TRUST LAW

Is your trustee exemption clause invalid?

By Anthony Grant

Professional trustees want the protection of exemption clauses, but the Trusts Act 2019 may disappoint them.

When the Act comes into force in January 2021, clauses exempting trustees from liability for "dishonesty, wilful misconduct or gross negligence" will be invalid: s 40.

If a Deed of Trust can be amended, the current exemption clause should be changed in two ways before January next year. Words purporting to exonerate a trustee for acts of "dishonesty," "wilful misconduct" and "gross negligence" should be removed, and possibly any words that are synonymous with them.

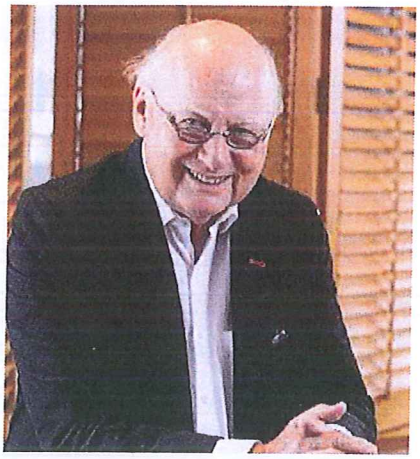
Second, those terms should be replaced with references to acts that the Trusts Act does permit settlors to include in exemption clauses.

If the Deed of Trust cannot be amended without an order of the court, it may be necessary to (a) get a court order to allow the modification or (b) resettle the assets of the trust onto a more flexible Deed of Trust, if that is permitted under the applicable Deed of Trust.

The next question is, "What acts does Parliament permit trustees to include in exemption clauses and indemnity clauses?"

Section 40 was recommended by the Law Commission, but not all its recommendations were accepted.

In paragraph 3.57 of its report *Review of the law of Trusts, Preferred Approach* it said, "We consider that it should be possible to protect trustees from the consequences of their own negligence." This positive move was partially undone by paragraph 3.61 which said trustees ought not to be permitted to exclude liability "for a negligent breach of a mandatory duty." (The Act specifies several mandatory duties and a number of default duties.)



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But Parliament didn't accept this proposal and it appears trustees can exclude liability for breaches of trust and acts of negligence which do not reach the standard of "dishonesty, wilful misconduct or gross negligence."

Exemption clauses should therefore be reworded to exempt trustees from liability for acts of negligence that are not as bad as "gross negligence" and from breaches of trust.

My last article in *LawNews* concerned the disclosure of trustee's reasons and I recommended it might be sensible for some Deeds of Trust to be amended.

When I wrote that article, I had not researched s 40 and the suggestions I made in that article for amendment or exemption clauses should be considered in the light of what is written in this article.

Book review

Assessment of Mental Capacity – a New Zealand Guide for doctors and lawyers VUW Press 2020, by A Douglass, G Young & J McMillan.

This substantial book of about 600 pages was published a few months ago and deserves a full review. I write about three aspects that I think should be treated with some caution.

The first concerns the degree of cognition that is needed to dissolve a marriage. This subject is dealt with at page 263 but there is no mention of Judge McHardy's decision in *Downer v D* [2015] NZFC 9217 that a litigation guardian has authority to seek the dissolution of a person's marriage.

That case also deals with the degree of mental capacity needed (a) to marry and (b) to dissolve a marriage, both of which deserve discussion in a text on mental capacity law in New Zealand.

The second aspect concerns testamentary capacity. In *Loosley v Powell* [2018] 2 NZLR 618 the Court of Appeal added some important glosses to *Banks v Goodfellow*.

The trial judge in that case was Courtney J. Amongst other deficiencies, the authors misspell her name on three occasions; on a fourth they say that Winkelmann J was the trial judge; they say Courtney J's judgment "was upheld in the Court of Appeal" when her reasoning was set aside by that court (see paragraphs 39-44); they say the case "turned on its facts, as interpreted by the trial judge" when the trial judge's assessment of the facts was set aside; and they omit two references to the case in the book's index.

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Of greater significance, the authors do not refer to the way the Court of Appeal in the *Loosley* case downgraded the significance of *Banks v Goodfellow* by saying the long-established principles from that case should now be seen as no more than some "guiding propositions rather than a formula".

The third aspect concerns capacity assessments.

The authors say the Medical Council of NZ considers a GP is an appropriate person to undertake a capacity assessment and, alarmingly, it is even suggested nurses could be expected to undertake capacity assessments.

Yet the authors' own research indicates "around one third [of doctors] were uncertain how to do a capacity assessment to a high enough standard to present in court" and the checklist given in the book for doctors to use may lead to assessments that are vulnerable to rejection by a court.

In particular, physicians who undertake capacity assessments of people who are about to sign legal documentation need to have comprehensive details of the nature of the transaction so they can test a person's knowledge of it and learn whether the person has been able to assess the risks and consequences appropriately.

I have seen assessments made where an assessor has had a minimal knowledge of a proposed transaction which might include trust documentation, a will, a memorandum of wishes and documents transferring assets to the trust.

The capacity assessor needs to have a full understanding of – among other things – all the elements of such a transaction, together with details of the person's other assets, to be able to assess that person's comprehension of the transaction and willingness to accept the associated risks.

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