

STEP Geneva

New Zealand Trust Case Law: How to Use It



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History of New Zealand Trust Law

New Zealand became an English colony in 1840.

English Laws Act 1858

“The laws of England as existing as at the 14th day of January 1840, shall ... be deemed and be taken to be in force on or after that day ...”

This included all case law, and statutory laws.

New Zealand has never had a codified legal system



Origins of New Zealand Trust Law

New Zealand Trust law is derived almost entirely from cases decided by the English courts, going back to 1224.

Trust law was developed by a special court – the Court of Chancery – which developed its own system of law, called the Law of Equity. This law was merged with the Common Law System in New Zealand in 1908.

These rules continue to apply – even the new Trust Legislation being developed in New Zealand states that existing rules of law developed by the courts, and as well law to be developed by the courts, will continue to apply.



Topics

New Zealand Trusts are very open and flexible. These are examples of way in which this flexibility may be obtained:

- Resettlement of Trusts
- Settlor Control and Sham Trusts
- Trust Advisors



Resettlement of Trusts

Power of Advancement

A power of advancement is a power that enables trustees to pay or apply capital, to, or for the benefit of a beneficiary. Trustees may do this by creating a new trust for that beneficiary.

This power is implied in to all New Zealand trusts.

This power can in fact be used to benefit persons who were not originally beneficiaries, or people related to the original beneficiaries.



Kain v Hutton

Kain v Hutton (2008)

The capital of a trust was to be held for the settlor's sister's children and grandchildren. The trustees resettled the trust, and added the settlor's wife's children as beneficiaries. The settlor's wife had a power of appointment.

The Supreme Court applied the principles in *Pilkington v IRC* (1964) and held that it was possible for the trustees to appoint additional beneficiaries to the new trust, as the settlor and the appointer had a “moral duty” to those beneficiaries.



Shams

Pugachev (2017)

This was a New Zealand Trust, with a Russian settlor.

The settlor was discretionary beneficiary and protector. He had an unrestricted power of appointment of beneficiaries. Was he divested of control?

The English judge applied Clayton v Clayton (NZ) (2016). The settlor was held to be able to exercise his powers under the trust for his own benefit. Therefore the trust was a sham.



Compare Goldie v Campbell (2017)

Here the settlor had some control but:

- He could not remove beneficiaries
- There was a no benefit clause in the trust document; the settlor could not exercise his power for himself
- The trust was upheld



Trust Advisers

Historically, New Zealand was commonly used by wealthy English families as a trust jurisdiction.

But the distance between New Zealand and Great Britain was so great, that some means had to be found whereby a New Zealand trust could be managed from the other side of the world.

Three devices were adopted:

- Advisory Trustee
- Managing vs Custodial Trustee
- Investment Manager



Trustee Bill

This is now being replaced by new legislation (The Trustee Bill) creating a Trust Adviser.

A trustee taking the advice of a trust adviser will be protected from liability, except in a case of dishonesty or breach of trust.



Trust Advisor

A trust adviser:

- May advise the trustee on any matter relating to the trust
- Is not a trustee or fiduciary

A trust adviser may carry out the functions of a:

- Protector
- Investment adviser
- Appointer
- General family counsel

The scope of the role is defined in the trust documents, and the adviser may be appointed at any time

