Rights and Responsibilities of Trustees
Introduction

When a trust is created there are generally four main categories of persons involved. First there is the settlor who provides the assets for the trust and who is responsible for the creation of the trust. Second there is the trustee who holds the assets on trust. Third there is the beneficiary who is the person that benefits from the trust and who eventually receives the trust’s assets. Finally, there is often an appointor who is responsible for the appointment and removal of the trustee.

Within these categories it is the trustee whose role is the most exhaustive. This is because it is the trustee’s role to maintain the trust, to look after the assets, and to ensure that the assets are distributed to the beneficiary (or beneficiaries) at the appropriate time.

Yet despite the role of the trustee being so important, many people accept the position without a full recognition of the rights and responsibilities involved in being a trustee. Accordingly, this paper will consider some of the most important rights and responsibilities of the trustee. It will also consider some recent cases regarding the rights and responsibilities of the trustee.

1. Responsibilities of the Trustee

It is appropriate to start with the responsibilities of the trustee rather than the rights of the trustee. This is because the trustee’s responsibilities far outweigh the trustee’s rights.

1.1 General Responsibilities

Although it may seem obvious, the first duty of the trustee is simply to read and understand the trust deed. This is because it is the trust deed which regulates the responsibilities of the trustee, how the assets are to be maintained and how the assets are to be distributed.

Many trustees fail to understand the entirety of the trust deed and this often causes problems at a later stage. Particularly where the trustee has failed to maintain trust property as stated by the trust deed, or failed to administer the trust in the correct manner.

1.2 Duty to preserve and invest trust property

The foundational responsibility of the trustee is to preserve the assets of the trust so that they can be distributed to the beneficiaries at the appropriate time. Depending on the property involved in the trust, this preservation could have a broad meaning. It could mean collecting debts, insuring property, selling property or it could mean maintaining investments such as shares.

Yet what happens if the assets of the trust are slowly losing their value? Can the trustee invest the trust property so that the size of the trust can grow or is it the trustee’s duty to preserve the trust property only in its current state?

The answer to this question is dependent upon the terms of the trust deed which is one example of why it is so important that the trustee reads and understands the trust.

Under section 5 of the Trustee Act 1958 (VIC) if the trust instrument expressly prevents the trustee from making investments, the trustee is bound by the trust instrument. However if the trust instrument is silent, the trustee may invest the property of the trust or may vary any investments which have already been made under the trust.

Although the trustee has discretion in whether or not they invest the trust property, in some cases if the trust property is losing its value, it would be necessary to invest the trust property in order to meet the obligation to preserve the trust.
1.3 To take reasonable care in making investments

If the trustee exercises their discretion to make investments, the trustee is also under a duty to take reasonable care and skill in choosing those investments. Under section 6 of the Trustee Act 1958 (VIC) the trustee is under an obligation to exercise the appropriate care, diligence and skill or to engage somebody who can provide the necessary care, diligence and skill in an appropriate area of law.

Consequently, this may require the trustee to engage an accountant or financial service provider in order to more readily understand the potential investment options. Similarly, where property is involved it may require the trustee to engage a real estate agent.

The standard of care, diligence and skill is based upon what a prudent person would do if they were managing the affairs of somebody else. The legal system assumes that a person would be more diligent and cautious in managing somebody else's affairs than they would be when managing their own. This is reason that the law imposes the need to engage professionals with the appropriate care, diligence and skill when making investments.

In addition, section 8 of the Trustee Act 1958 (VIC) specifies matters to which the trustee must have regard to, so far as they relate to the trust, in exercising their power of investment.

This includes: the purposes of the trust and the needs and circumstances of the beneficiaries; the desirability of diversifying trust investments; the nature of and risk associated with existing trust investments and other trust property; the need to maintain the real value of the capital or income of the trust; the risk of capital or income loss or depreciation; the potential for capital appreciation; the likely income return and the timing of income return; the length of the term of the proposed investment; the probable duration of the trust; the liquidity and marketability of the proposed investment during, and on the determination of, the term of the proposed investment; the aggregate value of the trust estate; the effect of the proposed investment in relation to the tax liability of the trust; the likelihood of inflation affecting the value of the proposed investment or other trust property; the costs (including commissions, fees, charges and duties payable) in making the proposed investment; and the results of a review of existing trust investments.

1.4 To keep accounts and provide proper information

In fulfilling their duty, the trustee is also responsible for maintaining financial records and accounts which record the status of the trust. When the beneficiaries request the trustee to do so, the trustee is also under an obligation to provide that information to the beneficiaries.

The justification for this is the fact that the trust property will ultimately become property of the beneficiary. Accordingly, by allowing the beneficiaries to view and understand the financial records of the trust, it allows the beneficiaries to protect their interest in the property which will eventually become theirs.

1.5 Fiduciary duties

The trustee is also under a fiduciary duty in administering the trust. Essentially, the fiduciary duties are those duties which are imposed by the relationship of trust formed with the settlor and beneficiary.

Firstly, the trustee has a duty to act honestly and in good faith. This requires the trustee to act with the intention of fairly administering the trust rather than from some other purpose.

The trustee also has a duty not to make a secret profit. This means that the trustee cannot use the trust to their own financial advantage.

The trustee also has a duty to avoid conflicts of interests. Accordingly, the trustee should not take on the role of trustee if the obligations in administering the trust would conflict with the trustee’s personal obligations.
2. Rights of the Trustee

Although the trustee has a number of rights, these rights are not of a personal nature, but rather, relate to the administration of the trust.

2.1 To advance capital and income to a beneficiary

In cases where the trust's beneficiaries are infants or persons under a certain age (as specified in the trust), the trustee may have the right to advance half of the trust to the beneficiaries.

The trustee shall have the right to advance the capital when there is a legitimate purpose for making the advancement. Accordingly, under section 38 of the Trustee Act 1958 (VIC) the trustee only maintains the right to advance capital to a beneficiary when the advancement would be for the maintenance, education, advancement or benefit of the beneficiary.

As above, in accordance with section 37 of the Trustee Act 1958 (VIC), the trustee has the right to pay the whole or part of the income of the trust to a parent or guardian of a minor beneficiary or otherwise apply this towards the maintenance, education, advancement or benefit of the beneficiary. A beneficiary who has attained the age of 18 years, but not yet attained a vested interest in the income of the trust, would be entitled to receive the income directly.

These sections have a broad application and are designed to accommodate, both the educational expenses of the beneficiary, as well as the general living expenses which would allow for their maintenance and benefit.

2.2 Assistance in discharging the role of the trustee

As a general rule, the trustee is responsible for the administration of the trust and they are unable to delegate this role to others.

However, section 41 of the Trustee Act 1958 (VIC) allows for the appointment of additional trustees, and section 48 of the Trustee Act 1958 (VIC) allows the court to appoint new or additional trustees.

2.3 Powers under the Trustee Act 1958 (VIC)

The Trustee Act 1958 (VIC) also provides the trustee with other powers. In particular, these powers relate to the ability to sell property or to transfer it. In addition, the trustee is also given powers regarding the leasing of real estate and the raising of moneys.

The Trustee Act 1958 (VIC) also provides for a number of powers and responsibilities which are addressed within this paper.

2.4 Trustee’s right of indemnity

The right of indemnity was described as follows: “Where the trustee acting within his powers makes a contract with a third person in the course of the administration of the trust, although the trustee is ordinarily liable to the third person on the contract, he is entitled to an indemnity out of the trust estate, if he has discharged the liability out of his individual property, he is entitled to reimbursement; if he has not discharged it, he is entitled to apply the trust property in discharging it, that is, he is entitled to exoneration.” (Commissioner of Stamp Duties (NSW) v Buckle 192 CLR 226).

Also in accordance with section 36 of the Trustee Act 1958 (VIC), the trustee has an implied right of indemnity provided that the loss does not result from his own willful default. The trustee may also be reimbursed or pay from the trust expenses incurred in the administration of the trust.
2.5 To commence litigation on behalf of the trust

The trustee also has the power to commence litigation on behalf of the trust. This can be an important right if there is further property owing to the trust which could potentially be reclaimed. As such, trustees often use their right to commence litigation in order to recover debts or to recover property owing to the trust.

Litigation can also be an important tool if there are issues in the trust which are contested. In commencing litigation the trustee can often resolve these issues and then administer the trust.

2.6 Powers of the court – trustees right to apply

Under Part IV of the Trustee Act 1958 (VIC), the court has a number of powers including but not limited to appointing new or additional trustees, making vesting orders, authorising dealings with trust property and varying trusts. A trustee is considered a person entitled to apply for orders in this regard in accordance with section 64 of the Trustee Act 1958 (VIC).

In addition, in accordance with order 54.02 of the Supreme Court (General Civil Procedure) Rules 2005 (VIC), the trustee has the ability to petition the court in order to obtain their opinion, advice or direction on any matter regarding the administration of the trust.

In exercising these rights, the trustee can be sure that their actions are justified.

3. Cases

3.1 Reid v Hubbard [2003] VSC 387

John Rickett Hubbard left behind a Will by which he appointed his son, John Harold Hubbard, and a solicitor, Bruce Sundberg, as his executors and trustees. He directed that they should get in the whole of the estate and, after payment of debt and testamentary expenses, should divide the residue into two halves: the first, to be held upon trust for his son John Harold Hubbard and others; and the second, to be held upon trust for his daughter, Susan Reid and her son Michael James Reid and others.

Contrary to the terms of the Will, John Harold Hubbard and Bruce Sundberg did not get in the assets of the estate, and they did not divide the residue in two as directed. There was a debt owed to Hubbard Holdings Pty Ltd (as trustee for the JRH Family Trust) of which the deceased and his son, John Harold Hubbard were directors. This debt was left outstanding, and John Harold Hubbard caused or procured the company to advance the amount of that debt, and a substantive amount of other funds from the JRH Family Trust to entities with which he was associated.

It should be noted that both John Harold Hubbard and Bruce Sundberg were removed from their roles as executors and trustees, and proceedings were brought by Susan and Michael Reid against John Harold Hubbard, and the newly appointed administrator was joined as a defendant.

John Harold Hubbard, raised a number of arguments including, that the terms of the will gave him power to defer the getting in of the assets, alternatively he stated that his actions were made in reliance on the advice (or lack thereof) of the co-trustee, Bruce Sundberg, and finally, that his actions were based on what he conceived to be were the wishes of his father, who was always interested in long-term investments, and who had wished him well with the vineyard when it first begun.

At Paragraph 33 – “A trustee must not only act honestly but also reasonably, and a trustee who acts on the statements of a co-trustee, even a co-trustee who is a solicitor, without assessing the accuracy of the statements, does not act reasonably and will not be excused.”

Ultimately, as a result of John Harold Hubbard’s failure as trustee to protect and maintain the trusts, he was held personally liable.
This case therefore demonstrates that if trustees fail to protect and maintain the trusts, they could be found personally liable for the trust's damage.

3.2 Tomasevic & Anor v Jovetic & Ors [2012] VSC 405

The case related to a charitable trust for the First Church. There were four trustees of the First Church Trust, and the trustees were equally divided as to whether the property should be distributed to the Serbian Orthodox Church or the Free Serbian Orthodox Church.

Consequently, in order to break the deadlock, the court recognised that it needed to use its power to either appoint a new trustee or remove one (or all) of the current trustees. The court also recognised that in exercising its power, it needed to have regard to the interests of the beneficiaries, the security and integrity of the trust assets and the way in which the trust was being administered, in terms of its efficiency, and meeting its charitable purpose.

It was the administration of the trust which ultimately swayed the court's decision. This is because it found that Mr Jovetic was acting with a lack of impartiality and objectivity in relation to the administration of the trust. Similarly, Mr Juzbasic was acting with hostility in not paying creditors and in freezing the bank accounts of the trust.

Ultimately, the court thought that in order to break the deadlock between trustees, it would be more appropriate to remove one of the trustees rather than appoint a new trustee. Accordingly, the court removed Mr Juzbasic as a trustee because it felt that his removal would ensure the most efficient administration of the trust going forward.

This case highlights that the court's have an ability to appoint or remove trustees, in order to ensure the efficient administration of trusts.

3.3 Morris v Smoel [2013] VSCA 11

This is an appeal of a case that was brought by the trustees and executors, in order to obtain judicial advice under rule 54.02 of the Supreme Court (General Civil Procedure) Rules 2005 (VIC) relating to the proposed sale of trust assets to pay for certain liabilities. More specifically, the estate had debts of approximately $300,000 but no liquid assets with which to meet those liabilities.

Mrs Morris, the wife of the deceased, argued against the sale of assets. This was on the basis that:

- it would be premature to sell the assets on the basis of a temporary liquidity problem;
- there was no evidence that any creditors (apart from the solicitors) were pressing for payment;
- there were real issues about the quantum of the solicitors' costs and whether they had been properly incurred; and
- there was no clarification as to what the assets of the estate actually were.

McMillan J rejected the arguments of Mrs Morris, and instead recognised the commercial demands that confronted the executors, and their obligation to meet the relevant debts.

This decision was upheld on appeal, with Maxwell P discussing at length the ability of a trustee or executor to seek judicial advice.

At Paragraph 22 – “The purpose of establishing a procedure of this kind was to enable a trustee or executor to obtain the direction or opinion of the Court on a matter of administration or management, or as to the construction of the will or trust instrument, without the need to commence an administration suit with all its attendant delay and cost.”

The case demonstrates an instance where a trustee sought the opinion of the court in order to ensure that it was correctly administering the trust.

See also the related case of Wooster v Morris [2013] VSC 594 regarding the validity of a binding death benefit nomination made by Mr Morris prior to his death.
3.4 Estate Wight; Wight v Robinson [2013] NSWSC 1229

This trust relates to the estate of Andrew John Wight. It also had implications for an estate in the United States which ultimately led to the parties agreeing on the course of action.

The estate was being administered by Mr Robinson, who was a long-time friend of the deceased. Mrs Wight, the deceased’s wife, was the sole beneficiary of the estate.

Despite this, the estate was subject to a number of claims which impeded its administration.

In these proceedings, Mrs Wight was alleging that Mr Robinson had defaulted in his responsibilities as an executor and failed to administer the estate. Accordingly, Mrs Wight sought to be made as the executor.

This was necessary because it would then allow her to place the assets in probate into a testamentary trust and then administer the trust.

This is significant as a result of the rule in Saunders v Vautier. The rule in Saunders v Vautier notes that the beneficiary, in certain circumstances, can call on the trustee to administer the trust and distribute the assets. See also Krstic v State Trustees Limited [2012] VSC 344 for application of the rule in Saunders v Vautier.

In the current case, the court thought it was appropriate to allow Mrs Wight to assume the duties of the executor, as agreed by the parties. This is because there had been a genuine dispute between the parties, the working relationship between the parties had broken down, and because it was appropriate that Mrs Wight be placed in charge considering that she was the sole beneficiary of the estate.

This case emphasises that where there is a dispute between the trustee (or in this case the executor who would become a trustee) and the beneficiary, the beneficiary can either call on the trustee to administer the trust, or they can request the trustees replacement by the court.

3.5 Miller v Cameron [1936] HCA 13

This historic case revolved around whether a trustee could be removed from their office on the basis of temptation rather than any actual failing. Essentially, it meant that the court had to have regard to whether the trust was in danger, and whether the court needed to protect the beneficiaries of the trust.

The trustee in this case was the sole trustee for a property of substantial value. In contrast with the trust, the trustee personally was in a precarious financial position and was unable to improve his financial position. Accordingly, in order to avoid a situation where the trustee utilised the trust assets for his own personal gain, the beneficiaries and the settlor all sought to remove the trustee. The court recognised that its most important duty was to protect the beneficiaries, and consequently it removed the trustee.

This case therefore demonstrates that a trustee can be removed even without any wrongdoing, and that the protection of the beneficiaries is the court’s most paramount concern.

3.6 Grant Thornton (WA) RSE Services Pty Ltd [2012] VSC 428

This case involves a trustee who applied to the court seeking declarations and guidance to assist in the fair and equal administration of a trust fund. The trust fund in question was the Brashs Pty Ltd Staff Provident Fund.

The trust deed was over 40 years old, and some details relating to its administration were uncertain. Moreover, an attempt to amend the terms of the deed had failed, despite the trustee thinking otherwise for a number of years.
As a result, there was confusion in relation to the date of dissolution of the fund, the identity of the members of the fund, and how the surplus within the fund should be distributed.

For instance, there were said to be 107 members that were entitled to distributions under the trust. However, of those 107 members, 12 could not be identified and 3 were identified but could not be found.

The trustee proposed to distribute the surplus funds only to members that were identifiable between the period of 2 May 1994 and 29 May 1998. These dates were relevant because it was argued that a number of partial dissolutions of the fund occurred during this period, with the final dissolution occurring on 29 May 1998. They proposed to distribute the surplus funds by direct payment to those members that had been identified and found, and the remaining portion relevant to those members that were identified but could not be found, by way of payment to the Registrar of Unclaimed Money.

The court accepted this proposal, despite the complicated nature of how the distributions were set up in the trust deed.

This case exemplifies that it can often be difficult to fairly administer the trust and to treat the beneficiaries equally and fairly.

3.7 Re McDonald Trust No 1 [2010] VSC 324

This case concerns a trustee who applied to the court for a variation of The McDonald Trust No 1, a trust made in favour of Malcolm McDonald and Kristie McDonald. This power is granted to the court under s 63A of the Trustee Act 1958 (VIC).

Firstly, the trustee sought to accommodate the inclusion, among persons who may be appointed as beneficiaries, those who may be a spouse or de facto spouse of any of the children or grandchildren of Malcolm McDonald.

Secondly, the trustee requested a typographical error in the definition of “Vesting Day” be corrected.

Judd J was prepared to authorise the first variation. This was because the trust was designed precisely to benefit members of the McDonald Family, and at the time of establishment, those preparing the trust deed had simply failed to accommodate changing community attitudes in relation the composition of a family which may include a de facto spouse.

Thus, having regard to the nature of the trust, and the circumstances in which it was established, and the informed consent of the members of the McDonald family, Judd J exercised the power available to the court under s 63A to vary the trust as from the date of its creation.

Judd J then adopted the approach taken by Brereton J in Saxby Soft Drinks Pty Ltd v George Saxby Beveridges Pty Ltd [2009] NSWSC 1486 “that rectification should not be ordered where the document used terminology which literally made no sense, and that one should simply construe the words in the manner which made sense”.

On this basis, he decided that there was plainly an error of expression in the definition of “Vesting Day.” The reference to “the shorter” should be read and construed as if meaning the “longer period.” In his reasoning, he stated that the word “shorter” does not make sense in respect of two dates that are followed by the expression of a power in the trustee to decide on an earlier date, and that the definition was intended to provide an outer limit.

This case is significant because it demonstrates in some circumstances trustees are unable to act on the terms of the trusts. When this occurs the trustee often needs to apply to the court to vary the terms of the trust.
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