COUNT YOUR BLESSINGS

Geoffrey Cone, Claudia Shan and **James Gribbin** review the recent New Zealand judgment in *Re PV Trust Services Ltd* on obtaining the court's blessing without sacrificing discretion

KEY POINTS

WHAT IS THE ISSUE?

The trustee in the judgment of *Re PV Trust Services Ltd* was faced with having to make a 'momentous decision' regarding the distribution of the trust's final balance in particularly exceptional circumstances. The trustee sought the court's blessing for its proposed cause of action. The second-category-type decision for a 'blessing order' from *Public Trustee* v *Cooper* had not yet been extended to New Zealand.

WHAT DOES IT MEAN FOR ME?

Many other common-law jurisdictions have similar provisions and principles regarding the trustee's ability to apply to the court for directions in the exercise of their discretion. This judgment clarifies the New Zealand position and relies on various English and Welsh cases in its reasoning.

WHAT CAN I TAKE AWAY?

These types of blessing order applications are a very useful pre-emptive remedy for trustees faced with circumstances that are likely to lead to a dispute. This judgment confirms the place of *Cooper*'s category-two-type decisions in the context of s.66 applications in New Zealand. The judgment expands the jurisdiction of this section, the benefit of which will continue under the *Trusts Bill*.

SECTION 66 of New Zealand's *Trustee Act 1956* (the Act) allows trustees to apply to the court for directions covering the exercise of their powers and discretions. It provides the statutory basis for the court's exercise of its inherent jurisdiction and is an enactment of the English and Welsh Chancery Court's 'broad equitable jurisdiction', reflected in the *Civil Procedure Rules*.[1]

Receiving the court's 'blessing' on a proposed course of action that represents a 'momentous decision' is a desirable pre-emptive remedy for a trustee faced with a complex situation where there is potential for a dispute to arise. Under s.69 of the Act, trustees acting under directions of the court are deemed to have discharged their duties in relation to the subject matter of those directions and are thus protected from future related claims. The decision of *Public Trustee* v *Cooper* is the English authority for these types of 'blessing orders'.[2] In this case, Hart J set out four categories where a trustee might make an application for the court's directions:[3]

- whether the proposed action is within the trustee's powers;
- whether the proposed course of action is a proper exercise of the trustee's powers in a situation where there is no doubt as to the nature of the trustee's power, yet the decision proposed is particularly momentous;
- where there is a surrender of discretion due to the trustees being limited by a deadlock or conflict of interest; and
- where the trustee has already taken the action, which is then being attacked in proceedings.

RE PV TRUST SERVICES LTD

Re PV Trust Services Ltd (*PVTS*) is the first New Zealand case applying the principles of *Cooper* in the context of a category-two-type incident.[4] The judgment is an extension of the jurisdiction afforded by s.66 and is a development of *Marley*, a UK Privy Council decision that limited such claims to circumstances where the trustee is in 'genuine doubt'.[5]

THE FACTS

The judgment concerned a trust fund worth approximately USD11 million; these funds had been the joint assets of the settlor and her daughter. The daughter was not named as a settlor, yet she was a beneficiary with a life interest and would often provide their advisor with instructions on her and her mother's behalf. The settlor wrote a letter of wishes outlining that, on her and her daughter's deaths, the first USD3 million would be distributed to a foundation; USD2,000 a month would be provided to a family employee, 'MM'; and the remainder would be distributed to various charities. The settlor indicated that she would later give directions regarding the final balance of the trust fund.

The settlor died in 2014 and her daughter died unexpectedly in 2015, without further directions being given to the trustee. Shortly before her death, the daughter provided the advisor with an incomplete handwritten list of final beneficiaries. She discussed finalising the list in a series of messages with him, but this never happened. Also relevant was a conversation recollected by her executor where she had mentioned several persons and entities who should benefit from the final balance. In the daughter's will, she left the balance of her estate to her close friends, A and B.

The trustee considered (and Justice Fitzgerald agreed) that these notes and recollections were too vague and informal to result in those persons being appointed as default beneficiaries. The trustee was faced with a problem: to give effect to the settlor's letter of wishes would mean holding approximately USD11 million until the 2090 vesting day or such date as the trustee nominated. As there were no default beneficiaries, the trust fund would be held under a resulting trust for the deceased daughter's estate, as she was the sole heir under the settlor's will. Under the daughter's will, A and B would then benefit, but by 2090 they would dead.

To give best effect to the wishes of settlor and her daughter, the trustee proposed the following solution:

- Set aside USD1 million to make the monthly payments of USD2,000 to MM for the remainder of her life.
- Distribute USD3 million to the foundation.

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- Distribute USD3,163,152 to associations dedicated to cancer and diabetes research. This was the amount calculated to be the total dividends that these associations would otherwise have received if the trust were to continue until its 2090 vesting day.
- Appoint A and B as beneficiaries and distribute to them the final amount of approximately USD7.8 million in equal shares.
- Following the death of MM, distribute the remainder of her USD1 million allocation for her income to A and B in equal shares.[6]

THE REASONING AND DECISION

Although the trustee, at its discretion, believed this was the best course of action, it was nonetheless a 'momentous decision' that it did not want to make without the support of the court.

Fitzgerald J relied on the decision of *Marley* in holding that the trustee was able to apply for directions for such a significant decision, as the mechanism could apply to 'any contemplated course of action'.[7] However, contrary to that same decision, in applying the reasoning from *Cooper*,[8] she held that the trustee need not be in 'genuine doubt' in order to make a s.66 application.

Fitzgerald J adopted the following principles of the second category from *Cooper*, which were stated to be relevant considerations for making blessing orders:

- whether the trustee had in fact formed the opinion in question;
- whether the opinion formed was one that a properly instructed trustee could reasonably and properly arrive at; and
- whether the opinion was vitiated by any conflict of interest on the part of trustee.

Ultimately, Fitzgerald J considered the trustee's proposed course of action to be both proper and lawful.[9] It was 'lawful' due to it falling within the trustee's wide-ranging discretionary powers under the trust deed. With particular regard to the unusual facts, Fitzgerald J held that the proposition was 'proper', as the trustee had genuinely formed the view, which was both reasonable and in the interests of the trust and its beneficiaries. The trustee received the court's blessing.[10]

WHAT THIS MEANS FOR TRUSTEES AND PRACTITIONERS

In extending s.66 applications to *Cooper* category-two-type directions, Fitzgerald J has provided New Zealand trustees with an extremely useful protection mechanism. It is important to note that the court will not hand out these blessings like they are pamphlets. Due to the potential for beneficiaries to be disadvantaged by improper orders, trustees must present a comprehensive case after they have properly considered the facts and potential implications. The court is in a position to withhold its approval if it is left in any doubt.[11]

Fitzgerald J herself commented on the wider context of the decision by noting that, in light of the unique trusts landscape that New Zealand enjoys,[12] such an extension of s.66 'could indeed be useful in the New Zealand context'.[13] New Zealand's *Trusts Bill* is nearing its enactment into law and will set out, in clear and concise legislation, well-established common-law principles that provide beneficiaries with sufficient safeguards, rights and claims to ensure that trusts are properly given effect to.[14]

The equivalent of s.66 is found in clause 125 of the *Trusts Bill*. There is little substantive change in the drafting; it merely clarifies that applications must be served in accordance with the rules of the court and that such an application does not restrict the availability of alternative proceedings within the court's jurisdiction.[15] It is likely that the same decision would have been reached under the new Bill.

CONCLUSION

PVTS is an important case for New Zealand trustees and practitioners. It is logical in its reasoning and confirms the place of *Cooper*'s category-two-type decisions in the context of s.66 applications. Although the costs of such an application must be weighed up by the trustee, if the proposed decision has the potential to lead to a dispute, then the mechanism provides the trustee with an opportunity to defuse the bomb before it starts ticking. This benefit will continue under the *Trusts Bill*, which is expected to be passed into law within a year.

1 *Civil Procedure Rules 1998* (UK), pt 64.2 and *Practice Direction 64B* **2** *Public Trustee* v *Cooper* [2001] WTLR 901 (Ch) **3** At [922]–[924] **4** *Re PV Trust Services Ltd* [2017] NZHC 2957 **5** *Marley* v *Mutual Security Merchant Bank and Trust Co Ltd* [1991] 3 All ER 198 (PC) at [201] **6** Above, note 4 at [4]–[33] **7** Above, note 5 at [201] **8** Above, note 2 at [925] **9** These are the two qualifications for such an assessment as summarised in David Hayton et al., *Underhill and Hayton Law of Trusts and Trustees*, 19th edn (London: LexisNexis, 2016) at [85.7] **10** Above, note 4 at [35]–[67] **11** At [55] **12** It is estimated that there are between 300,000 and 500,000 trusts in New Zealand, roughly one trust between every 10–15 people. Ministry of Justice, *Key Initiatives – Trust Law Reform* (4 August 2017), Justice Sector and Policy, www.justice.govt.nz **13** Above note 4 at [54] **14** *Trusts Bill 2018* (290-2) **15** At cl 125

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