IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
TRUSTS, EQUITY AND PROBATE LIST

Not Restricted

S ECI 2018 02534

PAUL ANDREW OWIES — First Plaintiff

and

DEBORAH OWIES — Second Plaintiff

v

JJE NOMINEES PTY LTD (ACN 004 856 366) (in its capacity as the trustee for the OWIES FAMILY TRUST) — First Defendant

and

MICHAEL BENJAMIN OWIES — Second Defendant

JUDGE:	MOORE J
WHERE HELD:	Melbourne
DATE OF HEARING:	10, 11, 12, 13, 26 February 2020 (and further written submissions provided on 4, 7 September 2020)
DATE OF JUDGMENT:	28 October 2020
CASE MAY BE CITED AS:	Re Owies Family Trust
MEDIUM NEUTRAL CITATION:	[2020] VSC 716

TRUSTS – Validity of resolutions purporting to amend trust deed – Whether trustee had power to vary identity of guardian and appointor by deed – Where trust deed permits addition to or variation of existing trusts and declaration of new trusts and powers – Question of validity turns on construction of specific terms of trust deed – Trust deed does not permit variation to identity of guardian and appointor – *Byrnes v Kendle* (2011) 243 CLR 253, applied – *Scaffidi v Montevento Holdings Pty Ltd* (2012) 246 CLR 325, applied – *Australian Broadcasting Commission v Australian Performing Right Association Ltd* (1973) 129 CLR 99, applied – *Schreuders v Grandiflora Nominees Pty Ltd* [2016] VSCA 93, applied – *Kearns v Hill* (1990) 21 NSWLR 107, applied – *Mercanti v Mercanti* (2016) 50 WAR 495, applied – *Re Scott (dec'd)* [1948] SASR 193, considered.

TRUSTS – Distribution of income – Whether trustee failed to properly exercise discretion to distribute income – Where class of beneficiaries limited to five natural persons who are members of the same family – Where trustee did not distribute income to plaintiffs on last

10 occasions – Plaintiffs time-barred in relation to some occasions on which discretion was purportedly exercised – Whether trustee gave genuine consideration to distributing income to plaintiffs – Knowledge of identity of beneficiaries insufficient to constitute genuine consideration of exercise of discretion – Where trustee had no knowledge of plaintiffs' circumstances on some occasions on which it exercised its discretion – Trustee failed to properly exercise discretion on those occasions – *Limitation of Actions Act 1984*, s 21 – *Karger v Paul* [1984] VR 161, applied – *Wareham v Marsella* [2020] VSCA 92, applied – *Sinclair v Moss* [2006] VSC 130, applied – *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254, applied – *Telstra Super Pty Ltd v Flegeltaub* (2000) 2 VR 276, applied.

TRUSTS – Removal of trustee – Whether trustee should be removed – Where trustee has acted in breach of trust – Where breaches of trust occurred when trustee was under control of previous directors – Whether trustee is incapable of acting impartially – Where trustee has recently distributed capital to one of the plaintiffs – Court not satisfied that trustee will fail to act impartially – Welfare of beneficiaries not opposed to trustee continuing to fulfil office – *Trustee Act 1958*, ss 41 and 48 – *Miller v Cameron* (1936) 54 CLR 572, applied – *Monty Financial Services Ltd v Delmo* [1996] 1 VR 65, applied – *Nicholls v Louisville Investments Pty Ltd* (1991) 10 ACSR 723, considered – *Re Whitehouse* [1982] Qd R 196, considered.

TRUSTS – Removal of guardian and appointor – Where not established guardian and appointor of trust are fiduciaries – Court does not have jurisdiction to remove guardian or appointor – *Blenkinsop v Herbert* (2017) 51 WAR 264, applied.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	Dr K P Hanscombe QC with Mr A P Dickenson	KCL Law
For the First Defendant	Mr J Evans QC with Ms R Grayson Morison	Tisher Liner FC Law
For the Second Defendant	Ms L Martin	McKean Park

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HIS HONOUR:

1 This proceeding concerns a dispute between the children of Dr John Joachim Owies and Dr Eva Owies over the control of the Owies Family Trust (the **trust**) and the entitlement to the trust's substantial income over the past 10 years.

2 Eva died on 27 November 2018, two days before the proceeding was commenced, at 89 years of age.[1] John died on 23 January 2020, less than three weeks before the commencement of the trial of the proceeding, at the age of 96.[2] A witness statement signed by John on 10 September 2019 was admitted as evidence in the proceeding.[3]

3 John and Eva had three children: Paul Andrew Owies and Deborah Owies, who are the plaintiffs in the proceeding, and Michael Benjamin Owies, the second defendant in the proceeding.[4]

4 The first defendant, JJE Nominees Pty Ltd (the **trustee**), has at all times been the trustee of the trust. The trust was settled by deed executed by Eva's sister, Agatha Getzler, on 30 November 1970 (the **trust deed**). John and Eva's children are the primary beneficiaries of the trust. John and Eva are also general beneficiaries of the trust. The trust deed specifies 30 June 2050 as the vesting day.

5 In broad terms, Paul and Deborah bring three claims in the proceeding. First, they challenge, on various grounds, the validity of deeds of variation to the trust deed purportedly executed in 2002, 2010 and 2017.[5] Those variations sought to change the persons identified in the trust deed as 'Guardian' and 'Appointor'. Before the first of those variations, the trust deed identified John and then, after his death, Eva, as Guardian and Appointor. If all of the variations are valid, Michael is the Guardian and Appointor under the trust deed. If they are all invalid, those positions were held by John until his death.

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1 Eva was born on 13 June 1929.

2 John was born on 1 July 1923.

3 Pursuant to s 63(2)(a) of the *Evidence Act 2008*. The witness statement was admitted into evidence subject to certain redactions. No evidence by Eva was sought to be admitted.

4 Without any disrespect to the parties, in the interests of clarity, I refer to the parties and their parents by their first names.

5 Referred to below respectively as the 2002 variation, the 2010 variation and the 2017 variation.

6 The determination of the true holder of the positions of Guardian and Appointor is important because of the powers vested in those positions under the trust deed as I will further outline. It is also potentially important (in respect of the position of Guardian) because it may affect the default position as to who will take the corpus of the trust upon its vesting.

7 The second aspect of the challenge brought by Paul and Deborah concerns the income of the trust between 2010 and 2019. The trust has substantial assets with an estimated value at trial in excess of $23 million.[6] Those assets comprise real properties and investments in publicly listed companies which pay dividends each year. In the years between 2010 and 2019, substantial distributions were made to John, Eva and Michael; no distributions were made to Paul or Deborah.

8 Paul and Deborah contend that the trustee in fact failed to make any resolution distributing the income of the trust for any of the financial years between 2010 and 2017. If that is correct, they submit that the net income for each of these years is held on trust for them and Michael in equal shares.

9 Paul and Deborah also contend that the resolutions of the board of directors of the trustee which purported to resolve the distribution of income for each year between 2010 and 2017 were made in breach of trust because they were made without the trustee giving any genuine consideration as to whether, in the exercise of its discretion, a distribution should be made to them.

10 The third aspect of the challenge brought by Paul and Deborah is whether the trustee should be removed as the trustee of the trust because of its alleged failure to properly execute and administer the trust and whether, if the Court has jurisdiction to do so, Michael should be removed as Guardian and Appointor of the trust because he is not a fit and proper person to undertake those roles.[7]

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6 Paul and Deborah submitted that the value of the trust's net assets was in fact likely to be in the order of $40 million.

7 This question is predicated on the validity of at least the 2010 variation and/or the 2017 variation.

11 These challenges require me to address the following nine issues:

Purported variations of the trust deed

1. Whether, properly construed, the trust deed gives power to the trustee to amend the description of the persons identified as 'Guardian' and 'Appointor'.

2. Assuming that the trustee had power to amend the description of the persons identified in the trust deed as 'Guardian' and 'Appointor', whether the 2002 variation, the 2010 variation and the 2017 variation are void because the Court cannot be satisfied that the board of directors of the trustee resolved to authorize the trustee to execute the variations.

3. Assuming that the trustee had power to amend the description of the persons identified in the trust deed as 'Guardian' and 'Appointor' and assuming that the 2002 variation was valid, whether the 2010 and 2017 variations are void because Eva Owies, as a joint Guardian appointed pursuant to the 2002 variation, did not consent to their making.

4. Assuming that the trustee had power to amend the description of the persons identified in the trust deed as 'Guardian' and 'Appointor', whether the 2017 variation is void because it was not properly executed by the trustee as the meeting of the board of directors in relation to the making of the variation was inquorate.[8]

Trust income

5. Whether the trustee failed to make any resolution regarding the income of the trust within the financial year for any of the financial years between 2010 and 2017.

6. Whether the resolutions of the board of directors of the trustee which purported to resolve the distribution of income for each financial year in and between 2010 and 2019 were made in breach of trust because they were made without the trustee giving any genuine consideration to whether, in the exercise of its discretion, a distribution should be made to Deborah Owies and/or Paul Owies.

7. Whether Paul and Deborah's claims regarding income distributions of the trust in 2010, 2011 and 2012 are barred by operation of s 21(2) of the *Limitation of Actions Act 1958* or by virtue of their laches in commencing the proceeding.

Removal

8. Whether the trustee should be removed as the trustee of the trust.

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8 It is contended by Paul and Deborah that the meeting was inquorate because the resolution of the meeting of members of the trustee on 14 December 2017 appointing Neville Sampson as a director was void. That resolution is in turn contended to be void because, in breach of cls 42 and 44 of the trustee's Articles of Association, Michael voted at the meeting as Eva's attorney without being registered.

9. If the Court has jurisdiction to do so, whether Michael Owies should be removed as the Guardian and Appointor of the trust because he is not a fit and proper person to undertake those roles.

Background - the trustee

12 The trustee was registered in Victoria on 30 November 1970. Until 30 July 2019, one of the two shares in the trustee was held by Eva[9] and the other held by John. On 30 July 2019, the share held by John was transferred to Michael.

13 John and Eva were directors of the trustee from its registration until their deaths in 2020 and 2018 respectively.

14 Paul and Michael were also appointed as directors of the trustee on 23 June 1998. They were both removed as directors on 30 March 2013. In the period that they held office as directors, neither Paul or Michael took any part in the management of the trust and did not actually act as directors.

15 Neville Sampson, who had been John and Eva's solicitor for many years,[10] was purportedly appointed a director of the trustee in December 2017. The validity of that appointment is in issue in this proceeding.[11]

16 Michael was appointed a director of the trustee on 20 November 2019. As at the trial of the proceeding, he and Mr Sampson (assuming his appointment is valid) were the directors of the trustee.

Purported variations of the trust deed

17 Sub-clauses 1(6) and 1(7) of the trust deed provide respectively that the 'the Guardian' and 'the Appointor' mean 'successively the person or persons named and described as such in the Schedule'.

18 In its original form, the schedule of the trust deed identified the Appointor and Guardian of the trust in the following terms:

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9 Or Eva's legal personal representative.
10 Mr Sampson is the executor of Eva's estate and was granted probate of Eva's will on 26 April 2019.
11 In relation to Issue 4. See n 8 above.

Guardian: The said John Joachim Owies during his lifetime and after his death the said Eva Owies

Appointor: The said John Joachim Owies during his lifetime and after his death the said Eva Owies

19 On 28 May 2002, the trustee purported to execute a Deed of Variation (the **2002 variation**) recording a variation to the trust deed to alter the description of the Guardian and the Appointor in the schedule. It was prepared by Mr Sampson at Eva's request and relevantly provided as follows:

> …
>
> AND WHEREAS Clause 20 of the deed of settlement provides that the Trustee may by deed with the consent of the guardian revoke, add to or alter all or any of the trusts
>
> AND WHEREAS the guardian of the trust is JOHN JOACHIM OWIES
>
> NOW THIS DEED WITNESSETH that the Trustee pursuant to Clause 20 of the deed of settlement with the consent of the said JOHN JOACHIM OWIES as guardian of THE OWIES FAMILY TRUST alters the description of guardian and appointor in the schedule to the deed of settlement to read as follows:-
>
> > "Guardian – The said JOHN JOACHIM OWIES and the said EVA OWIES jointly. In the event of the death of either JOHN JOACHIM OWIES or EVA OWIES the survivor of them together with PAUL ANDREW OWIES and MICHAEL BENJAMIN OWIES. In the event of the death of both JOHN JOACHIM OWIES and EVA OWIES then PAUL ANDREW OWIES and MICHAEL BENJAMIN OWIES.
> >
> > "Appointor – The said JOHN JOACHIM OWIES and the said EVA OWIES jointly. In the event of the death of either JOHN JOACHIM OWIES or EVA OWIES the survivor of them together with PAUL ANDREW OWIES and MICHAEL BENJAMIN OWIES. In the event of the death of both JOHN JOACHIM OWIES and EVA OWIES then PAUL ANDREW OWIES and MICHAEL BENJAMIN OWIES."
>
> …

20 If valid, the effect of the 2002 variation was to change the persons identified as Guardian and Appointor:

(a) from John and then, after his death, Eva;

(b) to John and Eva jointly and, in the event of the death of either of them, the survivor, together with Paul and Michael, and then Paul and Michael together in the event of the death of both John and Eva.

21 On 9 June 2010, the trustee purported to execute a Deed of Variation (the **2010 variation**). It relevantly provided as follows:

> … WHEREAS by deed of settlement made 30th November 1970 BETWEEN AGATHA GETZLER and the trustee a trust known as THE OWIES FAMILY TRUST was created AND WHEREAS clause 20 of the deed of settlement provides that the trustees for the time being may by deed with the consent of the guardian revoke, add to or vary all or any of the trusts AND WHEREAS the present guardian of the trust is JOHN JOACHIM OWIES
>
> NOW THIS DEED WITNESSETH that the trustee pursuant to clause 20 of the deed of settlement amends the schedule to the deed of settlement:-
>
> 1. To amend the "Guardian" to read "the said John Joachim Owies during the lifetime and after his death the said Eva Owies and upon the death of both John Joachim Owies and Eva Owies the guardian shall be Michael Owies".
>
> 2. To amend the description of the "Appointor" to read "the said John Joachim Owies during his lifetime and after his death the said Eva Owies and upon the death of both John Joachim Owies and Eva Owies the appointor shall be Michael Owies."
>
> John Joachim Owies being the guardian of the Owies Family Trust by his signature to this document HEREBY CONSENTS to the foregoing amendment to the deed of settlement.

22 The 2010 variation was also prepared by Mr Sampson at Eva's request. Eva provided instructions in relation to it at a meeting with Mr Sampson on 16 April 2010. Michael also attended the meeting. Mr Sampson's evidence, which I accept, was that Eva said that Deborah had 'cut herself off' and that her instructions were that Deborah was not to have any involvement in decision-making with the trust. Her instructions were also that Paul was to be removed as a 'successor' Guardian and Appointor because she was unhappy with some of his business dealings and 'had big ideas' and that Michael was to remain as the only 'successor' Guardian and Appointor. This is consistent with John's evidence that he intended that Michael would become the person with the power to control who would be the trustee of the trust when he and Eva had passed away.

23 If valid (and also assuming the 2002 variation to be valid), the effect of the 2010 variation was that John and Eva would no longer jointly be Guardian and Appointor and instead John would be both Guardian and Appointor with Eva holding those positions after his death and then Michael holding them after the death of both Eva and John.

24 On 15 December 2017, the trustee executed a deed (the **2017 variation**). It relevantly provided as follows:

> … WHEREAS by Deed of Settlement made 30th November 1970 BETWEEN AGATHA GETZLER and the Trustee a Trust known as THE OWIES FAMILY TRUST was created AND WHEREAS clause 20 of the Deed of Settlement provides that the Trustees for the time being may by deed with the consent of the Guardian revoke, add to or vary all or any of the trusts AND WHEREAS the present Guardian of the Trust is JOHN JOACHIM OWIES
>
> NOW THIS DEED WITNESSETH that the Trustee pursuant to Clause 20 of the Deed of Settlement amends the Schedule to the Deed of Settlement:-
>
> 1. To amend the "Guardian" to read "MICAHEL BENJAMIN OWIES during his lifetime and after his death his Legal Personal Representative".
>
> 2. To amend the description of "Appointor" to read "MICHAEL BENJAMIN OWIES during his lifetime and after his death his Legal Personal Representative".
>
> JOHN JOACHIM OWIES being the Guardian of the OWIES FAMILY TRUST by his signature to this document HEREBY CONSENTS to the foregoing amendment to the Deed of Settlement.

25 If valid (and also assuming the 2002 and 2010 variations to be valid), the effect of the 2017 variation was to appoint Michael as Guardian and Appointor (and after his death his legal personal representative), instead of those positions being held by John and then, after his death, Eva and then Michael after the death of both John and Eva.

Issue 1: Trustee's power of amendment

26 Given the purported making of the 2002, 2010 and 2017 variations (collectively, the **variations**), the first issue for determination is whether the trust deed, properly construed, gives power to the trustee to amend the description of the persons identified as Guardian and Appointor.

27 The determination of this question depends upon the proper construction of cl 20 of the trust deed which gives the trustee a general power of amendment. It was uncontroversial that the trustee's power of amendment was exclusively contained within cl 20.

28 Clause 20 provides as follows:

> The Trustees for the time being may at any time and from time to time by deeds with the consent of the Guardian if alive revoke add to or vary all or any of the trusts hereinbefore limited or the trusts limited by any variation or alteration or addition made thereto from time to time and may by the same or any other deed or deeds declare any new or other trusts or powers concerning the Trust Fund or any part or parts thereof the trusts whereof shall have been so revoked added to or varied but so that the law against perpetuities is not thereby infringed and so that such new or other trust powers discretions alterations or variations –
>
> (i) may relate to the management or control of the Trust Fund or the investment thereof or to the Trustees' powers or discretions in these presents contained;
>
> (ii) shall not be in favour of or for the benefit of the Settlor or result in any benefit to the Settlor but shall otherwise be for the benefit of all or any one or more of the General Beneficiaries or the next of kin of any of them or the next of kin of the Primary Beneficiary or Primary Beneficiaries or any of them;
>
> (iii) shall not affect the beneficial entitlement to any amount set aside for any Beneficiary prior to the date of the variation, alteration or addition.

29 In considering the proper construction of cl 20, it is relevant to note various other provisions of the trust deed referred to below.

30 Clause 1 of the trust deed contains various definitions, relevantly including the following:

> (1) The "Primary Beneficiaries" mean the person or persons named and described or defined as such in the Schedule.
>
> (2) The "General Beneficiaries" mean the Primary Beneficiaries the brothers and sisters spouses and children of the Primary Beneficiaries the spouses children and grandchildren of such brothers sisters and children and such additional persons (if any) as are named and described or defined in the Schedule as additions to the class of General Beneficiaries and "Beneficiary" means any of the General Beneficiaries:

…

(4) "the Trust Fund" means the said settled sum being a sum paid or to be paid by the Settlor to the Trustees upon the execution hereof all moneys investments and property paid or transferred to and accepted by the Trustees as additions to the Trust Fund the accumulations of income hereinafter directed or empowered to be made all accretions to the Trust Fund and the investments and property from time to time representing the said money investments property accumulations and accretions or any part or parts thereof respectively;

(5) "the Vesting Day" means the day specified in the Schedule as the Vesting Day or such earlier day as the Trustees may in their absolute discretion at any time during the lifetime of the Guardian with the consent of the Guardian or if the Vesting Day is later than the day of the death of the last surviving Guardian then after such last mentioned date without any consent appoint PROVIDED ALWAYS that notwithstanding anything herein contained all powers and dispositions made by or pursuant to or contained in this Deed which but for this provision would or might vest take effect or be exercisable after the expiration of the perpetuity period shall vest and take effect on and be exercisable only until the last day of the perpetuity period;

…

31 Relevantly, the schedule to the trust deed identifies:

(a) the primary beneficiaries as the children of John and Eva, with John and Eva being listed as additional members of the class of general beneficiaries;

(b) the Guardian and Appointor as John 'during his lifetime and after his death' Eva;[12] and

(c) the Vesting Day as 30 June 2050.

32 Clause 2 states:

> IN consideration of the premises the Settlor as Settlor HEREBY DECLARES that the Trustees shall and the Trustees HEREBY DECLARE that they will henceforth stand possessed of the Trust Fund and of the income thereof upon the trusts and with and subject to the powers and provisions hereinafter expressed concerning the same.

33 Clause 3 deals with the annual income of the trust and relevantly provides as follows:

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12 See [18] above.

(i) the Trustees shall in each accounting period until the Vesting Day pay apply or set aside the whole or such part (if any) as they shall think fit of the net income of the Trust Fund of that accounting period for such charitable purposes and/or to or for the benefit of or for all or such one or more exclusive of the others or other of the General Beneficiaries living from time to time in such proportions and in such manner as the Trustees in their absolute discretion and without being bound to assign any reason therefor (but after considering the wishes of the Guardian) shall think fit;

(ii) the Trustees shall hold so much of the income of the Trust Fund as the Trustees shall not pay apply or set aside pursuant to the powers contained in paragraph (i) of this Clause in trust for the persons successively described in paragraphs (a) (b) and (c) of Clause 4 hereof as though each date on which such income becomes subject to the Trusts hereof were the Vesting Day specified in the Schedule;

(iii) notwithstanding anything contained in paragraphs (i) and (ii) of this Clause the Trustees may determine in their absolute discretion before the expiration of any accounting period prior to the Vesting Day to accumulate all or any part of the income arisen or arising during such period and such accumulation shall be dealt with as an accretion to the Trust Fund;

…

34 Clause 4 deals with the vesting of the trust property and relevantly provides as follows:

> As from the Vesting Day the Trustees shall stand possessed of the Trust Fund and the income thereof in trust for such charitable purposes and/or for such of the General Beneficiaries for such interests and in such proportions and for one to the exclusion of the other or others as the Trustees may with the consent of the Guardian by instrument in writing revocable or irrevocable before the Vesting Day appoint PROVIDED ALWAYS that the Trustees shall not without such consent revoke any revocable appointment AND PROVIDED FURTHER that if there is no Guardian alive the Trustees shall have no such power of appointment and in default of and subject to any such appointment in trust –
>
> (a) for such of the Primary Beneficiaries as shall be living on the Vesting Day and attain the age of twenty-one years as tenants-in-common in equal shares absolutely PROVIDED ALWAYS that the children (if any) who shall be living on the Vesting Day of any Primary Beneficiary who dies before the Vesting Day (and the descendants of any of such children or the children of such children who dies before the Vesting Day) shall take as tenants-in-common a share calculated per stirpes which such deceased Primary Beneficiary would have received had he or she survived to the Vesting Day;
>
> (b) if in the events which happen or if for any reason whatsoever any part or parts of the Trust Fund shall not be effectively or validly disposed of by the trusts declared by this Deed or by any Deed from time to

> time in force varying altering or adding to such trusts the Trustees shall stand possessed of such part or parts of the Trust Fund as aforesaid for the statutory next of kin (excluding the Settlor) who are according to law next of kin of the Guardian first named in the Schedule who are living when the same falls or fall into possession as tenants-in-common in equal shares absolutely and if there shall be no such next of kin upon trust for such charitable purposes as the Trustees may determine any resulting trust to the Settlor being hereby expressly negatived;
>
> …

35 Clauses 7 and 8 detail the broad discretionary powers the trustee has in addition to any powers otherwise conferred upon it by law.

36 Clause 17 relevantly provides that, subject to any express provision to the contrary, 'every discretion vested in the Trustees shall be absolute and uncontrolled and every power vested in them shall be exercisable at their absolute and uncontrolled discretion …'.

37 Clause 21 provides that, '[e]xcept as provided by Clause 20 hereof this Deed and the Trusts hereby created shall be irrevocable'.

38 Clause 22 gives power to the Appointor to remove the trustee and appoint additional trustees as follows:

> The Appointor and if there is no Appointor living the legal personal representatives of the last surviving Appointor shall be entitled by instrument in writing at any time and from time to time –
>
> (a) in his her or their absolute discretion to remove any Trustee hereunder or of the Trust Fund;
>
> (b) to appoint any additional Trustee or Trustees hereunder or of the Trust Fund;
>
> ....

Parties' submissions

Paul and Deborah's submissions

39 Paul and Deborah contended that, objectively construed, cl 20 does not give the trustee power to amend any definition in the schedule to the trust deed, including

the person identified therein as Guardian.[13] The foundation for this submission was the provision made in the first part of cl 20 that the trustee may, with the consent of the Guardian, revoke, add to or vary the 'trusts'. Paul and Deborah submitted that, properly construed, the naming of the Guardian was not a 'trust' within the meaning of cl 20.

40 Paul and Deborah argued that cl 20 was a very carefully drafted power of variation which distinguished between 'trusts' and 'powers'. This distinction was said to be evident from: (a) the initial reference in the clause to 'the trusts' followed by the later reference to the trustee's power to declare new or other 'trusts or powers'; and (b) the preamble of the trust deed which records that the '[t]rustees have consented to become the Trustees hereof upon the trusts and with and subject to the powers and provisions hereinafter expressed'.

41 It was submitted that not every term, condition or definition in a trust deed is, or creates, a trust. A trust is an obligation attaching to property, whereas a power is the grant of the ability to do something. In support of these propositions, Paul and Deborah relied upon the following observations by Mayo J in *Re Scott*:[14]

> No definition of a "trust" seems to have been accepted as comprehensive and exact. The word is sometimes applied to the trust premises, sometimes to the duties related thereto, sometimes to both. Strictly it refers, I think, to the duty or the aggregate accumulation of obligations that rest upon a person described as a trustee. The responsibilities are in relation to property held by him, or under his control. That property he will be compelled by a court in its equitable jurisdiction to administer in the manner lawfully prescribed by the trust instrument, or where there be no specific provision written or oral, or to the extent that such provision is invalid or lacking, in accordance with equitable principles. …
>
> The part of the will that I have quoted might be thought to be a power rather than a trust. A trust and a power are to be differentiated. A power may be described for present purposes as the individual personal authority given to a person to do an act whereby the succession to property will follow as a result

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13 Although Issue 1 concerns whether the trust deed, properly construed, gives power to the trustee to amend the description of the persons identified as Guardian and Appointor, Paul and Deborah advanced their submissions by reference only to the position of Guardian, substantially on the basis that the same arguments were equally applicable to the position of Appointor.

14 *Re Scott dec'd* [1948] SASR 193, 196 ('*Re Scott*'). The first paragraph in the above extract was referred to with approval by McGarvie J in *JW Broomhead (Vic) Pty Ltd (in liquidation) v JW Broomhead Pty Ltd* [1985] VR 891, 925.

> of that act. A power may be given to a person who has no other interest in the property. If there be no duty to exercise control over the succession in any way the authority is a power and not a trust. That the legal estate in property is vested in a person to whom the beneficial interest does not belong is not necessarily inconsistent with him having also a power over the disposal of the property. If a trust instrument contains a power to be exercised at the discretion of the trustee, but such power is not required to be exercised at all, the trustee may decide not to utilise the faculty. In that case the court will not interfere. If, however, the powers must be exercised, and the discretion given only refers to a choice of objects, some of whom must be benefited by the exercise, the powers are in the nature of trusts. …

42 Consistent with this statement of principle, Paul and Deborah submitted that, if there is no duty to exercise the content of the provision of a trust deed, the provision contains a power and not a trust. Applying that distinction, because there is no duty or obligation on the trustee to amend the definition of the Guardian in the schedule, it is not a 'trust' with the consequence that the trustee has no power to vary it under cl 20.

43 Senior counsel for Paul and Deborah emphasised that the Court's primary task in construing the trust deed is to discover the intention of the Settlor from the words used in the trust deed, read as a whole.[15] Applying this approach, it was submitted that the Settlor's intention in relation to the position of Guardian was that:

(a) John would have the powers of the Guardian during his lifetime;

(b) if Eva survived John, she would then have those powers; and

(c) upon the death of both John and Eva, there would no longer be a Guardian.

44 A number of features and provisions of the trust deed were said to indicate that this was the Settlor's intention. First, reference was made to the absence of any express provisions in the trust deed for the appointment of new or additional successor Guardians, confirming the absence of any indication that the Settlor intended cl 20 to be any wider than its plain words. Secondly, reliance was placed on the definition of 'the Vesting Day' in cl 1(5) of the trust deed.[16] The clause relevantly provides that the

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15 Applying *Scaffidi v Montevento Holdings Pty Ltd* [2011] WASCA 146, [154].

16 See [30] above.

trustee may appoint an earlier Vesting Day with the consent of the Guardian during the lifetime of the Guardian, but without any consent after 'the death of the last surviving Guardian'. Thirdly, reference was made to cl 4 of the trust deed which gives the trustee power, with the consent of the Guardian, to appoint for whom of the general beneficiaries the trust fund is to be held on the Vesting Day. However, 'if there is no Guardian alive the Trustees shall have no such power of appointment', in which case the trust fund is to be held for the children of John and Eva as tenants in common in equal shares.

45 Senior counsel for Paul and Deborah submitted that these provisions made clear that the Settlor intended that John, or Eva after John had died, could consent to the trustee making an appointment to change the default position of each of John and Eva's children taking an equal share of the trust fund on vesting, but that if they had not done so before they had both died, there was to be no power to change that default position. It was submitted that such a consequence was unsurprising because it is apparent that the trust was set up to benefit the children of John and Eva as primary beneficiaries, and John and Eva themselves, while giving John and Eva a role in the operation of the trust during their lifetimes.

46 It was also submitted that the method of defining the Guardian successively showed that the Settlor did not provide for any other person to fill that role once both parents had died, reflecting a view that, once they had died, there would no longer be a need for a Guardian. It was submitted that the trust was simply intended to continue until it vested, either by effluxion of time, or by the trustee bringing forward the Vesting Day pursuant to cl 1(5). In support of this analysis, it was submitted that the existence of a Guardian is not necessary for the creation or operation of a trust.

47 Senior counsel for Paul and Deborah referred to various authorities which establish the proposition that a power of variation does not extend to giving a trustee power to destroy the substratum of a trust, being the trust's underlying foundation and purpose. Any change in the definition of the Guardian would change the substratum of the trust because of its effect on the rights of the next of kin of the

Guardian on vesting.

48 In that regard, reference was made to cl 4(b) of the trust deed[17] which, in effect, provides that, if none of the primary beneficiaries or their children are alive on the Vesting Day, the corpus of the trust is to be held for 'the next of kin of the Guardian first named in this Schedule who are living', namely, the next of kin of John. Such an outcome is consistent with the purpose of the trust being to benefit members of the Owies family. A change in the definition of the Guardian which names someone other than John as first in the definition in the schedule could create a completely different outcome on vesting, thereby changing the substratum of the trust. In this regard, it was submitted that the material before the Court established that, in relation to the 2017 variation, Michael's next of kin are not the same as John's next of kin. Thus, if the 2017 variation was effective, its outcome upon vesting would not be the outcome envisaged by the Settlor when the trust was settled.

49 In the alterative to their principal submission that the definition of the Guardian was not a 'trust' so as to engage the power of variation in cl 20, Paul and Deborah submitted that it remained necessary that the power be used by the trustee for the purpose for which it was conferred. In that regard, sub-cl (ii) of cl 20 required that the power of amendment be used for the benefit of the beneficiaries, or their next of kin. They submitted that, in changing the definition of the Guardian, the variations did not purport to be for and were not in fact for the benefit of any of those persons.

Trustee's submissions

50 The trustee's central contention was that, although no objection could be made to the statements of principle drawn from *Re Scott* on which Paul and Deborah relied, in the context of cl 20 of the trust deed, the 'trusts hereinbefore' must be taken to be a reference to the primary trust created by cl 2 of the trust deed. Because the trust is constituted by the bundle of rights and obligations which are vested in the trustee, it was argued that the 'trusts hereinbefore' must be understood as including the terms

17 See [34] above.

applicable to the exercise of powers in respect of the trust. The words 'vary all or any of the trusts hereinbefore' were therefore submitted to be broad enough to encompass a variation of the powers which were available to the trustee in respect of the operation of the trust. The power of amendment to vary the trusts must be understood to be a power to vary the rights and obligations to which the trustee is subject which, in addition to equitable principles, are those which are defined by the trust deed.

51 Senior counsel for the trustee argued that, if the power in cl 20 to 'vary all or any of the trusts hereinbefore limited' was not broad enough to encompass a variation of the powers available to the trustee in respect of the operation of the trust, an absurd result would ensue because it would suggest that there is no power of variation, in circumstances where the powers which are conferred by the deed generally on the trustee were extremely broad.

52 The trustee pointed to a number of features of cl 20 and other provisions of the trust deed to demonstrate that the power of amendment in cl 20 of the deed was broad.

53 First, although the power of amendment was subject to limits (namely, a requirement that the Guardian consent and the provisions made by sub-cls (i), (ii) and (iii)), the permissive expression ('may') in sub-cl (i) indicated that it was a sub-clause which was designed to confirm that the power conferred by the chapeau extends to the matters the subject of the sub-clause, namely 'the management or control of the Trust Fund or the investment thereof or to the Trustees' powers or discretions'.

54 Secondly, the requirement for the Guardian's consent was said to support an interpretation that the Settlor intended the power in cl 20 to be as broad as possible. In circumstances where it was apparent that she intended to have no role in the operation of the trust, the Settlor simply intended that there be a check on the trustee's power in the form of the Guardian, and that that check be administered by the Guardian.

55 Thirdly, senior counsel for the trustee drew attention to the second part of cl 20 the subject of the words 'and may…declare any new or other trusts or powers concerning the Trust Fund'. It was submitted that a power to vary a trust, such as that dealt with in the first part of the clause, is ordinarily different to a power to declare a new trust or a new power. Accordingly, cl 20 should be construed liberally so that it embraces both of these concepts and confers upon the trustee a very broad power of amendment including all of the powers and provisions of the trust deed.

56 Fourthly, the trustee submitted that the intended scope of the trustee's powers in cl 20 should be informed by the terms of cl 17 which provides that every power vested in the trustee 'shall be exercisable at their absolute and uncontrolled discretion'. It was submitted that it was almost impossible to imagine a broader grant of discretion to a trustee.

57 Fifthly, the trustee contended that there was absent from the trust deed any indication that the trustee cannot amend the trust deed to change the identity or description of the Guardian or Appointor. In conjunction with the unqualified nature of the power referred to in the first part of cl 20, there was no good reason to, in effect, read down the power of amendment therein provided.

58 The trustee also relied on the language used in cl 1 of the trust deed in referring to Guardian and Appointor as meaning 'successively the person or persons named and described as such in the Schedule'. It was argued that this indicated that the trust deed was drafted with a view that there may be more than one person who fulfils these roles over the life of the trust. The logic of this construction was submitted to be apparent from: (a) the ordinary dictionary definitions of 'successively' as meaning 'characterised by or involving succession' and as 'succession' as meaning 'a number of persons or things following one another in order or sequence';[18] and (b) the wording of cl 22 which grants the Appointor or, 'if there is no Appointor living the legal personal representatives of the last surviving Appointor', power to remove the

18 *Macquarie Concise Dictionary* (4th ed, 2006) 1221.

trustee. It was submitted that it can be inferred from this language that there may be a succession of Appointors.

59 In relation to the limitation in sub-cl 20(ii), the trustee submitted that the variations are properly viewed as being for the benefit of all the general beneficiaries because they have the effect of maintaining all of the trusts created by the trust deed as being for the continuing benefit of the general beneficiaries. Further, noting that it is sufficient for sub-cl 20(ii) if the variations were for the benefit of any one of the primary beneficiaries, to the extent that the variations conferred additional powers upon those who were appointed as Guardian subsequent to John and Eva, namely Paul and Michael, the amendments can be properly seen as being for their benefit.[19]

60 In the alternative to its primary submissions outlined above, the trustee relied upon a submission that the trustee's power to declare new trusts or powers in the second part of cl 20 extends to an ability to vary any of the provisions of the trust deed. That submission is outlined in [61]–[62] below in the summary of Michael's submissions.

Michael's submissions

61 Counsel for Michael submitted that the ordinary meaning of cl 20 conferred upon the trustee broad powers capable of being used to amend the identities of the people holding the position of the Guardian and Appointor, provided that the criteria in sub-cls 20(i) to (iii) are met. The basis of this contention was the second part of cl 20 pursuant to which the trustee may 'declare any new or other trusts or powers' and that 'such new or other trust powers discretions, alterations or variations' may, in accordance with subparagraph (i), 'relate to the management or control of the Trust Fund or the investment thereof or to the trustee's powers or discretions …'.

62 It was argued that these parts of cl 20, together with the word 'and' at the start of 'and may by the same or any other deed…', gave the trustee power to declare new powers and that this power was sufficient on its own for the trustee to have made

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19 On this analysis, the 2002 variation conferred a benefit on Paul and Michael and the 2010 and 2017 variations conferred a benefit on Michael.

the variations changing the definitions of Guardian and Appointor. Michael submitted that this analysis was supported by the fact that, pursuant to cl 17, the trustee's powers were exercisable at its absolute and uncontrolled discretion.

63 In the alternative, Michael adopted the trustee's submissions outlined above that the trustee's power in cl 20 to 'vary all or any of the trusts hereinbefore limited' is a reference to the primary trust created by cl 2 and that it is broad enough to permit a variation of the powers which are available to a trustee in respect of the operation of the primary trust, including the identification of the persons occupying the positions of Guardian and Appointor.

64 Michael submitted that this conclusion was supported by a reading of the whole of the trust deed. He relied in particular on the reference to 'successive' Guardians and Appointors in cl 1, and the reference to the 'last surviving Appointor' in cl 22, arguing that these features were strong indications that the Settlor intended that there would be more Appointors and Guardians than just John and Eva over the 80 year life of the trust. Contrary to Paul and Deborah's submissions that these references were only ever intended to be references to Eva taking John's place after his death, Michael submitted that a carefully drafted deed would have made this clear.

65 Michael submitted that a construction of cl 20 as encompassing a power to amend the identity of the persons holding the positions of Guardian and Appointor was supported by the key role the trust deed provides for the Guardian to play in respect of the control and management of the trust, in circumstances where the trust deed does not contain any other power of amendment and did not expressly prohibit such a variation. Reference was made to the role of the Guardian under cls 3, 4 and 20 of the trust deed.[20] Given this measure of control that it was intended that the Guardian would have over the discretions of the trustee and given the trust's vesting date of 30

20 See [33], [34], [28] above.

June 2050, it was submitted that it is to be expected that there would be provision in the trust deed for successive Guardians to be appointed.

66 Michael also adopted the trustee's submission that it cannot be said that the variations were not for the benefit of all or any of the primary beneficiaries as required by sub-cl 20(ii).

Principles of construction

67 The principles to be applied in determining the proper construction of cl 20 of the trust deed were not in dispute. The rules of construction of contracts also apply to trusts.[21] The parties' intentions are therefore to be determined objectively from what they have said in the instrument they have executed.[22] It is also sometimes permissible for the Court to have regard to the surrounding circumstances known to the parties at the time the contract was executed.[23]

68 In the case of a trust, '[t]he court's primary task in construction is to discover the intention of, relevantly, the Settlor from the words used in the instrument, read as a whole'.[24] Unless they have a special or technical meaning, the words used in a trust deed are to be given their ordinary and natural meaning, read in the context of the trust deed as a whole.[25]

69 As stated by Gibbs J in *Australian Broadcasting Commission v Australasian Performing Right Association Ltd*:[26]

> It is trite law that the primary duty of a court in construing a written contract is to

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21 See *Byrnes v Kendle* (2011) 243 CLR 253, 275 [57]–[59]; *The Trust Company (Nominees) Ltd v Banksia Securities Ltd (receivers and managed appointed) (in liq)* [2016] VSCA 324, [35]; *Schreuders v Grandiflora Nominees Pty Ltd* [2016] VSCA 93, [12].

22 *Byrnes v Kendle* (n 21) 273 [53]–[59].

23 As stated by the Court of Appeal in *Schreuders v Grandiflora Nominees Pty Ltd* (n 21) [15] in relation to the principles applicable to the construction of trusts, citing *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640, 656–7 [35].

24 *Scaffidi v Montevento Holdings Pty Ltd* (n 15) [154].

25 *Montevento Holdings Pty Ltd v Scaffidi* (2012) 246 CLR 325, 332 [25].

26 (1973) 129 CLR 99, 109 ('*ABC v APRA*') (citations omitted). In *The Trust Company (Nominees) Ltd v Banksia Securities Ltd (receivers and managed appointed) (in liq)* (n 21) [37], the Court of Appeal observed that the above principles stated by Gibbs J were not in doubt. The Court of Appeal also noted that 'Gibbs J did not suggest that harmony can always be achieved, rather that it is the object to be pursued in the course of construction'.

> endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied. Of course the whole of the instrument has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another. If the words used are unambiguous the court must give effect to them, notwithstanding that the result may appear capricious or unreasonable, and notwithstanding that it may be guessed or suspected that the parties intended something different. The court has no power to remake or amend a contract for the purpose of avoiding a result which is considered to be inconvenient or unjust. On the other hand, if the language is open to two constructions, that will be preferred which will avoid consequences which appear to be capricious, unreasonable, inconvenient or unjust, "even though the construction adopted is not the most obvious, or the most grammatically accurate", to use the words from earlier authority cited in *Locke v. Dunlop*, …

70 In *Schreuders v Grandiflora Nominees Pty Ltd*,[27] the Court of Appeal summarised the approach to the construction of trust instruments as follows:[28]

> … trust instruments are to be given their natural and ordinary meaning unless they have a special or technical meaning.[29] The terms of an instrument must be construed in the context of the entire document[30] and in such a way that renders them 'all harmonious one with another'.[31]
>
> The parties' intention must be found in the wording of the trust instrument rather than in what was on their minds when they executed the instrument.[32] … In *Byrnes v Kendle*,[33] Gummow and Hayne JJ stated:
>
> > [T]he expressed intention of the parties is to be found in the answer to the question, 'What is the meaning of what the parties have said?', not to the question, 'What did the parties mean to say?'[34]

71 In *Kearns v Hill*,[35] the Court of Appeal of New South Wales observed that the provisions of discretionary trusts, including powers of variation, are not to be interpreted in a 'narrow or unreal way' and that the 'cardinal duty' of the Court is 'to construe each provision according to its natural meaning, and in such a way to give it its most ample operation'.[36] As Buss P stated in *Mercanti v Mercanti*,[37] 'the nature,

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27 (n 21).
28 Ibid [21]–[22].
29 *Hill (Viscount) v Hill (Dowager Viscountess)* [1897] 1 QB 483, 486.
30 *Re Altson: Equity Trustees Executors & Agency Co Ltd v Spielvogel* [1955] VLR 281, 284; *ABC v APRA* (n 26) 109.
31 *ABC v APRA* (n 26) 109.
32 *Byrnes v Kendle* (n 21) 273 [53]–[59], 284–90 [98]–[115].
33 *Byrnes v Kendle* (n 21).
34 *Byrnes v Kendle* (n 21) 273 [53].
35 (1990) 21 NSWLR 107.
36 Ibid 109 (Meagher JA, with whom the other member of the Court agreed).
37 (2016) 50 WAR 495.

form and extent of the permitted variations depend, in general, upon the language and apparent purpose of the variation clause in the context of the trust deed as a whole'.[38] An express power of variation may contain express or implied limitations in relation to its exercise.[39]

Consideration

72 The proper construction of the word 'trusts' first appearing in cl 20 is central to determining whether the trust deed gives power to the trustee to amend the description of the persons identified as Guardian and Appointor. The word is not defined in the trust deed. However, as the trustee emphasised, the 'trusts' in cl 20 are not referred to in a decontextualised way; the clause refers to the 'trusts hereinbefore'.

73 As was submitted on behalf of the trustee, this must be taken to be a reference to the primary trust created by cl 2 of the trust deed. I do not, however, consider that, in the context of the provisions of this trust deed, the 'trusts hereinbefore' thereby extends to include the terms applicable to the exercise of powers in respect of the trust such that cl 20 is sufficiently broad to permit a variation of all of the rights and obligations to which the trustee is subject as set out in the trust deed. The trustee's submission rests on an appeal to general equitable principles, including that a trust is constituted by the bundle of rights and obligations which are vested in the trustee. It does not, however, engage with the terms of cl 20 considered in the context of the trust deed as a whole. Such an analysis leads to the conclusion that the trust deed does not give the trustee power to amend the description of the persons identified as Guardian and Appointor.

74 Of primary significance in this analysis is the fact that the declaration of trust in cl 2 to which the 'trusts hereinbefore' in cl 20 must be taken to refer, expressly distinguishes between 'the trusts' upon which the trustee is to hold the trust fund, on the one hand, and the 'powers and provisions hereinafter expressed concerning

38 Ibid 518.

39 *Mercanti v Mercanti* (n 37) 520.

the same', on the other.[40] Although dealing with a differently expressed power of variation, the same distinction in relevantly similar provisions of a trust deed was important in the task of construction undertaken by Buss P in *Mercanti v Mercanti*[41] and by Douglas J in *Jenkins v Ellett*.[42]

75 This distinction is also expressed in the preamble of the trust deed which records that the '[t]rustees have consented to become the Trustees hereof upon the trusts and with and subject to the powers and provisions hereinafter expressed'.

76 It is in the context of these provisions of the trust deed that the significance of the language used in cl 20 becomes evident. The initial reference in cl 20 to the trustee's power to 'add to or vary all or any of the trusts hereinbefore limited', is followed by the later reference to the trustee's power to declare any new or other 'trusts or powers'. The trustee and Michael did not advance a submission which addressed this important difference in the words used in cl 20. Given the clear distinction made in the trust deed between 'the trusts' and the 'powers and provisions' concerning the trust, including in particular in cl 2 to which cl 20 must be taken to refer, this strongly supports the conclusion that the power of variation provided by the clause does not extend to the powers available to the trustee in respect of the operation of the trust or, more generally, the other provisions of the trust deed which apply to the exercise of those powers.

77 I do not agree that this construction gives rise to an 'absurd result'.

78 First, it gives the trustee a power of variation, albeit one limited to the 'trusts'. The learned authors of *Jacobs' Law of Trusts in Australia* ('*Jacobs*") write that the '[p]recise definition [of a trust] is elusive, if not impossible'.[43] To similar effect, Mayo J in *Re Scott* observed that '[n]o definition of a "trust" seems to have been accepted as

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40 Clause 2 is set out in full in [32] above.
41 *Mercanti v Mercanti* (n 37) 525 [128], 527 [143].
42 [2007] QSC 154, [16]–[17].
43 JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 8th ed, 2016) [1.01] ('*Jacobs*').

comprehensive and exact.'[44] In the circumstances of this case, the distinction made in the trust deed between 'trusts' and 'powers' undercuts a broader conception of the word as meaning, for example, 'the whole relationship which arises between the parties in respect of the property the subject of the trust,' being the definition proffered by the learned authors of *Jacobs'*.[45] Instead, it is consistent with the narrower definition of a trust as an obligation attaching to property as elucidated by Mayo J in *Re Scott.* The trustee and Michael did not contest his Honour's observations at the level of principle. I consider that, in the context of this trust deed, the 'trusts' referred to carry the meaning advanced on behalf of Paul and Deborah as being an obligation attaching to property. As they submitted, because there is no duty or obligation on the trustee to amend the definitions of Appointor and Guardian in the schedule of the trust deed, it is not a 'trust' and accordingly not within the reach of the variation power in cl 20. In the language of cl 2, those definitions are 'provisions' expressed by the trust deed concerning the trusts.

79 Secondly, although limited to a power to vary the trusts in the sense which I have described, the permissively cast terms of sub-para (i) make clear that the power of variation may relate to 'the management or control of the Trust Fund or the investment thereof'.

80 Thirdly, separate to the power of variation, the second part of cl 20 also gives the trustee a power to 'declare any new or other trusts or powers concerning the Trust Fund or any part or parts thereof'. However, contrary to the trustee's submissions, it does not logically follow from the existence of this power in cl 20 that the clause should be construed so that it confers upon the trustee a very broad power of amendment including all of the powers and provisions of the trust deed. A power to vary a trust is, as the trustee submitted, different to a power to declare a new trust or a new power. It does not follow simply from the co-location of the two powers within the same provision of the trust deed that those powers should in effect be

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44 *Re Scott* (n 14) 196.

45 *Jacobs'* (n 43) 2 [1.03].

dissolved into one overarching power of amendment of the trust deed. Such an approach is contrary to the clear terms of cl 20.

81 It also follows from this discussion that I reject Michael's submission that the trustee's power to declare new powers was sufficient for the trustee to have made the variations. Each of the Deeds of Variation recited the trustee's power to 'revoke, add to or alter all or any of the trusts'. None purported to declare new powers. Further and in any event, as a matter of substance, the variations cannot be said to have declared new powers. Consistent with what was recited in each, they purported to 'alter' or 'amend' the relevant provisions of the schedule.

82 The above provisions make clear that cl 20 is cast in wide terms. This is underlined by the provision made by cl 17 that the powers vested in the trustee are exercisable at the trustee's 'absolute and uncontrolled' discretion. Nevertheless, cl 17 does not give licence to an interpretative approach to ascertaining the Settlor's intention which disregards the limits on the trustee's powers expressed in the words of the trust deed considered as a whole. Here, the power of variation is subject to a requirement that the Guardian consent, as well as the provisions made by sub-cls 20(ii) and (iii). It is also limited by subject matter, it being a power to vary the 'trusts hereinbefore', as distinct from a general power to vary the terms of the trust deed. The Settlor could have readily given the trustee such an expansive power of variation by the inclusion of plain and express terms in the trust deed if she had so intended.

83 It is true, as was submitted on behalf of Michael, that, under the trust deed, the Guardian has important functions relating to the control and management of the trust and that the trust deed does not provide for any power of variation except that provided for by cl 20. At first glance, the measure of control that the Guardian has over the discretions of the trustee in circumstances where the trust has a vesting date of 30 June 2050 might prompt an interpretation of cl 20 as encompassing a power to amend the identity of the persons holding the position of Guardian.

84 Such an approach would however be in error. First, the position of Guardian is not essential to the operation of a trust. Secondly, the Settlor's intention is to be found in the wording of the trust deed, as distinct from speculations about what might have been in her mind when the trust was settled. An examination of sub-cl 1(6) of the trust deed and the terms of the schedule in the context of the trust deed as a whole, show an intention on behalf of the Settlor that John would have the powers of the Guardian during his lifetime; that, if Eva survived him, she would then have those powers; and that, upon the death of both John and Eva, there would no longer be a Guardian. The first two of these propositions are reflected in the express terms of the trust deed; it is only the third which is controversial.

85 As was submitted on behalf of Paul and Deborah, this construction is indicated by the terms of cls 1(5) and 4 read with the above provisions of the trust deed. Sub-clause 1(5) provides that the trustee may appoint an earlier Vesting Day with the consent of the Guardian during the lifetime of the Guardian, but without any consent after 'the death of the last surviving Guardian'. Clause 4 gives the trustee power, with the consent of the Guardian, to appoint for whom of the general beneficiaries the trust fund is to be held on the Vesting Day. However, 'if there is no Guardian alive the Trustees shall have no such power of appointment', in which case the trust fund is to be held for the children of John and Eva as tenants in common in equal shares.

86 The reference in particular to 'the last surviving Guardian' in sub-cl 1(5) implies that the class of persons who may hold the office of Guardian is finite and ascertainable. That intention is reflected in turn in the specification only of John and then Eva as Guardians in the schedule to the trust deed. It is also consistent with the absence of any express provision in the trust deed for the appointment of new or additional successor Guardians. As to the reference in cl 4 to there being 'no Guardian alive', the need for such a provision would presumably be greatly diminished if the Settlor's intention had been to permit the trustee to vary the trust deed by appointing new or additional successor Guardians.

87 In addition to the terms of the trust, the Settlor's intention in settling the trust may also be objectively ascertained from a consideration of the surrounding circumstances known to her when the trust was settled. As the trustee submitted, the Owies family was the context in which the trust was made. The Settlor was Eva's sister. She self-evidently intended that, at least in the first instance, the trustee would be a company of which John and Eva were directors. As the terms of the trust make plain, she also intended that the children of John and Eva were to be the primary beneficiaries, with the general beneficiaries being John and Eva and the family of the primary beneficiaries. And of course the Settlor also expressly intended the Guardian and Appointor to be John and then, after his death, Eva. It is therefore correct, as the trustee submitted, that the Settlor intended the trust to operate in the context of, and for the benefit of, the Owies family.

88 It is also clear from the Vesting Date specified in the trust deed that the Settlor intended the trust to have a potential period of operation of up to 80 years. Given the familial relationship between the Settlor and John and Eva, the Settlor may be taken to have had at least a general idea of John and Eva's age when the trust was settled in 1970. At that time, John and Eva were 47 and 41 years of age respectively. With that knowledge, the Settlor must be taken to have known that John and Eva would not be alive if the trust continued to operate until the Vesting Date.

89 In the context of these circumstances in which the trust was made, it is significant that the Settlor only identified John and Eva, successively, as Guardian and did not include within the trust deed any express power for the appointment of new or successor Guardians. It confirms the conclusion, based on the terms of the trust deed, that the Settlor intended that, upon the death of both John and Eva, there would no longer be a Guardian. There is nothing anomalous or unexpected in such a result, given the Settlor's intention that the trust operate in the context of, and for the benefit of, the Owies family.

90 It is immaterial to this analysis that the trust deed provides a mechanism by which the Vesting Day may be brought forward because, in ascertaining the Settlor's

intention, it is appropriate to do so on the footing that the trust may operate until the Vesting Date. Although it is true that the Guardian has important roles under the trust deed, as I have noted, the existence of a Guardian is not necessary for the creation or operation of a trust.

91 In light of the above analysis and conclusion, it is unnecessary for me to determine whether, as Paul and Deborah contended, any change in the definition of the Guardian would change the substratum of the trust because of its effect on the rights of the next of kin of the Guardian upon vesting. It has been observed that, '[t]he determination of the substratum of a discretionary family trust is not without difficulty. … especially … where … the trust deed is drafted to confer maximum flexibility in relation to the beneficiaries of the trust, the distribution or accumulation of capital and income, and the management and control of the trust'.[46]

92 For the above reasons, the trust deed, properly construed, does not give power to the trustee to amend the description of the persons identified as 'Guardian' and 'Appointor'.

Issue 2: Validity of resolutions amending the trust deed

93 Assuming, contrary to my view, that the trustee had power to amend the description of the persons identified as Guardian and Appointor, the second issue for determination is whether the variations are void because the Court cannot be satisfied that the board of directors of the trustee resolved to authorise the trustee to execute them. This issue arises because there is no evidence of any resolution of the board of the trustee authorising the execution of each of the variations.

The 2002 and 2010 variations

94 The trustee contended that, despite the absence of any evidence of the board of the trustee resolving to authorise the execution of the 2002 and 2010 variations, the Court should act on the basis that, by operation of the presumption of regularity, a resolution of directors of the trustee was validly passed to make those variations.

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46 *Mercanti v Mercanti* (n 37) 546.

The presumption of regularity

95 The presumption of regularity is derived from the Latin maxim, *omnia praesumuntur rite esse acta*. In his recent extensive discussion of the principle in *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* ('*McHugh*'),[47] Anderson J identifies that the maxim broadly translates to mean 'everything is presumed to be rightly and duly performed until the contrary is shown'.[48]

96 In *Johnson v Director of Consumer Affairs (Vic)*,[49] Kyrou J (as he then was) referred to the presumption of regularity as:[50]

> … a well-established principle that where an act is done which can only be done legally after the performance of some prior act, proof of the later act carries with it a presumption of the due performance of the prior act.[51]

His Honour continued:[52]

> The presumption applies to both acts and omissions, and to matters of substance (such as compliance with statutory provisions) as well as matters of detail (such as those of form and procedure dealt with in regulations). It is based on inference from probabilities and policy considerations of public and business pragmatism.
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> In *Carpenter v Carpenter Grazing Co Pty Ltd*, Hope JA, with whom Samuels and Priestly JJA agreed, said that the presumption of regularity may reasonably be drawn:
>
> > where an intention to do some formal act is established, when the evidence is consistent with that intention having been carried into effect in a proper way, the observance of the formality has not been proved or disproved and its actual observance can only be inferred as a matter of probability.
>
> The presumption of regularity is a rebuttable presumption of fact, associated with a reasonable inference based on what ordinarily happens in the ordinary course of human affairs. In determining whether the presumption is rebutted, this inference from the ordinary course of human affairs bears some weight, which may vary according to the proved circumstances.

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47 [2020] FCA 416 ('*McHugh*').

48 Ibid [330], quoting RH Kersley, *Broom's Legal Maxims* (10th ed, Sweet & Maxwell, 1939) 642, quoted in *Minister for Natural Resources v NSW Aboriginal Land Council* (1987) 9 NSWLR 154 164 (McHugh JA).

49 (2011) 34 VAR 447.

50 Ibid [56].

51 *McLean Bros & Rigg Ltd v Grice* (1906) 4 CLR 835, 850, citing *Knox County v Ninth National Bank* (1893) 147 US 91, 97.

52 *Johnson v Director of Consumer Affairs (Vic)* (n 49) [58]–[60] (citations omitted).

97 The presumption applies in many areas of law and is clearly rebuttable. In the law relating to corporations, Lord Simonds in *Morris v Kanssen* observed that its application was very similar to the law of agency and that '[t]he wheels of business will not go smoothly round unless it may be assumed that that is in order which appears to be in order'.[53] Justice Anderson in *McHugh* referred to this as one of two broad foundations which underpinned the presumption, the other being in common experience. As to the latter, his Honour stated:[54]

> … The tenability of the presumption relies on there being "previous experience of the connection between the known and inferred facts, of such a nature, that as soon as the existence of the one is established, admitted or assumed, the inference as to the existence of the other immediately arises, independently of any reasoning upon the subject": …. As such, in determining whether the presumption is rebutted, the ordinary course of human affairs carries some weight, which may vary depending on the circumstances:….

98 His Honour summarised the position in this way:[55]

> The presumption of regularity is an *evidential* presumption. It is a judicial tool founded on common experience and pragmatic concerns to facilitate the proof of certain facts in appropriate circumstances. Where applicable in respect of a particular fact, a presumption will arise that the fact has occurred in the past, and it is up to the party against whom the presumption operates to present evidence to the contrary.

Consideration

99 The 2002 variation records that it was executed with the trustee company's seal. It bears John's signature as director of the trustee and Eva's signature as secretary. Mr Sampson's evidence was that he drafted the variation at Eva's request and provided it to her. Other than recognising Eva's signature on the variation, Mr Sampson was unable to say anything about the circumstances of its execution. Likewise, John's evidence was that he and Eva signed the variation. His witness statement, however, contains no indication about the making of any resolution by the board of the trustee authorising its execution.

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53 *Morris v Kanssen* (1946) AC 459, 475.
54 *McHugh* (n 47) [333] (citations omitted).
55 *McHugh* (n 47) [339] (emphasis in original).

100 The position is very similar in respect of the 2010 variation. It records that it was executed by the trustee by those persons authorised to sign for the company. It is signed by John as a director of the trustee and by Eva as secretary. Again, Mr Sampson's evidence was that he drafted it at Eva's request and that he recognises her signature on it. He also gave evidence that he met with Eva and Michael to take instructions and that he sent the variation to Eva and John by letter dated 7 June 2010 and received it back in executed form under cover of a letter from John dated 10 June 2010. He is unable, however, to say anything about the circumstances of its execution. In his witness statement, John only relevantly states that he and Eva signed the 2010 variation.

101 Paul and Deborah did not submit that there was no scope for the presumption of regularity to apply in the circumstances contended for by the trustee; they instead submitted that the evidence before the Court was sufficient to displace its operation. In that regard, they focussed upon the circumstances and timing of the preparation of John's witness statement. It was submitted that the Court should assume that the contents of John's witness statement contained all the evidence he could have given about the relevant issues concerning the making of the variations to the trust deed. They pointed to the fact that the trustee and Michael had previously submitted to the Court that they were preparing their cases on the basis that all the evidence in chief would be contained in witness statements and that John's witness statement was prepared months after the service of the statement of claim which properly articulated Paul and Deborah's claims.

102 Paul and Deborah also relied on the fact that the trustee and Michael were represented by experienced and senior legal practitioners who had taken steps, by the filing of a supplementary affidavit of documents, to provide late discovery in relation to the distributions of income in certain years when it appeared necessary to fill 'gaps in the evidence'. It was therefore submitted that the Court should infer that no evidence had been given to the Court of resolutions to execute the deeds of variation because no such evidence could be given. They submitted that the

operation of the presumption of regularity in the circumstances of the case could only extend to establish that the variations themselves were executed by the trustee in accordance with the *Corporations Act 2001* (Cth) ('*Corporations Act*'), not that there had been an anterior meeting of the board of directors authorising the trustee to take such action.

103 In relation to the 2010 variation, Paul and Deborah also submitted that the presumption was displaced because it wrongly recited that John was the Guardian (not John and Eva in accordance with the 2002 variation) and was not signed by Eva in her capacity as joint Guardian.

104 I am not persuaded by these submissions. Paul and Deborah carry the burden to rebut the presumption of regularity. In the circumstances of this case, that burden is onerous. It requires them to effectively prove a negative; to affirmatively establish that the trustee did not make the necessary authorising resolutions. The fact that John's witness statement does not include any statements about the making of such a resolution by the trustee, even assuming that it contains all the evidence he could have given about the relevant issues, cannot found a positive finding that the trustee did not authorise the making of the variations. The absence of any reference in John's witness statement to the making by the board of the trustee of an authorising resolution, is also consistent with a conclusion that John had no recollection of such a resolution, even though it occurred. Such a possibility is not fanciful given that John was 96 years of age when he signed the witness statement and the variations occurred between 10 and 18 years ago.

105 I also do not consider that the matters relied on by Paul and Deborah in respect of the 2010 variation concerning the Guardians of the trust referred to in [103] above have any particular significance. The issue of relevance concerns the absence of evidence of any resolution of the board of directors of the trustee authorising the trustee to execute the variations, not whether the Guardian has consented to a variation as required by cl 20. In any event, as I explain in Issue 3 below, I consider

that, although the 2010 variation makes no reference to Eva as joint Guardian, she did in fact consent to its making in her capacity as Guardian.

106 I also reject Paul and Deborah's attempt to confine the operation of the presumption of regularity in the circumstances presently in issue as only establishing that the variations were executed in compliance with the *Corporations Act*. No authority was cited in support of this proposition. Such an approach is inconsistent with the evidential nature of the presumption as explained in *Johnson v Director of Consumer Affairs (Vic)*[56] and in *McHugh*.

The 2017 variation

107 The 2017 variation was purportedly made in the circumstances set out below.

108 By late February 2017, both John and Eva were resident at the Arcare Residential Aged Care Facility in Caulfield North (**Arcare**).[57]

109 In October 2017, Paul filed an application in the Victorian Civil and Administrative Tribunal (**VCAT**) for guardianship and administration orders in respect of Eva and John.

110 In early December 2017, Mr Sampson raised with John and Michael his view that, because Eva's capacity was the subject of challenge in VCAT, it would be a good idea if he was appointed as a third director of the trustee. Michael and John agreed with this suggestion. Michael discussed it with Eva.

111 A members' meeting of the trustee was held in Eva's room in Arcare on 14 December 2017, the day before the 2017 variation was executed. By this time, as a result of the stroke she suffered in January 2017, Eva could not write with her right hand (she was right-handed) and could not speak. However, John, Michael and Mr Sampson all gave evidence that they considered that Eva had a clear understanding of what was said to her and discussed in the meeting.

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56 See [97] above.

57 John moved into Arcare on 28 May 2015. Eva moved into Arcare in late February 2017 after she suffered a stroke in January 2017.

112 The members' meeting, which went for 10-15 minutes, was attended by John and Eva as the shareholders of the trustee and by Michael as Eva's attorney.[58] Mr Sampson also attended the meeting as an observer. The meeting resolved to appoint Mr Sampson as a director of the trustee. Michael signed the minutes of the meeting 'as attorney for Eva Irene Owies and also at her request'. If valid, the effect of this resolution was to increase the number of directors of the trustee from two to three.[59]

113 Immediately after the shareholders' meeting on 14 December 2017, Mr Sampson had a discussion with John and Eva in the absence of Michael. Mr Sampson gave John a copy of a document entitled 'Proposal for the Owies Family Trust' (the **proposal**) which he then read aloud to John and Eva. It provided as follows:

> Proposal for the Owies Family Trust
>
> Control of the trust rests with the Appointor and Guardian of the trust.
>
> The trust deed (as amended) appoints as Appointor and Guardian:
>
> 1. Dr John Owies.
> 2. Upon his death Dr Eva Owies.
> 3. Upon the death of both John and Eva then Michael Benjamin Owies.
>
> The Appointor has control because he or she may remove the trustee (JJE Nominees) and appoint a new trustee.
>
> At present Dr John Owies has capacity, and is in effective control of the trust.
>
> However I propose (and this has the approval of [named barrister]) that the trust deed be amended to appoint Michael as Appointor and Guardian now.
>
> The reason is that if Dr John Owies in the future loses decision making capacity there will be a vacuum in who can control the trust. Further, if Dr John Owies dies it may be difficult for Dr Eva Owies to carry out this function, and if her affairs in the future are handled by someone else they may seek control of the trust.
>
> Dr Eva Owies told me before her stroke that she trusts Michael 110%, and he is the only one to divide family assets fairly.

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58 Eva had appointed Michael as her attorney on 22 May 2008 pursuant to an Enduring Power of Attorney (Financial) created under Part XIA of the *Instruments Act 1958*.

59 Paul and Deborah contend that this meeting was inquorate and the above resolution void because Michael voted at the meeting as Eva's attorney without being registered in breach of provisions of the trustee's Articles of Association. This is the subject of the complaint raised by Issue 4 which I consider later in these reasons.

> If that is the view of you both then I recommend this proposal.
>
> This would put Michael in control of the trust, but you both have significant loan accounts which are your own personal property. You could demand repayment of the loans at any time if you felt the trust was not being managed in a manner of which you approved. You also have significant assets outside the trust, being a joint freehold property, and Eva's share portfolio.
>
> I have not discussed this proposal with Michael, and I would be pleased if you did not discuss it with him before you make a decision. The reason is that I do not want Michael to have any influence on your decision. I do not want the other family members to allege there was any undue influence by Michael. If he doesn't know of the proposal he can have no influence at all.
>
> Regards,
>
> Neville Sampson.

114 After reading out the proposal, Mr Sampson then read aloud the 2017 variation to John and Eva. John said that he agreed with the proposed amendments. Eva nodded her head when Mr Sampson asked whether she agreed. Mr Sampson told them that they should consider the amendments overnight and not discuss them with Michael.

115 The following morning, John and Eva spoke about the idea of giving Michael control of the trust. Eva indicated to John that she agreed with that idea. That afternoon, Mr Sampson attended at Arcare and met with John, at which time they signed the 2017 variation as directors of the trustee.

116 In the context of these findings, Paul and Deborah ask the Court to infer that no board resolution was made on 15 December 2017 authorising the trustee to execute the 2017 variation. They submit that this inference can be drawn from the absence of any written resolution of the board of directors on 15 December 2017 in circumstances where a written resolution was executed at the members' meeting on the previous day and from John's evidence that, on 15 December 2017, he 'spoke further with Eva about the idea of giving Michael control of the trust' and that 'she indicated to me that she agreed'.

117 This submission is misdirected and inconsistent with established principle as to what is required for there to be a valid resolution of the directors of a company.

118 In *Swiss Screens Australia v Burgess*,[60] Bryson J considered the degree of formality required in order for a decision by a husband and wife who were directors of a company to be a resolution of a meeting of the directors of the company. He stated:[61]

> To my mind any event, even most fleeting, in which two directors who are married to each other and are the company's only directors reach concurrence in taking some course in the company's affairs can be part of their management of the business of the company, and can be described with accuracy as a meeting of the directors and as a proceeding at such a meeting. In the course of human affairs it is not to be expected that a recognisable meeting would often take place in which somebody took the chair, there was a call to order, a resolution was made, seconded, debated and voted on. What does seem to me to be essential is that they should both concur in some decision in the management of the business of the company. If they do, and the event is recorded in a minute which accurately states what they concurred in as their decision, the meeting and the minute are no less effectual because the minute is formally expressed and appears to be an account of a much more solemn event than in fact took place.

This approach has been applied in various authorities and is not confined in its application to directors who are married.

119 In *Poliwka v Heven Holdings Pty Ltd*,[62] the Full Court of the Supreme Court of Western Australia considered what was required for a valid resolution of directors. Justice Ipp stated that '[a] valid resolution of directors can be taken at an informal meeting; there must, however, at least, be a demonstrable expression of will, on the part of the directors, approving of the resolution'.[63] His Honour continued:[64]

> … while it may not be necessary for a director consciously to apply his or her mind to the fact that the decision is being taken at a meeting of directors, the concurrence with the resolution must be expressed by each director in that capacity, and for the purpose of resolving, as a director, upon affairs of the company …

These observations were referred to with approval by Ferguson J (as she then was) in *Xie v Crisp & Ors*.[65]

120 In *Jarrett v Perpetual Trustee Co Ltd*,[66] the Supreme Court of New South Wales upheld the validity of certain dividends where there were no meetings of directors on the

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60 (1987) 11 ACLR 756 ('*Swiss*').
61 Ibid 758.
62 (1992) 8 ACSR 747.
63 Ibid 785.
64 *Poliwka v Heven Holdings Pty Ltd* (n 62) 786 (citations omitted).
65 [2011] VSC 154, [158].

basis that the evidence established that the directors had decided to declare and pay dividends. Justice Hall described Bryson J's judgment in *Swiss* as emphasising:[67]

- That irregularities and anomalies in the records of a company will not always or necessarily negate corporate decision-making in the context of a "family company" or a tightly held companies.
- With companies of that kind, concurrence between directors in the course of a company's affairs which form part of the management of the business of the company may be evident from the conduct of directors and be the equivalent of a "meeting". That may be so, notwithstanding irregularities or anomalies in company record-keeping.

121 The above authorities and principles were more recently affirmed by Buss P in *Mercanti v Mercanti*.[68] His Honour also referred to Owen J's observations in *Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* that:[69]

> In order for there to be a valid meeting of directors, it is not necessary that the directors be simultaneously present in one room; one be chosen to chair the meeting; and the director so selected run the meeting through an agenda of minutes of previous meeting, matters arising not otherwise dealt with, agenda items (with resolutions as to each), other business and finally formal closure. In other words, directors of even large companies can meet and validly resolve as directors to bind the company and authorise acts without the formality typical of a civil service committee meeting.
>
> What is essential is that there be, in the phrase so often used, a genuine 'meeting of minds' of the directors, so that they have in reality met, considered, and decided.

122 After his review of the authorities, Buss P in *Mercanti v Mercanti* summarised the principles as follows:[70]

(a) directors may meet informally;

(b) directors may meet without being physically together;

(c) the critical point is that there must be a meeting of minds as distinct from a physical meeting; and

(d) the directors may concur informally in the company taking a particular action, but they must concur in their capacity as directors in

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66 (2007) 64 ACSR 552.
67 Ibid 572 [111].
68 (n 37) 321 [175]–[177].
69 [2008] WASC 239, [5586]–[5587], quoted in *Mercanti v Mercanti* (n 37) 321–2 [178].
70 *Mercanti v Mercanti* (n 37) [184]–[185]. See *Mercanti v Mercanti* (n 37) [366]–[369] (Newnes and Murphy JJA).

> the management of the company's affairs.
>
> Whether, in a particular case, there was a meeting of minds in the relevant sense is a question of substance as distinct from a question of form. …

123 Despite the absence of a minute recording a resolution by the board of directors of the trustee authorising the trustee to execute the 2017 variation, the conduct of John, Eva and Mr Sampson on 14 and 15 December 2017 was a demonstrable expression of their common will, as directors of the trustee, that the trustee approve the variation. So much is incontrovertible in relation to John and Mr Sampson who met on 15 December 2017, however briefly, and signed the 2017 variation as directors of the trustee. The challenge to the approval of the 2017 variation has not been advanced on the basis that it was defective because it was executed by only two of the three directors. In any event, I am satisfied that Eva, in her capacity as a director of the trustee, informally concurred in the trustee approving the variation by her conduct the previous day in nodding her head in response to Mr Sampson asking if she agreed to the terms of the variation after Mr Sampson read it aloud.

124 However, if I am wrong in this analysis, Paul and Deborah's challenge must in any event fail because the directors of the trustee later ratified the making of the 2017 variation. On 15 April 2019, the directors of the trustee resolved as follows:

> The Company was authorised, and the Directors and the Company hereby ratify the entering into of the Deed of Amendment dated 15 December 2017 in respect to amendments to The Owies Family Trust Deed (**Deed of Amendment**) a copy of which is attached to this Resolution.
>
> It is further confirmed and ratified that the Directors John Joachim Owies and Neville Richard Sampson were at the relevant date authorised to bind the Company and enter into the Deed of Amendment on the Company's behalf in its own right and as trustee of **THE OWIES FAMILY TRUST**.

The minute of this resolution was signed by John and Mr Sampson.[71]

125 I do not accept the submission advanced on behalf of Paul and Deborah that, in attempting to ratify the 2017 variation on 15 April 2019, the directors of the trustee

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71 On 15 April 2019, John and Mr Sampson (in his capacity as Eva's legal personal representative) also signed a circular resolution and memorandum of shareholders. It recorded a resolution by the shareholders of the trustee in identical terms to that referred to above.

acted for purposes collateral to the purpose of the trust. It is apparent that the power of ratification was exercised so as to ensure the realisation of the original intention of the directors of the trustee in making the 2017 variation. I do not consider that the fact that this proceeding had been commenced rendered it improper for the trustee to take action to give effect to its original intention.

Issue 3: Consent of the Guardian to the 2010 and 2017 variations

126 The power in cl 20 of the trust deed may be exercised 'with the consent of the Guardian'. Assuming that cl 20 gave the trustee power to amend the description of the persons identified in the trust deed as 'Guardian' and 'Appointor' and assuming that the 2002 variation was valid, the third issue for determination is whether the 2010 and 2017 variations are void because Eva, as a joint Guardian appointed pursuant to the 2002 variation, did not consent to their making.

2010 variation

Submissions

127 The deed of variation which purported to effect the 2010 variation records John as the Guardian of the trust and his consent to the variation. It makes no reference to Eva as joint Guardian. Although Eva signed the deed of variation as secretary of the trustee, senior counsel for the trustee accepted that this did not establish that she consented to the 2010 variation as Guardian.

128 Given the contents of the 2010 variation, Paul and Deborah's submitted that John was the only person who may have given any consideration to its terms as Guardian. Further, there was no evidence of any discussion about the requirement of the Guardian's consent at the meeting between Mr Sampson, Eva and Michael on 16 April 2010. The instructions provided by Eva to Mr Sampson that day in relation to the 2010 variation can only have been in her capacity as an officer of the trustee, not in her capacity as Guardian.

129 Paul and Deborah submitted that, on a proper construction of the trust deed, the Guardian's role in relation to any proposed amendment to the trust deed was to

ensure that the amendment was within power, including that, in accordance with sub-cl 20(ii), it was 'for the benefit of all or any one or more of the General Beneficiaries or the next of kin …'. In her capacity as director of the trustee, Eva did not have an independent duty to consider this question, but she did in her capacity as Guardian.

130 Contrary to this duty, it was submitted that Eva's motivation for providing instructions for preparing the 2010 variation was to remove Paul from any controlling role in the trust. There was no evidence of any discussion about the need for the variation to be for the benefit of the beneficiaries or the next of kin. Eva's instruction to Mr Sampson that Deborah had cut herself off from the family and that she was to have no role in decision-making was not a matter which showed any consideration of benefit to anyone from the making of the 2010 variation.

131 Although the 2010 variation makes no reference to Eva as Guardian, the trustee submitted that her consent to the variation should be inferred from: (i) the fact that she was the director of the trustee who provided Mr Sampson with the instructions to prepare the variation;[72] (ii) her intention that Michael was to remain as the only 'successor' Guardian and Appointor after she and John had passed away;[73] and (iii) the fact that she signed the deed of variation on behalf of the trustee, indicating that she did in fact resolve in favour of its execution.

132 The trustee rejected the submission that, on a proper construction of the trust deed, the Guardian's role in relation to any proposed amendment was to ensure that it was within power, including being for the benefit of the beneficiaries or their next of kin. The Guardian's obligation under cl 20 was to either provide consent, or to withhold consent; it was for the trustee to properly satisfy itself that the power can be properly exercised. In support of its submission, the trustee relied upon the judgment of the Court of Appeal of the Supreme Court of Western Australia in *Blenkinsop v Herbert &*

72 See [22] above.
73 See [22] above.

Ors ('*Blenkinsop*'),[74] which concerned the provisions of a trust deed in relevantly similar terms to the present matter insofar as it related to the role of Guardian. The Court of Appeal considered that the Guardian did not have a fiduciary role and was free to exercise the powers as he or she saw fit without owing any duties to the trust or to the beneficiaries.

Consideration

133 Paul and Deborah's submissions squarely raise the proper role of the Guardian under the trust deed. In *Blenkinsop*, an appeal from a decision dismissing an application to remove the Guardian of a trust, the Court of Appeal made a number of important observations about the role of a Guardian under a trust. The trust in question was not unlike the trust deed in this case in that it conferred broad discretionary powers on the trustee, with many of the powers to be exercised only with the consent of the person or persons defined as the Guardian. On appeal, the appellant accepted that the Court only had power to remove the Guardian if the Guardian had fiduciary power. The question on appeal was accordingly whether the Guardian's powers under the trust deed were fiduciary.

134 Speaking generally of the role of Guardians under a trust, the Court stated:[75]

> Under trust law, the concept of a guardian or, as it is sometimes termed, protector, does not have a fixed meaning or content. The role of a guardian (if any) under a trust is as defined by the trust deed. Broadly speaking, the concept of guardian may refer to any person, distinct from the trustee, upon whom powers are conferred under a trust deed that enable some form of participation in the administration of the trust or disposition of the trust property.[76] The rights and duties of a guardian will be greatly influenced by the particular functions and powers conferred on the guardian, as well as by the terms of the trust instrument generally.
>
> In this light, caution is needed in proposing universal propositions about guardians generally, or about limits on the court's powers in relation to guardians.

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74 (2017) 51 WAR 264 ('*Blenkinsop*').

75 Ibid 280 [70]–[71].

76 Adopting the working definition proposed in Holden A, *Trust Protectors* (2011) [1.6] and following; compare Hubbard M, *Protectors of Trusts* (2013) [2.02].

135 There is no presumption that, absent a contrary indication, a Guardian occupies a fiduciary position.[77] It is a question of construction of the particular trust deed as to whether a particular power conferred on a Guardian is fiduciary or not.[78] A range of considerations may be relevant to the construction question including the nature and purpose of the power, the nature of the instrument by which the power was conferred, the person or persons in whom the power is reposed, and the relationship of that person or persons to the trust.[79] The question of whether a power is conferred on a donee in a fiduciary capacity is 'to be decided in light of the extent to which, on a proper construction, the instrument conferring the power constrains the freedom of the donee to act in their own interests, or as they please, in exercising the power'.[80]

136 The Court analysed various matters relevant to the above considerations in concluding that the powers of the Guardian identified in the relevant trust deed were personal and not fiduciary.[81] It is apposite to note the following consideration by the Court of the relevant terms of the trust deed:[82]

> In these trusts, the powers conferred on the Guardian are all of the same nature: the power to decide whether to consent to an exercise of power by the Trustee, thereby rendering effectual the Trustee's decision. The powers, by their terms and nature, are permissive rather than mandatory. No occasion arises for the exercise of the Guardian's power of consent unless and until the Trustee makes a decision of a kind to which the requirement for the Guardian's consent applies. They are effectively powers of veto. The language used by the settlor does not objectively reveal an intention that the Guardian in these trusts has a duty to consider, *from time to time*, whether to exercise those powers. Also, the powers are not expressed in terms of consent not being 'unreasonably' withheld, or consent being subject to the Guardian being 'satisfied' or having formed an 'opinion' as to a state of affairs. The Guardian's powers are very different from the active powers conferred on the Trustee and the implicit duties associated with such active powers. The Guardian has no power of disposition of property, but is only given the opportunity to decide whether the particular disposition or other decision determined by the Trustee should be given effect. In relation to the Trustee's power of distribution of income under cl 5(a) and capital under cl 6(a), there are default provisions governing the position in the absence of appointment (cl 5(b) and cl 6(b)). Further, the Guardian in these trusts does not have a power to remove or appoint a new trustee. Also, the objects of the trusts are volunteers effectively relying on the bounty of Fred (and Judith).

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77 *Blenkinsop* (n 75) 294 [136].
78 *Blenkinsop* (n 75) 291 [121], citing *Re Bird Charitable Trust* [2008] JLR 1.
79 *Blenkinsop* (n 75) 286 [97], 288 [107], 291 [119].
80 *Blenkinsop* (n 75) 294 [138].
81 *Blenkinsop* (n 75) 295.
82 *Blenkinsop* (n 75) 291–2 [122]–[123] (citations omitted).

> Prima facie, these features of the Trust Deeds tend to indicate that the object of the provisions is to give the Guardian the opportunity, without the obligation, to exercise a measure of control over the otherwise very broad, and largely unchallengeable, discretions of the Trustee.

137 Although Paul and Deborah did not contend that the Guardian's role under cl 20 of the trust deed was of a fiduciary nature, the observations in *Blenkinsop* about the position of Guardian in a trust and the general approach adopted to determining the character of the powers given to the Guardian are of assistance. Amongst other things, they indicate that there is nothing inherent in the position of Guardian which would require a conclusion that the role of the Guardian under cl 20 is, as Paul and Deborah submitted, to ensure that an amendment be within power and be for the benefit of all or any one or more of the beneficiaries or their next of kin. Nor was any submission advanced on behalf of Paul and Deborah to establish how such a conclusion flowed from the proper construction of the provisions of the trust deed.

138 To the contrary, I accept the trustee's submission that, on the ordinary meaning of cl 20 considered in the context of the trust deed as a whole, the Guardian's role is to either provide consent to an amendment, or to withhold his or her consent. It is a matter for the trustee, not the Guardian, to properly satisfy itself that the power of amendment can be properly exercised.

139 Despite the fact that Eva did not sign the 2010 variation in her capacity as Guardian, on the evidence before me, the submission that she did not consent to it in her capacity as Guardian is unreal and cannot be accepted. Eva's consent may be inferred from the fact that it was she who directed Mr Sampson to prepare the 2010 variation and provided instructions in relation to it, that those instructions included that Paul was to be removed as a 'successor' Guardian and that Michael was to remain as the only 'successor' and from the fact that she resolved in favour of the resolution by signing the deed of variation.

140 I accordingly reject the claim that the 2010 variation is void because Eva did not consent to its making.

2017 variation

141 In light of my conclusion above in respect of the 2010 variation, the claim that the 2017 variation is void because Eva did not consent to its making must also fail. Assuming that cl 20 gave the trustee power to amend the description of the persons identified in the trust deed as Guardian and Appointor and assuming that the 2002 variation was valid, the effect of the 2010 variation was that John and Eva were no longer joint Guardians; John alone was Guardian at the time the 2017 variation was made.

Issue 4: Execution of the 2017 variation

142 The 2017 variation was signed by John and Mr Sampson on 15 December 2017. The issue for determination is whether, assuming that the trustee had power to amend the description in the trust deed of the persons identified as Guardian, the variation is void because the directors' meeting at which John and Mr Sampson signed the variation was inquorate. Paul and Deborah contend that the meeting was inquorate because the resolution of the meeting of members of the trustee on 14 December 2017 at which Mr Sampson was appointed as a director was itself void because, in breach of arts 42 and 44 of the trustee's Articles of Association, Michael voted at that meeting as Eva's attorney without being registered.

143 Articles 42 and 44 of the trustee's Articles of Association are as follows:

> 42. ANY of the following persons, that is to say –
>
> (a) Either of the parents or the Guardian of any infant member;
>
> (b) any person becoming entitled to a share in consequence of the bankruptcy of a member;
>
> (c) any person becoming entitled to a share in consequence of the death of a member;
>
> (d) any person having authority in law to manage the affairs of a member who by reason of mental or physical infirmity is unable to manage his affairs,
>
> shall upon such evidence being produced as is from time to time properly required by the Directors, have the right, either to be registered himself, to make such transfer of the share as the member could have made; but the Directors shall in either case have the same right to decline or suspend registration as they could have had in the

> case of a transfer of the share by the member if the member had been alive or capable of transferring the share.
>
> 44. A person becoming entitled to a share by reason of the infancy bankruptcy other incapacity or death of the holder shall be entitled to the same dividends and other advantages to which he would be entitled if he were the registered holder of the share, except that he shall not before being registered as a member in respect of the share, be entitled in respect of it to exercise any right conferred by membership in relation to the meetings of the Company.

144 It was uncontroversial that, as at 14 December 2017, Michael was not registered as a member in respect of Eva's shares in the trustee. Paul and Deborah therefore submit that, because Eva was suffering from at least physical infirmity on 14 December 2017 – she could not speak nor write – Michael had no authority to vote as her attorney and the resolution which purported to appoint Mr Sampson as a director of the trustee is therefore void.

145 In answering this claim, the trustee's primary contention was that the Court should find that, at the meeting of members on 14 December 2017, Eva in fact exercised her powers as a member herself and not through Michael as her attorney. The trustee relied upon the evidence given by John, Michael and Mr Sampson to which I have already referred[83] to the effect that they each considered that Eva had a clear understanding of what was said to her and what was discussed in the meeting. The trustee also referred to John's evidence that, during the meeting after Mr Sampson read out the words of the members' resolution, Eva nodded that she agreed with it. Reference was also made to Michael's evidence that he spoke to Eva before the meeting and asked if she wanted Mr Sampson to become a director of the trustee and that she tapped 'yes' on an iPad. Reliance was also placed upon the fact that the members' resolution was signed by John and Michael, with Michael signing 'as attorney for Eva Irene Owies and also at her request'.

146 The difficulty with this submission is that it is contrary to Michael's evidence that he attended the meeting 'on my mother's behalf', that 'I acted as my mother's attorney

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83 See [111]–[112] above.

in exercising her rights as a shareholder of JJE to appoint Mr Sampson' and that 'I later signed the minutes on my mother's behalf'. In the face of this evidence, I am unable to accept the proposition as put on behalf of the trustee that Eva did not exercise her powers as a member of the trustee through Michael as her attorney. That submission is contrary to Michael's evidence and what is recorded on the face of the members' resolution.

147 The trustee's alternative submission rested on the proposition that, as a donee of an enduring power of attorney executed by Eva, Michael was authorised to do anything that Eva as principal could lawfully do, which included signing the shareholders' resolution. Reliance was also placed upon paras 73 and 75 of the Memorandum of Association of the trustee which provide as follows:

> 73 (1) Any member may appoint an attorney (whether a member or not) to act for him on his behalf at all meetings of the Company at which he is not present himself and to give any consent and sign any appointment or resolution or other document which the member himself could give or sign.
>
> …
>
> 75 THE attorney so appointed may during the absence of the member and while the power of attorney remains unrevoked attend at and take part in the proceedings and vote at all meetings of the Company and demand or join in the demand for a poll in the same manner as the member himself could if personally present, and may give any consent and sign any appointment or resolution or other document which the member himself could give or sign.

148 The trustee submitted that the terms of the resolution made on 14 December 2017 do not constitute proof that Eva 'lacked capacity' at that date. The trustee therefore did not concede that arts 42 and 44 of the Articles of Association of the trustee had any relevant application.

149 This alternative submission is rejected. First, arts 42 and 44 of the Articles of Association do not speak of a member's lack of 'capacity'. The relevant expression is that a member 'by reason of mental or physical infirmity is unable to manage his affairs'. I consider that, in circumstances where Eva could not speak and where, as a right-handed person, she could not sign or write with her right hand, she is properly

characterised as having a physical infirmity by reason of which she was unable to undertake basic functions essential to her capacity to manage her affairs.

150 Secondly, the power of attorney held by Michael did not in some unstated way override the limitations imposed by the Articles of Association of the trustee set out in arts 42 and 44. As the trustee submitted, a donee of an enduring power of attorney is authorised to do anything that the principal could *lawfully* do. Eva's rights in relation to the transmission of shares were conditioned by the terms of arts 42 and 44 of the Articles of Association; it must follow that Michael's capacity to act as Eva's attorney was similarly constrained.

151 It was submitted on behalf of Michael that the only reason he signed the resolution on Eva's behalf was because she was unable to sign it herself and that he did not exercise the power of attorney because Eva was no longer able to manage her affairs. This submission does not accurately reflect the evidence given by Michael. More fundamentally however, the relevant inquiry is not about Michael's motivations as to why he exercised the power of attorney, but whether the conditions referred to in art 42 of the Articles of Association were engaged. As I have indicated, I am satisfied that they were.

152 It follows from the above analysis that I accept the submission that the members' resolution of 14 December 2017 appointing Mr Sampson as a director of the trustee was defective because Michael voted as Eva's attorney without being registered as required by the Articles of Association. However, I do not consider that this operates to invalidate the resolution of the directors' meeting held on 15 December 2017 in relation to the making of the 2017 variation. This is because of the effect of art 103 of the trustee's Articles of Association which states as follows:

> ALL acts done by any meeting of the Directors or of a committee of Directors, or by any person acting as a Director, shall, notwithstanding that it is afterwards discovered that there was some defect in the appointment of any Director or person so acting, or that they or any of them were disqualified, be as valid as if every Director or other person had been duly appointed and was qualified to be a Director.

153 As I have explained, there was a defect in the appointment of Mr Sampson as a director of the trustee on 14 December 2017. The effect of art 103 is to, amongst other things, validate all acts done by any meeting of directors of the trustee despite any later discovery of any defect in the appointment of any director. This must extend to the meeting of the directors on 15 December 2017 in which the 2017 variation was signed, which meeting was otherwise inquorate because of the defect in Mr Sampson's appointment on the previous day as a director of the trustee. No contrary submission about the operation of the article was advanced on behalf of Paul and Deborah.

Issue 5: Trust income

154 The fifth issue for determination is whether the trustee failed to make any resolution regarding the income of the trust within the financial year for any of the financial years between 2010 and 2017.

155 The significance of this issue arises from the operation of cl 3 of the trust deed,[84] the interpretation of which was not in dispute. Sub-clause 3(i) of the trust deed provides that the trustee 'shall' in each accounting period,[85] until the vesting day, pay, apply or set aside the whole or any part of the income of the trust for that period for charitable purposes and/or for the benefit of one or more of the general beneficiaries. When read with sub-cls 3 (ii) and (iii), it was uncontroversial that, collectively, those provisions of the trust deed operated to give the trustee two options in relation to the trust's net income each financial year: [86]

(1) it can pay, apply or set aside all or some part of that net income to charitable purposes and/or to the benefit of one or more of the general beneficiaries;[87] or

(2) it can accumulate some or all of the net income to the corpus of the trust.[88]

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84 See [33] above.
85 Generally being each financial year.
86 Paul and Deborah characterised this as a duty on the trustee.
87 Pursuant to sub-cl 3(i).

156 Any part of the net income for an accounting period which is not dealt with in either of the above ways is to be dealt with in accordance with the provisions of cl 4.[89] The effect of that provision, in the events which have occurred, is that any such amount is to be held for the primary beneficiaries in equal shares as tenants in common and each of them has an absolute vested interest in his or her share once the relevant accounting period is ended.

157 The significance of whether or not the trustee made any resolution regarding the income of the trust in and for the financial years between 2010 and 2017 is therefore apparent: to the extent that it did not, the relevant year's net income is held on trust for Paul, Deborah and Michael in equal shares.

158 Paul and Deborah submit that the Court should find that the trustee failed to make any resolution regarding the income of the trust within the financial year for any of the financial years between 2010 and 2017. Amongst other things, they submit that there is no evidence that the trustee made any resolution regarding the income of the trust in any of those years. The trustee contends that, on the basis of the evidence before the Court and the presumption of regularity, the Court should find that, in each of the above years, it did make an income resolution.

159 In addressing these contentions, I will first refer to the evidence about the trustee's general approach to the treatment of trust income over the relevant years. I will then summarise the evidence specific to each year between 2010 and 2017 relevant to whether or not the trustee made an income resolution in each year. Finally, I will make the relevant findings having regard to the matters just mentioned and the parties' submissions.

The trustee's general approach in relation to trust income

160 Evidence was given by Daniel Dexter, the trustee's accountant and tax advisor from 2005 and the person who approved the trust's financial statements.

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88 Pursuant to sub-cl 3(iii).
89 Pursuant to sub-cl 3(ii).

161 Mr Dexter did not specifically recall preparing income distribution resolutions and financial statements for the trust for any particular year. However, he had 'no reason to doubt' that he followed his usual practice in doing so. In that regard, he referred to his standard practice generally with trust clients and his standard procedure in relation to the trust in particular. As to the former, Mr Dexter's practice was to make sure that he made contact with clients 'well before the end of the tax year to take instructions'. Generally, after taking instructions, he would prepare a minute of income distribution at the same time as preparing the accounts, with the income resolution dated the day he took the instructions.

162 In relation to the trust in particular, Mr Dexter generally dealt with Eva who provided him with his instructions. His standard procedure was to call her before 30 June each year to prompt her to think about the income distribution to be made from the trust so that it could be done before the end of the financial year. He would ask her what she wanted to do in relation to the trust's income distributions. Eva would usually tell Mr Dexter the percentage distributions to be recorded in the minute of income distribution which Mr Dexter would then prepare and which was generally dated the date he took instructions from Eva.

163 Mr Dexter also gave evidence that minutes of meetings of his corporate trustee clients were not usually provided to the relevant trustee until the financial statements and tax returns for the relevant financial year had been prepared and were ready for signature.

164 John gave evidence that he always understood that each year he and Eva needed to decide, before 30 June, how the income of the trust was to be distributed. His evidence was that, each year, Eva and he discussed the distribution of income and, 'once we had worked out what to do,' Eva would instruct Mr Dexter to prepare a minute of meeting for Eva or him to sign which would record the income distributions for the year.

165 In relation to the years for which income distribution resolutions by the trustee had not been able to be located,[90] as noted below, John expressed his confidence that he and Eva did make decisions regarding income distribution in relation to those years. He also gave evidence that, 'if no income distribution resolution had been made in those years, I would have noticed this. Eva was a careful person, and I think that it is very unlikely that she would not have made sure that the income distribution resolution for each year was prepared and provided to her and me as directors of JJE'.

Evidence of income distribution by trustee: 2010–2017

2010 Income

166 There was in evidence minutes of a directors' meeting of the trustee dated 30 June 2010 attended by John and Eva. The minutes record a resolution that the net income of the trust for the year ended 30 June 2010 be distributed as follows: (i) 50% to Michael; and (ii) 50% to John. In his evidence, John confirmed that his signature was on the minutes, but that he did not recall the document or the meeting referred to in it.

167 The distribution of income recorded in the above resolution is reflected in the trust's 2010 tax return.[91]

2011 Income

168 Mr Dexter was unable to locate the minutes of income distribution for the trust for a number of years, including for 2011. Mr Dexter's firm moved offices in 2016. He gave evidence that the missing minutes were likely misplaced or lost during the relocation. In any case, no minutes of income distribution for 2011 were in evidence.

169 However, Mr Dexter expressed his confidence that, in line with his usual practice to which I have referred, he spoke with Eva in or around June 2011 to seek her

90 Income distribution resolutions could not be located for 2011, 2013, 2014 and 2016.

91 The trust's 2010 tax return shows distributions of $156,365 to each of John and Michael, being half of the trust's net income of $312,730.

instructions about the distribution of income for the financial year and thereafter prepared a minute of income distribution.

170 As I have noted, John's evidence was that, although income distribution resolutions for the trust for 2011 and other years had been unable to be located by Mr Dexter, he could 'say with confidence that Eva and I did make decisions regarding income distribution' in 2011 and the other years in relation to which no resolution has been able to be located.

171 The trust's 2011 tax return records a total net income of $394,324, with 40% of that income distributed to John, 20% to Eva and 40% to Michael. The trust's 2011 financial statements are to the same effect.

2012 Income

172 The minutes of a directors' meeting of the trustee held on 22 June 2012 attended by John and Eva were in evidence. The minute records a resolution that the income of the trust for the year ended 30 June 2012 be distributed as follows: (i) 20% to Eva; (ii) 40% to Michael; and (iii) 40% to John. John's evidence was that the minute contained his signature, but that he could not otherwise recall the document or the meeting.

173 The distribution of income set out in the above minute is reflected in the trust's 2012 tax return and its financial statements for that year.[92]

2013 and 2014 Income

174 There was not in evidence any executed income resolution of the trust for the financial years ending 30 June 2013 and 30 June 2014. Mr Dexter was unable to locate the minutes of income distribution for those years, but did retrieve from his firm's computer system draft (and undated) income resolutions for 2013 and 2014.

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92 The trust's 2012 tax return shows distributions of $144,186.48 to John, $72,093.24 to Eva, and $144,186.48 to Michael from the net trust income of $360,466.20.

175 Consistent with his evidence in relation to the trust's income for 2011, Mr Dexter expressed confidence that, in line with his 'usual practice', he spoke with Eva in or around June 2013 and June 2014 to seek her instructions as to the distribution of income for those financial years and thereafter prepared minutes of income distribution based on her instructions. As previously noted, his evidence was that the minute was generally dated the date he took instructions from Eva.

176 John also gave evidence that, as with the trust's income for 2011, he could 'say with confidence that Eva and I did make decisions regarding income distribution' in 2013 and 2014, despite the fact that a resolution for those years had been unable to be located.

177 The trust's 2013 and 2014 tax returns show a statement of income distribution for both years of 40% to John, 20% to Eva and 40% to Michael.[93]

2015 Income

178 A minute of a directors' meeting of the trustee dated 18 June 2015 attended by John and Eva was in evidence. The minute records a resolution that the income of the trust for the year ending 30 June 2015 be distributed as follows: (i) 20% to Eva; (ii) 40% to Michael; and (iii) 40% to John. Again, John's evidence was that the minute contained his signature, but he could not otherwise recall the document or the meeting.

179 The terms of the above resolution are reflected in the trust's 2015 tax return and financial statements.[94]

2016 Income

180 There was not in evidence any executed income resolution of the trust for the financial year ending 30 June 2016. Mr Dexter gave evidence that he had been

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93 The trust's 2013 tax return shows distributions of $149,422 to John, $74,711 to Eva and $149,422 to Michael from the net trust income of $373,555. The trust's 2014 tax return shows distributions of $164,236.86 to John, $82,118.44 to Eva and $164,236.86 to Michael from the net trust income of $410,592.16.

94 The trust's 2015 tax return shows distributions of $169,877.67 to John, $84,938.83 to Eva and $169,877.67 to Michael from the net trust income of $424,694.17.

unable to locate the minutes of income distribution for that year, although he did retrieve from his firm's computer system a draft (unsigned) income resolutions for the year.

181 As with his evidence in relation to the trust's income for 2011, 2013 and 2014, Mr Dexter's evidence was that he was confident that, in line with his 'usual practice', he spoke with Eva in or around June 2016 to seek her instructions as to the distribution of income for that financial year and thereafter prepared a minute of income distribution based on her instructions. As I have noted, his evidence was that the minute was usually dated with the date on which Mr Dexter took instructions from Eva.

182 As with the trust's income for 2011, 2013 and 2014, John's evidence was that he could 'say with confidence that Eva and I did make decisions regarding income distribution' in 2016, despite the fact that a resolution for that year had been unable to be located.

183 The 2016 tax return for the trust show a statement of income distribution for the year ended 30 June 2016 of 40% to John, 20% to Eva and 40% to Michael.[95]

2017 Income

184 The minutes of a meeting of the directors of the trustee held at Arcare on 8 June 2017 attended by John and Eva were in evidence. It records a resolution that the income of the trust for the year ending 30 June 2017 be distributed as follows: (i) 20% to Eva; (ii) 40% to John; and (iii) 40% to Michael.

185 The above distribution is reflected in the trust's 2017 tax return and its financial statements for that year.[96]

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95 The trust's 2016 tax return shows distributions of $348,280.70 to John, $174,140.35 to Eva and $348,280.70 to Michael from the net trust income of $870,701.75.

96 The trust's 2017 tax return shows distributions of $219,974.52 to John, $109,987.26 to Eva and $219,974.52 to Michael from the net trust income of $549,936.30.

Consideration

186 In light of the above summary of evidence, the submission advanced on behalf of Paul and Deborah that there is no evidence that the trustee made any resolution regarding the income of the trust in any of the years between any of the years between 2010 and 2017 must be rejected.

187 The evidence in relation to each of the above years highlights a distinction between those years for which there is in evidence a minute of a directors meeting of the trustee which records a resolution as to the distribution of the income of the trust[97] and those years for which no such resolution is in evidence.[98]

188 In relation to the former group, I have no hesitation in finding that, on the date that each of the minutes bear, the trustee made an income resolution in the terms reflected in the minutes. It is significant that each of those minutes were signed by John as a director of the trustee. Contrary to the criticisms of John's evidence advanced on behalf of Paul and Deborah, there is nothing particularly surprising in the fact that John could not specifically recall particular minutes or the meeting referred to in them; all the more so given his advanced years and the fact that they relate to the trustee's activities up to nine years before he made his witness statement in this proceeding. That these resolutions were made on the dates borne by the minutes is consistent with John's understanding that each year he and Eva needed to decide, before 30 June, how the income of the trust was to be distributed and his uncontroverted evidence that, each year, he and Eva discussed the distribution of income and, 'once we had worked out what to do,' Eva would instruct Mr Dexter to prepare a minute of meeting for Eva or him to sign.

189 It was submitted on behalf of Paul and Deborah that Mr Dexter's evidence established that, when he rang Eva each June, he was asking what she intended to do with the trust's income distributions and that, for those years where there are minutes, there is no way of knowing when they were signed by John because

97 2010, 2012, 2015 and 2017.
98 2011, 2013, 2014 and 2016.

Mr Dexter's evidence was that he would date them as at the date of his conversation with Eva.

190 There are a number of answers to these points. First, they hinge on Mr Dexter's recollection as to his purpose or intention in contacting Eva before the end of each financial year. The fact that Mr Dexter rang Eva for the purpose of prompting her to consider what income distributions to make, does not mean, for example, that Eva and John had already in fact decided upon the income distributions. Such a conclusion is entirely consistent with John's evidence to which I have referred above.

191 Secondly, even if it be assumed that Eva and John had not already decided upon the distribution of the trust's net income when Mr Dexter contacted Eva towards the end of each financial year, Mr Dexter's evidence that he dated the income resolution the date of his contact with Eva is not probative of a finding that no income distribution resolution was made by the trustee before the end of each financial year.

192 I do not consider that a different result follows in relation to those years for which there is not in evidence any income resolution by the trustee. I find that in each of those financial years, the trustee resolved to distribute the trust's net income in the proportions reflected in the trust's tax return and financial statements for the relevant year.[99]

193 The documentary evidence which supports that finding is clear and consistent. The trust's financial statements for each year between 2011 and 2017 record the making of income distributions to particular beneficiaries. In relation to those years for which there is in evidence a minute of income distribution by the trustee, the distribution as recorded in the minute accords with the distribution set out in the financial statements and tax returns.

194 Paul and Deborah sought to make something of Mr Dexter's evidence that the minute of income resolution which he prepared for the trustee would be sent with

[99] For each of the years the distribution was 40% to John, 20% to Eva and 40% to Michael.

the financial statements and tax returns sometime after the end of the financial year. This reliance is misplaced given that it does not bear upon whether a resolution was made and if so when.

195 Consistent with s 1305 of the *Corporations Act*, the financial statements and tax returns are *prima facie* evidence of their contents, absent some evidence which suggests that they are incorrect.[100] There is no evidence before the Court which undermines the reliability of the trust's financial statements and tax returns, or which suggests that the *prima facie* position represented by them is incorrect. Accordingly, contrary to the submissions made on behalf of Paul and Deborah, the financial statements do more than simply prove that at some stage after the end of each financial year certain entries were made in the accounts of the trust. It can be inferred from the financial statements and tax returns that, in each of the years in question, the trustee made an income resolution providing for the distribution of the trust's net income in the proportions reflected in the financial statements and tax returns.

196 The application of the presumption of regularity to which I have already referred supports the same conclusion.[101] It was not submitted that the presumption was inapplicable in the circumstances here relevant; instead it was submitted that its operation was displaced for two reasons.

197 First, various criticisms were advanced of John's evidence. I have already indicated why I consider some of these criticisms were misplaced. Further, the criticism did not engage with the presently important aspect of John's evidence, namely, that he and Eva discussed, each year, the distribution of income from the trust and that, having then worked out what to do, Eva would instruct Mr Dexter to prepare the necessary minute of meeting. This supports and gives weight to John's expression of confidence that he and Eva did make decisions regarding income distribution.

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100 *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1, 82 [398], [400]; *Shot One Pty Ltd (in liq.) & Anor v Day & Anor* [2017] VSC 741, [244].

101 See [95]–[98] above.

Secondly, reliance was placed on the criticisms of Mr Dexter's evidence referred to in [189]. For the reasons I have outlined, those criticisms are misplaced.

198 For these reasons, I do not accept that the evidence given by John and the evidence given by Mr Dexter separately or collectively is such as to provide a basis to call into question the presumption of regularity in relation to those years for which no minute of distribution was in evidence. The fact that there is no minute recording the making of income distributions in those years is not of itself a sufficient basis to rebut the operation of the presumption.

Issue 7: Claims barred by *Limitation of Actions Act 1958* or by laches

199 The trustee and Michael pleaded that, to the extent that Paul and Deborah seek to impugn any conduct of the trustee prior to 28 November 2012, or make any claims against the trustee in respect of income which they say they were entitled to receive in respect of the years ended 30 June 2010, 30 June 2011 or 30 June 2012, they are barred from doing so by operation of s 21 of the *Limitation of Actions Act 1958* ('*Limitation of Actions Act*') and by application of the doctrine of laches. It is convenient to address this defence at this point.

200 Section 21(2) of the *Limitation of Actions Act* provides:

> Subject as aforesaid, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued:
>
> Provided that the right of action shall not be deemed to have accrued to any beneficiary entitled to a future interest in the trust property until the interest fell into possession.

201 It has been held that, where the *Limitation of Actions Act* has no direct application to an equitable cause of action, the statute can be applied by analogy under the maxim that equity follows the law. As stated by Lord Westbury in *Knox v Guy*:[102]

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102 (1872) LR 5 HL 656, 674–5. See also, D Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (5th ed, Lexis Nexis Butterworths, 2015) 1073–4.

> [W]here the remedy in Equity is correspondent to the remedy at Law, and the latter is subject to a limit in point of time by the *Statute of Limitations*, a Court of Equity acts by analogy to the statute, and imposes on the remedy it affords the same limitation…Where a Court of Equity frames its remedy upon the basis of the Common Law, and supplements the Common Law by extending the remedy to parties who cannot have an action at Common Law, there the Court of Equity acts in analogy to the statute; that is, it adopts the statute as the rule of procedure regulating the remedy it affords.

202 The proceeding was commenced on 29 November 2018. Having found that the trustee made an income resolution in 2010, 2011 and 2012, by analogy with sub-s 21(2) of the *Limitation of Actions Act,* Paul and Deborah's claims in respect of those years in relation to Issue 6 below are accordingly barred. It is unnecessary to address the question of laches raised by the defendants.

Issue 6: Genuine consideration of the objects of the trust

203 The sixth issue for determination is whether the resolutions of the directors of the trustee which resolved the distribution of income for each financial year between 2010 and 2019 were made in breach of trust because they were made without the trustee giving any genuine consideration to whether, in the exercise of its discretion, a distribution should be made to Paul and/or Deborah.

204 Given my conclusions in respect of Issue 7 above, it is unnecessary to address this claim in respect of the 2010, 2011 and 2012 financial years. In considering the claim in respect of the remaining years, I will firstly make findings of fact concerning Paul and Deborah's circumstances and the relationships between Paul, Deborah and Michael. I will also make findings about the trustee's income distributions for 2018 and 2019.[103] I will then set out the parties' respective submissions.

Findings of fact

205 The central and uncontested factual allegation on which Paul and Deborah's claim depends is that, in no financial year relevant to this claim, did the trustee make any enquiry of either of them as to any need they might have for a distribution of income from the trust.

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103 Being years which are not the subject of the claims considered in Issue 5 above.

206 In broad terms, the case advanced by the trustee and Michael on the evidence is that, in the relevant years, the trustee was informed about Paul and Deborah's circumstances through the knowledge which the directors of the trustee had of their circumstances, which knowledge was imputed to the trustee. Relevantly, John and Eva were the directors of the trustee between 2010 and 2018.[104] John was the director of the trustee in 2019; Mr Sampson also purported to be a director in 2019, but I have found that his appointment was defective.[105]

Paul's circumstances

207 Paul graduated from university in 1983 and then worked in the financial industry in Australia and overseas. He returned to Melbourne in 1993, where he remained until September 2013 when he then moved to northern New South Wales after he purchased a business, Wallaby Foods, of which he is now the chief executive officer.

208 Paul's evidence was that he has always been financially independent from his parents. This would appear to be the case in relation to his business interests. In 1994 and later in 2007, he commenced businesses without financial assistance from John and Eva.

209 Paul has however received financial support from John and Eva in other areas of his life. In about 2007, John and Eva gave him $100,000 to pay for legal expenses incurred in relation to his divorce and, in 2008, Eva gave him approximately $100,000 'for looking after the family'.

210 After his return to Melbourne until 2013, Paul visited his parents for lunch most Saturdays. He would also occasionally see his father for lunch on a Tuesday or a Wednesday. Paul's evidence was that he had a close relationship with both John and Eva until 2010, a good relationship with John until 2013 and a 'somewhat distant

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104 As has been noted (see [14]), Paul and Michael were also directors from 1998 until 30 March 2013. Mr Sampson was purportedly appointed a director in late 2017, but I have found that his appointment was defective: see [152].

105 See [152].

relationship' with Eva between 2010 and 2013, but one in which he remained in contact with her. John's evidence was that their relationship was 'reasonable'.

211 When he visited John and Eva, Paul spoke to them generally about what was going on in his life. He gave evidence that the period between 2010 and 2013, when he was looking to purchase a business, was a 'difficult time'. He stated that John and Eva were 'very aware of exactly what I was doing because I'm very open that way'.

212 By 2010, Paul had heard of the first defendant and understood it to be the trustee of the Owies Family Trust. His evidence was that, between 2010 and 2013, he discussed the affairs of the trust with John at his weekly lunches. Paul told John that he wanted to know more about the trust and its structure.

213 Between January and March 2013, Paul asked John and Eva to provide him with a copy of the trust deed. He also asked them to tell him about the assets of the trust. These enquiries were not answered to Paul's satisfaction. As a consequence, on 13 March 2013, Paul sent a letter to 'the Trustees' of the trust regarding 'The Owies Family Trust and other serious issues'.

214 In the letter, Paul referred to his repeated attempts to have family meetings to discuss 'administrative issues' of the trust 'and other associated family matters' and the refusal of family members, other than Deborah, to hold any such discussions. He had therefore decided to put in writing his concerns about what he described as 'alleged serious breaches by the trustees of trust duties'. By this, he was mainly referring to what he described in his evidence as 'transparency and silence'. Paul gave the trustee the following three alternative courses of action.

(a) That he be appointed as trustee of the trust. He referred to John having 'informally admitted' on 10 March 2013 that Michael had been made a trustee of the trust about a year before. Paul stated that Michael was not a fit and proper person to hold office as director or trustee of the trust because he 'has engaged in conspiracy and has seriously breached administrative trust duties'. He detailed various serious allegations against Michael. Paul also

expressed his 'serious concerns' that Eva has been involved 'in conspiracy and various serious breaches of administrative trust duties' and therefore must resign as trustee of the trust and/or as a director of the trustee company.

(b) That he 'apply to the courts of Victoria' for, amongst other things: Eva and Michael 'to be removed as trustee of The Owies Family Trust for alleged conspiracy and serious breaches of trustee responsibilities'; for Michael to be criminally prosecuted; and for him to be appointed as trustee of the trust.

(c) That a financial settlement be reached between him and the 'trustees' providing for compensation for Michael's alleged 'criminal activity' and '[l]oss of future financial benefits from The Owies Family Trust'.

215 Paul demanded a response by 3.30pm on Friday 15 March 2013. None was forthcoming until a letter was sent by solicitors for John and Eva dated 3 April 2013. The letter denied Paul's allegations and informed him that, on 30 March 2013, he and Michael had been removed as directors of the trustee at a meeting of shareholders and that John and Eva continued as directors of the company. Until this time, Paul had been unaware that he was a director of the trustee.

216 Between March 2013 and January 2014, Paul sent seven letters to John and Eva about what he referred to as 'Owies Family Trust issues and family matters and the lack of transparency that had occurred'. Other than the letter dated 13 March 2013 referred to above, these letters were not in evidence. Paul did not receive any response to his letters and did not have any other communications with his parents in this time.

217 On 18 January 2014, Paul sent a letter to Eva concerning his views about Michael, but which made no reference to the trust. After sending this letter, Paul did not have any contact with either John or Eva until October 2016.

218 On 22 October 2016, Paul sent a letter to John and Eva with updates about his life, his travels overseas and telling them that he was now chief executive officer of Wallaby Foods.

219 After he discovered that John was in Arcare, Paul renewed contact with John on 30 November 2016. When he met with John that day, John told him that Eva had had a heart attack. Paul then visited Eva that day before returning to his home in New South Wales.

220 Paul visited John at least 10 times between November 2016 and May 2018. In those visits, Paul told John about what he was doing in his life, including about aspects of his business and its success.

221 On 9 December 2016, Paul's solicitors sent a letter to Michael requesting specific information in relation to John and Eva and that he be provided with a copy of the trust deed and the accounts of the trust. That request was refused in a letter from Mr Sampson on behalf of John and Eva dated 10 January 2017. The trust documents including the trust deed were not provided to Paul until November 2017.

222 Paul met with Eva at her home on 20 January 2017 for about an hour and a half. They spoke about what Paul had been doing and family matters. They did not speak about the trust.

223 Paul did not see Eva again until about July 2017, after he discovered that she had suffered a stroke on 24 January 2017 and had moved into Arcare. When he visited Eva at that time, she was unable to speak. Paul was unsure if he was able to communicate with her.

Deborah's circumstances

224 Deborah has had numerous medical conditions and as a consequence has been unwell for much of her adult life.

225 In about 1980, while she was still a medical student at university, Deborah was diagnosed with lupus. In about 1990, she was diagnosed with Crohn's disease, which was disabling until she commenced a new treatment in about 2000. The lupus and Crohn's disease have generally been managed since that time.

226 In 2011, Deborah had a knee replacement after which she developed various complications which required ongoing management. In 2012, she developed problems with her spine which ultimately resulted in her having to undergo spinal surgery. In 2013, she was diagnosed with rheumatoid arthritis, as a result of which she underwent surgery to her left hand and had a left foot reconstruction in 2014. The treatment she receives for her arthritis prevents Deborah from working full-time.

227 In 2017, Deborah suffered hypertension and in 2019 she underwent a revision of her left knee replacement. Deborah also has multiple skin malignancies caused by the medication she takes. Before October 2019, she took 18 medications on a daily basis to treat her various medical conditions.

228 In October 2019, Deborah was diagnosed with primary liver cancer and drug-induced hepatitis. On 20 November 2019, she had half of her liver removed.

229 Deborah also suffers from developmental trauma. She saw a psychiatrist twice a week from 1989 until 2006 and was then treated by an analyst three times a week for the following nine years. She currently attends her analyst once a week.

230 Deborah is a medical doctor and works as a consultant. In about 1994, after she was diagnosed with Crohn's disease, Deborah decided to work part-time, because she could not manage full-time work. It would appear that she has not since returned to full-time work, other than perhaps for short periods. She currently has three jobs with very limited numbers of hours per week.[106] She also maintains a private practice in which she sees two or three patients on Saturday mornings.

231 Between 2013 and 2017, Deborah's taxable income was in the range of between $39,000 and $44,000 per annum. It was less in previous years.[107]

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106 As a consultant at Monash Medical Centre Sexual Medicine and Therapy Unit for 4 hours per week, as a consultant at the Royal Women's Hospital Psycho-Sexual Service for 3½ hours per fortnight and with the Medical Health Tribunal 1 day a fortnight.

107 In 2011, Deborah's taxable income was $29,294 and in 2012 her taxable income was $24,821.

232 Over the last 13 years, Deborah's medical expenses have exceeded $20,000 per annum. I accept her evidence that, given her modest income and her substantial medical expenses, as well as the cost of her psychotherapeutic treatment, she has had little disposable income over the last 13 years.

233 Deborah has lived in the same apartment in Rockley Road, South Yarra (the **South Yarra apartment**) since 1984 when she was 26 years of age. The apartment is owned by the trustee which purchased it shortly before Deborah moved into it.

234 Deborah paid rent on the apartment of $55 per week from when she moved into the South Yarra apartment until 2006. In that year, Eva agreed to Deborah's request that she no longer pay rent because of increased expenses she was to incur for her analyst. Deborah has not since paid rent on the South Yarra apartment.

235 Deborah was estranged from Eva from 1986 until 1998. During that time, Deborah chose not to have face-to-face contact with her mother, although she still sent Eva birthday cards and presents. They also occasionally spoke on the telephone including about Deborah's health, her work and the effect her health was having on her income.

236 Deborah reconnected with Eva in 1998 after Eva was diagnosed with breast cancer. After that time, there were still periods when Eva and Deborah would not see each other for a year or two (although they would communicate in person or by phone at least once a year during which they would discuss Deborah's health). However, Deborah and Eva also had periods of reconnection (being in 2006, 2009, 2011 and 2012), when they saw each other every week or fortnight. In those periods, they discussed Deborah's health and that she was only working part-time.

237 In 2006 and 2009, Deborah asked Eva whether she would be willing to contribute to the cost of the psychotherapeutic assistance she was receiving. Eva declined Deborah's request. These were the only occasions when Deborah asked Eva for assistance for payment of her medical expenses, including for psychotherapy.

238 In about 2009, Eva offered to buy Deborah a new car. Deborah declined the offer, but accepted $6,000 from Eva, being half the cost of the second hand car Deborah was in the process of purchasing.

239 In 2010, Deborah received a gift of $240,000 from her friend and her friend's husband. Deborah may have mentioned to Eva in 2012 that a good friend had given her some money, although she could not recall whether she told Eva of the amount. Deborah has used these funds sparingly to meet her expenses which exceed her income. She still has about $120,000 of the gift which she has not spent. Since receiving the gift, Deborah did not make any requests of John or Eva for payments of money.

240 In 2011, Eva wrote Deborah a card while she was in hospital and gave her $5,000 which Deborah used to pay for her analyst.

241 In 2013, Eva paid for venetian blinds at the South Yarra apartment to be replaced. Deborah wrote Eva a letter to say that the blinds had arrived and to tell 'her a bit about my medical problems and the tulips in Tasmania' where she had done a locum to earn some extra money.

242 Deborah was also estranged from John from 1994 until about 2012, during which time Deborah decided not to have any contact with him. They had lunch together a few times in 2012 and Deborah saw John in hospital in 2013. They did not have contact again until 2017 when John was at Arcare. Deborah was concerned about Michael's apparent control over Eva's diet and saw John at Arcare about three times.

243 In May 2004, Deborah wrote to John telling him, in relation to the South Yarra apartment, that the kitchen sink was leaking and in need of repair. In his letter in response dated 29 May 2004, John stated that the problem was 'most neglectful' on Deborah's part and that, '[u]nder these negligent circumstances, kindly have that fixed up as soon as possible', stating that 'the repair is wholly your responsibility'. Deborah attended to the repair of the pipes.

244 On 15 April 2019, the trustee resolved to make a capital distribution to Deborah of the South Yarra apartment. The following day the trustee offered to transfer the apartment to Deborah. Photographs of the apartment which were in evidence show it to be in need of various repairs. It is valued at between $720,000 – $760,000.

245 Deborah, through her solicitors, accepted the above offer in a letter dated 25 June 2019. Deborah sought confirmation that the costs associated with the transfer would be paid by the trust and noted that she would obtain a condition report to document the required repairs to the property to bring it to a 'habitable state'. Deborah's solicitors also stated that, by accepting the distribution, Deborah did not concede any rights in relation to the current proceeding, or in relation to any family provision claim, and requested a confirmation from the trustee that the trustee would not deal with any other asset of the trust pending resolution of this proceeding.

246 In his evidence, Mr Sampson characterised the letter of 25 June 2019 as a 'bad-tempered, ungracious response' which 'grumbled' about the condition of the South Yarra apartment.

247 As at the trial of this proceeding, the South Yarra apartment had not yet been transferred to Deborah. Mr Sampson gave evidence that the new PEXA process and associated stamp duty requirements are onerous and has resulted in a much slower process. He did however accept that this process should have been commenced earlier. Mr Sampson rejected the proposition that the lengthy period between the offer of the apartment and its acceptance was an attempt to put pressure on Deborah. He gave evidence that he was still waiting for a condition report and a statutory declaration from Deborah in relation to the stamp duty exemption to complete the transfer. Mr Sampson stated that any challenge to his directorship of the trustee company could result in further delay.

Relationships between Paul, Deborah and Michael

248 Although not particularly close, Paul and Deborah had a good relationship between 2010 and when Paul left Melbourne in September 2013. They spoke, to a limited extent, about Deborah's life including her ill health, her financial position and that

she was working part-time and living in the South Yarra apartment. They did not generally speak about 'business matters'. They maintained a reasonable relationship after 2013.

249 Paul and Michael had a reasonable relationship until about March or April 2010. They saw each other regularly for coffee and spoke generally about what was occurring in their lives. They have, however, had very little contact since March or April 2010, when Michael told Paul that he could not see or speak to him again.

250 In 2002, Deborah ceased her relationship with Michael after he told her that he had purchased a property in the same street as the South Yarra apartment in which she lived. Her evidence was that she was 'terribly upset by this because at the time [she] was a bit frightened of Michael because of things that had happened in the past'. They resumed their relationship a 'few years' later. Deborah discussed her health with Michael and the fact that she worked part-time.

251 Since 2012, the contact between Michael and Deborah was limited to when John was in hospital in 2013 and when Eva was in Arcare in 2017.

2018 and 2019 income resolutions

252 On 29 May 2018, Mr Sampson visited John and Eva at Arcare to discuss the income resolution for the year ending 30 June 2018. John and Eva were directors of the trustee at this point in time. Mr Sampson also considered himself to be a director at the time, although his appointment was in fact defective as I have explained in relation to Issue 4.

253 The meeting went for less than 15 minutes. After discussing the distribution of the trust's income, it was resolved that the income for the 2018 financial year[108] be divided as follows: 40% to John; 40% to Michael; and 20% to Eva. It was determined that the rent on the South Yarra apartment and another of the trust's properties were

108 $687,106.83.

to remain unaltered for the 2017–18 and 2018–19 years. The minutes were drafted by Mr Sampson and signed by John.

254 At the end of the 2018 financial year, Eva and John both had substantial loan accounts in the trust. Eva's loan account contained $4,568,742.25, while John's contained $3,837,636.82.

255 On 17 June 2019, the trustee made an income resolution which distributed the whole of the trust's income for the financial year ending 30 June 2019 of nearly $1 million[109] to John.

256 When the trustee made the 2019 income resolution, John was resident at Arcare, had limited needs and had very substantial assets personally available to him, including a loan account worth several million dollars.[110]

257 About a week before it made the 2019 income resolution, the trustee was notified that Deborah intended to make an application under Part IV of the *Administration and Probate Act 1958* for further provision from Eva's estate which was valued at approximately $9.8 million.[111]

258 The 2019 income resolution included a statement that John and Michael 'to any and all extent necessary confirm their agreement to the above resolution', which was signed by John and Michael. Mr Sampson drafted the resolution. Michael had been appointed the Guardian of the trust pursuant to the 2017 variation. Mr Sampson's evidence was that the meeting went for no more than 15 minutes.

259 For all of the financial years in and between 2011 and 2018 inclusive, the trustee distributed the trust's income in the following proportions: 40% to John; 40% to Michael; and 20% to Eva. Mr Dexter's evidence was that Eva generally received a lower percentage of the trust's income because she had 'significant other income

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109 The precise amount of the trust's income for the financial year was not in evidence.

110 As at 27 March 2019, John's loan account was worth $3,837,636.

111 Deborah, through her counsel in the Part IV proceeding, later indicated on 22 October 2019 that she was seeking 50% of Eva's estate.

including a large share portfolio in her own name pursuant to which she received income'.

Paul and Deborah's submissions

260 As I have noted, central to Paul and Deborah's submissions is the fact that, in none of the relevant years, did the trustee make any enquiry of either of them as to any need they might have for a distribution of income from the trust. The failure to properly inform itself of Paul and Deborah's circumstances as beneficiaries of the trust had the consequence, it was submitted, that the trustee was simply unable to give genuine consideration in relation to the distribution of trust income.

261 In support of this proposition, senior counsel for Paul and Deborah relied upon the following statement by Callaway JA in *Telstra Super Pty Ltd v Flegeltaub*:[112]

> It would be unwise to give hypothetical examples of the ways in which the requirements of good faith, real and genuine consideration and proper purpose may be instantiated. It is sufficient to concentrate on the gravamen of the respondent's complaint. She is concerned that the reason the appellant has denied her claim is a view on its part that she has unreasonably refused to submit to treatment. She desires to correct what she believes to be misinformation in the possession of the appellant or information wrongly interpreted by it and to place material before it to allay its concern. It is not difficult to imagine that there may be cases, of which this appears to be one, where a bona fide performance of a trustee's task would lead it to give a person in the position of the respondent an opportunity of the kind she desires. As the words beginning "after consideration ..." in each of paragraphs (b) and (1) recognise, one cannot ordinarily decide a question of fact in good faith and give it real and genuine consideration without conducting some investigation and in some cases that will entail making an inquiry of a person who is willing to provide information and is in the best position to do so.[113] It is not a matter of natural justice but bona fide inquiry and genuine decision making.[114]

262 Paul and Deborah also relied on McGarvie J's analysis in *Karger v Paul* about a broad and unfettered discretionary power given to a trustee.[115] In that well-known case, a testatrix left her estate to her husband during his lifetime, giving her trustees an absolute and unfettered discretion to pay or transfer the whole or part of the capital of the estate to the husband for his own use, upon the husband's request. Pursuant

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112 (2000) 2 VR 276, 284 [30] (emphasis added).

113 Compare *Maciejewski v Telstra Super Pty. Ltd. [No. 1]* (1998) 44 NSWLR 601, 605 and *Maciejewski v Telstra Super Pty Ltd (No. 2)* [1999] NSWSC 341, [21].

114 Compare Geraint Thomas, *Thomas on Powers* (Sweet & Maxwell, 1st ed, 1998) 6-239–6-243A.

115 *Karger v Paul* [1984] VR 161.

to the testatrix's will, upon the husband's death, the trustees were to pay the residue to the plaintiff for her own use absolutely. The trustees of the will were the husband and the testatrix's solicitor. The husband made a request to himself and his co-trustee to pay the entire capital of the estate to him, which request was acceded to by the trustees. The husband died soon after the assets of the estate were transferred to him. The plaintiff, who did not receive any benefit under the testatrix's will because of the exercise of the discretion to pay the capital to the husband, brought an action against the testatrix's solicitor and the executor of the husband's will, alleging that the trustees had acted wrongfully in paying the estate to the husband because they did not act honestly and in good faith and had acted without giving any fair and proper consideration.

263 Justice McGarvie dismissed the plaintiff's claim. Senior counsel for Paul and Deborah referred me to the following parts of his Honour's analysis:[116]

> … In my opinion the effect of the authorities is that, with one exception, the exercise of a discretion in these terms will not be examined or reviewed by the courts so long as the essential component parts of the exercise of the particular discretion are present. Those essential component parts are present if the discretion is exercised by the trustees in good faith, upon real and genuine consideration and in accordance with the purposes for which the discretion was conferred. The exception is that the validity of the trustees' reasons will be examined and reviewed if the trustees choose to state their reasons for their exercise of discretion.
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> In this context I consider that the test of acting honestly is the same as the test of acting in good faith: compare: *R v Holl* (1881) 7 Q.B.D. 575, at pp.580-1, per Bramwell L.J. It was argued for the plaintiff that gross negligence may of itself amount to an absence of good faith. I do not agree. Honest blundering and carelessness do not of themselves amount to bad faith: *Jones v Gordon* [1877] 2 A.C. 616, at pp.628-9, per Lord Blackburn. Again I do not agree with the argument for the plaintiff that there is any conceptual territory which lies between good faith and bad faith. An act which falls short of good faith is done in bad faith.
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> For the plaintiff it was submitted that in this case the Court should examine whether the trustees gave fair and proper consideration to the exercise of the discretion and that the plaintiff should succeed in the action if they did not. In my view, in this case it is open to the Court to examine the evidence to decide whether there has been a failure by the trustees to exercise the discretion in good faith, upon real and genuine consideration and in accordance with the

116 Ibid 163–5.

purposes for which the discretion was conferred. As part of the process of, and solely for the purpose of, ascertaining whether there has been any such failure, it is relevant to look at evidence of the inquiries which were made by the trustees, the information they had and the reasons for, and manner of, their exercising their discretion. However, it is not open to the Court to look at those things for the independent purpose of impugning the exercise of discretion on the grounds that their inquiries, information or reasons or the manner of exercise of the discretion, fell short of what was appropriate and sufficient. Nor is it open to the Court to look at the factual situation established by the evidence, for the independent purpose of impugning the exercise of the discretion on the grounds that the trustees were wrong in their appreciation of the facts or made an unwise or unjustified exercise of discretion in the circumstances. The issues which are examinable by the Court are limited to whether there has been a failure to exercise the discretion in good faith, upon real and genuine consideration and in accordance with the purposes for which the discretion was conferred. In short, the Court examines whether the discretion was exercised but does not examine how it was exercised.

I regard it as an inherent requirement of the exercise of any discretion that it be given real and genuine consideration. To borrow a phrase from a passage quoted in *Partridge v The Equity Trustees Executors and Agency Co. Ltd*. (1947) 75 C.L.R. 149, at p.164, there must be the "exercise of an active discretion". It has been held that when the occasion for the exercise of a discretionary power has arisen, trustees, while not bound to exercise the discretion, are bound to consider whether it ought in their judgment to be exercised: *Klug v Klug* [1918] 2 Ch. 67; *In re Gulbenkian's Settlement* [1970] A.C. 508, at p.518. I think that it goes without saying that they must give real and genuine consideration. It seems to me that it is in this sense only that the Court can examine whether the trustees gave "proper" consideration to the exercise of the discretion. The language used in this area has not always been distinguished by its precision: see Hardingham and Baxt, *Discretionary Trusts*, 1975, p.92. The courts will examine whether a discretion has been exercised irresponsibly, capriciously or wantonly: *Lutheran Church of Australia South Australia District Incorporated v Farmers Co-operative Executors and Trustees Ltd.* (1970) 121 C.L.R. 628, at p.639. This is another way of saying that there may be an examination as to whether trustees have exercised their discretion on real and genuine consideration: *Pilkington v Inland Revenue Commissioners* [1964] A.C. 612, at p.641; [1962] 3 All E.R. 622.

It is an established general principle that unless trustees choose to give reasons for the exercise of a discretion, their exercise of the discretion can not be examined or reviewed by a court so long as they act in good faith and without an ulterior purpose: *Re Beloved Wilkes' Charity* [1851] 3 Mac. & G. 440; 42 ER 330; *Duke of Portland v Topham* (1864) 11 H.L.C. 31; 11 E.R. 1242. For reasons given above, I would add the further requirement, so obvious that it is often not mentioned, that they act upon real and genuine consideration. In the context, it was in that sense that Lord Truro L.C. used the expression "with a fair consideration" in *Re Beloved Wilkes' Charity*, at (42 E.R.) p.333. In the case of an absolute and unrestricted discretion such as the discretion in the present case, the general principle is given unqualified operation: *Gisborne v Gisborne* (1877) 2 App. Cas. 300, at p.305, per Lord Cairns L.C.; *Tabor v Brooks* (1878) 10 Ch. D. 273; *Craig v National Trustees Executors and Agency Company of Australia Ltd.* [1920] V.L.R. 569. The operation of the principle is

discussed in *Jacobs' Law of Trusts in Australia*, 4th ed., pp.300-2.

The policy which underlies the principle was discussed by Lord Truro L.C. in *Re Beloved Wilkes' Charity*. In *Re Londonderry's Settlement* [1965] Ch. 918, at pp.928-9; [1964] 3 All E.R. 855, at p.857, Harman L.J. explained the principle as follows: "... trustees exercising a discretionary power are not bound to disclose to their beneficiaries the reasons actuating them in coming to a decision. This is a long-standing principle and rests largely, I think, on the view that nobody could be called upon to accept a trusteeship involving the exercise of a discretion unless, in the absence of bad faith, he was not liable to have his motives or his reasons called in question either by the beneficiaries or by the court. To this there is added a rider, namely, that if trustees do give reasons, their soundness can be considered by the court."

264 The above principles were referred to by the High Court in *Finch v Telstra Super Pty Ltd*:[117]

> … There is no doubt that under *Karger v Paul* principles, particularly as they have been applied to superannuation funds, the decision of a trustee may be reviewable for want of "properly informed consideration"[118]. If the consideration is not properly informed, it is not genuine. The duty of trustees properly to inform themselves is more intense in superannuation trusts in the form of the Deed than in trusts of the *Karger v Paul* type. It is extremely important to the beneficiaries of superannuation trusts that where they are entitled to benefits, those benefits be paid. Here, for example, the applicant was claiming a Total and Permanent Invalidity benefit to support himself for the rest of his life. His claim depended on the formation of an opinion by the Trustee about the likelihood that he would ever engage in "gainful Work": that was not a mere discretionary decision. In the Deed there was a power to take into account "information, evidence and advice the Trustee may consider relevant", and that power was coupled with a duty to do so. It would be bizarre if knowingly to exclude relevant information from consideration were not a breach of duty. And failure to seek relevant information in order to resolve conflicting bodies of material, as here, is also a breach of duty. The Scheme is a strict trust. A beneficiary is entitled as of right to a benefit provided the beneficiary satisfies any necessary condition of the benefit. Whether or not it will be decided hereafter that, consistently with s 14 of the Complaints Act, the duty of a trustee in forming an opinion of the present type is a duty to form a fair and reasonable opinion, or even a duty to form a correct opinion, there is because of the importance of the opinion and its place in the Scheme a high duty on the Trustee to make inquiries for "information, evidence and advice" which the Trustee may consider relevant. The existence of that duty in a more intense form than exists under *Karger v Paul* principles in their standard application is further support for the correctness of Byrne J's decision.

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117 (2010) 242 CLR 254, 280 [66] (emphasis added).

118 *Kerr v British Leyland (Staff) Trustees Ltd* [2001] WTLR 1071, 1079; *Stannard v Fisons Pension Trust Ltd* [1992] IRLR 27, 31.

265 Senior counsel for Paul and Deborah submitted that the trustee had a duty, by reason of the terms of cl 3 of the trust deed, to consider exercising its discretion in relation to the distribution of the income of the trust income. That obligation was also submitted to be consistent with the general principle, that, in the case of a discretionary trust, a trustee is subject to a duty to consider exercising its discretion. Reliance was placed on the following extract from *Thomas On Powers*:[119]

> A discretionary trust, unlike a mere power, imposes on the trustee a duty to consider exercising his discretion (or to inquire and ascertain) and also a duty to distribute the subject-matter of that discretion. These duties are owed to the objects of the power. There are no beneficiaries entitled in default of appointment in this case; and no duty is owed to the donor of the power. If the trustee fails to carry out his duties, he is in breach of trust. Only objects of the power (and any non-defaulting trustee) can complain to the court. The trustee cannot be compelled to make any distribution in favour of any particular object (whether he is the complaining object or not). It may be the case that he can not even be compelled to consider the position, circumstances and needs of every object, although this would seem to depend on the width or range of the class: there is no obvious reason why he should not be expected to do so where the class is small. In any event, each object can complain that the trustee is refusing to consider the exercise of his discretion under the discretionary trust, whether by failing to inquire into and ascertain the range of potential beneficiaries or to consider any particular claimant, and thereby failing to administer his trust properly. The court can then take steps to ensure that the duty is executed.

266 Senior counsel for Paul and Deborah emphasised that, at all times, there was only a very limited class of objects about whose circumstances the trustee needed to inform itself.[120] There was an even lesser burden because two of those objects were the directors of the trustee and already fully aware of their own circumstances. This was submitted to be relevant to the content of the trustee's duty to enquire and ascertain.

267 It was also submitted that there were no board meetings of the trustee held in any year between 2010 and 2017. By failing to hold a meeting of all of the directors, the trustee did not have the benefit of the collective wisdom of the board so that, whatever consideration there was by the trustee, it was not real and genuine. In *Bell*

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119 Geraint Thomas, *Thomas on Powers* (Oxford University Pres, 2nd ed, 2012) 502 [10.47] (emphasis added) (citations omitted).

120 The only non-charitable objects of the trust being John, Eva, Deborah, Paul and Michael.

v Burton, Tadgell J stated that a company is entitled to the collective wisdom of all of its directors:[121]

> Adequate notice of a meeting of directors is not a matter of ensuring that the directors' interests will be represented, but of ensuring that a director will be able to make the necessary representation of the interests he or she has in his or her hands. These interests are not merely his or her own. The company is, of course, entitled to expect to receive the collective wisdom and contribution of all directors.

268 In arguing that the trustee failed to give real and genuine consideration to Deborah's circumstances, Paul and Deborah emphasised that the trustee knew from 2006 that Deborah was unable to pay the rent on the South Yarra apartment because she conveyed as much to Eva in asking to be relieved of the obligation to pay rent. Similarly, she told Eva in 2006 and 2009 that she needed assistance to pay her medical expenses. Despite this actual knowledge of Deborah's circumstances, at no time did the trustee make any enquiry of Deborah of any need for a distribution of income that she might have.

269 Applying the principle that the validity of a trustee's reasons will be examined where the trustee chooses to state the reasons for the exercise of discretion,[122] Paul and Deborah submitted that the trustee's reasons for the making of income distributions were revealed in the following ways:

(a) First, reliance was placed on Michael's hearsay evidence about discussions he had with Eva about distributions from the trust. Eva told him that she was of the view that Deborah was a 'spendthrift' and would not properly manage any money distributed to her from the trust. It was submitted that this was not a proper reason for a trustee not to consider an object of a trust in relation to the exercise of the discretion in respect of the making of income distributions.

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121 *Bell v Burton* (1993) 12 ACSR 325, 329.

122 *Karger v Paul* (n 116) 165–6.

(b) Secondly, Eva told Mr Sampson that Deborah had 'cut herself off' from the family.[123] Again, it was submitted that this was not a proper reason in relation to the income distribution resolutions made by the trustee.

(c) Thirdly, in relation to the trust's income distribution in 2019, it was submitted that Mr Sampson gave evidence that the reason all of the trust's income for that year was distributed to John was because John wanted it. It was submitted that this was not a proper consideration for the trustee to take into account in making the 2019 income resolution.

270 Paul and Deborah relied on John's response to Deborah's letter in 2004 about the leaking sink in the South Yarra apartment in which he said that she had been neglectful and directed her to attend to the necessary repairs.[124] It was submitted that this and the other examples referred to in [268] were examples of the trustee's conduct being consistent with a view that Deborah was a spendthrift and had cut herself off from the family.

271 Paul and Deborah also submitted that, by attempting to ratify the 2017 variation after the proceeding was commenced at a meeting on 15 April 2019, the directors of the trustee acted for purposes collateral to the purpose of the trust, namely, to avoid removal. At this time, the trustee must be taken to have known that the validity of the 2017 variation was in issue in the proceeding. Instead of standing by as an impartial trustee awaiting a decision from the Court in relation to that matter, the trustee took action to usurp the Court's decision.

272 The matters referred to in the preceding three paragraphs were submitted to establish that that the trustee had engaged in a course of conduct over decades which demonstrated that it had not given due consideration to Deborah as an object of the trust.[125]

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123 See [22] above.

124 See [243] above.

125 It was also submitted that the current directors – Michael and Mr Sampson – have demonstrated a lack of impartiality and an inability to fairly and properly consider Deborah's interests. This

273 It was submitted that the trustee's failure to consider Paul and Deborah's circumstances became more obvious as the years progressed.

(a) John moved to Arcare in May 2015 and his financial needs thereafter were limited. Despite this, in 2016 the trustee continued to distribute the trust income in the formula which had been applied in most of the previous years: 40% to John, 20% to Eva and 40% to Michael.

(b) The use of this formula, which was applied from 2011 to 2018, was based upon a consideration of Eva's income from her 'large share portfolio'. This was said to demonstrate that the application of the above formula for the distribution of income was not based upon any genuine consideration of Paul and Deborah's circumstances.

(c) By 2018, both John and Eva were in Arcare with limited and known financial needs. They had significant loan accounts in the trust. Despite this, the trustee again applied the previous formula in relation to the distribution of income.

(d) In relation to 2019, Eva had died the previous year and John was in Arcare with limited and known financial needs and a substantial loan account with the trust. The trustee was also on notice through this proceeding that Paul and Deborah sought to be considered for a distribution from the trust. Despite this, the trustee still made no enquiry of their circumstances and instead resolved to distribute all of the income to John.

274 In this context, it was submitted that the trustee's income distributions in 2018 and 2019 and the absence of any such distributions in those years to Paul and Deborah was perverse. As their senior counsel put it in respect of 2019:

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allegation is, however, principally based on matters which occurred subsequent to the end of the 2019 financial year: see [364] below. It is therefore addressed in the context of Issue 8 concerning whether the trustee should be removed. Insofar as the allegation concerns matter which pre-date the end of the 2019 financial year, I have taken those matters into account in my consideration below of whether the trustee failed to give any genuine consideration to whether, in the exercise of its discretion, a distribution should be made to Deborah and/or Paul.

> … by 2019 these proceedings are well on foot. There's a statement of claim, there's actual knowledge of the circumstances of Debbie and yet, in that year the whole of the net income which is nearly $1 million was distributed to John. John is in Arcare, he's already got a loan account that's $3.5 million that he isn't using, except the book entries to pay Debbie's rent and he gets another $1 million.

275 Senior counsel for Paul and Deborah submitted that the Court can infer from this perverse outcome (and, it was said, Mr Sampson's evidence that the reason for the income distribution in 2019 was because it was what John wanted), that the trustee's discretionary decision-making process in 2018 and 2019 miscarried. In support of that contention, counsel relied on Lord Reid's observation in *Dundee General Hospitals Board of Management v Walker*,[126] to which Byrne J referred in the following part of his Honour's summary of applicable principles in *Sinclair v Moss*:[127]

> The Court will interfere where a clear case is made out that the discretion is not exercised upon a real and genuine consideration of the matter entrusted to the trustees' discretion:[128]
>
> > If it can be shown that the trustees considered the wrong question, or that, although they purported to consider the right question they did not really apply their minds to it or perversely shut their eyes to the facts or that they did not act honestly or in good faith, then there was no true decision and the court will intervene,"[129]

Trustee's submissions

276 The trustee emphasised that no challenge was made by Paul and Deborah to the fact of the discretionary power being exercised, only as to the manner of its exercise. In challenging the manner of exercising the discretionary power, it is only the process of decision-making by a trustee which may be reviewed by a court of equity. It is not for the Court to review the result of the exercise of a discretionary power; a complaint cannot therefore be made that the result of the exercise of a discretion was unfair. In the context of the exercise of a discretionary power in relation to a

126 [1952] 1 All ER 896.
127 [2006] VSC 130, [17] (emphasis added). Byrne J's summary is set out in [277] below.
128 *Rapa v Patience* (Supreme Court of New South Wales, McLelland J, 4 April 1985) 11; *Telstra Super Pty Ltd v Flegeltaub* (n 113) 283 [26] (Callaway JA).
129 *Dundee General Hospitals Board of Management v Walker* (n 127) 905 (Lord Reid).

discretionary trust, there is no duty on the trustee to ensure equal treatment of each beneficiary.[130]

277 In support of these general principles, the trustee referred to the judgment of McGarvie J in *Karger v Paul* to which reference has already been made.[131] The trustee also referred to Byrne J's synthesis of relevant principles in *Sinclair v Moss*.[132] His Honour set out the following principles for the Court to consider in assessing whether there has been a valid exercise of a trustee's discretion:[133]

(1) The onus of establishing that the discretion in the year miscarried lies upon the plaintiff.

(2) The Court will interfere where a clear case is made out that the discretion is not exercised upon a real and genuine consideration of the matter entrusted to the trustees' discretion:[134]

> "If it can be shown that the trustees considered the wrong question, or that, although they purported to consider the right question they did not really apply their minds to it or perversely shut their eyes to the facts or that they did not act honestly or in good faith, then there was no true decision and the court will intervene,"[135]

(3) A discretionary determination may be impugned if the trustees in making it failed to take into account matters which are relevant, that is, matters which they should have taken into account or which should have affected their decision or where they took into account matters which they should not have taken into account …

(4) This principle, which is referred to in England as the Rule in *Hastings-Bass*, is there said to contain the further requirement that, had the trustees taken into account the matter which they should have taken into account but did not, they would not have exercised their discretion in the way they did … [his Honour queried whether this applies in Victoria]

(5) Notwithstanding that it is not a case where the trustees provided reasons for their determinations, the Court may examine the material available to the trustees and enquiries which they did or did not make in order to determine whether they took into account matters which they should have taken into account …

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130 *Edge v Pensions Ombudsman* [1998] Ch 512, 533.
131 *Karger v Paul* (n 116).
132 *Sinclair v Moss* (n 128).
133 Ibid [17] (most citations omitted).
134 *Rapa v Patience* (n 129) 11; *Telstra Super Pty Ltd v Flegeltaub* (n 113) 283 [26] (Callaway JA).
135 *Dundee General Hospitals Board of Management v Walker* (n 127) 905 (Lord Reid).

(6) Where the trustees make a determination after taking into account all matters which they should have taken into account, the Court will not interfere with the determination on the ground that the trustees made an error in their assessment of fact.

(7) There may be a point of distinction between a discretion which is unfettered or absolute and that which requires the trustees to be satisfied of or to form an opinion about a fact …

(8) Where … the trustees are required to take into account a particular matter, it is part of the decision-making process that the trustee make some effort to form a view upon that matter. What those efforts might be will depend upon the circumstances.

278 In assessing what constitutes a relevant consideration, the trustee submitted that the Court will look at all of the circumstances, including the terms of the trust instrument as well as what, if any, benefits have been conferred on the trust by any persons in consideration of them being named a beneficiary. The mere fact that there is material that the trustee might have taken into account, does not mean however that the trustee should have taken that material into account.[136] The trustee emphasised that it is not the role of the Court to determine the weight to be given to the various factors that the trustee may consider in exercising a discretion.

279 The trustee submitted that the scope of a trustee's obligation in determining to exercise a power is determined by two things: (a) the manner in which the discretion is expressed to be exercisable in the terms of the trust deed; and (b) the potential objects of the exercise of that discretion. Here, in relation to the discretion relating to the trust's income in cl 3, the trustee emphasised the 'absolute and uncontrolled' nature of the discretions vested in it pursuant to cl 17 and the fact that there were only five potential objects of the exercise of the discretion, being the general beneficiaries, and in addition a general discretion for the making of distributions for charitable purposes.

280 The *first principal submission* advanced by the trustee was that, in the face of the challenge brought by Paul and Deborah, the only examination to be undertaken by the Court in relation to the trust is, at most, to consider whether the trustee knew of

136 *Esso Australia Ltd v Australian Petroleum Agents' & Distributors' Association* (1999) 3 VR 642, 652 [41].

the identity of the general beneficiaries under the trust. This proposition was said to be supported by the principles referred to above and by an examination of the trustee's discretionary power to make income distributions under the trust deed.

281 As to the latter, the trustee's power to make income distribution resolutions in sub-cl 3(1) of the trust deed was said to be limited only by the requirement to consider the wishes of the Guardian. The trust deed did not impose any obligation on the trustee to apply the income of the trust to a charitable purpose or to a beneficiary in any accounting period. If the trustee determined to exercise its power to apply any or all of the trust's income to any or all of the beneficiaries of the trust, there are no stated criteria for doing so; it must only consider the wishes of the Guardian.

282 Critical to this submission was the provision made by cl 17 that, subject to any express provision to the contrary, every discretion and power vested in it shall be absolute and uncontrolled. The only provision to the contrary in respect of income distribution was the requirement on the trustee to consider the wishes of the Guardian. In light of this provision, it was submitted that, although the trustee might properly be expected to know the identity of the general beneficiaries who might be objects of the discretion, it had no other obligation to know of, or to enquire about, the circumstances of the general beneficiaries for the purpose of considering whether to exercise its discretion in their favour. It was submitted that the evidence established that the trustee was aware of the identity of the five general beneficiaries at all times.

283 I do not accept this submission. It is contrary to the principle articulated in McGarvie J's seminal observations in *Karger v Paul* that,[137] where a trustee is vested with a discretion cast in broad and unfettered terms, the Court will review the exercise by the trustee of such a power where there has been a failure to exercise the discretion in good faith, upon real and genuine consideration and where it has not been exercised in accordance with the purposes for which the discretion was

137 See [263] above.

conferred. In examining whether the discretion was exercised, the relevant obligation on a trustee is to give real and genuine consideration to the objects of the trust. His Honour described this as an 'inherent requirement of the exercise of any discretion'.[138] That requirement is not obviated because of the inclusion in a trust deed of a clause such as cl 17. No authority in support of that proposition was cited.

284 Furthermore, as McGarvie J stated, the requirement to give real and genuine consideration to the objects of the trust calls for the 'exercise of an active discretion'.[139] It is unclear to me how the trustee would be able to apply itself in this way knowing only the identity of the objects of the trust. The trustee's submission is also contrary to the statement in *Thomas on Powers* that there is no obvious reason why a trustee should not be expected 'to consider the position, circumstances and needs of every object' where the class of objects is small.[140]

285 The *trustee's alternative submission* proceeded from a more orthodox consideration of the principles referred to in *Karger v Paul*,[141] acknowledging the duty of a trustee to inform itself about some matters regarding the potential objects of the exercise of the power.

286 The trustee contended that the Court cannot find that the trustee exercised the discretion in breach of its duties because Paul and Deborah cannot show that the trustee did not give genuine consideration to them as well as to the other objects of the trust.

287 The trustee submitted that, in their complaint, Paul and Deborah had not identified any specific issues which it was said that the trustee was required to, but had not, taken into account in considering whether to make an income distribution. The asserted breach was instead that the trustee had failed to give genuine consideration as to *whether* a distribution should be made. In substance, it was submitted that this

138 *Karger v Paul* (n 116) 164.
139 Ibid referring to an expression quoted in *Partridge v The Equity Trustees Executors and Agency Co. Ltd*. (1947) 75 CLR 149, 164.
140 See the extract in [265] above.
141 (n 116).

complaint was no more than that they did receive an income distribution, from which they ask the Court to infer that the trustee must have failed to give genuine consideration as to whether to make an income distribution to them. The trustee submitted that this argument could only succeed if the Court was willing to find that there cannot have been any basis upon which the trustee could not have made a distribution to Paul and Deborah in any of the relevant years.

288 It was submitted that the material before the Court could not support such a finding, particularly where there was a range of potential objects in respect of the income distributions which the trustee could consider and because it was almost wholly a matter of conjecture as to why John and Eva in fact decided to make the distributions which were in fact made each year. It was submitted that the Court should not lightly impute a breach of duty to the trustee where it has no idea as to the motivating factors of the trustee and its directors in deciding to distribute income in the manner in which it did.

289 The trustee submitted that the fact that a distribution of income was not made to Paul and Deborah does not support an inference that there had been a failure to genuinely consider them before making an income distribution resolution. It was submitted that the Court could not be satisfied on the evidence that any trustee giving genuine consideration to the objects of the trust must necessarily have come to the conclusion that a distribution of income should be made to Paul and Deborah in each of the relevant years. This was particularly so given that: the wishes of the Guardian were required to be taken into account by the trustee and there is no evidence as to what those wishes were in each year; the fact that the trustee otherwise had an absolute discretion in respect of income distribution; and the existence of other relevant considerations for the trustee to take into account.

290 The trustee submitted that other considerations relevant to the exercise of the discretion whether to make an income distribution resolution might include: the wishes of the Guardian; that the trust fund comprised benefits conferred by John and Eva, whereas no other beneficiaries had conferred any benefits on the trust; the lack

of any stated criteria in the trust deed for the exercise of the discretion to apply any or all or part of the income of the trust; a desire on the part of those general beneficiaries who did receive a distribution to use it for a particular purpose; a desire on the part of the trustee to provide for the education, health, accommodation, or other needs or wants of the general beneficiaries.

291 The trustee argued that the decision of the High Court in *Finch* v *Telstra Super Pty Ltd* is authority for the proposition that both the terms of a trust deed and the factual context in which it is entered into are relevant to determining the proper interpretation of the trust deed and to identifying the considerations a trustee is required to take into account when exercising a discretion.[142] I have earlier accepted the trustee's submission that the context in which the trust was made was the Owies family and that the Settlor intended the trust to operate in the context of, and for the benefit of, the Owies family.[143] The trustee argued that, together with the effect of cl 17, this meant that there was little the trustee was required to take into account in exercising the discretion conferred on it.

292 One aspect of the factual context taken into account by the High Court in *Finch v Telstra Super Pty Ltd* was the fact that the trust deed was dealing with employees' superannuation. The plurality stated that '[s]uperannuation is not a matter of mere bounty, or potential enjoyment of another's benefaction. It is something for which, in large measure, employees have exchanged value – their work and their contributions. It is "deferred pay"'.[144] The trustee relied upon this observation in support of the proposition that, in exercising its discretion in respect of the trust's income, a consideration which the trustee was allowed to take into account was whether or not a beneficiary had made any contribution to the trust.

293 It was submitted that the inability of the Court to evaluate the extent to which the criteria referred to above might have been taken into account by the trustee

142 *Finch v Telstra Super Pty Ltd* (n 118). The trustee relied on [32] and [33] of the judgment of the plurality.

143 See [87] above.

144 *Finch v Telstra Super Pty Ltd* (n 118) [33] (citations omitted).

exemplifies that, in order for Paul and Deborah to succeed, the Court must be satisfied that, despite the possibility that these matters were taken into account by the trustee in making the distributions of income, it nonetheless failed to give genuine consideration as to whether to make a distribution to Paul or Deborah.

294 The trustee also took issue with the manner in which the case advanced on behalf of Paul and Deborah focussed upon the latter's circumstances. It argued that a comparison of Deborah's circumstances with what was said to be the legitimate interests and needs of John and Eva could not sustain the proposition that there must have been a failure by the trustee to genuinely consider whether to make a distribution to her. More generally, it was submitted that the Court's jurisdiction in this proceeding does not give rise to any 'needs-based' enquiry of the type, for example, dealt with under Part IV of the *Administration and Probate Act 1958*.

295 The *third contention* advanced by the trustee was that, even if the trustee may have breached its duties in making income distributions in the relevant years if it did not have some knowledge of Paul and Deborah's circumstances in life, the evidence in fact supported a conclusion that its directors had such knowledge when income distribution resolutions were made. The knowledge of the directors was imputed to the trustee. The trustee also argued that the fact that the trust is a family-operated trust was a circumstance which the Court was required to take into account and necessarily qualified the objectivity that a person brings to a decision-making process, particularly in the context of a breakdown in ordinary family relations.

296 By reference to detailed submissions directed at the evidence before the Court, the trustee argued that, at all relevant times, both John and Eva were aware, at least to some extent, of Paul and Deborah's financial situation and personal circumstances, including their health. John and Eva obtained knowledge about each of Paul and Deborah's circumstances from each other and from conversations with each of Paul and Deborah. It could be inferred that such knowledge was also obtained second hand from Michael. John and Eva were also aware of the benefits which they had provided over time to both Paul and Deborah. It was therefore submitted that it

could be inferred that genuine consideration was given by the trustee to each of the objects of the trust on the basis of information that was known to it through the directors when each relevant income resolution was made. It was submitted that there was no duty on the trustee to make further inquiries of the beneficiaries.

297 I will consider these submissions in further detail by reference to my findings of fact in my consideration of this issue below.

298 The trustee made the following points in response to the submission advanced on behalf of Paul and Deborah that the income distributions for 2018 and 2019 were perverse such that it can be inferred that the trustee's discretionary decision-making process in those years must have miscarried with the trustee failing to give and real and genuine consideration to the objects of the trust.

(a) The trustee did not accept that, in *Sinclair v Moss,* Byrne J was referring to a scenario where one beneficiary has needs and another does not and only the latter receives the benefit of the exercise of power by the trustee. Although the exercise of power by a trustee could be challenged on the basis that the outcome was so perverse so as to indicate that, in truth, there had not been any exercise of the trustee's discretion, the trustee did not accept that such a result could be established merely because one beneficiary has specific needs and another is said to have no needs.

(b) Since 2006, Deborah had had the benefit of, in effect, free accommodation in the form of the South Yarra apartment provided to her by the trust. Self-evidently that fact was known by the trustee.

(c) The trustee knew, or alternatively it cannot be said that the trustee did not know, that Deborah had received a gift of $240,000 from a friend and it was possible that she still had some portion of those funds in 2018 and 2019.

(d) As to the 2018 income distribution, the relevant resolution was made on 29 May 2018 and each of Mr Sampson, John and Eva were involved in the

decision-making process. It can therefore be inferred that all of their knowledge was brought to bear in respect of the decision about the distribution of the trust's income for that year. The trustee did not have knowledge of any particular aspect of Deborah's circumstances which meant that, in effect, it was required to make a distribution to her. In the circumstances, there was nothing perverse in the distribution adopted of 40% to John, 40% to Michael and 20% to Eva.

(e) As to the 2019 income distribution, the trustee submitted that the following two factors provided a clear basis for Deborah not receiving an income distribution:

(i) Two months before the trustee made the income resolution on 17 June 2019, the trustee resolved to make a capital distribution to Deborah of the South Yarra apartment which was worth $720,000.

(ii) Before the income resolution was made, probate of Eva's will had been granted. Her estate was valued at approximately $9.8 million. The trustee had been notified that Deborah intended to make an application under Part IV of the *Administration and Probate Act 1958*. An indication had been given that Deborah was seeking half of the estate. Accordingly, Mr Sampson, as an experienced legal practitioner, was aware that Deborah was making a claim on Eva's estate which, if successful, would be sufficient to meet all of her needs for maintenance and support in the future.

Michael's submissions

299 It was contended on behalf of Michael that, where there is a discretionary family trust in which the trustee has an absolute discretion, subject to considering the views of the Guardian as required by the trust deed in this case, the trustee is not under an obligation to make enquiries of the beneficiaries when making income distributions

to a small class of beneficiaries. In support of this contention, Michael relied upon the following statement by Callaway JA in *Telstra Super Pty Ltd v Flegeltaub*:[145]

> A trustee considering a question such as whether there has been an unreasonable refusal to submit to treatment must act in good faith and upon real and genuine consideration of that question and not for an extraneous purpose. The language of the three duties implicitly identified in *Karger v. Paul* may therefore be applied to the trustee's task. The difference lies in the way in which those duties work out in practice. There is likely, for example, to be a difference in practice between giving real and genuine consideration to the question whether to make a payment of capital to a life tenant and giving real and genuine consideration to a question of fact such as whether there has been an unreasonable refusal to submit to treatment.

300 Emphasis was placed on his Honour's observations that there will likely be a 'difference in practice' in how a trustee gives real and genuine consideration which depends upon how the duties work out in practice. The nature of the fact finding task in *Telstra Super Pty Ltd v Flegeltaub* was very different, for example, to the present matter. It was submitted that this was not a case where bona fide performance of the trustee's duty required the trustee to make enquiries of the beneficiaries and to give them the opportunity to put material before it.

301 Counsel for Michael accepted that, consistent with the principles articulated in *Karger v Paul*, in the case of the trustee directors of a discretionary family trust, the duty to act 'upon genuine consideration' required the trustee to take an informed view of whether to exercise its discretion and not to act irresponsibly, capriciously or wantonly. Thus, in the present matter, the trustee needed to inform itself and ask itself relevant questions in respect of income distributions and therefore needed to have a general understanding of the position of the beneficiaries.

302 It was submitted, however, that it was not necessary for the trustee to have a detailed understanding about the position of the beneficiaries and the trustee was not bound to make enquiries directly of them. This submission was developed by reference to the facts and analysis in *Karger v Paul* to which I have already referred.[146]

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145 *Telstra Super Pty Ltd v Flegeltaub* (n 113) [29] (citations omitted).

146 See [262]–[263] above.

The plaintiff had argued that the independent co-trustee (the testatrix's solicitor) had not made proper enquiries to ascertain facts which had a bearing on the exercise of the discretion, namely, those relating to the husband's situation, the plaintiff's situation and the husband's reasons for requesting the payment of the capital. Justice McGarvie dismissed the plaintiff's claim, even though the co-trustee had not made any enquiries directly of the plaintiff and where the only information the co-trustee had about the husband's reasons for requesting the exercise of the discretion came from the husband himself – some of which was erroneous - and from knowledge acquired when the co-trustee had acted as solicitor for the husband and the wife. Justice McGarvie stated that the exercise of the discretion was not deficient simply 'because [the co-trustee] acted on his general knowledge of [the plaintiff's] situation rather than on detailed information such as she gave in evidence'.[147]

303 Michael submitted that Paul and Deborah had not discharged the onus of proof upon them to establish that the discretion was not exercised in respect of the income distributions in the relevant years. Detailed submissions were made by reference to the evidence which I will consider below, having regard to my earlier findings of fact.

304 As to Deborah, it was submitted that the evidence established that, between 2010 to 2019, the trustee was generally aware that Deborah had health issues and that she worked on a part-time basis. Given that knowledge, it was submitted to be incumbent on Deborah to prove that, in exercising its discretion with respect to income distributions, the trustee refused to take these matters into account and that they failed to act in accordance with the objects of the trust. It was submitted that Paul and Deborah had not done so.

305 It was also submitted that it could not be said that the failure to provide Deborah with trust distributions was a 'grotesquely unreasonable' result because she received a long-term benefit of living at the South Yarra apartment rent-free and because she

147 *Karger v Paul* (n 116) 172.

received the payment of $240,000 from a friend which she does not have to repay. Deborah has accepted the trustee's offer to take ownership of the South Yarra apartment.

306 In relation to Paul, it was accepted that, between March 2013 and November 2016, the trustee would not have had a detailed knowledge of his personal and financial circumstances. That, however, was said to be a situation of Paul's own making, given the allegations and threats that he made in the 13 March 2013 letter and the fact that he moved to northern New South Wales during this period. In any event, John and Eva could be expected to have had a general knowledge of Paul's situation given the frequency of contact Paul had with John prior to Paul severing contact. It was suggested that this was acknowledged in Paul's letter to John dated 22 October 2016 in which he said 'As you probably know I have worked hard over the last 3 years'. When Paul resumed contact with his parents in October 2016, Eva and John were again put back in a position where they were able to have more detailed information about his circumstances.

307 In summary, it was submitted that, between 2010 and 2019, the trustee was, at a minimum, generally aware of Paul's financial and personal circumstances and, in some periods, in fact had more detailed information. In those circumstances, the burden was on Paul to prove that the trustee refused to take this information into account when exercising its discretion with respect to income distributions, thereby failing to act in accordance with the objects of the trust.

Consideration

308 The learned authors of *Jacobs'* describe the duty on a trustee to act upon genuine consideration as requiring the trustee 'to take an informed view of whether or not to exercise their discretion, and not to act irresponsibly, capriciously or wantonly'.[148] In

148 *Jacobs'* (n 43) 326 [16.08], citing *Pilkington v IRC* [1964] AC 612, 641; *Lutheran Church of Australia (South Australia District) Inc v Farmers' Co-operative Executors and Trustees Ltd* (1970) 121 CLR 628, 639. Trustees act 'capriciously' when they act for 'reasons which…could be said to be irrational, preserve or irrelevant to any sensible expectation of the settlor; for example, if they chose a beneficiary by height or complexion or by the irrelevant fact that he was a resident of Greater London': *Re Manistry's Settlement* [1974] Ch 17, 26.

Wareham v Marsella,[149] the Court of Appeal recently reaffirmed McGarvie J's analysis in *Karger v Paul* as to the approach to be adopted in reviewing the exercise of a trustee's absolute and unfettered discretion.[150] The question in *Wareham v Marsella* was whether the trustees of a superannuation fund had given real and genuine consideration to a beneficiary's claims when exercising a discretion as to the payment of a death benefit. In discussing *Karger v Paul*, the Court observed that:[151]

> … McGarvie J was at pains to make it clear that there were three obligations on a trustee exercising such a discretion: to do so in good faith, upon a real and genuine consideration, and in accordance with the purpose for which the discretion was conferred.[152] He described the real and genuine consideration requirement as being 'so obvious that it is often not mentioned'.[153]

309 In rejecting a contention that it was necessary to demonstrate bad faith in order to impugn the exercise of the trustees' absolute and unfettered discretion, the Court stated:[154]

> Of course, the tests for impugning a trustee's discretion are to be applied in every case by reference to the nature, scope and purpose of the discretion in issue, properly construed. Where that discretion is absolute and unfettered, the trustee's latitude to act is plainly broader and the task of the party seeking to displace the exercise of discretion is correspondingly more difficult. In particular, it will be more difficult to establish that the outcome of the exercise of the discretion was so unreasonable as to found an inference that it was not done in good faith, upon a real and genuine consideration, and in accordance with the purpose for which the discretion was conferred.

310 The Court also considered a challenge to the trial Judge's finding that the outcome of the trustees' exercise of discretion was 'grotesquely unreasonable'. The trustees of a superannuation fund had exercised their discretion to distribute the entire amount of the fund to one person – one of the trustees and a daughter of the deceased member – when the fund could also have been distributed to the deceased member's husband, other child or personal legal representative, or a combination of two or

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149 [2020] VSCA 92. Although delivered after the hearing of the trial of this proceeding, the parties were invited to, and did, provide written submissions in respect of the judgment.
150 See Ibid [59].
151 *Wareham v Marsella* (n 150) [91].
152 *Karger v Paul* (n 116) 164.
153 *Karger v Paul* (n 116) 165.
154 *Wareham v Marsella* (n 150) [95].

more of them. The Court of Appeal stated:[155]

> … It was submitted that the outcome of the exercise of discretion was irrelevant, although the applicants pointed to no authority for that submission. The judge cited *Re Lofthouse*,[156] in which Cotton LJ stated in argument that "perversity is dishonesty for this purpose",[157] meaning the purpose of impugning a trustee's exercise of discretion. The authors of *Jacobs' Law of Trusts in Australia* rely on that observation for the proposition that a "grotesquely unreasonable result may be evidence of a miscarriage of duty".[158] There is no reason to doubt that proposition.
>
> But in any event, arguments as to the result of the exercise of the discretion do not advance the applicants' case. The judge relied on her characterisation of the trustees' decision only as supporting her conclusion, based on other grounds, that the discretion had not been duly exercised.[159] The judge did not apply the above principle to identify a miscarriage. She invoked her finding to support a conclusion already reached. It is therefore unnecessary to venture into the question whether the decision was correctly characterised as "grotesquely unreasonable". But it must be said that the decision to pay no part of the death benefit to the deceased's husband of more than 30 years was, at least, remarkable.

311 I have applied these statements of principle and in particular the approach articulated by McGarvie J in *Karger v Paul* in determining whether the trustee failed to give any genuine consideration to whether an income distribution should be made to Deborah or Paul in the years in and between 2013 and 2019. I have done so in the context of and by reference to the findings of fact set out earlier, mindful that the question of whether real and genuine consideration was exercised by a trustee is a matter of fact unique to each case. Before addressing relevant matters, a number of important preliminary matters should however be noted.

312 First, the question of whether the trustee failed to give real and genuine consideration to the making of income distributions to Paul and Deborah is not to be considered by reference to general conclusions about the trustee's decision-making over the period from 2013 and 2019. Rather, the assessment must be made in a temporally specific way by reference to when each of the seven income resolutions

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155 *Wareham v Marsella* (n 150) [72], [73].
156 (1885) 29 Ch D 921, cited at Reasons [37].
157 *Re Lofthouse* (n 157) 930.
158 *Jacobs'* (n 43) 327 [16–08].
159 Reasons [51], [56]. These passages refer only to the position of Mrs Wareham, but it can be assumed that the judge applied the same reasoning in the case of Mr Wareham.

were made by the trustee in the above period. This of course does not exclude the possibility that there may be considerations which are common to more than one year.

313 Secondly and relatedly, because the task of determining whether there was any failure by the trustee to give real and genuine consideration will depend upon a consideration of, amongst other things, the information which the trustee had when it resolved to make each of the relevant income distributions, it is necessary to focus on the information which the trustee had at each of these different times. This is not straightforward. The knowledge which the trustee had at any particular time is the sum of the knowledge which it previously accrued. For example, in those, sometimes lengthy, periods when there is no evidence that the trustee acquired any information about Deborah or Paul, it (through John and Eva) nonetheless continued to hold information about Paul and Deborah which had been obtained in previous years.

314 An assessment of the information known to the trustee about Paul and Deborah at particular points in time is also made difficult because of the inherent complexity of familial relations and the various indirect ways in which information may be conveyed in that setting. This is heightened in the present case where, as senior counsel for Paul and Deborah observed, the evidence points to relationships which depart significantly from conceptions of what might be viewed as 'normal' paternal/child relationships, including a number of estrangements of varying lengths involving Paul and Deborah and their parents. Nevertheless, the nature of the relations between Paul, Deborah and Michael at different times allowed, to some degree, for the possibility of information about Deborah or Paul being conducted indirectly to John or Eva.[160] In other words, direct communication between one of the children and one of the parents was not the only way in which information about that child might have been conveyed to the trustee when John and Eva were the moving minds behind the trustee.

160 See my findings about the relationships between Paul, Deborah and Michael in [248]–[251] above.

315 A further specific limitation in the evidence about the information known to the trustee at particular times is the fact that, although the income distribution resolutions were made in respect of financial years, some of the evidence given by witnesses about communications and dealings between Paul and Deborah and their parents was, understandably, expressed generally by reference to particular 'years', which may be taken as references to particular calendar years. The difference between financial years and calendar years means that it is therefore not always possible to definitively identify the financial year in relation to which particular communications or dealings occurred.

316 With these matters in mind, as McGarvie J stated in *Karger v Paul*, in determining whether the trustee failed to give real and genuine consideration to whether to make an income distribution to Paul or Deborah in the relevant years, 'it is relevant to look at evidence of the inquiries which were made by the trustees, the information they had and the reasons for, and manner of, their exercising their discretion.'[161] Those matters are to be considered by reference to 'the nature, scope and purpose of the discretion in issue, properly construed'.[162]

317 Although sub-cl 3(i) of the trust deed provides that the trustee 'shall', in each accounting period, pay, apply or set aside the whole or any part of the income of the trust for that period for charitable purposes and/or for the benefit of one or more of the general beneficiaries, it is correct, as was submitted by the trustee and Michael, that the trustee's discretionary power to distribute income is limited only by the requirement to consider the wishes of the Guardian. There is no obligation on the trustee to apply the income of the trust to a charitable purpose or to a beneficiary in any period. If the trustee determines that it will exercise its power to apply any part or all of the trusts income to any or all of the beneficiaries, there are no stated criteria for doing so; it must only consider the wishes of the Guardian. Having regard to the terms of cl 17 of the trust, save only for the obligation to consider the wishes of the

161 *Karger v Paul* (n 116) 164.
162 *Wareham v Marsella* (n 150) [95].

Guardian, the trustee's discretion under sub-cl 3(i) is therefore properly regarded as otherwise being absolute and unfettered. Consistent with the observations of the Court of Appeal in *Wareham v Marsella*,[163] the broad latitude thereby afforded to the trustee accordingly renders the task of Paul and Deborah in seeking to impugn the exercises of discretion correspondingly more difficult.

318 As to the information that the trustee had about Paul and Deborah's circumstances, for the reasons I have explained, it is necessary to address this by reference to each of the relevant financial years. In considering this issue, I am also mindful that, as senior counsel for Paul and Deborah submitted, mere contact between either of them and John and/or Eva did not necessarily involve the transmission of information about their respective circumstances.

Paul

319 Paul moved away from Melbourne in September 2013. For many years until then, he had had lunch with his parents most Saturdays. Paul's evidence was that he was very open with John and Eva about what was going on in his life and that he had a good relationship with John until he left Melbourne. According to Paul, John and Eva 'were very aware of exactly what I was doing because I'm very open that way'. After he sent a letter to Eva in January 2014, Paul did not have any contact with her or John until October 2016.

320 I infer from these facts that the trustee, through John and Eva, was well-informed about Paul's circumstances in 2013 and 2014.

321 However, there is no evidence that the trustee received any information at all about Paul's circumstances in the 2015 and 2016 years. Although this must be seen against the backdrop of the previous years when the trustee was well informed about Paul's circumstances, there was a period of nearly two and a half years[164] which corresponded with Paul moving interstate and commencing a new business venture

163 (n 150).

164 From January 2014 until 30 June 2016.

when the trustee (whether 'directly' through John or Eva, or 'indirectly' through Michael or Deborah) did not receive any information at all about Paul's circumstances. Whether Paul's absence interstate following the 13 March 2013 letter might be viewed as a situation of his own making as submitted on behalf of Michael is of no relevance in determining whether the discretion in cl 3 of the trust deed was exercised upon a real and genuine consideration. Nor do I accept that any meaningful insight into that matter can be gained from Paul's letter to John dated 22 October 2016 as was submitted on behalf of Michael.

322 Paul renewed contact with John in October 2016. From that time until May 2018, Paul visited John at least 10 times. During these visits, Paul told John about what he was doing in his life, including about his business and its success. In the same period, on 20 January 2017, Paul met with Eva at her home for about an hour and a half. They spoke about what Paul had been doing and family matters.

323 I infer from these facts that the trustee, through John and Eva, was informed about Paul's circumstances in 2017 and 2018.

324 Although there is no evidence of any contact or communications between Paul and John in 2019,[165] the trustee had information about Paul's circumstances (and various complaints) from the contents of the originating motion, supporting affidavits and statement of claim which were served on it soon after 29 November 2018.

Deborah

325 Although the relationship between Deborah and her parents was complex and characterised by sometimes lengthy periods of estrangement, Deborah and Eva had periods of reconnection, in particular in 2006, 2009, 2011 and 2012. In these periods they saw each other at least every fortnight. They spoke of matters including Deborah's health and that she was only working part-time.

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165 I note that Eva died on 27 November 2018.

326 After an estrangement of nearly 20 years, Deborah and John had lunch together a few times in 2012 and Deborah visited him when he was in hospital in 2013. Deborah was also in contact with Eva in 2013 in relation to the purchase of new venetian blinds for the South Yarra apartment. Deborah told Eva about her medical problems and that she was working in Tasmania to earn some extra money.

327 I infer from these facts and circumstances that the trustee, through John and Eva, was generally informed about Deborah's circumstances in 2013.

328 Although there is no evidence of any specific contact or communication between Deborah and John or Eva in 2014, I also consider the trustee remained generally aware of Deborah's circumstances in 2014 because of: (i) the temporal proximity of the earlier communications referred to above; and (ii) the regular communications between Paul, John and Eva until September 2013 in a period when Paul and Deborah maintained a good relationship. In that setting, it is more likely than not that Paul would have conveyed at least some information about Deborah's circumstances to Eva and/or John.

329 As with Paul, there is no evidence that the trustee received any information at all about Deborah's circumstances in the 2015 and 2016 years. This must however be seen against the backdrop of the trustee being generally informed about Deborah's circumstances in the period from 2011 until 2013 and, to a lesser extent, in 2014.

330 Although there is no evidence that the trustee received any specific information about Deborah's circumstances in 2017, I consider it more likely than not that the trustee, through John, obtained at least some information about her circumstances. Such information would likely have come from Deborah herself from one of her visits to see John in Arcare in 2017 and also indirectly through Paul who, as I have noted, visited John a number of times in this period. Given the familial relations including the nature of the relationship between Paul and Deborah, it is likely that Paul would have conveyed to John at least some information about Deborah's circumstances.

331 There is no evidence that the trustee received any specific information at all about Deborah's circumstances in 2018.

332 As with Paul, although there is no evidence of any contact or communications between Deborah and John in 2019, the trustee received information about Deborah's circumstances (and various complaints) from the originating motion, supporting affidavits and the statement of claim which were served on it after 29 November 2018.

333 There is little evidence before the Court about the trustee's reasons for making the relevant income distribution resolutions. The reliance by Paul and Deborah on Mr Sampson's evidence that Eva had told him that Deborah had 'cut herself off' from the family was misplaced as it occurred significantly earlier than when the relevant income distribution resolutions were made and was a statement made in the context of the preparation of the 2010 variation.

334 I also do not accept the submission advanced on behalf of Paul and Deborah that the reason all of the trust's income for 2019 was distributed to John was because John wanted it. That submission is premised on a mischaracterisation of the evidence given by Mr Sampson. His evidence on this issue was given in the abstract and is properly viewed as a comment on the broad nature of a trustee's discretion to distribute income. In cross-examination, Mr Sampson elected not to give evidence about the details or substance of his conversation with John.

335 Although Michael gave evidence that Eva told him that she considered Deborah to be a 'spendthrift' who would not properly manage any money distributed to her from the trust, this evidence is of limited significance given its hearsay nature and the fact that Michael did not locate these conversations with Eva at any identifiable point in time. Many of the matters relied on by Paul and Deborah said to confirm this view concerned events and communications which occurred many years before 2013. In any event, I do not consider that it is sufficiently clear that they indicate a view by Eva that Deborah was a spendthrift.

336 For the reasons I have already explained,[166] I also do not accept the submission advanced on behalf of Paul and Deborah that, in attempting to ratify the 2017 variation on 15 April 2019, the directors of the trustee acted for purposes collateral to the purpose of the trust.

337 Given the above conclusions, the bases of Paul and Deborah's claim that the trustee has engaged in a course of conduct over decades which demonstrated that it had not given due consideration to Deborah as an object of the trust is not made out.

338 As to the evidence of any enquiries made by the trustee of the potential objects of an income distribution, the position is clear: In none of the relevant years did the trustee make any enquiries of Paul or Deborah as to any need they might have for a distribution of income from the trust. In the circumstances of this case, this is of significance.

339 As I have noted, sub-cl 3(i) of the trust deed imposed a duty on the trustee to consider, each year, exercising its discretion in relation to the distribution of the trust's income. Despite this, as I have noted, there is no evidence that the trustee received any information at all about either of Paul or Deborah's circumstances in 2015 or 2016 (or Deborah's circumstances in 2018). This is striking given that, because the trustee must be taken to have knowledge about John and Eva's circumstances by virtue of their positions as directors of the trustee, there were only three other potential objects of the exercise of the trustee's discretion.[167] Although the trustee, through John and Eva, held knowledge about Paul and Deborah's circumstances at earlier periods, those circumstances could not be assumed to be unchanging. These matters, in conjunction with the fact that no enquiries were made of Paul or Deborah at any relevant time as to any need they might have for a distribution of income, support an inference that, in 2015 and 2016 (and in 2018 in relation to Deborah), the trustee did not take an informed view of whether or not to

166 See [125].
167 In addition to charitable purposes.

exercise its discretion in relation to the making of an income distribution to Deborah or Paul.

340 As Callaway JA observed in a different context in *Telstra Super Pty Ltd v Flegeltaub* in relation to the obligation on a trustee to decide a question of fact, in some cases the requirement for a trustee to give real and genuine consideration will entail making an inquiry so as to ensure genuine decision-making.[168] In substance, this aptly describes the position of the trustee of the Owies Family Trust in the above years when it did not receive any information at all about Paul or Deborah's circumstances.

341 It is true that the trustee necessarily confronted evidentiary difficulties in answering the claim brought by Paul and Deborah. Those difficulties reflect the combined effect of a number of factors including the effluxion of time given the period the subject of the claim, the timing of Eva's death before the proceeding was commenced and the timing of John's death shortly before the trial of the proceeding. While the difficulties occasioned by the timing of Eva's death are insuperable, the trustee was nonetheless able to prepare evidence proposed to be given by John at trial in answer to the case advanced by Paul and Deborah, including in respect of the giving of real and genuine consideration by the trustee in the exercise of its discretion. I have taken that evidence into account and, notwithstanding the evidentiary difficulties which confront the trustee in answering Paul and Deborah's claim, am positively satisfied on all of the evidence that the trustee did not take an informed view of whether or not to exercise its discretion in relation to the making of an income distribution to Deborah or Paul in in 2015 and 2016 (and in 2018 in relation to Deborah).

342 Given my conclusion, it is unnecessary for me to determine whether the result of the exercise of the trustee's discretion in 2018 was 'grotesquely unreasonable' such that, on that basis, it can be inferred that the discretion in 2018 was not exercised upon a real and genuine consideration. However, if it had been necessary for me to

168 *Telstra Super Pty Ltd v Flegeltaub* (n 113) 284–5.

determine that question, I would have answered it in the negative for the following reasons.

343 On one view, the result of the exercise of the trustee's discretion in 2018 might reasonably be described as remarkable. John and Eva were 94 and 89 years of age respectively and living in Arcare with limited and known financial needs. They each had the benefit of very large loan accounts.[169] Despite having those resources available to them, the trustee applied the formula it had applied in the previous seven years, with 40% of the trust's income being distributed to John, 40% to Michael and 20% to Eva.

344 The apparent appeal of this analysis lies in the disjuncture between John and Eva's needs and the resources available to meet them. However, in circumstances where the trustee's discretion to distribute income was limited only by the requirement to consider the wishes of the Guardian (about which there was no evidence), the adoption of a needs-based analysis is, without more, insufficient to properly ground an inference that the discretion miscarried. Further, it is not merely an unreasonable result which may be evidence of a miscarriage of duty, but one which is *grotesquely* unreasonable. In the context of the relevantly absolute and unfettered nature of the trustee's discretion under sub-cl 3(i) and where Deborah received the benefit of living at the South Yarra apartment rent-free for many years, I do not consider that the result of the exercise of the trustee's discretion in 2018 can be so characterised.

345 Although the result of the trust's income distribution in 2019 on its face appears to be more unreasonable than the distribution in 2018, I am unwilling to infer that the trustee failed to exercise its discretion upon real and genuine consideration of Deborah and/or Paul's circumstances. There are two matters of principal significance. First, as I have noted, the trustee was on notice of Paul and Deborah's circumstances by the service on it of the originating motion and supporting affidavits in this proceeding. Secondly, two months before the trustee made the

169 Worth $3,837,636.82 for John and $4,568,742.25 for Eva.

income resolution for 2019, it resolved to make a capital distribution to Deborah of the South Yarra apartment which was worth $720,000. Mindful that it is not the task of the Court to examine the wisdom of the trustee's exercise of discretion, including the appropriateness and sufficiency of its enquiries or information, these matters, together with the breadth of the trustee's discretion under sub-cl 3(i), lead me to conclude that Paul and Deborah have not discharged the onus on them of establishing that the exercise of the discretion in 2019 miscarried.

Issue 8: Whether the trustee ought be removed

346 Issue 8 raises the question of whether the trustee should be removed as trustee of the trust. I will address this question having regard to the fact that Michael is and has been a director of the trustee since 20 November 2019 and Mr Sampson has purported to be the other director of the trustee since 14 December 2017.[170]

347 In closing submissions, senior counsel for Paul and Deborah clarified that her clients sought the removal of the trustee on the bases that they were successful in relation to either or both of Issues 1 and 6. They also sought removal on a third basis, namely, that the trustee is not impartial.

348 Paul and Deborah have succeeded in relation to Issue 1 and were partially successful in relation to Issue 6. Before addressing the parties' submissions on removal, I will first deal with the principles which govern the exercise of the Court's discretion to remove a trustee.

Legal principles

349 Paul and Deborah seek an order for the removal of the trustee pursuant to s 41 of the *Trustee Act 1958*.

350 Section 41 of the *Trustee Act 1958* has been described as:[171]

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170 I have earlier found however that Mr Sampson's appointment as a director was defective: see [152] above.

171 *Monty Financial Services Ltd v Delmo* [1996] 1 VR 65, 76 (Ashley J).

> … giv[ing] a power to private individuals, out of court, to appoint a new trustee where any one of a variety of circumstances is present. Those circumstances include the unfitness of the trustee to act in that office.

351 Where an allegation is made that a trustee is unfit to act, the usual course is to apply to the Court for removal of the trustee.[172] The Court has the inherent jurisdiction to remove a trustee and, under sub-s 48(1) of the *Trustee Act 1958*, has a power of appointment of a new trustee 'either in substitution for or in addition to any existing trustee …'. However, sub-s 48(1) will not ordinarily have application where, as here, the trustee is able to continue and opposes removal.[173] In that circumstance, the removal of a trustee will involve the exercise of the Court's inherent jurisdiction.

352 In his detailed consideration of s 41 of the *Trustee Act 1958* in *Monty Financial Services Ltd v Delmo*, Ashley J observed that the meaning of 'unfit' was not clear and that the limits of application of the section were not clearly defined.[174] However, his Honour referred with apparent approval to the statement in *Jacobs'* that 'it has been held in Victoria that breach of trust or neglect of duty can constitute unfitness to act'.[175]

353 Recently in *Wareham v Marsella,* the Court of Appeal, citing Ashley J in *Monty Financial Services Ltd v Delmo*, observed that the question of the removal of a trustee pursuant to the Court's inherent jurisdiction is not necessarily constrained by the concept of unfitness.[176] 'The safer guide is the requirements of the welfare of the beneficiaries'.[177] The Court referred to the seminal statement by Dixon J (with whom Evatt and McTiernan JJ agreed) in *Miller v Cameron*:[178]

> The jurisdiction to remove a trustee is exercised with a view to the interests of the beneficiaries, to the security of the trust property and to an efficient and satisfactory execution of the trusts and a faithful and sound exercise of the powers conferred upon the trustee. In deciding to remove a trustee the Court forms a judgment based

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172 *Monty Financial Services Ltd v Delmo* (n 172) 81 (Ashley J), citing *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths 5th ed, 1986) [15.17].

173 *Monty Financial Services Ltd v Delmo* (n 172) 76, referred to with approval in *Wareham v Marsella* (n 150) [100].

174 *Monty Financial Services Ltd v Delmo* (n 172) 81.

175 Ibid, citing *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths 5th ed, 1986) [15.17], citing *Willis v Stephens* [1934] VLR 19.

176 *Wareham v Marsella* (n 150) [103].

177 Ibid.

178 *Wareham v Marsella* (n 150) [103]–[104], quoting *Miller v Cameron* (1936) 54 CLR 572, 580–1.

> upon considerations, possibly large in number and varied in character, which combine to show that the welfare of the beneficiaries is opposed to his continued occupation of the office. Such a judgment must be largely discretionary. A trustee is not to be removed unless circumstances exist which afford ground upon which the jurisdiction may be exercised. But in a case where enough appears to authorize the Court to act, the delicate question whether it should act and proceed to remove the trustee is one upon which the decision of a primary Judge is entitled to especial weight.

354 The authors of *Jacobs'*, in referring to *Miller v Cameron* and *Letterstedt v Broers*, summarise the position as follows:[179]

> In cases of positive misconduct, courts of equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce courts of equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property or to show a want of honesty or a want of proper capacity to execute the duties, or a want of reasonable fidelity.[180]

355 It is not, however, a prerequisite to the exercise of the Court's inherent jurisdiction to remove a trustee that misconduct on the part of the trustee be demonstrated. Although the jurisdiction is to be exercised cautiously,[181] a lack of confidence in the trustee's further administration of the trust may be sufficient to justify their removal.[182]

356 In her summary of the principles relating to the removal of trustees at first instance in *Marsella v Wareham (No 2)*,[183] McMillan J stated that a breach of trust will not necessarily lead to the removal of a trustee.[184] *Re Wrightson*,[185] a case in which an application for removal was brought by some of the beneficiaries of a testamentary trust, was cited in support of that proposition. In that matter, the trustees' admission that they had committed a breach of trust by investing the trust estate in certain

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179 *Jacobs'* (n 43) 318 [15-85].

180 *Letterstedt v Broers* (n 180) 385, quoting Story's *Equity Jurisprudence*, section 1287; *Miller v Cameron* (n 179).

181 *Porteous v Rinehart* (1998) 19 WAR 495, 507.

182 See *Miller v Cameron* (n 179) 575 (Latham CJ), 582 (Dixon J); *Letterstedt v Broers* (n 180) 386; *Monty Financial Services Ltd v Delmo* (n 172) 78.

183 [2019] VSC 65.

184 Ibid [72]. No criticism of McMillan J's summary of principle was advanced on appeal: *Wareham v Marsella* (n 150) [102].

185 [1908] 1 Ch 789, 802–3.

securities, contrary to the terms of the trust deed, formed part of the grounds upon which removal was sought. In dismissing the application for removal, Warrington J relevantly stated, in terms consistent with the later pronouncements by Dixon J in *Miller v Cameron*,[186] that '[y]ou must find something which induces the Court to think either that the trust property will not be safe, or that the trust will not be properly executed in the interests of the beneficiaries'.[187]

357 It is relevant to identify the duties of a director of a company which acts as a corporate trustee. Those duties were described as follows by Garde AJA in *Australasian Annuities Pty ltd (in liq) v Rowley Super Fund Pty Ltd*:[188]

> … In circumstances where a company is a corporate trustee, a director acting in the best interests of the company as a whole must act in good faith to ensure that the company administers the trust in accordance with the trust deed having regard to the rights and interests of the beneficiaries of the trust. The best interests of the company as a corporate trustee are to act properly in accordance with the trust deed in managing the business of the trust and in dealing with the assets and liabilities of the trust. A director of a corporate trustee must act in good faith to ensure that the company complies with its obligations as a trustee, and properly discharges the duties imposed on it by the trust deed and by trust law generally. It is not in the best interests of the company for it to act in breach of its duties of a trustee, for the company has assumed the responsibilities of that office and must see to it that they are fulfilled.
>
> The obligation of a director of a corporate trustee is the same whether the trust is a unit trust or a discretionary trust viz to act in good faith to ensure that the company acts properly in accordance with the trust deed in administering the business, assets and liabilities of the trust. …

Lack of impartiality

358 One circumstance in which a corporate trustee may be removed from office is where it continually favours the interests of its directors over the interests of other beneficiaries, particularly where there is no reason to believe such conduct will not continue in the future. This circumstance arose in *Nicholls v Louisville Investments Pty*

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186 (n 179).

187 In *Re Wrightson* (n 186), the Court did not consider that removal of the trustees was necessary for the welfare of the beneficiaries or the protection of the trust estate because: 'the Court has now the power of seeing that the trust is properly executed'; the rest of the beneficiaries did not call for removal; and extra expense and loss to the trust estate was be occasioned by a change of trustees.

188 *Australasian Annuities Pty ltd (in liq) v Rowley Super Fund Pty Ltd* (2015) 318 ALR 302, [228]–[229] (citations omitted), cited in *Hoh v Ying Mui Pty Ltd* [2019] VSCA 203, [243].

Ltd.[189] Two trustee companies were found to be under the de facto control of two brothers. Justice Needham stated:[190]

> … The decisions as to distribution of trust income clearly indicate that the … brothers have continually made decisions favouring themselves as against the other beneficiaries. That is a clear breach of trust and there is no reason to believe that, in future years, similar decisions will not be made. While [the clause of the trust deed] gives the power to discriminate, it is, in my opinion, improper for those in control of the trustee to use that power regularly to advance their own interests. As no evidence was given by any of the … brothers seeking to justify this conduct, or, in the alternative, proposing future conduct which would not discriminate in their favour, there seems to me to be no alternative to the removal of the trustees and the appointment of an independent trustee.

359 Another case in which a trustee was removed because of a lack of impartiality was *Re Whitehouse* which concerned two trusts of which a married couple were the trustees and in relation to which their two adult sons were the beneficiaries.[191] The trust deed ultimately provided the father with extensive control over the trust. The relationship between the father and his sons deteriorated and the sons applied for the trustees to be removed. Shortly before the trial of the proceeding, the father replaced his wife as a trustee with his accountant, due to his wife's lack of capacity.

360 Justice Macrossan found that the attitude of the accountant trustee 'indicates that he was then taking his cue from others and was opting for a policy of obstruction, or, at least, non-cooperation with the beneficiaries, rather than providing them with the fullest measure of response'.[192] His Honour found that the accountant's justifications offered for his actions while giving his evidence 'showed something less than a willingness to bring to bear a full and fair appreciation of the beneficiaries' position and their entitlements'.[193] Although Macrossan J considered the accountant to be competent, he 'regarded himself as obliged to side with the existing trustee and support him' and as a result, '[h]e has failed to show the degree of detachment and that impartiality between existing trustee and beneficiaries which one would

189 (1991) 10 ACSR 723.
190 Ibid 728.
191 *Re Whitehouse* [1982] Qd R 196.
192 Ibid 201.
193 Ibid.

prefer'.[194] An order was made setting aside the appointment of the accountant as trustee.

361 Justice Macrossan considered that the personal disputes and animosity between the father and sons did not of themselves constitute sufficient ground for removal. However:[195]

> [T]he disputes and the state of animosity which exists have been attributable to [the father] to an extent sufficient to make me apprehensive as to his future administration of the trust. I think that he has carried over his attitude as dictatorial controller of the companies to his character as trustee and on the material before me I do not think he is capable of remedying the situation in the future.

His Honour ordered that an independent trustee be appointed.

Submissions on removal

Paul and Deborah's submissions

362 Paul and Deborah submitted that, because Mr Sampson was the author of the variations, given my findings in relation to Issue 1, he caused the trustee to execute deeds of variation which were beyond power and as such he ought not be allowed to act as a director of the trustee. They contended that it could not be said that he would properly administer the trust in the future.

363 As to the trustee's failure to give real and genuine consideration to whether or not to exercise its discretion in making an income distribution to Deborah or Paul in 2015, 2016 and 2018, Paul and Deborah submitted that the trustee was failing in what *Jacobs'* describes as '[p]erhaps the most important duty' to adhere rigidly to the terms of the trust.[196]

364 Paul and Deborah also submitted that the trustee should be removed because Michael and Mr Sampson have demonstrated a lack of impartiality and an inability

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194 *Re Whitehouse* (n 192) 207.
195 *Re Whitehouse* (n 192) 206.
196 *Jacobs'* (n 43) 338 [17.04], citing *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484, [32].

to fairly and properly consider Paul and Deborah's interests. They relied on the following matters:[197]

(a) The delays in transferring the South Yarra apartment to Deborah and Mr Sampson's view that her acceptance of the transfer was 'grumbling', bad-tempered and ungracious.[198] Paul and Deborah submitted that one reason Mr Sampson had not yet completed the distribution of the apartment was because of this view about the tone of Deborah's solicitor's letter and that this was not the behaviour of an independent trustee.

(b) The circumstances of at least one phone call made by Michael to Deborah while she was at the South Yarra apartment on 5 December 2019. On that day, Deborah had returned home from hospital after undergoing surgery to remove part of her liver. Her evidence was that she received several silent phone calls which made her feel anxious. Michael's evidence was that he rang Deborah once and did not speak when she answered the phone. He denied making more than one call. He gave evidence that he called Deborah because he had been told that she was in hospital which he did not believe to be true. Although he did not intend to be threatening in making the call and rejected the proposition that he was hostile towards Deborah, Michael accepted in his evidence that he could see how his call might be interpreted as threatening. Paul and Deborah submitted that Michael's evidence, including his demeanour, which established that he made a silent phone call to Deborah after her release from hospital, gives no confidence that, as a director of the trustee, he would give appropriate consideration to Deborah's circumstance and approach his task impartially in the future.

(c) The belated provision of the trust deed and trust documents to Paul,[199] in

197 They also relied on the 2019 ratification of the 2017 variation as indicating that the trustee was incapable of acting impartially. I have already rejected the substance of this submission at [125] above.

198 See [246]–[247].

199 See [221] above; the documents were provided in November 2017, nearly 12 months after Paul's request.

circumstances where Mr Sampson was acting on behalf of John and Eva in relation to Paul's request for trust documents and was aware of Paul's entitlement as a beneficiary to have access to these documents. Reliance was also placed on the refusal to supply Paul with documents related to the trust as far back as 2006 which were sought by Paul in the context of his divorce proceeding. It was submitted that Mr Sampson had demonstrated a lack of impartiality by his acceptance of instructions from Eva over more than a decade in refusing to provide Paul with trust documents to which he knew Paul was entitled as a beneficiary. It was also said to be notable that Mr Sampson did not seek instructions from anyone as a director of the trustee; the instructions to refuse came from Eva, and the correspondence pursuant to which the trust deed was finally provided to Paul was written by Mr Sampson as acting for Eva and John.

(d) The fact that Michael sought to be joined as a party to the proceeding (which was originally only brought against the trustee) because of the 'close bond' he had with his parents and because he wanted to be 'some sort of voice for them'.

(e) Alleged fundamental misunderstandings by Michael and Mr Sampson about the duties of trustees, such that they are unable to impartially consider Paul and Deborah's circumstances. Three misunderstandings were alleged:

(i) Mr Sampson's statement in the proposal he gave to John and Eva on 14 December 2017[200] that '[c]ontrol of the trust rests with the Appointor and Guardian of the trust' when in fact control of the trust assets lies with the trustee;

(ii) Mr Sampson's view that whether a beneficiary has asked for a distribution is relevant to the trustee's decision regarding the distribution of income; and

200 See at [113] above.

(iii) Michael's evidence that, when on 17 June 2019 he signed, purportedly as Guardian, the minute of resolution providing for the distribution to John of all of the trust's income for the year, he did so because that was what John wanted.

365 Paul and Deborah submitted that the trust had not been administered for the benefit of the beneficiaries; the trust's assets and income had instead been treated as belonging to John, Eva and Michael. In support of this argument, they referred to Mr Sampson's evidence that, if the Appointor was changed, John and Eva 'were the ones at risk if they hand over *their* effective ultimate control of *their trust* to someone else'.[201] They also relied on the trustee's continued application of a 40/20/40 formula[202] for the distribution of income between 2011 and 2018, even though John, Eva and Michael were spending very little of the money distributed to them with the income distributions simply being retained in the trust's ever-increasing loan accounts. They also referred to John's evidence that '[t]he assets were acquired and developed by Eva and myself' as disclosing a fundamental misunderstanding on his behalf about the nature of a trust. It was submitted that these matters meant that there was no basis to think that, in the future, the assets of the trust would be held and dealt with for the benefit of all objects.

366 It was also submitted by Paul and Deborah that Mr Sampson and Michael did not properly understand the duties of a trustee. In addition to the matters referred to in [364(e)], they referred to the South Yarra apartment, as an asset of the trust, being treated with 'gross neglect' over decades, despite Deborah's request for repairs as long ago as 2004. Following his appointment, Mr Sampson had not taken any steps to ascertain the state of the apartment as trust property. Reference was also made to Mr Sampson's realisation under cross-examination that the effect of the decision to distribute the South Yarra apartment to Deborah was that the trustee now holds the apartment on a separate trust for Deborah. In an affidavit sworn by him before trial,

201 Emphasis added by Paul and Deborah.
202 As between John, Eva and Michael respectively.

the apartment was listed as a trust asset. Mr Sampson acknowledged this to be a misunderstanding on his behalf.

367 In the context of the substantial value of the assets held by the trust, Paul and Deborah also criticised Mr Sampson's refusal for the trust to pay Deborah's legal costs for the conveyance of the apartment, despite Mr Sampson's evidence that those costs could be as little as $500. This was also said to be consistent with the lack of impartiality in the trustee's approach to administering the trust.

368 Paul and Deborah criticised the trustee for its approach to this proceeding in failing to acknowledge the claimed 'objective facts' regarding the lack of income distribution resolutions between 2010 and 2017. By seeking to 'reconstruct' events in a manner which was asserted to be inconsistent with the trust's own accountant, Mr Dexter, the trustee had shown itself not to be impartial and incapable of acting in good faith in the future.

369 Referring to the statement by Garde AJA in *Australasian Annuities Pty Ltd (in liq) v Rowley Super Fund Pty Ltd*,[203] Paul and Deborah submitted that the conduct of Michael and Mr Sampson cannot give the Court any confidence that they are capable of acting in good faith 'to ensure that the company administers the trust in accordance with the trust deed'.

Trustee and Michael's submissions

370 As to Paul and Deborah's reliance on their success in respect of Issue 1, the trustee submitted that the ineffectiveness of the variations does not of itself involve a breach of trust, particularly given that the trustee acted on the advice of Mr Sampson that the trust deed provided for a power to amend in the manner contemplated by the variations.

371 More generally, the trustee submitted that it was significant that its affairs have always been conducted by natural persons. To the extent that the trustee acted in

203 See [357] above.

breach of trust before December 2017 when Mr Sampson was purportedly appointed as a director of the trustee during which time John and Eva conducted the affairs of the trustee, it is significant that neither John nor Eva remain as directors and that the directors now include Mr Sampson, a legal practitioner of many years' experience in the field of trust law and someone who is not an object of the trustee's discretionary powers of income or capital distribution.

372 The trustee laid emphasis on the fact that, in April 2019, it had exercised its discretion to make a capital distribution of the South Yarra apartment to Deborah. This was said to demonstrate that the trustee, under the directorship of Mr Sampson and Michael, would be willing to make further discretionary distributions of capital or income to Deborah.

373 The trustee also argued that, even if the Court found that there had been a breach of trust, there was no evidence to suggest that the current directors would act capriciously in making income resolutions, nor any evidence to suggest that they would not give genuine consideration to all of the beneficiaries. The trustee referred to Michael's evidence that, in making future distributions of income from the trust, he would make enquiries of Paul and Deborah's circumstances (in his capacity as Guardian). The trustee also relied upon Mr Sampson's evidence that the purpose of the trust was that it 'may provide some income to the beneficiaries in accordance with the resolutions of the trust deed'.

374 The trustee submitted that there is no evidence that it will not execute and administer the trust properly in the future. The likelihood of a repeated breach of trust occurring, given the changing control of the trustee with the deaths of Eva and John, was said to be minimal.

375 Although Michael did not advance any submissions on the question of removal *per se*, he did submit that disproportionate significance had been attributed to the silent phone call made by him to Deborah on 5 December 2019. Counsel emphasised Michael's evidence that he only telephoned Deborah once and that the call was

motivated by scepticism about something he had been told. It was said to be a small incident which had been given an undeserved weight by Paul and Deborah in their submissions.

Consideration

376 A number of the matters raised by Paul and Deborah give rise to reservations about the suitability of the trustee continuing in office. However, upon analysis, those reservations are not of such a degree and character to cause me to lose confidence in the trustee's *future* administration of the trust having regard to the interests of the beneficiaries, the security of the trust property, the proper execution of the trust and the faithful and sound exercise of the powers conferred on the trustee.

377 As the trustee submitted, an important feature of this case is that its affairs have always been conducted by those natural persons who have held office as directors of the trustee. The identity of those persons has changed from time to time. At the outset, it is important to consider the breaches of trust which I have found by reference to this feature.

378 In relation to Issue 1, the trustee executed three deeds of variation which were beyond its power. In doing so, the trustee acted contrary to the trust deed and thereby committed a breach of trust in purporting to make each of the variations. Because Michael did not become a director of the trustee until 20 November 2019, these breaches do not raise any question about his suitability as one of the natural persons now in control of the trustee.

379 Mr Sampson is, however, in a different position. He prepared each of the variations and purported to sign the 2017 variation as a director of the trustee. It is therefore the case that, in purporting to act as a director of the trustee in relation to the 2017 variation, Mr Sampson failed to ensure that the trustee administered the trust in accordance with the trust deed. This is a matter which weighs in favour of the trustee's removal. However, without more, this conduct does not lead me to conclude that the trust property will not be safe or that the trust will not be properly executed in the interests of the beneficiaries. Mr Sampson acted on an erroneous

view about the trustee's power to vary the trust deed. However, as is apparent from the submissions advanced in this case, it must be acknowledged that the extent and nature of the trustee's powers of variation under the trust deed is not without complexity. Further, it cannot be said that Mr Sampson acted other than in good faith in relation to the variations.

380 In relation to my findings in respect of Issue 6 that the trustee failed to give real and genuine consideration to Paul and Deborah in determining income distributions in 2015, 2016 and 2018, on the question of removal, because John and Eva were the directors of the trustee in 2015 and 2016 and are no longer alive, it is the breach in 2018 which is of particular significance. Mr Sampson purported to be a director of the trustee in 2018 and I have found that, when exercising its discretion to make income distributions that year, the trustee failed to give real and genuine consideration as to whether or not to make a distribution to Deborah. That is a matter which weighs in favour of the trustee's removal.

381 The significance of this failure on the question of removal is however diminished by two factors. First, my rejection of the claim that the trustee failed to give real and genuine consideration to Paul and Deborah in determining income distributions in 2019 indicates that the trustee's failure in 2018 has not continued into the period of Michael and Mr Sampson's directorships. Secondly, it is of particular significance that, in April 2019 when Mr Sampson purported to act as a director of the trustee together with John, the trustee resolved to make a capital distribution of the South Yarra apartment to Deborah. In light of this fact, there is no proper basis to find that there is a real risk or likelihood that the trustee will not make further discretionary distributions of capital or income to Deborah.

382 The making of the capital distribution of the South Yarra apartment to Deborah is also important because it overshadows and contextualises the claim that Mr Sampson and Michael are incapable of bringing an impartial mind in their roles as directors of the trustee. Before explaining that proposition, it is important to first note that, in my view, many of the complaints made by Paul and Deborah about

Michael and Mr Sampson's claimed lack of impartiality were either not supported by the evidence, were of minor significance, or were overstated.

383 Contrary to Paul and Deborah's submission, the evidence does not support a finding that one reason for the delay in the transfer of the South Yarra apartment was because of Mr Sampson's adverse view about the tone of Deborah's solicitor's letter. I accept Mr Sampson's evidence for the reasons for that delay.

384 As to the belated provision of trust documents to Paul, two points may be made. First, the delays occurred in a period prior to when Mr Sampson and Michael commenced acting as directors of the trustee. Secondly, although Mr Sampson was involved in this earlier period in the communications with Paul and his representatives about the production of documents, his involvement was as Eva's (or Eva and John's) solicitor. His evidence was that Eva – his client – did not want to supply the documents to Paul and that the documents would only be produced on subpoena. That view reflects adversely on Eva's, rather than his, view about the duties of a trustee.

385 Although some criticisms can properly be levelled at Mr Sampson about his approach to and discharge of his duties as a director of the trustee,[204] their significance on the question of removal should not be overstated, particularly as I do not accept that his evidence disclosed fundamental misunderstandings on his behalf about the duties of trustees. In particular, Paul and Deborah's reliance upon a statement by Mr Sampson that 'control of the trust assets rests with the appointor and guardian' is taken out of context and ignores Mr Sampson's evidence on this topic in cross-examination.

386 I do, however, accept that, viewed in isolation, some of the specific complaints advanced by Paul and Deborah in support of the claimed lack of impartiality do provide a proper basis for concern about the capacity of Michael and Mr Sampson to

204 In particular that he did not ascertain the state of the South Yarra apartment after his appointment as a director of the trustee and misunderstood, which he frankly acknowledged in his evidence, the status of the South Yarra apartment following the resolution to transfer it to Deborah.

discharge their duties impartially. Mr Sampson's characterisation of Deborah's solicitor's acceptance of the transfer of the South Yarra apartment as being 'grumbling', bad-tempered and ungracious, does not speak of a moderate and detached attitude by a trustee towards a beneficiary. Similarly, his refusal for the trust to pay Deborah's legal costs for the conveyance of the apartment which he considered could be as little as $500 might be said to confirm a lack of impartiality on his behalf. In relation to Michael, his conduct in making at least one silent phone call to Deborah after her release from hospital is conduct which, looked at in isolation, is not fitting of a person charged with administering a trust for the benefit of persons including Deborah and does legitimately give rise to a concern about his capacity to impartially discharge his office as a director of the trustee.

387 However, care must be taken to not unduly exaggerate the significance of each of the above fairly minor separate incidents and reactions. Their significance on the question of impartiality must also be viewed in context. In that regard, their collective significance is diminished when regard is had to the trustee's resolution in April 2019 to transfer the South Yarra apartment to Deborah. The transfer of an asset worth in excess of $700,000 to a beneficiary provides me with a measure of confidence that, despite the apparent tensions and difficulties which have characterised the relations between Paul, Deborah and Michael over the years, the trustee is nonetheless capable of properly administering the trust now and into the future.

388 For these reasons, having regard to the grounds for removal relied upon by Paul and Deborah considered independently and collectively by reference to the circumstances of the case, on balance, the welfare of the beneficiaries of the trust is not opposed to the trustee's continued occupation of office.

Issue 9: Whether Michael ought be removed as Guardian and Appointor

389 Michael only holds the office of Guardian and Appointor if the 2010 variation or the 2017 variation are valid. Because I have found in Issue 1 that those variations are invalid, this issue accordingly does not arise for determination.

390 If, however, I am wrong in my conclusion in respect of Issue 1 and Michael holds the office of Guardian, I do not consider that, in the circumstances of the trust, the Court has power to remove him from that position. In *Blenkinsop*,[205] the Court of Appeal of Western Australia proceeded on the basis that the Court only has power to remove a Guardian if the Guardian has a fiduciary power.[206] I respectfully agree with the analysis and approach adopted by the Court of Appeal. In this matter, Paul and Deborah have not contended that the Guardian's role and powers under the trust deed are of this character. Accordingly, they have failed to establish that the Court has power to remove Michael as Guardian.

391 Given the above matters, it is unnecessary for me to address the evidentiary basis[207] upon which Paul and Deborah submitted that Michael should be removed as Guardian and Appointor.

Disposition

392 The parties are to confer about the form of orders to be made giving effect to these reasons and are to submit minutes of proposed orders within 14 days. The proceeding will then be listed for further directions.

393 The parties are also to confer about the terms of any orders which may be made in relation to costs. In the event that there is no agreement in respect of costs, the parties may submit submissions on costs, limited to 10 pages, within 14 days.

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205 (n 75).

206 Ibid [75], [89].

207 Namely, an allegation by Deborah, denied by Michael, that, in late 2012, Michael told her that he had been appointed to a role in relation to the trust, that she would never receive a distribution from the trust and that he did not want her to continue to be on the owners' corporation committee for the South Yarra apartment.