TRUST LAW

Access to the law should not be as hard as this

By Anthony Grant

In my last article (*LawNews* 29 March) I said it seemed strange that a court could grant an occupation order of a trust-owned house in favour of a non-beneficiary.

The case to which I referred was appealed from the Family Court to the High Court and I relied on what the appellate judge, Justice Graham Lang, said about the trust since I could not get my hands on a copy of the Family Court's decision.

Since that article was written I have finally obtained a copy of the Family Court decision: *Bell v Sutton* [2017] NZFC 5741 (more on this later) and I can now give a fuller description of the facts of that case.

Sutton owned a house before he began to co-habit with Bell.

When they began living in the property, it presumably changed its status from Sutton's separate property to relationship property.

Not long after they got together he transferred the property to a trust of which he and a corporate trustee were its two trustees.

Sutton was the settlor, a trustee, a discretionary beneficiary and a holder of powers.

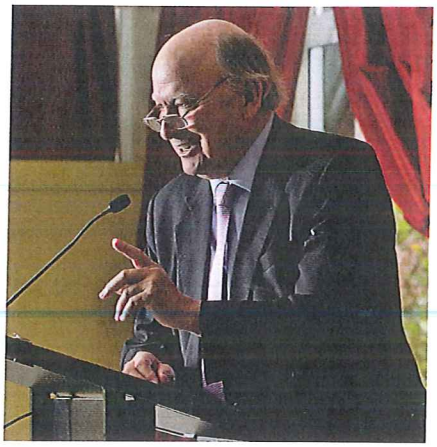
The trust had a non-self-benefit clause ("if there is only one trustee of the trust and that trustee is also a discretionary beneficiary, that trustee will have no power to [appropriate any part of the trust fund"]).

Bell had been a beneficiary of the trust while she lived with Sutton but she ceased to be so on their separation.

She stayed on in the house and refused to leave. The Family Court held an occupation order could be made in her favour under the Property Relationships Act (PRA), even though she was not a beneficiary.

This is the legal pathway the court adopted:

- When the parties began to live in the house together, the house became relationship property.
- When the property was transferred to a trust, Sutton retained several powers which the court considered gave him effective control of the property.
- In accordance with the Bundle of Rights theory as expressed by the Supreme Court in *Clayton v Clayton (Vaughan Road Property Trust)* [2016] 1 NZLR 551, Sutton's powers became items of relationship property for the purposes of the PRA.



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- The powers being relationship property, Bell was a co-owner of them and had a property interest in the house.

There are two obvious lessons from this case.

The first is the importance of a couple having a pre-nuptial agreement. Notwithstanding the possibility of unravelling a pre-nuptial agreement on the grounds it was unfair at the outset or that it became unfair subsequently, I think a well-drafted agreement could have prevented Bell from being able to gain occupation of the trust-owned asset.

Second, the non-self-dealing clause and the presence of a corporate trustee didn't protect the trust.

This is because there was said to be a pathway Sutton could take that would enable him to take the trust assets for himself.

This involved the following actions:

- he could transfer his power of appointment to a sole corporate trustee of which he would be the sole director and shareholder;
- with his control of the corporate trustee he could appoint himself a final beneficiary;
- he could bring forward the vesting date and then settle the assets on himself.

It appears there was no suggestion these actions would constitute a breach of fiduciary duty.

This seems a little surprising since the non-self-benefit clause was presumably put in the trust deed for the express purpose of preventing Sutton from being able to intercept the trust's assets for himself and it might be implied he should not be able to circumvent that clause so easily.

If the suggested course of action would have been a breach of Sutton's fiduciary obligations, his powers of appointment would probably not have constituted relationship property since they would not have enabled him to take the assets of the trust.

The case highlights the desirability for deeds of trust to be drafted so a person cannot arrange to appropriate trust assets for him/herself.

One way to defeat this form of reasoning is for a trust deed to record that various powers are fiduciary in nature.

This ought, of itself, prevent a court faced with a *Bell v Sutton* set of facts from being able to grant an occupation order in favour of a non-beneficiary.

I conclude with some comments about the availability of judgments from the Family Court.

The court did not like my statement in the previous article – that it had refused to give me a copy of the *Bell v Sutton* judgment and I was sent what might be described as a "Please Explain" letter.

I made that comment because when inquiries were made about getting a copy of the judgment, it was reported to me that I was not allowed to have it.

I was subsequently informed that if I wanted a copy, I would have to make a formal application to the court and give a convincing explanation for why I should be permitted to see it.

I made a request and, after more than two weeks had passed, the court accepted my explanation.

I have subsequently told the court several readers of this article are likely to want to read Judge Ian McHardy's decision, and I have asked what I should say to those of you who want it.

At the time of going to press, I have not received an answer from the court.

I therefore assume if readers want to read the decision, each of you will need to make a formal application to the Family Court since I don't want to be held in contempt of court for sending you a copy of the decision which was made available to me only because the court was satisfied with my explanation for wanting to see it.

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Anthony Grant is a barrister specialising in trusts & estates