

DECISIONS

Lindsay Pope, Trustee Support

Notes...

Henry Stokes: I'm Henry Stokes, Managing Solicitor Northern Region at Public Trust. I'm pleased to introduce Lindsay Pope, the creator of *10 Minute Trustee Success*. We've worked together when he was National Manager, Trustee Standards at Public Trust. Lindsay now helps trustees put in place plans and procedures to better manage their trusts, through his company Trustee Support Ltd.

Lindsay, I know in your former roles that you've been involved in managing, guiding and reviewing decisions, often in problem or complex trusts. Why is decision-making so important for trustees?

Lindsay Pope: Trustees have responsibility for holding and managing assets for the benefit of other people, called beneficiaries. The law gives trustees duties which require them to act in good faith, responsibly and within the powers of their trust deed. Those duties create obligations which make it important for trustees to exercise an appropriate level of care when they make trust decisions.

Trustees are given quite a bit of independence and freedom on how they run their trusts, but they can't be reckless in managing assets held for someone else's benefit. So, while trustees may have the authority to do something, they still need to work out if it's the right thing to do for their trust.

A poorly considered decision can have negative consequences not only for beneficiaries, but also trustees. Trustees can be personally liable to make good any loss that flows from a breach of trust (for example, where they may have breached their duty of loyalty, their duty of care or their duty to act according to the terms of the trust deed). So it's important to try and get decisions right.

Henry: With that context, trustees have quite a responsibility around their decision-making. What then are some of the challenges for trustees with their decisions?

Lindsay: The challenges come from the types of decisions trustees make, all the factors they need to take into account, the people who need to be involved, the circumstances of the particular trust or even the skill level of the trustees. Lots of trusts are managed by non-professional trustees who haven't been trained on the duties or job of a trustee. They don't know what they don't know.

If you look at the types of decisions trustees make, while many are routine, some are more significant and need extra care. Examples of significant decisions would be selling or buying trust assets, approving

an investment strategy, running a business, borrowing money, making loans or distributions to beneficiaries, winding-up a trust, or managing a challenging issue in the trust.

My experience has been that challenges around decisions often relate to the quality of the relationship between the trustees, or between the trustees and their beneficiaries, or settlors. The role can be demanding when you have to balance out different beneficiary interests, manage the expectations of settlors and beneficiaries, or manage a disagreement between trustees.

Take a common situation where a trustee is also the settlor of the trust and a beneficiary. Such a trustee will often have some pretty firm views over how the trust should be run which can create challenges for decision-making, especially if the other trustees don't agree with a proposed course of action. These situations can't always be avoided and have to be managed tactfully.

Other challenges can come from having to make decisions under pressure, urgently or having to tell a particularly demanding beneficiary that the answer is "No". In challenging situations you have to rely on good inquiry, good information, good advice and good process around your decisions.

Henry: You've mentioned quite a few things there so trustees have a fairly major balancing act going on. You've talked about relationships, types of decisions and pressures. So, in terms of handling all that, what do you suggest is good practice for trustees to manage decisions?

Lindsay: You're right, there can be lots of things for trustees to handle or balance out. From a good practice perspective, a way that might be useful to help trustees organise their thinking is to focus on strengthening four areas that impact on the quality of decisions – position, plan, people and process.

Trustees have to know the **position** of their trust. That's about trustees knowing why the trust was set up, what they are authorised to do, what the needs and circumstance of their beneficiaries are, what wishes the settlor may have made known and what trust property they are responsible for. So, position is about the trustees knowing the rules of the trust and where things are at.

As part of understanding the position of a trust, trustees must know how decisions are required to be made. The general rule is that trustee decisions have to be unanimous, unless the trust deed authorises decisions to be made by majority. If the trust deed is silent on decision making, decisions have to be made unanimously. Where decisions are made by majority, trustees should take extra care.

Next, trusts run over a long period of time so trustees need to know where they're heading. That's about having a **plan**. A good Trust Plan provides focus and becomes a reference point for trustee decisions. Trustees need to be thinking ahead and have clear goals and objectives for their trust.

The third area is around the **people** who may need to be involved in decisions. That's the relationships trustees have with beneficiaries, settlors, advisory trustees and advisers. When trustees make decisions, they need to consider the interests of beneficiaries and any wishes made known by the settlor. They should also look to take advice on any matters they don't understand.

I'd encourage trustees to engage with settlors and beneficiaries, especially on significant decisions like I described earlier. It provides trustees with different perspectives to consider as well as an opportunity to explain what's going on or to intercept potential issues. I think a trustee's job is often easier when people feel they've had their views considered as part of a decision.

Henry: And that's because the beneficiaries feel they've got a voice, that they've been listened to and that they've been part of the process. Even if the decision doesn't necessarily come out how they would want it to, they'll usually feel happier if they've felt listened to and involved.

Lindsay: Exactly. The last area is **process** and that's how trustees manage their decisions. We talked earlier about trustees exercising judgement consistent with their authority (i.e. their powers and discretions) and their obligations (i.e. their duties). Process helps trustees demonstrate they have exercised their discretions independently and responsibly. It helps reduce potential risk.

An example of a high-level process framework for making trustee decisions could be:

1. Identify the issue at hand and the decision that is required.
2. Confirm the trustee's legal authority; consider the trustee's duties and obligations in the context of what is proposed; identify any constraints or limitations.
3. Assemble the relevant information to understand the situation:
 - Background facts
 - Beneficiaries needs and circumstances
 - Settlor wishes

- Advice from appropriate experts
 - Key supporting documents
 - Inquiry with relevant parties
4. Carefully consider and assess the facts and the options available in the context of the trust circumstances and the trustee's goals and objectives.
 5. Shape a preferred option and weigh up the merits, impact and any potential risks.
 6. Make the decision and record it in writing; record the process used to reach the decision on the Trust File; reference the authority, advice and supporting information relied upon.
 7. Implement the decision and monitor the outcomes.

Process also covers how trustees go about the day to day running of their trust (for example, protocols and procedures for meetings, conflicts of interest, reviews, communication, information sharing, record keeping, etc). I'd encourage trustees to document procedures, protocols or policy in a Trust Policy Statement so all trustees know exactly what's expected and who's doing what.

Henry: Lindsay, I'm sure you'll agree it is one thing to have these processes, but it's the active part of using them that's critical. Trustees just can't agree them and then put them away on a shelf. They need to pull them out and use them when they're managing their trust.

Lindsay: You're absolutely right. The suggestions I've made are about setting out some good practices which can help trustees make better decisions and reduce potential risk. There's absolutely no point documenting processes that are not going to be used.

I'd make a final point about the process I've talked about. I wouldn't expect trustees to implement a set of formally documented procedures in a very modest trust with say, just a residential house. That said, trustees in all trusts have to make decisions and the framework I've shared can be helpful for inducting new trustees or for up-skilling people who are already trustees.

Henry: Almost like part of a training process...

Lindsay: Exactly. To build understanding on the things they need to be thinking about and doing.

Henry: Wonderful. Now, let's pick up on problems that you've seen trustees encounter with their decisions. What are some of the things trustees need to watch out for?

Lindsay: We spoke about trustees making decisions on their own or not participating in running the trust. They increase the potential risk for all trustees and can put the integrity of the trust at risk. An early warning indicator is where trustee meetings are not being held. Trustees need to talk about their plans, how the trust is running and what decisions are coming up, so meetings are important.

The next problem would be how decisions are recorded. While trustees don't have to record the reasons for decisions, they should prepare succinct resolutions as decisions are made. If a resolution is missed, the decision should be ratified at the next trustee meeting.

For significant decisions, I recommend trustees attach or reference on the Trust File the relevant background facts and context, the authority and documents or advice that they have relied on for their decision (so there's a paper trail to demonstrate the process used for the decision).

I think settlor wishes can be better utilised as part of decision-making. Trustees should check that settlor wishes are up to date and are being considered as decisions are made. I see many trusts where there are no settlor wishes or they are out of date.

I notice some trustees seem reluctant to get advice. Getting advice has to be seen as part of the cost of running a trust properly. Good advisers bring wisdom and experience and are invaluable in pointing out pitfalls or for giving trustees options to achieve outcomes they're seeking. When trustees take advice they need to assess and understand it before they accept it. That means asking good questions and checking the underlying assumptions behind the advice provided.

I've also seen problems where trustees haven't thought through the consequences or impact of their decisions. Part of making a decision involves considering how decisions are best implemented and what could possibly go wrong. I'll share a couple of examples to explain what I mean.

A trustee sold a very valuable piece of land by accepting a private offer (equivalent to the trustees registered valuation). It turned out other interested buyers didn't get the opportunity to put in an offer. While the trustee saved land agent costs, the market was never tested so there was always doubt about whether the trustee had achieved the best result for the trust and its beneficiaries.

There's nothing wrong with accepting a private offer. However, in this case the value of the land was several million dollars and there'd been buyer interest in the property. It may well have been more prudent for the trustee to go through a transparent process and test the market.

The second example involved a settlor/trustee who was the driver behind the trust making a significant investment in a private farming partnership. The trust didn't have an investment strategy and the focus was all on making the investment. Little thought was given to how prudent it was to put all the trust's eggs in one basket or how easy it would be for the trust to get its money out.

I was left wondering in that example how the professional co-trustee would explain the prudence of that investment in a situation where there was a downturn in farming and the settlor/trustee came back and said "hey, you were the professional trustee, you should have known better".

Henry: That's right. Sometimes it's a case of checking out alternatives and picking the best one, in other cases you need to go back to basics on what you're trying to achieve. Now, I know you've had to manage a few tough decisions. What's been some of your learning from those situations?

Lindsay: I think the hardest trustee decisions have been in problem trusts, often as a replacement trustee appointed by the Court. There's often a history of problems, contentious issues, competing interests and significant emotion so there can be quite a lot of pressure.

The learning from those situations is that sometimes you will never please everybody, but decisions still have to be made. It's often the time to take a much firmer stance as a trustee and communicate the process you will be taking to put things on a proper footing or bring a conclusion to the historical issues. Done well it can often bring closure and allow the parties to start looking forward again.

Henry: Well, thank you for that Lindsay. It was very enlightening and you have set out how important trustee decisions are and the best way of getting there. Sometimes when trustees are making decisions they have to "keep a lot of plates spinning in the air at the same time" and try and keep people happy while they follow a very thorough process. Do you have any final comments?

Lindsay: We've covered a fair bit. I think that if trustees understand their duties and obligations, they consider the interests of beneficiaries and are thoughtful and considered in exercising their judgement, it will help keep them on the right track.

Henry: Absolutely. That's very good advice Lindsay indeed and thank you for sharing your knowledge and your experience with us. If people wish to make contact with you they can do so through your website www.trusteesupport.co.nz

Lindsay: Thanks Henry