



Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

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MEDIA RELEASE

KEN LEGLER AND LAILA SUN LEGLER KLAUI v MARIA GUILLAUMINA CORNELIA JOHANNA FORMANNOIJ AND KAAHU TRUSTEE LIMITED

(SC 8/2023) [2024] NZSC 173

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: www.courtsofnz.govt.nz.

What this judgment is about

This appeal concerns whether the respondent was acting for an improper purpose when she appointed a company controlled by her as the sole trustee of a trust.

Background

The parties and their early history

The appellants in this case are Ken Legler and Laila Legler Klauī. They, along with their brother, Li Legler, are the adult children of the late Ricco Legler, who tragically died in a gliding accident in 2017. The respondent, Maria (Marina) Formannoij, is Ricco’s widow.

Marina met Ricco in the Caribbean in 1989 and became his de facto partner. The couple moved to New Zealand in 1991 and lived on a farm in the Bay of Islands which Ricco had purchased in 1986. Later, he purchased an adjacent forestry block.

In 2002, Ricco’s father died, leaving him a substantial inheritance. Ricco’s children were also left around \$1 million each under the will.

The trusts

The inheritance from Ricco’s father eventually led to the setting up of two family trusts: the Horowai Family Trust (Horowai) in 2007 and the Kaahu Trust (Kaahu) in 2008. Ricco,

Marina and Bay of Islands Taxation Trustee Company No 2 Ltd (BOI) were the original trustees of Kaahu.

There have been various transfers to and between the trusts. Ricco sold the forestry block to Horowai in 2008. Also in 2008, the farm property was sold to Kaahu and subdivided into two lots. One was sold to Horowai, and the purchase price was forgiven. The other lot was sold and part of the proceeds used to purchase land near Russell where a new home for Ricco and Marina was built, called Mokomoko. The balance of Kaahu's assets comprise managed funds which provide passive income. Around \$7.6 million had been transferred into Kaahu in 2013 from the legacy left to Ricco by his father and invested in managed funds. In mid-2017, \$3 million of those funds were transferred by Kaahu to Horowai.

The evidence at trial from Marina, Ricco's financial advisor, Alan Clarke, and Kaahu's accountant and director of BOI, Philip Tyler, was that Horowai was intended primarily to benefit Ricco's children and Kaahu to provide for Ricco and Marina. Marina said that she was aware that, under the two-trust structure, she had given up her rights over the forestry and farm properties. A relationship property agreement entered into in 2003 had provided that she would receive a significant share in the forest and farm properties in the event of Ricco's death.

Li's evidence was that his father had assured him that, if the children or grandchildren ever needed anything in the future, he would be there, which Li took to mean that the Kaahu assets would be available in such circumstances. Li said, however, that he and his siblings do not wish to deprive Marina of the financial support she receives from Kaahu.

Appointment of company as sole trustee

In late 2019, Mr Tyler informed Marina that BOI was intending to resign as a trustee of Kaahu. Marina attempted to find a trustee to replace BOI. She approached Dennis McBrearty, who was acting in respect of the administration of Ricco's estate. He refused, as his firm did not take on trusteeships. She then approached Perpetual Guardian but was unsure if it would be a "good fit" and considered its fees to be excessive.

In October 2019, Marina received legal advice from WRMK Lawyers (WRMK) that she could appoint a company to be the sole trustee of Kaahu and that it would be permissible for her to act as the sole director of this company. Marina's evidence was that the appointment of a company as sole trustee appealed to her as it would "simplify matters" in relation to Kaahu.

In a further letter of advice, WRMK explained to Marina that a trustee has a duty to act in the best interests of the beneficiaries of the trust, including Ricco's children as well as herself. The letter set out options as to the actions that could be taken after the company was appointed as trustee, including options that did not involve totally excluding the children.

BOI retired as a trustee on 21 November 2019. A further letter from WRMK, sent on 21 November 2019, set out the logistics for Marina appointing a company as sole trustee. WRMK also asked whether it should request financial statements for Horowai, because Marina would need to have all relevant information before making decisions regarding Kaahu. Marina agreed that WRMK should ask for Horowai's accounts.

On 27 November 2019, Marina appointed Kaahu Trustee Ltd (KT Ltd) as the trustee of Kaahu and resigned as trustee. Marina is the sole director of KT Ltd.

In a letter of 27 February 2020, TGT Legal wrote to WRMK, declining the request for financial information on Horowai.

WRMK wrote to Marina on 28 February 2020, enclosing the letter from TGT Legal. It set out various options including resettling Kaahu's assets on a new trust for Marina's benefit or distributing all of Kaahu's assets to Marina personally and winding up the trust. Another option was to remove Ricco's children as beneficiaries.

Marina's evidence at trial was that she had, in accordance with WRMK's advice, taken time to consider the needs of all the beneficiaries of Kaahu, including herself and Ricco's children. In March 2020, she then decided to have KT Ltd take a number of actions including: removing Li, Ken, and Laila as beneficiaries of Kaahu; distributing all of Kaahu's assets to her with the exception of Mokomoko; and appointing her as the beneficiary entitled to receive the trust fund on vesting day (the March 2020 deeds).

Li, Ken, and Laila issued proceedings challenging Marina's decision to appoint KT Ltd as trustee, arguing that the power was used for an improper purpose.

The Courts below

High Court

The High Court held that the Kaahu trust deed expressly permits a single corporate trustee to exercise the powers of a trustee even if a beneficiary is a director or shareholder or both. This meant that Marina did not, by the mere fact of appointing a single corporate trustee, act with an improper purpose (whether her intent was to simplify the trust or to control it). Further, on the facts, Marina had not exercised the power to appoint KT Ltd to benefit herself. The High Court gave six reasons for this conclusion.

First, Marina became the sole trustee through happenstance and not design after the death of her husband and the resignation of BOI. Second, Marina genuinely sought to find another trustee who would act with her. Third, Marina wanted to act lawfully and was acting on legal advice. Fourth, she had been advised by WRMK on the obligations of a trustee and had instructed WRMK to seek Horowai's financial statements. It was only when this request was refused that WRMK encouraged her to make a decision about Kaahu's assets.

Fifth, the Judge noted that the children do not directly challenge the March 2020 deeds. The Judge said that, in any event, any challenge would have been forlorn given that the children had been well provided for, both through Horowai and their grandfather's legacy. The Judge accepted that Horowai was primarily for the children and Kaahu primarily for Ricco and Marina which he considered put a "different light" on the March 2020 deeds. Finally, the Judge considered Marina to be a careful, fair-minded witness and noted that she was still considering how she could leave the children property when she died.

Court of Appeal

Li, Laila, and Ken appealed against the High Court decision to the Court of Appeal. The appeal was dismissed by a majority of the Court of Appeal (Brown and Brewer JJ).

The majority noted that the statement of claim pleads a single cause of action of fraud on a power. There was no pleading of an alternative cause of action to the effect that the appointment of KT Ltd was outside the powers conferred by the deed. In any event, the majority considered that, in view of the relevant terms of the deed, such an argument would not have succeeded. Clause 27 of the Kaahu trust deed provides that a corporate body can be the sole trustee or one of a number of trustees and, in terms of cl 27.2(c), that it can exercise the functions of a trustee despite the fact it may directly or indirectly benefit a beneficiary with an interest in the trustee (whether as director, officer or shareholder or otherwise).

The majority also held that the High Court was correct to find that the facts did not sustain the conclusion that, at the date of the appointment of KT Ltd, Marina had acted for an improper purpose. Differing from the High Court, the majority did not consider that the decisions of March 2020 should be taken into account in the determination of Marina's subjective motivation at the date of the appointment of KT Ltd and noted that the validity of those actions was not challenged. The majority considered, however, that the totality of the evidence supported the High Court's conclusion that Marina did not have an improper purpose.

Cull J dissented. She considered that the appointment of KT Ltd as sole trustee was not compliant with the terms of the trust. She also considered that the sequence of events from October 2019 to March 2020 showed that Marina had chosen the option of appointing KT Ltd "with the intention of controlling the trust exclusively to benefit herself to the exclusion of the other beneficiaries". This made the appointment a fraud on a power.

The Supreme Court granted leave to Ken and Laila to appeal against the decision of the Court of Appeal. Li did not join his siblings in the appeal to the Supreme Court.

Supreme Court decision

The Supreme Court dismissed the appeal by a majority, comprising Glazebrook, O'Regan, Williams and Miller JJ. Winkelmann CJ would have allowed the appeal.

Reasons

In the appeal before the Supreme Court, Laila and Ken accepted that the appointment of a company controlled by Marina as sole trustee was consistent with the terms of the Kaahu trust deed. They also accepted that whether or not Marina's purpose was improper is judged subjectively (that is, according to her intent) at the date of the exercise of the power.

The majority reasons

Glazebrook, O'Regan, Williams and Miller JJ found that the evidence failed to prove that Marina had the intent, at the time she appointed KT Ltd as trustee, of benefiting herself at the expense of Ricco's children (at [114]). This was for essentially the same reasons as the Courts below except that, like the Court of Appeal, the majority did not rule on the validity of the March 2020 deeds, as those deeds were not subject to challenge.

The majority highlighted the following factual features of the case. First that Marina had become a sole trustee through happenstance, she made efforts to find a replacement for BOI and she was concerned to fulfil her legal obligations (at [107]). Second, that the High Court Judge found Marina to be a credible witness. He had advantages as a trial Judge in assessing Marina's evidence and there was nothing to suggest that this Court should depart from his view (at [108]).

Third, the legal advice received by Marina prior to the appointment of KT Ltd made it clear that a trustee has fiduciary obligations. The Courts below found that Marina understood and accepted this advice. The options set out in this earlier advice included the possibility of only distributing part of Kaahu's assets to Marina (at [109]).

The majority's view was that the whole case had to be seen in the context that Kaahu was set up to provide for Marina and Ricco, while Horowai had been set up to provide for the interests of the children. Marina had also foregone rights under a previous relationship property agreement (at [112]). The majority (at [135]) noted that it had never been part of Ken and Laila's argument that Marina should receive no ongoing benefits from Kaahu. Nor could it have been. She was a discretionary beneficiary of the trust and a named final beneficiary and was dependent on Kaahu for her accommodation and living expenses.

Because the majority decided the case on the facts (upholding the conclusion in the Courts below that Marina did not, at the time of the appointment of KT Ltd, have the intention of benefiting herself at the expense of Ricco's children), it was unnecessary to decide whether, or in what circumstances, a purpose to benefit herself at the expense of the children would have been an improper purpose (at [115]).

The majority declined to consider the alternative ground that it would have been an improper purpose if Marina had intended to take control of Kaahu (at [100], n 95). This argument was outside the statement of claim and was essentially the same as arguing that the use of the power was not within the terms of the deed, an argument that was not before the Court.

Dissent

Winkelmann CJ dissented. She would have found that the appointment of a company which is exclusively controlled by a trustee/beneficiary was not authorised by the Kaahu trust deed (see at [185]–[194]). However, she accepted that Ken and Laila did not argue or plead that the appointment was outside the scope of the power (at [195]).

She concluded that Marina had appointed KT Ltd for an improper purpose: to deliver complete control of Kaahu and its assets to herself (at [143] and [195]–[210]). She considered that it was clear both from the terms of the Kaahu trust deed and from the fiduciary nature of the power that this was a purpose for which the power could not be used. Contrary to the view of the majority, she considered that this argument was within the scope of the pleadings (at [230]).

In her view, since taking control of Kaahu was itself an improper purpose, Marina's intention to take control was all that the appellants needed to prove. Nevertheless, she recorded that she also would have found in the appellants' favour on the argument which the majority rejected; that is, that Marina had appointed KT Ltd to benefit herself at the expense of Ricco's children (see at [232]–[239]).

Result

- A The appeal is dismissed.
- B The appellants must pay the respondents total costs of \$25,000 plus usual disbursements.

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