

The duty of a trustee not to self-benefit

It is implicit that Parliament contemplated that a trust deed can expressly authorise a trustee to be able to self-benefit from a trust



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A few days before Christmas, the Court of Appeal released its decision in *Legler v Formannoj* [2022] NZCA 607.

It is one of the more interesting decisions delivered on New Zealand trust law in 2022 and concerns the rights of a human trustee (Maria Legler) to form a corporate trustee which she would use to remove the other beneficiaries and appoint all of the trust's assets to herself.

The trial judge, Justice Mathew Downs, held that Legler was permitted to form the corporate trustee of which she would be its sole director and to act as she did. Two of the judges in the Court of Appeal (Brown and Brewer JJ) agreed with him. The third judge, Justice Helen Cull, forcefully dissented.

The Deed of Trust contained a clause appearing to give express authorisation to the creation of a corporate trustee by which a beneficiary could control the trust. It is clause 27.2 (c):

"It is expressly declared [that] 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... in that Trustee whether as director, officer, shareholder or otherwise however."

When a trust has a clause which appears to give express permission to a beneficiary to create and control a corporate trustee, it is not surprising that the trial judge and some judges in the Court of Appeal should say Legler was entitled to do what she did.

Clause 27.2 (c) is not written as clearly as it might have been. From a practitioner's point of view, the most important aspect of this case is whether clause 27.2 (c), had it been worded with greater clarity, would allow beneficiaries generally to control trusts via corporate trustees of which they are its sole director.

Maria Legler was the second wife of Ricco Legler and, as often happens in such situations, her relationship with the children of her husband's first marriage had its difficulties. The children said her actions in creating the corporate trustee which she controlled constituted a fraud on a power. That pejorative term is now being replaced by a new terminology. Instead of saying it was "a fraud on a power" for her to have used the power in the way she did, it is said her actions were contrary to "the proper purpose" of the power, meaning her actions had led to an invalid outcome.

The claim that her actions were a fraud on a power or a

breach of the proper purpose of her powers was rejected.

The hearing in the Court of Appeal was side-tracking to some extent by a dispute about the ambit of the children's appeal. Their counsel sought to argue that Maria Legler's actions were *ultra vires* but they had not pleaded such a claim and the court was not willing to allow the appeal to be advanced on that basis.

Even so, Brown and Brewer JJ said had they allowed the step-children to contend that Maria Legler's actions were *ultra vires*, their contention would have failed as a result of the reasoning the High Court of Australia gave in the *Montevento* litigation where it had permitted a trust to be managed by a beneficiary who controlled a corporate trustee.

In *Montevento Holdings Pty Ltd v Scaffidi Trust* [2012] HCA 48, the relevant Deed of Trust contained a clause saying "[i]f... any individual appointor is a beneficiary that individual shall not be eligible to be appointed as a Trustee".

A corporate trustee was appointed as the sole trustee of the trust and a beneficiary was its sole director and shareholder.

The trial judge said the Deed of Settlement "draws a clear distinction between individuals and corporations [and] recognises that a corporation may be a Trustee ... and contains no actual or implicit prohibition upon the corporation, even if controlled by a beneficiary, from being such Trustee. Because the corporation is distinctly and legally separate from the individual, I do not consider that the prohibition in the Deed of Settlement against an individual beneficiary being a Trustee prohibits the appointment of [the corporate Trustee] ..."

Justice Cull's dissent in the *Legler* appeal is lengthy and relies on factual evidence that is not recorded in either Justice Downs' decision or that of Justices Brown and Brewer. Her reasoning deserves consideration by a higher court.

Any further consideration of the case should take account of s 31 of the Trusts Act 2019 which says "A Trustee must not exercise a power of a Trustee directly or indirectly for the Trustee's own benefit." But that duty is described in the Act as a "default duty" which can be removed from a trust.

That being so, it is implicit that Parliament contemplated that a trust deed can expressly authorise a trustee to be able to self-benefit from a trust. The *Legler* decision is therefore primarily of interest in cases where the duty not to self-benefit remains as a term of a trust. ■

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