

Flight of fantasy

BERNADETTE CAREY TELLS A TALE OF TRUSTEE MISCONDUCT AND REMOVAL IN THE AUSTRALIAN CASE OF *TJIONG v TJIONG*

A fabricated pilot's log book, a mysterious bag of cigarette butts, a dusty pocket diary unearthed from storage and a bogus claim of medical malpractice are not the components of a traditional trust dispute. But, in *Tjiong v Tjiong*¹, each was a key piece of evidence in acrimonious litigation between the trustee of an Australian family trust and the beneficiaries who accused him of fraud and misrepresentation.

While the trustee's performance in putting his defence from the witness box at first instance was neither Oscar-worthy nor polygraph-proof, the facts of this extraordinary case give a good insight into the law regarding the establishment of family trusts by fraud and the forcible removal of trustees from their role.

Background

Dr Richard Tjiong was a well-regarded surgeon and lawyer based in Sydney. In 2001, Richard's brother, Dr George Tjiong, was diagnosed with cancer. Later that year, George executed a will leaving the whole of his estate equally to his children, Katrina and Lindsay, and appointing Richard as his executor.

In 2003, George became permanently incapacitated and Richard took over the management of George's affairs. A few months later, Richard informed Katrina and Lindsay that they should create a family trust, for two reasons: first, George had told Richard that he wanted Richard to establish a trust, and second, it would prevent significant tax liabilities arising on George's death. On his recommendation, Katrina and Lindsay agreed to the creation of the 'George Tjiong Family Trust', into which assets totalling AUD1.3 million from George's estate were settled. A company called 'Maroka', of which Richard, Katrina and Lindsay were directors, was appointed as trustee. The beneficiaries of the trust were George, Katrina, Lindsay and other family members.

Sadly, George died in January 2004. Shortly afterwards, Richard formed the view that George's wider family should receive part of the capital of the trust and he should distribute it as he wished. However, Katrina and Lindsay were of the opinion that George had wanted all of his estate to be left to them and they pressed for a distribution from the trust. With great reluctance, on 9 April 2004, Richard gave each of them a cheque for AUD100,000, drawn by Maroka but postdated to 22 April 2004.

On 14 April 2004, Richard exercised the powers conferred upon him as appointer of the trust to remove Maroka as trustee and appoint himself as the sole trustee in its place. On the same day, he requested that Katrina and Lindsay return the cheques to him. They refused, and sought legal advice.

On 21 April 2004, Richard informed Katrina and Lindsay that he had received a telephone call from a 'Mr Johnson' who had foreshadowed a large medical negligence claim against George's estate on behalf of his stepson, 'Kevin'. Various letters then flooded in, purportedly from Mr Johnson, explaining that Kevin had suffered brain damage after treatment by George many years earlier. Richard informed Katrina and Lindsay that no distribution could be made to them until this claim had been resolved.

Legal issues

Lindsay and Katrina became increasingly suspicious of the authenticity of the claim by 'Kevin', as well as Richard's actions in appointing himself as trustee. In February 2005, they commenced proceedings against Richard in the NSW Supreme Court, pursuant to which they sought various forms of relief, including the setting aside of the trust or, in the alternative, the removal of Richard as trustee. Their application was based on allegations that the trust had been established based on Richard's fraudulent misrepresentations, and that Richard's conduct as trustee had been unconscionable and warranted his removal.

In seeking to have the trust set aside, Katrina and Lindsay asked the Court to invoke its inherent equitable jurisdiction. They argued that Richard



had lied to them about Richard's wishes and the tax benefits of the trust and that he should not be allowed to take advantage of his own false statements². They also argued that they were induced to consent to the establishment of the trust by Richard's untruths and that in such circumstances equity would allow the transaction establishing the trust to be rescinded, thereby providing for the assets settled on the trust to revert to George's estate to be dealt with in accordance with his will³.

Alternatively, Katrina and Lindsay sought the removal of Richard as trustee of the trust. Under Australian law, a trustee may be removed from office and replaced either pursuant to an express power in the trust instrument, pursuant to the statutory powers for appointing trustees out of court in the *Trustee Act 1925 (NSW)* (the Act)⁴, or pursuant to the court's inherent jurisdiction. In this case, Richard was happy to continue in this role and opposed being removed, rendering the statutory provisions of little assistance. However, the Australian courts of equity, like those in most other Commonwealth jurisdictions, will exercise their inherent jurisdiction to remove trustees where there has been positive misconduct on the part of the trustee, endangering trust property, or dishonesty or a lack of fidelity on the part of the trustees⁵.

Richard's misconduct

Richard denied all allegations against him. He also brought a cross-claim against Katrina and Lindsay pursuant to s85 of the Act, which provides that the court may relieve a trustee either wholly or partly from personal liability for a breach of trust if the trustee has acted honestly and reasonably, and ought fairly to be excused for their conduct.

Richard's cross-claim was good in theory. However, it went up in smoke as soon as he was cross-examined. The Court was unimpressed, to say the least, about Richard's credibility as a witness and found that he had acted deceitfully and with improper motives by:

- Fabricating a pilot's log book for his private plane in an attempt to show that he had met with George to discuss the establishment of the trust, when he had not.
- Fabricating the medical negligence claim by the 'Johnson' family in an effort to prevent or delay distribution of the trust fund to Katrina and Lindsay.
- Endeavouring to cast suspicion on Katrina as the instigator of the bogus medical negligence claim. The Court found that Richard had arranged for the sending of a letter to Richard's lawyer, which arrived in an envelope containing two cigarette butts in a plastic bag. The letter included phrases such as 'My health has gone bad rapidly, I want to straighten things out before I'm gone... the cigarette butts come from Katrina, there may be some DNA links.'
- Lying in his evidence to the Court about notes in an old pocket diary that his wife had allegedly found in storage in their apartment a few days into his cross-examination and that he said were contemporaneous notes of key events. They were not.

In reaching these conclusions, the primary judge held that Richard had been caught out in 'the most flagrant act

of fabricating evidence' both during his trusteeship and in the course of the hearing.

Trustee removal

Lord Blackburn, speaking for the Judicial Committee of the Privy Council on the removal of trustees, once mused that:

'The reason why there is so little to be found in the books on this subject is... as soon as all questions of character are as far settled as the nature of the case admits, if it appears clear that the continuance of the trustee would be detrimental to the execution of the trusts... the trustee is advised by his own counsel to resign, and does so'⁶.

And so it was in Richard's case. Part-way through his grilling in the witness box, Richard's counsel informed the Court that he was willing to resign the trusteeship of the family trust and to discontinue his cross-claim.

Noting that these aspects of the case had been compromised, the Court stated that, had that not been the case, it would have found that Katrina and Lindsay had relied on fraudulent misrepresentations by Richard to their detriment, and that their consent to the establishment and administration of the trust by Richard had been procured by Richard's fraud. This would have been sufficient basis to set aside the trust. Similarly, Richard's actions were of a category so severe that his removal would have been warranted.

Court of Appeal

Richard was not happy about the Court's dim view of him and he decided to take steps to restore his reputation. He appealed to the NSW Court of Appeal, applying to adduce further evidence to challenge the findings of the lower court regarding his credibility. The Court of Appeal's judgment, handed down on 29 June 2012, made short work of Richard's application. Dealing largely with findings of fact and evidentiary issues, the Court reached the same conclusions as to Richard's credibility and upheld the findings of Palmer J.

Conclusion

As a tale of a trustee apparently seeking omnipotence but caught out in a labyrinth of lies, the case is fascinating. But it is more than that. Although a binding decision on the points was not required, the judgment itself contains confirmation, first, that the Australian courts will be willing to set aside a family trust if the settlement has been procured by fraud; and, second, that trustee misconduct, even if not at the extremes of this case, will not be tolerated. Trustees partial to fabrications and falsehoods are therefore on notice: their flights of fantasy will be easily and permanently grounded. ■

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1 [2012] NSWCA 201
2 An argument supported by *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447

3 Such relief would be available if there was proof of 'an actual intention to cheat': *Barton v Armstrong* [1973] 2 NSWLR 598

4 New trustees can be appointed in the place of one who remains out of New South Wales for more than two years, who desires to be discharged, who refuses to

or is unfit to act, or is incapable of acting

5 Re Henderson [1940] Ch 764

6 Letterstedt v Broers (1884) 9 App Cas 371, 385-7