TRUST LAW

Worthless indemnity clauses: another trustee hurdle

By Anthony Grant

Today's article is based on a decision of the Court of Appeal of Victoria, Australia: *Wareham v Marsella (No2)* [2020] VSCA 118, 13 May 2020.

Beneficiaries asked trustees to resign but they refused to go.

The dispute went to trial and the trustees lost. When it came to the question of costs, they said they weren't liable since the Deed of Trust under which they were appointed said they were "not... liable for... any claim, liability, cost... or expenses whatsoever arising in connection with this deed or the exercise or performance of the trustees' powers, discretions and duties."

Another clause was even more comprehensive. It said they "shall be indemnified out of the fund for all liabilities whatsoever" and you can't get much wider wording than that.

But the Court of Appeal said the trustees couldn't rely on either clause. It said an order of costs "sits outside" the indemnity provisions of a Deed of Trust.

The critical question was whether the trustees had engaged in litigation which "raise[d] a question as to a matter of administration of the trust" [18] or whether the trustees had engaged in the litigation "in their own self-interest" [20]. If they had engaged in the litigation "in their own personal interests" [15], the indemnity clauses would have no effect.

Trustees who defend applications for their removal will inevitably say they do so to support the interests of the trust rather than their own interests. But the court may conclude they were primarily seeking to "support [their] own interests".

In summary, the Court of Appeal of Victoria says trustees who engage in litigation of whatever nature for the purpose of supporting their own position will not be entitled to the benefit of indemnification clauses and will be personally liable to pay the legal costs they incur, as well as any award of costs that may be made in favour of the successful beneficiaries.

Are the New Zealand courts likely to follow this precedent?

I suspect they will. The paper I delivered at the ADLS *Cradle to Grave*™ conference this year gave details of different circumstances in which New Zealand courts have been ordering trustees to pay not only their own costs but also the costs of other parties.

At that conference I talked about major themes developing within the law of trusts, and the increased imposition of cost awards on trustees was, is my opinion, the most significant theme that trust lawyers should be aware of at present.

And the trend to impose costs on trustees is not confined to this country. *The Wareham* case shows it applies in Australia.

It also exists in England. For example, in *Perry v Neupert & Others* [2020] WTLR 221 an executor opposed an application for his removal but later changed his mind and agreed to go. It was held that he should pay 85% of the claimants' costs as well as his own costs, and he was not allowed to be indemnified by the estate for the period of his opposition. This was because his stance had been "partisan" and neither "reasonable nor proper".

In a second case – *Price v Saundry* [2020] WTLR 233 – it was held that in unsuccessfully defending herself against claims of breach of trust and serious misconduct, a trustee was clearly acting on her own behalf and not that of the trust.

It was said to offend all sense of justice to allow a trustee to recoup from the trust the costs she incurred in unsuccessfully defending herself from claims of breaches of trust and serious misconduct.

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What does this mean for trustees and executors?

It means if they face claims that they have acted in breach of their duties, and if the claims are upheld, they are likely to be personally liable to pay not only the costs they incur in defending themselves but also any costs that are likely to be awarded to the successful claimants.

All barristers know that litigation bears a close resemblance to a lottery. Cases that appear to have very strong prospects of success can be lost and cases that appear to have very poor prospects of success can be won. Predicting the outcome is impossible.

Faced with these difficulties, I think it likely that many trustees will prefer to resign when they are opposed, rather than stand and fight.

This will embolden unreasonable claimants to make threats against trustees in the knowledge that aggressive intimidation may lead to capitulation.

I would like to think courts would not see these disputes in the stark colouration of black and white and would be sensitive to disputes that are coloured grey – where trustees have acted honestly and sensibly and don't deserve to be condemned in costs even though they may have fought and lost.

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