IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA154/2021
[2023] NZCA 62

BETWEEN	RAEWYN PHYLLIS COOPER Appellant
AND	MARCUS ROBERT WILLIAM PINNEY Respondent

Hearing: 30 August 2022

Court: Cooper P, Miller and Gilbert JJ

Counsel: S J Zindel and RMB Brooke for Appellant
S N van Bohemen and R L Powell for Respondent

Judgment: 13 March 2023 at 3.00 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The cross-appeal is dismissed.

C No order as to costs.

REASONS

MILLER J

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Introduction

[1] This is a second appeal and cross-appeal, by leave, from a decision of the Family Court which ascertained relationship and separate property of the parties' relationship.

[2] Before Judge Grace the appellant, Raewyn Cooper, succeeded in establishing that powers held by the respondent, Marcus Pinney, in connection with the MRW Pinney Trust (the MRWT) were relationship property.[1] The Trust had been established during the relationship to hold assets distributed to Marcus by the trustees of his parents' trust. The Judge's decision to classify Marcus's powers as relationship property brought into account the farm on which the parties lived and worked throughout their relationship.

[3] In the High Court Clark J allowed Marcus's appeal, reasoning that all the powers conferred on him under the trust deed were subject to fiduciary obligations and

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1 *Cooper v Pinney* [2018] NZFC 9120 [Family Court judgment].

accordingly were not "property" for purposes of the Property (Relationships) Act 1976.[2]

[4] At separation Marcus had a credit balance in his current account with the MRWT. Both Courts below found this to be relationship property. He cross-appeals, saying that it was property he acquired as a beneficiary under a trust established by a third person and hence his separate property for purposes of s 10 of the Act.

Narrative

[5] Marcus's father, Bernard Pinney, established the Pinney Trust in 1977. The trust deed is not in evidence but we were given to understand that the beneficiaries were his children and remoter issue. Marcus was an infant at the time. By April 2004 the trustees were Jennifer Pinney (his mother), Lindsay McIntyre and John Acland. Mr McIntyre was an accountant and trusted advisor and Mr Acland appears to have been a farm advisor.

[6] In 2000 Marcus and his then partner, Mia Stafford-Bush, agreed to buy a deer farm of 130 ha at Te Taho, Whataroa, Westland. They intended to farm the property in partnership. An arrangement was reached under which the Pinney Trust acquired the farm, then valued at $495,000 inclusive of improvements. The Trust leased the property to the partnership. The Trust also acquired the stock and plant, on-selling it to the partnership and advancing the purchase price of $107,500. The purchase was settled in April 2001.

[7] Mr McIntyre explained in an affidavit sworn in this proceeding that from the outset the trustees had reservations about the farm's viability and Marcus's capacity to make a success of it. This Mr McIntyre attributed to Marcus's inability to control his expenditure, which appears consistently to have exceeded the modest income from his business ventures. Contemporaneous correspondence indicates that the trustees monitored the business quite closely, concerned about the partnership's ability to pay the rent and recoverability of advances made by the Trust.

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2 *Pinney v Cooper* [2020] NZHC 1178, [2020] NZFLR 150 [High Court judgment].

[8] In January 2003 Mia advised the trustees that the partnership would be wound up and Marcus would take over management of the farm. This led the trustees to advance further funds to clear his overdraft and other liabilities, including a payout to Mia, who had been supporting the business with off-farm income. Mr McIntyre warned that Marcus should not expect further financial support. By 2004 the Trust's advances to Marcus totalled $673,000. In that year Marcus proposed to lease out some of the land and establish a bed and breakfast operation, supported by income from his work as a hunting guide. The trustees declined to support this initiative in the absence of evidence of its viability.

[9] The de facto relationship between Marcus and Raewyn began in 2004. The parties agree that they were living together by September 2004. They separated in April 2014. There are two children of the relationship, born in 2007 and 2009.

[10] A decision was made on 2 June 2005 to distribute the Pinney Trust's assets to separate trusts for Marcus and his brother. Mr McIntyre deposed that at this meeting:

> It was agreed in principle that the time was appropriate to transfer assets into individual trusts for these beneficiaries.

[11] On 10 June 2005 Mr McIntyre wrote to Marcus offering advice that he should adopt an ownership structure that ensured any assets transferred from the Pinney Trust would be regarded as his separate property for relationship property purposes. Mr McIntyre wrote that:

> The principal issue in terms of structure is to maintain the assets transferred from the Pinney Trust, and any other future inheritance from your mother and father's estate as separate property under the Property Relationships Act 1976.

It was proposed that this would be done by way of a court-approved resettlement of assets from the Pinney Trust.

[12] Mr McIntyre claimed in his affidavit that this was intended not to defeat the interests of a partner but to give effect to the wishes of Bernard and Jennifer Pinney. I do not accept that any meaningful distinction can be drawn between these objectives. The primary purpose of the arrangement was to secure dynastic control of family resources by ensuring a partner would have no claim to assets which would otherwise

be "property", whether of the relationship or of Marcus, for purposes of the Act. That is not in itself impermissible, as explained below. There may also have been a desire to guide Marcus, for a time, in his management of his inheritance.

[13] Marcus followed Mr McIntyre's advice, establishing both the MRWT and a company, Te Taho Deer Park Ltd, to operate the business. The MRWT Trust Deed was executed on 27 January 2006. I examine its provisions below. Three features of the MRWT should be noted here:

(a) The settlors were the trustees of the Pinney Trust and Marcus. He has never been a trustee of that Trust,

(b) The trustees of the MRWT were Marcus, Mr McIntyre and Marcus's sister, Jennifer (Jane) Pinney,

(c) The beneficiaries were Marcus and his children and grandchildren.

[14] On 16 December 2005 the trustees of the Pinney Trust had executed a deed of partial distribution and appointment of capital in favour of the MRWT, to take effect on the date the latter was established. Court approval of what Mr McIntyre characterised as a resettlement was not sought. An agreement for sale and purchase of the farm was executed. Title was taken by Marcus, Mr McIntyre and Jane.

[15] The assets distributed to the MRWT were:

(a) the land and buildings at Te Taho. There was a current market valuation of $1,100,000 but the property was transferred at its book value of $469,669.

(b) advances to Marcus of $311,120 (representing among other things livestock and plant, a bank overdraft and Marcus's overdrawn current account). Marcus then owed the MRWT the amounts previously advanced to him by the Pinney Trust.

(c) an investment asset of $2016 and cash of $216,472.[3]

Clark J found that the total amount resettled on the MRWT was $1,652,992, taking the land at market valuation.[4]

[16] The livestock and plant were taken over by the company, the shareholders of which were the trustees of the MRWT (98 shares) and Marcus and Raewyn (1 share each). The company assumed a liability to Marcus, reflected in his current account.

[17] In the High Court Clark J found that the debts owed by Marcus to the MRWT and the company were subsequently forgiven, though these transactions were not documented.[5]

[18] Raewyn admits that she signed paperwork establishing the company but maintains that she took no legal advice and was not told that she had only a 1 per cent interest in it. She believed until 2011 that she had a half share of the business, including everything purchased through their farm account. She says in addition to raising children she worked on the farm and in the guiding/farmstay business, never receiving a salary. She points out that on separation Marcus resisted disclosure of accounts and other information about the company. Marcus denies these allegations and says that Raewyn always knew both that she had no interest in the land and that the MRWT owned 98 per cent of the company.

[19] Judge Grace resolved this conflict in favour of Raewyn. He found that it seemed she was not aware of "the true nature of the transactions in setting up the company",[6] observing that her signature appeared on no documents and there was no evidence that anyone told her the company was assuming debt at the outset.[7] Marcus was the sole director and his was the only name to appear in the accounts.[8] She had

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3 It does not appear that the credit balance of $32,000 in Marcus's current account at separation is a residue of these sums. The balance was $8,000 at 2006. The Family Court Judge appears to have attributed the subsequent increase to rent payments from the company to the MRWT.
4 High Court judgment, above n 2, at [111].
5 At [112].
6 Family Court judgment, above n 1, at [91].
7 At [91]–[92].
8 At [93].

"no say" in how the company was operated.[9] The Judge also found that "somewhere along the way" all chattels and any equipment not owned by the company had been transferred to the MRWT though there were no documents to evidence this.[10]

[20] Mr McIntyre's affidavit was sworn on 10 November 2015. He remained a trustee until his death in 2016. Judge Grace found that while he remained a trustee at the date of separation he had "stepped back", leaving the MRWT's administration in the hands of local advisors:[11]

> Mr McIntyre, although remaining as a trustee of the MRWT, stepped back and the administration of the MRWT and the administrative matters were taken over by other accountants and lawyers, closer to where the respondent lived so he could use local advisors when required. Mr McIntyre received copies of annual accounts, but his evidence suggests he was only maintaining a watching role as there is nothing to suggest he was involved to the extent that he had been with the Pinney Trust.

After Mr McIntyre died Marcus and Jane became the only trustees.

[21] Following establishment of the MRWT the Trust made the investments necessary to establish the bed and breakfast operation which the Trustees of the Pinney Trust had previously refused to support. This involved renovations to the farm property. The business was not a success; the company traded at increasing annual losses and mortgage indebtedness to the bank grew. Clark J recorded that sometime in 2011 Raewyn learned that she had only a one per cent interest in the company and asked Marcus to "fair it up".[12] His refusal to accede to this request seems to have contributed to the separation.

[22] The value of the farm at separation date was $1,860,000. At the date of hearing in the Family Court, 20 November 2018, it had fallen to $1,545,000.[13]

[23] As at June 2014 Marcus had a current account balance of $32,390 with the MRWT. This has been treated as the separation date balance.

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9 At [105].
10 At [40].
11 At [69(d)].
12 High Court judgment, above n 2, at [16].
13 Family Court judgment, above n 1, at [78].

[24] We were provided on appeal with a copy of the titles (there are two) to the farm as at 2021. It appears that the registered proprietors are now Jane and Philip Smith. On the record before us, however, Marcus is still a trustee of the MRWT. Nothing in the record explains who Mr Smith is or what office he holds.

The MRWT

[25] As noted, the settlors were Marcus and the trustees of the Pinney Trust. The Deed recited that they had caused $20 to be paid into the joint names of the MRWT trustees to be held on trust with further money, investments and property which might from time to time be transferred into their joint names.

[26] The discretionary beneficiaries of the trust were Marcus and the final beneficiaries, who were Marcus's children and grandchildren.

[27] The vesting day was 80 years from execution of the Trust Deed or such earlier date as the trustees might in their discretion appoint in respect of all or part of the trust fund. On vesting, the trustees would hold the trust fund for the discretionary beneficiaries or for any of them to the exclusion of others:

> 11. TRUSTS ON VESTING DAY
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> On the Vesting Day the trustees shall stand possessed of such of the capital and income of the Trust Fund as may then remain upon trust for the Discretionary Beneficiaries whether for all of them or one or more of them to the exclusion of another or others, or are living on the Vesting Day and if more than one in such shares and proportions as the trustees may in writing (revocable or irrevocable) at any time on or before the Vesting Day appoint and in default of for such of the children of the said **MARCUS ROBERT WILLIAM PINNEY** who survive him and who reach the age of twenty five (25) and if more than one then equally as tenants in common. However if any of the aforementioned children is already dead or dies before **MARCUS ROBERT WILLIAM PINNEY** leaving children then those children shall on reaching twenty five (25) take equally as tenants in common the share which their parent would otherwise have taken.

[28] The exercise of any power, authority or discretion vested in the trustees must be unanimous:

> 14. WHERE THIS DEED gives a power, authority or discretion to the Trustees, that power, authority or discretion must be exercised

> unanimously by a resolution in writing signed by all of the Trustees and recorded in the Trustees Minute, The Trustees Minutes are evidence of the nature and content of all such resolutions.

[29] The power of appointment of new trustees was vested in Marcus during his lifetime. The number of trustees could not be fewer than two. However, he might remove any trustee without giving reasons. Further, nothing precluded him from appointing a corporate trustee which he controlled. Cl 15 provided:

> 15. THE statutory power of appointment of new Trustees hereof shall vest in MARCUS ROBERT WILLIAM PINNEY during his lifetime. Upon the death MARCUS ROBERT WILLIAM PINNEY the statutory power of appointment of new trustees shall vest in the executors or trustees for the time being of his will and if at any time after his death and after the winding up of his estate there shall be no such administrator, executor or trustee willing to act then in the person or persons in whom the said statutory power is vested by the Trustee Act 1956 or any statutory modification thereof for the time being in force.
>
> The person or persons in whom the said statutory power is vested shall have power:
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> a) To appoint at any time or times additional Trustee or Trustees of all or any of the trusts whether or not occasion shall have arisen for appointment of a new Trustee or Trustees.
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> b) To appoint any person or persons at any time as Advisory Trustee or Trustees of the trusts hereof.
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> c) To appoint himself or herself or themselves or any of themselves to be a Trustee of all or any of the trusts hereof.
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> d) Without being obliged to give any reason to remove any trustee provided that if such removal will result in the number of continuing Trustees being reduced below two this power of removal shall be exercisable only in conjunction with the appointment of a new Trustee or Trustees so that there shall at all times be at least two Trustees

It is common ground that the adjective "statutory" is surplusage. The Deed contains no provision dealing with the role of an advisory trustee.

[30] The trustees were under no obligation to exercise their powers, and the exercise of every discretion or power vested in them was to be absolute and uncontrolled:

> 13. SUBJECT ALWAYS to any express provision to the contrary contained herein every discretion vested in the Trustees shall be

absolute and uncontrolled and every power vested in them shall be exercisable at their absolute and uncontrolled discretion.

[31] The trustees might advance capital and income to any discretionary beneficiary to the exclusion of the others. It suffices to quote cl 6, which dealt with capital:

> 6. DURING the Trust Period the Trustees may at any time or times and from time to time pay apply or transfer the whole or any part of the capital of the Trust Fund to or for the benefit of such of the Discretionary Beneficiaries as may then be living or such one or more of them to the exclusion of the others or other of them at such times and if more than one in such proportions and in such manner and subject to such terms and conditions as the Trustees shall think fit and without limiting the generality of the foregoing for the maintenance education advancement or benefit of such beneficiary or beneficiaries.

[32] They might also in their discretion resettle any part of the trust fund for the benefit of any discretionary beneficiary to the exclusion of the others:

> 7. THE powers of the Trustees in relation to income and capital contained in Clauses 4 and 6 hereof shall without in any way limiting or restricting such powers include the power for the Trustees in their absolute and uncontrolled discretion at any time or times during the Trust Period by deed to resettle UPON TRUST in any manner which in the opinion of the Trustees is for the benefit of any person object or purpose who shall for the time being be a Discretionary Beneficiary under the trust hereof the whole or any portion or portions of the capital or income of the Trust Fund PROVIDED HOWEVER that such resettlement shall not transgress the rule against perpetuities.

[33] Any trustee might exercise their powers to acquire trust property in a private capacity notwithstanding that the interests of the trustee in such matter might conflict with their duty to the trust fund or the beneficiaries:

> 17. ANY Trustee shall be entitled to act hereunder and to exercise all of the powers hereby conferred upon him or her or it notwithstanding that such Trustee is or may be or becomes associated as director or otherwise in a private capacity or as trustee of any other trust with any company to which the Trustees sell or lease any property forming part of the Trust Fund or in which the Trustees hold or propose to acquire shares or other investments as part of the Trust Fund or with which the Trustees otherwise deal as Trustees of these presents and notwithstanding that any Trustee may be Trustee of any other trust to or from which the Trustees propose to sell or purchase shares or other property or with which the Trustees otherwise deal as Trustees of these of these presents and notwithstanding that the interests or duty of such Trustee in any particular matter or matters may conflict with his or her duty to the Trust Fund or the beneficiaries therein and notwithstanding that such Trustee is selling or leasing any real or personal property

> forming part of the Trust Fund to itself or to himself or herself or purchasing any such property to form part of the Trust Fund from itself or himself or herself or otherwise deals as Trustee of these presents with itself or with himself or herself in a personal capacity

[34] The trustees were authorised to amend the Trust Deed to enable it to be better administered for the benefit of the MRWT, provided they were reasonably satisfied that such amendment did not prejudice the general interests of the beneficiaries, and further provided that the power of amendment could not be used to add a spouse or partner to the class of beneficiaries; such an amendment was "expressly excluded".

The Family Court decision

[35] Judge Grace dealt with numerous issues. I confine the survey of his decision to those which remain live.

[36] The Judge accepted that the Pinney Trust was efficiently administered, by which he meant that the trustees attended to their duties and Marcus did not have "free control".[14] He also accepted that the resettlement was carried out in a "proper and legitimate fashion".[15] Had it not been done the Pinney Trust would remain owner of the farm and there could be no challenge to its legitimacy.[16] This was not a case in which a party already in a relationship was divesting himself of ownership to protect his assets from potential relationship property claims.[17] He also accepted that the appointment of Mr McIntyre as trustee of the MRWT indicated that Marcus was not trying to put himself into a position of sole control.[18] Further, the MRWT continued to be run appropriately until Mr McIntyre's death, although he had previously stepped back from administration.[19]

[37] The Judge held that he must decide whether Marcus exercised control of the MRWT as at the date of separation, rather than at its establishment.[20] He found that Marcus's powers and entitlements afforded him such a degree of control over the Trust

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14 Family Court judgment, above n 1, at [59].
15 At [60].
16 At [63].
17 At [62].
18 At [65].
19 At [65].
20 At [68].

that it was right to classify the assets as property. Marcus was able to deal with Trust property as though it were his own. He had complete freedom to advance all of the Trust's capital to himself, and to resettle it in favour of himself, excluding any other discretionary or indeed final beneficiaries.[21]

[38] The Judge rested these findings on analysis of the Trust Deed. He recognised that two trustees were required and the exercise of their powers must be unanimous, but he found that Marcus could appoint and remove trustees at will and might appoint a trustee company of which he was the sole director, which would afford him complete control.[22] (This conclusion was not disputed in the High Court or before us, and we proceed on the basis that it is correct.[23]) Consistent with these conclusions, the Judge took the value of Marcus's powers to be that of the Trust assets.[24]

[39] Judge Grace also found that relationship property had been applied to the Trust, in the form of the parties' income from their business. Income from hunting or guiding, bed and breakfast guests, or off-farm income, went to the overall sustenance of the farm. The income from the company was treated in the same manner; it was controlled by Marcus and taken as drawings by him.[25]

[40] It followed that the credit balance in Marcus's current account with the MRWT at separation was relationship property, the Judge reasoning that it was generated during the relationship.[26]

The High Court decision

[41] Clark J focused not on whether the existing trustees were "tame", meaning accustomed to act at Marcus's direction, but whether the MRWD Deed conferred powers sufficiently extensive to be deemed property for relationship property purposes. Although she did not find it necessary to deal with the question of fact, she stated that she saw no basis for drawing the inference that Jane (who did not give

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21 At [73].
22 At [72(a)–(b)].
23 We note *CDT 12 Ltd v Millar* [2019] NZHC 606, [2019] 2 NZLR 888, decided under the Trustee Act 1956, and s 96 of the Trusts Act 2019, under which a "person" may serve as a trustee.
24 Family Court judgment, above n 1, at [80].
25 At [77].
26 At [84].

evidence) was a tame trustee.[27] The evidence of Mr McIntyre was generally to the effect that the other trustees did not act at Marcus's direction. The Judge noted that this evidence was unchallenged. Mr McIntyre had died by the time of the hearing in the Family Court.[28]

[42] The Judge undertook a careful analysis of the Supreme Court decision in *Clayton v Clayton*, comparing the provisions of the trust deed in that case with those of the MRWT Deed. Mr Clayton's powers were more extensive than those of Marcus; he was the settlor and sole trustee, he might remove discretionary (but not final) beneficiaries, he might bring forward the vesting date and appoint the entire trust capital and income to himself as a discretionary beneficiary, and he might resettle the trust capital on himself.[29] He was not constrained by any fiduciary duty when exercising these powers, which were properly classified as rights.[30] She acknowledged that the Supreme Court left for another case the question whether less extensive powers might be deemed property for relationship property purposes.[31]

[43] Clark J stated that the question was whether it was possible for Marcus to exercise powers under the MRWT Deed to effectively bring the Trust to an end. That involved determining whether he was constrained by any fiduciary duty when exercising powers in his own favour to the detriment of final beneficiaries. If he might exercise the powers to appoint whole of the Trust property to himself, the next question would be whether those powers were sufficiently similar in effect to a general power of appointment that it was appropriate to treat them as property.[32]

[44] The Judge answered these questions in the negative. Her reasons ultimately rested on clause 15, which as noted vests in Marcus during his lifetime the power of appointment of new trustees. She considered *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev*, a judgment of the High Court of England and Wales which involved

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27 High Court judgment, above n 2, at [85]–[86].
28 At [84].
29 At [93]–[97], referring to *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 [*Clayton v Clayton*].
30 At [93(a)].
31 At [37], citing *Clayton v Clayton*, above n 29, at [80].
32 At [56], referring to *Clayton v Clayton.*

New Zealand trusts.[33] In that case Birss J held that the power of appointment of trustees was personal rather than fiduciary in nature.[34] However, Clark J held, following *New Zealand Maori Council v Foulkes*, *Carmine v Ritchie*, and *Harre v Clarke*, that the power to appoint trustees is itself a fiduciary power which must be exercised by reference to the objects and purposes of the trust.[35] She added that even if Marcus could freely appoint trustees without regard to the interests of the trust, the newly appointed trustees themselves would be obliged to act in the best interests of the beneficiaries as a whole.[36]

[45] The Judge briefly surveyed other provisions of the Trust Deed, finding that they did not give Marcus the breadth of powers that had been vested in Mr Clayton and led the Supreme Court to conclude that the combination of powers was properly classified as his property.[37] Marcus's powers to appoint capital or income, or to modify the provisions of the Deed, were all subject to fiduciary obligations; he must act in good faith, for a proper purpose, rationally and for good reason.[38] That was so notwithstanding that the exercise of trustees' powers was absolute and uncontrolled. Unlike Mr Clayton, he could not apply the entire Trust capital to himself, bring forward the vesting date to one of his choosing, and effectively exclude the final beneficiaries by bringing the Trust to an end.[39]

[46] The Judge rejected Marcus's claim that his credit balance of $32,390 with the MRWT was separate property, reasoning shortly that as he was a settlor of the MRWT he could not claim to have received the credit balance as a beneficiary under a trust created by a third person.[40]

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33 At [60]–[72], referring to *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch).

34 *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev*, above n 33, at [267].

35 At [73]–[81], referring to *Carmine v Ritchie* [2012] NZHC 1514; *Harre v Clarke* [2014] NZHC 2533; and *New Zealand Māori Council v Foulkes* [2015] NZCA 552, [2016] 2 NZLR 337.

36 At [82].

37 At [87]–[92] and [94].

38 At [89] and [97].

39 At [96].

40 At [102], citing Fisher on Matrimonial and Relationship Property (online ed, LexisNexis) at [4.47] and [104]–[105].

The legislation

[47] The Act is concerned mainly with division of the property of couples in qualifying relationships when their relationship ends.[41] Its object is that of recognising the equal contribution of both partners to a qualifying relationship and providing for a just division of their relationship property.[42]

[48] "Property" receives an extended definition:[43]

> property includes—
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> (a) real property:
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> (b) personal property:
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> (c) any estate or interest in any real property or personal property:
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> (d) any debt or any thing in action:
>
> (e) any other right or interest

[49] For the most part, this language defines property by type: real or personal property or any estate or interest in them, or a debt or chose in action. However, the last limb – any other right or interest – broadens traditional concepts and may capture rights and interests that elsewhere might not be thought of as property.[44] That is permissible because the legislation establishes a community property regime under which distribution is guided by principles of equality of people and of their contributions to their relationships.[45]

[50] "Owner" is also defined:[46]

> **owner** in respect of any property, means the person who, apart from this Act, is the beneficial owner of the property under any enactment or rule of common law or equity

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41 Property (Relationships) Act 1976, s 1C.
42 Section 1M.
43 Section 2 definition of "property".
44 *Clayton v Clayton*, above n 29, at [38].
45 This is what Woodhouse J meant when he described the Act in *Reid v Reid* [1979] 1 NZLR 573 (CA) as "social legislation": at 580. He held that although the Act operates on property it is not property law in any traditional sense.
46 Section 2 definition of "owner".

It will be seen that ownership means beneficial ownership under any enactment or rule of common law or equity.

[51] The division exercise begins by cataloguing the partners' property and classifying it as either relationship or separate property. Relationship property, broadly speaking, comprises the family home and chattels, property owned by both partners, and all property acquired by either of them during their qualifying relationship.[47] It is subject to a presumption of equal sharing.[48] It is available for division between the parties.

[52] Separate property is property of either partner that is not relationship property.[49] Separate property is not available for division. But where relationship property or the non-owning partner has contributed to it, separate property may be used as a direct source of compensation for the non-owning partner or to quantify compensation which the owning partner must pay them. Notably, partner A may be required to pay partner B a sum of money as compensation where the application of relationship property, or B's actions, have sustained A's separate property.[50]

[53] Property that is not beneficially owned by either or both of the partners is not caught by the Act's definitions and so is unavailable for division or compensation.

Beneficial "ownership" of "property" under the PRA

[54] At law to say that someone owns property is to recognise that they may exercise certain property rights over it. Those are the rights to consume or destroy, to use and enjoy (which includes receiving the fruits of the property), to exclude others, and to alienate. These are traditionally described collectively as a bundle of rights.[51] I make

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47 Section 8.
48 Section 11.
49 Section 9(1).
50 Section 17.
51 The phrase "bundle of rights" has sometimes been used in relationship property cases in a different sense, to describe a combination of powers or entitlements held by a trustee. The object is to establish whether the powers, etc. collectively amount to ownership of an underlying asset. This usage appears to have commenced with *Harrison v Harrison* [2009] NZCA 68, a leave judgment in which this court spoke of a "bundle of rights" associated with a couple's positions as discretionary beneficiaries: at [10]. Courts sometimes prefer to speak of a "package" of rights: *Walker v Walker* [2007] NZCA 30, [2007] NZFLR 772 at [49]. We do not use the phrase in that sense.

this point for two reasons. First, we are concerned here with a trust, in which incidents of ownership are distributed between trustee and beneficiary.[52] It is not necessary for relationship property purposes that the beneficiary be able immediately to exercise the entire bundle of rights over trust assets. The extent to which these must be secured to the beneficiary, perhaps through control of the trust, is a question of judgement. Second, the inquiry into beneficial ownership is not confined to the right to alienate trust assets; the rights to possess and enjoy them are also important.[53]

[55] The interaction between trusts and the Act is problematic for reasons embedded in the legislative history. Parliament chose in 2001 not to adopt a recommendation that compensation be payable from a trust to which relationship property had been transferred, instead adopting a Select Committee opinion that trusts are created for legitimate reasons which they ordinarily should be permitted to fulfil. That is so notwithstanding that trusts exist to alter consequences that would otherwise follow at law and may be said to subvert the social purpose of the Act.[54] Indeed, they may be designed, as the MRWT was, for that very purpose. They are not by that reason alone ineffective. Parliament chose rather to confer limited powers to set aside dispositions to trusts or award compensation where such dispositions defeat a partner's rights.[55] For these reasons it has been said that the legislature decided trusts ordinarily should prevail over relationship property rights.[56]

[56] When ascertaining beneficial ownership of trust property under the Act, recourse must be had "first and foremost" to the law of trusts.[57] However, the statutory purposes remain relevant when analysing a trust, for several reasons. First, beneficial ownership is not a term of art in law.[58] Its meaning may vary with the context and the purpose of legislation in which it appears.[59] Second, in *Clayton* the Supreme Court

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52 Peter Jaffey "Explaining the Trust" (2015) 131 LQR 377 at 387.

53 *Martin v Martin* [1988] 1 NZLR 722 (HC) at 731.

54 Mark Bennett and Adam Hofri-Winogradow "The Use of Trusts to Subvert the Law: An Analysis and Critique" (2021) 41(3) Oxf J Leg Stud 692; and Jessica Palmer and Nicola Peart "*Clayton v Clayton*: A Step Too Far?" (2015) 8 NZFLJ 114 at 118.

55 Nicola Peart "Equity in Family Law" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 1161 at 1177.

56 *Ward v Ward* [2009] NZSC 125, [2010] 2 NZLR 31 at [18].

57 Jessica Palmer and Nicola Peart "Trust Principles Overlooked" (2011) NZLJ 423 at 424.

58 *Martin v Martin*, above n 53, citing *R v Neat* 1899 69 LJQB 118 at 121.

59 *Martin v Martin*, above n 53, at 730–731, followed in *Commissioner of Taxation v Linter Textiles Australia Ltd (in liq)* [2005] HCA 20, (2005) 220 CLR 592 at [50]–[53] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ, [125] per McHugh J, and [220] per Kirby J.

approved of statements in *Kennon v Spry* that "property" must be interpreted widely and conformably with the objects of the legislation.[60]

[57] Third, trust law recognises that a trust may be a sham, meaning that the settlor did not intend to create a true trust,[61] or illusory, meaning that the settlor did act with trust intention but reserved powers so broad that they cannot be said to have disposed of trust property to another, or that the trust relationship lacks a fundamental attribute or core obligation.[62] I need not discuss sham trusts, because it is not suggested that the MRWT was a sham. There is some ambiguity regarding illusory trusts: the debate extends to what is the irreducible core of a trust, whether a formal or contextual approach should be taken to analysis of a trust relationship, and what are the permissible limits of settlor or trustee control.[63] Given ambiguity, recourse may be had to the statutory purposes when considering these issues in relationship property litigation. I observe that in 2001 Parliament also introduced sections 1M and 1N, which affirm that the Act pursues a just distribution that recognises the equalities of contributions and has regard to economic advantages or disadvantages arising from the relationship.

[58] Fourth, the Supreme Court accepted in *Clayton* that it is necessary to bring a "worldly realism" to the task of determining whether trust assets are the property of a partner, and to recognise that "strict concepts of property law may not be appropriate in a relationship property context".[64] So a court need not confine itself to formal analysis of a trust deed but may rely also on the substance of the arrangement and the conduct of those involved.

[59] That said, the Court did not take the purposive approach nearly so far as the High Court of Australia did when dealing with similarly expansive statutory

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60 *Clayton v Clayton*, above n 29, at [37], citing *Kennon v Spry* [2008] HCA 56, (2008) 238 CLR 366 at [64].

61 *Official Assignee v Wilson* [2007] NZCA 122, [2008] 3 NZLR 45 at [26]; and *Clayton v Clayton*, above n 29, at [113].

62 *Clayton v Clayton*, above n 29, at [124].

63 Mark Bennett "Competing Views on Illusory Trusts: The *Clayton v Clayton* Litigation in its Wider Context" (2017) 11 J Eq 48.

64 *Clayton v Clayton*, above n 29, at [79].

language.[65] A majority in the High Court were prepared to find that both trust assets and a trustee's powers in connection with a valid trust were property of parties to the marriage or either of them; that was so because the husband had the discretion to apply trust property to himself or the wife in their capacity as discretionary beneficiaries.[66] That approach to "property" supplies a direct route to recovery from assets of such a trust.

[60] *Clayton* was decided on a narrower basis. This Court established that a general power of appointment may be relationship or separate property.[67] The Supreme Court confined itself to the status of the trust and whether the settlor enjoyed a general power of appointment.[68]

[61] This Court did reason in passing that the result reached in *Kennon v Spry* was immaterial because the case was decided in the context of the Australian legislation.[69] That view can be traced to two propositions: the Australian legislation gave courts a discretion to take account of financial resources available to either party, and the definitions of 'property' and 'ownership' in the PRA left little room for an expansive interpretation.[70] As to the first of these rationales, I accept there is a distinction but the majority in *Kennon v Spry* based their reasoning firmly on the definition of

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65 Section 79 of the Family Law Act 1975 (Cth) provided that a court might make such order as it thought appropriate "in the case of proceedings with respect to the property of the parties to the marriage or either of them" to alter "the interests of the parties … in the property" and might order "a settlement of property in substitution for any interest in the property". "Property" was defined "in relation to the parties to a marriage or either of them" as "property to which [the parties to the marriage or either of them] are … or is … entitled, whether in possession or reversion". See the judgment of Gummow and Hayne JJ at [91], quoting *In the Marriage of Duff* (1977) 29 FLR 46 at 55–56 and the judgment of French CJ at [54]. The Court went further, the majority being prepared to find that the wife's entitlement to due administration of the trust and consideration when it came to distribution was itself property, though very difficult to value; see [75]–[77] and [81] per French CJ and [126] per Gummow and Hayne JJ. Compare Heydon J at [160].

66 At [58] per French CJ, [137] per Gummow and Hayne JJ. The latter judgment states that the "potential enjoyment" of the entire trust fund was "property" because the wife was a discretionary beneficiary and although she had no right to a distribution at any time the entire corpus *might* have been applied to her. The husband was in the same position.

67 *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293 [*Clayton v Clayton (CA)*] at [111] and [113].

68 *Clayton v Clayton*, above n 29 at [4].

69 *Clayton v Clayton (CA),* above n 67, at [107], fn 108.

70 Peart "Equity in Family Law", above n 55, at 1178.

"property".[71] The second rationale did not survive the Supreme Court decision in *Clayton*. The question whether the *Kennon v Spry* approach to "property" is available strictly remains open.

[62] However, this appeal may be decided on the same basis as *Clayton*; the question is whether the MRWT is illusory or Marcus's powers in connection with it amount to a general power of appointment.

Illusory trusts and general powers of appointment

[63] I next examine the concepts of illusory trusts and powers of appointment in a little more detail.

Illusory trusts

[64] In *Armitage v Nurse* Millett LJ held that:[72]

> …there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts … The duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts…."

[65] Millett LJ rejected a submission that the core obligations included the duties of skill and care, prudence and diligence, finding that the core obligations he had identified sufficient.[73] As Professor Palmer has put it, without these core obligations there is nothing for which the trustee must be accountable to the beneficiaries and therefore no trust relationship.[74] She suggested that while there is some debate as to the precise content of these obligations, the minimum is that the trustee must act honestly and in good faith for the benefit of the beneficiaries.[75]

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71 When deciding whether to alter property interests under s 79 of the 1975 Act, a Court may take into account, to the extent relevant, certain matters listed in s 75(2), which deals with orders to pay spousal maintenance; one of those matters is "the income, property and financial resources of each of the parties". Prima facie this provision does not appear to expand the pool of property of the parties; rather, it allows a court to adjust the distribution of that property by reference to financial resources which need not themselves qualify as property.

72 *Armitage v Nurse* [1998] Ch 241 (CA) at 253–254, followed in *Clayton v Clayton*, above n 29, at [124].

73 *Armitage v Nurse,* above n 72, at 253–254.

74 Jessica Palmer "Controlling the Trust" (2011) 12(3) Otago LR 473 at 478.

75 At 478.

[66] An illusory trust is not a trust at all, the settlor having failed in the attempt to create one. Assets settled on the 'trust' may be held on a resulting or a bare trust for the settlor.[76] I observe that the Supreme Court recognised the concept of illusory trusts in *Clayton* while deprecating the term "illusory trust".[77] The Court thought it sufficient to say that no valid trust exists. However, the term usefully distinguishes sham trusts, in which the trust deed disguises the settlor's true intentions,[78] from those in which the settlor meant to create a trust but failed for want of trust fundamentals. It appears to have found acceptance in the literature.[79] It is applicable where the settlor intended to separate legal and beneficial ownership but failed to do so or reserved powers so extensive as to admit no meaningful obligations to other beneficiaries.[80]

[67] There is some debate about the degree of accountability required to establish a valid trust.[81] A conservative approach finds it sufficient that trustee powers are formally fiduciary in nature; in principle, the beneficiary in such a case can invoke the duty to administer the trust honestly, considering the interests of the beneficiary.[82] A purposive approach holds that, having regard to the objects of the PRA, accountability must be meaningful or effective and a court may look beyond the form of the trust deed to the substance of the arrangement.[83]

[68] In *Clayton* the Supreme Court cautiously approved of the judgment of the Court of Appeal of England and Wales in *Charman v Charman*, in which a substance over form approach was taken, the Court inquiring whether the nominally independent trustee of a trust over which a husband exercised de facto control would be likely to

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76 Paul Matthews and others *Underhill and Hayton Law of Trusts and Trustees* (20th ed, LexisNexis, London, 2022) [Underhill and Hayton] at [8.3].

77 *Clayton v Clayton*, above n 29, at [123] and [129]: The concern is that the term might suggest a trust has come into existence. To similar effect see Underhill and Hayton, above n 76, at [8.3].

78 Underhill and Hayton, above n 76, at [8.8].

79 See for example Jessica Palmer "Equity and Trusts" (2019) 3 NZ L Rev 365; and Bennett, above n 63. See too Lucas Clover Alcolea "Nothing New Under the Sun: The Case of the Illusory Trust" (2022) 30 NZULR 225.

80 *Webb v Webb* [2020] UKPC 22, [2021] 2 NZLR 376 at [87] and [89].

81 See Bennett, above n 63.

82 See Geraint Thomas *Thomas on Powers* (2nd ed, Oxford University Press, Oxford, 2012) at [1.52]; and John McGee (ed) *Snell's Equity* (34th ed, Sweet & Maxwell, London, 2020) at [27-011].

83 *Clayton v Clayton*, above n 29, at [73] and [75]. See also Palmer "Equity and Trusts", above n 79, at 368.

advance the trust capital immediately or in the future to the estranged wife.[84] The Supreme Court did not go so far as to adopt that test, but it did agree that "a judicious mixture of worldly realism" and of respect for the legal affairs of trusts and legal duties of trustees is necessary.[85] It follows that a court must be prepared to take the purposive approach in PRA litigation. Because the court is inquiring into trust intention and trustee powers which have been reduced to writing and executed, it must pay close attention to the language of the trust deed. But having regard to the objects of the legislation, a realistic view may be taken of what the trust deed permits the settlor or trustee to do in the particular factual setting.[86]

[69] Clark J took the conservative approach, ultimately resting her decision on a finding that the power of appointment of trustees in the MRWT Deed is fiduciary in nature.[87] The majority take the same approach here. I agree that the authorities she cited, principally *Carmine* and *Harre*, establish that a power of removal and appointment of trustees is prima facie fiduciary; that is so because the subject matter of the power of appointment is the office of the trustee which lies at the core of the trust.[88] The leading New Zealand decision on this point is now *Brkic v White*.[89]

[70] I observe that while *Carmine* and *Harre* both concerned family trusts, neither case involved a relationship property dispute, both predated *Clayton*, and in both the beneficiaries sought vigorously to hold the principal family member or settlor to account for the exercise of the power of appointment. Nor does it appear from the reports that the deeds in *Carmine* and *Harre* contained a provision, as the MRWT Deed does, stating that the person exercising the power of appointment need not give any reasons for doing so. In *Brkic*, also not a relationship property case, the trust deed contained an express prohibition on self-dealing.

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84 At [75]–[76], referring to *Charman v Charman* [2005] EWCA Civ 1606, [2006] 1 WLR 1053 at [13] per Wilson LJ. Both spouses were beneficiaries under a widely discretionary offshore trust. The wife alleged that if requested the trustee would make the trust capital available to the husband. The issue was whether disclosure and evidence could be compelled to prove that claim.

85 At [77] and [79], referring to *Charman v Charman (No 4)* [2007] EWCA Civ 503, [2007] 1 FLR 1246 at [57].

86 As was done in *Clayton* at [92]–[93], when addressing the husband's argument that if his powers were treated as property the trustees might be obliged to take action adverse to the interest of the daughters of the relationship, who were also beneficiaries.

87 High Court judgment, above n 2, at [73] and [81].

88 *Carmine v Ritchie*, above n 35, at [66]; and *Harre v Clark*, above n 35, at [24]. In *New Zealand Māori Council v Foulkes,* above n 35, at [22] this Court followed *Carmine* and *Harre.*

89 *Brkic v White* [2021] NZCA 670, [2021] NZFLR 840.

[71] It is however implicit in this Court's decision in *Clayton* that a power of appointment of trustees is fiduciary in nature unless it is found to be personal, meaning that the power may be exercised exclusively by the donee in their own interests.[90] In such a case the inference may be drawn that the power was conferred so the donee might look after their own interests; and if so, it is not fiduciary.[91]

[72] The Supreme Court judgment in *Clayton* establishes that to classify a trustee's (or settlor's) power as fiduciary in nature is not to end a court's inquiry in litigation under the PRA.[92] A court must be prepared to look beyond form and take a realistic view of substance. It must follow that the trustee's powers, or trust assets, may be property for PRA purposes where the trustee's powers are so weakly fiduciary, or the other beneficiaries' rights so precarious, that there is no meaningful accountability. In that case it could be said that the trustee was not a fiduciary, obliged to hold property for the benefit of others.[93]

General powers of appointment

[73] Courts of equity have long permitted creditors indirect access to trust assets via the device of deeming powers over property held on trust by the debtor to be property of the debtor, where those powers collectively amount to a general power of appointment under which the debtor may deal with the trust property as if it were their own.[94] What appear to be the leading cases for our purposes deal with the historical practice of establishing trusts for married women to protect them from the legal disability they experienced during couverture.[95] Such trusts commonly conferred on the woman a general power of appointment over trust assets and income that was exercisable by deed during her life or by will. The usual remedy to enforce some personal obligation of hers lay "by decree to bind the trustees, as to personal estate in

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90 *Clayton v Clayton (CA)*, above n 67, at [104]–[108]. See also *Brkic v White*, above n 89, at [33]–[34], referring to Lynton Tucker, Nicholas Le Poidevin and James Brightwell *Lewin on Trusts* 20th ed, Sweet & Maxwell, London, 2020 at [15-047]–[15-049] and [15-051]–[15-052].

91 Underhill and Hayton, above n 76, at [75.7].

92 *Clayton v Clayton*, above n 29, at [64].

93 Bennett, above n 63, at 66.

94 See *Re Armstrong, ex parte Gilchrist* (1886) 17 QBD 167 at 168, 169, 173.

95 *Hulme v Tenant* (1778) 28 ER 958; *Heatley v Thomas* (1809) 33 ER 880; *Mayd v Field* (1876) 3 Ch D 587; *Allen v Papworth* (1731) 28 ER 465.

their hands or rents and profits, according to the exigency of justice, or of the engagement of the wife to be carried into execution".[96]

[74] In modern law, a trustee's or settlor's powers in connection with the trust may amount to a general power of appointment where, in combination, they are tantamount to ownership.[97] It is settled law under the PRA that where a settlor's or trustee's powers and entitlements do amount to a general power of appointment they may be "any other right or interest" and hence separate or relationship property.[98] *Clayton* was ultimately decided on that basis, the Supreme Court focusing on the power of the trustee to apply the property of the trust to himself without any effective restraint.[99]

[75] To find that the trustee's powers and entitlements amount to a general power of appointment is to accept that the trust relationship exists; that is to say, the settlor succeeded in creating a trust notwithstanding the absence of any fiduciary obligation of the trustee to the beneficiaries. As Professor Palmer has pointed out, a court might take the more direct approach of finding the trust illusory.[100] The point was recognised but not examined in *Clayton*. The Supreme Court explained that it had taken the approach of treating the trustee's powers as property because the illusory trust issue raised some complexities regarding which the Court was not of one mind.[101] I observe that one of those complexities may be that an illusory trust must be invalid for all purposes, not merely as between the parties to relationship property litigation. That need not be the case where trust powers (or assets) are classified as relationship or separate property for purposes of the PRA.

[76] Where a trustee's powers amount to a general power of appointment, the powers themselves are property the value of which reflects, to an extent appropriate

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96 *Hulme v Tenant*, above n 95 at 960 per Lord Thurlow LC. The judgment was controversial for reasons that do not concern us. Lord Eldon appears to have doubted it on the ground that a contract or promise (as opposed to an appointment by deed or will, as the trust deed required) was not an exercise of the power conferred on the woman. See *Sperling v Rochfort* (1803) 32 ER 316 at 320; *Nantes v Corrock* (1803) 32 ER 572 at 574; and *Jones v Harris* (1804) 32 ER 691.

97 *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd* [2011] UKPC 17, [2012] 1 WLR 1721 [*TMSF*] at [60]–[62] and [33].

98 *Clayton v Clayton*, above n 29, at [81], following *TMSF*, above n 97.

99 At [59]–[68]. Status as relationship property would depend on when the powers were acquired and whether they were excluded because they were acquired through succession or gift. In this case Marcus acquired his powers during the relationship.

100 Palmer "Equity and Trusts", above n 79, at 366–367.

101 *Clayton v Clayton*, above n 29, at [127].

on the facts, that of the trust assets. The remedy for the plaintiff is a direction that the trustee's powers be exercised to gain access to its assets. By way of example, in *TMSF* the defendant enjoyed a power of revocation of discretionary trusts and the Privy Council ordered that he delegate his powers to receivers so they could enforce a judgment against the assets.[102]

[77] In *Clayton* the parties had settled before judgment, so the Supreme Court was relieved of the need to examine the vital question of remedy. The Court confined itself to declaring that the trustee's powers were relationship property the value of which was equal to the value of the net assets of the trust and, but for the fact that the parties had settled, would have formally remitted the proceeding to the High Court to fix quantum and determine other outstanding issues.[103]

Extremely discretionary trusts and Parliamentary intention

[78] Family trusts are used extensively in New Zealand to adjust the rights and obligations that might otherwise attach to property.[104] I have explained that in 2001 the legislature chose not to prohibit trusts which have the purpose or effect of removing what would otherwise be relationship or separate property from the pool available for division or compensation under the PRA. People may organise their family affairs in the expectation that the law will remain generally settled over time and changes will be telegraphed. For these reasons, subsequent relationship property judgments in which courts have appeared to look through trusts without sufficient regard to form and obligation have met with criticism.[105]

[79] But the legislative history does not take us very far. In *Clayton* the Supreme Court rejected a submission that it would be contrary to the history and purpose of the PRA to classify trust powers as "property". The Court accepted that the Act does not confer what it described as a "trust-busting" power, but it did not think the legislative history informed the statutory definition.[106]

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102 *TMSF*, above n 97, at [59].
103 *Clayton v Clayton,* above n 29 at [131]–[134].
104 Law Commission *Review of the Property (Relationships) Act 1975* (R143, June 2019) at [11.1] and [11.39].
105 See for example Palmer and Peart "Trust Principles Overlooked" [2011] NZLJ 423.
106 *Clayton v Clayton*, above n 29, at [84].

[80] To that I add that we are concerned in this case, as in *Clayton*, not with discretionary trusts generally but with trusts which are said to be so flexible as to leave the settlor or trustee with near-complete control over trust assets and no meaningful obligation to other beneficiaries. Such extremely discretionary trusts are a relatively modern phenomenon.[107] In my view it cannot be said that the legislature sought to protect trusts of this kind.

[81] Further, a relationship property claim, brought by a former partner who may be (as in this case) strictly a stranger to the trust, supplies the jurisdiction to intervene in such a trust's affairs, but the rationale for intervention that was adopted in *Clayton* is found in the law of trusts, which the PRA incorporates via its definition of "owner". Equity explains why such a trust may be a sham or illusory,[108] or why the trustee's powers may be tantamount to ownership.[109] There is some indeterminacy about these concepts,[110] and courts may have been slow to confront the challenges posed by increasingly discretionary trusts. But there is nothing new in the ideas that trustee powers might amount to property or that an attempt to separate legal and beneficial ownership might fail for want of trust fundamentals.

Marcus's powers in connection with the MRWT

Is the MRWT illusory?

[82] I begin by inquiring whether Marcus's powers are fiduciary in nature. I focus on powers that might be deployed to benefit him to the exclusion of other beneficiaries, allowing him to treat trust property as his own. They are:

(a) The powers to apply, during the period of the MRWT, the whole of the Trust's income and capital to one beneficiary to the exclusion of the others (clauses 4 and 6);

(b) The power to resettle income and capital for the benefit of any discretionary beneficiary (clause 7);

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107 Lionel Smith "Mistaking the Trust" (2010) 40 HKLJ 787 at 790.
108 See *Clayton v Clayton*, above n 29, at [110]–[117].
109 See *Clayton v Clayton (CA)*, above n 67, at [86]–[114].
110 Bennett, above n 63, at 77.

(c) The powers to advance the vesting date and to hold capital and income on trust at that date for any discretionary beneficiary to the exclusion of others (clauses 11 and 1(c));

(d) The power to remove and appoint trustees, without giving reasons (clause 16). As noted earlier, there may not be fewer than two but it is common ground that Marcus could appoint a corporate trustee which he controlled.

[83] As noted earlier, the trustees may also alter the trusts created by the Deed where necessary to respond to any change in law or to allow more advantageous management, but this power may be exercised only if the trustees are satisfied any alteration does not prejudice the general interests of the beneficiaries (clause 12). This clause is not directed to the application of trust property to one beneficiary to the exclusion of others. It is intended to confer flexibility to respond to an evolving regulatory or commercial environment. I mention it because it is remarkable in this Deed for requiring that the trustees consider the interests of the beneficiaries as a class.

[84] Other clauses address the exercise of trustee powers:

(a) All powers and discretions are expressed to be absolute and uncontrolled, but they must be exercised unanimously by the trustees, and recorded in a written minute (clauses 13 and 14).

(b) The Deed contains no prohibition on self-dealing, and must be taken to permit it given that Marcus is both trustee and beneficiary. It expressly permits a trustee to acquire property from the Trust, or otherwise transact with it, in a personal capacity notwithstanding that the trustee's interests may conflict with their duty (clause 17).

[85] I describe these powers as weakly fiduciary. None of the beneficiaries has any right to beneficial enjoyment of trust property except upon a trustees' decision to apply such property to them. The trustees may apply all the capital and income of the Trust to Marcus, a settlor and trustee, at any time, to the exclusion of the other beneficiaries.

That course of action was plainly within the express contemplation of the settlors. The trustees may also resettle the trust assets on him.[111] The Deed declares that these powers are unconstrained. There is no prohibition on self-dealing.

[86] Marcus might also appoint a second trustee (including a corporate trustee he controlled) who would act at his direction if Jane was not willing to do so, and then exercise these powers in his own favour. He need give no reasons for making such appointment. I draw the inference that the power of appointment of trustees was conferred on Marcus, a beneficiary, to better secure his personal control of the MRWT.[112] I note that in *In the Marriage of Goodwin* a husband who had the power of appointment, but could not be a trustee, had appointed a corporate trustee with himself as one of the three directors. The others were professional advisers. The Full Family Court of Australia upheld a finding that the trust was under the husband's control because the other directors could be expected to follow his direction. Because he was also a beneficiary to whom all the trust property might be applied, that property was in reality property of his.[113] In *Kennon v Spry* French CJ cited *Goodwin* with approval for the proposition that characterisation of property "is a matter dependant upon the facts and circumstances of each particular case including the terms of the relevant trust deed".[114]

[87] However, Marcus's powers are held in the capacity of trustee, which distinguishes this case from those in which relevant powers were vested in the capacity of a protector or consultant or settlor.[115] It is settled law that a power the exercise of which the trust deed declares to be entirely discretionary does not for that reason alone lose its fiduciary character.[116] And the MRWT Deed does not expressly exclude obligations to Marcus's children and grandchildren, who are discretionary and final beneficiaries. As Mr van Bohemen pointed out, this distinguishes the MRWT Deed from the trust deed in *Clayton*. That deed expressly authorised Mr Clayton to exercise

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111 *Clayton v Clayton (CA)*, above n 67, at [104].
112 Underhill and Hayton, above n 76, at [75.7].
113 *Re the Marriage of Goodwin* (1990) 101 FLR 386 (FamCAFC).
114 *Kennon v Spry*, above n 60, at [57]. At [56] the Chief Justice also cited to similar effect *In the Marriage of Ashton* (1986) 11 Fam LR 457 (FamCAFC).
115 See for example *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev*, above n 33; *Webb v Webb*, above n 80 (where Mr Webb was a settlor, trustee and consultant); and *Kennon v Spry*, above n 60.
116 *Webb v Webb*, above n 80, at [84].

powers in his own favour without considering the interests of others and notwithstanding that the decision might be contrary to their interests. Yet, as counsel emphasised, the Supreme Court was not prepared to find the trust illusory.

[88] I am not persuaded that the MRWT is an illusory trust.

A general power of appointment?

[89] Marcus already enjoys possession of the property and its income. There is no evidence of a lease and no reason to think he could be removed without his agreement. He himself pays no rent to the Trust. In its annual accounts the Trust reports income of $24,250 from rent paid by Te Taho Deer Company,[117] which is 98 per cent owned by the Trustees. This appears to be the same amount that Marcus formerly paid annually to the Pinney Trust. Although the Trust still reports rental income it appears that no money changes hands, and as best I can see from the accounts, any notional surplus is returned to Marcus as a distribution. There have been no distributions to any other beneficiary. On the evidence, the Trust has been administered for his benefit. The position appears to be that he will remain in possession of the property and the income he generates until he agrees to apply assets or income to another beneficiary.

[90] Although the Deed allows the trustees to appoint all the Trust property to Marcus to the exclusion of his children and grandchildren, or to resettle trust assets on himself, other beneficiaries have rights to be considered and to due administration of the trust. To apply property to Marcus without considering their circumstances at all might be an act of disloyalty. Under the MRWT Deed trustee decisions must be minuted, though that does not appear to have been done consistently; notably, there is no record of the decision to forgive Marcus's debt to the Trust. There is also in New Zealand law an expectation that basic trust information will be disclosed to a close beneficiary who wants it.[118]

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[117] For example, the Trust recorded rental income of $24,250 for the year ended 30 June 2014. The net income of $18,917 after expenses and depreciation was distributed to Marcus. In previous years the income appears to have resulted in an adjustment to his current account.

[118] *Erceg v Erceg* [2017] NZSC 28, [2017] 1 NZLR 320.

[91] But accountability is a mixed question of law and fact, and I see no realistic prospect that other beneficiaries might successfully review a decision to appoint the entire corpus of the Trust to Marcus or resettle the assets on him alone.[119] The MRWT Deed expressly authorises those courses of action and must be taken to exclude the duty of impartiality now implied by default under s 35 of the Trusts Act 2019.[120] Contrary to the view taken by Clark J, I consider that the absolute and uncontrolled nature of the trustees' discretionary powers matters a great deal.[121] The settlors intended that the trustees' exercise of these powers should be conclusive, precluding any possibility of review on reasonableness grounds. It is very difficult to see how the trustees could find themselves in breach of trust for deciding in the exercise of discretion to do what the trust deed expressly envisages. I infer that the settlors' intention that trustee decisions should be unreviewable would not extend to circumstances where the trustees acted in bad faith or entirely contrary to the settlors' purposes.[122] But that could hardly be said of a decision to appoint trust assets to Marcus. The settlors saw the farm as his inheritance and framed the Deed accordingly.

[92] Both counsel focused on comparisons between the MRWT Deed and the deed in issue in *Clayton*. In my view the exercise is not very useful because the trust in that case was at the extreme end of the discretionary spectrum[123] and might very easily have been classified as illusory.[124] *Kennon v Spry* offers a more relevant comparison because the trust was valid. Until 1983 the husband had been settlor, sole trustee and (along with his wife, children and other family members) a discretionary beneficiary.[125] He could vary the trusts qua settlor, though not to further benefit

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119 A similar view of trustees' powers was taken in *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev*, above n 33, at [243].

120 Trusts Act 2019, s 28.

121 *Gisborne v Gisborne* (1877) 2 App Cas 300; *Burgess v Monk (No 2)* [2017] NZHC 2424. See also Peter Watts "Trustees with Absolute Discretion – A Case of Dr Jekyll and Mr Hyde in New Zealand Courts" (2022) 36(1) TLI 3. The author argues that New Zealand authorities permitting review of discretionary trustee powers on reasonableness or relevant/irrelevant considerations grounds rest on a misunderstanding of English authorities, notably *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108.

122 Watts "Trustees with Absolute Discretion – A Case of Dr Jekyll and Mr Huge in New Zealand Courts", above n 122, at 17.

123 At 7.

124 Palmer "Equity and Trusts", above n 79.

125 The Court held that it might proceed as if variations and resettlements subsequent to the parties' divorce had not occurred: *Kennon v Spry*, above n 60, at [72] and [129].

himself.[126] The decisive considerations, however, were that the trust deed conferred on him an absolute discretion to apply any or all of the assets and income of the trust to himself and until such a decision was made none of the discretionary beneficiaries had an equitable interest in the assets.[127] At the date of distribution the fund was to be divided as he directed, and in the absence of direction it was to be divided equally among male beneficiaries save for the settlor. French CJ accepted a submission that the interest of the residuary beneficiaries was no more than a contingent remainder.[128]

[93] I conclude that Marcus's powers under the MRWT deed amount in combination to a general power of appointment. They are a right or interest and hence "property" for purposes of the PRA. In substance they give him control of the trust and access to all its capital and income.

Remedy

[94] In accordance with the views of the majority, the appeal will be dismissed. I record for completeness the remedy I would have granted.

[95] Mr Zindel acknowledged at one point in his submissions that but for the MRWT Marcus would have received the farm as a gift, and that being so, it was separate property notwithstanding that it was acquired after the relationship began.[129] I think that is correct. For that reason Marcus's powers under the MRWT are appropriately classified as his separate property notwithstanding that they were acquired during the relationship.

[96] Any increase in value of separate property may be relationship property under s 9A, and where separate property is a farm the non-owning partner may be entitled to share equally in a sum of money equal to the equity in the homestead under s 12. Or the non-owning partner may be awarded compensation under s 17 to the extent that their contribution sustained separate property.[130]

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126 This was held not to be a fiduciary power, but the High Court's conclusion that the assets and powers were together "property" did not depend on that: *Kennon v Spry,* above n 60 at [46] and [71].

127 At [58], [62], [66], [70] and [137].

128 At [60] and [62].

129 Property (Relationships) Act, s 10(1)(a)(iii).

130 Section 17 overrides s 12. It is not necessary to explore the interaction of these provisions.

[97] But for the Trust it would be appropriate to make orders of these kinds. In my view the appropriate remedy, but for the Trust, would be an order under s 9A declaring that the increase in the farm's value between its acquisition in 2006 and the date of separation or hearing in the Family Court was relationship property and Raewyn would be entitled to a half share of that. She contributed directly and substantially to the improvements made and the business run on the property, in addition to her contributions to the care of young children and the management of the household. For purposes of s 9A the increase in value was in part attributable to her actions, and there is no reason to think her contribution was any less than his. Again but for the Trust I would further declare that under s 12 Raewyn is beneficially interested in the land on which the family home and appurtenant land and improvements are situated. The home is a homestead as defined.[131] It appears to be common ground that it was worth $330,000 at 12 November 2018, though the evidence does not record the equity in it or any movements in equity.

[98] However, I have found that the MRWT was not illusory and it is Marcus's powers in connection with the trust that are property for purposes of the PRA. The appropriate remedy would involve the exercise of trustee powers to pay Raewyn.

[99] There is no reason to value Marcus's powers at less than the value of the trust assets. The increase in value of the farm between December 2005 and 12 November 2018 was $445,000, and to that must be added family chattels worth $45,000, making a relationship property pool (putting aside assets which have already been dealt with below) of $490,000. I would quantify Raewyn's remaining entitlement to one-half of that sum; that is, $245,000. Interest would run on that sum under the Interest on Money Claims Act from 20 November 2018, the date of hearing in the Family Court.

[100] I envisage that the trustees would be directed to pay Raewyn from assets under their control. I agree with the majority that this is to treat Raewyn as a creditor of the Trust, but that is permissible for the reasons given at [76] and the remedy is confined to compensation for her contribution to its assets. I would remit the proceeding to the

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[131] "Homestead" is defined in s 2 to mean a family home (which includes appurtenant land and improvements) where the dwellinghouse is situated on an unsubdivided part of land that is not used wholly or principally for household purposes.

High Court for further proceedings. I would take that course for two reasons. First, Jane (and perhaps Mr Smith, depending on his status) should be heard as to the form and conditions of relief. They are not parties to this appeal. Second, the remedy might extend to exercise of the High Court's jurisdiction to appoint receivers to the MRWT or replace the trustees.[132]

[101] I note for completeness Mr van Bohemen's protest that the pleadings do not invoke the jurisdiction to grant relief by reference to ss 9A, 12 or 17. I do not agree. The notice of claim in the Family Court took the usual brief form, seeking orders determining relationship property, compensation for disparity in post-separation living standards, or such other relief as the Court thought just. Affidavits were filed.[133] It is clear that Raewyn challenged the MRWT, both at first instance and on appeal, contending that its capital and income were in substance Marcus's personal property. She sought to classify property either as relationship property or as separate property by reference to which she ought to be compensated. Mr van Bohemen did not suggest that other evidence might have been led had her pleadings been more explicit. Raewyn alleged in her notice of appeal in this Court that the farm was relationship property because, while it was received as a gift, it was intermingled with other relationship property so as to lose its separate character, and she expressly claimed that the family home and chattels were relationship property.

The cross-appeal

[102] Marcus contends that his credit balance with the MRWT was property which he received from a trust settled by another person. The difficulty with this submission is that he was a settlor of the MRWT, from which he admits to receiving the money qua beneficiary.

[103] I accept Ms Powell's submission that Marcus did not personally settle any property on the MRWT. The money came from the Pinney Trust. She argued that a trust is settled by a third person only when, and presumably to the extent, that person

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132 Trusts Act 2019, ss 114 and 138.

133 To some extent narrative affidavits and affidavits of assets and liabilities take the place of pleadings by "advising the Court and the parties of the issues raised and providing evidence on those issues": *M v B* [2006] 3 NZLR 660 (CA) at [50].

personally settles property on it. That I cannot accept. Section 10(1) poses the question whether the trust was settled by a third person, meaning that the partner/beneficiary was not a settlor. The Court is agreed that the cross-appeal must be dismissed.

Disposition

[104] The appeal and cross-appeal are dismissed.

[105] There was no application for costs. We were advised that both parties are now legally aided.

COOPER P AND GILBERT J
(Given by Gilbert J)

[106] Discretionary trusts have been in widespread use in New Zealand for decades.[134] Parliament considered, but largely rejected, the enactment of provisions to enable the Court to address potential inequities on the division of relationship property arising from the relatively common use of trusts to hold assets enjoyed by the parties during the relationship.[135] The Court has not been given the power to ignore or "look through" valid trust instruments in order to achieve what they may perceive is a just outcome in a given case involving the distribution of property. Parties are entitled to expect that they may arrange their affairs in accordance with reasonably settled principles of law and that these arrangements will be respected. Every day, legal advisers up and down the country are required to advise their clients on the implications of contracting-out agreements and proposed settlements of relationship property disputes in circumstances where trusts have been established. The approach that can be expected to be taken by the courts when assessing the implications of the use of trust structures needs to be accessible and clear. Ordinary trust principles should be applied in all courts when assessing the validity of trusts, including in the context of relationship property disputes.

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134 Law Commission *Review of Trust Law in New Zealand: Introductory Issues Paper* (NZLC IP19, 2010) at 6.

135 See [56] above; Working Group on Matrimonial Property and Family Protection *Report of the Working Group on Matrimonial Property and Family Protection* (Wellington, 1988) at 30; and Matrimonial Property Amendment Bill 1999 (109-2) (commentary) at xii.

[107] For the reasons set out below, we agree with Miller J that the MRWT is a valid trust; it is neither a sham, nor is it "illusory" as he defines that term.[136] We agree with his assessment that the settlors of the MRWT did not fail in their endeavour to settle assets on the trustees to administer in accordance with the terms of the trust for the benefit of the beneficiaries. There has been an alienation of the property from the settlors' own personal estate such that the legal and beneficial interests in the trust assets were split between the trustees and the beneficiaries. The ultimate dispositive power vested in the trustees who became accountable to the beneficiaries. In particular, the MRWT deed did not purport to, and did not, exclude the trustees' fiduciary obligations to the beneficiaries to act honestly and in good faith for their benefit. These core requirements for a valid trust were present. It follows that the assets of the trust are not Marcus' separate property, nor can any increase in value of those assets during the relationship be properly characterised as relationship property.

[108] Miller J nevertheless finds that Marcus' powers under the MRWT deed amount in combination to a general power of appointment. He considers these powers confer on Marcus control of the MRWT and all its capital and income without any effective accountability.[137] Such control constitutes a "right or interest" and therefore property for the purposes of the PRA having a value equal to the value of the trust's assets. We respectfully disagree. None of the dispositive powers conferred under the MRWT deed are held by Marcus alone, nor is this a prospect because of the requirement that there must be at least two trustees at all times who must act unanimously. Further, any exercise of the dispositive powers by the trustees is constrained by the fiduciary obligations they owe to the beneficiaries, a narrowly defined class. In our view, Miller J's finding that Marcus has a general power of appointment of income and capital under the MRWT deed is fundamentally inconsistent with his finding that a valid trust existed.

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136 Above at [57].
137 Above at [91].

A valid trust?

[109] The primary purpose of the MRWT was to ensure that the benefit of the farm would be preserved for Marcus and his children and grandchildren to the exclusion of any spouse or partner. A trust is a common and legitimate means of achieving this lawful objective. Unlike the position in *Clayton*, there can be no suggestion that the settlors, the trustees of the Pinney Trust and Marcus, did not effectively alienate the assets to the MRWT or seek to retain control of those assets. This is not a case of settlor control (excessive or otherwise) compromising the validity of the trust. The only question is whether Marcus was given excessive powers such that he could effectively deal with the assets as if they were his own.

[110] During the period of the MRWT, the trustees have wide dispositive powers to appoint income and capital of the trust for the benefit of such of the discretionary beneficiaries (Marcus, his children, and grandchildren) as they think proper in their absolute and uncontrolled discretion. These powers can be exercised in favour of any one or more discretionary beneficiaries to the exclusion of the others. The significance of the "absolute and uncontrolled" description of the trustees' discretion is questionable.[138] In any event, it does not excuse the trustees from making their decisions on a properly informed basis, acting honestly and in good faith, and after taking account of the interests of the beneficiaries individually and as a whole.[139] The powers must be exercised by the trustees for a proper purpose and in accordance with the fiduciary duties they owe to the beneficiaries. The fiduciary nature of the dispositive powers is not negated by the fact that, as is not uncommon, one of the trustees is both a donee of the power and an object of the power as a discretionary beneficiary.[140]

[111] Importantly, the MRWT deed specifies that all trustee decision making must be unanimous and there must always be at least two trustees. Each trustee has a duty to bring an independent mind to the exercise of discretion and they are prohibited from

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138 *Thomas on Powers*, above n 82, at 11.12.

139 *Re Hay's Settlement Trusts* [1982] 1 WLR 202 (Ch) at 209; and *McPhail v Doulton* [1971] AC 424 (HL) at 449 per Lord Wilberforce.

140 *Thomas on Powers*, above n 82, at 1.58; and *Lewin on Trusts*, above n 90, at 46-071 and 47-073 citing *Edge v Pensions Ombudsman* [2000] Ch 602 (CA) at 622.

acting under dictation or instruction.[141] Marcus is therefore not able to control trustee decision making. Even though he may benefit, he cannot unilaterally appoint income or property to himself. We would not describe the trustees' powers under the MRWT deed as "weakly fiduciary".[142] On a proper interpretation of the deed, the trustees can be held to account by the beneficiaries for the proper discharge of their obligations.

[112] We do not consider the reasonably standard provision in cl 17 set out at [33] above affects the analysis. This clause is not concerned with the dispositive powers but is directed to conflicts of interest arising out of dealings between the trust and other parties with whom one or more of the trustees may be associated.

[113] Unlike the position in *Clayton*, the MRWT deed confers no power on the trustees or anyone else (such as a principal family member or protector) to remove beneficiaries or appoint additional beneficiaries. The trustees may modify the deed but only if they are reasonably satisfied that this does not prejudice the general interests of the beneficiaries. Miller J suggests this clause is remarkable as one of the few clauses in the deed requiring the trustees to consider the interests of the beneficiaries as a class. However, we attach no significance to this. In our view, the core obligation on the trustees to consider the interests of the beneficiaries when exercising their powers is fundamental to the office of trustee and therefore implicit; it did not have to be spelt out.[143]

[114] The only power reserved solely to Marcus is the power to appoint new trustees and remove any trustee. However, as noted, there must be at least two trustees at all times. The removal power can only be exercised in conjunction with the appointment of a new trustee or trustees to ensure there are always at least two trustees. It is generally accepted that the power to appoint and remove trustees, whether vested in a trustee or not, is a fiduciary power and can only be exercised in good faith, for a

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141 *Thomas on Powers*, above n 82, at 10.54 and 10.57.

142 Above at [85].

143 I note that this core obligation is explicitly recognised elsewhere in the deed, for example cl 22(j) confers general powers on the trustees to "do all things as the Trustees think to be in the interest of the beneficiaries hereunder or any one or more of them (including by way of illustration and not of limitation) …". Clause 17, cited at [33], is another example.

proper purpose and for the benefit of the beneficiaries.[144] These obligations constrain Marcus from exercising this power to remove a trustee not prepared to act under his direction and replace them with another who will. The fiduciary nature of the power coupled with the base requirement under the deed for there to be at least two trustees who must act independently prevents Marcus from removing all trustees not willing to comply with his directions and appointing only a corporate trustee of which he was the sole shareholder and director in order to take sole control of trustee decision making.

[115] For these reasons, we agree with Miller J's conclusion that the MRWT is a valid trust.

A general power of appointment?

[116] A general power of appointment is usually taken to mean an absolute disposing power which the donee is free to exercise in favour of any person they please, including themselves, without any restriction or limitation.[145] Professor Palmer persuasively argues that such a power vesting in a trustee without any effective accountability to the beneficiaries is anathema to a trust.[146] In our view, if it could be said that Marcus holds a general power of appointment of the income and assets of the trust without such accountability, then it would necessarily follow that there is no valid trust. We have already concluded that this is not the case. As Miller J acknowledges, other beneficiaries have a right to be considered and to due administration of the trust. As he says, if the trustees were to appoint property or income to Marcus without due consideration of their circumstances, this would be a breach of fiduciary duty.[147]

[117] For the reasons discussed above regarding the validity of the trust, we do not accept that Marcus holds a general power of appointment constituting a "right or interest" and therefore property for the purposes of the PRA. We see this case as being clearly distinguishable from *Clayton*. Mr Clayton was the settlor, the sole trustee and the "Principal Family Member". He could appoint or remove any discretionary

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144 *Carmine v Ritchie*, above n 35, at [66]; *Harre v Clarke*, above n 35, at [24]–[25]; approved in *New Zealand Māori Council v Foulkes*, above n 35 at [22].

145 *Thomas on Powers*, above n 82, at 1.16; and *Lewin on Trusts*, above n 90, at 33-003.

146 Jessica Palmer "A Lament for Trust Principles in New Zealand" in Ying Khai Liew and Matthew Hardings (eds) *Asia-Pacific Trusts Law Volume 1: Theory and Practice in Context* (Hart Publishing, Oxford, 2021) 39 at 47.

147 Above at [90].

beneficiary at any time. He could appoint trust capital to himself to the exclusion of any other discretionary beneficiary and he could bring forward the vesting date to any date he wished. In exercising his powers as trustee, he was specifically authorised not to consider the interests of other beneficiaries and he was entitled to exercise his powers regardless of conflict of interest and irrespective of whether it would be contrary to the interests of other beneficiaries, including the final beneficiaries. In other words, Mr Clayton was expressly not constrained by any fiduciary duty when exercising his powers in his own favour to the detriment of other beneficiaries.[148] The combination of powers conferred on him under the trust deed enabled him to deal with the trust assets as if they were his own.

[118] As to any remedy, we are troubled by the suggestion that the Court would make an order requiring the trustees to exercise their powers to pay Raewyn, a non-object of the trust.[149] What is contemplated is that the Court would make an order against a non-party to the proceeding requiring her to exercise a trustee power in breach of trust. The need for such an order illustrates the fundamental difficulty that Marcus cannot act alone without regard for the interests of other beneficiaries in disposing of trust assets. His powers cannot be accessed by his creditors utilising the court's enforcement powers as if they were his property. This also distinguishes this case from *Clayton* and *TMSF*.[150]

[119] We would therefore dismiss the appeal.

[120] We agree with Miller J that the cross-appeal should be dismissed for the reasons he gives.

Solicitors:
Zindels, Nelson for Appellant
Connors Legal, Greymouth for Respondent

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148 *Clayton v Clayton*, above n 29, at [58].
149 Above at [98].
150 *TMSF*, above n 97.