

ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



Barham [2023] NZHC 2760

High Court of New Zealand, Grice J, 3 October 2023

Charitable trustees seek the assistance of the Court to amend the trust deed and regularise the appointment of trustees.

Key words: Charitable Trust, New Zealand, Alternative Trust Deeds, Appointment of Trustees

1. The Joan Fernie Charitable Trust Board (the Trust) was established in 1976, and three years later, farming properties were transferred into the Trust. When Ms Fernie died in 2007, further assets were vested into the Trust, and currently, the farming land is valued at \$118m, with \$700,000 in cash.
2. The Trust made grants to projects and organisations within the Hawke's Bay Region.
3. An independent legal review identified that there were two trust deeds, one from 1976 and another from 1977.
4. The 1977 trust deed did not refer to the 1976 deed and had been regarded as the governing deed.
5. The 1976 trust deed did not include any terms or powers allowing the trustees to vary or replace the trust deed, and there was no record of the Court's approval of the trust deed's amendment or replacement.
6. There were also issues with the appointment of trustees and their retirement every four years.
7. The current trustees made an originating application for approval under pts 3 and 5 of the [Charitable Trusts 1957](#) (the CT Act) to ratify an amendment to the trust deed and for directions concerning the exercise of trustees' powers under s 133 of the [Trusts Act 2019](#) (the application).
8. The Court waived the advertisement requirements of the application as the 1977 trust deed was publicly available online and registered with the Charities Commission.
9. The Attorney General was advised, filed a report with the Court, and did not object to the application.
10. The Court was satisfied that the administration of the Trust would be facilitated by approving the 1977 Trust Deed as the operative trust deed replacing the 1976 Trust Deed under s 33 of the CT Act.

11. The charitable purposes of the 1976 and 1977 Trust Deeds were broadly similar. The 1976 Trust Deed listed 34 charities with a catchall provision of “any other charity or charitable organisation within the definition of ‘charitable purposes’ in Section 38 of the Charitable Trusts Act 1957”.
12. The 1977 Trust Deed did not list any charitable organisations, but provided for the Trust board to decide what part of the Trust property and the net annual income would be applied in New Zealand (or any other part of the world) “for any charitable purpose or purposes”.
13. As to the appointment of trustees, the Court was satisfied that in the circumstances, past non-compliance with appointment procedures did not invalidate the appointment of the trustees. Further, it was appropriate for the continuing trustees to exercise the power of appointment.
14. The Court further declared that a majority of the trustees should make trustee appointments, and that the four-year retirement requirement of all board members be removed.
15. The Court approved the application.

COMMENT



It was not known why there were two trust deeds and why the first deed had been disregarded, but the view of all the parties was that the following trust deed was to replace it. All had acted over the years as if the later trust deed was the operative one.

The Court showed a practical attitude to excusing previous errors and placing the charitable trust on a proper foundation to achieve its purposes for the foreseeable future.

VIEW THE CASE



This case may be viewed at: <http://www.nzlii.org/nz/cases/NZHC/2023/2760.html>

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