TRUST LAW

Must trustees disclose reasons for their decisions?

By Anthony Grant

Can trustees be forced to disclose the reasons for their decisions and provide copies of documents relating to them?

This topic is of concern to many trust professionals at present.

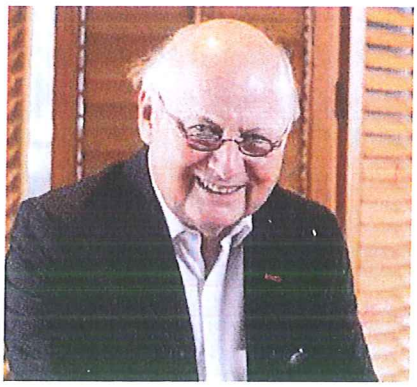
My answer is in two parts: the first is to record what judges have said in the exercise of their inherent jurisdiction concerning the law of trusts; the second is to indicate what Parliament has enacted on this subject.

Dealing with the first part, Nation J recently summarised the law in *Gavin v Powell* [2018] NZHC 2866 – a case in which, incidentally, I appeared as counsel for the successful applicant.

> "The rule under the trust supervisory jurisdiction, that the court will not order disclosure in favour of a beneficiary of the trustee's reasons for exercising a power or discretion, and normally will not order disclosure of documents concerning the trustee's reasons, does not exclude the obligation to give disclosure of documents... in litigation when the validity or propriety of the trustees' action is impeached or otherwise some other relief is sought beyond the provision of disclosure itself. Similarly, in such litigation the trustees can be required... to provide further information about the reasons and can be cross-examined at trial about them."

In saying this the judge relied in part on Dal Pont & Chalmers' *Equity and Trusts in Australia and New Zealand* 2nd ed at 622 where the authors said:

> "If a decision taken by trustees is directly attacked in legal proceedings, the trustees may be compelled legally through discovery or subpoena, to disclose the substance of the reasons for their decision. Moreover, if a plaintiff puts forward a prima facie case that the trustees' discretion has miscarried, the absence of reasons and the absence of any evidence before the court as to what happened will tend to make that prima facie case 'a virtual certainty.' So, trustees may be compelled practically to disclose reasons for the decision in issue in order to avoid adverse inferences from being drawn. If the trustees divulge reasons for their decisions, the court may then assess the correctness of the reasoning."



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In short, if a beneficiary simply wants to learn what a trustee's reasons were, and no more, the trustee can generally withhold them.

The situation is different if a beneficiary seeks relief beyond the disclosure of the reasons. If, for example, there is an application to set aside the decision because "the validity or propriety of the trustee's action is impeached" or "some relief is sought beyond the provision of disclosure itself," there may be an obligation to provide the reasons and to disclose documents that relate to them.

The recent Bermudan decision of *In the matter of the R Trust* [2019] SC (Bda) 36 Civ (3 June 2019) shows another pathway the courts have created in their inherent jurisdiction.

In that case, Hargun CJ was asked to approve a "momentous decision" that trustees proposed to make. The wife objected to the proposed decision but her objections were overruled. The judge said:

"In my judgment there is no obligation on trustees to explain specifically why a particular wish of the settlor was not followed by the trustees. For the purposes of this application, it is sufficient for the trustee to explain the relevant factors it took into account in coming to the decision and that the decision made by the trustee is a reasonable one in the sense that it is a decision which could be made by a reasonable body of trustees."

So, in seeking approval by a court for a proposed decision, trustees were obliged to disclose the factors they took into account when reaching their decision.

Similar reasoning would apply to the Court of Appeal's requirement that when trustees consider whether to implement a Memorandum of Wishes, they must take account of "all relevant factors": see *Chambers v S R Hamilton Corp Trustee Ltd* [2017] NZCA 131.

If the trustees say they took account of six identified factors in reaching their decision and it can be shown there were three other highly

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relevant factors of which the trustees were not aware because they had not made adequate inquiries, the disclosure of the six factors will reveal their decision was made without proper consideration.

In this way, a requirement to disclose the factors taken into account may expose trustees to the risk that their decision will be set aside for failing to take account of other relevant factors.

So much for a brief summary of the way the courts have considered this subject in their inherent jurisdiction. But what of Parliament?

The Trustee Act provides in s 68 that a person with a beneficial interest in a trust can apply to the court to review acts and decisions of trustees.

This provision has been interpreted cautiously. Kós J said in *Jaspers v Greenwood* [2012] NZHC 2433 that "section 68 does not confer upon the High Court the role of general court of appeal from trustees' decisions. The relevant beneficiary grievance must involve the exercise (or intended exercise) of a trustee power in a manner that is *ultra vires*, vitiable on the basis of relevance of considerations or bad faith, or unreasonable in a Wednesbury sense. In other words, the ordinary means of review of the exercise of a statutory power." [22]

Section 68 will cease to have effect in January next year when the Trustee Act expires and the Trusts Act 2019 comes into effect.

In place of s 68 there is a new provision giving trust professionals some concern. It is s 126.

This provision authorises the court to "review the act, omission or decision (including a proposed act omission or decision) of a trustee on the ground that the act, omission or decision was not or is not reasonably open to the trustee in the circumstances."

I will write about it in my next article.

Anthony Grant is an Auckland barrister specialising in trusts and estates law. He is a presenter of the Cradle to Grave™ Conference on 7 May.