



Discretionary
Beneficiaries' rights in the
light of *Little v Howick
Trustee Ltd*
[2018] NZHC 1884

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What is a discretionary beneficiary?

Kain v Hutton (Supreme Court):

“A power of appointment amongst discretionary objects (a special power) is a power to select whether and to what extent and at what time one or more of the discretionary objects will receive any part of the trust fund, perhaps with the result that other discretionary objects will miss out entirely. It is often under a modern trust deed the most significant or fundamental power which the trustees have at their disposal.”

Contrast to “final beneficiary”

Johns v Johns (Court of Appeal):

“The crucial difference between contingent and vested interests on the one hand and discretionary interests on the other is that possession of the former interests, if enjoyed at all, is enjoyed as of right; whereas discretionary interests are never enjoyed as of right; their enjoyment is always subject to the discretion of the trustees.”

Little v Howick Trustee

- Mr and Mrs Little established Woodside Trust in 2002
- Mr and Mrs Little discretionary beneficiaries, son final beneficiary
- Acrimonious separation
- Trustees replaced in 2014
- Mediation and signed settlement agreement 2015
- Mrs Little sought review of trustee's decisions under s 68 and replacement of trustee under s 51

Section 68 Trustee Act

“68 Applications to court to review acts and decisions of trustee

(1) Any person who is beneficially interested in any trust property, and who is aggrieved by any act or omission or decision of a trustee in the exercise of any power conferred by this Act, or who has reasonable grounds to anticipate any such act or omission or decision of a trustee by which he will be aggrieved, may apply to the court to review the act or omission or decision or to give directions in respect of the anticipated act or omission or decision...”

Standing under s 68

- Is a discretionary beneficiary “beneficially interested in any trust property”?
- *Jaspers v Greenwood* (High Court)
“It therefore excludes discretionary beneficiaries, who enjoy a mere expectation only.” (obiter)
- recent application in *Clement v Lucas* (High Court) but “beneficially interested” not considered

Standing under s 68 cont'd

Conclusion:

“a mere expectancy cannot be said to amount to a beneficial interest... the interest held by a discretionary beneficiary does not crystallise into a right to trust property until and unless the trustee’s discretion is exercised in the beneficiary’s favour. This may never happen. In circumstances where the fruition of a beneficiary’s interest in trust property depends entirely on the unfettered discretion of the trustee, I do not think the beneficiary can be said to be beneficially interested in the said property for the purposes of s 68.”

Section 51 Trustee Act

“51 Power of court to appoint new trustees

(1) The court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult, or impracticable so to do without the assistance of the court, make an order appointing a new trustee or new trustees, either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee.”

Section 67 Trustee Act

“67 Persons entitled to apply to Court

(1) An order under this Act for the appointment of a new trustee or concerning any property subject to a trust may be made on the application of any person beneficially interested in the property, whether under disability or not, or on the application of any person duly appointed trustee thereof or intended to be so appointed.”

Inherent jurisdiction

- derived from Court's supervisory power to supervise administration of trusts for welfare of the beneficiaries
- applies to both trustee removal and review of discretions
- grounds for court removal: endangering trust property or want of honesty, proper capacity or reasonable fidelity
- grounds for court intervention
 - bad faith
 - taking into account irrelevant considerations or failing to consider relevant considerations
 - reaching a decision that is perverse or capricious
- unreasonableness in administrative law context probably not a separate ground for intervention

Did court get it right?

- Outcome correct
- “Beneficially interested” analysis questionable
- Minimal NZ case law and commentary
- *Hunt v Muollo* (Court of Appeal):

“It is generally regarded as settled law that a discretionary beneficiary’s interest in a normal discretionary trust is no more than a mere expectancy. It is simply an expectation or hope (in Latin a spes) that the trustees’ discretion may be exercised in the beneficiary’s favour ... an ordinary beneficiary has no interest, legal or equitable in the assets of the trust.”
- See also Supreme Court in *Kain v Hutton*:

“A discretionary beneficiary has nothing more than a mere expectancy.”

Did court get it right? cont'd

- Leading case *Gartside v IRC* (House of Lords):

“No doubt in a certain sense a beneficiary under a discretionary trust has an ‘interest’: The nature of it, may sufficiently for the purpose, be spelt out by saying that he has a right to be considered as a potential recipient of benefit by the trustees and a right to have his interest protected by a court of equity. Certainly that is so, and when it is said that he has a right to have the trustees exercise their discretion “fairly” or “reasonably” or “properly” that indicates clearly enough that some objective consideration (not stated explicitly in declaring the discretionary trust, but latent in it) must be applied by the trustees and that the right is more than a mere spes. But that does not mean that he has an interest which is capable of being taxed by reference to its extent in the trust fund’s income: it may be a right with some degree of concreteness or solidity, one which attracts the protection of a court of equity, yet it may still lack the necessary quality of definable extent which must exist before it can be taxed.”

Did court get it right? cont'd

- Discretionary beneficiaries don't have proprietary interest but do have rights:
 - To be considered for benefits
 - To enforce trust under supervisory jurisdiction
 - To consent under *Saunders v Vautier* / s 64A
 - To request and be considered for disclosure of information

Did court get it right? cont'd

- Discretionary ‘interest’ not a proprietary interest in the trust property
- It could be said to be a package of rights derived from trust relationship and obligations of trustee
- Discretionary interest is an “expectancy” but may be something more than “mere expectancy” according to *Gartside*
- Even if “mere expectancy”, may still not preclude being beneficially interested
- Will depend on context

Trusts Bill

“118 Court may review trustee’s act, omission, or decision

- (1) The court may review the act, omission, or decision (including a proposed act, omission, or decision) of a trustee on the ground that the act, omission, or decision was not or is not reasonably open to the trustee in the circumstances.
- (2) The court may undertake a review on the application of a beneficiary.
- (3) The review must be conducted in accordance with **section 119.**”

“119 Procedure for court’s review of trustee’s act, omission or decision

- (1) An applicant for a review under **section 118** must produce evidence that raises a genuine and substantial dispute as to whether the act, omission, or decision in question was or is reasonably open to the trustee in the circumstances.
- (2) If the court is satisfied that the applicant has established a genuine and substantial dispute, the onus is on the trustee to establish that the act, omission, or decision was or is reasonably open to the trustee in the circumstances.”

Trusts Bill

- No need for applicant to be “beneficially interested”
- Not limited to powers under Act
- Makes onus clear
- **Law Commission:** “The test of “not reasonably open” we have recommended is one of whether or not the trustee’s action or decision was one of a range of options that was properly open to the trustee in the circumstances. It is our intention to capture, with this formulation, the established grounds for intervention developed by the court under its supervisory equitable jurisdiction, while also leaving open the possibility that the courts may need to further develop those grounds in the future...The court should not be invited to review the merits of the trustee’s decision or impose its own view as to what was reasonable in the circumstances.”

Trusts Bill

“106 Court may appoint or replace trustee

(1) Whenever it is necessary or desirable to appoint a new trustee and it is difficult or impracticable to do so without the assistance of the court, the court may make an order appointing a new trustee.”

– No need for applicant to be beneficially interested.

Conclusion

- Who cares?
- “Beneficially interested” and “beneficial interest” still relevant terms under Trusts Bill
- But still important to understand nature of trust and discretionary beneficiary’s rights and interests