[2015] WASC 297

JURISDICTION	:	SUPREME COURT OF WESTERN AUSTRALIA IN CHAMBERS
CITATION	:	MERCANTI -v- MERCANTI [2015] WASC 297
CORAM	:	LE MIERE J
HEARD	:	21-28 JULY, 11-12 DECEMBER 2014 & 12 FEBRUARY 2015
DELIVERED	:	20 AUGUST 2015
FILE NO/S	:	CIV 1262 of 2013
BETWEEN	:	MICHAEL ANGELO MERCANTI Plaintiff AND TYRONE KANE MERCANTI First Defendant SLONDIA NOMINEES PTY LTD Second Defendant CITYCOURT PTY LTD Third Defendant

FILE NO/S : CIV 2186 of 2013

BETWEEN : MICHAEL ANGELO MERCANTI
Plaintiff

AND

TYRONE KANE MERCANTI
First Defendant

PARRADELE PTY LTD
Second Defendant

SLONDIA NOMINEES PTY LTD
Third Defendant

CITYCOURT PTY LTD
Fourth Defendant

FILE NO/S : CIV 1276 of 2014

BETWEEN : JASON DEAN MERCANTI
Plaintiff

AND

SLONDIA NOMINEES PTY LTD
First Defendant

CITYCOURT PTY LTD
Second Defendant

TYRONE KANE MERCANTI
Third Defendant

PARRADELE PTY LTD
Fourth Defendant

Catchwords:

Trusts - Deeds of variation - Power to appoint trustees - Power to appoint appointors - Power to vary the trustee - Power to vary the appointor - Implied terms - Improper purpose - Corporate law - Directors' power to act on behalf of corporation - Corporate resolution - Informal acts of directors - Necessity of corporate seal - Applicability of *Corporations Act* - Undue influence - Equitable relief

Legislation:

Corporations Act 2001 (Cth)

Result:

1. MMF Trust Deed of Variation is of legal force and effect. The FW Trust Deed of Variation is of no force or effect.
2. Leave granted to the defendants to amend their defences.

Category: B

Representation:

CIV 1262 of 2013

Counsel:

Plaintiff	:	Mr S Penglis
First Defendant	:	Mr B G Grubb & J Burnside QC (trial only)
Second Defendant	:	No appearance
Third Defendant	:	No appearance

Solicitors:

Plaintiff	:	Herbert Smith Freehills
First Defendant	:	Metaxas & Hager
Second Defendant	:	No appearance
Third Defendant	:	No appearance

CIV 2186 of 2013

Counsel:

Plaintiff	:	Mr S Penglis
First Defendant	:	Mr B G Grubb & M Burnside QC (trial only)
Second Defendant	:	Mr B G Grubb & Mr J Burnside QC (trial only)
Third Defendant	:	No appearance
Fourth Defendant	:	No appearance

Solicitors:

Plaintiff	:	Herbert Smith Freehills
First Defendant	:	Metaxas & Hager
Second Defendant	:	Metaxas & Hager
Third Defendant	:	No appearance
Fourth Defendant	:	No appearance

CIV 1276 of 2014

Counsel:

Plaintiff	:	Mr S Penglis
First Defendant	:	No appearance
Second Defendant	:	No appearance
Third Defendant	:	Mr B G Grubb & Mr J Burnside QC (trial only)
Fourth Defendant	:	Mr B G Grubb & Mr J Burnside QC (trial only)

Solicitors:

Plaintiff	:	Herbert Smith Freehills
First Defendant	:	No appearance
Second Defendant	:	No appearance
Third Defendant	:	Metaxas & Hager
Fourth Defendant	:	Metaxas & Hager

Case(s) referred to in judgment(s):

Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175
Bell Group Ltd (in liq) v Westpac Banking (No 9) (2008) 39 WAR 1
Bofinger v Kingsway Group Ltd (2009) 239 CLR 269
Cachia v Westpac Financial Services Ltd (2000) 170 ALR 65
Constanton v Permanent Trustee Australia Ltd (Unreported, NSWSC (Equity Division), BC 9101904, 13 June 1991
Duke of Portland v Lady Topham (1864) 11 HLC 32
Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liq) (2001) 188 ALR 566
Franbar Holdings Ltd v Casualty Plus Ltd [2010] EWHC 1164 (Ch)
Harris v Rothery (as co-executor of Estate of late Harris) [2013] NSWSC 1275
Holmes v Keys [1959] Ch 199
Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd [1991] 1 WLR 589
In Re Internine Trust and the Intertraders Trusts [2005] JLR 236
J W Broomhead (Vic) Pty Ltd (in liq) v J W Broomhead Pty Ltd [1985] VR 891
Jenkins v Ellett [2007] QSC 154
Kearns v Hill (1990) 21 NSWLR 107
Montevento Holdings Pty Ltd v Scaffidi (2012) 246 CLR 325
Nydegger v McKenzie [2001] NSWCA 393
Price v Powers [2005] WASC 154
Price v Powers [2006] WASCA 262
Re Duomatic Ltd [1969] 2 Ch 365
Re Dyer [1935] VLR 273
Re Marsden's Trusts (1859) 4 Drew 594
Re Skeats Settlement (1889) 42 Ch D 522
Re Z Trust [1997] CILR 248
Roden v International Gas Applications (1995) 18 ACSR 454
Runciman v Walter Runciman Pty Ltd [1993] BCC 223
Sander v Twigg (1887) 13 VLR 765
Scaffidi v Montevento Holdings Pty Ltd [2011] WASCA 146
Swiss Screens (Aust) Pty Ltd v Burgess (1987) 11 ACLR 756
Topham v Duke of Portland (1863) 1 De GJ & Sm 517
Tulloch (Dec) v Braybon (No 2) [2010] NSWSC 650

LE MIERE J:

The proceedings

1 These proceedings are brought by and against members of the Mercanti family and companies controlled by members of the family. The proceedings are principally concerned with the validity of deeds of variation of two trust deeds and notices of the removal of trustees and appointment of new trustees of the two trusts. The trusts own and operate a wholesale and retail shoe repair business. The outcome of these proceedings will determine who is the trustee and appointor of the trusts and therefore has practical control of the trusts and hence of the business.

Mercanti family and associates

2 For convenience I will refer to members of the Mercanti family by their first names. Michael Mercanti was described by counsel for the plaintiffs as the patriarch of the Mercanti family. Sybil Yvonne Mercanti is Michael's wife. I will refer to her by her middle name, Yvonne, because that is how members of her family refer to her. Michael and Yvonne have four adult sons, Michael Jamie Mercanti, known as Jamie, Troy, Jason and Tyrone. The disputes giving rise to these proceedings are principally disputes between Michael and Tyrone. Michael is supported by Yvonne, Jason and Jamie.

3 Tyrone is married to Vanessa Mercanti. Anthony Torre is the brother of Vanessa and has been a close friend of the Mercanti family for the last 30 years. Matthew Bizzaca, a chartered accountant has been the accountant and financial adviser to Michael and Yvonne since about 1977.

The family business

4 In about 1963 Michael opened a shoe repair kiosk in Dianella Plaza in partnership with Corrie Di Giovanni. The partnership acquired further kiosks until in the mid-1970s Michael and Mr Di Giovanni dissolved their partnership and split the business. Michael took the kiosks in Karrinyup and South Perth.

5 In around 1977 Michael met Mr Bizzaca and engaged him to give financial and taxation advice. Mr Bizzaca recommended that Michael establish a family trust because it had tax advantages. Michael instructed Mr Bizzaca to establish what became the Michael Mercanti Family Trust (MMF Trust). Slondia Nominees Pty Ltd, the second defendant in CIV 1262 of 2013 and the third defendant in CIV 2186 of 2013, was the first trustee.

6 Between 1976 and 1985 the business grew and acquired further kiosks. In the early 1980s Michael went into partnership with two other men in a wholesale shoe repair supplies business. In the 1990s Michael acquired the whole of the wholesale shoe repair supplies business. In 1996 Michael instructed Mr Bizzaca to set up a new trust to operate the wholesale shoe repair supplies business. The trust was called the Footwear Wholesale Trust (FW Trust). The first trustee was Citycourt Pty Ltd, the third defendant in CIV 1262 of 2013, fourth defendant in CIV 2186 of 2013 and the first defendant in CIV 1276 of 2014.

The trusts

7 The MMF Trust is a discretionary trust established by a deed of settlement executed on 1 June 1979. The MMF Trust Deed established Slondia as trustee and Michael as guardian and appointor of the MMF Trust. The trustees may pay the net income of the trust fund to the General Beneficiaries but may not make a payment to a General Beneficiary on the first occasion except with the consent of the Guardian. The General Beneficiaries are the Specified Beneficiaries, their and their children and grandchildren. The Specified Beneficiaries are Michael and any spouse, children and remoter issue of Michael. The General Beneficiaries also include the brothers, sisters, children and grandchildren of the Specified Beneficiaries and their children and grandchildren. The trustees are expressly excluded from the class of General Beneficiaries. The first Appointor was Michael. The Appointor may remove any trustee and appoint a new trustee. In 2004 Slondia, as trustee, executed a deed of variation varying the MMF Trust Deed by appointing Tyrone as Appointor in place of Michael. Slondia, as trustee of the MMF Trust, owned and operated the retail shoe repair business founded by Michael. The MMF Trust also owned four real estate properties.

8 The FW Trust was established by a trust deed executed on 16 August 1996 (FW Trust Deed). The FW Trust Deed established Citycourt as trustee. The trustees may distribute income to any of the General Beneficiaries. The General Beneficiaries include the Primary Beneficiary and the Nominated General Beneficiaries. The Primary Beneficiaries are the children of Michael and Yvonne. The Nominated General Beneficiaries are Michael and Yvonne. The General Beneficiaries also include the brothers, sisters, spouses, widows, widowers, children and grandchildren of any Primary Beneficiary and their spouses, widows, widowers, children and grandchildren. The first Appointor was Michael. The Appointor may remove any trustee and appoint a new trustee. In 2004 Citycourt, as trustee, executed a deed of variation varying the FW

Trust Deed by appointing Tyrone as the Appointor in place of Michael. The FW Trust owns and operates the wholesale shoe repair business.

The companies

9 Slondia was registered in 1979. From at least 1995 to 2013 its registered office was the office of Mr Bizzaca's accounting practice. Citycourt was registered in 1996. Its registered office from 1996 to 2013 was the office of Mr Bizzaca's accounting practice. The shareholders of each of Slondia and Citycourt are Michael and Yvonne. Michael and Yvonne have been directors of Slondia since 1979 and Citycourt since 1996. Tyrone was a director of each company from 2001 to 30 July 2013. Vanessa was a director of Slondia from 2008 to 2013 and a director of Citycourt from November 2004 to 2013.

10 The second defendant in CIV 2186 of 2013 and third defendant in CIV 1276 of 2014 is Parradele Pty Ltd. Parradele is a company controlled by Tyrone. Parradele was appointed trustee of each of the trusts by notices of removal and acceptance of appointment of trustee executed by Tyrone and Parradele on 31 July 2013. The notices were executed by Tyrone as appointor of the two trusts. The validity of the deeds of variation appointing Tyrone as appointor of the trusts and of the notices appointing Parradele trustee of the two trusts are the principal issues in these proceedings.

The witnesses

11 The plaintiffs adduced evidence from Michael, Yvonne, Jamie and Mr Bizzaca. Each of the witnesses called by the plaintiffs gave evidence by way of witness statement and was cross-examined.

12 Tyrone gave evidence for the defendants. The defendants also adduced evidence from Mr Torre, Larry Thomas, the chief financial officer of the business from 2006 until 30 July 2013, from Peter Nettleton, Rosalina Chiu and Salvatore Radici, who were lawyers at Brett Davies Lawyers, from Mehernosh Noshir Burariwalla, an accountant who was employed by Mr Bizzaca and later became managing director of the accounting practice, from Marinus Bergshoeff, a bank officer who witnessed a deed of variation to the FW Trust dated 22 January 2008, and from Peter Reeves, a finance broker. Each of the witnesses called by the defendants gave evidence by way of witness statement except Mr Radici whose evidence-in-chief was led orally. Each witness called by the defendants was cross-examined except Mr Reeves.

Michael

13 Michael was born in Italy in 1933 and immigrated to Australia in 1952. He is a shoemaker by trade. He speaks English adequately but as his second language. At the time of trial he was 81 years old. Michael presented himself as a simple, unsophisticated man with little business knowledge or experience of financial and legal matters. The evidence presents a different picture.

14 In 1963 Michael operated a shoe repair business in partnership with Mr Di Giovanni for about 10 years before dissolving the partnership and splitting the business, after which Michael continued to operate his own business. In 1976 Michael engaged Mr Bizzaca as his accountant and financial adviser. Mr Bizzaca advised Michael and Yvonne to set up the MMF Trust. I find that Mr Bizzaca followed his standard practice when setting up a new family trust which was to thoroughly explain to his clients the key features of a discretionary trust by drawing a diagram of the trust structure and explaining, amongst other things, the roles of the trustee, the appointor and guardian.

15 The MMF Trust was varied by deed of variation executed on 12 October 1994. The deed of variation was drawn by Franklyn Simon, a solicitor. It is a simple two page document and was signed by Michael as a director of Slondia and by Michael as guardian consenting to the deed of variation. Mr Bizzaca witnessed Michael's signature as guardian. It is unlikely that the deed of variation would have been drafted by Franklyn Simon and Michael's signature witnessed by Mr Bizzaca without the terms and effect of the deed being explained to Michael. I infer that when he signed the deed Michael knew that he was the guardian and understood the nature of the document he signed.

16 In 1996, on the advice of Mr Bizzaca, Michael instructed Mr Bizzaca to set up a new trust which became the FW Trust. The FW Trust was drawn by Simeon Solicitors and signed by Michael and Mr Bizzaca. Michael is named as the appointor. It is unlikely that neither the solicitors nor Mr Bizzaca explained the nature and effect of the trust deed before Michael signed it. I infer that Michael understood the nature and effect of the trust deed and the role of appointor when he signed the trust deed.

17 At a meeting at the offices of Brett Davies Lawyers in May 2004, to which I will refer later in these reasons, Brett Davies, the principal of the firm, explained to Michael and Yvonne how a trust works. Mr Davies accompanied his explanation with a diagram. Mr Davies explained that the trustee was a mere puppet because the appointor was God and has the

power to hire and fire trustees at will. I find that Michael understood the role of a trustee and appointor at the time he signed the deeds of variation in October 2004.

18 Mr Bizzaca had annual meetings with Michael and Yvonne to go through the business accounts. Those annual meetings typically stretched over several hours. Mr Bizzaca went through with Michael and Yvonne the draft accounts for the preceding year in detail. Mr Bizzaca went through the financial statements. He explained to Michael and Yvonne the liabilities of the trusts. He impressed upon both Michael and Yvonne highlights of the accounts and significant changes from one year to the next. Mr Bizzaca continued to do that up to and including 2011, that is, he continued to go through the accounts with Michael and Yvonne after Tyrone had become managing director of Slondia and Citycourt. Mr Bizzaca said that after Tyrone became managing director when he reviewed the financial statements each year, he went to great pains and in great detail to explain to Michael and Yvonne the financial statements, the variations from one year to the next, profits, turnover, gross profit margins, assets, liabilities and those sort of matters. Mr Bizzaca went through with Michael and Yvonne the written resolutions of the trustee of the trust to distribute income to beneficiaries before Michael and Yvonne signed the resolutions.

19 Mr Reeves gave evidence, on which he was not cross-examined, that he arranged for finance agreements at the request of Tyrone. Mr Reeves arranged for Tyrone to sign the documents at his East Perth office. Mr Reeves would then attend Michael and Yvonne at their home in Karrinyup so that they could sign as directors of the company. It was his usual practice when having clients sign finance agreements to identify the parties to the agreement, the principal amount being borrowed, the term of the loan, the interest to be charged on the finance, the monthly instalments to be paid and the effect of the agreement and ask his clients if there was anything they did not understand. He does not recall an occasion when either Michael or Yvonne said that they did not understand the nature of the transaction. In his evidence Michael claimed to know little about loan agreements and guarantees. I find that Michael has either forgotten what he knew about such transactions or gave self-serving evidence to present himself as unsophisticated in matters of business and finance.

20 In his witness statement Michael said that prior to this dispute starting he did not know what an appointor or guardian was, those concepts may have been explained to him by Mr Bizzaca but he cannot recall. In his witness statements and in cross-examination Michael denied

knowing when he met with the lawyers at Brett Davies Lawyers that he was the appointor of the MMF Trust and FW Trust. He said:

> That I was the appointor? Absolutely not. I didn't know that I was the appointor. It was explained to me today and I've learned that as there is - the argument that arose in 2013.

It may be that Michael has forgotten things he knew and did between 1976 and 2004. In his written statements and cross-examination he referred to many things he cannot recall or remember. Michael says that he had only two meetings with lawyers from Brett Davies Lawyers. The evidence establishes that there were three. In cross-examination he conceded that he has started forgetting things and that his age might be a factor. I am satisfied that Michael had the nature of a trust and the role of the trustee and appointor explained to him before 2004 and again by Mr Davies on 27 May 2004. Michael's denial that he knew what an appointor or guardian was is either a result of his fading memory or deliberately self-serving evidence. Either way, it leads me to the conclusion that Michael's evidence is unreliable.

21 Michael said that he never said or agreed that he should be replaced as appointor of the MMF Trust or the FW Trust and has no recollection of asking the lawyers at Brett Davies Lawyers to review the trust deeds of the MMF Trust or the FW Trust. He said he had no involvement in the preparation of the deeds of variation and does not recall signing the deeds. He says that if he had known what he was signing he would not have signed the deeds. I reject all that evidence. Mr Nettleton's evidence, which I accept, is that Michael and Yvonne instructed him to review the two discretionary trust documents and instructed him to prepare deeds of variation to update both trusts and to replace Michael as the appointor of the two trusts with Tyrone. Tyrone's evidence is to the same effect.

22 I find Michael's evidence generally to be unreliable. In particular, I reject Michael's evidence in relation to his knowledge of the role of trustees and appointors and the circumstances in which the deeds of variation were prepared and executed.

Yvonne

23 Yvonne was born in Western Australia and was aged 75 at the time of the trial. She worked in the family business after the birth of Tyrone. Yvonne was involved less in the business after about 2002 and ceased working for the business in about 2006. However, in around 2008 she started doing banking for the retail business.

24 Yvonne was an unsatisfactory witness. Yvonne gave her evidence in a partisan and at times argumentative manner. At times Yvonne became emotional and her lack of objectivity coloured her evidence. Yvonne does not recall important events. For example, like Michael she does not recall the second meeting with Brett Davies Lawyers. She does not recall ever receiving any advice about the family trusts and does not recall ever speaking with any lawyers about the family trusts. I am satisfied by the evidence as a whole, and in particular the evidence of Mr Nettleton, that Mr Davies and Mr Nettleton explained to Yvonne the role of an appointor and trustees to the trusts and that Yvonne, together with Michael, instructed Mr Nettleton to draft deeds to make Tyrone appointor of the trusts in place of Michael.

Jamie

25 Jamie, the eldest son, was born in 1963 and was aged 51 when he gave evidence at the trial. He described his occupation as entertainer. He said that he works as a singer, band manager and in TV production and does MC work. He worked in the family business as a child and again for a month or so in the mid-1990s. Jamie is in the camp of his mother and father in opposition to Tyrone. On 30 July 2013 Jamie assisted his mother and father and Jason in physically seizing control of the business premises. Jamie gave evidence of a conversation with Tyrone in about 2004 about their parents' wills and how their assets should be distributed on their death. Jamie's account of that conversation is different from Tyrone's. I find it unnecessary to resolve that difference. Jamie was not a witness to the principal events surrounding the drawing and execution of the deeds of variation of the trust deeds.

Troy

26 The second son, Troy, was born in 1967. He worked in the family business for a time but then became involved with bikie gangs. He has spent substantial time in prison and was in prison at the time of this trial.

Jason

27 The third son, Jason was born in 1970 and was 44 years old at the start of the trial. He was involved in the family business from time to time. He went to prison for approximately six months in 2007. After he came out of prison Jason managed one of the family business's shoe repair kiosks. Jason's close friend, Damon Harris, conducted an accounting investigation for Michael and Yvonne in 2012 which resulted in Michael making allegations of serious misconduct by Tyrone. Jason joined

Michael, Yvonne, Jamie and Mr Harris in seizing control of the business premises on 30 July 2013. Jason is a General Beneficiary under each of the MMF Trust and FW Trust. He is the plaintiff in CIV 1276 of 2014. Jason elected not to give evidence in these proceedings.

Tyrone

28 The youngest son, Tyrone, was born in 1972 and was 42 years old at the time of the trial. He is the first defendant in CIV 1262 of 2013 and CIV 2186 of 2013 and the third defendant in CIV 1276 of 2014.

29 When he left school in 1990 at the age of 18 years Tyrone was employed in the wholesale shoe repair products business in which his father was then a partner. In about 1996 he became employed by the family business and remained an employee of the business until dismissed by Michael on 17 October 2013. I accept Tyrone's evidence that from about 1996 onwards Michael said to him that the business would be Tyrone's one day. In about 1996 Tyrone became general manager of the business. In 2001 he became a director of Slondia and Citycourt. On or about 15 June 2004 Tyrone was appointed by Michael and Yvonne as managing director of each of Slondia and Citycourt.

30 Tyrone gave evidence by witness statement and was extensively cross-examined. In general, I found Tyrone made appropriate concessions about his lack of recollection of some matters and likely events. In general, I found him to be a truthful and reliable witness.

The Brett Davies Lawyers

31 Peter Nettleton and Rosalina Chiu were lawyers working for Brett Davies Lawyers in 2004. Mr Nettleton received instructions from Michael and Yvonne in 2004. Mr Nettleton attended a meeting with Michael, Yvonne, Tyrone, Mr Torre and Mr Davies in May 2004 and a second meeting with Michael, Yvonne and Tyrone in June 2004. Ms Chiu was present at a meeting between Michael, Yvonne and Brett Davies in September 2004. As is to be expected neither Mr Nettleton nor Ms Chiu has much independent recollection of the relevant meetings. However, they gave evidence refreshed by contemporaneous notes. I accept their evidence and the contents of their notes as the best evidence of those meetings.

32 Mr Radici gave evidence without having given a witness statement. In general, I accept his evidence although it has little bearing on the matters in issue in this case. Brett Davies was present at the first meeting

with Michael, Yvonne and Tyrone at Brett Davies Lawyers offices on 27 May 2004 and gave advice about the structure of trusts and the role of trustees and appointors. He was in the United Kingdom at the time of the trial and hence did not give evidence.

Anthony Torre

33 Mr Torre is an accredited financial planner. He has known Michael, Yvonne and Tyrone since about 1985 and has had a close relationship with the Mercanti family. He referred Michael to Brett Davies Lawyers, who drafted the deeds of variation of the trust deeds and accompanied Michael, Yvonne and Tyrone to the first meeting with the lawyers in May 2004.

34 Tyrone called Mr Torre to give evidence. He was a reluctant witness. In re-examination he explained that the situation was awkward for him because he and his wife had a close relationship with all of the Mercanti family except Jamie and he was probably closer to Michael and Yvonne. Mr Torre was a truthful and reliable witness. In general, his account of the meeting at Brett Davies Lawyers on 27 May 2004 supports the evidence of Tyrone and Mr Nettleton.

Matthew Bizzaca

35 Matthew Bizzaca is a chartered accountant. Michael and Yvonne have been his clients since about 1977 or 1978. Mr Bizzaca set up the MMF Trust for Michael and Yvonne in 1979 and the FW Trust in 1996. Mr Bizzaca is a careful accountant. I accept his evidence that he went through the financial statements and relevant financial information relating to the business operated by the trusts with Michael and Yvonne each year and explained relevant matters to them in detail. In general, I accept Mr Bizzaca's evidence.

Larry Thomas

36 Larry Thomas was the chief financial officer of the family business in 2013. He gave evidence of what happened on 30 July 2013 when Michael, Yvonne, Jamie and Jason seized control of the business premises. Mr Thomas left the premises and did not return to work. I accept Mr Thomas' evidence.

Other witnesses

37 There were a number of other witnesses who were less involved in the events central to this proceeding. In general I accept their evidence.

The deeds of variation

38 Slondia, as trustee, and Michael, as guardian and appointor, executed a deed of variation of the MMF Trust Deed (the MMF Trust Deed of Variation). The MMF Trust Deed of Variation is dated 20 October 2004 and was drawn by Brett Davies Lawyers. The deed amended the MMF Trust Deed by deleting the definitions of guardian and appointor in the schedule to the MMF Trust Deed and replacing it with a definition of guardian and appointor that specified Tyrone as appointor and guardian. The MMF Trust Deed of Variation also amended the MMF Trust Deed in other ways. The other variations related to the exercise of the guardian's discretion in relation to CGT compliance and streaming provisions, which relate to making particular beneficiaries entitled to capital gains or franked distributions.

39 The FW Trust Deed was amended by a deed of variation (FW Trust Deed of Variation). The FW Trust Deed of Variation is dated 20 October 2004 and was also drawn by Brett Davies Lawyers. It was executed by Citycourt as trustee and Michael as appointor. The FW Trust Deed of Variation is in similar terms to the MMF Trust Deed of Variation. The FW Trust Deed was amended by deleting the definition of appointor in the schedule to the FW Trust Deed and replacing it with a definition which in effect made Tyrone appointor. There were also other amendments relating to streaming provisions and variation of the exercise of the appointor's discretion in relation to CGT compliance.

Relationship between Tyrone and Michael and Yvonne

40 Until late 2012 there was a close relationship between Tyrone and his parents. Michael and Yvonne lived at 4 Brodrick Street, Karrinyup. Tyrone and his wife, Vanessa, and their 12-year-old daughter lived opposite at 5 Brodrick Street. Slondia is the registered proprietor of 5 Brodrick Street. Tyrone had breakfast with his parents at their house every morning and discussed matters, including business matters with them.

41 Until the termination of his employment Tyrone had been an employee of the trustees of the trusts running the family business or entities of Michael for most of the time since he left school in 1990. On many occasions from about 1996 onwards Tyrone and Michael had conversations about Tyrone's role in the business. Tyrone's brothers had much less involvement in the business.

42 I accept Tyrone's evidence that Michael said that the business would be Tyrone's one day. In about 1996 Michael told Tyrone that he had decided to appoint Tyrone as general manager of the business. Thereafter Tyrone became general manager of the business. In 2001 Michael and Yvonne appointed Tyrone as a director of each of Slondia and Citycourt. From 1996 to 2004 Tyrone acted as general manager of Slondia and Citycourt. During this time Michael's attendances and involvement with the business progressively diminished until he no longer worked full time from about 2004 onwards. From about 15 June 2004 Michael appointed Tyrone as the managing director of each of Slondia and Citycourt. In the following years the business grew as Tyrone caused it to acquire more kiosks.

Michael and Yvonne attend Brett Davies Lawyers

43 In 2004 Michael, Yvonne, Tyrone and Mr Torre were together at Michael and Yvonne's home at 4 Brodrick Street. At the time Michael had a life insurance policy of $3 million which Mr Torre had arranged through his firm, Vertex Financial Solutions. Mr Torre told Michael that as the life insurance policy was in force Michael should review his will to reflect the potential insurance proceeds upon his death. Michael said that he did not have a will and asked Mr Torre whether or not it was important he had a will. Mr Torre told Michael he thought it was important Michael should get a will prepared to reflect the fact that $3 million would be coming into his estate upon his death from his life insurance policy and because his sons did not all see eye to eye and a will would determine Michael's wishes for the distribution of his estate. At Michael's request Mr Torre recommended that he go to Brett Davies Lawyers to help him prepare a will.

44 Michael made an appointment to see Peter Nettleton, a solicitor at Brett Davies Lawyers. Prior to the meeting, Mr Nettleton wrote to Michael to confirm the meeting, what would occur at the meeting, what Michael should bring to the meeting and giving information about Brett Davies Lawyers' costs. The letter also stated that Mr Nettleton was 'available to review and update your Family Trust Deed for an additional cost'.

45 On 27 May 2004 Michael, Yvonne, Tyrone, and Mr Torre attended a meeting at the offices of Brett Davies Lawyers with solicitor Peter Nettleton and the principal of the firm, Brett Davies. Michael and Yvonne executed a retainer agreement which stated that Mr Nettleton had to the day-to-day conduct of the matter. Michael instructed Mr Nettleton

that he wanted to step back from the business and Michael and Yvonne wanted to implement an estate plan that was fair to each of their four sons. They wanted Tyrone to take over the business and to make provision in their wills for their other sons by way of balance. Michael and Yvonne instructed Mr Nettleton to review their current structure and provide advice with a view to achieving that objective. I accept Mr Torre's evidence that Michael and the solicitors did most of the talking and Tyrone did not say much. I also accept Mr Torre's evidence that Yvonne expressed her agreement with the instructions that Michael gave to the lawyers.

46 At the meeting Mr Davies explained how a trust works. He drew a diagram to assist his explanation. Mr Davies explained that the trust deed was a mere puppet because the appointor was God and has the power to hire and fire trustees at will. Mr Nettleton requested that he be given the original trust deeds and any deeds of variation, financial statements for the last couple of years and Yvonne and Michael's super fund deed and any deeds of variation.

47 On 10 June Mr Nettleton informed Jeff Morphett of Mr Torre's firm, Vertex Group, that he had scheduled a further meeting with the Mercantis on 15 June and he understood that Tyrone would bring to the meeting the original deeds and any deeds of variation for the MMF Trust, the FW Trust and the Mercanti self-managed superannuation fund as well as financial statements for each of them for the last couple of years.

48 On 14 June Mr Nettleton wrote to Michael and Yvonne enclosing draft wills and powers of attorney.

Second meeting with lawyers - 15 June 2004

49 Michael, Yvonne and Tyrone met with Mr Nettleton again on 15 June 2004. Mr Nettleton reviewed the MMF Trust Deed and FW Trust Deed. Michael and Yvonne instructed Mr Nettleton to prepare deeds of variation to update both trusts and to replace Michael as the appointor of the trusts with Tyrone. Michael and Yvonne instructed Mr Nettleton to send the deeds of variation to Tyrone.

50 Mr Nettleton sent a letter dated 13 July 2004 to Tyrone. The letter enclosed deeds of variation for the MMF Trust and the FW Trust to be signed by the parties. I find that the deeds of variation were drawn in accordance with the instructions given by Michael and Yvonne on 15 June 2004. The provisions of the deed relating to the exercise of the guardian's discretion in relation to CGT compliance and the streaming provisions

were drafted in accordance with the instructions given by Michael and Yvonne to Mr Nettleton to review and update the trust deeds.

51 Mr Nettleton left Brett Davies Lawyers in July 2004. The Mercanti file passed to Sam Radici. Mr Nettleton's handover note to Mr Radici said that he had done variations for the two discretionary trusts and was awaiting return of the signed documents for stamping. Mr Radici wrote a letter dated 18 September 2004 to Tyrone requesting that the deeds of variation be returned as soon as possible for stamping.

52 Mr Davies instructed a solicitor, Rosalina Chiu, to take over the matter of Michael and Yvonne's wills. In his handover note of 24 July Mr Nettleton noted that Michael and Yvonne want Tyrone to get the business but they want to be fair to their other children as well. On 24 August 2004 Ms Chiu wrote to Michael and Yvonne. In her letter Ms Chiu said that she had checked that their wills and powers of attorney had been signed pursuant to the *Wills Act* and other legislation. On 1 September 2004 Michael wrote to Ms Chiu on behalf of himself and Yvonne requesting that Ms Chiu add to their will that on the division of their estate Jason will have as part of his inheritance a shop to give him a comfortable living.

53 On 2 September 2004 Michael and Yvonne met with Brett Davies and Ms Chiu. At the meeting Michael and Yvonne each signed the wills that had been prepared for them. In subsequent correspondence to Mr Bizzaca, Ms Chiu said that on 2 September 2004 Michael and Yvonne had instructed Brett Davies Lawyers to review the MMF Trust Deed.

54 On 3 September 2004 Ms Chiu sent a letter to Mr Torre which enclosed a copy of a letter of advice to Michael and Yvonne also dated 3 September 2004. The letter to Michael and Yvonne confirmed that they had signed their wills and gave advice in relation to estate planning. Ms Chiu sent another letter to Michael and Yvonne dated 3 September 2004. That letter enclosed a copy of their unsigned wills and confirmed the storage and safe custody of their original wills. Ms Chiu confirmed that she had written to Mr Bizzaca requesting him to send their family trust deed and all the deeds of variation to Brett Davies Lawyers' office and that once they had received the documents Ms Chiu would ring and organise a time to review their family trust deed. I find that the inconsistency between Ms Chiu's letters in relation to the review of the trust deeds and the advice and draft deeds of variation which had already been sent to them by Mr Nettleton arises from Ms Chiu not being

informed of or knowing the advice that Mr Nettleton had given and that he had drafted the deeds of variation and sent them to Tyrone for signing.

Deeds of variation executed

55 The deeds of variation are each dated 20 October 2004. The MMF Trust Deed of Variation was executed by Slondia and Michael. Slondia executed the deed by applying its common seal. The execution clause states that the seal was affixed with the authority of the directors who signed, that is Michael and Tyrone. The FW Trust Deed of Variation was executed by Michael and Citycourt. Citycourt executed the deed by applying its common seal. The execution clause states that the seal was affixed with the authority of the directors who signed, that is Michael and Tyrone. Tyrone says, and I accept, that he executed the deeds of variation on 20 October 2004 and that Michael executed the deeds.

56 Tyrone did not return the executed deeds of variation to Brett Davies Lawyers. In December 2004 Ms Chiu contacted Mr Bizzaca and Michael and Yvonne to locate the trust deeds and all deeds of variation. It appears from a letter of 7 May 2005 from Mr Radici to Tyrone that the deeds of variation for the MMF Trust and the FW Trust were delivered to Brett Davies Lawyers the previous week and Mr Radici then returned to Tyrone the original deed for the Citycourt Superannuation Fund and the deeds of variation for the MMF Trust and the FW Trust.

Michael, Yvonne and Tyrone execute further Deed of Variation

57 On or about 22 January 2008 the FW Trust Deed was varied by a further deed of variation. The deed of variation was signed by Michael and Yvonne as directors of Citycourt and by Tyrone who is described in the deed as Appointor. The deed varied the FW Trust Deed relating to guarantees and indemnities.

Relationship between Michael and Yvonne and Tyrone breaks down

58 In late 2012 the relationship between Tyrone and Michael and Yvonne broke down. A significant cause of the breakdown was that Michael wished to receive more income from the business, or have his credit card expenses paid from the business, and Tyrone declined. There were other disputes or differences between them. One matter related to Yvonne giving evidence as a prosecution witness against Troy, and Tyrone's response to a request to see if his mother could be excused as a witness.

59 Michael said that 'the problem' began in late 2012 when the business could not pay Yvonne's credit card. Michael complained to the other boys. In late December 2012 Michael and Yvonne had a discussion with Damon Harris, a director of an accounting firm. Mr Harris was Jason's best friend. Mr Harris said he would go away and do some investigations about what property Michael and Yvonne owned.

60 In early 2013 Michael, Yvonne and Mr Harris met with Mr Bizzaca at his office. Mr Bizzaca gave evidence, which I accept, that at that meeting Mr Harris made some significant assertions about mismanagement of the companies. There was a suggestion at the meeting that Tyrone had taken a large amount of money which on Mr Bizzaca's quick analysis turned out to be GST. Mr Harris made some assertions of wrongdoing within the companies. Mr Bizzaca disagreed with those assertions and later demonstrated that they were wrong.

Michael commences CIV 1262 of 2012

61 On 18 February 2013 Michael commenced CIV 1262 of 2012. Michael claimed a declaration that the terms of the MMF Trust Deed do not empower Slondia to vary the trust deed in the manner of the MMF Trust Deed of Variation and a declaration that the MMF Trust Deed of Variation was not validly executed by Slondia because there was no resolution of the directors authorising it to enter the variation deed or affix the common seal and because the directors of Slondia who witnessed the affixing of the common seal to the deed of variation did not know or agree to the terms of the deed of variation. Michael also sought a declaration that the variation effected by the deed of variation was made by Slondia in breach of trust because it was not an exercise of power in good faith and Tyrone was a knowing participant in the breach or knowingly took the benefit of the breach. Michael sought other relief including an order setting aside the MMF Trust Deed of Variation. Michael sought similar relief in relation to the FW Trust Deed of Variation.

Interlocutory orders

62 On 18 February 2013 Michael also caused to be issued a chamber summons which sought orders that Tyrone be restrained from exercising or purporting to exercise any powers as appointor of the MMF Trust or FW Trust until judgment or further order. On 20 February orders were made by consent restraining Tyrone from exercising or purporting to exercise his powers as appointor until the chamber summons was determined. On 7 March orders were made by consent and upon mutual undertakings discharging the orders made on 20 February.

63 On 23 July Michael's solicitors wrote to Tyrone's solicitors saying that they regarded the renewal of expired leases held by Slondia in the name of Parradele to be a breach of Tyrone's undertaking given on 6 March and Michael no longer regarded himself to be bound by the undertakings he then gave. Michael's solicitors gave notice of their intention to apply for an injunction to prevent Tyrone from exercising or purporting to exercise any powers as the appointor or guardian of the MMF Trust or as appointor of the FW Trust. On 29 July Michael caused a chamber summons to be issued seeking orders that Tyrone be restrained from exercising or purporting to exercise any powers as appointor or guardian of the MMF Trust or appointor of the FW Trust. Tyrone was then in China on company business.

Michael takes over the business

64 On 30 July 2013 whilst Tyrone was still in China Michael and Yvonne, as the shareholders of Slondia and Citycourt, removed Tyrone as a director of Slondia and Citycourt. At about 4.00 pm that same day, 30 July 2013, and without prior consultation with or notice to Tyrone, Michael, Yvonne, Jamie, Jason, Mr Harris, a solicitor from Michael's solicitors and an IT consultant from Mr Harris' firm, entered the business premises and took control of the office. At the time Tyrone was speaking on the telephone to Larry Thomas, who was then CFO of the business. Jason walked into Mr Thomas' office and snatched the telephone from Mr Thomas' hand. Jason told Tyrone that Mr Thomas was busy talking to the new owners of the business and then ended the conversation by hanging up. Michael told Mr Thomas that Tyrone had been removed as a director and that they were all there to take over the business. Michael's group took copies of all the computer hard drives. Jamie rummaged through drawers and cupboards in Tyrone's office. Later that day Tyrone learned from his solicitor that he was no longer authorised to manage the business and had been removed as a director of the companies.

Tyrone appoints Parradele trustee

65 On 31 July 2013 Tyrone and Parradele executed notices removing Slondia and Citycourt as trustee of the MMF Trust and FW Trust respectively and appointing Parradele as trustee of each trust. Each notice stated that it was made pursuant to the relevant trust deed and deeds of variation.

Michael commences CIV 2186 of 2013

66 On 31 July 2013 Michael commenced CIV 2186 of 2013 in which he claimed a declaration that the notices of removal of Slondia and Citycourt and appointment of Parradele as trustee of the MMF Trust and the FW Trust are invalid and of no legal force or effect or alternatively a declaration that the purported removal of Slondia and Citycourt as trustee of MMF Trust and FW Trust respectively was in breach of the duties of Slondia and Citycourt as trustee and sought an order setting aside the appointment of Parradele as trustee of each trust. Michael also sought injunctions. Michael says that the notices appointing Parradele trustee of the trusts are invalid and of no legal force or effect by reason of the matters alleged in CIV 1262 of 2013. Alternatively, Michael says that by effecting the notices of appointment of Parradele as trustee Tyrone breached his fiduciary duty or duty of care to exercise the appointment power bona fide for the purpose for which it was conferred. Michael says that Parradele had knowledge of those matters and has become trustee of the MMF Trust and FW Trust through its knowing involvement, alternatively knowing receipt of the benefit of Tyrone's breaches of duty.

67 Michael also caused to be issued a chamber summons seeking injunctions restraining Parradele from acting as trustee of the trusts or dealing with their assets. The chamber summons came on for hearing urgently on an ex parte basis. I dealt with the application as an application for an interim injunction until the matter could be heard on an inter partes basis. I made orders that Parradele be restrained from acting as trustee of the trusts or dealing with their assets until the hearing of the plaintiff's application for interlocutory injunctions on 7 August. On 7 August I made orders by consent that Parradele be restrained from acting as trustee of the trusts or dealing with their assets until judgment or further order. Those orders have remained in place since.

Defendants' positions

68 Slondia and Citycourt have taken no active part in the proceedings. Tyrone and Parradele generally deny the claims made by Michael and deny that he is entitled to the relief claimed. In addition to denying the claims made by Michael, Tyrone sets up defences of estoppel, laches and acquiescence. Tyrone also claimed that at the meeting with Brett Davies Lawyers on 27 May 2004 Tyrone agreed with Michael and Yvonne that Tyrone would receive control of the business from Michael and Yvonne immediately as an advance on his inheritance and Michael and Yvonne would make provision in their wills for their other sons by way of balance. In his defence Tyrone described this agreement as the Handover

Agreement. Tyrone counterclaims for a declaration that the Handover Agreement remains in legal force and effect and a declaration that there is an implied term to the FW Trust Deed to the effect that any appointor who determined thereafter to renounce or resign the position could, by notice in writing and with the consent of the trustee and guardian, thereafter nominate another appointor in his or her place and that person would thereafter be the appointor of the FW Trust.

Jason commences CIV 1276 of 2014

69 On 25 February 2014 Jason commenced CIV 1276 of 2014. In essence, Jason claims the same relief that Michael claims in CIV 1262 of 2013 and 2186 of 2013 and on the same grounds. Counsel for Michael and Jason, Mr Penglis, explained that Jason commenced that action because of the estoppel and laches defences pleaded by Tyrone in the actions brought by Michael. Mr Penglis explained that Tyrone could not plead estoppel or laches against Jason. There is no defence of estoppel or laches pleaded by Tyrone in CIV 1276 of 2014, the action brought by Jason.

Course of the proceedings

70 I ordered the three proceedings be heard together and that evidence in each of them be evidence in each of the other actions. Mr Penglis appeared as counsel for Michael, the plaintiff in CIV 1262 of 2013 and CIV 2186 of 2013, and Jason, the plaintiff in CIV 1276 of 2014. I will refer to Michael and Jason as the plaintiffs. Mr Burnside QC appeared with Mr Grubb as counsel for Tyrone, the first defendant in CIV 1262 of 2013 and CIV 2186 of 2013 and the second defendant in CIV 1276 of 2014 and Parradele the second defendant in CIV 2186 of 2013 and the third defendant in CIV 1276 of 2014. I will refer to Tyrone and Parradele as the defendants.

71 The trial commenced on 21 July 2014. The evidence concluded on 28 July 2014. As there was not sufficient time to complete closing addresses the trial was then adjourned for that purpose. Before the court reconvened the parties asked that the matter not be relisted for further hearing because they believed that a negotiated settlement would be achieved. Unfortunately, that did not happen and the court reconvened on 11 December 2014 for closing submissions. In the course of submissions in reply by Mr Burnside on 12 December, to which I will refer later in these reasons, the defendants applied or foreshadowed an application to amend their defences. I reserved my decision and gave directions for the

filing and disposition of an application to amend the defences, if it eventuated.

72 On 17 December 2014, in accordance with my directions, the defendants filed an application to amend their defences. The plaintiffs requested an oral hearing of the application. That hearing could not take place until 12 February 2015 after which I reserved my decision on the amendment application to be dealt with in the course of my reasons for judgment in the actions. I will deal with the application to amend the defences later in these reasons.

The trust deeds' power to vary the Appointor

73 The plaintiffs say that the MMF Trust Deed and the FW Trust Deed do not empower the trustee to revoke or vary the appointment of the Appointor or the Guardian provided for in the MMF Trust Deed or the Appointor provided for in the FW Trust Deed or alternatively, to vary the schedule to each of the trust deeds or those parts of the schedule relating to the 'person or persons (if any) successively named described or defined' as the Appointor or the Guardian in the MMF Trust Deed or those parts of the schedule relating to 'the person specified in item 7' as the Appointor in the FW Trust Deed.

74 The plaintiffs submitted that the legal construction of an instrument is the same in equity as at law. The nature of the instrument as a trust deed and the evident purpose of the trust may nevertheless inform the true meaning of its terms. The 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. Where an instrument is capable of more than one meaning the interpretation which avoids consequences which are, in the circumstances, capricious or unreasonable will be preferred. That meaning may not necessarily be the most obvious or most grammatically correct: ***Scaffidi v Montevento Holdings Pty Ltd*** [2011] WASCA 146 [65], [66], [154] and the cases there referred to.

75 A power of amendment in a trust deed will be construed according to its natural meaning. In ***Kearns v Hill*** (1990) 21 NSWLR 107 the New South Wales Court of Appeal rejected any narrow or strict construction of a power of amendment in a trust deed. Mahoney JA said at page 108 that the precedent books show that discretionary trusts have in more recent times been used to provide to the person having the benefit of the power of variation the power to make fundamental changes in the structure of the trust document and the entitlements under it. At page 109 Meagher JA said that the cardinal duty of a court called upon to interpret the provisions

of a trust deed is to construe each provision according to its natural meaning and in such a way to give it its most ample operation.

76 It has been held that a power of amendment is not likely to be held to extend to varying the trust in a way which would destroy its 'substratum': ***Re Dyer*** [1935] VLR 273. In ***Cachia v Westpac Financial Services Ltd*** (2000) 170 ALR 65 Healy J said:

> The power of variation conferred by this clause is apparently unconfined. There are, however, some authorities which suggest that a power to vary a trust deed may be held not to extend to a variation which would alter the substratum of the trust … this may be no more than an application of the equitable doctrine of fraud on the power …[68].

After making some observations about the variation in that case Healy J said:

> Even if there is some principle that a power of variation does not extend to an arrangement which changes the whole substratum of the trust, a fundamental reorganisation of the trust does not of itself necessarily involve destruction of the substratum of the trust. If there is a substratum underlying this trust it is that of a property trust in which units are issued to the public. That substratum was not destroyed by the amendments in question … [72].

77 In ***Jenkins v Ellett*** [2007] QSC 154 Douglas J held that a power to vary 'all or any of the trusts' of a trust deed did not include a power to discharge the principal of the trust deed, who had power to remove and appoint trustees. Douglas J reached that view after considering the text of the provision conferring the power of amendment. Douglas J also had regard to the nature of the proposed amendment:

> The power to appoint a new trustee available to the Principal under clause 12 does not seem to me to be one that requires easy amendment to add to any desirable flexibility in managing the fund: cf Meagher JA in ***Kearns v Hill*** (1990) 21 NSWLR 107 107 - 109. Clause 12's purpose of allowing the removal of a trustee is also inconsistent with the possibility that the trustee could negate the operation of the power by amending the schedule to the deed to change the identity of the Principal …
>
> The Principal's ability to remove and replace a trustee seems to me to be one of the fundamental features of the structure of this deed, one setting up the family discretionary trust. The maintenance of that power is obviously designed to ensure that the control of the trust will remain with the significant intended beneficiary, here George Jenkins, and after him his spouse or his executor, as follows from the definition of 'The Principal' in the schedule. To allow the power in clause 12 to be subverted by the trustee it was designed to supervise purporting to use clause 11's powers to

> amend the deed rather than the trusts declared by the deed is not, in my view, permissible. It is akin to destroying the substratum of the deed [18] - [19].

78 The scope of the power of amendment in each trust deed depends on its express terms, or on what may properly be implied. The correct approach to the construction of the power of variation in a trust deed is the same as for any instrument the meaning of which is in contention. The construction of an instrument involves ascertaining what a reasonable person would have understood the parties to the instrument to mean. Consideration should ordinarily be given not only to the language of the instrument, but also to the surrounding circumstances known to the parties when the instrument was executed: ***Scaffidi v Montevento Holdings Pty Ltd*** [65] (Buss JA).

MMF Trust Deed empowers Trustee to vary Appointor

79 The defendants say that cl 28 of the MMF Trust Deed empowers and authorises the trustee to amend the trust deed by removing the appointor and appointing a new appointor in his place.

80 The words of cl 28 of the deed, as with all words have to be read in the context of the document as a whole. The words should as far as possible be given their ordinary meaning. When attempting to discern the true meaning of the power conferred in the trust deed the court must have regard to the nature of the deed and the purpose for which the power appears to have been granted - though this will depend to a large extent on the terms of the deed itself.

81 Clause 28 of the MMF Trust Deed is:

> Subject to clause 10 hereof the Trustees for the time being may at any time and from time to time by deeds revocable or irrevocable revoke add to or vary all or any of the trusts terms and conditions hereinbefore contained or the trusts terms and conditions contained in any variation or alteration or addition made thereto from time to time and may in like manner declare any new or other trusts terms and conditions concerning the Trust Fund or any part or parts thereof the trusts whereof shall have been so revoked added to or varied provided that the rule known as the Rule against Perpetuities is not thereby infringed and provided that such new or other trust powers discretion alterations or variations -
>
> (1) insofar as the beneficial interests created by this Deed are revoked added to or varied shall be for the benefit of all or any one or more of the General Beneficiaries or any one or more persons born or unborn being lineal descendants of whatever degree (or the spouse

> of any lineal descendant) of any grandparent of any General Beneficiary; but
>
> (2) shall not be in favour of or result in any benefit to any member of the excluded class;
>
> (3) shall not affect the beneficial entitlement to any amount set aside for any beneficiary prior to the date of the variation alteration or addition; and
>
> (4) shall not (save as provided in paragraph (1) of this clause) enlarge the number of persons capable of falling within the description 'beneficiary' hereinbefore contained.
>
> Save as provided in this clause these presents shall not be capable of being revoked added to or varied.

82 I will refer to some other important provisions of the trust deed. Clause 1 contains definitions of the Guardian and the Appointor. Guardian is relevantly defined to mean the person or persons (if any) named in the Schedule. The definition contains a proviso that the Trustees may declare that any person who has not yet become Guardian but who would or might but for the proviso at some time become Guardian shall not become Guardian. Appointor is relevantly defined to mean the person named in the Schedule or determined according to the provisions of the Deed. Like the definition of Guardian, the definition of Appointor contains a proviso that the Trustees may declare that any person who has not yet become Appointor but who would or might but for the proviso become Appointor shall not become Appointor.

83 Clause 10 provides that subject to the express provisions of the deed the Trustees may exercise every discretion and power vested in them in their absolute discretion subject to certain stated qualifications. The first qualification is that the Trustees may before exercising any discretion or power or determination consult the wishes of the Guardian (if any). The third is that the trustee shall not, when there is a Guardian, exercise the reserved powers or the restricted powers except with the consent of the Guardian. There are further provisions relating to the exercise of reserve powers. The reserve powers are defined in cl 10(7). One reserved power is the power contained in cl 28, that is the power of amendment.

84 Clause 21 deals with the Appointor. It provides:

> The Appointor and on the death of the last surviving Appointor such other person as such survivor shall have appointed to act as Appointor and in

default of appointment his legal personal representative shall be entitled by instrument in writing at any time and from time to time -

(1) to remove any Trustee hereof;

(2) to appoint any additional Trustee or Trustees;

(3) to appoint a new Trustee or Trustees in the place of any Trustee who resigns his Trusteeship or ceases to be a Trustee by operation of law;

85 Provided that

(a) if and so long as the Appointor is a beneficiary he shall not be eligible to be appointed as a Trustee hereof;

(b) if there is no Appointor named in the Schedule or if at any time there is no one entitled to exercise the power hereinbefore conferred the statutory and other rights or removing and appointing Trustees hereof may be exercised by the Trustees or by the legal personal representatives or (if the Trustee be a corporation) the liquidator of the last surviving Trustee;

(c) a person appointed to act as Appointor by an Appointor named in the Schedule hereto shall have the same right of appointing a person to act as Appointor as the person who appointed him.

86 Clause 23 provides that any Trustee, Guardian or Appointor and any person who may by succession become a Trustee, Guardian or Appointor may resign or renounce such position and if upon an Appointor resigning there is no Appointor or other person entitled to exercise the power of appointment provided in cl 21 a sole surviving Trustee shall not resign except upon appointing a new Trustee or new Trustees.

87 The crucial words in cl 28 are 'the Trustees … may … vary … the trusts terms and conditions hereinbefore contained'. In the course of argument Mr Penglis suggested that the words 'trusts terms and conditions' might mean the trusts and the terms and the conditions contained in the trust deed or they might mean the terms and conditions of the trusts. In my opinion the natural and ordinary meaning of the words is that the trustees may vary the trusts, the terms, and the conditions contained in the trust deed. The words 'trusts terms and conditions' are items in a list. Commas are commonly used to separate items in a list. However, the absence of a comma between 'trusts' and 'terms' reflects the

drafter's sparing use of punctuation not that the words do not form items in a list.

88 Mr Penglis submitted that the Guardian and the Appointor are specified in the Schedule which comes after cl 28 and are therefore not trusts terms and conditions 'hereinbefore' contained. Clause 1(15) relevantly provides that the Appointor means the person named, described or defined in the Schedule. The placement of the name or description in the Schedule is a drafting technique to achieve clarity and brevity in the definition clause. The item in the Schedule should be read as incorporated into cl 1(15) of the clause. To do otherwise would be to exclude the name or description of the Appointor from the deed and is not a businesslike construction of the deed.

89 The proviso to the definition of Appointor provides that the Trustees may declare that any person who has not yet become Appointor but who would or might but for the proviso at some time become Appointor shall not become Appointor. Mr Penglis says that the proviso suggests that cl 28 does not empower the Trustees to amend the deed by varying a name or description of the Appointor in the Schedule. The argument is two-fold. First, if cl 28 empowers the Trustees to remove an Appointor and appoint a new Appointor then the proviso to the definition of Appointor would have no work to do and that would be inconsistent with the intent of the definition. Secondly, the express conferral on the Trustees of the power to declare that any person who has not yet become Appointor but who would or might but for the proviso become Appointor shall not become Appointor suggests that a wider power for the Trustees to remove or appoint an Appointor was deliberately omitted. This is an argument of the *expressio unius est exclusio alterius* variety.

90 I do not accept that argument. The proviso confers on the Trustees a limited power to prevent a person becoming Appointor. The deed must be read as a whole and its clauses interpreted in order to achieve a harmonious interpretation of all its provisions. However, those principles do not require that cl 28 be read down in the manner advocated by the plaintiffs. Clause 28 is a power to revoke, add to, or vary all or any of the trusts terms and conditions of the deed. The only express limitations on the power of the Trustees to revoke, add to, or vary all or any of the trusts terms and conditions are the proviso to cl 28 which relates to the rule against perpetuities and the prohibitions in cl 28(1) - (4). The plain words of cl 28 empower the Trustees to revoke, add to, or vary the terms and conditions of the trust deed. It is not sensible or logical to read down that

power so that it cannot be exercised to empower the Trustees to do things which they cannot do before the revocation, addition, or variation.

91 In my opinion the natural and ordinary meaning of the words of cl 28 are that the trustees may amend the provisions of the trust deed, including the items in the Schedule naming or describing the Appointor and the Guardian. In my opinion there is nothing in the remaining provisions of the trust deed that necessarily imply that the trustees cannot amend the deed by removing the Appointor or Guardian and replacing them.

92 ***In Re Internine Trust and the Intertraders Trusts*** [2005] JLR 236, referred to in *Thomas on Powers* (2nd ed) at [1620] is a helpful illustration of the proper approach to the interpretation of a power of amendment or variation in a trust deed. Sheik Ali Alhamrani died leaving substantial assets. He was survived by seven sons and two daughters. The assets outside Saudi Arabia were transferred to the trustees of two Jersey settlements - the Internine Trust and the Intertraders Trust. Originally there were two first protectors of each trust, Sheik Mohamed and Sheik Abdullah. The expression 'first protectors' was originally defined by cl 1(b) as meaning 'the persons appointed as the first protectors pursuant to clause 6(b)'. Clause 6(b) provided that the first protectors shall be Sheik Mohamad and Sheik Abdullah. Clause 6(c) provided that a person shall cease to be a protector in certain circumstances including if he shall be removed by notice by the trustee and the other protector signed by beneficiaries entitled to at least 75% of the trust fund. Clause 6(f) provided that the first protectors may exercise their powers individually in the exercise by one of them of any of their powers under four specified provisions and any consent given by one of the first protectors under the provisions of the trusts shall bind the other first protector and should be binding on the trustee. The first of the four provisions mentioned in cl 6(f) is cl 2(b) which provided:

> The first protector shall have the right at any time and from time to time up to revoke … or otherwise amend (both as to its beneficial and administrative provisions) this instrument by written instrument delivered to the trustee provided (first) that no such amendment shall diminish the compensation or the provisions for exoneration to which the trustee is entitled to increase its obligations hereunder without its consent in writing and (secondly) that no such amendment shall have retrospective effect …

Sheik Abdullah executed instruments amending the trusts by amending the text of cl 1(b) and cl 6(a) to remove all reference to Sheik Mohamad and stating that the first protector shall be Sheik Abdullah. Sheik Mohamad challenged the exercise of the power to amend in this way.

Sheik Abdullah ultimately accepted that the power to amend was of a 'restricted personal' or 'qualified fiduciary' nature. Commissioner Page in the Royal Court of Jersey noted two particular features of the trust deed. First, the only way to resolve an impasse between the two first protectors were the remedy of removal altogether of one or other first protector by the beneficiaries under cl 6(c) or by one of the first protectors amending the trusts so as to remove the other. The second feature was that there were only two exceptions to the first protector's power to revoke or amend. Commissioner Page concluded:

> It is plain, therefore, that there was deliberately intended to be no restriction on first protectors amending the trust deed so as to increase *their* powers without reference to the beneficiaries [69] (emphasis in original)

There was no express entrenching provision which might have operated to preclude certain amendments as being outside the contemplation of the makers of the deed as a matter of implication. The amendments in issue concerned the administration of the trusts and did not impose any additional financial obligations or destroy any substantive beneficial entitlement. Moreover, the potentially unreasonable result of permitting one person to act as first protector was controlled by the fiduciary nature of the power to amend or revoke. Accordingly, the inescapable conclusion was that the trust deeds provided for each of the two first protectors to exercise a unilateral power to amend or revoke the administrative provisions of the trusts, and there was nothing to stop Sheik Abdullah from executing the amending deeds other than the constraints inherent in the exercise of his fiduciary powers.

93 Similar observations apply to the power of amendment in the MMF Trust Deed. The power of amendment in cl 28 is subject only to the proviso relating to the rule against perpetuities and the prohibitions in cl 28(1) - (4) and to cl 10. The proviso relating to the rule against perpetuities and the prohibitions in cl 28(1) - (4) do not prohibit the Trustees from amending the trust deed so as to remove the Appointor and appoint a new Appointor. Clause 10 provides that subject to the express provisions of the deed the Trustees may exercise every discretion and power vested in them in their absolute discretion subject to certain stated qualifications. The only relevant qualification is that before exercising any discretion or power the Trustees may consult the wishes of the Guardian and the Trustees shall not exercise the reserved powers, which includes the power of amendment in cl 28, without the consent of the Guardian. Neither of those qualifications prevent the Trustees, with the

consent of the Guardian, from amending the trust deed by replacing the Appointor and appointing a new Appointor. There is no entrenching provision which might operate to preclude amendments to the deed to remove the Appointor and Guardian and appoint a new Appointor and Guardian. The amendments in relation to the Appointor and Guardian concern the administration of the trusts and did not impose any additional financial obligations or destroy any substantive beneficial entitlement, although, of course, the trust is a discretionary trust and the trustee has the power to distribute income.

94 The plaintiffs submit that their contention that the scope of the power of amendment does not extend to removing the Appointor and Guardian and appointing a new Appointor and Guardian is supported by the decision of Douglas J in ***Jenkins v Ellett***. The power to vary the trusts in that case was in cl 11 which provided that the trustee may vary 'all or any of the Trusts declared or any Trusts declared by any variation, alteration or addition made from time to time and may by the same or any other Deed declare any new or other trusts or powers concerning the Trust Fund'. The applicants contended that this power of variation applied only to the trusts declared in cl 2 to cl 10 of the deed. Clause 2 contained the declaration of trust, cl 3 to cl 10 dealt with income of the trust fund, termination, distribution of the trust fund, trustee's expenses and remuneration, and the trustee's discretion in the exercise of powers and questions of trustee's liability. The applicant contended that by contrast, the remaining clauses of the deed dealt with matters not likely to be the subject of a power to vary, namely, the removal and appointment of trustees, the governing law of the trust, its name and the absence of any obligation in the beneficiaries to indemnify the trustee. Douglas J held that cl 2, in declaring that the trustee holds the trust fund, 'upon the trusts subject to the powers and provisions contained in this Trust' highlights the link to cl 11's power to amend the 'Trusts declared' and the language of cl 2 makes the declaration of trust subject to the power, for example, vesting in the Principal to appoint new trustees in cl 12. Douglas J held that the power to amend in cl 11 is not to amend 'the trust constituted by and comprised in this Deed and the Schedule' but the 'Trusts declared', namely those declared in cl 2. The difference between the singular and the plural forms of the word 'trust' is significant. The drafter did not provide the trustee with a broad power of amendment of 'this Trust' which is defined in cl 1 to mean 'the trust constituted by and comprised in this Deed and the Schedule but only the 'Trusts declared'. In my view the decision of Douglas J in ***Jenkins v Ellett*** turns, as one would expect, on

the particular provisions of the trust deed in question which are quite different from the terms of the MMF Trust Deed.

95 In ***Jenkins v Ellett*** Douglas J also held:

> To allow the power in cl 12 to be subverted by the trustee it was designed to supervise purporting to use cl 11's powers to amend the deed rather than the trusts declared by the deed is not, in my view, permissible. It is akin to destroying the substratum of the deed [12].

96 In my opinion the power of the Trustees to replace the Appointor and Guardian of the MMF Trust is not akin to destroying the substratum of the trust deed. The power of amendment in cl 28 is a reserved power. Where there is a Guardian, the Trustees may not exercise the reserved powers except with the consent of the Guardian. Accordingly, the Guardian cannot be removed or replaced except with his or her consent. It cannot be said that the power of the Appointor to appoint new Trustees in cl 21 would be subverted by the Trustees the Appointor was designed to supervise if the Trustees have power to vary the trust deed by removing and appointing a new Appointor. The proviso to the definition of Appointor and paragraph (b) of the proviso to cl 21 confer powers on the Trustees to prevent a person becoming Appointor and to remove and appoint new Trustees in some circumstances. Those provisions give some powers to the Trustees in relation to the appointment of an Appointor and the removal and appointment of new Trustees.

97 Clause 28 of the MMF Trust Deed empowers the Trustees to remove the Appointor or Guardian and appoint a new Appointor or Guardian in his, her or their place.

FW Trust Deed does not empower Trustee to vary Appointor

98 The power of amendment in the FW Trust Deed is cl 14 which provides:

> 14.1 The Trustee may at any time and from time to time (but whilst there shall be an Appointor only after having given not less than 30 days written notice to the Appointor of his intention so to do) by deeds revoke add to or vary all or any of the trusts hereinbefore provided or the trusts provided by any variation alteration or addition made thereto from time to time and may by the same or any other deed declare any new or other trusts or powers concerning the Trust Fund or any part thereof the trusts whereof shall have been so revoked added to or varied.

14.2 The powers specified in clause 13.1 shall not be exercised so that:

14.2.1 any interest under the trusts as so revoked added to or varied may vest after the expiry of the perpetuity period;

14.2.2 any member of the Excluded Class is becomes or may become entitled to any interest or benefit under the trusts as so revoked added to or varied; or

14.2.3 the beneficial entitlement to any amount set aside for any Beneficiary prior to the date of the variation alteration or addition is affected.

14.3 Save as provided in clauses 14.1 and 14.2 these presents shall not be capable of being revoked added to or varied.

99 Clause 1, the definition clause, defines Appointor as the person specified in item 7 of the Schedule or determined according to the provisions hereof. Clause 10 deals with the Appointor. Clause 10.1 provides:

10.1 The Appointor and on the death of the last surviving Appointor such other person as he shall have appointed to act as Appointor and in default of appointment his legal personal representatives shall be entitled by instrument in writing at any time and from time to time:

10.1.1 to remove any Trustee hereof;

10.1.2 to appoint any additional trustee or trustees; and

10.1.3 to appoint a new trustee or trustees in the place of any Trustee who resigns his trusteeship or ceases to be a Trustee by operation of law.

Person Not Eligible

10.2 Any member of the Excluded Class shall not be eligible to be appointed as a Trustee.

No Appointor

10.3 If there is not an Appointor named or if at any time there is no one entitled to exercise the powers specified in clause 9.1 the statutory and other rights of removing and appointing trustees hereof may be exercised by the Trustee or by the legal personal representatives of the last surviving Trustee or (if the Trustee be a corporation) the liquidator thereof;

Same Powers to New Appointor

10.4 A person appointed to act as appointor by the Appointor named shall have the same right on the same terms of appointing a person to so act.

10.5 …

10.6 …

100 The crucial words of cl 14.1 are 'the Trustee may … vary … the trusts hereinbefore provided'. In my opinion the 'trusts hereinbefore provided are the trusts provided for in the earlier provisions of the trust deed. Clause 2 (Declaration of Trust) declares that the trustee shall stand possessed of the Trust Fund and the income thereof upon the trusts and with and subject to the powers and provisions hereinafter expressed. The trusts and powers expressed are found in cl 2 (Declaration of Trust), 4 (Profits of the Trust), 5 (Vesting of Trust), 6 (Benefits in Addition), 7 (Trustee Powers), 8 (Trustee's General Powers). The identity of the Appointor is not 'any of the trusts hereinbefore provided …'.

101 In my opinion the natural and ordinary meaning of the words 'the Trustee may … vary … the trusts hereinbefore provided' does not extend to varying the terms and conditions of the trust deed dealing with the office of Appointor as distinct from the trusts created by the trust deed. The FW Trust Deed distinguishes between 'the trusts' and 'the trusts powers and provisions' of the trust deed. The definition clause defines 'Trust' to mean 'the trusts powers and provisions as constituted by this Deed of Settlement'. The word 'Trust' appears in cl 15.4 which refers to persons claiming a beneficial interest in over or upon 'the property subject to this Trust'. Clause 15.10 specifies that the law applicable to 'this Trust' shall be the law of the place of the residence of the Trustee. In contrast, the power of amendment in cl 14 refers to varying 'the Trusts' herein before provided not 'the Trust'. Perhaps more persuasive is that cl 2.1, in which the Settlor declares the trust, distinguishes between 'the trusts' and 'the powers and provisions' in the trust deed. Similarly, cl 3.1, which is concerned with indemnity and exclusion of liability, distinguishes between 'Trusts' and 'authorities, powers and discretions' of the trust deed by referring to the execution or failure to exercise 'any of the trusts authorities powers and discretions' of the trust deed 'by virtue of being Trustee of the Trust'. Section 8 of the trust deed, which deals with trustee's powers, distinguishes between 'trusts' and 'powers' and 'powers and provisions'. Clause 8.19 refers to questions arising under or in relation to the execution of 'the trusts and powers of this Deed'.

Clause 8.29 refers to the trustees appointing the whole or any part of the Trust Fund to be held upon other trusts and thereupon 'the trust herein declared concerning that property' shall cease and the property shall be subject to 'the trusts powers and provisions contained in the other settlement'.

102 Clause 14 of the FW Trust Deed does not empower the Trustee to remove the Appointor and appoint a new Appointor in his, her, or their place.

No implied term to appoint Appointor

103 I have found that cl 14 of the FW Trust Deed does not empower the Trustee to remove the Appointor and appoint a new Appointor in his place. The defendants submit that there is an implied term of the FW Trust Deed to the effect that any Appointor who determined thereafter to either resign or renounce the position pursuant to cl 1.1, 10.4 and 11.1 of the FW Trust Deed could by notice in writing and with the consent of the Trustee and Guardian, thereafter nominate another Appointor in his or her place. The defendants submit that the term is to be implied because it is reasonable and equitable, it gives efficacy to the FW Trust Deed such that if the term was not implied the deed would not be effective as, upon resignation and any subsequent purported new appointment, no Appointor could ever exist to comply with cl 10.1 of the deed; it is so obvious that it goes without saying, it is capable of clear expression and it does not contradict any other express terms of the FW Trust Deed.

104 No term such as that contended for by the defendants should be implied. The FW Trust Deed expressly deals with an Appointor appointing an Appointor and limits it to an appointment upon the death of the last surviving Appointor. By cl 10.4 a person so appointed 'shall have the same right on the same terms of appointing a person to so act'. Clause 11.1 provides for the resignation or renouncement by an Appointor and 'any person who may by succession become … Appointor' without providing a power to nominate another person in their place. Clause 10.3 of the FW Trust Deed expressly contemplates and provides for the fact that, even if there is an Appointor named in the schedule, a time may come when there is 'no one entitled to exercise the powers' provided to the Appointor by cl 10.1.

FW Trust Deed of Variation is invalid

105 The scope of the power of amendment under cl 14 of the FW Trust Deed does not extend to removing the Appointor and appointing a new

Appointor. Therefore, the FW Trust Deed of Variation is beyond the power of the Trustee and is void. Michael is, and has been since the establishment of the FW Trust, the Appointor of the trust. Tyrone had no power to remove Citycourt as Trustee of the FW Trust and appoint a new trustee. Therefore, the notice of appointment of Parradele as trustee is void and of no force or effect. Citycourt is the Trustee of the FW Trust and has been since the establishment of the trust. That finding makes it unnecessary to consider the other grounds on which the plaintiffs contend that the FW Trust Deed of Variation is invalid and the notice of removal of Citycourt and appointment of Parradele as trustee of the FW Trust is invalid or should be set aside. However, as those matters were argued I will set out my findings in relation to those matters.

Plaintiffs say deeds of variation not validly executed

106 The plaintiffs further say that the deeds of variation are of no legal force or effect because no resolution was passed by Slondia or Citycourt in accordance with their respective articles of association or as provided by the relevant trust deeds authorising them to enter into the deeds of variation or to affix their common seals.

107 The defendants accept that no formal resolution was passed by the boards of Slondia and Citycourt before the deeds of variation were executed. The defendants make three submissions in answer to the plaintiffs' contentions. First, the articles of the companies do not require a resolution of directors before the seal can be applied. Secondly, Michael, Yvonne and Tyrone, the directors of the companies, instructed Brett Davies Lawyers to draw the deeds of variation and Michael and Tyrone signed them, which is sufficient authority. Thirdly, Tyrone is entitled to the statutory presumptions under s 127, s 128 and s 129 of the *Corporations Act 2001*.

Plaintiffs say directors did not authorise entering into and affixing seal to deeds of variation

108 The issue is whether the directors authorised Slondia and Citycourt to enter into the deeds of variation and authorised Michael and Tyrone to affix the common seal of Slondia and Citycourt respectively to the deeds of variation. Authority for each company to enter into the deed of variation is a different thing from the authority for Michael and Tyrone to execute the deeds of variation but the two things are closely related. The defendants' case is essentially that the directors of Slondia and Citycourt decided at an informal meeting or otherwise informally assented to each company entering into the deeds of variation and for each deed of

variation to be executed by Michael and Tyrone affixing the company seal to the deed of variation.

109 The plaintiffs say that the articles of association of Slondia and Citycourt each require a resolution of the directors authorising them to enter into the deed of variation and to affix their common seals and the deeds of variation are of no legal force or effect in the absence of such resolutions.

Trust deeds do not require resolution at directors' meeting

110 Mr Penglis submits that cl 17 of the MMF Trust Deed and cl 13 of the FW Trust Deed requires that the trustee exercise its powers or discretions by a resolution of the corporate trustee or by a resolution of its board of directors.

111 Clause 17 of the MMF Trust Deed is concerned with the exercise by the Trustees of powers or discretions conferred on them by the trust deed. The clause deals with the exercise of powers and discretions where there is more than one trustee. The clause also deals with the exercise of any power, discretion or authority conferred on the trustee where there is a sole corporate trustee. Clause 17(2) provides that in the case of a sole corporate trustee any exercise by the trustee of a power or discretion may be made in the manner set out in subcl (4). Subclause (4) relevantly provides:

> Every trustee which is a corporation … may exercise … any discretion or power hereby conferred on the Trustee by a resolution of such corporation … or by a resolution of its Board of Directors or governing body …

112 Clause 13 of the FW Trust Deed is also concerned with the exercise by the Trustees of powers or discretions conferred on them by the trust deed. Clause 13.1 provides that any determination by the trustee in exercise of any power, discretion or authority conferred on the Trustee by the deed may be made in writing signed by all the trustees or by a resolution duly passed at a meeting of the trustees or in the case of a corporate trustee in the manner set out in cl 13.3. Clause 13.3 provides relevantly:

> Every Trustee which is a corporation may exercise … any discretion or power conferred on the Trustee by a resolution of that corporation or by a resolution of its Board of Directors or governing body …

113 In my opinion cl 17(4) of the MMF Trust Deed and cl 13.3 of the FW Trust Deed are facultative provisions; they do not prescribe the only way in which a corporate trustee may exercise a power or discretion. A corporate trustee may properly exercise a power or discretion by a deed or other instrument executed by the trustee. The authors of Ford, Austin and Ramsey's *Principles of Corporations Law* (16th ed) say at [14.025] that for a long time the standard way for a corporation to assent directly to a transaction has been the fixing of its common seal to a document in the presence of several of its officers.

Articles of association do not require resolution at directors' meeting

114 The plaintiffs further submit that articles 83 to 88 of Slondia's articles of association and articles 70, 73, 74, 76 and 86 of the Citycourt articles of association provide that the directors are to exercise their powers by resolution passed at a meeting of the directors, alternatively by a resolution in writing signed by all of them.

115 Articles 83 to 88 of Slondia's articles of association deal with the proceedings of directors. Article 83 provides that the directors may meet together for the dispatch of business. Article 84 deals with convening a meeting of directors. Article 85 provides for the directors to delegate their powers to a committee. Article 86 deals with acts done at any meeting of directors where it shall afterwards be discovered that there was some defect in the appointment of a director. Article 87 provides that a resolution in writing signed by all the directors shall be as valid and effectual as if it had been passed at a meeting of the directors duly called and constituted. Article 88 deals with a director appointing an attorney. In short, those articles provide for meetings and proceedings of directors but do not provide that the directors can only authorise the company to enter into a transaction or to execute an instrument at a formally convened meeting. Article 91 provides that the management of the business of the company shall be vested in the directors.

116 Articles 70 to 72 of the Articles of Citycourt deal with the powers and duties of directors and articles 73 to 81 deal with the proceedings of directors. Article 70 provides that the business of the company shall be managed by the directors and they may exercise all such powers of the company as are not required to be exercised in general meeting. Article 73 provides that the directors may meet together for the dispatch of business and contains provisions relating to such meetings. Article 74 deals with how questions arising at a meeting are to be decided. Article 76 deals with the quorum at a meeting of directors.

117 In my opinion there is nothing in the articles of Slondia or Citycourt which provide that directors may only make a decision or exercise a power or discretion at a meeting convened in accordance with the respective articles of association.

Deeds and seal authorised by informal decision of directors

118 The most usual way for a company to make decisions by its directors is to convene a meeting and pass a resolution. However, in order for there to be a valid meeting of directors, it is not necessary that a meeting be formally convened and conducted. In ***Bell Group Ltd (in liq) v Westpac Banking (No 9)*** (2008) 39 WAR 1 Owen J, in considering the minimum requirements for a directors meeting, said that what is essential is that there be a genuine meeting of minds of the directors, so that they have in reality met, considered and decided. Owen J referred to ***Swiss Screens (Aust) Pty Ltd v Burgess*** (1987) 11 ACLR 756 where Buckley J said at 758:

> It is difficult to say how much or how little formality is essential if it is to remain true to say that a decision which a husband and wife, they being directors, concurred in was a resolution of a meeting of the directors of the company … 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. … 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.

119 On 15 June 2004 Michael, Yvonne and Tyrone, who were the only directors of Slondia and Citycourt, attended a meeting with Mr Nettleton at the offices of Brett Davies Lawyers. Michael and Yvonne instructed Mr Nettleton to review the trust documents and to prepare deeds of variation to update both trusts including replacing Michael as the Appointor of the two discretionary trusts with Tyrone. It may be inferred, and I do infer, that the updating of the trust documents which Michael and Yvonne instructed Mr Nettleton to prepare were the variations to the exercise of the Guardian's discretion in relation to CGT compliance and streaming provisions which Mr Nettleton subsequently included in the deeds of variation. Michael and Yvonne instructed Mr Nettleton to send the deeds of variation to Tyrone. Obviously, the deeds of variation had to be executed by Slondia and Citycourt as trustees and by Michael as Guardian and Appointor. Michael and Yvonne instructed Mr Nettleton to prepare the deeds of variation and to send the documents to Tyrone for

him to deal with their execution. Tyrone assented to the variations and to his appointment as Guardian and Appointor or Appointor in place of Michael as Guardian and Appointor and Appointor of the MMF Trust and FW Trust respectively and to the deeds being sent to him for him to attend to their execution.

120 There was a meeting of the minds of Michael, Yvonne and Tyrone. They expressed their agreement that Slondia and Citycourt should enter into the deeds of variation and that Tyrone should attend to their execution. That is a sufficient meeting notwithstanding its lack of formality and the fact that Mr Nettleton was also present at the meeting.

Deeds and seal authorised by directors' informal unanimous assent

121 If, contrary to my finding, the meeting between Michael, Yvonne and Tyrone at the offices of Brett Davies Lawyers on 15 June 2004 was not a meeting of directors then the directors nevertheless made a decision that Slondia and Citycourt should enter into the deeds of variation and that Michael and Tyrone should execute the deeds. The defendants submitted that the informal assent by Michael, Yvonne and Tyrone to the deeds of variation, and their execution, was as effective as a resolution at a meeting of the directors or shareholders. Counsel for the defendants invoked what is sometimes called the doctrine of unanimous assent or the *Duomatic* principle. ***Re Duomatic Ltd*** [1969] 2 Ch 365 established the principle of shareholders being able to make decisions by way of 'informal unanimous assent'. Buckley J summarised the principle as:

> Where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be (373).

122 Although the *Duomatic* principle is normally cited in the context of shareholders' decisions, a similar rule applies to director decisions. Anything the directors can do at a formal board meeting they can do informally if they all agree to it: ***Runciman v Walter Runciman Pty Ltd*** [1993] BCC 223, 230 (Simon Brown J); ***Franbar Holdings Ltd v Casualty Plus Ltd*** [2010] EWHC 1164 (Ch) [19] (Proudman J).

123 The authors of the 16th edition of *Ford's Principles of Corporations Law* say at [7.320] that the concurrence of all directors outside a meeting can amount to a corporate decision where the constitution allows directors to decide matters without having a meeting. That proposition, with which I agree, is illustrated by one of the authorities referred to by the authors:

J W Broomhead (Vic) Pty Ltd (in liq) v J W Broomhead Pty Ltd [1985] VR 891. The plaintiff company claimed that it carried on a building business and incurred liabilities as trustee under a trust deed. The defendants contended that the trust deed was not validly executed by the plaintiff and did not otherwise become binding on the plaintiff. The trust deed was executed by Keogh and Wood, two of the five directors of the plaintiff company. The defendants argued that the plaintiff company's articles required that its seal could only be affixed validly to the trust deed with the authority of a resolution of the plaintiff's directors. The articles were relevantly similar to the articles of Slondia and Citycourt. McGarvie J held at page 915 that upon a proper construction of the relevant article, the authority of the directors for the use of the seal is not limited to an authority given by resolution at a meeting of directors. Similarly, in my view, upon a proper construction of article 98 of Slondia's articles and article 88 of Citycourt's articles the authority of the directors for the use of the seal is not limited to an authority given by resolution at a meeting of directors. McGarvie J went on to hold that it is sufficient if at the time when the seal is used each of the directors has authorised that use.

124 Neither the words of the articles construed in their context nor any principle of law requires the authority ('or order') to be given in any particular way, at any particular time or on any particular occasion. Directors may give their authority at different times and in different ways. In ***J W Broomhead*** McGarvie J considered whether each of the five directors had given their authority for the sealing of the trust deed. McGarvie J held that Keogh and Wood who sealed and countersigned the deed themselves obviously gave authority and it was necessary to consider whether the other three directors authorised what they did. McGarvie J found that at what purported to be a meeting of members of the company at which Roy Broomhead was present, they agreed that the plaintiff would act in the capacity of a trustee. Another person, Calver, who had the authority of Roy Broomhead to do so, wrote that Roy Broomhead approved the trust proposals in an earlier letter. Subsequently Roy Broomhead attended a meeting at which each of the five directors was present. The deed was discussed at the meeting. McGarvie J was satisfied that the general tenor of the discussion was that the plaintiff was to enter into the deed unless someone had raised objection to that course and no one did. McGarvie J was satisfied from those matters that Roy Broomhead gave authority to Keogh and Wood to seal the deed on behalf of the plaintiff. McGarvie J then looked at the conduct of Roy Broomhead subsequent to the time of sealing. His Honour found that Roy

Broomhead acted as would be expected of a man who knew that he and the other four men had authorised the sealing and that the deed had been sealed with that authority.

125 Michael, Yvonne and Tyrone each assented to Slondia and Citycourt entering into the deeds of variation and Michael and Tyrone executing the deeds. Michael and Tyrone gave authority for that to be done at the meeting at Brett Davies Lawyers on 15 June 2004 and by sealing and countersigning the deeds of variation themselves.

126 I am satisfied that Yvonne authorised Slondia and Citycourt to make Tyrone Appointor and Guardian or Appointor of the trusts in place of Michael and to update the trust deeds in accordance with the instructions she and Michael gave to Mr Nettleton and authorised Michael and Tyrone to execute the deeds of variation to achieve that result. I am satisfied that Yvonne knew and understood what she did. I am satisfied of those things for the following reasons.

127 At the meeting at the offices of Brett Davies Lawyers on 27 May 2004 Mr Davies explained the way a trust worked. His description included that the trustee was a mere puppet because the appointor was God and had the power to hire and fire trustees at will. Michael and Yvonne instructed Mr Davies and Mr Nettleton to review their current trusts and provide them with advice with a view to achieving the objectives they had stated. That was that Tyrone was to get control of the business.

128 On 15 June 2004 Michael, Yvonne and Tyrone attended a second meeting with Mr Nettleton. Michael and Yvonne instructed Mr Nettleton to review the trust documents and to prepare deeds of variation to update both trusts including replacing Michael as the Appointor of the two discretionary trusts with Tyrone. As I have said I infer that the updating of the trust documents which Michael and Yvonne instructed Mr Nettleton to prepare were the variations to the exercise of the guardian's discretion in relation to CGT compliance and streaming provisions which Mr Nettleton subsequently included in the deeds of variation.

129 Michael and Yvonne instructed Mr Nettleton to send the deeds of variation to Tyrone. Obviously, the deeds of variation had to be executed by Slondia and Michael. I am satisfied that Yvonne and Michael both understood that. It was a matter of indifference to Yvonne which directors of Slondia applied and countersigned the seal. Indeed, the theme

of Yvonne's evidence is that she left matters of that sort to Michael and Tyrone. Yvonne instructed Mr Nettleton to prepare the deeds of variation and to send the documents to Tyrone for him to deal with them. I am satisfied that Yvonne gave authority to Michael and Tyrone to seal the deeds of variation on behalf of Slondia and Citycourt.

130 Yvonne's conduct after the deeds of variation were executed is relevant and admissible as circumstantial evidence: ***J W Broomhead (Vic) Pty Ltd (in liq) v J W Broomhead*** (917). On 22 January 2008 Citycourt and Tyrone executed a further deed of variation of the FW Trust. The deed was signed by Michael and Yvonne. Tyrone is described in the deed as 'the Appointor'. The schedule to the deed refers to the deed of variation dated 20 October 2004. Counsel for Michael, Mr Penglis, submitted that Yvonne did not read the document or if she did she did not understand it. I do not accept that submission. In cross-examination Yvonne said that she could not recall the document. It may be that she does not now recall the document. However, that does not mean that she did not read or understand the document at the time she signed it. Yvonne's conduct supports the conclusion that she knew Tyrone was the Appointor of the FW Trust and she knew that because she had authorised Michael and Tyrone to execute the deeds of variation which appointed Tyrone as Appointor of the FW Trust and the MMF Trust.

Articles do not require resolution to affix the seal

131 The plaintiffs further submit that the deeds of variation are of no legal force and effect because they were not executed in accordance with the articles of association of Slondia and Citycourt.

132 Article 11 of Citycourt's articles provides that the company seal shall only be used by the authority of the directors previously given. Whether the directors have given their authority for the fixing of the seal is a question of fact. The authority may be given otherwise than at a formally convened meeting. In ***Roden v International Gas Applications*** (1995) 18 ACSR 454 the articles of association of IGA relevantly provided that the company seal 'shall be used only by the authority of the Directors, or of a committee of the Directors authorised by the Directors to authorise the use of the seal'. There were only two directors of IGA, Mr Roden and Mr Cassis. Both were present on the occasion when the common seal was affixed to a deed of charge and both concurred in the affixing of the seal to that agreement as evidenced by their participation and signatures. McClelland CJ in Eq held that the charge was validly executed. The failure to formally resolve at a meeting of directors to affix the seal to the

charge was not sufficient to invalidate the execution of the charge. What was required was that the directors authorised the execution and it was unnecessary to have a meeting or resolution. The presence of Mr Roden and Mr Cassis together and their actual concurrence and consensual participation in the sealing process was sufficient to constitute a decision authorising the affixing of the seal of IGA to the charge as if there had been a formal resolution to that effect at a meeting of directors. Similarly, in this case, the presence of Michael and Tyrone together and their actual concurrence and consensual participation in applying and witnessing the application of the seal to the deeds of variation together with the authority of Yvonne given at the meeting on 15 June 2014 was sufficient to constitute a decision authorising the affixing of the seal of each of Slondia and Citycourt to the respective deed of variation.

133 In so far as article 88 of the Citycourt articles required the seal to be affixed by the authority of the directors 'previously given' I am satisfied that that requirement is met. In some circumstances the decision will be readily identifiable from actions of the directors which imply a prior decision: ***Roden v International Gas Applications*** (1995) 18 ACSR 454. Here, Michael, Yvonne and Tyrone had given instructions to Mr Nettleton to draw the deed of variation appointing Tyrone as an Appointor and updating the trust deed and subsequently Michael and Tyrone executed the deed of variation. Tyrone could not recall a particular time at which he showed the deeds of variation to Michael before Michael executed them. However, Tyrone saw Michael every day. They had breakfast together and Michael came to the office. Tyrone said it was 'just about inconceivable' that Michael had not seen the deeds of variation before he executed them on 20 October 2004. In the circumstances a prior decision by Michael to affix the common seal may readily be inferred. A prior decision by Yvonne that Michael and Tyrone affix each company seal to each deed of variation may readily be inferred.

134 Article 98 of Slondia's articles provides that the common seal shall not be affixed to any document 'except by order of the Directors'. Mr Penglis submitted that it is not sufficient that the directors should each give authority for the seal to be affixed; there must be something in the nature of an order which can only be a formal resolution at a meeting of directors. In my view, upon the proper construction of Article 98 the requirement that the seal be affixed by order of the directors is satisfied if the seal is affixed with the authority of the directors. The text refers to 'by order of the Directors' not 'by an order of the directors'. The articles of the company should be regarded as a business document and should be construed so as to give them reasonable business efficacy where a

construction tending to that result is admissible on the language of the articles, in preference to a result which would or might prove unworkable: ***Holmes v Keys*** [1959] Ch 199, 215 (Jenkins LJ). If the directors authorise a particular use of the seal, business efficacy in the operation of the company would be impeded by a requirement that there must be a meeting of directors and a formal resolution before the seal can be used.

Corporations Act **provisions do not apply**

135 It is strictly unnecessary, but I will briefly deal with the submission relating to the *Corporations Act 2001* (Cth) provisions. In my view s 127, s 128 and s 129 of the *Corporations Act* have no application in this case. Section 127 provides two statutory methods by which a company may execute documents generally. Section 127(1) deals with execution without using a common seal. That does not apply because the deeds of variation were executed using a company seal. Section 127(2) provides for the way in which a company may execute a document by affixing the seal. It has nothing to say about the authority of directors to apply the company seal. Section 128 provides that a person is entitled to make the assumptions in s 129 in relation to dealings with a company. Section 129 deals with the assumptions that can be made under s 128. The statutory provisions are for the benefit of persons dealing with a company, they do not assist the company and so do not assist Slondia or Citycourt. The assumption cannot be made by Tyrone because he was a director of each company and purported to act on behalf of the company in the transactions with himself. In such a case a director whose duty it was to know the correct procedure cannot be heard to say in his own favour that he did not know whether things had been done correctly.

Michael consented to the deeds of variation

136 The MMF Trust Deed and the FW Trust Deed provide that the relevant power to vary may only be exercised in some instances with the consent of the Guardian or Appointor. The power in cl 28 of the MMF Trust Deed is one of the 'reserved powers'. Clause 10.3 provides that, subject to subclause 5 which is not relevant to this matter, the Trustees shall not when there is a Guardian exercise their reserved powers except with the consent of the Guardian. Michael accepts that he signed the MMF Trust Deed of Variation and the FW Trust Deed of Variation under the words 'the Guardian/Appointor below accepts this variation' and that on its face that amounts to his consent to the variation. However, Michael says that notwithstanding that he signed each deed of variation, having regard to the circumstances surrounding his signing of the deed of

variation he did not in fact and at law consent to the terms of each deed of variation and this was known by Tyrone and through him Slondia.

137 I do not accept that argument. I find that Michael knew and intended to consent to his removal as Guardian and Appointor of the MMF Trust and Appointor of the FW Trust and replacement by Tyrone. Mr Davies explained the role of the Appointor to Michael at the 27 May 2004 meeting at Brett Davies Lawyers' offices. Mr Davies did so in terms which Michael could understand. I am satisfied Michael did understand. It was Michael and Yvonne who instructed Mr Nettleton to draw the deed of variation to appoint Tyrone in place of Michael as Guardian and Appointor.

No breach of trust

138 The plaintiffs' case is that if the deeds of variation are otherwise valid, having regard to the circumstances surrounding their execution, they ought be set aside by reason of breach of fiduciary duty by Slondia and Citycourt.

139 The plaintiffs say that the power of the trustee to remove the appointor and appoint a new appointor is a fiduciary power. The plaintiffs submit that in exercising the power Slondia and Citycourt owed to the beneficiaries of the trusts, including Jason, a fiduciary duty which required them to exercise their powers, including the power to replace the Appointor having regard to the objects and purposes of the trust and, or alternatively, for the benefit of the beneficiaries of the trust as a whole.

140 The plaintiffs rely on the authority of the decision of the Court of Appeal in ***Scaffidi v Montevento Holdings Pty Ltd***. In that case the trust deed of a discretionary family trust authorised an appointor to remove a trustee and to appoint new trustees. The deed provided that if and so long as any individual appointor was a beneficiary that individual was not eligible to be appointed as a trustee. An individual who was the appointor removed the company that was the sole trustee of the trust and appointed as trustee a company of which he was the sole director and shareholder. The appointor was a person within the class of beneficiaries of the trust. The trial judge found that there was no evidence that the appointor had appointed the company as trustee for an improper purpose. The trial judge found that the appointment was valid. The majority in the Court of Appeal, Murphy JA and Hall J, upheld the appeal from the trial judge on the basis that the appointment of the company as sole trustee was in breach of the provision of the deed which provided that an individual appointor who was a beneficiary was not eligible to be appointed as a

trustee. On appeal the High Court held unanimously that the trust deed prohibited only the appointment as a trustee of a natural person who held the office of appointor. Hence the appointment of the company was valid: ***Montevento Holdings Pty Ltd v Scaffidi*** (2012) 246 CLR 325. The plaintiffs rely upon the dicta of the majority in the Court of Appeal about the nature of the power to remove trustees and appoint new trustees. The majority said at [149] that 'even if not correctly technically described as a 'fiduciary power' (see the discussion in Finn P D (as his Honour then was), *Fiduciary Obligations* (1977) [67], [644]) such a power must nevertheless be exercised bona fide for the purpose for which it was conferred'.

141 The plaintiffs plead that Slondia, as trustee of the MMF Trust, and Citycourt, as trustee of the FW Trust, owed to the beneficiaries of each trust a fiduciary duty which required it to exercise its powers, including the power to vary the trusts, terms and conditions or trusts respectively, having regard to the objects and purpose of the trust and, or alternatively, the benefit of the beneficiaries of the trust as a whole. The plaintiffs say that the deeds of variation were acts of Slondia and Citycourt respectively in breach of their duty in that transferring de facto control of the trust from the patriarch of the Mercanti family to one of four sons was not an exercise of power in good faith having regard to the objects and purpose of the trust or the benefit of the beneficiaries of the trust as a whole. The plaintiffs say that Tyrone, in procuring the preparation of the deeds of variation, in witnessing the affixing of the seals to the deed of variation and procuring Michael to sign and witness the affixing of the seal, was a knowing participant in the breach of trust by Slondia and Citycourt respectively. The plaintiffs say further, alternatively, that by accepting the appointments as Appointor and Guardian of the MMF Trust and Appointor of the FW Trust pursuant to the terms of the deeds of variation Tyrone knowingly took the benefit of the breaches of fiduciary duty by Slondia and Citycourt.

142 Counsel for the plaintiffs, Mr Penglis, accepts that Michael cannot rely on the execution by Slondia and Citycourt of the deeds of variation being breaches of their fiduciary duty because Michael caused, or was one of the persons who caused, Slondia and Citycourt to execute the deeds of variation. However, Mr Penglis says that Jason may and does press the claim that the deeds of variation be set aside by reason of breach of fiduciary duty by Slondia and Citycourt.

143 Trustees are a recognised category of fiduciaries. However, the question is not whether the trustee is a fiduciary as a result of its office, but whether a particular power is subject to the fiduciary obligations. It is

possible for some powers to be held in a fiduciary capacity while other powers are held by the same person in a different capacity. It is well recognised that a person may be in a fiduciary position with respect to part of its activities and not with respect to other parts. In general, whether a person owes fiduciary duties in the exercise of a power involves an enquiry whether it is reasonable or legitimate, in all the circumstances of the particular case, for the beneficiaries to expect that the trustee will act in the best interests of the beneficiaries to the exclusion of his or her own several interests. If so, fiduciary duties are owed. In ***Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd*** [1991] 1 WLR 589 at 596, Browne-Wilkinson VC explained that an employer company's power to give or withhold consent to amendments to the company's pension scheme was not held in a fiduciary capacity because that would run counter to the expectations of all involved. In the Cayman Islands' case ***Re Z Trust*** [1997] CILR 248 Smellie J addressed, among other things, the legitimate expectations of a settlor when trying to determine whether powers given to protectors were held in a fiduciary capacity.

144 I find it unnecessary to classify the power of Slondia and Citycourt, as trustees, to vary the trusts terms and conditions or trusts respectively as fiduciary or non-fiduciary. It is sufficient to identify the obligations on the trustees in exercising the power. Each trustee must exercise the power bona fide and not for a purpose other than within the intention of the settlor as evidenced by the trust deed creating the power. If the trustee exercised the power contrary to this principle, equity holds the exercise of the power as a 'fraud on a power', that is the power has been exercised for a purpose or with an intention beyond the scope of, or not justified by, the trust deed.

145 I am not satisfied that Slondia or Citycourt exercised its power to vary the trusts terms and conditions or the trusts respectively for any improper or collateral purpose. The MMF Trust was established by Michael in 1979, on the advice of Mr Bizzaca, to carry on the shoe repair business established by Michael primarily for the benefit of Michael, Yvonne and their children. The FW Trust was established by Michael, on the advice of Mr Bizzaca, in 1996 to carry on the wholesale part of the business primarily for the benefit of Michael, Yvonne and their children. The original Guardian and Appointor of the MMF Trust and the original Appointor of the FW Trust was Michael. At the time Michael was the general manager of the business, a beneficiary of each trust and a director and shareholder of each corporate trustee. Subsequently Michael made Tyrone general manager of the business. In June 2004 Michael and Yvonne, who together with Tyrone were the directors of Slondia and

Citycourt, caused Slondia and Citycourt to appoint Tyrone as the managing director of each company and hence of the business. Michael and Yvonne intended that the business should be Tyrone's. Slondia and Citycourt, through Michael and Yvonne, decided to pass control of the trusts and hence of the business to Tyrone. On the advice of Mr Davies and Mr Nettleton Slondia and Citycourt, by Michael and Yvonne, decided to effect that purpose by causing Slondia and Citycourt to execute the deeds of variation appointing Tyrone as Guardian and Appointor of the MMF Trust and as Appointor of the FW Trust. The plaintiffs have not established that Slondia or Citycourt did so for any improper or collateral purpose.

No equitable fraud in entering or executing the deeds of variation

146 The plaintiffs say the deeds of variation should be set aside for equitable fraud. Mr Penglis said that the essence of the plaintiffs' case is that Michael executed the deeds of variation under a mistake or misapprehension about their content. The plaintiffs say that Tyrone was aware of that mistake or misapprehension and deliberately set out to ensure that Michael did not become aware of the existence of that mistake or misapprehension. Mr Penglis said that the mistake or misapprehension was threefold. First, Michael did not know that the deeds had the effect of immediately transferring ultimate control of the family business to Tyrone. Secondly, he did not know that the deeds transferred the whole family business to Tyrone rather than all of the business except one kiosk which was to go to Jason. Thirdly, he did not know that the deeds gave Tyrone, as appointor of the MMF Trust, control of the real properties as well as the business.

147 Mr Penglis submitted that Tyrone took a number of steps to ensure that Michael did not become aware of the mistake. First, he did not provide to Michael copies of any of the correspondence sent to Tyrone by Brett Davies Lawyers. Secondly, he did not recommend Michael to go and see Mr Bizzaca to discuss the matter or the draft deeds. Thirdly, Tyrone did not explain to Michael what the documents were when he signed them in October 2004.

148 I am not satisfied that the plaintiffs' claim of equitable fraud is made out. Michael understood the role and power of the Appointor. It was explained to him in words and pictures by Mr Davies. Michael intended that Tyrone should become Appointor of the trusts and control the trusts. Michael gave instructions to that effect to Mr Nettleton. Michael knew

that the deeds of variation transferred control of the trusts to Tyrone. He instructed Mr Nettleton to draft the deeds to have that effect.

149 I am not satisfied that Michael believed, when he signed the deeds of variation, that they transferred to Tyrone as Appointor control of the business excluding a kiosk that was to be transferred to Jason and the real properties. The plaintiffs have not explained how Michael could have had that belief. He knew that the deeds made Tyrone Appointor of the trusts. The consequence of that had been explained to him by Mr Davies and Mr Nettleton. Michael did not claim to have been told that some other instrument or instruments had been executed which had the effect of excluding one kiosk and the real properties from the trusts. Michael's evidence, which I do not accept, is that he did not intend and did not give instructions for Tyrone to be immediately appointed Appointor of the trusts. I accept that Michael intended that one kiosk should go to Jason and the real properties to his other sons on his death. That could be achieved by those properties being removed from the MMF Trust. Michael and Yvonne continued to control the trustee, Slondia, and could have effected that intention. There is no evidence that at the time the deeds of variation were executed Tyrone intended to replace Slondia as trustee or that Michael or Yvonne contemplated that Tyrone might do so in the near future.

No undue influence

150 The plaintiffs' case is that if the deeds of variation were effective to make Tyrone the Appointor of the MMF Trust and the FW Trust, then the notices of removal and acceptance of appointment of trustees by which Tyrone removed Slondia and Citycourt as trustee of the MMF Trust and the FW Trust respectively and appointed Parradele as trustee of each trust should be set aside. The plaintiffs say that the deeds of variation should be set aside because Michael was induced to sign and accept the deeds of variation by the undue influence of Tyrone.

151 ***Harris v Rothery (as co-executor of Estate of late Harris)*** [2013] NSWSC 1275 concerned the validity of various nominations and appointments. Kunc J in the Equity Division of the Supreme Court of New South Wales entered into a detailed discussion of the doctrine of undue influence in the context of the exercise by a father of the power to appoint his son as appointor of a trust. Kunc J held that whether or not the power to appoint a new appointor is fiduciary or personal the exercise of such a power is susceptible to the application of the doctrine of undue influence.

152 Undue influence may be cases of actual undue influence or presumed undue influence. In cases of actual undue influence it is necessary for the complainant, that is the person who wants to set aside the transaction, to prove that the wrongdoer exerted undue influence on the complainant to enter into the particular transaction. In cases of presumed undue influence the complainant only has to show, in the first instance, that there was a relationship of trust and confidence between the complainant and the wrongdoer of such a nature that it is fair to presume that the wrongdoer abused that relationship in procuring the complainant to enter into the transaction. Once the relationship has been proved the burden shifts to the wrongdoer to prove that the complainant entered into the transaction freely, for example by showing that the complainant had independent advice. A relationship of presumed undue influence can be proved in two ways. First, certain relationships as a matter of law raise the presumption that undue influence has been exercised. Secondly, if the complainant proves the actual existence of a relationship under which the complainant generally reposed trust and confidence in the wrongdoer, the existence of such relationship raises the presumption of undue influence.

153 The plaintiffs accept that the relationship of adult child and parent is not a category that creates a presumption of undue influence. The plaintiffs' case is that in fact there was an antecedent relationship between Michael and Tyrone, the nature of which was that Tyrone was in a position to exercise dominion, power or ascendency over Michael in relation to matters concerning the family business and the affairs of the two trusts.

154 A relationship of confidence is not a sufficient condition for undue influence to be presumed. Many parents would describe their relationship with their adult children as trusting and confidential. They are not relationships in which undue influence will be presumed. It is only where the trust and confidence reposed by one is such that there is also ascendency or dominion by the other over the will of the first that the presumption will arise: ***Tulloch (Dec) v Braybon (No 2)*** [2010] NSWSC 650 [77], [87] (Brereton J). In 2004 Tyrone had been general manager of the business for about eight years and a director of each of Slondia and Citycourt since 2001. From about 15 June 2004, that is the time that Michael instructed Mr Nettleton to appoint Tyrone as Appointor of each of the trusts, Michael appointed Tyrone managing director of each of Slondia and Citycourt. By that time Tyrone was making the senior management level decisions for the business. Those matters, and the evidence generally, establishes that Michael had a high level of trust in Tyrone. However, that is not the same thing as Tyrone having an

ascendency or dominion over Michael and Michael having a correlative dependence or subjection to Tyrone.

155 I am not satisfied that at the time of the execution of the deeds of variation Tyrone exercised dominion over Michael and Michael depended upon Tyrone such as to give rise to a presumptive relationship of undue influence. In 2004 Michael was 71 years of age. That does not give rise to any presumption that he was in poor health, that his intellectual capacities had diminished or that he was in any way dependent upon Tyrone. There is no evidence of any of those things. Michael was an experienced and successful businessman. He wanted to step back from the business and was in the process of transferring management of the family business to Tyrone but he was still involved in the running of the business. Michael and Yvonne attended upon Mr Bizzaca each year to go through the accounts of the business and the trusts.

156 In his evidence Tyrone accepted that Michael trusted him and agreed that Tyrone was 'the golden boy'. Tyrone said that when he asked Michael to sign a document his normal practice was that he would tell Michael what the document was and then ask him to sign it. It is not uncommon in the case of a father and son involved in running a business that the father should trust the son. It is not uncommon that a father might sign a document after the son has described the contents of it to him. Many people sign legal documents after the contents have been described to them but without reading the text of the document. That does not give rise to a presumption of dominion or ascendancy. I am not satisfied that the evidence establishes a presumptive relationship of undue influence.

157 In any event, I am satisfied that Michael had the capacity to understand the transactions effected by the deeds of variation, he did understand them, he received advice from a lawyer, Mr Nettleton, about the effect of them and he freely exercised his will in causing Slondia and Citycourt to enter into the transactions, to apply the company seals and to consent to the transactions as Appointor and Guardian or Appointor. Michael initiated the meeting with Brett Davies Lawyers on the recommendation of Mr Torre. Tyrone played no part in instigating or arranging the meeting. Tyrone attended the meetings at the request of Michael. Michael did most of the talking. Tyrone said little. Michael gave the instructions to Mr Nettleton to draft the deeds of variation. He did so after Mr Davies had explained the role of appointor and guardian. I am satisfied that Michael understood the transactions effected by the deeds of variation and freely exercised his will to cause Slondia and

Citycourt to enter into those transactions, to apply the company seals and to give his consent as Appointor and Guardian or Appointor.

Powers of appointment must be exercised for a proper purpose

158 The plaintiffs say that Tyrone, as Appointor of each of the trusts, owed to the beneficiaries of each trust a fiduciary duty, or alternatively a duty, to exercise the power of appointment bona fides for the purpose for which it was conferred and a duty to communicate with beneficiaries and consider their objections before exercising the power of appointment in circumstances where the beneficiaries are likely to oppose the exercise of the power of appointment. The plaintiffs say that Tyrone exercised the power of appointment in breach of those duties.

159 The plaintiffs say that the following circumstances give rise to the breach of duty. First, Slondia had been the sole trustee of the MMF Trust since it was established in 1979 and Citycourt had been the sole trustee of the FW Trust since it was established in 1996. Secondly, Michael had commenced proceedings in this court to challenge the validity and the effect of the deeds of variation. Thirdly, Tyrone had notice of Michael's chamber summons for an interlocutory injunction to restrain Tyrone from exercising the power of appointment which was to be heard on 31 July 2014. Fourthly, Tyrone appointed as the new trustee of each trust Parradele, which was a company owned and controlled by Tyrone. Fifthly, the notices of appointment had the effect of transferring control of the trusts to Tyrone. Sixthly, Tyrone did not consult, or give notice to Michael, Yvonne, Jason, Jamie or Troy in relation to the replacement of the trustees. Seventhly, Tyrone knew that Michael, Yvonne, Jason and Jamie would be likely to oppose the replacement of the trustees by Parradele.

160 I will first address the nature of the power of appointment. Many text books say that the power to appoint new trustees is fiduciary. Dal Pont, *Equity and Trusts In Australia* (6th ed) [21.55] writes:

> The power [to appoint new trustees] is not, however, ordinarily exercisable in the appointor's own interests, as in the usual case it will be construed as fiduciary, and thus be exercised for the beneficiary's benefit.

The first authority cited by Dal Pont is ***Re Skeats Settlement*** (1889) 42 Ch D 522. Dal Pont adds:

> But the position may be otherwise where the appointor is a beneficiary, the reason being that beneficiaries can act in their own interests in exercising a

> power; after all, beneficiaries are not trustees for the trust or one another, and their relations inter se are not generally fiduciary.

The authorities cited by Dal Pont for that proposition include ***Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liq)*** (2001) 188 ALR 566, 595 (Finkelstein J) and ***Price v Powers*** [2005] WASC 154 [75] (Le Miere J) (affirmed ***Price v Powers*** [2006] WASCA 262). Dal Pont further says that though a beneficiary may act in her or his own interests, the power is not unfettered; for instance, it must not be exercised fraudulently. Dal Pont cites Finkelstein J at 595 in ***Fitzwood*** as authority for that proposition.

161 *Thomas on Powers* (2nd ed) [10.49] says that the power to appoint trustees is a fiduciary power even when not conferred on an existing trustee. The primary authority cited is ***Re Skeats Settlement***.

162 The nineteenth edition of *Lewin on Trusts* states at [14-047] that powers of appointment of new trustees are fiduciary powers and cites ***Re Skeats Settlement*** in support of that proposition. However, the authors say at [14-048] that powers of appointment of new trustees are distinct from other kinds of fiduciary powers and it should not necessarily be assumed that they have the same attributes as other kinds of fiduciary power.

163 ***Fitzwood Pty Ltd v Unique Goal*** involved the removal of a trustee of a unit trust by a vote of the unit holders. Finkelstein J held:

> I am prepared to accept that a power of removal of a trustee may be a fiduciary power that must be exercised for the benefit of the beneficiaries and not for the benefit of the donee of the power, at least when the donee is not a beneficiary, although much will depend upon the terms of the trust instrument: In ***Re Skeats Settlement*** …; in ***Land Revenue Commissioners v Schroeder*** (1983) STC 480 at 500. However, it is not likely that such an obligation will be imposed when it is the beneficiary that has been given the power of removal. In that circumstance it may usually be assumed that the beneficiary is entitled to act in his own interests in exercising the power [98].

164 In ***Scaffidi v Montevento Holdings Pty Ltd*** the Court of Appeal considered a discretionary family trust. The trust deed authorised an appointor to remove a trustee and to appoint a new trustee. The deed provided that if and so long as any individual appointor was a beneficiary that individual was not eligible to be appointed as a trustee. Eugenio Scaffidi, who was the appointor, removed a company that was the sole trustee of the trust and appointed as trustee Montevento, a company of

which he was the sole director and shareholder. Eugenio was within the class of beneficiaries of the trust. Giuseppe Scaffidi, a beneficiary, brought proceedings for a declaration that the appointment of Montevento as trustee was invalid. The primary judge dismissed the action. On appeal, the Court of Appeal by majority allowed the appeal and made a declaration that the appointment of Montevento as trustee was invalid. In considering the power to remove trustees and appoint new trustees Murphy JA and Hall J said:

> Clause 11 of the trust deed confers a power to remove trustees and appoint new ones. It is convenient to note at the outset certain principles relating to powers of that kind.
>
> Whether the power given in an instrument to remove trustees and appoint new trustees is, by its terms, wide enough in scope to allow an appointor to appoint himself or herself as trustee, is a question as to the proper construction of the language of the power: ***Montefiore v Guedalla*** (1903) 2 Ch 723, 725 - 726; ***In re Christina Brown*** (1921) 22 SR (NSW) 90, 93 - 94.
>
> Even where the language is wide enough to permit the appointor to appoint himself or herself as trustee, it is a 'very salutary' or 'most salutary' rule that the power should only be exercised to that end in 'exceptional circumstances' or 'special circumstances': ***Montefiore v Guedalla*** (725, 726); ***In re Christina Brown*** (93 - 94); ***In re Power's Settlement Trusts*** [1951] Ch 1074, 1080.
>
> In a discretionary trust (and subject to the terms of the instrument) the power to appoint trustees may be construed as a 'fiduciary power': ***In re Skeats' Settlement*** (1889) 42 Ch D 522, 526; ***In re Newen*** (1894) 2 Ch 297, 309; ***Re Burton*** [1994] FCA 1146; (1994) 126 ALR 557, 559 - 560; ***Pope v DRP Nominees Pty Ltd*** [1999] SASC 337; (1999) 74 SASR 78 [46] - [48] [144] - [147].

Having referred to Kay J in ***Re Skeats Settlement*** their Honours continued:

> Even if not correctly technically described as a 'fiduciary power' (see the discussion in Finn PD (as his Honour then was), *Fiduciary Obligations* (1977) [627], [644]), such a power must nevertheless be exercised bona fide for the purpose for which it was conferred: ***Re Burton*** (559); ***Duke of Portland v Topham*** (1864) 11 HLC 32, 54. The purpose of the power of removing and appointing trustees is ascertained by reference to the fiduciary nature of the office the object of the appointment. The trustee is the 'archetype' fiduciary: ***Maguire v Makaronis*** [1997] HCA 23; (1997) 188 CLR 449, 473. The office exists for the benefit of the beneficiaries: ***Letterstedt v Broers*** (1884) 9 App Cas 371, 386. It is an essential element of the trust that the trustee is under a personal obligation to deal with the

> trust property for the benefit of the beneficiaries, an obligation giving correlative rights to the beneficiaries. There is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by the beneficiaries which is fundamental to the concept of a trust: Heydon JD and Leeming LJ, *Jacobs' Law of Trusts in Australia* (7th ed, 2006) [110], [1620]. If these do not exist, or if the beneficiaries have no rights to enforce them, there is no trust. The minimum duty is the duty to perform the trust honestly and in good faith, for the benefit of the beneficiaries. See ***Armitage v Nurse*** [1998] Ch 241, 253 - 254 [149].

Their Honours there applied a proper purpose test rather than a test applicable to a power 'technically described as a fiduciary power'.

165 On appeal, the High Court, in allowing the appeal, held that the trust deed prohibited only the appointment as a trustee of a natural person who held the office of appointor and hence the appointment of the company was valid: ***Montevento Holdings Pty Ltd v Scaffidi***.

166 Paragraph (a) of the proviso to clause 21 of the MMF Trust Deed prohibits the Appointor who is a beneficiary from appointing himself as a Trustee, but it does not prohibit him from appointing as a Trustee a company of which he is a director and shareholder. However, if the Appointor exercises the power he must do so with good faith and for a proper purpose and 'not for the purpose of accomplishing or carrying into effect any bye or sinister object (… sinister in the sense of its being beyond the purpose and intent of the power) which he may desire to effect in the exercise of the power': ***Duke of Portland v Lady Topham*** (1864) 11 HLC 32, 54 per Lord Westbury LC. These constraints are embodied in the doctrine of fraud on a power. Fraud in this sense means that the power has been exercised for a purpose or with an intention beyond the scope of, or not justified by, the instrument creating the power. Such an exercise is void.

167 The question is whether Tyrone exercised the power for some purpose foreign to the power. The court looks to the intention or purpose of the appointor at the date of the exercise of the power. The burden of proving an improper purpose lies on the person seeking to avoid the transaction. Lewin says at [9.77]:

> Fraud, improper motives, intentions, objects, or purposes, ought not to be presumed, they must be proved. Or, in the words of Jessel MR:
>
> > 'Fraud is not likely to be presumed or inferred. In all cases in which fraud is inferred there must be such cogent facts that the Court cannot reasonably come to any other conclusion.'

The position was summarised by Kindersley VC in ***Re Marsden's Trusts*** (1859) 4 Drew 594, 599 - 600:

> Unless it can be shown that the trustee having the discretion exercises the trust corruptly or improperly, or in a manner which is for the purpose not of carrying into effect the trust, but defeating the purpose of the trust, the Court will not control or interfere with the exercise of discretion.

Notices of appointment were not exercised for an improper purpose

168 I have set out earlier in these reasons the circumstances in which Tyrone executed the notices of removal and acceptance of appointment of trustees of the MMF Trust and the FW Trust. Michael had commenced proceedings in this court to challenge the validity and effect of the deeds of variation appointing Tyrone as Appointor and Guardian of the MMF Trust and the Appointor of the FW Trust. Michael had filed a chamber summons for an interlocutory injunction to restrain Tyrone from exercising any powers of appointment under the trusts. The chamber summons was to be heard on 31 July 2014. Tyrone knew that. On 30 July Michael, Yvonne, Jason, Jamie and others staged what senior counsel for Tyrone, Mr Burnside QC, described as the palace coup. Tyrone learned of the takeover of the business premises by Michael, Yvonne, Jason and Jamie as it was taking place. Later that day Tyrone learned that Michael and Yvonne as shareholders of Slondia had dismissed him as a director and as managing director of Slondia.

169 In his witness statement Tyrone says that on 30 July 2013, without any warning and whilst he was in China on company business, he was removed as a director of Slondia and Citycourt. He says that he was on the telephone with Larry Thomas, the CFO of the business, when Mr Thomas had the telephone taken out of his hand by Jason. Jason told Tyrone that Mr Thomas was busy talking to the new owners of the business and then hung up. Later that afternoon Mr Thomas told Tyrone that Michael, Yvonne, Jamie and Jason, together with others, had entered the business premises and taken control of the office and stated that Tyrone was no longer in control and that they were in control. Tyrone says that the then current management team of the business - the general manager, the CFO and the office administrator did not return to work after 30 July. They had worked for the business for approximately the last 10 years. Tyrone says 'in response to the conduct of my parents and my brothers' he executed the notices of removal and acceptance of appointment of trustee.

170 In cross-examination it was put to Tyrone that he executed the notices before the court heard the interlocutory injunction application and that he executed them when he did because he knew that he would not be able to exercise the power as appointor if the court granted an injunction. Tyrone denied that part of his purpose on 31 July 2013 was to execute the notices in time for his lawyer to be able to bring them to court before the hearing of the injunction application. Tyrone said that his intention was to retain the status quo in the sense of maintaining his position within the group. He said that the exercise of the power put him back where he was the day before his parents and brothers seized control of the business premises and dismissed him as managing director of Slondia and Citycourt. He did that by replacing Slondia and Citycourt as trustees with Parradele, a company controlled by himself and his wife.

171 It might be suggested that Tyrone acted in anger or resentment at the actions of his parents and brothers. However, that of itself does not establish improper purpose. *Thomas on Powers* says at [9.77] that evidence of motive, such as anger and resentment - under which it is alleged the exercise of power took place is not sufficient by itself to establish fraud. As authority for that proposition the author quotes Turner LJ in ***Topham v Duke of Portland*** (1863) 1 De GJ & Sm 517, 571, approved in (1869) LR 5 Ch App 40, 57. Turner LJ said that in considering whether or not a particular appointment is a fraud upon the power the purpose with which an act is done is to be distinguished from the motives which led to that purpose and said that what has to be considered is the purpose of the act which was done and not the motive which led to it.

172 In my opinion, the plaintiffs have not established that Tyrone executed the notices of removal and appointment for any improper or ulterior purpose. The trigger for Tyrone executing the notices of removal and appointment was his parents and brothers seizing control of the business premises and dismissing him as managing director on 30 July, not the impending application for an interlocutory injunction.

173 Tyrone's purpose in exercising the power of removal and appointment was to restore the status quo, the state of affairs existing immediately preceding Michael taking over the business premises and the management of the business.

174 The status quo before 30 July was that Tyrone was the managing director of each of the trustees and the general manager of the business. He had been managing director for nine years and general manager for

17 years. The chief financial officer was Mr Thomas, who had been there for about six years. On 30 July Michael and Yvonne, without prior consultation with or notice to Tyrone, removed him as a director of each of Slondia and Citycourt and, with the assistance of Jamie and Jason, seized control of the business premises and management of Slondia and Citycourt and the business.

175 Appointing a company controlled by him as trustee was not of itself the exercise of the power by Tyrone for a foreign or improper purpose. Tyrone's purpose was to appoint in place of Slondia and Citycourt as trustee of each trust a company which would reinstate the management of the business which had been removed without consultation or notice by Slondia and Citycourt acting by its shareholders, Michael and Yvonne. There is no evidence that Tyrone intended to effect any purpose beyond putting Parradele in control of the trusts and the management of the family business. For example, there is no evidence that Tyrone intended Parradele to deal improperly with trust assets. As trustee, Parradele was bound to exercise its powers, including its power in relation to the assets and income of the trusts, as a fiduciary.

176 Tyrone's purpose was to restore the status quo in the sense I have described. There is no evidence that Tyrone did so to achieve any purpose other than the proper and effective management of the business. It is not for the court to assess the relevant competence of Parradele on the one hand and Slondia and Citycourt on the other hand to act as trustees of the trusts and control the management of the business. The action of Tyrone in removing Slondia and Citycourt as trustees and replacing them with Parradele does not give rise to an inference that Tyrone did so for any purpose other than that Parradele would properly fulfil its duties as trustee including properly managing the business. The plaintiffs have not established that Tyrone executed the notices of removal and acceptance of appointment of trustee for any improper or ulterior purpose.

Estoppel, laches and acquiescence

177 Tyrone pleads the defences of estoppel, laches and acquiescence against Michael but not against Jason. Michael claims no greater relief than Jason. It is not necessary to consider the defences of estoppel, laches and acquiescence raised by Tyrone.

Tyrone's counterclaim

178 Tyrone claims that at the meeting with Brett Davies Lawyers on 27 May 2014 Tyrone agreed with Michael and Yvonne that Tyrone would

receive control of the business from Michael and Yvonne immediately as an advance on his inheritance and Michael and Yvonne would make provision in their wills for their other sons by way of balance. In his defence Tyrone described this agreement as the Handover Agreement. Tyrone counterclaims for a declaration that the Handover Agreement remains in legal force and effect.

179 In their opening written submissions the defendants refer to the Handover Agreement in the context of the defence of estoppel, laches and acquiescence. The defendants make no submission to the effect that there was a binding contract made or that the Handover Agreement remains in force and effect. Senior counsel for the defendants made no submissions about the alleged Handover Agreement in his closing submissions. Whilst not formally abandoning the claim, the defendants did nothing to press the claim in relation to the Handover Agreement. I am not satisfied that any enforceable legal agreement in the terms of the Handover Agreement was made. Michael gave instructions to Brett Davies Lawyers to draft deeds to appoint Tyrone as Appointor of the trusts so that Tyrone would receive control of the business immediately and stated that was an advance on Tyrone's inheritance and Michael and Yvonne would make provision in their wills for their other sons by way of balance. However, neither Michael nor Tyrone intended to form a legally binding agreement and no such agreement was made.

180 I have already referred to Tyrone's claim that there is an implied term to the FW Trust Deed to the effect that any appointor who determines thereafter to renounce or resign the position could, by notice in writing and with the consent of the trustee and guardian, nominate another appointor in his or her place and that person would thereafter be the appointor of the FW Trust. The defendants have not established that case.

Defendants' application to amend their defences

181 At the conclusion of the trial the defendants applied to amend their defences. It is necessary to outline the events which gave rise to that application. In accordance with O 34 r 5(4) of the *Rules of the Supreme Court 1971* (WA) senior counsel for the defendants made a closing address and counsel for the plaintiffs then made an address closing their case. In the exercise of my discretion I permitted senior counsel for the defendants to make a further address in reply. In the course of that reply Mr Burnside made a submission to the following effect. The plaintiffs seek equitable relief. He who seeks equity must do equity. The effect of granting the orders the plaintiffs seek would be to leave Tyrone out of the

business but liable for millions of dollars in securities. If relief is granted to the plaintiffs setting aside the deeds of variation and appointment of Tyrone as appointor of the trusts then such relief should be conditional upon Michael procuring Tyrone being released from any liabilities pursuant to securities given by him to support liabilities of the business. Upon Mr Burnside making those submissions counsel for the plaintiffs, Mr Penglis, interrupted to object. Mr Burnside then said that he was flagging the matter but it would have to be debated after I had delivered reasons for judgment and the question would then be what orders should be made. Mr Penglis took issue with that submission and objected that the conditional relief submitted by the defendants had not been pleaded, the facts giving rise to it had not been pleaded, the conditional relief was not raised by the defendants in opening and was raised for the first time in the defendants' reply. Mr Burnside made submissions that it was not necessary for the defendants to amend their defence to propound the argument based on the 'he who seeks equity must do equity' maxim and Mr Penglis made submissions to the contrary. I then informed counsel that if the defendants sought to amend their pleadings I would have to deal with their application and if they did not I would have to determine the defendants' contentions in relation to the maxim on the basis of the pleadings as they then stood. I gave directions for the making of any application to amend the defences. I then reserved my decision.

182 The defendants subsequently moved to amend their defences in each action. It is sufficient to set out the proposed amendment to the defence in CIV 1276 of 2014, the action brought by Jason. The proposed amendment is to amend [85] as follows:

> They deny the plaintiff is entitled to the relief claimed in paragraphs A) to ZD) in the prayer for relief or any relief sought, and say further that, if any relief is granted to the plaintiff in this action then such relief ought to be conditional upon the plaintiff procuring:
>
> (a) Tyrone being released from any liability pursuant to security given by him to support liabilities of the Business;
>
> (b) the fourth defendant being released from obligations under any lease executed by it in connection with the Business.
>
> **Particulars**
>
> Tyrone executed security documents in support of liabilities of the Business.
>
> The fourth defendant entered into lease agreements for premises used in connection with the Business.

> Tyrone and the fourth defendant refer to paragraph 37 of the amended defence in CIV 2186 of 2013 and to paragraph 30.17 above.
>
> Tyrone also refers to paragraph 30.24 of the amended substituted defence in CIV 1262 of 2013.
>
> Tyrone and the fourth defendant rely on the principle that he who seeks equity must do equity. It would be inequitable for Tyrone to be excluded from the Business but remain liable on securities given by him in relation to liabilities of the Business, and for the fourth defendant to remain liable under leases of premises used in connection with the business when it and Tyrone are excluded from the Business.

183 The application to amend is supported by an affidavit sworn by Tyrone on 12 February 2015 on behalf of himself and Parradele. Tyrone referred to the proposed amendments to the defences. Tyrone states that he did not previously instruct his solicitors to make the amendments now sought because he was not advised it was necessary for the defendants to plead the equitable maxim 'he who seeks equity must do equity' in the respective defences. Tyrone says that having heard what was said between the court and his counsel on the final day of the trial he instructed his solicitor to make the application to amend.

184 The court has a discretion under O 21 r 5 of the *Rules of the Supreme Court* to grant an amendment to pleadings at any stage of the proceedings. Such applications must be considered in light of case flow management principles. An application for leave to amend a pleading should not be approached on the basis that a party is entitled to raise an arguable claim, subject to payment of costs by way of compensation. There is no such entitlement: ***Aon Risk Services Australia Ltd v Australian National University*** (2009) 239 CLR 175 [111]. The objectives stated in O 1 r 4A and 4B do not require that every application for amendment should be refused because it involves the waste of some costs and some delay. Factors to be considered in the exercise of the discretion include the nature and importance of the amendment to the party applying, the extent of any delay and the costs associated with it and the prejudice which might follow the amendment. Invariably the exercise of the discretion will require an explanation to be given where there is delay in applying for amendment: ***AON Risk Services*** [102].

185 The authors of *Civil Procedure Western Australia* suggest at [21.5.29] that in the light of the case flow management principles and objects stated in O 1 r 4A and 4B the practice will now tend markedly against an amendment of the pleadings at the end of the trial which does more than clarify the issues. That may be accepted as a general

observation but of course each application must be considered on its merits. In this case the defendants, whilst moving to amend their defences, submit that 'an amendment was not necessary for the maxim to be ventilated'. The defendants contend that if that submission is right then it is in favour of the amendment being granted so that the judgment will reflect the operation of the maxim as it would if an amendment were not needed.

186 The maxim 'he who seeks equity must do equity' means that equity looks to the conscience of the applicant in determining whether to grant relief. It means that no plaintiff can get an equitable remedy unless that plaintiff fulfils his or her own legal and equitable obligations arising out of the subject matter of the dispute: *Meagher, Gummow and Lehane's Equity Doctrines & Remedies* (5th ed) [3-050]. Meagher, Gummow and Lehane caution that the limits of the maxim must be remembered; the maxim does not empower a court of equity to impose on a plaintiff as a condition of relief any term merely because it considers it reasonable. In ***Bofinger v Kingsway Group Ltd*** (2009) 239 CLR 269 Gummow, Hayne, Heydon, Kiefel and Bell JJ said:

> In ***Langman v Handover*** … Rich and Dixon JJ said that the maxim that he who seeks equity must do equity 'does not substitute moral for legal standards in the determination of the conditions of relief'. Rather, those who ask for the assistance of a Court of Equity must be willing to do justice by accepting terms which flow from the legal or equitable rights of the defendant to the suit [67].

187 The defendants submit that the pleading of the maxim is required as part of a plaintiff's pleaded case that is that the plaintiffs in their statements of claim must offer to do equity to Tyrone and prove their willingness to do so. The defendants cite four authorities in support of that proposition. The first is ***Sander v Twigg*** (1887) 13 VLR 765, 785, 793. I do not find that case helpful in the present context because it appears to me to address the substantive issue of law and not whether the maxim should be pleaded or how it should be raised procedurally.

188 The second authority referred to by the defendants is ***'Molton v Black*** Young J, 26/5/86'. The decision is referred to by the New South Wales Court of Appeal in ***Nydegger v McKenzie*** [2001] NSWCA 393 by Hodgson JA but I have not been able to access the decision.

189 The third authority referred to is ***Constanton v Permanent Trustee Australia Ltd*** (Unreported, NSWSC (Equity Division), BC 9101904, 13 June 1991 (Young J). Young J said:

> Accordingly, if the plaintiffs are to succeed at all against Howard Finance Ltd it would be under the general equitable rules. I had some problems at the hearing with the maxim 'he who seeks equity must do equity'. This was because the plaintiff's prime claim was to set aside the mortgage and there was no offer to pay to anybody the monies which had been used to pay out Westpac … There was a discussion as to whether it is necessary for the plaintiffs to both plead and offer in evidence to 'do equity' in this sense or whether, even without such an offer, the Court could give relief and mould its decree in a conditional way. In the event, it is not necessary to deal with this question because, as I have indicated, I will not be setting aside the mortgage and, so far as Howard Finance is concerned, there is no counterveiling loss which would be suffered if I ordered equitable compensation. However I should note that the better view appears to be in a post Judicature Act system that failure to offer to do equity is not a fatal defect in pleading; see Sander v Twig (1887) 13 VLR 765, 795 and 793 [BC9101904 at 16].

190 The final case referred to by the defendants is ***Nydegger v McKenzie***. The New South Wales Court of Appeal upheld in part an appeal from the decision of the primary judge that Olivia held her interest in certain properties on trust for Therese subject to Olivia being entitled to live with Therese and her family on one of the properties. The Court of Appeal found that there was an error in the form of the declarations in that they did not make the trust in favour of Therese subject to a life interest in favour of Olivia as had been claimed in the statement of claim. Hodgson JA with whom Sheller and Beazley JJA agreed, said that it should have been part of Therese's case to offer to do equity and prove willingness to do so and cited ***Sander v Twigg***, ***Malton v Black*** and ***Constanton v Permanent Trustee Australia Ltd*** and ***Nieborak v Piper*** as authority for that proposition.

191 Order 20 r 8(1) provides that subject to the provisions of the rule and r 11, 12 and 13, every pleading must contain a statement of material facts on which the party relies for his defence. The remaining provisions of r 8, r 11 and r 13 are not presently relevant. Rule 12 provides that a party may by his pleading raise any point of law. The rule refers to points of law not conclusions of law. I should also refer to r 9 which provides that a party must in its defence plead any matter which if not specifically pleaded might take the opposite party by surprise.

192 The defendants may rely upon the maxim 'he who seeks equity must do equity' without pleading it. The plaintiffs do not submit that the defendants need to expressly refer to the maxim in their pleadings in order to rely upon it at trial. The plaintiffs say that the defendants must plead:

1. the material facts they intend to rely upon with respect to the application of the maxim; and

2. the way they would contend at trial that those facts and the maxim would operate.

The plaintiffs say that that at the very minimum those matters needed to be clearly articulated in the course of the defendants' opening submissions.

193 In my opinion the defendants are not required to plead the maxim 'he who seeks equity must do equity' nor the way in which the pleaded facts and the maxim would operate. The defendants must plead the facts they intend to rely upon. The plaintiffs must also plead any matter which if not specifically pleaded might take the opposite party by surprise. In my view, that does not require the defendants to plead that they rely upon the maxim or how the pleaded facts and the maxim would operate. That is because when a plaintiff seeks equitable relief it should be part of his case to offer to do equity.

194 The statement in the proposed amendment to par 85 of the defence that if any relief was granted then it ought to be conditional upon the plaintiff procuring Tyrone being released from any liability pursuant to security given by him to support liabilities of the business and Parradele being released from obligations under a lease executed by it in connection with the business are not statements of fact and are not required to be pleaded as such.

195 The particulars refer to existing pleadings of the defence and in addition raise two other matters. The first is that Tyrone executed security documents in support of liabilities of the business. That adds nothing of substance to existing par 30.17 of the defence. The second matter is that Parradele entered into lease agreements for premises used in connection with the business. That is not elsewhere pleaded. However, there is evidence that Parradele took over the leases of some of the kiosks. Indeed, that is a point made by the plaintiffs.

196 The proposed amendment concludes with two sentences. The first sentence, that Tyrone and Parradele rely on the principle that he who seeks equity must do equity, is a point of law which the defendants may, but are not obliged, to plead. The second sentence, that it would be inequitable for Tyrone to be excluded from the business but remain liable on securities given by him in relation to liabilities of the business and for Parradele to remain liable under the leases of premises used in connection

with the business when it and Tyrone are excluded from the business, are conclusions of law. The rules do not provide for the pleading of conclusions of law but in practice such matters are often pleaded.

197 I will give leave to the defendants to amend their defences in accordance with the minute of proposed consolidated amendments to defences and counterclaims in all actions dated 17 December 2014. I do so for the following reasons. The amendment to plead that if any relief is granted it ought to be conditional upon the plaintiffs procuring Tyrone being released from any liability pursuant to security given by him to support liabilities for the business and Parradele being released from obligations under a lease executed by it in connection with the business are not matters which the defendants are required to plead by the rules. The defendants do not seek leave to reopen or adduce any further evidence to support those contentions. In that sense, the amendments clarify issues rather than introduce new ones. The amendments will not cause any substantial delay or additional cost other than that of the amendment application itself. In my opinion, the defendants should have raised the matters contained in the proposed amended pleading in their opening address. That would have informed the court and the plaintiffs of this aspect of the defendants' case. On the other hand, it is an established principle that he who seeks equity must do equity and that it should be part of the plaintiff's case to offer to do equity if that requirement arises from the facts.

198 The plaintiffs are not prejudiced by the defendants' delay in pleading the matters now sought to be pleaded for two reasons. First, the defendants are not required by the rules to plead those matters. Secondly, the plaintiffs are not prejudiced by the matter not having been raised by the defendants in their opening. The plaintiffs say that the only evidence of Tyrone's liabilities in respect of the business is found in exhibits 160 and 161 which showed the position as at 2011. To the extent that it is relevant that there is no evidence in regard to the present position, the absence of evidence is to the disadvantage of the defendants.

199 The plaintiffs further say that counsel for the plaintiffs did not cross-examine Tyrone with respect to the extent of such present liabilities, the extent to which he caused his parents to also be liable for those liabilities or why it was necessary for those additional liabilities to be incurred. The plaintiffs also say they have been denied the opportunity of adducing evidence, or alternatively cross-examining Tyrone with respect to the financial position of the business and capacity for the business to affect Tyrone's removal as guarantor. It must be remembered that the

maxim that he who seeks equity must do equity does not substitute moral for legal standards in the determination of the conditions of relief. In applying the maxim the court is not empowered to impose on a plaintiff a condition of relief merely because it considers it to be reasonable. A condition of relief may only be imposed to give effect to legal or equitable rights of the defendants or legal or equitable obligations of the plaintiffs arising out of the subject matter of the dispute. That does not raise questions of what is fair or reasonable in all the circumstances requiring an examination of, amongst other things, the capacity of each party to discharge their legal or equitable obligations.

Conditioning equitable relief in favour of plaintiffs

200 It is not appropriate to consider what, if any, conditions should be attached to relief granted to the plaintiffs to give effect to the principle that he who seeks equity must do equity. The outcome of these proceedings is that Tyrone is the Appointor and Guardian and Parradele trustee of the MMF Trust and Michael is the Appointor and Citycourt the trustee of the FW Trust. The parties did not make any submissions about what, if any, conditions should attach to the declarations or other relief granted to give effect to those findings. It is appropriate that the parties have a further opportunity to make submissions as to the appropriate orders. Those submissions may include that any relief in favour of Michael or Jason, or that has the effect of declaring Citycourt trustee of the FW Trust should be conditional upon Michael, Jason or Citycourt accepting terms which flow from the legal or equitable rights of Tyrone or Parradele established by the evidence in this case.

Conclusion

201 I find as follows.

1. On the proper construction of the MMF Trust Deed the trustee is empowered to vary the contents of the schedule so as to replace the Appointor and Guarantor and appoint a new Appointor and Guarantor.

2. The MMF Trust Deed of Variation was validly executed by Slondia.

3. The variation of the MMF Trust effected by the MMF Trust Deed of Variation was not made by Slondia in breach of trust.

4. Michael, as Guardian of the MMF Trust, consented to the exercise by Slondia of reserved powers to amend the MMF Trust deed to replace the Appointor and Guardian.

5. Tyrone did not procure Michael to sign the MMF Trust Deed of Variation or Slondia to execute the MMF Trust Deed of Variation in circumstances constituting equitable fraud or undue influence of Tyrone over Michael.

6. The MMF Trust Deed of Variation is of legal force and effect.

7. The notice of removal of Slondia and acceptance of appointment of Parradele as trustee of the MMF Trust is valid and of legal force and effect.

8. The removal of Slondia and appointment of Parradele as trustee of the MMF Trust was not in breach of Tyrone's duties as Appointor of the MMF Trust.

9. Parradele is and has been trustee of the MMF Trust since the execution of the notice of removal of Slondia and acceptance of appointment of Parradele as the trustee of the MMF Trust.

10. Tyrone is, and has been since the execution of the MMF Trust Deed of Variation the Appointor and Guardian of the MMF Trust.

11. On the proper construction of the FW Trust Deed the trustee from time to time is not empowered to vary the trust deed by amending or replacing the Appointor.

12. The FW Trust Deed of Variation is of no force or effect.

13. The notice of removal of Citycourt and acceptance of appointment of Parradele as trustee of the FW Trust is of no legal force or effect.

14. Citycourt is and at all material times has been the trustee of the FW Trust.

15. Michael is and at all material times has been the Appointor of the FW Trust.

202 I will hear the parties in relation to what orders should be made to give effect to these findings and, if appropriate, give them an opportunity to make further submissions in relation to the orders which should be made.

JURISDICTION	:	SUPREME COURT OF WESTERN AUSTRALIA IN CHAMBERS
CITATION	:	MERCANTI -v- MERCANTI [2015] WASC 297 (S)
CORAM	:	LE MIERE J
HEARD	:	20 AUGUST 2015
DELIVERED	:	18 JANUARY 2017
FILE NO/S	:	CIV 1262 of 2013
BETWEEN	:	MICHAEL ANGELO MERCANTI Plaintiff AND TYRONE KANE MERCANTI First Defendant SLONDIA NOMINEES PTY LTD Second Defendant CITYCOURT PTY LTD Third Defendant
FILE NO/S	:	CIV 2186 of 2013
BETWEEN	:	MICHAEL ANGELO MERCANTI Plaintiff AND TYRONE KANE MERCANTI First Defendant PARRADELE PTY LTD Second Defendant

SLONDIA NOMINEES PTY LTD
Third Defendant

CITYCOURT PTY LTD
Fourth Defendant

FILE NO/S : CIV 1276 of 2014

BETWEEN : JASON DEAN MERCANTI
Plaintiff

AND

SLONDIA NOMINEES PTY LTD
First Defendant

CITYCOURT PTY LTD
Second Defendant

TYRONE KANE MERCANTI
Third Defendant

PARRADELE PTY LTD
Fourth Defendant

Catchwords:

Costs - Trusts - More successful party - Turns on own facts

Legislation:

Nil

Result:

Plaintiff to pay two thirds of defendant's costs

Category: B

Representation:

CIV 1262 of 2013

Counsel:

Plaintiff	:	Mr S Penglis
First Defendant	:	Mr B G Grubb & J Burnside QC (trial only)
Second Defendant	:	No appearance
Third Defendant	:	No appearance

Solicitors:

Plaintiff	:	Herbert Smith Freehills
First Defendant	:	Metaxas & Hager
Second Defendant	:	No appearance
Third Defendant	:	No appearance

CIV 2186 of 2013

Counsel:

Plaintiff	:	Mr S Penglis
First Defendant	:	Mr B G Grubb & M Burnside QC (trial only)
Second Defendant	:	Mr B G Grubb & Mr J Burnside QC (trial only)
Third Defendant	:	No appearance
Fourth Defendant	:	No appearance

Solicitors:

Plaintiff	:	Herbert Smith Freehills
First Defendant	:	Metaxas & Hager
Second Defendant	:	Metaxas & Hager
Third Defendant	:	No appearance
Fourth Defendant	:	No appearance

CIV 1276 of 2014

Counsel:

Plaintiff	:	Mr S Penglis
First Defendant	:	No appearance
Second Defendant	:	No appearance
Third Defendant	:	Mr B G Grubb & Mr J Burnside QC (trial only)
Fourth Defendant	:	Mr B G Grubb & Mr J Burnside QC (trial only)

Solicitors:

Plaintiff	:	Herbert Smith Freehills
First Defendant	:	No appearance
Second Defendant	:	No appearance
Third Defendant	:	Metaxas & Hager
Fourth Defendant	:	Metaxas & Hager

Case(s) referred to in judgment(s):

Mercanti v Mercanti [2015] WASC 297
Mercanti v Mercanti [2016] WASCA 206

LE MIERE J:

Background

1 These proceedings are brought by and against members of the Mercanti family and companies controlled by members of the family. On 20 August 2015 I determined who was the trustee and appointor of two trusts, the Michael Mercanti Family Trust (MMF Trust) and the Footwear Wholesale Trust (FW Trust), and therefore who has practical control of the trusts and hence of the businesses owned and operated by those trusts: ***Mercanti v Mercanti*** [2015] WASC 297. An appeal by the plaintiff was dismissed by the Court of Appeal: ***Mercanti v Mercanti*** [2016] WASCA 206 (the appeal decision).

The proceedings

2 The proceedings are principally concerned with the validity of deeds of variation of two trust deeds and notices of the removal of trustees and appointment of new trustees of the two trusts. The trusts own and operate a wholesale and retail shoe repair business. These proceedings determined who is the trustee and appointor of the trusts and therefore has practical control of the trusts and hence of the businesses.

My findings

3 In my reasons for decision I found as follows:

1. On the proper construction of the MMF Trust Deed the trustee is empowered to vary the contents of the schedule so as to replace the Appointor and Guarantor and appoint a new Appointor and Guarantor.

2. The MMF Trust Deed of Variation was validly executed by Slondia.

3. The variation of the MMF Trust effected by the MMF Trust Deed of Variation was not made by Slondia in breach of trust.

4. Michael, as Guardian of the MMF Trust, consented to the exercise by Slondia of reserved powers to amend the MMF Trust deed to replace the Appointor and Guardian.

5. Tyrone did not procure Michael to sign the MMF Trust Deed of Variation or Slondia to execute the MMF Trust Deed of Variation in circumstances constituting equitable fraud or undue influence of Tyrone over Michael.

6. The MMF Trust Deed of Variation is of legal force and effect.

7. The notice of removal of Slondia and acceptance of appointment of Parradele as trustee of the MMF Trust is valid and of legal force and effect.

8. The removal of Slondia and appointment of Parradele as trustee of the MMF Trust was not in breach of Tyrone's duties as Appointor of the MMF Trust.

9. Parradele is and has been trustee of the MMF Trust since the execution of the notice of removal of Slondia and acceptance of appointment of Parradele as the trustee of the MMF Trust.

10. Tyrone is, and has been since the execution of the MMF Trust Deed of Variation the Appointor and Guardian of the MMF Trust.

11. On the proper construction of the FW Trust Deed the trustee from time to time is not empowered to vary the trust deed by amending or replacing the Appointor.

12. The FW Trust Deed of Variation is of no force or effect.

13. The notice of removal of Citycourt and acceptance of appointment of Parradele as trustee of the FW Trust is of no legal force or effect.

14. Citycourt is and at all material times has been the trustee of the FW Trust.

15. Michael is and at all material times has been the Appointor of the FW Trust [201].

Costs orders sought

4 The court has a general discretion in relation to costs. Counsel for the defendant submitted that they are entitled to the costs of the action as they were the largely successful party. Counsel for the plaintiff submitted that the result of the trial was that the parties split the trusts in dispute and were therefore equally successful and resultantly the parties should bear their own costs.

Issues in dispute

5 In the appeal decision Buss P stated the following:

The primary proceedings were concerned principally with the validity of:

(a) a deed of variation (the MMF Trust Deed of Variation) executed in 2004 by Slondia, in its capacity as Trustee of the MMF Trust, pursuant to which Slondia deleted provisions in the MMF Trust Deed with respect to the appointment of Michael Mercanti as the Guardian and Appointor of the MMF Trust and substituted new

provisions appointing Tyrone Mercanti as the Guardian and Appointor;

(b) a written notice executed on 31 July 2013 by Tyrone Mercanti and Parradele, pursuant to which Tyrone Mercanti, in his capacity as Appointor of the MMF Trust, removed Slondia as Trustee and appointed Parradele as the new Trustee of the MMF Trust;

(c) a deed of variation (the FW Trust Deed of Variation) executed in 2004 by Citycourt, in its capacity as Trustee of the FW Trust, pursuant to which Citycourt deleted provisions in the FW Trust Deed with respect to the appointment of Michael Mercanti as the Appointor of the FW Trust and substituted new provisions appointing Tyrone Mercanti as the Appointor; and

(d) a written notice executed on 31 July 2013 by Tyrone Mercanti and Parradele, pursuant to which Tyrone Mercanti, in his capacity as Appointor of the FW Trust, removed Citycourt as Trustee and appointed Parradele as the new Trustee of the FW Trust [43].

6 The defendant was successful on the issues relating to the MMF Trust and the plaintiff was successful in relation to the FW Trust. However, those were not the only issues in dispute. Counsel for the defendant submitted that there were seven causes of action in CIV 1262 of 2013 and the plaintiff was only successful in one of those causes of action, and only on half of it. Counsel for the plaintiff accepted that on an assessment of causes of action then it must be noted that the defendant was successful on far more than the plaintiff, although they failed on their counterclaim.

7 Counsel for the defendant also submitted that the main issue at trial was who had authority to have control of the two trust deeds and the major trust in issue was the MMF Trust. The trust which the defendant gained control of was the MMF Trust and the trust which the plaintiff was found to control was the FW Trust.

8 The assets within the MMF Trust include the real property in issue between the parties, the leases of the retail stores in what could be described as the retail business. I found that the trustee of the MMF Trust owned and operated the retail shoe repair business founded by Michael, the plaintiff in CIV 2186 of 2013 and CIV 1216 of 2013. The assets in the MMF Trust include the following real estate assets which are held on trust for the MMF Trust by Slondia Nominees Pty Ltd (Slondia Nominees): a property at 5 Broderick Street valued in 2013 at $900,000 - $1,100,000; a warehouse at 33 Gladstone Street, Perth valued in 2013 at $985,000 and given a realistic maximum price at around

$1,200,000 to $1,300,000; a House at 1 Granadilla Street, Duncraig valued in 2013 at $750,000; and a unit at 34/6A Valley Road, Halls Head valued at $350,000 in 2013. The residential properties were therefore worth somewhere between $2,985, 000 and $3, 500, 000. Sales for the MMF Trust in 2012 were recorded at $5,095, 734. The value of the net assets of the MMF Trust, which does not include the real estate assets held on trust by Slondia Nominees, was $721,845 at 2012.

9 In the main action I found that the FW Trust owns and operates the wholesale shoe repair supplies business. The FW Trust does not own any real estate. The value of the sales of the FW Trust was recorded at $1,465,755. The value of the net assets of the FW Trust was $1,069,034 in 2012.

Conclusion

10 I am satisfied that the defendants are the more successful party in this action. The defendants gained control of what was the more significant of the two trusts at the time of the trial. The defendants were also the more successful party in relation to the issues determined in my reasons for decision. In taking those factors into account in the exercise of my discretion in relation to costs orders I consider the appropriate order is that the defendants should have two thirds of their costs of the action. The appropriate costs order in this case is that the plaintiff should pay two thirds of the defendant's costs of the action.