Kain v Hutton

Facts: • Mr Couper settles OMT trust when unmarried over farmland and real estate • Discretionary beneficiaries are his wife, any children/grandchildren of sister Mrs Kain. • If discretion over beneficiaries is not exercised, then final beneficiaries are Mrs Kain's children who are living. Mr Couper is not a beneficiary. • Mr Couper married Mrs Couper who had 4 children from previous marriage and are not beneficiaries under OMT • Cannot make distributions to 4 children from OMT as that would a void exercise of trustee discretion • Mrs Couper settles a new trust called Ponui which allowed her to distribute the property from the old trust which Mrs Couper had received to her 4 children as beneficiaries. She was one of the trustees and a beneficiary of the Ponui trust who had the power to add or remove trustees. • Moved from OMT where beneficiaries include nieces and nephews to most of the property shifting into the new trust after going through one of the original beneficiaries • This escapes the limitation on distribution beyond non-objects of the trust • Trustees: have not exceeded their power as distributed to Mrs Couper as beneficiary
Issue: • Nieces and nephews: trustees committed fraud on power as they were not authorised to make a distribution for an ulterior purpose when distributing to non-beneficiaries through a distribution to a beneficiary. There was a scheme conditional on the legitimate beneficiary subsequently creating a trust to benefit others which is not permitted under the trust deed. This excluded the niece and nephews. • Fraud on power where an appointment appears on its face to be a legitimate object of a discretionary power but in reality is a device to effect a purpose to benefit non-objects • Looking at what happened on the face of things and an intention to benefit non-objects
Result: • An object can be benefited when a relative of the object receives a benefit. • Need to assess whether appointment made for an ulterior purpose based on if the inclusion of non-objects has genuinely been done for the object i.e. a legitimate object maybe benefited not simply by holding onto property but settling it on trust for another • May appear to be illegitimate and a fraud on power when Mrs Couper as object received trust property only to then settle it on trust for her children but she has still benefited from the benefits to her children and also discharges her moral obligation. • Trusts can avoid certain taxes and gift duties which may otherwise exist if Mrs Couper held onto the property herself. • Court: not a fraud on power as Mrs Couper benefited by retaining complete control over the Ponui trust through her ability to appoint and remove trustees and discretionary beneficiaries. As a trustee, she could ensure the property is reverted back to her and she could take ownership over the property if she desired. • Her children as discretionary beneficiaries do not have a vested interest and cannot claim any aspect of the property. • MB: How can illusory trust doctrine co-exist with such an affirmation of effective control – not contrary to Clayton but is contrary to other applications of illusory trusts i.e. Webb • Contrast: if she gives all the property to Mr Couper, easier to say there was a fraud on power. Query who the legitimate object wants to benefit. • Problematic if distribution made to legitimate object was:

- Conditional i.e. only if held for another person
  - only if object returned the property to the trustees
  - only if object gave the property to someone else
- Acceptable if Mrs Couper wanted to return property to someone else without pressure from trustees.
- No excessive exercise of power under fixed trusts as required to hand certain amount of property to beneficiaries – trustees are not exercising any discretion.

Power of appointment and advancement

- NMT where Mrs Couper and nieces & nephews were discretionary beneficiary
- Mrs Couper as beneficiary had a lot of control and used power of advancement to create a new trust, which is the ability to bring forward a distribution to an already vested beneficiary interest.
- Trust was subsequently found to be void because Mrs Couper in establishing new trust did not have a vested interest which meant she could not use the power of advancement to give property to her.
- Mrs Couper: actually used the power of appointment in setting up the new trust
- Court: if it is clear that the use of a power to achieve a particular purpose which the power does not allow, the court will not allow one to claim that they had exercised another power that they did have
- Criticism: why should it matter they used the wrong power - could have given Mrs Couper property to set up the OMT just like the trustees gave Mrs Couper the property to set up the Ponui Trust

- Excessive execution of power: going beyond scope of power and doing what trustee is not allowed to do – obvious court can intervene
- Fraud on a power: only reason made distribution is a plan that legitimate object passed it onto a non-object

- Constraints on fiduciary decision making where a fiduciary cannot make a decision for its own benefit unless it is specifically authorised. Family trust specifically authorised either in Clayton by saying can make a decision for its own benefit and by implication one of the discretionary beneficiaries and trustee as well
- Breach of fiduciary duties may not be as useful when have a classic family trust where settlor was trustee and beneficiary allowed to distribute to themselves in the circumstances

Penson v Forbes

Facts:

- Mrs Jack sets up a trust and was one of the trustees with another corporate trustee but she is not a beneficiary. Beneficiaries were her children. She also held the power to remove beneficiaries and removed Ms Penson. [17]
- Ms Penson:
  - Fraud over power – did not work as trustees had power to remove beneficiaries
  - No argument on even-handedness as challenging a decision which can be taken for the benefit of one beneficiary to the detriment of others i.e. removal of a beneficiary rather than an investment decision. A beneficiary who is removed no longer has any rights

- Irrelevant considerations – Ms Penson was removed as a discretionary beneficiary because settlor disliked her.

Result:

- Court: trustees can remove beneficiaries on the basis that they do not like them if it is within what the settlor intended
- If a random corporate trustee did not like beneficiary then that is a better argument that they have taken into account irrelevant considerations as trustees supposed to be administering trust for the benefit of the beneficiaries.
- In this case one of the trustees was the settlor who took a dislike of one of their children as a beneficiary so removed them.
- The availability of the power to remove discretionary beneficiaries shows the settlor had contemplated removing people.
- Legitimate to take into account settlor's views when administering the trust.
- the "sensible expectations of the settlor" - "include expectations that those who remain in her affections may remain in the class of discretionary beneficiaries and that those who fall from her affections may be removed from that class."
- No limitation on the reasoning for removing a discretionary beneficiary
- Penson: no indication trustees considered financial circumstances of the beneficiary
- "The decision-making of the trustees in relation to the class of beneficiaries is not alleged to have been taking place in the context of financial need. Rather, it is alleged to have been taking place because of disaffection. The financial circumstances of particular beneficiaries would have become a relevant consideration when distributions were made." i.e. not a mandatory consideration in relation to removing a beneficiary
- MB: Query if financial circumstances are a mandatory consideration when making financial distributions

Masters v Stewart

Facts:

- Ken sets up a discretionary trust for his children. The beneficiaries are Ken's four children: 1, 2, 3 and Philip
- Trust property included land Philip intended to purchase. Philip had worked on the land in relation to agricultural activities and provided value to the trust.
- Ken agreed that Philip can purchase the land at 115,000, despite market price of land at 331,000.
- Philip's contribution in relation to the land was 150-170,000.
- Issue arises when Ken equalises distribution between beneficiaries.
  Ken thinks he's already distributed to Philip through sale of land at the lower price. Other beneficiaries received 250,000 each.
- Philip sues the trust, not a legitimate decision. Relies on irrationality and the trustees taking into account irrelevant considerations or not taking into account relevant considerations.
- Considerations of even-handedness or fairness does not apply to a discretionary trust as he had no entitlement to trust property.
- Apply Pence v Forbes, when make distributions must consider financial circumstances of people as mandatory consideration.
- Trustees did take into account financial circumstances as Philip had received the land but other beneficiaries have not.

• Although trustees do not need to provide reasons for their decisions, do have information about the reasons which the trustees had used. This makes it easier to identify a relevant consideration.

Discussion:
• Court intervenes in the exercise of trustee discretion only in limited circumstances
• Trustees must act in good faith responsibly and reasonably.
• Court will only set aside a trustee's decision if they:
  o Considered irrelevant considerations
  o Failed to consider relevant considerations
  o Reached a decision that is perverse or capricious
  o i.e. trustee reached a decision which the settlor did not intend
• Reasonableness in trustee decision making not that different from requiring trustees to act in good faith and rationally.

Result: • Trustees acted for a proper purpose in exercising discretion – took into account the settlor's views as Ken suggested that the payment should be made to equalise the status of the family finances by distributing to the other 3 children and putting them on a similar footing, valid for there to be different distributions. Settlor's views not an irrelevant consideration. • Trustees are allowed to take into account the benefit which Philip received through the transaction with the trust property, which was similar to a distribution. • Trustees did not have to calculate exactly what their benefit was in determining accurately how much time Philip had worked on the property, but they could be out in equalising the status between family if they did not know what Philip had contributed. • Trustee decision set aside because the trustees never turned their mind to what Philip gave to the trust in the transaction • Trustees saw he took a benefit from the transaction but did not take into account he had given value and acted to his detriment. • In equalising things, trustees should take into account what Philip's contribution. Trustees though Philip benefited from the difference between 331,000 and 115,000 so give 250,000 to everyone else.

McClaren v McClaren
Facts: • Court critical of trust deed as family did not know what they were doing • Trustees were also beneficiaries • Family dispute where son had the ability to remove beneficiaries and he removed his parents from the trust • Son: not bound by fiduciary obligation so he did not need to exercise his power for the benefit of other beneficiaries and can utilise it as a personal power for himself • Parents: son had a fiduciary power which has to be exercised for the best interests of the beneficiaries • Power not given to son as a trustee - Issue: When power held by someone not as a trustee, are they held as fiduciaries for the benefit of the trust beneficiaries?
Result: • Court reluctant to say that the power was held in a non-fiduciary capacity but depends on context if it was a personal power – which could change legal relations.

• Difficult to argue son's power to remove trustees was a personal power and not a fiduciary one, as a settlor would give a non-trustee the power to remove or add other trustees in order to police the trustees in ensuring that they acted for the benefit of the beneficiaries. • Ability to remove discretionary beneficiaries different as not interfering with trustee decision making. By its nature there is a selection of beneficiaries – unclear if personal power as trustees do so as a fiduciary • Court: the expectation was the son would not remove the parents as beneficiaries as the parents were supposed to continue to benefit from the trust until they die, although not expressed in trust deed. This makes the son a fiduciary to his parents. • Son as fiduciary not permitted to remove his parents. • MB: less clear if court properly applied categories of a constraint which exist

Clement v Lucas
Facts: • Family trust used as succession device without parents deciding who receives what • Distribution to children by trust when parents die was challenged because trustees failed to take into account relevant considerations
Result; • Court found trustees did not take into account the general purpose of the trust which was to ensure equality in the property distribution to the children within the trust taking into account the property which some of the children had received outside the trust, despite not being in the trust deed. • New trustees did not realise whole point of trust was to equalise what children received from both outside and inside the trust and thought that they were not allowed to take into account what was a mandatory consideration. • Settlor's letters of wishes or memoranda and sets out the purpose of the trust. • As did not consider it, the distribution decision was improperly made and set aside. • Similar to McClaren, the purpose of the trust which was not written into the trust deed was still given effect to by the court. Settlor views have to be taken into account even if not given effect to, despite not exercising the same level of control as the trustees. They cannot be disregarded as clearly expressed purpose of the trust