

Removal of trustees – two recent cases

The Courts have both statutory and inherent jurisdiction to remove trustees and recent cases indicate they are now more willing to use this power. The recent decisions in *McCallum v McCallum* and *Burnside v Burnside* are illustrative in this context. Stuart, Dalzell, Partner, and Amy Davison, Senior Associate, discuss.

Guiding principles for removal of trustees

The leading case on when the Court will exercise its inherent jurisdiction to remove a trustee remains *Letterstedt v Broers* (1884) 9 App Cas 371. In that case, Lord Blackburn stated that a trustee will be removed when that removal is necessary for “the welfare of the beneficiaries”. In *Miller v Cameron* (1936) 54 CLR 572, the High Court of Australia said each factual scenario had to be considered, but a trustee could be removed if necessary for the proper management and protection of the Trust estate.

Fast forward to New Zealand today. Woodhouse J, considering the general approach to applications for removal of trustees in *McCallum v McCallum* [2017] NZHC 1218, stated “The Courts have not sought to closely define and limit the circumstances in which the jurisdiction [to remove trustees] may be exercised. In broad terms it is to be exercised for the primary purposes of seeking to protect the interests of beneficiaries, to ensure adherence to the objectives of the trust and preserve trust property.”

For his part, Palmer J in *Burnside v Burnside* [2017] NZHC 595 set out six principles the Court will consider in deciding whether to remove a trustee:

1. The starting point is the Court's duty to see estates properly

administered and Trusts properly executed.

2. The wishes of the testator/settlor (evidenced by the appointment of a particular executor or trustee) are to be given considerable weight.
3. The welfare of the beneficiaries is the litmus test.
4. Hostility between administrators/trustees and beneficiaries is not in and of itself a reason for removal. Such hostility assumes relevance if and when it risks prejudicing the interests of the beneficiaries.
5. The Court will consider the circumstances of the case in a macroscopic not microscopic fashion.
6. The security of Trust property is also a guiding principle.

McCallum v McCallum

In this case, two trustees applied for removal of the third trustee (William junior), who refused to even discuss a proposal agreed by the other trustees for the exchange of assets for the benefit of the beneficiaries. William junior did not appear at the removal hearing.

Woodhouse J granted the removal application because he was satisfied that:

1. William junior was unfit to continue to act as a trustee; and
2. The welfare of the beneficiaries and of the Trust property required his removal.

As an aside, the trustees also applied in this case for the Court to vary the Trust deed to provide the settlor with the power to remove trustees. The Court refused, noting that such a variation was sought because it was considered convenient, not for the benefit or welfare of the beneficiaries, to maintain

the Trust, or for the protection of Trust property.

Burnside v Burnside

In this case, the trustees were two brothers. They were unable to work together, and one trustee (Alec) applied for himself and his brother (Robert) to be removed as trustees, and for independent trustees to be appointed in their place. Robert fought Alec's removal application and counter-claimed, seeking directions for distribution to him of some assets held by the Trust.

Both brothers had some measure of success – the removal application was granted, and one of the assets in question was ordered to be transferred to Robert.

Palmer J stated that he granted the removal application because:

1. There was ample evidence of dysfunction between the trustees in relation to trustee matters;
2. The dysfunction was materially impeding management of investments held by the estate and distribution to a class of beneficiaries which were a key aspect of the will. Allowing that to continue would not be in the interests of the beneficiaries; and
3. Allowing the dysfunction and its effects on the administration of the estate to continue would not be consistent with the Court's duty to see the estate properly administered and the Trust properly executed.

Costs in removal of trustee cases

In the *Burnside* costs judgment, *Burnside v Burnside No 2* [2017] NZHC 1678, Palmer J considered who bears the costs of a proceeding for removal of a trustee, and what this depends on. He cited *Carmine v Ritchie* [2012] NZHC 2279 in which the High Court

held that a trustee who fights an action for their removal (rather than leaving the application in the Court's hands) "is personally exposed to costs, even if he or she acts on counsel's opinion and in good faith".

In *McCallum*, William junior did not appear at the hearing to defend the application for his removal as trustee. In that case, Woodhouse J found the application for removal was "fully justified" and appropriately made by the plaintiffs in their capacities as settlor and trustees. Therefore, costs were, in the Court's judgment, appropriately paid out of the Trust.

Compare *Burnside No 2*, in which the removal application was (unsuccessfully) defended, and the removed trustee had a measure of success in his counter-claim for distribution to him of Trust assets. In that case, Palmer J ordered that costs lie where they fall – i.e. personally with the trustees, stating "I consider it is primarily [the trustees'] jointly dysfunctional behaviour that has resulted in this litigation. They each acted unreasonably. The beneficiaries of the estate should not bear the costs of that.

Comment

While mere friction between the trustees will not generally justify the removal of one or more of their number, the Courts are willing to exercise their inherent jurisdiction to remove trustees in order to protect the beneficiaries' interests and/or Trust property, or for the proper administration of the Trust. However, parties should be careful that they do not become personally liable for costs. The prudent approach to avoid costs liability (i.e. so that costs are payable out of the Trust) is for:

1. **Applicants** to assure themselves before bringing the application that their conduct is not partly to blame for the dysfunction requiring removal of a trustee; and
2. **Trustees** the subject of a removal application to comply

with Court requirements for steps in the litigation but consider leaving determination of the application in the Court's hands, (instead of actively defending the application).