

# Private Client Briefing

Russell McVeagh

It was a busy end to 2024 for New Zealand's Supreme Court which handed down three much-anticipated determinations in the final weeks of the year.

Our summary of *A v D* [2024] NZSC 161, released by the Court at the end of November, appeared in our Private Client: 2024 Year in Review (available [here](#)).

In this publication we address two further important decisions released just before Christmas: *Cooper v Pinney* [2024] NZSC 181 and *Legler v Formannoij* [2024] NZSC 173.

Any questions? Talk to one of our experts



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## Cooper v Pinney [2024] NZSC 181

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This decision provides important clarity on the circumstances in which the rights or powers found in a family trust deed may constitute relationship property for the purposes of the Property (Relationships) Act 1976 (**PRA**). Russell McVeagh acted (alongside Andrew Butler KC) for the trustees.

The judgment draws heavily on the pivotal decision of *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, in which the Supreme Court held that the rights and powers conferred on Mr Clayton under a family trust deed were so extensive that they amounted to “property” for the purposes of the PRA. That decision raised concerns about the extent to which more conventional family trusts might also be vulnerable to such a finding. In *Cooper v Pinney*, the Supreme Court assesses a more common factual context alongside that of *Clayton*, providing greater clarity as to where the line is to be drawn.

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### Background

Mr Pinney and Ms Cooper were in a de-facto relationship for around 10 years. During their relationship the couple lived and worked together on a farm in the West Coast near Te Taho, which was owned by the MRW Pinney Family Trust (the **MRWT**). Under the terms of the MRWT Mr Pinney was a settlor, trustee, discretionary beneficiary and the sole appointer.

Following their separation Ms Cooper sought to have the MRWT’s assets (which totalled \$1,545,000 in 2018) included in the pool of relationship property by contending that Mr Pinney’s rights and powers in the MRWT fell within the PRA’s definition of “Property”. The lower courts views on the issue were mixed, with the Family Court finding they were relationship property, but the High Court, and a majority of the Court of Appeal, disagreeing.

### The decision

The primary question before the Supreme Court was whether the rights, interests and powers held by Mr Pinney under the trust deed constituted “any other right or interest” in the PRA’s definition of Property. Using the trust deed in *Clayton* as a yardstick, the Court found that Mr Pinney’s bundle of rights were not so extensive as to constitute property under the PRA.

### Constraints on the trustee appointment power

The Court held that, unlike the deed in *Clayton*, the requirements in the MRWT deed for two trustees, for those two trustees to act independently, and for unanimous decision making, meant that Mr Pinney could not lawfully appoint himself as sole trustee and exercise sole control of the trust assets. In particular, were Mr Pinney to exercise his power of appointment with the intention of taking sole control of the trust, he would breach the “proper purpose” rule, which requires the exercise of any power to align with the purpose for which it was conferred (by reference to the terms on which the power was conferred, and the intentions of the donor).<sup>1</sup> The Court additionally accepted that the power of appointment in this case was fiduciary, constraining Mr Pinney to exercise it only in the best interests of the beneficiaries and not for a collateral purpose.<sup>2</sup>

1. At [105]-[106]; [110].

2. At [111]-[112]; [114].



## Cooper v Pinney [2024] NZSC 181

### Constraints on other trustee powers

The Court held that the constraints on the trustee power of appointment were sufficient to conclude that Mr Pinney's powers under the deed were not "Property" for the purposes of the PRA, but also went on to assess the other relevant trustee powers.

Counsel for Ms Cooper had focused on the trustees' powers to dispose of trust property in favour of one or more of the beneficiaries at their "absolute and uncontrolled discretion" (with such expansive language common in trust deeds).<sup>3</sup> The Court observed that, in order for Mr Pinney alone to take advantage of this power, he would first need to take control of the trust (which, as above, it had concluded he could not lawfully do). The Court held that the power of disposition was also fiduciary in nature.<sup>4</sup> For fiduciary obligations to be excluded, clear and specific words were required, and the expression "absolute and uncontrolled discretion" was not sufficient to have this effect.<sup>5</sup> Further, importantly, unlike the deed in *Clayton*, the MRWT deed did not contain specific exclusionary terms which altered the fiduciary duties constraining the exercise of trustee powers, such as permitting a trustee to disregard other beneficiaries' interests.

### Outcome

The Court accordingly concluded that the bundle of rights held by Mr Pinney under the MRWT deed were not tantamount to effective control over, and therefore ownership of, the trust assets:<sup>6</sup>

*"The distinctions between the VRPT deed in Clayton and the MRWT deed are therefore sufficiently material to warrant different classification in terms of the PRA definition of "property". The two cases are not alike. It follows that we do not consider Mr Pinney enjoys a personal property right in respect of the bundle of powers vested in him by the MRWT deed."*

### Observations

The case signals that the *Clayton* decision may have limited application due to its fairly extreme facts, and that the rights, interests and powers commonly held under New Zealand family trusts are unlikely (without more) to constitute relationship property under the PRA.

In terms of the powers held under New Zealand trusts, the *Clayton*-style trust deed is at the more extensive end of the spectrum. The extent of Mr Clayton's powers meant he had effective control over the trust assets which he could appoint to himself effectively at will.

The MRWT deed sits, perhaps, more towards the middle of the spectrum. The settlor holds powers as appointer, but there are safeguards through the requirement for two trustees and unanimous decision-making, and no provisions seeking to remove fiduciary obligations. These terms are common in the standard form of New Zealand family trust. The Supreme Court's decision indicates that such powers are not so extensive as to give the appointer effective control over the trust assets.

Practitioners preparing trust deeds should keep the *Clayton* effective control test in mind when formulating appointer and trustee powers. Extensive and unfettered powers, such as those in *Clayton*, risk the entire value of the trust fund being classified as "relationship property".

3. At [116].

4. At [117]-[119].

5. At [120].

6. At [125]-[126].

## Legler v Formannoij [2024] NZSC 173

This decision addresses the issue of whether a power to appoint trustees was exercised for a proper purpose.

### Background

Li, Laila and Ken (the children) were the three children of Ricco Legler and his first wife. After his divorce, Ricco began a relationship with Marina Formannoij in 1989. They were married in 2009.

Ricco set up two trusts to manage his assets: the Kaahu Trust and the Horowai Family Trust. Marina's evidence was that the Kaahu Trust was established to provide for Ricco and Marina's ongoing living costs and retirement, and the Horowai Family Trust was established to provide for the children and enable them to retain ownership of Ricco's forestry business.

After Ricco's unexpected death in 2017, disputes emerged between Marina and the children regarding the Kaahu Trust's administration. In November 2019, following the resignation of the corporate trustee and difficulties in engaging a replacement, Marina, on her lawyer's advice, exercised her power of appointment to appoint Kaahu Trustee Ltd (KT Ltd), as trustee. Marina was the sole director of KT Ltd. In March 2020, KT Ltd exercised its powers as sole trustee to remove the children as beneficiaries, distribute the trust property to Marina, and appoint Marina as the sole, final beneficiary.

The children issued proceedings, alleging that Marina's appointment of KT Ltd was invalid as it was undertaken for an improper purpose: to enable her to exclude the children and obtain the entire benefit from the trust.

It was common ground between the parties that the terms of the Kaahu Trust deed permitted the appointment of a sole company trustee controlled by Marina, and that the test of whether Marina's purpose was improper was to be judged subjectively (that is, according to her intent), at the date of the exercise of the power.<sup>7</sup> Interestingly, although the first of these points was conceded by the appellant, Winkelmann CJ in a thought-provoking dissent concluded that the terms of the Kaahu Trust did not permit Marina to appoint as trustee a company she controlled.<sup>8</sup> First, the Chief Justice considered such an appointment to be precluded by cl 18.1 of the Trust Deed, which provided that "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**" (emphasis added). Appointing KT Ltd as sole trustee was clearly in Marina's favour, as it gave her control of the corpus of the trust, control of all decision-making, and the ability to distribute the trust assets to herself as she chose.<sup>9</sup> It was accordingly impermissible for Marina, rather than another trustee, to have exercised the power. Second, construed together, a number of clauses of the Trust Deed indicated an intention "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."<sup>10</sup> Finally, the Chief Justice considered her interpretation a matter of logic – it would be illogical for the terms of the Trust Deed to require independence in the exercise of trustee powers, while simultaneously allowing those requirements to be bypassed, as Marina had done.<sup>11</sup>

7. At [4]-[5].

8. At [184].

9. At [185].

10. At [187].

11. At [189].

## Legler v Formannoj [2024] NZSC 173

### The decision

Somewhat unusually for a case before the Supreme Court, the decision primarily turns on a single question of fact: what was Marina's intent at the time of the appointment of KT Ltd as trustee?

The majority of the Supreme Court found the appellants had failed to establish that Marina's purpose when appointing KT Ltd was improper. Several factors were highlighted as bearing on this conclusion:

- Marina's position as sole trustee was not of her own doing;
- she had expressed concerns about her legal obligations and obtained legal advice;
- she had taken steps to find an independent replacement trustee; and
- she was considering ways to enable the trust's assets to benefit the children.

The Court's majority placed importance on the fact that Marina had contracted out of the PRA, forgoing her rights to the farm and forest now held by the Horowai Family Trust, and accepted that the primary intention of the Kaahu Trust was to provide for Ricco and Marina.

In dissent, Winkelmann CJ considered the facts indicated Marina had acted improperly when exercising the power of appointment. Her Honour adopted Lord Richard's analysis in the Privy Council decision *Wong v Grand View Private Trust Co Ltd*,<sup>12</sup> that the purpose for which a power has been conferred must be analysed in the light of the trust deed as a whole. Relevant to that analysis was the deed's overall accentuation of independent decision-making, as referenced above. Marina's purpose when exercising the power – to take control of the trust – was clearly incompatible. Such exercise of the power was also inconsistent with 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."<sup>13</sup>

### Observations

While the majority Supreme Court decision permitted the appointment of a sole corporate trustee controlled by a beneficiary, the extensive dissenting judgment (as well as the dissent in the Court of Appeal) is a reminder to those drafting and exercising powers in relation to trusts that a trustee company should not be used to avoid the overarching protections contained in a trust deed. This decision, in our view, certainly should not be read as *carte blanche* to appointers or trustees seeking to get around, particularly, independence protections provided in New Zealand trusts.

In order to prevent disputes such as this from occurring, clauses concerning the powers to appoint trustees should be clearly and comprehensively drafted, and those exercising them should take advice (as Marina did here) if there is uncertainty.

12. *Wong v Grand View Private Trust Co Ltd* [2022] UKPC 47.

13. At [210].

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The Private Client Briefing is produced quarterly by Russell McVeagh. It is intended to provide summaries of the subjects covered, and does not purport to contain legal advice. If you require advice or further information on any matter set out in this publication, please contact one of our experts.

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