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IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

**SC 32/2023
[2024] NZSC 181**

BETWEEN	RAEWYN PHYLLIS COOPER Appellant
AND	MARCUS ROBERT WILLIAM PINNEY Respondent
AND	JENNIFER JANE PINNEY AND PHILLIP JOHN SMITH AS TRUSTEES OF THE MRW PINNEY FAMILY TRUST Interested Parties

Hearing: 1–2 November 2023

Further
Submissions: 13 May 2024

Court: Winkelmann CJ, Glazebrook, Ellen France, Williams and Kós JJ

Counsel: P G Watts KC, S J Zindel and I T K T R F Hikaka for Appellant
S N van Bohemen and R L Powell for Respondent
A S Butler KC, N L Walker and J A Tocher for the Trustees of the
MRW Pinney Family Trust as Interested Parties

Judgment: 20 December 2024

JUDGMENT OF THE COURT

A The appeal is dismissed.

B Costs are reserved.

REASONS
(Given by Winkelmann CJ and Kós J)

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Introduction

[1] At issue in this appeal is what rights or powers in respect of assets in a family trust can properly be treated as “property” rights or interests falling within the ambit of the Property (Relationships) Act 1976 (the PRA).

[2] The respondent, Mr Pinney, was a settlor of the trust in question. He is one of a number of discretionary beneficiaries under the trust, and also holds the power of appointment of trustees. The central proposition for the appellant, Ms Cooper—Mr Pinney’s former partner—is that his rights and powers under the trust give him effective control of the trust assets, so that those rights and powers should be treated as property for the purposes of the PRA.

[3] Addressing this appeal involves consideration of the breadth and application of the principles established in this Court’s decision in *Clayton v Clayton [Vaughan Road Property Trust]*, and the potential impact of the Trusts Act 2019 (the 2019 Act) on the duties and rights in this area.¹

Narrative

[4] The factual narrative giving rise to these issues is largely uncontroversial. The summary that follows is largely drawn from the judgment of Miller J in the Court of Appeal.²

[5] Mr Pinney and Ms Cooper began their de facto relationship (for the purposes of the PRA) in about September or October 2004. They separated in April 2014. During the relationship they had two children, born in 2007 and 2009.

[6] Throughout the relationship Ms Cooper worked alongside Mr Pinney on a farm held in a family trust, the MRW Pinney Family Trust (the MRWT). The farm and the trust are the focus of this appeal.

[7] To understand the history and purpose of the creation of the MRWT we must go back to the creation of an earlier family trust, the Pinney Trust.

[8] Mr Pinney’s father, Bernard Pinney, established the Pinney Trust in 1977. The beneficiaries were Bernard’s children and remoter issue (meaning future generations). Mr Pinney was an infant at the time. By April 2004 the trustees were

¹ *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551.

² *Cooper v Pinney* [2023] NZCA 62, [2023] 2 NZLR 455 (Cooper P, Miller and Gilbert JJ) [CA judgment]; on appeal from *Pinney v Cooper* [2020] NZHC 1178, [2020] NZFLR 150 (Clark J) [HC judgment].

Bernard's wife Jennifer (Mr Pinney's mother), Lindsay McIntyre (an accountant) and John Acland (a farmer).

[9] The Pinney Trust provided support to Mr Pinney and a previous partner of his when, in 2000, they established a farming partnership—buying land at Te Taho to lease to the partnership, and providing stock and plant at favourable prices.

[10] Both the relationship and the farming partnership failed. In evidence before the Court, one of the trustees of the Pinney Trust attributed the business failure to Mr Pinney's inability to control his expenditure.

[11] The Pinney Trust advanced further funds to clear Mr Pinney's overdraft and other liabilities and to enable the partnership to be wound up and the farm business to continue. By 2004, the Pinney Trust's advances to Mr Pinney totalled \$673,000.

[12] On 2 June 2005, the trustees resolved to distribute the Pinney Trust's assets into separate trusts for Mr Pinney and his brother. That was some nine or so months after the de facto relationship between Mr Pinney and Ms Cooper began.

[13] On 10 June 2005, Mr McIntyre wrote to Mr Pinney offering advice that he should adopt an ownership structure to receive those assets that ensured any assets transferred from the Pinney Trust would be regarded as his separate property for relationship property purposes. Mr McIntyre wrote that:

The principal issue in terms of structure is to maintain the assets transferred from the Pinney Trust, and any other future inheritance from your mother and father's estate as separate property under the Property Relationships Act 1976.

[14] The MRWT deed was executed on 27 January 2006. We set out more details about the terms of the MRWT deed later in this judgment.³ The MRWT was initially settled with a payment of \$20, but over time the following assets were distributed to it by the Pinney Trust:⁴

³ See below at [20]–[30].

⁴ The values of the advances to Mr Pinney and the investment asset were understated in the Court of Appeal's judgment: see CA judgment, above n 2, at [15]. Those figures have been revised here.

- (a) The land and buildings at Te Taho. There was a current market valuation of \$1,100,000, but the property was transferred at its book value of \$469,669.
- (b) Advances to Mr Pinney of \$334,428 (representing among other things livestock and plant, a bank overdraft and Mr Pinney's overdrawn current account). As a result, Mr Pinney owed the MRWT the amounts previously due to the Pinney Trust.
- (c) An investment asset of \$2,091 and cash of \$216,472.

In the High Court, Clark J found that the total amount resettled on the MRWT was \$1,652,991, taking the land at its market valuation.⁵

[15] A company, Te Taho Deer Park Ltd, was also formed to operate the business that Mr Pinney now managed with Ms Cooper. The shareholders were the trustees of the MRWT (98 shares) and Mr Pinney and Ms Cooper (one share each). Livestock and plant, previously Mr Pinney's separate property, were taken over by that company. It assumed a liability to Mr Pinney, reflected in his current account, and Mr Pinney was now separately indebted to the MRWT for advances received from the Pinney Trust in order to purchase those items in the first place. Clark J found that some of the debts owed by Mr Pinney to the MRWT were subsequently forgiven, though these transactions were not documented.⁶

[16] Ms Cooper admits that she signed paperwork establishing the company but maintains that she took no legal advice and was not told that she had only a one per cent interest in it. She says that until 2011 she believed that she had a half share of the business, including everything purchased through the farm account. She says in addition to raising children she worked on the farm and in the hunting and farmstay businesses, never receiving a salary. She says that on separation Mr Pinney resisted disclosure of accounts and other information about the company. Mr Pinney denied

⁵ HC judgment, above n 2, at [111].

⁶ At [112].

these allegations and said that Ms Cooper always knew both that she had no interest in the land and that the MRWT trustees owned 98 per cent of the company.

[17] In the Family Court, Judge Grace resolved this conflict in favour of Ms Cooper.⁷ He found that it seemed she was not aware of “the true nature of the transactions in setting up the company”, observing that her signature appeared on no documents and there was no evidence that anyone told her the company was assuming debt at the outset.⁸ Mr Pinney was the sole director and his was the only name to appear in the shareholder accounts.⁹ She had “no say” in how the company was operated, with Mr Pinney retaining “total control”.¹⁰ The Judge also found that “[s]omewhere along the way” all chattels and any equipment not owned by the company had been transferred to the MRWT though there were no documents to evidence this.¹¹

[18] Following its establishment, the MRWT made the investments necessary to establish a bed and breakfast operation which the trustees of the Pinney Trust had previously refused to support. This involved renovations to the farm property. The business was not a success; the company traded at increasing annual losses and indebtedness to the bank grew. Clark J recorded that sometime in 2011 Ms Cooper learned that she had only a one per cent interest in the company and asked Mr Pinney to “fair it up”.¹² His refusal to accede to this request seems to have contributed to the parties’ separation in April 2014.

[19] The value of the farm at the date of separation was \$1,860,000. At the date of hearing in the Family Court, 20 November 2018, it had fallen to \$1,545,000.¹³ As at June 2014, Mr Pinney had a current account balance of \$32,390 with the MRWT, which has been treated as the separation date balance.

⁷ *Cooper v Pinney* [2018] NZFC 9120 (Judge Grace) [FC judgment].

⁸ At [91]–[92].

⁹ At [93].

¹⁰ At [105].

¹¹ At [40].

¹² HC judgment, above n 2, at [16].

¹³ FC judgment, above n 7, at [78].

The MRW Pinney Family Trust

[20] We highlight provisions of the MRWT deed that were the focus of argument before us.¹⁴

[21] The settlors of the MRWT were Mr Pinney, his mother, Mr McIntyre and Mr Acland. The initial trustees were Mr Pinney, his sister Jennifer Jane Pinney¹⁵ and Mr McIntyre. The final beneficiaries are Mr Pinney's children and grandchildren. The discretionary beneficiaries are the final beneficiaries and Mr Pinney himself.

[22] Mr McIntyre remained a trustee until his death in 2016. Judge Grace found that, well before that, he had stepped back to a watching role only, with the MRWT effectively managed by others.¹⁶ After Mr McIntyre died, Mr Pinney and his sister became the only trustees. Mr Pinney is now no longer a trustee; the two current trustees are Mr Pinney's sister and a Mr Phillip Smith.

[23] The vesting day is 80 years from execution of the MRWT deed or such earlier date as the trustees might in their discretion appoint in respect of all or part of the trust fund. On vesting, the trustees hold the trust fund for the discretionary beneficiaries or for any of them to the exclusion of others:

11. TRUSTS ON VESTING DAY

On the Vesting Day the trustees shall stand possessed of such of the capital and income of the Trust Fund as may then remain upon trust for the Discretionary Beneficiaries whether for all of them or one or more of them to the exclusion of another or others, or are living on the Vesting Day and if more than one in such shares and proportions as the trustees may in writing (revocable or irrevocable) at any time on or before the Vesting Day appoint and in default of for such of the children of the said MARCUS ROBERT WILLIAM PINNEY who survive him and who reach the age of twenty five (25) and if more than one then equally as tenants in common[.] However if any of the aforementioned children is already dead or dies before MARCUS ROBERT WILLIAM PINNEY leaving children then those children

¹⁴ The provisions of the MRWT deed are set out in full in the Appendix to this judgment.

¹⁵ Identified as Jennifer Jane O'Neill in the MRWT deed.

¹⁶ FC judgment, above n 7, at [69(d)].

shall on reaching twenty five (25) take equally as tenants in common the share which their parent would otherwise have taken.

[24] The exercise of any power, authority or discretion vested in the trustees must be unanimous:

14. WHERE THIS DEED gives a power, authority or discretion to the Trustees, that power, authority or discretion must be exercised unanimously by a resolution in writing signed by all of the Trustees and recorded in the Trustees Minute. The Trustees Minutes are evidence of the nature and content of all such resolutions.

[25] The power of appointment of new trustees was vested in Mr Pinney during his lifetime by cl 15:

15. THE statutory power of appointment of new Trustees hereof shall vest in MARCUS ROBERT WILLIAM PINNEY during his lifetime. Upon the death [of] MARCUS ROBERT WILLIAM PINNEY the statutory power of appointment of new trustees shall vest in the executors or trustees for the time being of his will and if at any time after his death and after the winding up of his estate there shall be no such administrator, executor or trustee willing to act then in the person or persons in whom the said statutory power is vested by the Trustee Act 1956 or any statutory modification thereof for the time being in force.

The person or persons in whom the said statutory power is vested shall have power:

- a) To appoint at any time or times additional Trustee or Trustees of all or any of the trusts whether or not occasion shall have arisen for appointment of a new Trustee or Trustees.
- b) To appoint any person or persons at any time as Advisory Trustee or Trustees of the trusts hereof.
- c) To appoint himself or herself or themselves or any of themselves to be a Trustee of all or any of the trusts hereof.
- d) Without being obliged to give any reason to remove any trustee provided that if such removal will result in the number of continuing Trustees being reduced below two this power of removal shall be exercisable only in conjunction with the appointment of a new Trustee or Trustees so that there shall at all times be at least two Trustees[.]

The power conferred by cl 15 does not arise as an incident of settlorship (Mr Pinney was only one among several settlors) or of trusteeship (Mr Pinney does not need to be a trustee to exercise it—and indeed he no longer is one). The number of trustees

cannot be fewer than two. However, Mr Pinney may remove any trustee without giving reasons. And nothing in the deed expressly precludes him reappointing himself as a trustee or appointing a corporate trustee which he controls. It is common ground that the adjective “statutory” is superfluous. The MRWT deed contains no provision dealing with the role of an advisory trustee.

[26] Another clause which was the subject of some argument is cl 13:

13. SUBJECT ALWAYS to any express provision to the contrary contained herein every discretion vested in the Trustees shall be absolute and uncontrolled and every power vested in them shall be exercisable at their absolute and uncontrolled discretion.

[27] The trustees are also empowered to advance the whole or any part of the capital and income to any discretionary beneficiary to the exclusion of the others under cls 4 and 6:

4. DURING the Trust Period the Trustees may with respect to all or any part or parts of the net income of the Trust Fund after payment of all expenses and other charges to be met from income determine:
 - a) To pay or apply the same to for or towards the personal support maintenance comfort education advancement in life or otherwise howsoever for the benefit of such of the Discretionary Beneficiaries as may from time to time be living or in existence during the said period or such one or more of them to the exclusion of the others or other of them at such time in such manner and if more than one in such shares and proportions as the Trustees in their absolute and uncontrolled discretion shall think proper.
 - b) To make or retain out of or charge against income in any income year any payments reserves or other provisions of a capital nature for any of the purposes mentioned herein or incidental to the exercise of any of the powers authorities or discretions conferred upon the Trustees by this Deed.

...

6. DURING the Trust Period the Trustees may at any time or times and from time to time pay apply or transfer the whole or any part of the capital of the Trust Fund to or for the benefit of such of the Discretionary Beneficiaries as may then be living or such one or more of them to the exclusion of the others or other of them at such times and if more than one in such proportions and in such manner and subject to such terms and conditions as the Trustees shall think fit and without limiting the generality of the foregoing for the maintenance education advancement or benefit of such beneficiary or beneficiaries.

[28] They may also in their discretion resettlement any part of the trust fund for the benefit of any discretionary beneficiary to the exclusion of others:

7. THE powers of the Trustees in relation to income and capital contained in Clauses 4 and 6 hereof shall without in any way limiting or restricting such powers include the power for the Trustees in their absolute and uncontrolled discretion at any time or times during the Trust Period by deed to resettle UPON TRUST in any manner which in the opinion of the Trustees is for the benefit of any person object or purpose who shall for the time being be a Discretionary Beneficiary under the trust hereof the whole or any portion or portions of the capital or income of the Trust Fund PROVIDED HOWEVER that such resettlement shall not transgress the rule against perpetuities.

[29] Any trustee may exercise their powers to acquire trust property in a private capacity notwithstanding that the interests of the trustee in such matter might conflict with their duty to the trust fund or the beneficiaries:

17. ANY Trustee shall be entitled to act hereunder and to exercise all of the powers hereby conferred upon him or her or it notwithstanding that such Trustee is or may be or becomes associated as director or otherwise in a private capacity or as trustee of any other trust with any company to which the Trustees sell or lease any property forming part of the Trust Fund or in which the Trustees hold or propose to acquire shares or other investments as part of the Trust Fund or with which the Trustees otherwise deal as Trustees of these presents and notwithstanding that any Trustee may be Trustee of any other trust to or from which the Trustees propose to sell or purchase shares or other property or with which the Trustees otherwise deal as Trustees of these ... presents and notwithstanding that the interests or duty of such Trustee in any particular matter or matters may conflict with his or her duty to the Trust Fund or the beneficiaries therein and notwithstanding that such Trustee is selling or leasing any real or personal property forming part of the Trust Fund to itself or to himself or herself or purchasing any such property to form part of the Trust Fund from itself or himself or herself or otherwise deals as Trustee of these presents with itself or with himself or herself in a personal capacity.

[30] Finally, the trustees are authorised by cl 12 to amend the MRWT deed to enable it to be better administered for the benefit of the MRWT, provided they are reasonably satisfied that such amendment would not prejudice the general interests of the beneficiaries, and further provided that the power of amendment is not used to add a spouse or partner to the class of beneficiaries.¹⁷

¹⁷ Such an amendment is “expressly precluded”.

Decision of this Court in *Clayton v Clayton*

[31] The decision of this Court in *Clayton v Clayton* lies at the heart of the issues in this appeal.¹⁸ It will assist understanding if we outline briefly the facts and principles established in that case before looking at what the Courts below held in the present appeal.

[32] The central issue for the Court in *Clayton* was the same issue this Court faces: whether the “bundle of rights and powers” held by an individual under a family trust are “property” under the PRA.¹⁹

Relevant facts

[33] During a marriage of 17 years, Mr Clayton built up a successful sawmilling and timber processing business.²⁰ He and the business owned several properties, acquired before his relationship with Mrs Clayton began. Some 10 years into their marriage, Mr Clayton settled the trust in issue, the Vaughan Road Property Trust (VRPT), to hold the land and buildings from which the business operated.²¹ Mr Clayton was both the settlor and sole trustee of the VRPT. The discretionary beneficiaries included Mr Clayton as “Principal Family Member”, Mrs Clayton and their two daughters. Their daughters were also the final beneficiaries.²² As settlor, trustee, Principal Family Member and a discretionary beneficiary, Mr Clayton had various powers under the VRPT deed.

Definition of “property” under the PRA

[34] This Court began its analysis with the definition of “property” in s 2 of the PRA.²³ We set this out in full as it is the definition with which we are concerned:

property includes—

(a) real property:

¹⁸ *Clayton v Clayton*, above n 1.

¹⁹ At [4(c)(i)].

²⁰ At [8].

²¹ At [10].

²² At [10].

²³ At [24].

- (b) personal property:
- (c) any estate or interest in any real property or personal property:
- (d) any debt or any thing in action:
- (e) any other right or interest

The Court noted also the definition of “owner” in s 2 of the PRA:²⁴

owner, in respect of any property, means the person who, apart from this Act, is the beneficial owner of the property under any enactment or rule of common law or equity

These definitions then feed into the detailed definition of “relationship property” given in s 8(1) of the Act.

[35] This Court said that the “property” definition “must be interpreted in a manner that reflects the statutory context”.²⁵ While paras (a)–(d) conformed with ordinary concepts of property, it saw the reference to:²⁶

... “any other right or interest” when interpreted in the context of social legislation, as the PRA is, as broadening traditional concepts of property and as potentially inclusive of rights and interests that may not, in other contexts, be regarded as property rights or property interests.

[36] This required a substance-over-form approach. Such an interpretation was appropriate even though the legislative history of the PRA showed that Parliament had considered but rejected the inclusion of a “trust-busting” power.²⁷ In fact, a broad definition of “property” was needed to reflect the statutory context and the purpose of the PRA, the Court approving observations of the High Court of Australia in *Kennon v Spry* that “property” must be interpreted widely and conformably with the objects of the legislation.²⁸ A substance-over-form approach was also consistent with that taken in similar cases in both England and Hong Kong.²⁹ Although these cases

²⁴ At [25].

²⁵ At [38].

²⁶ At [38].

²⁷ At [84].

²⁸ At [37] citing *Kennon v Spry* [2008] HCA 56, (2008) 238 CLR 366 at [64] per French CJ and [89] per Gummow and Hayne JJ.

²⁹ At [75] citing *Charman v Charman* [2005] EWCA Civ 1606, [2006] 1 WLR 1053, *Charman v Charman (No 4)* [2007] EWCA Civ 503, [2007] 1 FLR 1246, *Whaley v Whaley* [2011] EWCA Civ 617, [2012] 1 FLR 735, and *Kan Lai Kwan v Poon Lok To Otto* [2014] HKCFA 65, (2014) 17 HKCFAR 414.

were decided against different statutory backdrops, this Court saw them as illustrative of “the need for ‘worldly realism’” in this context.³⁰

Application to the VRPT deed

[37] This Court then addressed Mr Clayton’s power as the designated Principal Family Member to appoint and remove discretionary beneficiaries under cl 7.1 of the VRPT deed. The Court of Appeal had held that this power alone amounted to a general power of appointment because it gave Mr Clayton a power to remove all other beneficiaries and appoint himself the sole beneficiary.³¹ That would be an effective revocation of the trust because he would become the legal and beneficial owner of the trust assets.³² The Court of Appeal had found that a general power of appointment was property for the purposes of the PRA.³³

[38] This Court agreed that a general power of appointment was tantamount to ownership. The Court defined such a power as a power to appoint property to anyone including themselves without considering the interests of anyone else.³⁴

[39] However, the Court disagreed with the Court of Appeal’s interpretation of the particular clause, finding that it did not extend so far as to allow Mr Clayton to change the final beneficiaries; even if he removed the discretionary beneficiaries, the trust would remain.³⁵ The Court therefore held that this power in isolation did not amount to a general power of appointment.³⁶

[40] This Court, however, considered that the above finding was not “fatal” to Mrs Clayton’s claim in relation to the trust generally.³⁷ That is because the power of appointment should not be the sole focus; the bundle of rights or powers conferred by

³⁰ At [79] referring to the term used in *Charman v Charman (No 4)*, above n 29, at [57].

³¹ *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293 at [88].

³² At [101].

³³ At [99] and [111].

³⁴ *Clayton v Clayton*, above n 1, at [60]–[61] citing David Hayton, Paul Matthews and Charles Mitchell *Underhill and Hayton: Law of Trusts and Trustees* (18th ed, LexisNexis, London, 2010) at 39, and Lynton Tucker, Nicholas Le Poidevin and James Brightwell *Lewin on Trusts* (19th ed, Sweet & Maxwell, London, 2015) at 1395.

³⁵ At [46]–[49].

³⁶ At [98(b)].

³⁷ At [50].

the VRPT deed must be looked at as a whole. The Court posed the overarching question as:³⁸

... whether Mr Clayton’s powers and entitlements as Principal Family Member, Trustee and Discretionary Beneficiary give him such a degree of control over the assets of the VRPT that it is appropriate to classify those powers as rights or interests in terms of paragraph (e) of the definition of property in s 2 of the PRA. ... In order to do this, it is necessary to consider what practical limitations the rights of the Final Beneficiaries had on Mr Clayton’s ability to appoint the property of the VRPT to himself.

[41] This Court considered three elements of the VRPT deed in particular illustrated Mr Clayton’s high degree of control over the trust assets and were “decisive” as to the nature of the powers he held:³⁹

- (a) clauses 6.1(a) and 4, which provided that Mr Clayton as the sole trustee could apply all or any part of the capital and income of the trust to any one or more discretionary beneficiaries (and therefore to himself);⁴⁰
- (b) clause 10, which empowered Mr Clayton to bring forward the vesting day of the VRPT and appoint all trust capital to any one or more of the discretionary beneficiaries, with the final beneficiaries only being entitled to any leftover capital;⁴¹ and
- (c) clause 8.1, which gave Mr Clayton broad powers to resettle the trust, effectively giving him the ability to resettle the trust capital on the trustee of another trust of which he was a beneficiary.⁴²

[42] Additionally, a suite of provisions modified ordinary fiduciary duties imposed on trustees. Clause 14.1 expressly permitted a trustee named as a beneficiary to exercise any power or discretion in his or her own favour; cl 19.1 permitted them to do so despite a conflict of duty or interest; and cl 11.1 authorised them to exercise a power or discretion even if the interests of all beneficiaries were not considered, the exercise would or might be contrary to the interests of any present or future

³⁸ At [50].

³⁹ At [52].

⁴⁰ See at [53].

⁴¹ See at [54].

⁴² See at [55].

beneficiary, and/or it would result in the whole of the trust capital being distributed to one beneficiary to the exclusion of others.⁴³ As a result, this Court held that the express terms of the VRPT meant that, in exercising any of the above powers, Mr Clayton was not constrained by fiduciary duties.⁴⁴ The Court accepted that in general Mr Clayton's powers as trustee were fiduciary powers, but because of the combined effect of the powers conferred on him expressly in the deed, "the normal constraints of fiduciary obligations are not of any practical significance".⁴⁵ The Court said that there was no "effective constraint" on the exercise of Mr Clayton's powers in favour of himself.⁴⁶ This meant that:⁴⁷

The fact that he cannot remove the Final Beneficiaries does not alter the fact that he can, unrestrained by fiduciary obligations, exercise the VRPT powers to appoint the whole of the trust property to himself.

[43] The Court concluded that the VRPT powers conferred on Mr Clayton amounted in effect to a general power of appointment in relation to the assets of the VRPT.⁴⁸ Those powers were properly classified as "rights" giving Mr Clayton an "interest" in the VRPT and its assets, and were therefore property for the purposes of the PRA.⁴⁹

[44] This Court also discussed the High Court of Australia's decision in *Kennon v Spry*. In that case it was the combination of the powers of Dr Spry to appoint the capital to Mrs Spry and the latter's rights as beneficiary that the Court treated as property of the marriage.⁵⁰ This Court acknowledged the concern expressed by some commentators about applying that case in New Zealand.⁵¹ But the Court did not need to decide whether for New Zealand purposes that particular combination of rights and powers of the parties to the marriage was property; the powers under the VRPT deed presented "a far more compelling case" for treating rights under a family trust as

⁴³ At [56]; and see the Appendix at 585.

⁴⁴ At [58].

⁴⁵ At [64].

⁴⁶ At [67].

⁴⁷ At [58].

⁴⁸ At [68].

⁴⁹ At [80] and [86].

⁵⁰ At [73] citing *Kennon v Spry*, above n 28, at [62] per French CJ and [126] per Gummow and Hayne JJ.

⁵¹ At [74].

property than those present in *Kennon v Spry*.⁵² It left open for another case what the position would be if trust powers “were less extensive: both the issue as to whether the powers were property and, if so, how they would be valued”.⁵³

[45] It is important to bear in mind, also, that this Court did not decide in *Clayton* whether the VRPT was a valid trust at all: it proved unnecessary to decide that as the case had settled before judgment, and the Court was divided on the point.⁵⁴

Family Court decision in this appeal

[46] In the Family Court, Judge Grace dealt with many issues relating to the PRA claims associated with the parties. Many of those claims are not in issue before us and we therefore only summarise those of relevance to this appeal—at this stage, those relevant to the principal issue of whether Mr Pinney’s powers in respect of the MRWT are property under the PRA. We address matters relevant to the remainder of the issues later in this judgment.

[47] Judge Grace concluded that Mr Pinney could deal with the farm property as though it was his own, notwithstanding that it was within the MRWT.⁵⁵ The Judge considered this finding was supported by the following factors:⁵⁶

- (a) Mr Pinney was a trustee of the MRWT;
- (b) he was also a discretionary beneficiary;
- (c) the MRWT deed gave the trustees the power to advance all monies to any discretionary beneficiary, to the exclusion of others;
- (d) Mr McIntyre had stepped back from the administration of the MRWT, taking a less active role than he had during his time as a trustee of the Pinney Trust;

⁵² At [73].

⁵³ At [80], n 81.

⁵⁴ At [127]–[130] and order (D) at 585.

⁵⁵ FC judgment, above n 7, at [73].

⁵⁶ At [69] and [72]. This list is not exhaustive of the matters considered by Judge Grace.

- (e) there was no evidence from the trust’s advisors that anyone had been keeping an eye on Mr Pinney’s management of the farm and business;
- (f) the MRWT deed gave Mr Pinney the power to remove and appoint new trustees—the only requirement being that there be two trustees at all times—and there would be nothing to prevent Mr Pinney from appointing a compliant trustee or a trustee company of which he was the sole director;
- (g) the other trustee, Mr Pinney’s sister, had not taken any active role in the administration of the trust; and
- (h) Mr Pinney had the power of resettlement in favour of himself and there was no express prohibition on self-dealing in the MRWT deed.

[48] Whilst the Judge acknowledged that this case was factually distinguishable from *Clayton v Clayton*, he considered the principles of that case nevertheless applied.⁵⁷ The Judge held that the rights under the MRWT, equivalent in value to the property held on trust, could be classed as property under the PRA.⁵⁸

High Court decision

[49] Clark J framed the issue as being whether:⁵⁹

... in the context of all powers under the deed ... it is possible for Mr Pinney to exercise powers under the deed so as to effectively bring the MRWT to an end.

[50] In that context she addressed whether Mr Pinney was constrained by any fiduciary duty when exercising MRWT powers. Applying *Clayton v Clayton*, the Judge considered the next question to be whether Mr Pinney’s powers under the trust were “sufficiently similar” to a general power of appointment to justify treating them as property under the PRA.⁶⁰

⁵⁷ At [75].

⁵⁸ At [74] and [80].

⁵⁹ HC judgment, above n 2, at [56].

⁶⁰ At [56] citing *Clayton v Clayton*, above n 1, at [58].

[51] The Judge was not satisfied that the powers, viewed collectively, equated to those at issue in *Clayton*. The Judge first addressed Mr Pinney’s power to appoint and remove trustees. She observed that these were fiduciary powers,⁶¹ relying on the High Court decisions in *Carmine v Ritchie*, *Harre v Clark* and *Goldie v Campbell*, and the Court of Appeal decision in *New Zealand Maori Council v Foulkes*.⁶² She said that the Family Court Judge had failed to properly consider the extent to which Mr Pinney’s powers were constrained by fiduciary obligations.⁶³ Clark J concluded that the power to appoint and remove trustees, being fiduciary in nature, “must not be exercised for a collateral purpose” and could not be “exercised in Mr Pinney’s purely selfish interests”.⁶⁴

[52] Clark J then turned to address whether the other powers Mr Pinney had under the deed amounted in effect to a general power of appointment allowing him to apply all of the income and capital under the MRWT to himself. The Judge considered the following elements of the MRWT deed (when looked at as a whole) prevented Mr Pinney from having that level of control:⁶⁵

- (a) there was no power to remove or add beneficiaries;
- (b) there had to be two trustees at all times, required to act unanimously; and
- (c) the purpose of the trust was to protect the MRWT assets for the benefit of both the discretionary and final beneficiaries.⁶⁶

[53] Clark J saw the case as distinguishable from *Clayton*, because “there are no relevant powers in the MRWT deed” that are not subject to fiduciary obligations.⁶⁷

⁶¹ At [73].

⁶² *Carmine v Ritchie* [2012] NZHC 1514, (2012) 3 NZTR ¶22-023 at [66]; *Harre v Clark* [2014] NZHC 2533; *Goldie v Campbell* [2017] NZHC 1692, [2017] NZFLR 529; and *New Zealand Maori Council v Foulkes* [2015] NZCA 552, [2016] 2 NZLR 337 at [22].

⁶³ HC judgment, above n 2, at [78].

⁶⁴ At [81] citing *New Zealand Maori Council v Foulkes*, above n 62, at [22].

⁶⁵ At [92].

⁶⁶ As in *Goldie v Campbell*, above n 62: see HC judgment, above n 2, at [92(c)].

⁶⁷ HC judgment, above n 2, at [93] and [97].

The MRWT deed did not give Mr Pinney “the breadth of powers” required to create rights and interests constituting property under the PRA.⁶⁸

Court of Appeal decision

[54] We begin our discussion with the dissenting reasons of Miller J, who would have held that Mr Pinney’s powers under the MRWT amounted to a general power of appointment constituting “property” for the purposes of the PRA. We address it first because the majority reasons are primarily expressed as a response to the dissent.

Miller J’s dissent

[55] Miller J addressed two key issues as to the application of the PRA. First, whether the MRWT was an illusory trust—that is, a trust document lacking the irreducible core of obligations owed by trustees to beneficiaries and which are enforceable by them against trustees.⁶⁹ Miller J found the MRWT was not illusory, and that issue is not raised in this appeal. The second issue he focused on is the subject of this appeal: whether the nature of the rights and obligations under the MRWT were such that Mr Pinney’s powers should be classified as property under the PRA.

[56] Miller J focused closely on the reasoning of this Court in *Clayton*. He noted that in that case the Court proceeded on the basis that classification of the trustee’s (or settlor’s) power as fiduciary was not the end of a court’s inquiry under the PRA.⁷⁰ Rather:⁷¹

A court must be prepared to look beyond form and take a realistic view of substance. It must follow that the trustee’s powers, or trust assets, may be property for PRA purposes where the trustee’s powers are so weakly fiduciary, or the other beneficiaries’ rights so precarious, that there is no meaningful accountability. In that case it could be said that the trustee was not a fiduciary, obliged to hold property for the benefit of others.

⁶⁸ At [94].

⁶⁹ See *Armitage v Nurse* [1998] Ch 241 (CA) at 253–254 per Millett LJ, referred to by this Court in *Clayton v Clayton*, above n 1, at [124].

⁷⁰ CA judgment, above n 2, at [72] citing *Clayton v Clayton*, above n 1, at [64].

⁷¹ At [72] (footnote omitted) citing Mark Bennett “Competing Views on Illusory Trusts: The *Clayton v Clayton* Litigation in its Wider Context” (2017) 11 J Eq 48 at 66.

[57] Whilst Miller J agreed that *Carmine* and *Harre* (as relied upon by Clark J) did establish the principle that the power of removal and appointment of trustees was prima facie fiduciary, he distinguished those cases from the present case, in part because neither concerned a power which could explicitly be exercised without the need to give any reasons.⁷²

[58] He focused on the powers that might be deployed to benefit Mr Pinney to the exclusion of other beneficiaries, allowing him to treat trust property as his own:⁷³

- (a) the trustees' power to apply all the capital and income of the trust to any beneficiary, at any time, to the exclusion of other beneficiaries;
- (b) the trustees' power to resettle the trust assets for the benefit of any discretionary beneficiary;
- (c) the trustees' powers to advance the vesting date and to hold capital and income on trust at that date for any discretionary beneficiary to the exclusion of the others; and
- (d) Mr Pinney's power to remove and appoint trustees without giving reasons for doing so.

[59] He noted also the power in cl 12 to alter the trust to respond to any change in law or to allow more advantageous management, but only so long as that did not prejudice the general interests of beneficiaries. He saw that as distinctive in the context of the MRWT deed, in requiring that the trustees consider the interests of the beneficiaries as a class.⁷⁴ He noted other clauses addressing the exercise of trustee powers: cls 13 and 14, which provide that all powers and discretions are absolute and uncontrolled but must be exercised unanimously by trustees; and cl 17, which permits a trustee to acquire property from the trust or otherwise transact with it, in a personal capacity, notwithstanding that the trustee's interests may conflict with their duty.⁷⁵

⁷² At [69]–[70].

⁷³ At [82].

⁷⁴ At [83].

⁷⁵ At [84].

Finally, he observed that the MRWT deed contained no prohibition on self-dealing “and must be taken to permit it given that [Mr Pinney] is both trustee and beneficiary”.⁷⁶

[60] Miller J concluded that the powers here were “weakly fiduciary” given the facts: none of the beneficiaries had any right to insist the trust property be applied to them; the trustees had broad powers (expressed in the deed as unconstrained) to distribute property and resettlement the trust to any individual beneficiary to the exclusion of other beneficiaries; and Mr Pinney had broad powers to remove and appoint trustees without giving any reasons for doing so.⁷⁷

[61] The fiduciary constraints were not so weak, however, as to render the MRWT illusory. Miller J considered that the fact the relevant powers were held in the capacity of trustee distinguished this case from those in which relevant powers were vested in the capacity of a protector, consultant or settlor.⁷⁸ He described it as settled law that a power the exercise of which the trust deed declares to be entirely discretionary does not for that reason alone lose its fiduciary character. And the MRWT did not expressly exclude obligations to Mr Pinney’s children and grandchildren as discretionary and final beneficiaries. By way of contrast, the trust deed in *Clayton* expressly authorised Mr Clayton to exercise powers in his own favour without considering the interests of others and contrary to their interests—and yet, Miller J said, the Supreme Court was not prepared to find that trust illusory.⁷⁹

[62] Miller J then turned to the question of whether or not there existed a general power of appointment. In analysing this he attached significance to the provision in the MRWT deed that the trustees’ discretions were “absolute and uncontrolled”, disagreeing with the High Court Judge that this was not material.⁸⁰ In his view, the exercise counsel undertook of comparing the deed in this case with that in *Clayton* was not useful because the trust in *Clayton* was at the “extreme end of the discretionary

⁷⁶ At [84(b)].

⁷⁷ At [85]–[86].

⁷⁸ At [87].

⁷⁹ As we note above at [45], in *Clayton v Clayton*, above n 1, the VRPT may or may not have been a valid trust. It proved unnecessary for this Court to decide the point.

⁸⁰ CA judgment, above n 2, at [91].

spectrum and might very easily have been classified as illusory”.⁸¹ He said a better comparison was with the facts in *Kennon v Spry*, where the decisive consideration was that the trust deed conferred on the husband settlor, who was also a sole trustee and discretionary beneficiary, an absolute discretion to apply the assets and income of the trust to himself and until such decision was made none of the discretionary beneficiaries had an equitable interest in the assets.⁸² In that case, a submission was accepted that the interest of the residuary beneficiaries was no more than a contingent remainder.⁸³

[63] Miller J concluded that Mr Pinney’s powers under the MRWT deed amounted “in combination to a general power of appointment” and therefore qualified as “property” under the PRA, as they gave him, in substance, “control of the trust and access to all its capital and income”.⁸⁴

Majority reasoning

[64] Cooper P and Gilbert J’s reasons begin with the proposition that the PRA did not give the court powers to ignore or look through valid trust instruments in order to achieve what the court may perceive as a just outcome in a given case involving the distribution of property.⁸⁵ They agreed with Miller J’s finding that the trust was a valid one—neither a sham nor illusory.⁸⁶ They made no finding as to the capacity in which Mr Pinney held the relevant power to appoint trustees.⁸⁷ But they disagreed with Miller J’s finding that Mr Pinney’s powers amounted to a general power of appointment constituting a right or interest under the PRA.⁸⁸ They said that when the trust was settled the ultimate dispositive powers were vested in the trustees who then became accountable to the beneficiaries.⁸⁹ In particular, the MRWT deed did not purport to, and did not, exclude the trustees’ fiduciary obligations to act in good faith

⁸¹ At [92] (footnote omitted).

⁸² At [92] citing *Kennon v Spry*, above n 28, at [58], [62], [66] and [70] per French CJ and [137] per Gummow and Hayne JJ.

⁸³ *Kennon v Spry*, above n 28, at [60] and [62] per French CJ.

⁸⁴ CA judgment, above n 2, at [93].

⁸⁵ At [106].

⁸⁶ At [107].

⁸⁷ Miller J had found Mr Pinney’s powers were held in his capacity as a trustee: see above at [61].

⁸⁸ CA judgment, above n 2, at [108].

⁸⁹ At [107].

and for the beneficiaries' benefit. It followed, they said, that the assets of the trust were not Mr Pinney's property under the PRA.

[65] The majority saw the MRWT deed as distinguishable from that in *Clayton v Clayton*, where on the facts there was clearly a general power of appointment.⁹⁰ The majority said that a general power of appointment typically meant an absolute disposing power which the donee is free to exercise in favour of any person they please, including themselves, without any restriction or limitation.⁹¹ Ultimately, the majority considered that Miller J's finding that the MRWT was a valid trust (not a sham or illusory trust) was fundamentally inconsistent with his finding that Mr Pinney had a general power of appointment of income and capital under the deed.⁹² They did not consider the powers conferred on Mr Pinney gave him control of the trust without any effective accountability:⁹³

None of the dispositive powers conferred under the MRWT deed are held by [Mr Pinney] alone, nor is this a prospect because of the requirement that there must be at least two trustees at all times who must act unanimously. Further, any exercise of the dispositive powers by the trustees is constrained by the fiduciary obligations they owe to the beneficiaries, a narrowly defined class.

[66] They disagreed also with Miller J's assessment of trustee powers under the MRWT as "weakly fiduciary":⁹⁴

We would not describe the trustees' powers under the MRWT deed as "weakly fiduciary". On a proper interpretation of the deed, the trustees can be held to account by the beneficiaries for the proper discharge of their obligations.

What relevance does the Trusts Act 2019 have in this appeal?

[67] We start with this preliminary issue. The 2019 Act was enacted in July 2019 and came into force on 30 January 2021.⁹⁵ It applies to "all express trusts, whether created before, on, or after the commencement date".⁹⁶ If a challenge were made now to an exercise of powers under the MRWT post-dating the 2019 Act's commencement,

⁹⁰ At [117].

⁹¹ At [116].

⁹² At [108].

⁹³ At [108].

⁹⁴ At [111] (footnote omitted).

⁹⁵ Trusts Act 2019, s 2(1); but see subs (2).

⁹⁶ Schedule 1 cl 2. None of the exceptions to that general rule are relevant here.

the 2019 Act would therefore apply to that challenge. The 2019 Act was intended to “restate and reform” New Zealand trust law by “setting out the core principles of the law relating to express trusts”.⁹⁷ In particular, the mandatory duties—to know, and act in accordance with, the terms of the trust; to act honestly and in good faith; to act for the benefit of the beneficiaries; and to exercise powers for a proper purpose—were “intended to restate and summarise the current legal position”.⁹⁸

Submissions

[68] The 2019 Act did not feature in the analysis of the High Court, and only in passing in the Court of Appeal.⁹⁹ Nonetheless, it was relied on extensively by counsel in this appeal. Counsel for Ms Cooper drew upon s 28 of the Act in support of the proposition that the duties to avoid conflicts of interest and self-benefit applied only “unless [otherwise] authorised”.¹⁰⁰ It was further submitted that ss 32 and 35 of the 2019 Act rendered the duties of active consideration and impartiality, respectively, merely default duties. Counsel for Mr Pinney also referenced the duty in s 32, along with that in s 26 to act for the benefit of the beneficiaries. Particular reference was made by counsel to the mandatory duties in ss 23–27 of the 2019 Act and the provisions dealing with judicial review of trustees’ actions and the appointment and removal of trustees.¹⁰¹

[69] Counsel for the trustees submitted that the 2019 Act was relevant both to resolution of the appeal on its facts and to the wider legal issues raised, while at the same time acknowledging that the Act was not in force during the relationship. They submitted that it would be incorrect to interpret the terms of the MRWT without reference to the now-applicable statutory framework and that the 2019 Act was largely intended to capture and reflect the existing common law position. The trustees referred to the 2019 Act in two main respects: on the taxonomy of trusts and powers, and on provisions relating to the accountability of trustees, referencing in particular

⁹⁷ Section 3(a). Among other matters: see paras (b)–(d).

⁹⁸ Sections 23, 24, 25, 26 and 27; and Law Commission | Te Aka Matua o te Ture *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at 107.

⁹⁹ CA judgment, above n 2, at [38], n 23, [91] and [100], n 132.

¹⁰⁰ Modification in original.

¹⁰¹ Trusts Act, Parts 5 and 7, and in particular s 126.

ss 45–55, 95, 126 and 138. Counsel suggested that *Clayton* might have been decided differently had the 2019 Act applied.

[70] After the hearing concluded, Ms Cooper sought leave to file further submissions on the non-application of the 2019 Act. Ultimately the Court sought further submissions on the matter from all parties.

[71] Counsel for Ms Cooper submit that insofar as the 2019 Act was consistent with law existing as at the date of separation, its provisions might have confirmatory effect in the present appeal. But to the extent it altered that law, it did not have operative effect. At the time of separation, it was the Trustee Act 1956 (the 1956 Act) that applied. They submit that the 2019 Act should be interpreted as not effecting any change in the position of beneficiaries under the MRWT prior to commencement of that Act.

[72] Counsel for Mr Pinney submit that his core submission, that he did not have a general power of appointment but rather a special power of appointment, was unaffected by implementation of the 2019 Act.¹⁰² That Act has “for the most part ... simply clarified and restated the law”. They accept the 2019 Act does not apply retrospectively to this proceeding.

[73] Counsel for the trustees, similarly, accept that the 2019 Act does not apply directly to the present proceeding. A combination of sch 1 cl 8 of the 2019 Act and s 18 of the Interpretation Act 1999¹⁰³ means the 1956 Act continues to govern the proceeding, because the proceeding was commenced prior to the 2019 Act coming into force. Their submission remains that the relevant provisions of the 2019 Act “simply restate long-established principles of trust law in modern and accessible language”. To that extent, they submit that there was a shared and justified assumption amongst all parties, including the appellant, that the 2019 Act was relevant.¹⁰⁴

¹⁰² A special power of appointment is a limited power allowing appointment to any person within a specified class of persons.

¹⁰³ The Trusts Act provision refers to s 18 of the Interpretation Act 1999 (which has since been repealed). The equivalent provision is now s 33 of the Legislation Act 2019, incorporated via s 38(2).

¹⁰⁴ As to that, see below at [75].

Discussion

[74] The ultimate issue in this appeal concerns the scope of the parties' relationship property. That property, along with its value, falls to be ascertained as at the date the relationship ended.¹⁰⁵ What constitutes "property" under the PRA needs therefore to be determined as at that juncture.¹⁰⁶ The essential approach taken by the PRA is to determine the relationship property to be shared as at the date of separation, leaving it to the Court to determine the precise manner in which those shares are then to be implemented.¹⁰⁷

[75] We therefore consider that the question of whether the rights or powers of Mr Pinney under the MRWT can be treated as "property" rights or interests within the ambit of the PRA must be answered by reference to an assessment of the substance of those powers at the date of separation, in April 2014. That includes any constraints on those powers found in equity or statute at that time. The applicable legislation governing beneficiary remedies in 2014 was the 1956 Act. While it is correct that the 2019 Act mirrors hitherto statutorily unexpressed equitable duties imposed on both trustees and those others holding powers of appointment under trust deeds, the content of those duties in this case must be assessed by reference to equity and the 1956 Act, rather than the 2019 Act. For these reasons we largely put the 2019 Act to one side. Expressly, we make no comment on the suggestion by Mr Butler KC that *Clayton* might have been decided differently under the 2019 Act.¹⁰⁸

[76] Finally, we note that the present proceedings are not concerned with any challenge to exercise of powers vested in Mr Pinney under the MRWT. No such challenge has been made. He is not currently a trustee of the MRWT. No exercise of his power of appointment or removal of trustees under cl 15 is currently in issue. Were such powers to be exercised today, any challenge would need to be made in fresh proceedings in the High Court.¹⁰⁹ By virtue of sch 1 cl 2 of the 2019 Act, that Act would then apply in those proceedings.

¹⁰⁵ Property (Relationships) Act 1976, ss 2F and 2G.

¹⁰⁶ See, for example, *Walker v Walker* [1983] NZLR 560 (CA) at 567 per Cooke J.

¹⁰⁷ See RL Fisher (ed) *Fisher on Relationship Property* (looseleaf ed, LexisNexis) at [16.49]; and Property (Relationships) Act, s 33.

¹⁰⁸ See above at [69].

¹⁰⁹ Under ss 95 or 126 of the Trusts Act.

Were Mr Pinney’s rights and powers “property” for PRA purposes?

[77] We turn now to the essential issue in this appeal, which is whether Mr Pinney’s rights and powers under the MRWT deed give him effective control of the trust assets, such that those rights and powers should be treated as property for the purposes of the PRA.

Submissions

[78] For Ms Cooper, Mr Watts KC argues that the principle established in *Clayton* should be applied here and that the grounds relied upon by the majority in the Court of Appeal (and by the respondent) are not sufficiently compelling to distinguish it. He says *Clayton* confirms that the Court is entitled to have regard to the use of trusts to avoid legislation and should not assist by turning a blind eye to powers within a deed that deliver control of the property to a trustee or beneficiary. The only relevant difference between the trust deed in *Clayton* and the MRWT deed is the requirement in the MRWT for there to be at least two trustees. But the requirement for a second trustee to act independently is “swept away” by the fact that the drafter of the deed intended to give Mr Pinney unqualified control over who that person is.

[79] Mr Watts argues that since the 19th century the existence of other named beneficiaries in a discretionary trust has been no obstacle to a conclusion that one beneficiary has a general power tantamount to ownership. It is a question of construction of the trust deed. The extensive control by the holder of powers under a trust deed may lead to the conclusion that there are no, or only weakly applying, fiduciary constraints. He refers to authority which he argues supports the conclusion that a power of appointment can be a general power even though the beneficiary of that power needs the consent of the trustees, or another third party, to exercise it.¹¹⁰

[80] Mr Watts builds on this proposition to respond to the reasoning of the Court of Appeal majority that Mr Pinney’s power to appoint trustees was not unqualified but was subject to fiduciary controls, namely the requirement that he consider the interests of all beneficiaries. Mr Watts says that if fiduciary controls do

¹¹⁰ Citing *Re Phillips* [1931] 1 Ch 347 (Ch).

not apply, or apply only in a minimal way, to the powers of distribution of capital or income by a sole trustee (as was the case in *Clayton*), it is difficult to see why a court should imply such controls over the discretion to appoint or remove trustees in this case. He points to the fact that Mr Pinney had the ability to appoint himself or anyone else, and to remove anyone, as trustee and that the trust deed conferred on the trustees an absolute discretion to distribute trust assets, including to Mr Pinney. Mr Watts emphasises the language of the trust deed, which provides (subject to express provision to the contrary) that every power or discretion conferred on the trustees is to be “absolute and uncontrolled”.

[81] Mr Watts contends that the core concept behind the trust at equity is not fiduciary obligations but an undertaking by a trustee to hold and deal with property on terms that are set by the settlor and are legally enforceable by a beneficiary. The trustee’s obligation, on accepting appointment, is to comply with the express and implied terms of the trust and exercise any powers consistently with and for the purposes for which the trust was established. Whilst the trustee must act honestly and in good faith, the existence of a trust does not necessitate the imposition of fiduciary obligations on top of those requirements. At most, counsel for Ms Cooper supports Miller J’s assessment of the trustee powers as only “weakly fiduciary”. The intensity of any fiduciary responsibility might be compromised by both settlor intention and express terms—and here, it was.

[82] In a discretionary trust, it is argued, the right to sue to ensure that the terms of the trust are abided by is all that usually exists, since the named beneficiaries do not, until the discretion is exercised in their favour, have any proprietary interest in the trust assets themselves—only a hope or an expectation. On this understanding of the trust, the named beneficiaries (other than Mr Pinney) might have standing to enforce its terms were the trustees to deviate from them, but a challenge directed at a disposition of trust assets approved by Mr Pinney would be unlikely to succeed because of the breadth of the powers conferred on him.

[83] Finally, even if some degree of fiduciary accountability is necessary for a trust, there is said to be a general principle that fiduciary obligations must not contradict the intentions of the party conferring the powers or the terms on which the powers have

been conferred. Here the intention of the settlor is relevant, so far as it can be discerned. Mr Watts contends that the evidence suggests the predominant intention was to benefit Mr Pinney (to the exclusion of any partner or spouse) and not to benefit any future children. To constrain Mr Pinney from using the powers he has under the trust to cause the assets to be distributed to him would contradict that intention.

[84] For Mr Pinney, Mr van Bohemen and Ms Powell say that there are critical factual distinctions between this case and *Clayton*. First, Mr Pinney is not the source of the trust property. Secondly, this is not a settlor-controlled trust; Mr Pinney was a nominal settlor only and the true settlors were the trustees of the Pinney Trust. Thirdly, the period of the relationship was one of financial failure for the parties and loss for the company and the trust; the property in the trust cannot be said in any way to be the fruits of the relationship.

[85] Counsel characterise Ms Cooper's case as an attempt to radically extend the principle in *Clayton*, in a way which is inconsistent with its jurisprudential underpinnings. They suggest such an extension would undermine the operation of many family trusts in New Zealand and would create injustice in this case. Mr van Bohemen and Ms Powell distinguished the *Clayton* trust deed on three particular bases. First, the MRWT deed does not permit the addition or exclusion of discretionary beneficiaries, unlike the *Clayton* deed. Secondly, the *Clayton* trust deed expressly limited the fiduciary duty of loyalty by providing, in cl 11.1, that the trustee need not consider the interests of the beneficiaries and could act contrary to their interests. There is no such limitation here. Thirdly, the power of removal of trustees in the MRWT deed cannot be exercised if removal reduces the number below two.

[86] For the trustees, Mr Butler characterises the decision in *Clayton* as turning upon the absence of constraints, particularly fiduciary constraints, on Mr Clayton's powers, which enabled him to self-appoint the trust assets. The Court's essential reasoning was that cl 11.1 went beyond permitting discrimination to excluding any requirement to consider the interests of other beneficiaries. The trustees argue that the VRPT deed in *Clayton* was unusual in this regard and clearly distinguishable from the MRWT deed.

[87] First, they say the dispositive powers of appointment under the MRWT are special, not general: they permit appointment of trust property only within a defined class of beneficiaries and are subject to fiduciary obligations. Secondly, there is no equivalent in the MRWT deed to cl 11.1 of the VRPT deed, which expressly enabled disregard of the interests of beneficiaries, exercise of powers contrary to beneficiaries' interests and distribution to one at the cost of all remaining. Thirdly, there is also no equivalent in the MRWT deed to Mr Clayton's non-fiduciary power to remove discretionary beneficiaries. Fourthly, while the MRWT permitted conflicts of interest (which is not per se inconsistent with trusteeship), the particular power to appoint and remove trustees remained fiduciary in nature and the "irreducible core" obligation to act for the benefit of beneficiaries was not eliminated.¹¹¹

[88] The trustees say that the power to appoint trustees is prima facie fiduciary because it is typically conferred to benefit beneficiaries. By "prima facie" they mean that, where the trust deed is silent on the matter, in the absence of clear evidence to the contrary the default assumption is that the settlor intended the power to be exercised for the benefit of all beneficiaries. They contend that there are no contextual or textual indications here that Mr Pinney was entitled to use his powers to appoint or remove trustees to further his own interests to the exclusion of others. Powers conferred by the MRWT deed remain "subject to meaningful constraints" and fiduciary obligations which are capable of being enforced by the other beneficiaries. Mr Pinney cannot then be said to have the unfettered power needed to achieve the appointment of the assets to himself. As a result, his rights under the MRWT cannot be considered property under the PRA.

[89] Mr Butler challenged the notion of "weakly fiduciary" powers. Miller J suggested the existence of such powers would mean other beneficiaries' rights were so precarious that there was no meaningful accountability. The apparent consequence of that would be that "weakly fiduciary" means "no fiduciary obligations apply at all". This, Mr Butler submitted, would be oxymoronic. It made little sense to speak of "weakly" fiduciary obligations when fiduciary obligations were notable for the

¹¹¹ Now enshrined in s 26 of the Trusts Act; and see *Armitage v Nurse*, above n 69, at 253–254 per Millett LJ.

strictness of their judicial enforcement.¹¹² Were this Court to send a message that discretionary beneficiaries “can only expect to have fiduciary obligations weakly enforced”, it would lead to first instance judges deferring to trustee decision-making generally, and would undermine the level of accountability that both equity and the 2019 Act expect.

The meaning of “property” under the PRA

[90] We first need to address what is meant by “property” under the PRA. We have touched on this subject already at [34]–[36] above, where we traversed some of the discussion of this point in *Clayton*. We will apply the principles developed in that decision which turn on the definitions provided in s 2 of the PRA—“property” including “any ... right or interest”,¹¹³ and “owner” meaning “the beneficial owner of the property under any enactment or rule of common law or equity”.

[91] The starting point is long-standing authority that a discretionary beneficiary under a discretionary trust does not have a beneficial interest in the income or capital of that trust.¹¹⁴ Any interest is entirely contingent on the exercise of the trustee’s discretion. Relying on this line of authority, the courts have therefore rejected arguments that discretionary beneficiaries under discretionary family trusts have a beneficial interest in the trust amounting to property under the PRA.¹¹⁵ Even where there is evidence of a long-standing intention by the trustees to exercise their discretion in favour of a particular beneficiary, “a discretionary beneficiary has no legal or equitable interest in the assets of the trust until the trustees have exercised their discretion in favour of the particular beneficiary”.¹¹⁶ We have not been asked to revisit these cases.¹¹⁷

¹¹² Citing, for example, *Premium Real Estate Ltd v Stevens* [2009] NZSC 15, [2009] 2 NZLR 384 at [12] per Elias CJ, [85] and [89]–[94] per Blanchard, McGrath and Gault JJ and [107]–[110] per Tipping J.

¹¹³ Property (Relationships) Act, s 2 definition of “property”, para (e).

¹¹⁴ *Gartside v Inland Revenue Commissioners* [1968] AC 553 (HL) at 607 per Lord Reid, Lord Morris of Borth-y-Gest and Lord Guest and 617–618 per Lord Hodson and Lord Wilberforce concurring.

¹¹⁵ See, for example, *Nation v Nation* [2005] 3 NZLR 46 (CA); and *Keats v Keats* [2006] NZFLR 470 (FC).

¹¹⁶ *Nation v Nation*, above n 115, at [74] citing *Hunt v Muollo* [2003] 2 NZLR 322 (CA), and *Johns v Johns* [2004] 3 NZLR 202 (CA).

¹¹⁷ Nor have we been asked to consider the approach in *Kennon v Spry*, above n 28: see *Clayton v Clayton*, above n 1, at [74]. Ms Cooper is not a beneficiary of the trust in issue, unlike Mrs Spry.

[92] Instead, we have been asked to apply the analysis in *Clayton* whereby this Court held that the powers vested in Mr Clayton, and the exclusions of fiduciary obligations, were cumulatively so extensive as to create what amounted in effect to a general power of appointment, and thereby a form of property for PRA purposes.

[93] The question is not whether powers or rights¹¹⁸ conferred by a trust deed actually amount to a general power of appointment. That status does not necessarily define those powers constituting donee property.¹¹⁹ Nor is that status definitive as to whether a power is property for the purposes of the PRA: in *Clayton* this Court did not find the trust deed actually created a general power of appointment, but rather recognised something analogous to one (which the Court said was property for the purposes of the PRA).¹²⁰ A similar conclusion was reached by the Privy Council in *Webb v Webb*, where the finding was not that a general power of appointment had been created, but rather that the trustee powers there amounted, in combination, to a “bundle of rights ... indistinguishable from ownership”.¹²¹

[94] But a finding that one is dealing with powers amounting in effect to a general power of appointment may offer a short-cut: it tends to be conclusive as to effective ownership by the donee, and an inference can therefore be drawn that the power concerned is property for PRA purposes.¹²² As the Privy Council noted in *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd*, the donee of a general power of appointment can appoint the subject matter of the power to himself, has an absolute disposing power over the property, and for many purposes will be regarded as “effective owner” of that property.¹²³

¹¹⁸ Or a combination thereof.

¹¹⁹ Lynton Tucker, Nicholas Le Poidevin and James Brightwell *Lewin on Trusts* (20th ed, Sweet & Maxwell, London, 2020) [*Lewin on Trusts*] vol 2 at [28-016].

¹²⁰ *Clayton v Clayton*, above n 1, at [68] and [98(a)].

¹²¹ *Webb v Webb* [2020] UKPC 22, [2021] 2 NZLR 376 at [89] per Lord Carnwath, Lady Black, Lord Briggs and Lord Kitchin.

¹²² See *Australian Securities and Investments Commission v Carey (No 6)* [2006] FCA 814, (2006) 153 FCR 509 at [19].

¹²³ *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd* [2011] UKPC 17, [2012] 1 WLR 1721 [*TMSF v Merrill Lynch*] at [43].

Judicial oversight of trusts

[95] Ms Cooper does not suggest that the trust here is illusory—eg, that there is an effective identity between legal and beneficial ownership of the trust assets, such that the legal interest-holders (the notional trustees) are substantially propertyless or powerless, and other beneficial objects of the trust may readily be dispossessed. In *Webb v Webb*, for instance, the settlor/sole trustee/“consultant”/beneficiary had “reserved such broad powers to himself ... that he failed to make an effective disposition of the relevant property”.¹²⁴ In *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* Mr Pugachev’s powers as protector/beneficiary under the trusts could be exercised freely for his own benefit to such an extent that formation of the trusts had never divested him of beneficial ownership of the assets transferred into them: “In substance the deeds allow Mr Pugachev to retain his beneficial ownership of the assets.”¹²⁵ Although the creditor’s claim was advanced on the basis that the trusts were “illusory”, Birss J did not find that assisted in resolving what was really in issue, which was whether Mr Pugachev had divested himself of control of the assets.¹²⁶

[96] As noted above at [45], in *Clayton* the issue of whether the VRPT was a valid trust was left undecided. In the present case, as the trustees submitted, and as Ms Cooper accepted, the MRWT *is* a trust, with all that entails.

[97] The formation of a trust brings with it a susceptibility to judicial oversight at equity. In contrast, the common law’s attitude to contracting parties is at a remove from equity’s jurisdiction over the exercise of trust powers by trustees and others such as protectors. Where the power is fiduciary—ie, it is controlled by fiduciary duties—judicial oversight obviously may take the form of a claim for breach of fiduciary duty. But beyond a claim based on fiduciary duty, a distinct claim may also lie for breach of trust in the case of misuse of non-fiduciary powers conferred by a trust (such as where the power has been used for an improper purpose) or

¹²⁴ *Webb v Webb*, above n 121, at [87] per Lord Carnwath, Lady Black, Lord Briggs and Lord Kitchin.

¹²⁵ *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch), (2017) 20 ITEL 905 at [278].

¹²⁶ At [169] and [225].

non-conformance with non-fiduciary duties arising from trusteeship (such as the trustee's duty of care).¹²⁷

[98] While restraint is exhibited by courts in New Zealand in reviewing the exercise of discretion by trustees, or of other fiduciary powers vested by a trust deed, they have traditionally intervened where a discretion has been exercised in bad faith or for an improper motive, or ultra vires, or after inadequate or misconceived deliberation.¹²⁸ Equitable review powers were enhanced by s 68 of the 1956 Act. Although that was concerned with review of statutory powers, the two sources of oversight worked in harness.¹²⁹ Judicial oversight of trusts is itself a constraint that may, on the facts of a particular case, be inconsistent with a conclusion that a trust power constitutes the donee's property, which they are free to exploit in a purely selfish manner. The more intrusive the scope for judicial oversight, the less likely it is that the power is the personal property of the donee.¹³⁰

[99] Having said that, and as Miller J observed in the Court of Appeal,¹³¹ the particular provisions of a trust deed may confer such broad discretion, or may so reduce the extent of duties imposed upon those exercising the power, that the ability to seek judicial oversight of the exercise of that power has limited practical utility. That was the case in *Clayton*, where the normal fiduciary constraints upon the trustee were substantially diluted. The consequence was that the settlor, Mr Clayton, retained such a degree of control as to constitute effective ownership of property. We return to that case now.

¹²⁷ Andrew S Butler "Breach of Trust" and "Fiduciary Law" in Andrew S Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 255 at [10.3.1(1)] and 471 at [17.3.1].

¹²⁸ *Gailey v Gordon* [2003] 2 NZLR 192 (HC) at [89]–[90]. See also the discussion in Chris Kelly and Greg Kelly *Garrow and Kelly Law of Trusts and Trustees* (8th ed, LexisNexis, Wellington, 2022) [*Garrow and Kelly*] at [19.65]–[19.74] and the cases there discussed.

¹²⁹ See *Garrow and Kelly*, above n 128, at [25.31] discussing *Jaspers v Greenwood* [2012] NZHC 2422, (2012) 3 NZTR ¶22-028. We note that in 2013 the Law Commission recommended a broader power of review of trustees' acts, omissions or decisions than s 68 of the Trustee Act 1956 allowed: Law Commission | Te Aka Matua o te Ture, above n 98, at 173–179. See now ss 126 and 127 of the Trusts Act, based on the Law Commission's draft provisions at 178–179.

¹³⁰ We are dealing here, of course, with the law as it applied before enactment of the Trusts Act.

¹³¹ CA judgment, above n 2, at [91].

Clayton contrasted: the MRWT powers are not so extensive or unconstrained as to constitute Mr Pinney's property

[100] There are several significant differences between the trust deed in *Clayton* (the VRPT deed) and the MRWT deed.¹³² For the reasons that follow, we have reached the conclusion that those differences are sufficiently material to distinguish this case from *Clayton*. The power to appoint and remove trustees does not allow Mr Pinney to take sole control of the trust—a fact which suffices alone to distinguish the MRWT deed from the VRPT deed in *Clayton*. But even if unilateral control were possible, as we shall explain, the dispositive powers remain fiduciary in nature, and constrained.

[101] We complete this analysis under the following headings:

- (a) The deeds distinguished
- (b) The trustee appointment power remains fiduciary and constrained
- (c) The remaining trustee powers likewise are fiduciary and constrained
- (d) Mr Pinney's powers are not his property for PRA purposes

(a) The deeds distinguished

[102] The main similarity between the VRPT and MRWT deeds is that both contain broad discretionary powers to distribute income and capital to discretionary beneficiaries. Clauses 4 and 6 of both deeds are substantially identical in this regard.¹³³ But there are four significant differences between the two deeds:

- (a) **Appointment and removal of trustees:** While both deeds confer a power to appoint and remove trustees on an individual,¹³⁴ including the ability to self-appoint, cl 15 of the MRWT deed makes this subject to a requirement that at least two trustees hold office at any given time. By contrast, the VRPT deed allowed Mr Clayton to hold office as sole trustee.

¹³² For the relevant clauses of the VRPT deed, see the Appendix to *Clayton v Clayton*, above n 1, at 585 and following.

¹³³ If anything, the MRWT clauses are arguably *more* permissive in that they allow distributions to one beneficiary to the exclusion of others and are exercisable in the “absolute and uncontrolled discretion” of the trustees. However, nothing turns on these distinctions: see below at [120]–[122].

¹³⁴ On Mr Pinney by name (MRWT deed, cl 15), and on Mr Clayton in his capacity as “Principal Family Member” (VRPT deed, cl 17.1), respectively. See above at [25].

- (b) **Unanimity:** Relatedly, cl 14 of the MRWT deed requires that all powers and discretions vested in the trustees be exercised unanimously. Coupled with the two-trustee requirement in cl 15, this means every exercise of trustee power under the MRWT must be the product of a meeting of the minds of more than one trustee. Conversely, the unanimity requirement in cl 12.5 of the VRPT deed only applied “[w]here there is more than one Trustee in office”, leaving a sole trustee free to act alone.
- (c) **Exclusion of fiduciary constraints:** Both deeds contain general clauses purporting to allow trustees to make decisions in their “absolute and uncontrolled discretion”.¹³⁵ However, cl 11.1 of the VRPT deed made detailed provision for the exercise of unconstrained discretion in regard to decision-making affecting the interests of beneficiaries.¹³⁶ This specifically excluded relevant obligations, including the basic obligation to consider the interests of the beneficiaries, in a way which the MRWT deed does not.¹³⁷
- (d) **Removal of beneficiaries:** Clause 7.1 of the VRPT deed allowed Mr Clayton to remove (or add) any person as a discretionary beneficiary of the trust. This empowered him to remove all discretionary beneficiaries other than himself and strip the trust before the vesting date set out in the deed.¹³⁸ There is no equivalent provision in the MRWT deed.¹³⁹

[103] We now turn to address the significance of each of these distinctions in the present case.

¹³⁵ MRWT deed, cl 13; and VRPT deed, cl 12.2. See above at [26], but also below at [120].

¹³⁶ See above at [42]; and see *Clayton v Clayton*, above n 1, at [56(b)].

¹³⁷ Some aspects of cls 4, 6 and 7 of the MRWT deed overlap with cl 11.1 of the VRPT deed, but the basic duty to consider the interests of the beneficiaries is not excluded under the MRWT deed: see below at [121].

¹³⁸ See *Clayton v Clayton*, above n 1, at [54] and [62]. Though the Court in *Clayton* said that in this case, Mr Clayton could have stripped the trust even without recourse to cl 7.1 due to the removal of fiduciary constraints: at [57] and [64].

¹³⁹ The variation power in cl 12 of the MRWT deed is so limited in scope that it could not be used to remove other beneficiaries for the benefit of Mr Pinney alone: see below at [124].

(b) The trustee appointment power remains fiduciary and constrained

[104] It is the power under cl 15 of the MRWT deed on which counsel for Ms Cooper place most reliance. They contend that the unconstrained power to remove and appoint trustees, exercisable in the appointor's own favour, opens the door for Mr Pinney to take control of the trust and thereby distribute the trust property to himself in reliance on the broad, discretionary dispositive powers in the deed. In this case, it is argued that although there must be two trustees, Mr Pinney could appoint someone he is satisfied will act under his direction, or even a corporate trustee which he wholly controls.

[105] We do not accept that cl 15 empowers Mr Pinney to take control of the trust. That is for two distinct but related reasons. First, exercising the power of appointment with the intention of taking sole control of the trust would breach the proper purpose rule.¹⁴⁰ Secondly, such an exercise would be inconsistent with the fiduciary nature of the power. We discuss each of these points in more depth below.

(i) The proper purpose rule

[106] The starting point is that any power must be exercised for a proper purpose by reference to the terms on which it was conferred and the intentions of the donor.¹⁴¹ The proper purpose rule applies whether the power is fiduciary or not.¹⁴²

[107] As mentioned above, in this case the appointment power under cl 15 is subject to the requirement that at least two trustees hold office at any given time.¹⁴³ As we also note below, those trustees must act independently and not under delegation or

¹⁴⁰ This is also sometimes referred to as the "fraud on a power" doctrine. But that term was criticised in *Kain v Hutton* [2008] NZSC 61, [2008] 3 NZLR 589 at [46] per Tipping J; and *Eclairs Group Ltd v JKX Oil and Gas plc* [2015] UKSC 71, [2016] 3 All ER 641 at [15] per Lord Sumption and Lord Hodge SCJJ.

¹⁴¹ *British Airways plc v Airways Pension Scheme Trustee Ltd* [2018] EWCA Civ 1533 at [43]–[46] per Patten LJ; and *Wong v Grand View Private Trust Co Ltd* [2022] UKPC 47, [2023] 2 LRC 559 at [1] and [55]–[63]. See also *Kain v Hutton*, above n 140, at [46]–[54] per Tipping J concurring; and *Eclairs Group Ltd v JKX Oil and Gas plc*, above n 140, at [14]–[22] and [30] per Lord Sumption and Lord Hodge SCJJ. The importance of this equitable rule is underscored by its subsequent inclusion as a standalone mandatory duty in the Trusts Act, both for trustees (s 27) and for persons exercising a power to appoint or remove a trustee (s 94).

¹⁴² *Brkic (as trustees of the Madeg Trust) v White (as trustees of the Awhitu Trust)* [2021] NZCA 670, [2021] NZFLR 840 [*Brkic v White*] at [35]; and see *Lewin on Trusts*, above n 119, vol 2 at [30-066].

¹⁴³ Above at [102(a)].

direction.¹⁴⁴ We agree with Mr Butler that these requirements, in combination with the unanimity requirement in cl 14, indicate strongly that the MRWT deed was not intended to allow Mr Pinney—or any other individual—to have sole control of the trust. While Mr Pinney was expressly allowed to appoint himself as a trustee, rebutting the rebuttable presumption against self-appointment, there is considerable distance between that position and the suggestion that he could essentially sit in the seat of *both* trustees.¹⁴⁵

[108] There are further factors supporting this conclusion. The power in cl 15 is not clothed in the language of enlarged discretion, unlike the trustees' powers,¹⁴⁶ and the cl 15 power is vested in Mr Pinney by name, rather than as a trustee power (to which the cl 13 enlarged discretion would apply). Nor is cl 15 clothed in the language of self-interest, save for Mr Pinney's power under para (c) to appoint himself as one of the trustees.

[109] Further, Mr Watts' argument that the intention of the settlors was to set the trust up for Mr Pinney's sole benefit—namely, as a device to avoid his property falling under the PRA regime¹⁴⁷—is undermined by the inclusion as beneficiaries of his children and grandchildren. Mr Watts relies on the 2005 letter written by Mr McIntyre (who was then a trustee of the Pinney Trust, and later a settlor of the MRWT) to Mr Pinney, advising him to ensure that any structure receiving his share of the Pinney Trust assets would be such that the assets would be regarded as his separate property; but this does not establish an intention to confer on Mr Pinney unfettered powers of control over the trust.

[110] We do not accept that the two-trustee requirement is capable of being lawfully subverted by the appointment of a corporate trustee controlled by Mr Pinney. Equity would look behind the corporate veil if confronted with an attempt to

¹⁴⁴ Below at [115].

¹⁴⁵ In regard to the rebuttable presumption, see *Re Skeats' Settlement* (1889) 42 Ch D 522 (Ch) at 527; *Re Newen* [1894] 2 Ch 297 (Ch) at 309; *Montefiore v Guedalla* [1903] 2 Ch 723 (Ch); and Geraint Thomas and Alastair Hudson *The Law of Trusts* (2nd ed, Oxford University Press, Oxford, 2010) at [22.43]. Also relevant is the fact Mr Pinney was appointed as an original trustee on settlement of the trust.

¹⁴⁶ But see below at [120].

¹⁴⁷ We note that Mr Watts does not argue that any of the anti-avoidance provisions of the Property (Relationships) Act apply.

undermine the constraints imposed by the settlors in providing for two trustees who are able to act only where of unanimous view.¹⁴⁸

(ii) Fiduciary constraints

[111] To the preceding analysis must be added the constraints imposed by virtue of the fiduciary nature of the appointment power in this particular case. In our view, the power to appoint or remove trustees is also, as Mr Walker submitted for the trustees, a fiduciary power and therefore not unconstrained by fiduciary obligations as counsel for Ms Cooper suggested.

[112] The office of trustee is prima facie a fiduciary one, which:¹⁴⁹

... lies at the core of the trust and carries fundamental and onerous obligations to act in the best interests of the beneficiaries as a whole to the exclusion of the trustee's own interest.

Relatedly, the power to appoint persons to a position of fiduciary responsibility will itself be regarded as fiduciary,¹⁵⁰ unless the trust deed makes clear that it is not.¹⁵¹ In *New Zealand Maori Council v Foulkes*, the Court of Appeal held that the power to appoint trustees was fiduciary in nature, concluding that:¹⁵²

In this respect it does not matter that the party exercising the power is not itself a trustee; it is the object and purpose of the power, taken from the deed, that is decisive.

¹⁴⁸ See *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 415 at [27] and [35] per Lord Sumption SCJ. See also *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734 (Ch) at [26]; and *Jones v Lipman* [1962] 1 WLR 832 (Ch) at 836. We contrast this Court's recent judgment in *Legler v Formannoij* [2024] NZSC 173 where, the majority noted at [4], the appellants accepted that appointment of a single corporate trustee, including one controlled by a beneficiary, was consistent with the trust deed in that case.

¹⁴⁹ *New Zealand Maori Council v Foulkes*, above n 62, at [22].

¹⁵⁰ See *Brkic v White*, above n 142, at [29]–[34] and the sources cited therein. See also *Re Skeats' Settlement*, above n 145, at 526–527; *Carmine v Ritchie*, above n 62, at [66]–[67]; *Goldie v Campbell*, above n62, at [63] and [67]; and Geraint Thomas *Thomas on Powers* (2nd ed, Oxford University Press, Oxford, 2012) [*Thomas on Powers*] at [1.52].

¹⁵¹ In which case the proper purpose rule would still apply, but separate fiduciary obligations would not: see above at [106].

¹⁵² *New Zealand Maori Council v Foulkes*, above n 62, at [22] (footnote omitted). This was cited with approval in *Brkic v White*, above n 142, at [29].

Accordingly, the power in that case had to be exercised in the best interests of the beneficiaries and could not be delegated or exercised for a collateral purpose.¹⁵³ The same constraints presumptively apply to cl 15.

[113] There is nothing in the MRWT deed which negates the fiduciary nature of the cl 15 power. As noted above at [108], it is not expressed in enlarged discretionary terms, and nor does it broadly empower Mr Pinney to exercise it for self-benefit, save for the power to appoint himself. It excludes the need to give reasons for removal, but this is no departure from the equitable norm in any case—and as counsel for the trustees submitted, it does not mean Mr Pinney need not *have* a reason for removing a trustee.¹⁵⁴

[114] We accept the submission for the trustees that the power of appointment in this case “fits the mould” of a power which equity makes subject to fiduciary responsibility: limited discretionary power is conferred; the power is created for the benefit of the beneficiaries; the beneficiaries are nonetheless vulnerable to the exercise of the power; and the power must be exercised for a proper purpose.¹⁵⁵ While the proper purpose rule is not necessarily a fiduciary constraint, the analysis above in relation to proper purpose is also relevant to the conclusion that the cl 15 power is fiduciary.¹⁵⁶

[115] The whole combination of these considerations leads inexorably to the conclusion that the cl 15 power is to be regarded as fiduciary in nature. The corollary of this is that it must be exercised in good faith and in the interests of the beneficiaries, and not for any improper purpose (as already discussed above). Each of the two trustees must also, once appointed, act independently, in the beneficiaries’ interests, and not under the delegation or direction of another.¹⁵⁷ The fiduciary nature of the

¹⁵³ *New Zealand Maori Council v Foulkes*, above n 62, at [22] and [24].

¹⁵⁴ Beneficiaries are not normally entitled to disclosure of trustees’ reasons: *Lambie Trustee Ltd v Addleman* [2021] NZSC 54, [2021] 1 NZLR 307 at [54]; and *Erceg v Erceg* [2017] NZSC 28, [2017] 1 NZLR 320 at [55].

¹⁵⁵ See generally *Thomas on Powers*, above n 150, at [1.54]–[1.58].

¹⁵⁶ See above at [106]–[110]. As stated above at [106], the requirement to exercise a power for a proper purpose is not limited to fiduciary powers; but it is axiomatic that a fiduciary power will be subject to the proper purpose rule: *Wong v Grand View Private Trust Co Ltd*, above n 141, at [1] and [51]–[52].

¹⁵⁷ *Niak v Macdonald* [2001] 3 NZLR 334 (CA) at [16].

power would therefore pose an additional barrier were Mr Pinney to attempt to use it to seize control of the trust and circumvent the two-trustee and unanimity requirements.

(c) The remaining trustee powers likewise are fiduciary and constrained

[116] Mr Watts also placed emphasis on that fact the trustees' powers in cls 4, 6, 7 and 13 of the MRWT deed confer "absolute and uncontrolled discretion" to dispose of trust property in favour of one or more beneficiaries.¹⁵⁸ This drafting is sometimes referred to as an "enlarged discretion".¹⁵⁹ There is some attraction in Mr Watts' argument, though it necessarily relies on Mr Pinney taking control of the trust in the first place, either by appointing himself and a corporate trustee controlled by him, or by appointing one or more trustees who will do his bidding. As we have concluded above, that would breach the proper purpose rule and be inconsistent with the fiduciary nature of the power—a conclusion which is itself dispositive of the case. For completeness, however, we will also consider the argument relating to the dispositive powers.

[117] The substantive difficulty with this argument is that the MRWT still requires the trustees to hold the assets, and look after those assets, for named classes of beneficiaries—an ownership arrangement which presumptively imports fiduciary obligations for the trustees. Indeed, trustees have been described by the High Court of Australia as "the archetype of the fiduciary".¹⁶⁰ As Paul Finn observed in *Fiduciary Obligations*, a trustee is a fiduciary because the position is held not for the trustee's benefit, but for that of others, and because the trustee alone has ultimate responsibility for the manner of discharge of his or her duties and powers.¹⁶¹

¹⁵⁸ See above at [25]–[28]. We note that, in the Court of Appeal, Cooper P and Gilbert J thought these words added little of significance: CA judgment, above n 2, at [110]. Likewise Clark J in the High Court: HC judgment, above n 2, at [89]. In contrast, Miller J thought they mattered a great deal: CA judgment, above n 2, at [91].

¹⁵⁹ Although in practical terms the words "absolute and uncontrolled" do little work: see below at [120].

¹⁶⁰ *Maguire v Makaronis* (1997) 188 CLR 449 at 473 per Brennan CJ, Gaudron, McHugh and Gummow JJ referencing *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 68 per Gibbs CJ. See also Paul Matthews and others *Underhill and Hayton Law of Trusts and Trustees* (20th ed, LexisNexis, London, 2022) at [1.59]–[1.60]; and Butler "Fiduciary Law", above n 127, at [17.3.1].

¹⁶¹ Paul Finn *Fiduciary Obligations* (2nd ed, Federation Press, Sydney, 2016) at [13], [15] and [708].

[118] We accept that there is force in Millett LJ’s description in *Armitage v Nurse* of the trustee duty to perform the trust honestly and in good faith for the benefit of the beneficiaries as an “irreducible core of obligations” owed by a trustee and fundamental to the concept of a trust.¹⁶² Despite criticism of that concept by Mr Watts, we think it sound as a general principle, for two reasons. First, it has support from recent decisions of this Court (in *Clayton*) and the Judicial Committee of the Privy Council.¹⁶³ Secondly, as Mr Butler submitted, that “irreducible core” has gained subsequent support from enactment of the mandatory trustee duties in the 2019 Act, particularly s 26.

[119] We also accept, however, that the precise extent of the fiduciary obligations applicable to a trustee will depend on the express terms of the trust deed and may be varied by those terms or by necessary implication from context, including the evident intent of the settlor of the trust. The context of the MRWT deed does not indicate that the settlors intended the powers to be exercised solely in the interests of Mr Pinney.¹⁶⁴

[120] The trustees being subject to fiduciary obligations, clear and specific words would be needed to exclude them. The expression “absolute and uncontrolled discretion” in cl 13 does not by its terms exclude fiduciary obligations and adds very little to the mere fact of discretion being conferred.¹⁶⁵ Unlike cls 11.1, 14.1 and 19.1 of the VRPT deed, which were decisive in *Clayton*, the MRWT deed contains no specific exclusionary terms.¹⁶⁶

[121] Clauses 4, 6 and 7 do contain some language of enlarged discretion, allowing income and capital to be applied “for the benefit of ... such one or more of [the discretionary beneficiaries] to the exclusion of the others” as the trustees see fit (and,

¹⁶² *Armitage v Nurse*, above n 69, at 253–254.

¹⁶³ *Clayton v Clayton*, above n 1, at [124]; and *Webb v Webb*, above n 121, at [89] per Lord Carnwath, Lady Black, Lord Briggs and Lord Kitchin. See also *Children’s Investment Fund Foundation (UK) v Attorney General* [2020] UKSC 33, [2022] AC 155 at [82] per Lady Arden SCJ.

¹⁶⁴ See above at [109] and [117].

¹⁶⁵ *Re Gulbenkian’s Settlements Trusts* [1970] AC 508 at 518 per Lord Reid; *Lewin on Trusts*, above n 119, vol 2 at [29–339]; *Thomas on Powers*, above n 150, at [11.28]–[11.30]; and Jeff Kenny “Trustees Powers” in Andrew S Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 155 at [6.4.1].

¹⁶⁶ *Clayton v Clayton*, above n 1, at [56]–[58]; and see above at [102(c)].

in the case of cl 7, a similarly framed discretion to resettlement of the assets of the trust).¹⁶⁷ That simply reflects the standard position that fiduciary obligations do not necessarily “require that *all* beneficiaries must benefit equally (or at all) from any decision” and that some beneficiaries may be preferred over others.¹⁶⁸ It does not follow that the duties to give proper consideration to the interests and circumstances of the beneficiaries, and to act in good faith and consistently with the purpose of the trust, do not apply.¹⁶⁹ In contrast, the VRPT deed in *Clayton* expressly excluded the former duties to consider, and as this Court observed: “These provisions mean that Mr Clayton is not constrained by any fiduciary duty when exercising the VRPT powers in his own favour to the detriment of the Final Beneficiaries.”¹⁷⁰ Indeed, the freedom given by that deed meant “the normal constraints of fiduciary obligations are not of any practical significance in relation to his powers as Trustee”.¹⁷¹ In the case of Mr Clayton, this Court said there was “no effective constraint on the exercise of powers in favour of himself”.¹⁷²

[122] We acknowledge that Mr Pinney, were he to appoint himself as a trustee, would be permitted to act for self-benefit and notwithstanding the conflict between his fiduciary duties and his interests as a beneficiary. That arises by necessary implication from cl 15(c) of the MRWT deed, which allows self-appointment, and from his original appointment as a trustee by the settlors.¹⁷³ But it is one thing to say Mr Pinney may act in a manner that benefits himself and where he is conflicted, and quite another to say he may act in a manner that benefits him *alone*, and with no obligation to deal with the other beneficiaries in good faith notwithstanding the conflict inherent in his position. The limit on fiduciary obligations goes only so far as expressed in the deed

¹⁶⁷ It may be noted that cl 6, unlike cl 4, does not use the formula of “absolute and uncontrolled discretion”. That this would make no material difference reinforces the modest significance of the formulaic drafting.

¹⁶⁸ *Garrow and Kelly*, above n 128, at [20.42] and [20.174]–[20.175] (emphasis in original); and see *Edge v Pensions Ombudsman* [2000] Ch 602 (CA) at 627.

¹⁶⁹ See *Gartside v Inland Revenue Commissioners*, above n 114, at 617–618 per Lord Hodson and Lord Wilberforce concurring; and *Re Hay's Settlement Trusts* [1982] 1 WLR 202 (Ch) at 208–210.

¹⁷⁰ *Clayton v Clayton*, above n 1, at [58].

¹⁷¹ At [64].

¹⁷² At [67].

¹⁷³ See *Sargeant v National Westminster Bank plc* (1991) 61 P & CR 518 (CA) at 523, cited with approval in *McLaughlin v McLaughlin* [2023] NZCA 473 at [122]–[127]. See also *Breakspear v Ackland* [2008] EWHC 220 (Ch), [2009] Ch 32 at [114] and [121]–[125].

or necessarily implied from the circumstances of the trust and the settlors' intent.¹⁷⁴ We again contrast the powers in the VRPT deed, which expressly removed the requirement for Mr Clayton to consider the interests of the other beneficiaries.

[123] As to the default obligations, it is clear that trustees “must inform themselves, before making a decision, of matters which are relevant to the decision”.¹⁷⁵ A decision to make a distribution must involve consideration of the circumstances of the beneficiaries as the trustees understand them to be at the time of the distribution.¹⁷⁶ That consideration cannot be a mere formality; it carries with it an expectation that the matters to be considered will be properly taken into account when the discretion is exercised. As noted above at [98], the courts' equitable jurisdiction to oversee trusts and review exercises of trustee powers may itself be a relevant constraint on a trustee's ability to exploit their powers in a purely selfish manner. A court on review may look to the decision reached in order to determine whether the duty to consider was properly discharged.¹⁷⁷ The exercise of trustees' powers in the case of the MRWT deed remains susceptible to judicial review if exercised without due consideration (unlike in *Clayton*), in bad faith or for an improper purpose.

[124] Finally, we note that none of these fiduciary constraints, grounded as they are in the fiduciary relationship between the trustees and the beneficiaries,¹⁷⁸ could be circumvented by removing all beneficiaries other than Mr Pinney. The MRWT deed confers no such power, unlike the VRPT deed, which empowered Mr Clayton to appoint and remove discretionary beneficiaries at his sole discretion.¹⁷⁹ Nor does the MRWT deed allow the displacement of fiduciary constraints by variation of the terms of the deed. The variation power in cl 12 is limited in scope and constrained by a general obligation to exercise it without prejudice to “the general interests of the beneficiaries”.¹⁸⁰

¹⁷⁴ Of course, Mr Pinney's ability to act for self-benefit would also be practically constrained by the requirement of unanimity amongst the minimum two trustees.

¹⁷⁵ *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705 (Ch) at 717.

¹⁷⁶ See, for example, *Molloy v Molloy* HC Auckland CP106/99, 10 June 1999 at 6.

¹⁷⁷ See *Garrow and Kelly*, above n 128, at [19.18]–[19.19].

¹⁷⁸ See above at [114].

¹⁷⁹ See above at [102(d)].

¹⁸⁰ Using the power in this way would also breach the proper purpose rule: see above at [106]–[110].

(d) Mr Pinney’s powers are not his property for PRA purposes

[125] It will be clear by now that we consider the combination of powers reserved to Mr Pinney under the MRWT deed to be significantly different to those powers reserved to Mr Clayton in *Clayton v Clayton*. A power analogous to a general power of appointment is not created. Rather, the core power in cl 15 to appoint and remove trustees remains limited by the proper purpose rule and bound by the fiduciary obligations that it be exercised in good faith and in the interests of the beneficiaries. So too are the dispositive powers in cls 4, 6 and 7—powers which are moreover constrained by the two-trustee requirement and the requirement of unanimity. The general discretion provision in cl 13 does not alter this analysis, and nor does the limited variation power in cl 12. The distinctions between the VRPT deed in *Clayton* and the MRWT deed are therefore sufficiently material to warrant different classification in terms of the PRA definition of “property”. The two cases are not alike.

[126] It follows that we do not consider Mr Pinney enjoys a personal property right in respect of the bundle of powers vested in him by the MRWT deed.

Does tikanga alter this analysis?

[127] Tikanga was raised for the first time in this case, before us. We have neither the benefit of evidence nor the considered views of the Courts below on the matter. While we accept, consistent with the decision of this Court in *Ellis v R (Continuance)*, that tikanga might be influential in the long-term development of the common law of Aotearoa New Zealand, including equity, we are not persuaded that anything in the submissions we received would necessitate a different conclusion on the narrow point before us as to whether, on the facts, a particular combination of trust powers constitutes the private property of the donee of those powers.¹⁸¹

[128] In our view, any discussion of tikanga’s influence on the application of the PRA to trusts should await a case where the matter has been properly raised at first instance,

¹⁸¹ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239.

has been the subject of evidence, and might conceivably make a real difference to the outcome. This is not that case.

Costs

[129] We are advised that both parties are legally aided. It may therefore be that costs are not in issue. Formally, we shall reserve costs.

Result

[130] The appeal is dismissed.

[131] Costs are reserved.

Solicitors:
Zindels Barristers and Solicitors, Nelson for Appellant
Connors Legal, Greymouth for Respondent
Saunders & Co Lawyers, Christchurch for Interested Parties

APPENDIX

TRUST DEED PROVISIONS

THE MRW PINNEY FAMILY TRUST

WHEREAS:

- A. THE Settlers are desirous of making provision for the benefit of the persons or objects hereinafter described and accordingly of creating such trusts as shall hereinafter appear.
- B. THE Settlers have caused to be paid into the joint names of the Trustees the sum of TWENTY DOLLARS (\$20.00) TO BE HELD by the Trustees UPON THE TRUSTS and with the powers hereinafter contained AND it is understood that further money investments and property may from time to time be paid to or transferred into or vested into the joint names or control of the Trustees.
- C. THE Trustees have consented to become the Trustees hereof upon the trusts and with and subject to the powers and provisions hereinafter expressed.

NOW IN CONSIDERATION of the premises THIS DEED WITNESSETH as follows:

- 1. IN this Deed the following terms where the context so admits shall have the following meanings:
 - a) “THE TRUSTEES” shall include the Trustees or Trustee for the time being hereof whether original, additional or substituted.
 - b) “THE TRUST FUND” shall mean the said sum of TWENTY DOLLARS (\$20.00) and the property and investments from time to time representing the same and any property hereafter transferred by the Settlers to the Trustees and directed to be held on like trusts and any further property whether real or personal of what nature and kind soever which may hereafter be otherwise acquired by the Trustees from any source whatever and whether by way of gift bequest devise purchase exchange or otherwise howsoever for the purposes of the said trusts and the moneys and investments from time to time representing such property and the income therefrom.
 - c) “THE VESTING DAY” shall mean:
 - i) The day upon which shall expire the period of EIGHTY (80) years from the date of execution of these presents being within the perpetuity period permitted to be specified herein by virtue of the provisions of Section 6 of the Perpetuities Act 1964 and the perpetuity period applicable to these presents is hereby specified accordingly.
 - ii) Such date being earlier than the day specified above as the Trustees may in their absolute and uncontrolled discretion by deed appoint in respect either of the whole or any specified part of the Trust Fund and any day so appointed shall for all purposes be and become the Vesting Day in respect of the Trust Fund or specified part thereof as the case may be.

- d) "THE TRUST PERIOD" shall mean the period from the date of execution hereof until the Vesting Day.
 - e) "THE FINAL BENEFICIARIES" shall mean the children and grandchildren of MARCUS ROBERT WILLIAM PINNEY.
 - f) The "CHILDREN AND GRANDCHILDREN" shall include children by adoption as well as natural born children.
 - g) "THE DISCRETIONARY BENEFICIARIES" shall mean:
 - i) The Final Beneficiaries;
 - ii) MARCUS ROBERT WILLIAM PINNEY.
2. THE trust created by this Deed is to be known as THE MRW PINNEY FAMILY TRUST.
3. THE Settlers DO HEREBY DIRECT AND DECLARE and the Trustees DO HEREBY ACKNOWLEDGE that the Trustees shall stand possessed of the Trust Fund upon the trusts and with the powers hereinafter set forth.
4. DURING the Trust Period the Trustees may with respect to all or any part or parts of the net income of the Trust Fund after payment of all expenses and other charges to be met from income determine:
- a) To pay or apply the same to for or towards the personal support maintenance comfort education advancement in life or otherwise howsoever for the benefit of such of the Discretionary Beneficiaries as may from time to time be living or in existence during the said period or such one or more of them to the exclusion of the others or other of them at such time in such manner and if more than one in such shares and proportions as the Trustees in their absolute and uncontrolled discretion shall think proper.
 - b) To make or retain out of or charge against income in any income year any payments reserves or other provisions of a capital nature for any of the purposes mentioned herein or incidental to the exercise of any of the powers authorities or discretions conferred upon the Trustees by this Deed.
5. ANY income of any income year not so paid applied or retained during or within six (6) months after the end of that income year shall be accumulated and any income so accumulated shall be added to and form part of the capital of the Trust Fund and shall be subject to the trusts and powers herein declared in respect of the Trust Fund.
6. DURING the Trust Period the Trustees may at any time or times and from time to time pay apply or transfer the whole or any part of the capital of the Trust Fund to or for the benefit of such of the Discretionary Beneficiaries as may then be living or such one or more of them to the exclusion of the others or other of them at such times and if more than one in such proportions and in such manner and subject to such terms and conditions as the Trustees shall think fit and without limiting the generality of the foregoing for the maintenance education advancement or benefit of such beneficiary or beneficiaries.
7. THE powers of the Trustees in relation to income and capital contained in Clauses 4 and 6 hereof shall without in any way limiting or restricting such powers include the

power for the Trustees in their absolute and uncontrolled discretion at any time or times during the Trust Period by deed to resettle UPON TRUST in any manner which in the opinion of the Trustees is for the benefit of any person object or purpose who shall for the time being be a Discretionary Beneficiary under the trust hereof the whole or any portion or portions of the capital or income of the Trust Fund PROVIDED HOWEVER that such resettlement shall not transgress the rule against perpetuities.

8. IN the exercise of any of their powers and discretions conferred in Clauses 4 and 6 hereof but without in any way restricting such powers the Trustees may pay the whole or any part of the capital and income of the Trust Fund for the purposes aforesaid to the guardian or parent of any of the Discretionary Beneficiaries for the time being a minor without being bound to see to the application thereof.
9. IN the exercise of any of their powers and discretions conferred in Clauses 6, 7 and 8 hereof but without in any way restricting such powers the Trustees may upon the transfer or resettlement of any portion of the capital of the Trust Fund to or for a Final Beneficiary direct in writing that the sum transferred or resettled is to be taken into hotchpot in ascertaining the share of the Final Beneficiary on the Vesting Day and upon such direction that Final Beneficiary shall not share in the Trust Fund upon the Vesting Day without bringing the capital so transferred or resettled into hotchpot and accounting therefore.
10. IN the exercise of any of their powers and discretions conferred in Clauses 6, 7 and 8 hereof but without in any way restricting such powers the Trustees may appropriate and partition any portions of the Trust Fund or any part including an undivided interest in any asset in or towards the share whether absolute contingent or settled of any beneficiary or beneficiaries (whether sui juris or not) and to determine values for that purpose and with power to transfer any undivided interest in any property to that person entitled thereto or to other Trustees and so that any such property may thereafter be held by the Trustees as tenants in common with any other persons.
11. TRUSTS ON VESTING DAY

On the Vesting Day the trustees shall stand possessed of such of the capital and income of the Trust Fund as may then remain upon trust for the Discretionary Beneficiaries whether for all of them or one or more of them to the exclusion of another or others, or are living on the Vesting Day and if more than one in such shares and proportions as the trustees may in writing (revocable or irrevocable) at any time on or before the Vesting Day appoint and in default of for such of the children of the said MARCUS ROBERT WILLIAM PINNEY who survive him and who reach the age of twenty five (25) and if more than one then equally as tenants in common[.] However if any of the aforementioned children is already dead or dies before MARCUS ROBERT WILLIAM PINNEY leaving children then those children shall on reaching twenty five (25) take equally as tenants in common the share which their parent would otherwise have taken.

12. ALTERATIONS OF TRUSTS

THE trustees may by Deed supplemental hereto alter modify add to or cancel the provisions of this Deed (including this present clause) in such manner and to such extent as may be required to:

- a) satisfy the requirements of any statute ordinance rule regulation or bylaw which may be passed by any competent authority and which affects trusts or the nature of this Trust, or

- b) to enable the provisions hereof to be more conveniently advantageously profitably or economically administered or managed (all to the benefit of the Trust.)

PROVIDED that the trustees are reasonably satisfied that such alteration addition modification or cancellation does not prejudice the general interests of the beneficiaries and that the consent (if required by law) by such authority as may be prescribed under any statute or regulation of the proper law shall be obtained prior to such alteration addition modification or cancellation.

It is agreed however that this herein Alteration of Trusts clause does not apply to the addition of a spouse or a partner to the class of beneficiaries with this being expressly precluded.

- 13. SUBJECT ALWAYS to any express provision to the contrary contained herein every discretion vested in the Trustees shall be absolute and uncontrolled and every power vested in them shall be exercisable at their absolute and uncontrolled discretion.
- 14. WHERE THIS DEED gives a power, authority or discretion to the Trustees, that power, authority or discretion must be exercised unanimously by a resolution in writing signed by all of the Trustees and recorded in the Trustees Minute. The Trustees Minutes are evidence of the nature and content of all such resolutions.
- 15. THE statutory power of appointment of new Trustees hereof shall vest in MARCUS ROBERT WILLIAM PINNEY during his lifetime. Upon the death [of] MARCUS ROBERT WILLIAM PINNEY the statutory power of appointment of new trustees shall vest in the executors or trustees for the time being of his will and if at any time after his death and after the winding up of his estate there shall be no such administrator, executor or trustee willing to act then in the person or persons in whom the said statutory power is vested by the Trustee Act 1956 or any statutory modification thereof for the time being in force.

The person or persons in whom the said statutory power is vested shall have power:

- a) To appoint at any time or times additional Trustee or Trustees of all or any of the trusts whether or not occasion shall have arisen for appointment of a new Trustee or Trustees.
 - b) To appoint any person or persons at any time as Advisory Trustee or Trustees of the trusts hereof.
 - c) To appoint himself or herself or themselves or any of themselves to be a Trustee of all or any of the trusts hereof.
 - d) Without being obliged to give any reason to remove any trustee provided that if such removal will result in the number of continuing Trustees being reduced below two this power of removal shall be exercisable only in conjunction with the appointment of a new Trustee or Trustees so that there shall at all times be at least two Trustees[.]
- 16. THE Trustees may keep a Minute Book or other record of the exercise of the powers, authorities and discretions reposed in the Trustees and the decisions so recorded shall be deemed incorporated in this deed and be deemed part of it and shall be binding on all persons interested in the Trust Fund.

17. ANY Trustee shall be entitled to act hereunder and to exercise all of the powers hereby conferred upon him or her or it notwithstanding that such Trustee is or may be or becomes associated as director or otherwise in a private capacity or as trustee of any other trust with any company to which the Trustees sell or lease any property forming part of the Trust Fund or in which the Trustees hold or propose to acquire shares or other investments as part of the Trust Fund or with which the Trustees otherwise deal as Trustees of these presents and notwithstanding that any Trustee may be Trustee of any other trust to or from which the Trustees propose to sell or purchase shares or other property or with which the Trustees otherwise deal as Trustees of these presents and notwithstanding that the interests or duty of such Trustee in any particular matter or matters may conflict with his or her duty to the Trust Fund or the beneficiaries therein and notwithstanding that such Trustee is selling or leasing any real or personal property forming part of the Trust Fund to itself or to himself or herself or purchasing any such property to form part of the Trust Fund from itself or himself or herself or otherwise deals as Trustee of these presents with itself or with himself or herself in a personal capacity.
18. ANY Trustee hereof may act as director officer or employee of any company the shares and debentures of which form part of the Trust Fund or as director officer or employee of any subsidiary company of any such company and may retain for itself, himself or herself any remuneration which it, he or she may receive as any such director officer or employee any rule of law or equity to the contrary notwithstanding and also notwithstanding that the votes or other rights attached to any such shares or debentures may have been instrumental either alone or in conjunction with other votes or rights in securing such appointment as director officer or employee.
19. ANY Trustee or Advisory Trustee from for the time being hereof (other than the Settlers or any person who shall have settled any moneys investments or property upon the Trustees as part of or as accretions to the Trust Fund or upon or by reference to the trusts of these presents) being a solicitor, accountant or other person engaged in any profession business or trade shall be entitled to be paid all usual professional business and trade charges for business transacted time expended and all acts done by him or her or any employee or partner of his or hers in connection with the trusts hereof including acts which a Trustee not being in any profession business or trade could have done personally.
20. THE Trustees are expressly authorised to exercise the powers of investment herein conferred upon them notwithstanding that the Trust Fund may be subject to any liability or liabilities and the Trustees shall not be liable for any loss occurring on the realisation of such investments.
21. NO trustee of these presents shall be liable for any loss not attributable to dishonesty or to the willful commission by the Trustees of any act known to the Trustees to be a breach of trust. No Trustee shall be liable for any loss to the Trust Fund arising by reason of any improper investment made in good faith or for the negligence or fraud of any agent employed by him or any other Trustee hereof in good faith. In particular no Trustee shall be bound to take any proceedings against a co-trustee or former Trustee for any breach or alleged breach of trust committed by such co-trustees or former Trustee.
22. THE Trustees in addition to all powers vested in them by statute or at law and in their absolute discretion may exercise the following powers and authorities or any of them both in respect of the Trust Fund and during the infancy of any beneficiary in respect of any property held by the Trustees but allotted appropriated credited in account or otherwise held for such infant beneficiary, namely:

- a) TO expend any portions of the Trust Fund on the acquisition or investment in real and personal property or securities o[f] any nature whatever in New Zealand or elsewhere notwithstanding that the same are not securities authorised by law for the investment of trusts moneys with power in particular and by way of illustration and not of limitation to acquire either by purchase or subscription in shares debentures notes or other securities in limited liability companies which may not be fully paid up or be subject to a reserve liability and with power in particular if they think fit to expend the said parts in freehold or leasehold property or in any one property and notwithstanding that the Vendor of any property purchased pursuant hereto may be one of the Trustees.
- b) TO sell call in and convert into money the whole or any part or parts of the Trust Fund at such time or times in such manner and upon such terms as to payment of purchase price and otherwise as they think fit.
- c) TO retain for so long as they think fit any real or personal property from time to time forming part of the Trust Fund.
- d) WITHOUT prejudice to the generality of sub-clause (a) of this Clause to purchase or otherwise acquire life insurance policies and to pay the premiums thereon out of either income or capital as the Trustees think fit and with power to the Trustees to surrender any such policy or policies convert the same into fully paid policies and to accept a new policy or policies in lieu of any policy and to agree with the Insurer on any variation of the terms of any policy.
- e) TO erect repair restore reconstruct and add to any buildings and erections and to do any act in connection with any freehold or leasehold property which the Trustees consider will increase the value thereof whether or not the Trustees would apart from these presents be empowered to do such an act including but not by way of limitation the power to enter into leases or tenancy agreements for such terms as the Trustees think fit or party wall agreements or to grant easements or profits a prendre.
- f) TO join with any other person or persons in exercising any of the Trustees' expressed or implied powers under this Deed and to invest on contributory mortgages whether in the names of the Trustees or their nominee and to acquire and retain undivided interests less than the whole in any property or to hold such property as tenant in common either with any other person or persons or corporation or corporations or to permit such property to be held in the name of a nominee.
- g) TO borrow money for the purpose of investing the same or for the purpose of exercising any of the Trustees' powers hereunder at such rate of interest and upon such other terms and conditions as the Trustees think fit and to give security for the repayment thereof over all or any part or parts of the Trust Fund whether or not the part or parts over which the security is given benefit by such borrowing and no person lending money to the Trustees shall be bound to enquire as to the purpose of any such loan or to see the application thereof.
- h) TO export invest and conduct business or trade in any manner which would be available to the natural person.
- i) TO lend moneys forming part of the Trust Fund to any person or persons or company including a Trustee or Trustees with or without security and with or without interest with liberty to allow any such loan to remain owing for such

period as the Trustees in their absolute discretion think fit.

- j) TO do all things as the Trustees think to be in the interest of the beneficiaries hereunder or any one or more of them (including by way of illustration and not of limitation);
 - i) The sale to any beneficiary any real or personal property forming part of the Trust Fund on such terms as the Trustees consider fair and reasonable.
 - ii) The granting to any beneficiary any favourable terms of purchase including the power to allow money to remain owing to the Trustees on second or subsequent mortgage.
 - iii) The giving of any guarantee either alone or jointly with any other person or company the giving of which the Trustees consider to be in the interests of the Trust Fund or of any one or more beneficiaries hereunder and in support of any such guarantee to give security over the Trust Fund or of any real or personal property comprised therein.
 - iv) To lend moneys forming part of the Trust Fund to any person entitled as a Discretionary Beneficiary hereunder with or without security and with or without interest with liberty to allow any such loan to remain owing for such period but not later than the Vesting Day as the Trustees in their absolute discretion think fit.

- 23. THE Trustees may engage in or carry on any business with all the powers conferred upon the Trustees of deceased persons in that behalf by statute but without limitation as to the length of time for which the Trustees may so engage in or carry on any such business.
- 24. IF any company in which the Trust Fund may be interested shall declare any dividend which in the opinion of the Trustees has been paid out of profits other than trading profits of the financial year in respect of which such dividend has been declared the Trustees shall determine how much as income of the Trust Fund such determination to be made at the absolute discretion of the Trustees after considering the nature of the profit used to pay the dividend and the account to which the dividend has been debited in the books of the company and the Trustees shall not be liable to any person pursuant to the payment of any moneys in accordance with any such determination by the Trustees.
- 25. AS between capital and income of the Trust Fund there shall be no apportionment of rents interests dividends or other periodical payments for the period current at the date of commencement of the Trust or for any other period during which interest hereby created shall determine.