Trust eSpeaking

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Welcome to the Autumn 2023 edition of *Trust eSpeaking*. We hope the articles in this e-newsletter are both interesting and useful.

To know more about any of the topics covered in this edition of *Trust eSpeaking*, or about trusts or succession issues in general, please don't hesitate to contact us. Our details are on the top right of this page.

NZ LAW Stronger Together.

Who really wants to be a trustee?

A trustee has many obligations

Are you a trustee of a family trust, or considering becoming one? If so, you need to be familiar with the obligations you are taking on when agreeing to act as a trustee. You should also have a clear understanding of the risks that you are exposed to when you agree to act as a trustee.

Our article explains a trustee's obligations, why someone would take on this role and what could be an alternative path for trusteeship by having an independent trustee.

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Who are the 'children of the settlors'?

Make it clear in the trust deed

In a recent case, the High Court was asked to determine who the beneficiaries of a trust were as it was unclear who was intended by the phrase 'children of the settlors' that was in the trust deed.

This is particularly necessary in the context of blended families where there may be reasons to differentiate between classes or groups of children.

It has highlighted the need for clear wording of a trust deed.

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Tikanga in the law of Aotearoa New Zealand

Role of tikanga in Peter Ellis case

Last year the Supreme Court quashed Peter Ellis' 1993 convictions of sexual offences against children. His 1994 and 1999 appeals to the Court of Appeal were unsuccessful. In July 2019 the Supreme Court granted leave to appeal the Court of Appeal decisions.

However, Mr Ellis died in September 2019 before the Supreme Court heard his case.

The Supreme Court was therefore asked a fascinating question: should the appeal continue despite Mr Ellis' death? The Supreme Court decided the appeal should go ahead. The court also had to decide the relevance of tikanga Māori to the continuation of the appeal.

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Before the Trust Act 2019

In its *Review of the Law of Trusts* in 2013, the Law Commission found that despite the large number of trusts in New Zealand and the number of people acting as trustees, the majority of non-professional trustees had little appreciation of the extent of their obligations.

The commission recommended an overhaul of the Trustee Act 1956 and, in 2019, new legislation was passed. It sets out the obligations of trustees, so that it is clear to both trustees and beneficiaries about trustees' obligations and what beneficiaries can do if trustees do not fulfil those obligations.

Trustees' obligations

The main obligations for trustees, as set out in the Trust Act 2019, are to:

- Know the terms of the trust
- Act in accordance with the terms of the trust
- Act honestly and in good faith
- Act for the benefit of the beneficiaries
- Exercise their powers for a proper purpose
- Exercise the care and skill that is reasonable in the circumstances (particularly where that person acts in their capacity as a professional, such as a lawyer or accountant)
- Invest prudently
- Be impartial as between beneficiaries
- Not exercise powers for their own benefit
- Act without reward (except where otherwise permitted by the terms of the trust), and
- Hold trust documentation.

The obligations on trustees are wide-ranging and there are significant risks for trustees who do not meet their obligations.

Why become a trustee?

In taking on a trusteeship, an individual or company is agreeing to act in the interests of the beneficiaries of the trust, and generally to do so without any expectation of reward for their services. Trustees are also often involved in court proceedings when family relationships break down.

So why would anyone take on a trusteeship?

The settlor/s, who are the people establishing the trust and contributing its initial assets, may wish to take on the trusteeship themselves in order to retain a high degree of control and oversight over the trust's assets. This arrangement is often attractive to settlor trustees as not only does it allow more control, but it also means that the trust is not incurring the costs associated with instructing a professional to act as an independent trustee.

There are, however, risks associated with this arrangement – particularly if a marriage or relationship breaks down and the trust owns property or there is a bankruptcy.

Ask a friend or relative?

A close friend or relative of the settlor/s may also be prepared to take on a trustee role – most commonly in conjunction with the settlor/s.

This arrangement can appeal as there is usually a high degree of trust between the settlors and the 'independent' trustee. It does, however, run the risk of placing the 'independent' person in a difficult position if the settlors have a relationship breakdown or if different groups of beneficiaries take issue with decisions being made affecting their interests in the trust.

It can also be difficult if there are court proceedings relating to the trust; that 'independent' professional trustee may be in the firing line, despite having tried their best and not having received a benefit for acting as trustee.

Have an independent trustee?

Independent professional trustees – whether individuals or trust companies – may be prepared to act as trustees, either by consent or by court appointment. Independent professional trustees expect to be paid for their services and the trust funds will need to be sufficient to justify those expenses being incurred. Sometimes these trustees charge an annual fee to account for the risks involved in being a trustee, such as being involved in litigation, as well as fees for their time spent on trust activities. The trust deed will also need to allow remuneration.

If the trust funds are sufficient to justify this cost, it can be worthwhile and will help protect trust assets in the event of a relationship breakdown or bankruptcy.

If you are asked

If you are considering taking on a trusteeship, we are happy to discuss with you any potential risks. This can also be a good opportunity for the trustees to consider a review and update of trust structures which are no longer fit for purpose, particularly before new trustees are brought on board. +

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Who are the 'children of the settlors'?

Make it clear in the trust deed

In the recent case of *Re Merona Trustees Ltd*[1], the High Court was asked to determine who the beneficiaries of a trust were as it was not clear who was intended by the phrase the 'children of the settlors' that was in the trust deed.

Background

The trust settlors, Merv and Rona, had two daughters together - Lilly and Miffy. Rona also had two sons from a previous marriage when she was very young - Rob and Ray. When Rona's first marriage broke down, and in the absence of social welfare benefits, she could not afford to keep her sons, and they both went to live with different extended family members. Rob had occasional contact with Rona and, after Rona's marriage to Merv, Rob was raised by them both. Ray, however, was raised by extended family and had no contact with Rona. It was only as an adult that Ray came to know Rona and the wider family.

Interpreting the trust deed

Rona died in 2013. Merv died in 2020. After Merv's death, a question arose as to who were the beneficiaries of the trust they had settled.

The question for the High Court was interpreting the trust deed that referred to 'the children of the Settlors'. Did it mean:

- The two natural children of Merv and Rona together, being Lilly and Miffy
- The two natural children of Merv and Rona, as well as Rona's son Rob, who was raised as a member of Merv and Rona's family, or
- The two natural children of Merv and Rona, as well as both of Rona's sons, Rob and Ray?

High Court hearing

The court heard two main competing arguments.

The trustees primarily argued that 'the children of the settlors' meant Rob, Lilly, and Miffy; the 'children' did not include Ray. They said that the context in which the trust was established was highly relevant to the interpretation of the trust deed. In particular, a predecessor trust had been established in 1986 before Ray connected with Rona as an adult. The trust in question was settled in 2002, when Rob, Lilly and Miffy were in their forties and fifties.

Even in 2002, after coming to know Ray, Merv and Rona presented to their professional advisors as a couple with three children - Rob, Lilly, and Miffy. Their accountants recorded Merv, Rona, Rob, Lilly and Miffy as the beneficiaries of the trust. The family's lawyers also understood Rob, Lilly and Miffy to be Merv and Rona's three adult children. Merv and Rona also signed memoranda of guidance in relation to the trust, that were effectively instructions to the trustees as to their wishes. These memoranda recorded their wish that 'our children' benefit from the trust; Rob, Lilly, and Miffy were named, but Ray was not.

Finally, Rona's will left a bequest each to Rob, Lilly, and Miffy as her children, and an equal but separate bequest to Ray who was described as her 'birth son.' She also left him a letter which asked that he be content with this bequest. The court found that by implication, she did not see him as eligible to benefit from the family wealth which was otherwise held in the trust.

On the other side, Ray's lawyers argued that Ray was also a beneficiary of the trust. They said that once Ray had been reunited with Rona, they developed a close relationship with each other and the wider family. Although Ray was not close with Merv, Ray was included in family gatherings including at Christmas and birthdays. Ray was treated equally with Rob, Lilly, and Miffy in Rona's will, and he was a part of the family.

The High Court considered that Merv and Rona had brought Rob up as a child of their own, and that it was 'inconceivable' that they would have intended to exclude him as a beneficiary of the trust. The documents signed at the time, and subsequently, showed that Merv and Rona thought that Rob was a beneficiary of the trust. In the context of their family, 'the children of the settlors' plainly included him. The only question was then whether Ray was also included.

Decision

The court found that the language of the trust deed could be interpreted to include Lilly and Miffy as natural children of the settlors, as well as Rob, who was raised within the family unit as though he was a natural child of both Merv and Rona.

The wording of the trust deed, however, could not be interpreted to include Ray. While Ray enjoyed a good relationship with the family when they reconnected, he was not raised as a part of Merv and Rona's family unit.

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1 *Re Merona Trustees Ltd* [2022] NZHC 1971.

Tikanga in the law of Aotearoa New Zealand

Role of tikanga in Peter Ellis' conviction, death and exoneration

Late last year the Supreme Court quashed Peter Ellis' multiple 1993 convictions of sexual offending against children who had attended the Christchurch crèche where he was a teacher[2]. His 1994 and 1999 appeals to the Court of Appeal had been unsuccessful. In July 2019, the Supreme Court granted leave to appeal the Court of Appeal decisions giving an extension of time to do so.

However, Mr Ellis died in September 2019 before the Supreme Court heard his case. Usually, an appeal dies with an appellant.

The Supreme Court was therefore asked to deal with a fascinating question: should the appeal continue despite Mr Ellis' death? Ultimately, the Supreme Court decided that the appeal should go ahead[3]. It was necessary to hold two hearings on separate days to determine that issue. The second hearing concerned, exclusively, the relevance of tikanga Māori to the continuation of the appeal.

The nature of tikanga

Before the Supreme Court deliberated, it was provided with a 'Statement of Tikanga' prepared by recognised tikanga experts. The statement began with an explanation of the nature of tikanga. It said that tikanga is the Māori 'common law'. It described tikanga as a system of law that is used to provide predictability; it is made up of templates and frameworks to guide actions and outcomes. The term 'tika' means 'to be right'. Tikanga Māori therefore means the right way of doing things in Te Ao Māori. It is what Māori consider is just and correct. Tikanga Māori includes all the values, standards, principles or norms that Māori subscribe to, to determine appropriate behaviour.

Tikanga at the heart of New Zealand's common law

The Supreme Court used the Ellis case to deal with the place of tikanga in the law of Aotearoa New Zealand more generally.

While the Supreme Court was divided on the issue of whether it should allow Mr Ellis' appeal to proceed after his death, it was unanimous that tikanga has been, and will continue to be, recognised in the development of this country's common law in cases where it is relevant. Tikanga also forms part of New Zealand law as a result of being incorporated into statutes and regulations. It is incorporated in the policies and processes of public entities and it may be a relevant consideration in the exercise of discretions.

Ascertaining tikanga

A Supreme Court majority held that the colonial tests for incorporation of tikanga in the common law should no longer apply. Rather, the relationship between tikanga and the common law will evolve contextually and, as required, on a case-by-case basis.

The majority judges accepted that tikanga was the first law of Aotearoa New Zealand and it continues to shape and regulate the lives of Māori. Therefore, the courts must not exceed their function when engaging with tikanga. The opinion was expressed that care must be taken not to impair the operation of tikanga as a system of law and custom in its own right. Where tikanga is relevant to a given case, the appropriate method of ascertaining it will depend on the particular circumstances of that case.

Importance of tikanga not confined to Māoridom

The Supreme Court recognised that the Ellis case concerned a Pākehā appellant and, as far as it was aware, none of the complainants were Māori.

It was determined, however, that the principles developed on deciding whether an appeal should proceed after an appellant has died should be capable of meeting the needs of all New Zealanders, including Māori. The court stated that Māori values in relation to the interests of tūpuna or ancestors are different from what are often termed 'Western values' that primarily informed the development of the English common law and on which our legal system is primarily based.

2 *Peter Ellis v R* [2022] NZSC 115.
3 *Peter Ellis v R* [2022] NZSC 114.

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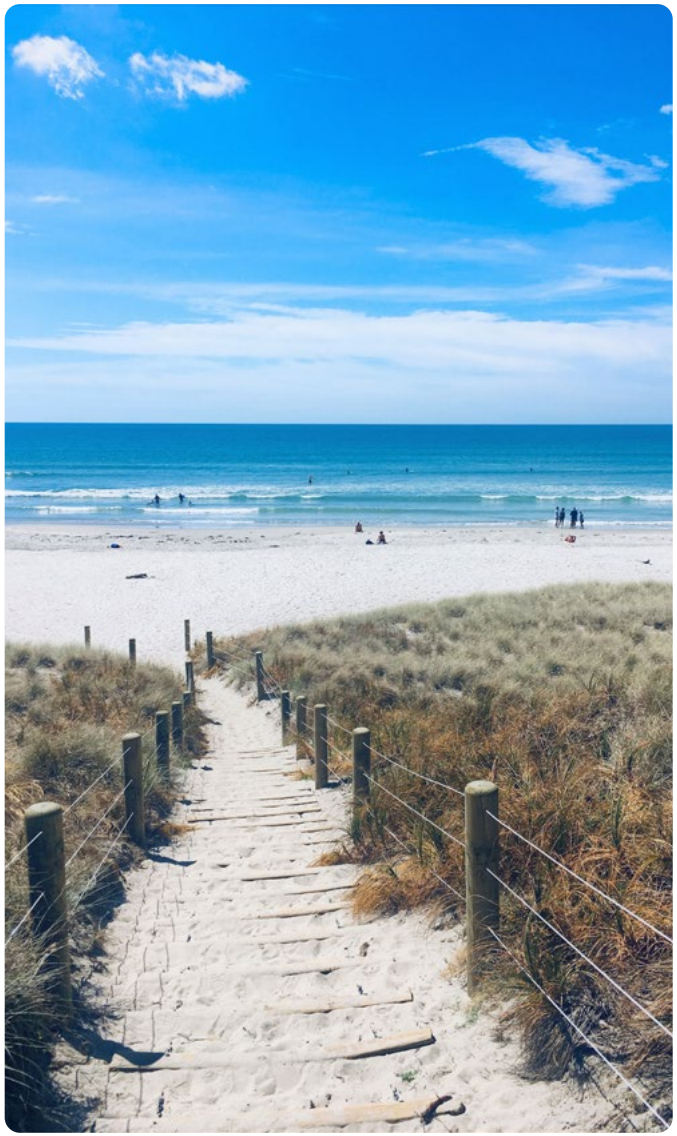

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Who are the 'children of the settlors'?

Care must be taken

This decision emphasises the importance of clarifying who is intended to be a beneficiary of a trust at the outset. This is particularly necessary in the context of blended families where there may be reasons to differentiate between classes or groups of children.

In this case, the lawyers and accountants were not necessarily aware that Rob was not a child of Merv and Rona. It is possible that if they had known at the outset, the trust deed would have been drafted in a way that made it clear who the beneficiaries were.

If you are concerned about the wording of your trust deed and how it may affect your children, please be in touch to review your trust deed. +

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Tikanga in the law of Aotearoa New Zealand

Future developments

The Supreme Court's decision in *Ellis* will have had an immediate and forceful impact on Mr Ellis' family, as well as the complainants and their families. However, the examination of the place of tikanga in the law of Aotearoa New Zealand more generally, and the resulting findings, have the potential to place tikanga at the centre of this country's legal system for all New Zealanders over the course of the next generation.

It can safely be said that when general principles need to be determined from a particular case, tikanga will be considered regardless of whether any of the parties are Māori. Once Māori values touch upon the general issue in question in a way which is distinct from 'Western values' it appears tikanga will have to be considered.

Notably the Law Commission, in its *Review of Succession Law: Rights to a Person's Property on Death* which predated the *Ellis* decision, had already recommended numerous changes to New Zealand's succession law which would mean a much greater recognition of tikanga within it. +