Why trustees **must keep** good records

There is a widespread misunderstanding about the length of time for which trust records should be kept

Anthony Grant

Sections 45 – 48 of the Trusts Act 2019 impose various obligations on trustees to maintain records about a trust. In my experience, it is surprising how many trustees fail to comply with these obligations.

The statutory requirements provide that trustees must keep not only what I will call "primary" documents (including the trust deed, any variations of it and details of trust assets and liabilities) but also retain records of all trustee decisions. This obviously includes decisions about distributions to beneficiaries.

If a trust requires unanimity and if it allows majority voting, then details of voting should be recorded. If a trust prohibits self-dealing, details of who voted for a distribution to a trustee beneficiary should be recorded.

I sometimes get the impression that some trustees think a failure to keep proper records will mean they will be immune from criticism since a court will not know whether a decision complied with the terms of the trust.

A failure to comply with these obligations to keep proper records may be expensive. If distributions have been made to beneficiaries without an adequate record of whether the trustees have complied with their obligations, they may be personally liable to restore the funds to the trust. Beneficiaries, too, may be liable to repay distributions to the trust if it cannot be shown that the distributions they received were made in compliance with the terms of the trust deed.

Another aspect of record-keeping by trustees should be mentioned. In my experience, there is a widespread misunderstanding about the length of time for which trust records should be kept. I have seen cases where accountants have destroyed all trust records after a period of years. This is not lawful. Trust records are to be maintained indefinitely. Each trustee is required by s 45(e) of the Trusts Act to keep "records of … decisions made during the trustee's trusteeship" no matter how long the trusteeship lasts.

Section 47 has a slight modification to this rule. It provides that "a trustee must keep, so far as is reasonable, the documents for the duration of the trustee's trusteeship". The words "so far as is reasonable" may relieve a trustee for failing to maintain some records but a court may be unsympathetic to a trustee who has not kept proper records in an era when computers can store huge amounts of information electronically.

As all trust practitioners will be aware, the courts are steadily requiring higher standards of competence from trustees, and this will apply to record-keeping.

An incidental expense for non-complying trustees will be the costs of litigation about an absence of proper records since trustees who fail to keep proper documentation may not be able to recover their costs from the trust and may have to pay the costs personally.

I write about this subject because of the failures I see in some of the cases I have to deal with in practice, and also from reading a recent decision in Australia where the degree of non-compliance with record-keeping was truly outstanding.

The decision did not record the costs outcome but had the case been decided in New Zealand under the terms of ss 45 – 48 of the Trusts Act, it is likely that the trustees would have been personally liable to pay the full legal costs of a very complicated hearing. ■

Anthony Grant is an Auckland barrister and trustee, specialising in trusts and estates