TRUST LAW

How 'worldly realism' might affect the distribution of assets

The court in *Legler* approved a pathway that enabled a human trustee to become the sole director of a corporate trustee who could take the assets for himself while in *Brkic* the court said the pathway proposed in that case would not enable the same outcome

Anthony Grant

Anthony Grant

Settlors want full control over a trust but the law says they can't. They must cede control of the trust's assets or the trust will be invalid.

At the Cradle to Grave™ conference in May, I will be talking about *Legler v Formannoij* [2021] NZHC 1271, 2 June 2021. Here, the court approved a person being a beneficiary and sole director of a corporate trustee who, in her capacity as director of the corporate trustee, could lawfully distribute all its assets to herself in her capacity as a beneficiary.

From the moment I read that decision I wanted to explore the ability for a person to be able to settle a trust, be a beneficiary of it and be able to distribute all its assets to him/herself.

The *Legler* decision was supported by a decision of the High Court of Australia which authorised a person to be both a beneficiary and the director of a corporate trustee who could distribute a trust's assets to himself.

In an era of increased difficulty in recruiting people to be trustees, an obvious solution is for a settlor to be the shareholder and director of a corporate trustee and do what he or she wants with a trust's assets.

The facts of the *Legler* case were unusual and readers should not assume it's safe for a person to be both a beneficiary and sole director of a corporate trustee who is able to distribute a trust's assets to him/herself.

Today's article deals with one aspect of this subject – the fiduciary and other constraints that may prevent a trustee from being able to create a corporate trustee of which he/she is a director. These constraints were referred to in a recent case which is memorable for the plaintiff's unpronounceable surname *Brkic v White* [2021] NZCA 670.

A trust had what is commonly called a 'no self-benefit clause'. The question was whether a creditor could access trust property on the grounds that a trustee debtor could appoint a corporate trustee in place of the existing trustee and distribute the trust's assets to himself, so the assets of the trust could be treated as the trustee's assets which could be taken by a creditor.

The Court of Appeal held in the *Brkic* case that in the context of a creditor's claim against a trust, a trustee could not circumvent a no self-benefit clause by resigning and appointing a corporate trustee of which he/she was its director.

The court held that the power of appointment of trustees is a fiduciary power and cannot be exercised selfishly by the trustee to enable him/her to take the trust's assets for himself/herself. It also held that even if the power of appointment of trustees was not fiduciary, the power to appoint a new trustee (ie, a corporate trustee of which the beneficiary was the sole director) could not be exercised "for a collateral purpose to avoid the restrictions of the no self-benefit clause".

The court in *Legler* approved a pathway that enabled a human trustee to become the sole director of a corporate trustee who could take the assets for himself while in *Brkic* the court said the pathway proposed in that case would not enable the same outcome.

A question of particular interest for me arises from the Supreme Court's statement in *Clayton (Vaughan Road Trust)* [2016] NZSC 29 that trusts containing relationship property are to be interpreted differently to trusts that do not. Courts that interpret the terms of trusts in relationship property disputes are to respect "the need for 'worldly realism'... [and an] acceptance that strict concepts of property may not be appropriate in the relationship property context." [79]

What is interesting about the *Clayton* decision is that it shows how the courts are willing to adopt a different approach to the interpretation of trusts that creditors want to attack and trusts that a spouse wants to attack

What is interesting about the *Clayton* decision is that it shows how the courts are willing to adopt a different approach to the interpretation of (a) trusts that creditors want to attack; and (b) trusts that a spouse wants to attack.

If, in the context of a *Legler*-style dispute, it was advantageous to keep the assets in a trust and not allow a husband/trustee to take them all for himself, might a court with its focus as 'worldly realism' be unwilling to allow a husband trustee to have such extensive control over a trust's assets and would it interpret the trust deed differently?

In short, in the context of creating a corporate trustee of which a beneficiary is its sole director, might a focus on 'worldly realism' (whatever that term means) produce a less predictable outcome for trusts in relationship property disputes than it does for trusts in creditor disputes? ■

Anthony Grant is an Auckland barrister specialising in trusts and estates law.

Cradle to Grave™ conference click here