

**JURISDICTION** : SUPREME COURT OF WESTERN AUSTRALIA

**TITLE OF COURT** : THE COURT OF APPEAL (WA)

**CITATION** : MERCANTI -v- MERCANTI [2016] WASCA 206

**CORAM** : BUSS P  
NEWNES JA  
MURPHY JA

**HEARD** : 20 APRIL 2016

**DELIVERED** : 29 NOVEMBER 2016

**FILE NO/S** : CACV 139 of 2015

**BETWEEN** : MICHAEL ANGELO MERCANTI  
First Appellant

JASON DEAN MERCANTI  
Second Appellant

AND

TYRONE KANE MERCANTI  
First Respondent

PARRADELE PTY LTD  
Second Respondent

SLONDIA NOMINEES PTY LTD  
Third Respondent

CITYCOURT PTY LTD  
Fourth Respondent

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**ON APPEAL FROM:**

**Jurisdiction** : SUPREME COURT OF WESTERN AUSTRALIA  
**Coram** : LE MIERE J  
**Citation** : MERCANTI -v- MERCANTI [2015] WASC 297  
**File No** : CIV 1262 of 2013, CIV 2186 of 2013, CIV 1276 of 2014

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*Catchwords:*

Trusts - Discretionary family trust - Proper construction of power of variation in the trust deed - Whether the power of variation authorised the removal of the appointor and the appointment of a new appointor

Trusts - Discretionary family trust - Deed of variation of the trust deed - Whether the deed of variation was executed by the corporate trustee pursuant to the lawful authority of the trustee's directors or shareholders - *Duomatic* principle

Equity - Fraud on a power - Discretionary family trust - Power of variation in the trust deed - Whether the execution of a deed of variation of the trust deed constituted a fraud on the power of variation

Equity - Equitable fraud - Undue influence - Discretionary family trust - Whether trial judge erred in failing to conclude that the agreement of a person who was the guardian and appointor of the trust, and also a director of the corporate trustee, to and the execution by him of a deed of variation was as a result of equitable fraud by or the undue influence of his son

Equity - Fraud on a power - Discretionary family trust - Power conferred on the appointor under the trust deed to remove the trustee of the trust and appoint a new trustee - Whether the exercise by the appointor of the power of removal and appointment constituted a fraud on the power

*Legislation:*

*Corporations Act 2001* (Cth), s 127, s 248A, s 248D

*Result:*

Appeal dismissed

*Category:* A

**Representation:**

*Counsel:*

First Appellant	:	Mr S Penglis
Second Appellant	:	Mr S Penglis
First Respondent	:	Mr J W K Burnside QC & Mr B G Grubb
Second Respondent	:	Mr J W K Burnside QC & Mr B G Grubb
Third Respondent	:	No appearance
Fourth Respondent	:	No appearance

*Solicitors:*

First Appellant	:	Jackson McDonald
Second Appellant	:	Jackson McDonald
First Respondent	:	Metaxas & Hager
Second Respondent	:	Metaxas & Hager
Third Respondent	:	Metaxas & Hager
Fourth Respondent	:	Metaxas & Hager

**Case(s) referred to in judgment(s):**

Adams v Lambert [2006] HCA 10; (2006) 228 CLR 409  
Allcard v Skinner (1887) 36 Ch D 145  
Antony v Weerasekera [1953] 1 WLR 1007  
Atkins v St Barbara Mines Ltd (1996) 135 FLR 119  
Australian Broadcasting Commission v Australasian Performing Right Association Ltd [1973] HCA 36; (1973) 129 CLR 99  
Baker v Local Government Superannuation Scheme Pty Ltd [2007] NSWSC 1173  
Bank of New South Wales v Rogers [1941] HCA 9; (1941) 65 CLR 42  
Beacon Life & Fire Assurance Co v Gibb (1862) 1 Moore NS 73; 15 ER 630  
Beck v LW Furniture Consolidated (Aust) Pty Ltd [2011] NSWSC 235

Bell Group Ltd (in liq) v Westpac Banking Corporation [No 9] [2008] WASC 239; (2008) 39 WAR 1

Benjamin v Harding Corporation Pty Ltd (1995) 16 ACSR 376

Berger v Lyster Pty Ltd [2012] VSC 95

Byrnes v Kendle [2011] HCA 26; (2011) 243 CLR 253

Cachia v Westpac Financial Services Ltd [2000] FCA 161; (2000) 170 ALR 65

Chacmol Holdings Pty Ltd v Handberg [2005] FCAFC 40; (2005) 215 ALR 748

Charlton v Members of the Teachers Tribunal [1981] VR 831

Commercial Bank of Australia Ltd v Amadio [1983] HCA 14; (1983) 151 CLR 447

Commissioners of Inland Revenue v Raphael [1935] AC 96

CPT Custodian Pty Ltd v Commissioner of State Revenue of the State of Victoria [2005] HCA 53; (2005) 224 CLR 98

Elder's Trustee and Executor Co Ltd v Higgins [1963] HCA 48; (1963) 113 CLR 426

Electricity Generation Corporation v Woodside Energy Ltd [2014] HCA 7; (2014) 251 CLR 640

Ellis v Dariush-Far [2007] QCA 398; (2007) 242 ALR 635

Esso Australia Ltd v Australian Petroleum Agents' & Distributors' Association [1999] 3 VR 642

Fardon v Attorney-General for the State of Queensland [2004] HCA 46; (2004) 223 CLR 575

Federal Commissioner of Taxation v Bargwanna [2012] HCA 11; (2012) 244 CLR 655

Fitzgerald v Masters [1956] HCA 53; (1956) 95 CLR 420

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Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liq) [2002] FCAFC 285

Flegeltaub v Telstra Super Pty Ltd [2000] VSC 107

Franklins Pty Ltd v Metcash Trading Ltd [2009] NSWCA 407; (2009) 76 NSWLR 603

Gardiner v Sevenoaks Rural District Council [1950] 2 All ER 84

Global Custodians Ltd v Mesh [2002] NSWSC 283

Goldsworthy v Brickell [1987] Ch 378

Gra-Ham Australia Pty Ltd v Perpetual Trustees WA Ltd (1989) 1 WAR 65

Harre v Clark [2014] NZHC 2533

Harris v Jenkins [1922] HCA 54; (1922) 31 CLR 341

Harris v Rothery (as co-executor of estate of late Harris) [2013] NSWSC 1275

Hartigan Nominees Pty Ltd v Rydge (1992) 29 NSWLR 405

Herrman v Simon (1990) 4 ACSR 81

Hill (Viscount) v Hill (Dowager Viscountess) [1897] 1 QB 483

Hillcrest (Ilford) Pty Ltd v Kingsford (Ilford) Pty Ltd (No 2) [2010] NSWSC 285; (2010) 4 ASTLR 233  
Hotien Holdings Pty Ltd v Frits Maré [2007] NSWSC 599; (2007) 25 ACLC 854  
Huguenin v Baseley (1807) 33 ER 526  
Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd [1991] 1 WLR 589  
ING Funds Management Ltd v ANZ Nominees Ltd [2009] NSWSC 243; (2009) 228 FLR 444  
Inland Revenue Commissioners v Schroder [1983] STC 480  
International Air Transport Association v Ansett Australia Holdings Ltd [2008] HCA 3; (2008) 234 CLR 151  
Jenkins v Ellett [2007] QSC 154  
Johnson v Buttress [1936] HCA 41; (1936) 56 CLR 113  
JW Broomhead (Vic) Pty Ltd v JW Broomhead Pty Ltd [1985] VR 891  
Karger v Paul [1984] VR 161  
Kearns v Hill (1990) 21 NSWLR 107  
Kennon v Spry [2008] HCA 56; (2008) 238 CLR 306  
Kent v SS 'Maria Luisa' (No 2) [2003] FCAFC 93; (2003) 130 FCR 12  
Lancedale Holdings Pty Ltd v Heath Group Australasia Pty Ltd [1999] NSWCA 460; (1999) 33 ACSR 247  
Letterstedt v Broers (1884) 9 App Cas 371  
LGSS Pty Ltd v Egan [2002] NSWSC 1171  
Lock v Westpac Banking Corporation (1991) 25 NSWLR 593  
Lord Napier and Ettrick v RF Kershaw Ltd [1999] 1 WLR 756  
Maciejewski v Telstra Super Pty Ltd (1998) 44 NSWLR 601  
Maguire v Makaronis [1997] HCA 23; (1997) 188 CLR 449  
Marshall v Sladden (1849) 7 Hare 428  
McLeary v Swift [2013] NSWSC 216  
Mercanti v Mercanti [2015] WASC 297  
Montevento Holdings Pty Ltd v Scaffidi [2012] HCA 48; (2012) 246 CLR 325  
Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd [2015] HCA 37; (2015) 256 CLR 104  
Muschinski v Dodds [1985] HCA 78; (1985) 160 CLR 583  
Ngurli Ltd v McCann [1953] HCA 39; (1953) 90 CLR 425  
Nocton v Lord Ashburton [1914] AC 932  
O'Reilly v Alderson (1849) 8 Hare 101  
Pepe v City & Suburban Permanent Building Society [1893] 2 Ch 311  
Permanent Mortgages Pty Ltd v Vandenberg [2010] WASC 10; (2010) 41 WAR 353  
Poliwka v Heven Holdings Pty Ltd (No 2) (1992) 8 ACSR 747  
Pope v DRP Nominees Pty Ltd [1999] SASC 337; (1999) 74 SASR 78  
Quek v Beggs (1990) 5 BPR 11,761

R v The Charity Commissioners for England and Wales; Ex parte Baldwin  
[2001] WTLR 137

Rayner v NJ Sheaffe Pty Ltd [2010] NSWSC 810

Re Ball's Settlement Trusts [1968] 1 WLR 899

Re Blocksidge [1997] 1 Qd R 234

Re Burton (1994) 126 ALR 557

Re Courage Group's Pension Schemes [1987] 1 WLR 495

Re Dion Investments Pty Ltd [2013] NSWSC 1941

Re Dion Investments Pty Ltd [2014] NSWCA 367; (2014) 87 NSWLR 753

Re Duomatic Ltd [1969] 2 Ch 365

Re Dyer [1935] VR 273

Re Express Engineering Works Ltd [1920] 1 Ch 466

Re Hay's Settlement Trusts [1982] 1 WLR 202

Re Marsden's Trusts (1859) 4 Drew 594

Re Newen [1894] 2 Ch 297

Re Skeats' Settlement (1889) 42 Ch D 522

Re Y Trust [2011] JRC 135

Roden v International Gas Applications (1995) 125 FLR 396

Royal Botanic Gardens and Domain Trust v South Sydney City Council [2002]  
HCA 5; (2002) 240 CLR 45

Sainsbury v Inland Revenue Commissioners [1970] Ch 712

Scaffidi v Montevento Holdings Pty Ltd [2011] WASCA 146; (2011) 6  
ASTLR 446

Schreuders v Grandiflora Nominees Pty Ltd [2016] VSCA 93

Scott v National Trust for Places of Historic Interest or Natural Beauty [1998] 2  
All ER 705

Smith v Lucas (1881) 18 Ch D 531

Spong v Spong [1914] HCA 52; (1914) 18 CLR 544

Stuart v Armourguard Security Ltd [1996] 1 NZLR 484

Swiss Screens (Australia) Pty Ltd v Burgess (1987) 11 ACLR 756

The Commonwealth and the Central Wool Committee v The Colonial Combing,  
Spinning and Weaving Co Ltd [1922] HCA 62; (1922) 31 CLR 421

Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52; (2004) 219  
CLR 165

Topham v Duke of Portland (1869) 5 Ch App 40

Vatcher v Paull [1915] AC 372

Versteeg v The Queen (1988) 14 ACLR 1

Vision Super Pty Ltd v Poulter [2006] FCA 849; (2006) 154 FCR 185

West v Public Trustee [1942] SASR 109

Wright v Carter [1903] 1 Ch 27

X v A [2000] 1 All ER 490

Youyang Pty Ltd v Minter Ellison Morris Fletcher [2003] HCA 15; (2003) 212  
CLR 484

## Table of Contents

<b>Buss P's reasons</b> .....	9
The Mercanti family and their associates .....	9
The Mercanti family businesses .....	10
The Mercanti trusts .....	10
The Mercanti companies .....	11
The purpose and use of discretionary family trusts in Australia .....	11
The relevant provisions of the MMF Trust Deed .....	12
The relevant issues in the primary proceedings .....	23
The circumstances in which Tyrone Mercanti and Parradele executed the written notices on 31 July 2013 .....	24
The trial judge's conclusions .....	25
The grounds of appeal .....	26
Grounds 1 and 2: Michael Mercanti's and Jason Mercanti's submissions .....	28
Grounds 1 and 2: relevant legal principles .....	30
Grounds 1 and 2: their merits .....	40
Ground 3: Michael Mercanti's and Jason Mercanti's submissions .....	48
Ground 3: relevant legal principles .....	52
Ground 3: its merits .....	56
Ground 4: Michael Mercanti's and Jason Mercanti's submissions .....	63
Ground 4: relevant legal principles .....	66
Ground 4: its merits .....	71
Ground 5: Michael Mercanti's and Jason Mercanti's submissions .....	76
Ground 5: relevant legal principles .....	78
Ground 5: its merits .....	82
Ground 6: Michael Mercanti's and Jason Mercanti's submissions .....	85
Ground 6: relevant legal principles .....	87
Ground 6: its merits .....	92
Ground 7 .....	95
Conclusion .....	95
<b>Newnes &amp; Murphy JJA's reasons</b> .....	95
Introduction .....	95
The terms of the MMF Trust Deed .....	97
Grounds 1 and 2 .....	99
Ground 3 .....	103
Ground 4 .....	105
Ground 5 .....	108
Ground 6 .....	112
Ground 7 .....	117



1     **BUSS P:** This consolidated appeal comprises the appeals in CACV 137  
of 2015, CACV 138 of 2015 and CACV 139 of 2015. On 22  
October 2015, the Court of Appeal Registrar ordered that the individual  
appeals be consolidated and carried on as one appeal under the number  
and description CACV 139 of 2015 (Consolidated).

2             The appellants in the consolidated appeal comprise Michael Angelo  
Mercanti (Michael Mercanti) as first appellant and Jason Dean Mercanti  
(Jason Mercanti) as second appellant.

3             The respondents in the consolidated appeal comprise Tyrone Kane  
Mercanti (Tyrone Mercanti) as first respondent, Parradele Pty Ltd  
(Parradele) as second respondent, Slondia Nominees Pty Ltd (Slondia) as  
third respondent and Citycourt Pty Ltd (Citycourt) as fourth respondent.

4             Each appellant has appealed from the judgment of Le Miere J after a  
joint trial in the Supreme Court of three actions including, relevantly, CIV  
2186 of 2013 (in which Michael Mercanti was the plaintiff) and CIV 1276  
of 2014 (in which Jason Mercanti was the plaintiff).

5             On 20 August 2015, his Honour delivered judgment and published  
his reasons. See *Mercanti v Mercanti* [2015] WASC 297.

6             I would dismiss the appeal. My reasons are as follows.

### **The Mercanti family and their associates**

7             Michael Mercanti has been referred to in the consolidated appeal and  
the primary proceedings as the patriarch of the Mercanti family. Sybil  
Yvonne Mercanti (Yvonne Mercanti) is his wife.

8             Michael Mercanti and Yvonne Mercanti have four adult sons,  
namely Michael Jamie Mercanti (known as Jamie), Troy Mercanti, Jason  
Mercanti and Tyrone Mercanti.

9             Tyrone Mercanti is married to Vanessa Mercanti.

10            The disputes which gave rise to the primary proceedings were  
principally between Michael Mercanti and Tyrone Mercanti.

11            Anthony Torre is Vanessa Mercanti's brother. He has been a close  
friend of the Mercanti family for more than 30 years.

- 12           Matthew Bizzaca, a chartered accountant, has been Michael Mercanti's and Yvonne Mercanti's accountant and financial adviser since about 1977.

### **The Mercanti family businesses**

- 13           In about 1963 Michael Mercanti commenced carrying on a retail shoe repair business in partnership with Corrie Di Giovanni from a kiosk in the Dianella Plaza shopping centre. The partnership acquired additional kiosks until the mid-1970s, when Michael Mercanti and Mr Di Giovanni dissolved the partnership and divided its assets. Michael Mercanti was allocated kiosks at Karrinyup and South Perth. He commenced carrying on a retail shoe repair business on his own account.

- 14           In about 1977 Michael Mercanti engaged Mr Bizzaca to provide financial and taxation advice. Mr Bizzaca recommended that, for taxation reasons, Michael Mercanti establish a discretionary family trust and transfer the retail shoe repair business to the trustee of the trust. Michael Mercanti instructed Mr Bizzaca to establish a trust which was called the M Mercanti Family Trust (MMF Trust). Slondia was the first Trustee. Slondia, in its capacity as Trustee of the MMF Trust, acquired the retail shoe repair business from Michael Mercanti. Between 1976 and 1985 the retail shoe repair business flourished. Further kiosks were acquired or opened.

- 15           In the early 1980s Michael Mercanti commenced carrying on a wholesale shoe repair supplies business in partnership with two other men. In the 1990s Michael Mercanti acquired the whole of the business. In 1996 Michael Mercanti instructed Mr Bizzaca to establish another discretionary family trust which was called the Footwear Wholesale Trust (FW Trust). Citycourt was the first Trustee. Citycourt, in its capacity as Trustee of the FW Trust, acquired the wholesale shoe repair supplies business from Michael Mercanti.

### **The Mercanti trusts**

- 16           The MMF Trust was created by a deed executed on 1 June 1979. As I have mentioned, Slondia was the first Trustee. Michael Mercanti was the initial Guardian and Appointor. The assets of the MMF Trust include the retail shoe repair business set up by Michael Mercanti and four pieces of real estate.

- 17           The FW Trust was created by a deed executed on 16 August 1996. As I have mentioned, Citycourt was the first Trustee. Michael Mercanti

was the initial Appointor. There was no Guardian. The assets of the FW Trust include the wholesale shoe repair supplies business set up by Michael Mercanti.

### **The Mercanti companies**

18           Slondia was registered in 1979. Between at least 1995 and 2013 its registered office was at Mr Bizzaca's place of business.

19           Citycourt was registered in 1996. Between 1996 and 2013 its registered office was at Mr Bizzaca's place of business.

20           At all material times, Michael Mercanti and Yvonne Mercanti have been the shareholders of each of Slondia and Citycourt.

21           Michael Mercanti and Yvonne Mercanti have been directors of Slondia since 1979 and directors of Citycourt since 1996.

22           Tyrone Mercanti was a director of each of Slondia and Citycourt between 2001 and 30 July 2013.

23           Vanessa Mercanti was a director of Slondia between 2008 and 2013 and a director of Citycourt between November 2004 and 2013.

24           At all material times, Parradele has been controlled by Tyrone Mercanti.

### **The purpose and use of discretionary family trusts in Australia**

25           As I have mentioned, the MMF Trust Deed was executed on 1 June 1979.

26           In the 1970s discretionary family trusts flourished in Australia. They were a taxation avoidance or minimisation device. In addition to reducing the amount or incidence of income tax, and gift, estate and death duties, discretionary family trusts offered flexibility and procedural simplicity. They facilitated succession planning. See Hardingham and Baxt, *Discretionary Trusts*, 1975, chapters 7, 8 and 9; Grbich, Munn and Reicher (eds), *Modern Trusts and Taxation*, 1978, 1-2; GL Davies, 'Some Problems with Discretionary Trusts', (1974-75) 9 *Taxation in Australia* 415; DH Bloom, 'The Discretionary Trust - Some Practical Implications', (1974-75) 9 *Taxation in Australia* 586; DKL Raphael 'Problems in Discretionary Trusts - What? Why? and How?', (1975-76) 10 *Taxation in Australia* 662; DG Hill, 'Comments on "Problems in Discretionary Trusts"', (1975-76) 10 *Taxation in Australia* 674; TW Magney, 'A

Comparative Analysis of Estate Planning Vehicles', (1977-78) 12 *Taxation in Australia* 222.

**The relevant provisions of the MMF Trust Deed**

27           The parties to the MMF Trust Deed were John Horace Barrow Linton, as Settlor, and Slondia, as Trustee.

28           The recitals in the MMF Trust Deed state that the Settlor desired to make provision for the persons referred to and in the manner set out in the MMF Trust Deed; for that purpose the Settlor had upon execution of the MMF Trust Deed transferred or was about to transfer to the Trustee the settled sum of \$10; and the Trustee had consented to become the Trustee under the MMF Trust Deed upon the trusts and with and subject to the powers and provisions expressed in the MMF Trust Deed.

29           Subject to variations made by a deed of variation executed in 2004, the efficacy of that deed being in contest in the primary proceedings and this appeal, at all material times the relevant provisions of the MMF Trust Deed have been as follows.

30           Clause 1 contains, relevantly, the following definitions:

In this Deed the following expressions shall unless there is something repugnant to or inconsistent with the subject matter have the meanings hereunder set out:-

(1)   'Specified Beneficiary' and 'Specified Beneficiaries' shall mean the person or persons named and described or defined as such in the Schedule.

(2)   'General Beneficiaries' shall mean and include -

(a)   The Specified Beneficiary or the Specified Beneficiaries (as the case may be);

(b)   the brothers sisters children and grandchildren of the Specified Beneficiaries or Specified Beneficiary and the children and grandchildren of such brothers and sisters children and grandchildren;

(c)   any of the following entities whether formed in Australia or elsewhere namely -

(i)   the Trustees (in their capacity as such) of any eligible trust;

(ii)   any eligible corporation;

- (iii) any other legal person at least one share or other interest in which is beneficially owned or held by any beneficiary (including the trustees of an eligible trust and an eligible corporation);
- (iv) any charity;
- (d) such other persons corporations and trusts (if any) as may be named described or defined in the Schedule as additional members of the class of General Beneficiaries;

PROVIDED HOWEVER that every member of the excluded class shall be excluded from the class of General Beneficiaries notwithstanding that he may otherwise be or be qualified to be included in the class of General Beneficiaries;

AND PROVIDED FURTHER that subject to clause 10 hereof the Trustees may at any time and from time to time declare in writing that any person shall be excluded from the class of General Beneficiaries notwithstanding that but for such exclusion he is or would by reason of one or more of the matters or circumstances hereinbefore referred to have been a General Beneficiary and the class of General Beneficiaries shall as from the date of the making of any such declaration be modified accordingly but so that this power shall not be capable of being exercised so as to derogate from any interest to which such General Beneficiary has previously become indefeasibly entitled whether in possession or in reversion or otherwise;

- (3) 'the excluded class' shall mean and include each of the following persons, namely -
  - (a) the Settlor;
  - (b) any notional Settlor;
  - (c) every person claiming under or in right of the Settlor or of any notional Settlor;
  - (d) the Trustees;
  - (e) every corporation and the trustees of every trust or settlement in or under which and any other person in which any other member of the excluded class has any interest so long as such interest continues;

PROVIDED HOWEVER that a person shall not be a member of the excluded class if his name is expressly included in the Schedule as an additional member of the class of General Beneficiaries;

AND PROVIDED FURTHER that subject to clause 10 hereof the Trustees may at any time and from time to time declare in writing that any person shall be a member of the excluded class notwithstanding that he is or might but for such declaration become a beneficiary and the excluded class shall as from the date of making any such declaration be modified accordingly but so that this power shall not be capable of being exercised so as to derogate from any interest to which such beneficiary has previously become indefeasibly entitled whether in possession or in reversion or otherwise;

- (4) 'eligible trust' shall mean any trust or settlement under which any beneficiary or class of General Beneficiaries has any interest;

PROVIDED that a trust shall be an eligible trust only if all interests therein must vest on or before the Vesting Date hereinafter referred to;

- (5) 'eligible corporation' shall mean any corporation at least one share in which is beneficially owned or held by any beneficiary (including the trustees of any eligible trust);

...

- (7) 'beneficiary' shall mean any of the General Beneficiaries;
- (8) the expressions 'Specified Beneficiaries' and 'General Beneficiaries' shall include persons who at any time or from time to time until the Vesting Day fall within any of the foregoing definitions or within any description in the Schedule notwithstanding that such persons may not at the date of this Deed be in existence or fall within that definition or description and (in the case of trustees) notwithstanding that at the date of this Deed the trusts or settlements of which they are trustees have not been established or do not fall within that definition or description;
- (9) 'the Trustees' shall mean the person hereinbefore named as the Trustees or other the Trustee or Trustees for the time being of this Settlement;
- (10) 'the Trust Fund' shall mean the said settled sum all moneys investments and property paid transferred to or accepted by the Trustees as additions to the Trust Fund held by them pursuant to this Deed the accumulations of income hereinafter directed or empowered to be made all accretions and additions thereto from any source and the investments and property from time to time representing the said money investments property accumulations accretions and additions;

- (11) 'notional Settlor' shall subject to clause 27 hereof mean any person by whom any disposition of property of any nature to or in favour of the Trustees shall be made at any time otherwise than for fully adequate consideration in money or money's worth;
- (12) 'the Vesting Day' shall mean -
- (a) the first to occur of the following dates namely -
    - (i) the day specified as 'the Vesting Day' in the Schedule;
    - (ii) such date being earlier than the day so specified as the Trustees may with the consent of the Guardian if there is a Guardian on the date of appointment and if there is then no Guardian without any consent appoint; or
  - (b) such date being later than the day specified in the Schedule as 'the Vesting Day' as the Trustees may subject to clause 10 hereof and subject to the same being within the perpetuity period appoint;

PROVIDED HOWEVER that where the date of expiration of the perpetuity period is earlier than the Vesting Day determined under the foregoing provisions that date shall be the Vesting Day and PROVIDED FURTHER that notwithstanding anything to the contrary herein contained all powers and dispositions made by or pursuant to or contained in this Deed which but for this provision would or might vest take effect or be exercisable after the expiration of the perpetuity period shall vest and take effect on and be exercisable only until the last day of the perpetuity period;

...

- (14) 'the Guardian' shall mean successively the person or persons (if any) successively named described or defined as such in the Schedule and where two or more persons are therein specified as acting jointly shall mean those persons acting jointly provided that the Trustees may at any time by instrument in writing (subject to clause 10 hereof) declare that any person who has not yet become Guardian but who would or might but for this proviso at some time become Guardian shall not become Guardian and if such declaration is so made that person shall not become Guardian notwithstanding that he is named as such in the Schedule;
- (15) 'the Appointor' shall mean successively the person or persons successively named described or defined as such in the Schedule or determined according to the provisions hereof and where two or more persons are specified in the Schedule as acting jointly shall

mean those persons acting jointly provided that the Trustees may at any time by instrument in writing (subject to clause 10 hereof) declare that any person who has not yet become Appointor but who would or might but for this proviso at some time become Appointor shall not become Appointor and if such declaration is so made that person shall not become Appointor notwithstanding that he is named as such in the Schedule.

31 By cl 2, 'the Settlor as Settlor HEREBY DECLARES that the Trustees shall and the Trustees HEREBY DECLARE that they will henceforth stand possessed of the Trust Fund and of the income thereof upon the trusts and with and subject to the powers and provisions hereinafter expressed concerning the same'.

32 Clause 3(1) empowers the Trustee, 'at any time before the expiration of any Accounting Period with respect to all or any part or parts of the nett income of the Trust Fund for such Accounting Period', to determine the manner in which the nett income should be dealt with, as permitted by cl 3(1), including by paying, applying or setting aside all or any part or parts of the nett income to or for any one or more of the General Beneficiaries living or in existence at the time of the determination or to accumulate all or any part or parts of the nett income.

33 Clause 3(2) contains provisions which apply to any determination made by the Trustee pursuant to cl 3(1). Clause 3(2)(d) and cl 3(2)(f) provide:

(d) subject to clause 10 hereof the Trustees shall have an absolute discretion in the making of any determination and shall not be required to assign any reason therefor;

...

(f) without limiting the ability of the Trustees to make a determination by other means the Trustees may effect a determination for the purposes of this clause by oral declaration or by written statement whether or not published to any person and a certificate by the Trustees as to any determination shall be prima facie evidence that such determination was made as and when set out in such certificate.

34 Clause 4 confers on the Trustee, as from the Vesting Day, powers of appointment and distribution with respect to the Trust Fund and the income of the Trust Fund. By cl 4(1), as from the Vesting Day, the Trustee shall stand possessed of the Trust Fund and the income of the Trust Fund:



[I]n trust for such of the beneficiaries for such interests and in such proportions and for one to the exclusion of the other or others at such age or time or respective ages or times if more than one in such shares and with such trusts and powers for their respective benefit maintenance advancement and education (including discretionary trusts and powers exercisable over capital or income at the discretion of the Trustees or of any other person or persons) as the Trustees may subject to clause 10 hereof by instrument in writing revocable or irrevocable and without offending the rule against perpetuities before the Vesting Day appoint provided that any revocable appointment shall be revocable only until the end of the day preceding the Vesting Day when it shall become irrevocable.

35 Clause 6 empowers the Trustee, subject to cl 10, at any time or times and from time to time before the Vesting Day:

- (a) to convey or transfer the whole or any part of the Trust Fund to or for the benefit of any Beneficiary for his or her own use and benefit;
- (b) to lend any sum to any Beneficiary; and
- (c) to pay or apply to or for the benefit of any Beneficiary the whole or any part of the income or capital or accrued or accumulated income to which the Beneficiary is either absolutely or contingently entitled.

36 Clause 7 confers extensive powers on the Trustee in relation to the Trust Fund. By cl 7(22), cl 7(25) and cl 7(33):

- (22) subject to clause 10 hereof in any conditions or circumstances which the Trustees think expedient to appoint either in respect of the whole of the Trust Fund or any part thereof new Trustees in any country in the world and to transfer assign and set over the investments for the time being representing the Trust Fund or any part thereof to any such new Trustees upon similar trusts and subject to terms and conditions similar to those declared by this Deed and either subject to the control of the Trustees of this Deed or to the exclusion of such control and the Trustees of this Deed shall be indemnified and held harmless against any loss which may arise from the exercise of this power;

...

- (25) subject to clause 10 hereof at any time or times before the Vesting Day by any irrevocable deed or deeds (without infringing the rule against perpetuities applicable to this Deed) to appoint that the whole or any part of the income or capital of the Trust Fund shall

thenceforth be held upon the trusts and with and subject to the powers and provisions of any eligible trust approved by the Trustees and upon any such appointment being made to transfer to the trustees or trustee for the time being of the said eligible trust the property comprised in the said appointment whereupon the trusts herein declared concerning such property shall cease and determine and the said property shall for all purposes be subject to the trusts powers and provisions contained in the said eligible trust and be subject to and governed by the proper law of the said eligible trust whether such proper law shall be the proper law applicable to this Deed or not.

...

- (33) generally to exercise or concur in exercising all the foregoing powers and discretions contained in this Deed or otherwise by law conferred notwithstanding that the Trustees or any person being a Trustee or any person being a director or shareholder of a Trustee hereof (being a company) has or may have a direct or personal interest (whether as trustee of any other settlement or in his personal capacity or as a shareholder or director or member or partner of any company or partnership or otherwise) in the mode or result of exercising such power or discretion or may benefit either directly or indirectly as a result of the exercise of any such power or discretion and notwithstanding that the Trustee for the time being is the sole Trustee.

37

Clause 10 is concerned with the office of Guardian:

Subject always to any express provision to the contrary herein contained 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 PROVIDED that notwithstanding anything contained in this Deed -

- (1) the Trustees may before exercising any discretion or power vested in them or making any determination hereunder consult the wishes of the Guardian (if any);
- (2) the Trustees may subject to this clause by instrument in writing revocably or irrevocably wholly or partially release abandon or restrict any power conferred on them by this Deed;
- (3) subject to sub-clause (5) of this clause the Trustees shall not when there is a Guardian exercise the reserved powers or the restricted powers except with the consent of the Guardian;
- (4) where a Guardian is named in the Schedule and there ceases to be a Guardian the Trustees shall not -

- (a) exercise the reserved powers; or
- (b) exercise the restricted powers in such manner as to impair or diminish the expectations of any Specified Beneficiary or of any other person or persons upon whom in the events which happen or pursuant to any appointment validly made pursuant to clause 4 hereof the Trust Fund is to devolve on the Vesting Day;

PROVIDED NEVERTHELESS that the Trustees shall have power to make a declaration pursuant to the second provisos to clauses 1(2) or 1(3) hereof in respect of any General Beneficiary who is adult and sui juris and who requests them to do so;

- (5) the Guardian may at any time by instrument in writing revocably or irrevocably declare that thenceforth all or any of the reserved powers or the restricted powers -
  - (a) shall cease to be reserved powers or restricted powers as the case may be and after any such declaration the Trustees shall be entitled to exercise such power or powers as though no Guardian had been named in the Schedule; or
  - (b) shall be prohibited to the Trustees and after any such declaration the Trustees shall not be entitled to exercise such power or powers;
- (6) where no Guardian is named in the Schedule the Trustees may unless otherwise expressly provided in the Schedule exercise all the reserved powers and the restricted powers in their absolute and uncontrolled discretion and without the consent of any other person;
- (7) in this clause -
  - (a) 'reserved powers' means -
    - (i) the power to make declarations pursuant to the second provisos to paragraphs (2) and (3) of clause 1 hereof;
    - (ii) the power pursuant to clause 1(12)(b) hereof to appoint a Vesting Day later than the day specified as the Vesting Day in the Schedule;
    - (iii) the power contained in the proviso to clause 1(14) hereof;
    - (iv) the power contained in the proviso to clause 1(15) hereof;

- (v) the power pursuant to clause 3(1)(a) hereof to pay apply or set aside any amount to a General Beneficiary described in clause 1(2)(c) hereof on the first occasion on which that power is exercised in relation to that General Beneficiary;
- (vi) the power to appoint the Trust Fund pursuant to clause 4(1) hereof;
- (vii) the power to revoke a revocable appointment validly made pursuant to clause 4(1) hereof;
- (viii) the power contained in clause 7(25) hereof;
- (ix) the power contained in clause 28 hereof;
- (x) the power contained in sub-clause (2) of this clause;
- (b) 'restricted powers' means -
  - (i) the powers contained in sub-clauses (1) (2) and (3) of clause 6 hereof;
  - (ii) the power contained in clause 7(22) hereof;
- (c) 'power' includes authority and discretion.

38            Clause 17 relates to the manner of exercise by the Trustee of any power, discretion or authority conferred on the Trustee by the MMF Trust Deed. It provides, relevantly:

- (2) Any exercise by the Trustees of any power discretion or authority conferred on the Trustees by this Deed including without limiting the generality of the foregoing the making of an appointment pursuant to clause 4(1) hereof and the revocation addition to and variation of the trusts terms and conditions herein contained may be made (but without derogating from anything contained in clause 3(2)(f) hereof) -
  - (a) in writing signed by all (or where sub-clause (3) of this clause applies by a majority of) the Trustees; or
  - (b) by a resolution duly passed at a meeting of the Trustees; or
  - (c) in the case of a sole corporate Trustee in the manner set out in sub-clause (4) of this clause.

...

- (4) Every Trustee which is a corporation or company may exercise or concur in exercising any discretion or power hereby conferred on the Trustee by a resolution of such corporation or company or by a resolution of its Board of Directors or governing body or by its representative as set out in sub-clause (5) of this clause.
- (5) Every Trustee not being a Sole Trustee which is a corporation or company may appoint a representative for the purpose of attending meetings of the Trustees.

39            Clause 21 is concerned with the office of Appointor:

The Appointor and on the death of the last surviving Appointor such other person as such survivor shall have appointed to act as Appointor and in default of appointment his legal personal representative shall be entitled by instrument in writing at any time and from time to time -

- (1) to remove any Trustee hereof;
- (2) to appoint any additional Trustee or Trustees;
- (3) to appoint a new Trustee or Trustees in the place of any Trustee who resigns his Trusteeship or ceases to be a Trustee by operation of law;

PROVIDED THAT

- (a) if and so long as the Appointor is a beneficiary he shall not be eligible to be appointed as a Trustee hereof;
- (b) if there is no Appointor named in the Schedule or if at any time there is no one entitled to exercise the power hereinbefore conferred the statutory and other rights or [sic: of] removing and appointing Trustees hereof may be exercised by the Trustees or by the legal personal representatives or (if the Trustee be a corporation) the liquidator of the last surviving Trustee;
- (c) a person appointed to act as Appointor by an Appointor named in the Schedule hereto shall have the same right of appointing a person to act as Appointor as the person who appointed him.

40            By cl 23, any Trustee, Guardian or Appointor, and any person who may by succession become a Trustee, Guardian or Appointor, 'may resign or renounce such position by notice in writing to the Trustees and forthwith upon the giving of such notice the person giving the same shall for all purposes hereunder cease to be a Trustee Guardian or Appointor or to be a person who may by succession become a Trustee Guardian or Appointor (as the case may be) ... provided that if at any time there is no Appointor or other person entitled to exercise the power of appointment

provided in clause 21 hereof a sole surviving Trustee shall not resign except upon appointing a new Trustee or new Trustees in his place'.

41 Clause 28 is concerned with the revocation, addition to or variation of 'the trusts terms and conditions' of the MMF Trust Deed:

Subject to clause 10 hereof the Trustees for the time being may at any time and from time to time by deeds revocable or irrevocable revoke add to or vary all or any of the trusts terms and conditions hereinbefore contained or the trusts terms and conditions contained in any variation or alteration or addition made thereto from time to time and may in like manner declare any new or other trusts terms and conditions concerning the Trust Fund or any part or parts thereof the trusts whereof shall have been so revoked added to or varied provided that the rule known as the Rule against Perpetuities is not thereby infringed and provided that such new or other trust powers discretion alterations or variations -

- (1) insofar as the beneficial interests created by this Deed are revoked added to or varied shall be for the benefit of all or any one or more of the General Beneficiaries or any one or more persons born or unborn being lineal descendants of whatever degree (or the spouse of any lineal descendant) of any grandparent of any General Beneficiary; but
- (2) shall not be in favour of or result in any benefit to any member of the excluded class;
- (3) shall not affect the beneficial entitlement to any amount set aside for any beneficiary prior to the date of the variation alteration or addition; and
- (4) shall not (save as provided in paragraph (1) of this clause) enlarge the number of persons capable of falling within the description 'beneficiary' hereinbefore contained.

Save as provided in this clause these presents shall not be capable of being revoked added to or varied.

42 The Schedule reads:

SCHEDULE	
Specified Beneficiaries:	<u>MICHAEL MERCANTI</u> and any spouse, children and remoter issue of the said <u>MICHAEL MERCANTI</u> .
Additional Members of the Class of General Beneficiaries:	The mother and the father of the said <u>MICHAEL MERCANTI</u> and the mother and father of <u>SYBIL</u>

	<u>YVONNE MERCANTI.</u>
In the Event of the total failure of both the Specified Beneficiaries and the Additional Members of the Class of General Beneficiaries:	Nil
Vesting Day:	30 <sup>th</sup> day of June, 2055
Guardian:	<u>MICHAEL MERCANTI</u> during his lifetime and after his death the spouse of the said <u>MICHAEL MERCANTI</u> and after her death such person nominated in writing to the trustee by the survivor of the said <u>MICHAEL MERCANTI</u> and his spouse during their lifetime and in default of such appointment the person nominated in writing by the duly appointed personal representative of the survivor of the said <u>MICHAEL MERCANTI</u> and his spouse.
Appointor:	<u>MICHAEL MERCANTI</u> during his lifetime and after his death the spouse of the said <u>MICHAEL MERCANTI</u> and after her death such person nominated in writing to the trustee by the survivor of the said <u>MICHAEL MERCANTI</u> and his spouse during their lifetime and in default of such appointment the person nominated in writing by the duly appointed personal representative of the survivor of the said <u>MICHAEL MERCANTI</u> and his spouse.

### **The relevant issues in the primary proceedings**

43 The primary proceedings were concerned principally with the validity of:

- (a) a deed of variation (the MMF Trust Deed of Variation) executed in 2004 by Slondia, in its capacity as Trustee of the MMF Trust, pursuant to which Slondia deleted provisions in the MMF Trust Deed with respect to the appointment of Michael Mercanti as the Guardian and Appointor of the MMF Trust and substituted new provisions appointing Tyrone Mercanti as the Guardian and Appointor;
- (b) a written notice executed on 31 July 2013 by Tyrone Mercanti and Parradele, pursuant to which Tyrone Mercanti, in his capacity as

Appointor of the MMF Trust, removed Slondia as Trustee and appointed Parradele as the new Trustee of the MMF Trust;

- (c) a deed of variation (the FW Trust Deed of Variation) executed in 2004 by Citycourt, in its capacity as Trustee of the FW Trust, pursuant to which Citycourt deleted provisions in the FW Trust Deed with respect to the appointment of Michael Mercanti as the Appointor of the FW Trust and substituted new provisions appointing Tyrone Mercanti as the Appointor; and
- (d) a written notice executed on 31 July 2013 by Tyrone Mercanti and Parradele, pursuant to which Tyrone Mercanti, in his capacity as Appointor of the FW Trust, removed Citycourt as Trustee and appointed Parradele as the new Trustee of the FW Trust.

44 The MMF Trust Deed of Variation and the FW Trust Deed of Variation were drafted by a solicitor, Peter Nettleton, of Brett Davies Lawyers.

**The circumstances in which Tyrone Mercanti and Parradele executed the written notices on 31 July 2013**

45 In about 1996 Michael Mercanti told Tyrone Mercanti that he had decided to appoint him as general manager of the business. Between 1996 and 2004 Tyrone Mercanti was the general manager of Slondia and Citycourt. In 2001 Michael Mercanti and Yvonne Mercanti appointed Tyrone Mercanti as a director of each of Slondia and Citycourt. After 1996 Michael Mercanti's involvement in the business diminished gradually until 2004, when he ceased to work on a full-time basis. On about 15 June 2004, Michael Mercanti appointed Tyrone Mercanti as the managing director of each of Slondia and Citycourt.

46 Until late 2012 there was a close relationship between Tyrone Mercanti and his parents. However, in late 2012, that relationship broke down. The trial judge found that a significant cause of the breakdown was that Michael Mercanti wished to receive more income from the businesses of the MMF Trust and the FW Trust, or have his credit card expenses paid by those businesses, and Tyrone Mercanti declined. There were other disputes or differences between them.

47 On 30 July 2013, while Tyrone Mercanti was in China, his parents, as the shareholders of Slondia and Citycourt, removed Tyrone Mercanti as a director of those companies. At about 4.00 pm on that date (and without prior consultation with or notice to Tyrone Mercanti), Michael Mercanti,



Yvonne Mercanti, Jamie Mercanti, Jason Mercanti and others acting on Michael Mercanti's instructions entered the business premises of the MMF Trust and the FW Trust, and took control of the premises and the business operations.

- 48           On 31 July 2013, Tyrone Mercanti and Parradele executed the notices removing Slondia as Trustee of the MMF Trust and Citycourt as Trustee of the FW Trust respectively and appointing Parradele as Trustee of each Trust.

**The trial judge's conclusions**

- 49           The trial judge concluded:

- (a)       On the proper construction of the MMF Trust Deed, the Trustee is empowered to vary the contents of the Schedule to the MMF Trust Deed so as to replace the Guardian and Appointor and appoint a new Guardian and Appointor.
- (b)       The MMF Trust Deed of Variation was validly executed by Slondia.
- (c)       The variation of the MMF Trust effected by the MMF Trust Deed of Variation was not made by Slondia in breach of trust.
- (d)       Michael Mercanti, as Guardian of the MMF Trust, consented to the exercise by Slondia of the 'reserved powers' (as defined in the MMF Trust Deed) to amend the MMF Trust Deed to replace the Guardian and Appointor.
- (e)       Tyrone Mercanti did not procure Michael Mercanti to sign the MMF Trust Deed of Variation or Slondia to execute the MMF Trust Deed of Variation in circumstances constituting equitable fraud by Tyrone Mercanti or undue influence by Tyrone Mercanti over Michael Mercanti.
- (f)       The MMF Trust Deed of Variation is of legal force and effect.
- (g)       The notice of removal of Slondia and acceptance of appointment of Parradele as Trustee of the MMF Trust is valid and of legal force and effect.
- (h)       The removal of Slondia and appointment of Parradele as Trustee of the MMF Trust was not made by Tyrone Mercanti in breach of his duties as Appointor of the MMF Trust.

- (i) Parradele is and has been Trustee of the MMF Trust since the execution of the notice of removal of Slondia and acceptance of appointment of Parradele as the Trustee of the MMF Trust.
- (j) Tyrone Mercanti is, and has been since the execution of the MMF Trust Deed of Variation, the Guardian and Appointor of the MMF Trust.
- (k) On the proper construction of the FW Trust Deed, the Trustee from time to time is not empowered to vary the FW Trust Deed by amending or replacing the Appointor.
- (l) The FW Trust Deed of Variation is of no legal force or effect.
- (m) The notice of removal of Citycourt and acceptance of appointment of Parradele as Trustee of the FW Trust is of no legal force or effect.
- (n) Citycourt is and at all material times has been the Trustee of the FW Trust.
- (o) Michael Mercanti is and at all material times has been the Appointor of the FW Trust [201].

50           So, his Honour held, in essence, that the FW Trust Deed of Variation and the notice in relation to the FW Trust were invalid and of no legal force or effect, but that the MMF Trust Deed of Variation and the notice in relation to the MMF Trust were valid and of legal force and effect.

51           The trial judge made declaratory and other orders which gave effect to his conclusions.

### **The grounds of appeal**

52           Michael Mercanti and Jason Mercanti rely on seven grounds of appeal.

53           Ground 1 alleges that the trial judge erred in law in concluding that the MMF Trust Deed empowers the Trustee to amend the MMF Trust Deed to remove the Appointor and appoint a new Appointor in his place. His Honour should have concluded that, on its proper construction, the MMF Trust Deed does not empower the Trustee to do so.

54           Ground 2 alleges that, alternatively to ground 1, his Honour erred in law in concluding that the MMF Trust Deed empowers the Trustee to

amend the Schedule to the MMF Trust Deed so as to remove the Appointor and appoint a new Appointor in his place. His Honour should have concluded that, on its proper construction, the MMF Trust Deed does not empower the Trustee to do so.

55           Ground 3 alleges that his Honour erred in law in concluding that the MMF Trust Deed of Variation is a document of, and binding upon, Slondia. His Honour should have held that the MMF Trust Deed of Variation is not a document of, or binding upon, Slondia because, to Tyrone Mercanti's knowledge, the instrument was not executed by Slondia (through the affixation of its common seal or otherwise) pursuant to the lawful authority of Slondia's directors or shareholders.

56           Ground 4 alleges that his Honour erred in law in concluding that the MMF Trust Deed of Variation did not constitute a fraud on the power to amend the MMF Trust Deed and thus a breach of Slondia's fiduciary duty as Trustee of the MMF Trust. His Honour should have concluded that:

- (a)       given that Slondia's purpose in doing so was to transfer control of the MMF Trust to Tyrone Mercanti as 'an advance on [his] inheritance', and without the knowledge or consent of the other beneficiaries, Slondia's agreement to and execution of the MMF Trust Deed of Variation was a fraud on the power to amend the MMF Trust Deed and thus a breach of its fiduciary duty; and
- (b)       Tyrone Mercanti was a knowing participant in, alternatively a knowing recipient of the benefit of, such breach of duty.

57           Ground 5 alleges that his Honour erred in fact and in law in concluding that Michael Mercanti's agreement to and execution of the MMF Trust Deed of Variation, both as a director of Slondia and in his own right as the Guardian and Appointor, was not as a result of any equitable fraud by or the undue influence of Tyrone Mercanti. His Honour should have concluded that, having regard to the whole of the evidence adduced at trial (particularly, the evidence of Jamie Mercanti, Tyrone Mercanti, Rosalina Sinshum Chiu, Mehernosh Buhariwalla and Mr Nettleton), Michael Mercanti's agreement to and execution of the MMF Trust Deed of Variation was as a result of the equitable fraud by, further or alternatively the undue influence of, Tyrone Mercanti.

58           Ground 6 alleges that his Honour erred in law in concluding that Tyrone Mercanti's conduct on 31 July 2013 when, purportedly as Appointor of the MMF Trust, by a written notice of that date, he caused Slondia to be removed as Trustee of the MMF Trust and Parradele to be

appointed as the new Trustee of the MMF Trust, did not constitute a fraud on the power of the Appointor, and thus a breach of duty. His Honour should have concluded, on the basis of Tyrone Mercanti's evidence at trial, that Tyrone Mercanti's conduct was a fraud on the power of the Appointor and a breach of duty.

59 Ground 7 alleges that his Honour erred in law in concluding that:

- (a) The appointment of Tyrone Mercanti as the Appointor and Guardian of the MMF Trust was valid. His Honour should have concluded that the appointment was void, alternatively voidable, alternatively that Tyrone Mercanti held such powers on constructive trust for Michael Mercanti, by reason of each and any of grounds of appeal 1, 2, 3, 4 and 5.
- (b) The appointment of Parradele as Trustee of the MMF Trust was valid. His Honour should have held that the appointment was void, alternatively voidable, by reason of each and any of grounds of appeal 1, 2, 3, 4, 5 and 6.

**Grounds 1 and 2: Michael Mercanti's and Jason Mercanti's submissions**

60 The trial judge held that the MMF Trust Deed of Variation validly deleted and replaced the 'definitions' of 'Guardian' and 'Appointor' in the Schedule to the MMF Trust Deed in the manner specified in the MMF Trust Deed of Variation.

61 Counsel for Michael Mercanti and Jason Mercanti submitted that cl 28 of the MMF Trust Deed does not empower the Trustee:

- (a) to revoke, add to or vary the appointment of the 'Appointor' or the 'Guardian' as provided for in the MMF Trust Deed; and
- (b) further or alternatively, to vary the Schedule to the MMF Trust Deed, alternatively to vary those parts of the Schedule relating to 'the person or persons successively named described or defined' (being words included in the definitions of 'the Appointor' and 'the Guardian' in cl 1 of the MMF Trust Deed) therein as the 'Appointor' or the 'Guardian'.

62 It was argued that cl 28 operates so as to provide that 'these presents' are not capable of being revoked, added to or varied other than as specified in cl 28. That is, apart from the specific matters referred to in cl 28, there is an express prohibition against revoking, adding to or varying 'these presents'.

63 Counsel emphasised that cl 28 'does not speak of amending the MMF Trust Deed (let alone the Schedule)'. Rather, the power conferred by cl 28 is confined to revoking, adding to or varying 'all or any of the trusts terms and conditions hereinbefore contained'.

64 It was submitted that the expression 'the trusts terms and conditions' in cl 28 must mean either:

- (a) the 'terms and conditions' of the 'trusts' created by the MMF Trust Deed, namely the terms and conditions on which the Trustee holds 'the Trust Fund and income thereof' (that is, as if an apostrophe appeared before or after the last letter of the word 'trusts'); or
- (b) the 'trusts', 'terms' and 'conditions' (that is, as if a comma appeared after the word 'trusts').

65 It was argued that, in any event, the Schedule appears in the MMF Trust Deed after cl 28 and, accordingly, is not a trust, term or condition 'hereinbefore' contained.

66 Counsel submitted that the MMF Trust Deed expressly deals with the powers of the Trustee (and the Appointor) in relation to changes to the identity of the Appointor. See, in particular, the definition of 'the Appointor' in cl 1(15), cl 21, cl 23 and the status of the power in cl 1(15) as a 'reserved power' within cl 10(7). According to counsel, those express provisions reinforce that, on the proper construction of the MMF Trust Deed as a whole, the general power of amendment in cl 28 does not extend to amending the definition of 'the Appointor' (let alone the actual identity of the Appointor). Counsel elaborated:

- (a) if cl 28 empowers the Trustee to remove an Appointor and appoint a new Appointor, then the proviso to the definition of 'the Appointor' would have 'no work to do' and that consequence would be inconsistent with the apparent intention of the definition as a whole; and
- (b) the express conferral on the Trustee, pursuant to the proviso to the definition of 'the Appointor', of power to declare that 'any person who has not yet become Appointor but who would or might but for this proviso at some time become Appointor shall not become Appointor', suggests that a wider power for the Trustee to remove or appoint an Appointor was omitted deliberately from the deed.

67 Further and alternatively, it was submitted that 'it would derogate from the fundamental purpose for which the power to amend was created' if cl 28 extends to empowering the Trustee to remove and replace the person occupying the office of Appointor (or a person who would, in future, occupy the office). According to counsel, the 'primary purpose' of the office of Appointor is 'to oversee and, if appropriate, remove the Trustee'.

### **Grounds 1 and 2: relevant legal principles**

68 The construction of a written agreement involves ascertaining what a reasonable person would have understood the parties to the agreement to mean. The rights and liabilities of the parties under a clause in the agreement are to be determined objectively. Consideration should ordinarily be given not only to the language of the agreement, but also to the apparent purpose and object of any transaction created by or evidenced in the agreement. See *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165 [40] (Gleeson CJ, Gummow, Hayne, Callinan & Heydon JJ); *International Air Transport Association v Ansett Australia Holdings Ltd* [2008] HCA 3; (2008) 234 CLR 151 [8] (Gleeson CJ), [53] (Gummow, Hayne, Heydon, Crennan & Kiefel JJ); *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [2015] HCA 37; (2015) 256 CLR 104 [46] (French CJ, Nettle & Gordon JJ).

69 It is necessary, in determining the meaning of the provisions of a commercial contract, to ask what a reasonable businessperson would have understood those provisions to mean. That inquiry will require consideration of the language of the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract. See *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7; (2014) 251 CLR 640 [35] (French CJ, Hayne, Crennan & Kiefel JJ); *Mount Bruce Mining* [47].

70 A written agreement must be construed as a whole. The words of a clause in the agreement are to be given the most appropriate meaning which they can legitimately bear. A court must have regard to all of the provisions of the agreement with a view to achieving harmony among them. See *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* [1973] HCA 36; (1973) 129 CLR 99, 109 - 110 (Gibbs J).

71 In *Fitzgerald v Masters* [1956] HCA 53; (1956) 95 CLR 420, Dixon CJ and Fullagar J said, '[w]ords may generally be supplied, omitted or corrected, in an instrument, where it is clearly necessary in order to

avoid absurdity or inconsistency' (426 - 427). See also *Adams v Lambert* [2006] HCA 10; (2006) 228 CLR 409 [21] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon & Crennan JJ).

72 The rules that apply to the construction of contracts apply to the construction of deeds. See *Royal Botanic Gardens and Domain Trust v South Sydney City Council* [2002] HCA 5; (2002) 240 CLR 45 [9] - [10] (Gleeson CJ, Gaudron, McHugh, Gummow & Hayne JJ).

73 The rules applicable to the construction of contracts apply also to trusts. The search for 'intention' in relation to trusts, as with contracts, is for the intention as revealed in the words used by the parties. The expressed intention of the parties is to be found in the answer to the question, 'What is the meaning of what the parties have said?', not to the question, 'What did the parties mean to say?'. See *Byrnes v Kendle* [2011] HCA 26; (2011) 243 CLR 253 [53] (Gummow & Hayne JJ), [102] - [107] (Heydon & Crennan JJ). See also *Smith v Lucas* (1881) 18 Ch D 531, 542 (Sir George Jessel MR); *Commissioners of Inland Revenue v Raphael* [1935] AC 96, 142 - 143 (Lord Wright).

74 Similarly, in *Scott and Ascher on Trusts* (5<sup>th</sup> ed, vol 1, 2006) § 4.1, it is said that 'it is necessary, when dealing with the creation of a trust and its terms, to speak not of the settlor's intention but of the settlor's manifestation of intention'. See also *Byrnes* [57] - [58] (Gummow & Hayne JJ).

75 In Conaglen, 'Sham Trusts' (2008) 67 *Cambridge Law Journal* 176, it is stated:

The court's focus when construing the terms of [a] bilateral arrangement [creating a trust] is on the objective meaning that those terms would convey to a reasonable person, just as it is when construing contractual arrangements (181).

76 That passage was cited with approval by Heydon and Crennan JJ in *Byrnes* [113]. Their Honours added that the question is 'what the settlor or settlors did, not what they intended to do' [113].

77 Subjective intention is only relevant in relation to trusts, as with contracts, when the transaction is open to some challenge or some application for modification; for example, an equitable challenge for mistake or misrepresentation or undue influence. However, subjective intention is irrelevant both to the issue of whether a trust exists and also to

the issue of the terms of the trust. See *Byrnes* [115] (Heydon & Crennan JJ).

78 In *Montevento Holdings Pty Ltd v Scaffidi* [2012] HCA 48; (2012) 246 CLR 325, the trust deed of a discretionary family trust authorised a person designated as the appointor to remove a trustee and appoint new trustees. The deed provided that if and so long as any individual appointor was a beneficiary that individual was not eligible to be appointed as a trustee. At the relevant times, Eugenio Scaffidi was within the class of beneficiaries of the trust and was also the appointor. He removed the trustee and appointed a company, Montevento Holdings Pty Ltd, of which he was the sole director and shareholder, as the sole trustee of the trust. The respondent did not challenge the validity of Eugenio Scaffidi's appointment of Montevento Holdings Pty Ltd as trustee on the basis of the equitable doctrine of fraud on a power. See *Scaffidi v Montevento Holdings Pty Ltd* [2011] WASCA 146; (2011) 6 ASTLR 446 [98] (Buss JA).

79 The High Court held that the trust deed prohibited only the appointment as a trustee of a natural person who held the office of appointor and, hence, the appointment of Montevento Holdings Pty Ltd was valid. French CJ, Hayne, Crennan, Bell and Gageler JJ noted that the trust deed distinguished consistently between individuals and corporations and that was the critical point which was sufficient to determine the appeal [22]. Their Honours said that the 'ordinary and natural meaning' of the clause in question, read in the context of the whole document, which repeatedly distinguished between an 'individual' (in the sense of a natural person) and a corporation, was that the trust deed prohibited only the appointment as a trustee of a natural person who held the office of appointor [25].

80 The words of a clause in a trust deed are therefore to be given their ordinary and natural meaning, read in the context of the trust deed as a whole, unless the words have a special or technical meaning. See the decisions of the High Court to which I have referred. See also *Hill (Viscount) v Hill (Dowager Viscountess)* [1897] 1 QB 483, 486 (Lord Esher MR); *Schreuders v Grandiflora Nominees Pty Ltd* [2016] VSCA 93 [21] (Kyrrou, Ferguson & McLeish JJA).

81 It is the duty, '[p]erhaps the most important duty', of a trustee to adhere to and carry out the terms of the trust. See *Youyang Pty Ltd v Minter Ellison Morris Fletcher* [2003] HCA 15; (2003) 212 CLR 484 [32] - [33] (Gleeson CJ, McHugh, Gummow, Kirby & Hayne JJ). A



trustee's function is 'to take the trusts as it finds them and to administer them as they stand'. See *Re Dion Investments Pty Ltd* [2014] NSWCA 367; (2014) 87 NSWLR 753 [94] (Barrett JA; Beazley P & Gleeson JA agreeing). A trustee does not have an implied power to vary the trust deed.

82 However, a trust deed may contain an express power of variation. Most modern trust deeds contain an express power which enables the trusts and the provisions of the trust deed to be varied, but the nature, form and extent of the permitted variations depend, in general, upon the language and apparent purpose of the variation clause in the context of the trust deed as a whole.

83 In *Gra-Ham Australia Pty Ltd v Perpetual Trustees WA Ltd* (1989) 1 WAR 65, the Full Court of the Supreme Court of Western Australia held that a power conferred on the trustee under a unit trust deed authorised the retrospective amendment of the deed for the purpose of defeating rights of unitholders which would otherwise have been vested or have accrued. Malcolm CJ (Nicholson J relevantly agreeing) said:

- (a) the authorities do not say that a retrospective amendment of a trust deed is beyond power or unlawful; and
- (b) what is within power and lawful is a matter of construction of the relevant instrument (85).

84 In *Kearns v Hill* (1990) 21 NSWLR 107, a trust deed of a discretionary family trust defined the term 'beneficiaries' in cl 1 to comprise the 'primary beneficiaries' together with certain named persons. The term 'primary beneficiaries' was defined in cl 1 to comprise certain other named persons.

85 The trust deed conferred on the trustees very extensive powers to deal with both the capital and the income of the trust fund.

86 Clause 24 of the trust deed contained a power of variation as follows:

- (a) The trustee may [by] deed release or revoke any power or powers conferred on the trustee under this Deed and may vary or amend any of the provisions contained in this Deed other than clause 2 or the vesting date PROVIDED HOWEVER that no such release revocation variation or amendment shall be valid if such release revocation variation or amendment would have the effect of infringing any rule against perpetuities or directing or requiring any excessive accumulation of income or would entitle the settlor or the

trustee or any person who has been a trustee of the settled fund to receive any of the income or corpus of the settled fund.

(b) On the execution of any deed pursuant to paragraph (a) of this clause:-

(i) the power (if any) purported to be released or revoked pursuant to such Deed shall be absolutely and irrevocably released or revoked.

(ii) the amendments to or variations of the provisions of this Deed purported to be effected thereby (if any) shall (subject as aforesaid) be deemed to be effective forthwith.

PROVIDED FURTHER that upon the death of the appointor the trustee shall have all the powers of the appointor under this clause.

87 By a deed poll, the trustees, purportedly exercising their power under cl 24(a), endeavoured to amend the trust deed by adding, in the definition of 'beneficiaries', a new class of beneficiaries called 'discretionary beneficiaries', being the children of the 'primary beneficiaries', and by making consequential amendments in other parts of the deed.

88 The deed poll did not relate to cl 2 or the vesting date or any of the matters referred to in the proviso to cl 24(a).

89 The appellant trustees contended that the deed poll was authorised by cl 24(a). The respondents, who were successful before the primary judge, contended that it was not.

90 The Court of Appeal of New South Wales (Meagher JA; Mahoney & Clarke JJA agreeing) allowed the appeal and held that the execution of the deed poll by the appellants was a valid exercise of the power granted under cl 24(a).

91 Meagher JA said:

(a) The language of cl 24(a) made it 'clear enough' that any clause of the deed was a 'provision' of that deed. If cl 24(a) had expressly said that the power to vary included a power to vary cl 1, the efficacy of the deed poll would be 'beyond doubt', and his Honour could see no difference between such language and the language actually employed, namely a power to vary 'any' of the provisions of the trust deed.

(b) The trustees' rights to vary the trust deed extended to alterations to the identity of the beneficiaries.

- (c) As a matter of construction, cl 24(a) was an express power to alter the list of the beneficiaries contained in cl 1 (110).

92 In the appeal, counsel for the respondents sought to rely on a number of cases in which various courts have read down powers, in apparently unlimited terms, to vary trust deeds. Meagher JA made these observations:

Such cases certainly exist. *Duke of Bedford v Marquess of Abercorn* (1836) 1 My & Cr 312; 40 ER 394 is one. *Re Dyer; Dyer v Trustees, Executors & Agency Co Ltd* [1935] VLR 273, is another, and it was cited with approval by Megarry J, as he then was, in *Re Ball's Settlement Trusts; Ball v Ball* [1968] 1 WLR 899 at 904. In the *Duke of Bedford's* case it was held that, in determining the ambit of a variation clause it is legitimate to consider its scope and evident purpose, but that consideration is not of much use when the evident purpose of the power is to ensure maximum flexibility. In *Re Dyer* it was held that the power of variation contained in a particular trust deed did not extend to varying the trust in a way which would destroy its 'substratum'. That, again, is not really helpful in the present context, where either it is impossible to locate any substratum at all, or alternatively, the relevant substratum is the benefit of the descendants of a named person, and the interests of that class are being actively promoted rather than diminished by the 1988 deed poll. I put to one side the obvious consideration that each deed must be considered in its own particular context, so that no other deed executed in different circumstances and in different language can decide the fate of a given deed. I also put to one side the equally obvious consideration that the conditions which existed in England in 1850 are not necessarily the same as those which existed in New South Wales in 1970. On the other hand, it is impossible to discern in the deed of trust any intention that the list of beneficiaries contained in cl 1 should remain perpetually inviolate (110 - 111).

93 Mahoney JA said:

[Counsel for the respondents] properly submitted that, in determining the construction of a clause authorising the variation of the provisions of a trust, it is legitimate to consider what was the purpose and intent of that clause. In earlier times, the view was taken in some cases that, as [counsel] submitted, the intention of the settler was that the alterations to be made should not alter the main structure of the trust or the beneficial entitlements under it. I doubt that that would be seen as the intention of such a clause at the present time. As the precedent books show, discretionary trusts have in more recent times been used to provide to the settler or the person having the benefit of the power of variation the power to make fundamental changes in the structure of the trust document and the entitlements under it. In England, the desire of settlers to retain such flexibility as would allow them to meet the changes resulting from war, taxes and depression is, I think, clear. And there are reasons why, in

Australia, a power of variation of greater rather than lesser extent has been seen as desirable. Therefore I do not think that any limitation should be placed upon the generality of the power of variation by reason of the factors referred to in the cases cited (108).

94 So, it was held in *Kearns* that a power to vary a trust deed (including a power of variation given to a trustee) which, in its ordinary and natural meaning, included a power to vary the identity of the beneficiaries of a trust, by the addition of beneficiaries, could not be limited by reference to historical presumptions against variations which alter the main structure of, or beneficial entitlements under, trusts.

95 The fact that a provision in a trust deed contains infelicities is not a sufficient reason to construe it other than in accordance with its ordinary and natural meaning. See *Kearns* (109); *Lancedale Holdings Pty Ltd v Heath Group Australasia Pty Ltd* [1999] NSWCA 460; (1999) 33 ACSR 247 [44] (Hodgson CJ in Eq; Meagher JA agreeing and Giles JA relevantly agreeing).

96 In *Cachia v Westpac Financial Services Ltd* [2000] FCA 161; (2000) 170 ALR 65, Hely J applied *Pepe v City & Suburban Permanent Building Society* [1893] 2 Ch 311 and *Gra-Ham*, and decided that an amendment to a unit trust deed was not invalidated by reason of the fact that it may defeat what would otherwise have been an entitlement of a unitholder who had requested redemption of his or her units prior to the operative date of the amendment [64] - [66]. See also *ING Funds Management Ltd v ANZ Nominees Ltd* [2009] NSWSC 243; (2009) 228 FLR 444, where Barrett J commented:

The rights arising under a constitution or a trust deed or a set of rules which is susceptible to amendment are rights that exist subject always to the possibility that the governing instrument will be changed. It is an incident or aspect of every right arising from that instrument that the amendment power may alter or abolish the right subject, no doubt, to the doctrine of fraud on a power [149].

97 An express power to vary a trust deed may contain, within the language of the power, express or implied limitations in relation to its exercise; for example, as to the manner and form of the variation or the obtaining of specified consents to the variation.

98 The rules that are applicable to the construction of an express power to vary a trust deed (and trust deeds generally) are separate and distinct from limitations which may apply, independently of the language of the

power, to its exercise. Limitations of that kind include, for example, the equitable doctrine of fraud on a power.

99 The power of variation in *Cachia* was apparently unconfined. Hely J (like Meagher JA in *Kearns*) noticed, however, that there are some authorities which suggest that a power to vary a trust deed may be held not to extend to a variation which would 'alter the substratum of the trust' [68]. His Honour referred to *Re Dyer* [1935] VR 273; *Re Ball's Settlement Trusts* [1968] 1 WLR 899; *Re Blocksidge* [1997] 1 Qd R 234; *Kearns*; *Lock v Westpac Banking Corporation* (1991) 25 NSWLR 593.

100 In *Federal Commissioner of Taxation v Bargwanna* [2012] HCA 11; (2012) 244 CLR 655, French CJ, Gummow, Hayne and Crennan JJ noted that references in a trust deed to 'the absolute and uncontrolled discretions and powers of the trustees' should be read in light of authorities which treat such apparently unconfined discretions and powers as not extending to alteration of the substratum of the trust [13]. Their Honours referred with approval to the analysis of the authorities by Hely J in *Cachia* [67] - [76].

101 Hely J said that the authorities which suggest that a power to vary a trust deed may be held not to extend to a variation which would 'alter the substratum of the trust' may be 'no more than an application of the equitable doctrine of fraud on the power' [68]. His Honour's view is, in my respectful opinion, correct, having regard to the decisions of the High Court in *Byrnes* and *Montevento*, which have held that the rules applicable to the construction of contracts apply also to trusts, and to the decision of the High Court in *Bargwanna*. In other words, the notion of an alteration to the substratum of the trust is not an aspect of the rules applicable to the construction of a trust deed but is, rather, an application of the equitable doctrine of fraud on a power.

102 In *Global Custodians Ltd v Mesh* [2002] NSWSC 283, Young CJ in Eq said in relation to an express power of variation in a trust deed:

The exercise of a power to amend is a very technical matter. Up until the Conveyancing Act, or up until the Imperial Laws Application Act, the only way one could amend a trust, technically, was if the original deed contained uses in favour of the settlor to revoke and to re-appoint. It is a very technical matter, and is dealt with in *Thomas on Powers* (Sweet & Maxwell, London, 1998) Chapter 13. As the learned author points out in para 13-11 at p 563, every such power reserved in a deed will be construed strictly. Authority such as *Hele v Bond* (1717) Precedents in Chancery 474; 24 ER 213, and *Evans v Saunders* (1855) 6 De GM & G 654 at 671; 43 ER 1387 at 1394 bear this out [18].

103 His Honour made the observation that 'every such power reserved in a deed will be construed strictly' without citing *Kearns* and before the decisions of the High Court in *Byrnes* and *Montevento*. His Honour retreated from that stance in *Re Dion Investments Pty Ltd* [2013] NSWSC 1941 [43].

104 In *Jenkins v Ellett* [2007] QSC 154, the question in issue was the identity of the trustees of a discretionary family trust. The resolution of that question depended on whether a power in cl 11 of the trust deed, available to the trustees, to vary the trusts declared pursuant to the deed, included a power to remove or change the identity of 'the Principal'.

105 The Principal was the person who had power under cl 12.1 of the trust deed to appoint and remove trustees. The trust deed included a scheme in its schedule for the replacement of the Principal, on his death, by his spouse or executor. George Jenkins was the original Principal. Part 9 of the schedule to the trust deed provided, relevantly, that on George Jenkins' death his executor became the Principal.

106 On 2 February 1999, the then Principal, George Jenkins, who was also a trustee, removed Luciano Menniti as a trustee and appointed Joyce Ellett as his co-trustee. Also on 2 February 1999, George Jenkins and Joyce Ellett as trustees, relying on the power of variation in cl 11 of the trust deed, purported to remove George Jenkins as the Principal and to appoint Joyce Ellett as the Principal.

107 On 29 January 2002, George Jenkins died. On 3 November 2003, probate of his will was granted to Georgina Jenkins. By a deed poll dated 10 December 2003, Georgina Jenkins, purporting to act as the Principal, appointed herself and her brother, Peter Jenkins, as new trustees, with Joyce Ellett as a continuing trustee.

108 A dispute emerged as to whether Joyce Ellett was the sole trustee or whether she, Georgina Jenkins and Peter Jenkins were co-trustees.

109 Clause 11 of the trust deed provided:

The Trustee may by Deed revoke add to release or vary all or any of the Trusts declared or any Trusts declared by any variation, alteration or addition made from time to time and may by the same or any other Deed declare any new or other trusts or powers concerning the Trust Fund but so that the Trustee shall not have any power to revoke add to or vary any of the Trusts so that the Settlor may acquire a beneficial interest in the Trust Fund or any part of it nor to effect [sic] the beneficial entitlement of any Beneficiary to any amount applied for him prior to the date of revocation

or alteration and any other person or persons upon whom any power or powers so conferred on him or them. Upon this exercise of any release and revocation pursuant to this clause the power so released and revoked shall be absolutely and irrevocably determined.

110 Douglas J identified the essential issue as whether the power given to the trustee under cl 11 to vary the trusts declared could extend to the removal of the Principal, especially where it was the Principal who, alone, in the trust deed as originally drafted, had the power to appoint and remove the trustee [14]. His Honour said that it was necessary, in answering the question, to construe the power in cl 11 by reference to the text of the provision in its surrounding context [14].

111 His Honour held that cl 11 should be construed so that its powers of amendment did not extend to a provision such as the definition of 'the Principal' in the schedule to the trust deed. His Honour reasoned:

Clause 2, in declaring that the trustee holds the trust fund 'upon the trusts subject to the powers and provisions contained in this Trust', highlights the link to cl 11's power to amend the 'Trusts declared'. The language of cl 2 also makes the declaration of trust subject to the power, for example, vesting in the Principal to appoint new trustees in cl 12. The power to amend in cl 11 is not to amend 'the trust constituted by and comprised in this Deed and the Schedule' but the 'Trusts declared', namely those declared in cl 2. The difference between the singular and plural forms of the word 'trust' is significant. It would have been easy for the drafter of the deed to provide the trustee with a broad power of amendment of 'this Trust', which is defined in cl 1 to mean 'the trust constituted by and comprised in this Deed and the Schedule' or of the deed and the schedule as a complete document if that were intended.

...

The power to appoint a new trustee available to the Principal under cl 12 does not seem to me to be one that requires easy amendment to add to any desirable flexibility in managing the fund; cf Meagher JA in *Kearns v Hill* (1990) 21 NSWLR 107 at 109. Clause 12's purpose of allowing the removal of a trustee is also inconsistent with the possibility that the trustee could negate the operation of the power by amending the schedule to the deed to change the identity of the Principal. Nor is it the case that the structure of the deed requires some continuing identity between the Principal and the trustee or trustees named under it so that there is a built-in safeguard against the Principal's position being subverted.

The Principal's ability to remove and replace a trustee seems to me to be one of the fundamental features of the structure of this deed, one setting up a family discretionary trust. The maintenance of that power is obviously designed to ensure that the control of the trust will remain with the

significant intended beneficiary, here George Jenkins, and after him his spouse or his executor, as follows from the definition of 'The Principal' in the schedule. To allow the power in cl 12 to be subverted by the trustee it was designed to supervise purporting to use cl 11's powers to amend the deed rather than the trusts declared by the deed is not, in my view, permissible. It is akin to destroying the substratum of the deed [16], [18] - [19].

112 It is unnecessary to consider whether the approach to the construction of pension or superannuation schemes differs from the approach to the construction of trust deeds generally. Pension or superannuation schemes are 'quite different' from traditional trusts. See *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 1 WLR 589, 597 (Browne-Wilkinson V-C); *Lock* (607 - 608) (Waddell CJ in Eq). See also *Vision Super Pty Ltd v Poulter* [2006] FCA 849; (2006) 154 FCR 185 [66] (Young J) and the cases there cited.

### **Grounds 1 and 2: their merits**

113 The MMF Trust Deed was executed on 1 June 1979. It includes recitals and an operative part. The operative part refers to a Schedule. The Schedule contains details of the Specified Beneficiaries, the Additional Members of the Class of General Beneficiaries, the Vesting Day, the Guardian and the Appointor.

114 The inclusion of the Schedule reflects a convenient drafting technique in the context of a trust deed that was obviously intended for use as a standard form document. It is apparent, on a fair reading of the MMF Trust Deed as a whole, that all of the clauses embodied in the operative part (that is, cl 1 to cl 29) are standard. Ordinarily, the only amendments necessary, to ensure that each trust deed related to the particular persons or entities for whom the trust was to be established, would be:

- (a) the date on page 1;
- (b) the name, address and description of the Settlor and the Trustee on page 1;
- (c) the amount of the settled sum in recital B on page 1;
- (d) the name of the trust in recital D on page 1; and
- (e) the details of the Specified Beneficiaries; any Additional Members of the Class of General Beneficiaries; any provision dealing with the possibility of there being a 'total failure' of both the Specified



Beneficiaries and the Additional Members of the Class of General Beneficiaries; the Vesting Day; and the Guardian and the Appointor, in the Schedule on page 25.

115 Recital A states that the Settlor 'desires to make provision for the persons hereinafter referred to as and in the manner hereinafter set out'. The expression 'in the manner hereinafter set out' refers to the operative part of the MMF Trust Deed including the Schedule.

116 Recital C provides that the Trustees have consented to become 'the Trustees hereof upon the trusts and with and subject to the powers and provisions hereinafter expressed'. The expression 'the powers and provisions hereinafter expressed' refers to the powers and provisions set out in the operative part of the MMF Trust Deed including the Schedule.

117 Recitals are separate and distinct from the operative part of a deed. If the provisions of the operative part are clear, it is not permissible to refer to the recitals to contradict or modify the clear meaning of the operative part. See *Chacmol Holdings Pty Ltd v Handberg* [2005] FCAFC 40; (2005) 215 ALR 748 [38] - [50] (Tamberlin J; North & Dowsett JJ relevantly agreeing). If, however, the operative part is unclear, the recitals may be referred to for the purpose of ascertaining the intention of the parties as expressed in the operative part. See *Ellis v Dariush-Far* [2007] QCA 398; (2007) 242 ALR 635 [18] (Keane JA; Williams JA & Daubney J agreeing). See also, in relation to the use of recitals in the construction of a deed, *Franklins Pty Ltd v Metcash Trading Ltd* [2009] NSWCA 407; (2009) 76 NSWLR 603 [379] - [390] (Campbell JA; Allsop P & Giles JA relevantly agreeing).

118 Clause 1 of the MMF Trust Deed contains a number of definitions. Some of the definitions are deviant in form in that they include an operative provision. Definitions of this kind have been described as 'stuffed' definitions. See P Butt, *Modern Legal Drafting*, (3<sup>rd</sup> ed, 2013) [6.79] - [6.80].

119 The definitions in cl 1 which include an operative provision are the definitions of 'Specified Beneficiary', 'Specified Beneficiaries', 'General Beneficiaries', 'the excluded class', 'the Vesting Day', 'the Guardian' and 'the Appointor'.

120 The expression 'the Appointor' is defined in cl 1(15) as follows:

'[T]he Appointor' shall mean successively the person or persons successively named described or defined as such in the Schedule or

determined according to the provisions hereof and where two or more persons are specified in the Schedule as acting jointly shall mean those persons acting jointly provided that the Trustees may at any time by instrument in writing (subject to clause 10 hereof) declare that any person who has not yet become Appointor but who would or might but for this proviso at some time become Appointor shall not become Appointor and if such declaration is so made that person shall not become Appointor notwithstanding that he is named as such in the Schedule[.]

121       The provisions of the Schedule in which persons are 'named described or defined' as the Appointor read:

MICHAEL MERCANTI during his lifetime and after his death the spouse of the said MICHAEL MERCANTI and after her death such person nominated in writing to the trustee by the survivor of the said MICHAEL MERCANTI and his spouse during their lifetime and in default of such appointment the person nominated in writing by the duly appointed personal representative of the survivor of the said MICHAEL MERCANTI and his spouse.

122       The exercise of the power contained in the proviso to the definition of 'the Appointor' in cl 1(15) is expressed to be 'subject to clause 10 hereof'. By cl 10, relevantly, that power is one of the 'reserved powers'.

123       The expression 'the Guardian' is defined in cl 1(14). It is relevantly identical to the definition of the expression 'the Appointor' in cl 1(15).

124       The provisions of the Schedule in which persons are 'named described or defined' as the Guardian are identical to the provisions of the Schedule in which persons are 'named described or defined' as the Appointor.

125       Clause 10 provides, relevantly:

- (a)    by cl 10(3), subject to cl 10(5), the Trustees shall not, when there is a Guardian, exercise the reserved powers except with the consent of the Guardian;
- (b)    by cl 10(4), where a Guardian is named in the Schedule and there ceases to be a Guardian, the Trustees shall not exercise the reserved powers;
- (c)    by cl 10(5), the Guardian may at any time, by instrument in writing, revocably or irrevocably declare that thenceforth all or any of the reserved powers:

- (i) shall cease to be reserved powers, and after any such declaration the Trustees shall be entitled to exercise such power or powers as though no Guardian had been named in the Schedule; or
- (ii) shall be prohibited to the Trustees, and after any such declaration the Trustees shall not be entitled to exercise such power or powers; and
- (d) by cl 10(6), where no Guardian is named in the Schedule, the Trustees may, unless otherwise expressly provided in the Schedule, exercise all the reserved powers in their absolute and uncontrolled discretion and without the consent of any other person.

126 Clause 2 contains the Settlor's declaration of trust and the Trustees' declaration that they will hold the Trust Fund upon trust. It provides:

In consideration of the premises the Settlor as Settlor HEREBY DECLARES that the Trustees shall and the Trustees HEREBY DECLARE that they will henceforth stand possessed of the Trust Fund and of the income thereof upon the trusts and with and subject to the powers and provisions hereinafter expressed concerning the same.

127 The 'premises' of a deed are, technically, all parts of the deed before the habendum. See *Norton on Deeds* (2<sup>nd</sup> ed, 1928), 218. However, more generally, in a written instrument, the word 'premises' means 'the subject or thing previously expressed' or 'that which [has] gone before'. See *Beacon Life & Fire Assurance Co v Gibb* (1862) 1 Moore NS 73, 97; 15 ER 630, 639 (Lord Chelmsford); *Gardiner v Sevenoaks Rural District Council* [1950] 2 All ER 84, 85 (Lord Goddard CJ; Humphreys & Morris JJ agreeing). It is unnecessary to determine the meaning of 'premises' in cl 2.

128 Clause 2 expressly distinguishes between 'the trusts' upon which the Trustees are to hold the Trust Fund, on the one hand, and the 'powers and provisions' expressed after cl 2 'concerning' the trusts, on the other.

129 Clause 17(2) provides that any exercise by the Trustees of 'any power discretion or authority conferred on the Trustees by this Deed including without limiting the generality of the foregoing ... the revocation addition to and variation of the trusts terms and conditions herein contained' may be made in the manner specified in cl 17(2).

130        Clause 21 provides that the Appointor and, on the death of the last surviving Appointor, 'such other person as such survivor shall have appointed to act as Appointor and in default of appointment his legal personal representative shall be entitled by instrument in writing at any time and from time to time':

- (1)     to remove any Trustee;
- (2)     to appoint any additional Trustee or Trustees;
- (3)     to appoint a new Trustee or Trustees in place of any Trustee who resigns his or her Trusteeship or ceases to be a Trustee by operation of law.

131        The provisions of cl 21, which I have reproduced, are qualified by a proviso. The proviso states that:

- (a)     if and so long as the Appointor is a beneficiary, he or she shall not be eligible to be appointed as a Trustee;
- (b)     if no Appointor is named in the Schedule or if, at any time, there is no one entitled to exercise the powers conferred by cl 21, the statutory and other rights of removing and appointing Trustees 'may be exercised by the Trustees or by the legal personal representatives or (if the Trustee be a corporation) the liquidator of the last surviving Trustee'; and
- (c)     a person appointed to act as Appointor by an Appointor named in the Schedule 'shall have the same right of appointing a person to act as Appointor as the person who appointed him'.

132        By cl 23, any Trustee, Guardian or Appointor, and any person who may by succession become a Trustee, Guardian or Appointor, may resign or renounce such position by notice in writing to the Trustees.

133        Clause 28 provides that the Trustees for the time being may, at any time and from time to time, by deeds revocable or irrevocable:

- (a)     'revoke add to or vary all or any of the trusts terms and conditions hereinbefore contained'; or
- (b)     'the trusts terms and conditions contained in any variation or alteration or addition made thereto from time to time',

and may 'in like manner declare any new or other trusts terms and conditions concerning the Trust Fund or any part or parts thereof the trusts whereof shall have been so revoked added to or varied'.

134       The exercise of the power contained in cl 28 is expressed to be '[s]ubject to clause 10 hereof'. By cl 10, relevantly, that power is one of the 'reserved powers'.

135       The provisions of cl 28, which I have set out, are qualified by two provisos. The provisos impose limitations upon the power to 'revoke add to or vary'. Neither of the provisos is relevant for the purposes of grounds 1 and 2 of this appeal.

136       Clause 28 concludes by stating that '[s]ave as provided in this clause these presents shall not be capable of being revoked added to or varied'.

137       The words 'these presents' are an expression by which reference is made in a deed to the deed itself.

138       Each of the definition of 'the Appointor' in cl 1(15), the relevant provision of the Schedule dealing with the Appointor and the operative provision with respect to the Appointor in cl 21 is not to be read or construed in isolation. All of those provisions must be read and construed together and in the context of the MMF Trust Deed as a whole.

139       As I have mentioned, the definition of 'the Appointor' refers expressly to 'the person or persons successively named described or defined as such in the Schedule'.

140       In my opinion:

- (a)     the attachment of the Schedule as a convenient drafting technique in the context of a trust deed that was obviously intended for use as a standard form document;
- (b)     the status of the definition of 'the Appointor' as, in part, a definition in the strict sense and, in part, an operative provision; and
- (c)     the express references in the definition of 'the Appointor' to the relevant provision of the Schedule,

require, in combination, that the relevant provision of the Schedule be read and construed as if it were, in substance, embodied in and part of the definition.

141 Also, in my opinion, the definition of 'the Appointor', with the relevant provision of the Schedule read and construed as if it were, in substance, embodied in and part of the definition, must be read and construed with the operative provision with respect to the Appointor in cl 21.

142 The expression 'the trusts terms and conditions' appears in cl 17(2) and cl 28.

143 As I have mentioned, cl 2, which contains the Settlor's declaration of trust and the Trustees' declaration that they will hold the Trust Fund upon trust, expressly distinguishes between 'the trusts' upon which the Trustees are to hold the Trust Fund, on the one hand, and the 'powers and provisions' expressed after cl 2 'concerning' the trusts, on the other. Recital C makes a similar distinction between 'the trusts' created by the deed and the 'powers and provisions' expressed in the deed.

144 In my opinion, the expression 'the trusts terms and conditions' in cl 17(2) and cl 28 should be read and construed as if a comma appears after the word 'trusts'; that is, as if the expression read 'the trusts, terms and conditions'. The drafter of the MMF Trust Deed has been consistent in his or her failure to use punctuation within clauses and subclauses. This technique reflects, no doubt, the traditional view that punctuation should be avoided and not used, as in normal prose, as an aid to understanding. Fortunately, the traditional view has been generally discredited. See Piesse, *The Elements of Drafting*, (10<sup>th</sup> ed, 2004), 107 - 110; *Modern Legal Drafting* [7.102] - [7.106]. It is apparent, on a fair reading of cl 17(2) and cl 28 in the context of the MMF Trust Deed as a whole, that 'the trusts' referred to in those provisions are separate and distinct from the 'terms and conditions' to which they refer.

145 In my opinion, the phrase 'the trusts terms and conditions hereinbefore contained' in cl 28 refers:

- (a) in the case of 'the trusts', to the trusts created or declared in provisions of the deed appearing before cl 28; and
- (b) in the case of 'the ... terms and conditions', to the other provisions of the deed (that is, the provisions apart from those declaring or creating trusts) appearing before cl 28.

146 However, I am satisfied that the preferable and correct view is that the power in cl 28 to 'revoke add to or vary all or any of the ... terms and conditions hereinbefore contained' extends to the provisions of the

Schedule (relevantly, the provision relating to the Appointor). My reasons are as follows.

147 First, as I have explained, the relevant provision of the Schedule must be read and construed as if it were, in substance, embodied in and part of the definition of 'the Appointor' in cl 1(15).

148 Secondly, as I have explained, the definition of 'the Appointor' in cl 1(15), with the relevant provision of the Schedule read and construed as if it were, in substance, embodied in and part of the definition, must be read and construed with the operative provision with respect to the Appointor in cl 21.

149 Thirdly, as I have explained, the words 'the ... terms and conditions', within the phrase 'the trusts terms and conditions hereinbefore contained' in cl 28, refer to provisions of the deed, apart from those declaring or creating trusts, appearing before cl 28.

150 Fourthly, the words 'the ... terms and conditions', within the phrase 'the trusts terms and conditions hereinbefore contained' in cl 28, therefore include the relevant provision of the Schedule read and construed as if it were, in substance, embodied in and part of the definition of 'the Appointor' in cl 1(15).

151 Fifthly, the language of cl 28, in its ordinary and natural meaning, embraces or extends to the variation of the terms or conditions of the MMF Trust Deed by the deletion of the original provision with respect to the Appointor (notably, those provisions relating to Michael Mercanti and his spouse) and the substitution of new provisions with respect to the Appointor (notably, the appointment of Tyrone Mercanti) in the manner and form set out in the MMF Trust Deed of Variation. Clause 28 contains a number of express limitations on the power conferred by cl 28 to revoke, add to or vary all or any of 'the trusts terms and conditions hereinbefore contained'. However, none of those limitations applied to the variation made by the MMF Trust Deed of Variation.

152 Sixthly, those provisions of the MMF Trust Deed which expressly deal with the powers of the Trustee (and the Appointor) in relation to changes to the identity of the Appointor (notably, the definition of 'the Appointor' in cl 1(15), cl 21, cl 23 and the status of the power in the proviso to the definition of 'the Appointor' as a 'reserved power' within cl 10(7)) do not require or justify restricting or confining the ordinary and natural meaning of the language of cl 28. In particular, the proviso to the definition of 'the Appointor' merely confers on the Trustee a limited

power to declare that a person shall not become an Appointor. The status of that power as a 'reserved power' makes its exercise subject to cl 10. However, subject to cl 10, the power may be exercised by an instrument in writing and without the necessity for a variation of the deed pursuant to cl 28. The power in the proviso can operate, reasonably and sensibly, independently of cl 28. It has 'work to do'. There is no basis in the language of the provisions of the MMF Trust Deed with respect to the office of Appointor, read and construed in the context of the deed as a whole, for inferring that a wider power for the Trustee to remove or appoint an Appointor, than the limited power in the proviso to the definition, was omitted deliberately from the deed.

153       Seventhly, I am not persuaded that 'it would derogate from the fundamental purpose for which the power to amend was created' (as submitted on behalf of Michael Mercanti and Jason Mercanti) if cl 28 extends to empowering the Trustee to remove and replace the person occupying the office of Appointor (or a person who would, in future, occupy the office). The MMF Trust Deed does not contain an express provision which entrenches, for the duration of the trusts, the original provisions of the MMF Trust Deed with respect to the office of Appointor. There is no basis in the language of the deed for an implication to that effect. The decision in *Jenkins* is distinguishable on its facts. The declaration of trust in cl 2 of the trust deed under consideration in *Jenkins* and the power of variation in cl 11 of that trust deed were materially different from cl 2 and cl 28 of the MMF Trust Deed.

154       Grounds 1 and 2 fail.

### **Ground 3: Michael Mercanti's and Jason Mercanti's submissions**

155       The trial judge held that the MMF Trust Deed of Variation is a document of, and binding upon, Slondia.

156       At the trial it was common cause that Slondia's common seal had been affixed to the MMF Trust Deed of Variation without a formal resolution of Slondia's board of directors.

157       As I have mentioned, cl 17 of the MMF Trust Deed relates to the manner of exercise by the Trustee of any power, discretion or authority conferred on the Trustee by the deed.

158       By cl 17(2):



Any exercise by the Trustees of any power discretion or authority conferred on the Trustees by this Deed including without limiting the generality of the foregoing the making of an appointment pursuant to clause 4(1) hereof and the revocation addition to and variation of the trusts terms and conditions herein contained may be made (but without derogating from anything contained in clause 3(2)(f) hereof) -

- (a) in writing signed by all (or where sub-clause (3) of this clause applies by a majority of) the Trustees; or
- (b) by a resolution duly passed at a meeting of the Trustees; or
- (c) in the case of a sole corporate Trustee in the manner set out in sub-clause (4) of this clause.

159 Clause 17(4) provides, relevantly, that every Trustee which is a corporation may exercise 'any discretion or power hereby conferred on the Trustee by a resolution of such corporation ... or by a resolution of its Board of Directors or governing body or by its representative as set out in sub-clause (5) of this clause'.

160 By cl 17(5), every Trustee, not being a sole Trustee, which is a corporation or company may appoint a representative for the purpose of attending meetings of the Trustees.

161 His Honour held that the validity of the MMF Trust Deed of Variation was not affected by the absence of a formal resolution of Slondia's board of directors. His Honour said that cl 17(4) was a 'facultative' provision which '[does] not prescribe the only way in which a corporate trustee may exercise a power or discretion' [113]. His Honour also said that '[a] corporate trustee may properly exercise a power or discretion by a deed or other instrument executed by the trustee' and noted that 'for a long time the standard way for a corporation to assent directly to a transaction has been the fixing of its common seal to a document in the presence of several of its officers' [113].

162 One of the issues raised in ground 3 is whether, on the proper construction of cl 17 of the MMF Trust Deed, the manner in which 'a sole corporate Trustee' can exercise 'any discretion or power hereby conferred on the Trustee', within cl 17(4), is limited to doing so 'by a resolution'.

163 Counsel for Michael Mercanti and Jason Mercanti submitted that:

- (a) as at the date of execution of the MMF Trust Deed of Variation, Slondia was 'a sole corporate Trustee';

- (b) the proper construction of cl 17(2) is that, without derogating from anything contained in cl 3(2)(f), any exercise by the Trustee of a power, discretion or authority conferred upon it by the MMF Trust Deed 'may be made' in a manner set out in cl 17(2)(a), (b) or (c);
- (c) it is not reasonably open to construe cl 17(2) to mean that the Trustee may exercise any power, discretion or authority in a manner set out in cl 17(2)(a), (b) or (c) or in some other way;
- (d) in particular, cl 17(2)(c) specifies how any power, discretion or authority conferred on the Trustee by the MMF Trust Deed is to be exercised in the case of a sole corporate Trustee, and that is 'in the manner set out in sub-clause (4) of this clause';
- (e) cl 17(4) states the specific manner by which a corporate Trustee may exercise any power, discretion or authority;
- (f) whether or not cl 17(4) is facultative or prescriptive with respect to corporate Trustees generally, cl 17(2)(c) is prescriptive with respect to a sole corporate Trustee; and
- (g) cl 17(2) and cl 17(4) 'serve no purpose if they are merely facultative'.

164 According to counsel, the trial judge held in effect that, by virtue of Michael Mercanti, Yvonne Mercanti and Tyrone Mercanti attending a meeting on 15 June 2004 and providing instructions to Mr Nettleton in connection with the MMF Trust, there was a meeting of Slondia's directors in which it was resolved by Slondia, through its directors, to agree to a deed of variation of the MMF Trust Deed, which had not yet been drafted by Mr Nettleton, and to agree to Slondia's common seal being affixed to the deed of variation.

165 Counsel for Michael Mercanti and Jason Mercanti submitted that:

- (a) None of Michael Mercanti, Yvonne Mercanti and Tyrone Mercanti suggested at the trial that they had attended the meeting with Mr Nettleton other than in their personal capacities.
- (b) Michael Mercanti's and Yvonne Mercanti's sole purpose in attending the meeting was 'estate planning'.
- (c) Mr Nettleton opened files in the names of Michael Mercanti and Tyrone Mercanti, and not in the name of Slondia (or Citycourt).

- (d) There was nothing in the evidence which enabled his Honour to conclude that Michael Mercanti, Yvonne Mercanti and Tyrone Mercanti had agreed, as directors, 'to adopt a document, in its terms, which had not even then been drafted'.
- (e) The instructions given to Mr Nettleton were not limited to changing the Guardian and Appointor, but were in very general terms, namely 'to review the trust documents and to prepare deeds of variation to update both trusts' [119]. It is unrealistic to suggest that Michael Mercanti, Yvonne Mercanti and Tyrone Mercanti resolved informally to bind Slondia to whatever document a solicitor, whom they had just met, might prepare in order to give effect to the instructions to 'update' the MMF Trust Deed.
- (f) As noted by his Honour, for there to be an informal meeting or resolution of directors, there must be a meeting of minds of the directors (in their capacity as directors), and the meeting of minds must be with respect to 'some decision in the management of the business of the company' [118]. It is unrealistic to suggest that, whatever Michael Mercanti, Yvonne Mercanti and Tyrone Mercanti agreed to at the meeting with Mr Nettleton, the agreement included decisions with respect to the management of Slondia's business as distinct from decisions with respect to their personal affairs (that is, estate planning).
- (g) His Honour inferred that 'the updating of the trust documents which Michael and Yvonne instructed Mr Nettleton to prepare were the variations to the exercise of the Guardian's discretion in relation to CGT compliance and streaming provisions which Mr Nettleton subsequently included in the Deeds of Variation' [119]. That inference was not open to his Honour on the evidence. In particular, the inference was inconsistent with the following:
  - (i) none of the witnesses who attended the meeting gave evidence to that effect;
  - (ii) the subject matter of the inference is not mentioned in Mr Nettleton's notes of the meeting (exhibit 61); and
  - (iii) the issue as to 'variations to the exercise of the Guardian's discretion in relation to CGT compliance and streaming provisions' was raised by Mr Nettleton after the meeting in a letter to Tyrone Mercanti dated 15 June 2004 (a copy of

which was not sent to Michael Mercanti or Yvonne Mercanti) (exhibit 302, pars 22 - 25; exhibit 58).

166 Counsel for Michael Mercanti and Jason Mercanti also submitted that the trial judge erred in finding that the 'doctrine of unanimous consent or the *Duomatic* principle' ([121], [125], [130]) was satisfied with respect to the MMF Trust Deed of Variation drafted by Mr Nettleton and the affixing of Slondia's common seal to the document. The alleged error was asserted on the basis set out at [164] - [165] above.

167 Article 98 of Slondia's articles of association reads:

98. THE Common Seal of the Company shall be kept by such person and in such place as the Directors shall determine and the Directors shall have power to use such Seal in the execution of all or any of the powers hereby vested in them but it shall not be affixed to any document except by order of the Directors. The affixing of the Seal shall be attested by one Director and the Secretary or other person duly appointed by the Directors or in such other way as the Directors may from time to time appoint and such attestation shall be sufficient evidence of the authority to affix the Seal.

168 Counsel for Michael Mercanti and Jason Mercanti submitted that his Honour erred in finding that Slondia's common seal was affixed to the MMF Trust Deed of Variation 'by order of the Directors', within article 98 ([134]; exhibit 9). The alleged error was asserted on the basis set out at [164] - [165] above.

### **Ground 3: relevant legal principles**

169 I have recounted, in the course of dealing with grounds 1 and 2, the rules applicable to the construction of trust deeds.

170 A corporation may act as a trustee.

171 The directors of a corporate trustee are not concerned merely with the interests of shareholders in a business. They are concerned, in particular, with the interests of the beneficiaries on whose behalf the corporation is administering a trust. A corporate trustee, like any other corporation, acts by its officers. See *Elder's Trustee and Executor Co Ltd v Higgins* [1963] HCA 48; (1963) 113 CLR 426, 452 - 453 (Dixon CJ, McTiernan & Windeyer JJ).

172 Ordinarily, a corporation makes decisions by its directors:

- (a) by convening a meeting of the directors and passing a resolution;
- or

(b) by passing a circulating resolution, without a directors' meeting being held, in accordance with s 248A of the *Corporations Act 2001* (Cth).

173 By s 248D of the *Corporations Act*, relevantly, a directors' meeting may be held using any technology consented to by all the directors.

174 Section 248A and s 248D of the *Corporations Act*, as currently enacted, were in force during 2004.

175 In *Swiss Screens (Australia) Pty Ltd v Burgess* (1987) 11 ACLR 756, Bryson J said:

To my mind any event, even most fleeting, in which two directors who are married to each other and are the company's only directors reach concurrence in taking some course in the company's affairs can be part of their management of the business of the company, and can be described with accuracy as a meeting of the directors and as a proceeding at such a meeting. In the course of human affairs it is not to be expected that a recognisable meeting would often take place in which somebody took the chair, there was a call to order, a resolution was made, seconded, debated and voted on. What does seem to me to be essential is that they should both concur in some decision in the management of the business of the company (758).

176 Obviously, that principle is not restricted to directors who are married to each other. See *Roden v International Gas Applications* (1995) 125 FLR 396, 398 (McLelland CJ in Eq).

177 The principle enunciated by Bryson J in *Swiss Screens* has been applied in numerous cases including, for example, *Versteeg v The Queen* (1988) 14 ACLR 1; *Poliwka v Heven Holdings Pty Ltd (No 2)* (1992) 8 ACSR 747; *Benjamin v Harding Corporation Pty Ltd* (1995) 16 ACSR 376; *Roden*; *Atkins v St Barbara Mines Ltd* (1996) 135 FLR 119; *Hotien Holdings Pty Ltd v Frits Maré* [2007] NSWSC 599; (2007) 25 ACLC 854.

178 In *Bell Group Ltd (in liq) v Westpac Banking Corporation [No 9]* [2008] WASC 239; (2008) 39 WAR 1, Owen J commented:

In order for there to be a valid meeting of directors, it is not necessary that the directors be simultaneously present in one room; one be chosen to chair the meeting; and the director so selected run the meeting through an agenda of minutes of previous meeting, matters arising not otherwise dealt with, agenda items (with resolutions as to each), other business and finally formal closure. In other words, directors of even large companies can

meet and validly resolve as directors to bind the company and authorise acts without the formality typical of a civil service committee meeting.

What is essential is that there be, in the phrase so often used, a genuine 'meeting of minds' of the directors, so that they have in reality met, considered, and decided [5586] - [5587].

179        In *Re Express Engineering Works Ltd* [1920] 1 Ch 466, a syndicate of five people formed a company in which they were the sole shareholders. They sold to the company, for £15,000 in debentures of the company, property which they had, a few days earlier, acquired for £7,000. The contract for the sale and the issue of the debentures was carried out at a meeting of the five members of the syndicate, who were present and appointed themselves as directors. This meeting was described in the minutes as a board meeting. At a later meeting, the company's seal was affixed to the debentures. The articles of the company stipulated that no director should vote in respect of any contract or arrangement in which he might be interested. The company was wound up. The liquidator claimed a declaration that the issue of the debentures was invalid and should be set aside. It was held that the issue of the debentures was not invalid. Although the meeting was described as a directors' meeting, all of the five shareholders were present, and they might well have turned the meeting into a general meeting of the company, and transacted the same business.

180        Lord Sterndale MR said:

It was said here that the meeting was a directors' meeting, but it might well be considered a general meeting of the company, for although it was referred to in the minutes as a board meeting, yet if the five persons present had said, 'We will now constitute this a general meeting', it would have been within their powers to do so, and it appears to me that that was in fact what they did (470).

181        According to Warrington LJ:

Inasmuch as they could not in one capacity effectually do what was required but could do it in another, it is to be assumed that as business men they would act in the capacity in which they had power to act. In my judgment they must be held to have acted as shareholders and not as directors, and the transaction must be treated as good as if every formality had been carried out (471).

182        The observations of Lord Sterndale MR and Warrington LJ in *Re Express Engineering Works* were referred to with approval by McGarvie J in *JW Broomhead (Vic) Pty Ltd v JW Broomhead Pty Ltd*

[1985] VR 891, 932 and by Barrett J in *Beck v LW Furniture Consolidated (Aust) Pty Ltd* [2011] NSWSC 235 [65] - [66].

183 Barrett J elaborated in *Beck* as follows:

It was considered appropriate in *Re Express Engineering Works Ltd* to regard the expressed assent of the totality of the membership as sufficient to achieve a result within the powers of a meeting of members where those persons had expressed that assent at a meeting at which they alone were present, even though the meeting was recorded and minuted as a meeting of directors. So too here, it is appropriate to regard the expressed assent of the totality of the directorate as sufficient to achieve a result within the powers of a meeting of directors where those persons had expressed that assent at a meeting at which they alone were present, even though the meeting was recorded and minuted as a meeting of members [67].

184 In summary:

- (a) directors may meet informally;
- (b) directors may meet without being physically together;
- (c) the critical point is that there must be a meeting of minds as distinct from a physical meeting; and
- (d) the directors may concur informally in the company taking a particular action, but they must concur in their capacity as directors in the management of the company's affairs.

185 Whether, in a particular case, there was a meeting of minds in the relevant sense is a question of substance as distinct from a question of form. See *Bell* [5590].

186 The *Duomatic* principle was enunciated by Buckley J in *Re Duomatic Ltd* [1969] 2 Ch 365.

187 In *Herrman v Simon* (1990) 4 ACSR 81, Meagher JA (Samuels JA relevantly agreeing & Priestley JA agreeing) summarised the principle as follows:

[W]here it can be shown that all shareholders having a right to attend and vote at a general meeting of a company assent with full knowledge and consent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be. In other words, it is a doctrine dispensing with the consumptive effect of formalities. It is a doctrine that formalities may be disregarded if

they have been waived by all shareholders acting in concert who want the same substantial result (83).

188 His Honour observed that the *Duomatic* principle goes to waiver of formalities as distinct from substantial rights (83).

189 Section 127(2) of the *Corporations Act* provides that a company with a common seal may execute a document if the seal is fixed to the document and the fixing of the seal is witnessed by, relevantly, two directors of the company or a director and a company secretary of the company. By s 127(3), a company may execute a document as a deed if the document is expressed to be executed as a deed and, relevantly, is executed in accordance with s 127(2). Section 127(4) provides that s 127 does not limit the ways in which a company may execute a document (including a deed).

190 Section 127 of the *Corporations Act*, as currently enacted, was in force during 2004.

### **Ground 3: its merits**

191 The MMF Trust Deed of Variation was a deed poll. It was executed in 2004 by Slondia in its capacity as Trustee of the MMF Trust. The MMF Trust Deed of Variation made a number of variations to the MMF Trust Deed. The variations included the following amendment in relation to the Guardian and the Appointor:

Deleting the definitions of Guardian and Appointor in the Schedule to the Trust Deed and replacing it with the following definition of Appointor and Guardian:

#### **Appointor and Guardian**

Tyrone Kane Mercanti; and

Upon the death of Tyrone Kane Mercanti if no other appointment has been made then Michael Angelo Mercanti and Sybil Yvonne Mercanti; and

If neither of Michael Angelo Mercanti and Sybil Yvonne Mercanti survives Tyrone Kane Mercanti or upon the death of Michael Angelo Mercanti and Sybil Yvonne Mercanti if no other appointment has been made then the legal personal representative of Tyrone Kane Mercanti.

192 During 2004 the directors of Slondia comprised Michael Mercanti, Yvonne Mercanti and Tyrone Mercanti.



193           Slondia executed the MMF Trust Deed of Variation under common seal. Michael Mercanti and Tyrone Mercanti witnessed the affixing of the seal. The execution clause stated that the seal was affixed 'with the directors' authority'.

194           Michael Mercanti also signed the MMF Trust Deed of Variation in his capacity (before the variations) as the Guardian (and, also, the Appointor) of the MMF Trust to acknowledge his consent to the variations, as required by cl 10 of the MMF Trust Deed.

195           In my opinion, cl 17(4) of the MMF Trust Deed is permissive and not prescriptive in relation to the manner in which a corporate Trustee (whether a sole Trustee or a co-Trustee) may exercise any discretion or power conferred on the Trustees by the MMF Trust Deed (including the power of variation in cl 28). My reasons are as follows.

196           First, cl 17(4) must be construed in the context of cl 17 (notably, cl 17(2)) as a whole.

197           Secondly, cl 17(2) is concerned with the manner in which the Trustees may exercise any power, discretion or authority conferred on the Trustees by the MMF Trust Deed (including the power of variation in cl 28). Clause 17(2) states that any exercise by the Trustees of any such power, discretion or authority 'may be made' in the manner specified in cl 17(2)(a), (b) or (c). The words 'may be made' are, in context, permissive and not prescriptive.

198           Thirdly, cl 17(2)(a), in effect, permits multiple Trustees to exercise any such power, discretion or authority 'in writing signed by all ... the Trustees'. Clause 17(2)(b), in effect, permits multiple Trustees to exercise any such power, discretion or authority 'by a resolution duly passed at a meeting of [all of] the Trustees'. It is plain, in my opinion, that cl 17(2)(a) and (b) are concerned to facilitate the exercise by multiple Trustees of powers, discretions and authorities conferred on them by the MMF Trust Deed by specifying, for that purpose, permissible mechanisms which are convenient and relatively informal. I have no doubt that, on the ordinary and natural meaning of the language of cl 17(2) in context, including the subject matter of cl 17(2), those mechanisms are permissive and not prescriptive.

199           Fourthly, cl 17(2)(c) read with cl 17(4) is concerned with the manner in which a corporate Trustee (whether a sole Trustee or a co-Trustee) may exercise or concur in exercising any power, discretion or authority conferred on the Trustees by the MMF Trust Deed (including the power

of variation in cl 28). Clause 17(2) states that any exercise of any such power, discretion or authority 'may be made' in the manner specified in, relevantly, cl 17(2)(c). Clause 17(2)(c) incorporates, by reference, cl 17(4). Clause 17(4) states, in effect, that every corporate Trustee 'may exercise or concur in exercising' any such discretion or power in the manner specified in cl 17(4). The words 'may be made' and 'may exercise or concur in exercising' are, in context, permissive and not prescriptive.

200 Fifthly, cl 17(2)(c) read with cl 17(4), in effect, permits a corporate Trustee (whether a sole Trustee or a co-Trustee) to exercise any such power, discretion or authority 'by a resolution of such corporation ... or by a resolution of its Board of Directors or governing body or by its representative'. Clause 17(5) enables every corporate Trustee which is not a sole Trustee to appoint a representative for the purpose of attending meetings of the Trustees. As with cl 17(2)(a) and (b), it is plain, in my opinion, that cl 17(2)(c) read with cl 17(4) is concerned to facilitate the exercise by a corporate Trustee of powers, discretions and authorities conferred on the Trustees by the MMF Trust Deed by specifying, for that purpose, permissible mechanisms which are convenient and relatively informal. I have no doubt that, on the ordinary and natural meaning of the language of cl 17(2) read with cl 17(4) in context, including the subject matter of cl 17(2) and cl 17(4), those mechanisms are permissive and not prescriptive.

201 The trial judge made adverse findings in relation to Michael Mercanti and Yvonne Mercanti. In particular:

- (a) His Honour found that Michael Mercanti's evidence was generally unreliable. His Honour specifically rejected Michael Mercanti's evidence as to his knowledge of the role of trustees and appointors and the circumstances in which the MMF Trust Deed of Variation and the FW Trust Deed of Variation were prepared and executed [22].
- (b) His Honour said that Yvonne Mercanti was an unsatisfactory witness. She gave her evidence in a partisan and, at times, argumentative manner. She did not recall important events [24].

Those findings have not been challenged.

202 His Honour accepted the evidence of Mr Nettleton and another lawyer, Ms Chiu, both of whom worked at Brett Davies Lawyers in 2004. His Honour specifically accepted 'their evidence and the contents of their notes as the best evidence of [the] meetings' they had with Michael

Mercanti, Yvonne Mercanti and Tyrone Mercanti [31]. Mr Nettleton attended a meeting with Michael Mercanti, Yvonne Mercanti, Tyrone Mercanti, Mr Torre and Brett Davies (of Brett Davies Lawyers) in May 2004. Mr Nettleton attended a second meeting with Michael Mercanti, Yvonne Mercanti and Tyrone Mercanti in June 2004. Ms Chiu attended a meeting with Michael Mercanti, Yvonne Mercanti and Mr Davies in September 2004 [31].

203        The trial judge was satisfied, on the evidence as a whole (and, in particular, the evidence of Mr Nettleton) that Mr Nettleton and Mr Davies explained to Yvonne Mercanti the role of trustees and appointors and that Michael Mercanti and Yvonne Mercanti instructed Mr Nettleton to draft deeds to make Tyrone Mercanti the Appointor of the MMF Trust and the FW Trust in place of Michael Mercanti [24].

204        His Honour made a number of findings in relation to a meeting on 15 June 2004 with Mr Nettleton at the offices of Brett Davies Lawyers attended by Michael Mercanti, Yvonne Mercanti and Tyrone Mercanti:

On 15 June 2004 Michael, Yvonne and Tyrone, who were the only directors of Slondia and Citycourt, attended a meeting with Mr Nettleton at the offices of Brett Davies Lawyers. Michael and Yvonne instructed Mr Nettleton to review the trust documents and to prepare deeds of variation to update both trusts including replacing Michael as the Appointor of the two discretionary trusts with Tyrone. It may be inferred, and I do infer, that the updating of the trust documents which Michael and Yvonne instructed Mr Nettleton to prepare were the variations to the exercise of the Guardian's discretion in relation to CGT compliance and streaming provisions which Mr Nettleton subsequently included in the deeds of variation. Michael and Yvonne instructed Mr Nettleton to send the deeds of variation to Tyrone. Obviously, the deeds of variation had to be executed by Slondia and Citycourt as trustees and by Michael as Guardian and Appointor. Michael and Yvonne instructed Mr Nettleton to prepare the deeds of variation and to send the documents to Tyrone for him to deal with their execution. Tyrone assented to the variations and to his appointment as Guardian and Appointor or Appointor in place of Michael as Guardian and Appointor and Appointor of the MMF Trust and FW Trust respectively and to the deeds being sent to him for him to attend to their execution.

There was a meeting of the minds of Michael, Yvonne and Tyrone. They expressed their agreement that Slondia and Citycourt should enter into the deeds of variation and that Tyrone should attend to their execution. That is a sufficient meeting notwithstanding its lack of formality and the fact that Mr Nettleton was also present at the meeting [119] - [120].

205       The trial judge said that if, contrary to his finding, the meeting between Michael Mercanti, Yvonne Mercanti and Tyrone Mercanti at the offices of Brett Davies Lawyers on 15 June 2004 was not a meeting of directors, then 'the directors nevertheless made a decision that Slondia and Citycourt should enter into the deeds of variation and that Michael and Tyrone should execute the deeds' [121].

206       His Honour also made the following findings:

Michael, Yvonne and Tyrone each assented to Slondia and Citycourt entering into the deeds of variation and Michael and Tyrone executing the deeds. Michael and Tyrone gave authority for that to be done at the meeting at Brett Davies Lawyers on 15 June 2004 and by sealing and countersigning the deeds of variation themselves.

I am satisfied that Yvonne authorised Slondia and Citycourt to make Tyrone Appointor and Guardian or Appointor of the trusts in place of Michael and to update the trust deeds in accordance with the instructions she and Michael gave to Mr Nettleton and authorised Michael and Tyrone to execute the deeds of variation to achieve that result. ...

At the meeting at the offices of Brett Davies Lawyers on 27 May 2004 Mr Davies explained the way a trust worked. His description included that the trustee was a mere puppet because the appointor was God and had the power to hire and fire trustees at will. Michael and Yvonne instructed Mr Davies and Mr Nettleton to review their current trusts and provide them with advice with a view to achieving the objectives they had stated. That was that Tyrone was to get control of the business.

On 15 June 2004 Michael, Yvonne and Tyrone attended a second meeting with Mr Nettleton. Michael and Yvonne instructed Mr Nettleton to review the trust documents and to prepare deeds of variation to update both trusts including replacing Michael as the Appointor of the two discretionary trusts with Tyrone. ...

Michael and Yvonne instructed Mr Nettleton to send the deeds of variation to Tyrone. Obviously, the deeds of variation had to be executed by Slondia and Michael. I am satisfied that Yvonne and Michael both understood that. It was a matter of indifference to Yvonne which directors of Slondia applied and countersigned the seal. Indeed, the theme of Yvonne's evidence is that she left matters of that sort to Michael and Tyrone. Yvonne instructed Mr Nettleton to prepare the deeds of variation and to send the documents to Tyrone for him to deal with them. I am satisfied that Yvonne gave authority to Michael and Tyrone to seal the deeds of variation on behalf of Slondia and Citycourt.

Yvonne's conduct after the deeds of variation were executed is relevant and admissible as circumstantial evidence: *J W Broomhead (Vic) Pty Ltd (in liq) v J W Broomhead* (917). On 22 January 2008 Citycourt and

Tyrone executed a further deed of variation of the FW Trust. The deed was signed by Michael and Yvonne. Tyrone is described in the deed as 'the Appointor'. The schedule to the deed refers to the deed of variation dated 20 October 2004. Counsel for Michael, Mr Penglis, submitted that Yvonne did not read the document or if she did she did not understand it. I do not accept that submission. In cross-examination Yvonne said that she could not recall the document. It may be that she does not now recall the document. However, that does not mean that she did not read or understand the document at the time she signed it. Yvonne's conduct supports the conclusion that she knew Tyrone was the Appointor of the FW Trust and she knew that because she had authorised Michael and Tyrone to execute the deeds of variation which appointed Tyrone as Appointor of the FW Trust and the MMF Trust [125] - [130].

207 At the meeting on 15 June 2004, Mr Nettleton made notes. The first page of those notes states, relevantly:

Att: Tyrone, Michael and Yvonne	15/06/04
The Mercanti Family Trust	01/06/79
(T'tee: Slondia Noms P/L)	

...

Instructed to change Appointor to Tyrone

208 Mr Nettleton said in his witness statement that he was 'instructed by Michael and Yvonne to prepare deeds of variation to update both trusts, including replacing Michael Mercanti as the appointor of the two discretionary trusts, with Tyrone' ([23.3]: exhibit 302).

209 By letter dated 15 June 2004, sent by facsimile transmission on that date, Mr Nettleton confirmed to Mr Torre and Mr Bizzaca that he had been instructed to review the MMF Trust in relation to trust streaming provisions and CGT compliance issues.

210 Recital E of the MMF Trust Deed of Variation states '[t]he Trustee seeks to vary the Trust Deed from the date of this Deed of Variation'.

211 Clause 1 of the MMF Trust Deed of Variation provides, relevantly:

**1. How does this Deed vary the Trust Deed?**

... the Trustee varies the Trust Deed from the date of variation by:

...

## 1.2. Updating Appointor

Deleting the definitions of Guardian and Appointor in the Schedule to the Trust Deed and replacing it with the following definition of Appointor and Guardian.

212 The submission on behalf of Michael Mercanti and Jason Mercanti to the effect that none of Michael Mercanti, Yvonne Mercanti and Tyrone Mercanti attended the meeting with Mr Nettleton other than in their personal capacities, and that Michael Mercanti and Yvonne Mercanti attended the meeting for the sole purpose of 'estate planning', is inconsistent with:

- (a) his Honour's findings at [119] - [121] of his reasons;
- (b) Mr Nettleton's contemporaneous notes of the meeting on 15 June 2004;
- (c) the provisions of recital E and cl 1 of the MMF Trust Deed of Variation;
- (d) Michael Mercanti's written consent, as the Guardian and the Appointor, to the MMF Trust Deed of Variation;
- (e) the affixing by Michael Mercanti and Tyrone Mercanti of Slondia's common seal to the MMF Trust Deed of Variation;
- (f) his Honour's findings at [125] - [130] of his reasons; and
- (g) his Honour's unchallenged adverse findings as to Michael Mercanti's and Yvonne Mercanti's credibility and reliability.

213 The submission on behalf of Michael Mercanti and Jason Mercanti to the effect that the trial judge erred in finding that the 'doctrine of unanimous assent or the *Duomatic* principle' was satisfied with respect to the MMF Trust Deed of Variation is without merit. His Honour held, on the basis of his findings at [121] and [125] - [130] of his reasons, that the *Duomatic* principle was satisfied. In my opinion, his Honour's conclusion was correct, generally for the reasons he gave and on the basis of my reasoning at [205] - [211] above.

214 The submission on behalf of Michael Mercanti and Jason Mercanti to the effect that his Honour erred in finding that Slondia's common seal was affixed to the MMF Trust Deed of Variation 'by order of the Directors',

within article 98 of Slondia's articles of association, is also without merit. His Honour's reasoning on that point was as follows:

Article 98 of Slondia's articles provides that the common seal shall not be affixed to any document 'except by order of the Directors'. [Counsel for Michael Mercanti and Jason Mercanti] submitted that it is not sufficient that the directors should each give authority for the seal to be affixed; there must be something in the nature of an order which can only be a formal resolution at a meeting of directors. In my view, upon the proper construction of Article 98 the requirement that the seal be affixed by order of the directors is satisfied if the seal is affixed with the authority of the directors. The text refers to 'by order of the Directors' not 'by an order of the directors'. The articles of the company should be regarded as a business document and should be construed so as to give them reasonable business efficacy where a construction tending to that result is admissible on the language of the articles, in preference to a result which would or might prove unworkable: *Holmes v Keys* [1959] Ch 199, 215 (Jenkins LJ). If the directors authorise a particular use of the seal, business efficacy in the operation of the company would be impeded by a requirement that there must be a meeting of directors and a formal resolution before the seal can be used [134]. (original emphasis)

215 In my opinion, his Honour was correct, generally for the reasons he gave, in rejecting Michael Mercanti's and Jason Mercanti's submission in relation to article 98. His Honour's conclusion was supported by the evidence to which he referred and the findings which he made at [121] and [125] - [130] of his reasons.

216 It was reasonably open to the trial judge to make the findings of fact which underpin his conclusion that the MMF Trust Deed of Variation is a document of, and binding upon, Slondia. His Honour did not make any material error in his fact-finding process or in the facts as found.

217 Ground 3 fails.

#### **Ground 4: Michael Mercanti's and Jason Mercanti's submissions**

218 Counsel for Michael Mercanti and Jason Mercanti informed the court that ground 4 '[proceeded] on the findings of fact made by [the trial judge] as to the purpose' of Michael Mercanti, Yvonne Mercanti and Tyrone Mercanti in authorising (and, in the case of Michael Mercanti and Tyrone Mercanti, in executing) the MMF Trust Deed of Variation; in particular, on his Honour's findings of fact that:

Tyrone ... claimed that at the meeting with Brett Davies Lawyers on 27 May 2004 Tyrone agreed with Michael and Yvonne that Tyrone would receive control of the business from Michael and Yvonne immediately as

an advance on his inheritance and Michael and Yvonne would make provision in their wills for their other sons by way of balance [68].

At the meeting at the offices of Brett Davies Lawyers on 27 May 2004 [attended by Michael, Yvonne and Tyrone] ... Michael and Yvonne instructed Mr Davies and Mr Nettleton to review their current trusts and provide them with advice with a view to achieving the objectives they had stated. That was that Tyrone was to get control of the business [127].

Michael gave instructions to Brett Davies Lawyers to draft deeds to appoint Tyrone as Appointor of the trusts so that Tyrone would receive control of the business immediately and stated that was an advance on Tyrone's inheritance and Michael and Yvonne would make provision in their wills for their other sons by way of balance [179].

219 His Honour was not satisfied that Slondia exercised its power to vary 'the trusts terms and conditions' of the MMF Trust Deed 'for any improper or collateral purpose' [145]. His Honour reasoned:

I find it unnecessary to classify the power of Slondia and Citycourt, as trustees, to vary the trusts terms and conditions or trusts respectively as fiduciary or non-fiduciary. It is sufficient to identify the obligations on the trustees in exercising the power. Each trustee must exercise the power bona fide and not for a purpose other than within the intention of the settlor as evidenced by the trust deed creating the power. If the trustee exercised the power contrary to this principle, equity holds the exercise of the power as a 'fraud on a power', that is the power has been exercised for a purpose or with an intention beyond the scope of, or not justified by, the trust deed.

I am not satisfied that Slondia or Citycourt exercised its power to vary the trusts terms and conditions or the trusts respectively for any improper or collateral purpose. The MMF Trust was established by Michael in 1979, on the advice of Mr Bizzaca, to carry on the shoe repair business established by Michael primarily for the benefit of Michael, Yvonne and their children. The FW Trust was established by Michael, on the advice of Mr Bizzaca, in 1996 to carry on the wholesale part of the business primarily for the benefit of Michael, Yvonne and their children. The original Guardian and Appointor of the MMF Trust and the original Appointor of the FW Trust was Michael. At the time Michael was the general manager of the business, a beneficiary of each trust and a director and shareholder of each corporate trustee. Subsequently Michael made Tyrone general manager of the business. In June 2004 Michael and Yvonne, who together with Tyrone were the directors of Slondia and Citycourt, caused Slondia and Citycourt to appoint Tyrone as the managing director of each company and hence of the business. Michael and Yvonne intended that the business should be Tyrone's. Slondia and Citycourt, through Michael and Yvonne, decided to pass control of the trusts and hence of the business to Tyrone. On the advice of Mr Davies



and Mr Nettleton Slondia and Citycourt, by Michael and Yvonne, decided to effect that purpose by causing Slondia and Citycourt to execute the deeds of variation appointing Tyrone as Guardian and Appointor of the MMF Trust and as Appointor of the FW Trust. The plaintiffs have not established that Slondia or Citycourt did so for any improper or collateral purpose [144] - [145].

220 Counsel for Michael Mercanti and Jason Mercanti submitted that:

- (a) his Honour erred in failing to conclude that the power of variation in cl 28 of the MMF Trust Deed is a 'fiduciary power', especially when it is being exercised to change the identity of the Guardian and the Appointor; and
- (b) in any event, whether the power of variation is a 'fiduciary power', or merely a 'non-fiduciary power' which must be exercised in good faith for the purpose for which it was conferred, his Honour should have held that Slondia's conduct (through its directors) was in breach of its fiduciary power, alternatively involved the exercise of its non-fiduciary power other than in good faith and for the purpose for which it was conferred.

221 The written submissions asserted that it is not proper for a trustee (or an appointor) of a discretionary family trust to agree, without the consent of or proper consultation with all of the beneficiaries, to exercise a power of variation of the trust deed for the purpose of passing 'control of the trusts and hence of the business to [a particular beneficiary, in the present case Tyrone Mercanti]'. As to the proposition in relation to the consent of or proper consultation with all of the beneficiaries, reliance was placed on *Marshall v Sladden* (1849) 7 Hare 428 [439] and *O'Reilly v Alderson* (1849) 8 Hare 101 [103], both of which were referred to, with apparent approval, by the majority (Murphy JA & Hall J) in *Scaffidi* [152].

222 At the hearing of the appeal, I asked counsel for Michael Mercanti and Jason Mercanti why it was necessary for the Beneficiaries to be consulted before the power of variation in cl 28 of the MMF Trust Deed was exercised (appeal ts 37). Counsel responded that the 'primary issue' in the context of ground 4 was whether it is 'open to a trustee to simply decide that it will ... in effect, hand over control to one of the beneficiaries by way of an inheritance', and that the 'lack of consultation is simply an add-on' (appeal ts 37 - 38). Despite counsel's characterisation of the assertion in the written submissions as an 'add-on', the point was not abandoned and it remains necessary to deal with it.

223        According to counsel for Michael Mercanti and Jason Mercanti, Slondia's conduct (through its directors) was aggravated by two factors. First, the Trust Fund of the MMF Trust included not only property 'which was intended to be "inherited" by Tyrone, but also other assets (which were not intended to be "inherited" by Tyrone and which were intended to ultimately form part of the estate of Michael and Yvonne to be "inherited" by their three other sons) but which will not now happen without Tyrone agreeing to that happening'. Secondly, by the fact (as admitted by Tyrone Mercanti) that there was (and had been for a considerable period) 'disharmony' between Tyrone and his brothers.

224        It was submitted that:

To purport to gift control of a true discretionary trust to one of four children as an '*advance on (his) inheritance*', particularly a trust which owns property which it is not intended that child will 'inherit' (but rather is intended to be inherited by the other children), does not give effect to the fiduciary nature of the office of trustee (or appointor) and cannot in any way be said to have been exercised having regard to the interests of all beneficiaries or the trust as a whole.

Having decided to put the business (and other property) in a discretionary trust (for all the financial and taxation benefits that go with it), Michael and Yvonne lost the ability to subsequently deal with the assets as if they were still their own and had not been put into a discretionary trust. Their endeavour to do so constitutes a breach of duty/fraud on the power (which, with full knowledge, Tyrone happily took the benefit of). (original emphasis)

225        It was therefore contended that his Honour erred in failing to be satisfied that Slondia exercised its power of variation for an improper or collateral purpose [145].

#### **Ground 4: relevant legal principles**

226        The purpose or essence of a fiduciary relationship is for the fiduciary to serve exclusively the interests of others. That is, it is a relationship in which the fiduciary is not free to pursue his or her separate interests. See Meagher, Gummow & Lehane's *Equity Doctrines and Remedies* (5<sup>th</sup> ed, 2015) [5-005].

227        The trustee is the archetype of the fiduciary. See *Maguire v Makaronis* [1997] HCA 23; (1997) 188 CLR 449, 473 (Brennan CJ, Gaudron, McHugh & Gummow JJ).

228        The duties of a trustee, in exercising a discretionary power, include:

- (a) to act honestly and in good faith; and
- (b) to exercise the power for the purpose for which it is conferred and not for any extraneous or ulterior purpose.

See *Re Hay's Settlement Trusts* [1982] 1 WLR 202, 209 (Sir Robert Megarry V-C); *Karger v Paul* [1984] VR 161, 163 - 164 (McGarvie J); *Esso Australia Ltd v Australian Petroleum Agents' & Distributors' Association* [1999] 3 VR 642 [38] - [43] (Hayne J).

229 In *Scaffidi*, the majority (Murphy JA & Hall J) observed in the context of an appeal concerning the exercise by an appointor under a discretionary family trust of a power to remove a trustee and appoint new trustees [152]:

It has been held that it is not proper to appoint new trustees without communicating with beneficiaries and hearing their objections, at least where it is likely that they would oppose the appointment: *Marshall v Sladden* (1849) 7 Hare 428 [439]; *O'Reilly v Alderson* (1849) 8 Hare 101 [103]. However, beneficiaries cannot dictate or control the exercise of the power: *In re Brockbank* [1948] Ch 206, 209 - 211.

230 I observe that:

- (a) *Marshall* and *O'Reilly* were cases in which, at the material time, the beneficiaries in question had a vested proprietary interest in the trust estate;
- (b) the majority in *Scaffidi* did not refer to a number of more recent decisions on the point, including decisions by Australian courts, in relation to discretionary family trusts; and
- (c) the decision of the majority in *Scaffidi* was reversed on appeal to the High Court: *Montevento*.

231 In *Karger*, McGarvie J considered whether trustees of discretionary trusts created by will were obliged to afford a hearing to a person affected by the exercise of their discretion. His Honour said:

It was submitted for the plaintiff that it was open to the Court to examine and review whether the trustees had given 'fair consideration' to the exercise of their discretion. In particular it was argued that from the terms of the will and the circumstances of the case it was to be implied that Mrs Karger was to be given a fair opportunity of making representations to them before they exercised the discretion. It was put that this was necessary to ensure that the inquiries of the trustees were adequate. I do not consider that the implication is to be made. I see no good reason for

importing rules of natural justice into the exercise of discretion by the trustees of the will. Such an implication is not necessary. The trustees of the will did not exercise their power in a type of situation where a right to make representations upon its exercise is normally afforded: cf *Charlton v Members of the Teachers Tribunal* [1981] VR 831, at pp 844-5. In any event the insufficiency of inquiries by the trustees is not a ground on which the exercise of discretion by the trustees can be examined and reviewed. As the expression 'fair consideration' correctly describes the ground on which the trustees' exercise of discretion can be examined and reviewed, only if it is used with the meaning equivalent to 'real and genuine consideration' there is no advantage in using it (166).

232 Those views of McGarvie J in *Karger* are referred to with approval in *Jacobs' Law of Trusts in Australia* (8<sup>th</sup> ed, 2016) [1608].

233 *Charlton v Members of the Teachers Tribunal* [1981] VR 831 was concerned with the nature and extent of any obligation by the Teachers Tribunal to observe the rules of procedural fairness in the course of discharging its statutory function of determining the salaries and conditions of employment of teachers. McGarvie J held that the Tribunal, in arriving at its determination of a claim by an association which represented high school principals, was required to afford the association a fair opportunity to make representations on all relevant issues involved in the determination (844 - 845, 852). *Charlton* was not concerned with trusts.

234 In *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, Mahoney JA held in relation to the exercise of a discretionary power under a discretionary family trust:

[T]he trustee is not bound to consult beneficiaries or to ascertain their views. He may do so in order to provide support for the conclusion he has reached as to the exercise of the discretionary power or in order appropriately to inform himself, but he need not do so. And, special cases apart, he is therefore not bound to inform a beneficiary apt to be affected of the views of himself or of the settlor as to what should be done in the particular case (431).

See also the reasons of Sheller JA (442 - 445).

235 In *X v A* [2000] 1 All ER 490, Arden J held that a trustee of a trust created by will under which the beneficiaries had a proprietary interest in the trust estate had no general obligation to consult the beneficiaries, unless he or she was required to do so by the terms of the trust or by statute (496). See also *R v The Charity Commissioners for England and Wales; Ex parte Baldwin* [2001] WTLR 137, 148 - 149 (Mr Jack Beatson

QC); *Re Y Trust* [2011] JRC 135 [55] - [59] (Commissioner JA Clyde-Smith & Jurats Tibbo & Nicolle). Compare *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705, 718 (Robert Walker J).

236 In *Stuart v Armourguard Security Ltd* [1996] 1 NZLR 484, McGechan J made these observations in deciding that a trustee of an employment superannuation trust was not required to observe the rules of procedural fairness:

Where ... there is a prima facie disinclination to interfere with exercise of discretion (not so in statutory or organisation cases), a prima facie presumption of good faith, and no obligation to give reasons, it seems somewhat unlikely the law nevertheless recognises some special per se obligation to observe natural justice. That concept is an unnecessary import. Questions relating to bias are covered by the trustees' recognised duty of impartiality and avoidance of personal profit. Questions of hearing conflicting contentions are covered, to the necessary degree, by the traditional duty of diligence, which in appropriate cases can encompass a duty to make inquiries. It would add new terrors (and costs) to the role of trustee to require, in addition, a compliance with rules of natural justice, as such, each time a discretionary determination was undertaken. Is the trustee required to call for submissions from potential beneficiaries with conflicting interests? Allow replies? Hold hearings? Where would it stop? I consider the trustee need do no more than discharge the recognised duties of impartiality and diligence. The latter could, in some circumstances, require the trustee to make appropriate inquiries and within that to gather and weigh conflicting contentions. There is not, however, some overarching requirement for natural justice as such (506).

237 It has been suggested that different considerations may, at least arguably, apply in the case of benefits payable under a superannuation and disability scheme. See *Baker v Local Government Superannuation Scheme Pty Ltd* [2007] NSWSC 1173 [17] - [19] (McDougall J); *Maciejewski v Telstra Super Pty Ltd* (1998) 44 NSWLR 601, 602, 605 (Young J). Compare *Flegeltaub v Telstra Super Pty Ltd* [2000] VSC 107 [15] - [16] (Byrne J). It is unnecessary to consider the merits of that suggestion.

238 I accept that, in some circumstances, the proper discharge of the duties (for example, the duty to act diligently) of a trustee (including a trustee of a discretionary family trust) may, subject to the provisions of the trust deed and subject to statute, require the trustee to make appropriate inquiries of some or all of the beneficiaries and, in that context, to evaluate different or conflicting contentions.

239           However, in my opinion, subject to the provisions of the trust deed and subject to statute, the trustee of a discretionary family trust under which the beneficiaries have no more than a right of due administration is not bound, at least ordinarily, in the exercise of a discretionary power (including a discretionary power to vary the trust deed or to appoint new trustees), to observe the rules of procedural fairness or to refrain from exercising the power to a beneficiary's disadvantage without seeking and taking into account the views of that beneficiary.

240           In *Vatcher v Paull* [1915] AC 372, Lord Parker of Waddington, who delivered the advice of the Privy Council, said:

The term fraud in connection with frauds on a power does not necessarily denote any conduct on the part of the appointor amounting to fraud in the common law meaning of the term or any conduct which could be properly termed dishonest or immoral. It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power (378).

241           That passage was cited with approval in *The Commonwealth and the Central Wool Committee v The Colonial Combing, Spinning and Weaving Co Ltd* [1922] HCA 62; (1922) 31 CLR 425, 471 (Higgins J) and *Ngurli Ltd v McCann* [1953] HCA 39; (1953) 90 CLR 425, 438 (Williams ACJ, Fullagar & Kitto JJ).

242           In *Topham v Duke of Portland* (1869) 5 Ch App 40, Lord Hatherley LC said that the court will not allow a person holding a power of appointment under a deed of settlement 'to interpret the donor's intention in any other sense than the Court itself holds to be the true construction of the instrument creating the power; and a literal execution of the power, with a purpose which it does not sanction, is regarded as a fraud on the power' (59).

243           That passage was cited with approval in *Ngurli* (438).

244           The equitable doctrine of fraud on a power requires, relevantly, that, in general, a power conferred on a trustee by the trust deed must not be exercised for a purpose, or with an intention, beyond the scope of or not justified by the trust deed. See *Re Courage Group's Pension Schemes* [1987] 1 WLR 495, 505 (Millet J); *Lord Napier and Ettrick v RF Kershaw Ltd* [1999] 1 WLR 756, 766 (Lord Steyn; Lord Browne-Wilkinson, Lord Woolf MR, Lord Hope of Craighead & Lord Hutton agreeing); *Cachia* [74].

245 So, in the context of the equitable doctrine of fraud on a power, a power of variation conferred on a trustee by the trust deed must not be exercised for a purpose, or with an intention, beyond the scope of or not justified by the trust deed. The power can be exercised only for the purpose for which it is conferred and not for any extraneous or ulterior purpose.

#### **Ground 4: its merits**

246 The term 'discretionary trust' does not have a constant, fixed normative meaning, in the absence of an applicable statutory definition. See *CPT Custodian Pty Ltd v Commissioner of State Revenue of the State of Victoria* [2005] HCA 53; (2005) 224 CLR 98 [15] (Gleeson CJ, McHugh, Gummow, Callinan & Heydon JJ).

247 It has been held that a discretionary trust, strictly so called, of its nature, confers on the beneficiaries no more than a right of due administration. See *Kent v SS 'Maria Luisa' (No 2)* [2003] FCAFC 93; (2003) 130 FCR 12 [59] (Tamberlin & Hely JJ).

248 A beneficiary of a so-called discretionary trust will have an equitable proprietary interest in the assets of the trust fund only if the provisions of the trust instrument create that result. See *CPT Custodian* [15]; *SS 'Maria Luisa' (No 2)* [60].

249 In the present case, the only relevant right of the Beneficiaries under the MMF Trust Deed was a right of due administration.

250 The duties of Slondia, in exercising the power of variation conferred by cl 28, were, relevantly:

- (a) to act honestly and in good faith; and
- (b) to exercise the power for the purpose for which it was conferred and not for any extraneous or ulterior purpose.

251 The trial judge noted that counsel for Michael Mercanti and Jason Mercanti described Michael Mercanti as 'the patriarch of the Mercanti family' [2].

252 It is apparent, from the objective facts combined with the provisions of the MMF Trust Deed which conferred effective control on him, that it was Michael Mercanti who decided that the MMF Trust should be established.

253        At all material times between 1 June 1979 (when the MMF Trust Deed was executed) and 2004 (when the MMF Trust Deed of Variation was executed) Michael Mercanti effectively controlled the MMF Trust.

254        At all times between 1 June 1979 (when the MMF Trust Deed was executed) and 2004 (when the MMF Trust Deed of Variation was executed) Slondia was the Trustee, Michael Mercanti was a Specified Beneficiary, and Michael Mercanti was the Guardian and Appointor.

255        At all times between 1979 and 2001 Michael Mercanti and Yvonne Mercanti were the directors of Slondia. Tyrone Mercanti was a director of Slondia from 2001 to 30 July 2013. Vanessa Mercanti was a director of Slondia between 2008 and 2013.

256        At all material times Michael Mercanti and Yvonne Mercanti have been the shareholders of Slondia.

257        The Settlor, Mr Linton, established the Trust Fund by transferring to the Trustee, Slondia, the (nominal) settled sum of \$10. The only reasonable objective inference is that, when the MMF Trust Deed was executed, the only property of any value that would become part of the Trust Fund would be transferred to the Trustee by or at the direction of Michael Mercanti.

258        The object of the execution of the MMF Trust Deed of Variation was, relevantly, to transfer effective control of the MMF Trust from Michael Mercanti to Tyrone Mercanti.

259        The achievement of that object by the variation of the Schedule to the MMF Trust Deed in the manner set out in the MMF Trust Deed of Variation required, relevantly:

- (a)       a decision by the directors of Slondia (that is, Michael Mercanti, Yvonne Mercanti and Tyrone Mercanti) to implement the object and execute the MMF Trust Deed of Variation; and
- (b)       the consent of Michael Mercanti as the Guardian pursuant to cl 10 of the MMF Trust Deed.

260        His Honour found that Slondia, by its directors, made a valid decision to implement the object and execute the MMF Trust Deed of Variation. His Honour also found that Michael Mercanti as the Guardian validly consented pursuant to cl 10 of the MMF Trust Deed. His Honour further found that Michael Mercanti as the Appointor validly consented to



the execution of the MMF Trust Deed of Variation. As I have explained or will explain in dealing with other grounds of appeal, there is no basis for impugning those findings in this appeal.

261 In my opinion, the power of variation in cl 28 of the MMF Trust Deed may be exercised to achieve or promote, relevantly, any of the purposes for which the MMF Trust was created.

262 It may be inferred from the provisions of the MMF Trust Deed, read and construed as a whole, that those purposes included, relevantly:

- (a) conferring benefits from time to time on one or more of the Beneficiaries for the time being of the MMF Trust, as determined from time to time by the Trustee for the time being (at all material times, Slondia), subject to the provisions of the MMF Trust Deed, including any consent required from the Guardian for the time being (at all material times, Michael Mercanti) pursuant to cl 10 of the MMF Trust Deed; and
- (b) ensuring, in the context of a trust which may not vest until the Vesting Day (namely, 30 June 2055) and the existing provisions with respect to the effective control of the MMF Trust, that the provisions of the MMF Trust Deed with respect to the offices of Guardian and Appointor remain appropriate.

263 It may also be inferred from the provisions of the MMF Trust Deed, read and construed as a whole and in the context of the Australian statutory framework when the MMF Trust Deed was executed, that the purposes for which the MMF Trust was created included, relevantly, avoiding or minimising the imposition of taxation on the business carried on by Michael Mercanti at that time and, also, facilitating succession planning.

264 In my opinion, the characterisation by Michael Mercanti, Yvonne Mercanti and Tyrone Mercanti of the transfer by Michael Mercanti to Tyrone Mercanti of effective control of the MMF Trust as 'an advance on [Tyrone Mercanti's] inheritance' [68], did not render the execution of the MMF Trust Deed of Variation improper or liable to be set aside in equity. That characterisation was not materially inconsistent with the purposes for which the MMF Trust was created, as discerned from the provisions of the MMF Trust Deed read and construed as a whole and in the context of the Australian statutory framework when the MMF Trust Deed was executed.

265 I am also of the opinion that the execution of the MMF Trust Deed of Variation did not alter the 'substratum' of the MMF Trust. The determination of the substratum of a discretionary family trust is not without difficulty. That is especially so where, as in the present case, the trust deed is drafted to confer maximum flexibility in relation to the beneficiaries of the trust, the distribution or accumulation of capital and income, and the management and control of the trust. See, generally *Kearns* (110 - 111); *Lock* (606 - 607); *Cachia* [68] - [69]; *Bargwanna* [13]. I consider that, on the proper construction of the MMF Trust Deed as a whole in the context of a trust which may not vest until the Vesting Day (namely, 30 June 2055), the substratum of the MMF Trust was the conferral of benefits from time to time on one or more of the Beneficiaries for the time being of the MMF Trust, as determined from time to time by the Trustee for the time being, subject to the provisions of the MMF Trust Deed, including any consent required from the Guardian for the time being pursuant to cl 10 of the MMF Trust Deed. The substratum was not, in my view, to be ascertained or defined by reference to the identity of the persons or entities who, at the date of execution of the MMF Trust Deed, held the offices of Trustee, Guardian or Appointor. The variation sought to be impugned by Michael Mercanti and Jason Mercanti did not involve the variation of a particular purpose for which the MMF Trust was created so that it served a materially different purpose.

266 It was not improper for Slondia to execute the MMF Trust Deed of Variation or for Michael Mercanti to consent to its execution without the consent of or consultation with all of the Beneficiaries. The submission to that effect on behalf of Michael Mercanti and Jason Mercanti is without merit. As I have mentioned, subject to the provisions of the trust deed and subject to statute, the trustee of a discretionary family trust under which the beneficiaries have no more than a right of due administration is not bound, at least ordinarily, in the exercise of a discretionary power (including a discretionary power to vary the trust deed or to appoint new trustees), to observe the rules of procedural fairness or to refrain from exercising the power to a beneficiary's disadvantage without seeking and taking into account the views of that beneficiary. At the material time the Beneficiaries of the MMF Trust had no more than, relevantly, a right of due administration. No provision of the MMF Trust Deed supports Michael Mercanti's and Jason Mercanti's submission. Indeed, the nature and content of the powers conferred on the Trustee, the Guardian and the Appointor are inconsistent with the submission. Also, no statutory provision supports Michael Mercanti's and Jason Mercanti's submission. Further, on the facts which the trial judge found and was entitled to find,

there was no basis for requiring a departure from the ordinary rule in relation to consent and consultation.

267 In any event:

- (a) Michael Mercanti and Yvonne Mercanti sought and obtained independent legal advice from Brett Davies Lawyers in respect of the appointment of Tyrone Mercanti as the new Guardian and Appointor [20], [129] - [130];
- (b) Tyrone Mercanti gave evidence at the trial that he consulted with his elder brothers, Jamie Mercanti and Troy Mercanti, prior to his appointment as the new Guardian and Appointor, and they told him they were not interested in the business (ts 453, 457; pars 53 and 54 of exhibit 301);
- (c) the trial judge found Tyrone Mercanti to be a 'truthful and reliable witness' [30]; and
- (d) Jason Mercanti and Troy Mercanti did not give evidence at the trial.

268 Other matters complained of by counsel for Michael Mercanti and Jason Mercanti, namely that the Trust Fund included assets which were not intended to be 'inherited' by Tyrone Mercanti and which were intended ultimately to form part of the estate of Michael Mercanti and Yvonne Mercanti and be 'inherited' by their three other sons, and the existence for a considerable period of 'disharmony' between Tyrone Mercanti and his brothers, do not form a proper basis for interfering with his Honour's conclusion that Michael Mercanti and Jason Mercanti had not established that the variation was made for an improper or collateral purpose or that the variation should otherwise be set aside under the equitable doctrine of fraud on a power.

269 I note that the assets which Michael Mercanti and Yvonne Mercanti intended would be 'inherited' by their three other sons remain part of the Trust Fund and that Tyrone Mercanti, as the new Guardian and Appointor, is subject to any and all duties and constraints under the MMF Trust Deed and in equity in relation to the exercise of his powers as the holder of those offices.

270 In my opinion, the trial judge was correct, generally for the reasons he gave and on the basis of my reasoning at [249] - [269] above, in

concluding, in effect, that Michael Mercanti and Jason Mercanti had not made out their case that:

- (a) Slondia did not act honestly or in good faith in executing the MMF Trust Deed of Variation; or
- (b) Slondia did not exercise the power of variation in cl 28 of the MMF Trust Deed for a purpose for which it was conferred, but exercised it for an extraneous or ulterior purpose.

271 It was reasonably open to his Honour to make the findings of fact which underpin his conclusion that he was not satisfied that Slondia exercised its power to vary 'the trusts terms and conditions' of the MMF Trust Deed 'for any improper or collateral purpose' [145]. His Honour did not make any material error in his fact-finding process or in the facts as found.

272 Ground 4 fails.

#### **Ground 5: Michael Mercanti's and Jason Mercanti's submissions**

273 Counsel for Michael Mercanti and Jason Mercanti informed the court that Michael Mercanti and Jason Mercanti did not, in ground 5, challenge any of the trial judge's findings on credibility.

274 Counsel for Michael Mercanti and Jason Mercanti submitted that his Honour should have found that Michael Mercanti's agreement to and execution of the MMF Trust Deed of Variation was vitiated by equitable fraud, further or alternatively by undue influence, by reason of the following:

- (a) Tyrone Mercanti knew that the purpose of Michael Mercanti (and Yvonne Mercanti) in meeting with solicitors at Brett Davies Lawyers was 'to organise their wills'.
- (b) Before meeting with any solicitors at Brett Davies Lawyers, Tyrone Mercanti knew that Michael Mercanti (and Yvonne Mercanti) wanted Tyrone Mercanti to inherit the 'family business' (apart from one kiosk which they wanted Jason Mercanti to inherit) and for all other assets (including properties in their own names and properties owned by the discretionary family trusts) to be divided between Tyrone Mercanti's three brothers.
- (c) At the second meeting with solicitors from Brett Davies Lawyers, Michael Mercanti announced (for the first time, to Tyrone

Mercanti's knowledge) that he wanted to transfer control of the 'family business' to Tyrone Mercanti immediately (as an 'advance on his inheritance'), but that the other assets owned by the MMF Trust (the Other Properties) and one kiosk were to be dealt with in Michael Mercanti's and Yvonne Mercanti's wills and would be inherited by Jamie Mercanti, Jason Mercanti and the children of Troy Mercanti.

- (d) Tyrone Mercanti (and Brett Davies Lawyers) did not suggest to Michael Mercanti (or Yvonne Mercanti) at any time that Michael Mercanti should discuss the matter with solicitors from Brett Davies Lawyers in Tyrone Mercanti's absence.
- (e) Tyrone Mercanti did not suggest to Michael Mercanti (or Yvonne Mercanti) at any time that Michael Mercanti should discuss the matter with Mr Bizzaca or ask Michael Mercanti whether he had done so.
- (f) Solicitors at Brett Davies Lawyers explained at a meeting attended by Tyrone Mercanti that, if Michael Mercanti's wishes in relation to the Other Properties were to be carried out, the Other Properties would have to be removed from the Trust Fund of the MMF Trust.
- (g) Tyrone Mercanti knew that his appointment as Appointor of the MMF Trust would confer on him immediate control over the Trust Fund, including the Other Properties (if they had not been removed from the Trust Fund).
- (h) Tyrone Mercanti knew that he was Michael Mercanti's 'golden boy' and that his father trusted him implicitly.
- (i) Tyrone Mercanti knew that neither his father nor his mother was able to understand a legal document such as a trust deed without assistance.
- (j) Tyrone Mercanti knew that when his father executed the MMF Trust Deed of Variation he was relying on Tyrone Mercanti to ensure 'that what [his father] had instructed [Brett Davies Lawyers] was reflected in the documents'.
- (k) When Tyrone Mercanti caused Michael Mercanti to execute the MMF Trust Deed of Variation, he knew that the Other Properties had not been removed from the Trust Fund, but he did not bring that fact to Michael Mercanti's attention, merely explaining that he

relied on his father understanding that circumstance as a result of the meeting with solicitors from Brett Davies Lawyers and his father trusting him as the new Appointor.

- (l) Tyrone Mercanti did not provide an execution (or other) copy of the MMF Trust Deed of Variation to Michael Mercanti (or Yvonne Mercanti) for him to read or (if he so chose) to discuss with his other sons, Mr Bizzaca or solicitors from Brett Davies Lawyers before he executed the deed.
- (m) Tyrone Mercanti sent the execution copy of the MMF Trust Deed of Variation to Brett Davies Lawyers and they subsequently returned the deed to Tyrone Mercanti.
- (n) Tyrone Mercanti did not discuss with Michael Mercanti, Yvonne Mercanti, any of his brothers, Mr Bizzaca or Mr Bizzaca's partner (Mr Buhariwalla) or anyone else on their behalf that he had been made the Appointor of the MMF Trust until a dispute arose between him and his parents in 2013, that dispute giving rise to the litigation in question.

275 It was also submitted that the trial judge erred in finding that, when he executed the MMF Trust Deed of Variation, Michael Mercanti understood the implications of doing so. According to counsel, his Honour did not afford 'any weight, alternatively appropriate weight' to the undisputed evidence that, shortly after the MMF Trust Deed of Variation was executed, Michael Mercanti and Yvonne Mercanti consulted Brett Davies Lawyers for the purpose of executing their wills and that:

- (a) before the appointment, Michael Mercanti and Yvonne Mercanti sent Brett Davies Lawyers a note confirming that they wished to ensure that one kiosk was inherited by Jason Mercanti; and
- (b) at the appointment (and thereafter) they gave instructions and made statements to solicitors at Brett Davies Lawyers about reviewing the MMF Trust Deed,

all of which was consistent only with Michael Mercanti (and Yvonne Mercanti) having no such understanding.

### **Ground 5: relevant legal principles**

276 In *Nocton v Lord Ashburton* [1914] AC 932, Viscount Haldane LC explained that in Chancery the term 'fraud' came to be used to describe

'what fell short of deceit, but imported breach of a duty to which equity had attached its sanction' (953). A little later, his Lordship elaborated:

[W]hen fraud is referred to in the wider sense in which the books are full of the expression, used in Chancery in describing cases which were within its exclusive jurisdiction, it is a mistake to suppose that an actual intention to cheat must always be proved. A man may misconceive the extent of the obligation which a Court of Equity imposes on him. His fault is that he has violated, however innocently because of his ignorance, an obligation which he must be taken by the Court to have known, and his conduct has in that sense always been called fraudulent, even in such a case as a technical fraud on a power. It was thus that the expression 'constructive fraud' came into existence. The trustee who purchases the trust estate, the solicitor who makes a bargain with his client that cannot stand, have all for several centuries run the risk of the word fraudulent being applied to them. What it really means in this connection is, not moral fraud in the ordinary sense, but breach of the sort of obligation which is enforced by a Court that from the beginning regarded itself as a Court of conscience (954).

277 More recently, Owen J noted in *Bell* that 'equitable fraud' is 'one of those compendious phrases that slips easily off the tongue' and yet 'its simplicity masks conceptual difficulties of significant proportions' [4843].

278 The doctrine of equitable fraud is fluid and flexible. In *Fardon v Attorney-General for the State of Queensland* [2004] HCA 46; (2004) 223 CLR 575 [105], Gummow J quoted this passage in a letter written by Lord Hardwicke LC to Lord Kames (reproduced in Parkes, *A History of the Court of Chancery* (1828), 508):

But as to relief against frauds, no invariable rules can be established. Fraud is infinite, and were a Court of Equity once to lay down rules, how far they would go, and no farther, in extending their relief against it, or to define strictly the species or evidence of it, the jurisdiction would be cramped, and perpetually eluded by new schemes, which the fertility of man's invention would contrive.

279 However, equitable doctrines must develop from recognised underlying principles and not according to idiosyncratic notions of fairness and justice. See *Muschinski v Dodds* [1985] HCA 78; (1985) 160 CLR 583, 615 - 616 (Deane J).

280 In *Bell*, Owen J, after recognising 'the tension between the expansive and principled approaches to the development of equitable doctrines' [4843], observed:

The doctrine of equitable fraud is broad and, like many equitable principles, cannot easily be defined. It cannot be confined to a strict set of

elements or identified according to criteria that can be set out in an exhaustive and all-embracing list. Fundamentally, fraud is abhorrent to the good conscience on which the principles of equity are based. The principles that underpin the doctrine of equitable fraud deal with the control of legal rights where their exercise would be so prejudicial to other parties as to amount to an act of fraud. The equitable jurisdiction in fraud encompasses all grounds for equitable relief except for accident or breach of trust [4845].

281 A number of recognised categories of equitable fraud have been established. Examples are enumerated in Meagher, Gummow & Lehane's *Equity Doctrines and Remedies* (5th ed, 2015) [12-050]. The categories include 'undue influence', pursuant to which a court sets aside a transaction which has been procured unconscionably as a result of the relationship between the parties.

282 In Sir Frederick Jordan's *Chapters on Equity in New South Wales* (6<sup>th</sup> ed, 1947), it is stated:

- (a) a court of equity regards the free consent of the parties concerned as essential to every dealing;
- (b) whenever one person procures another to enter into a transaction, or make a gift, 'by so dominating his mind as to prevent him from exercising a free discretion', the transaction or gift will have been produced by 'undue influence'; and
- (c) the party influenced is entitled to avoid the transaction or gift in equity, if it is inter vivos, although the influence 'may fall altogether short of common law duress' (136).

283 In *Quek v Beggs* (1990) 5 BPR 11,761, McLelland J said:

Generally speaking, the law permits a person of full age and capacity to dispose of his or her property by gift or otherwise in such manner as he or she may choose. However in certain recognised categories of case, principles of equity intervene to render such a [transaction or] gift liable to be set aside by the court. One of those categories is where the donor [enters into the transaction or] makes the gift as a result of 'undue influence' of the donee. In this context 'influence' means a psychological ascendancy by the donee over the donor, and 'undue influence' means the donee's taking improper advantage of such ascendancy: *Union Bank of Australia Ltd v Whitelaw* [1906] VLR 711 at 720. It is not necessary that the ascendancy amount to domination: *Goldsworthy v Brickell* [1987] Ch 378 at 402 - 406 (11,764).



284           A donor or his or her legal personal representative will prima facie be entitled to have a transaction or gift set aside on the ground of undue influence upon proof of:

- (a)       facts establishing that the transaction or gift was made by the donor as a result of the donee's undue influence; or
- (b)       facts that give rise to a presumption that the transaction or gift was so made, unless the donee rebuts the presumption.

See *Quek* (11,764).

285           A presumption of undue influence will arise where it is proved that:

- (a)       at the time of the transaction or gift there existed a relationship between the donor and the donee of such a nature as to involve reliance, dependence or trust on the donor's part which created an ascendancy on the donee's part; and
- (b)       the transaction is so improvident or the gift is so substantial as not to be reasonably accounted for on the ground of friendship, relationship, charity or other ordinary motives on which ordinary persons act.

See *Johnson v Buttress* [1936] HCA 41; (1936) 56 CLR 113, 134 - 135 (Dixon J; Evatt J agreeing); *Goldsworthy v Brickell* [1987] Ch 378, 400 - 401 (Nourse LJ; Parker LJ & Sir John Megaw agreeing); *Quek* (11,764).

286           Where the presumption arises, 'the Court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused': *Allcard v Skinner* (1887) 36 Ch D 145, 171 (Cotton LJ). See also *Bank of New South Wales v Rogers* [1941] HCA 9; (1941) 65 CLR 42, 85 (Williams J); *Antony v Weerasekera* [1953] 1 WLR 1007, 1011 (Lord Normand, Lord Cohen & Sir Lionel Leach); *Quek* (11,764). As Dixon J observed in *Johnson*:

[The donee] has chosen to accept a benefit which may well proceed from an abuse of [his position of ascendancy] and the relations between him and the donor are so close as to make it difficult to disentangle the inducements which led to the transaction. These considerations combine with reasons of policy to supply a firm foundation for the presumption against a voluntary disposition in his favour (135).

287 When certain well-established relationships, such as solicitor and client, trustee and beneficiary, parent and young child, and doctor and patient are proved, the presumption will arise. But the classes of relationship which will give rise to the presumption are not closed. The presumption will arise wherever one party occupies or assumes a position naturally involving influence over another. See *Johnson* (134 - 138); *Goldsworthy* (401); *Quek* (11,764).

288 Where the presumption of undue influence arises the donee may rebut the presumption by proving that the donor:

- (a) knew and understood what he or she was doing; and
- (b) was acting independently of any influence arising from the donee's ascendancy.

See *West v Public Trustee* [1942] SASR 109, 119 (Mayo J); *Quek* (11,765).

289 It is not sufficient to prove only the first condition. As Lord Eldon observed in *Huguenin v Baseley* (1807) 33 ER 526:

The question is, not, whether she knew what she was doing ... but how the intention was produced (536).

See also *Harris v Jenkins* [1922] HCA 54; (1922) 31 CLR 341, 368 (Starke J); *Rogers* (54), (85); *Quek* (11,765).

290 As to the second condition, it is not necessarily sufficient to prove that the proposal to make the gift originated with the donor (*Spong v Spong* [1914] HCA 52; (1914) 18 CLR 544, 549 (Griffith CJ; Isaacs, Gavan Duffy, Powers & Rich JJ agreeing)) or that no active steps were taken by the donee to procure the gift (*Allcard* (183 - 186); *Wright v Carter* [1903] 1 Ch 27, 52 - 53 (Vaughan Williams LJ). In *Quek McLelland J* said (11,765):

The matters which in a particular case will need to be proved in order to rebut the presumption will depend upon the nature and incidents of the relationship on which the presumption is founded, since the influence which arises from different kinds of relationships varies in kind and degree: *Johnson* at 134.

### **Ground 5: its merits**

291 The trial judge was not satisfied, for the following reasons, that the claim of equitable fraud had been made out:

I am not satisfied that [Michael Mercanti's and Jason Mercanti's] claim of equitable fraud is made out. Michael understood the role and power of the Appointor. It was explained to him in words and pictures by Mr Davies. Michael intended that Tyrone should become Appointor of the trusts and control the trusts. Michael gave instructions to that effect to Mr Nettleton. Michael knew that the deeds of variation transferred control of the trusts to Tyrone. He instructed Mr Nettleton to draft the deeds to have that effect.

I am not satisfied that Michael believed, when he signed the deeds of variation, that they transferred to Tyrone as Appointor control of the business excluding a kiosk that was to be transferred to Jason and the real properties. The plaintiffs have not explained how Michael could have had that belief. He knew that the deeds made Tyrone Appointor of the trusts. The consequence of that had been explained to him by Mr Davies and Mr Nettleton. Michael did not claim to have been told that some other instrument or instruments had been executed which had the effect of excluding one kiosk and the real properties from the trusts. Michael's evidence, which I do not accept, is that he did not intend and did not give instructions for Tyrone to be immediately appointed Appointor of the trusts. I accept that Michael intended that one kiosk should go to Jason and the real properties to his other sons on his death. That could be achieved by those properties being removed from the MMF Trust. Michael and Yvonne continued to control the trustee, Slondia, and could have effected that intention. There is no evidence that at the time the deeds of variation were executed Tyrone intended to replace Slondia as trustee or that Michael or Yvonne contemplated that Tyrone might do so in the near future [148] - [149].

292 Also, his Honour was not satisfied, for the following reasons, that the claim of undue influence had been made out:

I am not satisfied that at the time of the execution of the deeds of variation Tyrone exercised dominion over Michael and Michael depended upon Tyrone such as to give rise to a presumptive relationship of undue influence. In 2004 Michael was 71 years of age. That does not give rise to any presumption that he was in poor health, that his intellectual capacities had diminished or that he was in any way dependent upon Tyrone. There is no evidence of any of those things. Michael was an experienced and successful businessman. He wanted to step back from the business and was in the process of transferring management of the family business to Tyrone but he was still involved in the running of the business. Michael and Yvonne attended upon Mr Bizzaca each year to go through the accounts of the business and the trusts.

In his evidence Tyrone accepted that Michael trusted him and agreed that Tyrone was 'the golden boy'. Tyrone said that when he asked Michael to sign a document his normal practice was that he would tell Michael what the document was and then ask him to sign it. It is not uncommon in the case of a father and son involved in running a business that the father

should trust the son. It is not uncommon that a father might sign a document after the son has described the contents of it to him. Many people sign legal documents after the contents have been described to them but without reading the text of the document. That does not give rise to a presumption of dominion or ascendancy. I am not satisfied that the evidence establishes a presumptive relationship of undue influence.

In any event, I am satisfied that Michael had the capacity to understand the transactions effected by the deeds of variation, he did understand them, he received advice from a lawyer, Mr Nettleton, about the effect of them and he freely exercised his will in causing Slondia and Citycourt to enter into the transactions, to apply the company seals and to consent to the transactions as Appointor and Guardian or Appointor. Michael initiated the meeting with Brett Davies Lawyers on the recommendation of Mr Torre. Tyrone played no part in instigating or arranging the meeting. Tyrone attended the meetings at the request of Michael. Michael did most of the talking. Tyrone said little. Michael gave the instructions to Mr Nettleton to draft the deeds of variation. He did so after Mr Davies had explained the role of appointor and guardian. I am satisfied that Michael understood the transactions effected by the deeds of variation and freely exercised his will to cause Slondia and Citycourt to enter into those transactions, to apply the company seals and to give his consent as Appointor and Guardian or Appointor [155] - [157].

293        Ground 5 cannot be established unless the trial judge's findings of fact concerning the meetings at Brett Davies Lawyers are set aside. Those findings were based on the evidence of Mr Nettleton, Mr Torre and Tyrone Mercanti. His Honour said that each of them was a reliable witness [30], [31], [34]. There is no basis for impeaching his Honour's credibility-based assessment of Mr Nettleton, Mr Torre and Tyrone Mercanti.

294        Ground 5 is unsustainable for a number of specific reasons.

295        First, his Honour did not accept Michael Mercanti's evidence that he did not intend, and he did not give instructions for, Tyrone Mercanti to be made the Appointor of the MMF Trust immediately [149].

296        Secondly, his Honour did not accept Michael Mercanti's evidence that he 'believed', when he executed the MMF Trust Deed of Variation, that it transferred control of the business to Tyrone Mercanti, but excluded a kiosk that was to be transferred to Jason Mercanti and, also, various real properties [149].

297        Thirdly, his Honour did not accept that Michael Mercanti or Yvonne Mercanti was a reliable witness [19] - [24], [149].

298       Fourthly, his Honour found that Mr Davies of Brett Davies Lawyers explained the role of the Appointor under the MMF Trust to Michael Mercanti at the meeting on 27 May 2004 in terms that Michael Mercanti understood [137], [148].

299       Fifthly, his Honour found that at the meeting on 15 June 2004 Michael Mercanti and Yvonne Mercanti instructed Mr Nettleton to amend the MMF Trust Deed to make Tyrone Mercanti the Appointor in place of Michael Mercanti. Michael Mercanti and Yvonne Mercanti understood the nature and effect of the MMF Trust Deed of Variation. They wanted Michael Mercanti to 'step back' from the business and Tyrone Mercanti to become the Appointor. His Honour accepted the evidence of Mr Nettleton and Tyrone Mercanti on that point.

300       It was reasonably open to the trial judge to make the findings of fact which underpin his conclusion that Michael Mercanti's consent to the terms of the MMF Trust Deed of Variation was not vitiated by equitable fraud or undue influence. His Honour did not make any material error in his fact-finding process or in the facts as found.

301       Ground 5 fails.

#### **Ground 6: Michael Mercanti's and Jason Mercanti's submissions**

302       Michael Mercanti and Jason Mercanti pleaded in their statement of claim, but Tyrone Mercanti and Parradele denied in their defence, that if Tyrone Mercanti was the Appointor under the MMF Trust Deed, he owed the Beneficiaries of the MMF Trust:

- (a)     a fiduciary duty, alternatively a duty, to exercise the powers of the Appointor under the MMF Trust Deed bona fide for the purpose for which they were conferred; and
- (b)     a duty to communicate with the Beneficiaries and hear and consider their objections before exercising any of the powers of the Appointor under the MMF Trust Deed in circumstances where the Beneficiaries were likely to oppose the proposed exercise of power.

303       Michael Mercanti and Jason Mercanti also pleaded, and Tyrone Mercanti and Parradele admitted, that Tyrone Mercanti purported to exercise the powers of the Appointor under the MMF Trust Deed to remove Slondia as Trustee of the MMF Trust, and to appoint Parradele in its place, in the following circumstances:

- (a) Slondia had been the sole Trustee of the MMF Trust since the trust was established in 1979;
- (b) Parradele was owned and controlled by Tyrone Mercanti;
- (c) the exercise of the powers conferred on the Appointor had the effect of transferring control of the MMF Trust to Tyrone Mercanti;
- (d) Tyrone Mercanti did not consult or give notice to his parents or his brothers in relation to his proposed exercise of power; and
- (e) Tyrone Mercanti knew that his parents and his brothers would be likely to oppose the removal of Slondia and the appointment of Parradele in its place.

304 Michael Mercanti and Jason Mercanti further pleaded, but Tyrone Mercanti and Parradele denied, that, in the premises, Tyrone Mercanti acted in breach of his duties as Appointor, and Parradele was knowingly involved in, alternatively knowingly received the benefit of, those breaches of duty.

305 The trial judge found that:

Tyrone says 'in response to the conduct of my parents and my brothers' he executed the notices of removal and acceptance of appointment of trustee [169].

Tyrone said that his intention was to retain the status quo in the sense of maintaining his position within the group. He said that the exercise of the power put him back where he was the day before his parents and brothers seized control of the business premises and dismissed him as managing director of Slondia and Citycourt. He did that by replacing Slondia and Citycourt as trustees with Parradele, a company controlled by himself and his wife [170].

The trigger for Tyrone executing the notices of removal and appointment was his parents and brothers seizing control of the business premises and dismissing him as managing director on 30 July [172].

The status quo before 30 July was that Tyrone was the managing director of each of the trustees and the general manager of the business. He had been managing director for nine years and general manager for 17 years [174].

Those findings have not been challenged.

306 Counsel for Michael Mercanti and Jason Mercanti submitted that:

- (a) his Honour erred in failing to conclude that the power to appoint a new Trustee in cl 21 of the MMF Trust Deed is a 'fiduciary power'; and
- (b) in any event, whether the power of appointment is a 'fiduciary power', or merely a 'non-fiduciary power' which must be exercised in good faith for the purpose for which it was conferred, his Honour should have held that Tyrone Mercanti's conduct was in breach of his fiduciary power, alternatively involved the exercise of his non-fiduciary power other than in good faith and for the purpose for which it was conferred.

307 It was submitted that the trial judge misdirected himself in focusing on whether '[t]he action of Tyrone in removing Slondia and Citycourt as trustees and replacing them with Parradele ... [gives] rise to an inference that Tyrone did so for any purpose other than that Parradele would properly fulfil its duties as trustee including properly managing the business' [176]. Counsel asserted that Michael Mercanti and Jason Mercanti were not bound to establish that Tyrone Mercanti intended that Parradele would not properly fulfil its duties as Trustee (including properly managing the business). It was enough for Michael Mercanti and Jason Mercanti to establish that Tyrone Mercanti exercised the power for 'a purpose personal to him as opposed to a purpose related to the best interests of the [MMF Trust] and its beneficiaries as a whole'.

308 Further, counsel for Michael Mercanti and Jason Mercanti submitted that even if the matter is analysed (as his Honour did) by reference to the 'status quo', the relevant status quo was that Slondia had been the Trustee of the MMF Trust for more than 17 years and its shareholders and directors comprised Michael Mercanti, Yvonne Mercanti, Tyrone Mercanti and Vanessa Mercanti. Accordingly, so it was argued, Tyrone Mercanti held the positions of managing director of Slondia and general manager of the business at 'his parents' pleasure'. Consequently, Tyrone Mercanti's conduct did not involve maintaining the status quo, but rather changed the status quo substantially, by removing Slondia as the Trustee and transferring effective control of the MMF Trust from Michael Mercanti to himself.

### **Ground 6: relevant legal principles**

309 I have already examined, in considering the merits of ground 4, the equitable doctrine of fraud on a power in the context of powers conferred on a trustee under the trust deed.

310 Ground 6 is concerned with the equitable doctrine of fraud on a power in the context of powers created by a trust deed and conferred on a person who is not the trustee.

311 In *Re Skeats' Settlement* (1889) 42 Ch D 522, by a settlement made on the marriage of the defendant husband and the plaintiff wife, property and funds belonging to the wife were settled on trust for her for life and, after her death, for the children of the marriage. The deed provided that if any of the trustees appointed under the deed, or any future trustee, should die or go to reside abroad, or should desire to retire from or refuse or become incapable to act in the trusts, the husband and wife, during their joint lives, and the survivor of them during his or her life, were empowered to appoint a replacement trustee or trustees. The husband and wife, in exercise of that power, purported to appoint the husband and another person to be trustees in the place of retiring trustees. It was held that:

- (a) a power of appointing new trustees was fiduciary, and the donee of such a power could not appoint himself; and
- (b) the terms of the power in question required that the trustee or trustees to be appointed should be some person or persons 'other' than the person or persons making the appointment.

312 Accordingly, the appointment of the husband and the other person to be trustees was invalid.

313 Kay J said:

The ordinary power of appointing new trustees, under a settlement such as this is, of course imposes upon the person who has the power of appointment the duty of selecting honest and good persons who can be trusted with the very difficult, onerous, and often delicate duties which trustees have to perform. He is bound to select to the best of his ability the best people he can find for the purpose. Is that power of selection a fiduciary power or not? I will try it in this way, which I offered as a test in the course of the argument. Suppose, as happens not unfrequently, that trustees, under the terms of the deed of trust, are entitled to remuneration by way of annual salary or payment. Could the person who has the power of appointment put the office of trustee up for sale, and sell it to the best bidder? It is clear that would be entirely improper. Could he take any remuneration for making the appointment? In my opinion, certainly not. Why not? The answer is that he cannot exercise the power for his own benefit. Why not again? The answer is inevitable. Because it is a power which involves a duty of a fiduciary nature; and I therefore come to the conclusion, independently of any authority, that the power is a fiduciary



power. The case cited before Lord Eldon seems expressly to confirm that view. Lord Eldon did treat it as a power in the exercise of which the appointor had a fiduciary duty to perform, which he could not exercise in any way for his own benefit, and in exercising which he was bound to do the best in the interests of the cestuis que trust whose trustee he was appointed. I therefore come without any hesitation to the conclusion that this power is of a fiduciary nature. Now what is the rule, the universal rule, observed in Courts of Justice as to a duty of that kind? The universal rule is that a man should not be judge in his own case; that he should not decide that he is the best possible person, and say that he ought to be the trustee. Naturally no human being can be imagined who would not have some bias one way or the other as to his own personal fitness, and to appoint himself among other people, or excluding them to appoint himself, would certainly be an improper exercise of any power of selection of a fiduciary character such as this is. In my opinion it would be extremely improper for a person who has a power to appoint or select new trustees to appoint or select himself, for that principal reason (526 - 527).

See also *Re Newen* [1894] 2 Ch 297, 308 - 309 (Kekewich J).

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In *Inland Revenue Commissioners v Schroder* [1983] STC 480, the taxpayer settled his interest in certain shares in a company on discretionary trusts. The trusts were created subject to Bahamian law. The initial trustees were resident in the Bahamas. By the trust deed, a committee of protectors was created with power to remove and appoint trustees. A committee member could be removed by a majority of the committee and, in the event of a vacancy occurring, the taxpayer/settlor had power to fill the vacancy and to appoint additional members. Vinelott J held that the taxpayer/settlor's powers in relation to the appointment of trustees, whether directly or through the appointment of committee members, were fiduciary powers which could not properly be used to ensure that he had a majority which would follow his directions. His Lordship said:

Counsel for the Crown submitted that under these provisions the settlor has the practical ability to remove a trustee and appoint a new trustee in the place of the trustee so removed, and so can in effect make and unmake trustees until he has secured a body which will prove compliant to his wishes. I do not think the settlor has in fact power even indirectly to make and unmake trustees. The power to remove trustees is vested in the committee, and although the settlor can fill vacancies or possibly appoint additional members of the committee even when there is no vacancy, that power, like the power to appoint new trustees, must I think be a fiduciary power. It could not properly be used to 'pack' the committee to ensure that the settlor has a majority which will follow his directions. Similarly, the committee's power to remove and his power to appoint new trustees are fiduciary powers. Even though these powers are unusual it cannot in my

judgment be said that the settlor has put himself in a position where he can secure the appointment of trustees who would follow his wishes and who would not exercise any discretion of their own. The terms of the settlements, therefore, do not in my judgment found or support the inference which counsel for the Crown seeks to draw (500).

315 In *Re Burton* (1994) 126 ALR 557, Burton, a bankrupt, was the appointor under a discretionary family trust. The trust deed conferred on the appointor power to remove a trustee and appoint a new trustee. Burton's trustee in bankruptcy, fearing Burton would exercise that power to frustrate Burton's personal creditors, sought to restrain Burton from exercising the power. Davies J held that the power of removal and appointment was a fiduciary power which must be exercised in the interests of the beneficiaries and solely in furtherance of the purpose for which it was conferred. His Honour said:

[T]he power to remove a trustee and to appoint a new trustee is neither a general power of appointment nor a power which may be executed in the interests of the appointor. The interests of persons other than the appointor must be taken into account. The power is a trust or fiduciary power, being a power conferred by a deed of trust, and must be exercised accordingly, in the interests of the beneficiaries.

A power, even though not a fiduciary power, must be exercised solely in furtherance of the purpose for which it was conferred. In *Duke of Portland v Topham* (1864) 11 HLC 31; 11 ER 1242, the Lord Chancellor, Lord Westbury said at HLC 540; ER 1251:

Without farther dwelling on the matter, in as much as your Lordships concur in opinion, I think we must all feel that the settled principles of the law upon this subject must be upheld, namely, that the donee, the appointor under the power, shall, at the time of the exercise of that power, and for any purpose for which it is used, act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object (I mean sinister in the sense of its being beyond the purpose and intent of the power) which he may desire to effect in the exercise of the power.

When the power is contained in a deed of trust, the donee of the power is even more constrained to act in the interests of the persons for whose benefit the power was conferred. Thus, in *Re Skeats' Settlement* (1889) 42 Ch D 522, Kay J held that, as a power of appointing new trustees was fiduciary power, the donee of the power may not exercise it so as to appoint to himself (559 - 560).

316 In *Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liq)* [2001] FCA 1628; (2001) 188 ALR 566, the trust deed evidencing a unit trust provided that the trustee may be removed by 'the Unit Holders who shall so determine from time to time by a resolution passed or agreed to by the holders of 75 per centum in number of the Units issued from time to time'. Finkelstein J observed, in relation to that power:

*I am prepared to accept that a power of removal of a trustee may be a fiduciary power that must be exercised for the benefit of the beneficiaries and not for the benefit of the donee of the power, at least when the donee is not a beneficiary, although much will depend upon the terms of the trust instrument: Re Skeats' Settlement* (1889) 42 Ch D 522 at 526; [1886-90] All ER Rep 989 at 990; *Inland Revenue Commissioners v Schroder* [1983] STC 480 at 500. However, it is not likely that such an obligation will be imposed when it is the beneficiary that has been given the power of removal. In that circumstance it may usually be assumed that the beneficiary is entitled to act in his own interests when exercising the power. Unitholders are not trustees for the trust or for one another, and the relations between them cannot be compared with the relations between fiduciaries such as trustee and beneficiary, partners, principal and agent, and so on. However, while a beneficiary may act in his own interests, I do accept that there should be some limitations on the exercise of a power of removal. One restriction that I would adopt is that the power must not be exercised fraudulently. There may be other limitations as well [98]. (emphasis added)

317 Finkelstein J's judgment in *Fitzwood* was reversed by a Full Court of the Federal Court. See *Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liq)* [2002] FCAFC 285. However, the appeal was allowed on a different point and the Full Court did not cast any doubt on the correctness of the passage I have reproduced from Finkelstein J's reasons for decision.

318 The issue considered in *Re Skeat's Settlement*, *Re Newen*, *Schroder*, *Re Burton* and *Fitzwood* has also been considered in a number of other cases including *Pope v DRP Nominees Pty Ltd* [1999] SASC 337; (1999) 74 SASR 78 [46] - [47]; *Hillcrest (Ilford) Pty Ltd v Kingsford (Ilford) Pty Ltd (No 2)* [2010] NSWSC 285; (2010) 4 ASTLR 233 [38] - [39]; *Rayner v NJ Sheaffe Pty Ltd* [2010] NSWSC 810 [150], [152]; *Berger v Lyster Pty Ltd* [2012] VSC 95 [67] - [85].

319 In my opinion, not every power created by a trust deed, and conferred on a person or entity who is not the trustee, is necessarily a fiduciary power.

320 In general:

- (a) if the holder of a power created by a trust deed is entitled, on a proper construction of the trust deed, to exercise the power *for his or her own benefit*, then the power will be personal as distinct from fiduciary;
- (b) if the holder of a power created by a trust deed is not entitled, on a proper construction of the trust deed, to exercise the power for his or her own benefit, but is bound to exercise the power for the benefit of *other persons or entities*, then the power will be fiduciary as distinct from personal.

321 The position where a power created by a trust deed is exercisable by the holder of the power for the benefit of *a class of persons or entities, including the holder of the power*, is less clear. The rights and duties of the holder in relation to the exercise of the power will, in general, depend on the proper construction of the provisions conferring the power in the context of the trust deed as a whole and the relevant principles of equity.

#### **Ground 6: its merits**

322 The trial judge gave this description of the circumstances in which Tyrone Mercanti, as Appointor, appointed Parradele as the new Trustee of the MMF Trust in place of Slondia:

In his witness statement Tyrone says that on 30 July 2013, without any warning and whilst he was in China on company business, he was removed as a director of Slondia and Citycourt. He says that he was on the telephone with Larry Thomas, the CFO of the business, when Mr Thomas had the telephone taken out of his hand by Jason. Jason told Tyrone that Mr Thomas was busy talking to the new owners of the business and then hung up. Later that afternoon Mr Thomas told Tyrone that Michael, Yvonne, Jamie and Jason, together with others, had entered the business premises and taken control of the office and stated that Tyrone was no longer in control and that they were in control. Tyrone says that the then current management team of the business - the general manager, the CFO and the office administrator did not return to work after 30 July. They had worked for the business for approximately the last 10 years. Tyrone says 'in response to the conduct of my parents and my brothers' he executed the notices of removal and acceptance of appointment of trustee [169].

323 His Honour found:

In my opinion, [Michael Mercanti and Jason Mercanti] have not established that Tyrone executed the notices of removal and appointment for any improper or ulterior purpose. The trigger for Tyrone executing the notices of removal and appointment was his parents and brothers seizing

control of the business premises and dismissing him as managing director on 30 July, not the impending application for an interlocutory injunction.

Tyrone's purpose in exercising the power of removal and appointment was to restore the status quo, the state of affairs existing immediately preceding Michael taking over the business premises and the management of the business.

The status quo before 30 July was that Tyrone was the managing director of each of the trustees and the general manager of the business. He had been managing director for nine years and general manager for 17 years. The chief financial officer was Mr Thomas, who had been there for about six years. On 30 July Michael and Yvonne, without prior consultation with or notice to Tyrone, removed him as a director of each of Slondia and Citycourt and, with the assistance of Jamie and Jason, seized control of the business premises and management of Slondia and Citycourt and the business.

Appointing a company controlled by him as trustee was not of itself the exercise of the power by Tyrone for a foreign or improper purpose. Tyrone's purpose was to appoint in place of Slondia and Citycourt as trustee of each trust a company which would reinstate the management of the business which had been removed without consultation or notice by Slondia and Citycourt acting by its shareholders, Michael and Yvonne. There is no evidence that Tyrone intended to effect any purpose beyond putting Parradele in control of the trusts and the management of the family business. For example, there is no evidence that Tyrone intended Parradele to deal improperly with trust assets. As trustee, Parradele was bound to exercise its powers, including its power in relation to the assets and income of the trusts, as a fiduciary.

Tyrone's purpose was to restore the status quo in the sense I have described. There is no evidence that Tyrone did so to achieve any purpose other than the proper and effective management of the business. It is not for the court to assess the relevant competence of Parradele on the one hand and Slondia and Citycourt on the other hand to act as trustees of the trusts and control the management of the business. The action of Tyrone in removing Slondia and Citycourt as trustees and replacing them with Parradele does not give rise to an inference that Tyrone did so for any purpose other than that Parradele would properly fulfil its duties as trustee including properly managing the business. [Michael Mercanti and Jason Mercanti] have not established that Tyrone executed the notices of removal and acceptance of appointment of trustee for any improper or ulterior purpose [172] - [176].

324        So, on the trial judge's findings, Tyrone Mercanti's purpose in exercising the power of removal and appointment was to preserve the status quo which had existed for at least a decade. Until 30 July 2013, Tyrone Mercanti had been the managing director of Slondia and the

general manager of the business carried on by Slondia as Trustee of the MMF Trust. He had been the managing director for nine years and the general manager for 17 years. When he was in China, his parents and two of his brothers took physical control of the trust business. They did so in a manner that effectively repudiated the MMF Trust Deed of Variation.

325       The exercise by Michael Mercanti and Yvonne Mercanti of their powers to remove Tyrone Mercanti as a director of Slondia were powers relating to Slondia in its corporate capacity and not the MMF Trust. By contrast, Tyrone Mercanti's exercise of his power as Appointor to remove Slondia and appoint Parradele as Trustee were powers relating to the MMF Trust and not Slondia in its corporate capacity. His Honour's references to the status quo were, appropriately, to the status quo relating to the MMF Trust as opposed to the status quo relating to Slondia in its corporate capacity.

326       The effect of Tyrone Mercanti exercising his power as Appointor to remove Slondia and appoint Parradele as Trustee was consistent with the purpose of the MMF Trust, as revealed by the MMF Trust Deed of Variation. The effect of executing the MMF Trust Deed of Variation in 2004 was to transfer effective control of the MMF Trust and its business to Tyrone Mercanti immediately. Tyrone Mercanti's action in preserving the status quo was not improper. He was not acting dishonestly or in bad faith or for any extraneous or ulterior purpose.

327       The trial judge's finding that there was no evidence that Tyrone Mercanti, in exercising his power as Appointor to remove Slondia and appoint Parradele as Trustee, sought to achieve any purpose other than 'the proper and effective management of the [trust] business' [176], was consistent with and, in substance, involved an additional finding that Michael Mercanti and Jason Mercanti had failed to establish that Tyrone Mercanti exercised the power for a purpose personal to him as distinct from a purpose related to the best interests of the MMF Trust and the Beneficiaries as a whole.

328       Michael Mercanti's and Jason Mercanti's submission that Tyrone Mercanti should have sought the views of the Beneficiaries before appointing Parradele as the new Trustee is without merit. See my reasons at [228] - [239], [266] - [267] above in relation to a similar point taken in the context of ground 4. Further, and in any event, Tyrone Mercanti's parents and two of his brothers had made their views abundantly clear by their actions on 30 July 2013.

329           It was reasonably open to his Honour to make the findings of fact which underpin his conclusion that Michael Mercanti and Jason Mercanti had not established that Tyrone Mercanti's conduct in causing Slondia to be removed as Trustee, and Parradele to be appointed as the new Trustee, of the MMF Trust did not constitute a fraud on the power of the Appointor or a breach of duty. His Honour did not make any material error in his fact-finding process or in the facts as found.

330           Ground 6 fails.

### **Ground 7**

331           Ground 7 is predicated on Michael Mercanti and Jason Mercanti establishing that the trial judge made an error of law as alleged in one or more of the other grounds of appeal. His Honour did not make any of the alleged errors.

### **Conclusion**

332           The appeal should be dismissed.

## **NEWNES & MURPHY JJA:**

### **Introduction**

333           This is an appeal from a decision of Le Miere J: *Mercanti v Mercanti*<sup>1</sup> (primary reasons). The appeal concerns the proper construction and application of a family discretionary trust deed. The trust, described as 'The Michael Mercanti Family Trust' (MMF Trust), was established by a deed in 1979 (MMF Trust Deed). The assets of the MMF Trust included a business which had been established originally by the first appellant, Michael Mercanti.

334           These reasons will, like the primary reasons, and with no disrespect to the individuals involved, refer to the first appellant as 'Michael'; the first respondent as 'Tyrone'; the second respondent as 'Parradele'; the third respondent as 'Slondia'; and Michael's wife (and Tyrone's mother) as 'Yvonne'.

335           By way of overview, Michael was the original Appointor and Guardian under the MMF Trust Deed. Slondia was the Trustee. At all material times prior to 2004, Michael and Yvonne held all the shares in Slondia, and Michael, Yvonne and Tyrone were its directors. In 2004,

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<sup>1</sup> *Mercanti v Mercanti* [2015] WASC 297.

Slondia, with Michael's express consent as Guardian, varied the MMF Trust Deed (MMF Variation Deed) to remove Michael as Guardian and Appointor, and to replace him with Tyrone. Subsequently, in 2013, Tyrone exercised his power as Appointor to remove Slondia as Trustee of the MMF Trust, and appointed Parradele, a company controlled by Tyrone, as Trustee.

336           At the time of the execution of the MMF Variation Deed in 2004:<sup>2</sup>

- (a)     Michael was approximately 70 years of age, and Michael's attendances at, and involvement in, the business had progressively diminished over the preceding eight years;
- (b)     Tyrone, who was Michael and Yvonne's youngest son, had spent much of his time working in the family business since leaving school in 1990;
- (c)     in 1996, Tyrone was engaged as general manager of the business;
- (d)     Tyrone was the managing director of Slondia, having been appointed a director in 2001;
- (e)     Tyrone had breakfast with his parents every day and discussed business matters with them;
- (f)     Tyrone's brothers had much less involvement in the family business; and
- (g)     Tyrone had a close relationship with his parents.

337           Tyrone's close relationship with his parents deteriorated in late 2012, including over disputes as to whether Michael should receive more income from the business and have his credit card expenses paid.<sup>3</sup> On 30 July 2013, whilst Tyrone was in China on business, Michael and Yvonne, as shareholders of Slondia, removed Tyrone as director of Slondia, entered the business premises and took control of them.<sup>4</sup> Later that day, Tyrone heard that he was no longer authorised to manage the business and had been removed as a director of Slondia.<sup>5</sup>

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<sup>2</sup> Primary reasons [13], [29] - [30], [40] - [42].

<sup>3</sup> Primary reasons [58].

<sup>4</sup> Primary reasons [64].

<sup>5</sup> Primary reasons [64].



338           On 31 July 2013, Tyrone and Parradele executed notices removing Slondia as Trustee of the MMF Trust and appointing Parradele as Trustee in its place.<sup>6</sup>

339           In general terms, the primary proceedings concerned claims by Michael that on the proper construction of the MMF Trust Deed, there was no power to replace Michael with Tyrone as Appointor in 2004, and that even if there were, Slondia's execution of the MMF Variation Deed was a fraud on the power; and that (alternatively) Tyrone's exercise of the power of appointment as Appointor in 2013 was a fraud on that power. The primary judge dismissed Michael's claims.

340           For the reasons which follow, the appeal should be dismissed.

### **The terms of the MMF Trust Deed**

341           Before dealing with the grounds of appeal, it is convenient to refer to the relevant terms of the MMF Trust Deed.

342           The MMF Trust was established by a deed of settlement executed on 1 June 1979. The MMF Trust Deed established Slondia as 'Trustee', with Michael as first 'Guardian' and 'Appointor' of the MMF Trust. There are two types of beneficiaries specified in the MMF Trust Deed: 'Specified Beneficiaries' and 'General Beneficiaries'. The term 'Specified Beneficiaries' is defined in cl 1(1) by reference to the schedule. The 'Specified Beneficiaries' are Michael and 'any spouse children and remoter issue' of Michael. The 'General Beneficiaries' are defined in cl 1(2) to include the Specified Beneficiaries. Clause 1(2) also provides that the General Beneficiaries also include the siblings, children and grandchildren of the Specified Beneficiaries, as well as the children and grandchildren of any siblings, children and grandchildren of the Specified Beneficiaries. The General Beneficiaries also include certain legal persons and entities (cl 1(2)(c)), and the parents of Michael and the parents of Yvonne (cl 1(2)(d)). The Trustees are expressly excluded from the class of General Beneficiaries. Provision is also made in cl 1(2) for the removal of persons from the class of General Beneficiaries. Clause 3 provides that the Trustee may pay all or any part of the net income of the Trust Fund to the General Beneficiaries. Clause 3(1)(a) also requires that on the first occasion that a payment is made to a General Beneficiary who is a legal person or entity described in cl 1(2)(c), the Guardian must first give their consent before the payment can be made.

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<sup>6</sup> Primary reasons [65].

343            Clause 1 contains definitions of the Guardian and the Appointor. By cl 1(14), the Guardian is relevantly defined to mean the person or persons (if any) named in the Schedule. The definition contains a proviso that the Trustees may declare that any person who has not yet become Guardian but who would or might but for the proviso at some time become Guardian shall not become Guardian. By cl 1(15), the Appointor is relevantly defined to mean the person named in the Schedule or determined according to the provisions of the Deed. Like the definition of Guardian, the definition of Appointor contains a proviso that the Trustees may declare that any person who has not yet become Appointor but who would or might but for the proviso become Appointor shall not become Appointor.

344            Clause 10 provides that, subject to the express provisions of the Deed, the Trustees may exercise every discretion and power vested in them in their absolute discretion subject to certain stated qualifications. The first qualification is that the Trustees may, before exercising any discretion or power or determination, consult the wishes of the Guardian (if any). The third is that the Trustee shall not, when there is a Guardian, exercise the 'reserved powers' or the 'restricted powers' except with the consent of the Guardian. There are further subclauses in cl 10 relating to the exercise of 'reserved powers'. The 'reserved powers' are defined in cl 10(7). One 'reserved power' is the power contained in cl 28, that is, the power of amendment (cl 10(7)(a)(ix)).

345            Clause 21 deals with the Appointor. It provides:

The Appointor and on the death of the last surviving Appointor such other person as such survivor shall have appointed to act as Appointor and in default of appointment his legal personal representative shall be entitled by instrument in writing at any time and from time to time -

- (1)    to remove any Trustee hereof;
- (2)    to appoint any additional Trustee or Trustees;
- (3)    to appoint a new Trustee or Trustees in the place of any Trustee who resigns his Trusteeship or ceases to be a Trustee by operation of law;

PROVIDED THAT

- (a)    if and so long as the Appointor is a beneficiary he shall not be eligible to be appointed as a Trustee hereof;

- (b) if there is no Appointor named in the Schedule or if at any time there is no one entitled to exercise the power hereinbefore conferred the statutory and other rights or [sic - of] removing and appointing Trustees hereof may be exercised by the Trustees or by the legal personal representatives or (if the Trustee be a corporation) the liquidator of the last surviving Trustee;
- (c) a person appointed to act as Appointor by an Appointor named in the Schedule hereto shall have the same right of appointing a person to act as Appointor as the person who appointed him.

346        Clause 23 provides that any Trustee, Guardian or Appointor and any person who may by succession become a Trustee, Guardian or Appointor may resign or renounce such position. However, if upon an Appointor resigning there is no Appointor or other person entitled to exercise the power of appointment provided in cl 21, a sole surviving Trustee shall not resign except upon appointing a new Trustee or new Trustees.

347        Clause 28 is set out below.

### **Grounds 1 and 2**

348        Grounds 1 and 2 concern the proper construction of cl 28 of the MMF Trust Deed.

349        Clause 28 of the MMF Trust provides:<sup>7</sup>

Subject to clause 10 hereof *the Trustees* for the time being *may at any time and from time to time* by deeds revocable or irrevocable *revoke add to or vary all or any of the trusts terms and conditions hereinbefore contained* or the trusts terms and conditions contained in any variation or alteration or addition made thereto from time to time and may in like manner declare any new or other trusts terms and conditions concerning the Trust Fund or any part or parts thereof the trusts whereof shall have been so revoked added to or varied provided that the rule known as the Rule against Perpetuities is not thereby infringed and provided that such new or other trust powers discretion alterations or variations -

- (1) insofar as the beneficial interests created by this Deed are revoked added to or varied shall be for the benefit of all or any one or more of the General Beneficiaries or any one or more persons born or unborn being lineal descendants of whatever degree (or the spouse of any lineal descendant) of any grandparent of any General Beneficiary; but
- (2) shall not be in favour of or result in any benefit to any member of the excluded class;

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<sup>7</sup> Primary reasons [81].

- (3) shall not affect the beneficial entitlement to any amount set aside for any beneficiary prior to the date of the variation alteration or addition; and
- (4) shall not (save as provided in paragraph (1) of this clause) enlarge the number of persons capable of falling within the description 'beneficiary' hereinbefore contained.

*Save as provided in this clause these presents shall not be capable of being revoked added to or varied.* (emphasis added)

350 As noted earlier, cl 10, to which cl 28 is subject, deals with, relevantly, 'reserved powers' and the role of the Guardian. Clause 28 is one of the reserved powers. A reserved power may not be exercised by the Trustee where there is a Guardian, except with the consent of the Guardian (cl 10(3)), or where the Guardian has, in effect, declared that such a power is not to be treated as a reserved power (cl 10(5)(a)).

351 The appellants' contentions in relation to ground 1 concern, in particular, the meaning to be assigned to the words 'trusts terms and conditions hereinbefore contained' in cl 28, read within the context of cl 28 of the MMF Trust Deed as a whole. The appellants contend, in effect, that this phrase refers to the 'trusts terms and conditions' preceding ('hereinbefore contained') cl 28, and thereby excludes reference to the Schedule, which appears at the end of the MMF Trust Deed.

352 This point cannot be accepted. The persons, and categories of person, defined and described in the Schedule as (relevantly) Guarantor and Appointor are identified by, and applied for the purposes of, cl 1(14) and cl 1(15). Both clauses (self-evidently from their numbering) precede cl 28 in the scheme of the deed. As the judge correctly observed, the inclusion of these details in the Schedule is merely a 'drafting technique to achieve clarity and brevity in the definition clause'.<sup>8</sup> The persons, and categories of person, defined and described in the Schedule form part of the terms of cl 1(14) and cl 1(15) to which cl 28, subject to cl 10, refers.

353 The next point raised by the appellants is, in effect, that the words '*trusts terms and conditions* hereinbefore contained' should be read as 'the terms and conditions *of the trusts* hereinbefore contained'. This point also should be rejected. The MMF Trust Deed is to be construed by reference to the objective meaning of its terms, read as a whole.<sup>9</sup> The power of

<sup>8</sup> Primary reasons [88].

<sup>9</sup> *Byrnes v Kendle* [2011] HCA 26; (2011) 243 CLR 253 [17], [59], [102]; *Schreuders v Grandiflora Nominees Pty Ltd* [2016] VSCA 93.

variation in the MMF Trust Deed is to be construed according to its natural and ordinary meaning, and not in a narrow or unreal way.<sup>10</sup> The meaning contended for by the appellants puts a gloss on the words and does not reflect their ordinary meaning. As the primary judge observed, the words 'trusts terms and conditions' are, in their ordinary meaning, a list.<sup>11</sup> That is, the words mean 'trusts *and* terms and conditions', and not 'the terms and conditions of the trusts'. The second and third items in the list may, to some extent, be synonymous but, singularly or collectively, they are words of expansion and differentiation from the word 'trusts', and do not merely serve to elaborate on the scope of the word 'trusts' within the phrase 'trusts terms and conditions'.

354       Next, the appellants contend that the power under cl 28 is confined, on the proper construction of the deed, by the powers of the Trustee under cl 1(14) and cl 1(15). Those powers, which are 'reserved powers' (cl 10(7)(a)(iii) and cl 10(7)(a)(iv)) enable a Trustee to declare that a person not yet a Guardian or Appointor, but who would or might become a Guardian or Appointor, otherwise under the deed, should not become a Guardian or Appointor. The appellants contend that these express powers would be redundant if cl 28 could be used, subject to cl 10, to allow the replacement of the Guardian or the Appointor. They also contend, in an argument described by the judge<sup>12</sup> 'as of the *expressio unius est exclusio alterius* variety' that the express inclusion of the powers in cl 1(14) and cl 1(15) exclude any scope for attributing to cl 28 a broader power to remove the Appointor or the Guardian.

355       These submissions cannot be accepted. Clause 28 is a separate 'reserved power' exercisable, relevantly, in effect, only with the consent of the Guardian. A power to replace the existing Guardian or the Appointor with the Guardian's consent under cl 10(3), could not be construed as being beyond the scope of cl 28 merely because there exists another reserve power to exclude a prospective Guardian or Appointor from taking office in the future. The two powers would apply to different, but complementary, ends. Both are subject to cl 10. The reserved powers under cl 1(14) and cl 1(15) would continue to apply to prospective Guardians and Appointors irrespective of whether the identity of the existing Guardian or Appointor were changed through a variation under cl 28. Also, it is a feature of cl 28 that it contains its own express exceptions to the general power conferred by the clause. This feature is

<sup>10</sup> *Kearns v Hill* (1990) 21 NSWLR 107.

<sup>11</sup> Primary reasons [87].

<sup>12</sup> Primary reasons [89].

inconsistent with the appellants' suggested construction of cl 28, which depends upon reading into cl 28 other, implied, exceptions.

356 Finally, the appellants contend that 'it would derogate from the fundamental purpose for which the power to amend was created if cl 28 extended to empowering the Trustee to remove and replace the person occupying ... the position of the Appointor, the primary purpose of that position being to oversee, and if appropriate, remove the Trustee [under cl 21]'.<sup>13</sup> Reference in this regard was made to *Jenkins v Ellett*.<sup>14</sup>

357 Again, the appellants' contentions cannot be accepted. *Jenkins* was a case in which the 'Principal' had the power to remove a trustee and appoint a new person as trustee (cl 12). The trustee had the power to 'revoke, add to ... or vary' any of the 'Trusts' described in the instrument (cl 11). The trustee, purportedly under the latter power, purported to remove the Principal. The court held that the purported removal was not authorised under the trust instrument for effectively two reasons. One was that the power to 'revoke, add to ... or vary' expressly applied only to the 'Trusts', and not to the terms and conditions of the instrument more generally.<sup>15</sup> The second was, in effect, that on the proper construction of the instrument as a whole, primacy was to be given to the clause conferring the Principal's power to remove the trustee, and that, accordingly, to allow the trustee to remove the Principal would be to subvert the design of the deed and be 'akin to destroying the substratum of the deed'.<sup>16</sup>

358 Unlike in *Jenkins*, in the present case, cl 28 includes the power to vary the 'terms and conditions' of the deed, and not merely the trusts expressed in the deed. Also unlike the power purportedly relied on in *Jenkins*, the exercise of the power under cl 28 requires the consent of the Guardian. Under the MMF Trust Deed, if, with the consent of the Guardian, one Appointor is replaced with another Appointor, the Trustee remains amenable to removal by the Appointor under cl 21. The exercise of the reserved power under cl 28 to remove, relevantly, the Appointor does not affect, let alone destroy, the substratum of the MMF Trust Deed.

359 Accordingly, grounds 1 and 2 should be dismissed.

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<sup>13</sup> Appellants' written submissions, par 12; WB 16.

<sup>14</sup> *Jenkins v Ellett* [2007] QSC 154 [12].

<sup>15</sup> *Jenkins* [16] - [18].

<sup>16</sup> *Jenkins* [19].

360 It is unnecessary to examine the question of whether authorities to the effect that a power to vary a trust deed does not include a power which could alter the substratum of the trust, are no more than illustrations of the application of the equitable rule of fraud on the power.<sup>17</sup>

### **Ground 3**

361 Ground 3 alleges, in effect, that the MMF Variation Deed did not bind Slondia because it was not executed pursuant to the lawful authority of Slondia's directors or shareholders. In this regard, the appellants alleged, in particular, that there was no resolution of Slondia within the meaning of cl 17(4) of the Trust Deed. They contended that cl 17(4) was mandatory in its effect, and obliged a sole corporate trustee such as Slondia to pass a resolution in order to effectively exercise the power to vary the MMF Trust Deed under cl 28.

362 Clause 17(4) is to be read with cl 17(2) of the MMF Trust Deed. Clause 17(2) provides, relevantly:

Any exercise by the Trustees of any power discretion or authority conferred on the Trustee by this Deed including without limiting ... the revocation addition to and variation of the trust's terms and conditions herein contained *may be made* ... -

- (a) in writing signed by all ... the Trustees; or
- (b) by resolution duly passed at a meeting of the Trustees; or
- (c) *in the case of a sole corporate Trustee in the manner set out in sub-clause (4) of this clause.* (emphasis added)

363 Clause 17(4) relevantly provides:

[E]very Trustee which is a corporation ... *may* exercise ... any discretion or power hereby conferred on the Trustee by a resolution of such corporation ... or by a resolution of its Board of Directors or governing body. (emphasis added)

364 The language of cl 17(4), both read on its own and in conjunction with cl 17(2), is plainly permissive. Clause 17(4) does not, in its ordinary meaning, prescribe or mandate the manner of the exercise of a power by a sole corporate trustee. Clause 17(4) does not, accordingly, preclude a power of amendment to be exercised by a sole corporate trustee executing

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<sup>17</sup> See the discussion by Hely J in *Cachia v Westpac Financial Services Ltd* [2000] FCA 161; (2000) 170 ALR 65, 82 - 83, referred to in *Federal Commissioner of Taxation v Bargwanna* [2012] HCA 11; (2012) 244 CLR 655 [13].

a deed of variation under its corporate seal in accordance with s 127(2) of the *Corporations Act 2001* (Cth). That is what happened here.<sup>18</sup>

365       The appellants' counsel accepted that if the power under cl 17(4), properly construed, was permissive, that was 'the end of the point'.<sup>19</sup>

366       We should add, however, that, in any event, we do not accept the appellants' further contention that the primary judge erred in concluding there was a meeting of the directors of Slondia at which it was agreed that Slondia should enter into and execute the MMF Variation Deed.

367       The relevant finding was that, on 15 June 2004, Michael, Yvonne and Tyrone attended a meeting with Mr Nettleton of Brett Davies Lawyers at that firm's premises. His Honour found that at the meeting, Michael and Yvonne instructed Mr Nettleton, among other things, to prepare a deed of variation to update the MMF Trust Deed, including replacing Michael as Guardian and Appointor with Tyrone, and to send the document to Tyrone to deal with its execution; and that Tyrone assented to those things being done.<sup>20</sup> His Honour concluded that, notwithstanding the lack of formality, there was a meeting of the minds of Michael, Yvonne and Tyrone, as directors, that Slondia should enter into the MMF Variation Deed and that Tyrone should attend to its execution, and that that constituted a sufficient meeting of the directors.<sup>21</sup>

368       The appellants attacked that finding, submitting that Michael, Yvonne and Tyrone did not attend at Brett Davies Lawyers on that occasion in their capacities as directors, but solely in their personal capacities - in the case of Michael and Yvonne, for estate planning purposes - and that whatever Michael, Yvonne and Tyrone agreed to that day were not decisions in the management of the business of Slondia, but simply decisions with respect to their personal affairs.

369       That submission should be rejected. The primary judge made adverse findings as to the reliability of the evidence of Michael<sup>22</sup> and Yvonne,<sup>23</sup> and rejected their evidence as to the circumstances in which the MMF Variation Deed came to be executed.<sup>24</sup> His Honour's finding as to the meeting of the directors on 15 June 2004 was clearly open to him on

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<sup>18</sup> Primary reasons [55].

<sup>19</sup> ts 21 - 22.

<sup>20</sup> Primary reasons [119].

<sup>21</sup> Primary reasons [120].

<sup>22</sup> Primary reasons [22].

<sup>23</sup> Primary reasons [24].

<sup>24</sup> Primary reasons [15] - [17], [24].



the evidence. It is consistent with, among other things, the contemporaneous notes of the meeting on 15 June 2004 made by Mr Nettleton, which his Honour accepted as the best evidence of the meeting;<sup>25</sup> the subsequent affixing of Slondia's common seal to the MMF Variation Deed by Michael and Tyrone; and Michael's written consent to the change in the MMF Variation Deed.

370 Accordingly, ground 3 should be dismissed.

#### **Ground 4**

371 By ground 4, the appellants contend that the judge should have found that the MMF Variation Deed constituted a fraud on the power of the Trustee (Slondia) to amend the MMF Trust Deed, and thereby involved a breach by Slondia of its fiduciary duty as Trustee.

372 The appellants observed that the judge found that the objective of the MMF Variation Deed was to give Tyrone control of the business operated by the MMF Trust as an advance on his inheritance, on the basis that Michael and Yvonne would otherwise provide in their wills for their other sons.<sup>26</sup> It was alleged that the exercise of the power by Slondia for the sole purpose of passing control of the business to Tyrone was done otherwise in good faith and for proper purposes. In written submissions, it was also said that this was done without the consent of, or proper consultation with, all the beneficiaries. Reference was made in this latter respect to *Marshall v Sladden*;<sup>27</sup> *O'Reilly v Alderson*,<sup>28</sup> both of which were referred to in *Scaffidi v Montevento Holdings Pty Ltd*.<sup>29</sup> However, the appellants' counsel in oral submissions made it plain that *Scaffidi*<sup>30</sup> (which concerned the proper construction of a provision concerning the eligibility of an appointor) had no relevance to ground 4; that the reference to consent or consultation was merely an 'add on'; and the appellants' counsel did not suggest, either by reference to the above cases or otherwise, that a trustee's powers under a discretionary trust could only properly be exercised with the consent of, or after hearing, the objects of the trust.<sup>31</sup>

<sup>25</sup> Primary reasons [31].

<sup>26</sup> The appellants referred in this regard to primary reasons [68], [127], [179].

<sup>27</sup> *Marshall v Sladden* (1849) 7 Hare 428 [439].

<sup>28</sup> *O'Reilly v Alderson* (1849) 8 Hare 101 [103].

<sup>29</sup> *Scaffidi v Montevento Holdings Pty Ltd* [2011] WASCA 146 [152].

<sup>30</sup> Reversed in *Montevento Holdings Pty Ltd v Scaffidi* [2012] HCA 48; (2012) 246 CLR 325.

<sup>31</sup> Appeal ts 22, 36 - 37.

373 Accordingly, the appellants' case under ground 4 was put squarely on the basis that Slondia, in entering into the MMF Variation Deed, acted in bad faith and for an improper purpose, insofar as it acted for the sole purpose of giving control of the business to Tyrone. The scope and nature of the power was not otherwise in issue. The appellants alleged that, in acting for this purpose, Slondia thereby committed a fraud on the power under cl 28. It was said that this was made 'all the more egregious' by the facts that the MMF Trust held certain assets in addition to the business, and that there was disharmony between Tyrone and the other brothers.<sup>32</sup>

374 The judge's ultimate findings on the question of the alleged fraud on the power by Slondia were as follows:<sup>33</sup>

I am not satisfied that Slondia ... exercised its power to vary the trusts terms and conditions or the trusts ... for any improper or collateral purpose. The MMF Trust was established by Michael in 1979, on the advice of Mr Bizzaca, to carry on the shoe repair business established by Michael primarily for the benefit of Michael, Yvonne and their children. ... The original Guardian and Appointor of the MMF Trust ... was Michael. At the time Michael was the general manager of the business, a beneficiary of [the] trust and a director and shareholder of each corporate trustee. Subsequently Michael made Tyrone general manager of the business. In June 2004 Michael and Yvonne, who together with Tyrone were the directors of Slondia ... caused Slondia ... to appoint Tyrone as the managing director of each company and hence of the business. Michael and Yvonne intended that the business should be Tyrone's. *Slondia ... through Michael and Yvonne, decided to pass control of the [trust] and hence of the business to Tyrone.* On the advice of Mr Davies and Mr Nettleton Slondia ... by Michael and Yvonne, decided to effect that purpose by causing Slondia ... to execute the [deed] of variation appointing Tyrone as Guardian and Appointor of the MMF Trust ... The plaintiffs have not established that Slondia ... did so for any improper or collateral purpose. (emphasis added)

375 Ground 4 should be rejected. The equitable doctrine of fraud on a power was referred to by Williams ACJ and Fullagar and Kitto JJ in *Ngurli Ltd v McCann*,<sup>34</sup> in the following terms:

'The term fraud in connection with frauds on a power does not necessarily denote any conduct on the part of the appointor amounting to fraud in the common law meaning of the term or any conduct which could be properly termed dishonest or immoral. It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power', per Lord Parker in *Vatcher*

<sup>32</sup> ts 38 - 40; written submissions, pars 32 - 33; WB 23.

<sup>33</sup> Primary reasons [145].

<sup>34</sup> *Ngurli Ltd v McCann* [1953] HCA 39; (1953) 90 CLR 425, 438.

*v Paull* [(1915) AC 372, at p 378]. 'The Court will not allow him' (that is the appointor) 'to interpret the donor's intention in any other sense than the Court itself holds to be the true construction of the instrument creating the power; and a literal execution of the power, with a purpose which it does not sanction, is regarded as a fraud on the power', per Hatherley LC in *Topham v Duke of Portland* [(1869) 5 Ch App 40, at p 59].

376 The MMF Trust Deed is of a character which may conveniently be described as a discretionary family trust, evidently designed to allow assets built up by Michael (and Yvonne) to be held and applied on the terms of the instrument. A member of the class of 'beneficiaries' named in the instrument is, in point of law, more accurately described as an 'eligible object' of the trust: *Kennon v Spry*.<sup>35</sup> The objects of the trust have the right to due administration of the trust: *Kennon*;<sup>36</sup> *Sainsbury v Inland Revenue Commissioners*;<sup>37</sup> *Jacobs' Law of Trusts in Australia*.<sup>38</sup> However, the eligible objects of the discretionary trust, prior to any appointment to them under a power contained in the trust instrument, have no entitlement to any fixed beneficial interest, or proprietary interest, in the assets held on trust: *Kennon*;<sup>39</sup> *Jacobs' Law of Trusts in Australia*.<sup>40</sup>

377 In this context, under the MMF Trust Deed, Slondia, as Trustee, could only exercise the power under cl 28 with the consent of the Guardian. The removal and replacement of Michael as the Appointor occurred with the Guardian's (Michael's) written consent under cl 10(3). That gave Tyrone the power, as Appointor, to remove the Trustee under cl 21. Tyrone was also made Guardian. In a broad sense, it may be accepted that Tyrone was given 'control' of the business (and other assets) of the MMF Trust. The giving of 'control' in that broad sense might subjectively have been viewed by Michael as effectively giving Tyrone an 'advance on his inheritance', in the sense that Michael might take that into account in preparing his will. It may be accepted that this was Michael's (and Yvonne's) motivation behind the execution of the MMF Variation Deed. But *Slondia's* purpose was (relevantly for ground 4), to change the identity of the Appointor with the Guardian's consent, to Tyrone. Tyrone was Michael's (and Yvonne's) son, he had been involved in the running of the business carried on by the trust for most of the time since he had left school in 1990, he had been the general manager of the business since

<sup>35</sup> *Kennon v Spry* [2008] HCA 56; (2008) 238 CLR 306 [125].

<sup>36</sup> *Kennon* [74], [125], [161], [165].

<sup>37</sup> *Sainsbury v Inland Revenue Commissioners* [1970] Ch 712, 725.

<sup>38</sup> J D Heydon & M J Leeming, *Jacobs' Law of Trusts in Australia* (7th ed, LexisNexis Butterworths 2006) [314], [2315].

<sup>39</sup> *Kennon* [60], [62], [125], [152], [160].

<sup>40</sup> *Jacobs' Law of Trusts in Australia* (7th ed) [109], [314], [2315].

1996, he had been Slondia's managing director since 2004, and he was a person with whom Michael enjoyed a close relationship. Moreover, although Tyrone as the new Appointor had the power (by virtue of cl 21) to remove the Trustee, that power would be required to be exercised bona fide and for proper purposes for the benefit of the trust (as discussed under ground 6), whomever was Appointor. The appointment of Tyrone as new Guardian and Appointor, effected by the MMF Variation Deed with Michael's (ie, the original Guardian's) consent, was entirely unremarkable, and Slondia acted within the purposes contemplated by cl 28, having regard to the terms of the MMF Trust, read as a whole.

378           There is nothing in the MMF Trust Deed, or the circumstances in which the conditional power in cl 28 was exercised in 2004, which provides any foundation for a suggestion that Slondia acted other than for proper purposes and in good faith.

379           Ground 4 should be dismissed.

## **Ground 5**

380           Ground 5 alleges, in effect, that the judge erred in concluding that Michael's agreement to execute the MMF Variation Deed, both as a director of Slondia and in his own right as Appointor and Guardian, was not as a result of any equitable fraud or undue influence of Tyrone. It is contended that his Honour should have found that Michael acted in consequence of undue influence or other equitable fraud practised upon him.

381           In relation to undue influence, it was not in dispute in this appeal that the power to appoint a new Appointor may be susceptible to the operation of the doctrine of undue influence.<sup>41</sup> For present purposes, the principles of undue influence, including in relation to the relationship between parent and child, are sufficiently stated in *Permanent Mortgages Pty Ltd v Vandenberg*.<sup>42</sup> Relevantly, at trial, the appellants' case was one of presumed undue influence, said to arise from an antecedent relationship between Michael and Tyrone, the nature of which was that Tyrone was in a position to exercise dominion, power or ascendancy over Michael in relation to matters concerning the family business and the affairs of the trust.<sup>43</sup>

<sup>41</sup> The primary judge referred to this in his reasons at [151] and made reference to *Harris v Rothery (as co-executor of estate of late Harris)* [2013] NSWSC 1275.

<sup>42</sup> *Permanent Mortgages Pty Ltd v Vandenberg* [2010] WASC 10; (2010) 41 WAR 353 [166] - [177].

<sup>43</sup> Primary reasons [152] - [153].

382 The primary judge made findings to the effect that there was no antecedent relationship of that kind.<sup>44</sup> Counsel for the appellants accepted that the appellants did not challenge the judge's findings<sup>45</sup> to the effect that the relationship between Michael and Tyrone was not one which gave rise to a presumption of undue influence. Counsel further accepted that absent a challenge to such findings, the appeal with respect to undue influence could not succeed.<sup>46</sup>

383 Further, in oral submissions in relation to this ground, counsel for the appellants was unable to articulate any recognised category or species of equitable fraud, other than undue influence.<sup>47</sup> At one point, he appeared to suggest that the ground may have been directed to the equitable doctrine of unconscionable dealing.<sup>48</sup> However, he accepted that there was no mention in his written submissions of unconscionable dealing as explained in cases such as *Commercial Bank of Australia Ltd v Amadio*.<sup>49</sup>

384 The appellants' case was not advanced by the absence of any coherent explanation of the nature of the equitable fraud asserted. Ultimately, the arguments in relation to this ground of appeal appeared to rest on the bare proposition that there was equitable fraud because Michael did not in fact understand the 'implications' or 'practical implications' of his conduct when he executed the MMF Trust Deed Variation.<sup>50</sup>

385 The relevant findings of fact by the judge were as follows:<sup>51</sup>

Michael understood the role and power of the Appointor. It was explained to him in words and pictures by Mr Davies. Michael intended that Tyrone should become Appointor of the trusts and control the trusts. Michael gave instructions to that effect to Mr Nettleton. Michael knew that the deeds of variation transferred control of the trusts to Tyrone. He instructed Mr Nettleton to draft the deeds to have that effect.

I am not satisfied that Michael believed, when he signed the deeds of variation, that they transferred to Tyrone as Appointor control of the business excluding a kiosk that was to be transferred to Jason and the real properties. The plaintiffs have not explained how Michael could have had

<sup>44</sup> Primary reasons [155].

<sup>45</sup> Primary reasons [155].

<sup>46</sup> ts 45.

<sup>47</sup> ts 45 - 46, 48 - 50.

<sup>48</sup> ts 46 - 47.

<sup>49</sup> ts 47; *Commercial Bank of Australia Ltd v Amadio* [1983] HCA 14; (1983) 151 CLR 447.

<sup>50</sup> Appellants' written submissions, pars 41, 42; ts 45, 48, 52, 56 - 57.

<sup>51</sup> Primary reasons [148] - [149], [157].

that belief. He knew that the deeds made Tyrone Appointor of the trusts. The consequence of that had been explained to him by Mr Davies and Mr Nettleton. Michael did not claim to have been told that some other instrument or instruments had been executed which had the effect of excluding one kiosk and the real properties from the trusts. Michael's evidence, which I do not accept, is that he did not intend and did not give instructions for Tyrone to be immediately appointed Appointor of the trusts. I accept that Michael intended that one kiosk should go to Jason and the real properties to his other sons on his death. That could be achieved by those properties being removed from the MMF Trust. Michael and Yvonne continued to control the trustee, Slondia, and could have effected that intention. There is no evidence that at the time the deeds of variation were executed Tyrone intended to replace Slondia as trustee or that Michael or Yvonne contemplated that Tyrone might do so in the near future.

...

In any event, I am satisfied that Michael had the capacity to understand the transactions effected by the [deed] of variation, he did understand [it], he received advice from a lawyer, Mr Nettleton, about the effect of them and he freely exercised his will in causing Slondia ... to enter into the transactions, to apply the company [seal] and to consent to the [transaction] as Appointor and Guardian or Appointor. Michael initiated the meeting with Brett Davies Lawyers on the recommendation of Mr Torre. Tyrone played no part in instigating or arranging the meeting. Tyrone attended the meetings at the request of Michael. Michael did most of the talking. Tyrone said little. Michael gave the instructions to Mr Nettleton to draft the [deed] of variation. He did so after Mr Davies had explained the role of appointor and guardian. I am satisfied that Michael understood the [transaction] effected by the [deed] of variation and freely exercised his will to cause Slondia ... to enter into [the] [transaction], to apply the company [seal] and to give his consent as Appointor and Guardian or Appointor.

386 The judge's findings were, in large measure, based on his assessment of the oral evidence given at the trial. His Honour found that Michael's evidence was 'generally ... unreliable' and, in particular, his Honour rejected Michael's evidence in relation to his knowledge of the role of trustees and appointors, and the circumstances in which the MMF Variation Deed was prepared and executed.<sup>52</sup> On the other hand, his Honour regarded Tyrone as a truthful and reliable witness.<sup>53</sup> His Honour also accepted the evidence of the lawyers who were involved in advising in relation to and documenting the MMF Variation Deed, and

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<sup>52</sup> Primary reasons [22].

<sup>53</sup> Primary reasons [30].

the financial planner whose evidence supported that of Tyrone and the lawyer, Mr Nettleton.<sup>54</sup>

387 The appellants contended<sup>55</sup> that they did not seek to challenge the judge's findings based on credibility 'other than' with respect to an assortment of at least 14 matters, which they say are based on Tyrone's evidence, or witnesses called on behalf of Tyrone. The appellants contended that the judge had not taken these matters into account in determining whether Michael had been the subject of equitable fraud.<sup>56</sup>

388 The appellants' contention should be rejected for essentially two reasons. First, what is sought to be challenged is the judge's findings as to Michael's state of mind at the relevant time. The judge heard all the evidence, including Michael's evidence as to his understanding of the relevant instruments and events. His Honour concluded, in effect, on the evidence as a whole, that Michael understood the instruments and their significance. None of the various matters relied on by the appellants in relation to evidence given by, or on behalf of, Tyrone, points to any appellable error in the judge's findings of fact as to Michael's state of mind. In this regard, the High Court has recently confirmed in **Robinson Helicopter Co Inc v McDermott**,<sup>57</sup> that a Court of Appeal should not interfere with the primary judge's findings of fact unless they are demonstrated to be wrong 'by incontrovertible facts or uncontested testimony', or they are 'glaringly improbable' or 'contrary to compelling inferences'. Also, in **Fox v Percy**,<sup>58</sup> Gleeson CJ, Gummow and Kirby JJ referred to the 'natural limitations' of an appellate court proceeding wholly or substantially on the record, and said:<sup>59</sup>

These limitations include the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses' credibility and of the 'feeling' of a case which an appellate court, reading the transcript, cannot always fully share. Furthermore, the appellate court does not typically get taken to, or read, all of the evidence taken at the trial. Commonly, the trial judge therefore has advantages that derive from the obligation at trial to receive and consider the entirety of the evidence and the opportunity, normally over a longer interval, to reflect upon that evidence and to draw conclusions from it, viewed as a whole. (footnotes omitted)

<sup>54</sup> Primary reasons [31], [34].

<sup>55</sup> Written submissions, pars 40 - 42; WB 25 - 27.

<sup>56</sup> ts 58.

<sup>57</sup> **Robinson Helicopter Co Inc v McDermott** [2016] HCA 22; (2016) 90 ALJR 679 [43].

<sup>58</sup> **Fox v Percy** [2003] HCA 22; (2003) 214 CLR 118.

<sup>59</sup> **Fox** [23].

389           Those observations have particular application to a case such as this, involving a difficult family dispute.

390           Secondly, it cannot be accepted that the judge, in effect, overlooked the 14 matters referred to by the appellants in determining whether Michael was the subject of equitable fraud. The judge referred to the relevant evidence in his reasons.<sup>60</sup> It cannot be assumed that the judge overlooked the matters raised by the appellants when he came to consider the question of Michael's understanding of the transactions.

391           Ground 5 should be dismissed.

### **Ground 6**

392           Ground 6 alleges, in effect, that Tyrone's conduct, as Appointor, in removing Slondia as Trustee in July 2013, and appointing Parradele as Trustee, was a fraud on the power of appointment under cl 21 of the MMF Trust Deed as varied in 2004 by the MMF Variation Deed.

393           The MMF Variation Deed did not alter the terms of cl 21 and cl 28 of the MMF Trust Deed. However, cl 1.2 of the MMF Variation Deed provided that the MMF Trust Deed would be varied by:

Deleting the definitions of [relevantly] Appointor in the Schedule to the Trust Deed and replacing it with the following definition of Appointor ...:

...

Tyrone Kane Mercanti; and

Upon the death of Tyrone Kane Mercanti if no other appointment has been made then Michael Angelo Mercanti and Sybil Yvonne Mercanti; and

If neither of Michael Angelo Mercanti and Sybil Yvonne Mercanti survives Tyrone Kane Mercanti or upon the death of Michael Angelo Mercanti and Sybil Yvonne Mercanti if no other appointment has been made then a legal personal representative of Tyrone Kane Mercanti.

394           As noted earlier, cl 21 provides, in effect, that the Appointor may remove any Trustee and appoint any additional Trustee provided, amongst other things, that if and so long as the Appointor is a beneficiary, he or she shall not be eligible to be appointed as a Trustee.

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<sup>60</sup> Primary reasons [42] - [56].



395       The alleged fraud on the power was said to emerge from certain passages of Tyrone's evidence referred to by the judge as follows:<sup>61</sup>

In his witness statement Tyrone says that on 30 July 2013, without any warning and whilst he was in China on company business, he was removed as a director of Slondia ... He says that he was on the telephone with Larry Thomas, the CFO of the business, when Mr Thomas had the telephone taken out of his hand by Jason. Jason told Tyrone that Mr Thomas was busy talking to the new owners of the business and then hung up. Later that afternoon Mr Thomas told Tyrone that Michael, Yvonne, Jamie and Jason, together with others, had entered the business premises and taken control of the office and stated that Tyrone was no longer in control and that they were in control. Tyrone says that the then current management team of the business - the general manager, the CFO and the office administrator did not return to work after 30 July. They had worked for the business for approximately the last 10 years. Tyrone says 'in response to the conduct of my parents and my brothers' he executed the notices of removal and acceptance of appointment of trustee.

In cross-examination it was put to Tyrone that he executed the notices before the court heard the interlocutory injunction application and that he executed them when he did because he knew that he would not be able to exercise the power as appointor if the court granted an injunction. Tyrone denied that part of his purpose on 31 July 2013 was to execute the notices in time for his lawyer to be able to bring them to court before the hearing of the injunction application. Tyrone said that his intention was to retain the status quo in the sense of maintaining his position within the group. He said that the exercise of the power put him back where he was the day before his parents and brothers seized control of the business premises and dismissed him as managing director of Slondia ... He did that by replacing Slondia ... as [trustee] with Parradele, a company controlled by himself and his wife.

...

The trigger for Tyrone executing the notices of removal and appointment was his parents and brothers seizing control of the business premises and dismissing him as managing director on 30 July ...

...

The status quo before 30 July was that Tyrone was the managing director of each of the trustees and the general manager of the business. He had been managing director for nine years and general manager for 17 years. The chief financial officer was Mr Thomas, who had been there for about six years. On 30 July Michael and Yvonne, without prior consultation with or notice to Tyrone, removed him as a director of ... Slondia ... and,

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<sup>61</sup> Primary reasons [169] - [170], [172], [174].

with the assistance of Jamie and Jason, seized control of the business premises and management of Slondia ... and the business.

396 The appellants also contend that the judge erred in not finding, in terms, that the Appointor's power to remove the Trustee was a 'fiduciary power'.<sup>62</sup> However, his Honour accepted that the power was to be exercised in good faith and for proper purposes;<sup>63</sup> that these requirements would preclude any exercise of the power 'corruptly or improperly, or in a manner which [was] for the purpose not of carrying into effect the trust, but defeating the purpose of the trust';<sup>64</sup> and his Honour evidently accepted, having regard to his discussion of whether there was an abuse or unlawful exercise of power, that the power was to be exercised in the interests of the trust and not for the personal benefit of the Appointor.<sup>65</sup> The appellants, in this context, did not explain in what respects it was alleged that the proper exercise of the power required anything more than it be exercised in the manner explained and applied by his Honour. It was not contended, for example, that Tyrone, as Appointor, had, and breached, a duty to consider, from time to time, whether to exercise the power.<sup>66</sup>

397 The object of the power under a provision such as cl 21 is to facilitate the appointment of a new or replacement trustee. A trustee is the archetype of the fiduciary<sup>67</sup> and the office of trustee only exists for the benefit of the beneficiaries.<sup>68</sup> A power of this kind conferred in a trust instrument has generally been construed as having been conferred by the settlor not for the purpose of advancing the personal interests of the appointor or otherwise for the personal enjoyment of the appointor, but rather for the due execution of the trusts for the benefit of the objects of the trust. See, eg, *Re Burton*;<sup>69</sup> *Pope v DRP Nominees Pty Ltd*;<sup>70</sup> *McLeary v Swift*;<sup>71</sup> *Berger v Lyster Pty Ltd*;<sup>72</sup> *Rayner v NJ Sheaffe Pty Ltd*;<sup>73</sup> *Scaffidi*;<sup>74</sup> *Harre v Clark*.<sup>75</sup> Underhill and Hayton, *Law of*

<sup>62</sup> Appellants' submissions, par 50; WB 30.

<sup>63</sup> Primary reasons [166].

<sup>64</sup> Primary reasons [167], quoting *Re Marsden's Trusts* (1859) 4 Drew 594, 599 - 600.

<sup>65</sup> Primary reasons [175] - [176].

<sup>66</sup> cf *LGSS Pty Ltd v Egan* [2002] NSWSC 1171 [107]; Kessler & Finn, 'Drafting Trusts and Will Trusts in Australia' (LawBook Co, 2008) [6.170], [6.190].

<sup>67</sup> *McGuire v Makaronis* [1997] HCA 23; (1997) 188 CLR 449, 473.

<sup>68</sup> *Letterstedt v Broers* (1884) 9 App Cas 371, 387.

<sup>69</sup> *Re Burton* (1994) 126 ALR 557, 559 - 560.

<sup>70</sup> *Pope v DRP Nominees Pty Ltd* [1999] SAS 337; (1999) 74 SASR 78 [45] - [48].

<sup>71</sup> *McLeary v Swift* [2013] NSWSC 216 [34].

<sup>72</sup> *Berger v Lyster Pty Ltd* [2012] VSC 95 [85].

<sup>73</sup> *Rayner v NJ Sheaffe Pty Ltd* [2010] NSWSC 810 [12], [16], [150].

<sup>74</sup> *Scaffidi* [149] (reversed on other grounds in *Montevento Holdings*).

<sup>75</sup> *Harre v Clark* [2014] NZHC 2533 [25].

*Trusts and Trustees*;<sup>76</sup> Young, Croft & Smith '*On Equity*';<sup>77</sup> Ford & Lee '*Principles of the Law of Trusts*'.<sup>78</sup>

398 Nevertheless, each instrument must be construed according to its own terms. In this case, although under the MMF Trust Deed (as varied), the Appointor may be an eligible object of the trust, when the trust instrument is read as a whole, the power under cl 21 is, objectively construed, conferred for the purposes of the due execution of the trusts of the MMF Trust for the benefit of its objects, rather than as a personal privilege, or for the personal benefit, of the Appointor. The following matters are particularly relevant: the prohibition in cl 21 on the Appointor appointing himself or herself as trustee whilst he or she is a beneficiary; the provisions providing for the circumstances in which the Appointor may be replaced;<sup>79</sup> the proviso in cl 21 that where no Appointor exists, the power to remove and appoint new Trustees may be exercised instead by the Trustees (ie, fiduciary office holders); and the fact that the power under cl 21 is not expressed in unconditional and absolute terms. It is not necessary to enter into the debate as to whether the power to appoint a trustee held by a donee who does not hold a fiduciary office as such (eg, the donee does not hold the office of trustee) is a 'fiduciary power', properly so-called.<sup>80</sup> In this case, the judge, having, in substance, correctly understood the nature of the power, and applied it to the facts of the case, was not in error in not describing the power as a 'fiduciary power'.

399 As to whether there was an abuse or unlawful exercise of power, the judge's findings were as follows:<sup>81</sup>

Appointing a company controlled by him as trustee was not of itself the exercise of the power by Tyrone for a foreign or improper purpose. *Tyrone's purpose was to appoint in place of Slondia ... as trustee ... a company which would reinstate the management of the business* which had been removed without consultation or notice by Slondia ... acting by its shareholders, Michael and Yvonne. There is no evidence that Tyrone intended to effect any purpose beyond putting Parradele in control of the [MMF Trust] and the management of the family business. For example, there is no evidence that Tyrone intended Parradele to deal improperly with trust assets. As trustee, Parradele was bound to exercise its powers,

<sup>76</sup> Underhill and Hayton, *Law of Trusts and Trustees* (18th ed, LexisNexis, 2010) [1.80 - 1.83].

<sup>77</sup> Young, Croft & Smith '*On Equity*' (LawBook Co, 2009) [8.830].

<sup>78</sup> Ford & Lee '*Principles of the Law of Trusts*' (Thomson Reuters, 2016) [8180].

<sup>79</sup> Clause 28 read with cl 10.

<sup>80</sup> See P D Finn, *Fiduciary Obligations* [627], [644]; cf G W Thomas, *Thomas on Powers* (2nd ed, Oxford University Press, 2012) [1.52]; Young, Croft & Smith '*On Equity*' [8.830].

<sup>81</sup> Primary reasons [175] - [176].

including its power in relation to the assets and income of the trusts, as a fiduciary.

*Tyrone's purpose was to restore the status quo in the sense I have described. There is no evidence that Tyrone did so to achieve any purpose other than the proper and effective management of the business. It is not for the court to assess the relevant competence of Parradele on the one hand and Slondia ... on the other hand to act as trustees of the trusts and control the management of the business. The action of Tyrone in removing Slondia ... as [trustee] and replacing [it] with Parradele does not give rise to an inference that Tyrone did so for any purpose other than that Parradele would properly fulfil its duties as trustee including properly managing the business. The plaintiffs have not established that Tyrone executed the notices of removal and acceptance of appointment of trustee for any improper or ulterior purpose. (emphasis added)*

400       The appellants nevertheless contend<sup>82</sup> that Tyrone exercised the power 'for reasons purely personal to himself and in disregard to the interests of all other beneficiaries', and that the exercise of the power did not maintain the 'status quo', but rather substantially changed it 'by removing the trustee of over 17 years that was controlled by the heads of the Mercanti family and replace it with a trustee which was not controlled by the heads of the Mercanti's [sic] family'. The appellants also suggested that the abuse of power was 'all the more egregious' because Tyrone had not consulted the other beneficiaries before exercising the power under cl 21.<sup>83</sup>

401       The question of the purpose for which Tyrone appointed Parradele as Trustee was a question of fact. The judge found, in effect, that Tyrone's purpose was to appoint Parradele to reinstate the management of the business.<sup>84</sup> The reinstatement of the management of the trust's business was not, as the judge said, an improper purpose in itself. Even though the reinstated 'management' was effectively Tyrone, the exercise of the power of the Appointor was, in the circumstances of this case, as the judge found, consistent with a legitimate concern for 'the proper and effective management of the business'.<sup>85</sup> The effective management of the trust's business would be to the benefit of all the objects of the trust. There is no error in the judge's reasoning or conclusion.

402       The appellants also contend that the judge, in effect, failed to recognise that in order to succeed on the abuse of power claim, the

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<sup>82</sup> Written submissions, pars 51 - 56.

<sup>83</sup> Written submissions, par 55.

<sup>84</sup> Primary reasons [175].

<sup>85</sup> Primary reasons [176].

appellants needed only to establish that Tyrone exercised the power for purely personal purposes, and that the appellants were not required to establish that Tyrone appointed Parradele with the expectation that it would not discharge its fiduciary duties as trustee. This submission cannot be accepted either. The judge was not suggesting that the appellants had to establish that Parradele would not discharge its fiduciary duties as trustee. His Honour was merely observing that the purpose of the exercise of the power was to reinstate the previous management, which was within proper purposes for a trading trust, and that this purpose was not tainted by some collateral or corrupt purpose of having a trustee who the Appointor knew or expected would not properly discharge its fiduciary duties.

403           Accordingly, no error has been shown with respect to the judge's conclusion that on the evidence, the appointment by Tyrone of Parradele as the new trustee was not an unlawful exercise of the power conferred on the Appointor by cl 21.

404           Finally, there is no merit in the suggestion that the alleged fraudulent exercise of power was 'all the more egregious' for want of consultation. For the reasons given earlier, there was no unlawful exercise of power. Moreover, under the MMF Trust Deed (including as varied), the power to appoint a trustee was a 'reserved power' which required the consent of the Guardian. There is no basis for supposing, and the appellants did not explain the basis upon which it might be suggested, in the circumstances of this case, that the proper exercise of the power under cl 21 would, beyond obtaining the consent of the Guardian, require consultation with the 'beneficiaries' or eligible objects of the trust.

405           Ground 6 should be dismissed.

### **Ground 7**

406           Ground 7 is merely a conclusionary ground. It must fail as the earlier grounds have not been established.