In The Supreme Court of Bermuda

CIVIL JURISDICTION
2018: 40

IN THE MATTER OF THE X TRUSTS

Date of hearing: July 5-8, 2021
Date of Judgment 7 September, 2021

Mrs Elspeth Talbot Rice QC of counsel and Mr Edward Cumming QC of counsel and Mr Ben Adamson, Conyers Dill & Pearman Limited, for the Plaintiffs ("the Trustees")

Mr Simon Taube QC of counsel and Mr Thomas Fletcher of counsel and Ms Lilla Zuill, Zuill & Co., for D1, D5, D8, D9-D12 ("the B Branch")

Mr Brian Green QC of counsel and Ms Anna Littler of counsel and Mr Matthew Watson, Cox Hallett Wilkinson Limited, for D3 ("the A Branch")

Ms Elizabeth Jones QC of counsel and Mr Keith Robinson, Carey Olsen Bermuda Limited, for D16 and D17 ("the Protectors")

JUDGMENT

(in Camera)

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Construction of trusts instruments-role of protectors-whether powers of consent conferred to supervise due administration of trust or to confer broader discretion on protectors-principles of construction-relevance of extraneous material to construction of trust wording

Introduction

1. In my judgment herein dated October 23, 2020, I held as follows:

> "*54. The Trustees should be granted an Order substantially in the terms of their Summons dated June 22, 2020, namely an Order that (subject to their undertaking not to incur significant expense until the scope of the Protectors' powers issue has been determined).*
>
> '*1. The Court does approve the Plaintiffs' preliminary proposals for the long term future administration of the X trusts on the basis of the preliminary proposals set out in paragraph 285 of the Fourth Affidavit of [AA] filed on 22 June 2020 ("**the preliminary proposals**").*
>
> *2. The Plaintiffs should investigate, consider and develop detailed proposals for the long term future administration of the X Trusts on the basis of the preliminary proposals, and should return to Court for approval of such detailed proposals as they think appropriate.* "'

2. I accordingly granted on October 23, 2020 a *Public Trustee-v-Cooper* Category 2 application for a "blessing" of the Trustees' decision to develop the preliminary proposals for the future administration of the X Trusts. The preliminary proposals contemplated restructuring the X Trusts, broadly by effecting a division of the assets on the 2/3^{rds}-1/3rd basis along lines which were supported by the A Branch and opposed by the B Branch. While I considered that unequal division was rational, it is easy to understand why the B Branch finds it difficult to relinquish the intuitive conviction that inequality is inequitable.

3. Finalisation of the proposals requires the Trustees to obtain the consent of the Protectors. A dispute about the scope of the Protectors' powers somewhat belatedly raised by the Protectors could not conveniently be dealt with at the hearing in early October last year so I decided to grant that relief as the Trustees undertook not to incur significant costs on implementing Phase 2 of the restructuring of the X Trusts until that dispute was resolved. By a Summons dated January 20, 2021, the Trustees sought declarations as to:

> "*(1) whether, on the proper interpretation of the relevant trust instruments, the role of the 16th and 17th Defendants as protectors of the trusts identified in Appendix A to the Originating Summons dated 21 February 2018 (the **X Trusts**) (or any of them) (save for the settlement known as BS80B numbered*

65 in Appendix A to the Originating Summons) in exercising their powers to consent to the exercise of powers vested in the Plaintiffs (or any of them) is:

(a) to exercise an independent discretion as to whether or not to give consent to a proposed exercise of power by the Plaintiffs (as trustees of the X Trusts) (or any of them) which requires the protectors' consent, taking into account relevant considerations and disregarding irrelevant considerations so that the protectors might withhold their consent to a proposed exercise of power by the Plaintiffs even if the proposed exercise of power was an exercise of power which a reasonable body of properly informed trustees was entitled to decide upon (the latter being a relevant factor, but not the only relevant factor, for the protectors to take into account) [which the parties generally describe as the "Wider View"]*; or*

(b) to satisfy themselves that the proposed exercise of a power by the Plaintiffs (as trustees of the X Trusts) (or any of them) is an exercise which a reasonable body of properly informed trustees is entitled to undertake and, if so satisfied, to consent to the same [which the parties generally describe as the "Narrower View"]*; or*

(c) some other and if so what role [this question being the "Interpretation Issue"]*;*

(2) in the light of the answer to the question in paragraph 1 above declarations as to whether:

(a) it was within the power of the then trustees of the X Trusts to confer on the protectors the powers which they purportedly conferred, in whole or in part; and

(b) the instruments by which the protectors were appointed are valid and effective or not; and/or

(c) *the instruments by which the protectors were appointed should be avoided, in whole or in part (together with any necessary consequential relief)* [this question being the "Validity Issue"]."

4. This Summons was primarily supported by the Sixth Affidavit of AA. The Trustees adopted a neutral position as to the competing contentions of the A Branch and the B Branch for the Narrower View and Wider View respectively. So, in the event, did the Protectors, who placed the Second Affidavit of BB and the First Affidavit of CC before the Court.

5. In addition to factual evidence filed on behalf of the A and B Branches respectively, three expert reports were filed by each of the two family branches and the Protectors "*on the questions as to whether the protectors' consent provisions introduced in 1994/1995 were in a standard form, whether they were used in offshore trusts with UK resident protectors and whether it would have given rise to a materially greater concern in 1994/1995 from a UK tax perspective if such provisions were interpreted as having the Wider View*"[1]. Each Expert was economically cross-examined but no bright light was ultimately shone on the principal issues of construction which required determination.

6. What factual evidence was admissible as an aid to construction, and for what interpretative purposes, was controversial. In their Skeleton, the Trustees advanced submissions which did not appear at first blush to be properly viewed as controversial:

> "*15. As to the admissibility of evidence:*
>
> *(a) As noted below, evidence of any person's subjective intention in introducing the protector consent provisions – or their recollection of their purpose or intended effect – is inadmissible and irrelevant to the question of construction or interpretation of provisions in deeds.*
>
> (b) *Just as pre-contract negotiations are inadmissible and irrelevant to the task of interpreting the contract, as Lord Hoffmann explained in Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101, it is submitted that pre-instrument discussions or material evidencing the process by which a trustee or settlor decides to execute a trust instrument is inadmissible and irrelevant to the task of interpreting that instrument.*"

7. The Protectors set out in their Skeleton certain questions that guidance was sought from the Court on, depending upon whether the Narrower or Wider View prevailed.

[1] Trustees' Skeleton, paragraph 16, per paragraph 9 of the order for directions

8. The Trustees' Summons raised two issues: (1) what was the scope of the Protectors' powers of consent (the Narrower View or the Wider View) and (2) if the Wider View, was the Trustees' execution of the instruments creating the Protector Provisions in excess of their power and accordingly invalid. The A Branch advanced the invalidity argument on the grounds that, without regard to extrinsic evidence, it would be clear on the face of the relevant instruments read as expressing the Wider View that such a result conferred no benefit on the beneficiaries. I indicated in the course of argument that I found it difficult to envisage how I could both construe the Protector Provisions as expressing the Wider View and also hold that such a result was in excess of the Trustees' power.

9. The present Judgment accordingly focuses on Issue 1, which may be distilled as follows: do the Protector Provisions confer an independent decision-making discretion (Wider View), or merely a discretion to ensure that the Trustees' substantive decision is a valid and rational one (Narrower View)? The A Branch understandably contended for the Narrower View, in circumstances in which they are content with the central tenets of the Trustees' proposals, as it placed the Protectors' veto powers within limited bounds. The B Branch wish to encourage the Trustees to change course (or expand the scope for the Protectors to encourage them to do so). Understandably they contended for an unfettered veto power. It was common ground that the consent powers are fiduciary in nature.

The Protector Provisions

10. The Schedule to the Trustees' Skeleton Argument which summarised those X Trusts which contained Protector Provisions and divided them into five categories, set out sample clauses and identified the differences and similarities between them. Some Protector Provisions were created by the Trustees themselves for trusts which did not originally contain them. More modern trusts contained broadly similar Protector Provisions from inception. The Trustees submitted in their Skeleton:

> "*29. In essence the protector provisions require the protectors' consent before the Trustees can exercise*
>
> > *a. their powers to appoint capital under the relevant trusts, or*
> > *b. their powers to deal with shares in [OpCo], being the principal asset of the X Trusts.*"

11. A sample clause restricting the Trustees' power to appoint capital reads as follows:

> "*The Trustees shall not exercise any power to appoint, distribute or pay any part of the Trust Fund to or for the benefit of any member of the Appointed Class or any Beneficiary without obtaining the prior written consent of the Protectorate, nor, if the Trustees' consent is required for any appointment of capital, shall they give their consent without the prior written consent of the Protectorate.*"

12. A sample clause restricting the Trustees' powers to deal with the OpCo shares reads as follows:

> "*Notwithstanding anything to the contrary contained herein or in the Settlement, the Trustees shall not, without in each case obtaining the prior written consent of the Protectorate:*
>
> *(A) sell, charge, exchange, transfer or otherwise deal with any Specified Securities or any interest therein, whether legal or equitable;*
>
> *(B) give any consents that may be required of them in relation to any sale, charge, exchange, transfer or other dealing with any Specified Securities or any interest therein, whether legal or equitable; nor*
>
> *(C) exercise, or take or omit to take any action in relation to the exercise of, voting rights attaching to any Specified Securities."*

13. It is the scope of these consent powers which the Court is required to determine. Two sample clauses are closely connected with the consent powers. Firstly, it is often provided as follows:

> "*Any written consents of the Protectorate required under the terms of this Deed may be given either specifically in relation to any particular matter or by a general written consent referring to one or more matters, and any requirement as to prior written consent shall be satisfied by a written consent given simultaneously.*"

14. Secondly, it is typically provided as follows:

> "*If the Protectorate comprises more than one Protector, any decision by the Protectorate must be taken unanimously. If any power vested in the Trustees required the prior written consent of the Protectorate and if the members of the Protectorate cannot agree as to whether it should give or withhold its consent to a proposed exercise of such power in relation to a particular matter, the Trustees shall then be free to exercise their power (in relation to the matter in question but not further or otherwise) without having obtained the prior written consent of the Protectorate. In such a case the Trustees shall nevertheless consult with each Protector and shall take into account the views expressed before making a final decision.*"

15. Other 'generic' Protector Provisions are potentially relevant to this interpretative task. The Protectors are typically given designation powers in substantially the following terms:

> "*The Protectorate may at any time or times by notice in writing to the Trustees designate as Specified Securities any securities from time to time directly or indirectly comprising the whole or any part of the Trust Fund (whether held by the Trustees or by a company a majority or all the shares of which are held by the Trustees) and may also, at any time or times, revoke any such designation by giving written notice thereof to the Trustees.*"

16. Provision is usually made for the release of "Protectorate" powers through a clause providing substantially as follows:

> "*The Protectorate may, at any time or times by deed revocable (during the Trust Period) or irrevocable release, extinguish or restrict any or all of the powers conferred upon it by the terms of this Deed. The Protectorate may also waive, either specifically in relation to any particular matter or generally in relation to one or more matters, the requirement for the Trustees to obtain its prior written consent.*"

17. A sample appointment provision reads as follows:

> "*(A) Each Protector shall have power to appoint a successor. Such appointment may be made during the Protector's term of office to take effect immediately upon its termination, whether by the resignation of the Protector or, in the case of a corporate Protector, the commencement of its*

winding up, whether voluntary or otherwise or, in the case of an individual Protector, his death or the onset of physical or mental incapacity or some other circumstance which prevents him from carrying out his functions.

(B) If a Protector fails to exercise its or his power of appointment contained in sub-clause (A) for any reason or if there shall at any time be no Protector capable of acting, the power of appointing a new Protector shall be vested in the Trustees for the time being.

(C) The Protectorate shall have the power, exercisable at their discretion, to appoint or more additional Protectors [sic].

(D) Any appointment of a successor or additional Protector may be made either by deed or by writing under hand and written notice of the appointment shall forthwith be given to the Trustees.
(E) Each Protector may at any time resign its or his office by giving written notice to the Trustees and such resignation shall be effective upon receipt of the notice or the expiration of one month from the date of the notice or such date as may be agreed between the Protector in question and the Trustees (whichever shall be the earlier)."

18. The consequences of a vacancy in the Protectorate is dealt with in substantially the following terms:

> "*If there shall at any time be no Protectorate this Deed shall during such time as there shall be no Protectorate (but not further or otherwise) be read and construed as if all references to the requirement for the Protectorate's consent or agreement and to the exercise by the Protectorate of any power were omitted from this Deed.*"

19. A sample remuneration clause provides as follows:

> "*Each Protector shall be entitled to charge and be paid out of the Trust Fund and/or the income thereof such fees as may from time to time be agreed between the Trustees and such Protector and, in addition, each Protector shall be entitled to reimbursement of all proper expenses incurred in relation to the performance of its or his powers and duties hereunder and to reimbursement of any expenses incurred in the prosecution or defence of any legal proceedings arising in connection with the exercise or non-exercise of its or his powers and duties hereunder, provided that any claim*

for reimbursement shall be received by the Trustees within one year of the expenses being incurred."

20. As Mrs Talbot Rice QC pointed out in her concluding submissions, there is no indemnity clause for Protectors mirroring the indemnities conferred upon the Trustees.

21. The X Trusts are not all governed by Bermudian law. Many are governed by English law and some by Jersey law. Although counsel assumed that the principles of construction would be fundamentally the same, the supervisory jurisdiction of this Court under section 47 of the Trustee Act 1975, relevant to resolving a deadlock arising under the hypothetical Wider View, was agreed to be broader than it is under English law (section 57 of the Trustee Act 1925) and, apparently, Jersey law as well.

Legal findings: principles of construction governing unilateral instruments

22. The only controversy as to the applicable principles of construction really amounted to differences of emphasis. Mr Taube QC placed more emphasis on the relevance of both the text of the instruments and extrinsic evidence as to the purpose of the Protector Provisions; Mr Green QC encouraged the Court to focus on the terms of the relevant instruments and sought to minimize the relevance of the evidence his opponent relied upon relating to the context in which the relevant powers were conferred. However, he also placed reliance on the role of protectors as understood by various legal commentators. With these differing tactical goals in mind, issue was joined on the extent to which the 'commercial context' was equally relevant when construing contracts and unilateral instruments such as trust documents. It was ultimately common ground that the subjective intentions of the Trustees and/or the beneficiaries as to what the scope of the consent powers was intended to be were inadmissible and irrelevant.

23. Mr Green QC relied in particular on *Barnardo's v Buckinghamshire* [2018] UKSC 55, [2019] ICR 495 at [13] to [17] where Lord Hodge opined as follows:

"*13. In the trilogy of cases, Rainy Sky SA v Kookmin Bank [2011] 1 W.L.R. 2900, Arnold v Britton [2015] A.C. 1619 and Wood v Capita Insurance Services Ltd ; [2017] A.C. 1173, this court has given guidance on the general approach to the construction of contracts and other instruments, drawing on modern case law of the House of Lords since Prenn v Simmonds [1971] 1 W.L.R. 1381. That guidance, which the parties did not contest in this appeal, does not need to be repeated. In deciding which interpretative*

tools will best assist in ascertaining the meaning of an instrument, and the weight to be given to each of the relevant interpretative tools, the court must have regard to the nature and circumstances of the particular instrument.

14. A pension scheme, such as the one in issue on this appeal, has several distinctive characteristics which are relevant to the court's selection of the appropriate interpretative tools. First, it is a formal legal document which has been prepared by skilled and specialist legal draftsmen. Secondly, unlike many commercial contracts, it is not the product of commercial negotiation between parties who may have conflicting interests and who may conclude their agreement under considerable pressure of time, leaving loose ends to be sorted out in future. Thirdly, it is an instrument which is designed to operate in the long term, defining people's rights long after the economic and other circumstances, which existed at the time when it was signed, may have ceased to exist. Fourthly, the scheme confers important rights on parties, the members of the pension scheme, who were not parties to the instrument and who may have joined the scheme many years after it was initiated. Fifthly, members of a pension scheme may not have easy access to expert legal advice or be able readily to ascertain the circumstances which existed when the scheme was established.

15. Judges have recognised that these characteristics make it appropriate for the court to give weight to textual analysis, by concentrating on the words which the draftsman has chosen to use and by attaching less weight to the background factual matrix than might be appropriate in certain commercial contracts: Spooner v British Telecommunications Plc [2000] Pens. L.R. 65, para 75-76 per Jonathan Parker J; BES Trustees v Stuart [2001] Pens. L.R. 283, para 33 per Neuberger J; Safeway Ltd v Newton [2017] EWCA Civ 1482; [2018] Pens. L.R. 2, paras 21-23 per Lord Briggs JSC, giving the judgment of the Court of Appeal. In Safeway, Lord Briggs JSC stated, at para 22:

'the Deed exists primarily for the benefit of non-parties, that is the employees upon whom pension rights are conferred whether as members or potential members of the Scheme, and upon members of their families (for example in the event of their death). It is therefore a context which is inherently antipathetic to the recognition, by way of departure from plain language, of some common understanding between the principal employer and the Trustee, or common dictionary which they may have employed, or

even some widespread practice within the pension industry which might illuminate, or give some strained meaning to, the words used.'

I agree with that approach. ….

16. The emphasis on textual analysis as an interpretative tool does not derogate from the need both to avoid undue technicality and to have regard to the practical consequences of any construction. Such an analysis does not involve literalism but includes a purposive construction when that is appropriate. As Millett J stated in Re Courage Group's Pension Schemes [1987] 1 W.L.R. 495, 505 there are no special rules of construction applicable to a pension scheme but 'its provisions should wherever possible be construed to give reasonable and practical effect to the scheme'. Instead, the focus on textual analysis operates as a constraint on the contribution which background factual circumstances, which existed at the time when the scheme was entered into but which would not readily be accessible to its members as time passed, can make to the construction of the scheme.

17. It is nevertheless relevant to the construction of pension schemes that they are drafted to comply with tax rules so as to preserve the considerable benefits which the United Kingdom's tax regime confers on such schemes. They must be construed 'against their fiscal backgrounds': National Grid Co Plc v Mayes; [2001] ICR 544, para 18 per Lord Hoffmann; Stevens v Bell; [2002] Pens. L.R. 247, para 30 per Arden LJ."

24. I accept that primacy should ordinarily be given to a textual analysis of trust instruments and that the pension scheme context in which Lord Hodge's pronouncements were expressed is very broadly analogous to that of trust instruments, although there may for some purposes be material differences. The X Trusts are intended to last for a long time and it ought not to be necessary, decades after instruments have been executed, to delve into historic evidence about the circumstances of their creation to ascertain their meaning. This does not mean, of course, that the effect of doubtful provisions may not in exceptional cases be elucidated when cogent evidence exists as to their intended purpose, in the form of letters of wishes or otherwise. The importance of placing primary emphasis on the text and context when interpreting trust instruments is explicitly supported by the binding *dicta* of Sir Christopher Clarke (P) in *Grand View Private Trust Company v Wong et al* [2020] CA (Bda) 6 Civ (20 March 2020) in a case which concerned (a) the construction of the scope of a power of amendment and (b) whether it had been improperly exercised. The President critically opined as follows:

> "*178 … In determining the true construction of the express words of a power, or whether any restriction is to be implied therein, it is relevant to consider what the settlor or the parties must have meant by them or what they must be taken to have had in contemplation at the time. In determining whether the exercise of a power, although within its scope, is for an improper purpose one of the considerations, but not the only one, is the wording of the instrument.*
>
> *179. Each trust, and the powers contained within it, has to be considered in the light of its own nature, terms and context. There is, in this respect, a potentially important difference between a trust that arises as a result of commercial arrangements such as a pension fund, or a trust to which parties other than the settlor contribute for a particular purpose (such as the funding of an orchestra), on the one hand, and a non-commercial discretionary trust, funded entirely by the bounty of the settlor, on the other*[2] *….*" [Emphasis added]

25. I do not understand the reference to "*context*" in the quoted passage as suggesting that extrinsic evidence about the purpose of a power should always routinely be considered as part of the construction of the scope of a power, it being clear (from paragraph 179 of the *Grand View* case) that the text is not the sole criterion when considering the validity of a particular exercise of a power. It may well be that extrinsic contextual evidence will potentially have greater significance in relation to protector related issues, in the short to medium term, because the duties of protectors, unlike trustees and other fiduciaries (such as agents), a comparatively modern office, have yet to be fully worked out by the courts. This view finds indirect support in an authority the B Branch placed before the Court. In Underhill & Hayton, '*The Law Relating to Trusts and Trustees*', 15th edition (1995), Professor David Hayton (as he then was) observed (at page 24):

> "*In determining the scope of a protector's fiduciary duty a court will need to consider the settlor's purposes in conferring particular powers on the protector (so that, ideally, the purposes should be properly documented at the time) as well as the terms of any exemption or any other clause in the instrument that in any way relates to the protector's position…*"

26. However, in the present case, my provisional view, expressed in the course of argument, was that the somewhat esoteric question raised on the present application

[2] The potentially important difference identified between pension arrangements and discretionary trusts appears to be more relevant to the exercise of the power than to how the terms of the instruments should be construed.

about the legal scope of the Protectors' consent powers was not, perhaps unsurprisingly, materially answered by recourse to any extrinsic evidence about the underlying purposes of the Protector Provisions drafted by the Trustees over a quarter of a century ago.

27. The following umbrella principles of construction were relied upon by Mr Taube QC:

> "*86. Lord Neuberger stated the principles in Marley v Rawlings [2015] AC 129 at [19], [20]:-*
>
> *'When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party's intentions.'*
>
> *Lord Neuberger said the approach equally applies where the document is unilateral such as a will, as in Marley v Rawlings; and he continued at [20] that in all cases –*
>
> *'the aim is to identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context".*
>
> *87. The object of the court when construing the Powers of Veto is therefore to identify the intention of (a) the trustees who executed the deeds of appointment under Operation Protector and (b) the settlors in the case of the Modern Trusts. The relevant intention is not the subjective intention of the trustees or settlor. Instead, the court must ascertain what a reasonable person, having regard to the surrounding circumstances or 'factual matrix', would have understood the words in the trust instrument to mean.*"

28. The B Branch's Skeleton ultimately commended the following approach to construction which the Trustees' counsel also endorsed. In *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173, Lord Hodge stated:

> "*12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated... To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.*"

29. I accept all of these principles should be applied to the issue at hand. Despite commending this fine-tuned approach to construction to the Court, Mr Taube QC ultimately invited the Court to pivotally give deference to a far blunter literal construction. Why I reject the latter approach is explained below.

Extrinsic evidence as to the intended purpose of the Protector Provisions

30. Extrinsic evidence in connection with the adoption of the Protector Provisions was relied upon by the B Branch both as a sword to advance their construction case and as a shield against the A Branch's excessive execution claim. In the latter regard, which I consider briefly below, no admissibility objections properly arose. The boundaries between these two issues, construction and excessive execution, seemed to me to have become somewhat blurred in the way the extrinsic material was relied upon, on the one hand, and its admissibility challenged on the other.

31. The B Branch addressed the background to the Protector Provisions in their Skeleton at paragraphs 41 to 83 and in Schedule 1 where a chronology and extracts from contemporaneous documents were set out. At paragraphs 112 to 116, the specific reliance on this background as an aid to construction is set out. The points may be summarised as follows:

    (a) the Protector Provisions "*enabled the actions of the offshore trustees on important matters to be subject to the control of trusted advisers of the settlors and their families who were incorporated in a protector structur*e";

    (b) "*the trustees' advisers recommended, and the senior beneficiaries requested, the trustees to introduce into all the X Trusts the protector provisions, including the Powers of Veto, 'to provide stability, continuity and coherence in long term planning for the benefit of the family as a whole in relation to primary assets (i.e. shareholdings in*

[OpCo]*)', and to 'add to the cohesiveness of the protection of the assets held in the settlements'. If the role of the Protectors was merely the Narrow Review Role, neither goal could have been achieved*";

(c) "*An important feature of the protector provisions introduced by Operation Protector and the Modern Trusts was that one or other of the same two Protector companies, with the same directors, acted as Protector for all the X Trusts. This arrangement was obviously intended to ensure a cohesive and united policy in relation to the shares...held in all the X Trusts. Had the role of the Protectors been limited to the Narrow Review Role, it would have been impossible for the Protectors effectively to control the trustees' decisions or to procure that the trustees of each individual X Trust adhered to a cohesive and united policy.*"

32. Point (a) is in reality a generic function of protectorates in offshore trusts and does not pivotally rely on extrinsic evidence. Point (b) relies explicitly on direct evidence about the purpose of the Protector Provisions while point (c) relies on evidence about who was appointed under the Protector Provisions to inferentially support point (b). So the basket of purposes which the B Branch rely upon are essentially achieving "*stability, continuity and coherence… and to 'add to the cohesiveness of the protection of the assets held in the settlements*'". As a matter of first impression, such evidence seems arguably admissible but only supportive of the Wider View in a very general way. This support seems to be parasitic upon an assumption that the Narrower View necessarily produces powers of veto which lack any real bite at all, reducing the Protectors (in relation to the exercise of their consent powers) into mere toothless tigers.

33. The A Branch's Skeleton addresses admissibility (Appendix 1) and the merits of the extrinsic material (Appendix 2). On admissibility, it is submitted that: "*The historic material in the present case is all on the pre-contractual, subjective motive purpose or intent side of the line*" (Appendix 1, paragraph 24). That is a sweeping overstatement of the true position although it is clearly valid in respect of what are undoubtedly statements of subjective intent. However, these were statements which Mr Taube QC made no attempt to rely upon as an aid to construction of the Protector Provisions. The following objections of legal principle were set out in Appendix 1:

"*18 The objection to this process would apply even if the wording which was under interpretation was not as ordinary as is under consideration*

here: i.e., if (as is often the case) the issue of construction related to trust specific provisions.

19 It applies a fortiori in a case such as the present where the provision being interpreted – being no more and no less than an expression of a requirement of protector consent to the exercise by trustees of powers vested in them – is ordinary, appearing in a multitude of other trusts, and obviously having a common meaning whenever it appears in a trust instrument without additional words expressly or impliedly expanding or restricting its meaning.

20 Delving into the background papers to the making of trust instruments is inadmissible in principle…

22 It is one thing to recognise that there is an objective factual backdrop in which a document is made - e.g., a bond made in the context of a given pre-existing shipping contract, or an instrument entered into in a particular tax law context– and, in the objective (reasonable man's) exercise of interpreting (i.e., finding for the objective meaning of the language used in) such document, to take cognisance of the objective setting within which the document was entered into.

23 It is quite another to seek to railroad into the construction exercise subjective pre-transaction material - be it previous negotiations, advices, instructions on which such advices were obtained, or whatever. That is precisely what Lord Hoffmann was excluding from the realm of what is admissible in subjecting his proposition (2) to what he said at proposition (3)."

34. The relevant propositions of Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich Building Society (No. 1)* [1998] 1 WLR 896 at 912-913 were as follows:

"*(2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact,' but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*

> *(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification.*"

35. In my judgment, evidence about what the Protector Provisions were intended to achieve, admittedly a very slender slice of the meaty contemporaneous evidence 'feast' which the B Branch served up, falls within Lord Hoffman's category (2) rather than category (3) and is *prima facie* both relevant and admissible. In reaching this conclusion, I assume that in the trust context the admissible background is more narrowly circumscribed than in the context of negotiated bilateral or multi-party instruments. It remains to consider how the A Branch dealt with the merits of this evidence in Appendix 2 of their Skeleton.

36. The A Branch's response was based on the perhaps understandable assumption that all the evidence the B Branch placed before the Court, including all the "Operation Protector documents", were relied upon in aid of the Wider View construction. Appendix 2 also understandably assumed that the Protectors were advancing the Wider View construction and responded to the Protectors' October 2020 Skeleton. The reliance actually placed on the Operation Protector documents for construction purposes was far more narrow and nuanced than the A Branch had anticipated. And the Protectors adopted a neutral position on the construction question. One major function of Appendix 2, as Mr Green QC explained in oral argument, was to demonstrate, through reference to extracts from the contemporaneous documentation relating to the creation of the Protector Provisions, what support there was for the Narrow View.

37. As regards the two specific purposes contended for by the B Branch, derived from an August 31, 1993 'Introductory Paper' prepared by Slaughter & May, Mr Green QC submitted in Appendix 2:

> "*12.1.2 'The veto powers over capital and the control of specified securities would be designed to provide <u>stability, continuity and coherence</u> in long term planning for the benefit of the family as a whole in relation to primary assets (i.e. shareholdings in [OpCo])' ….*
>
> *Why exactly is this inconsistent with the Narrow Role? Under that role the protectors (paradigmatically closer to the settlor and/or the principal beneficiaries) bring relevant considerations to the attention of (paradigmatically actually or potentially more remote) offshore trustees. The point is actually made in the same document in the next quote…*

15. The purpose of putting in place the provisions for Protector consent to appointments of capital/dealing with the [OpCo] shares was to ensure that the entire picture of the trusts (the 'global view') was known to the particular X Trust trustee, including policies of different trustees, views of the family etc, such that the Protectors could ensure that the individual trustees knew of all such relevant factors and did not take a decision in 'isolation'. In this way, the Protector would be of 'assistance' to the trustees as a 'sounding board' in relation to trustee decisions because they may be aware of matters which "might not be known" to the Trustees. Further, the Trustees could take comfort in obtaining sign-off that their decisions had been properly taken on the basis of all relevant factors (including those which they may not otherwise have been aware of without the Protectors drawing their attention to them) given their 'difficult responsibility'."

38. In the final analysis there was no dispute as to what in very general terms the primary purposes of the Protector Provisions were. The controversy centred on what inferences should be drawn from the agreed purposes as regards whether the relevant provisions should be construed in accordance with the Wider or Narrower View. In these circumstances, I reject Mr Green QC's submission, if it was seriously pursued at all in the end, that these narrow strands of the contemporaneous transactional evidence are inadmissible for the purposes of construing the Protector Provisions. At first blush and in the final analysis, neither side's contentions as to what that evidence shows deliver a knockout blow in any event.

Construction of the Protector Provisions: the case for the Wider View

The implied terms/literal construction approach

39. Mr Taube QC rightly submitted that if one construed the Protector Provisions literally and only implied terms in the way one would do in relation to a contract, applying *Marks and Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Limited* [2015] UKSC 72; [2016] AC 742, the Wider View would potentially prevail. In his clients' Skeleton, the relevant principles were summarised as follows:

"*91.1. The Supreme Court pointed out at [15] that there are two types of implied term: first, a term implied into the contract in the light of its express terms, commercial common sense and the facts known to the parties at the time the contract was made; secondly, a term implied as a result of the operation of law – sometimes statute, sometimes the general law - because the law effectively imposes certain terms into certain classes of relationship.*

91.2. As regards the first type of implied term, at [16] – [23] the Supreme Court restated the requirement that an implied term must be one which a reasonable person would consider either to be so obvious as to go without saying or to be necessary to give business efficacy to the contract."

40. However, Lord Neuberger's judgment in that case made it clear that the implication of terms and construction of a document were different forensic processes:

> "*29 In any event, the process of implication involves a rather different exercise from that of construction. As Bingham MR trenchantly explained in the Philips case [1995] EMLR472, 481:*
>
> *'The courts' usual role in contractual interpretation is, by resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties themselves have expressed their contract. The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters for which, ex hypothesi, the parties themselves have made no provision. It is because the implication of terms is so potentially intrusive that the law imposes strict constraints on the exercise of this extraordinary power.* '"

41. I accept that implying a term into the Protector Provisions' express terms would be a dramatic thing to do. But the dispute raised by the Trustees' present Summons turns on the primary construction of the provisions; and the Narrower View is contended for as a matter of construction of the actual terms of the Protector Provisions without reliance on the doctrine of implication. The possibility that there may be no basis for implying a term that corresponds with the Narrower View only arises once one has determined, applying an iterative approach to construing the relevant terms, that they do not, *prima facie*, support the Narrower View at all.

42. Mr Taube QC in his oral submissions forcefully advanced the arguments set out in his Skeleton as regards this primary construction exercise:

> "*93. The Powers of Veto in the X Trusts state the Trustees' specified powers may not be exercised 'without obtaining the prior written consent of the Protectorate'.*
>
> *94. In this context the natural and ordinary meaning of the word 'consent" is agreement or permission: see the Oxford English Dictionary.*

95. The reference in the Powers of Veto to the Protector's 'consent' - to its agreement or permission - indicates the Protector has a choice whether to consent to the Trustees' proposed exercise of the specified powers.

96. It follows, as a matter of ordinary language, that the Protector has a discretion in the matter whether to choose to consent.

97. By contrast, the reference to the Protector's "consent" is not appropriate to describe the Narrow Review Role. The Narrow Review Role… involves not a discretion but an adjudication whether circumstances exist.

98. The Narrow Review Role is described in para 1(b) of the Protector Summons, where the court is asked whether the role of the Protectors is "to satisfy themselves that the proposed exercise of a power by the Trustees of the X Trusts (or any of them) is an exercise which a reasonable body of properly informed trustees is entitled to take and, if so satisfied, to consent to the same".

99. This description of the Narrow Review Role echoes the test applied by the court in a Public Trustee v Cooper Category 2 case. In such a case the court determines whether the proposed exercise of the trustee's power is rational: is the trustee's decision one which a reasonable body of properly informed trustees is entitled to take? The court adjudicates the point. It is not a matter of the court's discretion.

100. As a matter of ordinary language, these factors show the requirement for the 'consent' of the Protectors in the Powers of Veto is not intended to allocate to the Protectors the Narrow Review Role."

43. These submissions are coherent and compelling if one accepts that a literal construction should be adopted. The need to imply limiting terms would not, on this basis, arise either because such limiting terms are <u>not</u> "obvious" or, somewhat less clearly, because they would not arise by operation of law. Moreover, Mr Taube QC relied on potentially pivotal persuasive support for the Wider View:

"*117. The only case which has considered the Protector's Role Question in relation to a similar power of veto conferred on a protector is PTNZ v AS [2020] WTLR 1423. There, the High Court in England regarded it as almost self-evident that the protector had the Wide Discretionary Role, not the*

Narrow Review Role. Master Shuman explained at [82] that on any view "[t]he protector's powers of consent are independent of the powers of the trustee and are to be exercised by the protector on the basis of his own discretion"; and at [92] the protector's power of veto "would permit the protector, if he disagreed with the trustees, to withhold his consent even if the trustees are neither acting unreasonably nor for improper purposes". Master Shuman concluded at [97] in succinctly "[a] protector's power of veto is as the name suggests exactly that and not a power of review".

Surrounding circumstances/extrinsic evidence as to the purpose of the Protector Provisions

44. In section C of the B Branch's Skeleton Argument, the factual background to the introduction of the Protector Provisions is summarised. None of this is dispositive as regards whether the Wider View or Narrower View should prevail. The following submission to my mind represents the high point of the B Branch's submissions:

> "*79. On 12 December 1995, Mr Bougeard wrote separately on behalf of the Protectors to Mr Higgins to acknowledge receipt of the Family Accord [CM/239/1502-1503]… He said:-*
>
> > *'… we consider the Family Accord to be a very useful paper setting out the guidelines of family policy. These will be of help to us as and when questions are raised by trustees of family settlements requiring this company, as protector, to exercise its discretion.*
> >
> > *Although we will regard the "Family Accord" to be a positive indication of the family's views on many matters of policy in relation to the family's affairs and their assets nevertheless you will of course appreciate that this company, as a protector of family settlements, has to maintain its ability to act in any given circumstances with full discretion over issues that may be passed on to us for decision by trustees of family settlements' (emphasis supplied).*"

45. The Protectors' subjective view of the breadth of the discretion conferred on them at the time (as confirmed by the evidence of CC herein), however, can hardly be dispositive; it is in any event inadmissible. Counsel's advice and the relevant letters of wishes are in my judgment admissible background context potentially relevant to the purpose of the Protector Provisions. But nothing here shines a revealing light on

the character of the veto powers conferred. The letters of wishes linked to the Family Arrangement, for instance, merely stated:

> "*In my capacity as settlor of certain of [the family settlements], I confirm that I have carefully considered the question of introducing protectorship arrangements into the management of those settlements and confirm that I am wholly in agreement with the introduction of such arrangements which will, I am sure, be for the benefit of the beneficiaries of the settlements and also add to the cohesiveness of the protection of the assets held in the settlements.*"

46. The advice given by Robert Walker QC was somewhat beguilingly referred to as advice given by Lord Walker, a capacity he of course only acquired years later. His retainer was described as follows in Mr Taube QC's Skeleton:

> "*58. On 24 September 1993 Slaughter & May instructed Lord Walker to advise on the proposals [CM/27/256]. The instructions recorded that the trustees had 'satisfied themselves in principle that having regard to the interests of the beneficiaries as a whole the introduction of a Protector mechanism would be considerably to their advantage because of the stability and cohesion this will introduce'... Lord Walker was asked to advise on the proposal generally and in particular:-*
>
> > *58.1. 'Whether it could be a proper exercise of the wide powers and the narrow powers to introduce a Protector mechanism at all'...The issue of the width of the enabling power to introduce the protector provisions in each of the X Trusts had been raised in the Operation Protector Bible'.*
> >
> > *58.2. 'Whether the introduction of a Protector mechanism would be regarded as a 'fetter' on the powers of the trustees or in some other way be regarded as a delegation of their powers which is not permitted'.*" [Emphasis added]

47. The quoted instructions to counsel provide cogent evidence as to what the Trustees considered the purpose of the Protector Provisions was, albeit articulated in somewhat abstract terms: "*stability and cohesion*". I find that this provides no or no clear support for either the Wider View or the Narrower View. The advice provided by counsel on, *inter alia*, whether the provisions would constitute a fetter on the Trustees' discretion was at most a sword capable of slaying the A Branch's invalidity dragon. It did not help to carry the B Branch into Wider View territory through

elucidating the central construction question. One Note reproduced in Mr Taube QC's Skeleton, for example, reads as follows:

> "*Counsel advised that this did not amount to an actual extinguishment of the powers. Instead, it amounted to a form of delegation which still left the trustees with the responsibility of exercising their powers themselves. Counsel considered that the provisions in both the 'wider' and 'narrower' trusts were sufficient to enable these provisions to be introduced.*"

48. In short there was little to no admissible evidence relating to the purpose of the Protector Provisions which directly supported the contention that the Wider View of the Protector Provisions should be adopted. Nonetheless it was argued on behalf of the B Branch that inferential support could be found:

> "*An important feature of the protector provisions introduced by Operation Protector and the Modern Trusts was that one or other of the same two Protector companies, with the same directors, acted as Protector for all the X Trusts. This arrangement was obviously intended to ensure a cohesive and united policy in relation to the shares in [OpCo] held in all the X Trusts. Had the role of the Protectors been limited to the Narrow Review Role, it would have been impossible for the Protectors effectively to control the trustees' decisions or to procure that the trustees of each individual X Trust adhered to a cohesive and united policy.*"

49. This is a potentially pivotal submission, because in my judgment, an understanding of the practicalities of the interrelationship between the Trustees and the Protectors' powers, including how deadlocks are resolved, is central to resolving the present construction conundrum. If the Wider View would be more likely to promote the purposes for which the Protector Provisions were conferred, that would be a powerful justification for preferring it to the Narrower View, following both (a) the iterative approach to construction commended by Lord Hodge in *Barnardo's v Buckinghamshire* [2018] UKSC 55, [2019] ICR 495 at [13] to [17] and (b) the contextual analysis commended by Sir Christopher Clarke in *Grand View Private Trust Company Limited v Wong et al* [2020] CA (Bda) 6 Civ at paragraphs 178-179.

Expert evidence

50. I found it somewhat odd that the parties agreed to the admission of expert evidence on UK tax law, but it could not have been predicted before the relevant directions were agreed that the Experts would find substantial common ground. The B

Branch's Expert was Mr Giles Clarke Ph.D, who practised in tax Chambers for more than 15 years before becoming an independent consultant specializing in offshore matters. The Experts were asked to address the following three questions:

(1) whether the Protector's fiduciary consent provisions in issue as introduced in 1995/95 were in standard form;

(2) whether such provisions were in 1994/95 used in offshore trusts with UK resident protectors; and

(3) whether it would have given rise to a materially greater concern in 1994/95 from a UK tax perspective if such provisions were to be interpreted in the sense of paragraph 1(a) of the Summons dated 20 January 2021 rather than in the sense of paragraph 1(b) of the Summons.

51. Mr Clarke opined in relation to each of these three questions, in essence, that:

(a) the Protector Provisions were standard as regards the matters for which consent was required, save for the appointment of capital, but there was no standard form wording in 1994-1995;

(b) such provisions were best avoided as regards UK resident protectors at the time but were used in offshore trusts;

(c) there was no clear view at the time as to what scope of discretion was conferred by such clauses, the key consideration being whether the protectors were UK resident or not:

"*46 … the important points, from a UK tax perspective, were the nature of the powers over which consent was required and the place where decision making and implementation by the trustees occurred. On this analysis, it would be immaterial whether the protector had an Independent Discretion or a Review Function.*"

52. There was broad agreement between the Experts on the first two questions but disagreement on the third. In this respect, only Mr Goldberg QC, the A Branch's Expert, felt there would have been materially greater concern in 1994/1995 if the Protector Provisions had been construed as embodying the Wider View. But this presupposed that there were UK resident protectors; in this case there were not.

Submissions in oral argument

53. Mr Taube QC invited me to consider the Protectors' Skeleton Argument for the October 2020 hearing as to the scope of their powers, being views articulated before they decided to take a neutral position at the present hearing. He then proceeded to emphasize the importance of construing the Protector Provisions themselves, in the context of the relevant instruments, rather than having recourse to extraneous views about what role a protector played. As regards the critical question as to how the Protector Provisions operate in practice, he submitted[3]:

> "*First, we assume that the trustees have made a proposal which is rational to… favour… one beneficiary over everyone else. That decision, if it went before the court absent a protector provision, would be blessed.*
>
> *Assume the next thing that happens is, under these provisions, the trustees have to get the consent of the protectors. And let's assume that the protectors, rationally, taking into account all relevant considerations, ignoring all irrelevant considerations, refuse their consent. For example, they might consider that the distribution to beneficiary 1 would be damaging to the interests of the beneficiaries of the settlement as a class, taking them as a whole. And that would be a decision which couldn't be challenged if the matter came before the court.*
>
> *So, in that case, the provisions of the settlement, or the appointment, mean that the trustees' proposal cannot proceed… Now, the obvious purpose of a power of veto conferred on protectors to stop trustees exercising a power is to preserve the status quo…*"

54. Responding to Mr Green QC's suggestion that in such a scenario the Trustees would simply surrender their discretion to the Court under a *Public Trustee v Cooper* Category 3 application, Mr Taube QC argued:[4]

> "*In my respectful submission, that completely misunderstands the nature of the court's jurisdiction. The court, we say, would not accept the surrender of the discretion of the trustees in circumstances like that.*"

55. An application under Category 2 would not be possible, on this (Wider View) hypothesis, it was rightly submitted, because it would be beyond the Trustees'

[3] Transcript Day 2, page 95 lines 4-23; page 97 lines 3-5.
[4] Transcript Day 2, page 99 lines 7-11.

powers to seek to implement a proposal that had not received the requisite protector consent. Mr Taube also engaged head-on with Mr Green QC's Mr Taube QC also engaged head-on with Mr Green QC's counter-arguments in advancing the following significant submissions[5]:

> "*…what my learned friend's case amounts to is, there would be no scope for tailoring the protector's role by reference to the nature of the decision of the trustee for which they have to give a consent. It's a one-size-fits-all proposition…regardless of what the trust instrument says, unless it… were to go to the extent of expressly excluding the one-size-fits-all which is contended for. So, we say that the protector's submission therefore fits more naturally with the independent discretion*…"

56. Mr Taube QC also challenged the conceptual soundness of the notion that powers of consent should generally be construed in narrow terms[6]:

> "*If it were a principle of fiduciary law that…a fiduciary with a power of veto has to go along with the trustee or initiating fiduciary's decision, unless it's irrational, it is extraordinary that it's not been mentioned before, because in the context of protectors, the law of fiduciaries is constantly raised.*"

Construction of the Protector Provisions: the case for the Narrower View

Approach to construction

57. The Narrower View at first blush appeared to be supported by overly complicated reasoning which was inconsistent with a straightforward reading of the Protector Provisions. The construction contended for, seemed, to put it colloquially, to be "too clever by half". However the logic of Mr Green QC's submissions gradually grew in its cogency until, like a Siren song, it became almost irresistible. The essence of the argument was captured in the opening paragraphs of the A Branch's Skeleton:

> "*4.1 The starting point is that trustees and protectors have different constitutional roles, under which the former operate the trusts including exercising any relevant powers conferred in them, and the latter are there to act as watchdog or enforcer of the trusts imposed on the trustee, not to operate such trusts themselves. This provides one with the answer to Issue 1, unless and then to the extent that there are provisions contained in the trust instrument which alter the balance, conferring more extensive or*

[5] Transcript Day 4, page 10 line 14-page 11 line 1.
[6] Transcript Day 3, page 31 line 20-page 32 line 1.

different roles on the protectors and (correspondingly) less extensive or different roles on the trustees. There being no such provisions here, there is nothing to displace the supervisory role of the Protectors when it comes to the performance of their consent functions – and the Protectors had and have the Narrow Role accordingly.

4.2 Absent special wording (and there is none in the X Trusts) this is the principled result. The discretion where protector consent provisions are included in relation to powers conferred on trustees is and remains that of the trustee. As the Bermuda Court of Appeal put it in Re an Application for Information about a Trust [2013] CA (Bda) 8 Civ at [postscript 11]: "The words … 'with the prior written consent of the protector' … do not have the effect of transferring the trustee's discretion to the protector."

4.3 A provision for protector consent in relation to an exercise of a trustee's power of appointment is not a joint power of appointment: what it plainly does not provide is for a power of appointment exercisable by the trustee and the protector together. What it equally plainly is doing is providing for something different. That is for a protector sign off in relation to what the trustee is proposing to do in exercise of the discretion conferred on the trustee and the trustee alone. As such, and in accordance with the role of protectors generally, a provision for protector consent is providing for protector supervision.

It requires that the protector be satisfied that the trustee has properly exercised the trustee's power (the trustee taking due account of relevant considerations and ignoring irrelevant considerations particular to the trust and its beneficiaries, including those that the protector brings to its attention): see Bermuda Court of Appeal in Re an Application for Information about a Trust [2013] CA (Bda) 8 Civ at [43] quoting with approval Acting Deemster P.W. Smith QC sitting in the Isle of Man Court of Appeal in Rawcliffe v Steele [1993-95] MLR (SGD) 426 at 529 – '[the protector's] role … is that of assisting in the administration of the trust.'

4.4 The Wide Role is based on false reasoning. It jumps from the proposition that the protector is a fiduciary – and so like the trustee obliged to do what it does in performance of its office in the interests of the beneficiaries not itself – to the conclusion that therefore the protector takes its own independent view of whether and if so how the trustee's power should be exercised, when the substantive power in question (in this case, powers of appointment over capital) is that of the

trustee and the trustee alone, and there is nothing conferring such power on the protector.

Recognition that a consent provision involves a fiduciary role, and so is not exercisable beneficially by the office-holder, does not have the effect of conferring a parallel discretion on a protector in relation to the exercise by trustees of the substantive power vested in them (not the protector), any more than it has the effect of transferring the trustee's discretion to the protector (para 4.2 above).

4.5 It makes a great deal more sense, including practical sense, for provisions for protector consent to be a mechanism for ensuring that trustees exercise the discretions conferred on them by the trust instrument taking into account relevant considerations and so as to reach a reasonable conclusion.
4.5.1 The protector's consent under the Narrow Role is a valuable means of ensuring that trustees duly carry out their functions: without the consent, the trustees' power cannot be exercised. This is a valuable real-time brake on trustees who might otherwise potentially go wrong – especially where as is the paradigm case the protectors are closer to the settlors and/or beneficiaries than offshore trustees and so best placed to provide guidance and a sounding-board through the operation of a prior consent mechanism, with the ability to withhold consent if and for so long as not satisfied that what trustees are proposing would be a proper exercise of the trustees' power.

This provides a significant benefit to beneficiaries who would otherwise be left with the expensive and time-consuming option of bringing proceedings for the review of transactions after the event in relation to trustee decisions already implemented, by which time any damage may already have been done.

4.5.2 The Narrow Role also provides, by the same token, a significant benefit to trustees in assisting in the administration of the trust (see para 4.3 above) – since the protectors are liable to be well placed to ensure that relevant matters about which the trustee may have no knowledge, or no full knowledge, through no fault of its own, can be brought to the trustee's attention as part of the function of reviewing the trustee's proposed exercise of power.

4.5.3 And further, there is the potential benefit in the administration of the trust more generally, in that the trustees have the comfort of the protectors being a sounding board and check in relation to their decision-making on important matters (such as, in this case, appointments of capital and dealings

with/voting the [OpCo] shares), that the trustees may otherwise be hesitant to proceed with, or even inclined only to proceed with following authorisation of the Court.

4.6 As such the Narrow Role is an effective control mechanism. It is much more in keeping with a trustee's continuing to be subject to Court supervision in the exercise of its discretion, and entitled to obtain the assistance of the Court through a Public Trustee v Cooper category 2 confirmation that it has reached a lawful and reasonable conclusion in the exercise of its discretion (in proceedings to which the protector would be party to explain why it has not given its consent).
If the Court confirms that the trustee has reached a proper decision, the ground for the protector's withholding of consent falls away, as recognised by Elizabeth Jones QC in the correct advice which she originally gave to the Protectors in this matter:

4.6.1 '... the protector's role is to conduct a fair and impartial review of the Trustees' decisions, in a similar way to which a court might be asked to review Trustees' decisions.' [CO/96.1/718] (16 January 2018); and

4.6.2 'it is our current understanding that the trustees intend to seek a court blessing before seeking to implement the plan; it would not be appropriate for the Protectors to in effect set themselves up as an alternative tribunal on whether the proposed plan (or whatever version is put forward for blessing) should go forward.' [CO/96.1/843] (13 December 2017).

4.7 The Narrow Role is the only interpretation consistent with a recognition that the powers in question are for the trustees to exercise in the best interests of their beneficiaries in accordance with the trustees' fiduciary obligations (see paras 4.1 and 4.2 above). By contrast, the Wide Role sets up an alternative competing role for the protectors and their view as to what is in the best interests of the beneficiaries, which:

4.7.1 transfers significant discretion in relation to a power substantively conferred on the trustee from the trustee to a protector on whom such power is not even nominally conferred; and

4.7.2 introduces the potentiality for an impasse which preserves a status quo which neither the trustee whose power it is to exercise, nor the protector, consider to be in the best interest of the beneficiaries.

4.8 Which leads into a further important point.

4.8.1 On the Narrow Role, if the trustee and protector functions are properly exercised, there is no potential for deadlock between the trustee and protector: the trustee and protector roles are complementary.

4.8.2 On the Wide Role, by contrast, the potential for deadlock in relation to the trustee's exercise of its powers is baked in. On the Wide Role, the trustee and the protector (each exercising their independent discretion taking account of relevant considerations) may each be behaving entirely properly, and yet the result for the trust is stalemate and impasse.

4.8.3 This latter interpretation makes no sense – especially in the context of a discretionary trust where the ability of the trustee to exercise overriding powers of appointment over capital (to which provisions for protector consent are very often attached, as they are here) to appoint beneficial interests flexibly or fixed from time to time in response to family and fiscal exigencies arising over a long perpetuity period, lies at the heart of the trust in question.

4.9 The Narrow Role recognises that the power lies with the person on whom it is conferred (the trustee) and permits the operation of the trusts by the trustee in a proper fashion. The Wide Role places an unwarranted obstruction in the way of that – the reasonableness of the trustee's exercise of its power ceases to be the touchstone of the power's proper exercise. What becomes the touchstone is whether the protector is prepared to agree to the trustee properly carrying out its office in accordance with the power conferred on it - i.e., a power inherently exercisable by a trustee solely acting in a manner reasonably open to it ceases to be such a power.

4.10 The Narrow Role is simple and straightforward – there is no issue with its boundaries. It is complementary rather than potentially competitive, avoids duplication and delay. By contrast, the Wide Role as contended for by the Protectors in the present case… is anything but straightforward, involves a duplicative sequential process under which the Trustees serve up their decision to the Protectors who then separately evaluate it pursuant to an apparently flexible self-defined view of what is required of them in the circumstances (including potentially but not necessarily whether they would have come to the same decision as the trustees). It is a recipe for delay, cost and uncertainty in the administration of trusts, including uncertainty as to

whether the protectors themselves have complied with their fiduciary role." [Emphasis added]

58. For my part, the most significant elaboration of this central thesis in oral argument came when Mr Green QC explained why the Narrower View did not result in a serious dilution of the apparently unfettered veto powers conferred on the Protectors[7]. This was because the "narrow" role was not in reality so narrow at all in practical, real-world terms:

"*Paradigmatically, I think we're all agreed protectors may be geographically and personally closer to the settlors and the beneficiaries than are potentially more or less remote, distant, offshore trustees. And it is very much part of the [A Branch] case that on the narrow role, no less than on the wide role, the protectors can, and indeed should, so far as the facts require, be acting as a communications bridge. As well as, so far as the trustees in the exercise of their discretion may require a sounding board.*

At the end of the day… the trustees do require protector sign-off, and it is in the trustees' interests not to take the protectors for granted. And not to involve the protectors in a process for which their consent will be required in due course until too late is obviously not a sensible course…

…it's suggested that there is no commercial common sense in conferring so limited a role. But the answer is—but of course this is picking up on the buzz expressions in the Supreme Court decisions, you can always pick up on a buzz expression, but the question is, has your criticism any content? And the answer is, the criticism has no content at all, because the role is substantial and significant and of value both to the beneficiaries and the trustees…" [Emphasis added]

59. The one authority which supposedly supported the Wider View was robustly described as "*no authority at all*" by Mr Green QC in his oral submissions. The A Branch's Skeleton advanced the following main dismissive points:

"*Master Shuman's decision on this point is with the greatest of respect of no authority in this Court. It is apparent that the point (which was the last point) was the subject of only very limited argument before her, with the only opposition to the "joint power" interpretation provided by counsel for the neutral trustees [3], who was only seeking to assist the court and "expressly not adopting [the] position" he was arguing for: see [86].*

[7] Transcript Day 1, page 63 line 15-page 64 line 9; page 77 lines 8-17.

None of the analysis in this Skeleton or cases which may be said to bear on it was gone into, and the Master resorted to inadmissible material at [98] in order to reach her conclusion (nobody apparently even suggesting that she should not do so, and Barnardo's v Buckinghamshire [2018] UKSC 55, [2019] ICR 495 not having been cited to the Court). The Master did not decide whether the power in that case was fiduciary or not [80] and [85], and the only case on which she actually relied was Re Forster's Settlement [1942] 1 Ch. 199 which was not remotely a case that decided the present point.

100. Not only was Re Forster's Settlement a case of a beneficial consent power held by a life tenant (i.e., a case of the kind discussed at paras 71 to 74 above, and actually an example of what is described at para 73 above), but the issue in the case was whether a beneficial consent power could be ignored in circumstances where the trust deed provided for it, and the result would be to deprive the power holder (the life tenant) of her income interest in the property. That Morton J refused to override the life tenant's consent entitlement in the absence of evidence of her death is hardly surprising. What is surprising is that Master Shuman could have thought it any authority at all on the present question. It simply is not."

Excessive use of power

60. In the A Branch's Skeleton, Mr Green QC submitted:

"*142. In this case the Trustees' decision in 1994/95 irrevocably to introduce Wide Role Protectors' consent powers, incontrovertibly imposed a fetter on the potential future exercise by them of their discretion. In effect, they decided that they would never again exercise any of their powers to appoint capital unless an identified third party independently and in its own separate discretion agreed that the Trustees might. As described above, the before and after position, is stark. The Trustees' powers are retained but they are hand-cuffed as regards the future exercise of them. That is improper, and the fetter is invalid (and this is so irrespective of the view taken by the Trustees themselves as to whether such a fetter would be proper or desirable)…*

145… whatever the process undertaken by the Trustees in introducing the Protectorate consent provisions here, insertion of Wide Form consent provisions cannot be said to have been for the 'benefit' of the beneficiaries in question – and hence was outside the scope of the powers in question: i.e., to quote Lord Walker it constituted 'an error by

trustees in going beyond the scope of a power (for which I shall use the traditional term 'excessive execution').'

146. Thomas on Powers (2nd ed.) at 8.01 defines 'excessive execution' as:

'Excess in the exercise of a power consists in the transgression either of the rules of law or of the scope of the power'. Most instances of excessive execution involve attempts to go beyond that which is authorized by the express or implied terms of the particular power. Common examples include improper delegation of the power; attempts to impose or annex unauthorized conditions; the creation of excessive interests; the inclusion of persons who, or purposes which, are not proper objects of the power; and a failure to comply with any restriction or condition imposed on the power which is being exercised.'"

Extrinsic evidence

61. Mr Green QC understandably provided a full-blooded riposte to the admissibility of much of the evidence filed by the B Branch (Skeleton, Appendix 1), combined with responsive submissions to the substance of the evidence in case his primary objections were rejected (Skeleton, Appendix 2). In the event, as already noted above, Mr Taube QC effectively accepted the "objection" making it clear that only a narrow strand of evidence that related to the purpose of the Protector Provisions was admissible as an aid to construction.

The Trustees' Submissions on Construction

62. Only brief mention is required here of the Trustees' submissions on the construction issue, in light of their formal neutrality. Mrs Talbot-Rice QC's oral summary at one point provoked murmurs of disapproval from Mr Taube QC. The line between a neutral party assisting the Court and breaching their 'neutrality pact' is not always easy to draw. Indeed, Master Shuman observed in *PTNZ v AS* [2020] EWHC 3114 (Ch), [2020] WTLR 1423 (at paragraph 3): "… *Mr Wilson QC and Ms Bryan have had to walk a fine line to remain neutral but also to provide assistance to the court on how to approach the identified issues in a claim that the claimant elected to bring to court to seek directions.*"

63. The background to the present application made it self-evident that the Trustees' extensive work to date would potentially be undermined if the Wider View were to prevail. As a matter of general principle, the Trustees would be expected in any event to be unenthusiastic about a construction of the Protector Provisions which would in practical terms diminish their own operational autonomy. Mrs Talbot Rice QC thus

assisted the Court most by helpfully setting the scene and summarizing the issues before the Court. In the Plaintiffs' Skeleton Argument, the following important submissions on the practical implications of the contending positions were made:

> "*36. As to the commercial consequences of the Wider View and the Narrower View interpretations of the protector provisions, ¶10 of [AA] 6 explains that the powers of the Trustees in respect of which the protectors' consent is required are significant ones – and ones that the Trustees are likely to have to consider exercising particularly frequently. Insofar as the Wider View is the correct one, and the protectors take the view (as they have before) that they will not engage in the Trustees' decision-making process at an early stage, there is scope not only for deadlock, but also for waste (in terms of both time and money) and duplication if the Trustees are obliged to conclude their decision-making process before then waiting (i) for the protectors to undertake their own similar process to that already undertaken by the Trustees, and (ii) to discover whether the protectors' process has led to the same or a different decision as that made by the Trustees (with the result that the protectors will either consent to or veto the Trustees' proposed exercise of the relevant power). The scope for duplication and delay is increased insofar as the protectors undertake their own consultation exercises with the beneficiaries (after the Trustees have conducted theirs and reached a decision on the basis of it), and/or the Trustees, and then the protectors, each sequentially consult their own specialists and experts. These considerations are particularly acute given the important powers in respect of which the protectors effectively hold a veto (on any view of the proper scope of their role), and the prospect of the Trustees needing to resolve how they will exercise their powers in respect of [OpCo] shares relatively swiftly.*
>
> *37. The protectors seek to address these concerns in [BB] 2, ¶28 to ¶30. They are, however, not only unable to say that the Trustees' concerns will <u>not</u> eventuate, but specifically contemplate various circumstances in which those concerns <u>will</u> eventuate. Moreover, the suggestion, at [BB] 2, ¶30, that the need for the Trustees to act swiftly and to avoid delay 'emphasises the importance in such cases of the trustees giving the protectors as much warning as they can and of giving them the relevant information and their reasoning as early as possible' perhaps illustrates the scope for the Wider View to lead to precisely the sort of tension, and potential for delay (and 'waste of time and money',*

including on legal and experts' fees), about which [AA] 6 expresses concern – as well as unhelpful future disputes over matters of process."

The Protectors submissions on construction

64. Although in their September 29, 2020 Skeleton for the October hearing last year the Protectors raised the Wider View flag, they expressly adopted a neutral position at the present hearing. Ms Jones QC in her oral submissions merely identified matters upon which directions would be helpful depending on whatever way the Court resolved the construction issue. I do not consider it appropriate to deal with those issues, which are not formally before me, in the present Judgment. In these circumstances I decline the invitation of Mr Taube QC to take into account submissions which the Protectors provisionally advanced in October 2020 but did not substantively pursue in July 2021.

Legal findings: the construction issue

The literal meaning of the Protector Provisions

65. The key words "*without the prior written consent of the Protectorate*", which constrain the Trustees' powers to appoint capital or deal in any way with the "*Specified Securities*", do indeed suggest a power of veto when the relevant words are literally read. This is not an insignificant consideration as it represents the starting line in the iterative construction process. However, relevant considerations which must be taken into account in addition to the literal meaning include most significantly:

    (a) the purposes underlying the creation of the Protector Provisions;

    (b) the legal implications of the respective roles of trustees and protectors, as defined in the relevant trust instruments (i.e. the broader context within which the consent powers are embedded);

    (c) the practical implications of the competing constructions;

    (d) the significance of *PTNZ v AS* [2020] EWHC 3114 (Ch), [2020] WTLR 1423.

66. The fact that "special words" were not used to make any intended application of the Wider View explicit was relied upon as part of the textual analysis in contending for

the Narrower View. This is, I find, an aspect of the wording of the instruments containing the Protector Provisions which provides some (but not dispositive) support for the Narrower View. A very recent illustration of a clause making it explicit that a protector's consent power constituted an entirely autonomous and independent discretion is provided by *In the Matter of a Settlement*, Cayman Islands Grand Court FSD 83 of 2020 (IKJ), Judgment dated August 11, 2021 (unreported). The instrument in that case conferred both an "*absolute and uncontrolled power*" and the benefit of an indemnity:

> "*…every power, authority or discretion conferred on the Protector is an absolute and uncontrolled power, authority or discretion and no Protector is liable for any loss or damage occurring as a result of his agreement or refusal or failure to agree to any exercise of that power, authority or discretion…"*

The purposes underlying the creation of the Protector Provisions

67. The Protector Provisions were introduced to the Phase 2 Trusts not by way of innovation but in a way which made the administration of those trusts consistent with the Phase 1 Trusts created by the Settlors. It is essentially common ground that at the time their introduction was hoped to lead to consistency and stability in the Trust structure.

68. This somewhat broad and ill-defined purpose or objective is the best counsel could extract from the rather stony evidential ground. As regards the construction issue, in my judgment this purpose is ultimately neutral. It is more relevant to the validity issue which will be considered briefly below. To the extent that the 1994/1995 Protector Provisions introduced into subsequent X Trusts similar provisions to those found in the previous generation of X Trusts, this potentially supports the proposition that it was intended to enable the Protectors to adopt a coherent approach across the entire universe of the X Trusts. Or, to put it another way, it was perhaps intended that the Trustees' powers in relation to capital and dealing with the OpCo shares should be subject to similar Protector consent provisions across the board.

69. I find it impossible to infer from any such presumed dispositive intention on the part of the Trustees any conclusions supportive of either the Wider View or the Narrower View. Whatever view is taken of the scope of powers conferred on the Protectors, coherence and/or stability could surely be achieved through a consistent application of the relevant Protector powers.

Legal implications of the respective roles of Trustees and Protectors

70. The most important single criterion is the wider context of the instruments in which the Protector Provisions are found, because it is ultimately obvious that the consent powers conferred on the Protectors must be construed as part of the Protector Provisions as a whole. In considering the relevant text, I bear in mind the following observations of Lord Hodge in *Barnardo's v Buckinghamshire* [2018] UKSC 55, [2019] ICR 495 at [16]:

> "*The emphasis on textual analysis as an interpretative tool does not derogate from the need both to avoid undue technicality and to have regard to the practical consequences of any construction. Such an analysis does not involve literalism but includes a purposive construction when that is appropriate.*"

71. The first characteristic of the interrelated powers conferred on the Trustees and the Protectors which is apparent is the primacy of the power conferred on the Trustees. It is self-evident that the constrained powers are primarily those of the Trustees as they relate to assets held by the Trustees according to the terms of the various X Trusts. It is simply the exercise of their own powers that the Protector Provisions are expressed to restrict as Mr Green QC pointed out. For example:

> "*The Trustees shall not exercise any power to appoint, distribute or pay any part of the Trust Fund to or for the benefit of any member of the Appointed Class or any Beneficiary without obtaining the prior written consent of the Protectorate…*"

72. This without more is not dispositive, of course. But it undermines to a not insignificant extent the suggestion that the Protectors' discretion in relation to exercising their consent powers should be viewed as enjoying equal status to the powers conferred on the Trustees. The next significant characteristic of the consent powers viewed in the broader context of the Protector Provisions as a whole is that the Protectors' consent can be dispensed with at their election. For instance, a sample clause provides:

> "*…The Protectorate may also waive, either specifically in relation to any particular matter or generally in relation to one or immediately, the requirement for its prior written consent."*

73. This reinforces the initial view based on the express terms of the consent provisions that the substantive power is vested in the Trustees and that the Protectors' consent powers play an ancillary role. Further support for the same conclusion is provided by the following sample clause:

> "*If the Protectorate comprises more than one Protector, any decision by the Protectorate must be taken unanimously. If any power vested in the Trustees required the prior written consent of the Protectorate and if the members of the Protectorate cannot agree as to whether it should give or withhold its consent to a proposed exercise of such power in relation to a particular matter, the Trustees shall then be free to exercise their power (in relation to the matter in question but not further or otherwise) without having obtained the prior written consent of the Protectorate. In such a case the Trustees shall nevertheless consult with each Protector and shall take into account the views expressed before making a final decision.*" [Emphasis added]

74. The fact that the consent power effectively falls away when two or more Protectors cannot agree is a stronger pointer to the conclusion that the Protectors' consent powers are intended to be merely ancillary to the Trustees' substantive decision-making powers. Mr Taube QC relied upon the last sentence of the latter clause as indicative of the breadth of the discretion conferred upon the Protectors. He persuasively argued that the requirement for the Trustees to "*take into account the views*" of each Protector (where there was more than one and all did not agree) signified the Protectors' entitlement to have regard to the merits of the proposed course of action, not merely its *vires* and/or rationality. I agree that this sentence supports the view that, even where this particular clause is not engaged, the Protectors are entitled to form their own views of the merits of any proposed Trustee action which requires Protector consent.

75. However, accepting this submission does not provide any material support for the Wider as opposed to the Narrower View. On either view of the character of the consent powers, the Protectors by necessary implication must be entitled to have regard to, and communicate to the Trustees, their own views as to the merits of the proposed substantive decision or course of action by the Trustees. The competing constructions do not centre on the process through which decisions requiring Protector consent are reached. Nor does the central controversy primarily turn on how a potential deadlock should be broken (if at all) when the Trustees do not receive the requisite consent. The central question is: do the Protectors have an

absolute power of veto, or do they merely have the power to prevent the Trustees from taking action which reasonable trustees would not take?

76. The third significant characteristic embedded in the Protector Provisions which is relevant to the scope of the consent powers arises from the terms upon which the Protectors are appointed. Protectors are entitled to reimbursement of expenses but, unlike the Trustees, have no broader indemnity protections under a typical clause:

> "…*each Protector shall be entitled to reimbursement of all proper expenses incurred in relation to the performance of its or his powers and duties hereunder and to reimbursement of any expenses incurred in the prosecution or defence of any legal proceedings arising in connection with the exercise or non-exercise of its or his powers and duties hereunder…*"

77. Professionals carrying out substantive decision-making, whether as directors in the company arena or trustees in the trust sphere, will generally not accept such onerous responsibilities without receiving generous indemnities. The absence of commensurate indemnities in favour of the Protectors is a further pointer to the conclusion that their powers of consent are merely ancillary to, rather than equal in status to, the Trustees' relevant powers. Because the extent of their involvement in the administration of the X Trusts on the Wider View would be so extensive, it seems improbable that indemnities would not have been granted if such a role had been in contemplation.

78. In summary, the following aspects of the Protector Provisions of which the consent powers form part provide general support for the Narrower rather than the Wider View:

    (a) the consent powers themselves are expressed in terms which suggest that the substantive decision-making powers are vested in the Trustees;

    (b) the Protectors can waive their consent and, where there are more than one Protector, in the absence of unanimous consent the requirement for consent falls away;

    (c) the Trustees are appointed on terms which include the benefit of indemnities while the Protectors are not. Although no indemnity protections are conferred in relation to even those powers fully vested in the Protectors (in particular the power to appoint and remove Trustees),

those powers do not relate to the day to day operations of the administration of the X Trusts.

79. Against this contextual background, one can turn to such views as have been expressed by text writers about the roles protectors generally play. Such general views are not wholly irrelevant, as Mr Taube QC implied, but must play second fiddle to the actual role prescribed (expressly and/or inferentially) by the relevant trust instruments. One text potentially provides support for both the Wider View and the Narrower View. In Giles Clarke's '*Offshore Tax Planning*'[8], the learned author, considering whether or not a protector might be treated as a trustee for UK tax purposes, states:

> "…*It is highly unlikely that he can be so classed, for the trust property is not vested in him, and he does not have power to initiate action, but merely power to veto proposals put up by the trustees proper.*"

80. These observations assume both that a protector generally plays a role subsidiary to a trustee in relation to consent powers but also characterises those powers as a veto. Underhill and Hayton, '*Law Relating to Trusts and Trustees*', more pertinently (for present purposes) states[9]:

> "*Where a trustee cannot act without the protector's consent and the giving or withholding of such consent is a fiduciary power the trustee should not acquiesce in the refusal of consent if he reasonably believes such refusal is perverse. He should apply to the court under section 30 of the Law of Property Act 1925 or section 57 of the Trustee Act 1925 if the administrative disposition of trust property is involved or otherwise ask the court for directions*…"

81. Professor David Hayton (as he then was) seems to assume that protectors conferred with the power to consent which is fiduciary (as is the case here) possess an independent discretion which can only be overridden if it is used in an unreasonable or irrational manner. The views expressed appear to steer a middle course between the extreme markers laid down by the Wider and Narrower Views:

    (a) contrary to the Narrower View, this text extract assumes that it is for the trustee to show that the protector's withholding of consent is perverse rather than for the protector to justify the withholding of consent;

[8] (Butterworths: London, 1994) (at page 17).
[9] 15th edition (Butterworths: London, 1995) (at page 25).

(b) contrary to the Wider View, this text extract assumes that the veto should not be an absolute one and the trustee ought to be able to apply to court for directions if the veto has been perversely exercised by the protector.

82. This text firstly leans more towards the Wider View than the Narrower View in that it suggests the protector's consent powers are somewhat broader than the Narrower View implies. Rather than requiring the protector to consent unless the trustee is acting unreasonably, it requires the trustee to demonstrate that the protector's veto has been exercised on perverse grounds if it wishes not to be bound by the veto. The distinction is probably purely a matter of semantics, however. The learned author's views secondly lean more towards the Narrower View by opining that (a) there are limits on the protector's fiduciary power, namely the power must be exercised in a reasonable manner and not in a perverse way and (b) the trustee ought to be able to adjudicate this issue through seeking directions from the court. This aspect of the analysis has more substantive than semantic implications, in my judgment.

83. These views, despite their eminent source, are far from dispositive because the only authority cited in support is *Re Beale Settlement Trusts* [1935] 2 Ch 15, which concerns a personal power and not a protector. To the extent Professor Hayton was extrapolating from general principles about the nature of consent powers, I am cautioned about adopting an overly rigid approach to the present construction dispute based on the way disputing factions have formulated the competing construction options for the Court.

84. That the present construction dispute is a real and substantial one which yields no obvious, simple "slam-dunk" answer, applying general principles about the donees of fiduciary powers by analogy, is confirmed by the following statement, again addressing the generic situation of the donee of a fiduciary power, in '*Lewin on Trusts*'[10]:

> "*If the power is a fiduciary power, then in principle a third- party donee should owe the same duties as a trustee, both to give consideration in good faith and to act properly when forming a judgment… where he has formed a judgment, it should be open to challenge* [on] *the same grounds as are available when trustees have done so.*"

85. Little guidance can be extracted from such general propositions about the scope of a protector's consent powers. For present purposes the quoted extract from *Lewin* is

[10] 20th edition (Sweet and Maxwell: London, 2020) at paragraph 29-029.

as ambiguous as the extract from *Underhill and Hayton*. In David Hayton (ed.) '*The International Trust*', 1st edition[11], Chapter 4, '*Protectors*', is written by Robert Ham QC, Emily Campbell, Michael Tennet and Jonathan Hilliard. The learned authors opine, *inter alia*, as follows:

> "*4.2 In modern times, the term 'protector' has assumed a much wider meaning. It is not a term of art and may have different meanings in different contexts. The term is usually used to describe a person, who is not one of the trustees of a trust, but upon whom the trust deed confers a 'watchdog' role in respect of the administration of the trust by the trustees. This watchdog role may be achieved in many ways. Often, the protector's consent is required to the exercise of administrative or dispositive powers by the trustees… Usually, the protector's watchdog role will be supplemented or enhanced by incidental functions, of which the following serve as examples: the power to appoint and remove trustees, which is almost always conferred upon the protector; the power to approve trustees' remuneration; and the power to require the production of trust accounts and to nominate the auditor.*
>
> *4.4 The aim of the appointment of a protector is, therefore, to monitor the trustees in the administration of the trust, on one level to prevent those trustees from abusing their powers or breaching their duties, but also to ensure as far as possible that the trust is administered in accordance with the wishes of the settlor, at any rate in the case of the more important decisions and often on a day-to-day basis. Where, as is usual, the protector is given power to hire and fire trustees and to veto decisions, it is not unrealistic to regard the ultimate power as lying with the protector…*
>
> *For trust lawyers one of the most difficult questions relating to protectors concerns the duties owed by the protector in a particular trust…*
>
> *4.6 The answer to the question concerning a protector's duties is in the first instance a matter of construction of the particular trust instrument. This primarily depends upon the language of the trust instrument, although the surrounding circumstances may of course be taken into account as an aid to construction as in the case of any other instruments…*" [Emphasis added]

86. This text supports the Narrower View in contending that a protector's general role is to ensure the due administration of the trust by the trustee. It does not suggest that

[11] (Jordan: Bristol, 2011).

the protector's veto powers are absolute or highly significant; rather, real power is attributed to the entirely discrete power to remove and replace trustees. The central questions which are raised by the present construction controversy (what are the grounds upon which consent may be withheld and how (if at all) can a deadlock be broken?) are not directly addressed. Such matters presumably fall into the basket of "*the most difficult questions*" for trust lawyers. However the learned authors do go on to state (at paragraphs 4.9- 4.10) that as regards protectors, the main question is likely to be which of the following two categories a power belongs to:

> "*(1) a power given to a person to determine the destination of trust property without that person being under any obligation to exercise the power or to preserve it, for example, a special power of appointment given to an individual where there is a trust in default of appointment. Here, the donee owes duties to the beneficiaries of the trust not to misuse the power, but owes no duty to the objects of the power. The donee may thus release the power, but not commit a fraud on it;*
>
> *(2) <u>any power conferred on the trustees of property or on any other person as a trustee of the power itself. Such a power is a fiduciary power in the full sense</u>. A power in this category cannot be released: the donee of it owes a duty to the objects of the power to consider, as and when it may he appropriate, whether and if so how he ought to exercise it: and he is to some extent subject to the control of the courts in relation to its exercise…*" [Emphasis added]

87. This is an insightful and helpful analysis. It suggests that one way of framing the contending positions in the present case is as a controversy as to whether or not each of the Protectors' consent powers is *a* "*fiduciary power in the full sense*" (Wider View), or merely ancillary to the substantive fiduciary power vested in the Trustees and, accordingly, merely fiduciary in the sense that the Protectors must exercise their consent powers for a proper purpose (Narrower View). On balance, this text in my judgment clearly supports the Narrower View in the context of the instruments in the present case because:

    (a) the learned authors view the predominant role of protectors as generally being that of a watchdog; and

    (b) the instruments permit the Protectors to release their powers of consent.

88. The position of protectors is also specifically addressed by Mark Hubbard in '*Protectors of Trusts*'[12]. The learned author opines as follows[13]:

> "*A protector is very often given power to give or withhold consent ('a power to consent') to the exercise of a wide variety of the trustee's powers, both dispositive and administrative, particularly powers of investment. Together with a power to appoint and remove the trustee, these can be considered the basic set of protector powers and the powers most frequently vested in protectors.*
> *A power to consent is unlike other powers in that it usually arises by implication from the terms of and is parasitic upon the grant of a power to another, i.e. when it is provided that the consent of X is required for the exercise of a power vested in Y…*
>
> *A power to consent held by a fiduciary will (depending upon its terms) oblige the holder either to consider the exercise of the power or to exercise it, although the latter form of the power is rare.*
>
> *Where a protector holds a power to consent to the exercise of a power, the purported exercise of that power without obtaining the consent of the protector will normally be invalid. The situation where a protector cannot or will not exercise a power to consent is considered below.*" [Emphasis added]

89. Similar views are expressed in articles which were placed before the Court. Tsun Hang Tey, then an Associate Professor of Law at the National University of Singapore, in '*The Office of the Protector: its Nature and Duties*', opines as follows[14]:

> "*The settlor gives powers to the protector which has the effect of constraining the trustee's management decisions… This should not be interpreted as an attempt on the settlor's part to shift all decision-making responsibility from the trustee to the protector. Instead, the settlor simply expects the protector to monitor trustee behaviour, without affecting the level of discretion which the trustee possesses. The protector is expected to assume a monitoring role similar to that of a court, but without the litigation costs commonly involved with court actions*…" [Emphasis added]

[12] 1st Edition (Oxford University Press: Oxford, 2013).
[13] At paragraphs 6.126-6.127; 6.132 and 6.134.
[14] (2010) Trust Law International No.2 110 at 122.

90. These observations are not explicitly made in relation to consent powers, are not supported by any judicial authority and are sagely expressed as being subject to the terms of the applicable trust instrument. However, these academic remarks provide explicit support for the proposition that, consistent with the Narrower View, a protector's role is ultimately to withhold consent only when the trustee is proposing a course of action which the Court would not approve on a *Public Trustee v Cooper* category 2 application.

91. Subject of course to the terms of the relevant trust instrument, a majority of the cited texts suggest that protectors' consent powers have the following important legal and practical dimensions to them:

    (a) they are generally ancillary to or "*parasitic upon*" powers granted to the trustee;

    (b) the consent powers amount to a veto because if consent is withheld the power vested in the trustee cannot be validly exercised.

92. Only one text, based on the extracts placed before the Court, explicitly addresses the thorny question of what consequences flow from the power of veto being exercised. But the other texts which extensively address the function of protectors explicitly characterise the main role of a protector as being that of "*watchdog*" or a monitoring one. At this stage of the iterative construction process, therefore, the Narrower View has a small but clear lead over the Wider View.

93. This advantage is extended rather than narrowed by reference to a few general but significant observations found in judicial authorities. Persuasive authorities referred to by Mr Green QC include *Rawcliffe v Steele* [1993-95] MLR (SGD) 426 at 529 (Isle of Man Court of Appeal) and *In the matter of the A and B Trusts* [2012] JRC 169A at [4] (Royal Court of Jersey). The most significant authority is the Court of Appeal for Bermuda's decision in *Re Information About a Trust* [2014] Bda LR 5. The trustee was required to obtain the consent of the protector before complying with a beneficiary's information request. Sir Anthony Evans JA (delivering the judgment of the Court) crucially held as follows:

> "*67. In our view, clause 9.2 does not go so far as to release the Trustees from their duty to make their own decision, nor does it entitle them simply to pass on the request so that the Protector can decide. The clause reads 'no person or persons shall be provided with' Trust accounts or information 'except to the extent that the Trustees … In their discretion otherwise*

determine'. The discretion is clearly, and understandably, given to the Trustees. The words in parenthesis "with the prior written consent of the Protector" can only mean, in our judgment, that the Trustees must obtain the Protector's written consent before any release takes place; they do not have the effect of transferring the exercise of the Trustees' discretion to the Protector.

68. If that is correct, the Trustees are required to make their own decision, in the interests of the Trust and in accordance with the intentions of the Settlor as set out in the Trust Deed. If they are minded to release the information, they must seek the consent of the Protector before doing so. The question then arises, as it has done in the present case, on what grounds the Protector's consent can properly be withheld, in a case where the Trustees are of the view that there should be a release.

69. It is not contended that the Protector's refusal may be 'capricious', and it is recognised by the Appellant that it may not be 'unlawful or irrational'. In our judgment, the Protector is bound by the same constraints as are the Trustees. The clause encompasses the release of information to beneficiaries as well as to strangers to the Trust. There is no indication that the Settlor intended that they should be deprived of information to which they are entitled as of right under the general law. Just as the Trustees were expected to exercise their discretion accordingly, so also in our judgment is the Protector in deciding whether to refuse consent to a proposed release. The Protector cannot lawfully refuse consent in a case where the Settlor is taken to have approved the release, any more than the Protector can vary the terms of the Trust." [Emphasis added]

94. There is a need to read these *dicta* with some care. In particular, the information-providing power conferred on the trustee subject to protector consent in that case was not only a more simple and circumscribed discretionary power, the power was shaped by common law principles which favour enabling beneficiaries to have access to sufficient information in order to enforce the trust. More significantly still, it was unclear in that case that the trustee had actually arrived at its own independent decision. I assume, because of these distinguishing features, that the reasoning of Sir Anthony Evans is not strictly binding on this Court on the present case. Nonetheless, some statements of general principle do potentially have wider application to consent powers generally (subject, it bears repeating, to the terms of the relevant instruments in each case). I find the following general principles relating to fiduciary consent powers conferred on protectors can be extracted from the above-quoted

passages in *Re Information About a Trust* [2014] Bda LR 5, and are highly persuasive for present purposes:

(a) the protector's consent power was clearly regarded by the Court of Appeal as subsidiary to the primary decision-making power vested in the trustee;

(b) the consent power was clearly regarded as capable, in appropriate circumstances, of amounting to a veto;

(c) the consent power was clearly viewed as a power which could not be exercised in an unlawful or irrational way; and

(d) although the consent power was not expressly framed as embodying an obligation to consent if the trustee's decision itself was lawful and rational, the quoted passage implies that there should be such a result. The protector cannot refuse consent when the trustee's proposed course of action is something "*the Settlor is taken to have approved*". In my judgment this amounts to the same thing as saying that the protector cannot refuse consent to a trustee decision which was consistent with the settlor's intentions by virtue of the fact that it is both a lawful and rational decision on an issue requiring protector consent.

95. I consider this decision provides stronger support for the Narrower View than was implied by the reliance placed upon it by Mr Green QC in argument; emphasis appeared to me to be placed on the first of the four strands of reasoning set out in sub-paragraph (a) of the preceding paragraph hereof.

The practical implications of the competing constructions

96. In light of the above analysis, the practical implications of the competing constructions now seem somewhat less significant than they did in the course of the hearing. On the one hand, Mr Taube QC contended that the Narrower View effectively stripped the consent power of all meaningful practical force. On the other hand, Mr Green QC submitted that, in effect, chaos would reign in the administration of the X Trusts if the instruments were construed as conferring a full independent discretion in relation to each matter requiring consent. Both of these submissions had some validity, but neither was wholly right or wholly wrong.

97. For the reasons explained by Mr Green QC in oral argument, construing the consent powers as designed to ensure the Trustees act lawfully and rationally is in real-life terms a very substantial power. It does not constrain the ability of the Protectors to stress-test the Trustees' initial proposals by positing alternative proposals of their own. It does not require them to be a rubber stamp. Nor does it prevent them from refusing their consent if they feel strongly that the Trustees' proposed course of action is seriously misconceived. The Trustees cannot simply thumb their nose at the Protectors. They have an overarching duty to preserve the X Trusts' assets and to avoid the ultimate tie-breaker of an application under *Public Trustee-v-Cooper* Category 2, seeking Court confirmation that the Protectors ought to provide their consent.

98. For the reasons submitted by Mr Taube QC, in part by way of response to the A Branch's alternative invalidity argument, it makes no sense to suggest that the settlors could not validly confer consent powers on the Protectors consistent with the Wider View. Had this intention been expressed in the relevant Trust instruments expressly, the absence of any straightforward mechanism for breaking a deadlock would simply be a feature of the Protector Provisions regime. The problems which would flow from such a scenario cannot logically, in my judgment, constitute a dispositive ground for construing the consent powers as embodying the Narrower View.

99. Nonetheless, I accept entirely that the Narrower View makes it easier for the Trustees to resolve a deadlock by making a Category 2 application and contains an in-built constraint on the extent to which the Protectors are likely to withhold their consent. This is a consideration which materially supports the Narrower View, but in a somewhat more nuanced way than was contended for by way of argument. It shines a light on the sharp distinctions between the two posited Protector roles on the administration of the X Trusts, one (a) elevating the Protectors to the *de facto* status of co-trustee (in relation to the important and various matters where consent is required e.g. any dealings with the OpCo shares), and the other (b) requiring the Protectors to play a supporting "watchdog" role.

100. The wider role is, based on the above legal analysis of the role protectors ordinarily play, sufficiently atypical to give rise to a reasonable expectation that the draftsman of the relevant power would use clearer language than was actually deployed, with a view to signifying the donor's intention of conferring so broad a power of protector consent. Most importantly as regards the practicalities issue, though, I reject the suggestion that the narrower role is not a sufficiently important role at all. For these reasons I find that the practical implications of the competing constructions favour the Narrower rather than the Wider View. In my judgment the cumulative effect of this and the previous analytical steps in the construction analysis places the Narrower View on the home stretch with only one hurdle to surmount: *PTNZ v AS* [2020] WTLR 1423.

***PTNZ v AS* [2020] WTLR 1423**

101. The *PTNZ* case is a decision of Master Shuman of the English Chancery Division delivered on November 18, 2020. Coincidentally, Mrs Elspeth Talbot Rice QC (counsel for the Plaintiffs herein) represented the 8th Defendant in *PTNZ*, although Mrs Talbot Rice QC took no active role in that hearing. The issues dealt with by the judgment which are relevant for present purposes were summarised by the judge as follows (at paragraph 4):

> "*(1) whether the appointment of the 10th defendant as protector of the trusts on 9 October 2019 was valid or void ("the validity issue");*
>
> *(2) if the 10th defendant was validly appointed as protector:*
>
> *(a) whether his consent is required in relation to the decisions of the trustee that are the subject of the blessing application*
>
> *(b) whether there should be any restriction on the role he should play at all in relation to the blessing hearing ('the protector issues').*"

102. The protector's written consent was required, if there was a protector, for appointing any part of the trust fund or applying all or part of the capital, adding or removing beneficiaries and varying the trust. In *PTNZ*, it was not agreed that the powers of consent were fiduciary powers. The trustee contended that they were and the protector that they were not. Master Shuman saw no need to resolve that dispute in light of an undertaking given as to how the protector would exercise the relevant consent power and the consensus that the fraud on a power doctrine was applicable to the exercise of the consent power, be it fiduciary or personal in character. She eventually explicitly held that the powers of consent constituted an independent discretion jointly held with the trustee. There are three important reasons why this decision is not persuasive for the purposes of the present case.

103. Firstly, what I consider to be an important (and distinguishable from the present case) feature of the power was described by Shuman J as follows:

> "*76. Schedule 3, paragraph 2.6 of the trusts provides that the protector should not be prevented from exercising any power or discretion conferred by the trusts by reason of any direct or indirect interest, whether personal or in a fiduciary capacity…*
>
> *81. Here the trust instrument authorises the donee to exercise the power in a way which benefits himself, whether he has a direct or indirect interest in the*

exercise of the same; which accords with the intentions of the 1st defendant when the trusts were established…

82. The protector's powers of consent are independent of the powers of the trustee and are to be exercised by the protector on the basis of his own discretion."

104. The ability to exercise the powers despite conflicting personal or fiduciary interests was perhaps because the protector was (at some stage at least) also the settlor in *PTNZ*. But in my judgment it is to some extent at least material that the Protectors in the present case before me appear from the outset to have been contemplated as being independent professional fiduciaries rather than persons with other and potentially conflicting capacities in relation to the X Trusts. It is also noteworthy in the present case that the powers of consent are not amplified in any explicit way. They are neither "*vested in*" the Protectors (like the power to appoint and remove trustees) nor described as being exercised "*in their discretion*" (like the power to appoint new protectors).

105. Secondly, as was noted in the course of argument in the present case, the scope of the protector's power issue in *PTNZ* did not receive the benefit of full adversarial argument. As Master Shuman noted earlier in her judgment:

"*86. At the outset of this hearing I invited Mr Wilson QC to assist the court by setting out the contrary argument to that being advanced by Mr Hubbard on behalf of the 10th defendant. In making his oral submissions to the court Mr Wilson QC was expressly not adopting that position but retaining the claimant's neutral stance…*"

106. Thirdly, as is readily apparent from the summary of the legal arguments in that case, set out below, the scope of analysis in *PTNZ* was far narrower than the impressively comprehensive range of authorities and detailed submissions placed before me in the present case; a disparity no doubt attributable to the disparate commercial values of the respective trust disputes.

107. Despite these three qualifying considerations, the critical question of construction placed before Master Shuman was almost identical to that placed before me in the present case:

"*92. As to the content of the protector's power of consent, the parties agree that there are two alternative approaches. Either the protector holds effectively a joint power with the trustees or he has a power of review. The significance of this is that the former would permit the protector, if he disagreed with the trustees, to*

withhold his consent even if the trustees are neither acting unreasonably nor for improper purposes. That approach would of course still be subject to the protector not misusing his power and therefore having to exercise it in good faith and for the purposes for which it was conferred. A power of review would give the protector a more limited role effectively ensuring that the trustee is neither acting unreasonably nor for an improper purpose: a role similar to that of the court in a Public Trustee v Cooper category 2 case."

108. The trustee's neutral but opposing main submissions in that case were summarised as follows:

> "*93. Mr Wilson QC says that the parties agree there is no direct authority on the point. Although as Mr Hubbard pithily observed they agree that there is no direct authority on Mr Wilson's proposition that the protector's power is restricted to a power of review. Mr Wilson QC drew my attention to Bathurst v Bathurst [2016] EWHC 3033 (Ch). This was an application under the Variation of Trusts Act 1958 where the scheme of arrangement proposed that the principal beneficiary should have the power to appoint new trustees with the written consent of the trustees, a power that was reserved by the settlor under the original settlement and he was now deceased. One of the four trustees did not agree with this proposal suggesting that the existing trustees should retain the power they had been exercising with a power of veto to the principal beneficiary. The judge considered that the difference between the two was small but preferred the proposed scheme.*"

109. The protector's contrary submissions in *PTNZ* were summarised as follows:

> "*94. Mr Hubbard submits that the powers of consent to be exercised by the protector are independent of those of the trustee and are therefore a joint power not simply a review.*
>
> *95. In Re Forster's Settlement [1942] 1 Ch 199 the husband and wife were parties to a settlement which contained a power of advancement by the trustees out of the capital of the fund for the benefit of remaindermen with the written consent of the tenant for life. The husband divorced the wife, married again and had 3 children. The husband died leaving his widow and their 3 infant children. Meanwhile the wife had married an Austrian citizen in 1930 and went to live with him in Austria. On the outbreak of war in 1939 she became an enemy alien. She was believed to be living in Germany or Austria but there had been no information about her whereabouts for a considerable time. The trustees wished to advance some of the capital for*

the benefit of the 3 children. A summons was taken out on behalf of the infant remaindermen for a determination as to whether the trustees required the consent of the tenant for life. Morton J held on the evidence that the court could not presume that the wife had died and her consent to the advance could not be dispensed with. At page 206 the judge referred to Klug v Klug [1918] 2 Ch 67 a case that he was taken to in argument. In that case one third of the testator's residuary estate was held in trust for his daughter. She was unable to pay the legacy duty and applied to the trustees for assistance. One trustee was willing to exercise their discretion to aid the daughter but the other trustee, the testator's widow, declined to exercise it because her daughter had married without her consent. The court directed that a sum out of capital be paid to benefit the daughter. Morton J said,

> *'in my view, however, Klug v Klug does not assist Mr Cross. The position in the present case is not that of a trustee refusing or failing to exercise a discretionary power. The parties to this settlement thought fit to provide the discretion conferred on the trustees should not be exercised without the consent of a particular person. In those circumstances I do not think that the court can say that the power shall be exercised without the consent of that person. Nor do I think that Klug v Klug is any authority for saying that the court can take that course."*'

110. Master Shuman's critical findings on the scope of the protector's consent power issue were as follows:

> "*96. As Mr Hubbard emphasises in Re Forster the person who had the power to give consent was the life tenant who was an enemy alien and may or may not have been alive yet the court considered it could not dispense with her consent. He also submits, which I accept, that there is no magic in the word protector, what the court is concerned with is the nature of the power that that person holds. Lewin at paragraph 28-036 says,*
>
> > *'Wills and settlements have for many generations conferred powers that are exercisable by persons other than the trustees. The donees may, for instance, be beneficiaries, or the settlor himself, or a friend or adviser of the settlor with no beneficial interest. … Example of powers frequently given to third parties include powers of appointment, powers to appoint new trustees and powers to direct investments. Settlements and Wills have likewise often required the*

consent of third parties to the exercise of various powers by the trustees, the requirement thus conferring a power of veto. … in the absence of a consent by the terms of the power a purported exercise is simply invalid.'

97. A protector's power of veto is as the name suggests exactly that and not a power of review. Under the trusts the trustees have a wide range of powers and discretions which require the written consent of the protector; I have summarised the key ones in paragraph 75(b) (i) to (vii) above. In passing I note that this is consistent with how the judge approached the parties' respective positions in Bathurst.

98. Mr Wilson contends that if the settlor required a joint exercise of the dispositive powers by the trustee and the protector the trust deeds could easily have said so. Instead they provide for the trustee to exercise the power with the protector's consent. Mr Wilson suggests that as a matter of construction there is a distinction to be drawn between the powers that each has. I do not accept that that follows from the wording of the trust deeds and the mechanism by which the officeholders were to exercise their powers. As SW observed in his 1st witness statement the purpose of the protector holding the power of consent is to control the trustees' exercise of their broad discretionary powers. I have not been referred to anything in the trusts that is consistent with a restrictive interpretation of the protector's role. In contrast the genesis of the trusts (as referred to in paragraph 61 above), the language used in the trusts and the wide expansion of the powers of the protector set out in the deed of variation are consistent with the 1st defendant's intentions when the trusts were established that the protector would hold joint power with the trustee.

99. This position is also consistent with an offshore trust which typically appoints a protector. The trustee may very well be a corporate entity located in a different jurisdiction. The settlor and trustee may not know each other and there may be limited trust between them. In that context the imposition of a power of consent in the sense of being a joint power rather than a restrictive review power provides a solution to control the power exercised by the trustees.

100. I am satisfied that properly analysed the power of the protector is a joint power with the claimant and not a review power." [Emphasis added]

111. Mr Taube QC rightly argued that this is the only judicial authority to directly address the present construction dispute and that it fairly and squarely supports the Wider View construction of the Protector Provisions in the present case. It is at best persuasive authority and the question is whether I am persuaded that I should adopt a similar approach. The simple answer is that I do not find *PTNZ* persuasive, as already foreshadowed above, for the following three key reasons:

    (a) the conclusion that the powers of consent were jointly held between the protectors and the trustees was first and foremost based on a construction of protector provisions in which there was nothing "*consistent with a restrictive interpretation of the protector's role*". On the contrary, the terms of the relevant instruments were "*consistent with the* [settlor]*'s intentions when the trusts were established that the protector would hold joint power with the trustee*". The terms of the Protector Provisions in the present case, conversely, are more consistent with a restrictive interpretation of the Protector's role. The textual context in *PTNZ* is distinguishable from that in the present case;

    (b) a significant body of text authority supportive of a restrictive view of the consent powers of protectors was placed before me which Master Shuman did not have the opportunity to consider. Further, the scope of power point did not receive the benefit of full-blooded adversarial argument in *PTNZ*;

    (c) having regard to the terms of the Protector Provisions in the present case viewed in light of the supporting text authorities, the Court of Appeal for Bermuda's decision in *Re Information About a Trust* [2014] Bda LR 5 is far more persuasive as a matter of general principle for the purposes of the present construction dispute.

112. I find that *PTNZ v AS* [2020] WTLR 1423 does not undermine to any material extent the conclusion I would otherwise have reached to the effect that the dominant purpose and scope of the Protectors' role in relation to their consent powers is "*to satisfy themselves that the proposed exercise of a power by the Trustees is an exercise which a reasonable body of properly informed trustees is entitled to undertake and, if so satisfied, to consent to the same*". The Narrower View accordingly clears the last hurdle between it and the finishing line.

Summary of findings on construction issue

113. The Narrower View reflects the true construction of the consent powers conferred on the Protectors of the X Trusts primarily because it is clear from the terms of the relevant instruments that their dominant purpose is to ensure the due exercise of the powers vested in the Trustees. The preponderant view of the text writers whose learning on this topic was placed before this Court supports the following critical conclusion. Unless a contrary meaning can legitimately be discerned in the instrument conferring the relevant consent powers, the usual role of a protector is not to exercise a power jointly with the trustee in relation to the matter requiring protector consent. The protector's role is to be a "watchdog" to ensure due execution by the trustee of the powers vested in the trustee. I arrive at this conclusion based on an analysis of the terms of the instruments without implying any additional terms following both (a) the iterative approach to construction commended by Lord Hodge in *Barnardo's-v-Buckinghamshire* [2018] UKSC 55, [2019] ICR 495 at [13] to [17] and (b) the contextual analysis commended by Sir Christopher Clarke in *Grand View Private Trust Company-v-Wong et al* [2020] CA (Bda) 6 Civ at paragraphs 178-179.

114. In the present case the relevant instruments are substantially expressed in the same terms with the Protector Provisions created by the Trustees reflecting the Phase 1 Trusts created by the original settlors themselves. The drafting approach clearly distinguishes between powers expressly vested in the Trustees, powers expressly vested in the Protectors and powers expressly vested in the Trustees subject to Protector consent. It is true that on a literal reading of the wording of the consent powers, ignoring the wider context of the instruments of which they form part, a power of veto is imposed. However, particular clauses in trust instruments, like most legal documents, cannot properly be construed in isolation from other pertinent parts of the instrument and ignoring altogether the practical and legal dimensions of the competing constructions.

115. A contextual reading of the Protector Provisions suggests that the consent powers were not intended to be powers exercised jointly with, or entirely independently from, the powers conferred on the Trustees subject to Protector consent. There is no explicit wording used to signify an absolute discretion. But more importantly still, the powers requiring protector consent are expressed to be powers vested in the Trustees. This view is not only reinforced by the fact that the 'normal' function of 'standard' protector consent clauses appears to be understood by most legal writers as an ancillary power rather than a power exercised jointly with the trustee. This understanding has also received the imprimatur of the Bermudian Court of Appeal (Evans JA) in *Re Information About a Trust* [2014] Bda LR 5. In these

circumstances, clear language would be required to signify the intention of achieving an atypical result in terms of the scope of consent power conferred.

116. In *PTNZ v AS* [2020] WTLR 1423, Master Shuman admittedly held that consent powers conferred on a protector embodied an independent discretion jointly exercised with the trustee; it was not limited to ensuring the due administration by the trustee of the trust. This sole identified judicial authority directly considering the point raised by the present construction dispute was potentially the most powerful support for the Wider View. On closer consideration, however, its persuasive value was very weak for the following main reasons: (a) the protector's powers were seemingly drafted in wider terms than in the present case; (b) the authorities on protectors' powers placed before me were not considered; and (c) the point did not receive the benefit of full adversarial argument.

117. In rejecting the Wider View construction argument, it is important to reiterate that I have also rejected the thesis that the Narrower View results in defining the Protectors' role as being a fundamentally limited one. Ensuring the Trustees properly exercise their important powers is in and of itself an important and substantial role. Depending on the content of the proposed action for which Protector consent is required, the Protectors will be entitled to undertake greater or lesser degrees of independent analysis before deciding whether to grant or withhold consent. In many cases the Protectors' decision, affirmative or negative, will obviate the need for the Trustees to seek Court approval; in other cases the Protectors' consent may mean that "blessing" applications can be dealt with in a more economical manner.

118. It is likely to be the exception rather than the rule that the Protectors' deployment of their undoubted veto powers will result in the legality of the Trustees' proposed course of action being adjudicated on a contentious basis in the context of a Category 2 *Public Trustee-v-Cooper* application. That this is the efficient way the Narrower View operates in practice may well in large part explain why there is a dearth of judicial authority on the scope of the powers of consent conferred on protectors under so-called standard form trust instruments.

119. For the avoidance of doubt, I find that the expert evidence on the UK tax implications of the competing constructions was ultimately inconclusive and shed no material light on which construction should be preferred.

Alternative findings: the Validity/Excess of Power Issue

120. Because of the conclusions I have reached on the primary construction question in favour of the Narrower View, there is no need to deal fully with the alternative arguments of Mr Green QC. In brief, it was contended that if the Wider View had been expressed in the relevant trust instruments executed by the Trustees in 1994/1995, the purported conferring of such powers would have been an invalid exercise of the Trustees' own powers.

121. While these submissions seemed internally consistent and coherent, I initially found them difficult to digest as alternatives to the primary arguments deployed in support of the Narrower View. Those arguments stressed the importance of construing instruments in a way which would be comprehensible over time without regard to extrinsic evidence about the circumstances in which the instruments in question were created. The primary analysis appeared to concede that special wording could have been deployed to confer wider powers on the Protectors. On reflection there is an inconsistency between the apparent acceptance that special language could have explicitly conferred wider powers on the Protectors and the alternative argument that a similar result could not have been achieved by necessary implication.

122. The alternative argument appeared to me to simply go too far in suggesting that conferring wider powers on the Protectors would necessarily confer no benefit on the beneficiaries in any imaginable situation at all, without regard to positive evidence. Mr Taube QC in his Skeleton (at paragraph 141) aptly described the no benefit point as a "*last-ditch*" argument. Normally such a conclusion would be arrived at by the Trustees themselves who would apply with supporting evidence to be relieved from the consequences of the mistaken exercise of their powers either under the somewhat limited *Pitt-v-Holt; Futter-v-Futter* [2013] 2 AC 108 equitable jurisdiction, or (in relation to Bermudian law governed trusts), the more generous statutory jurisdiction under section 47A of the Trustee Act 1975. Indeed, Mr Green QC relied upon *dicta* from the same case (at the Court of Appeal level) in support of his invalidity argument (Skeleton Argument, paragraph 149, footnote 73):

> "*[73] Pitt v Holt [2011] EWCA Civ 197, [2012] Ch 132 at [66] (Court of Appeal). Lloyd LJ having previously observed at [64] under the heading 'In re Hastings-Bass, decd – the ratio decidendi': 'If the provisions that can and would take effect cannot reasonably be regarded as being for the benefit of the person advanced, then the exercise fails as not being within the scope of the power of advancement. Otherwise it takes effect to the extent that it can.*"

123. I accordingly indicated in the course of the hearing that I saw little merit in this argument. Having considered the matter further, this alternative argument also sits uncomfortably with the incontrovertible evidence that the introduction of the Protector Provisions in the "Phase 2 Trusts" essentially replicated provisions in the Phase 1 Trusts with the imprimatur of the Settlors themselves. Acceding to the invalidity argument in relation to the Phase 2 Trusts would imply that either:

    (a) although the settlors could validly confer joint consent powers on the Trustees and the Protectors directly, they could not empower the Trustees to do so on their behalf; alternatively

    (b) contrary to basic notions of settlor autonomy, the settlors could not even directly confer absolute veto powers on the Protectors at all.

124. The purposes of the Protector Provisions introduced by the Trustees in 1994/1995, stability and a coherent approach, seems inherently inconsistent with the notion of the Protectors playing dual roles in relation to different generations of trusts. I am not persuaded that there is any fundamental objection in principle to upholding the Wider View where such a donative intention is expressed with sufficient clarity.

125. For these reasons I would have summarily rejected the invalidity argument raised on behalf of the A Branch had I resolved the primary question of construction in favour of the Wider View.

Conclusion

126. The Trustees are entitled to declarations pursuant to paragraph 1 (b) of the January 21, 2021 Summons that:

    (1) on the proper interpretation of the relevant trust instruments, the role of the protectors in exercising their powers to consent to the exercise of powers vested in the Trustees is to satisfy themselves that the proposed exercise of a power by the Trustees is an exercise which a reasonable body of properly informed trustees is entitled to undertake and, if so satisfied, to consent to the same;

    (2) in the light of the proper interpretation of the relevant trust instruments:

(a) it was within the power of the then-trustees of the X Trusts to confer on the protectors the powers which they purportedly conferred (in whole or in part); and

(b) the instruments by which the protectors were appointed are valid and effective.

127. I will hear counsel if required as to costs and any other matters relating to the final Order to be drawn up to give effect to the present Judgment. The breadth and depth of counsel's researches and written and oral submissions have been of considerable benefit and illumination to the Court.

Dated this 7th day of September, 2021

_____

IAN RC KAWALEY
ASSISTANT JUSTICE