

**NOTE: THIS TRANSCRIPT IS NOT A FORMAL RECORD OF THE  
ORAL HEARING. IT IS PUBLISHED WITHOUT CHECK OR  
AMENDMENT AND MAY CONTAIN ERRORS IN  
TRANSCRIPTION.**

IN THE SUPREME COURT OF NEW ZEALAND  
I TE KŌTI MANA NUI O AOTEAROA

SC 8/2023  
[2023] NZSC Trans 14

**BETWEEN**

**KEN LEGLER  
LAILA SUN LEGLER KLAUI**  
Appellants

**AND**

**MARIA GUILLAUMINA CORNELIA JOHANNA  
FORMANNOIJ  
KAAHU TRUSTEE LIMITED**  
Respondents

Hearing: 10 October 2023

Court: Winkelmann CJ  
Glazebrook J  
O'Regan J  
Williams J  
Miller J

Counsel: D R Bigio KC and J W H Little for the Appellants  
J D McBride and R C Woods for the Respondents

---

**CIVIL APPEAL**

---

**MR BIGIO KC:**

E ngā Kaiwhakawā, tēnā koutou. Ko Bigio ahau, kei kōnei māua ko Little, tāku pou whirinaki, mō nga kaipira. May it please your Honours, Bigio appearing for the appellants with my learned junior Mr Little.

**WINKELMANN CJ:**

5 Tēnā koutou, Mr Bigio and Mr Little.

**MR MCBRIDE:**

May it please the Court, counsel's name is McBride. I appear with Ms Woods for the respondents.

**WINKELMANN CJ:**

10 Tēnā koutou, Mr McBride and Ms Woods. Tēnā kōrua, sorry.

**WILLIAMS J:**

Kōrua.

**WINKELMANN CJ:**

Brain's obviously not switched on this morning.

15 **WILLIAMS J:**

Perhaps you're counting the solicitors.

**WINKELMANN CJ:**

Mr Bigio.

**MR BIGIO KC:**

20 May it please the Court. I'm just saying on a personal note, this is the first time I've been in this room in many, many years, and it is a pleasure to appear before your Honours today and to be able to argue this matter.

I should also say that I've realised this year as I've gotten a little older that I  
25 have more difficulty hearing soft-spoken judges who may not speak into their microphones. So if I ask for a question to be repeated, it may not be the age-old

tactic of buying time to answer. It may be that I just haven't heard it properly and I'll just seek your Honours' indulgence in that.

**WINKELMANN CJ:**

We have hearing loops. You don't have a hearing aid?

5 **MR BIGIO KC:**

Not yet, but I'm going to – I decided this year that I have to go examine it at least for court purposes.

**WINKELMANN CJ:**

Well, Justice Young's not here now so you should be okay anyway.

10 **MR BIGIO KC:**

Thank you, your Honour. Your Honour should have the outline of our argument which was filed and served yesterday afternoon. A few pages. And if your Honours please, I'll start by saying the proper purpose rule –

**GLAZEBROOK J:**

15 I don't, actually.

**WINKELMANN CJ:**

Oh, so it was filed yesterday afternoon, but it should be on the – you don't have a spare copy, do you?

**MR BIGIO KC:**

20 Hard copy?

**WINKELMANN CJ:**

Yes.

**MR BIGIO KC:**

I'm afraid we only filed it electronically.

25 **WINKELMANN CJ:**

It should be on the –

**GLAZEBROOK J:**

Oh, no, it's all right. I have found it. Sorry.

**WINKELMANN CJ:**

5 Carry on.

**MR BIGIO KC:**

Thank you, your Honour. The proper purpose rule is the principle by which equity controls the exercise of a fiduciary's powers. The rule is to prevent an abuse of power. It's not, even though it used to be called "fraud on a power",  
10 about fraud, per se. The purpose in the exercise of the power can be improper even if it is honest, and we refer there to the *Grand View Private Trust Co Ltd v Wong* [2022] UKPC 47 decision of the Privy Council which was issued in December of last year and which contains a very helpful summary of the history of the rule and the latest expression of its approach, looking across all  
15 jurisdictions including New Zealand.

The proper purposes are to be determined objectively at the date the power was conferred, and so the terms of the instrument, the nature of the power and the context are all relevant. With that in mind, we should take your Honours to  
20 the terms of the trust deed to set the scene for the argument.

Ricco Legler established the Kaahu Trust with his inheritance and although the trust deed does not identify him as the settlor, subsequent documents recording further monies settled on the Trust do record him as the settlor of the Trust.  
25 I do not believe anything turns on this point, whether the settlors are the three original trustees or Mr Legler personally for the purposes of the argument, but I will address one aspect of that later on.

**WINKELMANN CJ:**

Well, one assumes that that was relationship property though, wouldn't it have  
30 been?

**MR BIGIO KC:**

Which property, your Honour?

**WINKELMANN CJ:**

The property that was settled on the Trust. You say he was the settlor of the  
5 Trust but he was in a long-term relationship with the other settlor of the Trust.

**MR BIGIO KC:**

Yes, that's correct. The fact of the – all of the funds came from the inheritance  
from his father and they were settled on two trusts.

**WINKELMANN CJ:**

10 All right. Okay.

**MR BIGIO KC:**

Now, the trust deed – the original trustees were Mr Legler, the first respondent,  
Ms Formannoij and BOI Taxation Trustee Company which was the independent  
trustee. At page – can you go to page 30, Mr Little? The discretionary  
15 beneficiaries at the top of that page means the final beneficiaries who,  
immediately below your Honours will see, are Mr Legler and Ms Formannoij,  
any issue of any final beneficiary, being the children of Mr Legler from his first  
marriage, and any trust which includes for the time being among its  
beneficiaries any beneficiary or any issue of any beneficiary, and the Horowai  
20 Trust which had been set up for the purposes of a forestry project with a  
corporate trustee administering the forestry project and under which the  
children were beneficiaries, is one of the discretionary beneficiaries which  
received capital distributions from this Trust, the Kaahu Trust.

25 The final beneficiaries are named as Mr Legler and Ms Formannoij, but if we  
can go to clause 6.1 which deals with distribution of capital on the vesting day,  
clause 6.1(a) provides that: “The Trustees shall hold the Trust Fund on the  
Vesting Day upon trust for such of the Final Beneficiaries and their issue then  
living as the Trustees may...appoint.” If there is no appointment, then it is held  
30 for such final beneficiaries “then living and, if more than one, as tenants in

common...the interest in the Trust Fund of any Final Beneficiary who has died before the Vesting Day [passes] to the issue of that Final Beneficiary.”

**WINKELMANN CJ:**

So what do you say is the effect of that?

5 **MR BIGIO KC:**

What I’m saying is that although the children are not named as final beneficiaries, they are contemplated in all of the potential distributions on the vesting day of the Trust.

10 Finally, just scrolling down, Mr Little, if there was no vesting under clause 6.1(b), then “for such...Discretionary Beneficiaries then living or existence”, including the children, “and in respect of any portion of the Trust fund not so validly appointed” under clause 6.1(c), “for such person...as tenants in common if more than one, who would have been entitled to the estate of [Mr Legler] had  
15 he died intestate”, meaning the children.

Now, in evidence, Ms Formannoij did not deny, in fact she agreed, that one of the purposes, her word, of the Trust was for the children to take any residue of the Trust after Mr Legler – she and Mr Legler had passed on. All right –

20 **O'REGAN J:**

Well, that’s assuming that nothing happened in the meantime to change who the beneficiaries were.

**MR BIGIO KC:**

That's correct, your Honour.

25 **O'REGAN J:**

So, I mean –

**MR BIGIO KC:**

But we’re –

**O'REGAN J:**

We can't make that assumption, you know what I mean? The fact is the trustees did have power to do that.

**MR BIGIO KC:**

5 We're only focused at the moment on what was the intent of the trust deed at the time that it came into account, not any dispositive decision that might've been made during the life of the Trust, in order to ascertain what its structure is. Then I'm going to link that to the exercise of the power of appointment to explore whether the power as it was exercised by Ms Formannoij was  
10 contemplated as being valid at the time this trust deed was entered into.

**GLAZEBROOK J:**

Can I just check on clause 6.1?

**MR BIGIO KC:**

Yes.

15 **GLAZEBROOK J:**

It does look as though if both of the final beneficiaries are living, the funds go – sorry, if one of the final beneficiaries died, then the funds would go to, only partly, to the issue of the one who's died?

**MR BIGIO KC:**

20 The half share, yes, your Honour.

**GLAZEBROOK J:**

Right.

**MR BIGIO KC:**

Because it's in –

25 **GLAZEBROOK J:**

So it's a half share?

**MR BIGIO KC:**

Half share because they're treated as tenants. The final beneficiaries are treated as tenants in common, and so the half share of the deceased final beneficiary goes to their issue.

5 **GLAZEBROOK J:**

So in fact, it's not – the children aren't contemplated as the final beneficiaries in those circumstances? Except as to half?

1010

**MR BIGIO KC:**

10 That's correct, your Honour. They are clearly not within the definition of final beneficiaries, but provision is made for them.

**GLAZEBROOK J:**

No, no. Understand that. Well, it's a fairly normal clause to say either the person who's the final beneficiary or issue.

15 **MR BIGIO KC:**

And that's part of our point, your Honour. There's nothing extraordinary in the structure of this trust deed in that regard.

Now, the power of appointment of the trustees which is at page 41, clause  
20 23.10, was vested in Mr Legler and if he died, then the power of appointment was vested in the remaining trustees, not in Ms Formannoij personally, not in the independent trustee personally, but whoever would be the trustees from time to time.

25 If we can just go back to clause 11.1. Just in relation to your Honour's point about whether the trustees were added or removed during the life of the Trust, the trust deed contemplated that the addition or an exclusion of a beneficiary was within the power of the trustees as a whole, not in Mr Legler or Ms Formannoij or any other appointor, but the trustees collectively would need  
30 to decide upon the addition or removal of any beneficiary.



**O'REGAN J:**

But don't all decisions have to be unanimous by the trustees?

**MR BIGIO KC:**

Under this trust deed, yes, except for one, and that is one of the points that I  
5 am coming to. That –

**O'REGAN J:**

Okay.

**MR BIGIO KC:**

So Mr Legler died and BOI later resigned, and that left Ms Formannoij as the  
10 sole non-corporate trustee. Now clause 26.1 which is at page 43 provides that  
unless a corporate body is the sole trustee, and at that point in time, there was  
no corporate body as the sole trustee, it was Ms Formannoij post the death of  
Mr Legler and resignation of BOI. "If at any time there is only one Trustee, no  
15 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."

So in her capacity as the remaining trustee as a natural person, Ms Formannoij  
was unable to exercise any powers under the trust deed except the power to  
20 appoint an additional trustee.

Paragraph (b) provides that: "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  
25 a Beneficiary or with a Trustee." So clause 26.1(b) requires that sole remaining  
trustee, Ms Formannoij, to appoint an independent trustee to be alongside her.  
Now –

**O'REGAN J:**

Do you say a corporate trustee of which she is the shareholder is not  
30 independent in terms of that clause?

**MR BIGIO KC:**

Not in respect of which she is a shareholder. A corporate trustee in respect of which she is in sole control is not contemplated.

**O'REGAN J:**

5 Where does it say that?

**MR BIGIO KC:**

It doesn't say that, and that –

**O'REGAN J:**

Well, why should we read it in?

10 **MR BIGIO KC:**

Because in the analysis in a proper purpose scenario, the first analysis is to determine what is the scope of the power of appointment. If the power to that is exercised is within the scope of the power, that doesn't end the exercise for equity. This is what several cases in New Zealand have decided and the Privy  
15 Council has concerned. The next question is, even if it appears to be within the scope of the language, was it done for a proper purpose and does it reflect the true intent of the deed, taking into account all of the surrounding circumstances at the time of formation?

**O'REGAN J:**

20 So you say she did have the power to do, it but she had to do it for a proper purpose.

**MR BIGIO KC:**

Exactly, your Honour. Equity looks at substance, not form.

**O'REGAN J:**

25 So in what circumstances could she validly do it, on your view?

**MR BIGIO KC:**

Could she validly do what she had done?

**O'REGAN J:**

Yes.

**MR BIGIO KC:**

She could never do it.

5 **O'REGAN J:**

So she didn't have power to do it, you're saying.

**MR BIGIO KC:**

No, no. She didn't have – she had the power to do it on the face of the document because there is no document, no express prohibition against it, but  
10 that doesn't – that's not the end of the enquiry. So she had no power to do it because by definition, as I'm coming to, it could only be done – couldn't be done for a proper purpose.

**O'REGAN J:**

So therefore she didn't have the power to do it. Isn't that what you're saying?  
15 If she could never validly exercise the power, that's not a power.

**MR BIGIO KC:**

Not exactly, your Honour. She could exercise the technical power to appoint the company. The question is whether equity would allow that to stand as a valid appointment, having regard to the circumstances. If she could  
20 demonstrate, in theory, that the appointment of this company was in the best interest of the beneficiaries as a whole, she might be able to validate it. But what we say is, looking at the structure of this trust deed and the reason for which she actually did it, this particular appointment was not valid.

**WINKELMANN CJ:**

25 So this is a very peculiar clause because it, as you say, looks like is intended to secure independence and there may be multiple reasons why it's intended to secure independence, to make it safe against trust busting, but it's still

intended to secure independence. But then why have a carveout for corporate body?

**MR BIGIO KC:**

In which clause, your Honour?

5 **WINKELMANN CJ:**

Clause 26.1. “Unless a corporate body is the sole Trustee”. So the prohibition on connection doesn’t...

**MR BIGIO KC:**

10 Well, the presumption would be that the corporate body is going to be an independent trustee by definition. That is what we say the intent of the deed is.

**WINKELMANN CJ:**

That’s why I find it hard to understand why it wasn’t pleaded as outside power as an alternative, but you didn’t plead it in that way.

**MR BIGIO KC:**

15 No, because it just appears – I understand the arguments, your Honour, but we focused on the fraud on a power and the purpose of it because we considered that to be the appropriate way of analysing what was actually done.

20 And if I can just add, the Privy Council said in *Grand View* of course that when you are looking at the proper purpose argument, you are of course considering the scope of the power, but looking at it beyond a technical approach or a technical interpretation and looking at what the intent of the rule was and whether that was expected.

**WILLIAMS J:**

25 But it’s rather hard to get to the idea of a completely independent professional corporate trustee given the part of clause 27 that acknowledges that an officer or shareholder or director of such trustee could be a beneficiary.

**MR BIGIO KC:**

Yes.

**WILLIAMS J:**

How does that work?

5 **MR BIGIO KC:**

Understood, your Honour. If I can complete the context and come back to your Honour's question, but I'll just say in brief, section 27 or clause 27 is silent on whether the concept of control is relevant there. So one could have a mere – one could be a beneficiary on a board of three directors, not have  
10 control of that company. That's all that clause 27.2 authorises. No more. It says you can own shares in that corporate trustee, but it doesn't invite, in the context of the whole of this deed, in my respectful submission, a conclusion that you can appoint a company which you can control by yourself when you're not entitled to control the Trust as a natural person.

15 **WILLIAMS J:**

Right, that's it. So you don't support Justice Cull's conclusion that it was really only a professional corporate trustee that was contemplated there?

**MR BIGIO KC:**

We haven't adopted her Honour's approach to clause 27. We adopt a different  
20 one.

**WILLIAMS J:**

Then on clause 26.1, you talk about the fact that the surviving trustee can only do one thing.

**MR BIGIO KC:**

25 Yes.

**WILLIAMS J:**

Appoint a new trustee. Are you suggesting that a new trustee had to be an additional trustee?

1020

5 **MR BIGIO KC:**

Well, only if she had appointed a sole corporate trustee which was outside – which was not in her control.

**WILLIAMS J:**

10 Well, my question is, did that new trustee have to be a trustee in addition to her?

**MR BIGIO KC:**

Yes, and it had to be an independent person or corporation.

**WILLIAMS J:**

Let's get to the person next, but on that question, what happened in this case?

15 **MR BIGIO KC:**

Well, just before I answer that question, can I just complete two provisions of the trust deed which I think it's important to provide context for when looking at the interpretation issue? And I will, I promise to come back to what actually happened because it is what follows.

20

25 So if we could just go to clause 18 of the trust deed. So clause 18 is what's commonly referred to as the no self-benefit clause: "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." So in order for her to derive any financial benefit from the Trust, which was something that she was – in regular receipt of income of the Trust, for example, she needed another trustee because only another independent trustee could approve the distribution of that benefit to her.

I'm almost at what actually happened in this case, your Honour.

**WILLIAMS J:**

I see where you're walking me. Keep going.

**MR BIGIO KC:**

5 Thank you. If we can go to clause 12 now, because this is a clause that is not present in any of the other cases and is very relevant to the interpretation, we say, in terms of the application of the proper purposes doctrine. This is the variation clause, and again, the power to vary resides in the trustees themselves, not in any one of them, not in any identified settlor, but collectively.  
10 But the key is that in clause 12.2 – and the clause 12.1, the power is broad, but in clause 12.2, there is a restriction: “Any such alteration, variation, addition or revocation shall...not vary the provisions of clause 26 of this deed specifying the identity of any of the Trustees.”

15 Clause 26 has been entrenched by the settlor or settlors, in a way which your Honours will unlikely to find in any of the authorities that we're going to refer to, which we say emphasises the point that Ms Formannoij at that point in time as the sole trustee could not vary clause 26 in order to achieve the outcome she wished to achieve. So she had to find, in our words – or her lawyers found her,  
20 a workaround.

So coming to your Honour's question about what actually happened. So that's the full context, we say. So coming back to clause 27. If you have a trust deed which is emphasising independence and is entrenching the requirement for  
25 independence, then in my respectful submission, one shouldn't read clause 27 as authorising the most simple workaround by saying it doesn't prohibit someone from being – you from appointing a corporate trustee of which you are in control.

30 Now, in the outline, I note that the power's fiduciary, which at this point in time I think is unarguable, and I'll go straight to the question of what actually happened and how we characterise it.

**GLAZEBROOK J:**

Can I just come back to the question? What it seems to me you're arguing is that there wasn't a power to do what she did. So as I understand the argument, it would have to be, she had to have an independent trustee, she should've

5 appointed that independent trustee. At that stage, the independent trustee would've been the only one who would've been able to appoint to her, or to decide that there would be a corporate trustee, or that – sorry, I suppose, unanimous decision because they would be appointors. Appointors at that stage would be – they could be a corporate trustee, but it would be only because

10 the independent trustee and her had decided there was a corporate trustee. At that stage, are you saying there was a – if the independent trustee and her together decided that it would be a company of the nature that we have at the moment, that that also would be outside power, but again, it seems it's an outside power not a fraud on a power argument.

**15 MR BIGIO KC:**

Well, we would still be saying that the appointment of that company, while technically, potentially permissible on the language of the trust deed, was done for an improper purpose.

**GLAZEBROOK J:**

20 Even if there was an independent trustee?

**MR BIGIO KC:**

Indeed, because the purpose is to give – would ultimately be to give her sole control of the Trust under a deed where she could not exercise that control as a natural person. She was not entitled to take control of the Trust.

**25 O'REGAN J:**

So you're saying no one could exercise the power to appoint a corporate trustee of which she was the sole shareholder, and if you're saying that, you must be saying there's no power to do it. You're saying she can't do it, an independent trustee couldn't do it, no one can do it.



**MR BIGIO KC:**

Your Honour, I have to acknowledge that there is a power to appoint corporate trustees under the trust deed. So there is a power and an ability to —

**GLAZEBROOK J:**

- 5 Where do you say that comes from? Is that just by implication as well? Or is that the clause 23.3, a separate trustee?

**MR BIGIO KC:**

I'm sorry, your Honour, I didn't quite catch the question.

**GLAZEBROOK J:**

- 10 So I don't think you took us to the power to appoint a corporate trustee. Is there a specific power you're relying on or is it by implication?

**MR BIGIO KC:**

Just by implication, your Honour.

**GLAZEBROOK J:**

- 15 Okay. No, that's fine.

**MR BIGIO KC:**

Certainly no – it appears that the language of the trust deed contemplates the existence of corporate trustees. That's it.

**GLAZEBROOK J:**

- 20 No, that's fine. I was just checking whether you said there was a specific power because it sounded as if you were.

**MR BIGIO KC:**

Yes.

**WINKELMANN CJ:**

- 25 We are all struggling with your not having taken up what seems – it seems an argument available, which is that properly construed, the trust deed does not

permit the appointment of a corporate trustee which is controlled by the trustee appointing.

**MR BIGIO KC:**

Well –

5 **WINKELMANN CJ:**

Because as you point out, clause 23 doesn't necessarily connote control.

**MR BIGIO KC:**

I have to deal with the possibility that under clause 27, there is a possibility for a corporate trustee of which she can be a director. And so the issue of control  
10 is one which we say comes from an interpretation of the trust deed, or the prohibition of it involving control, comes from the interpretation of the trust deed as a whole and the intent of the settlors at the time.

**GLAZEBROOK J:**

But again, that would be an argument on outside power, wouldn't it, if you say  
15 section 27.2(c) doesn't say that you could have control, and in fact, that would be contrary to, say, clause 18 in terms of no self-dealing?

**WINKELMANN CJ:**

Well, the operation of the Trust itself.

**MR BIGIO KC:**

20 Yes, but I have to acknowledge that it's arguable, because clause 27 does not refer to control. I don't have an express prohibition on control that I can rely on.

**WINKELMANN CJ:**

No, but the operation of the trust deed, you would say, is premised on there being some independence created by the requirement of an independent  
25 trustee – by an independent trustee because of the requirement for unanimity, the provision in clause 18, the no benefit clause, et cetera.

**MR BIGIO KC:**

As long as the trustee remains a beneficiary, yes.

**WINKELMANN CJ:**

Mmm.

5 **MR BIGIO KC:**

That's right. So the arguments on scope, and this is apparent from *Grand View*, the arguments on scope and proper purpose are very, very closely aligned and very finely balanced and nuanced, and the Privy Council notes that in *Grand View*, that when you're arguing a proper purpose analysis, you are of course revisiting the scope as expressed in the express words of the trust deed. But you are taking into – you're not looking for technical compliance. You're looking for something broader than that, whether what's actually done, while it could possibly fit within the words of the trust deed, was not part of the intention or purposes of the settlors when they framed the trust deed, and that's the limb that we have referred to, rely upon, because in our respectful submission, that argument is obvious.

So if I can take your Honours now to –

**GLAZEBROOK J:**

20 And at some stage, I assume you'll be talking about the fact that there were two trusts there?

1030

**WINKELMANN CJ:**

Which is something that's said against you. Which is the connection. So it's said against you, as I understand it, that the other trust was to look after the children, and this was to look after the two settlors.

**MR BIGIO KC:**

Yes, and my submission on that has been consistent, which is the Horowai Trust is a purpose trust, which was not so much designed to distribute

income to the children, as to assist in the management and the administration of the forest, which was Ricco's, the forestry project, which was his dream project, and in respect of which, on that trust deed, he formed a trustee company where he and his son Li were the directors of that trustee company, and so that trustee was set up for a specific purpose, similar to one of the trust deeds in *Grand View* but the Kaahu Trust was set up as an ordinary family trust, and what I want to take your Honours to later is illustrations of how under the Kaahu Trust provision for – it was a classic distinction, if you like, between income being distributed to Mr Legler and Ms Formannoij for their living expenses, a property acquired for them to live in, and substantial capital distributions during the life of that Trust were made to the Horowai Trust. So how can one say during the life of – the administration of that Trust, when substantial capital is being distributed, that it is specifically for one purpose.

**O'REGAN J:**

15 Well how do we know because you resisted discovery.

**MR BIGIO KC:**

I beg your pardon, your Honour?

**O'REGAN J:**

You resisted discovery about the Horowai Trust so we don't know that, do we?

20 We don't know whether the children were in fact the only beneficiaries of it.

**MR BIGIO KC:**

Well, we have the children's affidavit evidence about what the purpose of the Horowai Trust was. Mr Legler's affidavit.

**O'REGAN J:**

25 Yes, but we don't know what actually happened between 2007 and 2014.

**MR BIGIO KC:**

In terms of whether they received distributions.

**O'REGAN J:**

Because you refused to tell the Court.

**MR BIGIO KC:**

Well, that was a – that discovery issue was in a slightly different context, which  
5 was not, if I may say, faithfully recorded in the Court of Appeal decision.  
The question that arose was whether we were going to, in these proceedings,  
challenge whether the March 2020 distributions were made in breach of  
fiduciary duty with regard to the failure to take into account the children's  
particular circumstances at the time, and what we said was our case is not a  
10 case which is going to analyse those distributions per se, and so we're not  
engaging in that balancing exercise –

**WINKELMANN CJ:**

So can you just, I fail to follow you. When we go back to your submission, I  
think your submission was that the Kaahu Trust was set up as an ordinary trust  
15 and that substantial capital was distributed not just to the settlors, Maria and  
Ricco, but also to the children.

**MR BIGIO KC:**

No, didn't quite put it that way, your Honour.

**WINKELMANN CJ:**

20 So what was your –

**MR BIGIO KC:**

What we know about the Kaahu Trust are three different distributions, or three  
different distributions. Sums were paid annually for the upkeep of Mr Legler  
and Ms Formannoij, and there was a property which was owned by the Trust in  
25 which they resided. Mr Legler distributed himself, from distributions to him, an  
annual maintenance to his ex-wife, the mother of the children, \$60,000 a year.  
So what I said was the income of the Trust in terms of the cashflow of the Trust  
that was generated from investments, was used to fund their life and lifestyle,  
and also to fund Mr Legler's ex-wife, or to support her, and the capital

distributions, the substantial sums, transfers of land and other cash to assist in the forestry project, were transferred into the Horowai Trust, which was the trading trust of the forestry business. That's what we know about the life of the Trust.

5 **WINKELMANN CJ:**

So the transfers of capital, cash and land – or, transfers of capital came from this trust?

**MR BIGIO KC:**

From the Kaahu Trust.

10 **WINKELMANN CJ:**

The Kaahu Trust.

**MR BIGIO KC:**

To Horowai. As I indicated at the beginning any trusts in which one of the issue of the discretionary beneficiaries, right, was entitled to distribution. So capital was distributed to that trust.

**WINKELMANN CJ:**

And so this trust wasn't just used to look after Mr Legler and Ms Formannoij?

**MR BIGIO KC:**

Not at all. Not at all.

20 **WINKELMANN CJ:**

And the – now can – I lost the thread on why the discovery. I mean I, myself, am losing the thread on why the discovery of this other trust was relevant, other than possibly, I can see that it's relevant to the exercise of the trustee's discretion under the Kaahu Trust, because they might say, well, if these beneficiaries in the Horowai Trust are already well provided for, then we don't need to exercise our discretion. But why is it relevant and why was it said to be relevant in this proceeding?

**MR BIGIO KC:**

Well, we didn't think it was relevant.

**WINKELMANN CJ:**

But can you tell me why it was said –

5 **MR BIGIO KC:**

Yes, I can, because what happened was we issued these proceedings concerning the status of the appointment before the children knew about the March distributions. When I refer to the March distributions, your Honours are familiar with what resolutions I'm referring to, which is essentially distributed all  
10 of the assets of the Trust to Ms Formannoij and removed it.

**WINKELMANN CJ:**

Yes, I want to ask you about that shortly, but carry on.

**MR BIGIO KC:**

All right, and removed the children as beneficiaries. So we did not amend the  
15 pleading to allege a breach of fiduciary duty by the Kaahu Trust in passing those resolutions. Why? Because we said, if we are successful in arguing that the appointment of Kaahu Trust in the first instance was for an improper purpose, and therefore is void, then that would naturally unwind the resolutions. They would become invalid.

20 **WILLIAMS J:**

That's a big "if".

**WINKELMANN CJ:**

So that's quite a big call for you, not to ask for consequential relief because you're going to have to issue separate proceedings, aren't you, to get that  
25 consequential relief?

**MR BIGIO KC:**

That's correct, your Honour. That's correct.

**WINKELMANN CJ:**

But why not, why did you not amend this proceeding to encompass it?

**MR BIGIO KC:**

5 Because, your Honour, if we had opened up the proceeding to deal with all of  
the substance of the March resolutions, we might have turned a five-day  
hearing into a three-week or four-week hearing.

**WINKELMANN CJ:**

10 No, but you could have simply left it with your extremely pinpoint focus, which  
you have adopted, but ask for a consequential relief, couldn't you? I just don't  
understand.

**MR BIGIO KC:**

As for consequential, well we do have – what we say is if our relief is granted  
in terms of the invalidity of the appointment of the trustee, then those resolutions  
fall. We don't – we ask for that relief, we don't need to demonstrate –

15 **WINKELMANN CJ:**

Do you?

**O'REGAN J:**

Where did you ask for that relief?

**WINKELMANN CJ:**

20 I don't see it in your pleading.

**O'REGAN J:**

Where did you ask for that relief? It wasn't in your statement of claim.

**WINKELMANN CJ:**

We've been trying to find it in your pleading.



**MR BIGIO KC:**

Well, I would have to go back and check the pleading, but it's always been our argument that once the appointment falls the resolutions can't stand.

**O'REGAN J:**

5 Well, you didn't plead that.

**WINKELMANN CJ:**

Well, when I look at your pleading – because you've only got the one statement of claim, correct?

**MR BIGIO KC:**

10 Yes, we didn't amend it after we learned of the March resolutions.

**WINKELMANN CJ:**

So the relief sought is a declaration that the appointment of the second defendant is void as a fraud on a power and consequential relief is simply connected to reinstating Ms Formannoij as trustee, and then an order replacing  
15 her with an independent trustee, yes. So it's all to do with – you don't seek any – I was confused, you don't seek any consequential orders.

**MR BIGIO KC:**

Well, I have to say, your Honour, I didn't have a recollection of that. But it's beyond doubt that what we argued was that it would necessarily follow that the  
20 resolutions were invalid.

**WINKELMANN CJ:**

It does follow as a matter of law, but it just is – would have, you know, I think –

**GLAZEBROOK J:**

Well, I'm not sure about that because you have people who are trustees  
25 purporting to act as trustees.

**WINKELMANN CJ:**

Maybe, yes.

**MR BIGIO KC:**

Well, we argued that, and my learned friend Mr Little will be addressing the Court on the consequential relief in terms of appointment of trustee, but we say they were trustees de son tort and therefore their actions are not considered  
5 to be valid, and so it just falls as a matter of law.

**O'REGAN J:**

You don't raise that for the first time in a second appeal court.

**MR BIGIO KC:**

I beg your pardon, your Honour?

10 **O'REGAN J:**

You don't raise a point like that for the first time in a second appeal court.

**MR BIGIO KC:**

I don't believe we only raised it in this Court, your Honour.

**WINKELMANN CJ:**

15 Have you raised it?

**O'REGAN J:**

Well, have a look in your pleading. There's just nothing there.

**MR BIGIO KC:**

But that doesn't mean we didn't submit that in the High Court and the Court of  
20 Appeal, your Honour.

**O'REGAN J:**

Yes, but you didn't plead it.

**WINKELMANN CJ:**

So I think your submission, Mr Bigio, is that you don't need to plead it –

**MR BIGIO KC:**

That's correct, your Honour.

**WINKELMANN CJ:**

– because it follows as a matter of law.

5 **MR BIGIO KC:**

It's just a matter of law. It follows as a matter of law. So coming back to the discovery point –

**GLAZEBROOK J:**

Well, I think I'd need more convincing of that, and again not on a second appeal.

10 **WINKELMANN CJ:**

Well, and I think Mr Bigio said his junior was going to address it. Is that correct?

**MR BIGIO KC:**

Yes, and we can –

**WILLIAMS J:**

15 He is now.

1040

**GLAZEBROOK J:**

Especially if you say the power is validly exercised. But no, because if there was a power, and you say it's validly exercised, then in fact, those trustees are  
20 validly there. They've validly made decisions in respect of this. So you have to say the fraud on the power invalidates the decisions and the – because it's not that they shouldn't have been there in the first place, on your argument.

**MR BIGIO KC:**

No. It is our argument that they should not have been there in the first place –

25 **GLAZEBROOK J:**

Well, that is –

**MR BIGIO KC:**

– because their appointment was a fraud on a power.

**GLAZEBROOK J:**

Oh, okay.

5 **MR BIGIO KC:**

That is why they should not have been there.

**O'REGAN J:**

Yes, but they are a trustee until the Court says they're not.

**MR BIGIO KC:**

10 Yes, but they are a trustee, as I said, de son tort, and we – so it means that that –

**O'REGAN J:**

Well, that's a completely new argument to me.

**MR BIGIO KC:**

15 No, no –

**O'REGAN J:**

It's not mentioned in your submissions, it's not in your pleading, it's not in the High Court judgment, it's not in the Court of Appeal judgment.

**MR BIGIO KC:**

20 I'll come back to that, your Honour.

**WINKELMANN CJ:**

It's certainly opaque. It may have been argued at each level but what we're saying to you is that when I read all this material, I thought, well, why are we arguing about this, because the children being removed as beneficiaries and  
25 the assets have been dealt with, and yet there's no consequential relief sought

and it seemed a strange thing, and so it's obviously not apparent in the record to us.

**MR BIGIO KC:**

Well, I'll have to go back and check that to make sure that I can indicate it to you, but I can assure your Honours that this is not the first time that we have raised this point.

**WINKELMANN CJ:**

I suppose it could've occurred because you lost in the previous level, so there was nowhere to go onto consequential relief issue.

10 **MR BIGIO KC:**

Well, we just didn't amend the pleading consequentially, as I've said.

**WINKELMANN CJ:**

No, for the judges to go and consider the consequential relief, although it's strange you didn't refer to it. But all the same.

15 **MILLER J:**

As I read your pleading, what you are doing is seeking to reinstate her as a trustee and it seems implicit in that that the trustees as they properly stand will revisit those decisions possibly by reinstating beneficiaries. That's the implication of it.

20 **MR BIGIO KC:**

That is the implication, Sir.

**MILLER J:**

In other words, it doesn't happen automatically by operation of law. You contemplate that a set of decisions will be made by the trustees to unwind so far as you can what was done.

**MR BIGIO KC:**

I believe –

**WINKELMANN CJ:**

Well, that's different to what you've submitted.

**MR BIGIO KC:**

5 No, no. Sorry, your Honour. We sought her – the argument that we make about what happens if there was a fraud on a power is that one must go back to the point in time where – at the time she exercised the power where she was a sole trustee and the question that I –

**MILLER J:**

I understand the argument you're now making. I'm interpreting your pleading.

10 **MR BIGIO KC:**

No, I wasn't suggesting that the decision stand and that they simply reconsider it. By the trustees – how do I put it? The trustees would –

**WINKELMANN CJ:**

15 Well, that wouldn't work because the corpus has gone out of the Trust, so it's not within power of the trustees to actually reconsider.

**MR BIGIO KC:**

Correct. That's right. So we're relying on invalidity, the restoration of the assets of the Trust, the proper appointment of new trustees who then can consider any resolution they wish, that Ms Formannoij wishes for them to consider.

20

So properly constituted trustees may come to the same decision. They will do, in our respectful submission, a much more detailed analysis of the appropriateness of those resolutions, but that's not really the point. The point is that those resolutions were made by trustees who were not validly appointed.

25 **O'REGAN J:**

So on that basis, you're saying the Court's decision that the power was exercised for an improper purpose invalidates the power right from the beginning rather than from the time the Court says so?

**MR BIGIO KC:**

Absolutely. It is void. The appointment is void, and it is – therefore we go back to where we were on the date that the appointment was made.

**WINKELMANN CJ:**

- 5 Can you tell me if you challenged the appointment before the actions were taken or were you not advised of it?

**MR BIGIO KC:**

10 I'm going to take your Honours later to a letter – so what happened was, the appointment was made in November 2019. We – the children learned about the fact of the appointment in January of 2020, and then in February of 2020, my instructing solicitors wrote questioning the appointment. Should we go to that letter now?

15 So this is a letter from TGT Legal to WRMK who were the solicitors for the new corporate trustee in response to a request for information about the Horowai Trust, and the second part of the letter starting on page 818 contains a request for information from the Kaahu Trust. In paragraph 10, TGT notes “that the trustee of the Kaahu Trust has changed, and that is now a company...which Marina is the sole director”, and they ask for information concerning the  
20 company, and there, they assert that there’s an “obvious conflict that exists between Marina’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”.

25 In response to that letter – can we go to the WRMK letter? This is WRMK reporting to Ms Formannoj, your Honours will see, about the attached correspondence received from TGT Legal, and they record the fact that they are concerned about her being the sole director. They say this is all to be expected and they intend to prepare a draft response to the letter for her to  
30 consider which in fact they never did. There was no response to the letter.

Then she – they go on to say: “It is time for a decision to be made as to what to do with the assets of the Kaahu Trust,” and three options are recorded there “for dealing with the Trust and its assets (or a combination of 2 or all of them):  
1. Remov[ing] Ricco’s children... 2. Resettl[ing]...the Trust’s assets to a new  
5 trust... 3. Distribut[ing] all of the...assets to you personally and wind[ing] up the Trust”.

The March resolutions were implemented after receipt of this letter and TGT Legal was not advised of the fact of the resolutions. So the proceedings were  
10 issued solely on the question of the appointment and it is only after the proceedings were issued that we learned that the resolutions had been passed, and that then gave rise to the question, how are we going to deal with those resolutions over the course of the proceedings? We wanted to move as swiftly as possible to a determination of the appointment issue and did not turn the  
15 proceedings into an argument of breach of fiduciary duty by a trustee who we had considered to be invalidly appointed.

So that means we didn’t bring into play, when we were resisting discovery, all of the financial background of the children and their asset position in order to  
20 have the Court do an assessment of whether the resolutions were reasonably arrived at in and of themselves. That would have been an entirely different proceeding and a much longer one.

Now, if your Honours please, if I can get back to the outline, and I’m at  
25 paragraph 10. This submission here – sorry, I’m at paragraph 9 where – and the submissions are made in the context of the fact that we say this power to appointment is of a fiduciary nature and as such it must be exercised in the interest of the beneficiaries as a whole. It’s a power to put someone in the office of trustee and undertake, as described there in the *New Zealand Māori Council v Foulkes* [2015] NZCA 552, [2016] 2 NZLR 337 decision of  
30 Justice Kós, “...carries fundamental and onerous obligations to act in the best interests of the beneficiaries as a whole to the exclusion of the trustee’s...interest”.



In that context, we say that the first respondent abused the power she had by appointing herself in corporate form a second trustee in order to secure sole control of the Trust. It gave her a power, absolute control, that the trust deed expressly prevented her from having as a natural person. That is the core of our argument in terms of the proper purpose aspect.

Now, we get to the next limb of did she exercise that power nevertheless for the benefit of the beneficiaries as a whole or for her own benefit. We say only the first respondent – or she was the only person who could and did benefit from the appointment. She did not need to appoint a corporate trustee to allow her to discharge her duties towards the other beneficiaries. She was already a trustee. She did not appoint a new trustee with her in control because another trustee was not performing, as appears in a couple –

15 **WILLIAMS J:**

You agree, don't you, that the relevant time is the time of her retirement and appointment of a –

**MR BIGIO KC:**

Yes, Sir.

20 **WILLIAMS J:**

Right, so it's not did she, but did she intend to?

**MR BIGIO KC:**

Did she intend to.

**WILLIAMS J:**

25 Yes.

**MR BIGIO KC:**

Yes, that's correct. Yes. So she intended to appoint herself for the sole purpose of benefiting herself, and I say that because she was already a trustee of the

Trust, and therefore she could exercise every power that a trustee had under the trust deed except for one. The only inhibition she had in being a trustee as a personal capacity was the ability to confer benefits on herself.

**WILLIAMS J:**

5 Well, she couldn't do anything until she had appointed another trustee.

**MR BIGIO KC:**

Yes, indeed, Sir, but I'm now referring to the concept of sole control. So if she had appointed an independent trustee completely, then she could have discharged all of the duties that the trust deed gave her and she would not be  
10 entitled to confer benefits on herself. The only reason to appoint a corporate trustee which she was in control of was to attempt to avoid that limitation and confer benefits on herself. There's no other explanation.

**WINKELMANN CJ:**

So I think your submission is the obvious inference from the steps she took was  
15 that she was exercising for an improper purpose.

**MR BIGIO KC:**

Indeed, your Honour.

**WINKELMANN CJ:**

But you also say, don't you, and that is so is corroborated by the actions she  
20 immediately took?

**MR BIGIO KC:**

Exactly right. Immediately contemplated in November and then executed in March. And when I asked her questions about the March resolutions and said to her: "These are actions you were contemplating in November and discussing  
25 with WRMK between November and March," she agreed with me. She said yes.

Now, in this regard, her appointment of this company as a – with her in sole control differs from some of the Australian cases that my learned friend relies upon. There are cases where people have taken control of a trust to replace a non-performing trustee, for example, in circumstances where the Court has  
5 decided, well, it wasn't simply for the purposes of preferring that person's interests. It was in the interest of the beneficiaries as a whole such as in the *Baba v Sheehan* case, where there was a trust deed that was effectively a partnership agreement rolled into a trading trust, where the courts found that the appointment or the taking of control was for the benefit of the business and  
10 therefore for the benefit of all the beneficiaries. But as I've said here, she already had the office of trustee. She wasn't replacing somebody who was being obstructive or not administering the Trust properly. The only purpose was for her to protect her own interest, and she says, as we said as we record there in paragraph 10: "WRMK's advice gave me confidence that my interests were  
15 being looked after." That's not how a decision to appoint a trustee should be approached at the time. She was not considering the interest of the beneficiaries as a whole, and the decision was made in the context of a potential dispute or questions from beneficiaries about the Trust.

20 Paragraph 11, already referred to the March resolutions and what effectively was done. The children were removed as final beneficiaries even though she agreed in her evidence that them being final beneficiaries was one of the purposes of the Trust. Not just a feature of the Trust, one of the purposes of the Trust.

25

Now, in 12, we say there was no evidence from the 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", and by that she meant – she said she understood fully that she would not need to act alongside  
30 an independent trustee. She would have complete control. It's not a situation where she was led down a garden path or made the decision in the context of receiving only one piece of legal advice. The drafter of the trust deed – his name escapes me for the moment, but McBrearty? Mr McBrearty gave advice

that what she was contemplating to do was not in conformity with the intention of the trust deed.

5 Now, Mr McBrearty was somebody who was such a trusted advisor to her that she actually asked him to be an independent trustee but he declined to accept the appointment for various reasons. Mr Jordan who was actually advising the trustee at the time also expressed the view in correspondence that there needed to be an independent trustee.

**GLAZEBROOK J:**

10 She did make some attempts to get one and one can imagine in this situation that any further attempts would've likely been in vain.

**MR BIGIO KC:**

I'm not – with respect, your Honour –

**GLAZEBROOK J:**

15 Or an insane independent trustee taking on a trusteeship in a situation where there's clearly issues.

**WINKELMANN CJ:**

Was it a very fractious relationship by this time already?

**MR BIGIO KC:**

20 There was – I would say there were different degrees of tension between the children and Ms Formannoij depending on which child it was, but there was definitely correspondence that was seeking information about the administration of the Trust. This is now two years on from Mr Legler's death and there was anticipated litigation. But your Honour, Justice Glazebrook, the  
25 Public Trust was not pursued as an option not because they would've been unwilling –

**GLAZEBROOK J:**

No, no, no, I can understand you could get a trustee company, but you could also understand that trustee companies charge an awful lot of money and are not necessarily thought of as – one can understand why one didn't necessarily think that those large trustee companies was suitable in the context of a family trust.

**MR BIGIO KC:**

That may be –

**GLAZEBROOK J:**

10 For expense and other reasons.

**MR BIGIO KC:**

Yes. That and other reasons. But that doesn't mean that there were not other available trustee company options who may have accepted appointment and have experience in dealing with situations where demands or request for information are made on trustees. That's part of the ordinary course of business. But none of that entitles her to proceed by – to make an appointment for an improper purpose. That can't validate the decision if it was, in fact, for an improper purpose. She had the option of incorporating a company with a board of directors where she might have formed one of three, as I said, and not be in sole control, but this option that was presented to her suited her because as she said: "My interests are being looked after."

**MILLER J:**

You're using the concept of improper purpose in a very particular way, dealing with the use of an administrative power.

25 **MR BIGIO KC:**

Yes.

**MILLER J:**

As I understand the case is they usually speak of it in terms of what's the purpose of the trust as a whole, and that is to benefit such of the beneficiaries as the trustees think fit from time to time.

5 1100

**MR BIGIO KC:**

Yes, and that refers to the dispositive powers of the trustees, but the approach in *Grand View* makes this distinction. The approach to administrative powers, and the other cases that are referred to, when we're dealing with administrative powers such as the appointment of a trustee, to take the office, not in relation to individual decisions which are subject to a different form of review, when you're appointing someone to take the office you must consider the interests of the beneficiaries as a whole.

**WINKELMANN CJ:**

15 Such as they are?

**MR BIGIO KC:**

Such as the beneficiaries are at the date – as obviously –

**WINKELMANN CJ:**

No, such as their interests are because they're not all equal, are they? So it could be said, for instance, the primary purpose of this trust is to benefit Mr Legler and Ms Formannoij, and you might say, but that doesn't mean that you're entitled to appoint a trustee with the purpose of advantaging only Ms Formannoij, you have to appoint a trustee who is going to faithfully fulfil the trusts themselves.

**MR BIGIO KC:**

That's exactly right. First of all we don't accept the proposition that the trust deed itself evidences that the purpose of the Trust was primarily to benefit Mr Legler and Ms Formannoij –

**MILLER J:**

But the unchallenged evidence tells us that, does it not?

**MR BIGIO KC:**

I beg your pardon, Sir?

5 **MILLER J:**

Does not the unchallenged evidence tell us that, the evidence of the accountant? There's no doubt about this. They split their assets into two trusts. One primarily to benefit the couple, with the children as residuary beneficiaries, and the other for the children, and that evidence, as I – and I've read the  
10 evidence, you may be able to show me where you challenged it, but it seems to me not to be challenged.

**MR BIGIO KC:**

What we've said is that, and Mr Li Legler who gave an affidavit in reply said this, that's there's no question that one of the purposes of the Trust was to  
15 create an investment programme which yielded income, which could support Mr Legler and Ms Formannoj. But when one has also in the life of the Trust substantial capital distributions being made outside of it to another trust, what does it really mean, what does the word "primary" mean in that regard? They are the primary recipients of the income of the Trust, that is correct, but  
20 the capital distributions which were over, I think when you add them all up, \$4.5 million, went to the Horowai Trust during the life of the Trust, and the investment portfolio after – was never changed, it was consistent during the life of the Trust. After those distributions were made, Mr Legler didn't go to Mr Clarke and say, things are different, I want to change the portfolio now for  
25 this reason because now this Trust is only going to be about Marina and myself, and Li Leger gives evidence which was not – of conversations with his father that the Judge attached less weight to, the trial judge, appeared to attach less weight to than the conversations with Mr Clarke about the fact that after substantial distributions were made, his father never said to him, that's it, you're  
30 on your own. This is not for you anymore. He said that wasn't the type of person his father was, and their expectation was that if they were in need, they

could approach him, and the assets of the Kaahu Trust may be available for them.

**O'REGAN J:**

That might've been his –

5 **WILLIAMS J:**

Perhaps, but that evidence cuts both ways, doesn't it? They've already received extensive distributions.

**MR BIGIO KC:**

10 They received substantial distributions but the idea that it was at an end, that their interests in that Trust ceased because they had received substantial distributions, that's not supported by the evidence.

**WILLIAMS J:**

What if there was an independent trustee who joined Ms Formannoij in coming to the same result?

15 **WINKELMANN CJ:**

Wouldn't join her because it would have to act on its own because if it's distributing to her –

**MR BIGIO KC:**

Yes.

20 **WILLIAMS J:**

No, no, I mean if they agreed.

**MR BIGIO KC:**

25 Understood, yes. A properly constituted set of trustees could make decisions, as reflected in the March resolutions, provided they followed the proper steps of making the necessary enquiries to support those decisions.



**WILLIAMS J:**

Sure.

**MR BIGIO KC:**

5 So yes, the same outcome could happen one day, if the assets are restored to the Trust, and an independent trustee is appointed, Ms Formannoij could say to that trustee now, I would like you to consider doing this, doing X –

**WINKELMANN CJ:**

10 Your submission I think Mr Bigio is that in some senses whether or not, you know the primary purpose of the Trust was Mr Legler and Ms Formannoij or not, the children remain there in the Trust. A person appointing couldn't use that power to appoint for a purely instrumental purpose, which was to achieve the disposition of the Trust funds to themselves and exclude the children.

**MR BIGIO KC:**

That's correct, your Honour.

15 **WINKELMANN CJ:**

They had to use that power to appoint a trustee who would faithfully carry out the terms of the Trust as they were at that point in time.

**MR BIGIO KC:**

That's correct, your Honour.

20 **WINKELMANN CJ:**

Leaving to one side whether the children were ever going to get another dime, that's an irrelevance, and as you say that trustee could then look at everything and say, no they're not entitled to another dime, they've had a lot.

**MR BIGIO KC:**

25 That's correct.

**WINKELMANN CJ:**

Which might still be the outcome should you be completely successful.

**MR BIGIO KC:**

And that's correct, your Honour, at the time that the appointment was made there'd been no modifications made to the trust deed at all. No re-variations. The structure of the trust deed remained the same, and I've endeavoured to  
5 show that that structure was an ordinary family trust which contemplated distributions of income and capital. Did that during the life of the Trust and any new trustee would come into that context and be required, of course, by law, to apply the terms of the trust deed, and ultimately make decisions on request from beneficiaries for distributions down the track.

10 **WILLIAMS J:**

So your fraud on the power argument is procedural, really, in the sense that you are not arguing that Ms Formannoij could well have had that intention, as long as there was an independent trustee who agreed. Having gone through the due diligence that you suggest needed to be gone through.

15 **MR BIGIO KC:**

I'm not sure that I've understood the point entirely, the reference to the point in time of your Honour's questions.

**WILLIAMS J:**

Your point is what was missing throughout this was an independent trustee, or  
20 an independent decision-maker in some form.

**MR BIGIO KC:**

That's not actually what the case is about. The case is about what was in her mind and what did she do on the date she appointed a corporate trustee which allowed her to take control for herself.

25 **WILLIAMS J:**

Yes, but if she, at that time, had another trustee, even if that was still in her mind, that wouldn't have been fatal?

**MR BIGIO KC:**

No, it wouldn't have been fatal because the independent trustee would have been the decision-maker, not her.

**WILLIAMS J:**

5 Yes.

**MR BIGIO KC:**

Because she has no role in a decision – clause 18 says if a trustee benefits – for a trustee beneficiary to benefit from the Trust, someone else has to make that decision. Of course, if she's alongside the trustee –

10 **WILLIAMS J:**

Well, it's hard to understand what clause 18(1) means actually, but in any event you needed the concurrence of an independent trustee.

**MR BIGIO KC:**

In my respectful submission your Honour –

15 **WILLIAMS J:**

Because you've got to read that against the unanimity clause.

**MR BIGIO KC:**

Yes, that's correct.

**WILLIAMS J:**

20 But I don't think it matters.

**MR BIGIO KC:**

I don't think it matters either but I –

**WILLIAMS J:**

So my point is that your fraud on a power is essentially a procedural argument?

25 That a decision was purported to be made without the assistance of an

independent player, and the structure of this Trust is that an independent player was required, and that cannot be subverted.

**MR BIGIO KC:**

I wouldn't quite frame the argument that way, your Honour.

5 **WILLIAMS J:**

No, but that's really what you're saying because you don't have a – you agree that you can't have a problem with the ultimate outcome being the same, provided the independent person was in the mix.

**MR BIGIO KC:**

10 Yes, but when your Honour describes it as "procedural" she didn't need to consult with an independent person to make the decision to appoint the independent person.

**WILLIAMS J:**

15 No, I'm not – yes, procedural in the sense that the decider needed to be described in a particular way. Your problem is not, and I guess this is why you've structured your case the way you have, your problem is not necessarily with the outcome, because you accept that properly decided, you cannot have a problem with the outcome, you can only challenge the structure of the decider as being a fraud on the power?

20 **MR BIGIO KC:**

That is correct. But the relevant, and the relevant moment in time is when she made that appointment, and of course in terms of not being able to dispute the outcome, just emphasise, the words your Honour used to the effect that provided a proper process is followed in making that ultimate decision.

25 **WINKELMANN CJ:**

Which is including, so your independent trustee exercising their power, their decision-making power properly.

**MR BIGIO KC:**

They have to do that for her –

**WINKELMANN CJ:**

Under the trust deed, as opposed to acting at her direction.

5 1110

**MR BIGIO KC:**

Absolutely, your Honour. The independent trustee cannot act at her direction by definition. That would destroy the concept of independence entirely. And we say the framework of the trust deed felt so strongly about that that they entrenched clause 26.1 by not allowing the trustees during the life of the Trust to modify that requirement. That's why we have focused so much on the intent of the time the trust deed was framed and whether the decision that was made was for a proper purpose and consistent with that intent. Even if the trust deed left a nominal or technical gap allowing for the appointment of a corporate trustee, it wasn't to be a corporate trustee in this form, we say, when one looks at the proper purpose of the Trust and proper exercise of the power.

10  
15

**WILLIAMS J:**

If you read the relevant clause, the number for which now escapes me, the appointment of a new trustee clause in the event that the appointor dies, it's possible to read that as empowering the trustee only to appoint an additional trustee, isn't it? Clause 26.1 –

20

**MR BIGIO KC:**

I'm sorry, your Honour, I'm not sure I follow the question.

**WILLIAMS J:**

25 Clause 26.1.

**MR BIGIO KC:**

Yes, Sir.

**WILLIAMS J:**

If there is only one trustee, then that trustee can appoint a new trustee.

**MR BIGIO KC:**

Yes.

5 **WILLIAMS J:**

And that's the only thing the remaining trustee can do.

**MR BIGIO KC:**

That's correct.

**WILLIAMS J:**

10 It's possible to read that as meaning that whatever happens after the event, two trustees are required at that point, that the –

**MILLER J:**

Isn't the sequence that she appointed the company and then resigned?

**MR BIGIO KC:**

15 That's correct.

**MILLER J:**

So there were two trustees for a period then she resigned?

**MR BIGIO KC:**

For a nominal period of time.

20 **WILLIAMS J:**

I thought it was all done in one deed. Wasn't it all done in one deed?

**O'REGAN J:**

It was, I think, but –

**WINKELMANN CJ:**

But they can still achieve that sequencing.

**O'REGAN J:**

– the appointment was an earlier clause than the resignation.

5 **WINKELMANN CJ:**

You can still achieve the sequencing in one deed and it's legally done.

**MR BIGIO KC:**

It was carefully sequenced to appoint number 2, then to resign, and then to leave the sole corporate trustee.

10 **WINKELMANN CJ:**

Yes. We can be confident that she didn't resign before she appointed.

**MR BIGIO KC:**

Yes, I believe that's true.

**WILLIAMS J:**

15 Well, the point is that the next decision, arguably the next – no, actually, sorry. Back off. Keep going. I'll think about that.

**MR BIGIO KC:**

20 Right. Back to the outline. Yes, so I was just making the point in terms of advice when looking at the matter contextually, that she had advice, as I mentioned, from the framework of the trust deed and Mr McBrearty, that the specific course that was being proposed was not consistent with the intent of the trust deed. She consciously selected the advice which gave her confidence that her interests were being looked after.

25 Now, in terms of – just passing onto the page dealing with responses. I think I've already addressed the purpose of the Trust issue and the primary beneficiary issue. It doesn't, as I was discussing with the Chief Justice, permit

the appointor to take any other – or the fiduciary of the trust deed to take into account anything other than the interest of the beneficiaries as a whole as they find the trust deed at that time.

5 Paragraph 14, I have already covered conceptually, and there are cross-  
references to the evidence of Li Legler, the first respondent's own evidence that  
the whole purpose of the Trust, Ms Formannoij's evidence was that the assets  
were left for the children, distributions from Kaahu for the benefit of the children  
I've covered, and Ms Formannoij's concern that while Ricco was alive, the  
10 children's removal was never contemplated. But these are all after the fact  
matters. We are focused on what she did on that day, and on that, I pay  
particular emphasis as I've said to the fact that she was not appointing herself  
in a corporate form to take the place of any non-performing trustee or to get the  
Trust back on track. She was doing it to allow her to have the ability to avoid  
15 the inhibition on preferring or benefiting herself under the Trust. There can't be,  
and there is no other explanation offered for that.

Now, yes. Just, I refer briefly to something that featured in the Court of Appeal  
decision on the question of what was and wasn't put to Ms Formannoij in cross-  
20 examination. Now, one of the things –

**WINKELMANN CJ:**

Wasn't the entire case that she was meeting – that she was exercising for her  
own benefit?

**MR BIGIO KC:**

25 Our case was that she made that appointment for her own benefit.

**WINKELMANN CJ:**

Right.

**MR BIGIO KC:**

We rely on things that we consider to be admissions in the evidence, both in  
30 chief and in cross-examination. And what I said in the – I don't know that I can



improve upon it. What we said in the written argument is that if I had put the question to her: “Ms Formannoij, I put it to you that you appointed yourself as a director, sole director of a corporate trustee in order to benefit yourself,” and she said: “No,” I’d still be submitting to your Honours that that was against the weight of the evidence.

**WINKELMANN CJ:**

I thought there were multiple decisions which said that when the allegation is at the essence of the case against the person, you don’t need to put that. It’s just –

10 **MR BIGIO KC:**

That’s the other thing that we rely upon, your Honour. I wasn’t putting conflicting evidence –

**WINKELMANN CJ:**

15 I mean, there are multiple decisions to that. But is it actually taken as formal point against you? I don’t think it is taken as a formal –

**MR BIGIO KC:**

20 I was just criticised for it so I took it a bit personally. In the lower courts, that somehow I had failed to put an allegation, which is really the ultimate issue, to her. But we rely on what we rely on. Her own evidence and what we say are admissions and on inferences that we say can be drawn, on the date she made the appointment in the way that I’ve just described them to your Honour, that there’d be no other explanation for giving herself that one additional power that she was lacking because she had every other power under the trust deed which she could exercise.

25 **O’REGAN J:**

Well, no, she didn’t. Did she?

**MR BIGIO KC:**

I’m sorry, your Honour?

**O'REGAN J:**

She didn't have any other powers other than the one under clause 26.

**MR BIGIO KC:**

5 Yes, what I'm trying to get at, your Honour, is that if she had appointed a truly independent trustee, she – all her powers –

**O'REGAN J:**

All her decisions would've had to be unanimous, so she wouldn't have had the power. She and the independent trustee would've had to agree.

**MR BIGIO KC:**

10 Yes, of course. All decisions must be unanimous, but she didn't appoint that sole corporate trustee to allow her to do things that she couldn't already do under the trust deed, because once she put that independent trustee in place, then she was able to discharge all of her duties under the trust deed. If she put an independent trustee in place, she still wouldn't be able to make decisions to  
15 benefit herself. That's the point that I'm trying to make. The only change, the only thing that was different about appointing herself as a sole corporate trustee is that she could overcome two things: one, the need to consult with anybody about anything, and two, in particular, the ability to prefer her own interests without any accountability.

20

Now, I think I've already addressed – we've discussed clauses 26.1 and 27. I have to say, I actually don't have a sense of time.

**WINKELMANN CJ:**

It's nearly 20 past 11.

25 **MR BIGIO KC:**

All right.

**WINKELMANN CJ:**

You need to address relief, too.

**MR BIGIO KC:**

Beg your pardon, your Honour?

**WINKELMANN CJ:**

Well, the relief. Should you succeed, you need to address that. The relief –

5 **O'REGAN J:**

I think Mr Little said he'd do that, didn't he?

**WINKELMANN CJ:**

Is Mr Little doing all of the relief including the appointment of a trustee?

**MR BIGIO KC:**

10 He's doing everything to do with the appointment of the trustee, yes.

**WINKELMANN CJ:**

All right. Your outline runs out before him.

1120

**MR BIGIO KC:**

15 Yes, that's correct. I'm just looking at the balance of the outline. I think they're matters that I already addressed, and if I could just take a moment to confer with Mr Little about this.

Your Honours, unless there are any further questions for me at this point in  
20 time, I'd like to hand over to Mr Little to deal with the questions of the  
appointment of the trustee but perhaps during the morning tea break, I'd just  
like to satisfy your Honours that, with reference to the previous submissions,  
find the references, that the position we have always taken is that the effect of  
getting judgment in the High Court if we were successful, is that the decisions  
25 would have been void, that this is not –

**WINKELMANN CJ:**

So Mr Little is not going to deal with that?

**MR BIGIO KC:**

I'm not going to – well, I'd like to take the time to find the cross-references if I can.

**WINKELMANN CJ:**

5 Because that would have been a bit of a hot potato to pass him.

**MR BIGIO KC:**

Indeed your Honour, and that's why, if it's acceptable to your Honours I'll hand over to him and then I'll come back after the break.

**WINKELMANN CJ:**

10 Yes, that's fine.

**MR LITTLE:**

Good morning, your Honours. As Mr Bigio said, it's my responsibility to address you on the issue that arises if the Court accepts the issue of whether Ms Formannoij appointed the Kaahu Trustee Limited for an improper purpose, and the effect of that is that it's void. We say in that event, and Mr Bigio will return to this, that all steps following that appointment are necessarily also void on the basis that Kaahu Trustee Limited was not the trustee, and therefore under the terms of the settlement it had no powers to exercise –

15

**WINKELMANN CJ:**

20 Yes, but you're dealing with the appointment, the removal of the trustee and appointment of the trustee, et cetera.

**MR LITTLE:**

That's right, your Honour. The only reason I say that is because the key issue when considering whether to replace Ms Formannoij with an independent trustee, is whether that would be expedient in the interests of the beneficiaries as a whole, and so it's important that those beneficiaries include the appellants and all other beneficiaries that were removed.

25

**WINKELMANN CJ:**

And the respondent.

**MR LITTLE:**

Of course, and the respondent. The beneficiaries as a whole. I've set out in  
5 our submissions from paragraph 96 the principles applying to that question. I've  
said there that the principles are very well established. As I've said the focus  
is on the welfare of the beneficiaries as a whole. There's a reasonably recent  
Court of Appeal decision in *Tod v Tod* [2015] NZCA 501, [2017] 2 NZLR 145,  
10 which I quoted from, from paragraph 97, which simply summarises the  
principles. Now I should say that case involved an executor, but there's no  
difference in the relevant principles there, and that's reflected in the language  
used by the Court in that summary of principles.

Just to pick out a few of them, you'll see item (a): "The starting point is  
15 the Court's duty to see estates properly administered and trusts properly  
executed." So that would include ensuring that the duties of the trustees are  
properly executed.

Turning over the page, item (c): "The wishes of the testator/settlor... are to be  
20 given consideration..." so that would mean that in this case we would accept  
that it's a consideration that Ms Formannoij was appointed a trustee initially  
under the deed, but as the Court goes on to say: "...ultimately the question is  
as to what is expedient in the interests of the beneficiaries." So a factor, but  
not decisive.

25

Item (d), expedience, that's a lower threshold, it's not necessity. It's not  
necessary to show dishonesty or misconduct. It's simply, is it expedient.

Turning then to the ground that we rely on, this is from paragraph 99 onwards,  
30 the first ground we rely on is simply that the appointment of Kaahu Trustee  
Limited, if the Court accepts our case about that, was relevant misconduct.  
We say it was an act taken as a trustee, as a fiduciary for her own interests,  
and not the interests of the beneficiaries as a whole. On this point I understand

the respondents are relying on the fact that Ms Formannoj followed legal advice from WRMK, the law firm, in doing this, and that is exculpatory in some sense. In our submission, your Honours, the evidence is really that Ms Formannoj adopted the advice that was most accommodating of her own interests and chose to follow that advice, over advice from, for example, the drafter of the trust deed and the long-term lawyer for Mr Legler and Ms Formannoj to the effect that the intent of the document was that there would always be an independent trustee. So on this legal advice point we simply say that no weight should be placed on that in considering this point.

10

But in any event we also rely on the steps that Ms Formannoj subsequently took in March 2020, and we say a few things about that. The first is that those steps were contrary to what Ms Formannoj accepted at trial was a purpose of the Trust, which is that its assets eventually go to Mr Legler's children. She, of course, removed them as beneficiaries from the Trust. We say that's relevant misconduct for a trustee to act contrary to what they say is a purpose of the Trust.

15

The second aspect we rely on in –

20 **GLAZEBROOK J:**

Don't you look at purpose in terms of the trust deed, and in terms of final beneficiaries? If she was still living at the time of distribution, she's definitely got half. The children got nothing in those circumstances of her half.

**MR LITTLE:**

25 Completely accept that your Honour, but clause 6.1 provides that in the event of – if neither of those final beneficiaries, the named final beneficiaries are alive, it would go to Mr Ricco's issue, namely –

**WINKELMANN CJ:**

What is the final disposition date? Is it a life and being plus...

**MR LITTLE:**

I'm not sure, your Honour.

**GLAZEBROOK J:**

5 With power to bring forward I assume because it's standard – the trouble with these deeds is they do standard deeds and then add odd things into them that make no sense.

**MR LITTLE:**

I don't have it in front of me, your Honour, but I believe it's one of these trusts which has a very – a date long in the future.

10 **WINKELMANN CJ:**

Perpetuity, it's life and being plus 80 years, and the trust deed date is life and being, so it's 80 years hence, but that's...

**GLAZEBROOK J:**

There's usually an ability to bring it forward.

15 **WINKELMANN CJ:**

Strange, it's called the perpetuity period. Anyway, carry on.

**GLAZEBROOK J:**

Bring the vesting day forward.

**WINKELMANN CJ:**

20 Carry on.

**MR LITTLE:**

25 So I think the short point on that, on their status under the deed is that we say well under the deed they are effective final beneficiaries, but second, and more relevant for present purposes, is that the relevant trustee and Ms Formannoij knew that to be the case, that they were intended to benefit on her and Mr Legler's death, but she acted contrary to that purpose in March.

**GLAZEBROOK J:**

You can bring forward vesting day.

**O'REGAN J:**

5 So they would only get it if the vesting day happened after she died, and it wasn't brought forward.

**WINKELMANN CJ:**

And it wasn't distributed to them.

**MR LITTLE:**

That's right.

10 **WINKELMANN CJ:**

There's a lot of –

**O'REGAN J:**

15 I mean that's the thing about talking about the beneficiaries as a whole and a discretionary trust with the breadth of this one and the distribution possibilities, you know, a hundred years hence. It's a bit illusory, isn't it? I mean what – presumably you would say if she had done anything other than what she did do, it would have been in the interest of all the beneficiaries.

**MR LITTLE:**

20 I accept, Sir, that in a family trust like the ones we have in New Zealand where these very broad discretions are conferred on trustees, that the trustees, if they follow the proper process, follow their fiduciary duties and all the rest, do have very wide, a very wide ability to do what they decide is appropriate. I accept that, Sir.

**WINKELMANN CJ:**

25 But so that it doesn't fall within their estate, there has to be this independence, or else it's not out of their estate. They can't have complete control over everything and to disregard everybody, can they, as the Australian High Court



made the point. It's to stop trust bustings, there has to be some independence in there. There has to be someone. It's not just them saying we hold, you know, we're placing ourselves outside our estate, but we have complete control over it.

5 **MR LITTLE:**

In our submission that's right, your Honour, that this trust deed in particular does have these embedded requirements for independence. It's also the case, of course, that if the respondents were right, that a trustee in the position of Ms Formannoj could exercise these very wide powers for her own benefit, despite being a fiduciary, it does come very close to issues around *Clayton v Clayton* [2016] NZSC 29, [2016] 1 NZLR 551 and revenue and all the rest, if trustees can use these powers to benefit themselves. And that's one of the important reasons why I think many of the cases in this area push against that conclusion.

15 **GLAZEBROOK J:**

Well, usually they don't.

**MR LITTLE:**

Well, no, these –

**GLAZEBROOK J:**

20 Because they say the trust is valid –

**MR LITTLE:**

That's my point.

**GLAZEBROOK J:**

– and you are allowed to exercise powers in respect of yourselves as beneficiaries. It doesn't mean that you have control over the trust or that it's an illusory trust, except in very extreme circumstances.

**MR LITTLE:**

The cases in this area that we cited, cases like *White v Brkic* [2019] NZCA 514, and *Goldie v Campbell* [2017] NZHC 1692, [2017] NZFLR 529 in the High Court, they were concerned with a power to appoint trustees, and the issue they were grappling with was, well, could the person with that power simply use it to appoint a corporate trustee under their own control and then distribute all the property to themselves, and they said, no, because that would be a fraud on a power. They could not do that to avoid self-benefit clauses for their own benefit.

10 Coming back to these March resolutions and why we say they're relevant for this question of replacing Ms Formannoij. Of course what they involve –

**WINKELMANN CJ:**

It's the morning tea break actually, I think we'll take the break. You're nearly finished, I take it, though, in any case?

15 **MR LITTLE:**

I don't have long.

**WINKELMANN CJ:**

Right. We'll take the adjournment.

**COURT ADJOURNS: 11.32 AM**

20 **COURT RESUMES: 11.52 AM**

**MR LITTLE:**

Your Honour, just to reorientate where I was, I was going through the grounds that we rely on for replacing Ms Formannoij with an independent trustee.

**WINKELMANN CJ:**

25 Yes.

**MR LITTLE:**

I was looking at the March 2020 resolutions and describing why we say they're relevant. But the final thing to say about those resolutions is that one of them of course was to remove all other beneficiaries of this Trust as beneficiaries.

5 We say that is evidence that Ms Formannoij does not believe the other beneficiaries should be beneficiaries, and so in considering whether she would be able properly to carry out her duties and being even-handed towards all beneficiaries, we say that's relevant.

10 The third ground is simply the general level of dissension and distrust between Ms Formannoij and the other beneficiaries. I have addressed that in the written submissions. I don't propose to say any more about it. I've included references to the supporting material for that.

15 So for all of those reasons, your Honours, we say the most expedient course for this Trust with these beneficiaries restored is for an entirely independent person to be in there that all beneficiaries can have confidence in to have carriage of this Trust in the future. We rely on all the same grounds for saying why it wouldn't be an expedient course for the Court simply to appoint an  
20 independent person along with Ms Formannoij, because if she's not – if the Court is persuaded that the appellants have good grounds for removing her or her not being able to properly carry out her duties in an even-handed way, all of those reasons would apply also to her being one of two trustees because she would, of course, be able to block any decision that was not in her favour.

25

Unless the Court has any questions for me, I believe Mr Bigio will return to address you.

**WINKELMANN CJ:**

Mr Bigio.

30 **MR BIGIO KC:**

Thank you, your Honours. Well, it was very helpful to have the morning adjournment because that gave me an opportunity to confer with my learned

friend Mr McBride on the question of the understanding of the case that we've advanced with regard to the status of the trust assets.

5 So we did plead a declaration that the appointment was void and Mr McBride has confirmed to me that it has always been understood that the legal consequence of that appointment would be that we would seek the restoration of the trusts – of the assets back to the Trust. In fact, we've had some interlocutory arguments which have addressed that point. So there's nothing new in that consequence arising from a declaration of the appointment being  
10 void.

**WINKELMANN CJ:**

Well, it may have been common ground that you would seek it, but is it common ground that that is the consequence? It is?

**MR BIGIO KC:**

15 Yes, it is. And just for completeness, on the trustee de son tort point, I just wanted to confirm that we have raised that at all levels of submissions, and if your Honours wish, I can provide you with the footnote references to both the High Court and the Court of Appeal submissions which deal with it.

**O'REGAN J:**

20 Who's the trustee de son tort?

**MR BIGIO KC:**

Kaahu Trustee Limited.

**O'REGAN J:**

What did it do wrong?

25 **MR BIGIO KC:**

Sorry, Sir?

**O'REGAN J:**

What did it do wrong?

**MR BIGIO KC:**

Well, no, it is a trustee – the term of art just simply means it's there but not with  
5 any powers because it has been incorrectly appointed, so it's not entitled to  
exercise any administrative or dispositive powers because its appointment was  
void and the footnotes that we have refer to the relevant authorities. Would your  
Honours wish to have the – it is the same footnote in your submissions as they  
are in the Court of Appeal or the High Court, but I just wanted to confirm –

10 **WINKELMANN CJ:**

Well, what footnote is it in our submissions?

**MR BIGIO KC:**

In your submissions, footnote 8. And that's all, your Honours. Thank you.

**WINKELMANN CJ:**

15 Any questions? All right. Mr McBride.

**MR MCBRIDE:**

Tēnā koutou katoa. May it please the Court. This claim has always been  
presented as being something referred historically to as a fraud on a power,  
and that term has been used historically, as the authorities show, to describe a  
20 scheme or construct intended to bestow some collateral benefit or advantage  
on a non-object.

From the very outset of this claim, we have persisted in our view that that claim  
as pleaded and presented to the Court simply does not work, and it's the same  
25 position before your Honours today that there is no evidence of the improper  
purpose that the appellants rely on. There's no cross-examination on any of  
those purposes that are pleaded against her –

**WINKELMANN CJ:**

Well, I mean, Mr McBride, the whole case against your client was that she was acting with that purpose.

**MR MCBRIDE:**

5 Yes, but –

**WINKELMANN CJ:**

And she was refuting it, I assume.

**MR MCBRIDE:**

Well, all she said was that, in her evidence-in-chief, was that she was trying to  
10 simplify matters and I'll take your Honours to the relevant letter from the lawyers  
that explains it.

**WINKELMANN CJ:**

Well, from my part, if you're going to take that legal point, I'd like to see the  
authorities you say enables you to take that kind of a technical cross-  
15 examination point, because I think you'll find the authorities are against you.

**MR MCBRIDE:**

I need to be clear about it, and thank you, your Honour, it's not a technical  
cross-examination point. It's the effect of cases from – the authorities such as  
*Re Burton's Settlement* [1955] Ch 82, which is in the bundle, *Eclairs Group*  
20 *Ltd v Jkx Oil and Gas plc* [2015] UKSC 71, [2016] 1 BCLC 1, also in the bundle.  
And what those authorities all speak to is the central premise that the Court  
must discover the appointor's genuine intention. It's not enough to just look at  
effect and say, well look, what was achieved was X and Y, ergo, Z must have  
been the driving force behind that. So that's the point we make and take in  
25 terms of cross-examination, simply that if you are going to embark on an enquiry  
as the appellants do into why these transactions were transacted in the way  
they were, then one has to delve into why the appointor did what they did, and  
the singular feature of this case is that the appellants have never done that.  
At every level of the cross-examination they shied away from it –

1200

**WINKELMANN CJ:**

You are taking a cross-examination point, Mr McBride, because the whole case against your client is that she did this for this purpose. As Mr Bigio said it is, in  
5 fact, the ultimate issue in the case.

**MR MCBRIDE:**

Quite, but if I can finish. Allied with that, one comes to the documentary record. Now in the submissions against me, it's said, or against the respondents, it's said, the wealth of evidence is against – and we've called her Marina in the  
10 submissions. There's some confusion in the documents around that, so Ms Formannoj's legal first name is Maria, but she refers to herself as Marina, she's sitting in the court today in the pink, and Marina has asked me to convey to the Court that she would prefer to be called Marina if possible in the judgment, because in both the High Court and Court of Appeal it was her legal  
15 name that was used, and that's not a Dutch custom I'm told, so.

**WINKELMANN CJ:**

So she prefers to be referred to as Marina?

**MR MCBRIDE:**

Thank you, yes. Now it's her intentions that are at the core of this case and as  
20 the Court of Appeal explained in the majority judgment, it's not a case, as Mr Bigio just submitted, that the distinction between improper purpose and excessive execution is a fine and blurry one. The authorities don't say that at all, with respect. Lord Sumption in *Eclairs* at paragraph [9] makes the point that –

25 **WINKELMANN CJ:**

I don't think that he did make that submission. He made the submission that the distinction between whether the power exists and improper purpose is a fine one.

**MR MCBRIDE:**

Potentially, but it's a significant one, and it's a distinction that the Court of Appeal was focused on as well, that excessive execution is a very different animal from improper purpose. Excessive execution we don't need to worry  
5 about what the appointor was thinking or doing, or why they were doing it, we just look at what they did. Fraud on a power is different and takes us into the realm of subjective intention, and all of the authorities speak to this, the need to have a very careful look at what was intended. Now if it's said, well I didn't need to cross-examine on it because it was obvious, and the wealth of the documents  
10 support me, one says, well what documents do support you? Because again the authorities are crystal clear that one looks to the intention at the time of the transaction. Now what was said in submissions this morning is that –

**WINKELMANN CJ:**

Can I just zoom a little bit back out from the factual matters? So your  
15 submission, your key submission is, so you would accept that if she appointed so as to bring about the outcome that was achieved in March, that would be an improper purpose, or not?

**MR MCBRIDE:**

Well, that's not the pleaded case.

20 **WINKELMANN CJ:**

Well no, okay. She appointed so as to be able to – so as to be able to self-deal, step around the clause 18.

**MR MCBRIDE:**

There's two elements to it your Honour. One –

25 **WINKELMANN CJ:**

I'm just asking you to sort of zoom out to the legal as opposed –

**MR MCBRIDE:**

Yes.



**WINKELMANN CJ:**

So I'm just wondering if your case is simply –

**MR MCBRIDE:**

No.

5 **WINKELMANN CJ:**

– that they haven't proved it's improper purpose as a matter of fact, or have you got a bigger case, because you've gone straight to the fact.

**MR MCBRIDE:**

I have a much bigger case.

10 **WINKELMANN CJ:**

Okay so maybe if you could just give us the broader picture.

**MR MCBRIDE:**

That's set out in our oral outline. So we've got at section B the point I was just making to your Honours about the absence of any factual basis for any findings,  
15 and I do want to come back to that and zoom in on it a little, but what we say at C is that in any case, even if you were able to discern or divine this intention from the tea leaves, you're still left with, well why was this improper because as the High Court and Court of Appeal both said, she was allowed to do this. So given that you're allowed to appoint in the manner that she did, there needs  
20 to be something more, and that was the central finding of the Court of Appeal, that unless there's something more we're just left looking into the abyss really and saying, well why are we here.

**WINKELMANN CJ:**

So what was she entitled to do?

25 **MR MCBRIDE:**

Well she's entitled to appoint a trustee, and she's entitled to appoint either a non-beneficiary trustee, or a company. She's entitled to do that, and indeed it's

not just an entitlement. In our submission, respectfully, it's an obligation because as at matters stand when she – at the beginning of November 2019, Marina found herself in a position as follows. Husband had died two years prior. Children had commenced what I would call, with respect, a campaign of  
5 correspondence against her, challenging every decision she had made, and the basis upon which she was administering their late father's estate. The other independent trustee, Mr Tyler, and he gave evidence on this and it wasn't challenged, said I've had enough, and none of that is surprising, and said I'm resigning.

10

Now he didn't actually resign until the end of November, but Marina was in the invidious position, as Justice Glazebrook remarked I think earlier this morning, of trying to find someone who was mad enough to take on this role, and she did that, she went to her family lawyer and said, would you accept the appointment?

15

He said no. She went to Perpetual Guardian, and for exactly the reasons summarised by her Honour Justice Glazebrook, she got speed wobbles, if you like, about that and said, well I'm not sure about Perpetual Guardian, it's very expensive and I actually don't really know them, and the last resort was not to say, well I'll just take it all for myself, which is the case against us, the last resort

20

was she went to her trusted financial advisor and said, I'm in an absolute pickle. I am reliant on this Trust for my day-to-day welfare and support. It provides me with a home and it provides me with income, and at the moment I cannot find anyone to sit alongside me in the hot seat. What am I supposed to do? His advice was speak to another law firm in Whangārei that may be able to  
25 assist you.

That firm said, well actually we've got a solution for you. We don't want to do it either of course, we don't want to be the trustee, but we can put into play a corporate trustee. Now Justice Winkelmann, that's a long interrogation of the  
30 facts, but I'm squaring up to your Honour's point that, what could she do? Well, she had to find a new trustee, and that just wasn't a matter of obligation in the sense of a fiduciary obligation to the other beneficiaries, it was a matter of necessity because she didn't have otherwise any access to income.

**WINKELMANN CJ:**

Can I ask you – so she was entitled to appoint a trustee, either a non-beneficiary trustee or a company. You say she was entitled to appoint a company that she controlled?

5 **MR MCBRIDE:**

Of course, and that's –

**WINKELMANN CJ:**

So you accept Mr Bigio's point that she was within the power?

**MR MCBRIDE:**

10 Of course, and that's made abundantly plain on the terms of the trust deed, which says at clause 27.2(c), the corporate trustee may be directed by a beneficiary. That's the meaning in effect –

**WINKELMANN CJ:**

It doesn't say director, does it?

15 **MR MCBRIDE:**

That's the meaning and effect of it. It says that – yes, well, it says that a corporate trustee can bestow benefits on beneficiaries who are directors. So it follows that beneficiaries can be directors.

**GLAZEBROOK J:**

20 Well, that point's not taken against you. I mean I suspect that you could take a point in respect of the interpretation of the deed, but that point has not been taken. It's explicitly not taken. So we have to assume that both of you are right.

**MR MCBRIDE:**

25 Quite, and that – it's not taken, but it sort of is, is the difficulty, because they say it's not taken –

**GLAZEBROOK J:**

Yes, I understand.

**MR MCBRIDE:**

You understand the point?

**GLAZEBROOK J:**

Yes.

5 **WINKELMANN CJ:**

Well, but that's the essence of the whole purpose of a power –

**GLAZEBROOK J:**

Well, it's not taken but you can take it into account in deciding whether it's a fraud on the power to do that. Which is probably in line with the case law or do  
10 you say not?

**MR MCBRIDE:**

Well not –

**GLAZEBROOK J:**

Not in this stark way, is that...

15 **MR MCBRIDE:**

No, and not in line with it in the sense that the Court of Appeal got this, with respect, exactly right, that if you do flip to an excessive execution argument, you run headfirst into the High Court of Australia in *Montevento Holdings Pty Ltd v Scaffidi* [2012] HCA 48, (2012) 292 ALR 633, which again is a judgment  
20 that we say with respect is exactly right. *Montevento* was an appeal from the Western Australian Court of Appeal where in the minority, Justice Buss had examined a clause like this and her Honour Justice Glazebrook described it as "peculiar". Now respectfully, that's not the approach that was taken in Australia to this clause –

25 **WINKELMANN CJ:**

Which clause?

**MR MCBRIDE:**

Clause 27, or sorry, 26.

**GLAZEBROOK J:**

Sorry, what did you say I described it as?

5 1210

**MR MCBRIDE:**

Peculiar. Justice Winkelmann said it was peculiar earlier this morning, this dichotomy between a non-beneficiary trustee where there's people, and then no such requirement when there's a company.

10 **WINKELMANN CJ:**

Well it is peculiar, when there's a concern for independence but none when there's a company.

**MR MCBRIDE:**

That's precisely how it appears at first.

15 **WINKELMANN CJ:**

So what's its purpose?

**MR MCBRIDE:**

That's precisely how it appears at first blush, and that's the approach that found favour with the majority in the Court of Appeal in *Scaffidi v Montevento Holdings Pty Ltd* [2011] WASCA 146. The minority was Justice Buss. Justice Buss said, actually, just step back for a second. Why is this distinction drawn, and his Honour went through some of the estate legislation in Australia in the '70s and said actually what this is doing is ensuring separation between trustees and settlors. So if Mum and Dad settle the trust, and occupy the hot seat as  
20 trustees, there's a risk that the revenue will say this is a sham, this is an alter  
25 ego, this isn't real, and they just do a look-through.

**WINKELMANN CJ:**

But this is just another way of saying it's actually ensuring independence, so it isn't just a look-through, so it's actually an argument against you as well, Mr McBride.

5 **MR MCBRIDE:**

Well, potentially but that's not respectfully the way that the minority approached it in the Court of Appeal. The minority judgment of Justice Buss was described by the High Court of Australia as plainly correct, and it is plainly correct, respectfully.

10 **WILLIAMS J:**

Doesn't it just depend on purpose? I mean I can't see how *Montevento* is actually relevant.

**MR MCBRIDE:**

Quite, it's not relevant unless we get into why do these clauses exist, and  
15 *Montevento* gives the answer –

**WILLIAMS J:**

Not the purpose of the clause, but the purpose of the appointor, because fraud on the power is about purpose and, you know, there was clearly, as the High Court of Australia said, no evidence of improper purpose in *Montevento*.

20 **MR MCBRIDE:**

Well that was the finding in the first instance in *Montevento*, yes.

**WILLIAMS J:**

Well, and the High Court of Australia agreed but the argument here is that the evidence is abundant, an argument you disagree with?

25 **MR MCBRIDE:**

It is, but I agree completely with your Honour that we are here talking about purpose, not construction, and my observations on the construction of this

clause are directed to, well why does it exist, and the reason, and I'm just coming to this, why don't those same protections apply when we get to the corporate trustee. That's the point that sort of jumps off the page at you. Why is it that when the corporate body is the sole trustee, we can have whoever we want as a director, as confirmed by clause 27.2(c)? Why is that, and *Montevento* is the answer. *Montevento* says that once we have a corporate sitting in there, I don't need to worry about alter ego arguments because it's not me, it's a company, and that –

**WINKELMANN CJ:**

10 It's quite an unattractive argument, isn't it?

**GLAZEBROOK J:**

Well, not really because that's the whole basis of –

**MR MCBRIDE:**

It's just the law.

15 **GLAZEBROOK J:**

– of *Salomon v Salomon* effectively.

**MR MCBRIDE:**

Quite, quite.

**GLAZEBROOK J:**

20 I mean as mad as it is, it is the whole basis.

**MR MCBRIDE:**

As mad as it is –

**WINKELMANN CJ:**

It doesn't stop it being an unattractive argument.

**GLAZEBROOK J:**

It might be unattractive but it's the argument that happens with a corporate veil. So that you can set up a company and you then are immune from anything that...

5 **MR MCBRIDE:**

It's just the law.

**WILLIAMS J:**

Unless you did it for a wrongful purpose. Whatever the initial purpose of the clause, and perhaps Justice Buss is right, and the High Court of Australia is right too, but that's really not the argument here. Because the whole point of fraud on a power is that it's within the power, it's just for a wrong purpose.

**MR MCBRIDE:**

Yes, but what I am addressing here, your Honour, on that point is the argument that there is some inherent object under this trust deed to ensure an impartial and non-beneficiary trustee sits at all times, and that's the argument against me, and –

**WILLIAMS J:**

That's one way of ensuring –

**MR MCBRIDE:**

20 Quite, but –

**WILLIAMS J:**

– bad purpose, or avoidance of bad purpose.

**MR MCBRIDE:**

Yes, but it doesn't –

25 **WINKELMANN CJ:**

Well, the argument against you is actually not that, in fact. The argument against you is that that clause is based on the self-dealing clause. And I



appreciate the difficulty that Mr Bigio has there because he chose not to argue there was – this all meant there was no power to appoint a completely controlled company.

**MR MCBRIDE:**

5 Yes.

**WINKELMANN CJ:**

But if you, but your argument there is such a power, and his argument is, okay, there is such a power, but you can't use it in an instrumental way to achieve something which is a breach of fiduciary duty, and the argument against you is  
10 therefore simply that when – that the power to appoint is fiduciary, when you exercise it, you have to exercise it with regard for the whole of its terms of the trust, whatever they are, and not to achieve a single outcome in the trust, and that's the argument against you. So do you say that –

**MR MCBRIDE:**

15 Respectfully –

**WINKELMANN CJ:**

So if you say – say you failed on the first ground that there was no adequate factual basis, would you still say that the appointor was entitled to appoint a corporate trustee with the intention that that corporate trustee would then  
20 distribute the assets entirely to the appointor? Or do something? Just take an extreme case.

**MR MCBRIDE:**

There's quite a lot of ground to cover, respectfully, in those propositions. The –

**WINKELMANN CJ:**

25 Yes, so I'm just asking you, how far do you say this ability to self-deal and appoint companies, et cetera, takes you? Do you say that because in this nature of this trust deed, which allows a company which is controlled by a beneficiary –

**MR MCBRIDE:**

By beneficiary.

**WINKELMANN CJ:**

Would it mean, therefore, that a trustee who was appointing, a trustee  
5 beneficiary who was appointing a new trustee could use that power to appoint  
a trustee who would then – who the appointor knew would then exercise a  
power entirely in their interest? Would it go that far?

**MR MCBRIDE:**

The answer is that it has to because, again, if you look at the Australian  
10 authorities, and I'm talking about three in particular that are in the bundle,  
*Baba v Sheehan* [2019] NSWSC 1281, *Mercanti v Mercanti* [2015] WASC 297  
and *Montevento*, in all three of those cases, there was a power of appointment  
being exercised to appoint a new trustee being a corporate trustee that was  
entirely aligned with the appointor's interests. And in each of those cases, the  
15 Court said that's fine. That's as we expect. Now, to address your Honour's  
point, if they were to go further and say: "I'm going to appoint Mr Smith" – and  
it doesn't happen to be a corporate trustee, that's a little bit of a red herring,  
actually – "I'm just going to appoint Mr Smith as my new independent trustee,"  
knowing that Mr Smith is going to quietly receive \$50,000 a year from me on  
20 the side on the basis that anything I want, he will agree with –

**WINKELMANN CJ:**

Well, let's just take the 50,000 off. If we're going to appoint Mr Smith knowing  
that – with the intention that Mr Smith – well, it's not Mr Smith.

**MR MCBRIDE:**

25 It's not just the –

**WINKELMANN CJ:**

It has to be basically an agreement with Mr Smith that he will then use his  
powers because that's the equivalent here.

**MR MCBRIDE:**

Precisely, and –

**WINKELMANN CJ:**

5 An agreement with Mr Smith he will then use his powers to favour my interests over other beneficiaries’.

**MR MCBRIDE:**

10 Without even thinking about it, he would say: “Here’s my rubber stamp. I agree.” Is that a fraud on a power? Absolutely. That’s a problem, you know, where you fetter future discretions. There’s a rule against it. But what the Australian authorities all say, and the appellate judgments all confirm it, is that you need to actually prove that side deal or side agreement. You can’t just –

**WINKELMANN CJ:**

Hard to do when you – it’s the same –

**MR MCBRIDE:**

15 You can’t, and that’s –

**WINKELMANN CJ:**

Hard to do when it’s the same person though, isn’t it, Mr McBride?

**MR MCBRIDE:**

Well, that’s the case in all of –

20 **WINKELMANN CJ:**

But that takes you back to your first ground. But I’m asking you about your second ground.

**MR MCBRIDE:**

Around why’s it improper?

**WINKELMANN CJ:**

No, so whether she, say this is an individual, she, can appoint – do you say that the trustee could appoint a company that they control with the intention that that company will then use its powers as trustee to favour the appointing trustee?

5 **MR MCBRIDE:**

Well, it starts to get finely grained. The way your Honour's put it –

**WINKELMANN CJ:**

Well, no, I'm effectively creating a complete parallel with this situation.

**MR MCBRIDE:**

10 I'm answering your Honour's question.

**WINKELMANN CJ:**

Yes.

**MR MCBRIDE:**

15 The way your Honour's put it, that's improper. So if you're putting in someone that is going to slavishly, you know, follow directions, et cetera, without – in a predetermined way in the sense that they won't consider the issue or won't turn their mind to or just won't do anything, they'll just slavishly say: "Oh, we'll do whatever is in the best interest of" –

**WINKELMANN CJ:**

20 So I'm trying to see if there's actually another argument to the factual finding. That's what I'm trying to test out.

**MR MCBRIDE:**

Yes. I –

**WINKELMANN CJ:**

25 If there's a factual finding that the respondent appointed with the purpose with the intention of then, you know, reaching this – that she would be able to just

do as she pleased with included this purpose of removing the beneficiaries to get rid of this trouble that they were causing her...

1220

**MR MCBRIDE:**

5 And the Australian authorities deal with your Honour's questions in exactly the way your Honour's put it. Is there evidence of that? And in all of the cases in the bundle, they say there isn't.

**WINKELMANN CJ:**

So you accept that if there is evidence of that –

10 **MR MCBRIDE:**

If there is evidence of it –

**WINKELMANN CJ:**

Then that is an improper purpose.

**MR MCBRIDE:**

15 It's problematic.

**WINKELMANN CJ:**

So it's really one argument we're here about, then.

**MR MCBRIDE:**

20 Quite. It is, where is the evidence of the improper purpose, which is how I opened. Where do I see it, because in the Australian authorities, they ask the question and say: "We can't see it." Now, in the appellate judgments, they say: "This has gone before a trial judge who's had a look at this person, assessed them, and said I think that what they did was okay," and that's what's happened here, and if you look at the Australian authorities, the summaries of the  
25 evidence are much briefer than what we have from Justice Downs. Justice Downs gave six reasons, and I've given some of them in my opening where I've said – in my opening remarks, where I've said, well look, she was

there by accident, not design. She tried to find someone and couldn't. She went to see the lawyers who gave her the solution.

5 And I just want to turn, if I could, to the terms of the letter because we haven't looked at it and I think it's important. This is the letter of 7 November 2019 from the lawyers in Whangārei, WRMK, and I've just put it up on the screen. This is the letter that really what the Court is invited to do is to start reading in between the lines and say, well look, this isn't genuine, or there's something else going on, or we should read this letter in a different way.

10

Just before I go to the detail of it, could I just make this observation with respect to Marina? She's not a lawyer or an accountant or a professional person. She's an osteopath. She doesn't read clause 18 and ponder as we are today on the delicacies of distinctions between clause 18 and clause 26 or 27 and say  
15 there seems to be some inconsistencies and perhaps we can wriggle around it. Just allied with that, if you look at a case like *Wong v Burt* [2005] 1 NZLR 91 (CA), *Wong v Burt* was a construct, a scheme devised by a reputable firm of solicitors who said look, there's an issue with the way this estate's been planned. We don't like it. We're going to devise a way around it. And they set  
20 out to do that and it's all recorded in the documents and Justice Hammond in the Court of Appeal said that wasn't permissible for good reason.

Here, if we apply our *Wong v Burt* lens and say, well, let's look at the correspondence from the solicitors and see if we such a scheme being devised,  
25 which as my friend submits, is the wealth of evidence apparently against us, and if we just scroll through it, it says here that we have reviewed the trust deed, Mr Tyler's going to resign, we suggest you appoint yourself effectively by way of a company. New company will be the only trustee. You'll be the sole director and we'll be the joint shareholders, and here's the name. They explain what  
30 happens if she dies.

And then they say: "You will be the sole director...The Trustee (through you) has a number of powers," and they summarise them. You can give assets to any one or more of the beneficiaries, you can transfer some assets to a new

trust for any of the current beneficiaries, you can exclude any person as a beneficiary of the Trust, and then they say: "You will [still] have the ability to make all decisions affecting...Kaahu... However, this is always subject to the overarching duty of a trustee," and you can read what the advice says.

5

Now, the two complaints advanced against Marina are that number 1, you're trying to evade limits under a trust deed, and I say she wasn't cross-examined on it, and I've returned to this, and I'm not going to resolve from it. If she was going to be – if it was going to be said that all of this is a subterfuge and a carefully camouflaged scheme by which an osteopath from Bay of Islands is going to subvert clause 18 and clause 26, when taken in concert, one might expect to see some sort of hint of it in the correspondence from the solicitors, but instead, we have orthodox, accurate, and with respect, correct advice saying we're going to put you in the driver's seat. Once you're there, you have to think about everyone, not just yourself.

10  
15

You cannot, respectfully, draw an inference from any of this that the true intention and true purpose of Marina receiving this document was to somehow subvert some kind of underlying theme in the trust deed. It just doesn't get close to that.

20

**WILLIAMS J:**

Well, the two pieces of circumstantial or inferential evidence are the conflict that's going on at the time and what happened four months later.

**MR MCBRIDE:**

25 Yes.

**WILLIAMS J:**

Effectively a coup of the Trust.

**MR MCBRIDE:**

Well, you can look at it that way, but respectfully, what is really going on, in my submission, at this time, is that she has found herself unable to make any

30

decisions that might allow her ongoing support and welfare, and she's desperately trying to cure that. That's all that's happening, is trying to find a trustee that can make decisions, and she's been doing that for the previous few months without success. So saying that –

5 **WILLIAMS J:**

Yes, but, I mean you have to – my point is you have to address the impact on attitudes of the conflict and the fact that the children are cut out four months later.

**MR MCBRIDE:**

10 The Australian cases again deal with this. *Mercanti* deals with it and I might ask Ms Woods to search and find the reference, because *Mercanti* talks about this, your Honour's suggestion that underlying animosity or family rifts might give rise to the sort of inference that your Honour's talking about.

**WINKELMANN CJ:**

15 Well, it's a factual case. I mean, I don't know that another case is going to help us with this factual scenario.

**WILLIAMS J:**

Unless there's some enlightenment in *Mercanti* that explains what that inference is simply never available.

20 **MR MCBRIDE:**

Well, what *Mercanti* says, with reference to authority, is that just because someone's angry doesn't mean they're going to go off and form an improper purpose.

**WILLIAMS J:**

25 I don't think I need an authority for that.



**MR MCBRIDE:**

No, quite, but it's just that we need to be careful about conflating emotions and motives. That, again, cases all tell us this. We have to approach this with some precision. What is the intention you say she had, precisely, and just because  
5 you're angry with someone doesn't mean that you had an improper purpose. Just because you didn't get on with your sister doesn't mean, oh, well that pollutes all of your decision-making because we see the two of you don't like each other.

**WILLIAMS J:**

10 No, but –

**MR MCBRIDE:**

That's not the law.

**WINKELMANN CJ:**

Well, that's obviously right.

**GLAZEBROOK J:**

15 What you say is when she did it, what she had in front of her was quite proper advice from the solicitors that she had to consider the interest of all the beneficiaries and you say because you look at it actually at the time she did that, yes, you could infer from what she did four months later that she had  
20 already intended to do so, but you say in the light of what was allowable, it's just not something that can be inferred.

**MR MCBRIDE:**

It's not supportable, thank you. And if I can take the Court to an excerpt from the notes of evidence where there's cross-examination on Marina on whether  
25 her actions in March 2020 should be used to inform what she had been thinking prior to that, and it was said to the Court this morning that the concession from the witness was that, yes, her thoughts and thinking in March 2020 paralleled her thoughts from earlier.

Now, if we can bring that passage up. I have it –

**WINKELMANN CJ:**

Was it said that she accepted that in evidence or was it suggested it was an inference that we could draw?

5 **MR MCBRIDE:**

No, no, she doesn't accept it. She rejects it entirely. So if you look down, I'm on page 201.0155, and we're just going through to the section where – it's 201.0156 is the relevant section I wanted to look at. Keep scrolling down. And here, on line 6, these are the decisions that are occurring in  
10 February/March 2020, and it's put to her: "Because you were already considering, weren't you, the options contained in that letter including making distributions to yourself?" "I was, at that time, not considering that, no." "Well –" "That was not the stage I was at." So it's not correct to suggest that she was thinking all of this throughout. She had that put to her in terms of the March  
15 2020 transactions and she rejected it.

**WINKELMANN CJ:**

So she was tested on cross-examination on this point then, Mr McBride.

**MR MCBRIDE:**

Well, she was tested about whether her March 2020 thinking informed her  
20 November 2019 thinking. She wasn't tested about whether she was implementing this structure in November 2019 because of self-benefit or wish to evade limits under the trust deed.

**WINKELMANN CJ:**

Right.

25 **MR MCBRIDE:**

It's just, you have to – and I take your Honour's point about, the authority's moved on a little from this, but –

**WINKELMANN CJ:**

Yes, especially since it's squarely set against her in the pleading, so.

**MR MCBRIDE:**

5 But it was a factor in the High Court decision. There's a footnote reference to section 92 of the Evidence Act 2006. Because in fairness to the witness, if these – if she's going to be tasked with these very serious allegations, she might've –

**WINKELMANN CJ:**

She's tasked in the statement of claim with it, Mr McBride.

10 **MR MCBRIDE:**

Yes, but she's entitled to have an opportunity on the witness box to say what she wants.

**WINKELMANN CJ:**

And she did, I imagine, in her evidence-in-chief, and in this.

15 1230

**MR MCBRIDE:**

20 Well, we've covered the point. I'll move on. So that really takes me, I suppose, to these March 2020 transactions and this was something that informed the thinking of the minority in the Court of Appeal and it's presented again today, that she wasn't ever thinking about everyone, and again we come back to, well, where is the evidence of that, and I just want to develop that with reference to the evidence of Mr Clarke at trial.

25 So Mr Clarke was the financial advisor, and it was said to the Court this morning that Horowai was a, effectively a routine or regular beneficiary of the munificence of Kaahu. In other words, you've said Marina, that there is this dichotomy between Horowai and Kaahu, and never the twain shall meet, but actually if we examine it more carefully you'll see that there are routine benefits

from Kaahu to Horowai, and if I just take your Honours to this document on the screen, 201.0185, and this is Mr Clarke's evidence at trial

5 Just while we're bringing that up there was one payment from Kaahu to Horowai, it was a \$3 million transfer, and it's discussed by the financial advisor who had the responsibility for implementing this transaction. He says in late 2016, this is at paragraph 11, Ricco said that he had and Marina had decided to withdraw \$3 million and give it to Ricco's children. He takes half out then and half out later. 13 is a discussion about what to do with it. Just keep scrolling  
10 down, there's a bit of debate about how this was discussed with the children.

Then if you keep going down to 19 this is the passage here that Mr Clarke, he wasn't cross-examined at all on this, and: "He told me" – this is Ricco told Mr Clarke he'd put significant assets into Horowai. "After he and Marina gave  
15 the additional \$3 million to the Horowai trust, he felt he and Marina had finally (well and truly) set up his children financially. I then asked him 'what now for the funds in the Kaahu Trust?' and [he said] 'Marina and I can now get on with the rest of our lives.'"

20 So there's this hint in the submissions that Horowai was sitting in the wings, as it were, saying well listen if I've got some pressing need for money I can come along and ask for it, and I've done that in the past. That's not what occurred. What had occurred in the past is they had received a lump sum payment of \$3 million to set them up with working capital.

25 **WINKELMANN CJ:**

Well is it – so Mr Bigio said it was really to set the forestry block up. Do you accept that, or do you say they used it for their own purposes?

**MR MCBRIDE:**

30 It's at paragraph 19 where this is what the evidence is. Ricco told the financial advisor that he had finally "set his children up financially". I mean how, no other –

**WINKELMANN CJ:**

No, but that doesn't answer the question I just asked you. I mean, because the forestry trust might be seen as a capital asset to set the family up, the children up, but I'm asking you was it used for the forestry trust?

5 **MR MCBRIDE:**

We don't know. Because they won't tell us.

**WINKELMANN CJ:**

But we know why it was transferred across.

**MR MCBRIDE:**

10 Well we know what they – we know that, I agree, but we don't know what happened to it, and this is the issue you see, and this is where –

**WINKELMANN CJ:**

Well it's not much, it's not the issue, but so you – the answer is, you don't know?

**MR MCBRIDE:**

15 Of course, no I don't.

**WINKELMANN CJ:**

But the intention was –

**O'REGAN J:**

Well, he says here that it's a payment to the children in paragraph 19.

20 **MR MCBRIDE:**

But what happened to it, we don't know, and the reason this is significant is because when we get to March 2020 and there's this suggestion that somehow she didn't think about people, or she wasn't acting in everyone's best interests when she made the decisions she did, those transactions are not pleaded of  
25 course, and they're not an issue before this Court, or the High Court or the Court of Appeal, but if they did come under the microscope there's going to be a very

vigorous response on the basis that they've received a farm, they've received the forest –

**WINKELMANN CJ:**

A ship, a boat.

5 **MR MCBRIDE:**

And the boat, and what –

**WINKELMANN CJ:**

So I'm just asking you about – what I was asking Mr Bigio is I understood it he'd submitted that the \$3 million was put across to fund the forestry block, and –

10 **MR MCBRIDE:**

That was –

**WINKELMANN CJ:**

And I'm just asking if you say that's not so.

**MR MCBRIDE:**

15 That was the intention, quite, that was the intention on the part of Ricco and Marina, but she doesn't know what happened to it, because they won't tell us.

**WINKELMANN CJ:**

One assumes there is a funding need for it if it was put across.

**MR MCBRIDE:**

20 No. That's not accepted.

**WINKELMANN CJ:**

The evidence was it was not, there was no funding need?

**MR MCBRIDE:**

25 Quite, and that that is the evidence because I cross-examined on that point, and we can find you the reference –

**WINKELMANN CJ:**

No. I saw it, there's a reference in your submissions.

**MR MCBRIDE:**

5 Yes, we asked the question, did you need it, and the answer was no, they didn't need it. It was put across as a lump sum capital distribution for future needs, whatever that might be, and this is, you know, this point about March 2020 and how awful the stepmother was being, it's just not accepted for a second, the documents just don't bear it out. What was happening is the children –

**WINKELMANN CJ:**

10 I don't think we've had any submission to that effect.

**MR MCBRIDE:**

15 It's certainly inferential from some of the documents to date and moving on, the point in all of this is that Horowai is a – has been substantially endowed with legacy assets. If it's said that what happened in March 2020 was some flagrant example of a disregard for those children, it's not accepted for a second, and Marina was getting advice right through on all of this, starting with the advice that says before you do anything you're going to have to work out where everyone else is at. That is the effect of that 7 November letter. They did ask, and they had been asking, well, what is your position –

20 **WINKELMANN CJ:**

So Mr Bigio says the purpose of the Trust says – that your client accepted the purpose of the Trust was that the settlors, Mr Legler and Ms Formannoj, would enjoy the assets during their lives, and since it was the inheritance from Mr Legler's family, at the end of it the children would have whatever was left  
25 over.

**MR MCBRIDE:**

That's what the trust deed says.

**WINKELMANN CJ:**

And you don't dispute that?

**MR MCBRIDE:**

Of course not, and it's still not disputed, and the evidence at trial from Marina  
5 was this all got interrupted by COVID, which it did, so she'd gone and sat down  
with WRMK and said, well look, we're going to work through this. First thing,  
let's exclude the children, and there's reasons for that, and they do that, but she  
said, her evidence was, but we were still trying to work out how we bring them  
back into the fold after my death. That was her evidence at trial.

10 **WINKELMANN CJ:**

But that's not through the Trust?

**MR MCBRIDE:**

Well it could have been. This is the point. They never got to an answer on it.

**WINKELMANN CJ:**

15 But they'd removed them as the beneficiaries under the Trust?

**MR MCBRIDE:**

Well they can put them back in. So it's not final. So they can come and go from  
the Trust, that's permissible. But really this brings me back to what we've said  
at our section C, and why I say this whole case is a bit of a square peg in a  
20 round hole. You keep trying to impute an improper purpose because she was  
doing things to benefit herself, when she had set this up with her husband, and  
she was a final beneficiary and someone who had been a trustee from the  
inception. So where's the improper purpose if she's doing something to benefit  
herself? Now what *Thomas on Powers* says on this point, and it's in our  
25 submission, is that –



**WINKELMANN CJ:**

Well, do you accept it would be an improper purpose if she appointed a trustee of a trust which has multiple beneficiaries simply to benefit herself? That's where we came into this conversation.

**5 MR MCBRIDE:**

Yes, and the answer is that that is improper but equally there has to be a little bit of realpolitik about this at some point because in the modern expression of the family trust in New Zealand, appointors are appointing friendly trustees every day, and they're appointing trustees that they think are going to look after  
10 them at some point, and the classic example is you appoint your solicitor, or your brother, or whoever it might be.

**WILLIAMS J:**

But they're not appointing themselves.

**GLAZEBROOK J:**

15 But isn't your point here actually more that in fact the whole purpose of this trust was to look after them, so how can it be improper if she appoints somebody to look after her, especially as she was reliant on this for any of her income, and could not – isn't that your point, and could not have a trust where she couldn't make decisions?

**20 MR MCBRIDE:**

You've captured it perfectly, but I'd actually go further.

**WINKELMANN CJ:**

Can I just ask you how that sits with you accepting earlier that it would be an improper purpose for her to have appointed a trustee simply to look after her?

**25 MR MCBRIDE:**

If you tie it up on the basis that here's a side agreement that says whatever I say you'll agree with, or whatever it might be, then potentially –

**WINKELMANN CJ:**

But how would you prove such a thing when it's the same person?

**MR MCBRIDE:**

This is the point. This is the problem. This is the problem with this case.

5 1240

**WINKELMANN CJ:**

And on your submission, it's a problem for Mr Bigio, and on his submission, that's a problem for you.

**MR MCBRIDE:**

10 Yes. Yes, that's right, and here we all are. But really just to pick up on Justice Glazebrook's point about who you choose as a trustee. I mean, not only was she able to choose someone that was going to look after her, in fact, we would say that was the obligation. I mean, imagine if it was me sitting as the trustee and Ricco had died and the independent had resigned and Marina  
15 says you need to choose a new trustee, am I seriously going to say I'm going to appoint someone that hates her or doesn't like it –

**WINKELMANN CJ:**

But as a matter of law, doesn't she have to appoint a trustee who's going to faithfully execute the purposes and objects of the Trust? Isn't that the  
20 fundamental duty of a trustee? That's the essential character of their fiduciary duty?

**MR MCBRIDE:**

It is, and that's what the letter from WRMK explains perfectly.

**WINKELMANN CJ:**

25 Mmm.

**MR MCBRIDE:**

And that's why we say, are you going to look at WRMK's letter and say I infer from this that the Whangārei solicitors who you've known for two months have devised this cunning workaround which enables you to seize the family silver?

5 It's just – it's beyond absurd, and the case, once you start to examine it through these prisms, it just inevitably falls apart, because there isn't any purpose that you can divine from any of this that offends against the fundamental purposes of this Trust.

**WINKELMANN CJ:**

10 Well, yes, there is. Because the obligation is to faithfully undertake the purposes of the – to undertake the Trust as it's set up.

**MR MCBRIDE:**

Yes.

**WINKELMANN CJ:**

15 So you can't, you cannot appoint a trustee for the instrumental purpose of achieving a particular exercise of the trustee's duties under it, as opposed to simply – you know, a particular outcome, as opposed to looking at the trust and exercising your powers. So you can't just cut through and say well, this is the outcome.

**MR MCBRIDE:**

20 Well, again, there has to be, respectfully, an element of realpolitik. If you look at a case like –

**WINKELMANN CJ:**

No. Isn't it the law of fiduciary duties?

**MR MCBRIDE:**

25 Can I come to *Carmine v Ritchie* [2012] NZHC 1514?

**WINKELMANN CJ:**

Yes.

**MR MCBRIDE:**

5 *Carmine v Ritchie*, a case where Mr Carmine was a solicitor who formed the view on advice from senior counsel that the best course of action for the trust fund was to sue as a disaffected shareholder –

**WINKELMANN CJ:**

I know all about the case.

**MR MCBRIDE:**

10 You know the case?

**WINKELMANN CJ:**

Mmm.

**MR MCBRIDE:**

15 And what was decided by the Ritchie family was that actually, he wasn't an appropriate trustee and they'd get someone in who was more aligned with the family wishes. Now, that is – at a level, you could say, well, hang on, you can't choose someone that's aligned with any world view, you have to choose someone absolutely pure that has no preconceptions or biases.

**WINKELMANN CJ:**

20 It has to exist on a spectrum, doesn't it?

**MR MCBRIDE:**

25 Of course. Of course. And so to a certain level, you say, well, if we come back to this Trust, all right, well let's try and find an example where having seized the keys to the kingdom, Marina does something truly outrageous. Now, at first blush, we say well how about excluding all the children? That's outrageous. You say, well, yes, and here are the reasons why she did it: they had Horowai, they weren't talking to her, they refused to discuss what was in Horowai, what

their future needs were, and she said okay, fine, you're out. Now, please tell me why any of that strikes anyone as an abject abuse of fiduciary powers. She's asked the questions –

**WINKELMANN CJ:**

- 5 No, but it's not about what she exercises, it's about what she's thinking when she's appointing, so.

**MR MCBRIDE:**

I agree, and you've seen the note –

**WINKELMANN CJ:**

- 10 So she couldn't appoint to achieve that outcome.

**MR MCBRIDE:**

- I agree, and you've seen the notes of evidence where that was put to her and she rejected it and you've seen the letter from the solicitors, it says, no, you have to think about everybody. Well, it doesn't say "no", it just says you have  
15 to think about everybody. That's the central premise of the letter.

- So really, you're left, as we say in our oral argument, with these issues around, well, is there some generalised prohibition on doing this at law, we say there's no authority that says that. The Australian authorities certainly don't support  
20 that view. And the fact that you're appointing a friendly trustee, we said, well, if we're going to start saying there's a ban on using powers of appointment to –

**WINKELMANN CJ:**

That's not what's said against you, though.

**MR MCBRIDE:**

- 25 And it couldn't be, because it would turn the law of trust on its head.

**WINKELMANN CJ:**

That's right.

**MR MCBRIDE:**

So, yes, it's the most extreme example of a friendly trustee, I accept that. But again, we're on the spectrum. I mean what is it that she's done wrong, when as the Court of Appeal said and the High Court said, that this is  
5 permissible under the terms of the Trust?

And then, really to pick up on Justice O'Regan's earlier remark about best interests of the beneficiaries, well, that comment is routinely advanced in the context of pension funds. It was described by Justice Harrison in *Foulkes* as  
10 well which your Honour knows well, and those were not discretionary family trust cases where we have trustee beneficiaries, and the notion that every decision by a trustee has to somehow pick up everyone's best interest, that's not the law. So we get into, well, is there an administrative/investment disjunct, and so what –

**15 WINKELMANN CJ:**

But the most fundamental duty as a fiduciary is not to self-deal.

**MR MCBRIDE:**

Correct.

**WINKELMANN CJ:**

20 And that is exactly what is said has happened here on the appointment, and you're saying, no, it hasn't.

**MR MCBRIDE:**

Well, self-deal has a particular meaning, of course.

**WINKELMANN CJ:**

25 Which is to prefer – in fiduciary law, not to prefer your interests over the interests of the objects of the trust.

**MR MCBRIDE:**

Well, respectfully, I'd say it doesn't quite mean that. Self-deal, as I understand it, refers to entering into transactions with yourself.

**WINKELMANN CJ:**

5 No. That's too narrow of a view of the law of fiduciaries.

**MR MCBRIDE:**

But I understand.

**GLAZEBROOK J:**

10 Well, it can't possibly be if you can have a trustee and you're allowed to be a beneficiary and you're allowed to distribute to the beneficiary. Either that's just not permissible –

**MR MCBRIDE:**

Exactly.

**GLAZEBROOK J:**

15 And that would mean virtually every family trust in New Zealand would be –

**MR MCBRIDE:**

Under siege.

**GLAZEBROOK J:**

Yes.

20 **MR MCBRIDE:**

Every disaffected child is saying, well, hang on, I've just realised Mum and Dad have been living in the trust's principal assets for the last 30 years and did they really think about that properly when they did that and –

**WINKELMANN CJ:**

25 Yes, but the fundamental nature of a fiduciary duty is the prohibition against self-dealing, preferring your interest to that of the other parties, and trust deeds

allow trustees who are beneficiaries to do that in some circumstances. Some explicitly allow it. Some allow it as here when you have another trustee acting with you, but that doesn't detract from the nature of fiduciary law.

**MR MCBRIDE:**

5 Agreed, but one has to, again, just come back to how do these trusts work in New Zealand and I'm not sure that it's the position that it depends on the terms of the trust deed.

**WINKELMANN CJ:**

10 So you're saying the only thing that it prohibits is a deal done upfront as to the outcomes?

**MR MCBRIDE:**

Yes, and if you look at – the authorities all support that. *Re Skeats' Settlement* (1889) 42 Ch.D. 522 I think talks about it, the notion that there's a side deal, that there is some prior agreement. In the High Court, Justice –

15 **WINKELMANN CJ:**

Those of course are not situations where it's the person in their alter ego, are they?

**GLAZEBROOK J:**

Well, of course it is interesting that they didn't attack the actual distribution.

20 **MR MCBRIDE:**

Yes.

**GLAZEBROOK J:**

And purposefully didn't attack the actual distribution as being in breach of trust.

**MR MCBRIDE:**

25 It's very interesting. Exactly.



**GLAZEBROOK J:**

They're attacking it right back at the beginning, and what you say is look, to do that, they have to prove that there was an improper purpose at that time, which could be inferred from what happened in March, but you say there was not  
5 enough to infer that especially given the advice she was given at the time that she undertook the transaction.

**WINKELMANN CJ:**

Mr Bigio said that they didn't know about the March transactions when they issued the proceedings.

10 **MR MCBRIDE:**

That's right, and –

**GLAZEBROOK J:**

Well, no, but they didn't change it afterwards to say that it was a – and specifically decided not to, as I understand.

15 **MR MCBRIDE:**

I think it was my first act as counsel on the record was to tell Mr Bigio that there were some transactions he needed to know about because –

**WINKELMANN CJ:**

That was a good job for you.

20 **MR MCBRIDE:**

Because they hadn't been disclosed and I thought they probably ought to be.

**WINKELMANN CJ:**

But that was a – that's simply a litigation choice.

**MR MCBRIDE:**

25 Yes.

**WINKELMANN CJ:**

And I can understand because I mean it would've been far worse for everybody if they then challenged the transaction which would've been added costs and expense.

5 **MR MCBRIDE:**

We don't take anything from that. So really –

**GLAZEBROOK J:**

Well, but I think the point is that if there was something wrong with those transactions, then the fact you had the intention to enter into those transactions  
10 would just by itself have been enough.

**MR MCBRIDE:**

I totally agree.

**GLAZEBROOK J:**

But in fact, that's not what I think either you or Mr Bigio are actually saying.

15 **MR MCBRIDE:**

This is the issue. It's the issue with Justice Cull's minority judgment, is that what her Honour did was say, well look, I'm going – she says it in very strong terms: "You've breached your fiduciary terms when you entered into those transactions." Now, no one's purporting to try and hang onto those comments  
20 in this court because plainly, that's not supportable, but what they would have to do if they were going to reverse-engineer in the way it is suggested is actually impeach those March transactions. I know that your Honour's right that, Justice Winkelmann, that that adds more time and cost and so on, but you can't just fly a kite, as it were, and say, well, the March 2020 transactions look a bit dodgy  
25 or suspect and this is all part of this corrupt –

**WINKELMANN CJ:**

Well, I don't think that is exactly what's said against you.

**MR MCBRIDE:**

You have to actually – yes, but you – it is in the sense that they don't take issue with them. I've recorded that in our submissions. So there is no –  
1250

5 **WINKELMANN CJ:**

Well, they do take issue with them because they say that they were done by someone who had been appointed trustee and then proceeded to deal with the trust assets in a way which favoured just them, and –

**MR MCBRIDE:**

10 I'm just quoting what my friend has said in earlier submissions –

**WINKELMANN CJ:**

Right.

**MR MCBRIDE:**

– and it's in our submission, where they've said: "We are not attacking those  
15 transactions on the" –

**WINKELMANN CJ:**

Because they're not in their pleadings.

**MR MCBRIDE:**

No.

20 **WINKELMANN CJ:**

Mhm. I think that's common ground.

**MR MCBRIDE:**

So when we get to the March 2020 transactions, my submission is simply that if you're going to impeach her motives in November 2019 based on the mala  
25 fides from March 2020, you'll actually need to prove mala fides in March 2020. You can't just say you excluded a whole bunch of beneficiaries and that was somehow improper without explaining why it was.

**WINKELMANN CJ:**

Do you actually have to? Because isn't the point of the case that it was really – what the power to appoint couldn't be used for was to step around the prohibition on self-dealings so you didn't end up with a trustee who was doing –

5 **MR MCBRIDE:**

Yes. That's a fair point. I take that point. It's fair. So really, I think I can wrap up just with my point 18, which is just that these Australian authorities, we say, are all very supportive of our position, and certainly, this notion that corporate trustees with beneficiary directors are some kind of improper workaround, well, 10 that's not the law in Australia and shouldn't be the law here, and unless the Court has further questions, I might pass the baton –

**WINKELMANN CJ:**

What do you –

**MR MCBRIDE:**

15 No, I'm sorry. Yes.

**WINKELMANN CJ:**

Are you –

**MR MCBRIDE:**

Ms Woods is going to address on relief.

20 **WINKELMANN CJ:**

Oh, okay. Right.

**MR MCBRIDE:**

Yes. But I'm happy to deal with any other matters before I sit down. Thank you.

**MS WOODS:**

25 Yes, thank you, your Honours. It falls to me to address the issues of the relief that's sought by the appellants and specifically as to whether it would be appropriate to remove Marina as a trustee if KTL has not been appointed in a

valid fashion. It's accepted that if that is the Court's decision that there was some irregularity in the appointment of KTL, that Marina's retirement as a trustee would similarly be invalid because she had no power to do so while she was the sole remaining trustee, and therefore, we would be back in a situation  
5 where she would be the sole trustee. And so the question would then be, should she be removed and replaced with a purely independent trustee or should she be allowed to remain and either appoint a further trustee herself or sit alongside a trustee to be appointed by the Court.

10 My learned friend Mr Little has addressed your Honour in respect of the principles that are in play when considering these issues, and in my submission, the factors to be considered are the same whether we're talking about the replacement or the appointment issues, and effectively, they come down, in my submission, to a focus on whether Marina has an ability to administer the Trust  
15 in accordance with its terms and consistent with its purpose.

The cases that have been referred to identify various factors which are irrelevant to that assessment and the first I'll address you on is the settlor's intention, and there's been some discussion in the submissions as to who in  
20 fact the settlors of this Trust are, and it is of course the respondents' position that Marina is one of those settlors.

**WINKELMANN CJ:**

Mr Bigio said that all the assets had come through Mr Legler's family. Is that accepted?

25 **MS WOODS:**

That's certainly the origins of them, your Honour. However, in establishing this Trust and Horowai, Marina relinquished significant entitlements under a previous relationship property agreement and so they could not have been set up without her concurrence.

30 **O'REGAN J:**

It's pretty odd that the trust deed doesn't say who the settlors are, isn't it?

**WINKELMANN CJ:**

It does, I think.

**O'REGAN J:**

It's not – I mean, it just says this is a declaration of trust without saying –

5 **MS WOODS:**

That's correct, your Honour, and I –

**WINKELMANN CJ:**

But they don't, they settled \$10 –

**O'REGAN J:**

10 And the declaration's done by the people who also happened to be the trustees.

**WINKELMANN CJ:**

Yes, they're settling \$10 on it though, aren't they?

**O'REGAN J:**

Yes, I know, but you usually actually say who's doing the settling, don't you?

15 It's pretty strange.

**WINKELMANN CJ:**

It's implicit. It is strange.

1255

**GLAZEBROOK J:**

20 Actually, it isn't that odd. I think you often set these things up and then transfer assets afterwards or settle assets afterwards.

**WINKELMANN CJ:**

Justice O'Regan's point is that it's strange that the trustees simply settled the Trust.

**O'REGAN J:**

Yes.

**GLAZEBROOK J:**

Well, again, I think that's relatively – because it's not actually a settlement, it's  
5 a setting up of the Trust. You settle with the \$10 which is usually never paid.

**WINKELMANN CJ:**

Anyway.

**O'REGAN J:**

But on the face of it, the independent accountant was a settlor as well.

10 **MS WOODS:**

Quite. But in reality, certainly, the two parties who needed to agree to the  
assets being settled on these trusts were Ricco and Marina.

**WINKELMANN CJ:**

I mean, do you say that that was part of her relationship property or not?

15 **MS WOODS:**

That position is slightly unclear.

**WINKELMANN CJ:**

Okay.

**MS WOODS:**

20 But certainly she had these entitlements under the 2003 deed that had been  
entered into, and those entitlements were substantial.

In any case, it was decided that these assets would be settled on the two trusts,  
and in the case of Kaahu, the beneficiaries, Ricco and Marina, the named  
25 beneficiaries are two of three trustees, and that is consistent with their intended  
involvement with the Trust and its administration, recognising that it was going

to be their only source of funds, particularly in their retirement, and also that it owned their home.

5 Neither of them had the ability to remove the other and it's submitted that that's significant because it strongly suggests an intention that they would each be entitled to continue to have oversight and decision-making power within the Trust for as long as they wished to maintain that role. So it's our submission that to remove Marina from all input in the administration of the Trust would in fact be inconsistent with the settlors' intentions when establishing the structure.

10

The second fact that I'll address is the ability of the trustee to administer the Trust in accordance with the interest of all beneficiaries, and here, of course, Marina had been a long-standing trustee of the Kaahu Trust. She had been in that role for in excess of 10 years and there had of course been previous distributions to the – well, through Horowai Family Trust in favour essentially of the children, and those had all been completed of course with her agreement given that unanimity was a requirement.

20 It was suggested in the appellants' submissions that if she were permitted to remain as a trustee, she would have this ability to block decisions in favour of the children or which were inconsistent with her interests, and the point that I would make on that is that she was always intended to have that power. That was a power she had throughout the lifetime of the Trust and that was how the Trust was established, that either she or Ricco or the independent trustee 25 could block decisions that they did not consider to be appropriate in the interests or furtherance of the purpose of the Trust.

**WINKELMANN CJ:**

But what is said here is that she has exercised her power as a trustee in a partisan way and for an improper purpose.

30 **MS WOODS:**

In appointing KTL. Yes. And these submissions –



**WINKELMANN CJ:**

So these submissions have to assume that that's – we just have to – they're addressed at remedy so they have to assume that's the finding.

**MS WOODS:**

- 5 Yes, and to the extent that your Honour's point is that there's an allegation of misconduct, a deliberate misconduct, that is not accepted, and it's submitted that when assessing –

**WINKELMANN CJ:**

Yes, but you have to –

10 **GLAZEBROOK J:**

Or actually said against you because Mr Bigio was very careful to say that it's not misconduct, it's –

**WINKELMANN CJ:**

- 15 No. It's a use for an improper purpose, so you have to assume that's the factual scenario you're addressing, that it's found that this power to appoint has been used for an improper purpose. So...

**MS WOODS:**

Yes, and –

**WINKELMANN CJ:**

- 20 And it's said against you that given that and given the fractiousness, et cetera, to have her there is simply setting up – I think if we cut to the chase, it's simply setting up future trouble because that kind of improper purpose is going to be constantly in the air.

1300

25 **MS WOODS:**

Except, your Honour, that I would say that she took the steps that she did having taken advice and having sought assiduously to take a different route. She had

approached Mr McBrearty to ask him to act, she'd approached Perpetual Guardian but hadn't felt comfortable with that possibility, she approached WRMK but they would also not act. And so she's presented with this alternative, and it's not one she sought out deliberately or asked somebody to  
5 find her. It's simply an alternative that she's presented with to allow this trust to continue functioning.

It's on that basis that it's submitted that it shouldn't be seen as a step that was taken in bad faith or with any intention to breach her fiduciary obligations or to  
10 divert the purpose of the Trust. It was simply an alternative presented to her in circumstances which were proving truly unworkable.

There was some suggestion that she had chosen legal advice which suited her purpose, and that is also denied. When Mr McBrearty raises concerns about  
15 the approach that's suggested by WRMK, Marina immediately refers it back to them and asks them to comment on it. It's apparent, in my submission, that she is throughout anxious to do the right thing, and there's nothing to suggest that if allowed to remain in the trustee position, that she would not similarly take advice and seek appropriate guidance and follow it.

20

There is also the evidence that Marina recognises and acknowledges that the residue of the trust property is intended to devolve to the children. She didn't shirk from that in her evidence.

**WINKELMANN CJ:**

25 But at the moment, it wouldn't, would it, should she – at the moment, it's outside the Trust?

**MS WOODS:**

That's correct, your Honour. At the moment, it is outside the Trust and she gave evidence of the intention to ensure that that ultimate outcome was achieved,  
30 but as has been addressed in previous submissions, that was interrupted somewhat.

**GLAZEBROOK J:**

Have we got the reference to that, just – we don't need to go to it, but have we got the reference to...

**MS WOODS:**

5 I can certainly find that for your Honour.

**GLAZEBROOK J:**

Is it in your submissions? That's what I can't remember whether I saw.

**MS WOODS:**

I will need to check that for your Honour and I'll come back to you on that.

10 **GLAZEBROOK J:**

That's fine.

**MS WOODS:**

So your Honour, the –

**O'REGAN J:**

15 Helen, do you want to stop?

**WINKELMANN CJ:**

Is it lunchtime?

**MS WOODS:**

Oh, it is. Yes.

20 **O'REGAN J:**

Do you want to – well, we could keep on going if you wanted.

**WINKELMANN CJ:**

Yes. How much longer do you think you'll be?

**MS WOODS:**

Possibly a minute.

**WINKELMANN CJ:**

Okay. And Mr Bigio, how long do you think your reply will be?

5 **MR BIGIO KC:**

I would have thought about 20 minutes.

**WINKELMANN CJ:**

Okay. Well, we'll finish with you, Ms Woods, and then we'll go on to Mr Bigio after lunch.

10 **MS WOODS:**

Thank you, your Honour.

**WINKELMANN CJ:**

Thank you, Mark.

**MS WOODS:**

15 So really, in summary your Honours, in respect of Marina's continuing the role, it's submitted that that role is appropriate having regard to the manner in which this Trust was established. It's also appropriate having regard to Marina's standing in what I'll refer to as Ricco's family, not because it is specific to him but because he is kind of the lynchpin between these parties. But that standing  
20 also warrants her having that continuing administrative role in the Trust and particularly given her complete dependence upon it in her retirement.

**WINKELMANN CJ:**

And could that be achieved by having – her appointing someone as a – her appointing a trustee?

25 **MS WOODS:**

Yes, your Honour, I think the only pause on that one is that it's likely it would seem that there would be some resistance or potential opposition to whoever

she may choose unless it is somebody who can be seen to be wholly independent, so there is just obviously that concern to avoid further friction and dispute. But certainly, having somebody there who sits alongside her and assists her in that role would be entirely, in my submission, appropriate.

5

So unless your Honours have any questions of me, those are the submissions on the basis of which the respondents say that Marina should be allowed to continue in her role as trustee if the appointment of KTL is found to be irregular.

**WINKELMANN CJ:**

10 Right. We'll take the adjournment.

**COURT ADJOURNS: 1.05 PM**

**COURT RESUMES: 2.19 PM**

**WINKELMANN CJ:**

Mr Bigio.

15 **MR BIGIO KC:**

Thank you, your Honour. I believe Ms Woods wished to provide the Court with the reference that she was referring to before lunch.

**MS WOODS:**

20 Yes, thank you, your Honours. Your Honours asked about the passage in relation to Marina's agreement that the residue of the trust property would flow down to the children on her death and that those arrangements were left undone when COVID hit, and that's at – the reference is 201.0176. It's not referenced in our submissions but that's in Marina's re-examination.

**WILLIAMS J:**

25 Is the implication of that is that COVID stopped the re-vestment?

**MS WOODS:**

That's correct, that there were arrangements still to be put in place, but that at that point, COVID hit and everything was really put on hold.

**WINKELMANN CJ:**

5 But there's no suggestion they've been put in place to date?

**MS WOODS:**

No, no. Thank you, your Honour.

**WINKELMANN CJ:**

10 But was there any – was there some freezing-type order, something, some orders in place freezing the situation?

**MS WOODS:**

Yes, there was an interim injunction in place.

**WINKELMANN CJ:**

To do what?

15 **MS WOODS:**

So that froze the – it was an injunction freezing the assets of the Trust but there were conditions placed on it which allowed some distributions to be made to allow for Marina's maintenance in the meantime.

**WILLIAMS J:**

20 And what did that capture in terms of what was still in the Trust at that point?

**MS WOODS:**

So at that stage, their – the trust fund was still in place. I'm sorry, your Honour, I'm doing this from memory. If I might just pass to Mr McBride.

**MR MCBRIDE:**

25 Just to assist the Court, and it's all – it's a few years ago, but there was \$1 million distribution as part of the March 2020 deeds and that \$1 million was

going to be used to buy a new house and that sat there and then there was a series of applications about that \$1 million a couple of years ago, and the house ultimately was sold, the house up in Russell, and a new house was bought in Waiheke and there were arrangements around that. So there's –

5 **WILLIAMS J:**

So the house called Mokokoko –

**MR MCBRIDE:**

Mokokoko has been sold.

**WILLIAMS J:**

10 Right.

**WINKELMANN CJ:**

And the new house in Waiheke is subject to some sort of undertakings, then?

**MR MCBRIDE:**

Not anymore, no. It was prior to the Court of Appeal judgment.

15 **WINKELMANN CJ:**

Okay.

**MR MCBRIDE:**

Is that sufficient for your Honours?

**O'REGAN J:**

20 So is the outcome that if the Court finds the appointment was invalidly made, is there any steps necessary for her to put assets back into the Trust or are they all subject to this freezing arrangement?

**MR MCBRIDE:**

25 There's no freezing orders in place now, but they – I can tell your Honours there haven't been any dispositions from the Trust in terms of moving major assets

now. There's been access to income of course, but the major assets are still held in Kaahu Trust.

**O'REGAN J:**

So the Kaahu Trust wasn't wound up when the March resolutions were made?

5 **MR MCBRIDE:**

No, it wasn't, and nor were there any dispositions following the Court of Appeal judgment even though there weren't any interim restraints.

**WINKELMANN CJ:**

10 So the Mokomoko house is still subject – the proceeds of that, and therefore the Waiheke house is still subject to the Trust?

**MR MCBRIDE:**

Yes.

**WINKELMANN CJ:**

Right.

15 **MR MCBRIDE:**

Thank you.

**WILLIAMS J:**

Oh, sorry, just the million – sorry. The \$1 million distribution, has that been frozen? Or was that used to purchase Waiheke or where is that money?

20 **MR MCBRIDE:**

You're testing me, your Honour. I can't quite remember and I'm just hesitating because I don't want to get it wrong.

**WILLIAMS J:**

Okay, well.



**MR MCBRIDE:**

And –

**MR BIGIO KC:**

Did it go to the new house?

5 **MR MCBRIDE:**

I think so, I think –

**WINKELMANN CJ:**

But that new house is subject to the Trust, so that would be strange.

**MR MCBRIDE:**

10 New house is part of the Trust. The \$1 million that came out was to be used as a down payment on the new house. That was the intention behind that nice \$1 million withdrawal. It wasn't, let's go to Switzerland and spend it, it was – that was going to be a down payment on a new house in Waiheke.

**WINKELMANN CJ:**

15 Okay.

**MR MCBRIDE:**

But I think both – I think all counsel are a little reluctant to get into the details on the fly because we can't quite recall it with precision. No one's arguing about it at the moment, is the short point.

20 **WINKELMANN CJ:**

Thanks, Mr McBride.

**MR MCBRIDE:**

I'll check that I'm excused?

**WINKELMANN CJ:**

25 You're excused, yes. Mr Bigio.

**MR BIGIO KC:**

Thank you, your Honours. I will endeavour to be concise and what I wish to do is –

**WINKELMANN CJ:**

5 A 20-minute reply is not concise. So you should –

**MR BIGIO KC:**

20 minutes is not concise?

**GLAZEBROOK J:**

No.

10 **WINKELMANN CJ:**

Not for a reply, no, so you can try a little bit shorter than that.

**MR BIGIO KC:**

All right. Well –

**WILLIAMS J:**

15 Length and conciseness are not necessarily the same thing, Mr Bigio, so.

**WINKELMANN CJ:**

Not necessarily.

**WILLIAMS J:**

No.

20 **MR BIGIO KC:**

Not necessarily. Well, I'll endeavour to be interesting no matter how much time I take. I just wish to –

**GLAZEBROOK J:**

And limit to matters of reply, not matters that we've already traversed.

**MR BIGIO KC:**

Oh, indeed, your Honour. And so what I do just wish to address in terms of the context at the time on the 7<sup>th</sup> of November, what my learned friend referred your Honours to, take you to one exchange in cross-examination that relates to the  
5 exchange in cross-examination that my learned friend referred to, and then I'll address you very briefly on the Australian authorities which are, in my submission, very distinguishable. Those are the three things that I propose to do.

10 So my learned friend referred your Honours to the WRMK letter of 7 November, and I just wish to put in context there that it follows a letter from Mr – sorry, your Honours, I'm just looking for the reference – from Mr McBrearty who wrote directly to Ms Beckham at 303.0703.

**WINKELMANN CJ:**

15 Did it not also follow the letter from T – whatever they're called, Law, from the appellants challenging? I thought this W – we were taken to the second page of it.

**MR BIGIO KC:**

We will go to – that's the 28 February letter.

20 **WINKELMANN CJ:**

Oh, 28 February. Yes. Sorry, I'm conflating my timeframe.

**MR BIGIO KC:**

On the 7<sup>th</sup> of November, if I can take your Honours to document 303.0703 which is Mr McBrearty writing to Ms Beckham and enclosing documents that  
25 appeared to have been requested, and just at the foot of 303.0704, your Honours will see where Mr McBrearty is recording his comments on the WRMK – a previous letter from WRMK where he says: "Company as sole trustee. Technically the wording of the Trust Deed will allow for a company to be a sole trustee. Even though the wording of clause 26 of the Trust Deed

provides the sole company trustee as being an exclusion,” et cetera, “I believe the intent of the trust document is that there will...be an independent trustee.”

5 Now, without taking your Honours back to the 7 November letter but just asking you to note when you do look on it, your Honours will see that WRMK does not actually provide any advice about Mr McBrearty’s concern. They simply assert that the proposal is in conformity with the trust deed and what the letter actually does on that same day is begin to set out all of those options for disposition of assets in relation to – many of which of course would be in favour of  
10 Ms Formannoj.

Now, and the next piece of advice from WRMK, and I’ll just give your Honours the reference, is the letter of 21 November. We don’t need to go to it, Mr Little. The document number is 303.0725. Your Honours will see there – that’s  
15 21 November, before the appointment is actually made. There’s still no advice about Mr McBrearty’s concern, just a reference to control and options, and seeking instructions to start to seek information about the position of the other beneficiaries. Now –

**WILLIAMS J:**

20 This is a letter to?

**MR BIGIO KC:**

WRMK to Ms Formannoj.

**GLAZEBROOK J:**

25 In terms of the concerns though, all it says is the intent is this and they come back and say, doesn’t matter though, the words say that. So their advice was, doesn’t matter what the intent was. The words are clear.

**MR BIGIO KC:**

30 The advice – your Honour, that’s a generous description of what they actually say in their letter of 7 November. It’s very brief. They just refer to prior discussions and say it’s a valid approach. That’s all.

**GLAZEBROOK J:**

But they've already given advice that the trust deed allows it.

**MR BIGIO KC:**

Well, we haven't seen it, but apparently they have, yes.

5 **GLAZEBROOK J:**

I thought that's what the letter actually said, that we were taken to.

**MR BIGIO KC:**

My learned friend just handed me something. Yes, so that's not after the  
7 November letter. No, my learned friend is – the 7 November letter, shall I  
10 take your Honours to it briefly?

**WINKELMANN CJ:**

Which is the 7 November letter? Isn't that the one we did go to? Oh, okay.  
This is the 7 November. Yes, that's right. 7 November, which is the one that  
Mr McBride took us to?

15 **MR BIGIO KC:**

That's correct.

**WINKELMANN CJ:**

Yes.

1430

20 **MR BIGIO KC:**

And so, he was focusing on the advice about best interest of the beneficiaries  
as it relates to the dispositive power once she is the sole trustee, at the bottom  
of the letter. All that's recorded in the third paragraph is the new company will  
then be the only trustee as previously discussed. That is a valid option under  
25 the trust deed. So there is no response or advice set out in relation to what  
Mr McBrearty had written to Ms Beckham on the same day, continuing to  
express his concern on the question of intent.

**O'REGAN J:**

Do we know which was sent first? The WRMK letter or the Law North letter to WRMK?

**MR BIGIO KC:**

- 5 I am not sure. We have sequenced it in the bundle, both parties, as if the McBrearty letter was sent first, but what I can confirm, your Honours, if it was sent second, it wasn't addressed directly in any follow-up piece of advice. So when I referred to the –

**GLAZEBROOK J:**

- 10 But if the advice is, it doesn't matter what the intent was, this is what the words say, and what you were taking us to actually as a back-up said the concern would be that she could be accused of not thinking of the interests of the beneficiaries, and she's already been told that she has to think of the interests of the other beneficiaries.

**MR BIGIO KC:**

15 When she's disposing of the assets, but not when she's making the appointment.

**GLAZEBROOK J:**

- 20 Well, no, you're saying she can't make the appointment at all, it doesn't matter whether she's thinking of the other beneficiaries. So she can think of the other beneficiaries and say I'm going to make the appointment anyway. Your point is she couldn't do it.

**MR BIGIO KC:**

- 25 Your Honour, I don't want to repeat what I said before. My point was that even though the trust deed, as Mr McBrearty says, appears to have wording which permits it, it is contrary to the intent and purpose of the Trust, and therefore violates the proper purpose, your Honour.

**GLAZEBROOK J:**

No, but the answer – and rightly or wrongly, the answer they gave is it's clear on the face of the trust deed you can do this, so you can.

**MR BIGIO KC:**

5 Yes.

**GLAZEBROOK J:**

10 You can't answer an intent by – I mean either it's clear on the face of the trust deed and that's your advice, or you say it's not clear on the face of the trust deed because you have to infer intent and purposes from other provisions, which is what you say.

**MR BIGIO KC:**

15 Or you say the drafter of the trust deed records that what we've identified appears to be permissible but contrary to the intent of the trust deed, nevertheless we're advising you that it is in the best interests of the beneficiaries for you to make this appointment. They don't appear in writing to turn their minds to that.

**GLAZEBROOK J:**

Well, no, because they say it's quite clear under the trust deed you can do this.

**MR BIGIO KC:**

20 Yes, but your Honour, they haven't –

**GLAZEBROOK J:**

That's right or wrong, isn't it?

**MR BIGIO KC:**

But your Honour –

25 **GLAZEBROOK J:**

But you're saying they have to give different advice from what they think.

**MR BIGIO KC:**

No –

**WINKELMANN CJ:**

Are you saying, is your point – are you saying Mr Bigio is that Mr McBrearty had  
5 raised a different point about whether it was – are you saying he's effectively  
raising your purpose point –

**MR BIGIO KC:**

Yes.

**WINKELMANN CJ:**

10 – or are you – okay.

**MR BIGIO KC:**

Exactly what I'm saying.

**WINKELMANN CJ:**

And they're not addressing it, is that what you're saying?

15 **MR BIGIO KC:**

And they're not addressing it.

**WINKELMANN CJ:**

It's quite an obscure way to raise it.

**O'REGAN J:**

20 Why does that affect Marina's position?

**MR BIGIO KC:**

What I'm trying to – I'm just trying to provide context for what was happening  
on the 7<sup>th</sup> of November, what was and what wasn't happening. So what was  
happening is that there is detailed advice on options about what she could do  
25 with dispositions once she is the sole trustee. But there is not the same care  
that is being taken in dealing with the issue that is raised by the drafter of the



trust deed pursuant to a known equitable doctrine, and these lawyers have not referred to it. So –

**O'REGAN J:**

Do we have the communication between Mr McBrearty and Marina? Was there  
5 a direct advice by Mr McBrearty to Marina?

**MR BIGIO KC:**

I believe there was prior, yes, there was previous communication.

**O'REGAN J:**

To the same effect or not? Because on the face of it she doesn't seem to even  
10 know that this has happened, does she?

**MR BIGIO KC:**

No, she does know because she addresses in her evidence that she took Mr McBrearty's advice to WRMK to get advice on it.

**O'REGAN J:**

15 Right, okay.

**MR BIGIO KC:**

So simply saying she has –

**GLAZEBROOK J:**

What was the timing of that though?

20 **MR BIGIO KC:**

Timing of?

**GLAZEBROOK J:**

When she got advice on that? I mean that was when she first went to the other law firm, wasn't it?

**MR BIGIO KC:**

Well, the sequence of all the advice is, timing, is laid out in the submissions. There's a series of meetings and there's email exchanges, and when she has advised Mr McBrearty, or when Mr McBrearty realises that she is going to  
5 proceed with the option that he thinks is wrong, he doesn't just provide documents to Ms Beckham in this letter. He gives advice saying this is not within the intent of the trust deed. So he's raising, as the Chief Justice put it, the very issue we are raising here, putting the lawyers on notice that there is another consideration that needs to be taken into account, not just technical  
10 compliance with the trust deed.

**O'REGAN J:**

But why does that affect her?

**MR BIGIO KC:**

Well, what we say, your Honour, is in the face of contrary advice her  
15 subsequent evidence is she accepted the advice of WRMK because it's –

**O'REGAN J:**

What's wrong with her doing that? She's a layperson. She goes to a lawyer, she thinks this firm is better than the other one, so she accepts their advice.

**MR BIGIO KC:**

20 Well the operative word is "better". What she says is I preferred this advice because it simplified my life, which in cross-examination she acknowledged meant she no longer had to deal with an independent trustee –

**O'REGAN J:**

So are you saying she had to accept Mr McBrearty's advice? And if so, why?

25 **WINKELMANN CJ:**

I don't think this is a big point anyway. You probably don't need to –

**MR BIGIO KC:**

I'll just finish on this thought, because her response to it was she accepted advice that she said was in her personal interests, and therefore she didn't turn her mind properly to what she should have considered, whether it was in the  
5 best interests of the beneficiaries as a whole. That's why it's relevant, Sir.

**O'REGAN J:**

Sorry, that just passes me by completely. But anyway, that's fine.

**MR BIGIO KC:**

I beg your pardon, Sir?

10 **O'REGAN J:**

I said that just passes me by completely. She has advice that this is a perfectly proper thing to do. What is she meant to do – because some other lawyer says, we don't think it is, what's she meant to do?

**MR BIGIO KC:**

15 Sorry Sir –

**O'REGAN J:**

You're saying she has to accept the advice you think is right, not the advice that she thinks is right?

**MR BIGIO KC:**

20 Well, no, but she has advice from the drafter of the trust deed, and the previous advisor of the Trust, Mr Jordan, that an independent person is required, and she selects the advice, we say, which is more convenient for the exercise of her personal interests and her personal benefits, as opposed to principled advice in relation to the administration of the Trust.

**WILLIAMS J:**

There are two different points there. One is, is the improper purpose you're referring to the removal of an independent decider, or is it the acquisition of the assets of the Trust, or do you say they're one and the same thing?

5 **MR BIGIO KC:**

No, saying two, we have two different things. One is that she's giving consideration and accepting advice to become the sole controlling person in the Trust, which was an improper purpose having regards to the term of the Trust. But that context can't be separated from the fact that at the very  
10 moment she's just considering an administrative decision, that she is receiving immediately advice about options which relate to the disposition of assets to her. So we are saying that there is a continuum and relationship between those matters.

**O'REGAN J:**

15 Well except that that advice is, but whatever you do, you've got to act in accordance with your fiduciary obligations. Doesn't it?

**MR BIGIO KC:**

In disposing of the assets.

**O'REGAN J:**

20 Yes.

**MR BIGIO KC:**

That is the advice given, that's recorded there.

**O'REGAN J:**

Yes, so are you saying she ignored that?

**MR BIGIO KC:**

Well, that was the next thing that I wanted to illustrate, which is supposedly in implementing that advice, the first thing that is done on the day after the appointment, at document 303.0743.

**5 WINKELMANN CJ:**

We're getting that up.

**MR BIGIO KC:**

So this is an email chain of several pages between Ms Beckham and an accountancy firm who I think she believed to be the accountants for the  
10 Horowai Trust. The top email, the final one, which is the 26<sup>th</sup> of November, so at the time of the appointment, is requesting the financial statements for the Horowai Trust on the basis that the Kaahu Trust is a beneficiary. There's no indication there that what is being contemplated by the trustee is a decision to distribute assets and that they're collecting relevant information to enable them  
15 to make that decision. It's limited to what appears to be an orthodox request for trust information by a beneficiary of the Trust.

1440

What follows next, and that's the day after, what follows next in that sequence  
20 of requests, and I'm just addressing a point Mr McBride made, what did the beneficiaries expect, they're asked for information, they don't provide it, they're out. That was the initial request for information. This is an email from Laila Legler to Ms Beckham recording a phone conversation saying that she's taking advice on the request for Horowai Trust accounts, and she herself makes a  
25 request for information, and that, just to complete this loop, is what led to the TGT –

**WINKELMANN CJ:**

Are you taking us to another document?

**O'REGAN J:**

30 Sorry, where is that email that you were just referring to?

**WINKELMANN CJ:**

Is that another document? Because we're just on the email.

**O'REGAN J:**

You've just referred to an email but it's not on the screen.

5 **MR BIGIO KC:**

Oh, did you not call it up?

**MR LITTLE:**

I need the reference.

**MR BIGIO KC:**

10 I didn't give you the number? That's very naughty of me. 304.0809.

**WINKELMANN CJ:**

Is that hopeful?

**MR BIGIO KC:**

15 Yes. So now we see there's direct contact that's been made between WRMK and Laila Legler requesting the accounts with no – that has been made and Ms Legler is recording the phone conversation and saying she's getting advice on it.

**WINKELMANN CJ:**

20 So this is – so at some point is a request made on the basis that the trustees are trying to decide how they exercise their discretion?

**MR BIGIO KC:**

No. That's the reason why I'm taking your Honours through this sequence. The next –

**GLAZEBROOK J:**

25 Well, does it matter though?

**WINKELMANN CJ:**

I thought it does.

**GLAZEBROOK J:**

5 Because if you're entitled to the information because you're a beneficiary which would be a stance you could take.

**WINKELMANN CJ:**

Why wouldn't you ask the trustees though if that's what you wanted?

**MR BIGIO KC:**

Yes, you'd –

10 **GLAZEBROOK J:**

Well, but how do we know – I mean, you're actually saying they're not taking account of the position of the beneficiaries, whereas if you're right and they were asking for these accounts so they could take into account the position of the beneficiaries, then you're arguing against yourself.

15 **MR BIGIO KC:**

Your Honour, I'm just arguing about what the documents say on their face, and on their face, they indicate that a request is being made in one capacity and not in the capacity of a trustee who is about to make a decision on the distribution of assets, notwithstanding the advice that WRMK gave to Ms Formannoij. So –

20 **GLAZEBROOK J:**

So this is only evidence, you say – well, no evidence of them making a decision on the basis of the position of the beneficiaries. Is that...

**MR BIGIO KC:**

Correct, correct.

25 **WINKELMANN CJ:**

As I understand it, you're replying to Mr McBride's point, what were they do because they'd asked for the information –

**MR BIGIO KC:**

Correct.

**WINKELMANN CJ:**

– and in fact you're saying they hadn't actually asked for the information?

5 **MR BIGIO KC:**

Correct, and so, yes, I'll complete the loop very quickly. The next document –

**O'REGAN J:**

They asked for the information on the 26<sup>th</sup> of November.

**MR BIGIO KC:**

10 Yes.

**O'REGAN J:**

And the reply comes on the 31<sup>st</sup> of January.

**MR BIGIO KC:**

15 No. The reply – the request on the 26<sup>th</sup> of November appears to have gone to the accountant. We don't know what happened as between the accountant and beneficiary, and then when Ms Legler gets a phone call from Ms Beckham, she says: "I'm taking advice," and I'm just about take your Honour to the letter of advice that followed.

20 So 304.0817, 27 February 2020. This is the letter I took your Honours to this morning. But just looking at clause 3. So: "Request of Horowai Family Trust financial statements: We have been informed by Laila that you, on behalf of...the Kaahu Trust, have sought from her a copy of the financial statements of the Horowai Family Trust for the year ending 31 March 2019, on the basis  
25 that the Kaahu Trust is a discretionary beneficiary of the Horowai Family Trust (by virtue of common beneficiaries). You have not specified any particular reason why you seek this disclosure." So TGT is analysing this request which has been formulated as a request for information by a beneficiary according to



the principles of disclosure of information to beneficiaries, not anything to do or not with any anticipation that it is to actually find the asset position of each individual child for the purposes of determining whether distribution should be made.

5

And it's this letter which prompts – and this is just to refresh memory, and then I'll move on. 304.0826. WRMK to Ms Formannoij, 28 February: "We received the attached correspondence from TGT Legal yesterday afternoon," and the response is: "This was all to be expected," "It is time for a decision to be made..." The response is not – they've asked for an explanation, disclosures as to why we've made this request, should we be telling them what you are considering because we need to gather the information from the children before you can actually make the decision.

10

**O'REGAN J:**

15 But all of this relates to things that happened three months after the decision you're challenging.

**MR BIGIO KC:**

Yes –

**O'REGAN J:**

20 And you specifically aren't challenging the March decisions.

**MR BIGIO KC:**

No.

**O'REGAN J:**

So what's this got to do with anything?

25 **MR BIGIO KC:**

Your Honour's always one question ahead of the next thing that I'm going to take you to. So the point that I made in questions and I'll take your Honours to

that now. If I can find the cross-examination, please, of Ms Formannoij. 201.0129 at 201.0162.

**O'REGAN J:**

What is this document?

5 **MR BIGIO KC:**

This is cross-examination of Ms Formannoij and your Honours will see at line 6 where I'm referring her to WRMK's letter saying it's time for a decision to be made, and then I direct her to the paragraph which indicates the three options, "removing the children as beneficiaries, resettling the trust, distributing all of the trust assets to you personally and wind[ing] up the trust," and I ask her: "And these were more or less referred to in the November letters that we looked at together, weren't they?"

**GLAZEBROOK J:**

15 So where were they referred to in the November letters we've looked at together?

**WINKELMANN CJ:**

In the parentheses.

**GLAZEBROOK J:**

Because they certainly haven't jumped out at me from those letters.

20 **MR BIGIO KC:**

From the 7 November letter?

**WINKELMANN CJ:**

They're in the parenthetical comments, aren't they?

**MR BIGIO KC:**

25 Yes. And then further on at 201.0164, line 4: "I'm suggesting to you that you already had been discussing options with them about what to do with the assets

of the Kaahu Trust, between November and February 2020. Do you accept that?" "That's correct, yes."

**WINKELMANN CJ:**

That doesn't tell us when she'd been doing that though, does it?

5 **GLAZEBROOK J:**

Or what the options were.

**WINKELMANN CJ:**

Oh, so November...

**MILLER J:**

10 You're reading a lot into this cross-examination of a layperson.

**WINKELMANN CJ:**

Sorry, can I just finish – are you – so, it's between November and February?

**MR BIGIO KC:**

Yes.

15 **WINKELMANN CJ:**

That's not very particular. It's a three-month timeframe.

**MR BIGIO KC:**

But November is the time of the – around the time of the appointment. So –

**GLAZEBROOK J:**

20 So you say the options were always the three? They never discussed any other options? And how do you know that?

**MR BIGIO KC:**

No, I didn't suggest they hadn't discussed any other options. What we are saying is that the appointment to take control of the Trust was made at the same  
25 time that she was considering options to prefer her interests, not –

**GLAZEBROOK J:**

Well, you have to show why that's the case, and frankly, I don't see that from those November ones where it's made quite clear to her that she has to consider the interest of all of the beneficiaries and that's exactly what's said by  
5 the previous advisor, McGrearty.

**WINKELMANN CJ:**

McBrearty.

**GLAZEBROOK J:**

McBrearty.

**10 MR BIGIO KC:**

That may be what the letter records, but that's not how it actually played out. There was a request – the initial request for information, there was subsequent request for information, was not made pursuant to obtaining information for that purpose to satisfy that obligation. There was no disclosure of intentions to make  
15 any option – to make any distributions, and the response is, as I said, where the question is asked: "Why do you need this information?" When you would be – you think you'd be engaging with TGT on why the information was required, the response was: "We need to make decisions now. Here are your options all to prefer your interest. They're executed within a period of two  
20 weeks," and the children are not told.

1450

**GLAZEBROOK J:**

Well, you could infer they're not going to give us that information because they're very, very tidy and well looked after, as was the intention with the  
25 \$3 million distribution.

**MR BIGIO KC:**

Well, with respect your Honour the question wasn't even asked. The question wasn't raised. There was no disclosure of what steps she, as the sole trustee, was proposing to take and why she was seeking information.

**O'REGAN J:**

Yes, but she was under siege from these people. I mean, their lawyer was writing incredibly hostile letters to her. He effectively scared away the independent trustees. I mean, what are you expecting her to do?

5 **MR BIGIO KC:**

Scared away the independent trustees? Well, with respect, Sir –

**O'REGAN J:**

Isn't that the reason why he resigned, the independent trustee? He just didn't want to be involved in something where he was getting these hostile letters  
10 basically accusing him of incompetence.

**MR BIGIO KC:**

Yes but that's – well, he may have resigned for that reason, and there may have been pressure, but it just doesn't justify an appointment which gives you control for the intent of preferring your own interests. The two are not related in any  
15 way.

**O'REGAN J:**

Yes, they are. Of course they are. Because the other options weren't available to her because of the actions of your client.

**MR BIGIO KC:**

20 Well, with respect Sir, that's a very categorical, would be a very categorical and strong position, which is not borne out by the evidence. She turned down one option because it didn't suit her. A professional trustee who actually could have helped her navigate through any difficulties.

**GLAZEBROOK J:**

25 Do you know how much they cost? Was there a – the professional trustees usually take a percentage of the assets that they have under their control, which is absolutely, bears no relationship whatsoever to the amount of the work that

they put in. One can quite understand why you might not think that's a good idea.

**WINKELMANN CJ:**

You're saying that's not – is that in evidence?

5 **MR BIGIO KC:**

It's not in evidence at all, your Honour. Certainly not in evidence.

**WINKELMANN CJ:**

No, well, we can't take that into account, can we.

**MR BIGIO KC:**

10 And it's not in evidence that the Public Trust was unwilling to assist with a difficult situation, it's what they do for a living. None of that –

**GLAZEBROOK J:**

For a – well if you look at how they charge, it's a percentage of assets.

**MR BIGIO KC:**

15 Yes, but none of that allows a fiduciary obligation in appointing a trustee to be breached. None of it does. So this particular letter was an orthodox – from TGT, was an orthodox response to a request for information and then a request for information – request for information of a trust saying can you please tell us your reasons for seeking the information, entirely proper and correct response,  
20 and then asking for information about the appointment. As I put to your Honours, this letter was never answered.

**GLAZEBROOK J:**

Do you have to provide a reason if you're a beneficiary?

**MR BIGIO KC:**

25 Does one have to provide a reason?

**GLAZEBROOK J:**

Because this is primary information about the Trust, isn't it?

**MR BIGIO KC:**

5 Prior to the Trusts Act 2019 your request for information would have been governed by the principles in *Erceg* and so the solicitors are entitled to enquire into what the purpose is of a disclosure to decide if they are obliged to provide it or not. If it didn't fall within a definition of basic trust information, well, which now is statutorily based, then they're entitled to know what the beneficiary is asking for and why.

10 **O'REGAN J:**

The statute just mimicked *Erceg*. It was exactly the same. So there was no difference. The primary information was already clear from *Erceg*.

**MR BIGIO KC:**

15 Yes, well, with respect, Sir, I don't think the statute does completely mirror *Erceg* and does make some modifications to it. But in my respectful submission it cannot be suggested that it is improper for the trustee of the Trust to ask what the purpose of the disclosure is. If it is an improper question, the response is, we don't have to tell you, just give it to us, but they –

**WINKELMANN CJ:**

20 Well they could have said we want to know whether we – whether your clients are well provided for because we're interested in, and actually it's in our capacity as trustees for Kaahu.

**MR BIGIO KC:**

Which is my principal point.

25 **GLAZEBROOK J:**

But the trouble is, as soon as you start giving reasons, right, and putting anything in writing, you open yourself to issues of reviews, so one can understand why trustees don't do that.

**WINKELMANN CJ:**

Well, Mr Bigio, there seems to be an undercurrent in Mr McBride's submissions that there was open war and that your clients were very unreasonable. So I think you probably should say something on your clients' behalf in relation to that if you have anything to say.

**MR BIGIO KC:**

Yes, yes, Mr McBride has made much of that, and I just don't think that the characterisation is fair in any respect. I would invite your Honours to look at the affidavits that they filed in the proceedings. There were definitely some issues as between daughter and stepmother, which were more pronounced between Ms Formannoj and the boys. There were some real concerns about some of the – the way the assets might be treated. There was a fundamental belief, of course, that all of these assets in the Trust were from Mr Legler's father, in other words their grandfather. There was an emotive undercurrent, which of course finds its way into correspondence between parties. But your Honours, that's the life of trustees. That's the life of trusts, they have to deal with it, and the one thing they can't do is breach their fiduciary duties or responsibilities because it's just not convenient to follow them. That's just never an excuse. So Mr Tesiram makes a request or raises the question of disclosure. There are any number of answers that could be provided. An assertive one, we don't have to tell you, give it to us, or we're going to go to court.

**WINKELMANN CJ:**

Is the correspondence civil, or is it uncivil? Because the correspondence we've seen today has been very civil.

**MR BIGIO KC:**

Well, I thought the – I've worked with Mr Tesiram for many years.

**WINKELMANN CJ:**

No, I'm just talking about the stuff –



**MR BIGIO KC:**

Oh, today, I don't see, there's no lack of civility in this correspondence.

**WINKELMANN CJ:**

5 But in the lead up to the – it must – there must have been threats of litigation,  
et cetera.

**MR BIGIO KC:**

I wouldn't attribute any correspondence that was issued on Ms Legler's behalf  
by my instructing solicitors as being uncivil. It's not how they roll. Now, does  
Ms Formannoij subjectively feel assaulted by it?

10 **WINKELMANN CJ:**

Probably.

**MR BIGIO KC:**

Yes, but of course everyone is dealing with the trauma of a sudden death.

**WINKELMANN CJ:**

15 Yes.

**MR BIGIO KC:**

20 On all sides, partner and children, so everyone needs to be cut, and I mean  
everyone including Ms Formannoij, needs to be cut slack in terms of their  
emotive responses. But that's – the emotive response is not the legal question,  
and we're here to resolve the legal question and the application of equitable  
principles to the exercise of trust powers, and powers which are fiduciary in  
nature, and there's no way the respondents can get around it. They are  
fiduciary in nature, and they can't be avoided for the sake of convenience, and  
that's our principal argument, one of our principal arguments, your Honour.

25 **WINKELMANN CJ:**

Okay, so we're now straying from reply?

**MR BIGIO KC:**

We are straying from reply and I promised not to, but only in response to questions.

**WINKELMANN CJ:**

5 I accept that's because you've been questioned.

**WILLIAMS J:**

Well, we're leading you.

**MR BIGIO KC:**

Yes, thank you for that acknowledgement, Sir.

10 **GLAZEBROOK J:**

Well, I must admit I don't see requests for information on either side as being outside what one would expect to do because beneficiaries are entitled to information about the trust assets and what's happening if they are beneficiaries, and these are not, you know, the cat home that might get it in the event five generations go off, it's actually what one might think of as primary beneficiary.

**WINKELMANN CJ:**

There's nothing wrong with cat homes.

**GLAZEBROOK J:**

20 But that's why I can't see, it seems to be beside the point, because what we have to – well, do you accept that what we have to infer is that what happened was the intention all along when she made this appointment?

**WINKELMANN CJ:**

25 I think you're driving at, although you're not saying it very explicitly, a suggestion that there's really, you can see the fact they weren't upfront about the information they were requesting, et cetera, that they're not really there, is a plan at work is your submission, I suppose.

**MR BIGIO KC:**

Yes. That this was always contemplated at the time of the appointment. Now, were the actual ultimate three resolutions passed contemplated? Can't say that. But we have the seeds of them in the advice that was given at  
5 the relevant time, and the reason that I raise the 7 November letter is that instead of just focusing on the mechanics of appointment, and how we're going to get this appointment in place so that you can move on, the letter is dominated by advice on implementation of solutions, of options, a substantial number of which involve preferring her own interests, all things she could not do without  
10 an independent trustee if she we were acting as a natural person.

**GLAZEBROOK J:**

I'm sorry, I just don't read that from those November letters.

**MR BIGIO KC:**

Well, your Honour, I –

15 **GLAZEBROOK J:**

Whether she accepts that or not, if it's not in the November letters, then it's just not there, is it?

**MR BIGIO KC:**

But I've already referred your Honours to the evidence of why she made these  
20 decisions and accepted the advice.

**WINKELMANN CJ:**

Yes, we're just going over things.

**MR BIGIO KC:**

We are, your Honours, and I'm just trying to respond to questions as they arise.

**WINKELMANN CJ:**

Justice Glazebrook's – yes, we all have to look at the evidence, et cetera, so Justice Glazebrook is just indicating to you that she's not seeing things your way.

5 1500

**MR BIGIO KC:**

Understood. I can't take it any further. All the relevant references in her own evidence, in cross-examination, in correspondence, they're all footnoted, they're all described in the submissions for your Honour to see.

10 **WINKELMANN CJ:**

Yes, we have your submissions.

**MR BIGIO KC:**

Exactly. So I'm way over my 20 minutes.

**WINKELMANN CJ:**

15 Yes, well, we'll accept some blame.

**MR BIGIO KC:**

Now the last thing I wanted to address your Honours on, and I'll do it very briefly, are the Australian cases and where they may lead your Honours to. So there are three Australian cases in question. *Montevento*, *Mercanti* and the other one is *Baba*, and I will say something brief about all three, but I'll start with this general proposition. In none of those cases did the appointment of the trustee result in the destruction or termination of the trust. The appointments were all for the purpose of the preservation of the assets of the trust.

25 Now I'll take them one by one. *Montevento*, your Honours, by the time this case got – or when this case was in the High Court of Australia you will note that there is no reference to the proper purpose doctrine. None at all. That is because in the Court of Appeal decision it is recorded that counsel completely disavowed reliance on the proper purpose doctrine. It was only a scope, do the

words of the trust deed allow this, yes/no. Answer, yes. So it's not authority for the proposition on how to apply proper purposes in relation to those facts.

5 In *Mercanti* we are dealing with a situation where an individual appointed a company with him as a director to take control of a trading trust, again business assets, arising from concerns about the way the assets were being dealt with. The Court found that that appointment was expressly authorised by a validly entered into deed of variation of the trust. It's a long judgment, and I'm just giving your Honours the key point there. So there was no issue around the source of the power, that the appointment was consistent with the deed of variation, and that the purpose of it was for the preservation of the assets of the trust.

15 In *Baba*, which your Honours will find is another interesting situation – all three of these Australian decisions, by the way, dealing with trading trusts and businesses, none of them family trusts – in *Baba* there was a partnership agreement between three people or entities which was then supplanted by a trust deed. So the trust deed was, in effect, a form of partnership agreement and the appointor, the named appointor by agreement of the three parties appointed a company which he was the director of to take control of the trust for the purposes of taking control of the business because he was concerned that there had been defalcations of a sort from the other directors. The context, the finding that the purpose was not improper was driven by the Court's finding. You'll see that the Court of Appeal was concerned that in the light of the fact that it was a partnership, sole control was taken, but they were – their response to it came from what was the purpose and what was actually done after the appointment, and it was for preservation and not destruction.

**WILLIAMS J:**

30 Well, didn't the Court say, or didn't the trial judge say I'm suspicious about this but it doesn't look bad enough for me to actually make a finding and so I'll accept that he did this in good faith to, in his view, save the optometry business from ruin?

**MR BIGIO KC:**

Yes, I don't think it was only based on his subjective evidence, but also objective findings about the conduct of the other directors as well. I think that's what your Honours will find. So, and finally –

5 **WILLIAMS J:**

But I guess the question is whether that means Mr McBride is right that in these sorts of situations you need a contemporaneous gotcha and you don't have one.

**MR BIGIO KC:**

10 “Need a contemporaneous gotcha”. Did you put it like that?

**WINKELMANN CJ:**

He did. Effectively he said you need a side deal, aimed at a sort of side deal kind of situation.

**MR BIGIO KC:**

15 Yes, well a side deal, well I adopt what the Chief Justice said that one can't have a side deal with oneself. What is –

**WILLIAMS J:**

I don't know, I have those all the time, but you need a clear “gotcha” because the courts generally take a generous view of what people in the appointors or  
20 remaining trustees' position is.

**MR BIGIO KC:**

Yes, I come back then, and I'll be very brief, to what I said at the outset. When one looks at the terms of this deed, the entrenchment of clause 26.1, by 12.2, a feature you won't find in any other deeds. The fact that she could not make  
25 any decisions for her own benefit on her own, she was already a trustee, not coming to save the Trust from maladministration. The conclusion that I'm inviting your Honours to draw is that she formed this company and took these steps to give herself a control that the trust deed never intended her to have,

and that she did so in a context, immediately in the context of considering what she could do with that power for her personal benefit, and then in March, we have the outcome of that consideration.

- 5 Unless your Honours have any further questions for me, those are my lengthy submissions in reply.

**WINKELMANN CJ:**

- Thank you, Mr Bigio, and thank you counsel for your submissions. They're very helpful. We'll take some time to consider our decision and let you have it in due  
10 course. We will now retire.

**COURT ADJOURNS: 3.06 PM**