

Update Law of Trusts

Service 61 — November 2021

Updated commentary

Trusts Act 2019, s 81 — trustees' indemnities

The right of indemnity does not constitute a beneficial interest in the trust's assets, but rather an equitable lien over both the capital and income of the trust; and the liquidator of a corporate trustee is primarily interested in the assets of the trust only to the extent of the trustee's right to be indemnified: *Little v NZ Natural Therapy Ltd (in liq)* [2021] NZCA 461. See [TRU81.01].

Trusts Act 2019, s 81 — trustees' indemnities

Cases which have considered trustee's rights of indemnity include:

- *Lockhart Trustee Services No 56 Ltd v Ryan* [2021] NZHC 2544
- *Temple 88 Ltd (in liq) v Hassine* [2021] NZHC 2351
- *Jackson v Coll* [2021] NZHC 1768.

See [TRU81.01].

Trusts Act 2019, s 109 — application to prevent removal of trustee

In *Anglands (No 5) Trustee Services Ltd v Cains Trustees 2021 Ltd* [2021] NZHC 1909 directions for representation of a minor and for service were made in respect of an application under s 109. See [TRU53.01].

Trusts Act 2019, s 112 — court may make order for removal of trustee

In *Nyhoff v Atkins* [2021] NZHC 2238 Gwyn J made a consent order removing a trustee on the basis that there had been, and might in the future be, an impasse if that trustee remained a trustee of the trust See [TRU112.01] and [TRU114.01].

Trusts Act 2019, s 114 — court may appoint or replace trustee

In *Re Acland* [2021] NZHC 2403 Wylie J made an order under s 114 of the Trusts Act 2019 appointing the former trustees of a charitable trust as interim trustees of the trust until the trust's next annual general meeting. See [TRU114.01].

Trusts Act 2019, s 117 — requirements to notify vesting of trust property — transitional provisions

Where a trustee has resigned or been removed before the commencement date of the Trusts Act 2019 but the vesting of the trust property has not been completed, the transitional provisions in cl 11(2) of sch 1 of the Trusts Act govern the application: *Lewis v Lewis* [2021] NZHC 585. See [TRU117.01].

Trusts Act 2019, s 124 — power of court to approve variation of trust

In *Re Hugh Green Trust* [2021] NZHC 2184 Muir J made an order under s 124 of the Trusts Act 2019 approving the variation of the Hugh Green Trust deed by the deed of variation on behalf of all unborn and future natural or adopted grandchildren of Hugh Green (excluding any child of Maryanne Green). See [TRU124.01].

Trusts Act 2019, s 124 — power of court to approve variation of trust

In *Talijancich v Talijancich* [2021] NZHC 753 Isac J under s 124 approved the variation of the trust deed proposed by the trustees on behalf of all beneficiaries who lack capacity (including the minor primary beneficiaries); and/or persons who may acquire a beneficial interest at a future date or on the happening of a future event or on becoming a member of a certain class of persons; and/or future persons who may acquire a beneficial interest. See [TRU124.01].

Trusts Act 2019, s 126 — Court may review trustee’s act, omission, or decision

In *Easton v New Zealand Guardian Trust Co Ltd* [2021] NZHC 2084 the High Court discussed s 126, finding that the essence of the Court’s task under equitable jurisdiction was to ascertain whether a trustee has acted within the proper scope of the power. The Court found that the formulation of s 126 was consistent with that enquiry. See [TRU126.01].

Trusts Act 2019, s 130 — power of court to vary or extend trustees’ powers in relation to property

In *Re Setter* [2021] NZHC 1603 the s 130 application failed because it sought to alter (or expand) the beneficiaries’ power of appointment of trustees, rather than altering powers of trustees (as the section requires). See [TRU130.01].

Trusts Act 2019, s 131 — court may relieve trustee from personal liability

In *Deputy Registrar v Moeahu* (2021) 437 Aotea MB 3 (437 AOT 3) the Maori Land Court explained that for the trustees to claim relief under s 131, the onus is on the trustees to establish all the elements contained in s 131 and, while the Court has a wide discretion to grant relief and the extent of any such relief, that remedy is not given lightly. See [TRU131.01].

Trusts Act 2019, s 133 — trustee may apply to court for directions

Applications under s 133 are generally brought pursuant to Part 18 of the High Court Rules 2016. However, the Court has accepted that in appropriate cases applications for directions may be made in other forms, for instance by using the Part 19 originating application procedure: *Macnamara v Macnamara* [2021] NZHC 2361. See [TRU133.01].

Trusts Act 2019, s 133 — trustee may apply to court for directions

Section 133 was considered in *Re Hugh Green Trust* [2021] NZHC 2184 at [30]–[33] where the High Court held that because s 133 is in substantially similar terms to its predecessor, s 66 of the Trustee Act 1956, existing case law continues to inform the interpretation of s 133. See [TRU133.01].

Trusts Act 2019, s 133 — trustee may apply to court for directions — litigation directions — Beddoe applications

A *Beddoe* application was recently considered by the High Court in *Re ET & P Vincent Trusts* [2021] NZHC 2250, although it was ultimately unsuccessful. See [TRU133.05].

Trusts Act 2019, s 139 — court may order payment of remuneration to trustee

Section 139 was considered by the Maori Land Court in *Re Bamber* (2021) 259 Waiariki MB 274 (259 WAR 274). See [TRU139.01].

