TRUST LAW

Should non-beneficiaries get occupation orders?

By Anthony Grant

At first blush it seems extraordinary that the courts can impose occupation orders over trust-owned houses in favour of non-beneficiaries. But the courts appear to claim the power to do so.

In *Bell v Sutton* [2017] NZFC 5741 a couple lived in a trust-owned home. Two children were born to them. When the relationship ended and the woman refused to leave, the trustees brought proceedings to evict her.

Judge Ian McHardy held that the court has jurisdiction under the Property Relationships Act (PRA) to make an occupation order in her favour, saying the man "has a beneficial interest in the trust assets" and his interest was likely to be classified as relationship property.

Judge McHardy is reported to have said, "There is flexibility under this Act to make any such occupation order on terms, duration and conditions as the court thinks fit."

The case went on appeal. The trustees dropped their opposition to the order on the basis that the woman agreed to vacate the house. The only question the court had to decide was how much time should be given to her to do this.

Justice Graham Lang heard the appeal and his decision is reported at [2017] NZFLR 779.

He gave footnote references to two paragraphs in Judge McHardy's decision but these are meaningless without having access to that decision.

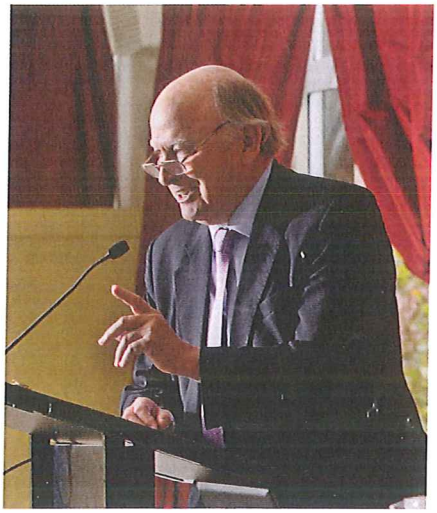
I have asked the Family Court for a copy but the court refused.

I am therefore confined to what Lang J said in the appeal from Judge McHardy's decision. As best I can understand the facts from Lang J's decision:

- The man appears not to have been a trustee.
- The man had "a beneficial interest" in the trust assets. I assume he was a discretionary beneficiary of the trust but Justice Lang did not identify his interest(s).
- The woman was not a beneficiary of the trust.

The Supreme Court's decision in *Clayton v Clayton* (*Vaughan Road Property Trust* 1 NZLR 551 [2016]) endorses the Bundle of Rights doctrine. Some powers and entitlements in a trust can be classified as "property" for the purposes of the PRA and trust powers created during the course of a relationship can be categorised as relationship property.

It appears the man's beneficial interest in the trust may have been created during the relationship, in a way that would enable it to be classified as "relationship property". Being relationship property, the woman had an interest in it too, and therefore in the house, being a trust-owned asset.



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A pathway as simple as this would presumably enable most spouses/cohabitees who are not beneficiaries of trusts to be eligible for occupation orders that may disadvantage a trust's genuine beneficiaries.

Having said that, most people would have sympathised with the order as the woman had nowhere else to live and little money. Her access to her children would have been severely restricted had she not been allowed to continue living in the trust-owned house.

Hard facts like these lead to distortions in the law.

I end this note with a comment on the Family Court's current unwillingness to give me a copy of Judge McHardy's decision in *Bell v Sutton*.

My understanding of the rule of law is that all citizens are governed by the law and are bound to comply with it.

I consider a Family Court decision that occupation orders can be made in favour of non-beneficiaries of trusts to be of material significance to the laws of New Zealand and there can be no justification for withholding such an important decision from interested citizens.

The *Jasmine* decision – some welcome news

My last two articles in *LawNews* concerned the impact of the *Jasmine* decision in England on s 43(2)(c) of our Trustee Act.

Justice Gerard van Bohemen has released his decision on a recent dispute involving s 43(2)(c). He decided:

- it was not necessary to determine whether the *Jasmine* reasoning is applicable in New Zealand, and
- it was not necessary to say whether the court has power to override the constraints of s 43(2)(c): see *Oldfield v Oldfield* [2019] NZHC 492, 19 March 2019.

He does, however, suggest in paragraph 53 of his decision that the court may not be bound by the constraints of s 43(2)(c) although he made no ruling to that effect.

Justice Jillian Mallon has not been so constrained. In a recent decision *CDT 12 Limited v Millar & Others* [2019] NZHC 606, 27 March 2019 she says she does not think it "inevitable" that a New Zealand court would adopt the *Jasmine* interpretation of s. 43(2)(c). "The alternative view, that 'individual' in ss 43 and 45 includes 'body corporate', seems to me to be the stronger [interpretation]."

The many readers who expressed alarm at my articles about the effect of the *Jasmine* decision can therefore breathe a sigh of relief.

Of perhaps greater significance than this development is the prospect of statutory reform.

In my previous article I said the Trusts Bill should be drafted so as to overcome the problems with s 43(2)(c). I read the Bill too hastily and am pleased to report it does overcome the difficulties identified in the *Jasmine* decision.

If clause 95 of the Bill is enacted in its current form, the problems with s 43(2)(c) will disappear.

Anthony Grant is a barrister specialising in trusts & estates