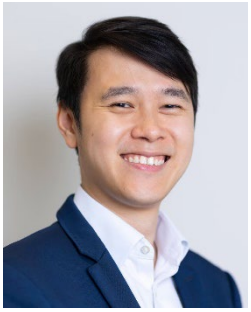
Private Client eBriefing

Grand View v Wong and the doctrine of improper purposes



Article by Jia Wei Lee[1], 30th June 2023

1. The improper purpose doctrine is an easy one to state: a power may only be exercised for a purpose for which it was conferred. As Lord Parker in *Vatcher v Paull* [1915] AC 372, at 378, put it:

> *"... 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."*

2. While this doctrine may seem intuitive, its application is frequently beguiling, and has led to considerable judicial and academic discussion. The Privy Council's decision in *Grand View v Wong* [2022] UKPC 47 is another chapter in that debate. It is a rare and important application of the doctrine in the context of a large discretionary trust, and is an important reminder that even where powers are drafted widely, there may well remain unspoken limits on these powers.

The facts

3. The Global Resource Trust No. 1 (the "**GRT**") was a Bermudan irrevocable discretionary trust, with a trust period of 100 years, declared on 10 May 2001. Its two economic settlors were YC Wang and YT Wang, two brothers who had founded one of the largest business conglomerates in Taiwan. YC Wang died in 2008, while YT Wang died in 2014. The objects of the GRT were the children and remoter issue of YC and YT Wang living or born after 10 May 2001. It was estimated to hold assets worth some US$500m as of 2019.

[1] I am indebted to Jonathan Hilliard KC for his insights, and for his contributions to many of the ideas I share in the Article. But as ever, I confirm that any views expressed in this article are my own, and assume full responsibility for them.

Its trustees at the relevant times was the Global Resource Private Trust Company ("**GRPT Co**").

4. On the same day that the GRT was declared, the Wang Family Trust (the "**WFT**") was also declared. The WFT was a Bermudan perpetual purpose trust for a mixture of noncharitable and charitable purposes and has no human objects. It was declared by a trust company known as the Grand View Private Trust Company ("**Grand View**") on 10 May 2001 and was transferred assets worth some US$567m at the time of its creation. The appellants, being Winston Wong, Riley Wong and Tony Wang, were all objects of the GRT at the time of its creation.

5. In May 2005, the directors of the GRT's trustee determined that the GRT trustee would (i) transfer the assets of the GRT to Grand View (of which they were also directors) as trustee for the WFT, (ii) add Grand View as an object of the GRT, and (iii) exclude all of the existing objects of the GRT (including the appellants). The power that they exercised was one granted under Clause 8.1 of the trust deed, headed "*Addition and Exclusion of Beneficiaries*." Clause 8.1 provided that:

> *8.1 The Trustees may, at any time before the expiration of the Trust Period by deed revocable during the Trust Period or irrevocable, declare that:*
>
> *8.1.1 any person or class or description of persons shall, as from either the date of such deed or such later date as is therein specified and permanently or for such period as is therein mentioned, be included as a Beneficiary for the purposes of this Declaration, and any such dec- laration may be expressed to refer either to the whole or to some part or share only of the Trust Fund and shall have effect accordingly; and*
>
> *8.1.2 any person or class or description of persons then included as a Beneficiary shall, as from either the date of such deed or such later date as is therein specified and either permanently or for such period as is therein mentioned, cease to be a Beneficiary for the purposes of this Declaration, and any such declaration may be expressed to refer either to the whole or to some part or share only of the Trust Fund and shall have effect accordingly.*

6. The directors of GRPT Co took steps to execute those decisions in September 2005. The appellants challenged the validity of GRPT Co's exercise of the power to change the GRT's objects, and thereafter, to transfer its assets to Grand View as trustee for the WFT. The appellants succeeded before the Bermuda Supreme Court, but that decision

was overturned by Clarke P in the Bermuda Court of Appeal. The appellants then appealed to the Privy Council.

7. The Privy Council allowed the appeal, with Lord Richards delivering the sole judgment. There are four aspects of Lord Richard's judgment which are worth dwelling on.

Improper purposes vs excessive execution

8. The first relevant part of Lord Richards' judgment is his affirmation that the improper purposes rule is not a species of excessive execution. At [55], Lord Richards cited with approval the following statement by Lord Sumption in *Eclairs Group Ltd v JKX Oil & Gas Plc* [2015] UKSC 71:

> *"15…The important point for present purposes is that the proper purpose rule is not concerned with excess of power by doing an act which is beyond the scope of the instrument creating it as a matter of construction or implication. It is concerned with abuse of power, by doing acts which are within its scope but done for an improper reason…*
>
> *… 30…The rule is not a term of the contract and does not necessarily depend on any limitation on the scope of the power as a matter of construction. The proper purpose rule is a principle by which equity controls the exercise of a fiduciary's powers in respects which are not, or not necessarily, determined by the instrument."*

9. And at [51] – [52], Lord Richards, citing Clarke P in the Bermudan Court of Appeal, clearly distinguished between the improper purposes doctrine from the doctrine of excessive execution and the fiduciary's obligation to give adequate deliberation to the exercise of a power.

10. The Privy Council's reaffirmation of this distinction is essential, because there is a natural temptation to conflate the two rules. They are, after all, very similar, to the point that the case law and academic literature frequently draw analogies between them. In *Pitt v Holt* (CA) [2011] EWCA Civ 197, for example, Lloyd LJ said, at [96]:

> *"[c]ases of a fraud on the power are similar to the latter [an appointment to someone outwith the class of objects], since the true intended beneficiary, who is not an object of the power, is someone other than the nominal appointee."*

11. The similarity is most pronounced in the archetypal case of an improper purpose, i.e. where a power is exercised in favour of a proper object of a trust, but with the intention of benefiting a non-object instead.[2] Had the power simply been exercised in favour of a non-object, it would have been a clear case of an excessive execution. But because the exercise of a power is formally *intra vires*, it is tempting to suggest, as Tipping J did in *Kain v Hutton* [2008] 3 NZLR 589 (Supreme Court of New Zealand), that these are merely cases of "*clandestine excessive execution*" – in effect, the improper purposes doctrine is regarded a species of excessive execution, focusing on the substance of the appointment rather than its form.[3]

12. But this temptation ought to be avoided. The nominal similarity in the way the doctrines of excessive execution and improper purposes apply in *this* scenario do not extend to all the *other* scenarios in which the improper purposes rule can bite. The improper purposes rule has been said to apply where:
    a. a power was used to prevent a daughter's marriage to a man the family thought undesirable;[4]
    b. a power was used to defeat forced inheritance rules in Jersey;[5]
    c. a power was used to procure its object to live abroad;[6]
    d. an object bribes a donee to use his power to make an appointment to said object;[7]
    e. an amendment power is used to alter the purpose of a trust[8].

13. In every one of these cases, the form and substance of the power's exercise matched, and in all of these cases, the power in question was exercised with the intention that

[2] *Lady Wellesley v Earl of Mornington* (1855) 2 K&J provides a good example of this – in that case, a father (who was not an object under a trust) had exercised a power to appoint assets in favour of his seriously ill child (who was a proper object of the trust), with the intention that those assets would pass to him upon the child's death. See also *Beere v Hoffmmister* (1856) 23 Beav 101.
[3] Note, to similar effect, Lord Sales' view (expressed extrajudicially) that the improper purposes rule is merely a "*function of interpretation of the contract*" – see his speech at the Lehane Memorial Lecture, titled "*The Interface between Contract and Equity*", delivered on 28 August 2019: https://www.supremecourt.uk/docs/speech-190828.pdf. For the reasons given below, this author disagrees with the suggestion that the improper purposes doctrine is merely an act of contractual interpretation.
[4] *Duke of Portland v Topham* (1864) 11 HLC 32.
[5] *Vatcher v Paull* [1915] AC 372.
[6] *D'abbadie v Bizoin* (1871) 5 IR Eq 205.
[7] *Re Wright* [1920] 1 Ch 108.
[8] *Re Courage Group's Pension Schemes* [1987] 1 WLR 495.

the object receive the full benefit of that appointment. But in every one of these cases, the donee was said to have exercised the power for improper purposes. It is plain, then, that the comparison with excessive execution is not always apt, and that the improper purposes rule is designed to capture a different form of "wrongdoing".

14. The boundary between a case of excessive execution and improper purpose is subtle, and difficult to draw. The reason is that the *starting point* from which both doctrines operate is the same. Both doctrines, fundamentally, are about trying to find out where the *intended limits* of a power lie. The judge applying either doctrine is, at heart, asking herself: "*How did the draftsman intend to constrain the use of this power*?" In both cases, this exercise, as Lord Richards makes clear at [57] and [84], is about construing intention objectively.

15. But where excessive execution is about construing the text, the doctrine of improper purposes is about stepping *outside* the text, to ask if the full context in which the power was granted shows that there is an intended, but ultimately unspoken, function or "spirit" to the use of the power.

16. The notion that a Court must look beyond the text is well-supported by the judgment – at [63], he made clear that the Privy Council were entitled to look not just at the GRT Deed, but also such extrinsic documents as "*objectively inform the context of the instrument in question*", including the WFT trust deed, and substantially contemporaneous documents which were intended to be read with the deed, such as a letter of wishes. Indeed, at [86], reliance was placed on the evidence of Ms Susan Wang as to conversations she had had with the GRT's economic settlors.

17. It is clear, then, that the Court is meant to have regard to *more* than merely the text of the relevant trust instrument. Rather, as Lord Walker maintained in *Pitt v Holt* [2013] UKSC 26, at [60] – [61] it is a *sui generis* judicial tool for controlling the exercise of the power. The normative basis for such a rule is that no power can be exercised otherwise that for the purpose for which it was granted. Critically, however, this purpose cannot be discerned simply by reading the text of the instrument. No draftsman can comprehensively account for all situations in which a power may or may not be exercised. Therefore, the improper purpose rule calls for a court to scrutinise both text and context, and identify the core functions and essence of a power, against which it

will become apparent whether a given exercise of the power accords with its legitimate purpose or not.

18. From this fundamental distinction springs a number of interesting questions, some of which are (partly) addressed in *Wang*, some of which are left unanswered.

How do we evaluate "purpose"?

19. The factors that the Privy Council took into account in finding that Clause 8.1 had been exercised for an improper purpose provide a useful guide to the types of factors which will be considered.

20. Most obviously, the text of the relevant power was essential. What the Privy Council particularly looked at was the breadth or otherwise of the power. In the Bermudan Court of Appeal, in particular, considerable weight was placed on the fact that Clause 8, and Clause 8.1 specifically, contained very broad language. It was "*highly relevant*" to the determination of the purpose of the power conferred therein that the express language was fit to "*confer the widest discretion on the GRT*" – see [75] – [77].

21. However, the Privy Council also rooted its analysis in a consideration of the GRT trust deed as a whole. In looking at the overall deed, the Privy Council considered, at [78] – [80] that it was of particular note that:
    a. the only specified objects of the discretionary dispositive powers were the children and remoter issue of the Founders, said to be "*unusual in the world of discretionary trusts*";
    b. the ultimate beneficiaries with fixed but defeasible interests were the same as those within the specified class of objects;
    c. Clause 14 provided for the trustee's remuneration to be agreed between the trustee and its adult beneficiaries, and did not envisage that the GRT would be without individuals as beneficiaries.

22. Further, the Privy Council stepped outside the strict text of the GRT deed, and compared it with evidence of the language, functions, and purposes of the contemporaneous WFT (see [80] to [88]):
    a. Recital (A) referred to the GRT as a "*private express trust*", language which did not appear in the WFT;

b. the WFT, which was established at the same time as the GRT, held the greater part of the shares in the Formosa Plastics Group, and it was clear that members of the Wang family were not to benefit from the WFT;
c. the GRT, by contrast, held only 1/6th of the total wealth in the FPG, and indeed, seemed designed for a wholly separate purpose to the WFT, with no suggestion of any link between them;
d. such evidence as Ms Susan Wang did produce about the economic settlor's intentions suggested that the aim of the GRT was merely to motivate their descendants to perpetuate the success of the FPG, an aim achieved only by their being objects and beneficiaries of a trust whose principal asset was a valuable holding of FPG's shares.

23. Based on the above, the Privy Council found that it was the clear purpose of the GRT generally, and therefore of Clause 8.1, to further the interests of the existing beneficiaries (including the appellants). Any exercise of a power intended to exclude these very beneficiaries therefore fell foul of the improper purposes rule.

24. What *Wang* illustrates is how the exercise of discerning the proper purposes of a power may begin with the text, but gradually broadens into a consideration of wider, extrinsic factors. Indeed, this is the primary point of difference between the Privy Council and the Court of Appeal – whereas the latter placed an enormous emphasis on the width of the power as expressed in the text, the Privy Council took a more balanced, global perspective of matters. This, it is suggested, is entirely consonant with the principle that the improper purpose doctrine is concerned with discerning a settlor/draftsman's intention in an extra-textual sense.

Some unanswered questions

25. There remain a few knotty questions which *Wang* has left unanswered, in large part because these issues did not arise for determination. I dwell for a moment on four especially interesting ones.

26. The first, and perhaps most complicated issue, is what happens when a donee acts for mixed purposes, and only one of these purposes is improper. The issue did not arise for consideration because it was common ground that the trustee acted for the sole, improper purpose of excluding the entire beneficiary class. But most trustees will act

for mixed purposes. The question is how one decides what degree of significance an improper purpose must have in the donee's calculus before the improper purposes rule will apply.

27. Space precludes a meaningful consideration of this question. In very general terms only, there are two competing approaches. The first is a "predominant purpose" test, adopted in, *inter alia*, *Howard Smith Ltd v Ampol Petroleum Ltd* (see 823F-H), and by the authors of Buckley on the Companies Act.[9] On the other hand, some courts have adopted a 'but for' test of causation, an approach which appears to be reflected in cases like *Re Turner's Settled Estates* (1884) 28 Ch D 205 (see, particularly, 217 – 219) and, arguably, in *IBM UK Holdings v Dalgleish* [2017] EWCA Civ 121, at [174]. The Supreme Court had an opportunity to clarify the correct approach in *Eclairs*, and Lord Sumption expressed, *obiter*, the view that the 'but for' approach was preferable. However, Lord Mance and Lord Neuberger expressly declined to express any concluded view on the test for causation, on grounds that they did not wish to effectively break new ground in company law without the benefit of full argument and submissions on the point. It seems, therefore, that the point remains an unsettled one, albeit Lord Sumption's *obiter dicta* may prove influential in due course.

28. The second issue which arises is what happens when the exercise of a power is taken for an improper purpose. In particular, is the exercise void, or merely voidable? It was common ground between the parties that the consequence of a power being exercised for improper purposes is that the decision is void (see [122]), but Lord Richards suggested that there was some debate on the issue. It is suggested that the better view is likely that it is void, there being a considerable volume of authority to such effect.[10] As a matter of first principles, this certainly makes sense – to act for an improper purpose is to step outside the unwritten boundaries of a power. In effect, the donee acted in a way that he was not authorised to do. It is logical, in these circumstances, for equity to treat such decision as never having been undertaken.

29. The third issue which arises is what happens when the purpose of a power changes over time. This matter was, to some degree, intimated in the Court of Appeal, when

[9] M, Arden, D, Prentice, D, Richard, *Buckley on the Companies Acts* (15th edn,London, Lexis Nexis UK), [3.869].

[10] *Re Marsden's Trust* (1859) 4 Drew 594; *Cloutte v Storey* [1911] 1 Ch 18; *Vatcher v Paull* [1915] AC 372, 378. *cf*. *Preston v Preston* (1869) 21 LT 346. See also *Pitt v Holt* [2011] EWCA Civ 197 (CA), [97]–[98]; *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108.

Clarke P (at [194]) noted that the purpose of a widely drawn power was to "*take account of changes, including in particular unforeseeable or unforeseen ones, in relation to which a wide power of addition and exclusion might be necessary, or at any rate desirable*." But while this was a point directed at the issue of whether a power's purpose should be interpreted widely, it actually raises the more difficult issue of whether a power's purpose can actually change from what was originally intended. Once more, space precludes a fuller consideration of this knotty question. On its face, the answer is "no", but it has been suggested that, in institutions of long duration like pension trusts, a purpose may, over a long period of time, change by degrees (see, e.g. *Re Courage* [1987] 1 All ER 528, 536, per Millet J (as he then was)). This is, in itself, a somewhat controversial proposition, that may well warrant appellate consideration.

30. Finally, there is the question of whether evidence of a settlor's *subjective* intentions in granting a power are admissible in determining the ambit of a power's purpose. This was raised but not decided at [86], in large part because counsel appear to have agreed at first instance that all evidence was admissible. But the Court of Appeal did explicitly state that equity ought not to "*close her mind to extrinsic evidence of the settlor's intentions, when setting up the trust and when granting the power, particularly when it is the wishes of the settlor that the trustee is required to take into account when deciding on the exercise of the power*." This would seem to suggest that a settlor's subjective intentions are a relevant consideration, at least when it comes to instruments created unilaterally, or where one person has a particularly important role in its establishment.

31. Such a position is perhaps open to doubt. One is looking at the power that the settlor actually created, not (in relation to his original intention) the one that he thinks he has created or (in relation to his subsequent intention) the one he thought he had created or where he thinks the limits of the power should now lie. Moreover, it is not particularly satisfactory for a trustee or the beneficiaries to have to work out something like the settlor's original or subsequent actual intentions to deduce the purpose of a power. The question, however, remains unsettled as a matter of English law, and one awaits more detailed consideration of this issue.

Concluding thoughts

32. In some ways, *Grand View v Wong* does not break new ground, in that it largely reaffirms the orthodox and common sense approach previously adopted by the Supreme Court in *Eclairs*, and because the decision which was reached turn on the very particular terms of the trust instrument in question. However, it provides an important practical reminder to trustees and draftsmen that merely having a widely drawn power is not enough. It is always open to the Court (and indeed, to beneficiaries) to look behind the text, at the context and circumstances surrounding the grant of a power, in order to challenge its exercise. It is therefore imperative that the purposes of a trust (or indeed, a power) are made clear in the text, if indeed the trust is to serve such explicit purposes.

33. By the same token, *Wong* is a reminder that undertaking a momentous decision without first obtaining a blessing from the Court is fraught with enormous risk. The decade or so of litigation which led to the Privy Council's judgment could, in many ways, have been avoided if the GRPT Co had sought the Court's approval. It may have had practical reasons for not doing so, but invariably made it possible for their decision to be challenged over a decade after it was made, at tremendous cost and probably reputational damage.

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