

**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI O AOTEAROA**

**SC 17/2022  
[2022] NZSC 65**

BETWEEN

JACK KAIN, MOLLY KAIN, RACHEL KAIN, STANLEY KAIN, WOLSEY KAIN, GEORGE COUPER MCHARDY KAIN, ASTA KAIN, MADELINE KAIN, GEORGE PAVEY KAIN, MICHAEL KAIN, RUPERT KAIN, SAMUEL KAIN and MARNIE COUPIE FORCER KAIN  
Applicants

AND

PUBLIC TRUST  
First Respondent

GEORGINA KAIN, GEORGE CHARLES KAIN, GEORGE HARRY COUPER KAIN, GEORGE MICHAEL KAIN, MARY HUTTON, GEORGIA HUMPHREY, CONSTANCE HUTTON and HARRIET HUTTON  
Second Respondents

GEORGIA HUMPHREY, CONSTANCE HUTTON, HARRIET HUTTON, DAVID WHYTE, KIRSTY MARGUERITE COUPER MASTERSON and ELIZABETH DIANE COUPER FRENDIN  
Third Respondents

**SC 18/2022**

BETWEEN

GEORGINA KAIN, GEORGE CHARLES KAIN, GEORGE HARRY COUPER KAIN and GEORGE MICHAEL KAIN  
Applicants

AND

PUBLIC TRUST  
First Respondent

MARY HUTTON, MARNIE COUPIE FORCER KAIN, JACK KAIN, MOLLY KAIN, RACHEL KAIN, STANLEY KAIN, WOLSEY KAIN, GEORGE

COUPER MCHARDY KAIN, ASTA  
KAIN, MADELINE KAIN, GEORGE  
PAVEY KAIN, MICHAEL KAIN,  
RUPERT KAIN, SAMUEL KAIN,  
GEORGIA HUMPHREY, CONSTANCE  
HUTTON and HARRIET HUTTON  
Second Respondents

MARNIE COUPIE FORCER KAIN, JACK  
KAIN, MOLLY KAIN, RACHEL KAIN,  
STANLEY KAIN, WOLSEY KAIN,  
GEORGE COUPER MCHARDY KAIN,  
ASTA KAIN, MADELINE KAIN,  
GEORGE PAVEY KAIN, MICHAEL  
KAIN, RUPERT KAIN, SAMUEL KAIN,  
GEORGIA HUMPHREY, CONSTANCE  
HUTTON, HARRIET HUTTON, DAVID  
WHYTE, KIRSTY MARGUERITE  
COUPER MASTERSON and ELIZABETH  
DIANE COUPER FRENDIN  
Third Respondents

Court: O'Regan, Ellen France and Williams JJ

Counsel: D A T Chambers QC for Applicants in SC 17/2022, and 2nd to 14th  
Named Second Respondents and 1st to 13th Named Third  
Respondents in SC 18/2022  
B D Gray QC and A G Holden for First Respondent in SC 17/2022  
and SC 18/2022  
J W A Johnson and W L Porter for 1st to 4th Named Second  
Respondents in SC 17/2022 and Applicants in SC 18/2022  
T C Weston QC and A V Foote for 5th Named Second Respondent  
in SC 17/2022 and 1st Named Second Respondent in SC 18/2022  
J F Anderson QC for 6th to 8th Named Second Respondents and 1st  
to 3rd Named Third Respondents in SC 17/2022, and 15th to 17th  
Named Second Respondents and 14th to 16th Named Third  
Respondents in SC 18/2022

Judgment: 24 May 2022

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### JUDGMENT OF THE COURT

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- A** The applications for leave to appeal in SC 17/2022 and SC 18/2022 are dismissed.
- B** Leave is reserved for submissions to be filed if costs are in issue.
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## REASONS

### Introduction

[1] Public Trust sought directions in the High Court under s 66 of the Trustee Act 1956 in respect of two trusts. This was opposed by both sets of current applicants (we will refer to them jointly as the applicants). The High Court largely made the directions sought.<sup>1</sup> The applicants' appeal to the Court of Appeal against a number of the directions was dismissed except in respect of one direction.<sup>2</sup> The applicants now seek leave to appeal from the decision of the Court of Appeal to this Court.

### Background

[2] The factual background is set out in detail in the High Court<sup>3</sup> and Court of Appeal judgments.<sup>4</sup> For present purposes we need only note that the proposed appeal relates to the administration of two discretionary trusts, the Waitaha Trust and Middle Road Block Trust. Both trusts were settled by WAX (Tom) Couper and form part of a larger network of trusts, companies and assets known as the Couper-Kain Group. Public Trust was appointed as trustee by agreement after the High Court, in a judgment delivered in 2004 (2004 HC judgment), directed that the original trustees be removed.<sup>5</sup>

[3] As the Court of Appeal explained, the beneficiaries of the Trusts essentially fall into two opposing camps of the Kain family, with the Kain siblings and the Kain grandchildren in one group, and Mary Hutton (née Kain) and the Hutton grandchildren in the other.<sup>6</sup> The Kain siblings and Mrs Hutton are beneficiaries only of the Waitaha Trust. The Kain grandchildren and the Hutton grandchildren are beneficiaries of both Trusts.

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<sup>1</sup> *Public Trust v Kain* [2021] NZHC 1000, (2021) 5 NZTR 31-002 (Mander J) [HC judgment].

<sup>2</sup> *Kain v Public Trust* [2021] NZCA 685, (2021) 5 NZTR 31-020 (French, Venning and Cull JJ) [CA judgment].

<sup>3</sup> HC judgment, above n 1, at [4]–[18].

<sup>4</sup> CA judgment, above n 2, at [4].

<sup>5</sup> *Kain v Hutton* (2004) 1 NZTR 14-022 (HC) [2004 HC judgment].

<sup>6</sup> CA judgment, above n 2, at [2]. The Kain siblings are the applicants in SC 18/2022 and the Kain grandchildren are the applicants in SC 17/2022.

[4] As noted, the Court of Appeal upheld the High Court Judge's directions except in one respect. The direction at [134(a)] of the High Court judgment was set aside and an amended direction made in its place.<sup>7</sup> For ease of reference, in discussing the directions in issue in these applications, we identify the directions by reference to the paragraph numbers in the High Court judgment.

[5] The first two directions related to the Waitaha Trust and were as follows:<sup>8</sup>

[108] ...

- (b) That when exercising its discretion to make any distributions to the Kain siblings and/or Mary Hutton Public Trust is required to recognise the principle of equality derived from the Equality Clause of the 1997 deed but only so far, in its assessment, as it is reasonably able to do so and only to the extent that it is consistent with its other duties as a trustee.
- (c) Subject to (b), Public Trust is not required to take into account what the beneficiaries who are beneficiaries of other trusts have received from the other trusts in the Couper-Kain Group.

...

[6] The next relevant direction related to the Middle Road Block Trust, and was in these terms:

[109] ...

- (d) Public Trust is not required to take into account what the beneficiaries who are beneficiaries of other trusts have received from the other trusts in the Couper-Kain Group.

[7] The final two directions related to both Trusts and read as follows:<sup>9</sup>

[134] ...

- (a) Public Trust is entitled to take into account the wishes and subsequent wishes of the settlor, Tom Couper, and to enable it to do so, it is necessary for Public Trust to read and understand those wishes. However, Public Trust can only take account of the wishes and subsequent wishes to the

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<sup>7</sup> At [136] and [152].

<sup>8</sup> The reference to the 1997 Deed is a reference to a deed of agreement signed in June 1997 between two of the Kain siblings as indemnifiers and the four other Kain children (including Mary Hutton) as beneficiaries.

<sup>9</sup> The wording of the direction identified as [134(a)] is that substituted by the Court of Appeal: CA judgment, above n 2, at [136] and [152].

extent they are not inconsistent with the terms and purposes of the trust.

- (b) Where subsequent wishes are inconsistent, Public Trust is in principle entitled to consider the most recent wishes as overriding earlier wishes. However, it remains a matter for Public Trust's assessment, in the exercise of its discretion to vest or make distributions, whether in the circumstances the subsequent wishes of the settlor, Tom Couper, should have that effect.

### **The proposed appeal**

[8] Broadly speaking, the proposed grounds of appeal are that the Court of Appeal erred in:

- (a) declining to remove the proviso to the direction at [108(b)] that Public Trust is required to recognise the principle of equality derived from the 1997 Deed;
- (b) declining to set aside the direction made by the High Court at [108(c)] and [109(d)] that Public Trust is not required to take into account what the beneficiaries who are beneficiaries of other trusts have received from those other trusts in the Couper-Kain group; and
- (c) declining to set aside the directions at [134(a)] and [134(b)] that Public Trust is entitled to take into account the subsequent wishes of the settlor and that, where subsequent wishes are inconsistent, Public Trust is entitled to consider the most recent wishes as overriding earlier wishes.

[9] It is submitted that these grounds give rise to questions of general or public importance and of general commercial significance.<sup>10</sup> Various matters are raised to support this submission including, by way of example, the proliferation of family trusts and the substantial wealth often held in these structures.

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<sup>10</sup> Senior Courts Act 2016, s 74(2)(a) and (c).

*The proviso to recognising the principle of equality ([108(b)])*

[10] Under this head, the Kain siblings wish to argue first that there has been “serious procedural unfairness”. They say that the High Court in this context was asked to second-guess the 2004 High Court judgment<sup>11</sup> in a situation where it was agreed no factual findings would be made. Second, they submit that the proviso undercuts the effectiveness of the instruction given to Public Trust in the 2004 High Court judgment to give effect to the equality principle, thereby undermining their rights.

[11] These matters were considered by the Court of Appeal. We see resolution of the issues arising from this proposed ground as turning on the approach to the particular facts. No question of general or public importance or of general commercial significance arises. Nor does anything raised by the Kain siblings call into question the Court of Appeal’s assessment of the position.

*The family trust context and s 21 of the Trusts Act 2019 ([108(c)] and [109(d)])*

[12] The main argument the Kain siblings wish to make in relation to these two directions is that the “family trust context”<sup>12</sup> is a mandatory consideration and the Court of Appeal erred in not treating it as such.<sup>13</sup> The submission is that the relevance of the family trust context is not just limited to the flow on effect to the financial needs and interests of beneficiaries as the High Court apparently considered. The Kain siblings also rely on the requirement in s 21 of the Trusts Act 2019 to the effect that in undertaking the mandatory duties in ss 23–27 and default duties in ss 29–38, “a trustee must have regard to the context and objectives of the trust”.<sup>14</sup>

[13] The Court of Appeal addressed the issues the applicants wish to raise and concluded the Judge had not erred in the approach taken. The Court saw that approach

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<sup>11</sup> 2004 HC judgment, above n 5.

<sup>12</sup> By this, the Kain siblings say they mean “prior distributions or future entitlements from related family trusts”.

<sup>13</sup> The Kain grandchildren adopt and rely on the Kain siblings’ submissions on this ground.

<sup>14</sup> A number of other points are raised under this head including a challenge to the way in which the unwind process was dealt with. The latter point reprises the arguments in the Court of Appeal and raises no question of general importance or of general commercial significance but rather is confined to the specific facts.

as consistent with this passage from *Lewin on Trusts*, namely, that “[w]hen considering whether or how to benefit a given beneficiary out of one settlement, it is, of course, proper to take into account his entitlement or expectation under another”.<sup>15</sup>

[14] The Court also referred in this context to s 21. The reliance on s 21 is not well explained. Nonetheless, the key point made in the analysis is that the High Court was not wrong to find that the Trusts were “to be treated as separate trusts rather than as inextricably linked”.<sup>16</sup> We accept that the scope and meaning of s 21 may be a question of general and public importance this Court may wish to consider at some point. But we do not see the present case as an appropriate vehicle for considering the question. The argument that the Court of Appeal and the High Court were wrong in this respect has insufficient prospects of success. And in any event, we see the matters raised as turning on an assessment of the, very particular, combination of facts.

*Subsequent statements of wishes ([134(a) and (b)])*

[15] Two main arguments are made in relation to the proposed ground based on the approach to subsequent wishes. The first is that the Court of Appeal erred in stating that the trustee was entitled to consider the most recent statement of wishes as overriding. The Kain grandchildren suggest the Court of Appeal’s reasoning will effectively elevate the settlor’s views over those of anyone else, including beneficiaries, even though the settlor has no expectation of a benefit and no right to control the trust. Second, the applicants wish to argue that where the settlor’s wishes are motivated by hostility towards a group of beneficiaries, that settlor’s subsequent statement of wishes should be treated as irrelevant.

[16] These arguments were also considered by the Court of Appeal. The Court addressed them in part by removing what it saw as some ambiguity in the High Court direction in [134(a)] and substituting the current direction which makes it clear that Public Trust is not required to follow the subsequent statement of wishes.

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<sup>15</sup> Lynton Tucker and others *Lewin on Trusts* (20th ed, Sweet & Maxwell, London, 2020) at [29-057].

<sup>16</sup> CA judgment, above n 2, at [62].

[17] The Court may wish at some point to consider the approach to subsequent wishes but, again, we do not see the current case as an appropriate vehicle for consideration of that topic. We agree with the submissions for the Hutton grandchildren that the applicants' approach overstates the consequences of the Court of Appeal judgment where it is made clear that the trustee must apply independent consideration. Further, consideration of the broader issues may well be premature where, as the Court of Appeal said, whether Public Trust ultimately takes the statements into account and any weight given to them remains to be "informed by the family history, background and circumstances, and with regard to the content and context of the statements of wishes, bearing in mind Public Trust's obligations as trustee".<sup>17</sup> These are factual matters for consideration by Public Trust when the time arises. There is also some force in Public Trust's submission about need to keep in mind the costs burden to the Trusts of the litigation steps already taken to date.<sup>18</sup>

## **Result**

[18] For these reasons, the criteria for leave to appeal are not met. The applications for leave to appeal in SC 17/2022 and SC 18/2022 are dismissed.

[19] Leave is reserved for submissions to be filed if costs are in issue.

### Solicitors:

LeeSalmonLong, Auckland for Applicants in SC 17/2022, and 2nd to 14th Named Second Respondents and 1st to 13th Named Third Respondents in SC 18/2022

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Vicki Ammundsen Trust Law Ltd, Auckland for 6th to 8th Named Second Respondents and 1st to 3rd Named Third Respondents in SC 17/2022, and 15th to 17th Named Second Respondents and 14th to 16th Named Third Respondents in SC 18/2022

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<sup>17</sup> At [150].

<sup>18</sup> Public Trust also notes that Waitaha Trust vests in default beneficiaries on 23 June 2023.