IN THE SUPREME COURT OF NEW ZEALAND

SC 40/2007
[2008] NZSC 61

BETWEEN	GEORGINA KAIN, GEORGE HARRY COUPER KAIN, GEORGE CHARLES KAIN, GEORGE THOMAS CARLTON KAIN AND GEORGE MICHAEL KAIN First Appellants
AND	GEORGE THOMAS CARLTON KAIN Second Appellant
AND	JONATHON RHODES HUTTON First Respondent
AND	WILLIAM ALEXANDER XAVIER COUPER Second Respondent
AND	ANNETTE ELIZABETH COUPER Third Respondent
AND	WAYNE KEITH STARTUP Fourth Respondent
AND	GEORGE THOMAS KAIN Fifth Respondent
AND	MARY HUTTON Sixth Respondent

Hearing:	10 June 2008
Court:	Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ
Counsel:	J S Kós QC, J V Ormsby and J W A Johnson for Appellants M R Camp QC for Second Respondent R A Osborne for Third Respondent
Judgment:	7 August 2008

JUDGMENT OF THE COURT

A **The appeal in relation to the shares in Ponui Station Ltd is dismissed.**

B **The appeal in relation to the shares in Mangaheia Station Ltd is allowed and it is declared that those shares remain vested in the trustee or trustees for the time being of the Mangaheia Trust on the terms of the trust deed of 3 June 1981.**

C **The appellants are awarded costs of $10,000 in this Court to be paid by the second and third respondents, together with the appellants' reasonable disbursements, to be fixed if necessary by the Registrar.**

REASONS

Para No

ELIAS CJ, BLANCHARD, McGRATH AND ANDERSON JJ

(Given by Blanchard J)

[1] Members of the Couper family have been engaged in extensive litigation over certain transactions relating to a number of trusts which hold farming interests in Hawkes Bay. Both the High Court and the Court of Appeal have been called upon to rule on a large number of issues. Leave has been granted by this Court for a second appeal concerned with two matters only, namely the validity of actions of the trustees of the Mangaheia Trust on 19 July 1999 in:

(a) making an appointment to Mrs A E Couper of its holding of shares in Ponui Station Ltd; and

(b) resettling the balance of the assets of the Mangaheia Trust, consisting of the shareholding in Mangaheia Station Ltd upon trusts declared in the new Mangaheia Trust.

[2] The original Mangaheia Trust, which we will call the old Mangaheia Trust or the old trust, was established by a declaration of trust executed on 3 June 1981 by Mr W A X Couper who is largely the source of the family's farming wealth. The

asset in respect of which the trust was declared was Mr Couper's shareholding in Mangaheia Station Ltd. In 1997 the trustees of the old trust acquired the shares in Ponui Station Ltd.

[3] When the old trust was established Mr Couper was unmarried. He had no children. In 1989, when he was in his early 60s, he married. Mrs Couper, who was in her mid 40s, already had four daughters. There have been no children of the marriage of Mr and Mrs Couper. They are now separated but apparently remain on amicable terms.

[4] The relevant terms of the old trust (omitting, in particular, references to any children of Mr Couper) can be summarised as follows:

(a) The trustees have power to allocate the *income* of the trust fund or any part of it as the trustees think fit to or for the benefit, education, maintenance, support or advancement of the wife of Mr Couper and the children and grandchildren (and their spouses) of his sister, Mrs J R Kain, or to pay income to the trustees of certain other trusts established by Mr Couper. In default of such an allocation there is provision for payment of an income of $8,000 per annum for Mr Couper's wife and for the balance of the income to go to the children of Mrs Kain.

(b) The trustees are directed to stand possessed of the *capital* of the trust fund until the date of distribution (30 June 2050) upon trust for the wife of Mr Couper and the children of Mrs Kain who are living at the date of distribution in such shares and proportions as the trustees in their discretion think fit, and in default of any decision of the trustees in that regard to hold the capital at the date of distribution for the children of Mrs Kain then living, with provision for substitution of grandchildren and for hotchpot.

(c) The trustees are given discretion by the deed of trust to appoint an earlier date or dates of distribution of the whole or part of the trust fund, so that, in order to exercise their discretion to make a distribution of capital, they can bring forward the date of distribution.

(d) The trustees have express power in their discretion to exercise the statutory powers of maintenance and advancement contained in s 41 of the Trustee Act 1956 (but construed as if para (a) of that section were omitted).

[5] It is particularly to be noted, and it is common ground, that Mrs Couper was under the old trust a discretionary object of the trustees' powers in relation to income, with an entitlement to a fixed annual sum in default of any other allocation of income. She was also a discretionary object as to the capital of the fund. She had, however, no vested or contingent interest in the capital. It is also to be noted, and again it is common ground, that Mrs Couper's daughters and her other blood relatives were not objects of the trustees' powers.

[6] Section 41 of the Trustee Act, to which reference is made in the trust deed, reads as follows:

> **41 Power to apply capital for maintenance, etc**.
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> A trustee may at any time or times pay or apply any capital money or other capital asset subject to a trust, for the maintenance or education (including past maintenance or education), or the advancement or benefit, in such manner as he may in his absolute discretion think fit, of any person entitled to the capital of the trust property or of any share thereof, whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death under any specified age or on the occurrence of any other event, and whether in possession or in remainder or reversion, and any such payment or application may be made notwithstanding that the interest of that person is liable to be defeated by the exercise of a power of appointment or revocation, or to be diminished by the increase of the class to which he belongs:
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> Provided that—
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> (a) Except with the consent of the Court, the money or asset so paid or applied for the maintenance, education, advancement, or benefit of any person shall not exceed altogether in amount or value—
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> (i) Half of the presumptive or vested share or interest of that person in the trust property where the value of that share or interest exceeds $15,000 or such other amount as the Governor-General, by Order in Council, may for the time being prescribe in place of that amount; or
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> (ii) In any other case $7,500, or such other amount as the Governor-General, by Order in Council, may for the time being prescribe in place of that amount; and
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> (b) Where that person or any other person is or becomes absolutely and indefeasibly entitled to the share of the trust property in which that person had a presumptive or vested interest when the money or asset was so paid or applied, that money or asset shall be brought into account as part of that share in the trust property; and

> (c) No such payment or application shall be made so as to prejudice any person entitled to any prior life or other interest, whether vested or contingent, in the money or asset paid or applied unless that person is in existence and of full age and consents in writing to the payment or application, or unless the Court, on the application of the trustee, so orders.

[7] By the first of the impugned transactions on 19 July 1999 the persons who by then were the trustees of the old Mangaheia Trust, Mr J R Hutton (his wife is a child of Mrs Kain), Mrs Couper and a chartered accountant, Mr W K Startup:

(a) appointed that day as the date of distribution for the Ponui Station Ltd shares; and

(b) distributed those shares to Mrs Couper.

It was recorded that she had declared her interest and consented to her decision as a trustee being taken by her co-trustees. On the same day, Mrs Couper settled the Ponui shares distributed to her on a trust (the Annette Couper Ponui Trust) which she established with herself, Mr Hutton and Mr Startup as trustees.

[8] The beneficiaries of the Annette Couper Ponui Trust, which we will call the Ponui Trust, are:

(i) Mrs Couper herself;

(ii) her children and grandchildren;

(iii) her siblings and their issue;

(iv) her parents;

(v) the spouses or partners of any of those persons (which included Mr Couper);

(vi) any trust or company of which respectively any of those beneficiaries is a beneficiary or 50% shareholder; and

(vii) any charity.

[9] The trust deed of the Ponui Trust provides for the trustees to distribute income and capital at any time amongst the beneficiaries in the discretion of the

trustees, with a final Vesting Date 80 years from the date of the deed[1] or such earlier day as the trustees appoint. The "Final Beneficiaries", who take equally between them on that Vesting Date such of the trust fund as has not already been appointed to a beneficiary, are Mrs Couper's children then living, with substitution of their issue.

[10] Importantly, there are express provisions under which Mrs Couper may both appoint and remove trustees and also both appoint and remove any person to and from the class of discretionary beneficiaries.

[11] The second of the transactions on 19 July 1999 dealt with the remaining asset of the old Mangaheia Trust, the shares in Mangaheia Station Ltd. Mr Hutton, Mrs Couper and Mr Startup, as trustees of the old trust, executed a deed poll in favour of themselves as trustees of the new Mangaheia Trust, established by a trust deed of the same date between Mr Couper as settlor and those three persons as trustees. The deed poll recited, inter alia, that the old trust provided that the statutory powers of maintenance and advancement contained in the Trustee Act applied (with the omission of para (a) of s 41) and that, "in reliance on the decision in *Pilkington v IRD* [sic] [1964] AC 612" the trustees had determined "to resettle the trust fund in the New Trust principally for the benefit of Annette Couper and the grandchildren of Janet Richmond Kain", who were described as "discretionary beneficiaries under the Old Trust". In the operative part of the deed poll it was declared that "[i]n pursuance of the powers of the Trustees under the Old Trust Deed to resettle the trust fund, the whole trust fund is hereby transferred to, and resettled in, the New Trust constituted under the trust deed dated 19 July 1999".

[12] The new Mangaheia Trust has the same basic format as the Ponui Trust, but there are significant differences. The settlor, who has the power to appoint and remove trustees and discretionary beneficiaries, is Mr Couper. The discretionary beneficiaries are Mrs Couper, her children, Mrs Hutton and any grandchildren of Mrs Kain. The Final Beneficiary is Mrs Couper. On the Vesting Day, which is 30 June 2050 or such earlier day as the trustees appoint, the trustees must hold the trust fund, in default of any appointment to discretionary beneficiaries, for

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[1] The copy of the deed exhibited to the Court is in fact undated but it is accepted it was executed on 19 July 1999.

Mrs Couper or, if she is not then living, for the then living grandchildren of Mrs Kain.

The issues

[13] In relation to the Ponui Trust, the plaintiffs (now appellants), the children of Mrs Kain (other than Mrs Hutton, who sides with Mr and Mrs Couper), allege that what was done was a fraud on the power of appointment by the trustees of the old trust, influenced by Mr Couper. They say that although an appointment of capital could be made to Mrs Couper under cl 4 of the old Mangaheia Trust deed (summarised at para [4](b) and (c) above), and the steps taken to advance the distribution date and make a distribution of the Ponui shares to Mrs Couper were ex facie proper, in reality what was sought to be achieved was to confer a benefit on non-objects, particularly Mrs Couper's daughters.

[14] In relation to the new Mangaheia Trust, the plaintiffs say that the deed poll was a purported advancement of capital under s 41 and was invalid as such because Mrs Couper did not have the requisite vested or contingent interest in the capital of the fund; nor was there the requisite written consent (under para (c) of s 41) of the Kain children, who were adults. The plaintiffs say that if the resettlement therefore fails under s 41, it cannot be taken, instead, to have occurred by way of an appointment under cl 4 and, even if it had done, it would have been an invalid appointment (an excessive execution of the power) because it was in part in favour of non-objects of the power, namely Mrs Couper's children and the Kain grandchildren.

Ponui

[15] In the High Court,[2] Panckhurst J came to the conclusion that the appointment to Mrs Couper of the Ponui shares was pursuant to a scheme to resettle the shares on non-objects of the old trust. He said there was nothing to suggest that Mrs Couper exercised genuine freedom of choice; the distribution to her was dependent upon the

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2 *Kain v Hutton* (High Court, Christchurch, M198/00, 3 December 2004).

resettlement. Hence "the intention of Messrs Hutton and Startup (and Mrs Couper) was to bring about a resettlement upon persons who were non-objects of the old trust, albeit they may not have been conscious that to do so was a fraud upon the power".[3] The Court of Appeal[4] took a very different view. It accepted that if an appointor's purpose is to effect distribution amongst persons who are not objects of the power, the appointee merely being a conduit, the appointment cannot be supported. But, the Court said, if the recipient has genuine freedom of action and wishes to benefit non-objects, then the exercise of the power to appoint will be upheld. The Court observed that there had been no explicit pleading of a fraud on the power. Mrs Couper had not been cross-examined on whether there was a binding scheme to benefit non-objects; nor were the other trustees. The documentary evidence did not sustain an inference of prior agreement. The contemporaneous nature of the transactions was insufficient by itself to do so. It did not prove the state of mind of the appointors. Mr Couper had stated that he was seeking to provide for his wife and stepdaughters and had raised this with the trustees. But his intentions were not conclusive. They did not prevent Mrs Couper from exercising genuine freedom of action in deciding to resettle the shares. She appeared "to have been the passive recipient of the benefits under the trust, but she does seem to have wanted provision to be made for her daughters".[5] The Court noted that Mrs Couper was a possible beneficiary of the Ponui Trust. It could not be said that its only purpose was to benefit non-objects:[6]

> Indeed, the fact that Mrs AE Couper had the right under the trust deed to appoint additional beneficiaries, and the power to appoint and remove trustees and beneficiaries, suggests that the trust was effectively her trust and for her benefit.

[16] Addressing an argument that the appointment was a fraud because it was made to shut out the Kain children, the Court said that the trustees had an absolute discretion to appoint any one of the beneficiaries to the exclusion of all others under cl 4. The desire to benefit Mrs Couper was perfectly proper.

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3 At para [238].
4 [2007] NZCA 199 (Glazebrook, Hammond and Robertson JJ).
5 At para [118].
6 At para [121].

[17] The trustees of the old Mangaheia Trust were given under cl 4 a special power of appointment exercisable (or not) in their discretion in favour of one or more of the named objects who were Mrs Couper and the Kain children.[7] Any appointment which was not in favour of one or more of those persons or for the benefit of one or more of those persons was beyond the power of the trustees, often called an excessive execution of the power.[8] There is overlap between the concept of an excessive execution of a special power of appointment and the concept of a fraud on the power. The latter can be viewed as a particular variant of the former: where the appointment appears on its face to be to an object but in reality is a device to effect the appointor's purpose of benefiting a non-object, whether as to the whole or part of the property comprised in the appointment.[9] Keeton and Sheridan comment that a fraud on a power is "an attempt by the appointor to secure the effect of an excessive execution without actually making one".[10]

[18] As the Court of Appeal appreciated and as Lord Parker of Waddington famously remarked in *Vatcher v Paull*, the term fraud does not in this context denote any conduct on the part of the appointor amounting to fraud in the common law sense of the term or any conduct which could be properly termed dishonest or immoral:[11]

> It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power. Perhaps the most common instance of this is where the exercise is due to some bargain between the appointor and appointee, whereby the appointor, or some other person not an object of the power, is to derive a benefit. But such a bargain is not essential. It is enough that the appointor's purpose and intention is to secure a benefit for himself, or some other person not an object of the power. In such a case the appointment is invalid, unless the Court can clearly distinguish between the quantum of the benefit bona fide intended to be conferred on the appointee and the quantum of the benefit intended to be derived by the appointor or to be conferred on a stranger.

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7 Again we omit reference to children of Mr Couper, as there were none.

8 See, for example, chapter 6 of Farwell, *A Concise Treatise on Powers* (3rd ed, 1916), entitled "Excessive Execution". *Thomas on Powers* (1998), para [8-11] says that it is "trite law that there is an excessive execution of a power of appointment if such execution is in favour of strangers", giving the example of a power to appoint to children being exercised in favour of grandchildren.

9 There are different consequences of excessive and fraudulent appointments. Whereas an excessive appointment to both objects and non-objects may be able to be saved in part by severing the good from the bad, an appointment tainted by fraud is generally wholly bad: 36(2) *Halsbury's Laws of England* (4th ed, 1999 Reissue), paras [354] and [368].

10 *Equity* (3rd ed, 1987), p 294.

11 [1915] AC 372 at p 378 (PC).

This must be read having regard to earlier and later case law. Some 50 years earlier, in *Duke of Portland v Topham*, Lord Westbury LC had referred to:[12]

> the settled principles of the law upon this subject … namely that the appointor under the power, shall, at the time of the exercise of that power, and for any purpose for which it is used, act with 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.

And Lord St Leonards made a statement to similar effect:[13]

> A party having a power like this must fairly and honestly execute it without having any ulterior object to be accomplished. He cannot carry into execution any indirect object, or acquire any benefit for himself, directly or indirectly. It may be subject to limitations and directions, but it must be a pure, straightforward, honest dedication of the property, as property, to the person to whom he affects, or attempts, to give it in that character.

[19] The party seeking to upset the appointment as a fraud on the power bears the onus of proof.[14] What that party must establish is that the real purpose of the appointor, without which the appointment would not have been made, was to benefit the appointor or a non-object (stranger) rather than benefiting an object:[15]

> The court looks to both the instrument itself and extrinsic material to determine whether the appointor would ever have exercised the power, had it not been for a purpose of benefiting herself or himself or non-objects, or whether such a purpose was merely incidental to a primary purpose of benefiting valid objects.

[20] Upjohn J said in *Re Burton's Settlements*; *Scott v National Provincial Bank Ltd* that the "purpose and intention" (Lord Parker's phrase) of the appointor is to be ascertained as a matter of substance and not solely by analysing the effect of the appointment, though that, of course, is important. "One must try to discover his

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12 (1864) 11 HLC 32 at p 54; 11 ER 1242 at p 1251.

13 At pp 55 – 56; p 1251.

14 It is sometimes said that there are limited exceptions to this rule, none of which would apply in the present case: see Hardingham and Baxt, *Discretionary Trusts* (2nd ed, 1984), para [511]; but those authors conclude that this is an undesirable qualification and that "the onus should remain throughout upon those alleging the invalidity of the appointment to show that it is fraudulent", on the basis of the evidence as a whole.

15 Dal Pont and Chalmers, *Equity and Trusts in Australia* (4th ed, 2007), para [8.60], citing *Redman v Permanent Trustee Co of New South Wales Ltd* (1916) 22 CLR 84 at pp 93 and 97.

genuine intention".[16] An appointment subject to a condition to be performed by the nominated appointee, such as the establishment of a trust, may be a fraud on the power if the purpose of the imposition of the condition is to benefit the appointor or a third person who is not an object of the power.[17] But an object may very well be benefited when a relative of the object receives a benefit. Frequently, in a family situation an indirect benefit to the object may be what really moves the appointor to make the appointment.

[21] In any case in which it is alleged that a power has been executed excessively, whether that is said to have been done directly and openly or concealed by the use of an object of the power as a conduit, it is necessary to consider carefully whether the inclusion by one means or another of non-objects has genuinely been done for the benefit of an object of the power. Has the actuating purpose of the appointor, no matter the form of the appointment, been to benefit the object? It is crucial that this question is answered taking full account of contemporary practices concerning how interests in assets are held and transferred within family groups.[18] It may, for example, be of considerable advantage for an object intended to be benefited to have a valuable asset held in a discretionary trust and thus capable of being passed across to that person's children or to other family members at a later time without incurring liability for gift duty or requiring a prolonged gifting programme to avoid that duty. There may also in some circumstances be legitimate taxation advantages, although that is not apparent in the present case. The best judge of what is for the entire benefit of the object may be the object him or herself. Wigram VC recognised this long ago in *Goldsmid v Goldsmid*, when he said that "in equity, a valid appointment may be made to persons who are not objects of the power, with the approbation of the persons who are the objects of the power."[19] This assumes, of course, that the approval of the object is fully informed and not induced corruptly. In summary: the appointor must be actuated by the purpose of conferring benefit on the

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16 [1955] Ch 82 at p 100.

17 *Vatcher v Paull* at p 379.

18 For an example of contemporary practice relating to 19th century marriage settlements being taken into account in upholding an appointment which was ex facie excessive, see *Daniel v Arkwright* (1864) 2 H & M 95; 71 ER 396.

19 (1842) 2 Hare 187 at p 197; 67 ER 78 at p 82.

appointee, but the appointee's approval and co-operation may be a strong indication that what the appointor is intending to effect is truly for the appointee's benefit.

[22] The question then in the present case is whether the appointor trustees' dominant purpose in relation to the Ponui shares was to benefit Mrs Couper by putting her in a position where she could establish her trust as a means of benefiting herself and whether Mrs Couper must have acted freely, regarding herself as the real recipient of the benefit. In our respectful opinion, the Court of Appeal was quite right to hold that the plaintiffs have not shown, as they must do, that the purpose of the appointors was not to benefit Mrs Couper but in fact to benefit her daughters and other members of her family, all of whom are admittedly non-objects of the old trust. The Court of Appeal had the distinct advantage not enjoyed by the trial Judge of having before it, as this Court did, the full terms of the Ponui Trust, which we have summarised at paras [8] – [10] above. When they are taken into account it is very obvious that it was a trust not only established and controlled by Mrs Couper but one which was very much for her own benefit. She made it clear in evidence that she had wanted provision to be made for her daughters. By doing so in the form of a sophisticated discretionary trust, no doubt on advice, the trustees with her participation gave her not only personal benefit – she could ensure, if she wished it, that the shares would revert to her – but also the benefit of being able to assist her daughters if she thought that course appropriate in the future. In that manner, as the Court of Appeal appreciated, she could discharge a moral duty to them. It is also entirely understandable that she would see benefit in including her siblings and parents as possible objects of her beneficence. It would be likely that anyone in her position would be advised to include such relatives as discretionary beneficiaries against the possibility that they might need her help or against other contingencies. Similarly, she would have included her husband in order to preserve the maximum flexibility. It has not been suggested that this was done at his dictation in order that he could achieve an illegitimate benefit from the transaction and she had of course the ability to remove him as a beneficiary at any time. She was also given the opportunity of making charitable gifts if that was her wish. Nothing could be done without her concurrence as a trustee.

[23] We therefore have no doubt at all that Mrs Couper and her co-trustees saw considerable benefit to her in the vesting of the Ponui shares in the trust which she established. It put her in effective control of those shares with the ability to take the benefit herself or, if she saw fit, to pass all or some of it to her daughters or other family members. The factor which makes it impossible to accept that the resettlement was somehow forced on her for the benefit of non-objects is her complete ongoing control of the trust through the ability to appoint and remove trustees and discretionary beneficiaries. This factor makes it, in our view, hopeless to contend that there was some ulterior or collateral purpose at work. The trustees were perfectly entitled to benefit Mrs Couper in this way and to select her as the object to be benefited to the exclusion of the other discretionary objects, the Kain children, even when that meant that the latter would receive no part of the Ponui farm shares. Clause 4 of the old trust expressly contemplated such discrimination between the objects of the power.

The new Mangaheia Trust

[24] Clause 4 of the old trust deed is a rather lengthy and convoluted provision whose meaning and effect is not immediately apparent. That clause is summarised at para [4] of this judgment. Panckhurst J was aware that in *Re Beckett's Settlement*, in a judgment regarded as authoritative, Simonds J had held that "although … the object of a discretionary trust has an interest in equity in the trust fund, yet he would not be appropriately described as a person entitled to an interest, vested or contingent".[20] But, on his reading of cl 4, Panckhurst J supposed that Mrs Couper had an entitlement to capital, contingent on living to the date of distribution and susceptible of being defeated by an appointment prior to or at that time. He therefore concluded that the advancement under s 41 was "not excessive".[21] It is now accepted that the Judge misunderstood cl 4 in this respect and that in relation to capital Mrs Couper was a discretionary object only.

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20 [1940] Ch 279 at pp 285 – 286 (ChD).
21 At paras [201] – [202].

[25] The Judge also concluded, and again it is accepted for the respondents that this was erroneous, that the Kain children did not have, for the purposes of para (c) of that section, a "prior life or other interest, whether vested or contingent".[22] The Judge recognised that the Kain children, who were adults, had a default interest in the income but considered that a default beneficiary was not in a better position than a discretionary beneficiary. There is, however, a very distinct difference. A discretionary beneficiary has nothing more than a mere expectancy. Lord Wilberforce has described a discretionary object as having "a right to be considered as a potential recipient of benefit by the trustees and a right to have his interest protected by a court of equity".[23] A default beneficiary has, in contrast, a vested or contingent interest, albeit that it may be, as s 41 puts it, "liable to be defeated by the exercise of a power of appointment". If the income in any year was not allocated by the trustees, the excess over $8,000 would go to the Kain children. Their right to that income produced by the capital of the fund is certainly sufficient to constitute, in the words of para (c) of s 41, a "prior life or other interest, whether vested or contingent, in the money or asset paid or applied". The fact that the interest is defeasible is, as Dixon J said in *Commissioner of Stamp Duties (NSW) v Sprague*, "a quality of the interest".[24] It takes immediate effect although capable of being defeated by an appointment.

[26] Proceeding on the basis that the trustees had power to make an advancement to Mrs Couper, Panckhurst J then considered whether the resettlement by the trustees on themselves as trustees of the new Mangaheia Trust constituted an unlawful delegation of their powers. He said that *Pilkington v Inland Revenue Commissioners*[25] was authority in favour of the view that the statutory power did enable a settlement on a new trust provided that its terms were reflective of the terms of the old trust, and that its terms need not be "completely analogous or identical" to

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22 At para [207].

23 *Gartside v Inland Revenue Commissioners* [1968] AC 553 at p 617. For fuller description see Hardingham and Baxt, para [605].

24 (1960) 101 CLR 184 at p 193.

25 [1964] AC 612.

those contained in the old trust.[26] Comparing the range of potential beneficiaries of the new trust with that under the old trust, the Judge said that it was only Mrs Couper's children who were an addition to the classes of beneficiaries under the old trust, although he also mentioned that under the new trust there was provision for substitution to the Kain great-grandchildren. In relation to Mrs Couper's children, the Judge concluded that, although there had been an addition to the class which was "not a necessary corollary of the resettlement or … an incidental addition to the class of lineal descendants",[27] there had not been an improper delegation nor, save in that respect, any impermissible resettlement. It was his view that the power of the settlor (Mr Couper) under the new trust deed to remove Mrs Couper's children from the class of discretionary beneficiaries cured "this possible difficulty".[28] He also held that the plaintiffs had not met the onus of demonstrating bad faith in what the trustees had done. Mrs Couper was the principal or final beneficiary of the new trust. She was not only an object of the old trust but, as Mr Couper's wife of about ten years, he said, it was not surprising that a decision should be taken to make provision for her. The plaintiffs' contingent right to income and capital had been removed but the outcome was to be assessed in the overall context. In particular, they remained as beneficiaries of other trusts. In these circumstances the Judge was not persuaded that the Court should intervene.

[27] The Court of Appeal, whilst upholding the transfer of the Mangaheia Station shares to the new trust, approached the matter in a quite different way. The Court examined, first, whether the trustees could be taken to have made a valid appointment of the shares under cl 4. Speaking for the Court, Glazebrook J accepted that there were some indications in cl 4 that the power of appointment did not contemplate any resettlement. She then considered whether the fact that the power could be exercised "in such manner" as the trustees in their absolute discretion thought fit, supported the contrary view,[29] but said that in *Re Morris's Settlement Trusts*; *Adams v Napier*,[30] it had been held that the same words were not sufficient

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26 At para [211].
27 At para [215].
28 At para [216].
29 At para [81].
30 [1951] 2 All ER 528 at pp 532 – 533 (CA).

for this purpose. This meant, Glazebrook J said, that the trustees could not rely merely on cl 4. But they could make a resettlement "with the consent of the sui juris object of the power", Mrs Couper, who had been supportive of what was done.[31]

[28] Clause 4 had not been mentioned in the deed poll but, the Court said, the question was whether what was done was within the trustees' powers under the old deed and not whether the powers in the deed they specifically relied on were the correct powers. The Court believed that the power relied on in the deed poll (s 41) was not materially different from cl 4. It said that both powers gave the trustees "an absolute discretion to advance capital" and that the mere fact the trustees failed to refer to the correct power in the deed poll could not curtail the trustees' powers.[32] It was also thought by the Court to be relevant that the resettlement could have been achieved in the same manner as the Ponui shares were resettled. There was every reason to believe Mrs Couper would have co-operated.

[29] For these reasons, the Court of Appeal considered that Panckhurst J had been correct to uphold the resettlement. But it also took the view, in the alternative, that the resettlement was within the powers of the trustees as an advancement under s 41. The Court accepted that Mrs Couper did not have an interest in capital under the old trust. But she was the final beneficiary of the new trust with a contingent, defeasible interest in its capital. Clause 4 could have been used to allocate capital to her under the old trust. Although that step was "not specifically taken", her status under the new trust could be regarded as having been achieved by using the cl 4 powers.[33] That meant, the Court said, that Mrs Couper would have had the requisite interest in the old trust to allow the s 41 advancement powers to be used.[34] In coming to this conclusion, the Court again seems to have based its view on the proposition that if a power existed, the validity of what was done was not negated merely because the power was not expressly relied upon.

[30] The Court accepted that the Kain children had a prior interest in terms of para (c) of s 41. Unlike Panckhurst J, it considered, correctly as we have already

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31 At para [82].
32 At para [84].
33 At para [88].
34 At para [88].

indicated, that there was a difference between default and discretionary beneficiaries. But it was persuaded that the Kain children's interest was so remote that the High Court would have been entitled to use its powers under para (c) "to endorse the resettlement even without consent".[35] The Court also rejected an argument that the resettlement was excessive, saying that a benefit can include the fulfilment of the moral obligations of an object that the beneficiary would otherwise have to discharge out of his or her own resources. The inclusion of Mrs Couper's children in the new trust was unobjectionable as she owed a clear moral duty to them: "the question of whether a trust is for the benefit of a person must be assessed in the context of modern conditions where discretionary trusts like the new Mangaheia trust are the norm".[36] The Court said that the inclusion of Mrs Hutton and the Kain grandchildren might be "more problematical in this regard, particularly as the Kain grandchildren were not possible capital beneficiaries of the old Mangaheia Trust".[37] However, Mrs Hutton was a possible object of the cl 4 power of appointment. There was nothing to suggest that Mrs Couper did not feel a moral obligation to her husband's family, and no one had challenged the inclusion of the Kain grandchildren as beneficiaries in the event that the resettlement was upheld.

[31] The Court also rejected arguments for the appellants that the trustees had acted in bad faith or unreasonably. It accepted that the desire to benefit Mrs Couper was an entirely proper one. Accordingly, it upheld the resettlement of the Mangaheia Station shares.

[32] In essence, the Court of Appeal considered that if the Mangaheia resettlement failed as an exercise of the s 41 power of advancement, it could nevertheless be upheld if treated as an exercise of the cl 4 power of appointment. It seems to us, however, that this approach was unsound. A power of appointment and a power of advancement, although they may have much in common in their practical application, are in substance quite different things. Thomas and Hudson, *The Law of Trusts*, makes the point:[38]

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35 At para [91].
36 At para [94].
37 At para [95]. They were in fact substitutionary capital beneficiaries.
38 (2004), para [14.35].

> There is an obvious difference between powers of *appointment* and powers of *advancement* in that no object of a power of *appointment* has any interest in the appointable property unless and until the power is exercised in his favour, whereas a common-form power of *advancement* applies to and operates in respect of a particular beneficiary's interest in the capital of the trust fund.

It was said in *Re Morris's Settlement Trusts* that the two kinds of power are "by no means analogous".[39] The matters relevant to the consideration of an exercise of each power may differ substantially. A power of appointment amongst discretionary objects (a special power) is a power to select whether and to what extent and at what time one or more of the discretionary objects will receive any part of the trust fund, perhaps with the result that other discretionary objects will miss out entirely. It is often under a modern trust deed the most significant or fundamental power which the trustees have at their disposal. In contrast, a power of advancement is a purely ancillary power enabling the trustees to anticipate by means of an advance under it the date of actual enjoyment by a beneficiary, and it can only affect the destination of the trust fund indirectly in the event of the beneficiary failing to attain a vested interest.[40] Crucially, s 41 requires that the beneficiary in question must already have at least a contingent interest in the capital of the fund, although in many cases there may be the potential for that interest to be defeated in the manner described in the section, namely by the exercise of a power of appointment or revocation, or by being diminished by the increase of the class to which the beneficiary belongs.

[33] The decision to be made on an *advancement* is therefore of a different character from a decision on an appointment: not whether the selected object is to benefit at all, but whether that person should receive his or her entitlement at an earlier time and possibly in a different manner and perhaps to the disadvantage of someone else who already has an interest in the fund. In the case of an *appointment* among discretionary objects, the other objects in that class ordinarily are not being deprived of anything more than their mere hope of an exercise of discretion in their

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39 At p 533 per Jenkins LJ.

40 *Re Morris's Settlement Trusts* at p 532 per Jenkins LJ.

favour.[41] It is perhaps because of this difference in the character of the two types of power, reflecting the fact that a power of advancement is exercisable only in favour of a beneficiary with an absolute or contingent interest in the capital of the trust property, that the courts have tended, especially since *Pilkington*, to have been more liberal in determining that a power of advancement has not been exercised excessively when that has occurred by way of resettlement. It has been suggested that this may reflect the fact that s 41 itself expressly recognises that the capital interest of the beneficiary selected for an advancement may be "contingent or defeasible, in remainder or in reversion".[42]

[34] In his concurring judgment, when comparing powers of appointment and advancement, Tipping J discusses the circumstances in which a power of advancement can properly be said to have been exercised for the benefit of the recipient. On the present state of the authorities this is a question of some uncertainty upon which we have found it unnecessary to express any view in this case in the course of determining that the two powers are quite distinct from one another.

[35] Where trustees have attempted to use a power they did not in fact enjoy, the courts will not come to their rescue by treating their action as if they had been engaged in exercising a quite different power that they did actually possess. A court of equity will not exercise a power which a donee has a discretion to exercise but has failed to exercise.[43] It is true, as the Court of Appeal in fact observed,[44] that an incorrect or incomplete description of the power exercised is not fatal if the intention to exercise the power is otherwise clear. So, in *Re Eardley Wilmot*[45] a reference to the wrong deed, which was clearly just a slip, did not invalidate the actions of the trustees when it was quite plain what they believed they were doing and that such an action was within their powers. Sir John Romilly MR said that the exercise of the

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41 *Hunt v Muollo* [2003] 2 NZLR 322 at para [11] (CA), citing, inter alia, *Gartside* at pp 607 and 615 and *Queensland Trustees Ltd v Commissioner of Stamp Duties* (1952) 88 CLR 54 at pp 62 – 65.

42 *Thomas on Powers*, para [7-72].

43 Keeton and Sheridan, p 292.

44 At para [83].

45 (1861) 29 Beav 644; 54 ER 777.

power was not to fail because the trustee did not properly describe the instrument under which the power was derived.[46] In other words, only the source of the power had been misdescribed. But, as Merkel J pointed out in *Collins v AMP Superannuation Fund*,[47] the position is quite different where the trustees mistakenly try to use a power which is materially different from the power which they actually have, and which they later seek to rely upon to justify what they have done. Megarry J has stated the position up in the following way:[48]

> If the instrument shows an intention not to exercise the power, then it is inconceivable that it should be exercised; if, on the other hand, it shows an intention to exercise the power, I can see no reason why that intention should not suffice. If the instrument displays no intention one way or the other, then I would hold that prima facie the power has not been exercised. The donor of the power has confided to the donee power to make an appointment, and, statute apart, I do not think that to hold that the donee has exercised the power unawares is likely to accord with the intention of either the donor or the donee.

[36] In *Re Gosset's Settlement*,[49] which is especially relevant to the present appeal, Sir John Romilly MR was asked to treat an advancement as if it were an appointment. While he entertained no doubt that the Court would "supply a defect" in an appointment, as he later did in *Eardley Wilmot*, he said in *Gosset* that he looked in vain to see any attempt at making one. The documentation indicated that the sums in issue had been paid for the advancement of a son. The Master of the Rolls said that:[50]

> when there is a power of advancement and a power of appointment, and the rights of the parties under the two are distinct and different, so that the question arises as to which power the payment of these sums is to be referred, I think there is no question but that the Court must attribute it to that to which it is obviously *prima facie* applicable, namely, to the power of advancement, and not to the power of appointment; especially when this is confirmed by the memoranda of both the father and mother, and there is no instrument or document attempting or purporting to execute the power of appointment in favour of the son.

[37] In the present case, the trustees very deliberately embarked upon a purported exercise of their power of advancement. That is very plain from the explicit

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46 At p 646; p 778.
47 (1997) 147 ALR 243 at p 247 (FC).
48 *Re Lawrence's Will Trusts*; *Public Trustee v Lawrence* [1972] 1 Ch 418 at p 430 (ChD).
49 (1854) 19 Beav 529; 52 ER 456.
50 At pp 535 –536; p 459.

references to s 41 and to *Pilkington* in the recitals of the deed poll. The operative clause invokes powers to resettle which are found not in the trust deed itself but in the case law, particularly in *Pilkington*. But of course those are powers to make a resettlement as a means of advancement only to a beneficiary with an absolute or contingent interest. The trustees appear to have been well aware of the distinction between advancement and appointment. They had chosen on the same day to travel a different route, namely appointment, in relation to the Ponui shares. If they had actually wanted to make an appointment for the benefit of Mrs Couper in relation to the Mangaheia Station shares, they knew how to do this and would surely have proceeded in the same way as they did for the Ponui shares. This suggests very strongly that they were intent on something different in relation to the Mangaheia Station shares. It may be that they were concerned that what they wanted to do might not be achievable by an appointment under cl 4. Whether or not that is so, the election against the use of cl 4 makes it quite impossible to argue that what occurred should be regarded as an appointment made under that clause.

[38] The Court of Appeal accordingly erred in deciding that the invalid advancement (made to someone who had no entitlement to the capital and made without the consent of the adult Kain children) could properly be treated as an appointment under cl 4, even on the assumption that an appointment in reliance on that clause, taking the form of a resettlement on the terms of the new Mangaheia Trust, would have been permissible.

[39] That being the case, the resettlement was invalid unless the Court of Appeal's alternative approach can be supported. We are satisfied that it cannot. The Court of Appeal appears to have reasoned that for the purposes of s 41 Mrs Couper could be regarded as if she had an interest in the capital of the fund because under cl 4 an appointment of capital could in the discretion of the trustees have been made to her. Thus, as she could have become entitled to capital, for the purposes of s 41, she should be treated as so entitled. With respect, that argument is not only circular but also again relies upon the existence of a quite different power which the trustees chose not to use. The fact of the matter, however regrettable it may be from the viewpoint of the respondents, is that Mrs Couper was not a capital beneficiary of the old trust in the absence of a valid appointment in her favour. And, ironically, if such

an appointment had ever been made of the Mangaheia Station shares under cl 4, requiring as a prerequisite a decision to bring forward the vesting date (which also did not happen), it seems that no advancement under s 41 would have been necessary.

[40] Furthermore, if the Court of Appeal's reasoning had on this point been supportable, so that there was in fact power to make an advancement to Mrs Couper, that still could not have been done without either the written consent of the Kain children, as the Court of Appeal accepted, or the approval of the High Court under para (c) of s 41, which the Court of Appeal felt would have been given. But no application for approval was ever made and s 41 does not appear to contemplate a retrospective approval.

[41] It follows that in relation to the Mangaheia Station shares the appeal must be allowed. The resettlement pursuant to the deed poll was an attempt to make an advancement which was unauthorised and therefore void. No appointment was made of the shares. They are accordingly still held by the trustee[51] in terms of the old Mangaheia Trust deed.

[42] It is unnecessary, in these circumstances, for this Court to determine whether an appointment by way of resettlement on the terms of the new Mangaheia Trust, relying on cl 4, would have been valid. All that need be said is that there do appear to be arguments of some substance against that view. In upholding the Ponui appointment we have particularly been influenced by the strong element of control which Mrs Couper has under the trust upon which she herself resettled the Ponui shares. A submission that the Mangaheia resettlement should similarly be viewed as made for the benefit of Mrs Couper, and can legitimately be treated as if there had been an appointment to her in absolute form and a resettlement by her,[52] would encounter the response that the new Mangaheia Trust is effectively controlled by Mr Couper, who in that instance holds the ability to appoint and remove trustees and

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51 The Court of Appeal recorded at para [265] of its judgment that Mrs Couper, Mr Hutton and Mr Startup have now been replaced by the Public Trustee.

52 Equity will not necessarily insist on circuity of actions, that is, the taking of multiple steps, where the same result can be achieved more directly: see, for example, *Daniel v Arkwright* at p 104; p 400; *Re Lord Gisborough's Settled Estates* [1921] 2 Ch 39 (ChD) and *Re Collard's Will Trusts*; *Lloyds Bank Ltd v Rees* [1961] Ch 293 (ChD).

discretionary beneficiaries. That makes it difficult to contend that the inclusion of non-objects of the old trust, her children, was done entirely to benefit her by enabling her to discharge her moral duty to them.

Result

[43] The appeal in relation to the Ponui Station shares is dismissed. The appeal in relation to the Mangaheia Station shares is allowed and it is declared that they remain vested in the trustee or trustees for the time being of the old Mangaheia Trust on the terms of the trust deed of 3 June 1981.

[44] The appellants have succeeded in relation to the larger of the assets in dispute but failed in relation to the Ponui shares and have failed to obtain leave on several other grounds after an oral leave hearing. They should have costs in this Court of $10,000 together with their reasonable disbursements, fixed if necessary by the Registrar, to be paid by the second and third respondents. So far as we are aware, costs in the High Court and the Court of Appeal have been reserved. The parties may apply to those Courts respectively to have costs fixed if agreement cannot be reached.

TIPPING J

[45] I agree that this appeal should be determined as Blanchard J has proposed in paras [43] and [44]. My reasons are broadly the same as his but on two points I wish to add some comments of my own.

Fraud on a power

[46] The expression fraud on a power is historical language for when a power is misused in an ultra vires manner. When an appointment is made pursuant to a power of appointment the person making the appointment (who can be called either the donee of the power or the appointor) is acting pursuant to a mandate granted by the

donor of the power and must stay within that mandate. The donor is normally the settlor of an inter vivos trust or the testator when the power is contained in a will.

[47] A general power of appointment entitles the donee/appointor to appoint to anyone at all, including himself. There cannot therefore be excessive execution of, or a fraud on, such a power because it is logically impossible for the donee/appointor to exceed the donor's mandate. By contrast a special power enables the donee/appointor to appoint only to those specifically permitted by the donor's mandate. A special power is one where the objects of the power are limited by the terms upon which the power is granted. An appointment to a person who is not a permitted object will usually represent an excessive execution of the power. The species of excessive execution known as a fraud on the power normally comes about when the appointment is in form to an object but in substance to a non-object. In such a case the object is simply a vehicle through or by means of whom the appointor's purpose of benefiting the non-object is carried out. Hence a fraud on a power is a clandestine excessive execution because it is regular on its face but in reality is undertaken for a purpose not within the donor's mandate.

[48] Against that background I do not consider the classic statement of Lord Parker of Waddington in *Vatcher v Paull*,[53] that for there to be a fraud on a power "it is enough that the appointor's purpose and intention is to secure a benefit … [for] some other person not an object of the power", can be applied in those literal terms and in isolation of the rationale of the doctrine. To do so would catch transactions which do not offend in substance against the reason for restraining or setting aside frauds on powers of appointment, namely to keep the appointor within the donor's mandate.

[49] The problem with Lord Parker's formulation, unless it is understood and applied in the light of the substantial body of case law which preceded it,[54] is that it has the focus in the wrong place. An appointment which secures a benefit for a non-object is not for that reason alone a fraud on the power. The focus should rather be

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53 [1915] AC 372 at p 378 (PC).

54 And indeed cases decided subsequently such as *Re Burton's Settlements*; *Scott v National Provincial Bank Ltd* [1955] Ch 82 (ChD).

on whether the purpose of the appointment was truly to benefit an object. If that is so, it does not matter that a non-object also obtains a benefit.

[50] In *Pilkington*'s case Viscount Radcliffe suggested that the primary benefit must be to the object, with the benefit to the non-object being "incidental".[55] I agree with what Thomas says in his work on powers[56] that it seems clear from the cases that the benefit derived by the non-object need not be merely incidental. That said, whatever the nature and comparative level of the benefit conferred on the non-object, the key point is that the purpose of the appointment must truly be to benefit the object. Whether that is so should be determined in a broad way bearing in mind the commercial, conveyancing, family or other realities of what is occurring.

[51] The normal rationale for the use of a special power of appointment is to give to the donee/appointor the ability to choose, on the donor's behalf, among a range of potential beneficiaries nominated by the donor. The power is given because the donor is unlikely to be able to anticipate all the relevant circumstances, including fiscal considerations, which will apply at the time the appointment falls to be made. Hence the donor gives the power to a person or persons whom he trusts to make the selection when the time comes and when the relevant circumstances are known.

[52] The appointor may decide that object A should be the subject of an appointment. Object A is aware of the proposed appointment. She wants to pass the benefit of the appointment on to a family trust. She does not want to be left with the conveyancing and potential gift duty implications of receiving the property herself and then transferring it to the trust. Provided she is fully informed of her rights and is not subject to any improper pressure, I consider it would be too narrow a view to insist on the appointment being made to object A herself, despite her wish to direct the appointment elsewhere. In these circumstances the appointment is of benefit to A as well as to the non-objects who take possession.

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55 *Pilkington v Inland Revenue Commissioners* [1964] AC 612 at pp 630 – 642, and in particular p 636.

56 *Thomas on Powers* (1998), para [9-51], footnote 46.

[53] In such circumstances, the appointor, if acceding to A's request, clearly has the purpose and intention of benefiting non-objects if the beneficiaries of the family trust are not objects of the power which the appointor is exercising. But cases of this kind have never been regarded as caught by the doctrine of fraud on a power.[57] This is because the direction of A is regarded as justifying the direct appointment to the family trust, albeit its beneficiaries are non-objects. The rationale for this view is that such a transaction is not fairly capable of being regarded as an abuse of the donor's mandate as it is truly of benefit to A, albeit it is also of benefit to the beneficiaries of the family trust.

[54] Clearly, in the present case, as Blanchard J's reasons demonstrate, there was no abuse of the appointor's mandate in the appointment of the Ponui shares directly to the Annette Couper Ponui Trust. The terms of that trust and the circumstances in which Mrs Annette Couper acquiesced in the appointment being made to the trust rather than to herself, demonstrate that the appointment was of real benefit to Mrs Couper, she being an object of the power. It is not a case where the donor of the power can reasonably complain that the power has been misused. Hence I would reject the contention that the appointment of the Ponui shares represented a fraud on the relevant power.

Powers of appointment and advancement

[55] The second point I wish to address is the apparent equation by the Court of Appeal of a power of advancement with a power of appointment. The two are materially different and different considerations apply to the exercise of one power as against the other. The objects of a power of appointment generally have no legal or equitable interest in the property the subject of the power unless and until it is exercised in their favour. Before that they have only a hope that the power may be exercised in their favour.[58] On the other hand, a power of advancement under s 41 of

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57 See for example *Goldsmid v Goldsmid* (1842) 2 Hare 187; 67 ER 78.

58 See *Hunt v Muollo* [2003] 2 NZLR 322 (CA) and *Johns v Johns* [2004] 3 NZLR 202 (CA).

the Trustee Act or any cognate express power of the same kind may be exercised only for the maintenance, education, advancement or benefit of a person who does have an interest in the property concerned, whether vested or contingent, albeit their interest is not yet enjoyed in possession.

[56] Importantly, a power of advancement may be exercised only if there is some "good reason" to exercise it at the time and in the manner proposed.[59] That good reason must of course be of benefit to the person the subject of the advancement. But in spite of the width of the concept of benefit, *Pauling'*s case shows that it is insufficient simply to make an advancement on the basis that any receipt of money or other property ahead of the date of vesting in possession must be of benefit to the recipient. The concept of benefit is wide but not wholly unrestricted.

[57] For example, proposed advancements close to the date of vesting in possession should be viewed cautiously. Trustees must make sure that there really is a good reason to advance the date.[60] Similarly, advancements when the trustees are or should be aware that the beneficiary may be going to use the money or other property unwisely should also be viewed with caution, unless the advancement is by means of a protective trust.[61]

[58] Need, as such, is not the touchstone but if there is a total absence of material or moral need the interests of those who take in default should be preferred to those of the proposed advancee. The position, in short, is that trustees may exercise their discretionary power to make an advancement only if they have formed the considered view that there is good reason to do so and it truly will be of benefit to the advanced beneficiary to exercise the power in the manner contemplated.[62]

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59 See *Re Paulings Settlement Trusts* [1964] Ch 303 at p 333 (CA) per Willmer LJ delivering the judgment of the Court of Appeal in a case decided shortly after *Pilkington* was decided in the House of Lords.

60 See *Lewin on Trusts* (18th ed, 2008), para [32-18] and *Pilkington* in the House of Lords at pp 640 – 641.

61 See Thomas and Hudson, *The Law of Trusts* (2004), para [14-31].

62 See Thomas and Hudson, para [14-30] citing *Phillips v Phillips* (1853) Kay 40; *Re Kershaw's Trusts* (1840) LR 6 Eq 322 and *Re Moxon's Will Trusts* [1958] 1 WLR 165 (ChD).

[59] In this respect powers of advancement are different from powers of appointment.[63] A person exercising a power of appointment is exercising a discretionary power to select who should take from a group of potential beneficiaries. That is a materially different task from that required of someone exercising a power of advancement. There, the essential question is whether a distribution should be made ahead of the time at which the beneficiary would otherwise receive possession of property in which they already have an interest.

[60] A misdescription of a power which has otherwise been validly exercised is capable of remedy, if necessary, by an ordinary rectification suit.[64] But in this case the trustees of the old Mangaheia Trust purported to exercise a power which they did not possess. There is no basis upon which that ineffective act can be validated by means of the Court ascribing to the trustees an intention to exercise a materially different power which, with the Ponui precedent in front of them, they demonstrably did not exercise. Indeed, even if the contrast provided by the Ponui transaction had not been present I do not consider the trustees could properly be treated as having exercised a power of a materially different kind requiring examination of materially different considerations.

[61] Powers of appointment and advancement are processes by means of which interests in property are transferred from one person (usually a trustee) to another. Those affected by their exercise are entitled to expect that those who exercise them should act with clarity and accuracy. It is one thing to correct an obvious descriptive slip or other error; it is quite another for the Court to deem a substantively different power to have been exercised.

[62] For these reasons I agree that the purported "resettlement" of the old Mangaheia Trust, which could only be achieved by appointment rather than advancement, was ineffective. The property concerned is still subject to that Trust and must be vested in the Public Trustee who is now its trustee.

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63 Unless of course the express terms of the power circumscribe its exercise by reference to benefit in which case that will be an additional criterion as well as the standard requirement that the appointee be an object of the power.

64 See *Re Butlins Settlement Trusts* [1976] Ch 251 (ChD) and the other cases cited in *Underhill and Hayton on Law of Trusts and Trustees* (17th ed, 2006), para [9.71]. Unilateral instruments such as a Deed Poll may be rectified as well as bilateral ones.

Solicitors:
Wynn Williams & Co, Christchurch for Appellants
DLA Phillips Fox, Wellington for Second Respondent
Duncan Cotterill, Christchurch for Third Respondent