When a court can order mediation to resolve trust disputes

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Section 145 of the Trusts Act empowers a court to order some trust disputes to be the subject of an ADR (alternative dispute resolution) process. *S v N* [2021] NZFLR 756 may be the first case to be dealt with under the new regime.

A husband and wife were trustees of two trusts. Following their separation, they couldn't agree on most things. The tensions between them extended beyond disputes about their trusts to more serious matters. The wife applied successfully for an order against the husband for domestic violence.

They eventually agreed to resign as trustees of the two trusts and to be replaced by two Auckland lawyers.

After their resignation, the husband's lawyer filed a memorandum with the High Court, asking the court to order a mediation of a number of disputes.

Wylie J said the method of requesting the mediation was flawed. Conventionally, it should have been done by an application for directions under s 133 of the Trusts Act and not by a memorandum, he said, but nevertheless went on to consider the substance of the informal application.

Section 145, authorising the court to refer "a matter" to ADR, is not as broad as some might suspect. The section confines the court's powers to "internal matters" and "a matter". These terms are defined in s 142.

The term "matter" is defined as "a legal proceeding brought by or against a trustee in relation to a trust; or a dispute … between a trustee and a beneficiary or between a trustee and a third party, or between two or more trustees that may give rise to a legal proceeding".

An "internal matter" is defined as being "a matter to which the parties are a trustee and one or more beneficiaries, or a trustee and one or more other trustees, of the trust".

Some lessons can be learned from the application:

- The court cannot submit a matter to an ADR process "if the terms of a trust indicate a contrary intention": s 145(1)(b). Wylie J held that the terms of the two trusts did not contain "a contrary intention".
- He held that the s 145 procedure does not authorise a court to require that "a dispute about the validity of all or part of a trust" can be made the subject of a compulsory ADR process. Only "internal matters" – a term that incorporates the separately defined term "matter" – can be the subject of a s 145 order.
- Some of the issues that the husband wanted to mediate had "nothing to do with a trust" and did not fall within the definition of "matters" or "internal matters".

If the court is satisfied that the issues an applicant wants to have resolved by ADR fall within s 145, it has a discretion to refuse to order an ADR process. The court declined to exercise its discretion for three reasons.

First, the court had previously made some consent orders and the husband had "agreed that the various matters he now seeks to mediate should be determined by the independent trustees. … The trustees have not as yet completed these tasks, and in my view, the court should be slow to undermine its existing orders".

Second, the husband was the subject of a domestic violence order involving the wife and her compulsory attendance in a mediation, even by a Zoom link, "would perpetuate the abuse to which she says she has been subjected". The judge added: "It is counterintuitive to force people to attend a mediation when they do not wish to do so. … Forcing an unwilling party, with the benefit of a protection order, to attend a mediation insisted on by her abuser is not an attractive proposition."

Third, the husband had "breached court orders" and "given the patently obvious absence of any goodwill between the parties, it is difficult to see that mediation would achieve anything. … It would force [the wife] into a distressing and unwelcome confrontation with [the husband] and inevitably involve her in additional cost and delay".

Most lawyers involved in mediations will be able to identify cases where the prospect of success is too remote to justify going through the process. They can accurately predict that a mediation will fail, and that the parties will simply be wasting their time and money on the exercise.

Lawyers with this experience may have had concerns that the court could use its powers under s 145 to order mediations that are doomed to fail.

But they can take some comfort from Wylie J's decision. There may be several good reasons why the court should not order a mediation and many judges have had sufficient exposure to the reality of mediations to know when it is not appropriate to order one. ■

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Anthony Grant is an Auckland barrister specialising in trusts and estates. ■