COURT SUPERVISION OF TRUSTS – THE PRINCIPLES AND PRACTICE

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Introduction

Trusts are considered to be a creature of the courts. The origins of the modern trust reach through the centuries to early medieval England. At that time, trustees were held to account by the ecclesiastical courts and, increasingly during the period, the Court of Chancery.

It is evident that the courts take their role as supervisors of trusts seriously. In a rare example of judicial intervention in the legislative process, then Chief Justice Dame Sian Elias wrote to the Justice Select Committee considering the Arbitration Amendment Bill.[1]

The Chief Justice, on behalf of the New Zealand judiciary, expressed concern about the prospect of automatic enforcement of arbitration clauses in trust deeds given the special role that courts have in relation to trusts. The Chief Justice declared such a step was "misconceived and undesirable", commenting "the exclusion of beneficiaries' entitlement to refer conduct to the Court, which has always exercised a supervisory jurisdiction over such matters, is unwarranted".

Putting aside the issue of the correctness of these statements (arbitral tribunals are, after all, subject to court supervision), the fact they were made highlights the way in which courts jealously guard their role in relation to trusts.

This paper will explore the role the courts play in the administration of trusts. In particular, this paper will consider how and when the courts supervise trusts and review trustee decisions.

There is a wealth of case law and commentary on this issue. The purpose of this paper is to explore some of the leading authorities, as well as more recent cases, and see what principles can be distilled from them.

The thesis of this paper is that two fundamental principles can be distilled. The first is that the courts, despite talking of formal rules, often deal with matters of substance.[2] Statements are often made by the courts around how they will not second guess trustee decisions, but the courts often appear to be drawn into doing just that.

The second principle is that the courts' jurisdiction to control trustee decisions is perhaps broader than the courts themselves generally acknowledge. In other words, the thematic approach of Richard Nolan in his article "Controlling Fiduciary Power" is the correct one.[3] Nolan suggests there are three broad ways in which courts control trustee actions. The first

1 Rt Hon Dame Sian Elias "Submission to Justice Select Committee on the Administration of Justice (Reform of Contempt of Court) Bill 2018".

2 This principle was explored in detail in Tobias Barkley "Judicial Review of Trustee Discretion and the Courts' Preference for Formal Rules" (paper presented to Obligations IX Conference, University of Melbourne, July 2018).

3 R.C. Nolan "Controlling Fiduciary Power" (2009) 68 Cambridge LJ 293.

involves looking at the scope of the powers being exercised by the trustees. The second looks at the process of trustee decision making. The third involves considering the degree of competence with which the power is exercised.

In other words, while the courts might proudly declare that their ability to review trustee decisions is limited to questions of the scope of the power, proper purpose and good faith, as well as *Wednesbury* reasonableness,[4] the reality is there are more techniques used than specifically declared.

This paper will consider both administrative and dispositive powers. The distinctions between those different types of powers are often lost in decisions or discussions regarding trustees' power but it is important for practitioners to always bear them in mind.

This paper will cover the following issues:

- The distinction between dispositive and administrative powers.
- The historic and modern approaches of the courts, which will be ascertained through consideration of relevant cases.
- The principles we can draw from the cases.
- Whether this paper's thesis, outlined above, stands true.

Dispositive and administrative powers

The powers given to trustees under trust deeds are distinct and can be conceptually categorised quite simply by acknowledging the difference between dispositive powers, being powers to appoint property, and administrative powers, which are powers that relate to the management of trust property or the administration of the trust.[5]

Sometimes these distinctions are lost in the cases. That is unfortunate because there are, arguably, different policy considerations that underlie the court's control of the trustees' exercise of each type of power. For example, a "light touch" approach to supervision of a discretionary decision to appoint trust property amongst a range of objects may make more sense than a "light touch" around investment decisions.

The lack of distinction between these two powers in cases is, perhaps, part of a broader trend seen in case law to move away from a detailed conceptual analysis of trustee powers.

It is also, arguably, part of a trend towards a lack of precision in language. For example, the use of the word "objects" is used now in relation both to private trusts (where the "objects" are the beneficiaries) and in relation to charitable trusts (where the "objects" are the purposes). The risk of such an approach is that the distinction between private trusts and charitable trusts begins to be lost – as seen in the New Zealand Law Society submission on the Arbitration Amendment Bill where charitable trusts were treated as if they had "objects" in the sense of beneficiaries who could enforce them.

4 In this regard see the judgment of Tipping J in *Craddock v Crowhen* (1995) 1 NZSC 40331.

5 The power to lease is an example of the former, the power to seek a legal opinion on an issue is an example of the latter.

For example, the old conception of more general powers of appointment as opposed to trust powers, and the distinctions between them, are rarely mentioned in modern jurisprudence.[6] That indicates those critical distinctions and the relevant historic cases have not been fully taught in law schools for a number of decades. It also represents a move away from a very formalistic to a more substantive approach to the law in this area.

This lack of conceptual clarity can affect the analysis of trustee control. It is important to remember there is a distinction between what a trustee can do, and should do, when exercising a discretionary power of appointment amongst a range of objects and what a trustee can do, and should do, when deciding whether a piece of real property should be leased or sold.

A further example of this trend can be seen in more recent judicial commentary in relation to the duty of even handedness, such as Dobson J's discussion in the High Court decision of *McLaren*.[7]

In broad terms, the facts of that case were that Mr and Mrs McLaren had settled assets they had an interest in onto the trust of which they were discretionary beneficiaries. Their son, unfortunately, was a trustee and appointor of the trust. As an appointor, Mr McLaren Jr had the power to appoint trustees and to add and remove beneficiaries.

Unfortunately for his parents, Mr McLaren Jr exercised his power to remove discretionary beneficiaries and removed Mr and Mrs McLaren. Mr McLaren Jr's removal of his parents as discretionary beneficiaries was challenged by his parents. Dobson J considered, amongst other things, the question of when, in light of the Supreme Court decision in *Clayton*,[8] the power to appoint and remove trustees should be considered a fiduciary power (being powers that have equitable obligations attaching such as the obligation to act in good faith and for a proper purpose).[9]

Although there is some recent commentary that suggests that a lot of these obligations are in fact legal obligations. For example, Lord Sales in a recent lecture on the topic of fraud on a power suggested that some of the constraints around fiduciary powers such as the concept of fraud on a power are clearly now legal concepts and could apply, for example, in the context of the exercise of a contractual discretion.

Critically for our purposes, Dobson J also referred to the power to add and remove discretionary beneficiaries in the context of saying that equity considers powers to be fiduciary powers. His Honour held that equity only allows fiduciary power to be fiduciary to the extent necessary.

The point Dobson J made in relation to the power to add and remove beneficiaries was that the duty to be even handed as between beneficiaries cannot apply to such a power because, by its very nature, it will discriminate against the existing beneficiaries either by adding one to their number or by removing one of them.[10]

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6 A Westlaw search indicates that there has only been about one case a year mentioning mere powers in the past decade with the most recent being *Re Steiner-Joyce* [2018] NZHC 2228 which was a case about the validity of a will.

7 *McLaren v McLaren* [2017] NZHC 161, (2017) 4 NZTR 27-004.

8 *Clayton v Clayton* [2016] NZSC 30.

9 See Lord Sales, *Fraud on a Power: the interface between contract and equity*, Lecture for the Chancery Bar Association, 2 April 2019.

10 *McLaren v McLaren*, above n 7, at [49].

The interesting thing about this comment is that the duty to be even handed between beneficiaries used to be only classified as a duty to be even handed between classes of beneficiaries. For example, in *Re Mulligan*, Pankhurst J in the High Court said that one of the duties breached by the trustee was the duty to be even handed between the income and capital beneficiaries.[11]

It appears that courts no longer speak of the duty to be even handed between classes of beneficiaries but instead speak of the duty to be even handed between beneficiaries *generally*. This demonstrates that some of the longstanding concepts in this area of the law appear to be no longer fully understood as a result of which the courts are actually, slowly, changing the concepts themselves.[12]

Cases involving judicial control of trustee powers

The history of court supervision of trusts is long and storied. It has only been in comparatively recent times that the courts have begun to exercise a much greater degree of restraint when it comes to supervision of trusts.

In *McPhail v Doulton*, Lord Wilberforce noted courts were willing to override the exercise of trustee discretions and were historically willing, as shown by historic cases such as *Mosely v Mosely*,[13] to "exercise [their] own discretionary judgment against equal division".[14]

In *Warburton v Warburton*, the House of Lords accepted that the exercise of a trustee's discretion should be overridden and that the plaintiff in that case should be given a double share because the plaintiff was the heir to the family and was looked upon as a "necessitous person".[15]

Times have changed since these cases were decided in the 1600s and 1700s. The courts' retreat from such an active role in trustee decisions appears to have started at the beginning of the nineteenth century.

The reason for the retreat, in part, was identified by Lord Wilberforce in *McPhail*:[16]

> This practice, however, has fallen into desuetude and the modern, less flexible, practice it appears has been followed since 1801 when… the Court now disclaims the right to execute a power and gives the fund equally. The basis of this change of policy appears to be that the Court has not the same freedom of action as a trustee and must act judicially according to such principle or rule and not make a selection giving no reason as the trustees can. The Court, it is said, is driven in the end to the principle that equity is equality unless, as in the relations cases, the Court finds something to aid it. Where there is no guide given the Court, it is said, has no right to substitute its own discretion for that of the designated trustees.

Cases such as *McPhail* signaled the beginning of a line of authorities that ultimately lead to the House of Lords' decision in *Gisborne v Gisborne* in 1877.[17] In that case, the House of Lords made it quite clear that the courts should not intervene in the exercise of a trustee's

11 *Re Mulligan* [1998] 1 NZLR 481 (HC).
12 Of course, there are those who would say that this is simply the way in which the common law develops.
13 *Mosely v Mosely* [1673] 23 ER 28.
14 *McPhail v Doulton* [1970] UKHL 1 at 5.
15 *Warburton v Warburton* (1702) 4 Bro PC1.
16 *McPhail v Doulton*, above n 14, at 5.
17 *Gisborne v Gisborne* [1877] 2 AC 300, [1874-80] All ER Rep Ext 1698.

discretion unless, in effect, there was bad faith, particularly where the trustee's discretion was referred to as absolute and unfettered. Lord Cairns said:[18]

> My Lords, in a case like this, the Court of Chancery recognises that the trustees, not the Court are to be the Judges of quantum to be allowed, where the trustees are willing to exercise a discretion to which they claim to exercise, and where the Court allows and declares their right to exercise that discretion I do not understand it to be the habit of the Court to go on and express any opinion as to whether the exercise of the trustee is a wise or unwise exercise of that discretion. I understand that in such cases the Court of Chancery steps aside and recognises the trustees as the persons to exercise the discretion, and in its decree does nothing more than, with regard to payments which may be necessary, act upon the exercise of the discretion of the trustees so made.

Since the decision in *Gisborne* there have been further developments. It is not necessary for the purposes of this paper to cover those developments in detail. However, it is worth outlining in broad terms where the law currently sits.

The starting point for that discussion is probably the decision of the Supreme Court of Victoria in *Karger v Paul*.[19] In that case, a wife left her husband her entire estate during his lifetime with the power for the trustees in their absolute and unfettered discretion upon his request to pay or transfer the whole or part of the capital to him for his own use absolutely. Otherwise, the leftover amount when the husband died was to go to Ms Karger.

The husband made a request for the entire capital of the estate to be paid to him and the trustees decided to grant his request. Soon after, the husband sadly died. Ms Karger, of course, was a "disappointed remainderman" who received no benefit under the will. Ms Karger subsequently claimed against the trustees for their exercise of their discretion.

McGarvie J held that when the court is reviewing a discretion in such broad and unfettered terms, it will not examine or review the discretion if it was exercised by the trustees:

- in good faith;
- upon real and genuine consideration; and
- in accordance with the purpose for which the discretion is conferred and not for some ulterior purpose.

McGarvie J added the proviso that the validity of the trustees' reasons for the exercise of their discretion will be examined and reviewed if stated.

Karger v Paul is still cited frequently in Australia as the starting point when considering the courts' supervision of trustee decisions. Curiously, the case appears to have been cited only six times in the New Zealand context based on Westlaw searches. Despite this, the New Zealand courts have generally adopted the approach set out in *Karger v Paul*. The only further development in New Zealand has been consideration of the extent to which the courts can look at the reasonableness of a trustee's decisions.

Tipping J in *Craddock v Crowhen* suggested that trustees' decisions could be assessed and reviewed on the basis that they may be unreasonable.[20] In doing so, his Honour suggested that the standard was *Wednesbury* unreasonable which is, of course, the public law test for reasonableness. Jonathan Orpin, in an excellent article, discusses both the background to

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18 Above.
19 *Karger v Paul* [1984] VR 161.
20 *Craddock v Crowhen*, above n 4.

this and the question of whether it is proper to imply *Wednesbury* unreasonableness into a private law context. He argues convincingly that it is a public law concept and should remain so.[21] Tipping J's approach has not been fully embraced by the New Zealand courts and authorities show the courts' position is relatively divided.

Fisher J in *Wrightsons Ltd v Fletcher Challenge Nominees Ltd* agreed with Tipping J to the extent that unreasonableness was defined as the trustee reaching a decision that no reasonable trustee could possibly have reached.[22] His Honour went on to say that it was only on that basis that an absolute and unfettered discretion would be examined by the courts.

That statement by Fisher J is a good summary of the approach of the courts in this area. However, there are some more interesting to this. The first is these cases only involved questions of the exercise of the trustees' dispositive powers. They did not involve questions of the exercise of trustees' management powers. Some other cases, which we will discuss shortly, demonstrate the courts have tended to apply the same standard to exercises of management powers.

The second point to note is that it is all very well to talk about these broad principles, but we must consider how the courts have actually applied them. While the courts say they will not review trustee decisions unless certain criteria are met, have they actually stayed true to their word? Or do the courts more regularly engage in substantive reasoning in relation to trustee decisions than they are willing to admit?

To answer that question, it is worth setting out a summary of recent cases so that we can see the practical application of the courts' stated principles.

The first case to consider is *Woodward v Woodward*, which was an unsuccessful summary judgment application. The plaintiff beneficiary sought orders for the removal of trustees for self-dealing, acting in breach of trust, and for acting in breach of their fiduciary duty to the beneficiaries.[23] Additionally, the plaintiff sought declaratory relief that all income allocation decisions and drawings made by the trustees to themselves were in breach of their fiduciary duty and in breach of the trust, seeking orders for inquiries as to loss and related orders.

In essence, the case involved (as they often do) a dispute between two sides of a family: the Smith side and the Woodward side. There were two trusts at issue, namely the APLJ Smith Family Trust (APLJ) and the Wanstead Trust (WT).

The assets of the APLJ included interests in property partnerships, commercial properties, residential properties, vineyards, a motel and other various property. The total funds of the APLJ were around $5.6 million at the time of litigation. The assets of the WT comprised interests in commercial and residential property and had a total value of $1.5 million at the time of litigation.

Of interest to us are the claims in respect of the APLJ, which involved claims of self-dealing and breach of duty when investing. The court considered that the overall complaint surrounding the APLJ was that the WT funds were being advanced to entities that were in

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21 See J Orpin *Reviewing 'Unreasonable' Discretionary Decisions Made by Trustees*, 21 NZBLQ Jun 2015, 131-153.

22 *Wrightsons Ltd v Fletcher Challenge Nominees Ltd* (1998) 1 NZSC 40,388. The decision was overturned in the Court of Appeal but upheld in the Privy Council. The critical aspect of the decision for our purposes – namely the standard used when assessing a trustees' discretionary decision – was not appealed.

23 *Woodward v Woodward* [2013] NZHC 1226 per Mallon J.

turn providing funds to the APLJ. In this way, funds that would have been for WT beneficiaries were ending up with the APLJ and the Smith side of the family.[24]

The court dismissed the claims against the APLJ on the basis that the trustees were entitled to make distributions that benefitted one side of the family over the other. The court ruled that such decisions can only be challenged if the discretion is being used without good faith or with improper motives considering irrelevant factors:[25]

> Such decisions may only be challenged if the discretion is being exercised without good faith, or with improper motives or taking into account irrelevant factors. The evidence on [the trustee's] behalf is that they are acting in good faith and are making decisions for proper and valid reasons.

In *Woodward v Woodward*, therefore, the court affirmed the principles identified in *Karger v Paul*.

Another relatively recent case is *Masters v Stewart*.[26] The case concerned a trust used as a vehicle to purchase commercial property, the beneficiaries of which were the settlor's four children, including the plaintiff, Phillip.

It was proposed that one of the properties purchased by the trust would be resold to Philip at some point in the future (at its initial purchase price), but that, in the interim, he would work on the property and maintain other properties owned by the trust. The property was subsequently transferred to Philip in 2003, with the difference between its initial purchase price and its current value being labelled as a capital distribution.

In 2006, at the instigation of the settlor, a distribution of trust capital in the sum of $250,000 was made to each of Philip's three siblings in a bid to equalise matters amongst the beneficiaries. Upon becoming aware of the distributions, Philip initiated proceedings claiming that the trustees had acted in breach of trust, because the distributions represented an unreasonable exercise of their discretion under the trust deed.

It was uncontested that the trustees had taken into account the benefit considered to have been received by Phillip, in seeking to make an equalising distribution. Instead, the particular criticism of the trustees was that they had failed to accurately assess the benefit received by Philip. That is, they had failed to take into account a consideration which *might* have affected their decision had they properly considered it—namely, Philip's contribution to the trust from the work he carried out on the property.

On the facts, Mander J found this criticism to be justified: the trustees were required to have examined the issue of Philip's contribution to the trust in assessing the benefit obtained by him before making the decision to make distributions to his siblings in an effort to equalise their financial positions. The failure to have regard to this relevant consideration that may have affected their assessment and, thereby, their ultimate decision, constituted a breach of trust.

An order was made directing the trustees to reconsider the appropriation of capital made by them to Philip's siblings, taking into account an assessment of his contribution to the Trust before the property was transferred to him in 2003.

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24 At [73].
25 At [74].
26 *Masters v Stewart* [2014] NZHC 2419, (2014) 3 NZTR 24-017.

Applications under s 66 of the Trustee Act 1956

Applications under s 66 of the Trustee Act 1956 (Act) involve trustees asking the court for directions concerning trust property, the management or administration of trust property, or the exercise of any power or discretion vested in the trustee. Section 66 provides:

> Any trustee may apply to the court for directions concerning any property subject to a trust, or respecting the management or administration of any such property, or respecting the exercise of any power or discretion vested in the trustee.

Consideration of cases involving s 66 applications provides helpful guidance regarding the courts' view of its supervisory role and the extent to which they will comment on trustees' exercises of discretion.

In terms of procedure, a s 66 application must be brought under Part 18 of the High Court Rules 2016 and served on "all persons interested in the application or such of them as the court thinks expedient".[27] This may include, for example, discretionary beneficiaries of the trust the application relates to, as was the case in *Mitchell v Griffiths* [2014] NZHC 751.

In *Re University of Canterbury a Body Corporate Under Provisions of University of Canterbury Act 1961*,[28] which involved a bequest to the university that created a charitable trust, the University of Canterbury did not serve all interested parties. Instead, the University advertised its s 66 application in newspapers and undertook internal consultation, including consultation with University academics, the University Council, its academic board and the community generally. The court was comfortable that the consultation involved all parties connected with the University who might be considered to be "interested parties" and was sufficient for the purposes of s 66(2).

Where a trustee is in doubt as to the propriety of a proposed course of action, a s 66 application can be a useful way to resolve such doubt. Section 66 is designed to address situations where the facts are clear, agreed and have been fully disclosed. A s 66 application will not be available if there are factual matters in dispute or allegations of breach of trust.

If a s 66 application succeeds and the trustee follows the directions made by the court, s 69 of the Act provides the trustee with protection from personal liability for later claims by beneficiaries or other parties.

The scope of s 66 has been discussed, and divergent conclusions reached, in a number of New Zealand cases over the years. On the one hand, some decisions described the section as narrow in scope and designed to permit trustees to apply for the court's assistance with "points of minor importance arising in the management of the trust".[29] However, recent cases have suggested a shift towards a broader scope and a more interventionist approach by the court.

See, for example, *New Zealand Maori Council v Foulkes*,[30] in which Kós J held at [46] that s 66 is a "robust, parallel source of jurisdiction to resolve any substantial question of law concerning the meaning or administration of a trust". Kós J also commented that s 66 was "simply an enactment of a broad equitable jurisdiction that has long resided in the Chancery Courts".[31]

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27 Trustee Act 1956, s 66(2).
28 [2018] NZHC 2259.
29 *Melville v NRMA Insurance NZ Limited* (High Court Wellington, CB70/01, 17 April 2002).
30 [2014] NZHC 1777, [2015] NZAR 1441
31 This sentiment was echoed by Fitzgerald J in *Re PV Trust Services* [2017] NZHC 2957 and Muir J in *Darlow v*

It is uncontroversial that a trustee can apply for directions under s 66 of the Act when a trustee is in genuine doubt as to the terms of the trust or the powers that he or she has under the trust deed. For example, in *Re Marianne Caughey Smith-Preston Memorial Rest Homes Trust Board*, the trustees of the Marianne Caughey Smith-Preston Memorial Rest Homes Trust applied to the High Court for directions on the meaning of "aged infirm or impecunious women" in the trust deed and what powers they had in relation to the trust.[32]

Similarly, *Re University of Canterbury* involved a s 66 application in which the trustees sought the court's clarification regarding the trustees' powers.[33] In that case, the trustees applied for directions that the trust was allowed to pay for companion airfares and associated expenses for visiting Fellows. The High Court interpreted the trust deed and held that it did allow the trust to pay for companion airfares and associated costs. It did not consider whether doing so was a proper use of trust funds.

However, cases under s 66 of the Act are more controversial when a trustee applies to the court for its "blessing" of a proposed course of action. These cases arise when a trustee does not doubt that the proposed action is within his or her trustee powers but nonetheless applies for the court to "bless" the action. Such an application was recently considered by Fitzgerald J in *Re PV Trust Services Ltd*.[34]

In *Re PV Trust Services Ltd*, the trustee of the Honoris Trust applied to the High Court to bless its decision to distribute the whole of the trust fund. The Honoris Trust was settled by Alsira Libendinsky, an Argentinian who was married to a successful businessman, Jorge. Jorge died in 1999 leaving significant assets to Alsira and their daughter, Dulce.

Alsira and Dulce instructed their lawyer to establish a trust in 2010. They wanted to settle their joint assets outside Argentina in a "safe" jurisdiction. Alsira settled the trust in New Zealand and the beneficiaries were Alsira, Dulce and any children of Dulce. Although Alsira was named as the settlor, Dulce was involved in the creation of the trust and they both settled assets on it. The value of the trust fund was approximately US$11,000,000. Alsira died in 2014 and left her entire estate to Dulce. Dulce died without children in 2015. This meant that, after Alsira and Dulce's deaths, there were no beneficiaries of the trust.

The trustee, PV Trust Services Ltd (PVTS), wished to distribute the trust fund in a way that was consistent with a memorandum of wishes written by Alsira and the terms of Dulce's will. PVTS did not doubt that this course of action was within its powers as trustee. However, PVTS applied for the court's blessing under s 66 because the proposed distribution was "particularly momentous".[35]

PVTS' application required Fitzgerald J to consider the scope of s 66 and, in particular, whether it was open to PVTS to seek the court's approval of an exercise of trustee discretion. Her Honour noted first the Court of Appeal had recently confirmed that s 66 is not restricted to minor or procedural issues.[36] Rather, s 66 is a statutory enactment of the English Chancery Court's broad equitable jurisdiction.

Raymond [2016] NZHC 269, both discussed below.

32 *Re Marianne Caughey Smith-Preston Memorial Rest Homes Trust Board* [2018] NZHC 3014.

33 *Re University of Canterbury*, above n 28.

34 *Re PV Trust Services*, above n 31.

35 At [2].

36 At [38], referring to *Chambers v S R Hamilton Corporate Trustee Ltd* [2017] NZAR 882.

Fitzgerald J then discussed the United Kingdom case of *Public Trustee v Cooper*. In *Public Trustee v Cooper*, Hart J described four categories of cases in which the Chancery Court will give directions to trustees:[37]

> (a) The first category is where the issue is whether a proposed action is within the trustees' powers. This is a question of construction of the trust instrument or statute or both.
>
> (b) The second category is where the issue is whether the proposed course of action is a proper exercise of the trustees' power. In this category, there is no real doubt that the proposed action is within the trustees' power but the trustees wish to obtain the court's blessing because the decision is 'particularly momentous'.
>
> (c) The third category is where the trustees surrender their discretion to the court because, for example, the trustees are deadlocked or disabled due to a conflict of interest.
>
> (d) The fourth category is where the trustees have already taken action and seek the court's directions as to whether the action was a proper exercise of their powers.

Blessing applications fall into the second category and are regularly decided by the Chancery Court.[38] On the basis that s 66 is an enactment of the Chancery Court's jurisdiction, Fitzgerald J held that trustees may make blessing applications under s 66 and are not required to be in genuine doubt as to the proposed action in order to apply for directions.[39] Fitzgerald J went on to comment that the court's jurisdiction to consider blessing applications "could indeed be useful" given New Zealand's unique trusts' landscape.[40]

Fitzgerald J adopted the approach taken by Hart J in *Public Trust v Cooper* to considering blessing applications, namely that the court must consider the following:[41]

> (a) First, has the trustee *in fact* formed the opinion which the court is asked to bless?
>
> (b) Second, is the opinion formed one at which a reasonable body of trustees, properly instructed as to the proper meaning of any relevant provisions of the trust deed, could properly have arrived?
>
> (c) Third, is the opinion vitiated by any conflict of interest…

Fitzgerald J noted the importance of a judge "adopting a thorough and active approach to testing the evidence" filed in a blessing application. However, Fitzgerald J also held that "it is not for this court to say how it would itself exercise the discretion", suggesting that there is still a divide between the New Zealand approach and the more interventionist approach taken in the United Kingdom.[42]

Ultimately, PV Trust Services Ltd's s 66 application succeeded and Fitzgerald J directed that the proposed distribution was proper and lawful.[43]

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37 *Public Trustee v Cooper* [2001] WTLR 901 (Ch) at 922-924.
38 *Re PV Trust Services*, above n 31, at [47].
39 At [47].
40 At [54].
41 At [56].
42 *Re PV Trust Services*, above n 31, at [62].
43 At [67].

Another recent case involving a s 66 application is *Little v Howick Trustee DL Ltd*.[44] The Woodside Trust was settled by Mr and Mrs Little, who were beneficiaries of the trust and the original trustees. In 2013, Mr and Mrs Little separated, and they were both removed by the court as trustees and replaced with Howick Trustee DL Ltd (HTDL).

During the course of proceedings arising out of Mr and Mrs Little's separation, Mrs Little unsuccessfully claimed against HTDL, alleging breach of trust. HTDL sought directions under s 66 of the Act as to how costs should be apportioned between Mr and Mrs Little and how the remaining trust capital should be distributed. HTDL proposed that the trust fund be divided equally and resettled on two new trusts, one for the benefit of Mrs Little and one for the benefit Mr Little and that the costs should be paid from Mrs Little's portion of the trust since she had brought the claim.

In considering HTDL's application, Brewer J adopted Fitzgerald J's reasoning in *Re PV Trust Services Ltd* and held that HTDL's application fell within category two.[45] Brewer J held that HTDL's proposed action was "an appropriate exercise" of its discretion as a trustee and gave directions pursuant to s 66.[46]

Another case involving a s 66 application is *Darlow v Raymond*. In that case, the trustees essentially disagreed as to whether a trust should be wound up and applied under s 66 for the court's directions as to the appropriate course of action.[47] In terms of the categories described in *Public Trustee v Cooper*, this case likely falls into category three.

Darlow v Raymond formed part of the long-running saga involving the Gough family's ownership of Gough, Gough & Hamer Ltd. The application concerned the head trustees of a multi-layered trust applying for direction as to the beneficial interests they were serving.[48]

The applicant trustees sought the court's directions on multiple issues surrounding their administration of the trust and procedures for distribution in light of the death of the last annuitants in 2011.[49]

The structure of the trusts was not straightforward. There were two sub trusts (the OT Gough and BT Gough trusts) under one head trust. The trust instrument required the head trust to have three trustees, who were directed to act unanimously but were able to act by majority if unanimity could not be achieved.[50]

The trustees of the head trust fund were to be constituted as follows:

> 1. a nominee of the OT Gough Sub-Trust, appointed by the Trustees of the Sub-Trust; and
> 2. a nominee of the BT Gough Sub-Trust, appointed by the trustees of the Sub-Trust; and
> 3. a third independent trustee appointed by the other two trustees.

44 *Little v Howick Trustee DL Ltd* [2018] NZHC 1884.
45 At [71] and [74].
46 At [80] and [84]–[85].
47 *Darlow v Ryamond* [2016] NZHC 269; [2017] 3 NZLR 353 per Muir J. Jeremy Johnson appeared as counsel for one of the parties.
48 At [111].
49 At [111] (a)-(i).
50 At [41].

The crux of the need for determination under s 66 was that the BT trustee and the OT trustee could not agree on whether the trust should be wound up and the assets distributed to the respective sub trusts. The issue was important because winding up the head trust saw effective control of Gough Holdings Ltd pass from the trustees of the head trust to the BT side of the family (which had a narrow majority of the shares).

As set out above, both the OT branch of the family and the BT branch of the family were represented in the head trust.

The BT branch argued that the trusts in question should be wound up because all the annuitants had died, all the capital had been distributed to the residuary beneficiaries, the redeemable preference shares had been redeemed and the trust held no property.

The OT Branch argued that the trusts should not be wound up because, though they held no assets, they were still performing a function, which was the conferment of fiduciary powers on the trustees. These were namely to maintain the profitability of Gough Holdings Ltd as a permanent investment for the family and an obligation to maintain equality and harmony between both sides of the family.

The OT Branch therefore proposed that the head trustees should continue in office discharging their governance responsibilities, which were tantamount to property and included appointment of directors of a Gough Holdings Ltd in which both sides of the family had shares.[51] The court considered this point the most important.

The court relied on previous law in establishing jurisdiction under s 66 and cited with approval Kós J's statement that s 66 is "simply an enactment of a broad [e]quitable jurisdiction that has long resided in the Chancery Courts".[52]

The court noted that, when determining a s 66 application, it is concerned with what is in the best interests of the trust and not with "determining the rights of adversarial parties".[53]

The court considered surrounding commentary approvingly, stating that it is not appropriate for a court to determine a s 66 application where there is an alleged breach of trust, a significant dispute over the facts, or the court lacks the relevant material or full information to properly give directions.[54] Muir J concluded that none of these circumstances applied in this case.[55]

Furthermore, it was not disputed that the court could direct that the head and sub trusts were appropriately wound-up, despite the absence of unanimity on the part of the beneficiaries.[56]

On the critical issue of whether the head trust should be wound-up (or whether the governance responsibilities constituted property), the court referred to *Clayton v Clayton [VRPT]*,[57] and *Tasarruf Mevudati Sigorta Fonu v Merrill Lynch*.[58] In both of those cases, the power in question was one of appointment under a trust deed that was "tantamount to ownership". The court considered that the statutory wording of the Trustee Act in this case was similar to that of the Property (Relationships) Act 1976 (PRA) in terms of the definition

51 At [10].
52 At [106] citing *New Zealand Maori Council v Foulkes* [2014] NZHC 1777 at [44].
53 At [107] citing *Marley v Mutual Security Merchant Bank and Trust Co Ltd* [1991] 3 All ER 198 (PC) at 201.
54 At [109] citing *Marley*; see also *Patchett v Williams* HC Blenheim (2005) 1 NZTR 9115-012 at [51] – [52].
55 At [109].
56 At [110].
57 *Clayton v Clayton* [2015] NZSC 29.
58 *Tasarruf Mevudati Sigorta Fonu v Merrill Lynch* [2011] UKPC 17.

of "property".[59] However, the court accepted that a distinction could be drawn between the PRA, which is social legislation, and the Trustee Act, which is not.[60]

The court turned to consider whether the power at issue was "tantamount to ownership" and stated that for this to be so, there must be a nexus between the power and the property.[61] The governance responsibilities in question were essentially powers to appoint members of the board of Gough Holdings Ltd (a company in which both trusts had shares) and to approve dividends. The court ultimately determined that the governance responsibilities were not property as they were not sufficiently connected to the disposition of property to be considered tantamount to ownership.[62]

The court continued in much the same fashion in deciding on the other issues determining that the governance responsibilities were also not choses in action.

The court then moved on to consider a critical issue, namely whether on wind-up the trustees should remove a family director from the board of Gough Holdings Ltd. The appointment was an issue because the director concerned was a full-time employee. That mean he was exempt from rotation as a director which had the consequence that he could remain in perpetuity without facing re-election. The company constitution required unanimous shareholder approval for any family member to be a director unless appointed by the Head Trustees.

The court decided that it would not remove the director saying that absent improper purpose it should not question trustee decisions. Muir J also held that in his view removal would itself constitute an improper purpose.[63]

The court ultimately directed that:

- the head trustees were obliged to wind up the head trust, together with the BT Gough Sub Trust and the OT Gough Sub Trust;
- they were to do so irrespective of the consent of any beneficiary; and
- they were not required to terminate the directorship of the director in question, or any other family member.

A slightly older example of a s 66 application is *Worn v Ellis and Buxton*.[64] Harold and Dorothy Buxton lived in a home in Kohimarama, which they owned as joint tenants. Mr Buxton moved into a rest home in late 1995, at which point the Linbul Family Trust was settled and the Buxtons' home was transferred into the trust. The trustees were indebted for the purchase price. The trustees of the trust were Penelope (the Buxton's daughter) and Mr Ellis, a lawyer. The beneficiaries of the trust were Mr and Mrs Buxton, and their children, Penelope and Timothy.

Mr Buxton died later that year in December1995, after which Mrs Buxton moved into a rest home. The home was then sold to Mr Curley (who, unbeknown to Mr Ellis, was Penelope's de facto partner). Mr Curley completed renovations to the home and sold it at a higher price a short time later.

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59 At [121] – [122].
60 At [122] – [123].
61 At [125].
62 At [127].
63 At [194].
64 *Worn v Ellis & Buxton* (HC, Auckland, M125-SD01, 17 June 2002, Paterson J).

In 1998, Mrs Buxton died. By the end of 1999, the trustees were willing to distribute half the capital to Penelope and Timothy, provided Timothy signed an indemnity. Timothy refused to do so and began to make allegations against the trustees.

On 8 February 1999, the trustees made a s 66 application, seeking directions to distribute the trust property equally. Timothy counter-claimed under s 68 of the Act, seeking a review of the trustees and an inquiry into the damages sustained by him.

The issues for the court were whether the trustees had breached their fiduciary duty.[65] The court found that, aside from a small issue regarding interest of an amount of $792.86, Timothy failed to establish any breach of fiduciary duty on part of the trustees. In particular, the court found:

- Timothy failed to prove the trustees did not act diligently and with prudence on the sale of the home, the acknowledgment of the interest to Penelope or the payments in reduction of Mrs Buxton's loan account;
- No action was found to lie from a failure to act impartially in respect of the resolution to contribute one-half of the corpus to Penelope, in selling the home after Mrs Buxton moved into a result home, or in failure to disseminate information to Timothy; and
- There was no evidence of a conflict of duty on the sale to Mr Curley.

As noted above, s 66 applications are not ordinarily available where allegations of breach of trust are made. However, on the basis that Timothy's allegations were unsubstantiated, the court held it was appropriate for the trustees to seek directions under s 66. The court noted that Timothy's attitude and correspondence were good reasons for putting the beneficiaries to the trouble and expense of an application. Timothy had been estranged from the family for some time and was uncooperative and difficult to contact.

Curiously, although the court declared a trustee's exercise of discretion will not be reviewed or examined except in very limited circumstances,[66] the court directed that Timothy was entitled to receive an additional sum of $396.43.[67]

Principles drawn from the cases

Having outlined some of these cases we now address the principles that can be drawn from them. The first principle is that the cases create a distinction in approach between superannuation trusts and standard private trusts.[68] This distinction makes some sense given the beneficiaries of the superannuation trust have a direct interest in the trust property, usually created by contract.

In the New Zealand context, of course, superannuation trusts are lesser known than they are overseas. The considerations that ordinarily apply to superannuation trusts do not apply to KiwiSaver accounts, which are directly held by those in the trustees' position as a custodian for regulatory reasons.

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65 The majority of the case focuses on discussion of the various duties Timothy alleged were breached. This is not material for our purposes, because ultimately the Court believed the allegations were unfounded.

66 *Worn v Ellis*, above n 64 at [70].

67 At [90].

68 Cases such as *Edge v Pensions Ombudsman* [2000] Ch 602 (EWCA), *Gailey v Gordon* [2003] 2 NZLR 193 (HC) and demonstrate this.

The second principle that we can draw from the cases is that although the general rule is that the courts will not interfere with the exercise by the trustees of their powers, that rule is not absolute.

The best example of that is the decision of *Worn v Buxton & Ellis*. Despite finding that the trustees' discretion should not be challenged except on a narrow basis, the court made an adjustment of the trustees' distribution to a beneficiary. The court's broad statement about its limited supervisory jurisdiction was inconsistent with its willingness to make an adjustment of such a small amount.

The third principle we can draw is that the law lacks clarity in some areas. The decision in *Masters v Stewart* is instructive in this regard. As outlined above, the court decided the trustees had failed to take into account a relevant factor and set the trustees' decision aside, even though it was accepted that the trustees had a discretion to make that decision. The basis for the court's decision in *Masters v Stewart* was the decision of the United Kingdom Supreme Court in *Pitt v Holt*[69] and the principle that where the trustees have failed to take into account relevant considerations in breach of a duty, the whole transaction becomes voidable.

With respect to the court, there are some conceptual difficulties with the way the issue was approached. The first point is that court did not articulate which duty it was that the trustees allegedly breached in failing to take this into account. This is important because the critical requirement in *Pitt* that must be met before voiding a transaction is that there has to be a breach of duty arising from the failure to consider.[70] The failure to consider a relevant factor in and of itself is not sufficient to overturn a trustees' decision.

The further point that can be made in relation to this judgment is that the court left open the entire issue of whether such a decision was void or voidable. The court gave no consideration to this question and did confront the issue of whether it is a proper exercise of a court's discretion to treat the decision that had been made as effectively void.

That issue deserves careful consideration in this area because what the court has effectively done is overturn the vesting of property in named individuals. The courts should not take such steps lightly and without proper explanation and analysis.

That leads on to the next principle, which is that, when the courts consider their control of trustee decision making, they appear to sometimes forget that there is an overlay of duties in place.

For example, the outcome in *Masters v Stewart* can only be justified on the basis the trustees were negligent in the process of their decision making. The trustees had a duty to take into account all relevant considerations and they negligently breached that duty. That is consistent with the approach in *Pitt v Holt* and indicates that while the courts talk about the basis on which they will look at trustee discretions, there are a number of other methods available to control trustees' decisions.

That leads to the issue of how different methods of control intersect. If a trustee has breached his or her duty in making a decision, why is it that the decision as in *Masters* is treated as avoidable? If there has been a breach of duty, why is it that the trustee is not held

69 *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC.

70 *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC at [68]. For a detailed discussion of the decision and its effect see Jeremy Johnson, *Farewell to Hastings-Bass?* [2013] NZLJ 249.

liable? Is it because the beneficiary could not prove that he or she would have received a benefit anyway?

A further question then arises: what if the trustee cannot be held liable because the trust deed exonerates him or her from all liability arising from any actions taken as trustee provided that they were honest? In that case, the courts effectively make the beneficiary responsible for a negligent action that the trust deed allows the trustee to commit without consequence.[71] This raises important policy issues. The tendency, shown by the judgment in *Masters v Stewart*, to set aside a trustee decision to the detriment of innocent third parties on the basis of breach of duty is concerning.

Another principle we can identify is that there is a difference of approach between a retrospective review or a beneficiary review of a trustee decision that is about to be, or has been, made and the trustees prospectively seeking approval for a decision under s 66 of the Act. In the latter case, the courts appear to more often take a "hands-off" approach. The courts seem primarily concerned with questions of good faith, proper purpose and relevant considerations. It is worth noting that if the court fails to take into account a relevant consideration, the judgment remains standing, in contrast to a trustee decision that was similarly flawed. It may therefore be sensible for trustees in fairly uncontentious situations to apply for court approval in order to achieve added protection.[72]

The approach of the courts in relation to trustees surrendering their discretions is also interesting. The only recent judgment where that appears to have occurred is *Darlow v Raymond*, in which the trustees' discretion relating to director appointments was surrendered. In that case, Muir J found (without any direct evidence but dated hearsay) that the risk to the family from a change of directors was significant.[73] That is notwithstanding the fact that leaving that director in place created a situation where he and he alone out of the entire family would then be exempt from a requirement that appointment as a director must be by unanimous consent of all the shareholders.

In assessing that question, the court, rather than deciding that the basis on which to exercise the discretion, engaged in a rather curious bit of reasoning around if it was exercised in a particular way it would constitute a fraud on a power in the sense that it would be exercised for an improper purpose.[74]

It is unusual for the court to consider its exercise of a surrendered discretion as potentially being considered a fraud on a power. That does not necessarily mean that some of the reasons underlying the allegation of fraud of power (although slightly overstated) were not relevant factors for the court to consider in exercising the discretion. But for the court to say it is not going to exercise the discretion because it will be fraud on a power, and would be for an improper purpose, without particularly good evidence, would arguably be open to criticism if the trustees had taken the same approach.

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71 A further consideration arises: what if the exoneration clause prohibits review on the grounds of irrelevant considerations? And is such detailed drafting required?

72 That option seems particularly attractive given the approach in *Re PV Trust Services Limited*, above n 31.

73 See [181] and [196] of the judgment.

74 At [194] of the judgment.

Does this paper's thesis stand?

In the introduction to this paper, two propositions were advanced. The first was that in reviewing trustee decisions, the court engaged in substantive reasoning despite formalist rhetoric. The second was that the courts' jurisdiction to review and control trustee decisions is broader than the courts generally acknowledge. In light of the analysis set out above, do these propositions stand?

In relation to the first proposition, the answer is mixed. The language of the courts is formalistic, with clearly defined grounds for review of trustee decisions. However, the approach often taken is substantive. This tension is clearly seen in *Worn v Buxton & Ellis*, *Masters v Stewart* and, more justifiably given the trustees' surrendered their discretion, *Darlow v Raymond*. In those case, the courts fundamentally engaged with the substance of the matter in approaching the issues.

In relation to the second proposition, the answer appears to be "yes". That is because of the overlay of various different concepts that are often not distinctly recognised. The obvious example relates to the principle in *Pitt v Holt*, which has long been recognised as establishing the failure to take account of relevant considerations as a basis for challenging trustee decisions.

The justification of that principle actually lies in another aspect of trust law, namely the duties of trustees to act with care and skill. When the courts will treat these issues as a matter of trustee competence in decision-making (as in *Pitt v Holt*) with the consequences for trustee liability and when the courts will treat them as a matter of decision-making process (as in *Masters v Stewart*) with consequences for the validity of the decision is, however, not clear.

The lack of clarity around issues such as this highlights the need for the parties to more clearly identify, and courts more clearly articulate, the technique being used to challenge the trustee decision.

Conclusion

Given the vast number of decisions over centuries, simple conclusions are hard to draw. As the cases evolve, so does the common law.

What is clear, however, is that while the apparent basis on which courts will intervene in trustee decision-making appears to be widely accepted – and consistent between England, Australia and New Zealand – the actual approach the courts take will differ from case to case and the courts have a tendency to engage in more substantive reasoning.

The best thing that practitioners and judges alike can do is to be careful of the analytical framework they use and wary of the consequences of a misapplication of that framework, as coherency in the law is something for which we should all aim.