

Trustee Rights

Rights of Indemnity

Overview

- Trustee is the legal owner of trust property and is personally liable
- But if expense occurred properly in course of administration of the trust (*Re Raybould*), the trustee will have the right to be indemnified (**s36(2)** TA)

ROI excluded?

- Not consistent between states
 - Vic: Can be excluded by trust deed on basis of freedom to contract and supremacy of trust deed per **s2(3)** TA (Brooking J in *RWG*)
 - NSW, Qld, SA: Cannot be excluded, intrinsic to trustee's office (*Jonco*)
- Give your opinion if required: Weigh up the arguments for and against exclusion, for example:
 - The Trustee is (or should be) aware of terms of the trust and has agreed to those terms (against ROI);
 - Beneficiaries have the benefit of the work performed by the Trustee so should also bear burden (for ROI);
 - Some creditors can't consider terms on which money is owed (e.g. torts victim) (for ROI); and
 - Creditors may not (and likely won't) be able to see information about the Trustee's indemnity

Identify expense

- Costs associated with running: rates, taxed (*Balkin*), supply, contracts, solicitor's fees
- Expense incurred in Damages claim (*Re Raybould*)
- Expense incurred in defending litigation (*Hayman*)

Expense properly incurred?

- Not consistent between states

- Vic: Look at circumstances of trustee's duty (*Nolan*). Expense must be properly incurred, which requires:
 - Within power
 - In good faith
 - With requisite standard of prudence
- NSW: Expense is properly incurred as long as the Trustee was not fraudulent (Meagher JA in *Gatsios*)

Effect of ROI / Outcome

- Places charge or lien over trust property in trustee's favour (ie they are entitled to the amount they incurred to be paid to them from the trust property)
- Lien takes priority over interest of beneficiaries (*Octavo*): must be paid out first (*Buckle*)
- ROI survives changes in trustees (*Gatsios*)

Set off

- ROI may be set off against a trustee's liability from a breach of trust
 - Effectively means that the trustee may make good the breach by reduction of the right of indemnity OR, the trustee will forfeit his indemnity to the extent of his indebtedness to the trust fund

Personal liability of directors of trust company

- A person who is a director of a corp when it incurs a liability while acting...as trustee, is liable to discharge the whole or a part of the liability if the corporation:
 - a) has not discharged, and cannot discharge, the liability or part of it; and
 - b) is not entitled to be fully indemnified out of trust assets solely because of one or more of the following:
 - i) A breach of trust by the corp
 - ii) The corp acting outside the scope of its powers as trustee;
 - iii) A term of the trust denying, or limiting, the corp's right to be indemnified against the liability.
- See **s197(1) Corps Act**: To meet cases where a trustee company had no, or no valuable, right of indemnity against trust assets
 - Directors will be liable individually and jointly with the corporation to the person to whom the corporation's liability is owed

ROI from beneficiaries personally

- Make sure ROI against **beneficiaries personally** not expressly excluded by deed
- Can pursue Bs personally if trust assets exhausted and Bs are (*Hardoon*):

- Absolutely entitled (NOT discretionary objects)
- *Sui juris* (of age)
- If multiple Bs:
 - Indemnified in proportion to Bs' interests (*Broomhead*)
 - Insolvency of one does not affect proportions of others
- If the only beneficiary is merely a life tenant or child beneficiary there is no B who can be justly expected or required personally to indemnify the T
- Liability can be incurred after trust wound up as long as arose during life of trust (*Balkin*)
- If beneficiary has assigned benefit: assignee still liable
 - Trustee can pursue either assignor or assignee

Subrogation

- Creditors can step into shoes of trustee and access property represented by trustee's ROI (*Octavo*)
- Applies to both individual persons and companies as trustees:
 - Natural person trustee: Trust property that is owed to a natural person trustee is not 'trust property' per *Bankruptcy Act* definition
 - Available for distribution to creditors of the bankrupt trustee
 - Corporate trustee: Property owed through ROI from trust assets is property of the trustee company within meaning of **s433** *Corps Act* (*Re Amerind*)
- Unclear whether subrogation extends to Trustee's personal rights against beneficiaries, or only to trust property

Judicial advice

- Trustee has right to approach court per **Order 54** of *Supreme Court Rules*
 - Should always be advised to do so to seek judicial advice if any ROI related issue arises

Right to approach court

When to use?

- Allowed under **Order 54** of *Supreme Court Rules*
- To determine questions re:
 - Administration of estate
 - Execution of trust

- Classification of objects / composition of a class of objects
- Rights of creditors against an estate or a beneficiary

Why approach court?

- Should take advice before:
 - Defending proceedings
 - Incurring expenses
- Protects both trustees and trust assets
- When uncertain, the trustee should seek advice and not rely on **s67** defence (*Macedonian Orthodox Church*)

Beneficiary Rights

General rights

- Right to consent to breach
- Right to call for trust property
- Right to seek removal of trustee
- Right to see remedy
- Right to compel performance of trust
- Right to restrain breach of trust
- Right to approach court (**Order 54**)
- Right to extinguish trust (*Saunders v Vautier*)
- Right to information concerning the trust (ties to Trustee duty to keep accounts and allow inspection)

Right to consent

- Beneficiary can consent to what would otherwise constitute a breach of trust by the trustee (*Spellson*)
- Trustee must know of consent before breach (*Spellson* approved in *Byrnes*)
- Consent can be:
 - Express
 - Knowledge couple with inactivity