

Trusts Update

Dr Andrew Butler, Barrister, Thorndon Chambers, Wellington

Topic overview

- Trusts Bill (update)
- Memoranda of wishes
- Remedies / Costs

Trusts Bill

- Trusts Bill has been reported back by the Justice Select Committee with a recommendation that it be passed with amendments proposed by the Committee
- Process from here

Purpose and Scope of Trusts Bill

- Three main objectives:
 - Clear and accessible core trust principles in statute
 - More efficient trust administration
 - Simplify and clarify the rule of Courts
- Not a complete codification of trust law

Main Features of Bill (if enacted with Select Committee amendments)

- Will commence 18 months after royal assent
- Applies to express trusts (though puts in place special regime for “specified commercial trusts”)
- Generally will apply to all express trusts **whenever** created

Main Features of Bill (if enacted with Select Committee amendments)

- Reversing the current position, both under Trustee Act 1956 and common law, the bill provides that “it applies to all express trusts despite anything to the contrary in the terms of the trust, except as provided in subsections 5(3A) to (3C).”
- Subsection (3A) allows certain provisions such as the default duties, certain powers of trustees, such as investment powers and maintenance, etc powers, and a certain limited number of trustee indemnities, to be modified.

Main Features of Bill (if enacted with Select Committee amendments) cont...

- Importantly, however, a wide range of matters can now no longer be overridden by the terms of a trust, including:
 - The mandatory duties of a trustee (need to know terms of trusts; act in accordance with terms of trusts, act honestly and in good faith, act for beneficiaries, exercise powers for proper purpose)
 - Exemption and indemnity clauses
 - Trustee obligations to give trust information
 - Rules on delegation of trustee powers and functions to others
 - Trustee indemnities
 - Provisions related to the appointment and discharge of trustees

New statutory features

- Obligations to keep and pass on trust documents (cII 41-44)
- Specific rules and presumptions on giving trust information to beneficiaries (cII 45-51)
 - purpose: to ensure beneficiaries have sufficient information to enforce trust and trustee duties
 - two presumptions:
 - (1) basic trust information must be given to every beneficiary
 - (2) other trust information should be given upon request
 - for the trustees to assess whether to depart from presumptions; broad range of circumstances to be considered; rules to apply if no beneficiary is given information.
 - very complex, convoluted scheme which, for discretionary trust at least, could be easily avoided by trustees providing information to a patsy beneficiary

New statutory features cont...

- Prohibition on exemption/indemnity for trustee dishonesty, wilful misconduct or gross negligence (cII 37-39)
- Reversal of current common law position with respect to powers – under cl 52 a trustee has “all the powers necessary to manage trust property including ... all the powers of an absolute owner”

New statutory features cont...

- New provisions on delegation
 - cl 63(2) specifically prohibits appointment of persons to exercise/perform a range of powers including:
 - (1) distributions, use, possession etc of trust property;
 - (2) capital/income apportionment;
 - (3) trustee removal/appointment;
 - (4) resettlement/variation of trust
 - cl 64 clarifies trustee liability, for breaches of trust done by a delegate
 - cl 65 preserves ability to delegate due to absence from NZ, temporary incapability, etc but cl 66 puts in place mandatory notice requirements

New statutory features cont...

- New provisions on “special trust advisers” (in place of the old position of “advisory trustee”)
- New provisions as to ability of “trust creditors” to access trust assets to meet debts
 - “trust creditors” a misnomer; strictly they are “trustee creditors” as a trust is not a legal entity as such
 - trustee creditor given a statutory subrogation right (cl 80(2))
 - the subrogation right exceeds that available at common law because it is available even where the trustee him/herself has lost the right to indemnification (so long as creditor has given value, trust received a benefit, and creditor acted in good faith).
 - right is capped at the amount of the benefit received.

New provision for advisors

- Solicitors (and other paid advisors) will have new obligations imposed by law in terms of advice to settlors on:
 - modification on exclusion of default duties (cl 36A)
 - meaning and effect of any liability exclusion or indemnity clause (cl 40(2))
- No “penalty” or consequence is attached to failure to respect the first duty, but failure of the second means that the solicitor cannot take advantage of it if he/she is a trustee of the trust (cl 40(3)).

Specified commercial trusts

- “Specified commercial trusts” have a special regime
- Specified commercial trust is:
 - wholesale trust
 - security trust
 - any express trust created for the purpose of facilitating a commercial transaction where every beneficiary is a beneficiary as a result of entering into the transaction
 - commercial transaction is one that all parties enter into in trade
- Special regime says certain provisions never apply to a specified commercial trust; while others are disapplied to such a trust created prior to commencement

Memoranda of wishes

- Increasingly important in trust litigation
- Shed light on trust purposes
- *Clement v Lucas* [2017] NZHC 3278
- *Goldie v Campbell* [2017] NZHC 1692