THE NINA WANG CASE IN THE HONG KONG COURT OF FINAL APPEAL

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In the first and second decades of the twenty-first century, the longest charity litigation was that involving the Wang fortune in Hong Kong and the role of the Chinachem Charitable Foundation Ltd ('The Foundation'). Nina Wang, who died in April 2007, was reputed to be the richest woman in Asia and this seminal case involved the construction of her homemade will. The principal issue in the proceedings was whether Nina Wang's estate was held by her administrators in trust for the Foundation absolutely (for its general wide charitable purposes) or for the Foundation on terms that the Foundation held the same in trust to give effect to all (or some) of the directions in clauses 2, 3 and 4 of the will. Her homemade will named the Foundation as the principal beneficiary, but difficult and technical legal issues arose as to the meaning and legal effect of her will. Clause 1 contained a gift of Nina's property to the Foundation. Clause 2 contained provisions about the appointment of a managing organisation to supervise the Foundation, and about the funding of 'a Chinese prize of worldwide significance similar to that of the Nobel Prize'. Clause 3 related to the Foundation's management of the Chinachem Group. Clause 4 contained provisions about the Foundation providing support for members of the family of Nina's late husband and staff of the Chinachem Group and their children.

In any event, the estate was irrevocably dedicated to charitable purposes: the difference was whether those purposes were to be defined solely by the memorandum and articles of the Foundation, with Nina's will as no more than an expression of wishes, or whether they were defined by trusts declared in her will, coupled with the Foundation's power to undertake the trusteeship of any charitable trust consistent with its main objects. At first instance[1] Poon J determined that the

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1 Decision of Poon J, 22 February 2013.

Foundation would hold as a trustee and be obliged to give effect to clauses 2, 3 and 4 of the will so far as possible. The Hong Kong Court of Appeal later dismissed the appeal.[2] The final appellate hearing took place in April 2015 and the main issue was concluded by the unanimous decision of the Court of Final Appeal in Hong Kong on 18 May 2015[3] upholding the claim of the Secretary for Justice that the funds of the Foundation were held on charitable trusts which were to be clarified by the court under its scheme-making powers. Such a scheme was to follow, as outlined in the Department of Justice announcement in July 2015. In August 2015, the costs element was the subject of a further adjudication.

Because the litigation took place in Hong Kong, some wills and probate practitioners beyond that jurisdiction may have overlooked it.[4] But since the structurally neat, subtle, and comprehensive leading judgment in the case was delivered by Lord Walker of Gestingthorpe and has much to say on the way in which modern courts are now inclined to deal with the interpretation of wills, it is a case which should definitely engage attention. Even though the particular wording in the will is very much a one-off, the technique applied by the court is an extension of the law governing the interpretation of commercial instruments to unilateral documents including wills. That a will is a wholly unilateral document[5] and is also ambulatory[6] is a distinguishing characteristic that has tended in the past to cause the construction or interpretation of wills to be regarded as different from the construction of other instruments not sharing those features. Yet while the two features are still very relevant to the construction of wills, the modern tendency is for the court, while recognising the points of difference between wills and commercial documents, to place still more emphasis on principles that are applicable to the construction of *all* legal documents. This tendency is referred to

2 CACV NO 44 OF 2013, 11 April 2014.

3 *Secretary for Justice [Hong Kong] v Chinachem Charitable Foundation* (Court of Final Appeal, Hong Kong Special Administrative Region, Ma CJ, Ribeiro PJ, Fok PJ, Chan PJ, Lord Walker of Gestingthorpe NPJ, 18 May 2015). FACV NO 9 OF 2014 (CIVIL).

4 See, however, the following articles or blogs in Lexology: Herbert Smith Freehills LLP, United Kingdom - Richard Norridge and Joanna Caen, 'The Nina Wang will saga: the penultimate chapter' (26 May 2015); Herbert Smith Freehills LLP, United Kingdom - Gareth Thomas and Richard Norridge, 'Hong Kong Court of Appeal upholds Court of First Instance decision that billionaire had bequeathed her fortune as a charitable trust and not as an absolute gift' (5 June 2014); Winston & Strawn LLP, Hong Kong - Deidre Fu, 'Passing your estate to a discretionary trust by will – pitfalls to avoid' (2 Oct 2015).

5 It embodies not a bilateral or multilateral commercial arrangement but the will-maker's personal wishes and directions as to the disposition of his or her estate.

6 The will speaks from the time of the will maker's death. The armchair principle is limited to, and only applies to, facts known at the time the will was made.

in the judgments at first instance before Poon J[7] and in the Court of Appeal,[8] but those judges did not have the advantage of the important recent judgment delivered by Lord Neuberger in the UK Supreme Court in *Marley v Rawlings*.[9]

Interpreting Contracts and Wills

Marley v Rawlings was an extraordinary will case with outlandish facts involving a husband and a wife, each of whom wished to make a new will. Each of the spouses contrived, remarkably, to sign the will prepared for the other without either of them or the witnesses or the solicitor who prepared the wills spotting the mistake. In this case, Lord Neuberger – after referring to the fact that during the last forty years, the House of Lords and the Supreme Court had laid down the correct approach in the interpretation or construction of commercial contracts in a number of cases starting with *Prenn v Simmonds*[10] and culminating in *Rainy Sky SA v Kookmin Bank*[11] – articulated the following propositions as regards contracts and wills:[12]

> When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (v) ignoring subjective evidence of any party's intentions. In this connection, see *Prenn*, at pp 1384 – 1386 and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (Trading as H E Hansen-Tangen)* [1976] 1 WLR 989, per Lord Wilberforce, *Bank Of Credit and Commerce International SA v Ali* [2002] 1 AC 251, para. 8, per Lord Bingham of Cornhill, and the survey of more recent authorities in *Rainy Sky*, per Lord Clarke of Stone-cum-Ebony JSC, at paras 21 – 30.
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> When it comes to interpreting wills, it seems to me that the approach should be the same. Whether the document in question is a commercial

7 Above n 1 [33-34].

8 Above n 2 [34].

9 [2014] UKSC 2.

10 [1971] 1 WLR 1381.

11 [2011] 1 WLR 2900.

12 Above n 9 [19-20].

> contract or a will, the aim is to identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context. As Lord Hoffmann said in *Kirin-Angen Inc v Hoechst Marion Rousell Ltd* [2005] 1 All ER 667, para. 64, 'No one has ever made an acontextual statement. There is always some context to any utterance, however meagre.' To the same effect, Sir Thomas Bingham MR said in *Arbuthnott v Fagan* [1995] CLC 1396, 1400 that '[c]ourts will never construe words in a vacuum'.

Lord Neuberger continued:[13]

> In my view, at least subject to any statutory provision to the contrary, the approach to the interpretation of contracts as set out in the cases discussed … above is therefore just as appropriate for wills as it is for other unilateral documents. This may well not be a particularly revolutionary conclusion in the light of the currently understood approach to the interpretation of wills (see e.g. Theobald on *Wills*, 17th ed (2010), chapter 15 and the recent supplement supports such an approach as indicated in *Royal Society for the Prevention of Cruelty for Animals v Sharp* [2011] 1 WLR 980, para 22, 31). Indeed, the well known suggestion of James LJ in *Boyes v Coo*k (1880) 14 Ch D 53, 56, that when interpreting a will, the court should 'place [itself] in [the testator's] armchair', is consistent with the approach of interpretation by reference to the factual context.

The approach taken in the English High Court when it was construing the will of the artist, Lucian Freud, in the case of *Rawstron v Freud*[14] (a decision which does not appear to have been cited to the Court of Final Appeal in Hong Kong) is also not without interest. It too was examining the rules of construction laid down in *Marley v Rawlings* in a case involving a *prima facie* absolute gift in a professionally drawn (and not homemade) will that never once used the word 'trust' - but this time against the backdrop of a secret trust.[15] The judge in the *Freud* case followed the approach of Lord Neuberger in *Marley v Rawlings*, interpreting the will in the same way as a commercial contract.

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13 ibid [23].

14 [2014] EWHC 2577 (Ch).

15 Meryl Thomas, 'The longer you look at a [will], the more abstract it becomes …'- Construction and Secret Trusts: Rawstron and Pearce v Freud' (2014) 28 Trust Law International 157.

The Wang Case

In the *Wang* case, a key passage in the judgment delivered by Lord Walker of Gestingthorpe is to be found in paragraph 31:[16]

> Two all-important general principles of construction are that words must be read and understood in their context, and that the will must be read as a whole. In *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, 384, Lord Mustill neatly combined the two principles in a single phrase, referring to the need to read words 'in the landscape of the instrument as a whole'. But how, in practical terms, is the court to go about its task of reading the will as a whole? Some helpful guidance was given, again by Lord Neuberger, in his dissenting judgment (upheld by the Supreme Court) in *Re Sigma Finance Corporation*. In the Supreme Court Lord Mance said ([2010] 1 AER 571, para 12),
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> > 'Lord Neuberger was right to observe that the resolution of an issue of interpretation in a case like the present is an iterative process, involving "checking each of the rival meanings against the other provisions of the document and investigating its commercial consequences".'
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> This applies to a will also if 'commercial' is read as 'practical'. The iterative process is often laborious. It may require the court to go forwards and backwards painstakingly between the various words and phrases occurring in different parts of the document, which give rise to the problem. That is the process that must be followed in construing Nina's will.

Lord Walker then carried out an elaborate and assured deconstruction of the elements, the details of which appear in paragraphs 47–52; a discussion too long to do justice to, or comment upon, in this article.

The Court of Final Appeal in Hong Kong then concluded that the Foundation held Mrs Wang's estate as a trustee subject to the powers under clause 4 of the will. It would therefore hold the estate as a trustee under the supervision of an independent managing organisation rather than receiving it as an unconditional absolute gift.

Concession of a quasi-trust

It was apparently (and some might think regrettably) conceded in argument by the Foundation that a corporate charity held its property according to a 'quasi-trust'.

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16 Above n 3 [31].

That language was employed by a judge in an American case cited in Picarda's text.[17] In a UK case,[18] Lord Simon denied the aptness of the term and it is indeed misleading having the potential to signal or lay the groundwork for a mandatory rather than a precatory outcome. The concession was a concession too far and perhaps ought not to have been made. Some academics[19] have embraced the quasi-trust language with apparent enthusiasm. Otherwise, the expression 'quasi-trust' has, significantly, not had any other currency. Nor has it been comprehensively defined or analysed. Even so, it has the potential to give rise to all sorts of misunderstandings - not least in connection with the extrapolation of incidents of the alleged quasi-trust, including its ancillary powers and other regulating provisions. On the other hand, beneficial ownership by a corporate charity still remains subject to interventions by the Attorney General to the extent that the charitable corporation flouts its fiduciary duties to charity.

Although it is suggested that the basis on which a corporate charity holds its property is not entirely clear,[20] it is in fact now apparent that such corporations are not trustees, though they are analogous to them.[21] Indeed, as pointed out by the Charity Commission for England and Wales,[22] it now seems reasonably clear that the corporate property of a charitable company, like that of any other company, is not generally held on a trust. In *Rabin v Gerson Berger Association Limited*[23] Ralph Gibson LJ said:

> The principle of law, as I understand it, is that a company for exclusively charitable purposes does not, by reason only of that attribute, hold all its property on trust; it may own property beneficially which, by reason of its constitution, it must apply to its charitable purposes … .

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17 Hubert Picarda, *Law and Practice Relating to Charities* (4th edn Bloomsbury Professional 2010) 272-273: see *Brigham v Peter Bent Brigham Hospital* 134 F 513 (1904) at 517 (Putnam J): 'Such a holding is sometimes called a quasi-trust … but the holding does not constitute a true trust'.

18 *National Westminster Bank Ltd v Halesowen Press Works Ltd* [1972] AC 785, 821.

19 See e.g. Ian Dawson and John Alder, 'The Nature of the Proprietary Interest of a Charitable Company or a Community Interest Company in its Property' (2007) 21 Trust Law International 3.

20 See Hubert Picarda, *Law and Practice Relating to Charities* (2nd edn Butterworths 1996) 383–385; (4th edn Bloomsbury Professional 2010) 272-275.

21 *Liverpool and District Hospital for Diseases of the Heart v Attorney General* [1981] Ch 193.

22 Charity Commission, *The Review of the Register of Charities. Maintenance of an Accurate Register* (Charity Commission 2012) para E10.

23 (1987) – not reported on this point.

Application to its charitable purposes includes applications made after bona fide consideration of any expressed wishes falling short of being mandatory restrictive provisions.

None of the judges in *Liverpool and District Hospital for Diseases of the Heart v Attorney General*[24] or *Re Vernon*[25] or *Von Ernst & Cie v IRC*[26] articulated the point in this way, while the Charity Commission, for its part, suggested[27] that it would seem that the only conceptual basis for depriving a company of the beneficial ownership of its corporate property (so as to ensure that that property is irrevocably dedicated to charitable purposes, notwithstanding the fact that the objects of the company are no longer regarded as charitable) is by the imposition of a trust. Indeed, the imposition of a trust has in this contingency only a limited prophylactic purpose - namely to prevent charitable property being applied otherwise than to charity. In other words, a trust is imposed to objects that are not (or are no longer) charitable. In the absence of express crystal-clear language, the previous conventional view was that there can reasonably be no room for imposing a super-added trust in derogation of an out-and-out gift conferring an absolute beneficial interest to which precatorily framed provisions are annexed.

Moreover, it seems appropriate to expect that the court could not conceive either that its own function or that of the Secretary for Justice was to uphold or to contend for outcomes that are inconsistent with the limits of the charitable objects already encompassed by the relevant objects clause, so as to have an outreach intended to be controlled by the designated Foundation. It ought not to carry with it implications that any accompanying expressed wishes must therefore necessarily be interpreted as imposing (creatively) mandatory, binding, trust-like fiduciary obligations of a comprehensive nature. Such a construction (which some at the time considered heterodox and unduly conjectural) is, the argument runs, ex hypothesi not benignant but detrimental. Fettering the discretion of the governing body of the charitable corporation by constant supervision by a grouping of external persons (or perhaps an organisation with a role analogous to a protector) would normally require very express language. However, the judgment of the Court of Final Appeal, following that of the two lower courts, must be treated as having detected or identified sufficient imperative language and other contextual indicia suggesting a trust or something akin to a trust producing such an outcome. Such mandatory control by a defectively defined body compares unfavourably with a gift to a charitable corporation with defined objects, whose exercise of

24 Above n 21.

25 [1972] Ch 300.

26 [1980] 1 WLR 468; [1980] 1 All ER 677.

27 Charity Commission above n 22 [E11].

discretionary directions would be controllable in the last resort, of course, by the court.

It is true that the Attorney General in charity cases in England and Wales (and the Secretary for Justice in Hong Kong) is a necessary party where the trust in question involves a gift to an established charitable institution to be held on trusts that *differ* from the trusts upon which the general funds of the institution are held.[28] But the Foundation took the view (and argued, in a presumably muted way, at first instance and beyond) that the Secretary for Justice in Hong Kong and those advising him should tread carefully; that the former was arguably misdirecting himself and that the latter (the advisers) were arguably misdirecting themselves in going beyond neutrality and helping the court by advancing a controversial, suppositious construction not calculated to be in the interest of charity and likely to deter mega-rich billionaire donors from giving. Indeed such, or some such, donors would (or might) not want their outright gift to a corporate charity to be bogged down in bureaucracy with discretionary decisions being reviewed by protector-like outsiders through reference to criteria not yet prescribed.[29]

In England and Wales, the Charity Commission already recognises that it may be appropriate for a charity to have appointed by scheme a person as protector of the charity with the function of exercising defined powers and whose fiduciary duty will be to ensure the integrity of the administration of the charity, and who must report to the Commission any matter which he has reasonable cause to believe is likely to be relevant for the purposes of the exercise by the Commission of any of its functions. The example of the Hastings and St Leonards Foreshore Charitable Trust[30] is in point where a Charity Commission Scheme[31] required the appointment of a protector so as to guard against the potential conflict of interest between the Council's position as charitable trustee and as local authority in this particular case.

Purposive interpretation

The judgment at first instance by Poon J[32] struck some analysts as disclosing what appears to be a strong judicial attitude (which no doubt accorded with public opinion as reflected in the Hong Kong Press), mirrored in the hearing and decision

28 *Wellbeloved v Jones* (1822) 1 Sim & St 40; *Sons of the Clergy Corpn v Mose* (1839) 9 Sim 610. See also *AG v Warren* (1818) 2 Swan 291.

29 cf Lau Kah Hee, 'The Control of Trust Protectors' (2012) 26 Trust Law International 39.

30 Reg No 1105649.

31 981/1011 made on 13 January 2011.

32 Above n 1.

in the Hong Kong Court of Appeal, that the affairs of the Foundation should be subject to strict controls. In a sense, it could therefore be accounted a purposive interpretation. As such, it presents a challenge for charities seeking to treat *prima facie* precatory wording as resembling letters of wishes capable of having 'soft law' significance. The challenge arises from the possibility of the court inferring (as happened) mandatory force to wording that would otherwise fall short of an express trust.

Moreover, the decision signals a seeming willingness to exclude any legal doctrine or maxim previously sought to be applied to *all* wills from being applied to *homemade* wills. Instead, the four corners of such homemade wills can (and perhaps should, according to the modern tendency) be rigorously scoured for material that rebuts any artificialities of construction. How far the long-established principle of benignancy in favour of charities in will construction is considered relevant and important is not apparent.

The so-called 'iterative' process by which the various conclusions in the present case were reached needs some explanation. 'Iteration' and the adjectival 'iterative' are both chameleon words. Each is, as its very name suggests, concerned with *repeated* cross-referencing to other language in the will. The process is subtle and sophisticated and the externals of the process intricate, labyrinthical and in some respects riddling. This resulted, of course, in part from the opposing arguments, which were themselves not free from these elements – though the final decision is authoritative within the legal system in Hong Kong's Special Region.

The application of this approach in relation to a *prima facie* outright gift to charity to which unclear untutored loose language is attached may be thought to be worrying. To sustain additional control over a charity by reference to - and spelling out of - such language and by elaborate inferences should require a strong case to support it. The fact that the case was thrice heard and differing arguments were mounted on either side prompts the speculation: would the testatrix sitting in her armchair have wanted huge sums of money to be spent using this technique litigating her injudicious language rather than accepting and construing it according to its natural *prima facie* meaning?

Conclusion: the Scheme Solution

The judgment clarified the proper interpretation of the will at law, and provided a legal basis and clear guidance for its future implementation through a scheme. The Secretary for Justice's claims that the funds of the Foundation were held on charitable trusts which were to be clarified by the court under its scheme-making powers were upheld.

Third time unlucky

After two adverse decisions on construction, the proverbial saying - or superstition - that a third attempt is more likely to succeed may be no more than a vain echo of the triple injunction to try, try and try again. Occasionally, success has been achieved on a third attempt. But even two unsuccessful attempts, especially one on an appeal with no redeeming dissentient voice, are likely to set the scene for a forensic kick down the stairs on a third attempt. The temptation at appellate level - with such a comprehensive failure rate - to lean against any but the most convincing arguments is perhaps understandable.

Scheme to be brought in

The effect of the Court of Final Appeal judgment was outlined in the discussion paper of 20 July 2015 put before the Legislative Council Panel on Administration of Justice and Legal Services[33] to which two Annexes are appended. It was that a scheme should be prepared and submitted to the High Court for approval after consultation between the Foundation's board of governors and Secretary for Justice as the guardian of the public interest. The scheme should, among other matters, set out the establishment of a supervisory 'managing organisation' and the detailed working out of the arrangements for the Chinese prize mentioned in the will.

The Court of Final Appeal has original jurisdiction to impose (upon application or otherwise) a scheme of administration on a charitable trust and will exercise such jurisdiction whenever the court is satisfied that the scheme will secure the better administration of the charitable trust. The Department of Justice will continue to liaise with the Foundation and the interim administrators in taking follow-up actions, having regard to the guidance given by the court on the various aspects, and will also seek the court's further directions when necessary. The Department of Justice will also continue its close monitoring of the interim administrators' work in managing and preserving the estate and will take such follow-up actions as may be appropriate with a view to protecting and safeguarding the interests of the charity.

Costs order

In August 2015, the costs element was the subject of a further adjudication.[34] The Foundation sought to claim its costs incurred in pursuing the case through the courts. Lord Walker of Gestingthorpe made it clear[35] that the unanimous decision

33 LC Paper No CB(4)1313/14-15(01).

34 Date of Ruling on Costs: 24 August 2015.

35 ibid [8].

of the judges in the Court of Final Appeal was that extravagant expenditure of charity funds should not be encouraged merely because they are large. So no part of the Foundation's costs of the appeal to the Court of Final Appeal could be ordered to be paid out of the Wang estate. Those costs were therefore disallowed. This outcome is to be contrasted with the position where the court, in its discretion, forms the view that the proceedings might be described as proceedings by the trustees for the interpretation of the charity's constitution and that they come into one of the categories outlined in *Re Buckton*,[36] not being hostile litigation[37] (which this case does not on its face seem to be).

The submission by the Secretary for Justice was that the Foundation should pay the other parties' costs because the real purpose of the appeal was to promote the position of the Foundation's governors and not to benefit charity. The conduct of the governors was not, however, stigmatised as evidencing bad faith. Given the variations in construction at different levels, derived ultimately from the choices made by the testatrix in expressing herself without legal assistance, the classification of the expenditure as extravagant and the accompanying refusal to allow costs of the trustees out of the estate sheers somewhat away from sympathy or unrestrained mercy toward trustees otherwise doing their best in the face of the wilfulness of a testatrix making a complicated and confusing homemade will.

Final comment

In February 2016, in answer to a series of questions put by member of the legislative council, the Hon Paul Tse, the Secretary for Justice, Mr Rimsky Yuen SC, confirmed that the Department of Justice was now actively liaising with the Foundation in relation to the implementation of Nina Wang's will with a view to seeking the court's directions as and when necessary.[38] The plan is eventually to submit to the court for approval a detailed scheme with a view to using the estate for charitable purposes.

As to the timing of the preparation of the scheme, the Department of Justice indicated that it aimed to complete the draft of the scheme by the middle of 2016 and to seek the court's directions at 'an appropriate time', a formula of some imprecision. Until then, the estate will continue to be administered by the court appointed independent interim administrators whose work will be monitored by the

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36 [1907] 2 Ch 406 at 414–416 per Kekewich J.

37 *Re Shree Swaminarayan Satsang* [2012] EWHC 1645 (HC); [2010] PTSR D39.

38 Press Release LCQ22, Chinachem Charitable Foundation, 17 February 2016. Details of the administration by the court appointed interim administrator, including the ambit of that appointment, and questions raised and the circumscribed responses are contained in this statement.

Department of Justice and the court. It was further indicated that no additional detail would be given of that follow-up work save that which is in the public domain.

The details of the scheme are therefore still being discussed. In the circumstances it remains undecided as to how the relevant expenditure and the balance of the estate for charitable purposes are to be disclosed in future to the extent permitted or required by law.[39]

It is almost unbelievable to think that Nina Wang, reputedly the richest women in Asia, chose to leave her fortunes upon her death by way of a homemade will. If it were at all necessary to do so, this litigation highlights why homemade documents are to be avoided at all costs and illustrates the need for clear drafting, if testators' wishes are to be upheld.

39 ibid.