The test for challenging a trustee's decision

They should avoid being caught with a trust deed which may expose them to a court deciding that they failed to take a relevant factor into account in their decision-making.

Anthony Grant

Assume that a trust deed gives trustees "an absolute and uncontrolled discretion" to make decisions. To what extent can a court investigate a decision and set it aside?

This is a question Emeritus Professor Peter Watts has asked in an article entitled *Trustees with Absolute Discretions – a Case of Dr Jekyll and Mr Hyde in the New Zealand Courts*, published recently in the journal *Trust Law International*.

Watts says the Supreme Court in *Clayton* [2016] NZSC 29 and the Privy Council in the *Webb* case [2020] UKPC 22 gave effect to the "absolute" nature of the powers.

He contrasts these decisions with two High Court cases where the courts took an opposite approach.

One is *Clement v Lucas* [2016] NZHC 29 where trustees were authorised to "exercise all [their] powers and discretions...in [their] absolute and uncontrolled discretion".

A decision of the trustees to make a co-equal distribution to the settlors' children was challenged and set aside. The clause giving them an absolute discretion was not referenced in the judge's reasons for reaching this conclusion. A partial explanation for this was the apparent agreement of opposing senior counsel that the test the court should apply was whether the trustees had taken into account all relevant factors and excluded all irrelevant factors when they reached their decision.

That test is a licence to unsettle trustee decisions as in many cases it will be possible to identify a factor that ought to have been considered but which wasn't. It adopts a Wednesbury approach to trustee decision-making which should make all trustees want to take out extensive liability insurance.

Watts is critical of the use of the relevant/irrelevant factor test in the context of a clause which authorises the use of an absolute and uncontrolled discretion.

The second case on which he focuses is *Pinney v Cooper* [2020] NZHC 1178. This was also a case with an "absolute and uncontrolled" discretion clause.

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The judge more or less dismissed it, saying "I do not read the words 'absolute and uncontrolled discretion' as limiting Mr Pinney's fiduciary duties in any meaningful way. He was still required to act in good faith, for a proper purpose, rationally and for good reason."

If this decision is correct there is little point in having an "absolute and uncontrolled discretion" clause.

Watts says in cases where there is an "absolute and uncontrolled discretion" clause, a better test to adopt is whether a decision of trustees would be "anathema" to the settlor.

There is statutory justification for this approach. Both ss 4(a) and 21 of the Trusts Act 2019 say a trust must be administered in accordance with its "objectives".

If, notwithstanding an authorisation to act with an "absolute and uncontrolled discretion", a decision would be anathema to a settlor (because it was in fundamental conflict with his or her objectives for the trust), it can be assumed he or she would not have intended that the "absolute and uncontrolled" clause would permit the decision.

Do ss 4(a) and 21 of the Trusts Act prevail over an "absolute and uncontrolled discretion" clause? I think it likely that the courts will say they do. Trusts are not created by accident. Each is the result of a deliberate decision and there is merit in the courts trying to give supremacy to what they consider a settlor's objectives to be.

What should trustees do about this? They should avoid being caught with a trust deed which may expose them to a court deciding that they failed to take a relevant factor into account in their decision-making.

Including a clause which authorises them to make decisions in their "absolute and uncontrolled" discretion should help to achieve this. ■

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