TRUST LAW

The thorny issue of a settlor's intentions

Litigants seeking orders from the courts without providing the court with adequate evidence of a settlor's intentions are at risk of having their applications adjourned while evidence is obtained of the settlor's intentions

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Trusts are not created in a vacuum. They're created for specific purposes and trustees ought, in general, to try to fulfil those purposes. They should therefore learn of the settlor's intentions for managing a trust's assets and how its income and capital are intended to be distributed.

A few days before Christmas, the Court of Appeal released a decision in the long-running *Kain/Hutton litigation* (*Kain & Others v Public Trust & Others* [2021] NZCA 685 16 December 2021). One of the subjects of the appeal involved the extent to which a trustee "is entitled to take into account the wishes and subsequent wishes of [a] settlor".

The Court of Appeal held that a trustee is entitled to take into account the original wishes and the subsequent wishes of a settlor to the extent that the wishes are not inconsistent with the terms and purposes of the trust that the settlor created.

In reaching this conclusion, the court referred to s 45(h) of the Trusts Act 2019 which provides that a trustee "must keep, as far as is reasonable, any letter or Memorandum of Wishes from the settlor". This statutory instruction indicates that trustees should learn about a settlor's intentions for the trust that he/she has created. Oddly, the court did not refer to a much more significant provision of the Trusts Act – s 4(a) – although it may be that none of the counsel in that case referred the court to this provision. Section 4(a) says:

> "Every person or court performing a function or duty… must have regard to the following principles:
> …
> A trust should be administered in a way that is consistent with its … objectives."

A requirement that a trust must be administered 'in accordance with its objectives' will necessarily involve learning about the settlor's intentions for the trust.

In a conventional discretionary trust, this is usually done by looking at a written Memorandum of Guidance/Wishes that the settlor has prepared. If there have been several Memoranda of Wishes, a trustee should consider them all. In the *Kain* case there were 37 Memoranda of Wishes.

A statutory instruction that trustees and the courts must 'have regard to the objectives of a trust' does not confine the court to a consideration of a Memorandum of Wishes. There will be many trusts in respect of which there are no such memoranda. There will also be many trusts where the Memoranda of Wishes have become outdated and no longer provide an accurate statement of a settlor's objectives for a trust.

Changing objectives

If I am correct in saying a settlor's objectives for a trust can change from time to time (and this was inherent in the Court of Appeal's decision in the recent *Kain* case), then trustees and the courts should obviously try to learn what the settlor's objectives are in the changed circumstances.

There is good law that a settlor's intentions can be learned from what he/she has said orally and from what he or she has written in documents other than formal Memoranda of Wishes. While a settlor is alive, the trustees will ordinarily want to speak with him/her to learn what he/she would like the trustees to do in the new circumstances.

Section 4(a) will create difficulties for courts. In light of Parliament's instruction that 'every court must have regard to a trust's objectives', what is a court to do if no evidence is given of a settlor's intentions in the circumstances that exist at the time of a hearing? Is the Court to make inquiries of its own? Or is it to ask a plaintiff/applicant to do so?

If it asks a plaintiff to make the necessary investigation, the court may not get the right information since the interests of a plaintiff may differ fundamentally from the interests of a settlor and any information a plaintiff gives to the court may be unreliable.

If s 4(a) requires a court to learn what a settlor's intentions are in the circumstances that prevail, the court may need to make its own inquiries.

Civil law regime

Section 4(a) creates obligations that are binding on all trustees and on all courts. The section creates a regime of the type that I understand exists with the civil law regimes in Europe where the courts are empowered to initiate their own inquiries and are not confined to the evidence provided by partisan advocates.

There are bound to be teething problems with the new regime until the extent of the obligations that are imposed on both litigants and the courts are clarified in future decisions.

In the meantime, litigants seeking orders from the courts without providing the court with adequate evidence of a settlor's intentions are at risk of having their applications adjourned while evidence is obtained of the settlor's intentions.

And judges who make orders without adequate evidence of a settlor's intentions are at risk of having their orders set aside. ■

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