

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

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CP 585/91

BETWEEN RICHARD ROY CHATWIN
PLAINTIFF

1021
A N D LYNETTE JOAN CHATWIN
FIRST DEFENDANT

A N D PAUL EWEN CALLAGHAN and
KEVIN GILLIGAN
SECOND DEFENDANTS

Hearing: 16 May 1991

Counsel: R. Harrison for Plaintiff
 D.G. Lee for Defendants

Judgment: 16 May 1991

ORAL JUDGMENT OF ANDERSON J

The plaintiff, who is a beneficiary under a family trust called "The Chatwin Trust", seeks interim injunctive relief by way of an order restraining or prohibiting the defendants from acting or purporting to or exercise any of the powers and rights as trustees of the particular trust. Interlocutory relief is also sought by way of an order directing that the NZI Guardian Trust, or another third party or parties suitable to the Court, be appointed in addition to the first defendants as trustees of the

particular trust. The application for interlocutory relief is resisted.

Mr and Mrs Chatwin are husband and wife but estranged. In the administration of their affairs whilst they lived together an elaborate trust structure was established presumably for normal and not inappropriate reasons of lawful tax avoidance. One trust, conveniently called "The Pell Trust", was established principally for the benefit of Mrs Chatwin. The relevant trust deed had what might conveniently be called a most favoured beneficiary clause which provided that the discretions and powers contained in the trust deed should be "exercised most favourably towards" Mrs Chatwin. A correlative trust for the benefit of Mr Chatwin called "The Chatwin Trust" had a similar most favoured beneficiary clause. The relevant trustees included in each case the settlor, spouse and a solicitor and accountant, professional trustees, until relatively recently Mr Gary Massey, a barrister and solicitor of Auckland, and a Mr W. Boyd, a chartered accountant. The income for each of the trusts derives from decisions made by a company conveniently referred to as CCL, which I understand is effectively under the control of Mr Chatwin.

The parties had children, all of whom are now adult and all of whom are generously provided for by their parents and the respective trusts. Land was acquired next to the former matrimonial home in Kohimarama and money was provided for

the construction of a residence for the benefit of one of the sons, Ross. One of the amenities of this residence is apparently a pleasant and much sought after tennis court. When Mr and Mrs Chatwin separated the geographical separation was plainly more limited than the emotional separation because she moved next door. With a commendable spirit of family harmony the parties shared the use of the tennis court. Regrettably with the passage of time territorial disputes arose and these were for a time settled by the wise and patient intervention of Mr Massey and Mr Boyd. The truce did not last. The tension which arose about the tennis court must surely have been merely an indication of a more palpable underlying antipathy leading to the removal and replacement of the trustees, litigation to deprive trust property, and the current litigation.

Mrs Chatwin has a power of appointment under the trust deed, of which she was the settlor, in respect of new trustees. The trust deed further provides that trustees may be removed by the decision of the majority. In her matrimonial property dispute with the plaintiff, Mrs Chatwin received legal professional advice from Mr Callaghan, and an accountancy professional advisor, Mr Gilligan. It was expedient for Mrs Chatwin to exercise her settlor's power of trustee appointment by way of appointing her personal professional advisors in a litigation context as trustees. Mrs Chatwin and the new trustees then formed a majority which exercised its power to remove Mr Massey and Mr Boyd.

Mr Chatwin is concerned that the trust, of which he is the most favoured beneficiary, may now be administered against his interests because the sole remaining trustees are his estranged wife and those professional advisors of his wife who are assisting the conduct of litigation against Mr Chatwin. This extraordinary situation is further complicated by litigation brought at the suit of Mrs Chatwin to obtain relief which would result in the disseising of the property of the very trust of which she is settlor and a trustee.

No more need be said to demonstrate the clear conflict of interest that exists between the trustees of The Chatwin Trust and that trust's most favoured beneficiary, Mr Chatwin. The metaphor of a mine field springs to mind. Messrs Callaghan and Gilligan are in the invidious position of high risk wherever they place their feet as trustees. A counsel of prudence I should have thought would be for them to seek to resign as trustees.

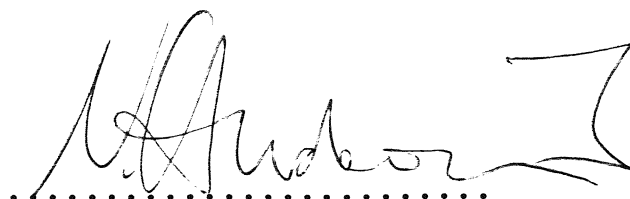
Equity has power to intervene to restrain apprehended breaches of the trust. In this case the apprehension arises out of the acuteness of the situation of conflict in which the professional trustees now find themselves. I make this point because it is fair to Messrs Callaghan and Gilligan that I observe that the injunction which I am about to order is not indicated by personal conduct on their part but by the matrix of risk generated by their various capacities.

It is not appropriate that this Court intervenes at an interlocutory level to appoint new trustees, when the power of appointment lies primarily with one of the parties and where the apprehended risk of breach of fiduciary duty can be met by restraining rather than mandatory orders. Nor is it appropriate to grant relief in the wide terms sought in paragraph (a) of the plaintiff's application because this would freeze the operation of a trust which is of such a nature and possesses such assets that normal revenue administration is vital for the protection of the trust property. The proper concerns of the plaintiff may be met by the following order by way of injunction which I now make.

It is ordered that until further order of this Court the trustees and each of them of the Lynn Chatwin Trust, constituted pursuant to a deed of trust dated 14 April 1981 of which the first defendant was settlor, be and the same are hereby restrained from disposing of any capital asset of the said trust. This order is without prejudice to their power and duty to receive and to disperse income of the trust in accordance with the trust deed.

Leave is reserved to any party to apply for such further or other orders as may be necessary or expedient for ensuring the proper administration of the trust and the preservation of its assets.

Costs are reserved.



N.C. Anderson, J.

Solicitors for Plaintiff: Vallant Hooker & Partners,
Auckland

Solicitors for Defendants: Callaghan Kernahan Town,
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