

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA359/2021
[2022] NZCA 607**

BETWEEN LI KARI LEGLER, LAILA SUN LEGLER
KLAUI AND KEN LEGLER
Appellants

AND MARIA GUILLAUMINA CORNELIA
JOHANNA FORMANNOIJ
First Respondent

KAAHU TRUSTEE LIMITED
Second Respondent

Hearing: 16 February 2022

Court: Brown, Brewer and Cull JJ

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

Judgment: 7 December 2022 at 10.30 am

JUDGMENT OF THE COURT

- A The appeal is dismissed.**
- B The appellants must pay the respondents one set of costs for a standard appeal on a band A basis and usual disbursements.**
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REASONS

Brown and Brewer JJ [1]
Cull J (dissenting) [43]

BROWN AND BREWER JJ

(Given by Brown J)

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Introduction

[1] As the sole remaining trustee of the Kaahu Trust (Kaahu) the first respondent (Maria) appointed the second respondent, Kaahu Trustee Ltd (KTL), as the sole trustee in her place. Maria is the sole director of KTL and, together with a company controlled by her solicitors, she owns all the shares in KTL. The appellants’ challenge to Maria’s appointment of KTL as the sole trustee of Kaahu was dismissed in the High Court.¹

[2] On appeal the appellants contend that Maria’s appointment of KTL as trustee was void as a fraud on her power of appointment, it being for the purpose of evading limits on self-dealing in the Kaahu trust deed and to benefit herself. They seek an order appointing an independent trustee in place of KTL.

Factual background

Ricco Legler and his family

[3] The appellants, Li, Ken and Laila Legler, are the children of Ricco Legler from his first marriage. Ricco married his second wife, Maria, in 2009 following a 20-year relationship. Ricco’s father, a successful European businessman, died in 2002 leaving

¹ *Legler v Formannoij* [2021] NZHC 1271, (2021) 5 NZTR 31-006 [High Court judgment].

Ricco a significant inheritance which ultimately led to the creation of two family trusts, the Horowai Family Trust (Horowai) in 2007 and Kaahu in 2008.

The Horowai Family Trust

[4] Horowai was established by a Deed of Declaration of Trust dated 2 March 2007 by its sole trustee, Horowai Trustee Co Ltd (HTL).² The appellants and Ricco were the final beneficiaries. The discretionary beneficiaries included the final beneficiaries, Maria and any trust a beneficiary of which was also a beneficiary of Horowai. On 30 May 2014 HTL removed Ricco as a beneficiary.

[5] Horowai's assets include a 214 hectare block of forested land at Purerua Road, Kerikeri, an adjacent 21 hectare block of farm land and a fund of at least \$3 million.

The Kaahu Trust

[6] Kaahu was established by a Deed of Declaration of Trust dated 9 June 2008 (the Trust Deed) by its trustees, Ricco, Maria and BOI Taxation Trustee Co No 2 Ltd (BOI). Philip Tyler, who was the accountant for both Horowai and Kaahu, was BOI's director. At its inception, Kaahu's final beneficiaries were Ricco and Maria. The discretionary beneficiaries were the final beneficiaries, any issue of the final beneficiaries (including the appellants) and any trust which included among its beneficiaries a beneficiary of Kaahu (including Horowai). At present Kaahu owns a home in Russell built by Ricco and Maria worth several million dollars and a fund of approximately \$5 million.

[7] Decisions of the trustees are required to be unanimous (cl 8.3), but the Trust Deed provides in cl 18.1 that any power or discretion vested in the trustees can be exercised in favour of a trustee who is also a beneficiary by the other trustee or trustees. Central to this appeal are the provisions of the Trust Deed concerning trustees:

² Its directors are Li and Laila Legler.

26. Restriction on number and identity of Trustees

26.1 Unless a corporate body is the sole Trustee:

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

27. Provisions as to future Trustee or Trustees

27.1 **Corporate bodies:** Any properly empowered corporate body may act as the sole Trustee or as one of two or more corporate Trustees.

27.2 Provisions applicable when the Trustee is a corporate body:

- (a) **Disqualification of Trustee:** Upon any change in the control or management of a corporate Trustee effected by the act or omission of any party other than the directors or shareholders of the Trustee or by the operation of law from the date of such change that Trustee shall cease to be the Trustee or one of the Trustees and shall not thereafter exercise any of the powers and discretions vested in a Trustee by this deed.
- (b) **No reinstatement:** Any change in any order or circumstances which has disqualified any Trustee under this clause shall not result in the removal of such disqualification of and the reinstatement of the Trustee concerned.
- (c) **Trustee/Beneficiary:** It is expressly declared a corporate Trustee may exercise all the powers and discretions vested in that Trustee by this deed and by law notwithstanding such exercise may in any way directly or indirectly benefit any Beneficiary who has any interest (contingent or otherwise) in that Trustee whether as director, officer, shareholder or otherwise however.

Changes in the trusteeship of Kaahu

[8] On 16 November 2017 Ricco died in a gliding accident.³ His death left Maria and BOI as Kaahu's trustees.

³ He left his shares in HTL to Li and the balance of his estate to Kaahu, which included a large catamaran.

[9] In late 2019 Mr Tyler concluded that BOI should resign as a trustee of Kaahu for a variety of reasons. Laila had questioned his competence as an accountant and Li was a friend. Mr Tyler did not want to be involved in litigation between Maria and the appellants, who had retained lawyers and were actively seeking information about Ricco's estate and Kaahu. As a consequence Maria became the sole trustee. She was required by cl 26 to appoint a new trustee.

[10] After considering two possibilities,⁴ on the recommendation of a trusted adviser Maria consulted WRMK Lawyers who informed her that the Trust Deed permitted her to appoint a corporate trustee, of which she could be a director, whereupon she could resign as a trustee. The lawyer who Maria had first approached had concerns about a sole corporate trustee controlled by Maria, considering that such control should be independent. However WRMK Lawyers confirmed their advice and Maria accepted it. KTL was incorporated with Maria and WRMK Trustees (2019) Ltd as equal shareholders. On 27 November 2019 KTL became a trustee of Kaahu and that same day Maria resigned as a trustee.

[11] In March 2020 KTL excluded Horowai and the appellants as beneficiaries of Kaahu. It distributed trust funds to Maria and appointed her as the beneficiary for whom the trust would be held on vesting day.

The High Court judgment

[12] The appellants' challenge to Maria's appointment of KTL as sole trustee in her place pleaded a single cause of action of fraud on a power and sought a declaration that KTL's appointment was accordingly void. They contended that the power to appoint new trustees of Kaahu was a fiduciary power which Maria was required to exercise in good faith, for proper purposes, and in the best interests of the beneficiaries as a whole.

⁴ A lawyer known to Maria, who was unable to assume the role as his firm did not act as trustees, and Perpetual Guardian.

[13] The pleadings then asserted:

21. On the true construction of the trust deed, including clauses 12.2(d), 18.1 and 26.1, [Maria] was unable in any event to exercise her power to appoint new trustees for her own benefit.⁵
22. [Maria's] purpose in replacing herself as sole trustee with a company under her control was to evade the limits in clause 18.1 of the trust deed and in the law on her ability as trustee to use the trust property to benefit herself.
23. In the circumstances pleaded above, [Maria's] appointment of [KTL] as trustee of the Kaahu Trust in her place complied with none of the requirements [to act in good faith, for proper purposes and in the best interests of the beneficiaries as a whole], was for her own benefit, and so was a fraud on her power of appointment.

While denying those allegations Maria did not dispute that she was required to exercise the appointment power in good faith and for a proper purpose. She maintained that she did so.

[14] Downs J ruled that the evidence did not establish that Maria appointed KTL with the purpose of preferring her own interests. Following a six-fold analysis of the evidence the Judge concluded:⁶

[59] I summarise. I am not persuaded Maria appointed [KTL] to benefit herself or that this was one of her purposes in appointing that trustee. While the March deeds are evidence that could support a contrary conclusion, the totality of evidence points another way. Maria found herself sole trustee. She looked to appoint a second trustee, encountered difficulties, and was then advised another course was permissible. Maria acted on that advice without concealing contrary opinion. Maria was informed of her fiduciary obligations and sought information relevant to their discharge. Direct challenge to the March deeds would fail. Maria impressed as sincere.

[15] The Judge recorded that the closing address of Mr Bigio KC, on behalf of the appellants, involved some recalibration of the appellants' case, asserting that the appointment of KTL was a fraud on a power because Maria had sought "to take exclusive control of the trust".⁷ Following an analysis of cls 26 and 27, the Judge

⁵ Clause 12.2(d) limits the general power of the trustees to vary the terms of the Trust Deed (provided for in cl 12.1), by stipulating that they cannot vary the provisions of cl 26 specifying the identity of any of the trustees. Clause 18.1 provides that 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.

⁶ High Court judgment, above n 1.

⁷ At [40].

concluded that the Trust Deed neither precluded, nor manifested an intention to preclude, control by a single corporate trustee with a beneficiary as director.⁸ The Judge ruled that the fact Maria had done no more than something envisaged by the Trust Deed, indeed expressly provided for by it, disposed of Mr Bigio's recalibrated exclusive control argument.⁹

The scope of the appeal

[16] The primary grounds of appeal include:¹⁰

- (a) that the High Court erred in holding that the appointment of a trustee company controlled by a beneficiary as sole trustee of Kaahu was not a fraud on the power to appoint trustees; and
- (b) that the High Court erred in holding that Maria exercised the power to appoint trustees for a purpose permitted by the Trust Deed, in good faith, and in the best interests of the beneficiaries as a whole.

[17] The second ground is directed to the Judge's conclusion on the evidence that Maria did not appoint KTL for the purpose of benefitting herself.¹¹ However the first ground, while ostensibly advanced as a fraud on a power contention, has the flavour of an ultra vires argument. The particulars of that ground include:

- (i) When interpreted properly, the Kaahu Trust deed evidences an intention by the settlor (the donor of the power) to preclude a sole trustee-beneficiary from taking sole control of the Trust for his or her own benefit;
- (ii) The High Court erred in failing to reach a conclusion on the meaning of cl 18.1 of the deed and its relevance;
- (iii) The High Court erred in failing to consider the purpose of cls 12.2 and 26.1, adopting instead an interpretation of the deed that leaves those clauses redundant;

...

⁸ At [44].

⁹ At [46]–[47].

¹⁰ The third primary ground was an allegation that the Court erred in not appointing an independent trustee.

¹¹ See [14] above.

[18] When taxed with the suggestion that the first ground of appeal involved an ultra vires challenge, Mr Bigio responded:

... the question is whether [this corporate trustee] is a qualifying corporate trustee so on its face [Maria] has appointed an entity which is potentially eligible to be the trustee and could remain the trustee if the defect in the appointment were cured for example by the appointment of an independent director to sit alongside her for example. But if the corporate trustee is to retain this form we say the Trust Deed doesn't authorise a corporate trustee with a sole director who is a beneficiary having complete control of that corporate entity. So on a continuum of what is allowed and what is a fraud on a power I cannot say it was never open to her to appoint a corporate trustee. The question is whether it was open to her to appoint one, this one in this form, which is purporting to administer the assets of the Trust.

[19] It was apparent that Mr Bigio envisaged that the impugned appointment by Maria of a corporate trustee solely controlled by a beneficiary could be analysed either as an ultra vires act or as a fraud on a power. As he put it:

... ultimately the avenue or the characterisation is not material. What is material is whether this trustee can conduct the affairs of this trust and either avenue would be open but we have followed the fraud on a power approach ...

[20] We do not accept the proposition that the characterisation is not material. The distinction between an ultra vires act and fraud on a power was emphasised by Lord Sumption in *Eclairs Group Ltd v JKX Oil and Gas plc*:¹²

... the proper purpose rule is not concerned with excess of power by doing an act which is beyond the scope of the instrument creating it as a matter of construction or implication. It is concerned with abuse of power, by doing acts which are within its scope but done for an improper reason. It follows that the test is necessarily subjective.

Similarly, in *Kain v Hutton* Tipping J expressed the point in this way:¹³

A special power is one where the objects of the power are limited by the terms upon which the power is granted. An appointment to a person who is not a permitted object will usually represent an excessive execution of the power. The species of excessive execution known as a fraud on the power normally comes about when the appointment is in form to an object but in substance to a non-object. In such a case the object is simply a vehicle through or by means of whom the appointor's purpose of benefiting the non-object is carried out. Hence a fraud on a power is a clandestine excessive execution because it is

¹² *Eclairs Group Ltd v JKX Oil and Gas plc* [2015] UKSC 71, [2016] 3 All ER 641 at [15]. Lord Sumption explained that the proper purpose rule has its origin in the equitable doctrine known, in his view rather inappropriately, as the doctrine of fraud on a power.

¹³ *Kain v Hutton* [2008] NZSC 61, [2008] 3 NZLR 589 at [47].

regular on its face, but in reality is undertaken for a purpose not within the donor's mandate.

[21] Invoking *Eclairs Group* Mr McBride, counsel for Maria, observed that it was implicit that the appellants accepted that Maria's appointment of KTL was *intra vires*, noting that one cannot abuse a power one does not have. However, drawing attention to paragraph 21 of the statement of claim,¹⁴ he submitted that the pleading conflates the concepts of acts beyond the scope of the creating instrument and acts within its scope but done for an improper purpose.

[22] The statement of claim pleads a single cause of action which bears the heading "fraud on a power". As noted above, Mr Bigio acknowledged that that was the "approach" which the appellants had adopted. There is no pleading of an alternative (and logically prior) cause of action to the effect that the appointment of KTL was *ultra vires*. Given the presence in the Trust Deed of cl 27.2(c) that approach is readily understandable.

[23] Restricting the claim to an alleged fraud on a power is also consistent with the way in which the claim was characterised by the appellants at an earlier stage in the litigation. An application by Maria for discovery of documents, including those relating to the administration of Horowai, was advanced on the ground that the appellants had refused to provide discovery of Horowai's financial position, such documents being directly relevant to the pleaded issues.

[24] When declining that application, Campbell J observed that the appellants had identified a very narrow factual mast to which they had nailed their colours, namely the allegation that Maria's purpose in replacing herself as sole trustee with KTL was to evade the legal limits on her ability as trustee to use the trust property to benefit herself.¹⁵ Recording Mr McBride's expression of concern that at the substantive hearing the appellants might seek to go beyond their pleaded case, the Judge observed that the appellants would face obvious difficulties in expanding their pleaded case at trial given the pains they had gone to on the discovery application to emphasise the

¹⁴ See [13] above.

¹⁵ *Legler v Formannoij* [2021] NZHC 737 at [28].

narrowness of their case.¹⁶ Such difficulties now confront the appellants in their attempt to advance their flip side ultra vires argument.

[25] In the circumstances we consider that Mr McBride's protest, that the claim is confined to an assertion of a fraud on the power of appointment, is fairly taken. It is not open to the appellants to now attempt to "run the blind side" in the form of an argument that, irrespective of Maria's purpose in doing so, it was not permissible under the Trust Deed to appoint a corporate trustee "in this form". Hence the sole issue on this appeal is whether Maria's appointment of KTL (of which she was the sole director) was for an improper purpose.

[26] However we think it appropriate to add that, in view of the terms of cl 27.2(c), we do not consider that an ultra vires argument would have availed the appellants. This case has parallels with *Montevento Holdings Pty Ltd v Scaffidi Holdings Pty Ltd (No 2)*.¹⁷ In that case, Giuseppe Scaffidi commenced proceedings in the Supreme Court of Western Australia seeking a declaration that the appointment of Montevento Holdings Pty Limited (Montevento), of which his brother Eugenio Scaffidi was the sole director and shareholder, as the sole trustee of a trust was invalid. Giuseppe claimed that the appointment breached cl 11.03 of the trust deed, which provided that "[i]f, and so long as any individual Appointor is a Beneficiary, that individual shall not be eligible to be appointed as a Trustee".¹⁸

[27] At first instance it was held that there was no evidence that Eugenio, a beneficiary of the trust, had appointed Montevento as trustee for an improper purpose. The Judge also rejected the argument that the appointment of Montevento as the sole trustee of the trust was in breach of cl 11.03.¹⁹ By a majority the Western Australian Court of Appeal allowed Giuseppe's appeal, making orders which included a declaration that the appointment of Montevento as the sole trustee of the trust was invalid because it breached cl 11.03.²⁰ Relying on the natural and ordinary meaning

¹⁶ At [38].

¹⁷ *Montevento Holdings Pty Ltd v Scaffidi Holdings Pty Ltd (No 2)* [2010] WASC 180.

¹⁸ At [23].

¹⁹ At [31]–[43].

²⁰ *Scaffidi v Montevento Holdings Pty Ltd* [2011] WASCA 146, (2011) 6 ASTLR 446 at [167] and [169].

of the words of cl 11.03 Buss JA dissented, holding that the language did not extend to prohibit the appointment of a trustee which is a corporation.²¹

[28] The High Court of Australia favoured the interpretation of Buss JA and allowed the appeal, ruling that when cl 11.03 was read in the context of the whole document, which repeatedly distinguished between an individual in the sense of a natural person and a corporation, the clause must be read as indicated by Buss JA.²² The Court rejected the argument that the class of persons excluded from appointment to the office of trustee extended to any corporate person whose powers, directions or duties as trustee would be exclusively exercised by the individual appointor.²³ Given the terms of cl 27.2(c) of the Trust Deed, we consider that the present case invites the same conclusion.

Was Maria’s purpose in the appointment of KTL improper?

[29] As this Court explained in *Wong v Burt*:²⁴

... the sine qua non which makes the exercise of a discretion or power “improper” is the improper intention of the person exercising it. The central principle is that if the power is exercised with the intention of benefiting some non-object of the discretionary power, whether that person is the person exercising it, or anybody else for that matter, the exercise is void. If, on the other hand, there is no such improper intention, even although the exercise does in fact benefit a non-object, it is valid.

As noted above, the test for establishing fraud on a power is necessarily subjective and the relevant point in time for consideration is the date of exercise of the power.²⁵

[30] Maria gave detailed evidence concerning the two trusts, the acrimony with Ricco’s children following his death and the changes to the Kaahu trustees. She explained that after Ricco’s death she received very aggressive letters from Laila’s lawyers concerning Ricco’s will, his estate and the administration of Kaahu. This caused her great personal stress and unhappiness. She related the sequence of

²¹ At [92]–[93].

²² *Montevento Holdings Pty Ltd v Scaffidi* [2012] HCA 48, (2012) 246 CLR 325 at [22] and [25].

²³ At [24]–[25].

²⁴ *Wong v Burt* [2005] 1 NZLR 91 (CA) at [30], citing *Vatcher v Paull* [1915] AC 372 (PC) at 378 per Lord Parker.

²⁵ *Eclairs Group Ltd v JKX Oil and Gas plc*, above n 12, at [15], referring to *Duke of Portland v Topham* [1864] 11 HLC 32 at 54.

the advice which she received from WRMK Lawyers, observing that the appointment of a sole corporate trustee appealed to her as she thought it would simplify matters relating to Kaahu.

[31] Although it was not a matter explored in the High Court judgment, we consider that Maria's use of the word "simplify" likely contemplated the difference of view which emerged between her and Ricco's children concerning the future of the Mokomoko property in Russell, where Maria and Ricco had resided. As Maria explained:

62. I have, for some time, wanted to sell the Mokomoko property and want to move to Waiheke Island. I have friends at Waiheke, and I feel that the Waiheke environment suits me and my lifestyle well.
63. The Mokomoko property is too large for me alone, requires significant upkeep and maintenance, and I feel isolated in Russell. I stay at Waiheke or in Auckland several times a month for various reasons, and find the long drive very tiring.

[32] A sale of Mokomoko was opposed by the appellants. As their lawyer explained in later correspondence:

This house was designed and built by their father. It was funded from legacy Legler family assets. They consider that, as a legacy asset, it should be retained in the trust for future generations of Ricco's family. They are not unmindful of your client's desire for alternative accommodation. They believe that that can be provided for from the Trust's other resources.

[33] Maria was dependent on Kaahu for her accommodation and financial support. We consider that a motivation to take steps to control Kaahu so as to pursue the objective of rendering her living arrangements more congenial would not have been objectionable as comprising an improper purpose. Hence this is not a case where by dint of the absence of a legitimate purpose an inference of the presence of an improper purpose could be drawn.

[34] We have noted above²⁶ the Judge's recognition of the evolution of Maria's alleged improper purpose in exercising her power of appointment. However, as

²⁶ At [15] above. See High Court judgment, above n 1, at [38]–[40], where the Judge noted that the allegation began as one that Maria acted for the purpose of preferring her own interests then, by the time that closing arguments were delivered, became one that she acted for the purpose of taking exclusive control of Kaahu.

Mr McBride observed, it is significant that there was no cross-examination of Maria concerning her intentions when she appointed KTL. It was not, at least expressly, suggested to her that she intended either to improperly promote her own interests, or to take control of Kaahu or evade restrictions under the Trust Deed. In these circumstances the Judge's acceptance of Maria's evidence is readily understandable, particularly against the background of the tension concerning her residential arrangements.

[35] Indeed it is fair to say that the way in which the appellants' case was formulated did not involve a direct attack on Maria's subjective purpose. Mr McBride first made this point with reference to the pleading, which he characterised as endeavouring to develop an overriding purpose for Kaahu, based on an artificial construction of the Trust Deed, and culminating in the proposition that Maria's actions contravened such overall object, thereby amounting to a fraud on a power. The same theme was apparent in the appellants' submissions, which were summarised in this way:

Summary

49. Given (a) the fiduciary nature of the power and (b) the provisions of the trust deed referred to above, a trustee who uses their power of appointment to take control of the trust, thereby defeating the intended effect of clauses 18.1 and/or 26.1(b) and benefitting themselves, would be acting for an improper purpose, and so committing a fraud on a power.

[36] However, as Mr McBride submitted, a claimant still needs to prove some improper, collateral, intention that offends against the objects of the trust, such as an anticipated breach of trust by the new trustee. He submitted, and we agree, that it is a logical fallacy to contend that strict compliance with the terms of the Trust Deed can amount to a fraud on a power, absent some further evidence of intention to act improperly.

[37] Despite the extensive citation of authority by both sides in attempts to find parallels in other judgments, this appeal turns on whether the High Court erred in its conclusion that the appellants failed to demonstrate that in exercising the power to appoint KTL Maria was motivated by an improper purpose.

[38] From our review of the evidence and the contemporaneous record we are not satisfied there was any error in the Judge's conclusion that Maria was not so motivated. As the Judge recorded, WRMK Lawyers gave explicit advice to Maria that her ability to make decisions was always subject to the overarching duty of a trustee to act in the best interests of the beneficiaries,²⁷ a point which was underscored in the course of Maria's cross-examination. We consider that it is apparent that Maria understood and accepted that advice. In the course of the events that followed, Maria obtained and acted upon further advice of WRMK Lawyers.

[39] Unlike the Judge, we do not consider that subsequent decisions, made with the benefit of such advice, to remove the appellants as beneficiaries should be taken into account in the determination of Maria's subjective motivation at the date of the exercise of the power of appointment.²⁸ The validity of those later actions has never been the subject of legal challenge. If a challenge were to be made, it would fall to be assessed by reference to different principles. In any event the Judge considered, correctly in our view, that the totality of the evidence supported the conclusion that Maria was not actuated by an improper purpose.²⁹

[40] In these circumstances we do not consider that it is necessary or appropriate to entertain the appellants' request for the appointment of an independent trustee, either in place of Maria or in addition to her.

Result

[41] The appeal is dismissed.

[42] The appellants must pay the respondents one set of costs for a standard appeal on a band A basis and usual disbursements.

²⁷ High Court judgment, above n 1, at [53].

²⁸ At [56]–[58], discussing the events following KTL's appointment.

²⁹ At [59].

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[43] I would allow the appeal. I disagree with the majority that Maria was not actuated by an improper purpose and that there was no exercise of a fraud on the power of appointment.

[44] There are three reasons for my dissent. First, the appointment of the company KTL as sole trustee was not compliant with the terms of the trust and the intention evidenced in the Trust Deed. Second, I consider that Maria was motivated by an improper purpose in the appointment of KTL as sole trustee to gain control of the trust for her benefit exclusively. Third, I consider that the decision to remove the beneficiaries from Kaahu cannot be evaluated separately from Maria’s exercise of her power of appointment.

Non-compliance with the Trust Deed

[45] The Trust Deed establishing Kaahu contains a number of provisions governing non-corporate trustees. Those provisions constrain self-dealing, require unanimous decisions of trustees, and mandate the appointment of an independent trustee.

[46] Clause 18.1 constrains a trustee from exercising their power to benefit themselves. It provides that where there are two trustees, only the other trustee can benefit the co-trustee. Clause 18.1 provides:

18.1 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.

[47] Clause 8.3 requires unanimity of trustee decisions. It states that “[t]he rule of law specifying all decisions of trustees shall be unanimous is applicable to the Trust.”

Clause 26.1(a) precludes a person acting as a sole trustee, while cl 26.1(b) provides that the trustees must always include at least one person who is not a beneficiary nor in a relationship with, or a relative of, a beneficiary or a trustee.

[48] Those clauses reinforce the intention evidenced in the Trust Deed that a sole individual trustee must have the restraint of an independent trustee to prevent an individual, exercising his or her trustee powers, from benefitting themselves. However, cl 27 provides that a corporate body may be a sole trustee and if it is, then it may benefit any beneficiary, notwithstanding that the beneficiary is a “director, officer, shareholder or otherwise” of the company. The wording of cl 27.1 is:

Corporate bodies: Any properly empowered corporate body may act as the sole Trustee or as one of two or more corporate Trustees.

[49] The appointment, therefore, of a sole corporate trustee is permissible under cl 27.1. However, in my view the Trust Deed precludes the appointment of a sole corporate trustee, such as KTL, under the sole control of a beneficiary as the only director of the company. There are three reasons for my view.

[50] First, the interpretation of the wording in cl 27.1 carefully distinguishes the type of corporate body to be appointed as sole trustee. To be a sole trustee, it must be a “properly empowered corporate body”. The “properly empowered corporate body” is not defined but is differently described in cl 27.1 to “corporate [t]rustees”. I consider the words “properly empowered corporate body” likely refer to a trustee company such as Perpetual Guardian or Public Trust or a trustee company with a board of directors and shareholders. On the wording of cl 27.1, such a company can be either a sole trustee or a trustee in addition to two or more “corporate [t]rustees”. The distinction in this wording suggests a difference between a corporate trustee, such as KTL, and a “properly empowered corporate body,” such as a professional trust company. This interpretation is supported by the reference in cl 27.2(a) to “directors or shareholders of the Trustee,” which suggests there should be more than one director of the corporate trustee.

[51] Second, such an interpretation is consistent with the other provisions of the Trust Deed requiring an independent trustee who is unrelated to a beneficiary and

constraining the exercise of powers for self-benefit. There is no logical explanation for allowing the requirement for an independent and unrelated trustee to be circumvented by the appointment of a company, which the appointer alone controls, unless it is a corporate body with a board of directors. Thus cl 27.2(c), allowing any beneficiary who is a shareholder/director of the corporate trustee to benefit from its decisions, can be read consistently with the intent of cl 26.1(b), that the trustees must always include one person who is not a beneficiary or related to/in a relationship with either a trustee or a beneficiary, by requiring that there be more than one sole shareholder/director of the corporate trustee.

[52] Third, it is highly relevant in my view that Mr McBrearty, the solicitor who drafted the Kaahu Trust Deed in 2008, who had acted for HTL, and who was acting in respect of Ricco’s estate, expressed his concerns to Maria when told she was going to engage new solicitors and informed of her likely use of a sole corporate trustee in her control.³⁰ He said he had “some concerns” about a corporate trustee controlled by Maria. He advised her that if she were to form a company, “the control of the company must be given to someone other than yourself” and control should be independent.³¹

[53] Maria forwarded Mr McBrearty’s email to her new solicitors, WRMK Lawyers, and was advised that their advice stands because the Trust Deed excludes the requirement for an independent trustee *if* a corporate trustee is the sole trustee. On 7 November 2019, Mr McBrearty wrote to WRMK Lawyers pointing out that while a corporate trustee was “technically” available, he believed that “the intent of the trust document is that there will at all times be an independent trustee”.

[54] If there were any doubt about the requisite intention in the drafting of the Trust Deed, the drafting solicitor himself gave advice to Maria. He was the person with “all the background knowledge” which was available at the time Kaahu was settled.³² He was not alone. Another solicitor, Mr Jordan, who had acted for the Kaahu trustees (including Maria), also expressed that an independent trustee was

³⁰ High Court judgment, above n 1, at [15] and [19]–[20].

³¹ At [20].

³² See *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60]–[63]; and see generally *Powell v Powell* [2015] NZCA 133, [2015] NZAR 1886 at [53]–[55], regarding the applicability of principles of contractual interpretation to express trust deeds.

required.³³ Maria chose not to follow Mr McBrearty's or Mr Jordan's advice. I disagree, therefore, with the finding of the High Court Judge that Maria did not commit a fraud on the power by appointing a corporate trustee subject to her control because she "did no more than something envisaged by the deed, indeed, expressly provided for by it".³⁴

[55] I accept the appellants' submission that, given the fiduciary nature of the power of appointment and the provisions of the Trust Deed as set out above, Maria has used her power of appointment to take control of the trust, thereby defeating the intended effect of cl 18.1 and/or cls 26.1(b) and 27.1 to enable her to self-benefit. This is an improper purpose and constitutes a fraud on a power.

Improper purpose

[56] I depart from the majority's view that the appellants failed to demonstrate that, in exercising the power to appoint KTL, Maria was motivated by an improper purpose.

[57] Maria accepted in re-examination that Kaahu was ultimately for the children's benefit on the death of her and Ricco. She said:

That was the whole purpose of the Kaahu Trust. It was set up for Ricco and I but at our death it would go to the children and I still wanted that to happen.

[58] When Maria first met the solicitors from WRMK Lawyers, however, she told them "it was likely the children would litigate".³⁵ The Judge observed that when Maria was told the Trust Deed permitted her to appoint a corporate trustee, of which she could be a director, then herself resign as a trustee, "[t]he advice was attractive, for, Maria wanted to 'simplify matters' in relation to Kaahu".³⁶ Maria acknowledged in evidence that she wanted to have a "clean break" from Ricco's children and to sever the link with them. She agreed in cross-examination that she believed they "had enough" and had "been ungrateful" for what she had done for them.

³³ This was communicated in an email dated 25 October 2018 to Mr Clarke, Maria's financial adviser: "The Kaahu Trust needs to have an independent trustee who is not a beneficiary"; and in a letter of 1 November 2018: "As you will be aware the trust must have and retain an independent trustee."

³⁴ High Court judgment, above n 1, at [46].

³⁵ At [18].

³⁶ At [18].

[59] From the sequence of events from October 2019 to March 2020, I consider that Maria failed to act in accordance with Kaahu's purpose, as she articulated it. She chose the options of appointing KTL as sole trustee and herself as sole director of that company, with the intention of controlling the trust exclusively to benefit herself to the exclusion of the other beneficiaries. The correspondence and its sequence were the subject of cross-examination of Maria. It appears the key dates are:

4 November 2019 Maria's solicitor, Mr McBrearty, emailed his concerns about a corporate trustee being controlled by Maria and told her there was a requirement for an independent trustee, if a corporate trustee were to be the sole trustee.

WRMK Lawyers, the new solicitors, advised that no independent trustee was required if a corporate trustee were the sole trustee.

7 November 2019 Mr McBrearty wrote to Maria's new solicitors, saying that while a sole corporate trustee was technically available, the intent of the trust document was that there would at all times be an independent trustee.

WRMK Lawyers assured Maria their advice was correct.

WRMK Lawyers provided a letter giving her three options if she controlled the sole trustee company. Those options were resettlement of Kaahu's assets onto a new trust, gifting some or all of the assets to any one of the beneficiaries, including herself, and/or excluding any person as a beneficiary of Kaahu.

21 November 2019 WRMK Lawyers sent Maria a letter seeking instructions for the request of financial statements for Horowai. WRMK Lawyers advised Maria she would be the "sole director of that company and make all relevant decisions". Maria agreed to this course of action.

27 November 2019 Maria resigned as trustee of Kaahu and KTL was appointed as sole trustee. Maria became the sole director of KTL and one of

its shareholders. The other shareholder was WRMK Trustees (2019) Ltd — her solicitors’ trustee company.

27 February 2020 The appellants’ solicitors raised concerns about Maria’s sole directorship of the sole trustee.

28 February 2020 WRMK Lawyers wrote to Maria asking for a decision on what to do with the assets of KTL.

March 2020 Maria executed the “March deeds” whereby KTL removed the other beneficiaries, distributed the trust funds to Maria, and appointed Maria as the sole beneficiary on vesting day.

[60] The 7 November 2019 letter from WRMK Lawyers to Maria demonstrates the improper purpose which motivated Maria in exercising her power of appointment. The letter explained the structuring of KTL and the options available to Maria, once she appointed KTL and became “the sole director of the sole trustee”. It also shows that choosing those options from the outset was dependent on the exercise of her power of appointment of KTL. The wording of the letter is instructive:

You will be the sole director of the sole trustee (Kaahu Trustee Limited) of the Kaahu Trust. The Trustee (*through you*) has a number of powers, including to:

1. give some or all of the assets of the Trust to any one or more of the beneficiaries (including yourself); and/or
2. transfer some or all of the assets of the Trust to a new Trust (called “resettlement”) for the benefit of any one (or more) of the current beneficiaries (including you); and/or
3. to exclude any person as a beneficiary of the Trust.

You will have the ability to make all decisions affecting the Kaahu Trust. However, this is always subject to the overarching duty of a trustee to act in [the] best interests of the beneficiaries of the trust, having considered the needs and circumstances of each of the beneficiaries, including Ricco’s children and yourself.

(Emphasis added.)

[61] It is clear from this correspondence that the stated purpose for the appointment of KTL was to give Maria sole control of Kaahu and its assets, highlighting that she would have the ability to make all decisions affecting Kaahu. Maria chose to instruct

WRMK Lawyers as her solicitors and followed their advice on the appointment of KTL.

[62] Once in control, Maria made decisions as director of KTL, choosing the option of excluding the other beneficiaries of the trust and deciding to “give ... all of the assets of the [t]rust” to herself, as her solicitor suggested. KTL’s actions are described in the High Court judgment:³⁷

[25] In March 2020, [KTL] excluded Horowai and the children as beneficiaries; distributed trust funds to Maria; and appointed Maria as the beneficiary for whom the trust would be held come vesting day.

[63] In rejecting the submission that Maria appointed the company to prefer her own interests, Downs J found that Maria sought and acted upon legal advice in appointing KTL and was advised of her fiduciary responsibilities as director of the sole corporate trustee.³⁸ I do not agree with this reasoning.

[64] First, the fact that Maria took and acted on legal advice is irrelevant to an improper exercise of the power to appoint. Legal advice does not prevent her actions being found to be a fraud on a power. In *Wong v Burt*, the respondents similarly sought and acted on advice, but this Court determined that the trustees’ scheme amounted to fraud on a power despite the “fraud” being done altruistically, by the distribution of funds to a non-beneficiary.³⁹ In this case, Maria’s evidence that she intended to leave something from the trust to the children upon her death is equally irrelevant to whether or not the exercise of her appointment power was lawful. It is clear that her intention was to appoint a vehicle through which she not only could maintain full control of Kaahu but, more problematically, divert the trust assets to herself alone and exclude the beneficiaries.

[65] Second, although Maria was advised of her fiduciary responsibilities, she did not follow that advice. In fact, the written advice from WRMK Lawyers on her fiduciary duties to the beneficiaries was contradicted by the options offered to Maria to gain control of Kaahu and self-benefit. In gaining control of the trust by the KTL

³⁷ High Court judgment, above n 1 (footnote omitted).

³⁸ At [51]–[52] and [59].

³⁹ *Wong v Burt*, above n 24, at [41]–[42] and [55]–[58].

appointment, Maria has derived *all* the benefit of the trust herself. There are no other beneficiaries.

[66] Third, while it is correct that the former trustee Mr Tyler did not want to remain as the BOI independent trustee, it did not justify Maria's decision to fail to appoint an independent trustee. As the 7 November 2019 letter demonstrates, the reason for her not doing so was Maria's decision to gain exclusive control of Kaahu. That is the improper purpose which motivated Maria to appoint KTL. Whether Maria became a sole trustee "through circumstance, not exploit" is irrelevant.⁴⁰

[67] I am therefore unable to agree with the majority that the submission that Maria appointed KTL to prefer her interests fails on the facts. The deliberate decision made by Maria to take the advice of new solicitors in early November 2019, contrary to the advice and concerns of both the solicitor who drafted the Trust Deed and the trustees' solicitor, evinces her intention to gain exclusive control of Kaahu to the detriment of the other beneficiaries, contrary to Kaahu's purpose.

[68] I consider it is no answer that KTL's appointment as a corporate trustee separates its actions from those of Maria. KTL cannot act in a vacuum even though it is a corporate body and separate legal entity. Its decisions and actions are those of the sole director, who is the ultimate sole beneficiary. Maria cannot be seen as separate from KTL, particularly as she and her solicitor's trustee company are the only shareholders of KTL and she is the sole director. In short, actions cannot be taken by KTL without Maria's decision and approval.⁴¹

[69] This case is distinguishable from *Montevento Holdings Pty Ltd v Scaffidi*,⁴² where the High Court of Australia upheld the construction of a clause of a trust deed which prevented any individual appointor who was a beneficiary from being appointed

⁴⁰ High Court judgment, above n 1, at [49].

⁴¹ Compare *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517 (CA) at 524. See s 8 of the Trusts Act 2019 for the High Court's supervisory function over trusts for the welfare of beneficiaries and *Clarke v Karaitiana* [2011] NZCA 154 at [38]. See for example *Jacomb v Jacomb* [2020] NZHC 1764, where the existing two trustees/beneficiaries became the directors and sole shareholders of the third, corporate, trustee. This state of affairs was held not to be compliant with the independence restrictions in the trust deed because the corporate trustee was incapable of providing a third voice and was indistinguishable from Mr and Mrs Jacomb during the period in which they were the directors and sole shareholders of the company.

⁴² *Montevento Holdings Pty Ltd v Scaffidi*, above n 22.

as trustee, and affirmed that a company whose sole director and shareholder was a beneficiary and the appointor of the trust could be appointed as trustee. The Court held that the appointment of a corporate trustee conformed with the requirement in the trust deed that prohibited an individual (a natural person) from being a trustee.⁴³ As here, the deed drew a distinction between individual and corporate trustees. The Supreme Court of Western Australia, whose conclusion as to the construction of the clause was upheld by the High Court, also observed that the corporate trustee had advanced the welfare of the trust and the interests of the beneficiaries by making efforts to identify, collect and preserve the assets of the trust.⁴⁴

[70] Putting aside the difference in the construction of the respective trust deed provisions, the corporate trustee's actions in *Montevento* contrast markedly with those of Maria. Unlike *Montevento*, even if Maria were legitimately appointed as the sole trustee in control, she was clearly not acting in the interests of the beneficiaries other than herself. Maria accepted that the object of Kaahu was to leave the trust fund to the discretionary beneficiaries, but she took deliberate steps not to do so. Maria has not acted in the interests of the other beneficiaries or preserved the assets of the trust.

[71] I consider therefore that Maria was motivated by an improper purpose in the exercise of her appointment power from the outset. The appointment of KTL gave her sole control of Kaahu and, as envisaged at the time, enabled her to choose the option of removing the beneficiaries and benefitting herself.

The March decisions

[72] The third issue is whether the decisions made by Maria in March 2020 are relevant to the exercise of the appointment power in November 2021. I consider the exercise of the appointment power is inextricably linked to the options Maria chose and implemented in March 2020. I therefore depart from the majority view, that the removal of the other beneficiaries should not be taken into account in the

⁴³ At [22] and [25].

⁴⁴ *Montevento Holdings Pty Ltd v Scaffidi Holdings Pty Ltd (No 2)*, above n 17, at [41]. See *Montevento Holdings Pty Ltd v Scaffidi*, above n 22, at [21], where the High Court of Australia made note of those observations.

determination of Maria's subjective motivation at the point of exercise of the power of appointment.⁴⁵

[73] It is significant, in my view, that it was WRMK Lawyers who wrote to Maria on 28 February 2020, asking her for a decision on what to do with the assets of Kaahu. This request for instructions reinforces that the purpose of the appointment of KTL as sole trustee, with Maria as sole director, was specially designed to enable Maria to exercise the options proffered by her solicitors. The request also followed receipt the day before of a letter from the appellants' solicitors raising concerns about Maria's sole directorship of the sole trustee. There was no other reason for Maria to decide what to do with the assets of KTL, other than completing the choice of WRMK Lawyers' options set out in their letter of 7 November 2019, all of which enabled her to self-benefit from the trust. This was an integral part of the structuring of KTL and the plan formed for Maria's exercise of the power of appointment.

[74] I do not accept therefore that Maria's exercise of the appointment power is separate from her March decisions. Her use of the appointment power was the means of achieving her purpose to gain sole control of the trust and make decisions, as her solicitor advised, to "give" herself "all of the assets of the Trust".⁴⁶ This purpose was not in the best interests of the beneficiaries, except her, and was improper.

[75] This Court in *New Zealand Māori Council v Foulkes* observed:⁴⁷

... the power to appoint new trustees is of a fiduciary nature because the subject matter of the power is the office of the trustee. That office lies at the core of the trust and carries fundamental and onerous obligations to act in the best interests of the beneficiaries as a whole to the exclusion of the trustee's own interest.

[76] As noted, Maria exercised the appointment power after she had received advice from WRMK Lawyers that appointing KTL as sole corporate trustee and herself as its director gave her the exclusive decision-making power over Kaahu. That advice and her acceptance of it was proximate in time both to the appointment of KTL on 27 November 2019 and her decisions taken in March 2020, which completed the plan

⁴⁵ At [39] above.

⁴⁶ See [60] above.

⁴⁷ *New Zealand Māori Council v Foulkes* [2015] NZCA 552, [2016] 2 NZLR 337 at [22].

for the exercise of the appointment power. I consider Maria had an improper purpose when exercising that power of appointment and the consequential removal of the beneficiaries is evidence of that.

Conclusion

[77] For the reasons above, I would uphold the appeal and find that Maria was actuated by an improper purpose in the exercise of her power of appointment and has committed a fraud on the power of appointment.

Observation

[78] Although it was not pleaded or submitted before us, there is a further potential consequence of the March decisions and that is whether Kaahu still exists. No trust can exist where the legal and equitable property of the trust is vested in one person, who is a trustee and a beneficiary. “A cannot be trustee for A”.⁴⁸ The authors of *Underhill and Hayton: Law of Trusts and Trustees* describe that where one person becomes the absolute beneficial owner of a trust, the trust no longer exists.⁴⁹

A settlor may be the beneficiary or one of the beneficiaries under the trust he creates. A trustee may also be a beneficiary, but a sole trustee cannot hold on trust for himself as sole beneficiary since it is impossible to have rights and duties at home in one person. No trust can exist where the entire property, legal and equitable, is vested in one person. Indeed, no separate equitable interest exists where O is absolute legal beneficial owner ...

[79] Maria is a controlling sole trustee, being the sole director of KTL, and her solicitor’s trustee company and herself are shareholders. Her solicitors must follow Maria’s instructions. Kaahu’s fund has been distributed to Maria, the other beneficiaries have been removed, and all that is left is the corporate trustee, which is governed by Maria only. Maria is the owner of the trust funds and property on vesting day with all other beneficiaries being removed. She is therefore the absolute legal beneficial owner of Kaahu’s assets. KTL has no fiduciary duties owed to anyone other

⁴⁸ *Re Cook, Beck v Grant* [1948] Ch 212 at 215.

⁴⁹ Paul Matthews and others *Underhill and Hayton: Law of Trusts and Trustees* (20th ed, LexisNexis, London, 2022) at [16.4] (footnotes omitted).

than Maria, who makes the decisions for KTL exclusively. No separate equitable interests exist any longer. I question whether her actions have vitiated Kaahu.

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