A ROUND UP OF RECENT CASE LAW – SOME HOT TOPICS & RECURRING ISSUES

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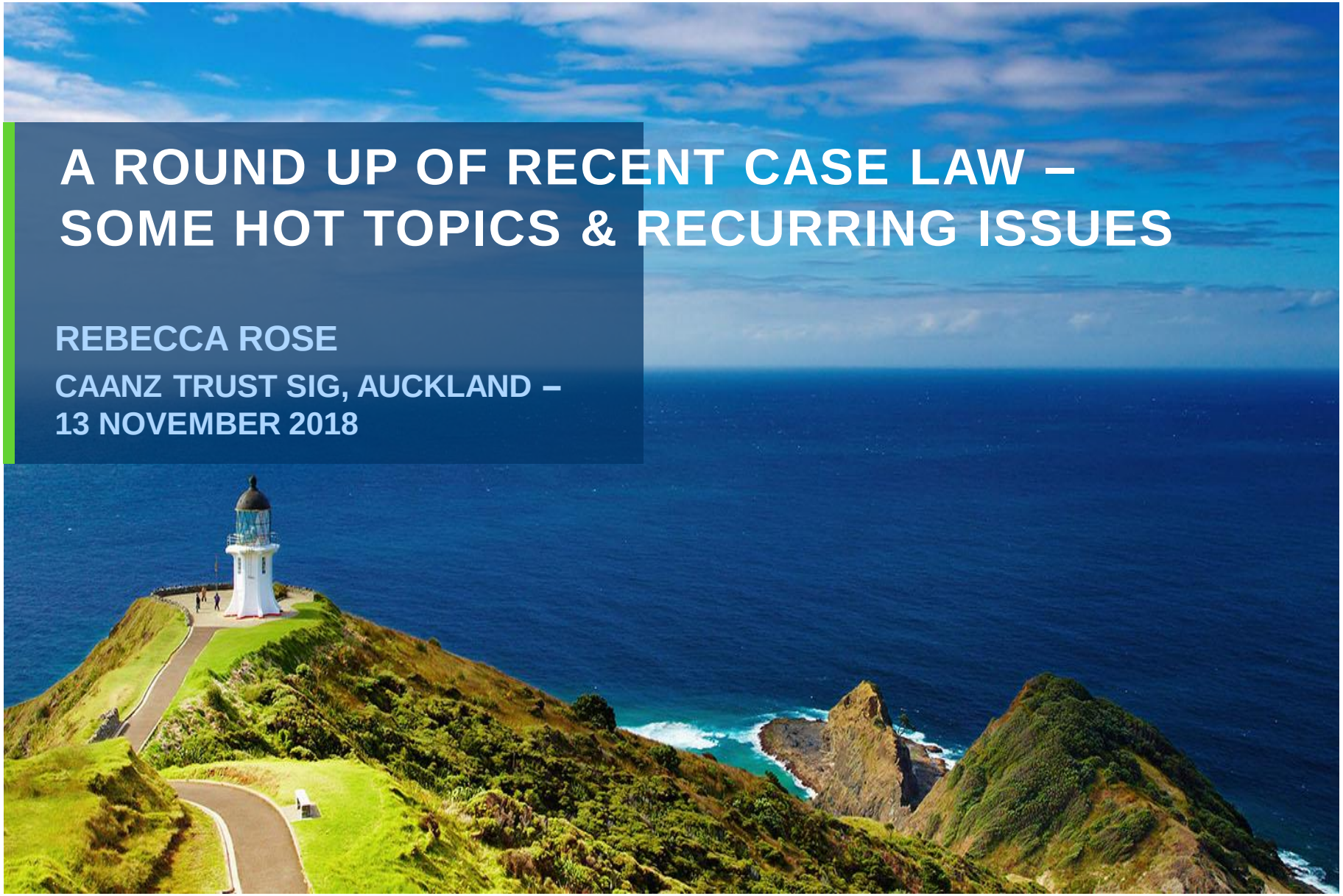
13 NOVEMBER 2018



Scene setting

- Continued proliferation of trusts and growing willingness by dissatisfied parties to take disagreements to court makes trust litigation a real risk for all involved.
- Settling disputes often isn't easy.
- Cases = disparate; wide-ranging subject matter. No single theme links cases in last 5 years or so.
- Broad variety of disputes = often result of differences in deed/will drafting.
- But some "hot topics"/recurrent themes are evident (NZ and internationally).

“Hot topics” & recurring issues

- In no particular order, key “hot topics”/“recurring issues” in recent cases include:

1. Deed/will construction & interpretation issues;
2. Memoranda of wishes;
3. Directions applications (s 66);
4. Review of trustees’ decisions (s 68);
5. Trustee indemnities;
6. Information disclosure; and
7. Litigation costs.

A. Interpretation issues

- If meaning of a trust deed's terms = unclear, same construction/interpretation principles applied in contract cases are relevant.
- But need to take care when attempting to distil settlor's intention.

- *Mercanti* [2016, WASCA]
- *Barnsley* [2016, EWCA]
- *Titris* [2018, JRC]

B. Memoranda of wishes & weight

- 3 recent New Zealand cases:
  - *Chambers* [2017, NZCA]
  - *Goldie* [2017, NZHC]
  - *Clement v Lucas* [2017, NZHC]

- All offer variants on two key ideas of trustees not "blindly following" or completely failing to take MOW into account.

- *Goldie* = unusual in that Moore J uses MOW to help construe the trust deed itself.

C. Directions applications (s 66)

- Increasingly trend in use of s 66 applications in New Zealand. Same = true of "momentous decision" approval internationally.
- Scope of s 66 seemingly now more settled: *Foulkes; Chambers*. Jurisdiction ≠ restricted to minor points.
- *Darlow* = directions sought as to whether trust ought to be wound up. Various issues/questions asked of Court, including whether power to appoint company directors/Governance Responsibilities = property/a chose.
- Be alive to potential "hostile" litigation and costs issues – see below.

- *Chambers v SR Corporate Trustee Ltd* [2017, NZCA]
- *NZMC v Foulkes* [2015, NZHC]
- *Darlow v Raymond* [2017, NZHC]
- *Re PV Trust Services* [2017] NZHC 2957, (2017) 4 NZTR 27-028 (HC) – "momentous decision" approval
- *Freeth v Kokich* [2018, NZHC] – winding up; beneficiary refusing to give indemnity
- *Public Trust v Kain* [2018, NZHC] – Pt 18 vs Pt 19 applications

D. Review of trustees' decisions (s 68)

- Not as common as s 66/directions applications.
- *Clement v Lucas* [2017, NZHC]
  - Trustees' failure to consider relevant considerations. Beneficiary disagreement as to how trustees should distribute trust property (farm blocks). Trustees had proposed selling farms and dividing proceeds equally, without taking account of MOW and pre-trust distributions.
  - Held: Trustees (on legal advice) had failed to consider pre-trust correspondence and the settlor's purpose/intention in establishing the trust. Trustees to re-consider decision to sell farms in light of trust's purpose and settlor's intention
  - Confirmation Court has jurisdiction to review/intervene in trustees' decisions taken under both trust deeds and the Trustee Act 1956.
  - But with respect to discretionary decisions under a trust deed, courts' powers are limited to circumstances where trustees have failed to consider relevant considerations or taken into account irrelevant considerations.
  - *Pitt v Holt* [2013, UKSC] = applied in absence of contrary authority. Consequently, trustees' failure to consider relevant material ≠ need to be fundamental; rather, "would" or "might" have affected trustee decision-making = sufficient.
  - As to continued recognition of "unreasonableness" as separate ground for court intervention (not addressed in *Pitt v Holt*), courts should be slow to recognise the separate ground if the relevant decision is consistent with a trustee's duties and within the trustee's powers.
- *Cf British Airways v APS Trustee Ltd* [2017, EWHC] – confirms importance of good record keeping and in taking time to give active and genuine consideration to matters.

E. Trustee indemnities

- Both *Butterfield v Public Trust* [2017, NZCA] and *Darlow v Raymond* [2017, NZHC] = unusual cases from an indemnity perspective.
  - *Butterfield* – indemnity extension granted to trustees de son tort where trustees' term had expired.
  - *Darlow* – blanket release from any liability (including previous breaches known or unknown) = sought by trustees; declined by Court.
- *Freeth v Kokich* [2018, NZHC] – beneficiary refusing to give indemnity (s 66 application also).

F. Information requests

- Steady stream of beneficiary information request cases internationally and domestically in recent years. Reflects changed/changing background environment.
- International courts currently seem more willing than New Zealand ones to grant information requests and to order disclosure of broader range of materials. Whether New Zealand position will change following any new Trusts Act remains to be seen.
- International decisions often grounded in discussion of principle, with courts willing to scrutinise trustee decisions closely. Not prepared to accept trustees' simple say so.
- Privilege issues – *Reinhart* [2016, NSWCA]; *Blades v Isaac* [2016, EWHC]; *Lewis v Tamplin* [2018, EWHC]; *Burgess v Monk* [2017, NZHC].

- *Erceg* [2017, NZSC]
- *Lewis v Tamplin* [2018, EWHC]
- *Re the Tchenguiz Family Trust* [2017, BVI]
- *Daniel v Cundall* [2017, NZHC]
- *Addleman v Lambie Trustee Ltd* [2017, NZHC] – under appeal

G. Litigation costs

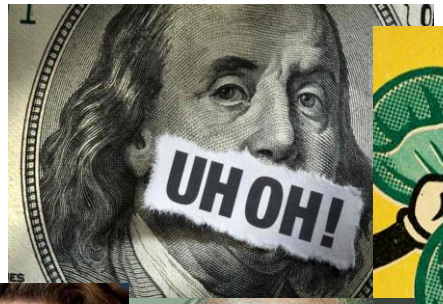
- Trust litigation ≠ less risky than “other litigation.
- Often no winners; “sometimes everyone hurts/cries”.
- Costs incurred/actions taken need to be reasonable and appropriate in circumstances.
  - Erroneous privilege/non-disclosure decisions can have costs consequences too.
  - Beddoe applications – consider but approach cautiously.
  - Section 66/directions applications
  - Check indemnities/seek advice before litigating if unsure.
- Cases illustrate pain which can be incurred though pursuing/responding to a proceeding and after (including appeals).

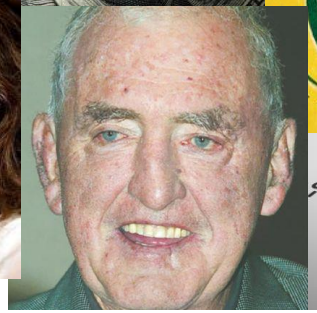
- *Burgess v Monk* [2017, NZHC]
- *Ong v Ping* [2015, EWHC]
- *Courteney v Pratley* [2017, NZHC]
- *Ash v Singh (costs)* [2018, NZHC]
- *Clement v Lucas (costs)* [2018, NZHC]
- *Crawford v Phillips* [2018, NZCA] – executor mistake causing litigation
- *Davis v White* [2017, NZCA] – trustee reliance on defective document as evidence of trust

So what lessons can be learned from recent cases?

- No single thread linking all cases.
- But some common themes emerge from hot topics/recurrent issues.

- 4 lists / sets of practical takeaways:
  - Trustees
  - Beneficiaries
  - Drafters/practitioners
  - All parties





Trustees (1/3)

1. "Eyes wide open" is generally best. Do your due diligence on the trust (including its asset position, generational context and existing trustees) as well as its beneficiaries/future beneficiaries before you accept appointment as a trustee. Serving as a trustee is not always plain sailing.
2. Get to know your beneficiaries even more after appointment, especially if they aren't close family members.
3. Read, understand and follow the terms of the trust deed/will. Seek advice if you are unsure about what the deed/will requires.
4. Before exercising any power/discretion (especially a significant one), double-check that what you are planning to do is consistent with the relevant trust deed's terms.
5. Think about how much information you want (or it is appropriate for) beneficiaries to have.
6. Communicate regularly (including among and between generations).
7. Wherever possible, be forthright and transparent with beneficiaries, fellow trustees and relevant third parties. Be prepared to justify any deviation from doing so.

Trustees (2/3)

8. Disclose conflicts early – whether actual, potential, perceived or similar. Where possible and unless authorised by a clear and express provision, refrain from participating in any decision involving a conflict.
9. Don't forget about compliance issues. Non-compliance issues may give disgruntled beneficiaries leverage.
10. Follow proper decision-making processes such that there can be no doubt about active and genuine consideration having been given to a matter.
11. Keep accurate, organised and proper records of trust matters and contemporaneous notes related to events and decisions. Make sure there's a backup copy somewhere in case that's ever needed. When you resign, complete a smooth handover of records to the new trustee.
12. Review and reflect often.
13. Be proactive.
14. Self-dealing or profiting from a trust is generally a "no-no" unless expressly authorised. But even then, the requirement for a good faith exercise of the relevant power/discretion remains.
15. Where conflict with a beneficiary occurs and stimulates a need/desire for legal advice about your personal position, unless clearly covered by the terms of your indemnity, consider paying for that advice personally rather than out of trust funds if you wish to avoid beneficiaries later being able to access any such advice.

Trustees (3/3)

16. Don't slavishly follow any memorandum of wishes. All the more so where they are inconsistent with particular terms or the overall purpose of a trust. But don't forget to consider them.
17. Think about whether decision-making would/could be tainted by failing to take into account relevant considerations or taking into account irrelevant considerations.
18. Don't allow yourself to be won over by dominant individuals or those simply wanting a "rubber stamp".
19. Encourage other trustees to do their job as trustee properly as well.
20. Death by 10,000 cuts is never fun! Where irretrievable relationship breakdowns occur among trustees or between trustees and beneficiaries or beneficiaries' propensity for war is interminable, consider resigning.
21. Removal applications are a zero-sum game.
22. Don't actively oppose a removal application. If you consider that you have appropriate grounds, use the s 66 application process.
23. When retiring as trustee, make sure you have indemnities under the trust deed and from the new trustee(s). Once parted from the trust's assets, the right to reclaim/recoupment shifts to only an equitable lien.

Beneficiaries (1/1)

1. Sometimes you have to fight for your rights. But pick your battles wisely. Be alive to the risk of draining the entire trust of funds just to be "right".
2. Litigation ought not to be a first port of call. "Going nuclear" requires deep pockets. Before doing so, consider less draconian dispute resolution measures (e.g. mediation or arbitration if allowed under the deed or relevant laws).
3. Courts don't lightly remove trustees. Where they do, the potential for conflicts if a beneficiary is appointed a trustee often results in appointment of an independent trustee (and the resultant expense that brings).
4. "Good things take time" and trustees aren't mind-readers. Communicate as appropriate with your trustees about needs and wishes and any trust matters of concern. But be patient with and tolerant of their different styles and approaches. In the majority of cases, they're trying their best.
5. If a trustee pays for legal advice with trust funds, you may also be able to access that advice.

Drafters/Practitioners (1/3)

1. Consider the “what ifs?”
2. When drafting deeds/wills and any related structure, give special consideration to potential “hot issues” or “flash points” which are likely to occur in the particular trust’s life and during the lives of beneficiaries and relevant others.
3. Build an appropriate level of flexibility into relevant documents and structures.
4. Take care when designing/implementing structures which give individuals multiple roles – both in relation to the potential for conflicts and unhappiness if all relevant sides/branches/parts of a family aren’t represented in the upper decision-making layers.
5. Consider asset classes (including offshore assets) and the risks attaching to each. Seek specialist advice about these matters where needed.
6. Consider payment dates carefully and be alive to arbitrariness in ages for those.

Drafters/Practitioners (2/3)

7. Don't forget about tax consequences.
8. Ensure someone other than the Court alone can remove trustees.
9. Keep beneficiary classes narrow with a power to add/remove beneficiaries.
10. Think carefully about confidentiality provisions and their scope.
11. It's generally much easier when Mum and/or Dad (or other relevant matriarch/patriarch) are alive than dead. Use the time to discuss and record wishes and issues with the aim of avoiding later implosions.
12. Equal treatment of beneficiaries tends to cause less grief! So too does the use of independent trustees.
13. Consider including a clause in the trust deed which gives trustees the right to commence proceedings on the advice of sufficiently senior counsel and an indemnity for reasonable costs from the trust fund rather than having to attempt to first obtain a *Beddoe* order.

Drafters/Practitioners (3/3)

14. Disclose conflicts early – whether actual, potential, perceived or similar. Where possible and unless authorised by a clear and express provision, refrain from participating in any decision involving a conflict.
15. Consider carefully the use of any "no contest"/"in terrorem"/"forfeiture" clause. Sometimes they can be a source of terror and real contests.
16. Consider including some sort of alternative dispute resolution clause. For some, a "quick and tidy" resolution procedure may diminish the anguish which often comes with litigation.
17. Take care when drafting variations. Ensure that any variation is consistent with the scope of the power conferred and the trust's purposes. Nullities can't be ratified.
18. Consider resettlement if a trust's terms no longer work/aren't fit for purpose. Be alive to the risk of conflicts as well as adverse costs orders for unnecessary separate representation.

All parties (1/2)

1. Never stir up litigation!
2. “Ding dongs” can get very expensive very quickly and take years to resolve.
3. Don’t dive in too litigation too quickly. But don’t leave it too long before going to court either.
4. Trust litigation is not “less risky” than other types of litigation.
5. Sometimes litigation is the only option. But be cautious about the type of proceeding pursued.
6. Choose trustees carefully. It may be hard to choose/find one. But it can be even harder to get rid of one.
7. Don’t underestimate litigation’s costs (emotional, financial and relationship wise).

All parties (2/2)

8. Keep any litigation as simple as the claim(s) allow. If a Toyota rather than a Rolls Royce can do the job sufficiently well, use it.
9. Be careful about steps taken during litigation:
   - Costs consequences
   - Indemnity coverage – varies among deeds and depending on actions at issue
   - Privilege or confidentiality claims – reasons and evidence are usually required
10. Take care with promises.
11. Good trust/will drafting and litigation strategy planning and review pay dividends and save tears.
12. If in doubt, seek advice and/or apply to the Court. Sometimes, everyone needs an education.
13. Mistakes and missteps can often be fixed if promptly addressed.
14. Be reasonable.
15. Don't forget common sense!.

Questions?

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