

TRUST LAW

The debate continues: unlawful corporate trustees

By Anthony Grant

My last article *When is it unlawful to have a corporate trustee?* (*LawNews* 22 February) was topical and I knew it would cause concern.

Some lawyers wrote to me and it may be helpful to refer to their comments and questions.

To recap: When continuing trustees use s43(1) of the Trustee Act to appoint corporate trustees as replacement trustees, s43(2)(c) provides that the retiring trustees will not be discharged from their liabilities unless there will be either a trustee corporation or at least two "individuals".

In this context the word "individuals" was interpreted in the English decision of *Jasmine Trustees Limited v Wells & Hind* [2007] EWHC 38 (Ch) as meaning humans and excluding corporate trustees.

This is significant because the retiring trustees are not discharged from their role as trustees and all the decisions made by their successors are invalid since they were not made unanimously.

Some people wrote and said s43(1) authorises continuing trustees to appoint "a person or persons" as replacement trustees. The term "person" has been interpreted to include companies. In other words, s43 expressly authorises the appointment of corporate trustees as replacement trustees.

It was said that if Parliament expressly authorises the appointment of corporate trustees under subsection 1, it cannot have taken that power away under subsection 2.

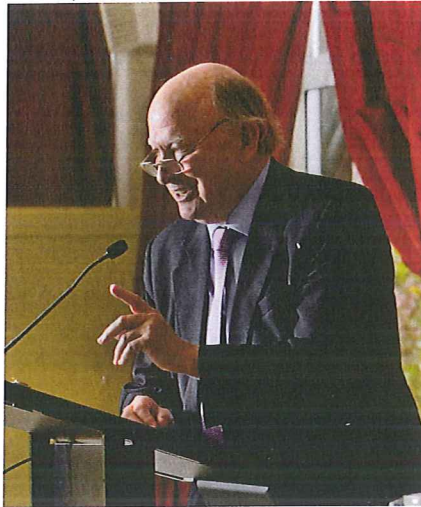
Section 43 is badly worded. Although subsection 1 authorises the appointment of corporate trustees, subsection 2 says a retiring trustee will not be discharged from liability unless there are two humans to act as trustees.

Section 43(1) had its parallel in England with s 36(1) of the Trustee Act 1925. This contained the same wording as s 43(1) of our Act (ie, the continuing trustees "may... appoint one or more other persons... to be a trustee or trustees..."). In *Jasmine* the court did not say the authorisation to appoint corporate trustees under subsection 1 meant the former trustees were discharged from their role as trustees.

So, subsection (1) of s43 does not overcome the need for there to be two human trustees.

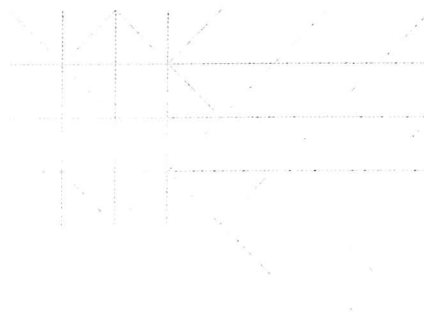
Other lawyers have asked whether the difficulties can be overcome by altering the terms of the relevant deed of trust to expressly permit the appointment of corporate trustees.

My response is that if a deed of trust contains a power of amendment which is wide enough to



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define when a trustee will be discharged from his/her office, an appropriate amendment to the deed should be able to achieve that purpose.

In saying this, neither I nor *LawNews* is giving legal advice. It is simply my opinion.

It is helpful to consider the origins of the Trustee Act. Our Act derives from the English Trustee Act. It, in turn, was a codification of decisions judges had given concerning trusts.

The Act was not intended to constrain the law in a straightjacket but to codify some established principles and to create some default rules to assist

with the orderly administration of trusts.

Most settlors of New Zealand trusts will want the ability to appoint corporate trustees these days since they will learn, if they don't already know it, that few lawyers and accountants are willing to be trustees in their personal capacity.

If that is the wish of most potential settlors, they should be free to say s43(2)(c) can be overridden by some express provisions to the contrary.

Many trusts have a provision allowing trust terms to be modified so long as they are confined to the "management and administration" of a trust. Does a modification allowing a trustee to be discharged from his/her role as trustee fall within the ambit of "management and administration"?

Such an amendment does not amount, in my opinion, to aspects of "management". Nor do I think it likely to fall within the ambit of "administration".

Does the High Court, with its inherent jurisdiction over the law of trusts, have power to override s43(2)(c)?

As I said in my previous article, Justice Gerard van Bohemen is currently writing a judgment that may provide the answer.

The problems with s43(2)(c) should not exist.

A number of MPs are lawyers who will read *LawNews*. I encourage them to arrange for the Trusts Bill to be amended to allow human trustees to be discharged from liability when they are replaced by corporate trustees.

There is no social or other harm in such an amendment and I suspect the only reason s43(2)(c) hasn't been neutralised in the current Bill is because the people who drafted it didn't fully appreciate its significance.

Postscript:

I referred in my previous article to trustee corporations and said the Public Trust and Perpetual Guardian (via its company The NZ Guardian Trust Company Ltd) are two well-known trustee corporations.

Trustees Executors Ltd is also a trustee corporation and it has written to me asking that I inform readers of its ability to act as the sole trustee of trusts, which I gladly do.

I had emails from many quarters in respect of my last article, including one from Trustees Executors Ltd, wanting readers to know the Public Trust and NZ Guardian Trust (to which I referred) are not the only two trustee corporation. It would like readers to know of its existence and status as a trustee corporation.

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