

**IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

CIV 2008 409 1407

UNDER the Trustee Act 1956 and the Judicature
Act 1908

IN THE MATTER OF an application seeking directions and
declaratory orders in connection with the
exercise of any power or discretion vested
in a trustee under The Highcroft Trust
and/or for the interpretation of that trust
and for directions as to service

HIGHCROFT TRUSTEES LIMITED
Applicant

Hearing: 15 December 2008

Appearances: D Martin for Applicant
NRW Davidson QC for Minor Beneficiaries

Judgment: 15 December 2008

ORAL JUDGMENT OF CHISHOLM J

[1] This is an application pursuant to s66 of the Trustee Act 1956 by the trustee of the Highcroft Trust, which was created by deed dated 26 June 2003. The trustee seeks a declaration that clause 12.3 of the trust deed authorises the inclusion of Kevin Carlin as a discretionary beneficiary.

[2] A detailed affidavit in support of the application has been sworn by Kevin Ayers, who is a director of the trustee. Mr Ayers is a solicitor and an expert in the field. Nicholas Davidson QC was appointed to represent three beneficiaries who are minors. I have been greatly assisted by the written submissions of Mr Davidson and Mr Martin.

[3] Given the circumstances surrounding the application and the absence of any contentious factual issues, I am satisfied that s66 confers the necessary jurisdiction for orders to be made. In this respect I adopt the approach of Paterson J in *Neagle v Rimmington* [2002] 2 NZLR 826.

Background

[4] The trust was established primarily at the instigation of Mr Carlin. He is a former citizen of the United States of America. By the time the trust was established he was living in New Zealand with his family. Because of possible tax implications he was not a settlor or beneficiary. However, given that the possible tax claw back only applied for a finite period, it was always contemplated that once that period had expired Mr Carlin would be included as a discretionary beneficiary.

[5] It was believed that clause 12.3 of the trust deed would provide the necessary power for that to happen. That clause provides:

“Power to vary or revoke trusts

The Trustee may at any time revoke, add to or vary all or any of the trusts, including any beneficial interests, and may, by the same or any other settlement, declare any new or other trusts or power concerning all or any part of the Trust Fund revoked, added to or varied, but so that any law against perpetuities is not infringed and so that such new or other trusts, powers, discretions, alterations or variations:

- (a) Shall be invalid to the extent that they purport to be in favour of or for the benefit of the Settlers or Trustee or any of them or any person claiming under or in right of any such person, or any person who has disposed of any property to the Trustee to be held trust otherwise than for full consideration, or would otherwise result in any benefit to the Settlers or Trustee or any of them or any such person; and*
- (b) Shall not affect the beneficial entitlement to any amount set aside for any beneficiary prior to the date of the variation, alteration or addition.*

Save as provided in this clause and subject to the provision of any clause which provides for addition or removal of beneficiaries the provision of this deed shall not be capable of being revoked, added to or varied.”

But when the time arrived to vary the trust to include Mr Carlin as a discretionary beneficiary the trustee responsibly decided that before exercising that power it was desirable to obtain the Court’s confirmation that the trustee was acting lawfully.

Discussion

[6] The issue is whether clause 12.3 allows the trustee to vary the trust to include Mr Carlin. Within that broad issue is the particular issue of whether paragraph (a) of that clause prohibits inclusion of Mr Carlin either because he is in substance the settlor or by virtue of the fact that he has transferred assets to the trust.

[7] It should be said immediately that this is not a situation where Mr Carlin is in any way endeavouring to exercise control over the trust. To the contrary, the variation would only result in him being included as a *discretionary* beneficiary and control would still remain with the trustee.

[8] I agree with Mr Davidson's careful analysis supporting his conclusion that clause 12.3 confers the necessary power for a beneficiary or beneficiaries to be added. It expressly empowers the trustee to vary all or any of the trusts "*including any beneficial interest*". There is no justification for reading down those words, especially in view of the background discussed earlier.

[9] In *Kearns v Hill* (1990 21 NSW LR 107 Meagher J accepted that a variation power in the trust deed before him included the power to add a beneficiary. The clause under consideration in that case was much less specific than clause 12.3. I do not find it necessary to resolve the conflicting views expressed by the authors of *Underhill & Hayton Law of Trust and Trustees* (17th ed) at paragraph 47.19 (that a power to vary will permit the addition of new beneficiaries) and the contrary view expressed by the authors of *Lexis Nexis Law of Trusts* at paragraph 5.3.5. The trust deed under consideration is sufficiently explicit to avoid that issue.

[10] Now I turn to paragraph (a) of clause 12.3. I agree with Mr Davidson that Mr Carlin is not a settlor. The trust deed specifically names and defines the settlors. There is absolutely no justification for going behind the trust deed. Indeed, if I did so the evidence would show that he was not a settlor. I also accept that the transfer of assets to the trust by Mr Carlin does not carry any implications that could preclude his inclusion as a beneficiary. There is no suggestion that the transfer was for other than adequate consideration.

Result

[11] There will be an order in terms of paragraph (a) of the draft order that has been submitted. In addition there will be an order for Mr Davidson's costs to be paid from the Trust funds. Leave is reserved for any further application to be made should the need arise.

Solicitors: Denham Martin, Lawyer, Auckland
NRW Davidson QC, Christchurch