

Removing a trustee for ‘failing to give real and genuine consideration’ to relevant facts

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Trustees must “inform themselves ... of matters that are relevant to [a decision]” and act “in good faith, responsibly and reasonably”. Robert Walker J said this in *Scott v National Trust* [1998] 2 All E R 705.

In *Karger v Paul* [1894] VR 161, McGarvie J held that trustees must act “upon real and genuine consideration and then in accordance with the purposes for which [their] discretion was conferred”.

These principles were recently applied by the Court of Appeal in Victoria in *Owies v JJE Nominees Pty Ltd* [2022] VSCA 142.

In the *Owies* case, two parents established a family trust, essentially for the benefit of themselves and their three children. As years went by, the parents became alienated from two of their children. One of the two children was in serious financial need and for

years the trust, which had substantial assets, made no provision for her.

The trustee was a company and at the outset, the parents were its directors. As time went on, the parents died and the two replacement directors were their third child and a family solicitor.

Both directors have been held by the Court of Appeal of Victoria to be in substantial default of their duties.

As is often the case with family trusts, the original intention of a trust can change over time in response to different family dynamics. While the *Owies* trust was intended from the outset to benefit the parents and their three children, two of them became alienated from their parents.

Sections 4(a), 21, 26(b) and 27 of the Trusts Act 2019 provide that trustees must give effect to “the purpose” and “objectives” of a trust. There is a similar legal requirement in Victoria. It was held that the change in family dynamics should not be allowed to convert a trust that was intended for the five family members into a trust that would benefit only three of them.

The failure of the directors of the corporate trustee to obtain sufficient information about the



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two children’s circumstances and to exercise their discretion after “a real and genuine consideration” of the relevant information was sufficiently bad, along with other factors, to justify the removal of the trustees and be replaced with an independent trustee who was free from family influences.

The *Owies* decision is well-written, well-researched and compelling.

The risk that the trustees will be removed and replaced by non-family members, especially in trusts with substantial wealth, for failing to make appropriate inquiries into the circumstances of the beneficiaries and for failing to give “a real and genuine consideration” to their need for provision, should be a wake-up call to trustees in many trusts who over the years have become autocratic and insensitive to the needs of those beneficiaries who deserve assistance.

The requirement that trustees must give “real and genuine consideration” to beneficiaries will, I suspect, become a more common cause of action in the years ahead. ■

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