

In the Supreme Court of New Zealand

I Te Kōti Mana Nui

SC 8/2023

Between **Ken Legler and Laila Sun Legler Klaui**
Appellants

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

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

RESPONDENTS' OUTLINE OF ORAL ARGUMENT

Dated: 9 OCTOBER 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

A. The pleaded case – confined to “fraud on a power”

1. Children’s claim repeatedly emphasised as “narrow” and confined to “fraud on a power”, based on *Goldie v Campbell* (at [68] to [70]).
2. Implicit in the only pleaded cause of action that decision was authorised by trust deed, but was for an improper purpose, outside trust objects.

B. No basis for disturbing High Court factual findings

3. Onus on the children to prove the pleaded improper purpose. Inferences insufficient – must be that Court “cannot reasonably come to any other conclusion” (*Mercanti* (SC) citing Jessel MR, at [167]).
4. Pledged improper purpose: either “evading trust deed limits to take control” or “self-benefit”. Recalibrated at end of High Court trial.
5. Marina’s evidence – thought the new structure would “simplify” matters.¹
6. No cross-examination of Marina concerning her motives or intentions. Not put to her that she knew about alleged limits under the trust deed, or that she just wanted to take control for her own benefit. **[[201.0158]]**. In the interests of all beneficiaries to have the trust operational again.
7. High Court concluded it was not improper to take control using a structure expressly authorised by the trust deed (at [46]). Unnecessary to consider whether a “self benefit” purpose was improper, as this was not proved – Marina was a “a careful, fair-minded witness” who “impressed as sincere” (at [58]). Court of Appeal majority agreed. Minority CA judgment – unsupportable conclusions on law and facts.
8. No basis to disturb High Court conclusions. *Montevento*, *Mercanti*, *Baba* – appellate Courts all declining to interfere with trial judge findings of no improper purpose. Court of Appeal majority – same approach.

¹ Marina has asked that she be referred to as “Marina”, not her legal first name, Maria.

C. In any event – purpose of Kaahu – support Marina – not improper

9. “Improper purpose” allegation – two stage test (*Grand View* at [61]):
 - (a) What is the nature and purpose of the power?
 - (b) Did the appointor exercise their power for a different purpose, to benefit a “non-object”? E.g. *Eclairs*, *Wong*, *Grand View*.
10. Nature and purpose of Kaahu – at one level an orthodox “Kiwi” family trust, but in fuller context a component of careful estate planning to remove “Legler legacy” assets from Ricco and Marina’s control:
 - (a) Kaahu settled 2008 by Marina and Ricco, both original trustees. Marina relinquished rights under earlier s 21 agreement.
 - (b) Third trustee (BOI) ensured Kaahu not attacked as sham/alter ego. But no requirement for “non-beneficiary” where corporate trustee.
 - (c) Kaahu administered by Ricco and Marina for their benefit: provided home and income for their retirement [[301.0111]] [[302.0403]]. Ricco had power of appointment but could not remove Marina.
 - (d) Horowai – settled 2007 as separate “Legler legacy” vehicle to house substantial forestry and farm estates, plus working capital, for Ricco’s children. Ricco (and Marina) excluded in 2014.
11. Despite breadth of discretion, Kaahu trustee powers still had to be exercised honestly and for a proper purpose: *Grand View* at [77].
12. No “default” rules for testing purpose (*Grand View* at [79]). Fiduciary obligations to other, unnamed, discretionary beneficiaries of limited practical significance (*Clayton* at [64], *Mercanti* (WACA) at [249]).
13. Purpose of Kaahu was to support Ricco and Marina. Any “improper” purpose would have to depart from that central premise and be shown to be intended to benefit a foreign object.
14. Not improper to wish to benefit Marina – she is the trust’s purpose.

D. No prohibition on self-benefit in any case

15. Children say it was improper for Marina to exercise powers to benefit herself, by appointing a friendly trustee (KTL, but could be her lawyer, etc). But, again, she was the **primary object** of Kaahu. Reliance on *Goldie* and *Brkic* misplaced – no actual appointments or actual motives under scrutiny in those cases, and in different context (*Clayton*).
16. Appointing a “friendly” trustee is not improper, without more: *Baba* (NSWCA) at [9] to [18], *Harre v Clarke* (HC). *Skeats* not good law.

E. “Best interests of beneficiaries as whole” has limited application

17. Again no cross-examination on this topic. Difficult phrase to apply to modern discretionary family trust, as opposed to a pension fund (*Cowan*) or Crown trust (*Foulkes*). Restricted to ensuring proper and lawful administration by competent trustee: *Mercanti* (WASCA) at [247].

F. Australian approach supports Marina

18. Authorities (*Montevento*, *Baba*, *Mercanti*) aligned and clear: not improper to oust hostile trustee and replace with a trustee more aligned to appointor. Corporate trustees with beneficiary directors can be selected, even if beneficiaries cannot personally hold office.

G. Not necessary to remove Marina and appoint a new trustee

19. No reason to remove Marina: intended to be involved in the administration of Kaahu from the outset. Founding trustee and object. No disqualifying conduct or want of fidelity. Marina acted in good faith and has shown herself willing to take appropriate professional guidance. Can and will appoint new trustee if required.

Dated this 9th day of October 2023

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

Certification as to publication

1. Pursuant to the requirements under the Supreme Court Submissions Practice Note and having made appropriate inquiries, counsel hereby certifies that, to the best of their knowledge, this Outline of Oral Argument does not contain any suppressed information and is therefore suitable for publication.

Dated this 11th day of October 2023

.....

Joshua McBride | Rachael Woods
Counsel for Respondents