

WHEN CAN A CORPORATE TRUSTEE BE A TRUSTEE OF A TRUST?

1. Introduction

2. I propose to talk today about the different types of Trustees that are permitted under the Trustee Act and some of the rules that relate to them.

Types of trustees

3. There are four types of Trustees, namely:

- (a) Trustee Corporations.
- (b) Corporate Trustees (ie Companies that are incorporated under the Companies Act).
- (c) Humans.
- (d) Advisory Trustees.

Trustee Corporations

4. Trustee Corporations are defined in the Trustee Act 1956 in the following way:

“Trustee Corporation means Public Trust or the Maori Trustee or any corporation authorised by any Act of the Parliament of New Zealand to administer the estates of deceased persons and other trust estates.”

5. I believe that there are six Trustee Corporations namely:

- (a) The Public Trust (including its wholly owned subsidiary, New Zealand Permanent Trustees Limited).
- (b) The New Zealand Guardian Trust Limited (which is part of Perpetual Guardian).
- (c) Trustees Executors Limited.
- (d) Covenant Trustees Services Limited.
- (e) Anchorage Trustee Services Limited.
- (f) The Maori Trustee.

All these entities have been expressly authorised by Parliament to act as Trustees.

6. One way to consider the size of these entities is to look at the funds that they manage:
 - NZ Guardian Trust has about \$65 billion under management.
 - The Public Trust has about \$35 billion under management.
 - Trustees Executors Limited has about \$30 billion under management.
7. Trustee Corporations, having been expressly authorised by Parliament to act as Trustees are permitted by the Trustee Act to act as sole trustees of a Trust. I shall refer to the relevant provision in a moment.

Corporate trustees

8. A corporate Trustee is simply a Company that is incorporated under the Companies Act.
9. In my experience many lawyers do not seem to know that a corporate Trustee is completely different from a Trustee Corporation. I am aware of some litigation where it appears that both a High Court Judge and the Court of Appeal were also ignorant of this distinction.
10. The distinction is very real and I shall refer shortly to constraints that exist on the appointment of corporate Trustees.

Human trustees

11. For the purpose of this Paper I do not propose to go into the qualifications that apply to humans. I will confine myself to saying that the humans must be adults with adequate cognition to understand the nature and role of trusteeship.

Advisory trustees

12. An Advisory Trustee is a person who assists to advise Trustees. The latter are called “*responsible Trustees*” in the Trustee Act. Section 49(2) of the Trustee Act provides that an advisory Trustee may be appointed in respect of all or any part of the Trust property:
 - (a) by the testator, settlor or other creator of the Trust, in the instrument creating the Trust; or
 - (b) by order by the Court made on the application of any beneficiary or Trustee or of any person on whose application the Court would have power to appoint a new Trustee; or
 - (c) by a responsible Trustee or any person having power to appoint a new Trustee; or
 - (d) in respect of the estate of a mentally disordered person, by order of the Court made on the application of the manager or person authorised to administer the estate or of any person on whose application the Court

would have power under the Protection of Personal and Property Rights Act 1988 to appoint a manager of that estate; or

- (e) in respect of the estate or any part of the estate of any person in respect of whom a property order is made under the Protection of Personal and Property Rights Act 1988, by order of the Court made on the application of the manager of the protected estate or of any person on whose application the Court would have power to make the protection order.
13. Where a responsible Trustee acts with an advisory Trustee the Trust property is vested in the responsible Trustee who has sole management and administration of the estate as if he were the sole trustee. The role of the advisory Trustee is set out in s 49(3) of the Act.
- (a) The responsible Trustee may consult with the advisory Trustee on any matter relating to the Trusts or the estate.
 - (b) The advisory Trustee may advise the responsible Trustee on any matter relating to the Trusts or the estate, but shall not be a Trustee in respect of the Trust.
 - (c) Where any advice or direction is tendered or given by the advisory Trustee, the responsible Trustee may follow it and act on it and shall not be liable for anything done or omitted by him by reason of his following that advice or direction.
 - (d) In any case where the responsible Trustee is of the opinion that such advice or direction conflicts with the Trusts or any rule of law, or exposes him to any liability, or is otherwise objectionable, he may apply to the Court for directions and the decision and order of the Court shall be final and shall bind the responsible Trustee and the advisory Trustee, although nothing in the section shall make it necessary for the responsible Trustee to apply to the Court for any such directions.
 - (e) Where advisory Trustees are not unanimous, and tender conflicting advice or directions to the responsible Trustee, the responsible Trustee can apply to the Court for directions.
14. No person who deals with the responsible Trustee in relation to any Trust property “*shall be concerned to enquire as to the concurrence or otherwise of the advisory Trustee, or be affected by notice of the fact that the advisory Trustee has not concurred.*”¹

The attraction of advisory trusteeship

15. Many lawyers and accountants are reluctant these days to act as Trustees and I recommend that in general, it is more practical for them to be appointed as advisory Trustees. In many family Trusts, the members of the family will

¹ Section 49(4)

want to have a lawyer and often an accountant as Trustees, to ensure that the Trust is being properly organised. This does not require the lawyer and the accountant to be appointed as responsible Trustees. They can fulfil the required role as advisory Trustees. They can, of course, fulfil their role without being either responsible Trustees or advisory Trustees but if they are appointed as advisory Trustees, there will probably be a greater incentive to make use of their services. One of the problems for Trusts which have advisory Trustees is that the responsible Trustees may not seek their advice. It can sensibly be said that if a settlor considers that there should be an advisory Trustee but he/she then decides to ignore them and not even consult with them, that is the settlor's look-out.

16. From the view point of a lawyer, there is much attraction in being appointed as an advisory Trustee. Although there will almost certainly be liability for giving negligent advice to the responsible Trustee, the risk exposure ought to be less than that of a responsible Trustee.

Trustee corporations

17. Section 48 of the Trustee Act provides that:

“Any trustee corporation may be appointed and may lawfully act as the sole trustee in respect of any trust, notwithstanding that the instrument creating the trust may provide for or direct the appointment of two or more trustees.”

18. The section extends to:

“all trusts and instruments and to all appointments of Trustees, whether created or made before or after the commencement of the Act.”

19. There is one exception: s 48 does not permit the appointment of a corporation as Trustee if the instrument creating the Trust forbids the appointment of the corporation.

The minimum number of trustees that a trust must have

20. Section 43(2)(c) of the Trustee Act provides that if a Trust starts off with two or more Trustees, it cannot have less than two Trustees at any time in the future unless a Trustee Corporation is appointed a Trustee, in which case the Trustee Corporation can be a sole Trustee.
21. In other words if a Trust starts off with four Trustees it can reduce down to two Trustees but not one unless the one Trustee is a Trustee Corporation.

Corporate Trustees

22. It has been common in recent years for lawyers and accountants to try to lessen their exposure to claims of loss and damage by acting as directors of a corporate Trustee. Many lawyers and accountants are not willing to act as

Trustees in their personal capacity but will only act via a Company of which they are a director.

23. But there are limitations on the role of corporate Trustees. Section 43(2)(c) says that:

*“It shall be not be obligatory to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than two trustees were originally appointed; but except where only one trustee was originally appointed, a trustee shall not be discharged under this section unless there will either a Trustee Corporation or at least **two individuals** to act as trustees to perform the Trust.”*

24. I have emphasised the words “*two individuals*” since they are very significant.
25. In the English case of *Jasmine Trustees Limited & Others v Wells & Hind* (a firm and another) [2007] EWHC 38 (Ch) it was held that the word “*individuals*” means humans.
26. In other words, s 43(2)(c) says that a Trustee will not be discharged under that section unless there are at least two humans to act as Trustees to perform the Trust.

The facts of *Jasmine*

27. In 1982 two Trustees appointed a non-resident Company and a non-resident human as Trustees and resigned (ie they purported to resign). One of the two retiring Trustees died a year later. During the following years there were a series of purported appointments of new Trustees (all of whom were non-residents in the UK). Two people were appointed as Trustees in 2002 and the Inland Revenue department in England assessed them with a liability to pay Capital Gains Tax for the years 1989-1990 through to 1996-1997.
28. The lawyers who had been involved in giving advice on the appointments of Trustees were sued for all of the tax that the Trustees were required to pay.
29. Justice Mann – a well-respected Judge – held that the English equivalent of s 49(2)(c) would only relieve a Trustee from liability on retiring if there were two human Trustees. As this was not the case, the two law firms were presumably held liable to compensate for the tax.
30. It was held that the Trustees’ decisions since 1982 had been invalid since, following the purported resignations, there had been no unanimity of decision-making amongst the Trustees because the trustees who thought they had retired, had not participated in the decision-making.
31. I wrote about this case a few weeks ago and received quite a bit of mail from concerned lawyers. Some said that s 43(1) authorises the appointment of Corporate Trustees. In saying this, they were correct. That section says:

“Where a trustee...desires to be discharged from all or any of the trust...the person nominated for the purpose of appointing a new trustees by the instrument (if any) creating the trust, or if there is no such person or no such person able and willing to act, then the surviving or continuing trustees for the time being...may by Deed appoint a person or persons...to be a trustee or trustees in the place of the first-mentioned trustee.”

Justice Mann held in the *Jasmine* case that the word “person” includes a corporate entity. In other words, s 43(1) permits the appointment of Corporate Trustees.

32. The lawyers who wrote to me about this assumed that if s 43(1) authorises the appointment of Corporate Trustees, then there should be no difficulty if a Trustee resigns, having been replaced by the Corporate Trustees.
33. Sadly this assumption is wrong. The English statute that Justice Mann considered has very similar wording to the New Zealand statute and there was no suggestion in the judgment that a retiring Trustee is discharged from his/her trusteeship where he/she is replaced by a Corporate Trustee.
34. The interpretation of s 43(2)(c) in England has not given rise to problems there since there has been a statutory amendment which involved the removal of the word “*individuals*.” The problem with the *Jasmine* interpretation only applies to the retirement of Trustees in the pre-amendment era.
35. The situation in New Zealand is quite different. The word “*individuals*” has been the subject of interpretation in this country and as misfortune would have it, the *Jasmine* case was invoked in a case to show that the word “*individual*” means humans. This was the case of *Greenpeace of New Zealand Inc v Electoral Commission* [2014] NZHC 2135.² In that case Mander J said:

“In the United Kingdom there is recent authority to the effect that an ‘individual’ must be a natural person.”

The citation for that proposition was the *Jasmine* case.

Mander J also referred to Australian precedent.

He concluded:

“In my view the only reasonably possible interpretation of the term of ‘individual’ in the context of [the applicable section] is that it is to be limited to natural persons and that was Parliament’s clear legislative intent.”

² At paragraphs 100-109

The significance of the *Jasmine* ruling

36. The effect of the *Jasmine* ruling is that in circumstances where s 43(2)(c) applies a Trustee who resigns will not be relieved of liability unless there are two human Trustees. All the actions of the successor Trustees will be invalid and the Trustees who thought that they had retired, will almost certainly be caught up with the liabilities.

What can be done about this?

37. I have been asked if a Trust has a clause that authorises the Trust Deed to be amended, can the Deed be modified so as to authorise the appointment of Corporate Trustees. In my opinion, if the wording of the variation clause is broad enough, it should be permissible to do this.
38. Some variation clauses, confine a permitted variation to matters of “*management and administration*” of a Trust. Without researching the law on the interpretation of these terms I think it unlikely that a Court would construe a power of variation of that nature as being sufficient to modify the circumstances in which a Trustee will discharge from his/her trusteeship.

A practical illustration of the problems

39. One of my recent cases involves a family Trust where the husband and wife (both of whom are Trustees) have fallen out and are unable to agree on almost anything.

The wife has applied for the husband to be removed or, in the alternative, if the Court will not remove him, for both herself and her former husband to be removed. In their place she has proposed that a Trustee Corporation should be appointed as sole Trustee or alternatively that her son, and a Corporate Trustee created by a local law firm should be appointed.

40. The husband, in turn, has said that if he is to be removed then he wants his wife to be removed and he proposes that the same Corporate Trustee from a local law firm should be appointed a Trustee.
41. Justice van Boheman has reserved his decision. One of the issues that he will almost certainly want to resolve is whether the Corporate Trustee created by the local law firm should be appointed a Trustee, having regard to the *Jasmine* decision and s 43(2)(c).
42. In saying this, it should be noted that s 43(1) permits the appointment of Corporate Trustees but there is no point in appointing a Corporate Trustee if the husband and wife are not discharged from their trusteeship going forward.
43. A second topic that the Judge may wish to investigate is whether the Court has power to override s 43(2)(c). The Judge does not need to go down this path and detailed submissions were not addressed on this topic. It is, however, a topic of some importance.
44. There are many thousands of Trusts in this country which do not permit any variation of their terms. In these Trusts, the only solution may be an

application to the Court for permission to modify the terms so as to allow retiring trustees to be relieved of liability. The question of whether a Court has authority to make this decision has not been decided.

The Trusts Bill

45. Submissions were made to the Law Commission that it should make provision in the Trusts Bill that retiring Trustees will be discharged of their trusteeship on the appointment of two "*persons*" – rather than "*individuals*" but the Law Commission has not modified the proposed Bill to make this change.

The present situation

46. The present situation is therefore most unsatisfactory: namely, that it is permissible to appoint Corporate Trustees under s 43(1) but unless there are two human Trustees, a Trustee who purports to resign will not be discharged from his/her trusteeship.

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