IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA91/2019
[2022] NZCA 138

BETWEEN	ALEXANDER CHARLES MASON Appellant
AND	VICKI ANN TRIEZENBERG and PAUL MORLEY DODD AS TRUSTEES OF THE MAMARI TRUST AND MAMARI (NO 2) TRUST Respondents

CA244/2019

BETWEEN	ALEXANDER CHARLES MASON Appellant
AND	VICKI ANN TRIEZENBERG and PAUL MORLEY DODD AS TRUSTEES OF THE MAMARI TRUST AND MAMARI (NO 2) TRUST Respondents

Hearing:	1 November 2021 (further submissions received 31 March 2022)
Court:	Clifford, Mallon and Moore JJ
Counsel:	G J Thwaite for Appellant V T M Bruton QC for Respondents
Judgment:	27 April 2022 at 10.30 am

JUDGMENT OF THE COURT

A The appeals are dismissed.

B The parties are entitled to an indemnity for their reasonable costs on these appeals from Mamari 2.

REASONS OF THE COURT

(Given by Mallon J)

Introduction

[1] These appeals concern Mr Alexander Mason's removal as a trustee of two trusts, the Mamari Trust (Mamari 1) and the Mamari (No 2) Trust (Mamari 2) that he and his wife, Mrs Wendy Mason, settled. The High Court ordered his removal on the application of his co-trustees — his daughter, Ms Vicki Triezenberg, and Mr Paul Dodd, the family's long-time accountant.[1]

[2] A dysfunctional relationship had developed between Mr Mason on the one hand and his co-trustees on the other following decisions about Mrs Mason's care when she developed advanced Alzheimer's Dementia. It was this dysfunction that led to the removal application.

[3] In CA91/2019, Mr Mason appeals the High Court decision to remove him. He contends that:

(a) his deed removing Ms Triezenberg and Mr Dodd from both trusts and appointing his son, Mark Mason, was valid;

(b) the Judge should not have intervened in Mamari 1 at all because the matters in respect of that trust were settled and there was an arbitration process that could be utilised if future disputes arose;

(c) he should not have been removed from either trust because his actions in relation to Mrs Mason's care were vindicated; and

(d) Ms Triezenberg and Mr Dodd should have been removed from both trusts because they were hostile to him.

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1 *Triezenberg v Mason* [2019] NZHC 14 [Substantive judgment].

[4] In CA244/2019, Mr Mason appeals the High Court's subsequent decision (i) to vary the trust deeds so the powers of appointment and removal of trustees vested in the continuing trustees; and (ii) to order Mr Mason to pay 2B costs to the respondents and to indemnify them out of the assets of Mamari 2 for the shortfall between that costs award and their actual costs.[2]

[5] The proceeding is determined under the Trustee Act 1956 because the proceeding was on foot before the Trusts Act 2019 came into effect.[3]

Factual background

[6] Mr and Mrs Mason have three children, Ms Triezenberg, Michelle Richardson and Mark Mason. Mr Mason is now in his mid-80s and lives in the house that is one of the assets of Mamari 1. Mrs Mason is currently in care at Abridge Rose Manor. The cost of that care is funded by Mamari 2.

[7] Mr and Mrs Mason built up substantial personal assets through a family construction business that they operated for many years. In early 1994, they instructed Mr Dodd to form a family trust for their assets. Mamari 1 was duly settled by a deed dated 26 April 1994. Mr and Mrs Mason were the settlors and the trustees. They were also the beneficiaries along with their three children, their grandchildren, their parents and any future spouse. The trust's assets were the family home, a commercial business, and cash holdings.

[8] The Masons sold the family business in 1997 and retired. In 2002, they purchased a property in Australia and thereafter divided their time between New Zealand and Australia. When they were in Australia, Ms Triezenberg attended to day-to-day and financial matters on their behalf.

[9] Mrs Mason was diagnosed with early stage degenerative dementia in 2012. This led to a meeting on 14 March 2013 with Mr Jorgenson, the family's solicitor for

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2 *Triezenberg v Mason* [2019] NZHC 920 [Variation and costs judgment]. As we explain below at [84], originally the respondents had brought the appeal in CA244/2019 and Mr Mason had cross-appealed. The respondents then abandoned that appeal, but Mr Mason's cross-appeal remained live.

3 Trusts Act 2019, sch 1, pt 1, cl 8.

about 55 years, attended by Mr and Mrs Mason and Ms Triezenberg. Mr and Mrs Mason each appointed Ms Triezenberg as their attorney in respect of property affairs and personal care and welfare. Ms Richardson was appointed as successor attorney.

[10] The meeting also discussed the settling of a further trust. Mr Jorgenson sent Mr Mason a draft deed of trust. A finalised deed was signed on 20 May 2013 (Mamari 2). The settlors were Mr and Mrs Mason. The trustees were Mr and Mrs Mason, Ms Triezenberg and Mr Dodd. The beneficiaries were Mr and Mrs Mason, their three children, and their grandchildren.

[11] On 29 May 2013 Mr and Mrs Mason forgave debts owing to them by Mamari 1 of $1,853,665 and on 30 May 2013 they resettled $3.3 million of term deposits from that trust to Mamari 2. Following this transfer, the main assets of Mamari 1 were their Auckland family home in which Mr Mason still lives (the 2017 QV was $1,540,000) and a commercial property (the 2017 QV was $1,000,000).

[12] Mrs Mason also made a new will on 30 May 2013. Ms Triezenberg and Mr Dodd were appointed as executors and trustees of her estate. She bequeathed chattels and her interest in the Australian property to Mr Mason and left the residue to Mamari 2.

[13] Mr and Mrs Mason also signed a Memorandum of Guidance stated to be in relation to Mamari 1 but accepted by the High Court as intended to relate to both trusts.[4] It stated:

> The first responsibility of the Trustees shall be to consider on a regular basis the circumstances of each of [Mr and Mrs Mason] while they are respectively living … so that the comfort and welfare of each of [them] while they or either of them are respectively living is the primary consideration of the trustees.
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> When [Mr and Mrs Mason] have both died then unless there is good reason to the contrary existing at that time, we request that the Trust be wound up and the assets distributed equally between our three children.

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4 Substantive judgment, above n 1, at [19].

[14] Ms Triezenberg and Mr Dodd were appointed as additional trustees of Mamari 1 on 31 May 2013. Also on that day, Mrs Mason appointed Ms Triezenberg and Mr Mason appointed Mr Dodd as their respective attorneys on both trusts.

[15] Mrs Mason's dementia worsened. In October 2013 Ms Triezenberg resigned from her full-time work to care for Mrs Mason two days a week. By mid-2014, part-time carers were employed so that, between them and Ms Triezenberg, Mrs Mason had in-home care three days a week. This care was paid for by monthly distributions of $2,000 from Mamari 2. By early January 2015, a third part-time carer was employed and the trust distributions increased to $4,000 per month.

[16] By 12 July 2015, Mrs Mason's dementia had worsened to the extent that she was referred to Mental Health Services for Older People for urgent review. On 10 August 2015 Mrs Mason was referred to Middlemore Hospital for assessment and respite care. This was with the agreement of all three children. It was also with Mr Mason's reluctant agreement and on the understanding that it would be for a few weeks only.

[17] Mrs Mason was certified mentally incapable due to her dementia on the day of her admission to Middlemore Hospital. This activated Ms Triezenberg's power of attorney. Not long after this, the clinical team recommended to the family that Mrs Mason be admitted to residential care specialising in dementia. Ms Triezenberg accepted that advice and was supported in her decision by her siblings. Mrs Mason was discharged from Middlemore Hospital on 1 September 2015 and transferred to St Andrew's Village in accordance with that decision.

[18] Mr Mason was vehemently opposed to this and very upset about it. He wanted her to return home. He posted a "mock" death notice for her at the hospital and sent a copy to each of his children. In the following months he wrote many letters to Ms Triezenberg and Mr Dodd (and to others). Some of these were threatening and insulting. He also applied to the Family Court for orders revoking Ms Triezenberg's power of attorney and that he be appointed as Mrs Mason's welfare guardian. Ms Triezenberg issued trespass notices against Mr Mason and also made complaints to the police.

[19] Issues arose in the administration of the trust. Mr Mason disagreed with the recommendation of an investment advisor for a diversified investment strategy accepted by Ms Triezenberg and Mr Dodd. Although the bank mandate for Mamari 2 required two trustee signatures for withdrawals, Mr Mason notified the bank in July 2016 that going forwards no withdrawals were to be made without the unanimous approval of all trustees. And although the trustees of Mamari 2 passed several resolutions for the smooth running of matters including for the payment of Mrs Mason's care, Mr Mason later refused to pay invoices for MEDACS nursing care at St Andrew's viewing their services as "totally unnecessary and at an incredible cost". Ms Triezenberg was able to put aside funds for the payment of Mrs Mason's care by withdrawing funds from Mrs Mason's personal bank account.

[20] Mr Mason was also causing difficulties for the staff at St Andrew's. Following a letter from the solicitors for St Andrew's in April 2016 and a "final warning" given to Mr Mason by St Andrew's for his aggressive and rude behaviour, on 2 September 2016 it advised that it would be terminating Mrs Mason's care effective as of 2 November 2016.

[21] With the pending termination of Mrs Mason's care at St Andrew's and the upcoming hearing on Mr Mason's Family Court application to revoke Ms Triezenberg's enduring power of attorney, a family mediation was held on 22 and 23 September 2016. A settlement agreement was reached.

[22] As part of this settlement it was agreed that Mrs Mason would be transferred home with 24/7 care to be provided by an external nursing agency and the costs of this met by Mamari 2. Dr Casey (an experienced psychiatrist and psychogeriatric consultant) would conduct monthly assessments of Mr and Mrs Mason. In accordance with this, Mrs Mason was transferred from St Andrew's to her home on 20 October 2016.

[23] It was also agreed that Ms Triezenberg's power of attorney was to be terminated and a Mr Allen appointed in her place with his fees met by Mamari 2. Interim orders were obtained from the Family Court implementing this aspect of the settlement and Mr Allen arranged in-home care for Mrs Mason.

[24] It was also part of the settlement that an independent company (SurePlan) would make recommendations as to the management of the trusts and all trustees would stand down and be replaced by professional trustees (to be agreed by the trustees). Some steps were taken towards this but they were not progressed when Mr Mason objected to the trustee proposed by Ms Triezenberg and Mr Dodd as being too expensive. SurePlan also made its recommendations about the assets of the two trusts.

[25] Mrs Mason's general condition improved on her return home with the 24/7 in-home care. However, Mr Mason refused to approve invoices for Mrs Mason's in-home care which meant that Mamari 2 was constantly in default. He also refused to pay all of Mr Allen's, Mr Dodd's and Dr Casey's fees. Mrs Mason's personal funds were used pending reimbursement from Mamari 2. Ms Triezenberg and Mr Dodd formed the view that it was necessary for Mr Mason to be removed as trustee. Mr Allen agreed that this would be in Mrs Mason's best interests.

[26] Mr Mason's conduct (in relation to the payment of invoices, his attitude to and criticism of the carers and others, and his refusal to pay for things such as a haircut for Mrs Mason) led to the home care provider advising they would withdraw their services on 24 May 2017. Ms Triezenberg and Mr Dodd endeavoured to have Mr Mason agree to resolutions to regularise payments but he did not respond to the proposal. Mr Allen arranged replacement care but difficulties continued with unpaid invoices. In June 2017 Dr Casey withdrew from her role because of the discord within the family, advising the Family Court that this was the first time in her 30-year career that she had done so.

[27] On 24 July 2017 Ms Triezenberg and Mr Dodd brought their proceeding to remove Mr Mason as trustee of the two trusts and for directions.[5]

[28] In August 2017 Mr Mason agreed to automatic payments for the new in-home carers' fees. In that month, the Family Court interim orders were made final with

[5] The proceeding also sought an order removing Mrs Mason as a trustee on the ground that she was mentally incapable. This order was granted and is not relevant to these appeals.

the consent of all parties, except Mr Mason who abided but then made an unsuccessful appeal to the High Court.

[29] In December 2017, there were discussions around all trustees resigning and being replaced by Guardian Trust or appointing Guardian Trust as a co-trustee with Mr Mason. This did not proceed because Mr Mason required it to be conditional on Mr Allen resigning and Ms Triezenberg and Mr Dodd did not agree to this. Discussions to try to resolve matters took place at Mark Mason's home in January 2018 during which he assaulted Ms Triezenberg. In February 2018, the High Court proceeding was amended to seek (amongst other things) orders that all trustees be removed and replaced with Guardian Trust. In March 2018, it was amended again to seek Mr Mason's removal (leaving Ms Triezenberg and Mr Dodd in place).

[30] In March 2018, Mrs Mason was moved to Abridge Rose Manor for her care, following an admission to Middlemore Hospital with pneumonia. She has remained in their care with the cost being met by an automatic payment from Mamari 2. The trustees also managed to pass other resolutions to regularise other matters including Mr Dodd's unpaid fees. However, also in that month, Mr Mason executed deeds by which he purported to remove Ms Triezenberg and Mr Dodd as trustees.

[31] Mr Mason also caused difficulty with implementing court orders for the payment of litigation costs from trust funds. This led to a further application to the High Court that was resolved only shortly before the scheduled hearing of that application.

High Court

[32] The substantive hearing in the High Court took place over four days before Fitzgerald J in September 2018 with a reserved judgment delivered in January 2019. At that time the Judge described the "current position" of both trusts as "relatively settled".[6] The key outstanding issue in the administration of the trusts was

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[6] Substantive judgment, above n 1, at [69].

the investment of the cash held by Mamari 2 on bank deposit (at that time totalling $2.2 million).

[33] The issues for the Court's determination were whether:

(a) the Court's jurisdiction was ousted by a dispute resolution clause in the Mamari 1 deed;

(b) Mr Mason had validly removed Ms Triezenberg and Mr Dodd and appointed Mark Mason; and

(c) any or all of the trustees should be removed and replaced.

[34] The Judge found that the dispute resolution clause did not oust the Court's jurisdiction — it was not an arbitration agreement subject to the Arbitration Act 1996 and in any event did not cover the issues in dispute in the proceeding. She declared the deeds of 11 March 2018 purporting to remove Ms Triezenberg and Mr Dodd and to appoint Mark Mason invalid and of no effect.[7] She made orders removing Mr and Mrs Mason as trustees of Mamari 1 and Mamari 2 and declined to make orders removing Ms Triezenberg and Mr Dodd as trustees.[8]

Issue one: arbitration

[35] This issue relates only to Mamari 1. Clause 15 of the Mamari 1 deed provides:

> If the Trustees are not unanimous in relation to the exercise of any part of their powers, authorities or discretions or in respect of any other matter to be determined by the Trustees in any way related to the administration of the trusts hereof the decision of the majority of the Trustees if reached shall be recorded in writing and dated and subject as hereafter set forth such majority decision shall prevail. PROVIDED HOWEVER that if a decision is reached which is not unanimous or there shall be an equality of votes among the Trustees the dissenting minority of the Trustees or any Trustee as the case may be shall be entitled by notice in writing given to the other Trustees within seven (7) days after the date of the non unanimous decision or failure to reach a decision to have the matter referred to an independent person to be agreed upon by the Trustees and in default of agreement nominated for that purpose by the President for the time being of the Auckland District Law Society and the decision of such independent person in relation to the matter in question

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7 At [166].
8 At [165] and [167].

> shall be final and binding on all of the Trustees who shall be bound to implement such decision and the Trustees shall not be liable in any way in respect of any act or thing done by them in accordance with such decision PROVIDED FURTHER HOWEVER that in the event of such non unanimous decision the Trustees shall also advise the person for the time being entitled to appoint a new or further Trustees of their inability to reach an unanimous decision and nothing in this clause shall limit the right of the person having the power of appointment to appoint new or further Trustees nor to remove Trustees.

[36] The clause has three parts:

(a) the power to make a majority decision if trustees are not unanimous;

(b) in that event:

(i) the power for the dissenting minority to give notice to have the issue decided by an independent person; and

(ii) a requirement for the trustees to advise the person with the power to appoint a new or further trustee of the inability to make a unanimous decision and clarification that nothing in cl 15 limits that person's right to remove a trustee or appoint a new or further trustee.

[37] The Judge held that cl 15 was not an agreement to submit to arbitration for the purposes of the Arbitration Act. It did not expressly provide for this and, as the deed was drafted with legal input, it would have been straightforward to have done so. The Judge considered the clause was more akin to an expert determination.[9]

[38] We agree with these conclusions. Mr Mason's argument to the contrary is that the policy of the Arbitration Act 1996 favours an expansive approach to whether the parties have agreed to submit to arbitration agreement. However, it is not the policy of that Act to override the parties' intention which is, as indicated in cl 15, to have a trustee decision determined by an independent person in the circumstances provided for in that clause.

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[9] At [80].

[39] The Judge also held that cl 15 relates to decision-making by trustees. The High Court proceedings were about the appointment powers under the trust deeds and whether the Court should exercise its jurisdiction under the Trustee Act or its inherent jurisdiction. She considered this meant they were not within the scope of cl 15.[10]

[40] We consider that cl 15 is directed to decisions made by the trustees in administering the trust. It is not directed to disagreements over whether any trustee should resign and be replaced. It provides a process by which a dissenting trustee can have a decision about, for example, whether to invest the trust assets in a particular investment, determined by an independent person. It also envisages that a disagreement over a decision could be resolved by the person with the appointment power exercising that power.

[41] We are not sure that Mr Mason sought to invoke that clause at any relevant point. In submissions to this Court, he did not identify a majority decision recorded in writing (provided for in cl 15). Nor did he identify whether he had given notice to the trustees within seven days of that decision that he was referring the matter to an independent person (the procedure that triggers the dispute resolution process under cl 15). The procedure to refer a dispute to an independent person is not mandatory. If it was not utilised by Mr Mason he cannot complain about Ms Triezenberg and Mr Dodd applying to the Court for the exercise of its jurisdiction.

[42] We therefore agree with the Judge that cl 15 does not purport to exclude the Court's jurisdiction under the Trustee Act or its inherent jurisdiction in respect of the removal and appointment of trustees.

[43] Mr Mason submits, however, that cl 15 evinces an intent for trustees to resolve differences without resort to High Court removal proceedings. Even if the Court's jurisdiction is not ousted, he submits this intention is relevant to whether the Court should have intervened by removing him from Mamari 1. The assets of that trust are the home where Mr Mason lives and a commercial building originally funded by his parents. The only dispute in relation to that trust was over the terms of lease for

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10 At [81]–[84].

the commercial property, which was resolved to the satisfaction of all trustees. He submits the Judge was wrong to remove him from this trust.

[44] We agree that these matters are potentially relevant to whether the Court's discretion to remove him from Mamari 1 was properly exercised. We discuss this under the third issue raised by this appeal.

Issue two: Mr Mason's purported exercise of the appointment and removal power

Mamari 1

[45] Clause 7 of the Mamari 1 deed provides:

> The power of appointment of new Trustees hereof shall be vested in the Settlors during their lifetimes and after the death of the first of the Settlors to die then in the surviving Settlor …

[46] Clause 8 provides:

> The person or persons in whom the power of appointment is vested shall have power:
>
> a) To remove any Trustee or Trustees for any cause whatsoever and without giving any reason therefor and upon such removal shall forthwith appoint a new Trustee in place of any person removed.
>
> b) To appoint at any time an additional trustee or trustees of all or any of the trusts hereof whether or not occasion shall have arisen for appointment of a new Trustee or Trustees.
>
> …
>
> d) Upon the retirement or death of a Trustee or Trustees of all or any of the trusts hereof to appoint a new Trustee or Trustees.
>
> …

[47] Mr Mason did not have the powers to remove and appoint under cl 8 because the power under cl 7 was vested in him and Mrs Mason. This appears to have been understood when Mr Mason purported to remove Mrs Mason, Ms Triezenberg and Mr Dodd pursuant to the deed dated 11 March 2018. That deed did not rely on cl 7. It purported to remove Mrs Mason pursuant to s 43 of the Trustee Act on the basis that she was incapable of acting as a trustee. It also purported to remove Ms Triezenberg

and Mr Dodd under s 43 of the Trustee Act on the basis that they desired to be discharged.

[48] Section 43(1) of the Trustee Act 1956 provides:

> **43 Power of appointing new trustees**
>
> (1) Where a trustee (whether original or substituted, and whether appointed by the court or otherwise)—
>
> (a) is dead; or
>
> …
>
> (c) desires to be discharged from all or any of the trusts or powers reposed in or conferred on him; or
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> …
>
> (f) is incapable of so acting;
>
> …
>
> the person nominated for the purpose of appointing new trustees by the instrument (if any) creating the trust, or if there is no such person or no such person able and willing to act, then the surviving or continuing trustees for the time being, or the personal representatives of the last surviving or continuing trustee, may by deed appoint a person or persons (whether or not being the person or persons exercising the power) to be a trustee or trustees in the place of the first-mentioned trustee.

[49] The submission in the High Court was that Mr Mason held the power to appoint as “the surviving or continuing trustees” because Mrs Mason was not able or willing to act on her joint power. However, as the Judge found, this misinterprets s 43. The person(s) nominated in the trust deed are Mr and Mrs Mason. That is so unless and until one of them dies, in which case the person with the power is the surviving person. As Mrs Mason is not dead, this means that Mr and Mrs Mason remain the person(s) nominated in the trust deed.[11]

[50] We agree with the Judge that, on a proper interpretation of s 43, Mr Mason did not have the power to unilaterally remove and appoint trustees while Mrs Mason was alive. Mr Mason’s submission that under s 33 of the Interpretation Act 1999

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[11] At [100]–[102].

the singular includes the plural does not advance the issue. We agree with the Judge that, because Mr Mason and Mrs Mason are unable to exercise their joint power (because Mrs Mason is unable to), then the continuing trustees must do so. The question is then whether "continuing trustees" includes a trustee who has lost the capacity to act.[12] The wording of s 43 is not clear.[13] We consider the appropriate procedure was to apply to the Court for orders removing trustees and appointment their replacements under s 51 of the Trustee Act to effect any changes.

[51] Mr Mason submits in the alternative that the Court should treat Mrs Mason as dead for the purposes of cl 7. He refers to a definition of "civil death" in the common law from an early edition of *Black's Law Dictionary* of "a person who, though possessing natural life, has lost all his civil rights, is considered dead".[14] That definition does not appear in precisely those terms in the latest edition.[15] In any event, the concept is not applicable. It is an archaic term that refers to someone who has lost rights — such as the right to vote, make contracts or sue — as a consequence of their actions (for example, being convicted of serious crime or having left the temporal world for the spiritual by entering a monastery). It does not extend to someone who is under a disability. We do not accept Mr Mason's submission that "death" in cl 7 should be interpreted so that it does.

[52] It follows that we agree with the Judge that the deed dated 11 March 2018 under which Mr Mason purported to remove Mrs Mason, Ms Triezenberg and Mr Dodd was invalid.

[53] This conclusion means that it is unnecessary to consider whether the ground relied on by Mr Mason (namely, s 43(1)(c)) in purporting to remove Ms Triezenberg and Mr Dodd was available. For completeness, however, we agree with the Judge that it was not.

[54] Clause 9 of the Mamari 1 deed provides that a trustee who desires to be removed may do so by giving signed written notice to the settlors. Ms Triezenberg

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12 See for example *Eggers v Eggers* [2019] NZHC 2732 at [3]–[9].
13 See for example the discussion in *Lyttle v Phiskie* [2019] NZHC 2262 at [9].
14 *Black's Law Dictionary* (4th ed, Thomson Reuters, United States, 1951).
15 *Black's Law Dictionary* (11th ed, Thomson Reuters, United States, 2019) at 502.

and Mr Dodd gave no such notice. We agree with the Judge that the settlement agreement pursuant to which the Guardian Trust was to be appointed was part of a compromise of several matters. Similarly, an in-principle agreement between Mr Dodd and Mr Mason in December 2017 was a proposed settlement. Neither trustee expressed a desire to be discharged outside of those intended settlement arrangements. The prayer for relief in which they sought orders for their removal was part of a range of orders potentially available to the Court.

Mamari 2

[55] Clause 17 of the Mamari 2 deed provides:

> 17.1 Settlor's powers of appointment and removal: Each Settlor shall have the powers, exercisable from time to time, to appoint one Trustee and to remove every Trustee appointed by that Settlor. For the purposes of this clause Alexander Charles Mason shall be deemed to have appointed himself and Wendy Anne Mason shall be deemed to have appointed herself.
>
> …
>
> 17.3 Death, disability and unwillingness to act:
>
> (a) If a settlor dies, subject to the terms of any transfer of the powers of appointment and removal held by that Settlor, those powers shall, from the date of the Settlor's death be exercisable by the legal personal representatives of the Settlor and after the final distribution of the estate of the Settlor by the Trustees.
>
> (b) If a Settlor is unable or unwilling to act, the Settlor's powers of appointment and removal of Trustees shall be exercisable:
>
> (i) If the Settlor shall have appointed an attorney or attorneys under enduring power of attorney in relation to property, by that attorney or those attorneys (who shall execute any document required upon the exercise of his, her or their powers under this subclause in the manner prescribed in the terms of his, her or their appointment as attorney or attorneys);
>
> (ii) If the Settlor shall not have appointed an attorney or attorneys under an enduring power of attorney in relation to property, by the Trustees.
>
> (c) If a Settlor shall have transferred the powers of appointment and removal of Trustees held by that Settlor to another person, and that person dies or is unable or unwilling to act, those

powers shall, subject to the terms of the transfer, be exercisable:

(i) by the Settlor who originally held those powers if that Settlor is then living; or

(ii) if that Settlor is not then living, by the legal personal representatives from time to time of that Settlor, and after the final distribution of the estate of that Settlor, by the Trustees.

17.4 Additional and advisory Trustees: The holder or holders of the powers of appointment and removal of Trustees shall jointly (if more than one) have the power to appoint and remove such additional and advisory Trustees as the holder or holders may determine. Paul Morley Dodd and Vicki Ann Triezenberg shall be deemed to have been appointed an additional Trustee pursuant to this clause.

…

17.7 Means of appointment and removal: Exercise of the powers of appointment and removal shall always be by deed but, in the case of the powers held by either of the Settlors, may be by will. Where the power of removal is vested in the Trustees, the power of removal may be exercised by a majority of not less than 75% of the Trustees.

[56] The effect of cl 17.1 is that Mr Mason has the power to remove himself and Mrs Mason has the power to remove herself. Neither of them has the power to remove Ms Triezenberg or Mr Dodd under his clause because they were not appointed by either of Mr Mason or Mrs Mason only. Pursuant to cl 17.4, Mr and Mrs Mason have a joint power to remove them.

[57] Mrs Mason is unable to exercise her powers of removal due to her dementia. Pursuant to cl 17.3, this means that during the period that Ms Triezenberg held her power of attorney, Ms Triezenberg jointly with Mr Mason had the power to remove herself and Mr Dodd. From September 2016 Ms Triezenberg no longer held this power as she no longer held Mrs Mason's power of attorney. Pursuant to cl 17.3(b)(ii), this meant that Mrs Mason's power to remove was held by "the Trustees" and, pursuant to cl 17.7, it could be exercised by a majority of not less than 75 per cent of them. The deed defines "Trustees" as "the trustee or trustees for the time being of the Trust, whether original, additional or substituted."

[58] This meant that Mrs Mason's powers of appointment and removal were exercisable by a majority of Mr Mason, Mrs Mason, Ms Triezenberg and Mr Dodd.[16] That power in relation to Ms Triezenberg and Mr Dodd's removal and Mark Mason's appointment was a joint one with Mr Mason. This in turn meant that when Mr Mason purported by deed to remove Mrs Mason, Ms Triezenberg and Mr Dodd and to appoint Mark Mason, he did not have the power to do so. That power was exercisable by Mr Mason and a majority of Mr Mason, Mrs Mason, Ms Triezenberg and Mr Dodd.

[59] It follows that we reject Mr Mason's submission that he had the sole power to remove Ms Triezenberg and Mr Dodd and to appoint Mark Mason. His submission is that he has the sole power because no-one holds Mrs Mason's power of attorney. That submission ignores cl 17.3(b)(ii). Mr Mason also submits that s 43 of the Trustee Act applies for the reasons advanced in relation to Mamari 1. For the reasons discussed, that submission is also without merit.

[60] It follows that we agree with the High Court that Mr Mason's deed purporting to remove Ms Triezenberg and Mr Dodd and to appoint Mark Mason was invalid and of no effect.

Issue three: removal of any or all of the trustees

Should the Court have intervened?

[61] The first part of issue three concerns whether the Court should have intervened at all. Mr Mason contends it should not have intervened in Mamari 1.

[62] The Judge correctly acknowledged that trustees should not be lightly removed and that incompatibility between trustees and beneficiaries was not enough to justify removal.[17] She also acknowledged that the position with both trusts was more settled than it had been. There were no outstanding issues in relation to Mamari 1. The only outstanding issue in relation to Mamari 2 was what was to be done with the

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[16] It might be argued that it did not include Mrs Mason if the definition of "Trustees" was interpreted in the same way as some courts have interpreted "continuing trustees" but this makes no difference in this case.

[17] *Letterstedt v Broers* (1884) 9 App Cas 371 (PC) at 387; and *Kain v Hutton* [2007] NZCA 199, [2007] 3 NZLR 349 at [267].

significant cash holdings on deposit with the bank. Mrs Mason was in care, an automatic payment was in place for the costs of her care and all the trust's significant debts had been paid.

[63] The Judge's view was that "[d]espite the present position being tolerably settled" it was "an inescapable conclusion that the Court ought to exercise its supervisory jurisdiction".[18] This was because:[19]

(a) The present position had been reached only through recourse to lawyers at significant cost to Mamari 2 and when Mr Mason had not had to engage directly with Ms Triezenberg and Mr Dodd following his purported removal of them.

(b) Recourse to lawyers was "inappropriate and unsustainable" and was significantly eroding the trust assets to the detriment of the trust's beneficiaries.[20] Such recourse would continue to be necessary for the administration of the trusts because the position "was well past the point of mere incompatibility" and the Judge could "not see any prospect of the three trustees being able to work together on an ongoing basis".[21]

(c) In the short to medium term it may be that Mrs Mason's condition will require different care arrangements. It would be unacceptable for there to be another crisis in relation to her care as between the trustees of Mamari 2. How to invest the cash held with the bank was still to be resolved. It was possible that the tenant of the commercial property held by Mamari 1 could quit. The current trustees would be unable to co-operate and make decisions about this.

(d) Although there was a mechanism in Mamari 1 for resolving trustee deadlock, the Court would be "parking" the dysfunction between

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18 Substantive judgment, above n 1, at [118].
19 At [119]–[123].
20 At [120].
21 At [120].

> the trustees. Future disputes were inevitable and recourse to the dispute resolution mechanism would involve disruption, delay and cost that would further erode trust assets.

[64] Mr Mason submits that the Judge erred in relation to Mamari 1. That trust held the commercial property and the home he lived in. The only dispute that had arisen related to the tenancy of the commercial property. That had been resolved when Mr Mason found tenants who would pay above a rental valuation obtained by Mr Dodd. Mamari 1 had been set up to ensure that the trustees could always make decisions, either directly or through the dispute resolution mechanism. Mr Mason says the Court should not have taken the drastic measure to remove him, one of the two settlors of the trust, in these circumstances.

[65] Ms Triezenberg and Mr Dodd submit that, to the extent this argument might seek to have Mr Mason reinstated on one trust but not the other, the case in the High Court was not run in that way. We do not agree with this submission. As part of a range of orders sought in the March 2018 pleading, they sought an order that Mr Mason be removed as a trustee of both trusts. For that jurisdiction to be exercised by the Court it was necessary that it be satisfied that it was appropriate to intervene in respect of each trust and that this intervention should involve Mr Mason's removal from each trust. It would have been open to the Judge to have found that this was appropriate in respect of one trust but not the other.

[66] Moreover, Mr Mason has provided a copy of submissions made to the Court in which he relied on the settled position of Mamari 1 and the dispute resolution mechanism in that trust to say that the Court should not intervene in Mamari 1. The Judge's reasons showed that she had turned her mind to the position of each trust and found that it was necessary to intervene in respect of both them.

[67] The "delicate question whether [the Court] should act and proceed to remove the trustee is one upon which the decision of the primary Judge is entitled to especial weight".[22] We are not persuaded that the Judge was wrong to intervene in

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[22] *Miller v Cameron* (1936) 54 CLR 572 at 581 per Dixon J, approved in *Kain v Hutton*, above n 17, at [266].

respect of Mamari 1 for the reasons Mr Mason advances. The Judge considered that decisions in the future would need to be made in the administration of that trust and the dysfunction between the trustees meant that inevitably they would need to be resolved at cost to the trust even under the dispute resolution process. She was entitled to form that view having heard the evidence.

Should Mr Mason have been removed?

[68] If intervention was necessary, Mr Mason submits that the Judge erred in deciding to remove him from both trusts.

[69] The Judge's reasons for deciding it was no longer appropriate for him to be a trustee were because:

(a) "[P]erhaps most importantly" in the Judge's view, Mr Mason did not believe in the concept of trusts and regarded the assets as his and his wife's and, in respect of which, he should be able to do with them as he liked.[23]

(b) Trustees must actively consider the management of trust assets and the exercise of discretions. In the Judge's view, Mr Mason had displayed a rigidity of thinking on a range of issues that indicated he was not well placed to do this. Mrs Mason's on-going care would be the main focus for the Mamari 2 trustees and Mr Mason's inability to accept her condition had created a barrier to that.[24]

(c) Mr Mason had shown "extreme hostility" to Ms Triezenberg (a co-trustee and beneficiary), Mr Dodd (a co-trustee), and Ms Richardson (a beneficiary).[25] The Judge was satisfied that Mr Mason was no longer capable of giving fair and impartial consideration to Ms Triezenberg and Mr Richardson as beneficiaries. She was also satisfied that his hostility towards his co-trustees presented "real issues" for

23 Substantive judgment, above n 1, at [125].
24 At [127]–[128].
25 At [129].

the "ongoing administration of the trusts" and had caused an "unsustainable dissipation of trust assets".[26]

[70] The Judge said she had reached this conclusion reluctantly given that Mr Mason was one of the settlors. However, she was satisfied that it was no longer appropriate for him to be a trustee.[27] The Judge also considered whether to instead replace Ms Triezenberg and Mr Dodd with a professional trustee who would be a co-trustee with Mr Mason. She decided against this because there was no principled basis to remove Ms Triezenberg and Mr Dodd and because it would not resolve the issues under the trusts. Mr Mason did not accept the concept of a trust and he would soon fall out with an independent trustee when they did not agree with him.[28] This was supported by the lengthy list of people that Mr Mason had fallen out with (including his family, Mr Dodd, his lawyer, medical professionals and caregivers).

[71] Mr Mason challenges this conclusion in two ways. The first of these relates to the medical certificate that activated the enduring power of attorney in Ms Triezenberg's favour. He says this certificate was invalid. Such a medical certificate must have the registration number of the health practitioner giving it and here it did not.[29] He says a major influence in the Judge's decision to remove him was her "critical" view of Mason's conduct in relation to the care of Mrs Mason. He submits he has been vindicated regarding this because the medical certificate that enabled Ms Triezenberg to make the decision for Mrs Mason to go to St Andrew's was invalid.

[72] We disagree with this submission. Even if the medical certificate did not comply with the relevant regulation in all respects, this did not excuse Mr Mason's conduct that influenced the Judge in deciding that Mr Mason should be removed. Having found that Mr Mason was extremely hostile to his co-trustees and two of the beneficiaries, and that this meant he was no longer capable of fairly considering

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26 At [130].
27 At [124].
28 At [132]-[134].
29 Protection of Personal and Property Rights (Enduring Powers of Attorney Forms and Prescribed Information) Regulations 2008, reg 5(1)(a).

those beneficiaries as well as presenting real issues with the ongoing administration of the trusts, it was entirely appropriate that he be removed.

[73] We note in any event that there were proper grounds for activating the enduring power of attorney. The Judge accepted the evidence of Dr Casey about this. She had been instructed by Mr Mason to give a second opinion in April 2013 about whether there was another option to Mrs Mason being moved from Middlemore to St Andrew's. Dr Casey said it was good clinical practice to activate the enduring power of attorney when a person is to be transferred to a dementia unit or to a rest home. The certificate was based on the health professional's clinical assessment and, in Dr Casey's view, it could have been activated earlier. There can be no question, therefore, that it was appropriate that the decision about Mrs Mason's care be made by Ms Triezenberg as the person Mrs Mason had decided should hold her power of attorney.

[74] Secondly, Mr Mason submits the Court was wrong to remove him on the evidence. He says the Judge failed to consider the circumstances in which the dispute arose. Specifically:

(a) Ms Triezenberg did not advise the doctors that the family had the financial resources to provide care for Mrs Mason at home;

(b) Ms Triezenberg had doubt about the doctors' recommendation but did not seek out alternative opinions;

(c) Mr Mason's view that Mrs Mason could be cared for at home was accurate — as the medical certificate that activated Ms Triezenberg's power of attorney was invalid, she had no power to insist on 24/7 home care;

(d) Mr Mason was right to object to a transfer of $200,000 to Mr Allen when there were no stipulated criteria for that payment;

(e) Ms Triezenberg's alienation from Mr Mason dated from the time of Mrs Mason's transfer to St Andrew's;

(f) when Mamari 1 was established Mr Dodd had encouraged Mr Mason to believe that he retained control of his assets and the right to "hire and fire" trustees;

(g) Ms Triezenberg and Mr Dodd did not call a trustee meeting after about 2014 whereas Mr Mason called two meetings in 2017;

(h) Ms Triezenberg and Mr Dodd refused to consider investing the cash held on bank deposit in real estate identified by Mr Mason that in all likelihood would now have materially increased in value;

(i) it was inappropriate for Ms Triezenberg and Mr Dodd to obtain from creditors details of amounts owing when Mr Mason had justified concerns about payment sought by Mr Allen and about the charges by the care agency; and

(j) when Mr Mason and Mark Mason were acting as trustees, they held meetings in an attempt to regularise matters under the trusts and sent minutes to the respondents.

[75] We consider that none of these matters show that the Judge was wrong to order Mr Mason's removal. The Judge was well aware of the evidence that there was money to pay for home care for Mrs Mason and that for a time she "blossomed" with that arrangement.[30] However, even with that arrangement, Mr Mason caused constant difficulties with those carers, not least of which was his objection to their charges. The Judge also acknowledged that it was not a "one-way street", but she had "no doubt [that] Mr Mason was the primary cause and source of the problem.[31] She was entitled to form that view and the matters Mr Mason has raised do not show that it was wrong.

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30 At [132].
31 At [130].

Should the Judge have ordered Ms Triezenberg and Mr Dodd's removal?

[76] Mr Mason submits that the Judge erred in not removing Ms Triezenberg and Mr Dodd from both trusts.

[77] The Judge considered whether it would be expedient to remove all three trustees and to appoint a professional trustee in their place. Guardian Trust consented to being appointed, the parties had agreed to this in their 2016 settlement, and it was what had been proposed in an earlier statement of claim. It was also the view the Judge had initially favoured. The Judge ultimately decided against this course. She considered there was no principled reason to remove them and appointing a new trustee would involve unnecessary cost.[32]

[78] The Judge set out detailed reasons as to why there was no principled basis to remove Ms Triezenberg and Mr Dodd. In essence, they had been handpicked by Mr and Mrs Mason to be a trustee of Mamari 2 and Mrs Mason was no longer able to speak for herself.[33] Further, they had worked conscientiously to carry out their roles and a range of criticisms made about them were not made out.[34] For example, Mr Dodd was entitled to charge for his time as a trustee, the money Ms Triezenberg withdrew from Mrs Mason's private account was properly explained by her, and the proposal to make a distribution of $200,000 to be held on trust for Mrs Mason was a pragmatic proposal to ensure Mrs Mason's care was not jeopardised.[35]

[79] Mr Mason challenges this conclusion. He says that Ms Triezenberg and Mr Dodd developed a hostile attitude to him. He says they did not involve Mr Mason in their decision to fund the litigation from trust assets, they did not engage in Mr Mason's repeated attempts to settle the litigation and were instead determined to remove Mr Mason on their terms.

[80] None of these reasons show the Judge's decision not to remove Ms Triezenberg and Mr Dodd were wrong. The Judge was satisfied that Mr Mason's conduct was

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32 At [136]–[137].
33 At [138].
34 At [140].
35 At [144], [147] and [154].

a major reason for the hostility. The Court approved funding from the trust for the litigation. Ms Triezenberg and Mr Dodd did engage in an (unsuccessful) settlement attempt (see [29] above) and were entitled to pursue the litigation against the history of the matter including the fact that the settlement reached in 2016 had not been implemented.

[81] For completeness, we note that the Judge also considered whether Mark Mason should be appointed as an additional trustee. She decided against it because, although it would give Mr Mason some comfort, it could inject hostility and dysfunction back into the trust.

[82] Overall, we are satisfied that the Judge gave careful consideration to Mr Mason's position and made no error in her decision that Mr Mason should be removed, Ms Triezenberg and Mr Dodd should remain and Mark Mason should not be appointed as an additional trustee. There is no basis for us to interfere with her decision.

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[83] In addition to the above issues, the respondents brought an appeal and Mr Mason brought a cross-appeal against the High Court's subsequent decision concerning amending the trust deeds, and costs and indemnity for costs.[36] In that decision, the Judge granted the respondents' application to vary the trust deeds so the powers of appointment and removal of trustees vested in the continuing trustees.[37] She also ordered that Mr Mason pay costs on a 2B basis to the respondents.[38] She determined that Mr Mason was entitled to an indemnity from Mamari 2 for those 2B costs and for his own reasonable costs incurred in the High Court litigation. Whether the respondents were entitled to an indemnity for their costs was not disputed by Mr Mason. Nevertheless she determined that the respondents were entitled to an indemnity for their reasonable costs.[39]

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36 Variation and costs judgment, above n 2.
37 At [22] and [26].
38 At [45].
39 At [47]–[49] and [63].

[84] The respondents abandoned their appeal from the decision that Mr Mason was entitled to an indemnity for the 2B costs and for his own costs. Mr Mason maintained his cross-appeal on all issues.[40] However, at the hearing of the appeals he advanced no submissions on the issues raised in that cross-appeal. Following the hearing, counsel for Mr Mason filed further submissions. We understand from those submissions that Mr Mason now maintains that the respondents were not entitled to an indemnity from Mamari 2 for their costs (in the High Court and on these appeals), that the 2B costs order in the High Court should be set aside and that he should have a costs order in his favour from the respondents.

[85] Mr Mason has not succeeded on his appeal on the three substantive matters addressed above. There is therefore no basis on which the 2B costs order in the High Court should be set aside and nor for a costs order in his favour in this Court. The respondents abide this Court's decision on costs on these appeals and seek an order that they are entitled to an indemnity from Mamari 2 for their costs. They abide this Court's decision on whether Mr Mason is entitled to an indemnity for his costs on these appeals.

[86] We agree with the High Court that both the respondents and Mr Mason were each entitled to an indemnity for their reasonable costs in the High Court from Mamari 2 for the reasons the Judge gave. For the same reasons they are each entitled to an indemnity for their costs on these appeals from Mamari 2. In view of this, there is no need to make an order for party/party costs on these appeals. Had it been necessary to do so, we would have ordered that the respondents were entitled to costs for a standard appeal on a band A basis.

Result

[87] The appeals are dismissed.

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40 For completeness, we record that by minute of 13 August 2020, Brown J directed that, in light of Ms Triezenberg and Mr Dodd's abandonment of the appeal in CA244/2019, Mr Mason was to be designated the appellant in that appeal.

[88] The parties are entitled to an indemnity for their reasonable costs on these appeals from Mamari 2.

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