

5 Khyentse v Hope

10 Court of Appeal CA 51/05 & 119/05
1 May; 7 June 2006
Hammond, Chambers and O'Regan JJ

15 *Trusts and trustees – Charitable trusts – Religious purposes – Spiritual leader to give supervision and assistance to trustees – Removal of trustees by person with authority to do so – Whether spiritual leader had power to dismiss trustees – Whether expedient to appoint new trustees – Whether spiritual, religious and doctrinal issues justiciable – Trustee Act 1956, s 51.*

20 The Karma Kagyü school of Tibetan Buddhism was administered in New Zealand by a charitable trust. The trust deed provided, by cl XII(a), that the trust board would recognise the spiritual authority of the 16th Karmapa (as head of the Karma Kagyü school) or, inter alia, other persons appointed by the 16th Karmapa to supervise and assist the board in carrying out the trust; and, by cl II(d)(vii), that a board member's position became vacant if the board
25 was advised by the 16th Karmapa or, inter alia, a person with authority from the 16th Karmapa that the board member was no longer suitable to continue as such. The 16th Karmapa appointed Khyentse Lama as spiritual leader for New Zealand. After the death of the 16th Karmapa, there was a dispute as to the successor as 17th Karmapa. Khyentse Lama supported one contender and
30 the trustees another. Khyentse Lama dismissed the trustees and issued proceedings for a declaration that the dismissals were lawful or an order for removal of the trustees under s 51 of the Trustee Act 1956. Under s 51(1), the Court could appoint a new trustee if it was expedient and it was inexpedient, difficult or impracticable to do so without the assistance of the Court. The Judge
35 granted a declaration that the dismissals were lawful. The trustees appealed to the Court of Appeal, arguing, inter alia, that Khyentse's appointment was terminated on the death of the 16th Karmapa.

Held: 1 Religious, spiritual and doctrinal issues were not justiciable by a Court. Whether Khyentse's appointment had been terminated on the death of the
40 16th Karmapa was a religious and spiritual issue and therefore not justiciable (see paras [36], [37]).

2 The power of removal of a trustee in a trust deed was to be strictly construed. Under cl II(d)(vii) of the trust deed, a person had power to remove a trustee if holding "authority to do so", which, construed strictly, meant an
45 appointment for that purpose, rather than a general appointment under cl XII(a). This was consistent with the principle that the property of a trust was controlled by the trustees. The Judge's interpretation had elevated Khyentse to a position above the trustees, contrary to cl II(d)(vii) and the scheme of the trust deed as a whole. Khyentse's removal of the trustees was therefore of no
50 effect (see paras [41], [44], [45], [46]).

3 No order would be made under s 51(1) of the Trustee Act as there was no allegation that the trustees had acted improperly or contrary to the trust deed. Rather, this was a doctrinal dispute which was not justiciable by the Court (see para [50]).

General Assembly of the Free Church of Scotland v Lord Overtoun [1904] 5 AC 515; [1904-1907] All ER Rep Ext 1448 adopted.

Result: Appeal allowed.

Appeal

This was an appeal by the defendants, Ross Hope, Lama Karma Shedrup, Thelma Burchell and Ellen Duckworth (as trustees of the New Zealand Karma Kagyü Trust) from the judgments of Baragwanath J (reported at [2005] 3 NZLR 501) granting a declaration to the plaintiff, Khyentse Rinpoche Lama, that the plaintiff's dismissal of the defendants as trustees was valid. 10

R T Fenton and *L A Lawson* for the trustees.

D G Hurd and *W M Patterson* for Khyentse Lama. 15

Cur adv vult

The judgment of the Court was delivered by

O'REGAN J. [1] This case concerns the New Zealand Karma Kagyü Trust (the trust). The dispute relating to the trust, which has led to the present litigation, reflects a wider dispute within the Karma Kagyü school of Tibetan Buddhism. The wider dispute involves matters having a doctrinal and spiritual dimension which raise justiciability issues. 20

[2] The appellants were, until March 2004, the trustees of the trust. The respondent purported to remove them from office in March 2004. The respondent, who was the plaintiff in the High Court, sought an order from that Court confirming his removal of the appellants as trustees, or alternatively seeking their removal under s 51 of the Trustee Act 1956 and the appointment of alternate trustees. Pending the hearing of the substantive issues in the High Court, the respondent sought an interim order appointing the Public Trustee as manager of the trust until further order of the Court. That application came before Venning J, and in a judgment dated 1 April 2004 (High Court, Auckland, CIV 2004-404-1363) he made an order to that effect. That order was subsequently varied by Ellen France J in a judgment dated 17 November 2004, although Her Honour essentially left Venning J's order undisturbed. 25 30

[3] The substantive proceedings were heard in November and December 2004 before Baragwanath J. The Judge issued an interim judgment on 10 March 2005, in which he indicated his preparedness to make a declaration that the respondent's dismissal of the appellants was lawful and effective, but gave the parties the opportunity to consider and discuss those findings before making formal orders. An informal hearing was then held in open Court on 12 May 2005, following which Baragwanath J issued a draft Minute and invited counsel's submissions on it. Once he had those, he issued a final judgment on 30 May 2005. Baragwanath J's interim and final judgments are now reported at [2005] 3 NZLR 501. 35 40

[4] In his final judgment, the Judge: 45

- (a) made orders declaring that the appellants had been validly dismissed as trustees of the trust and appointing the Public Trustee as trustee of the trust pending further order of the Court;

- (b) reserved leave to the Public Trustee, the respondent and the appellants to apply further on appropriate notice; and
- (c) discharged the orders made by Venning J and varied by Ellen France J, to which we have referred above.

5 [5] The appellants appealed to this Court. They argue that Baragwanath J was wrong to determine that they had been validly dismissed as trustees by the respondent, and seek the reversal of his decision and their reinstatement.

Background

10 [6] The background to the dispute within the Karma Kagyü school of Tibetan Buddhism is outlined in some detail in the judgment of Baragwanath J. Counsel were agreed that this was an accurate and sensitive account of the underlying dispute. Because of the approach we take to the case, it is unnecessary for us to traverse the same ground in this judgment. Reference should be made to the interim judgment of Baragwanath J if a full account of the dispute is sought. In order to give some context to the analysis which follows, however, it is necessary for us to provide a brief summary, which is based on the summary contained in the judgment of Venning J.

15 [7] Followers of the Buddhist religion in New Zealand established the Karma Choeling Monastery at Kaukapakapa. The monastery was established and is administered by the trust. The trust was established in 1979.

20 [8] At the time the trust was established, Rangjung Rigpe Dorje was the 16th Karmapa (the head of the Karma Kagyü school of Buddhism). He appointed the respondent as spiritual director for New Zealand (among other countries). The respondent visited New Zealand in 1979, 1993, 2003 and 2004. Events that occurred on the respondent's visit to New Zealand in mid-March 2004 led to the High Court proceedings.

25 [9] The 16th Karmapa died in November 1981. Following his death his general secretary appointed four regents to take responsibility for the affairs of the Karma Kagyü lineage and in particular consideration of who may be the new incarnation of the Karmapa. Some time prior to his death, the 16th Karmapa also established the Karmapa Charitable Trust (the KCT) to provide for the care and management of the Karma Kagyü lineage during the period after his death and before the 17th Karmapa attained the age of 21 years.

30 [10] The four regents were Kunzig Sharma Rinpoche, Tai Situ Rinpoche, Jamgon Kongtrul Rinpoche and Goshir Gyaltsab Rinpoche. Unfortunately a difference arose between the regents as to which of two persons was the new incarnation of the Karmapa. Tai Situ Rinpoche and Gyaltsab Rinpoche supported Ugyen Trinley Dorje. On the other hand, Kunzig Sharma Rinpoche supported Trinley Thaye Dorje. Jamgon Kongtrul Rinpoche died in 1992. Kunzig Sharma Rinpoche is also the chief executive of the KCT.

35 [11] The differing views as to the identity of the new incarnation of the Karmapa have caused difficulties for the followers of the Kagyü school of Buddhism throughout the world, particularly in Tibet and India. There are existing legal proceedings between the two groups in India which concern the Rumtek Monastery.

40 [12] The appellants follow the group led by Tai Situ Rinpoche and Gyaltsab Rinpoche, and consider Ugyen Trinley Dorje as the 17th Karmapa. The respondent says that he will accept whichever candidate is eventually enthroned at the Rumtek Monastery as the 17th Karmapa. He does not consider, at least at the present, that Ugyen Trinley Dorje should be recognised as the 50 17th Karmapa.

[13] In the light of dissension at Karma Choeling Monastery, which followed the resignation of a lama who had been a teacher there in the face of criminal allegations, the respondent decided to visit New Zealand in March 2004. He travelled to the monastery with a number of supporters. He was accompanied by a locksmith. There then followed a confrontation between one of the appellants, Lama Shedrup, and his supporters and the respondent and his supporters. The police were called. They declined to become actively involved. There was then a meeting at the monastery itself. An accord was reached to enable the respondent to live at, but not teach at, the monastery, while Lama Shedrup was also to stay at the monastery. Unfortunately the accord did not last. The next day Ross Hope, one of the appellants, and others forced entry to the monastery and issued trespass notices to the respondent and his supporters. The respondent in turn issued notices removing the appellants as trustees of the trust.

The trust

[14] The trust was established by a deed of trust dated 21 December 1979 (the trust deed). The trustees were incorporated as a board under the Charitable Trusts Act 1957 in early 1980.

[15] The objects of the trust include the following:

- “1 To promote and assist within New Zealand the doctrines and practice of the Karma Kargyud Pa lineage of Tibetan Buddhism;
- 2 To establish within New Zealand temples and centres for the dissemination of the said doctrines and their practice and to maintain established temples and centres;
- 3 To encourage and maintain an exchange of ideas, friendship, and Buddhist principles between followers of Buddhist doctrine, principles and practice and between such followers and the New Zealand public;
- 4 To appoint teachers of religious instruction and meditation to teach and promote the Board’s objects within New Zealand.”

[16] The rules of the trust are set out in Appendix B to the trust deed. Clause II deals with the constitution of the trust board (the board). Clause II(c) deals with the filling of vacancies in the membership of the board. It provides for a meeting of all existing board members plus representatives from each centre established by the board (see object 2 above) at which both board members and centre representatives have voting rights. A unanimous vote of those present is required to fill a vacancy.

[17] Clause II(c)(vii) provides:

“The names of persons voted into Membership of the Board and such other of their personal details deemed appropriate by the Board shall be forwarded to His Holiness Gyalwa Karmapa or his future incarnations or temporary successors or to such other person or persons appointed by His Holiness or his future incarnations or temporary successors to supervise and assist the Board in its activities.”

[18] Clause II(d) deals with the position of a board member becoming vacant. It provides for the conventional causes, such as retirement, insanity, death and the like. A board member can also be removed if the board passes a majority vote that he or she is deemed to have failed to fulfil the duties of board membership.

[19] For present purposes, the significant aspect of cl II(d) is cl II(d)(vii), which provides that a board member’s position becomes vacant if:

“The Board is advised by His Holiness Gyalwa Karmapa or his future incarnations or temporary successors or by such other person or persons holding authority to do so from His Holiness or his future incarnations or temporary successors that a Board member is not or is no longer suitable to continue as a Board member and is no longer to be a Board member.”

[20] The other rule which has particular significance in the context of this appeal is cl XII, which is headed “Spiritual Authority”. Clause XII(a) provides:

“The Board shall recognise the spiritual authority of His Holiness Gyalwa Karmapa and his future incarnations or temporary successors as conveyed to the Board directly by His Holiness and his future incarnations or temporary successors or by such other person or persons appointed by His Holiness and his future incarnations or temporary successors to supervise and assist the Board in carrying out the objects of the NEW ZEALAND KARMA KAGYU TRUST.”

[21] The other provisions of cl XII require that reports of activities of the board and centres established by the board be made regularly to the Karmapa or his representative, that all disputes between members of the board must be referred to the Karmapa or his representative, and that no centre or school may be established and no teacher of religious instruction or meditation appointed by the board without the approval of the Karmapa or his representative. In each case, the reference to the Karmapa and his representatives is in the following terms:

“His Holiness [Gyalwa Karmapa] and his future incarnations or temporary successors or to such other person or persons appointed in terms of paragraph (a) hereof.”

The parties

[22] The respondent was appointed in 1979 by the 16th Karmapa as (among other things) spiritual director of the Karma Choeling Monastery, and the appellants accept that this means he is the person who has been appointed for the purposes of cl XII(a) (see para [21] above). His authority in that regard was recognised by the trustees in a unanimous resolution passed on 5 December 1993, the text of which is set out in Appendix A to the interim judgment of Baragwanath J. In that resolution, the trustees specifically recognised the respondent as the spiritual director of the trust and acknowledged his appointment by the 16th Karmapa. The resolution purported to make a formal change to cl XII, by the addition of a new subpara (e), in the following terms:

“(e) No appointment of Trustees, no changes to these Rules or the Objects of this Trust as an incorporated Trust Board, and no acquisitions of land and buildings are to be made without the prior approval of His Eminence Beru Khyentse Rinpoche (the acknowledged Spiritual Director of the Trust’s activities appointed by His Holiness the XVth Karmapa . . .) or his successors or assigns, or his agent duly appointed for the purpose of providing such approval . . .”

[23] The new rule also required the prior approval of the spiritual director for any disposition of land, buildings or chattels of ritual or other religious significance. There is a dispute about the validity of this rule change and the respondent did not rely on the new rule. However, his counsel, Mr Hurd, did rely on the resolution as evidence of the respondent’s authority under cl XII(a).

[24] The appellants held office as members of the board until the purported removal of them by the respondent in March 2004.

High Court decision

[25] In his interim judgment at para [15], Baragwanath J identified five issues, namely:

- (a) the nature of the authority the respondent was given by the 16th Karmapa;
- (b) whether his appointment survived the death of the Karmapa;
- (c) whether he had been validly dismissed;
- (d) whether his dismissal of the appellants was effective; and
- (e) what order should then be made.

[26] We summarise below his treatment of each of those issues.

(a) The nature of the authority the respondent was given by the 16th Karmapa

[27] The Judge considered the evidence and concluded that there could be no real doubt as to the validity of the respondent's original appointment. However, he said that the validity and durability of that appointment depended on matters of doctrine and internal structure which were not justiciable. He discussed in detail the competing positions of the parties as to the identity of the 17th Karmapa and the competing claims of the KCT (supported by the respondent) and the International Kagyü Headquarters (the IKHQ) (supported by the appellants) to be the administrative centre of the Karma Kagyü school of Buddhism. Applying the well-known principle enunciated by the House of Lords in *General Assembly of the Free Church of Scotland v Lord Overtoun* [1904] AC 515, and subsequent cases which have applied the ratio of that case, the Judge determined that issues of doctrine and internal structure were not justiciable in the New Zealand Courts.

[28] Bearing in mind that limitation on the Court's ability to deal with the dispute, the Judge then turned to the remaining issues.

(b) Whether his appointment survived the death of the Karmapa

[29] The Judge rejected an argument made on the appellants' behalf that the relationship between the 16th Karmapa and the respondent was analogous to a mandate or agency which was revoked on the Karmapa's death. He determined that the respondent's appointment was to a status which, while revocable by a Karmapa or by an authority lawfully exercising the status of a Karmapa during an interregnum, must be presumed to continue indefinitely.

(c) Whether the respondent had been validly dismissed and (d) whether his dismissal of the appellants was effective

[30] The Judge determined that these two issues could be dealt with together. He determined that it was impractical to continue the interim regime applying pursuant to the judgments of Venning and Ellen France JJ, and that it was necessary to make a choice between the parties. He then considered the competing contentions of the respondent and the appellants as to the status quo.

[31] He accepted a submission on the appellants' behalf that aspects of the resolution of 5 December 1993 (summarised at paras [22] – [23] above) were ultra vires. He found they were inconsistent with cl XII in that they failed to recognise the potential removal of the respondent by a Karmapa or a person or

body authorised by the Karmapa to do so. But he said that, notwithstanding this, those resolutions constituted powerful evidence of acceptance by the appellants of the respondent's status, and that his decision-making power extended to property. He noted that the respondent's argument that the respondent's role as duly appointed spiritual director constituted the status quo since the death of the 16th Karmapa.

[32] The Judge then considered the appellants' argument as to the status quo. The appellants argued that the respondent had initially recognised Ugyen Trinley Dorje as the 17th Karmapa, and subsequently changed his position. They asserted that the recognition of Ugyen Trinley Dorje as the 17th Karmapa was so deep-seated as to constitute a status quo that ought not to have been changed by the respondent's intervention, and that the Court should restore them to office.

[33] The Judge then considered the provisions of the rules, particularly cl XII(a), which gives the respondent the power to "supervise and assist the board in carrying out the objects of the [trust]". He noted the argument that this did not extend to giving the respondent authority to render the office of a board member vacant under cl II(d)(vii), noting that the power to remove a trustee must be strictly construed. The Judge declined to read down the supervisory power, noting that it was exercisable by the Karmapa himself. He determined that this power must include the power under cl II(d)(vii) to dismiss trustees.

[34] Having concluded that the question of the survival of the appointment of the respondent after the death of a Karmapa involved non-justiciable issues, as did the question as to whether he had been validly dismissed, the Judge concluded that the respondent was the spiritual director under the trust deed and his dismissal of the appellants had been effective. He issued his interim judgment to that effect.

(e) Orders

[35] The Judge then made the final orders referred to at para [4] above in his final judgment.

Our approach to the appeal

[36] We agree with Baragwanath J that the religious and spiritual issues in this case are not justiciable, applying the principles in *Overtoun*. In our view, the issues raised by the present dispute are able to be dealt with as issues of interpretation of the trust deed itself.

[37] We are satisfied for essentially the same reasons as given by Baragwanath J that the appointment of the respondent was a valid appointment for the purposes of cl XII(a), that it was not terminated by the death of the 16th Karmapa (as counsel for the appellants, Mr Fenton, conceded in argument) and that the Court is unable to determine that his appointment has been terminated because that would require the Court to make a decision on a non-justiciable issue. Accordingly, the respondent remains as the person appointed for the purposes of cl XII(a) at the present time, and should be recognised as having that role by the Court in the absence of evidence to the contrary which could be accepted by the Court without the need for a finding on a non-justiciable issue.

[38] Baragwanath J considered that the appointment of the respondent under cl XII(a) meant that the respondent also had the power to remove trustees under cl II(d)(vii). He placed particular reliance on the use of the term "supervise" in cl XII(a). Mr Hurd supported that reasoning. He said the

similarity of the wording of cls XII(a), II(c)(vii) and II(d)(vii) was such that it was logical that the appointee under cl XII(a) was also the appointee under cl II(c)(vii) and cl II(d)(vii).

[39] Mr Fenton argued to the contrary. He began with the premise that a power to remove trustees must be construed strictly. He noted that the power to supervise the board contained in cl XII(a) had to be read in the context of the other provisions of cl XII. He said when that is done, it is clear that the supervisory power is a power remote from day-to-day control over the trustees, and it cannot be assumed that the power extends to the removal of trustees under cl II(d)(vii).

[40] We consider that the key provision for present purposes is cl II(d)(vii). The Judge gave greater focus to cl XII(a), but in our view that is subsidiary to cl II(d)(vii), which governs the removal of trustees. The Court must be satisfied that the respondent holds the power of removal referred to in that provision. In our view he does not.

[41] We start from the trite proposition that a power of removal of a trustee in a trust deed must be strictly construed: *Dal Pont and Chalmers, Equity and Trusts in Australia* (3rd ed, 2004), para [22.85].

[42] There is a clear difference between the wording of cl XII(b), (c) and (d) and cl II(c)(vii) on the one hand, and that of cl II(d)(vii) on the other.

[43] In the former cases, it is clear that the delegated person exercising the power under those provisions is the person appointed by His Holiness Gyalwa Karmapa and his future incarnations or temporary successors to supervise and assist the board in carrying out the objects of the trust. So, the person appointed under cl XII(a) also exercises powers under cl XII(b), (c) and (d), as well as under cl II(c)(vii).

[44] On the other hand, cl II(d)(vii) provides that the power to advise the board that a board member is no longer suitable to continue as a board member and is no longer to be a board member (thus causing the office of that board member to become vacant for the purposes of cl II(d)) may be exercised only by a “person or persons holding authority *to do so*”. Construing this provision strictly, we consider that a person seeking to exercise the power of removal must be appointed for that purpose (that is, the purpose of removing trustees under this provision) by the Karmapa or his future incarnations or temporary successors. A generic appointment under cl XII(a) is not sufficient. We do not accept the respondent’s submission that logic requires that a person appointed under cl XII(a) must thereby become entitled to exercise the power of removal under cl II(d)(vii).

[45] This interpretation is supported by the normal principles of trust law, that the property of the trust is under the control of the trustees. The interpretation which found favour in the High Court elevates the position of the respondent above that of the trustees, which in our view is contrary to the express wording of cl II(d)(vii) and to the scheme of the trust deed as a whole. We agree with Mr Fenton that the supervisory power under cl XII(a) must be read in the context of the remainder of cl XII. When that is done it is clear that the role of the person appointed under cl XII(a) is limited in scope. There is no proper basis for concluding that it authorises the exercise of power under cl II(d)(vii).

[46] The result of that conclusion is that the purported removal of the appellants as trustees by the respondent is of no effect and the appeal must therefore succeed.

[47] We are conscious that there is potential for continued difficulties in the administration of the trust, because the trustees are at odds with the person who currently holds appointment under cl XII(a), who has the supervisory and other powers referred to in cl XII. That situation will require both parties to exercise restraint and to act in an inclusive and tolerant manner. Both sides will need to recognise that any legal challenges each would wish to make against the other's holding of office will be hampered by the difficulties arising from the non-justiciability of the issues relating to the true successor to the 16th Karmapa and the exercise of administrative powers by the IKHQ and the KCT respectively.

Section 51

[48] In the High Court, the respondent sought an order under s 51 of the Trustee Act removing the appellants from the board and replacing them with his own nominees (this was later modified to a request that the board be replaced by the Public Trustee). Baragwanath J did not need to deal with this aspect of the case, given his decision upholding the removal of the appellants by the respondent.

[49] As we have come to the view that the removal of the appellants was invalid, we need to consider if any grounds exist for the removal of the trustees under s 51.

[50] Section 51(1) gives the Court power to appoint a new trustee in substitution for an existing trustee if it is expedient to do so, and inexpedient, difficult or impracticable to do so without the assistance of the Court. Section 51(2) provides examples of situations in which it is appropriate to appoint new trustees, but none of those are applicable to the present case. In the present case, there is no allegation that the appellants have acted in any way contrary to the terms of the trust deed, and no allegations of any other improper actions on their part. Rather, there is a doctrinal dispute between the appellants and the respondent which, for the reasons we gave earlier, is not able to be resolved by a New Zealand Court. That does not provide any basis for the exercise by the Court of the power under s 51. Accordingly, we decline to make any order under that section.

Result

[51] We allow the appeal. We quash the orders made in the High Court. As a consequence of that, we make an order terminating the appointment of the Public Trustee as trustee, and reinstating the appellants as trustees. In order to allow for an orderly transition, we direct that that order will come into effect on 22 June 2006.

Costs

[52] The parties agreed that the costs and disbursements of both parties should be met by the trust. They indicated that, in the event of any disagreement as to the amount of the costs or disbursements of either party, they would seek in the first instance to have the matter resolved by the Public Trustee. However, if there are any difficulties with that process, and the intervention of the Court is required, we reserve leave to either party to apply to the Court for determination of the reasonableness of the costs and disbursements of either or both parties.

Appeal allowed.

Solicitors for the trustees: *Dyer Whitechurch* (Auckland).
Solicitors for Khyentse Lama: *Patterson Hopkins* (Auckland).

Application for leave to appeal

The application by Khyentse Rinpoche Lama to appeal to the Supreme Court from the decision of the Court of Appeal was dismissed ([2006] NZSC 72).

Cur adv vult

Reported by: Stewart Benson, Barrister

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