

Applications to the court for directions, statutory (s 66 of the Trustee Act 1956) and inherent jurisdiction, review of trustee's decisions (s 68)

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Application for directions – Introduction

A trustee may apply to the Court for directions in respect of the management or administration of any trust property or in respect of the exercise of any discretion vested in a trustee under s 66 of the Trustee Act or as a part of the court's supervisory function in the administration of trusts.

In making an application trustees need to consider carefully the merits of the application and to ensure that they do not come before the courts without due cause and impose unnecessary costs on the trust estate. Historically there appears a general willingness by the English courts to assist trustees. Kekewich J in *Re Buckton; Buckton v Buckton* [1907] 2 Ch 406 at p 414 when referring to trustees' costs on such application being met from the trust estate commented;

"Although I have thought it necessary sometimes to caution timid trustees against making applications which might with propriety be avoided, I act on the principle that trustees are entitled to the fullest possible protection which the court can give them, and that I must give them credit for not applying to the court except under advice which though it may appear to me unsound, must not be readily treated as unwise. I cannot remember any case in which I have refused to deal with the costs of an application by trustees in the manner above mentioned"

Secondly, the procedure as a discretionary one "where the trustees are in doubt" as to the manner in which they ought to exercise their discretion and what is the proper thing for them to do. Therefore a trustee need not hesitate to apply where there are real factual or legal difficulties and sufficient at stake to warrant the cost. In such circumstances trustees are entitled to take reasonable steps to protect themselves, *Re Estate Hewitt; The New Zealand Guardian Trust Company Ltd v Hewitt* (1998) 1 NZTR 8-001, referring to *Re: Havill deceased* [1968] NZLR 1116 (CA) and *Re Allen-Meyrick's Will Trusts, Mangnall v Allen-Meyrick* [1966] 1 All ER 740, 743-744.

In essence, "in a trustee's application the Court is essentially engaged solely in determining what ought to be done in the best interests of the trust estate and not in determining the rights of adversarial parties". Consequently the court's jurisdiction under a s 66 application is generally restricted to ratifying or refusing to ratify the trustees' proposed decisions as reasonable, and this excludes making findings of fact, *Marley & Ors v Mutual Security Merchant Bank & Trust Co Ltd* [1991] 3 All ER 198 (PC) at p 201, *Neagle v Rimmington* (2002) 1 NZTR 12-006.

Section 66

Under s 66 of the *Trustee Act* 1956, any trustee may apply to the court for directions concerning:

- any property subject to a trust;
- the management or administration of any trust property; or
- the exercise of any power or discretion vested in the trustee.

Section 66 provides trustees with an inexpensive way of obtaining the court's assistance with minor matters of importance arising in the management of a trust. The main points regarding an application under the section were set out in *Re Estate Hewitt; The New Zealand Guardian Trust Company Ltd v Hewitt* (1998) 1 NZTR 8-001 and *Melville v NRMA Insurance NZ Ltd* (2002) 1 NZTR 12 -002. These were:

- There must be good reason for putting the estate and the beneficiaries to that trouble and expense;
- A trustee need not hesitate to apply where there are factual or legal difficulties and sufficient at stake to warrant the cost;
- Questions of substance or importance, in particular involving matters of controversy or contest between trustees, do not lend themselves to application under s 66;
- It has always been, and remains, inappropriate where there are substantial factual disputes and/or possibility of a breach of trust. It is certainly inappropriate where there is, explicitly or implicitly, an allegation of breach of trust;
- An application under s 66 must be made upon agreed facts. Such facts "cannot be inquired into and, if not agreed, should be established in the normal manner". (However in *Re Collins Family Trust; Walker v Collins* (2009) 2 NZTR 19-004 at [75] while it was considered unusual for the court to be asked to resolve substantial factual disputes in the context of a s 66 application, however, it was not unknown *Re Collins Family Trust; Walker & Ors v Collins & Anor* (2009) 2 NZTR 19-004;
- Although trustees often seek the court's approval of a proposed course of action, they can and do pose options;
- It is not a procedure for professional trustees in particular, to immunise themselves against unpopularity or claims, no matter how simple the question and no matter how modest the sums at stake.

However notwithstanding the foregoing, the circumstances of the application may be such that the court must work outside such limitations. It may be appropriate for the court to give directions to right a serious wrong. In *Te Kapuna Park Trust v Stratford Racing Club Inc* (2008) 2 NZTR 18-019 this was to put right the invalidity of an earlier transfer, without incurring further delay and costs, notwithstanding a breach of trust. (A race course had been transferred to a trust for one pepper corn by a faction of a racing club. The Court of Appeal had earlier held that the transfer to the trust was invalid and directed the trustees and the club to "vigorously pursue transferring the race-course back to the club", *Stratford Racing Club Inc v Adlam*

[2008] NZCA 92, 18 April 2008).

While the context of the directions may be a substantial factual dispute, for which the full machinery of the court is required for legal intention behind an action to become apparent, the court is still able to provide comment and questions to help assist differing trustees reach agreement and guide the trustees and help them resolve the issues that lead to the directions application, *Parlane v Parlane* (2011) 3 NZTR 21-012.

The court's directions while in the context of the court's supervisory jurisdiction over trusts and at the request of beneficiaries may require care and diplomacy, particularly where there are constitutional reasons, so as not to infringe the jurisdictional authority of others, and consequently the court's role may be to assist rather than dictate, *Karaka v Ngai Tai Ki Tamaki Tribal Trust* (HC, Auckland CIV 2003-404-6164, 13 Nov 2007, Heath J) at [12]-15].

Trustees may be personally liable for s 66 costs

The application for directions should not be unnecessary, otherwise the trustees may find they are personally liable for costs. A vital part of the role and the function of a trustee is to make decisions. Professional trustees in particular "should not unreasonably and unnecessarily abdicate their responsibility by asking the Court to make decisions for them at unjustifiable cost to the trust beneficiaries". If they do, the court may make the trustee bear the costs personally: *Estate N Roydhouse* (2003) 1 NZTR 13-017; *Re O'Donoghue* [1998] 1 NZLR 116.

Only trustees may apply under s 66

Only trustees may apply to the court for directions under s66, *Gailey v Gordon* (2003) 1 NZTR 13-002 at [74], *Jaspers v Greenwood* (2012) 3 NZTR 22-028 at [21]. It is not open to beneficiaries or former beneficiaries to make such an application. Nor is there jurisdiction under s 66 for the court to review trustee decisions or entertain other counterclaims by defendants in the course of a s 66 application by trustees, *Gailey v Gordon* (2003) 1 NZTR 13-002.

Sections 66 & 73 and trustee's right of indemnity

Failure by a trustee to obtain directions from the court may bar a trustee from relief from personal liability for breach of trust under s 73. The issue was highlighted by the Court of Appeal in *Wong v Burt* (2004) 1 NZTR 14-012; [2005] 1 NZLR 91 at [57] when the trustees embarked on a course of action that was "not merely unreasonable – it was downright foolish" and that "the appropriate course to have followed would have been to obtain directions under s 66 of the Trustee Act. This case would never have come about had that course been followed". The trustees were therefore unable to claim the protection of s 73.

Failure to apply for directions may affect the trustee's right of indemnity. In a more recent case the court held that a trustee who was concerned that his removal had been exercised contrary to the best interests of the beneficiaries should have applied to the Court for directions, whether the purported removal was valid. The court held that a trustee who unsuccessfully runs a case challenging his or her removal without

Court sanction may be deprived of the normal indemnity and personally exposed to costs to the successful party (as occurred here). It was considered that the trustee/solicitor was not entitled to be indemnified for his costs from the trust estate, not having acted reasonably or properly in bringing and pursuing the proceeding and he did not adopt the normal course of a neutral stance in placing the information before the Court and seeking directions, *Carmine v Ritchie No 2* (2012) 3 NZTR 22-025.

Directions – inherent jurisdiction – application by beneficiaries

Under the court's inherent jurisdiction, both trustees and beneficiaries can make application to the court for directions. Where applications are by beneficiaries as part of the court's inherent jurisdiction then, "such applications are made by reason of some difficulty of construction, or administration, which would have justified an application by the trustees, and it is not made by them only because, for some reason or other, a different course has been deemed more convenient", *Neagle v Rimmington* (2002) 1 NZTR ¶12-006; [2002] 3 NZLR 826 at [38] quoting from Kekewich J in *Re Buckton; Buckton v Buckton* [1907] 2 Ch 406 at p 414.

An application by beneficiaries would be governed by the same rules which govern an application by trustees, because the beneficiaries are making an application for directions that the trustees could or should have made. In the appropriate circumstances the beneficiary could seek declaratory orders, "which may be needed to secure the observance of the terms of the trust deed and the proper administration of the trust property and, in particular, the protection of the beneficiaries. However, this jurisdiction is discretionary and the court will not make such orders on hypothetical facts. Further, if the application is made by a beneficiary, it would be necessary for the beneficiary to show actual loss or the potential for loss to that beneficiary." *Neagle v Rimmington* (2002) 1 NZTR ¶12-006; [2002] 3 NZLR 826 at [39]. (The declaratory orders would be under the Judicature Act 1908, s 16A which empowers the High Court to award damages as well as or in substitution for an injunction or specific performance). It was acknowledged that the court should be slow in its inherent jurisdiction to allow an application which s 66 does not allow. It should also be noted that it would be necessary for the beneficiary to show actual loss, something that may be quite difficult for a discretionary beneficiary to do, not having an interest in the trust assets *Johns v Johns* (2004) 1 NZTR 14-005; [2004] 3 NZLR (CA) at [34].

Directions for charitable trusts – inherent jurisdiction

Part III of the Charitable Trusts Act 1957 (the requirement for trustees to put a scheme to the court where the existing charitable trust purposes may have become impractical) and the Act more generally was not an exclusive code and did not oust the Court's inherent jurisdiction to give directions and guidance, *Re Estate Erskine; University of Canterbury v Attorney-General* (1987) 1 NZTR 0-006.

Specific protection for a trustee under the direction of the court – s 69

Under the Trustee Act, s 69 a trustee acting under the direction of the court is

deemed to have discharged his duty and so is specifically protected from liability even though that direction may be subsequently invalidated or overruled, provided the trustee has not been guilty of fraud, wilful concealment or misrepresentation in obtaining or acquiescing in the court making the order giving the direction.

Surrender of trustee discretion to the court

While trustees may in an application for directions under s 66 surrender their discretion for the court to exercise, *Marley v Mutual Security Merchant Bank and Trust Co Ltd* [1991] 3 All ER 198 (PC) at 201 it would be the existing discretion in the existing circumstances. Trustees could not surrender to the court a discretion which needed to be exercised in the future because the discretion would need to be exercised in the light of the circumstances at that future time, *Re Allen-Meyrick's Will Trusts* [1966] 1 All ER 740. However an application under s 66 would not necessarily involve the surrender of the discretion by the trustees. That would depend on the particular proceedings and the terms of the application, *Gailey v Gordon* (2003) 1 NZTR 13-002; [2003] 2 NZLR 192 at [33]. It has been suggested that for the court to accept a surrender of a trustee's discretion requires good reason and that the type of circumstances where this would be appropriate include where there is a deadlock between trustees, trustees being disabled from acting due to a conflict of interest or where trustees are faced with a proposed compromise of litigation against a third party with the beneficiaries taking strong and opposed views as to the merits of accepting it, *Lewin on Trusts, Control by the Court*, at p 1103, para 29-300.

Application to the court to review acts and decisions of trustee, s 68

Under s 68 (1) of the *Trustee Act* 1956, any person who is beneficially interested in any trust property and who is aggrieved, or anticipates he or she will be aggrieved by any act or decision of a trustee in exercise of any power under the *Trustee Act*, may apply to the court;

- to review that act or decision, or
- to give directions regarding any anticipated act, omission or decision of the trustee.

The court may require the trustee to appear and to substantiate and uphold the grounds of the act or decision. While the court may "make such order in the premises as the circumstances of the case may require", the court may not make an order which shall:

- disturb any distribution of trust property that is not in breach of trust and was made before the trustee knew of the s 68 application; or
- affect any right acquired by any person in good faith and for valuable consideration.

Section 68(2) provides that the court may direct how any question of fact is to be determined and direct that affected parties be made a party to the proceedings.

Scope of section 68

Generally, s 68 has been rather narrowly interpreted. It applies only where those actions or anticipated actions involve the exercise of a power conferred by a provision of the Trustee Act. It does not apply to the exercise of powers conferred by the trust deed, *Neagle v Rimmington* [2002] 3 NZLR 826 (HC), *Jaspers v Greenwood* (2012) 3 NZTR 22-028 at [18]. Where the source of trustee powers is concurrent as between Act and deed, s 68 will still apply *Re Havill* [1968] NZLR 217 (HC), *Jaspers v Greenwood*.

It has been held not to apply where no decision had been made by the trustees (although a decision had been proposed but could not be implemented), *Gailey v Gordon* (2003) 1 NZTR ¶13-002; [2003] 2 NZLR 192. It has also been held not to apply where the anticipated exercise of the trustee's power was derived not from the trust deed or the Trustee Act by court order arising under s 66 to give directions and which derived from the parties consent to the proceedings. By those orders the trustee is not so much empowered but directed. He is instead exercising a mandatory duty imposed by the consent orders, not exercising a power under the Trustee Act and therefore no concurrent source existed, *Jaspers v Greenwood* (2012) 3 NZTR 22-028 at [19].

It was considered that doubt existed as to whether the Court had jurisdiction under s 68 of the Trustee Act or s 60 of the Charitable Trusts Act 1957 to grant any such relief, where a beneficiary of a statutory charitable trust sought a review of the acts and decisions of the trustees pursuant to s 68 (two trustees had made a loan of over \$150,000 to themselves from the charitable trust, which they as trustees subsequently sought to forgive). However such an issue was considered academic. The matter was approached by the Court by removing the trustees and appointing a trustee corporation which in subsequent proceedings sought restitution to the trust of the funds misappropriated, *The Attorney-General of New Zealand v Ngati Karewa and Ngati Tahinga Trust; McKinnon v Ngati Karewa and Ngati Tahinga Trust* (2001) 1 NZTR ¶11-012 and *Clark v Ngati Karewa and Ngati Tahinga Trust* (CA 112/04, 14 September 2004).

Section 68 has been held to apply where a district council, unaware it was a trustee, had taken into account irrelevant matters in the exercise of its powers under the Local Government Act 2002, ss 140, 141 not having applied its mind to the exercise of the discretion given, *Waitara Leaseholders Association Inc v New Plymouth District Council (No 2)* (2005) 1 NZTR ¶15-016. Where an estate beneficiary unsuccessfully sought to direct the trustee in a share pre-emption process, the Court held that if the beneficiary remained dissatisfied, she still had the ability to apply to the Court to review any act, omission or decision of the trustees under s 68, *Re Estate Kirkpatrick; Burns v Steel* (2005) 1 NZTR 15-017 at [69].

Any person "beneficially interested"

However, s 68 is limited to "any person who is beneficially interested in any trust property" and has been held not to apply where the trustee rejected a claim against a trust fund by the estate of the primary caregiver in respect of past care and support by the caregiver to an injured relative, *The New Zealand Guardian Trust Co Ltd v Siemonek* (2007) 2 NZTR ¶17-027; [2008] 2 NZLR 202 (CA). The Court of Appeal held that the estate of the caregiver did not have a beneficial interest in the

trust fund established as a result of successful personal injury proceedings and there was no jurisdiction for the Court to review the trustee's decision under s 68 not to make a payment to the estate.

In *Jaspers v Greenwood* at [21] it was considered that s 68 was limited to beneficiaries interested in the trust property and therefore excluded discretionary beneficiaries who have a mere expectation only. It was not ruled out as a possibility by the Court of Appeal in *Kain v Hutton* (2002) 1 NZTR 12-004 (CA) although the plaintiff beneficiaries who had made unsuccessful applications under ss 51 and 68 had both discretionary and default contingent interests.

The extent of the court's review under section 68

Jaspers v Greenwood considered that s 68 did not confer upon the High Court the role of general court of appeal from trustees' decisions, rather,

"The relevant beneficiary grievance must involve the exercise (or intended exercise) of a trustee power in a manner that is ultra vires, vitiable on the basis of relevance of considerations or bad faith, or unreasonable in a *Wednesbury* sense. In other words, the ordinary means of review of the exercise of a statutory power" at [22].

It was further considered that that s 68 does not alter the ordinary incidence of the onus on an applicant challenging a trustee's decision (or proposed decision). Such applicant must establish that the trustee has acted (or is proposing to act) ultra vires, in a manner vitiable on the basis of relevance or bad faith, or otherwise unreasonably in a *Wednesbury* sense (*Jaspers* at [25]).

Inherent jurisdiction

The Court also has general equitable jurisdiction to review and restrain trustees, to ensure they conform to their fiduciary obligations. The principal remedy to effect this is by way of injunction, *Jaspers* at [17].