

Russell McVeagh's expert private client team provides strategic advice on all areas of personal wealth, family succession and philanthropy. We act for individuals, family offices, corporates, trustees and iwi, and specialise in both "front end" work – establishing and managing asset ownership structures – and contentious matters. We also have market-leading expertise in tax and immigration, and are able to draw on the capabilities of the broader firm when needed. Russell McVeagh was thrilled this year to have [Priscilla Brown](#) join our private client team as a special counsel.

In this update we summarise some key recent developments in these areas of the law.

17 February 2023

Developments in trustee costs:

The Supreme Court issued its costs judgment in *Lambie Trustee Limited v Addleman*.¹

The substantive Lambie decision, released in June 2021,² addressed the circumstances in which a trustee could be required to provide a beneficiary with information that would otherwise be protected by legal privilege. The beneficiary, Mrs Addleman, was successful in her claim that she was entitled to receive legal advice obtained by the trustees as a consequence of having a "joint interest" in it. [Read more here.](#) In February the Supreme Court released its costs judgment, directing that Mrs Addleman was to have her legal costs paid for by the trust. The trustee was required to then reimburse the trust in respect of those costs and was not entitled to be indemnified for its own.

The costs decision was a reminder that the ability of trustees to be indemnified from trust property will only apply in respect of "reasonable" costs "properly incurred" in the administration of the trust.

May 2023

Change in tax rate for trustee income:

The Government has made a law change to align the trustee tax rate with the top personal tax rate of 39% for the 2024-25 and later income years. This takes effect from 1 April 2024 for most trusts.

This is estimated to raise approximately \$350 million per year (\$1.1 billion over the forecast period).

The proposed increase was prompted by a concern that high income earners were using trusts to circumvent their personal tax rates. There was some doubt about whether this change would proceed following the general election in October and the resulting change in Government, but the law change will take effect as expected from 1 April.

There is a tax avoidance question regarding transactions that occur pre-1 April 2024 in relation to distributions from companies with many seeking to make use of the 33% rate that currently applies. A dividend could be declared and left outstanding as a debt due to a trust shareholder to avoid the 39% rate. It will be interesting to see the approach taken by Inland Revenue to such transactions in 2024.

1 June 2023

Disposition of property prior to de facto relationship:

The Supreme Court released its decision in *Sutton v Bell*.³ Mr Sutton and Ms Bell were in a de facto relationship for more than seven years and had two children together. Shortly before their relationship began, Mr Sutton had transferred a residential property he owned (and in which he, Ms Bell and their children later lived) into a trust. Ms Bell claimed this transfer was a disposition by Mr Sutton to defeat her rights under the Property (Relationships) Act 1976. She argued that the transfer should be set aside under section 44, and the property characterised as relationship property.

The Supreme Court confirmed that section 44 can apply to the disposition of property made prior to the commencement of a marriage, civil union or de facto relationship.⁴ It will apply in respect of de facto relationships where the individuals involved have a "clear and present intention" to become parties to such a relationship, which will require careful assessment of the facts.⁵ On the facts here, the Court considered Mr Sutton and Ms Bell had such an intention at the time of the transfer. The Court additionally held that Mr Sutton had transferred the property in the knowledge that it would defeat Ms Bell's future claim, and therefore with the intent to defeat that claim.⁶ The Court did not consider it necessary to also establish a "dishonest" intention.⁷ Section 44 was accordingly triggered, and Ms Bell entitled to a half share in the property.

13-14 June 2023

Fiduciary obligations owed by parent to children:

The Supreme Court heard the appeal of *A, B and C v D and E Ltd*, known colloquially as the "Alphabet Case", which has some challenging facts.⁸ At issue is whether the majority of the Court of Appeal was correct to find that, while there was a fiduciary relationship between the (abusive) father and his children while they were under his care, that duty ended at the time they left home and his "responsibilities of parental care" concluded. That had resulted in a finding that the father's subsequent transfer of the majority of his assets into a trust less than two years before his death was not a breach of fiduciary duty, and that the children had no proprietary claim to them. The depletion of assets from his estate denied the children any recourse under the Family Protection Act 1955.

At the June hearing in the Supreme Court, the appellants submitted that the father's fiduciary relationship with his children continued at the time he disposed of his assets. This was largely on the basis that the children continued to be in a position of particular vulnerability arising from the significant abuse which had been inflicted upon them by their father during childhood. The Supreme Court was directed to overseas decisions that have addressed similar facts. However, no jurisdiction has yet extended a parent's fiduciary duty to an adult child resulting in a right to property. The decision remains pending.

20 June 2023

Application of Property (Relationships) Act 1976 to polyamorous relationships:

The Supreme Court released its decision in *Mead v Paul*.⁹ Fiona, Lilach and Brett had been in a triangular, polyamorous relationship. During the 15-year relationship, they had lived together at a property registered under Fiona's sole name. After the parties separated, Lilach and Brett both brought separate applications against Fiona for one third share of the property, claiming that the property was a family home (and therefore relationship property) under the Property (Relationships) Act 1976. The Court was required to decide whether the triangular relationship was itself a qualifying relationship under the Act, or alternatively whether it was capable of being subdivided into two or more qualifying relationships.

Under the Act, a de facto relationship is defined as one that is "a relationship between 2 persons" who "live together as a couple".¹⁰ The High Court had held that the Act did not apply on the basis that the triangular relationship was not a qualifying relationship, and the parties did not "live together as a couple" in subdivided de facto relationships.¹¹ The Court of Appeal had overturned that decision, holding that "coupledom" did not require exclusivity, and so the triangular relationship was capable of being subdivided into multiple de facto relationships (with each pairing living together as a couple).¹²

In a judgment given by Kós J, the majority of the Supreme Court agreed with the Court of Appeal. The Court reasoned that when Parliament had amended the Act in 2001 it expressly contemplated that complex arrangements involving more than two people might be "subdivided" into qualifying relationships, and that qualifying relationships need not be exclusive.¹³ The Court considered that whether three people "have so merged into a unity that functioning couples cannot still be discerned within it" will be a matter of fact, not jurisdiction.¹⁴

29 September 2023

The "implied authorisation" exception to trustee self-dealing:

The Court of Appeal issued its judgment in *McLaughlin v McLaughlin*.¹⁵

John McLaughlin was a trustee of a family trust established by his parents. The discretionary beneficiaries were John and his three brothers. The trust carried out a residential subdivision of land owned by the trust and adjoining land belonging to John. Through a company he owned, John was engaged as the full-time project manager for the subdivision and was paid a fixed fee.

Two of the brothers issued proceedings against John. One of their claims was that John had a conflict of interest as a consequence of both his ownership of the adjoining land, and his appointment and remuneration as project manager. The High Court found that the settlors (who had both passed away) had authorised these conflicts.¹⁶

In its judgment, the Court of Appeal summarised the three exceptions to the rule against trustee "self-dealing". These are circumstances where the transaction or impugned conduct is: (1) expressly authorised by the trust deed; (2) impliedly authorised by the settlor; or (3) sanctioned by the Court.¹⁷ The Court concluded that the settlors had impliedly authorised the conflict of interest that existed in relation to John's interests as an adjoining landowner; the settlors were well aware of that conflict at the time of settlement, and had appointed John a trustee precisely because he had "skin in the game".¹⁸ The Court did not consider that John's conflict as a project manager had been similarly authorised; while the evidence indicated the settlors had "pre-selected" John as the person to be in charge of the subdivision, there was no evidence of any specific discussions regarding him taking a paid full-time management role.¹⁹ However, the Court concluded payment to John was authorised under the express terms of the trust deed, and went on to say that the fees paid were "reasonable and just", and that the conflicts had been appropriately managed.²⁰

10 October 2023

Fraud on a power:

The Supreme Court heard the appeal of *Legler v Formannoij*,²¹ which relates to the concept of “fraud on a power” by a trustee. In this case, the discretionary beneficiaries of a trust claimed that a prior trustee (who was also the trust’s final beneficiary), Ms Formannoij, had committed a fraud on a power by appointing a corporate body as the trust’s sole trustee, which (arguably) had the effect of circumventing requirements elsewhere in the trust deed to always have an independent trustee. The issue arose because Ms Formannoij was both the sole director and a co-shareholder of the corporate body she had appointed. Soon after the appointment, the trustee distributed significant assets to Ms Formannoij and removed the appellants as beneficiaries. The appellants claimed that the trustee’s power of appointment had been exercised for an improper purpose: to prefer Ms Formannoij’s own interests or otherwise gain control of the trust.

The majority of the Court of Appeal agreed with the High Court that the evidence did not support a conclusion that Ms Formannoij was motivated by an improper purpose. Importantly, Ms Formannoij had acted on legal advice when undertaking the various steps. The Supreme Court’s decision remains pending. It is unclear the extent to which the outcome of the appeal will simply turn on its individual facts, or whether the Court’s conclusions will have broader application.

1-2 November 2023

Powers as property:

The Supreme Court heard the appeal of *Cooper v Pinney*,²² which relates to the definition of “relationship property”.²³ In the 2016 decision *Clayton v Clayton*,²⁴ the Supreme Court held that the powers Mr Clayton held under the trust deed were so extensive as to themselves be relationship property. As a result, the trust fund was subject to a claim under the Property (Relationships) Act 1976.

In *Cooper v Pinney*, the Supreme Court is considering similar issues, including whether Mr Pinney’s powers under the relevant trust deed amount to a right or interest within the scope of the Act. A key point of difference between the cases is the contrast in the allocation of powers under the trust deeds, with the deed in *Clayton* having reserved extremely wide powers for the settlor. If the appellants are successful, the case will considerably extend the application of the *Clayton* decision.

Immigration update

Residence by investment

The Active Investor Plus Visa (AIPV) opened on 20 September 2022, replacing the previous Investor 1 and 2 resident visa categories, which both closed to new applications on 27 July 2022. Broadly, the AIPV requires an investment of NZ\$15 million or the weighted equivalent in an acceptable investment over the course of a four-year period. Acceptable investments include direct investments, managed funds, listed equities, and philanthropy. Property is not an acceptable investment, however, investment in listed equity can include funds that own companies engaged in property-related assets. Applicants must meet the eligibility criteria in order to apply, including identity, health, and character requirements, as well providing evidence of meeting the English-language requirements and the nature/source of investment funds. An AIPV application that has been approved in principle allows applicants six months to transfer and invest funds in New Zealand. Applicants can apply for permanent residency after four years of keeping the funds in New Zealand, provided the conditions (including time spent in New Zealand) are met.

Any questions? Talk to one of our experts

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1. *Lambie Trustee Ltd v Addleman* [2023] NZSC 7. Russell McVeagh, together with Vanessa Bruton KC, acts for an independent trustee in later, related, proceedings.
2. *Lambie Trustee Ltd v Addleman* [2021] NZSC 54.
3. *Sutton v Bell* [2023] NZSC 65.
4. At [44]-[52].
5. At [66]-[69].
6. At [96].
7. At [93].
8. *Appealing D and E Ltd as Trustees of the Z Trust v A, B and C* [2022] NZCA 430.
9. *Mead v Paul* [2023] NZSC 70.
10. Section 2D.
11. *Paul v Mead* [2020] NZHC 666, [2020] NZFLR 1042.
12. *Paul v Mead* [2021] NZCA 649, [2022] 2 NZLR 413.
13. At [55] and [58].
14. At [83].
15. *McLaughlin v McLaughlin* [2023] NZCA 473.
16. *McLaughlin v McLaughlin* [2021] NZHC 3015 at [346] (HC).
17. At [116].
18. At [129]-[134].
19. At [143]-[147].
20. At [168] and [180].
21. *Appealing Legler v Formannoij* [2022] NZCA 607.
22. *Appealing Cooper v Pinney* [2023] NZCA 62.
23. Russell McVeagh, with Andrew Butler KC, appeared for the trustees as interested parties in the Supreme Court appeal.
24. *Clayton v Clayton* [2016] NZSC 29.

This publication is intended as a summary of the subjects covered only and does not purport to contain legal advice. If you require advice or further information on any matter set out above, please contact one of our experts.