Changes to the law of trusts and what you might do about them

By Anthony Grant, Trusts & Estates Litigator

The Government has introduced a Trusts Bill which it plans to enact next year.

It is 67 pages long, has 151 sections, and four schedules (two of which have not yet been published).

If the Act ends up in the form of the Bill, it is going to make some significant changes to the law of trusts.

For example, trustees will have a compulsory obligation to give information about "the terms of the trust, the administration of the trust and the trust property" to beneficiaries "who have a reasonable likelihood of receiving trust property ...".

Parents will have to disclose the terms of family trusts to their children and run the risk that the children will be demotivated by the expectation of future enrichment. There will also be children who, with knowledge of the trust and its assets, will want to complain about the management of trusts and the trustees' distribution policy.

There are to be nine "default" duties. These include a "duty to invest prudently", a "duty not to exercise power for own benefit," a "duty of impartiality" and "a duty not to profit."

If a settlor wants to exclude these duties, and if there is no power in an existing deed of trust to do this or to resettle the trust, the only option is presumably to apply to the High Court for permission to amend the deed.

This will involve considerable expense and uncertainty and I suspect there will, in any event, be far more trusts that need modification than the High Court can handle.

There are mandatory restrictions on what can be included in indemnity clauses and exemption clauses which will mean that trustees will be unable to avoid liability for some types of loss.

Readers of my articles will know that one of my main concerns at present is that the courts are declaring that arrangements which most other countries do not recognise as trusts are valid and enforceable as trusts in this country.

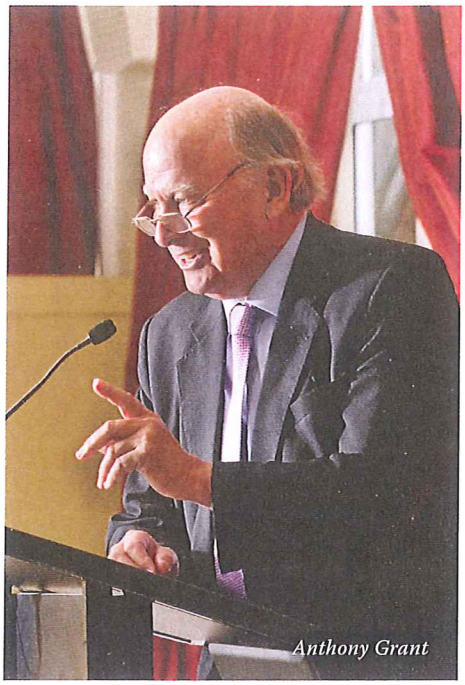
The Bill does not fix this. Clause 9 contains a description of four "characteristics of an express trust" but then says:

"If a trust does not have each of the characteristics ... but has characteristics that are recognised at common law as being sufficient to constitute an express trust, the court may determine that the trust has the characteristics of an express trust for the purposes of this Act."

In other words, the courts will have a complete discretion to redefine the concept of a "trust".

There are two broad reactions that trust lawyers can have to the way in which judges and Parliament are changing the law of trusts.

The first would have been unthinkable a few years ago. It is to declare that the law that is applicable to the trust is to be the law of another country, say, England or Australia.



Anthony Grant

There are two broad reactions that trust lawyers can have to the way in which judges and Parliament are changing the law of trusts. The first would be to declare that the law that is applicable to the trust is to be the law of another country, say, England or Australia. The second option is for settlors to be much more active in devising ways to circumvent adverse developments.

Although this option may sound expensive, in practice, the number of trusts that are likely to get into trouble and require the involvement of overseas lawyers is probably few.

If the law of England is chosen, its laws concerning trusts are well known and readily ascertainable in New Zealand through the excellent text books on trusts that are published there.

The second option is for settlors to be much more active in devising ways to circumvent adverse developments.

For example, I advise trustees who wish to avoid claims of a constructive trust over the assets of an express trust that they should make it a condition of giving a beneficiary a right of occupancy of a trust-owned property that the beneficiary must agree in writing at the outset that, in return for being given the right of occupancy, he or she will not thereafter make a claim of a constructive trust in respect of any direct or indirect contributions that are said to have been made to the property and, if a court should subsequently ignore that restraint, require the beneficiary to restore to the trust the monies that it lost to the constructive trust.

For settlors who do not want their children to be demotivated by learning of potential trust benefits, I would advise them not to appoint the children as beneficiaries in the usual way but to have the power to appoint and remove them for the purposes of a distribution.

In this way, a child would be a beneficiary for the few seconds it takes to make a distribution and no more.

If parents establish a trust for their children at a time when the children have partners, that trust will be a nuptial settlement that can be modified under section 182 of the *Family Proceedings Act 1980*, even though the children have not produced one cent of the trust's wealth.

Parents who wish to avoid this outcome could name their grandchildren as beneficiaries and not the children.

By making distributions to the grandchildren, they will in effect be benefiting the children and the assets of the trust will be preserved from attack by the spouse of a child's broken relationship.

These recommendations may not work but they illustrate ways in which some adverse developments might be countered.

In short, the days of relying on historic trust precedents have ended and settlors need to be innovative and quick to devise ways to overcome unhelpful trust developments as they arise.