TRUST LAW

Dealing with beneficiaries under the Trusts Act

By Anthony Grant

The Trusts Act 2019 requires trustees to inform beneficiaries of the fact that they are beneficiaries of a trust, the name and contact details of trustees, and the right to request a copy of the terms of the trust or unspecified "trust information".

Collectively this is called the "basic trust information".

Many trustees of typical family trusts may be reluctant to tell beneficiaries that a trust exists and they are beneficiaries for fear the beneficiaries might become demotivated or greedy.

In my last article (*LawNews* 13 September) I set out a form of letter that might be written to beneficiaries who fall into this category to give them the information the Act requires, but in such a way as to avoid demotivating them.

The Trusts Act does not require that all beneficiaries *must* be provided with trust information. Section 53 of the Act records several factors that will justify withholding this information.

These factors include confidential information or when the settlor did not intend the beneficiaries to receive the information or when the beneficiary is an infant and – importantly – "the effect on the beneficiary of giving the information".

The reason for requiring beneficiaries to be given trust information is to provide a mechanism for holding trustees to account.

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With no public register of trusts and no requirement to inform beneficiaries of a trust, trustees are effectively a law unto themselves and trusts are open to abuse.

If trustees consider there are good reasons for withholding information about the trust from all beneficiaries, the trustees must apply to the court for directions.

No details are given in the Act to indicate the kind of orders a court might make but presumably

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a judge could require the trustees to provide information to the court from time to time.

An application to court will not, however, be required if "the trustee gives to at least one beneficiary of the trust the basic trust information".

In a typical family trust where parents do not wish to inform children about the trust, it may therefore be permissible to comply with the disclosure obligations by providing the "basic trust information" to only one beneficiary.

This could be a responsible adult who can be relied upon to keep a check on the trustees' conduct while respecting the trustees' concern that disclosing the trust information to other beneficiaries might be harmful.

In circumstances where parents in a typical family trust are seriously concerned that disclosure of the trust will be harmful to their children, they should make provision for an adult beneficiary who can be given sufficient details of the trust to ensure its proper functioning while not disclosing details of it to the children.

It is foreseeable that some parents, knowing of this provision, may want to appoint a "patsy" beneficiary who will not be likely to enforce the terms of the trust.

This would be unwise since the courts can be expected to punish trustees who seek to avoid their obligations by this device.

Judges who wish to stamp out this practice might think it appropriate to remove the trustees for their attempt to defeat the Act's purpose.

In general, the concerns so many practitioners had about obligations to disclose details of trusts to beneficiaries are not justified. The mechanisms in the Act are sufficiently broad to enable trustees to comply with their obligations without the risks of harm that were anticipated.

England and Australia

New Zealand has a benign tax environment for trusts, which is one of the reasons for the great number of them. The same is not true elsewhere.

For example, in England only 149,000 trusts submitted tax returns in 2017-2018. That number has been falling since 2013 when 171,500 trusts submitted tax returns.

They are unpopular for several reasons.

Since 2006, assets moved into a trust have been subject to an immediate charge of 20% for inheritance tax and an additional charge of 6% every 10 years. A further charge of up to 6% is levied when assets are transferred out of a trust.

Since 2017 there has also been a requirement to register trusts and this has given rise to privacy concerns.

By contrast, in Australia a report from RMIT University in 2018 said income from trusts in 2013-2014 was more than A$340 billion.

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In 2015-2016 there were nearly 850,000 trusts in Australia with assets of more than A$3 trillion. One reason for the popularity of trusts in Australia is that trust income is often taxed at 30%, compared to the highest marginal income tax rate of 45%.

It has been reported that between A$672 million and A$1.2b of tax revenue could be sheltered annually.

The report found 73% of trusts in Australia were discretionary trusts involved in trading or investment.

This contrasts with several other countries where trusts are mostly used for administering wills and deceased estates, donations to charity, and to provide income for people who are unable to manage their own affairs.

Anthony Grant is an Auckland barrister specialising in trusts and estates law. This column is the second in a two-part series on complying with the beneficiary disclosure provisions of the Trusts Act 2019.