IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

CIV-2008-441-000537

IN THE MATTER OF	Part 4 of the High Court Rules
BETWEEN	ALAN GUY DEVER Plaintiff
AND	GRAEME STUART KNOBLOCH, ALAN EDWARD DEVER, JEANNE MARIE THECLA DEVER AND JOHN RICHARD BILLINGTON First Defendants
AND	JEANNE MARIE THECLA DEVER, WENDY JANET THECLA HOY, NEALE ALAN KENDALL DEVER, PENELOPE JEAN MARIE DEVER AND CATHERINE ADELAIDE DEVER Second Defendants

Hearing: 17 June 2009
(Heard at Wellington)

Counsel: J S Kós QC and J Orpin for defendants
J O Upton QC for plaintiff

Judgment: 29 October 2009

RESERVED JUDGMENT OF DOBSON J
(Defendants' summary judgment application)

Contents

[1] These proceedings involve a claim by one son (the plaintiff, Mr Dever) to pursue an entitlement to a distribution from the Alan E Dever Trust (the Trust) settled by his father (Mr Dever Snr). Mr Dever, his four siblings and his mother were all discretionary beneficiaries of the Trust. In four causes of action, Mr Dever alleges breaches of duty or obligations owed to him by the trustees of the Trust. He sues the trustees as first defendants. He also seeks orders in the nature of tracing against his mother and his siblings whom he sues as the second defendants in relation to the distributions made to them by the trustees, in which he did not share, when the Trust was wound up in June 2008.

[2] The present application is one seeking summary judgment on behalf of all the defendants. It requires the defendants to establish that all of Mr Dever's causes of action cannot succeed. I will shortly return to the high standard required in such circumstances. First, however, it is appropriate to outline the factual context in which Mr Dever's claims are being pursued.

The facts

[3] Mr Dever Snr settled the Trust in December 1969. The Trust owned a northern Hawke's Bay farming property, Glenbrook Station. Mr Dever managed Glenbrook from July 1986. In May 1993, the Trust sold Glenbrook to Glenbrook Station Limited (the company). Of the 3,000 shares issued by the company, the Trust held 1,800 and Mr Dever and Mr Dever Snr both held 600 shares, or 20%, each. Mr Dever did not provide his own consideration for the 20% shareholding. Mr Knobloch, a Napier chartered accountant who has been involved throughout and is sued as one of the trustees, has deposed that Mr Dever's shareholding was paid for by a distribution in his favour by the Trust. Mr Dever disputes that any consideration was required. Mr Knobloch also takes the view that the share parcel was treated as reflecting Mr Dever's "expectant family inheritance".

[4] The original trustees appointed under the 1969 Trust Deed were all professional advisers. Perhaps because of that, the deed did not contain any provision of the type that has subsequently appeared more frequently in family

trusts, namely a recognition that any trustee may be appointed, notwithstanding an interest as beneficiary.

[5] In September 2000, the then trustees appointed Mr Dever Snr and his wife (Mrs Dever) to be new trustees of the Trust.

[6] Then in March 2001 Mrs Dever settled her own trust, the Bangalore Trust. Mr Dever and his four siblings are the beneficiaries of the Bangalore Trust. Mr Billington QC is married to the fourth named of the second defendants. He was appointed as one of the original trustees of the Bangalore Trust and at some point around that time was also appointed an additional trustee of the Trust.

[7] Mr Dever Snr and Mrs Dever had been relatively assiduous in recording memoranda of wishes addressed to the trustees of the Trust, and subsequently also to the trustees of the Bangalore Trust. All but one of these memoranda included an acknowledgement that the memorandum is not binding on the trustees, but was provided for their guidance and was not intended in any way to fetter the discretionary powers vested in the trustees under the deed. The first memorandum was completed by Mr Dever Snr alone in September 1998 and was addressed to the trustees of the Trust. It recorded Mr Dever Snr's wish that the reasonable needs and requirements of Mrs Dever be met from the Trust and that her needs should be paramount and take priority over the needs and requirements of his children and other beneficiaries.

[8] In March 2001, Mr Dever Snr and Mrs Dever completed a memorandum to the trustees of the Bangalore Trust. That acknowledged that their children stood to receive benefits from a number of sources other than the Bangalore Trust, including the Trust, the company, and their respective estates. They expressed the belief that each of their children should share equally in the benefits received from all the sources referred to. The memorandum explicitly acknowledged that Mr Dever having managed Glenbrook Station for a number of years may feel that he should receive more than the other children as a form of compensation for doing so. They recorded their clear disagreement with any such view and their belief that Mr Dever's decision to remain on the farm should not lead to him receiving more

than their other children, when all the family assets are finally distributed. The Bangalore Trust was seen in that memorandum as a means of ensuring equality is achieved between all the children, after taking into account the benefits they had received or were to receive from all sources.

[9] A further memorandum of wishes to the trustees of the Trust was completed by Mr Dever Snr alone in July 2001. That memorandum acknowledged that Mr Dever Snr and Mrs Dever had placed significant assets into the Bangalore Trust and that, on distribution of the Trust, the trust fund should be divided into five equal parts, one for each of the children.

[10] In a further memorandum of wishes dated October 2004, prepared solely in Mr Dever Snr's name but endorsed with the total agreement of Mrs Dever, the terms of wishes to the trustees of the Trust and the Bangalore Trust, as well as to the executors and trustees of Mr Dever Snr's will, were updated. Anticipating the sale of the company, Mr Dever Snr acknowledged a doubt as to whether the assets in the Bangalore Trust would be sufficient to enable the trustees to reach equality between all of the children from all sources if the assets in the Trust were divided equally between all five children (as had been stipulated in the July 2001 memorandum). The October 2004 memorandum stated:

> This doubt arises principally from the fact that my son Guy [the plaintiff] will receive a significant distribution in his personal capacity as a shareholder in Glenbrook Station Limited when that company is wound up.
>
> I have therefore reached the conclusion that to provide sufficient flexibility within the Bangalore Trust to achieve total equality between all five children it is necessary for me to request the trustees of the Alan E Dever Trust to exclude Guy from any capital distribution from that trust.

[11] The memorandum also acknowledged that the earlier winding up of the company, relative to distributions from either of the trusts, would result in Mr Dever receiving capital before his siblings, but Mr Dever Snr did not want the trustees of the Bangalore Trust to attempt to put any monetary value on the timing difference in effecting equality between all of the children.

[12] There is no evidence that the content of these various memoranda were conveyed to all or any of the children of Mr Dever Snr and Mrs Dever. However, on

their instructions, their solicitor, Mr Graham Cowley of Langley Twigg in Napier, circulated to all of the children in April 2006 the parents' intentions as to disposition of assets. Mr Cowley recorded that the parents considered it appropriate to indicate their intentions to the family at that time and that it was particularly important for the plaintiff, to enable him to plan his future in farming following the sale of Glenbrook. The communication continued:

> Because Guy owns 20% of the shares in Glenbrook Station Limited he will, on the winding up of that company, receive his entitlement from those shares much earlier than the other four children will receive their entitlements which will be distributed at the time of distribution of the Alan E Dever Trust and the Bangalore Trust. This early distribution of part of his entitlements will provide opportunity benefits for Guy. It is also relevant that the purchasing power of money will change between the date that Guy receives his part entitlement on the winding up of Glenbrook Station Limited and the time when the remaining assets in the two Trusts are finally distributed to all five beneficiaries. Alan and Jeanne have recorded in Memoranda of Wishes to the trustees of the two Trusts that, notwithstanding those two issues, it is their wish that all of the family assets howsoever owned and from what entity they are directly derived, should be divided equally between their five children in absolute dollar terms pursuant to the discretions that are vested in the trustees in terms of the various Trust documents.

[13] Mr Dever's affidavit in opposition to the present summary judgment application deposes that he was opposed to any distribution along the lines of Mr Cowley's communication, and that his solicitors had strongly objected to it as soon as he received it. No documentation of that type is exhibited and it is to be assumed that the grounds for objection are encompassed within the causes of action now pleaded.

[14] Mr Dever Snr became aware that he was suffering from a terminal illness from about 2005, and thereafter he and Mrs Dever explored proposals for the sale of Glenbrook Station. Mr Dever issued proceedings in an attempt to prevent the sale, but they were discontinued, and settlement of the sale was concluded in July 2007. After receipt of the proceeds of sale of Glenbrook Station, the company was liquidated, enabling a distribution of some $780,000 to Mr Dever which his parents treated as capital for him to pursue an independent farming career.

[15] More recently still, it was resolved that the Trust should be wound up. The trustees resolved to allocate sufficient assets to provide an appropriate income for

Mrs Dever upon the death of Mr Dever Snr. After that apportionment, the Trust had $2 million in surplus assets and the trustees decided to distribute the assets of the Trust, allocating $500,000 to each of Mr Dever's four siblings. That occurred on 30 June 2008. The aim of the trustees in pursuing this course was to achieve partial parity with what Mr Dever had received through the company's liquidation. The remaining assets of the Trust were distributed to Mrs Dever, and will presumably be available for distribution to the beneficiaries in the Bangalore Trust and/or in her will.

The claims

[16] The present proceedings were commenced by Mr Dever to challenge his exclusion from the distribution of assets in the Trust. In his Amended Statement of Claim dated 20 March 2009, Mr Dever pleaded four causes of action as follows:

a) The trustees breached their duties in making distributions to his four siblings, but not to Mr Dever.

b) The trustees acted in breach of an equitable estoppel in making distributions to the siblings but not to him.

(The principal relief sought on the first two causes of action was equitable damages from the trustees.)

c) The trustees and the trustees of the Bangalore Trust should be removed and corporate trustees be appointed instead.

d) The incorrectly distributed assets of the Trust should be traced and restored to a constructive trust. Alternatively, that Mr Dever was entitled to an in personam remedy against the beneficiaries who received distributions for the value of the property distributed to them.

Approach to defendants' summary judgment

[17] The principles are well settled. The approach of Elias CJ giving judgment for the Court of Appeal in *Westpac Banking Corporation v M M Kembla New Zealand Ltd* [2001] 2 NZLR 298 was subsequently adopted by the Privy Council in *Jones v Attorney-General* [2004] 1 NZLR 433. In essence:

- The defendant has the onus of proving on the balance of probabilities that none of the plaintiff's claims can succeed.

- Summary judgment will be inappropriate where there are disputed issues of material fact or where material facts need to be ascertained by the Court and cannot confidently be concluded from affidavits. Summary judgment is suitable for cases where abbreviated procedure and affidavit evidence will sufficiently expose the facts and the legal issues.

- Except in clear cases, it will not be appropriate to decide by summary procedure the sufficiency of the proof of a plaintiff's claim.

(See the *Westpac* decision, [61]-[63].)

[18] For Mr Dever, Mr Upton QC emphasised the observation of the Privy Council in *Jones*, that described the test required of the defendant as an "exacting" one, "…rightly so since it is a serious thing to stop a plaintiff bringing his claim to trial unless it is quite clearly hopeless" (*Jones*, [10]).

[19] In addition, Mr Upton emphasised the existence of disputed matters of fact that he characterised as material to the plaintiff's causes of action. If accepted as such, then the existence of disputes on material facts will generally require the matter to go to trial. The argument for the defendants was that none of the identified differences on factual matters need to be resolved to determine that there is no tenable cause of action available to Mr Dever.

First cause of action – breach of trustees' obligations in excluding Mr Dever from distributions

[20] In both the Amended Statement of Claim and in Mr Upton's submissions, the essence of the plaintiff's case is that any benefit he received on the sale of his 20% share in Glenbrook Station Limited is totally irrelevant to any distribution of the assets of the Trust, and that he is "entitled" to share equally in any distribution with his siblings.

[21] The trustees' power on distribution was expressed in customarily wide terms:

> 3. …UPON TRUST for such of them the Settlor's said wife Jeanne Marie Thecla Dever and his children and grandchildren as the Trustees in their absolute and uncontrolled discretion shall by Deed appoint whether exclusively of any one or more of them or not…

[22] Accordingly, in literal terms, Mr Dever's claimed "entitlement" cannot be supported by the law. All beneficiaries of the Trust were only discretionary, and there was therefore no entitlement for any of them to participate, let alone to participate equally, in any distribution the trustees resolved to make. Discretionary beneficiaries have no more than an expectation that they will be considered. The trustees explain their decisions on distribution of the Trust assets as being in accordance with the clear directions in the memoranda of wishes, notwithstanding that such wishes could not formally fetter their discretion.

[23] The pleading does not acknowledge the gap between a breach of the standards all beneficiaries are entitled to require of trustees, and the absence of any entitlement to receive a distribution, in the event that the trustees had complied with legal obligations. If errors by the trustees were made out, but it is established that the same decision would have been reached if the trustees complied with the law, should the proceedings progress beyond the defendants' present challenge? Given the high onus on defendants moving for summary judgment and the importance attaching to the lawfulness of the exercise of trustees' powers, I consider that a disgruntled beneficiary should not be deprived of his day in Court, if he or she insists on it, to establish that a breach of trustees' duties has occurred, even if it appears that no damages could be made out. To succeed on summary judgment, defendants have

to make out that there is no liability, and it is not sufficient that any liability established could not lead to the granting of any monetary relief.

[24] Mr Upton submitted that there were arguable breaches by the trustees in that the relevant decision was affected by conflict, with Mrs Dever participating in a way that constituted self-dealing. He also contended that the circumstances in which the relevant decision was made lacked the necessary unanimity. Further, he contended for other arguable breaches of trust reflected in what he claimed to be a failure to act reasonably towards Mr Dever.

[25] It is convenient to deal first with the alleged absence of unanimity.

Unanimity

[26] The Amended Statement of Claim pleads that the trustees were in breach of their obligations by failing to act unanimously. Mrs Dever's affidavit deposed:

> John [Mr Billington] disclosed his indirect interest by virtue of his wife, Penny, being a beneficiary. To avoid any appearance of conflict or personal interest, John did not come to Hawke's Bay for the meeting and abstained from participating in the resolution and agreed to abide by the decision of the remaining trustees.

[27] That meeting was held on 25 June and on 30 June 2008 all trustees, including Mr Billington, executed a Deed of Appointment and Distribution. The recitals to the deed included:

> At that meeting [ie 25 June 2008] John by letter declared to his co-trustees his interest as the husband of Penny Dever one of the beneficiaries under the deed and consented to his decisions as a trustee being those taken by his co-trustees.

[28] The recitals to the deed also refer to the resolutions passed by the trustees as "unanimous".

[29] Mr Upton submits that beneficiaries are entitled to require that all trustees act, and that they act unanimously. He cited Garrow and Kelly *Law of Trusts and Trustees* (6ed) para 19.3.8:

> All trustees must concur in the exercise of powers conferred on them with reference to the trust estate. Unless the trust document says otherwise, the act of the majority of the trustees cannot bind a dissenting minority or the trust estate. The dissenting minority may of course defer to the judgement of the majority as long as they act in good faith.

[30] Here, Mr Billington absented himself from the decision making, but after the resolutions were made he committed himself to the formal documentation required to carry them into effect. In a passive sense, his execution of the deed reflects concurrence or, perhaps more accurately, acquiescence, but certainly not dissent. However, at the deliberative stage, he did not participate in unanimous action by all the trustees and certainly did not bring to bear a mind unclouded by any contrary interest (to paraphrase Vinelott J in the extract from *Re Thompson's Settlement* [1985] 2 All ER 720 at 730 cited in [39] below).

[31] Both sides cited the decision in *Rodney Aero Club Inc v Moore* [1998] 2 NZLR 192 at 195 (HC). In that case, one of two trustees entered into a new agreement with a third party knowing that the second trustee was unequivocally opposed to it. In those circumstances, the Court found that the agreement was invalid and did not bind the estate. Hammond J observed that the unanimity rule is a corollary of the non-delegation principle so that if trustees cannot delegate, it follows that they must all perform the duties attendant upon execution of the trust (195).

[32] Mr Dever could complain that there was a form of delegation, and that the decision was not a proper one because he was entitled to have all of the trustees individually consider the proposals, including his position. A decision reached without that quality of deliberation is less than he is entitled to. Conceptually, had Mr Billington participated, he may have questioned the fairness of excluding Mr Dever.

[33] However, in reality there is no suggestion that Mr Billington did not concur with the decisions taken. It is merely that he wished to avoid the appearance of positive participation. On the one hand, that stance is insufficient to constitute participation, affording a tenable basis for challenging the decisions made in his absence. Alternatively, given that he completed the formal deed, that may constitute

concurrence with the underlying resolution that it reflected and therefore be sufficient to constitute unanimity, as is required by the law.

[34] The essence of the position for the defendants on this point is that "The resolution to distribute the Trust assets was passed unanimously. Mr Billington permissibly deferred to the judgement of his co-trustees in good faith." Underhill and Hayton, *Law Relating to Trusts and Trustees* (16ed 2003) at 645 was cited for the latter proposition, which is to similar effect to the last sentence from Garrow & Kelly cited at [29] above. However, that is in the context of active participation by the trustee in debate on a decision leading to a recognised difference of view among trustees, and a decision to defer to a course other than the course the particular trustee prefers because of recognition of the other trustees' better judgement on the subject matter. Such a decision to defer on account of greater expertise or experience during the course of debate is distinguishable from a decision to abstain at the outset because of the perception of conflict. I am inclined to the view that formal endorsement of the documents following the decision being made by the other trustees is not sufficient to meet what is a requirement for substantive participation by all trustees in what was a fundamentally important decision to distribute the Trust.

[35] The alternative view would be that Mr Billington's limited participation in executing the documents does constitute participation by him in the formal decision to distribute the Trust. That would mean, to the extent he acknowledged a conflict of interest, that his participation is also to be taken into account when considering the first of Mr Dever's pleaded criticisms of the trustees, namely that they failed to comply with their obligation not to place themselves in a position where duty and interest conflict.

[36] Either way it is characterised, Mr Billington's "participation", or "non-participation" gives rise to the prospect of a tenable cause of action, and that leads to an assessment on whether it is one to which the trustees have an inarguably complete answer.

Conflict of interest

[37] As to the allegation of Mrs Dever's self-dealing by participating both as a trustee, and as a beneficiary receiving a substantial distribution, Mr Upton criticised her acceptance of appointment as a trustee by the then existing trustees in September 2000 and that error was allegedly compounded by failing to resign when she wished to take a benefit as a beneficiary under the Trust.

[38] If Mr Billington is held to have participated in the trustees' decision, then that is also participation arguably tainted by conflict, given his acknowledged interest in the position of his wife as a beneficiary.

[39] The scope of the rule against self-dealing advanced by Mr Upton is as described in the Chancery Division decision of Vinelott J in *Re Thompson's Settlement*:

> It is clear that the self-dealing rule is an application of the wider principle that a man must not put himself in a position where duty and interest conflict or where his duty to one conflicts with his duty to another … The principle is applied stringently in cases where a trustee concurs in a transaction which cannot be carried into effect without his concurrence and who also has an interest in or holds a fiduciary duty to another in relation to the same transaction. The transaction cannot stand if challenged by a beneficiary because in the absence of an express provision in the trust instrument the beneficiaries are entitled to require that the trustees act unanimously and that each brings to bear a mind unclouded by any contrary interest or duty in deciding whether it is in the interest of the beneficiaries that the trustees concur in it. ((d)-(f))

[40] That passage has most recently been cited in New Zealand in *Chellew v Excell* [2009] 1 NZLR 711 (HC) at 718. That case involved a trustee who was also a beneficiary acquiring property from the trust, purportedly for value, i.e. a dealing, rather than a distribution.

[41] Part of the rationale for the rule against any form of dealings by trustees with trust property is because of the prospect that their familiarity with the property gives trustees an advantage not shared by outsiders to the trust. Such advantages may be difficult to identify or measure. Equity is absolute on the point because of the

consistent high standards expected of those entrusted with the custody and management of property that belongs beneficially to others.

[42] However, Mr Upton did not cite any authorities instancing the extension of the rule against self-dealing to decisions on the distribution to beneficiaries of Trust assets, as distinct from dealings arising in the ongoing management and control of Trust property. I consider the rationale for the rule extends only to the conduct of trustees as trustees. It prevents trustees profiting from their ability to exercise legal control over the assets of a trust in its on-going management. The particular rule does not extend to the conduct of trustees in resolving distributions of trust assets, where their judgement might potentially be compromised by a conflict of interest. In practical terms, that constraint is enforced by the more general rule against fiduciaries acting where a conflict of interest arises.

[43] Mr Dever's earlier challenge to the sale of the Trust property has been settled. The subsequent decision by the trustees to wind up the Trust and make distributions to some, but not all, of the discretionary beneficiaries does not constitute a "dealing" with Trust property in the sense contemplated in the self-dealing rule.

[44] However, Mr Dever's pleading is in broad enough terms to encompass a more general allegation that the decision by the trustees to make the distributions they did was flawed because of the participation by Mrs Dever when she was conflicted by virtue of her interest in the capital apportioned for her benefit, relative to the extent of distributions made to other beneficiaries. If Mr Billington "participated", then a comparable issue arises in respect of his participation. In the absence of either an express provision in the Trust Deed permitting participation by a trustee who, as a beneficiary, may receive a benefit from a decision by the trustees, or the informed consent of all beneficiaries, then the participation by a trustee who acquires a benefit from such a decision is one in respect of which other beneficiaries may have a tenable basis for challenge. This presumptively arises because of the conflict between the duty to act even-handedly towards all beneficiaries, and the interest in preferring that trustee's own interests.

[45] The argument for the defendants was that the conflict between duty to all beneficiaries and interest as one of them is not objectionable where the particular trustee has not placed her or himself in that position, but rather has been put in it by the actions of others. This limitation on the rule against trustees acting where there is a potential conflict is recognised in cases involving superannuation trusts where individuals are appointed as trustees because of their status, typically as employee-members of the scheme, or as representatives of the employer. The defendants relied on *In re Drexell Burnham Lambert UK Pension Plan* [1995] 1 WLR 32. The frustration at the apparent uniform application of the rule against trustees participating in circumstances where they are perceived to have any conflict is reflected in Lindsay J's rhetorical questions:

> But has it to do so? Is the "general rule" quite so "universal" as Lord Cranworth L.C. would have it? Are there not exceptions to it? Does it apply here so inescapably, even notwithstanding that the proposals put forward by these blighted trustees are seen (as they are) to be ones which unblighted trustees could properly be directed to carry into effect, that the court must hold itself hobbled, unable to give directions to that end? (40)

[46] An analysis of earlier decisions led the Court to find that there is an exception to the rule where it was not the person in the position of conflict who had put themselves in that position (40-41).

[47] I do not accept that the rationale applying to the appointment of trustees in a superannuation trust situation can be applied without further consideration to the position of trustees in family trust situations. If one family member participates in decisions as to the disposition of property held for members of the family to that person's own benefit, then the spectre of conflict between the trustees' personal interest and the duty to all beneficiaries must arise, irrespective of the circumstances in which that trustee was appointed. Involvement in a family trust context is clearly distinguishable from, say, an employee-trustee participating in decisions affecting competing interests of different classes of members of a superannuation fund. Often, a certain number of such trustees are required to be chosen from members of classes of beneficiary. In the family trust context, it may be that appointment of trustees by a settlor including family member/beneficiaries could be taken to infer recognition of the prospect that such trustees will participate in decisions in which they have a personal interest. If that inference is not sustainable, then, in the negative sense,

appointment as a trustee and the obligation for unanimous participation may require exclusion from benefit as a beneficiary, unless the trust deed permits otherwise. This trust was not set up with any trustees who were also beneficiaries. Mr and Mrs Dever were added many years after the Trust was settled, but it appears that no variation to the terms of the Trust Deed was made to accommodate the conflict that has subsequently arisen.

[48] Mr Upton submitted that Mrs Dever's involvement was not inevitable, in the sense that other trustees could have made the decision from which she benefited. It was an option for her to decline appointment in 2000 when that was proposed if she had anticipated taking property as a beneficiary under the Trust. Alternatively, she could subsequently have resigned before trustees without the conflict of interest were confronted with the decision she subsequently participated in. On the other hand, I am mindful of the widespread practice of including persons in positions like Mrs Dever, as trustees of family trusts. They bring numerous practical advantages and should not be excluded for theoretical or purely formal reasons. One practical means of avoiding the prospect of a challenge such as has been raised here, is for the Trust Deed to include a provision such as that included in the Bangalore Trust's deed as follows:

> 13. TRUSTEE/BENEFICIARY
>
> 13.1 No Self Benefit: Notwithstanding anything contained or implied in this Deed no Trustee who is also a Beneficiary shall exercise any power or discretion vested in the Trustees in favour of himself.
>
> 13.2 Other Trustees: Any power or discretion vested in the Trustees may be exercised in favour of a Trustee who is also a Beneficiary by the other Trustee or Trustees.

[49] Certainly, the prospect of a conflict does not disqualify a candidate from appointment as a trustee: 48 *Halsbury's Laws of England* (4ed, reissue), Trusts, para [832]. That cites the decision in *Isaac v Isaac* [2005] EWHC 435 (Ch) which involved an internecine battle where family trusts held parcels of shares in a family owned company and control of voting decisions for the trusts effectively controlled the outcome of shareholder voting in the company. A challenge to appointment as a trustee of the managing director of the company held that the appointment was not

improper, and an order would not have been made for his removal. The judgment of Park J includes the following:

> Numerous trusts exist in which one or more of the trustees has or have one or more of the additional capacities which [the contested trustee] had in this case. If an actual conflict arises the law will expect the trustee to handle it carefully and appropriately in the circumstances, but no one suggests that such persons cannot be validly appointed as trustees. ([76])

[50] Again, cases arising in the superannuation trusts' context are authority for the proposition that a trustee will not be accountable for receiving distributions from a fund where the terms of the deed give an express power to distribute to a class including that trustee: *Edge v Pensions Ombudsman* [1998] 2 All ER 547 (Ch), affirmed [1999] 4 All ER 546 CA.

[51] In *Re Mulligan (deceased)* [1998] 1 NZLR 481, the High Court determined claims for breach of trust brought by residuary beneficiaries who claimed that the trustees had acted in breach of trust by making investment decisions over a long period that would maximise the income earned by the assets for the benefit of the life tenant, but at the expense of the severely depleted value of the capital ultimately available for the residuary beneficiaries. In that case, the trustees had been the widow/life tenant, and a professional trust company. Panckhurst J found that the widow had prevailed in decisions to invest the assets in interest-earning investments rather than in shares. The widow was found to have participated, and indeed to have dominated the investment decisions notwithstanding the acute conflict between her own interest in maximising her income, and her duty to act even-handedly to other classes of beneficiary. That involvement did not vitiate the decisions made. Rather, all trustees became liable for the breach of trust involved in making them.

[52] Mr Dever's claims against the trustees extend to a basis consistent with the analysis in *Mulligan*, ie that the decision to exclude him from the distribution was tainted by one or more trustees participating when in a conflicted position. Principally, this relates to Mrs Dever's involvement. However, in the less likely of the alternatives analysed above, it may extend to Mr Billington's participation.

[53] It is tolerably clear that the defendants have pursued an application for summary judgment because of the conviction they apparently hold, as reflected in the various affidavits, that the trustees' decisions in issue were made reasonably, in accordance with the clear and signalled wishes of the settlor, and ought therefore to be recognised as unimpeachable. If the spectre of the trustees' discretionary decision being tainted by conflict of interest affords a basis for an excluded discretionary beneficiary to challenge the decision, then by one means or another the trustees ought to be able to meet that by defending the substantive reasonableness of the challenged decisions. One avenue would be for the trustees to seek orders from the Court authorising the challenged dealings with Trust property under s 64 of the Trustee Act 1956. If that section is treated as available only in respect of proposed steps, as distinct from a mechanism for authorising steps already taken, then, in the alternative, the Court retains an inherent jurisdiction to supervise the conduct of trustees.

[54] The difficulty for the trustees is that their perception of the substantive merits of their decision are not an immediate answer to the criticisms of breach of obligations owed to beneficiaries in respect of the process by which the decision was reached. Having found that the defendants cannot discharge the onus of establishing that none of the plaintiff's claims can succeed (on the basis of a tenable claim to breach of trustees' obligations on part of the first cause of action), in many situations it would be inappropriate to go further in the analysis of the tenability of the claims. However, for reasons that I hope will become clear, in this case it is appropriate to do so.

Trustees' alleged failure to act reasonably

[55] The involvement by Mrs Dever (and potentially that of Mr Billington) when in a position of conflict comes within the umbrella of a general pleading that the trustees failed to act reasonably. I took the allegation of failure to act reasonably to represent, in addition, a stand-alone challenge to the unreasonableness of the decision made. On this head, Mr Upton cited *Craddock v Crowhen* (1995) 1 NZSC 40,331 and *Blair v Vallely* HC WANG CP8/92 23 April 1999. The latter decision is

perhaps the high water mark of the preparedness by this Court to reconsider the substantive reasonableness of decisions made by trustees in exercise of discretionary powers, to be measured by analogy with the administrative law *Wednesbury* test of reasonableness. In *Blair*, Wild J adopted the approach suggested by Tipping J in *Craddock*:

> However, an ostensibly intra vires exercise of a discretionary power can, in my judgment, be impugned on a basis somewhat wider than what is conventionally understood by bad faith in this field (see *Jacobs* supra). If trustees exercise their discretionary powers in a manner which, although formally intra vires, is unreasonable, the Court should be able to intervene. The basis is that unreasonableness is, in reality, a species of ultra vires. The donor of the power, be it testator, settlor or for that matter the members of a superannuation scheme, give the trustees their powers on the implicit basis that they will exercise them reasonably.
>
> Unreasonableness in this context is analogous with unreasonableness in administrative law: cf. the *Wednesburv* concept. Those exercising public powers are usually required to exercise them reasonably. I can see no good reason why those exercising private powers should be free of similar control, subject always of course to the terms of their empowering instrument. But, it must be emphasised, a decision in the present field, as in the public law area, will not be regarded as unreasonable unless it is such that no reasonable trustee could rationally have made in all the circumstances. The Court will not intervene simply because it would or might have made a different decision. To be impugned the decision must be one which can fairly be said to be beyond the bounds of reason. (40,337)

[56] Mr Upton fairly acknowledges that the more recent decision of *Gailey v Gordon* [2003] 2 NZLR 192 suggests something of a retreat from the preparedness to consider the reasonableness of trustees' conduct as demonstrated in *Blair*. However, even if Mr Dever's claim cannot initially extend to a challenge to the reasonableness of the trustees' decision, I consider the trustees' own arguments bring that analysis into play. On the arguments thus far, the defendants cannot dismiss the allegations of conflict of interest and lack of unanimous action as being bound to fail. The arguments for the trustees foreshadow alternatives that if there has been any breach of such obligations, then either no loss can be made out because of the inevitability of properly directed and unconflicted trustees arriving at the same decision, or possibly the trustees seeking approval of the decision as one potentially afflicted by a deficiency, but warranting the approval of the Court, such as under s 64 of the Trustee Act.

[57] As to the substantive reasonableness aspect of Mr Dever's first cause of action, there is an issue whether that can be adequately considered in the summary judgment context, or whether Mr Dever could advance any more detailed analysis after contested evidence at a full hearing. In this regard, Wild J referred to the approach of Thomas J in *Jones v AMP Perpetual* [1994] 1 NZLR 690 (HC) where the reasonableness of the conduct of trustees was characterised as being a question of fact and degree and that the facts must be "closely scrutinised" (see 711).

[58] Certainly, on all of the material available in the nine affidavits filed in support and in opposition to the summary judgment, the facts affecting the trustees' decision are relatively clear. I assume that all the trustees were aware of the contents of the various memoranda of wishes completed by Mr Dever Snr and Mrs Dever. I also assume that the trustees were aware of Mr Dever's strong objection to the assets of the Trust being dealt with in accordance with those memoranda of wishes, as they had been summarised in Mr Cowley's April 2006 communication to all of the settlor's children. The issue is simple. Mr Dever wished any distribution of the Trust to occur ignoring the benefit that had accrued from his 20% holding in the company.

[59] The memoranda of wishes made perfectly clear the parents' firm view that equal distribution should take account of amounts received by all of their children from all family sources. Rejection of Mr Dever's contrary view was explicit in the March 2001 memorandum, and a progression of thinking as to how equality could more or less be achieved, taking account of the distribution to him from the company, was a repeated theme of subsequent memoranda.

[60] The memoranda of wishes reflect an entirely conventional approach to inheritance of family assets. Aggregating everything available into one "pot" and ensuring that ultimately all of one generation benefit equally from the assets able to left to them by the previous generation is conventional and readily defensible as fair between members of the class. The present challenge to compliance with the settlor/donor's wishes along these lines could only be tenable if some basis existed for excluding Mr Dever's 20% of the shares in the company from "the pot". The Trust's 60% shareholding is obviously included in "the pot". The proceeds of the

other 20% shareholding held by Mr Dever Snr was also in "the pot", as Mr Knobloch deposes they were gifted by Mr Dever Snr to the Bangalore Trust. All of those circumstances support inclusion of all the shareholdings in "the pot".

[61] Rejection of the wishes of the settlor and Mrs Dever, so as to contemplate a distribution to Mr Dever that ignored the sum received for the 20% shareholding in the company, would require the trustees to be fixed with knowledge of, at the very least, a credible basis for challenging the approach reflected in the various memoranda of wishes, and in particular the way they took into account the distributions on liquidation of the company. No such tenable basis is suggested anywhere in the evidence. The Memoranda addressed to the trustees include recognition of Mr Dever's contrary view that the 20 percent shareholding should be excluded from his share of the inheritance, and reasons for rejecting that.

[62] Mr Dever does not plead any actionable promise by Mr Dever Snr to the effect that the shareholding would be a reward for his work on the farm and would be excluded from the assets that he would inherit in equal shares with his siblings. To the contrary, the only source of an estoppel is claimed to arise from a discussion with one of the solicitors acting for the various family members and entities. In these circumstances, it is abundantly reasonable that the trustees should conduct themselves in conformity with the memoranda of wishes and indeed they would be vulnerable to criticisms of unreasonable conduct had they ignored them.

[63] The essence of Mr Dever's claim is that the distribution from his shareholding in the company should be ignored as something excluded from his "inheritance" whereas his parents have consistently treated the farm, irrespective of the legal form in which it was owned, as part of the assets to be shared equally. Against this clear factual background, Mr Dever has no prospect of making out the trustees' decision to bring the distribution from his shareholding in the company into account, as an unreasonable one. Accordingly, assuming a challenge to the reasonableness of the trustees' decision was able to be pursued, there could be no tenable cause of action that the June 2008 decisions on distribution could be attacked as unreasonable.

[64] However, establishing the untenability of Mr Dever's claim that the decision was an unreasonable one does not provide an inevitably successful defence to the challenges that the decision was blighted by conflict of interest and possible lack of unanimity. Nor does the finding that the decision could not be attacked for unreasonableness equate with a finding that the Court would inevitably approve the decision, despite any such tainting in the process by which it was reached. On the approach in *Craddock v Crowhen*, the test to establish unreasonableness against trustees is a high one, namely whether the decision was one that no reasonable trustees, properly advised, could possibly have come to. The second inquiry would arise where the trustees acknowledge at least the prospect of some relevant deficiency in their powers and seek the assistance of the Court to sanction decisions that are vulnerable to challenge on that ground.

Second cause of action – equitable estoppel

[65] Mr Dever pleads that there was an equitable estoppel or "expectation" raised in his favour that the assets in the Trust would be distributed equally among the five children without regard being had to the benefit he received from his 20% shareholding in the company.

[66] As to the legal parameters on this cause of action, Mr Upton submitted that equitable estoppel will operate to prevent a party denying an expectation which it had raised, where to do so would be unconscionable. An appropriate formulation is that of the Court of Appeal in *Gold Star Insurance Co Ltd v Gaunt* [1998] 3 NZLR 80 at 86:

> Before judgment can be given against a defendant on the grounds of estoppel, some action, or representation, or omission to act, must have been carried out by, or on behalf of, that defendant causing the plaintiff to have acted in a manner causing loss.

[67] In his affidavit opposing summary judgment, Mr Dever deposes to the circumstances in which the relevant representation was said to have been made. He recalls a meeting in December 1992 at which arrangements for transfer of the farm to the company then being formed were discussed. One of the then senior partners of the firm acting for all of Mr Dever Snr, the company, the Trust and for Mr Dever

provided a basic explanation of what had been arranged, but said that Mr Dever was to return to another partner in the firm for a detailed explanation at a later date. Mr Dever deposes that such meeting occurred with Mr Greer, another partner in the same firm. He deposes:

> I came away from [the meeting with Mr Greer] with the definite message that I had a share in any profit from the farm if and when it was sold, through my 20% shareholding, and that I would also benefit from any distribution that would be made from the Trust.

[68] Mr Dever claims to have been encouraged by what he was told to go away and work harder to improve the value of the farm and in that way *"benefit myself and also the Trust's interest in the company through its shareholding and that of my father"*.

[69] Mr Greer responded to Mr Dever's affidavit, doubting that such a meeting took place at all, and suggesting reasons why the content recalled by Mr Dever would not have been traversed. However, for present summary judgment purposes, I evaluate the tenability of the equitable estoppel cause of action on the premise that Mr Dever could make out the discussion as he has recalled it.

[70] Numerous difficulties arise. No basis is suggested on which Mr Greer could, in 1992, have the authority to make representations binding the trustees of the Trust. All beneficiaries were only discretionary. At that time distribution of the Trust was well in the future, and there must have been reasonable prospects that the Trust would acquire assets in addition to its shareholding in the farm. At the time of the discussion as recalled by Mr Dever, the Trust would also have had the debt back owed by the company for the transfer of the farm assets. It is inherently unlikely that the discussion with Mr Greer as recalled by Mr Dever occurred on terms reasonably entitling Mr Dever to treat it as a representation binding on the trustees in the future. Assuming it occurred on the terms Mr Dever describes, it is unlikely to be an adequate basis for a representation binding the trustees. It has far more of the character of a prospective discussion between a lawyer acting for numerous parties in an intra-family series of arrangements as to how the consequences of what was then being done might subsequently play out.

[71] Even if the discussion occurred on some basis entitling Mr Dever to treat the comments made as a representation binding the trustees as to the future of the discretionary trust, then Mr Dever would have substantial difficulties in establishing reliance to his detriment on a representation that had such status throughout a period in which the trustees did not or were not free to resile from it. There is a dispute as to whether his terms of employment by the company were at less than market rates. There is no suggestion that they were discounted on a basis recognising that he would get any defined benefit at a later point in time.

[72] It can reasonably be inferred from the terms of the various memoranda to the trustees that the opposing views of Mr Dever and his parents on the inclusion or exclusion of his 20 percent shareholding in the company from his "inheritance" had been aired between them. Certainly, the communication from Mr Cowley in April 2006 would have disabused Mr Dever of any belief still persisting at that time that the distribution to him of his 20% shareholding in the company would be excluded from his overall share of the inheritance available to him and his siblings from all sources.

[73] Although Mr Dever's affidavit claims that the discussion with Mr Greer encouraged him to "work harder", and he also suggests his salary may not always have kept up with the market rates, those two aspects of his position seem unlikely to constitute sufficient reliance to his detriment on any representation.

[74] The estoppel cause of action invokes the notion of unconscionability in allowing the defendants to resile from a representation previously made and relied upon. Although it would be inappropriate in the context of a defendant's summary judgment application to find such a cause of action untenable solely on the view able to be formed on the affidavit evidence as to the absence of unconscionability, that is certainly an additional factor in the present circumstances. Assuming Mr Dever did establish representations by Mr Greer in the circumstances he relies upon, there must be very real doubts that a Court would ever find that it was now unconscionable to allow the trustees to resile from it, given everything that had transpired between 1992 and 2008.

[75] I acknowledge that the analysis on this cause of action assumes that Mr Dever could not materially improve the state of his evidence on the circumstances and terms of the representation, when he should not lightly be deprived of the opportunity to establish a sufficient representation by viva voce evidence and cross-examination. In view of the defendants' failure to achieve summary judgment on the first cause of action, it is unnecessary to reach a final view about the other causes of action. However, after careful analysis I am doubtful that there is any reasonable prospect of his enhancing the version he has deposed to, sufficiently to create any reasonable prospect of an estoppel being made out against the trustees. I have set out my analysis as it has a bearing on the view I take of the future for these proceedings, to which I return at the end of the judgment.

Third cause of action

[76] Mr Dever's third cause of action pleads that in the circumstances complained of, it is expedient that the first defendants be removed as trustees of the Trust and the Bangalore Trust, and that a corporate trustee be appointed in their stead. The basis for any such relief would depend on establishing some relevant breach of trust by the trustees in circumstances warranting their removal. As will be apparent from the foregoing analysis, I have very real doubts as to the prospects for such a breach being made out.

[77] Although conceptually the jurisdiction to appoint new trustees, either in substitution for or in addition to any existing trustee, does not depend on the Court finding a current trustee has consciously or deliberately misconducted her or himself in the administration of the Trust, there are unlikely to be other circumstances in which removal would be warranted here. This third cause of action would stand or fall with the success of the earlier two causes of action, and the full range of rejoinders to them that are open to the trustees.

Fourth cause of action

[78] The fourth cause of action pleads an entitlement to a remedy *in rem*, for the restoration back to the Trust of the property allegedly wrongly distributed, a remedial constructive trust over such property in favour of Mr Dever, and in addition, an *in personam* remedy for the value of the property transferred, together with interest on a compounding basis.

[79] As Mr Kós submitted, these are pleaded as remedial entitlements, consequent upon the making out of earlier causes of action. They add nothing to the nature of allegations against the defendants. If the earlier causes of action are unsuccessful, then these must also fall.

Future of the proceedings

[80] The parts of the first cause of action alleging participation by a trustee with a conflict of interest and lack of unanimity in the trustees' decision to distribute the Trust prevent the defendants making out the untenability of all aspects of the plaintiff's claims. Accordingly, they are not entitled to summary judgment.

[81] I can readily understand the rationale for the trustees seeking summarily to bring the proceedings to a conclusion. On the basis of all the information thus far before the Court, I see very little prospect of Mr Dever achieving the outcome he desires, namely an equal share with all his siblings of the portion of the Trust distributed to them. If the process by which the decision to exclude him was taken was blighted by the participation of a trustee with a conflicting interest as a beneficiary (or is otherwise deficient because of the absence of substantive participation by all trustees bringing an "unclouded mind"), then it would be unfair to Mr Dever's siblings if the consequences of such deficiencies required an outcome that he receive the payment he claims. Fairness would require that the trustees be afforded the opportunity to seek approval for the decision, or to restructure the decision-making process and then make a fresh decision on distribution of the Trust. (This does not suggest any merit in Mr Dever's application to have an independent,

corporate trustee appointed.) There seems every prospect that such a decision would be in the same terms as the decision now sought to be impugned.

[82] Applications for summary judgment often pursue what may appear to be the shortest route, but which become "the longest way home". I regret the delay in delivery of this judgment, and I remain concerned that a final conclusion of claims with forlorn prospects for any positive outcome should not be any more protracted than necessary. I would consider positively any initiatives to achieve a resolution promptly, that counsel may be instructed to propose.

[83] The formal outcome is that the defendants' application for summary judgment is dismissed. In the circumstances, there will be no order as to costs.

Dobson J

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