

Exercise regime

How the UK Privy Council's decision in Grand View clarifies the extent of trustees' fiduciary powers in relation to excluding or adding beneficiaries

By Caroline Miller and Sarah Turner

Abstract

- In December 2022, the UK Privy Council handed down judgment in the joint appeals of *Grand View Private Trust Co Ltd and another v Wen-Young Wong and others*.¹
- The decision is the latest in the long-running litigation, which started in 2018 and relates to a family dispute about the recovery of assets from a purpose trust worth more than USD560 million. The litigation relates to two offshore trusts created by brothers and a complete change in direction by the trustee of one of the trusts in terms of who benefited from it.
- The judgment was a keenly awaited decision in relation to the key question of how wide and far-reaching trustees' powers can be, as well as whether there are limits on the exercise of those powers.
- The authors appreciate this case has been commented on at each stage of the proceedings and will be well known to many readers, but a review of the facts up to the Privy Council decision is included for completeness.

¹ [2022]



Caroline Miller TEP is a Partner and
Sarah Turner TEP is an Associate at
Wedlake Bell

Grand View Private Trust Co Ltd and another v Wen-Young Wong and others relates to two offshore trusts set up in 2001 by brothers YC Wang and YT Wang from Taiwan.² Over 50 years, YC and YT both founded and developed a successful

group of companies now known as the Formosa Plastics Group (FPG), one of the largest corporations in Taiwan.

YC's daughter, Susan, said that her father was clear in conversations with her that neither he nor YT wanted any FPG shares to form part of their estates on their deaths and they did not wish to leave them to their heirs. Instead, they wanted the shares to be used to grow FPG and to 'give back to society'.

YC and YT set up two trusts on the same day in 2001. The first trust was a discretionary trust for the benefit of YC and YT's children and remoter descendants, known as the Global Resource Trust No 1 (the GRT). The GRT's trustee was Global Resource Private Trust Co Ltd, a Bermuda-based trust.

The principal asset of the GRT was Grid Investors Corp (GIC), an investment holding company that owned shares in FPG companies, worth approximately USD560 million at the time of the Bermudian appeal.

The second trust, known as the Wang Family Trust (the WFT), was also based in Bermuda. It was a purpose trust established for both charitable and non-charitable purposes including ensuring the continued growth of FPG and assisting with helping those in need. The trustee of the WFT was Grand View Private Trust Co Ltd (Grand View).

The assets in the WFT were shares in investment companies that owned shares in FPG, the total value of which at the time of the hearing was USD3.5 billion.

On 20 May 2004, YC sent a letter to his children within which he expressed that he would like to 'leave his personal wealth to the public' to 'improve public welfare and perpetuate the businesses that he founded in a way that benefits the staff and society long into the future'. Susan understood that YT expressed similar views.

THE CHALLENGED ACTION BY THE GRT TRUSTEE

Further purpose trusts were established in June 2002 and two more in May 2005. At the time the latter trusts were established, YC told Susan that, due to the likely damage to the public's confidence if he and YT were to give up most of

'Despite the significance of the appointment to the WFT by the GRT trustee, the GRT trustee did not seek court approval for the appointment ...'

their substantial personal shareholdings in FPG, they would instead retain these. This would mean that, on their respective deaths, YC and YT's children and descendants would inherit significant wealth, far beyond the value of GIC. YC explained to Susan that, as a result of this significant inheritance, there was no longer any need for the GRT, which was for the benefit of YC and YT's children and remoter descendants.

In September 2005, following consideration by the GRT trustee, in which they took into account the wishes of YC and YT, the GRT trustee executed irrevocable deeds that provided that:

- Grand View as trustee of the WFT was included as a discretionary beneficiary or 'object' of the GRT;
- with the exception of the WFT, which had just been added, all current and future discretionary objects (i.e., the children and remoter descendants of YC and YT) were excluded from the GRT;
- the assets in the GRT were to be appointed out of the GRT to the WFT, meaning they were to be transferred to Grand View as trustee of the WFT; and
- following the distribution to the WFT, the GRT was to be terminated.

The appointment of GRT's assets to the WFT was carried out by way of exercising the GRT trustee's power of appointment in the original trust deed, rather than the GRT trustee's power to transfer capital or income to another trust.

Despite the significance of the appointment to the WFT by the GRT trustee, the GRT trustee did not seek court approval for the appointment, which would have been a prudent action to take, particularly where a trustee is in any doubt about the suitability of the exercise of its fiduciary powers.³

YC and YT died in 2008 and 2014, respectively.

² Caroline Miller TEP moderated a STEP webinar on this topic on 7 March, titled 'The Privy Council judgment in *Wong v Grand View and Ors*'. It can be viewed at bit.ly/3Ti7izr

³ *Marley v Mutual Security Merchant Bank and Trust Co Ltd* (1991) 3 All ER, 201

THE CLAIM

Proceedings commenced in Bermuda in February 2018, brought by some of the family members of YT and YC on the basis of breach of trust on four grounds, where the GRT trustee:

- took into account irrelevant considerations and did not act for the benefit of the beneficiaries of the GRT;
- acted in excess of its powers (i.e., a breach of scope of the power rule);
- failed to exercise its powers for the purpose for which they were conferred; and
- acted in breach of the rule against remoteness of vesting in that it transferred trust assets to the WFT, a purpose trust.

A declaration was sought that Grand View held the assets transferred to it by the GRT trustee on constructive trust for the GRT.

In December 2018, a summons for summary judgment was issued on the basis that the decisions taken were in excess of the GRT trustee's powers under the GRT trust deed, taken for an improper purpose and contrary to the rule against remoteness of vesting. The first ground relating to the GRT trustee taking into account irrelevant considerations raised issues that could not be determined in a summary judgment application. In June 2019, Assistant Justice Kawaley concluded that trustees cannot use their powers of amendment to alter the 'underlying character' or 'substratum' of a trust, which, in the case of the GRT, is that the trust was established for the benefit of YC and YT's family members.

The Court of Appeal of Bermuda (the Court) reversed the above decision in April 2020. The judges unanimously rejected the concept of a substratum and determined that the key is whether the power has been exercised within the scope of the terms of the trust deed and whether the power has been exercised for a 'proper purpose'. In the leading judgment, Clarke P said that when taking decisions in relation to the power to add or exclude beneficiaries, trustees do not have to take into account the interests of the existing beneficiaries of the trust.

THE RECENT APPEAL AND FINAL DECISION

Winston Wong and Tony Wong, on different grounds, appealed the decision to the Privy Council. The Privy Council

is the final court of appeal for Bermuda (and other British Overseas Territories and Crown Dependencies).

The substratum rule

Winston argued that the transfer of the assets to the WFT was void on the basis that the transfer was in breach of the substratum rule, in that it modified the underlying character of the trust. The Privy Council did not accept that there was a substratum rule and thought that the power of addition and exclusion of beneficiaries could not be seen to be a power of amendment.

Tony argued that the power to add a beneficiary under the GRT trust deed did not, as a matter of construction, permit the addition of the trustee of a purpose trust on the basis that only a 'person' may be added. This argument was also not accepted by the Privy Council as it said the power should not be construed so narrowly as to rule out the addition of a trustee of another trust as a beneficiary.

Was the power exercised for an improper purpose?

Tony also submitted that the key question was whether the GRT trustee could validly use its power of addition and exclusion to remove, rather than advance, the interests of the family members who were named as both beneficiaries of the discretionary GRT and the ultimate beneficiaries on expiry of the trust period. He argued that the purpose of all of the fiduciary powers of a trust with named beneficiaries was to advance the interests of the beneficiaries, as they are referred to in the trust deed, at the time the power is exercised. Applying this to the GRT, Tony submitted that the fundamental purpose of the GRT was to benefit the beneficiaries named in the trust. It follows, therefore, that any exercise of the power of addition and exclusion by the GRT trustee must be for the benefit of at least one or more of the named beneficiaries. As the action taken by the GRT trustee to transfer the assets to the WFT did not benefit the named beneficiaries but, in fact, removed them from benefiting from the GRT at all, Tony submitted that the action was carried out for an improper purpose.

The Privy Council was of the view that the key question was whether the purpose for which the power was exercised was outside the purpose for which the power was conferred.

The Privy Council thought that, in reading the GRT trust deed as a whole, it demonstrated that it was set up as a family trust for the benefit of YT and YC's descendants. This is particularly evidenced by the fact that the family members

are the only named objects of the discretionary dispositive powers and they are also named as ultimate beneficiaries at the expiry of the trust period. Also, the fact that the WFT was created on the same day with an entirely separate purpose and no suggestion that it was to be linked with the GRT (or vice versa) is of particular note.

The Privy Council agreed with Tony that the purpose of the power of addition and exclusion was to further the interests of the beneficiaries of the GRT. They determined that fiduciary powers conferred on a trustee of a trust must be exercised to further the interests of the beneficiaries.

The Privy Council found that, in determining the purpose of a power to add or exclude beneficiaries, the purpose of the trust is of key importance. They concluded that the action taken by the GRT trustee in transferring the assets in the GRT to the WFT in September 2005 was for an improper purpose and, as a result, the decision was found to be void.

PRACTICAL CONSIDERATIONS

Although decisions made by the Privy Council are not binding on English and Welsh courts, this case could potentially have far-reaching consequences in practice.

Exercise of trustee powers within the proper purpose

Following the decision, it is important for trustees to note that they must act within the scope of the intention or proper purpose for which their powers are given. This principle is likely to be widely applied. If this were not the case, trustees could exercise their powers however they please and the beneficiaries of the trust would have no comeback.

Importance of a contemporaneous letter of wishes

The Court and the Privy Council disagreed on whether a letter of wishes made at any time could be taken into account by trustees when taking a decision. The Court said that a letter of wishes created at any time was admissible, whereas the Privy Council determined that only a letter of wishes that was made contemporaneously with the execution of the trust deed could be taken into account. This comment seems practical on the basis that if a later letter of wishes was taken into account in which a settlor changed their mind about who was to benefit from the trust, there is a real risk of repurposing the trust. This is also complemented by the construction argument, which takes into account what the intentions of the settlor were at the time the trust was established.

It was noted in the judgment that the trust deeds were professionally drafted by lawyers in both Bermuda and New York. Many months of discussions had taken place regarding the trust deeds and a lot of thought had been put into the relevant clauses in the deeds and who was to benefit. Despite this, the intention of YT and YC in establishing the GRT and how the trustee should exercise their powers was not clear and resulted in lengthy and undoubtedly costly litigation.

PRACTICE POINTS

An analysis of this case provides some helpful practical points for practitioners when drafting trust deeds and letters of wishes.

When drafting the trust deed, practitioners should be particularly careful with the wording of the trustees' powers. It might be helpful to include in any 'power to add or exclude beneficiaries' details about the scope of the power and how trustees should exercise the power. It would also be valuable to include in the recitals to the trust deed some indication as to the settlor's intention for the trust.

Practitioners should be careful to explain to settlors the need to consider future eventualities and ensure in giving their wishes to the practitioner that there is scope for future events to be covered. In this case, contrary to their original intentions, when the settlors realised that it would be damaging to the public confidence for them to relinquish the majority of their personal shareholding in their company and this meant, on their death, their heirs would inherit significant wealth from them and there would be no need for the private trusts, the decision was made to redistribute the assets of the GRT. Had it been in the purview of the settlors that the family may inherit wealth from another source or that, in any event, the trust may not have been needed by the family, the purpose of the trust could have been more widely construed in the first instance.

It is crucial that any letter of wishes prepared by the settlor of the trust is consistent with the terms of the trust deed. Practitioners should advise settlors that, although they may change their guidance to the trustees during the course of a trust, if that change of direction could result in the purpose of the trust being altered, then the trustees should ignore such guidance. A letter of wishes is, of course, not binding on trustees.

In conclusion, the judgment provides important clarification on the extent and limit of trustees' fiduciary powers, particularly in relation to the exclusion or addition of beneficiaries. ■