Use of mediation under the new Trusts Act 2019

By Carole Smith

Of course, parties have always been able to use mediation to settle their disputes, as long as they are all willing to give it a try. However, cases involving trusts are a little out of the ordinary when it comes to compromise. One of the reasons for this is that trustees' ability to compromise is limited by statutory powers, and the court's interpretation of those powers.

Trustees' ability to compromise has also historically been limited by concerns that there may be pushback from beneficiaries who may not be bound by any settlement reached. Further, trust cases often involve family relationships, which can be complex at the best of times, and all parties may simply not be willing to enter into the mediation process.

The number of trust cases which have ended up before the courts, including the Supreme Court on occasion, have been a source of frustration for judges. As Dobson J said in *McLaren v McLaren* [2017] NZHC 161 at [93]: "I endeavoured to convey to counsel and the parties at the conclusion of the hearing my clear view that it is the professional responsibility of all advisers to apply their minds constructively and co-operatively to pursue all options for an overall settlement. Their primary task ought to be building bridges between the two sides, not preparing rockets to fire at each other".

One of the real difficulties with trust cases is that litigation costs are usually sought from the trust fund. So regardless of the outcome of the litigation, the fund is usually depleted, sometimes substantially. That cannot be in the beneficiaries' best interests.

Trusts Act mediation provisions

The Trusts Act 2019 will, when it comes into force on 30 January 2021, bring about a sea change on the mediation front. The court will be able to order Alternative Dispute Resolution (ADR) for internal matters regardless of whether the parties consent. Internal matters are disputes between trustees and beneficiaries, or trustees and trustees. The exception to this power is where the terms of the trust indicate a contrary intention.

My hope is that this provision will see far fewer trust cases make their way through the court system. The fact that if the court orders it, it will be mandatory, should not mean that mediation will not succeed. One only needs to look at the employment model to see how successful mandated mediation can be.

Other provisions in the Trusts Act will help to address other concerns trustees may have about compromise. For example, the Trusts Act provides a mechanism for internal matters to ensure that where a trust has unascertained or incapacitated beneficiaries, representatives for those beneficiaries will be appointed. Such beneficiaries will therefore be bound by any compromise reached.

Costs can often be a major factor in preventing compromise being achieved. When trustees apply to the court requesting mediation, they can also ask the court to order that the costs of that mediation be paid from the trust fund. If beneficiary representatives are required, their costs may also be met from the fund.

The indemnity position under the Trusts Act regarding when trustees may take their costs from the fund is essentially the same as the current position; that is, they may do so where they have acted reasonably. This is what the court will consider when being asked for an order under the Trusts Act that the trustees' costs of mediation be met from the fund. One would think that in requesting mediation, trustees would always be acting reasonably. However, much depends on the type of dispute the trustees are engaged in.

If compromise is reached, then if it involved court appointed representatives under the Trusts Act, the court's approval of the compromise will need to be sought. The court will not sanction the compromise

compromise if it is not in the best interests of the beneficiaries (for an Australian example in a family protection context see Re Finnie; Petrovksa v Morrison [2020] VSC 9). Trustees' participation in a compromise which is not court sanctioned will also potentially jeopardise their being allowed to take the costs incurred in mediation from the fund.

Have the trustees acted reasonably?

How can trustees properly assess whether they are acting, or have acted, reasonably? The issue of whether trustees have acted reasonably is a deceptively complicated beast. However, in short, following the categorisation of trust disputes in *Alsop Wilkinson v Neary* [1995] 1 All ER 431 and other relevant caselaw, the broad position regarding where trustees may take their costs from the fund, whether following litigation or compromise, is as follows:

(a) where trustees are involved in a hostile trust dispute where there are rival claimants to a beneficial interest in the trust, such as a creditor of the settlor, trustees should remain neutral and leave it to the rivals to fight their battle. If they are seen to be preferring one beneficiary over another, and "lose" (whether as part of the compromise terms, or in litigation) they are at risk as to costs personally;

(b) where trustees are involved in a hostile trust dispute regarding claims by beneficiaries to further provision from the trust, whether trustees can compromise depends on whether any element of the compromise involves a variation of the trust or a variation of the beneficial interests. If so, any compromise will require all beneficiaries' consent (although it could be argued that in the latter class of variation only the consent of the main protagonists would be required);

(c) claims against trustees for breach of trust are dangerous territory for trustees regarding their costs - but all is not necessarily lost if trustees are able to remedy the breach of trust. In the context of compromise, much will depend on whether there is an admission of the breach;

(d) claims seeking to remove trustees are very context dependent – even where trustees are removed by the court, they have on occasion been said to have acted reasonably in defending the application for their removal. In particular, the High Court in *Triezenberg v Mason* [2019] NZHC 920 was impressed with the efforts the removed trustee had made to resolve the proceedings. By way of contrast, the decisions of *Summerlee v Pool* [2019] NZHC 387 and Jones v O'Keeffe [2019] NZCA 222 provide examples of where removed trustees have had to pay not only their own costs personally, but at least part of the other parties' costs in addition;

(e) claims seeking rights in the administration/ execution of the trust to be enforced are generally straightforward, in terms of being both capable of compromise, and costs being met from the fund. However, it is not difficult to envisage a situation where, for example, trustees have not acted entirely reasonably in refusing to provide a beneficiary with information, and costs consequences may therefore arise (note the English decision of *Lewis v Tamplin* [2018] EWHC 777 (Ch) in this regard);

(f) in disputes involving third parties, trustees still need to show that they have acted reasonably in order to take their costs from the fund. Whilst third parties might not be concerned about money coming out of the fund, beneficiaries may be and any settlement would, as with all settlements reached by trustees, need to be in the best interests of the beneficiaries.

This list is not exhaustive of the types of disputes trustees might find themselves embroiled in. However, it does provide some guidance on how trustees should conduct themselves regarding any compromise, and whether or not they are likely to have acted reasonably.

Beddoe orders

An article referring to trustees' costs would not be complete without mentioning *Beddoe* orders. Named after the 1893 decision of *Re Beddoe (Downes v Cottam)* [1893] 1 Ch 547 trustees can, if they are unsure about whether to pursue or defend proceedings, seek the court's directions about what to do. If Beddoe relief is granted, the trustees are fully protected as to their costs from the trust fund (assuming full disclosure was made in the first place).

Applications for Beddoe orders are relatively rare in New Zealand, but much more common in England, particularly in the context of pension schemes. It may be that they are not sought as often as they should be here. If trustees can take advantage of the ADR provisions in the Trusts Act at an early stage, any need for Beddoe orders will be further reduced.

Power to compromise

The specific power to compromise contained in current trust legislation is being subsumed into the ADR provisions in the Trusts Act. However, the power remains a broad one, with trustees essentially being able to compromise anything as long as they have acted honestly and in good faith (or any higher standard the trust deed imposes).

Interestingly, trustees will not be liable by reason only that the ADR settlement was not consistent with the terms of the trust. It will be interesting to see how this provision is interpreted, but one possibility is that the common law restrictions regarding variation of trusts may be relaxed.

Ultimately, trustees have an obligation to preserve and safeguard trust property for the benefit of the beneficiaries. Mediation is a flexible confidential process able to deal with even extreme hostility. In McLaren v McLaren [2017] NZHC 161 and referred to above, at [94] Dobson J then said: "However embittered each side's view of the other might now have become, putting differences aside and making every possible endeavour to objectively recognise the concerns of the other side is now required. The alternative is to commit disproportionate personal and trust resources for the benefit of the lawyers."

Let's see if we can really help parties to trust disputes achieve an outcome that is in everyone's best interests.

ABOUT THE AUTHOR

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Carole is an experienced litigator, mediator and negotiator with a special interest in trusts (including relationship property disputes involving trusts) and estates. She is also interested in equitable areas of law, and how negotiation and/or mediation may be used to align with the underlying concept of fairness in equity.