TRUST LAW

Who'd be a trustee when the new Act kicks in?

By *Anthony Grant*

In my previous column (*LawNews* 10 April 2020), I referred to the powers in the court's inherent jurisdiction to review a trustee's decision and to require the disclosure of a trustee's reasons.

In this article I refer to the new statutory regime the courts have been given in s 126 of the Trusts Act 2019 to review trustees' decisions.

Section 126 provides that "the court may review the act, omission, or decision... of a trustee on the ground that the act, omission or decision was not or is not reasonably open to the trustee in the circumstances."

Some rules governing this provision:

- The review can be undertaken only on the application of a beneficiary.
- The beneficiary "must produce evidence that raises a genuine and substantial dispute as to whether the act, omission or decision... is reasonably open to the trustee in the circumstances." [s 127(1)]
- If the court is satisfied the applicant has established a genuine and substantial dispute, "the onus is on the trustee to establish that the act, omission or decision was or is reasonably open to the trustee..." [s 127(2)]
- The court is required to be satisfied "on the balance of probabilities that the act, omission or decision was not... open to the trustee..." [s 127(3)]

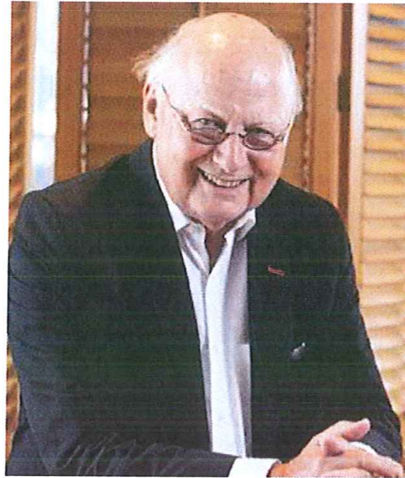
The reasoning behind s 126 is set out in chapter 10 of the Law Commission's *Review of the Law of Trusts, Preferred Approach* paper, published in November 2012.

The commission considered three options for the new law. Option (a) contained a low threshold for complaint. Under this scenario, beneficiaries would have been given substantial freedom to make claims against trustees. This option was rejected.

Option (c) involved a high threshold. An applicant would be required "to show on the balance of probabilities that the trustees breached the appropriate standard of conduct" required of them. Since beneficiaries would generally have no access to the trustees' documents, this would, in most cases, have been a hurdle they could not surmount.

The commission opted instead for option (b). Under this option "an applicant [must] put forward evidence that raises an issue about the trustees' exercise of their power. The onus would then shift to the trustees to substantiate their decision."

Option (b) is new law and is intended to make



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it easier for beneficiaries to challenge trustees' decisions.

The commission said of option (b):

"We favour option (b) because it will prevent trustees being subject to nuisance claims by beneficiaries who merely dislike a decision reached by a trustee or beneficiaries who are perpetually aggrieved. The proposed provision broadens the ability to have trustees' decisions reviewed, although this is subject to a clear threshold of evidence that is needed before an application is considered by the courts. We consider that this reform is beneficial for beneficiaries in that it provides a clear and workable mechanism for holding trustees to account."

Because s 126 provides a new test, which is intentionally broad in scope but vaguely defined, there is bound to be a rash of cases where the courts will be asked to interpret the section.

From a trust advisor's perspective, one of my main concerns is the cost of applications under s 126. At the 7 May ADLS *Cradle to Grave*™ conference, I will talk about the way courts are increasingly ordering trustees to be personally liable to pay not only

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the costs they incur in responding to applications against them, but also the costs of other parties.

So, if a challenge to a trustee's decision is upheld, trustees should not be surprised if they are ordered to pay not only the costs they incur in defending themselves but also the costs of a beneficiary who successfully challenges their decision.

In practice, if the courts impose cost sanctions of this type, I predict many lawyers and accountants who act as trustees will cease to be willing to do so.

My recommendation: trusts that can be amended should include a provision entitling trustees to use trust resources to defend themselves except where it is found they have acted with wiful neglect or dishonesty – or similar wording.

Whether such a clause will be upheld by the courts remains to be seen. But there is a substantial public policy benefit in upholding such clauses since, without them, many competent people who commonly act as professional trustees (whether in their personal capacities or as directors of corporate trustees) will be reluctant to act in either capacity.

I hesitate to say this, but one of the consequences of such a regime may be that trustees will be advised not to record their reasons in writing so, in the event of a challenge, they can fabricate additional reasons to sustain the legitimacy of a challenged decision.

It would be a sad day for the law if this were to occur.

When the Law Commission decided to promote s 126, it did not consider the prospect of trustees being required to pay the costs of responding to challenges to their decisions, and the substantial impact this could have on the availability of competent trustees for trusts in this country.

Hopefully, when challenges are made under s 126, the courts will not make trustees pay from their own pockets the costs they have incurred in responding to the applications, as well as the costs of a successful challenge to their decisions – except where the facts are egregious and most right-thinking people would think the trustees ought to be the subject of such orders.

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