

# Duty bound

John Brown considers whether the solicitor for a trustee owes a fiduciary duty to the trust



#### ABOUT THE AUTHOR

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**T**he issue of whether a solicitor for a trustee owes a fiduciary duty to the trust and the scope of that duty was considered recently by the New Zealand High Court in *Eden Refuge Trust v Hohepa*<sup>1</sup>. In addition to setting out the scope of the fiduciary duty, the case also contains a warning for solicitors acting for unknown trustees, adopting an inappropriate adversarial stance and getting into a conflict of interest at the expense of their fiduciary obligations.

While the case has myriad issues and the judgment covers 230 paragraphs, in essence it concerned a principally charitable trust, the major asset of which was misapplied by the trustee. That misapplication was made possible by the actions of the trustee's solicitor who was himself found liable for breach of fiduciary duty, knowing receipt and dishonest assistance.

#### Background

The trust was established in 1962 to hold for a religious congregation, a building (the property) purchased with funds provided by the congregation who had links with the present congregation. A difficulty with the trust deed was that it did not readily meet the legal requirements of a charitable trust. However, if the trust was characterised as a private trust, its terms failed to meet the necessary legal requirements. The Court's approach was to therefore treat the trust as charitable<sup>2</sup>.

By November 2001, the sole surviving trustee was the first defendant (who had been appointed in 1984) and who by the time of the proceedings had been living overseas for 15 years. In 2002 the trustee contacted a solicitor

in New Zealand (the second defendant) and instructed him to sell the property and remit the funds to the trustee, then living in Spain. At no material time did the parties meet. Other than filing a statement of defence, there was no appearance for the trustee. The trustee was found liable for breach of trust, breach of fiduciary duty and conversion, and in an interim judgment was removed by the Court from office. The major subject of this judgment was the solicitor.

#### Adversarial approach

When the trustee contacted the solicitor in 2002, the solicitor provided him with a written legal opinion that contained advice on the trustee's rights, duties and obligations and, in particular, advised that in the event of a dispute over ownership of the trust property recourse to the High Court for directions was the best course of action. Advice was also given as to how to remove caveats registered against the title to the property.

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The present religious congregation had occupied the property for the previous 15 years and claimed to be the beneficiary under the trust. The trust deed also provided for a default beneficiary, another religious organisation in New Zealand. Both of these parties had lodged caveats against the property<sup>3</sup>. The solicitor therefore made application to lodge a transmission transferring the property into the name of the sole surviving trustee, which was an essential step prior to the sale of the

property and was also designed to trigger a statutory mechanism leading to the caveats' removal<sup>4</sup>. When the circumstances of the trust and the limited financial resources of the congregation who were not astute to the commercial issues involved were considered, the Court regarded the solicitor's actions to be indirect, underhand and wrong. The solicitor had recommended an adversarial approach to flush out the strength of the opposition to the sale of the property and then lying low until the property was sold. The Court held that the proper approach for the trustee was to take active and transparent steps to ascertain how the trust's property should be applied.

#### Solicitor's conflict of interest

Upon the removal of the caveats the sale of the property proceeded. The trustee requested money to meet his Spanish hotel bills. The solicitor made his own American Express card available so funds could be drawn down for this purpose and then reimbursed from the property sale proceeds following settlement. The solicitor prepared a deed of debt recording loans by the trustee to himself in his personal capacity, in what the Court was to hold was a clear breach of trust. There were other breaches of trust by the trustee. The effect of all of this on the solicitor/client relationship was that for the solicitor to revisit the propriety of his actions and protect the trust, would place him in conflict with acting to protect his own interests. The solicitor chose the latter.

There were opportunities for the property sale not to proceed and for the solicitor to withdraw from the relationship, but those opportunities were not taken up. A worrying feature of the case was the content of email memoranda by the trustee to the solicitor, which should have raised serious concerns about the intentions and integrity of the trustee.

The solicitor's explanation was that he was acting for the trustee as instructed, selling the



property and remitting the proceeds to the trustee. This submission was not accepted by the Court, which held that it was incumbent on the solicitor to ensure that nothing he did harmed the trust's financial interests.

### Breach of fiduciary duty to the trust (paragraphs 191-205 of the judgment)

Drawing on the House of Lords decision in *Nocton v Ashburton*<sup>5</sup> and the more recent New Zealand decision of *Cook v Evatt* (No 2)<sup>6</sup> the Court held the solicitor owed fiduciary duties of loyalty, fidelity and utmost good faith towards the trust and as the trust in this instance had no separate legal personality, to the trust's trustee or trustees. This was held to be particularly the case with a charitable trust having no natural persons to protect the trust, should the trustee advance his own interests. It was held that in such circumstances the general fiduciary duties of solicitors would require them:

- (a) To refuse to act on instructions from the trustee which they could foresee would be likely to result in harm to the trust;
- (b) To ensure the trust's property is dealt with in accordance with the law; and
- (c) To ensure that the trustee's instructions if acted upon are not contrary to the trust deed.

A solicitor who continues to act on instructions that are inconsistent with the terms of the trust places himself in a position where he cannot discharge the fiduciary duties of loyalty and good faith owed to the trust. It was considered that this was analogous to a conflict of interest arising through acting for two clients. The solicitor was required to ensure the sale of the trust's property and the management of the sale proceeds were in keeping with the trust deed and were not dealt with in a way harmful to the trust. The solicitor was therefore bound to disregard instructions that required him to act in a way contrary to the terms of the trust.

However the Court went further. It noted that there was also room for finding a positive obligation to report the trustee's conduct to the Attorney-General (who has statutory duties to charitable trusts). Therefore discharging the solicitor's obligations of good faith and loyalty can include taking active steps to protect

the trust from a misapplication of its funds, particularly where it is a charitable trust.

### Dishonest assistance and knowing receipt

The Court found that the solicitor's actions enabled the trustee to gain access to the trust funds and misapply them. Sending trust funds offshore to the trustee was not consistent with the terms of the trust deed and was not the action of an honest person or honest solicitor. The solicitor knew the terms of the trust and that the money received was trust property and that it was used to pay the trustee's personal expenses in breach of trust. The solicitor's legal fees were regarded likewise (other than in regard to the initial legal opinion). The solicitor was found liable for breach of fiduciary duty, knowing receipt and dishonest assistance.

### Conclusion

The trust in this case was ultimately held to be charitable. However, the general fiduciary duties not to act on instructions that the solicitor could foresee would be likely to result in harm to the trust or contrary to the trust deed and to ensure the trust's property is dealt with in accordance with the law, would in the view of this writer apply to a solicitor

acting for a trustee of a private trust.

The fiduciary duties this judgment highlights may also be more extensive than first appears. The extent to which they could, in the case of a private trust, require proactive action by the professional advisor and whether such duties stop at the solicitor remain to be seen. ■

Information regarding the *Eden Refuge Trust v Hohepa* judgment is available at [www.cch.co.nz](http://www.cch.co.nz)

1. *Eden Refuge Trust v Hohepa*. (2010) 3 NZTR 20-009. An appeal to the Court of Appeal has been filed. The High Court judgment and head notes are available at [www.cch.co.nz/CA\\_DocumentLibrary/Eden\\_Refuge\\_Trust\\_v\\_Hohepa.pdf](http://www.cch.co.nz/CA_DocumentLibrary/Eden_Refuge_Trust_v_Hohepa.pdf)
2. The private trust components could be excised by the High Court under s 61B Charitable Trusts Act 1957 (NZ) so that the trust retained its charitable status.
3. New Zealand has a land registry system under which interests in land are normally registered. Land held in trust is registered in the name/s of the trustee/s.
4. The solicitor's approach took advantage of s145 of the Land Transfer Act 1952 (NZ) which provides for lapsing of a caveat if application is made to register an interest and the caveat holder does not apply to the High Court within 14 days for an order to sustain the caveat.
5. *Nocton v Ashton* [1914] AC 932 (HL)
6. *Cook v Evatt* (No 2) [1992] 1 NZLR 676 (HC).

