedule 1 paragraph 4. It can do this even if the decision is not in the best interests of the beneficiaries. There is no obligation on the Trustee to interfere in those circumstances. It argues that if the intention for the A Trust had been that it was in fact the Trustee who decided whether or not consent should be given to an exercise by the Grantor of her power, this would have been made explicit. It says that Mr Karlin's evidence lends support for the following conclusions: that HKS2 must have been intended to be “subordinate” to Helen to fall within the US Tax provisions under which a subordinate party would be presumed to be “subservient”; that HKS2's power to withhold consent cannot have been intended to be wider than a court's power to refuse to bless a decision that satisfied the requirements of *Public Trustee v Cooper*; and a duty on the Trustee to interfere with a decision by HKS2 would ensure that the A Trust failed to qualify as a Foreign Grantor Trust which cannot have been something the Settlor intended. What is important for the purposes of construing the document is the intention of the parties, not whether they are successful.
96. Further as one of the beneficiaries of the A Trust (as trustee of the Future Gen Trust), it recognises that if the entirety of the A Trust is appointed to a Cayman Star Trust some of its rights are diminished, but if it means no further litigation and it reflects the wishes of Helen, on balance it considers that it is worthwhile to forego those rights to order to preserve the capital of the A Trust. It says that there is no contract between Helen and Catherine so the principles from *Re Turner's Settled Estates* do not apply.
97. Helen agrees with Suntera that HKS2's power of consent is not a fiduciary power. At most she says it is a limited personal power. She says that it may only refuse to grant consent to an

exercise of the Grantor's power under clause 30 in limited circumstances e.g. if the power is not being exercised in good faith or its exercise would be fraud on the power. She says the entire structure was constructed for subservience of HKS2 to the Grantor. "*Related or subordinate*" party has a specific meaning that is taken from the US Tax Code and which is expressly set out in the A Trust. The definition of the TPCCH requires the TPCCH to be a related or subordinate party "*within the meaning of section 672(c)*" of the US Tax Code. This provides a related or subordinate party shall be presumed to be "*subservient*" to the Grantor in respect of the exercise or non-exercise of the powers conferred on the grantor for the purposes of subsection 672(f) of the US Tax Code. She says that it is a requirement of the terms of the A Trust for the TPCCH to be a "*related or subordinate party*" with respect to the Grantor. If it is not, then it cannot serve as a TPCCH. If the TPCCH ceases to be a related or subordinate party with respect to the Grantor, it cannot qualify as and/or serve as a TPCCH.

98. Clause 30.2 of the A Trust expressly states:

"It is the understanding of the Original Trustee that this Settlement as currently constituted shall be (i) treated for United States Federal income tax purposes as a trust described in Section 672(f)(2)(A)(i) of the Code and (ii) classified as a "foreign trust" within the meaning of Section 7701(a)(31)(B) of the Code."

99. This is important because it is unusual in a discretionary trust. The A Trust could only be so treated if it is: (i) a revocable trust, (ii) the person whose consent is required for the revocation – the TPCCH – is a "*related or subordinate*" party with respect to the Grantor; and (iii) the TPCCH is "*subservient*" to the Grantor. Although the A Trust is governed by Guernsey law, given the express references to specific provisions of the US Tax Code, it would be legitimate to look to those provisions to construe the meaning of "*subservient*". But in the absence of any guidance from US Tax Code, and in particular in the absence of evidence that "*subservient*" is a term of art under the US Tax Code or has a particular meaning, its ordinary English meaning should be used. Helen says that this suggests that the TPCCH has a duty to give consent otherwise it could not serve as a TPCCH.
100. She says that nothing in the terms of the A Trust expressly imposes any fiduciary obligations on the TPCCH to consider the interests of the beneficiaries of the A Trust when considering whether or not to give consent to an exercise of power by the Grantor. She says it would not be appropriate for any fiduciary obligations to the beneficiaries of the A Trust be imposed in respect of its power to consent.
101. She says that the hallmark of a fiduciary is that it must act for the benefit of beneficiaries without regard to the interests of others. Here, the Grantor is not a named beneficiary of the A Trust. It would accordingly be inconsistent for the TPCCH's power of consent to be a fiduciary power that required it to consider, and act only in the interests of the beneficiaries of the A Trust and not in the interests of the Grantor. A fiduciary duty to act in the interests of the beneficiaries would be contrary to, and undermine, its express requirement to be subordinated and subservient to the Grantor, particularly where the Grantor is not an expressly named beneficiary of the A Trust. She says that the Grantor, as the Settlor of the A Trust, could not have intended that a fiduciary power be created because of its potential to frustrate the Grantor's exercise of her powers to revoke the A Trust or to grant a general power of appointment to her descendant. Nor, she says, could the Settlor have intended to put the TPCCH in a position of conflict and it would be perverse and contrary to the scheme of the A Trust were it to be interpreted thus.
102. The terms of clause 30.1 are also relevant to the construction of HSK2's power. She says that Suntera and Helen intended the A Trust to be revocable by Helen in whole or in part, hence she was granted the power of revocation under clause 30.1. They intended this in order that the A Trust complied with the relevant provision of the US Tax Code. Imposing an obligation on the TPCCH to stop the revocation under clause 30.1 or an appointment under clause 30.3 would be incompatible with the intentions of the parties when setting up the A Trust. The TPCCH is not a trustee of the A Trust. Its only power is the power to give consent. It has no role other than to

act as the consent holder which it can only fulfil if it is a subordinated party and is subservient. Importantly Helen's powers are not conditional on the tax planning. The genesis of the power to give consent is South African tax law to avoid the tax disadvantages of a revocable trust. The South African tax expert confirms that there is no problem with the intended tax treatment of the A Trust in both South Africa and the US if HKS2 is subservient to Helen or duty bound to give consent as a consequence of US tax structuring. In any event Helen's powers are not conditional upon the tax structuring being effective as intended. In the nature of tax structuring, the parties seek to establish a structure with a particular tax consequence. The key point is that the A Trust was intended to give the Grantor certain powers, including the ability to grant a power of appointment and to revoke the A Trust.

103. She says that the purpose of the power to consent is to provide consent where there is a proper exercise of the power. It is akin to a limited power in that HKS2 may only refuse to give consent if it considers that the exercise of power by the Grantor is not in good faith or not for the purposes of the power. The TPCCH does not owe fiduciary duties to the beneficiaries of the A Trust when exercising its power of consent, and thus it is not obliged to act only in the interests of those beneficiaries.

Discussion

104. In categorising a third party power, as Lewin sets out in 28-038: *“In the absence of express provision in the trust instrument, it is necessary to have regard to the nature of the power, the nature of the donee and the other terms to categorise the power.”*

105. The requirement of consent is a power of veto. Powers of veto conferred on third parties may be of any kind. In the context of a power of revocation (as found under clause 30.1) Lewin says at paragraph 33-098:

“An unrestricted power of revocation of the settlement vested in the settlor, to whom an exercise of the power returns the trust property, must be intended to be exercisable entirely for the settlor’s own benefit, which is the mark of a beneficial power. When the settlor has imposed a requirement of consent for the exercise of the power, the power to give or withhold consent may be beneficial or it may be fiduciary.”

106. The parties agree that the Grantor's power of revocation is a beneficial power. No one is arguing that the power of veto can be used for HKS2's own benefit therefore it is not a beneficial power. As I have found above the power of the Grantor under clause 30.3 is not a beneficial power but a limited power. However, unlike many of the cases involving protector's consent it is not a power being exercised by a trustee in its fiduciary capacity but, as I have found above, by the Grantor, who is not a fiduciary, exercised according to the proper purpose rule. The Grantor's significant powers under these clauses have no force or effect unless the exercise of the power by the Grantor has the written consent of the TPCCH. In addition, although the parties did not focus on this in argument, the Grantor's power to direct the payment of Trust income under clause 5(a) is also subject to the prior written consent of the TPCCH.

107. The provisions for HKS2's power of consent needs to be construed in the wider context of the Trust Instrument. Other than clause 30.4 there is nothing in the Trust Instrument regarding the exercise of the TPCCH's power of consent. There is no indemnity provided by the Trust Instrument for HKS2 nor is there a charging clause both of which can be counter-indicators that an office is a fiduciary one. However, there is no question that HKS2 was going to be professionally administered. There does not appear to be a basis for Suntera's submission that the Protector was not appointed as the TPCCH to avoid the inference that the TPCCH was a fiduciary.

108. However, the real question is what is the purpose for which the power was granted to HKS2 and this is informed by the rest of the Trust Instrument containing the power (see paragraph 62 of *Grand View Private Trust co Ltd v Wong (ibid)*). Neither HKS2 as the incumbent of the

TPCH role nor any future replacement need be a company wholly owned by the Trustee. The genesis of the power of consent was to fetter the Grantor's powers which in turn had been included due to US tax reasons. There were other persons who would come within the definition under the US Tax Code as qualifying to be a TPCH. As Advocate Gray submitted this could include Helen's cleaner. Nevertheless, the Settlor and the Original Trustee decided that HKS2 should be appointed pursuant to the Trust Instrument. The Trustee is the 100% owner of HKS2. On a true construction of the Trust Instrument, it has been given to HKS2 because it is a company wholly owned by the Trustee. Succession is provided for only if HKS2 is dissolved but there is no power to remove HKS2. In addition to the powers of consent (or veto), as set out above HKS2 is the legal owner of the assets of the A Trust which are in turn invested with Canaccord Genuity.

109. Whilst the definition of the TPCH is focused on the replacement appointee if HKS2 is dissolved, the US Tax opinion confirms that under the US Tax Code, HKS2 is presumed to be subservient to Helen because of its relationship with the Trust (setting to one side the issue raised by the Tax Expert that there is a substantial risk of whether Helen would in fact be treated as the grantor under US tax law). In his opinion dated 12 July 2023, Mr Michael Karlin says:

"The next question is whether HKS 2 Limited is a related or subordinate party with respect to Helen. In other words, is HKS 2 Limited "a corporation . . . in which the stock holdings of the grantor and the trust are significant from the viewpoint of voting control"?"

There is no question that the stock holdings of the trust are significant from the viewpoint of voting control – the trust owns 100% of the only class of shares. The uncertainty resides in the question of whether the grantor also needs to hold at least some shares, because of the use of the word "and" in the words "the stock holdings of the grantor and the trust."

There is no authority on this point but we think that there is no such requirement – it suffices that either the grantor or the trust possess significant stock holdings."

110. In relation to the wording of section 672(c) and the requirement of subservience he says the following:

(b) "Subservient to the grantor". The flush language of section 672(c) provides as follows:

For purposes of subsection (f) and sections 674 and 675, a related or subordinate party shall be presumed to be subservient to the grantor in respect of the exercise or nonexercise of the powers conferred on him unless such party is shown not to be subservient by a preponderance of the evidence.

We have been unable to locate any authority on the meaning of these words in the context of section 672(f), dealing with a trust with a foreign grantor. There has, in fact, been scant case law in the domestic area relating to sections 674 and 675.³⁵ The language of the statute is quite blunt – there is a presumption of subservience and the burden of proof to show that there is no subservience lies on the party arguing against subservience, which in our case would be the IRS. The regulations under section 672 simply restate the presumption but do not explain it further. One commentator has stated that "As a practical matter, one must assume that it will be virtually impossible to prove that a related or subordinate trustee acted against the grantor's wishes, absent attempts by the grantor to have the trustee removed for those actions." There is a small amount of guidance in the legislative history of section 672(c), to the effect that one seeking to rebut this presumption must show that the trustee (or, presumably, the related or subordinate party) was not acting "in accordance with the grantor's wishes".

We also note that Section 672(c) was enacted long before section 672(f), at a time when Congress was concerned to expand, not contract, the application of grantor trust characterization. Congress must be taken to have been aware of how this was intended to apply when it enacted section 672(f) in its present form in 1995 and when it chose to apply the presumption in section 672(c) for purposes of section 672(f).

We conclude, therefore, that on its face the language of the A Trust Settlement meets the literal requirements of section 672(f): Helen may revoke the trust with the consent of a corporation in which the trust has a significant (100%) stock holding in a corporation, making it a related or subordinate party, that is presumed to be subservient to Helen's wishes.

It would be open to the IRS to argue that the presumption should be overcome in the present case. The IRS would argue that Helen has no control at all over the Third Party Consent Holder and that the trustee of the A Trust is the former trustee of the AACS Settlement that orchestrated the 2021 transactions in such a way as to continue to be the trustee of the assets derived from the AACS Settlement. Until Helen sought to exercise her power of revocation, there would be no evidence, one way or the other, of how the Third Party Consent Holder would behave if asked for consent – that is, would it act in a subservient manner? The arguments that could be made on either side would be highly theoretical and it is difficult to predict how a court might view the position. The statutory presumption places the burden on the IRS; we cannot say with certainty that they could not meet it.”

111. It is apparent from this opinion that the appointment of a particular category of person creates a presumption of subservience, but this is a presumption that can be rebutted by the manner in which the TPCCH acts. In other words, the definition determines who the TPCCH can be however does not of itself limit the powers of the TPCCH (although there may be tax consequences). Further, there is a fundamental difference between whether or not HKS2 qualifies under the US Tax Code to be subservient and its powers under the A Trust. If the Settlor and Original Trustee had wished to limit the exercise of the HKS2's powers so that it only acted in a subservient way, then this could have been included within the Trust Instrument. This is not what the references to the US Tax Code do. The terms could have prescribed the terms of the A Trust but they do not. Putting it another way, the Trustee having voting control of HKS2 is the reason why HKS2 qualifies under the US Tax Code however the A Trust does not contain restrictions or limitations on how this voting control should be exercised.
112. The Settlor and the Original Trustee must have understood the implications of this appointment and Guernsey law at the date of execution of the A Trust in the same way as the settlor in *In the matter of the Circle Trust HSBC International Trustee Limited v Wong* [2006 CILR 323] was found to have understood the law. In this case it will be the directors of HKS2 who will cause HKS2 to act. The directors are the same directors (albeit corporate directors) as the directors of the Trustee. The Trust Instrument does not distinguish between the duties owed by HKS2 as the owner of the Trust assets on behalf of the Trust and the duties or powers it owes when exercising its power as the under clause 30.4. As a matter of Guernsey law, the Trustee controls the corporate governance of HKS2 which is a Guernsey company with standard articles of association, and it is owned by the Trustee for the benefit of the A Trust which is a Guernsey law Trust. If this was in doubt it is made clear by the wording of the anti-Bartlett clause at paragraph 4.1(c) which is set out in full above but in particular says:
- “.....the business and affairs of such Company are being carried on competently honestly diligently and in the best interests of the Trustee in its capacity as shareholder or howsoever the Trustee is interested therein....”*

113. Advocate Gray urged me to find that HKS2 was effectively wearing a different hat when exercising its power of veto under the clause 30.4 and was not bound by these obligations. However, in the absence of express wording that there is such a carve out, the construction of

the A Trust does not support her analysis but rather that the “*Company*”, which must include HKS2 (see further below), “*must act in the best interests of the Trustee*”. Further, HKS2 which was created for the A Trust has standard articles of association without any restriction or provision for detaching its obligations from those it owes to its shareholder.

114. The beneficiaries of the A Trust are Murray and Suntera as Trustee of Future Gen Trust (whose beneficiaries are Helen and her grandchildren). The power under clause 30.3 is limited to being exercised by Helen for the benefit of her descendants. It makes sense that the power of veto would be exercised in the interests of the A Trust in circumstances where due to the deliberate structuring of HKS2 and the Trustee being the same people, there will be a full understanding and knowledge of how the A Trust is and has been operating for the benefit of the beneficiaries. This in my view is the intended purpose in the context of the A Trust by reference to all the terms of the trust instrument, the power of consent and to the circumstances in which the A Trust was created whether the power is exercised following the exercise of the Grantor’s powers under clauses 30.1, 30.3 or 5(a).

115. To construe otherwise would be to create an incoherent tension between HKS2 and the purpose of the A Trust which cannot be what the Settlor and the Original Trustee intended. This would not make “*common sense*”. As observed by Lord Reid in *Schuler (L.) A.G. v Wickham Machine Tool Sales Ltd* ([1974] A.C. 235, at 251) and relied at paragraph 30 of *In the matter of the K Trust (ibid)*:

“The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear.”

116. Taking all this account I have come to the conclusion that the intention of the purpose of the power is not as a limited power but is a fiduciary power which must be exercised for the benefit of the A Trust and in accordance with its terms as well as the proper purpose rule. As a consequence, HKS2 is not obliged to consent to the exercise by Helen of her power under clause 30. Further, to the extent it is necessary to decide, I do not consider that an analysis of the exercise of HKS2’s power of veto based on the narrow view⁶ or wider⁷ view of a protector’s fiduciary powers is of any assistance in this matter. This is not a case where a protector is being asked to consent to a trustee’s decision. In this case the Grantor is not a fiduciary and the Grantor’s powers are not fiduciary powers.

D Position of Oak

8. In view of the above, to what duties, if any, is Oak subject as trustee of the A Trust in relation to the exercise by HKS2 Limited of its Powers to Consent:

8.1 in relation to Helen’s exercise of the Power to Grant; and

8.2 generally.

E Potential Conflict

9. In view of the determination of issues 6 to 8 above, is there any conflict between Oaks’ duties as trustee of the A Trust and in that capacity as the sole shareholder of HKS2 Limited and HKS2 Limited’s duties as Consent Holder and if so what steps may Oak take to manage or resolve any such conflict.

117. At the time that Helen requested HKS2 to exercise its consent to her appointment to Catherine, Suntera identified a potential conflict between the Trustee and HKS2. In Suntera’s August

⁶ *In the matter of the X Trusts (ibid)*.

⁷ *In the matter of the Piedmont Trust & Rivera Trust (ibid)*.

Application, Suntera in its capacity as the Original Trustee of the A Trust set out its predicament and asked for the court's assistance in its resolution. It was expressed in the application both as a "*blessing application*" and as a "*surrender of its discretion*" under the principles identified in *Public Trustee v Cooper*. It identified that the so-called anti-Bartlett clause found at paragraph 4 of Schedule 1 of the Trust Instrument may be compromised because the individual directors of HKS2 and the Trustee were the same individuals (and remain the same when the Trustee became Oak). Mr Lihou said, "*in such circumstances the Trustee doubts whether decisions taken by individuals in their capacity as directors [of HKS2] can reasonably be separated from the duties that those same individuals owe acting for and on behalf of the Trustee as trustee of the A Trust.*" However, by the time of the instant application, Suntera's position was that the granting or withholding of consent is not a matter for the Trustee, but for HKS2 itself and that the Trustee could and should rely on the anti-Bartlett clauses. Oak says that it does not consider the Trustee has any discretion on a consent request, it is HKS2's decision to make.

118. Helen identifies no conflict because her view is that it is not part of the role or duty of the Trustee to interfere with the exercise of the powers by the Grantor or by the TPC. However, if a conflict did arise then this should be managed by Oak, for example, by ensuring that different persons are administering the affairs of the A Trust and affairs of HKS2 and information barriers between the two sets of individuals. However, she also says that Oak may need to consider whether, if such conflict arises, it can continue properly to administer HKS2 as well as carry out its duties as Trustee of the A Trust and if it should step back from the former.
119. Oak and Murray both consider that there is no conflict because of the duties owed by HKS2 in exercising its power to veto. Murray says that the Trustee has the power and duty to ensure that HKS2 considers the interests of the beneficiaries in the exercise of its power. The Trustee is obliged to exercise its functions with utmost good faith and to act *en bon pere de famille* (Section 22 of the Trusts Law). He says that even if HKS2 did not have the obligation to consider duties to the beneficiaries, the Trustee has those duties and the anti-Bartlett clauses would not exculpate the Trustee because the same human beings are on the board of the Trustee as are on the board of HKS2. This is the state of affairs which is foreshadowed in the construction of paragraph 4.1(c) of Schedule 1. The obvious intention when the choice was made for the Trustee to own HKS2 and for it to act through the same people was that they should both "point in the same direction". This is part of the factual matrix which suggests that HKS2 should be in harmony with the Trustee. Oak says that it was Suntera who set up this construction with HKS2 and nobody considered it a conflict until Murray tried to remove Suntera. It makes sense that the HKS2 duties were expected to align with the Trustee but if there is a conflict it must mean that there is a duty to intervene. Murray also argues that clause 7(b) of the Trust Instrument would prevent the Trustee from relying on an anti-Bartlett clause (if they could circumvent the actual knowledge issue) in relation to the current purported exercise of the power of appointment because Catherine is an Excluded Person.

Discussion

120. In addition to the codified duty of the Trustee to act *en bon pere de famille*, Clause 13.1 of the A Trust which is set out in full above expressly requires the Trustee to "*exercise (or refrain from exercising) the trusts powers and discretions vested in it as the Trustee shall think fit for the benefit of all or any one or more of the Beneficiaries...*" and at 13.2 sets out that subject to 13.1 and clause 24 (which relates to the powers of the protector) "*every discretion vested in the Trustee shall be absolute and uncontrolled and every power in the Trustee shall be exercisable at its absolute and uncontrolled discretion and the Trustee shall have discretion in deciding whether or not to exercise any such power.*"
121. In considering how these powers are exercised in relation to a company which is wholly owned by the Trustee, Lewin says at paragraph 34-061:

“When the trustees control a company, the prudence of the management is not their only concern. They will ordinarily be bound also to ensure that the directors exercise their management power over the company in a manner that is consistent with the terms of the trust and any orders of the court concerning the trust. An anti-Bartlett clause in ordinary form is unlikely to protect them if they fail to do so”.

122. In Schedule 1 paragraph 4 of the A Trust, which is set out in full above, the starting point is that the Trustee is not under any duty to interfere in the business of any company in which the Settlement is interested. This includes at paragraph 4.1 (a) and (c) references to this including *“the whole or substantial proportion of the shares”* and *“in its capacity as shareholder”*. Company is widely defined under clause 1.1 as:

“any entity (of whatsoever kind) incorporated or otherwise established in any jurisdiction or any body of persons corporate or unincorporate and shall include any subsidiary or holding company of any such company and any successive company of any such company and with limitation includes a Foundation and a limited partnership.”

123. Thus in accordance with the terms of the A Trust anti-Bartlett provisions, ownership of a company will not oblige the Trustee of the A Trust to intervene. However, continuing the extract of the anti-Bartlett provisions of paragraph 4.1(c), it says *“until such time as it shall have actual knowledge to the contrary.”* This makes clear that the protection of the anti-Bartlett provisions cease where the Trustee has actual knowledge. Where there are common directors between the company and the Trustee, the effect must be that the Trustee will have actual knowledge and therefore cannot rely in the anti-Bartlett clause.

124. In the A Trust there has been the deliberate decision to have the same directors undertaking the role of the directors of the Trustee and HKS2. This means that the Trustee will have actual knowledge of how the administration, management and conduct of the business of HKS2 is being carried out including the exercise of the power of veto and will be fully informed of it. The Settlor and the Original Trustee must have contemplated that the effect of the natural persons who act on the corporate director’s behalf in the management and control the actions of both HKS2 and the Trustee being the same natural persons. This is unsurprising given the original natural persons were well known to the Settlor, and the Original Trustee settled the Trust Instrument with the deliberate vesting of the shares of HKS2 in itself. Crucially, it was constructed in this way despite it being within the knowledge of the Settlor and Original Trustee that Murray was already unhappy with the Original Trustee and had in correspondence sought that the Nedgroup (as it was called then) step down as Trustee of the AACS Trust⁸. Despite this, there was no limitation or variation or exclusion of the role of the Trustee with regard to HKS2 or its decision-making on the exercise of HKS2’s power of consent. As I have found that Trustee will have actual knowledge and thus cannot rely on the anti-Bartlett clauses, it is not necessary for me to consider the impact of clause 7(b) on the anti-Bartlett clause argument put forward by Murray. The Trustee’s duty is to act for the benefit of the beneficiaries of the A Trust and to carry out and administer the trust in accordance with its terms. This includes in relation to its obligation to interfere in the exercise of the powers of HKS2.

125. In reality, however, this is not an issue, because as I have found above HKS2 must exercise the power for the benefit of the A Trust and therefore it is not likely that there will be a conflict in the respective positions of the Trustee and HKS2. The tax consequences of HKS2 consenting or not consenting to a request by the Grantor do not *“trump”* the obligations of the Trustee to the beneficiaries. It is one of the factors it will consider in its decision-making and will no doubt take account, without being bound, the expressed view of the Settlor in her Letter of Wishes in relation to tax mitigation.

Conclusion

⁸ Letter dated 20 April 2020 exhibited to the affidavit of Marcus Prevel.

126. In the context of the Application before me and the decisions I have made on the identified issues, it was not necessary for me to resolve the relative importance of South African and US tax considerations despite the suggestion that I should do so by Murray. It is now for the parties to consider the implications of these decisions in relation to the A Trust and if in due course the parties need further assistance of the court no doubt further applications will be made.