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Not such massively discretionary trusts: Proper purposes doctrine and protectors as means of control

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Not such massively discretionary trusts: Proper purposes doctrine and protectors as means of control

Man Yip* **and Tang Hang Wu** **

1. INTRODUCTION

Innovation in drafting trust deeds has been central to international trust practice resulting in the discretionary trusts being the norm in modern wealth management.[1] In a seminal article, Lionel Smith observes that these trust drafting practices have 'led to an increase in the dispositive discretions held by trustees'.[2] His analysis deprecates this development where the 'trustees' dispositive discretions effectively govern the whole trust structure'—which he labels 'massively discretionary trusts'.[3] Smith goes on to detail the various legal risks entailed in massively discretionary trusts which generally arise from the fact that the explicitly identified residuary or default beneficiaries are usually not the persons who will actually benefit under the trust. Specifically, he asserts that the wide dispositive discretions (which includes the discretion to add objects to the class) given to the trustees effectively confer upon them the power to

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1 See Tang Hang Wu, 'From Waqf, Ancestor Worship to the Rise of the Global Trust: A History of the Use of the Trust as a Vehicle for Wealth Transfer in Singapore' (2018) 103 *Iowa Law Review* 2263, 2284–90; Tang Hang Wu, 'Teaching Trust Law in the Twenty First Century' in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press 2010) 125, 129–32.

2 Lionel Smith, 'Massively Discretionary Trusts' (2017) 70 *Current Legal Problems* 17.

3 *Ibid.*

give the trust assets to whomever they wish, but with scant guidance on how that power is to be exercised and for what purpose.[4] Although 'massively discretionary trust' is not a term of art, the label, which has a marked pejorative undertone, has caught on in academic literature with some leading academics expressing similar concerns as to their validity and legitimacy.[5] For instance, proceeding from the normative foundation that trusts are 'founded on [their] autonomy-enhancing service', Dagan and Samet argue that what is '*inherently* scandalous' about 'massively discretionary trusts' is that they are abuses of the trust because they undermine instead of enhancing the trust's autonomy-enhancing function.[6] Further, they surmise that the appointment of a protector is one of the means by which a settlor '[pressurises] the trustee to submit the absolute discretion given on paper to the wishes of the settlor'.[7]

The narrative of the massively discretionary trusts adds to a broadly negative public perception of the trust—one that is skewed and 'exacerbated by media coverage of only the high-profile tax avoidance and money laundering cases and the sense that they are shrouded in secrecy and therefore something to be regarded with suspicion'.[8] This narrative risks undermining the social utility and value of the private trust, especially because 'quantified, empirical evidence' about its economic and social benefits is not readily available.[9] This is in sharp contrast to the readily available evidence of a few cases of abuse of trust or trustee's powers that have seized public attention.[10] Pertinently, we believe that discretionary trusts that are properly structured and subject to appropriate regulatory control are valid succession planning devices—which are essentially 'a gift, projected on the plane of time and so subjected to a management regime'.[11] Related to this, we should like to address one further criticism: the trust industry has often been criticised as enabling wealthy individuals to engage in tax avoidance[12] which is legal but viewed by tax justice

4 *Ibid*, 44–45. Smith also points out (at 45–46) the difficulty with the trustees having to take into account the settlor's wishes when exercising their discretion and the problem that the settlor's wishes may change over time.

5 See, for eg, James Penner, 'Justifying (or Not) the Office of Trusteeship with Particular Reference to Massively Discretionary Trusts' (2021) 35 *Canadian Journal of Law & Jurisprudence* 365; Mark Bennett and Adam Hofri-Winogradow, 'The Use of Trusts to Subvert the Law: An Analysis and Critique' (2021) 41 *Oxford Journal of Legal Studies* 692, 697–98.

6 Hanoch Dagan and Irit Samet, 'What's Wrong with Massively Discretionary Trusts' (2023) 138 *Law Quarterly Review* 624.

7 *Ibid*, 627.

8 Robert Carington, 'STEP's "Evidencing the Social and Economic Benefits of Trusts" Report' *IFC Review* (12 January 2022) <https://www.ifcreview.com/articles/2022/january/step-s-evidencing-the-social-and-economic-benefits-of-trusts-report/>.

9 Carington (n 8). For an attempt to draw together the evidence and research about the social benefits of trust, see STEP, 'Evidencing the Social and Economic Benefits' Report (2021) <https://www.step.org/system/files/media/files/2021-04/step_trust_report_280421.pdf>. Cf. See Adam Hofri-Winogradow, 'Trust Proliferation: A View from the Field' (2017) 31 *Trust Law International* 152 for valuable empirical work on modern trust practice surveying 409 trust service providers in 82 jurisdictions.

10 Carington (n 8).

11 Bernard Rudden, 'Book Review' (1981) 44 *Modern Law Review* 610. See also Ying Khai Liew, 'Justifying Anglo-American Trusts Law' (2021) 12 *William & Mary Business Law Review* 685.

12 We are grateful to the reviewer for making this perceptive point to us.

advocates as immoral. This raises an extremely tricky issue of whether it is legitimate for a taxpayer to be entitled to arrange his or her affairs in order to pay a lower tax.[13] Our view is that for individuals, the case based on morality, is not conclusive and the assumption made in this article is that it is legitimate for people to arrange their affairs to minimise their tax obligations.[14] In our view, fully compliant taxpayers have a right to arrange for succession planning and keep their affairs private to the extent that there is no tax evasion at stake.[15]

Crucially, the narrative of untrammelled discretion within modern trust structures fails to fully acknowledge the practical[16] and doctrinal controls on the trustee's exercise of powers embedded within contemporary trust deeds. This article seeks to present a nuanced picture of the modern discretionary trust by showing that the trustees' discretions are not at large in practice, by analysing four recent decisions that demonstrate the court's readiness to review and control trustee's exercise of powers (dispositive or administrative). First, in a landmark judgment, the Privy Council in *Grand View Private Trust Co Ltd v Wong*[17] limited the trustee's power to add and remove beneficiaries based on the proper purpose rule. Second, the High Court in the Isle of Man subjected the trustee's power to appoint a protector in *Mazzoleni v Summerhill Trust Company (Isle of Man) Ltd*[18] to rigorous judicial scrutiny. Finally, the last group of cases concerns two decisions that took diametrically opposite views as to the role of a protector in its exercise of veto power over a trustee's proposed exercise of power: *In the Matter of the Piedmont Trust & Riviera Trust*;[19] and *Re The X Trusts*.[20] The four cases, read together, demonstrate a deep-seated judicial concern to prevent abuse of trust arrangements in many jurisdictions. They further underscore the importance of thoughtful drafting to ensure the proper governance of modern trust structures.

13 For an overview of the debate see Allison Christians, 'Avoidance, Evasion, and Taxpayer Morality' (2014) 44 *Washington University Journal of Law and Policy* 39. The solution is the adoption of some supranational tax harmonization measures. This has happened in the corporate sphere but not for private individuals. We are grateful to the reviewer for making this perceptive point to us.

14 See *Helvering v Gregory* 69 F.2d 809, 810 (2d Cir. 1934); *Inland Revenue Commissioners v Duke of Westminster* [1936] 1 AC 1.

15 Filippo Noseda, 'Caught in the Crossfire Between Privacy and Transparency' (2016) 22 *Trusts and Trustees* 599.

16 First, the settlor should exercise due diligence in the selection of trustees especially professional trustees. Second, the settlor could guide (and therefore restrict) the trustees' exercise of discretion through a well drafted letter of wishes, which the trustees have to consider in their decision-making. In appropriate circumstances, the trustees may depart from the letter of wishes. Finally, where professional trust companies are appointed as trustees, being businesses and subject to regulatory control in well-regulated jurisdictions, these companies have an incentive to act diligently and professionally in order to maintain or advance their industry reputation.

17 [2022] UKPC 47, [2023] 2 LRC 559.

18 (2021) 2 DS 2021/3.

19 [2021] JRC 248.

20 [2023] CA (Bda) 4 Civ.

2. COURTS AND TRUSTS

The four decisions examined in this article are to be appreciated as part of the unique relationship between courts and trusts—that is, the court has inherent jurisdiction over the administration of trusts. In *Public Trustee v Cooper*,[21] Hart J recognised 'at least four distinct situations' in which a court may deal with the exercise of trustees' powers as part of the court's inherent jurisdiction:[22] (a) a question of construction as to whether the trustee's proposed action falls within the trustee's powers; (b) an application by the trustee to the court for a blessing on a momentous action; (c) a surrender of discretion to the court (eg where the trustees are honestly deadlocked or the trustees are conflicted to act); and (d) where trustees' actions are subject to attack in hostile litigation. These four situations do not exhaust the full scope of the court's inherent jurisdiction.

This vital and well-established jurisdiction has, however, escaped extensive academic scrutiny until recently,[23] resulting in a skewed perception that in modern discretionary trusts the discretion is at large resulting in the creation of massively discretionary trusts. In reality, professional trustees in making momentous decisions often resort to a 'blessing' application in court. The court's inherent jurisdiction, taken together with the doctrinal techniques that control the trustee's exercise of dispositive powers and momentous decisions,[24] ensures that the court has means of control over the execution of the trusts, even if the default beneficiaries of the trust are never meant to receive any benefit under the trust. This is because the objects of these fiduciary powers have *standing* to invoke the court's inherent jurisdiction to enforce a right of due administration.[25] In appropriate circumstances, the court may appoint new trustees, ask for a preparation of a scheme of distribution and even direct the trustees to distribute the trust property.[26] These means of control, as in any area of law, do not however mean that there are no flagrant trustee abuse in exceptional cases or that there are no practical risks entailed in the extensive use of dispositive fiduciary

21 [2001] WTLR 901.

22 1999 WL 1425717.

23 See, for eg, Richard Nolan, '"The Execution of a Trust Shall Be under the Control of the Court": A Maxim in Modern Times' (2016) 22 *Canadian Journal of Comparative & Comparative Law* 469; Daniel Clarry, *The Supervisory Jurisdiction over Trust Administration* (Oxford University Press 2018); Richard Nolan, 'Invoking the Administrative Jurisdiction: The Enforcement of Modern Trust' in Paul S Davies and James Penner (eds), *Equity, Trusts and Commerce* (Hart Publishing 2019) 151.

24 See generally Richard Nolan, 'Controlling Fiduciary Power' (2009) 68 *Cambridge Law Journal* 293. Nolan helpfully identifies three categories of techniques to control fiduciary's exercise of powers: (a) doctrines that limit the scope of the power; (b) doctrines that examine the decision-making process of a fiduciary; and (c) doctrines that consider the fiduciary's competence in the exercise of the relevant power. These three techniques furnish the substantive bases for challenging a trustee's decision.

25 Nolan, 'Invoking the Administrative Jurisdiction' (n 23) 159–68. See also Jessica Hudson, 'Mere and Other Discretionary Objects in Australia' in Ying Khai Liew and Matthew Harding (eds), *Asia-Pacific Trusts Law: Volume 1: Theory and Practice in Context* (Hart Publishing 2021) 19.

26 *McPhail v Doulton* [1971] AC 424, 457.

powers in settlements.[27] Importantly, the court's exercise of inherent jurisdiction proceeds on a pragmatic and balanced approach in protecting the interests of those who stand to benefit under the trust. Whilst recognising that the 'economically and socially significant beneficiaries'[28] (ie the true objects of the fiduciary powers) have some kind of interest and therefore have *locus standi* to bring a claim, the court is not obliged to allow the claim. As the Privy Council said in *Schmidt v Rosewood*, in the context of an application to court for the disclosure of information, the court will not hesitate to deny the claim where the object only has 'a theoretical possibility of benefit'.[29]

We now turn to consider the four cases each in turn.

3. THE PROPER PURPOSE DOCTRINE

3.1. Grand View Private Trust

Powers held by trustees of discretionary trusts must be exercised for proper purposes.[30] The Privy Council's decision of *Grand View Private Trust*[31] (on an appeal from Bermuda) have breathed new life into the proper purpose doctrine in relation to discretionary trusts. The main issue was whether the trustee acted for proper purposes when it did the following acts:

i Excluding all the settlors' children which hitherto comprised the entire class of discretionary objects while simultaneously adding a purpose trust as an object.
ii (i) was immediately followed up by the trustee appointing the whole trust fund to the purpose trust.
iii All this was done pursuant to the settlors' wishes that were expressed subsequent to the execution of the trust deeds.

The settlors were Taiwanese billionaires, YC Wang and YT Wang, the founders of Formosa Plastics Group ('FPG'). YC Wang died in 2008 whereas YT Wang died in 2014. Prior to their demise, they declared two Bermudan trusts on 10 May 2001. The first trust was known as the Global Resource Trust No 1 ('the GRT') which held shares in FPG via an investment company. These shares were worth around US$ 560 million.

27 Nolan, 'Invoking the Administrative Jurisdiction' (n 23) 166. For example, the trustees may not 'properly understand or properly use their powers' or the objects see no practical reason to use their standing to invoke the court's inherent jurisdiction.

28 Ibid.

29 [2003] UKPC 26, [2003] 2 AC 709 [67]. See also Lusina Ho, 'Trustees' Duties to Provide Information' in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press 2010) Ch 15.

30 See Nolan, 'Controlling Fiduciary Power' (n 24); Jessica Hudson, 'One Thicket in Fraud on a Power' (2019) 39 *Oxford Journal of Legal Studies* 577; Graham Virgo, 'Abuse of Trust' in Richard Nolan, Man Yip and Tang Hang Wu (eds), *Trusts and Private Wealth Management* (Cambridge University Press 2022) Ch 15.

31 (n 17).

The GRT gave the trustee the discretionary power to apply the whole or part of the capital and income of the fund for the benefit of '[t]he children and remoter issue of Y.C. Wang and the children and remoter issue of Y.T. Wang' during the trust period of 100 years. At the expiration of the trust period of 100 years, the trust deed provided for the remaining trust fund to be divided among the children and issue of YC Wang and YT Wang who shall then be living. Under Clause 8, the trustees had the power to add or exclude from this class 'any person or class or description of persons'. The second trust, declared on the same day, was the Wang Family Trust ('the WFT'). This was a purpose trust which did not confer benefit on members of the Wang Family but was intended to further a mixture of charitable and non-charitable purposes. These purposes included holding and acquiring FPG shares to ensure the continued prosperity of FPG and providing 'mutual assistance to mankind and help to those in need'. Under Bermudian law non-charitable purpose trusts were valid.[32] The WFT held FPG shares worth over US$ 3.5 billion.

The trustees for the GRT and WFT were private trust companies run by some of the children of YC Wang and YT Wang. While separate entities, the trustee companies had common directors comprising Susan Wang and Sandy Wang (daughters of YC Wang) and several others. The Privy Council noted that between YC Wang and YT Wang, they had 17 children. Rather tactfully, the judgment noted that the settlors' 'immediate families are complex and extensive'.[33] In our exploration of the ramification of this case, we will return to the theme of the complexity of the Wang family.

Susan Wang gave evidence on the circumstances pursuant to which the GRT and WFT were declared, and her account was assumed to be true. Neither settlor intended FPG shares to form part of the estate on his death. Instead, they wished the shares to be applied towards the perpetuation of FPG and fulfilment of their keen desire and vision of giving back to society.[34] The trusts were declared following many months of discussion involving New York and Bermudian lawyers, which resulted in the structuring of the GRT to benefit children of YC Wang and YT Wang and the WFT was to be a purpose trust with one of the primary purposes to ensure the perpetuation of the success of the FPG.

A mere four years later, in September 2005, the GRT trustee resolved to exercise the powers to add and exclude discretionary objects and to appoint the entire fund to the trustee of the WFT. YC Wang's and YT Wang's children and remoter issue were effectively excluded (the challenged decision). Again, Susan Wang gave evidence as to the context. YC Wang had allegedly told her that it would be damaging to the public's confidence in FPG if the settlors relinquished most of their shareholdings in FPG. Since the settlors would retain their shareholdings in FPG, this meant that when they died, their

32 See Kelvin Low 'Non-Charitable Purpose Trusts: The Missing Right to Forego Enforcement' in Richard Nolan, Kelvin Low and Tang Hang Wu (eds), *Trusts and Modern Wealth Management* (Cambridge University Press 2018) Ch 16 for a critique of the non-charitable purpose trust.

33 *Grand View Private Trust* (n 7) [8].

34 *Ibid*, [9].

heirs would inherit wealth that exceeded the amount in GRT. Hence, the settlors concluded there was no longer a need for the GRT.

Dr Winston Wong (also known as Wong Wen-Young), the eldest son of YC Wang, and, Riley Wong, YC Wang's grandson commenced proceedings alleging *inter alia* that the challenged decision was in excess of the GRT trustee's power because it was taken for an improper purpose of excluding the children and issue in favour of the WFT. This challenge was heard on a summary judgment basis. Lord Richards (with whom Lord Hodge, Lord Sales, Lord Burrows, and Lady Rose agreed) helpfully set out the basic principles:

i the proper purpose is 'to be determined as at the date of the instrument conferring the power and is to be objectively determined';[35]
ii 'it is a question of determining objectively the intention of the settlor';[36]
iii documents which objectively inform the context of the instrument such as the trust deed and substantially contemporaneous documents such as the letter of wishes are admissible;[37]
iv the parties proceeded on the common ground that while trustees could legitimately have regard to the wishes later expressed by the settlor as to how the trustees should exercise their dispositive powers, such subsequent wishes were not admissible in determining the purpose of those powers;[38] and
v 'the intention of settlor in conferring a power is to be ascertained by applying ordinary rules of construction to the trust deed and in light of the admissible factual matrix.'[39]

The central issue concerned the construction of clause 8 of the GRT deed pursuant to which the trustee may declare 'any person or class or description of persons' to be included or excluded as a beneficiary. 'Person' is defined as including 'any individual, company, partnership and unincorporated association and any person acting in a fiduciary capacity'. The nub of the matter was this: does the term 'person' include the WFT which is a non-charitable purpose trust? Or is the GRT a discretionary trust meant for individuals? The Privy Council held that this was a family trust for the benefit of the settlors' descendants and the power had been exercised for improper purposes. Several factors persuaded the Board to reach this decision. First, the specified objects of the discretionary dispositive powers were the settlors' children and remoter issue. Second, the ultimate beneficiaries after the trust period were the settlors' descendants. Agreeing with the challengers' counsel, the Board said, 'real thought had gone into the way in which the trust fund

35 *Ibid*, [61].
36 *Ibid.*
37 *Ibid*, [63].
38 *Ibid.*
39 *Ibid.*

should be distributed on the termination of the trust'.[40] Third, the recital referred to the GRT as a 'private express trust' in contrast with the WFT trust deed. Fourth, the trustee's remuneration clause envisaged remuneration to be agreed with the trustee and adult beneficiaries. Hence, the Board concluded it was not envisaged that the GRT would have no individuals as beneficiaries. Finally, Clause 19, which excludes community property rules, served to emphasise the nature of GRT being for the benefit of individuals.

Lord Richards thought the language of the trust deed was consistent with a narrower identification of the purpose of the powers which is in turn consistent with the family nature of the trust to benefit all or some of the beneficiaries. He observed: [41]

> Examples of additions which could benefit one or more existing Beneficiaries are spouses, other dependents, unmarried partners, stepchildren, and other individuals to whom a moral duty may be owed by one or more Beneficiaries. Other examples include charities or other organisations to which a Beneficiary owes a moral obligation …

Thus, the Privy Council held that the 'purpose of the powers of addition and exclusion was to further the interests of the Beneficiaries, or one or more of them'.[42] In relation to the power to exclude, an illustration of a proper exercise is excluding a beneficiary where his/her continued inclusion attracts adverse tax consequences.[43]

Further, the fact that the wealth was divided into two distinct trusts with separate purposes and no linkage being mentioned in the respective trust deeds were considered 'striking'.[44]

3.2. Ramifications

The potential ramifications of the *Grand View Private Trust* decision are significant. To recall, Lionel Smith says that the massively discretionary trusts 'do not restrict trustees to predefined purposes' and 'do not guide them much either', with the result that the trustee 'seem to have the power to give all of the trust property to whomever they wish' if they have the power to dispose all of the income and capital to a class of objects for any reason and are also conferred the power to add any person as an object to the class.[45] Post-*Grand View Private Trust*, it is envisaged that many discretionary trusts would now be construed as family trusts set up for the benefit of family members and close associates if they share the same features as the

40 *Ibid*, [80].
41 *Ibid*, [82].
42 *Ibid*, [94].
43 *Ibid*, [82].
44 *Ibid*, [84].
45 Smith (n 2) 44.

GRT. Even if there is a widely worded clause enabling trustees to add or exclude anyone in the world, trustees may only exercise their discretion for the benefit of the family members and their close associates; otherwise, the decision may be challenged on the proper purpose doctrine.

As an overriding principle, whether a trust is construed as a family trust depends on the objective intention of the settlor at the time the trust is declared. The lesson from *Grand View Private Trust* is that there are several factors in deciding the proper purpose of the power to add or exclude beneficiaries. First, if family members are named in the trust deed, this indicates the settlor's intention to primarily benefit the family. It would not be possible to wholly exclude members of this class of beneficiaries in favour of an unconnected third party. Second, if the residuary or default beneficiaries after the trust period are also family members, then this bolsters the conclusion that the trust is meant to principally benefit family members. In contrast, trusts which name a charity, say, the Red Cross, as the default beneficiary after the trust period might not be construed as a trust to benefit solely family members and their close associates. Third, recital clauses in trust deeds are important to determine the nature of the trust. If the recital clause stipulated that this is a private express trust for the benefit of family members, then it is unlikely that trustees may exercise their discretion to wholly exclude family members. Fourth, contemporaneous letters of wishes may be considered in deciding the proper purpose of a power to add or exclude beneficiaries. Subsequent wishes of the settlor are not admissible for determining the purpose of the trustee's power. Fifth, if the settlor contemporaneously declares two trusts for differing purposes, it might not be possible for the trustee to collapse one trust in favour of another even if this was the settlor's subsequent wish. Finally, the various clauses in the trust deed dealing with the remuneration and exclusion of community property must be scrutinised to see whether they shed any light as to the settlor's objective intention. If these clauses pre-suppose the existence of individual beneficiaries, then trustees may not replace individual beneficiaries with non-human entities.

Many of these points may be overcome with clever drafting. Making clear the purpose of the trust to which the power conferred upon the trustees relate would be key. Thus, if a settlor wanted to give their trustees maximum discretion, the trust deed could explicitly reflect that. Also, trustees should ensure they have copies/access to all documentation which existed at the time the trust was settled.[46] It remains to be seen how the trust industry reacts to *Grand View Private Trust*. Anecdotally, trust deeds are usually standard form documents instead of bespoke legal instruments. Would industry players, with benefit of advice from their lawyers, embark on amending all their 'off the shelf' trust deeds to get around *Grand View Private Trust*? If so, then newly declared trusts would not be subject to

46 Tom McPhail, 'A proper headache: trust drafting and the proper purpose rule after *Grand View v Wong*' (2023) 29 *Trusts & Trustees* 325, 331.

the principles discussed in *Grand View Private Trust*. Another possibility is that professional trustees or the settlors' lawyers would explain the implications of *Grand View Private Trust* to prospective settlors before any trust is declared. This might then lead to the development of two forms of trusts in the wealth management industry. Settlors who wish to principally benefit their family members would use a trust deed with language like *Grand View Private Trust*. Other settlors who want maximum flexibility will instruct their legal advisors to draft around *Grand View Private Trust*.

3.3. Internecine Power Struggle: An Alternative Narrative of Grand View Private Trust

In this part, we adopt a theoretical framework of 'narrative justice' [47] by exploring familial tensions documented in newspaper reports which were unexplored in the judgment. These tensions shed some light on the context of the declaration of the GRT and the challenged decision.

Lord Richards' diplomatic remark that settlors' 'immediate families are complex and extensive'[48] hints at the complicated familial entanglements. YC Wang had three wives and 12 children while YT Wang had two wives and eight children.[49] Winston Wong was the son of YC Wang's second wife and the designated successor of FPG. FPG was plunged into 'complete chaos' when YC Wang accused his son, Winston of lacking in filial piety for refusing to end an extra-marital affair,[50] sparking an internecine succession battle within the Wang family. Since then, YC Wang's third wife emerged as the most influential figure. A very public power struggle which gripped the Taiwanese press ensued between the children of the second wife and the third wife.[51] For context, Susan Wang, who gave much of the evidence, is the offspring of YC Wang's third wife. Further, the GRT was declared when YC Wang was 88 and YT Wang was 83; their advanced age contributed to the allegation that they did not fully understand the trust deeds because these documents were in English.[52] Winston accused family members of YC Wang's third wife (including Susan) of controlling 'secretive companies' which wrested control of YC Wang's assets to the exclusion of family members of YC Wang's second wife.[53] Separately, FPG came under trenchant

47 See Robin West, 'Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory (1985) 60 *New York University Law Review* 145.

48 Laura Tyson, 'Sins of the Son Visited on Taiwan Tycoon' *Financial Times* (London, 16 November 1996).

49 *Ibid.* Cf *Grant View Private Trust* (n 16) [8] (the judgment noted that the settlors had 17 children).

50 Laura Tyson, 'Taiwan's Family Feud Erupts: Formosa Plastics faces Uncertain Future Unless Succession Questions Can Be Resolved and the Process May be "Bloody"' *Financial Times* (London, 12 November 1996).

51 Tyson, 'Sins of the Son Visited on Taiwan Tycoon' (n 47).

52 George Liao, 'Taiwan's Formosa Plastics Scion Wishes to Retrieve, Donate Hidden Assets' *Taiwan News* (Taiwan, 26 July 2020).

53 Austin Chiu, 'Family Unity Lost in Battle Over Billions', *South China Morning Post* (Hong Kong, 21 December 2011).

criticisms from Taiwanese lawmakers for utilising trust structures to avoid taxes and only paying out very little of its assets to charitable purposes.[54]

Mindful that legal narratives are generally heavily contested and the account above may be challenged as being sexist, we offer an alternative counter narrative. Susan Wang was the filial daughter who was chosen to carry out her father's last wishes. She dutifully attempted to honour her father's last wishes only to be thwarted by her philandering half-brother, Winston, and the Privy Council.

Apart from puerile curiosity, why is the familial context important? It is suggested that the Privy Council was right in refusing to uphold the challenged decision. In fact, it is surprising that the challenged decision proceeded on a summary judgment basis when there were numerous possible difficulties concerning the integrity of the challenged decision. Given that the trusts were declared when both the settlors were in their eighties and not fluent in English, one might have thought that the challenged decision could have been attacked on the grounds of mental capacity, *non est factum* and undue influence. Other unusual features include: the fact that the challenged decision was made a mere four years after the declaration of the trusts; and the reasons for the change was not documented via a letter of wishes but through conversations between Susan Wang and the settlors who had passed away when the decision was taken.

Since WFT was a non-charitable purpose trust, there was no effective governance mechanism to ensure that the purposes were in fact carried out especially when there was no independent enforcer in the trust deed. In any case, one of the principal purposes of WFT was to ensure the perpetuation of FPG. This meant that whoever were the directors of the trustee company of WFT would effectively wield control over substantial shares of FPG. If Winston's allegations were true, it is hard not to conceive that the trust structures and the challenged decision are likely part of a wider succession battle within the family rather than a situation where the settlors genuinely wanted to collapse both structures. Thus, we are of the view that the Privy Council's decision was right in invalidating the challenged decision.

4. TRUSTEE'S DECISION NOT TO APPOINT A REPLACEMENT PROTECTOR

The appointment of a trust protector is a relatively recent phenomenon, with the role having been first introduced in offshore asset protection trusts.[55] Protectors are now

54 Chen Cheng-yu and Liu Tzu-hsuan, 'Business Groups Accused of Using Trusts to Avoid Taxes'.

55 Paul Matthews, 'Protectors: Two Cases, Twenty Questions' (1995) 9 *Trust Law International* 108; Anthony Duckworth, 'Protectors – Fish or Fowl?' [1996] *Private Client Business* 169, 328; Robert H Sitkoff, 'An Agency Costs Theory of Trust Law' (2004) 89 *Cornell Law Review* 62, 670–71; Tsun Hang Tey, 'Trust Protector' (2008) 20 *Singapore Academy of Law Journal* 99, 100; Matthew Conaglen and Elizabeth Weaver, 'Protectors as Fiduciaries: Theory and Practice' (2012) 18 *Trusts & Trustees* 17; Richard Nolan, 'Trustees and Third-Party Powers' in Richard Nolan, Kelvin Low and Tang Hang Wu (eds), *Trusts and Modern Wealth Management* (Cambridge University 2018) Ch 3; Nancy Chien, 'How Onerous is the Role of Protector' (2022) 28 *Trusts & Trustees* 351.

appointed in onshore trusts and beyond the asset protection trust context.[56] A protector[57] is chiefly appointed by the settlor to oversee the trustee's administration of the trust and in the case of long-term trusts, to enable the adaptation of the trust to new circumstances.[58] The duties and role of the protector are defined by the express terms of the trust.[59]

Because the settlor is the one who appoints the protector, the role has been portrayed by some skeptics as a mere conduit through which the settlor enforces his/her wishes against the beneficiaries' interests.[60] The criticisms ignore that a protector can be a useful office to oversee the trustee's administration of the trust and in specific circumstances, its appointment may even be considered necessary by the beneficiaries. Further, the office of the protector is sometimes held by professionals such as lawyers and trust companies, instead of a close friend or advisor of the settlor. The Manx court in *Rawcliffe v Steele* affirmed that the protector owes certain duties to the beneficiaries:[61]

> [The protector] is there to express to the trustees the settlor's wishes as to how the trust is operated. He can do no more, however, than express his wishes. It is clear as regards his powers that he would owe a fiduciary duty to the beneficiaries (and not the settlor) as to how those powers would be exercised. Thus, it was accepted by all parties that the protector could not refuse to exercise a power because the settlor wished that to happen. The protector must bona fide consider the exercise of his powers from the point of view of the beneficiaries under the trust.

Where the protector is a fiduciary,[62] the court has the power to remove it from office, if it misconceives its role as being 'the living guardian and enforcer' of the settlor's wishes.[63] Two recent offshore decisions affirm the Manx court's view in *Rawcliffe v Steele* in different contexts. We turn first to consider *Mazzoleni*.[64]

56 Tey (n 5) 100; Gregory S Alexander, 'Trust Protectors: Who Will Watch the Watchmen?' (2006) 27 *Cardozo Law Review* 2807.

57 The office of a protector is not defined in English law, though this office has been defined variously in other jurisdictions: see Patrick Harney and Marie McCallum, 'The Role of Protectors: a UK perspective' (2022) 28 *Trusts & Trustees* 862, 863. Therefore, the term 'protector' is not a term of art in every jurisdiction. Hubbard defines a protector as 'a person who holds powers under the terms of a trust instrument not entirely for his own benefit': see Mark Hubbard, *Protectors of Trusts* (Oxford University Press 2013), para 2.02.

58 Chien (n 55).

59 Harney and McCallum (n 57) 864.

60 See text to n 7 above.

61 1993–95 MLR 426, 529.

62 See Conaglen and Weaver (n 5). The authors point out whether a protector is a fiduciary is a question of construction of the trust deed.

63 *In the Matter of the A and B Trusts* [2012] JRC 169A [3]. As the Jersey court noted (at [4]), the limited powers conferred to the protector did not support a construction that he was appointed to ensure the settlors' wishes were carried out.

64 2DS 2021/3.

4.1. *Mazzoleni*: Facts and Decision

Mazzoleni concerned a trustee's decision not to exercise a non-imperative power to appoint a protector in a situation where it stands in a conflict that arose from it being the sole trustee of competing trusts. The Isle of Man High Court held that the trustee's decision was incorrect and directed the trustee to reconsider its decision. The Appellant in that case was the principal beneficiary of one of the four settlements (RR1, RR2, RR3 and RR4) established by her mother (the 'Settlor'), an Italian citizen, under Manx law for the benefit of each of her four children and their respective heirs. RR2 was settled in favour of the Appellant (the principal beneficiary) and her issue before the Perpetuity Date, as well as two charities (the 'Trust'). The terms of the Trust required the trustees to hold the trust assets and income derived therefrom on discretionary trusts 'for all or such one or more exclusively of the others or other of the Beneficiaries with wide powers of appointment of the Trust Fund or part of it for their advancement or benefit at the absolute discretion of the trustees'.[65]

Pursuant to a series of share transfers among the children, one branch of the family came to own a controlling shareholding in the family company which, through intermediate companies, held a controlling interest in another company, ITM. ITM later transferred its shareholding in a company called ITC to a German company. The Appellant and the RR3 beneficiary claimed to have no knowledge of this proposed sale. They commenced court proceedings in Italy against various family members, the original trustees, the Respondent and the companies in which the four settlements held shares to claim compensation for the 'failure to take into consideration the rights of the Italian plaintiffs as heirs to [the Settlor's succession]' (the Italian proceedings).[66]

The Italian proceedings formed an important part of the background to the dispute. Following resignations by the original trustees, the Respondent trust company became the sole trustee of the Trust from 13 December 2017. Further, all four settlements originally had a protector. However, with the resignation of the last protector and the nominated candidate's rejection of the office, the Trust had no protector since 27 October 2017. The trust deed provided, 'IF at any time there is no protector in office the Trustee may by Deed appoint a protector.' Relevantly, the Settlor's letter of wishes stated:[67]

> Please take note of the fact that I have appointed a protector and that the latter has been granted powers that I could have reserved to myself had I been younger, in order to ensure that my wishes concerning the future of the Trust Foundation are fulfilled.

On 26 May 2018, the Appellant told the Respondent trustee that a replacement protector should be appointed because her mother intended that the Trust should be overseen

65 *Mazzoleni* (n 8) [15].
66 *Ibid*, [11].
67 *Ibid*, [19] (emphasis in original).

by a protector. The Respondent replied to indicate that it was not appointing a replacement protector. Subsequently, the Appellant and the principal beneficiary of RR3, through their lawyers, requested the Respondent to appoint a protector in view of the position of conflict which the Respondent had placed itself in relation to the Italian proceedings. The alleged conflict arose because the Respondent, instead of seeking independent legal advice, sought advice from an Italian lawyer, who had represented and continued to represent the opposing parties in the Italian proceedings. The Appellant contended that the appointment of a protector was necessary in the circumstances to ensure that the interests of the Appellant and the RR3 beneficiary were not prejudiced. The Appellant's request was supported by all the adult beneficiaries of the Trust.

The Respondent disclosed an outline of the reasons for its decision not to appoint a protector:[68]

(1) There was no need to appoint a protector for either trust because the only 'substantive reason' put forward by the Appellant was the assurance of provision of financial information, but that had been fulfilled in practice.
(2) All four settlements were entangled in 'acrimonious litigation' in Italy which had caused discord within the family. The Respondent did not wish to 'take any unnecessary steps which might add to those hostilities'.
(3) All four settlements 'had considerable inter-relationships of trust assets and in some cases of beneficiaries'. The Respondent took the view that the inter-relationships 'required some unity of decision-making across the trust structures'. Hence, the Respondent did not consider it 'desirable' for only two trusts to have protectors.
(4) Any candidate for the role of protector 'should be impartial and independent' in relation both to the family and the Italian proceedings so as to avoid intensifying the hostilities. Given the acrimonious litigation, it would be difficult to find a candidate that all beneficiaries would regard as impartial and independent. The Respondent confirmed in the letter that it would provide full details as to the assets of RR2 and RR3 settlements and trust accounts going forward.

At first instance, Deemster Christie held that the terms of the trust did not mandate the trustees to appoint a protector and that it was not intended that there would always be a protector. Deemster Christie further affirmed that the Respondent had been 'conscientious' and 'proper' in the decision-making process. [69]

The appellate court overturned Deemster Christie's decision, although it affirmed his conclusion that clause 6 did not impose an imperative power by the use of the word 'may' which is different from the word 'must'.[70] On construing the trust deed,

68 *Ibid*, [21].
69 *Ibid*, [28].
70 *Ibid*, [47].

the appellate court concluded that there was 'an inbuilt preference within the Trust Deed' for the appointment of a protector because the protector is precluded from being resident in the jurisdiction constituting the forum for trust administration which necessarily means that the protector powers are expected to be exercised in a jurisdiction other than the Isle of Man.[71] That is to say, the protector should not be based in the same jurisdiction as the trustee. Hence, the vesting of the protector's powers in the trustee when the trust had no protector was meant to be a temporary, stopgap measure.[72]

The appeal court rejected the Respondents' reasons, stressing that the power to appoint a protector is a fiduciary power which must be exercised in the interests of all the beneficiaries, having regard to the wider basis of the power.[73] As to the Respondent's first reason, the court said that it fell into error in considering the appointment of a protector for only the specific purpose of provision of financial information to the beneficiaries.[74] The fact that the Appellant had been provided with financial information at the trustee's discretion was not the same as an entitlement to the information (which a protector would have).[75] As to the second reason, accepting that the Italian proceedings would engender conflict in the wider family (and not merely the Appellant and her issue), this would mean that the Respondent was considering the interests of non-beneficiaries.[76] In any event, it was not a 'good enough reason' for not appointing a protector.[77]

In relation to the Respondent's third reason, that all the adult beneficiaries supported the Appellant's attack on the trust structure as a whole meant that the 'interrelationships [of the four trust settlements] are not perceived to be working so far as the Trust is concerned', a point which the Respondent ought to have recognised.[78] The court further noted that unity in decision-making across the four settlements was not a sound justification because this would mean that a trustee could then make a decision based on the interests of the beneficiaries of another trust, instead of the interests of the beneficiaries of the Trust. Also, it was 'not necessarily appropriate or desirable' that all four trusts should have the same protector.[79] The court observed that the Respondent's final reason was a clear acknowledgement that the Respondent was not merely considering the interests of the beneficiaries of the Trust.

71 *Ibid*, [63].
72 John Rimmer, 'With power comes responsibility: *Mazzoleni v Summerhill*' (2023) 29 *Trusts & Trustees* 349, 356.
73 *Ibid*, [56].
74 *Ibid*, [56].
75 *Ibid*, [50]. See further Rimmer (n 73) 354.
76 *Mazzoleni* (n 18) [57].
77 *Ibid*, [58].
78 *Ibid*, [60].
79 *Ibid.*

4.2. Ramifications

With the facts pared down, and in view of the adult beneficiaries' support of the appointment, one can appreciate the court's instinctive thinking that appointing a protector in the case was necessary.[80] In *Mazzoleni*, therefore, the office of the protector is not a means to pressurise the trustee to submit the wishes of the settlor but one to watch over a conflicted trustee.

More broadly, *Mazzoleni* indicates that even where a power is phrased as non-imperative in nature, the trustee may not freely decide whether to exercise the power or not. Importantly, the court affirmed that the power to appoint a protector is a fiduciary power that must be 'exercised in the interests of all the beneficiaries'.[81] A decision to not exercise the power would be scrutinised on the same basis as a decision to exercise the power: that is, whether the trustee has taken into account only relevant considerations and no irrelevant considerations and arrived at a defensible conclusion.[82] Further, the court would construe the trust to determine whether the structure of the trust envisages that the power should be exercised in a certain way or in certain circumstances. In other words, even though the power is not imperative, the terms inform how the power is to be exercised. The power is therefore more constrained than at first blush suggests. A trustee, in taking office, should review the terms carefully and holistically to determine how the relevant administrative power relate to the trust more generally.[83] It is not safe to simply rely on the labels of 'may' or 'discretion'.

Importantly, the English High Court has ruled in *Lewis v Tamplin*[84] that a trustee is obliged to disclose the reasons for its exercise of administrative powers, thereby distinguishing between the exercise of administrative powers and the exercise of dispositive powers. The trustee is not obliged to disclose the reasons in respect of the exercise of dispositive powers. The court explained:[85]

> The point is that the decision made by the trustees in the exercise of a dispositive power produces, or at least may produce, different treatment for different beneficiaries. One beneficiary may receive more benefit from the trust than another. Hence, the trustees are justified by practical considerations in withholding their reasons for that exercise. Plainly, that does not apply to a request to trustees for information about the trust. No decision of the trustees on such a request will change the entitlement of the beneficiaries among themselves to benefit under the trust.

Trustees should also be warned that the court could intervene in a number of ways. In *Mazzoleni*, the court ordered the trustee to reconsider based on the court's guidance but

80 Rimmer (n 73) 354.
81 *Mazzoleni* (n 18) [56].
82 This was affirmed by the Manx appeal court: *Mazzoleni* (n 18) [48].
83 Rimmer (n 7275) 356.
84 [2018] EWHC 777 (Ch) [47].
85 *Ibid*, [52].

further indicated that if the trustee's ultimate decision remains 'unacceptable' to the adult beneficiaries, the court when confronted with a second application to review the trustee's decision will have to consider directly ordering the appointment of a protector.[86] Further, the court may replace the conflicted trustee, as the Jersey court has done so in the context of a conflicted protector.[87] Thus, even in respect of a non-imperative power, the court has numerous ways of supervising and controlling the trustee's exercise of discretion to ensure that decisions are made for proper purposes and in the interest of the beneficiaries.

5. THE ROLE OF A PROTECTOR IN THE EXERCISE OF VETO POWER

We now turn to consider how a protector provides safeguards against trustee misconduct. A usual way by which a protector achieves its 'watchdog' function is through the conferral of a power of veto in respect of the trustees' exercise of powers. Two recent offshore decisions came to different conclusions as to the role of the protector in the exercise of a veto power: *Piedmont*[88] and *X Trusts*.[89] In *Piedmont*, the Jersey court affirmed the wider approach which accords the protector an independent discretion to exercise; whereas the Bermudian court in *X trusts* adopted the narrower approach which restricts the protector's role to merely reviewing the legality and rationality of the trustee's decision.[90] Nevertheless, as our analysis will demonstrate, even under the narrower approach, the protector performs the vital function of ensuring that trustees make informed decisions.

5.1. *Piedmont*: The Wider Approach

Piedmont concerned an application by the trustees of two revocable discretionary Jersey law trusts (the 'P Trust' and the 'R Trust') to seek the court's approval to appoint the assets of the trusts amongst the beneficiaries in certain proportions with the effect that the trust would be terminated. The same trustees were appointed for both trusts. The class of beneficiaries under the P Trust comprised the father, the father's children (an

86 *Mazzoleni* (n 8) [65].

87 Rimmer (n 7275) 355, citing *Representation of Centre Trustees* [2009] JRC 109.

88 (n 19).

89 (n20).

90 The 'only known decision' (*Piedmont* (n 18) [116(iii)]) prior to *Piedmont* and *X Trusts* that dealt with this issue was the English decision of *PTNZ v AS* [2020] EWHC 3114 (Ch), [2020] WTLR 1423. In that case, Master Shuman adopted a position that is consistent with the Wider Approach. However, the authoritative significance of *PTNZ* may be limited. The decision was arrived at in *PTNZ* without the benefit of full arguments (*PTNZ* [105]). This was explicitly noted by the Bermudian Court of Appeal in *X Trusts*; and the court also opined that the English court's decision was 'wrong' (*X Trusts* (n 9) [124]). The Jersey court in *Piedmont*, on the other hand, conceded not having seen the judgment in *PTNZ* in arriving at its conclusion (*Piedmont* (n 19) [116(iii)]).

elder son, a younger son and a daughter) and remoter issue, and any beneficiaries added to the class pursuant to the power conferred by the trust deed. The R Trust had the same class of beneficiaries but with the addition of the R settlor and the Fifth Respondent. The father was the original protector of the two trusts but pursuant to a series of unpleasant events (including litigation) following the falling out between the father and the daughter, Rysaffe was eventually appointed as the protector of both trusts (the 'Protector'). Relevantly, the P Trust conferred on the protector a power to veto the trustees' decision:[91]

> Upon trust for all or any to the exclusion of the others or other of the Beneficiaries in such shares and in such manner and subject to such limitations and provisions as the Trustees (with the written consent of the Protector) in their absolute and controlled discretion at any time or times before the Perpetuity Date by any deed or deeds revocable or irrevocable … may appoint …

Subsequently, citing reasons of tax implications and breakdown of family relations, the daughter requested the trustees to exercise their discretion to terminate the two trusts and distribute the trust assets equally between the branches of the family of the elder son, the younger son and the daughter. Following consultations with the beneficiaries, the trustees formulated a proposal for distribution on 11 November 2019 (the 'November 2019 Proposal') to which the Protector indicated that it would not consent. The Protector asked a series of questions concerning the US tax position, as well as requested various letter of wishes and the trustees' reasons behind the November 2019 Proposal. The trustees declined to provide their detailed reasoning. In the main, the Protector was not comfortable with the Trustees' proposed basis of distribution, being on a per capita basis instead of the per stirpes basis set out in the letters of wishes. On 12 January 2021, the trustees sent a modified proposal to the Protector which then indicated its in principle consent.

Our analysis will focus on the issue of the role of the protector. Two competing approaches were canvassed. The first, as argued by the adult grandchildren beneficiaries, is that the protector's role in exercising the power of veto is confined to a limited review, akin to the role performed by the court in a blessing application and the exercise is 'only concerned with the rationality of the trustees' decision' (the 'Narrower Approach').[92] The question to ask is 'whether the decision of the trustees to which [the protector] is being asked to consent is one which a trustee could reasonably arrive at, whether or not it is a decision the protector himself would have made'.[93] The second and alternative approach, as argued by the Protector, is that it has an *independent* decision to make: it 'must reach its own decision in good faith in the interests of the beneficiaries' and its review is confined to neither the rationality nor legality of the trustees' proposed decision (the 'Wider Approach').[94]

91 The Protector was also conferred a power to remove and appoint new trustees.
92 *Piedmont* (n 19) [87].
93 *Ibid*, [87].
94 *Ibid*.

The Jersey Royal Court affirmed the Wider Approach, taking the view that where the settlor has specified certain matters that require the consent of a protector (whom the court assumes to be 'often himself or a longstanding friend or adviser whose judgment [the settlor] trusts'), the settlor must have intended that the protector should exercise an independent judgment.[95] Otherwise, the protector would be 'redundant' if it were to do no more than what a court would do in a blessing application.[96] Hence, a protector could, in the right circumstances, veto a rational decision of the trustee.[97] That being said, it was also stressed that the protector could not use the veto power to force the trustee into making a decision because the discretion lies with the trustee.[98] The court considered it desirable that the trustee and the protector engage in a 'full and open discussion' to find common ground, as the protector is not 'confined to a simple yes or no to a request for consent'.[99]

The Jersey Royal Court, by way of a postscript to its judgement, disagreed with the Narrower Approach adopted by the Supreme Court of Bermuda (Kawaley J) in *X Trusts*.[100] The difference in views arose out of a difference in the two courts' default positions in the construction of the consent provisions. The Jersey Royal Court observed that the settlor of offshore trusts would usually appoint a trustee company which is unknown to him or her. It would therefore be natural to wish to impose some control on the trustee's exercise of powers by appointing himself or herself or a trusted friend or advisor as a protector.[101]

5.2. X Trusts: The Narrower Approach

X Trusts similarly concerned trustees' application to the court for a blessing of their decision to develop the preliminary proposals—which involved restructuring of the trusts[102]—for the future administration of the trusts. A dispute arose as to the proper scope of the protectors' powers which read as follows:

> The Trustees shall not exercise any power to appoint, distribute or pay any part of the Trust Fund to or for the benefit of any member of the Appointed Class or any Beneficiary without obtaining the prior written consent of the Protectorate, nor if the Trustees' consent is required for any appointment of capital, shall they give their consent without the prior written consent of the Protectorate …

95 *Ibid*, [91].
96 *Ibid.*
97 *Ibid.*
98 *Ibid*, [92].
99 *Ibid*, [93].
100 *Ibid*, [91].
101 *Ibid*, [117].
102 Some of the trusts were governed by Bermudian law; many were governed by English law; and one was governed by Jersey law.

Kawaley J, the first instance judge, found that there were no 'special words' used to make explicit that it was the Wider Approach that was intended.[103] He explained that between the interrelated powers conferred on the trustees and the protectors, it was clear that the trustees' power had primacy which indicated that the protectors' powers should not be regarded as being equal in status to those of the trustees.[104] For instance, the protectors could waive the requirement of consent.[105] Further, the protectors' consent would not be required if two or more protectors disagreed.[106] The court also found it significant that whilst the trustees were appointed with the benefit of indemnities, the protectors were not and this suggested that their role was a limited one.[107] Kawaley J thus applied the Narrower Approach.

On appeal, Gloster JA, delivering the main judgment of the Bermudian Court of Appeal, upheld the outcome, but on 'somewhat different' reasoning.[108] The appeal court said that on the literal reading of these commonly used consent provisions, and having regard to the fact that the trustees have the 'paramount substantive role' of trust administration and the protector has a 'watchdog' function, the protector in the case did not have an independent discretion. The court favoured the Narrower Approach that did not blur the two roles. Nor was the court convinced that the other protector provisions supported the Wider Approach. The court also examined a string of decisions on protectors which, on its review, supported the Narrower Approach.[109] In particular, the Bermudian appeal court disagreed with the reasoning in *Piedmont*. It considered the decision to have been arrived at on the basis of 'limited argument'.[110] Its main thrust is that the Jersey court did not appreciate that the role of the protector has two functions.[111] First, the protector communicates the circumstances of beneficiaries or the settlors' wishes to the trustees, so as to ensure that the trustee has taken on board all relevant considerations in their deliberation. Further, he or she is the '"control mechanism for the real-time assurance of proper administration of a trust"' even though the scope of review under the Narrower Approach is more limited than that which is envisaged under the Wider Approach.[112] Hence, even on the Narrower Approach, and whether the protector is a close friend or trusted advisor of the settlor, the role is of clear benefit to the proper administration of trust by ensuring some degree of real-time control and supervision over the trustee's exercise of discretion.

103 *Re The X Trusts* [2021] SC (Bva) 72 Civ [66].
104 *Ibid*, [71]–[72].
105 *Ibid*, [72].
106 *Ibid*, [74].
107 *Ibid*, [76]–[77].
108 *X Trusts* (n 16) [84]. Clarke P provided separate brief observations that are in agreement with Gloster JA's judgment (see [160]–[165]).
109 *Ibid*, [109]-[143].
110 *Ibid*, [129(i)].
111 *Ibid*, [131]-[133].
112 *Ibid*, [133].

5.3. Ramifications

In both cases, the protector's powers were found to be fiduciary in nature. These decisions therefore do not bear on cases where the protectors' powers are non-fiduciary in nature.[113]

As readily acknowledged in *Piedmont*, the Wider Approach is more likely to lead to a deadlock between a trustee and protector if a protector declines to consent. With a note of optimism, the court said that this would be 'a natural consequence' and in the event of a deadlock, the trustee and the protector should engage in a discussion to find 'a sensible outcome'.[114] Where parties could not reach consensus, the court left open the possibility of going to the court for resolution of the deadlock.[115] To the contrary, the Bermudian Court of Appeal said that the 'obstacles and uncertainties' that trustees face to overcome the protector's withholding of consent would 'strongly support' the Narrower Approach, even though it did not decide on whether the various statutory routes empowered the courts to override the protector's refusal of consent would work.[116]

On the other hand, the downside of the Narrower Approach is that the protector is 'a tiger without teeth, who can only bless but never veto' a trustee's lawful and rational decision.[117] The Narrower Approach does not impose as great a constraint on the trustee's exercise of discretion as the Wider Approach but it still imposes some control. The Bermudian Court of Appeal has affirmed in *X Trusts* that one of the key functions of a protector is to communicate relevant information to the trustees. This ensures that the trustees do not make any decision as they please, as well as addresses Smith's point that trustees face real difficulties in taking into account settlors' wishes because their wishes 'evolve from time to time'.[118] This part of the Bermudian judgment also casts the protector in a positive light, contrary to the portrayal by Dagan and Samet.

More importantly, the Jersey Court did not lay down an absolute and rigid rule because it takes the view that the function and duties of the protector would depend on the terms of the trust.[119] Whilst tentatively accepting that it *might* be possible to draft the terms of the trust in a way to 'alter the balance between trustees and protectors',[120] the Bermudian Court of Appeal also said that 'it is possible for the court to discern, or develop, general principles which are likely to be applicable to

113 In *PTNZ* (discussed at n 90), the English High Court did not have to make a determination as to the nature of the consent power in question.

114 *Piedmont* (n 19) [118].

115 *Ibid*. See further Sarah Egan, 'Protectors as "Mere Toothless Tigers"? Advocating in Favour of the "Wider View"' (2022) 28 *Trusts & Trustees* 715, 720. Egan points out that the trustee may in the event of a deadline apply to the court under *Public Trustee v Cooper* Category 2 to seek a court order that the protectors ought to give consent.

116 *X Trusts* (n 20) [155].

117 Egan (n 115) 721.

118 Smith (n2) 46.

119 *Piedmont* (n 19) [88]; *X Trusts* (n 20) [98].

120 *X Trusts* (n 20) [91].

protectors, or to decisions of a protector, operating under the terms of such standard powers'.[121] It may be more difficult to persuade a Bermudian Court that the terms of the trust support the Wider Approach, unless the wording is abundantly clear.

6. CONCLUSION

This article is relevant to jurisdictions looking to reform trust law, and to those who call for regulation of discretionary trusts. A statutory provision that trustees must act with proper purpose, like those found in many corporation statutes, would reinforce that trustees' discretion is not at large and would ameliorate the charge of the massively discretionary trust. Further, some jurisdictions have enacted regulations in relation to protectors who essentially oversee trustees thereby curbing their discretion. Even without these law reforms, this article tackled two main criticisms that scholars levelled at modern discretionary trusts that employ extensive use of discretions. First, the trustees enjoy wide discretions that are generally uncontrolled; and secondly, the office of protector is introduced merely to channel the settlor's wishes. Both criticisms ultimately point to the concern that beneficiaries' interests are not adequately protected and that 'massively discretionary trusts' are an abuse of the trust structure. Through a thorough examination of four recent cases, we demonstrated that these criticisms are not well-founded in some trust structures and that properly drafted modern trusts are not such massively discretionary trusts.

DISCLOSURE STATEMENT

No potential conflict of interest was reported by the author(s).

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121 *Ibid*, [129(iv)].