

**IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
WHANGĀREI-TERENGA-PARĀOA ROHE**

**CIV-2020-488-000032
[2021] NZHC 1271**

IN THE MATTER of the Kaahu Trust

UNDER Part 18 of the High Court Rules 2016

BETWEEN LI KARI LEGLER, LAILA SUN LEGLER
 KLAUI and KEN LEGLER
 Plaintiffs

AND MARIA GUILLAUMINA CORNELIA
 JOHANNA FORMANNOIJ
 First Defendant

 KAAHU TRUSTEE LIMITED
 Second Defendant

Hearing: 17 - 20 May 2021

Counsel: DR Bigio QC and JWH Little for Plaintiffs
 JD McBride and R Woods for Defendants

Judgment: 2 June 2021

JUDGMENT OF DOWNS J

*This judgment was delivered by me on Wednesday, 2 June 2021 at 11 am
pursuant to r 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Solicitors/Counsel:
TGT Legal, Auckland.
Martelli McKegg, Auckland.
DR Bigio QC, Auckland.
JD McBride, Auckland.
JWH Little, Auckland.
R Woods, Auckland.

The case

[1] This case is about a challenge to the appointment of a single corporate trustee, on the basis it involved a fraud on a power, meaning, an improper purpose. It is also about two family trusts created little more than a year apart, and related acrimony in the wake of the patriarch's death.

Background

[2] Ricco Legler and Maria Formannoij met in the Caribbean in 1989.¹ They began a relationship that year. In 1991, the couple moved to New Zealand. They married 2009. Ricco died 2017. He and Maria were thus together 28 years.

[3] Ricco's children from his first marriage are Li, Ken and Laila Legler. All are now adults. Li also moved to New Zealand in 1991. Laila came approximately a year later. Ken lives in Perth.

[4] Ricco's father, Frederico or Fredy Legler, was a successful Italian businessman. Fredy died 2002, leaving Ricco a significant inheritance. This led to the creation of two family trusts: the Horowai Family Trust² and Kaahu Trust.³

[5] Horowai was established 2 March 2007. Its sole trustee remains Horowai Trustee Co Ltd.⁴ The directors of that company were Ricco and Li. They are now Li and Laila.

[6] Kaahu was established 9 June 2008. Its trustees were Ricco, Maria, and BOI Taxation Trustee Co No.2 Ltd.⁵ Philip Tyler, an accountant, was BOI's director. Mr Tyler was the accountant for both Horowai and Kaahu.

[7] Kaahu's sole trustee is now Kaahu Trustee Ltd.⁶ Its appointment is the heart of the case, about which more soon.

¹ For convenience, I use Christian names.

² Horowai.

³ Kaahu.

⁴ Horowai Trustee.

⁵ BOI.

⁶ Kaahu Trustee.

[8] The discretionary beneficiaries of each trust were the same: Ricco, Maria, Li, Ken, Laila, and any trust which included a beneficiary.⁷ Ricco and his children were the final beneficiaries of Horowai; Ricco and Maria only the final beneficiaries of Kaahu.

[9] A series of transactions ending 2016 endowed each trust with substantial assets. Horowai has a 214-hectare block of forested land at Purerua Road, Kerikeri. Li manages the forest. Horowai also has an adjacent 21-hectare block of farmland,⁸ and a fund of at least \$3 million. Kaahu has “Mokomoko”, a home in Russell built by Ricco and Maria, worth several million dollars. Kaahu also had a fund of approximately \$5 million.

[10] On 30 May 2014, Horowai’s trustee removed Ricco (and by proxy, Maria) as a final beneficiary. Ricco told Maria he wanted Kaahu to primarily benefit them, and Horowai to primarily benefit his children.

[11] On 16 November 2017, Ricco died in a gliding accident. Ricco left his shares in Horowai Trustee to Li, and the balance of his estate to Kaahu. This included “Jimmy”, a large catamaran built by Ricco for more than \$1 million.

[12] Ricco’s death left Maria and BOI as Kaahu’s trustees.

[13] In late 2019, Mr Tyler concluded BOI should resign as trustee. Laila had questioned Mr Tyler’s competence, Li was a friend, and Mr Tyler did not want to be involved in litigation between the children and Maria. Li, Ken and Laila had retained lawyers, and were actively seeking information about Ricco’s estate and Kaahu. There had also been disagreement about the treatment of a \$3 million payment from Kaahu to Horowai.

[14] This left Maria as sole trustee. Kaahu’s deed required her to appoint a new trustee. This introduces the important sequence.

⁷ Each trust uses somewhat different language, including the definition of “discretionary beneficiaries”.

⁸ There is a home on the property, which Horowai leases to a tenant.

[15] Maria approached Dennis McBrearty of Law North Ltd. Mr McBrearty was acting in respect of Ricco's estate, helped create both trusts, and had acted for Horowai Trustee. Mr McBrearty said he was unable to assume the role as his firm did not act as trustees. He commended Perpetual Guardian.

[16] Maria and Mr Tyler met a representative of Perpetual Guardian. Maria thought its fees excessive. She also had reservations about whether Perpetual Guardian would be "a good fit" for Kaahu.

[17] Maria told William Clarke of her concerns. Mr Clarke managed Kaahu's investment portfolio and was a trusted advisor. Mr Clarke commended WRMK Lawyers and, on 14 October 2019, approached them on Maria's behalf.

[18] On 21 October 2019, Maria met Neil McNab and Tania Beckham of WRMK. Mr Clarke was present. Maria said she was having difficulty finding a new independent trustee, and it was likely the children would litigate. Mr McNab and Ms Beckham told Maria the deed permitted her to appoint a corporate trustee, of which she could be a director, then herself resign as a trustee. The advice was attractive, for, Maria wanted to "simplify matters" in relation to Kaahu.

[19] On 31 October 2019, Maria told Mr McBrearty she was going to engage WRMK, and of her likely use of a corporate trustee.

[20] On 4 November 2019, Mr McBrearty responded. He said he had "some concerns" about a corporate trustee controlled by Maria, and such control should be independent.

[21] Maria forwarded Mr McBrearty's email to Ms Beckham the same day. Ms Beckham quickly replied. She told Maria the deed expressly excluded the requirement for an independent trustee *if* a corporate trustee were the sole trustee. Ms Beckham added WRMK's advice "stands".

[22] On 7 November 2019, Mr McBrearty wrote to Ms Beckham. He said while a corporate trustee was "technically" available, "the intent of the trust document is that

there will at all times be an independent trustee”. Ms Beckham wrote to Maria the same day. She assured Maria WRMK’s advice was correct.

[23] Maria followed this advice. On 27 November 2019, Kaahu Trustee became a trustee of Kaahu. Maria resigned as a trustee the same day. Maria is the director of Kaahu Trustee, and one of its shareholders. The other is WRMK Trustee (2019) Ltd.

[24] On 28 February 2020, Ms Beckham wrote to Maria, encouraging “a decision ... as to what to do with the assets of the Kaahu Trust”.

[25] In March 2020, Kaahu Trustee 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.⁹

[26] On 11 June 2020, Li, Ken and Laila filed this claim challenging the appointment of Kaahu Trustee. The claim contends Maria’s appointment of Kaahu Trustee was a fraud on a power.

[27] On 8 July 2020, the children obtained related, without notice, interim relief.¹⁰

Law

[28] The classic statement of law in relation to fraud on a power remains Lord Westbury’s in *Duke of Portland v Topham*:¹¹

... settled principles of law upon this subject must be upheld, namely that the donee, the appointor under the power, shall at the time of the exercise of that power, and for any purposes for which it is used, act in good faith and sincerity, and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object (I mean sinister in the sense of its being beyond the purpose and intent of the power) which he may desire to effect in the exercise of the power.

⁹ The March deeds.

¹⁰ *Legler v Formannoij* HC Whangārei CIV-2020-488-32, 8 July 2020 (Minute of Brewer J).

¹¹ *Duke of Portland v Topham* (1864) 11 ER 1242 (HL) at 1251.

[29] The leading New Zealand cases are *Wong v Burt*¹² and *Kain v Hutton*.¹³ These—and the cases in them—establish these principles.

[30] A trustee must exercise their powers in accordance with the purposes for which those powers were conferred. If a trustee exercises a power other than this way, she or he commits a fraud on a power. In this context, the term “fraud” is misleading. A trustee can commit a fraud on a power without being dishonest or immoral. All that is required is that the trustee exercises a power for an improper purpose, meaning one other than for which the power was conferred. So, for example, a trustee commits fraud on a power if she or he has an *ulterior* purpose in exercising the power. Unsurprisingly, the focus is the trustee’s purpose *when* exercising the power.¹⁴ Fraud on a power voids the exercise of that power, unless the impropriety is severable.

[31] On behalf of Maria, Mr McBride argues a fraud on a power cannot be committed in relation to the appointment of a trustee, for, the concept is ultimately concerned with disposition of trust property to someone other than a beneficiary. *Wong v Burt* affords an example. The trustees paid a beneficiary \$250,000 from the deceased’s estate knowing the beneficiary intended to lend the money to grandchildren, then forgive the debt. The Court of Appeal held this was a fraud on a power because the trustees’ purpose was to achieve something they could not do under the will.¹⁵

[32] While Mr McBride is correct the paradigm case of a fraud on a power involves the disposition of trust property to someone other than a beneficiary, he is incorrect the concept is so confined. The learned authors of *Equity and Trusts in New Zealand* say fraud on a power applies to administrative powers.¹⁶ *Lewin on Trusts* says the concept applies to the appointment of new trustees, and cites many case examples, including one endorsing that textbook.¹⁷ Moreover, in New Zealand at least, the

¹² *Wong v Burt* [2005] 1 NZLR 91 (CA).

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

¹⁴ Determined, equally unsurprisingly, by reference to surrounding circumstances.

¹⁵ *Wong v Burt*, above n 12, at [58].

¹⁶ Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at 166.

¹⁷ Lynton Tucker, Nicholas Le Poidevin and James Brightwell *Lewin on Trusts* (20th ed, Sweet & Maxwell, London, 2020) at [15-048] and [30-085].

appointment of a trustee is a fiduciary power.¹⁸ It follows a person appointing a trustee must exercise the power properly, in good faith, and with regard to the best interests of the beneficiaries as a whole.

[33] All this is uncontroversial. So too the importance of examining Kaahu's deed to discern its intent in relation to trustees, including their appointment.

The Kaahu deed

[34] Clause 2.2 is the interpretation clause:

- (a) except as otherwise expressly provided by this deed, all powers or discretions vested in the Trustees by any clause shall not in any way be limited or restricted by the interpretation of any other clause;
- (b) the interpretation of this deed in cases of doubt is to favour the broadening of the powers and the restricting of the liabilities of the Trustees;
- (c) unless the context otherwise requires:
 - (i) words importing the singular include the plural and vice versa;
 - (ii) words importing one gender include the other genders;
 - (iii) words denoting natural persons include companies;
 - (iv) reference to a statute shall be deemed to be reference to that statute as from time to time amended, re-enacted or substituted;
- (d) the deed shall be interpreted as always speaking, the present tense always being applied to circumstances as they arise;

...

[35] Clause 12 provides for variation of the deed:

12.1 The Trustees may alter, vary, add to or revoke all or any of the trusts, powers or provisions of the Trust by execution of a deed, such deed to be supplemental to or in replacement of this or any later deed as the Trustees may decide.

12.2 Any such alteration, variation, addition or revocation shall:

- (a) not vary the perpetuity period specified in this deed; and
- (b) take effect from the date of such alteration, variation, addition or revocation; and
- (c) not prejudicially affect any distribution or appropriation (contingent or otherwise) made to or for the benefit of any

¹⁸ *New Zealand Maori Council v Foulkes* [2015] NZCA 552, [2016] 2 NZLR 337 at [22].

Beneficiary before the date of such alteration, variation, addition or revocation; and

- (d) not vary the provisions of clause 26 of this deed specifying the identity of any of the Trustees.

[36] Clause 18 reads:

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.

[37] Clauses 26 and 27 concern trustees:

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.

- 27.3 Except as expressly provided in this deed the provisions of the Trustee Act 1956 in relation to the appointment, retirement, resignation and replacement of trustees shall apply to Trustees.

The claim

[38] Li, Ken and Laila's statement of claim contends Maria's appointment of Kaahu Trustee was a fraud on a power because:¹⁹

19. The power to appoint new trustees of the Kaahu Trust is a fiduciary power.
20. [Maria] was accordingly required to exercise her power to appoint new trustees in good faith, for proper purposes and in the best interests of the beneficiaries as a whole.
21. On the true construction of the trust deed ... [Maria] was unable in any event to exercise her power to appoint new trustees for her own benefit.
22. [Maria's] purpose in replacing herself as sole trustee with a company under her control was to evade the limits ... of the trust deed and in the law on her ability as trustee *to use the trust property to benefit herself*.

[39] Mr Bigio QC opened a similar way. He said Maria "appointed a company under her control as trustee for the purpose of evading ... the deed and *benefitting herself*".²⁰ Mr Bigio said Maria "sought to appoint herself as trustee, in a corporate form that would enable her *to prefer her own interests*".²¹

[40] Mr Bigio's closing involved some recalibration. Rather than alleging Maria acted to benefit her interests when appointing Kaahu Trustee, Mr Bigio said its appointment was a fraud on a power because Maria sought "to take exclusive control of the trust". And:

Here, if [Maria] was motivated by self-interest when she made the decision to appoint Kaahu Trustee Limited – that is, an interest in taking exclusive control of the trust so that she could use it however she wished, without regard to any additional or independent trustee – that would be an improper purpose, rendering the appointment void.

¹⁹ Emphasis added.

²⁰ Emphasis added.

²¹ Emphasis added.

[41] Both arguments presuppose the deed evidences an intention a sole trustee-beneficiary should not be able to control the trust alone. In support of this proposition, Mr Bigio observes clause 26 requires there be at least two trustees, and one of them independent. Kaahu originally had three trustees: Ricco, Maria and BOI. Mr Bigio contends this was no accident.

[42] Mr Bigio acknowledges clause 27 permits a single corporate trustee. However, as he emphasised when closing, Mr Bigio argues Maria committed a fraud on a power by appointing a sole trustee to control the trust.

Analysis

[43] Clauses 26 and 27 expressly permit a single corporate trustee. The prohibition in clause 26.1(a) on a single trustee exercising a power other than one of appointment of an additional trustee is subject to the single corporate trustee exception. Clause 27.2 identifies rules when there is a corporate trustee, single or otherwise. These include clause 27.2(c), which reads:

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.

[44] It follows the deed expressly permits a single corporate trustee to exercise “all the powers and discretions vested in that Trustee by this deed” even though a beneficiary is a director, shareholder, or both of that trustee. Contrary to Mr Bigio’s submission, the deed does not preclude—nor manifest an intention to preclude—control by a single, corporate trustee with a beneficiary as director.

[45] Context supports this conclusion. Horowai, which was created a little over a year before Kaahu, also permits a single corporate trustee. Moreover, Horowai has operated this way since inception, with (two) beneficiaries as directors. That Kaahu might *ultimately* be controlled a similar way is envisaged by its deed.

[46] This means Maria did not commit a fraud on a power by appointing a corporate trustee subject to her control. Whether viewed as the purpose of simplifying matters

in relation to Kaahu—Maria’s testimony—or as one to control Kaahu—Mr Bigio’s contention—Maria did not act with an improper purpose. Maria did no more than something envisaged by the deed, indeed, expressly provided for by it.

[47] This addresses Mr Bigio’s recalibrated exclusive control argument but leaves open that in the statement of claim, namely Maria committed a fraud on a power by appointing Kaahu Trustee to benefit herself. In other words, that Maria appointed Kaahu Trustee to prefer her interests.

[48] This contention fails too, and on the facts.

[49] First, it is important to remember Maria became the sole trustee through circumstance, not exploit. Her husband, Ricco, died. BOI then resigned after Laila questioned Mr Tyler’s competence as an accountant, and Mr Tyler did not want to become meat in the sandwich.

[50] Second, Maria attempted to find another trustee who would act *with* her. She approached Mr McBrearty of Law North Ltd. He declined. She then approached, and met a representative of, Perpetual Guardian. Maria believed Perpetual Guardian’s fees excessive and questioned whether it would be the right fit. Maria was then introduced by Mr Clarke to WRMK, who advised her a single corporate trustee was permissible. Mr Bigio cross-examined Maria about this sequence. However, he did not suggest Maria was going through the motions rather than genuinely looking for a second trustee.²²

[51] Third, when Mr McBrearty questioned the legitimacy of a single corporate trustee, Maria promptly forwarded Mr McBrearty’s concern to Ms Beckham of WRMK. Ms Beckham assured Maria she could appoint a single corporate trustee. When Mr McBrearty raised the point directly with Ms Beckham, Ms Beckham again assured Maria her advice was correct. The sequence suggests Maria wanted to act lawfully; and was acting on legal advice.

²² Evidence Act 2006, s 92.

[52] Mr Bigio argues it is significant Mr McBrearty was a longstanding legal advisor, whereas WRMK was newly introduced. This submission overlooks that WRMK was recommended to Maria by Mr Clarke, a longstanding financial advisor to Kaahu, and someone Maria trusted.

[53] Fourth, the next sequence is also important. It began 7 November 2019, with Ms Beckham informing Maria of the fiduciary obligations of a trustee:

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 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.

After you have considered the needs and circumstances of each of the beneficiaries, you might decide to proceed in any number of ways, including, for example:

1. Transferring part or all of the Trust’s assets to a new Trust (trust-to-trust transfers are called “resettlements”) of which you will be the primary beneficiary and Ricco’s children would be discretionary beneficiaries, but only following your death (subject to tax advice because resettlements can trigger tax obligations); or
2. Distributing part of the Trust’s assets directly to you (or a new Trust solely for your benefit) and leaving the rest in the Kaahu Trust, still available for your benefit. For example, you might decide to make a distribution to yourself of all of the funds invested by the Kaahu Trust and leave the property owned by the Kaahu Trust.

There are several options for you to consider. However, because you must first consider the needs of all of the current beneficiaries, before you can proceed with any particular option, you will need more information about the circumstances of each of Ricco’s children, including their entitlement under any other Trusts (like the Horowai Trust). You will see we have requested information about that Trust from Denis McBrearty, Law North, and from Phil Tyler, BOI taxation. We will keep you informed in that regard.

[54] Maria promptly instructed Ms Beckham to seek Horowai's financial statements to inform Kaahu Trustee's decision-making.

[55] On 27 February 2020, Li, Ken and Laila replied through lawyers. They said Kaahu was "very, very unlikely" to benefit from Horowai, and "not sufficiently 'close'" to be entitled to any information. They, therefore, declined to provide any. Only then did Ms Beckham encourage Maria to make a decision about Kaahu's assets.

[56] Fifth, Li, Ken and Laila do not challenge, at least directly, the March deeds. Direct challenge would be forlorn. The evidence makes plain Li, Ken and Laila have been provided for, and each is well off. As will be recalled, the children are Horowai's final beneficiaries. It has a 214-hectare block of forested land in Kerikeri; an adjacent 21-hectare block of farmland; and a fund of at least \$3 million. Each of the children received \$1.135 million from their grandfather, Fredy's, estate. I earlier mentioned Jimmy, an expensive catamaran built by Ricco. Ricco left Jimmy to Kaahu. In 2018, Maria and BOI decided, as Kaahu's trustees, to give Jimmy to Horowai.

[57] The evidence also makes plain Horowai was primarily for Li, Ken and Laila, and Kaahu primarily for Ricco and Maria. Mr Tyler, who was the accountant for both trusts, and a director of BOI, said just this. Mr Tyler's evidence was read by consent. Mr Clarke gave similar evidence, which also went unchallenged. Mr Bigio contends this division says nothing about whether Maria committed a fraud on a power by appointing Kaahu Trustee. True, but the division casts a rather different light on the March deeds, which the children advance as evidence of Maria's purpose to benefit herself in November 2019.

[58] Sixth, Maria testified. Maria was a careful, fair-minded witness. She impressed as sincere. I give an example. Mr Bigio taxed Maria she did not inform the children of their removal as beneficiaries of Kaahu until much later. Maria said the COVID-19 lockdown interrupted matters, and she was still determining how she could leave the children property when she died. Maria said that remained her intention despite the litigation.

[59] I summarise. I am not persuaded Maria appointed Kaahu Trustee 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.

[60] This brings me to some case law. Mr Bigio contends this case is very much like *Goldie v Campbell*, in which Moore J said:²³

... the trust deed expressly prohibited a trustee from exercising any power or discretion in his or her favour. If [the person exercising the power] was to appoint a sole corporate trustee under his control so that he could procure the exercise of trustee powers or discretion in his favour, then, to borrow the language of Tipping J, the corporate trustee would be “simply a vehicle through or by means of whom the appointor’s purpose of benefiting [himself] is carried out”. That would be a clandestine excessive execution [i.e., a fraud on a power] because it would appear regular on its face but in reality would be undertaken for a purpose not within the donor’s mandate.

[61] I do not accept Mr Bigio’s submission. *Goldie v Campbell* was about whether Mr Campbell had property interests by virtue of his powers in relation to a family trust. In this context, Moore J concluded *if* Mr Campbell exercised his power to appoint a sole corporate trustee under his control, that would be a fraud on a power because of the terms of the deed. The self-dealing clause in *Goldie v Campbell* was more restrictive than clause 18 of the Kaahu deed, and more importantly, the deed in *Goldie v Campbell* did not contain a clause like 27.2(c).

[62] Mr McBride invites attention to the decision of the Australian High Court in *Montevento Holdings Pty Ltd v Scaffidi*.²⁴ In *Montevento*, a trust deed said: “If, and so long as any individual Appointor is a Beneficiary that individual shall not be eligible to be appointed as a Trustee.” The appointor, who was a beneficiary, appointed Montevento Holdings Pty Ltd as sole trustee. The appointor was the sole director and

²³ *Goldie v Campbell* [2017] NZHC 1692, [2017] NZFLR 528 at [69].

²⁴ *Montevento Holdings Pty Ltd v Scaffidi* [2012] HCA 48, (2012) 246 CLR 325.

shareholder of the company. The validity of this appointment was challenged by another family member.

[63] The challenge failed at first instance.²⁵ Heenan J concluded there was “no evidence which would justify a finding that [the appointor] has appointed Montevento for an improper purpose”.²⁶ Heenan J also concluded the trust deed drew a clear distinction between individuals and corporations; and contained “no actual or implicit prohibition upon a corporation, even if controlled by a beneficiary, from being such a trustee”.²⁷

[64] A majority of the Court of Appeal for Western Australia disagreed.²⁸ Murphy JA and Hall J held the deed precluded Montevento’s appointment.²⁹

[65] The High Court unanimously reversed the Court of Appeal. It found the deed drew a distinction between a corporation and an individual; and did not prohibit Montevento’s appointment despite its control by a beneficiary.³⁰

[66] Mr Bigio argues *Montevento* has no relevance, for, it was not about a fraud on a power. This is not quite right. While the phrase “fraud on a power” was not used, it is clear at least Heenan J was alive to the possibility Montevento was appointed with an improper purpose. As observed, the Judge concluded there was no evidence to support that finding. Moreover, *Montevento* is high authority for the proposition a single corporate trustee controlled by a beneficiary is not inherently objectionable in a family trust setting. So, the case provides some support for Maria’s position.

[67] Mr McBride made wide-ranging submissions about family trusts in New Zealand. It is not necessary to say more about these submissions, for, I have already concluded the children’s claim fails. For the same reason, it is unnecessary to say anything about remedy.

²⁵ *Montevento Holdings Pty Ltd v Scaffidi Holdings Pty Ltd (No 2)* [2010] WASC 180.

²⁶ At [34].

²⁷ At [38].

²⁸ *Scaffidi v Montevento Holdings Pty Ltd* [2011] WASCA 146.

²⁹ At [165].

³⁰ *Montevento Holdings Pty Ltd v Scaffidi*, above n 24, at [22] and [25].

[68] This leaves two points. Mr Bigio accused Maria of improper litigation tactics by filing a statement of defence that wrongly said the children were still beneficiaries of Kaahu. Mr McBride accused the children of improper litigation tactics by obtaining without notice interim relief on a less than candid basis, and by adducing inaccurate evidence when seeking such relief. These contentions are peripheral. I say no more about them for this reason.

Result and orders

[69] The claim is dismissed. The interim relief orders are discharged.

Costs

[70] I can think of no reason why Maria should not have 2B scale costs. If the parties do not agree, they may file memoranda of not more than six pages each:

- (a) Maria by **23 June 2021**.
- (b) The children by **7 July 2021**.

.....

Downs J