

TRUSTS & ESTATES LAW

When is it unlawful to have a corporate trustee?

By Anthony Grant

Most lawyers and accountants these days will agree to act as trustees only via a corporate trustee.

They don't want to be trustees in their personal capacity because of the increased responsibilities and liabilities being imposed on trustees.

But many lawyers who want to escape personal liability and transfer their personal trusteeship to a corporate trustee will be surprised to learn they can't always do this.

Section 43(2)(c) of the Trustee Act provides that where two or more trustees were originally appointed "a trustee shall not be discharged... unless there will be either a trustee corporation or at least two individuals to act as trustees to form the Trust." [My emphasis]

A "trustee corporation" is defined in the Act as being "Any corporation authorised by any Act of the Parliament of New Zealand to administer... trust estates." For practical purposes there are two main trustee corporations: the Public Trust and NZ Guardian Trust.

Many lawyers appear not to know that a "trustee corporation" is completely different from a "corporate trustee." The Trustee Act provides that a "trustee corporation" can be a sole trustee but s 43(2)(c) prevents a corporate trustee – which is fundamentally different from a "trustee corporation" – from being appointed a replacement trustee for a human unless the Deed of Trust expressly permits it.

The operative words in s 43(2)(c) are "two individuals." The word "individuals" in the equivalent English statute was interpreted in *Jasmine Trustees Ltd v Wells & Hind* [2007] EWHC 38 (Ch) as meaning humans and not companies.



Anthony Grant

The process of reasoning by which the court reached this conclusion was detailed and compelling, and the judge who made the ruling is widely respected for his competence.

The New Zealand High Court has confirmed that the word "individuals" means humans and does not include companies: see *Greenpeace v Electoral Commission* [2014] NZHC 2135, para 108.

What then is the effect of appointing a corporate trustee under s 43(2)(c) when that section requires the replacement trustee to be a human?

Answer: the effect is disastrous. The *Jasmine* litigation involved claims against two law firms for negligently arranging for the appointment of a corporate trustee when the English equivalent of s 43(2)(c) required that the replacement trustee must be a human.

It was held that the original trustees had not successfully retired and all the decisions of the successor trustees were invalid since the original trustees had not been party to those decisions. This included distributions of trust property,

the retirement and appointment of trustees, the discharging of trustees and the postponing of vesting of an interest.

The *Jasmine* decision is of no current relevance in England since the word "individuals" in their statute was replaced many years ago with the word "persons" and it is well understood that the word "persons" includes companies. In England, a human trustee can therefore resign in favour of a corporate trustee.

So the problem is currently confined to New Zealand.

Will this problem be fixed if the Trusts Bill is enacted? To the extent that corporate trustees have been wrongly appointed in the period prior to the enactment of the Trusts Bill, there is no provision that will validate the erroneous appointment of a corporate trustee.

This means lawyers who negligently arrange for a corporate trustee to be appointed will be liable to be sued in negligence for all the consequences of their actions.

As for "retiring" trustees, being people whose retirements were invalid, and their successor trustees, I assume they too will be personally liable for the financial consequences of their actions and inactions.

Can the High Court overcome the constraints of s 43(2)(c) by using its inherent jurisdiction to appoint a corporate trustee when s 43(2)(c) forbids continuing trustees from making such appointments?

Answer: Justice Gerard van Bohemen was asked this question a couple of weeks ago and he has reserved his decision. If he decides to answer the question (and he doesn't have to) I'll write about it.

Anthony Grant is a trusts and estates litigator

