

BETWEEN

RAEWYN PHYLLIS COOPER

Appellant

AND

MARCUS ROBERT WILLIAM PINNEY

Respondent

AND

**JENNIFER JANE PINNEY and PHILLIP
JOHN SMITH as trustees of MRW PINNEY
FAMILY TRUST**

Interested parties

**OUTLINE OF ORAL SUBMISSIONS FOR THE TRUSTEES
2 NOVEMBER 2023**



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Key issue as crystallised (Butler KC)

- Applying *Clayton*: "Does MP hold a general power of appointment ("GPA")?"
- It is alleged that MP does have a GPA because of: (i) his power to appoint / remove trustees; and (ii) the trustees' broad dispositive powers.

Taxonomy

- As noted by Williams J it is not sufficient to simply apply labels. So, asserting that a power / combination of powers is a GPA does not suffice. Instead, the Court needs to: (i) understand what a GPA is; and (ii) determine whether the identified power(s) meet that understanding.
- What is a GPA? Existence of a broad power not sufficient. Must have unlimited objects (incl. donee) and no constraints: *Clayton* [60]; *Lewin* [33-003]. In essence, the question is whether the donee can act selfishly, having regard to their own interests without regard to those of anyone else.

Constraints

- What matters ultimately is not the source but that there *are* constraints:
 - Trustees must administer trust in accordance with its terms, context and objectives (ss 4(a) and 21).
 - Mandatory duties include duty to act: (i) in good faith / honestly (s 25); (ii) for the benefit of the beneficiaries (s 26); and (iii) for a proper purpose (s 27).
 - Other (excludable) duties include duties: (i) not to self-benefit (s 31); (ii) to avoid conflict of interest (s 34); and (iii) not to profit (36).
 - Personal liability of trustees where they act in breach of trust.

Armaments of equity

- Mechanisms: (i) rights to information (*Erceg*; ss 49–55); (ii) judicial review (ss 126–127 / inherent jurisdiction); (iii) judicial review of decision to appoint / remove trustee by beneficiary (s 95) or trustee (s 109); (iv) court removal of trustee (s 112); (v) general supervisory jurisdiction preserved (s 8); (vi) claim for breach of trust; and (vii) claim for breach of fiduciary duty.
- Standards:
 - **Information:** presumption of availability (esp. for close beneficiaries) (noting that for minors a representative (which includes a parent) can make the request): ss 49 (definition of "rep"), 51 and 52.
 - **Honesty and good faith:** "consideration they give must be genuine and responsible" – *Lewin* [29-018], [29-034]–[29-040].
 - **Adequate consideration:** *Pitt v Holt* [2013] 2 AC 108 [Trustees Tab 34] at [73]; *Clement v Lucas* [2017] NZHC 3278 at [84]–[103]; *Masters v Stewart* [2014] NZHC 2419 at [29], [88]–[91]; *Unkovich v Clapham* [2020] NZHC 952 at [70]–[71]; *McPhail v Doulton* [1971] AC 424 [App Tab 66] at 1077.
 - **Interests of beneficiaries:** *Cowan v Scargill* [1985] Ch 270 at 286–287; *Green v Green* [2015] NZHC 1218 [Trustees Tab 13] at [656].

- **Legitimate expectations:** *Scott v National Trust* [1998] 2 All ER 705 (CA) at 718 (Walker J).
- **Proper purpose:** *Grand View* [2022] UKPC 47 [App Tab 50] at [51].
- **Terms of trust:** *Re UEB Industries Ltd Pension Plan* [1992] 1 NZLR 294 (CA) at 301.
- **Rationality:** *Craddock v Crowhen* (1995) 1 NZSC 40,331 (HC) at 12.
- **"Reasonably open to the trustee in the circumstances":** ss 126–127; s 95; *Easton v NZGT* [2021] NZHC 2084 at [93]–[99].

Appellant's case for a general power of appointment

- Appellant's case is that broad dispositive powers plus "control" (power to appoint and remove trustees) is sufficient for a GPA. The GPA must exist on the terms of the trust (appellant does not advance Miller J's analysis).
- Appellant accepts that the existence of fiduciary duties means no GPA.
- Powers held *in capacity as trustee* are subject to fiduciary duties. Not a "semantic" point; follows from inherently fiduciary nature of trustee-beneficiary relationship [Trustee Subs at [4.3]–[4.11]].
- Absolute / uncontrolled discretion point ignores the mandatory (and default) Trusts Act duties. Do not need to expressly include constraints in a trust deed; opposite is true. If use a trust, accept the consequences ("tough").
- Section 26: "in accordance with the terms of the trust" – for discretionary beneficiaries means to *consider* their interests (individually or as class). Appellant interpretation incongruous; rendered redundant by s 24, and inconsistent with s 22(b). Section 26 did not change the law.
- GPA cases that the appellant relies on are not on point. In each case the instrument *did* confer a GPA on donee; the only question was whether the requirement of trustee consent rendered a GPA not a GPA. Answer: on the construction of each GPA: *no*. Those case do not assist the appellant. Here the trustees *are* required to make the selection of objects. If they acted on MP's direction, they would be acting in breach of trust (distribution would be invalid *and* if it could not be recovered, trustees would be personally liable).

What did Clayton decide?

- *Clayton* about the absence of *any* constraints (particularly fiduciary ones) preventing self-appointment of the trust assets: [57]–[58], [62], [64], [65]. [App Tab 44.] Deed "unusual"; lacked normal constraints.
- Clause 11.1 essential to reasoning (as was ouster of no self-benefit and no self-dealing rules), otherwise there may have been a constraint. Clause 11.1 went beyond permitting discrimination; it permitted no consideration of beneficiary interests at all (cf s 26).

How would analysis occur here?

- Trustees currently have no good faith reason to give the farm to Marcus.
- Giving him the farm would be inconsistent with settlors' intentions. Trust intended to be dynastic (ie to go down the line; not expected to be given outright to MP); intended to ringfence the farm from a "spendthrift" who lacks

business acumen. Not in interests of children or MP for the farm to be given to him. Need compelling reason to do so (not a simple request from MP).

- Personal liability risk if act in a manner that is not reasonably open.

Power to appoint and remove trustees (Walker)

- Power of appointment and removal of trustees: (i) *Clayton* distinguishable even if this power not fiduciary; but (ii) power is "prima facie" fiduciary.
- Weight of authority supports that approach:
 - New Zealand position: *Brkic v White* [2021] NZCA 670 at [29]; and *New Zealand Māori Council v Foulkes* [2015] NZCA 552 at [22]. See also *Legler v Formannoij* [2022] NZCA 607 (on appeal; narrow question; deed distinguishable). **[App Tabs 37, 70 & 63.]**
 - English position – *Lewin* [15-048] **[Trustees Tab 53]**. [15-047]: *Re Skeats' Settlement* the "leading case" (holding such a power as fiduciary). *Pugachev* treated with "caution" [15-052] and distinguishable. **[App Tabs 77 & 58.]**
 - Australian position – *Baba v Sheehan* [2021] NSWCA 58 per Brereton JA (not fiduciary; but minority view, *obiter*). Decisions going other way (eg *Re Burton, Wily v Burton* (1994) 126 ALR 557 (FCA) at 559. *Montevento Holdings Ptd Ltd v Scaffidi* [2012] HCA 48 (irrelevant as decided on a different issue; vires question, see 333). **[App Tabs 34 & 69; Trustees Tab 29.]**
- Approach consistent with fundamental principles of fiduciary law (see *Dold v Murphy* [2020] NZCA 313 at [55] for factors; **[Trustee Subs at [6.10]]**). Need assessment of terms of trust and context to characterise power – will need to be (very) clear that such a power is "personal" not fiduciary.
- Analysis of clause 15: clearly fiduciary; sensible appointments by Marcus **[Trustee Subs from [6.16]]**; a well-run trust (albeit not successful).
- That clause 15 is fiduciary is reinforced by "second-trustee requirement" – powerful indicator. Clause 15 different to *Legler* (clause 27.2, provisions applicable where trustee is a "corporate body"; CA decision at [7]) and *Montevento* (clause 11; HCA at [9]).

PRA context does not justify ignoring fiduciary duties

- Appellant's case cannot be isolated to the PRA context; significant ramifications for trusts law if successful (cf appellant position – "recalibration of trust drafting").
- Appellant asking for broad "trust busting power"; contrary to Supreme Court in *Clayton* that Parliament did not intend the courts to have one.

Relief (Butler KC)

- Distribution to non-object. Appellant case is that *MP* has GPA, arising from power to appoint and remove trustees. Relief must reflect that. Only way for Court to execute vis-à-vis the Trust is to require MP to assume control (presumably by appointing himself and a controlled corporate trustee), then exercise the dispositive powers.