

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

OUTLINE OF ORAL ARGUMENT FOR APPELLANTS

DATED 9 OCTOBER 2023

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Proper purpose rule

1. Rule to prevent abuse of power. Not about fraud: purpose can be improper even if honest. *Grand View* at [55]-[61].
2. Proper purposes determined objectively at date power conferred. Terms of the instrument, nature of power, context relevant: *ibid* at [61], [77].

Context and trust deed

3. Ricco Legler established Kaahu Trust with inheritance (201.0057 at 201.0059). Identified as settlor at time in documents signed by first respondent (301.0047 at B and 301.0053 at B).
4. Trust deed (301.0027). Original trustees Mr Legler, first respondent, BOI (independent). Discretionary beneficiaries: Mr Legler, first respondent and children. "Final beneficiaries" named as Mr Legler and first respondent but include children as Mr Legler's issue: cl 6.1.
5. Power of appointment of trustees vested in Mr Legler but if died on remaining trustees (not first respondent): cl 23.10.
6. Mr Legler died and BOI later resigned. As sole non-corporate trustee, first respondent could not exercise any power other than to appoint additional trustee: cl 26.1(a). The additional trustee could not be beneficiary, related to beneficiary/trustee, in relationship with beneficiary/trustee, etc.: cl 26.1(b). Only the additional trustee could exercise powers in first respondent's favour: cl 18.1. Clause 12.2 entrenched clause 26.1 – it could not be varied by the trustees.
7. Nature of power: fiduciary. 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 interests": *NZMC v Foulkes* at [22]-[24].

8. Must be exercised in “interests of beneficiaries as a whole” rather than own interest, even if the trustee is a beneficiary: *Lewin* at [15-048]. Language of “objects” inapposite; not dispositive power.

Abuse of power of appointment

9. First respondent abused power by appointing herself in corporate form as second trustee to secure sole control of the trust. Gave her a power (absolute control) that trust deed expressly prevented her from having as a natural person. Transparent workaround of clause 26.1.
10. Exercised power for own benefit, not beneficiaries as a whole. Only first respondent who could and did benefit from the appointment: did not need to appoint corporate trustee to allow her to discharge trustee duties towards other beneficiaries. Objective was to allow her to act in her self-interest unfettered by independent trustee. 201.0102 at 201.0117: WRMK advice “gave me confidence that *my interests* were being looked after”. Decision made in context of dispute and questions from beneficiaries about the trust. Subs at [46].
11. Purpose evidenced by what she was considering at the time of appointment and reinforced by what she did after taking control: benefits herself to the exclusion of all other beneficiaries as soon as appointment questioned. Subs at [29]-[32]. Children removed as beneficiaries, incl as final beneficiaries, even though she agreed them being such was one of the purposes of the trust (201.0176 and 201.0106).
12. No evidence from first respondent that she appointed KTL for any proper purpose / to benefit beneficiaries as a whole. Her evidence was that appointing KTL would “simplify” matters; see also reference to WRMK advice and “my interests” above. Subs at [46]-[48], [50]. Compare advice from long-time lawyer and drafter of deed (“intent of the trust document is that there will at all times be an independent trustee”) and Graham Jordan, previous legal advisor, to same effect. Subs at [80].

Responses

13. Rs say first respondent “*the purpose of the trust*”, its “primary beneficiary”; that the “trust’s purpose” was “her welfare”: R subs at [64], [76], [101]. That “Ricco and Marina” established Kaahu “for themselves”: [11].
14. Not consistent with trust deed: no “primary” beneficiary; children discretionary and (as Ricco’s issue) final beneficiaries. Not consistent with evidence: see Li Legler evidence (201.0057 at 201.0060); first respondent’s own evidence (“whole purpose” of trust was that assets left for children: 201.0174 at 201.0176; 201.0102 at 201.0106); distributions from Kaahu for benefit of children (201.0057 at 201.0060); when Ricco alive, children’s removal never contemplated (201.0129 at 201.0139 and 201.0141).
15. Rs say it was not put to first respondent that exercised power for own benefit. Own evidence contained admissions (above). Blanket denial would still have been against the weight of the evidence.
16. Rs rely on proviso to clause 26.1. Irrelevant: did not apply as first respondent not sole corporate trustee.
17. Rs rely on clause 27.2. Also irrelevant: authorises corporate trustee to exercise power even if benefits officer/shareholder. Presupposes corporate trustee has been validly appointed: not the case here. Does not override clause 26.1 or authorise non-corporate trustee in first respondent’s position to subvert that clause.
18. Rs reject “beneficiaries as a whole” requirement and say self-benefit permitted if a beneficiary. Inconsistent with fiduciary nature of power and settled authority: *NZMC; White; Harre; Goldie; Carmine; Lewin* at [15-048].

Dated 9 October 2023

**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 outline contains any suppressed information, we certify that, to the best of our knowledge, the outline is suitable for publication (that is, it does not contain any suppressed information).

Dated 11 October 2023

**DR Bigio KC/JWH Little
Counsel for the appellants**