

THE INDEPENDENCE OF TRUSTEES

BY

HANNAH MARIE COPE

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Abstract

This paper considers the concept of independence and how it applies to various types of trustees in an effort to assist more trustees to avoid the risks involved in being a trustee. There is also a practical aspect to this paper to offer assistance to professional trustees to achieve higher levels of independence.

Word length

The text of this paper (including abstract, table of contents, footnotes and bibliography) comprises approximately 30,081 words.

Subjects and Topics

Express Trusts

Trustees

Fiduciary Obligations

Trustee Independence

I Introduction

The focus of this dissertation is the *independence* of trustees. It is widely accepted in the legal community that trustees must be independent¹ however there is no clear analysis of the meaning of independence in the context of trusts law as there is in other fiduciary relationships. The concept of ‘independence’ as it applies to trustees, both professional and lay trustees, will be examined as well as where the idea of ‘trustee independence’ may originate. It will also determine how such a concept might be assessed.

By examining independence in other contexts, the factors that might affect independence and the types of trustees commonly used both in the family trusts and commercial trusts context will be considered. This dissertation will determine both the theoretical aspect of independence as well as the practical level and suggest a possible compromise between the two. Through the creation of an independence test an analysis of a trustee’s ability to fulfil the independence requirement can be undertaken in order for professional trustees to follow best practice.

This Chapter presents the topic and an overview of the structure of the dissertation. Chapter II gives the background to the topic, including the definitions of trust and trustee used in this paper, discussion of the Law Commission’s report on trusts law in New Zealand and consideration of the origins of the requirement for independence.

Chapter III proposes a definition for independence in the context of trusts law. This definition is tested against other areas of law that require independence. The result is a set of criteria against which different types of trustees may be measured. Chapter IV measures a range of trustees for independence using the test from chapter III and creates a scale against which trustee independence can be measured. Chapter V draws together the findings of the previous chapters, examines other factors that may impact on independence, evaluates the test and determines some practical application for trustees. Chapter VI concludes the dissertation.

¹ Sally Morris and Juliet Moses “Acting as an Independent Trustee - are you really, really sure you want to?” (New Zealand Law Society Continuing Legal Education, paper presented to Trusts Conference, Wellington, 2015) at page 102.

II Background

The introduction set out the core objective of the dissertation. This chapter provides background information on the form of trusts discussed in this dissertation, the Law Commission's suggested development of the future of trusts law and the requirement for independence by way of background for chapter III.

A *Trusts in this Dissertation*

The focus of this dissertation is express trusts with formal written trust documents and trustees of express trusts. It is not within the scope of this dissertation to examine the independence of trustees of other types of trusts. The definitions of an express trust and of trustee do not impact on independence directly but in order to determine a test for independence it is crucial to understand the context in which it must apply.

1 *Trustee Act 1956*

Legal concepts are often defined in key legislation governing the law in a particular area. Unfortunately the legislation in the area of trusts law in New Zealand is poor. The Trustee Act 1956 is the key piece of legislation governing trustee administration of trusts and estates in New Zealand. The definition of *trust*² in the Act offers the reader little assistance in determining its meaning. The Act assumes the reader has an understanding of the common law definition of a trust and does not try to state the common law definition. Rather it limits the word *trust* under the Act so that it does not include very specific listed examples. It then widens the term to include implied and constructive trusts, instances where a trustee has a beneficial interest, an administrator under the Administration Act 1969 and a manager under the Protection of Personal and Property Rights Act 1988.

This definition of *trust* is not informative or of any assistance to a reader unfamiliar with the general definition of a trust. It merely spells out what a trust is not and what it may include for the purposes of the Act. There is no further assistance in the Act. It is unsurprising then that the Law Commission found the need for an informative definitions section in the draft Bill to assist settlers and trustees to understand the law of trusts.

2 *Law Commission*

The Law Commission began a review of the practices and laws in the area of trust administration in March 2009. The Commission's *Review of the Law of Trusts: A Trusts Act for New Zealand*³ went to Parliament in September 2013 to be considered by the Minister of Justice. The Law Commission hopes to promote general awareness of trusts law with a Trust Act, making the law user-friendly and accessible to the lay trustees.⁴ The aim is to create a modern Act that encompasses as much of the common law relating to express trusts as possible to help understanding as well as to assist in good trust administration. In March 2014 the Government issued its response.⁵ In general it agreed with the Law Commission but requested further work before forming a comprehensive view on the matter.

It will be some time before there is any legislative change in this area. The Law Commission's report has highlighted the need for change and encouraged discussion of trusts law and trust administration in the legal community. The report does not touch on the issue of

² Trustee Act 1956 s 2 an extract of the definition is in the Schedule of this paper.

³ Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013).

⁴ Law Commission *The duties, office and powers of a trustee review of the law of trusts* (NZLC IP26, 2011) page 7-8 at paragraph 1.8

⁵ Ministry of Justice "Government response to Law Commission report 'Review of the Law of Trusts: A Trusts Act for New Zealand'" (March 2014) <<http://www.justice.govt.nz>>.

trustee independence nor does it look at reviewing professional trustees who offer trustee services.

The Law Commission discusses in detail the origins of trusts law and the eventual evolution to the modern trust.⁶ The Law Commission proposed a draft Bill in its report⁷ to Parliament. The draft Bill includes a definition⁸ stemming from the various issues papers and the responses received from the legal community.

The definition sets out the essentials of an express trust. Sections 4 and 5 in particular set out the core characteristics and the three certainties in a coherent manner to assist the lay person understand the basic requirements for trust formation.

The Law Commission defined trustee as “a person who holds property under a trust”.⁹ This description is very simple and does not adequately describe the true nature of the relationship. The trustee-beneficiary relationship is the fundamental fiduciary relationship. “Fiduciary relationships are those in which equity accepts that one person owes a duty of loyalty to another. As a result of this duty a range of other duties flow.”¹⁰ The key parts of the fiduciary relationship are loyalty, good faith, no profiting and no conflicts of interest. It is important to note that a settlor may on formation of the trust elect to reduce these fiduciary duties down to the irreducible core of fiduciary duties being loyalty and good faith however it cannot be reduced beyond that point as there would then be no trust.¹¹

The other duties that stem from the fiduciary relationship are trustee duties. There is no definitive list of a trustee’s duties however these trustee duties are in addition to the core fiduciary duties and their incorporation into a trust will depend on the settlor’s wishes at the time for formation. For example the duty to deal with the beneficiaries equally is a trustee duty which a settlor may vary by choice.¹² The idea of a settlor naming discretionary beneficiaries to a trust is that the trustees can transfer capital or income to the discretionary beneficiaries unevenly provided that the trustees considered all the beneficiaries. Other trustee duties are set out in statute and or the common law for example the power to invest trust funds is set out in s13A of the Trustee Act 1956.¹³ Trustee duties can apply in varying degrees or be waived depending on how these duties have been written into the trust deed. This means that the duties owed by trustees can vary between trusts but the irreducible core must remain unchanged for a trust to exist.

The Law Commission compiled a list of trustee duties that may be incorporated into the Trust Act as a guide for settlors and trustees. The duties of trustees discussed in this paper are those in the Law Commission’s list.¹⁴

B CIR v Newmarket Trustees Limited

The case of *CIR v Newmarket Trustees Limited*¹⁵ has been a turning point for professional trustees in legal practice. There are other cases against professional trustees but *CIR v*

⁶ Law Commission *Review of Trusts law in New Zealand: Introductory Issues Paper* (NZLC IP19, 2011) at chapter 2.

⁷ Law Commission, above n 3.

⁸ Draft Trusts Bill an extract of the definition is in the Schedule of this paper.

⁹ Law Commission, above n 3, at page 244.

¹⁰ Andrew S Butler and Tim Clarke *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009).

¹¹ *Armitage v Nurse and Others* [1997] 2 All ER 705 affirmed in New Zealand by *Clayton v Clayton* [2015] NZCA 30.

¹² *Re Mulligan (deceased)* [1998] 1 NZLR 481.

¹³ Trustee Act 1956 ss 13A to 13Q.

¹⁴ Law Commission, above n 4.

¹⁵ *Commissioner of Inland Revenue v Newmarket Trustees Limited* [2012] NZCA 351.

Newmarket Trustees Limited caught the legal community's attention in a way other cases had not, by alerting legal practitioners to the very real possibility of their trustee companies being liquidated. *CIR v Newmarket Trustees Limited* involved a solicitor's trustee company where one of its trusts became liable for tax. As is usual practice the trustee company did not retain funds in its accounts, the company merely held the title to the property in its name as trustee and otherwise had no other assets. The Inland Revenue sought to have the trustee company liquidated after it found the company to be in default and the court made the liquidation orders,¹⁶ highlighting the burden of company law as well as trusts law on trustee companies. *CIR v Newmarket Trustees Limited* has stirred the law community into starting to withdraw from the professional trustee market. Some in the profession have begun to advocate a complete withdrawal by solicitors from acting as professional trustees as the risk of attracting liability for being a trustee is too great. This suggestion should not be encouraged. There is and will always be a key role to be played by lawyers who specialise in trusts law, to act as professional trustees and advisors, to ensure good trust administration and compliance with trusts law.

There is plenty of guidance available for professional trustees, post-*Newmarket*, on how professional trustees might continue to exist in the trustee market while limiting their liability but none of that material touches on trustee independence. Trustee independence is established through the fiduciary relationship by complying with the fiduciary duties in the most diligent manner. This aspect of the fiduciary relationship is well documented in other fiduciary relationship such as lawyer-client however there is a void in all the available resources where discussion of trustee independence should be. The obligation of independence is not limited to professional trustees who fulfil the role as professionals; it applies to all trustees who owe fiduciary duties including trustees who are beneficiaries of the trust. Where there is no guidance for professionals, lay trustees cannot be expected to understand the notion of independence. As part of the goal of informing the general public about basic trusts law, guidance needs to be given on independence but first professional trustees must understand independence in order to assist other trustees to understand.

C Professional Trustees

Having a professional trustee adds a degree of objectivity to the trust administration by introducing an unrelated party to provide a check and balance on the decisions of the other trustees. Best practice would have a professional trustee on every trust whether it simply holds a family home or is the shareholder of a large company. Poor practices and bad administration have seen many trusts successfully challenged in the courts. It is time for the general public to be up-skilled in the area of trusts law together with professional trustees to ensure trusts are being managed correctly and that trustees understand their fundamental duty of independence.

In the family trust context family members are often asked to be trustees as they are familiar with the day to day running of the trust property or the settlor's intentions. In the commercial context specialists in areas such as investments are often trustees because of their particular expertise. Neither of these types of trustees are specialists in the law of trusts which means they often do not fully appreciate their role. As a result many law firms and corporate trustee companies offer a professional trustee service, because these particular professionals understand the law of trusts and the role of a trustee and therefore are better equipped to be a trustee. On the other hand a professional trustee or corporate trustee is more removed from the clients and not privy to the day to day happenings relating to trust property.

¹⁶ *Commissioner of Inland Revenue v Newmarket Trustees Limited*, above n 15 at [43]-[45].

This point was emphasised in *Judd v Hawke's Bay Trustee Company*.¹⁷ There a diligent professional trustee, an accountant, met with the settlor trustee once a fortnight to discuss trust matters. The issue was, whether the settlor-trustee could create an expectation in the settlor's wife that she might be entitled to a percentage of the trust property without the actual agreement of the professional trustee. The court found that the settlor-trustee who was living in the property made the day to day decisions and that the professional trustee had delegated his authority to the settlor-trustee for this purpose. Because of this delegation the settlor-trustee could bind the trust without the professional trustee's knowledge. The court awarded the settlor's wife a share of the trust property. *Judd* emphasises the need for professionals to know their trustees duties, adhere to best practice and ensure they are complying with the rule of no delegation of authority. Thereafter they should be educating the lay trustees to ensure that settlor-trustees are not creating unintended expectations in trust property.¹⁸

D Independence

Often a professional trustee, such as a lawyer or accountant, is referred to as an *independent trustee*. The concept of an *independent trustee* is misleading, as it suggests that other trustees are not independent. There are lay trustees and there are professional trustees but all trustees have the same obligations to act with good faith and loyalty, in the interests of the beneficiaries and in accordance with the settlor's intentions.

In a recent article published as part of the 2015 New Zealand Law Society Trusts law Conference the authors stated that "the law requires all trustees to act independently and impartially".¹⁹ It would seem the legal community agree there is a requirement for trustees to have 'independence', however it is unclear what is meant by this and where exactly such a requirement has stemmed from. There is no easily identifiable discussion of either the origins or meaning of 'trustee independence' in the case law or scholarly works which leaves its origins murky. If the obligation is not statutory and there is no common law rule then the only place it can come from is the fiduciary relationship between trustee and beneficiary.

1 Fiduciary duties

It is important to draw a distinction between duties that arise from the fiduciary relationship and other obligations a trustee is required to perform under the trust deed and trusts law. A trustee/beneficiary relationship is one of a number of fiduciary relationships recognised in equity. This special relationship arises where someone must act for or on behalf of another in relation to a specific matter which gives rise to a relationship of trust and confidence.²⁰ The trustee must first and foremost be loyal to the trust so the beneficiaries of the trust can have full trust and confidence in the trustee to manage the trust affairs in the beneficiaries' best interests. Although it is widely agreed that fiduciary loyalty is fundamental to the fiduciary role there is lack of agreement as to how many other fiduciary duties there are.²¹ Below are the four key concepts most often considered to be fiduciary duties.

(a) Duty of loyalty

Loyalty is the heart of any fiduciary relationship and is the duty that distinguishes the trustee/beneficiary relationship from other types of relationships. From the duty of loyalty flow the duties of good faith, no profiting and no conflict.²² The idea is that a fiduciary's sole concern is the obligation to the principal to the exclusion of any conflicts or self-interest that

¹⁷ *Judd v Hawke's Bay Trustee Company Limited* [2014] NZHC 3298.

¹⁸ *Judd v Hawke's Bay Trustee Company Limited*, above n 17 at [63]-[71].

¹⁹ Sally Morris and Juliet Moses, above n 1.

²⁰ *Bristol and West Building Society v Mothew* [1997] 2 WLR 436.

²¹ Matthew Conaglen *Fiduciary Loyalty* (Bloomsbury Publishing, 2010).

²² *Bristol and West Building Society v Mothew*, above n 20.

might touch on the matter. For example a trustee must be loyal to the beneficiaries of the trust and cannot profit from the relationship or have any conflicts of interest, as in *Keech v Sandford*²³ where the trustee who could not obtain a renewal of lease for the beneficiary obtained it for himself.

(b) No profiting

As mentioned in *Keech v Sandford*²⁴ a fiduciary should not profit from performing their role. The fiduciary in *Keech v Sandford*²⁵ held the benefit of a market lease on behalf of an infant. When a renewal of lease could not be obtained for the beneficiary, the trustee obtained the renewal in his own name. The court held that the renewal of lease should be held for the benefit of the infant as a trustee should not profit from the fiduciary relationship.

*Regal (Hastings) Ltd v Gulliver*²⁶ is another case involving the duty not to profit. Here the directors of a company, to assist that company, formed a subsidiary and used their position as directors of the first company to acquire shares in the subsidiary. They then went on to sell their shares for a substantial profit. The company took them to court to recover the profits made on the sale of shares. The directors were found to be in a position similar to a trustee and to owe fiduciary duties to the company, including the duty not to profit. By using their position and knowledge they had been able to sell the shares at a substantial personal profit.

(c) No conflict

A fiduciary must not have any conflicting duties or conflicting interests.²⁷ The case of *Boardman v Phipps*²⁸ highlights both the duty not to have a conflict of interest or conflict of duty and the duty not to profit. Mr Boardman was the solicitor for the trustees. A solicitor/client relationship is also a fiduciary relationship attracting the same fiduciary obligations as the trustee/beneficiary relationship.²⁹ Mr Boardman acquired confidential information about company shares by holding himself out as acting on behalf of his clients. The client was not interested in acquiring shares in the company and had informed Mr Boardman of this, so Mr Boardman used the information to buy shares in the company personally, for his own benefit. Mr Boardman profited from the information he acquired while holding himself out as acting for the trustees as their solicitor. The clients then successfully brought a claim against him alleging that he had received the information while ‘acting’ on their behalf and therefore he had a conflict of interest and was not entitled to the benefit.

(d) Good faith

Fiduciaries must act in good faith when performing their obligations for their principal.³⁰ Good faith means to act with honest and sincere intentions.³¹ It is at the heart of a trustee’s duty to act honestly and sincerely when performing the role of trustee.³² A trustee must not let other relationships or obligations influence the decisions made while trustee; a trustee must be faithful and loyal to their principal at all times.³³ The duty of good faith means

²³ *Keech v Sandford* (1726) 25 ER 223.

²⁴ *Keech v Sandford*, above n 23.

²⁵ *Keech v Sandford*, above n 23.

²⁶ *Regal (Hastings) Limited v Gulliver and Others* [1942] 1 All ER 378.

²⁷ Martin Day “Fiduciary duties” (2009) 15 *Trusts & Trustees* 447.

²⁸ *Boardman and Another v Phipps* [1966] 3 All ER 721.

²⁹ *Boardman and Another v Phipps*, above n 28 at 62 C.

³⁰ *Armitage v Nurse and Others*, above n 11.

³¹ Catherine Soanes and Angus Stevenson *Concise Oxford English Dictionary* (11th ed, Oxford University Press, New York, 2008).

³² *Armitage v Nurse and Others*, above n 11.

³³ *Bristol and West Building Society v Mothew*, above n 20.

coming into the relationship exercising honesty, sincerity and faithfulness towards the other party.³⁴

2 *The irreducible core*

The four core fiduciary obligations of loyalty, no profiting, no conflict and good faith go to the heart of the trustee-beneficiary relationship and set the foundation for trustee independence. The requirement for independence is not a separate fiduciary duty owed by the trustees but rather it stems from these core obligations coming together to create the concept of trustee independence.

The case of *Armitage v Nurse*³⁵ which has been confirmed in New Zealand by *Clayton v Clayton*³⁶ has made clear that these core fiduciary duties can be limited by the settlor to just loyalty and good faith. This is the minimum required for a trust to exist. It does not necessarily follow though that independence is not created in a situation where some of the core obligations are missing but rather the scope of independence is limited in the same way as the obligations.

3 *Conclusion*

Although there is very little written about the independence of trustees it is possible to see the origins of the requirement of trustee independence when examining the fiduciary duties. Lack of authority on trustee independence does not deny the usefulness of the requirement of independence or its existence. Independence is often used and defined in legislation for particular roles and it is also discussed in relation to other fiduciary relationships. Its value lies in how it brings together and moves beyond the fiduciary obligations even in situations where these are limited by the settlor to assist both professional and lay trustees to be the optimal trustee within the parameters set by the settlor. This benefits the trustee because by being independent they limit their risk of attracting liability for their actions.

Trustee independence stems from the fiduciary obligations but it does not follow that it should be assessed in the same way as you would assess compliance with each obligation in isolation nor is it necessarily confined to the limits of each obligation. To assess independence it is important to examine the concept as a whole regardless of whether it has been limited by the settlor. As will be seen in the next chapter the requirement for independence is common place in other legal relationships but there appears to be a gap in the discussion of the trustee relationship where independence should be. This dissertation will fill that gap with discussion of trustee independence by examining other areas of independence commonly discussed and then using this will analyse trustee independence within certain groups of trustees. The test will assist trustees in establishing their independence. The more independent a trustee can become the better they will perform their trustee duties and the safer from claims and liability they will be.

³⁴ Matthew Conaglen *Fiduciary Loyalty* (Hart Publishing, Portland, 2010).

³⁵ *Armitage v Nurse and Others*, above n 11.

³⁶ *Clayton v Clayton* [2015] NZCA 30.

III Defining Independence

As there is no definition of independence to test trustees against, this dissertation examines the concept of independence in the context of other independent relationships in order to determine the key concepts of independence. In practice not all trustees are described as *independent trustees*. It is in the nature of a trust that trustees have some level of independence. Trustees who are also beneficiaries may struggle to meet the requirements of independence but that does not absolve them from the requirement to be independent. When the term *independent trustee* is discussed in common usage it usually refers to a professional trustee, however a lay trustee can owe an equal obligation of independence. For example a law firm's trustee company is commonly thought of as an *independent trustee* but a beneficiary trustee would not be given this title.

A Dictionary

Two dictionaries have been used to give a basic understanding of the term 'independent' in common usage.

The *New Zealand Oxford Dictionary*³⁷ defines 'independent' as:

- Not depending on authority or control. Self-governing.
- Not depending on another person for one's opinion or livelihood.
- Unwilling to be under obligation to others.

The *Concise Oxford Dictionary*³⁸ defines 'independent' as:

- Free from outside control; not subject to another's authority.
- Not depending on another for livelihood or substance; capable of acting or thinking for oneself.
- Not connected with another; separate.

Both of these definitions indicate that to be 'independent' a person must be removed from the control of others and must not depend on others for opinions or earnings. Decisions should be free from the influence or wishes of others. When applying this idea to the express trust situation a trustee acting independently should make decisions based on the rules set out in the trust deed and take into consideration the interests of all beneficiaries of the trust. A trustee's decisions, beyond the terms of the trust, should not be determined by the wishes of the settlor and should not be swayed by remuneration.

1 Application of dictionary definition

The idea of being free from the influence of others brings into question the independence of the majority of trustees. Trustee-beneficiaries have a discretionary beneficial interest in the assets of the trust and professional trustees have an interest in being remunerated. Even a close personal relationship with a beneficiary would call into question whether the trustee was influenced by the beneficiary who wished to receive some benefit.

A family member or friend acting as trustee would not meet the definition of 'independent' as defined by the *New Zealand Oxford Dictionary* as their relationships will influence their decisions. Even where no influence is exerted there is a presumption of influence over the actions of family or friends which is hard to refute. The presumption arises because a settlor who chooses a trustee who is also a family member or friend does so, on the basis that they work well together or have a good relationship with each other and the trustee can therefore

³⁷ New Zealand Dictionary Centre *The New Zealand Oxford Dictionary*, Graeme D Kennedy and Tony Deverson (eds) (Oxford University Press, Auckland, 2005).

³⁸ Soanes and Stevenson, above n 31.

be influenced by the settlor. The only way to refute the presumption is through examining the decisions made during the party's tenure as trustee. This raises the following question: if a presumption of bias cannot be refuted without examining the trustee's actions while in the role of trustee, is it appropriate to appoint a family member or friend to be trustee and thereafter assess their bias? The risk with this approach is that the bias will crystallise after the appointment of the family member or friend as a trustee so the trustee has already had the opportunity to abuse their power by the time the bias can be assessed.

Professional trustees may not have the closeness of family but there can be other close relationships that may call into question the independence of a professional trustee. For example a lawyer or accountant who has had a longstanding client relationship with a settlor, who is then asked to be a trustee. The relationship between lawyers and their clients is one of trust and confidence. Lawyers know they must exercise extreme care where they have a personal friendship outside of their professional relationship with a client. This creates something extra in their relationship that would give rise to the same presumption as mentioned for family or friends and accordingly it is legislated for in the Lawyers and Conveyancers Act.³⁹

The other consideration of influence for most professional trustees is that they often receive payment for their services. Remuneration conflicts with the concept that independence means being free from the monetary influence of others. A lawyer in this position should carefully consider whether they can refute the presumption of bias before accepting the role of trustee.

2 Conclusion

The key point to draw from the dictionary definition of 'independent' is the idea of being free from the influence of others whether actual or implied due to relationships or other factors such as monetary influence. To be truly independent it is crucial to stand alone. The threshold for 'independence' is high but not unattainable; it would exclude beneficiaries as well as family and friends from being trustees. This would immediately resolve some of the Law Commission's concerns regarding the administration of trusts, but this raises some practical issues as well as questions about professional trustees and payment for their services.

B Case Law

There is limited discussion of the definition of independent trustee in the common law. In the case of *NZHB Holdings Limited v Bartells*⁴⁰ Baragwanath J quoted a passage from a deed of indemnity and right to mortgage between the parties in which an independent trustee is defined as:

An independent trustee is a person who is not a settlor of the trust or has no rights to an interest in any assets of the trust except as a trustee of the trust.

From this the conclusion can be drawn that an independent trustee cannot be the settlor or a beneficiary of the trust. This is consistent with the understanding from the dictionary definition of being free from influence but in this case it is self-interest that is prohibited. The definition fails to go any further, meaning that a family member or friend could be classified as an independent trustee. This falls short of the other key ideas of independence to be discussed in this chapter and conflicts with the dictionary definition.

The other case with a definition is *Trustees of Pukeroa Oruawhata Trust v Mitchell*.⁴¹ In this case an order varying the trust deed to require the appointment of an *independent*

³⁹ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

⁴⁰ *NZHB Holdings Limited v Bartells & Ors* (2005) 5 NZCPR 506 at [42].

⁴¹ *Trustees of Pukeroa Oruawhata Trust v Mitchell* [2008] NZCA 518.

professional trustee to the trust was being challenged. There Williams J defined an independent trustee as:

... an independent trustee is one who is not a beneficial owner or shareholder.

This definition also suggests that all that is needed for independence is that the trustee not be an interested party.

Neither of these cases adequately addresses the question of independence. Family members are not excluded from the definitions, nor can the definitions be used to formulate a test to determine whether a trustee is independent.

C Legislative Definitions

The Trustee Act 1956 is not a Trusts Act. Although it offers a definition of sorts of *trustee* in its interpretation section, it does not address the question of independence. There is also no definition of independent trustee or independence in the interpretation section of the Law Commission's proposed draft Trusts Bill.⁴² To find a statutory definition of independence the search had to be widened to include independence in contexts other than express trusts, for example other fiduciary relationships and other positions of power and influence. This chapter examines the requirements of independence for financial service providers, lawyers, judges, auditors, directors and arbitrators to form a set of requirements for trustee independence.

1 Financial Markets Conduct Act 2013

The Kiwisaver Act 2006 had a definition of independent trustee. That Act has now been replaced with a definition of independent trustee in the interpretation section of the Financial Markets Conduct Act 2013 which when read with s 131(3) of the same Act offers three core qualities that Parliament believes a trustee must have to be independent.

Independent trustee is defined in s6 of the Financial Markets Conduct Act 2013:

In relation to a restricted scheme, means the trustee, or director of a sole corporate trustee, who is the licensed independent trustee for the purposes of the restricted scheme.

The Financial Markets Conduct Act 2013 further defines *independent* in s131 (3): a person that-

- (a) is not a related body corporate of any other trustee of the restricted scheme; and
- (b) is not an employer that provides access to the scheme for its employees, or an administration manager or an investment manager of the restricted scheme (or a related body corporate of any of them); and
- (c) is not a director of, shareholder in, or an employee of any person referred to in paragraph (a) or (b); and
- (d) is not a current scheme participant; and
- (e) is not a representative in any capacity of an organisation (such as a trade union) that represents the interests of one or more scheme participants; and
- (f) is not a representative in any capacity of an organisation that represents the interests of one or more employer contributors to the scheme; and
- (g) is not a corporate trustee if none of its directors are independent under this definition.

⁴² Law Commission, above n 3.

Although this definition relates particularly to the regulation of financial markets and providers of financial services there are some key points about the independence of trustees which can be drawn from this definition to create a three step test which can then be applied to trustees of express trusts to evaluate a trustee's level of independence.

(a) Interested parties

The interested party principle is the first point that can be drawn from the Financial Market Conduct Act 2013. An interested party is one who might receive some benefit from a particular outcome or may have rights in the same matter as a person to whom a fiduciary duty is owed. It is irrelevant whether they ever receive any benefit from the trust; it is enough that they have a discretionary interest.

To be an independent trustee under this Act, the trustee cannot be a member of the scheme of which it is the trustee. The independent trustee should not be an interested party; they should not gain personal benefit from being a trustee. Applying the interested party principle to an express trust situation would mean that a trustee should not be a beneficiary of the trust even if the trustee is merely a discretionary beneficiary and may never receive any benefit.

This is the most widely recognised test for establishing the independence of a trustee. When banks examine express trust deeds to determine which trustees can have limited liability under any guarantees or lending with the bank, the only question asked is whether the trustee is a beneficiary. If the trustee is not a beneficiary, then the trustee satisfies the bank's test for independence and the trustee has limited liability.

(b) Related parties

Being related to an interested party is the second point to draw out of the definition. Related parties could mean relatives in the context of express trusts but can also mean related companies where one company owns the other. Where a director of one company is also a director of another could be a situation of being an interested and a related party. In the express trust situation it is more likely to be the case where family, friends and trustees are beneficiaries.

A trustee is not independent if the trustee is related to another company which is an interested party of the scheme. The related party principle can apply to more than just companies and in the context of express trusts the commercial meaning must be extended to encompass familiar relationships. Applying this principle to an express trust situation means that an independent trustee cannot be related to a beneficiary of the trust.

(c) No representation

The third point to draw from the definition is that even if the trustee satisfies the first two points that is not enough. The trustee must not, in any capacity, represent any interested party. This principle is made particularly strict by the terms 'any capacity' being added into the equation. This leads to a very high threshold for independence because the trustee can have no relationship or involvement with any interested party. Applying this principle to an express trust situation means that an independent trustee should not represent, other than in the role as trustee, any other party to the trust.

(d) Conclusion

Taking these three principles together forms a test for determining independence which focuses on the relationships between the trustees and beneficiaries. There is a very real risk that using the principles drawn from the Financial Market Conduct Act 2013 will lead to an impractical situation when applied to express trusts where no trustees can attain

independence. In the following sub-chapters the three principles drawn from the Act definition will be evaluated against other roles which require independence.

2 *Lawyers and Conveyancers Act (Lawyers Conduct and Client Care) Rules 2008*

If family members and friends are not afforded the status of independent trustee then a settlor may look to appoint a professional trustee such as a lawyer. Lawyers should be the ideal trustee because unlike other professional trustees their core business is in interpreting and administering the law. The Financial Market Conduct Act 2013 test of independence can be examined against the requirements for lawyers' independence as set out in the Lawyers Conduct and Client Care Rules.⁴³

Duncan Webb writing on lawyers' independence⁴⁴

Independence has long been a foundation stone upon which the professional obligations of lawyers rested. This is now explicitly recognised in the Lawyers and Conveyancers Act 2006, and in the Rules. The orthodox analysis sees barristers as the most independent lawyers of all as they are the most removed from their paymasters. Of course using this approach, in-house counsel is considered to lack independence, as they are in fact part of the very entity they serve.

(a) Conflicting interests

A lawyer must not act where they have an interest in the matter except where there is a negligible chance of a conflict arising and the client is aware of the conflict and has given informed consent for the lawyer to continue to act.⁴⁵ Although on first reading the rule for lawyers is slightly less strict than the rule that an independent trustee cannot be an interested party, in reality the test for whether there is a chance of conflict must be so strict that there can be no interest touching on the matter. The decision in *GD v RA*⁴⁶ states that it is inappropriate to act for a vendor and purchaser in the same transaction even where the parties consent. Acting for both sides in a standard conveyancing matter has long been a standard practice and not considered to meet the threshold of negligible chance of conflict. If it is inappropriate to act for the vendor and purchaser even where consent is given and the lawyer's duty cannot be discharged it calls into question the appropriateness of acting for a settlor and being a trustee of the same trust. Has consent been given and can the lawyer discharge their duty to both clients?

This raises the question of remuneration. Lawyers and most professional trustees would expect to be remunerated for their services. Payment for services rendered makes the lawyer or trustee an interested party. To continue to receive payment means that the lawyer or trustee must continue to render their services in a satisfactory manner so as to continue to be employed.

As indicated in the Duncan Webb extract above the concept of remuneration for services rendered conflicts with the concept of independence. In the quotation it is suggested that a barrister is the most independent of all the profession because the barrister is not paid directly by the client but traditionally through the solicitor by brief fee. Nor do barristers solicit clients but rather are instructed to act by solicitors on behalf of the solicitor's clients. Barristers have no 'beneficial' interest in the client but rather in the instructing solicitor. Barristers are also not looking to have an ongoing client relationship. In contrast the corporate in-house counsel has an employee/employer contractual relationship which sees

⁴³ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

⁴⁴ Duncan Webb "Privilege, Corporate Counsel, and Lawyer Independence" (2009) 15 NZBLQ 195.

⁴⁵ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rule 5.4 see also *Boardman and Another v Phipps*, above n 28 notes that it is a very high standard.

⁴⁶ *GD v RA* 290/2013 LCRO.

them provide legal services to their employer. In practical terms, a trustee should not be remunerated by the settlor or beneficiaries, but rather from the trust fund itself in such a way that promotes independence. If the trustees were like barristers, trustees would be removed from their paymaster.

(b) Third party conflicts of interest

A lawyer cannot act where there is a close personal relationship with an interested party or where there are conflicting business interests or for more than one client on a matter where there is a more than negligible risk of conflict of interest.⁴⁷ A lawyer must act in the best interests of the client to the exclusion of the interests of third parties.⁴⁸ Putting all these rules together results in a very similar principle to the one that states a trustee cannot be related to an interested party. The difference in the two points is that the rule for trustees is a strict no relationships rule, whereas the rule for lawyers is that there must be no more than negligible chance of conflict arising from the relationship. The threshold for negligible risk is so strict that to simply raise the question of conflict is enough to put the lawyer on notice a conflict exists. As the decision in *GD v RA*⁴⁹ indicates, lawyers are being encouraged now to view negligible risk as a no conflict of interest rule regardless of the real risk in practice.

(c) Conflicting duties

A lawyer must not act for more than one client in the same matter as this would result in a conflict between the duties owed to each client. A lawyer must at all times exercise independent judgement and advice⁵⁰ on a client's behalf. Independent advice⁵¹ is defined further to mean giving advice where there are no conflicts of interest. This is a strict requirement of no conflict of interest instead of the threshold of negligible risk as discussed above. It is irrelevant where the conflict comes from. This makes the potential for conflict high as the lawyer must be aware of all interested parties in each matter they are advising on as well as related interested parties, both their own potential conflicts and any within their firm. The threshold for independent advice is so strict that it would be fair to say a lawyer exercising independent advice on behalf of a client cannot represent an interested or related interested party in any capacity.⁵²

(d) Conclusion

When comparing the threshold for independence of trustees and the threshold of independence of lawyers, at first glance the threshold for lawyers seems to be not as strict as the threshold for trustees. In reality the test for negligible risk would see the two different assessments of independence align. Certainly this stricter interpretation of negligible risk now being promoted by lawyers insurance companies would indicate that a no conflict rule is a key part of independence. As stated earlier lawyers are best placed to fill the role of trustee not least because they understand perfectly the requirements of independence and are already bound by similar requirements. By fulfilling their own requirements for independence they are fulfilling the requirements of being an independent trustee. The lawyer-client relationship is another example of how independence stems from the fulfilment of the fiduciary obligations of loyalty, no profiting, no conflict and good faith. The conclusion then is that the

⁴⁷ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rule 5.6.

⁴⁸ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rule 5.6.

⁴⁹ *GD v RA*, above n 46.

⁵⁰ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rule 6.

⁵¹ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rule 1.2.

⁵² Protection of Personal and Property Rights Act 1988 and Property (Relationships) Act 1976 emphasise this last point as arrangements under either of these can be overturned if the advice given is not independent.

Financial Market Conduct Act 2013 test to assess a trustee's independence is set at a threshold similar to that of a lawyer's independence.

3 *Judicial independence*

The right to a fair hearing by an independent and impartial court is currently enshrined in the New Zealand Bill of Rights Act 1990 and the Judicature Act 1908. In future the Judicature Modernisation Bill will combine the Judicature Act and the Supreme Court Act 2003 so that these same rights will be contained in the Bill of Rights and the new Judicature Modernisation Bill. The case of *Wikio v Attorney-General*⁵³ was a challenge to the judicial independence of retired judges being appointed as acting judges under s11A of the Judicature Act 1908 for a period of two years. McKenzie J discussed the essential elements of judicial independence from the Supreme Court of Canada in *Valente v R*.⁵⁴ *Valente v R* was affirmed in New Zealand in the case of *R v Te Kahu*.⁵⁵ The essential elements of judicial independence are security of tenure, security of salary and institutional independence from other branches of Government.

(a) Security of tenure

To ensure judicial independence it is vital that a judge, even an acting judge, not be concerned as to the security of the position. The period of the tenure can be until retirement as set down in the Judicature Act, for a fixed term of employment such as two years as an acting Judge or for a specific task such as an inquest. The length of employment is not the relevant factor; the key is that once the appointment is made there can be no influence or interference, whether actual or implied, over the period of time for which the Judge has been employed.

In the case of *Wikio v Attorney General*,⁵⁶ the acting judge was only appointed for two years. It was understood there was no ability to remove the acting judge during tenure other than in accordance with s23 of the Constitution Act 1986. There is no specific section to that effect in the current Judicature Act. Under the Judicature Modernisation Bill this point will be clarified with s117 providing acting judges with the same jurisdiction, powers, protections, privileges and immunities as a judge of the court to which the acting judge is appointed.

(b) Security of salary

This is both security of salary while employed but also security of provision after retirement. Protection of judges' remuneration and their retirement fund is set out in the Judicature Act. Having statutory protection for salary and pension prevents interference and influence by the executive branch of Government. Although judges get paid for carrying out their functions, the amount they get paid is not determined by the cases they hear but is reviewed by an independent body and cannot be reduced during their tenure.⁵⁷

(c) Institutional independence

The Judiciary must administer the court system as far as possible to ensure the justice system is free from any actual or implied control by the executive. In *Wikio v Attorney General* the appointment of acting judges was questioned. Such appointment can only be made by the Chief Justice and the Chief High Court Judge and they must be satisfied that it is necessary for such an appointment to be made in the interests of justice and due process.

⁵³ *Wikio & Anor v Attorney-General* (2008) 8 HRNZ 544.

⁵⁴ *Valente v R* (1985) 24 DLR (4th) 161.

⁵⁵ *R v Te Kahu* [2006] 1 NZLR 459.

⁵⁶ *Wikio & Anor v Attorney-General*, above n 53.

⁵⁷ Constitution Act 1986 s 24.

(d) Judicial independence applied to trustees

The issue of remuneration of professional trustees appears again here. The receiving of payment for fulfilling the role of trustee can be seen as contrary to the idea of independence and many professional trustees try to alleviate this issue by ensuring appropriate charging clauses are inserted into trust deeds and wills. To continue to receive payment, and continue as trustee, the trustee must continue to render the services in a satisfactory manner. This raises the question, who is paying for the satisfactory services of the trustee and what happens when the service is no longer satisfactory? As discussed earlier trustees should have clarity around the fees being charged and where payment of these fees is coming from.

The protection of tenure and institutional independence for the Judiciary is statutory but there is no such protection for a trustee as the decision rests solely with the person with the power of appointment. The power of appointment is usually held by the settlor and then goes to the settlor's administrators or the continuing trustees. Failing this the High Court will exercise the power. When the power is with the settlor a presumption of bias is created because the settlor can use the power to remove and appoint trustees at his or her discretion. A trustee who fears removal cannot have independence from the settlor. The presumption does not lessen if the power passes to the trustees as they now have direct control over their own appointment. The High Court can be the only step in the progression that can be said to be independent and able to refute the presumption of bias created by the power being vested in either the appointor or continuing trustees. The issue with this is that often trusts do not have the funds available to make an application to the court and even if they did, they are unlikely to do so just to ensure appointment is exercised in a way that does not create a presumption of bias. This raises the question; can a trustee act independently if they fear removal for their decisions?

The test for judicial independence does not have the same requirements as the test for trustee independence so far determined and cannot be used as a direct comparison. However there are important factors to draw from the discussion of judicial independence that should be considered when considering trustee independence. In the context of judicial independence the key factor is that power is vested and exercised by the judiciary not by outside bodies; this is done to refute any presumption of bias.⁵⁸ Key legislation like the Constitution Act 1986 and the Judicature Act 1908 ensure there can be no tampering with a judge's appointment or remuneration by another branch of Government. When turning to the trust example, appointment and remuneration are controlled initially by the settlor of the trust and later by the appointor. This means there is no equivalent protection of trustee's tenure or remuneration as both are open to interference by a settlor. Even if the power of appointment and remuneration were vested in the trustees there would still be the possibility of abuse of power particularly with trustees who are also beneficiaries. Although there is High Court oversight for the exercise of these powers, trustees are unlikely to bring the matter before the court for fear of having costs awarded against them. Where the power of appointment is vested and how a trustee is remunerated are key questions to ask when examining the ability of a trustee to exercise independence.

The case of *Carmine v Ritchie*⁵⁹ was an unsuccessful challenge to the use of the power of appointment and removal of trustees. In this case Mr Carmine was the professional trustee along with Mr and Mrs Ritchie who were the settlors. When Mr Ritchie died Mrs Ritchie changed solicitors and proceeded to retire Mr Carmine from the office of trustee. Mr Carmine refused to be removed and took the matter to court arguing he was being removed because he

⁵⁸ Judicature Act 1908.

⁵⁹ *Carmine v Ritchie* [2012] NZHC 2279.

did not agree with Mrs Carmine's decisions regarding trust assets. He felt the trust had a duty to sell the company shares in question but Mrs Ritchie did not want to do so as her family wanted to continue on with the company. Mr Carmine's argument in court was that the removal was void because it was not done in the interests of the trust and protection of the trust assets. Mr Carmine failed to prove his case and the removal stood. Mr Carmine then wanted to rely on the indemnity for costs clause in the trust deed, the court found that he could not rely on the clause because he had not acted neutrally in the best interests of the beneficiaries but rather had acted aggressively in challenging his removal and in dealings with one of his co-trustees thereby losing the right to be reimbursed from the trust fund.⁶⁰

This is not a perfect case as Mr Carmine did many things that a professional trustee should not have done, but it highlights some of the issues faced by professional trustees when trying to act independently. A professional trustee should agree to resign as trustee even where there is no valid reason for that resignation; it merely brings embarrassment upon them to act as Mr Carmine did. However in situations where the trustee feels there is some impropriety in the removal, the trustee may approach the court provided they do so in a neutral manner. The court may still award costs against the trustee if they do not agree and this is the main problem of *Carmine v Ritchie*.⁶¹ This may well deter professional trustees from challenging their removal in legitimate circumstances due to a fear their costs will not be covered. Application to the court may seem like protection for a trustee who fears removal but in reality it may be more of a deterrent because of the risk of having costs awarded against the trustee.

4 Independence of auditors

Another role requiring independence is that of an auditor. There are different types of auditors depending on the type of body being audited. Some forms of legislation, such as the Food Act 2014, have specific sections on how parties under the Act are audited. Although the Act requires auditors to be independent and impartial, it does not define these terms.

(a) Auditors under the Financial Markets Authority Act 2011

Other bodies which are commonly audited are financial bodies registered on the share market. These bodies are overseen by the Financial Markets Authority (FMA) which in turn instructs bodies, such as the New Zealand Institute of Chartered Accountants, to license and register auditors in compliance with the criteria determined by the FMA. The FMA published guidance for financial institutes to assist them in determining whether the auditor used is *independent* in accordance with requirements of the Financial Markets Authority Act 2011. They have four key questions they ask:⁶²

1. Does the auditor have a financial interest in your business?
2. Will their interests be harmed by the results of an audit or do they have conflicting interests?
3. Is there perceived independence from your business?
4. Will we conclude that your auditor's objectivity is beyond question?

The establishment of auditor independence follows very closely the other interpretations so far examined just in a slightly different order to the test for trustee independence. The first question here is whether the auditor is an interested party. Independence seems to turn on this

⁶⁰ *Carmine v Ritchie*, above n 59 at [15].

⁶¹ *Carmine v Ritchie*, above n 59.

⁶² *Anti-Money Laundering and Countering Financing of Terrorism Monitoring Report 1 July 2013 to 30 June 2014* (2014).

point of being an interested party. The second point for auditor independence is whether the auditor has any conflicts of interest which may preclude them from being independent which is similar to the no representation rule. The third point is about perceived independence. If there is a perception that the auditor may not be independent then that is enough for the FMA to rule that the financial institute's auditor should not be used. This is similar to related party limb of the trustee independence test just interpreted in a commercial way. The last point for the FMA is whether after considering the first three points the FMA body will conclude the financial institute's auditor is independent. This extra part allows oversight by an external body to ensure independence of auditors and the auditing process is maintained.

(b) Auditor independence applied to trustees

The first three parts of the test for auditor independence are closely aligned to the test so far established for trustee independence. It is interesting, but perhaps not material, that they are placed in a different order. The two parts of most interest which are different to the other areas of law so far examined are the questions of perceived independence and the final sign-off by the FMA. This idea of perceived independence has been discussed early but described as a presumption of bias. Independence then is not just about the individual/entity being assessed but also there must be some consideration as to whether outsiders might consider the individual/entity to be independent. Perhaps when limb 2 of the test is being assessed in relation to trustee independence one part of that assessment is to consider whether the trustee is perceived to be independent or has a presumed bias.

The oversight by the FMA is interesting as its role is very different to the way the High Court oversees trusts. The FMA continually monitors all New Zealand financial institutes to ensure their compliance with all the rules, not just those rules about auditors. The High Court on the other hand does not have the ability to openly investigate every trust in New Zealand but rather waits for a trustee or beneficiary to approach them with a claim or question of law. In contrast to the financial institutes which are closely monitored, New Zealand has many trusts which go unmonitored and are considered to be poorly administered.⁶³

5 *Independent directors*

Not all company directors are required to be independent. Closely held family companies could not usually say they have independent directors as they are normally the majority shareholders of the company and maintain control within the family. Companies and trusts are often used together to create long-term ownership structures for the owning and running of family businesses such as farms. In these situations it may not be in the company's best interest to have an independent director who is not party to the day to day running of the family farm.

The Companies Act 1993 does not require director independence but other statutes that govern particular types of industries do require at least some of the directors of a board to be independent. For example the Non-bank Deposit Takers Act 2013 at s 25 requires at least two directors on the controlling board of the Non-bank Deposit Taker to be independent and further in ss (2) defines independent director to mean:

- (2) In subsection (1), independent director means a director who—
 - (a) is not an employee of either the NBDT or a related party; and
 - (b) is not a director of a related party other than a related party that is a guaranteeing subsidiary; and

⁶³ Law Commission, above n 6.

(c) does not, directly or indirectly, have a qualifying interest in more than 10% of the voting securities of the NBDT or a related party.

The test for an independent director has the same three limbs of the test for an independent trustee. This is another example of the key concepts that Parliament have agreed underpin the concept of independence. In s 25(2) (a) of the Act it states an independent director cannot be an employee, this is equivalent to saying that a trustee cannot be a beneficiary; i.e. the interested party rule. It specifically prohibits an independent director from being an employee of a related party or (b) a director of a related party. This would be equivalent to stating that a trustee should not have a relationship with an interested party, such as a beneficiary or trustee. With the related party rule for independence this relationship has been broadened to encompass family relationships. Family relationships can have an influence of the type envisaged by s 25(2) but that is not the mischief this particular Act is focused on.

The last rule regarding not representing a related or interested party is encompassed by the requirement not to be a director of a related party in (2) (b). However the rules for directors and the definition of an independent director are also derived from the Companies Act 1993. The Act has another set of restrictions for all directors, for example when a director is a financially interested party to a transaction undertaken by the company. It would not be correct then to narrow the test for independence of trustees to match that of a director under the Non-bank Deposit Takers Act 2013 as trustees are not subject to the same additional requirements as directors are under the Companies Act 1993.

The last point to take from the Non-bank Deposit Takers Act 2013 is in s 25(2) (c). An independent director is not completely prohibited from having an interest in the company's business but rather their interest must be less than 10%. If a director meets the requirements for independence where the director has an interest of 10% or less, could the same apply to a trustee with an interest in the trust fund or a trustee who wants to receive remuneration? Translating the 10% interest into trusts law could alleviate the issues around remuneration and having a beneficial interest by setting an acceptable interest level where it would not be considered to influence independence. This may be a practical solution to the issue of beneficial interest and remuneration. In the case of the beneficial interest there are already rules around self-dealing but there are many other transactions that take place that the beneficiary-trustee would have an interest in to which the self-dealing rules would not apply. Perhaps independence is lost where a trustee has an interest in more than 10% of the transaction being contemplated. That is not to say they do not have an interest in the whole of the trust fund, but rather in any one transaction contemplated by the trustees the beneficiary-trustee must have no more than a 10% interest and they must continue to adhere to the no self-dealing rules.

In regards to the remunerated trustee a 10% interest is harder to translate into remuneration terms. Applying the same theory as for beneficiaries' trustee's fees should be capped at no more than 10% of the value of the transaction. Remuneration must be governed by market forces as it is unlikely to ever be set by an independent body. As Public Trust often publishes its fees online, it would not be unreasonable to be guided by its fee structure provided that the trustee offers the same service and the same expertise. The argument against market rates is that as more professional trustees exit the market, market rates are likely to increase, making professional trustees unaffordable to the average family trust. It is important to give equal consideration to where the remuneration is coming from. The trust fund itself should pay for the professional trustee. Being paid by a settlor or another trustee would be inappropriate as it creates a presumption of bias that the trustee will follow the decisions of the paymaster. This particular point is problematic for trusts whose assets are tied up in real estate and which have no liquid assets to apply towards trustee remuneration. This does create a problem for the

remunerated trustee as the trust has no ability to pay and the presumption of bias becomes unavoidable. This issue is common in the family trust context where the only asset in the trust is the family home.

6 *Arbitration Act 1996*

Arbitrators have a set of general rules to follow which are set out in Schedule 1 of the Arbitration Act.⁶⁴ An arbitrator is required to act impartially and independently just as if the arbitrator was presiding at court. The independence and impartiality of arbitrators are the key grounds for challenge set out in rule 12:

(1) A person who is approached in connection with that person's possible appointment as an arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to that person's impartiality or independence. An arbitrator, from the time of appointment and throughout the arbitral proceedings, shall without delay, disclose any such circumstances to the parties unless they have already been informed of them by that arbitrator.

(2) An arbitrator may be challenged, only if circumstances exist, which give rise to justifiable doubts as to that arbitrator's impartiality or independence, or if that arbitrator does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by that party, or in whose appointment that party has participated, only for reasons of which that party becomes aware after the appointment has been made.

An arbitrator has a continuous responsibility of disclosure of anything that may bring into question their independence or impartiality. This obligation starts from when they are first approached about the appointment, through all stages of the hearing until the conclusion of the arbitration. If any matter is raised in which the arbitrator is interested they must immediately disclose the interest to the parties together with any mitigating factors before the arbitration can continue. Parties must be given the opportunity to consider an arbitrator's independence and impartiality whenever an interest arises.⁶⁵

The question is determined by a two stage enquiry. First what are the facts that have a direct impact on any suggestion of bias, whether presumed or apparent, and second would the reasonable person believe the arbitrator to be biased.⁶⁶ The parties can assess the interest and chose to accept the situation and allow the arbitrator to continue. This assessment of arbitrators is different to the three stage test for trustees. It is more an enquiry of the circumstances of the arbitrator, which the arbitrator will then disclose to the parties, and the parties can then choose to accept the arbitrator or not. The arbitrator is not immediately prohibited from acting where there is an interest or a conflict, the decision rests solely with the parties involved as to whether the arbitrator will act.

Can a trustee's lack of independence be overcome in the same way through making the enquiry and then leaving it for the settlor to make a final decision on whether a trustee is fit to hold office? Looking at the history of the trust and determining the trustee's actions over time may show that the trustee understands their role and has shown no bias or self-interest. However it would not be appropriate to appoint a potentially biased trustee and then wait five years in order to determine whether or not they are independent. The enquiry of independence needs to be made before appointment. Despite this under the enquiry of independence the settlor could choose to continue to appoint the trustee despite any presumed

⁶⁴ Arbitration Act 1996.

⁶⁵ Tomas Kennedy-Grant, Barbara Hunt and Phillip Green *Arbitration Law and Practice* - Westlaw NZ (Thomson Reuters).

⁶⁶ *Todd Taranaki Limited v Energy Infrastructure Limited* HC Wellington CIV-2007-485-1803, 5 August 2008 at [38].

or actual bias or self-interest. This accurately reflects the current position of appointment of trustees where beneficiaries are commonly appointed however this approach is not considered in any of the other examples examined in this chapter.

D Conclusion

Although there is no statutory or common law set of criteria for determining trustee independence in the express trust context, the starting place for trustee independence is the four fiduciary obligations from which independence stems. The key building blocks of independence are drawn from these fiduciary obligations and built upon by other areas of law which have a similar concept of independence. By examining these other roles requiring independence that are legislated an enquiry was established for examining trustee independence. A 3 limb test based on the Financial Market Conduct Act 2013 was proposed and then evaluated against other roles of which independence is a requirement where a set of criteria has been predetermined by Parliament. Each role had a similar core enquiry to establish independence, while some roles went beyond the Act enquiry to examine other points relevant for trustees. Interesting questions were raised about bias, remuneration and security of tenure. Each of these points was examined to determine relevance to the proposed test for trustee independence and those that added value to the test were then incorporated. In the next chapter the test will be restated and used to assess different types of trustees for their independence.

IV Evaluation of Trustee Independence

In the last chapter different ways of assessing independence were discussed and a 3 limb test for determining and analysing trustee independence was created. In this chapter the different types of commonly used trustees will be discussed including looking at the benefits and disadvantages of each type of trustee. Each will then be tested against the test for independence and ranked on an independence diagram to build up an overall picture of trustee independence.

A Test for Independence

The starting point for any trustee must be that this is a fiduciary relationship which calls for loyalty, good faith, no profiting and no conflicts and therefore some level of independence is required. The exact level of independence required is determined by the wishes of the settlor and the limits placed in the trust deed. In the examination which follows however each type of trustee is examined in the abstract and will be examined against the independence test to determine the level of independence the trustee can achieve and whether there are any other factors to consider.

1 Limb one

The first limb of the test is that the trustee must not be an interested party. When the limb was first discussed in chapter III C1 (a) it was proposed that interested party meant that the trustee must not be a beneficiary. After consideration of the rules for lawyers, interested party was expanded to include a party with an expectation of remuneration. If a trustee expects remuneration for their role then they too have an interest in the trust fund. This ties back to the initial definition of independence, as being free from influence, including monetary influence.

2 Limb two

The second limb is that a trustee must not be related to an interested party. Family and friends acting as trustees would be excluded due to their personal relationships with parties to the trust. This is similar to the conflict of interest rule for lawyers that a lawyer cannot act for two clients where there is more than a negligible risk of a conflict of interest. Having a personal relationship with an interested party gives the perception of bias.

3 Limb three

The third limb is particularly problematic for lawyers and accountants who act for multiple interrelated parties. Acting as a trustee has long been thought of as an ongoing revenue stream for lawyers and accountants but as it is not appropriate for lawyers to act for more than one party in any transaction they must always be alert to the possibility of conflict. It would not be appropriate for a lawyer to act for a settlor as an individual client and then for the lawyer to also be the professional trustee of the settlor-client's trust. A solicitor's trustee company would have the same issue as the law firm which incorporated the company, as the trustee company is a subsidiary of the law firm.

4 Other points to consider

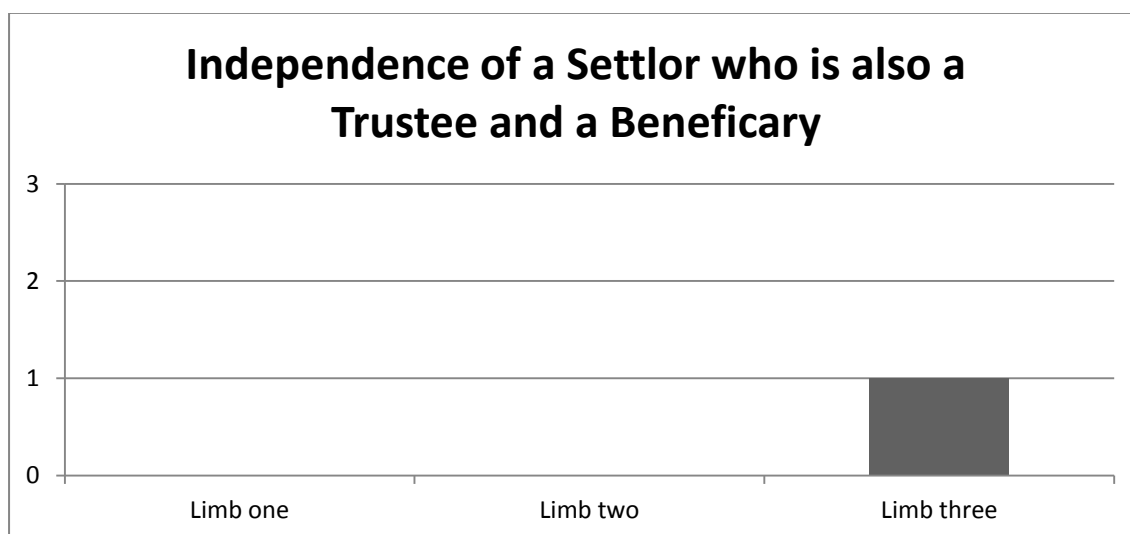
Other factors that should be considered to assist with the weighing of a trustee's independence are security of tenure, the presumption of bias and an allowance for a limited self-interest. The security of tenure is about who holds the power to remove a trustee, how it can be exercised and the protections a trustee has from removal taking account of the deterrence factors from *Carmine v Ritchie*.⁶⁷ The presumption of bias is about looking at the

⁶⁷ *Carmine v Ritchie*, above n 59.

facts that give rise to the bias and determining whether the reasonable person would believe the trustee to be biased on those facts. Perhaps a threshold of self-interest can be warranted by the settlor as long as the terms are clear and it is reasonable. Trustee independence may vary then depending on the terms of the trust and other factors such as trustee duties which will be discussed in chapter IV.

B Diagram

To assist in evaluating the independence of different types of trustees each trustee score from the independence test will be applied to a graph to give an overall picture of independence at a glance. Independence is a sliding scale with many different possibilities depending on the factors to be considered at each limb of the test. In order to graph overall independence each limb of the test will have a possible score of 0-3. Each type of trustee will be examined against the test, be given a score for each limb and the scores will then be graphed. At the end of the chapter the total score of each of the trustees will be graphed to allow for a direct comparison between all the trustees. For example a strict interpretation of independence would score 3/3 for each limb with a total overall independence score of 9/9 and a trustee with no independence would score 0/3 for each limb and a total overall independence score of 0/9. A settlor who is a trustee and a beneficiary of a trustee would score 0/3 for limbs one and two because of direct influence over the trust, the conflict between their wishes as a beneficiary and their role as trustee and their ability to dictate the initial terms of the trust. Under limb 3 a settlor would score 1/3 because they do not act for any of the other trustees or beneficiaries in any other capacity except they are conflicted themselves and unlikely to differentiate between their role as trustee and beneficiary.



C Interested and Related Party Trustees

An interested party is a trustee who is also a beneficiary and a related party is a family member or friend of the settlor or beneficiary. These appointments often occur in practice because of the personal relationships the parties have. These types of trustees are inexpensive as these trustees do not receive remuneration for fulfilling the role of trustee. With that typically comes a lack of experience and understanding of how to be a trustee and of trusts law. There is concern, expressed by the Law Commission, that many trusts in New Zealand are not administered properly. One of the key concerns in the first issues paper is the accessibility of trust information to the general public and the general lack of understanding

of trusts law.⁶⁸ If a trustee does not understand the basic duties and obligations of a trustee then they cannot know whether they are complying with the terms of the trust.

1 *Lack of knowledge*

Often when clients come to a law firm to discuss trust matters it quickly becomes evident that there is a lack of understanding of the basic concepts of trusts law and trust administration. Part of the reason for this is the inaccessibility of information that is easily understandable. The current Act⁶⁹ is difficult for the general public to understand and other sources of general trust information can be difficult to access without seeking professional advice. This leads to trustees being unable to fulfil their functions adequately.

The family trust with the family home is a prime example of this situation. Many New Zealanders have their family home in a trust in situations where there is no need; for example a retired couple who have only been married once and only have children together, where the only asset in the trust is the family home. The cost of maintaining the trust in this situation often outweighs any potential benefit they may have with WINZ particularly now that WINZ is beginning to look through trusts.⁷⁰ Many trusts were set up because it was a popular fashion. It is becoming evident in practice that many settlors do not understand that the family home is no longer their personal property to do with as they wish. Some examples of the lack of understanding by trustees are: refusals to retire from the role of trustee for fear of losing control over the trust has resulted in an increase in applications to the court to have property vested in the new trustees once a trustee has lost capacity.⁷¹ Another example is settlor trustees expecting to receive rate rebates for District Council rates for trust property⁷² or settlor trustees applying to WINZ for residential care subsidies.⁷³

2 *Settlor control*

Although family and friends have the advantage of being familiar with the day to day running of the trust property, which professional trustees may not have, a family member or friend of the settlor is may be unlikely to oppose the wishes of the other trustees or beneficiaries when it comes to trust matters. It may be more a case of rubber-stamping decisions or being a passive trustee to ensure that the required number of trustees under the trust deed is met. The family member or friend trustee may lack any real understanding of how to act independently and may therefore rely on the wishes of the settlor or beneficiaries. If a settlor-trustee uses a family member or friend who is easily influenced by the settlor-trustee's wishes to the point where the settlor in practice retains all control, there can be no independence to any of the trustee's decisions beyond the operative clauses in the trust deed.

3 *Independence evaluated*

A family member or friend cannot satisfy the three limbs of the test for independence as they will either fail on the first point by being interested themselves or fail on the second point by being related to an interested party. This does highlight the inadequacy of the definitions under the cases of *Bartells*⁷⁴ and *Mitchell*⁷⁵ as family and friends would satisfy either of the

⁶⁸ Law Commission, above n6.

⁶⁹ Trustee Act 1956.

⁷⁰ Theresa Donnelly "Opposite ends of the Spectrum - Trusts vs Residential Care Subsidy issues" (Ministry of Social Development) <www.nzica.com>.

⁷¹ *McComb v Ewers* [2015] NZHC 3146, see also *Cunningham v Cunningham* [2016] NZHC 1075.

⁷² Rates Rebate Act 1973 at s 3-4, see also Local Government (Rating) Act 2002 at s 11 requires the rating bill to be in the name of the legal owners of the property or lessee under certain types of leases.

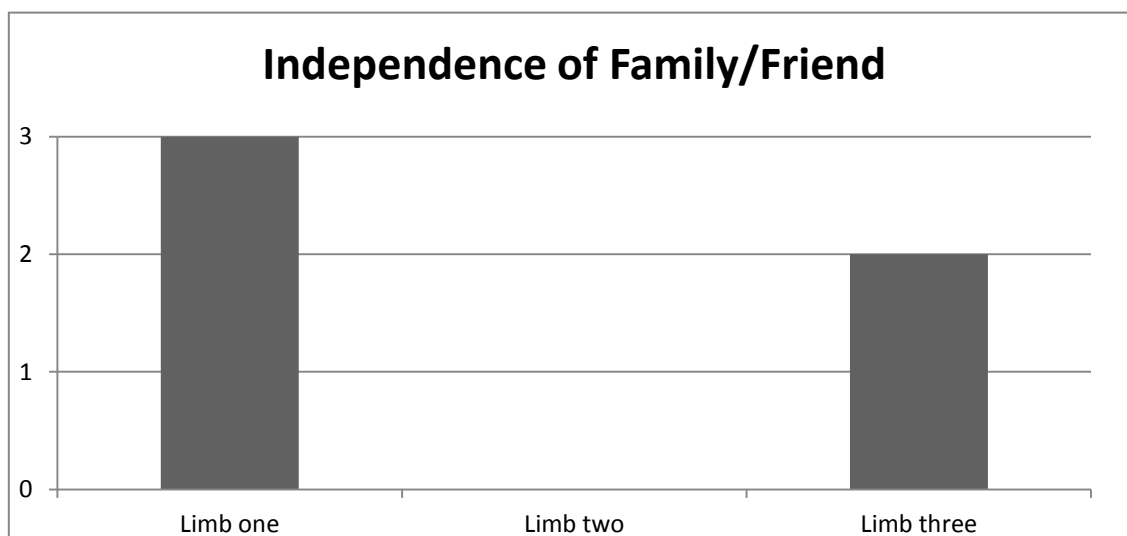
⁷³ Work and Income "General Information for Work and Income Clients" (Ministry of Social Development) <www.workandincome.govt.nz>.

⁷⁴ *NZHB Holdings Limited v Bartells & Ors*, above n 40.

definitions as set out in those cases. The family member or friend is only a step removed from a settlor trustee on the scale of independence as the relationship between the parties suggests a degree of influence and control by the settlor over the other trustee. Although the settlor-trustee has gone the extra step to appoint a third party being the friend or family member, to be co-trustee, the family/friend trustee's lack of understanding and close personal relationship with the settlor-trustees negates any advantage the trust may have gained by having a co-trustee.

4 *Diagram*

On the scale of trustee independence the settlor trustee will fail or pass the first limb depending on whether they are also a beneficiary. In the last diagram the settlor-beneficiary-trustee scored 0 for the first limb, 0 for the second limb and 1/3 from the third limb. If the settlor was not a beneficiary then they would score 2/3 for limb one as they still control many things about the trust including the power of appointment and may have a lot of influence over the other trustees of the trust. However they would not be beneficially entitled to the trust assets. In this instance the family/friend trustee is assumed not to have a beneficial interest in the trust fund. They are slightly more independent than a settlor and would pass the first limb of the test but fail at the second part as their personal relationships with the settlor and beneficiaries prevent them from scoring any points in the related parties' limb of the test. Regarding limb 3 both the settlor-trustee and the family/friend trustee are in a similar position as they are unlikely to act for another party. There is a question about whether these trustees can separate their roles as well as separate themselves from the other parties to the trust and therefore be more independent resulting in a score 2/3 for limb 3.



D *Bare Trustees*

A bare trustee is a trustee who has no duties or obligations beyond holding the trust property for the beneficiary and at some future point transferring the trust property to the beneficiary.⁷⁶

1 *Independence evaluated*

As the bare trustee's role is to simply hold the property on trust with limited ability to make decisions beyond the terms on which the trustee was instructed, without the authority of the managing trustee (if any), it is hard to place upon the scale. The role of the bare trustee is one of management and continuity. Despite the limited role of the bare trustee they still have a

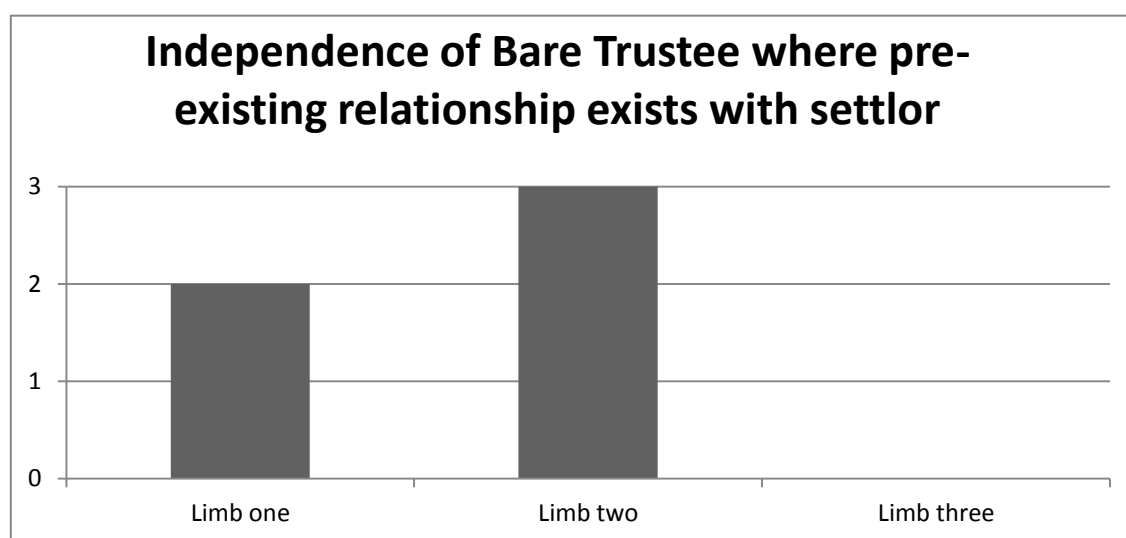
⁷⁵ *Trustees of Pukeroa Oruawhata Trust v Mitchell*, above n 41.

⁷⁶ Peter Spiller *Butterworths New Zealand law dictionary* (6th ed, LexisNexis NZ, Wellington, NZ, 2005) see also *Christie v Ovington* [1875] Ch D 279.

valuable role to play in the trustee services market. A bare trustee may be preferred to other types of legal arrangements for holding trust property such as having an agent. The bare trustee is not without protection from the managing trustee if there is one. A bare trustee can have recourse to the court where the bare trustee believes they have been instructed to breach the trust.⁷⁷ Where the trustee is a professional with no relationship to the settlor or beneficiary and does not act for them in any other capacity a bare trustee can have complete independence in the limited capacity of holding trust property. The placement of the bare trustee upon the diagram will depend entirely on the relationship with the parties to the trust. For example if the bare trustee is the settlor's lawyer that would result in a lower score than if the bare trustee was Public Trust because of the pre-existing lawyer-client relationship with the settlor.

2 *Diagram*

For placement of the bare trustee it will be assumed the bare trustee is a professional solicitor trustee who is also the solicitor for the settlor of the trust, so they have a pre-existing professional relationship. In this scenario the settlor has been appointed as the managing trustee. The trust fund is property so any remuneration of the bare trustee must be paid by the managing trustee. The terms of the trust are those commonly used in standard legal practice. On this basis the bare trustee would score 2/3 on the first limb being that they themselves are not interested in the trust fund but are remunerated by the managing trustee, 3/3 on the second as they are not related to any beneficiary limb and 0/3 on the third limb as they have a conflict of interest by being the solicitor of the settlor.



E Custodian Trustees

In New Zealand one of the most common types of bare trustee is the custodian trustee which is set out in s 50 of the Trustee Act 1956. Under the Act the custodian trustee must be a corporation although the Law Commission indicated in the review of the Act the intention to widen this to include individuals to ensure the custodian role can have maximum application. At present the custodian trustee holds the trust property in its sole name. It has no other obligations or duties except to comply with the directions of the managing trustees. If the managing trustees were to change there would be no need to convey the trust property to the newly appointed managing trustees as it will remain in the sole name of the custodian. This would be the main advantage of a corporation over an individual in that the company, except in the case of being wound up, could continue indefinitely as opposed to an individual who must at some point retire from the role.

⁷⁷ Trustee Act 1956, s 66.

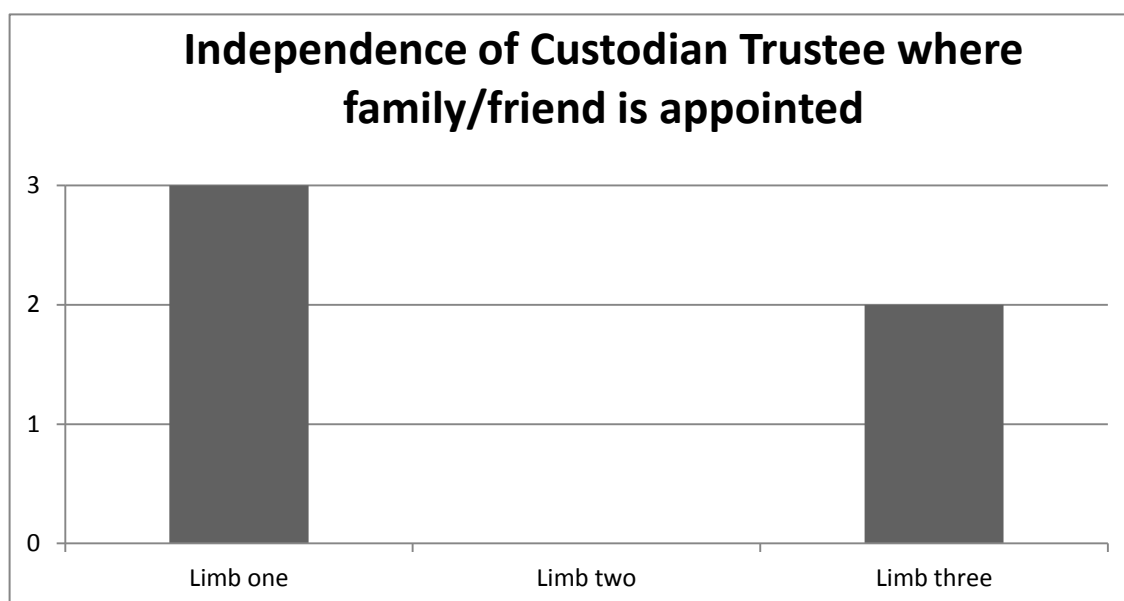
The custodian approach sees a further separation between the legal and beneficial ownership of trust property by separating out the legal and managerial roles. This means there is no liability for the custodian trustee when complying with the managing trustee's instructions; the only formal ability they have to challenge the managing trustee's decisions is by application to the Court if the custodian believes there to be a breach of trust.

1 *Independence evaluated*

As for the bare trustee, independence depends entirely on the identity of the party fulfilling the role. At present it can only be filled by a trustee corporation such as Public Trust or Perpetual Guardian. On the other hand if the Act is amended to allow anyone to be a custodian trustee this would not differ much from the current situation where there are family and friends being asked to fulfil roles for which they do not have the requisite understanding. The independence of the custodian will depend on the relationships with the settlor and beneficiaries.

2 *Diagram*

The ranking is based on the Law Commission's draft Bill that allows family or friends to be a custodian trustee, therefore only passing limb 1 of the test for independence in that they themselves are not beneficially interested in the property but are related to a beneficially interested party. This would result in a score of 3/3 for limb one, 0/3 for limb two and the score for limb three. It would depend on the identity of the custodian themselves just as in the case of the family/friend trustee. On that basis the custodian trustee will be scored 2/3 for limb three.



F *Advisory Trustees*

Section 49 of the Trustee Act 1956 allows for an advisory trustee to be appointed either by the settlor, court or party with the power of appointment. The trustees of the trust still hold the trust property and make all decisions; they may consult with the advisory trustee and rely on the advisory trustee's advice. The trustees do not have to follow the advisory trustee's advice. Where they do, they will be protected from liability, except in the case of breach of trust, where the trustees had knowledge but proceeded anyway.

The Law Commission proposes to continue with the advisory trustee role, with the intention of dropping trustee from the name, as in reality the advisor is not a trustee, but rather a professional advisor appointed by the trustees to assist in administration of the trust.

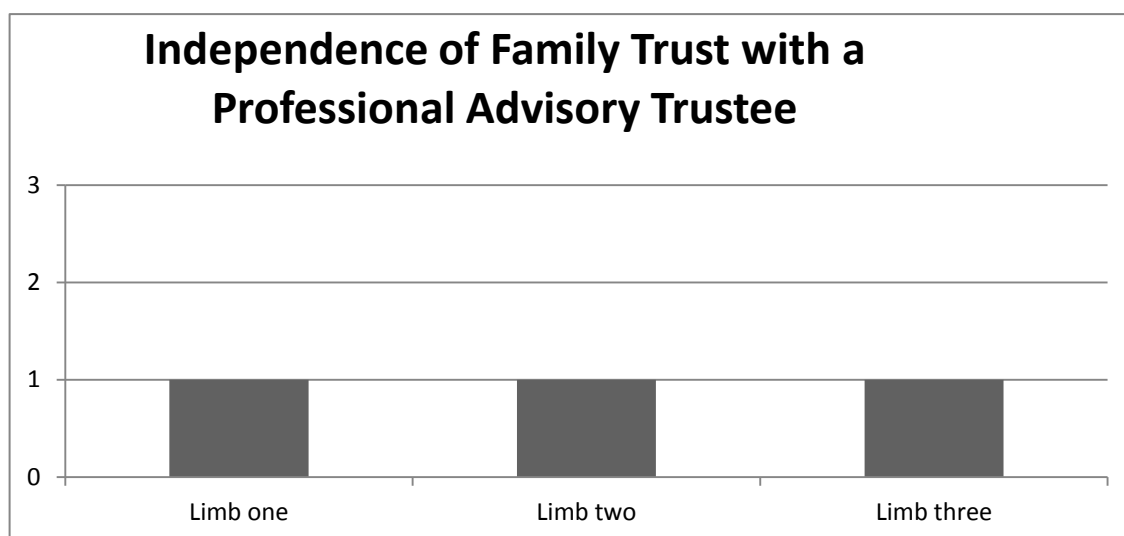
Although it does not directly relate to the independence of the trustees, this role is not without merit and it would be wrong to disregard it in this discussion of the independence of trustees. There is still a place for appointment of an advisor for trustees who lack knowledge or understanding, and seek out an advisor with specialist knowledge.

1 Independence evaluated

The purpose of the role of an advisory trustee is that the trustees seek out specialist knowledge and advice from a professional, for example, investment advice received from a financial advisor. Although they have no ability to directly control the assets of the trust, they will influence the trustees in making decisions about the trust assets, and it is for this reason that they should satisfy the test for independence. It is likely the advisor will pass the first two limbs as they are unlikely to be beneficially entitled or related to a beneficiary, however, the advisor may in their professional capacity have done work for a trustee. Professionals rely heavily on referrals, and if a trustee has used an advisor personally and had a good experience, then the trustee is more likely to use the same advisor for the trust. It is likely then that some trusts with professional advisors will satisfy two limbs, and some will satisfy all three limbs, depending on the relationship the advisory trustee has, if any, with the trustees of the trust.

2 Diagram

For the ranking of the advisory trustee, the trust itself is ranked, rather than the advisory because the advisor is not a trustee. It is assumed that this is an average family trust with family/friend trustees, together with a settlor/trustee/beneficiary, with the addition of an advisory trustee who is a professional, for example a lawyer who specialises in trust administration. It is assumed that the advisor is not beneficially interested in the trust property, and is not related to a beneficially interested party, but the advisor does work for one of the trustees personally. On this basis the trust scores 1/3 for the first limb, because although the advisory trustee is not beneficially interested it does not assist in limiting the interests of the other trustees. For limb two a score of 1/3 again because the professional trustee cannot counterbalance the personal relationships between the parties, only offer advice that the trustees may choose to follow, and limb three a score of 1/3, because the advisor works for one of the trustees in a professional capacity outside of the trust. The point to draw from this scoring is not that an advisory trustee is not useful, but rather it cannot be used to counter the lack of independence of the trustees of the trust.



G Professional Trustees

For a long time, settlors have turned to their legal and accountant advisors for trust advice. Often, they have asked or been persuaded to appoint, their advisors as trustees of their trusts. In the past the practice has been to appoint a lawyer or accountant in their personal capacity; more recently it is likely a professional's trustee company is appointed. Because professionals are often involved early in transactions in their dual capacity of professional and trustee, advice and input adds significant value to the transaction and helps to prevent mistakes.⁷⁸ This practice still exists, and there are many trusts which have a lawyer or accountant named personally as trustee; this is becoming less popular because of liability and continuity.

1 Specialist skill and knowledge

One of the main reasons professionals are popular for the role of independent trustee is their specialist skill and knowledge in the area of trusts law. It would be wrong to say that all professionals who offer these services meet this standard, but the idea of approaching a professional is similar to the reason trustees appoint advisory trustees. A specialist is part of the decision making process to ensure robust decisions are being made when dealing with trust property. With the specialist's knowledge comes a higher standard for liability.⁷⁹ A lay trustee is not expected to understand the complexities of trusts law and will be held to a much lower standard than professionals, who hold themselves out as experts in the field of trusts law.⁸⁰

2 Lawyers and Conveyancers Act

Chapter VI of the Lawyers and Conveyancers rules⁸¹ discusses client interests and conflicting duties. Lawyers should only act for one client at a time, to ensure they 'protect and promote' their client's interests. In reality, it can be hard to separate out the client instructing the lawyer from the trustee that the lawyer is representing, and what the interests of each of the parties, are and determine whether they are mutual. It is important to comply with the terms of the trust to execute the duties of trustee completely, but the water becomes murky when instructions are received from one client and not unanimously from all trustees, and payment of fees comes from one client not the trust.

3 The passive trustee role

Many lawyers or accountants accept the job as trustee as a passive trustee, letting the active trustees run the trust day to day, and to seek advice or consent from the passive trustee when major decisions are made, or documents need to be signed. This has led to the situations where a lawyer or accountant is appointed as a trustee not for any particular skill or knowledge in the area of trusts, but simply to rubber stamp decisions so that the settlor feels that their professional trustee will validate all the trustees' decisions. This practice has recently been commented on by the High Court.

The case of *Selkirk v McIntyre*⁸² emphasised for lawyers and accountants, the risk of being a trustee of a client's trust in their personal capacity. The lawyer, Mr Selkirk, was a co-trustee with Mr McIntyre of Mr McIntyre's trust. The trust failed to pay GST returns on several

⁷⁸ "The Problematic Role of the Trustee Services Companies" [2013] Lawlink <www.lawlink.co.nz>.

⁷⁹ Law Commission *Some Problems in the Law of Trusts* (NZLC R79, 2002) at page 3-8, in particular Trustee Act 1956 at s 13C.

⁸⁰ Law Commission, above n79, at page 3-8, in particular *Bartlett v Barclays Trust Co (No 1)* [1980] 1 Ch 515 at 534.

⁸¹ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

⁸² *Selkirk v McIntyre* [2013] 3 NZLR 265.

occasions; finally the Inland Revenue Department decided to pursue Mr Selkirk personally for the debt. Mr Selkirk paid \$200,000 of his own money to the Inland Revenue Department, and then brought proceedings against Mr McIntyre for recovery of the funds.

Mr Selkirk argued he should be indemnified for the full \$200,000 as he was a passive trustee. However the High Court said that he could only recover 50% of the debt from his co-trustee as all trustees are accountable to the beneficiaries of the trust, and all trustees must make trust decisions unanimously. It is no defence to argue there should be no liability, because the day to day activities of the trust were left to the client trustee. The professional-client relationship has evolved into one of co-trustees, where there is equal responsibility under the trust deed.

The *Selkirk v McIntyre*⁸³ case is a warning to professional trustees, that they cannot exist merely as a rubber stamp for trusts, and that there is no passive or active trustee role, but only the role of co-trustee. Settlers and other trustees expect a professional trustee to have a higher level of skill, understanding and knowledge, and that they will exercise due care and skill, and that they can be relied upon to assist the other trustees to manage the trust effectively.

4 *Risk of personal liability*

Being named personally as a trustee of a trust carries with it the risk of personal liability, because a trust is not a legal entity. Trustees must enter into contracts and be registered for trust property in their own names. The Christchurch Cathedral case⁸⁴ is a good example of the risk of liability, even when the trustees believe that they are acting in accordance with the founding trust documents. In that case, the trustees received an insurance payout after the Christchurch earthquakes for the damage to the Cathedral. The trustees believed that a portion of the funds should be used to construct a temporary cathedral, while decisions were made regarding the damaged cathedral. Unfortunately, for the trustees, Panckhurst J did not agree that the use of funds for a temporary cathedral was within the purpose of the trust. The trustees are personally liable for the whole cost of the temporary cathedral estimated to cost \$4.5 million. In this case, the trustees avoided having to seek relief under s73 of the Trustee Act 1956, by being able to make restitution of the funds spent, plus interest, using general trust funds which were confirmed as appropriate by the High Court.⁸⁵

5 *Independence evaluated*

The way professionals become trustees of many trusts, is by accepting the role of trustee for their clients, family members or friends. In this way, a lawyer may fail the test for independence at all three stages, depending on the trust. Where they are beneficially entitled it would be hard to argue the lawyer is appointed in their professional capacity; rather they are a beneficially interested party. Where the lawyer is not beneficially entitled but is a related party, perhaps being trustee for a close friend, they are moving into the professional trustee role, but still they fail limb 2 of the test. Where a lawyer acts as trustee for a client, they are fulfilling the role in their professional capacity only but have a conflict of interest because they act for more than one party. Often they will be remunerated where other trustees are not, and the remuneration will come from the client not the trust.

The conflict exists because the professional may act for the settlor as well as the trust, and potentially some of the trustees, and will likely be receiving remuneration for each of these roles. There is also the issue of security of tenure as the professional trustee must be prepared to be removed as trustee, where they cannot agree with the other trustees of the trust. It is for these reasons that a professional trustee fails the third limb of the test.

⁸³ *Selkirk v McIntyre*, above n 82.

⁸⁴ *Great Christchurch Building Trust v Church Property Trustees* [2014] 1182 NZHC.

⁸⁵ *Church Property Trustees v Attorney-General* [2015] NZHC 1843.

6 *Diagram*

For the ranking of professional trustees, it is assumed that the professional is not acting for family or friends, but rather for a client and accordingly they would score 3/3 for limb one and limb two, but score 0/3 on limb three because of the existing personal relationship with the parties.



H Trustee Companies

A more recent trend for professional trustees is to become directors of trustee companies which are then used to hold the position of trustee of many trusts. A quick search of the Companies Office website using search terms such as 'trustee' or 'trustees' will return thousands of results. Alternatively, searching the names of law firms and accounting firms will commonly result in at least one firm trustee company, set up for the sole purpose of being a professional trustee.

1 Continuity

Continuity is vital to legal and accounting firms for client retention purposes. When directors die, retire, resign or lose their capacity, the client/trust can continue to be administered by the same firm with no change, as the corporate trustee continues with the remaining directors of the firm. This avoids the inconvenience and cost of having to change the trustee of every trust for which the exiting partner acts as a trustee, as well transferring assets to new trustees.

2 CIR v Chester Trustee Services Ltd⁸⁶

Chester was a solicitor's trustee company which was trustee for 35 trusts. Two of the trusts that Chester was sole trustee for, were operating as trading trusts and incurred GST liability while undertaking land developments. Chester did not pay the GST as it did not have any assets, and accordingly the Commissioner of Inland Revenue applied to have Chester wound up. The Court of Appeal held that Chester was liable for the GST debt, and found that Chester was an insolvent trader. As such, they ordered the company to be liquidated as is the normal course of events for any insolvent company. The court took into consideration the cost to Chester's directors of arranging a change of trustees for all the trusts of which the liquidated company was a trustee. The conveyancing costs alone were estimated to be \$30,000 plus GST. The court also factored in that Chester was a bare trustee for its remaining 33 trusts. However, the court held that it was unsuitable for Chester to continue as a trustee, even considering the costs to Chester, and ordered that the company be liquidated. They also

⁸⁶ *Commissioner of Inland Revenue v Chester Trustee Services Limited* [2003] 1 NZLR 395.

ordered Chester to pay the Commissioner's court fees for both the High Court and Court of Appeal totalling \$75,000 plus disbursements.

This shows that even when the number of trusts a trustee company is trustee for is limited, it only takes one trust to incur a liability like tax and fail to pay, for the company to be liquidated and the solicitor to be left liable for the conveyancing fees and court fees.

3 *CIR v Newmarket Trustees Limited*

The problem with lawyers and accountants using corporate trustees is that they tend to form only one company for all their trusts. It is not good practice to have one company for 100+ trusts, but alternatively it is not effective to have one company for every trust. It would not make sense economically and administratively for any law firm or accounting practice to have to administer hundreds of trust companies.

The *CIR v Newmarket Trustees Limited*⁸⁷ case highlighted this issue. A law firm was using a corporate trustee company as an independent trustee on over 100 client trusts they administered. One of these trusts became liable to the Inland Revenue Department for GST and income tax. In the end, IRD decided to have the trustee company liquidated as it did not have funds to pay the debt; neither did the trust in question or the other trustee. The Court of Appeal appointed a liquidator to the company, so that other trustees could be appointed for all the other trusts administered by this one trustee company.⁸⁸

This case also highlighted the point from *Selkirk v McIntyre*⁸⁹ that there is no such role as the passive trustee. The Newmarket trustees were criticised by the court for not ensuring they were up to date with the administration of the trust, and the actions the other trustee was undertaking without Newmarket's knowledge.

4 *Director liability*

It has been said that "professionals use companies to quarantine exposure to liability".⁹⁰ The Companies Act 1993 places a duty on directors to act in good faith, and in the best interests of the company, to not trade recklessly or while insolvent, and to exercise care, diligence and skill. All these obligations on directors are in favour of the trustee company, not the beneficiaries of the trusts the company is trustee for. This raises two points: are these companies meeting their obligations under the Companies Act as well as their trustee obligations, and are all professionals with trustee companies allowing them to trade while insolvent?

Directors are personally liable for the company and its actions, but the director of the company is not the trustee of the trust; the company is named trustee. The director is a step removed from the liabilities and obligations of being a trustee and owes no fiduciary duty to the beneficiaries of the trust.⁹¹ The Law Commission, in its Preferred Approach paper, expressed the wish to ensure that directors of corporate trustees are liable to discharge the obligations and liabilities incurred by the company when acting in its capacity as trustee. The Commission indicated an intention to introduce a way to look through the company to the director, to ensure the director's actions on behalf of the company as trustee, are directly

⁸⁷ *Commissioner of Inland Revenue v Newmarket Trustees Limited*, above n 15.

⁸⁸ Brookfields Lawyers "What happens when things go wrong - Trustee liability for the actions of co-trustees" [2013] <www.brookfields.co.nz>.

⁸⁹ *Selkirk v McIntyre*, above n 82.

⁹⁰ Pravir Tesiram "Trusts" (New Zealand Law Society, Continuing Legal Education, paper present to Trusts Conference, Wellington, 2013) at page 27.

⁹¹ "The Problematic Role of the Trustee Services Companies" [2013] Lawlink <www.lawlink.co.nz>.

accountable to beneficiaries. Beneficiaries of any insolvent trust could then claim against the directors of corporate trustees.⁹²

5 *The Australian approach*

The Australian Parliament did not agree with trustees attempting to limit their liability by forming trustee companies to protect themselves, and legislated in this area to ensure that directors of trustee companies cannot insulate themselves from liability as trustee.⁹³ The Australian Corporations Act 2001 s 197, states that a director of a company acting as a trustee incurs liability if the company has not, and cannot, discharge the liability, and the company is not entitled to an indemnity because of breach of trust by the company, or it has acted ultra vires or the trust does not allow the company to limit its liability. This legislation is currently being considered by the New Zealand Law Commission with a view to bringing New Zealand legislation into line with the Australian version. At this time the Commission has set aside the issue of trustee companies for a separate review.⁹⁴ Even if the legislation comes into New Zealand, limiting liability is not the only reason to form a trustee company. There are other reasons, like that of continuity which still make them an attractive choice.

6 *Insolvent companies*

Both *CIR v Chester Trustee Services Limited* and *CIR v Newmarket Trustees Limited* are evidence of the general practice of trustee companies. They do not have funds or bank accounts, and often do not have Inland Revenue (IR) numbers. They are merely shell companies that are placed in the role of trustee to avoid the personal liability of the professional. This is changing now with the anti-money laundering legislation and the new capital gains tax requirements. These trustee companies cannot continue to be mere shells. The IR is tightening up the rules requiring the companies to register for an IR number. Banks are starting to require the companies to have bank accounts with nominal funds in them to comply with the new rules concerning anti-money laundering. With all of these changes in company administration, the cost of running the trustee companies increases making them less attractive.

7 *Independence evaluated*

The starting place for measuring the independence of a trustee company must be the independence of the professional trustee which formed the company. Many of the factors that influence the independence of a professional trustee will also influence the independence of the trustee company. The first main difference between the professional trustee and the trustee company, is the insulation of the director of the company from the personal risk and liability which they would otherwise attract, when trustee in their personal capacity. The second difference is that the trustee company does not have a professional relationship with any the other parties to the trust. Its sole role is to be a trustee, unlike a professional trustee who may offer other professional services. This last point is somewhat superficial as the director who controls the often will offer other professional services and it would be unconvincing to argue that there was enough separation between the director and the company that this would not create a relationship between the company, and any other parties to the trust to whom the director may offer professional services.

⁹² Law Commission *Review of the Law of Trusts: Preferred Approach Paper* (NZLC IP31, 2012) at pages 153 to 172.

⁹³ Pravir Tesiram "Trustee Companies" (New Zealand Law Society Continuing Legal Education, paper presented at Trust Conference, Wellington, 2013) at page 27 to 40.

⁹⁴ Law Commission, above n 3 at pages 153 to 172.

8 *Diagram*

Trustee companies are deemed to have satisfied the same limbs as the professional trustee as they are merely an extension of the professional trust, but the company's overall independence is lessened because of the current liability of directors to beneficiaries of the trust, and for this reason the professional trustee company is ranked at 2/3 for limb 3.



1 Private Trustee Companies

The heading of this section is slightly misleading as all trustee companies on the companies register are private companies, but in the context of this discussion a distinction must be drawn between those trustee companies discussed in H, which are run by professionals and are trustees of many trusts, and those private trustee companies which are run by the families of the trust and are trustees only of the family's trusts. This new approach is emerging out of the *CIR v Newmarket Trustees Limited* and *CIR v Chester Trustee Services Limited* situations where it is not economic for a law firm to have one trustee company for every client, but it is economic for the settlor who sets up the trust to create a company to be trustee.⁹⁵ This is known as a trading trust, but this approach does not have to be used only by trusts which are earning income and paying tax. Although not cost effective for a retired couple with only the family home in a trust, it could be used for farming or professional clients who have more income to spend on their asset protection structure.

1 Independence evaluated

The independence of these companies depends on how they are set up and who is given the role of director. If only family members or friends are given the role of director, the situation is the same as that where friends and family members are trustees. Alternatively, and if there were only professionals as directors, the situation would be no different from a professional's trustee company. There is a third scenario where there is a combination of family members who are familiar with the day to day running of the trust property together with at least one, if not two professionals, ideally an accountant and a lawyer, as directors. This would give a good mix of people on the board of directors making decisions for the trust, while still offering the professionals the protections of the company structure. The board of directors would be governed by company law, while the company would be governed by trustee law. This may resolve some of the other factors of independence like remuneration and security of tenure, because the company law rules on remunerating directors and removal of directors are

⁹⁵ Pravir Tesiram "Trustee Companies" (New Zealand Law Society Continuing Legal Education, Wellington 2013).

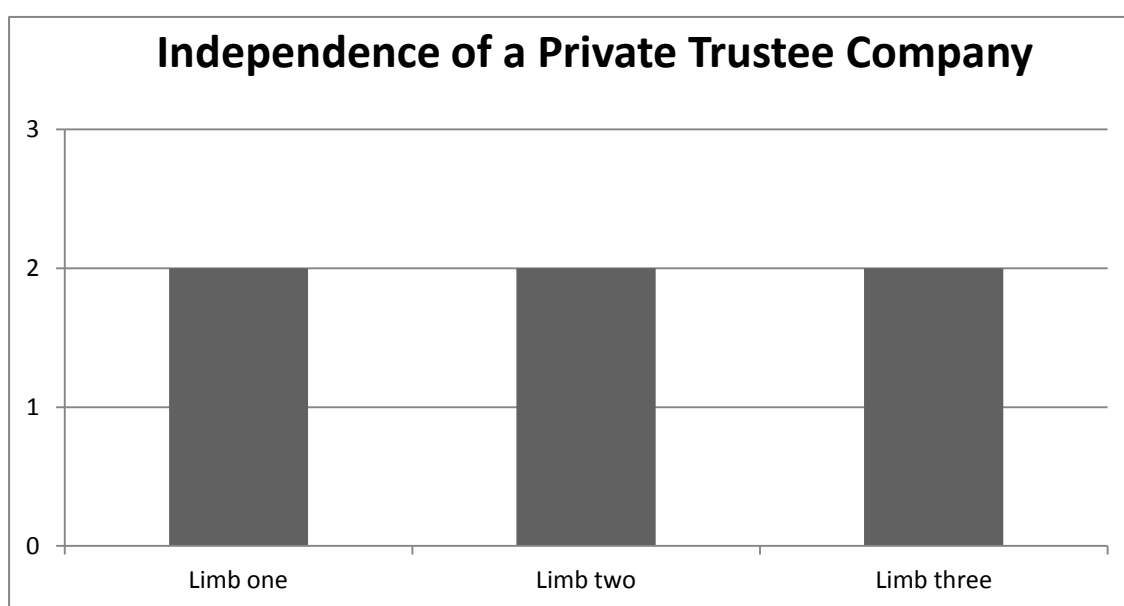
different to trusts law rules on remunerating and removing trustees. The board of directors would make all the decisions of the company thereby controlling the trust.

These companies can then be influenced by client objectives while still under the guidance of the necessary professionals, to ensure compliance with the trust deed and legislation. Having at least one professional who understands both trusts law and company law would be key to making this structure work. It has the further advantage of offering a long term structure that is easier to maintain over time. If the trustees are named personally, then any change to the named trustees requires all trust property to be changed to the new trustees. In the case of the company this would not be necessary; all changes would be done within the company and there would be no need to deal with the trust property. This advantage is particularly worthy of mention in light of Land Information New Zealand's (LINZ) opinion,⁹⁶ that enduring powers of attorney cannot be used for removing incapacitated trustees from property registers. The Companies Act requirements in relation to incapacitated directors, does not cause the same difficulties as the requirement by LINZ, that trustees must make High Court applications for the removal of incapacitated trustees where the trust owns land.

With regard to the third scenario where there is a mix of interested parties and professionals on the board, independence would depend on how well structured the company was, including shareholder arrangements, allocation of shares and numbers of board members. Although individually the parties may struggle to meet the test for independence, when company law is overlaid to prevent bias or influence, it may be possible to obtain a robust trustee. They may be a truly independent trustee; however the costs involved would be prohibitive for simple family home trusts.

2 *Diagram*

In the case of the private trustee company, the scenario is assumed where company law is used to obtain a highly independent private trustee company to fulfil the role as sole trustee. It is likely that each of the directors of the trustee company would have either a beneficial interest, be related to a beneficiary or act for another party of the trust. This means that the company scores 2/3 for each of the limbs; overall it scores higher than some of the more independent trustees, because of the range of directors who form the board which controls the trustee company, and the additional layer of company law controls.



⁹⁶ Chris Kelly "Incapacitated Trustees, EPAs and Land Titles Is LINZ right to say an EPA cannot be used following removal of a Trustee?" (2014) 14 The Property Lawyer 13.

J Maori Trustee

The Maori Trustee, Te Tumu Paeroa, is an excellent example of a custodian trustee in New Zealand. Originally called the Native Trustee, the office was established in 1920 by the Native Trustee Act to hold all the native reserves that were originally held by the Public Trustee. In 1947 the Native Trustee was renamed the Maori Trustee and, in 1952 the Maori Trustee received all the functions of the dissolved Maori Land Board, now giving the Trustee the powers to fulfil the role of executor and trustee as well as strong trustee administrative powers for the management of Maori land. In the 1980s and 1990s a major review of Maori land was undertaken, and Te Ture Whenua Maori Act 1993 was passed further protecting Maori land for future generations, and ensuring the Maori Trustee can protect and administer the land in the interests of its beneficiaries. Although appointed by the Minister for Maori Affairs, the Maori Trustee is a standalone organisation which is independent of the government allowing it to have the best interests of its beneficiaries at the forefront of its actions.⁹⁷

Under Te Ture Whenua Maori Act 1993 the Maori Land Court can vest land in the Maori Trustee under s 220, and appoint the Maori Trustee to be custodian trustee under s 222 at the request of the Maori land owners or trustees. The Maori Trustee will then manage the trust assets as directed by the managing trustees.

1 Independence evaluated

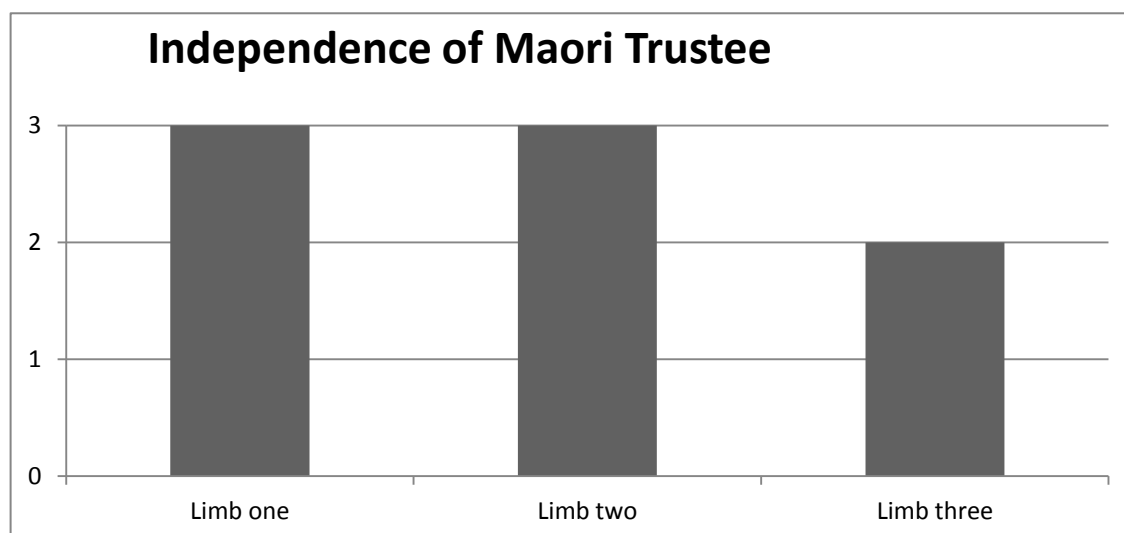
In the case of the Maori Trustee the organisation is highly skilled and knowledgeable in the role of trustee, ensuring every trust that is administered by the Maori Trustee is above reproach. The Maori Trustee is a model trustee. Many Maori land trusts have opted to use the Maori Trustee to administer trust assets because of the organisation's skills and for convenience, as many of these trusts have hundreds of beneficiaries. The Maori Trustee is an independent body⁹⁸ that meets all the limbs of the test for independence, while still remaining involved with the day to day running of the trust. This proves that a truly independent trustee can still be highly involved and relevant.

2 Diagram

The Maori Trustee is a highly independent body with no beneficial interest or relationships. It is not like other statutory trustee companies like Public Trust in that it does not offer services beyond that of a trustee. The only area of potential conflict would be where the Maori Trustee may be the trustee of related trusts, which could lead to potential conflict between the trusts. For this reason the Maori Trustee scores 2/3 for the third limb.

⁹⁷ Te Tumu Paeroa "History" <<http://www.tetumupaeroa.co.nz>>.

⁹⁸ Maori Trustee Act 1953 at s5.



K Statutory Trustee Companies

Statutory trustees like Public Trust are governed by legislation starting with the Trustee Companies Act 1967. This Act does not apply to the trustee companies discussed above. Trustee companies under this Act are trustee corporations for the purposes of the Trustee Act 1956. Public Trust is the only 'public' corporate trustee in New Zealand, but it is not the only statutory trustee company. Other companies are privately owned but have their own governing legislation, for example Perpetual Guardian.⁹⁹ Statutory trustees have been considered for a long time to be the ideal trustees, because they are first and foremost governed by legislation, which should hinder any influence a beneficiary or settlor may have to encourage them to deal inappropriately with trust property.

Appointing a statutory trustee to be a trustee has a lot of merit. They are not related to the settlor nor are they acting in any other capacity for the settlor or any of the other trustees or beneficiaries. There is no hidden agenda or alignment with other family members. They are appointed to fulfil the role as trustee in accordance with the trust deed and legislation.¹⁰⁰

1 Public Trust

Public Trust is one of the major corporate trustee companies in New Zealand. It was established in 2001 and is a combination of the Public Trustee and the Public Trust Office to provide comprehensive estate management and administration services, as well as such other functions as the Act or the Minister of Finance may require. Public Trust can be appointed to any role of a fiduciary nature such as executor, administrator or trustee by any person, and can be appointed as sole trustee even where the deed or will specifies the need for two or more trustees.¹⁰¹

Public Trust fulfils more than the role of trustee or executor, as it also assists its client with future planning just as a law firm would in certain matters such as wills, trust formation and enduring powers of attorney. Historically Public Trust was extremely competitive in the legal market. More recently Public Trust has stopped offering a free will service and general conveyancing. In recent times Public Trust has also centralised client records and has cut down on accessibility in smaller towns and no longer competes with the average law firm. In a recent article published for the Law Talk, Public Trust has announced it intends to go in a new direction by offering its services to law firms. Initially the assistance will be limited to

⁹⁹ AMP Perpetual Trustee Company Act 1988 and New Zealand Guardian Trust Company Act 1982.

¹⁰⁰ "The Problematic Role of the Trustee Services Companies", above n 91.

¹⁰¹ Public Trust Act 2001 at s75.

estate administration, allowing law firms who do not offer these services, or who wish to outsource some of their work to use the Public Trust to complete this work on behalf of the law firm. The law firm is not required to pass the entire job on to the Public Trust, just the parts with which they require assistance or wish to cut back on offering.¹⁰² Other corporate trustees like Perpetual Guardian also offer estate planning assistance, but neither Public Trust nor Perpetual Guardian offer the same variety as a general practice law firm. This means that corporate trustees may also have conflicts of interest by acting for other trustees or beneficiaries or receiving remuneration. The potential for conflicts is limited by the scope of services corporate trustees offer.

There is an advantage that a corporate trustee has that a company trustee does not have, and that is how it is governed. A corporate trustee is governed by its statute, not by the Companies Act. One particular advantage of a corporate trustee is the way remuneration is set. Section 122¹⁰³ of the Public Trust Act 2001 sets the remuneration for estate administration at 5% of the total value of assets, or such amount set by the Governor-General by Order in Council. The Act also provides for fee revision by the Court and the Court may reduce any fees determined to be excessive.

2 *Perpetual Guardian*

New Zealand Guardian Trust Company Act 1982 was an amalgamation of The New Zealand Insurance Company Limited and The South British Guardian Trust Company Limited, creating one company to vest the separate companies' respective rights and duties as executors, trustees and other fiduciary capacities in the new entity. More recently a third party company, Complectus Limited, purchased Guardian Trust and Perpetual Trust, and formed a new company Perpetual Guardian, which is governed by the original legislation of both Guardian Trust and Perpetual Trust.¹⁰⁴ This is a privately owned trustee corporation. Its governing legislation is significantly different to the Public Trust Act 2001 in that it is much less prescriptive. It still allows for oversight by the courts.

The two governing statutes for Perpetual Guardian are the AMP Perpetual Trustee Company Act 1988 and the New Zealand Guardian Trust Company Act 1982. Guardian Trust in particular has been an amalgamation of many trust companies over the years before becoming Perpetual Guardian. The new company particularly promotes itself as being an expert in estate planning, wills, trusts and enduring powers of attorney.¹⁰⁵

3 *Independence evaluated*

Public Trust and Perpetual Guardian will easily pass the first two limbs of the test for independence, and only hesitate on the last one because of client conflict of interest and remuneration. Where there is no other client relationship then the conflict of interest issue disappears leaving only the issue of remuneration. Public Trust easily avoids this issue with how its fees are set; Perpetual Guardian does not have this advantage. The remuneration issue can be surmounted by having set fees agreed to by the beneficiaries and paid from the trust fund. With these arrangements in place there is no reason for Public Trust and Perpetual Guardian to be less independent than the Maori Trustee. They should be model trustees, and therefore should meet all the limbs of the test for independence.

¹⁰² Sarah Sparks "From 'arch enemy' to ally - Why Public Trust aims to partner with lawyers" [2015] 871 Law Talk 34.

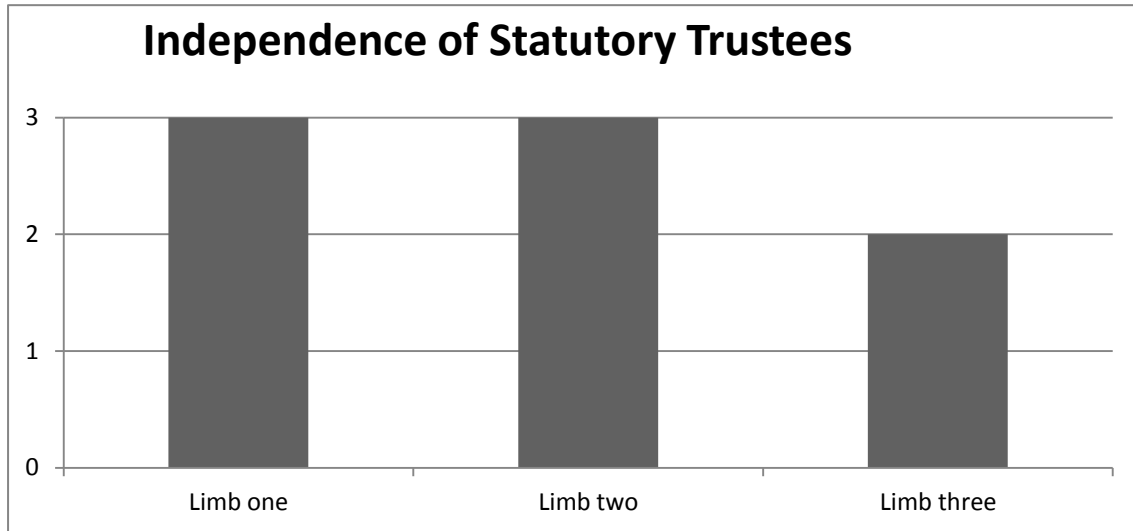
¹⁰³ Public Trust Act 2001.

¹⁰⁴ New Zealand Guardian Trust Company Act 1982 and AMP Perpetual Trustee Company Act 1988.

¹⁰⁵ Perpetual Guardian "Our Company" <<http://www.perpetualguardian.co.nz/>>.

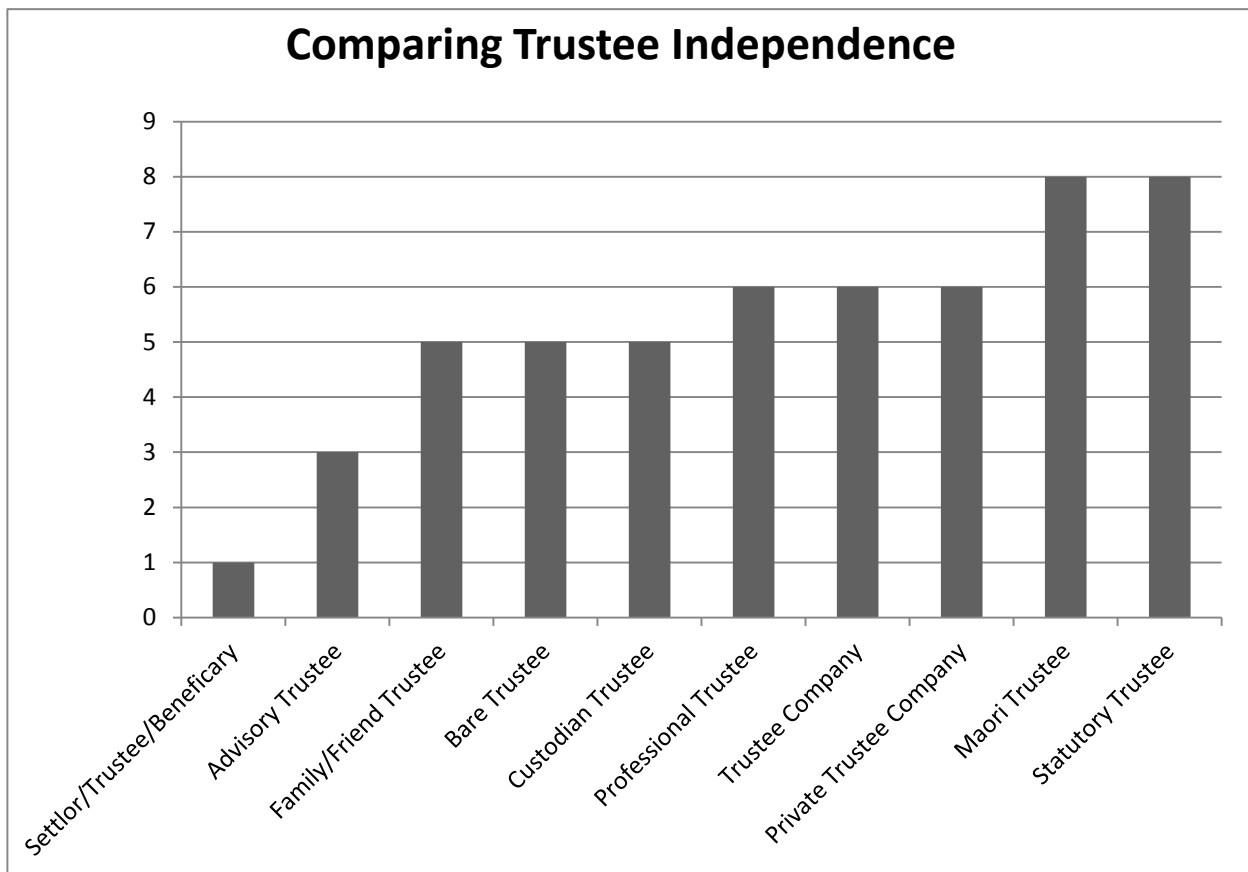
4 *Diagram*

As the statutory trustee has no beneficial interest in the trust assets, and is not related to a beneficiary scores of 3/3 for limb one and two are achieved. Limb three is 2/3 because often other legal services are offered to settlors and other trustees, although this is limited in comparison to the situation of professional trustees.



L The Optimal Trustee

Professional trustees are commonly referred to as ‘independent trustees’. Having evaluated each trustee from a beneficiary trustee to a statutory trustee using the independence test developed in chapter III, it becomes clear that professional trustee does not equal ‘independent trustee’. By tallying each trustee’s total score for independence and graphing the results in order of increasing independence, it becomes clear there is a very wide range of independence amongst the most commonly used types of trustees in New Zealand.



The most commonly used trustees, settlors, beneficiaries, family members and friends score very low in the independence test; however it must be remembered that the groups were examined in the abstract. In each trust a settlor may elect to limit some of the fiduciary obligations, thereby reducing the independence required of a trustee. For example, a settlor may choose to limit the no conflicting duties rule so that a beneficiary might also be a trustee. In this way the trustee would have a much lower level of independence as limb 1 and 2 would be limited. This is often the case in practice as these types of trustees are often preferred by settlors for various reasons such as availability, cost and personal knowledge.

Although lawyers should be the optimal trustee because of their knowledge, skills and expertise, they are often conflicted by their client relationships, presumed bias, and the issues around remuneration and security of tenure. Professionals also have tendency to always want to limit their liability through having a trustee company structure. Often in the case of professionals the settlor will alleviate some of these issues by again reducing the fiduciary obligations so that professionals may charge for their services. Professionals should be careful however when accepting roles as trustees where the settlor has heavily reduced the fiduciary obligations and thereby reduced the level of independence required of all the trustees, as they open themselves up to risk of liability.

Who then is the optimal trustee for a trust? Certainly it must first require the optimal trust situation, but any statutory trustee such as Public Trust, Perpetual Guardian or the Maori Trustee, providing the trust is eligible. These trustees are the model of trusteeship with expertise, professional knowledge, skills and independence. If every settlor appointed one of these trustees as sole trustee there would be fewer cases like *CIR v Newmarket Trustees Limited*,¹⁰⁶ *CIR v Chester Trustee Services Limited*,¹⁰⁷ *Judd v Hawke's Bay Trustee Company Limited*¹⁰⁸ or *Selkirk v McIntyre*.¹⁰⁹

The other option for an optimal trustee suggested was a hybrid of trust and company law to create a strict private trustee company. Although it would be economically burdensome for many, it does have potential for those who can afford it and do not wish to appoint a trustee like Public Trust. In a way, it allows for more semblance of control and perhaps that is because at the end of the day the settlor will end up with something very akin to a company, but with the assets protected separately in a trust. This does create a practical issue for trading, as creditors understandably do not want to trade with a company whose assets are all held in a trust.

¹⁰⁶ *Commissioner of Inland Revenue v Newmarket Trustees Limited*, above n 15.

¹⁰⁷ *Commissioner of Inland Revenue v Chester Trustee Services Limited*, above n 86.

¹⁰⁸ *Judd v Hawke's Bay Trustee Company Limited*, above n 17.

¹⁰⁹ *Selkirk v McIntyre*, above n 82.

V *Trusts in Practice*

In chapter IV the independence of common types of trustees was examined and scaled to find the optimal trustees for a trust. As was shown, the majority of current trustees do not meet the proposed requirements for independence. This statement is of course relative and each trustee would need to examine their own independence in light of their particular trust. There is no consequence for being less independent than the optimal level in a particular situation. However there is certainly a benefit to be gained from striving to attain the optimal level of independence. It is the best protection from risk and liability as a trustee. This chapter examines the trust situation in practice and offers some practical advice for professionals to assist in achieving their own optimal level of independence.

A *Applying the Test in Practice*

Apart from the cumbersome private trustee company option, the optimal trustees as determined in the last chapter are those created by statute. It would not be possible for every law firm to have a statutory trustee company nor would it be practical. The costs alone would make it prohibitive as would the oversight required to maintain its independence. It is also unlikely that settlors will all suddenly shift to using statutory trustee companies instead of their own lawyer or accountant for many reasons such as location, trust or cost. Practical solutions are needed to resolve the issues around trusteeship so trustees can avoid *CIR v Newmarket Trustees Limited* situations and beneficiaries can avoid *Judd v Hawke's Bay Trustee Company Limited* situations.

It is not practical for all trustees to attain the same level of independence as statutory trustees. Some qualifications need to be placed on independence to make it practical while still maintaining an acceptable threshold of trustee independence. The first area of law to examine for limitations on independence is fiduciary and trustee duties.

In this sub-chapter the core fiduciary obligations discussed in chapter II will be re-examined to determine how they influence trustee independence, then the duties of trustees as prescribed by both trust deed and trusts law which impact on independence will be discussed.

1 *Fiduciary duties and limitations on independence*

It is important to draw a distinction between duties that arise from the fiduciary relationship and the obligations a trustee is required to perform under the trust deed and trusts law. A trustee/beneficiary relationship is one of a number of fiduciary relationships recognised in equity. As discussed in chapter II the four key fiduciary duties are loyalty, no profiting, no conflict and good faith.

These four core fiduciary obligations go to the heart of the trustee-beneficiary relationship, and set the foundation for trustee independence. The requirement for independence is not a separate fiduciary duty owed by the trustees, but rather it stems from the duty of loyalty, good faith, no conflict and no profiting. If independence is an accumulation of the four core fiduciary duties, then it must be directly influenced by them. Any limitation on a fiduciary duty must impose a similar limitation on independence.

The lawyer/client relationship in New Zealand is governed by the rules set out in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 which are based on the fiduciary duties. Chapter V of the rules sets out the requirements of independence. It requires lawyers to be free from compromising influences and loyalties, that the relationship is one of trust and confidence, and that there can be no conflicts or profiting. The lawyer's conduct rules are a documented restatement of the fiduciary principles in a clear and concise way to show that independence requires the lawyer to fulfil each of these obligations. It is not that the law requires a trustee to be independent and therefore fulfil all of the fiduciary

obligations, but rather a trustee who truly satisfies the requirements of the fiduciary obligations shall be independent.

Although many factors were discussed in chapter IV to assist with assessing a trustee's level of independence, at the heart of the test is the core fiduciary obligations. If a trustee is a fiduciary, and therefore is independent, they will meet the requirements of the test. If the fiduciary obligations have been reduced then the limbs of the test would reduce accordingly.

2 *Trustee duties*

In this chapter III key trustee duties will be discussed and how they relate to trustee independence. Only those trustee duties that may have an influence on the way independence is defined are discussed.

(a) The duty to act in the beneficiary's best interests

Trustees are bound to act in the best interests of all beneficiaries even those who are not born yet, to the exclusion of all other interests including their own. This stems from the fiduciary role of the trustee. Usually it is the financial best interests of the beneficiary, but can sometimes include other interests such as religious and social beliefs.¹¹⁰

(b) The duty to maintain impartiality between beneficiaries

Beneficiaries must be treated impartially by the trustees unless the trust deed specifies otherwise. This can raise a conflict of interest between the interests of the income beneficiaries and the interests of the capital beneficiaries, which must be managed by the trustees.¹¹¹ It is the trustee's duty to consider the interests of both, and balance them to result in an equitable treatment of all beneficiaries.¹¹² If the settlor's intention is that some beneficiaries be favoured above others, then this must be made clear in the terms of the trust.

(c) The duty not to profit from being a trustee

The trustee, when acting in the best interests of the beneficiaries, must exclude their own interest which means they must not profit from their role as trustee. This helps to ensure the trustee's loyalty to the beneficiaries.¹¹³

(d) Limitations on independence

Trustee's duties build on the fiduciary duties. Fiduciary principles stem from the trustee/beneficiary relationship, but trustee duties are set by the settlor and although there are some duties that are commonly found in a trust deed, amendment can be made to many of the duties by the settlor when forming the trust. The influence of trustee duties on independence will depend on the circumstances of each trust.

The duty to act in the best interests of all the beneficiaries in accordance with the trust deed is a very strong factor for independence, because no one beneficiary is favoured above any other. For a trustee to adequately discharge this obligation it must be clear what is in the best interests of the beneficiaries. Where a trustee is not acting in the best interests of all the beneficiaries they are not acting in good faith and being loyal to beneficiaries of the trust, and are therefore not acting with independence.

Impartiality between beneficiaries is a positive factor in the test for independence; it promotes fairness and encourages trustees not to be influenced by any particular beneficiary. If a settlor writes into the trust deed that one trustee is to be treated more favourably than

¹¹⁰ *Harries and Others v The Church Commissioners for England and Another* [1992] 1 WLR 1241.

¹¹¹ *Re Mulligan (deceased)*, above n 12.

¹¹² Law Commission, above n 4.

¹¹³ *Jones & Ors v AMP Perpetual Trustee Co NZ Ltd* [1994] 1 NZLR 690.

another, this would mean the trustees would only be able to treat the beneficiaries impartially up to a point where one beneficiary then becomes entitled to more. The test for independence would say a trustee should not be influenced by a beneficiary but the trustee must, in accordance with the trust deed, give special treatment to one of the beneficiaries over the others.

Finally the duty not to profit is a positive factor for independence. As previously discussed, remuneration can be a factor against independence; however the duty not to profit is often included in the trust deed by the settlor to allow for trustees to be remunerated. Remuneration may be appropriate in some circumstances as discussed in relation to independent directors where Parliament sets the remuneration level. The duty not to profit clause of a trust deed or will is often written by lawyers, and usually states that a professional trustee may charge for their services. The remuneration clause is usually silent as to quantum or what sorts of services and remuneration are envisaged by the settlor. There must be some level of acceptable charging otherwise no professional would engage in trustee services. Perhaps using Public Trust as the bench mark for acceptable remuneration in this area, then limiting the profiting to remuneration could alleviate the negative influence of remuneration on independence.¹¹⁴

3 *Independence in light of fiduciary and trustee duties*

Trustee duties can all be altered to suit the settlor at the time of formation but alteration of the core fiduciary duties calls into question the very existence of the trust itself. Millett LJ found that the core obligations are those of performing the trust honestly and in good faith for the beneficiaries.¹¹⁵ By creating variations on the standard trustee duties, settlors are eroding some of the requirements of trustee independence by allowing certain situations that favour one beneficiary over another, or allow situations of influence otherwise prohibited. These variations do not alter the fundamentals of the test of independence. There can be no eroding of the fiduciary duties beyond the irreducible core.

B *Commercial Trust or Family Trust*

The nature of a trust may have an impact on the independence of trustees. In this chapter independence will be examined in two contexts; first an express trust set up for family reasons, and second an express trust set up for commercial reasons. Although there may be some overlapping, the ultimate goal of the trust is fundamentally different which may mean the overall independence of the trustees may vary.

*CIR v Newmarket Trustees Limited*¹¹⁶ is an excellent example of the difference in situation between a trustee administering a family trust, and the situation where a trustee is administering a commercial trust. In the situation of being a trustee of a family trust the requirements on the trustee are limited. The trust owns only the family home which the settlor lives in and maintains on a day to day basis. The administration of the trust would be limited to some annual gifting or an annual meeting of trustees, but otherwise not much would be required compared to a commercial trust which may own a business for example. Occasionally the trust might sell the family home and buy another family home, but all in all there would be limited change in the asset of the trust, meaning the risk of attracting liability is low. The issue of not creating an interest in the property for relationship property purposes is an issue which trustees must be alive to. If there was a third party living in the home with the beneficiary in a de facto relationship, then the trustees would need to give more oversight and consideration to the situation, and perhaps the settlor would retire as trustee.

¹¹⁴ Sarah Sparks, above n 102.

¹¹⁵ *Armitage v Nurse and Others*, above n 11.

¹¹⁶ *Commissioner of Inland Revenue v Newmarket Trustees Limited*, above n 15.

On the other hand is the commercial trust that is trading and attracting liabilities like GST, debtors and creditors. In this situation the trustees cannot afford to just meet once a year and hope things run smoothly, as liability is equal between the trustees and the risk of attracting liability is higher than for the family trust. It would be fair to say the oversight required in the family trust situation is far less than in the commercial situation.

Settlors of family trusts probably prefer to appoint family and friends as trustees because they have a personal connection, and are more inclined to protect that relationship than a professional. The type of trust and confidence in the family trust situation where the trustees are holding the family home is different to the type of trust and confidence in a commercial situation. The settlor appoints the family member who the settlor has known for a long time, and has trust and confidence the family member will look after the settlor's family and assets. A professional trustee will struggle to offer that same relationship. In the commercial situation, the professional trustee is preferred because of their skill and expertise, which creates trust and confidence that they will make good commercial decisions.

What it comes down to is that the purpose of the trust determines what is truly required from the trustee, and what things inspire a settlor to be confident in the choice of trustee. The purpose of the trust determines the preferred type of trustee and what is required of them, therefore the purpose of the trust must impact on the interpretation of the fiduciary duties and consequently on trustee independence. For example the duty not to profit. In the case of the family, the trust deed often varies the no profiting rule to allow beneficiaries who are trustees to receive a benefit. In the commercial context there is much more focus on trustees keeping a strict no profit rule, and variations allowing trustees to benefit are considered inappropriate.

Perhaps then the interpretation of independence should be a strict interpretation for commercial situations and less strict for family ones due to the nature of the trust. There can however, be only so much relaxing of the rules as regardless of the nature of the trust the core fiduciary duties apply. Some degree of independence is always required. The practical solution may be to re-examine the level of beneficial interest in each of these situations. In the family trust situation, the level of independence of lawyers may be an appropriate threshold of independence, and therefore any trustee in a family trust must be independent enough that the trustee reaches the level required of lawyers, rather than meeting the independence of a statutory trustee. In the commercial situation, the trustee must have a much lower level of beneficial interest, and therefore a higher threshold of independence is required ie the statutory trustee level of independence. Perhaps then the way lawyer's structure trusts when setting them up should be determined by the type of trust, the parties involved and the assets to be held.

C Practical Trust Structures

Keeping in mind the different points so far discussed in this chapter, but also having due regards to the requirements of independence, this sub chapter looks at possible trustee structures that may assist to promote independence while still being a practical structure to administer.

1 Professional private trustee company

As mentioned in chapter IV, there are professional trustee companies run by law firms and accountants to quarantine liability. There are also private trustee companies owned by clients which are commonly used in trading trusts. Often the settlor is the director and the law firm might hold some of the voting shares in the company. Holding some shares in the company is not enough to counterbalance the settlor's control over the company and encourage the independence of the private trustee company. The settlor will continue to make the majority of decisions as director of the trustee company.

A professional version of the private trustee company may be more practical. Rather than law firms running their own professional trustee companies, they should combine with the local accountants to create a private professional trustee company where no one firm has control, and settlors are not trustees, but rather hold the role of advisor to the trust. The control of the company would not be held solely within the law firm as there would be directors and shareholders from both the law firm and accounting firm. The only settlors who could use this trustee would be mutual clients, thereby addressing any privacy issues. A single independent director who is from outside the law firm and accounting firm would need to be appointed to hold the swing vote. This would ensure the actions of the trustee company are not being swayed inappropriately by the wishes of the advisor influencing any particular director. The settlor could then hold the power of appointment legitimately, as a counter balance to the lack of control they would now have over the administration of the trust.

The company would have set administration fees published in advance so that any settlor looking to use this structure would know the costs involved. They would need to be competitively priced to encourage settlors to use this structure rather than appointing themselves. It would assist the settlor in understanding that they are giving up their assets and transferring them to another entity. Remuneration could then come from the settlor without the implication of bias. The main issue remaining is that both the accounting firm and the law firm may continue to act for the settlor in another capacity, being that of lawyer and accountant. This issue is slightly addressed by the appointment of the independent director who must sign off on all transactions, thereby giving some extra independent quality to the decisions of the company.

This kind of trust structure may be attractive to commercial trusts, but be cost prohibitive for simple family trusts. As the level of independence for family trusts is lower, something similar but simplified may be more cost effective while still assisting in establishing trustee independence.

2 *Professional trustee company with advisor*

At present most professional trustee companies are co-trustees with the settlor which creates a lot of issues for independence. By using key points from the private professional trust structure a simplified version for family trusts may be suggested.

The settlor becomes the advisor to the trust rather than being a trustee, while the professional trustee company becomes the sole trustee, holding and managing the assets having due regard to the advisor's directions. This removes the direct influence of the settlor over the trust and while the settlor can still direct the trustee, such direction is not binding. This means that where the trustees do not agree with the advisor they do not have to comply. The settlor has the power of appointment to ensure that they retain the ability to remove the trust assets from the professional trustee's control if the professional trustee breaches the trust.

This structure resolves the issue of interested trustees (for example, a settlor or beneficiary trustee), however it does not prevent their appointment later and it does not limit the interests of the law firm. The law firm is likely to continue to act for the settlor and potentially beneficiaries of the trust in other capacities. Remuneration is also likely to continue to be paid by the settlor as the trust may not have cash assets.

This structure may not have the required independence for a commercial trust because of the higher interest level of the professional trustee, and it may not be satisfactory for all family trusts either. It will depend on what other methods the firm uses to promote their independence.

3 *Statutory trustees*

The simplest option is that lawyers encourage clients to appoint a statutory trustee company to be the sole trustee like Public Trust or Perpetual Guardian. It would work in a similar way to the professional trustee company option. The settlor could elect to be the advisor but rather than appointing their lawyer's trustee company, appoint a statutory trustee company. This would reduce some of the conflict of interest issues which arise when the lawyer is trustee, as well as acting for the settlor or beneficiaries. The statutory trustee would be contracted to act only in the role of independent trustee, with the law firm continuing to administer the rest of the settlor's estate. This option could be used for both family trusts and commercial trusts as the statutory trustee companies have vast experience in both areas and can afford to employ experts. This expert knowledge does result in higher fees.

D Other Practical Ways to Promote Independence

As the evaluation of types of trustees showed, there are few who would meet the requirements of independence and the majority of lawyers would not be amongst them. However trusts law needs good trust lawyers to be professional trustees. A mass exodus of professionals from the trustee market will not solve the issue, in fact it would likely result in more lay trustees than more trusts turning to statutory trustees. It is not practical to ask trustees to give up all their relationships and clients to become a trustee with true independence; some practicality is needed. One of the options discussed in the last sub chapter, was that lawyers use their trustee companies to become sole trustees for family trusts, and leave the commercial trusts to more complex structures or statutory trustees. This subchapter focuses on some practical ways law firms can strengthen their independence to continue to act as trustees for family trusts.

1 Promoting independence

Although most of this dissertation focuses on an individual trustee's independence, it is important to keep in mind the independence of the trustees together. One way lawyers can encourage trustee independence is to ensure the settlor understands this concept before choosing the initial trustees of their trust. To better ensure overall independence, lawyers should discourage settlors from nominating trustees who are also beneficiaries of the trust. By having no beneficiary trustee, the first step of the test of independence is already satisfied, increasing the overall independence of the trust from the outset. There is no exemption from independence for beneficiaries, so in principle they cannot make good trustees as they are too personally interested in the trust fund. This may also have the benefit of limiting the erosion of trusts law by relationship property law, because beneficiaries will not be in a position of control. The case of *Judd*¹¹⁷ would have been decidedly differently if the trust only had professional trustees, as the settlor could not then have been in control of the day to day running of the trust, and there could be no question of delegated authority.

2 Separation of clients

Since it is not desirable that lawyers stop being trustees, because they are best positioned to understand and advice on trust law, the lawyer's conflict of interest issue needs to be solved. There is a conflict between the lawyer acting for the settlor as an individual and the lawyer acting as a trustee of the trust. The conflict rule 6.1¹¹⁸ in the Lawyers and Conveyancers rules should be adhered to by getting the client's informed consent to act for both parties; this means not just the settlor, but any other trustees and all beneficiaries who are adults. It is also important that independent advice be sought whenever the interests of the settlor conflict with

¹¹⁷ *Judd v Hawke's Bay Trustee Company Limited*, above n 17.

¹¹⁸ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

the interests of the beneficiaries. Although spreading out clients to different lawyers within a firm does not avoid conflicts of interest, it will assist the client to understand the conflict better as well as assist them to understand the difference between acting as a trustee and acting in their personal capacity.

3 *Fitting the trust powers to the facts*

When writing trust deeds, extra care needs to be taken over the power of appointment of trustees and the power of appointment of beneficiaries as these powers essentially control the whole trust. It should never be assumed that the same power of appointment clauses are acceptable in every situation, every trust is different and therefore the scope of the powers of appointment should be different. The trust structure a settlor decides upon should influence how these powers of appointment are administered. If a trustee is not prepared to take a breach of trust to court, then they should not be a trustee nor should a trustee object to valid removal.

It is important when drafting trust deeds to be clear about remuneration. Lawyers should have set fees which are published online. This would alleviate some of the presumed bias around remuneration. It is then clear to every trustee and beneficiary the costs involved in using a professional trustee. A professional trustee should cover their costs but fees should not be excessive either. Remembering that an independent director can have a 10% interest in the assets of the trust indicates that some interest is allowed, but it should not be excessive. Remuneration is contrary to independence because it discourages retiring if the need arises or removal if required. Public Trust publishes lists of set fees online to be open and transparent about the cost of using its services.

4 *Choosing the right role*

There are many different roles an advisor can fulfil in relation to a trust, and it is important that lawyers take whatever role they fulfil seriously. If a lawyer wants to be more of a passive trustee than an active one, then they may be best placed as an advisor to the trust, rather than taking on the role of trustee where they are not in a position to administer the day to day running. Being an advisor will still require skill, time and effort. It would be less onerous than the role of trustee. If the facts of *Selkirk v McIntyre*¹¹⁹ were different, and the professional trustee was an advisor to the trust rather than a trustee, they would not have attracted the same liability to the Inland Revenue, while still assisting their client with professional trust advice.

5 *Continuing professional development for all trustees*

The Law Commission highlighted the need for both professionals and lay trustees to gain knowledge and understanding of trusts law. The legal community both fulfils the crucial role of being professional trustees, but are also the key people a lay trustee will seek out for advice. Educating lay trustees is the key to better trust administration in the future.

With the rate at which trusts law is currently evolving in the courts, it is crucial to constantly be honing skills in the area of trusts law. Attending trust conferences with other trusts specialists is one of many good ways to keep up to date with all the changes. Another is reviewing a text book on trusts law such as *Equity and Trusts in Australia and New Zealand*¹²⁰ or *Law of Trusts and Trustees*¹²¹ once a year to keep the core concepts of trusts

¹¹⁹ *Selkirk v McIntyre*, above n 82.

¹²⁰ GE Dal Pont *Equity and Trusts in Australia and New Zealand* (2nd ed, LBC Information Services, North Ryde, NSW, 2000) and GE Dal Pont *Equity and Trusts in Australia* (6th ed, Thomson Reuters, Pyrmont, NSW, 2014).

law in the back of the mind while administering a client's trust. There are also the recent Law Commission reports on the future changes to trusts law that need to be read and digested, to start the conversation about what trusts law will look like in the future. Change is certainly coming and clients need to be prepared for what their trust will look like in the future. The case law must be read as it comes out, together with other expert opinions and analysis, to create real skills, knowledge and expertise in the area of trusts law which can then be passed on to lay trustees.

Teaching lay trustees' trusts law must also include encouraging good trust administration habits. Trustees must know and understand the trust deed precedent, and should be reviewing it as part of their annual general meeting to keep its guiding principles in mind when making decisions. It should also be reviewed each time the trust undertakes some sort of action to ensure it has the authority to carry out its intentions. If a client cannot understand the fundamentals of being a trustee then they should be encouraged to relinquish the role to another. This last point may not be viewed positively by clients with family trusts. In this situation a review should be undertaken to establish whether the client still needs a family trust. Where the trust no longer has a purpose, it may be in a client's best interest to windup the trust and put the assets back into the family's control. In cases where there is still value in having the family trust, then trustees will need to be further educated and there must be greater oversight of the administration of the trust.

¹²¹ Kelly C and Kelly G *Law of Trusts and Trustees* (7th ed, LexisNexis NZ, Wellington, 2013).

VI Conclusion

The independence of all trustees is a concept that needs more attention and discussion. This notion of independence has no direct authority, nor does it reflect the fact that independence is required of all trustees. There was no clear authority to consult on what is meant by the term ‘independent trustee’ so other roles requiring independence were considered. The aim of this dissertation was to examine the concept of independence in defined situations, and to establish a set of criteria that could be objectively applied to any trustee, to determine their level of independence. By reviewing the independence of commonly used trustees, practical solutions could be developed for legal practitioners in the trustee market. The end result is to encourage lawyers to continue to be trustees, and to avoid liability through promoting trustee independence within the legal community.

In chapter I, the topic of the paper was outlined. Chapter II provided the background to the paper as well as discussion on the origins of trustee independence. The origin of the requirement of independence is not well documented in the authorities, and has not attracted much discussion in academic texts. By examining the fiduciary relationship as well as the lawyer and client relationship, it was determined that independence stems from the core fiduciary obligations of loyalty, no profiting, no conflicts and good faith. While some of these duties may be reduced by the settlor when settling the trust, the core obligations will always remain and so too will the requirement of independence, just in a reduced form. This point is something that needs to be considered when assessing the independence of a particular trustee; however it would entirely depend on the terms of the particular trust. Once the origin of independence was established, the next step was to determine a means of determining a trustee’s independence.

In chapter III different independent relationships were examined to determine ways of assessing independence. This was then combined into an objective set of criteria that could be used to assess the most common types of trustees. There is only one documented set of criteria for establishing trustee independence, and it is limited to *independent trustees* in the financial services market. This provided the framework to establish a test that could be used to examine the independence of trustees of express trusts. A comparison between the Financial Markets Conduct Act¹²² framework, and other well documented roles that require independence was undertaken. Roles like the lawyer-client relationship, independence in the judiciary, and independent directors, to ensure an accurate definition of independence and to flesh out the factors to consider when assessing a trustee.

In chapter IV the test was used to examine and rank commonly used types of trustees to determine the level of independence for each type of trustee. From this it was easily determined which trustees are the most independent, and are therefore the ideal on a purely abstract analysis, and which trustees are the least independent, therefore calling into question their ability to be a trustee. The test for independence developed in this dissertation has been used to examine types of trustees at a very high level, to create a range of independence which can be discussed. By using the test in this way, it has highlighted the ideal level of independence and the practical level of independence, and demonstrates the significant difference between the two. Although trustees should strive for the ideal level of independence, in reality there must be a lower more practical level of independence that should be met in order for trusts to be administered properly. Essentially, a compromise must be reached between the ideal and practical levels of independence to ensure at least some minimum level of independence is adhered too.

¹²² Financial Markets Conduct Act 2013.

Chapter V used the results from the objective testing of trustees and pulled together the key points to determine some practical advice for professional trustees. This advice was to assist professional trustees in maintaining independence, as well as suggesting some possible trustee structures to assist in developing more independent trustees for their clients.

The criterion for assessing trustee independence that has been established in this dissertation adheres to the key concepts of independence, and the purest form of the fiduciary relationship. Although the results clearly show the ‘ideal’ trustee, this may not be the most practical solution for many trusts. Though it only offers a high level overview of independence, it substantially assists in the assessment of whether any one trustee is best placed in their role. For example, beneficiaries do not make good trustees because of their personal interests in the trust fund. By examining their independence, it is shown that in the abstract they can have no independent qualities, and this calls into question their ability to fulfil the fiduciary obligations of a trustee.

The testing of the most commonly used trustees resulted in predictable results. It was no surprise that professionals are more independent than beneficiaries, and that statutory trustees are more independent than professionals. It does allow for a better understanding of why some trustees are better placed as trustees than others, and the qualities that they have that make them more independent. This then allowed for practical solutions to be drawn out of the results, and analysis which can be used in practice to promote independence, adherence to fiduciary principles and good trust administration.

What the results showed is that the ‘ideal’ trustee is the one most removed from interests in the trust, and that the more a party is interested in the trust the less independence they have. Statutory trustees, while falling into the ‘ideal’ trustee category for high levels of independence, can be among the most expensive as well as being less accessible than other types of trustees. This can mean they are not a practical solution to the issue of encouraging independence.

On the other hand beneficiaries do not make ‘ideal’ trustees. There are not enough countervailing factors to continue to allow beneficiaries to be trustees. There is nothing that can alleviate their lack of independence. Even a professional who is a trustee of his or her own trust cannot surmount the first hurdle of the test; they will always be interested in the trust assets. All their knowledge and understanding of trust law does not answer the first limb of the test. With such a low level of independence, how are beneficiaries acceptable trustees? The answer is that even where there is no independent quality to a trustee’s tenure, the trustee must still have some capability to perform the fiduciary duties.

Looking at beneficiaries as trustees from the practical perspective, many settlors who retain the power of appointment will continue to appoint beneficiaries, including themselves, as trustees for various reasons such as family ties or because the settlor themselves wishes to retain control of the trust. Beneficiaries will fulfil the role for little to no remuneration, and are usually more contactable than other types of trustees. This is not good trust administration because trustees are opening themselves up to liability by not being independent enough. It is in the beneficiaries’ best interests to have trustees who are independent. The problem is that not all trusts can afford to have a trust administered by an ‘ideal’ trustee.

What a settlor needs is a trustee option that is a practical compromise between these competing factors, and results in greater independence than they currently have from their trustees. The issue is one of control, and the practical solution is to place the assets with other trustees but to retain an appropriate level of control as settlor in the circumstances.

Careful consideration of trustee structures needs to take place to ensure the independence of trustees while still having a structure that will work for the settlor. In the last chapter, possible

examples of structures were given that could be used to increase trustee independence. The key to all of them would be to exclude beneficiaries from the role of trustee. After that has happened, then the next step is to look at the remaining trustees, and find practical ways of promoting independence. Assisting lay trustees to understand their fiduciary obligations will assist them to be more independent. The Law Commission's Trust Bill is the first step towards having a trusts law system that can be understood by lay trustees.

The key to acceptable levels of independence is not for lawyers to stop being trustees, but rather for them to treat trusts as they would any client in a conflict of interest situation, and adhere to their own rules around client conflicts of interest and independence. This is not the time for professionals to be exiting the trustee market. To decrease trustee liability, trustee independence must be increased. Now is the time for professionals to begin discussing, promoting and adhering to the criteria of trustee independence.

Schedule

A Current Definition of Trust from Trustee Act 1956

Trustee Act 1956 section 2 Interpretation and application -

trust does not include the duties incidental to an estate conveyed by way of mortgage, but with this exception it extends to implied and constructive trusts, and to cases where the trustee has a beneficial interest in the trust property, and to the duties incidental to the office of an administrator within the meaning of the Administration Act 1969, or a manager or person authorised to administer the estate of any person under the Protection of Personal and Property Rights Act 1988, or a manager of a protected estate appointed under the Protection of Personal and Property Rights Act 1988; and **trustee** has a corresponding meaning and includes a trustee corporation and every other corporation in which property subject to a trust is vested and every person who immediately before the commencement of this Act was a trustee of the settlement or in any way a trustee under the Settled Land Act 1908; and **new trustee** includes an additional trustee:

provided that in sections 14, 15, 16, 21, 23, 31, 32, 40, 41, 42, 43, 44, 45, 46, 47, 51, 65, 66, and 67 the term **trust** does not include the duties incident to the office of a manager or person authorised to administer the estate of any person under the Protection of Personal and Property Rights Act 1988 or a manager of a protected estate appointed under the Protection of Personal and Property Rights Act 1988; and the term **trustee** is modified accordingly.

B Proposed Definition of Express Trust from Draft Bill

Subpart 1 – Express trusts¹²³

3 Meaning of express trust

For the purpose of this Act, an express trust means a trust that –

- (a) has the characteristics set out in section 4; and
- (b) is created in accordance with section 5.

4 Essential characteristics of express trust

(1) the characteristics of an express trust are:

- (a) it is a legal relationship in which a trustee holds or deals with trust property in 1 or both of the following cases:
 - (i) trust property held or dealt with on behalf of the beneficiaries (where a trust has beneficiaries);
 - (ii) trust property held or dealt with for the purpose of the trust (where a trust is for a permitted purpose); and
- (b) the trustee is under a fiduciary obligation to deal with the trust property for-
 - (i) the benefit of the beneficiaries (where a trust has beneficiaries); or
 - (ii) the purpose of the trust (where a trust is for a permitted purpose); or
 - (iii) the benefit of the beneficiaries and the purpose of the trust, and
- (c) if the trustee's duties are enforceable, they may be enforced against the trustee by –

¹²³ Law Commission, above n 3.

- (i) any 1 or more of the beneficiaries where a trust has beneficiaries; or
- (ii) the Attorney-General where the trust is a charitable trust; and
- (d) as a consequence of paragraphs (a) to (c), the beneficiaries have equitable rights in or in respect of the trust property.

(2) An express trust must not have the sole trustee as the sole beneficiary of the trust.

5 Creation of express trust

An express trust is created –

- (a) subject to any formalities prescribed by a statute, by the settlor who, with reasonable certainty and by words or actions, -
 - (i) indicates an intention to create a trust; and
 - (ii) identifies the beneficiaries or the trust purposes; and
 - (iii) identifies the trust property; or
- (b) if a statute provides for the creation of an express trust, in accordance with that statute.

6 No express trust except under section 5

- (1) A trust, if it is to be an express trust, must be created in accordance with section 5.
- (2) Nothing in subsection (1) precludes the invalidity of an express trust on any other grounds recognised at law.

Bibliography

C Legislation

1 New Zealand

Administration Act 1969.

AMP Perpetual Trustee Company Act 1988.

Arbitration Act 1996.

Constitution Act 1986.

Companies Act 1993.

Electricity Industry Reform Act 1998.

Financial Markets Authority Act 2011.

Financial Markets Conduct Act 2013.

Food Act 2014.

Judicature Act 1908.

KiwiSaver Act 2006.

Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

Local Government (Rating) Act 2002.

Maori Trustee Act 1953.

New Zealand Guardian Trust Company Act 1982.

New Zealand Bill of Rights Act 1990.

Non-bank Deposit Takers Act 2013.

Property Law Act 2007.

Property (Relationships) Act 1976.

Protection of Personal and Property Rights Act 1988.

Public Trust Act 2001.

Rates Rebate Act 1973.

Reserve Bank of New Zealand Amendment Act 2008.

Supreme Court Act 2003.

Te Ture Whenua Maori Act 1993.

Trustee Act 1956.

2 *Australia*

Australian Corporations Act 2001.

D Bills

Judicature Modernisation Bill 2013.

E Case Law

1 New Zealand

AMP General Insurance Limited v Macalister Todd Phillips Bodkins and Graeme Morris Todd [2006] NZSC 105.

Carmine v Ritchie [2012] NZHC 2279.

Christopher Howard Reeves v Payne Gould Guinness Limited [1996] CEC 22/96.

Church Property Trustees v Attorney-General and The Great Christchurch Building Trust [2013] NZHC 678.

Church Property Trustees v Attorney-General [2015] NZHC 1843.

Clayton v Clayton [2015] NZHC 550.

Clayton v Clayton [2015] NZCA 30.

Commissioner of Inland Revenue v Chester Trustee Services Limited [2003] 1 NZLR 395.

Commissioner of Inland Revenue v Newmarket Trustees Limited [2012] NZCA 351.

Cunningham v Cunningham [2016] NZHC 1075.

FE v MB 328/2012 LCRO.

GD v RA 290/2013 LCRO.

Great Christchurch Building Trust v Church Property Trustees [2014] 1182 NZHC.

Hamilton v Murrell [2014] NZSC 162.

Penny and Hooper v Commissioner of Inland Revenue [2011] NZSC 95.

Jones & Ors v AMP Perpetual Trustee Co NZ Ltd [1994] 1 NZLR 690.

Judd v Hawke's Bay Trustee Company Limited [2014] NZHC 3298.

Lankow v Rose [1995] 1 NZLR 277.

Lower Hutt Law Centre Solicitors Nominee Co Ltd v Hutt City Council (1995) 7 NZCLC 260.

Marshall v Bourneville [2013] NZCA 271.

McComb v Ewers [2015] NZHC 3146.

Murell v Hamilton [2014] NZCA 377.

NZHB Holdings Limited v Bartells & Ors (2005) 5 NZCPR 506.

Official Assignee v Wilson [2007] NZCA 122.

Re Mulligan (deceased) [1998] 1 NZLR 481.

R v Te Kahu [2006] 1 NZLR 459.

Selkirk v McIntyre [2013] 3 NZLR 265.

Spencer-Marti v Crouch [2014] 3069 NZHC.

Todd Taranaki Limited v Energy Infrastructure Limited HC Wellington CIV–2007–485–1803, 5 August 2008.

Trustees of Pukeroa Oruawhata Trust v Mitchell [2008] NZCA 518.

Wikio & Anor v Attorney-General (2008) 8 HRNZ 544.

2 England

Arklow Investments Limited and another v ID Maclean and Others [2000] 1 WLR 594.

Armitage v Nurse and Others [1997] 2 All ER 705.

Boardman and Another v Phipps [1966] 3 All ER 721.

Bristol and West Building Society v Mothew [1997] 2 WLR 436.

Christie v Ovington [1875] Ch D 279.

Clough v Bond (1838) 40 ER 1016.

Hallows v Lloyd (1888) 39 Ch D 686.

Harries and Others v The Church Commissioners for England and Another [1992] 1 WLR 1241.

Keech v Sandford (1726) 25 ER 223.

Knight v Knight (1840) 3 Beavan 148.

Luke v South Kensington Hotel Company (1877) 7 Ch D 789.

Palmer v Simmonds (1854) 2 Drewry 221.

Paul v Constance [1977] 1 WLR 527.

Re Bellamy and Metropolitan Board of Works (1883) 24 Ch D 387.

Re Cook, Beck v Grant [1948] Ch 212.

Regal (Hastings) Limited v Gulliver and Others [1942] 1 All ER 378.

Snook v London and West Riding Investments Limited [1967] 786 QB.

Westdeutsche Landesbank Girozentrale v Islington LBC [1994] 1 WLR 938.

3 Canada

Valente v R (1985) 24 DLR (4th) 161.

4 Australia

Leahy v Attorney-General for New South Wales (1959) 101 CLR 611.

F Texts

Vicki Ammundsen *The Trustee's Handbook Checklists and Precedents for Trustees* (3rd ed, CCH New Zealand Limited, New Zealand, 2011).

Andrew S Butler (ed) *Equity and trusts in New Zealand* (Thomson Brookers, Wellington, 2003).

Andrew S Butler and Tim Clarke (eds) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009).

Matthew Conaglen *Fiduciary Loyalty* (Hart Publishing, Portland, 2010).

GE Dal Pont *Equity and Trusts in Australia and New Zealand* (2nd ed, LBC Information Services, North Ryde, NSW, 2000).

GE Dal Pont *Equity and Trusts in Australia* (6th ed, Thomson Reuters, Pyrmont, NSW, 2014).

Helen Dervan, New Zealand Law Society and New Zealand Law Society *The role of the trustee* (Continuing Legal Education, New Zealand Law Society, Wellington, 2013).

Jonathan Harris *The Hague Trusts Convention* (Hart, Oxford, 2002).

Charles Mitchell *Hayton and Mitchell, commentary and cases on the law of trusts and equitable remedies* (13th ed, Sweet & Maxwell, London, 2010).

Alastair Hudson *Understanding Equity and Trust* (5th ed, Routledge, New York, 2015).

Alastair Hudson *Great debates in equity and trusts* (Palgrave Macmillan, Basingstoke, 2014).

Tomas Kennedy-Grant, Barbara Hunt and Phillip Green *Arbitration Law and Practice - Westlaw NZ* (Thomson Reuters).

NC Kelly *Law of Trusts and Trustees* (6th ed, LexisNexis N.Z, Wellington, 2005).

C Kelly and G Kelly *Law of Trusts and Trustees* (7th ed, LexisNexis N.Z, Wellington 2013).

Maurizio Lupoi *Trusts* (Cambridge University Press, Cambridge; New York, 2000).

New Zealand Dictionary Centre *The New Zealand Oxford Dictionary*, Graeme D. Kennedy

and Tony Deverson (eds) (Oxford University Press, Auckland, 2005).

Paolo Panico *International trust laws* (Oxford University Press, Oxford ; New York, 2010).

Philip Henry Pettit *Equity and the Law of Trusts* (12th ed, Oxford University Press, Oxford, U.K, 2012).

Leonard Ian Rotman *Fiduciary law* (Thomson Carswell, Toronto, 2005).

Catherine Soanes and Angus Stevenson (eds) *Concise Oxford English Dictionary* (11th ed, Oxford University Press, New York, 2008).

Peter Spiller *Butterworths New Zealand law dictionary* (6th ed ed, LexisNexis NZ, Wellington, N.Z, 2005).

Arthur Underhill and David J Hayton *Underhill and Hayton, Law Relating to Trusts and Trustees* (14th ed. ed, Butterworths, St Paul, 1987).

G Reports

Financial Market Authority *Anti-Money Laundering and Countering Financing of Terrorism Monitoring Report 1 July 2013 to 30 June 2014*.

Financial Markets Authority *Standard Conditions for Independent Trustee Licences (for Individuals)*(2014).

Ministry of Justice “Government response to Law Commission report ‘Review of the Law of Trusts: A Trusts Act for New Zealand’” (March 2014)

Law Commission *Some Problems in the Law of Trusts* (NZLC R79, 2002)

Law Commission *Some Issues with the use of Trusts in New Zealand: Review of the Law of Trusts: Second Issues Paper* (NZLC IP20, 2010).

Law Commission *Review of Trust Law in New Zealand: Introductory Issues Paper* (NZLC IP19, 2011).

Law Commission *The duties, office and powers of a trustee review of the law of trusts* (NZLC IP26, 2011).

Law Commission *Review of the Law of Trusts: Preferred Approach Paper* (NZLC IP31, 2012).

Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013).

H Thesis

Christopher John Kelly *Supervision of trustees : enforcement or problem solving* (Thesis LLM--Victoria University of Wellington, 2009).

I Journals

Martin Day “Fiduciary duties” (2009) 15 *Trusts & Trustees* 447.

Philip Dreadon and Corina Haemmerle “Sham Trusts” (2014) 15 *The Property Lawyer* 30.

Chris Kelly “Incapacitated Trustees, EPAs and Land Titles Is LINZ right to say an EPA cannot be used following removal of a Trustee?” (2014) 14 *The Property Lawyer* 13.

Steven Li “There is no Such Thing as a Sham Trust” (2013) 44 *VUWLR*.

Geoff McLay “The law of trusts” [2013] *NZLJ* 357.

Jessica Palmer “What makes a trust a sham?” [2008] *NZLJ* 319.

Sarah Sparks “From ‘arch enemy’ to ally - Why Public Trust aims to partner with lawyers” [2015] 871 *Law Talk* 34.

LS Sealy “Fiduciary Relationships” (1962) 20 *The Cambridge Law Journal* 69.

Duncan Webb “Privilege, Corporate Counsel, and Lawyer Independence” (2009) 15 *NZBLQ* 195.

Terence Tan Zhong Wei “The irreducible core content of modern trust law” (2009) 15 *Trusts & Trustees* 477.

J Conferences

Chris Kelly and Greg Kelly “Asset Protection Update” (New Zealand Law Society Continuing Legal Education, 2014).

Sally Morris and Juliet Moses “Acting as an Independent Trustee - are you really, really sure you want to?” (New Zealand Law Society Continuing Legal Education, paper presented to Trusts Conference, Wellington, 2015).

Pravir Tesiram “Trustee Companies” (New Zealand Law Society Continuing Legal Education, Wellington 2013).

K Internet Materials

Brookfields Lawyers “What happens when things go wrong - Trustee liability for the actions of co-trustees” (Brookfields Lawyers, 2013) <<http://www.brookfields.co.nz>>.

“Being a Trustee: is it worth the risk?” [2013] *Lawlink* <www.lawlink.co.nz>.

Craig Sisterson “Cathedral insurance monies not available for wider use, confirms High Court” (3 March 2014) *NZLawyer Online* <<http://www.newzealandlawyer.co.nz>>.

Graham Tubb “Inland Revenue’s approach to tax debts incurred by trusts” (3 March 2014) *NZLawyer Online* <<http://www.newzealandlawyer.co.nz>>.

New Zealand Shareholders’ Association Incorporated “NZSA Policy Statements - Independent Directors” New Zealand Shareholders’ Association Inc. NZSA Best Practice Guidelines <<http://www.nzshareholders.co.nz>>.

NZAX “Listing Rules” (NZX Limited, 2010) - <https://www.nzx.com>>.

Perpetual Guardian “Our Company” <<http://www.perpetualguardian.co.nz>>.

Public Trust “What does it cost?” <<http://www.publictrust.co.nz>>.

Public Trust “Who are we?” <<http://www.publictrust.co.nz>>.

The World Organisation for Cross-border Co-operation in Civil and Commercial Matters
 “Hague Convention on the Law Applicable to Trusts and on their Recognition” HCCH -
 Hague Conference on Private International Law <<http://www.hcch.net>>.

“The Problematic Role of the Trustee Services Companies” [2013] Lawlink
 <www.lawlink.co.nz>.

Theresa Donnelly “Opposite ends of the Spectrum - Trusts vs Residential Care Subsidy
 issues” (Ministry of Social Development) <www.nzica.com>.

Te Tumu Paeroa “History” <<http://www.tetumupaeroa.co.nz>>.

Work and Income “General Information for Work and Income Clients” (Ministry of Social
 Development) <www.workandincome.govt.nz>.