TRUSTS

The Evolution of Trustees

From Medieval England to contemporary NZ

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The role of a trustee and its variants have evolved significantly over many centuries. Grain surpluses 7,000 years BCE apparently led to the development of the concept of "bailment" and increasing trade in commodities and precious metals led to the concepts of "agency", "brokerage". "custody" and "mandate". The Greeks, Romans and Egyptians all had legal relationships and structures similar to modern day trusts which they used to hold and manage property for estate planning and commercial purposes (K Wallace, "The First Professional Trustees", (2018) Trust Quarterly Review, vol.16, issue 2, p 12).

The influence of the Knights Templar

The Knights Templar are perhaps the forerunners of the modern day trustee. In the 11th century, devout pilgrims from Europe visited the Holy Land but were frequently robbed or exploited on their pilgrimage across south-east Europe and the Middle East. In response, knights were mobilised to guard the pilgrims on their travels.

The Knights Templar developed a reputation as obedient, religious defenders of Christians. They were granted exemptions from local taxes and entitled to paint a Templar cross on their properties to declare their tax-free status to the authorities. Perhaps predictably, some other opportunistic property owners mischievously copied this and thereby carried out an early example of tax evasion.

As a highly respected, well organised, devout and prosperous religious order, the Knights Templar were entrusted with estates while the owners went on pilgrimages or crusades to the Holy Land. They became property managers, consolidators of small parcels of land into large estates, revenue generators, cash accumulators, lenders, and distributors of surplus funds.

An important reason why the Knights Templar were so highly regarded and entrusted with such responsibility was that they were independent, experienced and qualified professionals. They were also subject to rigorously enforced moral, legal and religious codes. They were accountable, organised and structured and were fulfilling a calling that required them to put the interests of others ahead of their own.

Customisation

It was on this basis that the office of trustee as we know it today evolved in England and then, with the advent of British imperialism, was transplanted to all corners of the globe. However, since Commonwealth independence after the Second World War the use of trusts and the role of trustees in various countries has arguably been less influenced by these English origins and jurisprudence as local advisers, courts and parliaments have customised the use of trusts to a domestic context.

In some countries this customisation has been very successful and has led to sophisticated financial services industries and eminent judges, trustees and professionals expert in the law, governance and administration of trusts. In other countries, the outcomes have been less successful.

Unfortunately, the use, governance and administration of trusts in New Zealand has evolved in a way that leaves some things to be desired.

The use of trusts in New Zealand

Trusts are typically the centrepiece of a New Zealand family's asset plan. However, quite often people in New Zealand have assets held in a trust in circumstances where they receive only limited benefit from the arrangements. In some cases the following matters have obviously not been considered at the time the trust was set up:

- The assets held by the trust are encumbered with debt and security to banks and/or there are substantial settlor and beneficiary current accounts. And so there is not much wealth that is actually being protected by the trust.
- Often the trust has no income, and even if it does, there are no material tax advantages in New Zealand to having income producing assets in a trust. If indirect ownership is desirable then a limited partnership or company may well be more tax efficient. In any event, New Zealand is a relatively benign fiscal environment compared to most developed countries (we have no general capital gains, inheritance, estate or wealth taxes).
- Our succession laws are mature and relatively certain. They allow almost unrestricted freedom to benefit whoever we want under our wills. There are some requirements to provide for people to whom we have a moral duty but nothing like the forced heirship regimes that exist in many European and Middle Eastern countries.
- Our laws and nationalised accident compensation regime generally prevent claims being made against individuals for personal injuries caused by negligence.
- Tax authorities and government agencies nowadays typically look

through trusts to the people who set them up and benefit from them. Increasingly the same approach is being taken by courts in cases involving the dissolution of relationships and recovery of debts.

- We have a well-functioning and relatively sophisticated insurance industry.

In many cases, the trusts may just add unnecessary complexity and expense to people's lives. This soon becomes apparent when the family is refinancing, buying and selling property, preparing tax returns or adjusting succession planning settings. Many trusts in New Zealand would not withstand scrutiny from the court because of the way they are set up and/or operated.

The role of trustee in New Zealand

Another unique aspect of New Zealand asset planning is the distinct lack of independent governance of trusts and family investment holding entities (such as underlying companies). Globally, there is an entire industry dedicated to the independent governance of private wealth. However, in New Zealand we tend to conflate the provision of two very distinct functions, legal advice and fiduciary services. In each case the providers of those services require different skills and have duties which are owed to different classes of people.

Trusts are one of the most complex legal relationships. Many lawyers do not properly understand trusts and fiduciary powers and duties, let alone lay settlors, trustees and beneficiaries. In New Zealand, many clients are reluctant to appoint an independent professional trustee who is not also the family lawyer or accountant. A problem with that approach is that the family lawyer or accountant could be conflicted by a long-standing relationship with the people who set up the trust (whose interests may become misaligned with the next generation) and unaware of, or unable to fulfil, fiduciary duties to the wider family. In many cases he or she will not have the specialist skills to perform the role in an increasingly complex and regulated modern professional environment.

In other countries, it is generally undesirable for family members to be the trustees and/or have effective control over the trust. Instead, truly independent, professional and licensed trustees are typically granted wide discretionary powers, which they exercise judiciously, whilst mindful of fiduciary and other duties which are enforced by the courts and regulators.

The future of trusts in New Zealand

Historically, these idiosyncrasies were probably of only academic relevance in New Zealand, given net asset values may have been low and the interests of the beneficiaries and the trustees are often aligned whilst the second generation are young and uninformed. However, in recent years some asset classes have increased exponentially in value and many beneficiaries have grown into adulthood and are likely to be better educated, informed and advised in relation to trust matters. This represents both risks and opportunities for advisers and requires us to rethink the way we have traditionally done asset planning in New Zealand.

Paradoxically, this may lead us to consider the example set by the Knights Templar many hundreds of years ago and commit to a higher standard of governance and administration of trusts in New Zealand. The Trusts Act 2019 will almost certainly increase the level of scrutiny on New Zealand's community of trustees – most of whom are either lay persons or professional advisors rather than professional fiduciaries.

As the New Zealand private wealth sector eventually matures and aligns with other countries, there should be commercial opportunities for specialised, independent, professional (and perhaps regulated) trustees to fulfil these increasingly important governance and administrative roles. That should be a good thing for the preservation, enhancement and aggregation of family wealth in New Zealand. It may not be such a good thing for the trusts litigators of New Zealand who are currently dealing with an entire generation of trusts which have been set up and run in a rather peculiar manner. ■

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