

October 2017 | Issue 11

IN THIS ISSUE

Page ONE

Trustee Responsibilities

Page TWO

Trust Bill Released

FAMILY LOANS

Page THREE

NZ CA Member Contact Details

TRUSTEE RESPONSIBILITIES

Disclosure of trust information to beneficiaries is commonly considered. However, what of disclosure to the trustees? In the case of *Daniel v Cundall* Mr Daniel and Mr Cundall were the trustees of a trust. Mr Daniel, a lawyer, said that he left the day-to-day trust administration to Mr Cundall.

After a long period of time Mr Daniel decided he should be more actively involved with the affairs of the trust. He requested copies of the trust's financial records from his co-trustee, orally in the first instance, then in writing and then by lawyer. When no information was provided he filed proceedings. Once served with legal proceedings his co-trustee took legal advice and the requested trust information was provided.

However this was not the end of the matter. Mr Daniel had incurred legal costs of \$18,088, which he sought to recover from Mr Cundall. Mr Cundall suggested that Mr Daniel meet his own costs as Mr Daniel had disregarded his responsibility as a trustee for many years.

From the court's perspective the matter was unclear. While proceedings by beneficiaries against trustees to obtain trust documents are not unusual, a proceeding by one trustee against another trustee to obtain trust documents appears relatively uncommon.

In deciding the matter, the court (perhaps surprisingly) did not apply any discount for Mr Daniel's prolonged absence as a trustee. Rather the court found that Mr Cundall "Undoubtedly, breached his duty in not providing trust records to Mr Daniel when asked."

The result was an order that Mr Daniel's costs be met from the trust fund.

While the facts of this case may seem unusual they are an important reminder of the need for trustees to all have access to trust information, to act properly and consistently as trustees, and to ensure timely provision of information between trustees.



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TRUST BILL RELEASED

The Trusts Bill was introduced to Parliament on 1 August 2017.

The policy objectives of the Trusts Bill include providing "clear, simple, and accessible trust law". The Trusts Bill sets out important established trust law principles but does not codify New Zealand's trust law. The inherent jurisdiction of the High Court is expressly preserved and current case law will continue to apply.

A significant change from the draft Trusts Bill [see March 2017 newsletter] is that the provisions relating to trustee's obligations to disclose information to beneficiaries are now more robust. A presumption that trustees **must** make basic trust information available to **every** beneficiary or their representative is proposed.

The basic trust information is details of:

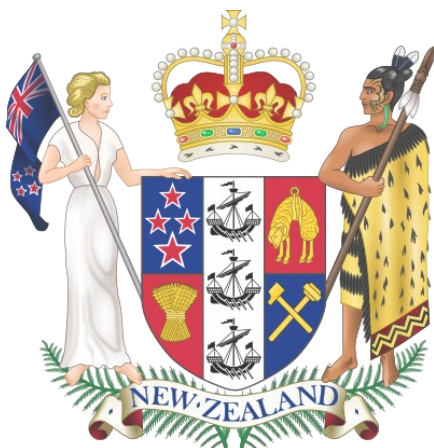
- the fact that a person is a beneficiary of the trust
- the name and contact details of the trustee
- appointments, removals, and retirement of trustees
- the right of the beneficiary to request a copy of the terms of the trust or trust information

Trust information is broadly defined to mean any information regarding the terms of the trust, the administration of the trust, or the trust property but does not include reasons for trustees' decisions.

Settlers and trustees will need to carefully consider the appropriateness of broad classes of beneficiaries and the practical implications of positive disclosure obligations. It is noted that the disclosure obligations in the Trusts Bill are greater than under the present common law following the Supreme Court decision in *Erceg v Erceg*.

The disclosure provisions will not apply to charitable trusts.

If enacted in its current form the Trusts Bill will come into force 18 months after the date on which it receives Royal assent. This is a longer transition than that provided for in the draft Bill.



Family Loans

The informality associated with loans between family members can lead to later disputes when different interpretations of the transaction emerge. *Warin v Warin* is a case in point. In that case \$367,903.90 was advanced to the Warins' daughter. The loan comprised:



- \$100,000 that was initially secured by mortgage in 1997
- \$141,749.70 that was loaned to meet the daughter's GST liability and was to be repaid when the GST refund was received (repayment on this basis did not occur)

23 smaller loans totaling \$126,154.20

There was no dispute about the amount owed. The Warins' daughter did not allege any of the advances were gifts. Rather she argued that:

- The loans were made by her parents' trusts
- The loans were not repayable on demand

If repayable no valid demand had been made

The daughter said repayment was contingent on her "situation".

The court considered the circumstances of all of the loans and was satisfied that all advances were made by the Warins personally. The court also found the advances to be repayable on demand and that demand had been made; accordingly summary judgment was entered in respect of the total amounts advanced. As the loans were not documented there was no evidence regarding interest. Nevertheless, the court awarded interest at the Judicature Act rate of 5% from the date formal demand was made.

The case highlights the risks when loans are not recorded in writing and all loan terms agreed.

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