IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 8/2023
[2024] NZSC 173

BETWEEN	KEN LEGLER LAILA SUN LEGLER KLAUI Appellants
AND	MARIA GUILLAUMINA CORNELIA JOHANNA FORMANNOIJ First Respondent
AND	KAAHU TRUSTEE LIMITED Second Respondent

Court: Winkelmann CJ, Glazebrook, O'Regan, Williams and Miller JJ

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

Judgment: 18 December 2024

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must pay the respondents total costs of $25,000 plus usual disbursements.

REASONS

GLAZEBROOK, O'REGAN, WILLIAMS AND MILLER JJ
(Given by Glazebrook J)

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Introduction

[1] Mr Ricco Legler (Ricco),[1] Ms Maria Formannoij (Marina)[2] and Bay of Islands Taxation Trustee Company No 2 Ltd (BOI) were the original trustees of the Kaahu Trust (Kaahu). Ricco died in an accident in November 2017. BOI retired as a trustee on 21 November 2019. On 27 November 2019, Marina appointed Kaahu Trustee Ltd (KT Ltd) as the corporate trustee of Kaahu and then resigned as trustee. Marina is the sole director of KT Ltd.

[2] Ricco's three adult children from a former marriage, Li and Ken Legler and Laila Legler Klaui, issued proceedings alleging that the appointment of KT Ltd was

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1 We use first names for ease of reference.
2 Ms Formannoij's legal first name is Maria but she prefers to be called Marina.

for an improper purpose—to enable Marina to use the trust property to benefit herself at their expense.[3]

[3] Li, Ken and Laila failed in their challenge in the High Court.[4] The Court of Appeal, by majority, dismissed the appeal against that decision.[5] Leave to appeal to this Court was granted on 4 May 2023.[6] Li is not a party to the appeal in this Court. The appeal is continued by Ken and Laila alone.

[4] It is common ground that the appointment of a corporate trustee, including where a beneficiary is the sole director and a shareholder, is consistent with the terms of the Deed of Declaration of Trust creating the Kaahu Trust (the Deed).[7]

[5] It is also common ground that whether Marina's purpose in appointing KT Ltd as trustee was improper is judged subjectively (that is, according to her intent) at the date of the exercise of the power.[8] This means that at trial Li, Laila and Ken had to prove that the appointment of KT Ltd, at the time the appointment was made, was for the purpose of benefiting Marina at their expense. If that has not been proved then the appeal fails, whether or not, and in what circumstances, an intention of benefiting herself at the expense of Ricco's children would have been an improper purpose.[9]

[6] We conclude that the appointment was not proved to be for that alleged purpose, largely for the same reasons as in the Courts below. The appeal must

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3 See further below at [135].

4 *Legler v Formannoij* [2021] NZHC 1271, (2021) 5 NZTR ¶31-006 (Downs J) [HC judgment].

5 *Legler v Formannoij* [2022] NZCA 607, (2022) 5 NZTR ¶32-013 (Brown, Brewer and Cull JJ) [CA judgment].

6 *Legler v Formannoij* [2023] NZSC 46 (O'Regan, Ellen France and Kós JJ). The approved question was whether the Court of Appeal was correct to dismiss the appeal.

7 Ken and Laila do not seek to support Cull J's conclusion, discussed below at [98], that a trustee company would be the only proper sole corporate trustee.

8 *Eclairs Group Ltd v JKX Oil and Gas plc* [2015] UKSC 71, [2016] 3 All ER 641 at [15] per Sumption LJ; and see the authorities there cited: *The Duke of Portland v Topham* (1864) 11 HLC 32, 11 ER 1242 (HL) at [54] per Lord Westbury LC, regarding the subjective assessment occurring at the point the power is exercised; and *Hindle v John Cotton Ltd* (1919) 56 SLR 625 (HL) at 630 per Viscount Finlay, regarding the test being subjective.

9 There was some indication during the oral hearing that counsel for Marina and KT Ltd conceded that Marina taking control of Kaahu Trust [Kaahu] for the purpose of benefiting herself would have been an improper purpose, but this apparent concession was at odds with their written submissions, outline of oral argument and some of their other oral submissions made at the hearing.

therefore be dismissed. Given this conclusion, we do not need to address the legal questions related to the scope of the improper purposes doctrine.

[7] In this judgment, we first give a detailed summary of the events that occurred both before and after the death of Ricco. We then provide summaries of the decisions below and of the submissions of the parties. After this, we assess the factual issue on which this case largely turns: Marina's intent at the time of the appointment of KT Ltd as trustee. Finally, we provide some comments on the reasons of the Chief Justice.

Background

[8] Marina and Ricco met in 1989 in the Caribbean, and their relationship began that year. They moved to New Zealand in October 1991 where Marina trained as an osteopath. Ricco had, in 1986, purchased a farm in the Bay of Islands. He later purchased a forestry block. Once the couple moved to New Zealand, they lived in a farmhouse on the farm. They married in 2009.

[9] Li moved to New Zealand in 1991 and Laila came a year or so later. Marina says that, as Laila grew older, Laila's relationship with Ricco and her deteriorated.[10] Marina says she still has a good relationship with Li, but her relationship with Ken weakened as he got older. Ken currently lives in Perth.

[10] Ricco's father died in 2002, leaving a substantial inheritance to Ricco.[11] Ricco was able to use part of this money to pay off debts (together with interest) owed to his father in relation to the farm property.[12] Ricco's legacy ultimately led to the creation of two family trusts: the Horowai Family Trust (Horowai) on 2 March 2007

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10 Li says that Ricco and Laila's relationship was strained at times but this was because of the strained relationship between Laila and Marina. Laila says that her relationship with Ricco was complicated by the relationship with Marina (particularly in her teen years) but her relationship with her father, while up and down, improved as she got older.

11 Ricco received various distributions (including in shares and foreign currency) totalling over CHF 5 million (Swiss Francs, around NZD 9.6 million at today's exchange rate) from two Europe-based foundations created by his father to provide for his family. Ricco initially held these distributions in his own foundation but eventually decided to wind up this foundation due to compliance costs. On 7 May 2013 around NZD 7.6 million was transferred from Ricco's foundation to Kaahu.

12 It is not clear whether there was debt owing on the forestry land.

and Kaahu on 9 June 2008. Ricco's father also left CHF 750,000 (Swiss Francs, around NZD 1.4 million at today's exchange rate) each to Li, Ken and Laila.[13]

[11] Marina's evidence was that the dual trust structure was set up on the basis that Horowai was primarily to hold assets for Ricco's children and Kaahu was primarily intended to provide her and Ricco with a home and income as they grew older. She says that Kaahu was "never intended to provide [the children] with any significant financial benefits".[14]

[12] As further background, on 10 July 2003, Ricco and Marina signed a relationship property agreement (the 2003 agreement) by which they contracted out of the Property (Relationships) Act 1976. Ricco acknowledged Marina as (at that stage) his de facto partner and agreed that she would be given a significant share of the farm and forest properties if he died. This agreement was overtaken by the formation of the two trusts and in 2008 the transfer of the farm to Kaahu and the forestry block to Horowai.[15]

[13] Marina's evidence was that she did not remember whether she and Ricco had really thought about the 2003 agreement when they started to transfer everything across to the trusts. She said, however, that she knew she was giving up the 2003 agreement as the new structure would be a "better way of making sure that the children had their own trust and that Ricco and I had our own property and income, held in Kaahu".

[14] Marina said that she had been intimately involved with setting up the trusts as it was important to her that she be protected if Ricco died, given the difficult

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13 HC judgment, above n 4, at [56]. The Chief Justice says below at [151] of her reasons that it is not in dispute that the original source of the wealth settled on both trusts was Ricco's father. We accept this is the case with regard to the sum of over CHF 5 million referred to above n 11. The extent to which it is the case with regard to the farm assets is not clear as the evidence does not appear to indicate the amount of the loans owed on the farm properties.

14 Marina agreed in cross-examination that the forgiveness of $900,000 for the sale of a plot of land from the Kaahu to the Horowai Family Trust [Horowai] was a significant benefit to the children: see below at [28]. She similarly agreed during cross-examination that the $3 million which was transferred from Kaahu to Horowai was a significant financial benefit: see below at [31].

15 Below at [27]. Later dealings are set out below at [28]–[40].

relationship they had with Laila in particular: "I wanted things to be right for Ricco and me, and for the children." Marina also said:

> … I gave up my own separate property to ensure that the farm and forest properties were held for [Ricco's children] in the Horowai Family Trust, on the basis that Kaahu would then be effectively ring-fenced as separate property for the benefit of me and Ricco. That has always been the purpose of the Kaahu Trust … Whatever remains in Kaahu, after my death, will go to them.

[15] Li, in his trial evidence, acknowledged that Ricco intended Kaahu to provide Ricco and Marina a home and income as they grew older. Li said that Ricco would draw $200,000 a year from the trust, pay $60,000 to the children's mother, Gitta, and use the rest to support Marina and himself.[16] Li did not, however, accept that his father would have thought of Kaahu as only being for him and Marina to the exclusion of his children and grandchildren. Li pointed out that Ricco did not remove him, Laila or Ken as beneficiaries of Kaahu when Ricco was removed as a beneficiary of Horowai.[17] Li said, however, that he and his siblings do not wish to deprive Marina of the financial support she receives from Kaahu.[18]

Kaahu Trust

[16] Kaahu was established by the Deed dated 9 June 2008. As noted above, the original three trustees of Kaahu were Ricco, Marina and BOI. Philip Tyler was the director of BOI[19] and also acted as accountant for both Horowai[20] and Kaahu. Kaahu's sole trustee is now KT Ltd.

[17] The final beneficiaries of Kaahu are Ricco and Marina. The discretionary beneficiaries of the trust are the final beneficiaries, any issue[21] (descendant) of any final beneficiary, any trust which includes among its beneficiaries any beneficiary or

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16 Gitta's full first name is Birgitta. She is Ricco's former wife.

17 See below at [26].

18 Laila in her evidence agreed with this, although she said she just knew the trust belonged to Ricco rather than it being set up primarily for both Ricco and Marina.

19 Marina says that, while he was to act as an independent trustee for Kaahu in his capacity as director, Mr Tyler never had much involvement with significant decisions. Such decisions were made by Ricco and her. According to Marina, while Mr Tyler did provide advice, he never disagreed with the decisions she and Ricco had made.

20 Mr Tyler ceased to be the accountant for Horowai in May 2019.

21 Defined in cl 2.1 as "lineal descendants, adopted or natural born".

their issue, and any beneficiary appointed by deed by the trustees.[22] Clause 11 of the Deed gives the trustees the power to add or exclude beneficiaries, including final beneficiaries.[23]

[18] Clauses 4 and 5 have the effect of allowing the trustees to make distributions of "all or any part" of the trust income or capital to any one or more of the beneficiaries.

[19] Clause 6 provides that the trustees shall hold the trust fund on the vesting day on trust for those of the living final beneficiaries, or their issue, who the trustees appoint by deed to benefit from the trust fund. In respect of any portion of the trust fund not appointed, the Deed provides in relevant part that the fund is held for the final beneficiaries then living as tenants in common in equal shares.

[20] If either of the final beneficiaries has died before the vesting date then that person's share passes to the issue of that final beneficiary living on the vesting day. This means that, if Ricco predeceased Marina and she was alive at the vesting day (which is able to be brought forward),[24] then (assuming no valid appointment to any other eligible beneficiary)[25] Marina would take a half share of the trust assets and Ricco's children would take the other half.

[21] Under cl 8.3, decisions of the trustees are required to be unanimous. Clause 18.1, however, reads: "Any power or discretion vested in the Trustees may be

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22 Clause 2.1.

23 Clause 2.1 defines "[b]eneficiary" as "any person who receives or may receive an interest in the Trust Fund". So, while cl 11 just refers generally to a power to appoint beneficiaries of the trust, this includes final beneficiaries.

24 Clause 2.1 defines the "[v]esting day" as the day upon which the period of 80 years from the date of Deed of Declaration of Trust creating the Kaahu Trust [the Deed] expires, or such earlier day as the trustees by deed appoint.

25 For the power to appoint and remove final beneficiaries see above n 23.

exercised in favour of a Trustee who is also a Beneficiary by the other Trustee or Trustees."[26]

[22] Clause 14 provides that the trustees may at any time resettle the Deed and all or any of the trust fund upon the trustees of a trust which includes among its beneficiaries one or more of the beneficiaries of Kaahu.

[23] Clauses 26 and 27 concern trustees. Relevantly, cl 26 provides that, unless a corporate body is the sole trustee, the only power of a sole trustee is to appoint a new trustee; and that the trustees must include one person who is independent of the beneficiaries. Clause 27 provides that a corporate body can be the sole trustee or one of a number of trustees and, in terms of cl 27.2(c), that it can exercise the functions of a trustee despite the fact that doing so may directly or indirectly benefit a beneficiary with an interest in the trustee (whether as director, officer or shareholder or otherwise). In full the clauses provide:

> **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.
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> **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.

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[26] We comment that, while Ricco was alive, it does not appear as if cl 18.1 of the Deed was interpreted as requiring Ricco to stand aside in decisions to make distributions to himself: see above n 19. This may be because decisions of Kaahu had to be unanimous (cl 8.3) and, therefore, involve all three trustees. Indeed, if Ricco were required to stand aside, then cl 8.3 would act to bar any distribution from being made—effectively meaning that no distribution could ever be made in Ricco's favour (which clearly would not reflect the intent of the Deed). The possible conflict between the two provisions may have been resolved by taking the view that cl 18.1 would be satisfied if the other two trustees (including Bay of Islands Taxation Trustee Company No 2 Ltd [BOI] as the independent trustee) were individually satisfied it was appropriate to decide to benefit Ricco before making a distribution. Having Ricco nevertheless also involved in making the decision would also satisfy cl 8.3.

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.

Horowai Trust

[24] The sole trustee of Horowai was from inception, and remains, Horowai Trustee Co Ltd (HT Ltd). The original directors of HT Ltd were Ricco and Li. Li and Laila are the current directors. The trust was established by the Deed of Declaration of Trust creating the Horowai Family Trust (the Horowai deed) dated 2 March 2007 by HT Ltd.

[25] The discretionary beneficiaries of Horowai are:

(a) the final beneficiaries and any issue[27] of the final beneficiaries;

(b) any "wife, husband, widow, widower, former wife, former husband, [de facto partner] or former [de facto partner]"[28] of any final beneficiary or issue of any final beneficiary;

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27 Defined as "lineal descendants, adopted or natural born".

28 "De facto partner" is defined as "any natural person who is or who has been at any time a partner in a de facto relationship as prescribed by the Property (Relationships) Act 1976".

(c) any trust which includes among the beneficiaries any beneficiary or issue of any beneficiary; and

(d) any beneficiaries the trustees appoint pursuant to the Horowai deed.

[26] Ricco, Li, Laila and Ken were originally the final beneficiaries but Ricco was removed as a final beneficiary on 30 May 2014.[29] Marina was not a final beneficiary of Horowai but, until Ricco was excluded as a final beneficiary of Horowai, she was a discretionary beneficiary because she was Ricco's de facto partner and, from 2009, his wife. Li's evidence was that Ricco was removed[30] as a beneficiary by HT Ltd to make sure that Marina could not have any claim to Ricco's share of Horowai, as Ricco's dream was for the forest[31] to be there for the long term.[32]

Asset transfers before 2018

[27] On 1 September 2008, Ricco sold the forestry block he had purchased in the Bay of Islands to Horowai for around $2.7 million.[33] Also in 2008, the adjacent farm was subdivided into two titles (lots 1 and 2) and sold to Kaahu for around $5.7 million.

[28] Lot 2, including the farmhouse, was sold to Horowai in May 2015 with the sale price of $900,000 being forgiven by way of distribution from Kaahu to Horowai.

[29] Lot 1 was sold to a third party for $3.1 million in November 2015. Around half of the proceeds was used to buy land near Russell where a new home for Ricco and Marina was built, called Mokomoko.[34]

[30] The balance of Kaahu's assets comprised managed funds which provided passive income. Around $7.6 million had been transferred into Kaahu in 2013, a

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29 Any other child or children of Ricco born or adopted before the vesting day were also final beneficiaries, but he had no more children.
30 Ricco agreed to being removed.
31 See below at [27].
32 Laila said she agreed that Ricco's dream was for the forest to be there for the long term.
33 But settlement did not occur until 31 March 2010, possibly due to a delay in waiting for titles to issue.
34 The house itself cost $1.7 million to build, but this seems to have been funded by Ricco personally.

product of the legacy left to Ricco by his father.[35] The remaining $1.5 million from the sale of Lot 1 was also deposited into the managed funds.

[31] In mid-2017, a total of $3 million was withdrawn from Kaahu's managed funds and transferred to Horowai. Ricco told his financial advisor, Alan Clarke, that he and Marina had decided to do this to set his children up financially. Part of the gift was intended to assist with the costs of managing the forest. The transfer was not prompted by any pressing need for financial assistance on the part of the children.[36]

[32] Mr Clarke, who had managed the investments of Kaahu since 2013,[37] gave evidence that the notes from his first meeting with Ricco show that Ricco was very clear that Kaahu was intended to be for the benefit of himself and Marina and that Horowai was intended to be for the benefit of the children. His evidence was that Ricco had made this clear on many subsequent occasions.

[33] Mr Clarke's evidence was that, after Ricco and Marina gave the additional $3 million to Horowai, Ricco "said he felt he and Marina had finally (well and truly) set up his children financially". He also said that "Marina and I can now get on with the rest of our lives using the funds in Kaahu for income and spending on ourselves for our lifetime". Mr Clarke said that Ricco "did not want to be too prescriptive" with how the $3 million was used but wanted the children to know that the "funds were to be used to develop the Horowai forestry block". He stated that Ricco "did not want to see it spent in the near future, except for emergencies and things like tertiary education". The $3 million was particularly intended to provide for the children's retirement, Ricco had said. Mr Clarke said he explained this to Li and Laila in the meetings he had with them.[38]

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35 See above n 11.

36 There was an issue at trial about the accounting treatment of the $3 million, but Marina confirmed in evidence that, whatever the correct accounting treatment, she and Ricco had wanted the $3 million to go to the children as a gift. See below at [47] and n 56.

37 In February 2021, another investment advisor took over managing Kaahu's portfolio after Mr Clarke's retirement.

38 When cross-examined on these statements from Mr Clarke, Laila said that she did not recall Mr Clarke using the word "retirement" in his meetings with her and Li. Nor, according to Laila, did Mr Clarke tell them that Ricco did not want to be too prescriptive. Rather, she said that Mr Clarke had told them that Ricco had wanted to provide the $3 million as Horowai had needed funds and because he was a "family man" who was proud of his ability to provide for his family.

[34] In his notes summarising a meeting in 2017, Mr Clarke said that the $3 million was intended to fund the Horowai forestry until it matured but also to "[b]e split equally between the three children to enhance their lives". Mr Clarke proposed that each of the children would receive $833,000.[39] This would be used to set up three investment portfolios under Horowai. Each portfolio should not be allowed to fall below $500,000 until the harvesting of the Horowai forestry was well underway, but each individual could draw down funds for personal purposes (subject to the approval of the director of HT Ltd). Li and Laila accepted that they recalled some of these details.[40]

[35] Li's evidence (as of 2021) was that the $3 million was, as at 2021, invested in a managed fund and had not yet been used for harvesting costs. Li did not know what the harvesting costs were going to be and accepted that the tree harvest would be self-funding "to a degree".[41]

[36] Li's evidence was that his father had told him that, if they (Ricco's children or their children) ever needed anything in the future, he would be there, which Li took to mean that the Kaahu assets would be available in such circumstances. Li accepted that the purpose of the $3 million, to support the development of the forest over the long term, would indirectly support Ricco's children and their families. But Li conceded that, in addition to indirect support, "down the line" there would be a direct benefit to Ricco's children, and Laila conceded that giving the $3 million to Horowai was a means of bestowing the money on her and her siblings. Li also conceded that it was a "fair comment" to say that his legacy was intact after the $3 million was transferred into Horowai.

[37] Marina said that she understood from her discussions with Ricco that he considered the forest (at the time of maturity and harvest of the trees) was likely to be

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39 The remaining $500,000 would be distributed to a company (run by Li) which would do the logging and milling work.

40 Li accepted that he recalled that Mr Clarke explained to him and Laila how the potential portfolio would work and seems also to have recalled the more specific details of the arrangement. Laila appears to have agreed that she recalled that each child would take one third of the $2.5 million.

41 This is because the income gained from each successive harvest could be used to cover future costs.

worth in the order of $16 million. But she said that she had not seen a formal current market valuation. Li disputed this and said that the forest was not worth "anything close" to that amount. He estimated a total value of $3,331,680 based on a recent pine harvest.[42] He stated in cross-examination that he did not know the value of the 215 ha on which the forestry sits, although it was rated at $2.6 million.

[38] It is worth mentioning that Mr Tyler, the director of BOI and the accountant for both trusts, confirmed that Kaahu was for the benefit of Ricco and Marina and was administered by the trustees on that basis. Horowai, to his understanding, was established for Li, Laila and Ken. He said that over the period from 2008 to 2017, Ricco, Marina and Kaahu entered into various transactions that were intended to remove assets from Kaahu and "ring-fence" them in Horowai for the benefit of the children.

[39] It is also worth mentioning that Ricco had lent $858,490 to a trust which owns the property in New Zealand on which Gitta lives and that he later forgave the debt. That trust also owns two properties in the Caribbean.

[40] As to the financial position of Kaahu, Marina gave evidence in 2021 that it held cash and investments of approximately $4.8 million. In addition to this was Mokomoko, which was worth $4–5 million. As we discuss below, Mokomoko has now been sold and a new house in Waiheke purchased.[43]

After Ricco's death

The will

[41] Ricco tragically died in a gliding accident on 16 November 2017. His will was dated 30 May 2014, the same day HT Ltd removed him as a beneficiary of Horowai. He left his shareholding in HT Ltd to Li and the residue of his estate to Kaahu.

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42 He said that the real value was likely to be less than this, as this estimate was based on the value of the forest if it were planted entirely with pine (in actuality, only one-third of the forest was pine).

43 See below at [73].

[42] On 13 March 2018, TGT Legal, acting for Laila, asked for confirmation that the will dated 30 May 2014 was Ricco's last will and commented that this will made no direct provision for any of his children, although noting that Kaahu was the residuary beneficiary. The letter also sought information about the assets of Ricco's estate and the application for probate.

Asset transfers

[43] In 2018, the remaining trustees of Kaahu (Marina and BOI) transferred *Jimmy*, a large sailing catamaran which had become an asset of Kaahu through Ricco's will, to Horowai.[44] Marina also arranged for Ricco's interest in the contents of dwellings in Portugal and Switzerland (or proceeds from their sale) to be transferred to his children. Marina continued the annual payment of $60,000 to Gitta, until December 2019, out of her own resources, as Gitta is not a beneficiary of Kaahu.

Further correspondence with lawyers acting for Laila

[44] On 22 August 2018, TGT Legal advised the executors of Ricco's estate that Laila would make a claim on Ricco's estate under the Family Protection Act 1955. No claim was, however, filed. Laila accepted in cross-examination that she was not genuinely intending to make a claim, and primarily wanted information.

[45] On 4 September 2018, TGT Legal wrote that, as they read the Deed, Ricco's children have a "contingent interest in one-half of [the] trust fund of the Kaahu Trust" and that the same applied to Marina. The letter said:

> Against that backdrop, it is inappropriate for Marina to be a trustee while there is no child of Ricco's who is a trustee. … Marina is in a position of conflict. Given that she is a fiduciary, she is unable to participate in any decision that favours her. This is the implication of clause 18 of the trust. That clause would leave all decisions involving the exercise of discretions in favour of Marina to the only other trustee, namely BOI … In the view of our client, this is inappropriate, as it is unclear how that company will be in a position to take the interests of all the beneficiaries (including Ricco's children and grandchildren) into account in making its decision.

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[44] *Jimmy* was built by Ricco, cost over $1 million and has a value of between $400,000 and $600,000. Marina had sailed this boat around the Pacific with Ricco, and Li had also been involved in its construction.

[46] It was also asserted that Kaahu assets were "primarily legacy assets derived from Ricco's family" and that "the children of Ricco have a legitimate interest in the stewardship of those assets". The letter noted it was unclear whether Marina had contributed anything to the trust. TGT Legal thus requested the trustees to consider appointing Laila as one of the trustees and offered to discuss "protocols" to ensure Marina was "able to benefit in a reasonable manner".

[47] Other correspondence followed, outlining a disagreement over the accounting treatment of the $3 million distribution to Horowai.[45] A letter of 15 February 2019 from TGT Legal said that their client was "very concerned about the efficacy of the accounting, the conduct of the Kaahu trustees, and the due administration of the Kaahu Trust". Mr Tyler's actions in relation to the accounting for the $3 million were expressly referenced and criticised. Detailed disclosure of documents relating to the administration of Kaahu was requested.

[48] Further correspondence asking for other information followed, including a letter of 31 July 2019 requesting information about, among other things, the sale of the remaining part of the farm, the custodial arrangements for the managed funds, and the financing of the buildings at Tapeka Point (where Mokomoko is located).

Retirement of BOI

[49] In late 2019, Mr Tyler made the decision that BOI should retire as a trustee of Kaahu.[46] He said in evidence that this was for a number of reasons, including his friendship with Li and the fact that in the letter of 15 February 2019 his "competence and efficacy as an accountant" had been questioned. This, he said, implied that the children "had no confidence in my abilities, which, in my mind, left me no option but to retire as trustee of any Trust which the [children] were involved in". Mr Tyler also did not wish to be involved in litigation between Ricco's children and his widow, particularly given his personal relationship with Li and his connection to Horowai.[47]

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45 The areas of disagreement expressed by TGT Legal related both to the accounting treatment and the source and nature of the funds.

46 BOI did not actually retire until towards the end of November, leaving about a week between this retirement and the appointment of KT Ltd where Marina was the sole trustee. Over the period when she was sole trustee, she could not exercise any power other than the power to appoint a new trustee: see cl 26.1(a) set out at [23] above.

47 BOI held two shares in HT Ltd up until 26 April 2019.

[50] Marina's evidence was that Mr Tyler told her that the decision that BOI would resign as trustee was "mainly due to the harassment he was receiving from Ricco's children, primarily Laila, in his capacity as both trustee and accountant of the Kaahu Trust".

Search for replacement trustee

[51] Marina's advisers at the time, including Mr Clarke and Graham Jordan (a lawyer who had been acting for the trustees of Kaahu and the executors of Ricco's estate in respect of Laila's potential claim), told her that a new trustee would need to be appointed in place of BOI. She initially approached Dennis McBrearty of Law North Ltd, who was acting in respect of the administration of Ricco's estate. He refused as his firm did not take on trusteeships. Marina suspected, given that Mr McBrearty knew that Marina was having issues with Ricco's children, that he refused because he "did not wish to take on what had the potential to become a litigious trusteeship".

[52] Mr McBrearty suggested Marina approach Perpetual Guardian (Perpetual). She did so. She considered whether Perpetual would be a good independent trustee but was unsure if it would be a "good fit" and she considered the fees to be excessive.[48]

Legal advice on sole corporate trustee

[53] When Marina advised Mr Clarke of her concerns about Perpetual, he introduced her to WRMK Lawyers (WRMK) in Whangārei. She and Mr Clarke met with two of its lawyers on 21 October 2019. They discussed the fact that litigation with the children seemed likely if not inevitable. They also discussed Horowai and the role of that trust to provide for the children. Marina explained the difficulties she was having finding a new person to take on the role of independent trustee.

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[48] It is not totally clear what the fees to be charged by Perpetual Guardian were, but the schedule of fees in the draft letter of engagement included an establishment fee of $4,000, an annual management fee of $15,668.75 and a minimum investment management charge of $5,750 with excess charged at an hourly rate. It also included a five per cent income management charge and an hourly rate for any accounting and tax services. The amount of the hourly rates was not specified.

[54] WRMK advised Marina that she would be able to appoint a corporate trustee and resign as a trustee and that it would be permissible for her to act as the sole director of this company. Marina said in evidence that this appealed to her as she thought "it would simplify matters relating to the Kaahu Trust".

[55] Marina let Mr McBrearty know that she had decided to instruct WRMK "to find a satisfactory solution for the trust". She said this would probably be a company with a sole director "which will be me". Mr McBrearty responded, expressing the view that:

> The Trust Deed for Kaahu provides that there must at all times be an independent trustee. … If you are going to form a company I believe the control of the company must be given to someone other than yourself.

He concluded by saying: "As you know it is important that you get this change of Trustees right as it is likely that Laila will be ready to challenge any misstep." Marina provided this correspondence to WRMK. It reiterated its advice based on cl 26.1 of the Deed.[49]

[56] Mr McBrearty provided a more detailed letter to WRMK on 7 November 2019. His concern appears to have been focused on the likelihood of Laila continuing to challenge the actions of Kaahu in the absence of an independent trustee. He said:

> … [W]e advise that Laila through TGT Legal argued that she should be appointed as a trustee of Kaahu Trust … Clearly such a proposal was not in the interests of the Trust or its principal beneficiary. It does however give an indication that it is likely that Laila will monitor the way in which the Kaahu Trust is administered and distributions that are made from it. It is for that reason we have expressed concern to Marina over her proposal to replace BOI … with a company in which she will be the sole shareholder and beneficiary.

[57] Mr McBrearty advised that, although technically cl 26 of the Deed provides a sole company trustee as being an exclusion from the requirement to have an independent trustee, it would not be in Marina's best interests to make such an appointment. He believed that:

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[49] Counsel for Ken and Laila also pointed to communications from Mr Jordan indicating the need for an independent trustee. These communications do not, however, seem to be directly engaging with the proposal to appoint a single corporate trustee or the effect of cls 26 or 27.

> … the intent of the trust document is that there will at all times be an independent trustee. It will be in Marina's best interest to have an independent trustee as a safeguard against allegations from Laila that she is using her position to benefit herself without adequate consideration of the interests of the other beneficiaries …
>
> …
>
> I remain concerned that if Marina is in sole control of the administration of the trust, it could encourage Laila to again raise issues or contest the administration of the trust.

[58] WRMK wrote to Marina on the same day recommending that, when BOI retired as trustee, she, as remaining trustee, appoint a new company to be the trustee and then retire as trustee. It said that this was a valid option under the Deed. It explained that it would set up a new company with her as sole director and her and the firm's trustee company as joint shareholders. It said that the company would not end and, in the event of her death, if Kaahu was still operating, a new director would be appointed.

[59] It was explained that, as Marina would be the sole director, the company as trustee would (through her) have a number of powers, including distributing some or all of the assets of Kaahu to any of the beneficiaries (including herself), resettling some or all the assets of Kaahu onto another trust, and excluding any person as a beneficiary. Marina was advised that she would be able to make all decisions in relation to Kaahu but that:

> … this is always subject to the overarching duty of a trustee to act in [the] best interests of the beneficiaries of the trust, having considered the needs and circumstances of each of the beneficiaries, including Ricco's children and yourself.

[60] The letter went on:

> 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 [Dennis] McBrearty, Law North, and from Phil Tyler, BOI taxation. We will keep you informed in that regard.

Technically, the Trust Deed gives you (the Trustee) a number of options and even allows you to distribute the whole Trust Fund to yourself, provided you first consider the needs and circumstances of each of the beneficiaries. There is nothing to prevent a beneficiary from making a claim regardless of what you do. Our job will be to assist you to gather and assess all of the relevant material before making your decisions which will lessen the chance that any such claim could be successful.

[61] On 21 November 2019, WRMK wrote again to Marina explaining the logistics of the change of trustee. It said that Marina was now the sole trustee as BOI had resigned and set out the steps for her to appoint KT Ltd as trustee. WRMK advised that, if she then resigned personally, KT Ltd would become the sole trustee and that Marina would be "the sole director of [KT Ltd] and make all relevant decisions (with our advice)". In that letter, WRMK also stated that: "At this stage we are just changing the trusteeship. Once that is done, we will work with you to help you decide what to do with the trust assets."

[62] Marina resigned as trustee and KT Ltd was duly appointed as sole corporate trustee on 27 November 2019 in accordance with the steps outlined in the letter of 21 November.

Requests for information about Horowai

[63] In the letter of 21 November 2019, Marina was also asked if WRMK should request financial statements for Horowai as she would "need to have all relevant information so you can assess that before making decisions regarding the Kaahu Trust". Marina confirmed it should ask for the accounts.

[64] Inquiries were duly made of the new accountant for Horowai on 26 November 2019 on the basis that Kaahu was a beneficiary. Inquiries were also made by Mr Tyler but, as of 9 December, no reply had been received by him.

[65] Following a telephone call from Laila on 30 January 2020, WRMK wrote to her confirming that KT Ltd was now the sole trustee of Kaahu, that Marina was its sole director and that Kaahu was now finalising its financial statements.[50] WRMK again asked for copies of Horowai's financial statements.

[66] Laila replied the following day to the effect that she was seeking advice and asked for copies of the relevant documents appointing KT Ltd. These were provided on 5 February 2020, and in the same email WRMK said that it was looking forward to receiving the accounts for Horowai.

[67] TGT Legal wrote to WRMK on 27 February 2020. It noted that no particular reason had been specified as to why the financial statements of Horowai had been requested. It was asserted that the fact that Kaahu may be considered a discretionary beneficiary of Horowai did not alone give it an entitlement to the information requested. It was noted that all the final beneficiaries of Horowai were privy to the information and there was "no reason at this time to make disclosure to any other person, especially one that only has a remote interest". It said that Kaahu was "very, very unlikely to benefit from the Horowai Family Trust". Kaahu was therefore not sufficiently "close" to entitle it to trust information.

[68] TGT Legal pointed out that, by contrast, their clients were discretionary beneficiaries of Kaahu, and "contingently interested in one-half of the trust fund". This meant that their clients:

> … stand in the shoes of Ricco as final beneficiaries, and have a legitimate interest in ensuring the stewardship of the family's legacy assets and that the trust is properly administered.

They requested information about the corporate trustee and various financial issues relating to Kaahu, saying:

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[50] WRMK Trustees (2019) Ltd, WRMK's trustee company, jointly holds shares in KT Ltd alongside Marina.

> Given the obvious conflict that exists between Marina's interest as a beneficiary, and now her sole directorship of the trustee, our clients are concerned to ensure that the affairs of the Kaahu Trust are properly managed.

Mokomoko

[69] In her evidence before the High Court, Marina explained that, after Ricco's death, she had personally paid for the insurance, rates, maintenance and other outgoings in respect of Mokomoko. She had also paid any tax owed by Kaahu, from the distributions she received from it, in the belief that, following Ricco's death, Mokomoko was primarily for her benefit.

[70] She deposed that she had for some time wanted to move to Waiheke Island where she has friends. She said that Mokomoko was too large for her and she felt isolated there. In early February 2020, Kaahu began taking steps to list Mokomoko for sale. The March 2020 COVID-19 lockdown delayed the listing and she had no communication with the children at that time. Marina explained that the High Court proceedings based on the fraud on a power argument were issued in June 2020 and an interim injunction was granted preventing the sale of Mokomoko.[51] Marina said that she decided (reluctantly) that she would not challenge the injunction but she was unhappy that she had not been able to move.

[71] On 3 December 2020, her solicitors requested a variation of the injunction to allow the sale of Mokomoko (on the condition that the sale proceeds would not be disposed of without a court order or the agreement of the parties) but received no reply. They asked again on 18 February 2021 and received a negative response on 23 February with the following explanation:

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

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[51] Brewer J made an order that the Marina and KT Ltd not "exercise any dispositive powers or otherwise dispose of property of the Kaahu Trust pending further order of the Court": *Legler v Formannoij* HC Whangārei CIV-2020-488-32, 8 July 2020 at [15]. This order was subject to stipulations which enabled the Marina and KT Ltd to challenge it.

[72] We note that Laila's position in her evidence at trial remained that Mokomoko had personal significance to her because it had belonged to her father, even though she acknowledged she had never been there before her father's death. Li conceded during trial that it was fair for Marina to sell Mokomoko in order to facilitate her lifestyle (if she could not live there). His concerns were based on where the proceeds from the sale went (given that Li saw Kaahu as intended for more than the benefit of Marina and Ricco). Also relevant here is Li's seeming acceptance that his legacy was intact after the $3 million was transferred back into Horowai, as part of the $3 million had originally been used to fund the purchase of the land on which Mokomoko was built.[52]

[73] Mokomoko has subsequently been sold and a new house on Waiheke Island purchased.[53] The Waiheke house continues to be held by Kaahu.

Actions taken after KT Ltd became sole trustee

[74] WRMK recommended that the power of appointing new trustees should vest in Marina in case a situation ever arose where KT Ltd was removed from the companies register, which WRMK were concerned might disqualify KT Ltd from acting as a trustee. This was done by deed of 31 January 2020.

[75] On 28 February 2020, WRMK wrote to Marina, enclosing the letter from TGT Legal of 27 February 2020.[54] WRMK said:

> In summary, they say that they do not have to give any information about the Horowai Family Trust, but they are still seeking the financial statements for the Kaahu trust and note they are concerned about you being the sole director.
>
> This was all to be expected.

[76] WRMK noted that it was preparing a response to the 27 February letter but did not have sufficient information to provide a proper response to the letter of 31 July 2019.[55] However, WRMK said it could respond by requiring TGT to explain the purpose of their requests for such detailed and historical information.

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52 See above at [36]. Lot 1 had originally been sold for $3.1 million, with half of this funding the purchase of the land on which Mokomoko sits: see above at [29].

53 The interim injunction was discharged by the HC judgment: above n 4, at [69].

54 See above at [67].

55 See above at [48].

[77] WRMK said that it was time for a decision to be made as to what to do with the assets of Kaahu. It advised:

> There are essentially 3 options for dealing with the Kaahu Trust and its assets (or a combination of 2 or all of them):
>
> 1. Remove Ricco's children (and associated trust) as beneficiaries;
>
> 2. Resettle (i.e. transfer) the Trust's assets to a new trust for your benefit only; and/or
>
> 3. Distribute all of the Trust's assets to you personally and wind up the Trust.
>
> We recommend option 2 and/or 3 in preference to option 1, however there are potentially tax implications arising from the proposed sale of [Mokomoko].

[78] In her evidence at trial Marina said that, in accordance with WRMK's advice, she took time to consider the needs of all of the beneficiaries of Kaahu, including herself as the sole remaining final beneficiary, along with Ricco's children and grandchildren, and Horowai. In the week or so following the 27 February letter, she had a number of meetings and telephone discussions with Tania Beckham of WRMK about the options available. In early March, she came to a tentative resolution as to what the next steps would be and instructed WRMK to prepare the documents it had recommended.

[79] WRMK prepared the documents whereby, in summary, KT Ltd, as trustee, agreed to write off all of the debt that Horowai owed to Kaahu, give the rest of the assets of Kaahu to Marina as a beneficiary, and remove Ricco's children (and associated trusts) as beneficiaries. These were forwarded to Marina on 6 March 2020, along with a letter of advice, which finished with the following:

> As we have discussed many times, there is nothing to stop Ricco's children making a claim against the Kaahu Trust and/or against you as a trustee. We can never stop someone making a claim against you, all we can do is best advise you so as to minimise their chances of succeeding if they do make a claim.
>
> You have all of the power and authority to take these actions under the Trust Deed. As a Trustee (technically a director of the company which is the trustee) your duty is to consider the needs and circumstances of each of the beneficiaries and to act in good faith and in accordance with the purposes of the Trust. By making the distributions as contemplated (i.e. releasing the Horowai Family Trust from all debt owed to the Kaahu Trust) and then giving the rest of the Kaahu Trust's assets to yourself before you remove Ricco's

> children as beneficiaries, you can say that you took into account the needs and circumstances of all of the beneficiaries before making the relevant distributions and decisions, and that you acted in accordance with the purpose of the Trust.
>
> Because you are acting in good faith and in accordance with the purpose of the Trust, because none of Ricco's children have any financial need and because they have already been generously provided for through the Horowai Family Trust, we do not consider they have a good chance of succeeding if they were to make a claim.

[80] Marina deposed that, after careful consideration of the legal advice, she decided KT Ltd would:

(a) distribute the sum of $1 million to her as a beneficiary of Kaahu (done by deed of distribution dated 3 March 2020);

(b) forgive the debt of $3,738,297.93 which was owed by Horowai to Kaahu (done by deed of distribution dated 12 March 2020);[56]

(c) remove Ricco's children and Horowai as beneficiaries of Kaahu (done by deed of distribution dated 12 March 2020);

(d) distribute all other assets of Kaahu, excluding the Mokomoko property, to her as beneficiary (done by deed of distribution dated 12 March 2020); and

(e) appoint her as the beneficiary entitled to receive the trust fund on the vesting day of Kaahu (done by deed of appointment dated 19 March 2020).

[81] We will refer to the various deeds described in the above paragraph as "the March 2020 deeds". Marina explained her actions in her evidence in the following way:

> All of the above actions were taken on the advice of WRMK, who drafted the documents and said this was an appropriate way to proceed. The advice

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[56] See above at [31]. Marina conceded during cross-examination that the $3 million should not have been treated as a debt owed. She did not, however, concede this in relation to the remaining $738,000. See above n 36 and at [47].

> provided by WRMK was based on my instructions to them that I wished to take a careful and cautious approach, and wished to ensure that my actions were not open to challenge by Ricco's children. WRMK were very clear in their advice that the actions outlined [above] were appropriate steps for me to take in my capacity as trustee of the Kaahu Trust.
>
> My intention in forgiving the debt owed by the Horowai Family Trust to the Kaahu Trust and removing Ricco's children and the Horowai Family Trust as beneficiaries of the Kaahu Trust was to sever the link between the Kaahu Trust and the children, based on my understanding that Ricco's children were already very well provided for and that the purpose of the Kaahu Trust was to provide for me and Ricco, or the survivor of us, for our retirement.

High Court judgment

[82] The High Court held that the Deed expressly permits a single corporate trustee to exercise the powers of a trustee even if a beneficiary is a director or shareholder or both.[57] Marina did no more than was contemplated by the Deed. And this meant she did not, by the mere fact of appointing a single corporate trustee, act for an improper purpose (whether her intent was to simplify the trust or to control it).[58]

[83] The Judge said that this left open the question of whether she appointed the trustee to benefit herself and to prefer her own interests.[59] It was held that this contention failed on the facts.[60] The Judge accepted that the March 2020 deeds were evidence that could support a contrary conclusion but determined that the totality of the evidence pointed the other way.[61]

[84] The Judge gave six reasons. First, Marina "became the sole trustee through circumstance, not exploit". Her husband died, and BOI resigned "after Laila questioned Mr Tyler's competence as an accountant, and Mr Tyler did not want to become meat in the sandwich".[62]

[85] Second, Marina tried to find another trustee who would act with her but was unsuccessful. Mr McBrearty of Law North Ltd declined. Perpetual was approached, but Marina believed the fees were excessive and "questioned whether it would be the

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57 HC judgment, above n 4, at [44].
58 At [46].
59 At [47].
60 At [48].
61 At [59].
62 At [49].

right fit". It was never put to Marina that she was "going through the motions rather than genuinely looking for a second trustee".[63]

[86] Third, when Mr McBrearty questioned the legitimacy of a single corporate trustee, Marina forwarded the advice to WRMK and was assured that its advice was legitimate.[64] When Mr McBrearty raised the point directly with WRMK, Marina was again assured the firm's advice was correct. The Judge found that the "sequence suggests [Marina] wanted to act lawfully; and was acting on legal advice".[65] The Judge noted that WRMK was recommended by Mr Clarke, a longstanding financial advisor to Kaahu.[66]

[87] Fourth, the Judge referred to correspondence from WRMK on 7 November 2019 advising Marina of the fiduciary obligations of a trustee.[67] In response to that correspondence, Marina instructed WRMK to seek Horowai's financial statements, and it was only when this was refused that WRMK "encourage[d] [Marina] to make a decision about Kaahu's assets".[68]

[88] Fifth, Li, Ken and Laila do not directly challenge the March 2020 deeds.[69] In the Judge's opinion, such challenge would have been "forlorn" as they had been provided for and were well off, both through Horowai and because each of the children had received CHF 750,000 (around $1.4 million) from their grandfather's estate.[70] The Judge also considered that the evidence made it plain that Horowai was primarily for the children and Kaahu primarily for Ricco and Marina, referring to the unchallenged evidence of Mr Tyler and Mr Clarke to that effect. The Judge said that this cast a "different light" on the March 2020 deeds, which the children had advanced as evidence of Marina's purpose to benefit herself in November 2019.[71]

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63 At [50].
64 At [51].
65 At [51].
66 At [52].
67 At [53]–[55].
68 At [55].
69 At [56].
70 At [56]. We note that Li's evidence was that the payment from the children's grandfather was spread over 15 years. The Judge also noted Marina's transfer of *Jimmy* to Kaahu.
71 At [57].

[89] Sixth, the Judge considered Marina to be a careful, fair-minded witness, and that she "impressed as sincere".[72] The Judge noted that Marina said that she was still determining how she could leave the children property when she died and that this still remained her intention despite the litigation.[73]

[90] The Judge summarised his conclusions as follows:[74]

> I summarise. I am not persuaded [Marina] 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. [Marina] found herself sole trustee. She looked to appoint a second trustee, encountered difficulties, and was then advised another course was permissible. [Marina] acted on that advice without concealing contrary opinion. [Marina] was informed of her fiduciary obligations and sought information relevant to their discharge. Direct challenge to the March deeds would fail. [Marina] impressed as sincere.

Court of Appeal judgment

[91] The majority of the Court of Appeal noted that the statement of claim pleaded a single cause of action of fraud on a power, and that there was no pleading of an alternative (and logically prior) cause of action to the effect that the appointment of KT Ltd was outside the powers conferred by the Deed and thus ultra vires.[75] The majority considered that, in view of the terms of cl 27.2(c), an ultra vires argument would not in any event have prevailed.[76]

[92] The question therefore was whether Marina's purpose in appointing KT Ltd as trustee was improper. The Court said that this is judged subjectively and at the date of the exercise of the power.[77] The majority accepted the submission that it would be:[78]

> … a logical fallacy to contend that strict compliance with the terms of the Trust Deed can amount to a fraud on a power, absent some further evidence of intention to act improperly.

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72 At [58].
73 At [58].
74 At [59].
75 CA judgment, above n 5, at [22] per Brown and Brewer JJ.
76 At [26].
77 At [29] citing *Eclairs Group Ltd v JKX Oil and Gas plc*, above n 8, at [15] per Sumption LJ; and *The Duke of Portland v Topham*, above n 8, at [54] per Lord Westbury LC.
78 CA judgment, above n 5, at [36].

[93] The majority commented that Marina's use of the word "simplify" likely "contemplated the difference of view which emerged between her and Ricco's children concerning the future of the Mokomoko property in Russell".[79] Marina wished to sell it and move to Waiheke. The children opposed the sale because they considered it a "legacy" asset.[80]

[94] The majority considered that, because Marina was dependent on Kaahu for her accommodation and financial support:[81]

> … a motivation to take steps to control Kaahu so as to pursue the objective of rendering her living arrangements more congenial would not have been objectionable as comprising an improper purpose.

This meant that this was "not a case where by dint of the absence of a legitimate purpose an inference of the presence of an improper purpose could be drawn".[82]

[95] The majority noted that it was not, at least expressly, suggested to Marina in cross-examination that she intended either to promote her own interests improperly, or to take control of Kaahu or to evade restrictions under the Deed. In these circumstances the majority considered that the High Court Judge's acceptance of Marina's evidence was readily understandable, particularly against the background of the tension concerning her residential arrangements.[83]

[96] The majority said that the appeal turned on whether the High Court erred in its conclusion that the children had failed to demonstrate that KT Ltd had been appointed for an improper purpose.[84] They were not satisfied that there was any error in the High Court's conclusion. WRMK gave explicit advice that KT Ltd's ability to make decisions was always subject to the overarching duty to act in the best interests of the beneficiaries, and the majority considered that Marina understood and accepted that advice. She then subsequently obtained and acted upon further advice of WRMK.[85]

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79 At [31].
80 At [31]–[32].
81 At [33].
82 At [33].
83 At [34].
84 At [37].
85 At [38].

[97] The majority did not consider, contrary to the view of the High Court Judge, that the decisions of March 2020 should be taken into account in the determination of Marina's subjective motivation at the date of the appointment of KT Ltd. The validity of those actions had not been the subject of legal challenge, but in any event the majority considered that the totality of the evidence supported the Judge's conclusion that Marina had not acted according to an improper purpose.[86]

[98] Cull J dissented. She considered that the appointment of KT Ltd as sole trustee was not compliant with the terms of the trust for three reasons. First, she noted that to be a trustee a corporate entity has to be a "properly empowered corporate body" which likely refers to a trustee company such as Perpetual, the Public Trust or a trustee company with a board of directors and shareholders.[87] Second, she considered that such an interpretation was consistent with other provisions of the Deed requiring an independent trustee unrelated to a beneficiary.[88] Third, she considered it highly relevant that Mr McBrearty, the solicitor who drafted the Deed, had "some concerns" about the proposal to appoint a sole trustee under Marina's control and that another solicitor also expressed the view that an independent trustee was required.[89]

[99] Cull J considered that the sequence of events from October 2019 to March 2020 showed that Marina had chosen the option of appointing KT Ltd "with the intention of controlling the trust exclusively to benefit herself to the exclusion of the other beneficiaries".[90] She considered that the decisions made in March 2020 were relevant to the exercise of the appointment power in November 2021. The exercise of that power was "inextricably linked to the options [Marina] chose and implemented in March 2020".[91] The use of the appointment power was, in Cull J's view, to gain sole control of the trust and to "give" herself "all of the assets of the Trust".[92] This was "not in the best interests of the beneficiaries, except her, and was improper".[93]

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86 At [39].
87 At [50] per Cull J dissenting.
88 At [51].
89 At [52]–[54].
90 At [59].
91 At [72].
92 At [74] quoting the letter from WRMK to Marina on 7 November 2019, discussed above at [58]–[60].
93 At [74].

Positions of the parties

[100] Ken and Laila submit that the power under the Deed to appoint new trustees is a fiduciary power and must be exercised for the benefit of the beneficiaries as a whole and not for Marina's personal benefit. It was therefore improper for Marina to exercise the power to benefit herself[94] and (additionally or alternatively) for her to use the power for the purpose of taking control of the trust.[95] They submit that Marina's purpose in appointing KT Ltd was to place herself in control of Kaahu and to exercise the trustee's powers for her own benefit. This is evidenced by the legal advice she considered at the time of exercising the power of appointment and by the March 2020 deeds. It is submitted that Marina chose to act based on advice which suited her interests and set aside advice which did not. With regard to Horowai, Ken and Laila submit that this is a purpose trust, designed to manage and administer the forestry land rather than to make distributions to the children. We deal with Ken and Laila's specific arguments directed to proving Marina's subjective intent in the next section.

[101] Marina and KT Ltd submit that Marina was the primary object of Kaahu following Ricco's death. It would not, therefore, be improper for her to wish to benefit herself.[96] A trustee's obligation to act in the best interests of the beneficiaries does not entail an obligation to ensure that every exercise of every discretion benefits every discretionary beneficiary considered as a class. The case must be seen in the context of Kaahu being set up primarily to provide for Marina and Ricco, and Horowai primarily to benefit the children. Marina and KT Ltd submit that it would not be improper for Marina to intend to benefit herself and, in any event, this Court should not disturb the evidential finding of the High Court that self-benefit was not among Marina's motivations for appointing KT Ltd. The burden of proving an improper

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94 We note that Ken and Laila accept that Ricco established Kaahu partly to benefit Marina (alongside Ricco and the children). Thus, on Ken and Laila's own view of the facts, it cannot be the case that Marina must entirely avoid considering her own interests.

95 This alternative ground, that it would be improper to have the purpose of intending to take control of the trust, is inconsistent with the statement of claim (contrary to the view of the Chief Justice below at [230]–[231]) which characterised the improper purpose as assuming control of the trust with an intent to benefit herself. Further, this ground functions in effect as a tacit ultra vires argument, which is inconsistent with the concession mentioned above at [4] and below at [122]. If it is not ultra vires to appoint a corporate trustee where a beneficiary is the sole director and a shareholder (as conceded) then it cannot be an improper purpose to have the bare intention of doing this.

96 But see above n 9 in relation to possibly contrary statements made during the oral hearing.

purpose lies on Ken and Laila, and it was never put to Marina during cross-examination that her real purpose in appointing KT Ltd was to benefit herself.

Our assessment of factual issues

[102] We do not consider that it was proved that the appointment of KT Ltd had the purpose, at the time it was made, of allowing Marina to take control of the assets of Kaahu for her own benefit at the expense of Ricco's children. This (apart from the two points set out below) is essentially for the same reasons as those outlined by the High Court and the majority of the Court of Appeal and summarised above.

[103] Like the Court of Appeal majority, we do not comment on the validity or otherwise of the actions in March 2020 as that question is not before us.[97] We therefore do not adopt that part of the High Court's reasons.[98]

[104] In terms of the Court of Appeal judgment, we comment that the objection raised by Ricco's children as to the possible sale of Mokomoko did not arise until after the decision to appoint KT Ltd as trustee and cannot therefore have been the purpose of the appointment.[99] Nevertheless, we do note the correspondence that had been received by the trustees since Ricco's death which asserted that Kaahu held "legacy" assets and that Ricco's children had a contingent interest in one-half of the assets owned by Kaahu.[100] We note also the requests that Laila be appointed a trustee and for information about the administration of the trust.[101] In those circumstances Marina could well have anticipated that issues would arise as to a trustee's (whether a sole corporate trustee or otherwise) ability to deal with the trust property (as indeed turned out to be the case).

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97 CA judgment, above n 5, at [39] per Brown and Brewer JJ.

98 HC judgment, above n 4, at [56].

99 Contrast above at [93]. Although, we acknowledge that Kaahu began taking steps to list Mokomoko for sale in February 2020: see above at [70].

100 The alleged one-half share is certainly contingent. It would depend, among other things, on the vesting day being brought forward and no other appointment of a beneficiary being made, as well as the resettlement power not being exercised: see above at [18]–[20].

101 See above at [44]–[48].

[105] We do not deal here with the full range of submissions made to us by the parties on Marina's intent at the time of appointment of KT Ltd but will instead focus on several key points.

[106] It is submitted by Ken and Laila that the majority of the Court of Appeal erred: Marina's improper purpose can be inferred from the correspondence from WRMK in November 2019 and her later actions in March 2020.

[107] Taking the last point first, we agree with the High Court that the actions taken in March 2020 could have supported an inference that it had been Marina's purpose at the time of appointing KT Ltd as trustee to take those actions. We also agree with the High Court, however, that there are major factors weighing against that conclusion, including that she became a sole trustee because of happenstance (the resignation of BOI as trustee), she had made efforts to find a replacement for BOI and the contemporaneous documentation showed she was concerned to fulfil her legal obligations.[102]

[108] The High Court Judge had the advantage of hearing and seeing the witnesses. He found Marina's evidence credible, including her wish to ensure her actions were legal and her intention to explore ways to ensure the residue of the trust assets would benefit Ricco's children after her death. An appellate court must "recognise and allow for the advantages that a trial judge has in assessing oral evidence", although it must not let deference prevent it from coming to its own view of the facts and deciding the case accordingly.[103] Here, there is nothing to suggest we should depart from Downs J's view of Marina as a credible witness. Indeed, the contemporaneous documentation, understood in context, clearly supports his conclusion. The Court of Appeal majority was correct to uphold his findings.

[109] We reject the contention that the November 2019 letters from WRMK support Ken and Laila's allegation. As noted by both Courts below, those letters made it very

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102 HC judgment, above n 4, at [59]. As noted above at [103], like the majority of the Court of Appeal, we do not, however, comment on the High Court's view about the validity of the March 2020 deeds, as that question is not before us: see at [56]; and CA judgment, above n 5, at [39] per Brown and Brewer JJ.

103 *Deng v Zheng* [2022] NZSC 76, [2022] 1 NZLR 151 at [71] citing *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [13].

clear that KT Ltd had fiduciary obligations to all of the beneficiaries and the Courts below found that Marina understood and accepted that advice.[104] This is why information was sought on the financial position of Horowai. We also note that the possible options set out in the 7 November 2019 letter were different from the actions taken in March 2020.[105] The two options outlined in the 7 November letter included the possibility that only "part" of Kaahu's assets would be distributed to Marina or resettled. The first of the 7 November options also specified that the children would remain discretionary beneficiaries following Marina's death.

[110] Ken and Laila submit that an improper purpose can be inferred from the fact Marina did not take Mr McBrearty's advice on the legality of the appointment of a sole corporate trustee with her as a sole director.[106] We do not accept that submission. Marina was not obliged to accept Mr McBrearty's advice, which she had been told was not correct by WRMK. She is a layperson and is entitled to rely on advice from experts unless there are indications, obvious to a layperson, that the advice is likely wrong. This is far from such a case. The WRMK advice was confirmed after Mr McBrearty's concerns were aired. It was grounded in the terms of the Deed and, in particular, cl 26.1, and three Judges (one in the High Court and two in the Court of Appeal) have agreed with WRMK's interpretation. Indeed, Ken and Laila concede that the appointment was consistent with the terms of the Deed.[107] We also note that this must all be viewed against the background of Marina's prior attempts to find a replacement independent trustee.

[111] Ken and Laila also criticise Marina and WRMK for not disclosing why they were asking about the financial position of Horowai. We accept that this was not disclosed, but nothing has been put forward to suggest that the answer would have been different had the purpose of the inquiry been disclosed or to suggest that, had the information been provided, it would have shown that Horowai and the children were

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104 See above at [86]–[87] and [96].

105 See above at [58]–[60] and [80]. The options set out in the letter of 7 November also differed from the options set out in the letter of 28 February 2020: see above at [76]–[77]. The three options recommended on 28 February all involved totally excluding Ricco's children as beneficiaries.

106 They make the same argument with regard to advice from Mr Jordan; but see above n 49.

107 See above at [4].

not in the healthy financial position Marina thought they should have been, given the assets held by Horowai.

[112] We also accept Marina's submission that the whole case must be seen against the background that Kaahu was set up in order to provide for the needs of Ricco and Marina while they were alive, while Horowai was to provide for the interests of the children.[108] It must also be seen in the context of the fact that Marina had foregone her rights under the 2003 relationship property agreement with regard to the farm[109] and the forest now held by Horowai.[110] It is also significant that Ricco left the residue of his estate to Kaahu, the trust set up primarily to provide for them as a couple.

[113] Finally, we reject Ken and Laila's submission that an inference can be drawn from the fact that other options (for example, appointing a company where she was merely one of three directors) were not pursued by Marina. The fact that other options were open to Marina, while relevant, is not decisive in explaining her reasons for the option she chose to pursue. In any event, given her issues with finding a possible independent trustee, it is unlikely that she would have found independent directors willing to act. We note, for example, that Mr McBrearty did not offer himself as one of the directors of a possible corporate trustee. Nor, seemingly, did WRMK offer one of its directors as an independent director.

[114] Taken overall, the evidence fails to prove that Marina's purpose in appointing KT Ltd was, at the relevant time, to benefit herself at the expense of the children.

[115] Given this conclusion (that on the facts Marina's purpose was not to benefit herself at the expense of the children) there is no need for us to decide whether or not, or in what circumstances, such a purpose would be improper.

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108 See above at [11] and [32]–[36].

109 Kaahu had owned the farm from 2008 until 2015. We note, as stated above, that only part of the farm (Lot 2) is held by Horowai given that Lot 1 was sold by Kaahu, with part of the sale funds being used to purchase the site of Mokomoko: see above at [27]–[29].

110 See above at [12]–[13].

Comments on the Chief Justice's reasons

[116] We make some brief comments below on the reasons of the Chief Justice.[111]

Relevant evidence

[117] The Chief Justice takes the view that the evidence led as to Ricco's intent with regard to the dual trust structure was not relevant insofar as it relates to the post-settlement administration of Kaahu and post-settlement statements regarding Kaahu's purpose and how Kaahu would be administered in the future.[112]

[118] We comment first that some of the third-party evidence on Ricco's intent came from Mr Tyler, who was the accountant for both trusts and the director of BOI which was one of the three original trustees of the Kaahu Trust.[113] It was thus evidence of Ricco's intent at the time that Kaahu was set up.

[119] Second, the evidence of Ricco's intent in 2013 and in 2017 appears to have coincided with major settlements on the trusts (the transfer of the assets from his foundation and the gift of $3 million).[114] The intent at the time of such settlements may be relevant to arguments concerning the limits of powers to deal with trust assets.

[120] Third, the point about a fraud on a power is that the exercise of the power is beyond the purpose of the power, even if it may be within its terms. This, by definition, must entail looking beyond what is narrowly permitted by the terms of the instrument and therefore would mean that a broad range of evidence to ascertain the purpose of a power could potentially be relevant and admissible.

[121] Fourth, we consider that, if the settlor (as a trustee or in collaboration with other trustees) administers the trust in a certain way, this may be relevant in ascertaining the purpose of any power in a trust deed. Likewise, evidence which

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111 We do not express a view on the Chief Justice's comments on the doctrine of fraud on a power at [156]–[163].

112 See below at [179]–[181].

113 See above at [37].

114 See above n 11 and [32]–[34].

otherwise establishes the post-settlement behaviour or words of the settlor may be evidence of what the settlor intended the words in the trust deed to mean.[115]

Intent to take control

[122] The Chief Justice interprets the Deed as not allowing the appointment of a "company which is exclusively controlled by a trustee/beneficiary".[116] We make no comment on this. We had no argument on this point, because Ken and Laila accepted that the Deed allowed this. The High Court and a majority of the Court of Appeal were also of this view.[117]

[123] The Chief Justice, however, says that if Marina had a purpose of taking control of the trust, then this in itself was not a proper purpose. We do not agree for two reasons.[118]

[124] First, the argument that it is not within the purpose of the power to appoint a company which is exclusively controlled by a trustee/beneficiary is effectively the same argument as the interpretation argument which is not before us.[119] Effectively it would mean that, although there is power to appoint such a trustee, it could never be exercised without it being a fraud on a power. This is tantamount to saying that the power does not exist at all, and the finding that it did exist by the majority of the Court of Appeal is not challenged before us.

[125] Second, we consider the argument in any event fails on the facts. It ignores the prior attempts Marina made to try and find an independent trustee. The High Court noted that it was not put to Marina that these attempts were not genuine.[120] She failed

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115 This phrasing is adapted from the judgment of Tipping J in *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [31]. This Court had earlier held that subsequent conduct may be relevant to contractual interpretation in *Gibbons Holdings Ltd v Wholesale Distributors Ltd* [2007] NZSC 37, [2008] 1 NZLR 277 at [7] per Elias CJ, [52]–[55] and [60]–[63] per Tipping J, [73]–[74] per Anderson J and [122] per Thomas J. We are not, however, to be taken as commenting on whether the principles of contractual interpretation necessarily apply to the interpretation of trust deeds.

116 See below at [184]–[194].

117 HC judgment, above n 4, at [44]–[46]; and CA judgment, above n 5, at [26]–[28] and [36] per Brown and Brewer JJ.

118 See above n 95.

119 See also above n 95. It follows that we do not agree with the Chief Justice's reasoning below at [199]–[228].

120 See above at [85].

to find an independent trustee, or at least failed to do so at a price she considered reasonable for the services provided and which would provide a proper fit for what was a family, as against a business, trust. Both these considerations were in our view legitimate and should not be overturned on a second appeal and in particular where Marina did not have any proper opportunity to make submissions or lead further evidence on this point.[121]

Self-benefit

[126] In the alternative, the Chief Justice says that she would have found it proved that Marina appointed a corporate trustee so that she could prefer her own interests.[122]

[127] For the reasons we have set out above, we, like the High Court and the majority of the Court of Appeal, do not accept that it had been proved that Marina had that intention at the time KT Ltd was appointed.[123] For example, we have noted that the letter of 7 November 2019 included the possibility that only some of Kaahu's assets would be transferred to Marina or resettled and included an option where the children would remain discretionary beneficiaries following Marina's death.

[128] Because we came to that conclusion on the facts, we did not need to consider whether and in what circumstances an intention of benefiting herself at the expense of Ricco's children would have been an improper purpose.[124]

[129] The Chief Justice does, however, in her reasons deal with what purposes would and would not be improper under the Deed, as well as the interpretation of the Deed more generally. We therefore make some brief comments on her discussion and on the arguments of Ken and Laila in this regard.

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121 For example, she might have offered submissions as to the costings provided by Perpetual compared to those of the current investment advisor. We also doubt that this ground is within the statement of claim. The passages quoted by the Chief Justice below at [230] seem to relate to the self-benefit argument.

122 Below at [232]–[238].

123 See above at [102]–[115].

124 See above at [5]–[6].

[130] The Chief Justice refers to Ricco's father and Ricco as being "family men" concerned to see their children and grandchildren well provided for.[125] She sees the Deed as looking after one generation but also at some point passing the family wealth to the next.[126] She gives this latter point as one of the reasons that Marina's benefit cannot be said to be the sole purpose of Kaahu, or its primary purpose following Ricco's death.[127]

[131] We comment, as indicated earlier, that it is not clear how much of Ricco's father's wealth ended up in the two trusts and how much of the funds were generated by Ricco and Marina in the course of their long relationship.[128] We also comment that Ricco's father did leave a substantial sum to each of his grandchildren in his will and that he apparently put no stipulation on the use to which Ricco could put the funds left to him.[129]

[132] It is relevant too that Horowai contained assets over which Marina would have had a claim (in terms of her contribution to them over a long relationship and in terms of the 2003 relationship property agreement).[130] Further, the farm and forestry assets held by Horowai were (and we assume remain) substantial assets,[131] and there is also evidence that Ricco considered the children were now well catered for by Horowai and that this left Kaahu for Marina and him.[132] It is also significant that Ricco and Marina were the named final beneficiaries of Kaahu and that Ricco had removed himself as a final beneficiary of Horowai, meaning he could no longer benefit from that trust.[133]

[133] In all of the circumstances outlined above, we do not agree with the Chief Justice's characterisation of Kaahu (as being to pass the family wealth to the next generation at some point) if this has the effect of never allowing the use of such powers as undoubtedly exist in the Deed: of distributing to one or more of the

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125 Below at [151].
126 Below at [208].
127 Below at [208]–[209].
128 See above n 12, n 13 and n 34.
129 See above at [10].
130 See above at [12]–[13].
131 See above at [27]–[28], [31] and [37].
132 See above at [33].
133 See above at [26].

beneficiaries at the expense of others, of bringing forward the vesting date and of adding and removing beneficiaries.[134]

[134] The claim by Ken and Laila is that it would have been a fraud on a power if Marina had had the subjective intention, at the time of the appointment of KT Ltd, of benefiting herself at the expense of Li, Laila and Ken.[135] This was, they say, because she would have been in breach of her fiduciary duty to exercise the power to appoint a trustee for the benefit of the beneficiaries as a whole.[136]

[135] We interpolate that it was never part of Ken and Laila's argument that Marina should receive no ongoing benefits from Kaahu.[137] Nor could it have been. She was clearly a beneficiary of the trust and a named final beneficiary, and needed funds for her accommodation and living expenses. Further, she was apparently dependent on Kaahu to satisfy these expenses, and the evidence makes clear that at least part of the purpose of Kaahu was to support her. Ken and Laila's claim cannot therefore plausibly be that *any* amount of concern for her own interests would be improper on Marina's part. Rather, their argument must relate to the extent of the distributions to Marina in the March 2020 deeds and their exclusion as beneficiaries, which they say mirrored her intention at the time of the appointment of the corporate trustee.

[136] Ken and Laila do not, however, challenge the validity of the March 2020 deeds. Yet, their view of Kaahu's purpose would effectively entail that distributive actions like this could never be taken. If it were the case that the assets in Kaahu were collectively Legler legacy assets, which could not be distributed to the sole benefit of Marina, then it is hard to see how (on this view) the distribution decisions made in the March 2020 deeds could ever be made at all. This would be the case even if, for example, similar actions had been taken while Ricco was still alive, if Marina had pre-deceased Ricco (and it was Ricco deciding to make the distributions) and if done while there was still an independent trustee. This is essentially the same as saying that the powers are in the Deed but can never be used.

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134 See above at [17], [18], [20] and [22].
135 See above at [5].
136 See above at [100].
137 See above at [15] and [72].

[137] If the argument is rather that the actions were outside the purpose of the power only because they were done by a corporate trustee with Marina as the sole director, then this is essentially the same argument as the control argument we have already commented on above.

[138] Ken and Laila argue that the power to appoint a new trustee must be exercised for the benefit of the beneficiaries as a whole and not for self-benefit.[138] The concept of acting for the benefit of the beneficiaries in the case of a discretionary trust does not mean that trustees can never exercise powers in a trust deed to distribute to one beneficiary and not to others or that they can never exercise other powers, such as bringing forward the vesting date or excluding or adding beneficiaries. Flexibility is the very essence of a discretionary trust.[139] Discretionary beneficiaries have no proprietary interest in the assets of a trust and no right to a definable part of the trust income.[140]

[139] We accept that there may be issues as to whether a discretion has been exercised properly by a trustee in any particular case. This would be a review of the particular exercise of the discretionary actions taken.[141] In this case, the March 2020 deeds are not the subject of challenge and we therefore make no comment on them.[142]

[140] We do not, however, rule out that it could be a fraud on a power if a trustee was appointed with the aim of exercising a discretion unlawfully or otherwise improperly.

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138 See above at [100] and [134]. We comment that s 26(a) of the Trusts Act 2019 provides that: "A trustee must hold or deal with trust property and otherwise act … for the benefit of the beneficiaries, in accordance with the terms of the trust".

139 See, for example, Chris Kelly and others *Garrow and Kelly Law of Trusts and Trustees* (8th ed, LexisNexis, Wellington, 2022) at [2.30].

140 Lynton Tucker, Nicholas Le Poidevin and James Brightwell *Lewin on Trusts* (20th ed, Sweet & Maxwell, London, 2020) at [1-061]; and *Gartside v Inland Revenue Commissioners* [1968] AC 553 (HL) at 606–607 per Lord Reid, Lord Morris of Borth-y-Gest and Lord Guest and 617–618 per Lord Hodson and Lord Wilberforce concurring.

141 A power to review the exercise of discretions is now provided for in ss 126 and 127 of the Trusts Act, which came into force on 30 January 2021. Section 126(1) provides that: "The court may review the act, omission, or decision (including a proposed act, omission, or decision) of a trustee on the ground that the act, omission, or decision was not or is not reasonably open to the trustee in the circumstances." For more on this see Kelly and others, above n 139, at [25.14]–[25.27]; and Lindsay Breach *Nevill's Law of Trusts, Willis and Administration* (14th ed, LexisNexis, Wellington, 2023) at [11.2.3]. We are not to be taken as making any comment on the grounds on which a trustee's decision may be reviewed under these provisions. Nor are we to be taken as commenting on the pre-Trusts Act position relating to grounds of review.

142 See above at [88].

If that had been the contention, however, then Ken and Laila would not only have had to prove that Marina had the intention, at the time of the appointment of KT Ltd, to have that trustee do the actions in the March 2020 deeds (which they have failed to do) but also to prove that the actions in the March 2020 deeds were unlawful or otherwise for an improper purpose (which they did not even attempt to do).[143]

Result and costs

[141] The appeal is dismissed.

[142] The appellants must pay the respondents total costs of $25,000 plus usual disbursements. We certify for second counsel.

WINKELMANN CJ

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[143] There is one issue for disposition on this appeal: whether the first respondent, Maria Formannoij (Marina), exercised the power she held under the Kaahu Trust, to appoint another trustee, for a proper purpose — that is to say, for the purpose for which the power was conferred. Differing from the majority, I conclude that Marina

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143 We do note that both the High Court (see above at [86]) and the Court of Appeal found that Marina wanted to act lawfully and was listening to legal advice. The Court of Appeal specifically found that she understood her obligation to consider the interests of the beneficiaries: see above at [96].

exercised the power to appoint a trustee for an improper purpose, which was to deliver complete control of the Kaahu Trust, and its assets, to herself. This was a purpose for which she could not exercise that power.

Parties' arguments on appeal

[144] The basic position of the parties on this appeal is as follows. The appellants say that the power to appoint trustees is a fiduciary power and subject to the proper purpose/fraud on a power doctrine. It must not be used for the personal benefit of the trustee but rather for the benefit of the beneficiaries as a whole. It is argued that, in this case, Marina appointed a corporate trustee she controlled, not for the benefit of the beneficiaries as a whole, but to gain control over the trust so that she could use the trustee's powers as she wished and for her own benefit. Alternatively it is argued that it was an improper purpose for a trustee/beneficiary to exercise the power of appointment to give control of the trust to themselves.

[145] The respondents say that the Deed of Declaration of Trust creating the Kaahu Trust (the Trust Deed) expressly permitted the appointment of a corporate trustee that was not independent of a beneficiary. They say that the appellants have failed to prove an improper purpose for the use of this power — the evidence suggests Marina took this step after the other trustee resigned, and only when a satisfactory replacement trustee was proving difficult to find. In any case, it is said that it would not be an improper purpose for a trustee to use a power to benefit themselves if they were the primary or sole object of the trust.[144] It is accepted that Marina had to act honestly in appointing a trustee. But beyond that, it is argued that because the purpose of the Kaahu Trust was, after Ricco's death, to support Marina, the power to appoint a trustee would only be improperly exercised if exercised to benefit a foreign object (not a beneficiary).

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[144] I note that the respondents sometimes also describe Marina as the primary "purpose" of the Kaahu Trust. I take that as meaning her *benefit* is the primary purpose.

Factual background

[146] As to the relevant background facts, Marina was the wife of Ricco Legler (they married in 2009 but had been in a romantic relationship since 1989). Ricco died in an accident in 2017. The appellants are two of his children from an earlier marriage.

[147] Ricco's father, Frederico Legler (Fredy), was a successful businessman in Italy. Ricco had received significant financial assistance from Fredy to establish a life in New Zealand. The principal assets purchased by Ricco were farm and forestry properties in the Bay of Islands region of New Zealand. It seems that Fredy provided financial assistance to enable him to buy these assets. When Fredy died in 2002, Ricco received a substantial inheritance and was able to pay off debts owing on the farm properties.

[148] In 2003 Ricco and Marina entered into an agreement contracting out of the provisions of the Property (Relationships) Act 1976, setting up their own property sharing arrangements to apply in the event of the death of either of them but not in the event of their separation. Marina was to have a significant share, but by no means all, of the farm and forestry properties should Ricco predecease her.

[149] In 2008 Ricco and Marina established the Kaahu Trust. Its principal assets were, or came to be, properties in the Bay of Islands and investments in securities. Some of the assets settled on the trust had been the subject of the relationship property agreement.

[150] The year before, in 2007, the Horowai Family Trust was declared by Horowai Trustee Co Ltd. Ricco and his son, Li Legler, were the original directors of that company. The Horowai Family Trust was set up to hold and operate forestry assets. The forestry assets initially came from Ricco, with Li in charge of the day-to-day running of the forestry business. The final beneficiaries were the three children and, initially, Ricco. The discretionary beneficiaries included the final beneficiaries and "any wife, husband, widow, widower, former wife, former husband, [de factor partner] or former [de facto partner] for the time being" of the final beneficiaries or of their issue. In 2014 Ricco removed himself as a beneficiary, which also removed Marina's status as a beneficiary under that trust.

[151] It was not in dispute and was accepted by counsel that the original source of the wealth settled on both of these trusts was Ricco's father, Fredy. The evidence was that both Fredy and Ricco were family men and were concerned to see their children and grandchildren well provided for.

[152] After Ricco's death, relations between Marina and her stepchildren fractured. One of the children, Laila Legler Klaui, raised the prospect of a claim under the Family Protection Act 1955 against her father's estate. Aside from leaving his shares in Horowai Trustee Co Ltd to his son Li, Ricco had made no express provision for the children (or Marina) in his will, rather leaving the bulk of his estate to the Kaahu Trust. The dispute then shifted to the treatment of a $3 million distribution Ricco had made from the Kaahu Trust to the Horowai Family Trust. The children understood it to be a gift, a belief supported by the documentary record at the time, but following Ricco's death its classification was disputed by the executors (one of whom was Marina) of his estate. Ultimately, the fracture lines shifted to the management of the Kaahu Trust, and it is that dispute which forms the immediate background to this proceeding.

[153] The immediate factual context for the issues on this appeal arose as follows. When established, and until Ricco's death, the trustees of the Kaahu Trust were Ricco, Marina and Bay of Islands Taxation Trustee Company No 2 Ltd (BOI), the latter company directed by the couple's accountant, Philip Tyler. Under the Trust Deed, Ricco had the power of appointment of trustees. On his death, that power passed to the trustees — Marina and BOI. When BOI later retired, it passed to Marina as the sole remaining trustee. She exercised that power to appoint a company, Kaahu Trustee Ltd (KT Ltd), as trustee — a company of which she was the sole director (the shares being held by her and by her solicitors' trustee company). Immediately upon appointing the company as trustee, she resigned as trustee in her personal capacity. Then, acting through her company, she caused the removal of Ricco's children as beneficiaries and distributed the corpus of the Kaahu Trust (with the exception of a property in Russell) to herself, while also appointing herself as the sole beneficiary for whom the trust fund would be held on the vesting day.

[154] The appellants were careful to focus their proceeding narrowly. Rather than challenging the corporate trustee's decision to remove them as beneficiaries, or the

decision to distribute the corpus to Marina, the statement of claim pleads one cause of action only — "fraud on a power". The appellants plead that the power to appoint new trustees is a fiduciary power and accordingly had to be exercised in good faith, for proper purposes and in the best interests of the beneficiaries as a whole. It is alleged that Marina's purpose in replacing herself as sole trustee with a company under her control was to evade a limitation in the Trust Deed and in the law on her ability as trustee to use the trust property to benefit herself. It is pleaded that, on a true construction of the Trust Deed, Marina was unable to use her power as a trustee to appoint new trustees for her own benefit.

[155] It is common ground on this appeal that the power exercised by Marina was a fiduciary power. This is clearly correct. Marina exercised the power in her capacity as trustee. Moreover, the power to appoint a trustee is presumptively fiduciary.[145]

Fraud on a power

[156] It is a principle of long standing that a power conferred by a trust deed, whether fiduciary or not,[146] may be exercised only for a purpose for which the power has been conferred. This rule is often referred to as "fraud on a power", but the fraud referred to in the phrase is equitable fraud and so need not entail dishonesty. For this reason, the rule is also referred to as the "proper purpose" rule. The rule was described by Lord Parker as follows in the case of *Vatcher v Paull*:[147]

> The term fraud in connection with frauds on a power does not necessarily denote any conduct on the part of the appointor amounting to fraud in the common law meaning of the term or any conduct which could be properly termed dishonest or immoral. 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.

[157] Where the allegation is made that a power has been exercised other than for a proper purpose, two issues arise for determination. First, what is the purpose for which

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145 *New Zealand Maori Council v Foulkes* [2015] NZCA 552, [2016] 2 NZLR 337 at [22]; *Brkic (as trustees of the Madeg Trust) v White (as trustees of the Awhitu Trust)* [2021] NZCA 670, [2021] NZFLR 840 at [29]–[35]; *Carmine v Ritchie* [2012] NZHC 1514, (2012) 3 NZTR ¶22-023 at [66]–[67]; and *Harre v Clark* [2014] NZHC 2533 at [24].

146 Geraint Thomas *Thomas on Powers* (2nd ed, Oxford University Press, Oxford, 2012) at [9.04]–[9.05]; Lynton Tucker, Nicholas Le Poidevin and James Brightwell *Lewin on Trusts* (20th ed, Sweet & Maxwell, London, 2020) vol 2 at [30-066]; and *Brkic*, above n 145, at [34]–[35].

147 *Vatcher v Paull* [1915] AC 372 (PC) at 378.

the power has been conferred, and what falls outside that purpose? Secondly, what was the purpose for which the power was exercised on the occasion which is the subject of challenge? The purpose for which a power was actually exercised by the donee of the power is to be determined as a matter of the donee's subjective intention.[148]

[158] As to the first question, issues have in the past arisen as to the relationship between the proper purpose rule and arguments that, if the instrument is properly interpreted, the conduct in question was beyond the scope of the power. In *Eclairs Group Ltd v JKX Oil and Gas plc* Lord Sumption SCJ responded as follows to an argument that limitations on the powers in question should be implied into (in that case) the articles of association of the company:[149]

> I do not doubt that a term limiting the exercise of powers conferred on the directors to their proper purpose may sometimes be implied on the ordinary principles of the law of contract governing the implication of terms. But that is not the basis of the proper purpose rule. The rule is not a term of the contract and does not necessarily depend on any limitation on the scope of the power as a matter of construction. The proper purpose rule is a principle by which equity controls the exercise of a fiduciary's powers in respects which are not, or not necessarily, determined by the instrument. Ascertaining the purpose of a power where the instrument is silent depends on an inference from the mischief of the provision conferring it, which is itself deduced from its express terms, from an analysis of their effect, and from the court's understanding of the business context.

[159] It must be observed that the process, as described, for ascertaining the purpose of a power where the instrument is silent on that purpose sounds a lot like the standard process involved when interpreting a contract. Lord Sales, writing extrajudicially, makes this point in his article "Use of Powers for Proper Purposes in Private Law".[150] Of this passage in Lord Sumption's judgment Lord Sales comments:[151]

> First, Lord Sumption was concerned to reject the idea that the only constraints on the exercise of the power had to be derived, if at all, from the very restrictive test for implication of terms in a contract or other instrument. That is a very important point and I respectfully submit it is correct. But secondly, it is open to question whether Lord Sumption is right to say that an analysis

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148 *Wong v Grand View Private Trust Co Ltd* [2022] UKPC 47, [2023] 2 LRC 559 at [72]; and *Eclairs Group Ltd v JKX Oil and Gas plc* [2015] UKSC 71, [2016] 3 All ER 641 at [15] per Lord Sumption SCJ.

149 *Eclairs Group Ltd*, above n 148, at [30].

150 Philip Sales "Use of Powers for Proper Purposes in Private Law" (2020) 136 LQR 384.

151 At 391.

> of the purpose of the power is a matter to be determined as something distinct from its proper interpretation. Might it not be said that the matters referred to by Lord Sumption as relevant to the identification of the proper purposes for which the power might be exercised—inferring the mischief or object at which the power is directed from the express terms, business context and the practical effects which its exercise in a given context will bring about—are precisely the matters to which one would have regard when interpreting the limits inherent in the power in the contractual setting in which it appears?

[160] Lord Sales' point is that the process of identifying the purpose of a power is closely linked to the process of interpreting the instrument conferring it (in this case the Trust Deed). His position gains support from the later case of *Wong v Grand View Private Trust Co Ltd*, in which Lord Richards, writing for the Board (of which Lord Sales was a member), said that the intention of the settlor in conferring a power "is to be ascertained by applying ordinary rules of construction to the trust deed and in the light of the admissible factual matrix".[152] I adopt that analysis.

[161] There are good policy reasons why the text of the trust deed should be central to this task — this approach promotes certainty for beneficiaries, trustees and third parties who deal with the trustees. Indeed, this connection between interpretation of the instrument in question and identification of the purpose of the power is not a new departure in the law. In *Topham v Duke of Portland*, a decision of 1869, Lord Hatherley LC made the point as follows:[153]

> … in this Court any attempt to exceed the limitations of the power through the medium of any appointment to one of [its] objects … is equally invalid, whether the purpose of the donee be selfish, or, as he supposes, a more beneficial mode of effecting that which he takes the donor of the power to have desired. The Court will not allow [the donee] to interpret the donor's intention in any other sense than the Court itself holds to be the true construction of the instrument creating the power; and a literal execution of the power, with a purpose which it does not sanction, is regarded as a fraud on the power.

[162] The importance of the proper purpose rule in this regard is that the drafters of deeds may not foresee all the circumstances in which broad discretionary powers come

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[152] *Grand View*, above n 148, at [63]. This approach also finds support in leading texts: see, for example, Thomas, above n 146, at [9.03]; and Jeff Kenny "Trustees Powers" in Andrew S Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 155 at [6.5.3(2)].

[153] *Topham v Duke of Portland* (1869) LR 5 Ch App 40 (Court of Appeal in Chancery) at 59.

to be exercised, and in which the explicit terms of the deed come to be applied and are tested.[154]

[163] Finally, although the proper purpose rule applies whether or not the power is fiduciary, where the power is fiduciary, as it is here, the exercise of that power is further constrained by the obligation of a fiduciary to act in the best interests of the beneficiaries.[155] That provides important context in determining the purpose of the power.

The first issue — the purpose for which a trustee could use the power of appointment

[164] The starting point for this analysis is the terms of the Trust Deed.

The terms of the Trust Deed

[165] The Kaahu Trust was settled for the benefit of the beneficiaries. "Beneficiary" is defined as any person who receives or may receive any interest in the trust fund, and therefore includes both "Discretionary Beneficiaries" and "Final Beneficiaries". The final beneficiaries are defined as Ricco and Marina. The discretionary beneficiaries include the final beneficiaries and their issue (including the appellants). Also discretionary beneficiaries are: any trust which includes amongst its beneficiaries any beneficiary of the Kaahu Trust (or their issue); and any beneficiary added to the list pursuant to the trustees' powers to add or remove beneficiaries.

[166] The trustees have broad powers to distribute the income and all or any part of the capital to the beneficiaries, or one or more of them. They can also bring forward the final distribution of the trust by bringing forward the vesting day for the purposes of the trust. But failing that, the vesting day is defined as the day upon which the period of 80 years, from the date of the Trust Deed, expires.

[167] Clause 6 deals with the distribution of the capital of the trust on the vesting day. Clause 6.1 provides:

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154 Lord Sales makes a broader point to the same effect in the article referred to above: Sales, above n 150, at 384–388.

155 See *New Zealand Maori Council*, above n 145, at [22] and [24].

> The Trustees shall hold the Trust Fund on the Vesting Day upon trust:
>
> (a) for such of the Final Beneficiaries and their issue then living as the Trustees may by deed appoint on or before the Vesting Day;
>
> and in respect of any portion of the Trust Fund not so validly appointed then
>
> (b) for such of the Final Beneficiaries then living and, if more than one, as tenants in common in equal shares, the interest in the Trust Fund of any Final Beneficiary who has died before the Vesting Day passing to the issue of that Final Beneficiary living on the Vesting Day per stirpes, and, if more than one, as tenants in common in equal shares;
>
> and in respect of any portion of the Trust Fund not so vested then
>
> (c) for such of the Discretionary Beneficiaries then living or in existence as the Trustees may by deed appoint on or before the Vesting Day;
>
> and in respect of any portion of the Trust [Fund] not so validly appointed then
>
> (d) for such person or persons, as tenants in common if more than one, who would have been entitled to the estate of Ricco LEGLER had he died intestate leaving no surviving spouse on the Vesting Day.

[168] Under the Trust Deed, Ricco had the power both to appoint trustees and to nominate someone else to appoint trustees. On Ricco's death, failing the nomination by him during his life of someone else to exercise that power, the power of appointment would vest in the trustees. Ricco did not, during his life, nominate someone else to exercise the power of appointment. Accordingly it passed to the trustees on his death.

[169] A critical provision on this appeal is cl 26.1, which provides:

> 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.

[170] A further elaboration of these rules is to be found in cl 27. Clause 27.1 provides that "[a]ny properly empowered corporate body may act as the sole Trustee or as one of two or more corporate Trustees". Clause 27.2(c) provides:

> … 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.

[171] There are several provisions in the Trust Deed which deal with trustee decision-making. Clause 8.2 provides:

> Except as otherwise expressly provided by this deed, the Trustees may exercise all the powers and discretions vested in the Trustees by this deed in the absolute and uncontrolled discretion of the Trustees at such time or times, upon such terms and conditions, and in such manner as the Trustees may decide.

[172] The Trust Deed is also generally permissive of conflicts of interest for trustees. In cl 20.1, headed "Negation of conflict", there is provision that a trustee may act as such even though they are in a conflict of interest in a business transaction because of an interest in the other party, and even though the interests or duties of such a trustee in any particular matter may conflict with their duty to the trust fund or any beneficiary.

[173] But there are limits on the powers exercisable by trustees. Clause 8.3 provides that the rule of law specifying all decisions of trustees are required to be unanimous is applicable to the Kaahu Trust. And notwithstanding the provisions of the "Negation of conflict" clause, the trustees are not absolved of their duty to act for the benefit of the beneficiaries in accordance with the terms of the trust. Clause 18.1, which I view as critical on this appeal, provides:

> 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.

The obvious interpretation of this clause is that a power or discretion vested in the trustees may be exercised in favour of a trustee who is also a beneficiary, but only by the other trustee or trustees.

[174] Clause 12 gives the trustees broad powers to revoke, add to or vary any of the trusts, powers or provisions of the Kaahu Trust. But there are two aspects of the Trust Deed itself they are not empowered to vary: first, the perpetuity period (it is to be inferred, to save the trust from invalidity by breaching the then-rule against

perpetuities);[156] and, secondly, the provisions of cl 26.1 placing restrictions on the identity of trustees.

[175] There are other relevant provisions that bear upon the interpretation of the Trust Deed. Clause 2.2 provides in material part:

> (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;
>
> …

The factual matrix

[176] It is also necessary to address the matters of context that are argued to be relevant to construing the purpose of the power.

[177] The appellants note that both the Kaahu Trust and the Horowai Family Trust were settled with wealth inherited from the Legler family. They emphasise that the appellants, as Ricco's children, were included as beneficiaries of both trusts. They note that when Ricco removed himself as a beneficiary of the Horowai Family Trust in 2014, he did not remove his children as beneficiaries of the Kaahu Trust. Further, they say that whilst during Ricco's life the Kaahu Trust was administered to benefit Ricco and Marina, it also benefited his children through distributions of capital. They also argue it is significant that unlike the Horowai Family Trust, which was settled with a corporate trustee directed by two beneficiaries, the initial trustees for the Kaahu Trust included an independent trustee in the form of BOI.

[178] The respondents contend that the Kaahu Trust was set up to look after Ricco and Marina, and the Horowai Family Trust was for the children. This is advanced to support their argument that, following Ricco's death, Marina was the primary object of the Kaahu Trust, so that it was not an improper use of the power of appointment for

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156 Since abolished by s 16(5) of the Trusts Act 2019.

her to benefit herself. In making this argument, the respondents rely upon the following:

(a) The Kaahu Trust was settled by Marina and Ricco in 2008, whereupon Marina relinquished rights under an earlier relationship property agreement (although from the terms of the Trust Deed it appears that the other trustee, BOI, was also a settlor).

(b) Mr Tyler, the director of BOI, gave evidence that the Kaahu Trust was established for the benefit of Ricco and Marina and was administered by the three trustees on that basis. He said that "another trust, the Horowai Family Trust, was established by Ricco for the benefit of his three children".

(c) The Horowai Family Trust had been settled as a separate "Legler legacy" vehicle in 2007, to house substantial forestry and farm assets, plus working capital.

(d) Ricco and (through him) Marina were excluded as beneficiaries of the Horowai Family Trust in 2014.

(e) The Kaahu Trust was administered by Ricco and Marina for their benefit, providing their home and income for their retirement.

(f) $3 million was distributed by the Kaahu Trust to the Horowai Family Trust in 2017.

(g) Various declarations of intent were made by Ricco around the time this distribution was made, to the effect that his children were "finally (well and truly) set up … financially", and that he and Marina could "get on with the rest of our lives using the funds in the Kaahu Trust for income and spending on ourselves for our lifetime".

[179] I accept that the overall purpose of the Kaahu Trust is relevant to determining the purpose of the power of appointment at issue on this appeal. Nevertheless, the

evidence from Mr Tyler as to the purpose of the Kaahu Trust and Horowai Family Trust deeds seems to me irrelevant to that issue. The best evidence as to the purpose of those deeds is their terms. In the case of each trust, Ricco and Marina and the children were beneficiaries. Ricco only removed himself as a beneficiary of the Horowai Family Trust (and, through that act, also removed Marina) sometime after the Kaahu Trust was settled. Moreover and more fundamentally, even then the children remained beneficiaries of the Kaahu Trust.

[180] Nor do I see the evidence of post-settlement distributions as relevant to the purpose of the Kaahu Trust or the purpose of the power of appointment. The fact of the various distributions (both those to the Horowai Family Trust and to Ricco and Marina) might well have been relevant to the trustee's exercise of the discretion whether or not to make further distributions to the children, but that issue is not before the Court.

[181] As to the post-settlement declarations by Ricco, again they seem to me to be irrelevant to determining what the purpose of the trust was, because that is determined as at the date it was settled.[157] Similarly they are irrelevant to the task before the Court of determining the purpose of the particular provisions dealing with the power of appointment of trustees.

[182] I accept, however, that it is relevant evidence that on the transfer of assets into the two trusts Marina effectively waived rights she had under the earlier relationship property agreement, because that is part of the factual matrix at the time the trust was settled. This is not a relationship property case, and we do not know the extent to which she would have had interests in some of the wealth inherited by Ricco from his father, but it is clear that she had interests in some of the property transferred into the Kaahu Trust and that these assets transferred made up a substantial part of Ricco's, if

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[157] *Grand View*, above n 148, at [61]. See also the explanation offered in David Russell and Toby Graham "Letters of wishes and understanding the purposes of a trust" (2019) 25 Trusts & Trustees 277 as to why a settlor's later expressions of subjective intent should not, as a matter of principle, be treated as relevant. The authors explain at 280–281 (footnote omitted): "Once a trust is created, the settlor's identity is no more than a matter of historical record … To allow him, through the original (or later) letter of wishes, to frame (and reframe) the purpose of the trust effectively gives him a power to amend the trust not found in the instrument and converts it into a trust for such … purposes as the settlor may from [time] to time select."

not the couple's, wealth at the time of the Kaahu Trust's creation. As the appellants submit, it is also relevant that the source of the wealth transferred into both trusts was inheritance from Ricco's father, Fredy.

What are the purposes for which the trustees' power of appointment may properly be used?

[183] The majority are of the view that the findings in the Courts below that the appointment of a trustee/beneficiary-controlled corporate trustee was authorised by the Trust Deed — and the appellants' concession to that effect in this Court — are fatal to the argument that it would be improper for a trustee/beneficiary to appoint such a trustee with the purpose of delivering control of the trust to themselves.[158] The findings to which they refer are as follows. In the High Court, the Judge found that Marina "did no more than something envisaged by the deed, indeed, expressly provided for by it".[159] In the Court of Appeal, the majority considered that the appointment of KT Ltd had been in "strict compliance" with the Trust Deed.[160]

[184] Contrary to the view of the majority, I consider that the appointment of a company which is exclusively controlled by a trustee/beneficiary was not authorised by the Trust Deed. Moreover, I consider that the Trust Deed precluded such an appointment. I say this for the following reasons.

Interpretation of the Trust Deed

[185] First, cl 18.1, a provision of general application, precludes a trustee/beneficiary exercising a power or discretion in favour of themselves. For a trustee/beneficiary to appoint a company they entirely control to the position of sole trustee is to exercise a

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158 See above at [122]–[124].

159 *Legler v Formannoij* [2021] NZHC 1271, (2021) 5 NZTR ¶31-006 (Downs J) [HC judgment] at [46].

160 *Legler v Formannoij* [2022] NZCA 607, (2022) 5 NZTR ¶32-013 (Brown, Brewer and Cull JJ) [CA judgment] at [36] per Brown and Brewer JJ. See also at [26]–[28] per Brown and Brewer JJ. Cull J, in dissent, found that the Trust Deed precluded the appointment of a sole corporate trustee under the control of a beneficiary as its only director: at [49].

power in favour of themselves.[161] They thereby gain control of the corpus of the trust, control of all decision-making and thereby the ability (unconstrained by the views of another trustee) to distribute the assets to themselves at will. The respondents say that cl 18.1 is permissive only, in the sense that the clause does not preclude a trustee exercising a power or discretion in their own favour. That is a hard argument to maintain. I repeat the terms of cl 18.1 in full:

> 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.

It is a necessary implication of cl 18.1 that a trustee who is also a beneficiary *may not* exercise a power or discretion as trustee in their own favour. As cl 18.1 makes clear, decisions benefiting a trustee who is also a beneficiary can only be made by the *other* trustee or trustees. It is also worthwhile contrasting this clause with the provision in the Horowai Family Trust deed which deals with the same subject matter and which could properly be categorised as permissive. The clause in that deed provides:

> Any power or discretion vested in the Trustees may be exercised in favour of or for the benefit of a Beneficiary who is also a Trustee.

[186] My second reason for rejecting an interpretation which treats such an appointment as authorised relates more directly to the provisions dealing with the appointment of trustees. It is significant that the Trust Deed does not expressly authorise such an appointment, contrary to what the High Court held. The best that the respondents can point to in this regard is cl 27.2(c), which contemplates that a beneficiary might have an interest in a corporate trustee as a shareholder, director or otherwise, and that the corporate trustee may exercise a power or discretion to benefit that beneficiary. But that does not authorise a corporation exclusively controlled by a beneficiary to act as sole trustee.

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[161] See, to similar effect, *Austec Wagga Wagga Pty Ltd v Rarebreed Wagga Pty Ltd* [2012] NSWSC 343 at [49]–[67], where the Supreme Court of New South Wales held that the appointment of a corporate trustee controlled by the appointor was in breach of a prohibition in the trust deed upon the appointor exercising the power of appointment "in favour of" himself. The phrase "in favour of" was given its ordinary meaning of "in support of", "on the side of" or "to the advantage of", following *Hillcrest (Ilford) Pty Ltd v Kingsford (Ilford) Pty Ltd (No 2)* [2010] NSWSC 285, (2010) 4 ASTLR 233 at [42].

[187] On the other side of the interpretive ledger, the intention to prevent a trustee/beneficiary from gaining and using control of the trust to prefer themselves is apparent from several other provisions within the Trust Deed. It is apparent from the requirement of unanimity in trustee decision-making in cl 8.3, from the prohibition on a trustee/beneficiary exercising a power in favour of themselves in cl 18.1, and from much of the text of cl 26.1. As noted, cl 26.1 (which is one of only two clauses from which there may be no derogation should the trust be varied) achieves two things: it prevents a trustee who finds themselves as the sole remaining trustee from dealing with the trust assets, allowing them only to act to appoint an additional trustee (para (a)); and it requires there to be at least one trustee who is not a beneficiary nor in a specified category of relationship with a beneficiary or other trustee (para (b)). Read as a whole, these provisions are clearly intended to ensure that independent judgement (in the sense of judgement which is not tainted by self-dealing or self-interest) is brought to bear when a discretion or power is exercised to deal with trust assets.

[188] The respondents point out that sole corporate trustees are excluded from cl 26.1, and thus from the restrictions on the identity of trustees in cl 26.1(b). However, it is apparent from the way cl 26.1(b) is drafted that it is directed to trustees who are natural persons. To state the obvious, a corporate trustee could never be in one of the prohibited categories of relationship (spouse, parent, child or sexual) with a beneficiary or other trustee. The fact that such restrictions are expressed, by virtue of the chapeau, to apply "[u]nless a corporate body is the sole Trustee" is therefore of no moment. It does not suggest that the intention to ensure independence in trustee decision-making is negated when the trustee is a body corporate. Rather, the proviso related to a sole corporate trustee should be read as applying to cl 26.1(a) — reconciling it with cl 27.1 so that a corporate body is able to act as sole trustee.

[189] Thirdly, logic compels such an interpretation. There is no logic in providing for independence, but allowing that requirement to be bypassed by the appointment of a company owned and controlled by a beneficiary as sole trustee. In particular, it is illogical to construe cls 26.1 and 27 as permitting a beneficiary-controlled body corporate to be sole trustee — why would the settlors intend to preclude individual

trustees from appointment, or from acting in certain circumstances, but allow companies controlled by those same individuals to be appointed and to so act?

[190] The respondents respond that cl 26.1 is not concerned with securing independence but rather with maintaining separation between the beneficiaries and the trust fund, so as to ensure the trust is immune from "trust busting" attacks. In this regard they call in aid the authority of the decision of the High Court of Australia in *Montevento Holdings Pty Ltd v Scaffidi*.[162] In that case the trust deed provided that, if the individual with the power to appoint and remove trustees was also a beneficiary, they were not eligible to be a trustee.

[191] The High Court of Australia approved the finding of Buss JA, who had been in the minority in the Court of Appeal, that there was no implicit or actual prohibition upon a corporation, even if controlled by a beneficiary, being a trustee in these circumstances.[163] In reaching that conclusion Buss JA had rejected an argument that, if an individual appointor/beneficiary was precluded from appointing themselves as trustee, they must also be precluded from appointing as trustee a company they controlled. The Judge, it seems, rejected the notion that the clause in question had anything to do with securing independence or "even-handedness" in decision-making.[164] Rather, he held, it was designed to avoid the risk, arising under particular legislation, that if a natural person who was a beneficiary under a discretionary trust was also the trustee, and the appointor of trustees, they would be held to hold a general power of appointment in respect of the assets and therefore be liable for death duties.[165] In reaching that view, the Judge referred to revenue legislation relevant to the trust when it was established, and contemporary legal writing from that time that elucidated what drafters of trust deeds were attempting to achieve.

[192] *Montevento*, then, turns upon the particular legal context and upon the particular provisions in that trust deed. As outlined above, there are clear indications

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162 *Montevento Holdings Pty Ltd v Scaffidi* [2012] HCA 48, (2012) 246 CLR 325.
163 *Scaffidi v Montevento Holdings Pty Ltd* [2011] WASCA 146, (2011) 6 ASTLR 446 at [93] per Buss JA.
164 Compare the reasoning of the majority: at [155]–[158] per Murphy JA and Hall J.
165 At [96] per Buss JA.

in the Kaahu Trust deed that there was a desire to achieve independence in decision-making.[166]

[193] Finally, I address the significance to this analysis of cl 2.2 — the clause which provides that, unless expressly provided for, powers in the Trust Deed are not limited by the interpretation of any other clause, and that interpretation should favour the broadening of powers. Such a clause does not of course remove the requirement to construe each clause within the overall context of the deed — to find otherwise would be to set up, through interpretation, conflict between the clauses. In this case, cl 2.2 cannot override the difficulty for the course of action settled upon by Marina that cl 18.1 creates — it is to be remembered that the effect of that clause is that a trustee/beneficiary may not exercise a power or discretion in their own favour. Nor can cl 2.2 compel an interpretation of a power or discretion that undermines the clear intent and purpose of other provisions — in this case the clear intent that there be independence brought to bear in trustee decision-making.

[194] To conclude on this point, Marina's appointment of a company owned and controlled by her as the sole trustee was precluded by the terms of the Trust Deed. This conclusion flows from the following:

(a) cl 18.1 precluded Marina, as a trustee/beneficiary, from appointing a company she controlled as sole trustee because to do so was to exercise that power in her own favour; and

(b) construed together, the provisions of the Trust Deed are to be interpreted as requiring that there be independence (in the sense of independence from the interests of an individual beneficiary) brought to bear in trustee decision-making and so as precluding the appointment by a trustee/beneficiary of a company they control as sole trustee in order to subvert this requirement.

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[166] It is interesting to note in this regard, as I come to shortly, that Mr McBrearty, who was responsible for drafting the Trust Deed, understood it to require an independent trustee: see below at [218]–[219].

The purpose of the power

[195] However, the appellants did not argue or plead that the appointment was outside the scope of the power. Rather they accept that the appointment was not expressly prohibited by, and was technically consistent with, the Trust Deed, instead arguing that it was not an exercise of the power for a proper purpose.

[196] The majority say that the appellants' concession to this effect is fatal to the argument that it was an improper purpose to seek to take control of the trust. They say that the argument that it is not within the purpose of the power to appoint a corporate trustee with a beneficiary as the sole director is effectively the same argument as the interpretation argument which is not before us. Since it is conceded there is such a power, accepting this argument would mean that, although there is the power to appoint such a trustee, it could never be exercised without it being a fraud on a power. This, they say, "is tantamount to saying that the power does not exist at all".[167]

[197] But the concession made by the appellants is not that the Trust Deed expressly provides that the power to appoint may be used in this particular fashion. It is rather that the Trust Deed does not, by its terms, expressly exclude it. The argument made is that the power is broad and cannot be used in a manner that, on the basis of the Trust Deed viewed overall, is outside the purposes for which it is conferred. That is a conventional invocation of the proper purpose rule.

[198] That being the case, I address the first question as formulated above — what is the purpose for which the power has been conferred, and what falls outside that purpose?

[199] Put at its most general, the purpose of the power to appoint a trustee is to appoint someone who is fit to carry out the terms of, and their duties under, the trust.[168]

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167 See above at [124]. See also above n 95.

168 See *Re Skeats' Settlement* (1889) 42 Ch D 522 (Ch) at 526, where Kay J said that "[t]he ordinary power of appointing new trustees, under a settlement such as this is, of course imposes upon the person who has the power of appointment the duty of selecting honest and good persons who can be trusted with the very difficult, onerous, and often delicate duties which trustees have to perform. He is bound to select to the best of his ability the best people he can find for the purpose." See also Tucker, Le Poidevin and Brightwell, above n 146, vol 1 at [15-048].

This is consistent with the fiduciary nature of the power and the consequent obligation on those exercising it to act in the best interests of the beneficiaries.[169]

[200] The terms of the Trust Deed provide further assistance as to the constraints upon the exercise of the power. In this regard, the analysis of the provisions of the Trust Deed set out above is relevant. As explained there, the Trust Deed makes clear an intention that there be some independence brought to bear in decision-making by the trustees.

[201] Construed against this background, the purpose of the power of appointment was to appoint a trustee with the skills and characteristics necessary to carry out the terms of the trust — skills and characteristics which were such as to ensure that there be an independent check (independent from the interests of one beneficiary) on decision-making. I conclude that it is not a proper use of the power of appointment in these circumstances, therefore, for a trustee/beneficiary to appoint another trustee with the purpose of themselves gaining complete control of the trust.

[202] I find support for this conclusion as to the purpose of the power in the Court of Appeal's decision in *Brkic (as trustees of the Madeg Trust) v White (as trustees of the Awhitu Trust)*.[170] The trust deed in that case contained a clause prohibiting a trustee/beneficiary from exercising a power or discretion in their own favour but allowing the other trustee to do so. At issue was whether, notwithstanding this clause, the respondent trustee had such unfettered powers over the trust property that it could be treated as her own for the purposes of enforcing a personal debt. The appellants' argument was that the respondent could avoid the effect of the "no self-benefit clause" by appointing a closely held company as corporate trustee and through that company directing that the trust assets be distributed to herself. The Court of Appeal, however, found that this would amount to a fraud on the power. It said:[171]

> Here, the potential use of the power of appointment suggested by the appellants is the sole route by which [the respondent] could avoid the restriction of the no self-benefit clause. In our view, therefore, whether or not

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169 See *New Zealand Maori Council*, above n 145, at [22] and [24].
170 *Brkic*, above n 145. See also *Goldie v Campbell* [2017] NZHC 1692, [2017] NZFLR 529 at [69].
171 *Brkic*, above n 145, at [35] (footnote omitted).

> the power of appointment is fiduciary (though we consider that it is), we agree with the Judge that the power cannot be exercised for a collateral purpose to avoid the restrictions of the no self-benefit clause. It would, as the Judge concluded, be inconsistent with the context which sits behind the Trust's establishment to construe the trust deed as permitting [the respondent] to use her power of appointment to avoid the restriction on self-benefit which constrains the trustees.

[203] I also do not see cl 8.2, which provides that trustees shall have "absolute and uncontrolled discretion" in the exercise of their powers, as a barrier to this conclusion. As the Privy Council held in *Grand View*, a provision such as this is directed at the discretion enjoyed by a trustee in the exercise of a power, not at the scope of the power or its purpose.[172] The clause does not displace the operation of the proper purpose rule.

[204] Before leaving this point, it is necessary to deal with Marina's argument that because her benefit was the primary or (as it was sometimes put) the *sole* purpose of the Kaahu Trust, it was not an improper purpose for her to use her power of appointment to take control of the trust for the purpose of benefiting herself. This is a slightly complex point, so I think it might assist if I set out my conclusions before embarking on the discussion. I conclude that, first, at the time she exercised the power to appoint a trustee, Marina's benefit was neither the sole nor primary purpose of the Kaahu Trust. Secondly, even if Marina's benefit were the primary purpose, that would not free her of the constraints to exercise the power for a proper purpose as set out above.

[205] The argument that Marina's benefit was the sole purpose of the Kaahu Trust following Ricco's death is insupportable, given the clear provisions of the Trust Deed that the appellants were also beneficiaries. As to the notion that her benefit was the primary purpose, that needs to be tested in two factual contexts: when Ricco was alive, and after his death. The Trust Deed operates differently in each context.

[206] What is clear from the structure of the Trust Deed is that Ricco wished to retain sufficient control to ensure that, during his life, he and Marina would receive the support they needed to live the lives they wished as a couple. Ricco retained control

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[172] *Grand View*, above n 148, at [78] referring to *Gisborne v Gisborne* (1877) 2 App Cas 300 (HL) at 305 per Lord Cairns LC.

of who the trustees were, and Ricco and Marina were listed as the final beneficiaries, should the trust be wound up at any point while they both were still alive. I accept that it is clear from this structure, and consistent with the context applying at the time the Kaahu Trust was settled, that Ricco and Marina were together a primary focus of the Kaahu Trust while they both remained alive.

[207] All the same, while the intention was to see Ricco and Marina provided for, the assets were placed outside their personal ownership when they were made subject to the trust. They lost the unconstrained rights to deal with the assets as if they were their own, free of the trusts set up under the Trust Deed. That is the inevitable effect of the creation of a trust. So too is the fiduciary constraint imposed upon the trustees, once appointed, to consider the interests of all beneficiaries. In that regard, the trusts created contemplated that the trust funds were available to meet the needs of other beneficiaries should the occasion arise, and should the trustees so decide. There is also an obvious intention, apparent on the face of the Trust Deed, that assets not distributed during Ricco and Marina's lives would pass to their issue on their death.

[208] As noted, the provisions of the Kaahu Trust operate differently on the death of either Ricco or Marina. Although Ricco and Marina were the final beneficiaries for the purposes of the vesting day, if either of them died before that date the Trust Deed provided their share was to go to their issue, and not to the surviving partner.[173] In other words the Trust Deed provided that, in the event Ricco predeceased Marina, Ricco's children stepped into his shoes as a final beneficiary alongside Marina. The Trust Deed therefore does the work of looking after one generation, but also, at some point, passing family wealth to the next. In this, it is no more than a conventional family trust.

[209] There is therefore no sense in which Marina's benefit can properly be said to be *the* purpose of the Kaahu Trust nor, following Ricco's death, its primary purpose. Of course, even were Marina the primary object of the Kaahu Trust, it would still not be a proper purpose to exercise the power to appoint a company she controlled in order to take control of the Kaahu Trust. This is for the reasons set out above.

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[173] See above at [167].

[210] To recapitulate, the following features support the conclusion that an exercise of the power of appointment by a trustee/beneficiary to deliver decision-making control to themselves is an improper use of that power:

(a) the fiduciary nature of the power of appointment of trustees, which requires that it be used to appoint someone with the skills and characteristics that enable them to discharge the terms of, and their duties under, the trust; and

(b) the provisions in the Trust Deed which are designed to ensure independent input (in the sense of judgement which is not tainted by self-dealing or self-interest) into trustee decision-making.

The second issue — Marina's purpose in exercising the power of appointment

Was Marina's purpose to take control of the Kaahu Trust?

[211] It can be said that the appointment by Marina of a corporate entity as trustee — a company which had been created for this purpose and which was owned and controlled by Marina — provides compelling evidence that her subjective intention was to take control of the Kaahu Trust and sidestep the restrictions that would otherwise have applied to require input other than her own into trustee decision-making. It remains necessary, however, to review the immediate factual circumstances surrounding the appointment in case they provide a different view of events.

[212] As noted earlier, in 2018 Laila's solicitors, TGT Legal, notified Laila's intention to bring a claim against the estate of her father under the Family Protection Act. In a later letter, TGT Legal raised concerns regarding the administration of the Kaahu Trust. They observed that, under the terms of the trust, and following the death of Ricco, Marina's interest was no greater than that of the children — the children and Marina were discretionary beneficiaries, and the children and Marina each had a contingent interest in one half of the trust fund. They contested Marina's view that the Kaahu Trust was established principally for Ricco and Marina and that Ricco's children would only have a "default interest". Against that

background, they said, it was inappropriate for Marina to be a trustee while none of Ricco's children were trustees, noting that Marina would be disqualified by cl 18.1 from participating in any decision favouring herself. They stated their understanding that the trust assets were primarily legacy assets derived from Ricco's family, querying whether Marina had contributed anything to the trust.

[213] In late 2018, TGT Legal and Lowndes Jordan, the solicitors acting for the executors of Ricco's estate (noting that Marina was one of two executors of that estate) and for the trustees of the Kaahu Trust, exchanged correspondence in connection with the signalled family protection claim. It was in this context that tensions developed over the status of the $3 million payment from the Kaahu Trust to the Horowai Family Trust. In a letter dated 15 February 2019 TGT Legal expressed concern regarding the executors' assertion that the $3 million had been an advance to the Horowai Family Trust from Ricco personally, although using Kaahu Trust funds (and so resulting in a debt owing by the Horowai Family Trust to the estate). TGT Legal noted that the advance had been recorded in the Horowai Family Trust's accounts as a distribution from the Kaahu Trust, and assumed that was how Mr Tyler had understood the transfer when he prepared the Kaahu Trust accounts. They recorded their understanding that, after Ricco's death, Mr Tyler had been directed to restate the Kaahu Trust's financial statements to reflect the $3 million as drawings by Ricco rather than a distribution to the Horowai Family Trust.

[214] Ultimately the executors accepted that Ricco had intended a gift to his children, and that there should be no obligation owing by the Horowai Family Trust to the estate. But this position taken by the executors set other events in motion. In that same letter of 15 February 2019 TGT Legal expressed concern about the efficacy of the accounting for and administration of the Kaahu Trust, and the conduct of its trustees, noting the various inconsistencies in the executors' attempt to recast the $3 million transaction. Mr Tyler's evidence was that it was partially the concerns expressed in this correspondence that caused him, in October 2019, to signal his wish that his company, BOI, resign as trustee of the Kaahu Trust.

[215] The possibility of such a resignation was not a new idea. In several items of correspondence Lowndes Jordan had made reference to the need for the Kaahu Trust

to have an independent trustee. In an email of October 2018, Lowndes Jordan expressed the view that BOI may not fit that bill, since Mr Tyler, who owned and controlled that company, was the accountant for both the Kaahu Trust and the Horowai Family Trust.

[216] After receiving notice from Mr Tyler that he wished his company, BOI, to retire as trustee, Marina approached her and Ricco's family lawyer, Dennis McBrearty, to ask him if he would accept appointment. Mr McBrearty declined, recommending Perpetual Guardian for the role. However, Marina was concerned that Perpetual Guardian would be too expensive and was concerned as to whether they were a good fit for the role. Alan Clarke, her financial advisor, recommended she seek the assistance of a Whangārei law firm, WRMK Lawyers (WRMK).

[217] Marina met with WRMK. Her evidence was that she instructed them that the Kaahu Trust "had been established to provide for Ricco and myself". She described the difficulties she was having with Ricco's children. WRMK advised her that she could appoint a corporate trustee that she controlled and then resign herself. Marina engaged WRMK to act for both herself and for the Kaahu Trust. It is not clear from the record whether BOI, as the other trustee, also agreed to instruct WRMK.

[218] Marina then made contact with Mr McBrearty to ask him to provide her new lawyers with anything they needed to carry this plan into effect. Mr McBrearty had drafted the Trust Deed for the Kaahu Trust. Mr McBrearty expressed his concern about the proposal to appoint as sole trustee a company of which Marina was sole shareholder/director. He said:

> The Trust Deed for Kaahu provides that there must at all times be an independent trustee. That is defined as a person who is not a beneficiary, nor the spouse, parent or child of a beneficiary. If you are going to form a company I believe the control of the company must be given to someone other than yourself.

[219] Mr McBrearty followed this up with a memorandum to WRMK. In that memorandum he said:

> Company as sole trustee. Technically the wording of the Trust Deed will allow for a company to be the sole trustee. Even though the wording of clause 26 of the Trust Deed provides the sole company trustee as being an exclusion

> from the requirement to have an independent trustee, I believe the intent of the trust document is that there will at all times be an independent trustee.

[220] By letter of 7 November WRMK confirmed their advice that the use of a sole corporate trustee controlled by Marina was a "valid option". They confirmed that this would enable Marina to make all decisions affecting the Kaahu Trust. They noted that her decisions would be subject to the overriding duty to act in the best interests of the trust and proceeded to say:

> 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 … of which you will be the primary beneficiary and Ricco's children would be discretionary beneficiaries, but only following your death …
>
> (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.

[221] Marina said in evidence that the "appointment of a sole trustee appealed to me as I thought it would simplify matters relating to the Kaahu Trust". She said that the letter of 7 November "gave me confidence that my interests were being looked after and that the proposal was legally permissible". She instructed WRMK to proceed with the proposal.

[222] KT Ltd was incorporated by WRMK for the purpose of acting as trustee of the Kaahu Trust. In accordance with the plan WRMK had set out to give Marina control of the Kaahu Trust, BOI resigned as trustee. Marina then appointed KT Ltd as trustee, before resigning and being discharged as a trustee herself. The resignation and appointment were effected on 27 November 2019.

[223] Predictably, on learning of the appointment of a company owned and controlled by Marina as the sole trustee of the Kaahu Trust, the children were aggrieved. On 27 February 2020 TGT Legal, now acting for all three children, wrote to WRMK. They inquired as to the beneficial ownership of the shares in KT Ltd held by WRMK's trustee company and continued:

> Given the obvious conflict that exists between Marina's interest as a beneficiary, and now her sole directorship of the trustee, our clients are concerned to ensure that the affairs of the Kaahu Trust are properly managed.

[224] WRMK reported this correspondence to Marina. At this point it is not entirely clear for whom WRMK was acting — whether it was for Marina (through her company) as trustee, or personally. The subject line of the letter, "Estate Planning", suggests that they were advising her in her personal capacity. Noting the requests for financial statements for the Kaahu Trust and the concerns expressed at Marina's sole directorship, they commented that "[t]his was all to be expected", continuing: "It is time for a decision to be made as to what to do with the assets of the Kaahu Trust."

[225] TGT Legal's concern was entirely reasonable. KT Ltd was not an independent trustee. WRMK was right, then, that the concern was predictable. What is harder to understand is why it was time to decide what to do with the assets of the Kaahu Trust. It is therefore of interest just what possible courses of action were identified for Marina. WRMK advised there were essentially three options for dealing with the Kaahu Trust and its assets, although it noted that they could be combined. The options were:

> (1) Remove Ricco's children (and associated trust) as beneficiaries;
>
> (2) Resettle (ie transfer) the Trust's assets to a new trust for your benefit only; and/or
>
> (3) Distribute all of the Trust's assets to you personally and wind up the Trust.

Again it is of interest that all of the available options entail the corporate trustee, controlled by Marina, exercising its discretion in favour of Marina.

[226] As noted earlier, on 12 March 2020 Marina then proceeded to cause the corporate trustee to remove Ricco's children as beneficiaries of the Kaahu Trust, appoint the assets to herself, and irrevocably appropriate to herself any further assets that came into the Kaahu Trust from Ricco's estate. The only asset she did not act to appoint to herself was the Russell property. As is clear from WRMK's advice to Marina, the reason for that was that it would have had adverse tax implications.

[227] This factual narrative makes plain that Marina acted to appoint a body corporate as sole trustee in order to give herself control of the Kaahu Trust. The respondents argue that the appellants needed to show more than that — that Marina intended to use her control in some improper way. In my view, it is not necessary for the appellants to make out any anterior motivation for Marina's intention to exercise the power of appointment to gain control of the trust. Since using the power to give control of the trust to a trustee/beneficiary is itself an improper purpose, Marina's intention to take control by that appointment is all that the appellants need prove. They have done that.

[228] I do not consider the legal advice Marina took as relevant to the conclusions I have reached in this case. In my view the advice she was given was wrong. Moreover, advice that Marina could act to use her power of appointment to take control does not alter the purpose for which she acted or make that purpose proper.[174]

[229] I would therefore have allowed the appeal.

[230] As is apparent from the foregoing, my analysis of the issues is different to that of the majority. The majority define the issue for determination as being whether the appellants have proved that Marina acted to appoint KT Ltd as sole trustee with the purpose of benefiting herself at the expense of Ricco's children. They do not address in any detail the alternative argument (the focus of my analysis) that Marina appointed KT Ltd as sole trustee with the improper purpose of gaining control of the Kaahu Trust. They say, among other things, that the argument is inconsistent with the statement of claim.[175] I do not agree. The alternative argument is squarely raised by the statement of claim. I set out the key passage from that pleading as follows:

> 20. [Marina] was … 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, including clauses 12.2(d), 18.1 and 26.1, [Marina] was unable in any event to exercise her power to appoint new trustees for her own benefit.

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174 See *Wong v Burt* [2005] 1 NZLR 91 (CA) at [55].
175 See above n 95.

> 22. [Marina]'s purpose in replacing herself as sole trustee with a company under her control was to evade the limits in clause 18.1 of the trust deed and in the law on her ability as trustee to use the trust property to benefit herself.
>
> 23. In the circumstances pleaded above, [Marina]'s appointment of [KT Ltd] as trustee of the Kaahu Trust in her place complied with none of the requirements referred to at paragraph 20 above, was for her own benefit, and so was a fraud on her power of appointment.

[231] On the face of the pleading, the appellants did allege that Marina wished to gain control of the trust and that this was an improper purpose. As set out above, gaining control of the trust in this way was to exercise the power of appointment in her own favour (in other words to benefit herself). In any case, to exclude the argument on this pleading point is, in my view, to take an overly technical approach given that the trust is a creature of equity, and given the importance of the matters at issue in this proceeding.

Was Marina's purpose to benefit herself at the expense of the children?

[232] I record that I would also have found in favour of the appellants on the argument the majority rejected. I would have found it had been proved that Marina appointed a corporate trustee so that she could use the trustee's powers as she wished and benefit herself at the expense of the children. In my view the factual narrative set out above presents an overwhelming case that Marina did take control in order to do just this.

[233] I recognise that this is to reach a different view to that of the High Court Judge, who found that Marina acted as she did because she encountered difficulties in appointing an independent trustee and was advised this other path was permissible.[176] The Judge found her to be a careful, fair-minded and sincere witness.[177] I acknowledge the benefits that the High Court Judge had in that regard in seeing her give evidence. Nevertheless, I consider that there is such clear evidence of her subjective intention

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176 HC judgment, above n 159, at [59].
177 At [58].

available that I would have been prepared to take a different view of the facts on appeal.[178]

[234] First, Marina made only modest efforts to find an independent trustee. There can be no suggestion that she was compelled by necessity to the course of action she took. There was an option available to her — Perpetual Guardian. There is no suggestion that their costs were prohibitive in the context of a trust of this value. Marina said that she also took into account whether they were a good fit for the role, but, as she should have realised, a body corporate controlled by her was a still worse fit. As WRMK said in their letter to her, it was expected that it would cause the adverse reaction that it did in fact elicit from the appellants.

[235] Secondly, Marina instructed WRMK that the Kaahu Trust was set up for her and Ricco — a position that the lawyers acting for Marina in these proceedings maintained at the hearing in this Court, notwithstanding that the words of the Trust Deed contradict that position. On Marina's own evidence, when she instructed WRMK she was pleased because she felt they would look after her interests.

[236] Thirdly, the advice that Marina received and acted upon from WRMK — who acted not just for the Kaahu Trust, but also for Marina personally — placed Marina's interests front and centre.[179] Although Marina was advised of the obligation to have regard to the interests of other beneficiaries, the possible courses of action mapped out in those letters of advice revolved around Marina gaining not just control of the Kaahu Trust but also the benefit of its assets, eliminating or minimising the interests of the children.

[237] Fourthly, and most significantly, Marina moved very promptly to use her control to benefit herself. Her actions are the best evidence of her intention.

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178 See *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [13]; and *Deng v Zheng* [2022] NZSC 76, [2022] 1 NZLR 151 at [71], where this Court said: "When considering whether to depart from findings of fact made at trial, an appellate court must, of course, recognise and allow for the advantages that a trial judge has in assessing oral evidence. But, if after allowing for those advantages the appellate court is of the view that the factual findings were wrong, it must decide the appeal in accordance with its own view of the facts."

179 There is an issue as to whether it was appropriate for WRMK to act for both the Kaahu Trust and Marina. The same issue might be said to arise in relation to these proceedings, although Marina's control of the Kaahu Trust's decision-making perhaps makes that issue somewhat more academic. However, since no argument was addressed on that issue, I make no further comment.

She caused the body corporate she controlled to become the sole trustee on 27 November 2019. She caused the removal of the children as beneficiaries and caused the assets to be appointed to herself on 12 March 2020. As the appellants argue, the inference that she appointed a company she controlled as sole trustee in order that she could benefit herself through the distribution of the assets seems to me to be irresistible.

[238] Finally, in my view it should not be overlooked that Marina has argued throughout that, because her benefit was the primary (or sole) purpose of the Kaahu Trust, the power to appoint a trustee would only be improperly exercised if exercised to benefit a foreign object (not a beneficiary), and would not be improperly exercised by her for the purpose of preferring her interest. This position is consistent with the appellants' case against her, and seems to me to provide support for it.

[239] To conclude, taking a different view of the facts and the issues to be determined on appeal to that of the majority, I would have allowed the appeal. Because of the finding of the majority, however, I need not explore issues related to relief.

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