IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI **SC 32/2023**

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

SUBMISSIONS FOR THE TRUSTEES
17 OCTOBER 2023

Counsel instructed:
N L Walker | J A Tocher
P +64 4 499 9555
F +64 4 499 9556
PO Box 10-214
DX SX11189
Wellington

Counsel instructed:
A S Butler KC
Thorndon Chambers
Wellington

Solicitor on the record:
R Sprott
Saunders & Co Lawyers
E richard.sprott@saunders.co.nz
P +64 3 662 9070
Christchurch

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MAY IT PLEASE THE COURT

1. INTRODUCTION AND SUMMARY

1.1 The current trustees of the MRW Pinney Family Trust (the "**MRWP Trust**") are Jennifer (Jane) Pinney and Phillip Smith (the "**Trustees**").

1.2 The Trustees were directed to be served by this Court on 3 July 2023.[1] The Trustees are not a party and were not represented in the courts below.

1.3 The Trustees oppose the appeal. These submissions focus on the position of the Trust, as distinct to that of the appellant or the respondent. Counsel also address the broader implications of this appeal, with the submission being that the case advanced by the appellant is inconsistent with accepted trust law and practice in New Zealand.

1.4 The appellant's central proposition is that the Trustees — in counsel's experience, trustees of an unremarkable, common form of discretionary trust — can act without fiduciary constraint, doing as they please with the trust assets. That proposition is misconceived. The appellant accepts the MRWP Trust is valid. It necessarily follows that the Trustees are fiduciaries, such that the MRWP Trust's assets can only be used for the benefit of the beneficiaries.

1.5 That alone distinguishes the trust deed of the MRWP Trust (the "**MRWP Deed**") from that in *Clayton v Clayton*, where the trust was (in light of this Court's analysis of the terms of that trust) almost certainly invalid. The submission that Marcus' power of appointment and removal of trustees — a fiduciary power, constrained by the "second-trustee requirement" — somehow negates the fiduciary (and non-fiduciary) constraints on the Trustees is simply wrong.

1.6 The issue this Court needs to decide is whether Marcus' one and only power (being the power to appoint and remove trustees) should be treated as a general power of appointment over the property of the MRWP Trust, such that it can be classified as "property" for the purposes of s 2 of the Property Relationships Act 1976 (the "**PRA**"). Counsel submit that no amount of "worldly realism" can save the appellant's case, which must fail on the terms of the MRWP Deed and accepted trust law and practice.

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[1] *Cooper v Pinney* [2023] NZSC 80 **[[101.0108C]]** at [2].

1.7 The remainder of these submissions is structured as follows:

(a) section 2 – the correct taxonomy, which can otherwise lead to (understandable) confusion among practitioners;

(b) section 3 – the precise issue before this Court;

(c) section 4 – the implications that flow from the (agreed) position that this trust *is* a valid trust — namely, that the Trustees occupy a fiduciary office, and must always act for the benefit of the beneficiaries;

(d) section 5 – analysis of what the above means on the present facts, including discussion of *Clayton*;

(e) section 6 – the implications of Marcus' power of appointment and removal of trustees (and the second-trustee requirement);

(f) section 7 – the implications of the appellant's submission that the PRA should ignore "technical" trust law; and

(g) section 8 – the appropriate remedy, if this Court is minded to allow the appeal.

1.8 The Trustees refer extensively to the Trusts Act 2019 ("**Trusts Act**") in these submissions as it is relevant both to resolution of this appeal on its facts and to the wider legal issues it raises (even though the Trusts Act was not in force during the relationship). The Trustees further note that:

(a) The Trusts Act applies to "all express trusts, whether created before, on, or after the commencement date", so it necessarily applies to the MRWP Trust.[2] It would be incorrect to interpret the terms of the MRWP Deed without reference to the applicable statutory framework.

(b) In any event, the Trusts Act was intended to largely capture and reflect the existing common law position.[3]

[2] Trusts Act 2019, sch 1, cl 2.

[3] See Trusts Bill 2017 (290–1) (Explanatory Note) at 2. See also the purpose of the Trusts Act 2019 in s 3(a) "to restate and reform New Zealand trust law by… setting out the core principles of the law relating to express trusts".

2. TAXONOMY

2.1 The vocabulary used in cases like this can be confusing or imprecise. In the case law and in statute, the term "power of appointment" refers to at least three different types of powers:

(a) A dispositive power — that is, choosing who will receive a benefit (and normally the nature of the benefit). This type of power is referred to as a "**dispositive power of appointment**" in these submissions, for clarity.

(b) A power to appoint and remove beneficiaries — this is a power, often granted to the settlor or to the trustee(s), to appoint and remove beneficiaries (discretionary or otherwise) of a trust.[4]

(c) A power to appoint and remove trustees of a trust — this is self-explanatory but is obviously fundamentally different to the two other types of powers just discussed. It represents not the ability to determine who will receive benefits, but who will make that choice.

2.2 For its purposes, the Trusts Act defines a "power of appointment" as a "power to appoint a person to be, or to remove a person from being, a beneficiary of a trust" (s 9). That is, only the second of the types addressed above. Elsewhere, the Trusts Act defines the phrases "person with the power to appoint trustees" and "person with the power to remove trustees" (s 9). That is, the third of the types addressed above.

2.3 As it happens, in the trusts world, the phrase "power of appointment" is most usually used to refer to dispositive powers of appointment.[5] These are often classified by the range of permissible objects — in other words, who can benefit:[6]

(a) A general (dispositive) power of appointment — this is "unbridled" power, with the holder being able to appoint the property to anyone in the world, including themselves, and without any constraint.[7]

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4 There is debate whether a power to vary the terms of the trust can be used to remove a beneficiary, so a specific power to appoint and remove beneficiaries is typically provided in trust deeds where this possibility is desired.

5 See eg Chris Kelly and others *Garrow and Kelly Law of Trusts and Trustees* (8th ed, LexisNexis, Wellington, 2022) at 901 (Glossary entry for "appointment").

6 See generally Lynton Tucker, Nicholas Le Poidevin and James Brightwell *Lewin on Trusts* (20th ed, Sweet & Maxwell, London, 2020) at [33-002]–[33-026]. See also [28-015]–[28-022].

7 *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] 1 NZLR 551 at [60]; citing earlier editions of Lynton Tucker, Nicholas Le Poidevin and James Brightwell *Lewin on Trusts* (20th ed,

(b) A special (dispositive) power of appointment — this is a constrained power, with the holder needing to appoint the property to a limited class of people (who, in turn, are referred to as the "**objects**" of the power).[8]

2.4 The next concept is that of a trust. The Trusts Act helpfully provides the characteristics of an express trust as follows (s 13):

> (a) it is a fiduciary relationship in which a trustee holds or deals with trust property for the benefit of the beneficiaries or for a permitted purpose; and
>
> (b) the trustee is accountable for the way the trustee carries out the duties imposed on the trustee by law.

2.5 So, a trust, at its core, involves a trustee dealing with property for the benefit of others, called beneficiaries. It is a relational concept. The Trusts Act sets out mandatory duties imposed on *all* trustees, which "must be performed" and "may not be modified or excluded by the terms of the trust" (s 22).

2.6 The modern (or relatively modern) New Zealand discretionary trust will normally include:[9]

(a) what are referred to as "discretionary beneficiaries" but are commonly the objects of a special dispositive power;[10] and

(b) what are referred to as "final beneficiaries", who will commonly have a contingent or (defeasible) vested interest in the trust property.[11]

2.7 It is important to recall that until cases like *Re Gulbenkian's Settlements Trusts*[12] and *McPhail v Doulton*,[13] a trust like the modern discretionary trust would have been held invalid for uncertainty of objects. To be valid prior to these decisions, a trust required that a complete list of beneficiaries could be drawn up at the moment of trust formation (referred to as the "list certainty rule").[14]

Sweet & Maxwell, London, 2020) at [33-003]; and David Hayton (ed) *Underhill and Hayton Law Relating to Trusts and Trustees* (18th ed, LexisNexis, London, 2022) at [1.62].

[8] A hybrid (dispositive) power of appointment is a form of special (dispositive) power of appointment defined inversely, ie the holder can appoint the property to anyone in the world except a particular class or person.

[9] Chris Kelly and others *Garrow and Kelly Law of Trusts and Trustees* (8th ed, LexisNexis, Wellington, 2022) at [2.31].

[10] Trusts Act 2019, s 9, definition of "discretionary beneficiary": "a person who may benefit under a trust at the discretion of the trustee or under a power of appointment but who does not have a fixed, vested, or contingent interest in the trust property".

[11] See *Johns v Johns* [2004] 3 NZLR 202 (CA) at [42]–[46].

[12] *Re Gulbenkian's Settlement Trusts* [1970] AC 508 (HL).

[13] *McPhail v Doulton* [1971] AC 424 (HL).

[14] See generally Jessica Palmer and Charles Rickett "The Revolution and Legacy of the Discretionary Trust" (paper delivered at Obligations VIII Conference, Cambridge, July 2016).

2.8 The interaction between trusts and general (dispositive) powers of appointment can also confuse. There is no dispute that a trust deed can include a general (dispositive) power of appointment, and that the general (dispositive) power of appointment can be held by a person who also happens to be a trustee.[15] But, a general (dispositive) power of appointment can only *ever* be held in a personal capacity, not "as trustee". In *Re Mills*, for example, which the appellant cites in an attempt to illustrate that trustees can hold a general (dispositive) power of appointment,[16] a general power of appointment was conferred on the testator's brother in his personal capacity.[17] The fact he was also a trustee is neither here nor there.

3. THE ISSUE BEFORE THIS COURT

3.1 This Court in *Clayton v Clayton* held that the "combination of powers and entitlements of Mr Clayton … amount in effect to a general power of appointment in relation to the assets of the VRPT".[18] Therefore, Mr Clayton's powers and entitlements were "property" as defined in s 2 of the PRA.[19]

3.2 The issue before this Court is therefore whether Marcus' powers under the MRWP Deed amount, in effect, to a general (dispositive) power of appointment over the assets of the MRWP Trust.

3.3 That is a narrow question, but any conclusions will not be limited to the PRA context — for example, holding that the courts' supervisory jurisdiction is effectively toothless, as the appellant suggests in order to advance the position for her specific PRA purpose,[20] would have considerable consequences for trusts outside the PRA context. As Gilbert J explained in the Court below:[21]

> Every day, legal advisers up and down the country are required to advise their clients on the implications of contracting-out agreements and proposed settlements of relationship property disputes in circumstances where trusts have been established. The approach

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[15] Compare submissions for the appellant dated 20 September 2023 ("**App Subs**") at [57].

[16] App Subs at [58].

[17] See *Re Mills* [1930] 1 Ch 654 (CA) at 663 per Lawrence LJ.

[18] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] 1 NZLR 551 at [68]. In terms of the taxonomy noted earlier, it appears that this Court's reference to "general power of appointment" was a reference to a general (dispositive) power of appointment. The decision in *Clayton* caused considerable discussion and debate amongst trust practitioners and academics: see, among others, Joel Nitikman "*Clayton v Clayton* in the New Zealand Supreme Court: it's hard to keep a good court down" (2016) Trusts & Trustees 22(10) 1049; Jessica Palmer "Equity and Trusts" [2019] NZ L Rev 365; Kate Davenport and Stephanie Thompson "Piercing the trust structure at a relationship's end: interesting developments in trust law from the New Zealand Supreme Court" (2016) Trusts & Trustees 22(8) 864; and Mark Henaghan and Siobhan Reynolds "The use of trusts and trust litigation" (2020) 33 AJFL 303.

[19] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] 1 NZLR 551 at [98].

[20] See paragraph 7.1 below.

[21] *Cooper v Pinney* [2023] NZCA 62 ("**CA Judgment**") **[[101.0108A]]** at [106] per Cooper P and Gilbert J (emphasis added).

> that can be expected to be taken by the courts when assessing the implications of the use of trust structures needs to be accessible and clear. **Ordinary trust principles should be applied in all courts when assessing the validity of trusts, including in the context of relationship property disputes**.

3.4 Counsel can only respectfully endorse his Honour's comments. There are at least 400,000 trusts in New Zealand according to recent Inland Revenue figures (which will not include trusts that do not produce income).[22] In the 2013 Census, 14.8% of households reported that their home was held on trust.[23] A conclusion that the terms of the MRWP Deed bestows a general (dispositive) power of appointment on Marcus would have wide-ranging implications for many of those trusts since many of the clauses in the MRWP Deed are common in family trust deeds.[24]

4. THE MRWP TRUST IS A TRUST (WITH ALL THAT ENTAILS)

4.1 The appellant accepts that "the instrument in the current case creates a valid trust".[25] The Trustees agree, as did all three Judges in the Court of Appeal.[26] Where the appellant and the Trustees part ways is on the consequences that flow from that starting point:

(a) The appellant argues that fiduciary obligations are not an essential part of a trust,[27] and that no substantive fiduciary obligations are owed by the Trustees.[28]

(b) The Trustees submit that a trustee is necessarily a fiduciary office, with the result that a trustee must always act for the benefit of the beneficiaries. Fiduciary obligations therefore constrain the Trustees' conduct (as do a range of non-fiduciary constraints, including the equitable duties to act honestly and in good faith and for a proper purpose).

4.2 This argument is a key pillar of the appellant's case. If the appellant is wrong, there are significant constraints on how the Trustees can exercise their powers, which was a central reason why the claim was dismissed by the High Court[29] and Court of Appeal.[30] The Trustees

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22 Regulatory Impact Statement: The Taxation of Trustee Income (Inland Revenue, 3 April 2023) at [24].
23 Statistics New Zealand *2013 Census QuickStats about housing* (March 2014) at 12.
24 See eg James Anson-Holland and others *Law of Trusts (NZ)* (online ed, LexisNexis) at [47.14], [47.60], [47.63] and [47.64].
25 App Subs at [39].
26 CA Judgment **[[101.0108A]]** at [88] per Miller J and [107] per Cooper P and Gilbert J.
27 App Subs at [44] and following.
28 App Subs at [47].
29 *Pinney v Cooper* [2020] NZHC 1178 **[[101.0044]]** at [97].
30 CA Judgment **[[101.0108A]]** at [108] and [116]–[117] per Cooper P and Gilbert J.

are, to adopt Gilbert J's language, "accountable to the beneficiaries".[31]

Origin of the fiduciary concept

4.3 The idea of a fiduciary originated in medieval English law of real property.[32] Around the 12th century, an early predecessor to the trust developed, called "feoffment to use". This involved a landowner (the feoffor) giving legal title to their landholdings to another (the feoffee) to hold for the benefit of the feoffor and subsequently the feoffor's designated heir. It was first used by religious orders, pilgrims and crusaders, but by the 14th century became a common device to avoid feudal inheritance rules. While originally feoffors relied entirely on the good will of their feoffees to carry out their wishes, the ecclesiastical and later chancery courts eventually stepped in to provide protection that the common law would not (by imposing what we would now call fiduciary duties).[33]

4.4 The term "fiduciary" developed much later, in the mid-19th century, to describe relationships that had previously been called a "trust" following the formalisation of that terminology (eg company directors, who were often called trustees in this period).[34] Throughout its early development, the concept of a fiduciary "evolved largely by analogy with the standards exacted from a trustee".[35]

Trustees are fiduciaries

4.5 The Trusts Act describes an express trust as a "fiduciary relationship" (s 13(a)). Section 6 of the Trusts Act, which provides a guide to the general scheme and effect of the Act, sees the point as so settled that the proposition a trustee is a fiduciary is a premise for further explanation ("[a]s a fiduciary, each trustee owes duties and is accountable for how the trust property is managed and distributed").[36] Counsel are not aware of *any* case where a court has held that an express trustee was not a fiduciary.

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31 CA Judgment **[[101.0108A]]** at [107] per Cooper P and Gilbert J.

32 Stephen Kós ""This May Seem Hard": Temporal and Personal Perspectives on Fiduciary Law" (speech to Society of Trust & Estate Practitioners New Zealand, 2021) at [11].

33 See generally David J Seipp "Trust and Fiduciary Duty in the Early Common Law" (2011) 91 Boston L Rev 1011; and F W Maitland "The Origin of Uses" (1894) 8 Harvard L Rev 127.

34 Stephen Kós ""This May Seem Hard": Temporal and Personal Perspectives on Fiduciary Law" (speech to Society of Trust & Estate Practitioners New Zealand, 2021) at [15].

35 Paul Finn *Fiduciary Obligations: 40th Anniversary Republication with Additional Essays* (The Federation Press, Sydney, 2016) at [7].

36 Trusts Act 2019, s 6(4).

4.6 In modern jurisprudence, the trustee-beneficiary relationship is commonly referred to as the archetype of a fiduciary relationship by the leading texts and judgments.[37]

4.7 In his seminal text, *Fiduciary Obligations*, Professor Finn identifies two reasons why an express trustee is a fiduciary:[38] (i) the position held exists not for the trustee's own benefit, but for another's benefit; and (ii) the trustee alone is ultimately responsible for determining how their duties are to be discharged and how their powers are to be exercised.

4.8 As the trustee-beneficiary relationship is inherently fiduciary,[39] all trustees are subject to fiduciary obligations by virtue of their office and irrespective of the circumstances. The content of the fiduciary obligations placed on a trustee may differ, but that does not mean they are not a fiduciary.

4.9 Trustees also exhibit all the factors that indicate a fiduciary relationship. That is unsurprising as the trustee was the historic role model for the fiduciary relationship.[40] The three factors that indicate a fiduciary relationship were recently summarised by the Court of Appeal in *Dold v Murphy*:[41]

(a) the conferral of powers in favour of the alleged fiduciary, which may be used to affect the proprietary rights of the beneficiary;

(b) the apparent assumption of a representative or protective responsibility by the alleged fiduciary for the beneficiary (for example, to promote the beneficiary's interests, or to prefer the interests of the beneficiary over those of third parties); and

(c) the implied subordination (although, not necessarily, elimination) of the alleged fiduciary's own self-interest.

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[37] See eg David Hayton (ed) *Underhill and Hayton Law Relating to Trusts and Trustees* (18th ed, LexisNexis, London, 2022) at [1.60]: "the trustee is the archetype of the fiduciary"; John McGee (ed) Snell's Equity (34th ed, Sweet & Maxwell, London, 2020) at [7-004]: "the paradigm example of a fiduciary relationship is the relationship between trustee and beneficiary"; *Maguire v Makaronis* (1997) 188 CLR 449 at 463, citing *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 68 ("[t]he archetype of a fiduciary is of course the trustee"); *White v Jones* [1995] 2 AC 207 (HL) at 271 (referring to a trustee as the "paradigm of the circumstances in which equity will find a fiduciary relationship"); and *Valard Construction Ltd v Bird Construction Co* 2018 SCC 8, [2018] 1 SCR 224 at [17] ("the "hallmark" characteristic of a trust is the fiduciary relationship existing between the trustee and the beneficiary").

[38] Paul Finn *Fiduciary Obligations: 40th Anniversary Republication with Additional Essays* (The Federation Press, Sydney, 2016) at [13].

[39] *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433 at [73].

[40] See paragraphs 4.3–4.4 above.

[41] *Dold v Murphy* [2020] NZCA 313, [2021] 2 NZLR 834 at [55].

4.10 These factors were drawn from this Court's decisions in *Chirnside v Fay*,[42] *Paper Reclaim Ltd v Aotearoa International Ltd*,[43] and *Amaltal Corp Ltd v Maruha Corp*.[44]

4.11 The factors also largely correspond to those outlined by Wilson J in *Frame v Smith*, which has influenced the Canadian jurisprudence on this subject.[45] More recently, in *Galambos v Perez*, the Supreme Court of Canada highlighted that fiduciary law focuses on relationships "in which one party is given a discretionary power to affect the legal or vital practical interests of the other".[46] In the case of a trustee, the requisite capacity for discretion is integral to the office.

What are fiduciary obligations?

4.12 Professor Finn has explained:[47]

> Because of this autonomy, this freedom of the office-holder within his discretions, Equity has intervened and not simply to prevent self-interested action. It has imposed a general obligation on the fiduciary controlling the manner in which he deals with and exercises his discretions. He is positively required in his decision-making to act honestly in what he alone considers to be the interests of those for whose benefit his position exists – his beneficiaries.

4.13 This positive obligation to act in the best interests of the beneficiaries is the core of what it means to be a fiduciary. The strong focus of fiduciary law on prophylactic duties — namely, the no-profit rule and the no-conflict rule — makes it common to lose sight of this underlying obligation. But, as Professor Finn explains, the prophylactic rules are protective measures to ensure that the trustee does not compromise their underlying obligation to act in the best interests of the beneficiaries.[48]

4.14 Significantly, that core positive obligation cannot be excluded by the terms of a trust deed as it is essential to the office of trustee. As Millett LJ put it in *Armitage v Nurse*, the duty "to perform the trusts honestly and in good faith for the benefit of the beneficiaries" is the "irreducible core of obligations" owed by a trustee and fundamental to the concept of a trust.[49] The appellant suggests that the "irreducible core" is not established law in Commonwealth

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42 *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433 at [73], [75] and [80] per Tipping J.
43 *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZSC 26, [2007] 3 NZLR 169 at [31].
44 *Amaltal Corp Ltd v Maruha Corp* [2007] NZSC 40, [2007] 3 NZLR 192 at [20]–[21].
45 *Frame v Smith* [1987] 2 SCR 99 at 136–137 per Wilson J.
46 *Galambos v Perez* 2009 SCC 48, [2009] 3 SCR 247 at [70].
47 Paul Finn *Fiduciary Obligations: 40th Anniversary Republication with Additional Essays* (The Federation Press, Sydney, 2016) at [11].
48 At [30].
49 *Armitage v Nurse* [1998] Ch 241 (CA) at 253–254 per Millett LJ.

jurisdictions,[50] yet it has recently been applied by both the Privy Council and United Kingdom Supreme Court.[51]

4.15 The irreducible core is now reflected in the Trusts Act — s 26(a) requires a trustee to "hold or deal with trust property and otherwise act … for the benefit of the beneficiaries, in accordance with the terms of the trust". This is the fundamental fiduciary obligation owed by trustees.[52] It cannot be excluded or modified by the terms of a trust.

Appellant's argument to the contrary

4.16 The appellant argues that the core concept behind the trust is not fiduciary obligation but an undertaking by a trustee to hold and deal with property on terms set by the settlor that are legally enforceable by a beneficiary. From this, the appellant concludes that a trust does not necessitate the imposition of fiduciary obligations on top of the obligations to comply with the terms of the trust deed, to act honestly and in good faith, and to exercise powers for proper purposes.[53]

4.17 The appellant omits from this list any mention of the mandatory (fiduciary) obligation in s 26 of the Trusts Act to act for the benefit of the beneficiaries.

4.18 The appellant claims that "every component typically making up the complement of 'fiduciary obligations'" can be excluded — referring to the default duties under the Trusts Act — and that "[f]iduciary obligations are not included in the Act's mandatory duties".[54] That is incorrect. The mandatory obligation in s 26 to act for the benefit of the beneficiaries is the fundamental fiduciary obligation. It cannot be excluded.

4.19 There is nothing in the appellant's point that the Trusts Act is not an exhaustive code for express trusts.[55] As illustrated above, the Trusts Act reflects the existing law on this subject.

4.20 As the sole authority for the unorthodox submission that express trustees are not fiduciaries, the appellant cites extra-judicial writing of

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50 App Subs at [54].

51 *Webb v Webb* [2020] UKPC 22, [2021] 2 NZLR 376 at [89]; and *Children's Investment Fund Foundation (UK) v Attorney General* [2020] UKSC 33, [2022] AC 155 at [82]. See also *Fenwick v Naera* [2015] NZSC 68, [2016] 1 NZLR 354 at [70].

52 *Green v Green* [2015] NZHC 1218 at [504]: ("The fundamental duty of a fiduciary is to exercise the power conferred upon them in the best interests of, in this case, the beneficiaries").

53 App Subs at [44].

54 App Subs at [50].

55 App Subs at [51].

Lord Millett.[56] What Lord Millett actually said is: "[t]he paradigm example of the fiduciary is the *express* trustee, not the constructive trustee" (emphasis original).[57] It is unnecessary to consider the obligations of a constructive trustee in this case concerning express trusts. Indeed, Lord Millett gives a useful exposition of why express trustees owe fiduciary obligations:[58]

> An express trustee is the paradigm example of the fiduciary. As Maitland explained, the relationship between the trustee and the settlor is one of trust and confidence, but the trustee owes no fiduciary duties to the settlor. There is no such relationship between the trustee and the beneficiaries. The fiduciary duties which an express trustee owes to the beneficiaries, therefore, are based, not on the relationship between them, but on his voluntary undertaking to the settlor to manage the trust property for their benefit and not his own. To derive his fiduciary character from the trust, that is to say, from the separation of the legal estate and the beneficial interests, is simply nonsense. They both derive from the same source, that is to say the obligations which he undertook when he voluntarily accepted the office of trustee.

4.21 The appellant cites two cases for the proposition that Lord Millett's views were not confined to constructive trusts.[59] But neither case concerned an express trust; both involved *sui generis* circumstances.[60] At best, these cases might show that other non-express trustees are akin to a constructive trustee.[61]

4.22 The appellant also attempts to draw an analogy with a bare trust.[62] It does not assist her. First, the Trust is manifestly not a bare trust (notwithstanding the faint submission to the contrary by the appellant)[63] — it has a comprehensive trust deed with a range of discretionary powers. Second, and more generally, it is not so clear that a bare trustee owes no fiduciary obligations.[64] A beneficiary of a bare trust remains vulnerable to the trustee's conduct even in the absence of a discretionary power, and s 26 applies to all express trusts. So a trustee of a bare trust must owe fiduciary obligations; it

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56 App Subs at [52].

57 P J Millett "Restitution and Constructive Trusts" (1998) 114 LQR 399 at 403.

58 At 405.

59 App Subs at [52].

60 *R v Chester and North Wales Legal Aid Area Office No 12, ex parte Floods of Queensberry Ltd* [1998] 1 WLR 1496 (CA) concerned a company litigating on behalf of its director following a failed assignment of a cause of action by the company to the director. *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195, [2013] Ch 91 concerned the obligations owed by an innocent recipient of trust property who is subsequently notified that they obtained the property in breach of trust. The Court was content to call it a constructive trust "provided that one is not misled into thinking that to call the relationship one of trustee and beneficiary tells you, of itself, what the duties and liabilities of the trustee are" (see [80]).

61 But note that Lord Browne-Wilkinson disagrees with Lord Millett even for non-express trusts: see *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL) at 706–707.

62 App Subs at [53].

63 App Subs at [53].

64 Matthew Conaglen *Fiduciary Loyalty* (Hart Publishing, 2010) at 197–201.

is just that the range of powers to which such obligations attach is more limited than a typical family trust.

4.23 Failing all else, the appellant argues that even if fiduciary obligations are essential to a trust, there 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".[65] The appellant cites the statement in *Clark Boyce v Mouat* that "fiduciary obligations cannot be prayed in aid to enlarge the scope of contractual duties".[66]

4.24 That statement must be understood in its context. The Privy Council's point was simply that there was no fiduciary duty on Mr Boyce, a lawyer, to advise Mrs Mouat, his client, on the wisdom of entering into the transaction at issue. That was a matter for contract — ie the scope of the retainer. The Privy Council was not saying that the terms of a contract take precedence over core fiduciary duties. In trust law, that interaction is addressed by the mandatory or default status of the fiduciary duties under the Trusts Act.[67]

4.25 As a final note in this section, the appellant makes a preliminary point that a non-beneficiary trustee might owe fiduciary duties (to at least Marcus) even if Marcus had a general power of appointment.[68] That is incorrect. All trustees owe fiduciary duties by virtue of their office.

5. WHAT DOES THIS ALL MEAN HERE?

5.1 It is common for trust deeds in New Zealand to exclude aspects of the fiduciary obligations imposed on trustees such as:

(a) the "no self-benefit" rule;

(b) the "no conflict" rule; and

(c) the "no remuneration" rule.

5.2 These are all default duties in the Trusts Act (ss 31, 34 and 37), capable of exclusion or modification by virtue of s 28. Trust deeds, before and following the Trusts Act, routinely do so. A number of

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65 App Subs at [56].
66 *Clark Boyce v Mouat* [1993] 3 NZLR 641 (PC) at 648.
67 Trusts Act 2019, ss 22 and 28.
68 App Subs at [42].

cases have considered such clauses in a range of contexts, with no indication that the clauses were problematic.[69]

The MWRP Deed

5.3 The MWRP Deed is vanilla. The key terms are as follows:

(a) The "final beneficiaries" are Marcus' children and grandchildren (clause 1(e)).

(b) The "discretionary beneficiaries" are the final beneficiaries plus Marcus (clause 1 (f)).

(c) The Trustees have a special (dispositive) power of appointment (discussed further below) over income and capital in favour of the discretionary beneficiaries during the life of the trust (clauses 4 and 6), including to guardians or parents (clause 8) and by way of resettlement (clause 7).

(d) On vesting day, in default of prior appointment, the trust fund is to be held equally for Marcus' children (or, if deceased, their children) (clause 11). The Trustees may bring forward the vesting day (clause 2(c)(i)).

(e) There is a limited power of variation (clause 12).

(f) Every discretion is said to be "absolute and controlled" (clause 13).

(g) Trustee decisions must be made "unanimously" (clause 14).

(h) Marcus has the power of appointment and removal of trustees (clause 15) (discussed further below).

(i) There are clauses negating the no conflict rule (clause 17) and no remuneration rule (clauses 19) but no express clause ousting the no self-benefit rule.

(j) The usual indemnity is provided to trustees (clause 21) and a range of other typical clauses for a trust deed in this context.

5.4 Any submission that the Trustees' dispositive power of appointment (clauses 4 and 6) is general rather than special is incorrect:

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69 See eg *McNulty v McNulty* HC Dunedin CIV-2010-412-810, 30 September 2011 at [58] (referring to a clause permitting conflicts as "boiler-plate", "relatively standard" and "suiting admirably a common family trust situation"); *Spencer v Spencer* [2012] 3 NZLR 229 at [189]; and *Patchett v Williams* HC Blenheim CIV-2005-406-82, 5 October 2005 at [35]–[37].

(a) For the dispositive powers to be general ones, they would need to enable the Trustees to appoint trust property to anyone in the world, including themselves.

(b) The dispositive powers plainly do not permit this — they are special powers, permitting the appointment of trust property within a defined class of discretionary beneficiaries.

(c) Indeed, powers conferred on trustees, in their capacity as trustees, cannot be general (dispositive) powers of appointment. Such powers are *always* fiduciary.[70] And trustees will *always* be subject to the mandatory obligations under the Trusts Act to exercise their powers honestly and in good faith (s 25), for the benefit of the beneficiaries (s 26), and for proper purposes (s 27).

Comparison with the *Clayton* deed

5.5 What is notable is the differences between the MRWP Deed and the trust deed considered in *Clayton* (the "***Clayton* Deed**").

5.6 The Court in *Clayton* identified three clauses of the *Clayton* Deed that meant Mr Clayton was "not constrained by any fiduciary duty" when exercising his trustee powers to appoint trust property.[71] Two of those clauses permitted: (i) self-benefit (cl 14.1); and (ii) acting despite a conflict of interest (cl 19.1(c)). Clauses of that kind are common in many trust deeds. They permissibly exclude the default duties now contained in ss 31 and 34 of the Trusts Act.

5.7 Unusual, however, was cl 11.1, which the Court described as follows:[72]

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

5.8 Together, the limbs of cl 11.1 went far beyond (permissibly) excluding the default duty of impartiality (s 35). Although the Court did not decide the point (noting the claim had already settled prior to judgment and that the Court was not of one mind on the issue),[73] counsel submit that this clause — which attempts to oust the

[70] Geraint Thomas *Thomas on Powers* (2nd ed, Oxford University Press, Oxford, 2012) at [1.46].
[71] *Clayton v Clayton* [2016] NZSC 29, [2016] 1 NZLR 551 at [58].
[72] At [56(b)].
[73] At [127].

irreducible core of a trust, permitting a trustee to act contrary to the interests of beneficiaries — must mean that no valid trust had been formed.

5.9 Clause 11.1 was essential to the analysis in *Clayton*. Without it, the Court could not have concluded that Mr Clayton (as trustee) was not constrained by any fiduciary duties, as he would have been obliged to consider the interests of other beneficiaries if he wished to appoint the trust assets to himself.

5.10 Importantly, Mr Clayton also held the power to appoint and remove discretionary beneficiaries (clause 7.1) in his personal capacity as "Principal Family Member". (It was also a non-fiduciary power to remove beneficiaries that was responsible for the outcome in *Webb v Webb*.)[74]

5.11 The Court in *Clayton* held that the:[75]

> …practical effect of the provisions discussed above is that Mr Clayton, as Trustee of the VRPT, could appoint all of the assets of the VRPT to himself, especially (though not exclusively) if he has already exercised his power as Principal Family Member under cl 7.1 to remove all other Discretionary Beneficiaries.

5.12 Therefore, the Court concluded that the "combination of powers and entitlements of Mr Clayton as Principal Family Member, Trustee and Discretionary Beneficiary of the VRPT amount in effect to a general power of appointment in relation to the assets of the VRPT".[76]

5.13 Although Mr Clayton also held a power to appoint and remove trustees as Principal Family Member, that power received little attention in the Court's reasoning, which referred to the power as merely having "contextual significance".[77]

5.14 The MWRP Trust is not a *Clayton* trust, as:

(a) there is no attempt to oust the irreducible core of a trust by permitting a trustee to act contrary to the interests of beneficiaries — cl 17 permits a conflict of interest (a "reasonably standard clause", per Gilbert J),[78] but this does not exonerate a trustee from the core duty to consider the

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[74] *Webb v Webb* [2020] UKPC 22, [2021] 2 NZLR 376 at [83]–[87]. Note in [84] the Privy Council disagreed that an unconstrained dispositive power of appointment held by Mr Webb as sole trustee, and exercisable with a conflict of interest, was sufficient to amount to property because Mr Webb remained subject to fiduciary obligations in his role as trustee.

[75] *Clayton v Clayton* [2016] NZSC 29, [2016] 1 NZLR 551 at [62].

[76] At [68].

[77] At [52].

[78] MRWP Deed **[[301.0456]]** at 461–462.

interests of all beneficiaries when exercising trustee powers or other breaches of trust;[79]

(b) in contrast to the extensive non-fiduciary powers available to Mr Clayton as sole trustee and "Principal Family Member" (and in similar cases),[80] Marcus only has a power to appoint and remove trustees; and

(c) the power to appoint and remove trustees is a fiduciary one that cannot be exercised if removal will result in fewer than two trustees (addressed in section 6 below).

5.15 The appellant also points to cl 13, which provides that the powers vested in the trustees shall be exercisable in their "absolute and uncontrolled discretion".[81] Counsel agree with Gilbert J's observation that the significance of this clause is "questionable".[82] At its highest, this clause could be interpreted as excluding all default duties under the Trusts Act (and it likely does not even achieve that).[83] But it cannot be read as excluding mandatory duties, as the appellant accepts (although, again, omitting reference to the core fiduciary duty in s 26).[84]

Meaningful accountability

5.16 The Trustees' conduct is therefore subject to meaningful constraints, resulting in accountability to the beneficiaries. That accountability could be enforced in a range of ways:

(a) Section 126 of the Trusts Act provides for judicial review of whether any particular trustee decision or proposed decision "was not or is not reasonably open to the trustee in the circumstances".

(b) Under s 95(1) of the Trusts Act, any beneficiary may apply to the High Court for review of an exercise of a power to remove or appoint a trustee (which is undertaken in the same way as a s 126 review: s 95(2)).

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79 *Webb v Webb* [2020] UKPC 22, [2021] 2 NZLR 376 at [84]. See also Paul Finn *Fiduciary Obligations: 40th Anniversary Republication with Additional Essays* (The Federation Press, Sydney, 2016) at [102].

80 Compare also the dispositive powers in *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch), which were all held in a non-fiduciary capacity as "Protector" rather than as trustee.

81 App Subs at [70]–[71], citing MRWP Deed **[[301.0456]]** at 461.

82 CA Judgment **[[101.0108A]]** at [110].

83 For example, it is not obvious that an ability to *exercise* a power with absolute discretion relieves a trustee of an obligation to "actively and regularly" consider exercise of that power (s 32); or to refrain from binding or committing to a future exercise of the power (s 33).

84 App Subs at [71].

(c) The courts frequently hold trustees to account for breach of fiduciary (and non-fiduciary) obligations, including by removing errant trustees where appropriate.[85]

(d) The disclosure provisions in the Trusts Act apply to all express trusts (and are not capable of exclusion or modification).[86]

(e) The High Court retains an inherent supervisory jurisdiction over trusts.[87]

5.17 So even if "indirect control" of a trust were sufficient, as the appellant suggests,[88] the powers Marcus would "control" would not permit him to, in the language of *Clayton*, appoint all of the assets of the MRWP Trust to himself.[89] The "controlled" powers would entail fiduciary obligations to act for the benefit of all beneficiaries, which must be discharged honestly and in good faith. Concerned beneficiaries would have several avenues to seek accountability. As Gilbert J held:[90]

> As Miller J acknowledges, other beneficiaries have a right to be considered and to due administration of the trust. As he says, if the trustees were to appoint property or income to Marcus without due consideration of their circumstances, this would be a breach of fiduciary duty.

5.18 There are two children of the relationship between Raewyn and Marcus (now aged 16 and 14),[91] who are beneficiaries of the MRWP Trust and could realistically be expected to hold Marcus to account (noting Raewyn could act as their litigation guardian while they remain minors).[92]

6. POWER OF APPOINTMENT AND REMOVAL OF TRUSTEES

6.1 The appellant places particular emphasis on Marcus' power of appointment and removal of trustees and the second-trustee requirement. The appellant submits that, as between *Clayton* and the present case, "only one difference is potentially decisive, namely the requirement in the MRWP Trust for there to be at least one trustee

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85 See eg *Walters v Wikiriwhi* [2022] NZCA 93 (where the Court removed trustees who permitted a trustee-beneficiary to personally profit from trust property); and *Adlam v Savage* [2016] NZCA 454, [2017] 2 NZLR 309 (where the Court required a trustee to disgorge $11.2 million in profits obtained through self-dealing).

86 Trusts Act 2019, ss 45–55. Compare *Erceg v Erceg* [2017] NZSC 28, [2017] 1 NZLR 320 at [56].

87 *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26, [2003] 2 AC 709 at [51] and [66].

88 App Subs at [69].

89 *Clayton v Clayton* [2016] NZSC 29, [2016] 1 NZLR 551 at [62].

90 CA Judgment **[[101.0108A]]** at [116].

91 Affidavit of Raewyn Phyllis Cooper sworn 15 September 2014 **[[201.0109]]** at [12].

92 Family Court Rules 2002, r 90C; and High Court Rules 2016, r 4.35.

other than the domestic partner".[93] The appellant goes on to submit, however, that the second-trustee requirement is immaterial given Marcus' power of appointment and removal of trustees, which she says is not a fiduciary power.[94]

6.2 The premise for the appellant's submission is wrong — for the reasons given above, the key difference between *Clayton* and the present case is that any trustees of the MRWP Trust would be subject to fiduciary obligations; the preceding analysis stands no matter the view taken of Marcus' power to appoint and remove trustees. That alone is a sufficient basis to dismiss the appeal.

6.3 The appellant's substantive submission is:

(a) partially correct, in that the second-trustee requirement is a further, independent, basis for concluding that Marcus' power under the MRWP Deed does not amount to a general dipositive power of appointment — it is yet another constraint on Marcus appointing all the MRWP Trust assets to himself; but also

(b) partially wrong, in that it mischaracterises the power of appointment and removal of trustees as non-fiduciary.

6.4 The Trustees submit that a power to appoint and remove trustees is not sufficient to give Marcus control over the assets of the MRWP Trust because that control rests, at law, with the trustees once appointed.[95]

Power to appoint and remove trustees prima facie fiduciary

6.5 The nature of the power to appoint and remove trustees and the circumstances in which it is usually bestowed are such that the power has been recognised as prima facie entailing fiduciary obligations regardless of who it is conferred upon.[96]

6.6 That position is well established in recent New Zealand authority.[97] It was accepted by all three judges of the Court of Appeal in this

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93 App Subs at [4].

94 App Subs at [15]–[18].

95 See *Financial Markets Authority v Hotchin* [2011] 3 NZLR 469 (HC) at [131].

96 Geraint Thomas *Thomas on Powers* (2nd ed, Oxford University Press, Oxford, 2012) at [10.49]; Lynton Tucker, Nicholas Le Poidevin and James Brightwell *Lewin on Trusts* (20th ed, Sweet & Maxwell, London, 2020) at [15-047]–[15-048]; and *Re Burton, Wily v Burton* (1994) 126 ALR 557 (FCA) at 559.

97 *Brkic v White* [2021] NZCA 670, [2021] NZFLR 840 at [29]; *New Zealand Māori Council v Foulkes* [2015] NZCA 552, [2016] 2 NZLR 337 at [22]; *Green v Green* [2015] NZHC 1218 at [504]–[505]; *Harre v Clark* [2014] NZHC 2533 at [24]; and *Carmine v Ritchie* [2012] NZHC 1514 at [66].

proceeding (including in Miller J's dissent).[98] By contrast, the appellant relies on an obiter comment by one Australian judge in a separate concurring judgment.[99]

6.7 The prima facie approach is justified by the principles of fiduciary law.

6.8 The terminology of "fiduciary power" can distract from the relational nature of fiduciary obligations. It is not the power itself but the relationship between the donee and the beneficiary that attracts fiduciary obligations.[100] The author of *Thomas on Powers* suggests that "the expression really denotes a power conferred on a holder of a 'fiduciary office'", but also acknowledges that description is "not appropriate in all contexts" because there is "no reason why one specific fiduciary power cannot be conferred on a person who has no other role", giving the example of the power to appoint and remove trustees.[101]

6.9 It may assist the analysis to focus on the relationship, applying the general principles of fiduciary law. That relationship may be embodied in a recognised office, such as trustee, or it may be an uncategorised relationship between a named individual (or a person identified with a tag such as "protector") and the beneficiaries. If the relationship has the requisite fiduciary characteristics, then the holder of the power will be subject to fiduciary obligations in its exercise.

6.10 The holder of a power to appoint and remove trustees fits the mould of a fiduciary:

(a) they hold a discretionary power, which they alone are responsible for discharging;

(b) the beneficiaries of the trust are vulnerable to the exercise of that discretionary power, as it will affect who is to discharge the obligations of trustee for their benefit;

(c) the power is limited in that it is necessarily conferred for the purpose of selecting trustees, who must be fit for that fiduciary office; and

[98] CA Judgment **[[101.0108A]]** at [69] per Miller J.

[99] App Subs at [34], citing *Baba v Sheehan* [2021] NSWCA 58 at [4] per Brereton JA, noting "this case is not an appropriate vehicle finally to resolve this issue". Brereton JA's remarks are largely contrary to those in the New Zealand authorities cited above and should not be preferred. Further, the suggestion that discretionary beneficiaries do not repose trust and confidence in an appointor ignores that the settlor has usually done so on their behalf.

[100] Paul Finn *Fiduciary Obligations: 40th Anniversary Republication with Additional Essays* (The Federation Press, Sydney, 2016) at [6].

[101] Geraint Thomas *Thomas on Powers* (2nd ed, Oxford University Press, Oxford, 2012 at [1.52].

(d) the power exists (usually) for the benefit of the beneficiaries.

6.11 Whether the power was conferred for the benefit of the beneficiaries will ultimately be a matter of interpreting the trust deed in its context.[102] Where the trust deed is silent on the matter, then in the absence of clear evidence to the contrary, the default assumption should be (and in New Zealand has been) that the settlor intended the power to be exercised for the benefit of all beneficiaries.

6.12 There are several reasons for this. The most common reason given is that the subject matter of the power is the office of trustee, which lies at the core of the trust.[103] That is significant because of the potential consequences for the beneficiaries of the power's exercise but also because it reflects a reposing of trust and confidence by the settlor in the holder of the power.[104]

6.13 It is also notable that under the Trusts Act the power to appoint and remove trustees is given in default of a specified appointor to the trustees (who must act in the interests of the beneficiaries).[105] That suggests the norm is for the power to be exercised subject to fiduciary obligations.

6.14 In the unusual situations where a settlor intended a power to appoint and remove trustees to be exercised for personal benefit, there should be clear evidence — such as express language to that effect in the terms of the power itself, in the preamble to the trust deed, or in admissible extraneous evidence as to the settlor's intentions.

6.15 The mere fact that the power has been granted to a beneficiary should not without more be sufficient to displace the usual inference that the power is for the benefit of the beneficiaries as a whole and subject to review on that basis.[106] In a family trust, a senior beneficiary will often be well placed to determine suitable candidates who could best act in the interests of the beneficiaries.

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[102] John McGee (ed) *Snell's Equity* (34th ed, Sweet & Maxwell, London, 2020) at [10-009].

[103] *New Zealand Māori Council v Foulkes* [2015] NZCA 552, [2016] 2 NZLR 337 at [22]. There the Court of Appeal, having noted earlier High Court authority with which it agreed, held that "the power to appoint new trustees is of a fiduciary nature because the subject matter of the power is the office of the trustee. That office lies at the core of the trust and carries fundamental and onerous obligations to act in the best interests of the beneficiaries as a whole to the exclusion of the trustee's own interest. And, as it reposes the settlor's personal trust and confidence in the donee to exercise its own judgment and discretion, the power cannot be delegated to a third party. In this respect it does not matter that the party exercising the power is not itself a trustee; it is the object and purpose of the power, taken from the deed, that is decisive".

[104] At [22].

[105] Trusts Act 2019, s 92(1)(b), (2)(a)(ii), (2)(b)(ii) and (2)(c)(ii). See *Basel Trust Corporation (Channel Islands) Ltd v Ghirlandina Anstalt* [2008] JRC 013, (2008) 11 ITELR 157 at [81], noting this point.

[106] *HSBC International Trustee Limited v Wong* (2006) 9 ITELR 676 (Cayman Islands GC) at [21].

Clause 15 of the MRWP Deed

6.16 Clause 15 of the MRWP Deed is a conventional power to appoint and remove trustees.[107] There is nothing especially unusual about it.

6.17 The power is vested in Marcus, who was: (i) a nominal settlor, together with the trustees of the Pinney Trust (who are the true settlors as only they appointed capital to the MRWP Trust);[108] (ii) (at that time) one of the trustees; and (iii) one of the discretionary beneficiaries. The remaining beneficiaries are the children and grandchildren of Marcus.[109] Marcus was the natural choice to be trusted with the power to ensure that the trustees remained well suited to act for the benefit of the beneficiaries, so as to preserve the benefit of the farm for Marcus and his children / grandchildren.[110]

6.18 The power was conferred on Marcus by name rather than in his (then) capacity as a trustee. It is therefore not subject to the "absolute and uncontrolled discretion" provision (cl 13).[111]

6.19 It is true that the power to remove may be exercised "[w]ithout being obliged to *give* any reason" (cl 13(d), emphasis added).[112] But cl 13(d) simply reflects the rule that beneficiaries are not usually entitled to *disclosure* of the reasons for a trustee's decision.[113] It does not mean that Marcus need not *have* a reason for exercising the power. Indeed, the jurisdiction to review such decisions under s 95(2) of the Trusts Act means that Marcus is not only required to have reasons, but also that those reasons are "reasonably open" to him.[114] That distinguishes *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev*, where the power could be exercised "with or without cause".[115]

6.20 Marcus may appoint himself as trustee (cl 15(c)). That proviso is not uncommon for a family trust in counsel's experience. In fact, it is

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107 MRWP Deed **[[301.0456]]** at 461.

108 See Deed of distribution dated 16 December 2005 **[[301.0437]]**.

109 MRWP Deed **[[301.0456]]** at 458, cl 1(e) and (g).

110 See affidavit of Lindsay Alexander McIntyre sworn 10 November 2015 **[[201.0345]]** at [9]: "The Trust was set up to provide for Marcus, his children and grandchildren…"; and [68] / [71] explaining that distributing the farm to Marcus personally "would not have been appropriate due to the original purpose of the [Pinney] Trust" and that the "original purpose of the [Pinney] Trust then continued into the [MRWP] Trust".

111 MRWP Deed **[[301.0456]]** at 461.

112 MRWP Deed **[[301.0456]]** at 461. Note that no similar provision is made with respect to the power to appoint, although that likely makes little difference for the reasons given in paragraph 6.19.

113 See *Lambie Trustee Ltd v Addleman* [2021] NZSC 54, [2021] 1 NZLR 307 at [54]; and *Erceg v Erceg* [2017] NZSC 28, [2017] 1 NZLR 320 at [55].

114 See Trusts Act 2019, s 95(2), which incorporates the standard set by ss 126–127.

115 *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch) at [272]: "The fact that the power of removal of trustees is expressed to be "with or without cause" is significant. In the context of all the other factors in this case, to go to the trouble of saying expressly that removal of a trustee may be without cause seems to me to negative any idea that the power is subject to a limitation of any kind."

entirely sensible where, as here, the appointor is already one of the original trustees.

Marcus owes fiduciary obligations in relation to cl 15

6.21 The appellant's claim rests entirely on Marcus' power under cl 15 of the MRWP Deed to appoint and remove trustees (as it must, now that he has retired as a trustee). But viewed in context, Marcus' power places him in a fiduciary relationship with the beneficiaries of the Trust.

6.22 There is no compelling textual indication that cl 15 was conferred otherwise than for the benefit of the beneficiaries. There is no provision excluding fiduciary or other obligations, except cl 15(c), which excludes (where applicable) the default duty not to exercise a power for the person's own benefit (s 31).[116] Note that s 31 would not always be relevant because self-appointment would not always be a benefit given the responsibilities and potential liabilities that come with the role of trustee.

6.23 Nor is there anything in the preamble to the MRWP Deed or otherwise in evidence to suggest that the settlors intended cl 15 to be used otherwise than for the benefit of the beneficiaries. As the respondent sets out, the evidence shows that the settlors did not intend to give Marcus unbridled power over the MRWP Trust.[117]

6.24 All the ordinary features that indicate a power of this kind will attract fiduciary obligations (as discussed in paragraphs 6.5–6.15 above) apply, including that the power ultimately passes to the trustees in accordance with s 92 of the Trusts Act after Marcus' death and the winding up of his estate.[118]

6.25 In addition, the restriction in cl 15(d) on Marcus using the power of removal to reduce the number of trustees below two is significant in understanding for whose benefit that power was conferred. There is no standalone provision in the Trust Deed requiring a minimum of two trustees.[119] The restriction arises entirely within the context of the power of appointment and removal. It is a strong indication that

[116] In respect of this, see Lynton Tucker, Nicholas Le Poidevin and James Brightwell *Lewin on Trusts* (20th ed, Sweet & Maxwell, London, 2020) at [28-018]: "Such a power remains fiduciary but subject to the qualification that the donee is not debarred from exercising it in a way which confers some benefit on himself".

[117] Submissions for the respondent dated 9 October 2023 ("**Res Subs**") at [97].

[118] That seems to be what was meant by the reference to the power being the "statutory power".

[119] When the MRWP Deed was drafted the Trustee Act 1956 applied. Section 43(2)(c) of that Act provided that "except where only 1 trustee was originally appointed, a trustee shall not be discharged under this section unless there will be either a trustee corporation or at least 2 individuals to act as trustees to perform the trust".

the settlors did not intend Marcus to be able to use the power of appointment and removal to assume control of the Trust.

6.26 The ability to self-appoint in cl 15(c) is insufficient to displace the numerous factors indicating that the relationship is fiduciary, especially since self-appointment cannot be as the sole trustee.[120] That Marcus is one of the discretionary beneficiaries is also not a significant factor given he also had roles as trustee and settlor.[121]

Second-trustee requirement

6.27 The appellant acknowledges that the power of appointment and removal of trustees in the MRWP Deed contains a "second-trustee requirement".[122] That poses a significant (and deliberate)[123] practical constraint on Marcus' ability to seize control of the Trust's assets for his own benefit.

6.28 Marcus cannot make himself the sole trustee.[124] That means he must convince another trustee (who is subject to fiduciary obligations) to act in accordance with his wishes. That would likely prove a formidable task if Marcus wished to appoint all the MRWP Trust's assets to himself, as the relief sought by the appellant assumes. That is because the second trustee would be exposing themselves to substantial personal liability if it transpired that the decision was flawed (for conflict, failure to consider relevant circumstances, unreasonableness, etc).[125]

6.29 Any beneficiary may possess the capacity to influence trustee decision-making by virtue of their mana and influence, persuasive reasoning or otherwise. But that cannot be sufficient for trust assets to constitute personal property. The ability to choose the identities of the trustees puts Marcus in no better situation. Whoever Marcus appoints will still have decisional autonomy and be subject to trustee obligations.

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[120] Compare *Australian Conservation Services Pty Ltd v Liladel Holdings Pty Ltd* [2017] ACTSC 162, (2017) 319 FLR 401.

[121] See *Berger v Lysteron Pty Ltd* [2012] VSC 95 at [83]–[85], where the Supreme Court of Victoria rejected a submission that because a beneficiary held the power it was intended for personal benefit.

[122] App Subs at [5] and [24]–[25].

[123] See affidavit of Lindsay Alexander McIntyre sworn 10 November 2015 **[[201.0345]]** at [16]: "The Trustees did not feel that Marcus would be able to run the financial side of the business successfully without close supervision. All significant decisions were therefore subject to discussion with the Trustees."

[124] See paragraph 6.25 above.

[125] As to the obligation to consider the consequences of a proposed exercise of a power (including on the interests of beneficiaries), see generally Lynton Tucker, Nicholas Le Poidevin and James Brightwell *Lewin on Trusts* (20th ed, Sweet & Maxwell, London, 2020) at [30-040]–[30-041], discussing *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108.

6.30 The sole exception would be a corporate trustee completely controlled by Marcus. The Trustees submit that it would not be permissible for Marcus to use his powers of appointment and removal to install such a trustee. Seeking to make such an appointment would amount to a deliberate attempt to circumvent the second-trustee requirement in cl 15(d). It could not be done in good faith, irrespective of whether Marcus owes fiduciary obligations. Moreover, if Marcus does owe fiduciary obligations (as the Trustees submit), it is difficult to imagine how appointing a puppet trustee would assist in faithfully administering the Trust for the benefit of the beneficiaries.

6.31 This Court recently heard the appeal in *Legler v Formannoij* on a very similar issue.[126] The Trustees agree with the appellant that *Legler* is distinguishable regardless of the outcome of that appeal because of the differences between the trust deeds.[127] However, *Legler* is at least informative of the level of scrutiny an appointment decision of this kind can attract.

Conclusion on power to appoint and remove trustees

6.32 There is meaningful accountability for the exercise of a power to appoint and remove a trustee, including jurisdiction for review by the High Court.[128] There are many examples of challenged appointments / removals,[129] including many that were successful.[130]

6.33 Therefore, assuming that the Trustees had unconstrained powers to appoint the Trust's assets to Marcus (which they do not), the appellant cannot demonstrate that Marcus is able to gain sole control over how those powers are exercised. Without such control, there can be no property right.

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[126] On appeal from *Legler v Formannoij* [2022] NZCA 607.

[127] App Subs at [30]. Note, in particular, that unlike the trust deed in *Legler* the MRWP Deed does not contain any provision permitting the appointment of a single corporate trustee. In contrast, here, s 97(1) of the Trusts Act provides the sole exception. It states: "A *statutory trustee* may be appointed and may lawfully act as the sole trustee of any trust, even if the terms of the trust provide for or require the appointment of 2 or more trustees" (emphasis added). "Statutory trustee" means "a trustee that is a body corporate and that is authorised under an enactment to act as executor or administrator of a deceased person's estate and includes a trustee corporation": Trusts Act 2019, s 9.

[128] Trusts Act 2019, s 95.

[129] See eg *Legler v Formannoij* [2022] NZCA 607; *Baba v Sheehan* [2021] NSWCA 58; *McLaren v McLaren* [2017] NZHC 161; *Australian Conservation Services Pty Ltd v Liladel Holdings Pty Ltd* [2017] ACTSC 162; *Mercanti v Mercanti* [2016] WASCA 206, (2016) 340 ALR 290; *Harre v Clark* [2014] NZHC 2533; *Carmine v Ritchie* [2012] NZHC 1514; *Montevento Holdings Pty Ltd v Scaffidi* [2012] HCA 48; *Berger v Lysteron Pty Ltd* [2012] VSC 95; and *Rayner v N J Sheaffe Pty Ltd* [2010] NSWSC 810.

[130] See eg *Ying Mui v Hoh (No 6)* [2017] VSC 730; *Re F Trust, Re A Settlement* (2015) 18 ITELR 459 (Bermuda SC); *Austec Wagga Wagga Pty Ltd v Rarebreed Wagga Pty Ltd* [2012] NSWSC 343; *Rayner v N J Sheaffe Pty Ltd* [2010] NSWSC 810; and *Hillcrest (Ilford) Pty Ltd v Kingsford (Ilford) Pty Ltd (No 2)* [2010] NSWSC 285, (2010) 4 ASTLR 233.

7. PRA SHOULD IGNORE "WEAKLY FIDUCIARY" DUTIES

7.1 The appellant's fallback argument is that even if Marcus and the Trustees are both subject to fiduciary obligations in the exercise of their respective powers, there is no practical means to enforce those obligations, so Marcus in effect has unchecked control over the Trust.[131] The submission for the appellant, in essence, is that permitting "technical arguments about the nature of property" would "fly in the face of the purposes and principles of the PRA", and that social legislation should not "ignor[e] the reality of how such powers … are exercised in practice".[132]

7.2 Three preliminary points should be made about this submission.

7.3 First, to the extent the submission relies on tikanga, the Trustees endorse the point on process made by the respondent.[133]

7.4 Second, the constraints on the powers at issue are far from "technical" — they reflect well-established limits, as explained elsewhere in these submissions.

7.5 Third, the premise that there is no meaningful accountability is wrong as previously noted,[134] and shows little faith in the judiciary. If, following this Court's judgment, Marcus re-appointed himself as trustee and together with another trustee exercised the trustees' powers to appoint all of the MRWP Trust's assets to himself, any judge would see immediately what had occurred. It would be difficult for Marcus to show that he acted in good faith given his obligation to act for the benefit of all beneficiaries (especially if he replaced another trustee to achieve this).

7.6 Preliminary points aside, the proposition advanced by the appellant is baldly that the PRA should ignore trust law. The appellant's arguments — eg that fiduciary obligations are not essential to a trust — cannot be isolated to an interpretation of the term "property" in the PRA. They are matters of trust law and must be determined as such (to avoid confusion that would undermine the accessibility of the law).

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131 App Subs at [47], [56] and [71].

132 See App Subs at [92]–[114].

133 Res Subs at [134]–[147].

134 See further paragraphs 5.16–5.18 and 6.32 of these submissions above.

No such thing as "weakly fiduciary" obligations

7.7 It is unclear what "weakly fiduciary" means.[135] Miller J described it as a situation where "other beneficiaries' rights [are] so precarious, that there is no meaningful accountability".[136] But the consequence was said to be "that the trustee was not a fiduciary, obliged to hold property for the benefit of others".[137] So it appears, "weakly fiduciary" means no fiduciary obligations apply at all.

7.8 It makes, respectfully, little sense to speak of "weakly" fiduciary obligations. Fiduciary obligations are notable for how strictly they are enforced by the courts.[138] Courts enforce them wholeheartedly, even in situations that many would regard as harsh.[139] And often the consequences are visited upon a trustee who has gained nothing from the exercise of power. Unsurprisingly, therefore, exposure to personal liability acts as a very significant handbrake on one trustee agreeing to exercise dispositive powers in favour of a trustee-beneficiary.

7.9 If this Court sends a message that discretionary beneficiaries can only expect to have fiduciary obligations weakly enforced, it will lead to first instance judges deferring to trustee decision-making to a greater extent in trust disputes (even where the PRA has no application) and undermine the level of accountability expressly endorsed by the Trusts Act to the detriment of beneficiaries.

A decision for Parliament

7.10 As Gilbert J noted, Parliament has considered, but not given, courts the powers to ignore valid trust instruments to achieve what they may perceive to be a just outcome.[140] This Court in *Clayton* also accepted that "the legislative history supports the view that Parliament did not intend the court to have a 'trust-busting' power".[141]

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[135] CA Judgment **[[101.0108A]]** at [72].
[136] At [72].
[137] At [72].
[138] An errant fiduciary is subject to disgorgement of profit; and more liberal rules of causation apply once a breach of fiduciary duty is established: see *Premium Real Estate Ltd v Stevens* [2009] NZSC 15, [2009] 2 NZLR 384 at [12] per Elias CJ, [85], [89]–[94] per Blanchard, McGrath and Gault JJ and [107]–[110] per Tipping J.
[139] There are many examples, most famously including *Boardman v Phipps* [1967] 2 AC 46 (HL), where a beneficiary and family solicitor successfully carried out (in their own names) a profitable takeover of a company partly owned by the trust and were stripped of profits when another beneficiary complained despite the benefits to the trust of their actions; and *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 (HL), where directors contributed personal capital to finance a company lease in circumstances where the company could not afford it and were stripped of profits when the venture was successful for the company.
[140] CA Judgment **[[101.0108A]]** at [106] per Cooper P and Gilbert J.
[141] *Clayton v Clayton* [2016] NZSC 29, [2016] 1 NZLR 551 at [84].

Property (Relationships) Amendment Act 2001

7.11 In 1988, a Government Working Group raised some concerns with the effectiveness of s 44 to meet the social purpose of the PRA (the equal division of relationship property).[142] Section 44 allows the recovery of property disposed of with the intent to defeat a partner's claim or rights under the PRA.

7.12 The Working Group's recommendations included that s 44 apply in the absence of an intention to defeat, and that courts be given a wide discretion to order the distribution of trust capital in addition to income.[143]

7.13 Parliament rejected these recommendations, noting that "trusts are created for legitimate reasons and should be permitted to fulfil that purpose, where there was no intention to defeat the spouse's claim at the time the trust was established".[144]

7.14 Instead, Parliament inserted ss 44A–44F.[145] Section 44C applies specifically to dispositions of property to a trust that have the *effect* of defeating a partner's claim or rights under the PRA. There is no need to prove an intention to defeat. Parliament did not enact powers to transfer trust capital.[146]

7.15 The appellant, in effect, seeks to have this Court create the power that Parliament would not. Parliament has already considered the appropriate balance between the PRA and trust law. It is a delicate balance to strike (with significant ramifications for many New Zealanders) and is one that should be done by elected representatives acting with a democratic mandate.

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142 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (Government Printer, Wellington, 1988) at 30; Property (Relationships) Act 1976; and Property (Relationships) Act 1976, s 1M.

143 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (Government Printer, Wellington, 1988) at 30.

144 Matrimonial Property Amendment Bill 1999 (109-2) (select committee report) at xii. The Select Committee received advice that until division takes place under the PRA, the owner of property can deal with it as they wish, and trusts should not be unwound so as to defeat the legitimate purpose for which they were created, to the detriment of beneficiaries; as for settlor control, the advice noted that trustees are constrained by duties to exercise discretions in good faith and for proper purposes: *Report of the Ministry of Justice on the SOP to the Matrimonial Property Amendment* Bill (Ministry of Justice, 16 August 2000) at 25–26.

145 Based on other recommendations by the Working Group: Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (Government Printer, Wellington, 1988) at 30.

146 The Select Committee had advice that rationale of ss 44A–44F was to provide an alternate means of compensation, not to permit the transfer of trust capital: *Departmental Report Clause by Clause Analysis – Matrimonial Property Amendment Bill* (Ministry of Justice, 2 March 1999) at 31.

Law Commission review

7.16 In 2013, the Law Commission looked at these powers in its review of the law of trusts.[147] The Commission raised concerns about the interaction of trust law with the PRA and recommended that s 44C be amended to give courts the power to make orders against the capital of a trust.[148]

7.17 The Ministry of Justice decided that the issues should be comprehensively examined in the Commission's review of relationship property law that began in 2016.[149]

7.18 In 2019, in its review of relationship property, the Commission recommended expanding s 44C to provide a comprehensive remedy to respond to the various ways a trust might hold property that is produced, preserved or enhanced by the relationship.[150]

7.19 The expanded s 44C would give the Family Court broad discretion to make orders where trust property has been enhanced or preserved as a result of the application of relationship property or the direct or indirect actions of either or both parties to the relationship, which would extend the provision's scope to include: (i) dispositions of separate property; (ii) property transferred when a relationship was reasonably contemplated; and (iii) dispositions that might defeat the rights of both parties.[151]

7.20 The Labour-led Government in 2019 indicated that it accepted reform of the PRA in principle but that it would consider the recommendations together with a review of succession law, which it referred to the Commission.[152] Following completion of the Commission's review of succession law in 2022, the Labour Government indicated that it would take time to work through the policy detail of implementing the Commission's comprehensive

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[147] Law Commission *Review of the Law of Trusts: A Trusts Act for New* Zealand (NZLC R130, 2013).

[148] Law Commission *Review of the Law of Trusts: A Trusts Act for New* Zealand (NZLC R130, 2013) at [19.7]–[19.8] and [R50]. The Commission also recommended that the power to vary nuptial settlements in s 182 of the Family Proceedings Act 1980 extend to de factor partners: [R51].

[149] Ministry of Justice, Regulatory Impact Statement: A New Trusts Act at [163].

[150] Law Commission *Review of the Property (Relationships) Act 1976 – Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [11.54]. The Commission also recommended retaining s 44 to provide a remedy for avoidance mechanisms other than trusts, and recommended abolishing s 182 of the Family Proceedings Act 1980.

[151] Law Commission *Review of the Property (Relationships) Act 1976 – Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [11.54].

[152] *Government Response to the* Law Commission Report *Review of the Property (Relationships) Act 1976 – Te Arotake i te Property (Relationships) Act 1976* (presented to House of Representatives on 27 November 2019).

recommendations on both relationship property and succession law.[153]

7.21 The bespoke nature of the Commission's proposal for s 44C is likely to provide a more tailored remedy, and result in fewer unintended consequences, than the blunt instrument of extending the concept of a general power of appointment beyond its natural boundaries to the detriment of trust law.

8. RELIEF AGAINST THE TRUSTEES

8.1 Finally, relief. Aspects of the relief sought by the appellant are problematic (and illustrate the flaws in the appellant's case). Amongst other remedies, the appellant seeks:

(a) a direction that the respondent exercise his powers of appointment of trustees in a way that ensures that the assets of the Trust are made available to meet any judgment sum to the appellant; or alternatively

(b) an order appointing a receiver under s 138 of the Trusts Act, either:

(i) to step into the shoes of the respondent in relation to his powers under the Trust; or

(ii) to exercise trust powers to sell assets and then make a distribution to meet the judgment sum.

8.2 Marcus' power to appoint and remove trustees does not (and could not) compel the trustees (whomever they might be) to make any particular distributions of trust assets. The Trustees certainly could not make any distribution to Raewyn, as she is not a beneficiary of the Trust. Any direct distribution to her would be in breach of trust and any indirect distribution would be a fraud on a power.[154]

8.3 The Trustees could make a distribution to Marcus, which Marcus could use to satisfy his debts (including to Raewyn), if satisfied that such a distribution would benefit Marcus and otherwise be a prudent use of the Trust's funds taking into consideration the interests of the other beneficiaries. It would not be appropriate for this Court to

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[153] *Government Response to the report of Te Aka Matua o te Ture | Law Commission: Review of Succession Law: Rights to a person's property on death* (presented to House of Representatives on 15 June 2022).

[154] See *Kain v Hutton* [2008] NZSC 61, [2008] 3 NZLR 589 at [46]–[54] per Tipping J.

pre-empt any such decision by the Trustees,[155] nor can the Trustees commit to exercise their future discretion in a particular way.[156]

8.4 There is also no basis to place the Trust into receivership. That step is only permissible if the Court is satisfied that it is both "reasonably necessary in the circumstances of the trust" and "just and equitable".[157] That involves "consideration of what is sought to be achieved by the appointment of a receiver, and why this step is thought to be necessary to achieve that outcome in the circumstances".[158]

8.5 A receiver could not "step into the shoes of the respondent" as the respondent is not a trustee.

8.6 It is not necessary, or just and equitable, to appoint a receiver to sell the Trust's assets in order to make a distribution to meet the judgment sum. That course of action would be to the detriment of the beneficiaries and would pre-empt any consideration by the Trustees of the merits of making a distribution to Marcus from which he could satisfy the judgment debt.

8.7 The appellant has also failed to identify the terms on which a receiver would be appointed, which would not be straightforward in the circumstances of this case.[159]

Dated 17 October 2023

A S Butler KC | N L Walker | J A Tocher
Counsel for the Trustees

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

[155] See generally Lynton Tucker, Nicholas Le Poidevin and James Brightwell *Lewin on Trusts* (20th ed, Sweet & Maxwell, London, 2020) at [30-104] ("the court will not interfere before the trustees have acted to compel a particular exercise of the power").
[156] Trusts Act 2019, s 33.
[157] Trusts Act 2019, s 138(2).
[158] *Re Cameron* [2022] NZHC 2495 at [12].
[159] See Trusts Act 2019, s 138(4).