IN THE SUPREME COURT OF NEW ZEALAND **SC 8/2023**

I TE KŌTI MANA NUI

BETWEEN	**KEN LEGLER AND LAILA SUN LEGLER KLAUI**
	APPELLANTS
AND	**MARIA GUILLAUMINA CORNELIA JOHANNA FORMANNOIJ**
	FIRST RESPONDENT
AND	**KAAHU TRUSTEE LIMITED**
	SECOND RESPONDENT

SUBMISSIONS FOR APPELLANTS

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May it please the Court:

1. This appeal concerns the Kaahu Trust. It was established by the appellants' father, Ricco Legler (**Ricco**).[1] The source of its wealth is their grandfather.[2]

2. Ricco established the trust with three trustees: himself; his partner and later wife, Maria (Marina) Formannoij (the first respondent); and an independent trustee. Sometime after Ricco's untimely death, the independent trustee decided to resign. That left Ms Formannoij as the sole trustee. Under clause 26.1(a) of the deed, she was not able to exercise any powers save for the power to appoint an additional trustee. That additional trustee would need to be independent in terms of clause 26.1(b), i.e., the trustee could not be a beneficiary or related to one, etc.

3. It was in these circumstances that, in November 2019, Ms Formannoij created a company – the second respondent, Kaahu Trustee Limited (**KTL**) – with herself as its sole director, appointed that company as the additional trustee, and then resigned as a trustee in her personal capacity. This left her company as sole *corporate* trustee, through which she would be able to exercise all trust powers. Ms Formannoij then, through KTL, removed all other beneficiaries – including Ricco's children and grandchildren – and took steps to appoint the $10-11 million+[3] of trust property to herself.

4. At issue on this appeal is whether Ms Formannoij's exercise of the power to appoint trustees was valid – that is, whether the power was exercised for a

[1] Li Legler affidavit dated 16 April 2021 at [8], [201.0057] at [201.0059]. Ricco is named as settlor in documents contemporaneous with the trust deed through which the trust was funded: [301.0047] at B and [301.0053] at B. Ms Formannoij is a signatory to those documents. At trial she accepted that Ricco dealt ''much more'' with the establishment of the trust: NOE at 133/15-17 [201.0179] at [201.0182]. In parts of her evidence, she refers to Ricco as having established the trust, e.g., Formannoij affidavit dated 26 March 2021 at [3](b) and the heading "B" above [20], [201.0102] at [201.0103] and [201.0105]. In others, she refers to Ricco and herself as having established the trust: at [20].

[2] Li Legler affidavit dated 16 April 2021 at [8] [201.0057] at [201.0059]; Formannoij affidavit dated 26 March 2021 at [20] [201.0102] at [201.0105].

[3] See Formannoij affidavit dated 26 March 2021 at [50] [201.0102] at [201.0111] (referring to "investments and cash" of approximately $4.8 million and the Mokomoko property, said then to be worth "4 to $5 million") and at [33.3] [201.0102] at [201.0108] (referring to Ricco's estate's share in his mother's estate in Switzerland, which Ms Formannoij has also appointed to herself personally and which she says "may" be worth about $500,000).

"proper purpose" and in the best interests of the beneficiaries as a whole, as opposed to her personal interests. If it was not proper then the appointment is ineffective, thereby 'restoring' the first respondent as sole trustee. A further issue would then arise, being whether the Court should appoint an independent trustee in place of or alongside her.

Summary

5. The power given to trustees of the Kaahu Trust to appoint new trustees is a fiduciary power. It is subject to the proper purposes / fraud on a power doctrine. It must be exercised not for the personal benefit of the trustee but for the benefit of the beneficiaries as a whole.

6. Ms Formannoij did not appoint KTL because she believed it was best placed to exercise the "very difficult, onerous, and often delicate duties which trustees have to perform" in the best interests of the beneficiaries as a whole.[4] She was already a trustee. She appointed KTL so that she could obtain control over the trust – a status that the trust deed prevented her from having as an individual. The trust deed also prevented her in a personal capacity from exercising trust powers in favour of herself. Her purpose in appointing KTL was to put herself in a position to exercise the trustee's powers as she pleased and for her own benefit.

7. That is the only plausible interpretation of the facts. It is what her new lawyers told her she would be able to do through KTL when advising her that she could appoint a corporate trustee. It is what she did within months of appointing KTL. Ms Formannoij's own explanation – that she appointed KTL to "simplify matters" against a backdrop of acrimony and likely litigation with Ricco's children, who were seeking information about the trust – is consistent with the conclusion that she appointed KTL to make it easier for herself to control the trust for her own benefit.

8. In addition or alternatively, it was an improper exercise of the power for Ms Formannoij to exercise it for the purposes of taking control of the trust

[4] *Re Skeats' Settlement* (1889) 42 Ch.D. 522.

through a corporate trustee. That appointment, even if in strict conformity with the deed, including in particular clause 26.1 (as KTL was not a beneficiary or related to one or in a sexual relationship with a beneficiary or a trustee), was contrary to the intent of the settlor of the Kaahu Trust considering the terms of the trust deed as a whole and in context.

9. Either way, it is submitted that the appointment violated the proper purpose rule and was therefore invalid.

Facts

10. The appellants are Ken Legler (**Ken**) and Laila Legler Klaui (**Laila**).[5] They, together with their brother Li, were Ricco's only children.[6] Li and Laila each have two children.[7] Ms Formannoij was Ricco's long-term partner and, from 2009, his wife. She is the sole director of KTL.[8]

Establishment and administration of the Kaahu Trust prior to Ricco's death

11. Ricco established the Kaahu Trust on 9 June 2008.[9] The trustees were Ricco, Ms Formannoij and an independent trustee, namely BOI Taxation Trustee Company No. 2 Limited (**BOI**), the director of which was Philip (Phil) Tyler, an accountant.[10]

12. Ricco established the Kaahu Trust to benefit himself, Ms Formannoij and his children (and ultimately their children). They were all discretionary beneficiaries. They were all effective final beneficiaries also, either because they were named as such (Ricco and Ms Formannoij) or because they were Ricco's issue.[11] Ricco's children's status as final beneficiaries is consistent

5 Laila Legler Klaui affidavit dated 16 April 2021 at [3] [201.0004] at [201.0005].

6 Laila Legler Klaui affidavit dated 26 February 2021 at [2] [201.0004] at [201.0005].

7 Laila Legler Klaui affidavit dated 16 April 2021 at [3]. [201.0004] at [201.0005].

8 On the appellants' case, KTL is merely a de facto trustee / trustee de son tort, which cannot exercise powers of appointment or other dispositive powers (refer, e.g., *Jasmine Trustees Ltd v Wells & Hind (a firm)* [2007] 1 All ER 1142 at [42] and *Lewin on Trusts* (20th ed, 2020) (at [42-106]). On the respondents' case, KTL is the valid trustee.

9 [301.0027] (Kaahu Trust deed).

10 Philip Tyler affidavit dated 31 March 2021 at [2], [201.0202] at [201.0203].

11 [301.0027] (Kaahu Trust deed) at [301.0032] at cl 6.1.

with what Ms Formannoij declared was the "whole purpose of the Kaahu Trust": "it was set up for Ricco and I but at our death it would go to the children".[12] That statement was only partially correct: the children were evidently intended to and did benefit from that trust during Ricco and Ms Formannoij's life as well.

13. During Ricco's life and while he was a trustee, the Kaahu Trust was administered to benefit himself and Ms Formannoij (including through regular distributions of cash to fund their lifestyle)[13] but also his children (through distributions of capital).[14]

14. Ricco had established another family trust, the Horowai Family Trust, about a year before, on 2 March 2007.[15] He chose a different structure: a corporate trustee with two directors, both of whom were beneficiaries (Ricco and Li), and no independent director or other independent trustee.[16] The Horowai Family Trust was to be a trading trust to manage a forest.[17]

15. Under the Horowai Family Trust deed, Ricco, Ms Formannoij (as Ricco's partner and then his spouse), and Ricco's children were all discretionary beneficiaries. The final beneficiaries were Ricco and his children, but not Ms Formannoij.

16. In 2014, at the same time that he re-did his will, Ricco decided to remove himself as a beneficiary of the Horowai Family Trust, which automatically removed Ms Formannoij also.[18] Ricco did not make any changes to the

[12] NOE at 130/27 – 131/3 [201.0174] at [201.0176]. See also Formannoij affidavit dated 26 March 2021 at [26], [201.0102] at [201.0106] ("My understanding was that Ricco and I were to be the primary beneficiaries of the Kaahu Trust, and that if there were any assets left after both of us had died, these would be distributed to Ricco's children").

[13] Li Legler affidavit dated 16 April 2021 at [14] [201.0057] at [201.0060].

[14] Ibid at [14]-[18] [201.0057] at [201.0060] (the benefits were distributed via the Horowai Family Trust in 2015 and 2017).

[15] Li Legler affidavit dated 16 April 2021 at [8] [201.0057] at [201.0059]; Formannoij affidavit dated 26 March 2021 at [21] [201.0102] at [201.0105]; and [301.0006] (Horowai Trust deed).

[16] [301.0006]; Li Legler affidavit dated 16 April 2021] at [7]. [201.0057].

[17] Li Legler affidavit dated 16 April 2021 at [9]-[10] [201.0057] at [201.0059].

[18] Li Legler affidavit dated 16 April 2021 at [12]-[16] [201.0057] at [201.0059].

Kaahu Trust at that time (or at any other time before his death). His children continued to benefit from distributions.[19] Ms Formannoij accepted that there had never been any consideration given to removing them as beneficiaries.[20]

Ricco's death and events since

17. The Kaahu Trust deed conferred on Ricco personally the power to appoint trustees.[21] It did not confer that power on him jointly with Ms Formannoij. Nor did it confer the power on her in the event Ricco died. Instead, it vested the power in the trustees, whomever they were, in the event he died or was otherwise unable to exercise the power.[22]

18. In November 2017, Ricco died in an electric glider accident.[23] In October 2019, the independent trustee, BOI / Mr Tyler, said he wished to resign.[24] These circumstances would leave Ms Formannoij, as remaining trustee, with the power to appoint additional trustees. As the sole trustee, that was the only power she could exercise: clause 26.1(a).

19. Any trustee Ms Formannoij appointed would need to comply with the independence requirements of clause 26.1(b) (which apply "unless a corporate body is the sole trustee", which was obviously not the case at that time). That is, the additional trustee could not be a "a Beneficiary, nor the spouse, parent or child of a Beneficiary or of a Trustee, nor a person who is or has been in any sexual relationship with a Beneficiary or with a Trustee."

20. Once Ms Formannoij appointed a second trustee, only that person would be able to make decisions to exercise powers for her benefit: clause 18.1 ("Any

[19] Li Legler affidavit dated 16 April 2021 at [14]-[18] [201.0057] at [201.0059].; Formannoij affidavit dated 26 March 2021 at [45] [201.0102] at [201.0110].

[20] NOE at 96/13-15 and 98/4-9 [201.0129] at [201.0139] and [201.0141].

[21] [301.0027] at [301.0041] at cl 23.2.

[22] [301.0027] at [301.0041] cl 23.10.

[23] Formannoij affidavit dated 26 March 2021 at [31], [201.0102] at [201.0107]. Under Ricco's will, he left the bulk of his estate – including assets to be received from his mother's estate in Switzerland – to the Kaahu Trust: Formannoij affidavit dated 26 March 2021 at [32]-[33] [201.0102] at [201.0107] and [302.0421].

[24] Philip Tyler affidavit dated 31 March 2021 at [8], [201.0202].

power or discretion vested in the Trustees may be exercised in favour of a Trustee who is also a Beneficiary by the other Trustee or Trustees").[25]

21. Graham Jordan, who acted for Ms Formannoij / the trustees,[26] advised her that she would need to appoint a trustee in place of BOI.[27] He said in several letters / emails that an independent trustee was required.[28] Dennis McBrearty, who had been the original lawyer for the Kaahu Trust and Ms Formannoij and Ricco's long-time advisor,[29] recommended she approach Perpetual Guardian. She did so but did not wish to proceed with them.[30]

22. In late October 2019, Ms Formannoij approached new lawyers, WRMK. She told them that the Kaahu Trust "had been established to provide for Ricco and myself"; that Ricco's children had engaged lawyers and were seeking information about his estate and the Kaahu Trust; and that litigation was likely.[31] WRMK told her that, in fact, she could appoint a company under her control as trustee.[32]

23. Ms Formannoij emailed Mr McBrearty to say that WRMK would now be advising her, and that "it will probably a company with a sole trustee, which will be me".[33] Mr McBrearty, who had drafted the trust deed,[34] was concerned. He told her "there must at all times be an independent trustee" and that if she were to form a company, "the control of the company must be given to someone other than yourself".[35] He said the proposal was

[25] [301.0027] at [301.0038] at cl 18.1. Even if clause 18.1 did not have that effect, any decision to benefit Ms Formannoij would need to be unanimous and so require the consent of the independent trustee.

[26] NOE at 102/13-16 [201.0129] at [201.0145].

[27] Formannoij affidavit at [75], [201.0102] at [201.0115].

[28] [302.0497]: [302.0513] at [302.0514] at [5].

[29] NOE at 93/27-31 and 111/14-17 [201.0129] at [201.0136] and [201.0154].

[30] NOE at 107/30-33 [201.0129] at [201.0151]; Formannoij affidavit dated 26 March 2021 at [76] [201.0102] at [201.0115].

[31] Formannoij affidavit dated 26 March 2021 at [79]-[81], [201.0102] at [201.0116].

[32] Ibid.

[33] [303.0632].

[34] Li Legler affidavit dated 16 April 2021 at [7] [201.0057] at [201.0059]; NOE at 93/26-31 [201.0129] at [201.0136].

[35] [303.0632] at [303.0633].

inconsistent with "the intent of the trust document", which was that there would at all times be an independent trustee.[36]

24. WRMK wrote to Ms Formannoij confirming their advice.[37] Appointing a company with herself as sole director was a "valid option". The letter goes on to say that, through her company, she would "have the ability to make all decisions affecting the Kaahu Trust". As "the sole director of the sole trustee", she would have powers to distribute the assets "to any one or more of the beneficiaries (including yourself)", resettle the trust for the benefit of "any one (or more of the current beneficiaries (including you)", and exclude anyone as a beneficiary. Those powers would be "subject to the overarching duty of a trustee to act in [the] best interests of the beneficiaries of the trust, having considered the needs and circumstances of each of the beneficiaries". After "considering such needs and circumstances", Ms Formannoij "might", "for example", transfer part of all of the trust's assets to a new trust, of which Ms Formannoij would be the primary beneficiary or distribute part of the trust's assets "directly to you, leaving the rest in the Kaahu Trust, still available for your benefit".

25. Ms Formannoij gave evidence that WRMK's letter "gave me confidence that *my interests* were being looked after and that the proposal was legally permissible" (emphasis added).[38]

26. WRMK wrote again to Ms Formannoij on 21 November 2019.[39] They told her that, following BOI's retirement, she would be the sole trustee and would need to appoint an additional trustee before she could exercise any trust powers. After appointing the company, "you will retire personally as a trustee because the requirement for an independent trustee only does not apply where a company is the sole trustee." The company would then

[36] [303.0703] at [303.0704]-[303.0705]
[37] [303.0706]; Formannoij affidavit dated 26 March 2021 at [81] [201.0102] at [201.0116].
[38] Formannoij affidavit dated 26 March 2021 at [86], [201.0102] at [201.0117].
[39] [303.0725].

become the sole trustee, and "you will be the sole director of that company and make all relevant decisions".

27. Ms Formannoij understood WRMK to be advising her that, in the structure proposed, she would be "entitled to act alone".[40] She "understood that to be different from having an independent trustee" alongside her.[41] She gave evidence that "the appointment of a sole corporate trustee appealed to me as I thought it would simplify matters relating to the Kaahu Trust".[42]

28. Following BOI's formal resignation, Ms Formannoij appointed KTL as a trustee.[43] Through the same deed, she then resigned and procured KTL to discharge herself as a trustee, leaving KTL as sole trustee.

29. After learning of KTL's appointment,[44] the children's solicitors, TGT Legal, wrote to WRMK on 27 February 2020.[45] They said that "given the obvious conflict that exists between [Ms Formannoij']s interest as a beneficiary, and now her sole directorship of the trustee, our clients are concerned to ensure that the affairs of the Kaahu Trust are properly managed".

30. WRMK reported to Ms Formannoij on TGT Legal's letter.[46] They noted TGT Legal's concern "about you being a sole director" of the trustee and said "this was all to be expected". They told her "it is time for a decision to be made as to what to do with the assets of the Kaahu Trust", and then referred to a number of options, all of which resulted in all assets being held for Ms Formannoij only.[47] It is not clear why the time for making "a decision" had

[40] NOE at 115/25-27 [201.0129] at [201.0158].
[41] Notes of Evidence at 115/28-30 [[201.0129]] at [[201.0158]].
[42] Formannoij affidavit at [81], [201.0102] at [201.0116]; NOE at 115/30-34 [201.0129] at [201.0158] (agreeing that the difference between having an independent trustee and being entitled to act alone was one of the reasons for using the word "simplify").
[43] [303.0754].
[44] [304.0799].
[45] [304.0817].
[46] [304.0826].
[47] Removing Ricco's children as beneficiaries; resettling the trust to a new trust for her benefit only; and distributing all of the assets to her personally and winding up the trust.

arrived, unless it was to ensure that previously contemplated actions were taken before Ricco's children could challenge them.

31. At the same time Ms Formannoij had been deciding to appoint KTL, she had also been considering what to do with trust property.[48] She had been discussing with WRMK the options for what to do with it since that time.[49]

32. In March 2020, Ms Formannoij executed deeds removing all other beneficiaries and appointing the trust's cash, investments, as well as the assets to come into the trust from Ricco's estate (including from the appellants' grandmother's estate) to herself.[50] She said she wished to achieve a "clean break" from, and to "sever" the link with, Ricco's children.[51] They had "had enough".[52] Ms Formannoij took these actions notwithstanding her understanding that the "whole purpose of the Kaahu Trust" was for its property to go to Ricco's children following his and her death.[53]

The proper purposes rule

33. The fraud on a power doctrine, better referred to today as the proper purposes rule, has a long heritage. Useful modern summaries appear in

[48] Ms Formannoij accepted that this was why had she sought information about the Horowai Family Trust prior to BOI's formal resignation and her appointment of KTL: NOE at 114/24-26 [201.0129] at [201.0157] (referring to the 7 November 2021 letter at [303.0706].

[49] NOE at 121/4-8 [[201.0129]] at [[201.0164]].

[50] [304.0830] ($1 million); [304.0850] (removal of other beneficiaries); [304.0846] (bank accounts, investment portfolio, further assets, etc.). It appears tax concerns around the bright-line test prevented the trust's Russell property being included in the distributions at this time: see [304.0837] under, "Accounting matters", item 2) and [304.0840]. One of the deeds was a deed of distribution forgiving a so-called $3.7 million "loan" to the Horowai Family Trust: [304.0844]; Graham Jordan letter dated 11 March 2019 to TGT, [303.0557]. However, Ms Formannoij accepted in cross-examination that there was "no doubt" that $3 million of the $3.7 million said to comprise the "loan" had actually been intended as a gift by Ricco: NOE at 105/35 [201.0129] at [201.0148]. See also at 102/1 ("Of Course, it was a gift") [201.0129] at [201.0145]. See also to similar effect Li Legler affidavit dated 16 April 2021 at [28] [201.0057] at [201.0062]. The remaining $738,000 was not intended to be repaid either: ibid at [29].

[51] See NOE at 124/15-23 [201.0129] at [201.0167]; and Formannoij affidavit at [99] [201.0102] at [201.0120].

[52] Notices of Evidence at 100/4-9 [201.0129] at [201.0143].

[53] NOE at 130/27 – 131/3 [201.0174] at [201.0176 - 0177]. See also Formannoij affidavit dated 6 March 2021 at [26], [201.0102] at [201.0106].

Grand View Private Trust Co Ltd v Wong [2022] UKPC 47 at [51]-[63] and in *Kain v Hutton* [2008] 3 NZLR 589 (SC) at [17]-[21].

34. The rule requires donees of limited powers to exercise them for the purposes for which they were conferred and no other purpose. Fiduciary powers are subject to the rule.[54] The rule does not apply to "general" or "beneficial" powers, given that they may be exercised as the donee of the power pleases, including for his or her own benefit.[55]

35. While the rule has often been applied to powers of appointment of property, it is of general application.[56] The doctrine "embraces far more than an intention to benefit a non-object".[57]

36. Three classic instances of "fraud" / improper purpose are:[58]

    (1) where the power is exercised by the donee with a view to benefitting themselves;[59]

    (2) where the power is exercised pursuant to a bargain with the appointee to benefit someone who is not an object of the power (being a category applicable to powers to appoint property);

    (3) where the power is exercised for some other purpose foreign to the power.

37. The "existence and scope of a particular power must be distinguished from

[54] *Lewin on Trusts* (20th ed, 2020) at [15-048]; Geraint Thomas *Thomas on Powers* (2nd ed, 2012) at [9.05].

[55] See *Kain v Hutton* [2008] 3 NZLR 589 (SC) at [47] per Tipping J and *Clayton v Clayton* [2016] NZSC 29 at [89]-[92].

[56] The word "object" is sometimes also used in the authorities to refer to the purposes of the power. See, for example, *Duke of Portland v Topham* (1864) 11 HL Cas 32 at 54.

[57] Geraint Thomas *Thomas on Powers* (2nd ed, 2012) at [9.28].

[58] *Lewin on Trusts* (20th ed, 2020) at [30-069]; *Thomas on Powers* (2nd ed, 2012) at [9.13].

[59] See *Vatcher v Paull* [1915] AC 372 (PC) at 378 ("it is enough that the appointor's purpose and intention is to secure a benefit for himself"); *Duke of Portland v Topham* (1864) 11 HL Cas 32 at 55-56 per Lord St Leonards ("A party having a power like this…cannot…acquire any benefit for himself, directly or indirectly"); *Kain v Hutton* [2008] 3 NZLR 589 (SC) at [19] ("What that party must establish is that the real purpose of the appointor…was to benefit the appointor or a non-object (stranger) rather than benefiting an object").

the purpose for which it is exercised".[60] For example, "a power of investment conferred on trustees may authorise investment in assets of a particular description, but it may still be a fraudulent exercise of that power if such assets are acquired (say) with the primary intention and purpose of benefitting the donee of the power".[61] As Lord Richards observed in *Grand View*, "[i]t is common for powers expressed in the widest of language, and hence of the widest possible scope, to be restricted as to their permissible exercise by their proper purpose."[62]

38. The nature of the power, including whether it is fiduciary, the terms of the instrument conferring it, the instrument as a whole, and the wider context, may all be relevant to identifying the purposes for which a power is conferred and so may be exercised.[63]

39. In *Grand View*, for instance, the trustee removed all beneficiaries and at the same time added a purpose trust (and then immediately disposed of the entire trust fund to the purpose trust). To identify the purposes for which the power could be exercised, the Board considered the terms of the power in the context of the trust deed as a whole, as well as the context in which the trust was established.[64]

40. The donee's "real purpose and intention"[65] in exercising the power is to be ascertained as a matter of substance, though the effect of the exercise of

[60] Geraint Thomas *Thomas on Powers* (2nd ed, 2012) at [9.06]. See to similar effect *Grand View Private Trust Co Ltd v Wong* [2022] UKPC 47 at [54]-[55] and *Eclairs Group Ltd v JKX Oil and Gas plc* [2015] UKSC 71, [2016] 1 BCLC 1 at [15] and [30].

[61] Geraint Thomas *Thomas on Powers* (2nd ed, 2012) at [9.06].

[62] *Grand View* at [77].

[63] *Grand View* at [62] ("The identification of the purpose of a power will also be informed by the rest of the instrument containing the power") at [77] ("while the terms of [the clause conferring the power] are of course highly relevant to the determination of the purpose of the powers conferred by it, they are only part of the enquiry."). See also Geraint Thomas *Thomas on Powers* (2nd ed, 2012) at [9.03] ("the intention of the donor of the power as to its scope and purpose must, of course, be ascertained from the instrument creating the power"); *Eclairs Group* at [30] per Lord Sumption ("Ascertaining the purpose of a power where the instrument is silent depends on an inference from the mischief of the provision conferring it, which is itself deduced from its express terms, from an analysis of their effect, and from the court's understanding of the business context.").

[64] *Grand View* at [74]-[94].

[65] *Re Burton's Settlement* [1955] Ch 82 at 100 per Lord Upjohn.

power is also important.[66] In "many cases contemporaneous evidence of memoranda or letters make the real purpose and intention of the appointor clear".[67] Often, the only purpose that can plausibly be ascribed to the donee is an improper one.[68]

The power to appoint trustees of the Kaahu Trust

Self-benefit is an improper purpose

41. It is settled law in New Zealand[69] that the power to appoint new trustees is fiduciary:[70]

> …because the subject matter of the power is the office of the trustee. That office lies at the core of the trust and carries fundamental and onerous obligations to act in the best interests of the beneficiaries as a whole to the exclusion of the trustee's own interest…it does not matter that the party exercising the power is not itself a trustee; it is the object and purpose of the power, taken from the deed, that is decisive. Finally, because the power is fiduciary in nature, it must not be exercised for a collateral purpose.

42. Thus the power is to be "exercised according to the best interests of the beneficiaries"[71] as opposed to the personal benefit of the donee.

43. The power to appoint new trustees was conferred on the trustees of the Kaahu Trust not to enable them to benefit themselves but to enable them to protect and advance the interests of the beneficiaries as a whole.

[66] *Re Burton's Settlement* [1955] Ch 82 at 100 per Lord Upjohn; *Kain v Hutton* [2008] 3 NZLR 589 (SC) at [20].

[67] Ibid.

[68] See, e.g., in the context of powers given to directors, *Eclairs Group Ltd v JKX Oil and Gas plc* [2015] UKSC 71, [2016] 1 BCLC 1 at [17] per Lord Sumption.

[69] *New Zealand Māori Council v Foulkes* [2015] NZCA 552, [2016] 2 NZLR 337 at [22]; *White v Brkic* [2021] NZCA 670 at [29]-[35]; *Harre v Clarke* [2014] NZHC 2533 at [24]-[26]. The position in England is that the power will always or nearly always be fiduciary: see *Re Skeats' Settlement* (1889) 42 Ch.D. 522 and *Lewin on Trusts* (20th ed, 2020) at [15-047]. The position in Australia is that a power of appointment given to a named beneficiary, e.g., the settlor, might not always be fiduciary. That question does not arise here.

[70] *New Zealand Māori Council v Foulkes* [2015] NZCA 552, [2016] 2 NZLR 337 at [22].

[71] Ibid.

44. That the Kaahu Trust deed confers the power on the trustees, whomever they are, as opposed to Ms Formannoij personally, reinforces that conclusion in the present context. So too does the definition of beneficiary and the provisions concerning who is to benefit in default of appointment on vesting day, namely those "who would have been entitled to the estate of Ricco Legler had he died intestate leaving no surviving spouse" – i.e., his children.[72] These various provisions make clear that the Kaahu Trust was established for the benefit of not only Ricco and Ms Formannoij, but also future generations of Leglers, including Ricco's children and grandchildren. They point away from a conclusion that Ms Formannoij was entitled to exercise her power as appointor for her own benefit.

Ms Formannoij exercised the power to benefit herself

45. Ms Formannoij's purpose in appointing KTL was not to benefit the beneficiaries as a whole. She did not appoint KTL because she believed it was best placed to advance the interest of the beneficiaries. Her purpose was to secure control of the trust in order to benefit herself.

46. Ms Formannoij chose to appoint KTL against a backdrop of tension, acrimony and "likely" litigation between her and the other beneficiaries of the Kaahu Trust, i.e., Ricco's children.[73] That choice was plainly, indeed could only have been, for her benefit. It would allow her alone to decide how to respond to Ricco's children and the questions they were asking about the trust.[74] It would give her sole power to decide how to manage and distribute the trust's property; it would "simplify matters"[75] for her.

47. It is submitted that "simplify" in this context meant the ability to act without constraint and take decisions for her own benefit. Ms Formannoij accepted

[72] See clauses 2.1 and 6.1(a), (b) and (c), [301.0027] at [301.0030] and [301.0032].

[73] Formannoij affidavit dated 26 March 2021 at [79] ("litigation seemed likely if not inevitable"), [201.0004] at [201.0116].

[74] Formannoij affidavit dated 26 March 2021 at [79]-[81], [201.0102] at [201.0116].

[75] Formannoij affidavit dated 26 March 2021 at [81] [201.0004] at [201.0116].

that the difference between having an independent trustee and being entitled to act alone was one of the reasons she used that word.[76]

48. The majority in the Court below thought "simplify" could refer to a desire to make her "living arrangements more congenial"[77] – presumably by being able to decide to sell the trust's existing property and purchase a new home for herself. Even if that were the case, her purpose would not be to advance the interests of the beneficiaries as a whole but rather her own interests.

49. Ms Formannoij was aware of the powers over the trust that she would be able to exercise, including for her benefit, through KTL at the time she contemplated KTL's appointment. WRMK advised her about those powers at the same time it was advising her that she could appoint a corporate trustee under her control.[78]

50. Ms Formannoij's own evidence was that WRMK's advice gave her confidence that *her* interests were being looked after.[79] Taking control was the only way Ms Formannoij could decide to distribute the trust's property to herself, remove the other beneficiaries as beneficiaries, etc., without an additional / independent person making or at least joining in such decisions.

51. Ms Formannoij rejected advice from two other trusted advisors to appoint an independent person. The inference that can be drawn is that appointing an independent person would interfere with her wish for control and her intention to benefit herself.

52. The majority in the Court below relied on WRMK's advice to Ms Formannoij, in the context of describing the powers she would have through KTL over the trust, that her exercise of those powers would be "subject to the overarching duty of a trustee to act in [the] best interests of the beneficiaries of the trust,

[76] NOE at 115/30-34 [201.0129] at [201.0158].

[77] At [33] ("Maria was dependent on Kaahu for her accommodation and financial support. We consider that a motivation to take steps to control Kaahu so as to pursue the objective of rendering her living arrangements more congenial would not have been objectionable as comprising an improper purpose."), [101.0036] at [101.0047].

[78] [303.0706].

[79] [201.0004] at [201.0116].

having considered the needs and circumstances of each of the beneficiaries".[80]

53. The above advice was directed to the decisions that Ms Formannoij would be able to make through her company once it was sole corporate trustee. That is clear from the letter and is how Ms Formannoij describes the advice.[81] But Ms Formannoij was not advised, nor did she consider, that she needed to act in the best interests of the beneficiaries in deciding whether to appoint a company under her control as trustee in the first place. She was simply advised that doing so was a "valid option under the Trust Deed";[82] that it was "legally permissible".[83] The implication was that Ms Formannoij was free to act however she pleased in deciding who to appoint as trustee.

54. The majority in the Court below also considered that the steps taken by Ms Formannoij through KTL in March 2020 were not relevant "in the determination of [Ms Formannoij's] subjective motivation at the date of the exercise of the power of appointment".[84]

55. However, it is respectfully submitted that it is both unrealistic and contrary to the evidence to isolate the steps taken in November 2019 from those taken a few months later in March 2020. The March 2020 deeds were part of a process that commenced in November 2019 with KTL's appointment. As covered above, at the time she appointed KTL, Ms Formannoij was already considering what to do with trust property once she was able to "make all decisions affecting the Kaahu trust".[85]

56. The majority in the Court of Appeal further said it was not, "at least expressly", suggested to Ms Formannoij that "she intended either to

[80] See [303.0706] and CA judgment at [38], [101.0036] at [101.0046].

[81] Formannoij affidavit dated 26 March 2021 at [86] ("This letter gave me confidence that my interests were being looked after and that the proposal was legally permissible. It also explained that before I made any *future* decisions about how I administered the trust, I would need to consider the interests of all the beneficiaries…"), [201.0004] at [201.0116].

[82] [303.0706]

[83] Formannoij affidavit dated 26 March 2021 at [86], [201.0004] at [201.0116].

[84] At [39], [101.0036] at [101.0049].

[85] [303.0706].

improperly promote her own interests, or take control of Kaahu or evade restrictions under the Trust Deed": at [34].

57. Ms Formannoij was cross-examined on her knowledge and intentions. That included her understanding of what she would achieve through appointing KTL,[86] her simultaneous exploration of "options" for what to do with the trust property",[87] and, as Cull J found, on the correspondence at the time of the appointment of KTL and the months following, all of which was evidence of her subjective understanding and intent at the time.[88] It is respectfully submitted that not asking Ms Formannoij a question that her express purpose was to benefit herself should be given no weight. The anticipated and inevitable denial of such a proposition would still be against the weight of the evidence.

58. The majority does not refer to the rule in *Browne v Dunn* and so it is not clear whether reliance was being placed on it. In any case and for completeness, the rule was not engaged. Ms Formannoij's evidence was that she wanted to "simplify matters" and that WRMK's advice gave her "confidence that my interests were being looked after". Her evidence in chief contained admissions in relation to the appellants' claim.

59. There is no evidence, including from Ms Formannoij herself, that her purpose was to benefit the beneficiaries as opposed to (or as well as) herself. She has never, for instance, claimed that she believed KTL would be best placed to advance the interests of the beneficiaries. That is understandable: it is not reasonably arguable that Ms Formannoij's purpose in appointing a company under her control was to benefit the beneficiaries as a whole, and this is reflected in the correspondence from WRMK discussed above.

[86] E.g., NOE at 111-115, [201.0129], [201.0154]-[201.0158].
[87] Ibid.
[88] CA judgment at [59], [101.0036] at [101.0054] and NOE at 110-124, [201.0129], [201.0154]-[201.0167]

Taking control of the trust is an improper purpose

60. In addition or alternatively, in view of the purpose of the restrictions on the power to appoint trustees in the deed, the trust deed as a whole, and the wider context in which the trust was established, it would have been improper for Ms Formannoij to have exercised the power for the purpose of taking control of the trust through a company under her control.

<u>The terms of and restrictions on the power exercised by Ms Formannoij</u>

61. Clause 23.2 vested the power of appointment of new trustees in Ricco personally. Ricco also had the power to vest the power of appointment in someone else.

62. Under clause 23.10, in the event of the death of Ricco, and in the absence of a nominee appointor, the power is vested in the trustees. As Ricco died, and did not vest the power it anyone else, that is what happened here.

63. It bears re-emphasis that the power at issue was given to the trustees. Ricco could have conferred the power of appointment on Ms Formannoij jointly with himself, or on Ms Formannoij in the event of his death. He did not.

64. As noted above, the independent trustee resigned, which left Ms Formannoij as the sole remaining trustee. Clause 26 therefore applied:

> 26. Restriction on number and identify of Trustees
>
> 26.1 Unless a corporate body is the sole Trustee:
>
> (a) if at any time there is only one Trustee, no power or discretion conferred on the Trustees by law or by this deed, other than that of appointing a new Trustee, shall be exercised by the surviving Trustee until such time as an additional Trustee has been duly appointed;
>
> (b) the Trustees must always include at least one person who is not a Beneficiary, nor the spouse, parent or child of a Beneficiary or of a Trustee, nor a person who is or has been in any sexual relationship with a Beneficiary or with a Trustee.

65. As Ms Formannoij was not a corporate body, clause 26.1(a) meant she could exercise no power other than that of appointing a new trustee, and clause 26.1(b) meant she could only appoint a trustee who was "not a beneficiary,

nor the spouse, parent or child of a beneficiary or of a trustee, nor a person who is or has been in any sexual relationship with a beneficiary or with a trustee".

66. These restrictions limited the scope of the power that Ms Formannoij could exercise. They are also relevant to ascertaining the purposes for which the power of appointment could properly be exercised by a trustee in Ms Formannoij's position.[89]

67. The evident purpose of sub-clauses (a) and (b) of clause 26 is to require a sole trustee in Ms Formannoij's position to appoint someone independent as an additional trustee. If a power or discretion were subsequently to be exercised for Ms Formannoij's benefit, the other trustee would need to do so (clause 18.1).[90] Both trustees would need to agree before any further trustees were appointed.

68. The importance of clause 26.1 to the intended operation of the trust is underscored by clause 12.2. Clause 12.1 provides wide powers to the trustees to alter, vary, add to or revoke any of the provisions of the deed. However, clause 12.2(a) specifies that any such alteration, variation or revocation cannot "vary the provisions of clause 26 of this deed specifying the identify of any of the Trustees".

69. The purpose of these provisions is to prevent a trustee who finds themselves as the sole trustee from unilaterally taking control the trust for their own benefit: they *must* appoint a second trustee first and that second trustee *must* be independent in terms of sub-clause (b). These are carefully designed safeguards against potential abuse.[91] They are particularly important in view of the very wide powers and discretions that (properly

[89] See *Eclairs Group* at [30] per Lord Sumption.

[90] Alternatively, if that were not the effect of clause 18.1, then the additional trustee would still need to join in any decision to benefit Ms Formannoij, given the default requirement for unanimity.

[91] Compare *Goldie v Campbell* [2017] NZHC 1692, [2017] NZFLR 529 where Moore J, referring to a clause that requires there to be two or more trustees or a sole corporate trustee, said that "it can be logically inferred that the purpose of this provision is to protect against abuse by a sole trustee" (at [65](b)).

appointed) trustees of this trust, in common with many trustees of discretionary family trusts, are given.

70. It is submitted that, in view of these provisions, it would be improper for a trustee in Ms Formannoij's position – that is, a sole beneficiary-trustee required to comply with clause 26.1 – to attempt to appoint a corporate trustee under their own control, thereby avoiding the intended effect of the clause.

71. The respondents have relied on the proviso to clause 26.1: "unless a corporate body is the sole Trustee". The proviso did not apply here: Ms Formannoij was not a corporate body at the time the power was exercised.

72. That the deed provides for a situation in which a corporate body is the sole trustee does not mean that it impliedly authorises (or suggest it would be proper for) a trustee in Ms Formannoij's position to attempt to evade the evident purpose of the above restrictions in the deed or otherwise act for their own benefit. If it did, the controls against abuse in clause 26.1 and their "entrenchment" under clause 12.2(a) would be made redundant, given how easily they could be avoided.

73. The respondents have also relied on clause 27.2:

> 27.1 **Corporate bodies** Any properly empowered corporate body may act as the sole Trustee or as one of two or more corporate Trustees.
>
> 27.2 Provisions applicable when the Trustee is a corporate body:
>
> (a) **Disqualification of Trustee** Upon any change in the control or management of a corporate Trustee…
>
> (b) **No reinstatement** Any change in any order or circumstances which has disqualified any Trustee under this clause shall not result in the removal of such disqualification and the reinstatement of the Trustee concerned.
>
> (c) **Trustee/Beneficiary**: It is expressly declared a corporate Trustee may exercise all the powers and discretions vested in that Trustee by this deed and by law notwithstanding such exercise may in any way directly or indirectly benefit any Beneficiary who has any interest (contingent or otherwise) in that Trustee whether as director, officer, shareholder or otherwise however.

74. Clause 27.2(c) is not concerned with the power to appoint trustees or the purposes for which such appointments may be made. Clause 27.2 is directed at the powers of corporate trustees once properly appointed. The respondents' approach is inconsistent with the deed read as a whole and would, again, make clauses 26.1 and 12.2(a) redundant.[92]

Clause 18.1: self-benefit clause

75. Clause 18.1 supports the analysis above. It confirms that trustee-beneficiaries may not exercise their powers in their own interest, and that where there is a trustee who is a beneficiary there will be an additional decision-maker, consistent with clause 26. It provides a carve-out to the requirement that decisions be unanimous (clause 8.3), enabling a trustee who is a beneficiary to benefit from the trust, but only if the other trustee determines that is appropriate.

Context

76. The trustees chosen by Ricco to administer the Kaahu Trust on its establishment provide further evidence of the purpose ascribed to clause 26.1 and the trust generally advanced above.

77. Ricco established the Kaahu Trust with an independent trustee alongside himself and Ms Formannoij. At its inception, there was therefore an independent check on the management of the trust in the form of BOI (Mr Tyler). This structure is readily understandable given the tension that could arise between Ricco's children (or some of them) and Ms Formannoij.[93] Should Ricco die unexpectedly, both Ms Formannoij and BOI would remain the trustees. Ms Formannoij would not have sole control and should BOI

[92] Even if the proviso to clause 26 and clause 27.2(c) were taken to mean or imply that a beneficiary-trustee in Ms Formannoij's position could, in theory, properly appoint themselves in corporate form in order to secure sole control of the trust, it would remain improper to take that step in order to benefit oneself. As submitted above, that is what the appellants say occurred here.

[93] See Formannoij affidavit dated 26 March 2021 at [11]-[13], [201.0102] at [201.0104]; Laila Legler Klaui affidavit dated 16 April 2021 at [3]-[8], [201.0004] at [201.0006].

resign for whatever reason, Ms Formannoij would still have to comply with clause 26.1) .

78. Ricco established the Horowai Family Trust about a year prior and chose to use a single corporate trustee, with himself and Li as directors. There was no independent trustee. Ricco could have adopted a similar structure for Kaahu, i.e., a single corporate trustee with himself and Ms Formannoij as its directors, had the intention been that Ms Formannoij would be able to control the trust in the event of Ricco's death. The Kaahu Trust was structured to avoid such an outcome.

Ms Formannoij exercised the power to take control of the trust

79. Ms Formannoij exercised the power for the purposes of taking control of the trust through a company under her control. That is what she set out to do by appointing KTL and then immediately resigning and procuring KTL to discharge herself as a trustee. It is what she was advised by WRMK she would achieve by taking these steps; once her company was sole corporate trustee, she could then, through her company, exercise all of the trustee's powers, including to remove beneficiaries and distribute the trust property.

80. Ms Formannoij accepted that she understood WRMK to be advising her that, in the structure proposed, she would be "entitled to act alone".[94] She "understood that to be different from having an independent trustee" alongside her,[95] which is what her previous advisors, including the drafter of the trust deed, said was required and the "intent of the trust document". As noted above, this is one of the reasons she used the word "simplify".[96]

Case examples of application of proper purpose rule to power to appoint trustees

81. Several New Zealand cases have considered the proper purpose rule in the context of powers to appoint trustees. In *Brkic v White*, the Court of Appeal and High Court held that a person who exercised their power of appointment

[94] NOE at 115/25-27 [201.0129] at [201.0158].
[95] NOE at 115/28-30 [[201.0129]] at [[201.0158]].
[96] NOE at 115/30-34 [201.0129] at [201.0158].

to appoint a sole corporate trustee under their control would be committing a fraud on a power.[97]

82. The defendants had sought to enforce a debt owed by Ms White personally against property held by her as trustee. They argued Ms White retained unfettered powers over the trust's property, making the trust analogous to that in *Clayton* and giving Ms White powers tantamount to ownership.[98] Key to this claim was the argument that the deed permitted Ms White to appoint a sole corporate trustee under her control, through which she would be able to procure the exercise of powers in her own favour.

83. The deed gave Ms White a personal power as settlor to appoint and remove trustees.[99] It permitted appointment of a sole corporate trustee "[n]otwithstanding anything contained or implied in this deed".[100] There was to be a minimum of two individual trustees or a sole corporate trustee.

84. The power of appointment was expressly general and the holder could, "subject to any contrary intention expressed in that deed (if any) transferring the power to that person, exercise that power in favour of himself or herself".[101] However, the deed contained clauses providing that no trustee who was also a beneficiary could exercise a power in her own favour; but the other trustee(s) could do so. The Court of Appeal referred to this as a "No Self Benefit" clause.[102] The Court considered that:[103]

(1) The power to appoint trustees was fiduciary.

(2) The use of the power of appointment to appoint a sole corporate trustee controlled by a beneficiary would be the "sole route by which Ms White could avoid the restriction of the no self-benefit clause".

97 *White v Brkic* [2021] NZCA 670; *Brkic v White* [2021] NZHC 919.

98 *Clayton v Clayton* [2016] NZSC 29, [2016] 1 NZLR 551.

99 *White v Brkic* [2021] NZCA 670 at [8].

100 At [17](c).

101 At [8].

102 At [10].

103 At [35].

Exercise of the power to avoid the restrictions of the no-self benefit clause would therefore be a fraud on a power regardless of whether the power to appoint was fiduciary or not.

85. As in *Brkic*, the only way for a trustee of the Kaahu Trust in Ms Formannoij's position to avoid the limits on control and self-benefit in the deed, here found in clauses 18.1, 26.1 and 12.2, would be to appoint a corporate trustee under his or her sole control.

86. The High Court in *Goldie v Campbell* [2017] NZHC 1692 reached a similar result. There, the deed precluded appointment of a sole *non*-corporate trustee and limited self-dealing. Moore J concluded that in the context of the trust deed, if the beneficiary/settlor were to appoint a sole corporate trustee under his control so that he could procure the exercise of powers in his favour, that appointment would be a fraud on a power:[104]

> [69] In this case, the trust deed expressly prohibited a trustee from exercising any power or discretion in his or her favour. If Mr Campbell was to appoint a sole corporate trustee under his control so that he could procure the exercise of trustee powers or discretion in his favour, then, to borrow the language of Tipping J, the corporate trustee would be "simply a vehicle through or by means of whom the appointor's purpose of benefiting [himself] is carried out". That would be a clandestine excessive execution because it would appear regular on its face but in reality would be undertaken for a purpose not within the donor's mandate.

87. At first instance, Downs J distinguished *Goldie* on the bases that (a) the context was different – there, the case was about whether Mr Campbell had property interests by virtue of his powers in relation to the family trust; (b) the self-dealing clause was "more restrictive" than clause 18.1, and (c) the deed in *Goldie* did not contain a clause like 27.2(c). However:

    (1) As to (a): the issue was also whether the appointment by the person with a power to appoint trustees of a sole corporate trustee under their control would be a fraud on a power; relevantly, the Court was

[104] *Goldie v Campbell* [2017] NZHC 1692, [2017] NZFLR 529 at [69].

concerned that if it were not, Mr Campbell's powers would amount to property interests.

(2) As to (b): while clause 18 may be less clearly worded than that in the *Goldie* deed, its effect is still to confirm that trustees may not exercise powers for their own benefit.

(3) As to (c): clause 27.2(c) is addressed above. It does not authorise what occurred here or otherwise suggest it was proper.

88. The issue also arose in *Austec Wagga Wagga Pty Ltd v Rarebreed Wagga Pty Ltd* [2012] NSWSC 343. That case concerned a discretionary family trust. The beneficiaries were Mr and Mrs Cullen and their children. The power of appointment was vested in Mr Cullen. The deed provided that the power "shall not be exercised in favour of… the person exercising the power of appointment". The Court noted that that prohibition was "consistent with, and indeed reflects, the law that the power to remove and appoint a trustee must be exercised for the benefit of the beneficiaries of the Trust, and not for the benefit of the appointor."[105]

89. The trustee, Austec, carried on a business. Mrs Cullen was the director. There was dispute between Mr and Mrs Cullen over the operation of the business. Mr Cullen attempted to appoint a company, "Rarebreed", under his control as trustee in place of Austec. At issue was whether that appointment was ultra vires and a fraud on the power. The Court held:[106]

> [B]y purporting to appoint Rarebreed as trustee of the Trust, Mr Cullen was purporting to exercise the power in his own favour…Mr Cullen purported to appoint Rarebreed as trustee so that in the face of the increasingly acrimonious relationship he had with Mrs Cullen, he could assume control of the business. He may well have believed that it was in the best interests of the Business that he take such control, and he may be right about that. But that is not the point. By reason of cl 6(iii) of the Deed he was not permitted to exercise

[105] At [50].

[106] At [55]-[71].

> his appointment in his own favour. I think it plain that he has purported to do so. For the same reasons, my opinion is that Mr Cullen's purported appointment of Rarebreed as trustee of the Trust was a fraud on the power of appointment.…In my opinion, Mr Cullen's purported appointment of Rarebreed was not a step taken by him to promote the objects of the trust. Rather, it was to ensure that he achieved control of the Trust and thus the Business. It follows, in my opinion, that Mr Cullen's purported appointment of Rarebreed was of no effect.

90. *Austec* also supports the appeal. Ms Formannoij's appointment of KTL was "not a step taken by [her] to promote the objects of the trust. Rather, it was to ensure that [she] achieved control of the Trust". By doing so, she would be able to advance her own interests.

91. The respondents have relied on the High Court of Australia's (**HCA's**) decision in *Montevento Holdings Pty Ltd v Scaffidi* [2012] HCA 48.

92. That case did not concern the fraud on a power doctrine. It concerned the construction of the following clause: "[i]f, and so long as any individual Appointor is a Beneficiary that individual shall not be eligible to be appointed as a Trustee".[107] The HCA held that, on its proper construction, the clause did not prevent the appointor, who was a beneficiary, appointing a company under his control. That was said to be the natural and ordinary meaning of the clause and supported by the fact the deed repeatedly distinguished between "individuals" and corporations.[108] This was the "critical point which [was] sufficient to determine [the] appeal".[109]

93. The HCA's decision is therefore of little assistance. The party challenging the appointment of the company had not sought to rely on the fraud on a power doctrine at first instance or on appeal.[110]

[107] At [4].

[108] At [25].

[109] At [22].

[110] *Montevento Holdings Pty Ltd v Scaffidi Holdings Pty Ltd* [2011] WASCA 146 at [98] ("I merely note, for completeness, that before the primary judge and this court counsel for Giuseppe

Appointment of an independent trustee

94. If Ms Formannoij's appointment of KTL was for an improper purpose and therefore ineffective, the result will be that Ms Formannoij personally will be "restored" as trustee. The deeds executed by Ms Formannoij through KTL after the appointment, including the deed removing all beneficiaries other than Ms Formannoij, will be void. That will "restore" Ricco's children and grandchildren as beneficiaries of the Kaahu Trust.

95. The appellants seek the appointment of an independent trustee in place of Ms Formannoij or, in the alternative, in addition to her. Perpetual Guardian had previously confirmed its consent to appointment as either the trustee or as an additional trustee.[111]

96. The Court has both a statutory[112] and inherent power to remove and appoint trustees.[113] The inherent jurisdiction is derived from the Court's general supervisory jurisdiction over trusts.[114]

97. The relevant principles are well established. The focus is on the welfare of the beneficiaries.[115] The Court of Appeal in *Tod v Tod* [2015] NZCA 501, [2017] 2 NZLR 145 endorsed the following summary:[116]

> (a) The starting point is the Court's duty to see estates properly administered and trusts properly executed.

did not challenge the validity of Eugenio's appointment of Montevento as Trustee on the basis of the doctrine of a fraud on the power") and [182] ("Mr Scaffidi in submissions disavowed any reliance on the doctrine of fraud on the power"). Given the position taken by the challenging party, including at first instance, little weight should be given to the first instance Judge's comment that "there is simply no evidence which would justify a finding that Mr Eugenio Scaffidi had appointed Montevento for an improper purpose": *Montevento Holdings Pty Ltd v Scaffidi Holdings Pty Ltd* [2010] WASC 180 at [34].

111 [304.1000] (statement of consent to appointment).

112 Section 112 of the Trusts Act 2019 and s 51 of the Trustee Act 1956. It does not matter which section applies here, given the test is the same and given the Court has, in any event, its inherent jurisdiction.

113 *Kain v Hutton* CA23/01, 25 July 2002.

114 Ibid.

115 *Kain v Hutton* CA23/01, 25 July 2002; *Letterstedt v Broers* (1884) 9 App Cas 371; *Hunter v Hunter* [1938] NZLR 520.

116 At [22]. The Court took this summary from *Farquhar v Nunns* [2013] NZHC 1670 (Heath J).

(b) This jurisdiction involves a large discretion which is heavily fact-dependent.

(c) The wishes of the testator/settlor (evidenced by the appointment of a particular executor or trustee) are to be given consideration, but ultimately the question is as to what is expedient in the interests of the beneficiaries.

(d) Expedience is a lower threshold than necessity, and imports considerations of suitability, practicality and efficiency. Misconduct, breach of trust, dishonesty, or unfitness need not be established.

(e) Hostility as between administrators/trustees and beneficiaries is not of itself a reason for removal, but hostility will assume relevance if and when it risks prejudicing the interests of the beneficiaries.

98. In cases of misconduct, the court has no difficulty in removing trustees, at least where such conduct shows "a want of proper capacity to execute the duties [of trust], or a want of reasonable fidelity".[117]

99. Here, if the Court concludes that Ms Formannoij misconducted herself in the way alleged – that is, exercised her power for her own benefit or otherwise contrary to the evident purpose of the deed's safeguards against sole beneficiary control and abuse – then it is submitted the case is made for her replacement with an independent trustee. Ms Formannoij's subsequent actions in March 2020 confirm that the Court cannot be satisfied that she will properly execute the trust for the benefit of the beneficiaries as a whole and act impartially towards all beneficiaries.

100. Further, by taking the steps she has, Ms Formannoij has acted in a manner contrary to what she said was the "whole purpose" of the Kaahu Trust: that is, that the trust property "go to the children" after Ricco's and her death.[118]

[117] *Kain v Hutton* CA23/01, 25 July 2002 at [19], quoting *Letterstedt v Broers* (1884) 9 App Cas 371 at 385-386.

[118] See above at fn 12 and NOE at 125/13-18 [201.0129] at [201.0168] ("I wanted for the kids to have, when i die, to have the money and the property at the end") and NOE at 130/27 – 131/3 [201.0174] at [201.0176] ("when I die, that the monies would go to the children and the house would go back to the children, so all the

It is relevant "misconduct" for a trustee to act directly contrary to what they believe to be the purpose of the trust.

101. The "acrimony"[119] and breakdown in trust between the Ms Formannoij on the one hand and the other beneficiaries on the other supports the case for the appointment of an independent trustee.

102. Ms Formannoij explained her actions of March 2020 by saying she wanted to achieve a "clean break"[120] and to "sever" the link with Ricco's children.[121] She said she felt "assaulted" by letters from Laila's lawyers and that they "caused me great personal stress and unhappiness".[122]

103. Ms Formannoij also confirmed that she felt that Ricco's children had "had enough"[123] and that she felt strongly that the children have been "ungrateful".[124] Ms Formannoij's attempt to remove the other beneficiaries is evidence that she believes they should not be beneficiaries.

104. It is submitted that the Court cannot, in view of those comments and actions, be satisfied that Ms Formannoij will be able to comply with her duties, including of even-handedness, towards the beneficiaries.

105. It is further submitted that the above matters make it expedient to remove Ms Formannoij entirely rather than simply appoint an independent trustee alongside her. If Ms Formannoij remains a trustee, she will be able to use her position to block any decisions in the other beneficiaries' favour.

residue of my money and the house…That was the whole purpose of the Kaahu Trust. It was set up for Ricco and I but at our death it would go to the children").

[119] Formannoij affidavit dated 26 March 2021 at [3](e) (referring to the "acrimony with Ricco's children"), [201.0102]

[120] NOE at 124/15-23 [201.0129] at [201.0167].

[121] Formannoij affidavit at [99] (referring to severing the link between the Kaahu Trust and Ricco's children) [201.0102] at [201.0120].

[122] Formannoij affidavit at [52], [201.0102] at [201.0111] and NOE at 128/24-35 [201.0129] at [201.0171]. Ms Formannoij showed particular ill-feeling towards Ricco's daughter, Laila: See NOE at 129/4-130/3 [201.0129] at [201.0172]. See also Reply Affidavit of Laila Legler at [4]-[8], [201.0004] at [201.0005] and Formannoij Affidavit at [11]-[12], [201.0101] at [201.0104]. Whatever the justification for that ill-feeling (and it is strongly disputed), it plainly exists.

[123] NOE at 100/4-9 [201.0129] at [201.0143].

[124] NOE at 128/23 [201.0129] at [201.0171].

106. Turning to who to appoint, the Court of Appeal has said that the task is "to appoint the person or persons best suited to administer the Trust in the circumstances prevailing".[125] Courts are to be guided by the three considerations set out in *Re Tempest*, namely:[126] (a) the settlor's intentions regarding the trustees;[127] (b) neutrality;[128] and (c) promotion of the purposes of the trust.

107. It is submitted that an independent trustee, such as Perpetual Guardian, would be most appropriate in terms of those factors:

    (1) Ricco created a trust with an independent trustee in place, and placed controls on the ability of trustees to benefit themselves.

    (2) An independent trustee will be neutral.

    (3) There is no dispute that the purpose of the Kaahu trust included providing Ricco and Ms Formannoij – and now, in his absence, Ms Formannoij – with a home and an income for the rest of her life. The appellants have never questioned that, as was made clear by Li on their behalf.[129] They simply seek to "put things back the way they were…the way our father decided them to be."[130]

108. Accordingly, there can be comfort that an independent trustee would continue to provide for Ms Formannoij, given all beneficiaries support that. There also appears to be no dispute that the capital should be left to the children when Ms Formannoij dies, and that this would be consistent with the purpose of the trust.[131]

[125] *Mendelssohn v Centrepoint Community Growth Trust* [1999] 2 NZLR 88 (CA) at 97.
[126] Ibid at 97-98.
[127] Ibid at 97-98 (": "[i]f... it can be seen that either expressly or implicitly the author [of the trust] intended the trustees to be of a certain description, the Court will give considerable weight to that expression of the author's wishes").
[128] Ibid at 98 ("trustees must be neutral and even-handed as between beneficiaries with different interests"). See also *Guest v Warner* [2018] NZAR 423 (HC) at [26] ("Courts typically refuse to appoint beneficiaries (or their spouses or relatives or advisors)").
[129] Li Legler affidavit at [14] and [19] [201.0057] at [201.0060].
[130] NOE at 80/16-18 (Li Kari Legler) [201.0067] at [201.0099].
[131] See above at [12].

Costs

109. It is respectfully proposed that costs be addressed following the Court's substantive decision and by the exchange of memoranda.

Dated 30 June 2023

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DR Bigio KC/JWH Little
Counsel for the appellants

Certification as to publication per Supreme Court Submissions Practice Note

Having made appropriate inquiries to ascertain whether this submission contains any suppressed information, we certify that, to the best of our knowledge, the submission is suitable for publication (that is, it does not contain any suppressed information).

Dated 21 September 2023

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DR Bigio KC/JWH Little
Counsel for the appellants