

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

**IN THE GUERNSEY COURT OF APPEAL
(CIVIL DIVISION)
Court of Appeal Case No: 585**

[2025]GCA102

28 January 2025

**ON APPEAL FROM THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)**

Before:

**Clare Montgomery KC, President
Sir Timothy Le Cocq, Bailiff of Jersey
Michael Furness KC JA**

Between:

HELEN KEITH STEWART

Appellant

-and-

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

-and-

(2) MURRAY ALEXANDER CRAIG STEWART

-and-

**(3) SUNTERA PRIVATE WEALTH (GUERNSEY) LIMITED
(in its capacity as trustee of the HKS Future Gen Trust)**

-and-

(4) HKS2 LIMITED

Respondents

Counsel for the Applicant: Advocate E Aron

**Counsel for the First Respondent: Advocate C J Hay
Counsel for the Second Respondent: Advocate J M Wessels
Counsel for the Third Respondent: Advocate H M Sandy**

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

Furness JA

1. This is the judgment of the Court.

Introduction

2. This is an appeal from an order of the Deputy Bailiff. The reasons for the order were set out in a judgment given on 5 June 2024. The litigation concerns a trust, referred to in these proceedings as "the A Trust". The A Trust was created by an Instrument of Settlement dated 28 February 2021 ("the Trust Instrument"). The Applicant in these proceedings, "Oak Trust", is the current trustee of the A Trust, and it has applied to the Court under sections 68, 69 and 71 of The Trusts (Guernsey) Law, 2007 ("the Trust Law"), and the inherent jurisdiction of the Royal Court, for rulings on a number of issues which have arisen in connection with the Trust Instrument and certain powers granted under it.
3. The A Trust is derived from a larger trust, referred to in these proceedings as the AACS Settlement which was declared on 20 December 2001 by the late Alistair Alexander Craig Stewart, deceased ("the Deceased"). The Deceased died on 7 September 2018 and was survived by his wife, Helen who is the Third Respondent, his son Murray, the First Respondent and his daughter, Catherine. Murray is unmarried and has no children. Catherine is married with two children. The beneficiaries of the AACS Settlement were the Deceased, Helen, Murray and Catherine and all the issue of the Deceased born within the trust period of 100 years from 20 December 2001. In February 2021 the sole trustee of the AACS Settlement was a trustee company now known as Suntera Private Wealth (Guernsey) Limited ("Suntera").
4. In February 2021, an exercise was undertaken by Suntera to divide the assets of the AACS Settlement into three new Trusts. One of these was the A Trust, another was a trust referred to as "the B Trust", and the third was a trust referred to as "the Future Gen Trust". The assets of the AAC Settlement were divided between these three trusts, with the A and B Trusts receiving \$15 million each and the Future Gen Trust the balance of the assets (some \$86 million). Each of these trusts was discretionary, but with differing classes of beneficiaries. For the A Trust the beneficiaries were Murray and the trustee of the Future Gen Trust. Catherine was an "Excluded Person" for the purpose of the A Trust. For the B Trust, the position was reversed with Catherine and the trustee of the Future Gen Trust as beneficiaries and Murray as an Excluded Person. In

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

both Trusts there was a power to add beneficiaries. Helen was "the Grantor" for the purpose of the A Trust and Catherine was the Grantor for the purpose of the B Trust. The Future Gen Trust was a trust for the benefit of Helen, and her descendants other than Murray and Catherine, who were both designated Excluded Persons. The Grantor of the Future Gen Trust was Catherine. The concepts of "Excluded Persons" "the Grantor" are explained below. We refer to the creation of these three trusts as "the 2021 reorganisation".

5. The settlor of the A Trust (in the sense of the person who executed the Trust Instrument) was Suntera. The AACS Trust was amended so as to give Helen a general power of appointment over its assets (subject to a consent requirement). She then exercised that power, with consent, so as to appoint \$15 million to Suntera as the trustee of the A Trust. This rather elaborate procedure was adopted so as to enable it to be argued that Helen was the "grantor" of the A Trust for US tax purposes. So, the substantive settlor of the A Trust, in the sense of the person who provided the assets which now form the trust fund, was Helen. It is clear that Suntera and Helen worked closely together when planning the 2021 reorganisation and there is no suggestion that they were not privy to the same information in the lead up to that transaction. When we speak below of what the extrinsic evidence surrounding the execution of the 2021 reorganisation shows about Suntera's intentions, it is reasonable to assume that Helen shared those intentions.
6. The fourth respondent to the application is HKS2 Limited ("HKS2"), which is a company which was incorporated in Guernsey in connection with the establishment of the A Trust. Its shares are wholly owned by Oak Trust in its capacity as trustee of the A Trust. The whole of the \$15 million appointed into the A Trust has been loaned to HKS2, which has invested it. Repayments of the loan are made from time to time to enable the trustee of the A Trust to pay fees and other running expenses of the trust.
7. The genesis for the present litigation is a proposal made by Helen to exercise a power conferred on her by clause 30.3 of the A Trust. Clause 30.3 enables Helen to confer a general power of appointment over the trust fund of the A Trust in favour of any of her descendants, but under the terms of the Trust Instrument any exercise of the clause 30.3 power requires the consent of the Third Party Consent Holder ("TPCH"), which was HKS2. In her proposal Helen stated her intention to confer a general power of appointment over the entire trust fund of the A Trust in

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

favour of Catherine, and asked for HKS2 to give the requisite consent. This proposal has given rise to the three issues which are raised on this appeal, as follows.

Issue 1

8. Does the power conferred by clause 30.3 authorise Helen to confer a general power of appointment on Catherine, in light of the fact that Catherine is an "Excluded Person" for the purpose of the A Trust. This issue turns on the construction of the relevant provisions of the Trust Instrument. The Deputy Bailiff answered this question in the negative, and Helen appeals against that finding. Murray supports the Deputy Bailiff's judgment on this point.

Issue 2

9. If the answer to issue 1 is that clause 30(3) does permit Helen to confer a general power of appointment on Catherine, is her proposed exercise of that power nonetheless void because it is to be undertaken for a purpose which is outside the purpose for which the clause 30(3) power was granted? The Deputy Bailiff addressed this issue, notwithstanding that it did not fall for decision in the light of her ruling on Issue 1. She found that the proposed exercise was within the proper purposes of the power. Murray challenges the Deputy Bailiff's finding on this issue. He argues, as an alternative ground for establishing the invalidity of the proposed exercise, that Helen's proposed exercise of the 30.3 power is void because it has been undertaken for an improper purpose. Helen supports the Deputy Bailiff's decision on this Issue.

Issue 3

10. This issue focusses on the power vested in the TPCH to consent to any exercise of the clause 30.3 power by Helen. On this issue Helen takes the position that the TPCH is bound to consent to any exercise of the 30.3 power by the Grantor once it is satisfied that the proposed exercise is lawful. Murray takes the position that power to consent is a fiduciary power, requiring the TPCH to give fully informed independent consideration of the merits of any proposed exercise by Helen, and so doing must take into account the interests not only of the objects of the clause 30.3 power, but also the interests of the Beneficiaries of the A Trust. The Deputy Bailiff found that the TPCH's power to consent was a fiduciary power of the sort contended for by Murray. On this appeal, Helen challenges that finding.

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

11. We have indicated above the positions taken on this appeal by Helen and Murray, who are the two protagonists. Oak Trust has filed submissions to assist the Court, but is, properly, taking a position of neutrality on the merits. Suntera and HKS2 have not taken any active part in the appeal.

The background facts

12. Before considering the Issues, it is necessary to give a more detailed explanation of the events leading up to the present dispute, and the factual circumstances in which the A Trust came to be established. There is no appeal against the Deputy Bailiff's findings of fact.
13. The Deputy Bailiff summarises the events leading up to the creation of the A Trust in paragraph 39 of her judgment. We gratefully adopt that summary, with a few minor amendments.

(i) The AACS Settlement was declared on 20 December 2001 by Alistair who died on 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.

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

- (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 (other than 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.

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

- (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 Trust 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 TPCCH. HKS2 is appointed as the TPCCH 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.
- (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

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

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. To the extent that this letter expresses Helen's subjective view on the reason why the A Trust is being set up, or sets out her expectations as to how the Trustee will exercise its powers in the future, it is of no assistance when construing the terms of the Trust Instrument. The only potentially relevant material in the letter is the view which Helen expresses about her lack of confidence in Murray's ability to manage his own finances (as to which see paragraph 42 below)

(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 2021 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.

The relevant provisions of the Trust Instrument.

14. The Trust Instrument is made by Suntera (then called Nedgroup Trust Ltd) as the original trustee. It is recited that Helen is desirous of making the Settlement hereinafter contained in the exercise of her powers under the AACS Settlement. Helen is identified as "the Grantor".

15. Clause 1.1 of the Trust Instrument sets out a number of definitions:

“ *Beneficiaries* means:

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

- (a) *all and any persons and classes of persons specified in Schedule 3 and*
- (b) *such other persons and classes of persons as are added to the class of Beneficiaries in exercise of the powers conferred upon the Trustee under this Settlement*"

Schedule 3 provides that the Beneficiaries are:

1 *[Murray]*

2 *Nedgroup Trust Limited [now Suntera], in its capacity as the trustee, or any successor trustee, of the [Future Gen Trust]"*

" 'Excluded Persons' means:

- (a) *all and any persons and classes of persons specified in Schedule 4; and*
- (b) *such other persons and classes of persons as are declared to be Excluded Persons in exercise of the powers conferred upon the Trustee under this Settlement."*

Schedule 4 defines Excluded Persons as:

"The Trustee and its Officers each in their respective personal capacities

[Catherine] (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)."

" 'Third Party Consent Holder' 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

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

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)¹."

16. The beneficial trusts are set out in clauses 5 and 6, and provide for the accumulation or discretionary distribution of income, and for wide powers of appointment and advancement of capital. Under clause 5, the Grantor is given a power to direct the application of the income of the Trust, with the consent of the TPCH.

17. Clause 7 is headed "Overriding Exceptions" and reads as follows:

"Notwithstanding anything herein contained in this Settlement:

(a) no trust power or provision hereby or by law conferred on the Trustee shall be exercised in such a way as to

(i) ...

(ii) authorise any payment transfer or advance of any part of the Trust Fund or any income thereof to the trustees of any other trust if any Excluded Person at the date of any such payment transfer or advance is or may become a beneficiary there under or is or may become capable of benefiting therefrom in any circumstances other than the payment of remuneration and expenses of an excluded person who is a trustee of that other trust (including in the case of a trustee which is a Company its Officers);

(b) No trust power or provision hereby or by law conferred upon the trustee shall be exercised and no part of the income or capital of the trust fund shall be lent or paid 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 persons save that for the avoidance of doubt:

[there then appear two exceptions to the general prohibition – one for the payment of remuneration and expenses to an Excluded Person who is a trustee or protector

¹ Section 672(c) refers to the section in the United States Inland Revenue Code.

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

or professional adviser, and the other for an Excluded person who has entered into an arm's length contract with the Trustee.]”

18. Clauses 23 and 24 make provision for a Protector of the A Trust and for the exercise of the Protector's powers. The first protector is named (in Schedule 6) as Mr Michael Arthur Trask. The Protector has the power to appoint and remove a trustee (clauses 16 and 17), and his consent must be obtained for the exercise of the Trustee powers identified in Sch 8, namely the Trustee's power to delegate, the Trustee's power to add or remove Beneficiaries, and the Trustee's power to amend the Trust Instrument under clause 27.

19. 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.”

20. Clause 30 is headed “Grantor's Powers”, and provides as follows

“30.1 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.”

30.2 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. ...

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

30.3 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."

30.4 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."

The fiscal background

21. Before considering the Issues, it is convenient to summarise the relevant parts of the expert evidence before the Court concerning the tax context in which the A Trust was made. There are two expert reports, both commissioned jointly by the parties, one on relevant principles of US tax law, and one on relevant principles of South African tax law. The Deputy Bailiff admitted the expert evidence on US tax in evidence, because it was addressed to the meaning of words and expressions used in the Trust Instrument. She ruled that the expert evidence on South African tax issues was inadmissible, because there were no parts of the Trust Instrument which required an understanding of South African law to aid their construction. Before this Court both parties referred to the South African expert evidence, or conclusions drawn from it, and we have found it of assistance in understanding the thinking behind the structure of clause 30 of the Trust Instrument (which we discuss in more detail below). While understanding why the Deputy Bailiff drew the distinction she did, we think it is appropriate to admit the South African expert evidence, and we do not understand either side to object to that course.
22. It is clear that the A Trust was established on terms which were intended to enable it to qualify as a US foreign grantor trust. There is in evidence an expert report from Mr Karlin of Karlin & Peebles LLP. which sets out the significance of, and the requirements for, the creation of such a trust. Mr Karlin explains that there are two types of trust for US tax purposes which are

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

commonly referred to as a grantor trust and a non-grantor trust. In the case of a grantor trust, the sole taxpayer is the grantor. No tax is payable by the trustee or the beneficiaries. In a non-grantor trust the tax is paid by the trust (if it is within the US tax net) or the beneficiaries, when they receive a distribution. For trusts set up outside the US which have US citizens or residents as beneficiaries, grantor trust status generally gives the more favourable tax outcome. It is clear that the A Trust was established with the intention that it should be a foreign grantor trust – clause 30.2 contains an explicit statement of Suntera's understanding of that fact. Where the trust is foreign trust (which the A Trust is for US purposes) it is necessary in order to claim foreign grantor trust status that either

- (a) 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; or
- (b) the only amounts distributable during the lifetime of the grantor are amounts distributable to the grantor or the spouse of the grantor.

Requirement (b) is not relevant to the present case.

23. It is clear that clause 30.1 of the A Trust confers on Helen a power of revocation. That power is, however, subject to a consent requirement, namely the need for the consent of the TPCH. The TPCH must therefore qualify as "a related or subordinate party who is subservient to the grantor" if foreign grantor trust status is to be established. A related or subordinate party is defined as follows:

"[A]ny nonadverse party who is:

(1) the Grantor's spouse if living the Grantor

(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."

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

The expression "nonadverse party" is defined as a person who is not an adverse party. An adverse party is defined as follows:

"[A]ny person having a substantial beneficial interest in the trust which would be adversely affected by the exercise or nonexercise of the power which he possesses respecting the trust. A person having a general power of appointment over the trust property shall be deemed to have a beneficial interest in the trust."

Mr Karlin observes that any existing beneficiary of the A Trust would be regarded as an adverse party. But HKS 2 is not an adverse party because it is not a beneficiary, nor is it otherwise entitled to benefit from the trust.

24. The expression "subservient to the grantor" is defined as follows:

"... 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."

25. Mr Karlin concludes:

"... 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"

He goes on, however, to point out that the IRS could argue against this conclusion the grounds that Helen has no control over HKS2 as TPCH, and that its subservience cannot be presumed unless and until the TPCH takes some action in response to a request for consent.

26. Finally, Mr Karlin considers a number of specific questions put to him in his instructions. For present purposes the relevant questions which have not already been addressed above, are as follows:

To what extent (if at all) would the following circumstances impact the analysis of HKS 2's "related or subordinate party" status and/or its "subservience" for the purposes of section 672 of the US Tax Code:

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

- (a) whether, as a matter of Guernsey law, HKS 2 owes duties to the beneficiaries of the A Trust in relation to its decision to consent (or to refuse consent) to the exercise of the Grantor's powers under clauses 30.1 and 30.3
- (b) whether, as a matter of Guernsey law, HKS 2 owes a duty to the Grantor to give consent in relation to the exercise of the Grantor's powers under clauses 30.1 and 30.3. Does it make a difference for these purposes if the duty is deemed an absolute one under Guernsey law, or a softer duty or expectation;
- (c) whether, as a matter of Guernsey law, HKS 2 owes no duty to consent to the Grantor in relation to the exercise of the Grantor's powers under clauses 30.1 and 30.3;
- (d) whether, as a matter of Guernsey law, the Trustee acting pursuant to its duty to act in the best interests of the beneficiaries of the A Trust, is deemed to be under a duty to exercise its rights as the sole shareholder of HKS 2 in order to control whether HKS 2 gives consent (or not) to any exercise by the Grantor of the powers under clauses 30.1 and 30.3.

27. Mr Karlin's answers to these questions are as follows:

- (a) Such duties could adversely affect the argument that HKS 2 Limited was subservient to Helen. The power of the Third Party Consent Holder to refuse consent can be meaningful, but it would not be helpful if it were circumscribed to any extent by rights of the beneficiaries. ...
- (b) If HKS 2 Limited is bound to give consent, that would make the consent requirement illusory or at the very least support an argument in favor of subservience. The stronger the obligation to give consent, the more helpful this is to the position that HKS 2 Limited is subservient to Helen.
- (c) Subservience is not automatically tied to duty. It is acceptable that HKS 2 Limited can refuse consent that is, its power to give or withhold consent is meaningful. The manner of refusal and the reasons, if any, given for refusing might affect an argument as to whether HKS 2 Limited was truly subservient.

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

(d) Again, this goes to the question of the existence of subservience. The existence of such a duty, if it required the trustee to prevent the exercise of the power of revocation, would be problematic. Even a requirement for the trustee to consider the beneficiaries' interest in deciding whether to use its control over HKS 2 Limited would be unhelpful.

28. An expert report was provided on the relevant questions of South African tax law by Mr Trevor Emslie SC of Huguenot Chambers, Cape Town. Mr Emslie advises that the statutory provision which is of most relevance to the present case is section 3(3)(d) of the Estate Duty Act 1955. This provides that property not owned by the deceased is deemed to be part of their estate if it is:

"... property (being property not otherwise chargeable under this Act or the full value of which is not otherwise required to be taken into account in the determination of the dutiable amount of the estate) of which the deceased was immediately prior to his death competent to dispose for his own benefit or for the benefit of his estate." (emphasis added by Mr Emslie).

This provision is the reason why the consent requirement in clause 30 was introduced in the first place. It would clearly have been easier to satisfy the US foreign grantor trust requirements if there had been no consent requirement at all. However, a power of revocation without a consent requirement would mean that section 3(3)(d) would cause the trust fund to be taxed as part of Helen's estate on her death.

29. Mr Emslie is asked to consider a range of possible outcomes to the issue of nature of the consent requirement in clause 30.3. These possible outcomes are similar to those put to Mr Karlin. Mr Emslie is satisfied that all of the possible outcomes, save perhaps one, would provide sufficient protection from South African Estate duty. The one exception is if the TPCCH was found to be under a duty to consent to any proposed exercise of the power of revocation by Helen. In that situation Mr Emslie expresses the view that:

"there would be a danger that the trust assets could constitute property which is deemed to be property in terms of section 3(3)(d) of the Estate Duty Act. This is because Helen, as the Grantor, could be regarded as having been competent to dispose of any of the trust assets for her own benefit or the benefit of her estate."

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

However, he goes on to say that he would be surprised if the South African tax authorities would be prepared to investigate the Guernsey law treatment of the consent power, and would probably assume that there was no point in having the power if the TPCH was under a duty to consent to Helen's exercise of the power. He also points out that the strict wording of the section requires that the deceased alone is competent to dispose of the property, not the deceased and some other person.

30. The expert evidence on US and South African tax is clearly helpful in establishing the context in which the issues fall to be decided. However, it is of course the case that neither of these reports were available at the time the A Trust was established. What is important when looking at any relevant extrinsic evidence as an aid to construction of the Trust Instrument is the parties' understanding of the tax position as at that date, based on the advice then available to them.

Issue 1

31. Issue 1 is shortly stated. Helen proposes to exercise the power conferred on her by clause 30.3 to grant a general power of appointment over the trust fund in favour of Catherine. Although Catherine is not a Beneficiary of the A Trust, clause 30.3 permits an exercise in favour of any of Helen's "descendants", and Catherine clearly qualifies as a descendant. However, she is named as an Excluded Person, which brings into play clause 7, and, in particular, the wording:

"Notwithstanding anything herein contained in this Settlement

(b) ... 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 persons."

32. Taken at face value the effect of those words is clear. Clause 30.3 is "contained in this Settlement". Clause 7 provides that notwithstanding the wording of clause 30.3, that power cannot be exercised so as to pay, settle or apply the trust fund for the benefit of an Excluded Person in any way. Catherine is an Excluded Person, so the clause 30.3 power cannot be exercised in a way which creates a power of appointment which she can exercise in her own favour.

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

33. Excluded Persons clauses are common in settlements. It is understood by settlors and their advisers that merely omitting an individual from the class of beneficiaries does not mean that they might not benefit indirectly from the exercise of the trustee's beneficial or administrative powers. For family or fiscal reasons it is often desired to exclude any form of benefit, even indirect, for some individuals or classes of persons. Hence the use of overriding restrictions on the exercise of all powers under the trust to ensure no benefit passes to persons who are designated as excluded from benefit. Having placed Catherine in the Excluded Persons category it is, at first sight, unsurprising that she should also be excluded from benefitting from the Grantor's powers under clause 30.3.
34. What then are the arguments deployed by Helen to escape from the apparently clear meaning of the words used in the Trust Instrument? In her written submissions, she argues that the prohibition on benefitting Excluded Persons in clause 7 only applies to powers exercisable by the Trustee, and does not apply at all to the powers of the Grantor. But the wording of clause 7 is against this conclusion. Clause 7(a) is expressly aimed at the Trustee's powers. Clause 7(b) then has this wording:

“No trust power or provision hereby or by law conferred upon the trustee shall be exercised and no part of the income or capital of the trust fund shall be lent or paid to or settled on or applied in such a way for the benefit either directly or indirectly of any Excluded Person ...”

The opening words, down to the word “and” are again directed against the Trustee's powers, but the use of the passive voice in the phrase “... no part of the income or capital of the trust fund shall be lent [etc] ...” shows a clear intention on the part of the draftsman to widen the scope of the clause 7 restriction to cover payments loans settlements and applications out of the income or capital of the trust fund whatever their basis. In the end, this line of argument was not pursued by Advocate Aron, who appeared for Helen, at the hearing before this Court.

35. Helen also argues in her written submissions that the phrase “*Notwithstanding anything herein contained in this Settlement*” does not justify the conclusion that it must refer to every part of the Settlement. It is said that the words must be read in context, and that they are “*equally apt*” to refer to only some, but not all, of the provisions of the Settlement. But, with respect, “*notwithstanding anything*” means just that. It cannot equally mean “notwithstanding some things”. It is of course possible that an expression like “*notwithstanding anything*” could be

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

read down to mean something less than anything if the context demanded such a construction, but that does not appear to be a justified course here.

36. At the forefront of his oral submissions Advocate Aron argued that only the Trustee has the power to *"to pay, lend, settle or apply the income or capital of the A Trust"*. He argued that the section 30(3) power, which only enables the Grantor to confer a general power of appointment, does not amount to a power to pay apply or settle capital. In response, Advocate Wessels, appearing for Murray, pointed to the fact that the words *"paid or lent to or settled on or applied"* are expanded by the words *"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 Persons."* This, he says, justifies giving the words "paid" "applied" and "settled" the widest possible meaning. He submits that conferring a general power of appointment on a person is equivalent to giving them ownership of the assets appointed, which means that the conferring of a general power is tantamount to a payment of the assets in question. He also submits that conferring a general power of appointment over assets can fairly be described as applying or settling those assets for the benefit of the holder of the general power.
37. We agree with Advocate Wessels that it is reasonable to construe the words "paid" "applied" and "settled" widely. We see no particular difficulty in the proposition that the conferring of a general power of appointment over assets constitutes a payment, an application or a settlement of the assets in question to or for the benefit of the person upon whom the power is conferred.
38. One consequence of the proposition that the clause 7 restrictions do not apply to the exercise of Grantor powers is that they will not apply to the two other Grantor powers in the A Trust, namely the power to direct the application of income in clause 5(a), and the power of revocation in clause 30.1. The power of revocation is clearly unaffected by clause 7, because the Grantor is not an Excluded Person, and because it is power to revoke the totality of the trusts, including clause 7. It must therefore be the case that it can always be exercised free of any restriction in the trusts being revoked. But the consequence of clause 7 not applying to the Grantor's power to direct income is a problem for Helen's argument. It seems unlikely that it was intended that the Trustee should be prohibited from distributing income to an Excluded Person, but that the Grantor could nonetheless direct them to do so. Helen meets this problem by suggesting that although the Grantor is enabled to direct the Trustee to pay income to an Excluded Person, the Trustee would be unable actually to pay the income to that person. It is, undoubtably the case,

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

as Helen accepts, that a payment of income by the Trustee to an Excluded Person is prohibited by clause 7. But we do not think it was intended to create a situation in which the Trustee could be validly directed by the Grantor to pay income to an Excluded Purposes, and then be subject to a conflicting duty not to comply with the direction. One would expect that the Grantor would not be permitted to direct the Trustee to do something which the Trust Instrument forbids the Trustee to do, and that conclusion is readily arrived at by giving the words "Notwithstanding anything herein contained in this Settlement" their natural meaning and applying the clause 7 restrictions to the powers conferred on the Grantor.

39. Similar inconsistencies are present when one considers the Grantor power in clause 30(3). Even if Helen was correct that it was possible for the Grantor to confer a general power of appointment on Catherine, Advocate Aron accepted that clause 7 would prohibit Catherine from exercising the power so conferred in her own favour. This conclusion leads, indirectly, to the conclusion that the Grantor cannot exercise the clause 30.3 power in favour of an Excluded Person, because clause 30.3 can only be used to confer a general power of appointment, and it is of the essence of a general power that the holder can exercise the power in his or her own favour. Because clause 7 would prevent an Excluded Person from exercising the putative general power in her own favour, it follows that it is not possible to confer a general power of appointment on an Excluded Person. Of course, the convoluted reasoning outlined this paragraph is, again, unnecessary if the clause 7 restriction applies to the clause 30.3 power.
40. Helen also argues that clause 7 cannot have been intended to apply to the power conferred by clause 30.3, because if it did apply it would prevent the clause 30.3 ever being exercised. Helen contends that because the effect of conferring a general power of appointment on any person would be to permit that person to appoint assets in favour of an Excluded Person, every exercise of the clause 30.3 power would fall foul of clause 7, if clause 7 were applicable to clause 30.3. But once an asset is appointed out of the A Trust in favour of a non-Excluded Person, that person is free to do with it what he or she wishes, including giving the asset to an Excluded Person. That is because once an asset is appointed out of the Trust it is effectively the absolute property of the appointee. The restrictions in the Trust Instrument no longer have any application because the asset can now be enjoyed free and discharged from the terms of the Trust. So, there is no objection to a person in whose favour a general power is conferred exercising the power so as to discharge the asset from the trusts, leaving them free to gift the asset to an Excluded Person,

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

and no objection to the exercise of the clause 30.3 power that such a result is a possible outcome of the conferring of the general power.

41. Helen also argues that because she could exercise her power to revoke the A Trust under clause 30.1, and then give the trust fund to Catherine, so she should be able to achieve the same result by means of the exercise of clause 30.3. But the former approach would involve terminating the trust altogether. Of course, once this done clause 7 ceases to have any effect, like all the other provisions of the Trust Deed. But Helen has not chosen to take that approach. Instead, she wants to keep the A Trust alive and confer a general power on Catherine by the use of a power which is subject to whatever restrictions the Trust Instrument may impose on it. That is why there is a difference in what Helen may be able to achieve depending on whether she exercises clause 30.1 or 30.3.
42. Helen also argues that if it is not possible for the clause 30.3 power to be exercised in favour of Catherine then it is impossible to exercise the power otherwise than in favour of Murray, because her only other living descendants (Catherine's children) are ineligible because they are tax resident in the USA. We do not think there is any force in this point. First because the status of Helen's descendants may change. The class is not closed (for example Murray might yet have children) and Catherine's children's tax residence might change. And in any case, it is unclear why it is objectionable for Murray to be the sole object of the power at present. It is true that the evidence of the letter of wishes shows that Helen considered that Murray was financially irresponsible. But we do not see why there is any impossibility in a construction which gives Helen the power to grant Murray control over all or part of the trust fund in the future. On any view he is a potential beneficiary of the clause 30.3 power, because he is a descendant of Helen and he is not an Excluded Person. We do not see why it is necessary to adopt a strained construction of the wording of clause 7 to avoid the possibility that he is, at least for the moment, the only potential beneficiary.
43. Finally, we come to Helen's argument based on wording in Sch 4 of the Trust Instrument. This wording qualifies the naming of Catherine as an Excluded Person with the following wording (which we will refer to as "the proviso"):

"(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)"

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

which qualify Catherine's inclusion on the list of Excluded Persons in Sch 4.

44. Helen argues that this wording must be given some effect. There is at present no personal power conferred on Catherine by the Trust Instrument. The only way that such a power could be conferred on Catherine is if she were granted a general power of appointment under clause 30.3. So, it is argued, the proviso is aimed at a personal power created by that means. Therefore it must be permissible for Helen to exercise the clause 30.3 power in order to confer such a power on Catherine.
45. We see a number of difficulties with this argument. The first is that the proviso contains the words "(if applicable)", which suggests that it may not be operative in the event that there is no personal power conferred on Catherine. We are informed that the same proviso appears in Sch 4 of the B Trust and of the Future Gen Trust, which were drafted as part of the same reorganisation exercise as produced the A Trust. In the Future Gen Trust the proviso does have some effect, because Catherine is the Grantor of that Trust, and so does have powers conferred on her by the trust instrument itself, and is also an Excluded Person. That leads to the possibility that standard wording was borrowed from one settlement into another. These circumstances detract from any argument based on the need to avoid redundancy.
46. Secondly, the proviso is clearly aimed at allowing Catherine to exercise any personal power she may have been granted under the terms of the Trust, but it has nothing to say about the ambit of a power vested in any other party. It does not follow that, because Catherine would be able, by virtue of the proviso, to exercise a personal power if it was possible to grant her one, that therefore the Trust Instrument must be construed so as to permit such a power to be conferred. We have explained above why we think the wording used in clause 7 clearly precludes the use of clause 30.3 to grant a general power of appointment to Catherine. We do not think the wording of clause 7 can be departed from merely in order to find some situation in which the proviso can be applied.
47. Finally on this argument, the effect of granting Catherine a general power of appointment over the trust fund is tantamount to giving her outright beneficial ownership of it – the general power of appointment is not subject to any third party consent requirement. It would be a surprising conclusion if the effect of the proviso was to permit the trust fund to be transferred to Catherine outright – such an outcome would effectively negate her status as an Excluded Person.

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

48. For all these reasons we do not consider that the argument based on the proviso justifies the conclusion that Catherine can be made an object of the clause 30.3 power.
49. In conclusion on Issue 1, we agree with the Deputy Bailiff that an appointment in favour of Catherine is not a lawful exercise of the clause 30.3 power, because of Catherine's status as an Excluded Person.

Issue 2

50. Issue 2 does not need to be determined, because it only arises if our conclusion on Issue 1 is erroneous. Nonetheless the Deputy Bailiff ruled on it, and the point was fully argued before us. The Deputy Bailiff considered this question on the basis that, contrary to her ruling in Issue 1, the terms of clause 7 do not preclude the possibility of conferring a power of appointment on Catherine under clause 30.3.
51. It is axiomatic that unless a power is conferred for the personal benefit of the donee, the power can only be exercised for a proper purpose. Unlike the power of revocation in clause 30.1, the power conferred on Helen by clause 30.3 is not conferred purely for Helen's benefit, because she is not an object of it. It is therefore a non-fiduciary power exercisable in favour of a limited class of beneficiaries. As such any exercise must comply with the so-called proper purpose rule (using a power for an improper purpose is referred to in the old cases as a "fraud on the power"). This much was common ground on this appeal.
52. The basic principles of what has come to be known as the proper purpose rule (formerly referred to as the rule against committing a fraud on a power) are not in dispute. The rule was considered by the Supreme Court in *Eclairs Group Ltd v JKK Oil & Gas plc* [2015] UKSC 71, in context of the powers of company directors. In his judgment, Lord Sumption made the following observations:

"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

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

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."

These paragraphs were cited by the Privy Council in *Grand View Private Trust Company v Wong* [2022] UKPC 47 at paragraph 55. While the purpose of the power is to be determined objectively (*Grand View* paragraphs 61 to 63) the purpose for which the power is to be used is the subjective purpose of the person exercising the power (*Grand View* paragraph 72).

53. So far as concerns the purpose of the power conferred by clause 30.3, the Deputy Bailiff makes no clear finding. But it is not really in dispute. The purpose of the power is to enable Helen to benefit one or more of her descendants by conferring on them complete control over all or part of the trust fund.

54. At paragraph 48 of her judgment the Deputy Bailiff records that it was common ground that the evidence of the purpose for which Helen proposes to exercise the clause 30.3 power is to be found in a letter from Helen to Mr Lihou of Suntera dated 10 July 2022, a letter from Carey Olsen (representing Helen) dated 12 December 2022 and Helen's affidavit. The Deputy Bailiff does not make any findings as to what those purposes are. In *the Carey Olsen letter Helen's thinking is described in the following terms:*

"During the recent Court hearings [in connection with Murray's application to remove Suntera as trustee of the A Trust] Murray's counsel made repeated submissions to the broad effect that if Catherine is granted a power of appointment, the Court should assume that the assets will be appointed to parties other than Murray, depriving him of his existing interest in the A Trust. On this point, Helen would like to record as follows. Firstly, by granting Catherine a power of appointment, it ultimately becomes a matter for her whether to exercise that power and, if so, how. Without prejudice to that fact, the plan under discussion (between Helen, David [Catherine's husband] and Catherine) is not to deprive Murray or diminish his interest in the assets comprised in the A Trust funds as Murray fears. Rather, if the Third Party Consent Holder in due course grants Helen's request for consent, Helen's expectation is that Catherine will exercise her power of appointment to appoint all of the A Trust's assets to a new STAR trust in the Cayman Islands.

As far as practicable, the new STAR trust would replicate the existing rights and entitlements, with minor amendments to ensure that any structuring issues that may be a

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

feature of the A Trust are resolved. Murray's discretionary entitlement to income and capital in respect of the same assets will remain in materially the same form as he has at present. The purpose of appointing the assets to the STAR trust would, therefore, be limited to establishing a structure that is resistant to the threat by Murray of future litigation. This would be achieved by a third party (and not Murray) having the ability to enforce beneficiary rights against the STAR trustee as an express term of the trust deed. This is believed by Helen to be in the best interests of all beneficiaries. Notwithstanding this, Helen appreciates and accepts that Murray will likely still be opposed to this course of action. However, it is a very different outcome to that which his counsel has suggested to the Court will inevitably follow."

55. According to Carey Olsen, Helen's intention in advancing the proposed appointment in favour of Catherine is to create a new form of trust under Cayman Islands law, into which the assets of the A Trust are to be appointed by Catherine. A "STAR trust" is a trust established under Special Trusts Alternative Regime provisions now found in Part VIII of the Cayman Islands Trust Law (2021 Revision). The important aspect of that regime for present purposes is that any persons who stand to benefit under the purposes of the trust have no right to enforce the trust (section 100(1) of the Law). That right is placed in the hands of one or more "enforcers". An enforcer is appointed under the terms of the trust (or by the Court) and need not (indeed often is not) a beneficiary. By doing this, Helen intends to restructure the A Trust in a very significant way, and to deprive Murray of an important aspect of his rights as a beneficiary under the A Trust as presently constituted.

56. The Deputy Bailiff said this about the evidence of Helen's intentions (at paragraph 82 of her judgment):

"Whilst there does appear from Helen's own evidence a firm intention about what the plan is devised between Helen and Catherine ... , 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."

It is unclear whether the Deputy Bailiff is at this point making a finding that there was an antecedent agreement between Helen and Catherine. Helen's intention is described as "firm" but the Deputy Bailiff appears, in the absence of evidence from Catherine, reluctant to make a finding about whether there was an agreement to implement that intention, and merely assumes its

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

existence for the sake of argument. More significantly, there are no findings as to the content of any agreement with Catherine, so we do not know whether, if she entered into an agreement at all, that agreement extended to implementing the entirety of Helen's intentions as quoted above, or whether Catherine might have had a rather different understanding of what she was going to do.

57. Mr Aron submitted that if we thought there was anything in Murray's case on this issue it would be necessary to adjourn and take evidence from Catherine. We disagree. The Deputy Bailiff had to decide the case before her on the basis of the evidence adduced by the parties. In fact the position on the evidence before the Deputy Bailiff seems to favour Helen's position, granted that the Deputy Bailiff seems not to have made a finding of fact as to the existence of any agreement.

58. We turn then to the case advanced by Murray for saying that Helen is proposing to exercise the power for an improper purpose. Murray says that the prior agreement with Catherine shows that Helen wishes to exercise the power in a way which benefits her, because she is to have the benefit of controlling the destination of the appointed funds. Helen is not an object of clause 30.3, and therefore it is outside the proper purpose of the power for her to stipulate for a benefit for herself. Murray relies on the case of *Re Turner's Settled Estates* (1884) 28 Ch D 205 as authority for the proposition that the improper purpose rule will be infringed where the power holder makes an antecedent bargain to benefit a person who is not an object of the power.

59. That case involved an appointment by trustees which was made on condition that part of the assets appointed were re-settled. It was argued that because some of the persons who might benefit under the re-settlement were not objects of the power the appointment was void as being a fraud on the power, which is to say it was being made for a purpose other than for which the power was created. The Court of Appeal said this (at pages 216 to 217)

"It appears to us to be plain that the mere conferring of a benefit upon a person not an object of the power will not avoid the exercise of the power, if made with the approbation of the real objects of the power: see Sugden on Powers 8th Ed page 630; or even if made with the approval of the person who would take under an exercise in favour of the object of the power, as in the case where an appointment was made to a married daughter, and she and her husband re-settled it, giving benefits, not only to their children, but to a stranger to the family: Wright v. Goff 22 Beav 207; or where the appointment was made

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

upon the usual terms of a marriage settlement on the occasion of the marriage of an infant daughter: Fitzroy v. Dulce of Richmond 27 Beav. 190(3).

It appears to us to be further plain 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.

...

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 25 Beav 307, "the reason of the appointment being made to the appointee," or, to use the language of Lord Justice Knight Bruce in Pryor v. Pryor 2 DJ&S 210, "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."

The Court went on to find that on the facts of the case the antecedent contract was not the reason the appointment was made, and upheld the appointment.

60. Having regard to the way in which Murray has framed his argument on this Issue, Murray therefore has to show:
- (a) That there was an antecedent agreement between Helen and Catherine as to how trust which was the subject of the proposed appointment to Catherine would be applied
 - (b) That the antecedent agreement was the reason the appointment was made, in the sense that but for the agreement there would have been no appointment and
 - (c) That terms of antecedent agreement could cause the appointed assets to be used for the benefit of a non-object of the power, otherwise than in circumstances where the real objects of the power approve of that benefit being conferred.
61. As noted in paragraph 56 above, the Deputy Bailiff made no clear finding that there was an antecedent agreement, and no finding at all as to its terms. Furthermore, although she addressed the argument now under consideration, she did not make any finding on point (b), above. She appears to have assumed in Murray's favour that he could succeed on points (a) and (b), because

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

she dismissed his challenge to the proposed appointment on the ground that he could not show that the result of the agreement was to benefit a non-object in an impermissible way. She expressed her conclusions on this issue in paragraph 84 in the following terms:

“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.”

62. The Deputy Bailiff's approach to Issue 2 was no doubt conditioned by the fact that it the issue was entirely obiter in the light of her decision on Issue 1. However, the absence of findings of fact on the key issues underpinning Murray's arguments makes it difficult for us to express a concluded view on such a fact sensitive issue. Had it been necessary to decide this Issue we would have had to do what we could with the materials available, but as it is not necessary to do that we prefer, for the reasons given above, not to express any concluded view on this point.

Issue 3

63. We consider that we should rule on this issue. It is true that the particular exercise of the clause 30.3 power presently under consideration will not necessitate any decision about whether consent should be given, because we have decided that it is outside the scope of the clause 30.3 power altogether. But it is quite possible that other exercises of the Grantor powers in clause 30 may be proposed by Helen in the future, and in that event the nature and scope of the power to consent to those exercises will become relevant.
64. The issue centres on the wording in clause 30.4, which qualifies exercises of powers under both 30.1 (the Grantor's power of revocation) and 30.3. So far as relevant, that wording reads as follows:

“the exercise of the Grantor's powers under this clause 30 shall be of no force or effect unless it shall have attached thereto the written consent of the third party consent holder.”

This deceptively simple wording conceals a multiplicity of possible interpretations regarding the giving of consent by the TPCH. At one extreme lies Helen's contention that the TPCH is

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

confined to confirming that the Grantor's exercise of the power is lawful – ie it is within the scope of the power and it is being made for a proper purpose. Beyond that, Helen's contention is that the TPCH has no independent decision making role; if the exercise of the power is lawful it is under a duty to consent. If that is not right, then the TPCH does have a real decision to take, but that then raises the question as to what factors or interests it should take into account when reaching its decision. Should it take into account the interests of all of the Beneficiaries of the A Trust, or should it only have regard to the interests of the Grantor, or the objects of the clause 30.3 power? Is it confined to merely reviewing the Grantor's decision, or should it decide for itself whether it would have exercised the Grantor power in the same way as the Grantor? Further, is the TPCH under a duty to give proper consideration as to whether or not to give consent whenever it is asked, or is it free to ignore any request?

65. Before addressing these questions, it is necessary to say something about the relevance of extrinsic evidence in the construction process. This was the subject of extensive submissions before the Deputy Bailiff. There is no dispute about the correct approach for the Court to take, although there has been some dispute as to the application of those principles to the facts. The Deputy Bailiff cites a range of authorities on this topic in paragraphs 26 to 30 of her judgment, which we do not reproduce here, although we have of course borne them in mind. For present purposes we refer to a short passage from Lord Richard's judgment in *Grand View Private Trust Co Ltd v Wong and others* [2022] UKPC 47 at paragraph 57 where he observes:

“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 ..., 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.”

66. In the present case, chief among those circumstances are the fiscal considerations which underpinned the design of the Grantor's powers. On the one hand the Grantor needed to have a power of revocation in order for the A Trust to enjoy foreign grantor trust status for US tax purposes. On the other hand, it was necessary for there to be some restriction on that power of revocation in order to avoid the whole of the trust fund being attributed to the ownership of the Grantor for South African estate duty purposes. The power of consent needed to be sufficiently robust to avoid that outcome, while rendering the TPCH sufficiently “subservient” to the

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

Grantor that the consent requirement did not deprive the A Trust of foreign grantor trust status. Mr Prevel, in his affidavit filed on behalf of Suntera, puts the matter thus, in paragraph 31 [763]:

"I understand that in order to reconcile the competing tax regimes of the various relevant jurisdictions, ie South Africa and the US, the concept of a "consent holder" was to be provided for in the new trusts. The consent holder's consent would be required both for the exercise of the Grantor's power of revocation and power to direct the payment of trust income. The inclusion of the consent holder was also intended to ensure that from a South African tax perspective the grantor's powers were fettered, such that the structure was afforded South African tax advantages."

67. There is in evidence some written advice produced by Werksmans, the South African advisers who were engaged by Suntera to advise on the 2021 reorganisation. This advice takes the form of a series of three "High Level Steps Plans" which show the evolution of the 2021 reorganisation between April 2020 and February 2021, and an advice letter addressed to Suntera dated 24 February 2021. For present purposes what is significant about this material is what, if anything, it has to say about the tax implications of inserting the consent requirement. This is because Suntera's (and Helen's) contemporaneous understanding of the relevant tax requirements which led to the insertion of the consent requirement may be of relevance when construing the effect of the wording of the consent requirement in clause 30.4.

68. In fact, the written material available to Suntera at the time of the reorganisation has nothing specific to say about the consent requirement. The first of the High Level Steps Plans does summarise the requirements of a US foreign grantor trust. It refers to the fact that the new trusts are to be set up as US Grantor Trusts, then says:

"... in other words in respect of which [Catherine] has the powers of appointment and revocation subject to the consent of a non-adverse person, eg DS"

At that stage it was envisaged that Catherine would be the grantor of each of the trusts. DS refers to David Selvan, Catherine's husband. Subsequent versions of the High Level Steps Plan do not have this wording. Otherwise, the advantages of the new trusts qualifying for US foreign grantor trust status are emphasised, as are the disadvantages of the AACS trust not qualifying. It is clear that obtaining a more advantageous US tax status for the family's wealth was a key motive behind the reorganisation (as which there is an explicit statement in clause 30.2 of the

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

Trust Instrument). But the need for the consent requirement to be "subservient" to the Grantor, and how that might be achieved is not addressed. The High Level Step Plans mention the fact that the AACS trust will not be attributed to Helen's estate because of the insertion by amendment of a consent requirement, but there is no consideration of the position of the A Trust and other two new trusts, and no consideration of whether the need for the TPCCH to be "subservient" to the Grantors of those trusts might cause an issue for South African estate duty purposes.

69. After the reorganisation was effected, the available written advice becomes more specific. For example, there is a Memorandum dated 18 November 2021 from a firm called Stonehage Fleming Law US, which states:

"Please accept this memorandum as confirmation that the position of "Third Party Consent Holder" in each of (i) The HKS Second Gen A Trust [the A Trust} (ii) The HKS Second Gen B Trust, and (iii) the HKS Future Gen Trust is a nonfiduciary position. The Third Party Consent Holder is intended to have non-fiduciary powers only. If that person's consent powers were fiduciary in nature it would defeat the US purposes that the position is intended to accomplish."

This is emphatic advice, but there is no evidence that it was given, and present in the mind of Suntera and Helen, at the date the Trust Instrument was executed. It appears that Stonehage were instructed to advise on an urgent basis on 12 February 2021, very shortly before the Trust Instrument was executed, but there is no evidence of what advice they gave before execution.

70. There is affidavit evidence before the Court but none of it touches on what if any specific advice was given about the consent requirement. The evidence filed on behalf of Oak Trust is given by Mr Sharman, but as Oak Trust were not involved in the 2021 reconstruction he can do no more than exhibit and comment on the available documents. Evidence is given on behalf of Suntera by Mr Marcus Prevel, but he was also not personally involved in the reconstruction. Helen has also made an affidavit. She was, of course, closely involved in the reconstruction, but she does not deal with the detail of the parties understanding of the way the consent requirement was to operate.

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

71. With regards to the South African tax position, the most detailed advice appears in Werksman's letter to Suntera dated 5 November 2021. So far as concerns the consent requirement the letter says this:

“Going forward, neither Catherine nor Helen have any powers referred to above (including the "power of appointment" in section 3(5)(b)(i) of the EDA), since the exercise of such powers cannot become effective without the consent of HKS 1 Limited, HKS 2 Limited or HKS 3 Limited. As such, there can be no inclusions for estate duty calculation purposes, in terms of section 3(3)(d) of the EDA.”

There is no more detailed consideration of the how the consent requirement might operate in practice, or the extent to which it conferred a real discretion upon the TPCH.

72. With the benefit, such as it is, of that background material, we now approach the question of the effect of the consent requirement in clause 30.4. Although much of the argument has centred around whether the consent requirement constitutes, or does not constitute a fiduciary power or duty, we think it is helpful to set that classification to one side, and begin by asking how the consent requirement was intended to work in practice.

73. The following features of the consent requirement should be noted at the outset:

- (1) The fact that the TPCH is required to give consent suggests that the TPCH is expected to exercise a discretion or a judgment in respect of the proposed exercise of the relevant Grantor power. The use of the word “consent” by itself, shows that is unlikely to have been intended that the TPCH should be obliged to give consent whenever the Grantor asks for it. Constrained consent is no consent at all.
- (2) Allied to the first point is a point emphasised by Murray, which is that the consent requirement was clearly intended to impose some additional requirement for validity on the exercise of a Grantor power, over and above the requirements for the validity, inherent in the Grantor powers themselves
- (3) The first TPCH to be appointed is an entity which is professionally managed and which has no personal interest in the family. It is in other words not an old family friend or long term family adviser. In the latter sort of case a settlor might allow a wide measure of discretion untrammelled by the oversight which attaches to fiduciary obligations,

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

having regard to the personal trust placed in the consent holder. However, where the consent holder is not personally connected to the family one might expect it to be subject to legal responsibilities which ensure that it carries out its functions in a proper manner.

(4) There are two other fiduciary entities involved in the A Trust – the Trustee and the Protector. Neither of these entities was selected to perform the role of TPCH. It has been suggested by Helen in argument that this is an indication that the TPCH was not intended to be a fiduciary. We agree that the choice of a distinct entity as TPCH is significant, but not perhaps for quite the reason Helen suggests.

(5) The power of appointing a successor to the current TPCH is vested in Helen, as Grantor. Whoever is appointed must satisfy the conditions laid down in clause 1, which correspond to the requirements of the US tax code. It should be noted, however, that the Grantor does not have the power to remove HSK2 as the TPCH. That could only happen if the Trustee chose to dissolve HSK2. It is therefore reasonable to assume that HSK2 will remain as TPCH for the foreseeable future, and quite possibly for the remainder of Helen's life.

(6) The terms of clause 30 are exempted from the Trustee's general power to amend the Trust Instrument conferred by clause 27.

74. We begin by considering what, if any, duties the TPCH might be subject to when exercising the power to give or withhold consent. Potentially, there are two such duties – the duty to consider exercising the power when asked to do so by the Grantor, and the duty to give properly informed consideration to the exercise of the power (that is to say, the same as the duty to which a trustee is subject when exercising its powers). Helen's case is that the power to give or withhold consent is a non-fiduciary power, which we understand to mean that her case is that no duties attach to the exercise of the power. Murray argues that the power is a fiduciary power, so on his case both of the duties under consideration will apply.

75. Having regard to the context in which the power to consent was conferred, it seems to us that it must have been intended that the TPCH should be under both of the duties referred to in the previous paragraph. Because of the importance of the consent requirement it seems very unlikely that it was intended that the TPCH should be entitled to ignore any request made by

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

the Grantor. Were that the case, the whole mechanism for obtaining consent could break down. Likewise, we think it likely that it was intended that the Grantor should be able to challenge an ill-considered refusal to give consent. The fact that HSK2 is a professionally managed entity supports the argument for saying such a duties exist. Although Helen is arguing for the consent power to be entirely non-fiduciary in nature, it seems to us that the existence these duties are in her interest. Without them she would be powerless to compel the TPCCH to give proper consideration to granting consent to any proposed exercise of her powers.

76. We think the real issue over the proper operation of the consent requirement concerns the purpose which the consent requirement exists to serve, and the identity of the persons or persons whose interests the consent requirement exists to serve.
77. As noted above, Helen submits that the function of the consent order is merely to enable the TPCCH to verify that the Grantor's proposed exercise of the power is valid, and if it is then consent must be given. Murray, on the other hand, submits that consent must be given or withheld by reference to the interests and wishes of the Grantor, but balanced by having regard to the interests of the A Trust as a whole, including whether the trust fund should be protected from being stripped bare entirely. The Deputy Bailiff effectively accepted this submission, but she expressed her conclusion slightly differently, saying (at paragraph 116 of her judgment):

"... 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"

This might indicate that the Deputy Bailiff was of the view that when exercising the power to give or withhold consent the TPCCH owes a duty to the Beneficiaries of the A Trust alone. If she did mean that, Advocate Wessels confirmed at the hearing before us that he did not support that position. His client's contention remains that the TPCCH owes a duty to consider both the interests of the Beneficiaries and also those of the Grantor and the objects of the clause 30.3 power.

78. We will look first at Helen's analysis of the way the consent requirement is to operate. Under Helen's analysis, the TPCCH is confined to determining whether the Grantor's exercise of her

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

power is lawful. If it is lawful, consent must be given. This approach seems to us to give too little weight to the fact that the TPCCH has a power to consent. On Helen's approach there is no choice or exercise of discretion involved for the TPCCH – if the power is lawfully exercised it must say yes, and, if not, it must say no. And the involvement of the TPCCH does not add anything to the requirements of the general law. It does not, as Advocate Wessels points out, add any additional requirement for the valid exercise of the Grantor's powers, which is contrary to what one might expect of a consent requirement. Advocate Wessels also makes the point that in the case of the Grantor's power of revocation, which is a power which clearly exists for the personal benefit of the Grantor, the proper purpose test cannot be applied. It is hard to see how any exercise of the power of revocation could fail to be lawful and, that being so, the TPCCH has no function to perform – the giving of consent will be compulsory.

79. It was the possibility of an unrestrained power of revocation which gave rise to concerns over South African estate duty. Helen's analysis of the operation of the consent power effectively leaves the power unconstrained. That is another reason for doubting whether it can really have been intended to leave no scope for the TPCCH to refuse consent to the exercise of the power of revocation. Helen points to the fact that Mr Emslie, while expressing concern that the existence of a duty to consent might not afford the necessary protection against South African estate duty, is of the view that the South African tax authorities would be unlikely to spot, or take, the point. But there is no evidence that this way of thinking was present to the mind of Suntera at the time the 2021 reorganisation.
80. We therefore reject Helen's analysis as failing to give any meaningful content to the requirement for the TPH to "consent" to any proposed exercise. We now turn to Murray's analysis of the operation of the consent requirement.
81. At the heart of the difference between Helen's analysis and Murray's analysis is a dispute over the overriding nature of the Grantor's powers in clauses 30.1 and 30.3. Helen considers that they operate outside the beneficial provisions of the Trust Instrument, in favour of the Beneficiaries of Trust A, and are intended to have overriding effect. On Helen's approach the whole purpose of the Grantor powers is to enable the Grantor to revoke, or extract assets from, Trust A at the expense of the Beneficiaries. Taking that view, the consent requirement should not involve any consideration of the interests of the Beneficiaries of Trust A. The only persons whose interests are engaged when the Grantor powers are exercised are the Grantor (in the case

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

of an exercise of the power of revocation in clause 30.1) or her descendants (in the case of an exercise of the power of appointment contained in clause 30.3). Although we have rejected Helen's analysis that the TPCCH is under a duty to consent to any lawful exercise of the power, that rejection does not mean that we consider that she is wrong in her basic contention that clause 30 operates independently of the beneficial powers and provisions declared in favour of the Beneficiaries.

82. Murray on the other hand, thinks that the Grantor powers should be integrated into the other beneficial provisions of the Trust Instrument, and sees the consent requirement as a mechanism to limit the overriding effect of the Grantor powers, by requiring any exercise of those powers to have regard to the interests of the Beneficiaries as well as those of the objects of the Grantor powers.
83. Agreeing, in essence, with Murray, the Deputy Bailiff said this (at paragraphs 114 and 115) [45]:

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.

...

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."

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

84. Murray supports the Deputy Bailiff's analysis. He submits that Helen's approach, namely that the Grantor's powers were intended to override the other terms of the A Trust is "fundamentally unbalanced". He submits that she is wrong to "assume" that some parts of the Trust Instrument (clauses 30.1 and 30.3) take precedence over others. The correct position, he submits, is that the Grantor powers are part of the terms of the trust subject to their own restrictions. The interaction of the Grantor powers with the consent requirement produces a "balanced" result.
85. There is no definitive answer as to which of these approaches is correct. The Trust Instrument does not contain any statement on the subject, and the evidence about Suntera's knowledge of the tax context at the time the Trust Instrument was executed is also inconclusive on this point. However, it seems to us that the correct starting point is the fact that the Grantor powers are clearly intended to be capable of overriding the other terms of the A Trust. That is the essence of a power of revocation, and it is also the effect of the power of appointment in clause 30.3, which has as its objects a class of beneficiaries quite distinct from the Beneficiaries of the A Trust itself. Having conferred on the Grantor these powers for the benefit of a class containing non-Beneficiaries, and having excluded the amendment of these powers by the Trustee under its general power of amendment, we ask how likely it is that power of consent for the exercise of those powers should have been intended to be exercised by reference to the interests of the Beneficiaries. Consent to the exercise of the Grantor's powers can, on Murray's analysis, be refused by reference to the interest of persons which the Grantor would not herself have taken into account when exercising her own power. That would create an inconsistency between the basis on which the power is to be exercised and the basis on which consent is to be given which is, we think, unlikely to have been intended. Instead of the TPCCH exercising a power to consent to an exercise of the Grantor's power, the TPCCH on this approach, enjoys a quite different power in which the interests of a different set of objects (the Beneficiaries) are considered alongside the objects of the Grantor power (the Grantor or her descendants).
86. Murray's submissions are predicated on the fact that it cannot have been intended for the Grantor to have overriding powers which could be exercised in a manner adverse to the interests of the Beneficiaries. But that seems to us to be an assertion which assumes what it seeks to prove. On its face, a power of revocation is a classic example of an overriding power to dispose of trust assets at the expense of the named beneficiaries of a trust. The Grantor's power to confer a general power of appointment on her descendants is of a similar nature. Although the tax advice received prior to the execution of the Trust Instrument did not descend into detail about

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

the way the consent requirement was to operate, what is clear is that Suntera knew that the Grantor needed to have a power of revocation, and the first High Level Steps Plan told them that the consent power needed to be vested in a "non-adverse" person. The approach advocated by Murray, and adopted by the Deputy Bailiff, has the effect of denaturing the Grantor's powers by making them subject to a TPCCH which is duty bound to have regard to the interests of persons who are very likely to be directly opposed to the interests of the Grantor, and the objects of the Grantor's powers. In his written submissions, Murray refers to the need to "protect the trust fund" from being stripped bare in its entirety by an exercise of the power of revocation. That is a clear example of a situation in which, on Murray's approach, the interests of the Grantor and the duty of the TPCCH would be diametrically opposed.

87. We think it is significant that it was decided to vest the power to consent to an entity distinct from the Trustees or the Protector (both of whom owe fiduciary duties to the Trust as a whole). By contrast the TPCCH has only a very limited function – its sole responsibility is to give or withhold consents to the exercise of Grantor powers under clause 30, and under clause 5(a). This suggests that clause 30 is a self-contained code, and that whether or not consent should be given is a decision to be taken by reference to the interests of the persons who might benefit under clause 30.
88. Advocate Aron places at the forefront of Helen's case the need to construe the Trust Instrument so as to ensure that it complies with US requirements for a foreign grantor trust. He stresses that it was clear that this was a key, perhaps the key, objective behind the 2021 reorganisation. So, no construction should be countenanced which runs the risk of losing foreign grantor trust status. In his submission Murray's proposed construction must be ruled out, because it does just that.
89. Advocate Wessels responded by downplaying the significance of the A Trust qualifying as a foreign grantor trust, and pointed out that at present there are no beneficiaries who are US tax resident, so the foreign grantor status of the trust is of no immediate relevance. However, we do not think it is right to minimise the significance of the foreign grantor status of the A Trust in this way, in view of the clear evidence that, whether necessary or not, foreign grantor status was at the forefront of Suntera and Helen's minds at the time of the 2021 reorganisation, and in view of the explicit statement in clause 30.2 that the A Trust that the Trust "as currently constituted" was understood to be a foreign grantor trust for US tax purposes.

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

90. Advocate Wessels also pointed out that HKS2, being a company owned by the Trustee, benefits from a presumption under the US tax code that, as "a related or subordinate party", it is presumed to be subservient to the Grantor. That presumption is of course capable of being rebutted by the IRS in the event that actions of the consent holder turn out not to be consistent with its subservient status. In effect, Advocate Wessels was asking us to assume that the A Trust was set up on a basis which was liable to fall foul of the foreign grantor trust requirements if the consent requirement was ever operated, albeit in the meanwhile it might be presumed to be compliant. While the evidence does not show what, if any, detailed tax advice about US foreign grantor trusts was available before the 2021 reorganisation, we think, notwithstanding Advocate Wessel's submissions, that it is very unlikely that the advisers in 2021 would have signed off on an arrangement which worked in the way that Murray contends for, because, by imposing on it a fiduciary duty owed to persons with an interest adverse to the Grantor, TPCCH would have become the very antithesis of a party subservient to the Grantor.
91. Before concluding this point, it is necessary to consider a further argument advanced by Murray. He relies on the close connection between HKS2, as the TPCCH, and the Trustee in support of his argument that the power of consent vested in HKS2 should be regarded as fiduciary in nature. For the reasons given above we agree with that proposition, in that we have concluded that the TPCCH is under a duty to consider the exercise of the power of consent when asked to do so, and is under a duty to give properly informed consideration to its decision. However, Murray also relies on this connection between HSK2 and the Trustee to support the proposition that it must have been intended that HKS2 should act in the interest of the Trustee (which he equates with protecting the interests of the Beneficiaries against exercises of the Grantor's powers). He points to the fact that the Trust Instrument contains what is commonly referred to as an "anti-Bartlett" clause, which is to say a clause which exonerates a trustee from responsibility for the decisions and conduct of the management of a company in which the trust has an interest, or which the trust controls. Murray argues that the anti-Bartlett clause in the Trust Instrument, at paragraph 4(c) of Schedule 1, states that 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. He argues that the consent power is part of HKS2's business and affairs, and paragraph 4(c) would make no sense if HKS2 was not required to act in the best interests of the Trustee in exercising that power.

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

92. With respect to the Deputy Bailiff, who found the argument persuasive, we do not think this point adds anything to Advocate Wessels other submissions on this issue. It is clear that HSK2 has been selected to perform a specific function under the terms of the Trust Instrument. The fact that it is wholly owned by the Trustee does not mean that it has the same fiduciary duties as the Trustee in respect of the distinct power of consent conferred on it by clause 30.4. It appears that the reason HSK2 was selected as the TPCCH was because, as a company 100% owned by the Trustee, it qualified as a related or subordinate party for US tax purposes *vis a vis* the Grantor. There is no reason to suppose it was selected for that role so that the Trustee could control it. HSK2 is a distinct legal person from the trustee and, like company with fiduciary duties, it must perform those duties without regard to the interests of its own shareholders. As it happens, it currently has the same directors as Trustee, but there is no reason why that should cause a difficulty when it comes to performing the limited fiduciary duties imposed on the TPCCH. If it does, one or more independent directors could be appointed to the board of HSK2.
93. The wording of the anti-Barlett clause does not compel the conclusion that every action which HSK2 undertakes must in fact be undertaken in furtherance of the interests of the Trustee or the Beneficiaries in general. It would in any case be placing altogether too much weight on a standard form trust administration provision to say that it outweighed the conclusions we have reached based on a construction of the wording of clause 31 itself, read in the light of the fiscal context in which the Trust Instrument was executed.
94. Having rejected both Helen's and Murray's preferred constructions, it is incumbent on the Court to determine what, objectively considered, is the most likely intended basis for the operation of the consent power. That basis must give real content to the consent requirement and, at the same time, represent a solution which might plausibly have been adopted by Suntera and Helen to address the competing fiscal requirements of the US and South African tax regimes.
95. For the reasons given above, we think TPCCH's power in clause 30.4 to give or withhold consent only operates within the parameters of clause 30. That is to say, whether consent is to be given or refused must be decided by reference to the interests of the persons who are subject to the overriding powers conferred by clause 30. The interests of other persons, such as the Beneficiaries of the A Trust are not to be taken into account. We also consider, in the present context, that the power to give or withhold consent involves merely evaluating the merits of the exercise proposed by the Grantor. It does not involve the TPCCH deciding whether it might have

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

taken some other decision if the exercise of the power had been entrusted to it. In the context of protector powers, a distinction has evolved between a consent power which involves the power holder having to decide for itself how it would have exercised the power (the so-called "wider view") and a consent power which is limited merely to reviewing whether the power holder has reached a decision which a reasonable trustee would have reached ("the narrower view"). The former view was advanced by the Jersey Royal Court in *Re Piedmont Trust* [2021] JRC 248 at paragraphs 87 to 92 and the latter by the Court of Appeal of Bermuda in *Re X Trusts* [2023] CA Bda 4 Civ, which came out decisively in favour of the narrower view. These authorities were referred to by the parties before the Deputy Bailiff and before this Court, but no reliance was placed on them, on the ground that they were addressing a very different situation, namely where a fiduciary protector was given a power of consent over the decision of another fiduciary, namely a trustee. By contrast, in the present case, the powerholder whose decision requires consent is not a fiduciary.

96. We consider that the provisions under consideration on this appeal differ from those in any decided case on the ambit of consent powers to which we have been referred, and so the results in those cases are of limited assistance when considering the consent requirement in clause 30.4. We have to form our judgment on what we consider most likely to have been intended based on the wording of Trust Instrument, having regard to the particular circumstances in which it was executed. Those circumstances make it unlikely that it was intended that the exercise of the consent power should have been the occasion for wholesale review by the consent holder of the merits of the proposed exercise of the power, having regard to the need to ensure the subservience of the TPCCH to the decisions of the Grantor. Rather we think that the TPCCH should be confined to deciding whether it considers that the proposed exercise is for the benefit of the person or persons in favour of whom the power is proposed to be exercised. That is to say, the TPCCH must ask if the proposed exercise is for the benefit of the Grantor, in the case of an exercise of the power of revocation, and for the benefit of the proposed object of the power, in the case of the clause 30.3 power.

97. In most cases the TPCCH will have no option but to grant consent when it addresses these questions. But that is not to say that the TPCCH would always be bound to consent. Where the Grantor exercises the power of revocation the TPCCH would have to consider whether such an exercise was for her benefit. In almost every case it would be bound to conclude that it was so, but if, for example, the TPCCH had concerns over whether some person was exercising undue

the Court of Appeal held that the Grantor's clause 30.3 power could not be exercised in favour of an Excluded Person, and therefore the daughter of the deceased could not be granted a general power of appointment. The Court further clarified the nature of the Third-Party Consent Holder's role, holding that consent must be assessed solely by reference to the interests of those who may benefit under clause 30.

influence over Helen, or it otherwise had doubts as to her capacity to manage her affairs, it might conclude that it was not in her interests to take absolute control of the trust fund. Likewise, if the Helen, as Grantor, appointed a general power of appointment in favour of a young and irresponsible descendant (assuming such an individual were to exist), TPCCH might consider, in all the circumstances, that it was not in the best interests of that descendant to receive control over such a substantial sum at such a young age.

98. The position we have reached is close to, but not the same as, the result argued for by Helen. Under Helen's analysis, as we understand it, once the TPCCH has determined that the power has been exercised for a proper purpose it must defer to the Grantors view as to whether the proposed exercise is for the benefit for the selected object. In the view of this Court, the TPCCH has to form its own view on that question before deciding whether or not to consent, albeit in most cases the grant of consent will be the only rational response.