

In the Supreme Court of New Zealand

I Te Kōti Mana Nui

SC 8/2023

Between **Ken Legler and Laila Sun Legler Klau**
Applicants

And **Maria Guillaumina Cornelia Johanna Formannoj**
First Respondent

And **Kaahu Trustee Limited** as trustee of the **Kaahu Trust**
Second Respondent

RESPONDENTS' SUBMISSIONS

Dated: 24 July 2023

Martelli McKegg
Lawyers
Auckland
Solicitor: E R Foster
Counsel Acting:
J D McBride / R C Woods

Phone: +64-9-379 7333
Fax: +64-9-309 4112
PO Box 5745
Victoria Street West
Auckland 1142
DX CP24036

TABLE OF CONTENTS

A. Introduction	1
B. Summary of Maria's argument	3
C. Relevant facts	4
<i>Ricco and Maria</i>	4
<i>The 2003 relationship property sharing agreement</i>	4
<i>Horowai and Kaahu</i>	5
<i>Horowai's "legacy" farm and forestry blocks</i>	8
<i>Ricco's death</i>	10
<i>BOI resigns as trustee</i>	12
<i>WRMK recommend appointing KTL</i>	13
D. The proper purpose rule.....	18
<i>The purpose of the power – the terms of the trust</i>	20
<i>The purpose of the power – the settlor's intentions and context</i> .	23
<i>The appointment of KTL</i>	24
E. Maria's subjective intentions	25
F. The "best interests of the beneficiaries as a whole"	26
G. Relief.....	30

MAY IT PLEASE THE COURT

A. Introduction

1. This appeal concerns:
 - (a) whether a trustee will be acting for an improper purpose if they exercise a discretion to benefit themselves, in circumstances where they are the primary beneficiary and object of the trust;
 - (b) whether, as a matter of fact, the first respondent (**Maria**) intended to benefit herself when she appointed the second respondent (**KTL**) as the sole trustee of the Kaahu Trust (**Kaahu**); and
 - (c) how a trustee is expected to act “in the best interests of the beneficiaries as a whole” when exercising a discretionary power, and whether Maria did so.
2. The appellants plead just one cause of action, “fraud on a power” (although they now prefer the term “improper purpose”). They say:
 - (a) Maria was required to exercise her power to appoint new trustees of Kaahu “in good faith, for proper purposes and in the best interests of the beneficiaries as a whole”;¹
 - (b) Maria’s purpose in “replacing herself as sole trustee with a company under her control was to evade the limits in clause 18.1 of the trust deed and in the law on her ability as trustee to use the trust property to benefit herself”;² and
 - (c) Maria’s “appointment of [KTL] as trustee of the Kaahu Trust in her place complied with none of the requirements referred to

¹ Statement of claim, [[101.0003]], at [20].

² At [22].

at paragraph [2(a)] above, was for her own benefit, and so was a fraud on her power of appointment”.³

3. These allegations conflate a number of different duties, including the duties of loyalty to the interests of the beneficiaries, fidelity to the terms of the trust, and the obligation to act for a proper purpose.⁴ The only pleaded cause of action, however, is “fraud on a power”.⁵ The appellants say that either:
 - (a) Maria’s 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;⁶ or
 - (b) Maria’s “purposes of taking control of the trust” were contrary to the intent of Kaahu’s “settlor” (meaning her late husband, **Ricco**).⁷ This allegation is not pleaded and is new.
4. This “improper purpose” pleading necessarily assumes that Maria’s actions were within the powers conferred on her by the trust deed. The distinction between an unauthorised act and an improper purpose was emphasised by both Lord Sumption in *Eclairs Group Ltd v JKX Oil and Gas plc* and Tipping J in *Kain v Hutton*.⁸ One cannot abuse a power one does not have.⁹ There is no claim that Maria breached clause 18.1 of the trust deed when she selected KTL. Rather, it is said she was trying to “evade” it.

³ Statement of claim, [[101.0003]], at [23].

⁴ Cf the Companies Act 1993, which distinguishes between the duty to act in good faith and in what the director believes to be the best interests of the company (s 131), and the duty to exercise powers for a proper purpose (s 133). The Trusts Act 2019, which does not apply to this appeal, makes the same distinction, at ss 26 and 27.

⁵ The term used in *Goldie v Campbell* [2017] NZHC 1692, [2017] NZFLR 528.

⁶ At [6] of their submissions.

⁷ At [8] of their submissions.

⁸ *Eclairs Group Ltd v JKX Oil and Gas plc* [2015] UKSC 71, [2016] 3 All ER 641 at [15]; and *Kain v Hutton* [2008] NZSC 61, at [47].

⁹ The Court of Appeal agreed: [[101.0044]] at [21].

B. Summary of Maria's argument

5. Maria says:

- (a) the appellants' summary of facts omits material contextual matters relevant to the purpose of Kaahu, including the significance of the "two trust" structure, by which the "legacy" farm and forestry properties were held for the appellants' benefit, in a separate trust;
- (b) she was only required to find a new trustee after Kaahu's other trustee, a company directed by her accountant, resigned;
- (c) Kaahu's new trustee did not have to be "independent", but simply a non-beneficiary and not a member of the specifically excluded class under clause 26.1(b);
- (d) Kaahu's trust deed expressly contemplated that the new trustee could be a company directed by a beneficiary, and that such company could benefit its beneficiary/director;
- (e) In any case, it would not be an improper purpose for a trustee to wish to benefit themselves if they were a primary object of the trust and, after Ricco's death, she was that primary object;
- (f) in any case, an improper purpose is not to be inferred, it must be proved, and the appellants have failed to prove any intention to self-benefit or any other improper purpose such as "taking control"; and
- (g) a trustee's obligation to act in "the best interests of the beneficiaries as a whole" describes an obligation to act in accordance with the overall purpose of the trust, meaning at least one identified beneficiary must benefit from an exercise of a discretionary power, rather than an obligation to ensure every exercise of every discretion benefits every discretionary beneficiary, considered as a class.

C. Relevant facts

Ricco and Maria

6. Ricco and Maria met in the Caribbean in the late 1980s.¹⁰ They moved to New Zealand in 1991. Ricco purchased forestry blocks and a farm on the Purerua Peninsula in the Bay of Islands. Ricco and Maria lived in the farmhouse on the farm.
7. Ricco had three children from his first marriage, Ken, Li, and Laila.¹¹ They also moved to New Zealand. Maria has no children.
8. Ricco's father died in 2002, leaving Ricco a substantial inheritance. Ricco used this inheritance to pay off debts owing on the farm and forestry properties.¹²

The 2003 relationship property sharing agreement

9. On 10 July 2003, Ricco and Maria signed a relationship property sharing agreement by which they contracted out of the Property (Relationships) Act 1976. Ricco acknowledged Maria as his de facto partner, and agreed that she would be given a significant share of the farm and forest properties, if he died.¹³
10. As Maria explained, it was important to her that she would be provided for, in the event of Ricco's death.¹⁴ That became even more important, as their relationship with Laila deteriorated.¹⁵
11. The 2003 deed was never given effect to. In 2007, Ricco and Maria decided to establish a "two trust" structure instead, with one

¹⁰ [[201.0103]] at [4].

¹¹ All three children were originally named as plaintiffs. This appeal is continued by Ken and Laila alone; Li is no longer a party.

¹² [[201.0123]] at [8] and [9].

¹³ [[201.0123]], at [11]; [[304.0975]].

¹⁴ [[201.0124]], at [18].

¹⁵ Accepted by Li in cross-examination: [[201.0073]] at lines 9 to 11.

trust for Ricco's children and a separate trust for themselves.¹⁶

Horowai and Kaahu

12. Maria knew the "two trust" structure was different to that described in the 2003 agreement. There would be a trust for her and Ricco, and a separate one for the children.¹⁷
13. Maria also acknowledged that, once she died, the residue of her and Ricco's trust would pass to Ricco's children.¹⁸
14. Ricco and Maria implemented this new structure, with two new trusts settled in 2007 and 2008. On 2 March 2007, the "Horowai Family Trust" (**Horowai**) was declared by Horowai Trustee Co Limited (**HTC**).¹⁹ Ricco and Li were the original directors of HTC.²⁰ The named "Final Beneficiaries" were Ricco, Li, Ken, and Laila.
15. Maria was not a final beneficiary of Horowai, but had standing as a discretionary beneficiary, as Ricco's de facto partner. Once Ricco had himself excluded as a beneficiary of Horowai (discussed below at 24(a)), Maria had no direct connection to Horowai.
16. Kaahu was declared the following year, on 9 June 2008.²¹ The appellants maintain that Ricco alone settled Kaahu and that it was "Ricco's trust".²² In fact, the trust was declared by Ricco, Maria, and a company, Bay of Islands Taxation Trustee No. 2 Limited

¹⁶ [[201.0105]] at [20].

¹⁷ [[201.0124]] at [17]. There is no evidence of any estate planning advice about this to Ricco and Maria at the time. All relevant legal advice was provided by way of discovery to the appellants, and any privilege waived [[201.0125]], at [20].

¹⁸ [[201.0124]] at [16] to [19].

¹⁹ [[301.0006]]. "Horowai" means "waterfall".

²⁰ [[201.0040]] at lines 3 to 16.

²¹ [[301.0027]]. "Kaahu" means "hawk".

²² Appellants' submissions at [11]. See also Laila cross-examination: [[201.0037]] at lines 17 to 23.

(BOI), directed by their accountant, Philip Tyler.²³ Maria was thus one of the three original settlers.

17. Kaahu was not described as a “family” trust. It did not have a company operating as its sole trustee. It was administered by Ricco, Maria, and Mr Tyler. The “Final Beneficiaries” of Kaahu were Ricco and Maria.²⁴ Kaahu’s “discretionary beneficiaries” included not only the “Final Beneficiaries”, but also “any issue of any Final Beneficiary” and, thus, Ricco’s children.
18. The trust deeds for Horowai and Kaahu were otherwise almost identical:
 - (a) if there were two or more trustees, decisions had to be unanimous;²⁵
 - (b) a corporate trustee could be appointed as the sole trustee;²⁶
 - (c) if there was a corporate trustee, there was no requirement for an additional “non-beneficiary” trustee, or for the board of directors of the corporate trustee to include a “non-beneficiary”;²⁷
 - (d) the corporate trustee could be directed and owned by beneficiaries and could exercise powers in favour of those beneficiaries;²⁸
 - (e) trustees could act and exercise all of their powers and

²³ [[301.0031]] at [3.1]. Maria rejected the suggestion that “it was actually Ricco who settled the Kaahu Trust” in cross-examination: [[201.0133]] at lines 24 to 25.

²⁴ [[301.0030]].

²⁵ Kaahu: [[301.0034]], at [8.3]. Horowai: [[301.0015]] at [8.3].

²⁶ Kaahu: [[301.0043]] at [27.1]. Horowai: [[301.0025]] at [26.1].

²⁷ Kaahu: [[301.0043]], at [26.1]. Horowai: [[301.0025]] at [26.2]. Horowai uses the term “independent”, but this is defined in similar terms to Kaahu – someone who is not a beneficiary or a parent, child or spouse of a beneficiary.

²⁸ Kaahu: [[301.0043]] at [26.1]. Horowai: [[301.0044]] at [27.2(c)].

discretions even though there was a conflict between the trustee's own interests and any beneficiary;²⁹

- (f) except as expressly provided, all powers or discretions vested in the trustees by any clause were not in any way limited or restricted by the interpretation of any other clause;³⁰
- (g) the interpretation of the trust deed in cases of doubt was to favour the broadening of the powers and the restricting of the liabilities of the trustees;³¹ and
- (h) the trustees had absolute and unlimited discretions as to how they exercised their powers.³²

19. The two trust deeds contained slightly different provisions regulating "trustee/beneficiary" transactions. The Horowai deed stipulated that "Any power or discretion vested in the Trustees may be exercised in favour of or for the benefit of a Beneficiary who is also a Trustee".³³ The Kaahu deed said "Any 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".³⁴ It is unclear how these provisions were intended to work in practice, given that both trusts required trustee decisions to be unanimous, in which case any trustee beneficiaries would still have to approve the exercise of any power or decision in their favour. But in any case, no breach of clause 18.1 is alleged.

²⁹ Kaahu: [[301.0039]] at [20.1(d)]. Horowai: [[301.0020]] at [19.1(d)].

³⁰ Kaahu: [[301.0031]] at [2.2]. Horowai: [[301.0011]] at [2.2].

³¹ Kaahu: [[301.0031]] at [2.2]. Horowai: [[301.0011]] at [2.2].

³² Kaahu: [[301.0034]] at [8.2].

³³ [[301.0019]], at [17.2].

³⁴ [[301.0038]] at [18.1].

Horowai’s “legacy” farm and forestry blocks

20. At the time of the establishment of the Kaahu and Horowai trusts, Ricco still owned the farm and forestry block on the Purerua Peninsula.³⁵ Having established the two trust structure, Ricco and Maria commenced moving these properties across to the two trusts, as described by Mr Tyler in his unchallenged evidence.³⁶
21. The transfers to the trusts occurred in stages:
- (a) on 1 September 2008, Ricco sold Horowai the 215 hectare forestry block on the peninsula;³⁷ and
 - (b) the adjacent farm, comprising an additional 61.6 hectares, was sold to Kaahu and subdivided into two titles. Lot 2 (some 20 hectares and including the farmhouse where Ricco and Maria had lived) was sold to Horowai. Lot 1 (the remaining 40 hectares) was sold to a third party for \$3.1m in 2015.³⁸
22. The proceeds from the sale of Lot 1 were used by Kaahu to buy land near Russell where Ricco and Maria had built a new home, known as “Mokomoko”. The balance of Kaahu’s assets comprised a managed fund which provided them with passive income.³⁹
23. Mr Tyler gave evidence that the intention was to “ring-fence” the farm and forestry assets for the children in Horowai, while Kaahu would provide for Ricco and Maria.⁴⁰ Li confirmed in cross-examination that the forest was intended as an intergenerational

³⁵ While they were in his name, Maria held entitlements to the properties, under the 2003 deed, in the event of Ricco’s death.

³⁶ [[201.0203]]. See also Maria’s account, at [[201.0110]] at [41] and following.

³⁷ Tyler evidence in chief: [[201.0203]] at [4.1].

³⁸ Maria evidence in chief: [[201.0110]] at [44] to [46].

³⁹ [[201.0109]] at [40] to [51].

⁴⁰ [[201.0202]] at [3]-[4].

asset that would benefit their future family.⁴¹

24. Two further steps were taken to sever ties between Horowai, and Ricco and Maria:
 - (a) on 30 May 2014, Ricco had himself excluded as a beneficiary of Horowai, telling Maria that this was to reflect his wish that Horowai was for the children, while Kaahu was for them;⁴² and
 - (b) in October or November 2016, Ricco advised his financial adviser, Alan Clarke, that he and Maria had decided to withdraw \$3 million from Kaahu's managed funds and transfer this to Horowai, to set his children up financially.⁴³ Part of this was intended to assist with the costs of managing the forest.
25. When the \$3 million gift to Horowai was discussed with the children in 2017, they agreed that none of them had any immediate need for that money. It was not advanced because of some pressing need for financial assistance.⁴⁴
26. Having established Horowai and transferred the properties and \$3 million across to it, Ricco told Mr Clarke that "he and Maria had finally (well and truly) set up his children financially".⁴⁵ Ricco said to Mr Clarke that "Maria and I can now get on with the rest of our lives using the funds in the Kaahu Trust for income and spending on ourselves for our lifetime".⁴⁶
27. Despite this evidence, the appellants maintain that Kaahu was

⁴¹ Li cross-examination: [[201.0070]], at lines 20-24.

⁴² [[201.0106]], at [27], [[301.0140]].

⁴³ [[201.0185]], at [11] to [17]. [[302.0373]].

⁴⁴ See Alan Clarke's notes [[302.0373]], Laila cross-examination [[201.0044]], Li cross-examination [[201.0094]] lines 23-29.

⁴⁵ [[201.0186]] at [19].

⁴⁶ [[201.0186]], at [20].

established to benefit Ricco, Maria, and the three children.⁴⁷ They submit that they “continued to benefit from distributions”, suggesting that they had an expectation that they would receive continuing day to day support from Kaahu, as and when it was required, and that the \$3 million was an example of this.⁴⁸

28. The contemporaneous documents do not support this narrative.⁴⁹ Nor does Mr Clarke’s or Mr Tyler’s evidence, which was not challenged in cross-examination.⁵⁰
29. As Lord Richards observed in *Grand View Private Trust Co Ltd v Wong*, the division of family wealth into these two parts, with wholly separate purposes and no suggestion in either trust deed that there was to be any link between them, is striking.⁵¹

Ricco’s death

30. Ricco was killed in a gliding accident on 16 November 2017.
31. On 13 March 2018, TGT Legal (then instructed by Laila) wrote to Maria and the other executor of Ricco’s estate, claiming that “From our preliminary view of the material made available to us by Laila, we see from Mr Legler’s will dated 30 May 2014 that he made no direct provision for any of his children, other than the gift to Li Karl Legler in clause 2.1 of this will”.⁵²
32. In 2018, Maria and Mr Tyler gifted Maria and Ricco’s large sailing catamaran (“Jimmy”) to the children and arranged for some of Ricco’s personal effects in Europe to be transferred to the

⁴⁷ Appellants’ submissions at [12].

⁴⁸ Appellants’ submissions at [16].

⁴⁹ [[302.0403]].

⁵⁰ [[201.0191]].

⁵¹ *Grand View Private Trust Co Limited v Wong* [2022] UKPC 47 at [84].

⁵² [[302.0432]].

children.⁵³ “Jimmy” was a catamaran that Ricco had designed and sailed on with Maria around the South Pacific Ocean.⁵⁴

33. On 22 August 2018, Laila’s solicitors wrote to Maria giving notice of a claim under the Family Protection Act 1955 against Ricco’s estate.⁵⁵ And on 4 September 2018, the same solicitors (TGT Legal) wrote to Dennis McBrearty (Ricco and Maria’s family solicitor), asserting that the children had an equal interest in Kaahu to Maria, that Mr Tyler’s company should not be making decisions about Kaahu, that it was unclear whether Maria had contributed anything to Kaahu (which was said to hold “legacy assets derived from Ricco’s family”), and asking that one of the children be appointed as a trustee to Kaahu.⁵⁶
34. On 1 November 2018, the estate’s solicitor, Graham Jordan, wrote to TGT Legal asking for some details as to Laila’s financial position.⁵⁷ That request was declined on 20 November 2018.⁵⁸
35. Despite Maria’s attempts in early 2019 to repair the relationship with the children,⁵⁹ her requests to talk with them met with resistance,⁶⁰ and, on 15 February 2019, TGT Legal wrote voicing a “very serious concern about the due administration of the Kaahu Trust”, because of a disagreement over how the \$3 million transfer to Horowai was to be treated for accounting purposes.⁶¹

⁵³ [[302.0441]], [[302.0442]], [[302.0443]], [[302.0444]], [[302.0446]], [[302.0447]], [[302.0448]].

⁵⁴ Li cross-examination: [[201.0090]] lines 2-14.

⁵⁵ [[302.0467]].

⁵⁶ [[302.0472]].

⁵⁷ [[302.0513]].

⁵⁸ [[302.0522]].

⁵⁹ [[303.0534]], [[303.0540]], and [[303.0548]].

⁶⁰ [[303.0541]].

⁶¹ [[303.0551]] and again at [[303.0552]].

36. Maria – an osteopath – was cross-examined about this issue and taxed as to which classification was correct.⁶² She was agnostic; her evidence was that, whatever the correct accounting treatment, she and Ricco wanted the children to have the \$3 million and that this was to be gifted to them, in addition to the farm and forest.⁶³

BOI resigns as trustee

37. Through the course of 2019, the children’s challenges to Maria’s administration of Ricco’s estate and Kaahu continued. Ultimately, in October 2019 Mr Tyler decided to have BOI resign as the other trustee of Kaahu. He told Maria this was because of the harassment from Ricco’s children.⁶⁴ Mr Tyler was not cross-examined on his evidence. Nor was Maria challenged on this.
38. BOI’s decision to resign left Maria as the sole trustee of Kaahu. She knew that this meant that she could not make any decisions as trustee of Kaahu, other than appointing a new trustee.⁶⁵
39. Initially, Maria sought another, non-beneficiary, trustee, to act alongside her, consistent with her understanding of what was required.⁶⁶ She asked her usual family lawyer, Mr McBrearty, to accept appointment, but he declined.⁶⁷ She approached and met with Perpetual Guardian, but became concerned at the high cost⁶⁸

⁶² [[201.0143]] at lines 20 to 34, to [[201.0148]].

⁶³ Graham Jordan, who acted for the executors of Ricco’s estate, thought the \$3 million was a personal withdrawal by Ricco in part payment of a loan owing to him by Kaahu, and which Ricco personally then gifted on to Horowai. See [[303.0667]] at [6] and also [[303.0734]] and [[303.0736]]. WRMK also found the issue difficult, despite there being “no doubt” that a gift from Ricco to his children was intended: [[303.0750]].

⁶⁴ [[201.0114]] at [73].

⁶⁵ [[301.0027]], clause 26.1(a) “Restriction on number and identity of Trustees”.

⁶⁶ [[201.0115]] at [75].

⁶⁷ [[201.0115]] at [76].

⁶⁸ [[303.0613]], describing an annual management charge of over \$15k, plus an investment management charge of at least \$5,750, and a 5% income management charge.

and whether they were a good fit for the role in any case.⁶⁹

40. It was never put to Maria in cross-examination that her attempts to find a new trustee were anything but genuine.⁷⁰ The increasing hostilities between Maria and the children made it very difficult to find someone to accept the role, other than an expensive professional trustee, whom she did not know.
41. This created a dilemma. Maria discussed her situation with Mr Clarke, her long-standing friend and trusted financial adviser. He suggested that she approach a reputable Whangārei law firm, WRMK Legal, as an alternative to Perpetual Guardian.⁷¹

WRMK recommend appointing KTL

42. Maria met with Neil McNabb and Tania Beckham at WRMK on 21 October 2019.⁷² WRMK advised Maria that there was a solution to the trustee vacancy issue; she could simply appoint a sole corporate trustee for Kaahu, with herself as the sole director.⁷³ As Maria explained in her evidence:⁷⁴

At this meeting, Tania and Neil told me that if I were to resign as a trustee of the Kaahu Trust in favour of a corporate trustee, it would be permissible pursuant to the terms of the trust deed for me to act as the sole director of this trustee company. They were very clear about this view. I am not a lawyer, and I of course trusted them and their advice to me that this was an appropriate way to proceed. The appointment of a sole corporate trustee appealed to me as I thought it would simplify matters relating to the Kaahu Trust.

43. This option had not previously been suggested to Maria. She went back to her original lawyer, Mr McBrearty of Law North Ltd,

⁶⁹ [[201.0115]] at [77]. See Maria cross-examination: [[201.0151]] at lines 25 to 29.

⁷⁰ [[101.0020]] at [50], [[201.0151]] lines 1 to 34.

⁷¹ [[201.0176]] at lines 12-21.

⁷² [[201.0116]] at [79].

⁷³ [[101.0020]] at [18].

⁷⁴ [[201.0116]] at [81].

to advise him of her decision to move her business to WRMK and to appoint a company as sole trustee, with a sole director, which would be her. Mr McBrearty counselled against this.⁷⁵ Maria forwarded his concerns to WRMK, who confirmed their earlier advice.⁷⁶ Mr McBrearty subsequently sent a formal memorandum to WRMK confirming his view on 7 November 2019.⁷⁷

44. WRMK, in the meantime, had written to Mr Tyler and asked him for copies of financial statements for both Kaahu and Horowai.⁷⁸ They made similar inquiries of Mr McBrearty.⁷⁹
45. WRMK wrote to Maria on 7 November 2019.⁸⁰ They confirmed their advice. They recommended appointing a new trustee company with Maria as sole director. The letter noted that, while Maria would have the ability to make all decisions affecting Kaahu, this was always 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, including Ricco's children and herself.
46. WRMK wrote again to Maria on 21 November 2019.⁸¹ They noted that she needed to appoint a new trustee, and that, per their earlier advice, they were now preparing to register a new company, KTL, of which she would be the sole director and which would become the sole trustee of Kaahu. The letter went on to ask whether WRMK should request financial statements for Horowai, given that she would need that information before

⁷⁵ [[303.0632]].

⁷⁶ [[303.0638]].

⁷⁷ [[303.0703]].

⁷⁸ [[303.0635]], letter dated 5 November 2018.

⁷⁹ [[303.0638]].

⁸⁰ [[303.0706]].

⁸¹ [[303.0725]].

making decisions regarding Kaahu. The letter concluded:⁸²

As discussed, please ask Graham [Jordan] to keep me in the loop with what he is doing. At this stage we are just changing the trusteeship. Once that is done, we will work with you to help you decide what to do with the trust assets.

47. Maria replied and confirmed that WRMK should request details of Horowai's financial statements.⁸³ Mr Tyler also agreed to ask for them.⁸⁴ Inquiries were made of Horowai's new accountants.⁸⁵
48. Following BOI's resignation,⁸⁶ Maria implemented WRMK's proposed structure, on 27 November 2019.⁸⁷ KTL was appointed sole trustee. Maria was the sole director. The shareholders were Maria and a WRMK trustee company.
49. As the High Court concluded, "The sequence suggests Maria wanted to act lawfully; and was acting on legal advice".⁸⁸ While, as the minority (Cull J) in the Court of Appeal noted,⁸⁹ receipt of legal advice is not a defence, that is beside the point. Maria needed to find a new trustee, through no fault of her own, and she plainly wanted to act lawfully. WRMK's recommended structure made the trust administration more straightforward.
50. In the Court of Appeal, Cull J nevertheless found that WRMK's 7 November letter "demonstrates the improper purpose which motivated Maria in exercising her power of appointment".⁹⁰ That observation, respectfully, simply does not square with the text of

⁸² [[303.0725]] at p2, emphasis in original.

⁸³ [[303.0737]].

⁸⁴ [[303.0740]].

⁸⁵ [[303.0743]].

⁸⁶ [[303.0731]].

⁸⁷ [[303.0754]], [[303.0757]].

⁸⁸ [[101.0020]] at [51].

⁸⁹ [[101.0036]] at [64].

⁹⁰ [[101.0036]] at [60].

the letter, or its context. Nor is it correct to suggest, as the appellants do, that Maria was “opinion shopping”. Her original lawyer had no solution at all for her predicament, but WRMK did.

51. Following KTL’s appointment, WRMK continued to request copies of Horowai’s financial statements.⁹¹ The requests were ignored.⁹²
52. Following a telephone call on 30 January 2020, Ms Beckham at WRMK wrote to Laila, confirming that KTL was now the sole trustee of Kaahu, that Maria was its sole director, and that Kaahu was now finalising its financial statements. WRMK again asked for copies of Horowai’s financial statements.⁹³ Ms Beckham reported to Maria on the conversation later that day.⁹⁴ Laila replied to the effect that she was seeking advice and asked for copies of the relevant documents appointing KTL.⁹⁵ These were provided on 5 February 2020 and again details were sought of Horowai’s financial position.⁹⁶
53. TGT Legal wrote on behalf of the children to WRMK on 27 February 2020.⁹⁷ They refused the request for Horowai’s financial statements, on the basis that Kaahu was not sufficiently “close”. TGT said that, in contrast, “Ricco’s children therefore stand in the shoes of Ricco as final beneficiaries, and have a legitimate interest in ensuring the stewardship of the family’s legacy assets and that the trust is properly administered”.
54. The children’s view that Kaahu held “legacy assets” for their

⁹¹ [[303.0767]].

⁹² [[303.0779]].

⁹³ [[304.0799]].

⁹⁴ [[304.0802]].

⁹⁵ [[304.0809]].

⁹⁶ [[304.0815]].

⁹⁷ [[304.0817]].

benefit was repeated in later affidavits.⁹⁸ That was not an accurate characterisation of the two trust structure. Horowai, not Kaahu, owned the 215 hectare forestry block and that part of the original farm with the family farmhouse.⁹⁹

55. Despite having never visited the Russell property, Laila nevertheless maintained that “Mokomoko” had some personal significance to her.¹⁰⁰ Li accepted that while part of the farm had been sold for \$3.1m in 2015, only a year or so later \$3m had come back to Horowai from Ricco, and so as a consequence the children’s “legacy” was “made whole” and was intact.¹⁰¹
56. WRMK reported to Maria on the TGT letter the following day.¹⁰² WRMK said that TGT’s letter was “to be expected” and that “It is time for a decision to be made as to what to do with the assets of the Kaahu Trust” and suggested three options, all of which had the effect of severing ties between Kaahu and the children.
57. While the High Court thought the questions on this topic irrelevant, the reality was that Ricco’s children (Laila, in particular) were largely estranged from Maria, and never thanked her for any of her generosity towards them, including the steps she took after Ricco’s death.¹⁰³ Unsurprisingly, following their continued refusal to engage in any questions concerning the financial position of Horowai, and the hostile questioning concerning her own administration of Kaahu, in March 2020 Maria undertook a series of transactions, on WRMK’s advice, in which KTL resolved to sell Mokomoko, distributed \$1 million to Maria (to enable her to

⁹⁸ See Affidavit of Ken Legler, [[201.0206]], at [5] and [8].

⁹⁹ Laila cross-examination: [[201.0023]] at lines 31 to 33.

¹⁰⁰ Laila cross-examination: [[201.0031]] at lines 13 to 22, and at [[201.0033]] lines 6 and following.

¹⁰¹ Li cross-examination: [[201.0084]] at lines 1 to 5.

¹⁰² [[304.0826]].

¹⁰³ See Laila cross-examination: [[201.0023]] at lines 31 to 33.

purchase a new home), forgave all debts still owing to Kaahu by Horowai, and thereafter excluded the children as beneficiaries.¹⁰⁴ All of this was the subject of legal advice from WRMK to Maria.¹⁰⁵

58. None of the 2020 transactions are challenged by the appellants.¹⁰⁶ They have previously told the Court they are “not in issue”.¹⁰⁷
59. Instead, the appellants maintain that Maria’s purpose when appointing KTL in November 2019, was not in the best interests of the beneficiaries as a whole, was in favour of herself, and thus had an improper purpose.¹⁰⁸ Proceedings issued in June 2020.

D. The proper purpose rule

60. Maria’s decision to appoint KTL as trustee of Kaahu was the exercise of a discretion by a fiduciary.¹⁰⁹ There are inherent difficulties framing and interpreting the law regulating the exercise of discretionary powers.¹¹⁰ It is nevertheless a fundamental principle of equity that a fiduciary power may be exercised only for a purpose for which the power has been conferred.¹¹¹ The

¹⁰⁴ [[303.0828]], [[304.0829]], [[304.0830]], [[304.0842]], [[304.0843]], [[304.0844]], [[304.0846]], [[304.0850]], [[304.0852]], [[304.0853]], [[304.0854]], [[304.0855]], [[304.0861]], [[304.0864]], [[304.0865]].

¹⁰⁵ [[304.0837]].

¹⁰⁶ When the appellants became aware of the March deeds, they initially indicated an intention to challenge them as part of this proceeding [[102.0252]] at [6]. However, when it became apparent that this would require a significantly expanded discovery process, the appellants elected not to pursue any such challenge [[102.0256]] at [2]-[3].

¹⁰⁷ [[102.0267]] at [11].

¹⁰⁸ Submissions at [5] and [6].

¹⁰⁹ The statement of defence denies that the power to choose a new trustee was a fiduciary power (it being initially unclear in what capacity Maria exercised it). But that point is not pursued; Maria exercised her power as a trustee, and owed fiduciary duties when doing so.

¹¹⁰ Andrew Butler, *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009), at [6.3.1.].

¹¹¹ *Grand View Private Trust Co Ltd v Wong* (above n51) at [1], per Lord Richards.

principles are settled and well known.¹¹²

61. In their submissions, the appellants highlight what they say are three “classic” instances of an improper purpose, including the one relied on in this case, “where the power is exercised by the donee with a view to benefitting themselves”.¹¹³
62. The proper purpose of a fiduciary power is determined as at the date of the instrument and is to be objectively determined.¹¹⁴ In the case of a trust, it is a question of determining objectively the intention of the settlor(s).
63. Where the trust deed is silent, ascertaining the purpose of a power 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 overall context.¹¹⁵ A broad and unfettered discretion will not permit a purpose that offends against the purpose of the trust.¹¹⁶
64. Here, Maria was the purpose of the trust. As noted by the learned author in *Thomas on Powers*:¹¹⁷

Difficult questions may arise where the donee of a fiduciary power is also an object of that power; and, although an exercise of such a power in favour of the donee himself may not be fraudulent it may nonetheless be open to challenge on other grounds, such as the application of the rule against conflict of interests.

65. Here, there is no pleading of a conflict of interest or breach of any

¹¹² See *Wong v Burt* [2005] 1 NZLR 91 (CA) at [30]; and *Kain v Hutton* above n8, at [47], per Tipping J.

¹¹³ Appellants' submissions at [36(a)].

¹¹⁴ *Grand View Private Trust Co Ltd v Wong*, above n51, at [61].

¹¹⁵ *Eclairs*, above n8, at [30].

¹¹⁶ *Grand View Private Trust Co Ltd v Wong*, above n51, at [78].

¹¹⁷ Geraint Thomas, *Thomas on Powers* (2nd ed, Oxford University Press, Oxford, 2012), at 9.01 and at 9.24.

provisions of the trust deed.

The purpose of the power – the terms of the trust

66. Maria had an absolute and uncontrolled discretion as to whom she selected as the new trustee, provided she complied with clause 26 and selected someone who was neither a beneficiary nor related to one. That person could be either a company (by definition, not a beneficiary) or a non-beneficiary natural person.¹¹⁸ The trust deed expressly contemplated that the director of the corporate trustee could be a beneficiary, and there was no requirement for non-beneficiary directors.¹¹⁹
67. Despite the appellants' claim that the trust deed required a trustee who was "independent",¹²⁰ in fact there was nothing in the trust deed requiring someone of that description. Mr Tyler, Ricco and Maria's accountant, was hardly "independent". Few family trusts operate with a non-beneficiary trustee who is truly "independent" of the settlors; typically it is their family solicitor or accountant.
68. Cull J's view in the Court of Appeal that "properly empowered corporate body" must mean a large corporate with a board of directors, such as Perpetual Guardian or Public Trust, is textually unsupportable, and contextually at odds with how most family trusts operate, and indeed how Horowai had operated since inception.¹²¹ And it does not explain why the trust deed permitted benefits to beneficiaries who were also directors of the company.
69. Further, the Kaahu trust deed contains an express and wide-ranging "negation of conflict" clause, which expressly excused any

¹¹⁸ At clause 8.2: [[301.0034]].

¹¹⁹ [[301.0027]] at clause 27.

¹²⁰ At [69].

¹²¹ [[101.0051]], at [50].

conflict between a trustee and a beneficiary.¹²² Clause 18.1, titled “Trustee/Beneficiary”, confirms that powers vested in a trustee who is also a beneficiary may be exercised in that trustee’s favour by the other trustees. But that clause is permissive (“may”), not mandatory, and no breach of clause 18.1 is pleaded in any case.

70. As the Court of Appeal noted, if an alternative (and logically prior) “beyond the scope of powers” cause of action was to be advanced, it would depart from the appellants’ undertaking to the Court, given when resisting the respondents’ discovery application, that their case is “narrow” and based on a “sole cause of action”, namely fraud on a power.¹²³ Having resisted discovery of Horowai’s records, on the basis of their very narrow pleading, the appellants cannot now pursue alternative formulations of their case. That would be an abuse of process.

71. The appellants nevertheless maintain that the requirements of clause 26 were “carefully designed safeguards against potential abuse”.¹²⁴ They suggest the purpose of the power to appoint new trustees is to ensure there is always someone “independent” involved in decision-making. But, as explained by Buss JA in the Court of Appeal of Western Australia in *Scaffidi v Montevento Holdings Limited*, that is not the purpose of these “non-beneficiary trustee” provisions.¹²⁵ Rather, they are designed to maintain

¹²² Clause 20.1: [[301.0039]].

¹²³ See submissions [[102.0265]] at [3], confirmed in *Legler v Formannoij* [2021] NZHC 737 at [28].

¹²⁴ At [69].

¹²⁵ *Scaffidi v Montevento Holdings Limited* [2011] WASCA 146, at [96]. The concept of a “sham” or “alter ego” trust, that should be set aside by the Court, gained traction in the New Zealand Courts in the 2000s, following a line of Australian decisions that held that if a spouse had effective control of a trust asset, that asset could be included in the division of relationship assets. See *Prime v Hardie* [2003] NZFLR 481 (HC) at [29]; *Glass v Hughey* [2003] NZFLR 865 (HC) at [91]; *Begum v Ali* (Family Court, Auckland, FAM 2001-004-866, 10 December 2004); *O v S* (2006) 26 FRNZ 459 (FC); *Genc v Genc* [2006] NZFLR 1119 (HC); *C v C (No 2)* [2006] NZFLR 908 (FC) at [53]; and *Solicitor-General v Bartlett* [2008] 1

separation between the beneficiaries and the trust fund, to ensure the trust fund is immune from a “trust-busting” attack, on the basis that it is just an “alter ego” of the settlor beneficiaries, and thus not really a trust. Buss JA’s reasoning was upheld by the High Court of Australia as “plainly correct”.¹²⁶

72. The Kaahu trust deed also included a requirement that a non-beneficiary was added as a trustee, unless the trustee was a company (and thus not a beneficiary either). They did not otherwise need to be independent, and were permitted by clause 18.1 to make decisions that favoured the trustee beneficiaries. As in *Montevento*, the purpose of these clauses is to protect Kaahu’s trust fund from attack by creditors or either one of Ricco or Maria, in the event of separation. *Montevento* is now well-established in Australia.¹²⁷
73. The two principal New Zealand authorities relied on by appellants, *Goldie v Campbell* and *White v Brkic*,¹²⁸ suggest that if a general power of appointment is used to appoint a corporate trustee “under the control of” the appointor, and there is a “no self-dealing” rule in the trust deed, then that would be a fraud on a power. These are curious propositions, which do not sit easily with Tipping J’s comments in *Kain v Hutton*¹²⁹ or recent Australian authorities such as *Mercanti v Mercanti*.¹³⁰ The usual purpose of the power of appointment is to enable the appointor to control the

NZLR 87 (HC). See also “Dealing with the Emerging Popularity of Sham Trusts” [2007] NZ Law Review 81 and “Alter ego trusts” [2007] NZLJ 316. These cases are summarised in the Law Commission’s “IP20 Some Issues with the Law of Trusts in New Zealand: Review of the Law of Trusts Second Paper” (2010).

¹²⁶ *Montevento Holdings v Scaffidi* [2012] HCA 48, at [22].

¹²⁷ See, for example *Baba v Sheehan* [2019] NSWSC 1281 at [64].

¹²⁸ *Goldie v Campbell* above n5; *White v Brkic* [2021] NZCA 670.

¹²⁹ *Kain v Hutton*, above n8 at [47].

¹³⁰ *Mercanti v Mercanti* [2015] WASC 297, upheld on appeal *Mercanti v Mercanti* [2016] WASCA 206.

composition of the trustees, to ensure their interests are protected, not to prevent them from appointing a friendly trustee.

74. An exception is *Austec Wagga Wagga Pty Ltd v Rarebreed Wagga Pty Ltd*,¹³¹ where the trust deed expressly provided that “the power to appoint a new trustee as in the clause contained shall not be exercised in favour of...the person exercising the power of appointment”. The appointor appointed a company directed by someone they employed, which was held to be both beyond the scope of the power *and* a fraud on the power. *Austec* is distinguishable on its facts; there is no such prohibition in the Kaahu deed, and the Court was wrong in any case to conclude that the appointor had abused a power it had already concluded he did not have.
75. As is always the case, everything depends on the terms of the trust deed itself, and the settlor’s intentions.

The purpose of the power – the settlor’s intentions and context

76. A natural reading of the Kaahu trust deed confirms that Maria was not only one of the two express objects of Kaahu, but was in fact its only primary object, following Ricco’s death.¹³² The power to choose new trustees needed to be exercised consistently with that purpose. That is supported by context; Kaahu was always operated for Ricco and Maria’s benefit, owning their home and providing them with income. Horowai had a different purpose altogether; to hold the farm and forest on trust for Ricco’s children, as their inheritance from him and their grandfather.
77. In those circumstances, it would have been proper for Maria to

¹³¹ [2012] NSWSC 343.

¹³² Contrast with the opaque and dynastic family trusts described in *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26, [2003] 2 AC 709, at [1], where the real purpose and object of the trust is concealed.

want to select a new trustee for Kaahu who she knew would continue to protect and support her, given that she was now the primary purpose of the trust. The new trustee could have been Maria's solicitor, accountant, or a friend or relative that she knew would be sympathetic to her vulnerable position and dependence on Kaahu.

78. Indeed, is difficult to conceive of a scenario in which a trustee/beneficiary in Maria's situation would not want to choose someone who they were confident would protect and promote their interests, to give effect to the careful estate planning that had been carried out some 10 years prior.¹³³ In fact, that was the obligation.

The appointment of KTL

79. As it was, WRMK suggested that Maria simply appoint a company that she controlled and directed, before any further decisions were made, to fill the trustee vacancy. None of the contemporaneous documents suggest that this was motivated by self-interest or a desire to control the trust. It was a response to the difficulties finding a new trustee. It was permitted by the trust deed.
80. In those circumstances, and as the majority of the Court of Appeal held, it is a logical fallacy to contend that strict compliance with the terms of the trust deed can amount to a fraud on a power, absent some further evidence of intention to act improperly.¹³⁴
81. Even if it was an improper purpose for Maria to want to benefit herself, which is denied, that necessarily begs the question: was Maria intending to benefit herself when she selected KTL?

¹³³ See *In the Marriage of K R and M I Davidson (No 2)* (1990) 14 Fam LR 817 at 824, cited with approval in *Baba v Sheehan* [2021] NSWCA 58, at [10]: "Whatever might be the remaining effect of *Skeats* case, it is not authority for the proposition that the husband is prevented from appointing a trustee who has complied to his wishes".

¹³⁴ [[101.0036]] at [36].

E. Maria's subjective intentions

82. The test for establishing fraud on a power is necessarily subjective and the relevant point in time for consideration is the date of exercise of the power.¹³⁵
83. The High Court held that, whatever might have appeared to be the case to the children, in fact Maria did not intend to benefit herself when she appointed KTL. That was because:¹³⁶
- (a) Maria became the sole trustee through circumstance, not exploit.
 - (b) Maria attempted to find another trustee who would act with her, and there was no cross-examination suggesting this was not genuine.
 - (c) Maria wanted to act lawfully and acted on legal advice.
 - (d) Maria tried to obtain information about Horowai but was rebuffed.
 - (e) There was no direct challenge to the March 2020 deeds, and – even if there had been – it would have been forlorn, given that “The evidence makes plain Li, Ken and Laila have been provided for, and each is well off.”
 - (f) Maria was a careful, fair-minded and sincere witness.
84. It was never put to Maria in cross-examination that her real intention when appointing KTL was to obtain a benefit for herself

¹³⁵ *Eclairs Group Ltd v JKC Oil and Gas plc*, above n8, at [15], referring to *Duke of Portland v Topham* [1864] 11 HLC 32 at 54.

¹³⁶ At [[101.0030]].

or to take control of the trust for her own benefit.¹³⁷

85. The burden of proving an improper purpose lies on the person seeking to avoid the transaction. It is not to be presumed or inferred, as the appellants suggest.¹³⁸ It must be proved.¹³⁹ The closest the appellants' counsel came to putting this to Maria was a proposition that she was considering making distributions to herself at the time she appointed KTL.¹⁴⁰ Maria rejected this. Otherwise, the appellants' submission (at [57]) that "Ms Formannoij was cross-examined on her knowledge and intentions" is simply not supported by the notes of evidence.
86. The High Court concluded that, whatever her motivations were in appointing KTL, self-benefit was not one of them. Those findings were plainly open to the Court and there is no principled basis upon which they might now be disturbed.
87. Faced with these legal and factual difficulties, the appellants now rely on the obligation to act "for the benefit of the beneficiaries as a whole". They treat this as a component of the "proper purpose" rule.
88. The meaning and scope of this obligation has not yet been considered by this Court, and – as discussed below – is not without controversy.

F. The "best interests of the beneficiaries as a whole"

89. The appellants say that Maria was obliged to exercise her power

¹³⁷ Refer notes of evidence [[201.0152]] to [[201.0168]]. There are no questions at all concerning Maria's intentions when she appointed Kaahu Trustee, let alone a suggestion that she was doing so to procure a benefit for herself.

¹³⁸ At [51] of their submissions: "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."

¹³⁹ *Mercanti v Mercanti* (SC) above n130 at 167, citing *Lewin* at [9.77].

¹⁴⁰ [[201.0156]] at lines 6-10.

to appoint new trustees “in the best interests of the beneficiaries as a whole”, and that she failed to do so.¹⁴¹ They cite *New Zealand Māori Council v Foulkes* in support.¹⁴² They presume Maria was required to exercise her discretionary powers in a way that did not just benefit herself, as the primary purpose of the trust, but rather all the discretionary beneficiaries, including the children.

90. That overstates the scope of the “beneficiary interests” rule.
91. *New Zealand Māori Council v Foulkes* did not concern a discretionary family trust, but rather trustee appointments to the Crown Forestry Rental Trust, and whether that power could be delegated. Harrison J referenced a “best interests of the beneficiaries as a whole” duty and cited two cases in the High Court in support, *Carmine v Ritchie* and *Harre v Clark*.¹⁴³ *Harre v Clark* in turn cites *Carmine v Ritchie* and *Scaffidi v Montevento*.¹⁴⁴
92. *Carmine v Ritchie* concerned the removal of one trustee by another. At issue was whether the trustee had a proper purpose in doing so. Gilbert J asked whether the trustee had exercised her power for a proper purpose, consistent with the object of the power, “in the best interests of the beneficiaries as a whole.”¹⁴⁵
93. As authority for the “in the best interests of the beneficiaries as a whole” rule, his Honour cited *Underhill and Hayton Law Relating to Trusts and Trustees*,¹⁴⁶ and concluded that there was no improper purpose, as “[the trustee’s] sole motivation was to protect the

¹⁴¹ [[101.0003]] at [20].

¹⁴² *New Zealand Māori Council v Foulkes* [2015] NZCA 552, [2016] 2 NZLR 337 at [22].

¹⁴³ *Carmine v Ritchie* [2012] NZHC 1514 at [66]; *Harre v Clark* [2014] NZHC 2533 at [24].

¹⁴⁴ *Scaffidi v Montevento* above n126 at [149]-[150]. This was overturned on appeal *Montevento v Scaffidi* (HCA) above n127.

¹⁴⁵ *Carmine v Ritchie*, above n143, at [66].

¹⁴⁶ David Hayton (ed) *Underhill and Hayton Law Relating to Trusts and Trustees* (18th ed, LexisNexis, London, 2010) at [70.20] and [71.11].

interests of the beneficiaries as a whole, her own family". These comments suggest that the trustee of a family trust, exercising a discretionary power, must do so in a way that benefits the whole family, rather than preferring one faction to another.

94. The origins of the expression "as a whole" are unclear. The principal authority, *Cowan v Scargill*, was a pension fund case dealing with an investment power, where the "best interests" duty was described by Megarry V-C as "paramount", albeit without reference to supporting authority or to the phrase "as a whole".¹⁴⁷
95. Even in its reduced form, the "best interests" duty has been criticised as "misleading and confusing for a variety of reasons".¹⁴⁸ It is said it is too literal and too precise.¹⁴⁹ The UK Law Commission thought *Cowan v Scargill* "particularly difficult".¹⁵⁰
96. In *Armitage v Nurse*, Lord Millett described the "irreducible core" of obligations owed by the trustees as being the duty to perform the trusts "honestly and in good faith for the benefit of the beneficiaries".¹⁵¹ But again his Lordship did not use the expression "as a whole". Nor did the Law Commission in their 2011 Issues Paper, concerning the "Duties, Office and Powers of a Trustee: Review of the Law of Trusts".¹⁵²
97. The origins of the qualifying phrase "as a whole" are thus unclear,

¹⁴⁷ *Cowan v Scargill* [1985] Ch 270 (EWHC), [1984] 2 All ER 750, at 760, cited in Butler, *Equity and Trusts in New Zealand* (2nd ed), at [6.5.6].

¹⁴⁸ David Pollard, "The Short-form 'Best Interests Duty' – Mad, Bad and Dangerous to Know: Part 1 – Background, *Cowan v Scargill* and MNRPF", (2018) 32(2)TLI, 106. See also M Scott Donald, "Best interests?" (2008) 2 J Eq 245 (2008).

¹⁴⁹ Pollard, above n148, at 111.

¹⁵⁰ Law Commission (UK), "Fiduciary Duties of Investment Intermediaries", 1 July 2014, at 4.35.

¹⁵¹ *Armitage v Nurse* [1998] Ch 241 at 253–254, [1997] 2 All ER 705 at 713. The Trusts Act 2019, s 26, also refers to "the benefit of the beneficiaries".

¹⁵² Law Commission, IP26 "The Duties, Office and Powers of a Trustee: Review of the Law of Trusts Fourth Issues Paper" (2011).

as is its meaning. It is not used in other jurisdictions.

98. Post-*Cowan*, Lord Nicholls commented extra-judicially that “To decide whether a proposed course is for the benefit of the beneficiaries or is in their best interests, it is necessary to decide first what is the purpose of the trust and what benefits were intended to be received by the beneficiaries.”¹⁵³
99. In *Grand View*, the Privy Council adopted Lord Nicholls “purpose” formulation for assessing “best interests”, noting:¹⁵⁴

The purpose of a typical family trust is coterminous with its identified beneficiaries. Radical changes may properly be made to such a trust, or to the beneficial interests under it, provided the changes are in the interests of one or more identified beneficiaries.

100. Again, Lord Richards did not suggest any broader requirement to consider the beneficiaries “as a whole”. Nor does the Trusts Act 2019. It is submitted that Lord Richards’ approach is to be preferred to that suggested in *New Zealand Māori Council v Foulkes*. A trustee of a modern family trust does not have to consider the discretionary beneficiaries “as a whole”. There is no obligation to formulate some collective interest that unites different family divisions. It suffices to act in one beneficiary’s interest.
101. Here, even if Maria had intended to benefit herself when she appointed KTL, and there is no evidence she had that intention, the appellants do not explain:
- (a) why that was not in her best interests as the primary beneficiary of the trust;¹⁵⁵ and

¹⁵³ Lord Nicholls of Birkenhead, “Trustees and their broader community: where duty, morality and ethics converge” (1995) 9(3) TLI 71 at 74, (1996) 70 ALJ 205, at 211.

¹⁵⁴ *Grand View*, above at n51, at [115]. Emphasis added.

¹⁵⁵ The majority in the Court of Appeal saw no issue with such a purpose: [[101.0047]] at [33].

(b) why she was not permitted to appoint a trustee that would continue to implement the trust’s purpose, namely her welfare.

G. Relief

102. Should the Court hold that the appointment of KTL was invalid, Maria’s resignation as trustee would, of necessity, also be invalid. The only power she held, following BOI’s resignation, was the power to appoint a further trustee.¹⁵⁶ As such, if the appellant’s challenge to KTL’s appointment is upheld, the result will be that Maria will remain as the sole trustee.

103. The appellants seek to have Maria removed and a replacement trustee appointed. However, nothing in the relevant circumstances would justify that approach.

104. Maria is the primary object of Kaahu and was at all times intended to have influence and control over the trust as a trustee from its inception. Further, Maria has at all times sought to act in accordance with legal advice and in compliance with her trustee obligations. There is nothing to suggest that she has acted other than in good faith. Two courts have agreed with her approach.

105. Therefore, should KTL’s appointment be found invalid, Maria should be permitted to exercise her power as sole remaining trustee to appoint a trustee, as contemplated by the trust deed.

Dated this 24th day of July 2023

.....
Joshua McBride | Rachael Woods
Counsel for the respondents

¹⁵⁶ [[301.0043]] at [26.1(a)].

AUTHORITIES

New Zealand Authorities

Begum v Ali (Family Court, Auckland, FAM 2001-004-866, 10 December 2004)

C v C (No 2) [2006] NZFLR 908 (FC)

Carmine v Ritchie [2012] NZHC 1514

Genc v Genc [2006] NZFLR 1119 (HC)

Glass v Hughey [2003] NZFLR 865 (HC)

Goldie v Campbell [2017] NZHC 1692, [2017] NZFLR 528

Harre v Clark [2014] NZHC 2533

In the Marriage of K R and M I Davidson (No 2) (1990) 14 Fam LR 817

Kain v Hutton [2008] NZSC 61

Legler v Formannoj [2021] NZHC 737

New Zealand Māori Council v Foulkes [2015] NZCA 552, [2016] 2 NZLR 337

O v S (2006) 26 FRNZ 459 (FC)

Prime v Hardie [2003] NZFLR 481 (HC)

Solicitor-General v Bartlett [2008] 1 NZLR 87 (HC)

White v Brkic [2021] NZCA 670

Wong v Burt [2005] 1 NZLR 91 (CA)

English and Privy Council Cases

Armitage v Nurse [1998] Ch 241 at 253–254, [1997] 2 All ER 705 at 713

Butler-Sloss v Charity Commission for England and Wales [2022] EWHC 974 (Ch), [2023] 1 All ER 1006

Cowan v Scargill [1985] Ch 270 (EWHC), [1984] 2 All ER 750, at 760

Dalriada Trustees Ltd v Faulds [2012] 2 All ER 734,

Duke of Portland v Topham [1864] 11 HLC 32

Eclairs Group Ltd v JKX Oil and Gas plc [2015] UKSC 71, [2016] 3 All ER 641

Grand View Private Trust Co Limited v Wong [2022] UKPC 47

Harries v Church Commissioners [1993] 2 All ER 300

Re Merchant Navy Ratings Pension Fund [2015] All ER (D) 298 (Feb)

Schmidt v Rosewood Trust Ltd [2003] UKPC 26, [2003] 2 AC 709

Australian Cases

Baba v Sheehan [2019] NSWSC 1281

Baba v Sheehan [2021] NSWCA 58

Mercanti v Mercanti [2015] WASC 297

Mercanti v Mercanti [2016] WASCA 206

Montevento Holdings Pty Ltd v Scaffidi [2012] HCA 48

Scaffidi v Montevento Holdings Limited [2011] WASCA 146

Wagga Wagga Pty Ltd v Rarebreed Wagga Pty Ltd [2012] NSWSC 343

Legislation

Trusts Act 2019, ss26, 27

Companies Act 2002

Secondary sources

Texts

Geraint Thomas, *Thomas on Powers* (2nd ed, 2012),

Articles and Law Commission papers

Gibbons, Thomas, "Alter ego trusts" [2007] NZLJ 316.

Palmer, Jessica, "Dealing with the Emerging Popularity of Sham Trusts" [2007] NZ Law Review 81

Pollard, David "The Short-form 'Best Interests Duty' – Mad, Bad and Dangerous to Know: Part 1 – Background, *Cowan v Scargill and MNRPF*", (2018) 32(2) TLI, 106.

M Scott Donald, "'Best' interests?" (2008) 2 J Eq 245 (2008).

Lord Nicholls of Birkenhead, "Trustees and their broader community: where duty, morality and ethics converge" (1995) 9(3) TLI 71 at 74, (1996) 70 ALJ 205

Law Commission, IP20 "Some Issues with the Law of Trusts in New Zealand: Review of the Law of Trusts Second Paper" (2010).

Law Commission, IP26 "The Duties, Office and Powers of a Trustee: Review of the Law of Trusts Fourth Issues Paper" (2011).

Law Commission (UK), "Fiduciary Duties of Investment Intermediaries", 1 July 2014.

Certification as to publication of these submissions

1. Pursuant to the requirements for submissions under the Supreme Court Submissions Practice Note and having made appropriate inquiries, counsel hereby certifies that these submissions do not contain any suppressed information and are therefore suitable for publication.

Dated this 6th day of September 2023

.....

Joshua McBride | Rachael Woods
Counsel for Respondents