



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

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MEDIA RELEASE

RAEWYN PHYLLIS COOPER v MARCUS ROBERT WILLIAM PINNEY

(SC 32/2023) [2024] NZSC 181

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.

Pursuant to s 35A of the Property (Relationships) Act 1976, any report of this proceeding must comply with ss 11B, 11C and 11D of the Family Court Act 1980. For further information, see: <https://www.justice.govt.nz/family/family-court/after-the-family-court/restrictions-on-publishing-information/>

What this judgment is about

This judgment provides clarification as to what rights or powers in respect of assets in a family trust can properly be treated as “property” rights or interests falling within the ambit of the Property (Relationships) Act 1976 (the PRA).

It involves consideration of the breadth and application of the principles established in this Court’s earlier decision in *Clayton v Clayton* [2016] NZSC 29, [2016] 1 NZLR 551, and the potential impact of the Trusts Act 2019 (the 2019 Act) on the duties and rights in this area.

Background

From late 2004 to early 2014, the appellant, Ms Cooper, was in a de facto relationship with the respondent, Mr Pinney. The latter was a settlor of the MRW Pinney Trust (MRWT), which was set up in 2005 to receive assets from an earlier trust set up by Mr Pinney’s father. Mr Pinney is also one of a number of discretionary beneficiaries under the MRWT, and also holds the power of appointment of trustees.

Throughout the relationship, Ms Cooper worked alongside Mr Pinney on a farm held in the MRWT. The farm and the trust are the focus of this appeal. The central proposition for Ms Cooper is that Mr Pinney’s rights and powers under the MRWT give him effective control

of the trust assets, so that those rights and powers should be treated as property for the purposes of the Property (Relationships) Act.

Issues

The main issue in this appeal is whether the combination of rights and powers available to Mr Pinney under the MRWT come within the definition of “property” in s 2 of the PRA, which includes as property any “right or interest”. In *Clayton v Clayton*, this Court held that rights and powers under a family trust could fall within that expression if they gave the holder control tantamount to ownership of the assets of the trust. That in turn meant the value of the trust assets could be taken into account in determining the property to be divided under the PRA.

Whether Mr Pinney’s powers under the MRWT are analogous to the powers in *Clayton* depends on (a) whether Mr Pinney could use the power of appointment and removal of trustees to take sole control of the trust and (b) whether, once in control, he could use the trustees’ dispositive powers to transfer the assets of the trust, including the farm, to himself to the exclusion of the other beneficiaries. Both questions require consideration of the existence and extent of constraints on Mr Pinney’s powers, including relevant fiduciary obligations.

A further, preliminary issue arising in the appeal concerns the relevance of the 2019 Act, which came into force in January 2021—more than six years after the parties separated.

Procedural history

The Family Court concluded that Mr Pinney could deal with the farm property as though it was his own, and the trust powers were accordingly his property under the PRA as in *Clayton*.

The High Court Judge said that the Family Court had failed to properly consider the extent to which Mr Pinney’s powers were constrained by fiduciary obligations, finding that this distinguished the MRWT powers from those in *Clayton*. Mr Pinney did not therefore have control tantamount to ownership of the assets of the trust.

A majority of the Court of Appeal, comprising Cooper P and Gilbert J, upheld the High Court’s decision. Miller J dissented, finding that although fiduciary duties applied to the exercise of the MRWT powers, the powers were in reality so “weakly fiduciary” that they gave Mr Pinney control over the trust and should therefore be treated as his property under the PRA.

On 3 July 2023, this Court granted Ms Cooper leave to appeal. The approved question was whether the Court of Appeal was correct to dismiss her appeal to that Court.

Supreme Court decision

The Supreme Court has unanimously dismissed the appeal. Mr Pinney’s powers under the MRWT are required to be exercised for a proper purpose and consistently with his fiduciary obligations. They are distinguishable from those in *Clayton v Clayton* and are not property under the PRA.

Preliminary issue: the relevance of the 2019 Act

The Court considered the question of whether the rights or powers of Mr Pinney under the MRWT can be treated as “property” under the PRA must be answered as at the date of

separation, in this case in April 2014. That includes any constraints on those powers found in equity or statute at that time. The applicable legislation governing beneficiary remedies in 2014 was the Trustee Act 1956, while the content of the relevant duties was governed by equity. For those reasons the Court largely put the 2019 Act to one side (at [75]).

Are Mr Pinney's powers property for PRA purposes?

Turning to the central issue, the Court concluded that the combination of powers reserved to Mr Pinney under the MRWT deed were significantly different to the relevant powers in *Clayton v Clayton*, which permitted Mr Clayton to hold office as sole trustee, made detailed provision for the exercise of unconstrained discretion in regard to decision-making affecting the interests of beneficiaries, and allowed him to remove (or add) any person as a discretionary beneficiary of the trust. In the present case, a power analogous to a “general power of appointment”, which the Court in *Clayton* considered tantamount to ownership, was not created.

To begin with, Mr Pinney could not use his power to appoint and remove trustees to take sole control of the MRWT. That was for two distinct but related reasons (at [105]).

First, exercising the power with the intention of taking sole control of the trust would breach the proper purpose rule, which requires that a power must be exercised for a proper purpose by reference to the terms on which it was conferred and the intentions of the donor. Unlike in *Clayton v Clayton*, the MRWT deed required a minimum of two trustees who were to make decisions about the trust's assets unanimously. That indicated strongly that the MRWT deed was not intended to allow Mr Pinney to have sole control of the trust—an indication supported by other provisions in the deed (at [106]–[108]).

Secondly, such an exercise of the appointment power would be inconsistent with its fiduciary nature. The power to appoint trustees is presumed to be fiduciary, and nothing in the MRWT deed rebutted that presumption. That meant the power had to be exercised in good faith and in the interests of the beneficiaries, for a proper purpose. The trustees appointed were required to act independently and not under the delegation or direction of another (at [112]–[115]).

That conclusion was itself determinative of the outcome, but the Court added for completeness that the dispositive powers of the trustees were also constrained by fiduciary duties. Unlike in *Clayton*, neither the terms nor the context of the MRWT deed indicated that the settlors intended the powers to be exercised solely in the interests of Mr Pinney, as opposed to in the interests of all the beneficiaries. It followed that the exercise of trustees' powers under the MRWT deed remained susceptible to judicial review if exercised without due consideration (unlike in *Clayton*), in bad faith or for an improper purpose (at [121]–[123]).

Finally, the Court noted that none of the relevant fiduciary constraints could be circumvented by removing all beneficiaries other than Mr Pinney. Unlike the *Clayton* deed, which permitted removal of discretionary beneficiaries, the MRWT deed provided no such power of removal. Nor did it allow the displacement of fiduciary constraints by variation of the terms of the deed (at [124]).

Tikanga

Tikanga was raised for the first time in this case, before this Court. The Court said any discussion of tikanga's influence on the application of the PRA to trusts should await a case where the matter had been properly raised at first instance, had been the subject of evidence, and might conceivably make a real difference to the outcome. This was not that case (at [128]).

Result

The appeal is dismissed. Costs are reserved.

Contact person:

Sue Leaupepe, Supreme Court Registrar (04) 914 3613

