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IN THE SUPREME COURT OF NEW ZEALAND

SC 23/2015
[2016] NZSC 29

BETWEEN	MARK ARNOLD CLAYTON First Appellant	
	MARK ARNOLD CLAYTON AS TRUSTEE OF THE VAUGHAN ROAD PROPERTY TRUST Second Appellant	
AND	MELANIE ANN CLAYTON Respondent	

Hearing: 1, 2 and 8 September 2015

Court: Elias CJ, William Young, Glazebrook, Arnold and O'Regan JJ

Counsel: M J McCartney QC and K E Sullivan for First Appellant
C R Carruthers QC and A S Butler for Second Appellant
D A T Chambers QC and J R Hosking for Respondent

Judgment: 23 March 2016

JUDGMENT OF THE COURT

A The appeal is allowed in part.

B We set aside the findings of the Court of Appeal that cl 7.1 of the Vaughan Road Property Trust (VRPT) trust deed (the VRPT deed) is a general power of appointment and that the power is both property and relationship property, having a value equal to that of the net assets of the VRPT.

C We substitute a finding that the powers of Mr Clayton as Principal Family Member and Trustee under cls 6.1, 7.1, 8.1 and 10.1 of the VRPT deed (read in light of cls 11.1,

14.1 and 19.1(c) of that deed) are property and relationship property having a value equal to that of the net assets of the VRPT.

D **We set aside the finding of the Court of Appeal that the VRPT is not an illusory trust (i.e. that it is a valid trust). We decline to make a ruling on that issue.**

E **We uphold the finding of the Court of Appeal that the VRPT is not a sham.**

F **We make no award of costs.**

REASONS
(Given by O'Regan J)

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[1] This is an appeal and cross-appeal against a decision of the Court of Appeal, which dealt with a number of aspects of the relationship property dispute between Mark and Melanie Clayton. Most of the dispute concerned trusts established by Mr Clayton both during his marriage to Mrs Clayton and after they separated.[1]

[2] The Court of Appeal decision dealt with issues relating to four trusts that were established during the marriage and four trusts that were established after the parties separated. The present appeal and cross-appeal relate to one of those trusts, the Vaughan Road Property Trust (VRPT). We heard this appeal and cross-appeal contemporaneously with an appeal by Mrs Clayton relating to another trust, the Claymark Trust. Our judgment in relation to that appeal is being delivered at the same time as this judgment.[2]

[3] On 21 December 2015, the parties notified the Court that they had reached a settlement. In their memorandum, counsel said they accepted that the Court should still deliver judgment. The Court is also of the view that it is appropriate to deliver both judgments, given the importance of the issues they raise.[3]

Leave

[4] Leave was granted on to the following questions relating to the VRPT:[4]

(a) Was the Court of Appeal correct to find that there is no distinction between a sham trust and what the Family Court and the High Court described as an illusory trust? (Mrs Clayton's cross-appeal).

(b) Was the Court of Appeal correct to find that the VRPT was neither a sham trust nor what the Family Court and the High Court described as an illusory trust? (Mrs Clayton's cross-appeal).

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1 *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293 (Ellen France, Randerson and White JJ) [*Clayton* (CA)].
2 *Clayton v Clayton* [2016] NZSC 30 [the Claymark Trust judgment].
3 *Osborne v Auckland City Council* [2014] NZSC 67, [2014] 1 NZLR 766 at [39]–[44].
4 *Clayton v Clayton* [2015] NZSC 84.

(c) If so:

(i) Was the bundle of rights and powers held by Mr and/or Mrs Clayton under the VRPT deed "property" for the purposes of the Property (Relationships) Act 1976 (PRA)? (Mrs Clayton's cross-appeal).

(ii) Was the Court of Appeal correct to find that the power of appointment under clause 7.1 of the VRPT deed was "relationship property" for the purposes of the PRA? (Mr Clayton's and the VRPT Trustee's appeal).

(iii) If so, did the Court of Appeal err in its approach to the valuation of the power? (Mr Clayton's and the VRPT Trustee's appeal).

Facts

[5] Before dealing with those questions, we briefly recount the factual background.

[6] Mr and Mrs Clayton commenced a de facto relationship in 1986 and married in 1989. They separated in 2006 after 17 years of marriage, and their marriage was dissolved in 2009. They have two daughters who were born in 1990 and 1994 respectively.

[7] Shortly before their marriage, the parties signed an agreement (the s 21 agreement) contracting out of the regime for the division of property on dissolution of marriage, which is contained in the PRA.[5] Under that agreement, Mrs Clayton was to receive a maximum of $10,000 for each year of marriage up to a maximum of $30,000.

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5 At the time the Property (Relationships) Act 1976 [PRA] was known as the Matrimonial Property Act 1976.

[8] At the time the parties met, Mr Clayton owned a small timber supply business and a block of land in Banksia Place, Tikitere, near Rotorua. The parties built a family home on that land during the relationship. The business owned two other blocks of land in Vaughan Road, Rotorua. By the time they separated, Mr Clayton had built up a significant sawmilling and timber processing business (the Claymark business). This business was owned and controlled by companies and trusts in New Zealand and the United States. The trusts involved in the appeals before us (the VRPT and the Claymark Trust) are two of those entities. The VRPT owned the land and buildings in Vaughan Road from which the Claymark business was operated while the Claymark Trust owned some adjoining land.

[9] The s 21 agreement was set aside by the Family Court under s 21J of the PRA, which empowers the Court to set aside such an agreement if satisfied that giving effect to it would cause serious injustice.[6] That finding was upheld by the High Court on appeal.[7] Mr Clayton did not challenge the decision to set aside the s 21 agreement in the Court of Appeal.

Vaughan Road Property Trust

[10] VRPT was settled on 14 June 1999 (some thirteen years after the relationship between the Claytons commenced) by a declaration of trust executed by Mr Clayton. He is the settlor and sole Trustee of the VRPT. The discretionary beneficiaries include Mr Clayton as "Principal Family Member", Mrs Clayton as his wife or former wife, and their two daughters. The daughters are the final beneficiaries.

[11] The Family Court Judge said the purpose for which the VRPT was set up was to separate and distance the ownership of the land associated with the Claymark business from the operating assets of the company that held the assets of that business. She described the operation of VRPT as acting as a banker.[8] She said the VRPT had borrowed largely from the Bank of New Zealand to advance loans to other entities associated with Mr Clayton.

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6 *MAC v MAC* FC Rotorua FAM-2007-063-652, 2 December 2011 (Judge Munro) [*Clayton* (FC)] at [35].

7 *Clayton v Clayton* [2013] NZHC 301, [2013] 3 NZLR 236 (Rodney Hansen J) [*Clayton* (HC)] at [14].

8 *Clayton* (FC), above n 6, at [74].

[12] As is clear from the issues on which leave to appeal has been given, Mrs Clayton claims that the VRPT is a sham or, if that claim is not upheld, that it is an illusory trust. The claim of sham has failed at all levels, but both the Family Court and High Court found that the VRPT was an illusory trust, though for differing reasons.[9] The Court of Appeal overturned the finding that the VRPT was an illusory trust, but upheld Mrs Clayton's claim that the power of appointment held by Mr Clayton as "Principal Family Member" under the VRPT deed was relationship property, and that the value of that relationship property was equivalent to the net value of the assets of the VRPT.[10]

[13] In this Court, Mr Clayton, in his personal capacity and as Trustee of the VRPT, challenges the Court of Appeal's finding that the power of appointment held by Mr Clayton is relationship property and that its value is equivalent to the net value of the assets of the VRPT. Mrs Clayton challenges the Court of Appeal's rejection of her claims that the VRPT is a sham or, alternatively, that it is an illusory trust. Mrs Clayton also argues that the bundle of rights and powers held by her and/or Mr Clayton under the VRPT deed are property for the purposes of the PRA and are, in the present case, relationship property.

[14] The relevant provisions of the VRPT deed are set out in the appendix.[11] As will become apparent, the VRPT deed is unusual because Mr Clayton is settlor, Principal Family Member, sole Trustee and Discretionary Beneficiary and his powers as Principal Family Member and Trustee are both broad and free from the normal obligations imposed on fiduciaries in family trust deeds.

Relevant legislation

[15] Section 1M of the PRA sets out its purpose. Of particular note in the present context is the purpose of recognising the equal contributions of both spouses to a

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9 Rodney Hansen J summarised the Family Court decision in *Clayton* (HC), above n 7, at [70]–[84] and set out his reasoning at [85]–[90].

10 *Clayton* (CA), above n 1, at [99] and [113].

11 Although these clauses refer to "the Trustees", they should be read as if they referred to "the Trustee" as Mr Clayton was the sole Trustee of the VRPT. Where we refer to defined terms from the VRPT deed, we will capitalise them as the deed does.

marriage partnership[12] and to provide for a "just division of the relationship property between the spouses … when their relationship ends by separation".[13]

[16] Section 1N sets out four principles that are to guide the achievement of the purpose of the PRA. These include the principle that "a just division of relationship property has regard to the economic advantages or disadvantages of the spouses … arising from their marriage … or from the ending of their marriage".[14]

[17] "Property" is defined in s 2. The definition of property includes within the concept of property "rights" and "interests". We will deal with that definition in more detail later.[15]

[18] Section 4 provides that the PRA is a code, and applies "instead of the rules and presumptions of the common law and of equity" to the extent that they apply to transactions between spouses or, where the PRA provides, to transactions between one or both spouses and third persons.

[19] Sections 8 and 9 define relationship property and separate property. In broad terms relationship property is subject to the presumption of equal sharing between spouses, while separate property remains the property of the spouse who owns it.[16] The concept of relationship property incorporates the family home and family chattels, jointly owned property and property that has been acquired by either spouse during the marriage. The definitions have a number of complexities, to which we will refer when addressing issues that require their application.

[20] We now turn to the questions relating to the VRPT on which leave to appeal was given. We will address the issues raised in paragraphs (c)(i) and (ii) of the leave question first.

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12 PRA, s 1M(b).
13 PRA, s 1M(c).
14 PRA, s 1N(c).
15 See [24]–[38] below.
16 PRA, s 11(1).

Are the rights of Mr (and Mrs) Clayton under the VRPT deed relationship property? Is the power of appointment under cl 7.1 of the VRPT deed relationship property?

[21] As these two issues overlap, we will deal with them together. Because the Court of Appeal decision engages the second issue, we will deal with that first.

Is cl 7.1 a general power of appointment?

[22] Mr Clayton, in his personal capacity and as Trustee of the VRPT, challenges the Court of Appeal's decision that the power of appointment in cl 7.1 of the VRPT deed amounted to relationship property. Under that clause, Mr Clayton, in his capacity as "Principal Family Member" may appoint or remove Discretionary Beneficiaries. He is a Discretionary Beneficiary as defined in cl 2.1. He could exercise his power under cl 7.1 to remove other Discretionary Beneficiaries and thereby make himself the only Discretionary Beneficiary. The Court of Appeal said this was a general power of appointment.[17] It was similar, in practical terms, to a power to revoke the VRPT and tantamount to ownership of the assets of the VRPT.[18]

[23] Mr Carruthers QC, counsel for Mr Clayton in his capacity as Trustee of the VRPT,[19] led the argument in support of this aspect of the appeal, but Ms McCartney QC, counsel for Mr Clayton in his personal capacity, adopted the argument advanced by counsel for the Trustee. The essence of the argument is as follows: Clause 7.1 does not allow Mr Clayton to remove the Final Beneficiaries, to whom Mr Clayton as Trustee would continue to owe fiduciary obligations. So the Court of Appeal was wrong to say the cl 7.1 power was relationship property. Indeed, it was not "property" as defined in the PRA.

Property definition

[24] The Court of Appeal's conclusion that the power of appointment was relationship property required it first to determine that that power was "property".[20]

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17 *Clayton* (CA), above n 1, at [88].
18 At [101].
19 References to the VRPT Trustee are to Mr Clayton in this capacity.
20 *Clayton* (CA), above n 1, at [111].

So the starting point is the definition of that term in s 2 of the PRA. The definition is:

> **Property** includes –
>
> (a) Real property;
>
> (b) Personal property;
>
> (c) Any estate or interest in any real property or personal property;
>
> (d) Any debt or any thing in action;
>
> (e) Any other right or interest.

[25] Paragraphs (a) to (c) of the definition highlight types of property but, as they use the term "property", are circular in nature. Paragraphs (d) and (e) do not have that circularity. The term "owner" is also defined in s 2 as follows:

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

[26] Although the format of the definition of "property" in the PRA was changed when the legislation was amended in 2001,[21] the content remains essentially the same as it was in the Act as originally passed in 1976, which, in turn, followed the definition in its predecessor legislation, the Matrimonial Property Act 1963. As the Court of Appeal noted in *Z v Z (No 2)*, this definition is similar to the definition of property in a number of other New Zealand statutes.[22]

[27] In *Z v Z (No 2)*, some significance was attached to the fact that the definition of property in the (then) Matrimonial Property Act was the same as that appearing in the Property Law Act 1952.[23] The Property Law Act 1952 has now been repealed and replaced by the Property Law Act 2007, which has a definition of property that differs from the definition of that term in the PRA. The Property Law Act definition is: "everything that is capable of being owned, whether it is real or personal property,

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21 By the Property (Relationships) Amendment Act 2001.

22 *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 279, discussed at [27] and [30] below. Examples of statues using a similar definition include the Crimes Act 1961, the Child Support Act 1991, the Family Proceedings Act 1980, the High Court Rules, the Legal Services Act 2011 and the Overseas Investment Act 2005.

23 At 279.

and whether it is tangible or intangible property".[24] This is an attempt to define what the concept "property" means, unlike the definition in the PRA which is essentially an inclusive definition, with, arguably, an extension of the normal concept of property to include a "right" or an "interest", even if it is not a right or interest *in property*.[25]

[28] The PRA does not have a provision authorising the Court to take into account the "financial resources" of either spouse when determining what orders are appropriate in a relationship property dispute. That can be contrasted with the position in some other jurisdictions, for example Australia,[26] England and Wales[27] and Alberta.[28] Some New Zealand legislation contains provisions that allow a court to take into account the "financial resources" of a party or otherwise to treat trust property as the property of any person controlling or otherwise interested in the trust or who has gifted the property to the trust.[29] But Parliament has not chosen to include such provisions in the PRA.

[29] Counsel for Mrs Clayton, Ms Chambers QC, emphasised that the PRA is social legislation, which justifies a broader approach to concepts of property than may be appropriate in relation to laws dealing with the property of strangers. She said that the concept of property should, in this context, be regarded as having a degree of fluidity and as having the capacity to change to meet social conditions. She emphasised the statutory context, particularly the purpose and principles of the PRA as set out in ss 1M and 1N and also the principle in s 4 that the PRA applies

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24 Property Law Act 2007, s 4.

25 In some statutes, the phrase "right or interest" is followed by the qualifying words "in relation to property": see, for example, the Insolvency Act 2006 and the Companies Act 1993.

26 Family Law Act 1975 (Cth), s 75(2)(b), which allows the court to take into account in determining spousal maintenance "the income, property and financial resources of each of the parties".

27 Matrimonial Causes Act 1973 (UK), s 25(2)(a), which allows the court to take into account when determining the amount of the payment required to be made by one spouse to the other a number of matters including "the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future".

28 Matrimonial Property Act RSA 2000 c M-8, s 8(d).

29 Examples are s 105(2)(c)(i) of the Child Support Act 1991, reg 8(4) and (5) of the Legal Services Regulations 2011, s 58 of the Criminal Proceeds (Recovery) Act 2009 and s 147A of the Social Security Act 1964, as explained in reg 9B of the Social Security (Long-term Residential Care) Regulations 2005. See also s 412 of the Insolvency Act 2006, which authorises a court to look at the "real nature" of a transaction.

instead of the rules of common law and equity in disputes relating to relationship property.[30]

[30] Counsel drew support for the broad approach from *Z v Z (No 2)*.[31] In that case, the Court of Appeal discussed the concept of "property" in the context of the (then) Matrimonial Property Act. The Court emphasised that it was a fluid concept that had extended to include interests which might not earlier have been covered by it. The Court said its meaning and scope must also be affected by the statutory and wider context (including changing social values, economic interests and technological developments) in which it is used.[32]

[31] In a later decision of the Court of Appeal, *Walker v Walker*, the Court made an obiter comment that suggested that rights associated with a trust arrangement could be property and relationship property.[33] In that case relationship property had been transferred into a trust, the trustee of which was a trustee company. The husband was the only director of that company. The spouses were both discretionary beneficiaries and had the power to appoint and remove trustees of the trust. The case was about the valuation of the debt owed by the trust to Mr and Mrs Walker. But the Court referred to "other assets" being:[34]

(a) The directorship of the trustee company;

(b) The shares of the trustee company;

(c) The power to appoint and remove directors of the trustee company;

(d) The power to appoint and remove trustees of the trust;

(e) The parties' discretionary interests under the trust.

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30 This Court emphasised the importance of the statutory context in determining the meaning of "property" in *Dixon v R* [2015] NZSC 147 at [25]. That was an appeal against conviction for an offence under s 249(1) of the Crimes Act 1961. That Act has a definition of "property" that is similar to that in the PRA.

31 *Z v Z (No 2)*, above n 22.

32 At 279.

33 *Walker v Walker* [2007] NZCA 30, [2007] NZFLR 772.

34 At [48].

[32] The Court then added:[35]

> Indeed, those items of property appear never to have been valued. Those five items of property, plus the debt, formed a very valuable package, as together they confer control of the company [which operated the husband's business].

[33] It is not necessary for us to form a view on the correctness of the classification of those items as "property". Professor Nicola Peart cautioned against attempts by the Court to widen the concept of property, emphasising the use of the conventional definition of that term in the PRA, in her chapter on equity and the PRA in *Equity and Trusts in New Zealand*.[36] She said:

> … the [PRA] has always defined beneficial ownership of property by reference to the general law. It is not a special definition designed to capture assets that would not normally qualify as property. … [A]s Parliament opted for conventional definitions of "property" and "ownership", it would be difficult to confine a judicial departure from the general law to claims under the [PRA]. …

[34] The United Kingdom Supreme Court has also recently warned against applying a different approach to the definition of "property" in matrimonial property litigation than in other areas of law.[37]

[35] The importance of context was however emphasised by the High Court of Australia in *Kennon v Spry*.[38] That case also concerned a matrimonial property dispute focussing on property held in a discretionary family trust. The applicable legislation was the Family Law Act 1975 (Cth). The relevant part of the definition of "property" in that Act is:[39]

> property to which [the parties to a marriage] are, or [one] party is, as the case may be, entitled, whether in possession or reversion …

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35 At [49].

36 Nicola Peart "Equity in Family Law" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 1161 at 1177.

37 *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 415 at [37] per Lord Sumption and at [87]–[88] per Lady Hale. Lord Wilson agreed with Lady Hale. It should be noted that the power given to the courts of England and Wales to have regard to the income, earning capacity, property and other financial resources which each spouse has or is likely to have in the foreseeable future when determining the amount to be paid by one spouse to the other obviates the need to interpret the term "property" in anything other than its strict sense: See Matrimonial Causes Act, above n 27.

38 *Kennon v Spry* [2008] HCA 56, (2008) 238 CLR 366.

39 Family Law Act 1975 (Cth), s 4.

[36] The case was decided under s 79 of the Family Law Act, which gives power to the court determining a relationship property matter to make an order "altering the interests of the parties to the marriage in the property [of the parties to the marriage or either of them]".

[37] French CJ emphasised that the term "property" had to be read "widely and conformably with the purposes of the Family Law Act".[40] In their joint judgment, Gummow and Hayne JJ expressed a similar view.[41]

[38] We accept the submission for Mrs Clayton that the property definition in s 2 of the PRA must be interpreted in a manner that reflects the statutory context. We see the reference to "any other right or interest" when interpreted in the context of social legislation, as the PRA is, as broadening traditional concepts of property and as potentially inclusive of rights and interests that may not, in other contexts, be regarded as property rights or property interests. Against that background, we now turn to the power of appointment in cl 7.1 and other relevant provisions of the VRPT deed.

The Court of Appeal finding: general power of appointment in cl 7.1

[39] The Court of Appeal relied on the decision of the Privy Council in *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank & Trust Co (Cayman) Ltd* (*TMSF*)[42] in its determination that Mr Clayton's power under cl 7.1 of the VRPT deed constituted a property right in his hands for the purposes of the PRA and that this property right was relationship property.[43] As *TMSF* was a key aspect of the Court of Appeal's decision in the present case, we begin with a discussion of the analysis of the Privy Council in that case.

[40] *TMSF* was a case resulting from the bankruptcy (under the law of Turkey) of a Mr Demirel. He had earlier established two discretionary trusts in the Cayman Islands, which, between them, had assets worth more than US$24 million. The

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40 *Kennon v Spry*, above n 38, at [64].
41 At [89].
42 *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank & Trust Co (Cayman) Ltd* [2011] UKPC 17, [2012] 1 WLR 1721 [*TMSF*].
43 *Clayton* (CA), above n 1, at [99].

discretionary beneficiaries included Mr Demirel and his wife and children. Mr Demirel, as settlor, had a general power to revoke the trusts. The issue before the Privy Council was whether this power of revocation was a property right that Mr Demirel could be required to delegate to the receivers in his bankruptcy, allowing them to exercise the power and obtain access to the assets of the trusts for the benefit of Mr Demirel's creditors.

[41] Lord Collins of Mapsbury delivered the advice of the Privy Council. Having reviewed the authorities, he concluded:[44]

> [59] … The powers of revocation are such that in equity, in the circumstances of a case such as this, Mr Demirel can be regarded as having rights tantamount to ownership. The interests of justice require that an order be made in order to make effective the judgment of the Cayman court recognizing and enforcing the Turkish judgment.
>
> [60] There is no invariable rule that a power is distinct from ownership. Nor, (as the cases on the rule against perpetuities show) is there an invariable rule that any departure from the distinction between power and property is effected solely by legislation. As Lord St Leonards said (and Hoffman LJ approved), "To take a distinction between a general power and a limitation in fee is to grasp at a shadow while the substance escapes", and in *In re Triffitt's Settlement* [1958] Ch 852, 861 Upjohn J said that "where there is a completely general power in its widest sense, that is tantamount to ownership".
>
> …
>
> [62] In the present case the power of revocation cannot be regarded in any sense a fiduciary power, and the defendants do not suggest otherwise. The only discretion which Mr Demirel has is whether to exercise the power in his own favour. He owes no fiduciary duties. As has been explained, the powers of revocation are tantamount to ownership.

[42] Having found that the power of revocation was "tantamount to ownership", the Privy Council ordered Mr Demirel to delegate the power of revocation to receivers representing TMSF's interests as a judgment creditor.[45]

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44 *TMSF*, above n 42.

45 At [61].

[43] The Court of Appeal applied *TMSF* in the present case for the following reasons:

(a) There was no good reason why in New Zealand "the traditional distinction" between the concepts of power and property should be preserved in all contexts and for all purposes.[46] Where the donee of a power is entitled to appoint the subject matter of the power to himself or herself without regard to the interests of others, it was appropriate to regard the donee as the effective owner of the property.[47]

(b) There was no practical distinction between the power to revoke the trust subject to the decision in *TMSF* and Mr Clayton's power to appoint himself as the sole beneficiary of the VRPT. If Mr Clayton had exercised the power he would effectively have revoked the trust.[48]

(c) The power under cl 7.1 was conferred by Mr Clayton as settlor on himself in his capacity as "Principal Family Member" and not in his capacity as a Trustee. The Principal Family Member had no fiduciary duty to the Beneficiaries. It would be wrong to interpret the VRPT deed as if this power was a Trustee power.[49]

(d) The doctrine of fraud on a power would not apply and the Court would not be able to constrain Mr Clayton from exercising the general power of appointment under cl 7.1 if he wished to do so.[50]

[44] We agree with the Court of Appeal that, if Mr Clayton had a non-fiduciary power as Principal Family Member to make himself the sole beneficiary under the VRPT deed, the effect of the exercise of that power would be analogous to the revocation of the VRPT, justifying the application of the same analysis as in *TMSF*. However, the interpretation of the VRPT deed that led the Court of Appeal to this conclusion is itself challenged.

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46 See *TMSF*, above n 42, at [31].
47 *Clayton* (CA), above n 1, at [100].
48 At [101].
49 At [102].
50 At [89]–[92] and [103].

Our interpretation of cl 7.1

[45] Counsel for the VRPT Trustee argued that the Court of Appeal erred in its interpretation of the VRPT deed. He said this error led the Court of Appeal to conclude incorrectly that Mr Clayton as Principal Family Member under the VRPT deed could exercise the power in cl 7.1 to appoint himself as the sole beneficiary of the VRPT and so effectively revoke the trust by becoming the legal and beneficial owner of the trust assets. As a result of this error of interpretation, the Court of Appeal had incorrectly seen the power of appointment in cl 7.1 as having the same practical effect as the power of revocation in *TMSF*.

[46] The Court of Appeal interpreted cl 7.1 as giving Mr Clayton the unfettered right to remove not only the other Discretionary Beneficiaries but also to remove the Final Beneficiaries.[51] This appears to be based on the fact that the definition of "Discretionary Beneficiaries" in cl 2.1 includes "the Final Beneficiaries". However, as counsel said, removal of the Final Beneficiaries *as Discretionary Beneficiaries* does not mean that they cease to be Final Beneficiaries. Thus, even if Mr Clayton exercised the power in cl 7.1 to remove all other Discretionary Beneficiaries so that he was the only remaining Discretionary Beneficiary, that would not have any effect on the position of the Final Beneficiaries in their capacity as Final Beneficiaries (as opposed to Discretionary Beneficiaries). We accept that this interpretation of the VRPT deed by the Court of Appeal was in error. Mr Clayton could not, in his capacity as Principal Family Member, remove the Final Beneficiaries (his two daughters).

[47] Counsel for the VRPT Trustee said once this erroneous interpretation was put to one side, the position was that there would always be Final Beneficiaries to whom Mr Clayton owed fiduciary duties. Because Mr Clayton continued to owe fiduciary duties to the Final Beneficiaries, the trust would continue in existence and the Court of Appeal's conclusion that the exercise of the power under cl 7.1 was, in substance, the same as the revocation of the VRPT was incorrect.

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[51] The Court of Appeal rejected an argument made for the VRPT Trustee that, if Mr Clayton used his power under cl 7.1 as Principal Family Member to make himself the sole Discretionary Beneficiary, this would amount to a fraud on a power: *Clayton* (CA), above n 1, at [89]–[92], citing *Kain v Hutton* [2008] NZSC 61, 3 NZLR 589 at [46]–[47] per Tipping J.

[48] He argued that the Court of Appeal was therefore wrong to conclude that the power in cl 7.1 was tantamount to ownership in the same way that the power of revocation was in *TMSF*.

[49] We accept that, in light of the error in the Court of Appeal's interpretation of cl 7.1 of the VRPT deed, it cannot be said that cl 7.1 on its own gives Mr Clayton a power that is analogous to a power to revoke the VRPT.

The VRPT powers

[50] We do not see that conclusion as fatal to Mrs Clayton's claim in relation to the VRPT, however. We consider it is necessary to analyse the VRPT deed more closely to see whether Mr Clayton's powers and entitlements as Principal Family Member, Trustee and Discretionary Beneficiary give him such a degree of control over the assets of the VRPT that it is appropriate to classify those powers as rights or interests in terms of paragraph (e) of the definition of property in s 2 of the PRA. We will refer to these powers and entitlements as "the VRPT powers". In order to do this, it is necessary to consider what practical limitations the rights of the Final Beneficiaries had on Mr Clayton's ability to appoint the property of the VRPT to himself.

[51] Counsel for Mrs Clayton pointed to a number of provisions in the VRPT deed that would enable Mr Clayton, in his capacities as Principal Family Member and Trustee, to appoint all of the trust capital and income to himself. She emphasised that Mr Clayton was settlor, sole Trustee and Principal Family Member. He had power of appointment of both Discretionary Beneficiaries and Trustees.[52] He could transfer the power of appointment of Trustees to another person.[53] He had power to change any provision relating to the management and administration of the trust.[54] There was a provision requiring the VRPT deed to be interpreted in a manner broadening the powers and restricting the liabilities of Mr Clayton as Trustee.[55] Other provisions of the VRPT deed that we would also note in this context are cls 12

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52 VRPT deed, cls 7.1 and 17.1.
53 VRPT deed, cls 17.2.
54 VRPT deed, cl 23.1.
55 VRPT deed, cl 2.2(b).

(broadly defining the powers and discretions of the Trustee) and 13 (the ability to lend to or guarantee any obligations of a Beneficiary, including himself).

[52] All of these provisions have contextual significance but three others are decisive. These are cls 6.1(a), 10 and 8.1.

[53] Clause 6.1(a) gives the Trustee the power to pay or apply all of any part of the capital of the Trust Fund to any one or more Discretionary Beneficiaries. As Mr Clayton is both Trustee and a Discretionary Beneficiary, he could pay or apply the entire trust capital to himself. Clause 4 has a similar power in relation to trust income.

[54] Clause 10 provides for the distribution of the trust capital on the "Vesting Day". As is evident from the definition of that term,[56] that is the date that is 80 years after the date of the VRPT deed or any earlier date that the Trustee (Mr Clayton in this case, as Trustee) may appoint. Clause 10 provides that the persons entitled to the trust capital will be such Discretionary Beneficiaries (one of whom is Mr Clayton) as the Trustee (Mr Clayton) appoints and, to the extent that any of the trust capital is not so appointed, to the Final Beneficiaries. So Mr Clayton as Trustee can appoint the trust capital to himself to the exclusion of any other Discretionary Beneficiary[57] and can also bring forward the Vesting Day to any date of his choosing. This would effectively exclude the Final Beneficiaries from deriving any benefit from the VRPT. If he brought forward the Vesting Day to a date of his choosing and had appointed all the trust capital to himself, that would give him both legal and beneficial ownership of the trust capital and the VRPT would be at an end.

[55] The VRPT deed also contains a very broad resettlement power. Under cl 8.1, the Trustee may resettle the Trust Fund upon the Trustees of any trust which includes any one or more of the Discretionary Beneficiaries (in this case, that class includes Mr Clayton himself). On the face of it, this would allow Mr Clayton to resettle the trust capital on the Trustee of a trust of which he was a (or the) beneficiary.

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56 Reproduced in the appendix: see cl 2.1.

57 Of course, if he had already exercised his power as Principal Family Member under cl 7.1 to remove all Discretionary Beneficiaries other than himself, he would be the only eligible appointee under cl 10.1(a).

[56] Counsel for the VRPT Trustee said Mr Clayton's fiduciary obligations to the Final Beneficiaries constrained Mr Clayton's ability to exercise these powers in his own favour. That submission has to be evaluated against a background of a number of provisions of the VRPT deed that modify the duties imposed on the Trustee. In particular:

(a) Clause 14.1 of the VRPT deed, which authorises a Trustee who is also a Beneficiary (as Mr Clayton is) to exercise any power or discretion vested in the Trustee in his own favour;

(b) Clause 11.1, which authorises the Trustee to exercise a power or discretion conferred on the Trustee even though the interests of all beneficiaries are not considered by the Trustee (cl 11.1(a)), the exercise would or might be contrary to the interests of any present or future Beneficiary (cl 11.1(b)) and/or the exercise results in the whole of the trust capital or income being distributed to one Beneficiary to the exclusion of others (cl 11.1(c)); and

(c) Clause 19.1(c), which authorises the Trustee to exercise any power or discretion notwithstanding that the interests of the Trustee may conflict with the duty of the Trustee to the Beneficiaries or any of them.

[57] These provisions make it possible for Mr Clayton, even if he has not exercised the power conferred on him as Principal Family Member by cl 7.1, to resolve as Trustee to apply the trust capital and income to himself (to the exclusion of the Final Beneficiaries and any remaining Discretionary Beneficiaries). He could do this without considering the interests of other Discretionary Beneficiaries (if any) or those of the Final Beneficiaries even if it meant all the trust capital and income was distributed to him to the exclusion of other Beneficiaries. The position of the Final Beneficiaries is contingent on the trust capital not being distributed before the Vesting Day. The fact that the decision involved a conflict between his personal interest and the interests of other Beneficiaries would not matter.

[58] These provisions mean that Mr Clayton is not constrained by any fiduciary duty when exercising the VRPT powers in his own favour to the detriment of the Final Beneficiaries. The fact that he cannot remove the Final Beneficiaries does not alter the fact that he can, unrestrained by fiduciary obligations, exercise the VRPT powers to appoint the whole of the trust property to himself. That leads to the next question: are the VRPT powers of sufficiently similar effect to a general power of appointment that it is appropriate to treat them as property for the purposes of the PRA?

General power of appointment?

[59] The power Mr Clayton has to apply the property of the VRPT to himself, with the freedom given to him by the clauses referred to at [56] above, has many of the characteristics of a general power of appointment.

[60] *Underhill and Hayton Law of Trusts and Trustees* defines a general power of appointment as a power under which the donee of the power may appoint to anyone including himself.[58] Similar statements are included in *Jacobs' Law of Trusts in Australia*[59] and in *Equity and Trusts in New Zealand*.[60] In *Lewin on Trusts*[61] the authors state that the distinctive feature of a general power is that the donee is free to appoint to himself without considering the interests of anyone else.[62]

[61] A general power of appointment is usually viewed as tantamount to ownership and can be treated as property for particular purposes.[63] This was made clear in *TMSF*.[64] As Lord Collins stated in that case:[65]

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58 David Hayton, Paul Matthews and Charles Mitchell *Underhill and Hayton Law of Trusts and Trustees* (18th ed, LexisNexis, London, 2010) at 39.

59 JD Heydon and MJ Leeming *Jacobs' Law of Trusts in Australia* (7th ed, LexisNexis, Chatswood, 2006) at 36.

60 Andrew Butler "The Trust Concept, Classification and Interpretation" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 43 at 50.

61 Lynton Tucker, Nicholas le Poidevin and James Brightwell *Lewin on Trusts* (19th ed, Sweet & Maxwell, London, 2015) at 1395.

62 See also *Kain v Hutton*, above n 51, at [47], *Re Park Public Trustee v Armstrong* [1932] 1 Ch 580 and *Re Penrose* [1933] Ch 793.

63 Geraint Thomas *Thomas on Powers* (2nd ed, Oxford University Press, Oxford, 2012) at [1.06].

64 *TMSF*, above n 42, at [40]–[44] and [60].

65 At [44].

> As *Thomas, Powers* (1998) puts it (at 1-08), the fundamental distinction between the concepts of power and property has not been preserved in all contexts and for all purposes. A donee of a truly general power can appoint the subject matter of the power to himself. He therefore has an "absolute disposing power" over the property, citing *Sugden, Powers*, 8th ed (1861), p 394. Consequently, for many purposes, the law regards the donee as effective owner of that property.

[62] The practical effect of the provisions discussed above is that Mr Clayton, as Trustee of the VRPT, could appoint all the assets of the VRPT to himself, especially (though not exclusively) if he has already exercised his power as Principal Family Member under cl 7.1 to remove all other Discretionary Beneficiaries. He could also appoint the assets of the VRPT to anyone else of his choosing by first utilising the cl 7.1 power to appoint a new Discretionary Beneficiary and then using his power as Trustee to appoint the property of the VRPT to the Discretionary Beneficiary so appointed.

[63] Counsel for the VRPT Trustee argued that the exercise of any power in a manner that "defeated [the] mandate [of the VRPT deed to the Final Beneficiaries]" would be an act in respect of which the Final Beneficiaries could enforce an account against the Trustee. He argued that, if Mr Clayton exercised any of these powers in favour of himself in breach of his fiduciary duty to the Final Beneficiaries, the Final Beneficiaries would have remedies for breach of trust.

[64] The powers Mr Clayton exercises as Trustee are fiduciary powers and it has been argued that even the cl 7.1 power is constrained by fiduciary obligations.[66] But the freedom given by cl 14.1, cl 11.1 and cl 19.1(c) mean the normal constraints of fiduciary obligations are not of any practical significance in relation to his powers as Trustee.[67] And Mr Clayton can appoint the property of the VRPT to himself without recourse to the cl 7.1 power.

[65] The fact that the VRPT powers are, for the most part, Trustee powers is, on the face of it, a distinction between this case and *TMSF*, where the relevant power

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66 Nicola Peart and Jessica Palmer "Double Trouble – the power to appoint and remove Trustees and the power to appoint and remove beneficiaries" (Paper presented to NZLS CLE Trusts Conference, June 2015) 33 at 37–38. See also Nicola Peart and Jessica Palmer "*Clayton v Clayton:* A step too far?" (2015) 8 NZFLJ 114 at 117.

67 See [56] above.

was held by the settlor of the trust, not the Trustee. We acknowledge that but consider that the lack of the normal constraints on Mr Clayton as Trustee means that this distinction is not significant in this case.

[66] It was also submitted on behalf of the VRPT Trustee that if Mr Clayton acted to defeat the "mandate" (of the VRPT to the Final Beneficiaries), he would be in breach of his obligation to hold the trust assets in accordance with the trust objects, which include the protection of the Claymark business from creditor claims, to protect the operating businesses and to keep the land held by the VRPT outside the personal guarantee of Mr Clayton to the Bank of New Zealand.

[67] We do not accept that submission. There is nothing in the VRPT deed referring to such a "mandate". Given the breadth of the powers held by Mr Clayton and the express authorisation described in [56] above, there is no effective constraint on the exercise of powers in favour of himself.

[68] We conclude that the combination of powers and entitlements of Mr Clayton as Principal Family Member, Trustee and Discretionary Beneficiary of the VRPT amount in effect to a general power of appointment in relation to the assets of the VRPT.

Are the VRPT powers "property"?

[69] As *TMSF* makes clear, a general power of appointment can be treated as effectively property for some purposes. In that case, the Privy Council determined that the power of revocation of a trust was such that it was appropriate to treat the power as property in an insolvency context. The question for us is whether the VRPT powers, which are to the same effect as a general power of appointment, are "rights" or "interests" and thereby come within the definition of "property" in s 2 of the PRA interpreted in the context of the PRA.

[70] If the reference to rights and interests in the definition of property in the PRA is interpreted conformably with the purposes of the PRA (to borrow the phrase used

by French CJ in *Kennon v Spry* referred to earlier),[68] it is clear that the VRPT powers should be regarded as property. As discussed earlier, the statutory context is an important factor in the interpretation of the property definition in s 2 of the PRA.

[71] The approach taken by the High Court of Australia in a similar situation in *Kennon v Spry* illustrates the importance of the statutory context in cases like the present.[69] That case also concerned the treatment of a family trust in the context of a marriage breakdown. The key elements of the trust were that the husband, Dr Spry, was able to appoint all of the trust capital and income to Mrs Spry, a discretionary beneficiary. Mrs Spry, as a discretionary beneficiary, had a right in equity to due administration of the trust and Dr Spry, as Trustee, had a fiduciary duty to consider whether and in what way he should exercise the power to appoint the capital and income to one or more beneficiaries.

[72] The majority of the High Court of Australia held that the trust property or the right to enjoy the trust property was "property of the parties to the marriage". There were two judgments for this majority, one by French CJ and one by Hayne and Gummow JJ. They took slightly different approaches, but both emphasised the need to interpret the property definition in a manner that gives effect to the purposes of the Act.[70]

[73] The VRPT deed presents a far more compelling case for treating powers and entitlements in relation to a family trust as property of one or both spouses than *Kennon v Spry*. In *Kennon v Spry*, it was the combination of the powers of Dr Spry to appoint the capital to Mrs Spry and the latter's rights as beneficiary that the Court treated as property of the marriage.[71] That can be compared to the present case, which involves a combination of powers that confer on Mr Clayton the ability to appoint all of the property of the VRPT to himself. The importance of *Kennon v Spry* is, however, not its similarity to the present case but the fact that the High Court majority interpreted the definition of "property" in light of its context in

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68 Above at [37].
69 *Kennon v Spry*, above n 38.
70 At [64] per French CJ and [89] per Hayne and Gummow JJ.
71 At [62] per French CJ and [126] per Hayne and Gummow JJ.

relationship property legislation and in a manner calculated to conform with the purposes and principles of that legislation.

[74] Some commentators have raised concerns about applying *Kennon v Spry* in New Zealand.[72] While we acknowledge the different definition of "property" in the Australian legislation and the differences between the legislative regimes in New Zealand and Australia, we do not see these as diminishing the importance of *Kennon v Spry* for the proposition that the definition of property must be interpreted in the context of the relationship property legislation. Whether a New Zealand court would hold, in the same circumstances as in *Kennon v Spry*, that the combination of rights and powers of the parties to the marriage was property is not something we need to decide.

[75] Counsel for Mrs Clayton also relied on a recent decision of the Court of Final Appeal of Hong Kong, *Kan Lai Kwan v Poon Lok To Otto*[73] and the English cases on which it is based, especially *Charman v Charman*,[74] *Charman v Charman (No 4)*[75] and *Whaley v Whaley*.[76] While we see these cases as less relevant to the issue than *Kennon v Spry*, we consider the approach taken in them supports a substance over form approach to the problem before us.

[76] The three English cases involve the interpretation of a statutory provision that requires the court to have regard to a number of matters including "the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future". In determining whether assets held in an offshore trust over which the husband had de facto control (despite there being a nominally independent Trustee) were "financial resources" of the husband, the Court in *Charman v Charman* applied this test: "whether the

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72 See for example Bill Atkin and Wendy Parker *Relationship Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2009) at 216 and Nicola Peart "*Intervention to Prevent Abuse of Trust Structures*" [2010] NZ L Rev 567 at 591.

73 *Kan Lai Kwan v Poon Lok To Otto* (2014) 17 HKCFAR 414 (CFA).

74 *Charman v Charman* [2005] EWCA Civ 1606, [2006] 1 WLR 1053.

75 *Charman v Charman (No 4)* [2007] EWCA Civ 503, [2007] 1 FLR 1246.

76 *Whaley v Whaley* [2011] EWCA Civ 617, [2012] 1 FKR 735 at [40].

Trustee would be likely to advance the capital immediately or in the future" to the relevant spouse.[77]

[77] That involves the Court bringing "a judicious mixture of worldly realism and of respect for the legal affairs of trusts, the legal duties of Trustees and, in the case of off-shore trusts, the jurisdictions of off-shore courts".[78] In a later decision of the England and Wales Court of Appeal, *Whaley v Whaley*, this approach was endorsed.[79]

[78] In *Kan Lai Kwan v Poon Lok To Otto*, the Hong Kong Court of Final Appeal adopted the *Charman* test.[80]

[79] The fact that the statutory context is so different from the PRA may count against applying the English and Hong Kong cases in New Zealand. However, they illustrate the need for "worldly realism" in this context and also acceptance that strict concepts of property law may not be appropriate in a relationship property context.

[80] We consider that, taking an approach that recognises the statutory context of the PRA, the VRPT powers are properly classified as "rights" that give Mr Clayton an "interest" in the VRPT and its assets.[81]

[81] Counsel for the VRPT Trustee argued that if Parliament intended that powers of appointment would be treated as property, it would have included a specific provision to this effect, as appeared in the Estate and Gift Duties Act 1968.[82] We agree with the Court of Appeal that this is not a decisive consideration. As the Privy Council recognised in *TMSF*, the power of appointment may be treated as property

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77 *Charman v Charman*, above n 74, at [12]–[13].

78 *Charman v Charman (No 4)*, above n 75, at [57].

79 *Whaley v Whaley*, above n 76. This approach is focused on the interpretation of the statutory term "financial resources [that a spouse] is likely to heave in the foreseeable future" rather than "property". See n 37 above.

80 *Kan Lai Kwan v Poon Lok To Otto*, above n 73, at [27].

81 We leave for another case what would be the position if the VRPT powers were less extensive: both the issue as to whether the powers were property and, if so, how they would be valued.

82 Estate and Gift Duties Act 1968, s 8, which provided that a deceased's dutiable estate included property over which he or she had a general power of appointment. This provision is discussed in Ivor Richardson and Robin Congreve *Law of Estate and Gift Duty* (5th ed, Butterworths, Wellington, 1978) at 80–81.

for some purposes even where there is no legislative provision requiring that to be done.[83]

Is this interpretation contrary to Parliament's intention?

[82] It was argued by counsel for the VRPT Trustee that the interpretation that trust powers amounted to property was, in effect, a law change, and that such a change was best left to Parliament. In support of this he pointed to materials from the legislative history of the Property (Relationships) Amendment Act 2001, which indicate that there was an original proposal to give the courts wide power to distribute the capital of a trust, but that this suggestion was not carried through into the legislation as enacted. The result was s 44C of the PRA, which restricts the power of the court to a power to order the Trustee to pay the whole or part of the income (but not the capital) of the trust.[84]

[83] Counsel's interpretation of this process is that the legislature did not intend for trust powers to be considered property, with the effect that the capital of the trust would be available for sharing under the PRA.

[84] We accept that the legislative history supports the view that Parliament did not intend the court to have a "trust-busting" power. The limited scope of s 44C illustrates this. But we do not see the history of the legislative process as determinative of the issue before us, namely what constitutes "property", a necessary forerunner for a determination of what constitutes relationship property. A finding that rights and powers associated with a trust or the assets held on trust are relationship property does not, of itself, lead to an order requiring capital of the trust

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83 *TMSF*, above n 42, at [41] and [60]; *Clayton* (CA), above n 1, at [112].

84 The original proposal was in the Ministry of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (Ministry of Justice, October 1988) at 28–30. This was not adopted in the provision in the Matrimonial Property Amendment Bill 1998 (109-1), cl 47. The provision in the Bill reflected recommendations in the Ministry of Justice's "Memorandum for Cabinet Social Policy Committee: Review of the Matrimonial Property Act 1976" LRD 14-3-10-2 at 6. See also Matrimonial Property Amendment Bill 1998 (109-2) (select committee report) at xii and 47, Ministry of Justice "SOP to Matrimonial Property Amendment Bill – Departmental Report" (16 August 2000) MAT/J/4 at 25, Matrimonial Property Amendment Bill 1998 (109-3) and Supplementary Order Paper 1999 (25) (select committee report) at 26.

to be paid to a spouse. Rather, it means the size of the pool of assets subject to the default equal sharing regime in the PRA is greater than it otherwise would be.

Is the property "relationship property"?

[85] The Court of Appeal determined that the power of appointment under cl 7.1 was relationship property. However, its analysis was aimed at establishing that the power of appointment was property, which did not automatically lead to a conclusion that it was relationship property. Counsel for the VRPT Trustee criticised this aspect of the Court of Appeal's decision. He said even if the Court had been correct to conclude that the power of appointment was property, it should have concluded that it was Mr Clayton's separate property.

[86] As the VRPT powers, which we have found to be property, were "acquired" by Mr Clayton after his relationship with Mrs Clayton began (when the VRPT was settled in 1999), they are relationship property under s 8(1)(e) of the PRA. Counsel for the VRPT Trustee suggested applying this analysis would lead to an unfair outcome, because the property transferred to the VRPT included the two Vaughan Road blocks, which Mr Clayton owned before the relationship began, and which were therefore separate property. He argued that the strict application of s 8(1)(e) of the PRA to the powers under the VRPT deed would, in substance, convert separate property into relationship property.[85]

[87] We do not see any basis for such a concern in this case. We accept that the Court of Appeal found that the property held in the VRPT was not relationship property.[86] But it is clear that its only reason for doing so was because the property in the trust was held on trust by Mr Clayton, not that it was Mr Clayton's separate property. The alleged unfairness would arise only if the underlying assets of the VRPT would, if they had not been settled on the VRPT, have been Mr Clayton's separate property.

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85 A similar concern was raised in Peart and Palmer "*Clayton v Clayton*, A step too far?", above n 66, at 117.

86 *Clayton* (CA), above n 1, at [162].

[88] The Family Court Judge accepted a concession from Mrs Clayton that the value of Mr Clayton's separate property when the relationship began was $500,000.[87] She found that, as both s 9A(1) and s 9A(2) applied, the increase in value of that separate property over and above that $500,000 was relationship property, to be shared equally.[88] This led her to order that the increase in value be shared equally.[89] She also ordered that Mrs Clayton was entitled to be compensated for half of the value of the assets of the VRPT, which, on her approach, were treated as being owned by Mr Clayton beneficially.[90] That involved a finding by Judge Munro that, once Mr Clayton's separate property interest of $500,000 was recognised, the remaining property held by Mr Clayton personally (which, on her approach, included the assets of the VRPT) was relationship property. The Family Court's finding was upheld in the High Court.[91] It was not challenged in the Court of Appeal.[92]

[89] In those circumstances, we see no basis for the allegation of unfairness. If the underlying assets of the VRPT were all such that they would have been separate property but for having been settled on trust, it may have been necessary to consider whether s 13 of the PRA should be invoked, but there is clearly no basis to do so in this case.[93]

[90] We do not overlook the fact that the Vaughan Road blocks were owned by Mr Clayton at the commencement of the relationship and are now assets of the VRPT. So, in that sense, it could be argued that the property settled on the VRPT was, or included, separate property. But the $500,000 allowance for separate property made by the Family Court recognised that the increase in value of those blocks was (on the Family Court approach of treating the assets of the VRPT as assets of Mr Clayton) relationship property. To make any further allowance based on

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87 *Clayton* (FC), above n 6, at [65].
88 At [66].
89 At [139](f).
90 At [139](h).
91 *Clayton* (HC), above n 7, at [41]–[44].
92 *Clayton* (CA), above n 1, at [4].
93 Section 13 of the PRA allows the court to distribute property or money unequally "in accordance with the contribution of each spouse to the marriage" where there are "extraordinary circumstances that make equal sharing … repugnant to justice".

the proposition that separate property was transferred to the VRPT would effectively involve double counting.[94]

[91] It was argued on behalf of the VRPT Trustee that if the Court were to hold that Mr Clayton's powers under the VRPT deed were property, this would lead to a division of property that was unjust. Thus, he argued, an order treating the powers as property should not be made, given the mandate in s 25 of the PRA to make such order as the court considers just. He argued that a possible consequence of treating the powers as property was that Mr Clayton would be required to take actions as Trustee of the VRPT that were adverse to the interests of the beneficiaries of that trust other than Mrs Clayton and him (notably Mr and Mrs Clayton's daughters).

[92] We do not have sufficient information to know whether that concern is real or imagined,[95] but it does not seem to us to be a relevant consideration to the determination of the legal issue before us, namely whether the VRPT powers are relationship property in terms of the PRA. On the face of it there does not seem to be anything unfair about Mr Clayton as Trustee of the VRPT resolving to make a distribution to Mrs Clayton as a Discretionary Beneficiary given the breadth of his powers. After all, he could at any time distribute all or part of the property of the trust to himself without regard to the interests of his daughters as Discretionary Beneficiaries or Final Beneficiaries (and, if he did, this would also provide a way for him to meet his payment obligation to Mrs Clayton). This reflects their precarious position as beneficiaries due to the breadth of the VRPT powers.[96]

[93] As discussed earlier in this judgment, it is hard to see how the other Discretionary Beneficiaries, particularly the daughters of Mr and Mrs Clayton, could complain if that occurred. We say this because of the breadth of the powers given to the Trustee under the deed, the lack of constraint on the exercise of those powers

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94 Ms McCartney also argued that any increase in value of separate property which is relationship property under s 9A(1) of the PRA is a separate asset from the underlying property that has increased in value. This is dealt with in the Claymark Trust judgment, above n 2, at n 143.

95 By this we mean that we do not have sufficient information to determine whether Mr Clayton has sufficient personal assets to meet any judgment in favour of Mrs Clayton.

96 In addition ,we note that the court has power under s 26 of the PRA to make an order settling all or some of the relationship property for the benefit of the children of the marriage, civil union, or de facto relationship or of any of them. It was not suggested that this power should be exercised in this case.

(discussed at [56] above) and the fact that, as Discretionary Beneficiaries, their interest is only the right to be considered, and as Final Beneficiaries their position is contingent on the trust capital not being distributed before the Vesting Day.

[94] Mrs Clayton submitted that the practical solution could be dealt with by orders made under s 33 of the PRA. That section empowers the Court to make a wide variety of orders, including orders vesting any property[97] and an order varying the terms of any trusts.[98] As the parties have settled the dispute, we say no more about that.

[95] It was also argued on behalf of the VRPT Trustee that an order treating Mr Clayton's powers under the VRPT deed as property may have an adverse impact on the Claymark business. The argument was that it may be necessary for assets held in the VRPT to be sold in order to meet any order in favour of Mrs Clayton, and given the significance of the Vaughan Road blocks to the Claymark business, this would adversely affect that business.

[96] We do not see how this could possibly affect the legal issue that we are required to determine. If the award ultimately made in favour of Mrs Clayton requires Mr Clayton to sell or use as security assets associated with the Claymark business, that is simply a consequence of the application of the PRA to the facts of the case. It is not a reason to deviate from the application of the law. In any event, it is not difficult for the Claymark business to ensure it has security of tenure over the Vaughan Road blocks as a lessee, paying market rent. If it has that security, a change in the identity of the landlord should not be fatal to its future success.

[97] A similar argument was made on behalf of Mr Clayton personally and it is also rejected.

Conclusions on VRPT powers

[98] Our conclusions in relation to the grounds of appeal (c)(i) and (ii) are as follows:

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97 Section 33(3)(e).
98 Section 33(3)(m).

(a) Are the rights of Mr (and Mrs) Clayton under the VRPT deed relationship property? We conclude that the VRPT powers (that is, Mr Clayton's powers and entitlements under the VRPT deed) are property as defined in s 2 of the PRA and relationship property as defined in s 8 of the PRA.

(b) Is the power of appointment under cl 7.1 of the VRPT deed relationship property? We conclude that the power under cl 7.1 does not give Mr Clayton the ability to remove the Final Beneficiaries and therefore does not allow him to, in effect, revoke the trust. On its own, it is not a general power of appointment. So, taken in isolation it is not property and not relationship property. But, in light of our conclusion in [98](a) above, this does not change in any practical sense the outcome of the Court of Appeal decision.

What is the correct valuation of the VRPT powers?

[99] The Court of Appeal determined that the value of the right represented by the power in cl 7.1 of the VRPT deed, which it found was a general power of appointment, was an amount equal to the net value of the assets of the VRPT.[99] The Court reasoned that the value of the right to the holder of the power was the value of the property that would be received by the holder of the power in the event that the power were exercised. In order to calculate the value, it would be necessary to work out the net value of the assets of the VRPT calculated as at 31 March 2011, which was the date that the parties had agreed should be adopted for valuation purposes. The Court of Appeal recorded that the parties had agreed that the calculation of this value should be remitted to the High Court for determination. The Court ruled that Mrs Clayton was entitled to half of the value so determined. The settlement means that there is now no need for this valuation exercise to occur.

[100] Counsel for the VRPT Trustee did not propose an alternative method of valuation, but instead argued that treating the powers as equal in value to the net assets of the VRPT would lead to injustice. He said this should be dealt with by a

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[99] *Clayton* (CA), above n 1, at [113].

recognition that the asset pool has been increased in a manner that disadvantages Mr Clayton, justifying an allocation of relationship property between Mr and Mrs Clayton under s 25(1)(a)(ii) other than on a 50/50 basis. He argued that this was permitted under that section which empowers the Court to make any order "it considers just … dividing the relationship property or any part of that property between the spouses or partners".

[101] We do not see that proposal as assisting in the valuation question. The case for an order other than on a 50/50 basis would require the Court to determine that attributing to the VRPT powers a value equivalent to the net assets of the VRPT would lead to an unjust outcome. But if it is unfair, the answer is to determine the fair value, not to redistribute relationship property.

[102] It was also argued that there would be unfairness in the outcome because it may require Mr Clayton to exercise his powers in a way that was adverse to the interests of his daughters. We do not see that question as relevant to the valuation issue and, in any event, we have already dealt with it.[100] Counsel for the VRPT Trustee suggested that this would favour Mrs Clayton who was not a beneficiary over the interests of her daughters, who are. This is factually incorrect. Mrs Clayton is a beneficiary in her capacity as wife or former wife of Mr Clayton, as counsel acknowledged in his leave submission. There was no evidence that she had been removed as a beneficiary.

[103] As a further alternative, counsel argued that the Court should make an order under s 33(d) of the PRA postponing the vesting of Mrs Clayton's share in the relationship property (presumably this was intended to refer only to that aspect of the relationship property constituted by the powers held by Mr Clayton in relation to the VRPT) until the power of appointment is exercised by Mr Clayton in the manner anticipated, and also requiring that the value of the property be determined at that date under s 2G(2) of the PRA. His submission was not developed in any detail and it seems to us to beg the issue and to be contrary to the "clean break" principle.

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[100] Above at [91]–[93].

[104] As Mr Clayton can appoint the assets of the VRPT to himself at any time, we see no reason to differentiate the value of the power to do this from the value of the assets to which the power relates. Indeed, some cases relating to general powers of appointment say that the power gives the donee of the power an interest tantamount to ownership of the assets to which the power relates.[101] Treating the VRPT powers as having a value equal to that of the assets to which they apply can be seen as consistent with that approach to general powers of appointment.

[105] As counsel for Mrs Clayton argued, if Mr Clayton's powers and entitlements under the VRPT deed were for sale, it is hard to see why Mr Clayton would not attribute to them precisely the same value as he would attribute to the net assets over which those powers give him virtually absolute control.[102]

[106] This outcome is also consistent with the approach taken in *Kennon v Spry*,[103] *Charman v Charman*,[104] *Whaley v Whaley*[105] and *Kan Lai Kwan v Poon Lok To Otto*.[106]

[107] We conclude that the value of the VRPT powers is equal to the value of the net assets of the VRPT.

Sham trust or illusory trust?

[108] We now turn to the grounds of appeal dealing with the allegations that the VRPT is a sham trust or an illusory trust. Our finding that the VRPT powers are relationship property having a value equal to the property to which they relate mean

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101 *Re Triffit's Settlement* [1957] Ch 852 at 861; *In Re Watts* [1931] 2 Ch 302 at 305. It was not argued that the VRPT powers gave Mr Clayton a direct interest in the underlying assets of the VRPT and we leave that issue for argument in a future case.

102 This approach to valuation is consistent with *Z v Z* [1989] 3 NZLR 413 (CA) and *Walker v Walker*, above n 33.

103 Above n 38.

104 Above n 74.

105 Above n 76.

106 Above n 73.

these allegations are not of great practical moment and we will deal with them relatively briefly.[107] Three issues arise for consideration:

(a) Is there a distinction between a sham trust and an illusory trust?

(b) Is the VRPT a sham?

(c) Is the VRPT an illusory trust?

[109] We propose to address the substantive arguments (b) and (c) first, before dealing briefly with the first issue (a).

Is the VRPT deed a sham?

[110] Mrs Clayton argued that the VRPT deed was a sham, or alternatively that the VRPT was an illusory trust.

[111] The Court of Appeal rejected that argument. It found that Mr Clayton did not have a subjective intent to create a document that did not evidence his true intention when he entered into the VRPT deed. On the contrary, he genuinely intended to create a trust.[108] This finding was consistent with those of Judge Munro in the Family Court[109] and Rodney Hansen J in the High Court.[110]

[112] The arguments advanced in support of the sham contention in this Court were largely the same as those which we have accepted as supporting the contention that Mr Clayton's powers under the VRPT deed are to the same effect as a general power of appointment and are property as defined in s 2 of the PRA. We will not rehearse those arguments again. In addition, counsel for Mrs Clayton relied on the evidence that Mr Clayton had little or no knowledge of the VRPT deed, the operation of the

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[107] There may have been some practical significance if Mr Clayton could not or did not meet the award to Mrs Clayton because the assets of the VRPT would not be directly available to satisfy the judgment in her favour. But the settlement means this possibility does not need to be addressed.

[108] *Clayton* (CA), above n 1, at [67].

[109] *Clayton* (FC), above n 6, at [73]. Judge Munro did not explicitly state that the trust was not a sham, but explained that its purpose was to separate and distance the underlying land ownership from the assets of the company.

[110] *Clayton* (HC), above n 7, at [79].

VRPT or his duties as Trustee. This, she argued, indicated that he did not consider he was restrained in any way by the existence of the VRPT deed and that he treated the property of the VRPT as his own.

[113] As this Court made clear in *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*, a sham is a pretence: a document that does not evidence the true common intention of the parties.[111]

[114] In the present case the only party to the VRPT deed is Mr Clayton, as both settlor and Trustee,[112] so, as the Court of Appeal pointed out,[113] the application of the *Ben Nevis* test requires us to determine whether the intention of Mr Clayton as settlor and Trustee was to create a trust when he entered into the VRPT deed and settled the Vaughan Road properties on the VRPT. As already noted, the concurrent findings of all three Courts below is that Mr Clayton did intend to create a trust when he established the VRPT.

[115] We do not consider that Mr Clayton's reliance on his advisors in relation to the VRPT and his lack of knowledge of the legal ramifications of the trust structure and the terms of the trust deed itself leads to the conclusion that the VRPT deed is a sham. Mr Clayton's reliance on his advisors does not indicate any lack of intent on his part to create a trust, nor does his lack of knowledge of the legal detail. The fact that the trust deed gives Mr Clayton powers that amount in effect, to a general power of appointment does not indicate that when entering into the VRPT deed, Mr Clayton in fact intended to create a structure different from that set out in the terms of the VRPT deed itself.

[116] Counsel for Mrs Clayton made a broader argument that a trust should be treated as a sham if, in light of the circumstances in which it was created and the

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111 *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289 at [33] per Tipping, McGrath and Gault JJ.

112 Where the settlor and trustee are different people, there is controversy as to whether the focus of the inquiry should be on their collective intention or that of the trustee only: *Official Assignee v Wilson* [2007] NZCA 122, [2008] 3 NZLR 45 at [41]–[53] and [113]–[122]. See the discussion of the alternative views in Jessica Palmer "What makes a trust a sham?" [2008] NZLJ 319 and Matthew Conaglen "Trusts and Intention" in Edwin Simpson and Miranda Stewart (eds) *Sham Transactions* (Oxford University Press, Oxford, 2013) 122.

113 *Clayton* (CA), above n 1, at [57].

manner it was administered, the Court came to the conclusion that "no trust had been established or that the trust should not be permitted to continue to exist". We do not accept this argument. We accept that the Court can find that the deed creating a trust is a sham if the parties are shown to have intended it to be a pretence. But there is no basis to extend the sham concept to encompass a trust created under a document that was not intended to be a pretence but that the Court considers is otherwise reprehensible in some way.

[117] We therefore conclude that there is no basis to depart from the concurrent findings of the Courts below that the VRPT deed was not a sham.

Is the VRPT an illusory trust?

[118] The attributes of the VRPT deed that led us to conclude that the powers of Mr Clayton as settlor, Principal Family Member and Trustee were effectively a general power of appointment were the same attributes that led the High Court Judge to conclude that the VRPT was an illusory trust. As the High Court Judge put it:[114]

> … the provisions of the [VRPT] give Mr Clayton unfettered power to distribute the income and the capital of the trust to himself if he wishes and to bring the trust to an end at any time he pleases. Mr Clayton effectively retained all the powers of ownership. What he has in fact done is neither here nor there, although it appears that, through his delegates, Mr Clayton exercises, in a practical sense, the powers of ownership. It is what he has the legal power to do that is important and that is basically to do whatever he wants with the trust property. Within a largely conventional framework the trust deed provides an appearance of separation. The reality is, however, that if he chooses to, Mr Clayton is able to deal with trust property just as he would if the trust had never been created.

[119] The concept of "illusory trust" was described by Rodney Hansen J as a trust under which the trustee retains such control that the proper construction is that he did not intend to give or part with control over the property sufficient to create a trust.[115]

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114 *Clayton* (HC), above n 7, at [90].

115 At [79], citing *Financial Markets Authority v Hotchin*, [2012] NZHC 323 at [30]. In that case, Winkelmann J rejected an argument that a trust having similar provisions to those of the VRPT deed was invalid because the powers reserved by the settlor/donor were so broad "the essential characteristics of a trust obligation are absent" (at [27]). However, in that case, there was a prohibition on self-dealing in the trust deed which prevented a trustee from distributing trust property to himself or herself. This distinguishes that trust from the VRPT. In addition, the power to appoint and remove beneficiaries in that case was held by a trustee rather than a non-trustee (the Principal Family Member).

The essence of the concept appears to be that the trust as constituted has the attributes of a trust, including the imposition on the Trustee of the obligation to act honestly and in good faith; but the powers given to the Trustee and, we would add in this case, the Principal Family Member, given that Mr Clayton had both roles, are so broad that the Trustee can "basically … do whatever he wants with the property".[116]

[120] The High Court Judge did not agree with the Family Court Judge that Mr Clayton as Trustee was not subject to the "irreducible core of obligations" owed by trustees to beneficiaries because of the authorisations in cls 11 and 19 of the VRPT deed.[117] He considered these provisions did not excuse Mr Clayton as Trustee from acting honestly and in good faith. But that did not deter him from finding the VRPT was an illusory trust for the reasons described above, so the finding made in the Family Court that the VRPT was an illusory trust was upheld, even though the Family Court Judge's reasons for reaching that conclusion were rejected. That meant that the Family Court order relating to the VRPT assets was upheld. That order was:[118]

> The assets of the [VRPT] vest in Mr Clayton personally, and as such, Mrs Clayton is entitled to be compensated for one half of their net value as at 31 March 2011.

[121] The High Court Judge said the breadth of the powers given to Mr Clayton did not override his overall duty to act in good faith, albeit that the interests of the beneficiaries were substantially compromised by the breadth of the powers he had to apply property to himself.[119] It is not clear whether the Judge was stating that as a general proposition or just disagreeing with Judge Munro's conclusion that cls 11.1 and 19.1(c) negated the ability of Beneficiaries to call the Trustee to account. If it was the former, the Judge's conclusion appears to have been that, while Mr Clayton had core obligations to perform his duties honestly and in good faith for the benefit of Beneficiaries, the breadth of his powers to apply property to himself gave him such wide powers over the VRPT assets that a trust could not be said to exist.

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116 *Clayton* (HC), above n 7, at [90].
117 At [80], *Clayton* (FC), above n 6, at [75]–[85], citing *Armitage v Nurse* [1998] Ch 241 (CA). Clauses 11 and 19 are discussed at [56] and [62] above.
118 *Clayton* (FC), above n 6, at [139(h)].
119 *Clayton* (HC), above n 7, at [81].

[122] The Court of Appeal overturned the finding that the VRPT was an illusory trust. It saw that finding as inconsistent with the findings made by Rodney Hansen J that the VRPT was not a sham trust, that Mr Clayton had core obligations as Trustee to act honestly and in good faith, and that other beneficiaries could enforce those core obligations.[120] It also saw the terms sham trust and illusory trust as synonymous and their legal definitions as overlapping.[121] It saw both as hinging on the settlor's intention to create a trust that was valid and enforceable. The Court said once the Court accepts a valid trust has been established (with no sham), it should not be able to be treated as non-existent because the Trustee has wide powers of control over the trust property.[122] In short, "[t]here is either a valid trust or there is not".[123]

[123] We will come back later to the distinction between a sham and an illusory trust. For the present we observe that a finding that a trust deed is not a sham does not seem to us to preclude a finding that the attempt to create a trust failed and that no valid trust has come into existence. That would lead to a finding that the trust is illusory, to use the terminology adopted in the Courts below. For our part we do not see any value in using the "illusory" label: if there is no valid trust, that is all that needs to be said.

[124] Given the extent of the powers held by Mr Clayton under the VRPT deed, there are two alternative lines of analysis concerning the VRPT's validity. First, it can be argued that the VRPT is not a valid trust because Mr Clayton, having reserved such broad powers to himself in the VRPT deed, cannot be said to have disposed of the property settled under the VRPT deed in favour of another.[124] Equally, the breadth of those powers can be said to bring into question whether the irreducible core of Trustee obligations referred to in *Armitage v Nurse* apply to Mr Clayton.[125] However, this does not deny the possibility that a valid trust may come into existence

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120 *Clayton* (CA), above n 1, at [76].
121 At [77].
122 At [80].
123 At [85].
124 *Knight v Knight* (1840) 3 Beav 148, 49 ER 58 (Ch) at 68 per Lord Langdale.
125 See [120]–[121] above. The argument that the VRPT is not a valid trust is supported by the observations of Associate Professor Palmer and Professor Peart in their "Double Trouble" paper, above n 66, at 50–51.

at some time in the future, for example, if Mr Clayton were to be replaced by a new Trustee who was not the Principal Family Member and/or a beneficiary.

[125] Second, it can be argued that, even though the VRPT is effectively defeasible, in the sense that the VRPT powers in substance give Mr Clayton power to bring the VRPT to an end, there is no reason in principle why it should not be regarded as a trust and required to be administered in accordance with the VRPT deed until the exercise of the VRPT powers in that manner. In *TMSF*, the Privy Council found that the settlor's powers to revoke the trust were such that the settlor could be regarded as having rights tantamount to ownership.[126] It made no finding about the status of the trust in the period before the revocation powers were exercised, because it was not required to do so in order to resolve the issue before it. However, there was nothing in the judgment to indicate that the trust was invalid in the period before the power to revoke it was exercised.

[126] It should be acknowledged that the power of revocation was not a power held by the trustee in that case, so there was no question but that the trustee's fiduciary obligations continued until the power of revocation was exercised. That can be contrasted with the present case, where the VRPT powers are, for the most part, powers held by Mr Clayton as Trustee.

[127] Determining which of these two lines of analysis is correct is a matter of some complexity on which the Court does not have a concluded unanimous view. In light of that, we do not intend to determine the issue because the settlement of the proceedings makes it unnecessary to do so and, given the very unusual terms of the VRPT deed, the issue is unlikely to arise in future cases.

Is there a distinction between a sham trust and an illusory trust?

[128] The answer to this question is academic, given our earlier findings. As noted earlier, a sham is a pretence: the terms of the document do not represent what the party or parties really intended. A finding of sham in this case would involve the

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126 *TMSF*, above n 42, at [59].

Court assessing the subjective intention of Mr Clayton and concluding that the VRPT deed did not conform with his real intention.

[129] As we have already said,[127] we do not find the term "illusory trust" helpful. What the Family Court and High Court meant by that term was that no trust was created. In such a case, the document as executed does represent the terms to which the party or parties intended to agree but, despite their subjective intention to create a trust, they failed in their attempt to do so.

[130] In the present case, Mr Clayton intended to create a trust on the terms recorded in the VRPT deed. The issue would be whether the powers held by Mr Clayton are so broad that what he intended to be a trust was not, in fact, a trust. As already noted, we are not determining that issue.

Result

[131] For the reasons given, we conclude that the Court of Appeal erred in determining that cl 7.1 of the VRPT deed was a general power of appointment and that power was relationship property. But we find that the VRPT powers are relationship property, the value of which is equal to the value of the net assets of the VRPT. The practical outcome is the same. We formally allow the appeal and quash the Court of Appeal's finding that the power of appointment under cl 7.1 of the VRPT deed is relationship property having a value equal to that of the net assets of the VRPT. We substitute a finding that the VRPT powers are relationship property having a value equal to that of the net assets of the VRPT. For the avoidance of doubt, we record the VRPT powers are Mr Clayton's power as Principal Family Member under cl 7.1 and his powers as Trustee under cls 6.1, 8.1 and 10.1, in light of cls 11.1, 14.1 and 19.1(c).

[132] We uphold the Court of Appeal's finding that the VRPT is not a sham.

[133] We do not determine whether the VRPT is an illusory trust.

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[127] Above at [123].

[134] At the hearing in this Court, counsel were agreed that it would be necessary to remit the matter to the High Court so that Court can determine issues of quantum and other outstanding issues. The settlement obviates the need to do this.

Costs

[135] The settlement also obviates the need to address the issue of costs.

Solicitors:
Tompkins Wake, Hamilton for First Appellant
Quigg Partners, Wellington for Second Appellant
Anderson Creagh Lai, Auckland for Respondent

APPENDIX

RELEVANT PROVISIONS OF VRPT DEED

INTRODUCTION

…

B. The Trustees hold the sum of ten dollars upon the terms and with and subject to the powers and discretions set out in this deed.

…

2. DEFINITIONS AND INTERPRETATION

2.1 **Definitions**

…

"**Discretionary Beneficiaries**" means:

(a) the Principal Family Member;

(b) the Final Beneficiaries;

(c) the issue of any Final Beneficiary;

(d) any wife, husband, widow, widower, former wife or former husband for the time being of any Beneficiary described in paragraphs (a) to (c) of this definition;

(e) any trust …. which includes … any Beneficiary;

(f) any person appointed pursuant to cl 7.1(a),

but does not include any person who has been removed from the class of Discretionary Beneficiaries pursuant to clause 7.1(b).

…

"**Final Beneficiaries**" means the child or children of the Principal Family Member born or adopted before the Vesting Day.

…

"**Principal Family Member**" means **Mark Arnold Clayton**.

…

"**Vesting Day**" means:

(a) the day upon which the period of eighty years from the date of this deed expires, being a date within the perpetuity period permitted to be specified by virtue of section 6 of the Perpetuities Act 1964, and the perpetuity period applicable to the Trust created by this deed is specified accordingly; or

(b) such earlier day as the Trustees may by deed appoint.

…

2.2 **Interpretation**: In this deed:

…

(b) the interpretation of this deed in cases of doubt is to favour the broadening of the powers and the restricting of the liabilities of the Trustees;

…

4. INCOME DISTRIBUTION

4.1 **Distribution**: The Trustees may, after payment of all expenses and other charges to be met from income, and after making or retaining out of, or charging against, the income of the Trust Fund any payments, reserves or other provisions for any of the purposes of the Trust:

(a) pay or apply all or any part of the income of the Trust Fund to or for such one or more of the Discretionary Beneficiaries who are then living or in existence;

…

6. DISTRIBUTION OF CAPITAL BEFORE THE VESTING DAY

6.1 The Trustees may at any time:

(a) pay or apply all or any part of the capital of the Trust Fund to or for such one or more of the Discretionary Beneficiaries who are then living or in existence;

(b) appropriate all or any part of the capital of the Trust Fund for such one or more of the Discretionary Beneficiaries who are then living or in existence contingently upon the reaching of a specified age or the happening of a specified event.

7. APPOINTMENT AND REMOVAL OF DISCRETIONARY BENEFICIARIES

7.1 **Power to appoint and remove Beneficiaries:** The Principal Family Member may, by deed, before the expiry of the Trust Period:

(a) appoint any person to become a member of the class of Discretionary Beneficiaries …

(b) remove any person from the class of Discretionary Beneficiaries …

…

8 RESETTLEMENT OF TRUST FUND

8.1 The Trustees may at any time resettle by deed all or any part of the Trust Fund upon the Trustees of any trust … which includes … any one or more of the Discretionary Beneficiaries … .

…

10. DISTRIBUTION ON THE VESTING DAY

10.1 Distribution of capital: The Trustees shall hold the Trust Fund on the Vesting Day upon trust:

(a) for such of the Discretionary Beneficiaries or such one or more of them to the exclusion of the other or others of them in such shares as the Trustees may by deed appoint on or before the Vesting Day;

(b) in respect of such of the Trust Fund as may not be validly appointed on or before the Vesting Day, for such of the Final Beneficiaries who are then living, and, if more than one, as tenants in common in equal shares and if any Final Beneficiary dies before the Vesting Day leaving issue living on the Vesting Day such issue shall take per stirpes and, if more than one, as tenants in common in equal shares all the interest in the Trust Fund which such deceased Final Beneficiary would have taken had such deceased Final Beneficiary been living on the Vesting Day;

(c) if none of the Final Beneficiaries nor any of their issue are living on the Vesting Day, for such person or persons living who would be entitled, in accordance with the applicable law governing the distribution of the estates of intestates, to

the estate of the Principal Family Member if the Principal Family Member were to die intestate on the Vesting Day and, if there is more than one such person, as tenants in common in such shares as they would have been so entitled.

…

11. TRUSTEES' DISCRETION UNFETTERED

11.1 For the avoidance of doubt and notwithstanding anything in this deed or any rule of law which imposes upon the Trustees the duty to act impartially towards Beneficiaries, the Trustees shall have unfettered discretion as to the exercise of the powers and discretions conferred upon them by this deed even though:

(a) the interests of all Beneficiaries are not considered by the Trustees;

(b) the exercise would or might be contrary to the interests of any present or future Beneficiary;

(c) the exercise results, at any time whether before or on the Vesting Day, in the whole or in any part of the capital or income of the Trust being distributed to any one Beneficiary or to any two or more Beneficiaries in equal or unequal proportions, in either case to the exclusion of the other Beneficiaries.

12. POWERS AND DISCRETIONS OF TRUSTEES

12.1 **Powers**: To achieve the objects of the Trust, the Trustees shall have in the administration, management and investment of the Trust Fund all the rights, powers and privileges of a natural person and, subject always to the trusts imposed by this deed, may deal with the Trust Fund as if the Trustees were the absolute owners of and beneficially entitled to the Trust Fund and, accordingly, in addition to any specific powers vested in the Trustees by law, in dealing with the Trust Fund or acting as Trustees of the Trust, the Trustees may do any act or thing or procure the doing of any act or thing or enter into any obligation whatever, including, without limitation, exercising unrestricted powers to borrow and raise money, and to give mortgages, other securities, guarantees and indemnities.

12.2 **Discretions**: Except as otherwise expressly provided by this deed, the Trustees may exercise all the powers and discretions vested in the Trustees by this deed in the absolute and uncontrolled discretion of the Trustees at such time or times, upon such terms and conditions and in such manner as the Trustees may decide.

12.3 **Appropriated funds**: The powers and discretions vested in the Trustees by law or by this deed may be exercised by the Trustees both in respect of the Trust Fund and, in respect of any property held by the Trustees but appropriated, credited on account or otherwise held for any Beneficiary, contingently or otherwise.

12.4 **Investment discretion**: In exercising their powers of investment the Trustees may acquire any property, or retain or deal with any property which from time to time comprises the whole or part of the Trust Fund notwithstanding that any act or omission by the Trustees in the exercise of those powers and discretions would be, or could be, contrary to the principles governing the investment of trust funds set out in the Trustee Act 1956. This clause expresses a "contrary intention" for the purposes of section 13D of that Act.

12.5 **Unanimous approval**: Where there is more than one Trustee in office, except as provided in this deed, all powers and discretions of the Trustees shall be exercised with the unanimous approval of the Trustees.

…

13. TRUSTEES DEALING WITH BENEFICIARIES

13.1 Without in any way limiting any of the powers and discretions vested in the Trustees by law or by this deed, the Trustees may:

(a) sell, lend, lease or license to any Beneficiary or allow any Beneficiary to occupy or use any property of the Trust Fund on any terms;

(b) for the benefit of any Beneficiary, given guarantees and/or indemnities, or enter into any obligation, either alone or jointly with any other person, and give mortgages or other securities in support of, or in place of, any such guarantee, indemnity or obligation, over any of the property of the Trust Fund.

14. TRUSTEE/BENEFICIARY

14.1 **Self benefit**: A Trustee who is also a Beneficiary may exercise any power or discretion vested in the Trustees in his, her or its favour.

…

17. APPOINTMENT AND REMOVAL OF TRUSTEES

17.1 **Principal Family Member's power of appointment and removal**: The Principal Family Member shall have the powers, exercisable, from time to time, to appoint and remove Trustees.

17.2 **Transfer of powers of appointment and removal:** The Principal Family Member may transfer the powers of appointment and removal of Trustees to such person or persons as the Principal Family Member may nominate by deed or will.

…

17.5 **Power of appointment unrestricted:** The holder of any power of appointment of Trustees may, subject to any contrary intention expressed in the deed (if any) transferring the power to that person, exercise that power in favour of himself or herself.

…

19. TRUSTEE'S CONFLICT OF INTEREST

19.1 **Negation of conflict**: A Trustee may act as such and exercise all of that Trustee's powers and discretions notwithstanding that:

(a) that Trustee is associated as a director, or otherwise in a private capacity, or as Trustee of any other trust, with any company or other person to which the Trustees sell or lease any property forming part of the Trust Fund, or in which the Trustees hold or propose to acquire shares, securities or other rights as part of the Trust Fund, or with which the Trustees otherwise deal as Trustees of the Trust; or

(b) that Trustee may be a Trustee of any other trust to or from which the Trustees propose to sell or purchase shares, securities or other rights or property or with which the Trustees otherwise deal as Trustees of the Trust; or

(c) the interests or duty of that Trustee in any particular matter may conflict with the duty of that Trustee to the Trust Fund or any Beneficiary; or

(d) such Trustee is personally purchasing or taking on lease any property forming part of the Trust Fund, or personally selling any property to become part of the Trust Fund, or is otherwise dealing with the Trust Fund in a personal capacity as well as that of a Trustee.

…

21. LIABILITY AND INDEMNITY OF TRUSTEES

21.1 **No liability of Trustees with exceptions:** No Trustee or former Trustee of any officer of any Trustee or former Trustee shall be liable for any loss incurred by the Trust Fund or by any Beneficiary not attributable to that Trustee's or officer's own dishonesty, or to the wilful commission or omission by that Trustee or officer of an act known by that Trustee or officer to be a breach of trust. No Trustee shall be bound to take any proceedings against a co-Trustee or former Trustee for any breach or alleged breach of trust committed by a co-Trustee or former Trustee or any officer of any co-Trustee or former Trustee.

…

23. AMENDMENT OF TRUST DEED

23.1 The Trustees may, with the prior written consent of the Principal Family Member while the Principal Family Member is living, at any time or times during the Trust Period, and without infringing the rules against perpetuities, vary, revoke or enlarge all or any of the provisions of this deed concerning the management or administration of the Trust.