IN THE SUPREME COURT
OF NEW ZEALAND **SC 32/2023**

I TE KŌTI MANA NUI
O AOTEAROA

BETWEEN	**RAEWYN PHYLLIS COOPER**
	Appellant
AND	**MARCUS ROBERT WILLIAM PINNEY**
	Respondent
AND	**JENNIFER JANE PINNEY and PHILIP JOHN SMITH as trustees of MRWP FAMILY TRUST**
	Interested parties

SUBMISSIONS FOR THE APPELLANT

DATED: 20 SEPTEMBER 2023

THESE submissions are filed by **STEVEN JULIAN ZINDEL**, Solicitor for the abovenamed Appellant whose address for service is at the offices of ZINDELS, Barristers & Solicitors, 21 New Street (PO Box 1023), Nelson, phone (03) 548 0039, email steven@zindels.co.nz. Counsel Acting: Peter Watts KC (peter@peterwattskc.com)/Steven Zindel/Isaac Hikaka (isaac.hikaka@millslane.co.nz)

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MAY IT PLEASE THE COURT:

A. Central question

1. The central task for the Court in this appeal is determining whether the Respondent's rights and powers under the trusts created by the MRW Pinney Family Trust (**the MRWP Trust**) entail that he possesses rights or interests in relation to the assets of the trust that fall within the ambit of the Property (Relationships) Act 1976 (**the PRA**).

2. To come under the PRA the assets in question have to be "property" of one of the parties to the relevant domestic relationship, within the definition found in s 2 of the PRA. That definition extends inter alia to "any estate or interest in any real property or personal property" (paragraph (c)) and to "any other right or interest" (paragraph (e)).

3. In *Clayton v Clayton* [2016] NZSC 29, [2016] 1 NZLR 551 at [50] it was held that the husband's: "powers and entitlements as Principal Family Member, Trustee and Discretionary Beneficiary give him such a degree of control over the assets of the [trust] 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".

4. There are a number of differences between the trust deed and the background facts in *Clayton* and those of the present case,[1] but it is submitted that only one difference is potentially decisive, namely the requirement in the MRWP Trust for there to be at least one trustee other than the domestic partner (the word "partner" herein used to encompass both spouses and partners as defined in the PRA).

5. It is submitted that where the partner holds the power of appointment and removal of all trustees (or a majority of trustees if unanimity is not required for trustee decisions) the requirement for one trustee other than the partner (for want of a better term, "the second-trustee requirement") is not itself a sufficient ground for distinguishing the reasoning in *Clayton* in relation to the application of the PRA to the trust. It would be remarkable, it is submitted, if social legislation such as the PRA and the approach taken to it in *Clayton* could be end-run by the simple device of

[1] See Appendix for a more detailed comparison.

appointing a separate trustee who holds that status at the will of the partner. In principle, the position is the same even if the partner is not a trustee at all.

6. The remaining issues in this appeal are consequential on this central issue and relate to the application of the PRA to the Respondent's interests in the MRWP Trust, in particular under s 9A of the PRA, and to the form of order.

B. Brief outline of the facts

7. The parties began their domestic relationship in or about September 2004. They separated in April 2014. During the relationship the parties had two children (born in 2007 and 2009). Throughout the relationship the Appellant worked without formal remuneration (not always fulltime) alongside the Respondent in a number of farming and other businesses (see Section F for more detail).

8. Initially the relevant farm was one of the assets owned by a family trust, the Pinney Family Trust, of which the Respondent was a beneficiary along with his brother. In late 2005 and early 2006, after the relationship had begun, the assets of this trust were divided, and, as explained below, the farm and other assets transferred by the trustees to the MRWP Trust.

9. Contemporaneous evidence establishes that the MRWP Trust was intended to benefit the Respondent without directly passing the assets to him (CA, [10]–[13]). This evidence also supported a finding that the intention of the settlors of the new trust (one of whom was the Respondent) was to provide some protection for the Respondent from any PRA claim that may be made on the assets in the future. Ironically, the way that intention was expressed by one settlor of the MRWP Trust (Mr McIntyre) to the Respondent as another settlor was that the assets should remain as "separate property" under the PRA (i.e. the property of the Respondent), as opposed to third-party property (CA, [11] COA431-432).

10. At about the same time as the transfer of the farm, a company was formed called Te Taho Deer Park Ltd ("the Company"), 98 out of the 100 shares of which were owned by the trustees of the MRWP Trust, with one share each being owned by the Appellant and the Respondent. The farming and other businesses that the parties worked together in were owned by the Company. The Respondent was its sole director. There was no formal lease of the farm between the trustees of the Trust and

the Company, and rental for it was recorded in the Trust's books but apparently not paid (CA, [89]). Any notional surplus derived by the Trust appears to have been returned to the Respondent as a distribution (CA, [89]). The affairs of the Company were managed by the Respondent informally, with the parties' day-to-day living needs being met from the company's resources without formal accounting (CA, [39] and [89]).

11. Since the parties' separation, the Appellant has received very little from the Respondent. She received some $25,000 in maintenance in 2014, and at about that time obtained from the Respondent a payment of $5,000, a cheap car, a few other chattels and three banana boxes of meat (COA142, 207). This was swiftly outweighed by legal costs, prior to present counsel and legal aid (COA839-864).

12. The 130-hectare farm, at Te Taho, Whataroa, Westland remains the principal asset of the MRWP Trust. At the date the MRWP Trust was established the farm was valued by QV desk-top at 20 December 2005 at $1.1 million (COA 443). The farm was distributed from the Pinney Family Trust to the MRWP Trust by the deed of partial distribution dated 16 December 2005 (before the MRWP Trust was in fact formally settled), which noted the farm's book value as $469,669 (COA439). It had been bought for $485,000 on 29 September 2000 (COA364). The Court of Appeal indicated that it was transferred at book value (CA judgment [15]), but the document stated that the transfer was at valuation, which was presumably the $1.1m (less the debts of $311,120.87 run up by the Respondent with the Pinney Family Trust). The final distribution to the MRWP Trust (of cash) was apparently on 19 June 2006 (COA479). There exists, inconsistent with the deed of distribution by way of gift, a sale agreement for the farm dated 27 January 2006 from the Pinney Family Trust to the MRWP Trust at $1.1m (COA447).

13. On 30 April 2014 (close to the date of separation), the value of the farm was assessed at $1.86m, with a dwelling and curtilage apportionment of $330,000 and a market rent assessment for the homestead of $17,680 pa (COA1599). By 12 November 2018, the farm's value had fallen to $1.545m with the same $330,000 dwelling and curtilage apportionment and homestead rent of $16,640 pa (COA1598). The improvements after separation are noted to have had a value of $25,000. The farm was not valued in depth by a registered valuer before Mr Hancock was instructed in 2018 (COA362-363). At the date of hearing in the Family Court in 2018 it was accepted as valued at

$1.545 million (CA, [22]). At that time, there were also family chattels worth $45,000 (CA, [99]).

C. The second-trustee requirement, and powers of appointment of trustees

14. Two arguments might be used to explain why a second-trustee requirement makes *Clayton* distinguishable. First, the requirement changes the whole meaning, and if not meaning then import, of the remaining provisions of the trust deed, so that the trustees no longer have the discretion to favour the partner that the Supreme Court in *Clayton* concluded that the trustee there had. Secondly, even if the second trustee has the same breadth of discretion as the trustee in *Clayton*, there can be no guarantee that the second trustee will agree with proposals for distribution that are made by the partner. Each trustee is as powerful as the other.

15. It is, in fact, not necessary for this Court to determine whether either of these arguments is tenable in order to decide the present case. This is because neither argument holds water once the partner is given the power the remove and appoint the trustees, as is the position in the present case.

16. As to the argument based on change of meaning and import, if in *Clayton* the Court was not prepared to imply substantial controls–such as breach of trust, or breach of fiduciary duty–on the partner's powers to distribute trust assets to himself, why suddenly would it be appropriate to imply restrictions on his doing so with the assistance of a colleague whose appointment the partner controls? This is particularly the case where the power to appoint and remove trustees is one held by the partner in his own right.[2]

17. The weakness of an argument based solely on the second trustee not being bound to agree with the partner almost speaks for itself when the partner is free to remove and replace a nay-saying second trustee.

18. It is submitted that there *are* no meaningful controls on the Respondent's power to appoint and remove trustees in the present case. There are no express controls, nor

[2] Note that in *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd* [2011] UKPC 17, [2012] 1 WLR 1721 at [28] the power to revoke the trust held by a non-trustee was treated as non-fiduciary, as was the settlor's power to make himself the sole beneficiary in *Webb v Webb* [2020] UKPC 22, [2021] 2 NZLR 376 at [83]. In *Kennon v Spry* [2008] HCA 56, (2008) 238 CLR 366 at [46] the power given to the settlor to vary the trusts was considered to be non-fiduciary. Cf *McLaren v McLaren* [2017] NZHC 161 at [49] and [63].

would it be appropriate to imply substantive controls when the powers of distribution would not otherwise be subject to such controls.

The Court of Appeal's reasoning

19. The majority of the Court of Appeal held that the second-trustee requirement did introduce substantive controls on the Respondent's powers. The principal steps in the majority's reasoning were as follows:

    19.1 A valid trust requires trustees to exercise their powers subject to fiduciary obligations to take account of the interests of all beneficiaries and these duties were not excluded (CA [107], [110]);

    19.2 The finding of Miller J in dissent that the partner had the equivalent of a general power of appointment in relation to the trust assets (i.e. a privilege to distribute all the trust assets to himself) was inconsistent with his finding that there was a valid trust (CA [108]);

    19.3 Unlike in *Clayton*, the majority of the MRWP Trust assets were not settled by the partner (CA [109]), nor did the Respondent have the power to remove or add discretionary beneficiaries, and any power to alter the trust deed had expressly to be exercised in the interests of the beneficiaries as a whole (CA [113]);

    19.4 Under the deed, there must always be at least two trustees who must exercise independent judgment but whose decisions must be unanimous (CA [111]);

    19.5 The Respondent's power to appoint and remove trustees is a fiduciary power and must be exercised taking account of the interests of all beneficiaries (CA [114]).

20. The first two of these reasons, even if they were correct in law, are, it is respectfully submitted, red herrings. The Court in *Clayton* decided to leave open whether the trust deed in that case created a valid trust (SC [127]), concluding that the issue was not one of "great practical moment" (SC [108]). Therefore, if there are insufficient differences between the MRWP Trust and the trust deed in *Clayton* to distinguish *Clayton*, then it no more matters whether there is a valid trust in the present case than it mattered in *Clayton*. To reverse the Court of Appeal in the present case, therefore, it is not necessary for the Court to uphold Miller J's conclusion that there was a valid trust. It will be submitted below that the MRWP Trust is a valid trust but that, if it is

accompanied by fiduciary obligations at all, such obligations as exist would not preclude the Respondent from arranging a distribution of the trust assets to himself.

21. Next, the differences between the background facts and the deed in *Clayton* and the MRWP Trust that the Court of Appeal relied upon are not sufficiently compelling to make *Clayton* distinguishable. As to the background facts, the main underlying assets of the trust in *Clayton* belonged to the settlor before the relevant relationship began and were, therefore, prima facie separate property under the PRA (see the discussion at SC [86] and ff). This is broadly the position in the present case (the Respondent being a discretionary beneficiary of an earlier trust). It is not the case that for *Clayton* to apply, the trust has to have been "*settlor*-controlled".[3]

22. In both cases the relevant trust deed was executed after the domestic relationship had commenced. The lack of a power in the MRWP Trust to change the named beneficiaries is also of little moment given the Respondent's ability to appoint himself and anyone else, and to remove anyone, as trustee, coupled with the absolute discretions conferred on the trustees as to distributions of trust assets, including to the partner (noting also that in *Clayton* the list of final beneficiaries *was* fixed). The limits in the MRWP Trust on altering the terms of the trust are likewise not of much moment. Even viewed collectively, these points do not create a case for distinguishing *Clayton*.

23. As for the requirement for a second trustee in the MRWP Trust, it is submitted that any prima facie obligation on the second trustee to act independently of the Respondent is swept away by the fact that the drafter was content to give the Respondent unqualified control over who that person is.

24. This then leaves the Court of Appeal's conclusion that the Respondent's power to remove and appoint trustees was not unqualified but was implicitly subject to fiduciary controls that required the interests of all the beneficiaries to be considered. To reiterate, if fiduciary controls do not apply, or apply only in a minimal way, to the powers of distribution of income and capital of the trust where the partner is the sole trustee, it is difficult to see why a court should imply such controls over a discretion to appoint and remove a second trustee vested in the same person. There is no basis for reading into the power a duty on the partner to choose a second trustee who will

[3] Contrary to the submission made in the Respondent's Submissions in Opposition to Application for Leave dated 22 May 2023.

be a brake on him or her. The second-trustee requirement is not a nullity or sham, but neither in *Clayton* was the listing of family members or the wife as beneficiaries.

25. The second-trustee requirement is, in short, window-dressing, to which the Court should respond with the same "worldly realism"[4] it applied in *Clayton*. Such realism requires no more of the Court than declining to read into the trust deed words that are not there.

26. It is submitted that the cases that the Court of Appeal majority relied on for its conclusions are distinguishable and, in any event, do not bind the Supreme Court. The cases were: *Carmine v Ritchie* [2012] NZHC 1514; *Harre v Clarke* [2014] NZHC 2533; and *New Zealand Māori Council v Foulkes* [2015] NZCA 552, [2016] 2 NZLR 337. Also relevant is *Brkic v White* [2021] NZCA 670, [2021] NZFLR 840.

27. The first three cases pre-dated *Clayton* and did not involve a domestic relationship claim nor consideration of the PRA. *Carmine v Ritchie* and *Harre v Clarke* both appear not to have involved trusts that concentrated control (and absolute discretion) in one beneficiary as in *Clayton* and the present case. Neither judgment suggests that the trustees there had an absolute discretion as to how they dealt with the trust property. In *Harre*, moreover, the party with the powers of appointment and removal of trustees appears not to have been a beneficiary of the trust. In neither case was the power of appointment of trustees found to have been improperly exercised. The *New Zealand Māori Council* case did not involve a family trust, and again the trust instrument almost certainly did not confer absolute discretions on any parties.

28. *Brkic v White* involved a dispute between judgment creditors of a principal beneficiary of a highly discretionary trust and the trustees, so is more analogous to the present case. Dunningham J for the Court, after referring to the foregoing cases, recorded that the majority of leading English texts on trusts also supported most powers of appointment of trustees as "carrying fiduciary obligations" (at [29]–[34]). However, the Judge noted that *Lewin on Trusts* acknowledged that in some circumstances the power may be subject only to the proper-purposes doctrine rather than (the implicitly more interventionist) fiduciary obligations. Her Honour went on to note that *Lewin on Trusts* also acknowledged that *Underhill & Hayton, Law of Trusts and Trustees* states

[4] The phrase comes from *Charman v Charman (No 4)* [2007] EWCA Civ 503, [2007] 1 FLR 1246 at [57], and was adopted in *Clayton* at [79] and by Miller J in the Court of Appeal at [58]. See also the reference to the "Andora cat problem" in *Pugachev* [2017] EWHC 2426 (Ch) at [438].

that "where a power of removal coupled with a power of appointment of trustees is vested in the principal beneficiary, the obvious inference is that the power has been conferred on the beneficiary to look after his own personal interests and not those of the beneficiaries as a whole". The decisive point in the Court's ruling in *Brkic* in favour of the trustees and against the outside parties was that the relevant trust deed prohibited a trustee who was also a beneficiary from exercising any trust powers in their own favour ("the conflicts clause").[5] In these circumstances, using the power of appointment for selfish purpose would be an improper purpose if not a breach of fiduciary duty (at [35]).

29. It is submitted, however, that the Court in *Brkic* erred in failing to give *any* weight to the fact that while the conflicts clause prevented the principal beneficiary from exercising her trustee powers in her own favour, the next sub-clause permitted the other trustee in such circumstances to act alone (and therefore without unanimity) and to favour the principal beneficiary. Since the principal beneficiary as settlor had the power to appoint and remove trustees, and to appoint a corporate trustee whereupon the conflicts clause would not apply, it is submitted that the principal beneficiary did retain control of the trust. It was as if the trust had only one trustee who could be appointed and removed at will by the partner.[6] The conflicts clause was only a façade. For this reason it makes no difference in the present case that it now appears that the Respondent has resigned as a trustee of the MRWP Trust.[7] Not only can he put himself back on as trustee, at will, but he does not need to in order to control the exercise of the unfettered discretions conferred by the Trust. It is submitted that the Court's conclusion in *Brkic* on the conflicts rule should not be supported.

30. Brief mention should also be made of *Legler v Formannoij* [2022] NZCA 607, currently under appeal to this Court. This case was argued and decided on the basis that the power of appointment of trustees in that case, held by the sole remaining trustee, had to be exercised in good faith and for a proper purpose. The dissenting judge, Cull J, considered that the power was also subject to fiduciary duties, a different thing.[8] The majority judges expressed no view on that subject. The trust deed in *Legler* was closer

[5] *Brkic v White* [2021] NZCA 670, [2021] NZFLR 840 at [35].
[6] It made no difference in *TMSF v Merrill Lynch*, above, that the single trustee was a non-beneficiary.
[7] The dictum in *Clayton*, above at [124] that things might have been different had Mr Clayton ceased to be trustee is, it is respectfully submitted, wrong.
[8] See *Legler v Formannoij* [2022] NZCA 607 at [55].

to a traditional family trust than the one in *Clayton* and the present case. In particular: both partners were initially trustees and beneficiaries; it appears that no absolute discretions were conferred; unless the sole trustee was a corporation, there had to be at least one non-beneficiary trustee (as in *Brkic*, which, however, was not cited); and trustees who were beneficiaries could not participate in decisions in their own favour. The majority of the Court concluded that there was no improper purpose on the facts, in circumstances where the sole remaining trustee, the first respondent, exercised her powers to appoint a corporate trustee of which she was the sole director and controlling shareholder. *Legler* is distinguishable from the present, whatever the outcome of the appeal.

Australian and English cases on powers of appointment and removal of trustees

31. Although Australian case law does not speak with one accord, a strong line of authority dating back to the 1990s supports the view that, at least in relation to highly discretionary trusts, there is no presumption that fiduciary duties attach to the power to appoint and remove trustees.

32. A useful recent authority is *Baba v Sheehan* [2019] NSWSC 1281. In this case a unit trust was established to run an optometry business, the beneficiaries of which were entities controlled by the parties working in the business. Rather surprisingly perhaps, the trust deed gave the power to appoint trustees to just one of those parties. He used that power, over the objection of the others, to appoint as trustee a company in which he and his wife were directors and shareholders. Parker J declined to follow a much-cited first-instance English decision, *Re Skeats' Settlement* (1889) 42 Ch D 522, which had taken the view that fiduciary duties do accompany powers of appointment of trustees, so that the appointer cannot appoint themselves or a party related to them as trustee without express authorisation. The Judge noted (at [67]) that (then) Professor Finn had in his classic work, *Fiduciary Obligations* (1977), seen powers of appointment of trustees as not automatically governed by fiduciary considerations.

33. On appeal to the New South Wales Court of Appeal, Brereton JA endorsed the views of Parker J at first instance: *Baba v Sheehan* [2021] NSWCA 58 at [18]. The other two judges, Emmett and Simpson AJJA, took a more cautious stance, which is perhaps not surprising since the trust in question was essentially a vehicle for a joint venture rather than a typical family trust. Nonetheless, the judgment of Brereton JA is not a

dissenting judgment and is, it is submitted, highly persuasive in the context of the present appeal.

34. Without finally deciding the point, Brereton JA considered that there is no presumption that powers of appointment of trustees are governed by fiduciary principles (at [3]–[4]). He stated (at [4], footnotes omitted):

> Although there are cases that hold that a power of the present kind is also fiduciary in nature, this is open to serious doubt, at least as a general rule, and it is clear that the appointment of the appointor himself or herself as trustee, or of a company controlled by the appointor, is not necessarily prohibited, although many of the cases turn on the terms of the particular trust deed. In theory, it is difficult to see how, in the context of the modern discretionary trust, involving a nominal settlor, a trustee who can be removed and replaced by an appointor who is typically the "true" settlor, and discretionary beneficiaries who have no proprietary interest but a mere right to due administration, there is any reposing of trust or confidence in, or any reliance on, the appointor, by the beneficiaries.

35. It should also be noted that all counsel in *Baba v Sheehan* accepted that the starting point is that a power of appointment of trustees must be exercised for a proper purpose,[9] but the judgment of Brereton JA on appeal supports the proposition that the proper-purpose doctrine is simply a contextual concept, designed to further the intentions of the settlor, rather than to proscribe conduct in the way fiduciary duties do.[10] On this approach, if self-interest is a proper purpose, then so be it. The Judge stated (at [8]–[9]):

> The appellants' case was that if Mr Sheehan's only purpose in appointing Silktote as trustee was to obtain control of the trust for himself (which Mr Sheehan denied), that was an improper or extraneous purpose within the doctrine.
>
> I would not accept that a purpose of maintaining or exerting control of a trust is, absent any intention that the appointee act other than properly in accordance with its responsibilities as trustee, necessarily inconsistent with the purpose for which a power of appointment of this kind is created, particularly in the context of the modern discretionary trust. Usually, a significant if not dominant purpose of this type of power of appointment is to reserve to the appointor the ability to "control" the trust by removing and replacing the trustee.

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[9] See [2019] NSWSC 1281 at [42]; [2021] NSWCA 58 at [5].

[10] In *Grand View Private Trust Co Ltd v Wang* [2022] UKPC 47, Lord Richards appeared to attach the proper-purpose doctrine only to fiduciary powers: see at [1], [52], [56] and [102]. However, the Judge accepted that context and purpose are relevant to determining what a non-fiduciary power was intended to achieve: see at [112]. See also *Lewin on Trusts* (20th ed, Sweet & Maxwell, 2020) at para 33-012: "The principle invalidating an exercise of a power which is fraud on the power has no application to general powers".

36. The earliest case on which Brereton JA relied in *Baba v Sheehan* was *Re Marriage of K R and M I Davidson (No 2)* (1990) 14 Fam LR 817 at 824 where the Full Court of the Family Court stated:

> It was argued that such a manipulation of the provisions of the trust would amount to a breach of the fiduciary duty of the husband as appointor relying on the decision of Kay J in *Re Skeats' Settlement*. Whatever may have been the position 100 years ago, Australian courts today have to look at the reality of the situation and the purpose which family trusts serve today.

Brereton JA went on to point out (at [11]) that the foregoing reasoning appears to have been endorsed by the High Court of Australia in declining leave to appeal in that case. Brereton JA also observed that (at [4]): "it is difficult to reconcile the decision of the High Court [of Australia] in *Montevento Holdings Pty Ltd v Scaffidi* [2012] HCA 48, (2012) 246 CLR 325 which upheld the appointment of a company controlled by the appointor, with a fiduciary obligation to avoid preferring one's own interest." A long list of other Australian authority on the topic is collected in footnote 3 of Brereton JA's judgment, to which can be added *Re Reserve Hotels Pty Ltd* [2021] NSWSC 376 at [131].

37. A similar approach to that taken in the foregoing cases was adopted by Birss J in *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch) at [188]:

> An analysis based on the idea of a fraud on the power does not add anything. If the purpose of the protector's powers in this case allows the protector to act in his own selfish interest then it cannot be a misuse of such a power to exercise it for example by vetoing distributions to any other of the discretionary beneficiaries or removing a trustee who does not act in the protector's wishes.

On the facts of that case, the relevant New Zealand-law deed provided that at least one trustee must not be a beneficiary, and the trustee at the relevant time was in fact a New Zealand company owned and controlled by local solicitors. Birss J held, nonetheless, that the defendant's powers as protector to remove and replace trustees was not fiduciary (at [267]). The protector also had a veto power over most classes of decision to be made under the trust. The assets of the trust were treated as belonging to the defendant.

38. It is submitted, therefore, that the correct approach is not to start with any presumption that fiduciary duties attend powers of appointment and removal of trustees but to assess the position in the light of the provisions of the trust deed as a whole and the context in which it was created. A similar approach was taken by the Privy Council in *Gany Holdings PTC (SA) v Khan* [2018] UKPC 21 at [20] per Lord

Briggs in determining whether, when a settlor transfers property to existing trustees of a family trust, he or she intends the property to be held on the same trusts as the existing assets.[11]

D. Is there a trust in a case like *Clayton* and the present?

39. To reiterate, it is not necessary for the Court to decide whether an instrument like that in *Clayton* and this case is a valid trust in order to find that the assets in question are caught by the PRA. However, it is proposed now to address the issue and to argue that at least the instrument in the current case creates a valid trust.[12] For that reason, the Court need not feel reticent that in taking the trust deed at face value, and applying worldly realism to it, the Court has to disown its form.

40. Yet, the majority of the Court of Appeal (see above, para 19) suggested that Miller J's acceptance that the MRWP Trust was a valid trust was inconsistent with his conclusions that: (a) the powers conferred on the Respondent amounted to a general power of appointment; and (b) there were no substantive fiduciary obligations owed by the trustees in the exercise of their powers. It is proposed to take these points in reverse order.

Fiduciary obligations not an essential part of trust at equity

41. Before addressing the point of principle about the place of fiduciary obligations in the law of trusts, two specific points can be made about the MRWP Trust even if no, or minimal, fiduciary obligations are owed under the trust to the beneficiaries as a whole.

42. First, the general powers of appointment conferred on the trustees and the Respondent by the Trust would not preclude any non-beneficiary trustee from owing fiduciary duties to the Respondent if not to the other named beneficiaries.

43. Secondly, if a party holding a general power of appointment fails to exercise the power in their lifetime, the trustees may then hold the trust property on trust for the

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[11] "It is not a case of a competition between competing legal presumptions...but a pragmatic analysis of the alternatives, and a sensible deduction as to what the transferor intended."

[12] It is less clear that the deed in *Clayton* did so since there the sole trustee also had the power of appointment over the assets. But were the trustee to die intestate a trust with undistributed assets might have operated.

persons who take on default, to whom fiduciary duties might be owed.[13] This may be the position under clause 11 of the MRWP Trust.[14]

44. Turning to the more fundamental point, the core concept behind the trust at equity is not fiduciary obligation, but an undertaking by a trustee to hold and deal with property on terms that are set by the settlor and that are legally enforceable by a beneficiary. The trustee therefore assumes an obligation to comply with the express and implied terms of the trust, and to exercise any powers consistently with and for the purposes for which the trust was established. The trustee must also act honestly and in good faith.[15] But a trust does not necessitate the imposition of fiduciary obligations on top of those requirements. The relevance of s 13 of the Trusts Act 2019 (**the 2019 Act**) to this question will be addressed below.

45. What results from that undertaking is a separation of ownership of trust assets, between formal ownership (in the trustee), and beneficial ownership (in the beneficiary). A formal owner can also be a beneficial owner, but a trust cannot exist where the sole formal owner is also the sole beneficial owner.[16]

46. In a discretionary trust, the right to sue to ensure that the terms of the trust are abided by is all that usually exists, since the named beneficiaries do not, until the discretion is exercised in their favour, have any proprietary interest in the trust assets themselves, but rather only a *spes* or hope.[17] It is sometimes said that the beneficial ownership in the trust assets themselves is in suspense, the only crucial thing being that the sole trustee not have full beneficial ownership.[18]

47. On this understanding of the trust, the named beneficiaries other than the Respondent may have standing to enforce the terms of the MRWP Trust if the trustees were to deviate from those terms. However, a challenge directed at a disposition of trust assets approved by the Respondent is not likely to succeed because of the general powers of appointment conferred by the trust in the Respondent's favour.

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[13] For this possibility, see *TMSF v Merrill Lynch*, above, at [46] citing *Re Churston* [1954] 1 Ch 334.
[14] But note that s 26 of the Wills Act 2007, following the Wills Act 1837 (UK), deems that any disposition in a will that is capable of including property over which the testator had a general power of appointment includes that property and deems that power to be exercised by the will unless otherwise provided.
[15] See Trusts Act 2019, s 25.
[16] See too Trusts Act 2019, s 14.
[17] *Hunt v Muollo* [2003] 2 NZLR 322 (CA) at [11]; *Johns v Johns* [2004] 3 NZLR 202 (CA) at [34]; *Kain v Hutton* [2008] NZSC 61, [2008] 3 NZLR 589 at [55].
[18] See *Commissioner of Stamp Duties v Livingston* [1965] AC 694 (PC) at 712–713; *Kennon v Spry*, above at [49]–[50].

48. Most express trusts are accompanied by some degree of fiduciary supervision, as s 13 of the 2019 Act recognises. But it is equally clear, both at equity and under the 2019 Act,[19] that the two most common facets of fiduciary obligation—the duty to avoid conflicts of interest and the duty not to profit from position—apply only "unless [otherwise] authorised". It is very common for one or more trustees to also be a beneficiary notwithstanding that, without authorisation in the trust deed, that would offend both the conflict and the profit rules. Another duty of trustees that is said to be of fiduciary character is the duty "to consider whether or in what way they should exercise their power".[20] Relatedly, s 32 of the 2019 Act provides that "a trustee must consider actively and regularly whether the trustee should be exercising 1 or more of the trustee's powers." But, as with the conflict and profit rules, this is only a default duty.[21]

49. To the extent that it too might be regarded as an aspect of fiduciary regulation, the duty of impartiality in s 35 is also only a default duty, and can be modified both expressly or implicitly.[22] It is, in fact, doubtful whether a duty of impartiality applies to discretionary trusts, even a standard one with independent trustees.[23] Any such duty as exists with discretionary trusts is an etiolated one. So much was stated in the Court of Appeal in *Kain v Hutton* [2007] NZCA 199 at [243]:[24]

> Any duty of impartiality must be viewed against the limited rights of discretionary beneficiaries. The duty of impartiality does not preclude a trustee from making a discretionary decision that benefits one beneficiary and disadvantages other beneficiaries.

As Lord Wilberforce said of the discretionary trust in *McPhail v Doulton*:[25] "Equal division is surely the last thing the settlor ever intended." The same point can be made about powers to remove and add beneficiaries. Almost by definition, such powers do not have to be exercised in the interests of existing beneficiaries.[26]

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[19] See Trusts Act 2019, ss 28, 31 and 34.
[20] *McPhail v Doulton* [1971] AC 424 at 456.
[21] Trusts Act 2019, s 28.
[22] See Trusts Act 2019, s 5(4). Miller J at [91] concluded that the impartiality duty was inapplicable.
[23] In *Edge v Pensions Ombudsman* [2000] Ch 602 (CA) at 627 doubts were expressed whether any general duty of impartiality exists, as opposed to being a concept that balances the interests of capital and income beneficiaries. See P Watts "Trustees with Absolute Discretions—a Case of Dr Jekyll and Mr Hyde in the New Zealand Courts" (2022) 36 TLI 3 at 22–24.
[24] See on appeal *Kain v Hutton* [2008] NZSC 61, [2008] 3 NZLR 589 at [23] (trustees "perfectly entitled" to distribute all capital to one beneficiary to the exclusion of the others).
[25] [1971] AC 424 (HL) at 451.
[26] See *Grand View* [2022] UKPC 47 at [121]; *Pollock v Pollock* [2022] NZCA 331 at [101].

50. Given then that the 2019 Act expressly permits every component typically making up the complement of "fiduciary obligations" to be excluded, it is submitted that very little weight can be put on the fact that s 13 of the Act describes the "characteristics" of an express trust as involving a fiduciary relationship. The presence of such a relationship is indeed characteristic, but not more. Fiduciary obligations are not included in the Act's mandatory duties in ss 22–27.

51. Moreover, the 2019 Act is not a code of the law of express trusts. This is made clear by s5(2)(b)(iii) which provides that courts may where necessary and appropriate apply the Act to "a trust that does not satisfy the definition of express trust but that is recognised at common law or in equity as being a trust", and by s 5(8), which provides that the Act "is not an exhaustive code of the law relating to express trusts". So, even if fiduciary obligations were an essential element of a trust under the 2019 Act, that Act expressly disowns being exhaustive of the subject of express trusts.

52. Although there are relatively few judicial statements that a trust need not be accompanied by any fiduciary obligations, the proposition has the distinguished support of the late Lord Millett. Writing extrajudicially, Lord Millett propounded that a trust need not be accompanied by fiduciary obligations.[27] He accepted that normally the express trust will be accompanied by some degree of fiduciary obligation, but pointed out that the reverse is true with most constructive trusts. Lord Millett's views on this issue are not confined to constructive trusts. He adopted a dictum of Lord Lindley that:[28] "All that is necessary to establish the relation of trustee and cestui que trust is to prove that the legal title was in the plaintiff and the equitable title in the defendant." Millett LJ (as he then was) made the point more generally in *R v Chester and North Wales Legal Aid Area Office No 12, ex parte Floods of Queensberry Ltd* [1998] 1 WLR 1496 (CA) at 1500: "The mere separation of legal and equitable ownership does not without more result in a fiduciary relationship". This conclusion was followed in *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195, [2013] Ch 91 at [80].

53. Longstanding judicial and academic support also exists for the view that the typical bare trust, namely one where the trustee's sole task is to hold the legal title to an asset and not do anything with it until instructed, will also involve only the most tenuous

[27] PJ Millett "Restitution and Constructive Trusts" (1998) 114 LQR 399 at 404–405.
[28] *Hardoon v Belilios* [1901] AC 118 (PC) at 123.

fiduciary obligations, if any, because there are no discretions to exercise.[29] It is at least arguable that the trustees of the MRWP Trust are bare trustees for the Respondent.

54. A contrary argument would be that the presence of fiduciary obligations is part of the so-called "irreducible core" of a valid trust.[30] However, it is submitted that the concept of an irreducible core that must include fiduciary obligations is not an established part of trust law at equity in leading Commonwealth jurisdictions. The judicial authority most often cited for the existence of "the core" is a dictum of Millett LJ in *Armitage v Nurse* [1997] EWCA Civ 1279, [1998] Ch 241 at 253, referring not to fiduciary obligation but to "the duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries".[31] As already noted, Lord Millett seems to have regarded the simple separation of legal and beneficial ownership as constituting the irreducible core and not the assumption of fiduciary obligation.[32] Further, the main thrust of Millett LJ's judgment in *Armitage* was to reinforce the flexibility of settlors to determine the content of the trustee's obligations.[33]

55. This Court in *Clayton* did refer to an irreducible core (at [120] and [124]), but not in terms that required the presence of fiduciary obligations. It appears that the Court was not certain whether any fiduciary obligations attached to the trust at issue in that case (compare [58] with [64]). If there were any fiduciary obligations the Court considered that they were very attenuated ([64]): "the normal constraints of fiduciary obligations are not of any practical significance". In the end, the Court decided not to rule on whether a valid trust existed ([127]). It was significant that the domestic partner in that case was the sole trustee.[34]

56. Finally on this topic, even if some degree of fiduciary accountability were necessary for a trust, it is a general principle that fiduciary obligations must not contradict the intentions of the party conferring the powers, or the terms on which those powers have been conferred.[35] It is respectfully submitted, therefore, that Miller J in the

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[29] See *Underhill & Hayton, Law Relating to Trusts and Trustees* (20th ed, LexisNexis, 2022) at [58.35]; *Lewin on Trusts* at paras 1-036 to 1-041; P Finn *Fiduciary Obligations* (Law Book Co, 1977) at [424]. Cf M Conaglen *Fiduciary Loyalty* (Hart Publishing, 2010) at 197–201.

[30] For discussion, see C Mitchell "Good Faith, Self-denial and Mandatory Trustee Duties" (2018) 32 TLI 92.

[31] See also *Citibank NA v QVT Financial LP* [2007] EWCA Civ 11; [2007] 1 All ER (Comm) 475 at [82]. Cf *Children's Investment Fund Foundation (UK) v Att-Gen* [2020] UKSC 33, [2022] AC 155 at [82]–[83].

[32] In *Webb v Webb*, above at [89] Lord Kitchin also appears to have used the irreducible core concept in this way.

[33] See too the way in which Millett LJ carefully separates out breach of trust from breach of fiduciary duty in judgment in *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) at 16, a leading judgment.

[34] See too *Webb v Webb*, above at [87] and [89] on similar facts.

[35] See *Clark Boyce v Mouat* [1993] 3 NZLR 641 (PC) at 648 ("[a fiduciary duty] cannot be prayed in aid to enlarge the scope of contractual duties"); *Kelly v Cooper* [1993] AC 205 (PC) at 213–214.

present case was correct to conclude that (at CA [72]): "the trustee's powers are so weakly fiduciary, or the other beneficiaries' rights so precarious, that there is no meaningful accountability."

General powers of appointment

57. Turning now to the connection between general powers of appointment and trusts, such powers whether in relation to assets or the appointment and removal of trustees, allow the holder of the power to exercise them solely in the holder's own interests.[36] The beneficiary of a general power of appointment over assets is for many purposes, including the present, effectively the beneficial owner of the assets to which the power relates.[37] Although such a power is often contrasted with "a trust" or "a trust power", where there is no such freedom in the holder of the power, a general power can be, and often is, conferred by an inter vivos trust instrument or by a will (and binds the executors and trustees appointed under the will).[38] The terminology is, therefore, confusing; "a trust" as a concept and "powers" are not exclusive categories. A valid trust can confer both general powers and trust powers.[39]

58. A good illustration of the foregoing principles is *Re Mills* [1930] 1 Ch 654 (CA).[40] Here a will appointed the testator's brother and another person to be executors of the will and trustees of the trusts thereby created. The residuary estate was to be held by the trustees for 21 years, then on certain trusts for the testator's grandson, his wife and issue, and, if those trusts failed (which they did when the grandson died prematurely without spouse or issue), then subject to any appointment made by the brother to such one or more relatives (defined to include the brother) as in the discretion of the brother were most likely to maintain the family fortune and, in default of appointment, to the brother absolutely. The brother could exercise those powers of appointment at any time, including before the 21 years were up. Six years after the testator's death the brother made a revocable appointment in favour of certain relatives, then revoked it in his own favour. The Court of Appeal found that the underlying intention of the testator was that, if he had no surviving direct descendants, his brother, unless that brother decided otherwise, was the intended

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[36] For a concise discussion of "powers", see P Pettit *Equity and the Law of Trusts* (12th ed, OUP, 2012), ch 2; and for detail G Thomas *Thomas on Powers* (2nd ed, OUP, 2012).
[37] See *TMSF v Merrill Lynch*, above at [31]–[46], [53]; *Clayton*, above at [68], [92]–[93]; *Webb v Webb*, above at [89].
[38] In *McPhail v Doulton* [1971] AC 424 at 448 Lord Wilberforce posits a dichotomy of trust and power, but also notes that trustees are often holders of powers (at 449). See too *Re Gulbenkian's ST* [1970] AC 508 at 525.
[39] The intermediate concept of a "mere power" is not here addressed.
[40] Treated as a leading case on powers in *Lewin on Trusts*, ch 33; and P Pettit *Equity and the Law of Trusts*, Ch 12.

beneficiary of the estate. It was a general power of appointment, not burdened with fiduciary duties (see at 661).

59. Whether or not one agrees with the Court's construction of the testator's expressed intentions, *Re Mills* bears similarities to the present in that a general power of appointment of assets could be exercised by one of two trustees solely in his own favour. The Court did not act to restrain the freedom the trust deed gave the holder of the power to allocate all the assets to himself. There was a valid trust but it contained a general power of appointment.

60. Technically, in the present case both trustees have to exercise the general powers of appointment of the assets, but the beneficiary of those powers, the Respondent, controls who those persons are.

61. Furthermore, authority supports a conclusion that a power of appointment can be a general power even though the beneficiary of the power needs the consent of the trustees, or another third party, to its exercise. It is simply a question of construction of the relevant document.

62. A pertinent illustration, since like the present case it was concerned with the interests of external parties, is *Re Phillips* [1931] 1 Ch 347.[41] Here, an inter vivos trust gave a party (subject to certain other trusts which failed) an unfettered power of appointment of the trust assets (coupled with a power of revocation), but any such appointment required the written approval of the then trustees. It is to be inferred that the donee of the power had no power to appoint and remove the trustees. With the trustees' consent, the donee by deed poll exercised his powers of appointment twice (having revoked the first exercise). On neither occasion did the donee actually exercise the power in his own favour, rather creating new trusts in favour of third parties. Upon the donee's death, the plaintiff, who was a creditor of the donee's estate, brought proceedings to challenge those new trusts. The plaintiff invoked a longstanding principle that the holder of a general power of appointment cannot exercise the power in favour of a volunteer without first paying their own debts. The position would have been different with a special power, since such a power-holder would be subject to fiduciary obligations. The plaintiff succeeded. Maugham J held that, on the construction of the deed in its context, the power conferred was a general

[41] See also *Re Dilke* [1921] 1 Ch 34; *Re Triffitt's ST* [1958] Ch 852. Cf. Companies Act 1993, s 7.

power notwithstanding that its exercise required the consent of the trustees of the trust that conferred the power. The Judge rejected (at 354) an argument that the trustees would be in breach of trust if they gave their consent without considering the interests of those parties who would benefit in default of any appointment.

63. Other cases from England and Wales, old and recent, have held as a matter of construction that a power given by will or inter vivos trust to appoint property amongst family members permits the holder of the power to appoint all the property of the trust to themselves if they are a member of that family and therefore within the class.[42] Pleas that doing so involves a breach of fiduciary duty have been rejected.[43]

64. In summary, neither the presence of a general power of appointment nor the absence of fiduciary obligations is inconsistent with the existence of a trust.

E. The features of a trust that might cause the PRA to apply

65. The case presented so far has been premised on a submission that there is insufficient in the background facts and in the provisions of the MRWP Trust to distinguish this case from *Clayton v Clayton*.

66. That submission, if accepted, would permit the Court to allow this appeal. It may be useful to the Court, however, to suggest (one cannot do more than that) what factors are likely to be relevant when a partner's powers under a trust are apt to be treated as property within the PRA.

67. Most obviously, it will normally be necessary for the partner to be one of the named beneficiaries of the trust. However, that will not be necessary if a named beneficiary is itself a trustee for the partner under another trust. A trust can also be subject to the PRA even though the claimant is a named discretionary beneficiary, as is shown by the facts of *Clayton* itself. Where the partner is the sole settlor of the assets held by the trust, a power to revoke the trust may also amount to a general power of appointment.[44]

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[42] In addition to the above cases, see *Taylor v Allhusen* [1905] 1 Ch 529; *Re Penrose* [1933] Ch 793; and *Melville v IRC* [2001] EWCA Civ 1247, [2002] 1 WLR 407.

[43] See *Re Penrose* [1933] Ch 793 at 804–805: "the question is in reality one of construction and not of invalidity arising out of any fiduciary capacity with which the donee of the power has been invested".

[44] See, for example, *TMSF v Merrill Lynch* [2011] UKPC 17, [2012] 1 WLR 1721.

68. It will usually also be necessary that the partner have the power to distribute capital and/or income to themselves, or otherwise determine the disposition of the assets.[45] It may be sufficient in relation to a claim limited to one on income that the partner has lawful access to the income, and likewise with capital, but in most cases the trust will give access to both. The partner can have control over the disposition of trust assets either as the trustee or as the holder in some other capacity of a power to appoint trust assets, including through a power to revoke the trust where the partner was the settlor of all the assets (as noted above).

69. So long as the partner is a beneficiary and the trust is appropriately discretionary, the necessary control can be indirect. As in the present case, it is enough that the partner, whether or not one of the trustees him or herself, has powers of appointment and removal of trustees. Where a trust deed does not require unanimity amongst trustees, a power of appointment of trustees may of itself be sufficient, even if not coupled with a power of removal. Equally, indirect control can be exercised through control of a corporate trustee.

70. The foregoing features will usually be not only necessary but also sufficient for the PRA to apply, unless the context otherwise suggests. It will not be necessary, therefore, that the partner (or other decisionmaker subject to the partner's control) be expressly conferred with an "absolute" discretion or similar wording as to how powers are exercised. However, such wording is of considerable weight in confirming that the decisionmaker was not to be restricted in the way the powers are exercised. In the present case, the discretions conferred on the trustees by the MRWP Trust were expressed to be absolute (see clauses 4 and 13). That precise term was not used in the power given the Respondent by clause 15 to appoint and remove trustees but, within the overall context of the trust, it is submitted that this is not significant. Moreover, the power to appoint new trustees under clause 15 could be exercised "at any time" and the power to remove trustees could be exercised "without being obliged to give any reason."[46]

71. It is submitted, therefore, that this Court should not endorse the views expressed by the majority of the Court of Appeal (CA [110], cf Miller J at [91]) and by the High Court (HC [89]) that the word "absolute" does not much affect, if at all, the way in

[45] In the present case, see clauses 4, 6, 7 and 10 of the trust deed.
[46] See the emphasis placed on similar wording in *Pugachev* [2017] EWHC 2426 (Ch) at [272].

which trustees should approach the exercise of their powers.[47] The conferral of an absolute discretion is a strong signal that the party creating the power intended the party exercising it not to be subject to normal curial oversight,[48] beyond at most requiring the power-holder to act in good faith, and consistently with the terms on which, and the purposes for which, the power was conferred.[49] Properly construed, the wording offers no realistic prospect of the other beneficiaries of the discretionary trust succeeding in an action against a trustee or the partner if indeed there were a distribution of the trust assets to the partner. To the extent that those drafting trust deeds have been acting mechanistically in using terms such as "absolute" or "unfettered" in their drafting, it will be salutary, it is submitted, for this Court to encourage drafters to deliberate over using such adjectives.

72. As signalled above, purpose and context can also be relevant in determining the powers of trustees,[50] and hence to the application of the PRA. So, it is conceivable, for example, that the background evidence relating to the formation of a trust might show that the settlor's predominant intent was to benefit his or her children and not the settlor even though the settlor was named both as trustee and beneficiary.[51] It might be, for instance, that the settlor can show that a separate trust had already been created under which the settlor, and ideally any present or former partner, was well provided for. In such circumstances, the earlier trust might be subject to the PRA but not the later one. No such argument is available on the present facts.

73. At the same time, a lack of transparency in the drafting of a trust conferring a general power of appointment is to be anticipated. Certainly, one cannot expect the trust document openly to provide that the assets are not to be available in the event of a claim against the partner under the PRA.[52] The holder of general powers of

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[47] For more detailed analysis, see Watts, above, (2022) 36 TLI 3.

[48] See *Gisborne v Gisborne* (1877) 2 AppCas 300 (HL) at 307, an "uncontrolled discretion" is intended to be exercised "without any check or control from any superior tribunal"; and *Burgess v Monk (No 2)* [2017] NZHC 2424 at [78]. For earlier New Zealand cases, see Watts, above, (2022) 36 TLI 3 at 19, plus *Watson v Richards* [1925] GLR 397.

[49] See the dictum in *Grand View* [2022] UKPC 47 at [78]: "Although clause 15 provides that every discretion and power conferred on the trustee is "absolute and unfettered", Grand View accepts that it does not displace the proper purpose rule. As the observations of Lord Cairns LC in *Gisborne v Gisborne* suggest, a provision such as clause 15 is directed at the discretion enjoyed by a trustee in the exercise of a power, not at either the scope of the power or its purpose."

[50] *Grand View* [2022] UKPC 47 provides a good example. Despite the wide discretions conferred on the trustees, it was held to be an improper use of the powers under a family trust for the trustees to remove all the family members and replace them with a trust for charitable and other public purposes.

[51] But note *Pugachev* [2017] EWHC 2426 (Ch) at [292]: "I have accepted that Pugachev adores his children. I do not doubt he truly did and still does intend that his children should benefit from his wealth… But that is different from saying that at any time he intended to part with ultimate control of the underlying assets in favour of the trustees... The fact he wanted to look after his family is not inconsistent with the idea that he wanted to retain control."

[52] See the discussion in *Pugachev* [2017] EWHC 2426 (Ch) at [275].

appointment in a setting such as the present would not, of course, exercise the powers unless the coast were clear on the domestic relationship front.

74. It is also not necessary for the Court in this case to define conclusively what powers are *not* an interest within the PRA. One obvious potential line is that if the partner cannot determine who are the trustees, nor otherwise unilaterally determine what happens to trust assets, the trust will fall outside the scope of the PRA. That could be so even if the trustees are close relatives or friends of the partner. One might call this "the risk test"; is there a real risk that the partner would not be able to obtain access to the trust assets if he or she wanted to? A harder line might require one of the trustees to be a professional trustee. A softer line would exclude from the PRA trust deeds that expressly impose fiduciary obligations or state that the powers are "trust powers".

75. Many trust deeds will have powers of variation or resettlement that permit existing trusts to be modified legitimately to conform with any lines that this Court might draw.

76. It is also likely that in some circumstances equity's doctrines of proprietary estoppel and constructive trust will be needed where a partner has expended sustained work and effort on trust assets.[53] It should also be accepted that statutory intervention could provide more flexible solutions than is available to the Court, such as allowing a court to deem the partner to be a fixed beneficiary as to a proportion of the trust's assets.

77. It is submitted, in conclusion, that the rights that the Respondent has under the MRWP Trust do entail that he has a general power of appointment over the assets of the Trust and that those rights are caught by the PRA.

F. Application of "relationship property" concepts to the MRWP Trust

78. A conclusion that the powers that the Respondent has under the MRWP Trust amount to "property" within the PRA does not determine whether the property is separate property or relationship property under that legislation. The following analysis largely accords with that of Miller J in the Court of Appeal, it, in turn, being

[53] Again, see *Hawke's Bay Trustee Co Ltd v Judd* [2016] NZCA 397.

consistent with the leading authorities. However, it is submitted, contrary to Miller J, that it is not necessary to refer the present case back to the High Court.

79. The interests that the Respondent obtained under the MRWP Trust arose on the creation of that trust on 27 January 2006 (CA, [13]), well after the relationship between the parties had begun, in September 2004. The starting point, therefore, is that the Respondent's interests under the Trust were "relationship property" within the definition in s 8(e) (and potentially also s 8(ee)) of the PRA. This starting point is consistent with the conclusion reached by this Court in *Clayton* (see at [86]), where the relevant trust was also created after the domestic relationship had commenced.[54]

80. In the present case, however, the starting point of s 8(e) is qualified by s 10 of the PRA to which section s 8(e) is expressly subject. In particular, s 10(1)(a) provides that property acquired by a spouse or partner from a third person by gift (s 10(1)(a)(iii)) or because they are a beneficiary under a trust settled by a third person (s 10(1)(a)(iv)) is separate property unless, by virtue of s 10(2), the property has been intermingled with other relationship property as envisaged by that sub-section.

81. Miller J considered that s 10(1)(a)(iii) applied (CA, [95]), having the effect of turning what would otherwise have been relationship property into separate property, subject in turn to exceptions.[55]

82. Miller J then concluded that three provisions of the PRA were potentially available for bringing at least some aspects of the property interests created by the MRWP Trust back into the relationship property pool. First, s 9A of the PRA provides for any increase in value of separate property to be treated as relationship property where that increase is attributable (wholly or in part, and whether directly or indirectly) to the application of relationship property and/or the actions of the other spouse or partner (see CA, [97]). Secondly, the family home and appurtenant land situated on the farm owned by the MRWP Trust, being a "homestead" as defined in s 2 of the PRA, could be treated as relationship property under s 12 of PRA (see CA, [97]). The value of the homestead at or near the time of the hearing in the Family Court (November 2018) was agreed to be $330,000. Thirdly, s 17 of the PRA allows

[54] The Court recognised that but for the claimant's concession that the value of the property at the beginning of the relationship was separate property recourse by the respondent to s 13 of the PRA may have been necessary.
[55] There was no discussion in Miller J's judgment whether s 10(1)(a)(iv) might also have applied. It is unclear whether that sub-paragraph applies where the partner is one of the trust's settlors.

compensation to be awarded where the separate property of a partner has been sustained by the application of relationship property or the actions of the spouse or partner.[56]

83. Miller J concluded that given that the farm and the homestead (in which the Appellant would have had an automatic 50% interest but for the trust) were not directly owned by the Respondent, the most appropriate prima facie measure of remedy was to treat the increase in value of all the assets of the MRWP Trust across the period of the relationship as relationship property, using s 9A of the PRA.[57] He also concluded that the appropriate division of that increase should be 50/50. The Judge stated (CA, [97]):[58]

> [The Appellant] contributed directly and substantially to the improvements made and the business run on the property, in addition to her contributions to the care of young children and the management of the household. For purposes of s 9A the increase in value was in part attributable to her actions, and there is no reason to think her contribution was any less than his.

Interest should then be applied to that value from the date of the Family Court hearing (CA, [99]). The Judge, however, considered that how that division should be realised, given that the trustees were not parties, should be returned to the High Court (CA, [100]).

84. Miller J's conclusions in respect of s 9A were consistent with the findings of Judge Grace in the Family Court who stated at [2018] NZFC 9120 at [77]:[59]

> Relationship property has been applied to the property during the course of this relationship. I say that because any income generated during the relationship, whether it be from hunting or guiding, bed and breakfast guests, or off farm income, has gone into the overall sustenance of the farm. The income from the company which was controlled by the respondent and taken as drawings by the respondent has also been used in the same fashion.

85. Although neither Miller J nor Judge Grace at first instance undertook a separate consideration of the two limbs of s 9A of the PRA, their conclusions were broadly consistent with the approach to s 9A taken by this Court in the leading case,[60] *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1, to which we now turn.

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[56] It is understood that the Respondent at this point is not in a position to pay compensation under s 17.
[57] Were the farm not in trust the Appellant would have had an automatic claim to a 50% share in the homestead.
[58] As to improvements, see also COA115, 116, 136.
[59] See also [2018] NZFC 9120 at [19] and [23] (appellant's off-farm paid work: COA110, 116, 137); [37] ("working around the farm and running the home and caring for the children": COA110–117); [136]] (running accommodation side of business; "she would have also worked around the farm, more particularly while the respondent was away on guiding/hunting trips" COA116, 136); and [139] (managing administrative side of hunting and fishing business: COA116, 117, 138).
[60] See [2018] NZFC 9120 at [79].

86. The Court in *Rose v Rose* explicated that s 9A comprises two limbs (see at [26] and [38]). The effect of sub-section (1) is that where relationship property (including the earnings of *either* partner and the fruits of borrowing by *either* of them) is applied to what would otherwise be separate property then not only does any increase of value in the property become relationship property but also that increase is subject to a prima facie 50/50 division. Under sub-section (2), however, where the claimant is relying for an interest only upon the claimant's *actions* during the relationship, there is no prima facie 50/50 division, but rather the court is to determine the division with regard to the respective parties' direct and indirect contributions to the increase in value.

87. The Court in *Rose* was also clear that in the application of s 9A(2) it is not a matter of determining the extent to which the relevant asset in its original state has increased in value by virtue simply of market demand and then determining the extent to which, if any, the direct and indirect contributions of the claiming party further enhanced that value. Rather the existing ownership interest of the other party (and the intrinsic capacity of that interest to increase in price) is to be treated as one form of contribution to the increase to be weighed in the balance with the direct and indirect non-financial contributions of the claiming party that have assisted to maintain the original value of the asset or to have enhanced that value (see at [47]).

88. Such an approach necessitates, as the Court made clear (at [46]), that the division cannot be arithmetical so that "in the end the evaluation of the relative contributions is likely to be a matter of general impression".[61]

89. Amongst other things pertinent to this appeal, the Court on the facts in *Rose* took account (at [49]) of the claimant's care of children, management of the household, performance of household duties and assistance or support which aided the respondent in carrying on the relevant business. Although, inevitably, there are aspects of *Rose* that are not duplicated in the present, it is of interest that the partnership business carried out on the relevant land in *Rose* ran at a loss throughout the period of the marriage (see at [12] and [17]), just as the businesses did in the present case. The fact that businesses have run at a loss does not entail that their

[61] See too the extrajudicial commentary by Elias CJ, "Separate Property—*Rose v Rose*", https://www.courtsofnz.govt.nz/assets/speechpapers/fccw.pdf: "The Courts are right to avoid requiring the parties to provide the sort of evidence which is disproportionate to the value at stake" (p12).

operation has not assisted to maintain and in some respects enhance the value of the land.[62] It was not held against the claimant that "she did not undertake any farm work or play any role in the farming partnership" (at [10]), whereas as in the present the Appellant *did* work in the businesses run on the farm.

90. The fact that the weighing of direct and indirect contributions by both parties to the increase in value of separate property involves a broad evaluation has been reinforced in cases subsequent to *Rose*,[63] and in particular by the Court of Appeal in *Biggs v Biggs* [2018] NZCA 546, [2018] NZFLR 854 at [27] where the Court stated:

> Speaking generally, the Act does not rely on an onus of proof, except in the sense that an applicant will fail unless they can point to something in the evidence that supports their claim; rather, it requires that a court be satisfied a state of affairs exists and envisages that the court will divide relationship property using a broad evaluative judgment.

91. Insofar as the Respondent sought to challenge the evidential basis to Judge Grace's conclusions on these issues (endorsed by Miller J),[64] there can be no basis for concluding that the Judge simply applied the automatic 50/50 division applicable under s 9A(1), although such an approach might have been appropriate on the facts. It is clear from the paragraphs from the Family Court judgment cited in paragraph 84 above that Judge Grace took account of both direct and indirect contributions. In these circumstances, it is submitted that the ruling of Judge Grace, endorsed by Miller J, should not be disturbed in this Court.

G. Tikanga and interpretation

92. The Appellant submits that the nature of this dispute gives rise to considerations, including those of broad policy import, for which a tikanga perspective will assist.[65] The law in this area is developing, and its development will benefit from a consideration of the relevant tikanga principles.[66] Tikanga principles will provide to the Court another "vocabulary"[67] or "ingredient"[68] in considering this issue.

93. This Court has recognised that family law is an area where tikanga has shaped and influenced social norms and values of society[69] and has contributed to the

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[62] In *Rose* the business started to become profitable after the relationship ended.
[63] See too the comparable approach taken when action is taken by a partner against the trustees directly at common law: *Hawke's Bay Trustee Co Ltd v Judd* [2016] NZCA 397 at [17]–[18], [30].
[64] Memorandum of Counsel for the Respondent of 13 August 2023.
[65] *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [263] per Williams J.
[66] *Ellis v R*, above at [265] per Williams J.
[67] *Ellis v* R, above at [176] per Winkelmann CJ, at [118] per Glazebrook J.
[68] *Ellis v* R, above at [269] per Williams J.
[69] *Ellis v R*, above at [174] per Winkelmann CJ.

jurisprudential framework of family law.[70] The Law Commission has recommended that the principles of the PRA ought to reflect the concept that a just division of property recognises tikanga Māori.[71] It is respectfully submitted that, following the approach of this Court in *Ellis v R* [2022] NZSC 1114, [2022] 1 NZLR 239, such recognition can be appropriately achieved through interpreting the PRA with tikanga in mind.

94. The consideration of tikanga as an ingredient relevant to interpretation is particularly important in the context of the PRA. The Act is a code,[72] applying in the place of rules and presumptions of common law. As such, the PRA replaces tikanga to the extent that, were it not for the PRA, tikanga would determine how property is to be divided. However, this does not mean that there is no room for consideration of tikanga in interpreting the PRA. As PRA applies to all division of property upon the end of a relationship, consideration of tikanga when interpreting the PRA means it will better serve the society of Aotearoa/New Zealand, and all in society.[73]

95. Before going further, it is acknowledged that there is a tension between the individualised ownership of property that underpins the PRA and the holding of property under tikanga (especially land). While Māori recognised a form of property ownership, the communal nature of Māori society meant it was conceptualised differently.[74] At tikanga, the purpose of holdings rights akin to property 'ownership' rights was not reflective of an inherent right to 'own' property[75] but reflected a privilege held by a member of a community to use resources to maintain obligations to the community and advance the interests of the community.[76]

96. Further, land could not be 'owned' in the way it could under common law. One could acquire a right to use the land, but it would not be expressed as a right to own it. As Papatūānuku could not be owned, nor could the land she personified – Māori belong to the land, rather than *vice versa*.[77] Acquisition and maintenance of rights was primarily based on whakapapa—a blood link to the community exercising authority over the

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[70] *Ellis v* R, above at [176] per Winkelmann CJ.
[71] Law Commission Review of the Property (Relationships) Act 1976 (NZLC R143, 2019) at 14.10.
[72] PRA, s 4.
[73] *Ellis v R*, above at [164] and [174] per Winkelmann CJ.
[74] Jacinta Ruru "Implications for Māori: Historical Overview" in Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Brookers, Wellington, 2004) 445 at 451.
[75] Jacinta Ruru, above at 451.
[76] E T Durie "F W Guest Memorial Lecture: Will the Settlers Settle? Cultural Conciliation and the Law" (1996) 8 Otago LR 449 at 454.
[77] Jacinta Ruru, above at 448.

land.[78] The importance of maintaining whakapapa links to land is why the PRA does not apply to Māori land as defined under Te Ture Whenua Māori Act 1993.[79]

97. The importance of whakapapa is reflected in the way that tikanga treated property where marriage occurred. Marriage at tikanga did not carry with it any rights to property held by the other spouse. It was common practice, however, for land and resources to be gifted (often by the woman's parents) to a couple who would be expected to reside on the land for at least some of the marriage.[80] Upon the end of the marriage the land would return with the wife to her whānau (or revert to her whānau should the marriage end by her death) even if the husband had worked on the land.[81]

98. The approach to property at the end of marriage also reflected that tikanga is underpinned by whānaungatanga. The whānau is the basic building block of the whole Māori social system,[82] and the whānau was the primary source of support.[83] This remained the case even upon marriage. For example, marriage did not end the role of a woman's whānau. If she went to live with her husband's whānau they were answerable to her whānau for her well-being and if the marriage ended she would return to her whānau.[84]

99. Thus at tikanga it was the whānau that was the primary support for persons after the end of a marriage—not the property worked on during the marriage. This reflected the collectivist rather than individualistic nature of Māori society, and the centrality of whakapapa and whānaungatanga in Te Ao Māori. This can be contrasted with the traditional approach of English law, which saw responsibility for support of women at the end of a marriage primarily fall back to her father—marriage largely having transferred responsibility for her care from the father to the husband.[85]

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[78] E T Durie, above at 452-453.
[79] PRA, s 6.
[80] Jacinta Ruru, above at 451.
[81] Jacinta Ruru, above at 451. If there were children of the marriage then they would have a blood link to the land.
[82] Hirini Moko Mead *Tikanga Māori, Living By Maori Values* (Revised Edition, Huia Publishers, Wellington, 2016) at 224.
[83] Ani Mikaere "Māori Women: Caught in the Contradictions of a Colonised Reality" (1994) Waikato Law Review 125 at 127.
[84] Ani Mikaere, above at 127.
[85] Ani Mikaere, above at 129-130.

100. Legislative reform abolished this common law position, and in doing so abolished the tikanga-based approach to support at the end of a marriage.[86] As a result of these reforms, which culminated in the PRA (and in particular the amendments made under the Property (Relationships) Amendment Act 2001), the primary source of ongoing property support after the end of a relationship became the property acquired, used and contributed to during the relationship. This reflected both the individually-based property ownership system and a greater recognition of the deleterious effects that the English-law based approach had for women. It could be said that the whānau support that was provided, as a matter of tikanga, by whānau as conceptualised at tikanga now is to be provided by a more narrowly bounded 'whānau', being the partners to the marriage.

101. Also relevant is that, at tikanga, excessive individual aggregation of wealth was not permitted and those who did so were subjected to muru to enable wealth to be distributed through the community.[87]

102. The PRA, like tikanga and contemporary society's values, recognises that support is needed for those who exit a relationship. The need for support is particularly acute for women exiting 'traditional' relationships because they usually will have sacrificed more by being the primary caregiver and so will have a much greater financial vulnerability upon the end of a relationship. The PRA is premised upon that support being supplied by (primarily) the property that was acquired or used for the purposes of the relationship,[88] but also by property whose value was increased because of the contributions of the relationship.[89] It recognises that all contributions to a relationship have value,[90] and the benefits derived from those contributions must be shared even if they were contributions to pre-existing or otherwise separate property.[91]

103. The ability to maintain separation of property and depart from the need for property to be shared according to the principles of equal division that underlie the PRA is maintained through the ability of parties to enter into agreements to contract out of

[86] It is probably fair to say that the impact on tikanga was more a by-product of the desire to change the 'English' approach to support at the end of marriage, which had unjust effects on women, rather than a truly conscious motivator of the change.
[87] E T Durie, above at 454.
[88] Reflected in s 8.
[89] Reflected in s 9A and s 17.
[90] Reflected in s 18.
[91] Reflected in s 9A in particular.

the effect of the Act.[92] But there are significant strictures placed around such agreements[93] to avoid exploitation and to provide a backstop against serious injustice.[94] This Court has also warned that the PRA should not be interpreted in a way that could see s 21 and the protections it provides 'hollowed out'.[95]

104. So, while the mechanics through which the PRA seeks to provide support post-separation are different from tikanga (being based on individual property ownership and self-sufficiency) both the PRA and tikanga share the philosophy that there should be meaningful support for both parties at the end of a relationship so that they may successfully live after separation. This approach aligns with societal values. It is also submitted that tikanga, and a tikanga-informed analysis, is relevant in that its values matter more than its surface directives.[96] It is submitted this accords with this Court's recognition that the PRA is social legislation that must be interpreted with an eye to 'worldly realism'.[97]

105. One of the ways the PRA achieves its aims is through a wide definition of 'property' so that technical arguments[98] about the nature of property do not prevent the achieving of the substantive aims of the PRA. Again, it is worth remembering that, although the definitions are not unique to the PRA, the interpretation exercise at the heart of this case is the interpretation of the term 'property' under the PRA—a specialist piece of social legislation. It does not need to determine whether an equivalent interest in a trust outside the PRA framework constitutes property—that would depend on the nature of that different framework, its context and in particular how property is defined within that framework.[99]

106. In this case what has happened is that the Appellant contributed to the increased value of the farm through her contributions, direct and indirect, to property and to the relationship. That increased value is a fruit of the relationship that would, in the usual course of events, be divided upon separation. Here, however, the Respondent argues that the ownership of the property by the trustees means it is out of reach of

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92 PRA, s 21.
93 PRA, s 21F.
94 PRA s 21J.
95 *Sutton v Bell* [2023] NZSC 65 at [45].
96 Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Maori Dimension in Modern New Zealand Law" (2013) 21 Waikato Law Review 1 at 3.
97 *Clayton* [2016] NZSC 29 at [79].
98 Which would reflect the 'surface directives' that tikanaga will not permit to undermine the core values.
99 For example, an interest in a partnership is 'property' in the PRA, but not in many other contexts.

the PRA's purview and hence out of reach of division. This is despite the fact that the only person who is able to decide who appoints the trustees is the Respondent.

107. What is happening is that the Respondent is seeking to accrue the entirety of the fruits of the shared efforts of himself and the Appellant to the benefit of his trust. He is able to control who has access to that benefit by the appointment of trustees. In any event, it will certainly not be the Appellant who has any access to those fruits—it will only go to those whom the Respondent's appointees decide it will go.

108. Permitting this outcome would fly in the face of the purposes and principles of the PRA.[100] It would mean that despite the principles that men and women have equal status and that their equality should be maintained and enhanced, and the principle that all forms of contribution to the domestic partnership are treated as equal, the result would not be equal—only the Respondent would have access to the fruits of the Appellant's contributions.

109. It would also reduce this Court's decisions in the *Clayton* case—decisions so important that the Court issued its judgment despite the parties settling the matter—to the fact pattern in that case. It is submitted that that was not the Court's intention. Rather the case was intended to act as a guide for other cases. Yet, a number of lower court decisions, including those of the High Court and the Court of Appeal in the present case, have in effect confined *Clayton* to its own facts—small differences in the trust deed are said to justify a fundamentally different outcome.

110. These decisions have failed to recognise the need, endorsed in *Clayton*, to apply worldly realism when interpreting and applying this piece of social legislation.[101] In the result, the principles of the PRA are being stymied by a technical reading of trust powers that ignores the reality of how such powers (especially powers to appoint trustees) are exercised in practice. In tikanga terms, it would be the promotion of a surface directive in a way that prohibits the operation of the underlying values. Recognition of the context and reality in which law operates (a fundamental aspect of tikanga) reduces the chances that substantial injustice may occur.

111. These injustices fall most heavily on women. It is usually they who have sacrificed income-earning potential to care for children and to develop the family unit outside

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[100] PRA, ss 1M and 1N.

[101] A need that has been recognised in other jurisdictions: e.g. *Charman v Charman (No 4)* [2007] EWCA Civ 503.

the paid workforce. It is usually they who face substantial inequality and greater hardship upon the end of a relationship. Sending the increased value from the fruits of her labour entirely out of her benefit compounds the injustice.

112. It would also mean that a domestic partner could achieve the effect of a s 21 agreement by stealth. The Appellant entered a relationship with the Respondent and contributed to that relationship in a way that raised the value of the farm. The Respondent's powers of appointment meant that he could ensure persons inclined to provide him with the benefit of that increased value would decide who received that value. The protections provided by s 21, on the other hand, could have allowed the Appellant to be fully informed about that potential outcome, taken advice on it and considered whether she was happy to contribute to that increase in value in those circumstances. The Court of Appeal's approach deprives parties in the position of the Appellant of those protections. Not only does this raise the concerns about 'hollowing out' s 21 noted by this Court in *Sutton v Bell* [2023] NZSC 65, it also cuts across the requirement that if a partner wishes to contract out of s 9A in a s 21 agreement specific words must be used to achieve that outcome.

113. It is no answer to say that the principles of constructive trusts can provide a remedy. Such principles were deemed to be inappropriate to address issues of division of property upon the end of de facto relationships—that was a major driver behind the 2001 Amendment Act. Those principles should not be reasserted as a panacea to injustice in situations such as this. They are not.

114. The Appellant's position on the law is submitted to be correct. It is founded upon principles that better reflect tikanga, better reflect Aotearoa/New Zealand's values, and better reflect the underlying aims and values of the PRA. It better permits proper support of persons after the end of a relationship. It reduces unjust agglomeration of wealth and benefit to one person against the community (in this case the community of the marriage). And it will see more just outcomes in a way that recognises the essential role of women in Māori society at tikanga.[102] That accords with modern values on the essential role of women in Aotearoa/New Zealand society.

[102] Ani Mikaere, above at 125.

H. Implementation of orders

115. As noted already, Miller J considered that notwithstanding that he had reached a firm view on the exact capital sum to which the Appellant was entitled ([99]), the case should be sent back to the High Court for implementation. Now that the trustees of the Trust have joined the proceedings, a conclusion by the Court that the Respondent has general powers of appointment (directly in respect of the appointment of the trustees and indirectly in respect of the trust assets) would bind the trustees.

116. Consistent with Miller J's judgment, judgment should be entered against the Respondent for $245,000, with interest to run on that sum under the Interest on Money Claims Act from 20 November 2018. The Respondent should also be directed to exercise his powers of appointment of trustees in a way that ensures that the assets of the MRWP Trust are made available to meet the judgment sum to which the Appellant is entitled.[103] Alternatively, this Court should appoint a receiver under s 138 of the 2019 Act,[104] either to step into the shoes of the Respondent in relation to his powers under the Trust (as the Privy Council initiated on the facts of *TMSF v Merrill Lynch*[105]), or to exercise trust powers to sell assets and then make a distribution to meet the judgment sum. Leave should also be reserved for the Appellant to apply to the Family Court[106] or the High Court for such further orders as the Court thinks fit. The Appellant should be awarded costs.

Dated: 20 September 2023

P G Watts KC/ S J Zindel/ I T F Hikaka (Counsel for the Appellant)

We certify that the submissions do not contain any information that is suppressed and the submissions are suitable for publication.

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[103] Reappointing himself as trustee and appointing a corporate trustee which he controls would be consistent with the trust and its purposes: see *Montevento Holdings Pty Ltd v Scaffidi* [2012] HCA 48.
[104] See *Armani v Armani* [2021] NZHC 547, [2022] 2 NZLR 547 at [64] and [82]–[86]; *Reaney v Reaney* [2021] NZHC 784 at [10].
[105] *TMSF v Merrill Lynch*, above at [59] and [61].
[106] Under the 2019 Act, s141, the Family Court is empowered to give directions under s 133 about trust property or the exercise of any trustee power as it thinks fit "to give proper effect to any determination in the proceeding".

Appendix: Table Comparing Trust Deed in *Cooper v Pinney* with that in *Clayton*

Vaughan Road Property Trust	**MRW Pinney Trust**
• Domestic partner was settlor • Domestic partner sole trustee • Discretionary beneficiaries: domestic partner plus spouse/partner, children and grandchildren • Final beneficiaries: children of domestic partner	• Domestic partner only one of settlors • Domestic partner not sole trustee unless others resign or die (cl 15) • Discretionary beneficiaries: domestic partner plus children and grandchildren • Final beneficiaries: children and grandchildren of domestic partner if no discretionary beneficiary has been designated (can be domestic partner)
As "Principal Family Member" domestic partner has the power to appoint and remove trustees (cl 17.1), and discretionary beneficiaries (cl 7)	Domestic partner in personal capacity has the power to appoint and remove trustees without reasons. Can appoint a corporate trustee (cl 15). No power to remove beneficiaries
The trustees have the power to pay or apply all of the income and/or capital to any of the discretionary beneficiaries (cl 6.1(a)), with express power to self-benefit (cl 14)	The trustees (which includes a sole corporate trustee) have the power to pay or apply all of the income and/or capital to any of the discretionary beneficiaries (cls 4, 6 and 10) [silent on self-benefit but implicit]
To resettle the trust fund upon the trustees of any trust which include as beneficiaries any one or more of the discretionary beneficiaries (cl 8.1)	To resettle the trust fund upon the trustees of any trust which include as beneficiaries any one or more of the discretionary beneficiaries (cl 7)
Powers may be exercised by trustees in an "absolute and uncontrolled" manner, and even though interests of all beneficiaries not considered (cls 11.1 and 12)	Powers may be exercised by trustees in an "absolute and uncontrolled" manner (cls 1(c), 7, 13 and 22)
To bring forward the vesting date (cl 10)	To bring forward the vesting date (cl 1(c))
To exercise any power notwithstanding any conflict of interest created (cls 19.1, plus 13 and 14) [*Clayton* [64])	To exercise any power notwithstanding any conflict of interest created (cls 17, 18, 22(j))
To vary or revoke (with the prior consent of the Settlor) any provision concerning the management or administration of the Trust (cl 23.1)	To vary or revoke provided does not prejudice interests of beneficiaries nor add spouse or partner of a beneficiary (cl 12)
Trustee liable only for dishonesty or wilful default (cl 21)	Trustee liable only for dishonesty or wilful default (cl 21)