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New Zealand's Trusts Bill: giving beneficiaries free rein to information or just business as usual?

The release of a select committee report on the Trusts Bill (the Bill) from the New Zealand Parliament[1] has caused some concern, primarily due to its provisions covering the disclosure of information to beneficiaries.

Since the mid-1950s, trust law in New Zealand has been left to develop through the courts. Case law has produced an array of trust law principles since the *Trustee Act 1956* (the Act), and it is these principles that the Bill now aims to set out and clarify in legislation. Therefore, it only makes sense that the majority of differences between the Bill and the Act are of little surprise as they are already well-established in case law. The same applies to the information disclosure provisions that cover the presumption for disclosure (and the exceptions) found in the New Zealand Supreme Court's decision in *Erceg,*[2] which replaced the UK Privy Council's decision in *Schmidt*[3] as the leading authority in New Zealand for this issue.

Disclosure to beneficiaries

The concern arises where the Bill, introduces a presumption under clause 47(1) that '…a trustee must make available to every beneficiary the basic trust information'. The Bill defines 'basic trust information' as:

- the fact that a person is a beneficiary;
- the name and contact details of the trustee;
- the details of appointments, removals and retirements of trustees as they occur; and
- the right of the beneficiary to request a copy of the terms of the trust or trust information.

Incorporating these principles into trust legislation adds nothing to the common law as it currently stands, it merely clarifies and creates certainty around the trustee's 'duty to disclose information'.

There are three principal areas where concern has been expressed. Firstly, that beneficiaries may, in obtaining information, 'attack' the trust and question the decisions of the trustees; second, that the interests and needs of individual beneficiaries may be different, and in some circumstances, the trustee may have concerns about advising the individual that he or she is a beneficiary; and third, how a trustee can ensure the information reaches every beneficiary, given that classes of beneficiaries can be very broad.

However, the requirement to pass information to beneficiaries is not absolute; there are exceptions.

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[1] Both the Bill and the select committee report can be viewed in full at: www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_74746/trusts-bill.
[2] *Erceg* v *Erceg* [2017] NZSC 28.
[3] *Schmidt* v *Rosewood Trust Ltd* [2003] UKPC 26.

Legal presumptions and exceptions

The presumption in clause 47(1) is consistent with *Erceg*, where in line with the 'irreducible core obligations' in *Armitage,*[4] the Court held there is a duty to account to the beneficiaries of the trust.[5] Consistent with the decision of the Supreme Court in *Erceg*, there are a number of factors that a trustee must take into consideration before providing the information.

Clause 49 provides for a list of 13 factors that the trustee must take into consideration before deciding whether it is appropriate to provide the information to the beneficiary, of which three are particularly important:

- Whether the information is subject to personal or commercial confidentiality. This will apply to many trusts holding intellectual property or interests in active businesses;
- The settlor's intentions as to beneficiary information disclosure. Often a settlor's letter of wishes expresses an expectation that certain beneficiaries not know of the trust or be provided with certain information; and
- The effect on the trustees, other beneficiaries, and third parties of giving the information. This allows the trustee to consider a wide array of interests.

These factors are comprehensive, and if they do not provide the trustee with the reassurance it seeks, clause 49(m) allows them to consider 'any other factors that the trustee reasonably considers are relevant to determining whether the presumption applies'.

The same presumption to disclose information and its exception apply equally to the more in-depth 'trust information' under clause 48. It is important to note that here, 'trust information' does not include reasons for trustees' decisions.

Clause 50 covers the procedure that applies when the trustee decides not to provide the information. Here, the trustee must apply to the court for direction that the decision to withhold information was reasonable. However, under clause 50(3), if one beneficiary already has the basic trust information, this will not apply, and the trustee will be free to exercise its discretion not to provide the information to the other beneficiary or beneficiaries.[6]

Conclusion

In summary, the Bill provides a welcome clarification and consolidation of New Zealand trust principles. In spite of concerns regarding the scope of the Bill, little has changed concerning the premise that a trustee should disclose information to beneficiaries. It would certainly be recommended, though, that settlors' advisors review their trusts to ensure that the trusts or letters of wishes sufficiently and expressly record the settlor's wishes regarding information disclosure. That way, when faced with a beneficiary information request, both the settlor and trustee can rely on this consideration (amongst

[4] *Armitage v Nurse* [1998] CH 241 (CA).
[5] *Erceg* v *Erceg*, above n 2, at [51].
[6] Clearly this will be easily satisfied where the settlor is also a beneficiary.

others) that the disclosure would be contrary to the settlor's intentions and the terms of the trust and may adversely impact the trustees, other beneficiaries of the trust, and/or third parties.

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