TRUST LAW

Clayton not the key to unlock trust assets

If the existence of two trustees whose need for unanimity in decision-making is sufficient to safeguard a trust from a *Clayton* attack, it is obviously sensible for the trust to be structured so there are two trustees or, if there is to be only one, for the trustee not to be a beneficiary

Anthony Grant

In the *Clayton (Vaughan Road)* decision [2016] 1 NZLR 551 the Supreme Court said the powers Mark Clayton held in a trust were 'property' for the purposes of the Property (Relationships) Act, enabling his wife to access some of the trust's assets.

In the years since that decision was delivered, wives and partners who wish to gain access to the wealth of trusts established by a partner during a relationship have hoped the Supreme Court's decision would be a key that could unlock trusts and make their assets available to them.

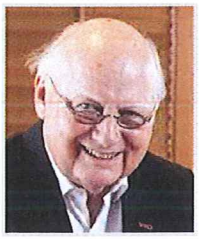
But attempts to use the *Clayton* decision for this purpose have failed and the latest case, *Pinney v Cooper* [2020] NZHC 1178, a decision of Clark J, makes it less likely that the *Clayton* case will become the hoped-for key.

Marcus Pinney was a trustee and discretionary beneficiary of a trust from the time of its inception. His former partner, Raewyn Cooper, argued that the trust Pinney had settled contained 'property' for the purposes of the PRA which should be divided between them.

Her arguments failed.

One of the reasons Mark Clayton's trust had been invalidated in the *Vaughan Road* decision was that he could access the trust's wealth without being subject to any fiduciary constraints. Clark J has held that Pinney's powers were different: they were the subject of fiduciary constraints. The judge said his power to appoint and remove trustees was of its nature a fiduciary power and in doing so, she has relied on well-established New Zealand authorities.

Pinney could not therefore exercise those powers for 'purely selfish interests'. Nor could he exercise the powers 'or a collateral purpose'.



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Fiduciary power

Justice Clark also held that a power of resettlement was fiduciary in nature.

Pinney had a power to remove beneficiaries and Clark J held that the exercise of the power in favour of himself would potentially constitute a fraud on the power.

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The judge said that 'if Mr Pinney exercised any of the powers of distribution or settlement in favour of himself, he would potentially be in breach of his fiduciary duty to the other discretionary beneficiaries'. [93]

I have some difficulty with this finding but it appears not to be fundamental to the decision. The difficulty is that Pinney was a settlor, trustee and discretionary beneficiary and in such circumstances it is implicit that he was intended to be entitled to vote in favour of a distribution to himself. His vote alone would not be sufficient as the trust required the presence of two trustees so the second trustee would need to have supported his attempt to get a distribution for himself.

Sensible precaution

One of the default duties under the new Trusts Act is that 'a trustee must not exercise a power... directly or indirectly for the trustee's own benefit'. This duty should obviously be expressly negated in all trusts where it's intended that a trustee will also be a beneficiary.

In a trust where it is intended that a trustee should also be a beneficiary, it is desirable that the trust should have two trustees: Clark J held that with the presence of two trustees 'Mr Pinney is unable to pay or apply the entire trust capital to himself [and] he cannot bring forward the vesting date to one of his choosing' [96].

Section 43(2)(c) of the Trustee Act 1956 required a trust to have at least two trustees unless one trustee was originally appointed. That provision has not been carried over to the Trusts Act 2019. Even so, the underlying philosophy of the 1956 Act that a trust should have two trustees is a sensible precaution to avoid the prospect that in the *Clayton* environment a trust will be invalidated because the trustee may be able to self-benefit without fiduciary or other constraints.

If the existence of two trustees whose need for unanimity in decision-making is sufficient to safeguard a trust from a *Clayton* attack, it is obviously sensible for the trust to be structured so there are two trustees or, if there is to be only one, for the trustee not to be a beneficiary.

There will be cases where the court will doubt that the existence of two trustees provides an adequate safeguard because of a belief that a co-trustee is just a cipher for the first trustee and the existence of a second trustee does not provide a sufficient safeguard.

The solution is for the trust to be managed in such a way that the second trustee can be shown to be independent and competent. ■

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