

TRUST LAW

Webb v Webb: bundle-of-rights case undoes trusts

Although New Zealand severed its links with the Privy Council in 2003, we retain a tenuous link with that court via the Cook Islands, which has kept the Privy Council as its final appellate court.

We now have a decision from the Privy Council on the bundle of rights – *Webb v Webb* [2020] UKPC 22.

The Cook Islands (CI) adopted the Matrimonial Property Act 1976 (NZ) and the *Webb* decision involves two trusts the Privy Council has set aside in the context of matrimonial property litigation.

The judges in the High Court and the Court of Appeal of the Cook Islands were all from New Zealand (Potter J in the High Court and Fisher, White & Grice JJA in the Court of Appeal). A decision from four New Zealand judges interpreting a New Zealand statute and the New Zealand approach to trust invalidity is of direct relevance to the law of this country.

Dragons' Den star Paul Nigel Webb and his wife Rosemary Julia Webb were New Zealand citizens at the time of the hearing and Paul Webb was living in Auckland. In one of the trusts he was the settlor, the sole trustee, the "consultant" and one of two beneficiaries. (The "consultant" had wide powers in relation to the trust.) The other trust was similarly structured in his favour.

His wife said the trusts were shams but this argument was rejected on the grounds that they were intended to operate as trusts.

Lord Kitchin, in delivering the opinion of the majority of the judges, held that the trusts should be set aside on the grounds that Paul Webb "had rights in the trust assets which were indistinguishable from ownership" and that he "had the power at any time to secure the benefit of all of the trust property to himself... regardless of the interests of the other beneficiaries." [89]

It was held that the Cook Islands Court of Appeal was "plainly entitled to find... that the trust deeds failed to record an effective alienation by Mr Webb of any of the trust property. The bundle of rights which he retained is indistinguishable from ownership." [89]

This was a two-pronged approach to trust invalidity. The first prong said Paul Webb's wide powers enabled him to take all the trust's assets for himself and he therefore owned the assets. The second prong said the assets had never been alienated to the trustees in the first place.

The core of the court's finding was that Paul Webb's powers "were so extensive that [he] can be said never to have disposed of any of the property purportedly settled on or acquired by the trusts" or alternatively that his powers "were so extensive that in equity he can be regarded as having rights which were tantamount to ownership." [89]

The court held that Webb could legitimately nominate himself as the sole beneficiary and become settlor, trustee, consultant and sole beneficiary.

Trusts that are structured so the assets can be withdrawn by the settlor whenever he or she wants them are liable to be set aside.

And in this context, the term "settlor" is to be given a broad meaning. Paul Webb arranged for his tax advisor, David Tauber (also known as Andrew Tauber), to settle one of the trusts with the sum of \$10. But the court was not impressed, saying it "made no material difference" as "it was plainly intended by Mr Webb that [the trust] would operate as a vehicle into which he could... transfer matrimonial property... it is a reasonable inference that [Mr Tauber's] activities... in connection with his trust were carried out by him under the direction and control of Mr Webb and his nominee." [88]

The Privy Council's decision is succinct and the lessons from it are important: the retention of excessive powers is liable to lead a court to conclude either that assets were never settled on a trust so no trust was ever created or that the powers were so comprehensive that in aggregate they make the person



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who has them the beneficial owner of the assets.

A clinical analysis of the *Webb* case should not obscure a wider picture that the courts were facing. Paul Webb was being pursued by New Zealand's IRD for tax liabilities of no less than \$26 million and one of the questions in the appeal was whether that sum was a matrimonial debt.

Lord Kitchin said in his opinion that Webb lived in the Auckland suburb of Remuera. Which Remuera man with the appellant's name Paul Nigel Webb had a tax exposure of that magnitude?

I think it likely that the parties to the appeal – Paul and Rosemary Webb – are the people with those names who in 2011 were fined for obstructing the IRD during a tax raid and that the appellant Paul Nigel Webb was the man with that name who was convicted by Peters J in 2018 on charges relating to tax evasion.

The nominal settlor of one of the two trusts, Andrew Tauber, was convicted with Paul Webb of tax offences, and was jailed for three years and three months.

In a submission that spoke cynically of the role of accountants, Tauber's counsel informed Justice Mary Peters that his client – a former tax partner at EY – had not committed "blatant tax fraud" but had merely been involved in "complex tax planning" and had used the kind of "clever tricks" he said tax accountants use. This unusual submission was as unsuccessful as Webb's claim that his trusts were genuine.

The use of trusts to shelter assets by people in grave financial difficulty is always a topic of public concern. Fortunately, in this case the settlor's wish to structure his trusts so strongly in his favour did not bring the law of trusts into disrepute.

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