In The Supreme Court of Bermuda

CIVIL JURISDICTION
COMMERCIAL COURT
2018: 44

BETWEEN:-

WONG, WEN-YOUNG

Plaintiff/Applicant

- and -

(1) GRAND VIEW PRIVATE TRUST COMPANY LIMITED

(2) TRANSGLOBE PRIVATE TRUST COMPANY LIMITED

(3) VANTURA PRIVATE TRUST COMPANY LIMITED

(4) UNIVERSAL LINK PRIVATE TRUST COMPANY LIMITED

(5) THE ESTATE OF HUNG WEN-HSIUNG, DECEASED

(6) OCEAN VIEW PRIVATE TRUST COMPANY LIMITED

(7) WANG, RUEY HWA (aka "Susan Wang")

Defendants/Respondents

(8) WANG, VEN-JIAO (aka "Tony Wang")

(as joint administrator of the Bermudian estate of YT Wang)

(9) WANG, HSUEH-MIN (aka "Jennifer Wang")

(as joint administrator of the Bermudian estate of YT Wang)

Defendants

IN COURT-VIA VIDEOCONFERENCE

Date of Trial: April 19-23, 26-30, May 3-7, 10-14, 17-21, 23-28, 1-4, 7-11, 14-17, 22-25, 28-30, July 12-16, 19-23, 26-28, September 7-10, 13-17, 20-24 and 27-28, 2021

Draft Judgment circulated: May 31, 2022

Judgment delivered (without a hearing): June [ ] 2022

Mrs Elspeth Talbot Rice QC and Mr Dakis Hagen QC of counsel and Mr Rod S. Attride-Stirling and Sean Dunleavy, ASW Law Limited, for the Plaintiff ("Dr Wong" / "Winston")

Mr Richard Wilson QC and Prof. Jonathan Harris QC (Hon.) of counsel and Mrs Fozeia Rana-Fahy MJM Limited, for the 8th Defendant ("D8" / "Tony Wang")

Mr Stephen Midwinter QC of counsel and Mr Steven White and John McSweeney, Appleby (Bermuda) Limited, for the 5th Defendant ("the Hung Estate")

Mr Mark Howard QC and Mr Jonathan Adkin QC of counsel and Mr Scott Pearman and Mr Paul Smith, Conyers Dill & Pearman Limited, for the 1st to 4th and 6th Defendants (the "Trustees")

Mr Scott Pearman and Mr Paul Smith, Conyers Dill & Pearman Limited, for the 7th Defendant ("Susan Wang")

HEADNOTE

Purpose trusts-statutory interpretation-whether trusts are void because of mixed charitable and non-charitable purposes or on grounds of uncertainty-whether founding of trusts vitiated by mistake, undue influence, lack of authority, mental incapacity and/or failure to comply with requirements for writing-governing law-whether Bermuda, British Virgin Islands and/or Taiwanese law applies to claims-whether English Statute of Frauds Act 1677 received into BVI law upon settlement at common law- whether foreign limitation periods should be disapplied on public policy grounds-Trusts (Special Provisions) Act 1989- Trusts (Special Provisions) Amendment Act 1998 - Trusts (Special Provisions) Amendment Act 2020-Limitation Act 1984 sections 34A, 34B

JUDGMENT

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PROLOGUE

1. In an iconic early scene in Mike Nichols' fictional 1967 coming of age movie '*The Graduate*', set in part at the University of California Berkeley campus, Ben is cornered at a party by a friend of his overbearing father who offers a word to the wise: "*Ben, I've got just one word for you: 'plastics'. There's a great future in it*". Meanwhile, in real world Taiwan, YC Wang ("YC") had already formed Formosa Plastics Corporation ("FPC") 13 years earlier. In 1957 a family friend, Wen-Hsiung Hung ("Mr Hung"), joined FPC. The following year YC persuaded his younger brother YT Wang ("YT") to join FPC, doubtless telling him that there was a great future in the business.

2. The Plaintiff, YC's first-born son, was completing his English boarding education and beginning his English University studies as the seismic inter-generational shifts reflected in part in student protests shook the Western world in the late 1960s. By Dr Wong's own account, it was "*somewhat of a cultural shock*"[1] when he returned to comparatively traditional Taiwan in 1980 with a British Chinese wife, after completing doctoral studies in London in 1975 and working for five years in the United States. The sixties were, Dr Wong recalled in his evidence, "*the period of the Beatles, of the hippies, of the mini-skirts and micro-skirts. So it was quite a period*"[2]. It is impossible to make sense of the present litigation without attempting to understand, if only in an impressionistic way, the dramatic falling out between the by now middle-aged Winston and his father in 1996[3]. This rupture resulted in the senior son and traditionally appointed heir apparent of YC being publicly banished from the family business, which was by then virtually a national institution in Taiwan.

3. In the imagined world of '*The Graduate*', the young Ben (having fallen out with his father) pursued romantic love on the nearby Campus of Berkeley. Two decades later in the real world, after his dizzying fall from grace, Dr Wong admitted to feeling "*bewildered and directionless*". However, he travelled nearly 7,000 miles from Taipei to the University of California at Berkeley in pursuit of his love of academe and for a brief sojourn as a visiting scholar. Dr Wong eventually rediscovered his focus and ultimately embarked upon a long and winding road that resulted in him joining arms with his cousin Tony Wang and bringing the present litigation to this Court's door.

[1] Transcript Day 16, page 32 line 22.
[2] Transcript Day 16, page 33 lines 23-25.
[3] I set out my impressions of the underlying motivations for this litigation later in this Judgment with a view to encouraging some movement towards a resolution of the underlying family conflict.

INTRODUCTION AND SUMMARY

4. The Plaintiff (referred to by his counsel at trial as Dr Wong) commenced the present proceedings on February 21, 2018. D8, the Plaintiff's cousin (referred to at trial by his counsel as "Tony") was joined as a Defendant on March 9, 2020 together with his half-sister Jennifer Wang (D9). The Plaintiff, as the administrator of his late father's estate in Bermuda and the British Virgin Islands ("BVI") (since 2016 and 2017, respectively) and D8, as an administrator of his late father's estate in Bermuda and BVI (since 2020 and 2021, respectively[4]), joined arms together (together, the "Claimants") to launch a concerted attack on the validity of five Bermuda purpose trusts, purportedly settled by their fathers (YC and YT (the "Founders")) as part of what may loosely be described as an estate planning exercise principally carried out between 2001 and 2005. In the cross-hairs of the Claimants' legal assault weapons are the following five purpose trusts (together, the "Bermuda Purpose Trusts" and, the first four together the "First Four Bermuda Purpose Trusts"):

    (a) the Wang Family Trust (declared May 10, 2001 – trustee, Grand View Private Trust Company Limited – "Grand View PTC");

    (b) the China Trust (declared June 24, 2002 – trustee, Transglobe Private Trust Company Limited – "Transglobe PTC");

    (c) the Vantura Trust (declared May 9, 2005 – trustee, Vantura Private Trust Company Limited – "Vantura PTC");

    (d) the Universal Link Trust (declared May 9, 2005 – trustee, Universal Link Private Trust Company Limited – "Universal Link PTC");

    (e) the Ocean View Trust (declared March 8, 2013 – trustee, Ocean View Private Trust Company Limited – "Ocean View PTC").

5. The main Defendants were the five private trust companies, referred to by their counsel as the "Trustees" but referred to by the Claimants, keen to point out that they were not independent professional trustees, as the "PTCs". D5, the Hung Estate, was to a significant extent a default defendant against whom relief was sought in the event that effective relief was not obtained as against the Trustees in respect of certain claims. Mr Hung was the loyal servant of YC and YT with longstanding family ties to them. The Claimants in their oral evidence appeared to withdraw any suggestion that Mr Hung had deliberately acted against the Founders' wishes. D7, Susan Wang, referred to by her counsel as "Susan", was

[4] Tony Wang was appointed jointly with D9, who ultimately took no active role in the present proceedings.

joined as a Defendant because certain powers of appointment had been conferred on her in relation to certain assets transferred to the Wang Family Trust and the Ocean View Trust. In the absence of unanimity amongst the parties about referring to the Founders' children by their first names, I generally refer to them all (save for reasons of economy or in references to their childhood) in formal terms.

6. Because of the substantial value of the trust assets in dispute, thought to be at least US$14 billion, the present litigation has been contested through the deployment of the most elaborate and skilfully advanced pleadings, legal and factual arguments that one could possibly imagine. Despite this, the foundations of the dispute at base consist of a relatively unremarkable family dispute in high value trust dispute terms. The Founders' families have different branches, and the Claimants are 'separated' from those family members who control the Bermuda Purpose Trusts. Unable or unwilling to achieve a negotiated resolution for their grievances, they have resorted to what is perceived by the family 'establishment' as almost seditiously aggressive litigation designed to recover the assets settled upon trust and to distribute them to the Founders' heirs according to Taiwanese inheritance law. An unusual feature of the present case is that those family members who seek to defend the Bermuda Purpose Trusts, on the grounds that they represent their fathers' desired legacy, do so against their own financial interest.

7. This unusual feature of an otherwise unremarkable general scenario arises in the following way. The common feature of the Bermuda Purpose Trusts is that they were established perpetually for non-charitable and charitable purposes with no possibility of personal benefit for the Founders' heirs. The Claimants, on substantially similar grounds, advanced one central factual thesis: the Founders did not in fact intend to establish trusts from which their descendants could never personally benefit and were fundamentally mistaken about the true legal character of the Bermuda Purpose Trusts. Credence was given to the plausibility of a mistake by the Founders, with the elder brother YC always playing the leading role, declining to receive legal advice directly. YC entrusted his daughter Ms Susan Wang, who was for many years resident in the United States, with the significant task of liaising with US and Bermudian lawyers in relation to the formation of the Bermuda Purpose Trusts. The mistake and lack of authority claims were mostly based on this central thesis. The mistake and lack of authority claims, together with the undue influence claims, are collectively referred to below as the "Avoidance Claims".

8. In addition, significant reliance was placed by the Claimants, as regards the First Four Bermuda Purpose Trusts, on the fact that the Founders appeared to have regarded themselves as entitled to control those trusts after they were established, rather than the Business Management Committees of the PTCs (the "BMCs"). This was entirely at odds with the true legal character of the First Four Bermuda Purpose Trusts. Whilst I accept that

the relevant actors did behave in a manner capable of supporting an inference that the Founders believed they had established traditional discretionary trusts, fairly viewed, there is no basis for this inference to be drawn. The distinctive culture within which the relevant events played out was one in which deference to the Founders as corporate icons and family elders was so powerful a force, I ultimately find, that permitting the Founders to continue to exercise *de facto* control is not indicative of there being a mistake as to the formal legal position. Reliance was also placed by the Claimants on the fact that those involved in managing the Bermuda Purpose Trusts appeared to believe that they could receive benefits from them. This evidence also potentially supported the mistake claims. However, I find that the preponderance of the evidence shows that YC (in particular) understood that the managers of the Bermuda Purpose Trusts could only receive remuneration as opposed to discretionary personal benefits. The fact that some of the remuneration proposals (which were never implemented) may have been inconsistent with the purpose trust regime, and the fact that after YC's death the proposed remuneration may have been pitched as "benefits" with a view to quelling potential family discontent, is ultimately beside the point. YT's Wills and Declarations (as defined below at paragraph 16), properly construed, do not support any freestanding finding in this regard that he was fundamentally mistaken about the legal basis of the Bermuda Purpose Trusts.

9. I have accepted the Claimants' applicable laws case that Bermuda law applies (by virtue of section 10 of the Trusts (Special Provisions) Act 1989 (the "1989 Act")) or that BVI law applies under the applicable common law choice of law rules. If I were required to apply Taiwanese law to these claims against the First Four Bermuda Purpose Trusts, Taiwanese limitation law would apply and these claims would all be time-barred.

10. The Claimants' Ocean View Trust claims raised certain distinct issues. The Plaintiff complained that upon YC's death in October 2008 his 50% share of the assets transferred to the Ocean View Trust fell under the authority of his father's estate and was transferred without authority on that basis. In this regard, I ultimately find that there was no agreement that authority to instruct Mr Hung as nominee of assets jointly beneficially owned by the Founders passed from YC to YT upon YC's death. The fact that the relevant actors behaved as if there was such an agreement is in my judgment primarily attributable to their belief that it was appropriate (within the distinctive family and business culture that they lived and conducted business) to do so.

11. D8 complained that his father lacked mental capacity when a power of attorney ("POA") was executed in favour of his eldest son William Wong in October 2012; accordingly, Mr Hung was not validly authorised to effectuate the transfer of assets to the Ocean View Trust. This was a seriously arguable claim, although I am unable to accept that it is not open to me to reach any other finding than that YT was incompetent to execute the POA

upon which the relevant transfers depend. The critical issue was in the end, having regard to the expert evidence which I accept, whether or not conferring broad authority on his eldest son was a 'new' transaction or merely another manifestation of an intention which YT had already manifested when his mental capacity was not subject to serious doubt. The decision to execute the POA in favour of YT's first-born son was in my judgment consistent with previous decisions and indeed the cultural norm. The level of understanding required was minimal, and I find YT had the level of understanding required. I summarily reject the belatedly added forgery claims, which were only seriously pursued in relation to the POA because I do not believe any of the supposed suspects (nor indeed any witness who appeared in the trial, including the Claimants) to have acted in any material respect with deliberate and premediated dishonesty. Although undue influence was pleaded and it was accepted that this claim would only be viable if Bermuda law applied, there was no evidential basis for this claim and it was not pursued (or not seriously pursued) at trial.

12. The second tranche of claims more sharply cast the Claimants in the role of 'rebels' and those defending the Bermuda Purpose Trusts as 'loyalists'. The legal validity of all five of the Bermuda Purpose Trusts was challenged on technical legal grounds unrelated to any suggestion that the Bermuda Purpose Trusts did not reflect the Founders' true wishes. A small sample of transfers was impugned on the grounds that they failed to comply with requirements for writing imposed by the English Statute of Frauds 1677 (the "Statute of Frauds"), said (by reference to expert historical evidence) to form part of BVI law. The Trustees advanced a counterclaim based on certain powers of appointment granted to Susan Wang in relation to the assets transferred by Mr Hung to the Wang Family Trust and the Ocean View Trust. It was said that those powers could be used to resettle the assets upon the same trusts, if those trusts were set aside. As regards these claims, I find:

    (a) the Bermuda Purpose Trusts are not void because the 1989 Act prohibits purpose trusts from embodying mixed charitable and non-charitable trusts;

    (b) the Bermuda Purpose Trusts are not void because their purposes fail to meet the statutory certainty test;

    (c) the Statute of Frauds does form part of BVI law, based on expert evidence as to BVI history and the application of the relevant rules about how the common law is received in British territories acquired by conquest or settlement. However, no separate writing was required in relation to the impugned transfers of the beneficial interests in the relevant shares, because the beneficial owners orally instructed the nominee to transfer both the legal and beneficial interests.

13. For the reasons set out below, I have reached the following principal conclusions:

    (a) the Founders were not mistaken about the legal character of the Bermuda Purpose Trusts which were designed to support the Formosa Plastics Group ("FPG") and philanthropic objects, goals which were entirely consistent with their own Vision. The fact that the bulk of their wealth was left for these purposes was not inconsistent with the Founders wishing to benefit their heirs as they left substantial sums to them through their estates;

    (b) subject to sub-paragraph (c), the Avoidance Claims are all dismissed;

    (c) the Plaintiff's claim to set aside the transfer of YC's 50% share of the Ocean View Trust assets is allowed (against Ocean View PTC and the Hung Estate) on the grounds that upon YC's death, authority to direct Mr Hung as nominee shareholder passed to YC's estate;

    (d) the Invalidity Claims and the Formalities Claim are all dismissed on legal grounds;

    (e) the Trustees' Powers of Appointment Counterclaim is dismissed.

14. Despite the vigour of the legal contest (in particular through the interlocutory skirmishes), counsel cooperated commendably from the eve of the trial until its conclusion. They agreed a trial timetable and ensured (with only light-touch judicial encouragement) that after beginning on April 19, 2021, the trial concluded on schedule on September 28, 2021. I am indebted to counsel for their assistance throughout the trial for this case management contribution as well as for the thorough (and often entertaining) manner in which they explored the wide array of factual and legal issues canvassed at trial.

THE ISSUES IN CONTROVERSY

Dr Wong's characterisation of the issues

15. In the Plaintiff's Opening Submissions, the issues were defined as follows:

    "*271. The following main issues arise for determination. Where sub-issues arise, they will be set out under the relevant Issue.*

    272. Are the Purpose Trusts void for containing both charitable and non-charitable purposes? (the Mixed Purposes Claim)

273. *Are the Purpose Trusts void because their purposes are insufficiently certain to allow the trusts to be carried out? (the Uncertainty Claim)*

274. *Were YC and YT Wang's beneficial interests in the shares purportedly transferred to the China Trust, the Vantura Trust and the Universal Link Trust transferred at all? (the No Written Assignment Claim)*

275. *Were YC and YT Wang operating under a mistake as to the nature of the [First Four Bermuda Purpose Trusts] when authorising their establishment and/or the transfer of assets to them? (the Mistake Claim); and if so was their (flawed) authority to transfer assets to those Purpose Trusts ineffective? (the Lack of Authority Claim)*

276. *In the case of the Ocean View Trust, did Mr Hung have authority to transfer YC and YT Wang's interests in Chindwell BVI and Vanson BVI to it? (the Ocean View Lack of Authority Claim)*

277. *Was YC and YT Wang's consent to the establishment of the [First Four Bermuda Purpose Trusts] and/or the transfers to them procured by the presumed undue influence of Susan Wang and/or Mr Hung? (the Undue Influence Claim)*

278. *Did Mr Hung exceed his authority or act in breach of trust or fiduciary duties in transferring or procuring the transfer of assets to the Purpose Trusts? (the Breach of Duty Claim)*

279. *Does Susan Wang have powers of appointment in relation to the shares in the BVI companies transferred to the [Wang Family Trust] and the Ocean View Trust? (no such powers having been given in respect of the shares in the BVI companies transferred to the China Trust, the Vantura Trust or the Universal Link Trust) (Susan Wang's Powers of Appointment Claim)*

280. *The first two claims are points of law in relation to which the oral evidence is not relevant. The third claim, the No Written Assignment Claim, turns primarily on points of BVI law (which are to be dealt with by submission) and the expert evidence on BVI history*."

Tony Wang's characterisation of the issues

16. In the Skeleton argument of D8 for Trial, the issues raised by Tony's case were summarised as follows:

> "*4. In a nutshell, Tony's case (in the alternative to his case that the Bermuda trusts are, in any event, legally invalid) is that:*
>
> *4.1. YT's understanding at all material times was that he (YT) continued to own his 50% interest in the Holding Companies and could direct what should happen to those assets. In particular, his understanding was that he could direct that those assets should be owned by his two families and jointly managed by the children of each of those two families. That this was what YT understood is clear from (among other things) express declarations and wills which he executed in 2010 and 2011 (the "YT Wills and Declarations").*
>
> *4.2. In short, whilst YT understood that he had transferred his assets to be held by trustees in Bermuda, he did not understand that the effect (if valid) of the Five Bermuda trusts (and therefore of the transfers to the trustees of those trusts) was that he would no longer own his 50% share of the assets, could not direct what should happen to those assets, and that those assets could never be used to benefit him, his families or his descendants.*
>
> *4.3. It follows that YT did not authorise Mr Hung to make the transfers or, if he did authorise them, he did so under a fundamental mistake as to the nature and effect of those transfers (flowing from his fundamental mistake as to the nature and effect of the terms of the trusts themselves), alternatively a presumption arises that he was unduly influenced into authorising them. In the premises, the transfers are either void ab initio or should be set aside. Further, Mr Hung exceeded his authority (as bare trustee or nominee for YC and YT) or acted in breach of trust or fiduciary duty in transferring the assets to the Five Bermuda Trusts.*
>
> *4.4. Moreover, there was no transfer of YT's (or YC's) beneficial interest in the shares which Mr Hung purported to transfer to the trustees of three of the trusts because YT (and YC) did not assign their interests to those trustees in writing signed by them.*"

The Trustees' characterisation of the issues

17. In their Opening Submissions, the Trustees concisely summarised the issues in relation to the claims against the First Four Bermuda Purpose Trusts as follows:

> "*24. The issues that arise on the Wrongful Transfer Claims, Mistake Claims and Undue Influence Claims may therefore be summarised as follows:*
>
> *24.1. Did YC Wang and YT Wang authorise the transfers by Mr Hung into the [First Four Bermuda Purpose Trusts]; did they do so under the mistaken belief that the [First Four Bermuda Purpose Trusts] were ones from which they or their families could benefit; and was their authorisation of the transfers the result of presumed undue influence? If the Founders did so authorise, and their authority was not given under a mistake or as a result of presumed undue influence, the Wrongful Transfer Claims, Mistake Claims and Undue Influence Claims all fail.*
>
> *24.2. Is the system of law governing the issue of whether Mr Hung duly authorised the transfers into the [First Four Bermuda Purpose Trusts] and whether such authorisation was vitiated by mistake or undue influence Bermuda or BVI law as Winston Wong and Tony Wang contend, or Taiwan law as the Trustees contend?*
>
> *24.2.1. If Taiwan law, then:*
>
> *24.2.1.1. The Undue Influence Claims must in any event fail because there is no doctrine of undue influence under Taiwan law.*
>
> *24.2.1.2. The Trustees submit the Mistake Claims must in any event fail because they are time barred under Taiwan law.*
>
> *24.2.1.3. The Court will have to determine whether the Wrongful Transfer Claims are time barred or otherwise are not effective claims under Taiwan law as the Trustees contend.*
>
> *24.3. To the extent that Bermuda or BVI law applies, the Court will have to determine whether the claims are time barred under those systems of law as the Trustees contend.*"

18. As regards the Ocean View Trust, the Trustees characterised the issues as follows:

> "*28. The issue that arises on the Winston Ocean View Claims is therefore whether or not Mr Hung was authorised, by the terms on which he held the assets placed into the Ocean View Trust, to transfer those assets into that Trust upon the authorisation of YT Wang (or his duly authorised representative) alone. If he was, the Winston Ocean View Claims fail…*
>
> *31. The issues that arise on the Tony Ocean View Claims may therefore be summarised as follows:*
>
> *31.1. Did YT Wang himself authorise the transfer of the assets into the Ocean View Trust in 2011? If so, did he do so under a fundamental mistake, namely that he did not know or appreciate that the effect of such transfers was to put the assets beyond the benefit of both himself and his family forever? If YT Wang authorised the transfers and was not mistaken in doing so, the Tony Ocean View Claims fail.*
>
> *31.2. Did YT Wang confer the Oral Mandate on William Wong in 2010? If so, did it confer authority on William Wong to authorise the transfers into the Ocean View Trust? If the Oral Mandate was granted and the authorisation of the transfers into the Ocean View Trust was within its scope, the Tony Ocean View Claims fail.*
>
> *31.3. Did YT Wang execute the Power of Attorney on 31 October 2012? If so, did it represent YT Wang's free and informed consent? Did YT Wang lack the requisite mental capacity to execute the Power of Attorney? If YT Wang executed the Power of Attorney and had the requisite capacity to do so, the Tony Ocean View Claims fail.*
>
> *31.4. Further and in any event:*
>
> *31.4.1. Is the system of law governing the issue of whether YT Wang's authorisation for the transfers into the Ocean View Trust was properly given Taiwan law? If so, are the Tony Ocean View Claims either time barred or otherwise not effective under Taiwan law?*
>
> *31.4.2. To the extent that the claims are governed by Bermuda or BVI law, are the claims in any event time barred?*"

The Hung Estate's characterisation of the issues

19. In the Hung Estate's Opening Submissions, the claims advanced were described as falling into three categories:

> "*19. First, there is the claim that the [First Four Bermuda Purpose Trusts] and the Ocean View Trust are invalid as a matter of Bermuda law because (in essence) they have mixed private and charitable purposes or because they lack sufficient 'certainty of object' to allow the trusts to be carried out ('the* ***Invalidity Claim****'). This claim is wrong in law…*
>
> *20. Second, there are the claims that YC Wang and YT Wang had a beneficial proprietary interest in the shares of the Holding Companies, and that the transfers of those beneficial interests to the [First Four Bermuda Purpose Trusts] and the Ocean View Trust are void or fall to be set aside because they … had to be made in writing signed by the beneficiaries under s.9 of the Statute of Frauds 1677 ('the* ***Transfer Claims****')…*
>
> *21. The third set of claims consists of the claims made against the Fifth Defendant as the representative of Mr Hung personally for breach of trust (or breach of mandate or tort) ('the* ***Breach of Duty Claims****'). These claims are governed by Taiwanese law…"*

THE MAIN LEGAL ISSUES IN CONTROVERSY

20. The principal legal issues in controversy were addressed in some detail in the main protagonists' opening submissions:

    (a) whether the Bermuda Purpose Trusts are void because they have mixed purposes and/or uncertain purposes contrary to section 12A(1) of the 1989 Act and/or the common law;

    (b) whether the transfer of certain assets made to certain of the Bermuda Purpose Trusts are formally invalid because (1) the transfers were governed by BVI law, (2) were not in writing and (3) section 9 of the Statute of Frauds forms part of BVI law (this issue also involved expert historical evidence about the settlement of the BVI);

(c) whether the "firewall" provisions of section 10 of the 1989 Act (in its pre-2020 iteration) mean that Bermuda law applies to the Avoidance Claims asserted in respect of the First Four Bermuda Purpose Trusts;

(d) (as regards the validity of the transfers to the First Four Bermuda Purpose Trusts), what is the relevant law governing mistake and/or lack of authority under (1) Bermuda law, (2) BVI law and/or (3) Taiwan law and undue influence under Bermuda law;

(e) what legal principles govern the relationship between Mr Hung and the Founders (the "Hung Arrangement") under (1) Bermuda law, (2) BVI law and/or (3) Taiwan law;

(f) as regards the validity of the transfers to the Ocean View Trust, what legal principles govern mental incapacity under (1) Bermuda law, (2) BVI law and/or (3) Taiwan law; and

(g) as regards the limitation defences, what time-bars (if any) apply to the various claims under (1) Bermuda law, (2) BVI law and/or (3) Taiwan law.

SUMMARY OF FACT EVIDENCE

Approach to the evidence

21. It may be helpful at the outset, in the context of a trial taking place largely remotely due to the Covid-19 Global Pandemic, to explain my approach to the evidence. The governing principles ought not to be controversial. I was assisted at the start of the trial by the following passage in D8's Opening Submissions:

> "*12. In Kimathi v The Foreign and Commonwealth Office [2018] EWHC 2066 (QB), a case concerning tort claims arising out of the Kenyan Emergency in 1952, Stewart J noted (at §95) that "In recent years there have been a number of first instance judgments which have helpfully crystallised and advanced learning in respect of the approach to evidence", citing the judgment of Leggatt J (as he then was) in Gestmin SGPS SA v Credit Suisse (UK) Limited [2013] EWHC 3560 (Comm) (together with two further authorities, themselves citing Gestmin). In Gestmin, Leggatt J held, at §22, as follows:*
>
> > *'In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was*

said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.""

22. Those comparatively modern views are supported by pronouncements of a maturer vintage. An additional reason for being cautious about placing reliance on the demeanour of the witnesses is the fact that most of them are Taiwanese and gave their oral evidence not just remotely, but also in Chinese through interpreters. As Lord Bingham has opined (writing extra-judicially 20 years ago):

> "*... however little insight a judge may gain from the demeanour of a witness of his own nationality when giving evidence, he must gain even less when (as happens in almost every commercial action and many other actions also) the witness belongs to some other nationality and is giving evidence either in English as his second or third language, or through an interpreter. Such matters as inflexion become wholly irrelevant; delivery and hesitancy scarcely less so. Lord Justice Scrutton once observed: 'I have never yet seen a witness who was giving evidence through an interpreter as to whom I could decide whether he was telling the truth or not'. If a Turk shows signs of anger when accused of lying, is that to be interpreted as the bluster of a man caught out in a deceit or the reaction of an honest man to an insult? If a Greek, similarly challenged, becomes rhetorical and voluble and offers to swear to the truth of what he has said on the lives of his children, what (if any) significance should be attached to that? If a Japanese witness, accused of forging a document, becomes sullen, resentful and hostile, does this suggest that he has done so or that he has not? I can only ask these questions. I cannot answer them. And if the answer be given that it all depends on the impression made by the particular witness in the particular case that is in my view no answer. The enigma usually remains. To rely on demeanour is in most cases to attach importance to deviations from a norm when there is in truth no norm.*"

23. While I am guided by the main thrust of these distinguished observations, the opening words merit some adaptation in the context of Bermudian judges sitting in Bermuda. In my judgment, assistance can potentially be gleaned from the demeanour of witnesses who belong not merely to the same nationality, but also witnesses who belong to a closely connected or highly familiar culture. Save in a technical legal sense, and speaking only for myself, I personally would not generally (for present purposes) consider a witness from the English-speaking Americas, the British Isles, the English-speaking Caribbean or English-speaking West Africa as "foreign" to any material extent. Of course, the position is best assessed by individual trial judges on a case by case basis.

24. Additionally, there has long been a global cosmopolitan culture binding persons with similar academic and/or professional backgrounds from every corner of the globe. Bermudian commercial judges will not infrequently have had longstanding personal and/or professional connections not just with counterparts from our Atlantic neighbours, but also further afield, in Hong Kong and Singapore (in particular) and Commonwealth Africa and the Indian sub-continent as well. People who inhabit this transnational cultural space often, no doubt to the chagrin of latter-day populists everywhere, have more in common with each other than their national "kith and kin". Dr Wong and Susan Wang, two key witnesses in this case who testified in English, despite their undoubtedly strong Taiwanese ties, appeared to me to inhabit this transnational cosmopolitan cultural space. The same applies, to a marginally lesser extent, to Wilfred Wang. I do not, accordingly, regard them as being "foreign" for the purposes of taking into account the manner in which their evidence was given, albeit that such "impressions" play a subsidiary role in the modern judicial fact-finding process.

25. As far as I can recall, and subject to one exception, every important witness whose testimony occupied one or more full days testified without wearing a mask so that their full demeanour could easily be assessed. The in any event limited significance of being able to assess demeanour is diminished in the case of the shorter witnesses who did wear masks because of Covid19 concerns. In summarising my impressions of the oral testimony of the fact witnesses below, I have merely recorded my initial or provisional views based on impressions I recorded shortly after they completed their evidence. I have adopted my approach to mitigate the necessarily large lapse of time in an unusually long case between my hearing the evidence (between early May and the end of June 2021), my hearing closing oral submissions (September, 2021), and the delivery of Judgment over six months after the last witness testified.

26. Finally, the mistake, undue influence and lack of authority claims require the Court to primarily analyse and assess interactions between the Founders and their children and

between the Founders and their employees. The Founders were clearly steeped in their native Taiwanese culture and it is common ground that they spoke and wrote exclusively in their native tongues. I acknowledge the need to avoid as far as possible in the fact-finding exercise either (a) being overly influenced by Western cultural assumptions about 'normal' human behaviour, (b) being overly influenced by Western cultural stereotypes about Chinese culture, and/or (c) being overly influenced by my own personal assumptions and views of human experience. That said, the evidence generally suggests that Taiwanese traditional culture, alongside modern Western influences, embodies communitarian values and notions such as filial piety, respect for the elders, respect for the ancestors and polygamy. I spent some of my most formative years in another somewhat westernized non-western country (with which I have patrilineal ties) with seemingly broadly similar traditional values and social systems to Taiwan. As the trial proceeded, it was impossible for me not to approach the admittedly distant and foreign social context in which much of the evidence in this case is embedded without an admittedly vague sense of fond familiarity.

THE PLAINTIFF'S CASE

Evidence-in-chief

Wong, Wen-Young (Dr Winston Wong)

27. Dr Wong's First Witness Statement is dated September 14, 2020 and his Second Witness Statement is dated November 4, 2020. As the Plaintiff, he is very much the leading character or the star of the show, although his cousin Tony has belatedly joined the cast, somewhat like Batman being supported by Robin. That said it is immediately apparent that Dr Wong's evidence-in-chief does not in a direct sense seek to provide the main evidential foundations for his claims. Instead, his evidence provides a valuable insight into his own personal background, his perspective of his relationship with his father, his father's true motivations, and his own views (largely argumentative and/or inferential as he was a non-participant) of the key events and transactions which led to the impugned transfers of assets to the Bermuda Purpose Trusts.

28. In his "*opening remarks*", he states:

> "*7. I am the firstborn son of the late Taiwanese industrialist Wang Yung Ching. My father died on 15th October 2008. I am an heir to my father's estate and the sole administrator of his estate in Bermuda, the British Virgin Islands and Hong Kong. These proceedings concern assets that, if my claims are successful, will be returned to my father's estate and that of my father's younger brother, my uncle, Wang Yung Tsai. My uncle died on 27th November 2014. For convenience, I will sometimes refer in this statement*

*to my father and my uncle by their abbreviated names, '**YC Wang**' and '**YT Wang**', or '**YC**' and '**YT**'.*"

29. It is perhaps an almost universal social phenomenon, in patriarchal societies at least, that the status of firstborn son is an important one. And, as Dr Wong goes on to depose, such is indeed the case in Taiwanese traditional culture. His father was born on January 18, 1917 and was himself an eldest son. He was married to Yueh-Lan, with whom he had no children, on December 20, 1935 and remained married to her until his death nearly 73 years later. He formed a relationship with Yang Chiao, whom he met in or about 1946, and had children (including Dr Wong) who formed what is known as the "Second Family". Those children in order of birth were Kuei Yung Wang (Margaret Wang), Wong Xue Ling (Charlene Wang), the Plaintiff, Wang Xue Hong (Cher Wong), and Wang Wen Hsiang (Walter Wang). He then proceeds to describe the other family branches.

30. YC had four children with Pao-Chu Lee ("PC Lee"): Susan Wang (born in September 1960), Sandy Wang (born in June 1962), Diana Wang (born in September 1965), and Lora Wang (born in June 1967) (the "Third Family"). The birth dates across these two branches overlap as (it appears to me), YC espoused polygamy rather than what is often referred to in the Anglo-American world as "serial monogamy". Dr Wong adopts an extended family approach by including his uncle's family as additional branches of the same extended family (YT was born in January 1922):

    (a) YT's family with Wang Pi Ruang: William Wong (the same age as the Plaintiff's eldest sister), Wilfred Wang (the same age as the Plaintiff), Wang Hsieh-Ching Lin (Sarah Wang), and younger sisters Wang Hsueh-Min (Jennifer Wang) and Wang Hsueh Kuang (Rachel Wang) ("YT's First Family");

    (b) YT's later family with Chou Yu Mei ("Madam Chou"), which produced children significantly younger than Dr Wong: Wang Hsiue-Huei (Tammy Wang), Wang Ven-Jiao (Tony Wang), and Wang Hsin-Jang (Janis Wang) ("YT's Second Family").

31. Dr Wong deposes that he had a close relationship with his father's first wife, who (with the support of YC's parents) wished to adopt him as her husband's first son, although this never came to pass as his mother objected. Nonetheless, Dr Wong's mother and Yueh-Lan lived in the same household and raised the Second Family together. Yueh-Lan, amongst other things, impressed upon the young Winston the importance of being self-reliant.

32. YC left school at 15 without attending Secondary School and started operating a rice flour mill. In the 1950's he expanded his business activities, during a post-War construction boom, going into the timber trade. FPC was formed in 1954 when YC was 37 years old. As YC's business success and wealth became more apparent, Dr Wong's paternal grandmother expressed fears that YC's wealth would fall into the hands of another family. He believes that his grandparents "*were aghast*" about their son's relationship with PC Lee, whom they considered to be unsuitable. Years later in the 1980's, after YC's own father had died, YC moved into a separate home with PC Lee. However, before that, YC moved between the two homes and "*during this period there was an intense rivalry between the competing households for my father's attention and affection*". Eventually, in the 1970's, Dr Wong's mother migrated to the United States with his younger siblings, Walter and Cher.

33. As for the Plaintiff's education, at 13 he was sent to a boys' boarding school, which Wilfred (who travelled with him in 1964, initially attending a language school) identifies as St. John's School in Leatherhead, Surrey. The young Winston did not understand why he was sent overseas. However, after school he attended Imperial College where he studied physics, obtaining a first degree, masters and PhD, achievements his father did not seem to fully endorse at the time: "*I… recall him telling me half-jokingly that a PhD is like 'soil' (the Chinese character for 'PhD' being similar to the Chinese character for 'soil')*".

34. In 1975, while still a student, Dr Wong married Anita, who was "*from a Chinese family but she was, to all intents and purposes, British and certainly much more British than me*". His parents and grandmother flew from Taiwan to England for the ceremony. After completing his studies later that year, he moved to the United States where he worked for Pittsburgh Plate Glass and additionally became licensed as a real estate broker. In 1977, he and his wife moved to Houston, Texas where Dr Wong worked for FPG on an important environmental project. His first child, Winston Jr., was born in Houston in 1979, and YC proposed he be given one of his own father's names. The following year, Dr Wong and his family returned to Taiwan where he took up a position with FPG.

35. Over the next few years, he was on good terms with his father and working closely with him. He accepted from YC the following core principles:

    (a) fairness to all;

    (b) responsibility to those who are less fortunate;

    (c) continuous learning;

(d) leadership by example-knowing the goal and getting the job done for the minimum costs and maximum efficiency.

36. Dr Wong assisted a not-for-profit institution YC had established (and which was later named the Chang Gung College of Medicine and Technology) gain university status. He became the founding Dean of Engineering and Technology.

37. By the mid-1990's as the FPG 'Empire' grew, the group and the Wang family attracted increasing media attention and an expectation grew that Dr Wong as the eldest son of YC would become his successor, he averred. In a paragraph which appeared at first blush to reveal the Plaintiff's main underlying grievance, he deposed as follows:

> "*83. It was assumed by the whole of Taiwanese society that as YC's eldest son, I was the heir to FPG and was therefore being prepared for the Chairmanship (e.g., the press sometimes described me as the "quasi-successor"). This was an expectation based on the cultural norms at the time and my status as the eldest son. That the eldest son succeeds his father is an important tradition in Taiwan—and even more so in Japan, which ruled Taiwan between 1895 and 1945, a period that includes the childhood of my father and uncle. In the past, daughters did not inherit family businesses, and they rarely do so even now. When I was young, I often heard my grandparents speaking openly in front of my father and uncle about the Chairman's son becoming the Chairman himself and I have already explained above that they taught me of the additional responsibilities bestowed on first born sons.*"

38. He then describes the very dramatic rupture which occurred in his relationship with his father and FPG. The main story is essentially agreed. Dr Wong provides a 'back story' according to which PC Lee, as matriarch of the Third Family, is the 'villain of the piece'. Her influence grew, the Plaintiff believed, after YC's mother, a moderating influence over his father, died in 1995 at the age of 108. Be that as it may, Dr Wong admittedly became involved in a public scandal the broad purport of which was that as a member of the Faculty of an academic institution (National Taiwan University - "NTU"), he was found to have improperly sought to alter the marks awarded by a colleague to a student he was romantically involved with. As a result, his employment with FPG was terminated. The Plaintiff denies any impropriety on the grounds that:

(a) he was not romantically involved with Annie, his MBA student at the relevant time (the media scrutiny threw them together and they subsequently became partners and produced a son born in February 1999);

(b) Annie had achieved the highest national mark in the qualifying exam and had been unjustly awarded zero on her oral PhD exam because she unwittingly cited an American text rather than referring to her examiner's own text; and

(c) he believed that only PC Lee, using the FPG Press Department, could have stirred up the media frenzy which ensued.

39. He roundly rejects the Trustees' case that this event effectively ended his relationship with his father and explains why he was told nothing about the Bermuda Purpose Trusts. He notes that even his sister Margaret, who worked for FPG, was not told about the Bermuda Purpose Trusts:

> "*99. … If our father knew precisely what he was doing in establishing the Trusts and they reflected his wishes, there is simply no explanation for the clandestine manner in which they were created.*"

40. Ordinary mortals might well have been laid low for some time by such a shuddering blow. But Dr Wong quickly found his feet, after initially feeling "*bewildered and directionless*", in the wake of a precipitous, public and no doubt humiliating ejection from the bosom of FPG. He spent a year as a distinguished visiting scholar at the Haas School of Business (University of California at Berkeley) and stayed with his mother. He returned to Taiwan with a plan to set up his own business in mainland China, which he implemented. He became Chairman of the Grace T.H.W. Group, in the plastics and electronics business. He denies poaching employees from Nan Ya Plastics Corporation ("Nan Ya") for which he previously worked; he admits that some employees did apply to join his new Group. After being 'burned' through competing with Nan Ya in the same market, he prudently steered clear of operating in the same markets as FPG.

41. After returning to Taiwan in 1996, he had lunch with his father regularly but only ever in the company of PC Lee. His termination from FPG was never discussed. He continued, as it were, to plough his own furrow. In 2000, he co-founded the Grace Semiconductor Manufacturing Corporation, now a US$1.5 billion enterprise. He was awarded an honorary doctorate in science by Imperial College, with whom he maintained links, in 2007. Nonetheless, he avers that documents disclosed in these proceedings confirm his belief that the Third Family feared that he was a threat to their position and might seek to lay claim to his father's estate.

42. Dr Wong's First Witness Statement then advances what is essentially his case, as opposed to evidence in the strict sense. For instance he advances, *inter alia* the following arguments:

(a) if the Founders had intended to "*give everything to charity*", the Bermuda Purpose Trusts would have already made substantial contributions to such causes;

(b) YC in 2000 gave instructions that family members should be owners of the Wang Family Trust, and signified in the 2008 "Guidelines for Modification of Overseas Trusts" that family members should benefit from the Bermuda Purpose Trusts;

(c) YC's enthusiasm for supporting good causes was really a business strategy rather than a purely enlightened philosophy and the Trustees have selectively quoted and mischaracterised his real views on "giving back";

(d) Taiwanese charitable trusts could have been established if the Founders' true intent was giving all of their wealth to charity.

43. However, in dealing with the events after YC's death in 2008 when he was over 90, Dr Wong does address events in which he was involved and can give direct evidence about. These events essentially centred on his own efforts to take charge of his father's estate and his gradual discovery of the existence of the Bermuda Purpose Trusts. These interactions seem to have quickly manifested themselves as a brewing dispute between the Second and Third Families, because as early as November 28, 2008 (less than three weeks after the Memorial service for YC), a "*Buddhist teacher and seer*" visited Dr Wong and offered to mediate.

44. In January 2009, various meetings took place between Dr Wong and, *inter alios*, Mr Hung and Jack Chien Fang Jao ("Mr Jao"). Some meetings are agreed to have occurred, but others are not. Some of what transpired is uncontentious; some is hotly disputed. At first blush, this part of the narrative appeared to be essentially background, explaining how the parties failed to compromise what seems to me at that stage to have been a somewhat ill-defined dispute. A controversy that more resembled a somewhat ragged tropical depression than an organised tropical storm or hurricane with a well-defined shape and form. In early February, Dr Wong was meeting with William to discuss YC's burial place, seemingly without rancour. In the same time period, Dr Wong learned that money was "*stored away in Bermuda and in BVI companies under a façade of my father's philosophies*", and was prompted to seek legal advice from outside Taiwan. On March 9, 2009, Dr Wong expressed concerns to Mr Hung about the need to ensure that proper tax disclosures had been made, in the context of the filing of the tax return for YC's estate. In September 2009, PC Lee commenced proceedings against Dr Wong in Taiwan seeking a declaration that she was a lawful wife of YC.

45. The Plaintiff also sets out an impressive account of his own philanthropic work and business achievements after his father's death. The value of his UK work was acknowledged through the award of an O.B.E. in 2015 for contributions to education and research. He describes the various pieces of litigation relating broadly to the present dispute. Schedule 5 to his counsel's Opening Submissions present the position in diagrammatic form.

46. After summarising the status of the various proceedings he has commenced, he avers by way of conclusion:

> "*276 … I believe sincerely that my father would never have intended his legacy to be placed under the control of only two of his daughters, and two of his nephews, to the exclusion of all of his many other children.*"

47. In his Second Witness Statement, Dr Wong replies on various points of detail to the Defendants' evidence and essentially stands by all key averments he initially made. On the important questions of his father's true philosophy and whether he intended to relinquish control of the assets in the Bermuda Purpose Trusts, he states:

> "*18. … Susan implies that the concept of 'giving back to society' was invented by our father and uncle or is somehow peculiar to them as philanthropists. I believe that this gives a misleading impression. 'Giving back to society' is a traditional Chinese saying, rooted in ancient philosophical teachings. Nowadays, the phrase is used by many Taiwanese entrepreneurs in reference to their acts of corporate social responsibility. Some examples have been identified by my team: …*
>
> *20. The expressions used in the examples I give at paragraph 18 above are similar to those expressed in the preamble and 'Founders' Vision' clauses in the various Bermudian trust instruments. This shows, to my mind and consistent with my own knowledge, that the concept of 'giving back to society' is nothing new or unusual in Taiwanese culture/philosophy, and Susan is wrong to suggest it follows from such a philosophy that our father and uncle did not wish their family to inherit any of their wealth or that 'giving back to society' is the goal of the Bermuda Purpose Trusts…*
>
> *23. I have read Susan Wang's account of the documents she showed my father in relation to the formation of the Wang Family Trust and the China Trust, which included the document dated 11th April 2001 ("April 2001 Memo")*

and the document dated 17th May 2002 ("May 2002 Memo"). According to this evidence, my father was given Chinese translations of the preamble to the two trusts, which recorded his 'vision' and 'family spirit', along with lots of flattery from Susan about how important and ground-breaking his vision was. Yet neither my father nor uncle appear to have been informed, or given a detailed explanation, about how the trusts would work in practice. Crucially, there is no documentary evidence they were ever expressly told that, once the trusts had been created, they would lose control forever over the assets placed into them. These vital details were, it seems to me, obscured by a discussion about how to phrase the founders' vision, which did not involve an explanation that the proposed private trust companies would be operating on terms quite different from those on which Mr Hung had previously held and managed the assets."

Impressions of the witness's oral evidence

48. Despite the huge emotional and financial stake he has in the present case as Plaintiff, Dr Wong generally gave his oral evidence in an impressively careful and straightforward manner. This may in part be attributable to the fact that he does not directly testify on the most important factual disputes. Nonetheless, his appreciation of the importance of giving honest evidence on matters important to his case was displayed in two main ways.

49. Firstly, he was willing to make sensible concessions and distinguish between matters he could give direct evidence of and matters as to which he could only speculate. For instance, he accepted the suggestion that "*the Annie Lu affair and the problems that* [it] *gave rise to were problems entirely of* [his] *own making*"[5]. Similarly, he accepted that it was essentially conjecture that PC Lee was behind the media "hype" about the affair which was central to his eventual expulsion from FPG. Secondly, he displayed on more than one occasion a nuanced understanding of the difference between matters as he perceived them at some time in the past and matters as he perceived them today in light of subsequently acquired knowledge. For instance, he accepted that a position he was contending for in September 2009 was at odds with what he was being told at that time his father's plans were: "*I agree now, but I didn't think of it that way at that time, really*"[6].

50. It is true that Dr Wong was on occasion inclined to stubbornly refuse to accept what appeared to be obvious when it was inconsistent with an important aspect of his case. For example, as regards the 2004 Letter to the Children, he was unwilling to accept it gave a

[5] Transcript Day 11, page 87 lines 13-15.
[6] Transcript Day 14, page 15 lines 13-14.

powerful indicator of YC's intentions not to leave most of his wealth to his children[7]. This was, in a sense, not really a question of fact as opposed a question of construction of a document. On the other hand he very honestly admitted, in a way which potentially undermined his legal case that the Bermuda Purpose Trusts were void for uncertainty, that he had no difficulty in understanding how to implement the broadly similar purposes of the Wang Chang Gung Public Interest Trust:

> "*Q. Yes. I am only putting this to you because of the arguments that are raised by you in these proceedings, Dr Wong. That's why I want to have your answer to it. As far as you are concerned, you read and understood the purposes of this trust and saw absolutely no problem whatsoever in carrying out your duties and responsibilities as trustee; correct?*
>
> *A. No problem whatsoever, correct…and I totally agree with you, totally agree even now*." [8]

51. He was also willing to accept that claims he had advanced in the past suggesting bad faith on Mr Hung's part were not justified, although he understandably reserved the right to take legal advice before formally withdrawing his claim against D5, the Hung Estate[9]. Dr Wong's apparent 'light-touch' approach to personally supervising his pleadings and sworn evidence was at first blush perturbing. At first blush, the explanation that in Taiwan one simply left the filing of Court documents to lawyers appeared to me to be an incomplete one even though it was advanced in a convincing manner[10]. The missing link appeared to me to be the Plaintiff's unwillingness or inability to admit how emotionally charged he was in bringing his various proceedings. In my own questioning at the conclusion of his re-examination, in discussing his English boarding school days in the 1960's, the only challenge he was willing to admit experiencing as a rare foreign student was adapting to English as a second language[11]. It was difficult to avoid the suspicion that the secret of the Plaintiff's ultimate success must in part have been attributable to an unusual capacity to ignore emotional discomforts, put his head down and focus on his ultimate goals.

52. Accordingly, notwithstanding the obvious need to approach the most controversial aspects of his evidence with care, I found Dr Wong to be a generally careful, credible and reliable witness.

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[7] Transcript Day 12, page 50 lines 5-19.
[8] Transcript Day 12, page 16 lines 11-20; Transcript Day 15, page 127 line 24-page 128 line 5.
[9] Transcript Day 15, page 105, lines 7-11.
[10] E.g. Transcript Day 15, page 24 lines 16-21.
[11] I explored this issue in part to avoid projecting my own assumptions about the impact of this experience, having myself attended a similar school myself as a rare foreign student during roughly the same period of time.

Toshio Chou

53. The First Affirmation of Mr Chou (pronounced "Jo") is dated September 11, 2020 and his Second Affirmation is dated November 6, 2020. Born on November 12, 1938, he was 81 when he made these Affirmations and 82 by the date of trial. He is the nephew of the Founders and the first cousin of the Plaintiff, Susan Wang, Jennifer Wang and Tony Wang.

54. Mr Chou worked for FPG between 1954 and 1979 when he moved to Canada and established his own business, Willis & Co. At FPG, he was for a time YC's assistant and he even stayed at the family's Chengde Road property. After leaving for Canada, he remained in contact with both of the Founders. After YC's death, he was asked by PC Lee to help resolve a dispute about the estate and he helped to broker an agreement which was reached in 2010. As a result, he considers he has a unique understanding of the background to the present dispute and his evidence is designed to assist the Court.

55. The first obviously pertinent topic he addresses is YC's use of nominees. He states (at paragraphs 33-34) that:

> "*… these arrangements were many and varied … were usually designed in reaction to statutory requirements or to benefit from favourable tax treatment. … At the heart of these arrangements was an absolute understanding that the assets in question belonged to YC and YT Wang…*"

56. Various examples of such arrangements are given. Mention is made of a longstanding tax investigation which YC compromised by agreeing to build a sports stadium. Mr Chou confirms that he was incorrect to depose in the *Beddoe* proceedings that he was involved in the establishment of Vanson International Investment Co. Ltd ("Vanson Liberia") and Chindwell International Investment Corp ("Chindwell Liberia"). This occurred after he was in Canada. However, from 2002, Mr Chou spent most of his time in Taiwan and would bump into YC from time to time due to the proximity of their respective offices. He noticed a gradual decline in YC's health from that time. YT's decline in the years before his death was more marked.

Impressions of the witness's oral evidence

57. Mr Chou insisted that he was a non-partisan witness and overall his evidence was not challenged to any significant extent. However, under cross-examination, he admitted that he had fallen out with the Third Family due to PC Lee's alleged refusal to permit YC's first wife, Yueh-Lan, to be buried alongside him in a cemetery which PC Lee owned. Mr Chou also admitted clashing with Mr Hung over an accounting error Mr Chou had identified and was keen to substantiate, although this went beyond the scope of his evidence.

58. I found him to be a generally credible witness.

Wong Quan-Ren (Winston Wong Jr.)

59. Winston Wong Jr.'s Witness Statement is dated September 14, 2020. Winston Jr. is the Plaintiff's firstborn son. He was 41 years old at the commencement of trial but turned 42 on June 3, 2021. Although he initially graduated from National Chengchi University in Taipei, he also obtained a PhD in Electrical and Electronic Engineering from Imperial College London in 2010. He founded Credo Diagnostic Biomedical in Singapore in 2011.

60. After discussing what he was told growing up about the role of the firstborn son, his family relations and the closeness of his relationship with his paternal grandmother, he avers that YC offered him a job at FPG. He believes that YC was dissuaded from following through by PC Lee. He inferred this from the fact that during a Sunday visit soon after the job offer was made, "*PC Lee said that she did not think I should work for FPG, because the work would be too tough and tiring for me.*" The offer was never extended again.

61. Winston Jr. was scheduled to give oral evidence but shortly before he was required to appear before the Court the Trustees indicated that he would not be cross-examined. His evidence, which was of peripheral relevance, was not in the event challenged.

D8'S CASE

Evidence-in-chief

Tony Wang

62. Tony's First Witness Statement is dated September 9, 2020 and his Second Witness Statement is dated November 4, 2020. Tony is the second born of YT's Second Family and was born in 1963, between the older Tammy and the younger Janis. The children of his father's First Family were born in the 1950's and YC's children are all much older than he and his siblings, Tony explains.

63. Implicitly explaining the underlying motivations for pursuing his claims, he deposes:

"*12. As I explain below, it was my father's wish that I should play a significant role in the management of the business (FPG) and/or charitable organisations (which themselves control substantial shareholdings in FPG companies) developed by him and YC. My father was careful to ensure that I received training and experience through holding various positions (of increasing responsibility) within FPG in order to enable me to assume a senior management position in due course.*

13. However, following my father's retirement, and contrary to what I believe my father wished and intended, I have been steadily side-lined from FPG's management and the Founders' principal charitable projects. This broadly coincided with the purported settlement of the trusts which form the subject matter of this dispute.

14. Since 2018, I have been named as a member of the "Advisory Committee" of FPG. However, this is merely a formal title and provides no opportunities for effective involvement or oversight of FPG. Since 2018 (four years after my father's death), I have also been a board member of the Chang Gung Memorial Hospital (CGMH), which represented my father's most significant contribution to charitable causes. However, this is again a purely formal role with no effective opportunity to participate in the management of the assets held by the CGMH and I do not receive any remuneration from that position.

15. As a result of my effective exclusion from the principal FPG businesses, the focus of my career has shifted towards substantial real estate projects involving urban regeneration (unconnected to FPG), hotel management and the promotion of charitable projects and events in the fields of sport, culture and medicine."

64. He proceeds to discuss how YT divided his time between his two families and the prominent supporting social role played by Madam Chou to YT in both the private and public realms. He describes the closeness of the relationship between YT and YC and the unique contributions made by YT to their joint commercial endeavours and his father's own charitable work. He also notes that the fact that charitable foundations have served as tax efficient vehicles for holding shares in FPG has been subject to criticism in the press.

65. With respect to his father's succession planning, Tony admits that discussions about his father's plans were limited and always necessarily initiated by YT himself:

"*77. Nevertheless, based on what my father said and did over many years, I have no doubt that it was his intention to pass on (at least the vast majority of) his interest in FPG to his children, subject to the donations which he had already made to the Taiwanese charitable trusts referred to above. Whilst it is difficult to relate this to specific conversations or documents (although, as I explain below, there were such conversations and documents), my clear impression growing up around him was (and is) that there was never any doubt within the family that my father's wealth would ultimately pass to his family.*"

66. He proceeds to describe three conversations in which YT "*made clear his wish and intention that his family (and, in particular, his children) should benefit from the assets that he had accumulated over his lifetime*":

(a) the first was a conversation between YT and Madam Chou relayed to Tony by his mother around 2000;

(b) the second was a conversation between YT and Tony in around 2004;

(c) the third was a conversation between YT and Madam Chou in April 2010 preceding the 2010-2011 Declarations.

67. Reliance is most significantly placed on YT's two wills dated April 15, 2010 and December 23, 2010 and the Declarations dated April 15, 2010, December 23, 2010 and two on October 27, 2011 (collectively "YT's Wills and Declarations" and respectively "YT's Wills" or the "Declarations"). As to the first Declaration, Tony deposes:

"*96. Unlike the terms of the trusts to which they relate, the declaration signed by my father was short and simple (consisting of just two fundamental points). The first point stated as follows:*

> *'Regarding the five overseas trust funds, they should according to their present value, be equally divided into 2 parts, [one part] to be owned by YC Wang's family and [one part] to be owned by my family. The part that I YT Wang own, should be co-administered by representatives of children assigned by children of my two families respectively.* '"

68. The terms of the wills relied upon were as follows:

"*All of my estates shall be divided into four shares. The first wife and the second wife, Chou, Yu Mei, will each receive one share, and the other two shares are equally divided among the eight children.*"

69. It is then averred:

> "*102. Based on the matters described above, it is inconceivable that my father would have intended to disinherit his children from the vast bulk of his wealth and to limit the control and management of FPG, through the Bermuda Trusts, to only William and Wilfred on behalf of his First Family, to the exclusion of our family. The Bermuda Trusts, which prevent my father's children from benefiting from his overseas assets, demonstrably contradict his wishes and intentions.*"

70. As for his own career, he explains that he graduated from Pitzer College in California with a Bachelor's degree after completing schooling in Taiwan. He started working for Formosa Chemicals and Fibre Company ("FCFC") in 1987 and spent most of the next three decades working within FPG. Tony was 43 when his father announced his retirement in 2006 aged 84. He accepts that partly in light of his relative youth, he was unable to reach the heights that the older William and Wilfred attained within the FPG hierarchy. After his father's death, he avers that they effectively forced him out of FPG, contrary to YT's wishes.

71. He avers that William in early 2009 promised a distribution running into millions of United States dollars on an annual basis. As regards the Bermuda Purpose Trusts, Tony deposes that although he first became aware of their existence in 2011, he first understood the legal status of a purpose trust in late 2019 after instructing Bermuda counsel. No one told him about the Bermuda Purpose Trusts when they were being established and in 2011, when Mr Jao visited the Ming Shui Residence (a meeting he does not recall actually attending), it was not made clear that the First Four Bermuda Purpose Trusts and the New Mighty Trust did not have beneficiaries. He has no recollection of receiving the February 26, 2015 letter from the Trustees' Bermudian attorneys which was supposedly sent to him.

72. YT was hospitalised in late 2011. After that, he moved to the Yanshou Residence at William's insistence. Thereafter his mental condition "*rapidly deteriorated*". Reference is made to various nursing and care records. He avers:

> "*183. I was shocked when I first learned of the existence of the Power of Attorney. My father had completely lost capacity by 31 October 2012 for the reasons set out above and this would have been apparent to anyone who had any dealings with him (including, in particular, William). There is no way that*

my father could possibly have been able to understand (whether by reading or having read to him) the terms, meaning or effect of the Power of Attorney. In the circumstances, I do not believe that the Power of Attorney, and therefore any transactions made through it, are valid."

73. In his Second Witness Statement, Tony Wang most significantly:

(a) disputes the accuracy of Mr Jao's account of the January 2011 meeting and the notion that the Second Family was told they would not benefit from the overseas trusts;

(b) disputes the suggestion that Mr Hung had extensive interaction with YT;

(c) asserts that William's evidence of an Oral Mandate is "false"; and

(d) insists that it was obvious that at the material time YT lacked mental capacity.

Impressions of the witness's oral evidence

74. Tony Wang's oral evidence suggested that he is a man with an unusual blend of charm, combativeness, determination, intelligence and honesty. Yet he was also able on many occasions to stubbornly avoid admitting inconvenient truths. Bearing in mind that he seeks to recover potentially more than US$3 billion on behalf of his father's Second Family if his claims succeed, he gave his evidence overall in an impressively composed and collected manner. It was also surprising in light of these large stakes that the contentious aspects of his evidence fell within a comparatively narrow compass.

75. Early on in his cross-examination, Tony Wang displayed his combative spirit by refusing to admit that recalling an undocumented conversation from 20 years ago was "*at best extremely difficult and in reality impossible.*" When pressed he honestly admitted that he would not have remembered what his mother told him about her own conversation with YT in 2000 about adequate provision being made for her and the children. Yet when it was pointed out to him that he and his mother and sisters must have collaborated in recording the key elements of that 2000 conversation in their witness statements in precisely the same words, he stubbornly refused to accept that this is what occurred[12]. He also was ultimately honest enough to admit that all that his mother reported was that his father had assured her

[12] Transcript Day 19 page 9 line 22-page 17 line 20.

was that they would be adequately provided for, and YT had in fact kept his word in this regard[13]. It initially seemed impressive that when he was describing a casual conversation with his father about "arrangements" that had been made, no attempt was made to embellish what he actually recalled being said when it would have been very easy for him to do so. He accepted his father had not expressly referred to "overseas assets"[14]. However a few moments later, as if rediscovering a steely resolve to advance his claims, he made what appeared to be a *volte face*:

> "*Q. Yes. Well, you've told us about that conversation with your mother. I'm certainly not going to go back over that. In this conversation with your father, he told you let's go back to precisely what I've put to you before and which you agreed so we're not in any doubt about it. In that casual chat in his office, he did not talk about any particular assets. He did not say 'overseas assets'. He did not say 'domestic assets' or refer to any particular assets; correct? You previously said that was correct, and that is correct, isn't it?*
>
> *A. He very vaguely said that he made arrangements for the overseas assets and we do not need to worry about them.*
> *Q. Yes. Mr Wang.*
>
> *A. He did not further discuss this and it is inconvenient for me to continue that conversation.*
>
> *Q. Mr Wang, I would like you to be shown the transcript of today, less than half an hour ago. So if we could get up on screen page 9 of the transcript {Day20/9:16}. It will be translated to you. Line 16 is me speaking and the question was: 'Question: ... that casual chat for everyone's note, I was reading back which you had previously told us he said ... he did not talk about any particular assets. He didn't say 'overseas assets', he didn't say 'domestic assets' or refer to any particular assets; correct?' Answer: 'Correct.' Mr Wang, that evidence is your evidence, and you stand by it; correct?*
>
> *A. Let me -- I do not agree. I'd like to talk -- mention two things. First of all, my father said he made arrangements for the overseas assets and told us not to worry, and what you asked; he did not refer to any particular assets and are you trying to say that -- or should I say my understanding is that my father did not specify the content of the overseas assets. He did not -- he was not very specific.*

[13] Transcript Day 19 page 19 line 19-page 20 line 7.
[14] Transcript Day 20, page 9 lines 14-21.

Q. Mr Wang, the answer that you gave, where you said 'correct', that was true evidence when you gave it, was it not?

A. My understanding is that…

Q. Could you answer my question, Mr Wang? When you said 'correct', that was true, was it not?

A. When I say 'correct', I'm saying that my father told me that he made arrangements for overseas assets. I think I reiterated this many times.

Q. Yes, Mr Wang. In the quotation that you set out, which purports to be a quotation of what your father said in Taiwanese, there is absolutely no reference to overseas assets; correct?

A. This is describing the fact that -- how to deal with the inheritance or his ideas, his thoughts. Basically, this is what it is describing, this quote.

Q. Yes. There is no reference -- tell me if this is right or wrong. You set out what your father's original wording in Taiwanese was. Just tell me, in the Taiwanese that you have set out, is there any reference to overseas assets? You should be able to answer that yes or no.

A. No…"[15]

76. Tony Wang ultimately appeared to me to explain that although his father had not expressly referred to overseas assets, it was clear to him as a matter of inference from the context of their discussions that these were the assets his father was referring to. He was most evasive and obtuse when asked awkward questions which asked him to comment on either the terms of documents or the improbability of his version of what happened at various meetings, two of which it was suggested never occurred. However, I do not ignore the possibility that on some occasions when it was suggested he was pretending not to understand questions as a delaying tactic something may genuinely have been lost in translation due to the complicated way in which hypothetical questions were sometimes put.

77. It is obviously necessary to approach the most controversial aspects of Tony Wang's evidence with considerable care in light of his huge financial stake in the outcome of the present litigation.

[15] Transcript Day 20 page 17 line 23-page 20 line 8.

Wang Hsiue-Huei (Tammy Wang)

78. Ms Tammy Wang's First Witness Statement is dated September 9, 2020 and her Second Witness Statement is dated November 4, 2020. She is the eldest child of YT and Madam Chou. She worked as a special assistant to her father at FPG between 1999 and 2002. She was forced to resign in 2004 for health reasons. Tammy Wang broadly supports Tony's evidence and vehemently denies that his claim is motivated by greed.

79. She accepts that YT was devoted to philanthropic causes, but does "*not believe that this in any way supplanted his wish to pass on the majority of his wealth to his family*". She relies in part on a meeting with her cousin William Wong in January 2009 at the Chang Gung Golf Course, the recording of which is now lost:

> "*22. At that meeting, William Wong said to us words to the effect that 'If the uncle's family would like to divide [i.e. to make separate arrangements in respect of YC's 50% share], they can do so among themselves, but we don't divide the [overseas trusts]. In the future, each of us can get substantial benefits/distributions per year'…*"

80. Her mother subsequently reported having subsequently raised with Mr Jao on two occasions why the distributions William had promised were not forthcoming. Her recollections of Mr Jao's visit in January 2011 are "*very hazy*". Tammy Wang avers that her father's health drastically declined in late 2011:

> "*40. Based on what I saw during regular visits, I had no doubt that my father had no ability to comprehend matters or make decisions in the second half of 2012.*"

81. She avers that her family was approached in November or December 2018 by Roger Hsiu Hsiung Yang ("Roger Yang") and requested to instruct the same lawyers in the Bermuda proceedings as William and Wilfred. She does not recall receiving any correspondence about these proceedings before then.

82. In her Second Witness Statement, she responds to the Trustees' evidence notably:

    (a) describing as "*false*" the account Mr Jao and Roger Yang give of the January 2011 meeting in relation to the overseas trusts;

(b) describing as "*false*" Roger Yang's account of a December 13, 2011 meeting which she denies took place;

(c) disputing Mr Jao's suggestion, based on her experience at FPG between 1999 and 2002, that Mr Hung regularly briefed YT.

Impressions of the witness's oral evidence

83. Tammy Wang, despite her status as the eldest child of YT's Second Family, appeared to me to have a more youthful and lighter spirit than her younger brother. Despite this, her oral evidence showed her to be far more robust than her physical frame initially suggested. She had a firm grasp on the central aspects of her evidence which even unrelenting cross-examination was unable to loosen, occasionally at the expense of denying what appeared to be obvious unhelpful truths. On the other hand, as regards the disputed 2009 Chang Gung Golf Course meeting she testified was organised by her half-brother William, she responded to one penetrating question in a refreshingly frank and honest way (without recanting from her evidence on the issue)[16]:

> "*Q. Your father was not dead in 2009, was he?*
>
> *A. Yes, he was still alive.*
>
> *Q. Before he died, the assets would not be divided, would they?*
>
> *A. Yes.*
>
> *Q. It would make no sense in 2009 for William to have been talking about dividing or not dividing the assets, would it?*
>
> *A. I think you have a point there. You're right. It doesn't mean -- it's there's no point, but the point is those are my father's assets. Children should not talk about how to split the wealth before he pass away. This is -- but you're right.*"

84. I found part of Tammy Wang's response to the suggestion that her support for her brother's claim was financially motivated to have the ring of truth[17]:

[16] Transcript Day 22 page 79 lines 12-24.
[17] Transcript Day 23 page 7 lines 17-20.

"*… I'm happy with my life. I am a housewife. I take care of my children and I take care of my husband. That's my life. I'm very happy with my life. I'm satisfied with my life…*"

85. Primarily because of her obvious family loyalty to her brother, who is bringing his claim on behalf of the entire Second Family, I am bound to approach the controversial aspects of her evidence with caution despite the fact that I found Tammy Wang to be a generally credible witness.

Wang Hsin-Jang (Janis Wang)

86. Ms Janis Wang's First Witness Statement is dated September 9, 2020 and her Second Witness Statement is dated November 4, 2020. She is the youngest child of YT's Second Family. After studying at Pitzer College in California, focussing on Comparative Literature, she returned home in 1990 and initially worked with friends. Between 2000 and 2008, she worked for Nan Ya in various administrative capacities. After marrying, she decided to focus on family life.

87. She essentially supports her brother Tony's evidence as regards family life and her expectation that she would have expected her father "*to have given a clear indication to us if he were intending to disinherit his children from the vast majority of the wealth which he had accumulated over his lifetime*". She avers that she recalls her mother mentioning a discussion with YT in 2000 to the effect that what later were referred to as the "Overseas Funds" would be left to the children. She also recalls a January 2009 meeting at the Chang Gung Golf Course where William promised that millions of US dollars annually would be distributed from overseas trusts. She avers that at a meeting with Roger Yang in 2010, her mother raised the question of the distributions and Mr Yang said they had been delayed due to Dr Wong's litigation. She recalls Mr Jao making it clear at both the January 13, 2011 meeting and an October 24, 2012 meeting that the family was to benefit from the Bermuda Purpose Trusts.

88. In her Second Witness Statement, Janis Wang stands by her initial evidence, disputes Roger Yang's evidence about a December 2011 meeting and concludes:

> "*17. Finally, I wish to re-emphasise my earlier evidence in relation to my father's lack of capacity in 2012 and, in particular, by October 2012. I have no doubt whatsoever that his inability to understand even basic day-to-day matters would have been obvious to any one who interacted with him at that time.*"

Impressions of the witness's oral evidence

89. Janis Wang appeared to me to be a confident and combative personality who was fully committed to her family's cause. This was entirely consistent with the fact that she was the one who made notes on the '*Introduction to Purpose Trusts*' document dated January 2011 which Mr Jao brought with him to the Ming Shui Residence that same month. For instance, she was resolute in holding the controversial family line to the effect that they were told that they were beneficiaries of the purpose trusts, despite the absence of documentary support for such contentions:

> "Q. *Nowhere in this document does it say that you or your brother or your sister are beneficiaries of these trusts, and nowhere have you noted on the document that you or your brother or your sister are beneficiaries of these trusts. The reason I want to suggest to you for that is because you were not told that you or your brother or your sister were beneficiaries of these trusts; that's right, isn't it ?*
>
> *A. Wrong. Mr Jao came to brief us because a week ago, my father gave him instructions asking him to brief us. According to my father's instruction, he should brief us the five overseas trusts. He should let us know, as managers, the contents of the trust. So the precondition was very clear. It was set very clear for his visit.*
>
> *Q. It didn't say anything about you being the beneficiaries of the trusts, did it?*
>
> *A. It doesn't say, but he came on the condition--on the precondition that we are the beneficiary. So he came to brief us. Likewise, it doesn't say that we are not the beneficiary and we were not told by Mr Jao that we are not beneficiary either and he did not tell us we are not beneficiary. The document doesn't say that we are not the beneficiary. My father asked him to brief us because we are the beneficiary. According to my father's instruction, it is clear that he should come to brief us because we are the beneficiaries. I don't understand why you should make such a fuss about these documents. There shouldn't be any doubts.*"[18]

90. She also displayed intelligence and wit. When Mr Adkin QC suggested that it was obvious that an attachment to the purpose trusts documents was obviously intended to shed light on the nature of the purpose trusts, she instantly responded: "*I'm not that imaginative.*"[19] Janis Wang was resolute in supporting the other main strands of her family's case.

[18] Transcript Day 23, page 18 line 8-page 19 line 12.
[19] Transcript Day 23, page 28 line 10.

91. Because of her obvious partisanship, it is obvious that the controversial aspects of her evidence should be approached with some caution even though I found her to be credible in general terms.

Yu-Mei Chou (Madam Chou)

92. The First Witness Statement of Madam Chou (pronounced "Jo") is dated September 9, 2020 and her Second Witness Statement is dated November 4, 2020. She avers: "*I was a devoted wife to YT Wang for over 50 years*" and insists that YT treated all of his children across the two families equally. He shared with Madam Chou his "*fervent wish*" that Tony should reach the same heights as William and Wilfred at FPG.

93. In or about 2000 when Tammy overheard YT discussing overseas assets, Madam Chou asked YT about the assets and he responded: "*No worries. I have arranged properly and those will be left to them [meaning the children] when time is up.*" Accordingly:

> "*31. Thereafter, I was aware from discussions with my husband that a significant proportion of his overall wealth was held in overseas trusts. He would refer to these as his 'overseas assets' or 'overseas funds'. My husband told me that he and the Chairman (i.e. YC Wang) had five overseas trust funds, and that he had made arrangements to leave the overseas assets to the children when the time came, that all children were included in equal shares, and that I had nothing to worry about.*"

94. Madam Chou does not remember the details of Mr Jao's January 2011 visit to her home, but understood what he said to be consistent with what YT had previously told her. When the dispute about YC's estate broke out in 2009, YT was nearly 90 and told Madam Chou that (a) YC's share and his share would be divided in half, and (b) that YT's half should be co-administered by the children from both of his families. At his request, she arranged for him to make YT's Wills and Declarations that he signed in 2010-2011. She elaborates on this process in her Second Witness Statement.

95. In addition, she insists that Mr Jao was given a letter of instruction signed by YT dated December 31, 2010 and is "*pretending*" he did not receive it to assist the Trustees. The letter requested a complete set of the documents for the overseas trusts to be delivered to the "administrators" (Tony, Tammy or Madam Chou). On his January 13, 2011 visit, he did not bring the requested documentation. She is sure that Mr Jao did <u>not</u> explain that the Bermuda Purpose Trusts had no beneficiaries. She replies to various other aspects of the

Trustees' evidence and, *inter alia*, explains that YT's Wills and Declarations were not presented in the course of the 2016 estate settlement negotiations because only a 'take it or leave it' offer was on the table.

Impressions of the witness' oral evidence

96. Madam Chou, the matriarch of YT's Second Family, gave her evidence in a confident and forthright manner and had the bearing one would expect of a mature woman from a country the predominant traditional culture of which, by all accounts, venerates elders. She began her cross-examination in such a loquacious manner that I felt obliged to encourage her to limit her answers to the questions put to her. In fairness, almost every 'partisan' witness had difficulty in doing this. Later in her cross-examination, when Madam Chou exclaimed indignantly: "*I do not answer hypothetical question*[s]", neither I nor counsel had the temerity to insist that she answer the question.

97. And the most striking feature of her evidence was this. It was suggested that she (and her children) had invented the controversial parts of her evidence, each of which supported Tony Wang's case in an extremely ambiguous way. Yet while it would have been easy for her without fear of direct contradiction, to conjure up any number of pivotal statements made by YT during their private interactions, she made no attempt whatsoever to report any such discussions, neither in her witness statements nor even in the heat of cross-examination. On the contrary, she freely admitted lacking familiarity with various aspects of her husband's business affairs. For instance:

> "Q. *Good. So let's look at it like this. You, at no stage in the more than 50 years that you were together with YT, at no stage did you know what wealth he had, how he held it ; correct?*
>
> *A. Correct.*"[20]

98. Nonetheless, she was willing to stubbornly hold to the central tenets of her son's case, even when logic suggested an alternative reality better corresponded to the objective truth of a matter. In light of her understandable desire to support her son's case, the controversial aspects of her evidence must be approached with considerable care even though, in general terms, I found Madam Chou to be a credible witness.

Hearsay Notices

[20] Transcript Day 23, page 66 lines 20-24.

99. Tony served Hearsay Notices dated December 1, 8 and 13, 2020 in respect of statements made by YT and other persons and in respect of the First Witness Statement of Yu-Shan Teng dated November 3, 2020.

100. Ms Yu-Shan Teng was employed as a nurse who cared for YT (referred to as "President") at the Chang Gung Memorial Hospital at Linkou between December 2010 and 2014 and made entries in the nursing records about his care. She deposes that these records were kept "*as a reference for the attending physicians so that they could properly evaluate the condition of the patients under our care*" (paragraph 5). She referred to an extract from the nursing records from 11.27 pm on October 30, 2012 to 1.30 am on November 1, 2012. She personally recorded the entries within that extract for the period 8.15 am to 3.48 pm on October 31, 2012. At 8.44am, she recorded:

> "*When sitting in position, President was led to sign his name. His hand was shaking slightly, but handwriting was still legible. Now company managers were giving documents to President for him to sign. With staff's reminder, President was able to sign at the designated places. President signed two documents. Throughout the process, the medical team was staying around.*"

101. Nurse Teng also significantly deposed:

> "*9. I remember there were two male managers who brought official documents to Linkou Chang Gung Memorial Hospital for the President to sign. Based on my recollection, besides the two male managers there were no other guests. Save for family members and medical staff, I do not recall any female guests visiting the President.*"

THE TRUSTEES' CASE

Evidence-in-chief

Ms Susan Wang

102. Ms Susan Wang's First Witness Statement is dated September 14, 2020 and her Second Witness Statement is dated November 6, 2020. As already noted, she is the daughter of YC and PC Lee. She is a director of each of the Trustees of the Bermuda Purpose Trusts, alongside her sister Sandy and her cousins William and Wilfred. Mr Hung was, until his death in December 2015, also a director of the same private trust companies. Her evidence is given both on behalf of the Trustees and herself as 7th Defendant.

103. As regards the backgrounds of the Founders, she bases her evidence on discussions with them and publicly available information. Their ancestors migrated from mainland China (Fujian province) and their father was a tea trader. They had challenging childhoods, walking barefoot to school and helping out at school during years when Taiwan was under Japanese rule. After the Second World War, they focussed on business development and they were affected by the loss of their father in 1961 to a treatable illness due to poor medical care in Taiwan. This experience she believes informed the following passage from the China Trust Declaration:

> "*We have also experienced the hopelessness of seeing family members ill and without the means to obtain proper medical care. These experiences help us to understand the despair of not having an opportunity to improve one's condition.*"

104. FPG was at the time of her father's death one of the largest conglomerates in Taiwan. the Founders worked closely and harmoniously together, with the elder brother being the visionary who focussed on efficiency and quality assurance while the 5 years younger brother, who was deferential and respectful to his elder sibling, specialised in policy implementation and ensuring good plant operations and construction quality at the operational level. Until 2006, YC was Chairman of the four FPG listed companies, FPC, Nan Ya, FCFC and Formosa Petrochemicals Corporation ("FPCC") (together, the "Four Treasures"). Her father and uncle both officially retired in 2006 at 89 and 84 respectively. She insists that her father's mental faculties were sharp and he was actively involved in business until the day he died. Until his 'retirement' (by which time the First Four Bermuda Purpose Trusts had been established) he went to his office every day. In April 2008, he was at FPG's offices when the newly elected President of Taiwan visited as part of a series of meetings with important business leaders.

105. Born in 1960, she is 9 years younger than her older brother Winston. She refutes his suggestion that her mother was behind his dismissal from FPG in 1995: "*I never saw or heard my mother express any view to my father about how to run FPG*". Susan herself was living in New Jersey at this time and her father never discussed the issue with her. Susan explains the strength of the connection with Mr Hung. The Wangs and the Hungs came from the same hometown. Mr Hung's father had been more prosperous than her grandfather, and had adopted one of his daughters (a younger sister of YC) whom Susan's grandfather could not afford to support. The Founders had a family connection with Mr Hung: "*Mr Hung was a loyal advisor to the Founders, who faithfully followed their directions*".

106. Born in Taipei, she left for education in the United States when she was 13. Although aware of her father's other wives, she recalls in her early years her father spending a lot of

time with her mother, and jointly entertaining business and other guests. In 1973, she moved to the United States and attended the Oregon Episcopal School in Portland, Oregon, before boarding at Choate Rosemary Hall in Wallingford, Connecticut. She graduated with a B.A. in Economics from Barnard College, Columbia University, in 1982. She remained in the United States until 2000, working with FPC affiliate FPC USA in Livingston, New Jersey. After initially rotating through various areas of the business, she held various executive positions from mid-1986 onwards.

107. YC received a US Government grant which was pivotal to the development of his business in 1954. As a mark of gratitude, in 1988 he invested US$1.8 billion to construct a petrochemical complex in Point Comfort, Texas. It was one of the largest single private investment projects in Texas and prompted the celebration of a "*YC Wang day*" in Calhoun County. She participated in this project. Her mother had a home in New Jersey, and YC stayed there for around two years around 1990-1991. In 2001, at her father's request, she returned home with her three children to assist him with succession planning. Although she married in the US in 1985, she divorced in 2017.

108. As regards the critical issue of the Founders' values, she deposed, *inter alia*, as follows:

> "*89. My father and my uncle shared the same values and were convinced that their later good fortune carried with it a responsibility to behave altruistically and generously towards the society which had given them an opportunity to become so successful…*
>
> *91. Their experiences earlier in life also had a lasting impact on the Founders' approach to possessions. They believed that wealth belonged to the society, that they were merely temporary custodians of their wealth, and that much of it should be returned to society in the most beneficial way. They put these ideals into practice throughout their lives.*"

109. After describing various charitable endeavours pursued by the Founders, Susan then addresses what she came to know about Chindwell Liberia, Vanson Liberia and certain other BVI holding companies (the "Holding Companies") (a) the shares of which were held by Mr Hung, and (b) which essentially held shares in FPG. Then Susan crucially deposed:

> "*101. My father informed me that the holding and accumulation of shares in the FPG Companies was an important part of the vision shared by the Founders. They were concerned to ensure that the companies were able to operate and expand according to their vision. They wanted the companies to stay competitive in order to take care of the shareholders of the FPG*

Companies (who had invested their hard earned money in the companies because they had faith in the management), and to take care of our dedicated employees and ultimately to contribute positively to the society.

102. My understanding based on those conversations was (and remains) that the basis on which the ownership of the Holding Companies had been entrusted to Mr Hung was that he would use the assets for such purposes as might be directed by the Founders. It was also my understanding based on those conversations that from the time the assets were entrusted to him, the expectation of the Founders was that Mr Hung would apply those assets for public purposes identified by the Founders, in particular the perpetuation of FPG long into the future and the sustaining of the charitable enterprises. I firmly believe from conversations with my father that neither my father nor my uncle intended that the assets entrusted to Mr Hung should form part of their respective estates upon their death to be shared, after payment of applicable tax, amongst their heirs by way of inheritance. To the contrary, they were determined that these assets should not be inherited by their children but instead should be applied for the fulfilment of their vision of giving back to society and the perpetuation of FPG into the distant future."

110. Much of the present case turns on the accuracy of that framing of the Founders' intentions and the assertion that they genuinely informed the establishment of the Bermuda Purpose Trusts. The setting up of the Bermuda Purpose Trusts process is also important. Section G of Susan Wang's First Witness Statement (paragraphs 155-294) addresses the formation of the Wang Family Trust and the Global Resource Trust ("GRT") (see paragraph 167 below). Susan Wang was the interface between Mr Granski and her father, YC. With his approval, she, Mr Hung and Mr Granski travelled to Bermuda in May 2001 to settle the formalities for establishing the Wang Family Trust and Grand View PTC.

111. The binders of documents in Chinese which Susan sent to YC are then discussed:

"*297. As a result, the Founders had available to them translations into Chinese of the three key documents, namely the Declaration of the Wang Family Trust, the Declaration of the Grand View Trust and the Grand View Bye-laws, as well as the structure chart.*"

112. In Section K of her First Witness Statement (paragraphs 324-393), the formation of the China Trust is addressed. She then proceeds to deal with the Plaintiff's allegations that her father did not consent to the transfer of assets to the China Trust, critically deposing:

"*395. These allegations are without any basis in fact. The Founders not only fully consented to the formation of the China Trust and the transfer of the relevant assets to it but they, along with Mr Hung, are the people who instructed me to proceed with arranging for the formation of the trust and for the transfer of the relevant companies' shares into the trust.*"

113. This response reflects a central tenet of Susan Wang's evidence: she was a loyal servant of her father and her uncle, not a self-interested manipulator. After describing the establishment of the Wang Chang Gung Public Interest Trust in 2002, with which all of YC's children (including the Plaintiff) became involved, Susan Wang addressed the September 2003 Shares Summary, which she herself prepared. She most significantly averred as follows:

"*422. The September 2003 Shares Summary made clear that shares in FPC, Nan Ya and FCFC with a then total value of US$ 1.029 billion were owned by the two Bermuda trusts, (namely, the Wang Family Trust and Global Resource Trust), that the Founders personally owned shares in those three companies with a value of US$ 1.086 billion (my father) and US$ 1.172 billion (my uncle), respectively, and that shares with a value of US$ 2.048 billion remained under Mr Hung's control. My father and my uncle were fully aware of this information at the time.*"

114. As regards the formation of the Vantura and Universal Link Trusts, she deposed:

"*449. I talked through with my father the draft documentation for the Proposed New Purpose Trusts and specifically discussed with him how the purposes of those trusts should be worded. As I have explained at paragraph 439 above, my recollection is that my father was instrumental in formulating (what ultimately became) the purposes of '**the Vantura Trust**' and '**the Universal Link Trust**'. I do not recall any specific discussions with my uncle about the Proposed New Purpose Trusts. However, as was their practice, my father and Mr Hung would have spoken to my uncle and kept him fully informed and there is no doubt in my mind that my uncle was aware of the formation and funding of these trusts…*

471. … I was personally involved in the discussions about the proposed transfer of these assets into the Vantura Trust and the Universal Link Trust. Once again, it is indisputably the case that, and I have no doubt that, the Founders not only fully consented to the formation of the Vantura Trust and the

Universal Link Trust and the transfer of the assets to them but that they were the very people who directed that those transfers take place. Indeed, on the basis of my recollection of events (and having reviewed the relevant documents once again), I am quite certain that my father and my uncle gave their approval to the terms of the Vantura Trust and the Universal Link Trust and that they fully understood and intended that the assets transferred into the purpose trusts would be used only for the purposes of those trusts and not for the purpose of benefiting the children personally."

115. The dissolution of the Global Resource Trust, which Susan Wang was involved in implementing, was discussed by the Founders and decided upon on the following grounds:

> "*474. My father concluded, and my uncle agreed, that because they would both retain their personal shares in the FPG Companies, and those shares eventually would be inherited by their children, the Global Resource Trust would no longer be needed as a means to incentivise them to support FPG.…*
>
> *477. The decision to wind-up the Global Resource Trust and to distribute the assets to the Wang Family Trust was supported by, and consistent with the wishes of, my father and my uncle.*"

116. A detailed account is given of plans which were not consummated before YC's death in 2008 to increase the participation of other family members in the management of the Bermuda Purpose Trusts. After her father's death, a more concerted effort was made to reach agreement with the Second Family in this regard. The formation of the Ocean View Trust is then addressed.

117. Susan Wang deposes that after the Plaintiff commenced the First Hong Kong Action in December 2011 against various defendants including Mr Hung, the latter indicated in July 2012 that he wished to be relieved of responsibility for, *inter alia*, Vanson International Investment Co., Ltd. ("Vanson BVI") and Chindwell International Investment Corp. ("Chindwell BVI"): "*Mr Hung suggested that those shares should now be transferred to a Bermuda purpose trust in accordance with the Founders' intentions*." Appleby were instructed to create a similar purpose trust to the First Four Bermuda Purpose Trusts in November 2012. The following month, the Plaintiff commenced the Second Hong Kong Action. On March 11, 2013, the shares of Chindwell BVI and Vanson BVI were transferred to the Ocean View Trust, which had been declared on March 8, 2013.

Impressions of the witness's oral evidence

118. Ms Susan Wang overall gave her evidence in a confident and straightforward manner. Her cross-examination spanned seven days, yet she displayed unflagging mental clarity and emotional composure throughout consistently penetrating questioning by Mrs Talbot Rice QC. Ms Wang generally displayed on the surface a somewhat deferential and almost demure demeanour and was often inclined to understate the significance of her role in the central events. Nevertheless, Susan Wang appeared to me to be a tough and sophisticated businesswoman with a deep conviction in the justness of the Trustees' cause.

119. That conviction seemed to encourage her once or twice to recall helpful snippets of distant events not mentioned in her Witness Statements which it seemed implausible that she could actually remember. For instance, when probed by Mr Wilson QC about the lack of direct evidence of YT approving YC's plans, she stated that she often would go to YT's office to check if he had any questions to raise about an issue. However, when it was pointed out that in her Witness Statement she had said that it was merely "implicit" that YC had consulted YT, she withdrew her initial suggestion that she remembered seeking YT's explicit approval and stood by what was recorded in her Witness Statement[21].

120. Much in the same manner as Dr Wong and Tony, when invited to comment on the implications of documents which were unhelpful to her case Ms Wang would stubbornly decline to agree what appeared to be an obvious inference or studiously avoid directly answering the question. It must be observed that many of these questions, by counsel on all sides, were really forensic devices for advancing what were essentially matters of argument rather than questions truly designed to elicit factual evidence. Exceptionally, there appeared to be a reasonable basis for suggesting that the witness in commenting on a document describing a meeting she participated in was closing her eyes to an obvious truth. For instance[22]:

> "*Q. We haven't reached August 2000, Ms Wang. We're at a meeting between you and Mr Granski in July 2000.*
>
> *A. Right.*
>
> *Q. You've told Mr Granski about the matters you want him to help with. He has written a letter which refers twice to the shares in question belonging to your father and your uncle, or that's how I read his letter. You seem to be saying in relation to this second entry, no, that's not -- that the entry is correct in referring to your uncle and your father's interests in the family companies. I've read that as an ownership*

[21] Transcript Day 31 page 42 line 5-page 50 line 7.
[22] Transcript Day 26 page 24 line 7-page 25 line 3.

interest, you don't seem to be reading it that way, so I'm asking you what you think it means.

A. I see that as more ensuring the companies' continuity, competitiveness, that they have control.

Q. Right. Well, Ms Wang, I'm going to suggest to you that that's absolute nonsense, and what plainly happened at this meeting is that you were discussing with Mr Granski how to structure your father and your uncle's ownership of FPG shares which were held through holding companies. Will you agree?

A. I disagree."

121. Susan Wang was generally careful to give factually honest answers to questions relating to purely factual issues. The only real display of emotion she gave came when discussing the motivations behind her stance in the present litigation[23]:

"*Q. Your mother, PC Lee, wanted to retain the status which being with your father bestowed on her and on you and your sisters; that's right, isn't it?*

A. I think there are a lot more than just status in life.

Q. Your mother, PC Lee, wanted to retain the status which being with your father bestowed on her and on you and your sisters, didn't she?

A. I think there are -- we're human. There are emotions, there are love. There's so many things. Status is not -- everybody believe something different. For some people, maybe status important, but for a lot of people, it's not important. I'm sorry.

Q. For your mother it was important, wasn't it?

A. I don't believe so.

Q. For you it's important, isn't it?

A. It is so, so, so unimportant for me, and that's why I already retired. I stepped down from the Executive Management Committee. I don't want anything. I just want to let my father--what he wanted, just deliver it, that's it, and then can the

[23] Transcript Day 30 page 74 line 16-page 75 line 14.

Wang family be harmonious and that it can go on for third, fourth, fifth, sixth generation. That's all I want. That's all; okay? I don't want a thing. I don't want anything."

122. Although I found Susan Wang to be a generally credible witness, her emotional stakes in the present litigation (in which she is in a real sense herself on trial) are so high, that it is necessary to approach the most controversial aspects of her evidence with care.

Sandy Wang

123. Ms Sandy Wang's First Witness Statement is dated September 15, 2020 and her Second Witness Statement is dated November 11, 2020. She is the second oldest child in YC's Third Family. She was born and raised in Taiwan but at age 11 went to the United States for her secondary education. After graduating from Choate Rosemary Hall in Wallingford, Connecticut, she attended New York University graduating with a B.A. in Accounting in 1984. When she returned to Taipei, she stayed at the family home on the top floor of the FPG Building.

124. She deposes that after five years' administrative work at the Chang Gung Memorial Hospital, she joined the FPG Group Administration Office. She helped to establish new FPG businesses in the biotechnology and LED fields, chairing various businesses including (until the present) Formosa Biomedical Technology Corp. Sandy Wang is currently a director of two of the 'Four Treasures', Nan Ya and FCFC.

125. She signed a memorandum in April 2001 (the "April 2001 Memorandum") having attended meetings with her sister Susan, her cousins William and Wilfred and Mr Hung. She was not surprised to hear that her father and uncle's wishes envisaged preserving the wealth they had created to perpetuate FPG and support charitable activities:

> "*43. Based on my involvement and discussions with Susan and the fact that my father and uncle signed the 2001 Memorandum, I am sure that my father and uncle fully understood and intended that the assets transferred into the Wang Family Trust would be held in such a way that their families could never inherit those assets, as was recorded in that document. Rather, it was their explicit intention that the Wang Family Trust would use the assets transferred to it to protect and preserve the operations of FPG into the future and to give back wealth to society.*"

126. The position was essentially the same as regards the 2002 Memorandum which, *inter alios*, she and the Founders also signed. As regards the China Trust, Sandy Wang travelled

with Susan to Bermuda in June 2002 for the establishment of Transglobe PTC. Her father's philosophy was confirmed through her appointment as director of the Wang Chang Gung Public Interest Trust later that year. She is the current President. She signed the consent requested in YC's Letter to his Children in 2004. She was also personally involved in the establishment of Universal Link PTC and Vantura PTC and trusts in 2005. In 2006 she was appointed to the FPG Executive Committee.

127. Sandy Wang also pours scorn on the suggestion that Mr Hung was disloyal and that her father could have been unduly influenced by Mr Hung or Susan. She is sure that her father and uncle would have wanted the remaining Holding Companies' shares to be transferred to a purpose trust.

128. In her Second Witness Statement, she stands by her initial evidence and takes issue with the conflicting accounts given by Tony, Tammy and Janis Wang on the main issues in controversy between them.

Impressions of the witness' oral evidence

129. Ms Sandy Wang gave her oral evidence from the start in a generally forthright and relaxed manner. Unburdened by the weight of primary responsibility for the matters in dispute in this litigation, and having played a more low-key role in FPG affairs overall, she appeared to have a more carefree spirit than her older sister. As a result, she was able to provide (without any apparent premeditation) potentially valuable insights into significant subsidiary issues which other witnesses did not reveal. For instance, when questioned by Mr Hagen QC about the relationship between the Founders and Mr Hung[24]:

> "*Q. So if I understand your evidence, it's that your father and uncle wouldn't have asked him to [do] something unreasonable --*
> *A. Mmm-hmm.*
> *Q. -- but he still would have done whatever they asked him to.*
> *A. No, but he will talk to them. He's the one who will reason with them and he's the one who dares to reason with them.*
> *Q. I see. But if they'd ultimately asked him to do something, he would have had to do it because he worked for them, didn't he?*
> *A. He will have to, but this is not -- it's not going to happen.*
> *Q. I see.*
> *A. They are not going to tell him to do something unreasonable.*"

[24] Transcript Day 32, page 16 lines 9-25.

130. She also displayed both confidence and intelligence in responding to potentially controversial suggestions in a fair yet careful manner[25]:

> "*Q. So if something important wasn't in the documents that YC Wang produced, it was unlikely to have been dealt with separately and informally, wouldn't you agree?*
> *A. Can you repeat that question?*
> *Q. If something important--*
> *A. If something important, uh-huh.*
> *Q. -- was not in the documents which YC Wang prepared, it was unlikely to have been dealt with separately and informally, isn't that right?*
> *A. Can you give example?*
> *Q. Just …*
> *A. Most likely, like, you know--*
> *Q. Yes, most likely--*
> *A. -- yeah, I will say that in principle, of course.*"

131. On the other hand, in relation to another contentious and potentially significant issue, Sandy Wang stubbornly defended the draft incentive plans from attack on the grounds that they conferred a benefit on all family members, to the extent of disputing the plain terms of the relevant draft document[26]. Accordingly, although Ms Sandy Wang was generally an entirely credible witness, the obvious strength of her loyalty to her elder sister and the Trustees' cause requires me to approach the most contentious aspects of her evidence with some care.

Wilfred Wang

132. Mr Wilfred Wang's First Witness Statement is dated September 15, 2020 and his Second Witness Statement is dated November 13, 2020. He is a member of YT's First Family and was born on November 7, 1951. He deposes that both he and his brother William had a close relationship with their father and uncle, a relationship which was strengthened through their work with FPG. As a child, he lived with his uncle's family (including Winston, with whom he went to school in Taipei) for four years.

133. Six months younger than Winston, the two boys went to school in England together in 1964 when Winston was 13 years old. They first attended a language school at Barcot Manor, near Oxford. Wilfred joined St John's School in 1965, with the older Winston being one year ahead (Winston in his Witness Statement disputes Wilfred's recollection that they

[25] Transcript Day 32, page 29 lines 7-20.
[26] Transcript Day 32, page 86 line 22-page 87 line 12.

were in the same boarding house). Wilfred did his A Levels at Hendon County Grammar School and stayed at a family property in Hampstead. He obtained a degree in Mechanical Engineering from Queen Mary College in London in 1975. After gaining work experience in the United States and Puerto Rico, he returned to Taiwan in late 1978 or early 1979 and joined FPG, initially as an intern, although he was assigned to FPC USA in Louisiana between 1980 and 1982 and was based with another FPG affiliate in California between 1984 and 1987. In 1992, he began working with his father YT on the 6th Naphtha Cracking Project with FPCC's Refinery Division, a project which he views as possibly his father's greatest legacy.

134. As regards the issues directly relevant to the present case, Wilfred Wang firstly deposes as follows:

> "*7. ... There are, however, certain central matters of which I have no doubt:*
>
> *(a) my father and my uncle, both of whom passed away when in their nineties, wanted their legacy to society to be preserved and protected as far as possible. The establishment of the PTCs and the five purpose trusts of which the PTCs are the trustees ("the Purpose Trusts") was part of my father and my uncle's careful planning to preserve their legacy, in particular, as the founders ("the Founders") of the Formosa Plastics Group ("FPG") which consists of valuable publicly traded and other companies they had established in Taiwan and which had become, and remain, an integral part of the Taiwanese economy;*
>
> *(b) I revered and respected both my father and my uncle, who played major roles in my upbringing and working life, as I describe below;*
>
> *(c) I am continuing to carry out the wishes of my father and my uncle, even though it is against my own financial interest to do so. In this respect , as the Court may be aware, I personally would inherit hundreds of millions of dollars if the Purpose Trusts were to be declared invalid. It may, therefore, seem surprising to the Court that I am committed to the preservation of the Purpose Trusts. However, I take this position willingly and notwithstanding all the deep personal stress caused by this litigation. I knew both my father and uncle extremely well and I have no doubt that they wanted the wealth arising from their hard work and devotion to continue to serve*

society through the Purpose Trusts and not to be inherited by their descendants, including me; and

(d) I am not alone in seeking to uphold the Purpose Trusts and thus disinherit myself. My brother William and my cousins Susan and Sandy similarly would stand to inherit hundreds of millions of dollars if the Purpose Trusts were to be declared invalid. Nonetheless, they too seek to uphold the trusts because they also know that the trusts represent the fulfilment of the Founders' vision and wishes, are the culmination of their careful planning and were established with the Founders' express knowledge to secure their legacy. None of us would wish to question or disrespect our respective father's wishes, even if that means forsaking an inheritance of billions of dollars."

135. In relation to the April 2001 Memorandum prepared by Susan Wang, he deposed that he recalls initial plans for the Wang Family Trust and a discretionary trust which would serve an incentivization function, a matter he discussed with his father:

"*111. I have a clear recollection of that discussion with my father, because it was triggered by the reading I had been doing into trusts at the time. In particular, I became interested in the ways in which other wealthy families managed their philanthropic legacies. I did my own research on the issue and had discussions with people from Credit Suisse as well as with contacts within family offices. I was aware, in particular, of the cautionary tale of the Du Pont family who apparently did not pay sufficient attention to the management of the companies after setting up their trust. I was conscious of the lack of commitment which could arise from family members being expected to act as custodians for companies in which they had no personal stake. I also believed in the importance of family members having a voice in the replacement of the managers of FPG. I discussed my research with my father…*

117. I am told that it is now being said both by Winston and by my half-brother Tony that my father and my uncle did not intend to set up trusts under which they and their children could not benefit. Although I cannot, from this great distance of time, remember my father's exact words, I have no doubt that what my father wanted was for this wealth to benefit society as a whole. He wanted members of his family to act through these structures as custodians of his greatest legacy, FPG, and to ensure that FPG could continue far into

the future to contribute to society in its many and varied ways and for wealth generated through FPG to be given back to society . It was not my father's intention for the assets held by Mr Hung to be dissipated amongst his heirs. To put it another way, if my father had ever expressed a view that he wanted his children to inherit the wealth which had been accumulated offshore I would have definitely remembered it. I would have been very surprised because such a sentiment would have been completely out of character…

120. I am sure that my father and uncle fully understood the distinction between a purpose trust designed directly to protect and preserve FPG and support charitable foundations and society on the one hand, and on the other hand, a discretionary trust from which those children serving the trusts might receive distributions in the form of shares in FPG companies and, in that way, be encouraged to support the aims of the purpose trust.

121 . I am sure that Mr Hung also understood the distinction. I am also sure that Mr Hung would have ensured that he acted consistently with my uncle and my father's directions."

136. The next most significant strand of the evidence which he substantively addresses, as opposed to commenting on, is the testamentary documents which his father apparently executed in 2010 and 2011. He avers, *inter alia*, as follows:

"*210. I am confident that my father would not knowingly and consciously have suggested that the assets in the [First Four Bermuda Purpose Trusts] or the New Mighty U.S. Trust were in some way 'owned' by him or members of the Wang family any more than he would have regarded the assets of the Wang Jang Yang Public Interest Trust as being owned by himself or our family. He understood very well the difference between a trust structure and personal ownership of assets. He also clearly understood the difference between management of assets and ownership of assets. He and I had talked about that essential distinction in great detail when the first Bermuda purpose trust was established…I also believe that he understood that the assets placed into these trusts could only be used for the purposes of the trusts and not for the purpose of either benefitting himself or his family.*"

137. He describes the oral mandate being given by his father to his eldest son William in early October 2010.

138. In his Second Witness Statement, Wilfred Wang stands by his initial evidence and takes issue with the conflicting accounts given by Tony, Tammy and Janis Wang on the main issues in controversy between them.

Impressions of the witness' oral evidence

139. Mr Wilfred Wang was initially cast in a supporting role, playing 'Robin' to his elder brother William's 'Batman', as it were. With William Wong's late withdrawal from the 'cast', Wilfred Wang was cross-examined over five days and his evidence assumed an unexpected prominence. He generally gave his evidence in a scrupulously careful and straightforward manner displaying a blend of authority, thoughtful reflectiveness, honesty, honour and family loyalty as well.

140. His Witness Statement was given in English but he indicated that he would be more comfortable giving his evidence in Chinese. Early on in his evidence, however, he displayed his authoritativeness by occasionally answering questions in English and ultimately dispensing with the interpreters and proceeding to give the rest of his evidence in English very effectively. His reflectiveness and honesty were perhaps best illustrated by the way he responded to questions from Mr Wilson QC about family relationships. Firstly, when describing the relationship between his father and his uncle, he unintentionally provided a potentially valuable insight into the strained relationship between YC and his eldest son[27]:

> "*A. ...You see, they are like brothers.*
> *Q. Yes.*
> *A. But they are six--six year apart.*
> *Q. Yes.*
> *A. So when they grow up, YC become more like a father and son, and then when they even grow up, they become business partner and then a brother and also.*
> *Q. Yes.*
> *A. So YT respect him and because of that, he will try to follow everything YC does.*"

141. Secondly, he was willing to honestly admit that he had never really accepted his father's Second Family[28] and that in his written evidence he had said hurtful things about Madam Chou[29]. In an impressive display of honour, Wilfred Wang kept his promise to apologize if he ever saw evidence that his father accepted Madam Chou as his wife[30]:

> "*So you said that if your father said they're married, you'd accept it.*

[27] Transcript Day 35, page 42 lines 6-15.
[28] Transcript Day 35, page 129 lines 5-9.
[29] Transcript Day 35, page 136 line 19-page 137 line 3.
[30] Transcript Day 35, page 151 lines 14-22.

A. Yes.
Q. You can see that in this document, in 2009, that's precisely what he did say. So will you now accept it and apologise to Madam Chou?
A. I would, yes. I will apologise.
Q. Thank you. And you accept it?
A. Yes."

142. It was also apparent that Wilfred Wang had a strong sense of family loyalty as he was rarely if ever willing to agree with suggestions on matters of inference or argument which would undermine the Trustees' case. I was not entirely convinced by his denial that he had been spoken to by family members over the weekend break. He continued his oral evidence on Day 36 with what appeared to me to be a newly found adversarial approach. However, after some encouragement from the Bench to avoid "*playing cat and mouse with*" counsel and being reminded that witnesses cannot avoid answering awkward questions he largely reverted to what I regarded as his own natural, frank testimonial style. This was overlain, however, with a seemingly 'tactical' emphasis on the fact that he was only able to speak for himself and not others[31]. His family loyalty is obviously a reason for approaching the controversial aspects of his evidence with some caution.

143. Two further specific reasons for caution about Wilfred Wang's evidence warrant brief mention. Firstly, he admitted on more than one occasion that passages in his witness statements were either inaccurate or did not reflect his own words. The fact that such inaccuracies existed in the written evidence of a witness who was so careful in his oral evidence lends credence to Dr Wong's suggestion that Taiwanese deponents do not place as much significance on the accuracy of written evidence as one would expect in the common law world. This suggests that his written evidence should be read with care. It was also apparent that, unsurprisingly, he had limited recall of distant events which he may have found insignificant at the time. On an entirely peripheral issue, I did find it surprising that he seemingly (according to Dr Wong at least) had not remembered what boarding house he was in at St. John's. Had I been required to resolve this dispute, I would prefer the recollection of Dr Wong whose tenure at boarding school was longer and perhaps happier.

144. However, overall I found Mr Wilfred Wang to be a credible witness whose willingness to admit mistakes, occasional confusion and the limitations of his recollections were illustrative of an impressive degree of core honesty on his part.

Chu-Tsung Lee

[31] Transcript Day 36, page 1 line 15-page 5 line 12; page 7 line 23- page 9 line 24; page 74 lines 17-22.

145. Mr CT Lee's First Witness Statement is dated May 10, 2019 and his Second Witness Statement is dated November 6, 2020. He replaced YC as Chairman of FPC on June 5, 2006 and retired himself in 2015. He is still Chairman of FPC USA and is a "chief advisor" to FPG. Born in Taiwan on July 9, 1935, he graduated from the National Cheng Kung University in 1958 with a bachelor's degree in chemical engineering. He worked alongside the Founders for 50 years. He joined FPC as its second graduate employee when it was a "small start-up" in November 1958 when he was 23 years old. In 2015, he wrote the preface to a book on YC which he exhibits to his First Witness Statement.

146. After describing the growth of FPG, he addresses the relationship between the Founders:

> "*36. … FPC was a small start-up business in 1954 and it did not commence production until 1957. YT Wang joined the company a short time later in 1958 at YC Wang's request. Over the course of the next fifty years or more, during which the brothers worked side by side, the business grew to what is now FPG based upon their joint contributions. The success of FPG was ascribed to the concerted efforts of these two brothers. YC Wang was the visionary and the generator of strategic ideas and management methods. YT was skilled at organisational and operational matters. It was the combined and complementing strengths of the brothers which enabled the tremendous success of FPG over the years.*"

147. Chairman Lee describes his involvement in succession planning with YC and states that he suggested that the Plaintiff be brought back into the FPG fold but that this suggestion was rebuffed by YC. He also stated as regards the claims asserted in these proceedings:

> "*59. I understand that in the present action, it is being contended that perhaps YC Wang did not fully understand the transactions through which the First Four Bermuda Purpose Trusts were created and funded or that his consent to those transactions was the product of mistake or undue influence. I know that these contentions are unfounded based upon my discussions with YC Wang — the establishment of these trusts was fully consistent with the Founders' wishes.*"

Impressions of the witness's oral evidence

148. Chairman Lee gave his oral evidence in an impressively fair and non-partisan way. I found him to be an entirely credible witness. Notably, he suggested that the Plaintiff had been unfairly criticised for underperformance having been given an initial role at Nan Ya which was unsuitable based on his limited experience at the time. He stated that PC Lee, a

hostess and "fabulous cook" at social events, was unlikely to have become involved in YC's business affairs, in the view of himself and colleagues at the time. However, he clarified that he "*would not say that she never had any influence*"; merely that he had never heard of her exerting influence over corporate matters.

149. However, his oral evidence cast doubt on the evidential weight to be attached to what might be described as 'boiler-plate' language found in his First Witness Statement (because they echo similar recitations in other witness statements). Critically, the broad assertion that "*the establishment of these trusts was fully consistent with the Founders' wishes*" (paragraph 59). Under cross-examination by Mrs Talbot Rice QC, he stated that he had preliminary discussions with the Founders about the general idea of establishing trusts or foundations, but was not involved in the subsequent decisions and action which were taken after Susan took over. Moreover, he knew nothing about the details of the trusts[32]:

> "*Q. Were you told what happened later?*
> *A. I knew there were some foundations set up, but it's not my job, so I did not ask.*
> *Q. So you did not know the details of those foundations; is that correct?*
> *A. I have --I completely don't know anything about them. I did not have any involvement. I knew there were foundations, but I don't know anything about the details.*"

<u>Chau-Lin Yang</u>

150. Mr CL Yang's First Witness Statement is dated May 10, 2019, his Second Witness Statement is dated September 15, 2020 and his Third Witness Statement is dated November 12, 2020. He was born in Taiwan in 1936 and graduated from National Cheng Kung University in 1960 with a bachelor's degree in accounting and statistics. He joined FPC's auditing department in 1964 and retired as President of the FPG Group Administration Office in 2015. He is still a consultant ("supreme advisor") to FPG.

151. CL Yang worked closely with the Founders and saw them both regularly until they died. He discussed their succession planning with them. He critically deposes that:

> "*19. While I did not learn of the precise details of the trusts, YC Wang discussed the Bermuda purpose trusts at issue in these proceedings with me both before and after they were established. I understood from him that the trusts had been established to assure the perpetuation of FPG and to continue the*

[32] Transcript Day 38, page 17 lines 9-17. His oral explanation as to what he meant in paragraph 59 of his Witness Statement was not illuminating.

Founders' charitable and philanthropic works. YC Wang informed me that under the terms of these trusts it would be impossible for the Founders' children to benefit from them. This information was entirely consistent with what YC Wang had told me the Founders wanted to achieve."

Impressions of the witness's oral evidence

152. President Yang generally gave his evidence in an authoritative, careful and straightforward manner consistent with his status as a retired senior executive and reflecting a man who still possessed a lucid mind. Unsurprisingly, he displayed considerable loyalty to the Founders for whom he worked for several decades. For instance, suggesting an intuitive appreciation of the significance of Mrs Talbot Rice QC's suggestion that YC never told him that his descendants were not intended to benefit from the Bermuda Purpose Trusts, he parried the repeated questions until eventually responding directly: "*He didn't say that but he meant that.*"[33] He then fairly conceded that paragraph 19 of his First Witness Statement in reality reflected what he understood YC to have said as opposed to what he actually said[34].

153. As regards the suggestion that the objectives of perpetuating FPG and charity could have been achieved through Taiwanese public interest trusts ("PIT"), which counsel vigorously pressed, he skilfully avoided answering the question on reasoned grounds without being obviously evasive[35]. He also firmly rebuffed the suggestion, supported by a press article, that PC Lee "*worked behind the scenes*" to achieve things she wanted to achieve at FPG while frankly admitting that he had no idea what went on between PC Lee and YC when they were alone together[36].

154. Accordingly, I found President Yang to be a credible and reliable witness in general terms. However because of his obvious loyalty to the Founders and his undoubted support for the notion that the Trustees' cause is a just one, the most contentious aspects of his evidence must be evaluated with some care.

Wang Hsieh-Ching Lin (Sarah Wang)

155. Ms Sarah Wang's First Witness Statement is dated November 12, 2020. She is the oldest daughter of YT's First Family, and was born on June 10, 1949. She confirms the closeness of the relationship between her father and his eldest brother, noting "*that they very rarely*

[33] Transcript Day 39, page 44 lines 12-14.
[34] Transcript Day 39, page 45 lines 15-34.
[35] Transcript Day 39, page 52 line 16– page 53 line 2; page 55 lines 6-25.
[36] Transcript Day 39, page 60 line 8-page 61 line 1.

disagreed or argued. Their relationship appeared to me to be based on mutual respect and shared values."

156. In relation to an alleged meeting in January 2009 at the Chang Gung Golf Course, she avers: "*I do not believe any such meeting ever took place … Nor do I have any recollection of William on any occasion making the statements which the Second Family have attributed to him*…". In relation to the Oral Mandate and the October 2010 meeting at the Yanshou Residence, she was making tea and in and out of the study where her father was with Mr Hung, William and Wilfred. However, she heard him instructing Mr Hung to follow William's instructions:

> "*23. My father was lucid and spoke clearly. He was in good spirits and did not seem sad about handing over responsibility to William. He seemed very determined. I have no doubt that my father fully intended to delegate the making of all final decisions about his property to William and that he understood the consequences.*"

157. She also refers to receiving a letter from Conyers Dill & Pearman dated February 26, 2015 which advised all YT's heirs of steps the Trustees were taking to defend her cousin Winston's Bermuda proceedings:

> "*33. As far as I was aware at that time, the Second Family shared our position and were content for the Trustees to defend the proceedings in Bermuda. Until Tony's intervention in the Bermuda proceedings in October 2019, I was completely unaware that he wished to challenge the validity of the Trusts. So far as I am aware, no member of the First Family was aware that Tony intended to take this course.*"

158. Sarah Wang remembers being told on several occasions by the Founders that they did not intend to leave the majority of their wealth to their families.

Impressions of the witness' oral evidence

159. Sarah Wang, possibly the most vivacious of the Founders' children who testified, gave her evidence in a manner which made it clear that she was passionately loyal to her father's First Family. Nonetheless, she also seemed desirous of giving, as far as she could, truthful evidence. Perhaps the best illustration of this is the completely frank way she responded to a question in relation to the highly contentious issue of the Oral Mandate, in relation to

which what YT said had been recorded in quotes in her own and her siblings' witness statements[37]:

> "*Q. Yes. That is what is written in the document. My question is: do you recall hearing the words that are set out in the document or do you recall hearing something else?*
> *A. (In English) Well, the meaning is that--.*
> *Q. I didn't ask you what you think the meaning is. I'm asking you what words you heard spoken.*
> *A. How would you remember the exact word 10 years ago? Of course you understand the whole meaning. Why I remember every word? I'm not a super memory, you know, can remember every word. Of course the context is important. What was said was important. My understanding was --was what my father's meaning of--of his instruction. I wouldn't--I --you know, I --how would I remember the exact words say? Nobody has that super memory; right?*
> *Q. Well, that's absolutely right, Ms Wang.*
> *A. Maybe you have. I don't.*"

160. My impression that Sarah Wang was a fundamentally honest witness was fortified by the fact that although she visited her father in Hospital on the same day the POA was purportedly executed she elected not to support his apparent capacity either in her written or oral evidence. It admittedly appeared that she was less than fully forthright on the reasons for her reticence in this regard; but it is a matter of record that the next year she applied in the *Beddoe* Proceedings to be appointed as her father's guardian *ad litem* on the grounds that he had in 2013 lost capacity. In addition, her support for the proposition that her brother William did not convene the January 2009 meeting was tepid and (on one view) equivocal. She merely firmly denied that she attended any meeting which may have taken place[38].

161. The fact that she was unwilling to forgive Madam Chou for a perceived insult to her mother[39] made it obvious that any views she expressed about her father's Second Family in her written and oral evidence should be critically assessed. However, even in this context, she was fair enough to acknowledge that her vividly expressed belief that YT was pressured into signing the Declarations was not something she could positively testify to, but merely her "*impression*"[40].

[37] Transcript Day 40, page 56 line 11-page 57 line 3.
[38] Transcript Day 40, page 145 line 22-page 146 line 17.
[39] Transcript Day 40, page 40 line 15 –page 41 line 24.
[40] Transcript Day 40, page 80 line 21-page 81 line 2.

162. Despite her obvious partisanship, I found Ms Sarah Wang to be a generally credible and reliable witness.

Ed Granski

163. Mr Granski's First Witness Statement is dated September 11, 2020 and his Second Witness Statement is dated November 6, 2020. He has been admitted to the Bars of Colorado, New York and New Jersey and between 1996 and 2002 was an associate and then partner with Cadwalader Wickersham and Taft. From 2002 to 2004, he was a partner with the New York office of Withers Bergman LLP ("Withers") and from 2004 to 2008 he was a Managing Director with UBS AG. Since then, he has been engaged in private practice focussing on advising families on wealth planning matters.

164. His initial contact with the Wang family was with Susan Wang in June 2000. Their first substantive meeting took place on July 5, 2000. She was acting on behalf of the Founders although it was clear that YC was "*the driving force*". Initial instructions were received in a July 7, 2000 fax and these instructions included the following planning criteria:

> "*All assets within 'Family Trust' exist for the sole purpose of business control to ensure business and charity foundations' continuity and to fulfil founders' vision.*"

165. The establishment of the Wang Family Trust was envisaged to be run by a BMC the guidelines of which stated:

> "*…all assets within 'Family Trust' are to be used for the sole purpose of maintaining business control, ensuring business continuity, and for charity purposes. They cannot be used for other purposes or for personal use.*"

166. This project was then developed in greater detail. In acknowledging receipt of draft documents in November 1, 2000, Susan Wang said she has discussed them with the Founders:

> "*34 … During my interactions with Susan, this was something that she often said. Susan also repeated, many times, that documents needed to be extremely clear, concise and focused so that the translation from English to Chinese would also be clear. She told me that she needed to prepare those translations for the Founders and Mr Hung…*"

167. By April, 2001, draft documents had been forwarded to Bermuda lawyers Appleby and input received from senior trust counsel John Campbell and Michael McAuley. The structure had evolved and involved creating one purpose trust (the Wang Family Trust) and one discretionary trust with beneficiaries (the GRT). Mr Granski met with Susan Wang and Mr Hung in Livingston, New Jersey on May 8, 2001, and the trio flew to Bermuda together the next day. Susan served as Mr Hung's translator and the "trustee" of the shares in the BVI companies which were to be transferred to the new trusts executed the transfer documents on May 8, 2001. Only some of the BVI company shares were transferred because, Mr Granski was informed, the Founders wished to get comfortable with how the structure worked before transferring the remaining shares.

168. On May 7, 2001, Harrington Trust Limited ("Harrington") declared the Grand View Trust which in turn incorporated Grand View PTC. Meetings took place in Bermuda with Appleby lawyers on May 9-10, 2001. The business included the first board of directors meeting of the newly created Grand View PTC and the creation of a BMC:

> "*73. At the meeting, Susan and Mr Hung spoke about the vision of the Founders (with Susan translating what Mr Hung was saying). This was a very moving moment which I still remember well after all these years. It was to my mind wholly appropriate for all of us who had worked so hard on this project to reflect on the Founders' vision because that was what we had all set out to achieve…*
>
> *75. The Board also agreed to the establishment and funding of the Wang Family Trust. Mr Hung contributed the initial property of the trust fund and the Board agreed to accept into the trust fund the shares held by Mr Hung (or his nominees) in each of the following BVI companies: (1) Power Unlimited Corp.; (2) Energy Associates Limited; (3) Rimwood Inc.; (4) Ackerman Brothers Inc.; (5) Macro Systems; (6) Consolidated Power; and (7) Pacific Light and Power Corporation…"*

169. Harrington also declared the GRT on May 7, 2001 and it incorporated Global Resource Private Trust Company Limited the following day. This PTC's first members' and directors' meetings also took place on May 9-10, 2001. Mr Hung transferred 48,000 shares in Grid Investors Corp. to the GRT. Mr Granski also described the establishment of another purpose trust, the China Trust, the following year, by which time he was attached to Withers in New York.

170. On June 13, 2002, Harrington declared the Transglobe Purpose Trust, which in turn incorporated the Transglobe PTC. The first members' meetings took place on June 21,

2002 and the board of directors was elected. On June 24, 2002, Mr Granski travelled to Bermuda with Susan and Sandy Wang for the first board meeting:

> "*96. … The Board … agreed to the creation and funding of the China Trust and to act as its trustee…*
>
> *97. The Board agreed to accept shares held by Mr Hung in three BVI companies that I delivered as attorney in fact for Mr Hung: (1) Pacific United; (2) Infinity Asia; and (3) Greatway Power, respectively.*"

Impressions of the witness' oral evidence

171. The most striking aspect of Mr Granski's evidence was the care that he took to review the wider context of the passages in various documents to which he was referred, often to the apparent frustration of cross-examining counsel. Although he stated this was his first experience as a witness, he revealed himself to be a battle-hardened private client lawyer, unwilling to be pressured or rushed into making ill-judged statements. And, despite often insisting that his caution was designed to see whether he could assist counsel with helpful answers, Mr Granski clearly had an enduring loyalty to his former clients.

172. On balance, however, more often than not Mr Granski was technically justified in resisting suggestions put to him by Mrs Talbot Rice QC which it initially seemed obvious he should accept. For instance[41]:

> "*Q. Can you now agree with me that what you're dealing with is YC Wang's shares, or, rather, sorry, what you're being asked to deal with is a structure for YC Wang's shares?*
>
> *A. Well, I have to be careful in agreeing with you, because going back to the first paragraph of my letter, I say that I'm looking at 'a private trust company structure for your father's and your father's brother's families'. So I - -I don't want to just rush to that conclusion.*"

173. He occasionally did give obtuse and somewhat evasive responses which seemed inconsistent with the contemporaneous documents[42]. On the other hand he was also on more than one occasion willing, to some extent at least, to give fair answers on points which potentially helped the Plaintiff's case[43]. Overall I found Mr Granski to be an entirely

[41] Transcript Day 41, page 31 lines 10-18.
[42] Transcript Day 42, page 36 line 5-page 37 line 10.
[43] Transcript Day 42, page 117 line 8-page 118 line 7.

credible witness. However, his obvious loyalty to his former clients necessitates approaching the most important aspects of his evidence with care.

Chang Li-Yu (Attorney Chang)

174. Attorney Chang was born in Taiwan in 1966. She obtained her BA in Law from Taiwan National University in 1988 and qualified as a lawyer in Taiwan in 1992. She has practised for nearly 30 years, having joined the Dah Jeng Law Firm. She critically deposes as follows as regards the execution of the POA by YT on October 31, 2012:

> "*11. I asked Dr. Wang about YT's state of mind. In response to my enquiry, Dr. Wang confirmed that YT was compos mentis and in a good mental state. I recall that Attorney Yeh also joined the conversation with Dr. Wang. It was apparent that the two of them were familiar with one another.*
>
> *12. I introduced myself to YT. I had not met him previously. Given that Attorney Yeh also introduced himself at the time, it is my understanding that it was also the first time the two of them had met.*
>
> *13. I explained the purpose of our visit. I then read out the terms of the PoA and explained the content to YT in simple language. At the same time, Mr Yang handed YT the PoA that I had been shown earlier that morning.*
>
> *14. I then asked YT whether he understood the content and whether he wished to provide the authorisation to William by signing the PoA. YT nodded and said "yes" in Taiwanese. My recollection is that when I read and explained the content of the PoA to YT, he listened attentively. He raised no objection to anything I told him.*"

Impressions of the witness's oral evidence

175. Attorney Chang appeared to be an independent professional witness with no basis for partisanship in the present proceedings. However, it was suggested that her evidence about having witnessed YT executing the POA on October 31, 2012 was entirely false. The reliability of her account of what happened at the Hospital was challenged in any event. I found Ms Chang to be a credible witness who gave her evidence in a consistently straightforward manner. My strong impression at the end of her very skilful cross-examination by Mr Wilson QC was that it was almost impossible to believe that this experienced lawyer was capable of such an elaborate case of bold-faced lying on oath before a court.

176. The fact that she is currently representing Yeh, Ta-Hui ("Attorney Yeh") (who she says asked her to witness the POA's execution and with whom she has a close professional relationship), on unrelated criminal charges, which broadly relate to witnessing the execution of documents, did raise something of a spectre over her testimony. (Attorney Yeh was expected to give evidence for the Trustees but was unsurprisingly not called). It also seemed important to carefully consider the timeline of events in light of an entry in her diary for the day in question.

177. Nonetheless, I found the confidence with which she was willing to give positive evidence about matters which were not supported by any contemporaneous documents and which occurred over 8 years ago somewhat surprising. In answer to my own questions she explained that interacting with the famous YT was a memorable occasion[44]. Because of the extent to which she elaborated upon her Witness Statement with details of what she says occurred in her oral evidence, these 'new' aspects of her evidence clearly require careful assessment. Early on in her cross-examination, she explained the brevity of her Witness Statement as follows[45]:

> "*Q. --you're a lawyer, so you presumably appreciate the importance when giving a statement of giving a full and complete account of your evidence. Would you agree with that?*
>
> *A. I agree, but this litigation, however, I have discussed with other attorneys. I was providing an account, a brief account, and therefore some details might not be seen in - -might not appear in the written statement, because in Taiwan's legal system we would provide our evidence in court. We would not provide a written statement in advance, so please allow me to make this explanation first.*"

Wang Hsueh Kuang (Rachel Wang)

178. Ms Rachel Wang's Witness Statement is dated November 12, 2020. She is a member of YT's First Family. She addresses two matters: (1) the alleged January 2009 meeting, and (2) the circumstances in which she became aware that the Plaintiff had commenced proceedings in Bermuda. As to the first issue, she deposes as follows:

> "*9. I have no recollection of attending a meeting at the Chang Gung Golf Club in January 2009, or of ever attending a meeting of the type described by the members of the Second Family. I do not believe that any such meeting took*

[44] Transcript Day 44, page 89 line 17-page 90 line 15.
[45] Transcript Day 44, page 2 line 23 – page 3 line 9.

place. In fact, I have never attended a meeting at which all of my father's children were present at which matters of family finances were discussed.

10. It has never been my understanding that members of the family would receive any form of distribution from the Overseas Trusts and I have never heard William make any such suggestion."

179. As regards how she learned of the Bermuda proceedings commenced by her cousin Winston, she confirms that she received a letter dated February 26, 2015 from the Trustees' Bermudian attorneys which she understands was sent to all members of YT's First and Second Families:

"*13. The letters referred to the legal proceedings being brought by Winston in Bermuda and asked whether the recipients had any comments on certain steps that were being taken in relation to the defence. My recollection is that no one from the First Family replied to that letter, because we had no comment to make concerning the approach being adopted by the Trustees.*"

180. Rachel Wang also received a letter from the Plaintiff's Bermudian attorneys dated March 8, 2018 to which she did not respond because she had no interest in supporting Winston's claim:

"*15. Until 2019, I had always believed that, despite our differences, the First Family and the Second Family were in agreement that the Overseas Trusts were an essential part of my father's mission in life and that the assets within those trusts were not, under any circumstances, to be distributed to members of the family. It was a considerable surprise for me and the other members of the First Family to learn that the position of the Second Family had changed.*"

Impressions of the witness's oral evidence

181. Rachel Wang was only challenged on the issue of the January 2009 meeting at the Chang Gung Golf Course which YT's First Family denies took place. She gave her evidence in a straightforward way and most notably explained in an unvarnished and seemingly impromptu way the interactions between herself and her mother with Madam Chou which Ms Wang clearly felt justified having no contact with YT's Second Family. Mr Wilson QC fairly suggested that paragraph 15 of her Witness Statement suggesting surprise at Tony Wang's intervention in the present proceedings was effectively argument written for her,

and was not a factual assertion. She freely admitted having no basis for knowing what YT's Second Family's position was.

182. I am bound to approach the disputed aspects of her evidence with some caution in light of her obvious partisanship although the fact that she made no attempt to conceal her antipathy for Madam Chou suggested that she is a fundamentally transparent "*what you see is what you get*" type of person. Ms Rachel Wang was in general terms an entirely credible witness.

Jack Chien Fang Jao (Mr Jao)

183. The First Witness Statement of Mr Jao (pronounced 'Rao') is dated September 15, 2020, his Second Witness Statement is dated November 13, 2020 and his Third Witness Statement is dated June 20, 2021. Mr Jao was born in Taiwan in 1959. His involvement with FPG began in 1984 when he joined the staff of the Chang Gung Memorial Hospital. He worked with the FPG Finance Department from 1991 until his retirement from fulltime work in 2011. He worked on a part-time basis until 2013.

184. From the early 2000s, Mr Jao deposes that he assisted Mr Hung in relation to the First Four Bermuda Purpose Trusts:

> "*8. Mr Hung and I had adjoining offices at the headquarters of FPG and we spoke to each other almost every day, when we were at work. The tasks in which I was involved included the preparation of financial reports, and dealing with enquiries Mr Hung received from the directors of the PTCs. The boards of directors of the PTCs ("**the PTC Boards")** were also members of the Business Management Committees of the First Four Bermuda Purpose Trusts ("**the BMCs").** From 2005 onwards, I provided similar assistance in relation to the New Mighty Trust, which is a United States trust. In this statement, I will refer to the Bermuda Trusts and the New Mighty Trust, together, as "**the Offshore Trusts".**"*

185. His duties included preparing share purchase reports for the holding companies incorporated in the BVI and Liberia ("Share Purchase Reports"). The Share Purchase Reports accounted for dividends received from FPG company shares held by the Holding Companies and made recommendations as to further share purchases. Mr Jao describes how, during his lifetime, YC would sign off on such reports, which were provided to Susan Wang, even after the shares in some of the Holding Companies had been transferred to the First Four Bermuda Purpose Trusts. YC often raised queries which were relayed to Mr Jao by Mr Hung:

"*23. … I recall being asked questions about the assets of the Bermuda Trusts, including the Holding Companies, and about the structure of the trusts. It was my clear impression, from the sort of questions that were raised and the level of detail they involved, that YC had a very detailed understanding of the Bermuda Trusts.*"

186. He understood from Mr Hung, that whatever information was made available to YC was also supplied to YT. However, he does not recall responding to queries made by YT. Mr Jao was also involved in the Share Equalization plan and discussions about broadening the scope of management participation within the family in 2007-2008. The family expansion project was initiated by Susan Wang. In 2009 he was involved with meetings with YC's children, including meetings with the Plaintiff on January 10, 12 and 17, 2009. He had a rare telephone call from the Plaintiff on February 5, 2009 in relation to information relating to Vanson Liberia and Chindwell Liberia. He does not recall receiving a December 31, 2010 letter from YT instructing him to deliver "*complete documentation for the five overseas funds*" to Tony, Tammy or Madam Chou.

187. Not long before he retired, Mr Jao was asked by Mr Hung to arrange a meeting with YT's Second Family at Ming Shui Residence on January 13, 2011 to explain the First Four Bermuda Purpose Trusts and discuss expanding family participation in their management. He suggested that his successor, Mr Roger Yang, also attend. He prepared a document '*Introduction to Purpose Trusts*' as an agenda for that meeting, which Tony did not attend. Madam Chou, Janis and Tammy were the family members present at the "*cordial*" meeting:

"*143. … First and foremost, I recall that I emphasised that the assets held in the Offshore Trusts were not available to the members of YT's families (or, indeed, YC's families). I remember emphasising the messages that the Offshore Trusts had been created to perpetuate FPG and its charitable activities and that those trusts had no beneficiaries.*"

188. In relation to the formation of the Ocean View Trust, Mr Jao explains that only two Holding Companies, Chindwell BVI and Vanson BVI, had not been transferred to the Offshore Trusts when YC passed away. The shares in these companies were held by Mr Hung and were not treated as part of YC's estate for Taiwanese tax purposes:

"*150. … After YC's death, Mr Hung did not regard these assets as forming part of YC's estate or as belonging to YT although he regarded himself as holding these assets subject to any further directions from YT…*

154. *… It was my understanding, from conversations I had with Mr Hung shortly following my retirement, that YT's health was not good and nor was Mr Hung's. He had cancer. He mentioned that YT had confirmed that Mr Hung could move the last of the assets into a Bermuda Trust so that Mr Hung could finally retire as well. Because of his health issues, Mr Hung was very conscious of his own mortality and he mentioned to me on more than one occasion, around this time, that Chindwell BVI and Vanson BVI should be transferred into a purpose trust structure sooner rather than later.*"

Impressions of the witness's oral evidence

189. Mr Jao's cross-examination spanned four days, with his re-examination concluding his testimony early on the fifth day. Although he had "retired" from fulltime work in 2011, he was a younger retiree than I had anticipated. He explained that he was born in 1959. Mr Jao appeared to me overall to be an honest, intelligent and diligent man who occasionally veered between a somewhat defensive reluctance to admit mistakes and a refreshing willingness to accept that he had erred. After all, in his examination-in-chief he verified a Third Witness Statement which corrected various aspects of his initial evidence and under cross-examination he freely conceded he had not approached the relevant issues initially with sufficient care.

190. His honesty in admitting the entirely unsurprising extent to which he had received assistance with his witness statements was striking having regard to how reticent most other witnesses were in this regard:

> "*Q. It's possible that it's somebody else's mistake, that's what I understand you to be saying. Do you agree?*
> *A. That's not what I mean, because it's so long ago. Which year, when I retired? Well, I provided the basic information- -*
> *Q. You provided the basic information - -*
> *A. - -and- -*
> *Q. - - and then somebody else wrote the statement, is that what you're saying?*
> *A. Of course, all the statements would be prepared by other people for me. There's no way I could write all these statements myself. I don't think it's no surprise. It applies to everyone.*"[46]

191. In light of this evidence, I found his unhesitating and unequivocal assertion later that day that he personally wrote the final sentence in paragraph 23 of his First Witness Statement

[46] Transcript Day 45, page 15 lines 8-20.

difficult to readily accept[47]. The sentence was entirely unremarkable and at first blush seemed to be written in classic 'lawyer-speak': "*It was my clear impression, from the sort of questions that were raised and the level of detail they involved, that YC had a very detailed understanding of the Bermuda Trusts.*" Further, these averments were not even addressing questions Mr Jao claimed to have personally heard YC raise. It was as if, on reflection, he felt his earlier admirable (from my perspective) frankness had 'let the side down'. It is only necessary to mention one example of Mr Jao's unsurprising loyalty to Mr Hung. When it seemed that Mr Hagen QC had clearly demonstrated that Mr Hung's *Beddoe* Affidavit was inaccurate in suggesting that share purchases were only ever made after BMC approval, rather than *vice versa* as seemed to have occurred, Mr Jao when pressed would only concede that his former boss' evidence "*could be*" inaccurate[48].

192. While he attempted to maintain a diplomatic stance of neutrality as regards a family dispute which was not his concern, he appeared to me to be (unsurprisingly) both (a) emotionally committed to upholding the integrity of transactions which he was involved in and (b) doing so in a manner which supported the Trustees' cause. Mr Jao gave a valuable insight into the partisan way in which the Plaintiff's claims were viewed by 'Team FPG' in the early stages[49]:

> "*… Dr Winston Wong tried to sabotage the purpose trust. That is why there were discussions about how to protect the purpose trust. To protect the purpose trust is the same as protecting the FPG and that again is protecting the livelihood of a million people in Taiwan, because FPG's a very large employer in Taiwan…*"

193. While he more often than not declined to agree with tactical questions which called for comments rather than 'pure' evidence, Mr Jao was usually sharp enough to spot the 'trap' and sidestep it with a somewhat non-responsive answer. However on many occasions when required to address potentially important issues as to which he had pertinent personal knowledge, he was willing to give straightforward honest answers. For instance[50]:

> "*Q. If Mr Hung was obliged to act on the instructions of YC Wang and YT Wang and they asked him to transfer the shares in one of the BVI companies to them, he would have had to do it. Do you agree?*

[47] Transcript Day 45, page 90 lines 18-23.
[48] Transcript Day 45, page 82 lines 3-7.
[49] Transcript Day 46, page 124 lines 1-8.
[50] Transcript Day 47, page 69 line 20-page 70 line 6. Also see Transcript Day 48 page 61 lines 1-9, another illustration of a fair answer to a question on a controversial topic put by Mr Wilson QC.

A. BVI company? Before they went to the trusts, YC - -if YC and YT asked Mr Hung to do something, Mr Hung would follow the instructions. Yes, that is correct and that is my understanding.
Q. That is our understanding too, and that meant anything, didn't it?
A. That meant anything. If there's an instruction, then corresponding actions will be taken."

194. In summary, I found Mr Jao to be a credible witness in general terms but one whose evidence on important contentious issues must be approached with some care in light of his understandable loyalty to his former employers and the Trustees' cause in this litigation.

Hsiu Hsiung Yang (Roger Yang)

195. The First Witness Statement of Roger Yang is dated September 10, 2020. His Second Witness Statement is dated November 12, 2020.

196. He joined Nan Ya in 1998 and in 2003 was promoted to Assistant Section Manager in the Accounting Department. He joined the FPG Finance Department in 2005 as an Administrator. After working with another Group company in 2009, he joined the Executive Projects Department of the Group Administration Office in April 2010. In December 2014 he was appointed Executive Vice-President of that Department. From 2010 he initially worked alongside Mr Jao and Mr Hung who were responsible for administering the First Four Bermuda Purpose Trusts (five after Ocean View was established in 2013) and the New Mighty Trust. He took over Mr Jao's responsibilities after his retirement from fulltime work on January 31, 2011. Roger Yang also had some involvement with various PITs and Charitable Foundations.

197. He firstly describes how he accompanied Mr Jao to the January 13, 2011 Meeting with YT's Second Family about the overseas trusts. He clearly recalls that Mr Jao said repeatedly that neither the First Four Bermuda Purpose Trusts nor the New Mighty Trust had beneficiaries. At Madam Chou's request, he attended the December 13, 2011 Meeting along with Bank representatives and responded to queries about the PITs.

198. He next describes how he was asked in early October 2012 to prepare a POA for YT to execute. Having arranged for the Taiwanese law firm Lee and Li, Attorneys-at-Law ("Lee and Li") to prepare the document, he prepared a memorandum dated October 24, 2012 under cover of which he forwarded the draft document to Mr Jao, William Wong and Wilfred Wang. YT's sons approved the draft on October 29 and 30, respectively. Roger Yang on October 30, 2012 was asked to attend the Hospital the following day and he asked Attorney Yeh to be a witness to the execution of the document. The attorney suggested that an independent witness, Attorney Chang also attend. They met before 8am on the morning

of October 31, 2021 at the FPG building, and attended the Hospital together, arriving before 9.00am. Mr Yang then describes what happened relating to the execution of the POA by YT.

199. Finally, he describes his involvement in the "2016 Meetings" between YT's two Families, after YT's death in 2014, which culminated in the "2016 Settlement Agreements". So far as he is aware, neither the Overseas Trusts nor YT's Wills and Declarations formed part of those negotiations.

200. In his Second Witness Statement, most importantly, he denies attending the 'alleged 2010 meeting' at the Ming Shui Residence. He also disputes the evidence of D8's witnesses about what was said during the January 13, 2011 Meeting and denies speaking of distributions from the Overseas Trusts being frozen by the Plaintiff's litigation. He also describes his involvement in attempting in late 2018 to retain Cox Hallett Wilkinson to represent all of YT's heirs in the present litigation.

Impressions of the witness's oral evidence

201. Roger Yang was cross-examined over nearly three full sitting days, and explained that he was wearing a mask based on medical advice. That was not as much of a hindrance to assessing his demeanour as might initially have been thought. Early on in his evidence, he appeared to me to be a somewhat unemotional highly logical 'numbers man', somewhat like Dr Spock of 'Star Trek' fame. However, by the end of his oral evidence when he was accused of, *inter alia,* forgery, Roger Yang was figuratively unmasked as being not just cool and logical but also, when pressed, a highly expressive and demonstrative man.

202. He was generally a careful witness quite willing to admit what he could not remember and not prone to denying what logic suggested might have occurred. For instance[51]:

> "*Q. I know. Of course it wasn't paid for by you, but are you telling me that there was no possibility that it was paid for by one of the trusts or Chindwell and Vanson BVI?*
> *A. I can only say to you that I do not recall. I really do not recall.*
> *Q. Okay. So you cannot deny that this litigation was paid for from one of the trusts or Chindwell or Vanson BVI?*
> *A. I cannot be sure.*"

203. It was the exception rather than the rule that he claimed to remember things, such as the fact that expanding the boards of the PTCs was mentioned at the January 13, 2011 Meeting

[51] Transcript Day 50, page 17 lines 14-22.

at the Ming Shui Residence, that one suspected he might not. Even then, he did so while acknowledging that he could not remember all the details of what was discussed[52]. Roger Yang was also occasionally reluctant to accept that he had made mistakes in his witness statements, even when it seemed clear that he had[53]. On potentially important issues, such as what Dr C. Wang, Chun-Chieh ("Dr C. Wang") said about YT's condition on October 31, 2012, he showed no inclination to be partisan and was willing to be entirely fair and objective[54]:

> "*Q. Yes. Thank you. So I can then put to you that that's what his evidence says and he's correct, isn't he, about what he said?*
> *A. Not necessarily, because it has - - many years have passed and everybody's memory might not be entirely accurate. My - - my recollection is that he said he is in a good condition or in good spirits and for me, when he says 'jingshén' or 'in good spirits', it means that both his mental and physical states are in good conditions. That is my understanding, because I'm not a medical expert. I'm not a medical professional. So, basically, it was Attorney Yeh and Attorney Chang who was asking the question. I was just standing there. I was just there and I heard - - heard them, heard their conversation. So you can't say that, oh, after so many years, because it's Dr [C.] Wang, so what he said was correct. Well, of course he would not tell a lie. Of course I'm not saying that he's going to lie, but memories are not entirely accurate. There might be discrepancies. He remembered he said so and I remember that he said he was in good spirits or in good conditions.*"

204. The only motivation Mr Yang appeared to be driven by was a desire to protect his reputation, as illustrated by his passionate rebuff of the suggestion that he had forged YT's signature on the POA[55]. Save for the need to carefully evaluate the reliability of any of his oral evidence which was not supported by contemporaneous documentation, I found Mr Roger Yang to be overall a credible and impressively honest witness.

Hearsay Notices

205. The Trustees served Hearsay Notices dated September 15, 2020 and November 13, 2020 in respect of reported statements made by various persons who are either dead (YC, YT and Mr Hung) or beyond the seas. The Trustees also served a Hearsay Notice dated January 6, 2021 in respect of Dr C. Wang's Witness Statement dated December 31, 2020.

[52] Transcript Day 51, page 42 lines 4-10.
[53] Transcript Day 51, page 136 lines 10-16.
[54] Transcript Day 51, page 112 line 18- page 113 line 14.
[55] Transcript Day 51, page 132 line 21-page 133 line 10.

THE HUNG ESTATE'S CASE

Mr Hung

206. The Hung Estate served a Hearsay Notice dated September 15, 2020 in respect of the late Mr Hung's First Affidavit and Second Affidavit originally filed in the *Beddoe* proceedings and which are dated January 15, 2014 and December 2, 2014, respectively. Those Affidavits were served in support of the Trustees' "*Beddoe* Proceedings".

207. Mr Hung deposed that from inception he had been a director and BMC member of each of the PTCs. He denied the "*serious allegations*" made by the Plaintiff against the Trustees and himself personally. Two key paragraphs in his First Affidavit merit recitation here. Firstly:

> "*15. Moreover, as I have stated above, I had a close relationship with the Chairman and Vice-Chairman and the utmost respect for them. I have never betrayed my relationship with them. In dealing with trust matters, I acted in accordance with the Founders' Vision. Neither the Chairman nor Vice-Chairman ever gave any indication that they did not approve my actions. Further, right up until the time of his death, I knew the Chairman to be a strong-willed person of sound mind. He was not somebody who was susceptible to undue influence at any time in his life.*"

208. He proceeds to affirm that all of the transfers made to the First Four Bermuda Purpose Trusts had the Founders' consent. As to the basis on which he held the shares before those transfers occurred, his initial characterisation of the position was beguilingly brief:

> "*18. At the time I transferred the various offshore companies to the Bermuda Trusts, those assets were not held by me for the benefit of any member of the Wang Family…*"

209. However, he expanded on this as follows:

> "*74. … at the time of the Chairman's death the two BVI companies which had not yet been placed into a Bermuda Purpose Trust (Chindwell (BVI) and Vanson (BVI)) did not belong personally to YC Wang. I also believe that YC Wang himself did not regard these companies as his personal assets. Prior to YC Wang's death, I was holding these companies as a trustee for*

purposes to be determined by YC and YT jointly. Following YC's death, I continued to hold those assets as trustee for purposes to be determined by YC and YT jointly. Following YC's death, I continued to hold those assets as trustee for purposes directed by YT alone. After 2012, following directions given by William Wong as the representative of YT, those companies were transferred into a formal Bermuda purpose trust structure."

210. Mr Hung's Second Affidavit responded in detail to Dr Wong's evidence about the meeting on January 10, 2009 (the "January 10, 2009 Meeting").

SUMMARY OF EXPERT EVIDENCE

EXPERT EVIDENCE ON TAIWANESE LAW

Plaintiff/D8's evidence

Overview of Expert Reports

211. Professor Yun-Chien Chang's Expert Report on Taiwanese Law is dated December 21, 2020. He is a Research Professor of Law at the Institutum Iurisprudentiae, Academia Sinica in Taiwan. After passing the Taiwan Bar exams in 2001, he obtained a Doctor in Juridical Science degree from the New York University School of Law in 2009. His areas of expertise include property law, succession law and trust law and he is the co-author of the only English language book on property and trust law in Taiwan, '*Property and Trust Law in Taiwan*'. He was a Visiting Professor at Cornell Law School in the Spring of 2021.

212. As regards trusts in Taiwanese law, Professor Chang opines as follows:

(a) a private trust must have a beneficiary or beneficiaries. Public trusts must have specified purposes which serve the public interest;

(b) the Taiwan Trust Law ("the Trust Law") requires trustees to be able to administer and dispose of trust assets. This requirement was not met by Mr Hung who was required to follow the directions of the Founders;

(c) a pre-1996 Trust Law relationship would only become a trust governed by the Trust Law if the relevant parties expressly sought to achieve this legal outcome by complying with its requirements; and

(d) the Founders-Hung relationship is accordingly not a trust one.

213. After explaining the main elements of nominee and mandate relationships, Professor Chang opines that the Founders-Hung relationship was a nominee and mandatory one based on the facts he has been asked to assume. As to the general principles of law which apply, he opines as follows:

(a) mandates may be general, specific or *sui generis*. However, contracts may be a combination of two basic forms such as a mandate and nomineeship;

(b) on the assumed facts, Mr Hung was a mandatory under a *sui generis* mandate contract and a nominee. Specific instructions would have been required from the Founders to authorise the transfers to the Bermuda Purpose Trusts including in the present case proof that they intended to transfer the shares to trusts from which their children could never benefit;

(c) an unauthorised transfer is not effective (Article 118) and the original owner of the property or right will in law be regarded as remaining the owner. In the present case, the Hung Estate would remain the owner of the transferred assets as nominee for the Founders;

(d) the *bona fide* transfer doctrine does not apply to shares and/or gratuitous transfers in any event;

(e) a power of representation must be conferred in writing if the relevant transaction itself has to be in writing (Article 531), as is the case with the transfer of immoveable property (Article 758(2)): "*if BVI law or Bermuda law requires the transfer of assets into trust by Mr Hung to be in writing, the Founders' specific authorization also has to be in writing. If any specific authorization given by the Founders was not in writing in those circumstances, such specific authorization would be invalid and any transfer made pursuant to it would be void*" (paragraph 182);

(f) by reason of Article 550 of the Taiwan Civil Code ("the Civil Code"), unless the Founders had agreed otherwise, the mandate and nominee contracts would have terminated on YC's death in 2008;

(g) agency and powers of attorney have no equivalent under Taiwanese law. A principal would have to both enter into a mandate contract and confer a power of

representation. Compliance with the requisite formalities would have to be established for the POA to be valid. The Oral Mandate would only be effective as regards the matters specified therein. Because of the proviso to Article 534, specific authority to make a gift of the overseas assets would have been required and the Oral Mandate would be invalid because it was not in writing in any event.

214. Professor Chang then addresses Article 242 of the Civil Code:

> "*216. If an obligor fails to exercise his rights, an obligee may, for the purposes of preserving his obligational claim, exercise the aforementioned rights in the obligee's name, as long as the exercise of such rights is not exclusive to the obligor.*"

215. The claims that can be brought in reliance on Article 242, standing in the shoes of Mr Hung, are said to be the following:

(a) unjust enrichment against the Trustees (Articles 179-183);

(b) a post-contractual claim by the Founders' estates against the Hung Estate;

(c) a contractual claim against the Hung Estate by the Founders' estates for negligence (Article 544);

(d) a direct claim under Article 113 on the basis of the Trustees entering into transactions they knew or ought to have known were void relying, *inter alia,* on an imputation to them of their director Susan Wang's knowledge;

(e) an alternative direct claim under Article 183.

216. As regards limitation periods, Professor Chang opines that 15 years applies unless any other period is prescribed pursuant to Article 125 of the Civil Code. This period would apply to the unjust enrichment, contractual damages and post-contractual obligations claims. Article 128, a substantive rule, provides that time runs "*from the moment when the claim may be exercised*". Professor Chang opines that two approaches have been adopted by the Taiwan Supreme Court, (1) a subjective knowledge–based test, and (2) an objective test based on when the claim may actually be brought. In his view a mixed approach is generally adopted designed to achieve justice on a case by case basis.

217. As regards other claims, limitation periods are said, *inter alia,* to be as follows:

(a) mistake (Article 88 of the Civil Code): 1 year;

(b) revocation under Article 244 of the Civil Code (unlikely to be needed in light of other claims): 1 year;

(c) revocation under Article 18 of the Trust Law (an improbable claim): 1 year.

218. Professor Chang then addresses the law of capacity. He cites Article 75 of the Civil Code as articulating the governing principles:

> "*341. …the expression of intent of a person who has no legal capacity to make juridical acts is void. An expression is also void which is made by a person who, though not without legal capacity to make juridical acts, is in a condition of unconsciousness or mental disorder*."

219. As regards public trusts, he opines:

> "*359. In practice, trusts with specified public-benefit purposes but which in reality involve the pursuit of private or profit objectives as well as public benefits have been set up in Taiwan. I am not aware of any such trust being revoked under Article 77 of the Trust Act*."

220. He addresses marriage and succession although at trial it was common ground that the issue of the status of the disputed "wives" would not fall for determination in the present proceedings. The forced heirship provisions of the Civil Code are briefly addressed.

221. Professor Chang's Reply Expert Report is dated March 31, 2021 and responds to various aspects of Professor Su's Expert Report. He opines, *inter alia*, as follows:

(a) he remains of the view that Mr Hung held the overseas assets as nominee of the Founders on the basis that he had no authority to dispose of them without their consent. Any management power was pursuant to a mandate contract;

(b) the mandate relationship terminated on YC's death pursuant to the default position in Article 550 of the Civil Code. In any event, the Founders held the assets as tenants in common;

(c) although he agrees with Professor Su that the absence of written authorisation of Mr Hung's transfers will not necessarily invalidate the transfers,

exceptional circumstances must be required otherwise the effect of Article 531 of the Civil Code would be nullified;

(d) he disagrees that the Oral Mandate was potentially valid because whether Mr Hung was a trustee or a mandatory, the requirements of writing cannot be ignored. The Oral Mandate could by its terms only apply (in any event) to assets YT owned and the Vanson BVI and Chindwell BVI shares were not owned by YT;

(e) he insists that if the transfers occurred without authority, they were unequivocally invalid;

(f) he confirms his initial view that the powers of appointment purportedly conferred on Susan Wang were invalid under the Trust Law and if Mr Hung was a nominee/mandatory, written authority from the Founders was required;

(g) he confirms his views on the availability of Article 242 of the Civil Code, and contends that Professor Su's suggestion that indirect claims are not available is "*counterintuitive*", because alternative claims can always be pursued.

222. Professor Chang also prepared an Expert Report on Article 113 of the Civil Code, which provides a fulsome response to Professor Su's initial treatment of the topic in his Reply Report.

Impressions of the witness' oral evidence

223. The youthful Professor Chang, despite occasional bouts of argumentativeness, generally gave his oral evidence with the degree of fairness and objectivity to be expected of an independent expert. He frankly accepted that he had fallen short when it was put to him that he failed to refer to an important Supreme Court Resolution save by way of reply. On the third day of his cross-examination, the Professor was suffering from a fever. Although he was bravely willing to continue, the hearing was adjourned because of concerns that Covid-19 regulations might be infringed through his presence at the Taiwan Arbitration Centre. He completed his evidence from home without incident. His ability to straddle the common law and civil law worlds combined with his fluency in English made him an impressive expert witness overall.

The Trustees' Evidence

224. Professor Yeong Chi-Su's Expert Report on Taiwanese law is dated December 22, 2020. He is a Professor of Law at the National Chenghi University ("NCCU") College of Law. He obtained a bachelor's in law from National Taiwan University in 1972 and a doctorate in law from the University of Munich in 1981. His academic career began with NCCU College of Law in 1981, and he secured tenure in 1988. Between 2010 and 2016, he served as a Justice of Taiwan's constitutional court of the Judicial Yuan. His academic specialties include Civil Law, Economic Law and Constitutional Law.

225. After he agreed to be the Trustees' expert in the present case, he discovered that he was required to address issues of trust law, not one of his specialties, not merely Civil Code issues. On trust law issues, his evidence is based in part on consultations with his NCCU colleague, Professor Kai-Lin Faung.

226. By way of introduction to the Taiwanese legal system, he explains that the Taiwanese law is a code-based system and that the Civil Code has been heavily influenced by the German and Swiss Civil Codes. Taiwan has three Court levels: the District Court, the High Court and the Supreme Court. The judicial branch of Government is known as the Judicial Yuan. Judicial precedent plays a very limited role, and judicial decisions are required by Article 80 of the Constitution to be based primarily on legislation enacted by the Legislative Yuan.

Limitation issues

227. Professor Su opines as follows in relation to the claims against Grand View PTC:

(a) the mistake claims under Article 88 of the Civil Code in relation to transfers to the Wang Family Trust in May 2001 were time-barred under Article 90 in May 2002;

(b) the claims under Article 244 of the Civil Code in relation to transfers to the Wang Family Trust in May 2001 were time-barred under Article 245 in May 2002;

(c) the claims under Article 18 of the Trust Law in relation to transfers to the Wang Family Trust in May 2001 were time-barred under Article 19 either one year after the beneficiary became aware of the claim or 10 years after the disposal of the trust property. On the assumed facts of the present case, the latest date for bringing a claim appears to be May 2011;

(d) the claims under Article 179 of the Civil Code in relation to transfers to the Wang Family Trust in May 2001 do not properly arise. If they did, a 15-year limitation period would apply.

228. As regard the transfers to Transglobe PTC:

(a) the mistake claims under Article 88 of the Civil Code in relation to transfers to the China Trust in June 2002 were time-barred under Article 90 in May 2002 in June 2003;

(b) the claims under Article 244 of the Civil Code in relation to transfers to the China Trust in June 2002 were time-barred under Article 245 in June 2003;

(c) the claims under Article 18 of the Trust Law in relation to transfers to the China Trust in June 2002 were time-barred under Article 19 either one year after the beneficiary became aware of the claim or 10 years after the disposal of the trust property. Only Tony asserts that his claims are not time-barred. On the assumed facts of the present case, the latest date for bringing a claim appears to be June 2012;

(d) the claims under Article 179 of the Civil Code in relation to transfers to the China Trust in June 2002 do not properly arise. If they did, a 15-year limitation period would apply.

229. The claims in relation to the transfers to Vantura PTC and Universal Link PTC in May 2005 under Articles 88 and 244 of the Civil Code and Article 18 of the Trust Law are said to be time-barred for the same reasons. No claim under Article 179 of the Civil Code arises.

230. As regards the claims in relation to the transfers to Ocean View PTC:

(a) the Plaintiff's claim under Article 244 of the Civil Code may be time-barred if YC or one of his heirs was aware of grounds for seeking revocation more than a year before February 2018, or (as regards Tony's claim) if one of YT's heirs was aware of a right to claim more than a year before February 2020. The same would be the case in relation to the claims under Article 18 of the Trust Law in relation to the transfers to the Ocean View Trust in March 2013;

(b) no claims arise under Article 179 of the Civil Code, but if they did they would not be time-barred.

231. All claims against D5, the Hung Estate, as regards the transfers to the Wang Family Trust and the China Trust in 2001 and 2002 are time-barred.

Mistake: Article 88 of the Civil Code

232. In Section VI of Professor Su's Report, he addresses the mistake-based claims under Taiwanese law, namely Article 88 of the Civil Code. Article 88(1) is set out as follows:

> "*If the expression [i.e. 'expresser'] was acting under a mistake as to the contents of his expression of intent, or had known the situation of affairs, he would not make the expression; he may revoke the expression; provided that the mistake or the ignorance of the affairs was not due to his own fault.*"

233. The Professor opines that even if the Founders' consent were to be vitiated by reason of mistake and *void ab initio* as a result pursuant to Article 114 of the Civil Code, this would not invalidate the transfer of assets to the First Four Bermuda Purpose Trusts.

Article 244 of the Civil Code

234. Professor Su opines that Article 244 of the Civil Code creates a remedy for prejudiced creditors to set aside gratuitous transfers. Although he believes any such claim is clearly time-barred, he opines that Article 244 would not in any event apply to the Hung Arrangement. This is because a Taiwanese court would conclude that the arrangement gave rise to a trust so that the Trust Law would govern it. However, if Article 244 did apply, he does not believe the Plaintiff and/or D8 could establish that the Founders were creditors and Mr Hung was a debtor because, as regards the transfers to the First Four Bermuda Purpose Trusts, the Hung Arrangement continued after the transfers were made.

Article 18 of the Trust Law

235. On the basis of assumed facts, Professor Su concludes that a Taiwanese court would find that the Hung Arrangement was governed by the Trust Law. Article 18 of the Trust Law critically provides:

> "*The beneficiary of a trust shall have the right to apply to the court for revocation of the disposal of trust property, if the property has been disposed of by [the trustee] in violation of the stated purpose of the trust. If there is more than one beneficiary, the motion for revocation may be filed by one of the beneficiaries…*"

236. He then opines that if the Hung Arrangement was for purposes, YC and/or YT would not be beneficiaries, accepting that if it was a hybrid purpose/beneficiary trust, they would have standing to bring an Article 18 claim. They would then have to prove:

(a) that Mr Hung disposed of the assets "*in violation of the stated purpose of the trust*"; and

(b) that the Trustees either knew or were grossly negligent in failing to realise that such violation of purpose had occurred.

Unjust enrichment

237. Professor Su opines that the Wrongful Transfer Claims under Taiwanese law would be governed by Articles 179 to 183 of the Civil Code. He opines:

"*164. As a starting point, the statutory language therefore requires a plaintiff to establish the following elements:*

(a) the recipient received a benefit;

(b) without a legal basis or ground; and

(c) *the plaintiff was damaged thereby.*

165. Depending on whether the recipient knew of the lack of legal basis for the transfer, and depending on whether the recipient has retained the benefit of the interest that was transferred, the recipient may then be required to provide restitution or compensation to the plaintiff…"

238. Based on the assumed facts, the Trustees' expert opines that claims under Article 179 against the Bermuda Purpose Trusts would not succeed. As regards claims based on the termination of the Hung Arrangement in 2008 under Articles 182-183, Professor Su opines that termination at that date cannot possibly impact on the First Four Bermuda Purpose Trusts, as contrasted with Ocean View Trust where the arrangement is said by D8 to have terminated on, *inter alia*, the date when YT lost capacity.

The Hung Arrangement

239. Professor Su opines, based on a very elaborate analysis, that the arrangement would be governed by the Trust Law. However, he accepts that it could be viewed as a nominee

arrangement or Contract of Mandate and deals with the various points relied upon by Dr Wong and Tony Wang in this regard, concluding:

(a) the requirement for writing under Article 531 of the Civil Code would not apply if the Hung Arrangement is a pre-1996 Trust Arrangement;

(b) whether joint instructions were required would depend on the terms of the Contract of Mandate if this is what the Hung Arrangement is characterised as;

(c) although the default presumption under Article 550 of the Civil Code is that the death of a party to a mandate agreement terminates it, this presumption could be displaced by contrary terms in the agreement or by the character of the mandate being inconsistent with termination on death;

(d) Article 541 of the Civil Code, which essentially requires a mandatory to transfer all rights and interests which he acquires to his principal states the default position, which may be displaced by the terms of the relevant agreement.

Claims in respect of Ocean View

240. Professor Su opines on the relevant legal issues as follows:

(a) YT could have validly authorised the transfers to the Ocean View Trust through the Oral Mandate, and no writing was required to give the relevant instruction;

(b) there is a presumption under Taiwanese law that a person over 7 years old who is not subject to guardianship has legal capacity, unless it is shown they were at the material time subject to either a "*condition of unconsciousness or mental disorder*" (Article 75);

(c) Article 550 does govern termination of a mandate contract on the grounds of loss of capacity and Article 8 of the Trust Law governs the effect of a loss of capacity on a trust ;

(d) a Taiwanese court would probably construe the Oral Mandate as being an enduring one which would not terminate on YT's loss of capacity.

Proprietary Rights under Taiwanese Law

241. Professor Su opines as follows:

(a) Taiwanese law does not distinguish between legal and beneficiary ownership (Articles 765-767 of the Civil Code);

(b) prior to January 1996 when the Trust Law was enacted, a trustee was regarded as the owner of the property and the settlor/beneficiary had no enforceable ownership rights. The position is the same under the Trust Law so that the trustee has the right to transfer the trust assets as long as he does not violate the terms of the trust;

(c) under a nominee relationship the nominee has full rights of ownership. Under a Contract of Mandate, who has title to the assets will depend on the terms of the agreement.

Article 242 of the Civil Code

242. In his Supplementary Report, Professor Su responds extensively to the suggestion that Article 242 applies to the present case, essentially on the grounds that it is solely a remedy to be invoked where no direct claims exist.

Impressions of the witness' oral evidence

243. Professor Su was expected to testify through an interpreter but boldly elected to give his evidence in English despite not having used the language in recent years. This was a well-judged decision as he was able (for the most part) to communicate quite competently taking care to seek clarification from counsel as to the meaning of complicated questions and reading the Chinese original of many legislative and judicial texts. Despite a generally more dry demeanour than his younger counterpart, whose opinions he either agreed or disagreed with in an equally respectful manner, Professor Su was often quite demonstrative, in his own distinctively dignified manner, in defending views which Mrs Talbot Rice QC vigorously challenged. While generally succeeding in discharging the functions of an independent expert, he occasionally strayed into the factual terrain and supporting the case of the parties who had called him.

244. The energy of the seemingly indefatigable Professor Su only seemed to flag somewhat during Professor Harris' cross-examination after 9.00pm Taipei time, on the fourth day of his testimony. However, over an hour later, while answering further questions by counsel arising from questions from the Bench, the Trustees' Taiwanese law expert required gentle encouragement to bring what threatened to be an enthusiastic 'mini-lecture' to an end at around 10.30pm Taipei time. Professor Su demonstrated an impressively deep and nuanced

understanding of the Civil Code generally as well as the particular statutory provisions he was required to address. He was an impressive witness overall.

Joint Statement of Legal Experts

245. The Joint Statement dated February 25, 2021 identifies the following issues of general and/or specific relevance as agreed:

(a) Taiwan does not have a system of judicial precedent in the strict sense. Although prior to December 7, 2018, certain Supreme Court decisions were accorded the status of precedents, they no longer enjoy any special status. On July 4, 2019, a new Chamber system for the Supreme Court was launched;

(b) the nominee contract discussed in their respective reports involves a nominee owning assets at the direction of another party;

(c) Article 544 of the Civil Code addresses the liability of mandataries: (1) in some mandate relationships, Article 531 of the Civil Code requires the act of conferring authority to be in writing; and (2) the level of care depends on whether a mandatary is remunerated (Article 535 of the Civil Code);

(d) loss of capacity to perform juridical acts must be enduring under Article 550 of the Civil Code and under Article 8 of the Trust Law;

(e) all of a party's conduct before and after the relevant expression of intent will be taken into account by a Taiwanese court in deciding what the true intention was under Article 98 of the Civil Code;

(f) the second sentence of Article 75 of the Civil Code is relevant to YT's case (assuming no guardianship order was made) and whether or not a person is "*in a condition of unconsciousness or mental disorder"* is to be decided on a case-by-case basis;

(g) for a claim under Article 242 of the Civil Code, (1) the creditor/obligee must have a non-time-barred claim against a defaulting debtor/obligor and (2) the debtor/obligor must have a non-time-barred claim against a third party;

(h) the estate stipulated in Article 1148 of the Civil Code is jointly owned by the heirs in the specific form prescribed by Articles 827-831 of the Civil Code;

(i) PITs can be established for purposes prescribed by Article 69 of the Trust Law. Approval under Article 70 from the competent authority is required, and this approval may be withdrawn under Article 77 of the same;

(j) the 15 year limitation period prescribed by Article 125 of the Civil Code applies to claims under Article 23 of the Trust Law, unjust enrichment claims under Article 179 of the Civil Code and damages claims under Article 544 of the Civil Code.

EXPERT EVIDENCE ON TAIWANESE TAX LAW

246. The Expert Report of Associate Professor Huang Shih Chou on behalf of the Plaintiff is dated December 7, 2020. He filed a Supplemental Report dated February 18, 2021. He was admitted to the Taipei Bar in 2001, received an LLM in Public Laws from the University of Taiwan in 2002 and a PhD degree in Public Law from the same institution in 2007. He has been an Associate Professor with the Tax Administration Faculty of the National Taipei University of Business since 2011, and has taught and published on Taiwanese tax law for over 10 years.

247. The Expert Report of Assistant Professor Chi Chung on behalf of the Trustees is dated December 23, 2020 and his Supplemental Report is dated February 12, 2021. He, *inter alia*, obtained an LL.B degree from the National University of Taiwan College of Law in 2000 and an LL.M degree from Harvard Law School in 2002. His Taiwanese academic experience includes service (between 2009 and 2018) as Assistant Research Professor for Institutum Iurisprudentiae, Academia Sineca and Adjunct Assistant Professor, 'Tax Planning and Transfer Pricing for Multinational Enterprises' in the Department of International Business, College of Management, National Taiwan University. He has published writings on Taiwanese tax law for over 10 years.

248. The Experts, following a meeting, prepared a List of Issues dated January 29, 2021 explaining that of the six issues addressed in Professor Chou's Report, only Issues 1 and 5 were in dispute, namely:

(a) whether income received by an individual from a PIT with a corporate trustee would be exempt from income tax (yes, according to Professor Chou, no according to Professor Chung);

(b) the extent to which the July 1, 2001 amendments to the Income Tax Act and the Estate and Gift Tax Act were generally known to those in the tax advisory

sector before that date. Broadly, Professor Chou contends that they were and Professor Chung contends that they were not.

249. In his Supplementary Report, Professor Chung articulates his position on Issue 1, in summary, as follows. Professor Chou cites no support for his Scenario A and B analysis and there is no legal support for it:

(a) Scenario A (a beneficiary receiving a distribution and having to report the income) would never arise because a PIT cannot have (private) beneficiaries;

(b) Scenario B (a beneficiary receiving a distribution for a charitable purpose and being exempt from paying income tax) is wrong in proposing that the charitable beneficiary would be exempt from income tax because the Income Tax Act expressly provides that such income received from a PIT is taxable (Article 3-4.5). Such a receipt would not qualify as a "gift". Any donation contract would be formed as between the settlor and the PIT, not between the PIT and the beneficiary, as would occur in the context of conventional trusts.

250. In his Supplemental Report, Professor Chou replies on Issue 1 in outline as follows:

(a) scholarships and/or tuition payments would be exempt from income tax under Article 4(1).8 of the Income Tax Act;

(b) qualifying payments to charities would be exempt under Article 4(1).13 of the Income Tax Act;

(c) qualifying payments to remunerate artistic, dramatic and literary work would be exempt under Article 4(1).23 of the Income Tax Act;

(d) Any other distributions within the charitable purposes of a PIT to individuals would fall within the gift exemption under Article 4(1).17 of the Income Tax Act.

251. Professor Chung in his Supplementary Report contests Professor Chou's assertions about the extent to which the 2001 tax changes were understood before their enactment in summary as follows:

(a) the uncertainty about the final legislative regime is reflected in the fact that the matter was carried over from one Legislative Yuan session to the next;

(b) the 1997 Draft Tax Legislation was described in a 1998 article by a Ministry of Finance Senior Executive Officer as "unpredictable". The 1999 Draft Tax Legislation was no more likely to be passed than its 1997 predecessor (which was not enacted).

252. Professor Chou in his Supplemental Report replies in relation to Issue 5 in summary as follows:

(a) many provisions in the 1999 Draft Tax Legislation were enacted without changes in 2001;

(b) the legislative progress of the 1999 Draft Tax Legislation shows that only one substantive change was made to the provisions dealing with trusts, the latter part of draft Article 3-4(6) of the Income Tax Act concerning undistributed earnings;

(c) although many legislative proposals are controversial, this was not the case in relation to the 1999 Draft Tax Legislation as far as the legal profession is concerned. This was because, *inter alia*, there were no rival drafts and the proposals were viewed as technical and uncontroversial and were adopted with little discussion.

253. On the morning of July 14, 2021 the Court was advised that neither expert would be required to attend for cross-examination.

EXPERT EVIDENCE ON BVI HISTORY

The Plaintiff's Evidence

254. The Expert Report of John Chenoweth, PhD is dated November 6, 2020. His Supplemental Expert Report is dated February 19, 2021. Professor Chenoweth is an historical anthropologist whose work focuses on the Caribbean and Colonial to 19th century United States. He obtained an MA in Anthropology from the University of Pennsylvania (2006) and his PhD from the University of California-Berkeley (2011). He conducted extensive research in the BVI between 2007 and 2017. His publications include '*Simplicity, Equality and Slavery: An Archaeology of Quakerism in the British Virgin Islands, 1740-1780*' (2017, Gainesville, Florida: University of Florida Press).

255. He explains the purpose and scope of his Report as follows:

"*2.1 I have been asked to produce a report containing my assessment of the date of settlement by the English of the British Virgin Islands (BVI), including a chronology of key events relating to the settlement of BVI. If I am not able to provide a precise date for such settlement having taken place I will give a date before which there was no such settlement or colonization. 'Settlement' or 'colonization' in this context is taken to mean: (1) that there was, within the Crown's dominion, a sufficient community of subjects of the Crown to call for legal regulation; and (2) that some form of governmental and legislative control had been set up (even if there was yet to be a formal legislature)…*"

256. Professor Chenoweth's critical finding is as follows:

"*3.1 It is my opinion that 'settlement' by a certain country (as distinct from transitory occupation or occupation by people acting without their government's approval or control) is suggested by some form of effective government (which, for the BVI, is lacking until at least 1683 and is inconsistent until the 1730s or later) and a long term, stable population (which, for the BVI, does not seem to appear until the 1690s or 1700s) primarily identifying and identified as subjects of that country (which post-dates the 1717 census in the BVI). Therefore, in any of the senses discussed more below, English 'settlement' of the BVI is not supported until at least 1683 and later by most measures.*"

257. In the Executive Summary to his Report, he sets out the basis for this conclusion in summary form. Distilling Professor Chenoweth's own summary even further, the principal points relied upon are as follows:

(a) Tortola changed hands several times but was occupied by Dutch citizens until 1672 when Colonel Stapleton seized the island (during the third Anglo-Dutch War) and destroyed its fort. However, no settlement took place at this time and, apparently, both Dutch and English residents were taken to St. Christopher's;

(b) under the Treaty of Breda (1667) and the Treaty of Westminster (1674), Tortola was supposed to have been returned to the Dutch. However Stapleton was instructed not to surrender the island and the Dutch did not initially demand its return. Between 1683 and 1688, an English Deputy Governor was appointed, but no clear attempts at settlement were made;

(c) in early 1684 the Dutch began to demand the return of Tortola. In November 1686, the Governor of the Leeward Islands was instructed to surrender Tortola to the Dutch. The ascension of William of Orange to the English throne in 1688 may have dampened enthusiasm for the handover which did not occur;

(d) as late as 1698 Governors of the Leeward Islands were being instructed to prevent settlement of the Virgin Islands which were at most informally occupied by a few families. Settled populations existed from 1700, but there were no effective courts or consistently appointed Deputy or Lieutenant Governors until 1740. A full legislature was not created until 1773, and permanent courts were only established in 1778.

258. In his Supplementary Report, Professor Chenoweth reinforces these points in light of points raised by the Trustees' Expert.

Impressions of the witness' oral evidence

259. Professor Chenoweth, despite his strikingly youthful appearance, quickly demonstrated that he deserved the "expert" label. At the beginning of his cross-examination by Mr Adkin QC, he readily accepted that his main expertise was anthropology and archaeology rather than mainstream history, explaining that his work required him to assess historical evidence. Significantly, his special area of interest was BVI. He parried some questions designed to undermine his central conclusions on the date of settlement skilfully. For instance, when asked to identify a landmark date, he responded[56]:

> "*A. I think I could make an argument for several different landmark dates. I think it's important to remember that at this time -- and that we are very far on the margins of the colonial world here and that people were moving back and forth without regard to the governments that they were supposed to be listening to and that they were coming and going from various islands without regard to who claimed them. A number of different countries claimed many different parts of the Caribbean all at this same time, overlapping and competing claims. If you were a Spanish historian, you might point to their early claims of the whole of the New World as the founding moments of the BVI. I would favour -- you know, if pressed to pick specific moments, I would favour those that suggest that a stable, long-term population in the exercise of some form of government by the English over that land.*"

260. His analysis, as I understood it, was centred on evaluating the quality of English settlement after the obviously pivotal events of 1672 when English control over Tortola was clearly asserted. His keenness to defend this central thesis sometimes resulted in him

[56] Transcript Day 61, page 7 lines 2-19.

occasionally adopting what seemed to me to be obtusely unrealistic views of some parts of the historical record[57]. Indeed, in a seemingly obvious Freudian slip, he started to describe the events of 1672 as a conquest before hastily re-characterising them[58]. Nonetheless I found Professor Chenoweth to be an impressive witness overall.

The Trustees' Evidence

261. The Expert Report of Professor Christian J. Koot (pronounced 'Koat") is dated November 5, 2020 and his Supplemental Report is dated February 19, 2021. He is a Professor of History at the University of Towson, Maryland and Chair of the History Department. He obtained an M.A. in History from University of Virginia in 2001 and a PhD in History from the University of Delaware in 2005. He has specialised in the history of the Leeward Islands, and published more broadly on the history of the British and Dutch Caribbean in the 17th and 18th centuries. His publications include '*Empires at the Periphery: British Colonists, Anglo-Dutch Trade, and the Development of the British Atlantic, 1621-1713*' (New York University Press: Early American Places Book Series, 2011).

262. In his Executive Summary, Professor Koot opines that although the BVI were included in a grant by Charles I in 1627, no permanent settlement occurred until 1648 when the Dutch West India Company granted Tortola to two Dutch traders, who founded a permanent settlement. Their interest passed to William Huntum. However in 1672, Leeward Islands Governor William Stapleton conquered the island and established English sovereignty over it. Although returning the territory to the Dutch was contemplated, this never occurred:

> "*23. Tortola therefore remained under English control throughout the 1680s and 1690s. In the 1690s, Huntum's heirs sold their purported interest in Tortola to a Rotterdam merchant, Sir Joseph Shepheard, who (through the Elector of Brandenberg, Frederick III) renewed the Dutch claim to Tortola. On the advice of the Council on Trade and Plantations (also referred to in this Report as the Lords of Trade and Plantations or the Lords of Trade), the Brandenberg claim was rejected by William III in 1698 on the grounds that, although 'Tortola was in possession of the Dutch' originally, it had been 'recaptured by Sir William Stapleton in 1672, not entrusted to him, as the envoy maintains'. The English therefore retained control of Tortola, as they had done since their conquest in 1672.*"

[57] Transcript Day 61, page 26 lines 6-20; page 50 line 17-page 51 line 9; page 76 line 23 –page 77 line 9.
[58] Transcript Day 61, page 24 line 22-23.

263. As far as governance is concerned, Professor Koot concludes (paragraph 85):

> "*(j) Civil Government was disorganized but the BVI came under the jurisdiction of the Governor General of the English Leeward Islands from its conquest in 1672 onwards and its appears that laws passed by the General Assembly of the Leeward Islands (first established in 1674) may have applied to the BVI. The BVI had Deputy Governors and councils from the 1730s and a local elected Assembly briefly in 1735 and then again from 1774 onwards*…"

264. In his Supplemental Report, Professor Koot reaffirms his initial findings that the BVI were settled by the English Crown without being abandoned from 1672.

Impressions of the witness' oral evidence

265. Professor Koot appeared, consistently with the date of his academic qualifications, to be somewhat more mature than his expert counterpart. Whether by dint of personality or the difference between the disciplines of anthropology and history, he testified in a more relaxed and expressive manner. Under cross-examination by Mr Hagen QC, he confirmed that teaching was his primary area, followed by "*dissertation research*". He acknowledged that in his own main book, '*Empires on the Periphery*', he had cited Professor Chenoweth's work. He predominantly gave his evidence in a fair manner and clearly understood his role as an expert[59]:

> "*I see my job as trying to help the court understand these moments, right, and what I see from the totality of the evidence, right , not just the comments about the Treaty of Breda or the text of the Treaty of Breda, but when I look as a historian at the totality of the evidence from 1672, what I see is a military conquer, what I see is an attempt to - -like I report - -like I say in my reports, an attempt to attack. I think that fits the evidence best.*"

266. As regards explaining the basis for regarding 1672 as a significant date in terms of British settlement without regard to the particularities of the quality of occupation at all times thereafter, he most pertinently stated[60]:

> "*…history is hindsight-based. That's - - things happen and then the meaning of them changes based on what happens after them.*"

[59] Transcript Day 61, page 155, lines 2-10.
[60] Transcript Day 61, page 166 lines 22-24.

267. The most significant demonstration of his independence came when he made the following concession[61]:

> "*Q. The statement in your first report that Tortola has been continuously inhabited by English colonists since at least 1672 is at best speculation and probably wrong. Do you agree?*
>
> *A. I think it's - - it's probably overstatement.*
>
> *Q. Thank you. The same would go for the words 'a permanent English occupation of Tortola which began in 1672'?*
>
> *A. I - - that probably goes too far*."

268. I found Professor Koot to be a very impressive witness overall.

EXPERT HANDWRITING EVIDENCE

D8's Expert Evidence

269. Ms Chang Yun Chi's Expert Report is dated March 31, 2021. Her Expert Supplemental Report is dated April 29, 2021. She has a BA degree from the National Central Police University Taiwan and an MSc degree from the University of Central Lancashire, Department of Document Analysis. After nearly 30 years of experience in the field of forensic document analysis with the Ministry of the Interior in Taiwan, she established her own consultancy (Yun Chi & Associates Consultancy) in 2015. She has written and delivered training on her subject and in 2019 founded the Association of Forensic Document Association in Taiwan.

270. Her Report addresses the report dated July 26, 2012 (the "July 26, 2012 Report") and the October 31, 2012 POA (together the "Questioned Documents" and individually Q1 and Q2 respectively) and their respective signatures (together the "Questioned Signatures" and individually Q1-1 and Q2-1 respectively). Her Executive Summary records the following findings:

> "*3.1 In relation to both of the Questioned Signatures, I have been significantly impeded in my investigations by the absence of any comparison signatures from 2012. Nevertheless, on the basis of the material with which I have been provided, I have been able to reach clear conclusions as follows.*

[61] Transcript Day 61, page 227 lines 12-19.

3.2 In relation to Q1-1: for the reasons set out below, it is my opinion that, on the balance of probability, that YT Wang did not write that signature;

3.3 In relation to Q2-1: for the reasons set out below, it is my opinion that, on the balance of probability, that YT Wang did not write that signature."

271. Her findings were based on the following main conclusions:

(a) the Questioned Signatures reflected different writing habits from those in the Sample Signatures;

(b) the Questioned Signatures exhibited signs of simulation;

(c) the fingerprint was impressed in a way consistent with the document being upside-down;

(d) although the Questioned Signatures were both written using ballpoint pens, the expected pressure points on the reverse side of the documents were missing;

(e) the baseline was drawn in pencil after rather than before the signature itself.

Impressions of the witness' oral evidence

272. Ms Chang generally maintained a fair balance between seeking to support the conclusions reached in her reports and providing independent evidence to assist the Court. While Mr Howard QC occasionally suggested that she was not answering questions directly, it usually emerged that D8's expert objected to the premises underlying some questions on what appeared to be reasonable principled grounds[62]. On the other hand she did not quibble with various points made in published articles to which she was referred. When questioned further about the significance of the gap in time between the sample signatures and the Disputed Documents, however, she did appear to be seeking to row back somewhat from the opinion set out in paragraph 4.6 of her Expert Report[63].

273. Ms Chang was clearly a handwriting expert with considerable experience and skill and I found her to be an impressive witness overall.

The Trustees' Expert evidence

[62] E.g. Transcript Day 62, page 15 line 12-page 16 line 6.
[63] Transcript Day 62, page 38 line 8 page 41 line 12.

274. Professor Hu-Sheng Chen's Expert Report is dated March 31, 2021. His Supplemental Expert Report is dated May 4, 2021. Since 2004, he has been (a) Professor in the Department of Communication Information, Chinese Culture University, and (b) Adjunct Professor in the Department of Forensic Sciences, Central Police University of Taiwan. He has LLB and LLM degrees from the Central Police University, and a PhD from Strathclyde University. He has written on the subject of handwriting analysis, which is one of his areas of expertise.

275. Professor Chen provides a general introduction to handwriting before describing his methodology and analysing the signatures on the July 26, 2012 Report and the POA (together, the "Two Disputed Documents") in light of the "Sample Signatures". He takes into account Professor Chiu's medical expert reports in relation to YT. He concludes:

> "*75. In light of my general observations concerning the 31 Sample Signatures…and the two Disputed Documents containing YT Wang's signature…and my precise examination…I conclude that it is almost certain that the signature on the July 2012 Report, the signature on the Power of Attorney and the 31 Sample Signatures were all written by the same individual.*"

Impressions of the witness' oral evidence

276. Professor Chen, under cross-examination by Mr Wilson QC, explained that his work encompassed three elements: (a) teaching, (b) research, and (c) handwriting examination work. He fairly acknowledged that Ms Chang's practical experience was greater than his own. Professor Chen ultimately maintained an appropriate balance between a natural inclination to defend the opinions set out in his reports with his duty to provide independent assistance to the Court. However he initially appeared to allow himself to become a little riled by Mr Wilson QC's typically robust cross-examination style. I had to direct the witness to answer factual questions more directly[64]. Because of pressure of time, Professor Chen was somewhat rushed through a series of questions about "unique" handwriting characteristics. He fairly accepted that a somewhat broader definition than the standard meaning of "unique" was possibly required.

277. He generally testified in a clear and reasoned manner. Under re-examination he explained that he had worked on approximately 120 handwriting cases per year over a 29-year period. Professor Chen was an impressive expert witness overall.

[64] Transcript Day 62, page 105 line 5-page 106 line 13.

EXPERT MEDICAL EVIDENCE ON CAPACITY

D8's evidence

278. Professor Robin Jacoby's Medical Report on YT is dated January 5, 2021. Professor Jacoby is Emeritus Professor of Old Age Psychiatry at the University of Oxford and has now retired from clinical practice. He is a Doctor of Medicine (Oxford) and a Fellow of the Royal College of Psychiatrists. He started work as a medical doctor in 1971, but became a psychiatrist in 1974 and a consultant in 1980. He became a Professor of Old Age Psychiatry in 1998. He has given medico-legal reports in more than 370 mental capacity cases, including over 20 reported (mostly) English cases.

Summary of conclusions

279. He summarises his opinions as follows:

(a) YT was diagnosed with "*mild Alzheimer's disease*" in 2007. By the end of 2011 and into 2012 there is clear evidence that he was suffering from dementia. This was exacerbated by seizures he suffered in late 2011 which also accelerated his mental decline. In mid-2012 he was suffering from carcinoma of the lung which physically weakened him;

(b) his dementia was characterised by, *inter alia*, his understanding of language, facial recognition, judgment and social control;

(c) YT lacked capacity by reason of dementia to approve the July 26, 2012 Report relating to his affairs and the October 31, 2012 POA. He was also incapable of assenting to the creation of the Ocean View Trust on January 11, 2013.

280. Although he has general regard to the legal test for capacity under the Mental Capacity Act 2005 (England and Wales), he states that he has been instructed as regards the Bermuda and BVI legal position to assume that:

(a) "*the relevant question is the ability to understand the transaction in question*" rather than whether it was actually understood; and

(b) "*the degree of understanding required…is relative to the nature of that transaction*".

Basis for conclusions

281. Professor Jacoby's Report is primarily based on translations of medical and nursing records from 2011-2012; however, he has also considered a November 22, 2007 Mini-Mental State Exam. That assessment did not confirm dementia but suggested the development of the disease which subsequently occurred. He quotes from the medical notes (paragraphs 26 to 27) and the caregivers' reports (paragraphs 51 to 69). The Professor also viewed video clips of YT dated December 2011 and February 2012, all of which show the patient with a vacant expression on his face.

Diagnosis

282. Professor Jacoby opines that dementia:

> "*…is a clinical syndrome, i.e. not a pathological diagnosis. In other words dementia is a collection of clinical signs and mental state phenomena, but not an underlying disease process. The main underlying disease processes which cause dementia in this country are Alzheimer's disease and cerebrovascular disease, although there are very many other causes…*" (paragraph 74)

283. He cites the World Health Organization's definition of dementia in its International Classification of Diseases (ICD-II), 2019 and notes: "*The important thing to note in this definition is that to sustain a diagnosis of dementia there must be 'impairment in two or more cognitive domains' and not just memory*." In Alzheimer's disease, two abnormal proteins are deposited on brain tissue and destroy nerve cells and their connections. Most cases of cerebrovascular dementia are caused by Small Vessel Disease (SVD) with brain tissue being starved of oxygen resulting in cell death.

284. As regards delirium, he describes this condition as "*a global impairment of multiple higher cortical functions*". Professor Jacoby also cites the ICD-II definition, and notes that its onset can take place over a short period of time and that it is a variable condition. He also opines that:

> "…*Older people are at a particular risk of delirium because they lack cerebral reserve. Dementia sufferers are at a high risk of delirium, often as a result of an underlying infection, such as of the urinary tract. Delirium is sometimes termed 'an acute confusional state' by physicians and surgeons.*" (paragraph 79)

285. The Professor's specific diagnosis is set out at paragraphs 80-91 of his Report. He critically records the following conclusions:

"*84. The underlying cause of the dementia is not as important in this case as the fact that the Deceased had dementia and what its severity was. As to severity, we are hampered by not having any results of cognitive tests or other specific clinical details, apart from the single Note in 2007. For the following reasons I conclude, on the balance of probability, that his dementia was at least moderately severe at the material time, and probably in fact severe.*"

286. He considers it unlikely delirium played a significant role in the relevant events in this case as if YT had been suffering from delirium at the relevant time(s) this would have been obvious to those dealing with him.

287. Professor Jacoby prepared a Supplemental Report dated March 12, 2021 which, in light of Professor Helen Chiu's responsive Report, addressed certain additional medical and nursing notes. These notes confirm his initial dementia diagnosis and his initial conclusions are not affected by the witness statements of Attorney Chang and Dr C. Wang.

Impressions of the witness' oral evidence

288. Professor Jacoby appeared to me to be the most experienced expert witness in any discipline to testify in the present trial, measured by reference to the number of times he has provided expert testimony (primarily before English courts). He clearly understood his role as an expert. He fairly admitted that any retrospective capacity assessment is necessarily imprecise. More importantly, he acknowledged that he had reviewed a narrower range of documents than Professor Chiu in that:

(a) he was provided a narrower range of documents to review overall; and

(b) as regards the voluminous nursing reports originally written in Chinese, he initially reviewed only the more summary weekly reports rather the more detailed daily reports[65].

289. Despite being shown various records which he had not previously taken into account, he was unwilling to resile from his initial conclusion that YT was suffering from severe rather than mild or moderate dementia and probably lacked capacity to execute the POA. On the other hand, he was very fairly willing to acknowledge that specific inferences he had drawn from individual documents could not be sustained on a fuller analysis[66]. I found his suggestion that it was not customary to challenge an opposing expert's report in one's

[65] E.g. Transcript Day 62, pages 151 lines 5-16 and 154 lines 17-24.
[66] E.g. Transcript Day 62, page 236 line 18-page 238 line 16; Day 63 page 22 lines 16-25.

supplemental report, based on his experience in the English Probate Division, surprising[67]. However in response to questions from the Bench at the end of his re-examination, he admitted that the way he dealt with, *inter alia*, his Supplemental Report had been influenced by a family bereavement he was affected by at the relevant time.

290. In general terms I found Professor Jacoby to be an impressive expert witness.

The Trustees' evidence

291. Professor Helen Chiu's Expert Report is dated January 8, 2021. She is Emeritus Professor of Psychiatry at the Chinese University of Hong Kong. Her clinical work spans some 40 years and she currently treats psychogeriatric patients and includes 25 years as Head of the Psychogeriatric team at Shatin Hospital, Hong Kong. Her academic work spans 30 years and her special research interest has been Dementia and Cognitive Assessment. She has published (locally, regionally and internationally) extensively on the topic. In addition to her Hong Kong medical and psychiatric qualifications, she is also a Fellow of the Royal College of Psychiatrists having trained in the Cambridge University Department of Psychiatry. Although her native language is Cantonese, she reads and writes Mandarin and is also proficient in English.

Documents reviewed

292. In addition to witness statements and videos, Professor Chiu reviewed the following records:

(a) all the medical files disclosed between 2006 and February 2013 (50 lever arch files);

(b) nursing records covering four periods in 2008, one period in 2010 and finally the period covering January 1, 2012 - November 2, 2012 (15 lever arch files).

Summary of conclusions

293. Professor Chiu summarises her conclusions in relation to YT's capacity to execute the POA as follows:

(a) YT's clinical position on October 31, 2012 indicates mild to moderate dementia on the CDR scale. Between January 1 and November 2, 2012, he "*demonstrated on a number of occasions sufficient ability, to understand situations and*

[67] Transcript Day 62, page 157 line 13-page 172 line 6; page 178 line 21-page 180 line 6.

information, to exercise reasonable judgment as to the effect of an act and to adequately communicate with others and express his wishes" (paragraph 24(b));

(b) applying the Taiwanese law test, on the balance of probabilities YT had capacity because his mental disability was not such as to make him unable to understand the effect of the document he executed and which is said to have been explained to him by Attorney Chang;

(c) applying Tony Wang's test, on a balance of probabilities he had sufficient ability to "*judge, recognise and anticipate, his own actions and their effects*" in executing the POA as explained to him.

Key concepts underlying assessment

294. The key concepts deployed in the Trustees' Expert's Report include the following:

(a) a functional approach rather than a status approach has been adopted because "*capacity is issue or decision-specific as well as time-specific, and the ability of the person to understand the nature of an issue, to judge its effect and to communicate a decision is more important than the actual diagnosis of the person's decision*" (paragraph 31);

(b) the nature of dementia, the relevance of culture to certain tests, the CDR (Clinical Dementia Rating) test and its limitations in YT's case are explained. Behavioural and Psychological Symptoms of Dementia are said to be very common;

(c) however, care in diagnosis is called for because of YT's other medical conditions, because he may have displayed symptoms of weakness, disinterest and inability to care for himself without regard to his cognitive abilities.

Assessment of mental capacity

295. A detailed assessment of mental capacity is set out with reference to medical and nursing notes. Professor Chiu concludes:

"*160. In conclusion, I am of the view that YT's clinical picture was consistent with a mild to moderate stage of dementia (by reference to the CDR staging) in the period from January to 31 October 2012, and indeed through to 2 November 2012. YT demonstrated sufficient ability to understand situations and information, reasonable judgement of the effect of an act, adequate communication with others and the ability to express his wishes on a number of occasions in 2012, including*

in the period from 18 September to 2 November 2012. On this basis, I am of the view that, on the balance of probabilities, the mental disability from which YT suffered was not such as to cause YT on 31 October 2012 to be unable to discern the effect of his act in executing the POA when that POA was, as I understand, explained to him by Attorney Chang."

296. In her Supplemental Report, she explains, *inter alia*, the advantages she believes she had over Professor Jacoby in particular through her (a) reviewing vastly more material and (b) ability to pick up nuances through reading records in their original Chinese language.

Impressions of the witness' oral evidence

297. Professor Chiu, unsurprisingly for an experienced specialist medical practitioner, clearly appreciated her role as an expert and mostly gave her evidence in a balanced manner. She admitted that she had, in her reports, selected evidence to support her main conclusions. She was willing under cross-examination by Mr Wilson QC to accept, where appropriate, that on further analysis some inferences which she had drawn from the records might not be entirely accurate[68]. She fairly accepted that the capacity issue fell to be determined based on YT's condition on the date the POA was executed, whether influenced by dementia, medication, fatigue or other factors[69].

298. Throughout she displayed a masterful command of the material she had reviewed. For instance, she refused to entirely accept that she had understated the significance of YT's mistaken identification of a railway station as the airport because these mistakes were made on the way to the hospital, but not on the way back.[70] Although she did not shift from her view that YT's dementia was mild to moderate, she did accept that the critical issue of whether he understood the POA turned in large part on what type of explanation about the document was given by Attorney Chang. How detailed the explanation needed to be turned on whether or not YT had previously considered conferring similar authority on his eldest son[71].

299. I found Dr Chiu to be a very impressive expert witness.

Joint Statement of Medical Experts

300. In their Joint Statement dated January 31, 2021, the following issues were agreed:

[68] E.g. Transcript Day 63, page 140 lines 17-23; Transcript Day 64 page 17 lines 7-15.
[69] Transcript Day 63, page 154 lines 1-15. Also see Transcript Day 64 page 40 line 22-page 41 line 9.
[70] Transcript Day 64, page 23 line 25-page 24 line 12.
[71] Day 64, page 125 lines 16-25.

(a) by 2012 YT was "*suffering from mixed dementia with a pathology of vascular dementia and Alzheimer's disease*";

(b) a retrospective analysis requires reliance on medical and nursing records. Witness statements have not been relied upon;

(c) a retrospective analysis will likely limit the precision of any conclusions reached;

(d) there are limitations to the use of the generally useful CDR tool for measuring the severity of dementia in a retrospective analysis;

(e) Professor Chiu has read and considered more medical and nursing records than Professor Jacoby.

THE APPLICABLE LAWS ISSUES

The main issues

301. The governing law issues may be summarised as follows:

(a) whether the "firewall" provisions of section 10 of the 1989 Act (in its pre-2020 iteration) mean that Bermuda law applies to the want of authority claims asserted in respect of the First Four Bermuda Purpose Trusts;

(b) which law governs the Hung Arrangement and accordingly applies to the determination of the want of authority claims asserted against Mr Hung's Estate in respect of his transfers to each of the Bermuda Purpose Trusts;

(c) (1) which law governs the formalities for the transfer of the equitable interests in the BVI shares to the China, Vantura and Universal Link Trusts which were not evidenced by writing, (2) if BVI law applies, whether the Statute of Frauds forms part of BVI law and (3) whether the impugned transfers are void because the Founders were required to transfer their equitable interests in the relevant shares in writing and failed to do so.

he Plaintiff's submissions

Summary

302. Mr Hagen QC presented the oral applicable law submissions of the Plaintiff with his typical skill and vigour. The arguments were summarised in his client's Closing Submissions as follows:

> "*In short, Dr Wong's position on applicable law is as follows:*
>
> *462.1 s.10(2) of the 1989 Act in the form in force when this action was issued falls to be applied in these proceedings (see paragraphs 463–473 below);*
>
> *462.2 as for s.10(2):*
>
> > *(a) properly construed, s.10(2) concerns all questions of dispositions into a Bermudian trust and is not limited to questions of capacity of the settlor, so requires the application of Bermudian law to Dr Wong's claims in lack of authority, mistake and undue influence (see paragraphs 474–492 below);*
> >
> > *(b) even if s.10(2) is limited to questions of capacity of the settlor, that encompasses Dr Wong's claim that Mr Hung lacked authority to transfer the assets to the Purpose Trusts and therefore did not have capacity to do so (see paragraph*[s] *493–494 below);*
> >
> > *(c) none of the derogations to s.10(2) are engaged (see paragraph 495 below), although even if they did that would not change the result that Bermudian law governs the questions whether the dispositions may be set aside (for mistake and undue influence) and the Founders' rights against the PTCs (in the case of the want of authority claim);*
>
> *462.3 if contrary to the above submissions, s.10(2) does not require the application of Bermudian law to Dr Wong's claims in lack of authority, mistake and undue influence or any of them:*
>
> > *(a) Bermuda's common law choice of law rules lead to the application of BVI law to those claims, because the true issue between the parties is whether the transfers should be set aside for mistake or undue influence or are invalid, and questions of the transfer of property are governed by the lex situs, BVI law (see Section K3 below). That is a simple and clear test to apply, and the Court need go no further (see paragraph*[s] *498–507 below).*
> >
> > *(b) however, to the extent an issue arises between the parties as to the nature of the interest which the Founders had in the BVI Holding Companies prior to their transfer (which it does not, except possibly in relation to the claim under s.9 of the Statute of Frauds):*

(i) that issue is a property issue, so is governed by the lex situs, BVI law, under which the Founders had an equitable interest in the BVI Holding Companies (see paragraphs 508–519 below);

(ii) alternatively that issue is a trust issue, so Part I of the 1989 Act (which sets out the choice of law rules for trust issues) applies and also leads to the conclusion that BVI law governs that interest (see paragraphs 520–541 below);

(iii) even if, contrary to the foregoing, that issue is a Taiwan law issue, Bermudian/BVI law would, upon examining the nature of those Taiwanese law rights, conclude that they are in substance equivalent to a beneficial interest and treat them as such for the purposes of Dr Wong's claims (including his claim under s.9 of the Statute of Frauds). Such an approach is consistent with a long line of authority (see paragraphs 542–545 below);

(iv) it is common ground that even if Taiwan law governed the rights the Founders had to the BVI Holding Companies prior to their transfer, at common law BVI law governs the issue whether "any rights that YC and YT Wang had can be exercised against the Trustees". Even taking the PTCs' case at its highest, Taiwan law plays a minimal role (see paragraph 546 below).

462.4 as for limitation periods:

> *(a) if Bermudian and/or BVI law governs the claims in their entirety, Bermudian and/or BVI limitation law applies;*
>
> *(b) even if a separate choice of law issue arises regarding the nature of the Founders' interest in the BVI Holding Companies prior to their transfer (which it does not), and even if Taiwan law governs that issue (which it does not), Taiwan law would not govern limitation. The law governing the Founders' rights against the PTCs (this is agreed to be BVI law) also applies to any limitation defences raised by the PTCs in response to those rights (see paragraphs 555–567 below);*
>
> *(c) even if Taiwan limitation law did prima facie apply (which it does not), the limitation periods in Articles 90 and 245 of the Taiwan Civil Code and Article 19 of the Taiwan Trust Act ought to be disapplied under s 34B of the Limitation Act 1984 (see paragraphs 568–577 below).*"

Section 10(2) of the 1989 Act

303. It was firstly submitted as follows:

> "*463. Section 10(2) of the 1989 Act (leaving aside its prospective repeal) provides as follows:*
>
> *All questions as to the capacity of any settlor arising in regard to a trust which is for the time being governed by the law of Bermuda or in regard to any disposition of property upon the trusts thereof are to be determined according to the law of Bermuda without reference to the law of any other jurisdiction with which the trust or disposition may be connected except that this subsection:*
>
> *(a) does not validate any disposition of property which is neither owned by the settlor nor the subject of a power in that behalf vested in the settlor, nor does this subsection affect the recognition of foreign laws in determining whether the settlor is the owner of such property or the holder of such power*
>
> *[…]*
>
> *(d) does not affect the recognition of foreign laws prescribing generally (without reference to the existence or terms of the trust) the formalities for the disposition of property."*

304. The position set out in the Plaintiff's Opening Submissions (at pages 191-198) as to why the version of section 10(2) introduced by way of amendment on August 5, 2020 did not apply to the present claims was reiterated in summary form. The simple and straightforward submission was that the new law was not expressed as having, and accordingly should not be construed as having, retrospective effect so as to deprive the Plaintiff of the benefit of the law that had governed his claims over nearly 20 years up to and including the date of the commencement of the present proceedings.

305. The kernel of the substantive construction dispute on the original section 10(2) was distilled as follows:

> "*476. The dispute between the parties, as those representing Dr Wong understood the PTCs' opening submissions, as to the meaning of those words, may be described as follows:*
>
> *476.1 The PTCs contend that the reader should break up the language as follows (with the added Roman numerals in red):*
>
> *All questions as to the capacity of any settlor arising (i) in regard to a trust which is for the time being governed by the law of Bermuda or (ii) in regard to any*

disposition of property upon the trusts thereof are to be determined according to the law of Bermuda without reference to the law of any other jurisdiction with which the trust or disposition may be connected.

476.2 Dr Wong contends that the reader should break up the language as follows (with the added Roman numerals in red):

All questions (i) as to the capacity of any settlor arising in regard to a trust which is for the time being governed by the law of Bermuda or (ii) in regard to any disposition of property upon the trusts thereof are to be determined according to the law of Bermuda without reference to the law of any other jurisdiction with which the trust or disposition may be connected.

On Dr Wong's reading, all claims to recover property disposed of upon the trusts of a Bermudian trust are to be governed by the law of Bermuda without reference to any other jurisdiction with which the trust or disposition may be connected (subject to the derogations at section 10(2)(a) to (f)); this would embrace as Bermuda law issues, all claims in undue influence, mistake and want of authority pursued in the action."

306. It is, *inter alia*, further submitted:

"*484. The derogations in ss.10(2)(a)–(f) supply an additional strong indication that Dr Wong's reading of the general provisions of s.10(2) is the correct one. This point derives from the fact that the exceptions are copied (almost) verbatim from s.90 of the Cayman Islands Trusts Law which had been brought into force only two years prior to the 1989 Act in 1987, and which legislation was unquestionably influential in Bermuda's decision to enact the 1989 Act.*

485. The general provisions of s.90 of the Cayman Islands legislation undoubtedly mandate that all questions in regard to (among other things) any disposition of property upon a Cayman Islands trust are to be determined under the laws of those Islands (which would cover claims in lack of authority, mistake and undue influence). The exceptions are tailored to that general provision; so too in Bermuda.

486. A further strong indication that Dr Wong's interpretation of s.10(2) is the correct one is derived from the wider context of Bermuda's legislation. The Hague Trusts Convention was made law by the extension to Bermuda of the Recognition of Trusts Act 1987 (Overseas Territories) Order[1187]*, which came into force in June 1989 shortly before the 1989 Act. The Convention was not extended to the Cayman Islands*[1188]*, which may be enough to explain why the Cayman Islands needed its choice of law legislation, but it does not explain why Bermuda did unless Bermuda was seeking to go further in its choice of law code than the Hague Convention had mandated.*

487. The Hague Convention only contains choice of law rules for a trust once it has been set up and the assets in it have been validly transferred to it. The Hague Convention explicitly does not apply to preliminary issues related to the validity of wills or other acts by which assets are transferred to the trustee: see Article 4. In other words, it supplies no choice of law rules for determining questions in regard to the disposition of assets to a Bermudian trust, sometimes metaphorically called 'rocket-launching' issues, with the trust being the "rocket" and the 'launcher' being the disposition into trust. That was a gap in the choice of law code under the Hague Convention which the legislature in Bermuda plainly thought it desirable to fill to give greater confidence and certainty to international consumers of its trusts services, and which explains the need for more expansive domestic legislation in Bermuda than the Westminster legislation extending the Hague Convention to Bermuda.

488. It is important to observe that it is common ground in this action that the Bermuda legislature did think it desirable to fill the gap in the Hague Convention relating to choice of law rules for 'rocket-launching' issues. This is because 'capacity' is a classic "rocket-launching" issue which the Hague Convention definitely does not cover. All parties agree that to the extent that s.10(2) covers question of 'capacity' (and it plainly does cover capacity, although there may be a debate about what that word means, discussed below) the limits of the Hague Convention choice of law rules were deliberately extended by the 1989 Act. But it makes no sense to include one rocket launching issue in relation to dispositions of property into trust (capacity of the settlor to make them), and not all other issues which might arise in relation to the dispositions of property into trust; it is arbitrary and inexplicable that the legislature would have stopped at the question of capacity to make dispositions and left the bulk of 'rocket-launching' issues to common law rules…

490. The vigorous arguments and satellite litigation in this case about which foreign law is applied (and what that foreign law says, consuming days of court time) further underscore what the legislature in 1989 was seeking to avoid by creating a simplified statutory scheme which aligns the approach of the Hague Convention to the governing law of the trust with the law governing dispositions of property into trust, subject to narrow and appropriate derogations – particularly when that is unquestionably what the Cayman Islands did in legislation made only two years prior to the Bermudian legislation which it plainly informed.

491. This is all relevant background to the task of statutory interpretation, which strongly favours Dr Wong's construction of s.10(2). As against this the PTCs point to the presence of a marginal note next to s.10 which refers to 'Capacity to create trust'. The PTCs state that this is "admissible as a guide to interpretation". That, so far as it goes, is correct, but it does not go very far: even a heading, let alone a marginal note, is most unlikely to be capable of affecting the plain meaning of language and a heading

'can only be an approximation and may not cover everything falling with the provision to which it is attached' and is thus 'a poor guide to the scope of a section'…

493. Even if, contrary to the submissions above, the PTCs' reading of s.10(2) is preferred (with all the violence it does to the language), it would still cover the want of authority claims. On Dr Wong's case the Founders are the substantive settlors of the Trusts, being the (beneficial) owners of the wealth which was placed into the Trusts; Mr Hung's nominative participation in the transactions would also make him a settlor (albeit not the economic settlor) within the meaning of the statute because s.2 of the 1989 Act refers to a settlor as the person who creates a relationship of trust 'by placing assets under the control of a trustee for the benefit of a beneficiary or for a specified purpose'. On any view, the Founders and Mr Hung all had a part to play in the placing of assets under the control of the PTCs in their capacities as trustees of the Bermudian Purpose Trusts…

496. In short:

496.1 In the light of the powerful textual and contextual arguments above, the true construction of the original s.10(2) is, as submitted by Dr Wong, that it relates to all dispositions into a Bermudian trust, and is not limited to questions of capacity of the settlor;

496.2 Accordingly, as all of the issues raised on Dr Wong's claims in want of authority, mistake and undue influence relate to dispositions of property upon Bermudian law governed trusts, and as none of the derogations set out in s.10(2) apply, those issues are governed by Bermuda law;

496.3 Alternatively if, contrary to the foregoing,

> *(a) the original s.10(2) is limited to questions of the capacity of the settlor, Dr Wong's claim that Mr Hung lacked authority to transfer the assets to the Bermudian Trusts (and therefore did not have capacity to do so) is governed by Bermuda law, leaving only the claims in mistake and undue influence to be considered under the common law. This result in itself shows that the legislature cannot have intended s.10(2) to be limited in the way in which the PTCs submit: if s.10(2) covers the vires of the transferor to make the dispositions to the trust (which it is common ground it does), there is no reason at all for it not to cover other ways in which the dispositions to the trust might be impugned. Otherwise the result could be that Bermuda law is applied to one of the ways in which the dispositions are impugned, but a different, foreign law, is applied to other ways in which the dispositions are impugned. The legislature cannot have intended such an inexplicable result; or*

(b) the derogation in the original s.10(2)(a) applies, the law of the BVI applies to the Founders' ownership rights to the shares and the law of Bermuda applies to the rights of recovery of them."

The common law position

307. In the event section 10(2) does not result in Bermuda law applying to the mistake and want of authority claims, the Plaintiff in his Closing Submissions submits:

> "*497.1 It is agreed that at common law, the court applies a three stage conflict of laws analysis as explained by Staughton LJ in Macmillan v Bishopsgate at 391G to 392B. Stage 1 is to characterise the issue before the court, stage 2 is to select the rule of conflict of laws which lays down a connecting factor for the issue in question and stage 3 is to identify the system of law which is tied by the connecting factor found in stage 2 to the issue characterised in stage 1.*
>
> *497.2 As explained at paragraph 495.1 above, the true issue:*
>
> *(a) on the mistake and undue influence claims, is whether the transfers should be set aside for mistake;*
>
> *(b) on the want of authority claim, is whether the transfers were invalid for want of authority.*
>
> *Those are the only real controversies between the parties, because the terms on which Mr Hung held the BVI Holding Companies for the Founders prior to the transfers is common ground: he could not dispose of the BVI Holding Companies without a direction from them.*
>
> *497.3 The connecting factor for each of those issues is the situs of the property transferred, and so the lex situs (BVI law) governs: see Whittaker v Concept Fiducaries Ltd, Lewin on Trusts at [12-011] and the other cases cited at Section K3 of Dr Wong's written opening. In particular Whittaker states at [19]:*
>
> *The applicable law as to whether the transfers in question should be set aside on the grounds of mistake is the law of England and Wales. This is because the lex situs of property which is the subject of the disposition to a foreign trust sought to be set aside determines the applicable law in respect of that disposition (see Dervan v Concept Fiduciaries Limited, Judgment 38/2012 at paras. 21, 30 and 47; followed in D G Nourse v (1) Heritage Corporate Trustees Limited and (2) Concept Fiduciaries Limited, Judgment 01/2015 at para. 11).*"

308. If it was necessary to look at the question of the Founders' interest in the shares as a discrete issue, it was clearly a property issue to which the *lex situs* applied:

"*512. The real controversy between the parties in this area (if, contrary to Dr Wong's position, any question about the rights of the Founders arises for determination on his claims) is more specific. It is whether the Founders had property rights, namely whether their rights in the BVI Holding Companies were capable of binding third parties (the PTCs) or whether, as the PTCs contend, they were not. That is plainly to be characterised by the Bermudian court (for the purposes of stage 1 of the conflict of laws analysis) as a property law issue. It makes no sense for the issue of whether A (the Founders) have rights that bind C (the PTCs) to be determined by the law of a relationship between A and B (Mr Hung) to which C is not privy. That is why it is a property issue, not an issue of the 'trust' between A and B.*

513. That analysis is consistent with the judgment of Lord Sumption in Akers v Samba:

> *The proprietary character of an equitable interest in property has sometimes been doubted, but in English law (which is in this respect the same as Cayman Islands law), the position must be regarded as settled. An equitable interest possesses the essential hallmark of any right in rem, namely that it is good against third parties into whose hands the property or its traceable proceeds may have come, subject to the rules of equity for the protection of bona fide purchasers for value without notice.*
>
> *[…]*
>
> *The question of whether some species of proprietary interest is capable of existing is necessarily a question for the general law. Unless the general law recognises the possibility of such an interest, it is self-evident that the parties cannot create or transfer it. That necessarily provokes the question: the general law of which jurisdiction? Normally, it will be the lex situs. This would be obvious in the case of land, but it is equally true of shares.*

514. What flows from this fundamental property ownership issue are the questions as to whether the Founders' property was not actually transferred at all (whether due to a lack of effective authority or due to a violation of formalities requirements) and whether YC Wang owned property in the BVI when he died which thereafter could only be dealt with by a BVI personal representative (as to which see below). These are not issues which go to the internal arrangements between the Founders and Mr Hung but to the fundamental issue as to whether the Founders owned property in the BVI which their personal representatives can now reclaim from the trustees of the Purpose Trusts.

515. Indeed it is apparent from s.7 of the 1989 Act and Article 8 of the Hague Trusts Convention which types of issues Bermuda (and the signatories to the Hague Convention) characterise as "trust issues" and therefore a matter for the law governing the trust. Section 7 provides that the law of the trust (as selected by ss.5 and 6) governs only internal aspects of the trust relationship. It does not govern questions of property rights capable of binding third parties, because such persons cannot be bound by the law of a relationship to which they were not privy…"

309. Even if the issue was characterised as a trust issue, it was submitted for various reasons that BVI law would still govern the relevant questions about the Founders' interests in the BVI shares. Amongst the most initially persuasive reasons were the following:

"*…527.4 The arrangements which were made for the BVI Holding Companies (the declarations of trust, the management agreements, and the powers of attorney) were all expressly governed by BVI law. Having taken the trouble of intentionally incorporating the BVI Holding Companies in the BVI and creating BVI law governed arrangements around those BVI Holding Companies, it would be bizarre for Mr Hung to hold his (BVI) interests in those BVI Holding Companies on a trust which was governed by anything other than BVI law.*

528. In opening, the PTCs argued that the BVI arrangements between Mr Hung and the Citco nominees were 'irrelevant' to the question of what law governed the arrangements between the Founders and Mr Hung, presumably because they were separate sets of arrangements. But the two sets of arrangements were intimately linked: Citco nominees held on trust for Mr Hung, who held his beneficial interest on a sub-trust for the Founders (in other words, a double nomineeship). The Citco nominees were entitled to ignore Hung and account directly to the Founders if they so chose, and the Founders could have asserted a direct equitable right against the Citco nominees for the return of the shares (either by terminating the sub-trust, or by commencing proceedings against the Citco nominees). Indeed Mr Hung could not have sued the Citco nominees for the shares, because that would run contrary to the principle that the Citco nominees could choose whether to deal with Mr Hung or with the Founders. It is submitted that with a trust and sub-trust, there must be a very strong countervailing factor (e.g. an express choice of law clause) for the Court to find that the ultimate beneficiary intended anything other than that the sub-trust would be governed by the same law as the top trust."

310. As far as the undue influence claim is concerned, the Plaintiff submits that the same analysis applicable to the mistake and want of authority claims applies with equal force: BVI law must apply for the additional reason that the doctrine of undue influence is not recognised in Taiwan and the doctrine reflects a rule of Bermudian public policy. As regards the transfers

to the Ocean View Trust, it is submitted that section 10(2) of the 1989 Act requires the application of Bermuda law. The common law position is argued to be as follows:

> "*552. If the common law is applicable, the application of the lex situs to the issue of who had authority to deal with YC Wang's assets after his death is fortified by the conflict of laws rules governing the administration of estates. As Henderson J (as he then was) held in Pakistan v Nat West [2015] EWHC 3052 (Ch) at [28]:*
>
> > *Under the English conflict of laws, the stage of administration of an estate is governed by the law of the place where the assets are situated, which, in the current context, means England…*
> >
> > *Later at [29] the learned judge quoted Warrington LJ in the case of Re Lorillard [1922] 2 Ch 638 at 645–6, where he said:*
> >
> > *The principle is that the administration of the estate of a deceased person is governed entirely by the lex loci and it is only when the administration is over that the law of his domicile comes in. [emphasis added]*"

Choice of law limitation issues

311. The Plaintiff's Closing Submissions advanced the following principal arguments on the question of what law governed the Trustees' limitation defences:

> "*555. …Dr Wong's position is that whether by virtue of s.10(2), common law choice of law rules or a combination of the two, Bermudian and/or BVI law govern his claims in want of authority, mistake and undue influence and all issues arising on them. Bermudian and/or BVI limitation law therefore govern those claims as well. It follows that no question of a statutory limitation period arises at all, as both Bermuda and the BVI do not impose limitation periods on the causes of action relied on (see Section O below).*
>
> *556. It is only if the PTCs succeed in their contentions that (i) there is a separate applicable law question regarding the Founders' rights to the BVI Holding Companies prior to the transfers and (ii) that Taiwan law governs that issue, that there can be any question of the Taiwan law of limitation applying. The PTCs say that in those circumstances (but only those circumstances), Dr Wong must show that his claims fall within the relevant limitation periods under both Taiwanese law and BVI law.*
>
> *557. That is wrong. Limitation periods govern claims, not issues. The claims here are to recover assets from the PTCs, either as a result of setting aside the transfers for mistake/undue influence or because the transfers were invalid for want of*

authority. Those claims are governed by BVI law; indeed the PTCs come very close to accepting this as they admit that BVI law governs the issue of (as they put it) 'whether any rights that YC and YT Wang had can be exercised against the Trustees'.

558. Because the law of the BVI governs the substance of the claims made, it is also BVI law which supplies the relevant limitation period (if any) for those claims. That result makes perfect sense, and is in line with the scheme of s.34A, which is to apply the limitation law of the lex causae so that there is one system of law, and only one system of law, which applies to both the substance and the limitation of a claim. The matter of whether the Founders had property rights to the BVI Holding Companies at a particular point in time, namely prior to the transfers to the PTCs, is not a matter to which a limitation period can sensibly attach. Thus even if (contrary to Dr Wong's case) the law of Taiwan applies to that matter, it makes no sense then to apply the Taiwanese law of limitation to claims against the PTCs arising out of the unauthorised or mistaken transfers of the shares in the BVI Holding Companies to the Purpose Trusts in circumstances where … those claims are governed by BVI or Bermuda law…

562. Moses J observed that 'consistent with the statutory principles contained in the 1984 Act, a court should strive to identify one law as governing the issue to be determined rather than two'. Thus, the Court's task is to try to find one law which governs the issue to be determined if it possibly can, and in this case it is respectfully submitted that it can for the reasons set out above. If the Court can find one law which governs the issue to be determined, s.34A(1) (s.1(1) in the equivalent Act in England) provides for that law to supply the law of limitation in respect of the matter for the purposes of the action or proceedings, and there is, therefore, only one law of limitation to apply.

563. The PTCs' submission (that two systems of law should be found to apply to the issues in this case, in respect of the matter to be determined), is flatly contrary to the approach which Moses J urged in the Gotha case. There is no need or justification for that approach…

566. S.34A(1) makes clear that it is only directed to the application of the law of limitation of one other country (not two or more), because its application is (s.34A(1)) to a case where 'the law of any other country falls … to be taken into account' and where that happens, s.34A(1)(a) provides for 'the law of limitation of that other country relating to limitation' … to be applied in respect of the matter. In other words, section 34A(1) is directed to the case where the law of a single other country applies to the matter, and provides for the law of limitation of that single other country to apply so that both the substance and the limitation of the

claims are decided by reference to one single law. s.34A(1) does not apply, or cater for, a case where the law of two or more other countries apply, no doubt because such cases (where there are two leges causae) are extremely rare. Indeed, as Moses J pointed out in the Gotha case, the English equivalent to s.34A(2) (which only applies where the law of the forum plus a foreign law fall to be taken into account) was directed to the rare tort cases in which the double actionability rule relating to tort (pursuant to which there are two leges causae) applied, and would not have been enacted but for the dual actionability rule. The trouble, as exemplified by the Gotha case, is that the wording of s.34A(2) captures other (unintended) cases, where there are two systems of law involved in the matter, and one of is the law of the forum.

567. However the unintended capture by the wording of s.34A(2) of cases which it was not intended to cover need not trouble the Court in this case, because on the PTCs' case (that the law of Taiwan and the law of the BVI apply to the matter), on no view does s.34A(2) apply: s.34A(2) only applies where the law of both Bermuda and the law of some other country fall to be taken into account in the determination of the matter. That is not the PTCs' case…"

D8's submissions

Summary

312. In D8's Opening Submissions, advanced orally by Professor Harris QC, the statutory and common law choice of law positions were summarised as follows:

"*328. …Bermudian law applies to Tony's claims, in accordance with the provisions of the 1989 Act. It is equally clear that the 2020 Amendment Act is not applicable. It would, in any event, have led to the same conclusion.*

329. Hence, all of Tony's claims are plainly governed by Bermudian law…

330. Even if the statutory choice of law rules in the 1989 Act were not applicable, the outcome would be materially the same, in that all of Tony's claims are governed by Bermudian or BVI law under the common law choice of law rules applicable in the absence of legislative provisions…

Wrongful Transfer Claims

332. The Wrongful Transfer Claims are …plainly governed by Bermudian law even if the statutory choice of law rules had been inapplicable. These are claims: (a) that transfers of property (shares) were not validly effected; and (b) claims to recover those shares. Both are quintessential property claims.

333. It is well established that BVI law, as the law of the place of incorporation, the place where the share register was kept and the law of the situs, applies to this issue: see Macmillan Inc v Bishopsgate Investment Trust Plc (No.3) [1996] 1 W.L.R. 387 (CA). As Lord Sumption states in Akers and others v Samba Financial Group [2017] UKSC 6, [2017] A.C. 424, at §80:

' (1) The transmission of property is governed by the lex situs, which in the case of registered shares is the law of the company's incorporation, in this case Saudi Arabia. This proposition is well established and was not seriously disputed: see Macmillan Inc v Bishopsgate Investment Trust plc (No 3) [1996] 1 WLR 387. It applies as much to the transmission of an equitable as to a legal interest in shares: Underhill & Hayton, The Law Relating to Trusts and Trustees, 18th ed (2010), para 100.[128]'."

313. As regards the formalities for transferring the equitable interest in shares, it was submitted:

"*359. It is clear that the same principles apply to a transfer of a beneficial interest in property. Such dispositions are subject to Bermudian law, in accordance with section 10(2) of the 1989 Act (considered above). Section 10(2)(d) provides that this does not affect the application of foreign laws prescribing generally (without reference to the existence or terms of the trust) the formalities for the disposition of property. In other words, it defers to the common law choice of law rule in respect of such formalities.*

360. Thus the relevant common law choice of law rule in this respect leads to the application of the formality rules of the BVI, as the law of the situs. In Akers, Lord Mance made clear that the rules for identifying the situs of shares (considered above) apply equally to equitable interests, which are located where the company is incorporated or the shares are registered.[322] Lord Sumption concurred,[323] considering this principle to be "well established and… not seriously disputed". He cited with approval a statement to this effect which is now contained in the 19th edition of Underhill and Hayton, at §100.128.

361. In the present case, the clear position is that such an interest is located in the place where the trust property is situated (here, the BVI).[324]

362. It follows that in order for a disposition of an equitable interest in property to be effective in the present case, it clearly must satisfy the formality requirements of BVI law (including the Statute of Frauds)."

Statutory choice of law rules

314. The Plaintiff's case on section 10 of the 1989 Act was supported by D8. In D8's Written Closing Submissions, the following key points were advanced:

"*1036. A first point is that very little can be gleaned from the heading to section 10 of the 1989 Act 'capacity to create trust'. The heading may appropriately describe section 10(1), which is concerned solely with capacity issues. In marked contrast to section 10(2) (which, of course, is the relevant provision in the present case), section 10(1) makes no mention of 'any disposition of property.' But section 10(2) clearly distinguishes between 'the capacity of any settlor arising in regard to a trust' and 'any disposition of property upon the trusts thereof'. This only reinforces the conclusion that section 10(2), which refers* <u>*both*</u> *to the capacity of any settlor* <u>*and*</u> *dispositions on trust, is intended to be broader in scope, and encompass both capacity issues and dispositions to a Bermuda trust. Any conclusion to the contrary would wholly distort the plain wording of section 10(2).*

1037. Nor is this the only example where a heading in the 1989 Act refers to the first subsection of a provision but plainly does not describe the whole subsection accurately. For instance, section 6 is headed 'No applicable law chosen'. Section 6(1) is indeed concerned with the applicable law in the absence of choice. Section 6(2) and 6(3), however, are concerned with the entirely <u>*different*</u> *question as to when a trust that is governed by the law of Bermuda may provide for a change of governing law. That has nothing to do with the issue of what happens where there is 'No applicable law chosen'.*

1038. In any event, the function of a heading is merely to serve as a brief guide to the material to which it relates and may not be accurate: see R v Montila [2004] UKHL 50, [2005] 1 All ER 113 at §34, HMRC v SSE Generation Limited [2021] EWCA Civ 105, 2021 WL 00311004 per Rose LJ at §30 and Bennion on Statutory Interpretation 8th Edition (2020) at section 16.7.

1039. The weight to be attached to headings has been said to be 'very slight' and they are 'a most unsure guide to the construction of the enacting section': see DPP v Schildkamp [1970] 2 W.L.R. 279 [1971] A.C. 1, at pp. 20 (per Viscount Dilhorne) and 28 (per Lord Upjohn).

1040. Furthermore, the construction seemingly suggested by the PTCs would require distorting the natural language of section 10(2)…"

<u>The Hung Arrangement</u>

315. As regards the Hung Arrangement, it was submitted in D8's Opening Submissions:

"*366. In any event (as explained above), the principal object of the Hung Relationship was to hold BVI assets. Such assets could only be administered in the BVI. In such circumstances, whether the relationship is subject to the choice of law rules for trusts (as set out above) or contractual obligations: (i) the implied intention was that the Hung Relationship was governed by BVI law; alternatively, (ii) the applicable law in the absence of choice would lead to exactly the same conclusion given that the assets were to be dealt with in the BVI, were sited in the BVI and the primary object of the Hung relationship was to hold BVI assets.*

367. It follows that, even if the law applicable to the Hung Relationship were of relevance to any of Tony's claims, that law is BVI law."

316. In D8's Closing Submissions, the notion that the Hung Arrangement was governed by Taiwanese law was vigorously contested. The following key submissions were advanced:

"*1135. In short, the intention behind Article 3 of the Hague Trusts Convention (which section 3 of the 1989 Act reflects) is to impose a de minimis formality requirement that enables a court to ascertain (especially a jurisdiction without a domestic trusts law) that a trust has actually come into existence.*

1136. There is no doubt that the Hung Arrangement was evidenced in writing by the alleged 'settlors': see, for example, the letter dated 20 August 2001 and signed by YC and YT, which begins:

'For many years, we have entrusted you with assets which you have managed on our behalf, you have safeguarded the assets meticulously and tried your best to carry out the purposes of the trust.'

1137. In short, it is plain beyond doubt that the Hung Arrangement falls within the ambit of section 3 of the 1989 Act and Article 3 of the Hague Trusts Convention.

1138. Since the 1989 Act applies to the Hung Arrangement, and since it cannot be governed by Taiwanese law under the Convention, it must be governed by BVI law…

1145. The true position is that the 'Hung Arrangement' comprised multiple nominee agreements which arose as and when the Founders decided to transfer a new asset to Mr Hung (or to a bare nominee to hold for Mr Hung) and which need to be considered separately for the purposes of the choice of law analysis. "Hung Arrangement" must be understood on that basis.

1146. Once this is appreciated, it is almost self-evident that these nominee relationships, properly understood, are, and can only sensibly be, governed by BVI law. The principal object of these nomineeships was to hold BVI assets.

1147. It will be recalled that (in brief outline) in 1994, a decision was made to create a structure of BVI companies to be held by Mr Hung (or by nominees on his behalf) which in turn would hold FPG shares. That structure involved:

1147.1 5 companies incorporated in the BVI;

1147.2 Directors and nominee shareholders being supplied for those companies by CITCO – a BVI services company;

1147.3 Various documents written in English – including management agreements and declarations of trust to be executed by Mr Hung – which contained BVI choice of law clauses; and

1147.4 Powers of appointment in favour of Susan which, it is common ground in this case, are governed by the law of the BVI.

1148. The BVI companies were to be treated as foreign investors for Taiwanese regulatory and withholding tax purposes. It was, accordingly, necessary to keep the structure offshore and away from the Taiwanese tax authorities...

1150. The BVI Holding Companies were administered in the BVI. Furthermore, given that all the arrangements between CITCO nominees, Mr Hung and Susan were governed by BVI law, it is highly implausible that the arrangement at the bottom of the structure between the Founders and Mr Hung would be governed by Taiwanese law.

1151. The repeated use of the term 'UBO' by Mr Hung and others further indicates that the nomineeships were not governed by Taiwanese law, which does not recognise the concept of beneficial owners or interests…

1185. In short, the axiomatic principle is that transfers of shares are governed by the law of the situs and not the law of any underlying relationship between the assignor and assignee of the right. Nothing can be gleaned from the authorities on contractual assignments of property other than shares."

317. It was further argued, at first blush ambitiously, that even if Taiwan law governed the Hung Arrangement, Bermuda law would apply to fill the gap created by Taiwanese law's failure to recognise equitable ownership:

> "*1193. A broad, internationalist approach is required for private international law purposes, which enables the Bermudian court to give effect to rights of the Founders arising under a foreign lex causae; one which reflects the fact that the assets were held by Mr Hung at their behest and that nothing happened upon the gratuitous transfer of those BVI sited assets to the PTCs that could have defeated those rights.*
>
> *1194. Rather, where a foreign law applies to a claim which does not have the concept of equitable ownership or equitable doctrines or remedies, the correct and established approach is for the Court: (a) first to determine the nature of the rights and duties arising under that foreign law; and (b) then to "translate" them into a common law equitable equivalent concept.*
>
> *1195. To this end, when considering the question whether a constructive or resulting trust may arise where the lex causae has no equivalent concept, Dicey, Rule 172 provides that:*
>
> > *' (2) Where the law applicable to a cause of action or issue requires a person to disgorge a benefit but does not know the concept of a constructive or resulting trust, the court may nonetheless regard that person as holding on a constructive or resulting trust, provided that no European or international instrument requires otherwise.'"*

318. Reliance on these principles seemed ambitious in the present context where Taiwan law, if it applied, appeared to me to have sufficient alternative legal remedies to avoid the need to fill a legal vacuum which would otherwise result in injustice.

The Trustees' submissions

Summary

319. In the Trustees' Closing Submissions, the choice of law issues were framed as follows:

> "*128. The relevance of the choice of law debate is actually very limited. That is because, whatever system of law is applied, the fundamental questions at issue in this action – whether Mr Hung was authorised to make the transfers into the [First*

Four Bermuda Purpose Trusts] and whether such authorisation was vitiated by a mistake on the part of the Founders – and the answers to them remain the same. It remains necessary though, both as a matter of principle and so that the right analysis of liability and limitation is deployed, to analyse properly the law which applies to Winston and Tony's Mistake, Lack of Authority and Undue Influence claims.

The correct approach

129. In Macmillan Inc v Bishopsgate Investment Trust PLC (No 3) [1996] 1 WLR 387 (CA) Staughton LJ set out the proper approach to identifying the system(s) of law applicable to the issues in an action at 391G to 392B…:

'In finding the lex causae there are three stages. First, it is necessary to characterise the issue that is before the court…

The second stage is to select the rule of conflict of laws which lays down a connecting factor for the issue in question…

Thirdly, it is necessary to identify the system of law which is tied by the connecting factor found in stage two to the issue characterised in stage one…""

320. The suggestion that the choice of governing law was an inconsequential one was a rather beguiling submission because it ignored the significant impact the choice had on important aspects of the merits of the Trustees' defences, not least in limitation terms.

Statutory choice of law rules

321. After noting the unusual character of the claims placing reliance on firewall provisions designed primarily to uphold the validity of Bermuda trusts, the Trustees submitted in salient part as follows:

"*157. The old section 10 was thus concerned with questions of a settlor's 'capacity', i.e. whether the settlor has the legal capacity to enter into a trust or transfer of assets to a trust. In the present case, there is no issue as to capacity – no one is suggesting that Mr Hung lacked legal capacity to enter into trusts or transfers. So section 10 prior to amendment is irrelevant and cannot lead to the application of Bermuda law to the claims…*

159. Winston attempted to avoid the problem by misquoting section 10, suggesting that it applied to 'all questions as to the capacity of any settlor arising in regard to a trust which is for the time being governed by the law of Bermuda' and 'all

questions… in regard to any disposition of property upon the trusts thereof" – i.e. that the latter limb does not relate to questions of the settlor's capacity but to all questions about dispositions of property on trust: see paragraph 576.1 Winston's Written Opening. That is not what the section says. It quite clearly applies to 'all questions as to the capacity of any settlor arising' (a) 'in regard to a trust which is for the time being governed by the law of Bermuda' or (b) 'in regard to any disposition of property upon the trusts thereof'. The phrase 'in regard to' sets up two parallel concepts to both of which the introductory words apply. Moreover, the fact that the section as a whole is about 'capacity' is clear from the terms of section 10(1) and from the heading/marginal notes, which the Court should use as guide to interpretation: see Bennion on Statutory Interpretation.

160. Winston also seeks to rely on a judgment of Kawaley J in a case involving the Cayman firewall legislation, section 90 of the Cayman Trust Law: see {AUTH-A11/145/59}. But the Cayman Trust Law is materially differently worded from section 10 of the 1989 Act prior to amendment: it does not apply only to 'All questions as to the capacity of any settlor' but has a broader ambit. There is therefore no assistance to be gained from Cayman cases.

161. Tony took a different approach, at least in his skeleton argument. He acknowledged that section 10 applies to 'capacity' issues. But he suggested that 'capacity' should be given an unusually broad meaning so as to encompass any issue as to whether, if the settlor was a trustee or agent, he had valid authority from his principal to transfer assets into trust:

paragraph 311 Tony's Written Opening. That is obviously not what 'capacity' means. 'Capacity' is a well understood term referring to the general ability of a person to enter into legal relations of a given kind. A person who acts in breach of contract, or breach of trust, does not lack 'capacity' to act.[10]

162. Tony has referred to one authority, Investec Trust (Guernsey) v Glenalla Properties [2019] AC 271, as supporting his unusual and broad meaning of 'capacity'. Investec provides Tony with no support. The Privy Council used the word 'capacity' in its Opinion to distinguish between the different hats that someone might wear – distinguishing between someone acting in a 'personal capacity' and in his 'professional capacity' as trustee. That is obviously not the sense in which the word is being used in section 10 – where it is referring to legal capacity to enter into a trust or transfer, not a dispute about what hat the settlor is wearing.

163. Finally, even if section 10(2) did apply to the issues raised in this case, so that the validity of the transfers into the trusts were governed by Bermuda law, that

would still not mean that Taiwanese law was irrelevant to the claims. The reason why is that YC and YT Wang were not the legal owners of the shares when they were transferred to the Trustees. In order for them to bring a claim to set aside the transfers they must first establish that they have a right in relation to the shares that has been engaged by the events that occurred.

164. That question obviously has to be determined by reference to the terms and effect of the Hung Arrangement, which is a matter for the law governing the Hung Arrangement. Nothing in section 10(2) requires or permits the Court to treat the Hung Arrangement as though it was governed by a different law from that by which it was governed, or to ignore the terms and effect of the Hung Arrangement in determining what rights YC and YT Wang had and whether they are engaged. Any doubt about that is removed by section 10(2)(a) which expressly provides that nothing in the section affects the recognition of foreign laws in determining "…whether the settlor is the owner of [the] property". Where the 'ownership' is said to be an interest arising under a foreign law relationship – whether a trust or a contract of mandate – then one obviously has to apply that foreign law in order to know what the interest is and whether it gives rise to any claim to the property, otherwise there is no relevant 'ownership' interest.

Section 10 post-amendment

165. The analysis above assumes that Winston and Tony are correct that section 10 applies to this case in its pre-amendment form. The position is even clearer under the current law. Section 10 (as amended by the Trusts (Special Provisions) Amendment Act 2020 ("2020 Act") with effect from 5 August 2020) provides in relevant part as follows {AUTH-A10/134/3}:

10 (1) No foreign law that is excluded under subsection (2) shall apply to the determination of any question concerning a Bermuda trust…

(2) For the purposes of subsection (1), a foreign law is excluded if it creates, recognises, or defeats, or gives a foreign court power to create, recognise, or defeat, any right or interest in or to property, or any obligation or liability on any person, by virtue or in consequence of, or in anticipation of—

(a) the death of a person …;

(b) the creation, existence or dissolution of a relationship of marriage, domestic partnership…cohabitation or other familial relationship…; or

(c) bankruptcy, liquidation or an analogous insolvency process…

166. Section 10 as amended does not apply in this case. The Trustees do not suggest that any provision of Taiwanese law that creates, recognises or defeats any rights or obligations by reference to the matters set out in section 10(2) should be applied.

167. Winston and Tony suggest that the application of Taiwanese law is nevertheless excluded because Taiwanese law generally contains provisions that are capable of creating, recognising or defeating rights or obligations by reference to death or marriage or insolvency. They say that if a foreign system of law contains that kind of provision it must be excluded, even if the issues at hand have nothing to do with that provision: see e.g. Tony's Written Opening at paragraph 325.

168. That is a hopeless contention. Almost all systems of law must have rules capable of affecting property rights or people's obligations on death, marriage or insolvency. English and BVI law have such rules. It cannot be the case that section 10 excludes the application of a foreign law that has the same rules about insolvency, death and marriage as Bermuda law. Why would the legislature have enacted such a provision? And why would the fact that the foreign law contains such rules be relevant if no one suggests that they apply? That is obviously not what section 10 is intended to mean.

169. That leaves the (academic) question of whether the Court should apply section 10 in its pre-amendment or post-amendment form. On the face of the 2020 Act, its effect was immediately to amend the 1989 Act with effect from 5 August 2020. There was no transitional provision, unlike the earlier 1998 amendment act which changed the substantive law and did contain transitional provisions. That is likely to have been a deliberate choice on the part of the legislature, and it makes sense:

> *169.1. First, the changes made by the 2020 Act were intended to 'enhance' and 'clarify' certain provisions of the earlier Act rather than make significant substantive changes to the law. It makes sense that the legislature would want those enhancements and clarifications to apply immediately and across the board: see the Explanatory Memorandum… The amendments to section 10 just made clearer what the intention and purpose of sections 10 and 11 had been all along. There was therefore no need to worry about impacting existing claims because all that was happening was that the existing law was being made clearer.*
>
> *169.2. Second, the changes made by the 2020 Act were to matters of procedure, not substance. Winston and Tony have belaboured the point that there is a presumption that legislation is not intended to be retrospective and affect accrued substantive rights. That general proposition is correct. But it does not apply to matters of procedure unless the change is "so*

unfair" that Parliament cannot have intended the change to apply to existing claims: see Lord Rodger in Wilson v First County Trust [2004] 1 AC 816 at paragraph 199 ff... What system of law applies to an issue is a matter of procedure. It would be absurd to speak of a party having an 'accrued substantive right' to have a particular system of law applied to a dispute: the choice of law rules applicable will always depend on the forum and the date that any relevant rules come into force.

169.3. Third, there is no 'retrospectivity' in the Court applying the law as it stands to determine the approach to choice of law in a dispute before it - the question of what system of rules should be applied to the 'determination of a question' (to use the language of section 10) before the Court arises only when that question falls to be determined, not before. It is unsurprising that where the legislature has identified a deficiency in existing procedural rules and remedied them, the remedy should apply immediately to all actions that come before the Court, whenever they happen to have been commenced."

The Hung Arrangement

322. For the Trustees, therefore, the starting point in the choice of law analysis was the proposition that the relevant issues in controversy fell to be determined by reference to the Hung Arrangement:

"*130. Winston and Tony seek, on behalf of YC and YT Wang's estates, to recover property held by Mr Hung under the Hung Arrangement and which was transferred to the Trustees, on the grounds that the transfers were either not authorised by YC Wang and YT Wang or, any authorisation was vitiated by mistake or undue influence. To identify the law(s) applicable to those claims the first step, as set out in Macmillan, is properly to characterise the issues they give rise to. There are three issues.*

130.1. First, what rights (if any) did YC Wang and YT Wang have in relation to property held by Mr Hung under the Hung Arrangement? In particular, did those rights include a right to recover the property from third parties if Mr Hung transferred it without authorisation, or with authorisation vitiated by mistake or undue influence?

130.2. Second, if YC Wang and YT Wang did have a right to recover property in those circumstances, were the transfers to the Trustees unauthorised and/or was any authorisation vitiated by mistake or undue influence, in such a way as to trigger the right?

130.3. Third, if the transfers of the property to the Trustees were either unauthorised or any authorisation can be vitiated, did the transfers of that property to the Trustees nevertheless have the effect of overriding whatever rights YC and YT Wang had?

Stage 2: the applicable conflicts rules for each issue

131. Stage two of the Macmillan analysis is to identify the conflict of laws rule which applies to each of the three issues.

132. First, what rights, personal or proprietary, YC Wang and YT Wang had in the property held by Mr Hung under the Hung Arrangement is determined according to the system of law with which that arrangement has its closest and most real connection. That is so whether the arrangement is properly characterised as a trust or a contract. The validity, interpretation and effect of an inter vivos declaration of trust is governed by the law with which the putative trust has its closest and most real connection: Chellaram v Chellaram [1985] Ch 409 at page 424H to page 425A. Similarly the applicable law of a contract is the law with which the contract has the closest and most real connection: Amin Rasheed v Kuwait Insurance [1984] AC 50.

133. Second, the issue of whether the transfers of property held by Mr Hung under the Hung Arrangement were made by him without authority or, if authorised, whether such authorisation was vitiated by mistake or undue influence in such a way as to trigger such rights as YC Wang and YT Wang held, is also determined by the system of law with which the Hung Arrangement has its closest and most real connection. The nature of the authority required to make a transfer of property held under an arrangement, and whether such authority may be vitiated, must be determined according to the law governing that arrangement.

134. Third, the issue of whether the transfers of the property held by Mr Hung under the Hung Arrangement to the Trustees had the effect of overriding whatever rights YC Wang and YT Wang had in relation to such property is governed by the law of the situs of the property. This is made clear by the decision in Akers v Samba Financial Group [2017] AC 424 ('Akers') at paragraph 80(1) in which the UK Supreme Court held that it was "well established" that the question of whether the transfer of shares by a trustee to a third party was effective to transfer the beneficial interest by overriding or extinguishing the beneficiary's beneficial interest was governed by the law of the situs of the property transferred."

323. Professor Harris QC described the Trustees' reliance on an agreement to which they were not a party to determine the governing law of claims impugning the validity of transfers to them of BVI shares as "*reverse alchemy*". However, if their initial framing of the issues was correct, the Trustees' consequent contention (as set out in their Closing Submissions) that Taiwanese law should apply seemed irresistible:

"*136. What rights YC Wang and YT Wang had in relation to the property held under the Hung Arrangement (i.e. Issue 1) and whether the transfers of property held under the Hung Arrangement were made without authority or whether such authorisation may be vitiated (i.e. Issue 2) is determined by the system of law with which the Hung Arrangement has its closest and most real connection.*

137. The system of law with which the Hung Arrangement had its closest and most real connection is assessed at the moment of its creation: see Dicey, Morris & Collins on the Conflict of Laws (15th ed., 2018) at paragraph 29-023 and footnote 128. The Hung Arrangement came into being when the first of the assets held under it – Vanson and Chindwell Liberia – were placed in Mr Hung's hands in 1979 and 1980.

138. At that time (and indeed at all times) the Hung Arrangement had its closest and most real connection with Taiwanese law. The arrangement was based upon an oral agreement that was entered into between three Taiwanese individuals, all of whom were resident at all material times in Taiwan. The arrangement was almost certainly entered into in Taiwan, almost certainly concluded in the Taiwanese dialect, and it was obviously intended that Mr Hung would perform his duties in Taiwan. The arrangement related to assets whose principal value consisted of indirect holdings in shares in Taiwanese companies, listed on the Taiwan stock exchange, operating in Taiwan and doing business largely in Taiwan.

139. At the time that the arrangement was created, there was no connection with any other jurisdiction except Liberia (the jurisdiction of incorporation of Vanson and Chindwell Liberia), and no one contends Liberian law applies. Moreover, while the situs of the assets held by a trust can be a relevant connecting factor, it is generally less important when the assets are intangible movables: see Dicey, Morris & Collins at paragraph 29-021. Indeed, the situs of the assets held by a trust is generally of limited relevance even where the assets are tangible. In Lightning v Lightning Electrical Contractors Ltd [1998] NPC 71, an individual resident in England provided money to an English company to purchase land in Scotland. It was held that the company held the land on a resulting trust governed by English law, notwithstanding the situs of the property. Millett LJ pointed out the odd practical consequences of any other conclusion in a passage cited with approval by the Supreme Court in Akers at paragraph 29.

140. Millet LJ's analysis is obviously correct, and it indicates that the court ought to regard connecting factors other than the situs of the assets held as more important. That is particularly so given that the original trust assets were sited in Liberia which no one contends the arrangement had its closest connection with. Indeed there does not appear to have been any particular reason for the choice of

Liberia: the shares could equally have been held via companies incorporated in other offshore jurisdictions."

Limitation issues

324. A discrete issue from the question of which law governed Winston's and Tony's claims was what law governed the limitation defences. In the Trustees' Closing Submissions, the following arguments were advanced:

> "*1460. Section 34A of Bermuda's Limitation Act 1984 governs the application of foreign limitation periods in Bermuda law. The issue in this case is how section 34A applies when a claim involves issues governed by different laws. The answer is that the limitation periods under each applicable law apply. That is the right answer for three reasons.*
>
> *1461. First, it reflects the language of section 34A itself. Section 34A(1) refers to the application of any law that 'falls…to be taken into account' in the determination of a matter. That is broad language that includes a case where multiple systems of law apply. Since both the law of Taiwan and of the BVI '[fall] to be taken into account' in this case, on a straightforward reading of the statute the limitation laws of both should apply. If only one limitation law could ever apply different (and tighter) language would have been used in section 34A. In fact, Section 34A (2) expressly envisages the possibility that the limitation law of more than one country should apply to the same matter. A common example of a situation in which this occurs is a claim in tort to which the double actionability rule applies: the limitation law of both the lex causae and the lex fori applies (McGee, Limitation Periods (8th ed., 2020), at paragraph 25.002).*
>
> *1462. Second, that answer is consistent with the leading authority on the question. Section 34A is in similar terms to the UK Foreign Limitation Periods Act 1984 section 1 ("FLPA"). An English authority (discussed at length in Limitation Periods at chapter 25 {AUTH-B10/83/1}) suggests the correct approach: Gotha City v Sotheby's (The Times, 8th October 1998). A painting was misappropriated in Germany and sold in England. A conversion claim was brought. The question of whether the claimant had title to the painting was governed by German law. The alleged tort occurred in England and was governed by English law. The judge, Moses J, held that both German and English limitation laws applied – if the claim was time-barred under either then it would fail. Applying Moses J's approach to the present case, the claims should be time-barred if either (i) YC and YT Wang's rights have been extinguished by a time-bar under Taiwanese law or (ii) the right to recover the shares from the Trustees has become time-barred as a matter of BVI law.*

1463. Finally, that answer accords with the purpose of limitation laws and common sense. If YC and YT Wang's interest in the shares was governed by Taiwanese law, their right to claim in respect of that interest must be subject to Taiwanese limitation law. Put another way: if YC and YT Wang had a right under the law governing the Hung Arrangement to set aside transfers of the shares within 10 years, then after 10 years their right is extinguished and they have nothing to exercise. Since the question of whether any rights that they had are exercisable against the Trustees as third party recipients of the shares is governed by BVI law, it also makes sense that the claim cannot be pursued if the limitation period within which the shares can be recovered from the Trustees under BVI law has passed. Though the right to challenge the transfers might still exist under Taiwanese law, the Trustees as third party recipients of the shares are entitled to the protection given to them by BVI law. The alternative position, in which YC Wang and YT Wang could seek to vindicate Taiwanese law proprietary rights where the right to do so has lapsed under Taiwanese law, or to challenge the BVI law transfer of those rights to the Trustees where the right to do so has lapsed under BVI law, is both unattractive and makes little sense.

1464. Winston and Tony contend that if the application of limitation periods under Taiwanese or BVI law leads to the claims being time-barred, the Court should disapply the foreign limitation periods as a matter of Bermudian public policy pursuant to section 34B of the 1984 Act. That argument is hopeless for a number of reasons.

1465. First, the circumstances in which it is appropriate to disapply a foreign limitation period based on public policy concerns are narrow and plainly inapplicable here: see KXL v Murphy [2016] EWHC 3102 (QB) at paragraph 45 where Wilkie J summarised the principles applicable to the identically-worded provision in the FLPA. It makes sense that 'exceptional circumstances' should be required before an applicable foreign limitation period is disapplied on public policy grounds. Different legal systems can legitimately take different views as to the appropriate period within which different rights must be exercised. It would be surprising for this Court to conclude that the BVI or Taiwanese law was so unfair that Bermuda's public policy was infringed.

1466. Second, the BVI law limitation periods are virtually identical to those applicable under Bermuda law, and there is nothing exceptional about the Taiwanese law limitation periods. The only limitation periods under Taiwanese law that might be regarded as relatively short are the one-year periods that apply to claims to revoke transactions with third parties. However: (a) the one-year periods in Article 18 and Article 244 of the Civil Code apply from the date when the person seeking to exercise the right knows of the alleged ground for revocation; (b) it is

unsurprising that a person who knows of a ground for revoking a transaction with a third party must act promptly; (c) the one-year period in Article 88 applies where a person seeks to revoke an expression of intent on the grounds of a mistake on his part (a right that may be exercised without bringing a legal claim). There is no inherent reason why a legal system should permit a person unilaterally to revoke transactions on the basis of a mistake on his part unknown to the other party, especially as it creates a real risk of unfairness and uncertainty in commercial dealings. Taiwanese law limits that risk by imposing a relatively tight limitation period on the exercise of the right. There is nothing contrary to Bermudian public policy about that.

1467. Third, where (as here) it is said that the foreign limitation period is contrary to public policy because it imposes 'undue hardship' on the plaintiff, it must be shown that in the particular circumstances of the case the short period has in fact caused 'undue hardship' to the plaintiff: see Harley v Smith [2010] EWCA Civ 78 at paragraph 29 {AUTH-B5/50.0.1/11-12}. In that case, the plaintiffs (who issued their claim just under 3 years after the cause of action accrued) complained that a 12-month limitation period under Saudi law had caused undue hardship because they had received legal advice that it did not apply. The Court of Appeal rejected that submission, because the plaintiffs could have commenced the claim within the 12-month period if they had wished to, and there was nothing special about the facts of the case that took it out of the ordinary: see paragraph 55 {AUTH-B5/50.0.1/20-21}.

1468. In Murphy, Wilkie J noted at paragraph 54(v) {AUTH-B6/57/12} that the inquiry is whether 'the undue hardship caused to the claimant by the application of the foreign limitation period over and above that inevitably caused by the application of the foreign limitation period in question' and quoted counsel's identification (at paragraph 56 {AUTH-B6/57/13-14}) of the types of case in which it has been held that a foreign limitation period has caused undue hardship in this sense. None of those cases are comparable to this one. The events of which Winston and Tony complain took place between 5 and 18 years before Winston issued his claim, and between 7 and 19 years before Tony issued his claim. Even if the applicable limitation periods had been 13 years, all of the claims in relation to the [First Four Bermuda Purpose Trusts] would have been time-barred. It is impossible in the circumstances to say that the foreign limitation periods have caused any undue hardship to Winston or Tony at all. The only 'hardship' is that inevitably caused by the application of the foreign limitation periods in question."

Legal findings on applicable laws issues

<u>Section 10(2) of the 1989 Act: preliminary analysis</u>

325. Section 10 ("*Capacity to create a trust*") may be viewed as having three elements to it: (1) subsection (1); (2) the body of subsection (2); and (3) the subparagraphs of subsection (3) relevant to the meaning and effect of section 10(2). Section 10(1) provides:

> "*(1) Subject to subsection (2), a person has a capacity to create a trust in the following cases:*
>
> *(a) where the trust property is movable—*
>
> *(i)in the case of an inter vivos trust, if he has the capacity to create a trust of movable property by the law of Bermuda;*
>
> *(ii) in the case of a testamentary trust, if he has the capacity to create a trust of movable property by the law of his domicile;*
>
> *(b) where the trust property is immovable, if he has the capacity to create a trust by the lex situs of the immovable.*" [Emphasis added]

326. All counsel essentially seemed to be agreed that section 10(1) at least arguably dealt with the settlor's capacity in the narrow sense that common lawyers understand that term. It was only the Trustees' counsel whose primary submissions were fundamentally based on this premise which I was initially swayed by but ultimately decline to accept. Capacity as regards natural persons often connotes possessing the minimum legal age required for entering into legal transactions and possessing the mental capacity required for entering into legal transactions. However, it is in my experience invariably the case that one refers to this particular form of capacity by asking whether a person possesses 'the capacity' the law requires or, perhaps more commonly still, whether a person has or lacks 'capacity'. A Bermudian legislative example may be found in section 58(1) of the Mental Health Act 1968 which provides:

> "*58. (1) It shall be the duty of the Commissioners to visit patients in accordance with the directions of the judge for the purpose of investigating matters relating to the capacity of any patient to manage and administering his property and affairs, or otherwise relating to the exercise, in relation to him, of the functions of the judge; and the Commissioners shall make such reports on their visits as the judge may direct.*" [Emphasis added]

327. A British legislative example is the Mental Capacity Act 2005 which provides: "*A person must be assumed to have capacity unless it is established that he lacks capacity*" (section 1(2)), a linguistic approach which is replicated elsewhere in the 2005 Act[72]. Similar phraseology has been used in the various submissions in this case. For instance, in the Trustees' Opening Submissions their counsel state "*Tony Wang has alleged that YT Wang*

[72] E.g. section 2(1), (3)-(5) and section 4(3)(a), (6)(a).

did not have capacity to sign the Power of Attorney" (paragraph 563) and "*Her opinion on YT Wang's capacity to sign the note is at Chiu 2*" (page 267 note 124).

328. In my judgment it is striking, on closer analysis, that section 10(1) speaks of "*a capacity*" rather than 'the capacity' or simply 'capacity' and inherently implausible that the draftsman intended to convey the narrow meaning of 'capacity' in the mental capacity/mental incapacity sense. This is not a point which was apparent to me on my previous readings of section 10(1), nor indeed in oral opening and closings. However, a more straightforward reading of section 10(1) is that the term 'capacity' is being used to convey the broader idea of the ability (in the legal 'power' or 'competence' sense) to create a trust under the applicable governing law, in the case of movable and immovable property respectively. One of the most well-known natural and ordinary meanings of the word 'capacity', which is routinely used in the phrase 'a capacity', is the following dictionary definition[73]:

> "*someone's ability to do a particular thing:*
>
> *She has a great capacity for hard work.*"

329. In my judgment a straightforward reading of section 10(1) is that the word 'capacity' is used in this broader sense, to connote not just the narrow legal meaning of possessing full age and mental capacity, but primarily to signify the broader legal meaning of possessing the power or competence to enter into transactions which may be valid under the laws of one forum but invalid under the laws of another. Bearing in mind that section 10(1) enunciates broad governing law principles, which are then qualified by section 10(2), in my judgment the term "*a capacity*" in subsection (1) is not limited to 'capacity' in the narrow legal sense. The relevant broad principles ("*Subject to subsection (2)*") are:

(a) in relation to movable property transferred *inter vivos* (such as the transfers of shares to the Bermuda Purpose Trusts), the starting position is that Bermuda law governs the legal ability of the settlor to create the trust;

(b) in relation to movable property transferred to a trust by a will, the law of the settlor's domicile governs the legal ability to create the trust; and

(c) in relation to immovable property transferred to a trust, the law of the *situs* of the property governs the legal ability of the settlor to create the trust, be it an *inter vivos* or testamentary one.

330. Reading section 10(1) in this straightforward way, section 10(2) is complementary to section 10(1) with both subsections concerned about the same broad, interrelated questions of what law

[73] https://dictionary.cambridge.org/us/dictionary/english/capacity.

governs the question of the legal ability of a settlor to create a trust through transferring property to trustees. Although this point was not fully developed in a contextual way, D8's Closing Submissions advanced the following broader common law analysis which I have built upon in reaching the conclusions set out above about the synergy between subsections (1) and (2), respectively, of section 10 of the 1989 Act:

> "*1050. Furthermore, even if section 10(2) had applied only to questions of 'capacity', this term is broad enough to include all issues relating to the settlor's status and whether the settlor was capable of making the transfer and had authority to do so. In Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd the Privy Council held that, as a general rule, the common law will recognise and give effect to limitations of liability which arise under an entity's constitutive law by reason of the particular status or capacity in which its members or officers assumed an obligation. This rule also applied to Jersey and Guernsey trusts. Accordingly, where a claim was made against Guernsey-based trustees of a Jersey law trust concerning the extent of their liability under a contract (governed by a different law), the provisions limiting the liability of the trustee in Trusts (Jersey) Law 1984, Art.32(1)(a) prevailed over the proper law of the transaction which created the liability…*
>
> *1053. So too, in Haugesund Kommune v Depfa ACS Bank [2012] Q.B. 549, Aikens LJ, in considering the meaning of "capacity" of a corporation, held that a broader, internationalist approach to should be adopted for choice of law purposes, which encompassed all questions as to the legal ability of to exercise specific rights:*
>
> > *'How the word "capacity" is interpreted for the purposes of the rule is, as Etherton LJ has stated in his judgment, ultimately a matter of policy. In my view it is important to remember the purpose of the rule, which is to determine which systems of laws will be used, under English conflicts rules, to decide whether a "corporation" has the ability to exercise the legal right to enter into a binding contract with a third party. If that accurately summarises the rule's purpose, then I think, following the approach of Auld LJ in the Macmillan case [1996] 1 WLR 387 , 407 that the concept of "capacity" has to be given a broader, "internationalist", meaning and must not be confined to the narrow definition accorded by domestic English law. In my view it should be interpreted as the legal ability of a corporation to exercise specific rights, in particular, the legal ability to enter a valid contract with a third party. So I agree with the approach of Tomlinson J; for the purposes of English conflicts of laws, a lack of substantive power to conclude a contract of a particular type is equivalent to a lack of "capacity", to use English terminology.'*

There can be no reason of principle for distinguishing in this respect between the meaning of 'capacity' for corporations and individuals…

1055. In the present case, the question concerns the legal ability of Mr Hung to effect a valid and unimpeachable transfer of assets to the PTCs. In adopting a 'broader, "internationalist" meaning' for choice of law purposes, this should plainly be regarded as an issue as to Mr Hung's 'capacity', not least to prevent the potential for different laws arbitrarily to apply to the question of whether a nominee was able to effect a legally valid and unimpeachable transfer of property." [Emphasis added]

The proper construction of section 10(2)

331. The main body of section 10(2) of the 1989 Act sets out the following general governing law rule:

> "*(2) All questions as to the capacity of any settlor arising in regard to a trust which is for the time being governed by the law of Bermuda or in regard to any disposition of property upon the trusts thereof are to be determined according to the law of Bermuda without reference to the law of any other jurisdiction with which the trust or disposition may be connected*…" [Emphasis added]

332. In my judgment, applying the construction I have adopted in relation to the meaning of "capacity" in subsection (1), it is far more straightforward to apply the same construction to subsection (2) in relation to the conjoined terms "*the capacity*" and "*or disposition of property*". I have no hesitation in preferring the result contended for by the Claimants through a far more direct and simple interpretative route. I have little difficulty in rejecting the result contended for by the Trustees, again without the need to fully engage with the various and somewhat elaborate arguments deployed. This is because I find that the notion of a conflict between the term "capacity" in subsection (1) and (2) respectively is an entirely false point. Section 10(2) clearly is intended to elaborate upon section 10(1) and accordingly the words "*the capacity of any settlor*" (which does suggest capacity in the narrower sense) when combined with "*or in regard to any disposition of property*" are complementary terms rather than juxtaposed against each other. I find that:

(a) the Trustees were right to contend that the two terms were linked and that it makes no sense to view subsection (1) and subsection (2) as not both dealing with capacity;

(b) the Claimants were right to contend that subsection (2) is clearly intended to apply to both issues of capacity (narrowly defined) and other dispositions potentially vitiated by broader legal invalidity grounds;

(c) however both sides were wrong to the extent that they posited an either/or construction analysis.

333. Section 10(1) enunciates a general governing law rule which applies Bermuda law to the categories of capacity issues it defines, essentially Bermuda law in respect of (a) movable property, transferred *inter vivos*, (b) movable property transferred by will if the settlor's domicile is in Bermuda and (c) immovable property situated in Bermuda. Section 10(2) builds on that foundational general principle by providing that where a trust is governed by Bermudian law, Bermuda law applies to all issues relating to the capacity of the settlor, broadly defined, including questions as to the validity of any dispositions to the trust, subject to the exceptions set out in the following subparagraphs. In my judgment the terms "*the capacity of any settlor"* and "*or in regard to any disposition of property*" are explicative of the broad sense in which the word capacity is used in section 10(1) rather than intended to be conjunctive in the usual sense. Section 10(2) is not suggesting an entirely different category of questions to which Bermuda law is intended to *prima facie* apply under section 10(2) in contrast to the position under section 10(1).

334. The third limb of section 10 is the exceptions to the general rule formulated in section 10(2). Here, I unequivocally accept the submissions of Mr Hagen QC and Professor Harris QC that the following subparagraphs make it clear that section 10(2) applies Bermuda law not simply to questions of capacity narrowly defined, but also to questions relating to dispositions to trusts governed by Bermuda law:

> "*(a) does not validate <u>any disposition of property</u> which is neither owned by the settlor nor the subject of a power in that behalf vested in the settlor, nor does this subsection affect the recognition of foreign laws in determining whether the settlor is the owner of such property or the holder of such power;*
>
> *(b) does take effect subject to any express contrary term of <u>the trust or disposition</u>;*
>
> *(c) does not, as regards the capacity of a corporation, affect the recognition of the laws of its place of incorporation;*
>
> *(d) does not affect the recognition of foreign laws prescribing generally (without reference to the existence or terms of the trust) the formalities for <u>the disposition of property</u>;*
>
> *(e) does not validate any <u>trust or disposition of immovable property</u> situate in a jurisdiction other than Bermuda which is invalid according to the laws of such jurisdiction;*

(f) does not validate any testamentary trust or disposition which is invalid according to the laws of testator's domicile." [Emphasis added]

335. Accordingly even if I was required to find that the terms "capacity" in section 10(1) and/or "*capacity…or any disposition of property*" in section 10(2) should be given the narrow construction contended for by the Trustees' counsel, I would still find that section 10(2) clearly applies to questions relating to dispositions to trusts governed by Bermuda law as well. Section 10(2) appears to be substantially the same as section 90 of the Caymanian Trusts Act (2018 Revision) and section 90 has long been construed as having the effect contended for by the Claimants for section 10(2) of the 1989 Bermudian Act. I accept their submissions in this regard and find that, subject to any derogations being engaged, Bermuda law *prima facie* applies to the adjudication of questions as to the validity of the transfers by Mr Hung to the Bermuda Purpose Trusts.

Derogations from the prima facie application of Bermuda law

336. The potentially relevant derogations are the following:

(a) the application of Bermuda law will neither (1) validate a transfer of property which is not owned by the settlor or subject to a power vested in the settlor which is invalid under a foreign law, nor (2) exclude the recognition of foreign laws related to questions as to "*whether the settlor is the owner of such property or the holder of such power*" (section 10(2)(a));
(b) the application of Bermuda law will not affect the recognition of foreign laws making general provision for the formalities for disposing of property (section 10(2)(d)).

337. The Claimants contend that section 10(2)(a) is not engaged in the present case because it is common ground that the Founders did not own the BVI shares which Mr Hung transferred to the Bermuda Purpose Trusts and that the Founders had a power to direct Mr Hung to dispose of the relevant assets. The mistake, undue influence and want of authority claims are governed by Bermuda law by virtue of the operation of section 10(2) of the 1989 Act. The common law conflicts rule they contend applies in any event is that the *lex situs* (BVI law) governs all questions relating to the validity of the transfers. The Trustees of course contend that the questions in dispute in relation to these claims fall under the umbrella of the Hung Arrangement which is governed by Taiwanese law. The Hung Arrangement and its applicable law will be considered further below in explaining my decision on what system of law applies to these various claims applying both a statutory and common law analysis.

338. As far as section 10(2)(d) is concerned, the Claimants rely on this as preserving the operation of BVI law in relation to the formalities issue. This is in my judgment a

straightforward argument, albeit that whether or not BVI law requires writing for the transfer of equitable interests in personal property is a very contentious and difficult question turning in part upon expert evidence on BVI history.

Section 10 as amended in 2020

339. It would require a very strained and unnatural reading of section 10 prior to its 2020 amendment to construe the section as only requiring the application of Bermuda law where this is necessary to override the invalidating effects of the foreign law which would otherwise apply at common law to the issue. However the express terms of the amended version of section 10 introduced in 2020 now expressly support such a construction. In the Trustees' Opening Submissions, it was argued:

> "*585. As is clear from its terms, by subsection 10(1) the firewall legislation excludes foreign law from applying to the determination of any question concerning a Bermuda trust, but only to the extent that it is a foreign law which 'creates, recognises, or defeats, or gives a foreign court power to create, recognise, or defeat, any right or interest in or to property, or any obligation or liability on any person, by virtue or in consequence of, or in anticipation of' any of the three matters listed in subsections 10(2)(a) to (c). Those three matters are, in summary, death, divorce or insolvency. [emphasis added]*
>
> *586. The short answer to this part of the case is that there is no suggestion that, to the extent that any foreign laws are applicable to any of the issues arising on the Transfer Claims, they are laws which do any of the things set out in section 10(2) of the 1989 Act. They are not therefore laws which fall to be excluded under subsection 10(1). That is unsurprising: the purpose of the firewall legislation is to prevent the operation of foreign forced heirship rules, matrimonial property legislation, and insolvency legislation so as to affect the validity of Bermuda trusts. The purpose of the legislation is not to apply Bermuda law to the questions of what rights YC Wang and YT Wang had in the property held by Mr Hung, whether Mr Hung was authorised to transfer that property as he did, or whether such transfer to the Trustees overrode whatever rights YC and YT Wang had. Those are matters which fall entirely outside the scope of the legislation.*"

340. The Trusts (Special Provisions) Amendment Act 2020 (the "2020 Act") was enacted on and with operative effect from August 5, 2020. It repealed and replaced section 10[74] which now provides as follows:

> "***Exclusion of application of foreign law***
>
> *10. (1) No foreign law that is excluded under subsection (2) shall apply to the determination of any question concerning a Bermuda trust, including any question concerning—*
>
> *(a) the capacity of a settlor to dispose of property upon the trusts of a Bermuda trust;*
>
> *(b) any right or interest in or to property disposed upon the trusts of a Bermuda trust;*
>
> *(c) the validity of a disposition of, or a declaration of trust in respect of, property upon the trusts of a Bermuda trust, including whether any such disposition should be declared void or invalid, rescinded, set aside, varied or amended; or*
>
> *(d) any obligation or liability of a settlor, trustee or beneficiary of a Bermuda trust.*
>
> *(2) For the purposes of subsection (1), a foreign law is excluded if it creates, recognises, or defeats, or gives a foreign court power to create, recognise, or defeat, any right or interest in or to property, or any obligation or liability on any person, by virtue or in consequence of, or in anticipation of—*
>
> *(a) the death of a person (other than as a result of a voluntary disposition, whether testamentary or otherwise, by the deceased);*
>
> *(b) the creation, existence or dissolution of a relationship of marriage, domestic partnership (or analogous relationship), cohabitation or other familial relationship, whether by blood or adoption; or*
>
> *(c) bankruptcy, liquidation or an analogous insolvency process, including a provisional process or a process for the restructuring of debts.*

[74] It also introduced a new section 11.

(3) No foreign law shall apply to the determination of any question concerning the validity, construction, effects or administration of a Bermuda trust, including any of the matters referred to under section 7(a) – (j).

(4) If and to the extent that this section excludes the application of foreign law, to that extent the court shall apply instead the law of Bermuda excluding rules of conflict of laws (save for those set out herein).

(5)This section shall not apply to the determination of any question to the extent that the question—

(a) concerns immovable property outside Bermuda; or
(b) relates to a severable aspect of a Bermuda trust governed by foreign law."

341. The Trustees relied on the application of the 2020 Act to the present claims against them because, quite clearly, the scope of the application of Bermuda law is now limited to cases where a foreign law invalidated a trust governed by Bermuda law or dispositions to such a trust. This argument was not advanced with much conviction. The Claimants responded that the 2020 Act was not intended to have retrospective effect on pre-existing claims such as their own claims herein. There are no transitional provisions which expressly provide that the 2020 Act applies to claims which accrued or proceedings which were commenced before August 5, 2020, the operative date of the amending Act. There is no express or implied legislative intention which displaces the presumption against retrospective legislative effect. The Interpretation Act 1951 provides:

"*16. (1) Where an Act repeals any other Act or any enactment in any Act then, unless the contrary intention appears in the repealing Act, the repeal shall not have effect —*

(a) so as to revive anything not in force or existing at the time at which the repeal takes effect; or

(b) so as to affect the previous operation of the Act or enactment so repealed, or so as to affect anything done or suffered under or by virtue of or in pursuance of the repealed Act or enactment; or

(c) so as to affect any right, privilege, obligation or liability acquired, accrued or incurred under or by virtue of the Act or enactment so repealed; or

(d) so as to affect any judgment, sentence or order duly given, imposed or made, or any punishment, forfeiture or disability duly incurred, in respect of any offence committed against the Act or enactment so repealed; or

> *(e) so as to affect any investigation, legal proceedings or remedy in respect of any such right, privilege, obligation, liability, judgment, sentence, order, punishment, forfeiture or disability as is mentioned in paragraph (c) or (d); and—*
>
> > *(i) any such investigation, legal proceeding or remedy may be instituted, continued or enforced; and*
> >
> > *(ii) any such judgment, sentence or order may be given, imposed or made; and*
> >
> > *(iii) any such punishment, forfeiture or disability may be imposed, as if the repealing Act had not come into operation...*" [Emphasis added]

342. Applying the more restrictive application of Bermuda law introduced by the 2020 Act to the present proceedings commenced before the new section 10 came into effect would clearly "*affect*" the present "*legal proceedings*". Under the version of section 10 in force when the Claimants commenced their proceedings, Bermuda law automatically applied to claims relating to the creation of or dispositions into Bermuda trusts. Under the post-2020 version of section 10, foreign law which would otherwise apply is only excluded and replaced by Bermuda law under the limited circumstances prescribed by the new section 10(2), none of which would appear to apply to their claims herein. The most dramatic way in which existing proceedings can be potentially affected by legislative changes given retrospective effect is to deprive a claimant of a remedy altogether. However, altering the governing law of an existing proceeding is in my judgment a sufficiently material impact to engage the interpretative protections afforded by section 16(1)(c) of the Interpretation Act.

343. I regard it as trite law that legal proceedings are not impacted by changes in the law unless it is clear that Parliament intends the legislation to have such an effect. It is not uncommon for procedural legislation to be enacted on the express basis that a new procedure will apply to existing proceedings. It would be quite exceptional, and possibly unconstitutional by virtue of section 13 of the Bermuda Constitution ("*Protection from deprivation of property*"), for substantive rights and/or liabilities to be retrospectively altered by legislation, even in express terms. There are no such express terms here. I accordingly reject the Trustees' following analysis in their Closing Submissions which effectively advances the heretical proposition that Parliament should be presumed to have intended the 2020 Act to have retrospective effect:

> "*169. ... On the face of the 2020 Act, its effect was immediately to amend the 1989 Act with effect from 5 August 2020… There was no transitional*

provision, unlike the earlier 1998 amendment act which changed the substantive law and did contain transitional provisions…That is likely to have been a deliberate choice on the part of the legislature, and it makes sense…"

344. As Mr Hagen QC correctly submitted in oral closing argument, it makes no sense to suggest that the new section 10 merely restated the old section because, if any doubt about its substantive changes existed, such doubts are laid to rest by the Explanatory Memorandum to the Bill which crucially explains that "*the new section 10 is intended to provide for an exclusion of foreign law where appropriate as opposed to providing for a blanket application of Bermuda law, subject to exceptions*" [Emphasis added]. I find that the new section 10 does not apply to the present proceedings.

The law governing the Hung Arrangement and its interaction with section 10(2) of the 1989 Act

345. On a straightforward reading of section 10(2)(a), the questions of whether or not the transfers purportedly effected by Mr Hung are vitiated by mistake, undue influence or lack of authority, assuming that Taiwanese law would otherwise apply, are not questions where the foreign governing law would be recognised because they do not relate to "*whether the settlor is the owner of such property or the holder of such power*". Accordingly, having rejected the Trustees' construction of section 10 and/or their submission that the new section 10 applies, I am bound to find that Bermuda law applies to the issues which are in dispute by virtue of the operation of section 10(2) of the 1989 Act in the form in force when the present proceedings were commenced by the Plaintiff and joined by D8. It matters not whether the Hung Arrangement (the legal relationship between the Founders and Mr Hung in relation to the BVI shares transferred to the Bermuda Purpose Trusts) is governed by Taiwanese law for the purposes of this statutory analysis.

346. Mr Howard QC persuasively argued, in the context of the common law analysis, that it was artificial to conceive of three men based in Taiwan entering into a nomineeship arrangement governed by some distant foreign law beyond their contemplation when the arrangement was initially consummated. In my judgment the proper construction of section 10 of the 1989 Act does not involve any inherent tension between the law the parties assumed would govern their relationship and the law applied to the mistake, undue influence and want of authority claims. The first two claims on their face have no direct connection to the nomineeship agreement at all. Although the want of authority claims clearly engage the nomineeship relationship, potentially at least, the application of Bermuda law to these claims in substantive legal terms simply reflects the expression of Bermudian legislative policy in relation to what law should govern the status of assets currently held by Bermuda-based trusts.

Findings: Bermuda law governs the mistake, undue influence and want of authority claims by virtue of section 10(2) of the 1989 Act

347. In summary, as a matter of statutory analysis, I find that Bermuda law governs the disputed aspects of the mistake, undue influence and want of authority claims asserted by the Claimants. In case I am wrong, I set out below my alternative findings on the common law position.

What law governs the Hung Arrangement as it relates to the BVI shares transferred to the Bermuda Purpose Trusts under Bermudian conflict rules?

348. The relevant applicable law issue is not what law governs the Hung Arrangement generally and/or for all purposes. The issue is, applying Bermudian common law conflict of laws rules, what law governs the terms upon which the BVI shares transferred to the Bermuda Purpose Trusts were held by Mr Hung on behalf of the Founders, to the extent (if any) that such terms are relevant to the validity of the impugned transfers. The starting point in the analysis is to identify the applicable choice of law rules.

349. In *MacMillan Inc. –v- Bishopgate Investment Trust plc* [1996] 1 WLR 387, Staughton LJ opened the leading judgment of the English Court of Appeal as follows:

> "*In any case which involves a foreign element it may prove necessary to decide what system of law is to be applied, either to the case as a whole or to a particular issue or issues. Mr Oliver, for Macmillan Inc., has referred to that as the proper law; but I would reserve that expression for other purposes, such as the proper law of a contract, or of an obligation. Conflict lawyers speak of the lex causae when referring to the system of law to be applied. For those who spurn Latin in favour of English, one could call it the law applicable to the suit (or issue) or, simply the applicable law.*
>
> *In finding the lex causae there are three stages. First, it is necessary to characterize the issue that is before the court. Is it for example about the formal validity of a marriage? Or intestate succession to movable property? Or interpretation of a contract?*
>
> *The second stage is to select the rule of conflict of laws which lays down a connecting factor for the issue in question. Thus the formal validity of a marriage is to be determined, for the most part, by the law of the place where it is celebrated; intestate succession to movables, by the law of the place where the deceased was domiciled when he died; and the interpretation of a contract, by what is described as its proper law.*

Thirdly, it is necessary to identify the system of law which is tied by the connecting factor found in stage 2 to the issue characterised in stage 1. Sometimes this will present little difficulty, though I suppose that even a marriage may now be celebrated on an international video link. The choice of the proper law of a contract, on the other hand, may be controversial.

In an ideal world the answers obtained in these three stages would be the same, in whatever country they were determined. But unfortunately the conflict rules are by no means the same in all systems of law. In those circumstances a choice of conflict rule may have to be made. It is clear that, in general, the second and third stages are to be determined by the law of the place where the trial takes place (lex fori). That law must tell one what the connecting factor is for the issue before the court, and what system of law it points to. But the first stage, characterisation of the issue, presents more of a problem.

In Dicey and Morris on The Conflict of Laws (12th edn) (1993) vol. 1, p.35 there is this passage:

> *'The problem of characterisation has given rise to a voluminous literature, much of it highly theoretical. The consequence is that there are almost as many theories as writers and the theories are for the most part so abstract that, when applied to a given case, they can produce almost any result.'*

Fortunately the next sentence reads:

> *'They appear to have had almost no influence on the practice of the courts in England.'*

The authors conclude, at p.44:

> *'The way the court should proceed is to consider the rationale of the English conflict rule and the purpose of the rule of substantive law to be characterised. On this basis, it can decide whether the conflict rule should be regarded as covering the rule of substantive law. In some cases, the court might conclude that the rule of substantive law should not be regarded as falling within either of the two potentially applicable conflict rules. In this situation a new conflict rule should be created.'*

Later, at p.47:

> *'... the way lies open for the courts to seek commonsense solutions based on practical considerations.'*

Before leaving these preliminary matters, I would add that if at all possible the rules of conflict should be simple and easy to apply. One might say that all rules of law should be of that character; but we have less control over rules of domestic law. The litigant who is told by his advisers that his case may or may not involve the application of a foreign system of law, and that he must be armed with expensive expert evidence which may, in the event, prove unnecessary, deserves our sympathy. For many years even cases of tort/delict involved uncertainty and the analysis of five different speeches in the House of Lords. Academic writers of distinction concern themselves with conflict, not surprisingly since it is a subject of great intellectual interest. We must do our best to arrive at a sensible and practical result."

350. Auld LJ on the issue of characterisation opined as follows:

"*… It follows from what I have said that the proper approach is to look beyond the formulation of the claim and to identify according to the lex fori the true issue or issues thrown up by the claim and defence. This requires a parallel exercise in classification of the relevant rule of law. However, classification of an issue and rule of law for this purpose, the underlying principle of which is to strive for comity between competing legal systems, should not be constrained by particular notions or distinctions of the domestic law of the lex fori, or that of the competing system of law, which may have no counterpart in the other's system. Nor should the issue be defined too narrowly so that it attracts a particular domestic rule under the lex fori which may not be applicable under the other system. See Cheshire & North's Private International Law, 12th ed., 45-46, and Dicey & Morris, vol 1., pp. 38-43 and 45-48.*"

351. It was common ground that the three-stage process described by Staughton LJ should be applied by this Court in the present case. The Trustees for the purposes of the first stage (in relation to the mistake and undue influence claims) identified three issues in their Closing Submissions:

"*130.1. First, what rights (if any) did YC Wang and YT Wang have in relation to property held by Mr Hung under the Hung Arrangement? In particular, did those rights include a right to recover the property from third parties if Mr Hung transferred it without authorisation, or with authorisation vitiated by mistake or undue influence?*

130.2. Second, if YC Wang and YT Wang did have a right to recover property in those circumstances, were the transfers to the Trustees unauthorised and/or was any authorisation vitiated by mistake or undue influence, in such a way as to trigger the right?

130.3. Third, if the transfers of the property to the Trustees were either unauthorised or any authorisation can be vitiated, did the transfers of that property to the Trustees nevertheless have the effect of overriding whatever rights YC and YT Wang had?"

352. They contended that the first two issues were governed by the law with which the Hung Arrangement was most closely connected and that the third issue was governed by the *lex situs*. Mr Hung's Estate, as regards the want of authority claims asserted against the Hung Estate, adopted the similar position that the Hung Arrangement was governed by Taiwan law so that this was the applicable system of law. Both of these arguments appear to assume (without justifying this conclusion) that the Hung Arrangement, namely the general oral nomineeship agreement pursuant to which Mr Hung held shares for the Founders since the 1970s, is the contract most closely connected with the claims. Arrayed against this are the contentions that (a) the relevant nomineeship agreement which is engaged by the present claims is the specific agreement in relation to BVI shares, and (b) that the claims are in any event property claims which are governed by BVI law as the *lex situs* of the shares. Because of the summary findings set out below in relation to the Plaintiff's undue influence claim and the Claimants want of authority claims against the Hung Estate, I need only consider for present purposes the characterisation of the mistake claims. In this regard, I accept and adopt D8's following Closing Submissions:

"*1102. In Whittaker v Concept Fiduciaries Ltd,*[75] *the Royal Court of Guernsey held, at §9, that:*

> *'The applicable law as to whether the transfers in question should be set aside on the grounds of mistake is the law of England and Wales. This is because the lex situs of property which is the subject of the disposition to a foreign trust sought to be set aside determines the applicable law in respect of that disposition (see Dervan v Concept Fiduciaries Limited, Judgment 38/2012 at paras. 21, 30 and 47; followed in D G Nourse v (1) Heritage Corporate Trustees Limited and (2) Concept Fiduciaries Limited, Judgment 01/2015 at para. 11). Shares have their situs in the country where they may be dealt with between shareholder and company (ie where the share register is kept) and in this case the shares in question were in companies registered in England and Wales.*"

*1103. The same view is expressed (as to the position in the absence of legislative provision) by Lewin on Trusts (20th ed.) ("**Lewin**"), §12-011:*

[75] Royal Court, 23 March 2017 (Judgment 15/2017).

'Questions whether a trust, or a transfer into trust, may be set aside for mistake should likewise be treated as a preliminary issue. The law to be applied is the lex situs of the trust property at the time of the transfer into trust".

1104. Accordingly, even if the statutory rules were inapplicable, the Mistake Claims would be governed at common law by BVI law as the law of the place of incorporation, registration and situs of the BVI shares, for the same reasons set out in respect of the Wrongful Transfer Claims.

1105. Moreover, it would be contrary to principle for the effects of a transfer of property to be determined by a different law depending upon whether the transfer was unauthorised or the product of a mistake. In both cases, the claim is to recover the property from the transferee. In the case of mistake, the law of the situs provides a balanced solution, protecting the interests and expectations of the mistaken party and the transferee, both of whom can easily determine the situs of the assets."

353. Signed nomineeship agreements in relation to the BVI companies whose shares were transferred to the Bermuda Purpose Trusts either were never executed or have now been lost. However there is no reason to doubt that the draft documents broadly reflect the formal arrangements entered into by Mr Hung with CITCO Nominees or other BVI corporate service providers. A September 9, 1994 letter from Robert Ho to Susan Wang in relation to five BVI companies[76] (Ackerman Brothers Inc, Rimwood Inc, Energy Associates Ltd, Power Unlimited Corp, Pacific Light & Power Corp), for instance, contemplated the following structure:

Registered shareholder: CITCO (on the terms of a Management Agreement and Declarations of Trust)

Legal Owner: Mr Hung.

Ultimate Beneficial Owner ("UBO"): Mr X and Mr X.

354. The rough structure chart displayed quite vividly from a corporate record perspective that, whatever pre-existing arrangements may have existed between Mr Hung and the UBOs (quite obviously the Founders), a new nomineeship agreement was entered into in relation to the shares of the five BVI companies with the sub-nomineeship relationship playing an integrated, albeit subsidiary, role. As the Claimants contended, it is clear that the nominee arrangements in relation to BVI shares were governed by BVI law. It also makes it easier

[76] Bundle G2/11/1-G2/11/3. In other instances it appears that Mr Hung, exceptionally, was the registered shareholder himself.

to apprehend that most questions about whether such shares have been validly transferred may logically be viewed as a property law question governed by the *lex situs* of the property.

355. It seems incongruous to contend, over 15 years later, that although these shares were issued on terms that Mr Hung was merely a sub-nominee and that the Founders were the ultimate beneficial owners, that what was contemplated at the time for BVI law and regulatory purposes was something entirely different. It was assumed at the time that the Hung Arrangement governed the relationship between Mr Hung and the Founders, that arrangement was governed by Taiwanese law, and as a matter of Taiwanese law the Founders had no beneficial ownership interest in the shares at all and need not even have been mentioned. In 21st century terms, there is an enhanced public policy interest in transparency about the ultimate beneficial ownership of shares. In offshore jurisdictions with a high volume of high value incorporations and share transfer transactions, legal policy should favour a practical approach to choice of law rules as they relate to ownership interests in shares. Practicality and certainty will usually favour (subject to express contrary agreement in a bespoke nomineeship agreement or other countervailing special circumstances), having all ownership questions governed by the law of the place of incorporation of the company or such other place where the share register is held.

356. Policy considerations apart, the accepted legal view in any event appears to be that whether or not transfers of property to a trust are vitiated by mistake is an issue which should be determined by the *lex situs* of the property. The Royal Court of Guernsey in *Whittaker v Concept Fiduciaries Ltd*, 23 March 2017 (Judgment 15/2017, Miss Amanda Tipples QC, Lieutenant Bailiff) held:

> "*17. The Application was made by Mrs Whittaker under section 69(1)(a)(iv) of The Trusts (Guernsey) Law, 2007 ("the 2007 Law"). She was the settlor, as defined by section 80 of the 2007 Law, and therefore had the necessary standing to make the Application (section 69(2)(c) of the 2007 Law).*
>
> *18. CFL, as the trustee, is resident in Guernsey and there is no dispute that the trust property is administered in Guernsey. This, of course, means that the court also has jurisdiction in relation to this Application under section 4(1)(b)(i) and (ii) of the 2007 Law.*
>
> *19. The trusts are governed by the law of England and Wales. They are 'foreign trusts' and Part II of the 2007 Law does not apply to them. <u>The applicable law as to whether the transfers in question should be set aside on the grounds of mistake is the law of England and Wales. This is because the lex situs of property which is the subject of the disposition to a foreign trust</u>*

sought to be set aside determines the applicable law in respect of that disposition (see Dervan v Concept Fiduciaries Limited, Judgment 38/2012 at paras. 21, 30 and 47; followed in D G Nourse v (1) Heritage Corporate Trustees Limited and (2) Concept Fiduciaries Limited, Judgment 01/2015 at para. 11). Shares have their situs in the country where they may be dealt with between shareholder and company (ie where the share register is kept) and in this case the shares in question were in companies registered in England and Wales." [Emphasis added]

357. In *Dervan v Concept Fiduciaries Limited*, Judgment 38/2012, the Royal Court of Guernsey (Richard McMahon, Deputy Bailiff) considered the common law choice of law rule in more depth:

> "*23. Prior to the resumed oral hearing, Counsel had provided copies of some helpful material written by Professor Jonathan Harris. The earliest in time is The Hague Trusts Convention: Scope, Application and Preliminary Issues (Hart Publishing, 2002). In relation to Article 4 of the Hague Convention, Professor von Overbeck's Explanatory Report (at para. 53) had offered an analogy with a rocket-launcher and its rocket: 'The image employed was that of a launcher and the rocket; it will always be necessary to have a "launcher", for example a will, a gift or another act with legal effects, which then launches the "rocket" the trust. The preliminary act with legal effects, the "launcher", does not fall under the Convention's coverage.' Professor Harris then comments (at page 151) that these rocket launching issues 'are of crucial importance and, in some cases, themselves give rise to very complex and unsettled choice of law problems' and continues that 'Where the transfer of property is ineffective by its governing law, the fact that it was valid by the law putatively applicable to the trust is irrelevant.'*
>
> *24. In this regard, Advocate Le Tissier drew attention to para. 54 of the von Overbeck Report:*
>
> > *'A transfer of assets to the trustee is a sine qua non condition for the creation of the trust. But the law designated by the Convention applies only to the establishment of the trust itself, and not to the validity of the act by which the transfer of assets is carried out. This act is entirely governed by the law to which the conflicts rules of the forum submit it. It may be moreover that different laws will be applicable for the substance and for the form of this act, or yet for the capacity of the person who has effected it. If it turns out that under the applicable law the transfer is not valid, one may consider*

at the start that the trust has not come into existence since an essential element is lacking.'

25. *Applying these principles to the two dispositions in this case, I am satisfied that Article 4 of the Hague Convention does not assist me in determining the law that will need to be applied. Neither Counsel has argued that the proper law of the trust is Guernsey law meaning that Part II of the 2007 Law applies. Advocate Le Tissier's submissions that Guernsey law should be applied, to which I will turn in more detail shortly, are based on the proper law of the restitutionary obligation rather than the proper law of the trust. He acknowledged that the proper law of the trust is English law. Accordingly, the mutual exclusivity of the distinction between Guernsey and foreign trusts in the 2007 Law leads to the conclusion that this is not a Guernsey trust for the purposes of that Law.*

26. *As such, being an English law trust, and insofar as this remains relevant, the way in which the Hague Convention has been given effect in English law through the 1987 Act means that its provisions have been incorporated into domestic law without further ado. This means that Article 4 of the Hague Convention would exclude from consideration in accordance with English law questions relating to preliminary issues, ie, the rocket-launcher matters. Therefore, the proper law relating to those issues has to be identified in another way.*

27. *Further guidance is offered in The International Trust (3rd ed., Jordans, 2011) and, in particular, by Chapter 2 entitled "Launching the Rocket – Capacity and the Creation of Inter Vivos Transnational Trusts", authored by Professor Harris, on which Advocate Robilliard based his further submissions at the resumed oral hearing. Focusing on intangible movables, the starting point (at para. 2.39) is expressed to be:*

> *'Given that the situs of an intangible is actually likely to be more enduring than that of a tangible movable, and that the lex situs can sensibly be applied to capacity to transfer the latter, it is difficult to see in principle why the lex situs ought not also to be applied to the transfer of intangibles.'*

This analysis then leads him to suggest (at para. 2.49) that the conclusion to be drawn is as follows:

> *'(a) The capacity of any settlor to dispose of any interest in his property inter vivos is governed by the lex situs at the time of the purported transfer.*

(b) The capacity of any settlor to create a trust of any property of which he may, according to rule (a), dispose, is governed by the proper law of the trust.'

28. *As regards the issue of the passing of property to the trustee, ie, its vesting, Professor Harris moves on to consider whether there should be two questions here relating to the transfer of the legal title to the trustee and the transfer of equitable title or equitable rights to the beneficiary. In this regard, he notes that 'once legal title has validly been transferred to B, the rocket-launching process is at an end and the law applicable to the trust takes over' This is the distinction that Advocate Robilliard submitted was of great significance. The Application is not founded on arguing that legal title in the shares and the money has not been legally vested in the First Respondent as trustee, but rather that the Court should exercise its discretion, on equitable principles, to set aside or, as he put it, 'unscramble' the two dispositions on the basis of mistake.*

29. *At paragraph 2.69 of his 2011 work, Professor Harris offers the following choice of law rules for the transfer of property on trust:*

'(1) Whether any proprietary interest has been transferred inter vivos from a would-be settlor to a would-be trustee is determined by the lex situs at the time of transfer. However, in the case of debts, the assignability of the debt will be determined by the law under which the debt arose; and the question whether the debt has been assigned to the trustee will be determined by the law governing the assignment itself.

(2) Whether the transfer is effective to transfer an equitable interest to the would be beneficiary, and thus to form a completely constituted trust, is determined by the proper law of the trust.'

30. *In relation to the Deed of Assignment of the shares, therefore, the lex situs route leads one clearly to applying the law of England and Wales. This was explained in the following way at para. 2.60:*

> *'The law still purports to ascribe a situs to intangible property. Shares have their situs in the country where they may be dealt with between shareholder and company. So, if shares are only transferable by entry on the register, they are situated in the country where the register is kept.'*

> *The company is registered in England and Wales. The Deed of Assignment transferred the legal ownership of the 100,000 ordinary shares from Ms Dervan to the First Respondent. The lex situs, therefore, is the law of England and Wales and, in my judgment, that is the applicable law in respect of the questions arising in relation to that disposition under the Application. The fact that the applicable law identified in this way corresponds with the choice of law on the face of the Deed of Assignment lends support to that conclusion.*" [Emphasis added]

358. This analysis does not solely rest on the submissions of Mr Hagen QC and Professor Harris QC as counsel supported by the views of Professor Harris as academician. In *Schroder Cayman Bank and Trust Company Ltd v Schroder Trust AG* [2015] (1) CILR 239 (at paragraph 46), Smellie CJ, dealing with a broadly analogous issue, held as follows:

> "*… The assets purportedly appointed out of the Cayman trust are choses in action or 'movables'… so under the applicable common law principles, the law of the domicile governs the transaction, which in this case is therefore Cayman law. See Dicey, Morris & Collins, the Conflict of Laws, 15th ed., Rule 129 (2012): 'Choses in action are generally situate in the country where they are properly recoverable or can be enforced'…*"

359. D8's Closing Submissions also relied upon the clear support for this approach in *Lewin on Trusts*, 20th edition, at paragraph 12-011(3). The authorities relied upon by *Lewin* include the Royal Court of Jersey decisions in *Whittaker* and *Dervan*; but mention is made in a footnote of the contrary approach taken by the Jersey Royal Court in *Re DSL Remuneration Trust* [2007] JRC 251 and *GL-v-Nautilus Trustees* [2009] JRC 124A and the possibility that the position may be affected by firewall legislation. In *Re DSL*, the governing law of the trust was applied without any real analysis because the parties were agreed that the transfer should be set aside on the grounds of mistake. In the *GL* case, the governing law of the trust was also applied without any analysis.

360. I find that the proper characterisation of the question of whether the transfers of BVI shares to the Bermuda Purpose Trusts were valid transfers or should be set aside on the grounds of mistake is that this issue relates to the title to foreign property which question should be governed by the law of the situs (BVI) assuming the common law applies. This is consistent with the broader conflicts rule that the transfer of movables is usually governed by the *lex situs:* '*Cheshire, North and Fawcett, Private International Law*', 15th edition (at pages 1263-1277). The learned authors suggest that this should be the position

in relation to *inter vivos* gifts, citing US authority to this effect in relation to shares (at page 1277) and earlier noted in relation to transfers for value that[77]:

> "*Exclusive reference to the law of the situs will undoubtedly cause hardship to the previous owner if his movables are dealt with in a foreign country without his knowledge.*"

361. In my judgment legal policy in the present context should not favour the selection of a foreign law in place of the *lex situs* which would make it more difficult for the ultimate beneficial owner of shares to obtain relief from mistake, rather than easier.

362. If the relevant choice of law issue at common law was required to be characterised as an issue relating to the relationship between Mr Hung and the Founders, rather than a question relating to the validity of the transfer of the BVI shares from the legal titleholders to the Trustees, I would accept that Taiwanese law applies as the law most closely connected with that trust or sub-nomineeship relationship.

Limitation choice of law issues

363. Based on my primary findings that Bermuda law and/or BVI law governs the mistake claims[78] of the Claimants, by virtue of section 10 of the 1989 Act or as a matter of common law respectively, no question of the application of Taiwanese limitation periods arises for consideration. However, if I am wrong and Taiwanese law does apply to the mistake claims, the Claimants contend that, to the extent that the shorter Taiwanese limitation periods bar their claims, the application of such foreign law should be disapplied on public policy grounds.

364. The key provisions in the Limitation Act 1984 are the following:

> "***Application of foreign limitation law***
>
> *34A (1) Subject to the following provisions of this Part, where in any action or proceedings in a court in Bermuda the law of any other country falls (in accordance*

[77] At page 1268.
[78] The position in relation to the undue influence and want of authority claims being academic in light of the substantive conclusions I reach on those claims.

with rules of private international law applicable by any such court) to be taken into account in the determination of any matter—

(366) *the law of that other country relating to limitation shall apply in respect of that matter for the purposes of the action or proceedings; and*

(b) except where that matter falls within subsection (2), the law of Bermuda relating to limitation shall not so apply.

(2) A matter falls within this subsection of it is a matter in the determination of which both the law of Bermuda and the law of some other country fall to be taken into account.

(3) The law of Bermuda shall determine for the purposes of any law applicable by virtue of subsection (1)(a) whether, and the time at which, proceedings have been commenced in respect of any matter; and, accordingly, section 36 applies in relation to time limits applicable by virtue of subsection (1)(a) as it applies in relation to time limits under this Act.

(4) A court in Bermuda, in exercising under subsection (1)(a) any discretion conferred by the law of any other country, shall so far as practicable exercise that discretion in the manner in which it is exercised in comparable cases by the courts of that other country.

(5) In this section "law", in relation to any country, shall not include rules of private international law applicable by the courts of that country or, in the case of Bermuda, this Part.

Exceptions to 34A

34B. (1) In any case in which the application of section 34A would to any extent conflict (whether under subsection (2) or otherwise) with public policy, that section shall not apply to the extent that its application would so conflict.

(2) The application of section 34A in relation to any action or proceedings shall conflict with public policy to the extent that its application would cause undue hardship to a person who is, or might be made, a party to the action or proceedings.

(3) Where, under a law applicable by virtue of section 34A(1)(a) for the purposes of any action or proceedings, a limitation period is or may be extended or interrupted in respect of the absence of a party to the action or proceedings from any specified jurisdiction or country, so much of that law as provides for the extension or interruption shall be disregarded for those purposes." [Emphasis added]

365. In oral closing argument, Mr Howard QC relied on, *inter alia*, *Harley-v-Smith* [2010] EWCA Civ 78. In upholding the decision of Foskett J, Chadwick LJ approved the following legal and factual findings he reached:

"*29. The judge reminded himself of the observations of this Court in Jones v Trollope Colls Cement Overseas Limited and another (24 January 1990, unreported), Arab Monetary Fund v Hashim and others [1996] 1 Lloyd's Rep 589 and Durham v T & N PLC and others (1 May 1996, unreported). He held (at paragraph [94] of his judgment) that the following propositions could be deduced from those authorities:*

'(i) That it is not sufficient to cross the 'undue hardship' threshold [posed by section 2(2) of the 1984 Act] by reason only of the fact that the foreign limitation period is less generous than that of the English jurisdiction.

(ii) That the claimant must satisfy the court that he or she will suffer greater hardship in the particular circumstances than would normally be the case.

(iii) That in considering (ii) the focus is on the interests of the individual claimant or claimants and is not upon a balancing exercise between the interests of the claimants on one hand and the defendant on the other.'

30. The judge went on to say this:

' [95] Applying these principles on the basis that the Saudi limitation period was either 12 months from the date of the incident or somewhat longer, but no longer than the expiration of the fixed term contracts that each claimant had, I would be satisfied that the 'undue hardship' threshold had been crossed in respect of each claimant in this case. On the premise to which I have referred the following factors would persuade me that this is so:

(366) *Each claimant was impeded in obtaining local advice and representation in the KSA in the manner I referred to in paragraphs 33-35 above.*

(ii) Had each of them obtained such advice or representation at the time, their respective interests would probably have been protected.

(iii) Each sought advice in the UK as soon as it was practicable to do so upon their return.

(iv) Each was misled by advice that was received to the effect that the limitation period did not begin until June 2006.

(v) Those giving the advice, whether in the UK or in the KSA, were disadvantaged because of the uncertainty of the legal position in the KSA and, as a result, the claimants were victims of that uncertainty.

(vi) Through no fault of their own they will be deprived of any opportunity of seeking any kind of redress as a result of the incident unless the limitation period is disapplied.'..."

366. This analysis in relation to substantially similar statutory provisions to section 34B (1)-(2) of the Limitation Act 1984 is highly persuasive as to the application of these Bermudian provisions. The Claimants did not cite any equally persuasive contrary authority. How these principles should be applied to the present case will be considered below in the context of recording my alternative findings on the merits of the Taiwanese law claims.

Formalities claim: applicable law

367. Section 10(2)(d) of the 1989 Act makes it clear that the application of Bermuda law to questions of 'capacity' broadly defined does not preclude the recognition of foreign law relating to "*formalities for the disposition of property*". The same broad policy reasons which militate against applying a different legal system to sub-nomineeship agreements which I adverted to in relation to the mistake claims apply with greater force, it seems to me, to formalities requirements. It would be a recipe for commercial confusion if the validity of share transfers were governed by the formalities requirements of more than one system of law at the same time. In any event, *Akers v Samba* [2017] AC 424 (UKSC) suggests that the proposition that the *lex situs* of the shares governs formalities requirements in relation to both legal and equitable interests is uncontroversial. As regards the *situs* of any equitable interest in shares, Lord Mance (with whom Lords Neuberger, Sumption and Toulson agreed) opined as follows:

"*19. The situs or location of shares and of any equitable interest in them is in the jurisdiction where the company is incorporated or the shares are registered (which is presently unimportant, since in this case they coincide in Saudi Arabia): Dicey, 15th ed., vol. 2, paras 22-044 and 22-048, Underhill and Hayton, Law of Trusts and Trustees (19th ed.) (2016) para 100.128, both citing In re Berchtold [1923] 1 Ch 192, Philipson-Stow v Inland Revenue Comrs [1961] AC 727, 762, per Lord Denning.*"

368. The central holding in *Akers* was that where the legal title in shares was transferred to a *bona fide* purchaser without notice of the separate equitable interest, the equitable interest

was extinguished and the beneficiary's sole remedy lay against the trustee, not the third party. As Lord Sumption stated:

> "*89. It is arguable, as Lord Neuberger of Abbotsbury PSC observes, that the transfer of the legal interest in movables may constitute a "disposition" of an equitable interest if its effect is that the equitable interest is extinguished. But the difficulty about the argument, and the reason why I would reject it, is that equitable interests arise from equity's recognition that in some circumstances the conscience of the holder of the legal interest may be affected. When the asset is transferred to a third party, the question becomes whether the conscience of the transferee is affected. On the facts pleaded in the present case, the equitable interest of SICL was defeated not by the act of the transferor (Mr Al-Sanea) but by absence of anything affecting the conscience of the transferee (Samba). The rules of equity which protect transferees acquiring in good faith and without notice are among the fundamental conditions on which equitable interests can exist without injustice.*"

369. However this case provides implicit support for the broader proposition, which accords with common sense, comity and practicality, that formal requirements for the transfer of movable and immovable property are governed by the *lex situs.* Formalities for property transfers are *par excellence* the sort of matter that one would expect the *lex situs* to govern. As Lord Sumption also remarked (at paragraph 80):

> "*… (1) The transmission of property is governed by the lex situs, which in the case of registered shares is the law of the company's incorporation, in this case Saudi Arabia. This proposition is well established and was not seriously disputed: see Macmillan Inc v Bishopsgate Investment Trust Plc (No 3) [1996] 1 WLR 387. It applies as much to the transmission of an equitable as to a legal interest in shares: Underhill & Hayton, The Law Relating to Trusts and Trustees, 18th ed (2010), para 100.128…*"

MISTAKE CLAIMS UNDER BERMUDA AND/OR BVI LAW

Preliminary

370. The nub of the complaint asserted by the Claimants in respect of the settlement of the First Four Bermuda Purpose Trusts is that there was a fundamental mistake made by the Founders as to the legal character of the Trusts. They believed it was possible for their children and wider descendants to benefit from the Trusts when in fact this was not possible. It was difficult from the outset to avoid viewing this complaint with considerable skepticism, advanced as it was by complainants who were not involved in either the formation or administration of the Trusts. After all, the mistake claims were opposed

(against their personal financial interests) by family members who had been involved in the creation and/or administration of the Trusts.

371. This part of the case was primarily advanced by the Plaintiff. The Plaintiff's counsel's Proposition 1, preliminary to the substance of the mistake claim, was more straightforward than Proposition 2. It advanced the assertion that prior to their transfer to the First Four Bermuda Purpose Trusts, Mr Hung held the BVI Holding Companies as nominee for the Founders. The Plaintiff's counsel most significantly submitted in their Closing Submissions:

> "*218.3 there is overwhelming evidence showing that Mr Hung held whatever interest he had in the BVI Holding Companies as nominee or bare trustee for YC and YT Wang and that YC and YT Wang were the ultimate beneficial owners of the BVI Holding Companies (which were simply held pursuant to a more formal and complex double bare trust/nominee arrangement to the nominee arrangements which YC Wang had been using since at least the 1950s, and that Mr Hung did not hold his interest on the terms of an oral purpose trust (purpose trusts being unknown and unrecognised in Taiwan, as Mr Hung knew.)*"

372. From the outset, it was difficult to avoid viewing the Trustees' contrary arguments as regards ultimate beneficial ownership, through the lens of Bermuda or BVI law at least, with a skeptical eye. Having now found (above) that Bermudian or BVI law governs the nomineeship arrangements, my primary framework for analysis suggest that this preliminary issue can be dealt with more summarily than the main mistake issue.

373. In the Plaintiff's Closing Submissions, Proposition 2 was described as follows:

> "*YC and YT Wang mistakenly believed that the [First Four Bermuda Purpose Trusts] were trusts from which their family could benefit and which they could freely control.*"

374. This was a distillation of the Plaintiff's pleaded case (Reply, paragraph 4) that if YC did assent to the impugned transfers:

> "*... he did so under a fundamental mistake that (i) his family could benefit and (ii) he retained ownership and control over the shares. Mr YC Wang was not told that the [First Four Bermuda Purpose Trusts] did not comply with his instructions; and neither was this fact ever specifically drawn to his attention.*"

375. D8's pleaded case was similar in general terms but did have a significant distinctive slant to it. This stemmed from the comparatively marginal direct involvement of YT in the formation of the First Four Bermuda Purpose Trusts. His counsel in their Closing Submissions invited the Court to make the following factual findings:

> "*569.2. No-one at all gave YT any oral explanation of the terms of the [Wang Family Trust] or any of the later trusts. In particular, no oral "presentation" of the April 2001 Memorandum by Susan took place, the May 2002 memorandum was simply circulated for signature, and no-one explained to him at any other time that members of his family could never benefit from the assets held on those trusts.*
>
> *569.3. None of the documents seen by YT would have imparted to him the understanding that he and his family were irrevocable* [sic.] *excluded from benefit under the trusts.*
>
> *569.4. YT never stated that he understood that he and his family could never benefit from the assets held on the trusts.*
>
> *569.5. Neither Susan nor anyone else (including any of the lawyers involved) took any steps at any stage to verify independently whether YT understood (even at a basic level) the effect of the terms of the [Wang Family Trust] or any of the [First Four Bermuda Purpose Trusts]*."

376. These submissions were based on the indisputable fact that YC played a visible, leading role in the establishment of the First Four Bermuda Purpose Trusts while YT's role was either minimal or a largely invisible one. Nonetheless, the practical position is that the primary field of factual inquiry is the understanding YC had and/or manifested when the trusts were being established, in circumstances where his own role was (in terms of interaction with external professional advisers) a withdrawn one. Most directly considered, this question involves a very narrow sphere of factual inquiry. However, the Plaintiff found the most fertile forensic ground to be a more indirect means of demonstrating that his father was mistaken about the true character of the Trusts. Heavy reliance was placed on a January 2008 Report '*Guidelines for Modification of Overseas Trusts*' signed by YC as demonstrating that he (and the family members who were subsequently involved with the administration of the First Four Bermuda Purpose Trusts) must have believed at the material time that the trusts were capable of benefiting the family.

377. A critical assertion was that YC believed that an incentivization scheme could be incorporated into the Purpose Trust structure. This appeared by the end of the evidential phase of the case to be a fairly arguable proposition, subject to determining whether (a) YC (and YT) did in fact believe that an incentivization scheme could be instituted under the umbrella of the Bermuda Purpose Trusts, (b) this was legally impossible, and (c) (if the answer to both (a) and (b) was affirmative), had a fundamental mistake occurred? The Claimants further relied on statements made (or allegedly made) by persons involved in the administration of the Trusts in Taiwan after YC's death as evidencing a mistaken belief that the Trusts could make financial distributions for the benefit of the Founders children and their descendants. In this context, the Claimants were able to provide direct oral evidence, some of which was supported by contemporaneous records.

378. The formal plea that the Founders believed that the Bermuda Purpose Trusts would continue their prior control over the assets placed in the trusts was only advanced by the Claimants in November and December 2020. Reliance was primarily placed in this regard (Plaintiff's Closing Submissions, paragraphs 364-379) on the fact that the Founders were said to have continued to exercise control (e.g. in relation to investment decisions) of the Bermuda Purpose Trusts after their establishment. This was by far the weaker limb of the mistake claims.

Legal findings: the legal requirements for vitiating transactions on the grounds of a mistake as a matter of Bermudian/BVI law

379. There being no material dispute as the applicable legal principles[79], I gratefully adopt the following legal summary set out in the Plaintiff's Closing Submissions:

> "*579. The key legal principles are common ground and are those set out in Pitt v Holt [2013] 2 AC 108. In summary, the principles are that:*
>
> *579.1 the equitable jurisdiction to set aside a voluntary disposition on the ground of mistake is exercisable whenever there has been a causative mistake which is so grave that it would be unconscionable to refuse relief;*
>
> *579.2 the test would normally be satisfied only when there has been a mistake either as to the legal character or nature of the transaction, or as to some matter of fact or law which is basic to the transaction;*

[79] See the Trustees' Closing Submissions at paragraphs 204-206.

579.3 a causative mistake differs from inadvertence, misprediction or mere ignorance, but forgetfulness, inadvertence or ignorance, although not as such a mistake, could lead to a false belief or assumption which the law would recognise as a mistake – "in carrying out its task of finding the facts, [the Court] should not shrink from drawing the inference of conscious belief or tacit assumption when there is evidence to support such an inference" and "A mistake may still be a relevant mistake even if it was due to carelessness on the part of the person making the voluntary disposition…";

579.4 the gravity of the mistake must be assessed by a close examination of the facts, including the circumstances of the mistake, its centrality to the transaction in question and the seriousness of its consequences for the disponor; and

579.5 the court must then make an objective evaluative judgment as to whether it would be unconscionable, or unjust, to leave the mistake uncorrected.

580. As to whether a given mistake is "sufficiently distinct", it is not enough for the plaintiff to have a general conscious belief or to have had a tacit assumption that generally the transaction being entered into would not have any adverse effects. However, a mistake by a disponer in relation to the nature of the trusts to which he is transferring assets is a paradigm example of an actionable mistake in respect of a voluntary disposition.

581. The remedy which the Court awards is fact sensitive and permits what is practically just. The Court thus has the power to order rescission in whole or in part. Equally it can impose conditions on rescission to reflect the justice of the case."

380. I also adopt the following summary of the governing legal principles set out in the Trustees' Closing Submissions:

"*218. In summary, in order to rescind a voluntary disposition on the grounds of mistake under BVI or Bermuda law it must be shown that when making the disposition the donor was acting under a distinct mistake which caused the relevant transaction to be made and which was of sufficient gravity, such that it would be unconscionable or unjust in all the relevant circumstances*

> *to leave the mistake uncorrected. In considering the final element of unconscionability the Court is required to form a judgment about the justice of the case with an intense focus on the relevant facts, including looking at the consequences of setting aside and not setting aside the disposition.*"

Factual Findings: were the Founders ultimate beneficial owners of the BVI shares transferred to the First Four Bermuda Purpose Trusts (Bermuda/BVI law position)?

381. Partly for the reasons set out above in considering the applicable law to the nomineeship and sub-nomineeship arrangements at common law, I find that the Founders were ultimate beneficial owners of the BVI shares transferred to the First Four Bermuda Purpose Trusts. The available draft nominee documents, sensibly read, suggest that the Founders were the ultimate beneficial owners. It is also essentially common ground that Mr Hung was merely the Founders' nominee, the position under Taiwan law apart. By Mr Hung's own sworn account:

> "*… Prior to YC Wang's death, I was holding these companies as a trustee for purposes to be determined by YC and YT jointly. Following YC's death, I continued to hold those assets as trustee for purposes to be directed by YT alone…*"

382. The bare assertion that Mr Hung was "*holding these companies as a trustee for purposes to be determined by YC and YT jointly*" is insufficient to displace the starting assumption that the exercise of control over shares is usually an indicator of beneficial ownership. A statutory illustration of this point may be found in Section 114 of and the Third Schedule to the Companies Act 1981, which provide that local companies must be both 60% owned and controlled by Bermudians. There is also no support in contemporaneous documentation prior to YC's death for the inherently improbable suggestion that the Founders could not have directed Mr Hung to apply the offshore assets to any purpose, personal or otherwise, as they wished. This is what occurred with the Share Equalization plan. Also, at the covertly recorded the January 10, 2009 Meeting, Mr Hung agreed with Mr Jao that a trust for purposes was not possible in the absence of special laws[80]. He did not assert in that context that he was holding the remaining offshore assets on a trust for purposes under some applicable foreign law. This does not mean that the Founders did not intend the bulk of the remaining assets not yet transferred to the First Four Bermuda Purpose Trusts to be ultimately applied for similar purposes.

383. Various witnesses, including the Plaintiff's witness Toshio Chou and the Trustees' witnesses Susan Wang, CL Yang, Chairman Lee and Ed Granski, gave evidence which

[80] G35//5.2/75.

made it obvious in objective terms that the shares transferred were (in common law terms) beneficially owned by the Founders. They had a longstanding practice (dating back to the 1970s) of purchasing shares in FPG companies through nominees and holding those shares through offshore holding companies, initially in Liberia and eventually (by the early 21st century) exclusively in the BVI. The Founders' wealth was always controlled by them, and they authorised the transfer of the shares used to fund the First Four Bermuda Purpose Trusts. Ms Wang's attempt to deny that Mr Granski (after their initial meeting on July 5, 2000) accurately recorded (in his letter of July 10, 2000) that the trusts were being established to deal with the Founders' "*interests in the Family Companies*" seemed obtuse in the extreme[81].

384. The only serious factual controversy in relation to the mistake claims is whether the Claimants can establish that a fundamental mistake was made by the Founders because they wrongly believed that (a) the Bermuda Purpose Trusts were capable of benefitting their heirs and (b) that they would be capable of controlling the Trust assets despite the fact that they were legally owned by the Trustees.

Factual findings: did the Founders mistakenly believe that the First Four Bermuda Purpose Trusts were capable of benefitting them and their descendants?

Preliminary

385. The first limb of the Plaintiff's Proposition 2 can helpfully be considered by initially addressing the sub-propositions also advanced in the Plaintiff's Closing Submissions:

(a) YC was said to be a "*man of the pen*" who conducted business with some formality making the written evidence of what he was told and approved (and any absence of written evidence) crucial. I accept this sub-proposition in general terms;

(b) YC Wang received succession planning advice directly in 1995 from Gordon Chang of Baker & McKenzie's San Diego, California office which was the only legal advice he directly received. He was told that trusts were "*extremely flexible vehicles*". This advice, of which Susan was unaware in the 2000 trust formation process, would have influenced his understanding about what a trust was. I accept that it is entirely possible that YC in 2000 still had this advice in mind but I find no or no sound basis for concluding

[81] Transcript Day 26, page 20 line 24-page 22 line 19.

that this prior advice actually had any material impact on his understanding of the structure under consideration roughly 5 years later;

(c) based on his expressed admiration for the Rockefeller family's approach to wealth preservation, YC's true wishes (in the mid-1990's and thereafter) would have been to preserve the capital of the family wealth from dissipation while allowing his descendants to benefit from the income. I accept that YC must have considered the option of establishing such a dynastic discretionary trust structure in the mid-1990s and at some time both before and after the First Four Bermuda Purpose Trusts were established. However, I consider this to be of peripheral relevance to what he actually decided when the First Four Bermuda Purpose Trusts were established and view this sub-proposition (assuming it to be valid) as more supportive in general terms of the conclusion that the distinction between purpose and discretionary trusts was fully understood by YC;

(d) YC's succession planning was not influenced by the Annie Lu incident and Dr Wong's dismissal from FPG. I accept this unchallenged sub-proposition although it has no evident connection to the merits of the mistake claims;

(e) YC's written August 2000 instructions contemplated a structure which would retain no ownership yet preserve control and entailed separate pots to which shares would be allocated for individual family beneficiaries. This sub-proposition is not controversial but the implications of it will be further considered below. I also accept that there was a risk of miscommunication because Mr Granski was only interfacing directly with Susan Wang in English, whilst she was communicating with her father in Chinese;

(f) the scheme to benefit the family was not abandoned in communications between YC and Ms Wang between August and December 2000. I accept this largely uncontroversial sub-proposition in general terms, but hold that it has little freestanding significance;

(g) YC "*understood in December 2000 that the trust being created was a 'temporary arrangement' which he could modify in the future to incorporate his scheme to benefit his and YT Wang's descendants before it was made permanent*". This is not an entirely controversial assertion, which is at first blush valid as regards the initial management structure as opposed to the trust structure as a whole. It focusses on advice provided by Jay Hughes in late 2000. What YC understood in April 2001 is far more pertinent;

(h) in February 2001, "*the lawyers appreciated the need to ensure YC and YT Wang understood the effect of the proposed trust but failed to follow this up*". It is not disputed that no direct legal advice was given to the Founders. The implications of this omission will be considered further below;

(i) Susan Wang's March 3, 2001 fax to her father about the establishment of the Wang Family Trust did not inform him that the proposed structure would not enable the family to benefit. Whether this communication supports a finding that the YC Wang believed the beneficiary pots concept had only temporarily been abandoned is highly contentious and will be considered further below, as will the consideration given to a discretionary trust during the same period;

(j) the April 2001 Memorandum failed to tell the Founders that the Wang Family Trust was one which the Wang family could not benefit from. The implications of this point lie at the heart of the mistake claims and will be further considered below;

(k) the "*decision to keep Vanson and Chindwell (Liberia and BVI) out of the proposed trust structure was not taken by YC or YT Wang*". This sub-proposition in my judgment has no great relevance to the merits of the mistake claims. It seems entirely possible, as the Plaintiff suggested through cross-examination, that Susan Wang and others may have made the last minute initial decision upon discovering that the corporate administration status of those entities was in a state of disarray. However, assuming this is what occurred, I have little difficulty in finding that the Founders through the presentation of subsequent financial reports were well aware that those entities remained out of the trust structure and that one rationale for keeping them out, possibly developed after the initial last minute decision, was to see how the new structure worked;

(l) "*YC and YT Wang did not see the full terms of the Wang Family Trust or the GRT prior to their creation*". The implications of this seemingly valid sub-proposition will be considered further below;

(m)"*The GRT was not YC Wang's intended incentivisation scheme and YC Wang was not told that it was*". The implications of this contentious sub-proposition will be further considered below;

(n) "*The August 2001 letter signed by YC and YT Wang is not evidence of a proper understanding of the terms of the Wang Family Trust*". The implications of this contentious sub-proposition will be further considered below;

(o) "*YC and YT Wang's mistaken understanding persisted in respect of the China Trust*". The point has little to no freestanding significance for present purposes if the Founders were not mistaken about the fundamental legal character of the earlier Wang Family Trust;

(p) the Founders did not approve the creation of the Vantura and Universal Link Trusts. The implications of this contentious sub-proposition will be further considered in relation to the want of authority claims below. The point has little to no freestanding significance for present purposes if the Founders were not mistaken about the fundamental legal character of the earlier Wang Family Trust and the China Trust;

(q) "*YC Wang's other actions in the 2000s demonstrate that he had no objections to conferring benefit on his children and it was not his intention to leave everything to society*". This point, thus distilled, seems valid on its face. However, while it potentially supports the mistake claims in an abstract sense, it is effectively countered by the Trustees' short response that there was no need for the family to benefit from the Bermuda Purpose Trusts as the Founders were retaining sufficient personal wealth for their descendants to be generously provided for;

(r) "*If YC Wang had intended to establish a trust for the purpose of acquiring FPG shares and donating to charity, from which his children could never benefit, he would have established another PIT (or donated his wealth to the WCG PIT)*". This sub-proposition, while not completely unarguable, was always in my judgment a somewhat hollow one. The Founders had for many years kept most of their wealth offshore and the Bermuda purpose trust regime offered commercial benefits beyond a simple tax benefit analysis, which a Taiwanese PIT could not offer. There was nothing illogical or surprising about purpose trust vehicles being used in another offshore domicile notable as a forum for substantial trusts. The purpose trust vehicle offered greater flexibility and privacy than a PIT, which the Founders clearly used as the public face of their philanthropy in Taiwan;

(s) the January 26, 2008 report '*Guidelines for the Modification of Overseas Trusts*' (signed by YC Wang in February 2008) provided further evidence of the mistake. This potentially significant sub-proposition is further considered below together with the Wang Family Accord process;

(t) at his death, YC Wang still believed the Wang Family Accord proposals could be implemented and the drafting process continued after his death into 2009. This sub-proposition adds little to (s) above;

(u) "*YT Wang's wills and declarations are evidence of YT Wang's understanding and are highly probative of YC Wang's understanding that the Trust Assets could be used to benefit their descendants*". This contentious sub-proposition is considered further below.

Factual findings: the relevance of the fact that the Founders never directly received legal advice

386. The fact that the Founders never received direct legal advice and communicated primarily through Susan Wang, who was translating English language documents and communications into Chinese, is a central background feature of the factual matrix in the present case. Whenever transactions are conducted across language barriers and/or through intermediaries, there are risks that innocent misunderstandings may occur or that the intermediary may abuse their trusted role for their own personal benefit. Every lawyer would probably regard the ideal way to deliver advice to a client as involving, to some extent at least, a direct personal meeting with the key client or key corporate representative. However, legal experience suggests that, in the private client world at least, the wishes of the ultimate client are usually 'king'. Wealth creators who wish to receive direct legal advice will usually ensure that they receive it; wealth creators who are content to rely on intermediaries will adopt a more withdrawn role. Accordingly, absent the existence of 'red flags' surrounding the ultimate clients' mental capacity, vulnerability to undue influence and/or the *bona fides* of the intermediary, the fact that a significant series of transactions is consummated without the provision of direct legal advice will not in itself be indicative of there being a risk of a legally vitiating mistake. Where such red flags are apparent, prudent lawyers will usually insist on having some direct interaction with the ultimate client to ensure that they are properly instructed and can safely proceed with the relevant legal transaction. As Mr Granski testified[82]:

> "*My - - the testimony I gave earlier was that- - and I - - I feel strongly about it, you know, YC tasked his daughter to accomplish this and to basically find the*

[82] Transcript Day 43 page 160 lines 9-16.

right people who could help her. And as you even suggested, you know, people like YC Wang have lots of people that can give them advice. If he had really wanted to meet me as one of the persons who was fulfilling this, I think he would have asked."

387. In D8's Written Closing Submissions, the following points were also fairly made:

> "*435. Mr Hughes' memo dated 11 February 2001 records the need to take steps to ensure that YC and YT understood the implications of transferring their assets onto the proposed trusts.*
>
> *436. He stated, inter alia, that Mr Granski had told him that:*
>
> *436.1. "there is an expectation that the eldest son may try to challenge the creation and transfer of assets to the charitable trust as there has been some form of family dispute that is ongoing"; and*
>
> *436.2. they had "also discussed the language differences and how we are going to be sure that the Settlor (or Settlors as the case may be) will fully understand the impact of their gift, including the fact that they may be giving away their major assets".*
>
> *437. He also stated that Mr Granski had "indicated that he has engaged Jack [Huang] of Jones Day in addition, as he apparently has experience in explaining these things to Chinese clients".*
>
> *438. However, there is no evidence that Mr Hughes or Mr Granski did in fact take any steps to be sure that YC, much less YT, fully understood the impact of their gift, including that they were giving away their major assets…*"

388. Clearly the US lawyers' preferred course of action would have been for direct legal advice to be given to the Founders, with the risk of a subsequent legal challenge being sagely identified. It is obvious that the Founders chose not to directly engage with the legal team. It is true that why this occurred is not clearly or directly explained by reference to contemporaneous documentation. In the present case, however, there is no or no credible suggestion that the Founders lacked capacity, were vulnerable to undue influence or were being exploited by their trusted intermediaries (principally, Ms Susan Wang). Moreover, it seems clear from the evidence of Mr Granski that the Founders were hypersensitive about confidentiality and wished to avoid any written record of their involvement in establishing

the Bermuda Purpose Trusts. It is therefore unremarkable that neither Appleby nor Mr Granski insisted on receiving direct instructions from the Founders before establishing the First Four Bermuda Purpose Trusts, particularly in the context of mistake claims in which no one who was actually involved in the transaction is complaining that a fundamental mistake occurred.

389. In my judgment the aspect of the framework within which the trust formation process occurred which created the greatest risk of a fundamental mistake was a relational one: a feature which is common in offshore transactions. Although Bermudian trusts were being formed, the Bermudian lawyers were not two, but three steps removed from the Founders. Accordingly, not only was there a risk of miscommunication between the US lawyers and Ms Wang and Ms Wang and the Founders, there was an additional risk of miscommunication between Appleby and Mr Granski, who was seemingly the main point of contact for the Bermudian firm. It is true that both Ms Wang and Mr Hung travelled to Bermuda for formal meetings between May 7 and 9, 2001, as well as Mr Granski, but the critical Bermudian legal advice had clearly already been given. These risks would have been obvious to all concerned and are so commonplace in relation to offshore legal transactions that specialist offshore lawyers and their counterparts usually develop an acute, intuitive sense of where tangible danger lies.

390. Despite the theoretical risk of a fundamental mistake being made about the legal character of a Bermudian purpose trust because the Founders received no direct Bermuda law trust advice, this risk seems somewhat ethereal in real world terms. Taking a very high-level yet practical view, there is no obvious reason to suspect that Mr Granski, an experienced private client lawyer familiar with establishing high-value offshore trusts (including other Bermudian purpose trusts), could have failed to clearly apprehend and explain to Ms Susan Wang the difference between a purpose trust and a discretionary trust. Moreover, although it was later dissolved, the fact that the GRT, a traditional discretionary trust, was established at the same time as the Wang Family Trust strongly suggests that the distinction between the two forms of trust was in the forefront of everyone's minds.

391. Further and perhaps most significantly, Mr Granski was most moved by the explanation Ms Wang and Mr Hung (through her) gave at one of the May 2001 Bermuda meetings of the Founders' Vision. That Vision, embedded in the Declarations of Trust for each of the First Four Bermuda Purpose Trusts, suggests on its face that the Founders intended to create trust vehicles which were quite different in character to a 'bog standard' beneficial trust. There is accordingly no basis for inferring that Susan Wang distorted the central tenets of the legal advice she received when passing it on to her father.

Factual findings: did the Founders mistakenly believe the Bermuda Purpose Trusts could be used to confer benefits on family members?

392. In Mr Granski's July 10, 2000 letter to Susan Wang memorialising their meeting on July 5, 2000, he recorded that they discussed "*whether a private trust company would provide the optimal legal structure for your father's and uncle's families*". The letter further states: "*You advised me that your father has asked you to assist him in researching, planning and implementing a legal and management structure for the Family Companies which will assist him in achieving certain goals which he has identified*." The goals identified were:

(a) ensuring the growth and continuity of the Family Companies;
(b) promoting family unity;

(c) asset security; and

(d) implementing YC's vision and continuing his charitable work.

393. The same letter also noted that the Founders proposed to establish a Wang Business Management Committee and that the guiding principles would include the following:

"*1. The Family Companies will be held for your father's and uncle's families as a whole.*"

394. The Plaintiff's counsel relied heavily on a July 7, 2000 fax from Susan Wang to her father (on which he commented) as illustrating what YC Wang wanted but did not get. Yet the BMC objectives in this document made no mention of family benefit at all. The structure chart in that document suggested that under the Wang Trust Company, separate and apart from the Wang Family Trust, there would be five separate trusts which Susan Wang agreed reflected the idea (not abandoned until the following year) of one trust for each of the Founders' 17 children [83]. It was also contemplated, *inter alia*, that each child (or family line) would be able to use 50% of the income allocated to their personal 'pot', but leaving 80% of their allocated capital intact. This was, she further agreed, her father's incentivization plan.

395. Overall, the succession plan had overriding objectives from the beginning which did not explicitly contemplate benefitting the family in financial terms through the Wang Family Trust itself, although the creation of private beneficiary trusts was also being considered to incentivise the family to support the broader Family Trust objectives. It is clear that in

[83] Transcript Day 27 page 54 lines 4-11.

August 2000 YC also contemplated that there would be 17 members of the Business Management Committee of the Wang Family Trust who would each receive remuneration based on a percentage of the value of the trust assets. He personally drafted what was referred to as the 'Main Principles' document in relation to the Wang Family Trust in August 2000[84]. This document contemplated the creation of beneficiary trusts. But as regards the Family Trust, under '*Trust Asset management Guideline*', the following pivotal statement appears on which the Trustees' counsel relied:

> "*1. All assets within Family Trust are to be used mainly for maintaining sufficient shareholding of Formosa Group Companies stocks, in order to ensure that all enterprises will continue to follow and fulfil visions set by the founders. Therefore, all assets in the Family Trust can only be utilized for the purpose of business operation and cannot be used for other or personal uses.*"

396. That guideline principle is consistent with the purposes found in the Wang Family Trust in its final formulation (and indeed the other Bermuda Purpose Trusts). It provides a powerful reason for rejecting the proposition that the Founders believed that the Wang Family Trust could confer personal benefits on Wang family members. This view is supported by a broader contextual and evidential analysis.

397. Advice was then taken from Jay Hughes about whether it was possible to donate shares to a non-profit organization while retaining control over the voting rights attached to such shares in September 2000. It seems plausible that, as Mrs Talbot Rice QC suggested to Ms Wang in cross-examination, Mr Hughes would have shared the advice given in his book '*Family Wealth: Keeping it in the Family*'[85]:

> "*The concept of 'control without ownership' expresses a way of thinking, a philosophy. This concept, once practiced, powerfully assists a family to overcome the proverb, 'Shirtsleeves to shirtsleeves in three generations'. Control without ownership means that each family member adopts the idea that, 'I am the owner of something if I control it, even if, as a legal fact, I am not the legal owner of that thing.*"

398. This passage would have had particular resonance for YC because of his own affection for the Taiwanese equivalent of the quoted proverb, "rags to riches and back to rags again, in three generations". In the following months, attention also turned to the Taiwan tax

[84] G5/18/1.
[85] Chapter VII, page 91.

implications of transferring the shares in the "Family Companies" into a trust structure outside of Taiwan. Susan Wang faxed Mr Granski on December 15, 2000 with her tentatively expressed "*logic*" as to why no inheritance tax should be payable. In essence:

> "*… Mr Hung has all along acted as trustee for the asset entrusted. As a trustee, he indeed has the legal ownership … The asset entrusted is not subject to heirship…*"

399. While this may well have reflected the Taiwanese tax law position, it did not reflect the BVI/Bermuda/common law position, because Ms Wang at this juncture regarded the offshore companies as a "*Wang Family asset*" over which her father and uncle exercised joint control[86]. The best available share ownership records together with the evidence surrounding the formation of the First Four Bermuda Purpose Trusts suggests that the Founders were viewed at this time (in 2000) by their US and Bermudian legal advisers, and BVI corporate service providers, as ultimate beneficial owners of the relevant shares. That this was the true legal position, for the purposes of the present mistake claims, is not in my judgment undermined by the fact that in her March 28, 2001 fax to Mr Hung, Susan Wang asked Mr Hung to provide personal information required of trust settlors for the purposes of establishing the Bermudian companies.

400. It is unclear precisely what advice Mr Hughes gave on the structural issues linked to the clearly complex incentivization plan but it appears that by March 2001 it was decided to proceed to establish the trusts leaving that knotty problem to be worked out at a later date. While Ms Wang's recollection was unclear and the precise rationale for adopting an interim approach is not clearly documented, I found her suggestion that the real reason was the following to be entirely credible and pivotal to an assessment of the present claims[87]:

> "*…the reason that there was an interim, it's because my father felt that it is important to make sure this structure works before introducing more people on it.*"

401. As early as December 12, 2000, Ms Wang was emailing Mr Granski about advice received from Mr Hughes and contemplating, with YC's approval, setting up the trust company as soon as possible on the basis of a "*temporary arrangement*". In a March 3, 2001 fax to her father, she forwarded draft revised documents to him identifying the main differences from his August 2000 Main Principles document. The changes identified included the following:

[86] Transcript Day 26, page 89 lines 19-21.
[87] Transcript Day 28, page 30 lines 17-20.

"*3. During this transitional period, there will only be five directors of the … Private Trust Company: Wen-Hsiung Hung, Susan Ruey-Hwa Wang, Sandy Ruey-Yu Wang, William Wen-Yuan Wong, and Wilfred Wen-Tsao Wang…*

4. For a temporary period, there will be four members of the trust company's Business Management Committee. They will be William Wen-Yuan Wong, Wilfred Wen-Tsao Wang, Susan Ruey-Hwa Wang, and Sandy Ruey-Yu Wang.

5. … Since the current framework will continue to apply during the transitional period, for the time being, the [issue of] annual remuneration for the directors and the members of the Business Management Committee does not arise."

402. It seems obvious from subsequent events that YC favoured involving a small handpicked family group who would allow himself and his brother to enjoy continued *de facto* control. That group consisted of the trusted Mr Hung, who was ready to retire, and two members of his own Third Family and two members of YT's First Family. Being keenly aware of latent family tensions between the different families he and his brother had, YC would have had reason to be anxious that too many cooks might spoil the broth. YC adopted a command and control approach to business and family life and was not a noted conciliator. It might be inferred that his haughty and authoritarian airs, which were seemingly endorsed by Taiwanese traditional culture, reflected insensitivity to the emotional dimension of family relations and/or timidity about confronting conflictual family matters. YC was undoubtedly nonetheless deeply committed to the ideals of family harmony and unity. Susan Wang had both the emotional intelligence and intestinal fortitude to confront the family unity issue head on and was for once the driving force, rather than her father, behind one initiative, the Wang Family Accord process which started as the Founders approached retirement.

403. YC's subsequent approval of the "temporary" unpaid select management team, and his apparent reluctance to depart from the temporary arrangement over 5 years later, confirms what is otherwise obvious. This arrangement emanated from the Founders, not (as was suggested to Susan Wang in cross-examination on Day 28) from Ms Wang and the advisers. The fact that there were latent tensions between some of YC's Second and Third Families, and cool relations between some of YT's First and Second Families, is pivotal to explaining not just why the present claims are being pursued by Winston Wong and his cousin Tony Wang. In my judgment it also lies at the heart of why both the so-called "17 pots" and 17 member BMC ideas were put off for another day.

404. It is entirely unsurprising that such delicate and private family concerns and/or motivations were not explicitly documented at the time. Dr Wong admitted that he did not have the temerity to raise his dismissal from FPG with his father, despite regular Sunday lunches over several years. Susan Wang, the chosen child in terms of leading the trust formation process, would have been even more reticent about canvassing such issues in correspondence with her father. Condescending to particulars, Ms Wang would have been all too aware of the potential difficulties of including her father's first-born son, by tradition his heir apparent, in a structure which she had helped to design. Her own pivotal role came about, not just because her elder brother Winston had been dismissed from FPG, but because her mother had displaced Winston's mother as her father's youngest wife. This issue would have been a significant "elephant in the room" the presence of which could not be explicitly acknowledged. Another more nuanced issue would have been the distance which clearly existed between YT's First and Second Families and the apparent absence of any tradition of close collaboration between them. The sheer logistics of a 17 member BMC managing a new trust structure which the Founders hoped to oversee in their lifetime might well have thrown up further, less obvious concerns.

405. The cultural and family context was, by the account of various witnesses, one in which elders like the Founders would often speak about important matters in somewhat ambiguous or euphemistic terms. It is entirely credible that YC verbally communicated to Susan Wang in very summary terms that he did not want to move forward with the involvement of all 17 children in managing the Wang Family Trust "*to make sure this structure works*", or words to similar effect. This decision would have involved, by necessary implication, effectively 'kicking the incentivization plan down the road'. But the first structure chart envisaged the '17 pots' being private trusts separate and apart from the Wang Family Trust itself; and the initial composition of the BMC was a managerial matter.

406. So the decision which I find YC consciously made to postpone (a) involving all of his own and his brother's children in the initial BMC, and (b) creating an incentivization structure, possibly involving private beneficiary trusts, could not have entailed any mistaken assumption on YC's part that the Wang Family Trust itself was capable of incorporating private beneficial trust purposes. The contemporaneous documentation makes it clear that the Wang Family Trust was never intended to embody private beneficial trusts at all. It was always envisaged that such trusts would be established as freestanding vehicles. And Susan Wang was astute to point out to her father in her March 3, 2001 fax:

> "*The above are the major differences between the current framework and provisions of the Trust and your instructions. Please advise if this is acceptable.*

After this Trust is founded, it will be irrevocable and its purposes cannot be changed, but the detailed operating procedures can be changed according to actual needs provided this does not violate the purposes of the Trust."

407. There is a further consideration undermining the suggestion that the Founders mistakenly and foolishly assumed that the Wang Family Trust, contrary to its express terms, was capable of conferring benefits on the Wang family. The GRT was established as a discretionary beneficiary trust alongside the Wang Family Trust at the same time. If it was intended to confer benefits on the Wang Family through a trust structure, as it seemingly was, the most logical vehicle through which to achieve this was the GRT. There is admittedly, as the Plaintiff's counsel fairly contended (through cross-examination and by way of submission), little contemporaneous documentary evidence from the 2001 period that the GRT was established to serve as an incentivization vehicle. The absence of clear evidence is consistent with the indisputable fact no final decision on what form of incentivization plan should be implemented was taken before any of the First Four Bermuda Purpose Trusts were formed. But accepting the Plaintiff's (and D8's) central thesis that the idea of beneficial trusts had not been finally abandoned at this juncture, the only reasonable inference to draw is that the GRT (and not any of the Bermuda Purpose Trusts) would have been viewed as the only potential trust vehicle then in existence capable of conferring personal benefits.

408. It is common ground in these proceedings that the Wang Family Trust and the GRT were both declared on May 10, 2001. The China Trust was declared on June 24, 2002. The Vantura Trust and the Universal Link Trust were declared on May 9, 2005. Each Trust Declaration expressly provided that personal benefits were not intended to be conferred. It is a matter of record in the GRT Proceedings that on September 26, 2005 the trustee of the GRT resolved to distribute the assets in the GRT to the trustee of the Wang Family Trust. This chronology is clearly inconsistent with the notion that the Founders in 2001 and 2002 believed that the purpose trusts could be used to confer personal benefits on family members, but the position in 2005 (with the GRT being dissolved and its assets transferred to the Wang Family Trust) is somewhat more ambiguous. It may potentially be suggested that the September 2005 decision is consistent with the belief that the family could be benefitted through the Wang Family Trust after the dissolution of the GRT, but this requires somewhat tortuous analysis. It requires even more tortuous analysis to infer that the GRT dissolution is indicative of a mistaken belief about the legal character of the China, Universal Link and Vantura Trusts.

409. The relevant time for any operative mistake alleged to vitiate any transaction cannot be later than the date when the transaction occurred. So the September 26, 2005 decision of the GRT Trustee potentially supports a finding that the Founders mistakenly believed in

2005 that the Wang Family Trust could confer personal benefits on family members, because the assets of a discretionary trust were resolved to be transferred to one of the First Four Bermuda Purpose Trusts which happened to bear the family name. This decision in no way supports the proposition that the asset transfers made in 2001 to the Wang Family Trust (or those made in 2002 and earlier in 2005 to the other trusts) should be held to be vitiated because the Founders believed at each material time that each trust was capable of conferring personal benefits. In 2001 the GRT was created on the same date as the Wang Family Trust. And in 2005 it was resolved that all the assets in the only discretionary trust should be distributed not to each of the First Four Bermuda Purpose Trusts, but only to one of them. The only question which potentially requires further analysis, therefore, is the following: whether the termination of the GRT in September 2005 and the transfer of its assets to the Wang Family Trust support a finding of a fundamental mistake as to the character of the Wang Family Trust at that point in time.

410. This proposition was not contended for and is not supported by a sensible interpretation of the evidence. The terms of the Wang Family Trust (and the other three of the First Four Bermuda Purpose Trusts) are simply too clear to justify the inference that the Founders believed in 2005 that in terminating the GRT any of the First Four Bermuda Purpose Trusts could have served the same function as a discretionary beneficiary trust. There is no basis for suggesting such a dramatic misunderstanding on their part in particular because there is no reason to believe that any of their advisers did or were likely to have encouraged such a misapprehension. It is true that the reasons for the abandonment of the GRT were not clearly explained but it may not be entirely coincidental that this occurred one year after YC's Letter to the Children inviting them to agree to forego an inheritance. Whatever the thinking behind the termination of the GRT may have been on the part of the Founders at the time, this affords no support for finding that there was a mistaken belief that any of the First Four Bermuda Purpose Trusts could serve a legal function analogous to a beneficiary trust.

411. An important overarching factual issue, which subsumes more than one of the Plaintiff's sub-propositions, is whether significant details about the final version of the Wang Family Trust structure and the GRT were actually approved (at a minimum) by YC Wang. First of all, it is clear that between August 2000 and April 2001, Susan Wang received detailed instructions from her father as the drafting evolved on more than one occasion. It seems inherently improbable that at the crucial stage material changes to the proposed structure would have been suddenly made without YC's express approval. Secondly, it is essentially common ground that YC was a somewhat authoritarian figure. It seems inherently improbable that Susan Wang would have made material changes without approval from her father, bearing in mind the culture of parental deference and the strong likelihood that she was chosen (as her sister Sandy's oral evidence implied) because YC trusted Susan

Wang to dutifully carry out his instructions. Thirdly, it must be remembered that the Bermuda Purpose Trusts as created by common accord confer no benefit on the Founders' children. So it makes little sense to imply that Susan Wang, acting against her own personal financial interests, would have failed to disclose to her father that the final version of the Wang Family Trust did not permit the conferral of personal benefits.

412. Ms Wang admitted that her March, 3 2001 fax to her father (responding to his March 3, 2001 fax), purported to set out the main changes and did not mention that the incentivization scheme was not being implemented at this stage, and that this was a significant change from his initial instructions. Her suggestion that this change would have been discussed with her father verbally amounts to no more than an assertion of what she thinks would have occurred. Bearing in mind her general *modus operandi* in leading the trust formation process, I consider it reasonable to infer that YC was well aware of what was happening in this regard. As far as the Wang Family Trust itself is concerned, it is clear that the trust purposes themselves (which were forwarded to him in March 2001) had not changed materially from YC's initial instructions.

413. There was no fundamental change to the Wang Family Trust itself. It was always contemplated that the incentivization plan would be ancillary to the proposed purpose trust, not a fundamental feature of the trust itself. The 17 "pots" were (as discussed further below) envisaged as being separate private trusts, alongside rather than incorporated into the Wang Family Trust. The "*investment and utilization guidelines*" were still substantially based on the August 2000 Main Principles document which YC himself drafted. Mr Granski admitted his written evidence about his conviction that the Founders and Mr Hung understood the final versions of the Wang Family Trust and the GRT discretionary trust was entirely based on his trust in the honesty of Ms Susan Wang, who relayed the contents of her communications with her father and translated what Mr Hung said in the meetings he attended. My view of Susan Wang's credibility suggests that his trust in her was entirely justified. In my judgment the evidence does not support a finding that YC Wang was mistaken about the fundamental legal character of the Wang Family Trust (or any of the three subsequent Bermuda Purpose Trusts) because the final legal documentation in relation to the first Bermuda Purpose Trust and/or the GRT was not shared with him. The burden lies on the Claimants to prove the mistakes of which they complain.

414. In summary, I find that the Founders were not mistaken and did not believe that the Wang Family Trust was capable of conferring personal benefits on Wang family members. Whether YC believed an incentivization plan of some other non-beneficial trust character (e.g. based on remuneration for directors and BMC members) could have been incorporated into the Wang Family Trust is an entirely different question. This question is considered separately below.

Factual findings: did the Founders mistakenly believe that an incentivization plan could be incorporated into the Wang Family Trust and/or the First Four Bermuda Purpose Trusts?

415. It was ultimately obvious that incentivising family members to support the implementation of the Founders' Vision through achieving the purposes embedded in the First Four Bermuda Purpose Trusts was an important goal which YC (and YT) never abandoned in their lifetime. Susan Wang admitted as much. And it is clear both that family involvement was desired by YC from the outset and that advice received about the logistics of preserving family wealth across multiple generations (as well as common sense) emphasized the importance of tangible action to ensure such family involvement. The first critical question is how did the Founders believe this could be achieved?

416. The draft proposals in relation to the Wang Family Accord developed in 2006-2007, approved in principle by YC in early 2008 and discussed briefly after his death by the BMC members were the main target of Mrs Talbot Rice QC's probing cross-examination. Secondary targets for both the Plaintiff's counsel and Mr Wilson QC on behalf of Tony Wang were general remarks about forthcoming distributions made at the recorded 2009 meetings and other agreed and disputed meetings involving YT's Second Family. It is clear beyond serious argument that the Founders believed that each of their children should be involved in (at some point, perhaps only after their deaths) managing the Purpose Trusts and should be remunerated for so doing. Both the scale and range of the compensation benefits which were under consideration makes it obvious this was intended to serve as the incentivization plan. There is also a question of the timing of when the GRT was actually terminated almost simultaneously with the progressing of the Family Accord (and, perhaps coincidentally, the implementation of the Share Equalization plan). As the Plaintiff pointed out in his Opening Submissions:

> "*210. A memorandum dated 26 January 2008 setting out the structure reflected by the draft documentation discussed between Susan Wang and Mr Harris in the summer of 2007 (the new draft bye-laws, Wang Family Accord and Standing Committees document) and setting out that Wang family descendants could obtain subsidies for university tuition, master's and doctorate degrees, was signed by William Wong, Susan, Sandy and Wilfred Wang, Mr YC Wang and Mr Hung between 26 January and 5 February 2008. A further draft Wang Family Accord was produced on 26 March 2008 and revised draft bye-laws on 28 March 2008. Susan Wang and Mr Harris continued to discuss the documents by email in the spring/summer 2008…*

212. By her email dated 27 May 2008 Susan Wang told Mr Harris that there might be the need to make some changes to the number of board members and the role of the Family Assembly and more time was needed to discuss the issues.

213. On 11 July 2008 Appleby Services (Bermuda) Ltd resolved to terminate the GRT purpose trust given the liquidation of its asset, GR PTC."

417. More than token compensation was under consideration, and the Founders' children would likely have viewed the prospect of such compensation with more enthusiasm than the parsimonious YC, in particular, would have desired. But the fact that this compensation scheme was being considered as part of a plan to involve all 17 children in managing the Trusts is compelling evidence that the Founders believed that the incentivization plan could be incorporated into the Purpose Trust regime. While this provides some support for the Claimants' mistake case, it does not automatically follow from this preliminary finding that the Founders must also have mistakenly believed that there was no fundamental legal distinction between a purpose and a beneficiary trust.

418. Just as there is no basis for finding that the Founders, despite dissolving the GRT for reasons that are unclear, abandoned the important goal of incentivizing family members to support the Bermuda Purpose Trusts and their Vision in the years to come, there is equally no basis for inferring that they abandoned one of the central tenets of the investment guidelines set out by YC in the August 2000 Main Principles document:

"*1. All assets within Family Trust are to be used mainly for maintaining sufficient shareholding of Formosa Group Companies stocks, in order to ensure that all enterprises will continue to follow and fulfil visions set by the founders. Therefore, all assets in the Family Trust can only be utilized for the purpose of business operation and cannot be used for other or personal uses.*" [Emphasis added]

419. The second critical question is whether the content of the Wang Family Accord proposals, which were never implemented (nor apparently submitted for Bermuda trust law advice) in large part because of the brewing of the legal controversy which led to the present litigation, are on their face only viable in the context of a beneficiary trust structure. The short answer is that the proposals are not on their face incompatible with being implemented in the context of a purpose trust. If they were on their face incompatible with incorporation into the Purpose Trust regime, this part of the mistake case could have been advanced primarily by way of argument rather than through the often over- elaborate cross-

examination which inevitably blurred the distinction between questions of fact and questions of law. A short overview of the version of a document signed by YC in early 2008 is required:

(a) the purpose of the '*Guidelines for Modification of Overseas Trusts*' was first and foremost "*to allow the descendants of the Wang Family to understand the reason for contributing continuously to Society for decades, to maintain their participation in and enthusiasm for the Formosa Group and affiliated enterprises…*";

(b) the first notable modification proposed was ensuring that the directors of the PTCs had two representatives for each of the family lines (with a cap of 9 members);

(c) the second notable modification proposed minimum "*remuneration*" of $50,000 annually per member of the second generation, with a cap of 30% of the total annual cash income of each trust being distributed for such purposes, supplemented by requirements for active participation to receive such remuneration. Directors' fees are proposed to be $3000 per annum. There is also a provision for educational subsidies.

420. $50,000 per year for work which is somewhat nebulously defined is arguably beyond the limits of reasonable compensation; more so the educational subsidies. However, it falls beyond the proper scope of the present litigation to decide the legalities of a draft proposed compensation scheme. The critical question is whether the proposals are indicative of a fundamental mistake on the part of the Founders when they settled the Trusts as to the legal character of the First Four Bermuda Purpose Trusts. In my judgment these proposals are not indicative of such a mistake.

421. The primary thrust of the proposals is to create a compensation scheme. The educational subsidies are the only feature of the proposals which on superficial analysis look somewhat odd. However, on reflection, it is not unprecedented for public and private sector employers to provide educational subsidies to their employees. It is not inconceivable that some private sector employers may provide educational subsidies for their employees' children. In any event the overall scheme envisaged that Wang Family members would be involved in managing the Bermuda Purpose Trusts. So subsidising the education of future Trust managers would neither necessarily nor obviously be inconsistent with the character of the Bermuda Purpose Trusts. The high points of this limb of the mistake claims which are supported by the evidence may be summarised as follows:

(a) the Founders did not comprehensively explore the legal ramifications of creating an incentivization scheme for the operation of the First Four Bermuda Purpose Trusts before the assets were transferred them;
(b) the Founders clearly believed that some form of incentivization scheme was possible within the structure. It is irrelevant if they initially contemplated using the GRT for incentivization purposes, because that was terminated;

(c) "*Any attempt by the trustee of any of the Purpose Trusts to pay, whether directly or indirectly, 'remuneration' or 'compensation' to family members which was gratuitous or uncommercial would have been a breach of trust.*"[88];

(d) the latest draft proposals intended to regulate and support Wang Family participation in the operation of the Bermuda Purpose Trusts may not pass legal muster in the present form.

422. In my judgment this factual matrix falls well short of the requirements for establishing a legally actionable mistake which requires, as the Plaintiff's counsel themselves argued, "*a causative mistake which is so grave that it would be unconscionable to refuse relief*". I accept entirely that in hindsight, in light of the present mistake claims, it seems at first blush surprising that the legalities of how the incentivization plan could be incorporated, if at all, into a purpose trust structure were not comprehensively explored prior to the establishment of the first of the First Four Bermuda Purpose Trusts. But the prosaic reason for this in my judgment was simply that consideration of the matter was put off for another day. It is on this basis that I reject the Trustees' assertion that the GRT was positively viewed as the incentivization vehicle; there is no contemporaneous documentary evidence supportive of the fact that this sort of conscious deliberation took place at the time. The evidence clearly demonstrates that the incentivization plan was only seriously addressed after the First Four Bermuda Purpose Trusts had been formed.

423. The fact that the incentivization plan was not considered important enough to be finalized as part of the initial formation of the Bermuda Purpose Trusts is inconsistent with the proposition that any mistake about the ability of the purpose trust vehicles to accommodate an incentivization could be characterised as a "*causative*" one in any event. The purpose of the equitable remedy to rescind or set aside a transaction which would not have been entered into on the relevant terms but for a fundamental mistaken assumption having been made when the relevant transfers were made. As Lord Walker opined in *Pitt-v-Holt*:

[88] Plaintiff's Opening Submissions, paragraph 547.4.

"*108 The fullest academic treatment of this topic is in Goff &Jones, The Law of Unjust Enrichment, 8th ed, paras 9-32—9-42. The editors distinguish between incorrect conscious beliefs, incorrect tacit assumptions, and true cases of mere causative ignorance ('causative' in the sense that but for his ignorance the person in question would not have acted as he did). The deputy judge's first instance decision in Pitt v Holt [2010] 1 WLR 1199, para 50 is suggested as an example of mere causative ignorance: If someone does not apply his mind to a point at all, it is difficult to say that there has been some real mistake about the point. The Court of Appeal adopted a different view of the facts, treating the case (para 216) as one of an incorrect conscious belief on the part of Mrs Pitt that the SNT had no adverse tax consequences. The editors of Goff & Jones are, on balance, in favour of treating mere causative ignorance as sufficient. They comment (at para 9-41, in answering a 'floodgates' objection):*

> *denying relief for mere causative ignorance produces a boundary line which may be difficult to draw in practice, and which is susceptible to judicial manipulation, according to whether it is felt that relief should be accorded with the court's finding or declining to find incorrect conscious beliefs or tacit assumptions according to the court's perception of the merits of the claim.'*

It may indeed be difficult to draw the line between mere causative ignorance and a mistaken conscious belief or a mistaken tacit assumption. I would hold that mere ignorance, even if causative, is insufficient, but that the court, in carrying out its task of finding the facts, should not shrink from drawing the inference of conscious belief or tacit assumption when there is evidence to support such an inference." [Emphasis added]

424. I find that there is insufficient evidence to support the inference that the Founders made even a tacit assumption, far less had a conscious belief, when funding the First Four Bermuda Purpose Trusts that these vehicles could incorporate within them an incentivization scheme conferring benefits on their descendants for the following principal reasons:

(a) it was initially proposed to confer benefits on family members through separate private beneficiary trusts on the premise that all the Founders' children would be involved in managing the proposed purpose trusts;

(b) the idea of full family involvement was postponed, and with it the idea of implementing the incentivization plan from the outset. No final consideration of what form the plan would take took place and the possibility of creating separate private trusts was not abandoned before any of the First Four Bermuda Purpose Trusts were formed;

(c) there is no basis for finding that in funding the said Bermuda Purpose Trusts the Founders consciously or tacitly assumed that they could confer flexible incentivization benefits on their descendants, because there is no credible evidence that such benefits (as opposed to compensatory quasi-employment benefits) had ever been expressly or implicitly considered as being conferred by a purpose trust;

(d) the Wang Family Accord proposals, which were explored from around the time of the Founders' retirement in 2006, do support an inference that at that juncture the Founders tacitly assumed that the incentivization plan could be implemented within (rather than without) the Purpose Trust structure. At this juncture the 17 'pots' idea had been abandoned and a decision made that the GRT (which could potentially have been used as an incentivization vehicle although it was never demonstrably ever designated as such) should be terminated;

(e) there is no sufficient logical connection between what the Founders appear to have assumed after they settled the First Four Bermuda Purpose Trusts and their state of mind when settling the trusts to justify drawing the inference the Claimants invite the Court to draw to the effect that a fundamental "causative" mistake occurred at each relevant establishment stage.

Factual findings: were YT's Second Family given assurances that they would benefit from the Offshore Funds and, if so, does this demonstrate a fundamental mistake by YT and/or the Founders about their legal character?

425. Once the Plaintiff became aware of the existence of the First Four Bermuda Purpose Trusts and raised the spectre of litigation, it makes sense that those seeking to defend the structure would have sought to mollify potential 'dissidents' with promises that "distributions" would soon be made. Such statements would not in this factual matrix (in which compensation was clearly in substance being discussed) support to any material extent an inferential finding that the Founders mistakenly believed that their descendants could "benefit" from the Bermuda Purpose Trusts in the requisite trust law sense.

426. On balance, I am inclined to accept the evidence of Tony Wang and his mother and sisters about the various "promises" of distributions from the "offshore funds" they claim to have been told they could expect to receive. As regards what Madam Chou was allegedly told by YT around 2000 and what Tony was told by his father around 2004, those statements were sufficiently vague to be interpreted in hindsight as a reference to what YT's Second Family eventually received from YT's estate. The statements were insufficiently precise to support an inference that YT believed the Bermuda Purpose Trusts were beneficiary trusts. It is inherently probable that YT would at some time in his senior years have wished to have reassured his Second Family that they would not be left destitute when he died. But these vague, undocumented recollections fall far short of establishing the proposition upon which D8 relies.

427. The Chang Gung Golf Club meeting was hotly disputed. However, it is difficult to understand, again, why Tony Wang should invent such an ambiguous statement by William Wong to support his mistake claim. It is plausible that as a division was emerging between YC's family branches, YT's eldest son would have wanted to forestall a similar split between the two branches of YT's family. William did not give evidence and Wilfred could not convincingly exclude the possibility that some such meeting (not initiated by him) may have taken place. Tony Wang in his oral evidence insisted that the main purpose of the meeting was family unity, adding that it was only at the end of the meeting that William briefly mentioned that "distributions" would be made. Such a statement would plausibly have been made to keep Tony onside, but would also be entirely consistent with the draft plan that all children should be generously compensated for managing the Bermuda Purpose Trusts. How formal the meeting was and whether it actually took place at the Chang Gung Golf Course as Tony Wang recalled need not be decided. Assuming the meeting did take place in the way Tony and his sisters described, this adds no material support to the mistake claims.

428. The Declarations and Wills signed by YT in the 2010-2011 period were also relied upon as evidence that YT was mistaken about the character of the First Four Bermuda Purpose Trusts. The fact that the circumstances in which YT came to sign these documents is largely unexplained together with the Second Family's failure to rely upon them when YT's estate was being administered undermines the weight to be attached to these documents. But on their face, the Declarations provide scant support for the proposition that YT believed the First Four Bermuda Purpose Trusts were discretionary trusts. The critical wording in them is more consistent with the idea that he wanted the Second Family to be involved in managing the Bermuda Purpose Trusts than that he believed the Bermuda Purpose Trusts were beneficial ones. For instance the Second Declaration of April 15, 2010 pertinently provided:

"*Regarding the 5 major overseas trust funds, they should, on the basis of their current value, be divided equally into 2 parts to be owned by Wang, Yung-Ching's families and by my families, respectively. The part that I, Wang, Yung-Tsai, own should be jointly managed by representatives assigned by children of my two families respectively.*"

429. Obviously, the suggestion that the "*overseas trust funds*" were "*owned*" by the Founders jointly, read literally and in isolation from the relevant context, suggests a complete misunderstanding of the nature of any trust, beneficiary or otherwise. I reject the suggestion that YC and/or YT were so naïve. It is not unusual for trust settlors from common law jurisdictions whose familiarity with trust concepts no one doubts to refer to assets they have settled on trust as "my assets". The assets were in fact the settlor's assets when they were settled on trust and even if the settlor has no continuing legal or beneficial ownership interest in the trust fund, the whole idea of a trust is to allow the assets to be dealt with in accordance with the wishes of the settlor expressed in the trust instrument. Whether the settlor is a beneficiary with fixed interests, a mere object of a discretionary power or a person with not even a contingent beneficial interest in a trust, the natural emotional and/or psychological impulse will be for the settlor to regard the trust as "his" or "her" trust. These considerations in my judgment generally apply as much to purpose trusts as they apply to beneficiary trusts.

430. In the present case it is noteworthy that the Declarations do not, looking forward, speak of YT's children's ownership of the assets. Rather, the Declarations anticipate their management of the assets, which is entirely consistent with the legal character of the Bermuda Purpose Trusts. In addition, the Founders' Vision is articulated in broadly similar terms in each Declaration of Trust and reveals that the Founders had a distinctive view of the function of individual wealth which was set out to explain why they were transferring their assets to the Bermuda Purpose Trusts. The Founders' Vision will be considered further below when considering the void for uncertainty claim. For present purposes it suffices to note, by of illustration, that in the Wang Family Trust Declaration the following statements are made:

"*It is our deep belief that society can only develop with individual diversity and cooperation. Even with all living organisms on this earth, survival hinges on interdependence. Therefore, humans are gifted with life because of their ability to make contributions to this world. If this is true, once an individual is well established and has been given the opportunity to develop his potential, he should pay back to society that which his ability allows him to. We also seek to realize the spirit of fulfilment, meaning that when a person is well established, he should help*

others to establish; when a person is well accomplished, he should help others to accomplish…"

431. If the central purpose of all human life was viewed by the Founders as being to give back to society as much as possible as I find that it was, it is entirely counterintuitive to contend that YT was seeking in effect to leave all of his wealth for the personal benefit of his descendants by (a) giving them collectively a substantial inheritance (more than $1 billion) and additionally (b) indirectly conferring far more substantial benefits on his family through the Bermuda Purpose Trusts, wealth as Mr Howard QC evocatively put it, "*beyond the dreams of avarice*". The concept of managing assets, mentioned in the Declarations, is also included in the founding instruments of the Bermuda Purpose Trusts. In the Wang Family Trust Declaration, for instance the Founders' Vision set out their specific wishes (none of which includes personal family benefit) the last of which provided as follows:

> "*5. To manage all assets in the trust with wisdom, in order to achieve the above-stated objectives while maintaining the continuous growth of asset value.*"

432. Wilfred Wang deposed in his Witness Statement:

> "*210 … He also clearly understood the difference between management of assets and ownership of assets. He and I had talked about that essential distinction in great detail when the first Bermuda purpose trust was established … I also believe that he understood that the assets placed into these trusts could be used only for the purposes of the trusts and not for the purpose of benefitting either himself or his family.*"

433. He was adamant in his oral evidence that he discussed the management of the trusts with his father before the Wang Family Trust was established but honestly agreed that he could only remember vague generalities as to what was said. I place no reliance on the quoted portion of his Witness Statement, which was also somewhat inconsistent with the Trustees' pleaded case. Since he read a book about wealth preservation in or about 2006 in the context of the Wang Family Accord meetings, I accept that from that juncture he was clearly taking a keen interest in the operation and management of the Bermuda Purpose Trusts. His impression that his father understood the difference between a purpose trust and a beneficiary trust carries some weight, because it would be surprising if he did not have some casual discussions with his father on the topic around this time. But I place primary reliance (in rejecting the reliance D8 places on YT's Declarations) on the clear terms of the Bermuda Purpose Trust Declarations, the business sophistication of YT and the fact there is more congruence than dissonance between the earlier and later documents.

434. D8 also relied on what Roger Yang allegedly said at the January 13, 2011 meeting with YT's Second Family. I accept Roger Yang's evidence that his carefully prepared formal briefing made it clear that the Bermuda Purpose Trusts were not beneficiary trusts. How this was understood by Madam Chou and her daughters is an entirely different matter. It seems plausible that, as an aside, Mr Yang may have mentioned monies that would be forthcoming, having in mind the compensation scheme under the Wang Family Accord, and indicated that the Plaintiff's litigation had effectively put this on hold. What might have been a casual unscripted observation by Roger Yang, which he would have no reason to recall 10 years later, would have made much more of an impression on YT's Second Family than a dry presentation about different types of trusts. Bearing in mind that the broad purpose of Roger Yang meeting with YT's Second Family was to keep them in the loop and avoid the family split that had occurred on the YC side, it makes sense that YT's Second Family would have been given some indication that they stood to benefit in some way from the Bermuda Purpose Trusts (and perhaps the New Mighty Trust as well). Or to put it another way, the broad strategic purpose of the meeting was clearly to 'keep the Second Family happy', so it makes sense that he would have wanted to give them, to some extent at least, a 'feel good' message. His brief was not to stir up contention. He would not have been doing his job if their 'takeaway' message was that they were getting nothing from the "overseas funds".

435. Assuming that such assurances were given, as D8 contended, doubtless alongside a more technical presentation which may not have sunk in, I find that this provides no material support for inferring that YT and/or YC were fundamentally mistaken about the legal character of the First Four Bermuda Purpose Trusts.

Factual findings: was YT fundamentally mistaken about the legal character of the First Four Bermuda Purpose Trusts because he was insufficiently involved in the approval process?

436. I summarily reject the argument that the transfers to the First Four Bermuda Purpose Trusts made by YT are vitiated by mistake because, in effect, the Trustees have adduced insufficient evidence to establish that he understood that he and his descendants could never benefit from the assets so transferred. This point exploited an undoubted gap in the evidence, which stemmed from the fact Susan Wang was the main interface with legal advisers and reported primarily to YC, rarely reporting to her uncle YT. D8's counsel's beguiling submissions effectively complained that the Trustees had failed to prove that no mistake had occurred. Context is everything. An abundance of circumstantial evidence established that the Founders were close (both at work and emotionally), and that, as YT

explained in his moving eulogy to his brother in late 2008, YT had followed YC in business throughout his life.

437. Mr Wilson QC fairly pointed out that YT did occasionally adopt different approaches to estate planning issues. YC, for instance, in his ultimately ineffective Letter to the Children sought to persuade his children to agree to waive any inheritance. YT did not. He was perhaps less abstemious than his brother; he left more shares for his children to inherit than YC left for his. This distinctive approach does not, bearing in mind that YT was far from an airhead, justify the conclusion that an inference should be drawn that YT was mistaken about the legal character of the Bermuda Purpose Trusts merely because there is no direct evidence that they were fully explained. I find on a balance of probabilities that YT was well aware that the Bermuda Purpose Trusts were not beneficiary trusts and that his descendants could not benefit from them in the same way that they could from a beneficiary trust.

Factual Findings: did the Founders mistakenly believe that they could control the Bermuda Purpose Trusts in their lifetime?

438. The second limb of the Plaintiff's Proposition 2 is that the First Four Bermuda Purpose Trusts were operated in a way which suggested that BMC members and the Founders believed they retained ultimate control over the Bermuda Purpose Trust assets in their lifetime. It was supported by the following sub-proposition:

(a) the April 2001 Memorandum did not inform her father that the Founders could not control the Wang Family Trust in their lifetime;

(b) the Wang Family Accord process in 2006-2007 provides further evidence of the Founders belief that they continued to control the Bermuda Purpose Trust assets and could use them to benefit their descendants. This sub-proposition, as regards the benefit point, is more arguable and goes to the root of the mistake claims, building on the assertion that the Founders believed from the outset that an incentivization scheme could be implemented within the purpose trust structures. This point will be considered further below.

439. The first sub-proposition appears to me to be a 'bootstraps' argument. It uses a conclusory assertion which is not supported (the Founders believed that they could control the Bermuda Purpose Trust and needed to be told that they could not) to support the posited conclusion.

440. The second sub-proposition was barely arguable. I accept that the Founders clearly acted as if they were in control of the Bermuda Purpose Trusts which were legally controlled by the BMC whose membership consisted primarily of their children, as the Plaintiff contended. However, I accept the Trustees' straightforward response (which is supported by the credible evidence of various witnesses together with the relevant documentation, sensibly read) that the Founders were in substance performing a consultative role extended to them in light of their status as elders and senior corporate leaders. The question before me is not whether the way in which the BMCs deferred to the Founders (in relation to share purchases, for instance) was appropriate in terms of law or trust administration practice. The question is whether the continuing role played by the Founders is reflective of what was considered to be the formal legal position.

441. I am bound to find that there is no credible basis for finding that the various sophisticated players mistakenly and naively believed that any nominal and/or symbolic 'control' the Founders continued to enjoy over the Bermuda Purpose Trust assets reflected the formal legal position. There is no credible evidence that YC and/or YT believed that they had the legal power to control the Bermuda Purpose Trusts in their lifetime. The highpoint of the evidence from the Claimants' point of view is that in practice they (and YC in particular) exercised *de facto* control because the BMCs in practice deferred to their wishes. It is clear that (a) the Bermuda Purpose Trusts were established as part of their planning for their retirement in their senior years, and (b) the deference shown to them as 'emeritus' corporate leaders before and after their retirement allowed them to exercise *de facto* control throughout YC's lifetime and throughout YT's healthy lifetime.

442. There is accordingly, further and in any event, no credible evidence of any prejudice suffered by the Founders sufficient to characterise any mistake about the historic legal position as a fundamental or "grave" one. There is in any event no possibility of any continuing or future prejudice, so I would decline to grant equitable relief in respect of this narrow strand of the mistake claims on the grounds that it has not been shown that it would be unconscionable to refuse relief.

Summary of factual findings on mistake claims

443. For the above reasons, the mistake claims asserted by the Claimants are dismissed. They have failed to prove on a balance of probabilities that YC Wang and/or YT Wang were fundamentally mistaken about the legal character of the First Four Bermuda Purpose Trusts. I am unable to find on the balance of probabilities that either or both of the Founders mistakenly believed that the Bermuda Purpose Trusts could confer benefits (in

the trust law sense) on their descendants or that they could legally control the Bermuda Purpose Trusts during their lifetime.

444. Although these findings assume that the Claimants' claims are governed by Bermudian or BVI law, I do not apprehend any viable basis for the Claimants to contend that if Taiwanese law applied they could succeed in the face of these factual findings applied to the corresponding Taiwanese law claims.

UNDUE INFLUENCE CLAIMS UNDER BERMUDA/BVI LAW

Preliminary

445. In the Plaintiff's Closing Submissions, the factual undue influence case was summarised as follows:

> "*618. On the facts, the presumption of undue influence is raised:*
>
> *618.1 Both Susan Wang and Mr Hung were trusted by YC Wang to take steps in the management of his financial affairs, namely the creation of offshore trusts to hold his offshore assets. It is a classic Etridge situation. Indeed, the relevant relationship has effectively been conceded in the case of Mr Hung, he being described, in the opening on behalf of his estate, as YC Wang's 'close and trusted friend and advisor'.*
>
> *618.2 The transactions plainly call for explanation – YC Wang was divesting himself of billions of dollars of assets.*
>
> *619. The burden thus falls on the PTCs to dislodge that presumption. On the facts, they have failed to do so:*
>
> *619.1 Neither Susan Wang nor Mr Hung ensured that YC Wang received proper independent legal advice in respect of the transactions. Susan Wang was instead driven by her concern to ensure that, come what may, the BVI Holding Companies did not fall into YC Wang's estate risking the halving of the number of FPG shares held by virtue of a 50% estate tax charge, and the marginalisation of the Third Family (see Section I above).*

619.2 Such explanations as Susan Wang gave to YC Wang in respect of the Wang Family Trust and the China Trust were insufficient (see sections H3 to H15 above) and he did not receive a full explanation as to the nature, effect and all of the terms of any of the [First Four Bermuda Purpose Trusts], whether directly from a suitably qualified lawyer or at all. Indeed, had he received such an explanation from a suitably qualified lawyer, the fundamental mistake under which he was operating may (should) have been uncovered and the [First Four Bermuda Purpose Trusts] would not have been created in the form in which they were in the first place."

446. In D8's Closing Submissions the legal bases for the undue influence claims were (in terms consistent with the Plaintiff's legal submissions) described as follows:

"*1280. As explained in Lewin, a claimant is able to benefit from the legal presumption of undue influence in the following circumstances (numbers in square brackets have been inserted for ease of reference):*

> *"Upon proof that [1] the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs, coupled with [2] a transaction which calls for explanation, the court will usually infer (in the absence of such an explanation) that the transaction was procured by undue influence." (emphasis added)*

1281. In opening submissions, Mr Hung's representative expressed indignation that "serious allegations of wrongdoing by Mr Hung at the very heart of … Tony's claim" could be pursued. Such indignation, however, misunderstands the nature and purpose of the doctrine of presumed undue influence. As explained by Mummery LJ in Pesticcio v Huet [2003] W.T.L.R. 1327 at §20:

> *"Although undue influence is sometimes described as an "equitable wrong" or even as a species of equitable fraud, the basis of the court's intervention is not the commission of a dishonest or wrongful act by the defendant, but that, as a matter of public policy, the presumed influence arising from the relationship of trust and confidence should not operate to the disadvantage of the victim, if the transaction is not satisfactorily explained by ordinary motives."*

1282. The first requirement – that YT placed trust and confidence in Mr Hung in the management of his financial affairs – is not (or cannot sensibly be) disputed in this case. Accordingly, it is unnecessary to consider the principles which have been developed in the case law as to the nature of the relationships which satisfy the first requirement.

*1283. The second requirement was explained in the leading House of Lords authority as one which "cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship". This is elaborated on in Snell's Equity (34th ed) ("**Snell**") (at §11-53):*

> *"When determining whether a transaction calls for explanation, the courts must take a range of factors into account: the relationship between the parties, the nature of the transaction, the size of the transaction, the amount of value transferred or risks assumed by the claimant relative to his assets, the benefits that the claimant would receive in exchange, and so on."*

1284. Once both requirements are satisfied, the burden shifts to the defendant to prove that the transaction was the product of the "free exercise of the will of the other party as a result of full, free and informed thought". In practice, the vitiation of YT's consent on the basis of the influence which Mr Hung is presumed to have exerted in the context of the transfers may well add little to the claim based on mistake, but it is nevertheless a distinct claim and it is submitted that the above presumption has not been rebutted on the evidence. In particular, there is no positive evidence to suggest that Mr Hung either: (i) ensured that YT himself received proper independent advice in relation to the transaction; or (ii) took any proper steps to discuss the terms of the trusts (insofar as Mr Hung himself had any understanding of them) with YT, in order to ensure that they were the product of YT's full, free and informed consent."

447. These arguments were advanced with a degree of brevity which betrayed an understandable lack of conviction as the facts of the present case seemed from the outset to be very far removed from undue influence territory. They also skated over the critical elements of the presumption which were most difficult to establish on the facts of this case. The Trustees in their Closing Submissions suggested that the claims had been "*all but abandoned*" because, *inter alia*, the pleaded case that Susan Wang and Mr Hung had

asserted undue influence was not developed in cross-examination. The following most pertinent arguments were advanced which I accept:

"*770. The critical question in such cases was authoritatively summarised by the English Court of Appeal in Daniel v Drew [2005] EWCA Civ 507 per Ward LJ (with whom Buxton LJ and Wilson J agreed) at paragraph 36 as follows:*

> *"[I]n all cases of undue influence the critical question is whether or not the persuasion or advice, in other words the influence, has invaded the free volition of the donor to accept or reject the persuasion or advice or withstand the influence. The donor may be led but she must not be driven and her will must be the offspring of her own volition, not a record of someone else's. There is no undue influence unless the donor if she were free and informed could say 'This is not my wish but I must do it.'"*

771. Given what is known of the relevant individuals, the suggestion that Mr Hung or Susan occupied (let alone abused) a position of ascendancy over YC Wang or YT Wang, such that the Founders' decision to authorise the transfers into the [First Four Bermuda Purpose Trusts] cannot be said to have been a product of their own free will, is hopeless. YC Wang was publicly referred to as the 'god of management', and YT Wang was often referred to as the 'thunder god'. They were, at the relevant times when the [First Four Bermuda Purpose Trusts] were set up, titans of industry and the authoritarian patriarchs of their respective families. It was palpable from both the content and tenor of Susan's evidence that she regarded herself, and was regarded by them, as the servant of her father and uncle in the tasks they entrusted to her relating to the formation of the trusts. As for Mr Hung, all of the witnesses, including Winston and Tony themselves, agreed that he served the Founders faithfully. That fact is well illustrated by Mr Hung's somewhat extraordinary request in December 2000 that he be granted permission, after many decades of service, to retire due to serious ill health, a request which the Founders in the event only partially granted. Moreover, whilst Winston and Tony have unpersuasively sought to suggest that Susan stood somehow to gain from the establishment of the [First Four Bermuda Purpose Trusts], they have made no similar suggestion in relation to Mr Hung.

772. Winston and Tony have sought to escape the obvious difficulties which the reality of the relevant relationships presents for any undue influence claim

by contending that the law nonetheless requires it to be presumed, absent evidence to the contrary, that the transactions were procured by undue influence. That is misconceived for several different reasons…

*775. These passages make various matters clear. First, a presumption that a transaction has been procured by undue influence may in certain circumstances be raised, but it is an **evidential** presumption only. Second, to raise the presumption it must be shown that an **advantage** was taken of the person allegedly subjected to the influence which, failing proof to the contrary, was explicable **only** on the basis that undue influence had been exercised to procure it. Further, and unsurprisingly, as Lord Scott explained in Etridge at paragraph 154 "the onus will, of course, lie on the person alleging the undue influence to prove in the first instance sufficient facts to give rise to the presumption*."

448. The undue influence claims must be summarily dismissed for the reasons which are set out briefly below.

Merits of undue influence claims

449. It was common ground that the leading authority on this area of the law is *Royal Bank of Scotland plc v Etridge* [2002] 2 AC 773. The most instructive and concise distillation of the essential requirements for establishing a claim of undue influence appears in the following passage in Lord Nicholls' speech:

"*14. Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof. On proof of these two matters the stage is set for the court to infer that, in the absence of a satisfactory explanation, the transaction can only have been procured by undue influence. In other words, proof of these two facts is prima facie evidence that the defendant abused the influence he acquired on the parties' relationship. He preferred his own interests. He did not behave fairly to the other. So the evidential burden then shifts to him. It is for him to produce evidence to counter the inference which otherwise should be drawn.*

15. The case of Bainbrigge v Browne, 18 Ch D 188, already mentioned, provides a good illustration of this commonplace type of forensic exercise. Fry J held, at p 196, that there was no direct evidence upon which he could

rely as proving undue pressure by the father. But there existed circumstances 'from which the court will infer pressure and undue influence.' None of the children were entirely emancipated from their father's control. None seemed conversant with business. These circumstances were such as to cast the burden of proof upon the father. None of the children were entirely emancipated from their father's control. None seemed conversant with business. These circumstances were such as to cast the burden of proof upon the father. He had made no attempt to discharge that burden. He did not appear in court at all. So the children's claim succeeded. Again, more recently, in National Westminster Bank Plc v Morgan [1985] AC 686, 707, Lord Scarman noted that a relationship of banker and customer may become one in which a banker acquires a dominating influence. If he does, and a manifestly disadvantageous transaction is proved, 'there would then be room' for a court to presume that it resulted from the exercise of undue influence.

16. Generations of equity lawyers have conventionally described this situation as one in which a presumption of undue influence arises. This use of the term 'presumption' is descriptive of a shift in the evidential onus on a question of fact. When a plaintiff succeeds by this route he does so because he has succeeded in establishing a case of undue influence. The court has drawn appropriate inferences of fact upon a balanced consideration of the whole of the evidence at the end of a trial in which the burden of proof rested upon the plaintiff. The use, in the course of the trial, of the forensic tool of a shift in the evidential burden of proof should not be permitted to obscure the overall position. These cases are the equitable counterpart of common law cases where the principle of res ipsa loquitur is invoked. There is a rebuttable evidential presumption of undue influence." [Emphasis added]

450. Undue influence would be a very powerful and popular equitable remedy indeed if all that was required to trigger the operation of the presumption of undue influence was (a) a relationship of trust and confidence, and (b) a transaction which calls for an explanation merely because a substantial voluntary disposition is involved. It is clear beyond serious argument that the presumption will typically only arise when a claimant can establish a *prima facie* case of undue influence because of:

(a) the existence of a relationship of trust and confidence; and

(b) an impugned transaction which is (absent a satisfactory explanation) otherwise indicative of a risk of undue influence being exercised by the 'dominant' party over the vulnerable putative 'victim'.

451. In the Plaintiff's written evidence, he appeared to accuse his sister Susan Wang of "flattery" in relation to the Founders' Vision[89]. This implied an attempt to cast her as a character akin to Goneril or Regan in Shakespeare's '*King Lear'*, who flattered their elderly father into giving them his kingdom before usurping him, while (to his ultimate regret) he disinherited the most loyal daughter who would not publicly articulate her love for her father. However no such case (sensibly in my view) was ultimately advanced. It is true that the Plaintiff advanced Proposition 3 in his Closing Submissions (Section I):

> "S*usan Wang and the Third Family were concerned that they risked marginalisation following YC Wang's death if the Holding Companies fell into his estate.*"

452. This proposition is supported by various sub-propositions, often speculative, which do not on their face support any of the Plaintiff's claims to a material extent. I see no need to make any findings on these matters. I acknowledge that they are considered important to the Plaintiff because of the significant role he understandably believes the tension between YC's Second and Third Family has played in the course of his own life. I will attempt to address those concerns at the end of the present Judgment by making certain tentative observations in this regard. The following conclusory submission, however, is illustrative of the legal intangibility of this part of the Plaintiff's factual case:

> "*422. It is plain from the law firm files that Susan Wang was concerned about the prospect of a future battle over YC Wang's estate and of Dr Wong and/or the Second Family acquiring a position of influence. Those concerns influenced her actions in the setting up of the trusts…*"

453. Even if Susan Wang favoured the Bermuda Purpose Trusts because they would give her family more influence than any other estate planning arrangements, these concerns and motivations have not been shown to have contributed to the Founders being misled or encouraged to adopt a course they would not otherwise have freely chosen to follow. It is not even submitted that these hypothetical views on Susan Wang's part had any causative effect on the impugned transactions themselves. There is no credible evidence that YC

[89] Second Witness Statement, paragraph 23.

and/or YT were even vulnerable to having their true wishes overridden by Susan Wang or Mr Hung, let alone that their admittedly loyal servants actually overrode (or should be deemed to have overridden) their respective wills. The evidence that the Founders justifiably placed trust in those who were most loyal to them is compelling and ultimately uncontradicted by any credible evidence.

454. Further and in any event, I summarily find that the transfers to the Bermuda Purpose Trusts, having regard to the Founders' Vision, do not call for an explanation. They do not *prima facie* appear to be 'disadvantageous' or improbable in the requisite sense.

455. The undue influence claims are accordingly summarily dismissed.

LACK OF AUTHORITY CLAIMS

Summary findings: the Claimants' claims in respect of the First Four Bermuda Purpose Trusts

456. The lack of authority claims asserted by the Plaintiff may be summarised as follows:

(a) the alternative Taiwanese law claims with the same factual basis as the equitable mistake claims under Bermudian or BVI law (described as Proposition 2 in the Plaintiff's Closing Submissions) in relation to the First Four Bermuda Purpose Trusts;

(b) the claims under Bermuda or BVI law, which are addressed in the Plaintiff's Closing Submissions (at paragraphs 608-614) with the same factual basis as the equitable mistake claims under Bermuda or BVI law in relation to the First Four Bermuda Purpose Trusts;

(c) "*in the case of the Vantura and Universal Link Trusts, YC Wang was not involved in, nor did he direct or authorize, their creation, or the transfer of shares to them*" (Closing Submissions, paragraph 27.6 (b));

(d) in relation to the Ocean View Trust, the claim that Mr Hung held Chindwell BVI and Vanson BVI as nominee for both YC and YT and transferred YC's 50% interest after his death without the authority of his estate representative under Bermuda or BVI law, alternatively under Taiwanese law.

457. D8's lack of authority claims in relation to the First Four Bermuda Purpose Trusts may be summarised as follows:

(a) the Taiwanese law equivalent to the equitable mistake claims;

(b) a mistake-based lack of authority claim (the mirror image of the Plaintiff's claim) under Bermuda or BVI law, alternatively under Taiwanese law;

(c) a claim based on the insufficiency of written evidence that YT approved the creation and settlement of the Vantura and Universal Link Trusts.

458. My provisional view was that, assuming that (a) the equitable mistake claims were rejected on factual grounds and (b) the credibility of Susan Wang and Mr Hung was not seriously undermined, only the Plaintiff's fourth lack of authority claim was seriously arguable. The Trustees' counsel described the contention that the Vantura Trust and the Universal Link Trust were set up behind the Founders' backs as "*utterly misconceived*". This claim is summarily dismissed based on my findings (explained above in relation to the mistake claims) that the Founders were not mistaken or misled. As regards the mistake-based lack of authority claims, Mr Howard QC submitted[90]:

> "*Now, my Lord, standing back for a moment, one just has to ask, 'Why is this point even being argued? Why are Winston and Tony seeking to repackage a mistake claim as a lack of authority claim?' The very simple reason for that is that Winston and Tony do not want your Lordship to be afforded the opportunity to decide whether rescission should be ordered on the basis of the alleged mistakes. They want to be able to say lack of authority means the court has no discretion, nothing it can do, the trusts must fail. It's a totally misconceived argument, but it is another example of Winston and Tony engaging in legal sophistry in order to destroy the trusts at all costs*."

459. I agree that the attempt to repackage the mistake claims as freestanding lack of authority claims is legally unsustainable once the factual basis for the mistake claims no longer exists. It follows that these claims must be summarily dismissed. The position as regards Mr Hung is perhaps even clearer. In the Hung Estate's Closing Submissions, Mr Midwinter QC set out the following compelling arguments:

> "*35. The claim made against the Fifth Defendant in relation to the [First Four Bermuda Purpose Trusts] is that, despite doing nothing wrong, and despite having the authority and/or approval of YC Wang and YT Wang to transfer*

[90] Transcript day 75, page 29 lines 2-14.

the shares to the Trustees at the time, Mr Hung should nevertheless be held liable for breach of trust (or breach of mandate) because (unknown to Mr Hung) YC Wang and YT Wang were mistaken about the nature or terms of the [First Four Bermuda Purpose Trusts] when they gave that authority or approval.

36. It should immediately be apparent that it would be unjust to hold Mr Hung liable in those circumstances. Mr Hung was not only legally entitled but obliged to transfer the shares to the [First Four Bermuda Purpose Trusts] if YC Wang or YT Wang gave him authority or approval to do so. It would have been unthinkable for him to question their authority or approval. The law does not generally punish those who act in accordance with their legal entitlements or who comply with their legal duties, and certainly does not do so at the instance of those who gave authority or approval for those actions (or the administrators of their estates).

37. It should therefore come as no surprise that neither Taiwan law nor BVI law imposes liability on a trustee (or mandatary/nominee) who acts with the authority or approval of those entitled to give him authority to act where, unknown to him, the authority or approval is affected by a mistake. The route taken by Taiwan law and BVI law to that conclusion is different but the outcome is the same."

460. The Plaintiff's claim that the transfer of YC's 50% share of the assets purportedly transferred to the Ocean View Trust after his death is void for want of authority is considered separately below.

The Plaintiff's claim that the transfer of YC's 50% interest in Chindwell BVI and Vanson BVI to the Ocean View Trust was void for want of authority conferred on behalf of YC's Estate

The respective submissions

461. In the Plaintiff's Closing Submissions, the following clear and concise arguments were set out:

"*680. Dr Wong's primary claim in respect of the transfers of YC Wang's 50% interest in Chindwell and Vanson BVI into the Ocean View Trust is that the transfers required his authority during his life and authority on behalf of his estate after his death; Mr Hung had no such authority from YC Wang's duly appointed personal representative. Dr Wong accordingly submits that such transfers are void and of no effect.*

681. It is common ground that:

681.1 YC Wang did not authorize any transfer of Chindwell and Vanson BVI to the Ocean View Trust prior to his death;

681.2 as a matter of Bermuda and BVI law, only a personal representative appointed under the law of the place where the assets of a deceased are located may deal with those assets until administration is complete;

681.3 dealings without such authority are void;

681.4 there was no authority from a duly appointed personal representative of YC Wang's estate in respect of the purported transfers to the Ocean View Trust; and

681.5 there is no limitation/laches defence.

682. It follows that the only issue is one of fact, namely whether or not Mr Hung needed authority on behalf of YC Wang's estate, as well as authority from YT Wang, to transfer the shares in Chindwell and Vanson BVI after YC Wang's death. For the reasons set out in Section J above, in common with all the BVI Holding Companies, Mr Hung held Chindwell and Vanson BVI as nominee for YC and YT Wang and required authority from both to deal with them. After the death of YC Wang, Mr Hung held the shares as nominee for YT Wang and YC Wang's unadministered BVI estate. On his death, YC Wang's beneficial interest vested in the Court who held it as a receiver but had no power to deal with it. No one, not even an heir, could give Mr Hung authority to deal with YC Wang's former interest until a personal representative was appointed for his estate, which did not occur in the BVI until 2017. Accordingly, the purported transfers of the shares in Chindwell and Vanson BVI to the Ocean View Trust were not valid. YT Wang did not,

contrary to the PTCs' case, have authority to deal with the shares and give directions to Mr Hung in relation to the shares after YC Wang's death.

683. The Court is accordingly invited to find that the purported transfer of YC Wang's 50% beneficial interest to the Ocean View Trust was void ab initio and there is a resulting trust in favour of Dr Wong as administrator of his estate."

462. The Trustees rightly submitted that the critical question was as to the terms of the Hung Arrangement (or nomineeship agreement) following the death of one of the Founders. That issue and the BVI/Bermuda law position was clearly articulated as follows:

"*792. The critical issue which arises on this part of the case is whether the Hung Arrangement terminated upon YC Wang's death. Winston contends that it did, with the consequence that half of the assets within it fell into YC Wang's estate and could not be dealt with without the authorisation of his duly appointed personal representative. The Trustees contend that the arrangement continued, so that Mr Hung was entitled to deal with the assets that remained in his hands on the authorisation of YT Wang alone.*

793. There is a dispute between the parties as to whether this issue is governed by Bermuda or BVI law, as Winston contends, or by Taiwanese law as the Trustees contend. It is therefore necessary to consider the position under those different systems of law.

The position under BVI and Bermuda law

794. The position is straightforward under BVI or Bermuda law. It is common ground that, if BVI or Bermuda law govern the Hung Arrangement, that arrangement constituted a bare trust or nomineeship, in the sense that Mr Hung held the assets subject to that arrangement at the direction of the Founders: see Winston's Written Opening at paragraph 663.1 ***{A4/1/230}****. Winston contends that the consequence of this is that, when YC Wang died, half of the assets held by Mr Hung under the Hung Arrangement fell into his BVI estate and could only be dealt with by the duly appointed administrator of that estate in the BVI: see Winston's Written Opening at paragraph 663.2* ***{A4/1/231}****. Since no such authority was given, the transfers of half of the assets placed into the Ocean View Trust were, Winston contends, undertaken without authority and in breach of trust.*

795. The difficulty with this analysis is that it ignores the terms of the Hung Arrangement itself. The terms of the trust or nomineeship on which Mr Hung held the assets obviously depend on what was agreed by the parties to it. If the Founders and Mr Hung agreed that, following the death of one of the Founders, the trust or nomineeship would continue, such that the survivor was entitled alone to direct Mr Hung to deal with such assets as remained within it, then Mr Hung plainly had authority under the terms of his trust to deal with such assets on the direction of the surviving Founder. That is what the Trustees say the terms of the arrangement were, as pleaded at paragraph 16 of the Trustees' Defence and Counterclaim."

463. The Taiwanese law position is more nuanced. If the nomineeship arrangement is governed by the Trust Law, Article 8 creates a presumption, rebuttable by the express terms of the trust, that the death of the settlor or trustee does <u>not</u> terminate the trust. If the nomineeship agreement is governed by the Civil Code, Article 550 provides death of party to a mandate contract terminates the contract unless otherwise provided. The Trustees submitted persuasively that on any basis the critical question was one of fact:

"*802. ... As Professor Su explained, "whether YT Wang was entitled to instruct Mr Hung in relation to the whole of the assets following YC Wang's death would depend on the terms of the agreement between the Founders and Mr Hung" (Su 2 paragraph 82). That is simply a question of fact for this Court and, contrary to Professor Chang's assertion, there would be no barrier to such an agreement as a matter of Taiwanese law.*"

464. In their Reply Closing Submissions, the Plaintiff's counsel further argued, most significantly, as follows:

"*5. The PTCs rely on Mr Hung's assertion in paragraph 74 of his affidavit filed by the PTCs in the Beddoe proceedings that "Following YC's death, I continued to hold those assets [Chindwell and Vanson BVI] as trustee for purposes to be directed by YT alone": <u>tellingly Mr Hung's evidence is not that the Founders and he had discussed the matter and agreed this. If there had been such discussion and agreement, Mr Hung would have said so. Mr Hung appears simply to have assumed what the position was after YC Wang's death</u>. His assumption was wrong, in the same way as his assertion in the very same paragraph that "Chindwell (BVI) and Vanson (BVI) did not belong personally to YC Wang" is wrong, and in the same way as he got other fundamental matters wrong in his affidavit: see the 10 examples*

> *in Dr Wong's written closing at para 176, and in particular Mr Hung's assertion that he held the China Companies - prior to their transfer to the China Trust - "as trustee for the benefit of the people of China". These parts of Mr Hung's affidavit are just wrong. It is notable that Mr Midwinter did not tackle these inaccuracies.*" [Emphasis added]

Factual findings: did the Founders agree with Mr Hung that he had authority to deal with their share of the offshore assets if one of them died on the instructions of the survivor?

465. It is not always as easy to determine the critical factual issues upon which the merits of a claim depend as to as to characterise what the critical issues are. In this instance the difficulty flows from the fact that there is no clear, direct evidence pre-dating or even immediately post-dating YC's death relating to these aspects of the nomineeship arrangement. This is unsurprising for two reasons. Firstly, it is clear that the Founders were astute to avoid creating overt evidence of their interests in the Holding Companies. Secondly, based on the apparent cultural reticence about other people expressly addressing the Founders' mortality with them, it would be unsurprising if both Mr Hung and the Founders themselves were not reticent about explicitly raising what should happen if either of them died.

466. Accordingly, the initial impression that I formed was that the Trustees' case to the effect that the Founders had agreed that whoever survived should continue to manage the 'overseas funds' potentially reflected more post-hoc rationalizations as to what would have been agreed rather than reliable recollections of what was actually agreed. It is a universal human instinct to want to honour a departed loved one's expressly articulated and presumed wishes as to how their affairs should be conducted after their passing. This instinct is perhaps stronger in cultures which conceive of an obligation to respect ancestors with whom one will be reunited in the spiritual world. As YT observed in his eulogy to his older brother:

> "*For more than 50 years I have followed you. In public life…In private life … As for the outcomes, I believe that you have no regrets with which to face our parents and ancestors…*"

467. Another significant consideration in approaching the evidence in this part of the case is another family and cultural matter which I have now accepted as a central plank of my reasons for rejecting part of the mistake claims. Because of respect for the status of the Founders, I have rejected the Claimants' arguments that the *de facto* control exercised by the Founders over the First Four Bermuda Purpose Trusts reflected their understanding as to the true legal position. I have accepted the Trustees' evidential case that although the

Founders appeared to have been exercising legal control over the Bermuda Purpose Trusts, in fact the BMCs (their chosen children and Mr Hung) allowed them to exercise control because of a deep sense of deference which all concerned felt, in effect, was the only logical way to proceed. In relation to the Plaintiff's comparatively minor (in commercial terms) claim for 50% of the Ocean View Trust, it is understandable that he did not positively invite the Court to approach the evidence on this part of the case in a way which would undermine his far larger mistake claim. But that does not absolve the Court of its adjudicative duty to approach the evidence on parallel issues in a manner which avoids actual or apparent inconsistency and/or partiality.

468. Did all concerned after YC's death simply assume that YT should give directions about the assets without even perceiving any need to consider what the legally agreed or mandated position might be? Is it inherently probable that YT and Mr Hung were acting in a way which was reflective of what had been explicitly or implicitly agreed before YC's death, as opposed to reflective of what was explicitly or implicitly agreed to be appropriate in light of a sad event which was clearly unexpected when it actually occurred?

469. The Trustees' Closing Submissions acknowledged the paucity of direct evidence on the question of whether YC's authority was separately required for the Ocean View transfers:

> "*803. The available evidence as to what the parties to the Hung Arrangement agreed was to happen when one of the Founders died is relatively limited. That is first and foremost because the terms of the arrangement were never committed to writing, do not appear to have been widely discussed beyond the three parties to it, and each of those parties died some time ago.*
>
> *804. What the available evidence, together with the inherent probabilities, show is that the parties to the Hung Arrangement agreed it should* ***not*** *terminate upon the death of one of the Founders but should continue with Mr Hung taking his directions from the survivor*."

470. The Court is invited to infer that an agreement was made that the Hung Arrangement should not terminate on the death of one of the Founders from, *inter alia*, the following facts and matters (Closing Submissions, paragraphs 806-824):

> (a) "*it is likely that* ***at some point*** *the Founders and Mr Hung discussed what should happen in the event that assets were held by Mr Hung under the Hung Arrangement after the death of one of the Founders*";

(b) "*from 2000 the Founders were planning what should happen in the long term to the assets held under the arrangement … One would expect the possibility that one of them might become incapacitated or die before the meticulously planned project was completed to have crossed their minds and, if it did, one would expect them to have agreed what should happen in that eventuality … An important factor in this regard is the fact that the Founders did not want the stake in FPG held by Mr Hung to be broken up and dissipated, and nor did they want it to fall into their estates such that half of it was lost to inheritance tax. In other words, they had a keen eye on what was to happen to the assets after their deaths*";

(c) "*It would have been a surprising oversight if, at the same time as implementing their meticulous plans for the future of the FPG stake held by Mr Hung, the Founders and Mr Hung had not also discussed what should happen if one of them died before the whole of the block had been placed into trust*";

(d) "*it is also likely that if the matter was discussed between the Founders and Mr Hung it was agreed that the Hung Arrangement should continue rather than ending upon the death of one of the Founders and half of any remaining assets falling into the deceased Founder's estate*";

(e) Mr Hung deposed in paragraph 74 of his Affidavit in the *Beddoe* Proceedings, sworn before any challenge had been made to the Ocean View Trust:

> "*… Prior to YC Wang's death, I was holding these companies as a trustee for purposes to be determined by YC and YT jointly. Following YC's death, I continued to hold those assets as trustee for purposes to be directed by YT alone…*";

(f) "*Mr Hung acted in a manner consistent only with it having been agreed that the Hung Arrangement would not terminate on YC Wang's death. Importantly, the assets were not declared to form part of YC Wang's estate for inheritance tax purposes, a process in which Mr Hung was closely involved. Had Mr Hung understood that on YC Wang's death the Hung Arrangement simply came to an end and half of the assets still held within it fell into YC Wang's estate, then such assets would have been liable to have inheritance tax paid on them and to be declared to the authorities for that purpose*";

(g) "*Mr Hung was content for Chindwell and Vanson BVI to be used to pay legal fees in defence of the claims made by Winston in the US attacking the Trusts without obtaining the approval of YC Wang's heirs*";

(h) "*it appears likely that YT Wang himself authorised the payment of legal fees from Chindwell and Vanson BVI without obtaining the approval of YC Wang's personal representative… The fact that YT Wang likely gave such authorisation is important, because it indicates that (like Mr Hung) he also believed that he was entitled to do so without the involvement of YC Wang's heirs*";

(i) "*Mr Hung sought only YT Wang's approval before transferring the shares in Chindwell and Vanson BVI into the Ocean View Trust. The evidence shows that Mr Hung was insistent upon obtaining written approval to make such transfers* ***from YT Wang*** *… Mr Jao's understanding that this was the arrangement was clearly based on the practice adopted by Mr Hung. That practice further illustrates that Mr Hung believed that he was entitled to deal with such assets with YT Wang's approval alone*";

(j) "*the evidence shows that in 2011 YT Wang informed Mr Hung that he wished the shares in Chindwell and Vanson BVI to be transferred into another purpose trust. If that is accepted then it demonstrates that YT Wang* ***himself*** *considered that he had authority alone to decide what should happen to such assets.*"

471. The Hung Estate's Closing Submissions were broadly to similar effect. The issue was critically dealt with as follows:

"*67. This is a short and simple question of fact and construction: what were the terms of the Hung Arrangement? Was Mr Hung entitled to act on authorisation from one of YC Wang or YT Wang if the other was dead (or otherwise incapacitated)? Or, if one of YC Wang or YT Wang died (or otherwise became incapacitated) was Mr Hung obliged to turn to all of the heirs of the deceased, as well as the surviving brother, for joint authorisation to act?*

68. There is very little material that is relevant to this question, which is fundamentally a question of construing the agreement between Mr Hung and YC Wang and YT Wang. The best evidence is:

a. The evidence of Mr Hung in his affidavit in the Beddoe proceedings. Though the Ocean View Trust was not relevant to the issues at the time (which is no doubt why he dealt with it shortly) he said in terms that "prior to YC Wang's death I was holding these companies as a trustee for purposes to be determined by YC and YT jointly. Following YC's death, I continued to hold those assets as a trustee for purposes to be directed by YT alone." That is the clearest and best evidence that we have as to the terms of the Hung Arrangement, given by an honest man who was party to it.

b. The evidence of Mr Hung's actions at the time. He was a careful and diligent man. He had no incentive or reason to cut corners or to act without getting the proper authorisation. He gained nothing from the creation of the Ocean View Trust. If he had been in any doubt as to whether authorisation from YT Wang alone was sufficient he undoubtedly could and would have sought authorisation from a duly appointed heir of YC Wang. He had no reason not to do so. The only realistic explanation for the fact that Mr Hung acted on the authorisation of YT Wang alone, consistent with the evidence as to Mr Hung's character and methods, is that that is what had been agreed.

c. The evidence of Mr Jao. Mr Jao's evidence was also that Mr Hung regarded himself at the time as holding the shares subject to directions from YT Wang alone after YC's Wang death, and reported orally to YT Wang on an ad hoc basis about financial matters. Mr Jao was an independent witness (having long since retired from FPG and having no ongoing connection with any of the parties) and there is no reason to reject his evidence.

69. In addition to that evidence, there are the inherent probabilities. It is clear that YC Wang and YT Wang were very close and generally acted jointly. There are many examples in the bundle of documents in which YC Wang speaks for both of them, or conveys their joint wishes in relation to the overseas assets, and where Mr Hung acts in relation to the overseas assets on the approval of one of the brothers alone. It is clear that the shares held by Mr Hung were regarded as being 'family' assets dealt with jointly and in relation to which there was to be "no separation"."

472. The Plaintiff's Closing Submissions (paragraphs 433-454) dealt fulsomely with the shortcomings of the evidence supportive of (a) the existence of an agreement that YC's authority would be transmitted to YT as the survivor, and (b) the notion that Chindwell BVI and Vanson BVI were held on a trust for purposes. I regard the following points as most cogent:

(a) Mr Hung's evidence ("*Following YC's death, I continued to hold those assets as trustee for purposes to be directed by YT alone*") should be disregarded because:

> "*Mr Hung does not set out any reasons for his assertion … The issue of who would give instructions as regards Chindwell BVI and Vanson BVI after YC Wang's death would have alluded to YC Wang's mortality and, following Mr Jao's logic, would not have been raised by Mr Hung. It follows that if Mr Hung believed that he held the companies at YT's sole direction, that belief could only be based on an assumption … while Mr Hung may have convinced himself that he held the companies at YT Wang's sole direction by the time he gave his Beddoe evidence in 2014, it is most unlikely that he believed this to be the case immediately after YC Wang's death, because it is inconsistent with how he dealt with the assets at that time … Mr Hung's evidence … is hearsay. cross-examination of PTC witnesses who were called to give evidence during the trial has revealed that their statements were wrong in material respects…*";

(b) "*Mr Jao's evidence that "After YC's death, Mr Hung did not regard these assets [Chindwell BVI & Vanson BVI] as forming part of YC's estate or as belonging to YT although he regarded himself as holding these assets subject to any further direction from YT" and Susan Wang's evidence that "Mr Hung could operate these assets on the say-so of [her] uncle alone"*" should be disregarded, because:

> "*… it is unlikely that (at least in 2009) Mr Jao or Susan Wang actually believed Mr Hung held the companies to YT's sole direction, even if they came to convince themselves of this when preparing for trial. Such a belief is inconsistent with their conduct at the 17 January 2009 meeting of YC Wang's heirs, at which Susan Wang suggested that the companies fund the construction of YC Wang's tomb and cemetery. At that meeting, neither Susan Wang nor Mr Jao informed the other heirs that YT Wang would need to approve her proposal … At the 17 January 2009 meeting, Susan Wang suggested that Chindwell BVI*

and Vanson BVI could be used to fund the construction of YC Wang's cemetery. She described them as "what father originally set aside to use" and stated "If we want to put it in [the trusts], we can. We can do whatever we decide"…"

(c) the Plaintiff's counsel aptly relied on the following, fuller extract from the transcript of the January 10, 2009 meeting he attended and secretly recorded:

"Jao: And we should also tell you about these too….

Hung: Yes, separate from these trusts…

Jao: Let me brief you about this. The Chairman kept a small portion. Of course, in comparison, it's a small portion, since the entire trust is valued at USD 7-8 billion… But he had...

Hung: Some money he wanted to utilize. Which was not in the trust.

Jao: It was not in the trust. For example, previously [the money] for purchasing the shares for Wen-Hsiang [Walter] and Xue-Hung [Cher] came from the two accounts. […]

Wong: Who are the shareholders of these 'BVI' companies?

Jao: It used to be Hung.

Hung: I am still the shareholder.

Wong: They have not been placed in trust?

Hung: No, no, no.

Jao: They have not been placed into the 'trust[s]' [word spoken in English]. This is…

Hung: Outside the trusts.

Jao: Outside the trusts.

Hung: Why did the Chairman have these? Because, at the moment, money is required in China […]

Wong: It's not a small amount here. What are you going to do with this?

Hung: Nothing. Because money is needed in China. This is reserved for that.

Jao: It was approved by the Chairman.

Wong: Who needs money in China?

Hung: No. China currently...

Wong: Does that belong to a company?

Hung: No, not a company. This is personal expenditure. All [of these are items of] personal expenditure. He promised China that he would build a …

Jao: A hospital at Tsinghua University.

[emphases added]"

473. In my judgment, the following factual findings are irresistible based on the relevant documentary record:

(a) Mr Hung's averment in his first *Beddoe* Affidavit (sworn on January 18, 2014) that he held the assets "*for purposes to be determined by YC and YT jointly*" (and similar averments in paragraph 18 of his Second Affidavit dated December, 2014) do not support a finding that the assets were not the personal property of the Founders as a matter of Bermuda/BVI law at least. Mr Hung's description of the nature of the assets as "*personal*" on January 10, 2009 shortly after YC had died is far more reliable in light of the other evidence about how the offshore assets were used during YC's lifetime. The purpose of the meeting was (seemingly) to give frank disclosure to the Plaintiff of his father's asset position after his death. By 2014, a decision had clearly been taken to classify YC's share of these assets as not falling within his personal estate, but this post-hoc rationalization (possibly valid as a matter of Taiwanese law) does not accord with any reasonable common law-shaped factual analysis of the actual position at the time of YC's death in October 2008;

(b) Mr Hung's averment in the said Beddoe Affidavit that after YC's death he held the assets "*for purposes to be directed by YT alone*" cannot be accepted as reliable evidence of any actual agreement between him and the Founders to that effect. It beggars belief that if such a fundamental and easy to articulate agreement (or understanding) had been reached before YC's death, that Mr Hung would not have mentioned it either (1) at the January 10, 2009 meeting when the status of the assets and their disposal was under consideration, or (2) (before or after that meeting) to other interested parties such as Susan Wang and Mr Jao;

(c) it is crucial in assessing the evidence in relation to this issue to distinguish between Mr Hung's subjective belief in 2014 as to the fact that he held the

assets subject to YT's direction from the question of whether such an arrangement was expressly or impliedly agreed prior to YC's death. It is clear that Mr Hung's desire to transfer the remaining offshore assets to Ocean View Trust must have been based on his belief that this was not simply what YT (and/or William empowered by the POA) wanted but also what YC would have wanted had he been alive.

474. For the avoidance of doubt, these conclusions are not intended in any way to imply that Mr Hung deliberately told any untruths. These findings are essentially interpretative in nature, rejecting the attempts made by the Trustees and the Hung Estate to stretch the plain words used beyond their sensible meaning in light of independent and largely incontrovertible evidence. I also take into account the fact, as noted previously in this Judgment, that several Taiwanese witnesses on all sides appear to have, to varying extents, approved evidence containing wording drafted by lawyers without scrupulously verifying the accuracy of what they have approved. Such witnesses have all demonstrated a far more careful approach to giving oral evidence before the Court than in swearing or affirming their written evidence.

475. Having made these preliminary findings that the direct evidence of Mr Hung (both in his evidence in 2014 and the record of what he said on January 17, 2009) supports a finding that the relevant assets were personal assets jointly beneficially owned by the Founders and does not support a finding that sole instruction by the survivor of the Founders was actually agreed, it is obvious that the Trustees' case that such an agreement is inherently probable is like a castle built on sand. It seems more inherently probable, in the absence of any direct evidence of such an agreement, either from Mr Hung or those who interacted with Mr Hung and YT after YC died, that no such agreement was reached. They failed to address what might seem to outside eyes to be an obvious issue to be addressed. However, in this particular cultural and relational context, it was precisely the sort of issue which would not likely be addressed.

476. It is true that YC was explicitly engaged in an estate planning exercise after 2000, and the Letter to the Children in 2004 displayed a willingness to overtly contemplate his own demise. Yet he made no will, despite leaving substantial assets to his children, presumably expecting (in line with the Share Equalization plan) that all his children would share equally in his estate. The preponderance of the evidence suggests that only YC or YT could comfortably raise with Mr Hung the topic of what would happen to the offshore assets if one of them died before they were disposed of. It is not inherently probable that Mr Hung would have raised the issue himself. In fact, he had by 2008 been seeking to retire from his nominee shareholder role because of his own ill health. If the Founders had raised the issue, it makes no sense that Mr Hung would have forgotten about such a discussion completely

both (a) in the immediate aftermath of YC's death when the ownership of the assets and what should happen to them was being directly discussed, e.g. in January 2009 and (b) in the subsequent years leading up to his 2014 *Beddoe* Affidavit, since no witness says that he mentioned such an agreement to them. Despite the fact that YC was over 90 in 2008, it was Mr Hung's illness and his desire to bring his nomineeship to an end which was most pressing documented concern prior to YC's seemingly sudden and unexpected passing. The furthest Susan Wang, who was closer to YC than any other witness apart from Mr Hung, was able to go was to suggest that "*you would assume*" the survivor would continue to control the joint family assets:

> "*My understanding, when I started in putting this trust together, I knew that they were family asset. They were called the Wang family asset. So they - - they never separated, so their control was joint control. So you would assume that if one founder died, then the other founder would continue to give instruction to Mr Hung. My understanding, when I started in putting this trust together, I knew that they were family asset. They were called the Wang family asset. So they they never separated, so their control was joint control. So you would assume that if one founder died, then the other founder would continue to give instruction to Mr Hung.*"

477. It remains to consider briefly why the Ocean View transfers in fact occurred with YT's purported authority only, and whether this fact alone is sufficient to justify the inference that the Founders must have agreed with Mr Hung that the survivor would be entitled to exercise sole authority after one of the brothers died, assuming the Hung Arrangement (or nomineeship agreement) still subsisted. As already foreshadowed above, this inference (which the Trustees invite me to draw) is somewhat similar to the inference the Claimants invited me to draw from the fact that the Founders in fact exercised control over the First Four Bermuda Purpose Trusts. I declined to infer that the Founders believed they had the legal controlling powers which they in fact exercised with the consent of the legally empowered BMC members (including Mr Hung). I accepted that because of the general and specific cultural, family and commercial context, the Founders' children and Mr Hung effectively decided to defer their strict legal rights out of deference to the Founders. The Trustees relied on the following averments in Mr Hung's First Affidavit in disputing the control limb of the mistake claims:

> "*18. At the time I transferred the various offshore companies to the Bermuda Trusts, those assets were not held by me for the benefit of any member of the Wang Family. Further, after I transferred the various offshore companies to the Bermuda Purpose Trusts, those companies were owned by the PTCs. As a Director of the PTCs' Boards and as a member of the BMCs,*

I believe that the Bermuda Purpose Trusts have operated in accordance with their stated purposes at all times since they were formed and funded. Based on my interaction with the Chairman from May 2001 until his death, and with the Vice-Chairman from 2001 until more recently, they shared the same belief. They made no effort to influence the Trustees improperly in the discharge of their duties under the trust instruments. Of course, given the respect that each of the Board members had and have for the Chairman and Vice-Chairman, they frequently updated the Chairman and Vice-Chairman in connection with the operation of the Trusts and sought their advice and approval in relation to trust matters." [Emphasis added]

478. In dismissing the control limb of the mistake claims, I did not accept the accuracy of the last sentence of the quoted paragraph. The Plaintiff established through cross-examination that the *de facto* control exercised by the Founders, until YC's death in particular, was much more substantial than is suggested by this sentence. Far from simply updating the Founders and seeking their advice, the Founders were seemingly 'permitted' to routinely make decisions (about share purchases at least) which were subsequently 'ratified' by the BMCs in which legal authority was properly vested. Perhaps the most compelling evidence of this was the following extract from the cross-examination of Mr Jao upon which the Plaintiff (at paragraph 367 of his Closing Submissions) relied:

"*Q. Once approval was given by YC Wang, the instruction would have been actioned, wouldn't it?*

A. Yes.

Q. Yes. If YC Wang had said, 'No, don't purchase the shares or purchase a lesser amount", you would have obeyed him. Do you agree?

A. Yes, I agree.[91]

[…]

A. When YC was still there, we all respected him very much. We respected his decisions. We will -- we would report everything to YC for his decision. Therefore, when we received instruction from YC, we put it into implementation right away and we report to BMC afterwards, because share purchase is very crucial when you -- to pick the timing, and also this

[91] Transcript Day 45, page 52 lines 8-14.

is a routine operation. Every year we do this to maintain the sustainability of PFG -- of, sorry, FPG.

Q. When you say 'respect' in relation to YC, you mean that you did what he said and so did everybody else. Do you agree?

A. Yes.[92]"

479. A vivid illustration of why the notion of challenging the Founders' assertion of *de facto* control was simply assumed to be heretical (by those who viewed themselves as still serving under them) was conveyed by the following evidence upon which the Plaintiff relied for his mistake claim:

> "*369. Susan Wang also agreed that the BMCs simply followed YC Wang's wishes in relation to the Trust Assets: 'It's our respect for our father';*[93] *'Whatever he tell me, I will do';*[94] *'Q. Right. If he had asked the trustee to do something within the purposes of the trust, he would have expected it to do it, wouldn't he? A. Yes.'* [95]"

480. This was in my judgment a very honest and revealing statement about the family business atmosphere and culture. Doing what was, within the context of this moral milieu, clearly 'the right thing to do' likely excluded any need to have regard to what was 'the technically legally correct thing to do'. This was not a subversion of the strict legal position, the fundamental character of which was understood by all concerned. The legal formalities were not so much ignored or even distorted; rather they were tacitly moulded so as to work harmoniously with what were perceived to be higher order guiding principles.

481. I rejected the Plaintiff's mistake claims and accepted the Trustees' submission that the control exercised by the Founders does not indicate their belief that they were legally entitled to exercise such control as settlors. Implicitly, I found that due to an intense culture of respect, arising out of the way the FPG Group had been run over many years as a family enterprise and the Founders having after 2006 formally retired while still occupying "emeritus" roles, the Founders were allowed to notionally and practically exercise powers they did not legally enjoy. So when analysing the evidential significance of proof that after YC's death YT (with the concurrence of the very same human actors) exercised sole *de facto* control over the jointly held assets, more is required to justify the inference that this conduct was consistent rather than inconsistent with the strict legal position. And if the

[92] Transcript Day 45, page 72 lines 10-22.
[93] Transcript Day 27, page 113 line 19.
[94] Transcript Day 27, page 113 lines 23-24.
[95] Transcript Day 28, page 90 line 23- page 91 line 1.

strict legal position is that an agreement to transfer control over YC's share to YT upon the former's death is required, in this peculiar factual matrix, the assumption by YT of apparent authority over YC's share of the overseas assets is not indicative of the existence of an agreement which no one positively contends was ever consummated. There is a fundamental distinction between drawing an inference as to what YC would have wanted to occur after his death (had he thought about it) and drawing an inference that he agreed with Mr Hung what should happen after his death. The former inference is easier to draw in all the circumstances of the present case than the latter inference.

482. I have also tentatively considered, beyond the strict confines of the case advanced by the Trustees that an express agreement was reached about the survivor of the Founders who died acquiring the right to exercise sole authority over the assets, whether an implied agreement could be found to have been consummated. Susan Wang gave oral evidence to the effect that based on the fact that the assets were viewed as family assets "*you would assume that if one founder died, then the other founder would continue to give instruction to Mr Hung*". This hinted that such a term would be obviously incidental to the expressly agreed terms from the standpoint of the parties to the Hung Arrangement. However, on proper analysis, an implied term was not pleaded and the issue was not adequately explored through evidence or argument. Indeed if any need arises to consider the possibility of an implied rather than an express agreement, it is only because the Trustees' primary case that it is inherently probable that an express agreement was consummated has failed. Having regard to the strict limits imposed (by the common law at least) on the implication of terms into contracts and the unique character of the Hung Arrangement, it is difficult to see how (as a matter of Bermuda or BVI law at least) an implied term-based case could have succeeded. And this perhaps explains why no such alternative case was pleaded.

483. It is not necessary to decide whether YC would have wanted to maintain the jointly owned assets without separating them and for YT to give directions for the entire fund in the event of his own demise. It is clear that this is what YT and Mr Hung convinced themselves and other BMC members his wishes would have been, at some point before the Ocean View Trust was established. There is no clear evidence about what thought processes they went through and what legal advice was received in relation to this aspect of the authority issue. But the approach decided upon must have appeared to be both morally and commercially acceptable, because no estate duty was payable on YC's share of the assets as a result. The key actors were in my judgment embedded in a corporate and personal culture which, particularly when concerned with the implications of the death of the senior Founder, did not privilege a hard-edged legal analysis of what course of action should be pursued.

484. It is certainly plausible that YC may have wanted YT to assume control and/or expected this to occur. On the other hand, it was somewhat odd that Mr Hung suggested on January

10, 2009 to the Plaintiff that the funds were being held to invest in China for "*personal expenditure*", implicitly on YC's part. This was either deliberate dissembling by Mr Hung or reflective of the fact that at that juncture no decision as to how Chindwell BVI and Vanson BVI would be used had actually been made. The latter view is strongly supported by the fact that financial reports before YC died described the companies as "*free use*", or "*freely available for use*", assets. Moreover, it is apparent from Roger Yang's Third Affidavit dated March 5, 2021 that the two BVI companies were used to fund the legal expenses of various family members in defending the Plaintiff's various claims from as early as 2009. This "*freely available for use*" label further undermines the suggestion that it was generally understood that YC had a firm or fixed view that these assets should never be separated or split.

485. In summary, I find that the Founders did not agree with Mr Hung that the nomineeship agreement would (if not previously terminated) survive the death of one of them on the terms that Mr Hung could take directions from the survivor in respect of a joint 'fund'. This conclusion is essentially based on an insufficiency of evidence of any such agreement in circumstances where:

(a) it is clearly possible (if not probable) that what would happen to the nomineeship arrangements on the death of one of the Founders was not expressly discussed by them with Mr Hung;
(b) positive evidence of an agreement is required to displace the starting assumption that YC's 50% share of the jointly owned assets would accrue to his estate upon his death; and

(c) it seems more likely on the balance of probabilities, to the extent that a positive finding is required, that no agreement was actually concluded between YC and Mr Hung on this sensitive issue. The preponderance of the evidence suggests that Mr Hung and the 'insider' children of the Founders simply decided that following the sole directions of YT was 'the right thing to do'.

486. I am unable to and do not need to make any positive findings as to what the relevant actors involved in the creation of the Ocean View Trust believed the legal position to be. The Plaintiff's litigation launched in 2011 would have been quite obviously perceived as an almost blasphemous attack on the Founders' legacy and Vision. In such circumstances, there would have been an overwhelming motivation amongst the ranks of the 'faithful' to do what was ethically and morally 'right' and an assumption that any credible legal system would be sufficiently flexible to bend to the justice of their cause. The perspective of the

'loyalists' defending the Founders' Vision, as they probably viewed themselves, would have most likely been as follows. With the health of both YT and Mr Hung in decline, and the 'barbarians' at the gates, it would be surprising if iron-clad legal guarantees on the authority question would have been sought or even considered essential before effecting the impugned transfers of the Chindwell BVI and Vanson BVI shares. It seems more plausible that if potential difficulties were identified, a decision would have been made to simply deal with such difficulties as best as possible in due course. This was essentially precisely what transpired.

Taiwanese law-linked factual findings

487. For the purposes of the Taiwan law analysis, in case I am wrong in finding that Bermuda law by virtue of section 10(2) of the 1989 Act or BVI law by virtue of Bermuda's common law choice of law rules applies, it is also necessary to consider whether the death of YC terminated the Hung Arrangement. As I find below, one critical factual question is (assuming the Civil Code applies rather than the Trust Law) whether there was an express agreement that the sub-nomineeship would survive one of the Founders' deaths and, if not, whether the nature of the agreement was incompatible with automatic termination on death of one of the 'principals'. The Plaintiff argued in his Closing Submissions:

> "*943. Dr Wong's case is that the nomineeship between the Founders and Mr Hung terminated over four years prior to transfers to the OVT, on YC Wang's death, on which event Mr Hung was required to return the interests which he held for YC Wang to YC Wang's heirs. That is because Article 550 of the Civil Code provides that a contract of mandate terminates when "one of the parties" dies or loses capacity, unless they have agreed otherwise or "unless, from the nature of the affairs commissioned, such mandate cannot be extinguished." It follows that Mr Hung had no authority to continue holding YC Wang's interests in Chindwell BVI and Vanson BVI, let alone to transfer them to the OVT.*"

488. The Trustees submitted in their Closing Submissions:

> "*800. If the Hung Arrangement was a contract governed by the Civil Code, then, even in the absence of agreement between the parties that it would survive YC Wang's death, the Court would have to consider two further issues:*
>
> > *800.1 First, in circumstances where there were two principals and one mandatary, whether the death of one of the principals alone would engage the presumption under Article 550. Professor*

Su considered it possible that Article 550 would not be engaged in those circumstances (Su 1 paragraph 225). Professor Chang disagreed, but acknowledged that there were no cases in either direction nor any authoritative guidance, and it was ultimately just a matter of interpreting the phrase 'one of the parties' in Article 550.

800.2 Second, whether 'the nature of the affairs commissioned' was such that the contract could not be extinguished by a party's death. As Professor Su explained, this is often the case where the task commissioned by the principal remains to be completed at the time of his death: Su 1 paragraph 228. Thus, if it was necessary for the Hung Arrangement to continue in order to give effect to the purposes directed by the Founders, the presumption in Article 550 might not be engaged; this would ultimately be a question of fact for the Court (Su 3 paragraph 81)."

489. Implicit in my findings recorded above that there was no agreement about what would happen to YC's share upon his death is the related finding that no agreement was reached as to whether or not the Hung Arrangement would survive the death of one of the brothers.

490. It now remains to address the question (of mixed fact and law) of whether "*the nature of the affairs commissioned*" is such as to preclude the assumption made by Article 550 that a mandate relationship terminates on the death of one of the principals. I will at this juncture limit my findings to recording the basic factual elements of the agreement as at the date of YC's death in October 2008:

(a) the registered shareholders of Chindwell BVI and Vanson BVI were Citco nominees under a nomineeship agreement with Mr Hung as beneficial owner;

(b) the Founders were ultimate beneficial owners under an oral sub-nomineeship agreement with Mr Hung;

(c) financial reports in various years including 2006 had described the shares in these two companies as capable of being "*freely used*"[96];

[96] G 28/58/1. The words were written on the typed Report in YC's hand. The reference to Chindwell BVI and Vanson BVI is implicit.

(d) on July 26, 1999, Chindwell BVI had pledged its assets to secure certain personal debts of YC Wang[97]. It is unclear when this registered pledge was discharged but there is no suggestion that it was still a liability when YC died;

(e) in 2007 assets of Chindwell BVI and Vanson BVI had been used as part of the Share Equalization plan by the Founders.

Legal findings (Bermuda/BVI law): Plaintiff's Ocean View Trust claim against the Trustees

491. My primary applicable law findings are that Bermuda law applies to this claim by virtue of section 10(2) of the 1989 Act, with the default position being that under Bermuda's choice of law rules, BVI law applies as a matter of common law. Letters of administration were granted to the Plaintiff in Bermuda in 2016 and in BVI in 2017 and so his standing to sue under Bermuda and/or BVI law on behalf of his father's estate is not subject to challenge.

492. In the Plaintiff's Opening Submissions, it was argued:

> "*550. In relation to the transfers to the Ocean View Trust in 2013, the claim by Dr Wong is of lack of authority only:*
>
> *550.1 there was no authority from Mr YC Wang, his heirs or his authorised representatives at all, Mr YC Wang having died in October 2008 and this transfer being made in 2013. On that basis, Dr Wong contends that the purported transfer of YC Wang's 50% interest in Chindwell BVI and Vanson BVI is plainly void…*"

493. The Trustees accepted that this legal result would follow if, under the terms of the Hung Arrangement, there was no agreement that the nomineeship arrangements would continue under the sole direction and control of the survivor when one of the brothers died. In effect it was conceded that under Bermuda and/or BVI law if the assets were jointly owned by the Founders personally, their interests were held as tenants in common and that the doctrine of survivorship applicable to joint tenancies did not arise.

494. In these circumstances it requires no elaborate legal analysis to conclude that YC's 50% share of the assets used to settle the Ocean View Trust could not validly be transferred

[97] This was said to be undisputed made in the Plaintiff's Opening Submissions (paragraph 663.1(b)).

without the authority of his heirs or administrator as a matter of Bermuda or BVI law. This finding is however subject to the determination reached on the Trustees' Power of Appointment Counterclaim.

Legal findings (Bermuda/BVI law): Plaintiff's Ocean View Trust claim against Mr Hung's Estate

495. In the Plaintiff's Closing Submissions, it is argued:

> *684. Mr Hung's intermeddling with YC Wang's beneficial interest absent a grant of letters of administration attracts a personal liability as an executor de son tort and in any event was a breach of the nominee arrangement according to which he held the shares in Chindwell BVI and Vanson BVI (because as nominee he could only hold the assets to the order of an administrator once appointed).*
>
> *685. Accordingly, Mr Hung's estate is liable for any shortfall in the value of the assets (once restored), arising by virtue of their being in the Ocean View Trust rather than having remained under his nominee arrangement with YC Wang and YT Wang. Most probably this will relate to dealings with dividend income from Chindwell BVI and Vanson BVI which has now become untraceable. His estate will also be jointly and severally liable for the costs of recovering the assets. The quantum of this claim will realistically have to await the accounting sought in the prayer to the Statement of Claim, which will also cover dealings with dividend income after YC Wang's death and before the transfer of the shares to the Ocean View Trust in respect of which no authority was given by YC Wang's duly authorised personal representative. At present, it is known that Chindwell BVI has been illegitimately used after YC Wang's death to pay in the region of US$8 million for the legal costs of certain individuals in the Wang family and others (including Mr Granski).*
>
> *686. Pausing here, it is worth addressing briefly the suggestions made on behalf of Mr Hung's estate that his inclusion as a party to the litigation is in some way inappropriate. This is wrong. The estate needs to be a party, not simply because it is liable for the reasons given above, but also because it needs to be bound by the result.*"

496. The legal principles relied upon by the Plaintiff for founding liability in the absence of authority were not disputed by the Hung Estate; only the essentially factual issue of

whether authority was required for the impugned transfers to the Ocean View Trust was what was in controversy. Mr Midwinter QC submitted in his client's Closing Submissions:

> "*65. The claim in relation to the Ocean View Trust is put on a different basis. The allegation is that Mr Hung transferred the shares in Chindwell BVI and Vanson BVI to the Ocean View Trust without authority because:*
>
> *a. He was obliged to obtain authority from all of the heirs of YC Wang in relation to YC Wang's 'half' of the shares (which he did not do); and*
>
> *b. He failed to obtain valid authorisation from YT Wang to make the transfer.*
>
> *66. Both of those assertions are wrong. They are addressed in turn below. No relevant issue of law arises: if (contrary to the Fifth Defendant's case) the transfers were not properly authorised, it is accepted that Mr Hung will have (innocently) acted in breach of duty in making them.*" [Emphasis added]

497. That sensible concession was emblematic of the dignified way in which the Hung Estate's defence of the present proceedings was conducted and consistent with the persuasively advanced central thesis that Mr Hung had acted honourably throughout his ultimately challenging and stressful role as nominee for the Founders. Both Dr Wong and Tony Wang in their oral evidence also sensibly confirmed that they accepted that Mr Hung was always loyal to their respective fathers. It follows however, that having found as a fact that YC's authority was required and not obtained, the Plaintiff's claim for consequential relief against the Hung Estate (if required) succeeds as a matter of Bermuda or BVI law.

Legal findings (Taiwanese law): Plaintiff's Ocean View Trust claims

Trust Law or Civil Code?

498. The alternative Taiwanese law position (in case my choice of law findings are found to be wrong) gives rise to the need to distinguish between:

(a) whether the nomineeship agreement is a trust governed by the Trust Law, in which case it is presumed absent evidence to the contrary that the death of one joint settlor does not terminate the trust; or

(b) whether the nomineeship is governed by the Civil Code in which case it is presumed that the death of one joint 'principal' terminates the mandate relationship.

499. It was common ground that under Taiwanese law the Founders were joint tenants under the Hung Arrangement. For obvious tactical reasons, the Plaintiff contended that the Civil Code applied whilst the Trustees (and Mr Hung's Estate) contended that the Trust Law applied. Based on the factual findings I have recorded above, the Plaintiff's lack of authority claim in respect of the Ocean View Trust would clearly potentially succeed on a Civil Code analysis, subject to limitation defences, because, in terms of what the default position would be, the analysis is aligned with the Bermuda or BVI legal position. If the Trust Law applies, however, the default position appears to be potentially different so it is necessary to record my findings as to which Taiwanese statute applies and how (if at all) this affects the merits result if the Trust Law governs the Plaintiff's claim.

500. My initial impression was that the case for viewing the nomineeship agreement as being governed by the Civil Code reflected a more straightforward and orthodox Taiwanese law proposition. The application of the Trust Law beyond the boundaries of an explicit trust arrangement seemed more likely to occur, exceptionally and remedially, in relation to relationships analogous to trusts which could not be shoehorned into a Civil Code concept. The Trustees' expert Professor Su was in reality a Civil Code specialist. After being initially retained, he discovered he was required to address Trust Law issues and based these aspects of his evidence in part on consultations with a colleague with more specialist knowledge in this area. The Plaintiff's expert, Professor Chang, had a special interest in trust law. This has no material effect on the weight which I attach to their evidence on this issue. But it does add to the general impression that the idea that a nominee arrangement in relation to shares was not a simple contract and was something of an inspired afterthought for the Trustees' legal team, much like the belatedly pleaded proposition that Taiwanese law governed the Hung Arrangement at all.

501. To the extent that it is necessary to resolve the dispute as to whether the Trust Law or Civil Code applies as between the Founders and Mr Hung, I prefer Professor Chang's view that a nomineeship is a form of mandate agreement covered by the Civil Code. The main rationale for Professor Su, eminence grise on the Civil Code, seeking to contend for the application of the Trust Law to the Hung Arrangement was seemingly the Trustees' desire to advance the theory that Mr Hung held the assets on trust for purposes, not for the benefit of the Founders at all. I have already found that there is no proper evidential basis for such a framing of the Hung Arrangement, or the sub-nomineeship agreement relating to the assets transferred to the Ocean View Trust. On the hypothesis that I am bound to find that an oral sub-nomineeship agreement in relation to BVI shares is governed by Taiwan law,

I do not accept that the Trust Law applies to such a commercial relationship on the basis that no Civil Code provision applies. I prefer Professor Chang's view that a nominee or mandate relationship, or nominee/mandate relationship, would fall within the rubric of the Civil Code.

502. The Trustees' case that the Hung Arrangement is governed by Taiwanese law was fundamentally based on the following factual framing:

> "*One has to step back and be realistic. The Hung Arrangement was an agreement between three Taiwanese men, resident in Taiwan, to administer in Taiwan assets located in various jurisdictions of which the most important were indirect holdings in shares in Taiwanese companies operating in Taiwan. It is obviously a Taiwanese arrangement. The fact that – over a decade after the arrangement was entered into – some of those shares came to be held through BVI vehicles rather than vehicles incorporated in another offshore jurisdiction was neither here nor there to Mr Hung or YC or YT Wang, and obviously was not a relevant factor at all when the relationship was created in 1979.*"

503. On the basis that I was wrong to reject these factual propositions and to conclude that in reality there was a series of nomineeship agreements from time to time in relation to each block of shares, albeit governed by corresponding terms, I would be entitled to find that the Hung Arrangement was entered into in the pre Trust Law 1996 era. I would decline to make that finding, because in my judgment it is artificial to view a sub-nomineeship agreement entered into in relation to the shares of companies incorporated in 1998 as part of some larger umbrella agreement made years previously even if the terms of the arrangement may have been broadly the same. In any event I accept the Trustees' case that the Trust Law potentially applies to pre-existing trusts, *inter alia*, because trust contracts were recognised when a particular type of relationship did not fit into a Civil Code-based contract category: Taiwanese Supreme Court, Judgment No. Tai-Tsai-Zi No. 42 (1977). I reject the application of the Trust Law on the broader basis that the Civil Code mandate provisions are more likely to be applicable to an informal oral commercial agreement. I will nonetheless briefly set out the findings I would make if bound to find that the Trust law applies to the Hung Arrangement.

The Plaintiff's YC lack of authority Ocean View Trust claim against the Trustees under the Trust Law

504. Article 8 of the Trust Law so far as is material for present purposes provides as follows:

"*A trust relation shall not be extinguished because the settlor or trustee dies, becomes bankrupt or loses his legal capacity unless the trust act provides otherwise.*"

505. To put the authority issue in its proper context, the Claimants rely substantively on Article 18 of the Trust Law to revoke the transfers Mr Hung made to the Ocean View Trust. Article 18 provides as follows:

> "*The beneficiary of a trust shall have the right to apply to the court for revocation of the disposal of trust property, if the property has been disposed of by [the trustee] in violation of the stated purpose of the trust. If there is more than one beneficiary, the motion for revocation may be filed by any one of the beneficiaries.*
>
> *The right to apply for revocation as provided in the preceding paragraph may be exercised only in any one of the following situations:*
>
> *(1) the trust property is a property right which requires registration and such trust registration has been duly completed;*
> *(2) the trust property is a property right in securities like stock certificates or other documentary evidence of rights and which clearly specify in accordance with the regulations of the industry's regulatory authority that they appertain to the trust property; or*
> *(3) the trust property is a property right other than those provided in the preceding two subparagraphs and both the opponent and the transferee knew or failed to know by gross negligence that the trustee had disposed of the property against the stated purpose of the trust.*"

506. Professor Chang explicitly agreed under cross-examination by Mr Howard QC, that[98]:

(a) if Article 19 of the Trust Law on limitation was objectively construed as Professor Su contended, the Article 18 claims would be time-barred (on the expiration of 1 year from the date the beneficiary was aware of the transfer); and

(b) he was unaware of any case where the Taiwanese Supreme Court had applied a subjective test or disapplied the prescribed limitation periods.

507. As far as the Ocean View Trust is concerned, where the 10-year outer limit had not expired when the present proceedings were commenced (in contrast to the position as regards the claims in respect of the First Four Bermuda Purpose Trusts, which appear to be obviously time-barred), the limitation defence would only succeed on proof that 1 year had expired after the date when the Plaintiff (or D8, or in the case of a subrogated claim, Mr

[98] Transcript Day 52, page 13 line 20-page 16 line 24.

Hung) had knowledge of the claim i.e. knew that the assets had been transferred without authority. This limitation defence, together with the extremely ambitious further argument that the 1 year limitation period should be disapplied on public policy grounds will be considered in relation to the limitation defences generally below.

508. The Trustees' case was that there was no material legal or evidential distinction between an Article 18 of the Trust Law claim and an Article 244 of the Civil Code claim (Article 88 being applicable solely to mistake) as regards the authority issue:

> "*Thank you. Now, the question of whether the transfers were authorised by the founders when we're considering an Article 18 question raises essentially the same questions concerning authority that we looked at a moment ago when we were considering 244. Let's just see whether we agree. Firstly, there's a question of fact did they give any authority at all? Secondly, can it be revoked under Article 88? Thirdly, the question of what was it they actually gave authority for? Did they authorise only a trust from which their children could benefit or did they authorise Grand View; Correct?*
>
> *A. Yes.*"

509. This line of cross-examination is consistent with the Trustees' Closing Submissions in relation to Article 8 of the Trust Law, and the narrower authority issue, which effectively invited the Court not to decide the point by applying an evidential onus of proof. This is because the ultimate legal question was whether the Court was able to find evidence that YT and/or Mr Hung had authority to transfer YC's share of the assets, after his death, to the Ocean View Trust. In fact, three days later, Mr Howard QC advanced a similar proposition on the authority point with respect to Article 8 of the Trust Law and Article 244 (as read with Article 550) of the Civil Code to Professor Chang[99]:

> "*Q. It could have done, you're right. There's a debate between the parties and ultimately - - there's a debate between the parties, isn't there, in this case as to whether the circumstances that arise upon YC's death are regulated by Article 8 of the trust code or Article 550 of the Civil Code; correct?*
>
> *A. Yes.*
>
> *Q. Now, I think what your last answer may be suggesting is ultimately it probably doesn't matter a great deal because the court ultimately has to decide, in the arrangement between the parties, whether it's a trust or a mandate, what did the parties intend should be the effect of the death of one of YC and YT?*

[99] Transcript Day 55, page 51 lines 2-17.

A. Well, of course, the intention becomes part of the contract and the contract, in the terms of nominee contracts, govern."

510. On reflection, the practical approach adopted by the Trustees' counsel on this sub-issue is consistent with legal principle in the factual matrix of the present case. Irrespective of the fact that Article 8 of the Trust Law states that a trust does not terminate on the death of the settlor unless the trust instrument so provides, it is common ground that YC's administrator did not authorise the impugned transfer of his share of the assets. Presumed continuation of the trust is a different matter from presumed authority, which Article 8 does not deal with at all. Unless the Court makes a positive finding that the trust envisaged that the survivor was empowered to unilaterally dispose of the trust property, the lack of authority claim will potentially succeed on the grounds that the transfers were made in breach of the trust which required YC's authority before his death and that of his beneficiaries after. The question is not simply authority, but what legal terrain does Article 18 cover? The Trustees' Closing Submissions identified the following impediments to the Plaintiff's claim:

(a) Article 18 of the Trust Law did not apply to a purpose trust, a factual premise I have already rejected above (i.e. the Hung Arrangement was not a trust for purposes);

(b) "*The second difficulty with the Article 18 claim is that a claim under Article 18(3) would require Winston and Tony to prove that the Trustees knew or failed to know by gross negligence that Mr Hung had disposed of the property against the stated purpose of the trust*" (paragraph 1514).

511. I find that the Plaintiff must establish that the Ocean View Trust (technically Ocean View PTC, the 6th Defendant) "*knew or failed to know by gross negligence*" that the transfer was made without the requisite authority. In the Plaintiff's counsel's Closing Submissions, it was argued:

"*1036.3 The Ocean View Trust was settled and assets transferred to it when YC Wang was dead, and YC Wang did not authorise the transfers prior to his death (see paragraph 451 above), so the PTCs obviously would or should have known that the transfers to that Trust were unauthorised. For the reasons given at Section 433 above, the PTCs cannot have reasonably (or actually) believed that YT Wang was empowered to give authority on YC Wang's behalf…*

…

1058. As for whether the PTCs knew of the disposal in violation of the stated purpose (or failed to know by gross negligence), Professor Chang explained

'gross negligence' is the same as the 'should have known' test which appears throughout the Civil Code (e.g. in relation to Article 113).' Professor Su considers the test connotes 'a significant degree of fault or carelessness', but agrees the Taiwan courts would approach the matter on a case by case basis. Dr Wong submits that the PTCs should have known that the transfers were unauthorised for the reasons given at paragraph 1036 above in relation to Article 113."

512. The first point to determine is, apart from what I consider to be an "actual knowledge" requirement, what the "constructive knowledge" threshold is. At first blush, Professor Su's interpretation of "gross negligence" is to be preferred. Simple negligence seems more compatible with "should have known", admittedly using a common law linguistic lens. Nonetheless, the fact that the Trust Law has used a phrase which translates as "gross negligence" makes all but obvious that there must be a distinction under Taiwanese law between "negligence" (without an additional adjective suggesting an exceptional degree of negligence) and "gross negligence".

513. The Plaintiff has failed to establish knowledge or gross negligence on the recipient trustee's part. The issue of whether YC's authority was required has not been shown to have been so obvious that Ocean View Trust PTC should have, in effect, been put on inquiry that Mr Hung lacked authority to validly transfer YC's 50% share of Chindwell BVI and Vanson BVI because of the terms of oral trust arrangement with a settlor/beneficiary who was no longer living and available to clarify what his instructions were. Bearing in mind the particular cultural and family context, there was at worst 'simple' negligence on Ocean View PTC's part in failing to verify the authority position in circumstances where, with the Plaintiff's litigation pending, there is no suggestion other than that the assets would be substantially preserved.

514. The Plaintiff's claim under Article 18 of the Trust Law would accordingly fail if my primary holding that the Civil Code would apply to this claim were incorrect, assuming Taiwanese law applies.

The Plaintiff's YC lack of authority Ocean View Trust claim against the Trustees under the Civil Code

515. The claims are pleaded in the Re-Re-Re-Amended Reply to the Defence and Defence to Counterclaim of the Trustees. The claims may be summarised as follows:

(a) the Hung Arrangement was a mandate agreement to which Articles 528-552 of the Civil Code applied. Mr Hung (1) could not make a gift without authorisation, and (2) was required to (i) exercise the care and skill of a prudent

administrator (if remunerated) or (ii) otherwise exercise the same care and skill as he would exercise in relation to his own affairs;

(b) the transfers are void ab initio under Articles 179, 181 and/or 182 of the Civil Code as read with Article 118 of the Civil Code;

(c) YC can under Article 242 of the Civil Code exercise the powers of the Hung Estate under articles 179, 181 and/or 182 of the Civil Code and knowledge is irrelevant but if it is required, the Trustees had knowledge of the lack of authority because Susan Wang's knowledge is attributable to them;

(d) under Articles 182 and 183 of the Civil Code, Mr Hung was unjustly enriched when, on the termination of the mandate upon YC's death in October 2008 he became obliged to return the shares he held pursuant to Articles 179 and 550 of the Civil Code, but did not do so. If the transfers to the Trustees were valid, Mr Hung's obligation to repay the shares was extinguished and the Trustees became obliged to give restitution under Articles 213II and 233 of the Civil Code;

(e) under Article 244 of the Civil Code, YC's Estate being a prejudiced creditor, the Plaintiff is entitled to revoke the transfers to the Trustees which are void ab initio. The Trustees are obliged to give restitution under Article 244(4) of the Civil Code and/or pay compensation under Articles 213 and 233 of the Civil Code; and/or

(f) under Article 113 of the Civil Code, the Trustees are liable to return the assets or compensate YC's Estate because they knew or ought to have known that the transfers were unauthorised and constituted a "*void juridical act*".

The "void ab initio" claims

516. Article 179 of the Civil Code provides as follows:

> "*A person who acquires interests without any legal ground and prejudice to the other shall be bound to return it. The same rule shall be applied if a legal ground existed originally but disappeared subsequently.*"

517. The Plaintiff submits that he is entitled to bring Mr Hung's Article 179 claim against the Trustees under Article 242 of the Civil Code (using Professor Chang's translation):

"*If an obligor fails to exercise his rights, an obligee may, for the purposes of preserving his obligational claim, exercise the aforementioned rights in the obligee's name, as long as the exercise of such rights is not exclusive to the obligor*."

518. Whether the Trustees received YC's share of the Ocean View Trust assets "without any legal ground" is the most important issue. Various other provisions support this substantive provision. Article 181 of Civil Code provides as follows:

> "*In addition to the interests received, a recipient unjustly enriched shall return whatever he acquired by virtue of such interests. If restitution is impossible by reason of the very nature of the interests or by reason of any other circumstance, he shall be bound to reimburse the value.*"

519. Article 179 of the Civil Code provides in effect that a person who receives any property or interest in property under an invalid transfer is obliged to return it. Article 181 creates an obligation to repay any profits earned out of the invalidly received property. Article 182 deals with the consequences of the recipient's knowledge (or lack of knowledge) of the invalidity of the transfer:

> "*The recipient, who did not know of the absence of legal ground … is released from the obligation to return the interests or reimburse the value.*
>
> *If the recipient knew of the absence of the legal ground at the time of the receipt, or if he was subsequently aware of it, he shall be bound to return the interests acquired at the time of the receipt or such interests still existing at the time when he was aware of the legal ground plus the interest and to make compensation for the injury, if any.*"

520. Article 183 of the Civil Code provides that where an unjustly enriched direct recipient is released from any repayment obligation and has transferred the property gratuitously to a third party, the third party is obliged to repay the property to the original owner.

521. The Plaintiff submitted that the Trustees were required to return YC's share of the shares transferred because, exercising Mr Hung's rights under Article 179 and its supporting provisions of the Civil Code, the transfers were invalid by reason of mistake or lack of authority. Professor Su's opinions which posited that lack of authority was irrelevant were said to be based on the incorrect factual assumption that Mr Hung had been the legal owner of the Chindwell BVI and Vanson BVI shares, thus being empowered to dispose of the assets by Article 765 of the Civil Code. Professor Su's oral evidence to the effect that approval by the registered shareholders for the transfers would validate them was said to be wrong. Based in part on Professor Chang's citation of additional authorities in the course of the trial, it was submitted that:

> "*989. For the foregoing reasons, Dr Wong invites the Court to find that as a matter of Taiwan law, an unauthorised transfer by a nominee to a third party will be legally ineffective where justice requires, and particularly where the transfer is gratuitous, and/or the third party has not relied on the legal effectiveness of the transfer to their detriment, and/or the third party knew or should have known of the lack of authority. Dr Wong also invites the Court to find that in this case, if the Founders did not authorise the transfers to the Purpose Trusts (or if their authority has been revoked for mistake), the transfers were legally ineffective. This is a paradigm case for departing from the 2017 Resolution…*"

522. Why lack of authority resulted in invalidity was addressed in a fulsome manner. Professor Chang opined that Mr Hung could not (because of Articles 118 and 534 of the Civil Code) validly dispose of shares which he legally owned by gift without specific authority. It seems clear that "*specific authorization*" is required for "*a gift*" (Article 534 of the Civil Code). Without such authority, the purported disposition is "*void ab initio under Article 118*" (paragraph 170). He translates Article 118 of the Civil Code in the following terms:

> "*A transfer made by a person without the power of disposition regarding the object of the transfer is not legally effective unless the person with the power of disposition approves the transfer.*"

523. Narrowly construed, Article 118 of the Civil Code means that a mandatary who is authorized to hold assets in his own name and is the sole legal owner does possess "*the power of disposition*". Third parties acquiring the title to assets from the legal owner do not have to worry about whether the legal owner can pass good title because of undisclosed nominee arrangements. This is Professor Su's construction, or at least this is the effect of his construction. Broadly construed, Article 118 would be a very powerful avoidance provision indeed; one which would require burdensome due diligence inquiries (in relation to voluntary transfers at least). This construction would seemingly mean that a legal owner cannot pass good title to a third party in assets he owns merely because under an oral contract not evidenced in writing (the present case) he does not have specific authorization from his 'principal' to transfer his own assets. This would in my judgment potentially result from Professor Chang's construction of Article 118. I find that Professor Su's analysis is more persuasive and consistent with a common sense application of the narrower scope of ownership recognised by Taiwanese law. Article 765 of the Civil Code provides as follows:

> "*The owner of a thing has the right, within the limits of the Acts and regulations, to use it, to profit from it, and to dispose of it freely, and to exclude the interference of others.*"

524. Having rejected the mistake claims, all of the *void ab initio* claims depend on the fundamental proposition that Mr Hung's lack of authority from YC to dispose of the assets invalidated the transfers. Was YC's authority for the transfer of his share of Chindwell BVI and Vanson BVI to the Ocean View Trust necessary to empower Mr Hung to effectuate the transfer? I have found this question is somewhat difficult to grapple with, apart from the complexity of the Taiwanese legal position, because it had appeared to me to be common ground that Mr Hung was, for the purposes of the impugned transfers, the legal owner irrespective of what the pre-transfer registration status might have been. In their Closing Submissions, the Trustees submitted:

> "*1546 … there is no dispute that, if Mr Hung owned and transferred the shares (or, more accurately, owned and transferred such BVI law rights in the shares as he had), then the 'enrichment' of the Trustees came at his expense. Conversely, however, if Mr Hung was not the owner of any rights in respect of the shares as a matter of Taiwanese law, then he had nothing to transfer and nothing to lose – so the third criterion above would not be satisfied, and the Article 179 claim would not get off the ground. That is why the point very belatedly raised by Winston's Counsel during cross- examination of Professor Su – i.e. that Mr Hung was not truly the owner of the shares – ultimately takes Winston and Tony nowhere, because if they are correct that Mr Hung did not own any rights in the shares then (on the evidence of their own expert) there can be no Article 179 claim at all…*"

525. This seems at first blush to be a powerful submission. It was reinforced by reference to the Experts' Joint Statement:

> "*4. We agree that the nominee contract as discussed by our reports means that a party, called the nominee, holds ownership of assets (including shares) for, and under the direction of, another party*."

526. I relied in part on this expert consensus as to what a nominee contract was to conclude that the Hung Arrangement was a mandate agreement pursuant to which Mr Hung was the owner of the offshore assets, subject to specific directions given by the Founders, rather than a trust arrangement. The substance of the agreement, consistent with the documentary record of the nomineeship arrangements and the general impression created by the oral factual evidence at trial, was that Mr Hung was in Taiwanese law terms the legal owner of the relevant shares who had effectuated the impugned transfers as such. The various subrogation claims were advanced on the hypothesis that Mr Hung had effectuated the transfers and on that basis had claims, which could be exercised on his behalf, to recover

the transferred assets. There is an internal inconsistency between the assertion that Mr Hung carried out the impugned transfers and the concurrent averment that, authority apart, he had no power to dispose of them in any event. It is necessary to briefly consider the position both on the pleadings and on the facts.

527. The general purport of the Plaintiff's pleaded case on Taiwanese law (Re-Re-Re-Amended Reply to Defence and Defence to Counterclaim of 1st to 4th and 6th Defendants, paragraphs 87A-87F) is that Mr Hung as party to a nominee contract could hold and transfer shares provided he had written authority to do so. The document evidencing the actual share transfer to the Ocean View Trust PTC was not marked by me as having been referred to in the course of the trial although it was certainly alluded to. Headed "*STOCK POWER*", dated "*March 8, 2013*" and signed by "*Wen-Hsiung Hung*" in the presence of William Wong, the transfer instrument states[100]:

> "*FOR VALUE RECEIVED, the undersigned does hereby sell, assign and transfer unto Ocean View Private Trust Company Limited, Trustee for the Ocean View Trust, his entire interest in 50,000 shares of [Chindwell BVI]… currently standing in the name of L'Orient Investment S.A. (as the nominee of Wen-Hsiung Hung), and does hereby irrevocably…appoint George N. Harris, Jr., as attorney to transfer the said stock on the books of the said company…*"

528. A corresponding document was executed in relation to Vanson BVI. As a matter of BVI law, for reasons which are set out in relation to the Formalities Claims below, I find that Mr Hung transferred the legal and beneficial interests in these shares to the Ocean View Trust's trustee. For the purposes of the Plaintiff's present Taiwanese law *void ab initio* claims, however, I find that Mr Hung was in fact the legal owner of the relevant shares. The Stock Transfer instruments demonstrate on their face that the shareholder of record's only interest in the shares was nominal and that Mr Hung on March 8, 2013 has assumed (if he had not always retained) all substantive ownership rights including, in particular, the power of disposal. The shareholder of record was clearly just that: a nominee for record purposes and the position of record had no impact on where legal ownership lay. Mr Hung was the legal owner of the shares, <u>for the purposes of the impugned transfers</u>, as Professor Su initially assumed. The value referred to as being received was perhaps nominal in hard commercial terms, but the ailing Mr Hung doubtless placed considerable personal value on being released from the burden that the Hung Arrangement must have been to him.

[100] G47/42.1. The corresponding Vanson BVI stock transfer form is at G47/44.

529. The Plaintiff submitted that the Taiwanese courts would take a flexible approach designed to do justice based on the cases he considered. There was indeed a distinction between registered owners disposing of property for value and gratuitous transfers by nominees. I agree that there may be a policy distinction but still prefer Professor Su's broad opinion that an orthodox view of the Taiwanese law position is that a nominee has a power of disposal of property which he owns and that disposing of it without authority even for no or nominal consideration would not make the transfer ineffective as between the nominee and a gratuitous recipient such as the Ocean View Trust PTC. I accordingly find that the Plaintiff's Taiwanese unjust enrichment claims would fail.

530. In my judgment the Plaintiff is on firmer ground in placing reliance on a provision of the Civil Code designed to protect creditors, which does not require the Plaintiff to assert the rights of a beneficial owner at all but rather the rights of a contractual counterparty. To just such a provision I now turn.

Article 244

531. The Plaintiff's lack of authority claim in respect of YC's share of the Ocean View claim founded on Article 244 of the Civil Code potentially succeeds (subject to other requirements for the claim being met) because: (a) a lack of actual authority conferred after YC's death is accepted; and (b) I am unable to find that the mandate contract conferred an asset disposal power on Mr Hung acting on the unilateral directions of YT. This is, of course, subject to the other requirements of Article 244 being met and the apparently strong Taiwanese law limitation defences. Article 244 (in Professor Su's English translation) provides as follows:

> "*[1] If a gratuitous act done by the debtor is likely to be prejudicial to the rights of the creditor, the creditor may apply to the court for the revocation of that act.*
>
> *[2] ….*
>
> *[3] The provisions of [paragraphs (1) and (2)] do not apply if (a) object of the act of the debtor is not property; or (b) the act of the debtor is only prejudicial to the creditor's ability to recover a specific item of property.*
>
> *[4] When the creditor applies to the court for the revocation [of the act] on the basis of the first paragraph (above), he may also apply for an order that the beneficiary or any person who acquired the object afterwards ("the after acquiring person") should restore the status quo ante, except if the after acquiring person did not know of the ground for revocation at the time of acquiring the object.*"

532. On the face of this Article, superficially read, it seems that the Trustees would potentially have a lack of knowledge defence (paragraph [4]). However, it benefits from a more careful reading. Professor Su critically opined as to the other requirements of Article 244 (as regards the Plaintiff's claim against the Trustees) that a gratuitous transfer in breach of a mandate would be valid, and the only remedy the the Plaintiff would have would be a claim for compensation from Mr Hung for breach of contract. This was on the fundamental premise that Mr Hung was the owner of the property transferred. His oral evidence when questioned about a claim for relief under Article 244 in respect of an hypothetical transfer by Mr Hung to his son (in light of the entirety of the evidence on Article 244 of the Civil Code and Article 18 of the Trust Law) seemed confident yet somewhat surprising[101]:

> "*Q. - -if Mr Hung was the owner of the shares, even though the son gave nothing for them and knew that Mr Hung was transferring them to him in breach of - - without any authority from his principal.*
>
> *A. Yes.*
>
> *Q. That's your position, is it? So your position is that the Founders could only make a claim against Mr Hung for acting in breach of mandate.*
>
> *A. Right.*
>
> *Q. Okay. If Mr Hung was unable to pay, because he had no money, for his breach of mandate, on your position, the Founders could expect no assistance from the court in Taiwan. That's just their hard luck. That's your position, is it?*
>
> *A. Yes, that's my position after reviewing all the possibilities. In the case you describe, still I can't find any right, any claim, for the Founders directly to the - -Mr Hung's son…*"

533. Professor Chang opined in his Expert Report that the Founders could step into Mr Hung's shoes and sue for the recovery of assets transferred without authority, but seemed to view Article 244 of the Civil Code almost as a last resort basis for a direct claim against the Trustees, and that the other claims were stronger:

> "*322 … it is almost impossible to conceive of a scenario where the Founders' estates would* need *to rely on Article 244 given the causes of action considered above…*"

534. The Plaintiff's counsel in their Closing Submissions, however, argued as follows:

> "*1043. Professor Chang explained that the Article 244 requirements were*

[101] Transcript Day 59, page 3 line 9-page 4 line 1.

satisfied as follows:

> *1043.1 Mr Hung was an obligor of the Founders, as he was required to return those interests to the Founders whenever they terminated the nomineeship (provided they had not already authorised the transfer of those assets to the PTCs);*
>
> *1043.2 The transfers of those interests to the PTCs were gratuitous acts and, provided that they left Mr Hung insolvent (i.e. he did not have sufficient assets to return the value of the interests to the Founders) they were prejudicial to the Founders' interests. Given the enormous value of the assets transferred, it is perfectly plain that Mr Hung did not have sufficient personal assets to compensate the Founders for the unauthorised transfers.*

1044. Importantly, the Article 244 claim does <u>not</u> require Dr Wong to establish that the transfers were legally ineffective at the outset (the issue addressed in Section T6 above).

1045. As set out at paragraph 970 above, Professor Su initially contended that Article 244 could not apply because Mr Hung was not an obligor at the time of the transfers as the nomineeship had not yet terminated, but he resiled from that position on the fourth day of his oral evidence. He was obviously correct to do so: as Professor Chang pointed out, Professor Su's argument would mean that if a debtor was due to repay a creditor £1m on 1 December but gifted all assets to a related party on 15 November, the creditor could not revoke the transfer because the repayment obligation had not crystallised. Following Professor Su's concession, by application of Article 244 Dr Wong is entitled to an order revoking the transfers and an order (under Article 244(4)) that PTCs must restore the status quo by returning the interests."

535. The critical question to grapple with is whether there is any fundamental impediment to the Plaintiff on behalf of YC stepping into Mr Hung's shoes to demand the assets back from the third party, knowledge and limitation defences apart, as otherwise the requirements for a claim would appear to be made out. Invalidity of the transfer does not appear to be required and prejudice seems to be straightforward for the Plaintiff to make out. The Trustees' counsel in their Closing Submissions accepted that although the owner of property has the right to dispose of it without interference under Article 765 of the Civil Code, it is still possible for an owner to contract out of that right:

> "*1553. That is not to say that an owner of property cannot assume a private contractual obligation not to **<u>exercise</u>** the Article 765 right. He obviously*

can, and indeed that is a common feature of a nominee agreement. If the owner disposes of the property in breach of that contractual obligation, then the counterparty to the contract may have a remedy for breach of contract; and if the owner renders himself insolvent such that he is unable to satisfy his personal liability to the counterparty, then the counterparty may have an Article 244 claim against a third party recipient of the property (Su 3 paragraph 46). However, the disposition by the owner is not void ab initio simply because it was made in breach of contract…"

536. Although the Plaintiff's pleading may have suggested a requirement to demonstrate that the transfer by the mandatary was void, there is nothing in Article 244 of the Civil Code which suggests that this is the case. The Plaintiff accepted that a mandatary could only seek to recover assets transferred to a third party in circumstances where he was unable to compensate his principal. This is consistent with the main thrust of Professor Su's evidence which I accept: a mandatory who is the legal owner of property received from a principal can validly dispose of it and will ordinarily only be liable in damages to his principal if he breaches the mandate contract when disposing of an asset. Moreover, under Article 244, the general validity of the transfer as between mandatary and third party does not appear to be an essential issue as the provision is an avoidance provision designed for the protection of creditors of the transferor. Any invalidity which must be shown is based on the debtor's inability to meet his creditor's claim rather than on the lack of authority *simpliciter*. Establishing a lack of authority in the mandate context is accordingly relevant for the purposes of establishing the Plaintiff's standing as a creditor. Having established such standing, Mr Hung's inability to fully compensate the Plaintiff for the loss flowing from the unauthorised disposal of the assets on a voluntary basis is what invalidates the transfer as between the transferor and the transferee.

537. In any event on balance it seems to me that the Plaintiff is right to contend that Article 244 of the Civil Code would be potentially available to recover YC's share of the assets transferred to the Ocean View Trust without his authority from the Trustee of that Trust, in all the circumstances of the present case. This is because:

(a) Mr Hung was a debtor under a general obligation to return the shares held subject to the terms of the mandate to YC upon his request and/or upon the termination of the mandate. The mandate terminated when the assets were finally purportedly disposed of by Mr Hung or upon the death of YT;

(b) under the terms of the mandate agreement (the Hung Arrangement), the Founders' specific authority was required for Mr Hung to dispose of the shares in Chindwell BVI and Vanson BVI;

(c) since YC's Estate did not authorise the transfer of his share of the assets, YC was entitled to demand the return of the assets and/or compensation for their loss. Mr Hung cannot return the shares (and has not sought to recover them from the Ocean View Trust) and cannot repay the equivalent value. The transfer was inherently prejudicial as a result;

(d) the Plaintiff is accordingly *prima facie* entitled to apply as against the Hung Estate for a revocation of the transfers to the Ocean View Trust (as to 50%) and to seek an order requiring the Trustees to restore the status quo.

538. Can the Trustees validly advance a lack of knowledge defence? In relation to a voluntary transfer, this is the only other potential substantive defence to an otherwise meritorious Article 244 claim. The Plaintiff submitted briefly[102]:

> "*Note there is no need to prove knowledge: under Article 244(4), Dr Wong need only prove knowledge if he was claiming against a subsequent recipient from the PTCs.*"

539. Article 244(4) of the Civil Code (in Professor Su's translation) provides:

> "*[4] When the creditor applies to the court for the revocation [of the act] on the basis of the first paragraph (above), he may also apply for an order that the beneficiary or any person who acquired the object afterwards ('the after acquiring person') should restore the status quo ante, <u>except if the after acquiring person did not know</u> of the ground for revocation at the time of acquiring the object.*" [Emphasis added]

540. On a straightforward reading of the relevant provision, a distinction is made between the direct "*beneficiary*" of the voluntary payment and "*an after acquiring person*", which accords with common sense and generally recognised legal principles. The beneficiary is likely to have some relationship or connection with the debtor while an after acquiring person will likely not. The Ocean View Trust is a beneficiary, not an after acquiring person and so an order for revocation of the transfers may be obtained without needing to prove any knowledge of the ground for revocation.

[102] Closing Submissions, paragraph 1045, footnote 2184.

541. Although the Trustees pleaded in their Re-Re-Amended Defence and Counterclaim that a creditor may under Article 244 of the Civil Code in respect of a gratuitous transfer "*apply for an order that any third party who acquired an asset…restore the asset to the debtor, except if the third party did not know of the ground for revoking the transfer…*" (paragraph 162.2), this point was not pursued in the final analysis. The main focus of the defence was on limitation, and even then primarily in relation to the First Four Bermuda Purpose Trusts. This was the position as regards submissions. As regards Professor Su's Report, as far as Article 244 is concerned at least, a similar limitation-focussed approach is adopted as well. It is of course his primary position that Article 244 does not apply at all, which hints at a lack of conviction in his ability to convincingly challenge the Article 244 case on its merits. Article 244 is substantively addressed at paragraph 134 *et seq* of Professor Su's Expert Report. He does not opine that the Plaintiff/D8 would have to establish any knowledge requirement:

> "*140. In those circumstances, Winston and Tony would have to establish:*
>
> *(a) that YC/YT were 'creditors' for the purpose of Article 244 at the time the transfers were made to the relevant Bermuda trusts;*
>
> *(b) That Mr Hung was a 'debtor' for the purpose of Article 244;*
>
> (c) *That the transfers of the assets to the PTCs involved a violation of the agreement or mandate.*"

542. I accordingly find that subject to a consideration of the Trustees' limitation defences, the Plaintiff's claim against D6, Ocean View PTC, under Article 244 would succeed.

543. I find that, if I am required to apply Taiwan law to this lack of authority claim, that the Plaintiff's alternative Taiwanese law claim against D6, Ocean View PTC, under Article 244 of the Civil Code would succeed on the merits. The position would be the same whether the Plaintiff were invoking Article 244 in his own right or invoking it on behalf of Mr Hung (now his estate).

The Plaintiff's YC lack of authority Ocean View Trust claims against the Hung Estate under the Civil Code

544. The Plaintiff's claims against Mr Hung's Estate in respect of YC's lack of authority after his death are pleaded in the Re-re-Amended Reply to the Hung Estate's Amended Defence. They may be summarised as follows:

(a) the relationship is governed by Articles 528-552 of the Civil Code and (1) under Article 534 Mr Hung required authorisation from the Founders to make a gift, and (2) under Article 535 he was required to exercise the skill and care of a prudent administrator or the same care and skill as he would deploy in relation to his own personal affairs;

(b) Mr Hung through breaching his authority became liable to compensate YC's Estate, (1) regardless of negligence, for loss suffered under Article 544 of the Civil Code and/or (2) for intentionally or negligently causing damage in breach of Article 184.

545. The claim against D5 (the Hung Estate) under Article 244 of the Civil Code would potentially succeed subject to further analysis of the distinctive merits issues as well as, finally, the limitation defences. As regards the merits, Professor Su in his Expert Report opined that:

(a) Article 18 of the Trust Law properly applies to the relationship (a view I have already rejected above);

(b) as the Plaintiff's case is that the Hung Arrangement did not terminate upon YC's death, Mr Hung would not have been a debtor of YC's estate when the impugned transfers to the Ocean View PTC took place on March 8, 2013, as required by Article 244(1) as a precondition for such a claim;

(c) whether there was a breach of contract in relation to the authority issue is a question of fact.

546. At first blush, the proposition that Mr Hung would only be a debtor if he had an obligation to return the assets transferred before he transferred them to the Ocean View Trust PTC seems an odd requirement from a common law perspective. At common law, one would expect a debtor and creditor relationship to exist throughout such an agency relationship. Under the relevant relationship, the Founders could have asked Mr Hung to return the shares to them at any time. This assumes, of course, that the Founders retained throughout a beneficial interest in the shares. Under Taiwanese law, I accept that this concept does not exist. The Founders' only legal right to demand the assets under mandate back, which they no longer owned, arose on termination. The question then arises as to why (in circumstances where the mandate has on any sensible view terminated because no further assets are being managed, YC's Administrator does demand the assets back and Mr Hung's Estate can neither retrieve the assets nor repay the Plaintiff in cash instead) the Plaintiff would not be a creditor for Article 244 of the Civil Code purposes.

547. Professor Chang opines that in such circumstances the Hung Estate would be insolvent and the Plaintiff would clearly be a creditor and liable to a revocation application under Article 244 of the Civil Code. I prefer this view, which accords with common sense and practicality, not to mention my distinct sense, in light of the oral expert evidence overall, that the Taiwanese Supreme Court is as concerned with substantive justice as one would expect a court in a commercially vibrant jurisdiction to be.

548. It is unclear in these circumstances why it matters precisely when the mandate arrangement was terminated for the purposes of the Plaintiff's claim against the Hung Estate. The death of YC would, potentially, have terminated the Hung Arrangement as the presumption in favour of termination is clearly engaged as YC was "*one of the principals*". The most plausible termination date would, however, be the date when Mr Hung disposed of the final assets he held in March 2013. At this juncture he and all concerned must have regarded his duties as having been brought to an end.

549. As to whether the mandate survived the death of YC, I have already recorded my findings above (in relation to the claim against the Trustees) that it did not terminate on YC's death on the grounds that "*the nature of the affairs commissioned"* is such as to preclude the assumption made by Article 550 of the Civil Code that a mandate relationship terminates on the death of one of the principals. Professor Su opined that this limb of Article 550 would apply in circumstances where the mandatary still had tasks to perform. That is *par excellence* the circumstance in the present case where in November 2008:

(a) Mr Hung still had to dispose of the relevant assets;

(b) the relevant assets comprised shares in BVI companies, and any change in ultimate beneficial ownership was a matter which Mr Hung as the beneficial owner would have to ensure was disclosed to the Citco nominees and the relevant BVI authorities, whenever either of the Founders died;

(c) the nature of the duties assumed by Mr Hung was such that automatically terminating his mandate on the death of one of his two principals would likely produce uncommercial results.

550. The two substantive statutory provisions are Articles 544 and 184 of the Civil Code. Article 544 most significantly provides:

> "*… the mandatary shall be liable to the principal for any injury resulting from his negligence in the execution of the affairs commissioned or from acts that are beyond his authority*"

551. Negligence apart, this provision seemingly affords a straightforward basis for the Plaintiff to seek compensation from Mr Hung (now the Hung Estate) for any loss flowing "*from acts that* are beyond his authority". The disposal of YC's 50% share of the assets to the Ocean View Trust, which I have found occurred without authority, combined with loss flowing from the unauthorised acts would found such liability on the Hung Estate's part.

552. Mr Midwinter QC in his Closing Submissions on behalf of the Hung Estate pointed out that it appeared that the Claimants were only pursuing the claims under Article 544 of the Civil Code and Article 23 of the Trust Law (assuming the Trust Law rather than the Civil Code applies to the Hung Arrangement (paragraphs 14-15). It was then submitted:

> "*<u>Ocean View Trust</u>*
>
> *a. Mr Hung was entitled to act with the authorisation of YT Wang alone.*
>
> *b. Mr Hung was in fact given authority to make the transfer (i) by YT Wang and/or (ii) by William Wong (pursuant to the oral mandate and/or power of attorney from YT Wang).*"

553. I have found that Mr Hung was not entitled to act with the authorisation of YT alone and so the Plaintiff would be entitled to relief under Article 544 of the Civil Code as against the Hung Estate in what presently seems the unlikely event that the Trustees having been found liable to return the relevant shares failed to do so.

<u>The Plaintiff's 'YC lack of authority Ocean View Trust claims' against the Hung Estate under the Trust Law</u>

554. In the Plaintiff's Closing Submissions, the following argument was set out:

> "*1067. Dr Wong's primary claims against Mr Hung are under the Civil Code (and are set out above) because the Hung relationship is a nomineeship and the Trust Act does not apply to it by analogy. In the event that he is wrong about that and provisions of the Trust Act are held to apply by analogy, Article 23 entitles a beneficiary to request Mr Hung as trustee to pay pecuniary compensation where Mr Hung disposed of trust property in violation of the stated purpose of the trust or improperly administered the trust property. The only issues between the parties on this claim are:*
>
> *1067.1 If the Hung relationship was a trust, was it a trust for beneficiaries or for purposes (if for purposes, there is no-one with standing to bring a claim under Article 23; if for the Founders as*

beneficiaries, Professor Su agreed that their heirs could bring the claim after their deaths); and

1067.2 Whether the Founders authorised the transfers (if they did not, there was a disposition in violation of stated purposes; if they did, there was not)."

555. The Hung Estate's counsel accepted in his Closing Submissions that there was no material distinction between Article 23 of the Trust Law and Article 544 of the Civil Code legal analysis:

> "*32. If the Hung Arrangement was governed by Taiwanese law, then there is a dispute as to whether it is properly to be characterised as a 'trust' or a 'mandate/nominee' contract. The dispute makes no material difference to the outcome of this case generally or to the claim against the Fifth Defendant in particular: the provisions relating to breach of trust in Article 23 of the Trust Act and the provisions relating to breach of mandate in Article 544 of the Civil Code are materially identical…*"

556. It follows that if the Trust Law applied to the Plaintiff's YC lack of authority claim in respect of the Ocean View Trust, the Hung Estate would be liable for any loss suffered in respect of the unauthorised asset transfer which occurred.

TONY WANG'S OCEAN VIEW TRUST CLAIMS

Preliminary: the issues

557. The issues raised by Mr Tony Wang through his Ocean View Trust claims are helpfully set out in his Closing Submissions as follows:

> "*645. It may assist the Court to have in mind the following questions when considering the analysis of the evidence in the following sections:*
>
> *645.1* ***First****, in relation to the Alleged Oral Assent:*
>
> *645.4.1 Did YT provide authorisation in 2011 as alleged by the PTCs? If so,*
>
> *645.1.2 Was YT acting under a mistake?*

*645.2 **Second**, in relation to the Alleged Oral Mandate:*

645.2.1 Did a conversation (of which no contemporaneous record exists) take place between YT and William in October 2010 in which YT delegated authority to William?

645.2.2 If so, was the scope of the authority delegated to William broad enough to enable William to exercise YT's right to direct Mr Hung in relation to Vanson BVI and Chindwell BVI?

645.2.3 If authority was delegated and its scope was sufficiently broad, did William in fact exercise such authority "during the summer of 2012" as alleged by the PTCs?

*645.3 **Third**, do the Alleged Oral Assent and the Alleged Oral Mandate comply with the requirements of Taiwanese law such that alleged authorisation given pursuant to them was valid? The issues of Taiwanese law relevant to these alleged transactions are addressed at §724ff, below, and §43-45 of **Appendix 10**.*

*645.4 **Fourth** in relation to the Power of Attorney:*

645.4.1. Did YT have capacity to execute a document in the terms of the Power of Attorney?

645.4.2 .Was YT's signature forged or elicited from him unthinkingly?

645.4.3. Did YT give his full, free and informed consent to the Power of Attorney?

645.4.4. Did the Power of Attorney comply with the requirements of Taiwanese law such that alleged authorisation given pursuant to it was valid? This is dealt with at §748 below."

558. The fourth issue, namely whether the POA was actually and validly executed by YT, seemed from the beginning of the trial to be the single most important part of Tony Wang's Ocean View Trust claims. This is because the Oral Assent and the Oral Mandate seemed to provide very feeble freestanding support for the Trustees' authority defence as regards YT's authorisation of Mr Hung to settle the Ocean View Trust. The Trustees boldly pursued these two grounds of authority for the Ocean View Trust transfers although they also sought to rely on these matters to fortify their stronger case on the POA. The evidence relating to capacity was fairly evenly balanced and required careful analysis, in my provisional view by the end of the trial.

The Oral Mandate

<u>The Trustees' case</u>

559. The Trustees' Closing Submissions summarised the evidence in relation to the October 2010 Oral Mandate they rely upon from YT to William Wong in salient part as follows:

> "*853. The evidence shows that the Oral Mandate was granted at a meeting attended by YT Wang, William, Wilfred, and Mr Hung at the Yanshou residence in October 2010 (at which Sarah was also present) as follows.*
>
> *854. First, Wilfred gave evidence to this effect. He stated in Wilfred 1 paragraph 211 as follows:*
>
> *'... I recall in early October 2010 a discussion which took place in the study on the first floor of the building where my father and the First Family lived. My father, William, Mr Hung and I were present at the meeting. I am reminded of the time frame by a note prepared by Mr Hung in July 2012 .... My sister Sarah was also present, looking after my father. At that time, my father was 89 years of age, and was not in good health. During this discussion, my father was frail but his instructions were clear and lucid. He wanted William to be responsible generally for his affairs. In particular, he gave specific verbal instructions that, from then on, all matters relating to his finances (such the withdrawal of funds from his accounts or his investments in shares) were to be discussed with William and myself, and that William was ultimately to make all of the decisions that became necessary. It seemed to me that he was concerned about his situation and wanted to make sure that both William and Mr Hung knew that he was relying fully on William to be in charge of his affairs.'*

855. During cross-examination, Wilfred confirmed repeatedly that the Oral Mandate was granted by YT Wang to William: see ***{Day37/145:23} - {Day37/146:4}****;* ***{Day37/150:25} - {Day37/151:9}****. He rejected firmly the suggestion that the Oral Mandate was either some form of power grab by YT Wang's First Family, or an invention manufactured in the summer of 2012 in response to YT Wang having lost capacity: see* ***{Day37/146:23}-{Day37/147:8}****.*

856. Second, Sarah also gave evidence that the Oral Mandate was granted as the Trustees contend. At Sarah 1 paragraphs 20 to 23 ***{B4/19/11}*** *she stated as follows:*

> *'20. For most of the meeting, the conversation between my father, William, Wilfred and Mr Hung concerned business matters relating to FPG and I did not pay much attention. However, I was in the room at a point when my father's personal affairs were being discussed. I could tell from my father's tone and demeanour that he was delivering an important message.*
>
> *21. At that point, my father informed us that, in future, Mr Hung would have to obtain permission from William before he acted on any instructions about my father's property. He said that, from that moment, any decisions concerning his financial affairs were to be discussed between William and Wilfred, with William (as my father's oldest son) being authorised to make the final decision. I understood my father to be saying that William was free to deal with my father's property, such as bank accounts and shares, without needing any specific authority from my father, but dispositions by others required specific authorisation from William.*
>
> *22. As far as I was concerned, this conversation was very significant, because it showed me that my father now regarded all of his property as being entrusted to William and Wilfred to manage.*
>
> *23. My father was lucid and spoke clearly. He was in good spirits and did not seem sad about handing over responsibility to William. He seemed very determined. I have no doubt that my father fully intended to delegate the making of all final*

decisions about his property to William and that he understood the consequences.'

857. *Sarah steadfastly confirmed her evidence when challenged about it in cross-examination at* ***{Day40/69:2} - {Day40/70:16}****.*

858. *Third, the giving of a mandate in 2010 by YT Wang to William to manage his financial affairs makes perfect sense. YT Wang was 89 years old and in declining health. William was his eldest son and had already some years earlier been hand-picked by him (together with YC Wang) to become Chairman of the Executive Committee of FPG. As Sarah put it at* ***{Day40/82:13-19}****:*

> *'A. William -- William is now [i.e. in October 2010] the chairman of FPG, you know, because he has the responsibility, very heavy responsibility. That's why my father allocated this power for him, take care of everything. When he notice that he was getting weaker in his physical and then sliding down on memory and things, so at that point, he need to make an important notary.'*

859. *Tony agreed in cross-examination that '[b]earing in mind the relationship that your father had with William, his eldest son, it would not be at all surprising, would it, for him to appoint William to hold an oral mandate or a mandate on his behalf when he was in declining health?':* ***{Day21/91:5-11}****. Tony also agreed that "there is nothing whatsoever out of character in your father granting a mandate to William without discussing it with you." At* ***{Day21/97:7-9}****.*

860. *Fourth, in January 2015, years before Tony threatened or brought any sort of action on behalf of YT Wang's estate, Wilfred is recorded as having made the following statement which was reported in Wealth Bi-weekly Magazine No 469 dated 28 January 2015:*

'Wilfred Weng-Tsao Wang stated that in his late years YT Wang understood the state of his health and Alzheimer's were deteriorating. As such, after the death of YC Wang, he instructed the "Chief Manager", Wen-Hsiung Hung, who was responsible for managing the family finances, that all financial expenditure regardless of whether they are for company investments or personal use cannot be disturbed unless approved and signed by his eldest

son William Wen-Yuan Wang. He has also signed a power of attorney which authorised William Wen-Yuan Wang with full authority to manage all his property.'

861. The reference to the Power of Attorney was of course to the document signed by YT Wang on 31 October 2012. But the prior reference to YT Wang's instruction to Mr Hung is plainly a reference to the Oral Mandate. This reference is inexplicable unless the Oral Mandate was truly given.

862. Fifth, a number of contemporaneous documents have survived showing the Oral Mandate being exercised by William in practice, as follows:

862.1On 20 May 2010 YT Wang signed a memo to Mr Hung, in which he asked Mr Hung to pay Yu-Mei Chou NT$1 billion. That direction was not immediately actioned. However on or around 14 October 2010 the memo was passed to William for him to review. He signed the memo on 14 October 2010. While YT Wang had authorised the payment in May 2010, i.e. before the Oral Mandate was granted, by October 2010 the Oral Mandate was in effect. While William's approval is consistent with the Oral Mandate, it is unclear why on Tony's case William's signature on this memo was needed.

862.2 On or around 12 August 2011 YT Wang signed a memo giving his approval to Mr Hung paying NT$1.2 billion to Yu-Mei Chou. Despite the fact that YT Wang had approved the payment, the memo was still sent to William, who signed it on 17 August 2011. The only explanation for why it was necessary for William to also give his approval for the payment is because the Oral Mandate required it. Again it is unclear what Tony's explanation for this document is.

862.3 In a report dated 27 July 2012, Mr Hung sought approval from William on the short-term investment of approximately NT$8.94 billion belonging to YT Wang before '…these funds are used to purchase stock at the right time…' Mr Hung ended the report by asking, 'Please instruct and advise on whether this is appropriate'. William approved the report, and therefore the short term investment of nearly NT$9 billion in funds belonging to YT Wang. This report is consistent with the existence of the Oral Mandate, and shows the power granted to William being used.

Conversely, if the Oral Mandate was not granted, it is wholly unclear why Mr Hung either would or could have sought William's approval to deploy YT Wang's money. It was suggested to Wilfred in cross-examination that the reason why Mr Hung sought William's approval was that by July 2012 YT Wang was unable to understand such matters. Wilfred disagreed: see ***{Day37/130:4-7} - {Day37/130:2}****. Moreover, even if YT Wang had lost capacity, Mr Hung could not have asked William what to do with YT Wang's money, unless there was some proper legal basis (like the Oral Mandate) for it.*

862.4 Finally in a report dated 3 October 2012, Mr Hung sought directions to suspend the payment of the 'considerable' monthly expenses for YT Wang's two residences (save certain miscellaneous expenses). These expenses were paid from YT Wang's deposit accounts. Consistent with the Oral Mandate this report was submitted not to YT Wang, but instead to William and Wilfred, for them to consider, and ultimately for William to approve (which he ultimately did on 23 October 2012). While it was suggested to Wilfred in cross-examination that his comments on the report were inconsistent with William's approval already being required, he rejected that assertion: see ***{Day37/122:20} - {Day37/123:6}****. He was right to do so. Absent the existence of the Oral Mandate there would be no reason for Mr Hung to have sought Wilfred's comments and William's approval for the report. And Wilfred's comment simply made clear that, whatever the prior position that was approved for the payment of household expenses, going forward a new system which required William to approve all expenses was to be put in place.*

*863. Sixth, Mr Hung made a note of the Oral Mandate in July 2012 which was signed by each of YT Wang, Mr Hung, William and Wilfred ("****Note of the Oral Mandate"****). Since Tony has alleged that YT Wang's signature on the Note was forged, it is necessary to deal with this document in some detail.*

The Note of the Oral Mandate

864. The Note of the Oral Mandate states as follows:

> *'In the afternoon on a certain day in early October 2010, as instructed by the President [YT Wang], I, being an officer of the Company, was requested to attend a meeting held on the 1st floor of YT*

Wang's apartment on Yanshou Street. CEO William Wen-Yuan Wong, Chairman Wilfred Weng-Tsao Wang and Miss Sarah Hsueh-Chin [Wang] were all present at that time. The President [YT Wang] declared before us that, 'from now on, any matter such as the withdrawal of funds from my accounts or investment in shares, etc. (except for any household expenses of the two families which have been previously reviewed and verified) must be discussed between the two brothers [William] and [Wilfred], and be verified and approved by [William].' In order that there is a written record that may be relied upon in the future, this document has been [drawn up].'

865. Mr Jao explained in Jao 3 paragraph 7 that the reason why Mr Hung felt the need to record the conversation he had had with YT Wang was because he was concerned about YT Wang's declining health and advancing age, his own health and the fact that YT Wang's provision of authority to William in October 2010 might, in the future, be disputed."

D8's case

560. In D8's Closing Submissions, the issues arising and Tony Wang's position on them were neatly summarised as follows:

"*685. There are three principal questions which arise in relation to the authorisation that is said to have been given pursuant to the Alleged Oral Mandate:*

(1) Did a conversation take place between YT and William in the presence of Wilfred and Mr Hung (and the intermittent presence of Sarah) in October 2010 in which YT delegated authority to William?

(2) If so, was the scope of the authority delegated to William broad enough to enable William to exercise YT's right to direct Mr Hung in relation to Vanson BVI and Chindwell BVI?

(3) If authority was delegated and its scope was sufficiently broad, did William in fact exercise such authority by giving oral assent for and on behalf of YT in respect of the transfer of Vanson BVI and Chindwell BVI to Ocean View PTC in the course of discussions with Mr Hung and the other members of the BMCs of the [First Four

Bermuda Purpose Trusts] "during the summer of 2012"?

586. On the basis of the evidence before the Court, the answers to those three questions are as follows:

(1) ***No.*** *If there was a conversation between YT and William in the presence of Wilfred and Mr Hung (and the intermittent presence of Sarah) in October 2010 (or at all), it did not (applying the relevant principles of Taiwanese law) involve YT delegating or otherwise ceding any authority to William over his (YT's) affairs.*

(2) ***No.*** *On a true construction (applying the relevant principles of Taiwanese law) of the words allegedly used by YT (as said to have been recorded by Mr Hung some 21 months after the event in the 26 July 2012 Memo), the scope of the Alleged Oral Mandate only covered (i) the withdrawal of funds from YT's bank accounts or (ii) the use of YT's funds to make investments in shares or (iii) matters similar in nature to (i) or (ii). Giving directions to Mr Hung to alienate overseas assets belonging to YT and to YC's heirs is not a similar matter to (i) or (ii) and it therefore fell outside the scope of the Alleged Oral Mandate.*

(3) ***No.*** *There is no evidence before the Court that there was any oral assent given by William pursuant to the Alleged Oral Mandate in the summer of 2012*."

Findings in relation to the Oral Mandate

561. The evidence of Wilfred Wang and Sarah Wang at trial potentially supports a finding that YT orally gave a broad mandate to William to manage all of his financial affairs. This evidence was reduced to writing some 10 years after the Oral Mandate was allegedly given and was addressed in oral evidence almost 11 years after the event. I accept that in or about October 2010 the discussions they described took place, but cannot place much reliance on the accuracy of their recollections of the detail a decade and more later. In any event, there are two documentary records of what transpired far closer in time to the actual events.

562. Mr Hung's 2012 Note of the Oral Mandate critically provided as follows:

> "*The President [YT Wang] declared before us that, 'from now on, any matter such as the withdrawal of funds from my accounts or investment in shares, etc. (except for any household expenses of the two families which have been previously reviewed and verified) must be discussed between the two brothers [William] and [Wilfred], and be verified and approved by [William].'*

563. On its face, the mandate described appears to relate to recurring items of expenditure and investment (including household expenditure) and matters potentially affecting YT's two families. It requires a strained interpretation to construe the Note of the Oral Mandate as conferring authority on William to dispose of assets jointly owned by YT and YC as well. Further and in any event, the examples relied upon by the Trustees of the Oral Mandate being used all appear to relate to YT's own assets. This position is not altered by the statements attributed to Wilfred Wong in the *Wealth Bi-weekly Magazine No 469 dated 28 January 2015*. This appears to distinguish between the Oral Mandate in relation to approval of "*expenditure*" and the POA conferring "*full authority to manage all his property*". The quoted language attributed to Wilfred Wang is entirely consistent with the terms of both the Note of the Oral Mandate and the POA read in a straightforward way.

564. Additionally, if YT was intending to confer a mandate in relation to assets held pursuant to the Hung Arrangement, it seems inherently improbable that he would have assumed the right to exclude YC's children from any decision-making role. Even assuming that he believed that he was entitled by dint of age and rank to give sole directions in this regard, which I accept he and all other 'insiders' probably did believe, it seems inherently improbable that he would decide that this 'sole' authority could be passed on to his own children, bypassing his older brother's children altogether. The Trustees' submission that it makes no sense to construe the Oral Mandate as distinguishing between YT's onshore and offshore assets appears to overlook a more fundamental distinction between (a) YT's personal assets and (b) assets which had belonged to both him and his brother over which he believed he was entitled to exercise sole control after YC's death.

565. Finally it also seems odd that Mr Hung, despite being keenly aware of the need to deal with Chindwell BVI and Vanson BVI, did not ensure that his Note made it explicitly clear that the Oral Mandate extended to those offshore assets as well. The fact that he failed to do so further weakens the case for construing the Oral Mandate as extending to those assets. It is difficult to avoid the strong suspicion that Mr Hung had a clear understanding of this distinction, because he had managed the brothers' separate and joint assets in a different way for many years. He would have been keenly aware that the Bermuda Purpose Trusts were funded with the brothers' joint assets and were managed by PTCs in which both sides

of the family were involved. It therefore seems inherently improbable that YT would have given a composite instruction solely to his sons as to (a) how his personal assets were to be managed and also (b) how assets which he was controlling on behalf of his and his brothers' families were to be managed.

566. In fact the preponderance of the evidence, taking into account inherent probabilities, suggests that William prior to the POA was taking *de facto* control of his father's personal affairs and assets under his father's legal control while Mr Hung retained legal control of the offshore assets and still took direction from YT himself. It is true that Roger Yang testified that Angela Lin of Lee and Li verbally advised that the Oral Mandate was broad enough to cover the transfer of the remaining offshore assets. I accept that evidence although I cannot accept, in light of the fact that the Oral Mandate was not in fact solely relied upon, that no written advice was sought because her advice (that the Oral Mandate could be relied upon) was so clear. Even the Trustees accepted in their Closing Submissions:

> "*882. … However, given Winston's litigation campaign, including against Mr Hung, it is reasonable to infer that Mr Hung would have wished for a formal written power of attorney to be granted by YT Wang so that there could be no debate as to William's authority to act on YT Wang's behalf.*"

567. That is a masterful understatement. There was much room for debate about whether the Oral Mandate, even supplemented by the Note of the Oral Mandate, provided sufficient authority for Mr Hung to transfer Chindwell BVI and Vanson BVI to a purpose trust. The canny Mr Hung was (I merely suspect) prompted more by principle than mere anxiety in requesting a POA for William to authorise him to dispose of those assets on YT's behalf. It beggars belief that Lee and Li advised that the oral Mandate and the Note of the Oral Mandate should be relied upon, because they were not. Even if that was the lawyers' view as a matter of abstract construction of a document in isolation from its factual matrix, the true position appears to have been different. On the Trustees' own case, Mr Hung would have had a clear appreciation in his own mind of the distinction between the Founders' solely owned personal assets and those assets which were jointly controlled by the Founders. Bearing in mind that by the date of the Oral Mandate, either YT had already agreed or was contemplating that the remaining jointly held assets (effectively legally owned by Mr Hung) should be settled on trust, it makes no sense that YT would have wanted to delegate authority over that discrete pot of assets without distinguishing them from his personal assets.

568. I therefore accept the submissions of D8's counsel that the Oral Mandate properly construed provides no support (in and of itself) for the proposition that YT thereby

authorised his son William to transfer the assets to the Ocean View Trust. At most, the Oral Mandate provides potential general support for the Trustees' case on capacity and their related reliance on the POA.

D8's case in relation to the Oral Assent/the 2011 authorisation

569. In Tony Wang's Closing Submissions, his counsel poured scorn on the Trustees' reliance on the 'Alleged Oral Assent'. The most cogent arguments were the following:

> "*662. The PTCs' factual case on the existence of the Alleged Oral Assent (i.e. even assuming that the inadmissible evidence the PTCs seek to rely upon could be considered) lacks credibility.*
>
> *663. The starting point is that from Mr Hung's (and the PTCs') perspective, Mr Hung needed only YT's consent to any transfer of Chindwell BVI or Vanson BVI. If that were so, it is inconceivable that if (as the PTCs assert) YT himself gave his express consent in 2011 to a transfer of Chindwell BVI and Vanson BVI into a Bermuda purpose trust, he would not have mentioned such a fact in evidence provided to the Beddoe Court in 2014. Instead, he referred only to the direction given by William Wong in 2013.*
>
> *664. In addition, the facts the PTCs seek to establish are incoherent and implausible.*
>
> *665. Having received the consent he considered that he required to transfer the shares in early 2011, Mr Hung inexplicably waited until July 2012 before even raising the issue with the members of the BMCs of the [First Four Bermuda Purpose Trusts]. There is no good reason for him to have delayed for such a lengthy period.*
>
> *666. Then, having been asked by Mr Hung in 2012 to effect the transfer of the Chindwell BVI shares and Vanson BVI shares to a Bermuda trust, the PTCs did not simply proceed with the transaction. Instead, they sought to procure the execution of a power of attorney over all of YT's assets (albeit, as explained below, all of the PTCs' directors who gave evidence sought to disavow any knowledge or involvement, albeit Wilfred was ultimately forced to back-track on the fact that he saw a draft of the Power of Attorney shortly before 31 October 2012). Had there been any suggestion that YT himself had actually consented to the transfer of Chindwell BVI and Vanson BVI, there would have been no need to do so. At the very most, they might have wanted to have YT confirm that consent in writing.*
>
> *667. That written confirmation could have taken the form of a short letter or memo – similar to that supposedly signed by YT in July 2012 to record the Alleged Oral Mandate. This was not done. If it had been, YT would have had the*

nature of the transaction drawn to his attention, but there is no evidence to suggest that it ever was.

668. Perhaps most telling is that no document from the period between 2011 and 2018 makes any reference whatsoever to the Alleged Oral Assent. In particular, when Roger Yang gave instructions to Lee and Li in October 2012 for the preparation of the Power of Attorney, he enclosed a copy of the document purporting to record the Alleged Oral Mandate, but made no mention of YT already having given his actual consent to the proposed transfer. Of course, if that consent had, in fact, been given then there would have been no need for the power of attorney (nor any requirement to 'backdate' it, as per Mr Yang's enquiry) said by the PTCs to have been for the purpose of effecting the transfer of Chindwell BVI and Vanson BVI.

669. The obvious explanation for all of this is that the Alleged Oral Assent has simply been made up in the course of this litigation in order to try and deal with the obvious weakness in the PTCs' case on the validity of the Power of Attorney. That is why there is no contemporaneous evidence that even hints at its existence, and why it first emerged in witness evidence in late 2020: after Tony had pleaded his case on YT's incapacity in October 2019…

671. As explained below, a number of the PTCs' witnesses purport to give evidence of what Mr Hung is alleged to have said to them in respect of the Alleged Oral Assent. As well as being inadmissible second-hand hearsay under s.27B(3), one of the most telling weaknesses in the PTCs' case is that Mr Hung's evidence itself makes no mention of the Alleged Oral Assent. His evidence on the transfer of Chindwell BVI and Vanson BVI is set out at §74 of his affidavit as follows:

> *'I was holding these companies as a trustee for purposes to be determined by YC and YT jointly. Following YC's death, I continued to hold those assets as trustee for purposes to be directed by YT alone. <u>After 2012, following directions given by William Wong as the representative of YT, those companies were transferred into a formal Bermuda purpose trust structure</u>" (emphasis added).*

672. Against that background, the PTCs' evidence is hopeless."

<u>The Trustees' case in relation to the Oral Assent</u>

570. The Trustees' evidential case on what they styled as the "*2011 authorisation*" was set out in their Closing Submissions as follows:

"*836. Mr Jao's evidence at Jao 1 paragraphs 154 to 157 is that Mr Hung told him that YT Wang '…had confirmed that Mr Hung could move the last of the assets into a Bermuda Trust so that Mr Hung could finally retire as*

well'.

837. In cross-examination Mr Jao confirmed that evidence. He explained that he '... often talked with Mr Hung. He had always wanted to transfer the shares of Chindwell and Vanson BVI to the purpose trust ***and he said that YT Wang also agreed****' {Day48/92:7- 12} [emphasis added]. Mr Jao further explained that "... Mr Hung was certain that he's allowed to transfer the Chindwell and Vanson BVI shares to a Bermuda trust."* ***{Day48/84:12-14}****. When it was put to Mr Jao in cross-examination that Mr Hung never told him that YT Wang had approved the transfer of Chindwell BVI and Vanson BVI into a purpose trust, 'I disagree. Mr Hung told me that YT agreed…'* ***{Day48/98:24}****.*

838. Wilfred gave evidence to similar effect. At paragraph 216 of Wilfred 1 Wilfred said that Mr Hung:

> *'...suggested that the shares in Chindwell BVI and Vanson BVI should now be transferred to a Bermuda purpose trust.* ***He told us that he had previously spoken to my father about his intention to retire and to transfer these assets into a purpose trust and that my father had agreed.****' [emphasis added]*

839. In cross-examination Wilfred confirmed that evidence was true: see ***{Day37/59:21} - {Day37/60:1}.***

840. Sandy explained that, whilst she was not specifically told by Mr Hung that YT Wang had approved the transfer of Chindwell BVI and Vanson BVI into a purpose trust, Mr Hung did tell her in 2011 that those companies would be placed into trust. Her evidence was as follows at ***{Day33/126:3} - {Day33/127:2}****:*

> *'Q. ... When you were first told about the proposal to transfer Chindwell and Vanson into the trusts, you weren't told, were you, by Mr Hung that YT had specifically approved the transaction the previous year in 2011, were you?*
>
> *A. Just like what I reiterated, starting from 2001, I knew that these holding companies will eventually be in the*

trusts. So if you ask me, you know, 2011, is it necessary to specify 2011? Because all along, the two founders had the same idea.

Q. That's not an answer to my question. I'm asking specifically about what you were told in 2012. What I'm suggesting to you is that you were not told by Mr Hung that he had had a specific conversation in 2011 with YT in which YT had consented to the transfer of Chindwell and Vanson, because we can look at it in your witness statement. You don't mention it. So would you confirm that that wasn't said?

A. No, I didn't. He didn't tell me. ***What he told me was that these two holding companies will be placed in the trust****, but because I said this, since 2001, 2001, I knew that these companies would be placed in the trust. He did not mention to me what he said or whom he were conversing with in 2011. He did not tell me the context or the background.' [emphasis added]*

841. Mr Hung would simply not have told Sandy that Chindwell and Vanson BVI were to be placed into trust unless YT Wang had told him so.

842. There is no sensible reason to disbelieve the evidence given by Mr Jao, Wilfred or Sandy, and none has been proffered. Wilfred and Sandy would stand to gain substantially if the transfers into the Ocean View Trust were reversed, and Mr Jao has no personal interest one way or the other and certainly no motive for lying about these events. Their evidence should be accepted.

843. The evidence is also supported by the relevant context. As Sandy pointed out in the extract from her cross-examination set out above, the intention had, from the beginning of the formation of the Trusts in 2001, to place the assets held by Mr Hung into trust. Whilst Chindwell and Vanson BVI were being used to implement the share distribution programme from 2007 onwards that could not be done, because once in trust they could not be used for that purpose. Once that scheme concluded in around 2008, however, it is unsurprising that YT Wang and Mr Hung should have wished to conclude what had been started in 2001, and transfer the remaining assets into trust."

Findings in relation to the Oral Assent/the 2011 authorisation

571. I find that there is no credible evidence that YT gave Mr Hung sufficient oral authority in 2011 to validly transfer the shares in Chindwell BVI and Vanson BVI to the yet to be created Ocean View Trust. The main overarching reason for this finding is the simple point that, at the time when the transfer had recently occurred or was about to occur, none of the relevant actors demonstrated in any unambiguous way that they believed that the 2011 authorisation was the basis for Mr Hung's transfer actions in March 2013. It is also important to note that the evidence relied upon by the Trustees in support of the Oral Assent, which I accept as credible, is almost entirely inconsistent with the notion that authority over these assets had previously been transferred to William under the Oral Mandate. It suggests, inferentially, that the relevant actors considered that Mr Hung was still entitled to act on the directions of YT.

572. The Trustees' evidence on this issue, taken at its highest, shows that YT "*agreed*" in principle that the relevant assets should be transferred to an unspecified purpose trust. Mr Jao was generally a very reliable witness, innately honest and precise of mind. It is striking that he said in his oral evidence that he "*often talked with Mr Hung. He had always wanted to transfer the shares of Chindwell and Vanson BVI to the purpose trust and he said that YT Wang also agreed*". Wilfred's written evidence about the earlier discussions between Mr Hung and YT was in very similar terms. Sandy's evidence even more clearly amounted to confirming no more than her understanding from Mr Hung that a decision had been made to put those assets into a purpose trust.

573. Accepting that the Hung Arrangement was an informal one and that Mr Hung and YT belonged to the same generation, what is reported by these witnesses (assuming it to be admissible) does not remotely sound like authority to carry out a specific transfer at all. Could Mr Hung unilaterally decide to transfer the assets to one of the First Four Bermuda Purpose Trusts, at his own sole selection? Clearly not. Could Mr Hung decide to create a fifth purpose trust and transfer the assets to it without further authority from YT? If these general discussions in 2011 between YT and Mr Hung did even arguably confer sufficient authority to effect a transfer without more, it makes no sense that the anxious and careful Mr Hung should have held onto these 'hot potatoes' for so long thereafter, let alone fail to make any written record of this authority as he diligently did with the Oral Mandate.

574. In my judgment the Trustees <u>can</u> rely on the fact that Mr Hung reported that it had been agreed by YT that Chindwell BVI and Vanson BVI should be transferred to a purpose trust in or about 2011 to support their case on the capacity of YT. But the Oral Assent/2011 authorisation provides no freestanding basis for establishing that the Ocean View Trust transfers were duly authorised by YT.

575. In these circumstances there is no need to decide whether the truth of what Mr Hung reported YT said to him is inadmissible on the grounds of being second-hand hearsay in relation to this part of the case.

The July 26 2012 Note of the Oral Mandate and YT's mental capacity

Preliminary

576. Whether YT had capacity when he purportedly signed this retrospective written record of the Oral Mandate is only relevant to what weight should be attached to it as an expression of YT's own views. This flows from my rejection of the Trustees' case that the Oral Mandate constitutes a freestanding basis of authority for the impugned Ocean View transfers.

D8's submissions

577. In their Closing Submissions, D8's counsel submitted:

> "895. *The PTCs have been unable to identify the date on which they allege the 26 July 2012 Memo is said to have been signed by YT: whilst the signatures of William and Wilfred are each dated 27 July, no date appears against YT's purported signature. Nevertheless, one can derive a sufficiently clear picture of YT's condition from the records in the period immediately following 26 July (the date of its purported creation):*
>
> > *895.1 On 26 July, YT confused Songshan airport for Chiayi station before asking three times on the way to/from hospital "Where is this?", proceeded to shave in the car, and thereafter had "no interaction" with anyone in the car.*
> >
> > *895.2 On 27 July, YT again confused Songshan airport for Chiayi Station and at just before 9am stated: 'Isn't it only 6am now?'. On the same day, he failed to respond to his daughter, Jennifer: 'Ms Hsueh-Min greets the President. The President looks only, without responding'.*
> >
> > *895.3. On 28 July, YT was accompanied both by his carer and by family members but nevertheless had 'no interactions' with them.*
> >
> > *895.4 On 29 July, YT made repeated inappropriate references to death including as recorded in the following entry: "The President sees the carer, smiles and says, 'Are you still not dead yet?' His comments are ignored, and his attention is diverted. But after a while, continues to ask the carer three*

times, until he lies in bed and rests.' During the course of a meal that evening, despite being greeted by family members, YT was only able to "respon[d] with nodding'.

896. In light of the above matters, it is inherently improbable that YT had capacity to execute the 26 July 2012 Memo. As explained below, that document not only purported to verify an undocumented conversation some 21 months earlier (which, insofar as he participated in it, YT is unlikely to have recalled) but involved the placement of restrictions in respect of transactions concerning specific assets belonging to YT.

897. Finally, there is no evidence of anyone having given any explanation of any sort to YT in relation to the 26 July 2012 Memo. Given the importance – which Professor Chiu recognised (see below) – of explanations being given in clear and simple terms to a dementia patient, the absence of any explanation is fatal even if the Court were to conclude that YT had the capacity to understand such an explanation (which, for the reasons set out above, is highly unlikely)."

The Trustees' submissions

578. In the Trustees' Closing Submissions, the following points were made about the Note of the Oral Mandate:

"*1163. Informed by her assessment of the severity of YT's dementia, discussed above, Professor Chiu considered that as of 26 July 2012 YT had the requisite mental capacity to (i) understand and (ii) give his free and informed approval of the contents of the Note of the Oral Mandate, even in the absence of a clear explanation of the Note of the Oral Mandate being given to him.*

1164. As Professor Chiu pointed out, reading was one of YT's daily activities in 2012, and there are numerous entries in the nursing records showing that he was actively and attentively reading, and that he was thinking about and understood what he was reading: Chiu 1 paragraphs 165-166. While there were also episodes where YT appeared to skip pages or lines, these tended to occur when he was tired and inattentive: Chiu 1 paragraph 167.

1165. Professor Chiu's conclusion was therefore that, in light of YT's mental state generally at the relevant time, and given the relative simplicity and brevity of the Note of the Oral Mandate, he would have had capacity to (i)

understand it and (ii) give his free and informed approval to its contents, even in the absence of a separate explanation, provided he was attentive when reading it: Chiu 1 paragraph 167; Chiu 2 paragraphs 103-107."

Findings: what weight can fairly be attached to the Note of the Oral Mandate?

579. In my judgment, having rejected the case that the Oral Mandate itself provides a basis of authority for the Ocean View Trust transfers, the only significance of the Note of the Oral Mandate is that it purports to record what YT said orally in 2010. While I accept that questions exist about the lucidity of YT in late July 2012, I reject the suggestion that this was a document so significant in its legal effect that it required a high level of comprehension and an explanation as to what its purport was. YT's signature was merely sought to confirm what the other signatories recalled and their capacity is not subject to any question. The Note of the Oral Mandate has no freestanding legal effect or status at all, as far as D8's Ocean View Trust claims are concerned, as I have found above.

580. I see no need to make any formal findings in relation to YT's capacity when he signed the Note of the Oral Mandate. The main evidential value of the Note of the Oral Mandate is that it sets out the terms of the Oral Mandate in writing; I see no reason to doubt that Mr Hung accurately recorded the relevant terms and YT's mental capacity is accordingly irrelevant as a result. Tony Wang's counsel have in any event succeeded in doing no more than raising questions about YT's mental capacity in July 2012 and to the extent that there is any conflict between the evidence of Professor Jacoby and Professor Chiu on this issue, I would prefer the evidence of Professor Chiu. However the expert evidence is not dispositive because (as I find below in relation to the POA), the capacity of YT during this period was somewhat fluid in nature and falls to be assessed on a day-by-day basis.

581. D8's counsel fairly point out that there is no direct evidence about the circumstances in which YT signed the Note of the Oral Mandate which would be the best available evidence about the level of understanding he had when he signed the Note of the Oral Mandate. I therefore accept that there is no firm basis for inferring that YT in any conscious way explicitly reaffirmed the Oral Mandate in July 2012, or indeed was actually explicitly reminded of it. I find that the Note of the Oral Mandate is merely reliable evidence of the contents of the Oral Mandate.

The Power of Attorney

Preliminary: the issues

582. The POA is the principal instrument relied upon by the Trustees as authorising the transfer of assets to the Ocean View Trust on YT's behalf. In D8's Closing Submissions, the issues requiring determination were summarised as follows:

> "*754. There are three broad issues to be determined in respect of the Power of Attorney. They are as follows.*
>
> 754.1 *Did YT have mental capacity to execute the Power of Attorney?*
>
> 754.2 *If so, was the purported signature on the Power of Attorney forged or applied unthinkingly by YT?*
>
> 754.3 *Did YT give his full, free and informed consent to the Power of Attorney?*
>
> *755. The first and second issues are sub-sets of the third: a finding that YT lacked capacity and/or that his signature was forged or applied unthinkingly would be dispositive of the third question without more. However, if – it is submitted, contrary to overwhelming evidence – the Court were to conclude that YT technically had capacity to approve the terms of the Power of Attorney and that he did in fact apply his signature as a conscious act of approval, the question would still arise as to whether his consent was full and informed. In the extraordinary circumstances surrounding the purported execution of the Power of Attorney, there is, it is submitted, no way in which the Court can reasonably or properly conclude that such consent was provided.*"

583. The second-quoted paragraph reflects the enthusiastic, forceful and persuasive way in which what appeared to be the flagship issue in Tony Wang's case was presented by Mr Wilson QC throughout the trial. It appeared at first blush as if the only real issue relating to the POA was whether YT possessed the mental capacity to sign the POA. However, it was contended that even if D8 lost on the capacity point, which could only be on technical grounds, it would not be open to the Court to find that YT approved and consented to the contents of the POA. The belated inclusion of the forgery allegation, which always seemed like an 'over-egging the pudding' claim, sounds a warning about the need to scrutinise the most appealing parts of Tony Wang's case with care.

584. The Trustees' counsel pulled no punches in seeking to undermine the forgery claim, describing it as a "*wild allegation …without any sensible foundation*". However the case on capacity was primarily advanced in reliance on careful analysis and cold logic,

implicitly acknowledging (it seems to me) that the Court could reasonably arrive at a conclusion in favour of one side or another whilst persuasively explaining why the Trustees' case should be preferred.

Capacity: findings on the legal test

585. D8 was keen to contend that not only was it was common ground that Taiwanese law governed the issue of YT's capacity, but also that there was no material distinction between the Taiwanese and the English law tests. In light of the position the Trustees' adopted on the expert evidence and the need to address the applicable Taiwanese test, whether there is any material distinction between the two legal tests will have to be addressed in that context briefly below.

586. In D8's Closing Submissions, the Taiwanese law position was summarised as follows:

> "*759. The relevant provision of the Taiwan Civil Code is set out in the second sentence of Article 75, which provides that an expression of intent is void if it is 'made by a person who, though not without capacity to make juridical acts, is in a condition of unconsciousness or mental disorder'.*
>
> *760. As Professor Chang explained and Professor Su agreed in his oral evidence, the Taiwanese Supreme Court has found that being 'in a condition of unconsciousness or mental disorder' means being unable to 'judge, recognize and foresee the actions or the outcome thereof'. The experts agree that the Taiwanese Court determines whether the test is met on a case-by-case basis …*
>
> *762. Accordingly, in order for a person to have capacity within the meaning of Article 75 of the Civil Code: (i) he must understand both the effects and the consequences of the transaction; and (ii) such understanding is transaction-specific: the more complex the terms of the transaction, the greater the level of mental faculty is required. It may be noted that the Taiwanese courts have held that a person may be held to be incapable even where only suffering from mild dementia.*"

587. The Trustees' counsel submitted:

> "*941.Ultimately, however, there is likely to be very little practical difference between the legal experts' alternative formulations of the*

Article 75 standard. The Trustees' medical expert, Professor Helen Chiu, has considered both formulations and stated that her view remains the same whichever formulation is adopted. Tony's medical expert, Professor Jacoby, has considered neither formulation, and has confirmed that he has not expressed any view at all by reference to the relevant mental capacity standard under Taiwanese law: see further paragraphs 1020-1030 below.

942. Four further points about Article 75 should be noted.

943.First, the burden of proving a lack of capacity falls on the party challenging the validity of a legal act – in this case, on Tony: Su 1 paragraph 261. This aspect of Professor Su's evidence was not challenged.

944.Second, it is agreed by the Taiwanese law experts that whether a person has the requisite mental capacity under Article 75 is assessed on a case-by-case basis (Joint Statement paragraph 12 ***{C3/3/3}****).*

945.Third, whether a person has the requisite mental capacity for the purposes of Article 75 is a question that must be answered by reference to the specific act which is alleged to be void: Su 1 paragraph 257 ***{C3/1/92}****. This aspect of Professor Su's evidence was also not challenged.*

946. Fourth, it follows from the third point above that, where an individual is granting a power of attorney, he needs to have the requisite capacity to discern the effect of granting the power of attorney; but not necessarily the capacity to perform all of the tasks that his chosen attorney may perform…"

588. In light of these submissions, I apply the following legal test to the capacity issue:

(a) D8 bears the ultimate burden of demonstrating that the POA is ineffective by reason of YT's incapacity on the date of execution, although ideally (as Mr Wilson QC urged on behalf of Tony Wang) the Court should seek to find one way or another on the balance of probabilities, there being no deficiency of evidence;

(b) concluding that a person possesses mental capacity requires the Court to find that the relevant party (YT) was able to "*understand both the effects and the consequences of the transaction*", as Tony Wang's counsel submitted. This requirement (it was common ground) is a transaction-specific one. Whether or not YT was suffering from mild or serious cognitive impairment is not dispositive of this issue.

589. In broad-brush terms, the Taiwanese law test for capacity does not appear to be materially different to the English law test. D8's counsel submitted in their Closing Submissions:

> "*764. As stated above, it is helpful to consider the guidance from the jurisprudence which has developed over many years by the English courts in circumstances where there is no material difference between the English and Taiwanese test for capacity. The leading case remains the decision of Martin Nourse QC (as he then was) in Re Beaney [1978] 1 W.LR. 770, where the position was stated as follows (at p.774):*
>
> > *'In the circumstances, it seems to me that the law is this. The degree or extent of understanding required in respect of any instrument is relative to the particular transaction which it is to effect. In the case of a will the degree required is always high. In the case of a contract, a deed made for consideration or a gift inter vivos, whether by deed or otherwise, the degree required varies with the circumstances of the transaction. Thus, at one extreme, if the subject matter and value of a gift are trivial in relation to the donor's other assets a low degree of understanding will suffice. But, at the other extreme, if its effect is to dispose of the donor's only asset of value and thus, for practical purposes, to pre-empt the devolution of his estate under his will or on his intestacy, then the degree of understanding required is as high as that required for a will, and the donor must understand the claims of all potential donees and the extent of the property to be disposed of." (emphases added)…*
>
> > *766. In Kicks v Leigh [2015] 4 All E.R. 329, the issue was whether the deceased had capacity to transfer the proceeds of his property to her daughter when the deceased was alive. The Court accepted the submission that, because the property was the deceased's principal asset of value, she had to be capable of understanding not only the general nature of the transaction, but also that the effect of the gift would have been to deprive other relatives of a real interest in her estate (at §193-195): "It does*

> *however appear very likely that the Property represented a substantial proportion of her assets… therefore, applying the approach in Re Beaney, Mrs Smith would have had to have been capable of a high level of understanding of the effect of the gift, in order to have had the mental capacity to make it. The question is whether it has been established that she was not capable of understanding all claims of all potential donees and the extent of the property she was disposing of, and the effect upon her own life.*"

590. These English law principles are broadly similar to the Taiwanese requirement that the relevant party "*understand[s] both the effects and the consequences of the transaction*", necessarily taking into account the nature of the impugned transaction. But this similarity merely justifies the court not summarily rejecting Professor Jacoby's conclusory evidence on capacity altogether because he applied the English rather than the Taiwanese test in his Expert Report. It does not justify applying English law capacity principles, willy nilly, when it is common ground that the issue is properly governed by Taiwanese law. It is also important for this Court to seek to apply the Taiwanese law test in the same way a Taiwanese court would, avoiding the natural tendency towards adopting a common law statutory interpretation approach (applying a purposive construction) to a provision in the Civil Code.

591. The Experts agreed that Article 75 must be applied on a case by case basis without making explicit what policy guidelines would be applied. Professor Chang in his Expert Report ("*Part 12: Mental capacity*") does not directly address the policy approach the Taiwanese Supreme Court would take to applying Article 75 of the Civil Code, although decisions are referred to. Professor Su's Expert Report provides further assistance in this regard, albeit in a somewhat indirect manner. Firstly, at paragraph 249, he sets out the legislative commentary on Article 75, which provides in salient part as follows:

> "*People without the capacity to make juridical acts include minors who have not reached their seventh year and those who were declared under interdiction. To protect the interests of people without the capacity to make juridical acts, their actions are void. For those with the capacity to make juridical acts, if an expression of intent is made under states of unconsciousness or mental disorder (e.g., sleeping, heavily drunk, or groggy in sickness, or an occasional psychiatric patient who is considered insane), the validity of such expression is not different from that of those without capacity to make juridical acts, and therefore, the acts are void.*" [Emphasis added]

592. This provides important explicit support for what might otherwise be assumed obvious; namely, that the legislative object and purpose of Article 75 is to "*protect the interests of people without the capacity to make juridical acts*". Professor Su (at paragraph 257) cites an extract from Taiwan High Court Taichung Branch Court Civil Judgment Zhong-Shang-Zi No. 232 (2016) (affirmed by the Taiwan Supreme Court) to support his opinion that the question of whether someone is temporarily incapable of performing a juridical act will be approached on a case by case basis. However, the opening and closing sentence in the quoted extract also provide a helpful insight into the Taiwanese policy approach:

> "*Accordingly, a generalized pronouncement that all persons with disabilities automatically lack capacity of expression or consciousness is unworkable….in the absence of unconsciousness or imposition of an order of commencement of guardianship…It cannot be concluded that each and every expression of intent made by the disabled is invalid, since the result would be that disabled individuals would completely forfeit any right [to] declare an intent.*"

593. I find that Article 75 is designed to protect the "*interests*" of persons who are permanently or temporarily incapacitated, as the legislative commentary explicitly provides. However, implicitly as well, those "*interests*" require a consideration of the need to both (a) protect a vulnerable person from, *inter alia*, disposing of property in a way they would be unlikely to consciously choose to do, and (b) protect a vulnerable person's right to be able to exercise their right to, *inter alia*, dispose of property. This approach is not dissimilar to the broad policy approach of courts applying Bermudian/English law to questions of mental capacity in relation to significant legal transactions.

594. The application of the applicable Taiwanese law test also requires the Court (when deciding whether or not the requisite capacity is present or absent) to adopt a blended approach to the evidence, taking into account both the Experts' views on the level of cognitive impairment YT suffered from and the non-expert evidence about YT's cognitive state when he executed the POA.

Factual findings: the expert evidence and the Experts' conclusions as to YT's general cognitive status

595. I have already summarised the expert reports' main conclusions and set out my impressions of the Experts' oral evidence above. The capacity dispute had two limbs to it: (a) what was YT's general cognitive status, and (b) taking into account his cognitive status, did he have the requisite mental capacity or not? It was common ground that by October 2012 he had been suffering from dementia for several years.

596. The main controversy as regards cognitive status was whether YT was likely suffering from serious cognitive impairment, and thus more likely to lack capacity for this reason alone, or was instead afflicted by merely mild or moderate impairment, and was thus potentially in possession of the mental capacity required for executing the POA (except perhaps on a 'bad day'). D8's counsel relied upon the eminence of their expert to fortify his cognitive status conclusions:

> "*805. The Court has had the benefit of hearing evidence from one of the (if not <u>the</u>) world's leading experts on old age psychiatry, Professor Robin Jacoby (a Professor Emeritus in Old Age Psychiatry from the University of Oxford), who has also given evidence in over 20 reported cases in the Courts of England and Wales over the last 15 years. His experience as an expert witness and author was summarised by the English High Court in Kunicki v Hayward [2017] 4 WLR 32 as follows (at §78):*
>
> > *'Prof. Jacoby is emeritus professor of old age psychiatry at the University of Oxford. He has been a psychiatrist since 1974 and is a well-known expert witness in testamentary capacity cases. He has given evidence in 27 reported cases. He has also published extensively on testamentary capacity and has contributed to the chapter on the topic in Williams, Mortimer & Sunnucks: Executors, Administrators and Probate (20th ed).'*
>
> *806. His clinical experience in the specific field of psychiatric conditions in old-age was commented on by Briggs J (as he then was) in Re Key [2010] 1 W.L.R. 2020:*
>
> > *'His medical career began in 1971, and he was a consultant psychiatrist between 1980 and 1993, for most of that time at the Bethlem Royal and Maudsley Hospitals in London. He was appointed Clinical Reader in Old Age Psychiatry at the University of Oxford in 1994, and Professor of Old Age Psychiatry in 1998.*
> >
> > *Unlike Dr Hughes, Professor Jacoby has considerable experience in giving expert evidence, including reports and oral evidence about testamentary capacity. Furthermore, his specialisation has been more focused upon the psychiatric problems of persons of advanced years than that of Dr Hughes. He was therefore a little better*

qualified both by experience and specialisation than Dr Hughes in giving expert evidence as to Mr Key's testamentary capacity...'

807. Professor Jacoby was scrupulously independent and it was obvious from hearing his evidence that his only interest was to assist the Court (rather than advocate the case being advanced by the party instructing him).[103] *His independence and objectivity was reinforced by concessions which he willingly made during the course of cross-examination.*

808. Professor Jacoby's report reached clear and unequivocal conclusions as follows:

> *'On the balance of probability, I consider that his dementia was severe and characterised by impairment of: understanding of language; executive function; facial recognition; calculation; bowel control; judgement and social control.'"*

597. In addition to relying on his Expert's conclusions and seeking to demonstrate the merits of the evidence upon which these conclusions were based, D8's counsel contended that the Court should infer from the Trustees' failure to call Dr Hsu that he would have assisted Tony Wang's case. Dr Hsu was YT's psychiatric doctor who deposed in an October 2013 Affidavit filed in the *Beddoe* Proceedings that YT lacked capacity at that point. I regard it as obvious that Dr Hsu was not viewed as positively helpful to the Trustees' case and likely that he was viewed as potentially unhelpful. Bearing in mind that D8 could have interviewed and called Dr Hsu himself, as the Trustees pointed out, I see no proper basis for drawing any inference stronger than that. The Trustees' case on capacity was clearly not an entirely routine or obviously strong one; YT had dementia when he executed the POA on October 31, 2012 and a year later had been formally certified by Dr Hsu himself as lacking mental capacity. The fact that D8 elected not to call Dr Hsu suggests an understandable anxiety on Tony Wang's part that the good doctor might be potentially unhelpful to his case as well.

598. That said, Professor Jacoby's Expert Report was subject to challenge on two important grounds:

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[103] "*Professor Jacoby was emphatic when he said {Day62/178:4-25}: "I want to make clear that, you know, I am batting for the court and I am not batting for Tony Wang or the other side. I don't consider it my duty... to engage in a sort of... pre-trial cross-examination [of the expert evidence on the other side]...*" (see footnote 1071 of D8's Closing Submissions).

(a) he considered only a limited sample of medical and nursing records. This was seemingly because D8's wife assumed responsibility for selecting what documents to provide (in what may have been a cost-saving, 'pennywise/pound foolish' approach);

(b) he did not file a reply report formally contesting Dr Chiu's well researched findings[104].

599. In the event, in his oral evidence at trial, he was unable to support (convincingly or at all) various findings he himself had made relevant to cognitive status on the basis of documents he had not examined[105]. Professor Jacoby admitted under cross-examination that he was unaware that his Report was based on a review of weekly nursing records and that he had not considered the more detailed daily notes[106]:

> "*Q. Well, actually, the thing is, you see, the majority of the extracts from the nursing records you were given for your first report came from the weekly reports, not the daily reports.*
> *A. Right.*
> *Q. Were you aware of that?*
> *A. No, I don't think I was. I mean, they were just all reports to me.*
> *Q. Right. Were you aware that some of the weekly summary reports you were given omit important details or context that is only available in the daily reports?*
>
> *A. No*."

600. He also admitted that in preparing his Expert Report he had not examined the dementia clinic records of Dr Hsu which suggested that YT's dementia had been stable over several years up to as late as September 2012[107]:

> "*Q. Good. Now, if we go on in this report to paragraph 90{C4/1/30}, you say in this paragraph that there seemed to have been a clear progression of YT's dementia and you say that by March or April 2012, it would be far more likely than not that his cognitive impairment and clinical dementia were worse than, say, one year before. That's what you say; right?*

[104] This was due to a sad family bereavement shortly before the time for filing a reply report.
[105] E.g. incontinence (Transcript Day 62, page 245 lines 4-10) and dyscalculia (Transcript Day 62, page 256 lines 5-12.
[106] Transcript Day 62, page 151 lines 6-17.
[107] Transcript Day 62, page 191 line 5 –page 192 line 8.

A. Yes.

Q. Now, when you wrote that paragraph, as we have seen, you had not been provided with the records from the dementia clinic; right?

A. I had not been provided with the records from the dementia clinic.

Q. Yes. So you were not aware, I presume, that YT was seen regularly in the dementia clinic from 2007 to 2012, were you?

A. No, no.

Q. No. So, for instance, you were not aware that YT was seen by Dr Hsu in the dementia clinic on, by way of example only, 6 April 2011, 30 May 2011, 22 August 2011, 16 January 2012, 20 April 2012, 6 August 2012 and 3 September 2012. You weren't aware of that, were you?

A. I don't think so.

Q. No. You were not aware, were you, that on each of those occasions from April 2011 to September 2012, YT's dementia was recorded in the medical notes of the highly reputable Dr Hsu as being stable or stationary? You weren't aware of that, were you?

A. No."

601. Professor Jacoby refused to concede that YT's dementia was in fact stable in 2012, but the fact that his opinion that the condition was likely worsening was not based on a complete review of the most pertinent records seriously undermined the reliability of his conclusions on this important issue. However, he very fairly admitted that YT's demonstrated mah-jong playing ability was "*taken by itself…wholly inconsistent with severe dementia*"[108]. He also conceded that his conclusion that YT had made "*a fatuous insulting remark consistent with frontal lobe disinhibition*" failed to take into account the fact that YT had a standard joke with the nurses about their looks[109]. Professor Jacoby was also forced to agree that a note he had not seen suggesting YT was able to make a clever pun a few days before he executed the POA was an "*important piece of evidence*" for the purposes of deciding whether or not YT was suffering from dysphasia[110].

602. The wide range of relevant documents which it was ultimately clear Professor Robin Jacoby had not considered in reaching his conclusion that YT was suffering from severe

[108] Transcript Day 62, page 265 line 23-page 266 line 11.
[109] Transcript Day 63, page 8 lines 1-8.
[110] Transcript Day 63 page 52 line 22-page 53 line 10.

dementia makes it impossible for me to place any weight on his findings in this regard. In stark contrast, Professor Helen Chiu's Expert Report set out conclusions as to YT's cognitive condition which were based on a far more comprehensive review of both medical and nursing records and were on their face far more persuasive. These conclusions were not to any material extent undermined through cross-examination when she demonstrated an impressively firm grasp of the contents of the relevant medical records.

603. The Trustees' expert agreed with various suggestions put to her in cross-examination in relation to general matters. For instance she agreed dementia patients often were able to put on a "social façade", concealing the extent of their illness from strangers. She agreed that joking about death in a Chinese cultural context would be "*inappropriate behaviour*". Professor Chiu accepted that YT's apparent attempt to strike a child may have been a more serious incident than her Report suggested[111]. However, she later insisted that although such incidents were clinically important, the most important measure of the severity of dementia was the Clinical Dementia Rating Scale[112]. That scale was set out in paragraph 144 of her Expert Report, and the most material columns were the following:

	Mild (1)	Moderate (2)	Severe (3)
Memory	Moderate memory loss, more marked for recent events; defect interferes with everyday activities	Severe memory loss; only highly learned material retained; new material rapidly lost	Severe memory loss; only fragments remain
Orientation	Moderate difficulty with time relationships; oriented for place at examination; may have geographic disorientation elsewhere	Severe difficulty with time relationships; usually disoriented to time, often to place	Oriented to person only
Judgment & Problem Solving	Moderate difficulty in handling problems, similarities and differences; social judgment usually maintained	Severely impaired in handling problems, similarities, and differences; social judgment usually impaired	Unable to make judgments or solve problems

604. Perhaps the most significant concession the Trustees' expert made, relevant to both YT's general cognitive status and his level of understanding on October 31, 2012 (based on his mah-jong performance), was the following[113]:

[111] Transcript Day 63, page 140 lines 3-23.
[112] Transcript Day 63, page 144 lines 12-24.
[113] Transcript Day 64, page 56 line 25-page 57 line 1.

"…*I agree that after* hospitalisation *in September 2012, YT was much weaker and his performance was not as good.*"

605. Nonetheless, I have little difficulty in accepting the critical conclusion reached by Professor Chiu in her Expert Report to the effect that YT was suffering from mild to moderate dementia on the CDR scale, taking into account her oral evidence explaining her approach[114]. However, bearing in mind the Taiwanese legal test, which assumes that a party not deemed to lack capacity is capable unless their mental state indicates otherwise, the key question is what YT's mental state actually was when the POA was executed.

606. It was essentially common ground between the Experts, that irrespective of what his general cognitive status was in CDR scale terms and taking into account his general medical condition and physical ailments, YT might from time to time (on bad days) lack capacity to enter into a significant legal transaction. That is the pivotal question in the present case as Professor Chiu accepted in the course of the cross-examination by Mr Wilson QC[115]:

"*Q…You'd accept, wouldn't you, that in determining whether YT was mentally capable of doing that, of understanding the act and executing the power of* attorney, *it doesn't really matter whether it was purely attributable to the dementia or attributable to dementia plus other causes, perhaps drugs, tiredness or anything else. The important thing is to determine whether YT was capable. Would you agree?*
A. For the actual mental capacity, yes, when he executed it."

Factual findings: the expert evidence and the Experts' conclusions as to YT's mental capacity

607. D8's Closing Submissions advanced the following key points in relation to Professor Jacoby's evidence:

"*808. Professor Jacoby's report reached clear and unequivocal conclusions as follows:*

'On the balance of probability, I consider that his dementia was severe and characterised by impairment of: understanding of language; executive

[114] Transcript Day 64, page 160 line 2-page 166 line 20.
[115] Transcript Day 63 page 154 lines 7-16

function; facial recognition; calculation; bowel control; judgement and social control.

In my opinion, by reason of dementia, the Deceased is unlikely to have had the capacity on 26 July 2012 to make financial decisions, probably even trivial ones, but certainly major ones involving extremely large sums of money…

In my opinion, by reason of dementia, the Deceased is unlikely to have had the capacity to understand the purpose and nature of the [Ocean View Trust] in the autumn of 2012…

In my opinion, the Deceased probably did not have the capacity to grant PofA in October 2012, by reason of dementia. If, as I consider it was, dementia was severe, I think it is likely that he would not have fully understood what a PofA entailed: whether the control he was going to grant was relatively trivial (e.g. paying household bill), or managing very substantial assets…"

809…. It is to Professor Jacoby's credit that he did not attempt to put any gloss on factual or legal matters which were beyond his knowledge or expertise."

608. In the Trustees' Closing Submissions, their case on the expert evidence was critically summarised in the following passages:

"*1024. No attempt was made during re-examination to elicit any evidence from Professor Jacoby as to whether YT Wang would have had the requisite capacity under the relevant Taiwanese law standard.*

1025. The bizarre position that Tony now finds himself is that he has not put forward any expert evidence whatsoever going to the actual issue in dispute in this litigation, i.e. whether YT Wang had the requisite mental capacity to understand and sign the Note of the Oral Mandate and the Power of Attorney ***as a matter of Taiwanese law****.*

1026. This is not simply a technical deficiency. Because he has relied on common law principles, Professor Jacoby's assessment of YT Wang has taken into account matters that have no bearing on the issue of YT

*Wang's capacity under Taiwanese law. For example, Professor Jacoby relied in both his written (Jacoby 1 paragraphs 10 and 124 and oral **({Day63/69:6-12})** evidence on the English judgment In re Beaney [1978] 1 WLR 770 in support of the proposition that the degree of capacity required to execute the Power of Attorney would have depended on the value of the assets to be managed. However, that is not a principle that either Taiwanese law expert has ever suggested has any application under Article 75 of the Civil Code.*

1027. Similarly, Professor Jacoby's solicitors instructed him that, in assessing YT Wang's mental capacity:

> *'...you should consider whether there was an ability to understand the nature and effect of the assets (and holding structures of those assets) as well as the nature and effect of the transactions themselves.'*

*1028. Professor Jacoby confirmed in cross-examination that he had endeavoured to follow the instructions he was given by his solicitors: **{Day62/202:6-10}**. It is apparent from his First Report that in, reaching the conclusion that YT Wang lacked the requisite capacity to understand the Note of the Oral Mandate and the Power of Attorney, Professor Jacoby took into account the nature and effect of the underlying assets, just as he was instructed to do. See e.g. Jacoby 1 paragraph 108:*

> *'The memorandum of 26 July 2012 appears simple on its face, but its consequences are clearly far-reaching **and require considerable understanding given the amounts of money involved**.' [emphasis added]*

1029. Again, however, that is an irrelevant consideration under Taiwanese law. Neither Taiwanese law expert has ever suggested that the degree of capacity required under Article 75 for an individual to grant a mandate or power of attorney over their financial affairs varies depending on the value of the assets at stake.

1030. The position is therefore as follows. It is not disputed that the burden of proving that YT Wang lacked the requisite capacity to understand the Note of the Oral Mandate and the Power of Attorney falls on Tony. While

the Trustees' instructed expert, Professor Chiu, has clearly opined that YT Wang did have the requisite capacity as a matter of Taiwanese law, Tony has put forward no expert evidence at all addressing YT Wang's mental capacity under the Taiwanese law standard. That is a major gap in this part of Tony's case because he has in fact adduced no expert evidence which addresses the correct test."

609. In light of my finding that there is no overarching difference between the English law concept of mental incapacity (the common law test applied for Professor Jacoby) and the Taiwanese law test applied by Professor Chiu, I reject the Trustees' submission that D8's Expert Report is effectively valueless on that technical ground alone. The most significant reason for placing less weight on his conclusions is that his central findings were admittedly based on a limited review of the relevant medical and nursing records. Because he did not challenge Professor Chiu's findings in any systemic way, his bare assertion that his original views had not altered after reviewing further material in preparation for the trial was entirely unconvincing.

610. However, in my judgment Professor Jacoby's failure to review a wider sample of the relevant medical and nursing records is more material to the general cognitive state findings than it is to the mental state on the date of execution issues which must be addressed. This is because:

(a) Professor Jacoby's analysis, which focussed on incidents of 'abnormal' behaviour or symptoms, does support a preliminary finding that YT was from time to time likely to be incapable of validly executing a document such as the POA;

(b) whether or not YT had capacity at the relevant time is ultimately a matter of fact for the Court, taking into account both the Experts' opinions of his general cognitive status and the evidence of factual witnesses who observed YT on the day in question and/or who participated in the execution of the POA;

(c) Professor Chiu in her oral evidence ultimately accepted that crucial considerations in determining whether YT had the requisite understanding included the clarity of the explanation he was given of the POA and whether or not he had previously given the Oral Mandate; and

(d) it was essentially common ground between the Experts by the end of the trial that YT's mental capacity was subject to doubt and that his understanding of the key document depended upon the factual circumstances in which execution occurred.

611. While a lot of evidential ground was covered with the Experts, the following part of Professor Chiu's cross-examination pointed to what the central issues really were[116]:

> "*Q… So would you accept that if what Attorney Chang did, as according to her first witness statement, was read out the document and simply asked YT Wang to confirm that he agreed with it, that would be unlikely to be an adequate explanation to enable YT Wang to understand the power of attorney?*
> *A. Yes, as I said, if this is -- if the court finds that there is no prior event, then this is not adequate. That means there is no oral mandate and the signing of the POA….*
> *Q. Professor Chiu, you are presupposing or assuming there that the terms --*
> *A. Okay.*
> *Q. -- of the power of attorney are the same as the terms of the oral mandate, aren't you?*
> *A. No, I mean that he had thought about giving authority to William. Then he has considered this, that is –*"

612. This is a significant piece of evidence. Professor Chiu (who also accepted that Attorney Chang as a stranger might not be able to reliably assess YT's mental state) opined that merely reading out the POA would potentially be insufficient to ensure YT understood it unless he had previously considered giving authority to William. This view was a fundamentally practical one, not based on there being legal parity between the terms of the Oral Mandate and the POA. Rather, it spoke to the important question of how complicated the decision to execute the POA was. As she later testified: "*because actually, granting the power of attorney to his son may not be of a very high cognitive capacity*". Because of Professor Chiu's mastery of the medical and nursing records and the fair way in which she gave her oral evidence, I place considerable weight on her opinions as to what the critical factual issues are for the purposes of assessing YT's mental capacity on the execution date. This framing of the issues takes into account YT's compromised mental cognitive state and the fact that Attorney Chang did not know him. However, it does not obviate the need to assess the evidence about his mental condition recorded in the contemporaneous records and the observations (however inexpert they have been) of those in attendance who did know the donor/patient fairly well.

[116] Transcript Day 64, page 125 lines 15-24, page 128 line 20-page 129 line 1.

Factual findings: did YT possess the requisite mental capacity to validly execute the Power of Attorney?

613. In my judgment the crucial question of whether or not YT possessed mental capacity to execute the POA on October 31, 2012 turns substantially on the determination of the following key factual issues:

(a) how complex was the POA and how difficult would it have been for somebody in YT's condition to understand its terms and its effects;

(b) was the POA an instrument which served to make an entirely new decision or was it merely confirmatory of a decision YT had already in principle made in the past;

(c) what was YT's mental state when he executed the POA (assuming for present purposes that he did);

(d) what explanation was YT given about the POA and was it sufficient to make it more likely that he understood or did not understand what he was signing?

614. The POA provides so far as is material as follows[117]:

"*I. I hereby authorize Mr. William Wen-Yuan Wong to handle and dispose of, with full authority, all of my assets, and to handle all matters relating to my assets, including but not limited to:*

1. all acts such as the management of, use of, benefit from, disposition of, gift of, settlement of, investment of and the establishment of trust, etc., in relation to rights over personal property, real property, creditors' rights, securities and all other property, the sale and encumbrance of real property, the leasing of real property for a period of over two years, etc. The aforementioned acts include factual acts and juridical acts, which can be gratuitous or non-gratuitous acts. If such acts are required to be done in writing, this Power of Attorney provides my written authorisation if the right to conduct such acts.

2. ...

[117] As translated by the Single Joint Expert.

3. ...

4. Mr. William Wen-Yuan Wong may handle all property-related matters for me according to his personal judgement, regardless of whether or not the outcome of [such acts] is objectively beneficial to me, and whether or not Mr. William Wen-Yuan Wong personally or [any] person associated with him will benefit as a result.

II. The property that I authorise Mr. William Wen-Yuan Wong to handle includes all assets that I own, shall own, and may obtain for any reason in the future.

III. I fully understand the contents of this Power of Attorney and sign this Power of Attorney based on my own free will.

IV. This Power of Attorney shall continue to be valid except when I amend or terminate it in writing, and shall not be affected by changes in my health, finances or other circumstances.

31 October 2012"

615. Clearly, a 'belt and braces' approach was adopted in drafting this document with a view to ensuring that maximum authority was transferred by the instrument. D8 did not have the temerity to suggest that its terms were not broad enough to embrace YT's rights under the Hung Arrangement so as to permit William Wong to direct Mr Hung to dispose of the Chindwell BVI and Vanson BVI shares. It seems obvious that the document was prepared with this related transaction in mind because Mr Jao confirmed that it was Mr Hung who instructed him to see that Mr Yang obtained a POA. And Mr Yang deposed that Mr Jao instructed him to make sure the document was drafted in wide terms although in his oral evidence he elaborated that his recollection was that it was he who asked whether the document should be as broad as an earlier precedent and Mr Jao agreed. The document's breadth in my judgment decreases rather than increases its complexity as regards the meaning of its essential terms. It purports to confer full authority on William Wong to deal with all of YT's property and property rights. The only complexity arises in relation to the significance of the consequences of conferring such expansive authority, which seems on superficial analysis to be no less momentous than executing a will.

616. In my judgment, accepting that YT had mild to moderate dementia and was suffering from, *inter alia*, cancer and had good days and bad days as far as mental clarity is concerned, I find that he would more likely than not have been capable of understanding the legal effect of the document if it was explained to him in simple terms during a period

of time when he was lucid. How much understanding he would have needed as to the implications of executing the document would depend on whether or not this represented confirming a decision already made in substance or an entirely new decision. I am assisted by the expert opinions of Professor Chiu in this regard although my findings corresponded to the approach I would have taken in similar circumstances in relation to a transaction governed by Bermudian law.

617. Was the POA an instrument which served to make an entirely new decision or was it merely confirmatory of a decision YT had already in principle made in the past? Adopting a common sense and realistic view of the evidence in this case as a whole, I have no hesitation in finding that the conferring of authority decision effected by the POA was in substance merely confirmatory of an earlier decision. The transaction was broadly consistent with analogous decisions which YT had made in the past and the general course of family affairs. In essence, the decision was that his eldest son William should ultimately replace YT as the family patriarch. This finding substantially eliminates any concerns which might otherwise have arisen about the need for him to receive independent legal advice so as to be able to apprehend the full implications of his decision.

618. When a 90 year old patriarch, living in a patriarchal society and on his sick bed, confers authority over all his affairs to his eldest son, whom he has previously entrusted with handling his affairs, the instinctive reaction of most reasonable bystanders would not be to ask: "could the old man possibly have known what he was doing?" Of course this is not the legally mandated approach to the evidence, but it is a useful way of forming at least a preliminary view of how the evidence should be assessed. As a matter of pure legal theory, a transaction entered into by a person without the requisite understanding may well be void even if the transaction is an entirely innocuous one. But the Taiwanese legal test of mental capacity is not a rigid and inflexible technical rule floating in the firmament above the world of flesh and blood. The legal starting assumption (in cases such as the present) is that the donor had capacity to enter into the impugned transaction. The capacity test is designed to do practical justice in the real world by both (a) preventing the mentally impaired from entering into transactions which they would not (with sound mind) have transacted, and (b) protecting the right of the mentally impaired (but not presumptively incompetent) to enter into transactions which they would (with sound mind) want to transact. In cases where the issue of mental capacity is subject to serious dispute, these legislative objectives must be relevant to how the evidence of mental capacity is assessed.

619. On both counts therefore, a preliminary view suggests that there ought <u>not</u> to be an overly zealous approach to any discernible mental capacity concerns. Because (1) there is nothing obviously prejudicial about the transaction (the mistake claims having been rejected), and (2) the transaction appears to be consistent with what one would imagine YT would have

wanted to do anyway if his mental faculties were entirely unimpaired. In this regard, it is pertinent to take into account the fact that the validity of the POA is being challenged to invalidate the transfers made by Mr Hung to the Ocean View Trust. In or about 2011 YT agreed with Mr Hung that the relevant assets should be transferred to a purpose trust to further the legacy creating process which began with the settlement of the First Four Bermuda Purpose Trusts.

620. D8's primary case on YT's true wishes (which I have rejected) was that his father did not want to transfer the assets to a trust from which his family could not benefit at all. The POA was on this hypothesis a document which was used to exploit his mental vulnerabilities to deal with his assets in a way he would not have wished to occur. Having found that the POA was indeed used to give effect to YT's wishes (formed before his mental capacity became subject to real doubt in late 2012) the decision to empower his eldest son so broadly does not even with hindsight look like a rash or imprudent decision. An imprudent or rash decision inconsistent with the donor's known wishes and interests is usually (or at least often is) an indicator in and of itself of diminished capacity. Of course, to be clear, such prejudice is not an essential element of an incapacity claim, it is simply a not infrequent feature of such claims. The approach to the evidence of mental capacity nevertheless would surely be legitimately quite different if the POA had been exercised in favour of a pretty female nurse who had transferred Chindwell BVI and Vanson BVI to herself, sold the shares and purchased a luxurious private island in the Caribbean. Both the identity of the donee and the way the powers were applied would provoke an eyebrow-raising response.

621. These preliminary views are supported by a more detailed analysis of the relevant evidence. The following factors most clearly support a finding that the POA was not an entirely new decision for YT but rather built on broadly similar delegation decisions made in the past:

(a) when the First Four Bermuda Purpose Trusts were established, William Wong was appointed to serve on the boards of the PTCs and on the BMCs;

(b) since in or before 2006, the year when YT formally retired from FPG, William has held senior positions within FPG. In October 2012, he was Chairman of the FPG Executive Committee; and

(c) in 2010, through the Oral Mandate YT conferred primary authority over YT's personal assets (but not the assets held by Mr Hung) on William.

622. In addition, Wilfred deposes in his First Witness Statement that he and William are defending the formation of the Bermuda Purpose Trusts (including the Ocean View Trust) against their own financial interest because they believe that the Bermuda Purpose Trusts represent their father's legacy and true wishes. This is perhaps the most striking feature of the present case; that those accused of subverting the Founders' true wishes are unarguably acting against their own financial interests. In rejecting the mistake claims, I have implicitly found and now explicitly confirm that YT did indeed want the assets held by Mr Hung to be transferred to another purpose trust similar to the First Four Bermuda Purpose Trusts. It is also undisputed that William Wong was involved in managing the First Four Bermuda Purpose Trusts from their formation. This demonstrates that YT had tacitly decided when the First Four Bermuda Purpose Trusts were being established (as part of what amounted to an estate planning exercise) that William should play a leading role in preserving his father's business and philanthropic legacy. It was also Tony Wang's positive case that, after the death of YC Wang when YT was concerned about family disunity, William Wong took the lead in organising a family meeting. This is further confirmation of the fact that William was, even before the POA was executed when serious mental capacity concerns did not exist, already assuming responsibility his father would personally have shouldered in earlier, healthier times. D8's own evidence best illustrates this factual position[118]:

> "*Q. … When your father and YC retired, they passed on the baton of leadership of FPG to William, Susan, Wilfred and Sandy; is that right or is it wrong? Please do tell us.*
> *A. I think the leadership was handed over to William alone.*"

623. Mr Tony Wang's answer in my judgment was accurate in general terms as regards how his own father passed on the baton of leadership, and it is possible that this was how he intended his answer to be understood. In short, despite the breadth of the terms of the POA, the fact that (a) YT executed it in favour of his eldest son (who had been for several years more than his 'heir apparent') and (b) the donee used the powers conferred to fulfil YT's actual wishes, is highly material to evaluating the complexity of the transaction and what level of understanding was required for its validity or invalidity. In my judgment, taking due account of (1) the family cultural context together with the relational history between the donor and the donee of the powers, (2) YT's stage of life and state of physical health and (3) the fact that the primary purpose of the POA was to enable Mr Hung to do what YT had in 2011 already agreed should be done with the relevant shares, the level of understanding required was much lower than might otherwise have been the case.

[118] Transcript Day 18, page 11 line 22-page 12 line 1.

624. This was not an arms' length transaction with a stranger. When the impugned transaction is properly contextualised in this way, it becomes readily apparent that the preponderance of the most reliable evidence is supportive of a finding that YT did have the requisite capacity. The evidence may be viewed as falling into three categories: (1) the medical records and the reported conduct of the attending doctor; (2) the attending FPG witnesses; and (3) the attending lawyer (Attorney Chang, who I find did attend despite the fanciful, bordering on comical, suggestion to the contrary).

625. Accepting that YT would from time to time be too incoherent to fully understand the import of even a confirmatory transaction, I consider it inherently improbable that the Hospital's staff would have permitted him to have what was obviously a business meeting when he was in a discernibly disoriented state. When examined on September 20 2012 (according to an Admission Note exhibited to Professor Chiu's Report), the patient's main complaint was hemoptysis (since September 5) against a history of, *inter alia*, "*chronic obstructive lung disease…strokes with mixed vascular and Alzheimer dementia*". He was taking a battery of medications. His consciousness was described as "*Clear*". A Progress Note dated October 15, 2012 reported "*Stable spirits and performance status*" and described his consciousness as "*Obey*". The latter word is possibly a typographical error but the word is reproduced in a subsequent note made at 22.34 hrs on November 8, 2012. No dramatic change of status was recorded in these records between mid-October and just over a week after the POA's execution date. Professor Chiu however explained that the nursing or caregiver records provided more insight into YT's medical status at the critical time because they were more detailed; I agree.

626. The following nursing notes are particularly relevant as regards his mental status on or before October 31, 2012:

(a) **October 25, 2012**: D8 points out that YT had difficulty adding up dice numbers when playing mah-jong;

(b) **October 26, 2012**: the Trustees point out that YT was capable of making a clever pun based on the name of a character in the DVD he was watching;

(c) **October 31, 2012**: referred to a 13.33 entry, Dr Chiu agreed that this was not a good mah-jong day. Referred to the records for the night of October 30-31 which suggested YT had a poor sleeping night, she responded that his sleep had generally been fragmented for the past few years. As for the period of time immediately before, during and shortly after the signing process, the following is recorded. At 08.44, YT sat down and was given two sets of papers by a "company manager" which he signed with "*staff's reminder*". The medical

team (which included Dr C. Wang) remained and he was fitted with an oxygen mask below his chin. At 08.50 the oxygen level was lowered, at 09.03 a nasogastric tube was used and at 09.16 he was led to the bathroom. Although the President joked with members of the care team at 10.15, he did not later in the morning interact with family visitors. Professor Chiu attributed this non-responsiveness to apathy and accepted that apathy is a symptom of dementia.

627. These notes are not, by themselves, particularly illuminating as to YT's mental status when the POA was executed. I accept the evidence of Professor Chiu, who reviewed all the records, that poor sleep was not unusual at that time. I note that he was able to joke with carers less than 2 hours after the signing process, but was apathetic with family visitors and poor at mah-jong later on in the day. There is on the face of the record no direct evidence of disorientation or confusion on his part at any material time, but general support for the conclusion that he was not in 'fine form' for most of the day. Bearing in mind what is common ground about his general cognitive state, these records potentially support a finding that, absent a very clear and careful explanation of the transaction, YT more likely than not lacked the requisite understanding to grant the powers purportedly conferred assuming that he had never contemplated conferring such authority before. Based on the findings I have already reached to the effect that this was not a new decision, the position on the nursing and medical records is inconclusive as to YT's mental state at the time of execution and the evidence of the 'eyewitnesses' must be reviewed.

628. Mr Roger Yang was the then comparatively junior FPG employee tasked with both preparing the POA, with legal advice, and also with ensuring that it was executed by YT on October 31, 2012. He was cross-examined about these events on Day 51 and continued his by then familiar pattern of giving evidence in a very straightforward manner. I readily accepted, for instance, his explanation about the conflict between his written evidence and Attorney Chang's evidence about where the lawyer went after the signing at the Hospital: he misremembered when preparing that part of his Witness Statement and her version was correct. He also admitted that he had never met YT before and knew nothing about his health status. He attended the Hospital with Attorney Yeh and Attorney Chang and they had an initial interaction with Dr C. Wang[119]:

> "*Q. You're aware that Dr [C.] Wang's evidence about YT is that he commented on YT's physical condition and not his mental condition; that's correct, isn't it?*
>
> *A. No, I remember that back then when we entered the room, Attorney Yeh saw Dr [C.] Wang. Attorney Yeh said that he was Dr [C.] Wang's patient.*

[119] Transcript Day 51, page 104 line 9-page 105 line 10.

So we just entered and Attorney Yeh first greeted each other and then I greeted Dr [C.] Wang and then introduced Attorney Chang to him. I did not know what his specialty was. I only heard from Attorney Yeh that Attorney Yeh was one of Dr [C.] Wang's patients, so that was it. And Attorney Yeh asked about the status of YT that day. I remember that Dr [C.] Wang said that he was in good spirit.

Q. Well, Mr Yang, I say to you that actually what Dr [C.] Wang said was that he was in good physical condition, which is all that Dr [C.] Wang as a cardiologist would be in a position to express a view on. That's what happened, isn't it?

A. I do not know, because I do not have a medical background. Based on what I observe on site and based on my memory, Dr [C.] Wang said he had good spirit. He was in good spirit.

Q. I see, that he was in good spirits. So he didn't say that YT Wang was of a clear mind and had sufficient capacity, did he?

A. He did not mention this. In my impression, he did not mention this."

629. When Mr Yang shortly thereafter was referred to his Witness Statement, the following modification to his evidence was given:

"*Q. I am reading from your witness statement. I think you've got it there in front of you, haven't you? Paragraph 50 in the Chinese version, ... In the last sentence of that, you say: 'I do not recall the details of what was discussed but I recall that Dr [C.] Wang assured them that YT Wang was of a clear mind and had sufficient capacity.' Now, you have just accepted that that is not what he said. He only said he was in good spirits. So what is said in your witness statement is not correct, is it?*

A. *No, 'in good spirit' meaning that had a very good mental status, so I did not make any mistakes there. So usually, when we say --... -- when we say one is in a good spirit or have a good spirit, it mean both physically and mentally were well. So my statement was not wrong.*" [Emphasis added]

630. This evidence requires careful evaluation because it is potentially strongly supportive of the Trustees' case on capacity. Mr Yang's Witness Statement was prepared years after the events he describes in it. There is an inherent inconsistency between his deposing that he

cannot recall the details of what was discussed and his purported ability to recall that Dr C. Wang "*assured them that YT Wang was of a clear mind and had sufficient capacity*". That is an odd detail to recall when by Mr Yang's account he had no briefing about YT's capacity being in issue. It is also difficult to see why Dr C. Wang, a cardiologist, would have volunteered an opinion about capacity when none was even sought. It is impossible to avoid the strong suspicion that the witness' memory was 'massaged' during the proofing process. This suspicion is in fact confirmed by the way in which the consummately honest Roger Yang acknowledged that the Chinese phrase which he recalls Dr C. Wang using does not necessarily refer to mental state at all. It "usually" does. So preparing a Witness Statement 8 years after a brief, albeit very significant, encounter with Dr C. Wang, he remembers the doctor using a phrase which conveniently can (but does not necessarily) support the Trustees' case on capacity.

631. The best available evidence of the execution process is Roger Yang's '31/10 Summary of Execution of YT's POA', which was prepared a few days later. It makes no mention of the supposed statement by Dr C. Wang about YT's mental state, which casts serious doubt on the proposition that any such statement was made. It records:

> "…
>
> *2. At around 9.00, after putting on an isolation gown and wearing a face mask, [the individuals] entered YT Wang's room and immediately handed the document to President [YT Wang], whilst attorney Chang who was beside him witnessed [it]. After the President [YT Wang] signed his name, [he] placed a fingerprint [on the document] with [his] right thumb. After this had been done, the nursing staff chatted casually with the President [YT Wang]. The nursing staff asked in Minnan dialect, 'The President [YT Wang], I have 'water' [meaning' am pretty), no?' The President [YT Wang] jokingly replied, 'you are the ugliest, you are the ugliest here'. <u>Attorney Chang believes that the President [YT Wang] was compos mentis, so [she] signed in the witness column</u> and stamped [it] with [her] attorney's seal.*
>
> *3. At approximately 9.05, Attorney Yeh, Attorney Chang, and Senior Specialist Yang left the President [YT Wang]'s room…*" [Emphasis added]

632. This document was made about a week after the event, although Mr Yang initially assumed (when preparing his Witness Statement) that it was made on the same day as the Hospital visit. It goes on, by way of footnote, to describe Dr C. Wang as being present throughout, but explicitly describes Attorney Chang as verifying that YT was "*compos mentis*". It seems inherently improbable that only a week after the event, Roger Yang would consider the mental status of YT to be significant enough to record what a lawyer

thought about it and omit to record what a medical doctor had said about it. It would also be surprising if an attorney asked to witness the signing of a power of attorney would not, on discovering that the donor was 90 years old and in hospital, make some elementary assessment of his mental status. However unscientific that lay assessment may have been in its own right, it is also impossible to believe that if YT was in an obviously confused state that a medical doctor of any specialty would have allowed what was manifestly a business encounter to proceed. In short, this evidence does not positively support the fact that YT had the requisite mental capacity; rather it confirms that there were no overt signs that he lacked the requisite capacity and that this position was confirmed by the lawyer/witness.

633. Needless to say Mr Yang was horrified at the suggestion that he would give false evidence about Attorney Chang being present at all and would implicate himself in procuring the forgery of YT's signature on the Power of Attorney. I accept his denials as truthful, unreservedly. Because D8's case, or his alternative case, was that Attorney Chang was not there, and Roger Yang's Summary of Execution was unhelpful to Tony Wang's case in this respect, the possibility that Attorney Chang's "*c*ompos mentis" determination was mistakenly attributed to Dr C. Wang 8 years later when Witness Statements were being prepared, was not explored with the Trustees' witness.

634. It remains to consider the evidence of Attorney Chang and the question of what level of explanation was given. While I found her to be an entirely credible witness in general terms, she kept no record of her own as to what transpired and I found she was unrealistically confident about the accuracy of her recall, even in relation to matters which were not recorded in her Witness Statement:

> "*ASSISTANT JUSTICE KAWALEY:… Do you accept that to the extent that you have expanded upon your witness statement based on recollection of what happened eight years ago that you may be mistaken on some points of detail?... Yes. My question was: do you accept that it's possible that you may be mistaken about some of the details of precisely what happened? That was my question.*
>
> *A. In principle, the witness procedure, my explanation and my enquiry, my discussion, my conversation with YT Wang, that I would not mistake. I would not make any mistake on that. But if you ask me if he had an oxygen mask or what other people said that day, or if you ask me if I had a mask or a protection wear or which floor of the --which floor was his room on, that I cannot remember correctly. But I remember the important details, to summarise, but*

the other minor details I may not remember. But the most important details, I remember them very clearly."

635. Accepting that Attorney Chang would indeed have reason to recall snippets of a brief meeting with a famous businessman, even a meeting nearly 9 years before her oral evidence, I was not initially inclined to place much reliance on her assertion that she would "*remember…very clearly…the most important details*". But on reflection, despite being overconfident about her powers of recall, I am persuaded that her memory is reliable in general terms. She claimed to recall that Dr C. Wang had told her that YT was in "*good health condition*" and that she had read the Power of Attorney out to YT in full. Neither of these events was recorded by Roger Yang, although his estimate of the length of the meeting was shorter than the generally reliable care notes. This suggests that his record, prepared a week later, was probably not a complete one. Attorney Chang's evidence about reading out the Power of Attorney in full seemed to me to be based, in part at least, on what she would ordinarily have done. However, her following testimony was given with a striking degree of specificity and unrehearsed fluency:

> "*A. … What I would like to add is before I read the document, as I said, after talking to Dr [C.] Wang, Mr Yeh and I walked to Mr YT Wang and Mr Yeh first introduced himself to Mr YT Wang. He said that, "We -- I am your friend's friend". The friend they both knew is Mr Wong, another Mr Wong who is another businessman. So they talked about this Mr Wong Chiao-Ching(?), because Mr Wong Chiao-Ching used to be Mr YT Wang's golf buddies. So I remember they talk about that Mr Wong. And Mr Yeh also asked Mr Wang if he had his breakfast, did he sleep well? And when they had that conversation, YT Wang responded very naturally. And they -- and Mr Yeh explained that, "Ms Chang is going to be the witness to the signature". So then it's my turn to talk to YT Wang. So I introduced myself, "I am Attorney Chang. You are going to sign the power of attorney in favour of William Wong and I will serve as the witness. Would you like me to serve as the witness?" He said, "Yes, okay". I also asked YT Wang, "What's your name?" He said, "YT Wang". I also ask him, "Who is William Wong to you?" He said, "My son". So it is after hearing the conversation between Mr Yeh and Mr YT Wang and after identifying his – who he was and then I began to witness the signature. So that's the process I have to explain to you.*"

636. None of this account made mention of reading out the document or explaining it to YT in the elaborate way she described in a less convincing manner earlier in her evidence. It suggests she explained that the document was a POA in favour of YT's son and confirmed that he understood he was executing a POA in favour of his son. This evidence is entirely

consistent with the fact that she had been hired to witness a signature, not to provide legal advice to the signatory. It is true that in her Witness Statement, she deposes (in terms similar to Roger Yang's written evidence) that Dr C. Wang said that YT was "*compos mentis*". For reasons already recorded in relation Mr Yang's evidence above, I find the written evidence unreliable on this point although it makes no difference to the way in which I ultimately resolve the mental capacity issue.

637. I accept based on Attorney Chang's evidence (considered in light of Roger Yang's Summary of Execution and the care records) that the following occurred:

(a) the lawyer spoke to Dr C. Wang who confirmed in general terms that YT was in good enough condition to have the meeting (the lawyer did not know YT had dementia and so did not construe what the doctor said as addressing his mental condition);

(b) the lawyer observed casual interactions between Attorney Yeh and YT and spoke to him briefly herself to confirm he knew who he was and his son was. Despite not being aware of any capacity issues, this would have been a natural thing to do when asked to witness the signature of an elderly hospitalised man on a legally significant document. It was these checks which formed the basis of Roger Yang recording a week later that Attorney Chang (not Dr C. Wang) confirmed that YT was *compos mentis*;

(c) the lawyer briefly explained that the document she was there to witness him signing was a POA from YT in favour of his son William; and

(d) YT signified that he was willing to sign the document and have Attorney Chang witness his signature.

638. I am unable to find that the POA was more likely than not read out in full or in part because the evidence of Mr Yang and Attorney Chang (based on the way she dealt with this point) is too unreliable in this respect. But this is not fatal to the validity of the instrument. Had the POA been drafted in favour of an unrelated party so that it represented an entirely new decision requiring careful evaluation, I would find that the very limited explanation given was inadequate and that on the balance of probabilities YT lacked the requisite mental capacity to execute the document. Or, to put it another way, if it was not open to me to find that the POA was in substance merely confirmatory of a decision which YT had already made when his capacity was not subject to serious doubt, I would have concluded that YT lacked sufficient mental capacity to validly execute it.

639. However, because the POA was executed in favour of YT's eldest son, upon whom he had previously conferred similarly broad authority, and who had already effectively replaced his father within the family business, I find that it is more likely than not that YT had the requisite understanding required by Taiwanese law. I am satisfied that he knew he was executing a POA in favour of his son and more likely than not (as a sophisticated businessman) had a sufficient understanding of what a POA was. The totality of the evidence also suggests that YT appreciated long before October 31, 2012 that he was at a stage of his life at which he could no longer manage his own affairs and had already designated his eldest son as his successor. I also reach this conclusion in the context of the important ancillary findings relevant to the legislative purpose of Article 75 of the Civil Code that:

(a) although YT's cognitive status was compromised by mild-moderate dementia and general frailty from an array of serious physical ailments, he was not in any way taken advantage of;

(b) executing the POA in favour of William Wong for the purposes of disposing of the remaining Offshore Assets to a new purpose trust was entirely consistent with what YT would have wished to have done if his cognitive status was unimpaired.

Summary of findings on mental capacity and the POA

640. For the above reasons, D8's claim to set aside the transfer of YT's share of the assets transferred to the Ocean View Trust on the grounds that YT lacked the mental capacity to execute the POA in favour of his eldest son William Wong is dismissed.

The Forgery Claim

Preliminary

641. A forgery case based on expert evidence is most plausibly advanced in relation to documents the provenance of which is suspect in circumstances where there is no direct evidence that the purported signatory executed the document. In the present case there was a witnessed signing of the only material document said to be forged and the fact that YT signed the POA is supported by:

(a) the written and oral evidence of an independent lawyer who was specifically engaged to witness the signing of the document;

(b) the written and oral evidence of a credible FPG employee;

(c) the scrupulously detailed daily carers' records.

642. It remains to consider shortly how D8 put this part of his case and to explain why I have summarily rejected it.

The respective arguments in outline

643. It was asserted that YT did not sign either the Note of the Mandate dated July 26, 2012 or the POA purportedly executed on October 31, 2012. As far as the former is concerned, to the extent that the point was in fact pursued, I make no findings because I place no reliance on YT's approval of the document so whether he signed it or not makes no difference.

644. In D8's Closing Submissions, the following introductory arguments were set out on the expert evidence in relation to the forgery case:

> "960. *Tony adduced expert evidence from Ms Yun Chih Chang (Ms Chang) whilst the PTCs relied upon the expert evidence of Professor Chen (Professor Chen).*
>
> *961. Whereas Professor Chen is principally an academic, Ms Chang has worked for over 30 years for the Criminal Investigation Bureau at the Taiwanese Interior Ministry. As a result, she has been able to accumulate substantially more practical experience than Professor Chen: her oral evidence was that, in the course of her professional career as a handwriting expert, she had undertaken an expert analysis of over 7,000 documents.*
>
> *962. Ms Chang's approach was – from start to finish – far more rigorous than the PTCs' expert. As well as taking greater care to capture accurate and consistent images of the signature samples, she was careful to select only those samples that were closest in form to the disputed signatures to provide the focus of her analysis. Her oral evidence was also extremely impressive:*

she gave clear, concise and cogent answers to the questions that were asked of her.

963. *By contrast, Professor Chen appears to have accepted – without engaging in any independent analysis of his own – his 'instructions' that all 31 samples were authentic and, in the course of his analysis, he did not draw any significant distinction between them despite substantial variations in their date and form. Whilst referring to his "instructions" in his report (see above), those instructions, or indeed any instructions, have never been disclosed and the PTCs refused to provide them in response to repeated requests. Accordingly, there is no transparency as to what Professor Chen was told or asked to assume. Professor Chen's oral evidence was also unsatisfactory: unlike Ms Chang, he was consistently unwilling to provide straightforward answers to questions.*

964. *Even before considering the fundamental flaws in his thesis, it is immediately obvious from looking at the disputed signatures, that Professor Chen's conclusion – that he is "almost certain" that they were written by the same person as the same person as all 31 sample signatures – is manifestly absurd. The Court is invited to compare Signature A and Signature B to the samples as depicted in Professor Chen's first report at Appendix III {C5/5/45}.*

965. *Professor Chen's essential thesis was that he was able to identify eight 'matching' characteristics across both the sample signatures and the disputed signatures on the basis of which he professed to be "almost certain" that the disputed signatures were those of YT.*

966. *There were essentially three stages to the thesis: (i) eight "matching characteristics" within YT's signatures samples could properly be characterised as unusual/distinctive (if not "unique"); (ii) those "matching characteristics" appeared consistently across the sample signatures; and (iii) those "matching characteristics" appear in the disputed signatures.*

967. *In his oral evidence, Professor Chen stated that, in order for a feature to be consistent so as to satisfy the second stage (above), it should be found in a very high percentage of samples: "the repetition rate has to be high, for example it has to be over 90% or 95%. And this means that from the analysis of the standard*

*handwriting, this person actually has shown consistency in these writing features and only when we can determine that there is consistency in this writing feature then we can use it as a criteria" (the "**Consistency Threshold**").*

968. For the reasons set out below, each of those three stages (to a greater or lesser extent) is unsustainable."

645. In the Trustees' Closing Submissions, the following most pertinent points were made:

"*915. The Court heard from handwriting experts, who were asked to express their opinions on whether YT Wang's signatures on the July 2012 Note of the Oral Mandate and the Power of Attorney were genuine or were forgeries.*

*916. The expert called by the Trustees was Professor Chen. He is clearly an extremely well credentialled expert who, as well as being a distinguished academic in the field, had over 35 years' practical experience of forensic document examination and has examined close to 3,000 disputed documents over the course of his career, as he confirmed at **{Day62/140:18} - {Day62/141:6}**. Professor Chen concluded at Chen 1 paragraph 3 that "it is almost certain" that YT Wang signed the documents in dispute. That conclusion is of course supported by the overwhelming weight of the factual evidence.*

*917. Tony called Ms Chang. She is also well credentialled, although from the somewhat less objectively detached background of providing support to the police and prosecution services. One of Professor Chen's roles is to sit on a committee which receives referrals from the High Court or Supreme Court of Taiwan **{Day62/75:20} - {Day62/76:4}** where there is a disagreement concerning the assessments undertaken by the department for which Ms Chang formerly worked. Ms Chang concluded at Ms Chang 1 paragraphs 3.1 to 3.3 that 'on the balance of probabilities' YT Wang did not sign the disputed documents.*

918. In addition to the factual evidence, there are a number of reasons why Ms Chang's analysis is inadequate to support a finding of forgery and Professor Chen's approach is to be preferred.

919. It was common ground that, in order to analyse whether a disputed signature is a forgery, a sufficient number of genuine signatures are needed as

comparators. In the majority of handwriting investigations "... between 15 and 20 specimen signatures should prove adequate ...": see O. Hilton, "The Collection of Writing Standards in Criminal Investigation" at ***{I15/60.2/4}****. However, as Ms Chang agreed in cross-examination at* ***{Day62/26:7-12}****, in the case of an elderly, ill signatory at least 25 samples are usually needed to obtain a reasonably accurate conclusion: see O. Hilton, 'A Further Look at Writing Standards' (1965) ...*

920. In 2012 YT Wang was elderly and ill. In cross-examination Ms Chang agreed at ***{Day62/20:13-19}*** *that the following factors could potentially have affected YT Wang's handwriting and its variability: (i) his age; (ii) his hand tremors; (iii) his Alzheimer's disease; (iv) his medication; and (v) his physical illnesses, as identified by Professor Chiu in Chiu 1 paragraph 55. It was clear that Ms Chang was unaware of and had not considered a number of these factors, including the list of physical illnesses from which YT Wang was suffering and the medication he was taking.*

921. What is clear is that any reliable analysis of the disputed signatures depended upon using at least 25 sample signatures from YT Wang and ideally as many sample signatures from the period of YT Wang's decline as possible. The need for as wide a use of samples as possible was increased in this case by the various additional factors, peculiar to YT. Wang, which would potentially have affected his signature and its variability at the relevant times in 2012.

922. Whilst Professor Chen used all the 31 genuine samples available to him, Ms Chang used just 6 samples. That is a totally inadequate number. It is far below the 25 samples needed for a reasonably accurate analysis, and Ms Chang has cited no source which suggests that using just 6 samples in a case like this would produce accurate results. Moreover, no genuine signatures of YT Wang from 2012 were available to the experts. Ms Chang acknowledged at ***{Day62/41:8-12}*** *that she did not know in what respects YT Wang's signature deteriorated between September 2011 (i.e. the date of the last samples she used) and July or October 2012, which are the respective dates of the disputed documents. That makes it even less likely that Ms Chang's analysis based on a mere 6 samples is reliable*."

Findings: merits of the forgery claims

646. I find it impossible to believe that Roger Yang and Attorney Chang (enlisting support from YT's carers) would conspire together to perpetrate the forgery of YT's signature on the POA, proceeding further to commit blatant perjury through both written and oral evidence. In these circumstances, expert analysis of the signature compared with sample signatures from a different period of time initially seems forensically meaningless. Bearing in mind the age and general medical condition of YT, it is unsurprising that he might have struggled to sign his name in a clear way, or in the same way that he did years ago.

647. It was also difficult to make sense of the forgery claim because Mr Wilson QC was understandably compelled to spend more time cross-examining Attorney Chang about what happened if she was in attendance, although D8's primary case was that she was not there at all. As D8's far stronger mental incapacity case was advanced, the forgery case appeared to be forced into a somewhat embarrassed retreat. It seemed logically inconsistent that it was being suggested that the lawyer was a complete liar (about being at the Hospital at all) and yet it was also being simultaneously implied that her evidence on the other hand could be relied upon to support the case of mental incapacity. The forgery case, like the briefing recording in the original television version of 'Mission Impossible' seemed to self-destruct, albeit in far longer than 5 seconds.

648. Ms Chang, whose expertise in general terms was impressive, was advanced by Tony Wang's counsel as being the more practically experienced of the two experts. However in the event she was essentially asked to carry out an academic exercise. She advanced a hypothesis that YT did not sign the documents based on various discrepancies, but very properly conceded that her analysis was based on comparisons of the disputed signature with a small fraction of the recommended number of sample signatures. The best case which could be advanced was on its face a weak one, which is unsurprising since credible witnesses swore that they saw YT sign the POA. Professor Chen's analysis was clearly more reliable in any event.

649. In the face of eyewitness testimony (which was *prima facie* credible) supporting the Trustees' case that YT did sign the POA, explosively compelling expert evidence to contrary effect was required. D8's expert evidence, far from being explosive, was an extremely damp squib. Ms Chang, despite her attractively presented analysis, was understandably unable to successfully make a silk purse out of a sow's ear. The forgery claims are accordingly dismissed.

PROVISIONAL FINDINGS: TONY WANG'S MOTIVES FOR BRINGING HIS CLAIMS IN THE PRESENT PROCEEDINGS

650. An important question which was raised in the present proceedings but which does not require a formal legal determination is this: why did Tony Wang somewhat belatedly join the present proceedings? His oral evidence spanned Days 17-22. It seemed obvious that although he had been encouraged by his older cousin Winston to support his claim, he had his own simmering grievance against the prevailing wider family status quo. It was suggested in cross-examination that he was purely motivated by money. Mr Tony Wang did not strongly dispute on the first day of his oral evidence that combining receipts from the Share Equalization plan, estate distributions and other payments received by his mother from YT in 2010-2011, the Second Family had possibly received a total sum in the region US$1 billion altogether[120]. On the final day of his cross-examination by Mr Howard QC, the following exchanges took place[121]:

> "*Q. Let's move on to deal with your motivation in these proceedings. Now, in this litigation, Mr Wang, you claim that the assets in the Bermuda trusts should be treated as falling into your father's estate; correct?*
>
> *A. Yes.*
>
> *Q. You also claim that the 2016 settlement agreement should not apply and your mother should be treated as a legitimate spouse entitled to half of the spousal share, that is to say 25% tax-free; correct?*
>
> *A. Correct.*
>
> *Q. Yes. Now, if you succeeded in these arguments, assuming that the assets in the trusts are worth, let's say, $15 billion, although I think they're worth substantially more than that, assume they were worth $15 billion, how much money does the second family hope to gain from this litigation? Can you tell us?*
>
> *A. Everybody accord -- execute my father's intentions according to what is written in my father's will and we can calculate the numbers according to what was written in the will.*
>
> *Q. Right. Well, we can do the calculations. On the basis that you're putting*

[120] Transcript Day 17 page 25 line 24-page 26 line 25
[121] Transcript Day 21 page 106 line 18-page 108 line 1,

forward, do you agree with me that on the basis of the assets being worth at least $15 billion, you, your sisters and mother collectively would hope to get in excess of $3 billion out of this litigation; correct?

A. Correct.

Q. Yes. So the effect of this if you were successful is that the second family would become even more fabulously wealthy than it is already and with the added advantage, as you see it, that you would be able to wield power and influence over Formosa Plastics Group from which you presently feel excluded; correct?

A. I'm only following my father's intentions."

651. The mantra that he was merely seeking to fulfil his father's wishes was unconvincing. I was not convinced that it was all about money either, but Mr Tony Wang (perhaps unsurprisingly) was not willing to be forthcoming about any other motives at the end of his oral evidence[122]:

"*ASSISTANT JUSTICE KAWALEY: Yes, Mr Wang, I don't want you to go into the details of your specific grievances. I was really asking you whether you had anything to share about what might be called the root cause of the division between your family and your father's First Family.*

Do you agree that, in a sense, the reason why you're here is because you, your family and your father's First Family have not been able to establish a harmonious relationship?

A. The reason why I participate in this procedure, the main purpose is to fulfil my father's wish, his will. I want my father's will to be realised…"

652. Some litigants are more forthright than others about the grievances which underpin their legal claims, especially in family disputes. Where money is involved, it is usually fair to infer that that is a significant motivating factor as it would be for most similarly positioned ordinary mortals; the Mother Theresas of this world are few and far between. However, in a cultural context where family harmony is highly valued and family discord frowned upon and there is no obviously inequitable testamentary dispensation to quarrel over, it is also reasonable to infer that some non-financial issues are also at play. Tony Wang did admit,

[122] Transcript Day 22 page 21 line 17-page 22 line 4.

conceding that he was much younger than William and Wilfred, that he felt marginalised from FPG. To my mind the most obvious sense of grievance nursed by Tony Wang, his mother and his sisters stems from an apparent sense that, despite YT's vigorous efforts to ensure that his Second Family was treated equally and fairly, they experienced a nagging sense of disrespect. More personally, he was willing to admit that he felt marginalised from involvement on the management of the FPG Group although he fairly accepted that age differences might play a factor.

653. The best evidence of this tension between YT's two families is the pendency of a dispute, not to be resolved in these proceedings, as to whether or not the Second Family's matriarch Madam Chou enjoys the status of wife. It is in any event common ground that YT was concerned, after YC's death, to avoid any conflict between his two Families. Wilfred Wang, under cross-examination by Mr Wilson QC, somewhat reluctantly (and very honestly) admitted that he had found it difficult to accept his father's Second Family. He appeared to have the wisdom to be able to simultaneously acknowledge latent hostility towards the Second Family while also appreciating that this attitude was in some sense 'wrong'. When shown that his father regarded Madam Chou in a display of shining honour, Wilfred Wang was willing to recant from his longstanding stance of disapproval[123]:

> "*Q. -- but you didn't see it in 2009. We see in there that what your father says in this document is:*
>
> > *'... out of my own free will, based on the principles of openness, fairness, and impartiality, have the responsibility to make a specific instruction about matters after my passing:*
> >
> > *'I firmly consider Ms Chou, Yu-Mei as my wife. She has been taking care of me very attentively for the past 50-plus years, fulfilling her duty as a wife. Therefore, Ms Chou, Yu-Mei, in the capacity and standards of my wife, can inherit all my movable properties, real estates, securities, and all other property.'*
>
> *So you said that if your father said they're married, you'd accept it.*
>
> *A. Yes.*

[123] Transcript Day 35, page 151 lines 1-20.

Q. You can see that in this document, in 2009, that's precisely what he did say. So will you now accept it and apologise to Madam Chou?

A. I would, yes. I will apologise."

654. If anything which has transpired during the present proceedings would have made YT smile with pride and joy, it would be those last-quoted six words from his son Wilfred. Not only do they offer hope of some future reconciliation; they also suggest that Tony Wang's claims are not simply reflective of a lust for wealth and status as was suggested. If only in a subliminal sense, I sensed that he was also fighting for his mother's honour and, if so, that was an important non-legal battle that deserved to be won. It was with this perception in mind that I made the following remarks at the end of Madam Chou's evidence[124]:

"*Yes, Madam Chou, thank you for your assistance. I just wanted to observe that it seems to me that you have made an important contribution to the success of your husband, because when you met him, you said that he was a nobody and 50 years later he was a very important person. So I think you are deserving of respect and gratitude from everybody.*"

THE TRUSTEES' POWERS OF APPOINTMENT COUNTERCLAIM

The Trustees' case

655. The relevant evidence is summarised in the Trustees' Closing Submissions as follows:

"*1669. Mr Hung's shareholding in various companies which were set up in the 1990s was subject to limited powers to appointment in favour of Susan. Specifically:*

1669.1 Susan held powers of appointment over his shareholding in all of the companies now held within the Wang Family Trust, namely, Ackerman, Pacific Light & Power, Power Unlimited, Energy Associates, Rimwood, Macro System, Consolidated Power and Grid Investors,

1669.2 Susan held powers of appointment over his shareholding in the two companies now held within the Ocean View Trust, namely, Chindwell BVI and Vanson BVI.

[124] Transcript Day 25, page 10 lines 11-17.

1670. Each of the powers of appointment is in materially similar form. That for Ackerman reads:

> *'BY THIS DEED, I, Hung Wen-hsiung of [etc] declare that the one hundred (100) shares (the "Shares") in the capital of Ackerman Bothers Inc., a British Virgin Islands company ("Company"), that are either registered in my name on the register of shares of Company or with respect to which a declaration of trust has been executed in favor of me by the person who is such registered holder, are held by me and my estate subject to a limited power of appointment.*
>
> *I or my estate (as the case may be) shall distribute the Shares (and all dividends, rights, and interest accruing to or to accrue upon the same or any of them) to such one or more persons (other than Susan Wang of [etc] ("Powerholder"), her creditors, her estate, the creditors of her estate, or any entity (corporate or otherwise) in which Powerholder (or her estate) has any interest) and on such terms or conditions, either outright or in trust, as Powerholder or her Estate shall appoint without the approval or consent of any other party by a written instrument filed with me specifically referring to and exercising this limited power of appointment.*
>
> *IN WITNESS WHEREOF [etc]'*

1671. Appended to each of the powers of appointment is a document signed by Mr Hung, but not dated by him, acknowledging receipt of the exercise by Susan of the power of appointment conferred upon her. That for Ackerman reads as follows:

> *'To: [Mr Hung], as grantor of a declaration of trust dated October 28, 1994*
>
> *From: Susan Wang*
>
> *Date:*
>
> *Re: Power of appointment*
>
> *I, Susan Wang of 9 Peach Tree Hill Road, Livingston, New Jersey 07039, hold a limited power of appointment under that certain Declaration of Trust dated October 28, 1994 and execute by [Mr Hung] (a copy of which is attached). Such grant relates to the shares of Ackerman*

Brothers Inc., a British Virgin Island company (the "Shares"), and certain dividends, rights, and interest relating to the Shares.

I hereby exercise such limited power of appointment and appoint the Shares (and all dividends, rights, and interest accruing to or to accrue upon the same or any of them to _____

Susan Wang

Date:

Receipt acknowledged:

[Mr Hung's signature]

Date:'

1672. *Susan's first witness statement acknowledges that she has confirmed to Grand View PTC and Ocean View PTC that if the Court were to find the transfers of assets to either of them to be ineffective for any reason, or if the Wang Family Trust or the Ocean View Trust are found to be invalid for any reason, she would exercise her powers of appointment to resettle the shares held by those companies upon trusts in the same or substantially the same terms as the Wang Family Trust. She further states that, insofar as she is able to do so pursuant to the Powers of Appointment, she intends to fulfil her father's and her uncle's wishes to the best of her ability and honour their memory: Susan 1 paragraphs 6 and 7.*

1673. *In the event that the Wang Family Trust or the Ocean View Trust fails or the transfers of assets into those trusts are void or should be set aside, the assets held by those trusts would revert to Mr Hung's estate. Grand View PTC and Ocean View PTC have therefore counterclaimed for declarations that, in that eventuality, the shares are (or should be ordered to be) held subject to Susan's powers of appointment, and that Susan may properly exercise the powers in the manner she has stated she intends to do: see Trustees' Defence and Counterclaim to Winston's Statement of Claim at paragraphs 143A, 241A, 260-266; Trustees' Defence and Counterclaim to Tony's Defence and Counterclaim at paragraphs 45, 136A and 175-181.*"

656. The legal reliance placed on the powers of appointment is set out in the following principal terms:

"*1676 … As submitted below, the powers are on their true construction not limited to the replacement of Mr Hung as a trustee but can be exercised to resettle the shares. If the Court holds that the transfers of the shares to the Trustees were ineffective or that the trusts on which the Trustees hold the shares fail, it is to be expected that Susan will wish to consider her position in the light of the Court's ruling. The Court should nevertheless make the declaration counterclaimed, because there would be no legal impediment to Susan exercising her powers in the manner referred to in her first witness statement.*

1677. It is common ground that the construction and effect of Susan's powers of appointment is governed by the law of the BVI, being the law of the jurisdiction in which the property subject to the powers, shares in BVI companies, is situated: see Winston Reply at paragraph 12a.

1678. The terms of the powers present no conceptual difficulty. They are exercisable in favour of anyone in the world except Susan, her creditors, her estate, the creditors of her estate, or any entity in which Susan or her estate has any interest. They are thus intermediate powers, as to which see generally Lewin on Trusts, 20th ed. Chapter 33 section 4.

1679. It is clear that intermediate powers are valid: Re Manisty's Settlement [1974] Ch 17, approved by the Privy Council in Schmidt v Rosewood [2003] 2 AC 709 at [35], [42] and by the Court of Appeal for Bermuda in Grand View Private Trust Company Ltd v Wong No 5A of 2019, at [173], [174], [211]. In the latter case, Clarke P at [174] said:

'A form of intermediate power of this kind is thus a well-established and judicially endorsed kind of power'."

657. The Plaintiff's summary of the response to the Counterclaim was set out in the Closing Submissions as follows:

"*853. Dr Wong contends that the counterclaim must fail for the following reasons:*

853.1 The starting point is that (irrespective of what the Powers say) Mr Hung could only deal with the interest which he held in the BVI

Holding Companies (a valueless trusteeship interest) and he could not grant to Susan Wang something he did not have, namely a right to deal with the beneficial interest in any BVI Holding Companies (nemo dat quod non habet). The true construction of the Powers whatever they purport to say cannot alter that basic fact.

853.2 To grant powers affecting YC Wang's and YT Wang's beneficial interests, Mr Hung needed YC Wang's and YT Wang's authority, as it was YC and YT Wang who owned the beneficial interest, not Mr Hung. There is no evidence before the court that YC Wang and YT Wang, either in writing or orally, authorised Mr Hung to hold their beneficial interests in the 1994-8 BVI Holding Companies on new terms (i.e., for such persons as Susan Wang may appoint (save for herself and her associates)).

853.4 Accordingly Susan Wang did not have authority (whether under the Powers or however) to deal with YC and YT Wang's beneficial interests in any BVI Holding Companies in their lifetimes, and she still does not have that authority now that they are dead (no authority having been given by their duly appointed personal representatives).

853.5 Further and in any event:

(a) on their true construction the Powers cannot be used to deal with YC Wang's and YT Wang's (or their estates') beneficial interests in the assets, and

(b) Susan Wang released the Powers when Mr Hung purported to transfer his interest in the BVI Holding Companies to Grand View PTC and Ocean View PTC to hold on the terms of the [Wang Family Trust] and [the Ocean View Trust], so they no longer exist to be exercised."

658. The merits of the Counterclaim turn on the construction of the powers of appointment in light of the evidence about the factual matrix in which they came to be made. Because of the findings I have made above and below on all of the substantive claims against the First Four Bermuda Purpose Trusts, my consideration of the Trustees' Counterclaim is limited to its application to the claims against the Ocean View Trust PTC.

Factual findings in relation to the Powers of Appointment

659. Susan Wang's evidence under cross-examination was essentially consistent with her written evidence and the evidence of other witnesses as to the central purpose of the powers of appointment[125]:

> "*Q. So when we see, as we do if we look at {G3/11/1}, that you were given by Mr Hung the power to appoint the BVI shares to someone, anyone other than yourself or someone associated with you, that is not a power you would have exercised unless your father and uncle had told you to; that's right, isn't it?*
>
> *A. Yes.*
>
> *Q. The purpose of these powers, and this is something you've told us, was to deal with a situation such as if Mr Hung became too ill to continue as the owner of the shares and it became necessary to replace him. That was the purpose of them, wasn't it?*
>
> *A. It – the purpose was if something happened to Mr Hung and we need to transfer it to someone else, that gave me the power to do so.*
>
> *Q. So what it's doing is giving you the power to replace Mr Hung, if necessary.*
>
> *A. That's correct.*
>
> *Q. So I'm right in thinking that these powers were simply an insurance policy against something happening to Mr Hung. They enabled you to put someone in his place if that became necessary.*
>
> *A. Yes.*
>
> *Q. There was a concern about that, wasn't there, because it had happened in the past? If we look at {B1/2/17}, that's Mr Toshio Chou's evidence, paragraph 56. Do you see he says there:*
> *'I recall that I was not the only person used as a nominee to purchase land for YC's various initiatives. Indeed, the use of other*

[125] Transcript Day 25, page 111 line 21-page 115 line 2.

people as nominees caused YC problems at times. I can remember that an employee passed away with land located in the Linkou district that was ostensibly owned by him. His widow claimed that the land belonged to her late husband rather than YC.'

So it was a problem that had happened in the past. Indeed, it was a fear that Mr Jao identified to Dr Wong. If we go back to the 10 March meeting transcript at {G36/39.3/9}, you see that Mr Jao says in this meeting at line 12:

'Later ...'

He's talking about Mr Chin and Mr Chen, which you can see from lines 6 to 10:

Later, we feared that if they somehow passed away, there would be problems with the assets, so at that time, in the 1980s, two companies were set up in Liberia, namely Chindwell [Liberia] and Vanson [Liberia], with Hung being the ultimate beneficiary.'

Then at line 19, he goes on to say:

The government can't tell but it was us who set up the two companies, Chindwell [Liberia] and Vanson [Liberia]. The two companies were set up to facilitate the transfer of their shares, so the shares came to be held by the companies.'

So the death of the person who was named as the owner had been a problem in the past and these powers that you were given were set up to ensure that there was no problem in relation to these BVI companies. Have I understood the position correctly?

A. *I was not aware of the incident that Toshio mentioned, so I cannot comment on it, but for these BVI companies, this -- it was set up so that if something happened to Mr Hung, we can find someone to replace him.*

Q. *If there had needed to be a replacement of Mr Hung, that replacement would have occupied the same position as Mr Hung had occupied, wouldn't he, or it?*

A. *Yes.*

Q. *So that substitute person would not have owned the shares in the BVI company outright. They would not have belonged economically to that replacement person, would they?*

A. *Can you repeat your question?*

Q. Yes. The value of the shares would not have belonged to that replacement person, would they?

A. As -- as we can see, we believed that Mr -- Mr Hung was the trustee, so the person replacing him would also be a trustee.

Q. Right. So I think you're agreeing with me. What you're describing as a trustee, and I'll come back to that, would not have the benefit of the economic value of the assets he or she held; that's correct, isn't it?

A. That's correct."

660. This evidence as to the original rationale for the powers of appointment was given in a clear and confident manner and advances an entirely credible commercial rationale for the documents. However, when Mrs Talbot Rice QC moved on to the more tactically sensitive terrain of how the powers could now be exercised by Ms Wang, the witness adopted a distinctly more cautious approach. Ms Wang eventually agreed with the following proposition[126]:

"*Q … All I'm saying is that the powers that you were given did not put you in the place of the Founders as having an ability to direct Mr Hung without regard to the Founders at all as to what to do with the shares; that's right, isn't it?*

A. That's right."

661. This was a very forthright and significant answer. It could not credibly be suggested that the powers of appointment were consciously intended to require Ms Wang to approve in writing any relevant disposition made by Mr Hung with the Founders' authority. Had this been the case, her written authority would have been obtained prior to the transfers of shares in relation to which the powers of appointment had been granted, to the Grand View PTC in 2001 and the Ocean View PTC in 2013.

662. Shortly thereafter, Susan Wang astutely avoided engaging with what she properly characterised as a legal question about her ability to exercise the powers after the assets had been transferred and Mr Hung had died:

[126] Transcript Day 25, page 116 lines 11-16.

"Q … Once Mr Hung's role had finished because these shares had been transferred into trusts, which we'll come to discuss a little bit later, the Wang Family Trust and others, your powers to replace Mr Hung must have come to an end at that point. Do you agree?

A. If Mr Hung is no longer the trustee and if the trust is the trustee, then I don't know, I guess we have to look for a legal opinion as to what this has entailed."

663. The need to parry the question also demonstrates, however, that Ms Wang was unable to positively assert that she believed or understood that the powers were designed to serve any commercial and/or legal function broader than replacing Mr Hung as nominee or sub-nominee shareholder and/or preventing the shares from being treated as beneficially owned by him upon his death, if he died without first disposing of them. In summary, I find:

(a) the central commercial purpose of the powers of appointment was to (1) enable Mr Hung to be replaced as a nominee shareholder on behalf of the Founders and (2) if he died without being replaced or having otherwise disposed of the shares, to avoid the risk that beneficiaries of his estate might assert that he was the legal and beneficial owner of the shares;

(b) there is no evidence that anyone concerned with the Founders' affairs, including the Founders themselves or Mr Hung, believed or consciously understood that the powers of appointment had any broader commercial and/or legal purpose or effect;

(c) Ms Susan Wang did not believe or understand that the powers displaced the Founders' right to give directions in relation to dealings with the shares.

Legal findings: construction of the Powers of Appointment

664. The principles of construction relating to trust powers are authoritatively set out in *Grand View Private Trust* Company *Ltd.-v- Wong Wen-Young (a.k.a. Winston Wong) et al* [2020] CA (Bda) 6 Civ (20 April 2020). Sir Christopher Clarke P. opined as follows:

"*93. As to the scope of the power, the principles of construction which apply to a document such as a declaration of trust are the same as those which apply*

to a contract: Marley v Rawlings [2015] A.C. 129, [17] - [23]; Richards v Wood & Wood [2014] EWCA Civ 327. The most important aspect of the process of construction is to consider the meaning of the words used; per Lord Neuberger at [17] and [18] of Arnold v Britton [2015] A.C. 1619…

94. In contract for such a term to be implied it must be either necessary to give the contract commercial or practical coherence, or so obvious that it goes without saying: see Marks and Spencer plc v BNP Paribas Service Trust Co (Jersey) Ltd [2016] AC 742 per Lord Neuberger (with whom the majority of the UK Supreme Court agreed) at paragraphs 17 to 21. This approach should be adopted in relation to the implication of terms in unilateral instruments such as trust deeds…

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…" [Emphasis added]

665. The passages from Lord Neuberger's judgment in *Arnold –v-Britton* [2015] A.C. 1619 quoted by the Court of Appeal for Bermuda President read as follows:

"*17 First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in Chartbrook [2009] AC 1101, paras 16—26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.*

18 Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way,

the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve."

666. The rules of construction in my judgment require greater emphasis on the express language of a trust instrument created by or on behalf of the economic owner of the trust assets, particularly in relation to discretionary trust instruments, than in other legal contexts. In my judgment the construction of the scope of a power conferred by a nominee shareholder requires, relative to a discretionary trust deed, greater weight to be given to the commercial context and function of the relevant instrument. As the Plaintiff's counsel rightly submitted, account must be taken of the fact that Mr Hung was not the economic owner of the shares and there is no evidence that the Founders empowered him to grant a power of appointment in relation to the resettlement of their beneficial interest in the shares. More fundamentally still, and in any event, it is a necessary part of construing any legal instrument to take into account the core characteristics of the parties involved in making it or intended to exercise powers under it. In *Arnold-v-Britton*, Lord Neuberger went on to opine as follows:

"*19 The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. Judicial observations such as those of Lord Reid in Wickman Machine Tools Sales Ltd v L Schuler AG [1974] AC 235, 251 and Lord Diplock in Antaios Cia Naviera SA v Salen Rederierna AB (The Antaios) [1985] AC 191, 201, quoted by Lord Carnwath JSC at para 110, have to be read and applied bearing that important point in mind.*

20 Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed,

even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party."

667. Construing legal instruments, therefore, requires considerable weight to be given to the language used but that does not mean that one ignores common sense and plainly obvious background context. As Lord Hodge, concurring with Lord Neuberger in *Arnold-v-Britton*, observed:

"*76 This conclusion is not a matter of reaching a clear view on the natural meaning of the words and then seeing if there are circumstances which displace that meaning. I accept Lord Clarke of Stone-cum-Ebony JSCs formulation of the unitary process of construction, in Rainy Sky SAv Kookmin Bank [2011] 1 WLR 2900, para 21:*

> *'the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.*

77 This unitary exercise involves an iterative process by which each of the rival meanings is checked against the provisions of the contract and its commercial consequences are investigated: In re Sigma Finance Corpn [2010] 1 All ER 571, para 12, per Lord Mance JSC. But there must be a basis in the words used and the factual matrix for identifying a rival meaning. The role of the construct, the reasonable person, is to ascertain objectively, and with the benefit of the relevant background knowledge, the meaning of the words which the parties used." [Emphasis added]

668. The evidence referred to in relation to this point in the present case focussed on "*the relevant background knowledge*" which the "*parties*" (Mr Hung, Ms Susan Wang and the Founders) would have had at the time the powers of appointment were granted. The preponderance of the evidence shows that the terms of the Hung Arrangement required the specific authority of the Founders for any disposition of their beneficial interest in the relevant shares. The absence of written evidence of such a direction because of the application of the Statute of Frauds is a moot point. The powers of appointment were granted on the instructions of the Founders and Susan Wang would never have exercised the limited powers without her father's consent. Accordingly the limited interest that Mr Hung himself held in the shares when he conferred the powers of appointment on Ms Susan Wang and the wishes of the economic owners when they conferred that interest on their nominee must be contextual matters which fall to be taken into account when construing the relevant powers. Mr Hung declared that:

> "[the Shares] *that are either registered in my name on the register of shares of Company or with respect to which a declaration of trust has been executed in favor of me by the person who is such registered holder, are held by me and my estate subject to a limited power of appointment.*
>
> *I or my estate (as the case may be) shall distribute the Shares (and all dividends, rights, and interest accruing to or to accrue upon the same or any of them) to such one or more persons (other than Susan Wang of [etc] ('Powerholder'), her creditors, her estate, the creditors of her estate, or any entity (corporate or otherwise) in which Powerholder (or her estate) has any interest) and on such terms or conditions, either outright or in trust, as Powerholder or her Estate shall appoint without the approval or consent of any other party by a written instrument filed with me specifically referring to and exercising this limited power of appointment.*"

669. The powers of appointment critically provide as follows:

(a) Mr Hung holds the shares which are either in his name or subject to a declaration of trust in his favour subject to a limited power of appointment;

(b) Ms Susan Wang is given a limited power of appointment in respect of "*the Shares (and all dividends, rights, and interest accruing to or to accrue upon the same or any of them)*";

(c) the limited power of appointment may be exercised in favour of "*such one or more persons (other than Susan Wang of [etc] ('Powerholder'), her creditors, her estate, the creditors of her estate, or any entity (corporate or*

otherwise) in which Powerholder (or her estate) has any interest) and on such terms or conditions, either outright or in trust, as Powerholder or her Estate shall appoint…"

670. The Trustees' construction of the Powers is to the following effect. The express terms confer a power on Ms Wang to appoint the legal and beneficial interest in the shares to anyone other than herself. Accordingly, they empowered her (since 1998 in the case of Chindwell BVI and Vanson BVI) to compel Mr Hung to transfer the legal interests of Mr Hung and the beneficial interests of the Founders to whomsoever she chose other than for her own benefit. Accordingly, if any purported transfer by Mr Hung is ineffective, the shares vest in his estate and the Hung Estate is required to recognise her right to exercise the powers of appointment which she will exercise by re-settling the shares on equivalent trusts to the Ocean View Trust. In my judgment if the relevant words are given their decontextualized literal meaning such an interpretation is potentially available, despite the fact that the opening words of the Powers do not expressly describe Mr Hung as being legal and beneficial owner of the shares. However, the governing rules of construction do not justify assigning a legal meaning to such instruments in an entirely decontextualized manner. As the Plaintiff's counsel argued in their Closing Submissions:

"*853.1 The starting point is that (irrespective of what the Powers say) Mr Hung could only deal with the interest which <u>he</u> held in the BVI Holding Companies (a valueless trusteeship interest) and he could not grant to Susan Wang something he did not have, namely a right to deal with the beneficial interest in any BVI Holding Companies (nemo dat quod non habet). The true construction of the Powers whatever they purport to say cannot alter that basic fact.*

853.2 To grant powers affecting YC Wang's and YT Wang's beneficial interests, Mr Hung needed YC Wang's and YT Wang's authority, as it was YC and YT Wang who owned the beneficial interest, not Mr Hung. There is no evidence before the court that YC Wang and YT Wang, either in writing or orally, authorised Mr Hung to hold their beneficial interests in the 1994-8 BVI Holding Companies on new terms (i.e., for such persons as Susan Wang may appoint (save for herself and her associates)).

853.3 Accordingly Susan Wang did not have authority (whether under the Powers or however) to deal with YC and YT Wang's beneficial interests in any BVI Holding Companies in their lifetimes, and she still does not have that authority now that they are dead (no authority having been given by their duly appointed personal representatives).

853.4 Further and in any event:

(a) on their true construction the Powers cannot be used to deal with YC Wang's and YT Wang's (or their estates') beneficial interests in the assets, and

(b) Susan Wang released the Powers when Mr Hung purported to transfer his interest in the BVI Holding Companies to Grand View PTC and Ocean View PTC to hold on the terms of the [Wang Family Trust] and OVT, so they no longer exist to be exercised."

671. There is only really one point of construction to be decided. That is whether the powers of appointment in referring to "*the Shares*" and related rights in them which are then held either (a) in Mr Hung's name, or (b) subject to a declaration of trust in his favour, should be read either (1) as referring to the bare legal interest Mr Hung actually held, or (2) as including the beneficial interest which he did not. It makes no sense to construe the powers of appointment as purporting to give a power over property rights which the grantor had and which he well knew he did not have, especially when no mention is even expressly made of any beneficial ownership interest in the shares in the relevant instruments. If a leaseholder assigns their interests under a lease without spelling out what the scope of those interests is, one would surely construe the relevant instrument as referring to the leasehold interest which the assignor actually had as opposed to the freehold interest which he did not.

672. Where the critical words relate to the scope of a power conferred by a power of appointment, the nature of the interest possessed by the donor in the property to which the power of appointment relates will generally be critical to a meaningful apprehension of the scope of the power conferred. Ascertaining the primary meaning of words in such an instrument, without having to consider the implication of terms which are not expressed, entitles the constructor to have regard to contextual background to ascertain how the maker of the instrument expected the language used to be understood. What particular elements of the background context will be relevant will depend upon what parts of an instrument are being construed. The construction contended for by the Trustees in respect of powers of appointment granted by a nominee shareholder, reading the instruments as (on their face) empowering the nominee to dispose of the legal and beneficial interests in the shares:

(a) leads to wholly uncommercial results; and

(b) is completely at odds with the parties' understanding of the relevant instruments when they were created.

673. It is, in any event, legally incoherent to construe a power of appointment as conferring on the donee a power which the donor himself did not possess. If the contextual evidence showed that the purpose of the powers of appointment was not to deal with the death or incapacity of Mr Hung, but instead of the Founders, this might justify the construction contended for by the Trustees. On that basis, the context at the time when the instruments were made would have supplemented the bare words of the powers of appointment and revealed that their intended purpose was to allow the nominee to dispose of not just the limited interest he held but the beneficial interest of the ultimate beneficial owners as well. As the Trustees themselves argued in defending the Formalities claims, where a nominee is expressly authorised to dispose of both legal and beneficial ownership in shares, he can effectively dispose of both interests. That principle (which I accept when considering the final limb of the Formalities claims below) applies in a general sense, by analogy, here.

674. The Plaintiff's defence to the Trustees' Counterclaim accordingly succeeds and the Counterclaim is dismissed. The Deeds of Appointment sensibly construed do not have the effect of Ms Susan Wang being entitled to exercise the powers if the impugned transfers are set aside. I do not need to decide whether the powers were released or lapsed. The substance of my findings is that the scope of the powers was limited to nomineeship rights and that the beneficial interests enjoyed by the Founders under BVI law were never affected by the powers of appointment instruments executed by their nominee. On that basis even if the powers survived the deaths of the Founders and Mr Hung, which is difficult to conceive, the powers retained by Susan Wang could not be exercised in relation to the beneficial interests of the Founders, in particular YC.

THE LIMITATION DEFENCES

Preliminary

675. The limitation defences fall to be considered in relation to two categories of claim and essentially two systems of law. The mistake, undue influence, want of authority and formalities claims in respect of transfers made to the First Four Bermuda Purpose Trusts on the one hand and the claims in relation to the Ocean View Trust on the other hand, raise distinct issues. It is also necessary to consider the different consequences of applying Bermudian/BVI law on the one hand and Taiwanese law on the other hand to these various claims.

676. The Plaintiff commenced his claims on February 21, 2018. As far as D8 is concerned, there is a dispute (relevant only to the claims against the Vantura and Universal Link Trusts) as to when his proceedings should be deemed to have commenced, with the

Trustees contending for the date when he applied to amend the capacity in which he sued (having taken out letters of administration in BVI), namely March 11, 2021 rather when he initially joined the proceedings (March 9, 2020). I reject the Claimants' suggestion that a 15-year time limit applies under Taiwanese law, so this point is academic.

677. Where I have dismissed claims in respect of which limitation defences have been pleaded on factual grounds involving to a material extent the assessment of oral testimony, I do not propose to fully consider the relevant defences. In adopting this approach, I am privileging the goal of expedition (as regards completing this judgment) over comprehensiveness. I have assumed that if the factual findings which form the basis for my dismissing the mistake claims and D8's want of authority based on mental incapacity claims are disturbed on appeal, the relevant claims would have to be retried.

678. In any event as regards the First Four Bermuda Purpose Trusts, all claims are obviously time-barred on any sensible analysis of the limitation periods which are credibly potentially applicable. To the extent that no limitation period is applicable to an equitable mistake claim, and I am held to be wrong in rejecting those claims, it seems improbable that such claims could be defeated on the grounds of waiver or delay but I make no formal alternative findings in this regard.

679. Finally the Claimants argued if their claims were *prima facie* time-barred under any applicable foreign limitation periods, this Court should disapply the limitation periods on Bermudian public policy/undue hardship grounds under section 34B of the Limitation Act 1984.

The Plaintiff's lack of authority claim in respect of the transfer of YC Wang's interest in the assets transferred to the Ocean View Trust

680. The impugned transfers took place on March 8, 2013. I have found that they are liable to be set aside under Bermuda, BVI and/or Taiwanese law (Article 244 of the Civil Code). It is common ground that the limitation period is 6 years under Bermuda/BVI law so no limitation issue arises if I am right that either of those systems of law governed the sub-nomineeship arrangement and also provide the applicable limitation period. In this regard, the Plaintiff's counsel relied upon section 34A of the Limitation Act 1984 (based on section 1 of the Foreign Limitation Periods Act 1984, UK):

> "**Application of foreign limitation law**
>
> *34A. (1) Subject to the following provisions of this Part, where in any action or proceedings in a court in Bermuda the law of any other country falls (in*

accordance with rules of private international law applicable by any such court) to be taken into account in the determination of any matter—

(a) the law of that other country relating to limitation shall apply in respect of that matter for the purposes of the action or proceedings; and

(b) except where that matter falls within subsection (2), the law of Bermuda relating to limitation shall not so apply.

(2) A matter falls within this subsection if it is a matter in the determination of which both the law of Bermuda and the law of some other country fall to be taken into account."

681. A straightforward reading of section 34(1) suggests that where a claim is governed by the law of a jurisdiction other than Bermuda under applicable rules of private international law, the corresponding limitation law also applies. When and how section 34(2) would apply is less straightforward. In their Closing Submissions, the Trustees' counsel argued as follows:

"*1460. Section 34A of Bermuda's Limitation Act 1984* ***{AUTH-A10/130/19}*** *governs the application of foreign limitation periods in Bermuda law. The issue in this case is how section 34A applies when a claim involves issues governed by different laws. The answer is that the limitation periods under each applicable law apply. That is the right answer for three reasons.*

1461. First, it reflects the language of section 34A itself. Section 34A (1) refers to the application of any law that "falls…to be taken into account" in the determination of a matter. That is broad language that includes a case where multiple systems of law apply. Since both the law of Taiwan and of the BVI "[fall] to be taken into account" in this case, on a straightforward reading of the statute the limitation laws of both should apply. If only one limitation law could ever apply different (and tighter) language would have been used in section 34A. In fact, Section 34A (2) expressly envisages the possibility that the limitation law of more than one country should apply to the same matter. A common example of a situation in which this occurs is a claim in tort to which the double actionability rule applies: the limitation law of both the lex causae and the lex fori applies (McGee, Limitation Periods (8th ed., 2020), at paragraph 25.002. ***{AUTH-B10/83/2}).***

*1462. Second, that answer is consistent with the leading authority on the question. Section 34A is in similar terms to the UK Foreign Limitation Periods Act 1984 section 1 ("**FLPA**"). An English authority (discussed at length in Limitation Periods at chapter 25 **{AUTH- B10/83/1}**) suggests the correct approach: Gotha City v Sotheby's (The Times, 8th October 1998). **{AUTH-B4/43/1}.** A painting was misappropriated in Germany and sold in England. A conversion claim was brought. The question of whether the claimant had title to the painting was governed by German law. The alleged tort occurred in England and was governed by English law. The judge, Moses J, held that **both** German and English limitation laws applied – if the claim was time-barred under either then it would fail. Applying Moses J's approach to the present case, the claims should be time-barred if either (i) YC and YT Wang's rights have been extinguished by a time-bar under Taiwanese law or (ii) the right to recover the shares from the Trustees has become time- barred as a matter of BVI law.*"

682. In *Gotha City v Sotheby's,* The Times, 8th October 1998, the Plaintiff's counsel point out that although Moses J held that two sets of laws and limitation periods applied, he also opined that "*consistent with the statutory principles contained in the 1984 Act, a court should strive to identify one law as governing the issue to be determined rather than two*". It seems to me to be obvious that this *dictum* applies with equal force to section 34A of the Bermudian Limitation Act 1984 which provides expressly and/or by necessary implication:

(a) if a claim or matter is governed by Bermuda law, Bermuda limitation law applies;

(b) if a claim or matter is governed by some foreign law, the corresponding limitation law applies;

(c) if a claim or matter is governed by both Bermuda law and some foreign law, both limitation periods apply. The statute does not contemplate the application of two concurrent foreign limitation periods (e.g. BVI and Taiwan law).

683. The potentially applicable limitation laws are accordingly as follows:

(a) my primary finding is that the Plaintiff's claim is governed (exclusively) by Bermuda law pursuant to section 10 of the 1989 Act;

(b) my alternative finding is that the Plaintiff's claim is governed (exclusively) by BVI law as the law governing the Hung Arrangement (as it relates to the shares of Chindwell BVI and Vanson BVI) under the common law conflicts rules;

(c) Taiwanese law would (exclusively) apply as a matter of common law if I am wrong in concluding that BVI law applies to the Plaintiff's claim; and

(d) Bermuda law and BVI or Taiwanese law would apply if I am wrong in finding that one system of law exclusively governs the want of authority claim.

684. In scenarios (a) and (b), no valid limitation defence arises. The only potentially valid limitation defence arises under scenario (c) and scenario (d) (assuming Bermuda and Taiwanese law apply to the Plaintiff's claim).

685. If Taiwanese law applies to the substantive authority claim, it would also in my judgment supply the governing limitation period and 1 year would apply. I prefer the evidence of Professor Su that an objective approach to this limitation period would apply to the evidence of Professor Chang that a subjective approach would be applied. This claim would be time-barred if Taiwanese law governs the Plaintiff's substantive claim so that Taiwanese limitation law also applies. It remains to briefly consider the Trustees' submission raised in the context of their limitation defences that if Bermuda law applies to any of the Plaintiff's claims Taiwanese law also applies as the governing law of the Hung Arrangement.

686. Apart from the double actionability rule in tort, which formed the basis of the *Gotha City* decision, no examples are cited to illustrate when a single claim would otherwise involve the application of both local law and foreign law. If I am right that section 10 of the 1989 Act mandates the application of Bermuda law to the Plaintiff's lack of authority claim against the Ocean View Trust, I see no proper basis for finding that Taiwanese law also applies as the law governing the Hung Arrangement. In my judgment if Bermuda law governs the substantive claim, it also supplies the corresponding limitation law and the limitation defence would fail.

The Statute of Frauds no written assignment claims

687. If I am held to be wrong in dismissing the no written assignment claim on legal grounds under BVI law, I would dismiss the pleaded limitation defences, accepting the Plaintiff's following arguments set out in his Closing Submissions:

"*847. There is no limitation period affecting a settlor's or transferor's right to call for assets under a resulting trust (see High Commissioner for Pakistan v Prince Mukkaram Jah & Ors [2016] W.T.L.R. 1763 at [125]). Such actions fall within s. 19(1) of the BVI Limitation Ordinance, not s. 19(2) as alleged by the PTCs.*"

Dis-applying the Taiwanese 1-year limitation period on undue hardship grounds

688. In the Plaintiff's Closing Submissions, the following key legal arguments were set out:

"*568. If, contrary to Dr Wong's case the court finds that the law of limitation of Taiwan applies to Dr Wong's claims, the following Taiwanese limitation periods should not apply pursuant to s.34B Limitation Act 1984 as being in conflict with Bermudian public policy because their application would cause undue hardship:*

568.1 one year under article 90 of the Taiwanese Civil Code (which applies to revocation for mistake); and

568.2 one year from knowledge of the transfer or ten years from the transfer, whichever is the earlier, under Article 245 of the Civil Code (which applies to Dr Wong's claim to revoke the transfer under Article 244 of the Civil Code) and Article 19 of the Trust Act (which applies to Dr Wong's alternative claim under Article 18 of the Trust Act to revoke the dispositions made by Mr Hung in breach of the stated purposes of the 'trust').

569. The cases on undue hardship have involved limitation periods which English (and by analogy Bermudian) law would regard as too short. In Jones v Trollope Colls Cementation Overseas Ltd, The Times 26 January 1990 (CA), for example, a one-year limitation period under Pakistani law was disapplied.

570. As Lord Denning MR held in The Pegasus [1967] 2 QB 86 at 98:

'Undue' there simply means excessive. It means greater hardship than the circumstances warrant. Even though a claimant has been at fault himself, it is an undue hardship on him if the consequences are out of proportion to his fault.

571. Moreover, as Longmore LJ held in Bank of St Petersburg v Arkhangelsky [2014] EWCA Civ 593, [2014] 1 WLR 4360 [24]:

the court has to look at all the circumstances in order to decide whether the application of the foreign limitation period will cause undue hardship.

572. It is possible for the plaintiff to be at fault to a degree and for the foreign limitation period still to be held to cause undue hardship; so for example, the PTCs may say that while YC Wang had laboured under the actionable mistake for the rest of his life after 2001, when the Wang Family Trust was established, that does not excuse Dr Wong for not issuing proceedings sooner than he did. But Dr Wong could only sue as YC Wang's administrator (as a matter of Bermuda law), his appointment to which office was contested and a grant in relation to which he only received in 2016; he sued in 2018. (See also more generally the section on laches at Section O3 below.)

573. It is part of 'all the circumstances' that if one contrasts the Taiwanese claims with the claims which Dr Wong brings under Bermuda and BVI law his are equitable claims to set aside voluntary dispositions which carry no time limit at all, alternatively they are claims to recover property under resulting trusts which carry no time limit at all…"

689. In the Trustees' Closing Submissions, the following pivotal arguments were advanced in response:

"*1467…where (as here) it is said that the foreign limitation period is contrary to public policy because it imposes 'undue hardship' on the plaintiff, it must be shown that* ***in the particular circumstances of the case*** *the short period has* ***in fact*** *caused 'undue hardship' to the plaintiff: see Harley v Smith [2010] EWCA Civ 78 at paragraph 29.* ***{AUTH-B5/50.01/11-12}.*** *In that case, the plaintiffs (who issued their claim just under 3 years after the cause of action accrued) complained that a 12-month limitation period under Saudi law had caused undue hardship because they had received legal advice that it did not apply. The Court of Appeal rejected that submission, because the plaintiffs could have commenced the claim within the 12-month period if they had wished to, and there was nothing special about the facts of the case that took it out of the ordinary: see paragraph 55.****{AUTH-B5/50.01/20-21}.***

1468. In Murphy, Wilkie J noted at paragraph 54(v) ***{AUTH-B6/57/12}*** *that the inquiry is whether 'the undue hardship caused to the claimant by the application of the foreign limitation period over and above that inevitably caused by the application of the foreign limitation period in question' and quoted counsel's identification (at paragraph 56* ***{AUTH-B6/57/13-14}****) of the types of case in which it has been held that a foreign limitation period has caused undue hardship in this sense. None of those cases are comparable to this one. The events of which Winston and Tony complain took place between 5 and 18 years before Winston issued his claim, and between 7 and 19 years before Tony issued his claim. Even if the applicable limitation periods had been 13 years, all of the claims in relation to the [First Four Bermuda Purpose Trusts] would*

have been time-barred. It is impossible in the circumstances to say that the foreign limitation periods have caused any undue hardship to Winston or Tony at all. The only 'hardship' is that inevitably caused by the application of the foreign limitation periods in question."

690. The argument that the Claimants put forward is that they would have suffered undue hardship if they succeeded on the merits of claims governed Taiwanese law but were barred by Taiwanese law limitation periods. This critically assumes that:

(a) the Hung Arrangement was found to have been governed by Taiwanese law;

(b) the application of Taiwanese law to the Hung Arrangement and the relevant claims was found to be consistent with the expectations of the parties to it who were all Taiwanese citizens resident in Taiwan;

(c) as regards the mistake claims in particular, the claims only arose because the well-resourced Founders elected not to obtain direct legal advice about the legal effect of the First Four Bermuda Purpose Trusts before or after they were settled;

(d) as regards the Ocean View Trust lack of authority claims, the Claimants failed to commence their respective proceedings within the applicable limitation period although with greater diligence they could have done so.

691. Section 34B of the Limitation Act 1984 is in substantially the same terms as section 2(1) of the UK Foreign Limitation Periods Act 1984. Section 34B provides:

"(1) In any case in which the application of section 34A would to any extent conflict (whether under subsection (2) or otherwise) with public policy, that section shall not apply to the extent that its application would so conflict.

(2) The application of section 34A in relation to any action or proceedings shall conflict with public policy to the extent that its application would cause undue hardship to a person who is, or might be made, a party to the action or proceedings…"

692. In *KXL et al-v- Murphy and the Society of Missionaries of Africa ('The White Fathers')*[2016] EWHC 3102 (QB), Wilkie J held as follows:

"*45. I accept that the following principles are established from the relevant authorities.*

i) *It would be wrong to treat a foreign limitation period as contrary to English public policy simply because it is less generous than the comparable English provision in force at the time (**Durham v T&N plc 1996 Court of Appeal unreported)**.*

ii) *Public policy should be invoked for the purposes of disapplying the foreign limitation period only in exceptional circumstances. Too ready a resort to public policy would frustrate our system of private international law which exists to fulfil foreign rights not destroy them.*

iii) *Foreign law should only be disapplied where it is contrary to a fundamental principle of justice.*

iv) *The fundamental principle of justice with which it is said foreign law conflicts must be clearly identifiable. The process of identification must not depend upon a Judge's individual notion of expediency or fairness but upon the possibility of recognising, with clarity, a principle derived from our own law of limitation or some other clearly recognised principle of public policy. English courts should not invoke public policy save in cases where foreign law is manifestly incompatible with public policy. (**City of Gotha v Sothebys, Transcript October 8 1998 p89)***

v) *The English law of limitation serves the purpose of providing protection for defendants from stale claims, encouraging claimants to institute proceedings without unreasonable delay, and conferring on a potential defendant confidence that after the lapse of a specific period of time he will not face a claim (**Law Com report No 114 para 4.44)** and*

vi) *The absence of any escape clause such as that contained in Section 33 of the 1980 Act cannot make the imposition of [the foreign limitation period] in any way contrary to English public policy (**Connelly v RTZ Corp plc & anr 1999 CLC 533 at 548)….***

…

*53**.** <u>In my judgment, given the way in which the Courts, the Law Commission and leading academic writers have described the way in which the Courts have, or should, approach the question of disapplying foreign limitation periods on grounds of conflict with public policy as requiring: a conflict</u>

with fundamental principles of justice readily and clearly identifiable; and have warned against approaching the matter on the basis of the 'idiosyncratic inferences' of a few judicial minds, it is a bold and, in my judgment, an erroneous submission to suggest that this Court should conclude that the application in this case of the Ugandan Limitation Act would conflict with public policy as described in the authorities…." [Emphasis added]

693. If required to consider disapplying any Taiwanese limitation periods which debarred the claims of the Plaintiff and/or D8 on public policy grounds, I would decline to do so on the grounds that their application is not contrary to public policy as required for section 34B to be applied.

MIXED PURPOSES TRUST CLAIMS

The Plaintiff's Submissions

694. The issue was concisely defined in the Plaintiff's Opening Submissions as follows:

> "*283. The issue for the Court is, therefore, whether as a matter of statutory interpretation section 12A(1) of Part II of the Trusts (Special Provisions) Act 1989 (as amended by the Trusts (Special Provisions) Amendment Act 1998) ('**the 1989 Act**') permits the creation of a trust containing such mixed purposes ('**a mixed purpose trust**').*"

695. The Bermuda Purpose Trusts contain non-charitable and charitable purposes. The Plaintiff's arguments were summarised as follows:

> "*286.1 At common law, mixed purpose trusts are prohibited and s.12A (1) does not permit them; it permits only trusts being created for "a non-charitable purpose or purposes" (see Section F1).*
>
> *286.2 That s.12A (1) does not permit the creation of a mixed purpose trust was intentional: in amending Part II of the 1989 Act in 1998 the legislature made a deliberate decision:*
>
> *(a) to abandon the language in the original legislation which expressly permitted the creation of a mixed purpose trust (see Section F2) and replace it with language which refers to "non-charitable purpose or purposes" only; and*

(b) not to adopt the other forms of explicit language permitting mixed purpose trusts favoured in the other jurisdictions reviewed by the Bermuda Law Reform Sub-Committee when making its recommendations (see Section F5).

286.3.1 To construe section 12A(1) as extending to, and permitting, the creation of a mixed purpose trust in the absence of express language would be to fail to observe the principle of statutory construction that a statute is not to be taken as effecting a fundamental alteration in the general / common law unless its language points unmistakably to that conclusion. The PTCs' construction necessitates the highly improbable finding that, without expressly saying so (indeed without any reference at all to "charitable purposes") and furthermore having expressly removed wording which did say so, the legislature has:

(a) Abrogated the long-standing common law prohibition against mixed purpose trusts (see Section F2);

(b) By section 12B(1), abrogated the Attorney General's centuries-old locus standi, right and duties on behalf of the Crown, as part of the royal parens patriae prerogative, to enforce the charitable purposes in mixed purpose trusts (see Section F3); and

(c) By section 12B (2), radically altered the approach to variation of charitable purposes within mixed purpose trusts (see Section F4).

286.3.2 The regimes of enforcement and variation in section 12B (including when read with subsequent legislation) only accord with reason and good sense if mixed purpose trusts are not permitted by section 12A (1). The legislature sensibly decided, on reflection, to keep the (very different) regimes for charitable purposes and non-charitable purposes separate. Therefore, at the same time as removing charitable purposes from the scope of Part II, it relaxed and amended some of the original requirements in relation to

trusts permitted by Part II (e.g. as to identity of trustees, enforcement and the keeping of a register) which were rendered unnecessary by Part II being restricted to private arrangements and not encompassing public arrangements (see Section F3).

286.3.3 The PTCs are simply wrong to suggest that construing section 12A(1) as Dr Wong submits means that mixed purpose trusts created under the old legislation are retrospectively invalidated: their position represents a mis-reading of section 4 of the 1998 Act and / or overlooks section 16 of the Interpretation Act 1955..."

696. These arguments, both in writing and persuasively advanced by Mrs Talbot Rice QC in oral argument seemed coherent and technically sound. However, it also seemed somewhat counterintuitive to propose that the Legislature in creating a statutory vehicle to circumvent the strictures of the common law prohibition on charitable trusts with non-charitable objects had in effect flipped the coin. It had created a new pure trust vehicle, one which could only validly contain non-charitable purposes wholly unblemished by charitable objects.

The Trustees' submissions

697. The Trustees summarised their responsive arguments in their Opening Submissions as follows:

"*772.1. The correct construction of "a trust … for a non-charitable purpose or purposes" in subsection 12A (1) is a trust for a purpose or purposes which are not exclusively charitable. Accordingly, they include trusts for purposes under which the trust property may be applied both for charitable and other purposes.*

772.2. Winston Wong's and Tony Wang's arguments ignore the general liberalising intent of the legislation and instead create a new and widely-applicable ground of invalidity, requiring reference back to the common law of charities, and creating arbitrary lines between the valid and the invalid. It is unlikely in the extreme that the legislature intended this result.

772.3. Winston Wong's and Tony Wang's approach also ignores the transitional provisions which give "trusts …. for a non-charitable purpose or purposes" a contrary meaning to the one they contend for.

772.4. Their approach also makes no practical sense.

772.5. The arguments previously deployed by Winston Wong in support of his approach are misconceived."

698. These arguments as developed in writing and orally relied heavily on a purposive construction and the legislative objectives of the purpose trust regime. However, by the end of Mr Howard QC's oral argument, I was all but convinced that the Trustees' contentions were supported by a more technical construction of the statutory provisions as well. The Trustees reinforced the cogent analysis set out in their Opening Submissions in their Closing Submissions (at paragraphs 1190-1255). In addition to meeting the various detailed points raised by the Plaintiff in support of the construction he contended for, I regarded the following submission as compelling in terms of identifying the specific and broader overarching legislative purposes which should inform construing the relevant statutory provisions:

"*1217. Importantly, there is nothing in the 1998 Law Reform Committee Report which supports the contention advanced by Winston and Tony that the Law Reform Committee was proposing that the legislature should reverse the previous reform and very significantly narrow the scope of the existing legislation, so as to permit only trusts for purposes which were exclusively not charitable and prohibit trusts for purposes which were both charitable and not that had hitherto been allowed. If that had been the Law Reform Committee's intention and recommendation, one would have expected it to have explained the policy reason behind the reversal, discussed the matter and made that intention clear in its report. It did not do so…*

1220. The 1998 amendments were intended to liberalise the regime created by the 1989 Act. This is clear from the 1998 Law Reform Committee Report. As set out above, at paragraph 1.1 of that Report … reference is made to the BIBA Report, which was described as having recommended changes "to enhance the competitiveness of Bermuda's trust law and Bermuda's reputation in the eyes of international trust lawyers". At paragraph 2.10 of the 1998 Law Reform Committee Report … reference is also made to the fact that the BIBA Report 'highlights a number of areas where the original purpose trust concept was beginning to look old-fashioned by comparison with some of the newer models and notes that experience had shown that some of the restrictions had proved to be unnecessary, and the Report recommended changes to update the law.'

1221. The liberalising intention behind the 1998 amendments is also clear from the nature of the other changes introduced by the 1998 Act. Thus:

1221.1. The perpetuities requirement in the original 1989 Act was dropped, so purpose trusts created under the amended Act could become perpetual.

1221.2. The requirement in section 13(2) (c) of the 1989 Act for the trust to be created by will or deed was dropped.

1221.3. The requirement in section 13(1) (d) of the 1989 Act for the trustee to be a designated person – i.e. lawyer or accountant or similar – was dropped.

1221.4. The requirement for the trust instrument to appoint an enforcer in section 13(1) (e) of the 1989 Act was made optional.

1221.5. The provisions regarding the keeping of documents in section 14 of the 1989 Act were dropped.

1222. The liberalising intention was also spelled out in the Explanatory Memorandum which accompanied the Bill…: 'The new Part II, substituted by clause 2, relaxes some of the requirements of Part II as originally enacted.""

The Hung Estate's Closing Submissions

699. The Trustees' position was supported by the Hung Estate in her Closing Submissions, although the point had no direct import on the claims she was required to defend. Mr Midwinter QC submitted:

"*85. The argument that Bermuda law does not permit a purpose trust with both charitable and non-charitable purposes is plainly wrong. A purpose trust with purely charitable purposes is valid as a matter of common law. A purpose trust with any purposes that are not charitable is a non-charitable purpose trust. It is valid by s.12 of the Trusts (Special Provisions) Act 1989. That is the case here. There is no conceivable reason why Bermuda law should prohibit the creation of a non-charitable purpose trust merely because some of its purposes happen to fall within the definition of charity*."

700. Having considered the written Closing Submissions and the Plaintiff's oral closing submissions, my provisional view that the mixed purpose trust point should be resolved in

favour of the Trustees was confirmed rather than undermined. I accordingly indicated to the Trustees' counsel that I did not need to hear from them orally on this issue.

Findings

The statutory provisions

701. Section 12A of the 1989 Act provides, so far as is material for the present point, as follows:

> "*(1) A trust may be created for a non-charitable purpose or purposes provided that the conditions set out in subsection (2) are satisfied; and in this Part such a trust is referred to as a 'purpose trust'*."

702. The main foundation for the argument that "*non-charitable purpose or purposes*" means exclusively non-charitable purposes was that when the 1989 Act was amended with effect from September 1, 1998, the language of section 12A was expressly changed so as to narrow the scope of the purpose trust construct. This seemed a compelling argument, because the 1989 Act as enacted did indeed use broader language in the form of a clause framed so as to oust the common law prohibition on charitable trusts with non-charitable purposes:

> "*13(1) Notwithstanding any law to the contrary but subject to this section and section 16, a person may create a valid trust for a purpose or purposes (whether charitable or not) for a term of years not exceeding one hundred years…"*

703. This language made it explicitly clear that a purpose trust could be established for charitable or non-charitable purposes and, implicitly, for both charitable and non-charitable purposes. The omission of "charitable" from the new section 12A (1) in 1998 does on superficial analysis suggest a change of legislative intent. Reading the statutory language of the new section 12A (1) solely in light of the corresponding language (principally in the repealed provisions section 13 of the 1989 Act as originally enacted) the inevitable conclusion appears to be that the omission of "*whether charitable or not*" is significant. This superficial analysis does not withstand more rigorous scrutiny for two primary reasons.

704. Firstly, it was common ground that the statutory purpose trust regime creates a legal framework for creating trusts which would be invalid at common law because their objects are not exclusively charitable. In other words, at common law a charitable trust is by definition a trust for exclusively charitable purposes. In *Leahy v Attorney General of New*

South Wales [1959] AC 457 at 473 (PC), where a statutory variation of this rule was under consideration, Viscount Simonds opined as follows:

> "*As the law stood before its enactment, a gift to such charitable or other purposes as trustees might think fit was void, and this was the law whether the alternative to charitable purposes was the vague and general expression "other purposes" or a less vague but still indefinite expression such as "benevolent purposes" or even a precisely defined non-charitable institution. Equally the gift was invalid if it was given for a purpose expressed in a compendious phrase which embraced both charitable and non-charitable objects*" [Emphasis added]

705. With this common law backdrop clearly in view, it becomes ultimately apparent that the term "charitable" connotes "exclusively charitable" reflecting a special legal meaning which lawyers (but not laymen) would understand. Conversely, the term "non-charitable" does not signify "exclusively non-charitable". This is because there is no pre-existing legal meaning which justifies attaching by necessary implication the "exclusive" handle to the words "non-charitable". For this reason I reject the argument, advanced with great conviction by Mrs Talbot Rice QC in her oral closing submissions, that the natural and ordinary meaning of the words "*non-charitable purpose or purposes*" unambiguously excluded mixed-purpose trusts.

706. Secondly, it is an elementary rule of statutory construction that the words of any particular section in an enactment must be construed in their wider statutory context. Section 12A was enacted through section 2 of the Trusts (Special Provisions) Amendment Act 1998 (the "1998 Act"). Section 4 provides as follows:

> "*(1) The substitution for Part II of the Trusts (Special Provisions) Act 1989 as originally enacted of Part II as set out in section 2 above ('the new Part II') shall apply—*
>
> *(a) in relation to trusts created after the coming into force of this Act; and*
>
> *(b) as provided in subsection (2), in relation to trusts for non-charitable purposes validly subsisting immediately before that date ('existing purpose trusts').*" [Emphasis added]

707. In my judgment this transitional provision furnishes further and dispositive support for the conclusion that the draftsman of section 12A did not consider the term "*trusts for non-charitable purposes*" as introducing a variant of the original purpose trust construct. The language of section 4 (1) (b) of the 1998 Act makes it clear that "*existing purpose trusts*",

created under the old law "*for a purpose or purposes (whether charitable or not)*", fall within the ambit of the new term. The implicit assumption is that pre-existing purpose trusts, explicitly including those for charitable or non-charitable purposes, can validly subsist under the new regime without any modifications being required in relation to the application of the post-1998 regime in the exclusively non-charitable purpose trust era which the Plaintiff's counsel contended was ushered in. It would produce an absurd legislative result if section 4(1)(b) were construed as only addressing the application of the 1998 amendments to existing trusts for exclusively non-charitable purposes, and failing to address altogether the status of existing mixed purpose trusts.

708. I find that section 12A permits the creation of purpose trusts for non-charitable purposes, but does not impose a mandatory requirement that such purposes should be exclusively non-charitable. As Mr. Howard QC rightly submitted, there is no justification for inserting the word "exclusively" before "*non-charitable purposes*" in section 12A (1) of the 1989 Act.

The legislative history

709. In my judgment, it is not in fact necessary to have regard to the legislative history of section 12A to decide whether or not its effect is to prohibit the creation of mixed purpose trusts for both non-charitable and charitable objects. A relatively straightforward reading of the natural and ordinary meaning of the critical provisions of section 12A (1), in the wider context of the 1998 Act of which it forms part, makes it clear that there is no such prohibition.

710. In case I am wrong in my finding that the meaning of "*trusts for non-charitable purposes*" clearly does not mean "*trusts for* [exclusively] *non-charitable purposes*", I will consider the impact of the legislative history of section 12A (1) on its construction. Further and in any event, a modern approach to statutory interpretation favours a purposive approach and permits recourse to the legislative history of difficult or novel statutory provisions even where there no ambiguity in the strict sense. Two main points were advanced.

711. The first and most attractive point made by Mrs Talbot Rice QC in support of the Plaintiff's case on this point of construction was the following:

> "359. *The language ultimately and deliberately chosen by the legislature (i.e. limited to 'non-charitable purpose or purposes') is particularly striking when one contrasts the approaches in other jurisdictions in 1998 to which the Sub-Committee had specific regard when preparing its draft Bill dated 4 February 1998: Report para*

1.4.

360. By 1998, many other common law jurisdictions had enacted, or were contemplating enacting, legislation which (as the 1989 Act as enacted had done) made express provision for mixed purpose trusts. In circumstances where the Sub-Committee specifically considered the language adopted by other jurisdictions, and then decided not to retain the original express language or incorporate similar express language permitting mixed purpose trusts into its draft bill, it is inherently improbable that the legislature intended implicitly to permit the continued creation of mixed purpose trusts. To the contrary, the inherent probability is that the legislature had decided against mixed purpose trusts and in favour of a clear delineation between the charitable and non-charitable regimes.

361. To take some examples:

British Columbia

*362. Section 12A in the new Part II is notably very similar to the corresponding parts of a draft model proposed in Non-Charitable Purpose Trusts (Working Paper of the Law Reform Commission of British Columbia, 1991) ("**BC Working Paper**"), a model which is specifically cited by the Law Reform Committee in its Report…*

363. Importantly, the British Columbia draft model goes on to provide for a section 44.1 (pp.56-57 of the BC Working Paper), which expressly validates mixed purpose trusts, as well as recognizing the good sense and desirability (see above) of keeping the regime for charitable purposes distinct from that for non-charitable purposes wherever possible….

*366. Thus, having expressly considered the draft British Columbia model and indeed largely mirrored the language of its definition of, and conditions for, a valid trust for a non-charitable purpose (draft section 44), it is conspicuous that the Sub-Committee chose **not** to incorporate into the new Part II wording similar to that of the draft section 44.1 i.e. to validate and provide a regime for mixed purpose trusts and, contrary to the British Columbia model, deliberately chose to relegate the Attorney General to only a long-stop role in respect of enforcement: Sub-Committee Report, para 3.21…*

Belize and the British Virgin Islands

367. The Sub-Committee also specifically cited the statutory language of the Belize Trust Act 1992 at para 3.6 of its report:

'a person may create a valid trust for any purpose ***<u>whether charitable or not</u>****..."*
[emphasis added]

368. The Sub-Committee likewise specifically considered the language of the Trustee (Amendment) Act 1993 (British Virgin Islands) which adopted at section 84(2) the same language as the Belize Trust Act 1992 (albeit the Sub-Committee Report appears to contain an error at para 3.6 in that it mis-quotes the BVI legislation).

369. This language is notably similar to the original language of section 13(1) of the 1989 Act which the Sub-Committee and the legislature decided to abandon in favour of the more restrictive language in new section 12A(1)."

712. The '*Law Reform Sub-Committee Report on Purpose Trusts*' (the "Sub-Committee Report") is by common accord highly pertinent to the legislative objects of the 1998 Act, as the legislation which was enacted was substantially based on its recommendations. The Sub-Committee was chaired by John Campbell QC, who coincidentally was involved at Appleby in the establishment of the Bermuda Purpose Trusts. Mr Howard QC relied heavily on the commercial underpinnings of the new law in quoting, *inter alia*, the following extracts from the Sub-Committee Report:

"'*3.9 Mr Anderson explained that the BIBA Committee were in favour of the possibility of allowing non-statutory purpose trusts, falling back on dicta in cases such as Re Denley's Trust [1968] 3 All ER 65 and Re Astor's Settlement Trust [1953] 1 QB 1067. This raised the question as to why have statutory requirements at all if common law purpose trusts were also to be permitted.* <u>*Bermuda's aim is the creation of a 'product' to be marketed in competition with other jurisdictions and it would be impossible to advise clients with any degree of certainty, since the case law in this field has led to a number of anomalous and irrational decisions.*</u>

<u>*We recommend that only purpose trusts which comply with the 1989 Act provisions as amended should be allowed.*</u>*'* [Emphasis added]"

713. It is true that a change of language was introduced which on superficial analysis appears to be more restrictive. Yet there is nothing in the Sub-Committee Report which suggested that the legislative intention was to replace the 1989 construct of purpose trusts which clearly permitted mixed purpose trusts with a more restrictive construct of an exclusively non-charitable trust. The Trustees' counsel further submitted:

"*757. The evolution of the statutory regime in Bermuda, and what it was intended to achieve, are neatly summarised in Offshore Commercial Law in Bermuda (1st ed.,*

2013) in a chapter written by Alec Anderson (a member of the Law Reform Committee whose report led to the 1989 Act):

> *'5.32 Bermuda was the first offshore jurisdiction to adopt legislation to provide for valid non-charitable purpose trusts under the Trusts (Special Provisions) Act 1989. Under English case law, with some anomalous exceptions, non-charitable purpose trusts were not valid, and so legislative recognition was required to deal with this issue. For example, a trust for philanthropic purposes which fell outside the definition of charity would not be a valid purpose trust. Another example is a trust to further the purposes of a political party, which would also be invalid until this innovative legislation was adopted.*
>
> *5.33 The Trusts (Special Provisions) Act 1989 was amended in 1998 to provide increased flexibility in the structuring of purpose trusts and to clarify the definition of purpose trusts under the Act, with the aim of enabling a more streamlined approach to the administration of purpose trusts….*"

714. This provided further general support for the proposition that practitioners viewed the legislative purpose of the 1998 Act as being to "*provide increased flexibility in the structuring of purpose trusts*". The proposition that there was, absent any express articulation of such a surprising hypothetical purpose in the legislative history of the 1998 Act, an intention to create a new statutory straitjacket is in my judgment an entirely untenable one. The main impetus of the purpose trust regime in the first place had been to liberate Bermuda from the strictures of the common law prohibition on purpose trusts which were not exclusively charitable. The 1998 Act sought to move further away from those strictures, not to turn back in their direction.

715. The strongest potential support for the Plaintiff's analysis was the following passage in the Sub-Committee Report which explicitly addresses the critical change of wording:

> "*3.1 Originally we decided to leave the existing wording 'purposes, whether or not charitable" without making any reference to the nature of the purposes. However, we later decided that it was confusing if the 1989 Act as amended were to apply to charitable trusts as it is not intended to amend the law relating to charities, and it is unnecessary for the legislation to permit a person to create a trust for charitable purposes.*
>
> *We recommend that the Bill permits trusts for 'non-charitable purposes' only which is, of course, wide enough to include business purposes without mentioning them separately."* [Emphasis added]

716. On first reading, this passage suggests an intention to draw a bright dividing line between trusts for charitable or non-charitable purposes and non-charitable purposes only. However in my judgment neither of the two quoted paragraphs, carefully read, actually advance any such proposal. Instead:

(a) the Report clearly recommended that the 1989 Act should be amended to make it clear that it does not apply to charitable trusts. Such trusts would, by definition, be for exclusively charitable objects or purposes. This proposal is in no way incompatible with the notion of a trust which includes both non-charitable and charitable purposes;

(b) the Report clearly proposed the application of the 1989 Act should be to trusts for "*'non-charitable purposes' only*", not "'non-charitable purposes only'". The former term, 'non-charitable purposes', is a wide term and does not connote 'exclusively non-charitable purposes'. The latter term, not used, would have suggested exclusively non-charitable purposes.

717. The Legislature faithfully, in my judgment, adopting these recommendations, enacted section 12A in terms that permitted trusts "*for a non-charitable purpose or purposes*". Had the draftsman apprehended that the legislative purpose was to limit the application of the 1989 Act to trusts "*for a non-charitable purpose or purposes* [only]", explicit language signifying this legislative intent would and could easily have been used.

718. For similar reasons the second legislative history argument, also initially somewhat appealing, must be rejected. It was argued that the loosening of the supervisory mechanisms introduced in 1998 (in particular in relation to charitable purposes) signified an intention to exclude any charitable purposes altogether. The following key submissions were advanced in the Plaintiff's Opening Submissions in this respect:

"324. *As with the new section 12A considered above, the legislature effected a wholesale regime change in 1989 in respect of the enforcement of the purpose trusts permitted by the1989 Act:*

324.1 It relaxed the strict requirements of the old Part II by removing the requirement for a designated trustee and a public register (along with the associated offences for failure to comply and the Attorney General's associated additional statutory rights summarized above); and

324.2 By section 12B (1), it enacted a new statutory code for enforcement.

325. Section 12B (1) provides:

> *'12B (1) The Supreme Court may make such order as it considers expedient for the enforcement of a purpose trust on the application of any of the following persons:*
>
> *(a) any person appointed by or under the trust for the purposes of this subsection;*
>
> *(b) the settlor, unless the trust instrument provides otherwise;*
>
> *(c) a trustee of the trust;*
>
> *(d) any other person whom the court considers has sufficient interest in the enforcement of the trust;*
>
> *and* ***where the Attorney-General satisfies the court that there is no such person who is able and willing to make an application under this subsection, the Attorney-General may make an application for enforcement of the trust****."[emphasis added]*

326. In other words, under the new regime the Attorney General has to satisfy the court of her right to make an application; she no longer has the right to make an application.

327. Section 12B(1) was interpreted by the Bermuda Court of Appeal in Trustee 1 & Ors v The Attorney General [2014] CA (Bda) 3 Civ (a decision made in the Beddoe proceedings in this litigation). It is important to recognize that this decision does not merely stand as binding authority at first instance in Bermuda, but also as an issue estoppel between the parties to the appeal; so the PTCs cannot now re-open the interpretation of the statute (for which their counsel contended) in this or any higher court.

328. Baker JA (with whom Zacca P agreed), allowing the appeal of the PTCs (save Ocean View PTC which was not then a party to the Beddoe proceedings), held as follows:

> *[29]: 'What enforcement means, in my judgment, is holding the trustees to account, to their proper duties under the trust…* ***Enforcers are creatures of statute and their functions, rights and powers are defined exclusively by the 1989 Act. One does not have to, indeed cannot, look further****. Ms. Warnock-Smith [who appeared for*

Dr Wong] is keen to equate enforcers to beneficiaries because, as the judge pointed out, beneficiaries can generally obtain disclosure of legal advice from the trustees' lawyers since the advice is held for the benefit of the beneficiaries. But, so it seems to me, an enforcer of a purpose trust is an entirely different animal from a beneficiary of a beneficiary trust. There are no beneficiaries as such of a purpose trust'.

[31]: 'An entitlement to enforce is a statutory right. Three persons are so defined…Subsection (d) then gives the court a residuary power to allow any other person to apply for the enforcement of a purpose trust "whom the court considers has sufficient interest in the enforcement of the trust". Finally there is ***a safety valve*** *giving the Attorney General a right to apply if no one else is able and willing to make an application'*
[emphases added]

329. *Thus, the new statutory enforcement regime for 'purpose trusts' within the meaning of section 12A (1) (i.e. trusts 'created for a non-charitable purpose or purposes') provides that:*

    329.1 *The only rights and duties in respect of the enforcement of such a trust are those arising under section 12B;*

    329.2 *as is clear from the decision of Baker JA in Trustee 1, the only right to information in respect of such a trust is one granted by the court on an application under section 12B;*

    329.3 *The Attorney General has* ***no*** *standing to make an application for an order to enforce the trust,* ***unless*** *the Attorney General first satisfies the Court that there is no one within section 12B(1)(a)-(d) who is able and willing to make an application for enforcement – the Attorney General is no more than a "safety valve" to use the words of Baker JA and, by definition, given the terms of sub-section (d), does not qualify as a person with "sufficient interest in the enforcement of the trust"; and*

    329.4 *Given, per Baker JA and Zacca P in Trustee 1, the rights of those entitled to enforce are exclusively defined by the Act, the Attorney General does not have a right to be joined to, and thus be heard in, any enforcement applications brought by others under section 12B(1) (there being no such statutory right identified in the section).*

330. This new enforcement regime is entirely consistent with the 1989 Act having been restricted, by the 1998 amendment, to govern only exclusively non-charitable purpose trusts:

330.1 It makes perfect sense that where one is dealing with exclusively non-charitable purposes which do not engage public law / policy considerations (unlike charitable purposes), that the Attorney General's supervisory function is not engaged and thus that she is not a person with 'sufficient interest' in such trusts and has only a 'safety valve' role in relation to them; the Attorney General has no interest in, nor should public money as a general proposition be used to further, the enforcement of trusts of a private nature.

330.2 So too, it makes perfect sense in that context to remove the requirement that specific records be kept and made available for inspection by the Attorney General. The Attorney General does not need automatic information rights in respect of private and non-charitable objects over which she does not have duties of supervision.

331. If, on the other hand (and as the PTCs contend) section 12A (1) permits mixed purpose trusts:

*331.1 section 12B will, **without express wording (indeed without any reference whatsoever to charitable purposes)**, have effected a radical change to common law principles of "long and immemorial custom" by completely abrogating the Attorney General's primary locus standi and rights in respect of charitable purposes (i.e. those purposes in which the public has an interest and which the Crown acting through the Attorney General has, at common law, always had a "sufficient interest" in enforcing);*

331.2 in other words, the Crown, as the centuries-long defender of charity for the benefit of the public, will have been placed at the very end of the queue when it comes to enforcement of the charitable objects, and, moreover, the Attorney General will have been burdened with the additional burden of first establishing her standing to enforce by demonstrating to the satisfaction of the Court that there is no one else who is "able and willing" to do so.

332. Such an interpretation plainly breaches the principle in Nokes (para 310 above) and the approach in Greenhouse (para 319 above) i.e. that legislation should not be interpreted as overthrowing fundamental principles of general law unless it unmistakably points to that conclusion."

719. This point loses much of its lustre once one takes into account the fact that the Sub-Committee expressly addressed the critical change of language and (a) made it clear that the aim was to exclude "charitable trusts" altogether, and (b) failed to even hint at an intention to limit validation to trusts with exclusively non-charitable purposes. At this point it may be noted that the Explanatory Memorandum to the Bill which introduced the 1998 Act does not suggest that any such limitation will be introduced:

"*This Bill replaces Part II of the Trusts (Special Provisions) Act 1989 (which relates to trusts for purposes) as recommended by the Law Reform Committee.*

The new Part II, substituted by clause 2, relaxes some of the requirements of Part II as originally enacted…"

720. The recommendations of the Law Reform Committee Report are attached to the Bill and those include "*(a) to permit the creation of trusts for non-charitable purposes only (discussed in paragraph 3.1 and given effect in new section 12A (1) as set out in clause 2 of the draft Bill)*".

721. The relaxing of the enforcement regime, including the diminished role of the Attorney-General, must be seen in the context of what the Trustees' counsel rightly submitted was the overarching purpose of the amendments, a commercial imperative articulated in the following passage in the Sub-Committee Report:

"*3.9 … Bermuda's aim is the creation of a 'product' to be marketed in competition with other jurisdictions …*"

722. Most importantly, there is no basis for inferring that limiting the role of the Attorney-General in the new Part II of the 1989 Act introduced in 1998 was grounded in an assumption (or presumed intention) that "*trusts for non-charitable purposes*" would have no charitable purposes whatsoever. The Sub-Committee Report in dealing with this matter observed:

"*3.21. Some members wondered whether it was appropriate to follow the British Columbia model and include the Attorney-General in the list of those empowered*

to enforce. It was noted that in case of fraud the Attorney-General would in any case be entitled to take appropriate steps. It was agreed that only if none of the named categories was available to apply to the Court that the Attorney-General be able to step in to enforce the trust."

723. In my judgment the legislative intent, both in the terms of the 1998 Act and its legislative history, is clear. If the presumption that Parliament does not intend to make substantial alterations to the law is engaged by these enactments (*Nokes-v-Doncaster Amalgamated Collieries Ltd.* [1940] AC 1014 at 1031), the presumption has been displaced by the clarity of the legislative intent to alter the law. To my mind, however, the presumption does not seriously arise for consideration for two main reasons.

724. Firstly, the *status quo ante* as regards the Attorney-General's involvement in charitable trusts generally, independently of the 1989 Act as amended, is not altered. Section 12A applies to non-charitable purpose trusts only, with the legislative history making it clear that charitable trusts will be regulated under the law and practice governing charities and/or charitable trusts. Because the hypothesis is that the diminished role of the Attorney-General under the post-1998 regime is incompatible with a regime applying to trusts with purposes which include charitable ones, it is necessary to consider how significant the changes to the Attorney-General's role after 1989 which were enacted in 1998, in relation to mixed purpose trusts, actually are. And it is immediately apparent when one considers the main provisions which have been repealed (section 13 (2)-(3) of the 1989 Act as originally enacted), that the Attorney General's initial statutory role had no connection with the supervision of charitable purposes. Where a trustee became aware that a person responsible for enforcing a trust was for some reason failing to do so, there was a statutory obligation to notify the Attorney-General. The Attorney-General on receipt of such a notice was empowered to apply to appoint a replacement enforcer.

725. Mrs Talbot Rice QC correctly submitted that the enforcement functions are strictly delineated by the terms of the statute. As Sir Scott Baker P held, in *Trustee 1, Trustee 2, Trustee 3 and Trustee 4-v-The Attorney-General* [2014] COA (BDA) 3 CIV, (at paragraph 29): "*Enforcers are creatures of statute and their functions, rights and powers are defined exclusively by the 1989 Act. One does not have to, indeed cannot, look further.*" The Attorney-General's express role under the pre-1998 regime was limited to applying to replace a delinquent, inactive or unfit enforcer. There was no general or specific statutory role entailing the enforcement of trusts generally, nor the enforcement of the charitable elements of mixed purpose trusts. Section 12B of the 1989 Act now provides:

"*12B (1) The Supreme Court may make such order as it considers expedient for the enforcement of a purpose trust on the application of any of the following persons:*

(a) any person appointed by or under the trust for the purposes of this subsection;

(b) the settlor, unless the trust instrument provides otherwise;

(c) a trustee of the trust;

(d) any other person whom the court considers has sufficient interest in the enforcement of the trust;

and where the Attorney-General satisfies the court that there is no such person who is able and willing to make an application under this subsection, the Attorney-General may make an application for enforcement of the trust."

726. The Attorney-General's role in relation to purpose trusts has not in my judgment been diminished in any way which is incompatible with a legislative intention to permit the establishment of trusts with non-charitable and charitable purposes. To the extent that the common law never permitted mixed purpose trusts, the Attorney-General has never played any historic role in enforcing non-charitable trusts which included charitable purposes. When the purpose trust regime came into force in 1989 by common accord permitting mixed purpose trusts, no express statutory role was conferred on the Attorney-General to enforce or protect the charitable interests embedded in mixed purpose trusts. Accordingly, either the Attorney-General's supervisory role was abrogated altogether, before section 12A was introduced by way of amendment through the 1998 Act, or it was preserved to an extent which is compatible with the purpose trust regime.

727. In either event, I find that no discernible change to the status of the Attorney-General's common law supervisory jurisdiction of the charitable objects in trusts which also contained non-charitable private beneficial objects was introduced by the 1998 amendments. The changes which were made related to a new and more limited enforcement function, which had no connection with enforcing the interests of charity.

728. However my second and alternative reason for rejecting this limb of the Plaintiff's legislative history of section 12A argument is that in my judgment at least one strand of the Attorney-General's supervisory jurisdiction has very arguably not been abrogated at all either by the 1989 Act as originally enacted or by the 1998 Act. It is not necessary to decide this point, which has not received the benefit of full argument, as it does not directly arise for determination. The most pertinent limb of the Attorney-General's common law supervisory jurisdiction in relation to mixed purpose trusts is the power to intervene in trust

administration applications in relation to private trusts which have charitable beneficiaries or charitable objects of a discretionary power. As the Plaintiff's counsel submitted in their Opening Submissions:

> "*320. This remains the common law of Bermuda today: St John's Trust Company (PVT) Limited v Watlington & Ors [2020] SC (Bda) 19 Civ, in which the Chief Justice at [87]-[104]:*
>
> *320.1 affirmed the principle that the Attorney General is the person with standing at common law in respect of the enforcement of charitable trusts / purposes; and*
>
> *320.2 declined an invitation to develop Bermuda common law to embrace a wider approach to locus standi by analogy with English legislation (as the Jersey Royal Court has done). Recognising the public law considerations engaged when one is dealing with charities, the Chief Justice importantly observed at [104] that "The issue of locus standi to enforce charities is not merely a technical area of law but is **underpinned by substantive public policy considerations**" [emphasis added].*
>
> *321. As the designated protector of the interests of charity on behalf of the Crown and representative of its beneficial interest (Brooks v Richardson [1986] 1 WLR 385 at pp.390-391), the Attorney General is also considered at common law to be a necessary party to many proceedings involving charitable objects, which the Attorney General has not personally initiated, but which require the beneficial interest to be represented before the court, such as trust administration proceedings: e.g.*
>
> *321.1 where a trustee of a trust for human beneficiaries and charitable objects seeks the blessing of a momentous decision: Barclays Bank and Trust (Cayman) Ltd v C, K and Attorney General [2014] 1 CILR 144 (at p.150-151, per Smellie CJ: "the Attorney General should have been represented…the interests of charity, like those of all the other named beneficiaries of the trust, needed to be represented before the court";*
>
> *321.2 Beddoe proceedings, as recognized by the PTCs in the Beddoe proceedings in relation to this litigation: the PTCs joined the Attorney General to represent the interests of charity (albeit this was*

before the Court of Appeal clarified the law in respect of enforcers of purpose trusts created under section 12A(1), see further below); or

321.3 where a trustee of a trust for human beneficiaries and charitable objects seeks declaratory relief as to the effect of an exercise of a power: Re A Trust (Change of Governing Law) [2017] SC (Bda) 38 Civ, [2017] Bda LR 53."

729. That jurisdiction is pertinent, because there is an analogy between a private trust with natural persons as actual or potential beneficiaries alongside actual or residual charitable objects, and a mixed purpose trust with non-charitable purposes accompanying charitable ones. In both instances the trusts themselves are not charitable but the need to take into account charitable interests will arise from time to time, particularly in relation to momentous decisions.

730. Section 13 of the 1989 Act as originally enacted required the purpose trust deed to designate an enforcer and empowered the Attorney-General merely to apply to appoint a replacement enforcer where this was needed. There is no obvious basis for the suggestion that a trustee or enforcer could not apply to the Court for directions in relation to a purpose trust and that the Attorney-General could not be joined to represent the interests of charity if they were engaged. It seems more appropriate to assume, as the Plaintiff's submissions implicitly invite the Court to do, that the Attorney-General's historic common law role in relation to trusts was not abolished by the 1989 Act in its original incarnation. As the Court's supervisory jurisdiction over purpose trusts was not defined by the 1989 Act as originally enacted, the Court's jurisdiction to supervise trusts generally would presumably have applied.

731. The Court of Appeal for Bermuda's decision in *Trustee 1 & Ors v The Attorney General* [2014] CA (Bda) 3 Civ concerned section 12B (1) (b) of the 1989 Act as amended in 1998, and also briefly mentioned section 12B (1) (d). Section 12B (1) provides as follows:

"*12B (1) The Supreme Court may make such order as it considers expedient for the enforcement of a purpose trust on the application of any of the following persons*

(a) any person appointed by or under the trust for the purposes of this subsection;

(b) the settlor, unless the trust instrument provides otherwise;

(c) a trustee of the trust;

(d) any other person whom the court considers has sufficient interest in the enforcement of the trust;

and where the Attorney-General satisfies the court that there is no such person who is able and willing to make an application under this subsection, the Attorney-General may make an application for enforcement of the trust." [Emphasis added]

732. The 1998 Act did introduce a bespoke enforcement jurisdiction for purpose trusts which could potentially be viewed as having altered the pre-existing law including the Attorney-General's right to vindicate charitable interests in trusts. In *Trustee No. 1* the Court of Appeal actually considered the statutory jurisdiction to enforce trusts. The actual holding was that the Appellant could not obtain disclosure by way of enforcement of the present Purpose Trusts because:

(a) he was neither a beneficiary (section 12B (1) (b)); nor

(b) a person with sufficient interest to enforce the trust (section 12B (1) (d)). This was because he was seeking to invalidate the trusts rather than to enforce them;

(c) the Attorney-General had been joined, presumably on the assumption that the common law jurisdiction to participate in proceedings on behalf of charity had not been abrogated. That issue was not of course directly addressed in *Trustee 1 & Ors v The Attorney General.* Be that as it may, the Court of Appeal explicitly held (per Baker JA at paragraph 29): "*Enforcers are creatures of statute and their functions, rights and powers are defined exclusively by the 1989 Act. One does not have to, indeed cannot, look further.*" The Court's jurisdiction to appoint persons with "*sufficient interest*" to enforce purpose trusts under section 12B (1) (d) was described as "*residuary*" (at paragraph 31).

733. Nonetheless it is difficult to see why the starting assumption ought not to be that this statutory power could, if necessary, be deployed by this Court to enable the Attorney-General to enforce charitable purposes under section 12B (1) (d) of the 1989 Act on the grounds that this Crown Law Officer has "sufficient interest" to enforce the charitable purposes of a purpose trust. The proviso to section 12B (1) in any event makes it clear that the Attorney-General may enforce a purpose trust where "*there is no* [other] *person who is*

able and willing to make an application". I find that the statutory language does not abrogate the role of the Attorney-General in relation to the enforcement of purpose trusts; rather the Attorney-General was conferred an active role for the first time through the 1998 amendments.

734. Even if the common law right of the Attorney-General to intervene was abrogated either in 1989 or in 1998, I would not regard this consideration as supportive of the view that the Legislature in *1998* intended to replace mixed purpose trusts with exclusively non-charitable ones because:

(a) the legislative intention to permit the continued creation of mixed purpose trusts under section 12A is too clear; and

(b) even if the 1998 Act did abrogate the Attorney-General's common law supervisory role over charities, which is far from clear, it is strongly arguable that a corresponding jurisdiction was preserved through section 12B (1) (d) of the 1989 Act in its current form.

735. The related argument that section 12A (1) cannot apply to trusts with mixed non-charitable and charitable purposes because the Attorney-General has no standing to apply to vary charitable purposes under section 12B (2) is more nuanced. Section 12B (2) provides:

> "*(2) On an application in relation to a purpose trust by any of the following persons-*
>
> *(a) any person appointed by or under the trust for the purposes of this subsection;*
>
> *(b) the settlor, unless the trust instrument provides otherwise;*
>
> *(c) a trustee of the trust,*
>
> *the court may if it thinks fit approve a scheme to vary any of the purposes of the trust, or to enlarge or otherwise vary any of the powers of the trustees of the trust.*"

736. Clearly the Attorney-General cannot apply to vary a purpose trust. Does this mean the Legislature could not have intended to permit trusts for non-charitable purposes to include

any charitable purposes at all? In my judgment limiting the availability of the variation remedy to persons chosen by the settlor is entirely consistent with an overarching legislative intention, made manifest by the legislative history, of creating a primarily commercial, settlor-friendly trust vehicle. The objective of permitting the inclusion of charitable purposes is not inconsistent with the objective of maximising settlor-driven control over the purpose terms as originally crafted and as may need to be varied. It is entirely consistent with the notion, illustrated by the purposes in the Bermuda Purpose Trusts, that the charitable purposes are likely to be subsidiary purposes which one would expect to be fulfilled in one of two main ways:

(a) making donations to existing charities; or

(b) establishing new charities, which will be separately regulated as such.

737. I find unpersuasive the notion that the Legislature would not have intended to deprive the Attorney-General of the ability to vary the charitable purposes of statutory trust vehicles established under the applicable legislative scheme, in light of the legislative history of the key statutory provisions. The scheme is clearly designed for predominantly commercial and/or quasi-commercial and/or philanthropic objects; it is not intended to apply to "charitable trusts" at all. The common law construct of a charitable trust never contemplated public interest oversight of entities which were not established for exclusively charitable purposes.

Subsequent legislation

738. The Plaintiff further submitted that if the meaning of section 12A (1) is ambiguous, regard may be had to subsequent legislation: *Commissioner of Inland Revenue v Hang Seng Bank Ltd* [1991] 1 AC 306 (PC) at p.324A-D. It was argued:

"*340. In 2014, the legislature passed the Trustee Amendment Act 2014, by which a new section 47A was incorporated into the Trustee Act 1975. Section 47A was intended to place the common law rule in Hastings-Bass on a statutory footing in this jurisdiction. It provides as follows at subsection (5):*

'(5) An application to the court under this section may be made by—

(a) the person who holds the power;

(b) where the power is conferred in respect of a trust or trust

property, by any trustee of that trust, or by any person beneficially interested under that trust, or ***(in the case of a purpose trust) by any person appointed by or under the trust for the purposes of section 12B(1) of the Trusts (Special Provisions) Act 1989****;*

(c) ***where the power is conferred*** *in respect of a charitable trust or* ***otherwise for a charitable purpose, the Attorney-General****; or*

(d) with the leave of the court, any other person.' [emphasis added]

341. Thus, section 47A (5) of the Trustee Act draws a clear distinction between:

341.1 a 'purpose trust' under the 1989 Act (as amended) on the one hand (i.e. a 'trust…created for a non-charitable purpose or purposes'): sub-section (b); and

341.2 'charitable trusts' (i.e. trusts for exclusively charitable purposes) and powers 'otherwise conferred for a charitable purpose' on the other: sub-section (c)."

739. My primary finding is that there is no ambiguity in section 12A (1) which justifies recourse to the canon of construction which permits regard to subsequent legislation as an aid to construing doubtful previous enactments. However, even if one does apply this interpretative tool, the terms of the Trustee Act 1975 section 47A (5) are not dispositive of the issue, in the Plaintiff's favour at least. In my view the later statute, read in a straightforward way, explicitly provides that the Attorney-General may indeed be appointed under section 12B (1) (d) of the 1989 Act in relation to the charitable purposes of a purpose trust. The drafting of section 47A(5) (b) and (c) is, however, also entirely consistent with the Court of Appeal's holding in *Trustee No. 1* that section 12B (1) of the 1989 Act is a self-contained code for the enforcement of purpose trusts. On that basis the Attorney-General would presumably have no standing to apply under section 47A(5) of the Trustee Act 1975 unless she were cloaked with enforcement authority under section 12B (1) of the 1989 Act. This sub-point need not be decided for present purposes. It suffices to say that I find no inconsistency between the terms of the Trustee Act 1975 section 47A (5) and construing the 1989 Act as amended in 1998 in a way which permits mixed purpose trusts.

740. Section 47A pertinently provides as follows:

"*(1) If the court, in relation to the exercise of a fiduciary power, is satisfied on an application by a person specified in subsection (5) that the conditions set out at subsection (2) are met, the court may—*

(a) set aside the exercise of the power, either in whole or in part, and either unconditionally or on such terms and subject to such conditions as the court may think fit; and

(b) make such order consequent upon the setting aside of the exercise of the power as it thinks fit…

(5) An application to the court under this section may be made by—

(a) the person who holds the power;

(b) where the power is conferred in respect of a trust or trust property, by any trustee of that trust, or by any person beneficially interested under that trust, or (in the case of a purpose trust) by any person appointed by or under the trust for the purposes of section 12B(1) of the Trusts (Special Provisions) Act 1989;

(c) where the power is conferred in respect of a charitable trust or otherwise for a charitable purpose, the Attorney-General; or

(d) with the leave of the court, any other person…"

741. Two sub-paragraphs in section 47A (5), read in a straightforward way, are entirely consistent with construing the 1998 Act as having preserved mixed purpose trusts:

(a) subsection (5) (b) provides that an application may be made "*by any person appointed by or under the trust for the purposes of section 12B (1) of the Trusts (Special Provisions) Act 1989*". Section 12B (1) expressly contemplates that the Attorney-General may be appointed to enforce a purpose trust where there is no other person able or willing to enforce it. Further, I consider that the broad power conferred on this Court by the same section to appoint any person with "*sufficient interest*" to enforce a purpose trust may be deployed through permitting the Attorney-General to enforce charitable purposes in a purpose trust;

(b) subsection (5) (c) expressly provides that section 47A is available to the Attorney-General "*where the power is conferred in respect of a charitable trust or otherwise for a charitable purpose*" [Emphasis added].

742. Section 47A (5) (c) in particular expressly provides that the section 47A remedy is available to the Attorney-General not simply in relation to charitable trusts but also "*otherwise for a charitable purpose*". Reading subsections (5) (b) and (c) together, it seems clear that this statutory provision contemplates the Attorney-General playing a role in enforcing charitable purposes in non-charitable purpose trusts. Mrs Talbot Rice QC sought to neutralize this reading of section 47A (5) in closing submissions in the following way[127]:

> "*So what the PTCs' argument would mean is that the Attorney General is given the power to make an application under section 47A to set aside the exercise of a power where there is a charitable purpose in a trust. In other words, in one of these 1989 Act trusts that they contend are permitted, because that's what the Trustee Act 1975 says, but she is not allowed to apply for a scheme in relation to that charitable purpose at all because she's not included in the list of people, under the 1989 Act, who can apply for a scheme. That would be an utterly bizarre result and what it shows is that the legislature think that the 1989 Act as amended does exactly what we say it does and not what the PTCs say. Indeed, in relation to a mixed purpose trust under the 1989 Act as amended, the Attorney General couldn't even bring a fraud action and yet under the 1975 Act she can make an application that a power has been exercised under a mistake. That just makes no sense.*"

743. This is a very convoluted way of drawing support from subsequent legislation to resolve supposed ambiguities in an earlier statute. The argument tacitly acknowledges that the subsequent legislation provides potential support for the Trustees' case that mixed purpose trusts were preserved by the 1998 Act. However, by positing an inconsistency between the power conferred by the later statute and the powers expressly conferred by the earlier statute, it is essentially contended (it seems to me) that the current purpose trust regime should be read in a way which not only (1) resolves the hypothetical inconsistency, but also (2) assumes that Parliament in enacting section 47A (5) (d) of the Trustee Act 1975 either:

(a) intended the statutory remedy conferred on the Attorney-General in relation to powers relating to charitable purposes not contained in charitable trusts to be exercised in relation to powers conferred in relation to all non-charitable purpose trusts (a category of trust which does not exist

[127] Transcript Day 65, page 113 line 12-page 114 line 5.

at common law and which most obviously only exists under the purpose trust regime); or

(b) that Parliament itself erred in enacting section 47A (5) on the assumption that charitable purpose trusts still existed under the 1989 Act as amended in 1998; and/or

(c) that section 47A (5) (d) should be read as intending only to apply to pre-1998 mixed purpose trusts.

744. That Section 47A (5) (d) was not intended to apply to any purpose trusts at all was not explicitly advanced in argument; the notion can be summarily rejected in light of the fact that section 47A (5) (c) expressly contemplates an application by the Attorney-General in relation to purpose trusts. Nor was it contended that Parliament had erred in making reference to "*or otherwise for a charitable purpose*" in the subsequent legislation. The circumstances in which a statutory provision will be held to be ineffective as a matter of construction are very rare indeed; the only instance that comes readily to mind is the *casus omissus* doctrine, which represents the converse position to suggesting that positive provisions should be ignored. That section 47A (5) (d) should be read as intended to apply only to those mixed purpose trusts preserved by the transitional provisions of the 1998 Act was perhaps the most arguable point which could have been made and was implicitly advanced. In an abstract sense, it is coherent to contend that a legislative intention to enable the Attorney-General to seek relief under section 47A (5) in respect of those charitable purposes contained in pre-1998 mixed purpose trusts can potentially be discerned in section 47A (5) (d). But such an intention can only be discerned if one has already concluded that mixed purpose trusts were abrogated in 1998 and that only 1995-1998 mixed purpose trusts preserved by the transitional provisions of the Act can legally exist. The point only gains traction (in the absence of express limiting words) if one can point to something in the legislative history of the 2014 amendments to the Trustee Act 1975 suggesting that section 47A (5) (d) was drafted only with that narrow class of first generation purpose trusts in mind.

745. In fairness the main point the Plaintiff's counsel make on the subsequent legislation is that it would lead to "*an utterly bizarre result*" if the Attorney-General was both able to get relief for the flawed exercise of a power in relation to a charitable purpose while unable to promote a scheme to amend a purpose trust. This point seems to be built on the unstable foundations of the misconceived contention that the 1998 Act limited the statutory role of the Attorney-General in relation to purpose trusts when in fact that role was, if anything, expanded. The Attorney-General's role as an enforcer of purpose trusts is logically limited because, as I have accepted, the main function of statutory purpose trusts was intended by

Parliament to be to serve as non-charitable vehicles for commercial settlors. The limitation of the right to promote an amendment scheme to (a) persons appointed by or under the trust, (b) the settlor, subject to the trust instrument, and (c) the trustee (section 12B (2)) is clear. Within section 12B, there is a contrast between who may enforce the trust (section 12B (1)) with the Attorney-General's right to do so being an unequivocally limited right. This is consistent with the notion that purpose trust vehicles were conceived as vehicles whose design and administration could as far as possible be shaped by settlors. Section 47A (5) (c), (d) simply makes it possible for the new statutory vehicle to be shaped to meet the whims of settlors, whatever those whims might be.

746. The inconsistency between the Attorney-General being permitted to make an application to enforce a purpose trust under section 12B (1) and not being empowered to promote an amending scheme under section 12B (2) was hardwired into the purpose trust scheme after these provisions were introduced through the 1998 Act. At the outset, it is for the settlor to define which charitable purposes (if any) should be included in the initial purpose trust scheme and the Attorney-General has no role to play in this regard. It is therefore hardly incongruous for the Attorney-General to be excluded from the post-formation enforcement role. In my judgment there is nothing "*bizarre*" about the Attorney-General being permitted by section 47A (5) to deploy that new enforcement remedy under the Trustee Act 1975 while being unable to promote an amending scheme under section 12B (2) of the 1989 Act. Any theoretical tension between the notion that the Attorney-General can enforce charitable purposes but not promote their amendment merely reflects a legislative policy choice which, far from being irrational, is entirely consistent with the predominantly non-charitable character of the post-1998 purpose trust regime.

747. In my judgment section 47A (5) of the Trustee Act 1975, enacted in 2014, ultimately supports rather than undermines the hypothesis that the purpose trust regime inserted into the 1989 Act by the 1998 Act permitted the establishment of trusts which were not exclusively for charitable purposes and did <u>not</u> prohibit mixed purpose trusts.

Summary

748. For the above reasons, I find that the Bermuda Purpose Trusts are <u>not</u> void on the grounds that they contain mixed non-charitable and charitable purposes. The most significant broad purposive basis of this decision is best expressed in the following arguments set out in the Trustees' Closing Submissions:

> "*1223. It makes no real sense, against the backdrop of this liberalising direction of legislative travel, for Parliament to be taken to have intended in 1998 that in one respect alone the amending Act was to have the opposite effect, so as*

to prohibit a form of trusts which had hitherto been permissible under the 1989 Act.

1224. It is also difficult, as a matter of common sense, to understand why Parliament should be taken by its amendments in 1998 to have wanted to make it more difficult for people to set up purpose trusts in Bermuda, and in particular to have wanted to make it more difficult for people to benefit charity by removing the ability to create trusts for purposes which were charitable in part but not in whole. What is the sense, for example, in permitting people to set up a trust for the purposes of holding shares in a company and using the dividends to promote some private purpose, but prohibiting people from setting up a trust for the purposes of holding shares in a company and using the dividends for some charitable purpose? It is difficult to see why Parliament would have wanted to depart from the general policy of the law to promote charity as a good thing, and it is clear that it did not."

749. I accept and adopt these submissions subject to the *caveat* that little if anything turns on what "*Parliament would have wanted*", appreciating that I myself from time to time in the present Judgment have referenced the presumed legislative intention. Further support for this purposive approach, and clarification as to why statutory interpretation should not today be concerned with the intentions of legislators, may be found in the following words of Professor Burrows (as he then was)[128]:

> "*... it is tolerably clear today that our judges have moved from an old literal to a modern contextual and purposive approach ... the modern approach has subsumed many of the old so-called "canons" of interpretation ... they have lost primacy with the demise of literalism and have tended to be swallowed up by the modern contextual and purposive approach ... when we talk of 'purpose', we are looking at the policy behind the statute or statutory provision. Identifying the policy is not dependent on identifying any person's intentions ... Indeed to expose the practical irrelevance of the legislator's intention, it may be helpful to focus on the statute, rather than the legislator, and to say that we are concerned with the meaning of the statute, ascertained by considering the statute's words, context and purpose. Certainly, an advantage of such a switch of focus is that it helps to clarify that what ultimately matters is the judicial analysis, at the time a dispute arises, of what the statute means*."

[128] Andrew Burrows, '*Thinking About Statutes: Interpretation, Interaction and Improvement*' (Cambridge University Press: Cambridge, 2018), The Hamlyn Lectures, pages 7-8, 19-20.

TRUSTS VOID FOR UNCERTAINTY CLAIMS

The Plaintiff's submissions

The appropriate certainty test

750. The Plaintiff's counsel submitted that the common law certainty test applies under section 12A (2) (a) the 1989 Act:

> "387. *The first question for the Court under this head of Dr Wong's claim is the proper test to be applied under section 12A(2)(a) (i.e. the Certainty Requirement). The difference between the parties may be summarized as follows:*
>
> *387.1 Dr Wong submits that 'sufficiently certain to allow the trust to be carried out' in section 12A(2)(a) reflects or incorporates the test for certainty at common law, such that the court can have recourse to authorities which establish what is, and is not, sufficiently certain (summarized above and detailed further below);*
>
> *387.2 The PTCs submit, to the contrary, that it is 'a practical test' and 'a trust satisfies [the Certainty Requirement] if trust property can be held or applied in furtherance of the purpose or purposes of the trust.'…*
>
> *389. The requirement of certainty of objects is fundamental to trusts at common law. Even in the case of charitable trusts, where the law often adopts a more benevolent approach and the Court can, therefore, cure some forms of uncertainty using its inherent scheme making jurisdiction (in recognition of the particular public law / policy considerations engaged in that context, which are not engaged in the present case), a sufficient degree of certainty is still required for the trust to be valid…*
>
> *393. A trust which is for purposes some of which are valid, and some of which are invalid, fails completely; severance is not possible …*
>
> *397. In order to be a valid purpose the Court must be able to say of any given application of funds whether it falls within, or outside the purpose. This goes to the question of whether the trust can be enforced and / or carried out…*

403. *The need to be able to identify precisely what is, and what is not, authorised by the pursuit of a particular purpose means that the purpose has to be expressed in terms which are sufficiently certain for the Court to be able with confidence to ascertain its limits.*"

751. A critical question, of course, is whether the importance of certainty in the common law trust context applies in the statutory context. The Plaintiff's counsel accordingly placed legitimate emphasis on the following legislative history point:

> "*416. The section represented an amendment to the 1989 Act as enacted which required the purposes to be 'specific, reasonable and possible' (see s.13 (1(a)). The amendment was prompted by a report of the Bermuda International Business Association ('**BIBA**') in 1995 which recommended changes to update the 1989 Act. One of those changes was: 'to substitute "certain" for "specific" in section 13(1) of the [1989 Act]': Sub-Committee Report, para 2.11(5).*
>
> *417. The Sub-Committee in its proposal (ultimately accepted by the legislature) went further than BIBA. Instead of simply substituting 'certain' for 'specific', section 12A (2) (a) removes the old language entirely in favour of 'sufficiently certain to allow the trust to be carried out', on the basis that the other elements of the old language, i.e. 'reasonable and possible', 'did not appear to add anything': Sub-Committee Report, para 3.8.*
>
> *418. The change in language is notable because the term 'certain', unlike the original 'specific', has a long established / recognised, technical meaning as a matter of general trusts law.*
>
> *419. Indeed, the language chosen by the Sub-Committee (and adopted by the legislature) of "sufficiently certain to allow the trust to be carried out" reflects the language one sees in the common law cases and is not, therefore, a mere coincidence. For example, in Re Astor (a leading non-charitable purpose case), Roxburgh J used the following language:*
>
> > *"the purposes must, in my judgment, be stated in phrases which embody* **definite concepts** *and the means by which the trustees are to try to attain them must also be prescribed with* **a sufficient degree of certainty***" [emphases added] (p.547)*
> >
> > *'The* ***purposes must be so defined that if the trustees surrendered their discretion, the court could carry out the purposes declared****, not a*

*selection of them arrived at by eliminating those which are **too uncertain to be carried out**" [emphases added] (p.548).*"

752. This limb of the argument, when advanced by Mrs Talbot Rice QC in her oral opening argument, appeared to me to be compelling, as a freestanding point at least. The Plaintiff's Opening Submissions concluded on the certainty test branch of this issue as follows:

> "*428 The problem for the PTCs in this case arises not because the common law principles are 'inappropriate' for purpose trusts, but rather because of the "extraordinary" (to coin Appleby's phrase) and 'not "standard"' (to coin Mr Granski's phrase) drafting of the purposes in the five Declarations. The legislature in Bermuda has permitted the creation of trusts for non-charitable purposes, but that permission is given only where the specified conditions are satisfied, one (and an important one) of which is the certainty of its purposes. In those circumstances it is respectfully submitted that the Court should not:*
>
> *428.1 strain the statutory language;*
>
> *428.2 effect a radical departure from the common law; and*
>
> *428.3 by imposing a vague "practical" test as the PTCs invite it to do: (a) place future Courts in a difficult position when it comes to enforcing / carrying out statutory purpose trusts, and (b) generate legal uncertainty and consequent difficulties for advisors,*
>
> *simply to save drafting which was recognized at the time to be "extraordinary" and 'not "standard"'.*"
>
> *429. For the foregoing reasons, we submit, the Court must have recourse to the four established principles (no severance, any given postulant, conceptual certainty and competence) when applying section 12A (2) (a) (properly interpreted).*"

753. I responded to these submissions in the course of the hearing, in part, as follows[129]:

> "*Yes. I mean, it seems to me that it is somewhat artificial or ill-fitting to apply the same approach to certainty which was developed in the common law context of having a*

[129] Transcript Day 2, page 10 lines 5-21.

restrictive view of or about purpose trusts that were not charitable. So one is concerned with fitting any purpose into the charitable shoe, as it were.

We're dealing with Bermuda legislation which, many years later, is specifically designed to escape the strictures of the common law and to create a user-friendly vehicle for people who want to achieve various non-charitable purposes. So when one is looking at certainty, one surely is looking at it through a slightly more rose-tinted lens than one would have been doing at common law, trying, straining to ensure that the Court can supervise a trust for charitable purposes only."

754. Mrs Talbot Rice QC provided the following persuasive and principled response[130]:

"*The policy underlying the fact that the preservation of that requirement in Bermuda for these new trusts is exactly the same as the policy underlying the need for certainty of objects in trusts generally. It's a basic tenet of trust law that the objects must be certain. So even it's for people, the objects must be certain.*

The statute has preserved that and the question, therefore, is, well, what counts as certain and what doesn't? Where these older cases are looking at that very question, what counts as certain, albeit in a different context, they are looking at the same underlying policy when they are saying, 'Well, this doesn't count'. The underlying policy is the trustees and the Court must know what it is they can and can't do. Otherwise, it's not a trust at all.

I think and may I submit that there's a very clear line that must be drawn here, because if your Lordship's answer is, well, actually , provided - - and this is the PTCs' argument - - that the trustee can say, 'Well, I am entitled to do that and therefore that's okay, it's certain enough', then you're simply ignoring the wording of the trusts entirely , because these trusts are not just to do that, the one thing that these trusts have in fact done, which is purchase more FPG shares.

These trusts have five purposes mostly, seven in the later ones, and the Trustees are not given a choice over which purposes they fulfil. These trusts are not for such of these purposes as the trustees may, in their absolute discretion, choose. These trusts are 'the money is entrusted to you, trustee, to fulfil these purposes', and it's all of them.

So there must be certainty in relation to all of them to enable the trustee to do its job. If one has purposes which are terribly vague, then you are essentially saying that, well,

[130] Transcript Day 2, page 12 line 9 –page 13 line 25.

actually, what this is is an absolute gift to the trustee coupled with a wish. So, 'Here you are, trustee. Here is my wealth. What I'd really like you to do with this is something good. I'd like you to take this wealth and try and do the best you can to help society with its problems from their root. "

755. The central thesis that the same broad certainty test which applied in the context of beneficiary trusts also operated in the purpose trust context was fortified in closing argument.

Application of the certainty test

756. The Plaintiff's counsel firstly set the scene by suggesting that local counsel had concerns about the clarity of the purposes which were overridden by Ed Granski. These submissions find some support in the contemporaneous documentation but were not, to my mind, altogether borne out when Mr Granski was cross-examined. Counsel then proceeded to set out why the purposes fail to meet the certainty test the Plaintiff contends for by reference to the various Bermuda Purpose Trusts, broadly contending that three of the Bermuda Purpose Trusts (Vantura Trust, Universal Link Trust and Ocean View Trust) have "very similar" purposes, while the Wang Family Trust is somewhat different. The one common purpose across all five Bermuda Purpose Trusts is "*to implement and accomplish the Founders' Vision*". The China Trust has its own distinctive purposes including its own articulation of the Founders' Vision.

757. The China Trust is dealt with first, perhaps because its purposes were considered to be most vulnerable to attack deploying the certainty test contended for. The submissions advanced in the Plaintiff's Opening Submissions include the following:

> "*444. The Founders' Vision in the China Trust is a mixture of background information, personal philosophy, general purposes and specific injunctions. Because of this it poses formidable difficulties of interpretation, since its implementation and accomplishment are among the Purposes of the Trust (clause 3.4). Per clause 3.4, it is the entirety of the Founders' Vision which has to be implemented and accomplished. This means not just a few of the more narrowly drafted expressions, but the whole of the Founders' aspirations which are there expressed.*
>
> *445. Doing the best one can, the following passages seem to indicate what needs to be implemented and accomplished when fulfilling the Founders' Vision:*

(a) *"It is our deep belief that society can only develop with individual diversity and co-operation … once an individual is well established and has been given the opportunity to develop his potential he should pay back to society that which his ability allows him to do. We seek also to realize the spirit of fulfillment, meaning that when a person is well established he should help others to establish [etc] …"*

(b) *"… it is our wish to make a contribution to our grandfather's homeland."*

(c) *"We wish to give people an opportunity to move towards equality."*

(d) *"It is our wish to improve the standard of living of the people in China …"*

(e) *"… and to narrow the gap between the world's rich and poor."*

(f) *"This is to be carried out by investing in both profit-driven and charitable enterprises that are meaningful, market competitive and consistent with the economic reforms to move towards market economy that are being implemented by the Chinese government."*

446. The following further purposes of the Trust can be identified from clause 3.

(g) *"To support the economic reforms initiated by the Chinese government with a view to leading the country toward a market economy." (clause 3.1)*

(h) *"The Trust Fund is to be used to make investments in both for-profit and charitable enterprises primarily within mainland China." (clause 3.1)*

(i) *"It is the Trust's ultimate goal to contribute to the improvement of the welfare and living standards of the people in China …" (clause 3.1)*

(j) *"… and to towards narrowing the wealth gap between the world's rich and poor." (clause 3.1)*

(k) *"To make an investment in both for-profit and charitable enterprises which conform to the principles of a market economy, and are significant and meaningful in their social impact and have the ability to maintain global competitiveness in the long run." (clause 3.2)*

(l) *"To provide mutual assistance to mankind and help those in need. This is to be accomplished through establishing charitable enterprises that focus on resolving major concerns of mankind from the root." (clause 3.3)*

(m) *"With the ultimate goal of contributing to the improvement of the welfare and standard of living of people in general and contributing towards narrowing the wealth gap between the world's rich and poor and if the conditions detailed in Clauses 3.2 and 3.3 are met [ie (k) and (l) above] the Trust Fund may be used to make investments in for-profit and charitable enterprises in countries other than China …" (clause 3.5)*

(n) *"… and may be used to support the normal operation of charitable enterprises around the world that are established by the Founders …" (clause 3.5)*

447. The purposes, as set out seriatim in the preceding two paragraphs, are riddled with uncertainty…

449. This leaves Transglobe PTC, and the Court, unable to be certain what criteria they are supposed to meet when looking to apply the Trust's funds in the investment in enterprises."

758. The main submissions in relation to the Universal Link Trust (and similarly drafted Vantura and Ocean View Trusts) were advanced in the following terms:

"*463. As in the case of the China Trust, there are wholly uncertain purposes, which the Court would have great difficulty interpreting and enforcing and which render the Universal Link Trust void. There is some repetition of the problems identified already above in respect of the China Trust (not repeated here), but some further examples specific to the Universal Link Trust are given below:*

463.1 Purposes (a) and (b) are so vague and obscure that it would be impossible to tell whether any given application of funds did or did not implement or

accomplish them. For example, what would constitute 'providing assistance which is in fact maintaining control'?

463.2 The Founders' "greatest wish" is that all residents of Taiwan can co-exist harmoniously (Purpose (d)). Like all societies there will be divisions (e.g. between those in favour of unification with China and those opposed to it). It will not be possible for a Court in Bermuda to adjudicate on whether particular applications of funds will or will not implement or accomplish the purpose of eliminating those divisions. Moreover, "all residents of Taiwan" is administratively unworkable (contrast Taiwan's population of c.23.5 million with the population of Greater London at c.9 million, the latter of which is likely administratively unworkable, per McPhail: see para 408.1 above)

463.3 Purpose (l): what are appropriate measures which resolve "the problems" from the root? Which types of social assistance do, and do not, achieve this purpose?

463.4 Purposes (j) and (o), which are identical: "To ensure that the Formosa Group Companies maintain their long term global competitive edge" was rightly identified by Mr McAuley of Appleby in his comments on an early draft of the Wang Family Trust on 9 April 2001 as a purpose which was 'perhaps' (we submit it is) 'not sufficiently certain to satisfy the requirements of the Act'. What is a 'competitive edge'? How is that to be defined and ascertained by the trustee and the Court? Not only was Mr McAuley's advice ignored in that the wording of clause 3.2 (purpose (o)) was left unchanged in the final drafting (save for the insertion of some examples, which, being non-exhaustive, plainly cannot cure the inherent uncertainty in the purpose), but the uncertainty on this front was further compounded by:

(a) the subsequent insertion of the same uncertain language in purpose (j) within the Founders' Vision (at Susan Wang's, rather last minute, request on 7 May 2001), which does not have any stated examples (unlike purpose (o)); and

(b) the further last minute insertion of the new sub-clause 3.5 (making the implementation and accomplishment of the Founders' Vision a Purpose) – language which was thereafter repeated in the later Universal Link, Vantura and Ocean View

Trusts.

463.5 Purpose (s) refers, in addition to resolving different (yet related) social problems "from the root", to the "guiding principle" of attaining "full implementation of the concept of giving back to society that which we [the Founders] have taken from it." Who can say what this means? How is the Court to ascertain what the Founders "have taken from society"? Or what would constitute "giving it back to society"?

463.6 Purpose (t). This permits investments in for profit, charitable and philanthropic enterprises. Any investments have to satisfy three criteria:

(i) conform to the principles of a market economy;

(ii) be significant and meaningful in their social impact; and

(iii) have the ability to maintain global competitiveness in the long run.

These are all very difficult, indeed impossible, criteria to apply. Would an investment in an industrial concern in China meet them?"

759. Despite identifying a few "important" drafting differences, it was submitted the Wang Family Trust is void for uncertainty for similar reasons.

760. At the end of the Plaintiff's oral Opening Submissions, it appeared to me that the critical question on certainty was whether the common law test applied. At least some of the purposes in each Bermuda Purpose Trust at first blush seemed vulnerable to attack on uncertainty grounds. Indeed the next step in the argument was that if the certainty test was not met, no mechanism existed in the Act to cure the fatal deficiencies:

"*469. The PTCs' counterclaim includes a claim under section 12B (2) to vary the trust purposes of the Purpose Trusts in the event that they are insufficiently certain.*

470. This is misconceived: the jurisdiction to approve a scheme to vary a purpose trust contained in section 12B (2) only exists in relation to a purpose trust which exists i.e. one which complies with s.12A (1): Section 12B (2) provides:

'12B … (2) On an application ***in relation to a purpose trust*** *…*

the court may if it thinks fit approve a scheme to vary any of the purposes of the trust, or to enlarge or otherwise vary any of the powers of the trustees of the trust.'

'Purpose trust' in that section is a reference back to the definition in section 12A (1). Under section 12A (1), a trust cannot be a "purpose trust" unless it satisfies the conditions set out in section 12A (2) (including the Certainty Requirement):

'12A(1) A trust may be created for a non-charitable purpose or purposes provided that the conditions set out in subsection (2) are satisfied; and in this Part such a trust is referred to as a "purpose trust".'

471. Thus, if a trust fails the conditions of section 12A (2) because it is too uncertain to be carried out, it is not a purpose trust under the 1989 Act at all, which means that its purposes cannot be rescued and validated by a scheme made under section 12A (2); there is simply no "purpose trust" in existence to rescue.

472. Likewise, section 12B (2) (c) refers to an application in relation to a purpose trust being made by a "trustee of the trust". "[T]he trust" in that sub-section is a reference back to the "purpose trust" but if the purpose trust has failed for uncertainty, the trustee will not be a trustee of the purpose trust at all but rather trustee of an entirely different trust, namely a <u>resulting trust</u> in favour of the economic settlor(s).

473. Section 12B(2) on its natural reading can accordingly only be used in the case of a purpose trust which was initially valid and the Purpose Trusts in this case were not for the reasons given above.

474. Such a natural reading is notably consistent with what the Sub-Committee envisaged when analysing the proposed new variation regime in para 3.26 of its Report:

*'Variation would, for example, be appropriate if circumstances had changed **<u>since the creation of the trust</u>** so that the intention of the party or parties was no longer fairly reflected in the purposes' [emphasis added].*

475. Had the Sub-Committee, and the legislature, intended section 12B (2) to

permit the validation of purpose trusts otherwise void for uncertainty, one would have expected wholly different statutory language to that adopted.

476. Indeed, this is exemplified by the legislation in other jurisdictions to which the Sub-Committee had regard but which they declined to mirror in this respect, in particular section 103 of the Cayman Trust Law…"

761. Finally, it was submitted that any uncertainty in the trust purposes could not be cured using the powers of amendment in the respective Declarations of Trust:

"478. *In the alternative to section 12B(2), which does not assist the PTCs for the reasons given above, the PTCs fall back in their Counterclaim onto clause 13.2 of the Declarations of Trust which gives the PTCs a power to amend the terms on which the trust fund is held, subject to compliance with certain provisos.*

479. Again this is misconceived: if the Purpose Trusts are void for uncertainty as submitted above, the PTCs do not hold the trust fund on the terms of the Declarations of Trust at all, but on resulting trust for the economic settlors, YC and YT Wang. As stated in Morice v Bishop of Durham (1805) 10 Ves Jr 522:

> *'there can be no trust, over the exercise of which this Court will not assume a control; for an uncontrollable power of disposition would be ownership and not trust. If there be a clear trust, but for uncertain objects, the property, that is the subject of trust, is indisposed of, and the benefit must result to those, to whom the law gives the ownership in default of disposition by the former owner'.*

480. Clause 13.2 of the Declarations is thus irrelevant because it will not form part of the PTCs' powers as resulting trustee for YC and YT Wang (and now their respective estates) and cannot, therefore, be exercised."

762. The Plaintiff's arguments forcefully advanced in written and oral closing fortified these opening submissions. Firstly, the argument that the definition of certainty introduced in 1998 had merely restated the common law test more clearly was more persuasively articulated in the Plaintiff's Closing Submissions:

"*76. In Wood and Whitebread*[131]*, the Judge found (at page 283) that neither the*

[131] *Wood and Whitebread-v-The Queen (Re Russell)* [1977] 6 WWR 273.

court nor the executor had any means of judging whether, in the law of private trusts, an application of funds was "religious, literary and educational", and that the gift was not "specific" because of the practical impossibility in interpreting those words in relation to the various objects of an unincorporated society to which the gift had been made. In reaching that conclusion the Judge referred (at page 282) to the McPhail v Doulton [In re Baden's Deed Trusts] test for certainty (namely, can be said with certainty that any given individual is or is not a member of the class?), and its application by the Supreme Court of Canada in Jones v T. Eaton Co), and applied it to the case before him: "modifying the first quoted test to relate to "purposes", I do not think it can be said within a certainty that any given use would qualify". He went on to find that the difficulty in applying the test in the case before him was compounded by the apparent conjunctive expression "religious, literary ***and*** *educational purposes" and found that expression to be linguistically uncertain which vitiated the gift as distinct from the difficulty of ascertaining the existence or whereabouts of members of the class (which can be dealt with on an application for directions) and in reaching that conclusion he referred to and applied what Lord Upjohn said in Re Gulbenkian's Settlement Trusts: Wishaw v Stephens ."... and perhaps it is the more hallowed principle, the Court of Chancery, which acts in default of trustees, must know with sufficient certainty the objects of the beneficence of the donor so as to execute the trust .... So if the class is insufficiently defined, the donor's intentions must in such cases fail for uncertainty."*

77. Thus, in deciding what "specific" meant in "A trust for a specific non-charitable purpose ..." in s.20 (1) of the Perpetuities Act, the Alberta Court:

77.1 reached out for, and applied, the existing English trust law on certainty of objects where those objects are persons or a class of persons, and

77.2 equated 'specific' with 'sufficiently certain'.

78. Accordingly, when changing the requirement that the non-charitable purpose or purposes of a trust must be "specific reasonable and possible" to "sufficiently certain to allow the trust to be carried out" in 1998, all the Bermudian legislature was actually doing was deleting the words "reasonable and possible" and giving "specific" its more universally known legal meaning (namely certainty of trust objects). This

78.1 explains the final sentence of paragraph 3.8 of the Law Reform sub-committee report "The other elements which the draft omits did not appear to add anything"98: in other words the sub-committee did not think that "reasonable and possible" added anything to the requirement of certainty;

78.2 is consistent with what Lloyd LJ said in Lowsley v Forbes: when Parliament uses a word or term, the meaning of which has been the subject of a judicial ruling in the same or similar context, then it may be presumed that the word or term was intended to bear the same meaning'; and

78.3 demonstrates the fallacy in the PTCs' submission in opening that 'the reference to the purpose or purposes being "sufficiently" certain suggests Parliament intended to set a relatively low bar'. The word 'sufficiently' does not suggest a different and more easily satisfied test to the long-standing test for certainty of objects; on the contrary, it ***is*** *the language of that test: see Lord Upjohn in Gulbenkian 'sufficient certainty' (see para 76 above) and Roxburgh J in Re Astor at pp547-8 "sufficient degree of certainty".*"

763. The main authority relied upon was *Wood and Whitebread-v-The Queen in Right of Alberta (Re Russell)* [1977] 6 WWR 273 (Alberta Supreme Court). Although a statutory definition of a non-charitable trust was being construed in this case, the relevant purpose was expressed as a gift in a will as opposed to in the foundational instruments of a statutory purpose trust. Nonetheless, this case provides persuasive support for the general proposition that it is appropriate and possible to adapt the common law certainty test to non-charitable purposes.

764. The statutory test under the 1989 Act which Mrs Talbot Rice QC proposed was elegantly formulated as follows:

"81. What is the test? It is that the trustee (and the Court) must be able to tell whether a particular application of the trust funds is within or without the purposes (even though it may be impossible to make a complete list of the application of funds which would be within the purposes).

82. In order to be able to tell whether a particular application of the trust funds is within or without the purposes of the trust:

82.1 There must be linguistic or semantic certainty – the purposes as set

out in the trust deed must be certain as a matter of language; and

82.2 The purposes must not be so wide as to render them administratively unworkable; in other words so wide that the purpose cannot be executed."

765. When she proceeded to apply this test to the various Declarations of Trust (criticising the Wang Family Trust, the China Trust, the Universal Link Trust, the Vantura Trust and the Ocean View Trust instruments), I accepted that it seemed arguable that some of the purposes, if properly characterised as such, lacked the requisite certainty. The Plaintiff's counsel, however, submitted that it was not possible to sever the good from the bad and referred to the following paragraphs in her Closing Submissions:

"*112. Whilst it is tempting to pick and choose between the purposes in the Trusts, and to try to give life to those which might be regarded as sufficiently certain whilst discarding and ignoring those which are not, it is clear on the authorities that such a course is impermissible. If such a course had been permissible, the bad would have been severed from the good in Chichester Diocesan Board of Finance v Simpson (by simply ignoring the words 'or benevolent' in the gift 'for such charitable institution or institutions or other charitable or benevolent object or objects in England'). The majority of the House of Lords was clear that the whole gift failed. There was no question of saving the gift to charity by ignoring the impermissible 'or benevolent' words.*

113. The no severance principle was clearly expressed and explained in Re Astor's Settlement Trusts

> *"The purposes must be so defined that if the trustees surrendered their discretion, the court could carry out the purposes declared, not a selection arrived at by eliminating those which are too uncertain to be carried out. If, for example, I were to eliminate all the purposes except those declared in paragraph 4, but to decree that those declared in paragraph 4 ought to be performed, should I be executing the trusts of this settlement?"*

114. And that must be right: if a settlor wishes to benefit 6 purposes but the gift to 4 of them fails, it does not carry out his intentions by applying all the funds to the 2 which do not fail, for if he had known that 4 of his chosen purposes were invalid and could not be fulfilled, he might have done something entirely different with the funds or at the very least with the funds

which were for the 4 failed purposes. As Lord Parker pointed out in Bowman v Secular Society Ltd there is no means of discriminating what portion of the gift was intended for the valid purposes and what portion for the invalid purposes, "and the uncertainty in this respect would be fatal."

766. In relation to the China Trust, Mrs Talbot Rice QC pointed to the additional problem of political objects:

> "*108. There is an additional reason why the China Trust fails: clause 3.1 requires the trustees to support a political outcome (China becoming a market economy) which is impermissible for the additional reason that it requires the Court, in its capacity of supervisor of trusts, to make political judgments which would involve weighing up political, economic or social considerations in China. That this is impermissible is made clear by Bowman v The Secular Society and McGovern v AG (the Amnesty International case). Whilst these cases were considering whether a trust for a political purpose could be charitable or not, it is respectfully submitted that Slade J's reasoning in McGovern also establishes why a trust which strays into the arena of government policy or particular administrative decisions of governmental authorities cannot be carried out by the Court: it is because the Court as a matter of public policy cannot descend into the political arena and risk prejudicing relations between countries and it is not proper (and would be entirely inappropriate) for the Court to encroach on the functions of the executive by holding, in the enforcement of a trust for a political purpose, that the executive should be acting in a different manner to the manner in which it is acting (intra vires), 'An English Court would not, it seems to me, to be competent either to control or reform a trust of this nature and it would not be appropriate that it should attempt to do so'*[132]."

767. In oral argument, counsel also relied on the further observations of Slade J (as he then was) in *McGovern-v-Attorney-General* at page 337A-C, where he quoted Lord Diplock's warning (*Duport Steel Ltd.-v-Sirs* [1980] 1 W.L.R. 142 at 157) about the need to have regard to "*public confidence in the political impartiality of the judiciary, which is essential to the continuance of the rule of law.*" However in reply, these arguments were, sensibly, significantly diluted. Instead it was merely submitted that, in relation to the China Trust in particular, some purposes were so vague as to require the Court to make moral judgments in supervising the administration of the Bermuda Purpose Trusts.

[132] *McGovern-v- Attorney-General* [1982] 3 Ch 321at 340A.

768. In a robust oral reply, Mrs Talbot Rice QC stressed the public interest importance of there being clear parameters as to how the certainty test was to be applied. The common law test established by *In re Baden's Deed Trusts* and *Re Gulbenkian's Settlement Trusts* was not only well understood but could be adapted to apply to purpose trusts. She argued that the Trustees' pragmatic approach did not formulate a test containing sufficient specificity to enable reliable advice to be given to settlors in relation to the formulation of purposes.

The Trustees' submissions

769. The Trustees most broadly submitted that the certainty test should not be approached as if the policy of the law was designed to invalidate trusts:

> "*809. Winston Wong and Tony Wang's positions might be thought to suggest that, in conducting this approach, the law is designed to frustrate the intentions of parties by identifying bases on which to invalidate the expressions of those intentions on grounds of uncertainty. On the contrary, however, the law strives to uphold the validity of instruments so as to give effect to parties' intentions wherever possible, as the Courts have repeatedly made clear:*
>
> > *'A court never construes a devise void, unless it is so absolutely dark, that they cannot find out the testator's meaning':* Minshull v Minshull *(1773) 1 Atk 411, 412 (Lord Hardwicke LC).*
> >
> > *'The difficulty must be so great that it amounts to an impossibility, the doubt so grave that there is not even an inclination of the scales one way':* Doe d. Winter v Perratt *(1843) 9 Cl & F 606, 689 (Lord Brougham).*
> >
> > *'The court would not hold a will void for uncertainty "unless it is utterly impossible to put a meaning upon it. The duty of the court is to put a fair meaning on the terms used, and not, as was said in one case, to repose on the easy pillow of saying that the whole is void for uncertainty"':* In re Roberts *(1881) 19 Ch.D 520, 529 (Sir George Jessel MR).*
> >
> > *'…in construing trust deeds the intention of which is to set up a charitable trust, and in others too, where it can be claimed that there is an ambiguity, a benignant construction should be given if possible. This was the maxim of the civil law: "semper in dubiis benigniora praeferenda sunt." There is a similar maxim in English law: "ut res magis valeat quam pereat." It certainly applies to*

charities when the question is one of uncertainty (Weir v. Crum-Brown [1908] AC 162, 167), and, I think, also where a gift is capable of two constructions one of which would make it void and the other effectual …': Inland Revenue Commissioners v McMullen [1981] AC 1 at 14F per Lord Hailsham LC.

810. The position was recently and authoritatively summarised by Leggatt J (as he then was) in Novus Aviation Ltd v Alubaf Arab International Bank Ltd BSC [2016] EWHC 1575 (Comm) in the context of contracts in terms which apply with equal force to other instruments such as trusts, as follows:

> *'Even when a document (or relevant part of a document) is intended by the parties to be legally binding, there are circumstances in which it may be regarded as too uncertain to be enforceable by a court. Such a conclusion should, however, be one of last resort. English law aims to uphold and give effect to the intentions of the parties, not to defeat them. As Lord Tomlin observed in Hillas & Co Ltd v Arcos Ltd (1932) 43 Ll L Rep 359, 364, the aim of the court "must always be so to balance matters that, without violation of essential principle, the dealings of men may as far as possible be treated as effective, and that the law may not incur the reproach of being the destroyer of bargains." Accordingly, where the court is satisfied that the parties intended that their bargain should be enforceable, it will strive to give effect to that intention by construing the words used in a way which gives them a practical meaning …'*

811. The policy of the law is not to be the destroyer of bargains; nor is it the policy of the law to be the destroyer of trusts."

770. This high-level point had considerable resonance to it. At a more granular level, it was submitted, in effect, that the Trust Deeds had to be read holistically in order to fairly apply the appropriate certainty test. For example in relation to the Wang Family Trust, it was argued:

> "*818. The statement written by the Founders includes an explanation of ethical principles followed by the Founders; a description of how the Founders applied those principles by founding and supporting four charitable foundations; descriptions of the activities of those foundations, relating them to the Founders' ethical principles; descriptions of further charitable activity the Founders wish to see carried out; and advice to the*

Business Management Committee and to the managing bodies of the foundations about the future conduct of the foundations.

819. This is followed by a conclusion, in which the Founders' specific wishes for the FPG companies and the foundations are expressed in five numbered paragraphs, under the opening words "To accomplish our vision as stated above, our specific wishes for the Formosa Group Companies and for the foundations are stated as follows'."

771. As regards what the elements of the appropriate statutory certainty test were, it was argued that the Plaintiff had superimposed additional requirements onto a straightforward and practical test:

"*788. The Trustees' position is that the statutory language is straightforward and means what it says: a trust will satisfy the condition set out in subsection 12A(2)(a) of the 1989 Act, as amended by the 1998 Act, if the purpose or purposes are sufficiently certain to allow the trust to be carried out. There is nothing difficult or complex about this statutory language, which makes plain that the test is a practical one of whether, having regard to the trust's purposes, the trust can be carried out. If it is possible to carry out the trust by reference to its stated purposes, then the purposes are sufficiently certain. Moreover, the reference to the purpose or purposes being 'sufficiently' certain suggests Parliament intended to set a relatively low bar.*

789. In order, it appears, to make this part of their case work, Winston Wong and Tony Wang seek to put a gloss on the statutory language. This is set out in Winston SOC paragraph 34, which is admitted and averred by Tony Wang at Tony DAC paragraph 33, and which states as follows:

"... none of the [First Four Bermuda Purpose Trusts] satisfies the Certainty Requirement. The Certainty Requirement is satisfied in relation to each Bermuda Trust only if each and every specified purpose of such Trust is expressed with sufficient conceptual certainty to permit the trustee to carry out the trust and further to permit the Court, so far as may be necessary, to control or direct the exercise of the trustee's powers and duties and so that the trustee and, so far as may be necessary, the Court, is able to identify with certainty whether any given purpose proposed to be carried out falls or does not fall within the purposes as defined ("the Certainty Test"). None of the [First Four Bermuda Purpose Trusts] satisfies the Certainty Test since each of the [First Four Bermuda Purpose Trusts] has at least one or more purposes that fail to satisfy the Certainty Test..."

790. This re-formulation of the statutory test, which makes no attempt to reflect the language of subsection 12(2)(a) of the 1989 Act as amended by the 1998 Act, seeks to impose additional significant requirements on top of the language of the subsection, none of which is expressed in the statute, namely that 'each and every specified purpose … is expressed with sufficient conceptual certainty to permit the trustee to carry out the trust and further to permit the Court, so far as may be necessary, to control or direct the exercise of the trustee's powers and duties and so that the trustee and, so far as may be necessary, the Court, is able to identify with certainty whether any given purpose proposed to be carried out falls or does not fall within the purposes as defined.' [emphasis added]

791. The further requirement which this gloss seeks to read into the statutory language constitutes an attempt to transpose into the statutory test a formulation of the common law test for certainty as developed in the very different context of discretionary trusts for persons by the House of Lords in Re Baden's Deed Trusts [1971] AC 424."

772. My initial preliminary view, reflecting on the opening submissions, was that this submission did not go quite as far as it might have done. It failed to adequately acknowledge that the common law certainty test might well be apposite when applied to charitable purposes, but that a more flexible certainty test might be appropriate when construing non-charitable purposes. Both sides' analyses seemed to assume a legislative intention to apply a 'one size fits all' test. The critical language of section 12A (2) (a) of the 1989 Act, "*sufficiently certain to allow the trust to be carried out*", read in a straightforward way, suggests a flexible and nuanced certainty test: a certainty test which depends on the specific purpose in the context of the particular trust which is under consideration. This is, perhaps, simply the addition of my own gloss onto the point which the Trustees ultimately expressly made:

"*805. That the requirement provided for in subsection 12A(2)(a) of the 1989 Act as amended, namely that the purposes are "sufficiently certain to allow the trust to be carried out", is a practical one which simply requires the trust purposes to be sufficiently certain to enable the trustee to carry out the trust is supported by academic opinion.*"

773. The first fall-back submission was that:

"*838. … if the court holds that any of the Trusts contains provisions which do not comply with section 12A (2) (a) of the 1989 Act as amended, those provisions will form no part of the purposes of the Trust. The other provisions should stand as the purposes of the Trust if the Founders' and settlor's overall intentions, as*

manifested by the Trust Deed read as a whole, would continue to be satisfied by purposes declared by those other provisions, and if the Founders' and settlor's intentions would have been for the purposes declared by those other provisions to take effect rather than for the Trust to fail altogether…"

774. My initial response to this submission was that it seemed more consistent with the commercially-driven purpose of the legislative scheme that any partial invalidity of some purposes should not result in the entire impugned purpose trust structure collapsing like a pack of cards. Indeed, in the course of the Plaintiff's opening submissions on the mixed purpose trust point I (perhaps inappositely) queried whether the *ut res magis valeat quam pereat* rule of statutory construction might not apply to validate parts of a mixed purpose trust[133]. In response to Mrs Talbot Rice QC's invitation to apply the common law approach of invalidating a purpose trust with uncertain objects, I remarked[134]:

"*… It just seems to me that the philosophical disposition in these cases is not the same philosophical disposition that a court should be taking in 2021 dealing with late 20th century legislation designed to encourage people to set up vehicles in Bermuda…*"

775. These remarks overlooked the fact that section 12C expressly prescribed invalidity as a consequence of non-compliance with section 12A and, *inter alia*, its certainty requirements. That suggested a strict approach was required unless the overarching statutory purposes could be deployed to require a more liberal approach to the certainty test than that prescribed by the common law. Nonetheless, it was difficult to avoid the impression that, to some extent at least, the Plaintiff was contending for a certainty test which required the Court to assume that the Legislature wished to turn the certainty requirements into a minefield for the drafters of purpose trusts. As the Trustees' counsel submitted in their Closing Submissions:

"*1270. Put simply, it is clear from the relevant context that what the Law Reform Committee wished to achieve in recommending the purpose trust legislation, and what Parliament wished to accomplish by enacting it, was not to make it difficult to create purpose trusts in Bermuda but to make it easy, and to make Bermuda an attractive jurisdiction in which to create such trusts, not a difficult one beset with traps for the unwary. This is the context in which the conditions for a valid purpose trust set out by Parliament at section 12A (2) fall to be read, understood, and construed.*"

[133] Amended Transcript Day 1, page 134 line 25-page 135 line 21.
[134] Amended Transcript Day 2, page 11 lines 19-23.

776. The merits of the Trustees' second fall-back submission were more difficult to initially assess. Nevertheless, the proposition that the powers of amendment conferred by the statute could be used to cure an otherwise invalid purpose trust (by reason of uncertainty) was coherently articulated in the Trustees' Opening Submissions:

> "*840. As set out further above, section 12B (2) of the 1989 Act as amended by the 1998 Act provides in relevant part as follows:*
>
> *12B (2) On an application in relation to a purpose trust by any of the following persons—*
>
> *…*
>
> *(c) a trustee of the trust,*
>
> *the court may if it thinks fit approve a scheme to vary any of the purposes of the trust, or to enlarge or otherwise vary any of the powers of the trustees of the trust."*
>
> *841. Out of an abundance of caution appropriate to their position as trustees, the Trustees have applied by way of counterclaim that, if the Court holds that the purposes of any of the Trusts fail to comply with the requirement set out in subsection 12A (2) (a) of the 1989 Act as amended, the Court should direct a scheme to vary the purposes so as to comply with that requirement. The Trustees are evidently persons who qualify to make such an application under subsection 12B (2) (c).*
>
> *842. The issue that arises is whether the power to vary the purposes conferred by section 12B (2) can be used by the Court where it has already concluded that the purposes are insufficiently certain to allow the trust to be carried out and the trust is therefore invalid. The answer to this question turns on what is intended by the reference in the opening words of section 12B (2) to 'an application in relation to a purpose trust …' and in particular whether the powers conferred on the Court are confined to applications made in relation to valid purpose trusts, or extend to applications made in relation to invalid purpose trusts. As to this:*
>
> *842.1. The term 'purpose trust' is first referenced in section 12A(1) as follows: 'A trust may be created for a non-charitable purpose or purposes provided that the conditions set out in subsection (2) are satisfied; and in this Part [ie sections 12A to 12D] such a trust is referred to as a purpose trust.'*

842.2. This meaning of the term is resolved by looking at how the term 'purpose trust' is used in the rest of the legislation and, in particular, whether that term is used to mean valid purpose trusts only or extends to include invalid purpose trusts. The position is made clear by section 12C, which provides that 'purpose trusts which do not comply with Section 12A are invalid'. This use of the term 'purpose trust' here is self-evidently not restricted purely to valid purpose trusts.

842.3. The wording of section 12C therefore strongly suggests that the term 'purpose trust' as used in the legislation was not intended to be confined to valid purpose trusts only and that there is no reason why the use of that term in section 12B is to be so confined. Indeed, reading references to a 'purpose trust' as encompassing both valid and invalid purpose trusts is the only way of giving that term the same meaning throughout the statute; any other approach would require it to be given different meanings in different places in the legislation.

842.4. The term 'purpose trust' in section 12A (1) therefore simply means any 'trust … created for a non-charitable purpose or purposes', whether valid or invalid, and the reference to the validity conditions in the first part of subsection 12A (1) does not form part of what is meant by the reference to 'purpose trust' set out in the second part of the subsection.

843. The conclusion that the power to vary a purpose trust under section 12B (2) extends to varying an otherwise invalid purpose trust also makes good sense. There are strong policy reasons why Parliament should be taken to have intended to confer such a power on the Court…"

777. This technical construction of the natural and ordinary meaning of the statutory language was not entirely convincing. Seemingly more attractive was the Plaintiff's counter-argument that for a valid purpose trust to be created, its purposes had to be "*sufficiently certain*" at the outset. The fact that, thereafter, the policy reasons relied upon for amending purposes might arise over the duration of a perpetual trust (changes in the law or public policy) did not justify the conclusion that, in effect, a settlor contravening the certainty requirements of section 12A (2) (a) was able to draw a 'Get Out of Jail Free' card under section 12B (2).

778. The Trustees' third fall-back submission seemed more doubtful on its face:

"*845. Clause 13.2 of the Wang Family Trust {D3/6/18}) (which is typical of all five trusts) states:*

'Without prejudice to the provisions of Clause 13.1 and of Section 12(B)(2) of the Act, the Trustee may at any time and from time to time by deed supplemental hereto, amend in whole or part any or all of the provisions of this Declaration, provided, however, that:

(a) the Trustees may not exercise this power so as to confer or permit the conferral of any benefit on an Excluded Person;

(b) recital (C) may not be amended; and

(c) a provision of the Declaration (other than recital (C)) may be amended but only insofar as and to the extent that such amendment is consistent with the principles set forth in Recital (C).'

846. The power authorises the Trustee to amend 'all or any of the provisions of this Declaration'. Crucially, the power is not limited by its terms so as to be effective only if all the purposes declared by the Declaration are valid. This is shown by the proviso which prohibits the amendment of Recital (C), which is not an operative part of the Deed. The power permits a variation of the terms of the Declaration whether they have legal effect or not, and so it extends to amending the Declaration so as to create valid purposes even if, if prior to the exercise of the power, the instrument contained one or more invalid purposes. The only constraints on the exercise of the power are those contained in the provisos to the clause.

847. If, contrary to the above, any of the purposes of a Trust do not meet the requirements of subsection 12A (2) (a) of the 1989 Act as amended, the Trustees therefore have power under these provisions to amend the terms of the Trust Deed (subject to compliance with the proviso to the provisions) to create new or amended purposes which comply. Again, out of an abundance of caution appropriate to their position, the Trustees have counterclaimed for a declaration accordingly."

779. These arguments were further developed in the Trustees' Closing Submissions (at paragraphs 1256-1343). In terms of the broad approach the Court should adopt, it was argued:

"*1297. It is also well established that the law strives to construe instruments so as to uphold their validity and give effect to the parties' intentions wherever possible, as the Courts have repeatedly made clear:*

'A court never construes a devise void, unless it is so absolutely dark, that they cannot find out the testator's meaning.': Minshull v Minshull (1773) 1 Atk 411, per Lord Hardwicke LC at page 412 {AUTH-B2/14/2}.

'The difficulty must be so great that it amounts to an impossibility, the doubt so grave that there is not even an inclination of the scales one way': Doe d. Winter v Perratt (1843) 9 Cl & F 606, per Lord Brougham at page 689 {AUTH-B2/20/32}.

'The court would not hold a will void for uncertainty "unless it is utterly impossible to put a meaning upon it. The duty of the court is to put a fair meaning on the terms used, and not, as was said in one case, to repose on the easy pillow of saying that the whole is void for uncertainty"': In re Roberts (1881) 19 Ch.D 520, per Sir George Jessel MR at page 529 {AUTH-B2/22/10}.

'…in construing trust deeds the intention of which is to set up a charitable trust, and in others too, where it can be claimed that there is an ambiguity, a benignant construction should be given if possible. This was the maxim of the civil law: "semper in dubiis benigniora praeferenda sunt.' There is a similar maxim in English law: "ut res magis valeat quam pereat." It certainly applies to charities when the question is one of uncertainty (Weir v. Crum-Brown [1908] AC 162, 167), and, I think, also where a gift is capable of two constructions one of which would make it void and the other effectual …': Inland Revenue Commissioners v McMullen [1981] AC 1 per Lord Hailsham LC at page 14F {AUTH-B4/37/14}.

1298. *More recently, in Novus Aviation Ltd v Alubaf Arab International Bank Ltd BSC [2016] EWHC 1575 (Comm) {AUTH-B6/58/1} the position was summarised by Leggatt J (as he then was) at paragraph 60 {AUTH-B6/58/15} in terms which, though expressed in the context of contracts, apply with equal force to other instruments such as trusts, as follows:*

'Even when a document (or relevant part of a document) is intended by the parties to be legally binding, there are circumstances in which it may be regarded as too uncertain to be enforceable by a court. ***Such a conclusion should, however, be one of last resort****. English law aims to uphold and give effect to the intentions of the parties, not to defeat them. As Lord Tomlin observed in Hillas & Co Ltd v Arcos Ltd (1932) 43 Ll L Rep 359, 364, the aim of the court "must always be so to balance matters that, without violation of essential principle, the dealings of men may as far as possible be treated as effective, and that the law may not incur the reproach of being*

the destroyer of bargains." ***Accordingly, where the court is satisfied that the parties intended that their bargain should be enforceable, it will strive to give effect to that intention by construing the words used in a way which gives them a practical meaning*** ...' [emphasis added]

780. While these principles were broadly relevant, they appeared to overlook the potentially significant distinction between the construction of private instruments and the interpretation of statutory provisions governing the formation of a statutory trust vehicle. The Plaintiff's case was that, in effect, the governing statute in permitting the establishment of purpose trusts had as a matter of public policy imposed a strict certainty test and the failure to strictly comply with the relevant statutory requirements to any material extent was total invalidity of the impugned purpose trust. While there was support in the legislative history for the proposition that the common law certainty test was embraced, it seemed improbable that a test of similar rigidity was contemplated for the new statutory regime. The most cogent overall point advanced in the Trustees' Closing Submissions (and in Mr Howard QC's oral submissions) on the certainty issue in my judgment was an avowedly short and simple one:

> "*1286. Ultimately, the simple point is that section 12A(2)(a) of the 1989 Act (as amended) falls to be construed on its own terms, in the context of the piece of legislation in which it is contained and against the background of what that legislation was intended to accomplish and permit. It is not to be construed by reference to old common law cases in a different field decided against a different philosophical background divorced from what the Bermudian legislation in question was designed to achieve.*"

781. To my mind, the main distinction in the approach contended for by the Plaintiff and the Trustees was not so much the bare terms of the relevant certainty test, by common accord being designed to enable the trust to be carried out. Rather the question was how the certainty test fell to be <u>applied</u> in the statutory purpose trust context or what its guiding operational principles were. As noted above, in their Opening Submissions the Trustees relied in part on the common law approach to certainty in relation to charitable objects, which were more analogous to (if not indistinguishable from) purposes and indicated a benignant approach to construction. The simple point made in relation to the common law test in relation to discretionary trusts was that it was easier to be definite about identifying who was entitled to benefit from a trust than how a purpose should be implemented. It was submitted:

> "*1275. The common law test makes sense in the context of a common law discretionary <u>beneficiary</u> trust: people are finite, and it should be possible to identify, at least in theory, whether any given person is inside or outside the class of beneficiaries who*

are to benefit from the trust fund. But the test makes no sense at all in the context of trusts for purposes. A purpose is a concept. The means by which one could contemplate carrying out a purpose may be infinite. The idea that one could identify in respect of every conceivable application of the trust fund whether such an application of the fund would or would not further the purpose is fanciful. And, more importantly, it is not what Parliament said."

782. This submission reinforced the primary straightforward and persuasive submission that the statutory language itself required a practical approach to be adopted: "*sufficiently certain to allow the trust to be carried out*". The views of text writers were also drawn on for support:

"*1277.1. Davern, Legislating on purpose: a critical evaluation of statutory purpose trusts in the British Virgin Islands, Trusts and Trustees (Vol 17, No 1, February 2011): 'To adopt the within or without test would greatly undermine the practical utility of the legislation and … the specificity requirement does not entail this.'*

1277.2. Antoine, Offshore Financial Law: Trusts and Related Tax Issues, (2nd ed., 2013) (Oxford University Press) at paragraphs 3.73-3.74…: 'Certainly, it is expected that the intentions of such statutes will be respected, that is, to give more flexibility in the establishment of trusts for commercial purposes and in so doing, deviate in substantial ways from the traditional common law understandings of aspects of trust formation. … it is not expected that those same rules, designed for discretionary trusts with beneficiaries are to apply.'

1277.3. Panico, International Trust Laws (2nd ed., 2017) at paragraph 13.180 …: 'The definition of non-charitable purposes under the different instances of offshore purpose trust legislation was meant to be so wide in scope as to admit any lawful applications, both social and commercial.'

1277.4. Waters, Protectors and Enforcers: Drafting the Trust Instrument [2000] 8 JITCP 237 at page 30: 'Uncertainty appears to exist only when the descriptive language is so vague and ambiguous that, as it were, there is no intelligible idea or conception that can be found. The 1998 Bermuda legislation avoids the descriptive words "specific" and "reasonable" and 'possible' and asks only whether it can be seen what is to be done. I think that is right. Is the purpose clear enough for it to be capable of being carried out? […]'"

783. As regards the application of the test contended for to the purposes set out in the relevant Declarations of Trusts, the Trustees critically argued in their Closing Submissions as follows. Firstly, in response to reliance placed on a stricter approach to certainty at

common law in mostly older cases, it was submitted that the modern statutory approach in Bermuda to charitable purposes was more flexible than the older common law approach. The following provisions of the Charities Act 1978 were prayed in aid in this regard:

"***Descriptions of purposes***

4. (1) A purpose falls within this subsection if it falls within any of the following descriptions of purposes-

(a) prevention or relief of poverty;

(b) the advancement of education;

(c) the advancement of religion;

(d) the advancement of health or the saving of lives;

(e) the advancement of citizenship or community development;

(f) the advancement of the arts, culture, heritage or science;

(g) the advancement of sport;

(h) the advancement of human rights, conflict resolution or reconciliation, or the promotion of religious or racial harmony or equality and diversity;

(i) the advancement of environmental protection or improvement;

(j) the relief of those in need because of youth, age, ill-health, disability, financial hardship or other disadvantage;

(k) the advancement of animal welfare;

(l) the promotion of the efficiency of the armed forces of the Crown or of the efficiency of the police, fire and rescue services or ambulance services;

(m) any other purposes—

(i) that are not within paragraphs (a) to (l) but are recognised as charitable purposes by virtue of section 6 (provision of recreational and similar facilities, etc.); or

(ii) that may reasonably be regarded as analogous to, or within the spirit of, any purposes falling within any of paragraphs (a) to (l) or sub-paragraph (i)."

784. Secondly, as regards the argument that the courts will not enforce political purposes, it was submitted:

"*1289. The short answer to this argument is that the cases do not establish the principle for which Winston and Tony have cited them. They establish an entirely different principle, namely that a trust to promote political purposes will not qualify at common law as a charitable trust. This is because, in order to qualify as a charitable trust, the purpose must be for the public benefit. The court is unwilling (and indeed unable) to make findings as to whether a political purpose is or is not for the public benefit.*

1290. This can be seen from the decision of Slade J (as he then was) in McGovern v Attorney General [1982] Ch 321…that case concerned the issue of whether a trust set up to support certain aspects of the work of Amnesty International was charitable or not. The Court concluded that it was not. It set out its reasoning from page 333G onwards… as follows:

> '*Save in the case of gifts to classes of poor persons, a trust must always be shown to promote a public benefit of a nature recognised by the courts as being such if it is to qualify as being charitable. The question whether a purpose will or may operate for the public benefit is to be answered by the court forming an opinion on the evidence before it: see National Anti-Vivisection Society v. Inland Revenue Commissioners [1948] A.C. 31, 44, per Lord Wright. No doubt in some cases a purpose may be so manifestly beneficial to the public that it would be absurd to call evidence on this point. In many other instances, however, the element of public benefit may be much more debatable. Indeed, in some cases the court will regard this element of being incapable of proof one way or the other and thus will inevitably decline to recognise the trust as being of a charitable nature. Trusts to promote changes in the law of England are generally regarded as falling into the latter category and as being non-charitable for this reason. Thus Lord Parker of Waddington said in Bowman v. Secular Society Ltd. [1917] A.C. 406, 442:*
>
> > *"The abolition of religious tests, the disestablishment of the Church, the secularisation of education, the alteration of the law touching religion or marriage, or the observation of the Sabbath, are purely political objects. Equity has always refused to recognise such objects as charitable. It is true that a gift to an association formed for their attainment may, if the association be unincorporated, be upheld as an absolute gift to its members, or, if the association be incorporated, as an absolute gift to the corporate body; but a trust for the attainment of*

political objects has always been held invalid, not because it is illegal, for everyone is at liberty to advocate or promote by any lawful means a change in the law, but because the court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore, cannot say that a gift to secure the change is a charitable gift. The same considerations apply when there is a trust for the publication of a book. The court will examine the book, and if its objects be charitable in the legal sense it will give effect to the trust as a good charity: Thornton v. Howe (1862) 31 Beav. 14; but if its objects be political it will refuse to enforce the trust: <u>De Themmines v. De Bonneval</u> (1828) 5 Russ. 288."…

1292. In the present case, nobody is suggesting that the Trusts are for purposes which are exclusively charitable. Therefore no question arises as to whether or not any of the purposes of the trusts with which we are concerned are for the public benefit. The Court is not therefore being called upon to judge whether or not a particular purpose of any of the trusts is for the public benefit. For that reason, the principle identified in the McGovern case and relied on by Winston and Tony simply does not arise."

785. After setting out the key provisions of the Wang Family Trust, the following critical conclusory submissions are made:

"*1307. The Trust Deed therefore begins with a detailed explanation of the principles which have guided the Founders' actions. It then declares purposes of two types: purposes relating to the use and acquisition of FPG shares; and a purpose stating how distributions from the trust fund are to be applied. The purposes are to be carried out to implement and accomplish the Founders' Vision. Detailed provisions are then set out as to how the trust assets are to be used and invested to achieve the purposes.*

1308. The purposes declared by clause 3 are sufficiently certain to allow the trust to be carried out. The Trustees can have no difficulty identifying activities falling within the terms of the purpose in clause 3, and the Trustees are given detailed guidance in clause 4. It is immaterial that it may be possible to devise borderline cases, about which doubt may be felt as to whether they fall within the purposes.

1309. Paragraph 35 of Winston's Statement of Claim pleads that the Founders' Vison is described in 'general and inherently uncertain terms' and highlights the phrases 'to see that all residents of Taiwan – regardless of their origins – can coexist harmoniously, helping each other as if we were all together on the same

boat' and 'to be able to maintain the Wang Family's spirit of mutual assistance.' The fallacy in this approach is to treat the ideas, wishes and objectives expressed in the Founders' Vision as free-standing purposes, ignoring the final part of the Founders' Vision and to suggest that these ideas, wishes and objectives can somehow be divorced from what was set out in clauses 3 and 4 of the Trust Deed."

786. The Trust Deeds of the Vantura, Universal Link and Ocean View Trusts, it is reiterated, are essentially the same as the Wang Family Trust. As regards the China Trust, the relevant provisions in the Trust Deed are also reviewed before the following significant conclusory submissions are made:

"*1317. As with the Wang Family Trust, the Trust Deed begins with a detailed explanation of the rationale for the creation of the China Trust. It then declares purposes of investing in both for-profit and charitable enterprises, and of establishing charitable enterprises, explaining the objectives for which these activities are to be undertaken, and provides detailed provisions as to how those investments are to be made. The purposes of the China Trust are sufficiently certain to allow the trust to be carried out and therefore satisfy the condition set out in section 12A(2)(a) of the 1989 Act (as amended).*

1318. Paragraph 38 of Winston's Statement of Claim {A1/1/16} pleads that the Founders' Vison is described in "general and inherently uncertain terms" and highlights the phrase "to improve the standard of living of the people in China and to narrow the gap between the world's rich and poor". There is nothing uncertain about the concept of improving the standard of living of the people in China or narrowing the gap between rich and poor, but in any event the fallacy in this approach is to treat the ideas, wishes and objectives expressed in the Founders' Vision as free-standing purposes, divorced from what was later set out in clauses 3 and 4 of the Trust Deed.

1319. Views may differ in respect of how best to achieve such a purpose but that is not a matter going to whether the purpose itself is sufficiently certain to allow the trust to be carried out. A failure to appreciate this critical distinction lies at the heart of Winston and Tony's case…"

787. It seemed clear having reviewed the respective written submissions and heard the Plaintiff's oral closing submissions, that the merits of the certainty point depended substantially (if not entirely) on how the express statutory test under section 12A (2) (a) ("*sufficiently certain to allow the trust to be carried out*") should be applied. To what

extent, if any, did the restrictive elements of the common law test for the certainty of discretionary trusts or charitable trusts apply? Applying the restrictive test proposed by the Plaintiff, the purposes of the China Trust in particular seemed vulnerable to attack. Applying the more benignant certainty test proposed by the Trustees, the various purposes did not seem vulnerable to attack.

788. Instinctively, and particularly in light of the clear commercial imperatives found in the legislative history of the purpose trust regime (considered above in relation to the mixed purpose trust point), I felt that the correct approach to applying the statutory certainty test adumbrated in section 12A (2) (a) of the 1989 Act was that proposed by the Trustees. However, because of the novelty of the argument and the strict compliance with the section 12A requirements section 12C implied, I did not consider it appropriate to determine the certainty point summarily without hearing further oral argument.

789. I accordingly invited Mr Howard QC to focus his oral submissions on (a) the operational aspects of the certainty test, and (b) the Trustees' fall-back submissions which I provisionally considered lacked merit. In the event, in light of my indication that I provisionally considered that the primary arguments had merit, the fall-back points were not addressed by counsel in oral closing submissions. The Trustees' broad submissions on how the certainty test should be applied seemed irresistible even though, as Mrs Talbot Rice QC would argue in reply, the precise parameters of the proposed test seemed ill-defined.

Findings on certainty issue

The applicable certainty test: conceptually defined

790. I find that the statutory certainty test for purpose trusts is, as one might initially assume, conceptually defined by the express terms of section 12A (2) (a) of the 1989 Act. Valid purposes must be "*sufficiently certain to allow the trust to be carried out*". That test is in general terms conceptually derived from the common law test developed in relation to both beneficiary and charitable trusts (including will trusts), as the Plaintiff's counsel rightly submitted based in large part on the Law Reform Sub-Committee Report which preceded the introduction of the provisions through the 1998 Act.

791. As the Trustees' counsel also correctly contended, the natural and ordinary meaning of the words of the statute require no embellishment and it is the statutory language in its legislative context which determines how the certainty test ought to be applied in relation to statutory purpose trusts. But how this primary conceptual jurisdictional test falls to be applied cannot be resolved in as simple a manner as it leaves begging two questions: (a) what are the limits or minimum certainty standards to be applied and (b) how flexible or

strict is the operational test? Each side implicitly, if not explicitly, contended for contrasting standards of strictness to suit the tactical dictates of their case.

The applicable certainty test: operationally defined

792. The Plaintiff's counsel fully grasped the nettle and sought to propose a neat and clearly demarcated set of principles defining how the certainty test should be applied on a case by case basis. It bears reproducing again here from the Plaintiff's Closing Submissions:

> "*81. What is the test? It is that the trustee (and the Court) must be able to tell whether a particular application of the trust funds is within or without the purposes (even though it may be impossible to make a complete list of the application of funds which would be within the purposes).*
>
> *82. In order to be able to tell whether a particular application of the trust funds is within or without the purposes of the trust:*
>
> *82.1 There must be linguistic or semantic certainty – the purposes as set out in the trust deed must be certain as a matter of language; and*
>
> *82.2The purposes must not be so wide as to render them administratively unworkable; in other words so wide that the purpose cannot be executed.*"

793. In my judgment the first limb of the test advanced by Mrs Talbot Rice QC is fundamentally sound, subject to one cosmetic and one substantive modification. It is entirely consistent with the fact that the legislative language and history support the view that the statutory certainty test is conceptually grounded in or derived from the common law certainty test. It is indeed, as Mr Howard QC urged, a test designed to ensure the functionality of purpose trusts in practical terms. Central to carrying out a trust for purposes, no less than a trust for persons, is the ability of the trustee (subject to the supervision of the Court) to decide whether a proposed application of trust funds is within the intended purposes of the trust. However, the following modifications are required to the test proposed by the Plaintiff's counsel:

(a) limiting the test to uncertainty in relation to the application of trust funds is probably an overly narrow formulation or framing as in some cases (e.g. the promotion of a scheme to amend the trust purposes under section 12B (2) of the 1989 Act) the application of funds may merely be incidental to some other higher trust purpose. Indeed, more practically still, where a purpose trust (as here) holds

shares, important decisions may have to be made about how the voting rights should be exercised; and

(b) only an irreconcilable uncertainty which will not "*allow the trust to be carried out*" will invalidate a purpose trust.

794. I would accordingly accept the Plaintiff's posited test modified to read as follows: the trustee (and the Court) must (a) be able to tell whether a proposed application of trust funds or course of action is within or without the purposes (even though it may be impossible to make a complete list of the application of funds which would be within the purposes), and if not (b) be able to determine that the trust can nevertheless still be carried out. Because of the express terms of section 12A (2) (a) of the 1989 Act, the no severance rule relied upon by Mrs Talbot Rice QC does not apply.

795. In my judgment this test embodies a requirement for "*linguistic or semantic*" clarity, rather than certainty, as Mrs Talbot Rice QC proposed.

796. Having regard to the legislative purpose of section 12A (2) (a) in its wider statutory context, I would provisionally reject the submission that administrative unworkability of trust purposes would be caught by the statutory certainty test. For the reasons explained below, administrative unworkability does not properly arise for serious consideration here. It is difficult to imagine what types of administrative unworkability would make it impossible to carry out a perpetual purpose trust. What is administratively impracticable today may be administratively feasible in 50 years' time. I prefer the view that Parliament must have intended that administrative unworkability problems, even affecting an entire trust, would not invalidate a purpose trust but could be cured by a scheme of amendment if required. For instance, a purpose trust established in 2022 for the sole purpose of "investing in companies involved in commercial inter-planetary travel" would be invalid for uncertainty. However the trustee could seek to amend the trust purpose to read "investing in companies involved in promoting or carrying out interplanetary travel".

797. Since one is generally on firmer ground when analysing past events, it is more instructive to look back more than 160 years to a period when any form of commercial flight was no more than "*the stuff that dreams are made of*". In *Whicker-v-Hume* (1858) 7 H.L. Cas. 124 at 154-155, in a passage upon which the Trustees' counsel relied in oral closing, an uncertainty complaint based on unworkability in relation to a charitable gift in a will was rejected by the House of Lords. The instrument devised funds to the testator's trustees "*to be applied by them according to their discretion for the propagation of education and learning all over the world*". Lord Chelmsford LC opined as follows:

"*But then it is said, that the bequest is of such an extensive nature, that it is impossible that it can be carried into effect; that it extends over the whole habitable world ... But, I apprehend, my Lords, that there is no difficulty whatever with regard to the extensive character of this gift, because of the trust, for the subject upon which the discretion of the trustees is to be exercised is specific and limited. It is for 'education' and for 'learning' in the sense of teaching and instruction. And, in that sense, it appears to me, that the case which was cited by the Respondents, and which is printed in the Respondent's case of* <u>*The President of the United States v Drummond*</u> *... may be applicable, where Lord Langdale decided, that a gift to the United States of America, to found, at Washington, under the name of the 'Smithsonian Institution, an establishment for the increase of knowledge among men,' was a valid charity. There the area was as spacious and extensive as in the present case. The particular mode in which the object of the testator was to be carried out was described, namely, by founding an institution for the increase of knowledge among men. Here it is to instruct, to teach, and to educate throughout the world. Then the mere circumstance of this spacious area being open to the discretion of the trustees, would not prevent the gift from being available as a good charitable bequest, the discretion being sufficiently pointed and specific to make it definite and certain.*"

798. In summary, as a starting point, I would adopt in modified form the first limb of the Plaintiff's operational certainty test as best expressing the practical application and scope of the conceptual statutory test, "*sufficiently certain to allow the trust to be carried out*". The Trustees' counsel's reliance on the bare words of the statute in this regard was ultimately circular. A fuller explanation of practical effect of the certainty test is as follows. The trustee (and the Court) must:

(a) be able to tell whether a proposed application of trust funds or course of action is within or without the purposes (even though it may be impossible to make a complete list of the application of funds which would be within the purposes); and if not

(b) be able to determine that the trust can nevertheless still be carried out.

<u>Is the certainty test required to be applied in a rigid or flexible manner?</u>

799. Mrs Talbot Rice QC's submissions implied that a rigid and strict approach to certainty was required. I accept that two considerations potentially support such a conclusion. Firstly, the statute expressly provides that failure to comply with, *inter alia*, the certainty requirements of section 12A (1) results in the trust being "*invalid*". Secondly, the statute does not, as it might do, expressly permit trust purposes to be amended to cure any potential

invalidity. Neither of these considerations, properly analysed, ultimately support this conclusion.

800. In the Plaintiff's Opening Submissions, primarily in response to the Trustees' argument that any uncertainty found to exist could be cured by amendment, it was persuasively argued:

> "*476. Indeed, this is exemplified by the legislation in other jurisdictions to which the Sub-Committee had regard but which they declined to mirror in this respect, in particular section 103 of the Cayman Trust Law. It provides at subsection (1) that 'Subject to subsection (4), a special trust is not rendered void by uncertainty as to its objects…' and at subsection (4) unambiguously confers on the Court the power to resolve 'an uncertainty as to the objects… (i) by reforming the trust; (ii) by settling a plan for its administration; or (iii) in any other way which the court deems appropriate…' As a matter of express statutory language, it will only be if the STAR trust is uncertain and the general intent of the trust cannot be found on admissible evidence that a STAR trust will be declared void ab initio.*"

801. I find this submission compelling in defeating the Trustees' fall-back submission on curing uncertainty deficiencies through amendment, a point I deal with somewhat summarily below. But the fact that the Sub-Committee and the Legislature did not choose to incorporate such elaborate saving provisions in my judgment is more consistent with a legislative intention to adopt a flexible certainty test. Having regard to the express terms in which the statutory test is cast and the unambiguous purpose of the wider revisions in 1998 to the original 1989 purpose trust regime, it makes no sense and would lead to absurd results if the new certainty test were construed as designed to, in the words of Mr Howard QC, "*set a trap for the unwary*". To my mind, the imposition as the penalty for uncertainty of invalidity without the chance of a reprieve is more indicative of a legislative intention that invalidity should be an exceptional result, rather than suggesting that it should be the rule whenever through clever arguments advanced by parties hostile to the trust infelicitous drafting is revealed.

802. Construing the natural and ordinary meaning of the words "*sufficiently certain to allow the trust to be carried out*" in section 12A (2) (a) of the 1989 Act in their wider statutory context, I find that the crucial words read in a straightforward way require the application of a flexible approach to the test. The words convey a clear legislative intention that all that is required is <u>sufficient</u> certainty to <u>allow</u> the trust to be carried out. The dominant legislative intention, as would be obvious without the benefit of the Law Reform Sub-Committee Report, is to facilitate the creation and carrying out of purpose trusts. The certainty requirement is clearly intended to be facilitative of that dominant purpose. It is

not intended to facilitate invalidating purpose trusts as the Plaintiff's rigid approach necessarily implies. Mr Howard QC made the more subtle submission in oral argument that the legislative language requires the ability for the whole "*trust*" to be carried out to be assessed, not each of several purposes[135]:

"*It is interesting that Parliament has framed the test not by reference to whether each individual purpose can be carried out, but by reference to whether the trust can be carried out as a whole. So at this stage, we suggest that what Parliament intends is that if the purposes are sufficiently certain to allow the trust to be carried out, the condition is satisfied and that's all that is required.*"

803. This is a significant (though easy to overlook and unduly minimize) aspect of the statutory language which furnishes further support for the flexible approach I find the statutory test embodies. It is also noteworthy that both practitioner scholars and academics have, in the absence of judicial authority on the statutory certainty test introduced into the 1989 Act by the 1998 Act, read the bare statutory language as suggesting a flexible approach, in relation to Bermuda's statute and more broadly. Most coherently and persuasively, Professor Rose-Marie Belle Antoine in '*Offshore Financial Law: Trusts and Related Tax Issues*', 2nd ed. (Oxford University Press: 2013) at paragraphs 3.73-3.74 opines as follows in relation to the general statutory position:

> "*Given the lack of case law, it is still too early to comment on the courts' approach to interpreting the statutory requirements for establishing purpose trusts in offshore jurisdictions. In what circumstances will a purpose trust be struck down as invalidly constructed? Certainly, it is expected that the intentions of such statutes will be respected, that is, to give more flexibility in the establishment of trusts for commercial purposes and in so doing, deviate in substantial ways from the traditional common law understandings of aspects of trust formation.*
>
> *An underlying question, for example, is what is meant by a clear or specific purpose? While there is a body of case law which gives guidance on trust formation with respect to certainty of objects, it is not expected that those same rules, designed for discretionary trusts with beneficiaries are to apply. Similarly, while common law rules on the establishment of charitable trusts may have some analogical value, given their similar make-up as trusts without identifiable beneficiaries, the focus of such trusts are different to commercially sensitive purpose trusts, particularly, in view of the fact that other common law rules, such as the rule against perpetuities, on alienation and the rule in Saunders v Vautier, have also been modified to support the purpose trust and its more commercially oriented purposes.*"

[135] Transcript Day 76 page 21 lines 9-16.

804. As regards both the general purpose trust position and the Bermudian statutory certainty test itself, the most persuasive and coherent text cited by the Trustees' counsel was '*Waters, Protectors and Enforcers: Drafting the Trust Instrument*' [2000] 8 JITCP 237 at 264, 266-267:

> "*With regard to 'purposes', as opposed to beneficiaries, this means that it may be difficult to work out in what manner a complex or sophisticated business purpose is to be discharged, but it can be done. Even confusion of expression can be unravelled if there is an idea that can be intellectually grasped within the expression. Uncertainty appears to exist only when the descriptive language is so vague and ambiguous that, as it were, there is no intelligible idea or conception that can be found….*
>
> *The 1998 Bermuda legislation avoids the descriptive words 'specific' and 'reasonable' and 'possible' and asks only whether it can be seen what is to be done. I think that is right. Is the purpose clear enough for it to be capable of being carried out? …*"

805. In the course of oral closings, I indicated that my provisional view was that the Trustees' position on the certainty point was a sound one. Mrs Talbot Rice QC understandably sought to dislodge me from my provisional position in her oral reply. She opened her submissions on this point in typically combative style:

> "*Your Lordship will have, I'm sure, in mind the warning given in the Chichester Diocesan case set out in our closings at {A5/1/54} that the tail shouldn't be made to wag the dog. Your Lordship will have regard to that, I'm sure, in assessing and analysing this question. The exercise and the analysis required to determine whether these trusts are sufficiently certain or not has to be conducted intellectually honestly, not starting from a prejudged position of the result which the court would like to achieve and then backfilling the reasoning to that result.*"

806. The relevant warning, to which counsel referred on the opening day of the trial, was set out in the Plaintiff's Closing Submissions in relation to the approach to the certainty point as follows:

> "*97. This question must be answered without regard to the result, as Lord Simonds cautioned in Chichester Diocesan Fund v Simpson*[136]
>
> > *'Equally irrelevant are the facts which are brought to your Lordships' attention that the estate is a large one, that the next-of-kin are not near*

[136] [1944] A.C. 341 at 367.

relatives, that the discovery of a possible flaw in the will was fortuitous, and that the proceedings were belated. The construction of this will is the same, whether its invalidity brings an unexpected windfall to distant relations or its validity disappoints the reasonable hopes of a dependent family.'

The Court should not approach the question of whether the purposes are sufficiently certain to allow the trusts to be carried out on the basis of a preconceived idea of the result which it wishes to achieve. That would be to prejudge the issue and to replace the law with a palm tree."

807. This *dictum* is of no relevance at the present stage of the analysis, which is concerned with statutory interpretation and how Parliament intended its certainty test to be applied in individual cases. It was potentially apposite at the next stage of the analysis, namely construing the relevant purposes with a view to deciding whether the requirements of the statutory test are satisfied, to ignore the consequences of a finding of invalidity. But having found that section 12A (2) (a) of the 1989 Act requires a flexible approach to the question of certainty it is difficult to see how those judicial remarks, made over 75 years ago in the context of applying a common law test to a purely private instrument, can have much resonance in the present context. I was not persuaded by the academic texts relied upon as supporting the application of the common law test in unfiltered form:

(a) the bare assertion that "*presumably, the principles established in English law in relation to trusts for beneficiaries will apply*" (Thomas and Hudson, '*The Law of Trusts*', 2nd edition (Oxford University Press: 2010) at paragraph 41.15 is no more than a speculative unreasoned comment;

(b) no weight can be attached to essentially the same comment in Hayton (ed.) '*The International Trust*', 3rd edition (Jordans: 2011)) at paragraph 5-166.

808. The main criticism of the Trustees' approach as lacking any limits was ultimately circular. Their posited approach can only fairly be criticised as overly broad if one has already determined that Parliament did not intend to make it easy to create valid purpose trusts. In her oral reply submissions, Mrs Talbot Rice QC also argued:

"*So when Mr Howard submitted, as he did on Day 76, 2 page 100 {Day76/100:5}, that it's: '... not by reference to each individual purpose but by reference to the trust as a whole indicates that where you have a number of purposes, the fact that one or more of them may not be sufficiently certain to be carried out does not mean that the trust itself cannot be carried out.' That, we respectfully submit, is wrong. The trust is all of the purposes and if you're only able to carry out two out of five of them, you're not carrying out the trust which the settlor has settled. You're only carrying out two fifths*

of it. That is the answer to his, 'If you can find one application of funds which is within the purpose, that's all right'. It's not, because it is not carrying out the trust which the trustee has been given to carry out."

809. This submission was to some extent sound. In my judgment the clear terms of section 12A (2) (a) define certainty by reference to the possibilities of carrying out the trust as a whole. The legal position cannot be that in every case the test will be met if at least one purpose can be carried out. Rather, determining whether the trust can be carried out requires analysis of the impact of any uncertainty of purposes found to exist on the trust looked at holistically having regard to the terms of the relevant trust instrument. In short, I reject the Plaintiff's contention that the statutory certainty test requires a strict or rigid construction likely to invalidate rather than validate purpose trusts. A flexible approach to applying the certainty test does not entail a complete departure from the common law. As Lord Hailsham opined in *Inland Revenue Commissioners v McMullen* [1981] AC 1 at page 14F in a passage upon which the Trustees relied:

> "*…in construing trust deeds the intention of which is to set up a charitable trust, and in others too, where it can be claimed that there is an ambiguity, a benignant construction should be given if possible. This was the maxim of the civil law: 'semper in dubiis benigniora praeferenda sunt.' There is a similar maxim in English law: 'ut res magis valeat quam pereat.' It certainly applies to charities when the question is one of uncertainty (Weir v. Crum-Brown [1908] AC 162, 167), and, I think, also where a gift is capable of two constructions one of which would make it void and the other effectual …*"

810. In effect my central finding is that the statutory certainty test for purpose trusts requires the conceptual test to be operationally applied to the governing trust instruments through the deployment of a benignant construction. This follows from construing the natural and ordinary meaning of the relevant statutory words in their context and is fortified by the application of a purposive construction. In the course of the hearing I felt that some further unarticulated canon of statutory interpretation fortified the Trustees' otherwise dispositive reliance on a purposive approach to construction. An aspect of a purposive approach to statutory construction is the application of the presumption that Parliament does not intend absurd or futile results. This somewhat elementary principle, which was implicit in the submissions advanced by the Trustees on this point, is illustrated by the following passages from two cases not cited in argument.

811. Most concisely, the Privy Council (Lord Scott) opined as follows in *Gumbs –v-Attorney-General of Anguilla* [2009] UKPC 27:

"*44. The presumption that the 1973 Ordinance was not intended to take away private rights of property without compensation, i.e. the appellant's property rights in the thirty-two foot wide strip of land, is fortified by a further presumption, namely, that the legislator does not intend absurd consequences. The presumption against absurdity is fully discussed in Bennion on Statutory Interpretation (5th Ed.) at 969 et seq and was referred to by Lord Millett* <u>*in R (Edison First Power Ltd) v Central Valuation Officer*</u> *[2003] 4 All ER 209*

> *'The courts will presume that Parliament did not intend a statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless. But the strength of these presumptions depends on the degree to which a particular construction produces an unreasonable result. The more unreasonable a result, the less likely it is that Parliament intended it …* "

812. The relevant principles were set out in the more recent first instance judgment of Lane J in *Hamilton-v-Secretary of State for Business, Energy and Industrial Strategy* [2021] EWHC 2647, [2021] 1 W.L.R. 1717. The following extracts make it clear that the presumption against absurdity is an element of the broader purposive construction principle:

"80. *Mr Royle lays emphasis on the purpose behind the enforcement provisions of the 2007 Act. He accordingly draws support from section 12.1 of Bennion (Purpose, mischief and evasion), whereby an Act or other legislative instrument 'is passed or made for a reason'. In interpreting the legislation, the courts, accordingly, seek to identify and give effect to its purpose. This leads to section 12.2, which provides that in construing an enactment the court should aim to give effect to the legislative purpose. The purposive construction is one that interprets the enactment's language, as far as possible, in a way that best gives effect to the enactment's purpose. The purpose of construction may ether accord with the grammatical construction 'or may require a strained construction'. At section 12.3, the authors suggest that where the court is unable to find out the purpose of an enactment, or is doubtful as to its purpose, the court may be reluctant to depart from the grammatical meaning.*

81. Mr Royle also lays emphasis on section 13.1, concerning the presumption that an 'absurd' result is not intended. It is helpful to set out section 13.1 in full:-

> *'13.1 Presumption that "absurd" result not intended*
>
> *(1)* <u>*The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by the legislature. Here, the courts give a very*</u>

wide meaning to the concept of 'absurdity', using it to include virtually any result which is impossible, unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief.

(2) The strength of the presumption against absurdity depends on the degree to which a particular construction produces an unreasonable result.

(3) The presumption may of course be displaced, as the ultimate objective is to ascertain the legislative intention.'

82. The presumption against absurdity is frequently relied on by the court. In Project Blue Ltd v HMRC [2018] UKSC 30, Lord Hodge described it as 'without question a legitimate method of purposive statutory construction that one should seek to avoid absurd or unlikely results' (paragraph 31). In Oldham Metropolitan BC v Tanna [2017] EWCA Civ 50, Lewison LJ said that it 'is a fundamental principle of the interpretation of statutes that Parliament does not intend an absurd or futile result' (paragraph 31)…" [Emphasis added]

813. The 1989 Act provides a statutory framework for creating purpose trusts by private instrument and provides that failure to comply with the statutory formation conditions results in the trust being invalid. It was anticipated before these provisions were enacted that this hybrid statutory/private law vehicle would be used for commercial purposes. The "*disproportionate counter-mischief*" which would flow from a certainty test which made it easy to invalidate a purpose trust on purely technical grounds, even after the trust has entered into numerous commercial transactions, is another ancillary factor which supports the benignant construction I find must be used when considering questions of certainty. No countervailing public policy benefit to be derived from the strict approach to applying the statutory certainty test was advanced by the Plaintiff's counsel, which I find to be entirely counterintuitive. In short, the purpose of the relevant statutory regime was to make it easier to create purpose trusts as flexible commercial vehicles, so the critical formational requirements must be construed in a flexible user-friendly manner.

814. These conclusions have been decisively reached based on a straightforward application of workaday canons of statutory construction. They are also consistent with the higher level objectives of statutory construction. As Sales LJ (as he then was) has observed, writing extra-judicially[137]:

"*The text of the statute stands in the middle of a force-field, subject to forces coming from different directions pressing on or bending its meaning. The courts therefore*

[137] '*Modern Statutory Interpretation*', December 2016, Statute Law Society.

have to make sensitive evaluative judgments balancing the different elements and assessing their respective weights in light of broad background understandings in relation to the proper respective constitutional roles of Parliament and the courts. They aim to produce a statutory meaning which reflects the reasonable expectations of citizens and, in particular, the lawyers who advise them, who are inculcated in the relevant legal culture and trained in the way in which courts derive legal meaning from legislation."

Application of the statutory certainty test to the Bermuda Purpose Trusts

Preliminary

815. Applying the statutory certainty test, therefore, involves determining whether it is possible for the trust as a whole to be carried out and construing the purposes with a view to upholding the validity of the trust and giving effect to the settlor's intentions rather than frustrating them. At this stage of the analysis, construing the terms of the instruments as opposed to construing the statute, the consequences of invalidity (such as undermining the validity of other purpose trusts) may not be taken into account. Also irrelevant are the identities of the lawyers involved in the legal team, although the fact that the Appleby team was led by the Bermudian trust law *eminence grise*, John Campbell QC, who had chaired the Law Reform Sub-Committee whose Report laid the foundations for the statutory provisions in question means that one does not begin by viewing the instruments with skepticism. Although the Founders' Vision wording comes from the Founders themselves (or YC), the instruments containing the purposes were drafted with some care and were, as Mr Howard QC colourfully put it, "*not written on the back of a fag packet*" [138].

816. Each side relied on extraneous evidence to support their respective cases on the application of the certainty test. Both pieces of evidence are probably strictly admissible but have negligible significance. It is true that during the drafting process one of the Bermudian lawyers, Mr McAuley, referred to the need to meet the certainty requirements in relation to the Wang Family Trust. However, his concerns were not ignored and his April 9, 2001 Note in relation to the draft Wang Family Trust instrument explicitly stated, as the Trustees pointed out[139]: "*Suffice it to say that the Declaration establishes a valid charitable and non-charitable purpose trust the duration of which, I gather, is perpetual*". In light of the evidence of Ed Granski under cross-examination, I also reject the suggestion by the Plaintiff's counsel that he overrode the concerns of the local lawyers by pressurizing them to complete the transaction.

[138] I.e. a cigarette packet.
[139] Closing Submissions paragraph 1328.

817. The Trustees sought to draw some support from the fact that the Plaintiff admitted purposes of the Taiwanese Wang Gung Chang Public Interest Trust were viable in a practical sense, but Mr Howard QC appeared to me to tacitly accept in oral closing that this was essentially a 'jury point' which carried little if any real weight. The legal challenge in this case is purely based on a construction argument unsupported by any positive evidence of unworkability. Such evidence could only be credibly advanced by persons, such as the Trustees, who have been involved in the administration of the First Four Bermuda Purpose Trusts. I reject Mrs Talbot Rice QC's invitation in her oral reply submissions to infer from the fact that the Bermuda Purpose Trusts have been doing very little that the Trustees are having difficulty in understanding the Bermuda Purpose Trust instruments.

818. In my judgment the Plaintiff's certainty case stands or falls based on an analysis of the terms of the relevant instruments and there is no evidential basis for any finding that in factual terms the Trusts are too uncertain to be carried out. As the Plaintiff's counsel correctly submitted, this legal analysis on statutory validity is a freestanding point completely detached from the merits of the Plaintiff's (and D8's) other claims. In considering the attacks made on the respective instruments, I will adopt the approach of the Plaintiff in Schedule 6 to their Opening Submissions, which distinguishes between:

(a) the Wang Family Trust, the Vantura Trust, the Universal Link Trust and the Ocean View Trust, which it is accepted have substantially similar wording; and

(b) the China Trust which has several distinctive purposes.

The Wang Family, Vantura, Universal Link and Ocean View Trusts

819. The Plaintiff adopts the following colour code in Schedule 6 to his Opening Submissions:

"*Text in black appears in the above four Trust Deeds*

Text in blue is in WFT only

Text in green is in Vantura, UL and Ocean View only

Text in pink is in Ocean View only".

820. The following purposes are then set out:

"*This Trust is established for the following purposes:*

3.1 To take possession of, [and] hold, [either directly or indirectly, the shares of stock of the Formosa Group Companies and] control, manage and vote the shares of stock of the Formosa Group Companies held by the Trust and to ensure the continued growth and prosperity of such companies. This is to allow business continuity, and, therefore, fulfill the Founders' objectives of making positive contributions to society, fulfilling their responsibility to the shareholders and taking good care of the employees of the Formosa Group Companies;

3.2 To ensure that the Formosa Group Companies maintain their long-term global competitive edge. This includes, for example, ensuring that such companies have proper leadership and management, setting up appropriate goals and ensuring proper execution to achieve such goals;

3.3 To invest all or a substantial portion of the Trust Fund in shares of stock of the Formosa Group Companies and to acquire, from time to time, such additional shares of stock of the Formosa Group Companies to ensure that the Trust maintains the ownership of a sufficient number of shares of stock of the Formosa Group Companies to enable the purposes escribed in Clauses 3.1 and 3.2 to be fulfilled;

3.4. To provide mutual assistance to mankind and help to those in need. This is to be accomplished through providing assistance to the [charitable] [philanthropic] enterprises established by the Founders, including the Chang Gung Hospital, Ming-Chi Technology College, Chang Gung University, Chang Gung Institute for Nursing, educational programs for the aborigines and the villages for the elders, to enable them to maintain their normal operations and well-being following and consistent with the Founders' Vision and to continue to make positive contributions to society. In addition, the Trustees should focus on improving the standard of living for mankind [by making investments in for-profit, charitable, and other philanthropic enterprises anywhere in the world and contributing towards narrowing the wealth gap between the world's rich and poor]. The Trust's guiding principle is to assist in resolving different related social problems from their root, and to attain full implementation of the concept of giving back to the society that which we have taken from it: and

3.5 To implement and accomplish the Founders' Vision.

3.6 To make investments in for-profit, charitable and other philanthropic enterprises which conform to the principles of a market economy, and are

significant and meaningful in their social impact and have the ability to maintain global competitiveness in the long run;

3.7 To provide assistance to mankind and help to those in need. This is to be accomplished through establishing or making distributions to charitable and philanthropic enterprises that focus on resolving major concerns of mankind from the root; and

3.8 To provide assistance to any charitable or philanthropic enterprise which, in the Trustee's sole discretion, the Trustee believes is consistent with the Founders' Vision."

821. These purposes can be summarised as follows under two heads. Firstly, commercial purposes:

(a) holding Formosa Group Companies' (FGC) shares and exercising the related voting rights to ensure FGC's continuity;

(b) ensuring the FGC maintain their competitive edge through e.g. ensuring proper management and leadership standards are maintained; and

(c) investing in FGC stock for the above purposes.

822. The commercial purposes are at first blush quite clear: holding and acquiring further FGC stock and exercising the voting rights to ensure FGC's continuity. Adopting a benignant construction and regarding uncertainty as a last resort outcome, it is difficult to see why the Trustees should be unable to carry out the broad commercial purpose which is prescribed. The shares to be held and invested in are clearly defined and by necessary implication the Trustees are conferred a broad discretion to exercise their commercial judgment as to how the voting rights should be exercised to ensure the Group's continuity.

823. Secondly there are philanthropic and/or charitable purposes:

(a) providing assistance to mankind through investing in charitable and philanthropic entities already established by the Founders or similar entities anywhere in the world;

(b) implementing and accomplishing the Founders' Vision;

(c) investing in entities (whether for profit or not) operating according to market economy principles which are likely to have a positive long-term social impact;

(d) assisting those in need by making distributions to charitable and philanthropic entities which focus on solving major problems of mankind "from the root";

(e) providing assistance to any charitable or philanthropic entity which the Trustee believes "in its sole discretion" is consistent with the Founders' Vision.

824. Three of the five purposes involve contributing to specified types of charitable, commercial or philanthropic entities. The Trustees are conferred a circumscribed discretion as to precisely who the donees should be and in what amounts. At first blush, applying a benignant construction, no certainty issues appear to arise. Two of the purposes relate to implementing the Founders' Vision and cannot be understood without reference to the Vision, which is set out in Recital C to each Trust instrument:

> "*(C) This Trust is declared by the Original Trustee in order to fulfill the purposes described herein. The fulfillment of such purposes shall be accomplished, to the greatest extent possible, following and consistent with the spirit, vision and principles of Y.C. WANG and Y.T. WANG (the "Founders") reflected in the following statement written by the Founders regarding the background and the purposes and vision for the major foundations they established and their objectives and wishes for the Formosa Group Companies [(defined as those companies that are generally viewed as part of the Formosa Plastics Group [headquartered in Taipei, Taiwan] or that were created by or at the direction of the Founders)] and these foundations:*
>
> *'It is our deep belief that society can only develop with individual diversity and cooperation. Even with all living organisms on this earth, survival hinges on interdependence. Therefore, humans are gifted with life because of their ability to make contributions to this world. If this is true, once an individual is well established and has been given the opportunity to develop his potential, he should pay back to society that which his ability allows him to. We also seek to realize the spirit of fulfillment, meaning that when a person is well established, he should help others to establish; when a person is well accomplished, he should help others to accomplish. With this belief in mind, after our successes in business, we established the Ming-Chi Institute of Technology, Chang Gung University, Chang Gung Institute of Nursing, and Chang Gung Hospital to meet the needs of society.*
>
> *To achieve the most proficient and meaningful use of the accumulated assets of the trust, one must understand the fact that the concepts of 'give' and 'take' are two sides of the same coin and that 'providing assistance' is in fact 'maintaining control'. The educational and medical institutions we established belong to non-*

profit enterprises. Other than investing large sums of capital, there is also the need to devote oneself fully to setting up all necessary management systems to ensure their proper operation.

In the 1960's, the processing industry in Taiwan was well established, yet there was a lack of industrial talent to support it. In order to educate people to develop the necessary talents to meet the needs of industrial development, we established the Ming-Chi Institute of Technology, which later added a college of technology to it and was renamed Ming-Chi Technology College, and began recruitment in 1964. We later added technician training courses as well as a three-year high school equivalent vocational program, tailored specifically to meet the needs of the aborigines in Taiwan. This is done, on the one hand, to provide industrial talents to improve Taiwan's industrial standards. and, on the other hand, this also provides a helping hand to the aboriginal youth, allowing them the opportunity for normal development.[c] *Most importantly, it is our wish to see that all residents of Taiwan - regardless of their origins - can coexist harmoniously, helping each other as if we were all together on the same boat. This is indeed our greatest wish. Based on this background and vision. Ming-Chi Technology College has lived up to our founding principle of' 'Perseverance, Frugality, Hard Work and Down to Earth' in both teaching and school operation since its inception. As a result, students educated there have attained high levels of achievement and have made significant contributions to society. In order for the college to maintain its low tuition policy in the future and secure long-term growth and development, the college's financial management must continue to operate under the spirit of this founding principle.*

Since the foundation of Chang Gung Institute of Nursing, and under the leadership of its first term principal, Mrs. Liao Chang, we were again able to fully implement our founding principle of 'Perseverance, Frugality, Hard Work and Down to Earth'. All nurses trained there possess quality standards, enjoy high praise and an excellent reputation. In addition, the institute has been able to maintain a positive financial position.

The history of Chang Gung University is short. There is a need to continue its efforts to benchmark and learn from private universities in advanced nations. Our goal is for Chang Gung University to become the top performer in all aspects of education.

In order to allow for the normal financial operation of these three colleges, it is critical that the Business Management Committee fully implement the concept of "providing assistance" which is in fact "maintaining control". They must assist these three colleges in the implementation of the true purpose and vision of education based on this concept. The members of the Business Management

Committee, through the wisdom they possess coupled with the financial strength of the trust, should be able to implement the above-mentioned concept and assist these colleges to operate smoothly along a normal path, when it is requested that the trustee provide financial assistance to these colleges.

Since its establishment, Chang Gung Hospital has not only promoted the improvement of medical treatment in Taiwan, it has also become the largest scale medical center in the world. It has over 6,700 beds, serves over 30,000 outpatients daily, and is well regarded by the general public. Although Chang Gung Hospital has promoted the improvement of medical treatment in Taiwan, most hospitals in Taiwan remain centered around large cities, such as Taipei and Kaoshung. There is an urgent need to set up branches in other, more remote areas of Taiwan. We have decided to set up a 1,500 bed hospital in the Chia Yi area, and, at the same time, an Institute of Nursing, and a village for the elderly with 3,000 to 10,000 households.

In addition to providing quality medical treatment to patients, Chang Gung Hospital is fully devoted to the development of hospital management systems and has attained significant achievements in this field. In the mid-l970's in Taiwan, other than a few of the government-owned hospitals scattered around major cities, most areas had only one-man medical clinics. It is not difficult to imagine the poor medical standards at that time. Chang Gung Hospital only attained its current position as the result of continuous hard work in an environment of scarce medical resources and very underdeveloped medical standards. Having established the above-described foundations, we have the faith and ability to seek further development and make even further contributions in the future.

Due to the fact that the quality of medical standards highly impacts the patients' health and benefit, it is the mission of Chang Gung Hospital to provide the best possible medical services. With proper utilization of its human and other resources, it is our hope that the hospital will be able to step outside Taiwan and establish hospitals in places that are most in need of medical services. In addition to providing good medical services, the hospital will also be able to promote market-driven management systems, which can function as a model, and which also carries profound significance and meaning.

As explained through the examples and actual events described above, we truly feel that, within our capability in the future, the assets entrusted can be used to reasonably fund these very meaningful projects, and continue to accomplish our vision.

To accomplish our vision as stated above, our specific wishes for the Formosa Group Companies and for the foundations are stated as follows:

1. To ensure the continued operation and growth of the Formosa Group Companies;

2. To ensure that all Formosa Group Companies will maintain a long-term global competitive edge. This is to fulfill Formosa Group Companies' responsibilities to their shareholders, take care of their employees and make a positive contribution to the society;

3. To maintain the normal operation of all non-profit enterprises and also be able to maintain the Wang Family's spirit of mutual assistance;

4. To provide those in need of help in the society with appropriate measures that will assist in truly resolving the problems from the root; and

5. To manage all assets in the trust with wisdom, in order to achieve the above-stated objectives while maintaining the continuous growth of asset value.' "

825. At first blush, on a superficial view, the Founders' Vision appeared somewhat 'woolly' or nebulous and vulnerable to attack on the grounds of uncertainty. It is therefore necessary to firstly break down the somewhat bulky verbiage into more digestible, 'bite-sized' portions. The Vision has the following elements to it:

(a) a general overarching statement of philosophical principles which, at the highest level of abstraction, expresses the belief that human beings' central purpose is to contribute to the world: "*humans are gifted with life because of their ability to make contributions to this world"*. The subsidiary and more practical idea that contributions should be proportionate to one's ability to contribute, whatever its source may actually be, seems to echo the Biblical words "*to whom much is given, much is expected*";

(b) a more detailed account of the reasons for establishing the Founders' philanthropic bodies in Taiwan and guidance as to how the work of these bodies should be expanded;

(c) a statement of the Founders' "*specific wishes*" as to how their Vision should be implemented in relation to FGC and the "*foundations*", which wishes appear designed to serve as guiding principles intended to provide a higher level guide for the more instrumental commercial and non-commercial purposes set out in the body of the Bermuda Purpose Trust instruments.

826. Having decided that the express statutory test embodies both a conceptual and an operational element, and that a construction of the trust instruments in favour of validity is to be applied, it is helpful to remind oneself what operational test is required to be applied when seeking to answer the question of whether the particular trust purposes meet the express statutory requirements. The question has two limbs to it: (1) will the Trustees (and the Court) be able to tell whether a proposed application of trust funds or course of action is within or without the purposes (even though it may be impossible to make a complete list of the applications of funds which would be within the purposes); and (2) (assuming the answer to (1) is negative) does the uncertainty also make it impossible to implement the entire trust?

827. In every purpose trust with commercial and/or or philanthropic purposes, a trustee will necessarily have a wide range of choices to make when deciding what investments to make with the trust assets, how to exercise voting rights or which philanthropic bodies to donate to. There is a fundamental distinction between uncertainty as to what judgment to make, from which uncertainty will inevitably arise, and uncertainty as to whether a proposed course of action or decision falls within or without a trust's purposes. Mere uncertainty as to the construction of one or more of a trust's purposes is obviously not fatal. The uncertainty must be both irreconcilable by the trustee and the Court and so fundamental as to make it impossible for "*the trust to be carried out*".

828. Accordingly, applying a benignant construction designed to uphold (if possible) rather than invalidate the Bermuda Purpose Trusts, a preliminary review of the instruments suggests that no uncertainty problems arise in relation to this aspect of the Bermuda Purpose Trusts' purposes. Rather than being a source of uncertainty, the Founders' Vision appears to reduce the uncertainty which might otherwise arise in relation to the more general and potentially unclear non-commercial purposes by adding an additional layer of meaning to the more tightly expressed formal purposes, as Mr Howard QC submitted in oral closing argument. As I have already foreshadowed above, the critical question on this part of the case is how the certainty test should be applied in practice. And, having decided that a modified version of the common law test coupled with a benignant construction applies, the Plaintiff's case on certainty all but evaporates. An instructive authority on how the certainty test should be applied to a purpose trust is provided by *Whicker-v- Hume* (1858) 17 H.L. Cas. 124, mentioned above in relation to unworkability, in which linguistic uncertainty arguments not dissimilar to those advanced by the Plaintiff in this case were also rejected by the House of Lords. Lord Chelmsford LC held (at page 154):

> "*… I apprehend that if there are two meanings of a word, one of which will effectuate and the other will defeat a testator's object, the Court is bound to select*

that meaning of the word which will carry out the intention and objects of the testator; and I think that your Lordships are not without aid in giving the particular limited interpretation (if I may use the expression), to the word 'learning' which is required for the purpose of establishing the validity of this bequest, because when you find that the testator associates with that word 'learning' the word 'education', I think that from the society itself in which you find the word, your Lordships may gather the meaning which it is necessary to put upon it, and that he means the word 'learning' in the sense of imparting knowledge by instruction or teaching. Well, if this construction be correct, then I apprehend there is no difficulty whatever, because it will range itself pretty much within the meaning of the word 'education', although not precisely synonymous with it, and it is admitted in the argument that if the word 'education' had stood alone, the bequest would have been valid…"

829. Dealing with both the commercial and philanthropic purposes of the relevant Bermuda Purpose Trusts, it is clear beyond sensible argument that applying the applicable statutory test together with a validating construction, the impugned purposes are "*sufficiently certain to allow the trust to be carried out*". The Plaintiff's complaints were only coherent on the basis that the Court adopted an approach which treated the administration of purpose trusts as almost indistinguishable from the administration of beneficiary trusts. Dealing with the commercial purposes first:

(a) holding and controlling the management of FGC shares with a view to ensuring the Group's continuity and prosperity (paragraph 3.1 of the Declarations of Trust) could not be clearer, despite the fact that a wide array of business judgments may be required in implementing this purpose;

(b) ensuring the FPG companies maintain their competitive edge through e.g. ensuring they have proper management and leadership and set appropriate goals (paragraph 3.2) could not be clearer, despite the fact that a wide array of business judgments may be required in implementing this purpose;

(c) acquiring and holding sufficient shares in FGC companies to support the fulfilment of paragraphs 3.1-3.2 (paragraph 3.3) could not be clearer.

830. In summary, I have little difficulty in rejecting the uncertainty complaints directed at the commercial purposes. The fact that there may be different views about how to ensure the Group's continuity and prosperity, the overarching commercial purpose, merely means that a wide array of potential options is available to the Trustees. This decreases rather than increases the likelihood that doubts will arise as to whether any proposed action is within the relevant trust purposes. On any objective view, there is no basis for finding that the

commercial purposes are uncertain at all, let alone so uncertain as to make it impossible to carry out any of the Bermuda Purpose Trusts.

831. In fairness, the Plaintiff's attack on the certainty of the Bermuda Purpose Trusts' purposes always depended on a strict construction and focussed on the philanthropic purposes, which at first blush appeared more vulnerable to this attack. Dealing with paragraph 3.4 first, this may be broken down into the following elements:

(a) most narrowly, helping to improve the living standard of mankind through making contributions to the philanthropic "enterprises" the Founders have established;

(b) more broadly, helping to improve the living standards of mankind through unspecified means (save in the case of the Vantura Trust, the Universal Link Trust and the Ocean View Trust where it is spelt out that the means should be making contributions "*by making investments in for-profit, charitable, and other philanthropic enterprises anywhere in the world and contributing towards narrowing the wealth gap between the world's rich and poor*");

(c) with (a) and (b) both informed by the fact that each Bermuda Purpose Trusts's "*guiding principle is to assist in resolving different related social problems from their root, and to attain full implementation of the concept of giving back to the society that which we have taken from it"*.

832. On careful analysis, (a) is not uncertain at all even read in isolation from (c). It clearly requires contributions to be made to bodies which are clearly identified and which actually existed when the Bermuda Purpose Trusts were created and still exist today. Even taking (c) into account, Mrs Talbot Rice QC in her closing oral arguments sought to convince me that the purposes were uncertain because it was impossible to determine whether any particular application of funds would achieve the Settlors' intended purpose[140]:

> "*So the focus of this, it is said expressly, has to be on improving the standard of living for mankind, assisting in the resolution of different related social problems from their root and giving back to society. So the trustee and the court is left in position of being able to tell whether an application of funds falls within this purpose or not. For example, funding a war against the Taliban with a view to improving the standard of living of women in Afghanistan, including ensuring their*

[140] Transcript Day 65, page 171 line 15-page 172 line 12.

education and employment rights, would that qualify? It would assist in the resolution of the social problems in Afghanistan from its root. Would that be right? Would that be a correct application of these funds or not? Funding a campaign to oppose the Texas abortion law, would that be improving the standard of living for mankind and assist in the resolution of related social problems from their root; or would the opposite do that, funding the other states in following Texas' example? So one sees immediately that it is impossible to tell whether the Founders would think that an application of funds in any of those ways would fulfil this purpose."

833. These submissions did not reflect a benignant approach to construction at all. Rather it reflects the contrary approach in which construction is akin to a bowling ball and the trust purposes are like bowling pins, designed to be knocked over by even a glancing blow. Further, as Mr Howard QC rightly pointed out, all that is required is for any proposed expenditure to be within the trust purposes; there can be no need for certainty purposes to be sure that any proposed expenditure would "*fulfil* [the] *purpose*". The guiding principle of addressing the root causes of social problems and giving back to society adds further nuance to the already specific purpose of contributing to specific organizations which already have their own defined purposes. The extreme hypothetical projects which the Plaintiff's counsel posited would not ever be considered, seriously or at all, by sensible Trustees living in the real world.

834. Clause 3.4 (b)-(c) has an admittedly broad scope, but having regard to the clear guidance given, reducing the gap between rich and poor, solving social problems "*at the root*" and the almost limitless range of potentially qualifying development projects across the globe, the submission that "*helping to improve the living standards of mankind*" is uncertain or unworkable can also firmly be rejected.

835. Clause 3.5 briefly provides: "*To implement and accomplish the Founders' Vision.*" Bearing in mind that the Founders' Vision set out in Recital C itself makes it clear that the purposes set out in in the body of the Trust Declarations "*shall be accomplished, to the greatest extent possible, following and consistent with the spirit, vision and principles of … the Founder*s", this clause may be viewed as somewhat repetitive. However, it surely reflects the importance that the Founders attached to their Vision. Read with a cynical eye, and the Plaintiff's mistake claim is grounded in part on a central thesis which is at odds with the notion that the Founders actually wished to give back to society to the somewhat dramatic extent that the Bermuda Purpose Trusts purposes imply, this purpose at first blush appears vague and uncertain. But if the purpose is viewed not as a bowling pin, designed to be knocked over, but rather like a beautiful vase to be preserved and admired, the Vision is not quite as nebulous as it first appears.

836. While Mr Granski testified that he and other members of the Appleby team considered the Founders' philosophy to be "*extraordinary*", Dr Wong in his Second Witness Statement somewhat peevishly sought to downplay its significance:

> "*18 … Susan implies that the concept of 'giving back to society' was invented by our father and uncle or is somehow peculiar to them as philanthropists. I believe that this gives a misleading impression. 'Giving back to society' is a traditional Chinese saying, rooted in ancient philosophical teachings. Nowadays, the phrase is used by many Taiwanese entrepreneurs in reference to their acts of corporate social responsibility. Some examples have been identified by my team…*"

837. In my judgment the Founders' Vision, viewed in the evidential context of the present case, is far more distinctive than what is generally understood in the sphere of corporate governance or corporate social responsibility. It commends a distinctive approach to life as well as business with the following three key elements to it, only the third of which appears analogous to corporate social responsibility:

(a) most broadly, the overarching purpose of life is to make a contribution to the world, not to take things from the world;

(b) the more wealth that you acquire in your lifetime, the more you must give back to society, as illustrated by the not-for-profit medical and educational institutions the Founders established and their governing philosophy (and, arguably, as illustrated by the fact the Founders were giving the bulk of their wealth back to society);

(c) the specific goal of perpetuating FPG was to facilitate the fulfilment of the Group's "*responsibilities to their shareholders, take care of their employees and make a positive contribution to the society*".

838. Read as a whole, and in conjunction with clause 3.6 considered below, the Vision may be read as proposing not just a "responsible" approach to business, but more fundamentally a more community-oriented approach to life linked with a belief in a market economy. Mr Howard QC likened the Founders' Vision to "socialism", but in my judgment that is not a complete analogy either. To my mind the Vision reflects an attempt to create a synthesis between traditional cultural, social and spiritual values and modern market-driven business models embracing the corporate social responsibility principles to which Dr Wong referred. Incidentally, I was aware from my own independent researches unconnected with the present trial of attempts to create a broadly similar synthesis being pursued academically in sub-Saharan Africa. For instance:

"*The ubuntu philosophy of Africa can make a significant contribution to the requisite theory of ethical global management, because it correctly understands that we are truly human only in community with other persons. Moreover, since all human persons share the same human nature, we find substantial agreement between traditional African and traditional non-African philosophy. Within the limitations of this paper, two other philosophical traditions will be considered briefly, the Confucian tradition of Asia and the Platonic-Aristotelian tradition of Europe…*"[141]

839. I take judicial notice of the fact that the Founders' Chinese ancestry makes it likely that they would be influenced to some extent by Confucian values. Roughly 2,500 years ago when Master Kong (Confucius) was asked for a single word as a guide to how to live one's life, he is said to have responded: "*Reciprocity perhaps? Do not inflict on others what you would not wish done to you.*"[142] That broad, high-level moral principle underpins many major religions which are practised globally today. Seemingly giving advice to leaders and "gentlemen", Master Kong also opined in terms which find a distinct echo in the Founders' Vision: "*Now the humane man, wishing himself to be established, sees that others are established, and wishing himself to be successful, sees that others are successful.*"[143] Just over 100 years after the death of Master Kong in 479 BC, Plato in his '*Republic*' posited the following rule of selfless leadership: "*there is no one in any rule who, in so far as he is a ruler, considers or enjoins what is for his own interest, but always what is for the interest of his subject or suitable to his art; to that he looks, and that alone he considers in everything which he says and does.*" Meanwhile, a 20th century study on the traditional culture of Onitsha in Eastern Nigeria by an American anthropologist concluded that it was "*of great importance for the meaning of Onitsha social life that every man had the potentiality to become a king*"[144]. There are, therefore, precedents for three ideas proclaimed by the Founders in their Vision:

(a) successful people have a duty to help others to achieve success;

(b) leaders should put the interests of those whom they have led ahead of their own personal interests; and

[141] David Lutz, '*African Ubuntu Philosophy and Philosophy of Global Management*', J Bus Ethics 84, 313 (2009). This article is the product of my own pre-trial researches and was not referred to in argument.
[142] '*Confucius: The Analects*' (Oxford University Press: Oxford, 1993), Book 15 paragraph 24.
[143] Ibid, Book 6, paragraph 30.
[144] Richard N. Henderson, '*The King in Every Man*', 1996, page 526.

(c) everyone has the right to achieve success in life, regardless of their status at birth.

840. If the Founders' Vision is viewed as being influenced by what might be viewed as global ethical values, this might explain why, despite the fact that it was conceived by two elderly Taiwanese businessmen, it may have struck a faintly familiar chord with lawyers based in Bermuda and New York from (apparently) entirely different cultural backgrounds. Their response appeared to me (hearing and seeing Mr Granski's evidence in particular) to be a mixture of admiration and surprise. The Founders' Vision may also fairly be said to be "*extraordinary*" because it reflects not just the notion of proclaiming a commitment to conducting business through corporate entities in an ethical way. The Vision also articulates the more radical and seemingly original notion that the more wealth that individuals acquire, the more they must give back to society with a view to, in particular, helping those who have not achieved financial success to achieve it. Free enterprise is commended, but only on the condition that as much wealth as possible be returned by the successful businessmen and businesswomen to society. Supporting FPG fits into this scheme because FPG itself is playing a social role in supporting its employees and perpetually generating income for the Bermuda Purpose Trusts to contribute to society. This could be viewed as an equal opportunity-promoting scheme privately funded by those who have accumulated the most personal wealth.

841. The Founders' Vision may be seen not just as the personal manifesto of YC and YT, which is all it seeks to be on its face. It may also be seen as a moral guide for those who achieve or receive considerable wealth. It does not seek to inspire the Mother Theresas of this world, nor the many others who serve community without significant reward. This is perhaps another reason why it is very easy for those who have not achieved the exceptional degree of financial success as the Founders to instinctively find the Vision appealing. It counterintuitively downplays the significance of wealth, in and of itself. The Vision implies that the real purpose of life is, to use a somewhat trite phrase, to 'make the world a better place', validating rather than castigating those who have not chosen and succeeded in purely commercial pursuits. Reflecting on the Founders' Vision in this somewhat free-flowing and deliberately non-legalistic way does serve a certain forensic function in applying the statutory certainty test to these trust purposes. It does justify the preliminary finding that the Founders' Vision is informed by and articulates concepts that can easily be understood by persons within and without the Founders' immediate family circle. The ideas articulated are not, as Mrs Talbot Rice QC's submissions seemed to imply, the "*stuff that dreams are made of*", unsuited to the real world (particularly the trust world) and suitable only for a wildly imagined 'cloud-cuckoo-land'.

842. On the face of the various instruments, therefore, in creating the Bermuda Purpose Trusts the Founders could potentially be viewed as literally "putting their money where their

mouth is" by giving the bulk of their wealth back to society, in their own distinctive way. And the idea that they did not want their descendants to personally benefit from vast wealth is, contrary to the central thesis of the mistake claims (rejected above), unsurprising. The idea that they wanted to preserve the wealth for the benefit of their descendants is in fact antithetical to the Founders' Vision which at its core posits the notion that those who accumulate great wealth have a duty to return as much as possible to society. The fact that the Founders' Vision appears to be influenced by values which are coherent and can easily be understood by persons other than the Founders' immediate family and others who knew them well is both of general relevance to the certainty point and affords further grounds for rejecting the mistake claims.

843. For the avoidance of doubt, the observations just set out above (based primarily on materials which I encountered before my involvement in the present proceedings) have not in any way altered the conclusions which I would have reached in any event based on the material placed before the Court. I have set them out partly in the interests of transparency, to make explicit the underlying assumptions and reasoning processes with which I have approached the evidence and submissions in this case on both the mistake and certainty points. But also these materials are mentioned to demonstrate that the Founders' Vision is not entirely quixotic. I now return to the central terrain of the certainty issue and a more focussed legal analysis.

844. There is of course a fundamental distinction between an admirable set of ideas and a purpose which is sufficiently certain to allow a trust to be carried out. As a freestanding solitary purpose stripped of any surrounding and supporting context, I accept that clause 3.5 ("*To implement and accomplish the Founders' Vision*") would probably be uncertain. But it is not a freestanding purpose; and any discrete uncertainty is not so fundamental as to make it impossible to carry out the other purposes which clearly meet the certainty test. And when read in conjunction with the more detailed wishes (in Recital C) and other purposes (in clauses 3.1-3.4), the Vision serves as a valuable guide as to how the more specific purposes should be carried out. While it is internally uncertain as a self-contained purpose, it boosts the certainty of the other purposes when sensibly read in light of its wider context. This uncertainty complaint is accordingly also rejected.

845. The following clauses will be dealt with together and only appear in the Vantura, Universal Link and Ocean View Trust Declarations:

> "*3.6 To make investments in for-profit, charitable and other philanthropic enterprises which conform to the principles of a market economy, and are*

significant and meaningful in their social impact and have the ability to maintain global competitiveness in the long run;

3.7 To provide assistance to mankind and help to those in need. This is to be accomplished through establishing or making distributions to charitable and philanthropic enterprises that focus on resolving major concerns of mankind from the root; and

3.8 To provide assistance to any charitable or philanthropic enterprise which, in the Trustee's sole discretion, the Trustee believes is consistent with the Founders' Vision."

846. For essentially the same reasons set out above, I reject the uncertainty complaints in relation to these purposes as well. They are sufficiently certain, appreciating that the broad scope of the purposes reduces the scope of difficulties in applying a benignant construction designed to uphold the trust if possible. I reiterate that there is a distinction between what course of actions falls within a purpose and what course of action should be undertaken within broad trust purposes. As the Trustees' counsel submitted, the former is relevant to certainty, the latter is not.

The China Trust

847. The China Trust provides as follows:

"*3. PURPOSES OF THE TRUST*

This Trust is established for the following purposes:

3.1 To support the economic reforms initiated by the Chinese government with a view to leading the country toward a market economy. The Trust Fund is to be used to make investments in both for-profit and charitable enterprises primarily within mainland China. It is the Trust's ultimate goal to contribute to the improvement of the welfare and living standards of the people in China and to contribute towards narrowing the wealth gap between the world's rich and poor;

3.2 To make investments in both for-profit and charitable enterprises which conform to the principles of a market economy, and are significant and meaningful in their social impact and have the ability to maintain global competitiveness in the long run;

3.3 To provide mutual assistance to mankind and help to those in need. This is to be accomplished through establishing charitable enterprises that focus on resolving major concerns of mankind from the root;

3.4 To implement and accomplish the Founders' Vision;

3.5 With the ultimate goal of contributing to the improvement of the welfare and standard of living of people in general and contributing towards narrowing the wealth gap between the world's rich and poor and if the conditions detailed in Clauses 3.2 and 3.3 are met, the Trust Fund may be used to make investments in for-profit and charitable enterprises in countries other than China and may be used to support the normal operation of charitable enterprises around the world that are established by the Founders when it is deemed appropriate by the Trustees.

848. In the Plaintiff's Opening Submissions, the main focus of the attack was on the Founders' Vision, which I will turn to below after considering the purposes as a whole:

"*444. The Founders' Vision in the China Trust is a mixture of background information, personal philosophy, general purposes and specific injunctions. Because of this it poses formidable difficulties of interpretation, since its implementation and accomplishment are among the Purposes of the Trust (clause 3.4). Per clause 3.4, it is the entirety of the Founders' Vision which has to be implemented and accomplished. This means not just a few of the more narrowly drafted expressions, but the whole of the Founders' aspirations which are there expressed.*"

849. It was further more broadly complained that all of these purposes "*are riddled with uncertainty*" (paragraph 447). This criticism was not fully developed at this stage. In the Plaintiff's Closing Submissions, it was submitted that "*the Court's enforcement of the political purposes of the China Trust would engage the Court in descending into the political arena by potentially having to hold that the China Trust's funds should be applied to try to persuade the Chinese government to change its economic policies so as to progress to a market economy*" (paragraph 109). The political purpose objection, which I initially considered to be a valid one, was comprehensively dismantled in Mr Howard QC's closing oral submissions, as mentioned above. The central thesis underpinning the Plaintiff's uncertainty case in respect all of the Bermuda Purpose Trusts is best illustrated by the following extract from Mrs Talbot Rice QC's closing oral arguments[145]:

[145] Transcript Day 65 page 129, lines 17-23.

"*The bottom line is this: that if there can be real and legitimate disagreement about whether a particular application of funds is within or outside the purposes which the settlor has set out in his trust document, it follows that he has not set out his purposes sufficiently clearly or with sufficient certainty to allow those purposes to be carried out…*"

850. As already noted above, with broadly defined purposes there will rarely be any difficulty in deciding whether a particular application of funds is within or without a purpose. There may be disagreement as to which of many potential applications of funds is best likely to best achieve a purpose, but that does not mean that the purpose is itself uncertain applying a benignant construction to the instrument. In a purpose trust, there is a two-stage analysis: (1) is a potential application of funds within the relevant purpose and (2) how should the funds be applied? Question (1) engages the certainty test; question (2) does not. In relation to a beneficiary trust where a question arises as to whether one or more individuals belongs to the beneficial class, the analysis collapses into one hard-edged question which engages the common law certainty test: who is within or without the beneficial class? Cases like *Re Gulbenkian's Settlement* [1970] AC 508, dealing with a materially different certainty context, are not instructive for the purposes of the present case. That the Plaintiff's analysis both generally and as regards the China Trust in particular blurred the distinction between the scope of the purposes and what operational choices should be made as to the fulfilment of those purposes is illustrated from the following submissions in oral closing[146]:

"*The China Trust is on the right-hand side of this, because it's in different terms, in red. One sees from looking through those purposes that they are all entirely uncertain {A4/1.6/1}: '... support the economic reforms initiated by the Chinese government with a view to leading the country towards a market economy.' Again, by investing in both for profit and charitable enterprises on the mainland, the ultimate goal being: '... to contribute to the improvement of the welfare and living standards of the people of China and contribute to narrowing the wealth gap between the world's rich and poor.' In 3.2, making investments which are 'significant and meaningful in their social impact", which means very different things to very different people. Global competitiveness features. Then there's 'mutual assistance to mankind and help to those in need' in 3.3 again and implementation and accomplishment of the Founders' vision. An additional one at 3.5 in the China Trust, improving: '... the welfare and standard of living of people in general and contributing towards narrowing the wealth gap between the rich and the poor ..." So uncertain that it is not possible to identify an application of funds which would fulfil these purposes, unless one says that the trustees can apply the funds to any enterprise in China at all, whether charitable or for profit ,*

[146] Transcript Day 65 page 176 line 15-page 177 line 22.

because they could say, 'Well, I think that contributes to the improvement of the welfare and standing of living of people in general'." [Emphasis added]

851. The Plaintiff's counsel was understandably advancing an approach to certainty which would be most likely to assist her client's case. But, as I have already indicated above in relation to the the Wang Family Trust, the Universal Link Trust, the Vantura Trust and the Ocean View Trust, I reject this approach. Having regard to the fact that the process of construction of the Bermuda Purpose Trust instruments involves the application of a statutory conceptual certainty test, I firmly reject the notion that Parliament intended valid purpose trusts to be both certain as to their scope and also, additionally, certain in terms of the ways and means through which the trust purposes would be implemented in practice. The Trustees' counsel aptly sought to draw very general support for the proposition that the notion of drafting broad trust purposes leaving the means of implementation undefined is legally acceptable from the Charities Act 2014 which provides:

"***Meaning of 'charitable purpose'***

3. A charitable purpose is a purpose which—

(a) falls within section 4(1); and

(b) is for the public benefit (see section 5).

Descriptions of purposes

4. (1) A purpose falls within this subsection if it falls within any of the following descriptions of purposes-

(a) prevention or relief of poverty;

(b) the advancement of education;

(c) the advancement of religion;

(d) the advancement of health or the saving of lives;

(e) the advancement of citizenship or community development;

(f) the advancement of the arts, culture, heritage or science;

(g) the advancement of sport;

(h) the advancement of human rights, conflict resolution or reconciliation, or the promotion of religious or racial harmony or equality and diversity;

(i) the advancement of environmental protection or improvement;

(j) the relief of those in need because of youth, age, ill-health, disability, financial hardship or other disadvantage;

(k) the advancement of animal welfare;

(l) the promotion of the efficiency of the armed forces of the Crown or of the efficiency of the police, fire and rescue services or ambulance services;

(m) any other purposes—

(i) that are not within paragraphs (a) to (l) but are recognised as charitable purposes by virtue of section 6 (provision of recreational and similar facilities, etc.); or

(ii) that may reasonably be regarded as analogous to, or within the spirit of, any purposes falling within any of paragraphs (a) to (l) or sub-paragraph (i)."

852. These statutory provisions do provide general but significant indirect support for the view that there is no general public policy objection to broadly defined trust purposes. However it is also more important to note that even the unmodified common law trust certainty test the Plaintiff contended for provided no support for the proposition that legal certainty connotes both (a) certainty as to the scope of the purposes and (b) certainty as to the means through which the purposes will be achieved by the trustees. In reaching this conclusion, I do not exclude the possibility that in probably exceptional circumstances, the impracticability of a trust's purposes might have implications for the certainty of the trust.

853. Having clarified the lens through which the relevant purposes must be viewed, which is no different in relation to the China Trust, one can now turn fairly shortly to the relevant clauses. It is significant that, as in the case of the other Bermuda Purpose Trusts, the purposes are not confined to the conceptual or theoretical, as in my judgment they could validly have been, but include practical guidance as well. I accordingly find:

(a) the first purpose is a broad overarching purpose but has coherence to it. Higher level purposes are supporting the Chinese Government's reforms aimed at developing a market economy, improving the living standards of people in China and narrowing the global gap between rich and poor. More practically and operationally, the purpose provides that the "*Trust Fund is to be used to make investments in both for-profit and charitable enterprises primarily within mainland China*". The practical limb of the purpose is clarified by the conceptual limb of the clause. I find clause 3.1 is sufficiently certain;

(b) the second *purpose* (clause 3.2) is uncertain if read in isolation from the Declaration of Trust as a whole. Contributing to organizations which adhere to market principles and are likely to be competitive in the long-term is comprehensible, but the additional requirement that the donees be "*significant and meaningful in their social impact*" is conceptually uncertain absent further clarification as to what sort of social impact is desired. But instruments such as wills and trusts are to be construed in many respects like commercial contracts. Accordingly, "*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*": *Marley-v-Rawlings* [2015] AC 129 at paragraph 20 (per Lord Neuberger). Clause 3.2 read in the wider context of the purposes as a whole, and in particular the Founders' Vision, is "*sufficiently certain to allow the trust to be carried out*". To the extent that the common law non-severability principle upon which the Plaintiff relies potentially applies in this sort of context, I have already indicated that I find that the principle is excluded by the terms of section 12A (2)(a);

(c) the third purpose, providing "*mutual assistance to mankind and help to those in need*" through establishing charitable organizations "*that focus on resolving major concerns of mankind from the root*" is borderline conceptually uncertain, read in isolation from the other purposes and the Founders' Vision. However, clause 3.2, read in the wider context of the purposes as a whole, and in particular the Founders' Vision, is "*sufficiently certain to allow the trust to be carried out*";

(d) the fourth purpose (clause 3.4), implementing the Founders' Vision will be considered separately below;

(e) the fifth purpose contemplates extending the support for, in essence, organizations likely to improve living standards, to the rest of the world, beyond China. Clause 3.5 is clearly intended to be read in light of the other purposes and is (read in its wider context) "*sufficiently certain to allow the trust to be carried out*".

854. It remains to consider whether the Founders' Vision, in its China Trust iteration, is uncertain as a freestanding purpose. Recital C provides:

> "*(C) This Trust is declared by the Original Trustee in order to fulfill the purposes described herein. The fulfillment of such purposes shall be accomplished following and consistent with the spirit, vision and principles of Y.C. WANG and Y.T. WANG (the "Founders") reflected in the following statement written by the Founders:*

It is our deep belief that society can only develop with individual diversity and cooperation. Even with all living organisms on this earth, survival hinges on interdependence. Therefore, humans are gifted with life because of their ability to make contributions to this world. If this is true, once an individual is well established and has been given the opportunity to develop his potential, he should pay back to society that which his ability allows him to. We also seek to realize the spirit of fulfilment, meaning that when a person is well established, he should help others to establish; when a person is well accomplished, he should help others to accomplish. With this understanding and with the accomplishment we have today, we wish to make contribution to the homeland of our ancestors within our limited capability.

Our grandfather was born in the Fujian Province of China. Due to the harsh environment that existed in his hometown, life was extremely difficult. Like many others, he left his hometown, crossed the strait and arrived in Taiwan in search for an opportunity to have a better life. With great perseverance and hard work, he was able to make a living and support his family.

Our grandfather was an educated man. However, the hardship that he endured in his life was such that he found his education and knowledge did not help him, and he decided to keep two of his children illiterate. It is not difficult to imagine the extreme poverty he must have endured to take such drastic action.

When we were small, we never wore new clothes or ever owned a pair of shoes. Our father planted and sold tealeaves for a living and our mother was always busy from morning until late at night taking care of the household chores to keep us safe and healthy. Because of the harsh living conditions, three out of our five sisters were given to other families that were considered better off than us when they were small. It was our parents' hope to see our sisters have a better life. From a young age, we experienced the helplessness of not having the opportunity to improve one's living condition. We have also experienced the hopelessness of seeing family members ill and without the means to obtain proper medical care. These experiences help us to understand the despair of not having an opportunity to improve one's condition. We vowed that one day if we became successful, we would do our best to give those in need the opportunity to improve their lives and to alleviate their physical and mental suffering. We wish to give people an opportunity to move towards equality.

As a result of China's closed-door policy for many decades, her people, who possess the same intelligence and human traits, were not given the opportunity to make improvements like the rest of the world. They continued to live in the backwardness and poverty of the past. However, in the last two decades, due to the aggressive open door policy and reforms made by the Chinese government, the overall economy has improved drastically. When people were actually given the opportunity to improve their lives after a whole life in poverty, they cherished and treasured every opportunity that was given to them and worked hard to hold on tight to that opportunity. The current situation in China is no different from our own situation in Taiwan 50 years ago, and similar to what we experienced during our childhood. All that people really desire is an opportunity to make it on their own.

Utilising the success that we have accomplished to date, it is our wish to make a contribution to our grandfather's homeland. It is our wish to help improve the standard of living of the people in China and to narrow the gap between the world's rich and poor. This is to be carried out by investing in both profit-driven and charitable enterprises that are meaningful, market competitive and consistent with the economic reforms to move toward market economy that are being implemented by the Chinese government. It is our hope that all members of the Wang family will be proud of this endeavour and will work hard to achieve this goal."

855. The core philosophy set out in the second paragraph of Recital C is essentially the same as in the other Bermuda Purpose Trusts. However the remaining paragraphs explain the Founders' ancestral connections with China and their desire to promote economic development there through private enterprise. A value is placed on "individual diversity", but that autonomy is expected to be used to benefit the people of China and/or the wider world. The Founders express their wish to "*help improve the standard of living of the people in China and to narrow the gap between the world's rich and poor*." The Vision is clearly intended to provide a framing for how the formal purposes are to be understood and carried out. The main focus is China, but the rest of the world may also be taken into account. It is perhaps a somewhat odd drafting approach to recast Recital C as a freestanding purpose. Even read in isolation, nonetheless, I find that it is (like Recital C in the other Bermuda Purpose Trusts) sufficiently certain, as the Vision/purpose "*is to be carried out by investing in both profit-driven and charitable enterprises that are meaningful, market competitive and consistent with the economic reforms to move toward market economy that are being implemented by the Chinese government.*"

856. Not only is there a clear purpose, but there is specific guidance as to how that purpose should be carried out.

857. I accordingly find that clause 3.4 of the China Trust is "*sufficiently certain to allow the trust to be carried out*", as are clauses 3.1-3.3 and 3.5. For these reasons I find that the purposes of the China Trust read as a whole meet the statutory certainty requirements under section 12A (2)(a) of the 1989 Act.

Summary of findings on certainty

858. The Plaintiff's application for a declaration that all five of the Bermuda Purpose Trusts are invalid on grounds of uncertainty is dismissed.

FORMALITIES CLAIM (DOES THE STATUTE OF FRAUDS FORM PART OF BVI LAW AND INVALIDATE THE TRANSFER OF THE FOUNDERS' EQUITABLE INTEREST IN THE SHARES TO THE BERMUDA PURPOSE TRUSTS?)

Preliminary

859. The issues arising for determination in relation to the formalities claims asserted by the Claimants are summarised in the Plaintiff's Closing Submissions as follows:

> "*694.2 YC Wang and YT Wang were the ultimate beneficial owners of the BVI Holding Companies, including the China Companies, Everred and Landmark (see Section Q2 below);*
>
> *694.3 The Statute of Frauds 1677 forms part of BVI law because (see Section Q3 below):*
>
> *(a) As a matter of judicial decision and long established practice, the BVI is a territory acquired by settlement, not conquest.*
>
> *(b) The publication dated September 1831 on which the PTCs relied in their written opening does not authoritatively establish the status of the BVI as a colony settled in 1666.*

(c) The date of settlement of the BVI is, on any view, after 24 June 1677 and the right cut-off date for reception of English law in the BVI is 1774.

(d) The Statute of Frauds 1677 is a statute of general application. The PTCs have demonstrated no solid ground sufficient to establish that it was inapplicable to the conditions of the BVI or that it is "necessary" to disapply it; to the contrary, it was considered to be applicable to the circumstances of the BVI and is consistent with its current legislative regime.

694.4 S.9 of the Statute of Frauds 1677 applies to transfers of pure personalty (see Section Q4 below);

694.5 S.9 of the Statute of Frauds 1677 applies to the facts of this case with the consequence that there was no valid grant or assignment of YC Wang's interest in the China Companies, Everred and Landmark in the absence of compliant signed writing (see Section Q5 below);

694.6 There is no signed writing in respect of the China Trust which complies with the requirements of s.9 (see Section Q6 below); and

694.7 The Statute of Frauds-based claims are not time barred (see Section Q7 below);

694.8 Accordingly, Dr Wong is entitled to declarations that the purported assignments of YC and YT Wang's interests in the China Companies to the China Trust, Everred to the Vantura Trust and Landmark to the Universal Link Trust were void."

860. The main questions for determination are (a) what constitutional and administrative legal rules govern the reception of English law in British territories and what is the cut-off date for the reception of English law, (b) (having regard to expert evidence of BVI history), when were the BVI settled and when was English law received, and (c) (only if the Statute of Frauds does indeed form part of BVI law) did the transfer of the Founders' equitable interest in the shares to the Bermuda Purpose Trusts need to be in or evidenced by writing?

The reception of English law

The submissions

861. In the Plaintiff's Closing Submissions it was argued:

"*705. The general principle is that if the BVI is a British territory acquired by settlement (rather than conquest or cession) then, so long as the date of that settlement postdates 24 June 1677 (when the Statute of Frauds came into force), the Statute of Frauds forms part of BVI law, unless it may be shown that the Statute was inapplicable to the circumstances of the colony: Warren v Immigration Board [2002] CILR 188 at [14] …*

709. The BVI has been classified as settled as a matter of judicial decision and long-standing practice such that it is not open to the PTCs to argue, or for the Court to find, that the BVI was acquired by conquest…"

862. In the Trustees' Closing Submissions it was argued:

"*1380. The principles as to the identification of whether and how English law is received into a colony may therefore be summarised as follows:*

1380.1 The first stage is to identify whether the relevant colony was (a) settled or (b) conquered or ceded. In Christian v R [2007] 2 AC 400 at paragraph 47 Lord Hope described the assignment of colonies into one or other category as 'a classification of law, and once made by practice or judicial decision it will not be disturbed.'

1380.2 If the colony was settled, then English law will be treated as having been received on the date of settlement, since it is 'the birthright of every subject' and is carried with them to the colony being settled. However, such law is received only insofar as applicable to the situation of the colonists and the condition of an infant colony. Acts of Parliament enacted and coming into force in England after settlement will not apply to the colony unless the relevant Act specifically says it is to do so.

1380.3 If the colony was conquered or ceded, then the laws and customs of the conquered colony are retained until such time, if any, as the Crown chooses to impose different laws upon them.

…

1382. The rationale of the principle relating to conquered or ceded territories also explains a qualification to it. Where the conquest of a territory is so complete that nothing remains of its former system of government, the territory may be treated as settled, with the consequence that English law applies without the need for a formal proclamation imposing it: see R v Vaughan (1769) 4 Burr. 2494, 98 ER 308 at 2500, 311; Campbell v Hall (1774) 1 Cowper 204, 98 ER 1045 at 212, 1049; Roberts-Wray, Commonwealth and Colonial Law (1966) at 542, 3. This is the conclusion reached in relation to the BVI in Patchett, Reception of Law in the West Indies (1973), column 1."

863. It is almost common ground, therefore, that the BVI should be treated as settled in any event and that such elements of English law which are (a) in force at the date of settlement and (b) appropriate for the conditions of the colony, would be received into BVI law. However, the Plaintiff went on to submit that English law continued to be received until the colony became capable of legislating for itself, a proposition which was not clearly substantiated.

864. Evidentially, it was broadly clear that Tortola was either settled or so comprehensively conquered that it should be treated as settled at some point in the second half of the 17th century. The BVI as presently constituted did not yet exist. The main historical dispute was whether this settlement occurred before or after 1677 when the Statute of Frauds was enacted in England, with a subsidiary issue being at what point Tortola acquired a legislature of its own. It was common ground that although the Leeward Islands Assembly had legislative competence over Tortola from 1674, no legislation was actually passed until after 1700.

865. Mr Midwinter QC submitted in the Hung Estate's Closing Submissions:

"*88. …s.9 of the Statute of Frauds 1677 does not form part of the law of the BVI at all either (i) because the BVI was settled or conquered by England in 1672 when Governor William Stapleton took control of Tortola from the Dutch; or (ii) because the BVI had its own legislature from 1674 when the General Assembly of the Leeward Islands was established – which body must have had the power to legislate for the BVI because one of the BVI's foundational statutes was enacted by it in 1705; or (iii) because the Statute of Frauds was not appropriate to the circumstances of the BVI at the time it was settled and so was not adopted as part of local law, as reflected in the fact that the statute appears never to have been applied in the BVI in 400 years and/or that provisions*

covering some of the same ground were specifically enacted in s.81 of the Virgin Islands Courts Act 1784 and s.4 of the Conveyancing and Law of Property Ordinance 1961, and without any suggestion that they were repealing or replacing any earlier provision…"

866. The common law of England was applied to Tortola by the Leeward Islands Common Law (Declaration of Application) Act 1705[147]. This Act applied to "*each of these your Majesty's Leeward Charibbee Islands*" (section 2).

Findings: legal principles governing reception of English law

867. The reception of English law occurs in two principal ways, at common law or by statute. The former reception method gives rise to more potential legal difficulties than the latter. The Bermudian position is dealt with by the Supreme Court Act 1905 which provides:

"***Extent of application of English law***

15. Subject to the provisions of any Acts which have been passed in any way altering, amending or modifying the same, and of this Act, the common law, the doctrines of equity, and the Acts of the Parliament of England of general application which were in force in England at the date when these Islands were settled, that is to say, on the eleventh day of July one thousand six hundred and twelve, shall be, and are hereby declared to be, in force within Bermuda." [Emphasis added]

868. Not only is the date of reception of English law into Bermuda law dealt with by statute here. The date of Bermuda's settlement has perhaps been easier to define because the settlement of Bermuda in 1612, following its more dramatic English discovery three years earlier, initially as an outpost of Virginia, was quite substantial and in the event more uninterrupted than the settlement of Virginia itself. As the expert evidence on BVI history considered below shows, the English settlement of Tortola was far less clear-cut, which in part at least explains why determining the date of settlement is problematic and the reception of English law only occurred at common law rather than by statute.

[147] The long title was: An Act for Preventing Tedious and Chargeable Law Suits, and for Declaring the Rights of Particular Tenants, 31/1705, enacted at Nevis on June 20, 1705.

869. The leading text on constitutional law in the British Commonwealth during the colonial era, Roberts-Wray,'Commonwealth and Colonial Law', states[148]:

> "*British subjects who settle abroad in territory not within the jurisdiction of any civilised power take English law with them…*
>
> *(1) The rule applies as a consequence of the fact of settlement-whether or not the establishment of the Colony has been previously authorised or subsequently recognised by the Crown.*
>
> *(2) The English law taken by the settlers is both the unwritten law (common law and equity) and the statute law in force at the time of settlement- not that subsequently enacted unless it is specifically extended to them.*
>
> *(3) It is not however the whole of the law. The colonists 'carry with them only so much of the English law as is applicable to their own situation and the condition of an infant Colony'.*
>
> *(4) Any law in force by reason only of the fact of settlement may, in its local application, may be repealed or altered by the legislature of the Colony.*
>
> *(5) Sometimes, but by no means invariably, the somewhat nebulous common law rule has been superseded by statute, given greater precision to the extent to which English law is the law of the Colony…*"

870. The same principles apply to territories which are settled by the English even though they were acquired "*by conquest or mere annexation*"[149]. Text writers have considered what quality of occupation by settlers qualifies as a "settlement" for the purposes of receiving English law. Professor Keith Patchett in '*Reception of Law in the West Indies*', an article to which the Trustees' counsel referred, has opined[150]:

> "*The date of establishment of a settlement is of first importance. For it is from that date that the common law and English statutes of general application prior to that date apply to the inhabitants of the territory. A settled colony could be established in a territory previously uninhabited, or inhabited by uncivilised populations or occupied by a civilised system which has abandoned the territory*

[148] At pages 540-541.
[149] Ibid, at pages 542-543.
[150] (1973) JLJ 17 at 17-18, 20.

or been destroyed.

But two prerequisites, it is suggested, must be present before it can be said that English law is received. The territory must have been brought within the Crown's dominions and a settlement must have been established...

It is questionable whether an authorised 'settlement' can be said to be established merely by the presence of scattered colonists. Woodcock commented in 1838 that the term

> *'is not to be understood as signifying merely the establishment of inhabitants in a country engaged in the culture of the soil, the rearing of stock or the business of merchandise but refers to the period in which the colony is in possession of a legal constitution, with authority to make law…'*

There is point in this suggestion….Yet if this intended to mean that the relevant date is the date of the establishment of a representative legislature, doubts must be expressed. Thus in the case of the Virgin Islands (Tortola), colonists arrived in 1666 but the legislature was not set up until 1774. It is clear that these islands were not without law until that time and there seems to be no authority for the view that English statutes of general application automatically extended during this period.

The better view, borne out by the reference in some text writers and in case law to 'the founding of the settlement', seems to be that the date of settlement is when there was sufficient communal organisation to call for legal regulation and some form of governmental and legislative control was set up…

There seems to be…good evidence that Tortola, at least, of the Virgin Islands was acquired by conquest….

Some doubts must therefore exist about the date of reception of law in the Virgins…The relevant date, it is suggested, should be 1672… " [Emphasis added]

871. Professor Patchett is clearly positing the date of initial conquest as the date when English law was initially received in the BVI, but he implies that such law continued to be received throughout an uncertain subsequent period. There is some inconsistency between his positing of 1672 as the reception date for "*the Virgins*" and his earlier suggestion that reception should not begin until "*some form of governmental and legislative control was*

set up". But this tentative suggestion does not explicitly take into account historical evidence about what happened on the ground in 1672.

872. Professor Rose-Marie Belle Antoine in '*Commonwealth Caribbean Law and Legal Systems*', in an extract the Plaintiff's counsel placed before the Court, has opined[151]:

> "*One difficulty with adopting the date of settlement is that it may preclude the application of laws which were not suitable at the time, due to the infant state of the colony, but which become suitable later on. The Cooper approach allows for this evolutionary determination of suitability ... in Bennet v Garvie, the Statute of Frauds was held to be inapplicable because it required written evidence of certain transactions and was thus unsuitable for a largely illiterate population* …" [Emphasis added]

873. Judicial authority on the common law position is not entirely clear, perhaps in part because most colonial territories addressed the date of reception issue by way of legislation. Mr Adkin QC described *Anonymous* [1722] 2 P WMS 75 as the foundational case. 300 years ago, the Privy Council held:

> *"1st, That if there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject, so, wherever they go, they carry their laws with them, and therefore such new found country is to be governed by the laws of England; though, after such country is inhabited by the English, acts of parliament made in England, without naming the foreign plantations, will not bind them; for which reason, it has been determined that the statute of frauds and perjuries, which requires three witnesses, and that these should subscribe in the testator's presence, in the case of a devise of land, does not bind Barbadoes; but that,*
>
> *2dly, Where the King of England conquers a country, it is a different consideration: for there the conqueror, by saving the lives of the people conquered, gains a right and property in such people; in consequence of which he may impose upon them what laws he pleases. But,*
>
> *3dly, Until such laws given by the conquering prince, the laws and customs of the conquered country shall hold place; unless where these are contrary to our religion, or enact anything that is malum in se, or are silent; for in all such cases*

[151] 2nd edition, (Routledge: London/New York, 2008) at page 90.

the laws of the conquering country shall prevail."

874. This passage ignores the principle, supported by Privy Council authority (*Yeap Cheah Neo v Ong Cheng Neo* (1875) LR 6 PC 381 at 393-394) that where the conquest is so complete that the territory is *de facto* a settled one, English law is received on the same basis as would occur in the case of a *de jure* settled colony.

875. Mr Adkin QC, after referring to the *Anonymous* case and the passage from *Blackstone* cited in *Cooper* (below), submitted:

> "*The principles are relatively straightforward, we would suggest. They throw up, essentially, two issues in this part of the case. First, what is the date of conquest or settlement of the BVI? Secondly, if that date is after the date of the Statute of Frauds, 1677, was the Statute of Frauds applicable in the sense that Blackstone has just explained at the relevant date to the circumstances of the BVI?*"

876. In my judgment the principles are in fact more complicated than that. In *Cooper-v-Stuart* [1889] UKPC 1; 14 App Cas 286, to which Professor Belle-Antoine referred, Lord Watson (delivering the advice of the Privy Council in a New South Wales appeal) expressly opined that at common law English law was received not just at the initial settlement date, but on an incremental basis according to the needs of the new colony:[152]

> "*11. The extent, to which English law is introduced into a British Colony, and the manner of its introduction, must necessarily vary according to circumstances. There is a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class. In the case of such a Colony the Crown may by ordinance, and the Imperial Parliament, or its own Legislature when it comes to possess one, may by statute declare what parts of the common and statute law of England shall have effect within its limits. But, when that is not done; the law of England must (subject to well established exceptions) become from the outset the law of the Colony, and be administered by its tribunals. In so far as it is reasonably applicable to the circumstances of the Colony, the law of England must prevail, until it is abrogated or modified, either by ordinance or statute. The often quoted*

[152] At page 291.

observations of Sir William Blackstone (1 Comm. 107) appear to their Lordships to have a direct bearing upon the present case. He says: -

> *'It hath been held that, if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every English subject, are immediately there in force (1 Salk 411 at 666). But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to the condition of an infant Colony such, for instance, as the general rules of inheritance and protection from personal injuries. The artificial requirements and distinctions incident to the property of a great and commercial people, the laws of police and revenue (such especially as are enforced by penalties), the mode of maintenance of the established Church, the jurisdiction of spiritual Courts, and a multitude of other provisions are neither necessary nor convenient for them, and therefore are not in force. What shall be admitted and what rejected, at what times and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature, subject to the decision and control of the King in Council; the whole of their constitution being also liable to be new-modelled and reformed by the general superintending power of the Legislature in the mother country.'*
>
> *12. Blackstone, in that passage, was setting right an opinion attributed to Lord Holt, that all laws in force in England must apply to an infant Colony of that kind. If the learned author had written at a later date he would probably have added that, as the population, wealth, and commerce of the Colony increase, many rules and principles of English law, which were unsuitable to its infancy, will gradually be attracted to it; and that the power of remodelling its laws belongs also to the Colonial Legislature.*" [Emphasis added]

877. The *Cooper* approach indicates that the issue of reception of English law is far more nuanced than simply determining one settlement date after which no further reception occurs. That is the statutory approach reflected in section 15 of the Bermudian Supreme Court Act 1905. *Cooper* suggests that (a) English law in force at a territory's "*infancy*" may be received incrementally, based on the needs of the relevant colonial settlement and (b) that it is for the courts to determine in cases of controversies which English laws were received when. This decision sheds no clear light on what Mr Hagen QC referred to as the cut-off date for reception, but hints that is likely to be at a point when a comprehensive legislative regime is established in the colonial territory.

878. Further support for the view that it is only English law in force at the date of settlement which is received at common law is provided by a case upon which the Trustees' counsel relied. In the New South Wales case of *Macdonald v Levy* (1833) 1 Legge 39 at 52, Forbes CJ (coincidentally a native and former Attorney-General of Bermuda) held at page 52 that "*it will be seen that the point in time when the colony was first inhabited is a necessary preliminary to the correct application of the rule… [s]tatutes passed* ***after*** *the settling of a new colony do not bind such colony unless they are extended to the colonies at large, or such colony in particular…*"

879. I accept that the reception of English law at common law is not necessarily, depending on the nature of the particular initial colonial settlement, a single bullet event. However I am bound to find that the initial settlement date is the critical date, because it is only English laws in force at that juncture which will be automatically received until the territory is fully competent to enact its own laws.

880. 21st century support for this view of the law can be found in the Cayman Islands Grand Court decision of *Warren-v-Immigration Board* [2002 CILR 188] where Graham J held:

> "*18. As to the further test of suitability, whilst various approaches have been suggested, I prefer to follow the decision in Cooper v. Stuart, a decision of the Privy Council. It was there held that 'suitability should be determined by allowing the litigant to enjoy the privilege of any English statute which was on the English statute book at the time of the settlement if, in years to come, the Act suited the settlers' circumstances. In Roberts-Wray that approach is commended (op. cit., at 547), as it allows for the development of courts and civil government in the territory in question…*"

881. The historical evidence in this case means that the real issues which need to be decided are (a) whether English law was first received in Tortola before 1677, and (if it was not) (b) whether the cut-off date for the reception of English law at common law occurred before conditions in Tortola were suitable for the Statute of Frauds to be received. The legislative materials are also important, including the unusual feature of a regional General Assembly being given legislative competence over Tortola which it exercised in the 1700s before Tortola acquired its own legislature.

882. In *Christian-v-R* [2007] AC 400, Lord Hope stated:

"*47… In my opinion the evidence shows that Pitcairn was established by settlement. As para 800 of 6 Halsbury's Laws of England (4th ed, 2003 Reissue) puts it, every colony must be assigned to one or other of two classes, either (1) settled or (2) conquered or ceded. This is a classification of law, and once made by practice or judicial decision it will not be disturbed. Much interesting historical research has been laid before us. But, as long standing practice has established Pitcairn's status as a settled colony, it must be held to be irrelevant to the issue of classification raised in these appeals."*

883. Reception at common law did not arise for determination in that case. The latter observations do not exclude the relevance of expert historical evidence about the date of settlement in the present case. *Christian* provides general support for the proposition that a Court of law may consider historical evidence when seeking to determine the state of law in a British colony. It seems clear that the preponderance of commentators agree that Tortola should be treated as having been settled for reception of law purposes, even if it was in fact initially acquired by English conquest.

884. The common law rules on the reception of English law are from an academic perspective difficult to precisely define. However, from a practical standpoint, like most common law rules, the governing principles are intentionally flexible and fluid because they were originally designed to deal with a variety of fluid and shifting colonial settlement scenarios. I would summarise the relevant legal rules on the reception of English law at common law for present purposes as follows:

(a) English law will be received from the date when a colony is settled;

(b) 'settled' or 'settlement' for reception of law purposes depends on a combination of acquisition and/or control by the English Crown and the imposition of a minimum degree of Governmental and legal control over a coherent community;

(c) where the initial settlement is rudimentary, only appropriate, basic laws accompany the settlers. However, this initial corpus of basic law will be complemented over a further period by such further laws as may be needed until a more formal governmental and legal system, inconsistent with the automatic reception of English law, is established;

(d) a dispute over what English laws were received in the early history of a

colonial settlement may be resolved by reference to both judicial and legislative authority as well as historical sources, including expert historical evidence.

Historical findings on the settlement of Tortola

885. In my judgment it is clear that Tortola became an English territory by conquest or acquisition in 1672 because although subsequent claims were made by the Dutch, such claims were never vindicated. I accept the following arguments in the Trustees' Closing Submissions:

> "*19. It [is] submitted that the following facts are agreed (or, to the extent not agreed, are incontestable):*
>
> *(1) In 1672, Stapleton informed the Lords of Trade that he had 'reduced … Tortola to the King's subjection' and 'got possession of … Tortola'.*
>
> *(2) The Treaties of Breda (1667) and Westminster (1674) both provided for the return of (inter alia) Tortola to the Dutch: see List of Issues at 3.1.*
>
> *(3) Discussions of Tortola by the Lords of Trade from 1676 onwards were premised on Tortola being in the possession and under the control of the English Crown: see, for example, the entries dated 15 January 1676, 14 June 1677 {C1/1/65}, 10 September 1677, and 25 April 1678 {C1/1/66-67} in the schedule below.*
>
> *(4) From 1684, the heirs of Huntum sought restitution of Tortola on the ground that Stapleton had taken it on trust for him, and that claim was later advanced by the Dutch ambassador and (from 1696) by a purchaser from the heirs of Huntum acting through the Elector of Brandenburg.*
>
> *(5) There is no evidence to support the claim that Stapleton did in fact hold Tortola on trust for the heirs of Huntum: see Professor Chenoweth's first report para 4.5.2, Professor Koot's first report para 50.*
>
> *(6) At certain times it is unclear whether the claim being*

advanced by the Dutch was, or was treated as being, based on Huntum's title or the treaties of Breda or Westminster: see, for example, CSP entry dated 25 July 1686 {C1/1/84-85}.

(7) The English came very close to acceding to the Dutch claim, which fell into abeyance following the accession of William of Orange to the English Crown in 1688-9.

(8) On 27 September 1697 Codrington the elder said of Tortola 'it is within my commission and within the commission of my predecessors'. Codrington's predecessors were Johnson and Stapleton.

(9) The English resisted the claim made through the Elector of Brandenburg.

20. In the light of these facts it is submitted as follows:

(1) Because there is no evidence that Stapleton acquired Tortola on trust for Huntum, claims based on Huntum's title cannot be relied on to contradict the proposition that England acquired Tortola by conquest in 1672.

(2) If it is correct to treat the English Crown as having acquired Tortola by conquest, this occurred in 1672.

(3) If Tortola was not conquered but was settled, the dealings between the English Crown and those asserting a claim to Tortola (whether through Huntum, the Treaties of Breda or Westminster, or otherwise) have no relevance to the question of when settlement occurred. What matters for that purpose is the presence on Tortola of English subjects, who are to be treated as having brought with them English law as their birthright. As submitted above, the evidence shows that Tortola was continuously inhabited from 1672, or alternatively from 1676, by a population consisting of or including English subjects.

(4) Insofar as it is necessary, for settlement to have occurred,

for the inhabitation of Tortola by English subjects to have been authorised by the English Crown, the inhabitation of Tortola by English subjects was plainly authorised by the English Crown from 1672 onwards."

886. Professor Koot's opinion that Tortola was acquired by conquest in 1672 was supported by the preponderance of the historical materials both Experts referred to; Professor Chenoweth's attempt to advance a contrary theory seemed transparently obtuse. On the other hand when it came to analysing the quality of settlement from that point, Professor Chenoweth was more convincing in contending that occupation by English colonists was probably peripatetic and certainly lacking in substance until (at the earliest) 1682.

887. It was ultimately common ground that although there was some prior Dutch presence on Tortola, when Colonel Stapleton conquered the island in 1672, the Dutch left no law behind. Accordingly, the initial reception date for English law must be determined by reference to the initial settlement involving some minimum degree of legal regulation. Professor Koot under cross-examination agreed[153]:

"*Q. So there were no laws left by the Dutch in Tortola by which later English colonists could live or institutions left by the Dutch by which they could be governed. Do you agree?*

A. I agree we don't know about any, and I would assume not."

888. Professor Koot also agreed that there was no evidence of any local Government in Tortola until a Deputy Governor was appointed in 1683[154]. As far as the occupation of Tortola is concerned, Professor Koot agreed that it was unclear whether settlement was continuous from 1672 until 1682 and the suggestion there had been a continuous settlement in his Report was a bit of an overstatement. He further agreed that the first time Colonel Stapleton in his reports described Tortola as "*inhabitata*" was in 1684 after he received a commission to settle the island and references to children first appear in the early 1700s[155].

889. Professor Chenoweth accepted that there were "*two files of men*" (40 soldiers) and some families on Tortola in 1676 and opined that they shortly thereafter left. I see no need to decide whether the island was in fact totally abandoned at this point, nor indeed in 1672,

[153] Transcript Day 61, page 232 lines 2-6.
[154] Page 223 lines 4-13.
[155] Transcript Day 61, page 226 lines 22-page 227 line 1; page 228 line 1-page 229 line 1.

although it seems on balance more likely that after Captain Burt destroyed the Dutch fort in 1672, on the instructions of Leeward Islands Governor Colonel Stapleton, most of the population (mainly Dutch) left. On any view it is clear that whatever English law the initial English settlers took with them to Tortola in or after 1672, the development of the settlement did not reach the point where the automatic reception of English law would have ceased before 1684. The following concession was also made during the cross-examination conducted by Mr Adkin QC:

> "*Q.* *… So if we could please look at your second report… You say at paragraph 7.1: 'In general, it appears that no formal legal system existed in the Virgin Islands until at least the institution of a Council in 1734 ... this body dealt only with simple contract matters according to Suckling ... and most cases, including criminal cases in Tortola at this time (including in at least one case for murder) seem to have had no forum and their trial on other islands was declared to be illegal in Tortola for lack of jurisdiction , allowing the accused to go free. A Supreme Court was established only after the Legislature in 1774, but seems to not have sat for almost a decade following due to the conflict over the Court Bill and Quieting Bill, settled only in 1783.' So your conclusion is , and I'm not challenging this, that there was no court system in the BVI until after the BVI legislature was set up in 1774 and even then no court seems to have sat for about a decade, almost a decade; yes?*
>
> *A.* *Yes.*
>
> *Q.* *Prior to that, for anything other than the simplest contract matters, there was simply no forum for the resolution of disputes at all in the BVI; yes?*
>
> *A.* *Yes.*
>
> *Q.* *Prior to 1734, there was no forum for any matters; correct?*
>
> *A.* *That's my understanding.*
>
> *Q.* *Now, prior to the introduction of courts in the BVI, legislation which had as its object the prevention of perjury would have been irrelevant to the needs of the islanders because there were no courts and therefore nowhere they could go and commit perjury. Do you agree?*
> *(Pause)*

A. *I suppose. I don't know. It sounds - - it sounds kind of like a legal question, but I 'm not sure. But sounds like a reasonable statement.*

Q. *Well, if we look at - - well, before we move on from that let me ask a historical question. The flavour that one gets from your reports, is this right, is that until really after 1774, the Virgin Islands were the Wild West?*

...

A. *Yes... That seems a - - that seems a reasonable gloss.*"

890. This questioning raised some doubts as to whether the Statute of Frauds would have been suitable for the conditions of Tortola as late as 1774, which date would be a logical latest potential date for the automatic reception of English law to be cut-off. However, a "Wild West" environment does not normally signify a society with no laws and lacking any need for legal regulation; on the contrary that term typically implies the presence of laws and the absence of effective law enforcement mechanisms.

891. Professor Chenoweth opined in his Expert Report that there was no permanency in the population of Tortola until around 1700. It is not disputed that the earliest record of a Deputy Governor being appointed (seemingly on a non-resident basis) is during the 1683-1688 period. There is some evidence that from 1705 a local Council of 6 was appointed alongside the Deputy Governor although taxes were in practice only collected on a voluntary basis and officials were as late as the 1730's "*thrashed*" for attempting to carry out their functions. Such law as there was was enforced on a voluntary basis. He exhibits extracts from the Calendar of State Papers, America and West Indies from the turn of the century which provide contemporaneous snippets of the state of the Virgin Islands and the Leeward Islands as a whole. Tortola is described as being "*settled*" after the Dutch fort was destroyed in 1672. In 1717, the Leeward Islands Governor reports that most of the land in Tortola has been "*given away in great tracts under the Great Seal of these Islands*" by his two predecessors, not with a view to settlement but for timber exploitation. This suggests that landownership in Tortola probably began at some point in the early 1700s. The population was recorded in 1724 as 1100, more than half of whom were probably enslaved people rather than settlers. Land is said to be held on the same basis as in Antigua, where settlers are described as having received Crown grants subject to an obligation to pay taxes. A small amount of trade in sugar, molasses and cotton was produced on Tortola and Spanish Town for the modest needs of the inhabitants who were in a "*poor condition*". Additional Colonial Office documents during this period suggest that the Deputy Governor was charged with settling all "*controverseys*".

892. By the end of the first quarter of the 18th century, therefore, it seems clear that real property rights had been acquired and that some trade in timber and other agricultural produce had been established. That potentially made the territory suitable for receiving the Statute of Frauds. It is not necessary to decide at what point the local and/or regional legislative competence in respect of Tortola became sufficiently effective to stop the automatic reception of English law (Professor Patchett doubted that reception could have continued until as late as 1774, but his tentative view was not based on an extensive review of the historical and legal materials which have been placed before me in the present case). If the initial reception date for Tortola was after 1677, the Statute of Frauds would have been received at some point before the cut-off date occurred.

893. When conditions in the territory became suitable for reception of the Statute of Frauds is a mixed question of history and constitutional legal history which will be addressed separately below. However, the experts essentially agreed that although the Leeward Islands legislature had theoretical competence over Tortola and the other islands which became the BVI from as early as 1672, this competence was first exercised in 1705 to clarify that the English common law was indeed part of the law of all territories in the Leeward Islands. This is indicative of two potential scenarios, which are not necessarily mutually exclusive: (a) the regional authorities saw no need to legislate further for Tortola during this period because of the undeveloped nature of its settlement, and/or (b) because it was assumed that the English statutes in force on the respective settlement dates would be received into the law of Tortola and the other less mature regional territories on an incremental basis, the statutory position did not need to be addressed.

894. The historical evidence viewed in isolation from legislative and other legal materials supports the following findings in relation to the reception of English law generally:

(a) Tortola was acquired by the English by conquest in 1672 from the Dutch;

(b) because the Dutch left no law behind them, the reception of English law accompanied English settlement on or after that date;

(c) stable settlement of Tortola did not occur until after 1677;

(d) the Leeward Islands Assembly first acquired competence over Tortola in 1682. However it did not actively exercise legislative competence over Tortola before 1705 and settlement probably occurred for reception purposes no later than this date;

(e) Tortola itself did not acquire a form of legislative and judicial Government which was clearly incompatible with the continued reception of English law until 1774;

(f) by 1724 modest trade was taking place and private land ownership already existed based on Crown grants. This suggests that conditions were suitable for receiving the Statute of Frauds by that date at the latest.

895. However, whether the Statute of Frauds was received into Tortola and consequentially BVI law requires further legal analysis in light of the available legal materials.

Legal findings: was the Statute of Frauds received into BVI law by virtue of the operation of the common law?

896. The Plaintiff's counsel also unsurprisingly placed reliance on the summary view expressed in '*William Burge QC, Commentaries on Colonial Laws and Foreign Laws*'[156] that:

> "*In the colonies of Jamaica, Tortola, Antigua, Montserrat, Dominica, Tobago, Grenada, St Vincent, Bermuda, Upper Canada, Nova Scotia, and Prince Edward's Island, the Statute of Frauds is in force as part of the English statute law received on the establishment of those colonies.*"

897. It is impossible to place much reliance on bare statements such as this having regard to the legal principles which I have found govern the reception of English law at common law. There is no analysis as to why it is considered that the Statute would have been appropriate for the needs of the colonies, unless it is assumed that the establishment date is the cut-off date for reception and not the date of the original settlement. Pivotal to such an analysis is an appreciation of what legislative purpose the Statute served. It was enacted by Parliament during the reign of Charles II and provided in its original form as follows[157]:

> "***Parol Leases and Interests of Freehold, &c. to have the Force of Estates at Will only.***

[156] (1838) Vol. II page 526. John Howard also suggests that English law was received in the Virgin Islands prior to 1774: '*The Laws of the British Colonies in the West Indies and Other Parts of America Concerning Real and Personal property and Manumission of Slaves*', Volume I (John Butterworth: London, 1827) at pages x-xi.

[157] https://www.british-history.ac.uk/statutes-realm/vol5/pp839-842.

For prevention of many fraudulent Practices which are commonly endeavoured to be upheld by Perjury and Subornation of Perjury Bee it enacted by the Kings most excellent Majestie by and with the advice and consent of the Lords Spirituall and Temporall and the Commons in this present Parlyament assembled and by the authoritie of the same That from and after the fower and twentyeth day of June which shall be in the yeare of our Lord one thousand six hundred seaventy and seaven All Leases Estates Interests of Freehold or Termes of yeares or any uncertaine Interest of in to or out of any Messuages Mannours Lands Tenements or Hereditaments made or created by Livery and Seisin onely or by Parole and not putt in Writeing and signed by the parties soe makeing or creating the same or their Agents thereunto lawfully authorized by Writeing, shall have the force and effect of Leases or Estates at Will onely and shall not either in Law or Equity be deemed or taken to have any other or greater force or effect, Any consideration for makeing any such Parole Leases or Estates or any former Law or Usage to the contrary notwithstanding.

II. Except Leases not exceeding Three Years, &c.

Except neverthelesse all Leases not exceeding the terme of three yeares from the makeing thereof whereupon, the Rent reserved to the Landlord dureing such terme shall amount unto two third parts at the least of the full improved value of the thing demised.

III. No Leases or Estates of Freehold or Copyhold, &c. to be granted or surrendered but by Writing signed.

And moreover That noe Leases Estates or Interests either of Freehold or Terms of yeares or any uncertaine Interest not being Copyhold or Customary Interest of in to or out of any Messuages Mannours Lands Tenements or Hereditaments shall at any time after the said fower and twentyeth day of June be assigned, granted or surrendred unlesse it be by Deed or Note in Writeing signed by the party soe assigning granting or surrendring the same or their Agents thereunto lawfully authorized by writeing or by act and operation of Law.

IV. No Action against Executors, &c. upon a special Promise, or upon any Agreement, or Contract for Sale of Lands, &c. unless Agreement, &c. be in Writing and signed.

And bee it further enacted by the authoritie aforesaid That from and after the said fower and twentyeth day of June noe Action shall be brought whereby to charge any Executor or Administrator upon any speciall promise to answere damages out, of his owne Estate or whereby to charge the Defendant upon any speciall promise to answere for the debt default or miscarriages of another person or to charge any

person upon any agreement made upon consideration of Marriage or upon any Contract or Sale of Lands Tenements or Hereditaments or any Interest in or concerning them or upon any Agreement that is not to be performed within the space of one yeare from the, makeing thereof unlesse the Agreement upon which such Action shall be brought or some Memorandum or Note thereof shall be in Writeing and signed by the partie to be charged therewith or some other person thereunto by him lawfully authorized.

V. Devises of Lands to be in Writing and signed and attested by Three or Four Witnesses.

And bee it further enacted by the authority aforesaid That from and after the said fower and twentyeth day of June all Devises and Bequests of any Lands or Tenements deviseable either by force, of the Statute of Wills or by this Statute or by force of the Custome of Kent or the Custome of any Burrough or any other perticular Custome shall be in Writeing and signed by the partie soe deviseing the same or by some other person in his presence and by his expresse directions and shall be attested and subscribed in the presence of the said Devisor by three or fower credible Witnesses or else they shall be utterly void and of none effect.

VI. How the same Devise to be revocable.

And moreover noe Devise in Writeing of Lands Tenements or Hereditaments nor any Clause thereof shall at any time after the said fower and twentyeth day of June Be revocable otherwise then by some other Will or Coddicill in Writeing or other Writeing declareing the same or by burning cancelling teareing or obliterating the same by the Testator himselfe or in his presence and by his directions and consent but all Devises and Bequests of Lands' and Tenements shall remaine and continue in force untill the same be burnt cancelled torne or obliterated by the Testator or his directions in manner aforesaid or unlesse the same be altered by some other Will or Codicill in Writeing or other Writeing of the Devisor signed in the presence of three or fower Witnesses declareing the same, Any former Law or Usage to the contrary notwithstanding.

VII. Declarations or Creations of Trusts of Lands to be in Writing signed.

And bee it further enacted by the authoritie aforesaid That from and after the said fower and twentyeth day of June all Declarations or Creations of Trusts or Confidences of any Lands Tenements or Hereditaments shall be manifested and proved by some Writeing signed by the partie who is by Law enabled to declare

such Trust or by his last Will in Writeing or else they shall be utterly void and of none effect.

VIII. Proviso for Trusts arising, transferred or extinguished by Implication of Law.

Provided alwayes That where any Conveyance shall bee made of any Lands or Tenements by which a Trust or Confidence shall or may arise or result by the Implication or Construction of Law or bee transferred or extinguished by an act or operation of Law then and in every such Case such Trust or Confidence shall be of the like force and effect as the same would have beene if this Statute had not beene made. Any thing herein before contained to the contrary notwithstanding.

IX. Assignments of Trusts shall be in Writing.

And bee it further enacted That all Grants and Assignments of any Trust or Confidence shall likewise be in Writeing signed by the partie granting or assigning the same [or] by such last Will or Devise or else shall likewise be utterly void and of none effect.

X. Lands, &c. of Cestui que Trust liable to the Judgments, &c.

and held free from the Incumbrances of the Persons seized in Trust. Trust shall be Assets by Descent.

And bee it further enacted by the authoritie aforesaid That from and after the said fower and twentyeth day of June it shall and may be lawfull for every Sheriffe or other Officer to whome any Writt or Precept is or shall be directed at the Suite of any person or persons of for and upon any Judgement Statute or Recognizance hereafter to be made or had, to doe make and deliver Execution unto the partie in that behalfe sueing of all such Lands Tenements Rectories Tythes Rents and Hereditaments as any other person or persons be in any manner of wise seised or possessed [or hereafter shall be seised or possessed] in Trust for him against whome Execution is soe sued like as the Sheriffe or other Officer might or ought to have done if the said partie against whome Execution hereafter shall be soe sued had beene seised of such Lands Tenements Rectories Tythes Rents or other Hereditaments of such Estate as they be seized of in Trust for him at the time of the said Execution sued. Which Lands Tenements Rectories Tythes Rents and other Hereditaments by force and vertue of such Execution shall accordingly be held and enjoyed freed and discharged from all Incumbrances of such person or persons as shall be soe seised or possessed in Trust for the person against whome such Execution shall be sued. And if any Cestuy que Trust hereafter shall dye leaveing a Trust in Fee simple to descend to his Heire, there, and in every such case such Trust

shall be deemed and taken and is hereby declared to be Assetts by descent and the Heire shall be lyable to and chargeable with the Obligation of his Auncestors for and by reason of such Assetts as fully and amply as he might or ought to have beene if the Estate in Law had descended to him in possession in like manner as the Trust descended, Any Law Custome or Usage to the contrary in any wise notwithstanding.

XI. But Heir shall not by reason thereof become chargeable of his own Estate.

Provided alwayes That noe Heire that shall become chargeable by reason of any Estate or Trust made Assetts in his hands by this Law shall by reason of any kinde of Plea or confession of the Action or suffering Judgement by Nient dedire or any other matter bee chargeable to pay the Condemnation out of his owne Estate but Execution shall be sued of the whole Estate soe made Assetts in his hands by descent in whose hands soever it shall come after the Writt purchased in the same manner as it is to be at and by the Common Law where the Heire at Law pleading a true Plea Judgement is prayed against him thereupon. Any thing in this present Act contained to the contrary notwithstanding.

XII. Estates pur auter vie devisable;

and to be Assets in the Hands of the Heir; and where no special Occupant, to go to Executors.

And for the amendment of the Law in the particulars following Bee it further enased by the authorise aforesaid That from henceforth any Estate per auter vie shall be deviseable by a Will in writeing signed by the party soe deviseing the same or by some other person in his presence and by his expresse diresions attested and subscribed in the presence of the Devisor by three or more Witnesses, and if noe such Devise thereof be made the same shall be chargeable in the hands of the Heire if it shall come to him by reason of a speciall Occupancy as Assetts by descent as in case of Lands in Fee simple And in case there be noe speciall Occupant thereof it shall goe to the Executors or Administrators of the partie that had the Estate thereof by vertue of the Grant and shall be Assetts in their hands.

XIII. Recital of Mischiefs arising from the Relation of Judgments to the First Day of the Term, &c.

The Day of signing any Judgment to be entered on the Margin of the Roll without Fee:

And whereas it hath beene found mischievous that Judgements in the Kings Courts at Westminster doe many times relate to the first day of the Terme whereof they are

entred or to the day of the Returne of the Originall or fileing the Baile and binde the Defendants Lands from that time although in trueth they were acknowledged or suffered and signed in the Vacation time after the said Terme whereby many times Purchasers finde themselves agrieved Bee it enacted by the authorise aforesaid That from and after the said foure and twentyeth day of June any Judge or Officer of any of his Majestyes Courts of Westminster that shall signe any Judgements shall at the signeing of the same without Fee for doeing the same sett downe the day of the moneth and yeare of his soe doeing upon the Paper Booke Dockett or Record which he shall signe which day of the moneth and yeare shall be alsoe entred upon the Margent of the Roll of the Record where the said Judgement shall be entred.

XIV. And such Judgments as against Purchasers shall relate to such time only.

And bee it enacted That such Judgements as against Purchasers bona fide for valueable consideration of Lands Tenements or Hereditaments to be charged thereby shall in consideration of Law be Judgements onely from such time as they shall be soe signed and shall not relate to the first day of the Terme whereof they are entred or the day of the Returne of the Originall or fileing the Baile Any Law, Usage or Course of any Court to the contrary notwithstanding.

XV. Writs of Execution to bind the Property of Goods but from the time of their Delivery to the Officer.

And bee it further enacted by the authority aforesaid That from and after the said fower and twentyeth day of June noe Writt of Fieri facias or other Writt of Execution shall binde the Property of the Goods against whome such Writt of Execution is sued forth but from the time that such Writt shall be delivered to the Sheriffe Under Sheriffe or Coroners to be executed, And for the better manifestation of the said time the Sheriffe Under Sheriffe and Coroners their Deputyes and Agents shall upon the receipt of any such Writt (without Fee for doeing the same) endorse upon the backe thereof the day of the moneth [or (fn. 2)] yeare whereon he or they received the same.

XVI. In what Cases only Contracts for Sales of Goods for £10 or more to be binding.

And bee it further enacted by the authority aforesaid That from and after the said fower and twentyeth day of June noe Contract for the Sale of any Goods Wares or Merchandises for the price of ten pounds Sterling or upwards shall be allowed to be good except the Buyer shall accept part of the Goods soe sold and actually receive the same or give some thing in earnest to bind the bargaine or in part of

payment, or that some Note or Memorandum in writeing of the said bargaine be made and signed by the partyes to be charged by such Contract or their Agents thereunto lawfully authorized.

XVII. The Day of Enrolment of Recognizances to be set down;

and Lands in the Hands of Purchasers bound from that time only.

And bee it further enacted by the authority aforesaid That the day of the moneth and yeare of the Enrollment of the Recognizances shall be sett downe in the Margent of the Roll where the said Recognizances are enrolled, and that from and after the said fower and twentyeth day of June noe Recognizance shall binde any Lands Tenements or Hereditaments in the hands of any Purchasor bona fide and for valueable consideration but from the time of such Enrollment, Any Law Usage or Course of any Court to the contrary in any wise notwithstanding.

XVIII. No Nuncupative Will good where Estate exceed £30 in Value;

unless proved by Three Witnesses on Oath, and made; in last Sickness of Testator, and where he had been resident Ten Days or more; Exception.

And for prevention of fraudulent Practices in setting up Nuncupative Wills which have beene the occasion of much Perjury Bee it enacted by the authority aforesaid That from and after the aforesaid fower and twentyeth day of June noe Nuncupative Will shall be good where the Estate thereby bequeathed shall exceede the value of thirty pounds that is not proved by the Oathes of three Wittnesses (at the least) that were present at the makeing thereof, nor unlesse it be proved that the Testator at the time of pronounceing the same did bid the persons present or some of them beare wittnesse that such was his Will or to that effect, nor unlesse such Nuncupative Will were made in the time of the last sicknesse of the deceased and in the House of his or her habitation or dwelling or where he or she hath beene resident for the space of ten dayes or more next before the makeing of such Will except where such person was surprized or taken sick being from his owne home and dyed before he returned to the place of his or her dwelling.

XIX. No Testimony to be received after Six Months. Exception.

And bee it further enased That after six monethes passed after the speaking of the pretended Testamentary words noe Testimony shall be received to prove any Will Nuncupative except the said Testimony or the substance thereof were committed to writeing within six dayes after the makeing of the said Will.

XX. Probates of Nuncupative Wills.

And bee it further enacted That noe Letters Testamentary or Probate of any Nuncupative Will shall passe the Seale of any Court till fowerteene dayes at the least after the decease of the Testator be fully expired, Nor shall any Nuncupative Will be at any time received to be proved unlesse Processe have first issued to call in the Widow or next of kindred to the deceased to the end they may contest the same if they please.

XXI. In what Cases only Wills of Personal Estate may be revoked or altered by Parol.

And bee it further enacted That noe Will in writeing concerning any Goods or Chattells or Personall Estate shall be repealed nor shall any Clause Devise or Bequest therein be altered or changed by any Words or Will by word of mouth onely except the same be in the life of the Testator committed to writeing and after the writeing thereof read unto the Testator and allowed by him and proved to be soe done by three Wittnesses at the least.

XXII. Proviso for Soldiers and Mariners Wills.

Provided alwayes That notwithstanding this Act any Soldier being in actuall Military Service or any Marriner or Seaman being at Sea may dispose of his Moveables, Wages and Personall Estate as he or they might have done before the makeing of this Act.

XXIII. Proviso for the Jurisdision of Courts granting Probate.

And it is hereby declared That nothing in this Act shall extend to alter or change the Jurisdiction or Right of Probate of Wills concerning Personall Estates but that the Prerogative Court of the Archbishop of Canterbury and other Ecclesiasticall Courts and other Courts haveing Right to the Probate of such Wills shall retaine the same Right and Power as they had before in every respect subject neverthelesse to the Rules and Directions of this Act.

XXIV. 22 & 23 C.II. c.10. Husbands not compellable to make Distribution of the Personal Estates of their Wives.

And for the explaining one Act of this present Parlyament entituled An Act for the better setleing of Intestates Estates Bee it declared by the authority aforesaid That neither the said Act nor any thing therein contained shall be construed to extend to the Estates of Feme-Coverts that shall dye Intestate, but that their Husbands may demand and have Administration of their Rights Credits and other Personall

Estates and recover and enjoy the same as they, might have done before the makeing of the said Act."

898. It is important to view the Statute of Frauds in its wider canvass because it is necessary to remember that the particular provision the Plaintiff (and D8) rely upon is simply one, admittedly freestanding, part of a greater whole. The wider contents of the Statute are also relevant for resolving the point raised by the Trustees that the section in question only applies to real and not personal property, albeit that this point is not being addressed at this stage. Nevertheless, the following preliminary findings can easily be made:

(a) sections 1-8 expressly provide that various transactions relating to land and interests in land (including those involving wills and other trusts) must be in writing;

(b) section 9 is the specific section relied upon. By its terms it provides that transfers of "*any*" trust interests will "*likewise*" be void unless in writing;

(c) various sections after section 9 address issues relating to e.g. the enforcement of judgments and wills in terms which embrace both realty and personalty; and

(d) section 16 makes provision for the validity of contracts for the sale of goods worth "*£10 or more*" (such contracts must either be in writing or evidenced by part-payment or some other exchange of consideration);

(e) section 21 provides that wills dealing with personalty can only be altered or revoked in writing.

899. At first blush, it seems apparent that the Statute of Frauds contains many straightforward provisions designed to prevent fraud by requiring writing in relation to a variety of dealings with real and personal property, both *inter vivos* and by will. These statutory provisions do not appear to require a very sophisticated society as it is easy to imagine, in relation to infant settlements during the periods in question, contracts and wills being entered into by persons resident in England or elsewhere in relation to land or goods (such as timber) located in Tortola, as well as persons actually resident in the territory. This was certainly the Bermudian experience in the first decades of the Bermuda Company (which replaced the Virginia Company in 1615) when the various shareholders of the Company (who received a Charter from James I to administer the territory and who gave their names to Bermuda's parishes) were based in England.

900. In my judgment any sensible analysis of the suitability of the Statute of Frauds for Tortola must have regard to the commercial realities of the legal needs of the territory in the widest possible sense. Settlers who were employed to cultivate and exploit timber and agricultural produce might not themselves be entering into contracts for the sale of goods or making wills relating to land and equipment located in Tortola. But their employment would vitally depend on their possibly non-resident employers being able to enter into such transactions in a legally effective way. The efficacy of such transactions would not depend on the existence of Tortola courts because non-resident investors would always be able to found jurisdiction elsewhere. The direct evidence as to the legal needs of Tortola is somewhat sketchy.

901. Professor Chenoweth's Report emphasised the fact that early settlers in the late 17th and early 18th century were marginalised people eking out a subsistence existence (paragraph 4.13.2). However, as mentioned above, his Appendix also reveals that part at least of the island was owned by persons who had received Royal grants. Either these were resident or non-resident landowners. In 1724, Professor Chenoweth records that a census records Tortola and Virgin Gorda having a combined population of "1,168 whites and 6,121 enslaved Africans" (paragraph 4.13.11). That is suggestive of not insignificant commercial activity, because someone had to own the enslaved people. And the enslaved were under the common law of that era (it is a notorious fact) valuable forms of personal property and who would routinely be bought, sold and disposed of by will. Professor Koot, who sought to emphasise rather than minimise the substance of early settlement, provides a valuable insight in his Expert Report while fairly disclosing how tenuous the early occupation was for those who did not own or control land:

> "*63* *While in the BVI* [in 1717] *Governor Mathew received a petition from residents of Spanish Town and Tortola 'for liberty to settle upon Santa Cruis or Santa Cruix'. In the petition, the inhabitants of Tortola explained they wanted to abandon Tortola because all the land was controlled by 'six or seven persons being granted by the former Generals' for timbering 'the poor inhabitants having no land to live upon'…*
>
> *64* *… The new Governor of the British Leeward Islands, John Hart, reported 1200 residents in Tortola* [in 1725]*…*
>
> *65* *In the decades which followed Hart's administration, the population rose and economic development accelerated as the islands became profitable sugar islands … In 1756, Tortola's population was 4329 … During this period it is assumed that land ownership expanded as planters developed*

previous undeveloped land, purchased enslaved Africans to work the land and invested in sugar works and other infrastructure necessary for economic growth. Many of these new planters arrived from other British colonies and likely brought capital to enable the transition to sugar with them."

902. It is essentially common ground that there were many marginalised settlers in Tortola in the first quarter of the 18th century and that most of the land was owned or controlled by persons who received grants from Leeward Islands Governors (who were also Generals). Such persons were mostly likely of a higher social and economic status than the 1717 petitioners, and may not have actually themselves been permanently resident in Tortola. Although there were no courts, and perhaps because there were no local courts, formal requirements for the transfer of property of all description as basic as the writing requirements the Statute of Frauds imposed would have been useful for all those living in and/or doing business in Tortola, as low key as activities may have been. By 1756, the need for such legislation would have been even more compelling as commercial activity was clearly increasing.

903. Against this background, the judicial and legislative authorities may be considered. In the Plaintiff's Closing Submissions, Mr Hagen QC submitted:

"*The statute was treated as received from England by local courts in many other territories, including the Cayman Islands,* [158] *British India* [159] *and Saskatchewan*[160]*. As the leading commentator on Canadian trusts put it* '*so fundamental is the Statute to a common law system taken over from England, that the burden of proof lies on the party who alleges that the Statute is not in force in any particular province'*[161]."

904. Reception is ultimately a jurisdiction-specific process so authorities from other jurisdictions are only really helpful to the extent that they elucidate the general judicial approach to the question. It is obvious that the Statute is one of general application suitable for being received automatically or by express re-enactment. The most instructive authority for present purposes is the BVI 18th century legislation upon which the Plaintiff's counsel heavily relied. The Quieting Act 1784 provided as follows:

158 *McCallister v Santa Cruz* [1984-5] CILR 123.
159 *Freeman v Fairlie* 18 ER 117.
160 *Balaberda v Mucha* (1960) DLR (2d) 760 (Sak. CA), (1960) CanLII 235.
161 Waters, '*Law of Trusts in Canada*', 2012, p. 253.

"*... no Defects or informalities in Law either in the words or manner of passing and executing any Will Gift Deed or other Instrument already heretofore executed or made in writing for the purchasing devising or Conveying of any Lands, Tenements or Hereditaments or Slaves or any other personal Estate whatsoever in the Said Islands shall be in any wise Sufficient to defeat the Effect of such Will Gift Deed or other Instrument where the Intent of the Parties to the same Appears…*"

905. It was amended shortly thereafter by Act No.5 in the same year which provided as follows:

"*… all Agreements, Conveyances and Assurances, Declarations of Trust, Wills, Codicils, Deeds of Gift or other Instruments of Writing whatsoever already executed or made relating or concerning any Lands, Tenements, Hereditaments or real estate, or to Slaves or any other personal Estate whatsoever in these Islands; or to Monies charged or chargeable on or issued out of any Lands, Tenements or Slaves in these Islands, shall be good valid and effectual in Law and Equity according to the true Intent and Meaning, notwithstanding any Want of Law Form in the drawing or the Want of Technical Words, or any Defect in the manner of the passing, executing or signing the laws…*"

906. This legislation only makes sense if the legislative view at the time was that the 1677 English Statute was already in force as part of BVI law. It assumes that writing is required, but clarifies that no other formal defects will invalidate transactions including, *inter alia*, declarations of trust. The Court Act 1784 was relied on by the Trustees' counsel as suggesting the contrary position. It critically provides as follows:

"*And for the better support of Credit, Be it enacted by the Authority aforesaid, that from and after the Date hereof, the Benefit of Trust lands, Tenements, Hereditaments and Slaves, within these Islands Whether such Trusts be now created or in being, or shall hereafter be created and in being, shall be liable to Judgment and Execution, and be assets in all Respects, and the Heirs and other Persons be chargeable therefore* ***in the same Manner as such Lands, Tenements, Hereditaments and Heirs and persons are liable in England by the Statute made in the Twenty Ninth Year of the Reign of our late Sovereign Lord Charles the Second, Chapter the third, entitled "An act for prevention of Frauds and Perjuries" as the same is extant in the Statutes at large, printed by the Printers to the Crown, with the following alteration*** *(that is to say) that the whole Trusts in all the Lands and Tenements, Hereditaments and Slaves, shall*

be sold and Execution thereon be done as hereinafter directed in Case of Lands, Tenements, Hereditaments and Slaves respectively; and that such Trusts shall be liable against any Purchasers thereof, in all Respects on the Entry of an Action or Suit in Equity as Lands, Tenements and Slaves are before, or after hereby made liable: and all Estates for the Term of any other Persons Life, or Lives of Lands, Tenements, Hereditaments and Slaves within these Islands, shall be devisable, descend, and go, and be Assets ***in the same Manner here as such Estates in Lands in England are*** *directed by the same last mentioned Statutes, as extant in the same printed Statutes.*" [emphasis added]

907. This enactment clearly potentially supports the view that the Legislature assumed that the 1677 Act was not in already force as Mr Howard QC contended. However, regard must be had to two important counter-indications: (a) the Court Act was enacted in the same year as the two Quieting Acts, and (b) the Court Act is dealing with a different aspect of the 1677 English Act, namely that portion which deals with the enforcement of judgments. As a matter of linguistic analysis, I am not persuaded by Mr Hagen QC's suggestion that it is clear that all that is being done by the Court Act is to alter the effect of provisions which were already in force. But I do agree for other more cogent reasons that the 1784 Court Act does <u>not</u> suggest that the local Legislature assumed that section 9 of the Statute of Frauds was not already in force.

908. Firstly, the suggestion that there is an inherent inconsistency between the drafters of the Court Act believing that those portions of the Statute of Frauds which deal with the enforcement of judgments (in particular section 10) not being already in force and those portions requiring writing for various property transfers being already in force is a false point. The whole basis of the common law reception doctrine is that it is an incremental and selective process rather than an all or nothing exercise. There is no reason why section 9 might have logically been assumed by the same legislators to have been received into BVI law (as suggested by the Quieting Acts) while section 10 was assumed not to have been received.

909. Secondly, as I have already noted above, the historical evidence (and common sense) suggests that section 9 would have supported the early settlers and/or non-resident proprietors of land and related trade. Even if disputes could only be informally settled by the Deputy Governor in Tortola, they could (potentially at least) have been formally adjudicated in jurisdictionally competent established courts elsewhere. In stark contrast, those provisions of the Statute of Frauds which deal with the enforcement of judgments (including section 10) would have been quite obviously unsuitable and/or inappropriate for reception before Tortola and/or the BVI had its own court system able to issue judgments

capable of enforcement. Those legislating for the BVI in the late 18th century would have been ideally placed to make such informed and practical judgments about the reception of English law which had already occurred in the territory as its legislative and judicial infrastructure was being designed for the first time. Legislative practice in subsequent centuries, and the failure to list in the Revised Laws English statutes received in the 1700s, carry far less weight in determining what the true legal position was at the material time. I see no need to expressly deal with the various peripheral points made in this regard.

910. Clearly a Bermudian Court should show considerable deference to the modern views of the BVI courts and legal commentators. However it is common ground that the question of whether the Statute of Frauds was received into BVI law has not before been fully and formally addressed. Mr Hagen QC relied on two decisions of Jack J (Ag.) in support of the proposition that the BVI were settled and not acquired by conquest: *VTB Bank v Miccros Group Limited & Anr* BVIHC (Com) 2018/0067 (January 23, 2020) at [44] to [46]; *Great Panorama International Ltd v Qin Hui & Ors* BVIHC (Com) 2019/0180 (August 13, 2020) at [57] to [59]. The classification of the BVI as a territory acquired by conquest or settlement was not in issue in either case; the settlement date was merely referred to as the basis on which law is received. The Statute in question was the Statute of Elizabeth 1571. The classification question, which might well have been a live issue, is ultimately a non-issue in view of the findings I have made based on the most helpful expert evidence on BVI history adduced in this case. The most that can be extracted from Acting Justice Jack's decisions is that he expressed the provisional view that the settlement date (by which I assume he meant the latest date for receiving English law automatically) might be as late as 1774.

911. More to the point, the reception of the Statute of Frauds itself has been directly addressed by two modern BVI legal texts. Mr Hagen QC in oral closings relied upon James Kessler, Tony Pursall & Naresh Chand, '*Drafting British Virgin Islands Trusts*'[162] at paragraph 9.13 note 21:

> "*A written and signed direction would be needed under the Statute of Frauds 1677 s. 9, which is considered to be law in the BVI, although the position is not beyond doubt and some practitioners take a contrary view. The prudent course is to ensure compliance with it*…"

[162] Sweet & Maxwell: London, 2014.

912. Mr Howard QC in oral opening relied upon the following passage in Harney Westwood & Riegels (Colin Riegels and Ian Mann eds.), '*British Virgin Islands Commercial Law*', Fourth Edition at paragraph 1.050[163]:

> "*Most historical sources which subscribe to the settlement theory use the date of 1666 as the date of settlement. However, from the legal perspective there were no significant statutes adopted by the English parliament between 1666 and 1672, so which of those two dates is used appears to be largely immaterial.*"

913. This passage does not fairly reflect the primary view of the learned authors on the settlement date question. They in fact express concern that the territory has been classified as a settled territory despite evidence to the contrary and sagely point out (in footnote 92):

> "*Theoretically, one could make an argument that the islands were settled by the Dutch, conquered by the British, returned and then immediately, abandoned and resettled by the English.*"

914. The theoretical argument posited there is precisely what the historical evidence, extensively reviewed, shows occurred. The reason why legal historians frequently refer to the territory as being settled is because, even if it was actually acquired by conquest, the reception of law rules which are applicable to settled colonies apply by analogy. As to the question of whether the Statute of Frauds forms part of BVI law, the learned authors appear to approach the question (at paragraph 1.048), like a wickedly spinning cricket ball, with a solid defensive stroke:

> "*In various other common law jurisdictions local legislatures have passed laws which expressly provide for British statutes to apply in those jurisdictions, but no such statutes have been passed in the British Virgin Islands (although certain ancient statutes have been expressly extended to the British Virgin Islands by more modern legislation). However, the matter is not entirely free from doubt. English statutes which have from time to time been considered as to whether they have any application in the British Virgin Islands include the Statute of Frauds 1677…*"

915. Neither text provides any reasoned argument for or against the view that the 1677 Act forms part of BVI law. Mr Hagen QC summarised the effect of the above sample of modern

[163] Sweet & Maxwell: Hong Kong, 2018.

BVI views on the reception of English law question placed before this Court as follows in his oral closing arguments[164]:

> "*... your Lordship is not going to be lighting the touchpaper of controversy by finding that the Statute of Frauds is part of BVI law.*"

916. In my judgment it is ultimately clear that section 9 of the Statute of Frauds was received into BVI law at some point between 1705 (when the Leeward Islands Assembly first legislated for the territory) and 1784 when the territory's first Legislature enacted legislation (the Quieting Acts) which clearly assumed that such reception had already taken place. The territory's first legislators were the best placed to judge the reception position and their contemporaneous views are supported rather than undermined by an objective retrospective historical analysis of:

(a) the initial settlement date (for reception purposes), which was in or about 1705 and on any view after 1682; and

(b) the suitability of conditions in Tortola for receiving section 9 of the 1677 English Statute, which requirements were met at some point between 1705 and 1784 (the earliest plausible cut-off date for automatic reception purposes).

Submissions on whether the voluntary transfer of the Founders' equitable interests in the BVI shares have to comply with section 9 of the Statute of Frauds?

917. Whether the impugned transfers of the Founders' equitable interests in the shares were invalid by reason of failing to comply with the formalities requirements of section 9 of the Statute of Fraud essentially turned on two disputed issues. The first question appeared to me to be a relatively straightforward point of statutory construction. The second point initially seemed to call for more esoteric legal analysis:

(a) whether the Statute applies to personalty at all; and

(b) if so, whether, and if so in what circumstances, it was possible to validly transfer the legal and beneficial interest in shares together, without any separate written evidence of an equitable assignment.

[164] Transcript Day 66, page 134 lines 18-20.

918. In the Plaintiff's Closing Submissions, the following arguments were advanced on the first of these two legal points:

"*764.1 Jerdein v Bright (1860-1861) 2 J & H 325 is an example of a case which concerned personalty (i.e. a debt) and one of the reasons given by the Vice Chancellor for the failure of the action was that "it appears to me essential that the assignment should be in writing, because the 9th section of the Statute of Frauds refers to the interests of the cestui que trust". Lord Upjohn was accordingly wrong to say in Vandervell (in the obiter dictum passage relied upon by the PTCs in their written opening) that s.9 had never been applied to a trust of an equitable interest of pure personalty – in fact it had been so applied in Jerdein (albeit this particular issue was assumed rather than argued in Jerdein (unlike the other point for which Jerdein is cited below)).*

764.2 Implicitly Grey v IRC [1960] AC 1 – the case concerned shares (i.e. personalty), yet the claim was not dismissed on that basis, even though it proceeded on the mistaken footing at first instance that s. 53(1)(c) LPA 1925 was directed to 'precisely the type of disposition which fell within the old section 9'.

764.3. Pehrsson, a bankrupt v. Madeleine von Greyerz (Gibraltar) (1999-2000) 2 I.T.E.L.R. 230 (Privy Council) – the case concerned whether a bankrupt had validly transferred his beneficial interest in shares to Miss von Greyerz at any time before 28 December 1992 (so as to escape a claim to set aside the disposition under the Fraudulent Conveyances Act, to which at that date it became vulnerable). Lord Hoffmann giving the Advice of the Board at p.238 held that:

> *'There is no doubt that as beneficial owner, he could (subject to compliance with the provisions of the Statute of Frauds 1677 which require writing for an assignment of an equitable interest) have transferred his interest by directing the trustee to hold on behalf of [MvG]: see Grey v IRC…'*

Thus, Lord Hoffmann (giving the Advice of the Board) plainly held that s.9 applies as much to personalty as to realty.

*765. **Second**, there is in any event nothing in s.9 itself which expressly limits its application to trusts of land. To the contrary, it refers to all 'Grants and Assignments' of any 'Trust of Confidence'. It provides in full:*

And be it further enacted, That all Grants and Assignments of any Trust or Confidence shall likewise be in Writing, signed by the Party granting or assigning the same, or by such Last Will or Devise, or else shall likewise be utterly void and of none Effect."

919. The Trustees nonetheless provided a robust response in their own Closing Submissions:

"*1372. It is clear from its context that section 9 of the Statute of Frauds was intended by Parliament to apply to assignments of realty only, and not to assignments of personalty. The Statute of Frauds addressed transactions involving trusts at sections 7 to 9 as follows:*

'VII. And be it further enacted by the authority aforesaid, that from and after the said four and twentieth day of June all declarations and creations of trusts or confidences of any lands, tenements or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect.

VIII. Provided always, that where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then in every such case such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made; anything therein to the contrary notwithstanding.

IX. And be it further enacted that all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by such last will or devise, or else shall likewise be utterly void and of none effect.'

1373. Section 7 of the Statute of Frauds is concerned with the creation of trusts, whereas section 9 is concerned with the assignment of interests under them. The writing requirement imposed by section 7 is limited to the creation of trusts of realty. There is no apparent reason why the writing requirement imposed by section 9 should not be similarly limited to assignments of interests under trusts of realty. Given the stated objective of the statute, set out in its title, was 'for prevention of frauds and perjuries' why, it might fairly be asked, would Parliament have wished to permit

the creation of trusts of personalty without any writing, but to prohibit the assignment of interests under such trusts without writing? Winston and Tony have not sought to provide an answer to this question.

1374. Such an anomalous result is avoided if section 9 is read together with section 7, and section 8 simply treated as a proviso to section 7, which it plainly is.' Thus, where section 9 refers to 'all grants and assignments of any trust or confidence shall likewise be in writing' the word 'likewise' indicates that the trusts or confidences being referred to are those set out in section 7, namely trusts of realty.

1375. In Vandervell v IRC Lord Upjohn commented at page 310G that section 9 of the Statute of Frauds 'had never been applied to a trust of an equitable interest of pure personalty.' Winston has identified the case of Jerdein v Bright (1861) 2 J&H 325 in which Sir Page Wood V-C appears at pages 330-331 to have assumed that the assignment of an interest in the assets held by an insolvency trustee would be required to be in writing under section 9 of the Statute of Frauds, but the question of whether the section was limited to realty was not argued in that case and the Vice-Chancellor's comments on the section were amongst a number of different findings relevant to the disposal of the matter. The preponderance of academic opinion before the Statute of Frauds was superseded in England was against the section having extended to personalty: see Lewin on Trusts, (12th ed., 1911) page 890, paragraph 3 and AW Scott, The Law of Trusts, (2nd ed., 1956) at paragraph 139. For the reasons set out above, that is the correct view."

920. The personalty/realty issue is not quite as straightforward as it initially appeared and a clear analysis of the issue is hampered by the fact that the Statute was superseded by more modern legislation, both in England and Wales (and many Commonwealth territories) many years ago.

921. The Plaintiff, supported by D8, further argued as to the practical application of section 9 of the Statute of Frauds, most pivotally (in light of the Trustees' most cogent arguments on this part of the case):

"*771. There are two important, indeed fundamental, points to keep in mind arising from that wording:*

771.1 It applies to 'all' Grants and Assignments of 'any' Trust or Confidence. This 'means that the "grant" or "assignment" of ***any*** *trust interest is affected by the section' [emphasis added]. It relates to all 'equitable interests' that being the 'only meaning that can be attached to the seventeenth century language –"grants and assignments of any trust or confidence"'. There is thus nothing express in the language to suggest that where Mr Hung's trustee interest as nominee (if one can call it that) is transferred to a new trustee or extinguished, the section is automatically disapplied in relation to the (more important) transfer of the subsisting economic/beneficial interest of YC Wang;… there has been a purported assignment of YC Wang's economic/beneficial interest:…*

771.2 The section does not permit execution by an agent, nominee or holder of a superior equitable interest. As is clear from the wording 'signed by the Party granting or assigning the same', it must be the owner of the equitable interest in question who effects the disposition in writing. This is made clear by comparing the language of s. 9 with s. 4 (which is still in part good law in England), which enables in respect of contracts of guarantee 'Writing … signed by the Party to be charged therewith, ***or some other Person thereunto by him lawfully authorized'****. This is a very important point of distinction between s.9 and s.53 (1) (c), because s. 53(1) (c) now provides that:*

> *'a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same,* ***or by his agent thereunto lawfully authorised in writing or by will****" [emphasis added]*

Thus, unlike s.9, the modern s.53 (1) (c) expressly envisages that signature by someone other than the owner of the equitable interest in question may in appropriate circumstances suffice. S.9 provides no such flexibility – it was plainly important to the legislature that it was the owner and the owner alone who provided the signed writing."

922. Evidentially, there is no dispute that no written record of the transfer of YC and YT's equitable interest exists. The nub of the Trustees' case is that it suffices if the legal owner being duly authorised by the beneficial owner transfers the legal title in writing, because that will carry the equitable interest with it. The Plaintiff's Closing Submissions summarised the factual matrix as follows:

"*774.1 In <u>advance</u> of Mr Hung purporting to make the transfers of the China Companies, Everred and Landmark to Transglobe PTC, Vantura PTC or Universal Link PTC as the case may be (on around 18 June 2002 in the case of the China Companies and on 18 April 2005 in the case of Everred and Landmark):*

(a) Mr Hung executed powers of attorney in favour of Mr Granski in the case of the China Companies and Mr Harris in the case of Everred and Landmark purportedly empowering the attorney to 'transfer' the shares (both legally and beneficially) in each company to the relevant PTC; and

(b) Mr Hung wrote to each of the Citco nominee shareholders of those companies to tell them that on or about 25-6 June 2002 in the case of the China Companies and on or about 9 May 2005 in the case of Everred and Landmark he intended to 'transfer' his entire interest, and that he had appointed an attorney of fact (the relevant PTC would then request a new nominee agreement with each of the Citco nominees). Mr Hung's interests would be "transferred" to the relevant PTC on that date;

774.2 Then on 24 June 2002 in the case of the China Trust, or 9 May 2005 in the case of the Universal Link and Vantura Trusts:

(a) Mr Hung (in reality Mr Granski in 2002 or Mr Harris in 2005 as attorney) wrote to each relevant PTC stating that he wished to add and "hereby transfer" [emphasis added] his entire interest in each of the China Companies to Transglobe PTC, Everred to Universal Link PTC and Landmark to Vantura PTC as an addition to the trust fund;

(b) Mr Granski (in 2002) and Mr Harris (in 2005) wrote to each of the relevant Citco nominees c.c.-ed to Mr Hung instructing each of them to 'take such action to have Mr Hung's interest' in each of the companies "transferred" to Transglobe PTC, Universal Link PTC or Vantura PTC (as the case may be) and informing them that each

such PTC had resolved that the Citco nominee who held legal title should act as its nominee;

(c) Mr Hung (in reality Mr Granski (in 2002) or Mr Harris (in 2005) as attorney) executed in each case a 'stock power' which spoke of Mr Hung 'hereby' (inter alia) 'assign[ing]' 'his' interest in each China Company, Everred and Landmark to Transglobe PTC, Vantura PTC or Universal Link PTC as the case may be."

923. It is then submitted that *Grey-v-IRC* [1960] AC 1 at 17 is authority for the fact that there is no direct connection between section 9 of the Statute of Frauds and section 53(1) (c) of the Law of Property Act 1925, so that it is important for reliance to be placed on authorities on the older and applicable statute. The main authority relied upon is *Jerdein v Bright* (1861) SC 30 LJ Ch 336:

"*793. In Jerdein v Bright it was asserted that the plaintiff was an assignee of a right to sue under a trust. Counsel for the plaintiff submitted at [329] that s.9 had no bearing upon the issue because s.9 "refers to an assignment by the trustee, not by the cestui que trust". That submission is, of course, on all fours with the PTCs' case here discussed more fully below (i.e., if the trustee has assigned his interest in signed writing, s.9 has no bearing upon the assignment of the cestui que trust's interest which can be effected without writing). The Vice Chancellor in Jerdein roundly rejected that submission at [330]-[331], and did so on the basis of statutory construction:*

> *'Now, whether he is assignee in bankruptcy or insolvency, or in what capacity, and whether by any assignment in writing, contract or agreement there is not a word to shew. In the first place,* ***it appears to me essential that the assignment should be in writing, because the 9th section of the Statute of Frauds plainly refers to the interest of the cestui que trust****, as evident from the 10th section, where similar words are used in the like sense.' [emphasis added]*

794. The proposition that s.9 'refers to assignments by the cestui que trust' was included in William Fischer Agnew's A Treatise on the Statute of Frauds (Lincoln's Inn, 1876) at p.445 (citing Jerdein at footnote (a)). Pausing there, it is significant that the Vice-Chancellor's finding on s. 9 that writing was "essential" and that it refers to the interests of the "cestui que

trust" was derived from a construction which examined s. 10 of the Statute of Frauds. This was presumably because the 10th section spoke of a "cestui que Trust" who "leaves a Trust in Fee-simple to descend upon his Heir". In other words the reference to 'Trust' in the Statute of Frauds refers to the beneficial interest thereunder. This language of 'cestui que trust' is not used in s. 53 LPA 1925 and it supplies a further reason for caution in assuming that s. 53(1)(c) authorities may be used unreflectingly to analyse the meaning of s.9."

924. Mr Hagen QC also addressed why two cases heavily relied upon by the Trustees, *Vandervell-v-IRC* [1967] 2 AC 291 and *Re LBIE* [2014] 2 BCLC 295 (neither of which applies section 9 of the Statute of Frauds), do not support the principles the Trustees seek to extract from them.

925. The Trustees described the effect of the impugned share transfers as follows:

"*1359. What is clear from the above is that the Founders did not grant or assign, or purport to grant or assign, anything to the Trustees of the China, Vantura and Universal Link Trusts. It would have made little sense if they did:*

*1359.1 The idea was **not** that there would simply be a change in the beneficiaries under the Hung Arrangement, with Mr Hung continuing as trustee or nominee, and YC and YT's position under the Hung Arrangement simply being replaced by some purposes.*

1359.2 The idea was that, as regards the assets transferred into the Trusts, the Hung Arrangement would come to an end and that YC, YT and Mr Hung would all step out of the picture.

1359.3 As can be seen from the above summary of the transactions, that is what was done. YC and YT instructed Mr Hung to transfer the entirety of the interest he held under the Hung Arrangement to the Trustees, bringing the Hung Arrangement in relation to the assets transferred to an end.

1360. Where a beneficiary instructs a trustee to transfer the entirety of the trust property to a third party and the trustee does that, that is not a grant or assignment for the purposes of section 9 of the Statute of Frauds. That is

so whether the property held by the trustee is a legal title, or whether the property held by the trustee is itself an equitable interest in an asset, with legal title to that asset being held further up the chain, as was the case here."

926. At first blush this seems like an artificial, technical way of avoiding the policy of the Statute of Frauds. However, on reflection, it is in fact an illuminating framing which reveals the practicalities of what the Trustees say occurred. The Founders did in fact authorise the transfer of their equitable interest in the shares to the relevant Trustees. This basic assertion implicitly raises two fundamental questions relevant to a modern, purposive construction of section 9:

(a) who is the Statute intended to protect and against what type of harm or prejudice?

(b) does it make sense (having determined what the essential legislative purpose of section 9 is) for an equitable owner who has instructed his/her trustee to transfer his/her beneficial interest, and has not suffered the prejudice the Statute seeks to prevent, to be viewed as having standing to later complain about his/her own failure to record his instruction in writing?

927. These questions were then explicitly raised and answered through the following cogent submissions in relation to *Vandervell*:

"*1361. ... in Vandervell v Inland Revenue Commissioners [1967] 2 AC 291 ... Mr Vandervell had orally directed his bank to transfer shares which they held for him on bare trust to the Royal College of Surgeons, which they did. The Revenue argued that he had failed to divest himself of his beneficial interest, due to the absence of signed writing under section 53(1)(c) of the Law of Property Act 1925, which is the modern iteration of section 9 of the Statute of Frauds.*

1362. The House of Lords held that section 53(1) (c) of the Law of Property Act had no application to the transaction. The key part of the reasoning is set out in the speech of Lord Upjohn at page 311C-E ***as*** *follows:*

'... the object of the section, ***as was the object of the old Statute of Frauds, is to prevent hidden oral transactions in equitable interests in fraud of those truly entitled, and making it difficult, if not impossible, for the***

***trustees to ascertain who are in truth his beneficiaries**. But when the beneficial owner owns the whole of the beneficial estate and is in a position to give directions to his bare trustee with regard to the legal as well as the equitable estate **there can be no possible ground for invoking the section where the beneficial owner wants to deal with the legal estate as well as the equitable estate**. …*

*… if the intention of the beneficial owner in directing the trustee to transfer the legal estate to X is that X should be the beneficial owner I can see no reason for any further document or further words in the document assigning the legal estate also expressly transferring the beneficial interest; **the greater includes the less**.' [emphasis added]*

*1363. Lord Pearce agreed with Lord Upjohn at page 309F **{AUTH-A3/49/19}**. Lord Donovan, who gave a speech in similar terms to Lord Upjohn, stated as follows at page 317G**:***

*'The present case, it is true, is different in its facts in that the legal and equitable estates in the shares were in separate ownership; but **when Mr. Vandervell, being competent to do so, instructed the bank to transfer the shares to the college, and made it abundantly clear that he wanted to pass, by means of that transfer, his own beneficial, or equitable, interest, plus the bank's legal interest, he achieved the same result as if there had been no separation of the interests. The transfer thus made pursuant to his intentions and instructions was a disposition not of the equitable interest alone, but of the entire estate in the shares.** In such a case I see no room for the operation of section 53(1) (c)." [emphasis added]*

*1364. What one sees from this is clear. As Lord Upjohn explains, the object of section 9 of the Statute of Frauds was 'to prevent hidden oral transactions in equitable interests in fraud of those truly entitled, and making it difficult, if not impossible, for the trustees to ascertain who are in truth his beneficiaries.' Where what one is concerned with is not a grant or assignment by a beneficiary to another person, but **an instruction by the beneficiary to their trustee** for the trustee to transfer the entirety of the trust property to a third party, the statute has no application. There is no question of the trustee not knowing who their beneficiary is, because the whole trust comes to an end.*

1365. What happened in the present case is what happened in Vandervell v IRC. YC Wang and YT Wang instructed their trustee, Mr Hung, to transfer the entirety of the trust assets to a third party. The Hung Arrangement in relation to those assets came to an end. There was no grant or assignment by YC Wang or YT Wang of their beneficial interest to the Trustees, not least because that would have involved Mr Hung remaining as trustee but substituting the Trustees as the beneficiaries instead of YC Wang and YT Wang. That is not what happened, and it is not what was intended to happen."

Findings: did the voluntary transfer of the Founders' equitable interests in the BVI shares have to comply with section 9 of the Statute of Frauds?

928. The points for determination are (a) whether section 9 applies to personalty, and (b) whether the Founders' instructions to transfer their equitable interest in the shares, assuming for present purposes such authority to have been validly given, required writing to be valid and legally enforceable. I resolve the first question in favour of the Plaintiff (and D8), and the second question in favour of the Trustees (and D5, the Hung Estate).

929. Taking a high level view, the Statute of Frauds clearly applies to realty and personalty. A straightforward reading of section 9, in isolation, from its wider statutory context provides no support for the view that its scope should be limited to real property:

> "***IX. Assignments of Trusts shall be in Writing.***
> *And bee it further enacted That all Grants and Assignments of any Trust or Confidence shall likewise be in Writeing signed by the partie granting or assigning the same [or] by such last Will or Devise or else shall likewise be utterly void and of none effect.*"

930. The words "*all*" and "*any*", and the explicit application of the section to will trusts, suggest trusts relating to all forms of property are in contemplation. The Trustees' counsel posit a tension between sections 7 and 9 if the latter is construed as applying to both realty and personalty as section 7 clearly does. It is argued that trusts relating to personalty could be validly created without writing under section 7 but could not be validly transferred under section 9. Section 7 provides as follows:

> "***VII. Declarations or Creations of Trusts of Lands to be in Writing signed.***
> *And bee it further enacted by the authoritie aforesaid That from and after the said fower and twentyeth day of June all Declarations or Creations of Trusts or Confidences of any Lands Tenements or Hereditaments shall be manifested and proved by some*

Writeing signed by the partie who is by Law enabled to declare such Trust or by his last Will in Writeing or else they shall be utterly void and of none effect."

931. An initial reading of section 7 (especially its heading or marginal note) does suggest that its scope is limited to real property. However, the term "*Hereditaments*" must be construed and taken into account. The ordinary dictionary meaning of the term (not referred to in argument) is as follows:

> "*In common law, a hereditament (from Latin hereditare, to inherit, from heres, heir) is any kind of property that can be inherited.*
>
> *Hereditaments are divided into corporeal and incorporeal. Corporeal hereditaments are 'such as affect the senses, and may be seen and handled by the body; incorporeal are not the subject of sensation, can neither be seen nor handled, are creatures of the mind, and exist only in contemplation' An example of a corporeal hereditament is land held in freehold and in leasehold.*
>
> *Examples of incorporeal hereditaments are hereditary titles of honour or dignity, heritable titles of office, coats of arms, prescriptive baronies, pensions, annuities, rentcharges, franchises and any other interest having no physical existence. Two categories related to the church have been abolished in England and Wales and certain other parts of the British Isles: tithes and advowsons. The term featured in the one-time 'sweeper definition', catch-all phrase, 'lands, tenements and hereditaments' is deprecated in contemporary legal documents. The terms 'land, buildings' and where such land is unregistered 'appurtenant rights' invariably coupled with itemised lists more properly describe property respectively forming and connected with land, as distinguished from goods and chattels or movable property.*" [Emphasis added]

932. Although this narrow sub-point has not received the benefit of full argument, I find that section 7 of the Statute of Frauds does in fact apply according to its terms to declarations of trusts in relation to both personalty and realty. So the alleged inconsistency between section 7 and section 9 (construed as applying to realty and personalty) does not arise. In any event, the preponderance of academic and judicial authority directly considering the point (and/or assuming it to be obvious) supports the view that section 9 applies to both personalty and realty. As regards academic authority, I accept the following helpful summary set out in the Plaintiff's counsel's Closing Submissions:

> "*768 ... the burden of the academic literature is in favour of s.9 applying to both*

realty and personalty:

768.1 Maitland Lectures on Equity (1936), at p.58: 'the 9th [section] relates to all grants and assignments of any trust or confidence, whether of hereditaments, of moveable goods, or of choses in action or of what you will'.

*768.2 Snell's Equity (18th edition, 1920) at pp.63-64: 'though if the case falls within s.9 of the Statute of Frauds as being an assignment of a trust, writing is essential**, whether the property is realty or personalty'**.*

768.3 Waters Law of Trusts in Canada (2012) at p. 264 (citing Grey v IRC [1959] 3 WLR 759): 'Section 9 also covers both realty and personalty, and this is a departure from the other sections of the Statute already discussed'.

768.4 Lewin on Trusts (13th edition, 1928), which is relied upon by the PTCs in support of their case that s.9 applies only to realty, is (unusually) unreliable on this point in that it appears to suggest that section 53(1) (c) of the English Law of Property Act 1925 also applies only to realty (it being clear from Vandervell that that section extends to personalty). Little weight can, therefore, be placed on the view expressed in Lewin in this connection."

933. In *Jerdein v Bright* (1860-1861) 2 J & H 325, the Vice-Chancellor held in relation to a debt that "*it appears to me essential that the assignment should be in writing, because the 9th section of the Statute of Frauds refers to the interests of the cestui que trust*". This provides direct support for the proposition that section 9 applies to personalty. I find it particularly persuasive because it hails from an era when the Statute of Frauds was very much in force and when 17th century English legislation would have looked less strange than it does to the judges of today. It is noteworthy that the point was not even a controversial one. A century later, construing what was regarded as a successor provision, the House of Lords were willing to assume that section 9 of the 1677 Act previously applied to personalty. Lord Hoffmann made a similar assumption more recently still in relation to a territory (like the BVI) where the Statute of Frauds was still in force. In *Pehrsson, a bankrupt v. Madeleine von Greyerz (Gibraltar)* (1999-2000) 2 I.T.E.L.R. 230, delivering the advice of the Privy Council (in a case concerning the transfer of shares but directly concerning the Statute of Elizabeth), he observed:

"*There is no doubt that as beneficial owner, he could (subject to compliance with the provisions of the Statute of Frauds 1677 which require writing for an assignment of an equitable interest) have transferred his interest by directing the trustee to hold on behalf of [MvG]: see Grey v IRC…*"

934. Based primarily on construing the natural and ordinary meaning of the words of section 9 of the Statute of Frauds in their wider statutory context, and in light of the judicial and academic support for the view I would otherwise have been inclined to reach, I find that section 9 of the Statute of Frauds applies to personalty and real property.

935. It remains to consider the final limb of the formalities claim, which in purely intellectual terms was a strong contender for the most elegant part of the case, even though in substantive merits terms this technical claim is a somewhat unattractive one. Be that as it may, I still take no great pleasure in concluding that the formalities point, like Macbeth's "*vaulting ambition*", ultimately "*o'er leaps itself and falls*" at the final hurdle. The point fails not because of any flaw in the main legal reasoning, but because the final limb of the argument on the facts of the present case implies that the writing requirement is an inflexible rule which results in automatic invalidity without regard to whether any prejudice has occurred. Having regard to the factual matrix in this case where the Claimants sue as administrators of the estates of the equitable owners (or *cestuis que trust*), the impugned transfers will only be void for non-compliance with the writing requirement if it can be established that:

(a) section 9 forms part of BVI law;
(b) section 9 applies to personalty such as shares; **and**

(c) the absence of written evidence of the transfer of the equitable title is material to the validity of the impugned share transfers on the facts of the present case and, taking into account the policy underpinning section 9 of the Statute of Frauds, some prejudice to the Founders' rights as equitable owners has occurred. Section 9 need not be complied with whenever an equitable interest is transferred.

936. In my judgment the requirement set out in (c) is a more straightforward, prosaic way of applying section 9 than analysing what happened to the Founders' equitable interest that Mr Hung was trustee of when the shares were transferred. Whether the statute requires writing or not is the predominant consideration in assessing whether whatever equitable transfer may have occurred is invalid on statutory formality grounds. The policy considerations underpinning section 9 were explained with irresistible force (albeit with

direct reference to an analogous provision) in the passages in *Vandervell* upon which Mr Howard QC aptly relied. The object of section 9, according to Lord Upjohn, "*is to prevent hidden oral transactions in equitable interests in fraud of those truly entitled*". I do not believe the example he went on to give of secret transfers of the beneficial interest without the trustee's knowledge is the only mischief the Statute of Frauds was designed to cure, but that would certainly have resonance in the modern context of nominee shareholders.

937. *Vandervell* makes it clear that where the beneficial owners of shares wish their beneficial interests to be transferred with the legal title to a third party, there is no need for any written evidence of the transfer of the beneficial interest which will validly be transferred with the legal interest. This result is not really attributable to any abstract property law analysis, but rather flows from an analysis of the circumstances in which section 9 was intended by Parliament to apply. The writing requirement was fundamentally designed to prevent those "*truly entitled*" to equitable interests being defrauded. Broadly speaking, section 9 will have to be complied with in relation to the transfer of equitable interests where some prejudice (or at least a risk of prejudice) to the equitable owners can be shown. *Vandervell v Inland Revenue Commissioners* [1967] 2 AC 291 illustrates this point by reference to circumstances when the requisite need for writing did <u>not</u> arise on the facts.

938. *Jerdein v Bright* (1860-1861) 2 J & H 325 is an illustration of circumstances where the requisite writing <u>was</u> required. The Court's concern was whether or not the plaintiff had the right to sue on a debt owed to a party not before the Court. The holding was that if the claim was brought as an assignee, the assignment had to be in writing signed by the cestuis que trust. The Court was concerned (a) with the potential prejudice to the original creditor, who might not have assigned the debt, and (b) with the potential prejudice to the defendant, who should not be required to pay a debt which was not properly due to the plaintiff, resulting in continuing indebtedness to the true creditor's claim.

939. In short, section 9 potentially applied to any transfer of the Founders' equitable interests in the shares, whether that transfer was to Mr Hung or otherwise. However, any such transfer would only be liable to be held to be invalid for want of writing if they or their successors in title were also able to allege and establish that the relevant transfer did not in fact occur because not even oral instructions were given to transfer full ownership in the shares.

940. In light of these findings, it is not necessary for me to determine an issue which was raised in oral closing argument by the Trustees. This was that any requirements for writing were met by documents signed by Mr Hung's attorneys by virtue of section 54 of the BVI Conveyancing and Law of Property Act 1961. Further, the Plaintiff had not pleaded a case

relying on Mr Hung personally executing the writing. The pleaded case was based on the absence of writing signed by the Founders. As the Trustees' counsel submitted in their written response to new authorities:

> "*… none of this affects the analysis of the Statute of Frauds case which was actually pleaded, namely that the transfers into the purpose trusts were ineffective because (to quote Winston's pleading as set out above) 'there was in each case no grant or assignment in writing of such beneficial interests signed by Mr YC Wang and Mr YT Wang'. The decision in Clauss does not detract from, or alter, any element of the PTCs' answer to the case actually pleaded by Winston, which remains the same: YC and YT directed their trustee, Mr Hung, to dispose of the entirety of the trust property he held for them, which he did; an instruction by a beneficiary to their trustee to dispose of the trust property to a third party does not constitute an assignment by that beneficiary of their equitable interest; that is so whether the trust property consists of a legal title (as the House of Lords made clear in Vandervell {AUTH-A3/49/21} and {AUTH-A3/49/27}) or whether the trust property consists of equitable property (as Briggs J made clear in Lehman Brothers [2014] 2 BCLC 295.*"

941. In the Plaintiff's reply to these submissions, it was argued:

> "*Clauss v Pir was not cited to support a new case that Mr Hung had not effectually transferred his interest to the PTCs, as the PTCs submit, but to respond to the PTCs' new point (raised for the first time in their oral closing) that documents signed by Mr Hung's attorneys were as effectual as if they had been executed by Mr Hung himself pursuant to s.54 of the BVI Conveyancing and Law of Property Act 196l ("the BVI Act") (an argument repeated in paragraph 7 of the PTCs' additional submissions). P produced Clauss to show that the provision in the BVI Act is procedural and that it 'does not enlarge the scope of the things which may be done by the donee of a power of attorney on behalf of his principal'{Day80/26:10-13}. The PTCs' true reply to the Clauss authority is in paragraph 8 - 9 (only) of their new submissions: they submit that Clauss is irrelevant or wrong. P takes issue with that, and the Court will take a view on the basis of its consideration of the authority…*"

942. In his oral reply, Mr Hagen QC submitted:[165]

> "*So I'm going to deal very, very briefly with one last point, and that is a fallback position. The fallback position is a sort of response to a response. The*

[165] Transcript Day 80, page 24 lines 7-23.

response to a response is this; that my learned friends say that it was enough for -- if my learned friends are right that it was enough for Mr Hung to sign, then we say but he didn't assign because he assigned the dispositions through an agent, Mr Granski and Mr Harris. My learned friend says that that's not pleaded. My Lord, it is. At least it's in dispute and available to us on the pleadings because your Lordship has seen that I showed you that it was separately pleaded by the defendants that Mr Hung assigned his interest. We have denied that specific sub-paragraph by way of -- done the traverse. All of the facts are pleaded and the Statute of Frauds is pleaded."

943. As I understand the Plaintiff's case, the primary case on the Statute of Frauds is that the assignment of the Founders beneficial interest had to be in writing, but that if writing by Mr Hung could cure this non-compliance then no such writing existed and the writing of Mr Hung's agents was insufficient. This point only arises for determination if the Court finds that the equitable interests were assigned and this assignment had to be in writing. Having found that no (separate) assignment of the equitable interests occurred (or was required), there is no need to determine whether written instructions by Mr Hung's agents satisfy the requirement for writing test.

Formalities Claim under Taiwanese law

944. There is in my judgment no need to determine the Taiwanese law writing requirement which is entirely parasitic on a BVI writing requirement. In their Closing Submissions, the Plaintiff's counsel submitted:

"*930. Article 531 of the Civil Code provides as follows:*

If, in order to deal with the affairs commissioned to him, the mandatory has to make juridical acts, which are required by law to be in writing, giving the power of dealing with the affairs shall also be in writing.

931. Dr Wong's position is that if Mr Hung was authorised (or commissioned) to transfer BVI shares, those transfers of (legal or beneficial title in) BVI shares had to be in writing under BVI law, and therefore the authority to make the transfers also had to be in writing pursuant to Article 531. To the extent it was not, the authority – even if granted in substance – was ineffective."

945. If the Hung Arrangement is, contrary to my primary applicable law finding governed by Taiwanese law, the Claimants contend that the same impugned transfers considered above are void for non-compliance with writing requirements under Taiwanese law. But Article 531 is only by its terms engaged when there is some other legal requirement for writing. If I am held to be wrong in concluding that no writing requirement exists under BVI law, the question of whether Article 531 applies to a foreign law requirement would need to be determined. The Plaintiff submitted:

> "*935. The second issue (whether "by law" is restricted to the law of Taiwan) was something of an afterthought by Professor Su: in his first report, despite addressing Article 531, he did not take issue with Dr Wong's pleaded position that if Article 531 applied to the Hung relationship and if BVI law required the transfers to be in writing, the authority also had to be in writing. It was only in his second report that he suggested that "by law" referred only to Taiwan law. The words 'Taiwanese' or 'domestic' do not appear in Article 531, and there is no case law on the point. In those circumstances, the right approach, as Professor Chang explained, is to focus on the policy underlying Article 531. The agreed policy is ensuring that principals are aware of the power they are conferring and the risk that such conferral entails. That policy is not obviously more important where the assets being transferred are Taiwanese than where the assets being transferred are foreign (such that the underlying writing requirement is foreign); in fact it sounds more strongly in the case of transfers of foreign-sited assets, where a principal may be further from the transaction and therefore less able to understand the risks involved. The Court is invited to prefer Professor Chang's evidence, namely that these policy considerations point strongly in favour of the words "by law" in Article 531 including foreign law. It follows that any authority given to Mr Hung was ineffective for lack of writing…*"

946. To the extent that it is possible for this un-pleaded point to be taken at all, I would find that Article 531 does not apply to foreign law writing requirements. The Trustees' Closing Submissions advanced the following arguments on this point which I accept:

> "*1438. Winston and Tony allege that Article 531 is engaged because the transfers of assets to the Trustees were required to be in writing* ***as a matter of BVI law****. Professor Su's position was that Article 531 is not triggered by foreign law formality requirements. Article 531 applies where "the mandatory has to make juridical acts,* ***which are required by the act*** *to be in writing" [emphasis added]. Professor Su explained that 'required by the*

act' in this context means 'required by Taiwanese law': Su 3 paragraph 69 ***{C3/5/35}****. As Professor Su explained in cross-examination at* ***{Day58/102:17} - {Day58/103:19}****, Taiwanese law starts from the basic principle of freedom of contract. Formality requirements, which restrict freedom of contract, are rare in Taiwan compared to other civil law systems. If Article 531 was triggered by foreign law formality requirements, this would be an unacceptable impingement of freedom of contract, as the parties' freedom would be constrained by rules outside the control of the Taiwanese legislature. Professor Su was obviously correct about this: Article 531 cannot have been intended to import into Taiwanese law by the back door the formality requirements of unknown foreign jurisdictions.*"

947. The Taiwanese law formal invalidity claims are accordingly dismissed.

PROVISIONAL FINDINGS: THE PLAINTIFF'S MOTIVES FOR BRINGING HIS UNSUCCESSFUL CLAIMS

948. Because the present proceedings may fairly be viewed as arising out of family discord and the main human protagonists must seek at some level at least to live and work together, it seems appropriate to make some observations (not findings) about my perceptions of what the Plaintiff's underlying grievances really are. As far as the possibility of conciliation after hard fought litigation is concerned, hope should always spring eternal in the human breast.

949. The Plaintiff's motives for bringing in particular the various 'technical' invalidity claims were unsurprisingly impugned, particularly on Day 15, the last day of his cross-examination. From the perspective of family harmony and what I have found to be the true wishes of his father and his uncle for their legacy, it is understandable that those family members who have chosen to defend the Bermuda Purpose Trusts view these proceedings as almost heretical. In this regard, the Plaintiff on the witness stand appeared to me to have been almost oblivious to how aggressively he had been litigating and to be genuinely regretful that it might be perceived that he had been "hounding" the Hung family. More broadly, he made no real revelations of how he actually felt when he was very publicly exposed in the media as an eldest son who had disappointed his father. Nor did he articulate

how he felt in the aftermath of the passing of his father with the rupture in their relationship unresolved to explain the sometimes surprising litigation strategies he has deployed, in one instance with his mother and siblings as adversaries. However, under cross-examination he did give a fleeting glimpse of the depth of his conviction that the maternal head of his father's Third Family has inflicted real harm on other family members, in particular the Plaintiff's own mother[166].

950. It seemed obvious to me that the Plaintiff has pursued the present proceedings to a material extent because of a deep-seated sense that, beyond the narrow confines of his formal legal claims, serious 'moral' wrongs have occurred which must be redressed. The notion that these proceedings are solely motivated by unvarnished greed appeared to me to be an overly simplistic analysis of a complex and clearly principled man whose personal charitable contributions to Britain have been honoured by the Queen. He made the following surprising pronouncement under re-examination about what he would do with his share of any assets recovered in the present litigation:

> "*After compensation for all my legal fees, which are very clearly documented, I would give it all to charity in public*."[167]

951. My distinct sense was that an important and entirely understandable grievance nurtured by the Plaintiff was the perception that not only had his mother been ousted from her comfortable position as his father's second wife accepted by his first wife, but also his deep suspicion that his father's third wife was implicated in some way in his own cherished role as YC's heir apparent being snatched away from him in a very public way. The course the Plaintiff's family currents took must have created an awkward situation for him at home and at work. Putting aside internal family tensions, I suspect that the Plaintiff may have too resembled his father in temperament to easily play the dutiful son role, particularly with his fancy PhD which his father joked resembled the word "soil" in Chinese. As for the Annie Lu affair, I found the Plaintiff's explanation about his outrage at a perceived academic injustice suffered by his student to be entirely credible. As a foreign student in England in the 1960's-1970's who achieved academic success, in some respects, against the odds, he may well have been impressed by the extent of academic impartiality which he benefitted from and developed a strong empathy for the underdog. Converts to 'international standards', returning to their tropical or sub-tropical homes, can also easily acquire a zeal for 'correcting' their fellow countrymen which is not always well received. To the person whose travels have somewhat altered their connections with their native soil, the ties that still bind can take on an added significance. The Plaintiff's status as his father's first born son was surely not insignificant, and being publicly tossed out of the family

[166] Transcript Day 14, page 101 line 21-page 103 line 4.
[167] Transcript Day 16, page 12, lines 2-4.

business nest must have been a stunning blow indeed. Unlike participants in modern television reality shows, the Plaintiff was unwilling or unable to shed light on his feelings in this regard. It is surely a notorious fact that English boys' boarding schools in the 1960's and 1970's were places where survival often depended on repressing one's feelings; environments in which one tolerated the absence of home comforts, the unpalatable quality of institutionalised food and corporal punishment by reassuring oneself that all such discomforts were actually "character building". If this was the young Winston's experience, it stood him in good stead and enabled him to have countless Sunday lunches with his father after his fall from grace without mouthing a single word of protest. I would venture to suggest that, as implied in the question I put to the Plaintiff at the end of oral testimony, the subliminal motivation underlying the present litigation, even if not consciously appreciated by the Plaintiff himself, may well have been not a desire to 'destroy the Family' but a deep desire to return to the fold:

> "*[Court]* Yes. So after your father's sad passing, would you say that you were left with a feeling that your identity as the eldest son had been taken away from you?
>
> A. My identity as the eldest son has only been impressed to me by my grandmother and my mother, and then when I came back to Taiwan was by the public especially, you know, people who came to the press, come and say, 'You are the eldest son of YC Wang", and so on and so on. It was never that very much impressed on myself."

952. In my judgment the Plaintiff was treated overly harshly by his father, based on the admittedly limited information before this Court, in publicly banishing him from FPG in 1996. However, taking into account the overall picture the undisputed evidence paints of YC himself, it seems unlikely that the exclusion from FPG was a purely impulsive decision which he was stubbornly unwilling to retract. Equally, the idea that the titan YC would have been pressured into such a decision by his third wife also seems unlikely. All of these matters must be left to the realms of speculation; is it not time for these now distant events to be consigned to the family historical dustbin? It would be surprising if YC did not sense that his first born son was more suited by temperament and academic training to building an independent career of his own, rather than walking entirely in his father's shadow. If so, Dr Winston Wong O.B.E. has (apart from his attack on the validity of the Bermuda Purpose Trusts) surely fulfilled his father's expectations, leaving one main aspiration yet to be fulfilled: family harmony.

Conclusion

953. The various claims asserted by the Plaintiff and D8 herein are disposed of as follows:

(a) subject to (b), the Plaintiff's and D8's Avoidance Claims (the want of authority, undue influence and mistake claims) are dismissed as against each and all of the Trustees and the Hung Estate. The same result applies on evidential grounds regardless of which of the potential governing laws is applied;

(b) the Plaintiff's want of authority claims against the Ocean View Trust PTC and the Hung Estate are allowed, on the basis that those claims are governed by Bermuda or BVI law. If I were required to apply Taiwanese law to these claims, the limitation defences would succeed and the Plaintiff's claims would be liable to be dismissed;

(c) the Plaintiff's and D8's Invalidity Claims are dismissed;

(d) D8's Ocean View Trust claims are dismissed for substantially the same reasons as the Plaintiff's overlapping claims are dismissed. His mental incapacity and forgery claims in relation to the POA are dismissed.

954. I will hear counsel as to costs, the terms of the final Order and any other matters arising from the present Judgment.

955. However it is in my judgment appropriate to deal at this stage with one discrete issue raised by the Plaintiff's counsel after circulation of the draft of this Judgment and which I was expressly requested to deal with before finalizing the draft Judgment. The point was addressed by ASW Law Limited in letters dated June 6, 2022 and June 10, 2022 (Second Letter) and by Conyers Dill & Pearman Limited in their letter dated June 13, 2022. The Plaintiff contended that the rejection of the Formalities Claims was based on a fundamental error of fact and that the Court should revisit the relevant findings. The Trustees contended no such error had been made.

956. I am not persuaded that any sufficently obvious and material factual error has been made to justify my reconsidering the findings which I made in relation to the Formalities Claims.

Dated this 22nd day of June 2022

_____

IAN RC KAWALEY
ASSISTANT JUSTICE