

# Update Law of Trusts

## Service 67 — November 2023

### Updated legislation

#### **Charities Amendment Act 2023 No 34**

This Act amended on 5 October 2023:

- ss 4, 12A, 13, 13A, 16, 18, 19, 31, 36A, 36B, 36C, 36D, 39, 42G of the Charities Act 2005

#### **Family Court (Family Court Associates) Legislation Act 2023 No 25**

This Act amended on 6 October 2023:

- s 25 of the Property (Relationships) Act 1976

#### **Incorporated Societies Act 2022 No 12**

This Act amended on 5 October 2023:

- ss 6, 8, 9, 10, 11, 17, 30A and sch 2 of the Charitable Trusts Act 1957

### Updated commentary

#### **Trusts Act 2019, s 21 — Guiding principle in performing duties**

The relevant principles of the construction of trusts were considered in *Grand View Private Trust Co Ltd and another v Wong and others* [2022] UKPC 47. See [TRU21.06] and [TRU21.06.1].

#### **Trusts Act 2019, s 27 — Duty to exercise powers for proper purpose**

In *Grand View Private Trust Co Ltd and another v Wong and others* [2022] UKPC 47, the Privy Council dealt with the proper purpose rule. Lord Richards, delivering the decision of the Privy Council detailed the three key questions which must be asked when assessing the validity of the purported use of a fiduciary power:

- (a) Whether the way in which it has been exercised is not within, or contrary to, the express or implied terms of the power (the scope of the power rule);
- (b) Whether the trustee has given adequate deliberation as to whether and how they should exercise the power;
- (c) Whether the use of the power, although within its scope, was for an improper purpose i.e. a purpose other than the one for which it was conferred (the improper purpose rule) but recognising the fact that such a power will inevitably be exercised discriminately as between beneficiaries puts a limit on the extent of any fiduciary obligations because it logically excludes any obligation to act even-handedly between all beneficiaries.

See [TRU27.02].

**Trusts Act 2019, s 94 — Duty to exercise power to remove or appoint trustee honestly and for proper purpose**

In *Grand View Private Trust Co Ltd and another v Wong and others* [2022] UKPC 47, the Privy Council dealt with the powers of trustees to add and exclude beneficiaries, which it held were fiduciary powers. The case did not consider the use of powers to add and exclude beneficiaries held by non-trustees such as settlors, appointors or protectors. See [TRU94.02].

**Trusts Act 2019, s 94 — Duty to exercise power to remove or appoint trustee honestly and for proper purpose**

The Supreme Court has granted leave to appeal in *Legler v Formannoij* [2023] NZSC 46. See [TRU94.03].

**Trusts Act 2019, Part 6 — Exercise of trustees’ powers to add and remove beneficiaries**

In *Pollock v Pollock* [2022] NZCA 331, (2022) 5 NZTR 32-011 the trustees removed one of the settlor’s sons as a beneficiary. One of the trustees’ reasons for their decision was that it was untenable for him to remain as a beneficiary of the trust as his actions in setting up in competition to the family business was potentially putting at risk the success of the family business and the assets of the trust. The Court of Appeal dismissed the son’s appeal against the decision of the High Court to dismiss his application challenging the trustees’ decision. See [TRUPART6.03.2].

**Commentary outside the Trusts Act 2019**

***Chapter 2 — Trusts and family law — “property”— general power of appointment***

In *Cooper v Pinney* [2023] NZCA 62, [2023] 2 NZLR 455, [2023] NZFLR 20 the majority of the Court of Appeal held that Mr Pinney having a general power of appointment was inconsistent with the existence of a valid trust. They concluded that the powers he had in the MRWT were not so extensive as to amount to a general power of appointment which was “property” (“any right or interest”) for the purposes of the Property (Relationships) Act 1976. He was not able to deal with the trust assets as his own and was constrained by fiduciary duties when exercising powers in his own favour. See [TRUChap2.2].

***Chapter 2 — Trusts and family law — whether disposition made “in order to defeat the claim or rights” of de facto partner — s 44(1), Property (Relationships) Act 1976***

In *Sutton v Bell* [2023] NZSC 65, [2023] 1 NZLR 150, [2023] NZFLR 49 at the time of the disposition the parties had been in an exclusive and recognised relationship for 16 months, living together for 8 of those months and were serious and committed. The Supreme Court held there was no reason to restrict the application of s 44 to dispositions made after the de facto relationship. The Supreme Court restated *Regal Castings v Lightbody* [2008] NZSC 87; [2009] 2 NZLR 433 as the relevant test for intention and knowledge that the effect of the disposition would defeat the rights would be sufficient and there is no need to prove a dishonest intent. The trustees did not received the property in good faith and relief was granted. See [TRUChap2.7] and [TRUChap2.8].

***Chapter 2 — Trusts and family law — nuptial settlement — discretion under s 182 of the Family Proceedings Act 1980***

In *Preston v Preston* [2021] NZSC 154, [2021] 1 NZLR 651, [2021] NZFLR 304 it was held by the High Court, Court of Appeal and Supreme Court that a deed appointing the

wife as discretionary beneficiary was a nuptial settlement, enabling the Court to exercise discretion on divorce. The High Court declined to exercise discretion a decision upheld by the Court of Appeal. The Supreme Court disagreed and exercised discretion in favour of the wife to remedy the consequences of divorce. See [TRUChap2.14].

***Chapter 2 — Trusts and family law — unequal contributions to purchase of properties within trust — discretion under s 182 of the Family Proceedings Act 1980***

In *Zhou v Lassnig* [2022] NZHC 2475, [2022] NZFLR 430 the parties were in a short duration marriage. They settled a trust to purchase properties and made unequal contributions to the purchase. Mr Lassnig advanced \$167,000 to the deposit and Ms Zhou \$1,211,000. The Family Court held that after the payment of the loan accounts (the parties' separate property), the balance of the equity should be divided equally. On appeal, instead of an equal sharing after repayment of advances the High Court substituted a 60/40 resettlement with a payment of 40% to Mr Lassnig. See [TRUChap2.15.01(e)].

***Chapter 2 — Trusts and family law — discretion under s 182 of the Family Proceedings Act 1980 — occupation rent***

*K v K* [2022] NZHC 3123, [2022] NZFLR 624 illustrates the types of orders that can be made to give effect to s 182 of the Family Proceedings Act 1980 including as to s 112 of the Trusts Act 2019 and compensation for the occupation of the trust owned home. Compensation for occupation rent as part of the exercise of discretion is clearly a means of addressing the difference between dissolution and continuation of the marriage and recognises in the s 182 context the benefits to the occupant spouse. See [TRUChap2.15.01(e)].

***Chapter 2 — Trusts and family law — order that parties participate in mediation — s 145, Trusts Act 2019***

In *Terry v Terry* [2023] NZHC 884 (a dispute between family members) the High Court declined to refer the matter to mediation because there had already been a settlement conference in the Family Court in respect of the father's estate and the Judge did not consider that there would be a prospect of settlement and the pleaded case did not address the real dispute. See [TRUChap2.18].

***Chapter 2 — Trusts and family law — removing a trustee — s 112, Trusts Act 2019***

*Stratford v Moses* [2022] NZHC 1463 the wife was given power to appoint and remove trustees and removed the husband after separation 18 months later she appointed an independent trustee alongside herself. The husband sought an order appointing a receiver or a court appointed independent trustee. The existence of an independent professional trustee persuaded Eaton J that it was not necessary to remove and replace trustees. Instead he made comprehensive orders to restrict the actions the trustees could take and to ensure the operation of the trust pending resolution of the wider dispute. See [TRUChap2.19].

***Chapter 2 — Trusts and family law — removing a trustee — s 112, Trusts Act 2019***

In *Nadan v Sharma* [2022] NZHC 2553 the wife's failure to comply with a judgment made from an arbitral award resulted in the removal of both parties and replacement with an independent trustee. The trustees were at an impasse and the order was necessary so orders removing them under s 112 of the Trusts Act 2019 and replacing them under s 114 were made. See [TRUChap2.19].

***Chapter 2 — Trusts and family law — constructive trusts***

In *Chignall v Keane* [2022] NZHC 2566 the de facto couple each had trust structures and reasonably separate finances. Mr Keane's trust purchased a property where the parties

would be living. When his trust had insufficient funds to build the house Ms Chignall advanced \$200,000 to the cost. The evidence for Ms Chignall was that this was to be on the basis that she would have a 20% interest in the property. Mr Keane said that the funds were loaned. The Court accepted Ms Chignall's claim and ordered the Keane Trustees to pay her an amount that was 20% of the value of the property. See [TRUChap2.20].